

HUMANITARIAN INTERVENTION WITHOUT BORDERS: BELLIGERENT OCCUPATION OR COLONIZATION?

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“It is now increasingly felt that the principle of non-interference with the essential domestic jurisdiction of States cannot be regarded as a protective barrier behind which human rights could be massively or systematically violated with impunity.”¹

“Territory is considered occupied when it is actually placed under the authority of the hostile army.”²

There is an “imperative need for all foreign forces engaged in military occupation, intervention or interference to be completely withdrawn to their own territories, so that people under colonial domination, foreign occupation or racist regimes may freely and fully exercise their right to self-determination”³

1. Javier Perez de Cuellar, Report of the Secretary-General on the Work of the Organization, U.N. GAOR, 46th Sess., Supp. No. 1, at 5, U.N. Doc. A/46/1 (1991).

2. Convention Respecting the Laws and Customs of War on Land (Hague, IV), Oct. 18, 1907, art. 42, 36 Stat. 2277, 2306, 205 Consol. T.S. 277, 295 [hereinafter Hague Convention IV].

3. G.A. Res. 2832, U.N. GAOR, 36th Sess., Supp. No. 20, at 79, U.N. Doc. A/RES/36/103 (1981).

I. INTRODUCTION

The past decade has seen a dramatic increase in the willingness of the international community to involve itself in the domestic affairs of states where those states are the sites of egregious violations of international law. Humanitarian intervention has taken place both under the auspices of the United Nations (U.N.) as well as unilaterally by one or more states, and these actions have spurred much debate regarding their legality in light of the well-established international legal prohibition on the use of force. Though the debate continues, there are still no established international legal guidelines specifically applicable to such interventions, and the intervenors do not abide by existing international legal norms regulating armed conflict. Thus, humanitarian intervention occurs on an ad hoc and inconsistent basis and almost without bounds.

In trying to insert humanitarian intervention into existing international legal regimes, two possibilities for comparison emerge. One is that humanitarian intervention is much like belligerent occupation, an action that is illegal unless undertaken in self-defense, but is nonetheless specifically regulated by the provisions of international humanitarian law. The other is that humanitarian intervention is like recolonization, which would violate the U.N. well-developed prohibition against colonization. In either of these comparisons, the conclusion must be that humanitarian intervention "without borders," that is, uncontrolled by international standards, risks violating long-established international principles, and thus risks becoming something worse than what it was intended to combat.

II. HUMANITARIAN INTERVENTION IS THE NONCONSENSUAL INTERVENTION INTO A SOVEREIGN NATION TO PREVENT A MASSIVE HUMANITARIAN CRISIS

Humanitarian intervention is the term used to describe armed intervention by the United Nations, a coalition of outside states, or a single outside state, into another state to prevent widespread human rights violations or a massive humanitarian

crisis.⁴ Debates surrounding the legality of humanitarian intervention under the auspices of the United Nations center around Article 2(4) of the U.N. Charter, which states that, "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state . . ." ⁵ which is the legal basis for the U.N. prohibition against the use of force by states against other states.⁶ An exception to this prohibition exists in situations where a state is using force as a means of self-defense under Article 51 of the U.N. Charter in response to an armed attack.⁷ Another exception is the permissible use of force when authorized by the Security Council under its Chapter VII power to take measures to address "any threat to the peace, breach of the peace, or act of aggression."⁸ When peaceful methods have failed, the Security Council is empowered to authorize the use of force "by air, sea or land forces as may be necessary to maintain or restore international peace and security."⁹ In making this determination, the Council may "arrive at its conclusions on the basis of whatever factual and other considerations it regards proper to take into account."¹⁰

Under Chapter VII, the Security Council may determine that the massive scale of violations of human rights or war crimes being committed within a particular nation constitutes a threat to international peace and security and may authorize intervention to prevent the continuation of such abuses.¹¹

4. LOUIS HENKIN ET AL., *INTERNATIONAL LAW: CASES AND MATERIALS* 930 (3d ed. 1993) (describing humanitarian-based intervention as an exception to the general prohibition against intervention) [hereinafter HENKIN ET AL., *INTERNATIONAL LAW*].

5. U.N. CHARTER art. 2, para. 4.

6. HENKIN ET AL., *INTERNATIONAL LAW*, *supra* note 4, at 932-34.

7. U.N. CHARTER art. 51 ("Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.").

8. U.N. CHARTER arts. 39-42.

9. U.N. CHARTER art. 42.

10. K. Skubiszewski, *Use of Force by States. Collective Security. Law of War and Neutrality*, in *MANUAL OF INTERNATIONAL PUBLIC LAW* 739, 786 (Max Sorensen ed., 1968).

11. U.N. CHARTER arts. 39, 41-42. U.N. peacekeeping missions do not fall under the concept of humanitarian intervention, primarily because they are undertaken with

Viewing an internal conflict or actions within a state to be a threat to international peace and security has been justified on the basis that turmoil within a nation is likely to cause refugee flows, or is likely to elicit military responses from neighboring states, which thus brings the situation to the level of international concern.¹² However, proponents of humanitarian intervention maintain that massive violations of human rights and international humanitarian law become events of international concern, obliging other nations to become involved to protect civilians from large-scale death and destruction.¹³ As Professor Louis Henkin states:

[K]illings, rape, other massive violence, or even massive hunger or the breakdown of social order, may well be found to be a threat to the peace, especially if they arouse world opinion and threaten reaction by other states. In some situations, surely, the Security Council would be obviously justified in determining that gross human rights violations have created a threat to the peace: atrocities may be so shocking or may otherwise incite reaction as to threaten international peace.¹⁴

International legal scholars on the side of the illegality of humanitarian intervention argue that the territorial integrity of a sovereign state is inviolate, as a long established precept on which the U.N. system is based, and that permitting exceptions even for humanitarian purposes would lead the international community down a slippery slope of each state policing every

the consent of the target state. U.N. Secretary-General Boutros Boutros-Ghali defined peacekeeping as "the deployment of a United Nations presence in the field, hitherto with the consent of all the parties concerned, normally involving United Nations military and/or police personnel and frequently civilians as well." Boutros Boutros-Ghali, *An Agenda For Peace—Preventive Diplomacy, Peacemaking, and Peacekeeping: Report of the Secretary-General*, U.N. GAOR, 47th Sess., para. 20, U.N. Doc. A/47/277 (1992).

12. HENKIN ET AL., *INTERNATIONAL LAW*, *supra* note 4, at 930; Joseph Fitchett, *New Concern Over a Surge in Nationalism: The Silent Issue: Greater Albania*, INT'L HERALD TRIB., Apr. 6, 1999, available at 1999 WL 5110574 (stating that the Kosovo conflict could spread through the southern Balkans and ultimately into Greece and Turkey).

13. See HENKIN ET AL., *INTERNATIONAL LAW*, *supra* note 4, at 931.

14. LOUIS HENKIN ET AL., *HUMAN RIGHTS* 711 (1999) [hereinafter HENKIN ET AL., *HUMAN RIGHTS*].

other state.¹⁵ As Professor Oscar Schachter has stated, “States strong enough to intervene and sufficiently interested in doing so tend to have political motives. They have a strong temptation to impose a political solution in their own national interest.”¹⁶

Long stymied by the Cold War era’s weak Security Council and the persistent blocking of resolutions by the United States, the former Union of Soviet Socialist Republics (USSR), and China, the post-Cold War era has seen a dramatic increase in the willingness of the Security Council to use its powers to intervene.¹⁷ With this increased tendency toward intervention and the simultaneous increased worldwide support for humanitarian intervention, the role of the powerful industrialized nations in making decisions regarding intervention is primary. When the United States agreed, the humanitarian intervention in Somalia went forward; when the United States objected, no intervention took place in Rwanda to prevent genocide.¹⁸ The United States and France have publicly accepted responsibility for failing to prevent mass murder in Rwanda.¹⁹

Presently, there is no system to ensure that intervention for the protection of human rights is consistently engaged, particularly in light of the inherent structure of the Security Council. The veto power of the Russian Federation—as one of the five permanent members—ensures, for example, that no humanitarian intervention under the United Nations could ever take place in Chechnya to end the widespread atrocities

15. HENKIN ET AL., *INTERNATIONAL LAW*, *supra* note 4, at 933 (arguing in favor of a strict interpretation of the U.N. Charter prohibition of the use of force, humanitarian intervention not excluded).

16. Oscar Schachter, *The Right of States to Use Armed Force*, 82 MICH. L. REV. 1620, 1629 (1984) [hereinafter Schachter, *The Right of States*].

17. See Ved P. Nanda, *Tragedies in Somalia, Yugoslavia, Haiti, Rwanda and Liberia—Revisiting the Validity of Humanitarian Intervention Under International Law—Part II*, 26 DENV. J. INT’L L. & POL’Y 827, 828-31 (1998) (providing background on humanitarian-intervention actions of the Security Council and U.N. member nations, generally, before and after the Cold War); PETER MALANCZUK, *AKEHURST’S MODERN INTRODUCTION TO INTERNATIONAL LAW* 375 (7th ed. 1997) (noting use of the veto power among Security Council members during the Cold War).

18. HENKIN ET AL., *HUMAN RIGHTS*, *supra* note 14, at 733.

19. *Id.* at 732.

committed there by Russian forces.²⁰ President Clinton stated openly in 1994 that it is U.S. policy only to get involved in U.N. missions that support U.S. geopolitical interests.²¹ Critics of humanitarian intervention cite this policy as a basis for the proposition that humanitarian intervention, even under U.N. auspices, continues to be ruled by the political interests of the powerful nations.²²

Nonetheless, humanitarian intervention to prevent large-scale atrocities has been increasingly viewed positively by international legal scholars.²³ International jurists who support humanitarian intervention on this basis argue that when violations of human rights and humanitarian law reach outrageous levels, it is the obligation of all states to take action to protect the victims.²⁴ As one international legal scholar stated:

The argument against a right of humanitarian intervention is based primarily on an absolute interpretation of the article 2(4) prohibition on the use of force and the fear of abusive invocation of the doctrine. The reality of current state practice, however, has rendered the absolute prohibition of the Charter meaningless. Thus, there exists a compelling need for a contemporary and realistic interpretation of article 2(4) based on state practice that recognizes an exception to the Charter prohibition when force is required to prevent mass slaughter.²⁵

20. See Ralph Zacklin, Comment, *Beyond Kosovo: The United Nations and Humanitarian Intervention*, 41 VA. J. INT'L L. 923, 933, 935-36 (2001) (questioning whether humanitarian intervention should hinge on the political agendas of powerful nations); but see Richard Falk, Editorial, *Kosovo Revisited*, THE NATION, Apr. 10, 2000, available at 2000 WL 17718399 (noting Russia's acting President and Foreign Minister both wrote columns rejecting criticism of Russian policies concerning Chechnya).

21. Nanda, *supra* note 17, at 830.

22. See *id.* (indicating that a major outcome of the Cold War's end was the end of superpower intervention based on ideological grounds).

23. Jonathan I. Charney, *NATO's Kosovo Intervention: Anticipatory Humanitarian Intervention in Kosovo*, 93 AM. J. INT'L L. 834, 837 (1999).

24. See OSCAR SCHACHTER, INTERNATIONAL LAW IN THEORY AND PRACTICE, 123-25 (1991) [hereinafter SCHACHTER, INTERNATIONAL LAW].

25. Daniel Wolf, *Humanitarian Intervention*, 9 MICH. Y.B. INT'L LEG. STUD. 333, 368 (1988).

Those who argue for humanitarian intervention make the point, additionally, that if an obligation to intervene is found to exist, it must be implemented consistently and must not be a means by which the political motives of intervening states can be effectuated.²⁶

Humanitarian intervention does not always fall under the rubric of the United Nations; nations have, at times, taken it upon themselves to intervene unilaterally under a humanitarian justification. Some examples of unilateral humanitarian intervention are the Indian invasion of Bangladesh in 1971, the Tanzanian invasion of Uganda in 1979, the Vietnamese invasion of Cambodia in 1978, and the recent North Atlantic Treaty Organization (NATO) armed intervention in the Federal Republic of Yugoslavia.²⁷

Unilateral humanitarian intervention has been almost universally condemned by all states.²⁸ Unilateral intervention is viewed as “contraven[ing] the target state’s essential right to be let alone”²⁹ and thus not sanctioned by the U.N. Charter. And, it is viewed as presenting a greater risk of political motives disguised as concern for human rights and victim protection. Professor Henkin has stated:

Proponents of unilateral humanitarian intervention have asserted an analogy to a neighbor’s intervention to prevent gross child abuse. But state neighbors cannot be trusted, and the risks and costs of permitting them to intrude are too great. State neighbors do not in fact intervene to safeguard human rights, though they may sometimes use that pretext.³⁰

There are proponents of unilateral intervention on humanitarian grounds, however, who argue that unilateral

26. See SCHACHTER, *INTERNATIONAL LAW*, *supra* note 24, at 123-26.

27. See HENKIN ET AL., *INTERNATIONAL LAW*, *supra* note 4, at 934; T. Modibo Ocran, *The Doctrine of Humanitarian Intervention in Light of Robust Peacekeeping*, 25 B.C. INT’L & COMP. L. REV. 1, 2 (2002).

28. See Ocran, *supra* note 27, at 18; Steve G. Simon, Comment, *The Contemporary Legality of Unilateral Humanitarian Intervention*, 24 CAL. W. INT’L L.J. 117, 144 (1993) (discussing the almost universal condemnation of humanitarian intervention by the United Nations).

29. HENKIN ET AL., *HUMAN RIGHTS*, *supra* note 14, at 712.

30. *Id.* at 714.

intervention must be recognized as a legitimate option, primarily because:

[I]t remains doubtful whether collective intervention could be realistically expected to occur even in the face of egregious violations of human rights, if the major powers in the U.N., especially those with veto power in the Security Council, did not find it in their national interest to authorize the use of force for such intervention.³¹

A. *There Is a Lack of Established Standards Governing Humanitarian Intervention*

The commonality among all the above instances of intervention is that all “employ military force in the territory of another state for the purpose of protecting the indigenous population against abuses by their own government.”³² As such, all involve the military incursion into a sovereign state. There is no universally established, systematized method of deciding when humanitarian intervention is justified; neither are there delineated boundaries specified for such interventions when they take place. In 1991, the U.N. Secretary-General outlined certain guidelines for humanitarian intervention:

First, like all other basic principles, the principle of protection of human rights cannot be invoked in a particular situation and disregarded in a similar one. To apply it selectively is to debase it. Governments can, and do, expose themselves to charges of deliberate bias; the United Nations cannot. Second, any international action for protecting human rights must be based on a decision taken in accordance with the Charter of the United Nations. It must not be a unilateral act. Third, and relatedly, the consideration of proportionality is of the utmost importance in this respect. Should the scale or manner of international action be out of proportion to the wrong that is reported to have been committed, it is bound to evoke a vehement reaction, which, in the long run, would jeopardize the very rights that were sought

31. Nanda, *supra* note 17, at 830.

32. HENKIN ET AL., *INTERNATIONAL LAW*, *supra* note 4, at 931.

to be defended.³³

In spite of this broad outline of concepts that the Secretary-General viewed as crucial to a system of humanitarian intervention, presently there are no established guidelines for such interventions. When the United Nations or powerful industrial nations decide that violation of another nation's territorial integrity is necessary to protect individuals from egregious violations of human rights or genocide, then they are free to decide how to proceed. Apparently, there are no existing specifications for the parameters of the action: no guidelines concerning the length and extent of its mandate, the size and composition of the forces, the boundaries of its powers, or the relationship it will have with domestic state institutions.

Furthermore, the status of a nation is unclear when its borders have been violated and its domestic jurisdiction has been suspended to a greater or lesser extent by international action. It is also uncertain to what extent international humanitarian law binds a U.N. peacekeeping or humanitarian force. Will the rules applicable to the military component of the force also apply to the civilian component of the force? Without established guidelines directing instances of humanitarian intervention, a regime that is intended to protect individuals from abuse may too easily become an abusive system itself.

III. THE LAWS GOVERNING BELLIGERENT OCCUPATION ARE EXTENSIVE AND DETAILED

The primary provisions of international law governing belligerent occupation can be found in the Hague Conventions and the Geneva Conventions.³⁴ The laws of many nations also

33. *Report on the Work of the Organization: Report of the Secretary-General*, U.N. GAOR, 46th Sess., Supp. No. 1, at 10-11, U.N. Doc. A/46/1 (1991) [hereinafter *Report of the Secretary-General*].

34. HENKIN ET AL., *INTERNATIONAL LAW*, *supra* note 4, at 1032; Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention Relative to Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3218, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva Civilian Convention]; Protocol Additional to

provide extensive provisions governing their armed forces in cases when those armed forces are in belligerent occupation of another territory.³⁵ The following section is organized according to several aspects of belligerent occupation and utilizes provisions from the Hague and Geneva Conventions, as well as the applicable U.S. and British Military Law provisions.

A. Occupation Exists When Control by a Foreign Power Is Effective

Under the provisions of Hague Convention IV, a territory is considered occupied “when it is actually placed under the authority of the hostile army”³⁶ and “[t]he occupation extends only to the territory where such authority has been established and can be exercised.”³⁷ The British Manual of Military Law defines “effectiveness” of occupation by requiring that:

[T]here must be more than a mere declaration or proclamation that possession has been taken, or that there is the intention to take possession. . . . It is sufficient that the national forces should not be in possession, that the inhabitants have been disarmed, that measures have been taken to protect life and property and to secure order, and that, if necessary, troops can within a reasonable time be sent to make the authority of the occupying army felt.³⁸

The British Manual provides a test to determine whether an

the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), *adopted* June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Protocol I]; Protocol Additional to the Geneva Conventions of 12 August 1949; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), *adopted* June 8, 1977, 1125 U.N.T.S. 609; Hague Convention IV, *supra* note 2, 36 Stat. 2277, 205 Consol. T.S. 277.

35. See HENKIN ET AL., INTERNATIONAL LAW, *supra* note 4, at 1032 (explaining that the laws and customs of the Hague and Geneva Conventions incorporate the principles of these conventions when involved in belligerent occupation).

36. Hague Convention IV, *supra* note 2, art. 42, 36 Stat. at 2306, 205 Consol. T.S. at 295.

37. *Id.*

38. THE WAR OFFICE, BRITISH MANUAL OF MILITARY LAW: THE LAW OF WAR ON LAND 141 (1958) [hereinafter BRITISH MANUAL].

occupation has occurred.³⁹ The first aspect requires that “the legitimate government should, by the act of the invader, be rendered incapable of publicly exercising its authority within the occupied territory.”⁴⁰ The second requirement is that “the invader should be in a position to substitute his own authority for that of the legitimate government.”⁴¹ The U.S. Army Manual states that:

Military occupation is a question of fact. It presupposes a hostile invasion, resisted or unresisted, as a result of which the invader has rendered the invaded government incapable of publicly exercising its authority, and that the invader has successfully substituted its own authority for that of the legitimate government in the territory invaded.⁴²

Similarly, the U.S. Army Manual also requires that “the organized resistance must have been overcome and the force in possession must have taken measures to establish its authority” for the occupation to be considered “effective.”⁴³

B. The Occupied Territories Retain Their Sovereignty

Article 4 of the Protocol I to the Geneva Conventions provides with regard to the status of the occupied territory that “[n]either the occupation of a territory nor the application of the [law of war] shall affect the legal status of the territory in question.”⁴⁴ The U.S. Army Manual is most direct on this issue, stating that military occupation only involves effective control over a territory for a limited period of time and that “[i]t does not transfer the sovereignty to the occupant, but simply the authority or power to exercise some of the rights of sovereignty.”⁴⁵ The British Manual similarly states that “[d]uring the occupation by the enemy the sovereignty of the

39. *Id.*

40. *Id.*

41. *Id.* at 141-42.

42. DEP'T OF THE ARMY, FIELD MANUAL NO. 27-10: THE LAW OF LAND WARFARE 139 (1956) [hereinafter ARMY MANUAL].

43. *Id.* at 139.

44. Protocol I, *supra* note 34, art. 4, 1125 U.N.T.S. at 8.

45. ARMY MANUAL, *supra* note 42, at 140.

legitimate Government of the territory is temporarily latent and is not exercised, but it continues to exist and in no way passes to the Occupant.”⁴⁶

C. The Occupying Power Is Bound by International Humanitarian Law

Protocol I of the Geneva Conventions obligates the occupier to abide by the law of war.⁴⁷ The U.S. Army Manual states that:

Military and civilian personnel of the occupying forces and occupation administration and persons accompanying them are not subject to the local law or to the jurisdiction of the local courts of the occupied territory unless expressly made subject thereto by a competent officer of the occupying forces or occupation administration.⁴⁸

The U.S. Army Manual does, however, bind the occupier to abide by the laws of war and states that “[i]t is immaterial whether the government over an enemy’s territory consists in a military or civil or mixed administration. . . . It is a government imposed by force, and the legality of its acts is determined by the law of war.”⁴⁹ Similarly, the British Manual describes an occupation as “a government imposed by the necessity of war” and states that the “legality of its acts” is determined by “the laws of war alone.”⁵⁰

D. The Occupying Power May Alter the Roles of the Civil and Judicial Authorities

There are provisions of the British Manual and the U.S. Army Manual that guide the relationship between the occupying power and the local civil authorities. The Geneva Civilian Convention provides that the “[o]ccupying power may not alter the status of public officials or judges,” but also states that “[t]his prohibition . . . does not affect the right of the occupying

46. BRITISH MANUAL, *supra* note 38, at 143.

47. Protocol I, *supra* note 34, art. 1, 1125 U.N.T.S. at 7.

48. ARMY MANUAL, *supra* note 42, at 143.

49. *Id.* at 142.

50. BRITISH MANUAL, *supra* note 38, at 145.

power to remove public officials from their posts.”⁵¹ The British Manual states that, when occupied, “[t]he legislative, executive and administrative functions of the national government, whether of a general, provincial, or local character, cease when military occupation commences.”⁵² The U.S. Army Manual provides that “[t]he ordinary courts of justice should be suspended only if . . . ” the judges refuse to take their posts, “[t]he courts are corrupt or unfairly constituted,” or the “[l]ocal judicial administration has collapsed during the hostilities.”⁵³ In the third case, the rules permit the occupying power to “set up its own courts to ensure that offenses against the local laws are properly tried.”⁵⁴

E. The Occupying Power Has Some Authority to Modify or Add to Local Law

The occupying power is obliged to respect, “unless absolutely prevented, the laws in force in the country.”⁵⁵ The Geneva Conventions also provide that, with regard to the criminal laws of the occupied territory, they shall remain in force, but “they may be repealed or suspended by the Occupying Power in cases where they constitute a threat to its security or an obstacle to the application of the [1949 Geneva] Convention.”⁵⁶ Article 64 of the Geneva Civilian Convention also permits the occupying power to issue “provisions which are essential to enable the Occupying Power to fulfil its obligations under the [1949 Geneva] Convention, to maintain the orderly government of the territory, and to ensure the security of the Occupying Power”⁵⁷

Thus, under the Geneva Conventions, the occupiers must

51. Geneva Civilian Convention, *supra* note 34, art. 54, 6 U.S.T. at 3552, 75 U.N.T.S. at 322.

52. BRITISH MANUAL, *supra* note 38, at 144.

53. ARMY MANUAL, *supra* note 42, at 143.

54. *Id.*

55. Hague Convention IV, *supra* note 2, art. 43, 36 Stat. at 2306, 205 Consol. T.S. at 295.

56. Geneva Civilian Convention, *supra* note 34, art. 64, 6 U.S.T. at 3558, 75 U.N.T.S. at 328.

57. *Id.*

respect the local penal laws unless they threaten the occupiers' security, but they may add penal provisions. The Geneva Civilian Convention does not state whether a penal provision enacted by an occupying power, which contradicts a local penal provision, would supersede the local provision, but it most certainly would in the case where the occupying power viewed the local provision as threatening its security.⁵⁸

The U.S. Army Manual grants broad power to the occupying power to "alter, repeal or suspend laws" which threaten its security or are "inconsistent with the duties of the [occupying power]."⁵⁹ However, those laws, which do not fall under any of these categories, continue in force in the occupied territory.⁶⁰ The British Manual provides that "political laws" of the occupied territory "are as a matter of course suspended during occupation,"⁶¹ but the "civil and penal laws of the occupied territory continue" to be effective and the local courts continue to have jurisdiction over all crimes "not of a military nature or not affecting the safety of the army of occupation."⁶²

F. The Occupying Power May, in a Limited Fashion, Restrict the Rights of Citizens of the Occupied Territories

Because the authority of the occupying power must be effective in order for its presence to be termed an occupation, the occupiers are in a position of control over the population. As such, the Geneva Conventions recognize the right of the occupying power to restrict certain rights of the population, such as freedom of movement if necessary to protect the occupiers' security. Article 35 of the Geneva Civilian Convention states: "All protected persons who may desire to leave the territory at the outset of, or during a conflict, shall be entitled to do so, unless their departure is contrary to the national interests of the State."⁶³ The British Manual additionally grants the occupant

58. *See id.*

59. ARMY MANUAL, *supra* note 42, at 143.

60. *Id.* at 142-43.

61. BRITISH MANUAL, *supra* note 38, at 145.

62. *Id.* at 145.

63. Geneva Civilian Convention, *supra* note 34, art. 35, 6 U.S.T. at 3540, 75 U.N.T.S. at 310.

the power to “forbid individuals to change their residence,” “restrict freedom of internal movement and forbid visits to certain districts,” as well as the right to “prohibit immigration,” and “insist on all persons providing themselves with an identification pass.”⁶⁴ Similarly, the U.S. Army Manual grants the occupying power the right to restrict or suspend freedom of movement, immigration, or emigration.⁶⁵

The occupying power must not, under the rules of the British military, “treat the country as part of his own territory, or consider the inhabitants as his lawful subjects.”⁶⁶ But the occupier is permitted under these regulations to “demand and enforce such measures of obedience as are necessary for the security of his forces, the maintenance of order, and the proper administration of the country.”⁶⁷ The U.S. Army Manual permits the occupying power to change laws that protect the population’s “rights of suffrage and of assembly.”⁶⁸

IV. HUMANITARIAN INTERVENTION “WITHOUT BORDERS” IS NOT UNLIKE BELLIGERENT OCCUPATION

A. *Both Belligerent Occupation and Humanitarian Intervention Involve Obtaining and Maintaining Effective Control over the Target Territory*

The most fundamental comparison between humanitarian intervention and belligerent occupation is that both involve the encroachment into another state without consent.⁶⁹ There are international laws regulating permissible and impermissible activities of the belligerent occupier, viewed as an illegal action unless undertaken in self-defense,⁷⁰ yet there are no international regulations controlling humanitarian intervention. In fact, there is much international debate over whether the

64. BRITISH MANUAL, *supra* note 38, at 147.

65. ARMY MANUAL, *supra* note 42, at 143.

66. BRITISH MANUAL, *supra* note 38, at 143.

67. *Id.*

68. ARMY MANUAL, *supra* note 42, at 143.

69. HENKIN ET AL., INTERNATIONAL LAW, *supra* note 4, at 930.

70. *Id.* at 929-30; *see, e.g.*, U.N. CHARTER art. 51.

provisions of international humanitarian law are applicable to the United Nations and NATO.⁷¹

Many international legal scholars, as outlined above, have suggested that humanitarian intervention appears to violate the provisions of Article 2(4) of the U.N. Charter, which prohibits the use of force. Therefore, a humanitarian intervention is an illegal action, much like illegal belligerent occupation.⁷² This creates the curious situation where belligerent occupations are governed by international law, but humanitarian situations are not.

Both humanitarian intervention and belligerent occupation involve effective control over some or all of the territory of another nation. Humanitarian intervention is an example of effective control over a target nation, because it involves overpowering and disarming that nation's military forces.⁷³ The British Manual describes an occupation in a manner that applies equally to humanitarian intervention and belligerent occupation. It requires that the local military no longer be in control, the local population has been disarmed, "measures have been taken to protect life and property and to secure order," and the presence of occupying troops makes their control "felt" by the population.⁷⁴ The aim of humanitarian intervention is to gain control over the local authorities that allegedly are responsible for the crimes that initially prompted the intervention.⁷⁵

71. Compare Major J.D. Godwin, *NATO's Role in Peace Operations: Reexamining the Treaty After Bosnia and Kosovo*, 160 MIL. L. REV. 1, 11 (1999) (arguing that the U.N. Charter provides legal basis for NATO humanitarian intervention operations without the express approval of the U.N. Security Council), with H.B. McCullough, *Intervention in Kosovo: Legal? Effective?*, 7 ILSA J. INT'L & COMP. L. 299, 302-03 (2001) (asserting that NATO's involvement in Kosovo does not find legal basis in the U.N. Charter).

72. HENKIN ET AL., *INTERNATIONAL LAW*, *supra* note 4, at 930-35; see also McCullough, *supra* note 71, at 301-03 (arguing that NATO's intervention in Serbia was excessive).

73. See Byron F. Burmester, Comment, *On Humanitarian Intervention: The New World Order and Wars to Preserve Human Rights*, 1994 UTAH L. REV. 269, 295-99 (1994) (arguing that humanitarian intervention is "nothing short of war").

74. BRITISH MANUAL, *supra* note 38, at 141.

75. See Burmester, *supra* note 73, at 272-73, 295-96, 308 (arguing that humanitarian intervention seeks to end human rights violations, even at the expense of infringing upon sovereignty).

A “successful” humanitarian intervention will take control away from the local military—and to this end—will make disarmament an early goal of the intervention.⁷⁶ The justifications for intervention are disorder and the lack of protection for life, and thus the intervention seeks to “secure order” and “protect life.”⁷⁷ For any of these aspects of the intervention to succeed, the “presence” of the international force will be evident to the local population.⁷⁸

The British Manual’s test of occupation is also met by humanitarian intervention. First, the intervening force seeks to suspend the power of the local authorities over the population in order to protect the population from the authorities’ abusive practices.⁷⁹ Thus, the intervenors seek to “render” the local authority “incapable of publicly exercising its authority within the [target] territory.”⁸⁰ Second, the intervenors replace the power of the local authorities with the power of the intervening force, often installing civilian authorities as part of the later phases of the intervention.⁸¹ Thus, the intervenors are “in a position to substitute [their] own authority for that of the legitimate government.”⁸² The British government’s military guidelines on belligerent occupation, therefore, appear to be applicable to humanitarian intervention as well.

Both humanitarian intervention and belligerent occupation may be justified by the existence of a threat to the peace.⁸³ Belligerent occupation can occur in the course of an armed conflict or when the occupying power views the occupied territory as posing a threat to its security because both of these situations involve a threat to the peace.

Both belligerent occupation and humanitarian intervention

76. *See id.* at 319 (explaining that in order for the United Nations to successfully accomplish the objective of protecting relief workers in Somalia, it became necessary for U.N. forces to disarm various gangs).

77. BRITISH MANUAL, *supra* note 38, at 141.

78. ARMY MANUAL, *supra* note 42, at 140.

79. BRITISH MANUAL, *supra* note 38, at 141-42.

80. *Id.*

81. *Id.*

82. *Id.*

83. Burmester, *supra* note 73, at 322.

are assumed to be temporary, but can last for years.⁸⁴ Belligerent occupation clearly ceases when the control is no longer “effective,” but there is no established limit for the duration of humanitarian intervention.

Belligerent occupation does not permit an official change in the status of the occupied territory by the occupying power.⁸⁵ Yet the change in status of a state from independent nation to occupied territory may be a change in national status. Similarly, it is said that humanitarian intervention is not intended to change the status of the target nation; however, the local authorities of the target nation are not able to rule the nation freely.⁸⁶

For example, in the case of Kosovo—though there was no stated intention of the intervenors to change the status of the Republic of Kosovo—prior to the intervention, the territory was controlled by Serbia, and after the intervention, the territory was no longer controlled by Serbia.⁸⁷ Though the status change was not given a name, and certainly not called “independence,” a reference to Kosovo that names it a republic of the Federal Republic of Yugoslavia does not adequately describe its current status because the Federal Republic of Yugoslavia does not have any authority in the republic.⁸⁸ So, the intervention changed the status of Kosovo with regard to Federal Republic of Yugoslavia.⁸⁹ Thus, humanitarian intervention may also change the status of the target territory.

84. *Id.* at 315-17 (discussing the U.S. intervention in Somalia that began on December 9, 1992 and was projected to end by March 31, 1994).

85. ARMY MANUAL, *supra* note 42, at 140.

86. BRITISH MANUAL, *supra* note 38, at 143.

87. Tania Voon, *Closing the Gap Between Legitimacy and Legality of Humanitarian Intervention: Lessons from East Timor and Kosovo*, 7 UCLA J. INT'L L. & FOREIGN AFF. 31, 48-52 (2002) (discussing the chain of events, from Serbia's domination of Kosovo to Kosovo's changed status after the NATO intervention).

88. *Id.* at 51-52 (discussing the establishment of authority in Kosovo after the intervention).

89. *Id.* at 48-52.

B. The Relationship Between an Occupying Power and the Civil Authorities of the Occupied Territory Is Regulated by International Law, but Comparable Powers of Humanitarian Interveners Is Not.

Under the laws governing occupation, the occupying power has the right to remove public officials,⁹⁰ and under humanitarian intervention, frequently this becomes part of the implementation of the goals of the intervention.⁹¹ In Kosovo, for example, a civilian administration under the auspices of the United Nations was established to replace the authority structures that existed prior to the intervention.⁹² Furthermore, both occupation and humanitarian intervention forces, after they have gained effective control, oblige the local authorities to cooperate with the occupying power. Therefore, provisions exist to limit the potential for abuse of power by the occupying power, but no similar restrictions on intervenors exist.

C. There Are No International Restrictions on the Power of Humanitarian Interveners to Change the Local Laws, as There Are for Occupying Powers

Both occupation and humanitarian intervention often involve either the suspension or alteration of local laws. Occupying powers are granted the right, under the provisions described above, to alter laws that conflict with the effectiveness of the control. When humanitarian intervention forces change the laws of a target territory, or when they apply their domestic laws, the intervenors do so without established international restriction or guidelines.

90. Geneva Civilian Convention, *supra* note 34, art. 54, 6 U.S.T. at 3552, 75 U.N.T.S. at 322.

91. See Richard C. Hottelet, *The Kosovo Quandary*, CHRISTIAN SCI. MONITOR, Apr. 24, 2001, at 11, available at 2001 WL 3735000.

92. *Id.*

D. There are no International Guidelines Regulating the Authority of Humanitarian Intervenors to Restrict the Rights of Citizens in the Target Territory, as There are for Belligerent Occupiers.

International humanitarian law prescribes limits to the occupant's authority for use of force restricting the rights of the occupied population.⁹³ Intervening forces, not considering themselves to be occupiers, do not have any established and recognized limits on what rights they can restrict.

However, there are sufficient similarities between humanitarian intervention and belligerent occupation to conclude that humanitarian intervention should abide by the rules governing belligerent occupation. Newly drafted guidelines governing humanitarian intervention would be extremely useful. Until such rules are drafted, international humanitarian law must not be violated.

V. COLONIZATION WAS A COMMONPLACE METHOD OF TERRITORIAL CONQUEST AND CONTROL, UNTIL THE UNITED NATIONS BEGAN TO REGULATE IT

Prior to the development of the international legal regime, land was legally acquired by conquest or military victory. Eighteenth and nineteenth century geography was largely one of imperialism, in which "the rule of the technologically-advanced, economically-developed and militarily-powerful nations over less advanced nations totally different in culture and social background"⁹⁴ was the norm. Lands rich in minerals and resources were routinely conquered and exploited by wealthy powerful nations, while the local population was often stripped of its means of subsistence and denied the economic advantages that were readily available to the imperialist nations.⁹⁵ In most

93. Geneva Civilian Convention, *supra* note 34, art. 47, 6 U.S.T. at 3548, 75 U.N.T.S. at 318 (stating that persons within the occupied territory shall not be deprived of their rights under their nation's constitution).

94. USHA SUD, *DECOLONIZATION TO WORLD ORDER* 19 (1983).

95. *See id.* at 19-20 (stating that economically powerful nations exploited less powerful nations).

cases, the colonized populations were subjected to exploitation and repression, and, in some cases, violence and slavery.⁹⁶

The League of Nations was established following World War I (WWI) to curb the devastating abuses that occurred during that war and to create an international regime for the governance of dependencies.⁹⁷ The mandate system established by the Covenant of the League of Nations was designed as a structure for managing dependencies, but with the openly stated goal of assisting those nations in achieving independence.⁹⁸ The concepts of self-governance and self-determination did not enter the international legal arena as bases for independence for dependent territories until the United Nations, in its Charter, and many post-World War II (WWII) international instruments included them.⁹⁹

A. Dependent Entities Had Some Powers, but Were Essentially Wholly Dominated by the Colonizing Powers

There have been a variety of non-state entities that have been legally dependent on another nation, including protectorates, self-governing colonies, nonself-governing colonies, mandates, and trusteeships.¹⁰⁰ Some of these structures permitted the “subordinate” state to have a great deal of authority, and in some cases, even engage in interaction with other such entities, in spite of their lack of status as a “state.”¹⁰¹ For example, some had treaty-making capacity, while others only had this power as an organ of the dominant state.¹⁰²

96. *See id.* at 20.

97. *See id.* at 22-23.

98. *Id.* at 22-23.

99. Universal Declaration of Human Rights, G.A. Res. 217A(III), U.N. GAOR, 3d Sess., U.N. Doc. A/810 (1948); International Covenant of Economic, Social, and Cultural Rights, Dec. 16, 1966, art. 1, 993 U.N.T.S. 3, 5; International Covenant on Civil and Political Rights, Dec. 19, 1966, art. 1, 999 U.N.T.S. 171, 173; U.N. CHARTER art. 1, para. 2, art. 73.

100. HENKIN ET AL., INTERNATIONAL LAW, *supra* note 4, at 294-95.

101. *Id.*

102. *Id.*; *see also* SIR GEORGE CORNEWALL LEWIS, GOVERNMENT OF DEPENDENCIES 145 (rev. ed. 1901) (discussing the dominating state’s control over the colony’s international affairs).

B. The League of Nations Established the Mandate System as a First Step Towards Regulating and Supervising Colonial Domination, but Did Not Outlaw It

The League of Nations was established in April 1919 as an international institution with “its own juridical authority distinct from that of the governments which are parties to it.”¹⁰³

Article 22 of the Covenant of the League of Nations created the mandate system following WWI.¹⁰⁴ This article provides that mandates will be organized “subject to the rendering of administrative advice and assistance by a Mandatory until such time as they are able to stand alone.”¹⁰⁵ The mandate system was viewed as being a legal system, yet one that was not completely integrated into the international legal regime at the time.¹⁰⁶ Quincy Wright, writing for the University of Chicago on the mandate system under international law in the late 1920s, stated that whereas territorial sovereignty makes sense, there is “nothing in human nature, political organization, social grouping, or logic which renders the assumption permanently and universally inevitable.”¹⁰⁷ This concept of the legitimacy of certain restrictions on sovereignty underpinned both the colonial system and the newly established mandate system.

The League of Nations had certain rights under its mandate system, such as the right to be consulted on any contemplated change in mandate text.¹⁰⁸ There is some debate over the powers of the League of Nations to appoint and dismiss mandatory powers and it is unclear whether a proposed mandatory power had to be a member of the League of Nations.¹⁰⁹

Regardless, the Covenant of the League of Nations provided that the mandatory powers had to be “advanced nations who by reason of their resources, their experience, or their geographical

103. QUINCY WRIGHT, MANDATES UNDER THE LEAGUE OF NATIONS 436 (1930) (quoting PAUL FAUCHILLE, TRAITÉ DE DROIT INTERNATIONAL PUBLIC vol. I, part I, 48 (1922)).

104. See HENKIN ET AL., INTERNATIONAL LAW, *supra* note 4, at 296.

105. LEAGUE OF NATIONS COVENANT art. 22, para. 4.

106. WRIGHT, *supra* note 103, at 266.

107. *Id.* at 269.

108. *Id.* at 438.

109. *Id.* at 439-40.

position can best undertake the responsibility and who are willing to accept it.”¹¹⁰ These mandatory powers would have control over territories, “which as a consequence of the late war have ceased to be under the sovereignty of the States which formerly governed them[,] and which are inhabited by peoples not yet able to stand by themselves under the strenuous conditions of the modern world.”¹¹¹ Although in name, the League of Nations was the supervisory authority over the mandatory powers, there is no evidence to suggest that it chose the mandatory powers through any existing screening process, scrutinized the territory to be taken over by these powers, or monitored their progress with any authority. Nonetheless, the mandatories were created under this rubric, were supervised by the League’s Permanent Mandates Commission and existed until the U.N. system converted the mandate system into the trusteeship system following WWII and the demise of the League of Nations.¹¹²

The mandate system differed from the formerly prevalent colonial system in that it was a structured international regime with a system of supervision and operated under an established legal rubric.¹¹³ According to the International Court of Justice, Article 22 of the Covenant of the League of Nations was based upon “[t]wo principles . . . of paramount importance: the principle of non-annexation and the principle that the well-being and development of such peoples form ‘a sacred trust of civilization.’”¹¹⁴ Taking the developments of the past half-century into account, there can be little doubt that the ultimate objective of the sacred trust was self-determination and independence.¹¹⁵ The mandate required observance of a number of obligations, and the Council of the League was to see that

110. LEAGUE OF NATIONS COVENANT art. 22, para. 2.

111. *Id.* para. 1.

112. See SUD, *supra* note 94, at 23-27; Ryan C. Hendrickson, *Article 51 and the Clinton Presidency: Military Strikes and the U.N. Charter*, 19 B.U. INT’L L.J. 207, 209-10 (2001).

113. See *id.* at 22-23.

114. See Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Resolution 276, 1971 I.C.J. 16, 28 (June 21) (quoting LEAGUE OF NATIONS COVENANT art. 22, para. 1).

115. *Id.* at 31.

they were fulfilled.¹¹⁶

Thus, territories placed under mandate were “entrusted” to mandatory powers—a practice dramatically different than the previous land ownership-by-conquest.¹¹⁷ Only those former colonies, which had been controlled by nations defeated in WWI, were entrusted to the mandate system.¹¹⁸ The structure established by the League of Nations, under which the mandate system functioned, also “strengthened a sense of responsibility of colonial powers for the progress of dependent peoples.”¹¹⁹ The League of Nations required the mandatory powers to comply with certain minimum international standards for protection of the rights of the population of their mandates, and instituted a system of reporting through which the League of Nations could monitor mandate administration.¹²⁰ It provided supervision for the previously unsupervised colonial structures.¹²¹ Nonetheless, the mandate system was essentially in the hands of the mandatory powers; the League of Nations could not force the mandatory powers to behave in a particular manner with regard to their mandates.¹²²

The League of Nations Covenant permitted a “fully self-governing State, Dominion or Colony” to become a member of the League of Nations.¹²³ For example, India became a member of the League of Nations, as well as a party to other international treaties, while remaining a British colony.¹²⁴ The same was true of the Philippines.¹²⁵ Even when an entity was dependent, it may have been granted the authority by the controlling power to enter into treaties. However, even in such a circumstance, the authority to conduct this aspect of foreign relations stemmed exclusively from the colony having obtained

116. *Id.* at 30.

117. SUD, *supra* note 94, at 22.

118. *Id.*

119. *Id.* at 23.

120. *Id.*

121. *Id.* at 22.

122. *Id.* at 23.

123. LEAGUE OF NATIONS COVENANT art. 1, para. 2.

124. HENKIN ET AL., INTERNATIONAL LAW, *supra* note 4, at 296.

125. *Id.*

such power from the colonizing power.¹²⁶ In such situations, the colonizing power would generally be held responsible for breaches of international commitments by the colony.¹²⁷ Thus, the international personality of the colony was overshadowed by the domination of the colonizer.

Both the mandate system and the trusteeship system that replaced it shared a common goal—that of promoting “the well-being and development” of the population residing therein—with the eventual aim of independence and self-government.¹²⁸ Yet both the mandate and trusteeship systems were a continuation of the “paternalistic traditions of colonialism.”¹²⁹

C. The U.N.-Established Trusteeship System Replaced the Mandate System, While Taking One Step Closer to Protecting Dependent Peoples

The mandate system survived the demise of the League of Nations.¹³⁰ Meanwhile, the United Nations, as provided in Chapters XII and XIII of the U.N. Charter, established a system of trusteeship.¹³¹ The trusteeship system replaced the League of Nations mandate system and was similarly structured and supervised.¹³² Article 76 of the U.N. Charter describes the goals of the trusteeship system, including promotion of political, economic, social, and educational advancement of the inhabitants of the trust territories and their progressive development towards self-government or independence as may be appropriate to the particular circumstances of each territory and its peoples.¹³³

Territories were placed under the trusteeship system by way

126. *Id.*

127. *Id.*

128. Compare LEAGUE OF NATIONS COVENANT art. 22, para. 1, with U.N. CHARTER art. 76; see also SUD, *supra* note 94, at 23.

129. SUD, *supra* note 94, at 23.

130. See Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276, 1971 I.C.J. 16, 32-33 (June 21).

131. U.N. CHARTER arts. 75-91.

132. SUD, *supra* note 94, at 27.

133. U.N. CHARTER art. 76.

of trusteeship agreements. Territories eligible for the trusteeship system included those that had been under mandate, those that were “detached from enemy states as a result of the Second World War,” and those “territories voluntarily placed under the system by states responsible for their administration.”¹³⁴

The U.N. Trusteeship Council, whose powers and duties were outlined in Chapter XIII of the U.N. Charter, supervised the administration of the trusteeships.¹³⁵ As in the mandate system, the trustee powers did not grant the inhabitants of the trusteeships status as part of their territory, nor were they granted the nationality of the administering nation.¹³⁶ The inhabitants of the trusteeship were said to have sovereignty, but were rigidly controlled by the administrative power.¹³⁷

The mandate and trusteeship systems are largely defunct today, but the nations that emerged from these structures and their image as new states have been lastingly impacted by their history as “administered” territories, previously deemed “incapable” of governing themselves.¹³⁸

D. The U.N.-Established Guidelines for Other Nonself-Governing Territories to Protect the Well-Being of the Populations

The U.N. Charter also provided overarching guidelines for all territories administered by other nations. Article 73 of the U.N. Charter referred to nonself-governing territories as those territories “whose peoples have not yet attained a full measure of self-government” and called on the administering powers to consider such territories to be a “sacred trust.”¹³⁹ All colonial powers were bound under Chapter XI of the U.N. Charter to uphold the provisions of the U.N. Charter with regard to the

134. U.N. CHARTER art. 77, para. 1.

135. *Id.* arts. 86-91.

136. HENKIN ET AL., INTERNATIONAL LAW, *supra* note 4, at 296.

137. *Id.* at 296-97.

138. *Id.* at 297; *see, e.g.*, Li-ann Thio, *Battling Balkanization: Regional Approaches Toward Minority Protection Beyond Europe*, 43 HARV. INT'L L.J. 409, 445-46 (2002) (discussing the impact of Africa's colonial history on its subsequent development).

139. U.N. CHARTER art. 73.

administration of these territories.¹⁴⁰ These obligations included ensuring “respect for the culture of the peoples concerned, their political, economic, social, and educational advancement, their just treatment, and their protection against abuses.”¹⁴¹ These obligations also committed the administering nations to assist the nonself-governing territories in the “progressive development of their free political institutions, according to the particular circumstance of each territory and its peoples and their varying stages of advancement.”¹⁴²

Article 73, which applies to colonies, mandates, and trust territories, mentions that the governing of these territories occurs “within the system of international peace and security established by the [U.N.] Charter [and] the well-being of the inhabitants of these territories,” and requires the administering powers to work for “further international peace and security.”¹⁴³

E. Colonization Had a Lasting Impact on the Colonized Populations

The history of dependencies is a history of domination and exploitation.¹⁴⁴ Sir George Cornwall Lewis, the British War Secretary at the turn of the twentieth century, wrote unabashedly about the advantages of dependencies to the dominant country as well as to the dependency.¹⁴⁵ The advantages “which dominant states have derived, or attempted to derive, from the possession of dependencies” include: first, dependencies may provide a source of “revenue to the government of the dominant country”; second, dependencies “may furnish men for the army and navy of the [dominant state]” and “may also be used by the dominant state as a military or naval station”; third, the dominant community may benefit from “the trade which she may carry on with [the dependency], under circumstances more favorable to her traders

140. See *id.* But see SUD, *supra* note 94, at 46-47 (discussing the ambiguity in the language of Article 73).

141. U.N. CHARTER art. 73.

142. *Id.*

143. *Id.*

144. See, e.g., LEWIS, *supra* note 102, at 151-68.

145. *Id.* at 123-46.

than if the dependency were an independent state"; fourth, the dependent entities "may furnish a field where the inhabitants of the [dominant country] may find advantageous employment for themselves or profitable investments for their capital"; fifth, dependencies may be used as a "place to which convicted criminals may be transported"; and last, dependencies provide the dominant country with the "glory which a country is supposed to derive from an extensive colonial empire."¹⁴⁶

Sir George Cornwall Lewis also referred to the benefits to the dependent entity, including protection against adverse forces, such as "neighboring tribes of barbarians";¹⁴⁷ subsidization, such as better trade conditions than the dominant nation would grant to non-dependencies; and supervision, to ensure that local institutions do not become oppressive.¹⁴⁸

Mandates and trusteeships, though sanctioned by the League of Nations and the United Nations (which offered some protection against the flagrant abuses of the colonies by the colonizers), were a continuation of a structure of dependency and, as such, not unlike colonization. Although under international law such structures were legal at the time, they rested solidly on the same presuppositions justifying colonization.

There is an evident parallel between the "legitimate" international legal status of mandates and trusteeships with regard to their administration of powers and the status of the populations in colonies with regard to the colonizing power. In both colonization and mandates/trusteeships, the territory was taken by conquest, usually for economic reasons; the local population was usually not consulted regarding their desire to be controlled by an external power; the external power imposed its will on the local population, installing, to varying degrees, its military forces, administrative bodies, culture, language, and often religion; and the dominant power determined, as justification for its domination, that the local population was, as

146. *Id.* at 123-42.

147. *Id.* at 143.

148. *Id.* at 144-46.

yet, incapable of self-rule.¹⁴⁹

There is, of course, a recognizable difference between the colonial structure and the mandates and trusteeships: the admittedly temporary nature of mandates and trusteeships “until such time as they are able to stand alone.”¹⁵⁰ The focus of the mandates was said to be striving towards the eventual independence of the local population once they are “able.”¹⁵¹ Yet in all cases, the determination of whether they were in fact “able to stand alone” was entrusted to the industrialized nations serving as mandatory powers over these mandates.¹⁵²

From the perspective of the mandate’s residents, particularly when the territory was a colony, a mandate, and finally a trusteeship, it may have seemed the same: the installation of one people on the territory of another with the intention of dominating with her army, her administration, her language, and sometimes, her religion.¹⁵³

VI. THE UNITED NATIONS, DETERMINING THAT COLONIZATION WAS AN EVIL, SET OUT TO PROHIBIT IT, WHILE FORMER COLONIES SPONTANEOUSLY SOUGHT INDEPENDENCE

When the United Nations was established following the brutality of WWII, much of the developing world was still under colonial domination or the mandate system.¹⁵⁴ The assumptions made by the victors of WWII were that the system of colonialism would disintegrate and the international arena would soon be populated by “sovereign, independent states working together in a system of collective security and responsibility centered in the United Nations.”¹⁵⁵

This vision was dispelled by the onset of the Cold War, which hampered the ability of the Security Council to make

149. See, e.g., LEAGUE OF NATIONS COVENANT art. 22, para. 1.

150. *Id.* para. 4.

151. See *id.* (discussing certain communities formerly belonging to the Turkish Empire).

152. See *id.* paras. 7-9.

153. JOSEPH LEVESQUE, COLONISATION ET DECOLONISATION: ANALYSE DU PROCESSUS ET DESCRIPTION DE DEUX CAS: L’INDE ET L’ALGERIE 8 (1998).

154. BRIAN URQUHART, DECOLONIZATION AND WORLD PEACE 1 (1989).

155. *Id.* at 2-3.

decisions in the face of security threats.¹⁵⁶ Developing nations, emerging from colonization and looking to the Security Council for assistance, were disappointed by the inability of the Security Council to take action, and many of these nations erupted into war.¹⁵⁷ Soon, the General Assembly became the primary means of expression for these developing, post-colonial nations, and they strongly criticized the members of the Security Council for being ruled by politics and not by the provisions of the U.N. Charter.¹⁵⁸ African nations, in particular, found a voice through the General Assembly and had a significant impact on the early years of the United Nations.¹⁵⁹ As the West failed to come to the aid of the newly independent nations whose sovereignty and self-government they had so boldly supported prior to the Cold War, these new states developed a strong opposition to the political influence of the unsupportive, industrialized countries.¹⁶⁰ This antagonism was only strengthened by the duplicity of the industrialized powers supplying weapons to the Third World, which fueled armed conflict and stymied development.¹⁶¹

The controlled, orderly decolonization process apparently envisioned by the United Nations never took place.¹⁶² In 1960, the General Assembly, concerned that the process of decolonization was not proceeding as swiftly as they would have liked, passed a resolution entitled *Declaration on the Granting of Independence to Colonial Countries and Peoples*.¹⁶³ The resolution demonstrated the dramatic shift in international thinking regarding colonialism in all its forms and affirmed the ideals enshrined in the U.N. Charter of independence, territorial integrity, sovereignty, and self-determination.¹⁶⁴ The resolution

156. *Id.*

157. *Id.*

158. *See id.* at 4-5.

159. *Id.* at 13-18; SUD, *supra* note 94, at 4.

160. URQUHART, *supra* note 154, at 5-6.

161. *Id.* at 18-19.

162. *See id.* at 15.

163. G.A. Res. 1514, U.N. GAOR, 15th Sess., 947th plen. mtg., Supp. No. 16, at 66, U.N. Doc. A/4684 (1960).

164. *See id.*

stated that the General Assembly is

[c]onvinced that the continued existence of colonialism prevents the development of international economic co-operation, impedes the social, cultural and economic development of dependent peoples and militates against the United Nations ideal of universal peace . . . [and that] in order to avoid serious crises, an end must be put to colonialism and all practices of segregation and discrimination associated therewith.¹⁶⁵

The resolution further stated that,

[t]he subjection of peoples to alien subjugation, domination and exploitation constitutes a denial of fundamental human rights, is contrary to the Charter of the United Nations and is an impediment to the promotion of world peace and co-operation.¹⁶⁶

Regarding the role of the mandate and trusteeship systems in “assisting” the dominated peoples in their preparation for independence, the resolution stated that “[i]nadequacy of political, economic, social or educational preparedness should never serve as a pretext for delaying independence.”¹⁶⁷

What the League of Nations attempted to do with colonialism, namely to supervise it and control and limit its abusiveness, the United Nations attempted to do with Chapters XI, XII, and XIII of the Charter. Yet international scholars indicate that the founding members of the United Nations intended to gradually liquidate all dependencies.¹⁶⁸ As one scholar writes: “If the League [of Nations] aimed at supervising colonialism, the United Nations had taken upon itself the task of liquidating colonialism.”¹⁶⁹

Chapter XI was the starting point for the anti-colonial movement, as intended by the framers of the Charter, according to scholars.¹⁷⁰ Chapters XI, XII, and XIII were eventually viewed conjunctively and this “assimilation” of aspirational

165. *Id.*

166. *Id.* at 67.

167. *See id.*

168. SUD, *supra* note 94, at 18, 44-45.

169. *Id.* at 45.

170. *See id.* at 44-45.

provisions were viewed as encouraging self-rule.¹⁷¹ This paved the way for an “eruption . . . of decolonization through the United Nations.”¹⁷²

In the end, decolonization occurred faster than anyone anticipated: ninety-four new states were created in two decades.¹⁷³ The newly independent nations did not experience the Industrial Revolution, leaving them, economically, far behind the industrialized countries.¹⁷⁴ Their transitions to independence were sometimes peaceful, sometimes violent, yet in each case there was struggle and adjustment involved.¹⁷⁵ Often there was also a period of great disappointment after the initial thrill, when it became clear that independence would not solve their economic woes—on the contrary, often they suffered terribly economically.¹⁷⁶

VII. HUMANITARIAN INTERVENTION “WITHOUT BORDERS” IS NOT UNLIKE COLONIZATION

The Declaration on the Granting of Independence to Colonial Countries and Peoples states:

The subjection of peoples to alien subjugation, domination and exploitation constitutes a denial of fundamental human rights, is contrary to the Charter of the United Nations and is an impediment to the promotion of world peace and co-operation.¹⁷⁷

Humanitarian intervention involves the nonconsensual interference by foreign powers into the domestic situation in a particular country.¹⁷⁸ Subjugation of the local military powers is crucial for the intervention to be successful, and often the primary goal of military interventions has been to disarm the target’s military forces, in other words, to subjugate the target’s

171. *Id.* at 64.

172. *Id.*

173. URQUHART, *supra* note 154, at 15.

174. *Id.* at 15-16.

175. *See id.* at 17-18.

176. *Id.* at 5.

177. G.A. Res. 1514, *supra* note 163, at 67.

178. *See* HENKIN ET AL., INTERNATIONAL LAW, *supra* note 4, at 931.

military to the international military forces.¹⁷⁹ The foreign forces have an openly stated intention to “dominate” the local authorities, whom they view as having acted in violation of international principles.¹⁸⁰

For example, as described above, the NATO powers that intervened in Kosovo in 1999 justified their intervention by stating that the Serb authorities had essentially relinquished their right to rule the territory by committing violations of human rights.¹⁸¹ In this way, this provision of the General Assembly regulations guiding decolonization appears to be contradicted by the very nature of humanitarian intervention.

The Declaration provides that “[a]ll peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.”¹⁸² Yet a territory that becomes a target of humanitarian intervention will have its right to freely determine its political status suspended; once the intervention occurs, the political authorities of the target territory will not be permitted to rule as they choose or to continue a repressive and abusive political system, even if the public supports such a system.¹⁸³

Once the control of the intervening forces is effective, the local authorities will not have the power to engage in international relations without the consent of the intervention forces. Similarly, a colony or trust territory administered by a foreign power does not have the authority to engage in international relations during that colonization.

Colonization that occurred prior to the establishment of the

179. See Ivo H. Daalder & Michael E. O’Hanlon, *Unlearning the Lessons of Kosovo*, FOREIGN POLICY, Fall 1999, at 128, 129-32 (arguing that the bombing campaign against Yugoslavia was successful against the Yugoslavian military).

180. Wolf, *supra* note 25, at 348-49.

181. See Thomas M. McDonnell, *Cluster Bombs over Kosovo: A Violation of International Law*, 44 ARIZ. L. REV. 31, 36 n.12 (2002) (citing Noam Chomsky, *Kosovo Peace Accord*, Z MAG., July 1999, at 1, 7); *7:30 Report: Kosovo Peace Deal Could Finally Bring Stability to Balkans, Says Expert* (Australian Broadcasting Corporation television broadcast, Sept. 6, 1999), available at <http://www.abc.net.au/7.30/stories/s28556.htm>.

182. G.A. Res. 1514, *supra* note 163, at 67.

183. See Wolf, *supra* note 25, at 348-49; HENKIN ET AL., INTERNATIONAL LAW, *supra* note 4, at 931-34.

League of Nations is most like unilateral intervention, and the mandate and trusteeship systems are most like U.N.-authorized intervention. Colonization, similar to unilateral intervention, lacks the authorization of an internationally-constituted body.

Mandates and trusteeships were administered and supervised under the auspices of the United Nations, and U.N.-authorized humanitarian intervention occurs under the rubric of the Security Council, which authorizes its deployment and expansion, and tracks its progress.¹⁸⁴ Mandates and trusteeships were aimed at guiding the territory's population to self-governance. Humanitarian intervention is guided by the principle of leading the territory's authorities from abusive to democratic practices, until they can democratically govern themselves.¹⁸⁵

Under Article 84 of the U.N. Charter, the administering authority of a trusteeship must ensure that the territory plays its part in the maintenance of international peace and security, and under Article 76(a), a basic objective of the trusteeship system is to further international peace and security.¹⁸⁶ Also, Article 73 of the U.N. Charter imposes an "obligation [on administrators of nonself-governing territories] to promote to the utmost, within the system of international peace and security established by the present Charter, the well-being of the inhabitants of these territories, and, to this end[,] further international peace and security."¹⁸⁷

Humanitarian intervention, similarly, is authorized by the U.N. Security Council when there is a breach of international security and is deployed with the purpose of restoring international peace and security.¹⁸⁸ The administrators of nonself-governing territories are required to protect the population's "just treatment, and their protection against

184. *Id.* at 296-97; see Voon, *supra* note 87, at 32-33.

185. See U.N. CHARTER art. 76; Jeremy Levitt, *Conflict Prevention Management & Resolution: Africa—Regional Strategies for the Prevention of Displacement and Protection of Displaced Persons: The Case of the OAU, ECOWAS, SADC, & IGAD*, 11 DUKE J. COMP. INT'L L. 39, 52 (2001).

186. *Id.* arts. 76, 84.

187. *Id.* art. 73.

188. See U.N. CHARTER art. 42.

abuses,”¹⁸⁹ and trusteeships are “to encourage respect for human rights and for fundamental freedoms for all.”¹⁹⁰ Similarly, humanitarian intervention is authorized by the Security Council to protect a population from abuse and to ensure respect for human rights.¹⁹¹

VIII. HUMANITARIAN INTERVENTION MUST NOT BE “WITHOUT BORDERS”

There is strong support for the view that humanitarian intervention necessarily violates Article 2(4) of the U.N. Charter.¹⁹² Article 2(4) protects each state’s “territorial integrity and political independence,” and therefore “it is necessary to argue that where *the purpose* of the intervention is neither to impair territorial integrity nor to challenge political independence then there is no violation of the article.”¹⁹³

However, where there is an armed incursion into a state against its will, there is necessarily a violation of that state’s territorial integrity. And where the political authorities of that state are the perpetrators of atrocities against its citizens in order to halt these actions, the political independence of that nation must be challenged. Additionally, if “it was the unabashed *intent of the framers* to assure that there would be no exceptions to the prohibition on the use of force other than for self-defense,”¹⁹⁴ then humanitarian intervention appears to fall squarely outside the parameters of what was contemplated by in the U.N. Charter, and thus outside the regime of the United Nations. As Professor Brownlie concluded: “it is ‘extremely doubtful’ whether humanitarian intervention survived the ‘general prohibition of resort to force to be found in the U.N.

189. *Id.* art. 73.

190. *Id.* art. 76.

191. Levitt, *supra* note 185, at 52.

192. Wolf, *supra* note 25, at 339-40.

193. *Id.* at 340 (emphasis in original); U.N. CHARTER art. 2, para. 4.

194. Wolf, *supra* note 25, at 340 (emphasis in original); *see also* HENKIN ET AL., HUMAN RIGHTS, *supra* note 14, at 714 (drafting history of the U.N. Charter demonstrates that the Charter was intended to prohibit all uses of force against other states aside from self-defense).

Charter.”¹⁹⁵

The extensive similarities between humanitarian intervention and belligerent occupation, and the fewer, but nonetheless significant, similarities between humanitarian intervention and colonization serve to bolster the argument that humanitarian intervention without borders violates international law. Humanitarian intervention, nonetheless, has become ubiquitous enough to impel the international community to take steps to regulate such actions.¹⁹⁶ In particular, following the NATO intervention in Kosovo in March 1999, which was undertaken without a Security Council resolution, it seems there is an emerging trend to recognize that gross violations of human rights threaten humanity as a whole which justify and, some may argue, require intervention.¹⁹⁷

A first step towards regulating humanitarian intervention includes using the prohibitions against colonization and the rules guiding occupation as the basis for international legal standards guiding humanitarian intervention. The Secretary-General's standards¹⁹⁸ may also be useful in creating such an instrument, as would the general provisions of customary international law, because, although all international “persons” are bound under the provisions of customary international law, a codification of these obligations in a single document pertaining directly to international intervention forces would strengthen those obligations. However, regardless of whether international standards regulating humanitarian intervention are developed, humanitarian intervention must always be guided by the principles of humanitarian law as enshrined in the Hague and Geneva Conventions.

195. Wolf, *supra* note 25, at 340 (quoting IAN BROWNLIE, *INTERNATIONAL LAW AND THE USE OF FORCE BY STATES* 342 (1963)).

196. See Mary Ellen O'Connell, *Regulating the Use of Force in the Twenty-First Century: The Continuing Importance of State Autonomy*, 36 *COLUM. J. TRANSNAT'L L.* 473, 473-74 (1998).

197. Sergio Balanzino, *NATO's Actions to Uphold Rights and Democratic Values in Kosovo: A Test Case for a New Alliance*, 23 *FORDHAM INT'L L.J.* 364, 364-67 (1999).

198. *Report of the Secretary-General*, *supra* note 33, at 5.

IX. CONCLUSION

Humanitarian intervention, to be in compliance with international law, must not violate the existing provisions of international humanitarian law. In addition, humanitarian intervention involves effective occupation of the target territory. As such, the force implementing the intervention—the occupying force—is bound under international law to comply with the terms of the Geneva Conventions, which regulate belligerent occupation. All persons, nations, and organizations (as international “persons”) are bound under customary international law by the provisions of the Hague and Geneva Conventions.¹⁹⁹ Thus, the Hague and Geneva Conventions bind an intervention force and individual nation participants. Furthermore, every soldier participating in military activities under the authority of a nation that is party to the Geneva Conventions is individually bound to comply with provisions of those Conventions.²⁰⁰

The laws of belligerent occupation provide detailed regulations limiting the permissible activities of an occupying force.²⁰¹ Activities that violate these provisions are violations of international law, and are thus illegal.²⁰² Humanitarian intervention, which affects permanent changes in the status, civil or judicial personnel or structures, or laws of the target territory, violates the prohibitions against such permanent changes that pervade the rules regarding belligerent occupation in the Geneva Conventions.²⁰³

The consequences of a failure to comply with these provisions can be dramatic and far-reaching. For example, it may be permissible under the Geneva Conventions for the civilian component of an intervening force to organize elections,

199. Protocol I, *supra* note 34, art. 43, 1125 U.N.T.S. at 23.

200. Geneva Civilian Convention, *supra* note 34, arts. 144, 146, 6 U.S.T. at 3616, 75 U.N.T.S. at 386.

201. *Id.* arts. 47-78, 6 U.S.T. at 3548-66, 75 U.N.T.S. at 318-38; Hague Convention IV, *supra* note 2, arts. 42-47, 36 Stat. at 2306-07, 205 Consol. T.S. at 295-96.

202. See Geneva Civilian Convention, *supra* note 34, arts. 146-48, 6 U.S.T. at 3616-18, 75 U.N.T.S. at 386-88.

203. *Id.* arts. 54, 64-65, 67, 6 U.S.T. at 3552, 3558-60, 75 U.N.T.S. at 322, 328-30.

create domestic laws regarding the conduct of these elections, supervise the elections, eliminate candidates who do not meet its standards, and validate or invalidate the results of these elections—as did the intervention force in Bosnia and Herzegovina. But an occupying power is justified in “modifying” or adding to local laws only as long as the occupation continues to be effective; after the occupying force withdraws from the target territory, the laws modified or added by the international force become ineffective and void. Thus, officials elected under the laws of the occupying force may or may not be legitimately elected officials according to the domestic laws of that nation—and if their election was not in compliance with local law, they cannot be said to be legitimately in those positions of authority following the end of the occupation.

Similarly, judges selected and appointed by intervention officials and all civil institutions and positions created by the intervention forces in Kosovo may be said to hold their positions during the occupation. However, according to international law governing belligerent occupation, once the occupying intervention force leaves Kosovo, all the institutions and positions installed and created by the Kosovo Force (KFOR) and the United Nations will cease to be legally constituted creations.

Regulations, defining (1) when humanitarian intervention is permissible—and even obligatory; (2) what the extent of its power, authority, and lasting impact will be; and (3) what its relationship to local structures will be, are critical to ensuring that humanitarian intervention is not engaged in inconsistently and that the regulations closely respect existing international legal standards. Until such regulations are created, humanitarian intervention forces must be held to current international standards governing occupation.

Humanitarian intervention may be viewed as a legitimate use of force for collective self-defense. In this case, it is engaged on very compelling grounds; namely, that systematic and flagrant violations of human rights and humanitarian law are the concern of every nation and individual and that protection of the victims is the universal obligation of humanity. But a humanitarian intervention force that intervenes to ensure compliance with humanitarian law cannot then engage in

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violations of international law. Such practices not only detract from the legitimacy of the interventions, they may also threaten any lasting positive changes made in the target territory. Two wrongs cannot make a right. Humanitarian intervention forces must ensure that their activities fully comport with the laws of war, lest their activities turn them from the enforcers of international law to the perpetrators of international crimes.