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## **On Moral Arguments Against a Legal Right to Unilateral Humanitarian Intervention\***

Under current international law, armed intervention in the territory of another state is legally permissible only in self-defense or when authorized by the United Nations, and in the latter case, only for the purpose of maintaining international peace and security. Over the past decade, however, events in the Balkans, Rwanda, East Timor, and elsewhere have led politicians as well as theorists to question both of these conditions on the legality of intervention.

Most of the debate has focused on the second of these two requirements: the possible legal justifications for intervention (or, to use the terminology of just war theory, what counts as a just cause). For example, a number of political philosophers and international lawyers have recently challenged the traditional notion of sovereignty that limits international law to regulating the relations amongst states, and so places outside the purview of international law those persecutions, ethnic cleansings, and other atrocities that take place solely within the borders of a single state.<sup>1</sup> If successful, arguments of this sort may contribute to a change in international law whereby a state's treatment of those within its borders, as well as its behavior in the international sphere, can provide a legal justification for intervention by other states. On a practical level, however, a change to the possible legal justifications for intervention may be less important than a change in who may exercise the legal authority to intervene. A state's widespread violation of its subjects' most basic rights almost always has repercussions beyond the state's border, and the United Nations has demonstrated a willingness to interpret the idea of a threat to

international peace and security quite broadly. If the international community wishes to intervene, it can probably justify such an action under existing international law.

As the international response to recent events in Darfur demonstrates, the restriction of authority to intervene to the United Nations poses the greater legal barrier to intervention. From a practical perspective, then, the more pressing question may be whether international law ought to be modified to permit states, or multi-state organizations, to carry out unilateral humanitarian interventions; that is, interventions that are not authorized by the United Nations. The issue here is essentially a moral one: would the incorporation of a right to unilateral humanitarian intervention entail a moral improvement to international law – for example, a decrease in the number and severity of basic human rights violations that occur under it – or would it instead lead to an even greater disparity between legality and morality? Those theorists who have considered the issue have been quick to assert the latter, emphasizing in particular the possibility that states would abuse a unilateral right to humanitarian intervention, so that ultimately a legal system that included such a right would facilitate greater human rights violations than occur under the present international legal system. Though this conclusion may be correct, this essay maintains that the arguments that have been provided to support it are inadequate to that task.

Much of the debate over the moral case for reforming international law to include a unilateral right to humanitarian intervention has focused on NATO's 1998 intervention in Kosovo. The discussion herein does the same, though as noted above, the current situation in Darfur renews the urgency of this debate. Section I concerns the characterization of the right to unilateral humanitarian intervention that NATO might

have proposed to justify its actions in Kosovo. Specifically, NATO need only have asserted a right to unilateral intervention on the part of multi-state organizations, members of which have varying degrees of military and economic power, and in which each member exercises a veto over the organization's policies, in a state that is inflicting a humanitarian disaster on its citizens (or a portion thereof).<sup>2</sup> As section II demonstrates, this relatively narrow construal of the legal right to unilateral humanitarian intervention renders it less open to the abuse that Allen Buchanan appeals to when arguing that the incorporation of such a right would lead to the moral deterioration, rather than improvement, of international law. Moreover, any state likely to abuse the right to unilateral humanitarian intervention is already likely to abuse the right to self-defense to justify its conduct. In short, it is far from clear that the new legal right in question will result in a greater number of basic human rights violations than occur under the existing international legal system.

Section III examines several other possible objections to a narrowly defined legal right to unilateral humanitarian intervention. These include (1) an argument from unfairness in the application of the law (i.e. which states are likely to find the right in question exercised against them); (2) an argument that recognition of such a right, even if morally unproblematic itself, will lead inevitably down a slippery slope to the recognition of legal rights that are morally problematic; (3) arguments concerning the impact a right to unilateral humanitarian intervention will have on diplomatic efforts to resolve conflicts peacefully; and (4) the objection that legal recognition of a right to unilateral humanitarian intervention is incompatible with the rule of law. Neither of the first two

arguments succeeds, the third is inconclusive, while the fourth reduces to the abuse objection examined in section II.

Before proceeding to these arguments, however, several points about the type of project undertaken here must be noted. First, and most importantly, this essay does not claim that NATO acted legally when it intervened in Kosovo. Nor is it clear that NATO or the member states that constituted it intended that their intervention establish (or be part of a process establishing) a unilateral right to intervention, however specified.<sup>3</sup> Thus the arguments of this paper are to a significant degree counter-factual. The aim is to examine the kind of arguments NATO and its members *might have made* were they committed to creating a new norm of international law. These arguments are of more than just theoretical interest, however, since they are the kind of considerations that states might appeal to in the future if they wish to advocate or oppose changes to the international law governing the use of force.

Second, even if a legal right to unilateral humanitarian intervention had existed at the time of NATO's intervention in Kosovo, that action might still have been illegal (and immoral) in virtue of the way NATO conducted it. It does not follow from an agent having a right to X that the agent is morally or legally permitted to X in whatever way he chooses. Other rights or values may limit the means by which the agent can exercise his right to X. The issue in question in this paper concerns when going to war is legally justifiable – a question of whether a state has a right to X. Even should a right to unilateral humanitarian intervention eventually be recognized, however, it seems reasonable to suppose that the exercise of that right will be limited by existing legal (and moral) constraints on how the right to wage war can be exercised.<sup>4</sup> Though detailed

discussion of this topic is not possible here, it is not implausible to think that NATO pursued its intervention in Kosovo in ways that violated legal (and moral) constraints on the conduct of warfare, and that it did so knowingly (and perhaps even deliberately). Thus even if the international legal community had already recognized a right of the type under discussion in this paper, it would not follow that NATO's intervention would have been perfectly legal.

## I

Allen Buchanan notes that “whether or not the NATO intervention [in Kosovo] can be described as an act of illegal reform that would, if successful, bring about a major [moral] improvement in the [international legal] system depends upon the precise characterization of the norm that this illegal act is likely to contribute to the establishment of – and upon whether a norm of this character would be likely to be abused.”<sup>5</sup> This section offers a characterization of the legal norm implied by NATO's intervention, one that construes the right to unilateral intervention more narrowly than Buchanan does.<sup>6</sup> The following sections consider various arguments that might be offered to show that even as that norm is specified here, the moral case against it remains stronger than the moral case in its favor.

The creation of a new customary legal norm requires that international legal actors undertake a certain kind of conduct, under a certain description, and do so from the belief that the law requires the conduct so described.<sup>7</sup> Thus if NATO's intervention in Kosovo is to be understood as establishing, or as contributing to the establishment of, a new norm of international law, how NATO characterized its action is crucial to the moral evaluation of the new customary norm. Of course, as noted above, though NATO and

some of its member states did initially advocate for a new legal right to intervention, or argue that the intervention was already legal under existing international law, support for such a position later waned. Still, drawing on certain statements made by NATO and its member states leading up to its intercession in Kosovo, it is possible to infer the content of the new legal norm that NATO and its member states might have advanced, had they remained determined to reform the existing law governing the use of force.

Buchanan argues that a proper characterization of the norm implied by NATO's intervention in Kosovo must include "the assertion [that] the requirement of Security Council authorization is a defect in the [international legal] system" and recognize "the fact that the intervention was undertaken by a regional military alliance whose constitutional identity is that of a pact for defense of its members against aggression."<sup>8</sup> The reason for the former claim should be clear; if the need for Security Council authorization (except in cases of self-defense) is not a defect in the international legal system, then what justification can there be for a state or group of states to assert a legal right to unilateral intervention? Whether or not the requirement of Security Council authorization is a (moral) defect depends on a comparison of the likelihood and number and/or magnitude of human rights violations that are occurring (or will occur) under such a system, and the likelihood and number and/or magnitude of human rights violations that will occur under some alternative system – in this case, a system that includes a legal right to unilateral intervention. Buchanan asserts that the latter legal system would be worse than the former, from the standpoint of securing respect for human rights, because a right to unilateral intervention would be liable to abuse, and so lead to more and greater violence. Before examining this argument, however, consider the second fact that

Buchanan claims must be recognized in the new norm implied by the intervention in Kosovo: that it was undertaken by NATO.

The reason this fact must be recognized by the new norm, Buchanan contends, is that “those who undertook the intervention and their supporters emphasized that it was conducted by NATO.”<sup>9</sup> The crucial question for determining the content of the new norm is why they did so. Buchanan’s answer is “because they thought that this fact made the justification for it stronger than would have been the case had it been undertaken by a mere collection of states.”<sup>10</sup> Though this claim is correct, Buchanan seriously understates the way in which this fact made NATO’s justification stronger, as well as its implications for the content of the new norm NATO might have proposed. First, by emphasizing that NATO, a multi-state organization intended to provide for collective defense, undertook the intervention, those who interceded in Kosovo attempted to demonstrate that the intervention was not undertaken as a means for territorial or economic aggrandizement, or the settling of old scores.<sup>11</sup> This should not be taken to deny that NATO was motivated, at least in part, by considerations of self-interest. These include concern on the part of member states that they would be swamped with refugees, and that greater instability in the Balkans would provide fertile ground for international criminal organizations.<sup>12</sup> But that the motives of states claiming to intervene on humanitarian grounds should be “pure” seems an impossibly high standard, and not obviously one that must be attained. After all, in an interpersonal context we do not require that people always act from a pure motive; as Kant argues, such a motive may be necessary for an agent to be morally worthy, but it is not necessary for that agent to act in accordance with morality. Perhaps it suffices, then, that intervening states demonstrate that they are not



motivated by certain reprehensible motives, such as territorial or economic aggrandizement, even if their motives are not pure.

Second, NATO intervention required the agreement of a number of states; it was not a unilateral action taken by one powerful state. Moreover, a number of these states were militarily and (at least vis-à-vis the U.S.) economically weak ones, and so could be expected to be concerned with the weakening of the prohibition on unilateral intervention (particularly given the history of warfare in Europe). The consent of these states, and indeed their active involvement in the operation (though it was predominately American) places important constraints on the new norm of intervention. It might be plausibly inferred that intervention in the absence of Security Council authorization still requires the consent of states representing a range of military and economic power, and so perhaps representing different degrees of need for, and commitment to, caution in condoning and participating in unilateral interventions. Indeed, the consent of NATO's weaker member states to intervention in Kosovo may come closer to representing the interests of weak and strong states than does the requirement of Security Council authorization, since NATO's weaker member states still exercise an individual veto on NATO operations, while weaker states on the Security Council do not. It may also be true that NATO's weaker member states are better able to resist behind the scenes arm-twisting by powerful states than are weak states serving a stint on the Security Council. In sum, it is not obvious how vulnerable the norm implied by NATO's intervention in Kosovo is to the objection that it will encourage predation by stronger states on weak ones; but as will become clear below, this concern is an important reason Buchanan cites for rejecting

NATO intervention, understood as an illegal reform of international law aimed at establishing a unilateral right to intervention.

Another manner in which Buchanan sometimes seems to under-describe the right to unilateral intervention implied by NATO's actions in Kosovo involves the circumstances in which such a right may be exercised. It may well be that a right to unilateral intervention, even when restricted to multi-state defense organizations, or other military organizations recognized under article 52 of the U.N. charter, would simply be too liable to abuse. The result would be an increase in warfare and other forms of political violence, and the concomitant violations of human rights, in comparison to the present international legal regime. But what seems to be implied by NATO's intervention in Kosovo is not a right to unilateral intervention whenever an organization of states wishes to intervene, or even when a state treats its citizens (or some portion thereof) unjustly, but rather a right to unilateral intervention when a state is inflicting a humanitarian disaster upon its citizens (or some portion thereof), and perhaps additionally, when the Security Council is unwilling to act. This appears to be the position defended by the United Kingdom's delegate to the United Nations, in an emergency meeting of the Security Council following the commencement of NATO's bombing campaign on March 24, 1999.

Every means short of force has been tried to avert this situation. In these circumstances, and as an exceptional measure on grounds of overwhelming humanitarian necessity, military intervention is legally justifiable. The force now proposed is directed exclusively to averting a

humanitarian catastrophe, and is the minimum judged necessary for that purpose.<sup>13</sup>

There is good reason to believe, then, that in specifying the new legal norm that empowers them to intervene in Kosovo, NATO and its member states would incorporate what Buchanan labels “the familiar and widely acknowledged conditions for justified intervention.”<sup>14</sup>

Suppose, then, that the right to unilateral intervention is restricted to cases where a state is inflicting, is about to inflict, or is unable to prevent others from inflicting, a humanitarian disaster on its citizens, or some portion thereof. It is true that the concept of a humanitarian disaster is a somewhat vague concept, but this is not to say that the concept has no content at all. Indeed, there appears to be fairly widespread agreement on the general description of a humanitarian disaster as the widespread and systematic violation of basic human rights.<sup>15</sup> This suggests that a legal right to unilateral humanitarian intervention simply faces the same kind of problems as do the right to freedom of speech, or the right to be free from cruel and unusual punishments. Like those rights, a legal right to unilateral humanitarian intervention would have cases in which it clearly applies (e.g. Rwanda in 1994) and cases where it would not (e.g. present day Sweden), and of course there would be cases that fall in what H.L.A. Hart called the penumbra of a law.<sup>16</sup> Unless the law in question is understood to list exhaustively the instances that fall under it, the penumbra cannot be eliminated, but its scope can be narrowed or enlarged as a result of an evolving but informal shared understanding of what qualifies as a humanitarian disaster, and/or formal determinations of this matter by authoritative sources such as courts or treaties. Even if the scope of the right in question

were interpreted fairly broadly, the content of the norm alone would place some constraints on the number and type of cases where states or regional military organizations could plausibly claim to be exercising it. Of course, this assumes (as does this entire paper) that it is important to states to at least be able to make a case, the more plausible the better, that their actions are legal. This seems to be a safe assumption, at least so long as no further claim is made regarding why states wish their actions to be viewed as legal by other states.

There are good reasons, however, to suspect that the concept of a humanitarian disaster, and so of a right to unilateral humanitarian intervention, would come to be understood narrowly instead. As indicated above, militarily and economically weak states would have a powerful interest in limiting the cases where international actors could exercise such a right. But so too would members of certain ideological groups in powerful states. The recognition of a right to unilateral humanitarian intervention might well facilitate the efforts of individuals and groups within a powerful state who are inclined to a cosmopolitan ideology to press for more frequent interventions. Isolationists, and in most cases Realists, would therefore have good reason to advocate a narrow construal of the phrase ‘humanitarian disaster,’ at least as it is used in international law, so as to avoid being drawn into conflicts and foreign entanglements that, for moral and/or prudential reasons, they believe the powerful state ought to avoid.<sup>17</sup> Finally, even cosmopolitan-minded individuals might support a narrow reading of the right under discussion, if it turned out that by making the legal recognition of humanitarian disaster rarer, states were more likely to intervene when such legal recognition was granted. If these arguments are correct, and again assuming the

importance to just about every state of being able to make a plausible case for the legality of its conduct, then the very content of a right to unilateral humanitarian intervention might provide a significant barrier to its abuse.

Thus far it has been argued that the right to unilateral intervention implied by NATO's actions in Kosovo can be plausibly understood in fairly narrow terms. Specifically, it is a right to unilateral intervention by a multi-state organization, members of which have varying degrees of military and economic power, and where each exercises a veto over the organization's policies, in a state that is inflicting a humanitarian disaster on its citizens (or a portion thereof). The question to be addressed in the rest of this paper is whether the incorporation of such a right into international law would result in a morally better international legal system than currently exists.

## II

Buchanan and many others primarily object to a right to unilateral intervention, even when limited to responding to cases of alleged humanitarian disaster, because they believe that such a right would be too liable to abuse. Ultimately, they claim, the proposed modification to the international legal system would result in an increase, rather than a decrease, in political violence and the violation of human rights. Or in other words, the reformed international legal system would be less substantively just than the existing international legal system.

When evaluating the "abuse objection," it is crucial that we note precisely the kind of empirical support necessary to substantiate such a claim. Specifically, it must be the case that there are (or will be) states (or better, multi-state organizations) that would not unjustly intervene in another state, but for the possibility of defending their conduct

as just on the basis of the proposed right to unilateral humanitarian intervention. Thus, neither the behavior of states that use force (or will use force) against other states regardless of the requirements of international law, nor the behavior of states that claim to be (or will claim to be) justified in the use force on the basis of self-defense, will provide evidence to support the claim of likely abuse. The latter point in particular bears repeating; what is the likelihood that a case will arise where a state believes it can plausibly justify its use of force against another state on the basis of a right to unilateral humanitarian intervention, but does not believe that it can plausibly justify its use of force by appeal to a unilateral right to self-defense?

Though a systematic case cannot be presented here, the conjecture is that any state that might consider abusing the right to unilateral humanitarian intervention is already likely to abuse the right to self-defense to justify its conduct. Consider, for example, the instances of armed intervention often identified as the most plausible examples of morally justifiable illegal humanitarian intervention: East Pakistan/Bangladesh in 1971, Uganda in 1978-9, and Kampuchea/Cambodia in 1978-9. In all three cases, the states in question also appealed to their right to the unilateral exercise of force in self-defense to justify their actions. Moreover, in two of the three cases the state's intervention was "shielded" by the simultaneous actions of national liberation groups supported by the invading states. The suggestion, then, is that if a state wishes to invade another state, it seems at least as easy, if not easier, to create the conditions for the exercise of a right to self-defense as it does to create the conditions for the exercise of a right to unilateral humanitarian intervention. All the state need do is offer covert support to a rebel military group in the target state, as Rwanda has done in the Congo, and as Tanzania did in

Uganda. In sum, the suspicion is that there are no states that (a) wish to invade another state, and (b) do not believe they can even begin to make a case for doing so on grounds of self-defense, nor bring about a situation in which they could begin to make such a case, but (c) do believe they can make a case for invading on the basis of a right to unilateral humanitarian intervention, or can bring about a situation in which they might begin to make such a case.

In order to show that a right to unilateral humanitarian intervention would lead to greater violations of basic human rights than occur under the present system, it is necessary to factor in both how often an act of political violence that would not otherwise have taken place will occur, and how much harm will result from such an act. This essay claims that the frequency of the type of acts a proponent of the abuse objection needs to buttress his claim would be very low. But perhaps the number of rights violations that would result from the few abuses of a right to unilateral humanitarian intervention would exceed the number of rights violations that occur (or will occur) under the current international legal system. While the veracity of this claim is far from clear, such a possibility cannot be denied. Still, a right to unilateral humanitarian intervention is not a right to intervene in whatever manner one chooses; the existing laws governing the conduct of wars still hold. Of course, a state that abuses the right to humanitarian intervention may also feel little compunction when it comes to violating these laws as well. But then, is such a state really likely to be one that would refrain from intervening in another state but for the pretext provided by a legal right to unilateral humanitarian intervention?

In his brief discussion of the ways in which a right to unilateral intervention might be abused, Buchanan hints at the possibility of China and Pakistan forming a regional military organization, which in turn justifies its invasion of Indian-governed Kashmir by appeal to such a right. Ignore for now the fact that however unjust India's treatment of Muslim's in Kashmir may be, it does not reach the level of a humanitarian disaster.<sup>18</sup> More importantly, a sufficient appraisal of the new legal rule permitting unilateral humanitarian intervention would require an examination of its implications for a wide range of actual and hypothetical interventions. It may be that even if the implications in Buchanan's hypothetical case would be bad, the implications in many other cases might be good, so that the sum total of interventions produced fewer human rights violations overall than occur under the present international rules governing the use of force.<sup>19</sup> The complaint here is not that Buchanan fails to marshal enough empirical support for his conclusion; much of that evidence would be conjectural, and in any case, the philosopher plays only one part in a debate to which many different disciplines must contribute. Rather, the objection is a methodological one: pointing to one possible event that might occur under a reformed international legal system, even a particularly troubling one, is simply not enough to establish that the reform ought not to be made. Without further evidence and argumentation, the reader ought not to draw the conclusion that advocates of the abuse argument against a right to unilateral humanitarian intervention would have him or her accept.

States are not the only actors who might abuse the legal recognition of a right to unilateral humanitarian intervention, thereby causing greater human rights violations (in number and/or in magnitude) than occur under the present system. Such a right might



also encourage national liberation groups (genuine or not) to attack the states from which they wish to secede, or rebel groups to attack the governments they wish to replace, in an effort to manipulate other states into helping them to achieve their liberation or revolution. Though unable to mobilize the military power and/or popular support necessary to achieve their ends, such groups might instigate the target state or government into responding in ways that caused a humanitarian disaster. Though other states might intervene for purely humanitarian reasons, such interventions would at the least provide the liberation or revolutionary group with greater freedom to recruit and train fighters, and greater security from which to build popular support and coordinate future political and military actions. At most, such a strategy might engage the intervening state in advancing the cause of liberation or revolution.<sup>20</sup> Under a reformed international legal system, the incentives for liberation and revolutionary groups to employ this tactic might be greater than at present, since they would only need to convince a subset of existing states that intervention was warranted, rather than a majority of the Security Council, together with the assent or abstention of the permanent members.

In response to this concern, a defender of the right to unilateral intervention might argue that some liberation and revolutionary groups will be unwilling to deliberately impose the costs involved in such a strategy on the population whose interests they seek to advance. Those groups not so inclined will already be disposed to employ this strategy, because either (a) they are willing to deliberately impose whatever costs are necessary to convince the Security Council to authorize intervention on grounds of international peace and stability, or (b) they believe they can mobilize enough political

pressure on third-party states to move those states to intervene, regardless of the legality of doing so. In short, as with the earlier response to the possibility of state abuse of the right to unilateral humanitarian intervention, the response in the case of national liberation groups is that there are few, if any, non-state groups that would forbear from deliberately inciting a humanitarian disaster under the present international legal system, but who would were the proposed reform to occur.

Even if the preceding arguments are correct, they only show that a right to unilateral humanitarian intervention would not lead to abuse, or that on balance the abuse would not outweigh the benefits resulting from the existence of such a right. These arguments do not speak to cases where states mistakenly believe that by exercising the right to unilateral humanitarian intervention, they will reduce the number of human rights violations. That is, even if legal permission to unilaterally intervene would not lead to (much) abuse, it might lead to many cases of unwise but well-intentioned exercise of the right, with the end result being greater violations of human rights than occur under the present international legal system. The question of whether, on the whole, humanitarian interventions contribute to greater or fewer violations of human rights is beyond the scope of this paper. Still, if even well-intentioned humanitarian interventions lead in the end to greater violations of human rights, then this might well provide a strong argument against incorporating a right to unilateral humanitarian intervention into international law.<sup>21</sup> Note, however, that such an argument would not be premised on the abuse of such a right; that is, it would not be the argument that Buchanan and many others offer as their primary reason for rejecting a legal right to unilateral humanitarian intervention.

### III

In addition to worries that a right to unilateral humanitarian intervention might be abused, several other objections to such a right might be advanced. The first such objection concerns unfairness in the application of international law; specifically, the use of the right to unilateral humanitarian intervention to enforce respect for basic human rights.<sup>22</sup> The recognition of such a right would be unfair to weak states because while they would be susceptible to invasion, powerful states would not be. Even if there were a right to unilaterally intervene in Russia, or at least Chechnya, in light of the Russian government's treatment of the civilian population in that province, surely no state or organization of states would bear the costs involved in doing so. The same is not true, however, in weaker states such as the former Federal Republic of Yugoslavia, or perhaps Sudan.

Suppose that under a reformed international legal system, weak states (like the former Federal Republic of Yugoslavia) would suffer intervention if they created (or permitted) a humanitarian disaster for some or all of their citizens, while powerful states like Russia would be able to act, more or less, with impunity. While Russia's ability to do so would constitute an injustice, it is not obviously a matter of unfairness. Unfairness is a comparative wrong, but the injustice involved in Russia's treatment of civilians in Chechnya is not comparative.<sup>23</sup> That is, the injustice does not lie in Yugoslavia being treated in a way that Russia is not, where the two states being treated in the same way is essential to their being treated justly. Rather, the injustice lies in Russia being free to violate the basic human rights of a segment of its population. That Yugoslavia is not similarly free to do so is not in any sense an injustice to Yugoslavia.<sup>24</sup>

An analogy to the receipt of a speeding ticket may help illustrate this point. A person ticketed for speeding cannot justifiably complain about her treatment simply because tickets are not handed out to every person who violates the speed limit. That the law has not been enforced in all those cases where it might be enforced does not entail that one is treated unjustly when the law is enforced in one's own case.<sup>25</sup>

On the other hand, Buchanan may be correct when he argues that the impartial enforcement of the law is integral to the ideal of the rule of law, and that approximation to this ideal is one of the moral standards against which we ought to evaluate a legal system. While impartiality does not require that the law be enforced in every case where such action would be justifiable, it does require the absence of any bias in the selection of those agents that will have the law enforced against them. At this point, the analogy between the enforcement of respect for basic human rights through the exercise of a right to unilateral humanitarian intervention, and the enforcement of speed limit laws (in a just state), breaks down. Enforcement of the law in the first case appears to depend on factors that ought to be irrelevant from a moral standpoint, such as the relative military and economic power of the state causing (or permitting) a humanitarian disaster. It is as if a state were to enforce speed limit laws selectively, exempting certain parties because they can afford cars that are too fast to catch, or because they are so strong they could beat up any police officer who tried to ticket them. Surely there is a comparative injustice here, and so perhaps weak states are right to complain that the legal recognition of a right to unilateral humanitarian intervention will create, or more realistically, exacerbate unfairness in the international legal system.

Yet it must be asked whether this unfairness warrants rejecting such a right. Consider, first, that the present international legal system already contains a great deal of unfairness of this sort; presumably Russia will not permit the Security Council to authorize intervention in Chechnya. The question, then, is which of two legal systems, neither of them particularly fair in their enforcement of the law, is morally better: one that includes a right to unilateral humanitarian intervention, or one that does not. In answering this question, it seems the focus should be on the number of human rights violations that will occur under these two systems. The fact that no one will exercise this right against a powerful state simply entails that, for purposes of evaluating the two legal systems, human rights violations in powerful states should be ignored, since they will occur under both legal systems.

A second objection to a right to unilateral humanitarian intervention takes the form of a slippery slope argument. Even if a right to unilateral humanitarian intervention would on balance result in fewer rights violations, might the recognition of such a right lead to the establishment of other rights to unilateral action that would produce greater violations of basic human rights? Similarly, even if a right to unilateral humanitarian intervention could be fairly circumscribed, and so subject to very little abuse, might its recognition lead to the establishment of other rights that would be subject to substantial abuse (even if the recognition of those further rights, absent any abuse of them, would morally improve the international legal system)? Logical necessity need not lead down this slope; it is logically possible to draw clear and substantial distinctions between a right to unilateral humanitarian intervention and other possible rights to unilateral action. Indeed, the likelihood that some other right to unilateral action might lead to an increase

in the number of basic human rights violations provides one basis upon which to make such a distinction. Nor is there any reason to assume that some sort of natural necessity, some rule of human psychology or institutional design, inevitably draws people down this slope. Finally, it should be noted that insofar as the international legal system already recognizes a right to the unilateral use of force in self-defense, it is already on the slippery slope of unilateral action. Any slippery slope criticism of a right to unilateral humanitarian intervention will therefore apply equally well to the right to the unilateral use of force in self-defense; but, presumably, the propriety of such a right is not in doubt.

The potential consequences that legal recognition of a right to unilateral humanitarian intervention will have on efforts to resolve diplomatically existing or impending humanitarian disasters comprise a third argument against such a reform to the international legal system. Under the present system, the difficulty states (or regional defense organizations) have in obtaining U.N. Security Council authorization for the use of force provides them with an incentive to use non-coercive means to correct a state's violation of its citizens' basic human rights. Under a reformed international legal system, states might resort more quickly to coercive measures, including intervention. The present legal constraints on the use of force may also encourage potentially intervening states to remain engaged in negotiations with the rights-violating state longer than they would otherwise choose, and to make compromises with that state they might not make were they to have a legal right to intervene unilaterally. Of course, prolonged negotiations and compromises in specific demands regarding a state's treatment of its citizens have a cost in terms of human rights violations, but that cost may be lower than the one entailed by the legal recognition of a right to unilateral humanitarian intervention.

A related concern regarding the effects such a right would have on diplomacy and the use of force involves the likelihood that having threatened to exercise the right to unilateral intervention, states would feel compelled to follow through with their threat because of the consequences non-intervention would have for their reputation, and so for future negotiations. Simon Chesterman claims, for instance, that

a credible argument may be made that NATO commenced air strikes [against the Federal Republic of Yugoslavia] primarily because it had said it would. Amid the talk of preserving NATO's 'credibility', a widely held view, articulated most bluntly by Henry Kissinger, was that whatever folly led NATO into battle 'victory is the only exit strategy'.<sup>26</sup>

Just such a worry is one reason why Realist members of powerful states (such as Kissinger) could be expected to advocate for a narrow understanding of humanitarian disaster, as noted in section I. Still, the concern that a right to unilateral humanitarian intervention might result in "reputational interventions," and so contribute to an increase in the violation of basic human rights, cannot be denied. However, it must be balanced against the apparent fact that states creating or permitting a humanitarian disaster among their own citizens almost always fail to respond to demands for changes in their behavior that are not backed by force, or the credible threat thereof. It may be, then, that an occasional "reputational intervention" is a necessary side effect of an overall policy - namely one that includes the possibility of unilateral humanitarian intervention - that reduces the incidence and magnitude of humanitarian disasters.

Against these reasonable worries that a right to unilateral humanitarian intervention might lessen attempts to resolve humanitarian disasters peacefully must be

weighed certain reasons to think that such a right might make diplomatic efforts more fruitful. For example, the possibility that states might intervene unilaterally should the U.N. not act might lead to a greater willingness to compromise on the part of member states, including the permanent members of the Security Council. Likewise those states directly responsible for a humanitarian disaster may be more inclined to negotiate, and live up to, a settlement regarding their treatment of their citizens when negotiation takes place against the backdrop of a legal right to unilateral humanitarian intervention. I conclude, therefore, that the consequences for diplomatic efforts to address humanitarian disasters do not clearly favor nor count against such a right.

But perhaps these suggestions about the impact a right to unilateral humanitarian intervention might have on negotiations in the Security Council are moot. Perhaps Michael Byers and Chesterman are correct when they write, “states are not champing at the bit to intervene in support of human rights around the globe, prevented only by an intransigent Security Council and the absence of clear criteria to intervene without its authority.”<sup>27</sup> If true, and it almost surely is, this fact implies that the legal recognition of a right to unilateral humanitarian intervention would be unlikely to lead to an increase in genuinely humanitarian interventions, the goal which is after all the reason to advocate for such a right in the first place. As Byers and Chesterman note, what is missing amongst states is the will to act at all. But in this regard a right to unilateral humanitarian intervention might make a difference. The present international legal system provides those in government with a useful excuse for not pursuing humanitarian intervention. Leaders can tell those who advocate for intervention in a particular case that while they sympathize with their cause, too many in the international community do not, and only a



consensus in the international community, or at least as much of a consensus as is reflected in Security Council authorization, can make intervention legitimate. The legal recognition of a right to unilateral humanitarian intervention would remove this excuse. It would also enable groups advocating for humanitarian intervention in a particular case to focus their limited resources on a smaller number of states, at least once their initial effort to convince the Security Council had come to naught. Persuading states to mount a humanitarian intervention is likely to remain hard work. But the possibility of circumventing the barrier created by one permanent member's recalcitrance to such action in a particular case, as with Russia's opposition to intervention in Kosovo, might make that work a bit easier.<sup>28</sup>

One last objection to the incorporation into international law of a right to unilateral humanitarian intervention involves the challenge such a right poses to the rule of law. It is important to distinguish here between the challenge for the rule of law presented by *any* illegal act aimed at reform of international law, and that posed specifically by the legal recognition of a right to unilateral humanitarian intervention (and perhaps other rights to unilateral action). The former concern points to an apparent inconsistency between fidelity to law on the one hand, and legally unjustifiable violation of the law on the other, even if for the purpose of reform. Buchanan presents a convincing response to this worry, which need not be repeated here.<sup>29</sup> Instead, the focus will be on the latter concern; that there is something particularly problematic about legal recognition of a right to unilateral humanitarian intervention from the standpoint of the rule of law.

Chesterman eloquently presents this concern in the conclusion to his book *Just War or Just Peace?* where he writes that

the danger of an international rule of law being subverted to legitimating the interests of the Great Powers is still preferable to the unregulated exercise of that power. Even though Security Council resolutions authorizing interventions might have been drafted in the war rooms of states preparing military action, adopted in votes of questionable impartiality, and implemented by states of dubious disinterestedness, such limitations do less damage to the international legal order than the abandonment of the multilateral institutions set in place after the Second World War that characterized NATO's 1999 intervention in the FRY [Federal Republic of Yugoslavia].<sup>30</sup>

In other words, the legal recognition of a right to unilateral humanitarian intervention will lead to the replacement of a proto-global order, founded on collective legal governance, with a balance of (regional) powers order, founded on a state of nature right to be judge in one's own case. The latter is inimical to the rule of law, however. Buchanan, citing Locke, points out that partiality and inconsistency in the application of rules inevitably results when multiple agents independently formulate, interpret, and apply them.<sup>31</sup> It is the avoidance of such a situation that justifies the creation of a legal system, and yet it seems that to recognize a right to unilateral humanitarian intervention would lead right back to it.

Note, first, that this objection would not hold against any attempt at illegal reform of international law, but only those that aim to reform law by granting states rights to

unilateral action. Second, this argument is usually not taken to exclude altogether an agent's application of legal rules to his own case; most (all?) domestic legal systems recognize a unilateral right to use force in self-defense, and the international legal system recognizes an analogous right on the part of states.<sup>32</sup> The question, then, is not whether agents ought to be permitted to be judges in their own cases, but rather in what circumstances should they be permitted to do so. This brings us to the third point, namely that answering this question requires a consideration of the consequences that will likely follow from legal recognition of a right to be judge in one's own case in various types of circumstances. But this in turn leads back to the kind of arguments discussed earlier in this paper. Chesterman's rule of law concern probably rests on a view about the number of rights violations likely to occur under a reformed legal system (one that grants legal recognition to unilateral humanitarian intervention), in comparison to the number that will occur under the present system. Perhaps he has additional slippery slope worries, of the type discussed earlier. Though this essay has nothing more to say in response to these concerns, it is important to note that the rule of law objection, as Chesterman appears to be making it, does not constitute an additional objection to a legal right to unilateral humanitarian intervention.

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In his most recent discussion of the morality of NATO's intervention in Kosovo, understood as an instance of illegal reform of international law, Buchanan focuses on additional steps a state aiming to reform customary international law ought to take, beyond the illegal act itself. He writes that "by failing to do all it could have to *specify* the principle it was acting on, NATO ran the risk that its action would come to be viewed

as a precedent for a change in customary law that would not in fact be an improvement over the current requirements of Security Council authorization.”<sup>33</sup> As a criticism of NATO this is not quite fair, since after some initial talk of reforming international law, its members decided not to treat intervention in Kosovo as an initial step in the creation of a new customary law, and instead emphasized that their actions should not be taken to be a contribution to the creation of new rules governing the use of force. But Buchanan’s general point is still a good one; given the degree to which a proposed new customary rule of international law can be altered by the process for vetting that rule as a legally valid one, states that claim to be engaged in morally justified IRIL ought to couple their initial illegal act with further efforts to ensure that the new rule really does morally improve international law. This point is consistent with the arguments of this paper, however, and it is mentioned only to preempt the reader’s confusing Buchanan’s criticism of NATO’s actions on this basis with his distinct criticism of the characterization of a right to unilateral intervention, with which this paper has taken issue.

In the same work, Buchanan also considers the possibility of characterizing the unilateral right to intervention NATO might have proposed as one that can be exercised only by liberal democratic states.

All members of NATO are liberal-democratic countries, with free presses and a political culture that questions government actions. In that respect NATO is much more accountable and therefore less likely to abuse the right to intervene than an alliance of repressive, unaccountable states.<sup>34</sup>

Unfortunately it is not obvious that Buchanan's assertion is correct. Whatever may be said in favor of the democratic peace hypothesis, historically democracies have been quite willing to intervene in non-democratic states even when doing so was not morally (and sometimes not legally) justifiable. Such states might be just as willing as non-liberal-democratic states to abuse a unilateral right to humanitarian intervention; indeed, some might conjecture that had such a right existed in 2003, the U.S. would have appealed to it as part of its overall legal justification for invading Iraq. It is important to recognize, too, that in the past non-liberal-democratic states have sometimes intervened in other states to bring an end to genuine humanitarian disasters. It is not clear, therefore, that a unilateral right to humanitarian intervention limited to liberal-democratic states would result in fewer overall violations of basic human rights than would a similar right restricted to multi-state organizations composed of both powerful and weak states.

The conclusions of this paper are modest, yet potentially of great significance. They are modest because no positive argument has been presented to support the claim that the reform of international law to include a unilateral right to humanitarian intervention, exercisable by multi-state organizations with a particular kind of constituency and decision-structure, would in fact better secure basic human rights than does the current international legal system. If successful, however, the arguments herein do entail that such a possibility has been too quickly dismissed in past discussions. The significance of this paper, then, lies in the possibility that it will encourage political leaders and theorists to consider more carefully the likelihood that the inclusion of a unilateral right to humanitarian intervention will morally improve the international legal system, perhaps even with the end result that disasters like those presently occurring in

Darfur are dealt with sooner, and with fewer of those harms constitutive of basic human rights violations.

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<sup>1</sup> See, for example, Henry Shue, "Limiting Sovereignty" in Jennifer M. Welsh, ed., *Humanitarian Intervention and International Relations* (New York: Oxford University Press, 2004); Andrew Altman and Christopher Heath Wellman, "A Defense of International Criminal Law," *Ethics* 115 (2004): 35-67.

<sup>2</sup> What counts as a humanitarian disaster is discussed, though by no means settled, below. For now, note that as it is used in this paper, humanitarian disasters are limited to a state's treatment of its own citizens. That is, this paper is not concerned with the often terrible plight of victims of a natural disaster (which, in a different context, could justifiably be labeled a humanitarian disaster).

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<sup>3</sup> Though Prime Minister Tony Blair of the United Kingdom made some suggestive remarks in this vein, he later made clear that NATO's intervention in Kosovo was not intended to create a new customary law governing the use of force. See Simon Chesterman, *Just War or Just Peace?* (Oxford: Oxford University Press, 2001): 216ff.

<sup>4</sup> In the terminology of the just war tradition, this paper addresses the subject of *jus ad bellum*, but the conduct of a just war may still be immoral (and in many cases illegal) if it violates various strictures of *jus in bello*.

<sup>5</sup> Allen Buchanan, "From Nuremberg to Kosovo: the Morality of Illegal Legal Reform" in Aleksander Jokic, ed., *Humanitarian Intervention: Moral and Philosophical Issues* (Orchard Park, NY: Broadview Press, 2003), 153; originally published in *Ethics* 111 (2001), 673-704. Buchanan also discusses NATO's actions in Kosovo and the moral case for a legal right to unilateral humanitarian intervention in "Reforming the Law of Humanitarian Intervention" in Jeffrey Holzgrefe and Robert O. Keohane, eds., *Humanitarian Intervention: Ethical, Legal, and Political Dilemmas* (New York: Cambridge University Press, 2003); and *Justice, Legitimacy, and Self-Determination: Moral Foundations for International Law* (Oxford: Oxford University Press, 2004), chapter 11.

<sup>6</sup> To be fair, Buchanan's characterization of this right has continued to evolve within the various permutations of his argument. The most recent considers characterizing the right as one exercisable only by liberal democratic states, a considerably narrower construal than in earlier versions. This most recent construal is discussed at the end of this paper.

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<sup>7</sup> This analysis of the creation of customary law entails what is often referred to as the chronological paradox: a state must act from the belief that its conduct is required by a legal rule in order to bring about (as legal) the very rule it must already believe legally requires the conduct in question. Distinguishing the process whereby a customary rule comes to exist from the process whereby that customary rule becomes law dissolves this paradox. See Lefkowitz, “(Dis)solving the Chronological Paradox in Customary International Law,” draft on file with author. For a discussion of different approaches to the chronological paradox, see Michael Byers, *Custom, Power, and the Power of Rules: International Relations and Customary International Law* (Cambridge: Cambridge University Press, 1999): 130-33.

<sup>8</sup> Buchanan, “From Nuremberg to Kosovo,” 153-4.

<sup>9</sup> Buchanan, “From Nuremberg to Kosovo,” 154.

<sup>10</sup> Ibid.

<sup>11</sup> A state that intervenes in another state in order to set up a puppet government, which in turn grants enormous economic benefits to the public and private companies of the intervening state, provides one example of an intervention undertaken for economic aggrandizement.

<sup>12</sup> The need to follow through on one’s threat to use force, and so preserve one’s reputation for future negotiations, is a further consideration of self-interest that might motivate intervention. This point is discussed further in section III.

<sup>13</sup> S/PV.3988 (1999) 12; quoted in Chesterman, “*Just War or Just Peace?*,” 212. As noted at the outset, unlike the British delegate this essay is not arguing that NATO’s intervention was legally justified. Nevertheless, this statement does indicate the



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scope of a legal right to humanitarian intervention the U.K. likely would have advocated, had it attempted to argue for the recognition of such a right as a new element of customary international law.

<sup>14</sup> Buchanan, "From Nuremberg to Kosovo," 148.

<sup>15</sup> At present, those basic rights the systematic violation of which constitute a humanitarian disaster are not thought to include the right to democratic governance, the right to freedom of expression (beyond a minimal right to freedom of conscience), and most of the so-called social and economic rights enumerated in the 1948 Declaration of Human Rights.

<sup>16</sup> H. L. A. Hart, *The Concept of Law*, 2<sup>nd</sup> Edition (Oxford: Clarendon Press, 1994).

<sup>17</sup> The Realists concern is not with the law per se, but the means for persuasion that such a law makes available, leading to policies the Realist rejects.

<sup>18</sup> As noted above, though some states may wish to construe the phrase 'humanitarian disaster' quite broadly, the concept is not without content, and will bear only so much enlargement of its scope.

<sup>19</sup> Note that the argument here is not consequentialist; it does not condone the deliberate violation of some people's basic human rights in order to minimize the overall number of rights violations, but rather evaluates instrumentally two possible, imperfect, and incompatible legal systems in terms of the number of rights violations likely to occur under them.

<sup>20</sup> There is some reason to think that the Kosovo Liberation Army employed this strategy. See Stacy Sullivan, *Be Not Afraid for You Have Sons in America* (New York: St. Martin's Press, 2004).

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<sup>21</sup> Of course, such an argument might also provide a strong argument against U.N. Security Council authorized humanitarian intervention.

<sup>22</sup> This essay will assume for the sake of this discussion that the state in which intervention will take place is a signatory to various human rights treaties, or that it has acquired a legal duty to protect its citizens' basic human rights by some other mechanism.

<sup>23</sup> For discussion of comparative and noncomparative justice, see Joshua Hoffman, "A New Theory of Comparative and Noncomparative Justice," *Philosophical Studies* 70 (1993): 165-183.

<sup>24</sup> The term 'free' is used here to mean something like 'unconstrained', not in the normative sense of being at liberty to act.

<sup>25</sup> For discussion of this example in the context of racial disparities in the application of the death penalty, see Louis P. Pojman and Jeffrey Reiman, *The Death Penalty: For and Against* (Lanham, MD: Rowman and Littlefield, 1998): 56, 119.

<sup>26</sup> Chesterman, *Just War or Just Peace?* , 224.

<sup>27</sup> Byers and Chesterman, "Changing the Rules About Rules? Unilateral Humanitarian Intervention and the Future of International Law," in Jeffrey Holzgrefe and Robert O. Keohane, eds., *Humanitarian Intervention: Ethical, Legal, and Political Dilemmas* (New York: Cambridge University Press, 2003): 202.

<sup>28</sup> Byers and Chesterman assert that bringing states to see the prevention of systematic and widespread human rights violations as in their "national interest" is central to creating a will to act on the part of states. See "Changing the Rules About Rules?" 202. Here, too, legal recognition of a right to unilateral humanitarian intervention

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might play a role, by removing the illegality of the action as an argument to be used against it by those unconvinced that the prevention of a particular humanitarian disaster is in a state's national interest. Even if it is assumed that states are sometimes willing to act illegally in pursuit of their perceived national interest, there is still reason to believe that the legal status of their action does factor into their deliberation; it may, for example, affect how long members of the state take to reach a decision about what to do. Moreover, an unwillingness to violate the law, even when doing so would promote a state's national interest, is presumably a trait Byers and Chesterman wish to encourage. The stronger such a disposition becomes, however, the more important it will be that states are legally permitted to conduct humanitarian interventions, or else we may indeed confront a situation where states are prevented from intervening only because of the intransigence of the Security Council and the absence of clear criteria for intervening without its authority.

<sup>29</sup> Buchanan, "From Nuremberg to Kosovo," 134-44.

<sup>30</sup> Chesterman, *Just War or Just Peace?*, 234.

<sup>31</sup> Buchanan, *Justice, Legitimacy, and Self-Determination*, 293.

<sup>32</sup> It might be argued that in a domestic setting an impartial court will eventually pass judgment on an individual's allegation that he used force in self-defense. But either the same is (or can be made to be) true of a state's right to use force in self-defense, a practice that could be extended to the right to unilateral humanitarian intervention. Or such a practice does not exist (and cannot be made to exist) for a state's right to self-defense, in which case that right already poses a challenge to the international

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rule of law equal to the one a right to unilateral humanitarian intervention would pose.

<sup>33</sup> Buchanan, "Reforming the Law of Humanitarian Intervention," 167.

<sup>34</sup> Buchanan, "Reforming the Law of Humanitarian Intervention," 167.