

Humanitarian Intervention and Pretexts for War

A Critique of Ryan Goodman, 100 Am. J. Int'l L. 107 (2006)

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A. Introduction

Professor Ryan Goodman, a renowned U.S. scholar in the area of international law,¹ suggests that one of the common arguments against legalizing unilateral humanitarian intervention ('UHI'),² namely the danger that such a right be abused (or the 'pretext objection', as Goodman puts it), is unfounded.³ Goodman claims that legalizing UHI (i) should discourage aggressive wars by states using the pretext of humanitarianism, and (ii) would prevent some aggressive wars under the current legal regime from being fought. In this article, I discuss and question this analysis, also on the basis of the social science research underlying Goodman's theory. Goodman does not suggest that his analysis 'provide[s] an affirmative justification to legalize UHI.'⁴ However, the use of his concept would entail such legalization, and possible consequences should be discussed.

The article consists of three major parts. The first part summarizes Goodman's theory, in particular his contentions that encouraging states to justify force as UHI can facilitate conditions for peace. The second part conveys the critique of this theory. This critique will start off by formulating some concerns about the methods and reliability of the social science studies on which Goodman relies. The next step will question whether the studies allow the conclusions Goodman drew to be drawn. The third part will direct attention to some implications that the legalization of UHI, on the basis of Goodman's theory, would have for incentives in primary state behavior. These include (i) additional incentives to bypass the Security Council, (ii) so-called 'perverse incentives' owed to moral hazard, (iii)

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¹ Ryan Goodman is a professor for human rights and humanitarian law at Harvard Law School. See <http://www.law.harvard.edu/faculty/rgoodman/> (last visited Nov. 27, 2009).

² The so-called collective humanitarian intervention on the other hand, *i.e.* intervention for the protection of fundamental human rights on the basis of a U.N. Security Council authorization according to Article 42 of the U.N. Charter is widely recognized, see Fernando R. Tesón, *Collective Humanitarian Intervention*, 17 MICH. J. INT'L L. 323, 337 (1996). The classic discussion about UHI used to make a distinction between interventions to rescue own nationals and interventions to protect another state's citizens. *De lege ferenda*, this distinction is not any more so convincing. Since individual citizens (as distinguished from the people as a whole) do not form a constituent part of statehood, the often claimed invocation of Article 51 of the U.N. Charter's right to self-defense (see in this regard Ulrich Beyerlin, 'Humanitarian Intervention', in: 3 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 926, 928 [RUDOLF BERNHARDT ED., 1982]) is weak a basis for military intervention on the territory of another state. Consequently, there is no good reason to distinguish between own and foreign citizens when it comes to interventions to protect human rights, for both groups are made up of human beings, who unquestionably dispose of inherent human rights. However, for technical reasons the distinction still has to be made, since it seems that a right to rescue own nationals could be easier recognized in customary international law. The article at hand deals with the pretext argument against a right to UHI to protect another state's citizens.

³ See Ryan Goodman, *Humanitarian Intervention and Pretexts for War*, 100 AM. J. INT'L L. 107-141 (2006).

⁴ *Idem*, at 110.

the credibility dilemma created by threat diplomacy, and (iv) incentives that can lead to a 'misery of the protected' in case a UHI actually takes place. This part provides an alternative view of Goodman's discussion of NATO's Kosovo war as an example for his theory. A last section in this part recognizes the trade-off between 'good' and 'bad' incentives every legal order has to find in order to determine the optimal rule, and discusses whether a legalization of UHI would be likely to offer a better trade-off.

Overall, the article shows that Goodman's theory is based on unconvincing conclusions from the underlying social science studies, and on a view that is too one-sided and positive about incentives that could be created by a legalization of UHI. The conclusion is that Goodman is not right to suggest retiring the pretext objection against legalizing UHI.

B. Ryan Goodman's Thesis About the Invalidity of the Pretext Argument Against a Right to Unilateral Humanitarian Intervention

I. The Discussion About Legalizing UHI

This article assumes that, *de lege lata*, a right to UHI does not exist. Yet, the question whether UHI is legal or should be legalized has been discussed for decades. There are multiple approaches as to how humanitarian intervention could be viewed as legal or be legalized. Some argue that the prohibition on the use of force enshrined in Article 2 (4) of the U.N. Charter should be narrowly interpreted, by way of employing the modalities 'against the territorial integrity or political independence of any state' to argue that UHI does not aim at violating the territorial integrity or political independence of any state.⁵ There is another way in which UHI is constructed so as not to violate the U.N. Charter. This view suggests allowing UHI in analogy to the right of self-defense under Article 51 of the U.N. Charter.⁶ Another idea, to justify very limited types of UHI on the basis of the institute of conflicting duties, does not in any event allow warfare in the name of human rights.⁷ Other scholars claim that a right of customary international law to UHI has

⁵ A proponent of this view is Anthony D'Amato, *The Invasion of Panama Was a Lawful Response to Tyranny*, 84 AM. J. INT'L. L. 516, 520 (1990). For a discussion and refutation of this argument see CLEMENS E. ZIEGLER, *KOSOVO-KRIEG DER NATO 1999 UND IRAK-KRIEG 2003. VÖLKERRECHTLICHE UNTERSUCHUNG ZUM UNIVERSELLEN GEWALTVERBOT UND SEINEN AUSNAHMEN [NATO'S KOSOVO WAR 1999 AND IRAQ WAR 2003. ANALYSIS IN PUBLIC INTERNATIONAL LAW REGARDING THE PROHIBITION ON THE USE OF FORCE AND ITS EXCEPTIONS]* 197-201.

⁶ Proponents of this view are e.g. Ruth Wedgwood, *NATO's Campaign in Yugoslavia*, 93 AM. J. INT'L. L. 828, 833 (1999), Paolo Picone, *La «Guerra del Kosovo» e il Diritto Internazionale Generale*, 83 RIVISTA DI DIRITTO INTERNAZIONALE (RDI) 309, 328-29 (2000); and Franz Köck, *Legalität und Legitimität der Anwendung militärischer Gewalt–Betrachtungen zum Gewaltmonopol der Vereinten Nationen und seinen Grenzen*, 54 AUSTRIAN J. PUBL. & INT'L L. 133, 153 (1999). The latter claims the existence of a corresponding right to help a forcefully oppressed people or ethnic group. This argument is discussed and refuted by ZIEGLER, above note 5, at 298-303.

⁷ This view, if at all, allows the use of very limited military force to save concrete human beings. The idea is that states' obligation to honor the prohibition to use force may conflict with their duty to protect human rights, so that they may, under very limited circumstances, forcefully intervene to save concrete human lives. See Dieter Blumenwitz, *Souveränität–Gewaltverbot–Menschenrechte. Eine völkerrechtliche Bestandsaufnahme nach Abschluß des nicht mandatierten NATO-Einsatzes in Ex-Jugoslawien*, in: POLITISCHE STUDIEN, SONDERHEFT 4/1999. DIE KOSOVO-KRISE–EINE VORLÄUFIGE BILANZ 19, 30 (1999); see also ZIEGLER, above note 5, at 311-15. The usual discussion in this regard, which is conducted around a dichotomy of state sovereignty and human rights, disregards that the prohibition on the use of force also serves the protection of the human right to peace. Accordingly, the tension should be between human rights and peace. See Robert Uerpman, *La Primauté des*

emerged,⁸ whereas the prevailing opinion is that such emergence is yet to have taken place.⁹ A further approach is a legalization of UHI by way of a U.N. Charter amendment¹⁰ or a General Assembly declaration.¹¹ A last approach does not technically lead to legalization, but sees UHI under certain conditions as morally excusable.¹² The article at hand does not intend to enter into this broader discussion whether UHI is legal or should be legalized. Rather, it focuses on the discussion of one argument against the legalization of UHI: The fear that a right to UHI, once established, might be prone to abuse.

II. The Concerns Regarding the Abuse of a Right to UHI and Goodman's Theory

Concerns that UHI, once legalized, would provide ample means for states to abuse such a right,¹³ are but one argument against legalizing UHI.¹⁴ However, they are important, and

Droits de l'Homme: Licéité ou Illicéité de l'Intervention Humanitaire, in: KOSOVO AND THE INTERNATIONAL COMMUNITY. A LEGAL ASSESSMENT 65, 71 (CHRISTIAN TOMUSCHAT ED., 2002). See also Nico Krisch, *Review Essay. Legality, Morality and the Dilemma of Humanitarian Intervention after Kosovo*, 13 EUR. J. INT'L L. 323, 330-31 (2002). That sovereignty is not the primary concern was shown by the broad acceptance of Security Council authorized humanitarian interventions in the 1990's. See *idem, ibidem*. Also the U.N. General Assembly's proclamation of a right of peoples to national and international peace and security (see General Assembly Resolution 39/11, November 12, 1984) casts doubt on whether human rights trump peace. See Krisch, at 331-32.

⁸ See e.g. Fernando R. Tesón, HUMANITARIAN INTERVENTION: AN INQUIRY INTO LAW AND MORALITY, 418-19 (3d ed. 2005). However, Tesón does not base his analysis on the traditional approach to custom, which requires consistency, uniformity and longevity of a certain state practice. See *idem*, at 222. In addition, the analysis is biased, in that Tesón himself admits to conducting his study with the aim of proving the existence of a customary right to UHI: 'Central to my approach is the belief that to say that a rule is custom is to endorse the rule— independently of how much support the rule finds in state practice.' *Idem, ibidem*.

⁹ See e.g. Jane Stromseth, *Rethinking Humanitarian Intervention: The Case for Incremental Change*, in: HUMANITARIAN INTERVENTION. ETHICAL, LEGAL, AND POLITICAL DILEMMAS 232, 252 (J. L. HOLZGREFE & ROBERT O. KEOHANE EDS., 2003); Michael Byers & Simon Chesterman, *Changing the Rules About Rules? Unilateral Humanitarian Intervention and the Future of International Law*, in: HOLZGREFE & KEOHANE (above), at 177, 190-94; INTERNATIONAL COMMISSION ON INTERVENTION AND STATE SOVEREIGNTY, THE RESPONSIBILITY TO PROTECT: REPORT OF THE INTERNATIONAL COMMISSION ON INTERVENTION AND STATE SOVEREIGNTY, paras. 2.24, 6.36-37 (2001), available at <http://www.iciss.ca/pdf/Commission-Report.pdf> ('R2P REPORT') (last visited Nov. 27, 2009); ZIEGLER, above note 5, at 304-10, and 315-26 (in the latter section making the case that NATO's bombing campaign in the Kosovo conflict is unsuitable as a precedent for the emergence of a customary right to UHI).

¹⁰ The high threshold for Charter amendments established in Article 108 of the U.N. Charter makes this option very unrealistic.

¹¹ This approach is discussed, but not endorsed, by Stromseth, above note 9, at 245 and 255-61.

¹² See e.g. Yves Nouvel, *La position du Conseil de Sécurité Face à l'Action Militaire Engagée par l'OTAN et ses États Membres Contre la République Fédérale de Yougoslavie*, 45 ANNUAIRE FRANÇAIS DE DROIT INTERNATIONAL (AFDI) 292, 307 (1999). Stromseth, above note 9, at 243-44 and 251, calls this approach 'unsatisfactory' and points out that the NATO states did not justify their Kosovo intervention on this basis; *for a refutation of this approach with regard to NATO's Kosovo intervention see ZIEGLER*, above note 5, at 343-350.

¹³ Examples throughout the history are legion. Consider only the justifications engaged in for colonial wars (see Nico Krisch, *Review Essay. Legality, Morality and the Dilemma of Humanitarian Intervention after Kosovo*, 13 EUR. J. INT'L L. 323, 324 [2002]), the second and third separation of Poland in 1793 and 1795, where the so-called 'protecting powers' Russia, Prussia and Austria claimed to put an end to bloodshed, anarchy and civil war (see Dieter Blumenwitz, *Die humanitäre Intervention*, B47 AUS POLITIK UND ZEITGESCHICHTE 3, 4 [1994]) or Hitler's justification for attacking the Czech part of Czechoslovakia in 1939. See Goodman, above note 3, at 113.

¹⁴ Other arguments are e.g. the protection of world peace and the dangers of escalation and proliferation implied in every military conflict. Even moral objections can be used as an argument against humanitarian interventions in the form of wars, since every war, as NATO's Kosovo air campaign showed, will automatically cause civil casualties, even if the warfare is conducted by the most sophisticated armies in the world. There can be no legal justification or moral excuse for the killing of innocent civilians in order to allegedly save other innocent civilians. Under moral terms, this cannot depend on how many lives could be saved, for this would imply setting off human

the position of those arguing against legalizing UHI would be substantially weakened, should the pretext objection be unfounded, as Goodman asserts.

1. Goodman's View of the Model of Pretext Wars

Goodman begins his analysis by describing what he calls as the 'model of pretext wars'. The model presumes a static condition and dynamic interactions.¹⁵ Under the static condition, the 'leadership of a revisionist state (state R) is motivated by self-regarding and aggressive purposes to wage war against a defending state (state D),' whereas dynamic interaction means that '[e]xpanding the international legal exception increases the likelihood that state R will wage war against state D.'¹⁶ Under element A, the model presumes that 'R undertakes efforts to justify escalating hostilities in terms of purposes that conform to the new legal exception.'¹⁷ Further, the 'effort to justify escalating hostilities is undertaken in order to convince actors or institutions to relax pressure that they would otherwise apply if state R were to attack state D' ('[e]lement B'),¹⁸ and the 'actual or expected reduction of pressure reduces the costs of state R to wage war against state D' ('[e]lement C').¹⁹

2. Goodman's Criticisms of the Pretext Model

Goodman formulates three basic criticisms of the pretext model. 'First, exponents of the pretext model fail to articulate a baseline of interstate hostilities for measuring the effect of legalizing UHI.'²⁰ Stating that the level of militarized conflicts is already high, Goodman asks whether legalizing UHI might substantially discourage some of those conflicts from erupting into war.²¹ Secondly, according to Goodman, the 'pretext model does not adequately consider relationships between international and domestic political process. (...)

lives against other human lives, in a situation where it is not sure that even one single life could certainly be saved. That legalizing UHI could have stopped the genocide in Rwanda is only wishful thinking, given that there would have been no-one who would have intervened. This leaves us with the insight that the well-being of all individuals might, in general, be better served by rejecting a right to UHI, because states, in using such a right, would most probably act on the basis of their own moral principles and jeopardize a peaceful, just international order. See Krisch, above note 13, at 330-31; cf. HEDLEY BULL (ED.), *INTERVENTION IN WORLD POLITICS*, 193 (1984). For further considerations in this regard see below, under D.IV., at 190-193.

¹⁵ See Goodman, above note 3, at 114.

¹⁶ *Idem, ibidem.*

¹⁷ *Idem, ibidem.*

¹⁸ *Idem, ibidem.* See also Goodman's references for authorities and studies supporting the conditions and elements of the pretext war model, at 114-15.

¹⁹ *Idem, ibidem.* Contrary to Michael Glennon's view in *The Fog of Law: Self-Defense, Inherence, and Incoherence in Article 51 of the United Nations Charter*, 25 HARV. J. L. & PUB. POL'Y 539, 540-41 (2002), pretextual justifications of the use of force by states cannot lead to a *desuetudo* of the U.N. Charter prohibition on the use of force. This is the position of the International Court of Justice ('ICJ'): 'If a State acts in a way prima facie incompatible with a recognized rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself, then whether or not the State's conduct is in fact justifiable on that basis, the significance of that attitude is to confirm rather than to weaken the rule.' *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, I.C.J. Rep. 1986, 14, 98, para. 186 (June 27, 1986). In the case of pretext wars—whether for humanitarian reasons or for self-defense, there will be no basis to claim a change of customary international law on the basis of the rhetorical justification engaged, for the *consuetudo* to be observed will be inconsistent with the *opinio juris* proclaimed. See ZIEGLER, above note 5, at 309.

²⁰ Goodman, above note 3, at 115.

²¹ *Idem, ibidem.*

[T]he desire of leaders to show that their actions conform to international legal norms has ramifications on the domestic political sphere that are not envisaged by the model.²² Finally, Goodman contends that ‘the pretext model disregards the sociological effects of the process of justifying the resort to force, (...) [assuming] that leaders’ interests and beliefs remain static, (...) [*i.e.* state R’s leaders] begin and end with the design to wage war against state D.’²³ Goodman states that efforts to justify not only aim at creating domestic political support, but also change collective beliefs and preferences concerning the conflict. According to Goodman, those changed conditions can lead to important constraints on leaders’ actions, and determine whether a dispute will escalate into war.²⁴

3. Goodman’s Contention that Encouraging States to Justify Force as Humanitarian Intervention Can Facilitate Conditions for Peace

a) Considering Steps to War in a Process Model

Wars are considered to be the final point of an extended, dynamic process, having grown ‘out of a long-term political relationship that has become increasingly intractable, conflictive and hostile.’²⁵ Goodman wants ‘to understand the conditions under which states progress from an initial stage of a diplomatic dispute to a militarized interstate dispute’ (‘MID’)²⁶ and then to the onset of war.²⁷ ‘Steps to war’ can include ‘elevating individuals who adhere to a “power politics” paradigm (realpolitik) to positions of greater governmental authority; engaging in arms buildups; and forging military alliances.’²⁸ ‘[C]hanges in domestic political configurations and interstate relations can unintentionally accelerate the speed with which the process unfolds.’²⁹ Wars usually are multicausal, ‘there are quite a few roads to interstate war, and all of them have fairly frequent exit ramps.’³⁰ According to Goodman, the task would be to encourage warranted humanitarian actions to remain on the road to war (solving the Rwanda problem), and to discourage other military actions.³¹

b) Foundation to Use Force and the Likelihood of War

Goodman cites some social science studies which suggest that the likelihood that an MID will escalate to a war depends on the type of issue in dispute, a dimension on which the first

²² *Idem, ibidem.*

²³ *Idem, at 116.*

²⁴ *See idem, at 116.*

²⁵ *Idem, ibidem, citing JOHN A. VASQUEZ, THE WAR PUZZLE 42 (1993).*

²⁶ A MID is ‘a conflict short of a war that includes a threat, overt display, or use of force.’ Goodman, above note 3, at 117, in note 53.

²⁷ *Idem, at 117.*

²⁸ *Idem, ibidem, citing VASQUEZ, above note 25, at 153-97.*

²⁹ Goodman, above note 3, at 117.

³⁰ *Idem, at 118, citing J. David Singer, The Etiology of Interstate War: A Natural History Approach, in WHAT DO WE KNOW ABOUT WAR? 3, 19-20 (JOHN A. VASQUEZ ED., 2000).* ‘On the other hand, some of these exits are not clearly marked, and even when they are, the protagonists fail to see them because (1) they are not interested in looking for them, (2) they are moving too fast, (3) they are anxious as to what lies beyond them, or (4) they fear an ambush from their own countrymen as soon as they slow down. As social scientists pursuing an improved understanding of the etiology of war, you might say that our central mission is to discover the location of these exits, improve their visibility, find out how to make them safer, and then go on to map the roads to which they lead.’ Singer, at 20.

³¹ *See Goodman, at 118.*

generation of empirical social science studies on the origins of war did not rely.³² The issue also determines which constituencies participate in the domestic debate around the MID, which influences state incentives on the primary behavior level.³³ With regard to UHI, Goodman especially relies on the Correlates of War project database, which contains studies about ‘dyads’ (pairs of states) and classifies three types of issues: (1) territory; (2) conflicts with the other state’s foreign policy behavior; and (3) claims about changing the other state’s government.³⁴ The studies find a much higher probability that an MID ends in war in territorial MID’s, namely about five times higher than for the two other types of rivalry.³⁵ Goodman states that disputes about humanitarian concerns are more closely related to the third type of MID’s, namely those about regime change,³⁶ and uses this observation to state that, if states relied more often on humanitarian concerns in their disputes, it would be less likely that their MID’s end in a war.³⁷

Goodman also points to the possibility that the ‘justifications that leaders use to build support for their policies at one stage of hostilities constrain their actions at later stages, (...) [due to] “blow-back effects” inhere[nt] in political and sociological processes.’³⁸ Historic experience suggests that such blowback effects do not depend on the type of regime, for they occurred in illiberal and democratic states alike.³⁹ In this regard, legalizing UHI could create favorable domestic incentives, namely, if a state invokes UHI as a basis for intervening, domestic humanitarian groups may be empowered to insist on certain limits that may help to prevent the conflict from escalating.⁴⁰ However, Goodman adds a considerable limitation to this part of the theory, namely that these domestic blowback effects are likely to occur only if the humanitarian justifications rely on a sturdy factual basis, *i.e.* where the pretext objection would not apply.⁴¹

C. Critique

To begin with, Goodman’s theory is quite hazardous. Apart from criticisms regarding the underlying studies by social science scholars, the question is whether the studies allow one to draw Goodman’s conclusions.

I. Criticisms Concerning the Underlying Studies

Nobody questions that most wars are multicausal.⁴² It is therefore questionable whether the

³² ‘Political scientists instead concentrated on features of the international system (for example, the distribution of power among states) and on the characteristics of states (for example, forms of domestic governance structures) as the key explanatory variables.’ Goodman, above note 3, at 118, *referring inter alia* to Paul R. Hensel, *Theory and Evidence on Geography and Conflict*, in VASQUEZ ED., above note 30, at 57, 69-71.

³³ *See idem*, at 118-19. This point will be particularly discussed below, under C.II.2., at 185-186.

³⁴ *See idem*, at 119.

³⁵ *See idem*, at 120-121.

³⁶ *See idem*, at 120.

³⁷ *See idem*, at 120-35.

³⁸ *See idem*, at 123.

³⁹ *See idem*, at 125. Nondemocratic regimes governed by cartels and democratic regimes with high cartelization were found to be the most prone to experiencing blowback. *See idem*, at 125-26.

⁴⁰ *See idem*, at 127.

⁴¹ *See* Goodman, at 128-29.

⁴² Also Goodman, at 127, calls erroneous a view relying ‘on a sense that wars result from a unitary cause or motivation.’

causes of war can be properly studied in a statistical exercise which categorizes the causes of war in three or four different groups of issues and classifies each conflict by coding it with one, at maximum two, issues out of these groups. Apart from the danger of arithmetic or other statistical errors, additional errors can derive from sample selection and coding. Given the multiple causes and complex interrelations involved, it seems doubtful whether the necessary simplifications every statistical study has to make will still allow conclusions to be drawn that do justice to the high complexity of causes for war. Accordingly, a healthy skepticism about the results of such social science studies is warranted.

Goodman bases his critique on social science studies that mainly took interstate rivalries among states which had military conflicts into account. Only data from periods where military confrontation took place between the relevant state pairs were used. So, it is questionable whether the results can really be generally applied, for there will be pairs of states which lived peacefully together over decades and or even centuries, even though they may have had disputes of the kind considered in the studies.⁴³ In particular, why is a dataset, which only takes militarized rivalries into account and does not capture non-militarized periods of such rivalries, adequate to infer incentives for states in non-militarized rivalries,⁴⁴ which likely could tell more about conflict avoidance than the former?

Furthermore, the social science studies cited by Goodman may contain further flaws, which warrant the question as to how much confidence should be given to its results.⁴⁵ E.g., the concept of using state rivalries may also disregard some causes for important, facially internal conflicts.⁴⁶ Especially during the cold war period, a lot of wars were actually fought as proxy wars, in particular between the United States and the Soviet Union, on the territory of third states. In my view, the exclusion of states that delivered money and weapons to one of the conflicting parties, such as e.g. the United States and the United Kingdom in the two Afghanistan wars listed in the database, from 1979 to 1982 and from 1983 to 1987,⁴⁷ distorts the results of the study.⁴⁸ In addition, since the reason for the U.S.' (and the U.K.'s) involvement were of political nature, this would also increase the number of instances in which conflicts on regime and political issues in fact led to military

⁴³ For some of the studies, the pairs were chosen on the basis of how often within a certain period these states resorted to the use of military force against each other. See John Vasquez & Christopher S. Leskiw, *The Origins and War Proneness of Interstate Rivalries*, 4 ANN. REV. POL. SCI. 295, 296-97 and 300-03 (2001), which provide ample references to authority criticizing the rivalry approach.

⁴⁴ See *idem*, at 301. Cf. William R. Thompson, *Principal Rivalries*, 39 J. CONFL. RESOLUT., 195, 197-203 (1995), offering some more examples of selection bias which may distort the results of the studies.

⁴⁵ See Thompson, above note 44, *ibidem*. The more one reads into the studies Goodman cites, the more surprises one may find. E.g., even though Italy—as had likewise already happened in World War I—declared war against Germany on October 13, 1943 following its hostile occupation by German troops after Mussolini's government had been overthrown (see *The Washington Post*, October 14, 1943, at 2), the German-Italian relationship is listed as without any wars. See Vasquez & Leskiw, above note 43, at 312.

⁴⁶ According to Hedley Bull's definition of war as 'organized violence carried on by political units against each other' (cited after VASQUEZ, above note 25, at 23), civil wars are wars for the purpose of the mentioned social science studies. See VASQUEZ, *ibidem*.

⁴⁷ See conflict numbers 2053 and 2054 in file 'MIDB_210.TXT', available from <http://www.correlatesofwar.org/> (last visited April 27, 2009).

⁴⁸ Despite all the proxy wars—apart from the mentioned involvement of the U.S. in the Afghanistan war in the 1980's another example would be the Soviet Union's involvement in the Vietnam war—the relationship between the United States and the Soviet Union is seen as void of wars in the COW database. See Vasquez & Leskiw, above note 43, at 312. That is a surprising result for a social science study that wants to shed light on the causes for war, for delivering weapons and giving financial support to one of the parties in a civil war is one such cause.

confrontation.⁴⁹

Flaws may also derive from questionable classifications of the study data. The Correlates of War database uses a very debatable definition of war: ‘An international war is a military conflict waged between (or among) national entities, at least one of which is a state, which results in at least 1000 battle deaths of military personnel.’ The 1000 battle deaths threshold in this definition is quite dubious, and studies conducted on its basis are automatically biased, for they necessarily disregard military conflicts that constituted wars. Under this definition, NATO’s air campaign on Kosovo, which led to less than 1,000 deaths of military personnel⁵⁰ would not qualify as a war, even though about 500 civilian deaths resulted from the bombings and 6,000 people were wounded.⁵¹ Also, under this definition, bombing campaigns with far more civilian casualties would not be considered as a war, as long as the 1,000 military deaths threshold is not exceeded. The Kosovo example might also offer a far easier explanation for the high divergence of war probabilities in territorial conflicts versus foreign policy or regime issues, namely that such conflicts may still lead to military confrontation or even war but due to the studies’ questionable death threshold, may not always be counted as wars.

II. Questioning Goodman’s Conclusions

1. Studies Do Not Seem to Convey Particularly New Messages

Considering that the studies concern pairs of states that already are or were in rivalry,⁵² the result does not seem particularly surprising. Despite all doubts about probable flaws in the underlying studies, it would not be at all surprising that the probability of war is higher when territorial rather than issues of foreign or even of domestic policy are at stake.⁵³ However, such results may better be used to support Louis Henkin in his findings about ‘How Nations Behave’,⁵⁴ rather than to build game theoretic models about humanitarian intervention.⁵⁵

⁴⁹ The rivalry between the United States and the Soviet Union is considered as one based on regime issues. See Vasquez & Leskiw, above note 43, at 305.

⁵⁰ Cf. Eric Herring, *From Rambouillet to the Kosovo Accords: NATO’s War against Serbia and Its Aftermath*, in: THE KOSOVO TRAGEDY. THE HUMAN RIGHTS DIMENSIONS, 225, 231-32 (KEN BOOTH ED., 2001).

⁵¹ See HUMAN RIGHTS WATCH, UNDER ORDERS. WAR CRIMES IN KOSOVO, 437 (2001), and Johan Galtung, *Bombing Yugoslavia: Several Readings. Text, Supertext, Subtext, Deep Text, Context – and a Pretext (with a Posttext)*, in: ETHICS OF HUMANITARIAN INTERVENTIONS, 335, 347 (GEORG MEGGLE ED., 2004).

⁵² See already above, under C.I., at 182-184.

⁵³ The same applies to the finding that territorial wars are more likely for contiguous states than for states which are not in each others’ close proximity. See Paul D. Senese, *Geographical Proximity and Issue Salience: Their Effects on the Escalation of Militarized Interstate Conflict*, in: A ROADMAP TO WAR. TERRITORIAL DIMENSIONS OF INTERNATIONAL CONFLICT 147-171 (PAUL F. DIEHL ED., 1999).

⁵⁴ ‘Almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time.’ LOUIS HENKIN, HOW NATIONS BEHAVE. LAW AND FOREIGN POLICY, 47 (2d ed. 1979). One could argue that the results just show that states are honoring the prohibition to intervene in the domestic affairs of other states, and only when territorial issues come into play, namely issues which immediately also concern themselves, their own sovereignty and rights, they are more willing to resort to military force.

⁵⁵ Goodman’s argument (at 140-141) that one could use the pre-UN-Charter experience as a control against the argument that states’ incentive to abide by Article 2 (4) UN Charter’s prohibition on the use of force could be an explanation why regime issues are less war-prone is but a factoid. First, it is not uncontested that UHI was lawful in the pre-Charter period, and second, UHI would still have been in conflict with the command of non-intervention stemming from customary international law.

2. Conclusions Not Convincing/Compelling

MID's among states arise over certain issues, and there is no way to influence or modify those issues, or to somehow channel them. Why should a state formulate humanitarian concerns if it has territorial claims instead, in particular in situations lacking humanitarian concerns all together, or where it may fear that humanitarian concerns could be advanced by others in regard to its own domestic policy. It does not seem convincing that e.g. a territorial dispute would become less war-prone were it mantled with claims involving humanitarian concerns. Indeed, what Goodman cites as evidence of his respective proposition is not data meant to measure what happens when territorial MID's are recast in humanitarian terms,⁵⁶ but data to test the proposition that alliance-making is increasing the probability of a war among states which already had an MID.⁵⁷

It seems particularly unlikely that any dispute (regardless of its issue) would become less war-prone if rephrased in humanitarian terms where humanitarian concerns lack a basis. In these cases, experience suggests that humanitarian concerns so far have been formulated in a quite late step on the 'scale to war', just to provide a further (political, not legal) justification to use force, as e.g. in the 2003 Iraq war. In such situations, rhetorical efforts of this kind would seem to neither increase nor decrease the probability of a war.⁵⁸

However, Goodman relies also on the assumption that legalizing UHI would create deescalating domestic incentives, in particular through the mentioned blowback effects. According to Goodman, if a State invokes UHI as a basis for intervening, domestic humanitarian groups may be empowered to insist on certain limits that may help to prevent the conflict from escalating.⁵⁹ But how realistic is the possibility of successfully recasting the territorial issue of an MID? Let's assume a situation where two states do have a territorial MID, and where the conditions to fairly switch the focus on humanitarian concerns would also be met. Considering the high importance of territorial claims, in general,⁶⁰ and in the domestic political debate, it does not seem too realistic that the current regime of state R would take the risk of dropping territorial claims in favor of phrasing humanitarian concerns. This is because opposing domestic elites might use such a shift to portray the failure to maintain territorial claims as a major foreign policy setback.⁶¹ Even if

⁵⁶ Goodman, at 122, citing John A. Vasquez, *The Probability of War, 1816-1992, Presidential Address to the International Studies Association*, 48 INT'L STUD. Q. 1, 21 (2004).

⁵⁷ See Vasquez, above note 56, at 20-21. In other words, the study tests the sequences 'specific issue–alliance–any issue', as well as 'any issue–alliance–specific issue', but without connecting the issues of the first and second MID's. See *idem, ibidem*. Hence, they do not show, where a territorial MID is followed by an alliance, how war probabilities depend on whether the second issue is a territorial, foreign policy or regime issue. Cf. *idem, ibidem*. Even if that were so, the data would still not make the distinction whether the first and the second MID are entirely different disputes, or whether the second MID so to say is the first MID 'in disguise'. Cf. *idem, ibidem*. In addition, the data would only be about cases in which an alliance was created between two MID's but not cases in which one MID is followed by another, without an alliance having been created.

⁵⁸ On this point, Goodman seems to agree. See at 133.

⁵⁹ See above, note 40 and corresponding text.

⁶⁰ Goodman himself names several alternative explanations why territorial issues would be that salient and prone to escalation. These go as far as contentions that 'the explosive character of territorial MID's may reflect the influence of innate human tendencies.' Goodman, at 122, citing Paul D. Senese & John A. Vasquez, *A Unified Explanation of Territorial Conflict: Testing the Impact of Sampling Bias, 1919-1992*, 47 INT'L STUD. Q. 275, 277 (2003). All this seems to suggest that where territorial issues are at stake, it does not sound conceivable that the issue, including all the incentives involved, could effectively be changed into a less escalation-inflicting issue.

⁶¹ See PAUL K. HUTH, *STANDING YOUR GROUND: TERRITORIAL DISPUTES AND INTERNATIONAL CONFLICT*, 93-100 (1996). Also Goodman himself admits that the domestic power relationships and incentives may 'preclude

there were no prior MID, wouldn't a new MID also most likely be phrased around the issues that are of concern, *i.e.*, in terms of territory if this is at stake, and in terms of foreign policy or of regime issues if one of these are of relevance?

In the end, Goodman himself devalues this aspect of his theory by admitting that these favorable domestic blowback effects would be likely only to arise where humanitarian justifications are not pretextual.⁶² I consider this to weigh heavily against Goodman's theory, for if this limitation—to which I entirely agree⁶³—is made, legalizing UHI would, according to Goodman's theory, decrease the likelihood that UHI occurs in the only cases in which it might be desirable, because deescalation in these cases may mean either not to intervene at all or in a manner which is less suitable to save concrete human lives.⁶⁴ At the same time, legalization would provide a welcome, additional way of legal justification for pretext wars on other issues than humanitarian concerns, without contributing any cognizable or meaningful incentive for deescalation whatsoever.

D. Possible Implications of a Legalization of UHI – Incentives for Primary State (and Intra-State) Behavior

I. Creation of Additional Incentives to Bypass the Security Council

Goodman's concept, in order to work effectively, entails allowing UHI under conditions going beyond of what was so far suggested by a majority of those who developed frameworks for the legalization of UHI. In particular, most of such models foresee that prior to the use of force on the basis of a UHI, it has to be seriously attempted to obtain an authorization from the U.N. Security Council.⁶⁵ Should this not be a condition for a possible future 'right to UHI', this would create and at the same time suppress incentives, which Goodman did not include in his analysis. E.g., Goodman's analysis does not take the opportunity cost for jeopardizing the effectiveness of a great power's veto right in the Security Council into account, as well as incentives for states not to seek Security Council authorization in the first place, and the loss of chances to solve conflicts peacefully, with the Security Council's support. Also, a general Security Council 'preauthorization' for UHI's on the basis of the U.N. Charter's Chapter VII, as Goodman suggests,⁶⁶ would not provide relief for these concerns—not to mention how doubtful and unrealistic such a 'preauthorization' seems.

II. Moral Hazard and the Creation of So-Called 'Perverse Incentives'

Legalizing, and thereby providing incentives for UHI may also cause additional internal wars: 'Although intervention is typically thought of as a remedy for internal wars, it may cause as well as calm them.'⁶⁷ This is suggested by the concept of moral hazard.⁶⁸ '[T]he

leaders from reframing a dispute along humanitarian lines.' At 129.

⁶² See above, note 41 and corresponding text.

⁶³ See above, paragraph after note 57.

⁶⁴ This thought will be developed further below, on the basis of Goodman's view of NATO's Kosovo war. See under D.III.2., at 188-190.

⁶⁵ See e.g. the ICISS' R2P REPORT, above note 9, at 50.

⁶⁶ See Goodman, at 136.

⁶⁷ Timothy W. Crawford, *Moral Hazard, Intervention and Internal War: A Conceptual Analysis*, in: GAMBLING ON HUMANITARIAN INTERVENTION. MORAL HAZARD, REBELLION AND CIVIL WAR, 26 (TIMOTHY W. CRAWFORD

idea is that the prospect of outside support tempts groups, which would otherwise be cautious and peaceful, to run risks and use violence in challenging their governments.⁶⁹ Consider for example, U.S.-President George H. W. Bush's recommendation to the Iraqis, given after the 1991 Iraq war, to 'take matters into their own hands.' This suggestion may have encouraged the subsequent uprisings against Saddam Hussein by Kurdish and Shiite groups, in the hope that U.S. forces might intervene in their support.⁷⁰ It is known that this only led to further brutal repressions against Iraqi Kurds and Shiites.

Another example can be taken from the aftermath of the Holbrooke-Milošević-Agreement of October 1998. It was the joint assessment of the U.S. Secretary of State, the German Foreign Minister and NATO's Secretary General that the Serbians honored the agreement by withdrawing their troops. The Kosovo Liberation Army ('KLA'), however, took advantage of this withdrawal and subsequently took these positions, in violation of the armistice.⁷¹ This happening can be explained by the moral hazard problem of 'perverse incentives' that were given to the KLA. As a paramilitary group, they knew that they could never achieve their political goals by terrorist activities alone. Their only reasonable chance was to set the stage for outside intervention.⁷²

Beyond these considerations, the idea of pervasive moral hazard, in general, suggests a more remote incentive for discontented groups to resort to force in order to provoke radical answers. In this way, those groups may precipitate an intervention from outside in their favor, which can help them achieve what they could never have achieved on their own.⁷³ This was a lesson bitterly learned by the Kosovo Albanians, who for years, namely until 1996, tried to resist Serbian oppression by peaceful means, without receiving any support from the international community.⁷⁴ Getting the impression that peaceful resistance was fruitless, pervasive moral hazard created an incentive for the KLA to resort to force, provoking even more repression from the Serbian side and the violent escalation of the conflict.⁷⁵

& ALAN J. KUPERMAN EDS., 2006), with further references.

⁶⁸ See *idem, ibidem*.

⁶⁹ *Idem, ibidem*.

⁷⁰ See *Idem*, at 36.

⁷¹ See ZIEGLER, above note 5, at 29-30; THE INDEPENDENT INTERNATIONAL COMMISSION ON KOSOVO, THE KOSOVO REPORT. CONFLICT. INTERNATIONAL RESPONSE. LESSONS LEARNED, 78 (2000) ('KOSOVO REPORT'), which also notes that the West had made 'no attempt (...) to interdict the flow of arms and money to the KLA or to challenge seriously its provocative tactics' (at 150). See also Crawford, above note 67, at 29.

⁷² The KLA leaders' awareness of these incentives was among other things documented in a BBC2 Special by Allan Little, broadcast on March 12, 2000. In this Special, Hashim Thaçi, then KLA leader (and Kosovo's current Prime Minister), said: 'Any armed action we undertook would bring retaliation against civilians. We knew we were endangering a great number of civilian lives.' Dugi Gorani, then-Kosovo Albanian Negotiator, stated: 'The more civilians were killed, the chances of international intervention became bigger, and the KLA of course realised that. There was this foreign diplomat who once told me "Look unless you pass the quota of five thousand deaths you'll never have anybody permanently present in Kosovo from the foreign diplomacy."' The transcript of the BBC2 Special is available at http://news.bbc.co.uk/hi/english/static/events/panorama/transcripts/transcript_12_03_00.txt (last visited Nov. 28, 2009). A more current example for perverse incentives is the Tamil Tigers' use of civilians as human shields in the recent Sri Lanka crisis. See News.BBC.co.uk, Tamil Tigers Urged to End Fight, April 23, 2009, available at http://news.bbc.co.uk/2/hi/south_asia/8013683.stm (last visited Nov. 28, 2009).

⁷³ See Crawford, above note 67, at 38.

⁷⁴ This failure to give more support to the Kosovo-Albanian civil resistance could at the same time be seen as creating a so-called negative precedent, *i.e.* an example that guides behavior in an undesirable direction. See Crawford, above note 67, at 27-28.

⁷⁵ See ZIEGLER, above note 5, at 361 and 374-75 (2009).

III. Further Possible Incentives Not Considered in Goodman's Theory

1. Threat Diplomacy and the Credibility Dilemma

To speak about humanitarian intervention in an interstate conflict means that one state threatens to intervene in the other, in order to protect human rights. Goodman says that such discourse could actually limit the number of instances in which states resort to war. However, such rhetoric also leads to incentives which make war more likely, namely by undermining diplomatic efforts of deescalation, and by creating a credibility dilemma. The Independent Commission's Kosovo Report states, in regard to NATO's October 1998 threats to use force against Yugoslavia: 'Aside from undercutting diplomatic options, threat diplomacy puts the threatener under pressure to demonstrate that the commitment is not just a bluff.'⁷⁶

Furthermore, being under pressure to actually resort to force for the sake of credibility, can again create incentives leading further down a slippery slope to war. A government, which knows it may need to start a war, will do everything to justify the use of force. This creates incentives to manipulate the facts, be it by tampering with intelligence evidence or by just taking a biased look on the information available. In this regard, the Republican U.S. Senator Hiram Johnson's statement during World War I that '[t]he first casualty when war comes is truth'⁷⁷ gains particular importance. If an uncritical public relies on its government's biased war propaganda in favor of humanitarian intervention, this also will not contribute to create incentives against the use of military force within the domestic constituencies in the intervening state or group of states.

2. Incentives Potentially Leading to the 'Misery of the Protected'⁷⁸

Let's now get to cases in which military humanitarian intervention might be objectively desirable to protect concrete human beings, cases such as Rwanda or Darfur, cases involving genocide. In these cases, intervention has not occurred. Legalizing UHI would, according to Goodman's theory, also not contribute to increasing the number of cases in which effective protective measures would be taken, due to the domestic constituencies' impact and the deriving incentives for state R's government. Deescalation in these cases can mean abandoning the victims of genocide to their fate. Goodman uses NATO's Kosovo intervention as an example: He states: 'Having proffered a humanitarian justification for initiating force, NATO leaders were able to make politically difficult concessions and deescalate the conflict before it turned into full-scale, ground warfare.'⁷⁹ This analysis entirely disregards the escalation incentives based on moral hazard discussed above,⁸⁰ as well as the violence and the killings on the ground that actually took place once the NATO bombings had started.

To really protect the Kosovo Albanians from being slaughtered would have meant to intervene where the murdering occurred, *i.e.* on the soil. It must have been clear to experienced military commanders that dropping bombs would not prevent the Serbian

⁷⁶ KOSOVO REPORT, above note 71, at 159.

⁷⁷ See <http://www.guardian.co.uk/notesandqueries/query/0,5753,-21510,00.html> (last visited Nov. 28, 2009).

⁷⁸ The corresponding German term has been used by Reinhard Merkel, *Das Elend der Beschützten*, Die Zeit, Mai 12, 1999, at 10.

⁷⁹ See Goodman, at 130.

⁸⁰ See above, under D.II., at 186-188.

soldiers and police forces from indiscriminately killing Kosovo Albanian civilians alongside with KLA terrorists. However, politicians feared the protest of domestic constituencies, should the lives of many soldiers be sacrificed for a life-saving intervention on the ground.⁸¹ Hence, they put further civilian lives at risk by ordering NATO planes to fly at altitudes above 15,000 feet, to protect their soldiers and planes from being shot down by the Yugoslavian air defense systems,⁸² which inevitably led to further civilian casualties. Alone the first three weeks of NATO's bombings cost more civilian lives than the whole civil war between the Serbian Army and Police forces and the KLA in the three months preceding the bombing campaign, the alleged 'humanitarian catastrophe'.⁸³ Accordingly, since we do not know the 'but for' world, *i.e.* what would have happened after March 23, 1999, there is no evidence that the massive human rights violations that occurred after March 23, 1999 in Kosovo would also have occurred, or occurred at the same scale, had the NATO states not started their bombing campaign. Considering the situation before the bombings started,⁸⁴ it is at least conceivable that the conflict could have been solved peacefully, *e.g.* by getting Russia involved in an international, UN-mandated peace-enforcement mission. Once the air campaign started, any deescalating incentives that the bombing threats may have exerted on Serbia were bound to vanish. At the same time, the Kosovo-Albanian civilian population was inevitably abandoned to its fate- misery. To sum up, in terms of incentives created, NATO's Kosovo air campaign cannot serve to support Goodman's theory that a legalization of UHI can provide any deescalatory incentives on primary state behavior. The fact-based analysis set out above suggests rather that it did more harm than good.

⁸¹ This is consistent with Goodman's analysis of domestic incentives. *See* Goodman, at 126-30.

⁸² *See* KOSOVO REPORT, above note 71, at 93.

⁸³ Noam Chomsky, *Is it Really a Grand NATO Victory?*, 128 NEW STATESMAN, Issue 4440, at 11 (June 14, 1999). The KOSOVO REPORT states: '[T]he UNHCR reported that 300 people had been killed between February and May, and the Council for Defense of Human Rights and Freedoms asserts that 750 were killed between May and August 1999. But neither set of numbers indicates how many of the victims were KLA members and how many were civilians.' Whatever the exact numbers, it is beyond doubt that they do not even come close to the number of casualties in real humanitarian catastrophes such as in Rwanda or in the Darfur region of Sudan.

⁸⁴ *See* above, text before note 83. Unimpaired, clear evidence of targeted ethnic cleansing in Kosovo before NATO started its bombing campaign is lacking. In particular, there are serious doubts about the so-called Massacre of Raçak/Reçak, for there are indications that it was nothing more than a combat between Serbian soldiers and security forces and KLA fighters. OSCE representatives assumed that the massacre had been 'staged' by the KLA, and stated that most of the cadavers had been collected from the broader surroundings of the village. The OSCE representatives further stated that most of the Kosovo Albanians died in combat operations involving Serbian Artillery forces, and that a lot of killed KLA fighters subsequently had been clothed with civilian clothes. *See* Roland Heine & Thomas Götz, *OSZE-Vertreter Widerlegen Walker [OSCE Representatives Rebut Walker]*, Berliner Zeitung, March 13, 1999, at 7. *For further indications in this regard see* ZIEGLER, above note 5, at 31-32. An internal report of the German Foreign Ministry stated on January 12, 1999 that it was not possible to assess a political sequestration explicitly tied to Albanian ethnicity. The Serbian security forces' measures were not directed against Kosovar Albanians as an ethnically defined group, but against the military enemy and its actual or assumed supporters. *See* CATHRIN SCHÜTZ, *DIE NATO-INTERVENTION IN JUGOSLAWIEN. HINTERGRÜNDE, NEBENWIRKUNGEN UND FOLGEN* 73 (1st ed. 2003). Still in January 1999, German courts dismissed the claims of Kosovo Albanian asylum seekers against deportation on this basis. *See* GEORG NOLTE, *Kosovo und Konstitutionalisierung: Zur Humanitären Intervention der NATO-Staaten*, 59 HEIDELBERG J. INT'L L. 941, 950 (1999). All this is also supported by the indictment against Serbian war criminals before the International Criminal Tribunal for the Former Yugoslavia: Apart from the doubtful events in Raçak and an attack on the Kosovo Albanian village Kotlina/Kotlinë which is alleged to have taken place on March 8, 1999, it only accuses crimes committed on March 24, 1999 and later. *See Prosecutor v. Milutinović, Sainović, Ojdanić & Stojiljković*, Case No. IT-99-37-PT, Third amended indictment, ¶¶ 63 and 66 (July 19, 2002). Further documentation can be found from ZIEGLER, above note 5, at 32-34.

It is not justified to question this assessment on the basis that Kosovo declared its independence on February 17, 2008.⁸⁵ An analysis of incentives for primary behavior cannot allow a possibly desirable outcome in one single case to change the results of the overall analysis. Yet, again, since we do not know the but-for world, nobody can claim that an independent Kosovar state could not likewise have emerged out of a political process following a peaceful solution of the crisis through continued diplomatic efforts.⁸⁶ In addition, to allow this objection could be misunderstood as a rubber-stamp on violent resistance and terrorist conduct of secessionist movements throughout the world. After all, a further balkanization of the world, leading to more and more micro-states (which often tend to be economically in-viable, i.e. can only survive due to support from outside) is not desirable at all.⁸⁷

IV. The Trade-off Between ‘Good’ and ‘Bad’ Incentives

The discussion above is not meant to deny that the current situation, in which UHI is unlawful, may also create ‘bad’ incentives. Some may argue that the current legal system creates negative incentives insofar as many tyrants of the world do not have to fear outside intervention and continue to abuse their own people. In this regard, fingers usually are pointed at China and Russia, for blocking Security Council-authorized enforcement measures, including military interventions, through their veto power.⁸⁸ However, under all legal regimes, there will always be some ‘good’ and some ‘bad’ incentives. The choice of the proper legal rule entails a trade-off between these ‘good’ and ‘bad’ incentives, and the optimal legal rule is one that overall creates more ‘good’ incentives. On the basis of the above analysis, it is fair to make the case that the current legal regime offers an overall better incentive trade-off than a legalization of UHI would do. Several considerations

⁸⁵ The legal status of the Republic of Kosovo remains controversial, however. Until November 9, 2009, only 63 states have recognized the Republic of Kosovo as a state. See <http://www.kosovothanksyou.com/> (last visited Nov. 28, 2009). In October 2008, the U.N. General Assembly approved a resolution authored by Serbia to seek an opinion of the ICJ on the legality of Kosovo’s independence. Serbia claimed Kosovo’s secession violated its sovereignty and territorial integrity. 77 states voted for Serbia’s draft resolution, 6 voted against, while 74 countries abstained. See [Balkaninsight.com, Kosovo Optimistic on ICJ Decision](http://balkaninsight.com/en/main/news/17938/), April 6, 2009, available at <http://balkaninsight.com/en/main/news/17938/> (last visited Nov. 28, 2009). Hisashi Owada, the President of the ICJ, recently announced “that the Court’s advisory opinion on whether Kosovo’s unilateral declaration of independence went against international law will not be “a clear yes or no.” [Balkaninsight.com, ICJ Decision on Kosovo to Be Vague](http://www.balkaninsight.com/en/main/news/23851/), Nov. 20, 2009, available at <http://www.balkaninsight.com/en/main/news/23851/> (last visited Nov. 28, 2009).

⁸⁶ E.g., the armistice terms which were imposed on Yugoslavia after the bombings by way of S.C. Res. 1244 ¶ 1, read alongside with annexes 1 and 2, U.N. Doc. S/RES/1244 (June 10, 1999), were much less restrictive than what the Serbians had been urged to sign in Rambouillet in February and in Paris in March 1999: The deployment of the NATO-led peacekeeping force was limited to the Kosovo area, and it comprised a Russian contingent which was not subordinated to NATO command structures. See FRANCESCO FRANCONI, *Balancing the Prohibition of Force with the Need to Protect Human Rights: A Methodological Approach*, in: CUSTOMARY INTERNATIONAL LAW ON THE USE OF FORCE. A METHODOLOGICAL APPROACH 269, 287-88 (ENZO CANNIZZARO & PAOLO PALCHETTI EDS., 2005).

⁸⁷ “[U]sing partition to resolve internal wars (...) [creates another negative precedent,] the issue being whether partition in a few countries encourages partition elsewhere.” Crawford, above note 67, at 28, who also points at the negative experience with the consequences of Woodrow Wilson’s strong call for self-determination in the aftermath of World War I.

⁸⁸ See e.g. CanWest News Service, *China Blocks Efforts to Sanction Sudan Over Darfur Crisis* (May 30, 2007), <http://www.canada.com/topics/news/world/story.html?id=4bb2ff74-12a6-4a92-a3c4-2bf5c2ec1481> (last visited Nov. 28, 2009).

support this view.

First, it remains yet to be proven that legalizing UHI would necessarily lead to interventions which could, from a purely humanitarian point of view seem as ‘desirable.’ Let’s not be hypocritical, but realistic: Too many crises take place in states which do not seem attractive for an intervention. Experience suggests, in these situations, that interventions would not occur where it would be most justified by the scale of human misery and the extent of human suffering.⁸⁹ The debate in the Security Council, in light of the looming genocide in Rwanda, provides the best example: Still on April 21, 1994, not one single Council member, including the African states Nigeria and Djibouti, suggested forcefully intervening,⁹⁰ although all knew what was going on.⁹¹ Rather, per unanimous vote, the Council decided to even reduce (!) the number of UNAMIR troops.⁹² The only voice which pled for an increase of UNAMIR troops, ‘to enable it to contribute to the re-establishment of the ceasefire and to assist in the establishment of security conditions that could bring an end to the violence,’⁹³ was the voice of Rwanda’s Permanent Representative to the United Nations. So, even assuming a legalization of UHI, it would still be questionable that interventions would occur e.g. in the Darfur region of Sudan or in Zimbabwe. The mismatch between not even pleading for an intervention in the light of several thousands, maybe tens of thousands of deaths (Rwanda) and an intervention on a doubtful factual basis with, at best, a few hundred victims in the three months before the intervention (Kosovo) unearths a double standard which can hardly be justified on the basis of humanitarian considerations.⁹⁴

Second, these double standards get exactly into the heart of fears of abuse of a right to UHI, because if the protection of human rights is only a concern where other interests are involved, we are just opening the door to abuse. The concern is that interventions do not primarily occur to protect human rights, but chiefly to serve arbitrary considerations of power politics and economic interests. So, either we are really concerned about human rights and have clear criteria when interventions are really necessary to stop atrocities, and

⁸⁹ See in this regard already above, under D.III.2, at 188-190.

⁹⁰ See U.N. SCOR, 3368th mtg., U.N. Doc. S/PV. 4893 (Apr. 21, 1994).

⁹¹ ‘[T]he crash of the plane at Kigali airport on 6 April 1994, which caused the deaths of all those on board, including President Juvenal Habyarimana of Rwanda and President Cyprien Ntaryamira of Burundi (...) set off a torrent of widespread killings, mainly in Kigali but also in other parts of the country. The violence appears to have both political and ethnic dimensions. No reliable estimate of deaths has so far been available, but they could possibly number tens of thousands.’ The Secretary General, *Special Report of the Secretary-General on the United Nations Assistance Mission for Rwanda*, ¶¶ 1-2, delivered to the Security Council, U.N. Doc. S/1994/470 (April 20, 1994) (*‘Special Report on UNAMIR’*).

⁹² See S.C. Res. 912, ¶ 8, U.N. Doc. S/RES/912 (April 21, 1994), read together with *Special Report on UNAMIR*, ¶¶ 15-18.

⁹³ See U.N. SCOR, 3368th mtg., at 6, U.N. Doc. S/PV.4893 (Apr. 21, 1994).

⁹⁴ It is interesting that of all things it was Djibouti’s President who pointed the U.N. General Assembly’s attention to this double standard, whereas Djibouti had taken part in the fatal, unanimous vote in the Rwanda crisis (see above, text before note 90). See U.N. GAOR, 54th Sess., 9th plen. mtg., at 5, U.N. Doc. A/54/PV.9: ‘The Somalis, too, have human rights; they have the same right as others to be protected from oppressive, malicious and power-hungry individuals who continually and freely move from one capital to another, raising funds and securing armaments. Although these individuals are responsible for the destruction of their country, for the deaths of tens of thousands of innocent civilians, countless numbers of casualties and for the paralysis that immobilizes the country to this day, the international community did not intervene in Somalia, “to defend humanitarian principles and to stand up for the values of civilization and justice”, as one Western leader stated in justifying the Kosovo operation.’ As the current Somali pirates problem shows, a failed state and lawlessness in a poor country do not get the international community’s attention until the situation starts to create inconvenience in particular for other states’ economic interests.

apply them in a credible manner, or we better leave it, to avoid interventions that are chiefly or partly driven by other concerns than human rights, and make things even worse. Since it is, mainly for political reasons, unrealistic to credibly implement a framework in which the protection of human rights takes precedence over everything else, the pretext argument has full authority, and consequently a legalization of UHI should not be attempted.

Third, legalizing UHI would automatically create additional double standards, for no reasonable politician would seriously suggest intervening against great powers or very close allies to a great power.⁹⁵ Hence, UHI will never be an option for the Tibet problem, for cases involving Russia such as Chechenia, or for cases involving allies of the United States, e.g. Turkey's violent fight against the Turkish Kurds in the 1990's⁹⁶ or the violation of Palestinians' human rights by Israel in the Palestine Conflict.

The fourth consideration concerns the above-mentioned 'negative incentives': That regimes violating human rights do not have to fear outside intervention, and therefore can continue committing crimes against humanity. Here, the real cause of the problem is the institute of the Security Council's five permanent members' veto power in the Security Council.⁹⁷ Well understood, this institute is abused not merely by China and Russia,⁹⁸ but also (and even more often) by the U.S., which blocks every Security Council Resolution that could be understood as criticizing Israel's policy in the Palestine conflict.⁹⁹ To prevent Security Council action against the illegal Israeli settlements in Palestine creates a host of undesirable incentives, not only in the narrow conflict between the Israelis and the Palestinians, but in the whole Middle East and beyond, throughout the entire Muslim world. This pattern feeds anti-Western resentments and ultimately the so-called 'Islamic' terrorism. The solution to that problem would be either a Security Council reform (even though that is a very difficult and complex issue that would warrant another article or even a doctoral thesis)¹⁰⁰ or more reasonable behavior by the five permanent members,¹⁰¹ rather than the legalization of UHI.¹⁰²

⁹⁵ In this regard, the R2P REPORT, above note 9, at 37, points to the precautionary principle, according to which UHI 'is not justified if actual protection cannot be achieved, or if the consequences of embarking upon the intervention are likely to be worse than if there is no action at all.' *Idem, ibidem*.

⁹⁶ For a survey see NOAM CHOMSKY, THE NEW MILITARY HUMANISM. LESSONS FROM KOSOVO 52-61 (1999).

⁹⁷ See Article 27 (3) of the U.N. Charter.

⁹⁸ See above, text before note 88. It also has to be noted that the abuse allegation may not always be justified. E.g., if Russia threatened to veto a draft Chapter VII resolution that would have authorized NATO's Kosovo bombing campaign, there were reasonable grounds to do so that go beyond the often-alleged old ties with Serbia. In particular, why should the Security Council authorize a military intervention with inadequate means to prevent killings on the ground, in a situation where further diplomatic means would have been available? See above, note 86 and corresponding text.

⁹⁹ See Jewishvirtuallibrary.org, U.S. Vetoes of UN Resolutions Critical of Israel (1972-2006), <http://www.jewishvirtuallibrary.org/jsourc/UN/usvetoes.html> (last visited Nov. 28, 2009). For a more recent case see PressTV.ir, US Veto Blocks UN Anti-Israel Resolution, Dec. 28, 2008, <http://www.presstv.ir/detail.aspx?id=79727§ionid=351020202> (last visited Nov. 28, 2009).

¹⁰⁰ See e.g. BARDO FASSBENDER, UN SECURITY COUNCIL REFORM AND THE RIGHT OF VETO : A CONSTITUTIONAL PERSPECTIVE (1998); Yehuda Z. Blum, *Proposals for UN Security Council Reform*, 99 AM. J. INT'L L. 632-649 (2005); a lot of materials on this issue can be found from <http://www.globalpolicy.org/security/reform/index.htm> (last visited Nov. 28, 2009).

¹⁰¹ In this regard, Stromseth's suggestions (above note 9, at 261-267) of more diplomatic efforts to achieve consensus within the Security Council on how to effectively respond to human rights atrocities in the future seem much more realistic than any initiative to formally modify the institution of the permanent members' veto.

¹⁰² The R2P REPORT, above note 9, suggests Uniting for Peace-type General Assembly action, while recognizing that reliance on regional organizations, due to Article 53 (1) of the Charter, cannot not really solve the problem of Security Council blockage. See *idem*, at 53-54. The report also recognizes that, '[a]s a matter of political reality, it

Fifth, some may argue that the creation of incentives to forcefully overthrow dictatorial regimes that are abuse of human rights by way of legalizing UHI should be embraced and seen as 'good' incentives. However, in the interest of peace, the aim must be peaceful resistance, not terrorism. Terrorism does not kill the tyrant, but innocent civilians. The foreign policy of 'peace-loving' states should support the Ghandis and Rugovas of this world, but not ambiguous figures, who are 'one man's terrorist, another man's freedom fighter.' The goal should be to deescalate internal conflicts. If peaceful and political resistance or opposition appears to be less efficient, this is due to flawed foreign policy, which fails to support the right domestic forces in such countries. For a credible foreign policy of all 'peace-loving' states or states which want to be seen as civilized nations, the creation of 'perverse incentives' in internal conflicts is a deep shame, because it animates to commit abhorrent war crimes.

Sixth, a belief that legalizing UHI would end oppression and abuse of gross violations of human rights in a lot of countries is shortsighted, for it is based too optimistically on an idea concerning the ability of military intervention to solve these problems. It should be recognized that military interventions cure only the symptoms, but not the root causes underlying a conflict. Also, since military interventions are very expensive, it would make a lot of sense to divert some of the financial sources from military expenses into civil conflict prevention, as well as into the fight against poverty. This initiative may hurt some armaments manufacturers, but it may, in the long run, save more human lives than a legalization of UHI.

On the other hand, it needs to be recognized that in consequence, the conservation of the current legal regime can entail that we have to say 'sorry' to some oppressed groups, for the interest of all is better served by not allowing UHI. This does not mean that the violation of human rights by oppressive regimes should not be fought against. On the contrary, serious political efforts, in particular so-called 'smart' economic sanctions should be employed to stop such abuses, unless they are—though smart—more harmful for the civilian population than for the regime. Another possibility is aiming at negative general prevention by way of indictments and convictions before and by the International Criminal Court. Furthermore, even without the prospect of UHI, collective humanitarian interventions still cannot be outright excluded, which may—recognizing the veto problem discussed above—somewhat mitigate the 'bad' incentives mentioned at the outset of this section.¹⁰³

To sum up, the above considerations raise serious doubts about the so often purported benefits of a legalization of UHI.

E. Conclusions

Professor Goodman's conclusions do not necessarily follow from the social science studies on which he relies. His analysis takes place in a vacuum, disregarding incentives the legalization of UHI would create within an internal conflict. Some of the consequences of an implementation of Goodman's concept were not calculated into the theory. Implications that the legalization of UHI would have for incentives in primary state behavior include (i)

would be impossible to find consensus, in the Commission's view, around any set of proposals for military intervention which acknowledged the validity of any intervention not authorized by the Security Council or General Assembly.' *Idem*, at 54-55.

¹⁰³ See above, at 190.

additional incentives to bypass the Security Council, (ii) so-called ‘perverse incentives’ created by moral hazard, (iii) the credibility dilemma created by threat diplomacy, and (iv) incentives that can lead to a ‘misery of the protected’ where a UHI actually takes place. The article discussed these issues on the basis of an alternative view of Goodman’s discussion of NATO’s Kosovo war undertaken to back up his theory. It has to be recognized that the current legal regime also creates some bad incentives. However, every legal order has to find the right trade-off between ‘good’ and ‘bad’ incentives in order to determine the optimal rule. The discussion in this article casts serious doubt that legalization of UHI would be likely to offer a better trade-off.

Overall, Goodman’s theory is based on unconvincing conclusions from the underlying social science studies, and on an overly optimistic view of incentives that could be created by a legalization of UHI, namely that there would be cognizable deescalating incentives. Consequently, Goodman’s claim that there would be less resort to war overall (which remains to be proven in any event), does not rely on a very strong basis. Overall, there is no basis to retire the pretext objection against legalizing UHI. Instead of focusing on a legalization of UHI, states should rather be concerned with eliminating the root causes of conflicts. After all, military intervention only cures symptoms, and may add additional problems rather than solving the existing ones. States would therefore be well advised to divert a part of the vast financial resources spent on the military to measures of civil conflict prevention and the fight against poverty. This reallocation of priorities and efforts likely would save more human lives than any legalization of UHI.