
Applying the Extra-Legal Measures Model to Humanitarian Interventions: A Reply to Devon Whittle

Oren Gross*

Abstract

In 'The Limits of Legality and the United Nations Security Council: Applying the Extra-Legal Measures Model to Chapter VII Action', Devon Whittle analogizes the United Nations Security Council's Chapter VII powers to domestic emergency powers. He then seeks to apply the extra-legal measures (ELM) model of emergency powers, which I developed some 20 years ago, to exercise by the Council of its Chapter VII powers. This brief comment seeks to expand the discussion of ELM in international affairs beyond the collective security system by exploring the application of ELM in the setting of unilateral humanitarian intervention.

No state shall forcibly interfere in the constitution and government of another state.¹

It isn't too much of an exaggeration to say that the greatest danger most people face in the world today comes from their own states, and the chief dilemma of international politics is whether people in danger should be rescued by military forces from outside.²

In his carefully argued article 'The Limits of Legality and the United Nations Security Council: Applying the Extra-Legal Measures Model to Chapter VII Action', Devon Whittle analogizes the United Nations Security Council's (UNSC) Chapter VII powers to domestic emergency powers. He then seeks to apply the extra-legal measures (ELM) model of emergency powers, to exercise by the Council of its Chapter VII powers. Having been asked to comment on the article, I thought that it would be of greatest interest to expand the scope of inquiry and suggest additional perspectives for utilizing ELM to consider and frame questions on the international plane. I am sympathetic (of course) to Whittle's attempt to apply ELM to the extraordinary actions by the UNSC

* Irving Younger Professor of Law, University of Minnesota Law School, Minneapolis, United States. Email: gross084@umn.edu.

¹ I. Kant, 'Perpetual Peace', in H.S. Reiss (ed.), *Kant: Political Writings* (2nd edn, 1991) 93, at 96.

² M. Walzer, *Just and Unjust Wars* (4th edn, 2006), at xi.

under Chapter VII and am likewise generally in agreement with his careful analysis. To be sure, one may wonder why, if the UNSC operates with ‘few (if any) legally binding checks and balances’ would it ever choose to characterize its own actions as extra-legal rather than fully compliant with the Charter of the United Nations (UN Charter) and with international law.³ Indeed, more consideration could, and should, be given to the intricate relationship between ‘the Council’ and its constituent member states (particularly, the P5), for example, in the context of the viability and meaningfulness of *ex post* review. Yet these queries do not detract from the overall value of the project. Indeed, I believe that we can expand the discussion of ELM in international affairs. While Whittle focuses on the actions by the UNSC – that is, on the operation of the collective security system, which may be the closest analogy to ELM’s ‘official disobedience,’⁴ this brief comment explores the application of ELM in the setting of state action and specifically in the context of unilateral humanitarian intervention.

Over the past four years, hundreds of thousands of innocent civilians have been killed in Syria. Unfortunately, this massive scale killing by a government of its own citizens is not a unique aberration in the annals of human history. It is estimated that in the 20th century alone governments killed one hundred and seventy million of their own citizens.⁵ The question whether states may use armed force and engage unilaterally⁶ in humanitarian intervention in the territory of another state if genocide or mass murders and atrocities are being committed within that state, and the UNSC is unable or unwilling to act, or refrain from such unilateral action has been one of the ‘chief dilemma[s] of international politics’.⁷ The problem of humanitarian intervention emerges when fundamental values of the international legal system collide. The tension is not merely one between state sovereignty and human rights but, rather, between such fundamental values as order and peace, on the one hand, and justice and human rights, on the other.

From a conceptual standpoint, humanitarian intervention invokes the question of whether the purpose of the international society is to maintain international order, even if unjust, or to provide for conditions of justice everywhere. The moral imperative and political need ‘to do something’ about genocide and mass atrocities perpetrated by, or in, other countries and the inability of the United Nations to live up to

³ Whittle, ‘The Limits of Legality and the United Nations Security Council: Applying the Extra-Legal Measures Model to Chapter VII Action’, in this volume at 671.

⁴ Gross, ‘Are Torture Warrants Warranted? Pragmatic Absolutism and Official Disobedience’, 88 *Minnesota Law Review* (2004) 1481.

⁵ United Nations Development Programme, *Human Development Report 2002: Deepening Democracy in a Fragmented World* (2002), at 2, 6.

⁶ I use the term ‘unilateral action’ to connote an action by an individual state or a group of states. Such action is to be distinguishable from an action undertaken at the behest of the United Nations Security Council (UNSC). While the authority of the UNSC to authorize or direct military intervention on humanitarian grounds has not gone unchallenged in the past, it is now generally accepted that the Council can, in fact, embark on such operations if it deems them appropriate. However, such acceptance has not been forthcoming with respect to the right of individual states to use force unilaterally to intervene in the affairs of other nations on humanitarian grounds.

⁷ Walzer, *supra* note 2, at xi: ‘[T]he chief dilemma of international politics is whether people in danger should be rescued by military forces from outside.’

the challenge have resulted in governments, particularly in the West, coming under increasing pressure to use force to intervene unilaterally to stop the killing. This has been especially true with respect to the USA as its 'unparalleled power together with the availability of reports on wide-scale human tragedies ... breed a sense of moral responsibility to intervene militarily in foreign countries to prevent mass atrocities'.⁸ At the same time, claims of 'humanitarian' intervention can be, and have been historically, used as pretext for the use of force in international affairs that is aimed at promoting selfish national interests via coercive means.⁹ Thus, after NATO's Allied Force operation in Kosovo in 1999, UN Secretary-General Kofi Annan expressed the dilemma in these words: '[W]hile the genocide in Rwanda will define for our generation the consequences of inaction in the face of mass murder, the ... conflict in Kosovo has prompted important questions about the consequences of action in the absence of complete unity on the part of the international community.'¹⁰ How are we, then, to deal with the Scylla of Rwanda's inaction (by the international community) without letting the whole international legal system be devoured by the Charybdis of Kosovo's unilateralism?

For international lawyers, the dilemma becomes even more acute since under positive international law unilateral humanitarian intervention is, simply put, unlawful, since it is abundantly clear that it violates the UN Charter. The horrors of World War II and the Holocaust ushered in many changes in international law, of which the most significant was the creation of an international political and legal system around the newly established United Nations organization – that is, around a collective security system designed, in the words of the preamble to the UN Charter, to save 'succeeding generations from the scourge of war'. The fundamental purposes of the United Nations are outlined in Article 1 of the Charter, which reflects the drafters' intention that the organization will focus on the maintenance of peace and security and that member states will resolve future conflicts and disputes by peaceful means.

This emphasis on peace is expressed clearly and forcefully in Article 2(4) of the Charter – 'the pivot on which the present-day *jus ad bellum* hinges'¹¹ – which contains a prohibition on the threat or use of force among member states. This foundational prohibition is only subject to two exceptions: the 'inherent' right of individual or collective self-defence under Article 51 of the UN Charter and enforcement measures carried out by, or through the authorization of, the UNSC. Unilateral humanitarian intervention does not fulfil the conditions for a lawful self-defence,¹² and, by definition,

⁸ Benvenisti, 'The US and the Use of Force: Double-Edged Hegemony and the Management of Global Emergencies', 15 *European Journal of International Law (EJIL)* (2004) 677, at 678.

⁹ See, e.g., I. Brownlie, *International Law and the Use of Force by States* (1963), at 341; Dino Kritsiotis, 'Reappraising Policy Objections to Humanitarian Intervention', 19 *Michigan Journal of International Law* (1998) 1005, at 1020–26; John F. Murphy, *The United States and the Rule of Law in International Affairs* (2004), at 162.

¹⁰ Secretary-General Presents His Annual Report to General Assembly, UN Doc. SG/SM/7136 (20 September 1999) available at www.un.org/press/en/1999/19990920.sgs7136.html (last visited 28 September 2015).

¹¹ Y. Dinstein, *War, Aggression, and Self-Defence* (5th edn, 2011), at 87.

¹² Simma, 'NATO, the UN and the Use of Force: Legal Aspects', 10 *EJIL* (1999) 1.

it lacks UNSC approval. As these are the only two exceptions to the prohibition on the use of force under Article 2(4), the UN Charter does not accommodate a unilateral right of one member state to use force against another, regardless of the laudable aims that such intervention may have. Yoram Dinstein concludes, in a characteristically forceful statement, that “[k]nights of humanity” ... are out of time and out of place in the contemporary world since no “general licence” for the use of force is provided to “vigilantes and opportunists”.¹³ The International Court of Justice (ICJ) accepted this position in its decision in the *Nicaragua v. United States* case when it ruled that the USA could not have invoked Nicaragua’s human rights record to justify American military activities.¹⁴ As Nigel Rodley comments, the decision ‘unmistakably places the Court in the camp of those who claim that the doctrine of humanitarian intervention is without validity.’¹⁵

Attempts have been made to argue for the legality of unilateral humanitarian intervention under the existing UN Charter framework. These attempts mostly follow two general lines of argument: interpretation of the existing Charter text as licensing humanitarian intervention and arguing that while the Charter, in and of itself, makes humanitarian intervention illegal, subsequent developments have modified and amended its norms. Both arguments are unpersuasive. The first argument seeks to show that unilateral humanitarian intervention does not violate Article 2(4)’s prohibition on the use of force since such intervention is neither ‘against territorial integrity or political independence’ nor ‘inconsistent with the purposes of the United Nations’. Yet such ‘text-based revisionism’¹⁶ and ‘Orwellian construction’¹⁷ ignores the drafting history of the UN Charter, which makes it clear that the phrase ‘against territorial integrity or political independence’ and the requirement of consistency with the purposes of the United Nations were both aimed to strengthen and reinforce the general prohibition in Article 2(4) rather than to qualify it. They were added ‘to close all potential loopholes in [the] prohibition on the use of force, rather than to open new ones’.¹⁸

¹³ Dinstein, *supra* note 11, at 75.

¹⁴ *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States)*, ICJ Reports (1986) 14, para. 268.

¹⁵ Rodley, ‘Human Rights and Humanitarian Intervention: The Case Law of the World Court’, 38 *International and Comparative Law Quarterly* (1989) 321, at 332. But see, Kritsiotis, *supra* note 9, at 1013 (interpreting the International Court of Justice’s (ICJ) ruling as merely finding that, in the particular circumstances before the ICJ, there was no right of intervention in support of an opposition within another state because states had not justified their conduct by reference to a new right of intervention and thus there was no possibility of demonstrating the emergence of a new customary norm on the matter).

¹⁶ Slaughter, ‘Security, Solidarity, and Sovereignty: The Grand Themes of UN Reform’, 99 *American Journal of International Law (AJIL)* (2005) 619, at 623.

¹⁷ Schachter, ‘The Legality of Pro-democratic Invasion’, 78 *AJIL* (1984) 646, at 649.

¹⁸ Charney, ‘Anticipatory Humanitarian Intervention in Kosovo’, 32 *Vanderbilt Journal of Transnational Law* (1999) 1231, at 1234. At the San Francisco conference, France had proposed an amendment to the draft Charter of the United Nations (UN Charter) that would have authorized states to intervene in another state, even without authorization of the UNSC, when ‘the clear violation of essential liberties and human rights constitutes a threat capable of compromising peace’. This was rejected.

A different attempt to legalize unilateral humanitarian intervention focuses on the possibility of a change in the UN Charter over the years by way of constitutional interpretative gloss through the practice of states and international organizations and through dynamic treaty interpretation in light of developments in international law (specifically the strengthening of the international human rights regime and the shifting understanding of 'sovereignty' in the context of an interdependent world). These are seen to provide a broader context within which to examine and interpret Article 2(4)'s prohibition on the use of force. However, the relevant practice of states since 1945 is far from conclusive and offers little, if any, support to the existence of a legal doctrine of humanitarian intervention. Neither the 'claiming behaviour' of intervening forces – who, for the most part, opted to base their legal right to use force on the grounds of self-defence or implied authorization by the UNSC rather than on a doctrine of humanitarian intervention¹⁹ – nor the international community's response to attempts to base use of force on a legal doctrine of humanitarian intervention – denunciation or silence in many cases²⁰ and the passage by the United Nations General Assembly (UNGA) of resolutions that outlaw forcible intervention in absolute terms – offer much support to the position that humanitarian intervention enjoys broad acceptability and constitutes a new customary international norm.²¹ Thus, as the British Foreign and Commonwealth Office claimed in 1984 in a lawyerly triple-negative tongue twister, 'the best case that can be made in support of humanitarian intervention is ... that it cannot be said to be unambiguously illegal'.²² Moreover, for changes to be made to the scope and meaning of Article 2(4), a very high threshold must be crossed since the prohibition on the use of force represents a fundamental norm of international law. Whatever one may make of the state of affairs over the past 70 years, that threshold has not been crossed.

¹⁹ Even in the context of the three examples that are most often quoted as instances of permissible humanitarian intervention – India's intervention in East Pakistan in 1971 that led to independence for Bangladesh, Tanzania's 1979 overthrow of Uganda's Idi Amin and Vietnam's invasion of Cambodia and the overthrow of the Khmer Rouge in 1978 – the intervening forces have resorted to claims of self-defence rather than humanitarian intervention. Two notable exceptions to this general trend are, first, the invocation of humanitarian intervention as a legal doctrine by the United Kingdom in the context of protecting the Shi'ites and Kurds in Iraq in the aftermath of the 1991 Gulf War and the creation of no-fly zones in southern and northern Iraq (the USA justified its actions by reference to implied authorization by the UNSC). The United Kingdom argued in that context that 'international intervention without the invitation of the country concerned can be justified in cases of extreme humanitarian need'. Second, the resort to such doctrine by Belgium in its response to the case brought by Yugoslavia to the ICJ against 10 NATO members. However, other NATO members and the organization itself did not attempt to peg their actions on a legal doctrine of humanitarian intervention and declared explicitly that NATO's operation was an exceptional measure in the face of an 'overwhelming humanitarian catastrophe' and, thus, should not be considered as a legal precedent for future action.

²⁰ However, international denunciation of interventions has often not been accompanied by any action taken by the international community against the intervening nations, leading Tom Farer to comment that such examples offer 'large playgrounds in which scholars may frolic'. Tom J. Farer, 'Common Rights of Mankind in Gentili, Grotius and Suarez', 85 *AJIL* (1991) 110, at 122.

²¹ T. M. Franck, *Recourse to Force: State Action Against Threats and Armed Attacks* (2002), at 186.

²² Foreign Policy Paper No. 148, excerpted in 57 *British Yearbook of International Law* (1986) 614.

Accommodating a humanitarian intervention doctrine within the framework of the UN Charter would transform international law from a system of restraints on transboundary projections of military power into a system of affirmative approval for achieving political objectives through forcible means.²³ The inclusion of a humanitarian intervention exception to the general prohibition on the use of force would provide states with more opportunities to resort to forceful measures and diminish the disincentives to use of force while also undermining the international system by challenging its source of authority – the state – and by putting additional stress on its already fragile, yet foundational, precept.²⁴ Since violations of human rights are common around the world, the introduction of a legally recognized humanitarian intervention exception would undermine the viability of a general prohibition on the use of force and enable states to claim humanitarian intervention as pretext to deviate from the general rule against use of force. It would undermine the perceived legitimacy of the basic rule by both exacerbating power differentials among nations, giving powerful states an ‘almost unlimited right to overthrow governments alleged to be unresponsive to the popular will or the goal of self-determination’,²⁵ and by reason of the inevitable selectivity in application of such an exception.²⁶ As Thomas Franck notes, ‘[t]o admit exceptions may undermine law’s claim to legitimacy, which depends at least in part on its consistent application’.²⁷ Yet, at the same time, ‘the law’s legitimacy is surely also undermined if, by its slavish implementation, it produces terrible consequences. The paradox arises from the seemingly irreconcilable choice, in such hard cases, between consistency and justice.’²⁸

The tension between the strictures of positive international law and the need to address urgent humanitarian appeals and prevent or stop mass atrocities has led some proponents of humanitarian intervention to couch their arguments in moral terms,

²³ L. F. Damrosch, ‘Commentary on Collective Military Intervention to Enforce Human Rights’, in L. F. Damrosch and D. J. Scheffer (eds), *Law and Force in the New International Order* (1991) 220.

²⁴ T. Nardin, ‘Justice and Coercion’, in A. J. Bellamy (ed.), *International Society and Its Critics* (2005) 247, at 260 (legalizing humanitarian intervention would ‘further rend the already worn fabric of international order’).

²⁵ Schachter, *supra* note 17, at 649.

²⁶ Kritsiotis, *supra* note 9, at 1026–1034. In its traditional format, the argument from selectivity focuses on the willingness of states to intervene in order to avert some humanitarian catastrophes but not others. A somewhat related argument challenges the unreliability of humanitarian intervention. But see *ibid.*, at 1027 (arguing that if we regard humanitarian intervention as a matter of a right to intervene then such right may be exercised selectively). See also M. Ignatieff, ‘State Failure and Nation-building’, in J.L. Holzgrefe and R. O. Keohane (eds), *Humanitarian Intervention: Ethical, Legal, and Political Dilemmas* (2003) 299, at 319: ‘[T]he fact that we cannot intervene everywhere is not a justification for not intervening where we can’; President William J. Clinton, Address to the Nation on Implementation of the Peace Agreement in Bosnia-Herzegovina (27 November 1995), available at www.presidency.ucsb.edu/ws/?pid=50808 (last visited 28 September 2015): ‘We cannot stop all war for all time. But we can stop some wars. We cannot save all women and all children, but we can save many of them. We can’t do everything, but we must do what we can’; Franck, *supra* note 21, at 189–190.

²⁷ Franck, *supra* note 21, at 175.

²⁸ *Ibid.*

seeking to bypass 'capricious legalistic logomachy'²⁹ by direct appeals to moral legitimacy. A recurrent theme in this context challenges traditional notions of state sovereignty and replaces them with a conception of sovereignty as a contingent value whose observance depends on the actions of the state that invokes it. Justification for sovereignty does not rest on its own presumptive legitimacy but, rather, derives from the individuals whose rights are to be protected from foreign oppression and from those individuals' right to a safe framework in which they can enforce their autonomy and pursue their interests.³⁰ Hence, a state that is oppressive and violates the autonomy of its subjects forfeits its moral claim to full sovereignty and with it the protection under the principle of non-intervention.

Thus, for example, Michael Walzer argues that any state that can stop crimes that 'shock the moral conscience of mankind' should stop them or at least has the right to do so.³¹ The rights of states derive from the rights of individuals to 'the political association they have made', creating a 'historic community' of 'common life' developed by cooperation and 'shared experiences' over a long period of time. As it is difficult for outsiders to pass judgment as to the legitimacy of domestic institutions, there exists a presumption against external military intervention in the domestic affairs of states. However, this presumption is rebuttable and when massacre, enslavement or large-scale expulsion of peoples occurs, there is little point in prohibiting intervention out of respect to the community when that community is in the process of being annihilated. In those circumstances, moral 'rules of disregard' justify ignoring the legal principle.³²

Others have attempted to close the gap between legality and legitimacy. The notion of 'responsibility to protect', for example, adapts the principle of complementarity to deal with human rights violations by proposing a two-tier system in which national governments have the primary responsibility to protect their citizens and their rights, but if deemed 'unable or unwilling' to fulfil their obligations, the international community, acting through the UNSC, may assume a complementary responsibility to rectify the situation. Other proposals include the creation of a treaty-based, rule-governed coalition of democratic, human-rights respecting states, which would offer a multilateral bypass to the UNSC with respect to giving approval and authorization to humanitarian interventions³³ and developing a legal derogations regime that would allow states to engage not only legitimately but also legally in humanitarian intervention.

²⁹ N. K. Tsagourias, *Jurisprudence of International Law: The Humanitarian Dimension* (2000), at 64.

³⁰ See, e.g., Smith, 'Humanitarian Intervention: An Overview of the Ethical Issues', 12 *Ethics and International Affairs* (1998) 63, at 75–79.

³¹ Walzer limits the circumstances in which humanitarian intervention may be pursued to massacre, enslavement or large-scale expulsion of peoples. Occasions have to be extreme if they are to justify forceful intervention across international boundaries. Not any violation of human rights justifies, excuses or permits such intervention. As Walzer puts it, there exists 'a radical break, a chasm, with nastiness on one side and genocide on the other.' M. Walzer, 'The Argument About Humanitarian Intervention', in G. Meggle (ed.), *Ethics of Humanitarian Interventions* (2004) 21, at 22. Walzer's is a 'stark and minimalist version of human rights' in this context. *Ibid.*, at 23.

³² Walzer, *supra* note 2, at 86.

³³ A. Buchanan, *Human Rights, Legitimacy and the Use of Force* (2009), at 298.

ELM offers yet another, and I would argue more attractive, alternative for states to undertake unilateral humanitarian intervention while, at the same time, maintaining the strong principle of prohibiting the use of force. This model involves the possibility that when the circumstances ‘on the ground’ are truly exceptional and the UNSC is unwilling or unable to act, and no other alternatives for action exist, unilateral action could be undertaken, violating international law and acknowledging such a violation, rather than attempting Orwellian legal interpretations, reasoning and justifications for action. It is important to note that such exceptional extra-legality is meant to serve merely as a supplement to the collective security system and to fill the gaps left by the UNSC’s inability or unwillingness to act in truly exceptional circumstances.³⁴

How can this position – openly invoking the possibility of the violation of the law – be defended? Does it not seek to plug the humanitarian intervention loophole only by undermining the entire international legal rule of law? In fact, I believe that ELM offers the best promise of both maintaining existing rules while also bridging the gap between positive law and moral dictates in the context of humanitarian intervention. As Thomas Franck notes, when arguing for what he calls the ‘mitigation approach’ (which is a specific manifestation of ELM), ‘[t]he essence of mitigation is that the law recognizes the continuing force of the rule in general, while also accepting that, in extraordinary circumstances, condoning a carefully calibrated and justifiable violation may do more to rescue the law’s legitimacy than would its rigorous implementation’.³⁵

It is of great importance that unilateral humanitarian intervention remains illegal and is openly acknowledged as such. It upholds the principle of non-intervention and the prohibition on the use of force without modifying them so as to accommodate for those rare (yet real) cases in which intervention may be morally needed and acceptable. Taking to heart the admonition that bad cases make bad laws, this position eschews tinkering with the most fundamental norm of international law in order to allow for exceptions in extreme cases. At the same time, its exceptional character, coupled with the absence of arguments that attempt to ‘legalize’ the illegal, support the claim that such actions do not create legal precedents nor can they be counted as state practice for the purposes of changing customary international law or modifying existing norms of international law. As Oscar Schachter puts it, ‘[i]t would be better to acquiesce in a violation that is considered necessary and desirable in the particular circumstances than to adopt a principle that would open a wide gap in the barrier against the unilateral use of force’.³⁶

³⁴ See also M. Byers and S. Chesterman, ‘Changing the Rules About Rules? Unilateral Humanitarian Intervention and the Future of International Law’, in J.L. Holzgrefe and R.O. Keohane (eds), *Humanitarian Intervention: Ethical, Legal, and Political Dilemmas* (2003) 177, at 188 (suggesting that ‘the mitigation approach’ (a sub-category of ELM) is ‘not intended to provide an alternative system for regulating the use of force in international affairs. It simply recognizes that circumstances will invariably (if unusually) arise when the existing rules cannot be made to work. In such circumstances, it seems unwise to change longstanding and largely effective rules to accommodate the exception, rather than simply letting the exception prove the rule’).

³⁵ Franck, *supra* note 21, at 185.

³⁶ O. Schachter, *International Law in Theory and Practice* (1991), at 126. See also Henkin, ‘NATO’s Kosovo Intervention: Kosovo and the Law of “Humanitarian Intervention”’ 93 *AJIL* (1999) 824; Johnstone, ‘The Plea of “Necessity” in International Legal Discourse: Humanitarian Intervention and Counter-Terrorism’, 43 *Columbia Journal of Transnational Law* (2005) 337, 357–366.

The manifest illegality of the action would shift much of the debate to political and moral tracks. Significantly, states that engage in unilateral intervention would need to give reasons, *ex post*, to publicly justify or excuse their actions.³⁷ This need to 'give reasons' publicly and acknowledge openly the extra-legal nature of the actions taken will contribute to reasoned discourse and dialogue not only between the government and its own domestic constituency but also between the government and other governments and between the government and non-governmental or international organizations. Such *ex post* exercise has international implications, both political and legal. The need to give reasons *ex post* – that is, the need to publicly justify or excuse (not merely explain) one's actions after the fact – emphasizes accountability. The fact that unilateral humanitarian intervention remains extra-legal preserves the need not only to give reasons for such intervention but also to give reasons that go beyond pure pragmatic excuses or justifications for it.

National governments engaging in unilateral humanitarian intervention may hope that even 'in the absence of [a] prior approval, a State or group of States using force to put an end to atrocities when the necessity is evident and the humanitarian intention is clear is likely to have its action pardoned'.³⁸ Yet such 'pardon' is not guaranteed, and states that engage in unilateral humanitarian intervention will operate under conditions of uncertainty as to how their actions will be assessed after the fact.³⁹ There is a multiplicity of forums that can fulfil what Franck calls the '[j]urying process' and in which such reasons will be required and assessments of actions meted.⁴⁰ These may be of a political, as well as a judicial, flavour. Indeed, one can expect more of the former than the latter. Thus, one can count here the UNSC and the UNGA, judicial and quasi-judicial international and regional bodies such as the ICJ and the International Criminal Court as well as less formal (but perhaps not less significant) venues such as the court of public opinion – both domestically and in and by other actors on the international scene.

The extremity of the circumstances may act as a mitigating factor when assessing that a state used force illegally yet legitimately. The basic prohibition on the use of force continues to apply to other situations (it is neither terminated nor overridden in the concrete case at hand), and rule departures continue to constitute violations of the rule. Indeed, as the ICJ suggested in the *Nicaragua* case, when a state admits that it is violating international law, the overall effect is as likely to strengthen the rule as to weaken it. However, it remains a separate (legal as well as political) question whether, and to what extent, the acting state will be penalized for its violation. Thus, it may be that a particular intervention is declared to be illegal under international law, while the violating state does not bear the full brunt for its violation of the law.

³⁷ On the critical role that 'giving reasons' play, see Gross, *supra* note 3, at 1529–1530. See also Byers and Chesterman, *supra* note 34, at 188; Schauer, 'Giving Reasons', 47 *Stanford Law Review* (1995) 633, at 656–657; Shapiro, 'In Defense of Judicial Candor', 100 *Harvard Law Review* (1987) 731, at 737.

³⁸ Schachter, *supra* note 36, at 126.

³⁹ On the role that uncertainty plays in extra-legal measures, see O. Gross, 'Stability and Flexibility: A Dicey Business', in V. Ramraj, M. Hor, and K. Roach (eds), *Global Anti-Terrorism Law and Policy* (2005) 90.

⁴⁰ Franck, *supra* note 21, at 187.

Such a mechanism allows us to construe the fundamental prohibition on the use of force in broad terms with the understanding that in truly exceptional circumstances some sort of an act of civil disobedience by states may be resorted to. If one considers that the alternative is an unappealing narrowing of the scope of Article 2(4), either by expanding the scope of the existing exceptions to it or by ‘finding’ that a growing set of actions lies outside its scope of coverage, applying ELM to the dilemma at hand makes a lot of sense.