

YES, NO, MAYBE: WHY NO CLEAR “RIGHT” OF THE ULTRA-VULNERABLE TO PROTECTION VIA HUMANITARIAN INTERVENTION?

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ABSTRACT

Whether or not unilateral humanitarian intervention should be considered “legal” in public international law remains unresolved, and is apparently unresolvable. (Unilateral humanitarian intervention here refers to international military intervention by one or more countries in the territory of another, in the absence of clear Security Council mandate, and designed to protect a population under immediate threat of violence.) This article argues that, when seen from the point of view of the world’s most vulnerable populations, the humanitarian intervention question is in fact the most significant question in contemporary international law. Its resolution is also key to the consistent and coherent functioning of the international legal regime. Especially when comparing recent events in Libya to other long running—but neglected—conflicts, international law seems to have contented itself with an ad hoc, even arbitrary, approach to the question of when military intervention on behalf of a besieged population is permitted. By contrast, a disproportionate amount of intellectual energy is directed at post-conflict criminal tribunals, which are far less important to the

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international rule of law than a strong, positive doctrine of humanitarian intervention would be.

The article reviews the history of U.N. Charter “dysfunction,” in that the international military force intended to meet threats to international peace and security was never created, and the problem of gridlock on the Security Council—although certainly less acute now than during the Cold War—was never fully resolved. The result, as the article details, has been a string of tragedies, in which vulnerable populations are often left to fend for themselves in the face of brutal violence. The article pays particular attention to those situations, as in Uganda, where populations have been terrorized by small, low tech military bands, whose violent activities would have been quite easy to put a stop to, but where the international community has felt no compulsion to step in. Such conflicts often run for many years.

The article discusses in detail the evolution of international thought on the matter of unilateral humanitarian intervention. In particular, it notes recent attempts to reframe the concept as an international “responsibility to protect.” The argument is made that this change is attractive in the sense of linking military intervention with the idea of “rights” belonging to those under threat; however, it might prove less effective than the more robust notion of a unilateral right of nations to intervene on an as-needed basis.

The article makes the further argument that it is a grave mistake to treat the issue of unilateral humanitarian intervention as just another thorny issue in international law; whereas in fact a viable legal system simply cannot allow genocidal events to run their course. The article also reviews the old arguments as to whether international law is in fact “law” as we understand that term, and suggests that a negative response to that question might refocus the scholarly mind on revamping the Charter system to ensure clear protective responses to genocidal threats.

I. HUMANITARIAN INTERVENTION: WHY IS THIS KEY ISSUE LEFT OPEN-ENDED?

The question of whether or not international law “allows” for humanitarian intervention has been left up in the air for decades.¹

1. Humanitarian intervention here refers to the armed intervention by one country or a group of countries within the territory of another. Controversy arises over the legality of doing so in the absence of explicit Security Council authorization, for the purpose of protecting people who are in imminent danger of being harmed, whether by their own government or some other force. The operative elements here are; (1) that the territorial integrity of a state is being violated, and (2) that the international community has not given its specific approval for the action. *See, e.g.,* Jonathan E. Davis, *From Ideology to Pragmatism: China’s Position on Humanitarian Intervention in the Post-Cold War Era*, 44 VAND. J. TRANSNAT’L L. 217, 221 (2011) ([H]umanitarian intervention is defined as the use of force by a state (or group of states) in another sovereign state’s territory to protect the host state’s citizens from gross human rights abuses, mass atrocities, crimes against humanity, or

International jurists and commentators appear to be relatively content to let this matter remain unresolved despite its central significance for the international legal system.² In fact, whether or not humanitarian intervention is to be prohibited, tolerated, or even mandated, is a far more important question than others that seem to gain more intellectual attention from international legal scholars.³ The answer to this “humanitarian intervention” conundrum determines whether extremely vulnerable people in situations of violent conflict have a recognized right to be protected against attack—surely a more pressing question (as perceived by those who suffer) than whether a small handful of individual war criminals will face international prosecution, for instance.⁴ And yet, the question of the legality of humanitarian intervention is generally treated as a thorny if obscure dilemma, about which opinions simply differ. There is little apparent urgency with respect to the need to solve this matter once and for all in the interests of the most vulnerable and of the international legal system itself.

Where many commentators seem to get it wrong is in treating humanitarian intervention and its legality as just one of many difficult questions in international law, whereas it is *the* question from the point of view of those most directly affected by failures in the international rule of law. It is well established that the system envisioned by the United Nations

genocide. Thus defined, humanitarian intervention is in direct tension with the norms of state sovereignty and nonintervention that arose out of the settlement at Westphalia in 1648.).

2. See Ian Hurd, *Is Humanitarian Intervention Legal? The Rule of Law in an Incoherent World*, 25 ETHICS & INT’L AFF. 293, 293 (2011) (“The debate suggests that humanitarian intervention is either legal or illegal depending on one’s understanding of how international law is constructed, changed and represented. Since these questions cannot be answered definitively, the uncertainty remains fundamental, and the legality of humanitarian intervention is essentially indeterminate.”). See also Davis, *supra* note 1, at 221 (“The legal status of humanitarian intervention remains unsettled under international law.”).

3. This article will argue that the question of the legality of humanitarian intervention in the absence of U.N. authorization is the most fundamental question of international law, of far more significance to real people around the world than matters that receive far more attention by international lawyers, as humanitarian intervention involves effective action on the prevention side. See JAMES PATTISON, HUMANITARIAN INTERVENTION AND THE RESPONSIBILITY TO PROTECT: WHO SHOULD INTERVENE? 2 (2010) (regarding a trend in the direction of recognizing the legality of humanitarian intervention and making the argument that despite the lack of legal clarity on the issue, many now believe that intervention to prevent mass killing may be justified.) (“Indeed, it is much harder to find someone who completely supports non-intervention nowadays. The lack of action in Rwanda . . . and the subsequent genocide has had a massive impact on the theory and practice of intervention. Even those who are deeply suspicious of armed intervention and deeply skeptical about its prospects of success may still admit that it might, in theory, be justified when a humanitarian crisis is sufficiently serious.”).

4. See, e.g., Margaret M. DeGuzman, *Choosing to Prosecute: Expressive Selection at the International Criminal Court*, MICH. J. INT’L L. (forthcoming 2012) (pointing out that “[t]he International Criminal Court . . . has the mandate to ‘end impunity’ for serious international crimes around the world but the budget to prosecute only a few cases per year. This high degree of selectivity represents one of the greatest threats to the Court’s legitimacy.”) (internal quotations added).

(U.N.) Charter—with the Security Council identifying threats to international peace and security, and when needed calling forth an international military response—never functioned as it should have.⁵ Careful reading of the U.N. Charter makes plain that this system of surveillance and ready response by the international community was to be at the heart of a global system that aimed to stamp out conflict before it had a chance to spread.⁶ The profound and ongoing importance of this “constitutional” failure at the heart of the international regime has not received sufficiently coherent and sustained attention.⁷ Few seem to state clearly that, in the face of this functional defect, either the Charter should be revised (to clearly allow for and even demand humanitarian intervention

5. See U.N. Charter art. 42 (enabling the Security Council to “take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockage, and other operations by air, sea or land forces . . . of the United Nations”). See U.N. Charter art. 43, para. 1 (calling on “All Members of the United Nations” to make armed forces and other services available to the Security Council “for purposes of maintenance of international peace and security”). *But see* W. Michael Reisman, *Criteria for the Lawful Use of Force in International Law*, 10 YALE J. INT’L L. 279, 279-80 (1985) for a formulation of the issue that “special agreements” necessary for such action were never carried out (“[T]he security system of the United Nations was premised on a consensus between the permanent members of the Security Council. Lamentably, that consensus dissolved early in the history of the organization The international political system has largely accommodated itself to the indispensability of coercion in a legal system, on the one hand, and the deterioration of the Charter system, on the other . . .”).

6. See Jeffrey L. Dunoff, *International Law in Perplexing Times*, 25 MD. J. INT’L L. 11, 15 (2010) (including in his symposium remarks that “the aftermath of World War II saw an intensification of many of the doctrinal and institutional trends that began during the inter-war years. In the United Nations (U.N.) Charter, states agreed to ban the use of force against the territorial integrity or political independence of states, with limited exceptions, including when a state is responding in self-defense to an armed attack and when the use of force is authorized by the U.N. itself. Hence the League of Nations’ failures prompted states to modify, rather than reject, the project to build an international collective security system”).

7. See, e.g., Saira Mohamed, *Restructuring the Debate on Unauthorized Humanitarian Intervention*, 88 N.C. L. REV. 1275, 1286-87 (2010) (stating that the three principal arguments in favor of humanitarian intervention are somehow made outside international “law,” namely: (1) that the Charter’s Article 2(4) prohibition on the use of force is only violated when the territorial integrity or political independence of the state are implicated by the use of force; (2) that when the Security Council fails to realize one of its principal purposes, such as protecting human rights, then unauthorized use of force by a U.N. Member does not violate the terms of the U.N. Charter; and (3) that customary international law provides a right of unauthorized humanitarian intervention). Mohamed advocates holding to a firmer line with respect to what he/she sees as the clear legal rule against such intervention. However, the real problem is that without the U.N. providing the kind of hard and collective military option to protect people suffering mass human rights abuses—as was clearly allowed for in the Charter—then it is difficult to understand the “law” as mandating that individual states refrain from taking military steps in defense of suffering people. Under these circumstances, the basic structure of the “law” has been fundamentally compromised. *Id.*

under certain circumstances), and/or that the formation of an active global “police force” should be revived in the post-Cold War age.⁸

The U.N. Charter is the most fundamental document of postwar international law, amounting almost to a global Constitution.⁹ To a degree that often seems insufficiently appreciated, its main goal is the suppression of armed conflict, if necessary, through reliance on targeted multilateral force.¹⁰ The full operation of the Charter was obviously impaired by the ideological gridlock of the Cold War, during which the permanent members of the Security Council could not agree on issues relating to the coordinated use of force.¹¹ It should be noted that these ideological disagreements have persisted to some extent into the post-Cold War era.¹² It may be that most commentators and policy makers have simply accepted this contradictory and unsatisfactory state of affairs in the face of political reality and with the resigned awareness that fundamental revision is just not politically feasible. The Charter as written is unambiguous, though: the international system eschewed unilateral acts of violence by particular states against other states,

8. See A NEW CHARTER FOR A WORLDWIDE ORGANISATION? 117 (Maurice Bertrand & Daniel Warner eds., 1996) (“That volume, a provision-by-provision revision of the UN Charter, calls for the establishment of what has been called a limited world government; but since this limited world government implements complete and general disarmament, possesses a standing UN police force, compels compulsory jurisdiction before courts and establishes a world development authority and other centralized organs, that project is a radical revision of the UN.”).

9. See, e.g., Blaine Sloan, *The United Nations Charter as a Constitution*, 1 PACE Y.B. INT’L L. 61 (1989) (making the point that the U.N. Charter is a treaty, but also a constitution for the international community).

10. See Grant L. Willis, *Security Council Targeted Sanctions, Due Process and the 1267 Ombudsperson*, 42 GEO. J. INT’L L. 673, 676-77 (2011) (“In 1945 the United Nations was established as an international organization whose *raison d’être* was the maintenance of international peace and security. The U.N. system was formulated to deal with states, which are the principal subjects of international law, and the United Nations Security Council (UNSC) was ascribed the power to take actions that are binding on states in response to threats to international peace and security. Under Chapter VII of the United Nations Charter, the Security Council may take enforcement measures to maintain international peace and security. Such measures range from economic and/or other sanctions not involving the use of armed force to international military action.”). See also Mohamed, *supra* note 7, at 1282 (“[A]lthough the promotion of human rights constituted a significant focus of the United Nations, the aim of the creators of the new organization was, above all, the suppression of armed conflict. A right of humanitarian intervention, therefore, did not figure into the UN Charter.”).

11. See Reisman, *supra* note 5, at 280.

12. See, e.g., Randall Peerenboom, *Human Rights and Rule of Law: What’s the Relationship?*, 36 GEO. J. INT’L L. 809, 870 (2005) (“The U.N. regime was largely an attempt to bring war and the use of force within an international legal framework. But it has proven incapable of preventing wars: the twentieth century was one of the bloodiest, and the twenty-first is not shaping up to be much better. The Cold War undermined whatever hope there might have been that the Security Council would be able to play a moderating role during the early decades of the U.N. The NATO bombings in Kosovo and the American invasion of Iraq without Security Council approval have demonstrated further the limits of international law in preventing war in the post-Cold War era.”).

except in clear self-defense, while accepting that coordinated use of military force might be necessary to achieve the overarching goals of international peace and security.¹³ Viewed systemically, however, it is plain that the global regime has failed to adopt a predictable set of humanitarian responses to outbreaks of mass violence (perpetrated by state and non-state actors) that, of course, continue to occur.¹⁴

A central myth of international legal analysis is that we are in the age of “international institutional building,” and that international law is gradually becoming more “enforceable.”¹⁵ As evidence of this new enforceability, the emphasis on post-conflict criminal prosecutions takes up an inordinate amount of intellectual energy within the discipline of international law.¹⁶ On the one hand, such an ex-post prosecution focus is disproportionate in itself.¹⁷ On the other hand, regarding the lack of clarity around the doctrine of humanitarian intervention, there is little more than an intellectually disorganized mission creep approach, in which no one knows exactly whether armed intervention on behalf of endangered civilians is to be applauded or denounced.¹⁸

13. See, e.g., James A. Green, *Questioning the Peremptory Status of the Prohibition of the Use of Force*, 32 MICH. J. INT'L L. 215, 215-16 (2011) (conceding that “the unilateral use of force is a fundamental aspect of the United Nations (U.N.) era system for governing the relations between states” and questioning whether this prohibition should be considered as having *jus cogens* status).

14. See Hurd, *supra* note 2, at 297 (“Disagreements about deep points of international law, including how law changes in response to practice, how treaties are interpreted, and the meaning of compliance and noncompliance in particular cases, overlay a remarkable consensus that humanitarian intervention is an important tool for states and international organizations *whether it is legal or not*. The disagreements over how international law works, alongside a consensus in favor of the practice regardless of its legality, suggests that humanitarian intervention is likely to exacerbate the ambiguities inherent in the idea of the rule of law for sovereign states.”) (emphasis in original).

15. See, e.g., Naomi Roht-Arriaza, *Making the State Do Justice: Transnational Prosecutions and International Support for Criminal Investigations in Post-Armed Conflict Guatemala*, 9 CHI. J. INT'L L. 79, 81 (2008) (“Much of the international institution-building over the last two decades in the field of human rights and international humanitarian law has been aimed at overcoming the impunity of powerful, untouchable actors. An emerging international norm holds that when large-scale humanitarian law violations have been committed, action must be taken to deal with the past, including measures to allow victims to find out what happened to their loved ones, to sanction those responsible, and to provide redress.”).

16. See, e.g., Mark S. Ellis, *Combating Impunity and Enforcing Accountability as a Way to Promote Peace and Stability—The Role of International War Crimes Tribunals*, 2 J. NAT'L SECURITY L. & POL'Y 111 (2006).

17. See, e.g., Gerry J. Simpson, *Didactic and Dissident Histories in War Crimes Trials*, 60 ALB. L. REV. 801 (1997).

18. See Robert P. Chatham, *Defense of Nationals Abroad: the Legitimacy of Russia's Invasion of Georgia*, 23 FLA. J. INT'L L. 75, 92 (2011) (describing the legality of humanitarian intervention as “tenuous at best”). Compare Robert Marquand, *How Libya's Qaddafi Brought Humanitarian Intervention Back in Vogue*, CHRISTIAN SCI. MONITOR, (March 28, 2011), <http://www.csmonitor.com/World/Middle-East/2011/0328/How-Libya-s->

A vexing result of this situation is that some of the most egregious violations of human rights are left unaddressed—even those that could be rectified with relatively little investment of international time and attention—while others are responded to with eagerness.¹⁹ Recent events in Libya fall into the latter category.²⁰ One could argue that what distinguishes Libya from, say, Uganda or southern Sudan is the long-standing Western desire to drive Muammar Qaddafi from power. However, such opportunistic considerations seem an unattractive basis on which to advance international law and policy. International law purports to be “law,” in the sense of applying principles derived from the realm of rationality, even handedness, and fairness. Leaving the basic matter of humanitarian protection unresolved is an invitation to ad hoc solutions that inevitably contribute to international insecurity and unpredictability.

A. What the U.N. Charter Actually Said

Despite some developmental inertia, international law can claim its constitutional milestones. The creation of the United Nations in 1945 was meant to make serious and unambiguous inroads into the capacity of sovereign states to engage in warfare as a means of resolving conflict.²¹ No one reading the U.N. Charter could mistake the fact that the U.N. had, as its primary mission, to severely restrict recourse to the unilateral use of force to

Qaddafi-brought-humanitarian-intervention-back-in-vogue (“[That the international community’s decision to intervene in Libya] has returned the idea of humanitarian intervention to the world stage. It’s a notion that has lain dormant—and was discredited in many corners—after the Iraq war, but has now returned, championed by many of the same countries that were the greatest opponents of invading Baghdad.”), with Sarah Joseph, *Humanitarian Intervention in Libya*, CASTAN CTR. FOR HUM. RTS. L. BLOG, (Mar. 18, 2011, 3:54 PM), <http://castancentre.wordpress.com/2011/03/18/humanitarian-intervention-in-libya> (discussing the pros and cons of international intervention in Libya).

19. See, e.g., Jeb Sharp, *Why Libya is Different from Darfur*, PRI’S THE WORLD (Apr. 5, 2011), <http://www.theworld.org/2011/04/libya-intervention-darfur-sudan>. See also Rebecca Kaplan, *Between Sudan and Libya, Critics See U.S. Inconsistency*, NAT’L J. (Mar. 18, 2011), <http://www.nationaljournal.com/whitehouse/between-sudan-and-libya-critics-see-u-s-inconsistency-20110314>.

20. See Simon Chesterman, *‘Leading from Behind’: The Responsibility to Protect, the Obama Doctrine, and Humanitarian Intervention After Libya* (N.Y.U., Pub. L. & Legal Theory Res. Paper Series, Working Paper No. 11-35, 2011) (describing the role of advocates for intervention in Libya within the Obama administration).

21. See THOMAS M. FRANCK, *RECOURSE TO FORCE: STATE ACTION AGAINST THREATS AND ARMED ATTACKS 2* (2002) (“On its face, the UN Charter, ratified by virtually every nation, is quite clear-eyed about its intent: to initiate a new global era in which war is forbidden as an instrument of state policy, but *collective security* becomes the norm.”) (emphasis in original); ANTHONY CLARK AREND & ROBERT J. BECK, *INTERNATIONAL LAW AND THE USE OF FORCE: BEYOND THE U.N. CHARTER PARADIGM 29* (1993) (stating most important task of U.N. Charter as “maintenance of international peace and security”).

settle international disputes.²² The Charter set out a system of checks on the use of military power by particular states, in favor of a coordinated, international approach to the use of force where deemed necessary in order to restore peace and security.²³ The determination of such a threat was to come from the Security Council, acting in its core capacity as keeper of that international peace and security.²⁴

The notable exception to this restriction on the use of force was in the context of self-defense, at least against an immediate and demonstrable threat to the state's integrity in the form of an armed attack.²⁵ As is well known, the integrated system envisaged by the U.N. Charter—meant to include a kind of international enforcement brigade at the beck and call of the Security Council—was never even remotely implemented.²⁶ The idea of an international military force—a kind of “international police”—to respond to threats to international peace and security was never realized, and has scarcely been treated as a matter high on the international agenda.²⁷ At the same time, individual states have in reality continued to engage in armed conflict—based on their own determinations of national and international need—although legal scholars stick to their formalistic position that international law does not “allow” this except when that state has experienced armed attack, or when explicitly and unambiguously authorized

22. See U.N. Charter art. 2, para. 4 (“All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state . . .”). See also FRANCK, *supra* note 21, at 1-5 (characterizing Charter's prohibition on unilateral recourse to force as “absolute”).

23. See U.N. Charter arts. 39, 42, 43 (authorizing use of force upon determination of Security Council that there exists a threat to international peace or security, or in response to act of aggression); FRANCK, *supra* note 21, at 2 (introducing international norm of collective security).

24. See U.N. Charter art. 39 (authorizing Security Council to make recommendations or decide measures to be taken to “restore international peace and security”).

25. See U.N. Charter art. 51 (authorizing use of individual force by individual U.N. members if an armed attack occurs against them); AREND & BECK, *supra* note 21, at 31 (detailing U.N. Charter exceptions to art. 2, para. 4).

26. See U.N. Charter arts. 42, 43 (obligating U.N. members to make available to Security Council armed forces and facilities for authorized military actions); AREND & BECK, *supra* note 21, at 52-53 (distinguishing between pure collective security and ‘limited’ collective security arrangement implemented by United Nations); FRANCK, *supra* note 21, at 2 (envisioning an international military police force). In short, the attempt of the United Nations to establish a meaningful arrangement for collective security has been seriously undermined by: (1) the Security Council veto power wielded by its permanent members and (2) the inability of the U.N. to establish formal mechanisms for collective military action, as contemplated under Article 43 of the Charter. AREND & BECK, *supra* note 21, at 57-58.

27. See AREND & BECK, *supra* note 21, at 50-51 (describing attempts to recruit an international police force). Article 43 military agreements for the contribution of member state forces to Security Council missions broke down with the onset of (and primarily due to) the Cold War. *Id.*

by the Security Council.²⁸ It is glaringly obvious that there is a basic gap in the U.N. system where a ready, willing, and able international military entity should exist. This fundamental defect tends irresistibly in the direction of a reconceived right of states to engage in military action outside the parameters envisaged in the terms of the Charter, in certain defined circumstances.²⁹

The two choices for reform seem to be either that states be given explicit latitude to go ahead and use force in appropriate circumstances relating to humanitarian need, or that the Charter-based vision of a global police force should be revived.³⁰ If neither of these options can be exercised due to political obstacles, then it should be admitted that the post World War II international law experiment has been to some extent a failure, even if one can point to positive elements within the system of international relations and diplomacy.

In light of the Security Council's historical and ongoing gridlock, it has been proposed by some commentators that international law should be interpreted to allow individual nations or groups of nations to take action to prevent mass violations of human rights of the type that shock the global conscience and threaten international peace, given the existence of particular circumstances.³¹ However, the notion that the international

28. *C.f.* AREND & BECK, *supra* note 21, at 76-79, 94-102, 114-28 (analyzing use of military force by sovereign states under various contexts including anticipatory self-defense, protection of nationals and humanitarian intervention). *See also* SIMON CHESTERMAN, JUST WAR OR JUST PEACE? 87, 108-11 (2001) (rejecting any possible expansion of Article 2.4 beyond self-defense and Security Council authorization and agreeing with Franck that although the international community may in some circumstances condone derogations from the customary uses of force allowed under the U.N. Charter, this is insufficient to provide those derogations any legal force).

29. *See* Linda A. Malone, *The Responsibility to Protect Haiti*, 14 AM. SOC'Y INT'L L. (Mar. 10, 2010), <http://www.asil.org/insights100310.cfm> (questioning traditional rules of state consent and Security Council authorization in face of environmental and humanitarian disasters, as well as widespread public health dilemmas); Gareth Evans, *From Humanitarian Intervention to the Responsibility to Protect*, 24 WIS. INT'L L.J. 703, 707 (2006) (identifying strain that intrastate conflict, civil war, terrorism and cases of massive internal violence have had on U.N. security structure).

30. *C.f.* NICHOLAS J. WHEELER, SAVING STRANGERS: HUMANITARIAN INTERVENTION IN INTERNATIONAL SOCIETY 16 (2000) (recognizing a new norm of Security Council-authorized intervention). *Compare* Henry Shue, *Limiting Sovereignty*, in HUMANITARIAN INTERVENTION AND INTERNATIONAL RELATIONS 11, 21 (Jennifer Welsh ed., 2004) (theorizing that basic negative rights such as right not to be killed place a duty upon states to protect), *with* Chesterman, *supra* note 20, at 2 (framing NATO intervention in Kosovo as a violation of international law and a blow to sound international relations policy found in U.N. Charter).

31. *See, e.g.*, Nicholas J. Wheeler, *The Humanitarian Responsibilities of Sovereignty: Explaining the Development of a New Norm of Military Intervention for Humanitarian Purposes in International Society*, in HUMANITARIAN INTERVENTION AND INTERNATIONAL RELATIONS, *supra* note 29, at 29, 48-51 (disputing not the existence of intervention norm, but only its scope); *see also* ERIC HEINZE, WAGING HUMANITARIAN WAR 134-38 (2004) (describing a consequentialist, morally permissible strand of intervention); *see*

community should openly embrace “humanitarian intervention” of this kind has also been strongly resisted, at least where the action has not received the explicit blessing of the Security Council.³² It is unsurprising that many have advocated for a doctrine of humanitarian intervention to act as a legally recognized exception to the (formal if ineffective) doctrine that states should renounce reliance on unilateral force in international relations,³³ considering that state and non-state actors are precluded under international law from violating the basic human rights of civilians. Nonetheless, opposition to *formalizing* a doctrine of humanitarian intervention on behalf of ordinary people has remained surprisingly strong.³⁴ In light of the fact that international custom evolves only slowly, and that an international treaty (or Charter revision) seeking to define situations triggering an armed international response remains highly unlikely, lack of resolution on this

also Mehrdad Payandeh, Note, *With Great Power Comes Great Responsibility? The Concept of the Responsibility to Protect Within the Process of International Lawmaking*, 35 YALE J. INT’L L. 469 (2010).

32. AREND & BECK, *supra* note 21, at 112-14; Sean Murphy, *Protean Jus Ad Bellum*, 27 BERKELEY J. INT’L L. 22, 24 (2009) (noting predominant view among states that humanitarian intervention is not a valid legal justification for use of force); see Jean D’Aspremont, *Mapping the Concepts Behind the Contemporary Liberalization of the Use of Force in International Law*, 31 U. PA. J. INT’L L. 1089, 1089 n.1 (2010) (noting that Art. 2(4) prohibition on use of force has been “eroded” by lack of reaction to violations); d’Aspremont, *supra* at 1109-10 (d’Aspremont is far from convinced, though, that there is any consensus around particular exceptions to the Charter’s prohibition. He also fails to fully address the fact that the collective security system envisaged by the Charter was never truly developed. As for the doctrine of “humanitarian intervention” and the more contemporary responsibility to protect, he writes: “Although [the doctrine of humanitarian intervention] has been expressly invoked by some States and supported by some scholars, it seems uncontested that positive international law does not enshrine anything close to an entitlement to use force in the case of a humanitarian disaster on the territory of another State. Even the vague political concept of the responsibility to protect falls short of recognizing any entitlement to use force in the absence of a Security Council authorization.” *Id.*) (internal footnotes omitted).

33. See Fernando R. Tesón, *Collective Humanitarian Intervention*, 17 MICH. J. INT’L L. 323 (1996); Samuel Vincent Jones, *Darfur, The Authority of Law, and Unilateral Humanitarian Intervention* 39 U. TOL. L. REV. 97, 116-19 (2007); Christopher P. DeNicola, *A Shield for the “Knights of Humanity”: The ICC Should Adopt a Humanitarian Necessity Defense To the Crime of Aggression*, 30 U. PA. J. INT’L L. 641, 662-69 (2008) (contemplating illegality of unilateral humanitarian intervention as a crime of aggression under ICC Rome Statute).

34. See Chesterman, *supra* note 28, at 235-36 (2001); Bruno Simma, *NATO, the UN & the Use of Force: Legal Aspects*, 10 EUR. J. INT’L L. 1, 5 n.9 (1999); Payandeh, *supra* note 31, at 470, 482-83 (doubting any claim that responsibility to protect contains normative content and noting the recent failures of the international community to act even in the face of mass atrocities against civilians, Payandeh writes: “By the end of the twentieth century, the world was deeply divided into proponents who regarded humanitarian intervention as often the only effective means to address massive human rights violations and critics to whom humanitarian intervention was nothing but a rhetorical and euphemistic pretext under which the great powers pursued their imperialist self-interests through coercive measures.” *Id.* at 469).

vital issue will continue to undermine the international rule of law.³⁵ A central argument of this article is that there is no genuine “international rule of law” without a clearly defined, militarily effective doctrine of humanitarian intervention.

Those most strenuously opposed to the adoption of a humanitarian exception have expressed doubt that a pro-intervention doctrine would be used impartially and fairly, and there is a fear that strong states would rely on the doctrine to interfere in an exploitative manner in the affairs of weaker states.³⁶ Humanitarian intervention is also opposed by those who are resistant to the proliferation of virtually any genuinely binding international norms and collective actions predicated on those norms.³⁷ In theory, the doctrine of humanitarian intervention as an exception to the prohibition on the use of force awaits the development of “international consensus”—something that is unlikely to occur in the near term.³⁸ The upshot of this state of affairs is that the “international community” adheres—if ambivalently—to a doctrine which holds that, in the absence of Security Council approval, the unilateral (or group) use of force is unlawful except for purposes of self defense (either on one’s own behalf or at the specific request of another state under attack)—despite the fact that the unilateral

35. Neville F. Dastoor, *The Responsibility to Refine: The Need for a Security Council Committee on the Responsibility to Protect*, 22 HARV. HUM. RTS. J. 25, 27-29, 32-35 (2009) (noting slow pace of R2P implementation due to lack of any activation system and resistance from permanent Security Council members).

36. See Adam Roberts, *The So-Called ‘Right’ of Humanitarian Intervention*, 2000 Y.B. INT’L HUMANITARIAN L. 3, 32 (noting fear of former colonial states in Africa and Asia as to expansion of humanitarian intervention); see also Petr Valek, Note, *Is Unilateral Humanitarian Intervention Compatible With the U.N. Charter?*, 26 MICH. J. INT’L L. 1223, 1250 (2005) (citing dicta from ICJ’s *Corfu Channel* case contemplating system of intervention dismissed by most powerful states).

37. Contrast Chesterman, *supra* note 20, at 5 (listing various theories of customary international law already proliferating with respect to humanitarian intervention and making the point that, with the proliferation of newly-formulated models of ‘lawful’ intervention, the formal requirements for the use of force embodied in the U.N. Charter have been gradually weakened); but see Jutta Brunnee & Stephen Troope, *The Responsibility to Protect and the Use of Force: Building Legality?*, 7 (Mar. 23, 2011), available at <http://ssrn.com/abstract=1551296> (unpublished manuscript) (A formal plenary debate ensued).

38. Payandeh, *supra* note 31, at 484-85 (recognizing difficulty in characterizing actions of international actors as stemming from obligation or responsibility to protect and predicts that because states are motivated by so many factors, it will be unlikely if not impossible for any responsibility to protect to collect a body of state practice and opinio juris necessary to cement the principle as jus cogens). See also d’Aspremont, *supra* note 32, at 1102; AREND & BECK, *supra* note 21, at 136 (noting states that have condoned or supported humanitarian intervention often characterize their actions in other terms, such as self-defense); Brunnee & Troope, *supra* note 37 (outlining the international norm building process and showing that it is to the detriment of the Responsibility to Protect).

use of force *in reality* remains relatively commonplace.³⁹ Adding to this confusing state of affairs, the rise of non-state actors as perpetrators of organized violence in the post-Cold War era makes the failure to embrace humanitarian intervention as a valid exception to the (theoretical) restraint on the use of force seem particularly anachronistic, even cruel.⁴⁰

Given the range of conflicts in which the world has failed to act expeditiously to prevent what seems otherwise preventable slaughter (the Balkans, Rwanda, Darfur, civil wars in Sierra Leone and Uganda), it is natural that there should be intellectual developments aimed at leading us out of this international law impasse, this Westphalian stranglehold. In fact, where a *jus cogens* norm has been articulated and widely accepted, and where such a norm is being obviously violated, it is especially odd not to allow—even encourage—an armed response. Indeed, it would perhaps make more sense to say that an armed or otherwise real and effective response is required in such circumstances.

II. REHABILITATING INTERNATIONAL LAW: THE RESPONSIBILITY TO PROTECT

In the light of this contradictory state of affairs, the Canadian-inspired report of 2001, *The Responsibility to Protect*, authored by the International Commission on Intervention and State Sovereignty,⁴¹ is a predictable and logical attempt to recast the traditional concept of humanitarian intervention as a responsibility, a duty, on states to protect the vulnerable.⁴² This new formulation (a duty on the part of states to protect civilians) sounds significantly better than *an exception to a prohibition* on interfering with another State's territory. In articulating a "responsibility to protect," there is no need to manufacture a reason to deviate from a foundational concept of

39. Valek, *supra* note 36, at 1228 (setting forth leading opinion on legality of unilateral humanitarian intervention as finding no support in current customary international law).

40. See INT'L COMM'N ON INTERVENTION & STATE SOVEREIGNTY, THE RESPONSIBILITY TO PROTECT 3-5 (2001) [hereinafter ICISS], available at <http://www.iciss.ca/pdf/Commission-Report.pdf> (discussing effects of non-state actors on U.N. Charter framework); d'Aspremont, *supra* note 32, at 1119-21 (noting ill-fit of Charter article 2(4) to situations involving non-state actors).

41. ICISS, *supra* note 40.

42. See generally ICISS, *supra* note 40, at VI-X (setting forth core principles of R2P). See Payandeh, *supra* note 31, at 470, 482 (deciphering significance of term "responsibility to protect"). Payandeh writes that "[t]he concept [of the responsibility to protect] moves the debate past the controversial notion of 'humanitarian intervention' to a 'responsibility to protect,' thereby focusing on the perspective of the victims of human rights violations." *Id.* at 470. See also Patrick J. Flood, *A Next Rwanda? A Next Iraq? Military Intervention in the 21st Century*, 11 ILSA J. INT'L & COMP. L. 379, 383 (2005) ("The Commission rightly affirms the existence of a responsibility to protect human life even in the face of the important norm of nonintervention, and that appropriate action to carry out this responsibility should be recognized as legal.").

the United Nations (that is, the prohibition on the unilateral use of force)—even one that has been more honored in the breach than otherwise.⁴³ Rather, the *responsibility to protect* sounds like an extension of other positively-framed human rights principles, not a problematic expansion of the range of situations in which states may act militarily in the absence of clear authorization of the Security Council.⁴⁴

It may be asked whether this shift in emphasis from humanitarian intervention to the duty to protect is more than a simple repackaging.⁴⁵ Certainly the reframing has an intellectually calming effect, as it extends the already familiar reach of positive state obligations in the realm of human rights law; it lengthens the human rights terrain, as it were.⁴⁶ On the other hand, as with other human rights principles and mores, it leaves unresolved the important question of when the duty arises, whose duty it is to try and stop atrocities from happening, and what the penalties should be (and by what entity imposed) for failure to live up to this duty to protect.⁴⁷ The difference may be either semantic or more substantive, but the term “humanitarian intervention” does have the virtue of linking the demands of

43. See ICISS, *supra* note 40, at 15-18 (shifting terms of intervention debate away from territorial integrity towards protection of human needs).

44. It is important to note that the R2P framework calls for the duty to engage and take whatever non-military force that may be necessary *first*. The first two pillars of R2P involve the responsibility to prevent and the responsibility to react—the latter of which may involve a wide range of measures that fall short of military intervention. See ICISS, *supra* note 40, at 19-31.

45. ICISS, *supra* note 40, at 12 (“Changing the language . . . does not, of course, change the substantive issues which have to be addressed.”). Various scholars throughout the recent past have posed this question. See Payandeh, *supra* note 31, at 481 (discounting responsibility to protect as little more than a change in terminology); Natalie Oman, *The Responsibility to Prevent: A Remit for Intervention*, 22 CAN. J. L. & JURIS. 355, 361 (2009) (characterizing R2P as a reinterpretation of U.N. Charter art. 39 authorizing force in light of threats to international peace and security); Carsten Stahn, *Responsibility to Protect: Political Rhetoric or Emerging Legal Norm*, 101 AM. J. INT’L L. 99, 102, 111-15 (2007) (noting presence of certain parts of R2P framework in various international law documents dating back to time of Hugo Grotius).

46. See ICISS, *supra* note 40, at 15 (attempting to bridge the gap between national security and individual human rights). See also Oman, *supra* note 45, at 357 (arguing that the responsibility to protect “provides proponents of intervention on humanitarian grounds with a theoretical foundation for focusing upon the needs of individuals”). For a good background on the liberal theory of duty toward civilians suffering gross human rights violations and viewing only those nations which protect the fundamental human rights of their citizens as belonging to community of nations, see generally Tesón, *supra* note 33, at 3-11.

47. Jeremy I. Levitt, *The Responsibility to Protect: A Beaver Without a Dam*, 25 MICH. J. INT’L L. 153, 170-72 (2003) (reviewing Int’l Comm’n on Intervention & State Sovereignty, *Responsibility to Protect* (2001)) (questioning definitive nature of “just cause” requirement and admonishing R2P for its reliance on Security Council authorization); Stahn, *supra* note 45, at 117-18 (pointing out failure of R2P to address consequences for states that do not take action to respond, react, prevent and doubting that the authors of R2P contemplated the remedy of direct action against non-complying states).

humanity with an active, direct, and even militaristic effectiveness.⁴⁸ By explicitly connecting humanitarian intervention with the Charter's proscription on the unilateral use of force—connecting it, that is, as an exception—there may be less danger that the concept will languish in the realm of human rights do-goodism and be lost sight of.⁴⁹ The term “humanitarian intervention” implies a robust *right to act militarily* being granted to ready and willing member states of the United Nations, allowing them to deviate from the general restriction on the use of force to protect a threatened group of persons.⁵⁰ Perhaps the best of both worlds could be found in an international *duty* to engage in humanitarian intervention,⁵¹ although this formulation would almost certainly invite states to argue their incapacity for doing so. The opposite side of this coin would be the over-eagerness of certain states to take the lead in such actions.

International law has supposedly developed a “short list” of particularly heinous criminal acts. Based on the combined conceptual traditions of international humanitarian law (IHL) and human rights law, *jus cogens* norms constitute a set of *thou shalt not* behaviors about which there is no further international argument possible.⁵² Torture, rape, genocide, use and abuse of children by either state armies or other organized militias—these actions are unequivocally proscribed at the international level. No state, or indeed non-state actor, may lawfully engage in these behaviors, and no one can validly defend such actions. With that in mind, it is extraordinary that the international community has not placed greater emphasis on developing

48. See ICISS, *supra* note 40, at 9 (seeking to avoid militarizing the humanitarian term); Levitt, *supra* note 47, at 155 (noting the disdain many humanitarians hold for the phrase “humanitarian intervention” due to its invocation as an exception for use of militaristic force); Payandeh, *supra* note 31, at 470-71 (“Conceptually [The Responsibility to Protect] tries to cut the Gordian knot of tension between sovereignty and human rights by embedding the notion of human rights in the idea of state sovereignty.”).

49. See GEORGE R. LUCAS, JR., PERSPECTIVES ON HUMANITARIAN MILITARY INTERVENTION 39 (2001) (linking need for a strong U.S. military force to reality of failed states around world and need for humanitarian intervention). The “Albright Doctrine,” named after former U.S. Secretary of State Madeline K. Albright and exemplified by U.S.-led NATO strikes against Serbian forces in Kosovo, envisions the humanitarian uses of force as the chief reason for raising, training, equipping and deploying a world-class military. *Id.* at 36.

50. See *infra* notes 65, 67 and accompanying text (discussing morally permissible behavior and humanitarian intervention as affirmative defenses to proscription on force); but see ICISS, *supra* note 40, at 16-17 (stating that framing issue as a right to intervene may delegitimize humanitarian purposes).

51. Monica Hakimi, *State Bystander Responsibility*, 21 EUR. J. INT’L L. 341, 355 (2010) (proposing a framework for assessing whether a bystander state has a duty to intervene).

52. See, e.g., Mary Ellen O’Connell, *Jus Cogens: International Law’s Higher Ethical Norms*, in THE ROLE OF ETHICS IN INTERNATIONAL LAW 78 (Donald Earl Childress III ed., 2012) (describing the lack of consensus concerning the scope of the *jus cogens* definition, and asserting the essentially moral roots of *jus cogens* norms).

a doctrine of *jus cogens*-level crimes of omission, along the lines of *irrefutably unlawful failures to act*.

Identifying such failures appears far more significant than prosecuting violators of *jus cogens* norms after the fact, in that failure to protect leads directly to suffering that could otherwise be prevented. While in the absence of an international military force such as the Charter originally envisaged it would be difficult to pin this responsibility on any particular state or states, at a minimum acceptance of the doctrine could put humanitarian intervention on a clear legal footing. The international community itself would then be obligated to come up with a set of options with respect to which countries and which military forces are in the best position to take action. A new emphasis on prevention could make legal skepticism towards justified intervention obsolete.

For that matter, the legally binding duty could be framed as a *duty to prevent*; a protective notion evident in the full title of the “Genocide Convention,” for instance—which is framed as a convention “on the Prevention and Punishment of the Crime of Genocide.”⁵³ While it may be superficially assumed that the duty to prevent applies to national leaders *vis*

53. See Application of Convention on Prevention and Punishment of Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), 2007 I.C.J. 43, 91, ¶ 165 (Feb. 26) [hereinafter *Bosnian Muslim Genocide Case*] (“In particular, the Contracting Parties have a direct obligation to prevent genocide.”). This idea, as explained above, can easily and logically be extended beyond the obligation to prevent actors within one’s own territorial state from engaging in this behavior. Indeed, in the same ruling, the ICJ states that “[t]he substantive obligations arising from Articles I and III are not on their face limited by territory. They apply to a State wherever it may be acting or may be able to act in ways appropriate to meeting the obligations in question.” *Id.* ¶ 183. See also *id.* ¶ 430, wherein the Court states that “responsibility is however incurred if the State manifestly failed to take all measures to prevent genocide which were within its power, and which might have contributed to preventing the genocide. In this area the notion of ‘due diligence,’ which calls for an assessment *in concreto*, is of critical importance.” (emphasis in original). It should be noted, though, that some of the absurdity of international law is on display throughout the judgment, where the ICJ finds that in most instances of mass slaughter the requisite “*dolus specialis*” for genocide is not present! See, e.g., *id.* ¶ 376 in which the Court states that it has

already concluded . . . that—save in the case of Srebrenica—the Applicant has not established that any of the widespread and serious atrocities, complained of as violating Article II, paragraphs (a) to (e) of the Genocide Convention, were accompanied by the necessary specific intent (*dolus specialis*) on the part of the perpetrators. It also finds that the Applicant has not established the existence of that intent on the part of the Respondent, either on the basis of a concerted plan, or on the basis that the events reviewed above reveal a consistent pattern of conduct which could only point to the existence of such intent.

See also, ¶ 415 where the Court presents similarly convoluted reasoning to the effect that “the acts of those who committed genocide at Srebrenica cannot be attributed to the Respondent under the rules of international law of State Responsibility; thus, the international responsibility of the Respondent is not engaged on this basis.”

à vis activities within their own territories, it seems logical that the duty should be extended to potentially all states in their capacity as observers, even arm's length ones. There is no good reason why fears of territorial encroachment should make this extension controversial, at least not if the international community begins to take as its focus the actual suffering international law was meant to alleviate—as opposed to professional legal concerns that purport to have “preventative” effects, but in reality do not appear to.⁵⁴

A. International Protection: It Cannot be Pacifist or Piecemeal

As the international military force envisaged in the U.N. Charter—to be at the ready for use by the Security Council—never came into being, there is a conspicuous gap where an international “police force” should logically be.⁵⁵ There is no international military to respond to the phenomenon of mass killings by a state or by non-state actors, and in situations of political collapse this often leaves the most vulnerable populations at the mercy of extremely violent forces.⁵⁶ In at least some of these situations, even a modest international force, insulated from the restraining influences of national politics, could take action to stop rape, torture, and killing from the outset.⁵⁷ This would be especially effective in situations of low-tech warfare, where small militias target villagers and other weak and defenseless groups, and where the national military is unable or unwilling to adequately protect. Such a force could come quickly and efficiently to the assistance of governments or governmental factions struggling to contain internal strife leading to ethnic slaughter. This is not to suggest that any use of force can be entirely problem free, but compared with the spectacle of

54. *See id.* ¶ 427 (pointing out that “it is not the case that the obligation to prevent has no separate legal existence of its own; that it is, as it were, absorbed by the obligation to punish The obligation on each contracting State to prevent genocide is both normative and compelling.”). Of course, the ICJ in this case was talking about a situation in which a State has some degree of influence over the perpetrators of an imminent genocide—not the case of intervention by a third party for the sake of protecting those in need of protection. Nevertheless, it is the logic of international law that is in question here; the burgeoning norms of international law are worse than meaningless if the international community assumes no burden of physical implementation. *See also id.* ¶ 429 (pointing out that the principle of prevention appears in a number of important conventions.).

55. *See infra* notes 58, 60, 65, 67 and accompanying text (tracing the history of U.N. Charter and the fate of the proposed international police force attached to the U.N. organization).

56. SAMANTHA POWER, *A PROBLEM FROM HELL: AMERICA AND THE AGE OF GENOCIDE* 381-85 (2002) (estimating the forces necessary to have stopped Rwandan genocide).

57. *See generally id.* (estimating forces necessary to contain threat of genocide in Rwanda and elsewhere).

senseless, long-running regional conflicts, a military-based conclusion is certainly to be preferred.⁵⁸

As mentioned above, there remains resistance to the suggestion that the international legal community has begun to embrace an exception to the rule against armed interference in the affairs of another state, even where the need for such intervention is obvious.⁵⁹ The United States underwent a period of extreme remorse over its intervention in Somalia in an attempt to avert humanitarian catastrophe; the political establishment within the United States and abroad was highly critical of President Clinton for his decision to send in American troops for the “mere” purpose of providing aid to a starving population.⁶⁰ Other uses of force by the United States in what has seemed more obvious self-interest have garnered less domestic criticism.⁶¹ It is understandable that the international community might still prefer a clear-cut rejection of “humanitarian intervention” over adoption of a principle that could, in theory, provide justification for a wide range of military actions by one nation against another.⁶² There is no indication that we have drawn nearer to creating any truly international police force for these purposes. U.N. peacekeepers are sent in to maintain an already established peace and not to use force proactively to protect vulnerable populations from violence while the relevant conflict is still “hot.”⁶³ Thus,

58. TAYLOR B. SEYBOLT, HUMANITARIAN MILITARY INTERVENTION: THE CONDITIONS FOR SUCCESS AND FAILURE 1-22 (2008).

59. See *infra* notes 65, 67 (documenting resistance of international law scholars to any duty to protect or right to intervene).

60. PETER RONAYNE, NEVER AGAIN? THE UNITED STATES AND THE PREVENTION AND PUNISHMENT OF GENOCIDE SINCE THE HOLOCAUST 3, 163-64 (2001) (noting effect of news media and public opinion on policymakers following debacle in Somalia). See also Walter Clarke & Jeffrey Herbst, *Somalia and the Future of Humanitarian Intervention*, FOREIGN AFF., Mar.-Apr. 1996, available at <http://www.foreignaffairs.com/articles/51844/walter-clarke-and-jeffrey-herbst/somalia-and-the-future-of-humanitarian-intervention> (describing public reaction in the United States to Clinton’s use of force in Somalia for humanitarian purposes).

61. PEW RESEARCH CENTER FOR THE PEOPLE & THE PRESS, PUBLIC WARY OF MILITARY INTERVENTION IN LIBYA (2011), available at <http://pewresearch.org/pubs/1927/strong-opposition-us-involvement-libya-military-overcommitted>.

62. See Sophie Clavier, 15 ANN. SURV. INT’L & COMP. L. 145, 151 (2009) (reviewing a chapter by Willy Mamah entitled *Is Humanitarian Intervention a Pseudonym for Aggressive unilateralism?* (adopting “the view point that unilateral humanitarian intervention is . . . used as a Trojan horse by interventionist countries”)), in CONTEMPORARY ISSUES ON PUBLIC INTERNATIONAL AND COMPARATIVE LAW: ESSAYS IN HONOR OF PROFESSOR CHRISTIAN NWACHUKWU OKEKE 643(Chima Centus Nweze ed., 2009); see also Marjorie Cohn, *The Myth of Humanitarian Intervention in Kosovo*, in LESSONS OF KOSOVO: THE DANGERS OF HUMANITARIAN INTERVENTION 121 (Aleksandar Jokic ed., 2003).

63. U.N. DEP’T OF PEACEKEEPING OPERATIONS & FIELD SUPPORT, UNITED NATIONS PEACEKEEPING OPERATIONS: PRINCIPLES AND GUIDELINES 25-26 (2008) available at http://pbpu.unlb.org/pbps/Library/Capstone_Doctrine_ENG.pdf (describing that today, U.N. peacekeeping operations are typically deployed as part of a much broader international effort to assist countries emerging from conflict; their primary mandates are to typically strengthen

the implementation of a doctrine of humanitarian intervention might well come to rely on action taken by military superpowers with uncertain consequences and with obvious implications for political objectivity.⁶⁴

To ensure some consistency, it might be more desirable for international responses to be unabashedly driven by moralistic principles than by the usual “legal” ones.⁶⁵ The development of international law according to its ordinary methodology is too time-consuming and too open-ended. The duty to prevent and protect, at least where feasible, could be placed on the same plane as other (non-derogable and/or morally self-evident) *jus cogens* norms whenever an imminent threat to civilians reached a certain level of seriousness. In a system without alternative protective mechanisms, there is little reason to hesitate when it comes to the need for armed assistance to protect the most vulnerable and urgently at risk.⁶⁶

B. Why the Ready Assumption of Humanitarian Intervention in Libya?

It is noteworthy that when the Libyan government turned the full force of its military on opposition demonstrators in March 2011, the international response was swift and urgent.⁶⁷ There was little evidence of agonized discussion of the rightness of humanitarian intervention—strong statements were made in the United States and in European capitals about the self-evident necessity of taking action to protect both civilians and

a State’s ability to provide security and to promote dialogue and reconciliation among civilian populations. To this end, U.N. peacekeepers often play a “catalytic role” in the following activities: disarmament, mine removal, security sector reform, human rights protection & education, and electoral assistance). *Id.* at 26.

64. See generally Suyash Paliwal, *The Primacy of Regional Organizations in International Peacekeeping: The African Example*, 51 VA. J. INT’L L. 185 (2010) (discussing the use of regional forces).

65. See SIOBHAN WILLS, *PROTECTING CIVILIANS: THE OBLIGATIONS OF PEACEKEEPERS* (2009) (arguing that the moral and political imperative to protect civilians ought to be a legal duty if the principles of the Geneva Conventions and general spirit of international law are to mean anything). See also Tesón, *supra* note 33, at 361 (arguing in favor of some type of moral analysis when considering standards of “international law”).

66. It is extraordinary that, even for authors who freely acknowledge the terrible failures of the international community to respond to mass violations of human rights, they also recognize that the system of making international law places an almost insurmountable obstacle in the way of the revised responsibility to protect doctrine. See, e.g., Payandeh, *supra* note 31, at 471-72 (arguing that this doctrine “lacks specific normative content” and that the corresponding “conceptual change in the understanding of sovereignty cannot, by itself, lead to a change in international law”).

67. See Christian Pippan, *The 2011 Libyan Uprising, Foreign Military Intervention, and International Law*, 2 JURIDIKUM: ZEITSCHRIFT FÜR KRITIK—RECHT—GESELLSCHAFT 159, 159, 161-64 (2011) (describing the rapid-fire events that led to UN security Council-authorized action against the Libyan government for the stated purpose of protecting civilians as part of a trend towards “value driven interventionism”).

demonstration leaders who had quickly come to be treated as a kind of government-in-waiting.⁶⁸

The Security Council resolution allowing for this use of force retained the sort of ambiguity characteristic of the international approach to humanitarian intervention; the speed and strength of the resulting military response was highly unusual.⁶⁹ As was true of Iraq under Saddam Hussein, the Libyan regime had been a thorn in the side of Western governments for decades. As so many humanitarian disasters had been ignored by the international community, it is not unreasonable to point out that strategic interests must have played a key role in pushing Western governments to take rapid and effective action against Libya. However, this brings us back to a central difficulty posed by the humanitarian intervention dilemma: If a coordinated military response to threats to international peace and security should be seen as a central aspect of the international rule of law, how can it be that these responses are so varying, so ad hoc, and so inconsistent? If anything, the more vulnerable the threatened group—especially where many children are involved—and where the low tech nature of the warfare (such as has been the case in many of the African civil wars) makes success almost assured, the more eager and enthusiastic the international response should be. Because an international response is often not forthcoming in even the most obvious type of situation, it may not be a stretch to conclude that international law is in fact too haphazard to be accurately termed “law.” Despite the existence of high level international prosecutions and elaborate treaty drafting mechanisms, it may be productive to acknowledge this

68. See Chesterman, *supra* note 20 (making the case that the international reaction to repression in Libya shows that it is harder in the contemporary world to do nothing in the face of such situations). Also note that there is less than full consensus on the meaning of the Security Council resolution on Libya and the implications of the international reaction going forward; see *Russia Warns Over NATO Intervention in Libya*, RADIO FREE EUROPE/RADIO LIBERTY (June 5, 2011), available at http://www.rferl.org/content/russia_warns_over_nato_intervention_in_libya/24215871.html (“Russian Deputy Prime Minister Sergei Ivanov has warned that NATO’s Libya campaign is ‘one step’ away from sending in ground troops to assist antigovernment forces battling Libyan leader Muammar Qaddafi.”); see *id.* (noting that while Russia abstained from the Security Council vote, its government stated that it had been supportive of some of the international moves to protect civilians, but was opposed to any escalation of that effort to include stronger military intervention).

69. The international action has also been roundly criticized from a variety of points of view. See, e.g., Chris Brown, *Liberal Interventionism and the Case of Libya*, INT’L AFF. AT LSE BLOG (Apr. 7, 2011), <http://blogs.lse.ac.uk/ideas/2011/04/liberal-interventionism-and-the-case-of-libya> (explaining that recent action in Libya shows that ‘liberal interventionism’ to support the human rights of civilians is not exempt from politics and that “R2P and other consensus-oriented interventionist notions come up against this kind of contradiction because they are attempts to find non-political solutions to problems that are, in their very essence, political. ‘Protecting civilians’ sound like non-political idea we can all subscribe to, but when civilians are being attacked (as they certainly were in Benghazi and elsewhere in Libya) they are being attacked for a political reason, and, if you protect them, you are, whether you like it or not, intervening in local politics.”).

central failure of the postwar international legal system and work towards the development of a coherent and consistent template for civilian protection, a synthetic blend of humanitarian intervention, and the responsibility to protect.

III. THE OLD “IS INTERNATIONAL LAW REALLY LAW?” DEBATE

In light of these systemic failures, it is at times troubling to teach a course the law school catalog entitles *International Law* when so much of its subject matter fails to resemble law at all.⁷⁰ Ideally, international law should reflect and encompass a set of aspirations around which the international community, acting through the United Nations and other bodies, mobilizes to generate clear norms and to ensure enforcement. Applying such norms across a wide variety of cultural zones—which international law inevitably must—is challenging in and of itself, but not insurmountable. It now amounts to a truism to say that the rightful subject matter of international law includes both relations between and among states as well as between state (and increasingly non-state) actors and civilians.⁷¹ Given the meteoric rise of human rights norms in the post-World War II period, international law should at a minimum provide assurance that

70. It is quite usual for a course in public international law to begin with the overarching question: *Is International Law really law like other kinds of law?* I begin my class with a selection from the now classic book LOUIS HENKIN, *HOW NATIONS BEHAVE* (2d ed. 1970), wherein he explores the various criticism routinely made of international law. Henkin ultimately defends international law by arguing that international lawyers will insist that

critics of international law ask and answer the wrong questions. What matters is not whether the international system has legislative, judicial, or executive branches corresponding to those we have become accustomed to seek in a domestic society; what matters is whether international law is reflected in the policies of nations and in relations between nations.

Id. at 26. See, e.g., ANNE ORFORD, *READING HUMANITARIAN INTERVENTION: HUMAN RIGHTS AND THE USE OF FORCE IN INTERNATIONAL LAW* 72-73 (2003); Anthony D’Amato, *Is International Law Really “Law”?*, 79 NW. U. L. REV. 1293, 1293 (1985) (“Many serious students of the law react with a sort of indulgence when they encounter the term ‘international law,’ as if to say, ‘well, we know it isn’t really law, but we know that international lawyers and scholars have a vested professional interest in calling it law.”) (emphasis in original); Elizabeth M. Bruch, *Is International Law Really Law? Theorizing The Multi-Dimensionality of Law*, 44 AKRON L. REV. 333 (2011).

71. See Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599, 2631 (1997) (describing global decision-making as being made by a “complex rugby scrum of nation-states, intergovernmental organizations, regional compacts, nongovernmental organizations, and informal regimes and networks”); David J. Bederman, *Law of the Land, Law of the Sea: The Lost Link Between Customary International Law and the General Maritime Law*, 51 VA. J. INT’L L. 299 (2011); ICISS, *supra* note 40, at 3-4 (highlighting various non-governmental organizations and other new institutional actors on the international stage, including factional terrorist sects).

certain types of gross victimization will become far less frequent.⁷² Proscriptions against genocide, torture, and other forms of inhumane treatment are now broadly accepted as part of our international legal inheritance.⁷³

As mentioned above, there remain many instances in which the victims of organized atrocities (perpetrated either by state actors or insurgent militias) are extremely vulnerable, the violence used against them is quite low tech and not particularly complicated to prevent or to end, and yet the international community stands back as this violence unfolds.⁷⁴ In such

72. See generally, Dinah Shelton, *International Human Rights Law: Principled, Double, or Absent Standards?*, 25 LAW & INEQ. 467 (2007), for a discussion of the main purposes behind and weaknesses in international human rights law.

73. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85; Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90.

74. The literature on this problem is voluminous and draws a set of unmistakable conclusions, mainly to the effect that much of the extreme mass violence against civilians taking place in recent years could have been prevented by a committed international community. See generally POWER, *supra* note 56, at 132-36 (recounting rejection of proposal by Senator George McGovern to intervene militarily in Cambodia to halt genocidal Khmer Rouge by Carter Administration.); *id.* at 142 (“Twelve divisions of Vietnamese infantry easily disposed of the Khmer Rouge regime, responsible for the death of approximately 1.7 million Cambodians, in a matter of two weeks during the winter of 1979.”); *id.* at 283-84 (contesting figures supplied by U.S. Joint Chiefs of Staff as to forces necessary to neutralize nationalist Serb forces in former Yugoslavia); *id.* at 367-68 (describing vast undersupply of manpower provided to Canadian Major General Romeo Dallaire, head of United Nations peacekeeping forces in Rwanda, during summer of 1994) (“Dallaire insists that the well-equipped 1,000 man European force sent into Rwanda to evacuate nationals, together with 300 U.S. Marines stationed in nearby Burundi, would have sufficed to stop the genocidal advances of Hutu fighters, who were armed primarily with machetes and clubs.”); *id.* at 357 (“Former Ambassador to Yugoslavia Warren Zimmerman believes that, playing on the Clinton Administration’s fear of mission creep, U.S. military officials inflated these figures in order to avoid military intervention in Bosnia.”); RONAYNE, *supra* note 60, at 3 (noting preference of West to create postgenocide tribunals as opposed to a committed prevention policy); *id.* at 178 (noting presence of American, French and Indian forces in nearby African localities) (“More recently, atrocities committed in Sudan, Uganda, the Democratic Peoples’ Republic of Congo and the Central African Republic have raised criticism as to the effectiveness of UN peacekeeping missions around the globe.”); ELIZABETH NEUFFER, *THE KEY TO MY NEIGHBOR’S HOUSE: SEEKING JUSTICE IN BOSNIA AND RWANDA* 49, 82 (1st ed. 2002) (noting emboldening effect of unfulfilled NATO airstrike threats on decisions by Serb leaders to bomb Bosnian Muslim areas and enter U.N. safe area at Srebrenica); L.R. MELVERN, *A PEOPLE BETRAYED: THE ROLE OF THE WEST IN RWANDA’S GENOCIDE* (2000) (describing negligence and complicity of western powers and United Nations in Rwandan genocide); W. Michael Reisman, *Prevention: Acting Before Victims Become Victims: Preventing and Arresting Mass Murder*, 40 CASE W. RES. J. INT’L L. 57, 60-68 (2008) (relating abject failure of United States and international community to prevent genocide in Germany, Cambodia and Uganda). See HUMAN RIGHTS WATCH, *KILLINGS IN KIWANJA: THE UN’S INABILITY TO PROTECT CIVILIANS*, 8-16, 22-25 (2008), available at <http://www.hrw.org/sites/default/files/reports/drc1208web.pdf>; *CAR/DR Congo: LRA Conducts Massive Abduction Campaign*, HUMAN RIGHTS WATCH (Aug. 11, 2010), <http://www.hrw.org/en/news/2010/08/11/cardr-congo-lra-conducts-massive-abduction->

cases, the term *international law* seems somewhat of an embarrassment.⁷⁵ It can be painful to cover academic material that shows children in particular being mistreated in the most egregious fashion by militarily unsophisticated—and thus hardly invincible—groups during armed conflicts that often continue for years.⁷⁶ In such instances, it would seem that both the rules and the ideals of the international community—reflecting what could be thought of as international constitutional law—should *mandate* an organized and effective response by that international community.⁷⁷ This is generally not the case, however, as international law consistently fails to offer anything of immediate value to those most acutely in need of protection.⁷⁸ This is more than a complaint directed at the

campaign (reporting the abduction of approximately 700 adults and children for war and sex throughout Central African Republic and the northern DR Congo by Lord's Resistance Army, and that only 1,000 out of the 19,000 U.N. peacekeeping troops assigned to the region were stationed within reach of the affected areas); Scott Baldauf, *Mass Rape in Congo Reignites Questions on Efficacy of UN Force*, CHRISTIAN SCI. MONITOR, (Aug. 25, 2010), available at <http://www.csmonitor.com/World/Africa/2010/0825/Mass-rape-in-Congo-reignites-questions-on-efficacy-of-UN-force> (documenting mass rapes in eastern Congo of more than 150 women and children with U.N. peacekeepers stationed less than 20 miles away).

75. See Part II, *supra*.

76. See U.N. Secretary General, Impact of Armed Conflict on Children: Rep. of the expert of the Secretary-General, ¶¶ 24–27, U.N. Doc A/51/306 (Aug. 26, 1996) (by Graca Machel) [hereinafter Machel Report] (establishing link between rise in civilian warfare, displaced populations, and the use of child soldiers utilizing cheap, light weaponry); Timothy Webster, *Babes With Arms: International Law and Child Soldiers*, 39 GEO. WASH. INT'L L. REV. 227 (2007) (recognizing that child soldiers are most likely to be engaged in prolonged, low-intensity conflicts characterized by fragmentation of armies and police forces and high civilian casualty losses). In 2007, author approximated that 300,000 child soldiers were actively engaged in combat. The figure of 300,000 children engaged in active combat is cited in numerous sources. See, e.g., *id.* at 231; AFUA TWUM-DANSO, AFRICA'S YOUNG SOLDIERS: THE CO-OPTION OF CHILDHOOD, 9, (2003); COAL. TO STOP THE USE OF CHILD SOLDIERS, CHILD SOLDIERS GLOBAL REPORT 2008, at 7, 9 (2008) [hereinafter CHILD SOLDIERS REPORT] (reporting that children were actively involved in armed conflict in government forces or non-state armed groups in 19 countries or territories between April 2004 and October 2007).

77. See LOUIS HENKIN, THE AGE OF RIGHTS 13-15 (1990) (noting transformation of idea of constitutional rights into a universal conception); U.N. Charter arts. 1, 55; United States Diplomatic and Consular Staff in Tehran (United States v. Iran) 1980 I.C.J. 3 (May 24) (citing principles contained in U.N. Charter and those “fundamental” principles enumerated in Universal Declaration of Human Rights); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES: CUSTOMARY INT'L LAW OF HUMAN RIGHTS § 702 cmt. a (1987) (listing genocide, murder, torture, and causing disappearance of individuals as “those human rights whose status as customary law is generally accepted”); *Filartiga v. Penarala*, 630 F.2d 876, 887 (2d Cir. 1980) (listing those crimes outlawed as violating law of nations).

78. See MELVERN, *supra* note 74; POWER, *supra* note 56, at 369 (recounting Security Council vote to slash peacekeeping forces of United Nations Assistance Mission for Rwanda amid slaughter in April 1994); Philipp Kastner, *The ICC in Darfur—Savior or Spoiler?*, 14 ILSA J. INT'L & COMP. L. 145, 147 (2007) (claiming the tribunals in Rwanda and Yugoslavia were “too late to influence the conflict whilst the atrocities were being committed”); *id.* at 146 (claiming that on the whole, the international community is “slow to react”).

systemic defects of international law enforcement, a type of analysis which has been presented repeatedly in recent decades.⁷⁹ Rather, there is a strong argument to be made that abstract, academic claims regarding the reality and the effectiveness of international law should, as a matter of conscience, be scaled back.⁸⁰ A more honest appraisal of the current capacities of international law could lead international policy makers to reconsider and redraft the pillars on which contemporary international law stands.⁸¹

The gap between international law rhetoric and reality has of course not gone unnoticed. A considerable number of writings, intended to demonstrate the gross disparity between the promises made by international law and its weak delivery of protection for civilians on the ground, feature stark, symbolically charged descriptions of particular atrocities.⁸² Across time and space—Cambodia, Iraq, the Balkans, Rwanda, Sierra Leone, Uganda, Darfur, Congo and Kyrgyzstan—there is no dearth of examples tailor-made for demonstrating the ineffectiveness of international law and the fecklessness of the international community when it comes to preventing fear, suffering, and slaughter.⁸³ There are many advocates for a clear articulation of the view that the familiar failure of the international

79. See AREND & BECK, *supra* note 21, at 179 (explaining that states have begun to re-think “peace before justice” paradigm characterized by weak U.N. enforcement system); PATTISON, *supra* note 3, at 15 (portraying reality gap between international instruments aimed at protecting civilians in warfare and atrocities committed on ground); Jones, *supra* note 33, at 108 (characterizing U.N. Charter as a woefully ineffective means of protecting human rights).

80. *Developments in the Law—International Criminal Law*, 114 HARV. L. REV. 1943, 1966 (2001) (stating that international law fails to meet its ambitions often enough to be considered illusory). See AREND & BECK, *supra* note 21, at 184 (offering support for “rejectionist” interpretation of U.N. Charter art. 2, para. 4 proposed by Professor Thomas Franck.); AREND & BECK, *supra* note 21, at 185 (explaining the rejectionist approach argues that, due to the large disparity between what states “have been saying and...doing,” Article 2(4) of the U.N. Charter—supposedly the pillar of our modern international legal order—has been rendered a legal fiction).

81. See AREND & BECK, *supra* note 21, at 188-94 (predicting emergence of a new international value hierarchy with new legal obligations and expanded bases for *jus ad bellum*).

82. See, e.g., POWER, *supra* note 56, at XI—XIII (depicting the scene of young children killed in bombing of Sarajevo); MELVERN, *supra* note 74, at 157-62 (describing scenes of corpses floating down Rwandan rivers, organized massacres held in churches and construction of mass grave sites); *id.* at 158 (describing that, in Rwanda, the entire population of Tutsi men were often exterminated in each village, with mothers and widows forced to dig their graves). Melvern tells the story of one survivor: “I will never forget the sight of my son pleading with me not to bury him alive . . . he kept trying to come out and was beaten back. And we had to keep covering the pit with earth until . . . there was no movement left.” *Id.*; Jones, *supra* note 33, at 97-98 (describing carnage of Sudan’s Darfuri landscape following attack by Janjaweed Arab militia forces).

83. See POWER, *supra* note 56, and accompanying text (noting failure of international community to prevent genocide and crimes against humanity in Bosnia, Burundi, Cambodia, Congo, Darfur, Rwanda, Sudan, and Uganda).

community to respond in the face of mass atrocities is unacceptable.⁸⁴ Such a theory would, by extension, demand that states take action to protect the vulnerable when they are under extreme threat—the so-called duty or responsibility to “protect,” discussed above.⁸⁵ It has been forcefully argued that time and again the international community has stepped out of the way to allow torturers to get on with their business; time and again commentators have bemoaned the lack of action taken by anyone to prevent even the most unorganized, low tech, and internationally unimpressive tyrants from acting with total impunity against the defenseless.⁸⁶ The geographical range across which this phenomenon has played out is striking; the fact that the international political reaction follows a more or less identical pattern raises intense concern; yet, the pattern persists.⁸⁷

Despite a great deal of rhetoric to the contrary, international law remains overwhelmingly a system designed to protect the interests of sovereign states by ensuring stability of territorial boundaries and deterring outside “interference” within those boundaries.⁸⁸ It continues to promise more than

84. See, e.g., PATTISON, *supra* note 3, at VIII (outlining the core framework of the responsibility to protect); Carlo Focarelli, *The Responsibility to Protect Doctrine and Humanitarian Intervention: Too Many Ambiguities for a Working Doctrine*, 13 J. CONFLICT & SECURITY L. 191 (2008); Peter Stockburger, *The Responsibility to Protect Doctrine: Customary International Law, An Emerging Legal Norm, or Just Wishful Thinking?*, 5 INTERCULTURAL HUM. RTS. L. REV. 365 (2010); Rebecca J. Hamilton, *Recent Developments, The Responsibility to Protect: From Document to Doctrine—But What of Implementation?*, 19 HARV. HUM. RTS. J. 289 (2006); Emma McClean, *The Responsibility to Protect: The Role of International Human Rights Law*, 13 J. CONFLICT & SECURITY L. 123 (2008); Payandeh, *supra* note 31, at 469.

85. ICISS, *supra* note 40, at VII (setting forth criteria necessary prior to military intervention in humanitarian crises); Samantha Power, *The Void: Why the Movement Needs Help*, NEW REPUBLIC, May 15, 2006, available at <http://www.hks.harvard.edu/news-events/news/commentary/the-void-why-the-movement-needs-help> (describing objectives and accomplishments of American movement to end genocide in Sudan).

86. MELVERN, *supra* note 74, at 227-33 (capturing lack of political will among Western and African leaders); POWER, *supra* note 56, at XIV-XVII (noting consistency of U.S. responses to cases of genocide throughout 20th century).

87. POWER, *supra* note 56, at XIV-XVII; MELVERN, *supra* note 74, at 5 (explaining organized nature of genocide).

88. STEVEN L. BURG & PAUL S. SHOUP, *THE WAR IN BOSNIA-HERZEGOVINA: ETHNIC CONFLICT AND INTERNATIONAL INTERVENTION* 10 (1999) (commenting on domination of realist principles of sovereignty and territorial integrity over international human rights enforcement); *A Problem from Hell: A Conversation with Samantha Power, Part I*, GOOGLE VIDEOS (Mar. 2, 2007), <http://video.google.com/videoplay?docid=2209257471900990711> (noting inconsistent application of sovereignty as both a sword for and a shield against calls for unilateral humanitarian intervention); Payandeh, *supra* note 31, at 487 (describing tension between sovereignty and human rights regime); AREND & BECK, *supra* note 21, at 40, 58, 114, 136 (justice over peace, rejection of limited collective security.); Tesón, *supra* note 33, at 371 (“The rise of collective humanitarian intervention and the shrinking of traditional concept[s] of sovereignty and domestic jurisdiction are essential for the preservation of peace Conversely, if we lose the battle for democracy and human rights, we necessarily lose the battle for peace and security. . . . [T]he gradual dilution of state sovereignty is . . . a moral imperative.”).

it can deliver to the world's people and often operates primarily in the realm of assertion.⁸⁹ At the highest levels of international institution building, this image of international law as unresponsive in the face of mass atrocities has undergone some repair work in the form of a large number of "post-conflict criminal tribunals."⁹⁰ However, as these tribunals generally proceed with prosecutions after the atrocities have occurred, and as there is generally little, if any, prior accompanying intervention in the ongoing slaughter, it is possible to see these forums as largely symbolic constructs, providing international lawyers with the sense that they are doing something meaningful to deter mass violence against civilians.⁹¹ More darkly, they can be seen as designed to give international lawyers a professional role in world affairs.⁹² This nexus of after-the-fact activity we might call the *pseudo-effective* face of contemporary international law. Because they do not touch upon the precipitating events directly, these tribunals provide no substitute for action that might have been taken to stop the many waves of violence directed at civilians.

89. See, e.g., Nigel Purvis, *Critical Legal Studies in Public International Law*, 32 HARV. INT'L L.J. 81, 115 (1991) ("[I]nternational law is merely a particular type of discourse about international social life. It is a method of conversation that states have chosen to follow. To some it is a conversation entirely without content."). See also JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* 15 (2005).

90. See generally Ellis, *supra* note 16 (reviewing several major conflict zones during the past 25 years); see also HUMAN RIGHTS WATCH, *COURTING HISTORY: THE LANDMARK INTERNATIONAL CRIMINAL COURT'S FIRST YEARS* (2008) [hereinafter *COURTING HISTORY*], available at <http://www.hrw.org/en/node/62135/section/1> (examining accomplishments and shortcomings of ICC since its opening in 2003).

91. The performance of the ICTY is but one example. In 2011, out of the 126 concluded cases, only 64 were convicted, the rest either being acquitted, dead, transferred to a regional jurisdiction or had their indictments withdrawn. See Avery Capstone as to most prominent complaints with regards to ICTY, including unclear mandate and poor victim-witness services. See also ERIC STOVER, *THE WITNESSES: WAR CRIMES AND THE PROMISE OF JUSTICE IN THE HAGUE* (2005). See NEUFFER, *supra* note 74, at 129-31, 256-57, 428, 437, 443. See generally Hans Peter-Kaul, *Construction Site for More Justice: The International Criminal Court After Two Years*, 99 AM. J. INT'L L. 370 (2005) (describing functions of Office of the Prosecutor at ICC, activities conducted in first years of existence); *id.* at 380 (The United Nations Security Council took three years to refer the ongoing genocide in Sudan to the International Criminal Court); *COURTING HISTORY*, *supra* note 90 (In its first five years of existence, the International Criminal Court issued 12 public arrest warrants, *id.* at 4; only four of the alleged perpetrators have been brought into ICC custody. *Id.* The ICC's first ever trial, against Thomas Lubanga, was suspended because of the prosecution's inability to disclose to the court potentially exculpatory information. *Id.* at 5); *International Criminal Court 'Altered Behaviour'—UN*, BBC NEWS.COM (May 31, 2010), <http://www.bbc.co.uk/news/10196907> ("So far no one has been convicted of alleged war crimes.").

92. Interview by Patrick Smith with Luis Moreno-Ocampo, Prosecutor, ICC (Sept. 21, 2009), available at <http://www.theafricareport.com/index.php/200909213281793/news-analysis/interview-luis-moreno-ocampo-icc-prosecutor-3281793.html> (discussing progress in establishing an "international criminal justice system"). Moreno-Ocampo states that "Armies all over the world are adjusting to [the ICC]." *Id.*

A certain amoral, professionalized version of justice is contained in the vision of international criminal tribunals, insofar as they exist in isolation from the more urgent question of how to prevent mass rape, torture, and killing from happening before they occur.⁹³ It is certainly problematic for us to teach students that international justice exists primarily *in the tribunal*, disregarding the general lack of an international response to events giving rise to the creation of that tribunal.⁹⁴

Some have characterized what we call international law as more akin to religion or moralistic teaching—insofar as the basic logic of law *qua* law requires an enforcement arm that to some degree corresponds to the letter of the law itself.⁹⁵ This debate over the validity of international law is as old as the discipline itself.⁹⁶ While controversy over whether a particular national act is “contrary to international law” or not may at times seem sterile and meaningless, states do continue to engage in these arguments and so treat the imprimatur of international law as having some ultimate importance.⁹⁷

93. *Id.*

94. For more philosophical doubts and dissatisfactions arising from efforts to prosecute perpetrators of large-scale killings and other war crimes, see Mark J. Osiel, *Why Prosecute? Critics of Punishment for Mass Atrocity*, 22 HUM. RTS. Q. 118 (2000). See Donna E. Arzt, *Views of the Ground: The Local Perception of International Criminal Tribunals in the Former Yugoslavia and Sierra Leone*, 603 ANNALS, AM. ACAD. OF POL. & SOC. SCI. 226, 230 (2006) for more practical considerations as to the effectiveness of war crime tribunals; see James F. Alexander, *The International Criminal Court and the Prevention of Atrocities Predicting the Court's Impact*, 54 VILL. L. REV. 1 (2009) (critiquing potential of ICC to prevent humanitarian atrocities); Richard Ashby Wilson, *Judging History: The Historical Record of the International Criminal Tribunal for the Former Yugoslavia*, 23 HUM. RTS. Q. 908, 922 (2005).

95. See, e.g., Douglas Donoho, *Human Rights Enforcement in the Twenty-First Century*, 35 GA. J. INT'L & COMP. L. 1, 6 (2006) (highlighting and explaining the enforcement gap and suggesting a new approach is necessary, while stating “traditional approaches to enforcement . . . are inadequate to meet the challenge of effectively realizing human rights in the twenty-first century”); Makau wa Mutua, *Looking Past the Human Rights Committee: An Argument for De-Marginalizing Enforcement*, 4 BUFF. HUM. RTS. L. REV. 211 (1998).

96. See *supra* text accompanying notes 1, 32 (listing criticisms of modern international legal system); HENKIN, *supra* note 77, at 1-5 (tracing the history of the role of sovereignty throughout international law).

97. Again, academic and popular literature on those criteria necessary to support a rule of customary international law, and the application of international law to specific acts by members of the international community is voluminous. See, e.g., TERRY NARDIN, *LAW, MORALITY, AND THE RELATIONS OF STATES* (1983) (reviewing opposing positions on what is international law); Roberts, *supra*, note 36 (attempting to reconcile “traditional” and “modern” approaches to creating customary international law); Victor Kattan, *The Legality of the West Bank Wall: Israel's High Court of Justice v. The International Court of Justice*, 40 VAND. J. TRANSNAT'L L. 1425 (2007) (discussing the debate over the wall's legal status and comparing contradictory court rulings between the High Court of Israel and the ICJ); Anguel Anastassov, *Are Nuclear Weapons Illegal? The Role of Public International Law and the International Court of Justice*, 15 J. CONFLICT & SECURITY L. 65 (2010) (outlining the debate of whether nuclear weapons are illegal under customary international law). Compare Leon Sheff, *The Application of Israeli Law to the Golan Heights Is Not Annexation*, 20

On the other hand, the fact that enhanced norms of actual enforcement cannot develop without something akin to the clear consent of at least most nations would suggest that the international community is likely to go on wringing its hands in the face of even the most egregious violations of its supposedly non-derogable principles.⁹⁸ The international law-making apparatus functions, if at all, like an unwieldy town meeting, with each bloc of participants holding the veto.⁹⁹ Adoption of cost-free (because abstract) norms is attractive; adoption of implementing mechanisms and duties to act is much more problematic and nearly impossible to achieve in a still largely consensus—and consent—based system.¹⁰⁰

Given the amount of time spent by legal scholars and diplomats arguing over the status of particular “pieces” of international law (is it yet customary international law, is it *jus cogens*?), it is discouraging to witness those instances where disputation over norms evaporates in the face of a violent reality.¹⁰¹ United Nations peacekeepers are often associated with such lapses—such as in the massacre of Srebrenica and in the Rwandan genocide.¹⁰² In Rwanda most dramatically, it quickly became clear that the role of the U.N. was to get the Europeans and Americans out, while leaving

BROOK. J. INT’L L. 333 (1994), with Asher Maoz, *The Application of Israeli Law to the Golan Heights Is Annexation*, 20 BROOK. J. INT’L L. 355 (1994). See also *Iraq War Illegal, Says Amman*, BBC NEWS.COM (Sept. 16, 2004), <http://news.bbc.co.uk/2/hi/3661134.stm> (capturing thoughts of U.N. Secretary General Kofi Annan with respect to U.S.-led coalition’s invasion of Iraq).

98. See AREND & BECK, *supra* note 21, at 136-37 (noting that U.N. Charter prohibition on unilateral intervention is authoritative and controlling despite past cases of humanitarian intervention); Malone, *supra* note 29 (questioning whether, due to lack of precedent, states should be barred from intervening in order to prevent or mitigate environmental and humanitarian disasters). Compare Jones, *supra* note 33, at 105-06 (bemoaning the inability to create Security Council precedent for humanitarian intervention so long as China and Russia continue to exercise veto power in such instances), with Roberts, *supra* note 36, at 136-37 (stating belief of some international lawyers that NATO’s intervention in Kosovo will establish a right to unilateral intervention).

99. See Roberts, *supra* note 36, at 28, 38 (citing Security Council veto power as one impediment to creation of certain international norms).

100. See Philip Alston and Bruno Simma, *The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles*, 12 AUSTL. Y.B. INT’L L. 82, 89 (1992) (recognizing that, for some writers, the notion of “state practice” has turned into “paper practice”: “words, texts, votes and excuses” that contradict the external actions (or inaction) of states).

101. See generally Roberts, *supra* note 36 (attempting to reconcile traditional and modern forms of customary international law into coherent theory with which to move forward).

102. POWER, *supra* note 56, at 361 (describing bitter divide within U.N. Security Council over whether to term events taking place in Rwanda during the spring and summer of 1994 as “genocide”); *id.* at 406-30 (describing deliberate efforts by Clinton administration to avoid intervening in Bosnia despite reports of mass killings at Srebrenica).

the incredulous Rwandans to their fate.¹⁰³ It is apparent that the real sin in those cases was one of omission, and that it was the failure of militarily capable states to provide effective protection that led directly to the larger tragedy.¹⁰⁴ As for the U.N., the image of those in the blue helmets stepping back while slaughter was being planned and executed was not only troublesome, but, in light of the fact that the U.N. represents the “international community” and its endless wrangling over international law norms, the ultimate irony.¹⁰⁵

A. How International Law Gets Made

In many ways, international law can hardly be called a legal system at all, except for the persistence of legal scholars in doing so.¹⁰⁶ An especially challenging aspect of international law is that its evolving norms—that is to say, its very substantive content—is driven by both the consent and practice of sovereign states.¹⁰⁷ Westphalian notions of sovereignty impede the development of international law along cleaner, more coherent lines.¹⁰⁸ While no legal system is immune from irrationality, these defects are especially characteristic of international law.¹⁰⁹ The conceptual dominance of sovereignty and its concomitant notion of state consent leave certain egregious violations unaddressed. This is true whenever there is a failure by

103. *Id.* at 352-53 (relating commands from head of U.N. Peacekeeping Operations Kofi Annan to General Dallaire with regards to maintaining neutrality and evacuating foreign nationals).

104. At the height of the Rwandan genocide in April-May, Dallaire’s forces were reduced from 2,500 to 2,100 and finally to 270 following U.N. Security Council authorization. POWER, *supra* note 56, at 352-53.

105. It is a matter of great interest that, as of this writing, the Security Council has decided (Russia, China, Brazil, India and Germany abstaining) to give approval to a no fly zone in Libya to protect Libyan rebels seeking the end of the Qaddafi regime. Far from indicating a sea change in international views of humanitarian intervention, one issue being heatedly discussed in what makes this conflict different from so many that have been essentially ignored by the international community. One factor that cannot be overlooked, of course, is the importance of Libyan oil and general strategic significance. Richard Falk, *In Libya, Decoding an Uncertain Future*, AL JAZEERA (Aug. 31, 2011), <http://www.aljazeera.com/indepth/opinion/2011/08/201182885646839710.html>

106. See Joshua Kleinfeld, *Skeptical Internationalism: A Study of Whether International Law is Law*, 78 FORDHAM L. REV. 2451 (2010); Murphy, *supra* note 32 (attempting to identify the contemporary norms governing resort to war); ORFORD, *supra* note 70, at 72 (stating that international law appears to lack the familiar institutions of domestic law, and questioning whether international law is really law at all).

107. See ALEXANDER ORAKHELASHVILI, PEREMPTORY NORMS IN INTERNATIONAL LAW 41-45 (2006) (listing state and international judicial practice as one factor in identifying peremptory norms).

108. See Louis Henkin, *That ‘S’ Word: Sovereignty, and Globalization, and Human Rights, Et Cetera*, 68 FORDHAM L. REV. 1 (1999), for a discussion on the inapplicability of Westphalian notions of sovereignty to an increasing number of arenas—including international human rights, corporate responsibility and cyberspace.

109. See generally debate discussed in note 44, *supra*.

states either to arrive at consensus as to the appropriate response or, more fundamentally, as to the nature of the unfolding events.¹¹⁰

On the one hand, ordinary “customary international law” is created through a process of broad state practice over time, combined with so-called *opinio juris*—the belief by the state that it is adhering to a rule because the rule is legally binding upon it. That is to say, the state believes the rule to reflect what the law really is (as opposed to merely a good or moral idea).¹¹¹ This somewhat fanciful formulation reflects the implicit resistance of international lawyers to the accusation that international norms rest on a merely prescriptive sense of fairness, propriety, or global goodness. Outside of treaties and ordinary custom, there is another *uber* layer of rules, based upon the notion that *jus cogens* or peremptory norms are so basic, so fundamental, that it can be assumed no state would or could reject them.¹¹² Such norms are non-derogable; they are inherently and unequivocally binding. It is often said that this branch of modern international law is based upon natural law, to the extent that as a source of rules, *jus cogens* norms are moral, right, and unquestionably beneficial. One problem, however, is that this “peremptory” quality extends only to the norm and not to its means of enforcement—which is often all but non-existent. A further problem is that this higher status of non-derogable norms means that there is a deep reluctance on the part of international and national tribunals to acknowledge or identify such norms.¹¹³ To the extent that *jus cogens* is a powerful term, it is only reluctantly affirmed.

110. See AREND & BECK, *supra* note 21, at 128-36 (arguing that norm prohibiting humanitarian intervention to remove tyrants is authoritative and controlling based on rejection of theory by states); *id.*, at 136 (detailing Professor Tesón’s observations regarding this argument: “There must be something deeply wrong with an international legal system that protects tyrants like [Idi] Amin”); Scott Straus, *Darfur and the Genocide Debate*, 84 FOREIGN AFF. 123, 125, (2005); Joyce Apsel, *On Our Watch: The Genocide Convention and the Deadly, Ongoing Case of Darfur and Sudan*, 61 RUTGERS L. REV. 53, 54-55 (2008) (“[A] significant amount of time and energy was spent on debates over whether or not events in Darfur were ‘genocide’ and if the Genocide Convention applied, on recommendations to the Security Council, and on official and public condemnations—none of which stopped the momentum of escalating violence.”).

111. See Roberts, *supra* note 36, at 758-61 (introducing concept of *opinio juris*).

112. See *id.* at 761-63 for a discussion on the difference between legal (prescriptive) and moral (normative) imperatives to act and explaining difference between prescriptive, descriptive and normative actions.

113. See ORAKHELASHVILI, *supra* note 107, at 545-50 (noting incorporation of *jus cogens* into national decisions in Israel, Britain and United States). Both the Eichmann and Pinochet cases are pivotal to the current debate over *jus cogens* crimes. In the United States, a growing body of law centered on delineating the limits of *jus cogens* and customary international law has emerged under the Alien Torts Claims Act, originally passed in 1798. See, e.g., *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004) (ruling that illegal detention of defendant did not amount to a breach under law of nations); *Viet. Ass’n for Victims of Agent Orange v. Dow Chem. Co.*, 517 F.3d 104 (2d Cir. 2008); *Kadic v. Karadzic*, 70 F.3d 232, 238 (2d Cir 1995) (setting forth basis for an adequate pleading alleging violations of law of nations).

Several extraordinary facts about the formation of international law come together here: international law is still based largely on the consent of sovereign states—whether in treaty law or in the creation of customary international law, the latter involving a process that is less explicit and more mysterious than adoption of treaty obligations.¹¹⁴ A special class of super norms, the *jus cogens* norms, having to do with egregious violations of human rights, may be asserted without a full demonstration of state consent—or less provocatively, may be treated as so obvious to all that the process of demonstrating state consent becomes inherently irrelevant.¹¹⁵ On the other hand, even where *jus cogens* norms are recognized (and it has been pointed out that tribunals are reluctant to acknowledge the existence of these norms without a very firm foundation for doing so) the means of norm enforcement may nonetheless remain largely undeveloped.¹¹⁶ Despite these contradictions, international law scholars and international lawyers continue to assert that international law *is* law; it is not morality or secular religion but rather law as any other law, albeit with its own specialized characteristics.¹¹⁷

I have suggested that the gap between the promise and reality of international law is most obvious where an extremely vulnerable set of victims could with relative ease be saved by the international community, but where the international community conspicuously fails to act.¹¹⁸ This puts those insisting that international law is law—and as such guarantees a

114. Of the controversial nature of customary international law, British Diplomat Anthony Aust states:

[T]here is no agreement on the criteria for identifying which norms of general international law have a peremptory [*jus cogens*] character Perhaps the only generally accepted example is the prohibition on the use of force as laid down in the UN Charter. The prohibitions on genocide, slavery and torture may also be said to be *jus cogens* . . . [b]ut it would be rash to assume that all prohibitions contained in human rights treaties are *jus cogens*, or even part of customary international law.

ANTHONY AUST, MODERN TREATY LAW AND PRACTICE 257 (2000).

115. See *Filartiga v. Pena-Irala*, 630 F.2d 876, 887 (2d Cir. 1980) (listing those crimes outlawed as violating law of nations).

116. See Sloan, *supra* note 9, at 84-85 (indicating that current international system geared not towards accomplishing justice but rather non-intervention); *c.f.* Alexander, *supra* note 94, at 5, 19-22 (assessing the relationship between the ICC and the United States and explaining complementarity doctrine). See *id.* at 5 (stating President Bush famously “unsigned” the Rome Statute creating the International Criminal Court in 2005); *id.* at 19 (“ICC jurisdiction operates according to the complementarity doctrine, under which the Court will not exercise jurisdiction over a case unless the State(s) with original jurisdiction is unwilling or unable genuinely to carry out the investigation or prosecution.”).

117. See HENKIN, *supra* note 77, at 25-29 (arguing, essentially, that substance of international law should take precedence over form).

118. See *supra* notes 5, 7, 9, 10, 13 and accompanying text (suggesting inability of international legal system to create an enforceable set of rules governing responses to genocide and other atrocities committed by state and non-state actors).

certain minimum level of humanitarian protection—in a very uncomfortable position, necessitating intellectual gymnastics to preserve the fiction that this is indeed recognizably law, as opposed to aspiration. This pressure to vindicate the effectiveness and enforcement capability of international law in real time accounts, it can be argued, for the intense professional interest in structures like the International Criminal Court.¹¹⁹ International criminal tribunals in particular create a good deal of rhetorically pleasing “accountability,” by “ending impunity” and the like, whereas all of this legal activity generally takes place after numerous barbaric events have played out on the ground.¹²⁰

IV. THE ULTRA-VULNERABLE AND A CLEAR RESPONSIBILITY TO PROTECT

This article has argued that claims of international law effectiveness have been consistently undermined by the failure of international law to provide basic guarantees of safety for the ultra vulnerable. One example of this global cohort of the “ultra-vulnerable” are children caught up in brutal, though generally low tech, civil wars. Since the adoption of the United Nations Convention on the Rights of the Child (UNCRC) in 1989,¹²¹ it has been often stated that children are now the holders of their own rights,¹²²

119. See Alexander, *supra* note 94, at 19-20 (discussing the ability of ICC to enforce international criminal laws); Smith, *supra* note 92 (discussing prospect of prosecuting and convicting various alleged war criminals).

120. See generally Payam Akhavan, *Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?*, 95 AM. J. INT'L L. 7 (2001) (arguing that ICTY and ICTR have contributed to peace-building in post-war societies by introducing international criminal accountability). *But see* STOVER, *supra* note 91, at 142-45 (summarizing thoughts of ICTY witnesses on international criminal tribunal process and sentences received by convicted criminals). See also *id.* at 142 (discussing that, in addition to certain, surprisingly-short prison sentences handed down by the ICTY, it is clear that the work of international criminal tribunals can in no way substitute for intervention into and prevention of horrific war crimes).

121. U.N. Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3 [hereinafter UNCRC].

122. Earlier child rights documents focus simply on economic and social needs of the child delivered through the parent or family. *Compare Declaration of Geneva*, League of Nations Doc. A.127 (1924); *Declaration of the Rights of the Child*, G.A. Res. 1386 (XIV), 14 U.N. GAOR, 14th Sess., Supp. No. 16, U.N. Doc. A/4354, arts. 25, 26 (Nov. 20, 1959); International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), arts. 23, 24, 21, U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316, at 52 (Dec. 16, 1966); International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200A (XXI), arts. 10, 21 U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316, at 49 (Dec. 16, 1966), *with* Convention on the Rights of the Child, G.A. Res. 44/25, art. 12, Annex, U.N. GAOR, 44th Sess., Supp. No. 49, U.N. Doc. A/RES/44/25, at 167 (Nov. 20, 1989)

1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

they are no longer to be seen as appendages of the family or community.¹²³ While there is no clear consensus on the hierarchy of rights within children's rights as found in the UNCRC, it is apparent that there is something distinct and instinctual about the impulse to protect children from unnecessary suffering. To the extent that children are unable to analyze or influence their own fates to any appreciable degree, it falls to others—the non-children among us—to protect them from harm whenever possible. This responsibility to protect falls in obvious ways on families, communities and states, as well as on the international community. Failure to react effectively to the suffering of children may be seen as a particularly egregious form of indifference.

In the late 1990s, Graca Machel described the chilling reality that civil conflicts raging in many parts of the post-Cold War world were not only dangerous and violent for children; in fact, these conflicts took as their specific objective terrorizing children through extreme forms of exploitation and brutalization.¹²⁴ Targeting children as a means of intimidating communities had become a principal technique of waging war in the 1990s.¹²⁵ The damage was no longer incidental but instead intentionally directed at children. Territory could be controlled; villages could be cowed through a raw demonstration of power that eschewed any pre-existing notion to the effect that, even in warfare, there should be a bare minimum of humanistic behavior in the form of child protection.¹²⁶ In the decade that followed publication of her report, a number of conflicts seemed to unfold according to the Machel playbook: children were raped, tortured, and killed and were also made to engage in this kind of behavior.¹²⁷ Nothing short of the most brutalizing forms of indoctrination would do.¹²⁸ Anti-government

2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

Id.

123. See Maria Grahn-Farley, *Foreword: Crossing Borders*, 30 CAP. U. L. REV. 657, 659 (2002) (“The CRC is a unique human rights treaty, not only in its universality, but also in its paradigmatic shift from looking at the child as a passive object based on her needs to looking at the child as an active subject and bearer of her own rights.”).

124. Machel Report, *supra* note 76, ¶ 3.

125. *Id.*

126. *Id.*

127. See Baldauf, *supra* note 75.

128. See BUREAU FOR INTERNATIONAL REPORTING, *Uganda's Silent War* (Dec. 20, 2008), [YOUTUBE](http://www.youtube.com/user/TheBIRorg#p/u/20/j8ZxHQLA0ww) (Dec. 20, 2008), at: 1:05/36:19, <http://www.youtube.com/user/TheBIRorg#p/u/20/j8ZxHQLA0ww> (interviewing several children who were forced to brutally kill and rape other children in Uganda); DeNeen L. Brown, *A Child's Hell in the Lord's Resistance Army*, WASH. POST, May 10, 2006, at C1, available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/05/09/AR2006050901907.html>.

militias, well aware of their own weakness in conventional terms, used children to augment their power through the sheer terror they could call forth in civilian populations by such systematic abuse.¹²⁹ Destruction of the deepest human instinct to protect the very young became a weapon of war.

While perhaps an obvious point, it should be noted that children and their immediate relatives have borne the brunt of this reality themselves. The U.N. may use its descriptive outlets to raise awareness of the problem, but the terror brought to bear against children has been experienced within particular communities.¹³⁰ Those who make law and policy to address these situations do not themselves undergo any of the adverse effects. Much of this post-Cold War civil warfare has been extremely unsophisticated in military terms. There is little question about the inability of violent militias to stand up to the military power of any modern, organized army. Nevertheless, a striking characteristic of these conflicts is that they have continued in some cases literally for years, leading to tens of thousands of deaths.¹³¹

One of the most extreme examples of children being allowed to suffer needlessly was that of the Ugandan “night walkers,” children who had to sleep collectively in order to avoid being kidnapped or killed when in their homes. Many had to walk long distances every night in order to find safety in numbers at some common location.¹³² This nightly ritual went on for several years during a prolonged period of intense violence perpetrated by Joseph Kony and the Lord’s Resistance Army in Uganda. As far as “evidence” is concerned, it is a simple matter to find video depictions of these children, marching joylessly out from their homes each night to shelter in overcrowded, dirty, and depressing buildings where they could

129. CHILD SOLDIERS REPORT, *supra* note 76.

130. See Ilene Cohn, *The Protection of Children in Peacemaking and Peacekeeping Processes*, 12 HARV. HUM. RTS. J. 129 (1999) (Despite increased international attention to and awareness of children’s rights, children are largely overlooked in the peacemaking and peacekeeping process. Rules of engagement for peacekeepers disregard children, and reconstruction and reconciliation programs that emerge from negotiations ignore the differential impact on and particular needs of children. The effect is to marginalize persistent problems like the rehabilitation and reintegration of child soldiers and, more broadly, to miss the opportunity to address widespread systemic problems common to war-torn societies.); Brown, *supra* note 128.

131. See, e.g., TIM ALLEN, TRIAL JUSTICE: THE INTERNATIONAL CRIMINAL COURT AND THE LORD’S RESISTANCE ARMY 64-65 (2006) (chronicling the atrocities in Uganda as including forcing children to kill their own parents, crushing babies’ and toddlers’ skulls or throwing them into fires, mutilating innocent civilians, and abducting and forcing girls and young women into sexual slavery).

132. See *The Oprah Winfrey Show: Humanitarian Crisis*, Harpo Productions, (Apr. 26, 2006), available at <http://www.oprah.com/oprahshow/Humanitarian-Crisis/2>; Jeevan Vasagar, *The Nightwalkers*, GUARDIAN (London), Feb. 10, 2006, § G2, at 10, available at <http://www.guardian.co.uk/world/2006/feb/10/uganda.jeevanvasagar>; John Goddard, *Uganda’s Night Walkers*, TORONTO STAR, Mar. 14, 2006, at A03, available at Westlaw, 2006 WLNR 4226010.

attain some basic safety in numbers.¹³³ Because of the brutal nature of the militia members' behavior,¹³⁴ the communities from which the children came could no longer protect them; they had no choice but to let their children go out on these forced marches each night. In the face of this prolonged and supremely unnecessary suffering (as compared, for instance, with the vexed situation of human rights violations in strong, heavily armed, totalitarian states like Burma or North Korea), it is hard to accept the fact that the international community took no organized steps to stop it—yet that is the case.¹³⁵ News outlets could readily find the children and film them in their nightly misery, yet the international community could find no real, practical solution, even over the course of many years.

Joseph Kony did not represent a state, and his military band numbered only in the hundreds. As military forces go, his was weak and unimpressive.¹³⁶ It is not difficult to imagine ways in which the international community could have taken some direct action against Kony, such that he would have been at least deterred from his brutal crusade. Dozens of reports and studies were issued, and Kony's outrages against the people of Northern Uganda were exhaustively detailed.¹³⁷ However, as his actions were allowed by the international community to continue indefinitely, tens of thousands of refugees entered substandard government-run camps, and where villagers did remain in their home places, the children kept walking each night to comparative safety.¹³⁸ Ugandan government-run refugee camps were notorious in their own way for violence and a generally dismal quality of life.¹³⁹

133. See, e.g., Journeyman Pictures, *Abduction—Uganda*, YOUTUBE (Dec. 2003), <http://www.youtube.com/watch?v=Kft07dZLpks>.

134. See generally ALLEN, *supra* note 131.

135. Payam, Akhavan, *The Lord's Resistance Army Case: Uganda's Submission of the First State Referral to the International Criminal Court*, 99 AM. J INT'L L. 403, 404 (2005) (describing the international community as "aloof" regarding the crisis in Uganda.); *id.* ("Given the absence of any vital national interests, influential states have not been inclined either to pressure Sudan to stop harboring the LRA or to help government forces confront the insurgents. Instead, the burden was placed on Uganda to negotiate a peaceful settlement with a ruthless, cult-like insurgency.").

136. ALLEN, *supra* note 131, at 40.

137. See e.g., *Uprooted and Forgotten*, HUM. RTS. WATCH (Mar. 16, 2009), <http://www.hrw.org/en/reports/2009/03/16/uprooted-and-forgotten>; *As If We Weren't Human*, HUM. RTS. WATCH (Aug. 26, 2010), <http://www.hrw.org/en/reports/2010/08/26/if-we-weren-t-human>.

138. ALLEN, *supra* note 131, at 53-54; U.N. Econ. & Soc. Council [ECOSOC], Comm'n on Human Rights, Specific Groups and Individuals: Mass Exoduses and Displaced Persons, ¶1, Statement Submitted by Caritas Internationalis et al., U.N. Doc E/CN.4/2006/NGO/174 (Feb. 13, 2006) [hereinafter ECOSOC] (estimating the number of displaced persons at 1.7 million).

139. ALLEN, *supra* note 131, at 53-54. See also *Abducted and Abused*, HUM. RTS. WATCH (July 14, 2003), <http://www.hrw.org/en/node/12306/section/7>; *Uprooted and Forgotten*, *supra* note 137.

It is interesting that Joseph Kony is being sought by the Ugandan government, with the assistance of other governments,¹⁴⁰ so that he can be sent to prosecution to the International Criminal Court (ICC) in the Hague. International lawyers are profoundly interested in the ICC, which has been active since 2002. In that time, the Court has spent “half a billion euros”¹⁴¹ and issued warrants for only a small number of criminal defendants.¹⁴² International prosecutions of war criminals have been controversial in countries where years of civil conflict have left the local populations decimated by violence and hunger. In the case of Uganda, there has been great fear that Kony’s flight from ICC prosecution could prolong and even revive the conflict.¹⁴³ International law has been bullish on the creation of post-conflict tribunals; it has, by ironic contrast, been timid and resistant on the question of armed humanitarian intervention.¹⁴⁴ In Uganda, as in other conflict situations, prosecuting militia leaders has often been debated in the context of peace-at-all-costs versus “justice,” as if the mere fact of criminal prosecution after many years of neglected conflict aptly represented justice.¹⁴⁵ This article will not revisit the broader debate over the desirability of peace versus justice, one of the grand themes of academic writing on “transitional justice.” However, one aspect of justice must surely be to *prevent* suffering where possible, and in such conflicts, prevention appears to be far more possible than the reaction of the international community has indicated. In this sense, we might posit *a responsibility to intervene* where there is a likelihood of success—that is, where there would be no significant countervailing threat to international peace and security arising from the intervention.

140. See generally Caroline Ayugi & Peter Eichstraedt, *The ICC Wants Joseph Kony Leader of the Lords Resistance Army* (May 23, 2008), <http://miafarrownews.blogspot.com/2008/05/icc-wants-joseph-kony-leader-of-lords.html>; Joe Bavier, *Waiting for the Americans: Dungu*, PULITZER CTR. ON CRISIS REPORTING (Sept. 10, 2010), <http://pulitzercenter.org/blog/untold-stories/waiting-americans-dungu>.

141. See Press Release, ICC Watch, *The ICC: Half a Billion Euros, For What?*, (Mar. 3, 2010), available at <http://www.iccwatch.org/pdf/Press%20Release%203Mar10.pdf>.

142. See *All Cases*, ICC, <http://www.icc-cpi.int/Menus/ICC/Situations+and+Cases> (last visited Aug. 30, 2011) (detailing the “situations” in which the ICC is involved).

143. Josefine Volqvartz, *ICC under Fire over Uganda Probe*, CNN (Feb. 23, 2005), <http://www.cnn.com/2005/WORLD/africa/02/23/uganda.volqvartz> (quoting Jan Egeland, U.N. humanitarian emergency coordinator, characterizing/describing? the conflict as “one of the world’s most neglected crises”).

144. See HUMAN RIGHTS WATCH, *SELLING JUSTICE SHORT: WHY ACCOUNTABILITY MATTERS FOR PEACE* 35-92 (2009), available at http://www.hrw.org/sites/default/files/reports/ij0709webwcover_3.pdf.

145. Compare Luis Moreno-Ocampo, Prosecutor, ICC, *Address at Building a Future on Peace and Justice International Conference* (June 25, 2007), available at <http://www.peace-justice-conference.info/download/speech%20moreno.pdf>, with Lucy Hovil & Joanna R. Quinn, *Peace First, Justice Later: Traditional Justice in Northern Uganda* 50-52 (Refugee Law Project, Working Paper No. 17, 2005), available at http://www.refugeelawproject.org/working_papers/RLP.WP17.pdf

A. International Lawyers, the Nuremberg Illusion and International Criminal Tribunals

Since international law is relatively strong on norm production (even taking into account constraints on the development of norms demanded by the methods of customary international law, as described above) and extremely weak on enforcement and implementation, this leaves an unsatisfying state of affairs for international *lawyers*. Lawyers with a public international portfolio resist the idea that international law is merely exhortation or moralizing, and seek wherever possible to establish equivalence between international law and “real” law.¹⁴⁶ Since military action carried out to protect the vulnerable from violations of their international rights would demand intense political advocacy, and entail at least some risks in implementation, international lawyers have turned instead to a formalized, ritualized version of norm enforcement—the international criminal trial. Recent international criminal tribunals have been based loosely on the “Nuremberg” model—the trial of Nazi war criminals after the allied victory World War II.¹⁴⁷ The authors of the Nuremberg judgment took pains to convince an international audience that the criminal trials were not merely manifestations of victors’ justice, but represented the collective will of the international community, applying real law to real criminal defendants.¹⁴⁸ The difference between Nuremberg and the more recent tribunals, of course, is that in World War II real armies first took on the Nazis, and the criminal trials took place only after the war had been won through actual intervention of the strongest kind—not after the war had been allowed to simply “run its course.”¹⁴⁹ Rulings of the international tribunals set up in the wake of conflicts in the former Yugoslavia, Rwanda, and Sierra Leone have all been extensively mined for nuggets of international criminal law.¹⁵⁰ Such jurisprudential views,

146. See Jordan J. Paust, *In Their Own Words: Affirmations of the Founders, Framers, and Early Judiciary Concerning the Binding Nature of the Customary Law of Nations*, 14 U.C. DAVIS J. INT’L L. & POL’Y 205 (2008).

147. See STEVEN R. RATNER & JASON S. ABRAMS, *ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW: BEYOND THE NUREMBERG LEGACY* 193, 205 (2d ed. 2001) (discussing the ICTY and ICTR as having principle origins from, and similarities with, Nuremberg).

148. TELFORD TAYLOR, *THE ANATOMY OF THE NUREMBERG TRIALS: A PERSONAL MEMOIR* 42 (1992).

149. Simpson, *supra* note 17, at 805 (“In the absence of a uniform and global approach, the trials of war criminals have generally occurred only where defeat and criminality coincide.”); see *id.* at 809 (noting that the ICC was “designed to be operative during times of peace when distinctions [of winners and losers] are meaningless.”).

150. See *id.* at 808-09; Akhavan, *supra* note 120, at 9 (“The empirical evidence suggests that the ICTY and the ICTR have significantly contributed to peace building in postwar societies, as well as to introducing criminal accountability into the culture of international relations.”).

however, reflect the situation after brutal conflict has subsided and after thousands have suffered and died who might have been protected from that fate had international law forthrightly embraced a doctrine like humanitarian intervention and/or the responsibility to protect. There may well be situations in which nations are fearful of huge investments in blood and treasure, and ultimate lack of success, but with respect to many conflicts, it would seem that relatively modest involvement by outside forces to stop bloodshed, if not to topple governments or engage in nation building, might have yielded significant results.¹⁵¹ And yet, such efforts are only rarely made.¹⁵²

The debate over whether international law allows for unilateral or even group humanitarian intervention is real and vibrant, if often overly technical in nature.¹⁵³ However, it is treated as an arcane and generally non-urgent question to be sorted out over a very long timeline of real-world events and academic writing. Interest in international criminal tribunals is far less ambiguous, however. International lawyers engage fully with the idea of international criminal tribunals, set up under the auspices of the international community.¹⁵⁴ International crimes are parsed, the relevant criminals identified, and the proper procedures pondered. The ICC, for all the academic analysis it has engendered, has spent a huge amount of money and only brought a handful of defendants to trial as of this writing.¹⁵⁵ Yet, its chief prosecutor has insisted that the mere fact of its existence will “change the world” and act as the ultimate deterrent, even for the type of incorrigible war criminal involved in brutal civil wars.¹⁵⁶ However implausible that claim, this is the belief that drives interest in the international criminal tribunals and sustains belief in the relatively inactive ICC.

There is nothing inherently objectionable about the establishment of international criminal tribunals. Indeed, the proliferation of these tribunals is often cited as a sign that the enforcement aspect of international law is

151. GÉRARD PRUNIER, *THE RWANDA CRISIS, HISTORY OF A GENOCIDE* 224, 228 (1995).

152. As mentioned in the first part of this article, the recent Libyan intervention by NATO seems to be the exception that proves the rule. While the ostensible justification for involvement in Libya is the danger posed to civilians by the Tripoli regime, it must be noted that similar dangers in other countries have remained unaddressed for years. Certainly the presence of large quantities of oil, and Libya’s consequent geopolitical importance, cannot be ignored.

153. See Nikolai Krylov, *Humanitarian Intervention: Pros and Cons*, 17 *LOY. L.A. INT’L & COMP. L.J.* 365 (1995).

154. See Ellis, *supra* note 16, at 120 (“The statutes reflect a belief that the creation of international war crimes tribunals will ensure respect for and enforcement of international justice, and a determination that grave breaches of international humanitarian law will not go unpunished.”).

155. See Press Release, *supra* note 141.

156. See generally Moreno-Ocampo, *supra* note 145.

becoming more credible.¹⁵⁷ U.S. failure to participate in the treaty establishing the ICC is taken, by contrast, as an indication of U.S. resistance to the encroachment of international law on U.S. military activities.¹⁵⁸ What is troublesome, however, is that international lawyers appear to endorse this over-emphasis on criminal tribunals, by contrast to the at best anemic response to real-time rape and slaughter of vulnerable populations, even by low tech, poorly armed, and disorganized bands of marauding militias.¹⁵⁹ The mobilization of legal elites around the idea of international tribunals gives rise to an uncomfortable suspicion that international legal scholars are mistaking norm creation and abstract prosecution for effective intervention or at least substituting norm analysis for international law reform advocacy.¹⁶⁰ At their worst, the international criminal tribunals, which are of such interest to international lawyers, perversely provide cover for the fact that international law has little to offer the most vulnerable populations when it comes to actual protection against real threats to life and safety.¹⁶¹

It is nearly ten years since the appearance of Samantha Power's book, *A Problem from Hell*, in which she excoriated the United States for its historical indifference to instances of genocide around the world. She was not the first to point out that there was little political cost associated with turning a blind eye to genocide, nor the first to note American and European hypocrisy in these matters.¹⁶² The examples of Cambodia, the Balkans, and Rwanda could not be clearer, and, as presented by Power, show the degree to which political elites in the U.S. and elsewhere were more worried about the adverse consequences of direct involvement than what inevitably happens to vulnerable populations under extreme threat.¹⁶³ One would like to think that at least the international community broke its own rules when it looked the other way and allowed the Rwandan genocide and other slaughters to proceed.¹⁶⁴ The fact, though, is that even with regard to what should be a very clear point of agreement, no solid international law has had an opportunity to crystallize. There is no generally recognized responsibility to protect civilians not within one's own borders, even when the act of

157. See Ellis, *supra* note 16, at 119.

158. See Osiel, *supra* note 94.

159. For a discussion of the ICC, see COURTING HISTORY, *supra* note 90.

160. *Id.* It is interesting to note that President Obama recently made the decision to send a small number of troops to Africa for the purpose of attempting to capture Joseph Kony. This symbolic gesture is to be welcomed, but comes many years too late. Howard LaFranchi, *LRA Leader Joseph Kony: Why Obama sent US Troops to Uganda to get him*, THE CHRISTIAN SCIENCE MONITOR (Oct. 14, 2011), <http://www.csmonitor.com/USA/Foreign-Policy/2011/1014/LRA-leader-Joseph-Kony-Why-Obama-sent-US-troops-to-Uganda-to-get-him>.

161. *Id.*

162. See RONAYNE, *supra* note 60.

163. See POWER, *supra* note 56, for the recent example of ethnic Uzbeks in Kyrgyzstan.

164. See Wheeler, *supra* note 31, at 50.

protection would be relatively easy and the type of suffering that would be prevented is grave and extensive.¹⁶⁵

It certainly matters which phrase we use to describe the international right and/or duty to take meaningful action when the lives of civilians are at serious risk from immediate violence, in situations where the state in which these civilians live is unwilling or unable to respond in a protective way. The drafters of the report on the Responsibility to Protect might well have framed the issue as they did from a desire to remove the entire problem from the sterile debate over the U.N. Charter's proscription on the use of force, and bring it instead into mainstream thinking over human rights and the widely accepted diminution of state sovereignty in that arena. On the other hand, the idea of a broadly embraced exception to the prohibition on the use of force has a more robust quality to it and could more squarely and explicitly help to remove scruples that arise when the international community is faced with the problem of when and how to act in the face of mass atrocities. As explained above, perhaps a duty of humanitarian intervention would capture both the requirement to take meaningful action and the sense that military force (as opposed to mere dialogue or threats) would be involved.

The virtue of the designation *Responsibility to Protect* is that it encompasses situations outside of regular warfare and so has broader potential for principled application. As for what the children's rights dimension adds to this discussion, the readiest answer is that where there are massive and deliberate violations of children's rights, there is a heightened sense of egregiousness. In instances of extreme vulnerability, it seems completely unreasonable to expect that civilians should have to wait for conflict to "run its course" before the international community takes action. An urgent duty on the international community to come up with strong protective structures would seem in such cases beyond dispute. Where such indicia of extreme vulnerability are present, any system of "law" should certainly be required to offer a clear remedy in the form of unambiguous prevention.

165. See generally Payandeh, *supra* note 31.

