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## Humanity and National Security: The Law of Mass Atrocity Response Operations

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# HUMANITY AND NATIONAL SECURITY: THE LAW OF MASS ATROCITY RESPONSE OPERATIONS

*Keith A. Petty\**

At the point when you decide to punish, you have already failed.<sup>1</sup>

INTRODUCTION .....	746
I. HISTORY OF MASS ATROCITIES: PREVENTATIVE AND RESPONSE MEASURES .....	749
A. <i>History of Violence: Atrocity Crimes Through the     Centuries</i> .....	749
B. <i>Global Failure to Prevent Mass Atrocities</i> .....	754
C. <i>Modern Developments in Atrocity Prevention and     Response</i> .....	761
1. Humanitarian Intervention .....	762
2. Responsibility to Protect .....	765
D. <i>The United States and Mass Atrocity Prevention &amp;     Response Operations</i> .....	768
1. Full Spectrum Approach .....	770
2. Military Preparedness .....	770
E. <i>Atrocities in Syria</i> .....	775
II. THE LEGALITY OF ATROCITY RESPONSE WHEN THE UNITED NATIONS FAILS TO ACT .....	777
A. <i>Jus ad Bellum &amp; Atrocity Response</i> .....	778
1. Law and the Use of Force: Article 2(4) in Context .....	780
B. <i>The Emergence of Contingent Sovereignty</i> .....	792

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1. Benjamin B. Ferencz, Commentary, *Origins of the Genocide Convention*, 40 CASE W. RES. J. INT'L L. 13, 26 (2008).

C. <i>Nonlegal Considerations: Morality and Justification</i> ..	796
D. <i>Syria and Unilateral Intervention</i> .....	799
III. DEVELOPING A LEGAL NORM FOR ATROCITY RESPONSE .....	800
A. <i>Norm Development Through Action and Discourse</i> ..	801
B. <i>Leadership: The Will to Act</i> .....	806
C. <i>Mass Atrocity Response Is a National &amp; Global         Security Interest</i> .....	810
D. <i>Overcoming Pretext</i> .....	812
IV. PROPOSED THRESHOLD FOR UNILATERAL ATROCITY RESPONSE OPERATIONS .....	815
A. <i>Objective Threat of Atrocity Crimes</i> .....	816
B. <i>Intervention Is Necessary</i> .....	817
C. <i>Proportionate Response</i> .....	819
D. <i>Regional and Coalition Coordination</i> .....	820
E. <i>Intervening States' Reports to the UNSC</i> .....	821
F. <i>Intervening States' Jus Post Bellum Planning</i> .....	821
G. <i>MARO Threshold Applied to Syria</i> .....	822
CONCLUSION .....	826

## INTRODUCTION

Among the greatest threats to global security is the slaughter of civilians. This is due to the inconsistent reaction of the international community to genocide and other atrocity crimes. Whether it was the slaughter of hundreds of thousands of Armenians in Turkey in 1915<sup>2</sup> or Rwandan Tutsis in 1994,<sup>3</sup> mass murderers act with impunity when there is not a forceful response. Contrast these situations to Vietnam's intervention in Cambodia in 1978 that put an end to the Khmer Rouge's nightmarish killing fields,<sup>4</sup> or the North Atlantic Treaty Organization's (NATO) intervention in Kosovo in 1999 that protected ethnic Albanians from Serb brutality.<sup>5</sup> Even though atrocities like these have been the hallmark of oppressive regimes throughout recorded history, they continue today in places like Syria partly as a result of the uncertain legality of the use of force to respond to these crimes. Strict interpretation of state sovereignty and the United Nation's monopoly on authorizing force significantly limit effective response measures, allowing grotesque human rights violations to continue. In order to break the atrocity cycle, states must have the authority to use force to prevent and respond to atrocity crimes when the United Nations fails to act.

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2. See discussion *infra* note 36.

3. See discussion *infra* note 50.

4. See discussion *infra* note 45.

5. See discussion *infra* notes 49, 122 and accompanying text.

A new strategy, led by the United States, is emerging in response to atrocity crimes.<sup>6</sup> The doctrine of Mass Atrocity Response Operations (MARO)<sup>7</sup> is developing as a result of several high-level reports and strategic publications highlighting the urgent need for more effective measures.<sup>8</sup> Further support came on August 4, 2011, when President Barack Obama issued a presidential directive to create an interagency “Atrocities Prevention Board.”<sup>9</sup> This interagency body is tasked with coordinating a government wide approach to preventing mass atrocities.<sup>10</sup> Of the many possible actions that can be taken to prevent atrocity crimes, military action—noncombat or outright intervention—must be included as a key element to deter and suppress violence. Still, due to the uncertain legality of intervention to halt atrocities, the new U.S. strategy could have a short life span largely due to inflexible interpretations of the U.N. Charter’s prohibition on the use of force and traditional notions of state sovereignty.

Until now, scholarship has failed to address the application of MARO when there is no U.N. authorization. This article proposes that the United States take the lead in developing a new norm allowing states to intervene to protect civilians from atrocity crimes when multilateral institutions fail to act. This can be accomplished in two complimentary ways. First, the United States should engage the world community—the United Nations, states, nongovernmental organizations (NGOs), the public, and the media—in a discursive process challenging the failure of the status quo to effectively stop the next Rwanda. Highlighting the institutional and practical ineffectiveness of the current legal regime will demonstrate that atrocity prevention is a global and state priority in need of a new normative standard.

Second, during the interpretive phase of a positive norm, like-minded states should work together to respond to mass atrocities with force if necessary and use the developing norm as the basis for intervention. Instead of waiting for global consensus on the positive law, which may never occur, this approach contributes to the gradual development of a customary

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6. See SARAH SEWALL ET AL., *MASS ATROCITY RESPONSE OPERATIONS: A MILITARY PLANNING HANDBOOK* 97 (2010) [hereinafter *MARO HANDBOOK*].

7. Mass Atrocity Response Operations (MARO) are the future of U.S. military initiatives to halt mass murders. The military intervention of MARO is a subset of atrocity response measures falling under the full spectrum of Mass Atrocity Prevention and Response Operations (MAPRO), which include diplomacy, intelligence gathering, economic, and other measures to prevent and respond to atrocity crimes. See *id.*

8. See MADELEINE K. ALBRIGHT & WILLIAM S. COHEN, *PREVENTING GENOCIDE: A BLUEPRINT FOR U.S. POLICYMAKERS* (2008) [hereinafter *GENOCIDE REPORT*]; *MARO HANDBOOK*, *supra* note 6, at 23.

9. Directive on Creation of an Interagency Atrocities Prevention Board and Corresponding Interagency Review, 2011 DAILY COMP. PRES. DOC. 1 (Aug. 4, 2011) [hereinafter *Presidential Directive*]. The Atrocities Prevention Board was formally activated in April 2012. See *President Obama Announces Creation of Atrocities Prevention Board*, HUM. RTS. FIRST (Apr. 23, 2012), <http://www.humanrightsfirst.org/2012/04/23/president-obama-announces-creation-of-atrocities-prevention-board/>.

10. Presidential Directive, *supra* note 9.

norm—even when violating the U.N. Charter’s provisions.<sup>11</sup> Genocidal regimes do not wait for an effective international legal framework, and neither should those who seek to prevent another Holocaust.

Preexisting barriers to developing a norm of this nature are breaking down. The traditional pillar of world order—state sovereignty—has been eroded since the drafting of the U.N. Charter. A robust human rights framework makes individuals, not just states, proper subjects of international law.<sup>12</sup> Additionally, the concept of Responsibility to Protect (R2P) now places the focus on states and their ability to prevent civilians from being subjected to large-scale atrocities.<sup>13</sup> This concept, adopted by every state at the 2005 World Summit,<sup>14</sup> suggests that sovereignty is now contingent on a state’s ability to protect its civilians from these crimes.

Nonetheless, many remain concerned that powerful states will use humanitarian justifications as pretext for political aims. Some states are fearful that a right to intervene in response to atrocity crimes will usher in a new era of imperialism, with stronger states annexing vulnerable neighbors.<sup>15</sup> Similarly, scholars suggest that permitting the use of force beyond the U.N. framework will cause a breakdown in world order.<sup>16</sup>

Responding to these claims, this Article emphasizes that the unilateral use of force in response to mass atrocities remains a last resort. Leaders do not face an all-or-nothing choice when deciding which actions are best suited to respond to genocide and other atrocity crimes.<sup>17</sup> But when the diplomatic, economic, and multilateral options prove insufficient, there must be a framework in place that applies MARO doctrine in a principled, accountable manner in adherence with the rule of law. Therefore, this Article proposes six threshold conditions for the application of MARO: (1) an objective threat assessment of atrocity crimes is conducted prior to intervention, (2) the intervention is necessary to prevent or halt the atrocities, (3) the scale and nature of the intervention is proportional to the threat to civilians, (4) intervening states have coordinated with regional actors and coalition partners, (5) the intervening states regularly update the United Nations about the situation, and (6) the intervening states conduct advanced planning for post-atrocity or *jus post bellum* contingency efforts prior to the intervention. Applying these six conditions will contribute to the responsible development of atrocity response without U.N. authorization and persuade uncertain states that intervention should not only be justified, but lawful as well.

This article is the first scholarly work to analyze the legal framework governing the emerging MARO doctrine and should serve as a guide for

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11. See discussion *infra* Part II.
  12. See discussion *infra* Part II.B.
  13. See discussion *infra* Part II.D.
  14. See discussion *infra* Part III.A.
  15. See discussion *infra* Part III.D.
  16. See discussion *infra* p. 263.
  17. GENOCIDE REPORT, *supra* note 8, at 73.

policy makers and military personnel when planning atrocity prevention and response measures. Part I of this article discusses the history of atrocity crimes, the legal framework in place to prevent massive human rights violations, and the viability of modern enforcement measures such as humanitarian intervention, R2P, and MARO. The uncertain state of the law governing atrocity response is examined in detail in Part II, revealing an overly restrictive interpretation of the U.N. Charter's general prohibition on the use of force, antiquated political notions of sovereignty, and nonlegal considerations such as moral justifications that must be taken into account. Part III urges policy makers to enter into a discursive process, domestically and abroad, that supports a developing norm allowing state action when multilateral efforts fail. This Part also demonstrates the national and global interests at stake when atrocities arise, and dispels concerns that this norm will be used as pretext for states' political agendas. Finally, Part IV proposes and analyzes six threshold conditions that clearly define the parameters of unilateral MARO and appropriately limit the scope of intervention based on legal, moral, and political considerations. Throughout the Article, the situation in Syria is analyzed to demonstrate both the failure of historical approaches to atrocity crimes and the viability of the six-part threshold analysis proposed in Part IV.

## I. HISTORY OF MASS ATROCITIES: PREVENTATIVE AND RESPONSE MEASURES

Humanity remains unwilling and unable to take effective measures to prevent the slaughter of innocent civilians. Although the plague of mass murder has existed since the beginning of recorded history, even today world leaders have no cure. In a 2009 U.N. Report, Secretary General Ban Ki-moon stated that

the brutal legacy of the twentieth century speaks bitterly and graphically of the profound failures of individual States to live up to their most basic and compelling responsibilities, as well as the collective inadequacies of international institutions.<sup>18</sup>

Today, the world community is at odds over prevention and response strategies, which consist of bilateral diplomacy, multilateral efforts at the United Nations, humanitarian intervention, or the application of the concept of R2P. This Part details a brief history of atrocity crimes, early (failed) steps to prevent them, and the current plans for operations to prevent and respond to the next atrocity, including the development of U.S. MARO doctrine.

### A. *History of Violence: Atrocity Crimes Through the Centuries*

Many centuries before there was a name for these crimes, slaughtering civilians was considered business as usual for regime elites and conquering

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18. U.N. Secretary-General, *Implementing the Responsibility to Protect: Rep. of the Secretary-General*, ¶5, U.N. Doc. A/63/677 (Jan. 12, 2009) [hereinafter *U.N. R2P Report*].

armies.<sup>19</sup> As used in this Article, “atrocities crimes” and “mass atrocities” refer to any large-scale brutality against civilians, by a state or a non-state group, including the crimes of genocide, crimes against humanity, large-scale war crimes, and the concept of ethnic cleansing.<sup>20</sup> In order to comprehend these gruesome acts, it is helpful to first understand the scope of atrocities committed by brutal regimes. Initially, one must recognize that aggressive war is not, as some suggest, the crime of all crimes.<sup>21</sup> In fact, the number of victims of government murder greatly exceeds the numbers of international war related deaths.<sup>22</sup> Professor R.J. Rummel estimates that in all of the international wars between 30 B.C.E. and 1900 C.E., as many as 40,457,000 were killed.<sup>23</sup> This is less than one-third of the estimated 133,147,000 civilians killed at the hands of governments.<sup>24</sup> But numbers alone are not sufficient to properly understand the nature of these acts.

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19. See MARO HANDBOOK, *supra* note 6, at 95-96. Professor David Scheffer cites five characteristics of atrocity crimes, which are: (1) must be of significant magnitude (“substantiality test”), (2) may or may not be international and occur in time of war or peace, (3) must be identifiable as genocide, war crimes, crimes against humanity, or ethnic cleansing, (4) must have been led by a ruling or otherwise powerful elite in society, and (5) individuals may be held responsible for the crime. David Scheffer, *Atrocity Crimes Framing the Responsibility to Protect*, 40 CASE W. RES. J. INT’L L. 111, 118 (2008). Atrocity crimes do not cover combat fatalities or even civilian casualties directly related to combat operations, i.e., collateral damage. Other terms previously used to define offenses committed by governments against civilians include politicide (“[T]he murder of any person or people by a government because of their politics or for political purposes,”), mass murder (“[T]he indiscriminate killing of any person or people by a government.”), and democide (“[T]he murder of any person or people by a government, including genocide, politicide, and mass murder.”). R.J. RUMMEL, DEATH BY GOVERNMENT 31 (1994).

20. See MARO HANDBOOK, *supra* note 6, at 95. For the purposes of this article, I make reference interchangeably to mass murder, civilian slaughter, and massacre, all of which are references to the more formal “atrocities crimes” and “mass atrocities.”

21. See INT’L MILITARY TRIBUNAL, *One Hundredth and Eighty-Ninth Day, Monday, 29 July 1946, in 19 TRIALS OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL* 530, 562 (1948), available at [http://www.loc.gov/rr/frd/Military\\_Law/pdf/NT\\_Vol-XIX.pdf](http://www.loc.gov/rr/frd/Military_Law/pdf/NT_Vol-XIX.pdf) (closing remarks of French prosecutor, Champetier de Ribes, recognizing genocide as the “greatest crime of all.”).

22. RUMMEL, *supra* note 19, tbl.1.6, at 15. Rummel includes in his definition of war deaths the killing of soldiers by lawful means, the collateral death of civilians during an otherwise lawful use of force, as well as battle-related disease and famine. *Id.* at 40-41. Although governments are not the only groups capable of atrocity crimes, they are the most common culprits. Non-state actors, such as the Lord’s Resistance Army or al Qaeda, also commit atrocity crimes in numerous territories.

23. *Id.* tbl.3.1, at 70 (noting that this number is likely inflated due to concurrent civilian slaughter not related to combat).

24. *Id.* at 69, 71 (noting that it is impossible to accurately reflect the total number of civilians murdered by government or government agents, but that this modest estimate is only a small fraction of those deaths resulting from atrocity crimes prior to the twentieth century). Approximating civilian deaths at the hands of tyrants is not an exact science and various studies result in different casualty rates. See Robert I. Rotberg, *Detering Mass Atrocity Crimes: The Cause of Our Era, in MASS ATROCITY CRIMES: PREVENTING FUTURE OUTRAGES*, 1, 22 n.2 (Robert I. Rotberg, ed., 2010) (providing a significantly lower estimate of civilian deaths from genocide).

Whether it was the Hebrews of the Old Testament,<sup>25</sup> ancient Assyrians,<sup>26</sup> or the Roman Empire,<sup>27</sup> mass murder was common practice throughout history and was often part of the strategy of conquerors.<sup>28</sup> In the Common Era, Christian crusaders<sup>29</sup> and the Mongol Khans<sup>30</sup> contributed to the suffering of millions. But atrocities were not limited to combat and conquest.<sup>31</sup> European settlers of the Americas,<sup>32</sup> as well as five centuries of the African slave trade,<sup>33</sup> caused the death of millions.

The carnage of the twentieth century serves as a reminder that atrocity crimes are not a relic of the ancient past. The wholesale slaughter of civilians by governments, not including war deaths, approached 170 million.<sup>34</sup> This is four times the number of war-related casualties in the same period and greater than the estimated total of mass murders from all previous centuries.<sup>35</sup>

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25. It is recorded in the Old Testament that Hebrews slaughtered men, women, and children of the Amalekites and Midianites. See 1 *Samuel* 15:2-3; *Numbers* 31:7-18; see also ADAM JONES, *GENOCIDE: A COMPREHENSIVE INTRODUCTION* 4-5 (2006).

26. Among the most infamously bloody of the ancient regimes were the Assyrians, whose soldiers were rewarded for every severed head brought in from the field, "whether enemy fighters or not." RUMMEL, *supra* note 19, at 45-46; see also JONES, *supra* note 25, at 5.

27. After Rome sacked Carthage at the end of the Third Punic War in 46 B.C.E., some 150,000 civilians perished when the city was razed. JONES, *supra* note 25, at 5.

28. Even in classical literature, atrocity crimes were recognized as part of business as usual. In Homer's *ILIAD*, Agamemnon states:

So soft, dear brother, why? Why such concern for enemies? I suppose you got such tender loving care at home from the Trojans. Ah would to god not one of them could escape his sudden plunging death beneath our hands! No baby boy still in his mother's belly, not even he escape—all Ilium blotted out, no tears for their lives, no markers for their graves!

HOMER, *THE ILIAD* bk. 6, at 197, ll. 63-70 (Robert Fagles trans., 1990).

29. Some estimate that when Christian crusaders sacked Jerusalem in 1099, some 40,000 to 70,000 inhabitants were butchered. RUMMEL, *supra* note 19, at 47.

30. During the reign of terror of the Mongul Khans and their successors, their forces "slaughtered around 30 million Persian, Arab, Hindu, Russian, Chinese, European, and other men, women and children." *Id.* at 51.

31. *Id.* at 46.

32. During the course of European colonization of the Americas, it is estimated that anywhere between two million and fifteen million Native Americans (in both North and South America) were eradicated, not including deaths related to disease or war. *Id.* at 59.

33. The African slave trade by Europeans, Arabs, Asians, and African traders resulted in the death of at least 17 million Africans. *Id.* at 48.

34. *Id.* at 4 tbl.1.2.

35. Rummel estimates that 169,198,000 civilians were murdered by governments in the twentieth century through 1987, compared with an estimated figure of deaths caused by war during the same period of 34,021,000 people. *Id.* at 15 tbl.1.6. This, of course, does not account for those murdered after 1987, including Serbia's attempted ethnic cleansing of two hundred thousand in Bosnia and Kosovo, Charles Taylor's atrocities in Sierra Leone and Liberia resulting in 1.3 million murdered, over eight hundred thousand Rwandan Tutsi eliminated by Hutu, Saddam Hussein's bloody retaliation against the Kurds and Marsh Arabs,

The Armenian genocide by the Young Turk Government prior to the First World War is widely recognized as one of the first genocides of the twentieth century,<sup>36</sup> and is noteworthy for several reasons. Not only does modern day Turkey deny that this atrocity occurred,<sup>37</sup> but this particular massacre would later be cited as an example of impunity for other atrocity crimes.<sup>38</sup> To make matters worse, the world community knew of the Armenian genocide while it was occurring and failed to act.<sup>39</sup> This sort of willful blindness is just one part of the cycle of atrocity crimes—a dismaying pattern of inaction that persists today.<sup>40</sup> Moreover, this inaction was encouraged by common views of sovereignty at the time. Then U.S. Secretary of State Robert Lansing said of the Turkish atrocities, “The essence of sovereignty [is] the absence of responsibility.”<sup>41</sup> As discussed in more detail below, remnants of this logic remain an impediment to atrocity prevention efforts today.<sup>42</sup>

The atrocities that followed are a tale of unmitigated human suffering. The worst of the mass murdering states were the Soviet Union (62 million victims from 1917-1987), communist China (35 million victims from 1949-

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perhaps five million killed in the Democratic Republic of the Congo (DRC), and approximately three hundred thousand murdered in Darfur. ROTBERG, *supra* note 24, at 1.

36. The Young Turk Government attempted to exterminate every Armenian in the country and nearly succeeded by massacring approximately 1.9 out of 2 million Turkish Armenians. RUMMEL, *supra* note 19, at 209.

37. *French Genocide Bill Angers Turkey*, BBC NEWS (December 20, 2011), <http://www.bbc.co.uk/news/world-europe-16261816>.

38. In a meeting with his military chiefs, Adolph Hitler demonstrated what he learned from the Young Turks' atrocities. He asked, “Who today still speaks of the massacre of the Armenians?” SAMANTHA POWER, “A PROBLEM FROM HELL”: AMERICA AND THE AGE OF GENOCIDE 23 (2002) (citing an August 22, 1939 meeting with military chiefs in Obersalzberg). Josef Stalin would also learn that atrocities are not remembered in history. He asked, “Who’s going to remember all this riff-raff in ten or twenty years’ time? No one. Who remembers now the names of the boyars Ivan the Terrible got rid of? No one.” *Id.* at 23 n.16.

39. In January 1915, Turkish interior minister Mehmet Talaat was quoted in the New York Times as saying, “there was no room for Christians in Turkey.” POWER, *supra* note 38, at 2, 5. U.S. Ambassador to Turkey, Henry Morgenthau, Sr. sent a cable to Washington on July 10, 1915, describing how Turkish authorities engaged in “rape, pillage, and murder, turning into massacre, to bring destruction [to the Armenians].” *Id.* at 6.

40. Samantha Power decries U.S. inaction in the following passage: Time and again the U.S. government would be reluctant to cast aside its neutrality and formally denounce a fellow state for its atrocities. Time and again though U.S. officials would learn that huge numbers of civilians were being slaughtered, the impact of this knowledge would be blunted by their uncertainty about the facts and their rationalization that a firmer U.S. stand would make little difference. Time and again American assumptions and policies would be contested by Americans in the field closest to the slaughter, who would try to stir the imaginations of their political superiors. And time and again these advocates would fail to sway Washington.

*Id.* at 13-14. For a more detailed discussion of the impact of government inaction and willful blindness, see *infra* Part IV.B-C.

41. POWER, *supra* note 38, at 14; see also GARY JONATHAN BASS, *STAY THE HAND OF VENGEANCE: THE POLITICS OF WAR CRIMES TRIBUNALS* 125-29 (2001).

42. For a discussion regarding state sovereignty, see *infra* Part III.C.

1987), Nazi Germany (21 million victims from 1933-1945), and Chiang Kai-Shek's nationalist China (10 million victims from 1928-1949).<sup>43</sup> Following these mass murders were several cases in the 1970s: 1.5 million Bengali civilians slaughtered by Pakistani forces in 1971,<sup>44</sup> 2 million Cambodians massacred by the Khmer Rouge from 1975-78,<sup>45</sup> and Idi Amin's murder of 300,000 Ugandans in 1979.<sup>46</sup> When the Cold War ended, it was hoped in the 1990s that power politics would give way to greater international cooperation and usher in an era of peace and prosperity. Multilateral institutions indeed flourished, but were still incapable of preventing atrocities in Iraq,<sup>47</sup> Liberia and Sierra

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43. RUMMEL, *supra* note 19, at 4 tbl.1.2. These rounded figures include civilians murdered by all forms of atrocity crimes, including genocide, politicide, and mass murder. These numbers do not include the war dead. Rummel notes, "These are most probable mid-estimates in low to high ranges." *Id.*

44. In 1971, India intervened in East Pakistan (now Bangladesh), putting a halt to the slaughter of 1.5 million Bengali civilians by the Pakistan government. Don Hubert, *The Responsibility to Protect: Preventing and Halting Crimes Against Humanity*, in MASS ATROCITY CRIMES: PREVENTING FUTURE OUTRAGES, *supra* note 24, at 89, 90; RUMMEL, *supra* note 19, at 315-16; see also Thomas M. Franck & Nigel S. Rodley, *After Bangladesh: The Law of Humanitarian Intervention by Military Force*, 67 AM. J. INT'L L. 275, 276 (1973) (concluding that India's intervention to halt Pakistan's human rights violations did not establish a unilateral right of humanitarian intervention). Although India's intervention halted Pakistan's crimes, India justified its intervention on self-defense, not humanitarian, grounds. See U.N. SCOR, 1606th mtg. at 32-33, U.N. Doc. S/PV.1606 (Dec. 4, 1971); U.N. SCOR, 1608th mtg. at 27-28, U.N. Doc. S/PV.1608 (Dec. 6, 1971); U.N. SCOR, 1611th mtg. at 7-14, U.N. Doc. S/PV.1611 (Dec. 12, 1971).

45. The communist Khmer Rouge—among the most gruesomely effective of the 20th Century's mass-murdering regimes—killed more than 2 million of its 7 million inhabitants from 1975-1978, before Vietnam intervened and put an end to the worst of the atrocities. Rotberg, *supra* note 24, at 1; RUMMEL, *supra* note 19, at 159-61. Vietnam was reacting to Cambodian incursions into its territory, and so its intervention was based on self-defense, not humanitarian purposes. Still, the humanitarian effects are readily apparent by the end of the Khmer Rouge's murderous rampage. Hubert, *supra* note 44, at 90.

46. Following Idi Amin's murderous rampage of 300,000 of his fellow Ugandans, RUMMEL, *supra* note 19, at 93-94, Tanzania intervened in 1979 to remove him from power, Hubert, *supra* note 44, at 90.

47. Shortly after the 1991 Gulf War, Saddam Hussein's brutal treatment of Iraqi Kurds and the oppressive crackdown of a Shia uprising, led to the enforcement of no fly zones in Northern and Southern Iraq respectively by U.S.-led coalitions. See SEAN D. MURPHY, HUMANITARIAN INTERVENTION: THE UNITED NATIONS IN AN EVOLVING WORLD ORDER 165-98 (1996); MICHAEL P. SCHARF & GREGORY S. MCNEAL, SADDAM ON TRIAL: UNDERSTANDING AND DEBATING THE IRAQI HIGH TRIBUNAL 59 (2006) (describing how the 1991 crimes by Hussein's regime are only one in a long line of atrocity crimes committed against Iraqi civilians. Hussein was accused of "ordering the slaughter of some 5,000 Kurds with chemical gas in Halabja in 1988 [and] killing or deporting more than 200,000 Northern Iraqi Kurds during the Anfal campaign in the 1980s . . ."). Saddam was also responsible for slaughtering 8,000 Kurds of the Barzani clan in 1983. M. Cherif Bassiouni, *Events Leading to the Creation of the IHT*, in SADDAM ON TRIAL: UNDERSTANDING AND DEBATING THE IRAQI HIGH TRIBUNAL 10 (2006).

Leone,<sup>48</sup> Bosnia and Kosovo,<sup>49</sup> and Rwanda.<sup>50</sup>

Today, in spite of reports indicating that armed conflict is on the decline,<sup>51</sup> atrocities continue in the Democratic Republic of the Congo (DRC) (some 5 million killed),<sup>52</sup> Darfur (some 300,000 killed),<sup>53</sup> and Syria (approximately 100,000 civilians killed as of summer 2013),<sup>54</sup> just to name a few. That these situations are occurring in the twenty-first century clearly indicates that the global community has yet to implement an effective strategy to prevent and respond to atrocity crimes.

### B. *Global Failure to Prevent Mass Atrocities*

Following the Second World War, the global community has taken great strides in developing a legal regime that prohibits and responds to atrocity crimes. These include the peaceful ordering of states through the United Nations, the continued development of humanitarian law, the emergence of human rights law, and more recently, the revival of international criminal law. In spite of these efforts, and as the previous Section's account of modern atrocities makes clear, an effective solution remains elusive.

According to the Genocide Task Force Report, "There is no consensus as to the causes of genocide and mass atrocities, nor is there one commonly agreed upon theory that sufficiently explains the key catalysts, motivations, or mechanisms that lead to them."<sup>55</sup> Nonetheless, atrocity

48. The infamous warlord Charles Taylor, now on trial in The Hague, was responsible for the massacre of 1.3 million civilians in Liberia and Sierra Leone. Rotberg, *supra* note 24, at 1, 10-11.

49. Serbian atrocities claimed the lives of 200,000 Bosnians and Kosovo Albanians. *Id.* at 1.

50. 800,000 Rwandan Tutsi were slaughtered in the genocide by the ethnic majority Hutu. *Id.*

51. See HUMAN SEC. REPORT PROJECT, HUMAN SECURITY REPORT 2009/2010: THE CAUSES OF PEACE AND THE SHRINKING COSTS OF WAR 1-10 (2010), available at <http://www.hsrgroup.org/human-security-reports/20092010/text.aspx>. See generally STEVEN PINKER, THE BETTER ANGELS OF OUR NATURE (2011) (suggesting that we may be living in the most peaceful era in world history).

52. Rotberg, *supra* note 24, at 1.

53. *Id.*

54. *Opposition presses for weapons as Syria Death Toll tops 100,000*, CNN (July 26, 2013 5:59 AM) <http://www.cnn.com/2013/07/25/world/meast/syria-violence>; *Syria Deaths Near 100,000 says UN – and 6,000 are children*, THE GUARDIAN (Jun. 13, 2013 4:17 PM) <http://www.theguardian.com/world/2013/jun/13/death-toll-syrian-conflict-93000>. According to an independent U.N. commission, Syrian forces have committed "widespread, systematic, and gross human rights violations." Rep. of the Independent Int'l Comm'n of Inquiry on the Syrian Arab Republic, para. 2, *delivered to the General Assembly Human Rights Council*, U.N. Doc. A/HCR/19/69 (Feb. 22, 2012) [hereinafter Report on the Syrian Arab Republic], available at [http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session19/A-HRC-19-69\\_en.pdf](http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session19/A-HRC-19-69_en.pdf).

55. GENOCIDE REPORT, *supra* note 8, at xxii. *But see* Power Point: Gregory Stanton, *The Eight Stages of Genocide*, GENOCIDE WATCH (2007), available at [www.genocidewatch.org/aboutgenocide/8stagesofgenocide.html](http://www.genocidewatch.org/aboutgenocide/8stagesofgenocide.html) (describing the common stages of genocide and how they might inform prevention and response measures).

crimes in a temporal context can be viewed in three overlapping periods. Prior to the twentieth century, mass slaughter of civilian populations was business as usual for brutal regimes. Then, following the Peace of Westphalia in 1648, and today enshrined in the U.N. Charter, the concept of state sovereignty served as a shield for barbaric acts within a state.<sup>56</sup> During this time, even though most theological and political traditions prohibited war-time atrocities,<sup>57</sup> civilians were murdered at alarming rates during times of war and peace.<sup>58</sup> It was not until 1944, when Raphael Lemkin defined the term genocide, that humanity entered a third phase—the development of the modern legal framework to punish and prevent atrocity crimes.<sup>59</sup> Lemkin, outraged that sovereignty could mean “the right to kill millions of innocent people,”<sup>60</sup> worked tirelessly until the Genocide Convention became law in 1948.<sup>61</sup> The sovereignty shield was losing its luster, and states now had a responsibility to prevent or punish genocide.<sup>62</sup>

In 1945, the United Nations was established in order to “save succeeding generations from the scourge of war.”<sup>63</sup> In furtherance of conflict prevention, the U.N. Security Council (UNSC) is authorized under Chapter VII of the Charter to maintain peace and security. Initially understood as regulating only international armed conflict, this authorization is now widely understood to extend to internal human rights violations and atrocity crimes.<sup>64</sup> Despite this authority, states failed early on to take advantage

56. MURPHY, *supra* note 47, at 42.

57. Rotberg, *supra* note 24, at 2. For a detailed discussion of ancient traditions, see MURPHY, *supra* note 47, at 35-42.

58. See discussion *supra* Part II.A.

59. RAPHAEL LEMKIN, *AXIS RULE IN OCCUPIED EUROPE* (1944). For a detailed discussion of the tireless efforts of Raphael Lemkin to put a name to the worst crimes known to man, see POWER, *supra* note 38, at 17-60; Henry T. King, Jr., et al., *Origins of the Genocide Convention*, 40 *CASE W. RES. J. INT'L L.* 13, 14-34 (2008).

60. POWER, *supra* note 38, at 19.

61. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 *U.N.T.S.* 277 [hereinafter *Genocide Convention*].

62. *Id.* art. I.

63. U.N. Charter pmbl.

64. See SUSAN BREAU, *HUMANITARIAN INTERVENTION: THE UNITED NATIONS & COLLECTIVE RESPONSIBILITY* 238 (2005). The U.N. authorization for intervention in Rhodesia in 1966 marked the first time the U.N. Security Council (UNSC) treated an internal human rights situation as a “threat to the peace” and paved the way for future Chapter VII actions—ranging from sanctions to the use of force—in matters that would otherwise have been treated as internal to the state and protected from U.N. involvement under article 2(7) of the Charter. MURPHY, *supra* note 47, at 117-18. The first time the UNSC authorized armed intervention in an internal conflict after the Cold War was in Somalia in 1992. S.C. Res. 794, ¶10, U.N. Doc. S/RES/794 (Dec. 3, 1992); see also W. Michael Reisman, *Acting Before Victims Become Victims: Preventing and Arresting Mass Murder*, 40 *CASE W. RES. J. INT'L L.* 57, 72 n.47 (2008).

of the United Nation's atrocity response capabilities, which set a precedent for practice today.<sup>65</sup>

For example, the UNSC has rarely authorized a Chapter VII action against a state targeting its own citizens.<sup>66</sup> In fact, some suggest that the United Nations has never relied upon Article 42 the way the drafters intended,<sup>67</sup> depriving the Security Council of a tool that would allow it greater flexibility to utilize armed forces to maintain peace and security.<sup>68</sup> In order to give effect to this provision, Article 43 of the Charter envisioned a standing U.N. security force that could be deployed to crisis situations.<sup>69</sup> But this provision is contingent on member states providing standing forces to be utilized by the UNSC. Because the necessary state agreements were never reached under Article 43, the United Nations has never exercised its Article 42 authority as intended.<sup>70</sup> As a result, one of the United Nations' most promising atrocity prevention tools remains dormant.<sup>71</sup>

Additionally, the entire U.N. system is premised on consensus-based decision making by the UNSC for the collective good, not for the political self-interests of states. When good faith consensus building broke down in the early days of the Charter system as a result of Cold War power politics, the entire organization failed to function properly.<sup>72</sup>

Although the International Court of Justice (ICJ) noted in 1962 that "the Security Council [cannot be said to be] impotent in the face of an emergency situation when agreements under Article 43 have not been concluded,"<sup>73</sup> other U.N. enforcement measures, ranging from sanctions

65. Russia and China are partly responsible for this result, since, as some have pointed out, they tend to block UNSC actions that could set a precedent, which might someday require them to account for their own human rights violations. See Rotberg, *supra* note 24, at 7.

66. The intervention in Libya in 2011 was the first time the UNSC authorized enforcement action (non-peacekeeping) to protect civilians. S.C. Res 1973, ¶4, U.N. Doc. S/RES/1973 (Mar. 17, 2011).

67. YORAM DINSTEIN, *WAR, AGGRESSION, AND SELF-DEFENCE* 304-07 (4th ed. 2005).

68. U.N. Charter art. 42.

69. *Id.* art. 43. See also, Robert J. Delahunty & John Yoo, *Great Power Security*, 10 CHICAGO J. INT'L L. 1, 7 (2009).

70. YORAM DINSTEIN, *WAR, AGGRESSION, AND SELF-DEFENCE* 304-07 (4th ed. 2005).

71. *But see* NEWT GINGRICH & GEORGE MITCHELL, *AMERICAN INTERESTS AND UN REFORM: REPORT OF THE CONGRESSIONAL TASK FORCE ON THE UNITED NATIONS* 28 (2005) (stating that "the United Nations must create a rapid reaction capability among UN member-states that can identify and act on threats before they fully develop.").

72. W. Michael Reisman, Editorial Comment, *Coercion and Self-Determination: Construing Charter Article 2(4)*, 78 AM. J. INT'L L. 642, 643 (1984). Reisman argues elsewhere, "Only in the most exceptional cases will the United Nations be capable of functioning as an international enforcer; in the vast majority of cases, the conflicting interests of diverse public order systems will block any action." W. MICHAEL REISMAN, *NULLITY AND REVISION: THE REVIEW AND ENFORCEMENT OF INTERNATIONAL JUDGMENTS AND AWARDS* 850 (1971).

73. Certain Expenses of the United Nations (Article 17, Para. 2, of the Charter), Advisory Opinion, 1962 I.C.J. 151, 167 (July 20).

to peacekeeping forces,<sup>74</sup> are not demonstrably more effective at protecting civilians.<sup>75</sup> Failed peacekeeping missions in places like Somalia, Bosnia, and Rwanda are often used to illustrate the shortcomings of the United Nations to effectively respond to complex crisis situations.<sup>76</sup> These missions, however, are inherently limited because they are premised on host state consent and are not permitted to take military action against a state.<sup>77</sup> This necessarily means that peacekeeping missions are not oriented to halting atrocity crimes, but rather to facilitate a political resolution to ongoing conflicts—a separate and distinct goal.<sup>78</sup> Gaining the consent of the host government means the United Nations is required to negotiate the mandate of peacekeepers with leaders that may be complicit in, or primarily responsible for, ongoing atrocity crimes.<sup>79</sup>

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74. The UNSC adopted numerous resolutions in the post-Cold War era that cite a threat to the peace, impose sanctions, or authorize coercive enforcement measures. DINSTEN, *supra* note 70, at 300-04. Many of these relate to situations of atrocity crimes, but cannot be said to have consistently reduced the threat of further atrocities. See *infra* note 78.

75. Although peacekeeping missions attempted to protect civilians during the mid-1990s, the U.N. Security Council recognized the authority to take action to protect civilians in 1999. S.C. Res. 1265, ¶10, U.N. Doc. S/RES/1265 (Sept. 17, 1999). The United Nations authorized a peacekeeping mission for the express purpose of protection of civilians in Sierra Leone in 1999. S.C. Res. 1270, ¶14, U.N. Doc. S/RES/1270 (Oct. 22, 1999). According to one study, the United Nations and experts “continue to struggle with what it means for a peacekeeping operation to protect civilians, in theory and practice.” VICTORIA HOLT ET AL., *PROTECTING CIVILIANS IN THE CONTEXT OF UN PEACEKEEPING OPERATIONS: SUCCESSES, SETBACKS, AND REMAINING CHALLENGES* 18 (2009).

76. See John Norton Moore, *Introduction to the Reprint Edition*, in *LAW AND CIVIL WAR IN THE MODERN WORLD* vii, x (John Norton Moore ed., 1974) (discussing the failure of Belgium, the United States, France and others to support an effective U.N. effort to stop the Rwandan genocide); see also HOLT ET AL., *supra* note 75, at 2-3 (analyzing deficiencies in the ability of U.N. peacekeeping missions to protect civilians). Efforts were made at the United Nations to determine where the failures lie in the process. Two reports, one on the failure at Srebrenica and the other on the lack of will in Rwanda, demonstrated that there was a need to re-evaluate the ability to intervene in the event of humanitarian crises. The Srebrenica report urged that atrocity crimes “must be met decisively with all necessary means,” and criticized the “pervasive ambivalence within the [United Nations] regarding the use of force in the pursuit of peace” and “an ideology of impartiality even when confronted with attempted genocide.” U.N. Secretary-General, *The Fall of Srebrenica*, ¶¶502, 505, U.N. DOC. A/54/549 (Nov. 15, 1999). The independent inquiry into Rwanda concluded that “there can be no neutrality in the face of genocide, no impartiality in the face of a campaign to exterminate part of a population.” Rep. of the Independent Inquiry into the Actions of the U.N. During the 1994 Genocide in Rwanda, ¶19, U.N. Doc. S/1999/1257 (Dec. 15, 1999).

77. See Advisory Opinion on Certain Expenses of the United Nations, *supra* note 73, at 170, 177.

78. See GENOCIDE REPORT, *supra* note 8, at 76. Additionally, U.N. forces lack certain mission essential characteristics to effectively halt atrocity crimes, including: the ability to deploy rapidly and effectively, adequate resources and training for hostile combat environments, intelligence capabilities, certain command and control structures, and a host of communications and logistics capabilities. *Id.* at 85. Moreover, forces contributed by member states often come with crippling national caveats on their combat role and prohibitive rules of engagement. *Id.*

79. *Id.* at 85.

The Charter paradigm was never intended to regulate state conduct vis-à-vis civilians, but rather interstate disputes and interactions. The responsibility of states to individuals is governed by three overlapping but distinct disciplines: international humanitarian law (IHL, also referred to as the laws of armed conflict), international human rights law (IHRL), and international criminal law (ICL). Each discipline has suffered its own enforcement deficit. As one commentator notes,

Collectively . . . [these laws] compose an overarching norm that should be sufficient to prevent renewed attacks on civilians . . . . But converting that norm into a series of effective preventive measures is still a work very much in progress, and tentative in its advances.<sup>80</sup>

International humanitarian law (IHL) has long prohibited the mistreatment of combatants and civilians during war. States have had an interest in regulating the way hostilities are conducted since at least the nineteenth century.<sup>81</sup> Following the Second World War, the Geneva Conventions of 1949 were implemented to guarantee humane treatment of combatants who are shipwrecked, sick, wounded, or *hors de combat*, in addition to prisoners of war and civilians.<sup>82</sup> While this body of law has had a tremendous impact on state behavior during armed conflict,<sup>83</sup> there is no

80. Rotberg, *supra* note 24, at 3.

81. Convention (II) with Respect to the Laws and Customs of War on Land with Annex of Regulations, pmbL., July 29, 1899, 32 Stat. 1803, [hereinafter 1899 Hague Convention (II)]; U.S. DEP'T OF WAR, GEN. ORDER NO. 100, ART. 33-37, INSTRUCTIONS FOR THE GOVERNMENT OF ARMIES OF THE UNITED STATES IN THE FIELD (1863), available at [http://avalon.law.yale.edu/19th\\_century/lieber.asp](http://avalon.law.yale.edu/19th_century/lieber.asp) (commonly referred to as the Lieber Code); see also, e.g., Convention Relative to the Treatment of Prisoners of War, July 27, 1929, 47 Stat. 2021, 118 L.N.T.S. 343 [hereinafter 1899 Hague Convention (III)]; Convention Respecting the Laws and Customs of War on Land, pmbL., Oct. 18, 1907, 36 Stat. 2277, [hereinafter 1899 Hague Convention (IV)].

82. Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter Geneva Convention I]; Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter Geneva Convention II]; Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva Convention III]; Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva Convention IV]. Additionally, certain standards of humane treatment apply to the conduct of states and non-state actors alike in non-international conflicts under article 3 common to all four Geneva Conventions. See, e.g., Geneva Convention III *supra*, art. 3. Following Vietnam and other post-colonization civil wars, Additional Protocol I & II to the Geneva Conventions were drafted to further clarify the standards governing international and non-international armed conflicts respectively. Convention Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Geneva Convention Protocol I]; Convention Relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 609 [hereinafter Geneva Convention Protocol II].

83. See, e.g., Laura A. Dickinson, *Military Lawyers on the Battlefield: An Empirical Account of International Law Compliance*, 104 AM. J. INT'L L. 1, 10 (2010) (concluding that

indication this framework has had a limiting effect on the behavior of non-state actors or the conduct of states vis-à-vis their citizens. For example, the International Committee of the Red Cross, the monitoring body of IHL, has no enforcement mechanisms other than dialogue with parties to armed conflict, and, on rare occasions, public statements condemning violations.

International human rights law, which restricts state behavior toward individuals during peacetime and war, found robust support following the Second World War.<sup>84</sup> In fact, human rights are embedded in the U.N. Charter, which had as its three primary purposes to maintain peace and security, protect state sovereignty, and respect human rights.<sup>85</sup> Shortly thereafter, Lemkin's notion of genocide became law in 1948 with the Genocide Convention, followed days later by the passage of the Universal Declaration of Human Rights.<sup>86</sup> Later still, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Cultural and Social Rights, and other treaties would be added to this burgeoning body of law.<sup>87</sup> Similar to IHL, IHRL norms are difficult to enforce. Monitored in part by the UN, and in part by states themselves, the lack of accountability at the international level means that violations often go unpunished.<sup>88</sup>

International criminal law (ICL) emerged after the Second World War when the Axis leaders most responsible for policies of aggression, crimes against humanity, and war crimes were prosecuted at the Nuremberg and Tokyo Tribunals.<sup>89</sup> Tyrants would no longer be able to engage in aggressive war or subject civilians to wholesale slaughter with impunity, or so it was thought. While ICL lay dormant for the remainder of the Cold War, the atrocities in Bosnia and Rwanda in the 1990s shocked the world into action and led to the creation of two ad hoc tribunals: the International

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respect for the law of armed conflict is institutionalized and reflected by the legal advice given by U.S. judge advocates).

84. INTERNATIONAL HUMAN RIGHTS: PROBLEMS OF LAW, POLICY, AND PRACTICE 49 (Richard B. Lillich, et al. eds., 4th ed. 2006) [hereinafter HUMAN RIGHTS] (describing the revolutionary developments in human rights law following the Second World War).

85. U.N. Charter pmbl.

86. See Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948) [hereinafter UDHR].

87. See International Covenant on Civil and Political Rights, *opened for signature* Dec. 19, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR]; see also International Covenant on Economic, Social and Cultural Rights, *opened for signature* Dec. 19, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR].

88. See generally HUMAN RIGHTS, *supra* note 84, at 439, 613 (discussing state and regional measures to enforce human rights violations respectively, including the European Court of Human Rights). Human rights nongovernmental organizations, however, have been instrumental in bringing awareness to violations and in norm development. See POWER, *supra* note 38, at 72; GENOCIDE REPORT, *supra* note 8, at ix.

89. PETER JUDSON RICHARDS, EXTRAORDINARY JUSTICE: MILITARY TRIBUNALS IN HISTORICAL AND INTERNATIONAL CONTEXT 104 (2007).

Criminal Tribunal for the Former Yugoslavia (ICTY)<sup>90</sup> and the International Criminal Tribunal for Rwanda (ICTR).<sup>91</sup> The failure to prevent the massacres in Bosnia and Rwanda caused the United Nations to recognize that its obligations to protect civilians “superseded existing principles of peacekeeping and noninterference.”<sup>92</sup> The successful efforts to establish the ad hoc tribunals motivated world leaders to restart negotiations for a permanent war crimes tribunal. The International Criminal Court was realized in 1998 with the drafting of the Rome Statute, which entered into force in 2002<sup>93</sup> and established the Court’s jurisdiction to prosecute four crimes: genocide, war crimes, crimes against humanity, and the recently defined crime of aggression.<sup>94</sup>

Today, ICL is the preferred method for responding to atrocity crimes, even though “[t]he debate rages over the deterrent value of punishment.”<sup>95</sup> Courts cannot prevent atrocities, since they punish crimes after the fact.<sup>96</sup> The existence of international tribunals had little impact on atrocities in Kosovo, Darfur, DRC, Uganda, Libya, and now Syria.<sup>97</sup> In fact, some suggest that the issuance of indictments and arrest warrants—mostly unenforceable—gives perpetrators of atrocity crimes little incentive to exercise restraint in their slaughter.<sup>98</sup>

Others are more positive about the deterrent effect of ICL, arguing that “anecdotal evidence suggests that some perpetrators are more fearful that they will be prosecuted by the ICC . . . to the extent that the international community demonstrates its willingness to detain indicted fugitives and bring them before the court.”<sup>99</sup> Former international prosecutors sug-

90. S.C. Res. 827, U.N. Doc. S/RES/827 (May 23, 1993).

91. S.C. Res. 955, U.N. Doc. S/RES/955 (Nov. 8, 1994).

92. Rotberg, *supra* note 24, at 8.

93. GENOCIDE REPORT, *supra* note 8, at 100-02 (describing the role of International Criminal Law (ICL) at the International Criminal Tribunal for the Former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR), and the International Criminal Court (ICC)).

94. Rome Statute of the International Criminal Court arts. 5-8, *opened for signature* July 17, 1998, 2187 U.N.T.S. 3, 37 I.L.M. 999 [hereinafter Rome Statute]. For a discussion of the history of the crime of aggression, see Keith A. Petty, *Sixty Years in the Making: The Definition of Aggression for the International Criminal Court*, 31 HASTINGS INT’L & COMP. L. REV. 531 (2008); Keith A. Petty, *Criminalizing Force: Resolving the Threshold Question for the Crime of Aggression in the Context of Modern Conflict*, 33 SEATTLE U. L. REV. 105 (2009). Although the Court may not exercise jurisdiction over the crime of aggression until after January 1, 2017, the new definition was adopted by consensus on June 11, 2010. See Resolution RC/Res.6 of the Review Conference of the Rome Statute Annex I, June 11, 2010, available at [http://www.icc-cpi.int/iccdocs/asp\\_docs/Resolutions/RC-Res.6-ENG.pdf](http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/RC-Res.6-ENG.pdf).

95. Reisman, *supra* note 64, at 58.

96. Reisman pointedly asks, “[I]f life is the most precious of things, then I ask you, should not acting to prevent before the fact, as opposed to acting to punish after the fact, be the primary technique of international law for dealing with mass murder?” *Id.* at 59.

97. *Id.* at 62-68 (commenting on the failure of ICL to prevent atrocity crimes).

98. GENOCIDE REPORT, *supra* note 8, at 103.

99. *Id.* at 103; see also KATHRYN SIKKINK, *THE JUSTICE CASCADE: HOW HUMAN RIGHTS PROSECUTIONS ARE CHANGING WORLD POLITICS* 26 (2011) (arguing that ICL has

gest that it is too early to tell whether the ICC and ad hoc tribunals have had a clear impact on preventing atrocity crimes.<sup>100</sup> Richard Goldstone, former ICTY Chief Prosecutor, senses that the loss of impunity through the ICC and the vigilance of special courts have created “moderation” of at least the language of tyrants.<sup>101</sup> The presence of war crimes tribunals, he suggests, is in the minds of political and military leaders engaged in armed conflict.<sup>102</sup>

As valuable as the humanitarian legal regime is to the world community, IHL, IHRL, ICL, and domestic laws are too often recognized in the breach. While the delegates met in San Francisco debating the final wording of the U.N. Charter, the Soviet gulags were fully operational. Before the ink had dried on Lemkin’s Genocide Convention, communist China was engaging in mass murder in the name of re-education. Even with an active ICC, indictments and arrest warrants have failed to deter violence in Darfur and the DRC.<sup>103</sup>

### C. *Modern Developments in Atrocity Prevention and Response*

Where the legal regime has proven insufficient, states have been required to take action even without U.N. support. When Serbia threatened to wipe out the ethnic Albanian population in Kosovo in 1999, NATO intervened without U.N. authorization and effectively ended the slaughter. This prompted fierce debate about the legality of humanitarian intervention. As a result of the legal backlash to NATO’s action, policy makers and legal experts sought to answer when, if ever, states may intervene to prevent atrocities. The result was a study describing the new concept of R2P.<sup>104</sup> This Section discusses the origins and application of both humanitarian intervention and R2P and how they have contributed to atrocity prevention and response.

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had a deterrent effect); Richard J. Goldstone, *The Role of the International Criminal Court, in MASS ATROCITY CRIMES, PREVENTING FUTURE OUTRAGES*, *supra* note 24, at 55 (citing other benefits to ICL such as bringing an end to impunity for war criminals, providing justice to victims, ending fabricated denials, advancing international humanitarian law, and increasing the capacity of states).

100. Rotberg, *supra* note 24, at 9 (citing comments by Richard Goldstone, former Chief Prosecutor at the ICTY, and David Crane, former Chief Prosecutor at the Special Court for Sierra Leone).

101. Goldstone, *supra* note 99, at 61-62.

102. *Id.* States also have a role in prosecuting atrocity crimes. Under the doctrine of complementarity, domestic resolution of atrocity crimes is preferred, but international tribunals, such as the ICC, will assert jurisdiction when states are unwilling or unable to effectively investigate and prosecute offenders. See ANTONIO CASSESE, *INTERNATIONAL CRIMINAL LAW* 352 (2003); see also SIKKINK, *supra* note 99, at 5 (describing the trend in holding leaders accountable in international and domestic courts). In the United States, domestic laws allowing jurisdiction over atrocity crimes include the Genocide Convention Implementation Act, the War Crimes Act, the Uniform Code of Military Justice, and, on the civil side, the Alien Tort Statute and the Torture Victims’ Protection Act.

103. Reisman, *supra* note 64, at 62.

104. INT’L COMM’N ON INTERVENTION & STATE SOVEREIGNTY, *THE RESPONSIBILITY TO PROTECT* (Dec. 2001) [hereinafter ICISS REPORT].

## 1. Humanitarian Intervention

The history of humanitarian intervention is given a thorough treatment in Don Hubert's, *The Responsibility to Protect: Preventing and Halting Crimes Against Humanity*, and Sean Murphy's, *Humanitarian Intervention*.<sup>105</sup> Humanitarian intervention, defined as "the use of armed force by a state or states, without authorization by the U.N. Security Council, for the purpose of protecting nationals of the target state from large-scale human rights abuses,"<sup>106</sup> is legally controversial.<sup>107</sup> For the purposes of this Article, this definition excludes intervention when the target government consents, and also interventions used to protect the nationals of the intervening state, which is consistent with prevailing interpretations of international law.<sup>108</sup>

Hubert, among others, recognizes that the promulgation of the U.N. Charter in 1945, and its limits on the use of force, may have deprived states of the ability to unilaterally intervene to protect another states' citizens.<sup>109</sup> Under Articles 2(4) and 51 of the Charter, the use of force may

105. Hubert, *supra* note 44; MURPHY, *supra* note 47. This section relies heavily on Hubert's and Murphy's works, as well as several sources originally cited by those authors.

106. Saira Mohamed, *Restructuring the Debate on Unauthorized Humanitarian Intervention*, 88 N.C. L. REV. 1275, 1277 (2010). Mohamed's definition is limited to non-U.N. sanctioned interventions, which is the focus of this article. Her definition is consistent with other widely recognized definitions, such as Professor Sean Murphy's, which states that humanitarian intervention is "the threat or use of force by a state, group of states, or international organization primarily for the purpose of protecting the nationals of the target state from widespread deprivations of internationally recognized human rights." MURPHY, *supra* note 47, at 11-12.

107. Henry Wheaton has been credited as the first scholar who attempted to draft a legal framework for humanitarian intervention. See ELLERY C. STOWELL, INTERVENTION IN INTERNATIONAL LAW 461, 538 (1921) (citing HENRY WHEATON, ELEMENTS OF INTERNATIONAL LAW 91 (1836)).

108. See Mohamed, *supra* note 106, at 1281.

109. The right of states to intervene to protect another states' civilians has a long history. For example, in several cases in the late nineteenth century, European states intervened in the Ottoman Empire on behalf of Christian minorities on humanitarian grounds. See Hubert, *supra* note 44, at 90; see also GARY JONATHAN BASS, FREEDOM'S BATTLE: THE ORIGINS OF HUMANITARIAN INTERVENTION 18-19 (2008); IAN BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES 338 (1963); MANOUCHEHR GANJI, INTERNATIONAL PROTECTION OF HUMAN RIGHTS 22-24, 33-37 (1962) (detailing the demands of Austria, France, Italy, Prussia, and Russia on the Ottoman Empire (1866-68) for action to improve treatment of the Christian population of Crete, and the intervention of Austria, Russia, Great Britain, Italy, and France in Turkey as a result of insurrections and misrule in Macedonia (1903-08)); MURPHY, *supra* note 47, at 52-56 (describing five instances of humanitarian intervention prior to the formation of the League of Nations: Great Britain, France and Russia in Greece in 1827-30; France in Syria in 1860-61; Russia in Bosnia, Herzegovina, and Bulgaria in 1877-78; the United States in Cuba in 1898; and Greece, Bulgaria, and Serbia in Macedonia in 1913).

The interwar/League of Nations period presented examples of how an exerted right to intervene can be abused, including Japan's incursion into Manchuria in 1931 ("Rape of Nanking"), Italy's invasion of Ethiopia in 1935, and Germany's annexation of Czechoslovakia in 1939. See MURPHY, *supra* note 47, at 60-62.

only be authorized by the UNSC or in situations requiring self-defense.<sup>110</sup> Because the UNSC “was incapable of obtaining a consensus [during the Cold War] on the use of force to address threats to international peace, states and regional organizations were left on their own to develop coercive techniques for conflict management.”<sup>111</sup> Even though several interventions legitimately halted widespread human rights violations, a mistrust of great power politics<sup>112</sup> as well as a distaste among post-colonial states of any kind of foreign intervention prohibited a norm of humanitarian intervention from solidifying into law.

Several interventions in the 1970s brought the legal debate to the forefront once again.<sup>113</sup> First, in 1971 India intervened to put an end to East Pakistan’s (now Bangladesh) slaughter of hundreds of thousands of its own citizens.<sup>114</sup> In 1978, Vietnam invaded Cambodia to oust the genocidal Khmer Rouge.<sup>115</sup> Tanzania’s intervention into Uganda to remove Idi Amin in 1979 underscored the prominence of this practice.<sup>116</sup> And even though the legal justification in each of these cases was self-defense, the humanitarian results are self-evident. Contrast these interventions with

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And even though the Second World War was not fought in defense of human rights, the Allied victory over the Axis powers did have the ancillary effect of ending Germany’s atrocity crimes. MURPHY, *supra* note 47, at 65 (rejecting the argument that WWII was a humanitarian war when history clearly reflects that it was a war of self-defense). *But see* FERNANDO R. TESÓN, HUMANITARIAN INTERVENTION: AN INQUIRY INTO LAW AND MORALITY 156 (2d ed. 1996) (stating that the Second World War was a humanitarian war).

110. U.N. Charter arts. 2(4), 51.

111. MURPHY, *supra* note 47, at 143.

112. Several interventions in the 1950s and 1960s are cited as examples of powerful nations using humanitarian justifications as pretext to intervene out of some national interest. MURPHY, *supra* note 47, at 87-97 (describing the Soviet invasions of Hungary in 1956 and Czechoslovakia in 1968; Belgian and U.S. intervention in the DRC in 1964; U.S. intervention in the Dominican Republic in 1965).

113. Following the crisis in Pakistan, some attempted to establish a new international legal standard. *See* International Law Association 56th Conference, New Delhi, India, Dec. 29, 1974–Jan. 4, 1975, *Report of the Fifty-Sixth Conference: Human Rights*, INT’L L. ASS’N REP. CONF., 1976, at 178; Hubert, *supra* note 44, at 90. *But see* MURPHY, *supra* note 47, at 143-44 (describing how the international community was widely critical of unilateral interventions during this period).

114. Hubert, *supra* note 44, at 90; MURPHY, *supra* note 47, at 97-100 (arguing that India likely believed partitioning Pakistan would serve its national interests, even though they argued before the United Nations that the reason for intervention was related to self-defense). Murphy goes on to argue that the weighing of two concerns—maintaining international peace and security versus human rights benefits—will not always come out in favor of human rights, based on the international response largely condemning India’s intervention. *Id.*

115. MURPHY, *supra* note 47, at 103-04 (arguing that Vietnam intervened out of self-defense based on Cambodian aggression, and perhaps had humanitarian reasons as a secondary concern, if at all); *see also* Hubert, *supra* note 44, at 90.

116. Hubert, *supra* note 44, at 90; MURPHY, *supra* note 47, at 107 (stating that for Tanzania “once the justification of self-defense existed for intervening in Uganda the desire to prevent further human rights atrocities surely was a factor in assessing how far to carry the intervention.”).

France's bloodless coup in the Central African Republic in 1979 that was based on humanitarian grounds.<sup>117</sup>

The modern practice of humanitarian intervention arose after the end of the Cold War. The first situation occurred in Liberia in 1990, when the Economic Community of West African States (ECOWAS) authorized a humanitarian force to intervene.<sup>118</sup> This regional action was only later "endorsed" by the UNSC in 1992.<sup>119</sup> ECOWAS also intervened to halt atrocities in Sierra Leone in 1997 and only received UNSC approval months later.<sup>120</sup> Similarly, the U.S. led coalition that enforced the Iraq no-fly zones was not preauthorized by the UNSC.<sup>121</sup> And, as previously mentioned, in March 1999 the debate over humanitarian intervention took on an urgent tone when NATO launched a seventy-eight day bombing campaign against Serb forces targeting Kosovo Albanian civilians.<sup>122</sup> Numerous scholars labeled the intervention unlawful,<sup>123</sup> in addition to some leaders outright condemning the military action.<sup>124</sup> An independent commission into the NATO intervention famously concluded that the mission was unlawful but "legitimate."<sup>125</sup>

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117. MURPHY, *supra* note 47, at 107-08 (explaining that from 1966 to 1979 Jean-Bedel Bokassa brutally ruled the Central African Republic after which a Franco-African Commission of Inquiry determined that Bokassa had committed atrocities). In 1979, France sent military forces in a bloodless coup that ousted Bokassa. *Id.*

118. See MARC WELLER, REGIONAL PEACE-KEEPING AND INTERNATIONAL ENFORCEMENT: THE LIBERIAN CRISIS 69-71 (1994). See also Hubert, *supra* note 44, at 91.

119. See S.C. Res. 788, U.N. Doc. S/RES/788 (Nov. 19, 1992) (determining that the situation in Liberia constituted a threat to international peace and security and provided authorization for the Economic Community of West African States Monitory Group (ECOMOG) force under Chapter VII); WELLER, *supra* note 118, at 71-72; Anthony Chukwuka Ofofile, *The Legality of ECOWAS Intervention in Liberia*, 32 COLUM. J. TRANSNAT'L L. 381, 413-418 (1994); Hubert, *supra* note 44, at 91. See also, Hubert, *supra* note 44, at 91.

120. S.C. Res. 1132, U.N. Doc. S/RES/1132, (Oct. 8, 1997) (providing explicit authorization for ECOMOG under Chapter VII). See Hubert, *supra* note 44, at 91; Akintunde Kabir Otubu, *Collective Intervention in International Law: ECOMOG/Sierra Leone in Retrospect* (July 6, 2008) (unpublished manuscript) (on file with SSRN at <http://dx.doi.org/10.2139/ssrn.1140203>).

121. See discussion *supra* note 47.

122. Hubert, *supra* note 44, at 92.

123. Antonio Cassese stated that the "resort to armed force was justified . . . [but] contrary to current international law." Antonio Cassese, *Ex iniuria ius oritur: Are We Moving Towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?*, 10 EUR. J. INT'L L. 23, 25 (1999); Jonathan Charney, *Anticipatory Humanitarian Intervention in Kosovo*, 93 AM. J. INT'L L. 834, 836-837 (1999); John J. Merriam, *Kosovo and the Law of Humanitarian Intervention*, 33 CASE W. RES. J. INT'L L. 111, 151 (2001); Bruno Simma, *NATO, the UN, and the Use of Force: Legal Aspects*, 10 EUR. J. INT'L L. 1, 22 (1999); see also Hubert, *supra* note 44, at 92.

124. Press Release, Security Council, Security Council Rejects Demand for Cessation of Use of Force Against Federal Republic of Yugoslavia, U.N. Press Release SC/6659 (Mar. 26, 1999). See also Hubert, *supra* note 44, at 92.

125. INDEP. INT'L COMM'N ON KOS., KOSOVO REPORT (2000) [hereinafter KOSOVO REPORT], available at <http://reliefweb.int/sites/reliefweb.int/files/resources/F62789D9FCC56FB3C1256C1700303E3B-thekosovoreport.htm>.

Efforts to articulate a new doctrine of humanitarian intervention were met with skepticism and ultimately failed due to concerns for state sovereignty.<sup>126</sup> As a result, then Secretary General Kofi Annan famously asked, “If humanitarian intervention is, indeed, an unacceptable assault on sovereignty, how should we respond to a Rwanda, to a Srebrenica—to gross and systematic violations of human rights that affect every precept of our common humanity?”<sup>127</sup> Unable to reach consensus on a right of humanitarian intervention, the next effort to combat atrocity crimes focused not on the intervening state, but on the right of people everywhere to be free of assault by genocidal regimes.

## 2. Responsibility to Protect

The new concept of R2P is a direct response to twentieth century “failure of individual States to live up to their most basic and compelling responsibilities, as well as the collective inadequacies of international institutions” to combat the world’s worst crimes.<sup>128</sup> The shift in the debate began in 2001 when the International Commission on Intervention and State Sovereignty (ICISS) published a report outlining the concept of R2P.<sup>129</sup> According to the ICISS Report, R2P is a two-tiered concept. First, states are responsible for the protection of their civilian populations, specifically for the prevention of atrocity crimes against them.<sup>130</sup> Second, if a state fails to protect its population, then its sovereignty gives way to the international community’s responsibility to prevent civilian slaughter.<sup>131</sup> Intending to set a standard with greater weight than the controversial “right” of humanitarian intervention,<sup>132</sup> the ICISS report established a high threshold for intervention, set parameters for the decision to use

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126. See U.N. GAOR, 54th Sess., 8th plen. mtg., U.N. Doc. A/54/PV.8 (Sept. 22, 1999); U.N. GAOR, 54th Sess., 9th plen. mtg., U.N. Doc. A/54/PV.9 (Sept. 22, 1999) (chronicling the divisive debate at the General Assembly over humanitarian intervention); see also Edward C. Luck, *Building a Norm: The Responsibility to Protect Experience, in MASS ATROCITY CRIMES: PREVENTING FUTURE OUTRAGES*, *supra* note 24, at 108, 111.

127. U.N. SECRETARY-GENERAL, ‘WE THE PEOPLES’ THE ROLE OF THE UNITED NATIONS IN THE 21ST CENTURY at 48, U.N. Doc. A/54/2000, U.N. Sales No. E.00.I.16 (2007).

128. *U.N. R2P Report*, *supra* note 18, ¶5. For a detailed discussion of the development of the Responsibility to Protect (R2P), see GARETH EVANS, *THE RESPONSIBILITY TO PROTECT: ENDING MASS ATROCITY CRIMES ONCE AND FOR ALL* 38-54 (2008); Luck, *supra* note 126.

129. ICISS REPORT, *supra* note 104.

130. The 2005 World Summit Outcome proved: Each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity. This responsibility entails the prevention of such crimes, including their incitement, through appropriate and necessary means. We accept that responsibility and will act in accordance with it. 2005 World Summit Outcome, ¶138, GA Res. 60/1, U.N. Doc. A/RES/60/1 (Sept. 16, 2005) [hereinafter Summit Report].

131. *Id.*; see also Hubert, *supra* note 44, at 93. See generally FRANCIS DENG ET. AL., *SOVEREIGNTY AS RESPONSIBILITY: CONFLICT MANAGEMENT IN AFRICA* (1996).

132. Rotberg, *supra* note 24, at 11.

force,<sup>133</sup> and urged the UNSC to act first before states take action on their own.<sup>134</sup>

In spite of mixed initial reactions to the ICISS Report,<sup>135</sup> R2P became a priority in light of atrocities in the DRC and genocide in Darfur.<sup>136</sup> It was in this context at the 2005 World Summit of leaders—at the time the largest gathering of world leaders in history—that consensus was reached on R2P. The World Summit Outcome Report (Summit Report) embraced the notion of R2P, but with caveats.<sup>137</sup> Notably, it did not contemplate intervention without UNSC approval. Article 139 of the Summit Report provides:

[The international community is] prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity.<sup>138</sup>

Under this U.N. model, R2P relies on three pillars. First, states are responsible for protecting their civilians. Second, states should work together on a preventive strategy involving development, human rights, governance, peacebuilding, rule of law, security sector reform efforts, and two types of consent-based military action.<sup>139</sup> It is the third pillar,<sup>140</sup> “timely and decisive response to prevent and halt genocide, ethnic cleansing, war crimes and crimes against humanity”—including the use of force under

133. The six criteria established in the ICISS Report are: right authority, just cause, right intention, last resort, proportional means, and reasonable prospects of success. ICISS REPORT, *supra* note 104, at 32. These threshold criteria for the use of force to halt atrocities were instructive to the conditions established in this article. See *infra* Part V.

134. Hubert, *supra* note 44, at 93. The African Union was actually first to articulate a collective right to intervene in cases of atrocity crimes a few years before the emergence of R2P. The AU Constitutive Act takes a position of “non-indifference” to unfolding atrocities, compared to the failed African League’s policy of “nonintervention.” See GENOCIDE REPORT, *supra* note 8, at 98.

135. The initial reaction to the ICISS report ranged from apathy to strong opposition. Hubert, *supra* note 44, at 93. Because the report was released just after the attacks of September 11, 2001, the world was more focused on the “war on terror” and less on humanitarian missions. The reaction to the concept grew more hostile in the wake of the U.S. invasion of Iraq, which was not authorized by the UNSC. *Id.* For a more detailed discussion regarding the concern of pretext with regard to intervention to halt atrocity crimes, see *infra* Part III.D.

136. Hubert, *supra* note 44, at 94 n.31.

137. Summit Report, *supra* note 130.

138. *Id.* at ¶139.

139. These two types are: (1) preventive peacekeeping, as in Macedonia (FYROM) and Burundi, and (2) military assistance, including Chapter VII action, to help states controlled in part by armed groups, such as Sierra Leone. Luck, *supra* note 126, at 116-17.

140. U.N. R2P Report, *supra* note 18, at ¶49.

Chapter VII when states fail to act—that has drawn the most attention and concern, particularly from smaller states fearful that broadening the ability to use force will be easily abused.<sup>141</sup> While states do in fact have the responsibility to protect their civilians, the international community only has the option to intervene to protect civilians (with U.N. authorization), but no affirmative obligation.

In its current form, R2P does little to change preexisting norms or the ability of states to intervene absent U.N. authorization.<sup>142</sup> Best understood as an “important tool for moral suasion,”<sup>143</sup> R2P can have an impact on government policy toward atrocity crimes and should motivate states to enforce widely accepted humanitarian standards.<sup>144</sup> Perhaps the two most significant breakthroughs of R2P are the shift in focus from intervening states to perpetrator states,<sup>145</sup> and a dedication to early warning and capacity building to protect populations from slaughter.<sup>146</sup>

In this early, developmental stage of R2P, it is difficult to tell whether it will prove to be effective in practice.<sup>147</sup> So far, the early test-cases have demonstrated mixed results. Beginning in 2003, the widespread attacks against civilians in Darfur by Sudan backed forces appeared to meet the threshold of R2P.<sup>148</sup> Still, the African Union (AU) force that deployed in 2004, followed by a UN-AU hybrid operation in 2007, failed to prevent the deaths of hundreds of thousands and the displacement of millions.<sup>149</sup> Simi-

141. *RtoP and Rebuilding: the Role of the Peacebuilding Commission*, INT’L COAL. FOR THE RESPONSIBILITY TO PROTECT, <http://www.responsibilitytoprotect.org/index.php/about-rtop/related-themes/2417-pbc-and-rtop> (last visited 12 Apr. 2013); *U.N. R2P Report*, *supra* note 18, at ¶139.

142. See Summit Report, *supra* note 130.

143. GENOCIDE REPORT, *supra* note 8, at 98.

144. Luck, *supra* note 126, at 109.

145. For further discussion on the shift in focus to perpetrator states, see *infra* Part III.B.

146. MATTHEW C. WAXMAN, COUNCIL ON FOREIGN RELATIONS, *INTERVENTION TO STOP GENOCIDE AND MASS ATROCITIES* 5 (2009).

147. Institutionally, the United Nations is working to make R2P part of its bureaucratic process in order to provide early warning and be able to develop interdepartmental and interagency responses to emergency situations. Luck, *supra* note 126, at 124; see also GENOCIDE REPORT, *supra* note 8, at 99. Additionally, the 2010 U.S. National Security Strategy includes language that mirrors the concept of R2P, suggesting greater acceptance. See NATIONAL SECURITY STRATEGY OF THE UNITED STATES 48 (May 2010) [hereinafter 2010 NATIONAL SECURITY STRATEGY], available at [www.whitehouse.gov/sites/default/files/rss\\_viewer/national\\_security\\_strategy.pdf](http://www.whitehouse.gov/sites/default/files/rss_viewer/national_security_strategy.pdf).

148. See generally, Paul D. Williams & Alex J. Bellamy, *The Responsibility to Protect and the Crisis in Darfur*, 36 SEC. DIALOGUE 27 (2005).

149. Hubert, *supra* note 44, at 96-97. But these shortcomings have less to do with the validity of R2P, and more to do with geopolitical realities. For example, China threatened to veto UNSC efforts to place an oil embargo on Sudan, which many believe would have ended the genocide. Katy Glassborow, *China, Russia Quash ICC Efforts to Press Sudan Over Darfur Crimes*, SUDAN TRIB. (Jan. 12, 2008), <http://www.sudantribune.com/spip.php?article25544>. Sudan just so happens to be a key oil supplier to China. Hubert, *supra* note 44, at 97. Sudan’s open defiance to indictments and arrest warrants issued by the ICC has also frustrated efforts to prevent and punish those responsible for the atrocities in Darfur. Once

larly, international and regional efforts to end atrocities in the DRC have been a failure.<sup>150</sup> Contrast these situations with the UN-authorized intervention in Libya in 2011 in response to President Qadhafi's brutality against Libyan civilians.<sup>151</sup>

In spite of the push to see universal application of R2P, efforts have stalled. Observers are naturally concerned as "[n]ations have stood by as atrocities unfolded in the Sudan and the Democratic Republic of the Congo, deferring action to weak regional bodies or patchy and under-resourced multilateral forces."<sup>152</sup> This failure is compounded by proponents of R2P that want to keep the discussion on the "safe" terrain of nonmilitary prevention methods. While mass atrocities require a full spectrum of responses, including diplomacy, economic sanctions, and multilateral efforts, military measures must be on the table if peaceful measures fail to stop the next genocide.<sup>153</sup> The difficult issue of military intervention, whether as an extension of R2P or humanitarian intervention, must be addressed if there is any hope of adopting an effective strategy to prevent and respond to atrocity crimes.

#### D. *The United States and Mass Atrocity Prevention & Response Operations*

In conjunction with, and as a logical extension to, the concept of R2P, the United States is actively developing a mass atrocity prevention and response doctrine (MAPRO).<sup>154</sup> The 2010 National Security Strategy promises, "In the event that prevention fails, the United States will work both multilaterally and bilaterally to mobilize diplomatic, humanitarian, financial, and—in certain instances—military means to prevent and re-

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again, China was responsible for blocking the UNSC from even issuing a Presidential Statement condemning Sudan's noncooperation. Rotberg, *supra* note 24, at 7 (stating that Russia and China will often block UNSC actions, worrying that U.N. intervention (reprimands, sanctions, or even outright intervention) could set a precedent, which they will have to someday answer to for their own breaches of international law).

150. Claire Applegarth & Andrew Block, *Acting Against Atrocities: A Strategy for Supporters of R2P*, in MASS ATROCITY CRIMES: PREVENTING FUTURE OUTRAGES, *supra* note 24, at 128, 128.

151. S.C. Res. 1970, U.N. SCOR, S/RES/1970 (Feb. 26, 2011); S.C. Res. 1973, U.N. SCOR, S/RES/1973 (Mar. 17, 2011); S.C. Res. 2040, U.N. SCOR, S/RES/2040 (Mar. 12, 2012). Each of these UNSC resolutions refer to states' responsibility to protect their populations, and specifically reference the crisis in Libya.

152. Applegarth & Block, *supra* note 150, at 128.

153. Professor Sarah Sewall notes that state paralysis will continue so long as R2P proponents make "prevention appear to be low-cost and uncontroversial." Sarah Sewall, *From Prevention to Response: Using Military Force to Oppose Mass Atrocities*, in MASS ATROCITY CRIMES: PREVENTING FUTURE OUTRAGES, *supra* note 24, at 159, 172.

154. See Presidential Directive, *supra* note 9. The U.S. Army Peacekeeping and Stability Operations Institute also issued a white paper titled, MASS ATROCITY PREVENTION AND RESPONSE OPTIONS (MAPRO): A POLICY PLANNING HANDBOOK (2012) [hereinafter MAPRO HANDBOOK].

spond to genocide and mass atrocities.”<sup>155</sup> This passage is significant because it moves away from a strict non-kinetic, preventive strategy that many leaders, R2P advocates, and scholars endorse.<sup>156</sup> Rather it recognizes that when peaceful preventive efforts fail, the United States may use whatever means necessary to respond to the threat of atrocity crimes—and not necessarily with U.N. support. This Section discusses recent developments in this strategy and recognizes the need for the development of military doctrine specifically tailored to confront mass atrocity prevention and response operations.

As recently as 2010, expert commentary criticized nations for failing to prepare for the next atrocity crisis.<sup>157</sup> Although the United States has not yet included atrocity response operations in military doctrine,<sup>158</sup> recent efforts indicate there is reason to be optimistic. In addition to independent studies such as the 2008 Genocide Prevention Task Force Report<sup>159</sup> and the 2010 Mass Atrocity Response Operations Handbook (MARO Handbook),<sup>160</sup> President Obama has convened the full spectrum of U.S. national security actors, including the Department of Defense (DoD), the Department of State, the National Security Council, and the Office of the Director of National Intelligence, among many others, to develop a government-wide approach to prevent and respond to mass atrocities.<sup>161</sup> Proposals by the Genocide Prevention Task Force, the MARO Handbook, as well as leading scholars highlight issue areas that should be included in future policy and practice.

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155. 2010 NATIONAL SECURITY STRATEGY, *supra* note 147, at 48; *see also* U.S. DEP'T. OF DEF., QUADRENNIAL DEFENSE REVIEW, at 15 (2010) [hereinafter QUADRENNIAL DEFENSE REVIEW] (providing that, “The Defense Department must be prepared to provide the President with options across a wide range of contingencies, which include[s] . . . preventing human suffering due to mass atrocities. . . .”); S. Con. Res. 71, 111th Cong. (2010) (enacted) (calling for the United States to engage in a “whole of government” and “strategic effort to prevent mass atrocities and genocide.”).

156. *See* Ian Hurd, *Is Humanitarian Intervention Legal? The Rule of Law in an Incoherent World*, 25 ETHICS & INT'L AFF. 1, 10 (2011) (stating that “much of the formal support for [R2P] . . . is for the relatively easy case of intervention approved by the Security Council.”).

157. Rotberg, *supra* note 24, at 16.

158. Sewall states, “Political leaders are reluctant to direct the [U.S.] military to prepare for a MARO, while military leaders, already fully occupied, say they will prepare for a MARO when civilian leaders direct them to do so. As a result, the United States may not be better prepared for the next Rwanda than it was in 1994.” Sewall, *supra* note 153, at 172. Most agree that institutional capacity to prevent atrocity crimes at the earliest stages must be strengthened at both the state and international levels. Hubert, *supra* note 44, at 100.

159. GENOCIDE REPORT, *supra* note 8.

160. MARO HANDBOOK, *supra* note 6.

161. Presidential Directive, *supra* note 9. The United States is not alone in taking measures to prevent atrocity crimes. France recently included R2P in its 2008 Defense and National Security White Paper. *See* PRESIDENT OF THE REPUBLIC OF FRANCE, THE FRENCH WHITE PAPER ON DEFENCE AND NATIONAL SECURITY 115 (2008). Additionally, the European Union defense strategy incorporates R2P. European Union, *Report on the Implementation of the European Security Strategy-Providing Security in a Changing World*, S407/08 (Dec. 11, 2008).

## 1. Full Spectrum Approach

The nature of mass atrocities and the range of options States have to respond to them, mean that these crimes are “absolutely preventable.”<sup>162</sup> States have numerous tools at their disposal to react to pending or ongoing atrocities, only one of which is the use of military force.<sup>163</sup> In fact, it is necessary to point out that in spite of this Article’s emphasis on coercive intervention measures, military action should be a last resort following diplomatic, economic, and multilateral efforts.<sup>164</sup>

The Genocide Prevention Task Force recognized that genocide and atrocity crimes are avoidable tragedies when there is leadership and political will to confront brutal regimes.<sup>165</sup> Besides leadership, the Task Force identified five initiatives that should be implemented for an effective prevention strategy: (1) an atrocity risk assessment prepared by the Director of National Intelligence for Congress, (2) early prevention measures, (3) preventive diplomacy, (4) military atrocity response doctrine, and (5) international cooperative networks to remove the shield of sovereignty from perpetrator states.<sup>166</sup>

## 2. Military Preparedness

Many of the options and considerations discussed by the Task Force focus on policy shaping, capacity building, institutional development, and non-kinetic engagement of world leaders and organizations before atrocity crimes occur. These are all consistent with the accepted meaning of R2P discussed above, and fall within the comfort zones of scholars and leaders alike. But even the Task Force recognized that the “credible threat of coercive measures, including ultimately the use of force, is widely seen as a necessary complement to successful preventive diplomacy.”<sup>167</sup> The difficult question remains—if peaceful prevention measures fail, is the United States prepared to take military action to halt atrocity crimes?

In the 2006 National Security Strategy, the United States offered the first glimpse of its willingness to use force to respond to genocide. It pro-

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162. See Reisman, *supra* note 64, at 59, argues, “Unless a mass murder is accomplished with a single devastating weapon of mass destruction, . . . the business of killing a large group of people takes time, communication, and organization.” Reisman goes on to state, “This means that, unlike individual murders. . . many of the individual murders that comprise a mass murder can be prevented.” *Id.*

163. Currently, the only office in the U.S. Government that is the closest to being focused on atrocities prevention is the State Department Office of War Crimes Issues (S/WCI), which was created in 1997 to advise on serious humanitarian violations throughout the world with an emphasis on prosecution at an international tribunal. GENOCIDE REPORT, *supra* note 8, at 4.

164. MAPRO HANDBOOK, *supra* note 154, at 81. For a detailed discussion of the proposed threshold for using force to prevent or respond to mass atrocities when the United Nations fails to act, see *infra* Part IV.

165. GENOCIDE REPORT, *supra* note 8, at 1-2.

166. *Id.* at xvii-xviii.

167. *Id.* at 69.

vides, "Where perpetrators of mass killing defy all attempts at peaceful intervention, *armed intervention may be required*, preferably by the forces of several nations working together under appropriate regional or international auspices."<sup>168</sup> This strategy highlights the desire to utilize peaceful measures first, and force if necessary. Crucial to this passage is the desire, but not the requirement, to have the military action authorized by an "appropriate" international or regional organization. The 2010 National Security Strategy adopts a similar approach.<sup>169</sup>

Experts recognize that in order to increase military readiness, states must develop "rules of engagement, a military doctrine, and pre-deployment training that all differ from traditional peacekeeping or war-fighting."<sup>170</sup> In fact, the Genocide Task Force specifically recommended that the "secretary of defense and U.S. military leaders should develop military guidance on genocide prevention and response and incorporate it into Department of Defense (and interagency) policies, plans, doctrine, training, and lessons learned."<sup>171</sup>

Mass Atrocity Response Operations are a subset of atrocity response measures falling under the full spectrum MAPRO paradigm, and are the future of U.S. military initiatives to halt mass murders. MARO policy deals only with military operations, distinct from MAPRO policy which includes diplomatic, economic, and military measures, among others, to respond to atrocities. The MARO Handbook, noted above, provides policy-makers with a blueprint for turning MARO planning into official military doctrine. It discusses challenges unique to atrocity prevention and response operations, planning strategies, and specific tactics to facilitate mission success.<sup>172</sup>

Although the nature of MARO operations will resemble international armed conflicts or contingency operations, MARO have many distinguishing characteristics.<sup>173</sup> For example, MARO success is measured in terms of protecting civilians, not necessarily by vanquishing an enemy force. Sarah Sewall clarifies that, regime change, enforcing agreements, and supporting peacetime humanitarian operations might be follow-on aspects of

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168. NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 17 (March 2006) [hereinafter 2006 NATIONAL SECURITY STRATEGY] (emphasis added), available at <http://nssarchive.us/NSSR/2006.pdf>.

169. 2010 NATIONAL SECURITY STRATEGY, *supra* note 147, at 22. The Genocide Report similarly endorses military measures to respond to ongoing atrocities once opportunities for prevention have been lost. Moreover, the Report suggests that "U.S. military assets can also play an important role in supporting and providing credibility to options short of the use of force." GENOCIDE REPORT, *supra* note 8, at xxiii.

170. Hubert, *supra* note 44, at 100. See generally VICTORIA HOLT, THE IMPOSSIBLE MANDATE: MILITARY PREPAREDNESS, THE RESPONSIBILITY TO PROTECT AND MODERN PEACE OPERATIONS (2006); Thomas Weiss & Don Hubert, *Conduct and Capacity*, in THE RESPONSIBILITY TO PROTECT: RESEARCH BIBLIOGRAPHY AND BACKGROUND 177-206 (Thomas Weiss & Don Hubert eds., 2001).

171. GENOCIDE REPORT, *supra* note 8, at 87.

172. MARO HANDBOOK, *supra* note 8.

173. GENOCIDE REPORT, *supra* note 8, at 76.

these missions, but are not the military objective in a MARO.<sup>174</sup> As a result, the complexity of mass atrocities should not be underestimated by planners. As the MARO Handbook explains, “every situation of mass killing is unique and requires a tailored response.”<sup>175</sup> Initially, there can be no illusion that intervening to protect a civilian population will be seen as hostility toward the perpetrator.<sup>176</sup> There can be no impartiality in mass atrocity situations, even if the underlying goal is to protect something as seemingly neutral as human rights.

Military planners must also take into account the complex multiparty dynamics of MARO. Mass atrocities involve a number of players—perpetrators of violence (usually regime elites), victims, and interveners—some of whom may switch roles and cause the situation to escalate quickly.<sup>177</sup> Additionally, the response of the victims can often confuse the matter. Whether the victims flee, fight, or ask for outside intervention will determine how the perpetrator acts and the political viability of the intervener’s options. Take, for example, the Serbian slaughter of Bosnian Muslims and Croats. The United States failed to take initial action in part out of a concern that intervention would result in a Vietnam-like quagmire because atrocity crimes were being committed by all parties to the conflict.<sup>178</sup> As a result of the uncertainty of the various actors’ roles in a mass atrocity situation, the intelligence community will need to tailor its intelligence gathering to the actors and cultures involved.<sup>179</sup>

Finally, there is a potential for escalation of violence. As stated in the MARO Handbook, “mass killing of civilians can potentially intensify and expand very quickly once it begins.”<sup>180</sup> Also, the initial victims of government violence may also use the intervention as a shield for exacting vengeance, while outside parties, such as neighboring states, may seize on the chaos of conflict to intervene on either side or manipulate the conflict toward their own ends. As a result of these unique concerns and distinguishing characteristics, decision makers must be prepared to respond to situations of mass violence quickly, which requires established doctrine, policy, and training.<sup>181</sup> Unlike a traditional conflict, enemy gains (such as

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174. Sewall, *supra* note 153, at 166.

175. MARO HANDBOOK, *supra* note 8, at 9.

176. See GENOCIDE REPORT, *supra* note 8, at 74.

177. Sewall, *supra* note 153, at 167.

178. POWER, *supra* note 38, at 284.

179. Sewall, *supra* note 153, at 168.

180. MARO HANDBOOK, *supra* note 6, at 28. See, for example, the rapid pace of slaughter in the Rwandan genocide, which lasted only 100 days and resulted in approximately 800,000 murdered. POWER, *supra* note 38, at 329-89. In contrast, other situations are more sporadic, as in the varying degrees of intensity of the Darfur genocide at different times, which may have resulted from Bashir’s belief that culpability can be avoided as long as the bloodshed stays under a certain threshold. Sewall, *supra* note 153, at 170.

181. The MARO Handbook lists several operational and political considerations that must be taken into account during the planning phase. These are (1) utilizing different information from different sources (traditional intelligence and NGOs) to best inform the unpredictable and complex nature of events leading to MARO; (2) advanced interagency planning

seizing territory) cannot be undone in a mass atrocity situation. In mass atrocity situations, “the perpetrator has achieved success if the civilians it wishes to have killed are killed; no subsequent victory against the perpetrators will undo the civilian deaths. Since the primary purpose of a MARO is to stop that killing, speed of response can determine overall success.”<sup>182</sup>

Prior to a full intervention, and when there is a threat of atrocity crimes, states may consider military flexible deterrent options (FDOs) to aide ongoing diplomatic, economic and intelligence gathering efforts. For example, U.S. forces stationed around the globe can provide intelligence that could be useful to atrocity prevention at the early warning phase.<sup>183</sup> If atrocities have begun, methods such as disrupting supply lines, launching cyber network attacks against communications and military infrastructure, and protecting internally displaced persons will prove useful.<sup>184</sup> These tactics vary in scope and level of intrusion, but will in any event be used to “expose perpetrators to international scrutiny, establish the credibility of a potential intervention, build capacity, isolate perpetrators, protect potential victims, dissuade or punish perpetrators, or build and demonstrate international resolve.”<sup>185</sup>

Depending on the success of FDOs, the MARO Handbook lists several tactics that can be employed individually or jointly in a comprehensive intervention to protect the civilian population from mass killings. MARO forces can (1) saturate a large area with sufficient force deployed in sectors; (2) secure limited areas with the intent of growing them like “oil spots”; (3) establish a buffer zone between perpetrators and victims; (4) secure safe areas for victims and internally displaced persons; (5) provide support—advisory, military equipment, or technical and air support—to coalition partners, host nations, or victim groups; (6) contain perpetrators with blockades or no-fly zones; and (7) attack and defeat the perpetrators’ leaders and/or capabilities.<sup>186</sup>

The U.S. Department of Defense (DoD) must take relevant doctrine and training and specifically tailor these aspects of mission readiness to an

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so that leaders can shape a preexisting crisis plan to fit the dynamics on the ground; (3) prioritizing speed over mass in terms of military deployment as well as political and military decision making; (4) developing a historical record (*Power of Witness*) of events with various tools, which can be used to make the political case for the need to intervene, and later the legal case in a criminal tribunal; (5) determining whether the MARO will encompass immediate civilian rescue or attempt to handle root causes such as restoration of government; (6) satisfying immediate nonmilitary requirements such as short term humanitarian assistance, public order, and justice; (7) overcoming moral dilemmas including distinguishing between perpetrator and victim and avoiding complicity in revenge killings; and (8) engaging political leaders for guidance on key issues such as identifying perpetrators and determining the scope of operations. MARO HANDBOOK, *supra* note 8, at 18-19.

182. *Id.* at 33.

183. GENOCIDE REPORT, *supra* note 8, at 23.

184. *Id.* at 84.

185. MARO HANDBOOK, *supra* note 6, at 19-20.

186. *Id.*

atrocities prevention and response scenario. Until MARO doctrine is in place, military leaders will be unprepared to present a full range of options to political leaders, who must ultimately decide whether utilizing U.S. armed forces to intervene is in the best interests of the United States.<sup>187</sup> Additionally, advance planning for MARO will permit the United States to offer sufficient support in atrocity situations to international and regional organizations—such as the United Nations, NATO, the European Union (EU), AU, or ECOWAS—who currently “rely on doctrine, training, guidance, and scenarios developed by western [sic] nations such as the United States.”<sup>188</sup>

Developing MARO doctrine will not cause an undue burden on DoD resources. While mission accomplishment is measured differently in MARO than in typical military interventions, U.S. armed forces are uniquely situated to handle these diverse tasks. The preexisting ability of U.S. forces to respond rapidly to any crisis is a built-in strength crucial to MARO success. Additionally, there are many aspects of MARO that will utilize the same tasks required in other missions, including convoy escorts, direct fires, noncombatant evacuations, counterinsurgency measures, detainee operations, no-fly zones, protected enclaves, and separation of forces.<sup>189</sup> Peace and stability operations are already a core mission of U.S. armed forces and will have significant overlap with the underlying MARO mission.<sup>190</sup> Even without specific mention of atrocity response, these and

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187. The MARO doctrine is implicated in the Department of Defense (DOD)’s 2010 Quadrennial Defense Review:

[T]he Defense Department must be prepared to provide the President with options across a wide range of contingencies, which include supporting a response to an attack or natural disaster at home, defeating aggression by adversary states, supporting and stabilizing fragile states facing serious internal threats, and *preventing human suffering due to mass atrocities or large-scale natural disasters abroad.*

QUADRENNIAL DEFENSE REVIEW, *supra* note 155, at vi (emphasis added); GENOCIDE REPORT, *supra* note 8, at 75.

188. GENOCIDE REPORT, *supra* note 8, at 78. As of 2008, these are currently the only international organizations that have authority and “some capacity”—although inconsistently applied—to use military force to prevent and stop genocide. *Id.* at 84. It is U.S. policy to work with allies, international, and regional organizations to prevent atrocity crimes. See 2010 NATIONAL SECURITY STRATEGY, *supra* note 147, at 12, 48. In fact, in previous interventions in East Timor in 1999, Liberia in 2003, and Darfur in 2004-2007, the United States provided assistance to missions led by Australia, ECOWAS, and the AU, respectively, although with an aim at stability rather than MARO. GENOCIDE REPORT, *supra* note 8, at 84.

189. Sewall, *supra* note 153, at 167 (citing JOINT CHIEFS OF STAFF, CJCSM 3500.04E, UNIVERSAL JOINT TASK LIST (2008), available at [www.dtic.mil/doctrine/training/cjcsm3500\\_04e.pdf](http://www.dtic.mil/doctrine/training/cjcsm3500_04e.pdf)); see also GENOCIDE REPORT, *supra* note 8, at 79.

190. GENOCIDE REPORT, *supra* note 8, at 79-80; see also U.S. DEP’T OF ARMY, FIELD MANUAL 3-07, STABILITY OPERATIONS (6 Oct. 2008) (emphasizing that as of 2008, stability operations were at least on par with traditional combat operations in terms of importance to military success); U.S. DEP’T OF DEF., DIR. 3000.05, MILITARY SUPPORT FOR STABILITY, SECURITY, TRANSITION, AND RECONSTRUCTION OPERATIONS (28 Nov. 2005) (explaining the DOD’s policy on peace and stability operations).

other MARO-relevant training and tactics are already on the books.<sup>191</sup> Because the MARO Handbook is drafted in a military friendly planning style,<sup>192</sup> it will be easy to apply this doctrine to atrocity situations that arise quickly, like what occurred in the Syrian situation described below.

### E. Atrocities in Syria

While the international community debates effective response measures to atrocity crimes, Syria's government, led by Bashar al-Assad, continues to perpetrate crimes against its people. Following popular uprisings in Tunisia and Egypt, Syrians began protesting against the Assad regime in early 2011 demanding "political freedom, an end to corruption, and action [against] poverty."<sup>193</sup> Syrian government forces and government sponsored militia quickly embarked on a brutal crackdown of dissidents, military defectors, and the general population, resulting in over 100,000 civilians killed as of summer 2013.<sup>194</sup>

Today, the Syrian opposition is organized, has garnered international support, and is currently engaged in a full-fledged non-international armed conflict against government forces.<sup>195</sup> Even if the opposition coalition is successful in toppling Assad's regime, the international community has already failed to take effective action to prevent widespread atrocity crimes,

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191. See JOINT CHIEFS OF STAFF, JOINT PUB 3-0, DOCTRINE FOR JOINT OPERATIONS (11 Aug. 2011) (outlining military strategy on joint operations); U.S. DEP'T OF ARMY, FIELD MANUAL 3-0, OPERATIONS (27 Feb. 2008) (revising military doctrine to include a variety of offensive, defensive, and civil support strategies to advance military goals). See generally DEP'T OF DEF., UNIVERSAL JOINT TASK LIST (2012), available at [www.dtic.mil/doctrine/training/ujtl\\_tasks.pdf](http://www.dtic.mil/doctrine/training/ujtl_tasks.pdf); U.S. DEP'T OF ARMY, THE ARMY UNIVERSAL TASK LIST (2012). Even without referencing genocide prevention, these publications include many tasks that would be utilized in prevention and response operations. GENOCIDE REPORT, *supra* note 8, at 70-80.

192. The MARO Handbook utilizes a typical mission analysis outline. MARO HANDBOOK, *supra* note 6, at 33. Additionally, the Handbook lists lines of effort (LOEs) such as situation understanding, strategic communication and diplomacy, unity of effort, military operations, force generation and sustainment, safe and secure environment, governance and rule of law, and social and economic well-being. *Id.* at 20-21. The MARO Handbook also conforms to the "doctrinal-phasing construct" as follows: "Phase 0 (Shape): Prevent Crisis or prepare a contingency; Phase I (Deter): Manage Crisis, deter escalation, prepare for intervention; Phase II (Seize Initiative): Conduct initial deployments and actions by intervening forces; Phase III (Dominate): Stop atrocities; control necessary areas; Phase IV (Stabilize): Establish secure environment; Phase V (Enable Civil Authority): Transition to responsible indigenous control." *Id.* at 21.

193. *Arab Uprising: Country by Country – Syria*, BBC NEWS (Aug. 31, 2012), <http://www.bbc.co.uk/news/world-12482309>.

194. *Opposition presses for weapons as Syria Death Toll tops 100,000*, CNN (July 26, 2013 5:59 AM) <http://www.cnn.com/2013/07/25/world/meast/syria-violence>; *Syria Deaths Near 100,000 says UN – and 6,000 are children*, THE GUARDIAN (Jun. 13, 2013 4:17 PM) <http://www.theguardian.com/world/2013/jun/13/death-toll-syrian-conflict-93000>.

195. *European Union Backs Syrian Opposition Coalition*, N.Y. TIMES (Nov. 19, 2012), <http://www.nytimes.com/2012/11/20/world/middleeast/islamists-reject-new-syrian-opposition-coalition.html>; *Syria in Civil War, Red Cross Says*, BBC NEWS (July 15, 2012), <http://www.bbc.co.uk/news/world-middle-east-18849362>.

adding to the long list of historically preventable civilian slaughter discussed above.

The failure to prevent Syria's crimes reflects the failure of the U.N. Security Council to effectively respond to mass atrocities. Russia and China, both allies of Syria, have prevented UNSC resolutions that would have taken steps toward stalling, if not halting, war crimes and crimes against humanity committed by Assad's forces.<sup>196</sup> As articulated by Turkey's foreign minister, the UNSC's failure "encourages the Syrian nation to kill even more people."<sup>197</sup>

Unable to agree on even economic sanctions, the UNSC is certainly not poised to consider more intrusive, but likely effective, measures such as a U.N. peace enforcement mission, or U.N.-authorized intervention.<sup>198</sup> The U.N. Human Rights Council, however, did vote overwhelmingly to extend the mandate of the Commission of Inquiry on Syria, which has already reported the "widespread, systematic, and gross human rights violations" of Syrian forces.<sup>199</sup> While the Commission will have no impact on stopping atrocities, it could be useful to document atrocity crimes and for building a case for future prosecution of war criminals before international or domestic courts. Because Syria is not a party to the ICC, crimes committed by its leaders would have to be referred to the Court by the UNSC (unlikely due to Russia and China's veto) or permitted by Syria itself.<sup>200</sup> If the Syrian opposition is successful, it is feasible that the new government would permit the investigation and prosecution of Assad and other officials most responsible for atrocities.

As discussed above, international criminal justice serves more of a retributive function and has a limited deterrent effect. Currently, the Syrian crisis is well past the point of atrocity prevention. There is no bringing back the thousands already murdered. Still, dozens of countries are calling for regime change in Damascus in an effort to halt the slaughter. That Turkey, the United States, Australia, Canada, and the United Kingdom, among dozens of other Western and Arab states, have the will to respond to these atrocity crimes underscores the need to equip these states with effective response measures.<sup>201</sup>

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196. Rick Gladstone, *Friction at the U.N. as Russia and China Veto Another Resolution on Syria Sanctions*, N.Y. TIMES (July 19, 2012), <http://www.nytimes.com/2012/07/20/world/middleeast/russia-and-china-veto-un-sanctions-against-syria.html>.

197. *Diplomat to UN: Security Council Has Failed in Syria*, CNN (Sept. 28, 1992) [hereinafter *Security Council Has Failed*], <http://www.cnn.com/2012/09/28/world/meast/syria-civil-war/index.html>.

198. One of Russia's primary concerns to any U.N. resolution regarding Syria is that it would result in international military action to oust the Assad regime, as occurred in Libya in 2011. See Gladstone, *supra* note 196, at 2-3.

199. Report on the Syrian Arab Republic, *supra* note 54, at para. 2; see also *Security Council Has Failed*, *supra* note 197.

200. See Rome Statute, *supra* note 94, art. 13.

201. See *Security Council Has Failed*, *supra* note 197.

As a result of situations like Syria, the United States is developing a government wide approach to mass atrocity prevention and response operations. This alone is a significant step and because of the comprehensive nature of these efforts, there is reason to believe the recommendations of the Genocide Task Force will be fully implemented.<sup>202</sup> Once the domestic, interagency lines of effort are sorted out, one challenge remains to full implementation of MARO doctrine. As discussed in the next Part, it is uncertain at best whether the law permits the use of military force to protect civilians from slaughter without the authorization of the United Nations. Overcoming this challenge of legal interpretation—and traditional notions of sovereignty—is vital to responding to atrocity campaigns like that of Bashar al-Assad.

## II. THE LEGALITY OF ATROCITY RESPONSE WHEN THE UNITED NATIONS FAILS TO ACT

At the 2005 World Summit, every world leader agreed that states have an affirmative responsibility to protect civilians from slaughter.<sup>203</sup> Still, history demonstrates that the international response to genocide and crimes against humanity has been a failure, including the cautious response to the atrocities occurring in Syria today.<sup>204</sup> As such, U.S. efforts to establish a comprehensive strategy involving diplomatic, economic, intelligence, and military measures to deal with this scourge should be welcomed by all.<sup>205</sup> When the discussion turns to military intervention, however, there is little consensus on the lawfulness of using force to prevent atrocity crimes absent U.N. authorization. Recent reports and scholarship recognize that military force may be necessary to prevent or respond to mass killings in some situations, but most do not address the more difficult question of the legality of this practice when the UNSC fails to act. This Part critically analyzes the history of humanitarian intervention as it developed parallel to *jus ad bellum* and concludes that a traditional interpretation of the U.N. Charter prohibits the unilateral use of force even to halt mass atrocities. Over sixty-five years after the Charter's inception, however, the law has evolved. The erosion of state sovereignty, the focus on

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202. With regard to military options, the Genocide Report recommends: (1) the Secretary of Defense and military leaders should develop policies, plans, doctrine, training, and lessons learned for genocide prevention; (2) the Director of National Intelligence and the Secretary of Defense should leverage military and intelligence capacity for early warning of atrocity crimes; (3) the Departments of Defense and State should work to enhance the capacity of international, regional, and subregional bodies to develop military capacity to respond to mass atrocities; (4) increase state preparedness to reinforce or replace U.N., AU, or other peace operation to prevent atrocities; and (5) the Departments of State and Defense should enhance U.S. and U.N. capacity to support long term post-conflict stability operations after genocidal violence. GENOCIDE REPORT, *supra* note 8, at 87-92.

203. Summit Report, *supra* note 130, at ¶¶ 138-139.

204. See Nic Robertson, *Syria Toll Rises to 25; Monitors Cheered in Besieged Town*, CNN (Jan. 16, 2012), [http://www.cnn.com/2012/01/15/world/meast/syria-unrest/index.html?hptHP\\_t3](http://www.cnn.com/2012/01/15/world/meast/syria-unrest/index.html?hptHP_t3).

205. Presidential Directive, *supra* note 9, at 2.

state responsibility under R2P, and the emergence of the human rights legal regime must inform a state's legal analysis when deciding whether to use force in response to atrocity crimes when the United Nations has failed to act.

### A. *Jus ad Bellum & Atrocity Response*

The legality of the use of force to prevent atrocity crimes falls within the body of law governing when states may resort to force: *jus ad bellum*. This law developed from natural law principles and state practice to the modern day U.N. Charter framework. A brief history of the *jus ad bellum* demonstrates that the legal authorization to use force to protect civilians has evolved over centuries. This survey details the current status of the law and whether a new norm is developing that would authorize unilateral armed force to respond to atrocity crimes.

*Jus ad bellum* emerged within natural law teachings, relying on "just causes" from religious and moral principles to guide decisions to go to war.<sup>206</sup> While these principles sought to limit leaders' resort to force, there was no general prohibition on aggressive war. Later, in the nineteenth century, state practice and international agreements—positive law—determined whether the use of force was lawful.<sup>207</sup> In the twentieth century, customary law<sup>208</sup> and treaty law<sup>209</sup> became the exclusive sources of law governing armed conflict.<sup>210</sup> A general prohibition on the use of force emerged.<sup>211</sup>

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206. MURPHY, *supra* note 47, at 33. The Just-War tradition of Saint Thomas Aquinas is often cited as evidence of the natural legal justifications for using force. See IAN BROWNLEE, *INTERNATIONAL LAW AND THE USE OF FORCE BY STATES* 5 (1993); ANTHONY CLARK & ROBERT J. BECK, *INTERNATIONAL LAW AND THE USE OF FORCE: BEYOND THE UN CHARTER PARADIGM* 11-16 (1993); C.A. POMPE, *AGGRESSIVE WAR: AN INTERNATIONAL CRIME* 125, 127 (1953). Murphy explains that ancient legal traditions typically had requirements prior to a just use of force that included: "exhaustion of means of reconciliation, the need for a valid ground for commencing war, the requirement in some circumstances for a declaration of war prior to its commencement, rules on the conduct of the fighting, and rules on truces and cessation of the conflict." MURPHY, *supra* note 47, at 35-36.

207. See, e.g., *THE CHARTER OF THE UNITED NATIONS: A COMMENTARY*, I, at 103, 115 (Bruno Simma ed., 2d ed. 2002) [hereinafter *CHARTER COMMENTARY*] (citing the 1899 Peaceful Settlement of Disputes, Hague Convention, and the Hague Peace Conferences of 1899 and 1907).

208. *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, 1986 I.C.J. 14, 165 (June 27) (noting that Article 2(4) of the Charter reflects customary law).

209. *General Treaty for Renunciation of War as an Instrument of National Policy*, Aug. 27, 1928, 46 Stat. 2343, 94 L.N.T.S. 57 [hereinafter *Kellogg-Briand Pact*].

210. MURPHY, *supra* note 47, at 33-34.

211. For example, following the First World War, the preamble to the League of Nations Covenant announced the acceptance of members "of obligations not to resort to war." *League of Nations Covenant* pmb., arts. 12, 13, 15. The Geneva Protocol of 1924 for the Pacific Settlement of Disputes filled in some gaps to the Covenant's prohibition on the use of force. *CHARTER COMMENTARY*, *supra* note 207, at 115-16; see also *Kellogg-Briand Pact*, *supra* note 209 (prohibiting aggressive war).

Support for the use of force to prevent tyrants from slaughtering their people has a long history.<sup>212</sup> Aristotle theorized that war could be used to help others to share in the good life, and disdained rulers who “ask for just government [among other rulers]; but in the treatment of others they do not worry at all about what measures are just.”<sup>213</sup> In the school of natural law, then, failure of foreign peoples to abide by “universal principles” could be a just cause for using force against them.<sup>214</sup>

The concept of state sovereignty arose following the Peace of Westphalia in 1648 and set in motion a reinterpretation of when rulers could wage war against one another.<sup>215</sup> Sovereignty at this time meant that rulers could govern their internal affairs in any way they deemed appropriate without outside interference.<sup>216</sup> But even during this time, tensions emerged between those who viewed using force to prevent widespread suffering as a “right vested in humanity”<sup>217</sup> and those who advocated non-intervention in order to protect state sovereignty and maintain the balance of powers among nations.<sup>218</sup> This tension remains today.

Even if there existed a universal right to intervene to prevent the slaughter of civilians, this natural law concept did not survive beyond the Second World War. Professor Sean Murphy warns, “The fact that older doctrines [and state practice] regarding the use of force may have included notions properly associated with humanitarian intervention . . . does not mean that a right of humanitarian intervention survived into this century . . . .”<sup>219</sup> The creation of the United Nations, and lessons learned from

212. The concept of humanitarian intervention, however, only arose in the scholarship of the twentieth century. MURPHY, *supra* note 47, at 34.

213. ARISTOTLE, *THE POLITICS* bk. 7, ch. 2, at 396-97 (Trevor J. Saunders ed., T.A. Sinclair trans., rev. ed. 1992); see also MURPHY, *supra* note 47, at 38.

214. MURPHY, *supra* note 47, at 40.

215. *Id.* at 42-43. For a detailed discussion of the role of sovereignty in atrocity prevention and response, see *infra* Part III.B.

216. MURPHY, *supra* note 47, at 42.

217. Influential international scholars in the 17th and 18th centuries, such as Hugo Grotius and Emmerich de Vattel, paid explicit attention to the use of force to prevent the suffering of those ruled by an unjust sovereign. *Id.* at 43-46 (citing H. GROTIUS, *ON THE LAW OF WAR AND PEACE*, bk. 2, ch. 25, para. 8 (F. Kelsey, trans., 1925); E. VATTEL, *THE LAW OF NATIONS OR THE PRINCIPLES OF NATURAL LAW APPLIED TO THE CONDUCT AND TO THE AFFAIRS OF NATIONS AND OF SOVEREIGNS*, bk. 1, ch. 2, sec. 17 (C. Fenwick trans., 1916) (finding that the sovereign right to rule at all costs was limited and could result in lawful outside intervention by foreign powers)).

218. Nonintervention would become the norm, as described in the writings of Immanuel Kant and John Stuart Mill. See IMMANUEL KANT, *PERPETUAL PEACE* (1939); John Stuart Mill, *A Few Words on Non-Intervention* (1859), reprinted in *ESSAYS ON POLITICS AND CULTURE* 368 (Gertrude Himmelfarb ed., 1962); see also MURPHY, *supra* note 47, at 46.

219. MURPHY, *supra* note 47, at 35; see also Ian Brownlie, *International Law and the Use of Force by States' Revisited*, 1 CHINESE J. INT'L L. 1, 12-19 (2002), stating:

By the end of the nineteenth century the majority of publicists admitted that a right of humanitarian intervention (*l'intervention d'humanité*) existed. A state which had abused its sovereignty by brutal and excessively cruel treatment of those within its power, whether nationals or not, was regarded as having made itself liable to action by any state which was

the failed League of Nations, forever altered the legal framework governing the use of force.

### 1. Law and the Use of Force: Article 2(4) in Context

The U.N. Charter is the primary legal instrument governing *jus ad bellum* and explicitly prohibits the use of force as an extension of state policy. It was drafted in 1945 following two devastating World Wars in order to prevent aggressive war, protect state sovereignty, and promote human rights.<sup>220</sup> Article 2(4) prohibits states from using force against other states,<sup>221</sup> and is widely regarded as *jus cogens*—a peremptory norm that is binding on all states.<sup>222</sup> When read in conjunction with article 2(7)<sup>223</sup>—prohibiting the United Nations from interfering in states' domestic matters—the prohibition against the use of force to protect foreign civilians is quite broad.

The Charter provides two explicit exceptions to the general prohibition on the use of force. First, the U.N. Security Council may authorize collective security measures under its Chapter VII authority after it has determined that there is a threat to the peace, breach of the peace, or act of aggression.<sup>224</sup> The second type of authorized force is individual or collective self-defense pursuant to Article 51.<sup>225</sup>

prepared to intervene. [By 1963] few experts believed that humanitarian intervention had survived the legal regime created by the United Nations Charter.

220. See generally STEPHEN C. SCHLESINGER, *ACT OF CREATION: THE FOUNDING OF THE UNITED NATIONS* (2003) (describing the political and legal circumstances surrounding the drafting of the U.N. Charter at the San Francisco Conference in 1945).

221. U.N. Charter art. 2(4) (providing, “[a]ll members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state or in any other manner inconsistent with the Purposes of the United Nations.”).

222. DINSTEN, *supra* note 70, at 99-102 (discussing authorities that consider the prohibition on the use of force a peremptory norm); see also Mohamed, *supra* note 106, at 1283.

223. U.N. Charter art. 2(7).  
Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.

*Id.*

224. U.N. Charter arts. 39, 41, 42. “The Security Council has shown that human rights violations may, under certain circumstances, be regarded as threats to the peace and rampant and egregious violations of essential human rights may constitute “breaches” of the peace.” Dan Kuwali, *Old Crimes, New Paradigms: Preventing Mass Atrocity Crimes, in MASS ATROCITY CRIMES: PREVENTING FUTURE OUTRAGES*, *supra* note 24, at 26 (citing the U.N. interventions in Northern Iraq (1991), Somalia (1992), Rwanda (1994), and Haiti (1994) as evidence that the UNSC will authorize Chapter VII action to end mass atrocities). Although the intervention in Haiti may not have been in response to atrocity crimes, there was a disruption of a democratic regime leading to a threat to the peace.

225. U.N. Charter art. 51 (providing, “[n]othing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.”).

Beyond these explicit exceptions, there is no consensus on whether the Charter provides an implicit exception for military intervention to prevent or respond to mass atrocities.<sup>226</sup> The following Subsections examine the legality of humanitarian intervention by interpreting Article 2(4) in terms of (a) the plain meaning of the Charter's text, (b) subsequent interpretation and practice by U.N. member states, and (c) whether preexisting or emerging custom has changed the normative character of the Charter.<sup>227</sup> After undergoing this analysis, if the Charter's terms remain ambiguous or lead to a "manifestly absurd or unreasonable" result, then supplementary interpretive materials—such as the preparatory work of the treaty and the circumstances of its conclusion—may be utilized.<sup>228</sup>

#### a. Plain Language of the Charter

The terms of the Charter appear unambiguous at first blush. A use of force, of nearly any kind, will be a violation of the territorial integrity or political independence of the target state, and is therefore prohibited. To traditionalists, it is irrelevant whether the use of force is to prevent the slaughter of civilians; it still must be authorized by the UNSC or be taken under a theory of self-defense.<sup>229</sup> Under this view, unilateral intervention in response to atrocity crimes is a *prima facie* violation of Article 2(4).<sup>230</sup> In support of this position, traditionalists point to the drafting history of the Charter to demonstrate that the language "territorial integrity or polit-

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226. Although the issue was given consideration in 1958 by Julius Stone, the scholarly debate regarding the lawfulness of humanitarian intervention in the Charter era can rightly be said to have begun with Richard B. Lillich's proclamation that humanitarian intervention is lawful. See JULIUS STONE, *AGGRESSION AND WORLD ORDER* 95, 98-99 (1958); Richard B. Lillich, *Forcible Self-Help by States to Protect Human Rights*, 53 IOWA L. REV. 325, 326 (1967); see also Myres S. McDougal & W. Michael Reisman, *Humanitarian Intervention to Protect the Ibos in HUMANITARIAN INTERVENTION AND THE UNITED NATIONS* 167 (Richard B. Lillich ed., 1973); Myres S. McDougal & W. Michael Reisman, *Rhodesia and the United Nations: The Lawfulness of International Concern*, 62 AM. J. INT'L L. 1, 9 (1968). But see Ian Brownlie, *Humanitarian Intervention, in LAW AND CIVIL WAR IN THE MODERN WORLD* 217, 219 (John Norton Moore ed., 1974) (arguing that intervention is unlawful absent U.N. authorization).

227. This subsection follows the analytical model of treaty interpretation found in the Vienna Convention on the Law of Treaties art. 31, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT].

228. *Id.* art. 32.

229. For scholars taking the traditional approach, the use of military force, even if for humanitarian purposes, is unlawful absent UNSC authorization or self-defense purposes. See, e.g., IAN BROWNIE, *INTERNATIONAL LAW AND USE OF FORCE BY STATES* 342 (1963); MICHAEL BYERS, *WAR LAW: UNDERSTANDING INTERNATIONAL LAW AND ARMED CONFLICT* 102-103 (2005); DINSTEIN, *supra* note 70, at 91; MURPHY, *supra* note 47, at 72 (stating that even if the intervention is only for a short term and is for a good purpose, it runs afoul of Article 2(4)); Brownlie, *supra* note 226, at 219; Franck & Rodley, *supra* note 44, at 267; Mary Ellen O'Connell, *The UN, NATO, and International Law After Kosovo*, 22 HUM. RTS. Q. 57, 70 (2002) (stating that there is no customary right or treaty that authorizes humanitarian intervention without UNSC approval); Oscar Schachter, *The Right of States to Use Armed Force*, 82 MICH. L. REV. 1620, 1629 (1984).

230. See MURPHY, *supra* note 47, at 3-4.

ical independence" was added to strengthen the prohibition against non-UNSC authorized force, not to limit its application.<sup>231</sup>

To modernists, the intent of the intervening state is relevant to the lawfulness of the use of force. Under this interpretation, the purpose of using force to prevent mass atrocities is not to annex or occupy territory, nor is it to overthrow a sitting government.<sup>232</sup> Although these actions may in fact occur in the course of military operations, they are ancillary to, and not the goal of, missions to prevent and arrest genocide.<sup>233</sup> However, a similar argument failed in the Corfu Channel case, where the ICJ invalidated U.K. claims that its unilateral minesweeping in Albanian waters was not for the purpose of intervention as prohibited in Art. 2(4).<sup>234</sup>

Similarly, some suggest that the phrase "or in any other manner inconsistent with the purposes of the United Nations" permits humanitarian intervention.<sup>235</sup> These scholars maintain that because one of the purposes of the Charter was to promote respect for human rights,<sup>236</sup> intervening to

231. See Comm'n I: Gen. Provisions, Summary Report of Seventh Meeting of Committee 1/1, [1945] 6 Doc. U.N. Conf. on Int'l Org. 331, 334-35, Doc. 784; Comm'n I: Gen. Provisions, Summary Report of Seventh Meeting of Committee 1/1, [1945] 6 Doc. U.N. Conf. on Int'l Org. 342, 342, Doc. 810 (adopting provision unanimously); RUTH B. RUSSELL, *A HISTORY OF THE UNITED NATIONS CHARTER: THE ROLE OF THE UNITED STATES* 456-57 (1958) (explaining that the drafters' interest was in codifying an obligation stronger than a mere promise not to use force); CHARTER COMMENTARY, *supra* note 207, 117-18, 124; Brownlie, *supra* note 109, at 268 (stating that "the phrase under discussion was not intended to be restrictive but, on the contrary, to give more specific guarantees to small states and that it cannot be interpreted as having a qualifying effect."); Mohamed, *supra* note 106, at 1286; Oscar Schachter, *The Legality of Pro-Democratic Invasion*, 78 AM. J. INT'L L. 645, 648-49 (1984) (arguing that it is not logically consistent to argue for right to use force to protect human rights).

232. Richard B. Lillich, *Humanitarian Intervention: A Reply to Ian Brownlie and a Plea for Constructive Alternatives*, in *LAW AND CIVIL WAR IN THE MODERN WORLD* 236-37 (John Norton Moore ed., 1974).

233. For scholars taking the modernist view, intervention for humanitarian purposes does not violate the plain language of Article 2(4) and, in any event, may be justified under certain circumstances. See, e.g., STONE, *supra* note 226, at 95; TESÓN, *supra* note 109, at 217; Michael Reisman, *Humanitarian Intervention to Protect the Ibos*, in *HUMANITARIAN INTERVENTION AND THE UNITED NATIONS* 167, 177 (Richard B. Lillich ed., 1973); John Norton Moore, *The Control of Foreign Intervention in Internal Conflict*, 9 VA. J. INT'L L. 205, 264 (1969).

234. Corfu Channel (U.K. v. Alb.), 1949 I.C.J. 4 (Apr. 9).

235. U.N. Charter art. 2(4); STONE, *supra* note 226, at 43, 95-96.

236. See U.N. Charter pmb. ("to reaffirm faith in fundamental human rights."), art. 1(3) (stating its goal to "achieve international co-operation in . . . promoting and encouraging respect for human rights."), art. 13(1) (providing that the GA "shall initiate studies and make recommendations for the purpose of . . . assisting in the realization of human rights."), art. 55 (requiring the United Nations to "promote. . . universal respect for, and observance of, human rights."), art. 56 (requiring states to take "joint and separate action in co-operation with the [UN]" to achieve universal respect for human rights.), arts. 62, 68 (establishing the Economic and Social Council (ECOSOC), which is called upon to establish a commission promoting human rights.), art. 76 (establishing the basic objectives of the U.N. trusteeship system, including "to encourage respect for human rights.").

prevent widespread atrocities is consistent with the Charter.<sup>237</sup> However, a textual interpretation of the Charter illustrates that the “or” in Article 2(4) supplements the general prohibition on the use of force. This means that states may not use force against other states as a general matter, but they are also prohibited from the threat or use of force in a manner that runs afoul of the Charter’s other purposes.<sup>238</sup>

Looking beyond article 2(4), some find support for unilateral atrocity response operations in the human rights provisions of the Charter. As noted above, the protection of human rights is a primary purpose of the U.N. Charter<sup>239</sup> but is often given second billing to regulating the use of force and ensuring state sovereignty.<sup>240</sup> In fact, advocates of a unilateral MARO policy should be cautious of reading too much into the Charter’s human rights provisions. First, these provisions arise in a nonbinding context. Language such as the United Nations shall “promote” human rights, or its members are “determined” to “reaffirm” does not create obligations or appear to modify the prohibition on the use of force.<sup>241</sup> Second, the last-minute inclusion of the human rights language into the draft Charter at San Francisco indicates that the delegates were primarily concerned with peace and security.<sup>242</sup>

#### b. Subsequent Interpretation & Practice

The legality of unilateral MARO must reside beyond a formalist Charter interpretation, if at all, and can be gleaned from “any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions.”<sup>243</sup> While traditionalists tend to view the Charter as a static document, modernists consider Charter interpretation to evolve to meet modern challenges.<sup>244</sup> One such subsequent agreement was the General Assembly’s adoption of the Uniting for Peace resolution in 1950, which permits the General Assembly to recommend the use of force when the UNSC fails to act, but only if two-thirds of Mem-

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237. See generally Lillich, *supra* note 232; Reisman, *supra* note 64, at 76.

238. MURPHY, *supra* note 47, at 73.

239. U.N. Charter *supra* note 63, art. 1(3).

240. MURPHY, *supra* note 47, at 69-70.

241. Hurd, *supra* note 156, at 10.

242. Clark Eichelberger is widely acknowledged as being responsible for getting human rights into the Charter, including the Human Rights Commission. SCHLESINGER, *supra* note 220, at 124. See also MURPHY, *supra* note 47, at 66. But see Michael Reisman, *Criteria for the Lawful Use of Force in International Law*, 10 YALE J. INT’L L. 279, 279-81 (1985); Reisman, *Coercion and Self-Determination*, *supra* note 72, at 642 (arguing that intervention would be unnecessary if the United Nations functioned according to terms of the Charter).

243. VCLT, *supra* note 227, art. 31(3)(a).

244. See, e.g., HELEN DUFFY, THE ‘WAR ON TERROR’ AND THE FRAMEWORK OF INTERNATIONAL LAW 149 (2005); see also CHARTER COMMENTARY, *supra* note 207, at 13, 26 (arguing for a dynamic interpretation of the UN Charter).

bers vote in favor.<sup>245</sup> This resolution does little to change the nonbinding nature of General Assembly resolutions, nor does it take away from the primacy of the UNSC in matters of peace and security.<sup>246</sup> Nonetheless, this was a significant blow to the UNSC's authority—a recognition that political paralysis, at the time a result of Cold War power politics, requires other actors to make decisions. As a result, the UNSC's ability to authorize the use of force is no longer absolute, and the General Assembly could recommend that states intervene in situations of mass human rights violations.

Another subsequent interpretation of the Charter is General Assembly Resolution 3314, which serves as a nonbinding guide for the UNSC when determining whether state acts constitute a “threat to the peace, breach of the peace, or act of aggression.”<sup>247</sup> Making no distinction based on the purpose of the intervention, the prohibited acts in Resolution 3314 are comprehensive, making virtually any use of force an act of aggression.<sup>248</sup> This is just one of many subsequent interpretations of the Charter's prohibition on the use of force and the requirement to resolve disputes peacefully.<sup>249</sup>

Instances of U.N.-authorized force are instructive as to the appropriate circumstances for intervention, particularly because the Security Council maintains control over decisions to use force for nondefensive purposes.<sup>250</sup> The Security Council's interpretation of its authority to maintain peace and security has developed from resolving international armed conflicts to reacting to intrastate human rights violations and atrocity crimes.<sup>251</sup> During the Cold War, for example, there were only two in-

245. See G.A. Res 377 (V), U.N. Doc. A/1775 (Nov. 3, 1950) (“Uniting for Peace Resolution”), which provides that in cases of a threat to the peace, breach of the peace, or act of aggression, the General Assembly shall consider the matter immediately with a view to making appropriate recommendations to Members for collective measures, including in the case of a breach of the peace or act of aggression the use of armed force when necessary, to maintain or restore international peace and security.

246. The Uniting for Peace Resolution has rarely been invoked. Two notable examples were in the 1950s during the Korean crisis and to establish the United Nations Emergency Force (UNEF) to oversee the cessation of hostilities between Egypt and Israel in 1950. Reisman, *supra* note 64, at 73 n.48.

247. G.A. Res. 3314 (XXIX), art. 3, U.N. Doc. A/9631 (Dec. 14, 1974).

248. G.A. Res. 3314, Article 3 provides that aggressive acts include: invading territory or military occupation, however temporary; the use of any weapons against the territory of another state; blockades; a use of force against the armed forces of another state; using force within the territory of another state beyond any prescribed agreement permitting the presence of the “visiting” state; allowing another state to launch aggressive attacks from a state's territory; sending armed groups to carry out attacks against another state. *Id.*

249. For a summary of declarations and resolutions, see CHARTER COMMENTARY, *supra* note 207, at 104.

250. Reisman, *supra* note 64, at 78 (stating, “the explicit language of the U.N. Charter, as repeatedly and authoritatively construed, does not allow actions to prevent or arrest mass killings without Security Council authorization.”).

251. U.N. Charter art. 2(4). See *infra* notes 254-260.

stances when the UNSC authorized member states to use force: (1) in 1950 after North Korea invaded the South, and even then the UNSC only “recommended” that Members assist South Korea;<sup>252</sup> and (2) in 1966 to prevent, “by use of force if necessary,” the arrival in Mozambique of tankers believed to be carrying oil for Southern Rhodesia.<sup>253</sup>

Since the end of the Cold War, the UNSC has authorized force more frequently. Specifically, it authorized force in the following six situations:<sup>254</sup> (1) to repel Iraq’s invasion of Kuwait in 1990,<sup>255</sup> (2) to facilitate humanitarian assistance in Bosnia in 1992,<sup>256</sup> (3) to establish a secure environment for humanitarian assistance in Somalia in 1992,<sup>257</sup> (4) to restore the Aristide government in 1994 in Haiti,<sup>258</sup> (5) to combat piracy in Somalia’s territorial waters and land in 2008,<sup>259</sup> and (6) in 2011 to protect civilians in Libya.<sup>260</sup>

The legality of the above interventions, at least half of which were based on humanitarian assistance or the protection of civilians from regime violence, is not questioned because UNSC resolutions are legally binding on all member states. Nonetheless, the practice of the United Nations since the 1990s demonstrates a seismic shift in the perception of massive human rights violations. No longer the exclusive business of perpetrator states, “internal violations of human rights” are now recognized as threats to international peace and security that may require forceful intervention.<sup>261</sup> The nexus between the human rights violation and international peace and security is essential. The UNSC is not authorized to take Chapter VII action for any severe violation of human rights without this crucial link.<sup>262</sup> It is when the UNSC fails to act to prevent atrocity crimes that unilateral or multilateral intervention is called into question.<sup>263</sup>

252. S.C. Res. 83, U.N. Doc. S/RES/83 (June 27, 1950).

253. S.C. Res. 221, ¶5, U.N. Doc. S/RES/221 (Apr. 9, 1966). *See generally* BYERS, *supra* note 229.

254. MICHAEL J. MATHESON, COUNCIL UNBOUND: THE GROWTH OF UN DECISION MAKING ON CONFLICT AND POSTCONFLICT ISSUES AFTER THE COLD WAR 145-58 (2006).

255. S.C. Res. 678, ¶2, U.N. Doc. S/RES/678 (Nov. 23, 1990).

256. S.C. Res. 770, ¶6, U.N. Doc. S/RES/770 (Aug. 13, 1990).

257. S.C. Res. 794, ¶3, U.N. Doc. S/RES/794 (Dec. 3, 1992).

258. S.C. Res. 940, ¶4, U.N. Doc. S/RES/940 (July 31, 1994).

259. S.C. Res. 1851, ¶6, U.N. Doc. S/RES/1851 (Dec. 16, 2008); *see also* S.C. Res. 1838, ¶¶3-4, U.N. Doc. S/RES/1838 (Oct. 7, 2008); S.C. Res. 1816, ¶7, U.N. Doc. S/RES/1816 (June 2, 2008).

260. S.C. Res. 1973, ¶4, U.N. Doc. S/RES/1973 (Mar. 17, 2011).

261. Reisman, *supra* note 64, at 71-72.

262. *See* CHARTER COMMENTARY, *supra* note 207, at 725.

263. *See* Paul R. Williams & Meghan E. Stewart, *Humanitarian Intervention: The New Missing Link in the Fight to Prevent Crimes Against Humanity and Genocide?*, 40 CASE W. RES. J. INT’L L. 97, 97 (2008) (arguing that the lack of a legal framework permitting humanitarian intervention has taken one of the most effective tools to prevent atrocity crimes off the table).

Member States' interpretations of the Charter's terms are reflected in actions taken by regional organizations to halt ongoing conflict and atrocities—often without prior U.N. authorization.<sup>264</sup> The U.N. Charter specifically contemplates action for maintenance of peace and security by regional organizations.<sup>265</sup> The African Union, for example, allows AU Members to intervene in the event of genocide.<sup>266</sup> NATO famously intervened in 1999 to prevent Serb atrocities in Kosovo without U.N.-backing. Still, the lawfulness of forcible measures taken by regional actors is based on UNSC authorization.<sup>267</sup> Even if the AU Charter or other regional agreements authorized collective action without U.N. authorization, such provisions are considered *ultra vires*, since article 103 of the U.N. Charter requires any conflict between another treaty and the U.N. Charter to be settled in favor of the U.N. Charter's terms.<sup>268</sup>

The ICJ is also empowered to determine when the use of force is lawful,<sup>269</sup> although rulings on the legality of conflicts are rare—particularly as it relates to humanitarian intervention. Generally taking a cautious approach, the ICJ has until very recently rejected forceful measures to prevent massive human rights violations without UNSC authorization. Specifically, the Court has reaffirmed that self-defense under Article 51 and UNSC Chapter VII authority are the only two exceptions to the prohibition on the use of force;<sup>270</sup> there are no implicit exceptions to the Charter's general prohibition on the use of force;<sup>271</sup> collective armed response is not permitted unless it is in response to an armed attack;<sup>272</sup> the use of force is not permitted to ensure respect for human rights;<sup>273</sup> and

264. See *supra* notes 119-123 and accompanying text (describing examples of regional interventions).

265. See U.N. Charter arts. 52(1), 53(1).

266. See A.U. Charter art. 4(h) (granting the A.U.'s right to collective action, rather than a right for individual states to intervene).

267. See U.N. Charter art. 53(1).

268. See *id.* art. 103. If this provision relates to future treaties, then arguably subsequent human rights treaties, including the genocide convention, cannot be used to weaken the prohibition on the use of force. See also Hurd, *supra* note 156, at 6-7.

269. See Charter of the United Nations and Statute of the International Court of Justice, art. 36(1), June 26, 1945, 59 Stat. 1055, 1 U.N.T.S. XVI.

270. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, 244(38) (July 8).

271. See, e.g., Corfu Channel *supra* 234 (rejecting the UK's argument that emergency circumstances implicitly allowed it the right to sweep Albanian territorial waters for mines, which had previously done damage to UK ships, using its naval forces).

272. Military and Paramilitary Activities in and Against Nicaragua, *supra* note 208, ¶¶246-49.

273. *Id.* ¶268; MURPHY, *supra* note 47, at 129; N.S. Rodley, *Human Rights and Humanitarian Intervention: The Case Law of the World Court*, 38 INT'L & COMP. L.Q. 321, 332 (1989). *Contra* TESÓN, *supra* note 109, at 270 (attempting to read the Nicaragua judgment more narrowly).

UNSC resolutions may not be read to imply the authorization to use force.<sup>274</sup>

Two cases involving the former Yugoslavia are critical to the Court's interpretation of armed force in response to atrocity crimes. In 1999, the Court was highly critical of the NATO intervention in Kosovo, stating that the Court was "profoundly concerned with the use of force in Yugoslavia" and that "under the present circumstances, such use raises very serious issues of international law."<sup>275</sup>

Almost a decade later, the Court issued a seminal opinion, which could serve as the legal basis for unilateral MARO, at least with regard to the crime of genocide.<sup>276</sup> In the Genocide Case, brought by Bosnia and Herzegovina against Serbia and Montenegro, the Court held that "the obligation of states parties is rather to employ all means reasonably available to them, so as to prevent genocide so far as possible."<sup>277</sup> This case can be interpreted in one of two ways. Either it means states must do whatever is necessary, including unilateral MARO, to halt genocide, or it can stand for the proposition that intervention is not lawful since that is not a "means reasonably available to [States]" without U.N. authorization.<sup>278</sup> In any event, the Court made clear that states will be responsible for failing to prevent genocide if they did not take whatever action they could "at the instant that the State learns of, or should normally have learned of, the existence of a serious risk that genocide will be committed."<sup>279</sup>

### c. Customary Right to Intervene

As it appears the Charter cannot clearly be interpreted to permit humanitarian intervention without UNSC approval, many support the idea that there is a customary right to intervene to prevent massive human rights violations that preexists the Charter.<sup>280</sup> This right, it is argued, has not been diminished in the Charter era.

State practice at the end of the nineteenth century reflects a policy of humanitarian intervention. Several instances, mostly involving European states intervening to protect Christian minorities in the Ottoman Empire,

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274. Armed Activities on the Territory of The Congo (Dem. Rep. of Congo v. Uganda), Judgment, 2005 I.C.J. 168, ¶152 (Dec. 19) (holding that Uganda violated Article 2(4) when it used military force in the DRC, even though the UNSC recognized states' responsibility for peace in the region. This was a direct refutation of the ability to rely on UNSC resolutions for implied authority to use force).

275. Legality of Use of Force (Yugo. v. Belg.), Order, 1999 I.C.J. 124, 132 (June 2).

276. See Reisman, *supra* note 64, at 81-85.

277. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), 2007 I.C.J. 169, ¶430 (Feb. 26) [hereinafter Genocide Case]. For a detailed discussion of this case, see Reisman, *supra* note 64, at 80-84.

278. See Genocide Case, *supra* note 277.

279. *Id.* ¶431.

280. NEIL FENTON, UNDERSTANDING THE UN SECURITY COUNCIL 14 (2004); Moore, *supra* note 76; see also Lillich, *supra* note 232.

suggest that this practice was accepted.<sup>281</sup> It is also recognized that “[b]y the end of the nineteenth century the majority of publicists admitted that a right of humanitarian intervention (*l'intervention d'humanité*) existed.”<sup>282</sup>

In the Charter era, it is uncertain at best whether states have retained a right to intervene for human rights purposes. It is widely acknowledged that self-defense was a right that preexisted the U.N. Charter, and is a legal right of states with or without the Charter's article 51 authorization. In contrast, there is no explicit language in the Charter regarding an “inherent right” to unilateral humanitarian intervention, and so we must look to whether a customary norm survived the general prohibition on the use of force in article 2(4).

There are two requirements for a norm to be considered customary international law. First, there must be state practice that is “constant and uniform.”<sup>283</sup> Second, states engaging in this practice must demonstrate *opinio juris*, or “evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it.”<sup>284</sup> State practice in the Charter era does not provide a clear picture of the legality of force to halt atrocities. Although states undertook unilateral interventions that had obvious humanitarian effects, it is not clear that they did so out of a sense of a binding legal obligation.

The previously discussed interventions in the 1970s in East Pakistan (Bangladesh), Cambodia, and Uganda effectively halted atrocities, but were justified on the grounds of self-defense, undermining the argument that there was a humanitarian legal norm at play.<sup>285</sup> Similarly, the United States led no-fly zones in Iraq to protect the Kurds and Marsh Arabs<sup>286</sup> were justified in large part on implied U.N. authorization.<sup>287</sup> Even in

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281. Hubert, *supra* note 44, at 90. See Part I.C. *infra* for a more detailed discussion of these and other historical cases of humanitarian intervention.

282. BROWNLIE, *supra* note 229, at 338. Lillich also cites several authors for the proposition that humanitarian intervention was a customary norm prior to the Charter, including, Grotius, Vattel, Wheaton, Heiberg, Woolsey, Bluntschli, Westlake, Rougier, Arntz, Winfield, Stowell, Borchard, and others. Lillich, *supra* note 232, at 232 (citing E. STOWELL, INTERVENTION IN INTERNATIONAL LAW 461-540 (1921)). Those in the noninterventionist camp include Halleck, Angelins Wedenhagen, Kant, Despagnet, Mamiani, Pradier-Fodere, and Brownlie. Lillich, *supra* note 232, at 232 n.23.

283. Asylum Case (Colom. V. Peru), Judgment, 1950 I.C.J. 266, 276-77 (Nov. 20).

284. North Sea Continental Shelf (Ger. v. Neth.; Ger. v. Den.), Judgment, 1969 I.C.J. 3, 44 (Feb. 20).

285. For additional sources and discussion see *infra* Part I.C.1; notes 113-14. See also MURPHY, *supra* note 47, at 97-100, 102-07. Compare France's humanitarian justification for intervening in the Central African Republic in 1979. *Id.* at 143. The international community largely accepted France's intervention, and it is interesting to note that it occurred after a multilateral Commission of Inquiry made a determination that the Central African Republic's emperor, Jean-Bedel Bokassa, had engaged in atrocity crimes. *Id.* at 107-08.

286. MICHAEL A. NEWTON & MICHAEL P. SCHARF, ENEMY OF THE STATE: THE TRIAL AND EXECUTION OF SADDAM HUSSEIN 65 (2008); MURPHY, *supra* note 47, at 172, 179.

287. These actions were not debated or authorized by the UNSC, and Resolution 688, which established a threat to peace and security in northern Iraq due to the brutal treatment of civilians and refugee flow into Turkey and Iran, did not expressly authorize U.N.-man-

NATO's intervention in Kosovo, most states involved in the mission relied on moral justifications,<sup>288</sup> or implied UNSC consent to enforce prior resolutions.<sup>289</sup> The United Kingdom<sup>290</sup> and Belgium<sup>291</sup> were the only two states that argued the intervention was lawful based on humanitarian norms. In spite of these two exceptions, most states, including the United States, suggested that the cause was justified but should not serve as grounds for future interventions without U.N. authorization.<sup>292</sup>

The international community's reaction to humanitarian interventions has not been consistent. In 1990, ECOWAS intervened to prevent the bloodshed of a multi-party civil war in Liberia.<sup>293</sup> Although this action was taken by a sub-regional organization without U.N. authorization, it was later "endorsed" by the UNSC<sup>294</sup> and was almost universally well received in the international community.<sup>295</sup> In 1997, the UNSC subsequently endorsed the ECOWAS intervention in Sierra Leone months after troops attempted to halt massacres led by Charles Taylor.<sup>296</sup> Contrast the favorable reaction to these interventions with the negative response to the unilateral actions taken in the 1970s.<sup>297</sup> The penultimate example is the

dated or individual state force. Still, while the United States emphasized implied U.N. authorization based on UNSC resolutions, the United Kingdom was more forceful in suggesting "humanitarian need" and a "customary international law principle of humanitarian intervention." MURPHY, *supra* note 47, at 188, 190 (internal citations omitted).

288. U.N. SCOR, 54th Sess., 3988th mtg. at 17, U.N. Doc. S/PV.3988 (Mar. 24, 1999) (stating that Germany, holding Presidency of EU at time, informed the UNSC that the EU had a "moral obligation" to respond.).

289. See 328 PARL. DEB., H.C. (6th ser.) (1999) 617 (U.K.) (statement of U.K. Defense Secretary George Robertson), available at [http://www.publications.parliament.uk/pa/cm199899/cmhansrd/v0990325/debtext/90325-33.htm#90325-33\\_snew3](http://www.publications.parliament.uk/pa/cm199899/cmhansrd/v0990325/debtext/90325-33.htm#90325-33_snew3); Press Release, Security Council, Security Council Rejects Demand for Cessation of Use of Force Against Federal Republic of Yugoslavia, U.N. Press Release SC/6659, at 4, 7 (Mar. 26, 1999) (statements of France and Netherlands citing prior UNSC resolutions).

290. SELECT COMMITTEE ON FOREIGN AFFAIRS, INTERNATIONAL LAW FOURTH REPORT, 2000, H.C., ¶¶129-34 (U.K.); MARK LITMAN, *KOSOVO: LAW AND DIPLOMACY* (1999); Christopher Greenwood, *Jurisdiction, NATO, and the Kosovo Conflict*, in *ASSERTING JURISDICTION: INTERNATIONAL AND EUROPEAN LEGAL APPROACHES* 151-61 (Patrick Capps, Malcolm Evans & Stratos Konstadinidis eds., 2003).

291. Oral Pleading of Belgium, *Legality of Use of Force (Yugo. v. Belg.)*, 1999 I.C.J. Pleadings 15 (May 10, 1999), available at <http://www.icj-cij.org/docket/files/105/4515.pdf> (uncorrected translation).

292. Mohamed, *supra* note 106, at 1288.

293. MURPHY, *supra* note 47, at 146-51.

294. See discussion *supra* note 119.

295. MURPHY, *supra* note 47, at 163. Professor Mohamed suggests that even though the legality of the operation was not debated, "[t]he only clear conclusion from the ECOWAS intervention is that the international community was willing not only to condone, but also to commend, the intervention of a regional organization in an internal violent conflict without authorization of the Security Council." Mohamed, *supra* note 106, at 1309.

296. See discussion *supra* note 120.

297. See MURPHY, *supra* note 47, at 143 (citing a number of reasons for the negative response to the interventions in East Pakistan, Cambodia, and Uganda, including a post-war ideal of maintaining world order through strict enforcement of the prohibition on the use of

mixed global response to NATO's Kosovo bombing campaign. Far from establishing *opinio juris*, numerous scholars<sup>298</sup> and most states<sup>299</sup> did not believe a legal right of humanitarian intervention existed, even if the action was seen as legitimate.<sup>300</sup>

Modern practice and global response does not support a customary international norm of humanitarian intervention. While each situation represents interventions that halted, or attempted to stop, atrocity crimes, each comes with certain caveats. In the 1970s cases, the intervening states did not justify their actions—with the exception of France in the Central African Republic—on humanitarian grounds, but rather on a right of self-defense. Later in the 1990s, the world community supported cases that later received UNSC approval (Liberia and Sierra Leone), but disapproved of others (Iraq and Kosovo). Rather than reflect *opinio juris* on unilateral mass atrocity response, these cases show a world community that is still deeply divided on the issue such that a right of humanitarian intervention cannot be said to have supplanted the general principle of nonintervention in Article 2(4).<sup>301</sup>

#### d. Drafters' Intent

That the law as currently interpreted forbids unilateral intervention to save civilians from slaughter is truly an “absurd result.”<sup>302</sup> It is at this point that an examination of the true purposes behind the Charter's prohibition on force is necessary to clarify whether the drafters of the Charter intended to prohibit humanitarian intervention outright. Although the scope of article 2(4) was intended to be quite broad, there is insufficient

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force, a general mistrust of the superpowers' motives, a visceral distaste among newly independent nations of foreign intervention, and a general fear of the escalation of conflict in the age of nuclear weapons).

298. See discussion *supra* note 123.

299. See Press Release, General Assembly, General Debate Surveyed Pros and Cons of Humanitarian Intervention, Globalization, Poverty, UN Reform, Observes Assembly President, U.N. Press Release GA/SM/105 (Oct. 2, 1999); see also Mohamed, *supra* note 106, at 1306 n.127.

300. See KOSOVO REPORT, *supra* note 125, at 4. In prophetic fashion, Brownlie and Lillich writing in 1974 suggested that in cases of humanitarian intervention, states might condone the action, even if the world community does not approve. LILLICH, *supra* note 232, at 230.

301. Thomas Franck, argued that Article 2(4) no longer has the force of law because of numerous and significant derogations during the Charter era: “The prohibition against the use of force in relations between states has been eroded beyond recognition.” Thomas M. Franck, *Who Killed Article 2(4)? Or: Changing Norms Governing the Use of Force by States*, 64 AM. J. INT'L L. 809, 835 (1970). More recently, Michael Glennon argued “the Charter's use-of-force regime has all but collapsed.” Michael Glennon, *The Fog of Law: Self-Defense, Inherence, and Incoherence in Article 51 of the United Nations Charter*, 25 HARV. J. L. & PUB. POL'Y 539, 539 (2002); see also Lillich, *supra* note 232, at 248. Even if it is true that the laws governing the use of force are more often recognized in the breach, the international community's reaction to the humanitarian interventions previously discussed does not reflect global opinion to abandon the Charter paradigm of world order.

302. VCLT, *supra* note 227, art. 32.

evidence to conclude that the drafters gave humanitarian intervention serious consideration.

The San Francisco Conference in 1945 was in the immediate aftermath of two devastating World Wars and at a time when state sovereignty was absolute as a concept. Delegates in attendance were concerned with “above all, the suppression of armed conflict.”<sup>303</sup> Although humanitarian intervention as a response to atrocities was not discussed at the conference, this was due to the contextual focus on ending wars of aggression, not the absence of an international right to such intervention at the time.<sup>304</sup> Because the issue of humanitarian intervention was not given serious consideration,<sup>305</sup> it is hardly convincing to suggest that the general prohibition in article 2(4) absolutely prohibits action to halt the worst atrocities known to man, when that was, in fact, not the focus of the negotiations.<sup>306</sup>

Another focal point of the drafters was to ensure that armed force would only be used in the interest of the international community.<sup>307</sup> As one scholar notes, “The decision of the drafters to vest in the Security Council control over the nondefensive use of force signifies a determination to change the character of military force by preventing states from resorting to arms to pursue national interests.”<sup>308</sup> However, is it in the national or international interest to intervene to prevent mass atrocities? Resolving this question necessarily raises issues of the underlying intent of intervening states.<sup>309</sup> Functioning properly, the Charter would allow collective action “for the countering of aggression and the upholding of community values.”<sup>310</sup> This would eliminate the need for states to act

303. Mohamed, *supra* note 106, at 1282. President Roosevelt made it clear that the U.S. focus was on suppressing aggressive war when he said, “The policy we hope and believe will emerge from the San Francisco Conference and others to follow will embody cooperation among nations to keep down aggressors.” Schlesinger, *supra* note 220, at 7. Human rights were not initially contemplated as a purpose of the new organization, and were only added to the Charter’s purpose near the end of negotiations. See *Proposals for the Establishment of a General International Organization*, Oct. 7, 1944, in 1 *FOREIGN RELATIONS OF THE UNITED STATES: DIPLOMATIC PAPERS* 890, 890 (1944).

304. It is noteworthy that the Charter begins with a commitment to “save succeeding generations from the scourge of war,” making no reference to mass atrocities except for a passing mention of human rights. See U.N. Charter pmb1.

305. Brownlie, *supra* note 226, at 222 (suggesting that “[t]he participating governments took a view of the legal regime as a whole” and “made no reference to what statesmen would have regarded as a non-issue [i.e. humanitarian intervention].”).

306. See also Mohamed, *supra* note 106, at 1285 (stating that the intent of the drafters in Art. 2(4) was to “formulate language that would make clear that armed force should not be used in the absence of U.N. authorization,” but without citing to language from the *travaux préparatoires*). See generally CHARTER COMMENTARY, *supra* note 207.

307. The preamble provides that “armed force shall not be used, save in the common interest.” U.N. Charter pmb1.

308. Mohamed, *supra* note 106, at 1318.

309. For a detailed discussion of pretextual concerns in unilateral MARO, see *infra* Part IV.D.

310. STEPHEN C. NEFF, *WAR AND THE LAW OF NATIONS* 281 (2005).

unilaterally. In spite of this intent, and assuming that preventing atrocity crimes is in the common interest, the United Nations has not supplanted the need of state action in this area as evidenced by the repeated failure to stop these crimes.

### B. *The Emergence of Contingent Sovereignty*

Beyond the Charter's general prohibition on intervention, state sovereignty is a significant impediment to effective action to prevent atrocity crimes. State sovereignty, the right of states to conduct internal affairs without outside interference,<sup>311</sup> not only allows perpetrator states to continue killing civilians, but also justifies inaction by the world community.<sup>312</sup> Originating with the Peace of Westphalia in 1648,<sup>313</sup> and today enshrined in the U.N. Charter,<sup>314</sup> the concept has been the fundamental building block of international relations for several centuries. With respect to atrocity crimes, however, sovereignty is susceptible to challenge.<sup>315</sup> Since the United Nation's founding, the erosion of absolute sovereignty through the development of human rights law, the rise of the individual as a subject of international law, and the emergence of sovereignty as responsibility under R2P indicates that traditional barriers are being broken in favor of protecting civilians from slaughter.

Today, the U.N. Charter codifies the principle of state sovereignty in articles 2(1) and 2(7).<sup>316</sup> Some questioned the inclusion of these articles in 1945, suggesting that they were detrimental to the Charter's goals of peace

311. See discussion *infra* notes 312-314.

312. In the face of mounting atrocities, governments will often "seek refuge in the principle of a state's sovereign right of noninterference in its internal affairs at the expense of victims of mass atrocities." GENOCIDE REPORT, *supra* note 8, at 95.

313. See MURPHY, *supra* note 47, at 42 (suggesting that in its earliest form, sovereignty meant a ruler wielded absolute power over his subjects); see also HURST HANNUM, AUTONOMY, SOVEREIGNTY, AND SELF-DETERMINATION: THE ACCOMMODATION OF CONFLICTING RIGHTS 14-26 (1990); ROBERT A. KLEIN, SOVEREIGN EQUALITY AMONG STATES: THE HISTORY OF AN IDEA (1974); STEPHEN D. KRASNER, POWER, THE STATE, AND SOVEREIGNTY: ESSAYS ON INTERNATIONAL RELATIONS 179-210 (2009); EDWARD C. LUCK, SOVEREIGNTY, CHOICE, AND THE RESPONSIBILITY TO PROTECT, GLOBAL RESPONSIBILITY TO PROTECT 10-21 (2009); Sewall, *supra* note 153, at 161; Mohamed, *supra* note 106, at 1319 (discussing how only a legitimate authority can wage war under the Western just war tradition). But even in ancient times, some warned of the hazards of abusing this power. Aristotle stated, "To rule at all costs, not only justly but unjustly, is unlawful, and merely to have the upper hand is not necessarily to have just title to it . . ." Aristotle, *supra* note 213.

314. U.N. Charter art. 2(1) (providing that the "Organization is based on the principle of sovereign equality of all its Members"); U.N. Charter art. 2(7) ("Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state . . . but this principle shall not prejudice the application of enforcement measures under Chapter VII.").

315. See Ferencz, *supra* note 1, at 26 (suggesting that "[t]he idea of sovereignty itself is an obsolete notion.").

316. U.N. Charter art. 2, paras. 1, 7.

and security.<sup>317</sup> In fact, the prohibition on the use of force in article 2(4) was meant in part to uphold and protect article 2(1)'s concept of the sovereign equality of all states.<sup>318</sup> The question remains whether there is a limit to what a sovereign state may do within its own borders before other states may lawfully intervene to prevent grossly unjust behavior against the target state's civilians. As former Secretary-General Kofi Annan stated, the U.N. Charter's purpose was "to protect individual human beings, not to protect those who abuse them."<sup>319</sup>

Still, the language of the Charter is not so permissive. As discussed above, the drafters of the U.N. Charter gave little consideration to human rights, focusing instead on preventing aggressive war.<sup>320</sup> At the time, the human rights regime was only just beginning. The Universal Declaration of Human Rights of 1948, preceded just days before by Lemkin's Genocide Convention, laid the foundation for modern human rights law.<sup>321</sup> Since then, the human rights regime has flourished in its nearly seventy-year history. Subsequent treaties, regional courts, and the development of ICL have significantly strengthened what were once considered nonbinding, aspirational goals.<sup>322</sup> Not only does this body of law prohibit states from taking certain actions against civilians, but heads of state will be held individually responsible for certain violations.

The human rights legal framework has also eroded state sovereignty by shifting the focus from the state to the individual, making civilians subjects of international law—an area that traditionally only regulated state behavior.<sup>323</sup> Even though enforcement of the human rights regime is often lacking, many of its norms, including the prohibition of atrocity crimes, are now considered *jus cogens*.<sup>324</sup> This places the prohibition of genocide on par with the *jus cogens* norm of the non-use of force, a status that the

317. After the San Francisco Conference, John F. Kennedy noted, "The international relinquishing of sovereignty would have to spring from the people—it would have to be so strong that the elected delegates would be turned out of office if they failed to do it," and, The *New Yorker* journalist, E.B. White, added that "under all is the steady throbbing of the engines: sovereignty, sovereignty, sovereignty." Schlesinger, *supra* note 220, at 156.

318. See CHARTER COMMENTARY, *supra* note 207, at 109. *But see* Reisman, *supra* note 64, at 58 ("[A] major purpose of international law, is the provision of security, which means the protection of individual lives.")

319. Kofi Annan, *Two Concepts of Sovereignty*, *ECONOMIST* Sept. 18, 1999, at 49-50, available at <http://www.economist.com/node/324795>.

320. See *supra* note 242 and accompanying text.

321. See HENRY J. STEINER, *TRANSNATIONAL LEGAL PROBLEMS* 344 (4th ed., 1994) (citing ANTONIO CASSESE, *HUMAN RIGHTS IN A CHANGING WORLD* (1990)).

322. For a discussion of international human rights law and international criminal law, see *supra* Part II.B.

323. See generally RUTI TEITEL, *HUMANITY'S LAW* (2011) (discussing an emerging theory of individual-centric international law).

324. Sources indicating that the prohibition of genocide is a *jus cogens* norm, include: Cases Concerning Barcelona Traction, Light and Power Co., Ltd. (Belg. v. Spain), Advisory Opinion, 1970 I.C.J. 3, ¶34 (Feb. 5); Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, 1951 I.C.J. 15, at 7 (May 28); Prosecutor v. Jean-Paul Akayesu, Case No. ICTR-96-4-T, Judgment, ¶495, (Sept. 2, 1998);

principle of non-intervention has never reached.<sup>325</sup> For this reason, one might conclude that a sovereign's right to be free of interference is secondary and may give way when it commits atrocity crimes.<sup>326</sup>

The most striking recent development in the international legal and political landscape is the emphasis on sovereignty as responsibility, or contingent sovereignty.<sup>327</sup> Where efforts to justify humanitarian intervention failed because of the focus on the lawfulness of the intervening state's actions, contingent sovereignty shifts the burden to states to prove that they are fulfilling certain responsibilities, not least of which include the responsibility to protect civilians from atrocity crimes.<sup>328</sup> For example, in response to Syria's brutal crackdown of a popular uprising that began in March 2011, then Secretary of State Hillary Clinton stated, "From our perspective, [President Assad] has lost legitimacy, he has failed to deliver on the promises he's made, he has sought and accepted aid from the Iranians as to how to repress his own people."<sup>329</sup> During the crisis in Libya in 2011, Italy similarly commented that the Libyan government "no longer exists,"

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Prosecutor v. Radislav Krstic, Case No. IT-98-33-A, Judgment, ¶541 (Aug. 2, 2001); *see also* WILLIAM A. SCHABAS, GENOCIDE IN INTERNATIONAL LAW 444-45 (2000).

325. *See* CHARTER COMMENTARY, *supra* note 207, at 109.

326. *But see* ANNE ORFORD, READING HUMANITARIAN INTERVENTION 148-50 (2007) (warning against the false narrative of human rights triumphing over sovereign rights).

327. Hurd, *supra* note 156, at 21 ("The idea of contingent sovereignty suggests that statehood itself is legally dependant on acceptable government behavior, such that failure of a government to meet certain minimum standards nullifies its claim to noninterference."). Another variation of this concept is the theory of relational sovereignty. Helen Stacy, *Humanitarian Intervention and Relational Sovereignty*, in INTERVENTION, TERRORISM, AND TORTURE 6 (Stephen Lee ed., 2006).

328. *See* for example, the Genocide Report, providing:

It has often been argued that external action in response to threats of genocide constitutes unacceptable interference in a country's domestic affairs. There is a growing understanding, however, that sovereignty implies rights and obligations, and that states have a basic responsibility to protect their citizens from genocide and mass atrocities. No government has the right to use national sovereignty as a shield behind which it can murder its own people.

GENOCIDE REPORT, *supra* note 8, at xxi.

Gareth Evans, a sponsor of R2P in the ICISS Report, also stated,

[E]ven the strongest supporters of state sovereignty will admit today that no state holds unlimited power to do what it wants to its own people. It is now commonly acknowledged that sovereignty implies a dual responsibility . . . . In international human rights covenants, in UN practice, and in state practice itself, sovereignty is now understood as embracing this dual responsibility.

Gareth Evans & Mohamed Sahnoun, *The Responsibility to Protect*, 81 FOREIGN AFF. 99, 102 (2002).

329. *Clinton Says Syria's Assad Has Lost Legitimacy*, REUTERS (July 12, 2011), <http://www.reuters.com/article/2011/07/12/us-syria-idUSLDE76A0I620110712>; *see also*, *Syria Condemns Hilary Clinton's Remarks About Assad*, BBC NEWS (July 12, 2011), <http://www.bbc.co.uk/news/world-middle-east-14123188>.

thereby releasing Italy of its obligation to honor treaties with Qaddafi's regime.<sup>330</sup>

The concept of R2P directly challenges traditional notions of sovereignty,<sup>331</sup> but also signals a dramatic shift in focus to the state where atrocities occur. Still, R2P is limited in that its focus is on multilateral assistance to prevent atrocities in the first place, and, if necessary, U.N.-authorized intervention to respond to ongoing massacres.<sup>332</sup> At least one critic argues that this concept fails to take the necessary next step: authorizing state action when the UNSC is incapable of mounting an effective response.<sup>333</sup> Although R2P in the 2005 World Summit Report did not define the threshold for military intervention, nor did it prioritize R2P over non-intervention rights, it did set the normative terrain for intervention by rejecting the notion that sovereignty can serve as a shield to abusive leaders.<sup>334</sup>

R2P and the concept of contingent sovereignty could lead to the conclusion that a state engaging in atrocity crimes is stripped of the protections sovereignty affords, including the right of non-intervention. Once the sovereign shield is removed, then the leadership may have lost the legitimacy to rule, paving the way for armed intervention. This does not necessarily change the nature of the prohibition on the use of force, but rather diminishes the right to political independence and territorial integrity of the violating state and its right to sovereign equality.<sup>335</sup>

The principle of necessity, as found in the International Law Commission's Draft Articles on State Responsibility (ILC Report),<sup>336</sup> also undermines the notion of absolute sovereignty. Under article 25, states violating international law may justify their actions on necessity when the action "is the only way for the State to safeguard an essential interest against a grave and imminent peril."<sup>337</sup> The necessity of the intervention to prevent sys-

330. John M. Broder, *U.S. and Allies Weigh Libya No-Fly Zone*, N.Y. TIMES (Feb. 28, 2011), [http://www.nytimes.com/2011/02/28/world/europe/28military.html?\\_r=0](http://www.nytimes.com/2011/02/28/world/europe/28military.html?_r=0) (noting Italy's statement about application of its treaty with Libya).

331. Sewall, *supra* note 153, at 161.

332. *See generally id.* (criticizing those who would rely on prevention only).

333. *Id.* (justifying response measures, but failing to discuss the legality of taking action without U.N. authorization).

334. ROTBERG, *supra* note 24, at 13. For a detailed discussion of the threshold for intervention to prevent atrocity crimes, see *infra* Part V.

335. Tesón argues that "to the extent that state sovereignty is a value, it is an instrumental not an intrinsic value. Sovereignty serves valuable human ends; and those who grossly assault them should not be allowed to shield themselves behind the sovereignty principle." Fernando R. Tesón, *The Liberal Case for Humanitarian Intervention*, in HUMANITARIAN INTERVENTION: ETHICAL, LEGAL AND POLITICAL DILEMMAS 93 (J.L. Holzgrefe & Robert O. Keohane eds., 2003). In 1992, the U.N. Secretary-General stated that "the time of absolute and exclusive sovereignty, however, has passed; its theory was never matched by reality." U.N. Secretary-General, *An Agenda for Peace*, U.N. Doc. A/47/277 (June 17, 1992).

336. G.A. Res. 56/10, art. 25, U.N. GAOR, 56th Sess., U.N. Doc. A/56/10 (2001) [hereinafter ILC Report]. The General Assembly approved the ILC Report the same year. *See* G.A. Res. 56/83, at 1-2, U.N. Doc. A/RES/56/83 (Dec. 12, 2001).

337. ILC Report, *supra* note 336.

tematic human rights violations “precludes the wrongfulness” of the intervention.<sup>338</sup> Similar to contingent sovereignty, the principle of necessity focuses on the state committing the underlying wrong, and justifies a second wrong—unauthorized military intervention—to prevent “grave peril.”

Critics of this approach rely on two primary arguments. First, article 25 of the ILC Report was not intended to excuse humanitarian intervention, because it “seriously impair[s] an essential interest of the State or States towards which the obligation exists, or of the international community as a whole.”<sup>339</sup> The perpetrator states’ interests are obviously impaired when another state intervenes, but it cannot be said that any damage has been done to the international community as a whole. Quite the opposite is true. Responding to and halting mass atrocities puts an end to threats to the world community—a type of grave peril to which article 25 allows a necessary, if unlawful, response.

Second, opponents of states responding to atrocity crimes rely on article 2(4) and a strict sovereignty approach. The emphasis here is only on the actions taken by the intervening state, not on the wrongs of perpetrating states.<sup>340</sup> Under this approach, any use of force without U.N. authorization—even to stop an ongoing genocide—diminishes the prohibition on the use of force and the principle of sovereign equality.<sup>341</sup> Take for example Russia’s draft UNSC resolution following NATO’s intervention to prevent the slaughter of Kosovo Albanians in 1999. Attempting to proclaim the NATO action as a violation of international law, Russia’s draft was rejected by Slovenia, who thought it did not sufficiently highlight the abuses of the Yugoslav government.<sup>342</sup> In that case, common sense ruled the day, but too often traditionalists and strict sovereigntists prevail.

### C. *Nonlegal Considerations: Morality and Justification*

The central focus of this Section is the lawfulness of mass atrocity response operations when the UNSC does not take action. But legal considerations alone do not paint the entire picture. Decision-makers are acutely aware that the law does not exist in a vacuum and that other considerations must be taken into account when deciding to use military force. These factors must be considered on a case-by-case basis, and will drive decisions to intervene to halt atrocity crimes. As one commentator notes, effective prevention is necessary because “it would be morally unaccept-

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338. *Id.*

339. Mohamed, *supra* note 106, at 1304.

340. *See id.* at 1277 (emphasizing how legal restraints on the use of force reflect societal attitudes about the role of violence in shared community, but with little emphasis on attitudes regarding violence in terms of mass atrocities).

341. *Id.* at 1311.

342. U.N. SCOR, 54th Sess., 3989th mtg. at 3, 5, U.N. Doc. S/PV.3989 (Mar. 26, 1999); *see also* N.D. White, *The Legality of Bombing in the Name of Humanity*, 5 J. CONFLICT & SECURITY L. 27, 33 (2000) (“[A] major concern for many states voting against the resolution was its lack of balance in that it failed also to condemn the brutality of the repressive measures taken by [Yugoslavia].”)

able to base one's strategy only on responding to mass crimes after the bodies have started to pile up and when only extreme measures would make a difference."<sup>343</sup>

Legal philosophers have long argued that protecting the innocent is a primary value of any legal system. Hobbes stated that the principle of self-preservation is at the heart of all virtues.<sup>344</sup> The preservation of human life, then, must be a driving factor behind the law. H.L.A. Hart suggests that the inability of even the strongest among us to defend ourselves all the time necessitates a legal system.<sup>345</sup> As previously discussed, the current international legal system is often incapable of protecting the weakest among us—those who are victimized by genocidal leaders—calling into question the ability of the system as a whole to protect the innocent and right wrongs.<sup>346</sup> Therefore, normative (that is, values-based) standards must be taken into account.

The current status of the law does not sufficiently account for moral considerations.<sup>347</sup> The *prima facie* illegality of humanitarian intervention highlights a discomfiting preference of sovereignty over human rights, even though the latter are largely based on moral concerns.<sup>348</sup> When states violate sovereign rights to prevent atrocity crimes, as in the NATO intervention in Kosovo, there exists a “gap between legality and legitimacy” of the operation.<sup>349</sup> In describing the NATO campaign, commentator Bruno Simma noted a troubling disconnect between law and morality.<sup>350</sup>

While the Kosovo Report ultimately suggested amending the law to allow certain humanitarian interventions,<sup>351</sup> others recommend violating the law outright and relying on the forgiveness of the international community. This approach maintains that the existing prohibition on the use of force remains in place, but the unlawfulness of state intervention to prevent atrocities will be forgiven.<sup>352</sup> Thomas Franck argues that the interna-

343. Luck, *supra* note 126, at 116.

344. LEO STRAUSS, *THE POLITICAL PHILOSOPHY OF HOBBS: ITS BASIS AND ITS GENESIS* 15 (Elsa M. Sinclair trans., 1936); *see also* Reisman, *supra* note 64, at 57.

345. H.L.A. HART, *THE CONCEPT OF LAW* 194-95 (3d ed. 2012).

346. *See* Terry Nardin, *The Moral Basis for Humanitarian Intervention*, in *JUST INTERVENTION* 11, 11-12 (Anthony F. Lang, Jr. ed., 2003).

347. Numerous scholars have discussed the moral issues underlying humanitarian intervention. *See generally* ANTONIO CASSESE, *INTERNATIONAL LAW* 373 (2d ed. 2005); TESÓN, *supra* note 109, at 6; Miriko Bagaric & John R. Morss, *Transforming Humanitarian Intervention from an Expedient Accident to a Categorical Imperative*, 30 *BROOK. J. INT'L L.* 421, 428 (2005); Bartram S. Brown, *Humanitarian Intervention at a Crossroads*, 41 *WM. & MARY L. REV.* 1683, 1689-90 (2000).

348. Nico Krisch, *Legality, Morality and the Dilemma of Humanitarian Intervention After Kosovo*, 13 *EUR. J. INT'L L.* 323, 327-329 (2002).

349. *KOSOVO REPORT*, *supra* note 125, at 10.

350. *CHARTER COMMENTARY*, *supra* note 207, at 131-32.

351. *KOSOVO REPORT*, *supra* note 125, at 291.

352. THOMAS M. FRANCK, *RECOURSE TO FORCE: STATE ACTION AGAINST THREATS AND ARMED ATTACKS* 139 (2002).

tional community will act as a sort of “jury” through the UNSC or UNGA, which balances the strict application of the law with considerations of moral legitimacy.<sup>353</sup> Similarly, Oscar Schachter argues that, even without UNSC approval, pardoning unilateral intervention to save lives is preferable to creating a rule that allows it.<sup>354</sup> While some describe this as the *criminal law* approach to the use of force,<sup>355</sup> it fits comfortably with the ILC Draft Code on State Responsibility, which precludes the wrongfulness of certain actions when necessary to prevent gravely perilous threats.<sup>356</sup> The doctrine of necessity is in fact recognized in international law, and should serve as the basis for the application of unilateral MARO in the future.<sup>357</sup>

Prior to engaging in unilateral MARO, policy makers will ultimately need to determine which factors justify intervention, whether the resulting degree of suffering outweighs the intrusion of sovereignty, and whether the contemplated use of force will accomplish its goals.<sup>358</sup> Noninterventionists, however, are wary of placing non-legal considerations such as legitimacy and practical effects on a higher level than the legality of the action.<sup>359</sup> Taking a traditional approach to Charter interpretation, as well as a strict application of sovereignty, these critics argue that extralegal atrocity response will upend restraints on power and the operation of the law.<sup>360</sup>

Whether Article 2(4) still has the force of absolutely prohibiting unilateral atrocity response operations depends on whether or not one takes an originalist or teleological view. The text and drafting history of the Charter do not permit humanitarian intervention unauthorized by the UNSC, but has this original meaning changed with the ever evolving nature of international law? Even though the human rights aspects of the Charter were secondary to sovereignty concerns at the drafting, this body of law has grown significantly. Due to state practice and the parallel development of humanitarian norms, the Charter must be understood in the current normative and political context, and not with an originalist’s dog-

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353. Thomas M. Franck, *Legality and Legitimacy in Humanitarian Intervention*, in HUMANITARIAN INTERVENTION 143, 148, 152 (Terry Nardin & Melissa S. Williams eds., 2006); see also Mohamed, *supra* note 106, at 1291-92.

354. OSCAR SCHACHTER, *INTERNATIONAL LAW IN THEORY AND PRACTICE* 126 (1991).

355. See generally Mohamed, *supra* note 106, at 1298 (explaining the *criminal law* approach to the international community’s humanitarian intervention strategy).

356. See ILC Report, *supra* note 336, art. 25(1)(a).

357. See Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 131, ¶¶140-42 (July 9) (recognizing the existence of a doctrine of necessity in international law); Gabcikovo-Nagymaros Project (Hung. V. Slov.), 1997 I.C.J. 92, ¶¶49-59 (Sept. 25).

358. ANTHONY C. AREND & ROBERT J. BECK, *INTERNATIONAL LAW & THE USE OF FORCE: BEYOND THE U.N. CHARTER PARADIGM* 128-29 (1993). Considerations such as these are taken into account in the MARO Handbook and inform the six threshold conditions for unilateral intervention discussed *infra* Part V.

359. Mohamed, *supra* note 106, at 1278.

360. *Id.* at 1298.

matic adherence to a text drafted in an era that is normatively far removed.<sup>361</sup> The traditionalist approach perpetuates a cycle of violence, where effective response measures are impeded and atrocity crimes continue. The situation in Syria demonstrates this analysis.

#### D. *Syria and Unilateral Intervention*

As of early 2013, it appears unlikely that there will be overt military intervention to resolve the crisis in Syria. As previously discussed, Russia and China will not permit a UNSC resolution that authorizes intervention. Therefore, without U.N. authorization, and without a valid self-defense justification for most states,<sup>362</sup> military action would be in violation of the U.N. Charter. Even if intervention were based on humanitarian justifications, traditionalists would argue that there is no lawful exception to violating the territorial integrity or political independence of a sovereign state.

By slaughtering his own people, however, Bashar al-Assad may have diminished Syria's sovereign shield. Under the principle of contingent sovereignty, embraced in the concept of R2P, a state is only entitled to noninterference when it effectively protects civilians from atrocity crimes. Prominent figures, including former U.S. Secretary of State Hillary Clinton<sup>363</sup> and Turkey's Foreign Minister, Ahmet Davutoglu,<sup>364</sup> have since called into question the legitimacy of the Assad regime, while many others now support the rule of the opposition Syrian National Coalition.<sup>365</sup> Such statements reflect contingent sovereignty in practice. Although contingent sovereignty does not expressly authorize unilateral intervention to oust a sitting government, the foundation is in place to justify such an action, not unlike the NATO intervention in Kosovo in 1999.

In addition to diminished sovereignty, intervention in Syria could be justified on moral grounds or the principle of necessity. Values-based justifications are fairly straightforward—the international community has a moral duty to take action to prevent further atrocities against the Syrian

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361. Hurd, *supra* note 156, at 24 (suggesting that the law can be interpreted in both ways—according to an originalist interpretation, or in terms of evolving norms).

362. Turkey may have limited self-defense justifications as a result of cross-border engagements with Syrian forces. *But see* Tim Arango, *On Edge as Syria's War Knocks Ever Harder on the Door to Turkey*, N.Y. TIMES (Oct. 12, 2012), <http://www.nytimes.com/2012/10/13/world/middleeast/on-the-edge-in-turkey-as-syria-war-inches-closer.html?pagewanted=all> (explaining how Turkey may have limited self-defense justifications as a result of cross-border engagement with Syrian forces).

363. See Andrew Quinn & Khaled Yacoub Oweis, *Clinton Says Syria's Assad Has Lost Legitimacy*, REUTERS (July 12, 2011), <http://www.reuters.com/article/2011/07/12/us-syria-idUSLDE76A0I620110712> *see also*, *Syria Condemns Hilary Clinton's Remarks About Assad*, BBC NEWS (July 12, 2011), <http://www.bbc.co.uk/news/world-middle-east-14123188>.

364. See *Diplomat to UN: Security Council Has Failed in Syria*, CNN (Sept. 28, 2012), <http://www.cnn.com/2012/09/28/world/meast/syria-civil-war/index.html>.

365. See Tim Arango, *European Union Backs Syrian Opposition Coalition*, N.Y. TIMES (Nov. 19, 2012), <http://www.nytimes.com/2012/11/20/world/middleeast/islamists-reject-new-syrian-opposition-coalition.html>.

population. Additionally, assuming intervention is unlawful, unilateral action may be deemed necessary to stop more significant legal violations, specifically Assad's war crimes and crimes against humanity.

In spite of the availability of moral or necessity justifications, the current state of the law and traditionalist interpretations of the U.N. Charter and state sovereignty stand in the way of non-U.N. authorized mass atrocity response operations in Syria. As such, if a state or group of states were to intervene, they would have to hope for the forgiveness of the international community much like that following the NATO intervention in Kosovo. While it would be possible to halt Assad's crimes against his people, state intervention would be in the legal limbo of "unlawful" but "legitimate" action.

Therefore, states seeking to prevent atrocity crimes in situations like Syria are left with two choices: (1) breaking the law outright, hoping for forgiveness, and slowly developing a new customary norm, or (2) working with other states to draft a positive normative standard. The next Part considers both approaches and prescribes a discursive process that seeks to accomplish two interrelated objectives: justify derogations from current prohibitions on the use of force when engaging in non-U.N. sanctioned MARO, and encourage efforts to revise the law.

### III. DEVELOPING A LEGAL NORM FOR ATROCITY RESPONSE

The current legal regime is prohibitive of atrocity response without U.N. authorization. The initial failure to establish a permanent U.N. response force under Article 43 and the misuse of the veto power each "effectively destroyed the power of the United Nations to act as an organ of enforcement of international law against a potential lawbreaker."<sup>366</sup> As a result, states and regional organizations must be enabled to take action, rather than sitting by and watching atrocities unfold while waiting for an effective U.N. response.<sup>367</sup>

The United States must take the lead in developing a norm authorizing mass atrocity response when the United Nations fails to act. By engaging in a discursive process—interpretation and development of legal norms through dialogue with other states, international organizations, NGOs, domestic interagency actors, and the media—the United States can argue for a change in the positive law governing atrocity prevention and response. Moreover, when engaging in future unilateral MARO, and prior to the development of hard law, states should embrace humanitarian justifications for intervening, thereby contributing to customary norm development. Besides prescribing a normative discursive process, this Part contributes methods for overcoming political inaction, demonstrates that

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366. Lillich, *supra* note 232, at 245 (stating that, as a result, "the effective power of using military or lesser forms of coercion in international affairs essentially remains with the nation States.") (internal citations omitted).

367. *See id.* at 247.

MARO is in the domestic and international interest, and addresses concerns of pretextual uses of intervention.

### A. Norm Development Through Action and Discourse

Expert studies have long called for a strengthened normative framework to prevent and halt atrocity crimes.<sup>368</sup> Garnering enough support to create positive law—treaties, statutes, regulations—is wrought with challenges, especially in our polarized political climate. Nonetheless, the alternative is even more problematic. As one scholar remarked:

Those who wait for others to see the rationality or morality of their position, who expect the attractiveness of the emerging norm or standard to do the work, are likely to be disappointed. The development of norms is really the story of the expansion of political support for particular sets of ideas and values.<sup>369</sup>

Scholars have paid significant attention to the legal, political, and socio-psychological components of international norm development and compliance.<sup>370</sup> Among the more influential studies, Finnemore and Sikkink outline a three step process to norm development.<sup>371</sup> These steps are: (1) norm emergence, where norm entrepreneurs utilize organizational platforms to advocate for a new standard, (2) norm cascade, where states accepting the new norm exert peer pressure on other states to adopt the norm, and finally (3) norm internalization, where the norm may or may not be codified, but is internalized into state practice.<sup>372</sup>

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368. KOSOVO REPORT, *supra* note 125, at 291 (suggesting that following NATO's intervention in Kosovo, the law should be amended to bridge the gap between the current illegality of humanitarian intervention and the legitimate action of saving civilian lives); *see also* GENOCIDE REPORT, *supra* note 8, at 93 (concluding that a strong normative framework is required to prevent and halt genocide).

369. Luck, *supra* note 126, at 123.

370. *See, e.g.*, Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599, 2646 (1997) (describing the history of compliance theory and its several schools, as well as further developing the "transnational legal process," which entails three stages of norm compliance: the interaction between transnational actors, the interpretation of the norms governing the underlying conduct, and the internalization of the norm at issue); *see also* MICHAEL P. SCHARF & PAUL WILLIAMS, *SHAPING FOREIGN POLICY IN TIMES OF CRISIS: THE ROLE OF INTERNATIONAL LAW AND THE STATE DEPARTMENT LEGAL ADVISOR* (2010); FREDERICK SCHAUER, *PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE* (1991); Paul Harris, *The Moral Obligation to Obey the Law*, in *ON POLITICAL OBLIGATION* (Paul Harris ed., 1990); Roscoe E. Hill, *Legal Validity and Legal Obligation*, 80 YALE L.J. 47 (1970); M.B.E. Smith, *Is There a Prima Facie Obligation to Obey the Law?*, 82 YALE L.J. 950 (1973).

371. Martha Finnemore & Kathryn Sikkink, *International Norm Dynamics and Political Change*, 52 INT'L ORG. 887 (1998).

372. *See* Luck, *supra* note 126, at 110. The acceptance of R2P by every leader at the World Summit in 2005 is a recent and striking example of effective norm emergence and norm cascade, but demonstrates that the persuasive, discursive process is ongoing for skeptics, and that norm internalization has yet to occur. Recall that consensus on this norm was only reached by relying on minimally invasive prevention and capacity building measures,

Besides following these steps, norm development requires a cohesive message and concept, which enhances support for an emerging norm.<sup>373</sup> This requires significant coordination among states, civil society, and domestic policy-makers.<sup>374</sup> Thus, developing a norm that permits unilateral MARO will require a discursive process to persuade these actors of the values at stake when intervention is necessary; contextual differentiation of other claims to intervene; and a clear set of principles establishing a threshold to intervene.<sup>375</sup>

It may prove difficult to establish a positive norm for unilateral MARO in light of previous efforts to reform the Charter.<sup>376</sup> Some attempted to amend the composition of the UNSC or limit the veto power of the permanent five members in certain cases, among other approaches.<sup>377</sup> While amendments to the Charter or other international agreements would add legitimacy and persuasiveness to calls for states to internalize a new norm,<sup>378</sup> geo-political realities limit the feasibility of these approaches. Powerful states will not easily give up the status quo and relinquish that power, and weak states that remain relatively immune to these power struggles likely will not want to be put in jeopardy.

Even when the development of positive norms is not feasible, states can shape customary law by taking action and justifying that action on an emerging normative value. The more the UNSC proves ineffective at responding to massive human rights violations, the more often states will take action into their own hands (for example, Kosovo), thereby laying the groundwork for a new customary norm.<sup>379</sup> State practice, in this case non-

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and, when these measures fail, enforcement measures through UNSC action. There is no clarity at this point on what steps will be taken when the United Nations fails to act under R2P and when states may forcefully intervene to prevent mass killings. Summit Report, *supra* note 130.

373. Applegarth & Block, *supra* note 152, at 40.

374. *Id.* at 49.

375. Moore, *supra* note 76, at 8.

376. Several scholars have voiced skepticism about changes in positive law governing the use of force. *See, e.g.*, FRANCK, *supra* note 352, at 183-84 (suggesting that a formal adjustment of the law is not necessary because international law may accommodate instances of noncompliance without changing the rule); SCHACHTER, *supra* note 354, at 126 (arguing that it is undesirable to have a new rule allowing humanitarian intervention, and that it would be better to acquiesce in necessary violations than open the door to unilateral uses of force); Charney, *supra* note 123, at 837 (concluding that there is no international consensus in support of a right of unilateral intervention); O'Connell, *supra* note 229, at 81 (stating that even supporters of a forgiveness approach to Charter violations for humanitarian purposes do not advocate a universal doctrine of unilateral humanitarian intervention or an abandonment of the Charter use of force regime).

377. *See* WAXMAN, *supra* note 146, at 11-14; *see also* Sean D. Murphy, *Protean Jus Ad Bellum*, 27 BERKELEY J. INT'L L. 22, 47-50 (2008) (suggesting various methods of amending or reaffirming *jus ad bellum*, including Charter amendments, GA resolutions, UNSC resolutions, major power agreement, case law, and "principles" adopted by NGOs).

378. *See* THOMAS M. FRANCK, *THE POWER OF LEGITIMACY AMONG NATIONS* (1990); *see also* MURPHY, *supra* note 47, at 23.

379. CHARTER COMMENTARY, *supra* note 207, at 132.

compliance, serves as both a breach of the law and the basis for a new standard.<sup>380</sup> The international community has yet to utilize force without UN authorization under the doctrines of R2P or MARO.

In these circumstances, states must engage in the discursive process to justify otherwise unlawful actions for two reasons. First, state behavior, and the acceptance of developing norms, is shaped in part by reputation.<sup>381</sup> Exposing the wrongfulness of perpetrator states and the embarrassing inaction of the world community will encourage an effective response so that either the perpetrator stops the unlawful activity, or states are shamed into taking lawful collective action.<sup>382</sup>

Second, public discourse allows states to demonstrate *opinio juris* when seeking to change the customary normative landscape. In the event of MARO, states must argue that they have the legal authority to resort to force if nonviolent measures and the UNSC have failed to halt the mass slaughter of civilians. As previously discussed, although the prevailing traditionalist interpretation of *jus ad bellum* does not clearly delineate a binding legal obligation to intervene to halt atrocities, there is sufficient support to advocate for a developing norm.

Examples of *opinio juris* can be found in the evolution of humanitarian intervention. Even the U.N.'s Chapter VII authority has grown to encompass peace and security operations for internal atrocity crimes.<sup>383</sup> While not directly applicable to a customary international law analysis, this change of application of the U.N. Charter demonstrates a significant normative shift. Specifically, the international community now not only

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380. Hurd, *supra* note 156, at 26 (recognizing that “[s]tate practice has a productive effect on the content of the law.”); Mohamed, *supra* note 106, at 1311-12.

381. See MURPHY, *supra* note 47, at 22 (stating that “law can arise either when one is obliged to act due to a threatened, effective sanction or when one is obliged to act due to social rules for which conformity is generally demanded and from which deviations are therefore met with social pressures large and small.”) (emphasis added).

382. This “reputational pull” to norm acceptance and compliance is evident “through public opinion, news media, and other mechanisms of public accountability [including domestic and international organizations, political debate, and other states] faced daily” by decision-makers. Koh, *supra* note 370, at 2652; see also NICHOLAS WHEELER, *SAVING STRANGERS: HUMANITARIAN INTERVENTION IN INTERNATIONAL SOCIETY* 290-91 (2000) (discussing the “shaming power of humanitarian norms”); Nicholas 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* 29, 39 (Jennifer M Welsh ed., 2004) (arguing that states suffer political costs when they oppose “global humanitarian values.”); Keith A. Petty, *Beyond the Court of Public Opinion: Military Commissions and the Reputational Pull of Compliance Theory*, 42 *GEORGETOWN J. INT’L L.* 303, 318-26 (2011) (arguing that earlier engagement in the interpretive, discursive process by decision-makers would have enhanced the legitimacy of the U.S. Military Commissions); Michael P. Scharf, *International Law in Crisis: A Qualitative Empirical Contribution to the Compliance Debate*, 31 *CARDOZO L. REV.* 45, 70 (2009) (discussing methods utilized by the State Department Legal Adviser to exert influence “in shaping modalities and articulating the rationale” for actions such “that it would be accepted by the international community.”).

383. See discussion *supra* note 64.

tolerates intervention to prevent states' massive human rights violations, but may also give intervening states legal authorization to do so.<sup>384</sup>

The international community further expressed its desire for an emerging legal norm with its embrace of R2P.<sup>385</sup> Again, the discourse surrounding the adoption of R2P demonstrates states' willingness to internalize emerging norms and take action to protect civilians from slaughter. That R2P found consensus among all nations in 2005 is possibly the strongest basis to argue that MARO – just one step removed from the collective action envisioned in R2P – is based on a legal obligation to prevent atrocities occurring in other states.

*Opinio juris* can also be found by culling the laws and pronouncements of states that have engaged in non-U.N. authorized humanitarian intervention, and also those best positioned to influence future operations. Specifically, the French intervention in the Central African Republic in 1979,<sup>386</sup> the ECOWAS interventions in the 1990s,<sup>387</sup> and the United Kingdom's and Belgium's involvement in the 1999 Kosovo intervention<sup>388</sup> were all humanitarian-based actions. Moreover, the African Union, which has and continues to confront mass atrocities on the continent, may allow its Members to intervene to halt atrocity crimes.<sup>389</sup>

The United States, uniquely positioned to influence the legal development in this field, has made pronouncements since 2006 that contribute to the legal basis for future unilateral MARO.<sup>390</sup> Specifically, the 2006 and 2010 National Security Strategies,<sup>391</sup> the 2010 Department of Defense Quadrennial Defense Review,<sup>392</sup> Senate Resolution 71 (2010),<sup>393</sup> and President Obama's Study Directive of 2011<sup>394</sup> each call for U.S. preparedness to confront atrocity crimes, often in the absence of U.N. authorization. These official statements and expert reports embraced by the United States<sup>395</sup> reflect domestic interpretations of the lawfulness of atrocity response (i.e. how the use of force for humanitarian purposes is understood differently today than it could have been in 1945). State pronouncements

384. See, e.g., the 2011 intervention in Libya authorized by the UNSC.

385. See discussion *supra* Part I.C.2.

386. See MURPHY, *supra* note 47, at 107-08.

387. See *supra* notes 118-120.

388. See *supra* notes 290-291.

389. A.U. Charter, art. 4(h).

390. See discussion *supra* Part I.D.

391. See 2006 NATIONAL SECURITY STRATEGY, *supra* note 168 and accompanying text at IV.C.4; 2010 NATIONAL SECURITY STRATEGY, *supra* note 147, at 48.

392. QUADRENNIAL DEFENSE REVIEW, *supra* note 155, at vi (“The Department must be prepared to provide the President with options across a wide range of contingencies. . . which includes preventing human suffering due to mass atrocities.”).

393. Sen. Con. Res. 71, *supra* note 155 (calling for the U.S. to engage in a “whole of government” and “strategic effort to prevent mass atrocities and genocide.”).

394. See Presidential Directive, *supra* note 9.

395. See, e.g., Summit Report, *supra* note 130, at ¶¶138-40; GENOCIDE REPORT, *supra* note 8; MARO HANDBOOK, *supra* note 6, at 7.

such as these,<sup>396</sup> bolstered by the 2008 ICJ Genocide Case<sup>397</sup> and the principle of necessity,<sup>398</sup> now lend considerable support to norm entrepreneurs arguing that *opinio juris* is emerging for a customary norm of non-U.N. authorized MARO.<sup>399</sup>

Should this interpretation result in a “norm cascade,” it is noteworthy that prior state action, current reports, and state pronouncements would reflect a permissive, rather than obligatory norm.<sup>400</sup> For example, Article 139 of the 2005 World Summit Report states that the international community “*is prepared to take collective action,*” but does not require it.<sup>401</sup> Similarly, the U.S. 2006 National Security Strategy states that in order to halt atrocity crimes “armed intervention *may be required.*”<sup>402</sup> Such non-binding language illustrates that a norm of non-U.N. authorized atrocity response would operate similarly to the customary right of self-defense. States are authorized, but not required, to take measures in defense of

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396. Sources of custom include “[d]iplomatic correspondence, policy statements, press releases, the opinions of official legal advisors, official manuals on legal questions, e.g. manuals of military law, executive decisions and practices [among other sources].” See IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 6 (6th ed. 2003); OSCAR SCHACHTER, *INTERNATIONAL LAW IN THEORY AND PRACTICE* 84-105 (1991). It has been argued that “instant customary law” requires no state practice at all, but rather that states demonstrate *opinio juris* through votes on UN General Assembly Resolutions, for example. See Bin Cheng, *United Nations Resolutions on Outer Space: “Instant” International Customary Law?*, 5 *INDIAN J. INT’L L.* 23, 36 (1965); Michael P. Scharf, *Seizing the “Grotian Moment”: Accelerated Formation of Customary International Law in Times of Fundamental Change*, 43 *CORNELL INT’L L.J.* 439, 446 (2010). This is relevant in light of the fact that the principle of R2P, which authorizes intervention in certain limited circumstances, was adopted unanimously by the General Assembly in 2005. G.A. Res. 60/1, UN Doc. A/Res/60/1, ¶¶138-40 (Sept. 15, 2005).

397. See discussion *supra* Part II.A.b.

398. See discussion *supra* Part II.C.

399. *But see* discussion *supra* Part III.A. (arguing that currently *opinio juris* does not exist with regard to non-U.N. authorized humanitarian intervention).

400. The article suggests that a permissive, rather than obligatory norm of unilateral MARO is possible in the future. To be precise, the *opinio juris* required of customary international law is traditionally defined as arising from a sense of legal obligation. See *Continental Shelf Case*, *supra* note 284, at para. 77; see also PETER MALANCZUK, *AKEHURST’S MODERN INTRODUCTION TO INTERNATIONAL LAW* 44 (7th ed. 1997). But not all customary rules impose duties. STEINER, *supra* note 321, at 233 (describing that “[b]y virtue of a developing custom, particular conduct may be considered to be permitted or obligatory in legal terms . . . .”). Permissive rules “permit states to act in a particular way (for example, to prosecute foreigners for crimes committed within the prosecuting state’s territory) without making such actions obligatory.” MALANCZUK, *supra*. In the case of permissive rules, “*opinio juris* means a conviction felt by states that a certain form of conduct is permitted by international law.” *Id.* But in order to demonstrate custom, other states (that is, those affected by the conduct) must acquiesce to the underlying conduct. *Id.*; see *Case of the S.S. “Lotus”* (France v. Turk.), 1927 P.C.I.J. (ser. A) No. 10, at 18 (Sept. 7); STEINER *supra*.

401. See Summit Report, *supra* note 130, at ¶139 (emphasis added).

402. See 2006 NATIONAL SECURITY STRATEGY, *supra* note 168, at 17 (emphasis added).

their own territory or in defense of others.<sup>403</sup> Moreover, because self-defense is a recognized exception to the general prohibition on the use of force—both in custom and the Charter—it has been suggested that a new norm of humanitarian intervention be based on a similar exception for collective self-defense.<sup>404</sup>

States should advocate for and internalize a norm of unilateral atrocity response. If a norm is developed, states will not have to rely on concerted legal justifications for their action, or on the flimsy “unlawful but legitimate” rationale. A concerted discourse will generate broader public support for legally tenuous policies that stretch the limits of the law and hasten acceptance of the emerging norm by the international community.<sup>405</sup>

### B. *Leadership: The Will to Act*

The development of international norms requires political and moral leadership from states.<sup>406</sup> Take the development of R2P, for example. Some argue that the inability of R2P to gain traction as a binding norm is not as much related to the few outlier states that oppose the concept, but rather to the disinterest and disorganization of its supporters.<sup>407</sup> As a result, “nations [supporting R2P] must take the lead in finding and cement-

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403. The right of self-defense is recognized as a permissive customary norm. *See, e.g.*, Frederic L. Kirgis, *Pre-emptive Action to Forestall Terrorism*, ASIL INSIGHTS (2002), <http://www.asil.org/insigh88.cfm>.

404. *See generally* GEORGE P. FLETCHER & JENS DAVID OHLIN, *DEFENDING HUMANITY: WHEN FORCE IS JUSTIFIED AND WHY* (2008).

405. GOLDSMITH, *THE TERROR PRESIDENCY* 81 (2007) (arguing that in the domestic national security context, if the President is to take action contrary to an interpreted legal norm, then he must do so publicly and allow Congress and the people to determine whether the crisis warrants extralegal action). As an additional example, at the international level, prior to U.S. involvement in the Second World War, President Roosevelt provided destroyers to aid Britain in its war efforts against Nazi-Germany as part of a Lend-Lease Program, which was in violation of domestic and international law. Peter Margulies, *True Believers at Law: National Security Agenda, the Regulation of Lawyers, and the Separation of Powers*, 68 MD. L. REV. 1, 20 (2008). In order to garner support for the program, Roosevelt consulted actors at home and abroad. It is now widely recognized that although the program pushed the envelope legally, it was reasonable given the circumstances. *Id.* at 31. The discursive process is also valuable in shaping the policy options in response to international wrongs. During the Cuban Missile Crisis, for example, President Kennedy ultimately decided against using force in response to the Soviet Union's placement of ballistic missiles in Cuba. *Id.* at 69-70. After serving to publicly confront the Soviet Union, the United Nations was instrumental in supervising the removal of the missiles. SCHLESINGER, *supra* note 220, at 283.

406. Reflecting on his struggles to abolish genocide, Raphael Lemkin proclaimed, “It takes great moral strength to give up temporary political interests and inconveniences in order to build something bigger and better which will serve mankind as a whole.” GENOCIDE REPORT, *supra* note 8, at 93 (building on Raphael Lemkin's statement while discussing the Genocide Prevention Task Force's recommendation to strengthen international norms to respond to threats of genocide); *see also* LUCK, *supra* note 126, at 124 (“The ultimate test of [mass atrocity prevention efforts] will be in capitals and on the ground, not in international meeting halls.”).

407. Applegarth & Block, *supra* note 150, at 129.

ing consensus and in moving forward on an ambitious, actionable agenda.”<sup>408</sup> The same is true for the adoption of norms that supplement R2P—mass atrocity response absent U.N. authorization.

To its credit, the United States has been active to prevent some atrocity crimes, with varying degrees of commitment and success, including efforts to halt the slaughter in Bosnia and Kosovo, the no-fly zones in Iraq, diplomatic pressure on Kenya in the wake of its 2008 post-election violence, intervention in Libya, and strong statements regarding Syria.<sup>409</sup> Nonetheless, for the few instances of attempted prevention and intervention, it is widely recognized that the United States has not done enough to prevent or respond to atrocity crimes.<sup>410</sup>

The primary political reason for the legacy of inaction in response to atrocity crimes is willful blindness, meaning the problem is ignored so that states will not be compelled to take action.<sup>411</sup> For example, many states downplayed the level of violence in Rwanda, so as not to invoke the obligations in the Genocide Convention.<sup>412</sup> This type of willful blindness illustrates the lack of political will to respond to atrocity crimes in a meaningful way.<sup>413</sup>

Definitional vagueness of atrocity crimes is also relied upon to justify inaction.<sup>414</sup> In one glaring example, the U.N. International Commission of Inquiry on Darfur concluded that Sudan did not have a policy of genocide, and that only a competent tribunal could determine whether Sudan’s acts met the legal definition of that crime.<sup>415</sup> Contrary to this Commission’s

408. The United States is viewed as a strategic “wild card” in terms of support for R2P. During the Bush administration, the U.S. position was to support R2P in so far as it emphasized the role of the UNSC in making R2P decisions. The Obama administration went from merely embracing R2P to advocating its implementation in Darfur. *Id.* at 140-141.

409. GENOCIDE REPORT, *supra* note 8, at 94 (describing U.S. actions vis-à-vis Bosnia and Kosovo, Iraq and Kenya); Helene Cooper, *Obama Cites Limits of U.S. Role in Libya*, N.Y. TIMES (Mar. 28, 2011), <http://www.nytimes.com/2011/03/29/world/africa/29prexy.html?pagewanted=all>; *US Urges Syria to Work With Annan Peace Plan*, BBC NEWS (Mar. 21, 2012), <http://www.bbc.co.uk/news/world-middle-east-17466453>.

410. GENOCIDE REPORT, *supra* note 8, at xxi, 94. See generally POWER, *supra* note 38.

411. GENOCIDE REPORT, *supra* note 8, at 95.

412. William Schabas, *The Genocide Convention at Fifty*, U.S. INST. PEACE, 6-7 (Jan. 7, 1999), <http://www.usip.org/pubs/specialreports/sr990107.pdf>. Ironically, the Convention does not mandate or authorize intervention, rather it merely requires states to “call upon the competent organs of the UN” to take action to suppress acts of genocide. Genocide Convention, *supra* note 61, art. 8.

413. This is reflected in states’ faith that minimal diplomatic effort or multilateral institutions will have the desired or expected effect. In Darfur, for example, the United States issued strongly worded statements and encouraged U.N. action, but all parties failed to follow up with concrete action to halt the ongoing genocide. GENOCIDE REPORT, *supra* note 8, at 94-95. To its credit, the United States was the first to recognize the actions in Darfur as genocide and encouraged multilateral efforts to stop it. Kuwali, *supra* note 224, at 37.

414. GENOCIDE REPORT, *supra* note 8, at xxi-xxii.

415. Int’l Comm’n of Inquiry on Darfur, Report of the International Commission of Inquiry on Darfur to the U.N. Secretary-General, ¶¶518, 522 (Jan. 25, 2005) (also concluding that Sudan may have been involved in other war crimes and crimes against humanity).

suggestion, decision makers need not delve into the specific intent or other elements necessary to prove atrocity crimes, as would a prosecutor in court. Numerous conventions now form the basis of modern international humanitarian law, human rights law, and international criminal law, providing ample legal definitions for acts that might constitute atrocity crimes. Between the Genocide Convention, the Geneva Conventions, and the Rome Statute of the ICC, the definitions for genocide,<sup>416</sup> war crimes,<sup>417</sup> and crimes against humanity<sup>418</sup> are readily available. The case law of Nuremberg, the ICJ, ICTY, ICTR, and someday the ICC, although not always consistent with each other, also provide adequate interpretive guidance to provisions in these treaties that might somehow be vague. This is precisely why use of the term “atrocity crimes” as a catchall for the more specific legal definitions should be used by policy makers for discussion and planning purposes.<sup>419</sup> Allow prosecutors to worry themselves with the precise legal definition of these heinous acts.<sup>420</sup>

The “highly subjective” nature of facts on the ground is another reason cited by states that are unwilling to act.<sup>421</sup> The “subjective” nature of facts on the ground, however, is dubious at best. The latest technologies will be instrumental in capitalizing on the “power of witness:” exposing civilian slaughter to the world.<sup>422</sup> In the broader discursive process, the

416. Genocide is defined as any of the following acts committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group: 1) killing members of the group; 2) causing serious bodily or mental harm to members of the group; 3) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; 4) imposing measures intended to prevent births within the group; and 5) forcibly transferring children of the group to another group. Genocide Convention, *supra* note 61, art. 2; Rome Statute, *supra* note 94, art. 6; *see also* Kuwali, *supra* note 224, at 34-36 (describing case law of the ICTY and ICTR that further defines the crime of genocide).

417. Rome Statute, *supra* note 94, art. 8 (defining war crimes as grave breaches of the 1949 Geneva Conventions “when committed as part of a plan or policy or as part of a large-scale commission of such crimes.”).

418. *Id.* art. 7 (defining crimes against humanity as inhumane acts, such as murder, enslavement, forcible transfer, torture, rape, and other acts, “committed as part of a widespread or systematic attack directed against any civilian population.”); *see also* Prosecutor v. Erdemovic, Case No. IT-96-22-T, Sentencing Judgment, ¶¶27-28 (Int’l Crim. Trib. For the Former Yugoslavia Nov. 29, 1996) (stating that crimes against humanity are “inhumane acts that by their extent and gravity go beyond the limits tolerable to the international community, which must perforce demand their punishment.”); Kuwali, *supra* note 224, at 25, 40.

419. David Scheffer, *Genocide and Atrocity Crimes*, 1 GENOCIDE STUDIES & PREVENTION 229, 229, 239 (2006).

420. *But see id.* at 231.

421. Kuwali, *supra* note 224, at 25, 43; *see also* Franck & Rodley, *supra* note 44, at 282 (“The international machinery for effectively monitoring claims of “humanitarian” conditions warranting unilateral intervention did not exist in the nineteenth century, does not exist now, and is unlikely to be created within the foreseeable future.”). Today, however, technological advances have effectively mooted this line of argument. *See* CARNEGIE COMM’N ON PREVENTING DEADLY CONFLICT, PREVENTING DEADLY CONFLICT: FINAL REPORT 43 (1997).

422. Although social media did not start the Egyptian revolution in 2011, it has been credited with exposing the despotic nature of the regime. *See* Sam Gustin, *Social Media*

power of witness can shame perpetrators into ceasing their crimes and refute allegations that crimes are being committed by everyone involved.<sup>423</sup> Witnessing and recording genocidal acts is also valuable for creating a historical record and facilitating possible future prosecutions of high level perpetrators in either domestic or international courts.<sup>424</sup> The Genocide Task Force highlights the need for early warning to effectively prevent genocide, and cites the intelligence capacity of states, NGOs, and other atrocity alert mechanisms that are available to inform decision makers of pending and ongoing crisis situations.<sup>425</sup> Furthermore, a 1997 study by the Carnegie Commission rejected the argument that inaction was due to lack of information, stating that this “argument is simply unconvincing in an age when major governments operate extensive, sophisticated early warning and intelligence networks worldwide.”<sup>426</sup> In the case of Rwanda, for example, U.S. leaders, among many others, were apprised of the atrocities and failed to take appropriate action.<sup>427</sup>

The only way to overcome these impediments to action—willful blindness, definitional quagmires, and subjective facts—is for states to demonstrate leadership. There is some evidence in past episodes that the international community responds when the United States takes an active leadership role in genocide prevention.<sup>428</sup> While U.S. support to global initiatives can spark backlash if the concept is perceived as expanding “Western influence,” the United States is nonetheless uniquely positioned to influence states to adopt developing norms.<sup>429</sup> But the United States alone is incapable of influencing events in areas where “neighboring states, regional powers, and patron states will outweigh [the influence] of the United States.”<sup>430</sup> In such situations, norm development will require building partnerships to assist in anti-atrocity efforts.<sup>431</sup>

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*Sparked, Accelerated Egypt's Revolutionary Fire*, WIRED (Feb. 11, 2011), <http://www.wired.com/epicenter/2011/02/egypts-revolutionary-fire/>; see, e.g., Nic Robertson, *Syria Toll Rises to 25; Monitors Cheered in Besieged Town*, CNN (Jan. 16, 2012), [http://www.cnn.com/2012/01/15/world/meast/syria-unrest/index.html?hptHP\\_t3](http://www.cnn.com/2012/01/15/world/meast/syria-unrest/index.html?hptHP_t3) (describing how Syria's restrictions on media reporting make it difficult for journalists and human rights groups to verify the extent of the ongoing massacre of Syrian civilians).

423. Sewall, *supra* note 153, at 159, 169; MARO HANDBOOK, *supra* note 6, at 18.

424. Sewall, *supra* note 153, at 159, 169-70.

425. GENOCIDE REPORT, *supra* note 8, at xvii, 13, 24 (highlighting other useful early warning tools; most important amongst them the Political Instability Task Force, used by academics since 1994 to assess and explain vulnerable states, as well as the Atrocities Watchlist, published quarterly and considered the “major regular product” on atrocity prevention since the NIC's Warning Staff began distributing it in 1999).

426. CARNEGIE COMMISSION, *supra* note 421, at 43.

427. POWER, *supra* note 38, at 354-64.

428. GENOCIDE REPORT, *supra* note 8, at 95.

429. *Id.* at 95-96.

430. *Id.* at 5.

431. *See id.*

### C. Mass Atrocity Response Is a National & Global Security Interest

It is common for states to look away as atrocities occur because they are not considered to implicate national interests.<sup>432</sup> When Ambassador Morgenthau reported the Armenian genocide to a disinterested Wilson administration, he had to remind himself that “unless it directly affected American lives and American interests, it was outside the concern of the American Government.”<sup>433</sup> Consider, for example, that the United States embraced a foreign policy principle of nonintervention from its founding days.<sup>434</sup> Even though the noninterventionist impulse is ingrained in the national character, as U.S. global influence grew so too did the need to take proactive security measures. President Franklin Roosevelt, for example, warned of an isolationist United States. With regard to the formation of the United Nations, he stated, “There can be no middle ground here. We shall have to take the responsibility for world collaboration, or we shall have to bear the responsibility for another world conflict.”<sup>435</sup> This statement about conflict echoes efforts to prevent atrocity crimes. An isolationist position will only foster impunity for the killing of civilians, as will an ineffective United Nations.

Today it is widely recognized that genocide and crimes against humanity are crimes that affect all of humanity, not simply the target population or the territory where the atrocity occurs.<sup>436</sup> Still, the Genocide Prevention Task Force reported that “[a] core challenge for American leaders is to persuade others—in the U.S. government, across the United States, and around the world—that preventing genocide is more than just a humanitarian aspiration; it is a national and global imperative.”<sup>437</sup>

432. *Id.* at 95 (“Blame for inaction hardly belongs solely to the United States; other governments have been willing to turn a blind eye to mass atrocities.”).

433. POWER, *supra* note 38, at 8.

434. George Washington famously stated that the fledgling union should “steer clear of permanent alliances” that did not directly impact U.S. interests. See SCHLESINGER, *supra* note 220, at 17. Thomas Jefferson echoed this sentiment when he admonished “entangling alliances.” *Id.* But these statements had more to do with the politics of the day, particularly the interventionist wars in Europe, derived largely from a policy of intervention to maintain the status quo of the powers then in place. MURPHY, *supra* note 47, at 46-52.

435. SCHLESINGER, *supra* note 220, at 64.

436. See Michael Abramowitz & Lawrence Woocher, *How Genocide Became a National Security Threat*, FOREIGN POL’Y (Feb. 26, 2010), [http://www.foreignpolicy.com/articles/2010/02/26/how\\_genocide\\_became\\_a\\_national\\_security\\_threat?page=full](http://www.foreignpolicy.com/articles/2010/02/26/how_genocide_became_a_national_security_threat?page=full) (describing genocide’s impact on the national security of the U.S.).

437. GENOCIDE REPORT, *supra* note 8, at xx. Contrast the current political and public opinion regarding atrocity crimes to that in the 1990s. Then, the atrocities in the Balkans were considered a “European problem.” Today, it is unlikely that such crimes would be greeted in Congress or by the people with indifference, considering the significant interest in response when atrocity crimes are publicized. Take, for example, the “viral” response to a video publicizing the crimes of Ugandan warlord Joseph Kony. Hilary Whiteman, *Joseph Kony: Brutal Warlord Who Shocked World*, CNN (Mar. 9, 2012), [http://www.cnn.com/2012/03/09/world/africa/uganda-kony-profile/index.html?hptHP\\_c1](http://www.cnn.com/2012/03/09/world/africa/uganda-kony-profile/index.html?hptHP_c1) (describing the documentary “Kony 2012” produced by the NGO Invisible Children and viewed by more than fifty million as of March 9, 2012).

National policy and recent studies indicate that the United States is moving toward this perspective. Since at least 2006, the United States has concluded that mass killings are a threat to U.S. national security.<sup>438</sup> Today, the President and Congress are in agreement about the threat posed to U.S. interests by atrocity crimes.<sup>439</sup> The Genocide Task Force reported that atrocity crimes are a direct threat to core U.S. national interests,<sup>440</sup> in addition to an assault on the universal right to life. These crimes fuel instability in weak states, which are often the source of other national security threats, such as “terrorist recruitment and training, human trafficking, and civil strife.”<sup>441</sup> The spillover effects of these crimes also have long-term consequences in both the region where they occur and in the United States. When millions of refugees flow across porous borders, states provide humanitarian assistance ranging from assisting displaced people to bearing high economic costs for aid. In Bosnia, for example, because state action was ineffective at the early stages, “the United States has paid nearly \$15 billion to support peacekeeping forces.”<sup>442</sup> This is significant in a time of economic austerity in the United States and abroad.<sup>443</sup>

Public opinion also appears to favor measures to prevent and respond to atrocity crimes.<sup>444</sup> The ICISS Report found that even among states that were staunchly opposed to infringement on sovereignty, “there was general acceptance that there must be limited exceptions to the non-intervention rule for certain kinds of emergencies.”<sup>445</sup> At the United Nations, Kofi Annan was a strong proponent of R2P while Secretary-General,<sup>446</sup> and his successor, Ban Ki-moon, is no less committed.<sup>447</sup>

438. 2006 NATIONAL SECURITY STRATEGY, *supra* note 168.

439. See discussion *supra* note 155.

440. GENOCIDE REPORT, *supra* note 8, at xx.

441. *Id.*

442. *Id.*

443. See generally Andrew Tilghman, *DoD: Budget Cuts Won't Hurt Troops—For Now*, ARMY TIMES (Feb. 13, 2012), <http://www.armytimes.com/news/2012/02/military-pentagon-says-budget-will-not-hurt-current-troops-021312w/> (describing how upcoming military budget cuts through 2013 will limit Overseas Contingency Operations). Additionally, Sewall argues that “relying on a vague concept of prevention could lead the United States to spend billions on economic development or political reconciliation in places that are not at real risk—all in the name of genocide prevention.” Sewall, *supra* note 153, at 159, 163.

444. See discussion *supra* note 437.

445. ICISS REPORT, *supra* note 104, at 31. See also MICHAEL WALZER, JUST AND UNJUST WARS xiii (3rd ed. 2000) (finding, “The most common response—a majority [of individuals] in eight countries and a plurality in four—is that the Security Council has not only a right but a responsibility to authorize the use of force [to prevent] severe human rights violations, such as genocide, even against the will of the government committing such abuses.”).

446. Hubert, *supra* note 44, at 89, 98.

447. U.N. Secretary-General, *Challenge is to Make Responsibility to Protect Operational*, Statement on the Anniversary of Rwandan Genocide, U.N. Doc. SG/SM/10934 (2007) (“Our challenge now is to give real meaning to [R2P], by taking steps to make it operational. Only then will it truly give hope to those facing genocide, war crimes, crimes against humanity and ethnic cleansing.”). Ban Ki-moon has taken numerous steps within the United Nations to further the development and implementation of R2P. See U.N. R2P Report, *supra*

Responding forcefully to atrocity crimes can save lives, money, and preserve the moral authority of those with the will to act.<sup>448</sup> If the United States is truly interested in continuing its standing as a world leader, then it must be prepared to take whatever steps are necessary, but not necessarily alone, to respond to atrocity crimes.<sup>449</sup> This includes spending political capital in order to convince the U.S. public and the international community that it is the right thing to do. Teddy Roosevelt famously said of the Armenian genocide, “until we put honor and duty first, and are willing to risk something in order to achieve righteousness both for ourselves and for others, we shall accomplish nothing; and we shall earn and deserve the contempt of the strong nations of mankind.”<sup>450</sup> The next Section embraces this sentiment and discusses how a principled approach to unilateral MARO will overcome concerns of pretext.

#### D. *Overcoming Pretext*

Persuading the international community that intervention is necessary to respond to atrocity crimes is difficult on a case-by-case basis, let alone achieving consensus on a new norm. The primary concern about the use of force for humanitarian purposes is that this justification will serve as pretext for the national interests of powerful states.<sup>451</sup> Some argue that such a policy necessarily preferences militarily strong states over weaker states, erodes the principle of nonintervention into sovereign matters, and undermines the authority of the UNSC. While these concerns are legitimate in a world of *real politick*, the risk that an emerging norm will be abused can be limited by developing principled threshold conditions.

Noninterventionists warn that carving out a humanitarian exception to the prohibition on the use of force is easily abused.<sup>452</sup> The issue of pretext

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note 18 (establishing a framework for operationalizing the R2P agenda throughout the U.N. system); *see also* Luck, *supra* note 126, at 108, 119.

448. *See* GENOCIDE REPORT, *supra* note 8, at 11-12 (making detailed recommendations for fiscal priorities to prevent genocide).

449. *Id.* at xviii.

450. THEODORE ROOSEVELT, FEAR GOD AND TAKE YOUR OWN PART 377 (1916); *see also* POWER, *supra* note 38, at 11.

451. LOUIS HENKIN, HOW NATIONS BEHAVE: LAW AND FOREIGN POLICY 144-45 (2d ed. 1979); Ian Brownlie, *Thoughts on Kind-Hearted Gunmen*, in HUMANITARIAN INTERVENTION AND THE UNITED NATIONS, *supra* note 233, at 139, 147-48; FRANCK & RODLEY, *supra* note 44, at 304. *But see* Ryan Goodman, *Humanitarian Intervention and Pretexts for War*, 100 AM. J. INT'L L. 107, 107 (2006) (discussing the frailty of the pretext arguments). Another concern, particularly from China and Russia, is that setting a new precedent for atrocity intervention will require states to answer for their poor human rights records.

452. For example, when Nazi Germany occupied Czechoslovakia in 1939, Hitler argued that this was necessary due to “assaults on the life and liberty of minorities, and the purpose of disarming Czech troops and terrorist bands threatening the lives of minorities.” Brownlie, *supra* note 226, at 221 (internal citation omitted). Years later, the United States was criticized for its intervention in Nicaragua. The ICJ stated: “[W]hile the USA might form its own appraisal of the situation as to respect for human rights in Nicaragua, the use of force could not be the appropriate method to monitor or ensure such respect.” CHRISTINE GRAY, INTERNATIONAL LAW AND THE USE OF FORCE 28 (Malcolm Evans & Phoebe Okawa eds., 2004).

was at the forefront of concerns at the 2009 General Assembly debate on R2P.<sup>453</sup> The argument was that R2P is nothing more than a reformed version of humanitarian intervention and was akin to “renewed imperialism and major power intervention.”<sup>454</sup> It must be noted that militarily strong states are also concerned about a norm of intervention, particularly if it obligates them to respond under an expanded R2P or MARO regime.<sup>455</sup>

Some argue that an expanded R2P concept, or a right to intervene, could impact the principle of the sovereign equality of states.<sup>456</sup> But, it was a comparatively small, weak state, Guatemala, that drafted and negotiated the 2009 U.N. resolution adopting the principle of R2P.<sup>457</sup> This likely had something to do with Guatemala’s past experience with atrocity crimes, and the country’s recognition that more effective international efforts are needed to prevent and respond to these crimes. Additionally, the application of R2P and a unilateral MARO framework will always be inconsistent, favoring intervention in cases where the perpetrator state is militarily weak.<sup>458</sup> There are simply fewer incentives and pressure points to dissuade strong states.<sup>459</sup> Among the threshold conditions discussed below is that the use of force be proportionate to the underlying atrocity crime, which includes that there be minimal loss of civilian life in the planned MARO. A direct use of force against a well-trained armed force would likely result in greater loss of civilian life, thereby failing the proportionality test.

There are obvious concerns about this Article’s proposal to violate the general prohibition on the use of force for humanitarian purposes in order to develop a customary norm. Noncompliance, it is argued, “impinges on

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States often cite the U.S. and U.K.-led invasion of Iraq in 2003 and Russia’s 2008 intervention in Georgia as evidence that States will find a way to justify even unlawful uses of force against weaker states. Applegarth & Block, *supra* note 150, at 134; GENOCIDE REPORT, *supra* note 8, at 95-96 (discussing the shadow cast by the Iraq invasion in 2003). For further examples of pretextual “humanitarian” intervention, see *supra* notes 109, 112.

453. See Applegarth & Block, *supra* note 150, at 136; Rotberg, *supra* note 24, at 15.

454. Rotberg, *supra* note 24, at 15. It must be noted, however, that many of those opposed to this concept are “noted outliers” on many international agreements, and denounce R2P as “a tool of the world’s most powerful states intended to justify military adventurism or political and economic interference in domestic affairs.” These states, which include Burma, Cuba, Nicaragua, North Korea, Sudan, Venezuela, and Zimbabwe are quick to point out their wariness of U.S. involvement and see intervention as a way to push U.S. interests, or exert military influence over weaker states. Applegarth & Block, *supra* note 150, at 129, 136; GENOCIDE REPORT, *supra* note 8, at 95-96. Russia and China were largely supportive of the status quo. India, Vietnam, and Egypt were slightly more favorable to R2P in 2009 than they were in 2005. Overall, approximately 94 nations were supportive of R2P in the 2009 General Assembly debate. Rotberg, *supra* note 24, at 15.

455. See LUCK, *supra* note 313, at 11.

456. Mohamed, *supra* note 106, at 1314.

457. G.A. Res. 308, U.N. GAOR, 63rd Sess., U.N. Doc. A/RES/63/308 (Oct. 7, 2009); Luck, *supra* note 126, at 121.

458. Hubert, *supra* note 44, at 99.

459. See generally discussion *supra* Part III.B (addressing contingent sovereignty in the context of massive human rights violations).

the principle that power must be exercised in accordance with law.”<sup>460</sup> Critics of unilateral action suggest that unauthorized intervention opens the door to noncompliance by other states, unsettles assumptions that states must comply with the prohibition against force, and diminishes U.N. primacy over the use of force.<sup>461</sup> Intervention, then, could quickly cause a downward spiral of conflict escalation and even more suffering.

This argument lacks intellectual integrity in at least two ways. First, the focus of traditionalists is on the actions taken by states to end atrocities, rather than on the perpetrators of genocide and crimes against humanity. By shifting the burden, states that would take legitimate action are called into question and must defend their atrocity response, while civilian slaughter continues and mass murderers receive at least a temporary free pass.

Second, concerns of noncompliance escalation are exaggerated and fundamentally misunderstand the nature and cause of armed conflict.<sup>462</sup> There is no evidence, empirical or otherwise, that interventions with the purpose of halting mass atrocities have led to an out-of-control spiral of conflict.<sup>463</sup> And even though intervention to prevent ongoing slaughter necessarily requires engaging the perpetrator state and likely its leadership,<sup>464</sup> this does not reflect a cascade of noncompliance. Rather it brings to an end the humanitarian noncompliance of the perpetrator state, might end an ongoing conflict, and, assuming the regime leadership is removed in the MARO, could prevent future conflicts by an otherwise aggressive state.

Finally, and most controversially, it is not conflict that is the greatest threat to humanity: it is atrocity crimes. Although aggressive wars throughout history have caused significant human suffering, this suffering is only a fraction of that endured by victims of genocide, crimes against humanity, widespread war crimes, and ethnic cleansing.<sup>465</sup> MARO is not aggression, although it will often take the form of an armed conflict. If we must prioritize the two, atrocity crimes are a greater threat than armed conflict<sup>466</sup> and must be stopped, with force if necessary.

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460. Jacob Katz Cogan, *Noncompliance and the International Rule of Law*, 31 *YALE J. INT'L L.* 189, 203 (2006).

461. *Id.* at 203.

462. See JOHN NORTON MOORE, *SOLVING THE WAR PUZZLE*, xx (2004) (stating that “[w]ars are not simply accidents,” and describing how aggressive war is a result of a combination of three underlying deficiencies—form of government, individual decision makers, and lack of deterrence).

463. Even where ECOWAS intervened in Liberia and later Sierra Leone, where there were initially positive results followed by ongoing slaughter in both cases, the culprit was not the underlying humanitarian effort, rather the capacity of those forces to bring the mass murders to an end. See *supra* notes 119-120 and accompanying text.

464. See Sewall, *supra* note 153, at 166; GENOCIDE REPORT, *supra* note 8, at 74.

465. See RUMMEL, *supra* note 19, at 1.

466. See *supra* Part I.A.; *supra* text accompanying note 19. Death tolls alone will not determine whether atrocity crimes or armed conflict are a greater threat to humanity. None-

Developing norms are fragile and must be applied with discipline in order to persuade others to embrace the norm and dispel criticism. States interested in advancing a norm of unilateral MARO must be sure that it is applied in limited circumstances and with clearly articulated threshold conditions. Following these conditions—discussed in detail below and applied to the situation in Syria—will overcome suggestions that intervention is for pretextual purposes and erodes the rule of law. As part of a principled effort to stop atrocity crimes once and for all, MARO is the world community's opportunity to finally make good on the unfulfilled promise of "never again."

#### IV. PROPOSED THRESHOLD FOR UNILATERAL ATROCITY RESPONSE OPERATIONS

Waiting for the United Nations to effectively respond to atrocity crimes is a failed strategy. Various proposals have been introduced to reform the United Nations and enable it to better respond to atrocities and aggression, yet none have proven successful.<sup>467</sup> As a result, states should endeavor to establish a new norm permitting action when the UNSC fails to exercise its duties, and, if necessary, back up MARO with forceful arguments on behalf of the humanitarian norm justifying the intervention.

That this approach conflicts with the U.N. Charter's provisions is not in doubt, and, as a result, must be advanced prudently. As such, the threshold conditions proposed below builds upon decades of efforts by governments, scholars, and expert committees seeking to develop methods to stop mass atrocities when the United Nations fails to act.<sup>468</sup> Based upon

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theless, the fact that several times as many civilians have been killed in atrocities as compared to war related casualties is compelling.

467. See Edward M. Kennedy, *International Humanitarian Assistance: Proposals for Action*, 12 VA. J. INT'L L. 299, 307 (1971-72); see also LEE FEINSTEIN, COUNCIL ON FOREIGN RELATIONS, *DARFUR AND BEYOND: WHAT IS NEEDED TO PREVENT MASS ATROCITIES* 22-23 (2007); FRANCK, *supra* note 352, at 155-62 (suggesting that the five permanent members of the UNSC agree not to use their veto in the event of humanitarian emergencies); WAXMAN, *supra* note 146, at 5 (citing Task Force on the U.N., *American Interests and UN Reform: Report of the Congressional Task Force on the United Nations*, U.S. INST. PEACE 28 (2005), [www.usip.org/files/file/usip\\_un\\_report.pdf](http://www.usip.org/files/file/usip_un_report.pdf) (suggesting creation of a U.N. rapid reaction force)); U.N. Secretary-General, *In Larger Freedom: Towards Development, Security and Human Rights for All*, U.N. Doc. A/59/2005, at 33 (Mar. 21, 2005) (urging consensus among U.N. members regarding standards for intervention).

468. See ICISS REPORT, *supra* note 104, at 32-37; Thomas M. Franck, *Interpretation and Change in the Law of Humanitarian Intervention*, in *HUMANITARIAN INTERVENTION: ETHICAL, LEGAL, AND POLITICAL DILEMMAS*, *supra* note 335, at 221-23; John Norton Moore, *Toward an Applied Theory for the Regulation of Intervention*, in *LAW AND CIVIL WAR IN THE MODERN WORLD* 24-25 (John Norton Moore ed., 1974); Reisman, *supra* note 233, at 195; Kuwali, *supra* note 224, at 30, 45; Lillich, *supra* note 226, at 347-51; Mohamed, *supra* note 106, at 1323-1324; V.P. Nanda, *The United States' Action in the 1965 Dominican Crisis: Impact on World Order—Part I*, 43 DENV. L.J. 439, 475 (1966); Scheffer, *supra* note 19, at 133; Michael L. Burton, Note, *Legalising the Sublegal: A Proposal for Codifying a Doctrine of Unilateral Humanitarian Intervention*, 85 GEO. L.J. 417, 427 (1996); Gareth Evans, *Speech to the UN General Assembly in New York, Implementing the Responsibility to Protect: The Need to Build on the 2005 Consensus* (July 23, 2009), <http://www.gevans.org/speeches>.

lessons from these works, the principle of necessity, and modern *jus ad bellum*, the six conditions for the responsible application of MARO are: (1) an objective threat assessment of atrocity crimes is conducted prior to intervention, (2) the intervention is necessary to prevent or halt the atrocities, (3) the scale and nature of the intervention is proportional to the threat to civilians, (4) intervening states have coordinated with regional actors and coalition partners, (5) the intervening states regularly update the United Nations of the situation, and (6) the intervening states conduct advanced planning for post-atrocity or *jus post bellum* contingency efforts prior to the intervention. The following Sections describe how these conditions—to be applied conjunctively—may be utilized.

### A. *Objective Threat of Atrocity Crimes*

Experts agree that an initial consideration before using force to prevent atrocity crimes is that the underlying atrocity be accurately assessed and found to be immediate and of sufficient magnitude.<sup>469</sup> This means that there must be an objectively measurable atrocity crime of a certain character and that it is presently occurring or will be committed imminently.

The magnitude of the human rights violation justifying intervention must be limited to the most serious offenses. The commonly recognized atrocity crimes—genocide, widespread war crimes, crimes against humanity, and ethnic cleansing—are the only appropriate crimes that would permit outside intervention.<sup>470</sup> These atrocities are well defined,<sup>471</sup> and limiting response actions to these crimes prevents the use of force for lesser or pretextual reasons.<sup>472</sup>

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469. See KOSOVO REPORT, *supra* note 125, at 192-95 (requiring “serious violations of human rights or international humanitarian law.”); THE DANISH INST. OF INT’L AFFAIRS, HUMANITARIAN INTERVENTION: LEGAL AND POLITICAL ASPECTS 192-93 (1999) (requiring only serious violations of human rights or international humanitarian law); Lillich, *supra* note 232, at 347-51 (including in his criteria for humanitarian intervention the immediacy of the human rights violation and the extent of the violation of human rights); Moore, *supra* note 468, at 24-25 (requiring an immediate threat of genocide or other widespread arbitrary deprivation of human life in violation of international law); Scheffer, *supra* note 19, at 133 (describing appropriate resort to force for R2P purposes, which must include an accurately identified atrocity of sufficient magnitude). Along the same lines, the U.K. requires that there be an overwhelming humanitarian catastrophe. See also U.N. Secretary-General, *Rep. of the Secretary-General to the Security Council on the Protection of Civilians in Armed Conflict*, 22, U.N. Doc. S/1999/957 (Sept. 8, 1999) [hereinafter *Protection of Civilians Report*] (considering the scope of the atrocity crime, including the number of people harmed and the nature of violations); ICISS REPORT, *supra* note 104, at 32-37, 53-55 (requiring just cause in the form of large scale ethnic cleansing or loss of life and the primary purpose of the intervening state is to stop or prevent the atrocity); Robin Cook, U.K. Foreign Sec’y, Guiding Humanitarian Intervention, Speech to the Am. Bar Ass’n, at 55 (July 19, 2000) [hereinafter *Secretary Cook Speech*], available at [www.parliament.uk/briefing-papers/rp08-56.pdf](http://www.parliament.uk/briefing-papers/rp08-56.pdf).

470. Kuwali, *supra* note 224, at 30; see MARO HANDBOOK, *supra* note 6, annex A, at 103.

471. See *supra* notes 414-420 and accompanying text.

472. For example, U.S. interventions in Grenada in 1983 and Panama in 1989-90 were based, in part, on the protection of democratic principles and the right of self-determination, and were widely criticized. THOMAS GEORGE WEISS, HUMANITARIAN INTERVENTION: IDEAS

The ability to measure the extent of atrocity crimes will be affected by the capacity of early warning mechanisms.<sup>473</sup> Some argue that the subjectivity of assessing grave circumstances undermines the implementation of an effective response strategy.<sup>474</sup> But modern technologies, along with well-tested observance and reporting mechanisms exercised by states, NGOs, and media outlets have mooted this argument. Working together, state governments and NGOs should be able to develop a coalition that aims to shed light on facts on the ground—the power of witness.<sup>475</sup>

Another approach worth considering, but by no means required, is an outside adjudicative body determining whether atrocity crimes are ongoing prior to the authorization of unilateral MARO. Prior to the French intervention in the Central African Republic in 1979, a Commission of Inquiry made up of five African countries determined that serious human rights violations had occurred.<sup>476</sup> Similar apolitical bodies, such as the African Court of Justice and Human Rights, the ICJ, or even a well respected NGO, could be used to determine whether the threshold for intervention has been met.<sup>477</sup> Even if the subsequent intervention violates articles 2(4) and 2(7) due to lack of U.N. support, it will gain legitimacy if an impartial international organization finds that atrocities are occurring.

### B. *Intervention Is Necessary*

Non-U.N. authorized MARO is deemed necessary when atrocity crimes are reasonably certain to occur or are presently occurring and the only way to safeguard civilians from slaughter is to use military force.<sup>478</sup> Several conditions must be met prior to satisfying the necessity prong of this threshold analysis, including that force be used as a last resort, the UNSC has failed to act or its action is deemed infeasible, and the threat is immediate requiring urgent action.

International order is governed by the principle that state disputes are to be settled peacefully.<sup>479</sup> This means that prior to using military force to respond to atrocity crimes other methods—diplomatic, economic, multi-

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IN ACTION 6 (2007) (citing ICISS REPORT, *supra* note 104). This demonstrates the need to limit unilateral MARO to only the most severe atrocity crimes, and does not include the overthrow of elected governments, environmental disasters, or even widespread human rights abuse, unless it results in a large-scale loss of life.

473. See GENOCIDE REPORT, *supra* note 8, at 24.

474. Kuwali, *supra* note 224, at 29; see also Franck & Rodley, *supra* note 44, at 275.

475. See *supra* note 422 and accompanying text.

476. MURPHY, *supra* note 47, at 107-08.

477. Kuwali, *supra* note 224, at 45.

478. ILC Report, *supra* note 336, art. 25 (allowing unlawful acts to be “justified” when they are necessary to safeguard an essential state or international interest. However, the wrongful act must be the only way to safeguard essential interests threatened by a grave and imminent peril). See also Franck, *supra* note 468, at 221-23 (discussing that force may be necessary for humanitarian intervention); Nanda, *supra* note 468, at 475 (suggesting that there be no other recourse prior to humanitarian intervention).

479. See U.N. Charter arts. 1(1), 2(3)-(4).

lateral—must be exhausted or deemed infeasible.<sup>480</sup> This preserves the integrity of state sovereignty, allowing domestic authorities the opportunity to gain control of an internal matter and meet their responsibilities as provided for in R2P.<sup>481</sup> But if the state proves unwilling or unable to prevent atrocities, either due to complicity in the crimes or lack of control, then the concept of contingent sovereignty applies, and intervention may be appropriate.

Additionally, all efforts must be made to secure UNSC authorization; only when the Council fails to act—or its action is deemed infeasible—should states take on unilateral MARO.<sup>482</sup> This reaffirms the UNSC's authority over the lawful use of force, but also recognizes that inaction by the Council does not mean civilians must be subject to slaughter. One commentator suggests that states invoke article 34 of the Charter, which calls for the UNSC to investigate a pending crisis and engage in prevention in a timely manner.<sup>483</sup> Additionally, regional organizations might take action under article 53, or the General Assembly could become involved.<sup>484</sup> If these bodies are successfully engaged, then the intervention can be kept within the broader purpose of the U.N. Charter—that the use of force be applied only in the collective interest of states. Even if not adhering to the black letter of the Charter, this approach is deferential to the rule of law.

Necessity also speaks to the immediacy of the threat. While the occurrence of an objective atrocity is an obvious trigger to intervention, the

480. ICISS REPORT, *supra* note 104, at 35-37 (requiring the exhaustion of nonmilitary options prior to military intervention to enforce R2P); Moore, *supra* note 468, at 24-25 (prescribing an exhaustion of diplomatic and other peaceful techniques for protecting the threatened rights to the extent possible and consistent with protection of the threatened rights); *see also Protection of Civilians Report*, *supra* note 469, at 22 (recommending that the exhaustion of peaceful efforts, and the inability of local authorities to enforce the law or their unwillingness and complicity, be considered).

481. According to the 2005 Summit Report: (1) the state in question has primary responsibility to protect its citizens; (2) the international community should improve capacity-building and assistance measures in states under pressure or risk, and (3) the international community must react decisively to crises when states fail to do so. *See Summit Report*, *supra* note 130, ¶¶138-39.

482. *See KOSOVO REPORT*, *supra* note 125, at 192-93 (discussing intervention only when the United Nations has failed to act); Franck, *supra* note 468, at 221-23; Moore, *supra* note 468, at 24-25 (describing intervention only upon the unavailability of effective action by an international agency, regional organization, or the United Nations); Secretary Cook Speech, *supra* note 469 (describing the preference to act under UNSC authority, but, if not feasible, then with a coalition of states). The following conditions were offered by Professor Jules Lobel: (1) whether the situation is condemned by the UNSC as a threat to peace under Chapter VII of the U.N. Charter, (2) whether the UNSC is paralyzed by a veto and the action is being taken by a regional organization that says it is “intervening to protect human rights,” (3) the UNSC is silent or refuses to condemn the intervention, and (4) peaceful options have been exhausted. Jules Lobel, *Benign Hegemony? Kosovo and Article 2(4) of the U.N. Charter*, 1 CHI. J. INT'L L. 19, 29-30 (2000) (pointing out that the weakness of this approach is the failure to determine who decides whether a situation meets these criteria and requires the use of force).

483. Kuwali, *supra* note 224, at 45-46.

484. ICISS REPORT, *supra* note 104, at 53-54.

threat of mass murder short of actual commission of atrocity crimes poses a greater challenge. In these cases, “anticipatory MARO” should mirror the Caroline test for anticipatory self-defense.<sup>485</sup> Under that test, intervention is justified in situations where the “necessity of self-defense [or, in this author’s opinion, atrocity response] is instant, overwhelming, and leaving no choice of means, and no moment for deliberation.”<sup>486</sup>

When early warning mechanisms are effective, it is possible to recognize the preparation phase of atrocity crimes, where groups are made to wear identifying symbols, death lists are made, victims are separated, segregation and starvation occur, weapons are stockpiled, and militia are trained.<sup>487</sup> It is at this stage that humanitarian supplies should be gathered and military forces should be organized, including advanced planning for MARO. So long as the atrocity is imminent, then military intervention should be authorized.

### C. Proportionate Response

The character and scope of MARO will be circumscribed by the human rights violation that instigated the action. The use of force, then, must be proportional to the underlying crisis, cause minimal harm to civilians, and, if possible, cause as little interference with state independence as possible.<sup>488</sup> As such, the proportionality of a MARO action must be viewed on a case-by-case basis depending on the nature of the underlying humanitarian crisis.

The use of force in *jus ad bellum* must be “necessary” (discussed above) and “proportional.”<sup>489</sup> Because we are contemplating unilateral

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485. Letter From Daniel Webster to Henry Stephen Fox (Apr. 24, 1841), in 1 THE PAPERS OF DANIEL WEBSTER: DIPLOMATIC PAPERS 58, 62 (Kenneth Earl Shewemaker ed., 1983) [hereinafter *Caroline Doctrine*]. This standard arose out of the Canadian rebellion of 1837, where British forces boarded a U.S. vessel—the *Caroline*—believed to be supporting rebel troops, set it on fire, and sent it over Niagara Falls. U.S. Secretary of State Daniel Webster objected, and the British agreed that the necessity giving rise to anticipatory self-defense must be “instant, overwhelming, and leaving no choice of means, and no moment for deliberation.” *Id.* at 67.

486. *Id.*

487. Stanton, *supra* note 55, at 24-27 (describing the telltale signs of atrocity preparation: the segregation of target populations, e.g. German Jews being required to wear distinctive symbols and removed from their homes to ghettos and camps; and the use of various media outlets—newspaper, radio, etc.—to propagate ethnic violence, e.g. RTLM radio in Rwanda). Samantha Power describes many of the preparatory acts taken by governments prior to carrying out atrocity crimes. POWER, *supra* note 38. These include compiling lists of targeted members of opposing ethnic groups as the Serbs did in Bosnia in 1992 and Hutu did in Rwanda in 1994. *Id.* at 249, 333. Targeted groups are also forced to leave their homes and cities, as evidenced in Cambodia in 1975 and as occurred with the Kurds in Iraq in 1982. *See id.* at 88, 177. Additionally, men and women of the targeted ethnic groups are separated, as witnessed in Srebrenica in 1995. *See id.* at 392.

488. *Cf.* Nanda, *supra* note 468, at 475 (urging limited duration and limited coercive measures).

489. *See* *Caroline Doctrine*, *supra* note 485. *See also* Steven R. Ratner, *Jus ad Bellum and Jus in Bello after September 11*, 96 AM. J. INT’L L. 905, 905 (2002).

MARO without U.N. authorization, the action must be “for the shortest possible period during the continuance of [the atrocity crimes], and strictly confined within the narrowest limits imposed by [these crimes].”<sup>490</sup> If the planned MARO will result in a disproportionate loss of civilian life, or risk escalating to a broader, deadlier conflict, then this element of the threshold analysis will not be satisfied.

Some scholars place an emphasis on a limited impact on existing authority structures in target states.<sup>491</sup> In an ideal situation, the political independence of the target state could remain intact. But many situations will require dissolution of the government, targeting regime elites who are complicit or directly involved in atrocity crimes, or making arrests for future prosecution.<sup>492</sup> The extent of the violation of the target state’s political independence will depend on how deep the nexus is between civilian slaughter and government leaders. Additionally, military planners may deem a mission infeasible if they are not able to incapacitate the target state’s defense infrastructure.

#### D. Regional and Coalition Coordination

Nearly all commentators agree that if the United Nations fails to act and states feel obliged to intervene to halt atrocity crimes, they should do so with a coalition of states.<sup>493</sup> This will generate a broader consensus and added legitimacy for the action. Moreover, working with a coalition signals that the intervention is for the right reasons and not purely out of an individual state’s self-interest.

Regional actors must be encouraged to act even when the United Nations has not authorized intervention, as in Liberia, Sierra Leone, and Kosovo. This is a second best to UNSC authorization. Five international organizations—the United Nations, EU, AU, ECOWAS, and NATO—have some capacity to engage in MARO.<sup>494</sup> The AU and ECOWAS operate with the broadest legal flexibility under the African Union Constitutive Act, but their forces need the most training, capacity building, and logistical support.<sup>495</sup> Conversely, NATO and the EU have demonstrated their capacity for atrocity response in Kosovo and the DRC respectively, but have traditional legal limits (for example, the UN Charter) on humanitarian intervention.<sup>496</sup>

Working with a coalition or in support of regional groups will alleviate some international concerns that the United States is acting out of imperialistic design. Domestically, it is critical for the United States to demon-

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490. ILC Report, *supra* note 336, art. 25 and accompanying commentary.

491. Moore, *supra* note 468, at 24-25.

492. See, e.g., MARO HANDBOOK, *supra* note 6 at 78-80.

493. KOSOVO REPORT, *supra* note 125, at 194-95; see also Secretary Cook Speech, *supra* note 469.

494. GENOCIDE REPORT, *supra* note 8, at 85.

495. *Id.* at 85-86.

496. *Id.* at 86.

strate that it is sharing the responsibility and cost for these actions. U.S. public opinion appears to oppose increased foreign intervention,<sup>497</sup> which most likely reflects domestic economic concerns and war fatigue following Iraq and during the draw down in Afghanistan. As such, responsibility sharing is also part of the administration's comprehensive atrocity prevention strategy.<sup>498</sup>

#### E. *Intervening States' Reports to the UNSC*

Any time states engage in non-U.N. authorized MARO, the United Nations (and any relevant regional organization) must be notified of the action at an early stage and updated throughout the course of the intervention. This is akin to the reporting requirement of states under article 51 self-defense measures. It will serve the purpose of promoting accountability of intervening states, and it will reinforce U.N. primacy in matters of international peace and security.<sup>499</sup> Furthermore, this will likely motivate the United Nations to issue statements or resolutions which provide guidance to intervening states, express condemnation or support of the action, inspire U.N. assistance, or other guiding instructions. In any case, intervening states are legally bound to comply with any relevant UNSC resolutions.<sup>500</sup>

#### F. *Intervening States' Jus Post Bellum Planning*

States engaging in MARO must have a contingency plan for *jus post bellum*—implementing the rule of law after the intervention has successfully halted the atrocity crime.<sup>501</sup> Measures to consider are humanitarian aid from government agencies, the United Nations, regional organizations, NGOs, or other nonmilitary agencies; the possible introduction of U.N. peacekeeping forces to prevent the outbreak of hostilities once the MARO is complete; truth and reconciliation measures; domestic or international criminal proceedings for perpetrators of atrocity crimes; and rule of law initiatives to develop a functioning political and legal system.

This element incorporates planning for a reasonable prospect of success.<sup>502</sup> If it appears impracticable to successfully halt the atrocity, or if doing so would result in a much larger, and more catastrophic armed conflict (for example, intervention in China), then this prong is not satisfied.

497. Fred Backus, Poll: Americans Against U.S. Intervention in Syria, N. Korea, CBS News (Apr. 30, 2013), [http://www.cbsnews.com/8301-250\\_162-57581989/poll-americans-against-u.s-intervention-in-syria-n-korea/](http://www.cbsnews.com/8301-250_162-57581989/poll-americans-against-u.s-intervention-in-syria-n-korea/); Public Wary of Military Intervention in Libya: Broad Concern that U.S. Military is Overcommitted (Mar. 14, 2011), <http://www.people-press.org/2011/03/14/public-wary-of-military-intervention-in-libya/>.

498. Presidential Directive, *supra* note 9.

499. *Protection of Civilians Report*, *supra* note 469, at 22 (requiring that the UNSC have the ability to monitor the response).

500. Moore, *supra* note 468, at 24-25.

501. See, e.g., Major Richard P. DiMeglio, *The Evolution of the Just War Tradition: Defining Jus Post Bellum*, 186 MIL. L. REV. 116 (2004).

502. ICISS REPORT, *supra* note 104, at 37.

In this sense, MARO that do not appear likely to succeed will probably fail the proportionality prong of this threshold analysis as well.

MARO action is necessarily narrowly tailored to bring an end to atrocity crimes.<sup>503</sup> Still, in the court of public opinion, which plays a large part in the viability of emerging norms, MARO success will not be measured in the short-term success of preventing or halting genocide or crimes against humanity. The value of these operations will depend on their long-term success at atrocity prevention and political stability.

Ultimately, the above six conditions must be applied as a whole. Adhering to these conditions should add conceptual clarity to states' response to mass atrocities, and will garner widespread support for an emerging norm; overcome criticism of unlawfulness and political pretext; enhance the likelihood of mission success; and limit the frequency and scope of interventions, thereby reinforcing the rule of law. These conditions purposefully omit one factor that appears frequently in the literature: the clean hands of the intervener.<sup>504</sup> This concept means that the intervening state should only act if it stands nothing to gain from the intervention. The author does not discount the risk of states acting out of self-interest. This is an historical inevitability, and something that persists today, as we see in the way states jealously guard traditional concepts of sovereignty. Instead, the above conditions implicitly limit selfish state acts by requiring interveners to act only when the humanitarian crisis is demonstrable, to seek U.N. authorization or other multilateral support, and to limit interference with the target state's political independence to the extent possible. Rather, the "clean hands" element was omitted to reflect the paradigm shift that started with R2P and continues with the development of MARO—that the prevention and response to atrocity crimes is in the interest of all nations.

### G. *MARO Threshold Applied to Syria*

The situation in Syria provides a timely and complex example of how the six threshold conditions can be applied to ongoing atrocities. The opportunity for swift intervention to prevent atrocities has long since passed. As this article went to print, there had not yet been overt intervention, yet thousands have perished both as a result of atrocity crimes and as casualties to a non-international armed conflict.<sup>505</sup> Nonetheless, as states learn of Syria's possible use of chemical weapons against its people and of preparations for future mass killings<sup>506</sup> there may be a greater impetus to intervene.

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503. See generally MARO HANDBOOK, *supra* note 6.

504. Franck, *supra* note 468, at 221-23; Lillich, *supra* note 226, at 347-51.

505. Turkey Claims Evidence of Syrian Chemical Weapons Use, BBC News (May 10, 2013), <http://www.bbc.co.uk/news/world-middle-east-22484115> (citing the total number of casualties at 70, 000 since March 2011, not discriminating between atrocity deaths and war fatalities).

506. *Id.*

The first condition, that there be objectively identifiable atrocity crimes, was established shortly after the Assad regime began its brutal crackdown on protesters and dissidents after the March 2011 uprising. In July 2011, Amnesty International cited possible crimes against humanity committed by Syria's armed forces during a security crackdown. Specifically, Amnesty cited civilian deaths while in custody, torture and arbitrary detention that occurred in May 2011 when the Syrian army and security forces took action in the town of Tell Kalakh.<sup>507</sup> The U.N. Human Rights Council issued a report in June 2011 condemning the human rights violations committed by Syrian forces.<sup>508</sup> The report relied on information from human rights organizations and refugees fleeing Syria. Later in 2012, increased access was available to both reporters and monitors, and the results were overwhelming. It was finally confirmed that Syria was committing atrocities against its civilian population.<sup>509</sup>

The situation on the ground is now somewhat more complex. The opposition is better organized and has allegedly committed crimes of its own.<sup>510</sup> As anticipated by MARO doctrine, multi-party dynamics in conflict situations should not deter an effective response. Lessons learned from the situation in Bosnia in the 1990s should remind leaders that, even when atrocities are allegedly committed by both sides in an internal armed conflict, there is no legitimate reason not to act to prevent further civilian slaughter.<sup>511</sup> The same holds true in Syria, where the initial failure to respond has permitted crimes against tens of thousands of civilians.<sup>512</sup>

Although the evidence against Assad's regime is now strong, in the early months of the popular uprising accurate reports of civilian deaths were tentative due to limited access by media and other observers inside Syria.<sup>513</sup> This highlights the urgency of early reporting mechanisms that utilize the latest technology and are shared between states, NGOs, and media outlets. This way the commission of atrocity crimes, like those in Syria, can be verified before the bodies begin piling up.

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507. AMNESTY INT'L, *CRACKDOWN IN SYRIA: TERROR IN TELL KALAKH*, (2011), available at [http://www.amnestyusa.org/sites/default/files/mde240292011en\\_2.pdf](http://www.amnestyusa.org/sites/default/files/mde240292011en_2.pdf).

508. U.N. Office of the High Comm'r on Human Rights [OHCHR], Preliminary report of the High Commissioner on the situation of human rights in the Syrian Arab Republic, U.N. Doc. A/HRC/17/CRP.1 (June 14, 2011).

509. See sources cited *supra* note 54.

510. Ian Black, *Syrian Rebels Accused of War Crimes*, THE GUARDIAN (Sept. 17, 2012), <http://www.guardian.co.uk/world/2012/sep/17/syrian-rebels-accused-war-crimes>.

511. POWER, *supra* note 38, at 284 (describing how the United States failed to take initial action in Bosnia in part out of concern that intervention would result in a Vietnam-like quagmire because atrocities were being committed by all sides).

512. See Azmat Khan, *Syria's Shocking Civilian Death Toll*, FRONTLINE (Sept. 14, 2012), <http://www.pbs.org/wgbh/pages/frontline/foreign-affairs-defense/battle-for-syria/syrias-shocking-civilian-death-toll/>.

513. Jennifer Preston, *Seeking to Disrupt Protestors, Syria Cracks Down on Social Media*, N.Y. TIMES (May 22, 2011), <http://www.nytimes.com/2011/05/23/world/middleeast/23facebook.html>.

Having determined that mass atrocities are being committed in Syria, the next step is to determine whether intervention is necessary. During the first year of the crisis, the necessity of intervention fluctuated as the world community discussed, but failed to implement, various response measures.

On the side of necessity, the inability of the UNSC to secure even economic sanctions against Syria<sup>514</sup> made it clear that there would be no U.N.-sponsored resolution to the atrocities. Moreover, the moment Kofi Annan's six-point peace plan failed to take hold in 2012,<sup>515</sup> it seemed that a diplomatic solution was unattainable and that peaceful measures had been exhausted. Expressing doubt about the success of diplomatic efforts, UN Secretary General, Ban Ki-moon, stated that, even though Kofi Annan's plan was still the best hope for peace, "persistent divisions" in the UN Security Council "have themselves become an obstacle to diplomacy, making the work of any mediator vastly more difficult."<sup>516</sup>

In spite of the apparent exhaustion of peaceful options, the immediate need for outside intervention is less certain today. What was once a lopsided government crackdown on civilians has transformed into a full-fledged non-international armed conflict.<sup>517</sup> That the status may have changed from government atrocities to a civil war does not, in and of itself, preclude the necessity of outside intervention. If the Syrian regime continues to engage in atrocities, whether against civilians or widespread war crimes against rebel forces, then the necessity condition is fulfilled. Similarly, the use of chemical weapons, if they have in fact been employed, represents a significant escalation in the Syrian regime's criminal activity. Such disregard for the laws of armed conflict and the well being of its civilian population necessitates intervention to prevent further slaughter.

Assuming that intervention is necessary, the next requirement is that the intervention be a proportionate response to ongoing atrocities. This means using whatever force is required to halt the war crimes and crimes against humanity being committed against dissidents, defectors, and political prisoners inside Syria. Today, this could include targeted strikes on Syria's defense infrastructure and the apprehension or temporary safe passage of President Assad. Already, numerous states have called for the removal of the embattled regime's president.<sup>518</sup>

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514. Neil MacFarquhar, *Russia and China Block U.N. Action on Crisis in Syria*, N.Y. TIMES (Feb. 4, 2012), [http://www.nytimes.com/2012/02/05/world/middleeast/syria-homs-death-toll-said-to-rise.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2012/02/05/world/middleeast/syria-homs-death-toll-said-to-rise.html?pagewanted=all&_r=0).

515. *But see Syria Crisis: Kofi Annan Quits as UN-Arab League Envoy*, BBC NEWS (Aug. 2, 2012), <http://www.bbc.co.uk/news/world-middle-east-19099676>.

516. *But see Syria Crisis: Kofi Annan Quits as UN-Arab League Envoy*, BBC NEWS (Aug. 2, 2012), <http://www.bbc.co.uk/news/world-middle-east-19099676>.

517. Ben Hubbard, *Syrian Rebels Seize Military Base, Munitions*, ASSOCIATED PRESS (Nov. 20, 2012) <http://bigstory.ap.org/article/britain-officially-recognizes-syrian-opposition>.

518. Reena Ninan, *Secretary Clinton Says Syrian President Assad 'Must Go'*, ABC NEWS (Apr. 1, 2012), <http://abcnews.go.com/Politics/secretary-hillary-clinton-syrian-president-assad/story?id=16049737#.ULRQTYVaOt8>. Richard Spencer, *Morsi Tells Iran That Syria's Assad Must Go*, TELEGRAPH (Aug. 30, 2012), <http://www.telegraph.co.uk/news/worldnews/middleeast/syria/9509248/Morsi-tells-Iran-that-Syrias-Assad-must-go.html>. *But*

In order to halt atrocities and oust Assad, states can rely on a wide range of tactics. As mentioned in Part I.D. above, disrupting supply lines, launching cyber network attacks, and protecting internally displaced persons may become necessary.<sup>519</sup> Various military strategies, ranging from securing limited areas with the intent of growing safe zones like “oil spots,” to attacking and defeating leaders, might be called for depending on the nature of the underlying atrocities.<sup>520</sup> As the severity of the crimes increase, so will the lawfulness of more intrusive and violent response measures.

With a proportional response in mind, the fourth condition urges, but does not require, that there be regional or coalition support for any MARO action. This is the only prong of the threshold analysis that is not mandatory but is nonetheless strongly advised in order to increase the legitimacy and support for the operation. Obvious allies in the movement to oust Assad and put an end to mass atrocities include Turkey,<sup>521</sup> which is experiencing the brunt of the refugee influx and the costs of the Syrian crisis; the Arab League, which has already called for Assad to step down<sup>522</sup> and assisted in observer missions; and the United States, which has been a vocal proponent at the UNSC of ending atrocities in Syria. Other Western and Arab states have demonstrated support for the opposition coalition and, as a result, might provide assistance in an intervention to halt ongoing crimes.

The fifth condition can be met if the intervening states provide regular status updates of the intervention to the UNSC. This requires keeping the UNSC abreast of new developments and adhering to possible limiting UNSC resolutions.

The sixth condition, *jus post bellum* planning, will require a significant degree of forethought regarding reconstructing the damage done during the intervention and the preceding atrocities, political reform to prevent the next Assad from grabbing unlimited power, and restitution to the victims of regime violence. Additionally, consideration must be given to regional and global effects of intervening in Syria. For example, were states to send forces into Damascus to oust Assad, this could possibly generate a reaction from Iran that escalates the conflict and further destabilizes the region.<sup>523</sup> A similar analysis must be done with regard to Russia and

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see Clinton: “Friends of Syria” Must Unite to Stop Russia, China “Blockading” Progress, CBS NEWS (July 6, 2012), [http://www.cbsnews.com/8301-202\\_162-57467452/clinton-friends-of-syria-must-unite-to-stop-russia-china-blockading-progress/](http://www.cbsnews.com/8301-202_162-57467452/clinton-friends-of-syria-must-unite-to-stop-russia-china-blockading-progress/).

519. GENOCIDE REPORT, *supra* note 8, at 84.

520. MARO HANDBOOK, *supra* note 6, at 20.

521. Jonathon Burch, *Turkey tells Syria's Assad: Step Down*, REUTERS (Nov. 22, 2011), <http://www.reuters.com/article/2011/11/22/us-syria-idUSL5E7MD0GZ20111122>.

522. *Syria's Bashar al-Assad Should Go, says Arab League*, BBC NEWS (July 23, 2012), <http://www.bbc.co.uk/news/world-middle-east-18950418>.

523. Bassem Mroue, *Iran Warns Against Attacking Syria*, ASSOCIATED PRESS (Jan. 26, 2013), [http://www.thestar.com/news/world/2013/01/26/iran\\_warns\\_against\\_attacking\\_syria.html](http://www.thestar.com/news/world/2013/01/26/iran_warns_against_attacking_syria.html). Recent air strikes by Israel have raised concerns of the conflict spilling over into the region. See Anne Barnard, *Syria Blames Israel for Fiery Attack in Damascus*, N.Y. Times

China, who have sided with Assad's regime. If pre-intervention planning indicates that Iran's threats are genuine, and that Russia would turn Syria into a proxy war with the United States, then one must consider whether post-conflict stability is attainable. This prong of the MARO threshold analysis cannot be met if it is determined that a certain degree of stability is not feasible following the intervention.

As this analysis demonstrates, the threshold for non-U.N. authorized intervention under MARO doctrine is not easily met. Quite the opposite is true. The complex situation in Syria shows that depending on the nature of the conflict and the actions, or in this case inaction, of the international community, the necessity of intervention may change over time. Currently, although the conflict can appropriately be categorized as a non-international armed conflict, Syria continues to disregard fundamental norms of humanitarian and human rights law. Under these circumstances, the threshold conditions for mass atrocity response operations have been met. Far from allowing intervention for self-serving purposes, a careful application of these threshold conditions will ensure that an emerging norm of non-U.N. authorized atrocity response is applied responsibly and effectively.

#### CONCLUSION

It is not clear that the law has evolved so much since the Charter was drafted to permit a unilateral right to intervene without U.N. authorization. Certainly the law has evolved with respect to antiquated notions of sovereignty and even the ICJ has revealed the extent to which states should take action to prevent genocide. Nonetheless, commentators and most states are unwilling to take the final step and allow military intervention when foreign civilians are at risk of large-scale slaughter. This must change.

This Article endeavors to urge action by decision makers to utilize whatever steps are necessary to prevent the next Cambodia or Rwanda. This includes diplomatic, economic, and multilateral measures to dissuade perpetrator states from committing mass atrocities. When these measures fail, however, states must work together (or alone if necessary) to respond to ongoing atrocities.

A principled application of the emerging MARO doctrine will highlight the feasibility of limited atrocity response, as well as garner support for a norm of protecting civilians through force. In order to address concerns that this approach will serve as pretext for imperialist conquests, states must engage in a discursive process that justifies unilateral MARO, places the burden on perpetrator states to protect civilians, and shames the inaction of others. Even while a customary or positive norm is developing, states will be on notice that sovereignty is now synonymous with responsibility.

If the international community has learned anything from a long history of civilian massacres, it should be that there has never been a consistently effective method to combat atrocity crimes. This is not an indictment of the legal regime intended to protect basic human rights, or even of multilateral institutions responsible for maintaining peace and security. Each has contributed significantly to world order, but each is limited in scope and enforceability. If governments choose to seek comfort in the status quo, the world will continue to fail to protect civilians from mass-murdering regimes.