Humanity & National Security: The Law of Mass Atrocity Response Operations

A Thesis Presented to The Judge Advocate General's School United States Army in partial satisfaction of the requirements for the Degree of Master of Laws (L.L.M.) in Military Law

The opinions and conclusions expressed herein are those of the author and do not necessarily represent the views of either The Judge Advocate General's School, the United States Army, the Department of Defense, or any other governmental agency.

BY MAJOR KEITH A. PETTY
JUDGE ADVOCATE GENERAL'S CORPS
UNITED STATES ARMY

60TH JUDGE ADVOCATE OFFICER GRADUATE COURSE
APRIL 2012

HUMANITY & NATIONAL SECURITY: THE LAW OF MASS ATROCITY RESPONSE OPERATIONS

MAJOR KEITH A. PETTY*

* Judge Advocate, United States Army. Presently assigned as Student, 60th Judge Advocate Officer Graduate Course, The Judge Advocate General's Legal Center and School, Charlottesville, Virginia. LL.M., 2008, Georgetown University Law Center; J.D., 2002, Case Western Reserve University, School of Law; B.A., 1999, Indiana University. Previous assignments include Command Judge Advocate, 5th Signal Command, Wiesbaden, Germany, 2009-2011; War Crimes Prosecutor, Office of Military Commissions, Office of the Chief Prosecutor, Washington, D.C., 2006-2009; Trial Counsel/Brigade Judge Advocate, 2nd Brigade Combat Team, 1st Cavalry Division, Fort Hood, Texas, 2005-2006; Command Judge Advocate, 2nd Brigade Combat Team, 1st Cavalry Division, Baghdad, Iraq, 2004-2005; Legal Assistance Attorney, 1st Cavalry Division, Fort Hood, Texas, 2003-2004. Served as a legal clerk at the International Criminal Tribunal for the Former Yugoslavia, Trial Chambers, 2002. Member of the bars of the State of Illinois and the Supreme Court of the United States. Previous publications include: *Professional Responsibility Compliance and National Security Attorneys: Adopting the Normative Framework of Ethical Legal Process*, ___ UTAH L. REV. ___ (forthcoming 2012); *Beyond the Court of Public Opinion: Military Commissions and the Reputational Pull of Compliance Theory*, 42 GEORGETOWN J. OF INT'L L. 303 (2011); *Criminalizing Force: Resolving the Threshold Question for the Crime of Aggression in the Context of Modern Conflict*, 33 SEATTLE U. L. REV. 105 (2009); *Who Watches the Watchmen? 'Vigilant Doorkeeping,' The Alien Tort Statute, And Possible Reform*, 31 LOYOLA L.A. INT'L & COMP. L. REV. 183 (2009); *Are You There, Geneva? It's Me, Guantánamo*, 42 CASE W. RES. J. INT'L L. 171 (2009); *Veiled Impunity: Iran's Use of Non-State Armed Groups*, 36 DENV. J. INT'L L. & POL'Y 191 (2008); *Sixty Years in the Making: The Definition of Aggression for the International Criminal Court*, 31 HASTINGS INT'L & COMP. L. REV. 531 (2008); A Teacher's Guide to Michael Scharf's Law of International Organizations (2003). This article was submitted in partial completion of the Master of Laws requirements of the 60th Judge Advocate Officer Graduate Course.

Abstract

The United States is currently developing a whole of government approach to prevent and respond to genocide and other atrocity crimes. Military intervention under the recently developed concept of Mass Atrocity Response Operations (MARO) will certainly be included as part of any planning contingency, following diplomatic, economic, and multilateral actions. The current state of international law, however, only permits the use of force, to prevent atrocity crimes or for any other reason, if authorized by the UN Security Council or in self-defense. When the UNSC fails to act—as it has so often in the past—any MARO action taken by a State or group of States without a self-defense justification will be highly contentious and likely unlawful. As a result, political paralysis ensues and mass atrocities continue apace.

This article argues that individual States or groups of States must have the authority to intervene to halt atrocity crimes, even without UNSC approval. Initially, the historical State-centric legal regime, including the UN framework, has proven incapable of effectively dealing with widespread human rights violations. As a result, the international community is embarking on a civilian centric approach, including the concept of Responsibility to Protect (R2P), which has contributed to the erosion of State sovereignty and, as a result, fostered the legitimacy—if not legality—of unilateral action. In order to overcome legal obstacles to protecting civilians from slaughter, U.S. decision-makers must take the lead in developing norms that will effectively halt ongoing atrocities through a discursive process at the international and domestic level, and, if necessary, through transgression of existing law. Besides outlining steps to develop a positive or customary legal norm, this article prescribes a principled threshold for MARO application, which will lead to greater international acceptance of this strategy and, ultimately, the effective arrest of ongoing atrocities.

Table of Contents

At the point when you decide to punish, you have already failed. [1]

I. 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 or Rwandan Tutsis in 1994, mass murderers acted with impunity when there was 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, or the NATO intervention in Kosovo in 1999 that protected ethnic Albanians from Serb brutality. Even though atrocities like these have been the hallmark of oppressive regimes throughout recorded history, they continue today in part as a result of the uncertain legality of the use of force to respond to these crimes. Strict interpretation of State sovereignty and the UN'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.

A new strategy, led by the United States, is emerging to respond to atrocity crimes. The doctrine of Mass Atrocity Response Operations (MARO) is developing as a result of several high-level reports and strategic publications highlighting the urgent need for more effective

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

measures.[2] Further support came on August 4, 2011, when President Barack Obama issued a presidential directive to create an interagency "Atrocities Prevention Board."[3] This interagency body is tasked with coordinating a "whole of government approach" to preventing mass atrocities. Of the many possible actions that can be taken to prevent atrocity crimes, military action—non-combat 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 UN Charter's prohibition on the use of force, and traditional notions of State sovereignty. The remaining obstacle is the law.

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 UN, States, NGOs, the public, and 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 the need to develop a new normative standard. This discourse must include persuading States that atrocity prevention and response is a global and State priority, and that intervention will be used in a principled, accountable manner in adherence with the rule of law.

---

[2] *See* MADELEINE K. ALBRIGHT & WILLIAM S. COHEN, PREVENTING GENOCIDE: A BLUEPRINT FOR U.S. POLICYMAKERS (2008) [hereinafter GENOCIDE REPORT]; MASS ATROCITY RESPONSE OPERATIONS: A MILITARY PLANNING HANDBOOK (2010) [hereinafter MARO HANDBOOK].

[3] OFFICE OF THE PRESS SECRETARY, OFFICE OF THE PRESIDENT, PRESIDENTIAL STUDY DIRECTIVE ON MASS ATROCITIES, PSD-10 (2011), *available at* http://www.whitehouse.gov/the-press-office/2011/08/04/presidential-study-directive-mass-atrocities [hereinafter PRESIDENTIAL DIRECTIVE].

Second, during the interpretive phase of a positive norm, the United States—working with other like-minded States—should response 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 norm—even when violating the UN Charter's provisions. Genocidal regimes do not wait for an effective international legal framework, and neither should those who seek to prevent another Holocaust.

Pre-existing barriers to developing a norm of this nature are breaking down. The pillar of world order—State sovereignty—has been eroded since the drafting of the UN Charter. A robust human rights framework makes individuals, not just States, proper subjects of international law. 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. This concept, adopted by every State at the 2005 World Summit, suggests that sovereignty is now contingent on a State's ability to protect its civilians from these crimes.

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.[4] But when the diplomatic, economic, and multilateral options prove insufficient, there must be a framework for the use of force when a State or group of States applies MARO doctrine. Therefore, this article proposes six threshold criteria for the application of MARO: (1) An objective threat of atrocity crimes, (2) intervention is a necessary last resort, (3) the intervention is proportionate to the underlying atrocity, (4) regional and coalition partners are involved, (5) the UN is updated regularly, and

[4] GENOCIDE REPORT, *supra* note 2, at 73.

(6) intervening States prepare for *jus post bellum* contingencies. Applying these six criteria will contribute to the responsible development of atrocity response without UN authorization and persuade uncertain States that intervention should not only be legitimate, 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 policy-makers and military personnel when planning atrocity prevention and response measures. Part II 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 III, revealing an overly restrictive interpretation of the UN Charter's general prohibition on the use of force, antiquated political notions of sovereignty, and non-legal considerations such as moral justifications that must be taken into account. Part IV 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 V proposes and analyzes six threshold criteria that clearly define the parameters of unilateral MARO and appropriately limit the scope of intervention based on legal, moral, and political considerations.

II. History of Mass Atrocities and 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 UN 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."[5] Today, the world community is at odds over prevention and response strategies, ranging from bilateral diplomacy, multilateral efforts at the United Nations, humanitarian intervention, or the application of the concept Responsibility to Protect (R2P). This section 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 genocide, including the development of U.S. Mass Atrocity Response Operations (MARO) doctrine.

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

Slaughtering civilians was considered business as usual for regime elites and conquering armies many centuries before there was a name for these crimes.[6] In order to comprehend

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

[6] For the purposes of this article, I make reference interchangeably to mass murder, civilian slaughter, and massacre. These descriptive terms are best captured by what is currently referred to as "atrocity crimes" or "mass atrocities," which means 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. *See* MARO HANDBOOK, *supra* note 2, annex A, at 103. Professor David Scheffer cites five characteristics of atrocity crimes, which are: (1) the crime must be of significant magnitude ("substantiality test"), (2) the crime may be international, non-international, and occur in time of war or peace, (3) it must be identifiable as genocide, war crimes, crimes against humanity, or ethnic cleansing, (4) the crime must have been led by a ruling or otherwise powerful elite in society, and (5) individuals may 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).

these gruesome acts, it is helpful to first appreciate 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.[7] In fact, the number of victims of government murder greatly exceeds the numbers of war related deaths.[8] 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.[9] This is less than one-third of the estimated 133,147,000 civilians killed at the hands of governments.[10] But numbers alone are not sufficient to properly understand the nature of these acts.[11]

Whether it was the Hebrews of the Old Testament,[12] ancient Assyrians,[13] or the Roman Empire,[14] mass murder was common practice throughout history and was often part of the

---

Atrocity crimes do not cover combat fatalities or even civilian casualties directly related to combat operations, ie., collateral damage. Other terms previously used to define offenses committed by governments against civilians include politicide ("the murder of any person or people by a government because of their politics or for political purposes"), mass murder ("the indiscriminate killing of any person or people by a government"), and democide ("the murder of any person or people by a government, including genocide, politicide, and mass murder"). R.J. RUMMEL, DEATH BY GOVERNMENT 31 (1994).

[7] Trials of the Major War Criminals (France v. Goering), 19 IMT 562 (July 29, 1946) (closing remarks of French prosecutor, Champetier de Ribes, recognizing genocide as the "greatest crime of all").

[8] RUMMEL, *supra* note 6, tbl.1.6, at 15. 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, can also commit atrocity crimes in numerous territories.

[9] *Id*. tbl.3.1, at 70 (1994) (noting that this number is likely inflated due to concurrent civilian slaughter not related to combat).

[10] *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).

[11] 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, *Deterring Mass Atrocity Crimes: The Cause of Our Era*, *in* MASS ATROCITY CRIMES: PREVENTING FUTURE OUTRAGES 1, 22 n.2 (Robert I. Rotberg, ed., 2010).

[12] 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, and *Numbers* 31:7-18. *See also* ADAM JONES, GENOCIDE: A COMPREHENSIVE INTRODUCTION 5 (2006).

strategy of conquerors.[15] In the Common Era, Christian crusaders[16] and the Mongol Khans[17] contributed to the suffering of millions. But atrocities were not limited to combat and conquest.[18] European settlers of the Americas[19] as well as five centuries of the African slave trade caused the death of millions.[20]

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, exceeded 170,000,000 . This is four times the number of war-related casualties

---

[13] Among the most infamously bloody of the ancient regimes were the Assyrians, whose Soldiers were awarded for every severed head brought in from the field, "whether enemy fighters or not." RUMMEL, *supra* note 6, at 45-46. *See also* JONES, *supra* note 12, at 5.

[14] 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 12, at 5.

[15] 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 197, ¶¶ 63-70, bk. 6 (transl. Robert Fagles, 1990).

[16] Some estimate that when Christian crusaders sacked Jerusalem in 1099, some 40,000 to 70,000 inhabitants were butchered. RUMMEL, *supra* note 6, at 47.

[17] 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.

[18] *Id*. at 46.

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

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

in the same period and greater than the estimated total of mass murders from all previous centuries.[21]

The Armenian genocide by the Young Turk Government prior to the First World War was one of the first genocides of the twentieth century,[22] and is noteworthy for several reasons. Not only does modern day Turkey deny that this atrocity occurred,[23] but genocidal regimes after this massacre would use it as an example of impunity.[24] To make matters worse, the world community knew of the Armenian genocide while it was occurring and failed to act.[25] This sort of willful blindness is just one part of the cycle of atrocity crimes—a dismaying pattern of inaction that persists today.[26] Moreover, this inaction was encouraged

---

[21] Rummel estimates that 169,198,000 civilians were murdered by governments in the twentieth century through 1987. *Id*. at 1. This, of course, does not account for those murdered after 1987, including: Serbia's attempted ethnic cleansing of 200,000 in Bosnia and Kosovo, Charles Taylor's atrocities in Sierra Leone and Liberia resulting in 1.3 million murdered, over 800,000 Rwandan Tutsi eliminated by Hutu, Saddam Hussein's bloody retaliation against the Kurds and Marsh Arabs, perhaps 5 million killed in the Congo, approximately 300,000 murdered in Darfur. Rotberg, *supra* note 11, at 1.

[22] The Young Turk Government attempted to exterminate every Armenian in the country, and nearly succeeded by massacring 1.9 out of 2 million Turkish Armenians. RUMMEL, *supra* note 6, at 209.

[23] *French Genocide Bill Angers Turkey*, BBCNEWS.COM, December 20, 2011, *available at* http://www.bbc.co.uk/news/world-europe-16261816.

[24] 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": AMERICA AND THE AGE OF GENOCIDE 23 (2002) (citing an August 22, 1939 meeting with military chiefs in Obersalzburg). 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.

[25] 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 24, at 2, 5. U.S. Ambassador to Turkey, Henry Morganthau, Sr. sent a cable to Washington describing how Turkish authorities engaged in "rape, pillage, and murder, turning into massacre, to bring destruction [to the Armenians]." *Id*. at 6.

[26] Samantha Power decries U.S. inaction in the following passage:

> Time and again the U.S. government would be reluctant to cast aside 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

by common views of sovereignty at the time. Then Secretary of State Robert Lansing said of the Turkish atrocities, "The essence of sovereignty [is] the absence of responsibility."[27] As discussed in more detail below, remnants of this logic remain an impediment to atrocity prevention efforts today.[28]

The atrocities that followed are a tale of unmitigated human suffering. The worst of the genocidal States were the Soviet Union (62 million victims from 1917-1987), communist China (35 million victims from 1949-1987), Nazi Germany (21 million victims from 1933-1945), and Chiang Kai-Shek's nationalist China (10 million victims from 1928-1949).[29] Following these mass murders were several cases in the 1970s: 1.5 million Bengali civilians slaughtered by Pakistan forces in 1971,[30] 2 million Cambodians massacred by the Khmer

---

> 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.

[27] GARY JONATHAN BASS, STAY THE HAND OF VENGEANCE: THE POLITICS OF WAR CRIMES TRIBUNALS 125-29 (2001). *See also* POWER, *supra* note 24, at 14.

[28] See discussion regarding State sovereignty, *infra* Part III.C.

[29] RUMMEL, *supra* note 6, tbl.1.2, at 4. 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*. In light of these experiences, it is striking that some scholars cling to outdated and dangerous notions of strict State sovereignty. *See generally* Saira Mohamed, *Restructuring the Debate on Unauthorized Humanitarian Intervention*, 88 N.C. L. REV. 1275 (2010) (defending the sovereign equality of all States and refuting the legality of responding forcefully to atrocity crimes without UN authorization).

[30] In 1971, India intervened in East Bengal, Pakistan (now Bangladesh), putting a halt to the slaughter of 1.5 million Bengali civilians by the Pakistan government. RUMMEL, *supra* note 6, at 315-16; Don Hubert, *The Responsibility to Protect: Preventing and Halting Crimes Against Humanity*, *in* MASS ATROCITY CRIMES: PREVENTING FUTURE OUTRAGES 89, 90 (Robert I. Rotberg, ed., 2010); Thomas M. Franck & Nigel S. Rodley, *After Bangladesh: The Law of Humanitarian Intervention by Military Force*, 67 AM. J. INT'L L. 275 (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* UN Doc. S/PV.1606, Dec. 4, 1971, and 1608, and 1611.

Rouge from 1975-78,[31] and Idi Amin's murder of 300,000 Ugandans in 1979.[32] 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,[33] Liberia and Sierra Leone,[34] Bosnia and Kosovo,[35] and Rwanda.[36]

Today, in spite of reports indicating that genocide is on the decline,[37] there is little reason for hope in light of ongoing atrocities in the Congo (some 5 million killed),[38] Darfur (some

[31] 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 11, at 1; RUMMEL, *supra* note 6, at 159-61; Hubert, *supra* note 30, at 90. 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.

[32] Following Idi Amin's murderous rampage of 300,000 of his fellow Ugandans, Tanzania intervened in 1979 to remove him from power. Hubert, *supra* note 30, at 90; RUMMEL, *supra* note 6, at 94.

[33] Shortly after the 1991 Gulf War, Saddam Hussein's brutal treatment of Iraqi Kurds and the oppressive crackdown of a Shia uprsising, 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, 65 (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).

[34] 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 11, at 1.

[35] Serbian atrocities claimed the lives of 200,000 Bosnians and Kosovo Albanians. *Id*.

[36] 800,000 Rwandan Tutsi were slaughtered in a genocide by the ethnic majority Hutu. *Id*.

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

[38] Rotberg, *supra* note 11, at 1.

300,000 killed),[39] and in Syria (currently over 8,000 killed),[40] just to name a few. That these situations are occurring in the twenty-first century are a clear indication 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 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 agree-upon theory that sufficiently explains the key catalysts, motivations, or mechanisms that lead to them."[41] Nonetheless, atrocity crimes in a temporal context can be viewed in three overlapping stages. 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 UN

[39] *Id*.

[40] As of March 2012, UN officials estimate that more than 8,000 Syrian civilians have been killed since the government crackdown began in March 2011. *Russia Says It's Ready to Support Annan's Efforts in Syria*, CNN, Mar. 21, 2012, *available at* http://www.cnn.com/2012/03/21/world/meast/syria-unrest/index.html?hpt=hp_bn5.

[41] GENOCIDE REPORT, *supra* note 2, at xxii. *But see* Dr. Gregory Stanton, Genocide Watch, Eight Stages of Genocide (2007) (PowerPoint Presentation) (on file with author) (describing the common stages of genocide and how they might inform prevention and response measures).

Charter, the concept of State sovereignty served as a shield for barbaric acts within a State.[42] During this time, even though most theological and political traditions prohibited war-time atrocities,[43] civilians were murdered at alarming rates during times of war and peace.[44] 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.[45] Lemkin, outraged that sovereignty could mean "the right to kill millions of innocent people,"[46] worked tirelessly until the Genocide Convention became law in 1948.[47] The sovereignty shield was losing its luster, and States now had a responsibility to prevent or punish Genocide.[48]

In 1945, the United Nations was established in order to "save succeeding generations from the scourge of war."[49] In furtherance of conflict prevention, the UN 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

[42] MURPHY, *supra* note 33, at 42.

[43] Rotberg, *supra* note 11, at 2. For a detailed discussion of ancient traditions, see MURPHY, *supra* note 33, at 35-42.

[44] *See* discussion *supra* Part II.A.

[45] RAPAEL LEMKIN, AXIS RULE IN 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 24, 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).

[46] POWER, *supra* note 24, at 19.

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

[48] *Id*. art. I.

[49] U.N. Charter pmbl.

widely understood to extend to internal human rights violations and atrocity crimes.[50] Despite this authority, States failed early on to take advantage of the UN's atrocity response capabilities, which set a precedent for practice today.

For example, the UNSC has rarely authorized a Chapter VII action against a State targeting its own citizens.[51] In fact, the UN has never relied upon Article 42, which permits the Security Council to utilize armed forces to maintain peace and security.[52] In order to give effect to this provision, Article 43 of the Charter envisioned a standing UN security force that could be deployed to crisis situations.[53] 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 UN has never exercised its Article 42 authority,[54] and as a result one of the UN's most promising tools remains dormant.

Additionally, the entire UN 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

[50] *See* SUSAN BREAU, HUMANITARIAN INTERVENTION: THE UNITED NATIONS & COLLECTIVE RESPONSIBILITY 238 (2005). The UN authorization for intervention in Rhodesia in 1966 marked the first time the UNSC treated an internal human rights situation as a "threat to the peace" and would pave 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 UN involvement under article 2(7) of the Charter. MURPHY, *supra* note 33, 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, para. 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).

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

[52] U.N. Charter art. 42.

[53] *Id*. art. 43.

[54] YORAM DINSTEIN, WAR, AGGRESSION, AND SELF-DEFENSE 304-07 (4th ed. 2005).

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.[55]

In spite of these deficiencies in Charter implementation, the International Court of Justice (ICJ) noted, "It cannot be said that the Charter has left the Security Council impotent in the face of an emergency situation when agreements under Article 43 have not been concluded."[56] Still, other UN enforcement measures, ranging from sanctions to peacekeeping forces,[57] are not demonstrably more effective at protecting civilians.[58] Failed peacekeeping missions in places like Somalia, Bosnia, and Rwanda are often used to illustrate the shortcomings of the UN to effectively respond to complex crisis situations.[59]

---

[55] W. Michael Reisman, Editorial Comment, *Coercion and Self-Determination: Construing Charter Article 2(4)*, 78 AM. J. INT'L L. 642 (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).

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

[57] 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. DINSTEIN, *supra* note 54, at 300-04. Many of these relate to situations of atrocity crimes, but did not prove to significantly reduce the threat of further atrocities.

[58] Although peacekeeping missions attempted to protect civilians during the mid-1990s, the UNSC first recognized the authority to take action to protect civilians in 1999. S.C. Res. 1265, U.N. Doc. S/RES/1265 (Sep. 17, 1999). The UN first authorized a peacekeeping mission for the express purpose of protection of civilians in Sierra Leone in 1999. S.C. Res. 1270, U.N. Doc. S/RES/1270 (Oct. 22, 1999). According to one study, the UN and experts "continue to struggle with what it means for a peacekeeping operation to protect civilians, in theory and practice." VICTORIA HOLT, GLYN TAYLOR, & MAX KELLY, PROTECTING CIVILIANS IN THE CONTEXT OF UN PEACEKEEPING OPERATIONS: SUCCESSES, SETBACKS, AND REMAINING CHALLENGES 18 (2009).

[59] *See* John Norton Moore, *Introduction to the Reprint Edition, in* LAW AND CIVIL WAR IN THE MODERN WORLD, at vii, x (Moore, ed., 1974) (discussing the failure of Belgium, the United States, France and others to support an effective UN effort to stop the Rwandan genocide). *See also* HOLT & TAYLOR, *supra* note 58, at 2-3 (analyzing deficiencies in the ability of UN 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 Srebenica report urged that atrocity crimes "must be met decisively with all necessary means," and criticized the "pervasive ambivalence within the [UN] 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.

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.[60] This necessarily means that peacekeeping missions are not oriented to halting atrocity crimes, rather to facilitate a political resolution to ongoing conflicts—a separate and distinct goal.[61] 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.[62]

The Charter paradigm was never intended to regulate State conduct vis-à-vis civilians, but rather State disputes and interactions. The responsibility of States to individuals is governed by three overlapping, but distinct disciplines: International humanitarian law (IHL/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

---

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." Report of the Independent Inquiry into the Actions of the U.N. During the 1994 Genocide in Rwanda, U.N. Doc. S/1999/1257 (Dec. 16, 1999).

[60] *See* Advisory Opinion on Certain Expenses of the United Nations, *supra* note 56, at 170, 177.

[61] GENOCIDE REPORT, *supra* note 2, at 76. Additionally, UN 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 structure, 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*.

[62] *Id*.

series of effective preventive measures is still a work very much in progress, and tentative in its advances."[63]

The laws of armed conflict have 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.[64] Following the Second World War, the Geneva Conventions of 1949 were implemented to guarantee humane treatment of combatants who are shipwrecked, sick, wounded, or otherwise out of the fight, in addition to prisoners of war and civilians.[65] While this body of law has had a tremendous impact on State behavior during armed conflict,[66] there is no 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

[63] Rotberg, *supra* note 11, at 3.

[64] U.S. DEP'T OF WAR, GENERAL ORDERS NO. 100, INSTRUCTIONS FOR THE GOVERNMENT OF ARMIES OF THE UNITED STATES IN THE FIELD (24 Apr. 1863), *available at* http://avalon.law.yale.edu/19th_century/lieber.asp (commonly referred to as the Lieber Code); 1899 Hague Convention (II) with Respect to the Laws and Customs of War on Land with Annex of Regulations, July 29, 1899, 32 Stat. 1803, 1 Bevans 247. *See also* Convention Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, 1 Bevans 631; Convention Relative to the Treatment of Prisoners of War, July 27, 1929, 47 Stat. 2021, 118 L.N.T.S. 343.

[65] Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, August 12, 1949, 75 U.N.T.S. 31; Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, August 12, 1949, 75 U.N.T.S. 85; Geneva Convention (III) Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, August 12, 1949, 75 U.N.T.S. 287. 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) Relative to the Treatment of Prisoners of War, art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135. 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. Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 1125 U.N.T.S. 3 (June 8, 1977); Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 1125 U.N.T.S. 609 (June 8, 1977).

[66] *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 (2010) (concluding that respect for the law of armed conflict is institutionalized and reflected by the legal advice given by U.S. judge advocates).

international humanitarian law, 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.[67] In fact, human rights are embedded in the UN Charter, which had as its three primary purposes to maintain peace and security, protect State sovereignty, and respect human rights.[68] 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.[69] 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.[70] Similar to the laws of war, 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.[71]

International criminal law (ICL) emerged after the Second World War when the axis leaders in Germany and Japan most responsible for policies of aggression, crimes against

---

[67] 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).

[68] U.N. Charter pmbl.

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

[70] International Covenant on Civil and Political Rights, G.A. Res. 2200, U.N. GAOR Res., (No. 2200A), entered into force Mar. 23, 1976; International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200A, U.N. GAOR Supp. No. 16 (Vol. XXI), UN Doc. A/6316 (1966), 993 U.N.T.S. 3; 6 I.L.M. 368 (1967).

[71] *See generally* HUMAN RIGHTS, *supra* note 67, at 439, 617 (discussing State and regional measures to enforce human rights violations respectively, including the European Court of Human Rights). Human rights non-governmental organizations, however, have been instrumental in bringing awareness to violations and in norm development. *See* POWER, *supra* note 24, at 72; GENOCIDE REPORT, *supra* note 2, at ix.

humanity and war crimes were prosecuted at the Nuremburg and Tokyo Tribunals.[72] 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 shocked the world into action, and led to the creation of two ad hoc tribunals—the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR). The failure to prevent the massacres in Bosnia and Rwanda caused the UN to recognize that its obligations to protect civilians "superseded existing principles of peacekeeping and non-interference."[73] 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, and was activated in 2002[74] with the jurisdiction to prosecute four crimes: genocide, war crimes, crimes against humanity, and the recently defined crime of aggression.[75]

Today, ICL is the preferred method to respond to atrocity crimes, even though "[t]he debate rages over the deterrent value of punishment."[76] Courts cannot prevent atrocities, since they punish crimes after the fact. [77] The existence of international tribunals had little

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

[73] Rotberg, *supra* note 11, at 8.

[74] GENOCIDE REPORT, *supra* note 2, at 100-02 (describing the role of ICL at the ICTY, ICTR, ICC).

[75] Rome Statute of the International Criminal Court arts. 5-8, July 17, 1998, 37 I.L.M. 999.

[76] Reisman, *supra* note 50, at 58.

[77] *Id*. at 59 (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?").

impact on atrocities in Kosovo, Darfur, Congo, Uganda, Libya, and now Syria.[78] 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.[79]

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."[80] Former international prosecutors suggest that it is too early to tell whether the ICC and ad hoc tribunals have had a clear impact on preventing atrocity crimes.[81] Richard Goldstone, former ICTY Chief Prosecutor, senses that the loss of impunity through the ICC and the vigilance of special courts has created "moderation" of at least the language of tyrants. The presence of war crimes tribunals, he suggests, is in the minds of political and military leaders as they carry out operations.[82]

---

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

[79] GENOCIDE REPORT, *supra* note 2, at 103.

[80] *Id*. at 103. *See also* KATHRYN SIKKINK, THE JUSTICE CASCADE: HOW HUMAN RIGHTS PROSECUTIONS ARE CHANGING WORLD POLITICS 26 (2011) (arguing that ICL has had a deterrent effect); Richard J. Goldstone, *The Role of the International Criminal Court, in* MASS ATROCITY CRIMES, PREVENTING FUTURE OUTRAGES 55 (Robert I Rotberg, ed. 2010) (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).

[81] Rotberg, *supra* note 11, 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).

[82] Goldstone, *supra* note 80, at 61-62. States also have a role in prosecuting atrocity crimes. Under the doctrine of complimentarity, domestic resolution of atrocity crimes is preferred, but international tribunals (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 80, at 5 (describing the trend in holding leaders accountable in international and domestic courts). In the United States, domestic laws with 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.

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 UN 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 Congo.[83]

C. Modern Developments in Atrocity Prevention and Response

Where the legal regime has proven insufficient, States have been required to go it alone. When Serbia threatened to wipe out the ethnic Albanian population in Kosovo in 1999, NATO intervened without UN 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 Responsibility to Protect (R2P).[84] This sub-section discusses the origins and application of both humanitarian intervention and R2P and how they have contributed to atrocity prevention and response.

1. Humanitarian Intervention

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

[83] Reisman, *supra* note 50, at 62.

[84] REPORT OF THE INTERNATIONAL COMMISSION ON INTERVENTION AND STATE SOVEREIGNTY, THE RESPONSIBILITY TO PROTECT (Dec. 2001) [hereinafter ICISS REPORT].

target state from large-scale human rights abuses,"[85] is legally controversial.[86] 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.[87]

While the debate over the legality of a State to intervene to protect another States' citizens is long-standing,[88] the promulgation of the UN Charter in 1945 all but put this debate to rest. The Charter mandates that the use of armed force is only authorized in cases of self-defense and when mandated by the UNSC.[89] Because the UNSC was incapable of reaching

[85] Mohamed, *supra* note 29, at 1277. Mohamed's definition is limited to non-UN sanctioned interventions, which is the focus of this Article. His 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 33, at 11-12.

[86] H. Wheaton has been credited as the first scholar who attempted to draft a legal framework for humanitarian intervention. *See* E. STOWELL, INTERVENTION IN INTERNATIONAL LAW 461-540 (1921) (citing H. WHEATON, ELEMENTS OF INTERNATIONAL LAW 91 (1836)).

[87] Mohamed, *supra* note 29, at 1281.

[88] 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 30, at 90; 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); MURPHY, *supra* note 33, 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); M. GANJI, INTERNATIONAL PROTECTION OF HUMAN RIGHTS 22-24, 33-37 (1962) (detailing the demands of Austria, France, Italy, and Prussia, and Russia on the Ottoman Empire (1866-68) for action to better 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)).

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 33, at 60-62.

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 33, 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).

[89] U.N. Charter arts. 2(4), 51.

consensus during this time on the proper use of force to address threats to the peace,[90] States and regional organizations were left to fend for themselves. Even though several interventions legitimately halted widespread human rights violations, a mistrust of great power politics[91] 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.[92] First, in 1971 India invaded East Pakistan (now Bangladesh) in response to a brutal crackdown by East Pakistani authorities on secessionists that resulted in hundreds of thousands killed and millions of refugees.[93] Vietnam's invasion of Cambodia to oust the genocidal Khmer Rouge in 1978 again raised the issue.[94] Tanzania's intervention into Uganda to remove Idi Amin in 1979 underscored the prominence of this practice.[95] And

---

[90] MURPHY, *supra* note 33, at 143.

[91] 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 33, at 87-97 (describing the Soviet invasions of Hungary in 1956 and Czechoslovakia in 1968; the Belgian and U.S. intervention in the Congo in 1964, and the U.S. intervention in the Dominican Republic in 1965).

[92]Following the crisis in Pakistan, some attempted to establish a new international legal standard. *See* INTERNATIONAL LAW ASSOCIATION, THE INTERNATIONAL PROTECTION OF HUMAN RIGHTS BY GENERAL INTERNATIONAL LAW: THE THIRD INTERIM REPORT OF THE SUBCOMMITTEE ON THE INTERNATIONAL PROTECTION OF HUMAN RIGHTS (1974); Hubert, *supra* note 30, at 90. *But see* MURPHY, *supra* note 33, at 143-44 (describing that the international community was widely critical of unilateral interventions during this period).

[93] Hubert, *supra* note 30, at 90; MURPHY, *supra* note 33, at 97-100 (arguing that India likely believed partitioning Pakistan would serve its national interests, even though they argued before the UN 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 v. human rights benefits—will not always come out in favor of human rights, based on the international response largely condemning India's intervention). *Id*.

[94] MURPHY, *supra* note 33, at 102 (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 30, at 90.

[95] Hubert, *supra* note 30, at 90; MURPHY, *supra* note 33, at 105-07 (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.").

even though the legal justification in each of these cases was self-defense, the humanitarian results are self-evident. Contrast these interventions with France's bloodless coup in the Central African Republic in 1979 that was based on humanitarian grounds.[96]

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. This regional action was only later "endorsed" by the UNSC in 1992.[97] ECOWAS also intervened to halt atrocities in Sierra Leone in 1997 and only received UNSC approval months later.[98] Similarly, the U.S.-led coalition to enforce the Iraq no-fly zones was not pre-authorized by the UNSC.[99] 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.[100] Numerous scholars cited the intervention as unlawful,[101] in addition to some leaders outright condemning the

[96] MURPHY, *supra* note 33, at 107.

[97] S.C. Res. 788, U.N. Doc. S/RES/788 (Nov. 19, 1992) (determined that the situation in Liberia constituted a threat to international peace and security and provided authorization for the ECOMOG force under Chapter VII). *See* MARC WELLER, REGIONAL PEACEKEEPING AND INTERNATIONAL ENFORCEMENT: THE LIBERIAN CRISIS (1994); Anthony Chukwuka Ofodile, *The Legality of ECOWAS Intervention in Liberia*, 32 COLUM. J. TRANSNAT'L L. 381-418 (1994); Hubert, *supra* note 30, at 91.

[98] S.C. Res. 1132, U.N. Doc. S/RES/1132, (Oct. 8,1997) (providing explicit authorization for ECOMOG under Chapter VII). *See* Akintunde Kabir Otubu, *Collective Intervention in International Law: ECOMOG/Sierra Leone in Retrospect* (2009), *available at* http://dx.doi.org/10.2139/ssrn.1140203; Hubert, *supra* note 30, at 91.

[99] *See* discussion *supra* note 33.

[100] Hubert, *supra* note 30, at 92.

[101] Antonio Cassese stated that the "resort to armed force was justified . . . . [but] contrary to current international law." Antonio Cassesse, Ex iniuria ius oritur: *Are We Moving Towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?*, 10 EUR. J. INT'L L. 25 (1999); Bruno Simma, *Nato, the UN, and the Use of Force: Legal Aspects*, 10 EUR. J. INT'L L. 1 (1999); Jonathan Charney, *Anticipatory Humanitarian Intervention in Kosovo*, 93 AM. J. INT'L L. 834 (1999); John J. Merriam, *Kosovo*

military action.[102] An independent commission into the NATO intervention famously concluded that the mission was unlawful but "legitimate."[103]

Efforts to articulate a new doctrine of humanitarian intervention were met with skepticism and ultimately failed due to concerns for State sovereignty.[104] As a result, then Secretary-General Kofi Anan 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?"[105] 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 the Responsibility to Protect (R2P) is a direct response to twentieth century "failures of individual States to live up to their most basic and compelling responsibilities, as well as the collective inadequacies of international institutions" to combat

---

and the Law of Humanitarian Intervention, 33 CASE W. RES. J. INT'L L. 111 (2001); Hubert, *supra* note 30, at 92.

[102] 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).

[103] THE KOSOVO REPORT: INDEPENDENT INTERNATIONAL COMMISSION ON KOSOVO (2000).

[104] U.N. GAOR, 54th Sess, 8th and 9th plen. mtgs., U.N. Doc. A/54/PV.8 and PV.9, 1999 (Sep. 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 111 (Robert I. Rotberg, ed., 2010).

[105] U.N. Secretary General, *Two Concepts of Sovereignty: Address to the Fifty-Fourth Session of the General Assembly*, U.N. Doc. SG/SM/7136 (Sept. 20, 1999).

the world's worst crimes.[106] 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.[107] According to the ICISS Report, R2P is a two-tiered concept. First, States are responsible for the protection of their civilian populations, specifically to prevent them from being subject to atrocity crimes.[108] Second, if a State fails to protect its population then its sovereignty gives way to the international community's responsibility to prevent civilian slaughter.[109] Intending to set a standard with greater weight than the controversial "right" of humanitarian intervention,[110] the ICISS report established a high threshold for intervention, set parameters for the decision to use force,[111] and urged the UNSC to act first before States take action on their own.[112]

---

[106] U.N. Secretary-General, *Report of the Secretary-General to U.N. General Assembly on Implementing the Responsibility to Protect*, ¶ 5, U.N. Doc. A/63/667 (Jan. 12, 2009). For a detailed discussion of the development of R2P, see GARETH EVANS, THE RESPONSIBILITY TO PROTECT: ENDING MASS ATROCITY CRIMES ONCE AND FOR ALL 38-54 (2008); Luck, *supra* note 104.

[107] ICISS REPORT, *supra* note 84.

[108] *Id*. at para. 138, providing:

> 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.

[109] Hubert, *supra* note 30, at 93. *See also* FRANCIS DENG ET. AL., SOVEREIGNTY AS RESPONSIBILITY: CONFLICT MANAGEMENT IN AFRICA (1996).

[110] Rotberg, *supra* note 12, at 11.

[111] 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 82, at 32. These threshold criteria for the use of force to halt atrocities were instructive to the criteria established in this article in Part V *infra*.

[112] Hubert, *supra* note 30, 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 "nonindifference" to unfolding atrocities, compared to the failed African League's policy of "nonintervention." *See* GENOCIDE REPORT, *supra* note 2, at 98.

In spite of mixed initial reactions to the ICISS Report,[113] R2P became a priority in light of atrocities in the Democratic Republic of Congo and genocide in Darfur.[114] 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.[115] 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.[116]

Under this UN model, R2P relies on three-pillars. First, States are responsible to protect their civilians. Second, States should work together on a preventive strategy involving development, human rights, governance, peace-building, rule of law, security sector reform efforts, and two types of consent-based military action.[117] It is the third pillar, the use of a

[113] The initial reaction to the ICISS report ranged from apathy to strong opposition. 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. Hubert, *supra* note 30, at 93. For a more detailed discussion regarding the concern of pretext with regard to intervention to halt atrocity crimes, see Part IV.D *infra*.

[114] Hubert, *supra* note 30, at 94 n.31.

[115] GA Res. 60/1, U.N. Doc. A/RES/60/1 (Oct. 24, 2005) [hereinafter Summit Report].

[116] *Id*. art. 139.

[117] Luck, *supra* note 104, at 116-17. These 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.

wide range of options—including the use of force under Chapter VII—that has drawn the most attention and concern.[118]

In its current form, R2P does little to change pre-existing norms or the ability of States to intervene absent UN authorization.[119] Best understood as an "important tool for moral suasion,"[120] R2P can have an impact on government policy toward atrocity crimes and should motivate States to enforce widely accepted standards.[121] Perhaps the two most significant breakthroughs of R2P are the shift in focus from intervening States to perpetrator States,[122] and a dedication to early warning and capacity building to protect populations from slaughter.[123]

In this early, developmental stage of R2P it is difficult to tell whether it will prove to be effective in practice.[124] So far, the early test-cases have failed to bring genocidaires to account. Beginning in 2003, the widespread attacks against civilians in Darfur by Sudan-backed forces met the threshold of R2P. Still, the African Union (AU) force that deployed in

[118] *Id*. at 117.

[119] GA Res. 60/1, U.N. Doc. A/RES/60/1 (Oct. 24, 2005).

[120] GENOCIDE REPORT, *supra* note 2, at 98.

[121] Luck, *supra* note 104, at 109.

[122] For further discussion on the shift in focus to perpetrator States, see Part III.B *infra*.

[123] MATTHEW C. WAXMAN, COUNCIL OF FOREIGN RELATIONS, INTERVENTION TO STOP GENOCIDE AND MASS ATROCITIES 11 (2009).

[124] Institutionally, the UN 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 104, at 124; GENOCIDE REPORT, *supra* note 2, at 99. Additionally, the 2010 US National Security Strategy includes language that mirrors the concept of R2P, suggesting greater acceptance. *See* 2010 NATIONAL SECURITY STRATEGY OF THE UNITED STATES 48.

2004, followed by a UN-AU hybrid operation in 2007, failed to prevent the deaths of hundreds of thousands and the displacement of millions.[125]

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."[126] This failure is compounded by proponents of R2P that want to keep the discussion on the "safe" terrain of non-military prevention methods. While mass atrocities require a full spectrum of responses, ranging from diplomacy, economic sanctions, and multilateral efforts, military measures must be on the table if peaceful measures fail to stop the next genocide.[127] 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.

---

[125] Hubert, *supra* note 30, 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, *available at* http://www.sudantribune.com/spip.php?article25544. Sudan just so happens to be a key oil supplier to China. Hubert, *supra* note 30, 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 again, China was responsible for blocking the UNSC from even issuing a Presidential Statement condemning Sudan's non-cooperation. Rotberg, *supra* note 12, at 7 (stating that Russia and China will often block UNSC actions, worrying that UN 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).

[126] Claire Applegarth & Andrew Block, *Acting Against Atrocities: A Strategy for Supporters of R2P*, *in* MASS ATROCITY CRIMES: PREVENTING FUTURE OUTRAGES 128 (Robert I. Rotberg ed., 2010).

[127] 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 159, 172 (Robert I. Rotberg ed., 2010).

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).[128] 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 respond to genocide and mass atrocities."[129] This passage is significant because it moves away from a strict non-kinetic, preventive strategy that many leaders, R2P advocates, and scholars endorse.[130] Rather it recognizes that when peaceful preventive efforts fail, the United States can and must use whatever means necessary to respond to the threat of atrocity crimes—and not necessarily with UN support. This sub-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.[131] Although the United States has not yet included atrocity response

---

[128] *See* PRESIDENTIAL DIRECTIVE, *supra* note 3. 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).

[129] 2010 NATIONAL SECURITY STRATEGY, *supra* note 124, at 48. *See also* U.S. DEPT. OF DEFENSE, QUADRENNIAL DEFENSE REVIEW, at vi (2010) (providing, "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."); Sen. Con. Res. 71, 111th Cong. (2010) (calling for the United States to engage in a "whole of government" and "strategic effort to prevent mass atrocities and genocide").

[130] *See* Ian Hurd, *Is Humanitarin Intervention Legal? The Rule of Law in an Incoherent World*, 25 ETHICS & INT'L AFF. 1, 20 (2011) (stating that "much of the formal support for [R2P] . . . is for the relatively easy case of intervention approved by the Security Council.").

[131] Rotberg, *supra* note 11, at 16.

operations in military doctrine,[132] recent efforts indicate there is reason to be optimistic. In addition to independent studies, such as the 2008 Genocide Prevention Task Force Report[133] and the 2010 Mass Atrocity Response Operations Handbook (MARO Handbook),[134] President Obama has convened the full spectrum of U.S. national security actors, including the Department of Defense, the Department of State, the National Security Council, and the Office of the Director of National Intelligence, among many others, to develop a whole of government approach to prevent and respond to mass atrocities.[135] Proposals by the Genocide Prevention Task Force, the MARO Handbook, as well as leading scholars highlight issue areas that should be included in the Presidential working group's final report.

1. Full spectrum approach

Mass murders, as opposed to the often instantaneous nature of individual murders, take time, communication, and organization to accomplish (absent, of course, the use of weapons of mass destruction). This means that they are absolutely preventable.[136] States have numerous tools at their disposal to react to pending or ongoing atrocities, only one of which

[132] 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 127, 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 30, at 100.

[133] GENOCIDE REPORT, *supra* note 2.

[134] MARO HANDBOOK, *supra* note 2.

[135] Presidential Directive, *supra* note 3. 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 (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 (2008).

[136] Reisman, *supra* note 50, at 59.

is the use of military force.[137] 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.[138]

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.[139] Besides leadership, the Task Force identified five initiatives that should be implemented for an effective prevention strategy, including: (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.[140]

2. Military Preparedness

Many of the options and considerations discussed by the Task Force are focused on policy shaping, capacity building, institutional development, and non-kinetic engagement of world leaders and organizations to act 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

---

[137] 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 2, at 4.

[138] MAPRO HANDBOOK, *supra* note 128. Also, for a detailed discussion of the proposed threshold for using force to prevent or respond to mass atrocities when the UN fails to act, see Part V *infra*.

[139] GENOCIDE REPORT, *supra* note 2, at 1-16.

[140] *Id*. at xvii-xviii.

complement to successful preventive diplomacy."[141] 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 provides, "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."[142] 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.[143]

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."[144] In fact, the Genocide Task Force specifically recommended that the "secretary of defense and US military leaders should develop military

[141] *Id*. at 69.

[142] 2006 NATIONAL SECURITY STRATEGY OF THE UNITED STATES 17 (emphasis added).

[143] 2010 NATIONAL SECURITY STRATEGY, *supra* note 124. 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 2, at xxiii.

[144] Thomas Weiss & Don Hubert, *Conduct and Capacity*, *in* THE RESPONSIBILITY TO PROTECT: RESEARCH BIBLIOGRAPHY AND BACKGROUND 177-206 (Thomas Weiss & Don Hubert eds., 2001); VICTORIA HOLT, THE IMPOSSIBLE MANDATE: MILITARY PREPAREDNESS, THE RESPONSIBILITY TO PROTECT AND MODERN PEACE OPERATIONS (2006); Hubert, *supra* note 30, at 100.

guidance on genocide prevention and response and incorporate it into Department of Defense (and interagency) policies, plans, doctrine, training, and lessons learned."[145]

Mass Atrocity Response Operations (MARO) 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.[146] Although the nature of these operations will resemble international armed conflicts or contingency operations, MARO have many distinguishing characteristics.[147] For example, MARO success is measured in terms of protecting civilians, not necessarily by vanquishing an enemy force. Regime change, enforcing agreements, and supporting peacetime humanitarian operations might be follow-on aspects of these missions, but are not the military objective in a MARO.[148] 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."[149] Initially, there can be no illusion that intervening to protect a civilian population will be seen as hostility toward the perpetrator.[150] There can be no impartiality in mass atrocity situations, even if the underlying goal is to protect a neutral norm—human rights.

---

[145] GENOCIDE REPORT, *supra* note 2, at 87.

[146] MARO policy deals only with military operations, which is a subset of MAPRO policy dealing with 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. MARO HANDBOOK, *supra* note 2.

[147] GENOCIDE REPORT, *supra* note 2, at 76.

[148] Sewall, *supra* note 127, at 166.

[149] MARO HANDBOOK, *supra* note 2, at 7.

[150] GENOCIDE REPORT, *supra* note 2, at 74.

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.[151] But the Unites States, which has traditionally prepared for State against State international armed conflicts, is now cognizant and prepared for multiparty dynamics, at least as it relates to counterinsurgency operations and combating non-State actors.[152] Second, the response of the victims can often confuse the matter. Whether they 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.[153] As a result of the uncertainty of the various actors in a mass atrocity situation, the intelligence community will need to tailor its intelligence gathering to the actors and cultures involved.[154]

Finally, there is a potential of escalation of violence. As stated in the MARO Handbook, "mass killing of civilians can potentially intensify and expand very quickly once it begins."[155] Also, victims might use the interveners as a shield to exact vengeance, or outside

[151] Sewall, *supra* note 127, at 167.

[152] *Id*.

[153] POWER, *supra* note 24, at 284.

[154] Sewall, *supra* note 127, at 167.

[155] MARO HANDBOOK, *supra* note 2, at 18. See, for example, the rapid pace of slaughter in the Rwandan genocide, which lasted only 100 days and resulted in approximately 800,000 murdered. See POWER, *supra* note 24, at 329-89. In contrast, other situations are more sporadic, as in the varying degrees of intensity of the Darfur

parties, including neighboring States, might seize the chaos of conflict to side with either the perpetrating State or the intervening State. 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.[156] Unlike a traditional conflict, enemy gains (such as seizing territory) cannot be undone in a mass atrocity situation. In MARO 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."[157]

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.[158] If atrocities have begun, methods such as disrupting supply lines, launching cyber network

---

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 127, at 170.

[156] 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 so that leaders can shape a pre-existing 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 non-military 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, (8) Engaging political leaders for guidance on key issues such as identifying perpetrators and determining the scope of operations.[156] MARO HANDBOOK, *supra* note 2, at 18-19.

[157] *Id*. at 33.

[158] GENOCIDE REPORT, *supra* note 2, at 23.

attacks against communications and military infrastructure, and protecting internally displaced persons will prove useful.[159] 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."[160]

Depending on the success of FDOs, the MARO Handbook lists several tactics that could be employed individually or jointly in a comprehensive intervention to protect the civilian population from mass killings. MARO forces could: (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/air support—to coalition partners, host nation, or victim groups, (6) contain perpetrators with blockades or no-fly zones, and (7) attack and defeat the perpetrators leaders and/or capabilities.[161]

The Department of Defense must take relevant doctrine and training and specifically tailor these aspects of mission readiness to an atrocity 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.[162] Additionally, advance

---

[159] *Id*. at 84.

[160] MARO HANDBOOK, *supra* note 2, at 20.

[161] *Id*.

[162] The 2010 Quadrennial Defense Review provides:

planning for MARO will permit the United States to offer proper support in atrocity situations to international and regional organizations—UN, NATO, EU, AU, ECOWAS—who currently "rely on doctrine, training, guidance, and scenarios developed by western nations such as the United States."[163]

Developing MARO doctrine will not cause an undue burden on DoD assets. While mission accomplishment is measured differently, U.S. armed forces are uniquely situated to handle these diverse tasks. The pre-existing 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, non-combatant evacuations, counterinsurgency, detainee operations, no-fly zones, protected enclaves, and separation of forces.[164] Peace and stability operations are already a core mission of U.S. armed forces and will have significant overlap with the

---

> Not all contingencies will require the involvement of U.S. military forces, but the 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*."

2010 QUADRENNIAL DEFENSE REVIEW, *supra* note 129, at 15 (emphasis added). *See also* GENOCIDE REPORT, *supra* note 2, at 75.

[163] GENOCIDE REPORT, *supra* note 2, at 78. 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 124. 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 respectively by Australia, ECOWAS, and the AU, although with an aim at stability not MARO. GENOCIDE REPORT, *supra* note 2, at 84.

[164] Sewall, *supra* note 127, at 167 (citing Stanley A. McChrystal, Universal Joint Task List CJCSM 3500.04E (Washington, D.C., 2008), *available at* www.dtic.mil/doctrine.jel/cjcsd/cjcsm/m350004c.pdf). *See also* GENOCIDE REPORT, *supra* note 2, at 79.

underlying MARO mission.[165] Even without specific mention of atrocity response, these and other MARO-relevant training and tactics are already on the books.[166] To make matters even easier, the MARO Handbook offers a user friendly planning model using a typical mission analysis outline,[167] lines of effort (LOEs) common to interagency, international and military planning,[168] and a model for phase of operations which conforms to the doctrinal phasing construct.[169]

The Presidential Directive working group is currently reviewing a whole of government approach to atrocity prevention and response operations. This alone is a significant step, and because of the comprehensive nature of the study there is reason to believe the recommendations of the Genocide Task Force will be fully implemented.[170] Once the

---

[165] U.S. DEP'T OF DEF. DIR. 3000.05, MILITARY SUPPORT FOR STABILITY, SECURITY, TRANSITION, AND RECONSTRUCTION OPERATIONS (28 Nov. 2005); U.S. DEP'T OF ARMY, FIELD MANUAL 3-07, STABILITY OPERATIONS (6 Oct. 2008); GENOCIDE REPORT, *supra* note 2, at 79-80.

[166] *See* JOINT CHIEFS OF STAFF, JOINT PUB 3-0, DOCTRINE FOR JOINT OPERATIONS (11 Aug. 2011); U.S. Dep't of ARMY, FIELD MANUAL 3-0, OPERATIONS (27 Feb. 2008); UNIVERSAL JOINT TASK LIST (2006), and ARMY UNIVERSAL JOINT TASK LIST (2008). Even without referencing genocide prevention, these publications include many tasks that would be utilized in prevention and response operations. GENOCIDE REPORT, *supra* note 2, at 80.

[167] MARO HANDBOOK, supra note 2, at 42.

[168] *Id*. at 20-21 (listing LOEs 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).

[169] *Id*. at 21. The suggested phase of operations for MARO is: 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.

[170] 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 States 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 UN, AU or other peace operation to prevent

domestic, inter-agency lines of effort are sorted out, one challenge remains to full implementation of MARO doctrine. As discussed in the next Section, 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 effective atrocity response measures.

III. The Legality of Atrocity Response When the UN Fails to Act

At the 2005 World Summit, every world leader agreed that States have an affirmative responsibility to protect civilians from slaughter.[171] 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.[172] 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.[173] When the discussion turns to military intervention, however, there is little consensus on the lawfulness of using force to prevent atrocity crimes absent UN authorization. The Genocide Task Force Report and the MARO Handbook recognized that military force will be necessary to prevent or respond to mass killings in some situations, but neither tackled the more difficult question of the legality of this practice when the UNSC fails to act. This Section critically illustrates the history of humanitarian intervention as it developed parallel to *jus ad bellum*, and concludes that a

---

atrocities, and (5) the Departments of State and Defense should enhance US and UN capacity to support long term post-conflict stability operations after genocidal violence. GENOCIDE REPORT, *supra* note 2, at 87-92.

[171] Summit Report, *supra* note 115.

[172] *UN Chief to Syria's al-Assad: 'Stop Killing Your People'*, CNN, *available at* http://www.cnn.com/2012/01/15/world/meast/syria-unrest/index.html?hpt=hp_t3.

[173] PRESIDENTIAL DIRECTIVE, *supra* note 3.

traditional interpretation of the UN 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, particularly the focus on State responsibility under R2P, and the emergence of the human rights legal regime must inform the legal analysis when deciding whether to use force in response to atrocity crimes when the UN 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 UN 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 authorizing 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.[174] 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—

[174] MURPHY, *supra* note 33, at 33. The Just-War tradition of Saint Thomas Aquinas is often cited as evidence of the natural legal justifications for using force. *See* DR. C.A. POMPE, AGGRESSIVE WAR: AN INTERNATIONAL CRIME 106 (The Hague, Martinus Nijhoff 1953); ANTHONY CLARK & ROBERT J. BECK, INTERNATIONAL LAW AND THE USE OF FORCE: BEYOND THE UN CHARTER PARADIGM 11-16 (Routledge 1993); IAN BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES 5 (Oxford University Press, 1993). Murphy explains that the 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 33, at 35-36.

determined whether the use of force was lawful.[175] In the twentieth century, customary law[176] and treaty law[177] became the exclusive sources of law governing armed conflict.[178] A norm of non-intervention emerged.[179]

The use of force to prevent tyrants from slaughtering their people has a long history.[180] 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."[181] 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.[182]

---

[175] *See, e.g.*, THE CHARTER OF THE UNITED NATIONS: A COMMENTARY, vol. 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).

[176] Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, 100 (June 27) (noting that Article 2(4) of the Charter reflects customary law).

[177] Treaty Between the United States and Other Powers Providing for the 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].

[178] MURPHY, *supra* note 33, at 34.

[179] 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." The Covenant of the League of Nations 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 175, at 115. *See also* Kellogg-Briand Pact, *supra* note 177 (prohibiting aggressive war).

[180] The concept of humanitarian intervention, however, only arose in the scholarship of the twentieth century. MURPHY, *supra* note 33, at 34.

[181] Aristotle, The Politics bk. 7, ch. 2, at 396-97 (T. Sinclair trans., T. Saunders ed., Penguin, London, rev. ed. 1992). *See also* MURPHY, *supra* note 33, at 38.

[182] MURPHY, *supra* note 33, at 40.

The concept of State sovereignty arose following the Peace of Westphalia in 1648 and significantly limited the right of leaders to intervene to protect foreigners.[183] Sovereignty at this time meant that rulers could govern their internal affairs in any way they deemed appropriate without outside interference.[184] But even during this time, tensions emerged between those who viewed using force to prevent widespread suffering as a "right vested in humanity"[185] and those who advocated non-intervention in order to protect State sovereignty and maintain the balance of powers among nations.[186]

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 . . . ."[187] The

---

[183] Some suggest that State sovereignty has been a major impediment to effective enforcement of human rights law. *Id*. at 42. For a detailed discussion of the role of sovereignty in atrocity prevention and response, see Part III.B *infra*.

[184] *Id*.

[185] 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 (Carnegie Classics of Int'l Law 1925) (F. Kelsey, trans.) (1646)), and (citing 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., Carnegie 1916) (1758) (finding that the sovereign right to rule at all costs was limited and could result in lawful outside intervention by foreign powers)).

[186] Non-intervention would become the norm, as described in the writings of Emmanuel Kant and John Stuart Mill. *See* I. KANT, PERPETUAL PEACE (Columbia U. Press, new York 1939) (1795); J. Mill, *A Few Words on Non-Intervention* (1859), *reprinted in* ESSAYS ON POLITICS AND CULTURE 368 (G. Himmelfarb ed., 1962). *See also* MURPHY, *supra* note 33, at 46.

[187] MURPHY, *supra* note 33, at 35. *See also* Ian Brownlie, *International Law and the Use of Force by States' Revisited*, 1 CHINESE J. INT'L L. 1-19 (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

creation of the United Nations, and lessons learned from the failed League of Nations, forever altered the legal framework governing the use of force.

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

The UN 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.[188] Article 2(4) prohibits States from using force against other States,[189] and is widely regarded as *jus cogens*—a peremptory norm that is binding on all States.[190] When read in conjunction with article 2(7)[191]—prohibiting the UN from interfering in States' domestic matters—the prohibition against the use of force to protect foreign civilians is quite broad.

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

[188] *See generally* STEPHEN C. SCHLESSINGER, ACT OF CREATION: THE FOUNDING OF THE UNITED NATIONS (2003) (describing the political and legal circumstances surrounding the drafting of the UN Charter at the San Francisco Conference in 1945).

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

[190] DINSTEIN, *supra* note 54, at 99-102 (discussing authorities that consider the prohibition on the use of force a peremptory norm). *See also* Mohamed, *supra* note 29, at 1283.

[191] UN Charter, article 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.

The Charter provides two explicit exceptions to the general prohibition on the use of force. First, the UN 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."[192] The second type of authorized force is individual or collective self-defense pursuant to Article 51.[193]

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.[194] The following sub-sections 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 UN Member States, and (c) whether pre-existing or emerging custom has changed the normative character of the Charter.[195] After undergoing this analysis, if the Charter's terms remain ambiguous or lead to a "manifestly absurd or

---

[192] U.N. Charter arts. 39, 42, 43. The UNSC has stated that human rights violations may be treated as threats to the peace and egregious violations treated as "breaches" of the peace. Dan Kuwali, *Old Crimes, New Paradigms: Preventing Mass Atrocity Crimes*, *in* MASS ATROCITY CRIMES: PREVENTING FUTURE OUTRAGES 26 (Robert I. Rotberg, ed., 2010) (citing the UN 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.

[193] U.N. Charter art. 51 (providing, "Nothing 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 to maintain international peace and security.").

[194] 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 (1958); Richard B. Lillich, *Forcible Self-Help by States to Protect Human Rights*, 53 IOWA L. REV. 325 (1967). *See also* Myres S. McDougal & W. Michael Reisman, *Rhodesia and the United Nations: The Lawfulness of International Concern*, 62 AM. J. INT'L L. 1 (1968), and HUMANITARIAN INTERVENTION AND THE UNITED NATIONS 167 (Reisman & McDougal eds., 1973). *But see* Ian Brownlie, *Humanitarian Intervention*, *in* LAW AND CIVIL WAR IN THE MODERN WORLD 217 (John Norton Moore, ed., 1974) (arguing that intervention is unlawful absent UN authorization).

[195] 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.

unreasonable" result, then supplementary interpretive materials—such as the preparatory work of the treaty and the circumstances of its conclusion—may be utilized.[196]

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.[197] Under this view, unilateral intervention in response to atrocity crimes is a *prima facie* violation of Article 2(4).[198] In support of this position, traditionalists point to the drafting history of the Charter to demonstrate that the language "territorial integrity or political independence" was added to strengthen the prohibition against non-UNSC authorized force, not to limit its application.[199]

---

[196] *Id*. art. 32.

[197] 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 BROWNLIE, INTERNATIONAL LAW AND USE OF FORCE BY STATES 342 (1963) ("doubtful if [humanitarian] intervention survived."); Brownlie, *supra* note 194; MICHAEL BYERS, WAR LAW: UNDERSTANDING INTERNATIONAL LAW AND ARMED CONFLICT 92-103 (2005) (arguing that there is no right of humanitarian intervention in international law); Franck & Rodley, *supra* note 30 (1973). Oscar Schachter, *The Right of States to Use Armed Force*, 82 MICH. L. REV. 1620, 1629 (1984); 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 SC approval); MURPHY, *supra* note 33, 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)); DINSTEIN, *supra* note 54.

[198] MURPHY, *supra* note 33, at 3-4.

[199] U.N. Conference on Int'l Org., Comm'n I: Gen. Provisions, S.F. Cal., Apr. 25-June 25, 1945, Summary Report of Seventh Meeting of Committee 1/1, *in* 6 DOCUMENTS OF THE UNITED NATIONS CONFERENCE ON INT'L ORG. [U.N.C.I.O.] 331, 334-35, Doc. 784 (June 5, 1945); U.N. Conference on Int'l Org., Comm'n I: Gen. Provisions, S.F. Cal., Apr. 25-June 25, 1945, Summary Report of Seventh Meeting of Committee 1/1, *in* 6 DOCUMENTS OF THE UNITED NATIONS CONFERENCE ON INT'L ORG. [U.N.C.I.O.] 342, 342, Doc. 810 (June 6, 1945) (adopting provision unanimously); Mohamed, *supra* note 29, at 1286; Brownlie, *supra* note 194, at 265-68 (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."); RUTH B. RUSSELL, A HISTORY OF THE UNITED NATIONS CHARTER: THE ROLE OF THE UNITED STATES 1940-1945, at 456-57 (1958) (explaining that the drafters' interest was in codifying an obligation stronger than a mere promise not

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.[200] 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.[201] However, a similar argument failed in the Corfu Channel case, where the ICJ invalidated UK claims that its unilateral minesweeping in Albanian waters was not for the purpose of intervention as prohibited in Art. 2(4).[202]

Similarly, some suggest that the phrase "or in any other manner inconsistent with the purposes of the United Nations" permits humanitarian intervention.[203] These scholars maintain that because one of the purposes of the Charter was to promote respect for human rights,[204] intervening to prevent widespread atrocities is consistent with the Charter.[205]

---

to use force); 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); CHARTER COMMENTARY, *supra* note 175, 117-18, 124.

[200] 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).

[201] 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 194, at 95; John Norton Moore, *The Control of Foreign Intervention in Internal Conflict*, 9 VA. J. INT'L L. 205, 261-64, 338 (1969); TESÓN, *supra* note 88; W. Michael Reisman, *Humanitarian Intervention to Protect the Ibos*, *in* HUMANITARIAN INTERVENTION AND THE UNITED NATIONS 167, 177 (Richard B. Lillich ed., 1973); Lillich, *supra* note 200, at 229.

[202] *See* RUSSELL, *supra* note 199.

[203] U.N. Charter art. 2(4); STONE, *supra* note 194, at 43, 95-96.

[204] *See* U.N. Charter pmbl ("to reaffirm faith in fundamental human rights"); art. 1, para. 3 (stating its goal to "achieve international co-operation in …promoting and encouraging respect for human rights"); art. 13, para. 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 UN 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

However, a textual interpretation of the Charter illustrates that the "or" in Article 2(4) supplements the general prohibition on the use of force, meaning that States are prohibited from threatening or using force against the territorial integrity or political independence of a State, as well as threatening or using force in any other way contrary to the Charter's purposes.[206]

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,[207] but is often given second billing to regulating the use of force and ensuring State sovereignty.[208] 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 UN 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. [209] 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.[210]

(ECOSOC), which is called upon to establish a commission promoting human rights); art. 76 (establishing the basic objectives of the UN trusteeship system, including "to encourage respect for human rights").

[205] *See generally* Reisman, *supra* note 50; Lillich, *supra* note 200.

[206] MURPHY, *supra* note 33, at 73.

[207] U.N. Charter art. 1, para. 3.

[208] MURPHY, *supra* note 33, at 66-70.

[209] Hurd, *supra* note 130, at 10.

[210] SCHLESSINGER, *supra* note 188, at 124. Clark Eichelberger is widely acknowledged as being responsible for getting human rights into the Charter, including the Human Rights Commission. MURPHY, *supra* note 33, at 66. *But see* W. Michael Reisman, *Criteria for the Lawful Use of Force in International Law*, 10 YALE J. INT'L L.

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."[211] While strict textualists tend to view the Charter as a static document, modernists consider Charter interpretation to evolve to meet modern challenges.[212] 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 Members vote in favor.[213] This resolution does little to change the non-binding nature of General Assembly resolutions, nor does it take away from the primacy of the UNSC in matters of peace and security.[214] 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

---

279, 279-81 (1985); Reisman, Coercion and Self-Determination, *supra* note 55, at 642 (arguing that intervention would be unnecessary if the UN functioned according to terms of the Charter).

[211] Vienna Convention on the Law of Treaties art. 31(a).

[212] *See, e.g.*, HELEN DUFFY, THE 'WAR ON TERROR' AND THE FRAMEWORK OF INTERNATIONAL LAW149 (2005); *and see* CHARTER COMMENTARY, *supra* note 175, at 13, 27.

[213] G.A. Res 377 (V), U.N. Doc. A/1775 (Nov. 3, 1950) ("Uniting for Peace Resolution") Providing 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.

[214] 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 (UNEFI) to oversee the cessation of hostilities between Egypt and Israel in 1950. Reisman, *supra* note 50, at 73 n.48.

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 (GA Res.) 3314, which serves as a non-binding guide for the UNSC when determining whether State acts constitute a "threat to the peace, breach of the peace, or act of aggression."[215] Making no distinction based on the purpose of the intervention, the prohibited acts in GA Res. 3314 are comprehensive, making virtually any use of force an act of aggression.[216] 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.[217]

Instances of UN-authorized force are instructive as to the appropriate circumstances for intervention, particularly because the Security Council maintains control over decisions to use force for non-defensive purposes. [218] Initially, the Security Council's interpretation of its authority to maintain peace and security has developed from resolving international armed conflicts to reacting to internal human rights violations and atrocity crimes.[219] During the cold war, for example, there were only two instances when the UNSC authorized member States to use force: (1) In 1950 after North Korea invaded the South, and even then the

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

[216] 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.

[217] For a summary of these declarations and resolutions, see CHARTER COMMENTARY, *supra* note 175, at 104.

[218] Reisman, *supra* note 50, 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.").

[219] U.N. Charter art. 24.

UNSC only "recommended" that Members assist South Korea,[220] 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.[221]

Since the end of the Cold war, the UNSC has authorized force more frequently. Specifically, it authorized force in the following six situations:[222] (1) to repel Iraq's invasion of Kuwait in 1990,[223] (2) to facilitate humanitarian assistance in Bosnia in 1992,[224] (3) to establish a secure environment for humanitarian assistance in Somalia in 1992,[225] (4) to restore the Aristide government in 1994 in Haiti,[226] (5) to combat piracy in Somalia's territorial waters and land in 2008,[227] and (6) in 2011 to protect civilians in Libya.[228]

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 UN since the 1990s demonstrates a seismic shift in the perception of massive human rights violations. No longer the exclusive business of perpetrator States, it is recognized that

---

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

[221] S.C. Res. 221, para. 5, U.N. Doc. S/RES/221, (Apr. 9, 1966). *See generally* MICHAEL BYERS, WAR LAW (2005).

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

[223] S.C. Res. 678, para. 2, U.N. Doc. S/RES/678 (Nov. 23, 1990).

[224] S.C. Res. 770, para. 6, U.N. Doc. S/RES/770 (Aug. 13, 1990).

[225] S.C. Res. 794, para 3, U.N. Doc. S/RES/794 (Dec. 3, 1992).

[226] S.C. Res. 940, para.4, U.N. Doc. S/RES/ 940 (July 31, 1994).

[227] S.C. Res. 1851, para. 6, U.N. Doc. S/RES/1851 (Dec. 18, 2008); S.C. Res. 1838, para. 3, U.N. Doc. S/RES/1838 (Oct. 7, 2008); S.C. Res. 1816, para. 7, U.N. Doc. S/RES/1816 (June 2, 2008).

[228] S.C. Res 1973, U.N. Doc. S/RES/1973 (Mar. 17, 2011).

"internal violations of human rights could threaten international peace and security," and may require forceful intervention.[229] 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.[230] It is when the UNSC fails to act to prevent atrocity crimes that unilateral or multilateral intervention is called into question.[231]

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 UN authorization.[232] The UN Charter specifically contemplates action by regional organizations under Chapter VIII.[233] The African Union, for example, allows AU Members to intervene in the event of genocide.[234] NATO famously intervened in 1999 to prevent Serb atrocities in Kosovo without UN-backing. Still, the lawfulness of forcible measures taken by regional actors is based on UNSC authorization.[235] Even if the AU Charter or other regional agreements authorized collective action without UN authorization, such provisions are

[229] Reisman, *supra* note 50, at 72, n. 47.

[230] CHARTER COMMENTARY, *supra* note 175, 701, 725.

[231] *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 (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).

[232] *See* examples of regional interventions in Part II.C.1 *supra* notes 97-103, at 23-4.

[233] U.N. Charter arts. 52, 53.

[234] A.U. Charter art. 4(h). This is a collective action by the AU, not a right for individual States to intervene.

[235] U.N. Charter art. 53.

considered *ultra vires*, since article 103 of the UN Charter requires any conflict between another treaty and the UN Charter to be settled in favor of the UN Charter's terms.[236]

The International Court of Justice is also empowered to determine when the use of force is lawful, 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,[237] there are no implicit exceptions to the Charter's general prohibition on the use of force,[238] collective armed response is not permitted unless it is in response to an armed attack,[239] the use of force is not permitted to ensure respect for human rights,[240] and UNSC resolutions may not be read to imply the authorization to use force.[241]

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

---

[236] *Id*. art. 103. If this provision relates to future treaties, then it could be said that subsequent human rights treaties, including the genocide convention, cannot be utilized to dilute the prohibition on the use of force. Hurd, *supra* note 130, at 13.

[237] Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, 244 (Jul. 8).

[238] Corfu Channel (U.K. v. Alb.), 1949 I.C.J. 4 (Apr. 9) (rejecting the UK's argument that it could sweep Albanian territorial waters for mines which had previously done damage to UK ships).

[239] Military and Paramilitary Activities, *supra* note 176, para. 249.

[240] *Id*. at para. 134-35. *See* MURPHY, *supra* note 33, 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 88, at 270 (attempting to read the Nicaragua judgment more narrowly).

[241] Case Concerning Armed Activities on the Territory of The Congo (Dem. Rep. of The Congo v. Uganda) (Judgment of Dec. 19, 2005), para. 152 (holding that Uganda violated Article 2(4) when it used military force in the Democratic Republic of the Congo, 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). For a detailed discussion of this case, see Reisman, *supra* note 50, at 80-84.

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."[242]

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.[243] 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."[244] 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 UN authorization. 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."[245]

c. Customary Right to Intervene

As it appears the Charter cannot be interpreted to permit humanitarian intervention without UNSC approval, many support the idea that there is a customary right to intervene to

[242] Legality of Use of Force (Yugo. V. Belg.), 1999 I.C.J. 124, 132 (June 2).

[243] Reisman, *supra* note 50, at 81-85.

[244] Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. V. Serb. & Mont.), 2007 I.C.J. 169, para. 430 (Feb. 26) [hereinafter Genocide Case].

[245] *Id*. para. 431.

prevent massive human rights violations that pre-existed the Charter.[246] 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, suggest that this practice was accepted.[247] 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."[248]

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 pre-existed the UN 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."[249] Second, States engaging in this practice must demonstrate *opinio juris*, or "evidence of a belief that this practice is

---

[246] NEIL FENTON, UNDERSTANDING THE UN SECURITY COUNCIL 14 (2004); Moore, *supra* note 59; Lillich, *supra* note 200.

[247] See Part II.C. *infra* for a more detailed discussion of these and other historical cases of humanitarian intervention. *See also* Hubert, *supra* note 30, at 90.

[248] BROWNLIE, *supra* note 197, at 338. Lillich 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 200, at 232 (citing E. STOWELL, INTERVENTION IN INTERNATIONAL LAW 461-540 (1921)). Those in the non-interventionist camp include, Halleck, Angelins Wedenhagen, Kant, Despagnet, Mamiani, and Pradier-Fodere, and Brownlie. Lillich, *supra* note 200, at 232.

[249] Asylum Case (Colom. V. Peru), 1950 I.C.J. 266, 276-77 (Nov. 20)

rendered obligatory by the existence of a rule of law requiring it."[250] 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.[251] Similarly, the U.S.-led no fly zones in Iraq to protect the Kurds and Marsh Arabs[252] were justified in large part on implied UN authorization.[253] Even in NATO's intervention in Kosovo, most States involved in the mission relied on moral justifications, [254] or implied UNSC consent to enforce prior resolutions. [255] The United Kingdom[256] and Belgium[257] were

[250] North Sea Continental Shelf (F.R.G. v. Neth.; F.R.G. v. Den.), 1969 I.C.J. 3, 44 (Feb. 20).

[251] *See* sources and discussion Part II.C.1 *infra* notes 92-96. *See also* MURPHY, *supra* note 33, at 97-100, 102-107. Compare France's humanitarian justification for intervening in the Central African Republic in 1979. *Id.* at 143. The international community largely accepted the intervention, and it is interesting to note that 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.

[252] *See* MICHAEL A. NEWTON & MICHAEL P. SCHARF, ENEMY OF THE STATE: THE TRIAL AND EXECUTION OF SADDAM HUSSEIN 65 (2008); MURPHY, *supra* note 33, at 166-98.

[253] 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 UN-mandated or individual State force. Still, while the U.S. emphasized implied UN authorization based on UNSC resolutions, the UK was more forceful in suggesting "humanitarian need" and a "customary international law principle of humanitarian intervention." MURPHY, *supra* note 33, at 188 (internal citations omitted).

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

[255] 328 Parl. Deb., H.C. (6th ser.) (1999) 617 (statement of U.K. Defense Secretary George Robertson), *available at* http://www.publications.parliament.uk/pa/cm199899/cmhansrd/vo990325/debtext/9032533.htm#90325-33_spnew3; Press Release, Security Council Rejects Demand for Cessation of Use of Force Against Federal Republic of Yugoslavia, U.N. Doc. SC/6659, at 4, 7 (Mar. 26, 1999) (statements of France and Netherlands citing prior UNSC resolutions).

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 UN authorization.[258]

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.[259] Although this action was taken by a sub-regional organization without UN authorization, it was later "endorsed" by the UNSC[260] and was almost universally well received in the international community.[261] In 1997, the UNSC subsequently endorsed the ECOWAS intervention in Sierra Leone months after troops attempted to halt massacres led by Charles Taylor.[262] Contrast the favorable reaction to these interventions with the negative response to the unilateral actions taken in the 1970s.[263] The penultimate example is the

---

[256] House of Commons Publications, Select Committee on Foreign Affairs, Fourth Report, International Law, para. 129-34 (2000); Christopher Greenwood, *Jurisdiction, NATO, and the Kosovo Conflict*, *in* ASSERTING JURISDICTION: INTERNATIONAL AND EUROPEAN LEGAL APPROACHES 147-75 (Patrick Capps, Malcolm Evans & Stratos Konstadinidis, eds., 2003); MARK LITMAN, KOSOVO: LAW AND DIPLOMACY (1999).

[257] 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).

[258] Mohamed, *supra* note29, at 1288.

[259] MURPHY, *supra* note 33, at 147.

[260] *See* discussion *supra* note 97.

[261] MURPHY, *supra* note 33, 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 29, at 1309.

[262] *See* discussion *supra* note 98.

[263] MURPHY, *supra* note 33, 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 force, a general mistrust of the superpowers' motives, a visceral

mixed global response to NATO's Kosovo bombing campaign. Far from establishing *opinio juris*, numerous scholars[264] and most States[265] did not believe a legal right of humanitarian intervention existed, even if the action was seen as legitimate.[266]

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, 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 non-intervention in Article 2(4).[267]

---

distaste among newly independent nations of foreign intervention, and a general fear of the escalation of conflict in the age of nuclear weapons).

[264] *See* discussion *supra* note 101.

[265] Press Release, General Assembly, General Debate Surveyed Pros and Cons of Humanitarian Intervention, Globalization, Poverty, UN Reform, Observes Assembly President, U.N. Doc. GA/SM/105 (Oct. 2, 1999). *See also* Mohamed, *supra* note 29, at 1306 n.127

[266] KOSOVO REPORT, *supra* note 103. In prophetic fashion, Brownlie and Lillich writing in 1974 suggested that in cases of humanitarian intervention, States might condone the action, even if it is not approved by the world community. Lillich, *supra* note 200, at 230.

[267] It has been argued that Article 2(4) no longer has the force of law because of numerous and significant derogations during the Charter era. In 1970, Thomas Franck argued, "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, 810 (1970). More recently, Michael Glennon argued that "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 (2002). *See also* Lillich, *supra* note 200, 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

d. Drafters Intent

That the law as currently interpreted forbids unilateral intervention to save civilians from slaughter is truly an "absurd result."[268] 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 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. Delegates in attendance were concerned with "above all, the suppression of armed conflict.[269] The idea of intervening to prevent genocide and other atrocity crimes wasn't considered—not because there was no right, but the context in which the discussions took place clearly contemplated preventing the next Germany and Japan-like aggression.[270] Because the issue of humanitarian intervention was not given serious consideration,[271] it is hardly convincing to

---

humanitarian interventions previously discussed does not reflect global opinion to abandon the Charter paradigm of world order.

[268] Vienna Convention on the Law of Treaties art. 32.

[269] Mohamed, *supra* note 29, at 1282 (citing Declaration of Four Nations on General Security, Nov. 1, 1943, in 1 FOREIGN RELATIONS OF THE UNITED STATES: DIPLOMATIC PAPERS 755, 756 (1943)). 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." Schlessinger, *supra* note 188, at 7. Human rights were not initially contemplated as a purpose of the new organization and were only put into 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).

[270] It is noteworthy that the Charter begins with a commitment to "save succeeding generations from the scourge of war" and makes no reference to the even greater scourge of mass atrocities except for a passing mention of human rights.

[271] Brownlie suggests, "The participating governments took a view of the legal regime as a whole and, because they made no reference to what statesmen would have regarded as a non-issue, it can hardly be said that they

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.[272]

Another focal point of the drafters was to ensure that armed force would only be used in the interest of the international community.[273] As stated by Mohamed, "The decision of the drafters to vest in the Security Council control over the non-defensive use of force signifies a determination to change the character of military force by preventing states from resorting to arms to pursue national interests."[274] 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.[275] Functioning properly, the Charter would allow collective action and eliminate the need for States to act unilaterally to counter aggression and uphold community values.[276] In spite of this intent, and assuming that preventing atrocity crimes is in the community 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.

---

were reserving their position [about the lawfulness of humanitarian intervention]." Brownlie, *supra* note 194, at 222.

[272] In the Charter commentary, no authority is cited suggesting that humanitarian intervention was considered at the Charter conference. *See generally* CHARTER COMMENTARY, *supra* note 175. *See also* Mohamed, *supra* note 29, 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*).

[273] The preamble provides that "armed force shall not be used, save in the common interest." U.N. Charter pmbl.

[274] Mohamed, *supra* note 29, at 1318.

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

[276] STEPHEN C. NEFF, WAR AND THE LAW OF NATIONS 281 (2005).

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, not only allows perpetrator States to continue killing civilians, but also justifies inaction by the world community.[277] Originating with the Peace of Westphalia in 1648,[278] and today enshrined in the UN Charter,[279] the concept has been the fundamental building block of international relations for several centuries. With respect to atrocity crimes, however, sovereignty is most susceptible to challenge.[280] Since the UN'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 in R2P indicates that traditional barriers are being broken in favor of protecting civilians from slaughter.

[277] 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 2, at 95.

[278] *See* MURPHY, *supra* note 33, at 42 (suggesting that in its earliest form, sovereignty meant a ruler wielded absolute power of his subject). *See also* Sewall, *supra* note at 161; Mohamed, *supra* note 39, at 1319 n.175-180; 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); HURST HANNUM, AUTONOMY, SOVEREIGNTY, AND SELF-DETERMINATION: THE ACCOMMODATION OF CONFLICTING RIGHTS 14-26 (1990); EDWARD C. LUCK, SOVEREIGNTY, CHOICE, AND THE RESPONSIBILITY TO PROTECT, GLOBAL RESPONSIBILITY TO PROTECT 10-21 (2009). 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, The Politics bk. 7, ch. 2, at 396-97 (T. Sinclair trans., T. Saunders ed., Penguin, London, rev. ed. 1992).

[279] U.N. Charter art. 2(1) (providing that the "Organization is based on the principle of sovereign equality of all its Members"); *Id*. art. 2(7) (providing, "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.").

[280] Ferencz, *supra* note 1, at 26 (suggesting "The idea of sovereignty itself is an obsolete notion.").

Today, the UN Charter codifies the principle of State sovereignty in articles 2(1) and 2(7).[281] Some were concerned at the inclusion of these articles in 1945, suggesting that they were detrimental to the goals of peace and security in the Charter.[282] 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.[283] 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 UN Charter's purpose was to protect individual human beings, "not to protect those who abuse them."[284]

Still, the language of the Charter is not so permissive. As discussed above, the drafters of the UN Charter gave little consideration to human rights, focusing instead on preventing aggressive war. [285] At the time, the human rights regime was only just beginning. Lemkin's Genocide Convention in 1948, followed days later by the Universal Declaration of Human Rights, laid the foundation for modern human rights law. Since then, the human rights regime has flourished in its nearly seventy-year history. Subsequent treaties, regional courts, and ICL have significantly strengthened what were once considered non-binding, aspirational

[281] U.N. Charter arts. 2(1), 2(7).

[282] 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 . . . . " Schlessinger, *supra* note 188, at 156. The NEW YORKER journalist, E.B. White, added that "under all [the talk of peace at San Francisco] is the steady throbbing of the engines: sovereignty, sovereignty, sovereignty." *Id*.

[283] CHARTER COMMENTARY, *supra* note 175, at 109. *But see* Reisman, *supra* note 50, at 58 (stating that "a major purpose of international law, is the provision of security, which means the protection of individual lives.").

[284] Kofi Annan, *Two Concepts of Sovereignty*, ECONOMIST, Sept. 18, 1999, at 49-50.

[285] *See* discussion, *supra* note 210.

goals.[286] 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 regulates State behavior.[287] 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*.[288] This places the prohibition of genocide on par with the *jus cogens* norm of the non-use of force, a status that the principle of non-intervention has never reached.[289] This indicates that a sovereign's right to be free of interference is secondary and may give way when it commits atrocity crimes.[290]

The most striking recent development in the international legal and political landscape is the emphasis on sovereignty as responsibility, or contingent sovereignty.[291] Where efforts to justify humanitarian intervention failed because of the focus on the lawfulness of the

---

[286] See discussion of international human rights law and international criminal law in Part II.B supra.

[287] For a detailed discussion of an emerging theory of individual-centric international law, see RUTI TEITEL HUMANITY'S LAW (2011).

[288] Sources indicating that the prohibition of genocide is a *jus cogens* norm, include: Cases Concerning Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain), ICJ, Advisory Opinion (1970); Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, ICJ (1951); Prosecutor v. Jean-Paul Akayesu, ICTR-96-4-T, 1998, para 516, 495; Prosecutor v. Radislav Krstic (Appeal Judgement), IT-98-33-A, International Criminal Tribunal for the former Yugoslavia (ICTY), April 19, 2004, para. 541; *see also* WILLIAM A. SCHABAS, GENOCIDE IN INTERNATIONAL LAW (2000).

[289] CHARTER COMMENTARY, *supra* note 175, at 109.

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

[291] Hurd, *supra* note 130, at 21 (describing "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).

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.[292] For example, in response to Syria's brutal crackdown of a popular uprising that began in March 2011,[293] 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."[294] During the crisis in Libya in 2011, Italy similarly commented that the Libyan government "no longer exists," thereby releasing Italy of its obligation to honor treaties with Qaddafi's regime.[295]

---

[292] *See, e.g.*, 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 2, at xxi. Gareth Evans, a sponsor of R2P in the ICISS Report, 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).

[293] As of March 2012, the UN estimates that over 8,000 civilians have been killed at the hands of Assad's regime. *Russia Says It's Ready to Support Annan's Efforts in Syria*, CNN, Mar. 21, 2012, *available at* http://www.cnn.com/2012/03/21/world/meast/syria-unrest/index.html?hpt=hp_bn5.

[294] *Clinton Says Syria's Assad Has Lost Legitimacy*, REUTERS, July 12, 2011, *available at* http://www.reuters.com/article/2011/07/12/us-syria-idUSLDE76A0I620110712. See also, *Syria Condems Hilary Clinton's Remarks About Assad*, BBCNEWS, 12 July, 2011, *available at* http://www.bbc.co.uk/news/world-middle-east-14123188.

[295] David D. Kirkpatrick & Kareen Fahim, *Libya Blames Islamic Militants and the West for Unrest*, N.Y. TIMES, Feb. 28, 2011 (noting the Italy comment).

The concept of R2P directly challenges traditional notions of sovereignty,[296] 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, UN-authorized intervention to respond to ongoing massacres.[297] Critics argue that this concept fails to take the necessary next step—authorizing State action when the UNSC is incapable of mounting an effective response.[298] Although R2P in the 2005 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.[299]

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.[300]

---

[296] Sewall, *supra* note 127, at 161.

[297] *See generally id*. (criticizing those who would rely on prevention only).

[298] *Id*. (justifying response measures, but failing to discuss the legality of taking action without UN authorization).

[299] Rotberg, *supra* note 11, at 13. For a detailed discussion of the threshold for intervention to prevent atrocity crimes, see Part V *infra*.

[300] 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* HUMANITARIN INTERVENTION: ETHICAL, LEGAL AND POLITICAL DILEMMAS 93 (J.L. Holzgrefe & Robert O. Keohane, eds., 2003). In 1992, the UN Secretary-General stated that "the time of absolute and

The principle of necessity, as found in the International Law Commission's Draft Articles on State Responsibility (ILC Report),[301] 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."[302] The necessity of the intervention to prevent systematic human rights violations "precludes the wrongfulness" of the intervention.[303] 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."[304] 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.

---

exclusive sovereignty, however, has passed; its theory was never matched by reality." U.N. General Assembly, An Agenda for Peace, Report of the Secretary-General, A/47/277, June 17, 1992.

[301] U.N. Int'l Law Comm'n Draft Articles on Responsibility of States for Internationally Wrongful Acts, art. 25, Report of the International Law Commission on the Work of Its Fifty-third Session, U.N. GAOR, 56th Sess., Supp. No. 10 at 49, 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).

[302] ILC Report, *supra* note 301, art. 25.

[303] *Id*.

[304] Mohamed, *supra* note 29, at 1304.

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.[305] Under this approach, any use of force without UN authorization—even to stop an ongoing genocide—diminishes the prohibition on the use of force and the principle of sovereign equality.[306] 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.[307] In that case, common sense ruled the day, but too often traditionalists and strict sovereigntists prevail.

C. Non-Legal 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

[305] *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).

[306] *Id*. at 1311.

[307] U.N. SCOR, 3989th mtg. at 3, 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].")

would be morally unacceptable 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."[308]

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.[309] 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.[310] 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.[311]

The current status of the law does not sufficiently account for moral considerations.[312] The prima facie illegality of humanitarian intervention highlights a discomforting preference of sovereignty over human rights, even though the latter are based on moral concerns.[313]

---

[308] Luck, *supra* note 104, at 116.

[309] LEO STRAUSS, THE POLITICAL PHILOSOPHY OF HOBBES: ITS BASIS AND ITS GENESIS 12 (1936). *See also* Reisman, *supra* note 50, at 57.

[310] H.L.A. HART, THE CONCEPT OF LAW 191 (1961).

[311] Terry Nardin, *The Moral Basis for Humanitarian Intervention*, *in* JUST INTERVENTION 11, 11-28 (Anthony F. Lang Jr., ed., 2003).

[312] Numerous scholars have discussed the moral issues underlying humanitarian intervention, including: TESÓN, *supra* note 88; Bartram S.Brown, *Humanitarian Intervention at a Crossroads*, 41 WM. & MARY L. REV. 1683, 1689 (2000); ANTONIO CASSESE, INTERNATIONAL LAW 104 (2001); Mriko Bagaric & John R. Morss, *Transforming Humanitarian Intervention from an Expedient Accident to a Categorical Imperative*, 30 BROOK. J. INT'L L. 421, 427-31 (2005).

[313] Nico Krisch, Legality, *Morality and the Dilemma of Humanitarian Intervention After Kosovo*, 13 EUR. J. INT'L L. 323, 327, 329 (2002). *But see* ORFORD, *supra* note 290.

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.[314] In describing the NATO campaign, commentator Bruno Simma noted a troubling disconnect between law and morality.[315]

While the Kosovo Report ultimately suggested amending the law to allow certain humanitarian interventions,[316] 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.[317] Franck argues that the international 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."[318] Similarly, Schachter argues that, even without UNSC approval, unilateral intervention to save lives should be pardoned.[319] While some describe this as the "criminal law" approach to the use of force,[320] 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.[321] The doctrine of

---

[314] KOSOVO REPORT, *supra* note 103, at 4.

[315] CHARTER COMMENTARY, *supra* note 175, at 132.

[316] KOSOVO REPORT, *supra* note 103, at 291.

[317] THOMAS M. FRANCK, RECOURSE TO FORCE: STATE ACTION AGAINST AND ARMED ATTACKS 139 (2002).

[318] Thomas M. Franck, *Legality and Legitimacy in Humanitarian Intervention*, *in* HUMANITARIAN INTERVENTION 143, 148, 151 (Terry Nardin & Melissa S. Williams eds., 2006); FRANCK, *supra* note 317, at 185; Mohamed, *supra* note 29, at 1292.

[319] OSCAR SCHACHTER, INTERNATIONAL LAW IN THEORY AND PRACTICE 126 (1991).

[320] *See generally* Mohamed, *supra* note 29, at 1298.

[321] ILC Report, *supra* note 301, art. 25.

necessity is in fact recognized in international law, and should serve as the basis for the application of unilateral MARO in the future.[322]

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.[323] Non-interventionists, however, are wary of placing non-legal considerations such as legitimacy and practical effects on a higher level than the legality of the action.[324] Taking a traditional approach to Charter interpretation, as well as a strict application of sovereignty, these critics argue that extra-legal atrocity response will upend restraints on power and the operation of the law.[325]

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, 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

---

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

[323] 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 criteria for unilateral intervention discussed in detail in Part V *infra*.

[324] Mohamed, *supra* note 29, at 1278.

[325] *Id*. at 1298.

and political context, and not with an originalist's dogmatic adherence to a text drafted in an era that is normatively far removed.[326]

The traditionalist approach leads to an absurd result, which perpetuates atrocity crimes and impedes effective response measures. Therefore, States seeking to prevent atrocity crimes are left with two choices: (1) break the law outright, hoping for forgiveness, and slowly develop a new customary norm, or (2) work with other States to draft a positive normative standard. The next section considers both approaches and prescribes a discursive process when engaging in non-UN sanctioned MARO in order to justify derogations from current prohibitions on the use of force, and encourage efforts to revise the law.

IV. Developing a Legal Norm for Atrocity Response

The current legal regime is prohibitive of atrocity response without UN authorization. The initial failure to establish a permanent UN 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 law-breaker."[327] 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 UN response.[328]

The United States must take the lead in developing a norm authorizing mass atrocity response when the UN fails to act. By engaging in a discursive process—interpretation and

[326] Hurd, *supra* note 130, at 24 (suggesting that the law can be interpreted in both ways—according to an originalist interpretation, or in terms of evolving norms).

[327] Lillich, *supra* note 200, at 245 (stating that, as a result, "[T]he effective power of using military or lesser forms of coercion in international affairs essentially remains with the nation States.") (internal citations omitted).

[328] *Id*. at 247.

development of legal norms through dialogue with other States, international organizations, NGOs, domestic inter-agency 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 section contributes methods to overcome political inaction, demonstrates that MARO is in the domestic and international interest, and discounts arguments of pretext.

A. Norm Development Through Action and Discourse

Expert studies have long called for a strengthened normative framework to prevent and halt atrocity crimes.[329] Garnering enough support to create positive law—treaties, statutes, regulations—is wrought with challenges, particularly 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.[330]

[329] KOSOVO REPORT, *supra* note 103, 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 2, at 93 (concluding that a strong normative framework is required to prevent and halt genocide).

[330] Luck, *supra* note 104, at 123.

Scholars have paid significant attention to the legal, political, and socio-psychological components of international norm development and compliance.[331] Among the more influential studies, Finnemore and Sikkink outline a three step-process to norm development.[332] These steps are: (1) norm emergence, where norm entrepreneurs utilize organizational platforms to advocate for a new standard, (2) norm cascade, where once enough States buy off on the new norm there is discourse and peer pressure for 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.[333]

Besides following these steps, norm development requires a cohesive message and concept, which enhances support for an emerging norm.[334] This requires significant coordination among States, civil society, and domestic policy-makers.[335] Thus, developing a norm that permits unilateral MARO will require a discursive process to persuade these actors

---

[331] *See*, *e.g.*, Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599 (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). *Id*. at 2646. *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 (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).

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

[333] Luck, *supra* note 104, 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, 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 UN fails to act under R2P and when States may forcefully intervene to prevent mass killings.

[334] Applegarth & Block, *supra* note 126, at 142.

[335] *Id*. at 142-143.

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. [336]

It may prove difficult to establish a positive norm for MARO when the UN fails to act in light of previous efforts to reform the Charter.[337] Some attempted to amend the composition of the UNSC, limit the veto power of the permanent five members in certain cases, among other approaches.[338] While amendments to the Charter or other international agreements would add legitimacy and persuasiveness to calls for States to internalize a new norm,[339] geo-political realities limit the feasibility of these approaches. Powerful states are not willing to give up the status quo and relinquish that power, and weak states that remain relatively immune to these power struggles do 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 (e.g. Kosovo), thereby laying the

---

[336] Moore, *supra* note 59, at 8.

[337] Several scholars have voiced skepticism about changes in positive law governing the use of force. *See* FRANCK, *supra* note 317, at 183-84 (suggesting that a formal adjustment of the law is not necessary because international law may accommodate instances of non-compliance without changing the rule); SCHACHTER, *supra* note 319, 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 101, at 837 (concluding that there is no international consensus in support of a right of unilateral intervention); O'Connell, *supra* note 197, 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).

[338] *See* Waxman, *supra* note 123, at 11-14. *See also* Sean D. Murphy, *Protean* Jus Ad Bellum, 27 BERKELY J. INT'L L. 22, 47-50 (2008) (suggesting various methods of amending or reaffirming *jus ad bellum*, including Charter amdendments, GA resolutions, UNSC resolutions, major power agreement, case law, and "principles" adopted by NGOs).

[339] THOMAS M. FRANCK, THE POWER OF LEGITIMACY AMONG NATIONS (1990). *See also* MURPHY, supra note 33, at 23.

groundwork for a new customary norm.[340] State practice, in this case noncompliance, serves as both a breach of the law and the basis for a new standard. [341]

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.[342] 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.[343] 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 can and will resort to force if non-violent measures and the UNSC have failed to halt the mass slaughter of civilians. This way, States will not have to rely on contorted legal justifications for their action, or on the flimsy "unlawful but

---

[340] CHARTER COMMENTARY, *supra* note 175, at 132.

[341] Mohamed, *supra* note 29, at 1311-12; Hurd, *supra* note 130, at 26 (recognizing that "State practice has a productive effect on the content of the law.").

[342] MURPHY, *supra* note 33, at 22 (stating that "[L]aw 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.").

[343] 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 331, at 2652. *See also* 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 so "that it would be accepted by the international community."); 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); NICHOLAS J. 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.").

legitimate" rationale. An open, honest discourse will generate broader public support for policies that stretch the limits of the law and hasten acceptance of the emerging norm by the international community.[344]

B. Leadership: The Will to Act

The development of international norms requires political and moral leadership from interested States.[345] 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, rather the disinterest and disorganization of its supporters.[346] As a result, "[t]hese nations must take the lead in finding and cementing consensus and in moving forward on an ambitious, actionable agenda."[347] The same is true for the adoption of norms that supplement R2P—mass atrocity response absent UN authorization.

---

[344] GOLDSMITH, THE TERROR PRESIDENCY 81 (2007) (arguing, in the domestic national security context, that 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). 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. 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. Peter Margulies, *True Believers at Law: National Security Agenda, the Regulation of Lawyers, and the Separation of Powers*, 68 MD. L. REV. 1, 19, 20 (2008). 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 against the Soviet Union after it had placed ballistic missiles in Cuba. *Id*. at 69-70. After utilizing the UN to publicly confront the Soviet Union, the UN was instrumental in supervising the removal of the missiles. SCHLESSINGER, *supra* note 188, at 283.

[345] 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." Raphael Lemkin, quoted in GENOCIDE REPORT, supra note 2, at 93. As stated by Luck, "The ultimate test of [mass atrocity prevention efforts] will be in capitals and on the ground, not in international meeting halls." Luck, *supra* note 104, at 124.

[346] Applegarth & Block, *supra* note 126, at 129.

[347] *Id*. 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.

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 2008 post-election violence, UN authorized intervention in Libya, and strong statements regarding Syria.[348] 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.[349]

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.[350] For example, many States downplayed the level of violence in Rwanda, so as not to invoke the obligations in the Genocide Convention.[351] This type of willful blindness illustrates the political inability to respond to atrocity crimes in a meaningful way.[352]

---

[348] GENOCIDE REPORT, *supra* note 2, at 94 (describing US actions vis-à-vis Kenya); Helene Cooper, *Obama Cites Limits of U.S. Role in Libya*, NYTIMES, Mar. 28, 2011, *available at* http://www.nytimes.com/2011/03/29/world/africa/29prexy.html?pagewanted=all; *US Urges Syria to Work With Annan Peace Plan*, BBCNEWS, Mar. 21, 2012, *available at* http://www.bbc.co.uk/news/world-middle-east-17466453.

[349] GENOCIDE REPORT, *supra* note 2, at xxi, 94. *See generally* POWER, *supra* note 24.

[350] GENOCIDE REPORT, *supra* note 2, at 96.

[351] William Schabas, *The Genocide Convention at Fifty*, 40 CASE W. RES. J. INT'L L. 6 (2008). 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 47, art. VIII.

[352] 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 UN action, but all parties failed to follow up with concrete action to halt the ongoing genocide. GENOCIDE REPORT, *supra* note 2, 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 192, at 37.

Definitional vagueness of atrocity crimes is also relied upon to justify inaction.[353] In one glaring example, the UN 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. [354] Contrary to this Commission's 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, and provide ample legal definition 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,[355] war crimes,[356] and crimes against humanity[357] are readily available. The case law of Nuremburg, the ICJ, ICTY, ICTR, and someday the ICC, also provide adequate interpretive guidance as to provisions in these treaties that might somehow be vague. This is precisely why use of the term "atrocity

[353] *See* GENOCIDE REPORT, *supra* note 2, at xxi-xxii.

[354] U.N. Human Rights Commission, International Commission of Inquiry on Darfur to the UN Secretary-General (2005) (also concluding that Sudan may have been involved in other war crimes and crimes against humanity).

[355] 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 47, Art. II; Rome Statute, *supra* note 75, art. 6; Kuwali, supra note192, at 34-36 (describing case law of the ICTY and ICTR that further defines the crime of genocide).

[356] *See* Rome Statute, *supra* note 75, 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).

[357] *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, 1996, IT-96-22-T, paras. 27-28. (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 192, at 40.

crimes" as a catch all for the more specific legal definitions should be used by policy-makers for discussion and planning purposes.[358] Allow prosecutors to worry themselves with the precise legal definition of these heinous acts.[359]

The "highly subjective" nature of facts on the ground is another reason cited by States that are unwilling to act.[360] 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.[361] In the broader discursive process, the power of witness can shame perpetrators into ceasing their crimes and refute allegations that crimes are being committed by everyone involved.[362] 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.[363] The Genocide Task Force highlights the need for early warning to effectively prevent genocide,

---

[358] David Scheffer, *Genocide and Atrocity Crimes*, 1 GENOCIDE STUDIES AND PREVENTION 229 (2006).

[359] *Id*.

[360] Kuwali, *supra* note 192, at 43. *See also* Franck & Rodley, *supra* note 30, at 282 (stating that "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, e.g.*, CARNEGIE COMMISSION, PREVENTING DEADLY CONFLICT 43 (1997).

[361] 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 Sparked, Accelerated Egypt's Revolutionary Fire*, WIRED, Feb. 11, 2011, *available at* http://www.wired.com/epicenter/2011/02/egypts-revolutionary-fire/. It is customary for brutal regimes to limit civilian access to media outlets during violent crackdowns. *See, e.g.*, Nic Robertson, *Syria Toll Rises to 25; Monitors Cheered in Besieged Town*, CNN, Jan. 16, 2012, *available at* http://www.cnn.com/2012/01/15/world/meast/syria-unrest/index.html?hpt=hp_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).

[362] Sewall, *supra* note 127, at 169; MARO HANDBOOK, *supra* note 2, at 18.

[363] Sewall, *supra* note 127, at 169-70.

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.[364] 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."[365] In the case of Rwanda, for example, U.S. leaders, among many others, were apprised of the atrocities and failed to take appropriate action.[366]

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.[367] While U.S. support to global initiatives can spark backlash if the concept is perceived as expanding "Western influence," the U.S. is nonetheless uniquely positioned to influence States to adopt developing norms.[368] 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

[364] GENOCIDE REPORT, *supra* note 2, at 24 (highlighting other useful early warning tools, such as 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).

[365] CARNEGIE COMMISSION, supra note 360, at 43.

[366] POWER, *supra* note 24, at 354-64.

[367] GENOCIDE REPORT, *supra* note 2, at 95.

[368] *Id*. at 141.

States."[369] Norm development, then, will require building partnerships to assist in anti-atrocity efforts.[370]

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.[371] 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."[372] Consider that the United States was founded on a principle of non-intervention.[373] Even though the non-interventionist 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 UN, 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."[374] This statement about conflict echoes

[369] *Id*.

[370] *Id*. at 5.

[371] GENOCIDE REPORT, *supra* note 2, at 95 (stating, "Blame for inaction hardly belongs solely to the United States; other governments have been willing to turn a blind eye to mass atrocities.").

[372] POWER, *supra* note 24, at 8.

[373] George Washington famously stated that the fledgling union should "steer clear of permanent alliances," that did not directly impact U.S. interests. SCHLESSINGER, *supra* note 188, 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 33, at 46-52.

[374] SCHLESSINGER, supra note 188, at 64.

efforts to prevent atrocity crimes. An isolationist position will only promote future 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.[375] 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."[376]

National policy and recent studies indicate that the U.S. 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.[377] Today, the President and Congress are in agreement about the threat posed to U.S. interests by atrocity crimes.[378] The Genocide Task Force report emphasizes that atrocity crimes are a direct threat to core U.S. national interests,[379] in addition to the assault on the universal right to life. These crimes fuel instability in weak

---

[375] *See* Michael Abramowitz & Lawrence Woocher, *How Genocide Became a National Security Threat*, FOREIGN POLICY, February 26, 2010, *available at* http://www.foreignpolicy.com/articles/2010/02/26/how_genocide_became_a_national_security_threat?page=full.

[376] GENOCIDE REPORT, *supra* note 2, 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 such indifference, considering the significant interest in atrocity response when the 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, *available at* http://www.cnn.com/2012/03/09/world/africa/uganda-kony-profile/index.html?hpt=hp_c1 (describing the documentary "Kony 2012" produced by the NGO Invisible Children, and viewed by more than fifty million as of March 9, 2012).

[377] 2006 NATIONAL SECURITY STRATEGY, *supra* note 142.

[378] *See* discussion *supra* note 129.

[379] GENOCIDE REPORT, *supra* note 2, at xx.

states, which are often the source of other national security threats, such as "terrorist recruitment and training, human trafficking, and civil strife."[380] The spillover effects of these crimes also have long term consequences in the region in which 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.[381] This is significant in a time of economic austerity in the United States and abroad.[382]

Public opinion also appears to favor measures to prevent and respond to atrocity crimes.[383] 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."[384] At the UN, Kofi

[380] *Id*.

[381] *Id*.

[382] Andrew Tilghman, *DoD: Budget Cuts Won't Hurt Troops—For Now*, ARMY TIMES, Feb. 13, 2012, *available at* 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 127, at 163.

[383] *See* discussion *supra* note 376.

[384] ICISS REPORT, *supra* note 84, at 32. *See also* MICHAEL WALZER, JUST AND UNJUST WARS xiii (3rd ed. 2000) (finding, "The most common response—a majority 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.").

Annan was a strong proponent of R2P while Secretary-General,[385] and his successor, Ban Ki-moon, is no less committed. [386]

Responding forcefully to atrocity crimes can save lives, money, and preserve the moral authority of those with the will to act.[387] 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.[388] This includes spending political capital in order to convince the American 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."[389] The next sub-section embraces this sentiment and discusses how a principled approach to unilateral MARO will overcome accusations of pretext.

---

[385] Hubert, *supra* note 30, at 98.

[386] UN Secretary General Ban Ki-moon, Challenge is to Make Responsibility to Protect Operational, Statement on the Anniversary of Rwandan Genocide, UN Doc. SG/SM/10934 (2007). Ban Ki-moon has taken numerous steps within the UN to further the development and implementation of R2P. *See* U.N. Report, Impementing R2P, *supra* note 106 (establishing a framework for operationalizing the R2P agenda throughout the UN system, and providing, "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."). *See also* Luck, *supra* note 104, at 119.

[387] *See* GENOCIDE REPORT, *supra* note 2, at 11 (making detailed recommendations for fiscal priorities to prevent genocide).

[388] *Id*. at xx.

[389] THEODORE ROOSEVELT, FEAR GOD AND TAKE YOUR OWN PART 377 (1916); POWER, *supra* note 24, at 11.

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.[390] They argue that it necessarily preferences militarily strong States over weaker States, it erodes the principle of non-intervention into sovereign matters, and it 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 will be limited by developing principled threshold criteria.

Non-interventionists are quick to point out that carving out a humanitarian exception to the prohibition on the use of force is easily abused.[391] The issue of pretext was at the forefront of concerns at the 2009 General Assembly debate on R2P.[392] The argument was that R2P is nothing more than a reformed version of humanitarian intervention and was akin

[390] 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, 139, 147-48; Franck & Rodley, *supra* note 30, 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.

[391] 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 194, 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 (2004). 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 always find a way to justify even unlawful uses of force against weaker States. Applegarth & Block, *supra* note 126, at 134; GENOCIDE REPORT, *supra* note 2, at 96 (discussing the shadow cast by the Iraq invasion in 2003). For further examples of pretextual "humanitarian" intervention, see *supra* notes 88, 91.

[392] Rotberg, *supra* note 11, at 15; Applegarth & Block, *supra* note 126, at 136.

to renewed imperialism and major power intervention.[393] 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/MARO regime.[394]

Some argue that an expanded R2P concept, or a right to intervene, could impact the principle of the sovereign equality of States.[395] But, it was a "small, weak" State, Guatemala, that drafted and negotiated the 2009 UN resolution adopting the principle of R2P.[396] 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.[397] There are simply fewer incentives and pressure points to dissuade strong States.[398] Among the threshold criteria discussed below is that the use of force be proportionate to the underlying atrocity crime, which includes that there be minimal loss of

---

[393] Rotberg, *supra* note 11, 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 126, at 129; GENOCIDE REPORT, *supra* note 2, 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 11, at 15.

[394] *See* LUCK, *supra* note 278, at 10-21.

[395] Mohamed, *supra* note 29, at 1314.

[396] G.A. Res. 308, U.N. GAOR, 63rd Sess., U.N. Doc. A/RES/63/308 (Oct. 7, 2009). *See also* Luck, *supra* note 104, at 121.

[397] Hubert, *supra* note 30, at 99.

[398] *See also* discussion, *supra* Part III.B, regarding contingent sovereignty in the context of massive human rights violations.

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 articles' 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 the principle that power must be exercised in accordance with law."[399] Critics of unilateral action suggest that this opens the door to noncompliance by other States, unsettles assumptions that States must comply, and diminishes UN primacy over the use of force.[400] Intervention, then, could quickly cause a downward spiral and conflict escalation, causing 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 who 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.[401] There is no evidence, empirical or otherwise, that interventions with the purpose of halting mass atrocities has led to an out-of-control spiral of conflict.[402] And even though intervention to prevent ongoing slaughter

---

[399] Jacob Katz Cogan, *Noncompilance and the International Rule of Law*, 31 YALE J. INT'L L. 189, 203 (2006).

[400] *Id*.

[401] *See* JOHN NORTON MOORE, SOLVING THE WAR PUZZLE, at xx (2004) (stating that "Wars 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).

[402] 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,

necessarily requires engaging the perpetrator State and likely its leadership,[403] 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.[404] 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 and must be stopped, with force if necessary.

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 criteria. Following these criteria—discussed in detail below—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."

---

rather the capacity of those forces to bring the mass murders to an end. *See supra* notes 97-98 and accompanying text.

[403] *See* Sewall, *supra* note 127, at 166; GENOCIDE REPORT, *supra* note 2, at 74.

[404] *See* RUMMEL, *supra* note 6, at 1.

V. Proposed Threshold for Unilateral Atrocity Response Operations

Waiting for the UN to effectively respond to atrocity crimes is a failed strategy. Various proposals have been introduced to reform the UN and enable it to better respond to atrocities and aggression, yet none have proven successful.[405] 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 UN Charter's provisions is not in doubt, and, as a result, must be advanced prudently. As such, the threshold criteria proposed below build upon efforts spanning decades from governments, scholars, and expert committees seeking to develop methods to stop mass atrocities when the UN fails to act.[406] Based upon lessons from these works, the principle of necessity, and modern *jus ad bellum*, the six criteria for the responsible application of MARO are: (1) An objective threat of atrocity crimes, (2)

---

[405] *See* Edward M. Kennedy, *International Humanitarian Assistance: Proposals for Action*, 12 VA. J. INT'L L. 299 (1971-72). FRANCK, *supra* note 317, at 155-62 (suggesting that the five permanent members of the UNSC agree not to use their veto in the event of humanitarian emergencies); LEE FEINSTEIN, COUNCIL ON FOREIGN RELATIONS, DARFUR AND BEYOND: WHAT IS NEEDED TO PREVENT MASS ATROCITIES 22-23 (2007); WAXMAN, *supra* note 123, at 5 (citing New Gingrich & George Mitchell, *American Interests and UN Reform: Report of the Congressional Task Force on the United Nations* 28 (2005) (suggesting creating a UN rapid reaction force)); Kofi A. Annan, *In Larger Freedom: Towards Development, Security and Human Rights for All*, p. 33, U.N. Doc. A/59/2005 (Mar. 21, 2005) (urging consensus among UN members regarding standards for intervention).

[406] Thomas M. Franck, *Interpretation and Change in the Law of Humanitarian Intervention*, *in* HUMANITARIAN INTERVENTION: ETHICAL, LEGAL, AND POLITICAL DILEMMAS 221-23 (J.L. Holzgrefe & Robert O. Keohane, eds., 2003); 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); Reisman, *supra* note 201, at 195; Lillich, *supra* note 194, at 347-51; 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); Scheffer, *supra* note 6, at 133; Kuwali, *supra* note 192, at 30, 45; 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), *available at* www.gevans.org/speeches; Mohamed, *supra* note 29, at 1323-1324; Michael L. Burton, *Legalising the Sublegal: A Proposal for Codifying a Doctrine of Unilateral Humanitarian Intervention*, 85 GEO. L. J. 427 (1996); ICISS REPORT, *supra* note 84, at 32-37.

intervention is necessary to prevent or halt the atrocities, (3) the response is proportional to the threat to civilians, (4) States have coordinated with Regional actors and coalition partners, (5) the UN is informed of the ongoing situation, and (6) post-atrocity, or *jus post bellum* contingency efforts are planned in advance of intervention.

1. 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 identified, immediate, and of sufficient magnitude.[407] 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.[408] These atrocities are well defined,[409] and limiting

[407] *See* Moore, *supra* note 406, 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 6, at 133 (describing appropriate resort to force for R2P purposes, which must include an accurately identified atrocity of sufficient magnitude); Lillich, supra note 200, 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); 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); KOSOVO REPORT, *supra* note 103, at 192-95 (requiring "serious violations of human rights or international humanitarian law"); The United Kingdom requires that there be an overwhelming humanitarian catastrophe, Robin Cook, U.K. Foreign Sec'y, Guiding Humanitarian Intervention, Speech to the American Bar Association (July 19, 2000), available at http://www.fco.gov.uk/en.newroom/latest-news/?view=Speech&id=2148757 [hereinafter Secretary Cook Speech]; ICISS REPORT, *supra* note 84, 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); U.N. Secretary-General, *Report of the Secretary-General to the Security Council on the Protection of Civilians in Armed Conflict*, 22, U.N. Doc. S/1999/957 (Sep. 8, 1999) (considering the scope of the atrocity crime, including the number of people harmed and the nature of violations).

[408] Kuwali, *supra* note 192, at 30. *See also* MARO HANDBOOK, *supra* note 2, annex A, at 103.

[409] *See supra* notes 353-359 and accompanying text.

action to responding to these crimes prevents the use of force for lesser, possibly pretextual reasons.[410]

The ability to measure the extent of atrocity crimes will be affected by the capacity of early warning mechanisms.[411] Some argue that the subjectivity of assessing grave circumstances undermines the implementation of an effective response strategy.[412] 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.[413]

Another approach worth considering, but by no means required, is an outside adjudicative body determining whether atrocity crimes are ongoing prior to the authorization for unilateral MARO. Prior to the French intervention in the Central African Republic in 1979, a Commission of Inquiry made of five African countries determined that serious human rights violations had occurred.[414] 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

[410] 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 IN ACTION 6 (2007) (citing the ICISS Report). 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.

[411] See GENOCIDE REPORT, *supra* note 2, at 24.

[412] Kuwali, *supra* note 192, at 29. *See generally* Franck & Rodley, *supra* note 30.

[413] *See supra* note 361 and accompanying text.

[414] MURPHY, *supra* note 33, at 107-08.

the threshold for intervention has been met.[415] Even if the subsequent intervention violates articles 2(4) and 2(7) due to lack of UN support, it will gain legitimacy if an impartial international organization finds that atrocities are occurring.

2. Intervention is Necessary

Non-UN 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.[416] 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 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.[417] This means that prior to using military force to respond to atrocity crimes other methods—diplomatic, economic, multilateral—must be exhausted or deemed infeasible.[418] This preserves the integrity of State sovereignty, allowing domestic authorities

[415] Kuwali, *supra* note 192, at 45.

[416] ILC Report, *supra* note 301, 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 406, at 221-23 (discussing that force be necessary for humanitarian intervention); Nanda, *supra* note 406, at 475 (requiring that there be no other recourse prior to humanitarian intervention).

[417] UN Charter arts. 1(1), 2(3), 2(4).

[418] Protection of Civilians Report, *supra* note 407, at 22 (describing the requirement of the exhaustion of peaceful efforts, and the inability of local authorities to enforce the law or their unwillingness and complicity); ICISS Report, *supra* note 301, at 32-37, 53-55 (requiring the exhaustion of non-military options prior to military intervention to enforce R2P); Moore, *supra* note 406, 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).

the opportunity to gain control of an internal matter as provided for in R2P.[419] 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, and only when they fail to act, or action in the Council is deemed infeasible, should States take on unilateral MARO.[420] This reaffirms the UNSC's authority over the lawful use of force, but 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.[421] Additionally, regional organizations might take action under article 53, or the General Assembly could become involved.[422] If these bodies are successfully engaged, then the intervention is kept within a broader purpose of the UN Charter—that the use of force is applied only in the

[419] The three pillars of the 2005 Summit Report, *supra* note 115, are: (1) 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.

[420] The following criteria were offered by Professor Jules Lobel: (1) whether the situation condemned by UNSC as threat to peace under Chapter VII, (2) whether the Council 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 (2000) (pointing out the weakness of this approach is the failure to determine who decides whether a situation meets these criteria and requires the use of force). *See also* Secretary Cook Speech, supra note 407 (describing the preference to act under UNSC authority, but, if not feasible, then with a coalition of States); KOSOVO REPORT, *supra* note 103, at 192-93 (discussing intervention only when the UN has failed to act); Moore, *supra* note 406, at 24-25 (describing intervention only upon the unavailability of effective action by an international agency, regional organization, or the United Nations); Franck, Interpretation and Change, *supra* note 406, at 221-23.

[421] Kuwali, *supra* note 192, at 30, 45.

[422] ICISS REPORT, *supra* note 84, at 32-37, 53-55.

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 threat of mass murder short of actual commission of crimes poses a greater challenge. In these cases, "anticipatory MARO" should mirror the Caroline test for anticipatory self-defense. Under that test, intervention is justified in situations where the "necessity of self-defense [or atrocity response] is instant, overwhelming, and leaving no choice of means, and no moment for deliberation."[423]

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 stock-piled, and militia are trained.[424] It is at this stage that humanitarian supplies should be gathered and military forces should be organized, including advanced planning for MARO.

3. 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

[423] Daniel Webster, *Letter to Henry Stephen Fox*, *in* THE PAPERS OF DANIEL WEBSTER: DIPLOMATIC PAPERS, VOL. 1. 1841-1843, 62 (K.E. Shewmaker, ed., 1983) [hereinafter Caroline Doctrine].

[424] Use of various media outlets (newspaper, radio, etc.) is evidence of the preparation of genocide, as in RTLM radio in Rwanda. *See* Stanton, *supra* note 41.

independence as possible.[425] 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."[426] Because we are contemplating unilateral MARO without UN 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]."[427] 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 place an emphasis on a limited impact on the target State's government.[428] In an ideal situation, the political independence of the target State could remain intact. But many situations will require dissolution of the State, targeting regime elites who are complicit or directly involved in atrocity crimes, or making arrests for future prosecution.[429] The extent of the violation of the target State's government structure will depend on how deep the nexus is between civilian slaughter and government leaders. Additionally, military planners may

---

[425] Nanda, *supra* note 406, at 475 (urging limited duration and limited coercive measures); Moore, *supra* note 406, at 24-25 (requiring a proportional use of force which does not threaten greater destruction of values than the human rights at stake and which does not exceed the minimum force necessary to protect the threatened rights); Protection of Civilians Report, *supra* note 407, at 22; KOSOVO REPORT, *supra* note 103, at 192-93 (requiring that force be necessary and proportionate); Secretary Cook Speech, *supra* note 107 (explaining that the use of force must be proportionate to achieving the humanitarian purpose and carried out in accordance with international law); ICISS REPORT, *supra* note 84, at 32-37, 53-55 (requiring the duration and intensity of force be limited to that necessary to prevent the crisis).

[426] *See* Caroline Doctrine, *supra* note 423.

[427] ILC Report, *supra* note 301, art. 25 commentary.

[428] Moore, *supra* note 406, at 24-25 (requiring that humanitarian intervention have a minimal effect on the authority structures necessary to protect threatened rights).

[429] *See generally* MARO HANDBOOK, *supra* note 2.

deem a mission infeasible if they are not able to incapacitate the target State's defense infrastructure.

4. Regional and coalition coordination

Nearly all commentators agree that if the UN fails to act, and States feel obliged to intervene to halt atrocity crimes, they should do so with a coalition of States.[430] This will generate a broader consensus as to the legitimacy of the action, and signal 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 UN has not authorized intervention, as in Liberia, Sierra Leone, and Kosovo. This is a second best to UNSC authorization. Five international organizations—UN, EU, AU, ECOWAS, and NATO—have some capacity to engage in MARO.[431] The AU and ECOWAS operate with the broadest legal flexibility under the African Union Constitutive Act, but need the most training, capacity building, logistics and sustainability.[432] Conversely, NATO and the EU have demonstrated their capacity for atrocity response in Kosovo and the Congo respectively, but have traditional legal limits on humanitarian intervention.[433]

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 demonstrate that it is sharing the responsibility and cost for these actions. Criticism of the United States as the world's police

---

[430] KOSOVO REPORT, *supra* note 103, at 192-95; Secretary Cook Speech, *supra* note 407.

[431] GENOCIDE REPORT, *supra* note 2, at 108.

[432] *Id*. at 85-86.

[433] *Id*. at 86.

force is perhaps strongest at home, particularly when the nation is gripped with economic concerns and war fatigue following Iraq and during the draw down in Afghanistan. Responsibility sharing is also part of the administration's comprehensive atrocity prevention strategy.[434]

5. UNSC Reporting

Any time States engage in non-UN authorized MARO, the UN (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 UN primacy in matters of international peace and security.[435] Furthermore, this will likely motivate the UN to issue statements or resolutions which provide guidance to intervening States, express condemnation or support of the action, inspire UN assistance, or other guiding instructions. In any case, intervening States are legally bound to comply with any relevant UNSC resolutions.[436]

6. 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.[437] Measures to consider are: humanitarian aid from government agencies, UN and

---

[434] PRESIDENTIAL DIRECTIVE, *supra* note 3.

[435] Protection of Civilians Report, *supra* note 407, at 22 (requiring that the UNSC have the ability to monitor the response).

[436] Moore, *supra* note 406, at 24-25.

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

regional organization, NGOs, and other non-military agencies; possible follow-on UN 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.[438] If it appears impracticable to successfully halt the atrocity, or if doing so would result in a much larger, and more catastrophic armed conflict (e.g., intervention in China), then this prong is not satisfied. 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.[439] 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 criteria must be applied as a whole. Adhering to these criteria should add conceptual clarity to States' response to mass atrocities, and will achieve the following: 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 criteria purposefully omit one factor that appears frequently in the literature—the clean hands of the

[438] ICISS REPORT, *supra* note 84, at 32-37, 53-55.

[439] *See generally* MARO HANDBOOK, *supra* note 2.

intervener.[440] This is not because the author discounts the risk of States acting out of self-interest. This is an historical inevitably, and something that persists today as we see in the way States jealously guard traditional concepts of sovereignty. Instead, the above criteria implicitly limit selfish State acts by requiring interveners to act only when the humanitarian crisis is demonstrable, to seek UN authorization or other multilateral support, and by limiting 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—the prevention and response to atrocity crimes is in the interest of all nations.

VI. 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 UN 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.

---

[440] Franck, *supra* note 406, at 221-23; Lillich, *supra* note 194, at 347-51; ICISS REPORT, *supra* note 84, at 32-37, 53-55.

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. Underlying a proactive response framework, 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 purposed to maintain 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.