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Justifying War and the Limits of Humanitarianism

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ARTICLE

JUSTIFYING WAR AND THE LIMITS OF
HUMANITARIANISM

*Mohamed S. Helal**

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INTRODUCTION

On March 28, 2011, as US warplanes participated in an international campaign to protect civilians in Libya from the wrath of Colonel Muammar Qaddafi, President Barack Obama addressed the nation to explain America’s role in the Libyan conflict.¹ Inaction as atrocities that “stained the conscience of the world” were being perpetrated by forces loyal to Libya’s longtime tyrant would have betrayed both America’s values and “our responsibilities to our fellow human beings,” the President declared.² Slightly over two years later, on August 26, 2013, Secretary of State John Kerry decried the use of chemical weapons against civilians in Syria, which “should shock the conscience of the world,” and called on the international community to “stand up to assure that there is accountability” for this heinous crime.³ In the ensuing weeks, the world witnessed an international diplomatic rollercoaster that brought the United States to the brink of military action against the Assad regime and compelled Syria to surrender its chemical weapons stockpiles to international control.⁴

As is customary for Middle Eastern conflicts, the Libyan and Syrian crises presented America and the world with innumerable

1. The international intervention to protect civilians in Libya was undertaken pursuant to UN Security Council Resolution 1973. *See* S.C. Res. 1973, para. 4, U.N. Doc. S/RES/1973 (Mar. 17, 2011).

2. Barack Obama, President, United States, Remarks by the President in Address to the Nation on Libya (Mar. 28, 2011), *available at* <http://www.whitehouse.gov/photos-and-video/video/2011/03/28/president-obama-s-speech-libya#transcript>.

3. John Kerry, Secretary of State, United States, Remarks on Syria (Aug. 26, 2013), *available at* <http://www.state.gov/secretary/remarks/2013/08/213503.htm>.

4. On September 27, 2013, the Security Council adopted Resolution 2118 demanding the immediate destruction of the Syrian chemical weapons program and promising punitive action under Chapter VII of the UN Charter in case of non-compliance by any of the warring parties in the Syrian civil war. S.C. Res. 2118, U.N. Doc. S/RES/2118 (Sept. 27, 2013).

policy and legal challenges. Constitutional lawyers debated whether America's involvement in the Libyan civil war complied with the War Powers Resolution,⁵ and pundits of every political persuasion evaluated the Obama Administration's posture towards the Syrian civil war.⁶ Meanwhile, for some commentators, a resurgent Russia actively protecting its regional interests and allies was reminiscent of bygone Cold War days,⁷ while for others the American and European response to these conflicts reflected the diminishing global influence of the west and portended a drift towards a politically "anchorless world."⁸

Beyond the particularities of these crises, the human suffering they wrought, and the intricate questions of law and policy they raised, for some scholars the fact that the international community did not condone the terrorizing of civilians by tyrannical regimes is symptomatic of a profound shift in the nature of international law and the structure of international relations. Regardless of the form and efficacy of efforts to protect civilians in any particular conflict, the emergence and increasing potency of the global concern for the safety, security, and welfare of human beings everywhere,⁹ evinces a transformation in the dominant norms of international affairs. The salient feature of this transformation, it is argued, is the systematic humanization of international law, which makes

5. See, e.g., Trevor Morrison, *Libya, 'Hostilities', The Office of Legal Counsel, and the Process of Executive Branch Legal Interpretation*, 124 HARV. L. REV. F. 62 (2011).

6. In support of President Obama's policy regarding the Syrian civil war, see Jeffrey Goldberg, *From Iran To Syria, Obama's Toughness Is Paying Off*, BLOOMBERG VIEW (Sept. 20, 2013, 1:04 PM), <http://www.bloomberg.com/news/2013-09-20/from-iran-to-syria-obama-s-toughness-is-paying-off.html>. For critical views of the Administration's positions, see Thom Shanker & Lauren D'Avolio, *Former Defense Secretaries Criticize Obama on Syria*, N.Y. TIMES, Sept. 18, 2013, <http://www.nytimes.com/2013/09/19/world/middleeast/gates-and-panetta-critical-of-obama-on-syria.html>.

7. David Kenner, *How Putin Turned Moscow Back into a Middle East Powerhouse*, FOREIGN POL'Y (Sept. 13, 2013), http://www.foreignpolicy.com/articles/2013/09/13/how_putin_turned_moscow_back_into_a_middle_east_powerhouse?page=0,1.

8. Roger Cohen, *An Anchorless World*, N.Y. TIMES, Sept. 12, 2013, <http://www.nytimes.com/2013/09/13/opinion/global/cohen-an-anchorless-world.html>.

9. For example, speaking before the Security Council after the adoption of Resolution 2118 on the situation in Syria, Secretary of State Kerry declared that measures taken against the Assad regime were reflective of the fact that "[a]s a community of nations, we reaffirm our responsibility to defend the defenseless." John Kerry, Secretary of State, United States, Remarks at the United Nations Security Council (Sept. 27 2013), available at <http://www.state.gov/secretary/remarks/2013/09/214890.htm>.

the overarching purposes of the global legal order the upholding of human rights, the protection of human security, and the fulfillment of human needs.¹⁰ In short, human beings are being brought front and center, and thus displacing the state from its long unrivaled position as the principal actor and primary beneficiary of the legal regulation of international relations.

This seismic shift from state-centrism to an individual-focused global legal order is said to have had a deep impact on international law. Traditionally, the absence of either a central lawmaker or enforcer led international relations theorists to depict world affairs as an anarchic realm populated by coequal, mutually suspicious, sovereign states.¹¹ In this dangerous world where survival and security are never guaranteed,¹² the purpose of international law was conceived as being limited to minimizing violence and facilitating peaceful coexistence between states.¹³ The humanization of international law, however, is argued to be contributing to upending this image of the society of states and laying the foundations for the emergence of a global community of humankind. This is occurring through a multifaceted process of hierarchization. First, a set of predominantly humanitarian principles, drawn

10. See generally Theodor Meron, *International Law in the Age of Human Rights: General Course on Public International Law*, 301 RECUEIL DES COURS 21 (2003). See also *infra* Part I.

11. The canonical statement of this image of international relations is provided by Kenneth Waltz, who explained that unlike domestic orders where governments execute the lawmaking and law enforcement functions, “[t]he parts of international-political systems stand in relations of coordination. Formally, each is the equal of all others. None is entitled to command; none is required to obey. International systems are decentralized and anarchic.” KENNETH WALTZ, *THEORY OF INTERNATIONAL POLITICS* 88 (1979).

12. As Robert Jervis explains, the anarchical nature of international relations causes international politics to degenerate into an “unrelenting struggle for survival, advantage, and often dominance.” Robert Jervis, *Realism, Neoliberalism, and Cooperation*, *INT’L SECURITY*, Summer 1999, at 42, 45.

13. This is why, as I detail below, scholars have identified what is called the “international law of coexistence.” This form of legal regulation emerges because in the absence of a central enforcer and in an environment where states are unsure about the intentions of other states there is always a potential for conflict that limits the possibilities for establishing and maintaining stable cooperative relations regulated by law between states. See John Mearsheimer, *The False Promise of International Institutions*, *INT’L SECURITY*, Winter 1994–95, at 5.

from international human rights,¹⁴ humanitarian,¹⁵ and criminal law,¹⁶ are recognized as occupying the normative apex of the international legal order. Second, an array of global and regional institutions are both challenging the state as the primary actor in international affairs and overseeing the implementation of these humanitarian principles. And third, the myriad forces of globalization coupled with the enmeshment of societies in webs of transnational relations heralds the emergence of a post-national global social consciousness predicated on common values and interests.¹⁷

Expectedly, the reverberations of this putative process, frequently referred to as the constitutionalization of international law, have been felt throughout the global legal system. Many of the foundational principles of international law, such as sovereignty, non-intervention, the juridical equality of states, and state consent as the source of legal obligation are either radically revised or wholly discarded. More profoundly, the purpose underlying international law is said to have evolved beyond the limited objective of regulating relations between coequal sovereigns to protecting the rights, promoting the interests and values, and fulfilling the needs of an emergent global post-national community of humankind. This reconstitution of the global order also brings, or at least aspires to bring, inter-state competition and Great Power politics to an end,¹⁸ and to subject, or at least aspires to subject, world affairs to the rule of law.

14. Thomas Buergenthal, *The Normative and Institutional Evolution of International Human Rights*, 19 HUMAN RTS. Q. 703 (1997).

15. M. Cherif Bassiouni, *International Law and the Holocaust*, 9 CAL. W. INT'L L.J. 201, 205 (1979); Theodor Meron, *The Humanization of Humanitarian Law*, 94 AM. J. INT'L L. 239 (2000); Gabriella Blum, *The Individualization of War: From War To Policing in the Regulation of Armed Conflict*, in LAW AND WAR 48 (Austin Sarat et al. eds., 2014).

16. M. CHERIF BASSIOUNI, INTRODUCTION TO INTERNATIONAL CRIMINAL LAW 35–37 (2d ed. 2013).

17. See, e.g., Christian Tomuschat, *International Law: Ensuring the Survival of Mankind on the Eve of a New Century: General Course on Public International Law*, 281 RECUEIL DES COURS 1, 42 (1999); see also Paul Schiff Berman, *From International Law To Law and Globalization*, 43 COLUM. J. TRANSNAT'L L. 485 (2005).

18. Rosa Brooks, *Transnational Security Advisors*, FOREIGN POL'Y (June 6, 2013), http://www.foreignpolicy.com/articles/2013/06/06/transnational_security_advisors_rice_power (arguing “that the age of great powers is coming to an end”).

One area of international law, on which this Article focuses, that is said to have evolved to reflect this ongoing process of humanization is *jus ad bellum*.¹⁹ All laws serve certain social purposes and policies,²⁰ and in the case of *jus ad bellum* the rules and institutions constituting this field of law were designed to protect the security, independence, and territorial integrity of states through minimizing inter-state violence.²¹ The humanization of international law promises to overturn this conception of the purpose of *jus ad bellum*. In a humanitarian legal order serving the interests of a global community of humankind, the principal purpose for which armed force may be justifiably deployed is the protection of *human*, not *state*, security.

At first glance, political and legal developments in the past twenty years may appear to corroborate claims that the humanization of international law is having a transformational impact on *jus ad bellum*. Armed interventions to protect civilians against mass atrocities in places like Iraq, Liberia, Somalia, Haiti, Kosovo, and, most recently, Libya, in addition to efforts to end civil strife and bring the perpetrators of crimes against civilian populations to justice in war torn societies like the former Yugoslavia, Rwanda, Darfur, and now Syria, are all potentially suggestive of a humanitarian shift in *jus ad bellum* and, more broadly, in international law and politics.²² Moreover, the meteoric rise of the Responsibility to Protect (“RtoP”) as a

19. *Jus ad bellum* is the area of international law that determines when states may resort to armed force in international relations. By focusing exclusively on *jus ad bellum*, I engage in an act of analytical isolation. This, as Frederick Schauer explains, means that “studying a part of law does not deny the connections between that part and the rest of law, and studying or even defining law as a whole does not deny the connections between law and everything else.” Frederick Schauer, *Slippery Slopes*, 99 HARV. L. REV. 361, 364 (1985). Therefore, I realize that the conclusions reached in this Article about *jus ad bellum* may not be completely valid for other fields of international law.

20. See *Fitzgerald v. Racing Assn. of Central Iowa*, 539 U.S. 103, 108 (2003) (“The Iowa law [enforcing a differential tax rate], like most laws, might predominantly serve one general objective”); see also HENRY HART & ALBERT SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 159 (1958).

21. ALEXANDER ORAKHELASHVILI, *COLLECTIVE SECURITY* 4 (2011).

22. Jack Donnelly, *Human Rights, Humanitarian Crises, and Humanitarian Intervention*, 48 INT’L J. 607 (1993) (observing that “in fact, human rights, and issues of humanitarian politics more generally, have achieved an international prominence at least as great as at any other time in modern history”).

policy framework to prevent egregious human rights violations,²³ and its subsequent invocation to justify a war waged to protect civilians in Libya, may provide further evidence of the emergence of a global community of humankind predicated on common humanitarian values.²⁴

In this Article, I challenge claims that the structure, substance, and ultimately, the social values and policy purposes underlying *jus ad bellum* are experiencing a paradigm shift. I argue that this vital field of international law has not, as many contend, undergone a process of humanization whereby its overarching objective has become the promotion, protection, and fulfillment of human security, rights, and interests. Furthermore, recent interventions undertaken for humanitarian purposes and doctrinal developments, such as the adoption of RtoP, do not portend a future trajectory of humanization. To the contrary, in this Article I show that the normative architecture and institutional infrastructure of the system of rules governing the resort to force continue to reflect statist, not humanitarian, values, and that the dominant understanding of security remains defined in terms of *state*, not *human*, security.

To make this point, I show that although a unique opportunity arose to humanize *jus ad bellum* following the 1999 Kosovo War, the international community purposively elected to keep the doctrinal and institutional components of *jus ad bellum* intact. As discussed below, the intervention by the National Atlantic Treaty Organization (“NATO”) to protect civilians in Kosovo was judged to be illegal because it was launched without the requisite UN Security Council authorization, but was widely lauded as legitimate because it served the humanitarian objective of saving innocent civilians from mass atrocities. In essence, the war had driven a wedge between a state-centric *jus ad bellum* and a humanitarian legitimacy that justified overriding

23. Thomas G. Weiss, *RtoP Alive and Well After Libya*, 25 ETHICS & INT’L AFF. 287 (2011) (noting that since the concept of genocide, “no idea has moved faster in the international normative arena” than RtoP”).

24. See Stewart Patrick, *A New Lease on Life for Humanitarianism*, FOREIGN AFF. (MAR. 24, 2011), <http://www.foreignaffairs.com/articles/67674/stewart-patrick/a-new-lease-on-life-for-humanitarianism?page=show>; Hallie Ludsin, *Returning Sovereignty to the People*, 46 VAND. J. TRANSN’L L. 97, 138–45 (2013).

legal strictures to serve the higher purpose of protecting human lives.

To bridge this gap between legality and legitimacy, various justifications for waging humanitarian war were proposed in the years following the Kosovo War. To varying degrees, these justificatory techniques, which I catalogue in a typology I call “The Legitimacies of Humanitarian War,” entailed revisiting the existing doctrinal and institutional components of *jus ad bellum* to bring them in line with humanitarian interests and values. The purpose of this typology is not to recreate the tired debate over the legality or legitimacy of the Kosovo War. Rather, the objective is to illustrate to the reader that in the aftermath of Kosovo a range of justifications emerged that, if they had garnered sufficient international support, would have overturned the statist structure and values of *jus ad bellum*. The most prominent justification of humanitarian war to emerge during this period was a variant of RtoP that I call RtoP-*Humanity’s Version*, which proposed substantial revisions to the rules and institutions of *jus ad bellum*.

Ultimately, however, the international community rejected these legitimacies of humanitarian war. At the 2005 UN World Summit, a version of RtoP that I call RtoP-*Realpolitik* prevailed and jettisoned those features of RtoP-*Humanity’s Version* that challenged the existing *jus ad bellum* scheme. RtoP-*Realpolitik* was purposefully designed to make the legitimate use of force to protect civilians wholly dependent on the consent of the Security Council, which, as I argue below, is essentially a Great Power concert. In other words, while protecting civilian populations and safeguarding basic human rights have undoubtedly become recognized as legitimate causes for armed intervention by the international community, it remains that the pursuit of these humanitarian objectives is doctrinally and institutionally subordinate to the goal of protecting the essential interests of the Great Powers and the maintenance of inter-state peace. This means that the pursuit of humanitarian objectives and the protection of human lives continues to function within the bounds and limits of Great Power politics.

In a sense, therefore, the international response to the Syrian civil war is unsurprising. By adopting RtoP-*Realpolitik*, the international community effectively drew a line in the sand not

at the perpetration of egregious crimes against civilians, whether committed using conventional or non-conventional weapons, but at the essential interests of the Great Powers. The 2005 World Summit practically prioritized the protection of Russian and Chinese interests—and those of the other Great Powers—over the humanitarian interest in protecting civilians from mass atrocities. This indicates that the social objectives underlying *jus ad bellum* continue to reflect the privileging of statist, not humanist, values, which challenges suggestions that world politics is witnessing the emergence of a global community of humankind.

This Article proceeds as follows: Part I outlines the claim that international law is undergoing a process of constitutionalization that is laying the groundwork for the emergence of a global community of humankind. In this Part, I also outline the contours of what I call the ‘humanitarian thesis,’ which is the label I attach to claims that the international legal order is experiencing a shift from state-centrism to a focus on the rights, needs, and interests of individual human beings. Part I also explains how the putative humanization of international law challenges the norms and institutions of *jus ad bellum*, and concludes with a discussion of how the Kosovo War provided an opportunity to fundamentally revise the tenets of this field of international law.

Part II is devoted to laying out my typology of justifications for waging humanitarian war that emerged in the aftermath of the Kosovo War, including a discussion of the content of RtoP-*Humanity’s Version*. Finally, Part III demonstrates how the international community ultimately rejected all these justifications and adopted RtoP-*Realpolitik*, which preserved the doctrinal and institutional structure of *jus ad bellum* and the statist values underlying this legal regime.

I. HUMANITARIANISM AND THE TRANSFORMATION OF INTERNATIONAL LAW

International legal scholarship is awash with talk about the transformational changes that the field is experiencing. International law, traditionally understood as the corpus of rules

regulating relations between territorially distinct sovereign states, is expanding exponentially.²⁵ Symptoms of this growth are abundant. Formerly unregulated areas of international affairs have come within the ambit of international law,²⁶ while numerous actors, such as individuals, corporations, civil (and uncivil) society, and international organizations, are becoming increasingly integral to the international legal process, and at times even challenging states as the principal actors in particular fields.²⁷

But international law is not only expanding horizontally to include more issue-areas and actors. It is also growing vertically. For decades, governments, courts, and scholars have acknowledged the emergence of a normative hierarchy in international law. Certain rules are considered to enjoy superiority over and trump other rules. In addition, the practice of international law is becoming progressively institutionalized. Countless global and regional organizations and courts of both general and issue-specific jurisdiction have been established to manage vast swaths of international affairs.²⁸

More profoundly, it is argued that this multidimensional expansion of international law reflects a deeper transformation: the purpose underlying the entire system has changed. As discussed below, proponents of what I call the 'humanitarian

25. See Anne Peters, *The Growth of International Law between Globalization and the Great Power*, 8 *AUSTRIAN REV INT'L & EUR. L.* 109 (2003) (arguing that international law is not only expanding, but exploding).

26. For example, international law today regulates access to and exploitation of the global commons, which has also spurred the rapid evolution of international environmental law. See PHILIPPE SANDS, *PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW* (2d ed. 2002). As space travel became relatively routine since the mid-twentieth century, a series of multilateral treaties were contracted to ensure that space exploration is undertaken for peaceful purposes and for the benefit of the entire international community. See generally NANDASIRI JASENTULIYANA, *INTERNATIONAL SPACE LAW AND THE UNITED NATIONS* (1999). Similarly, the scientific realization of the negative impacts of degradation of biodiversity led to concerted international efforts to protect the global ecosystem. See *BIODIVERSITY AND INTERNATIONAL LAW: THE EFFECTIVENESS OF INTERNATIONAL LAW* (Simone Bilderbeek ed., 1992).

27. See, e.g., Jose Alvarez, *The New Treaty Makers*, 25 *B.C. INT'L & COMP. L. REV.* 213 (2002) (discussing the role of international organizations in the negotiation and conclusion of treaties). See generally NON-STATE ACTORS AS NEW SUBJECTS OF INTERNATIONAL LAW (Reiner Hofmann ed., 1999).

28. See generally KALEVI HOLSTI, *TAMING THE SOVEREIGNS: INSTITUTIONAL CHANGE IN INTERNATIONAL POLITICS* (2004) (examining the proliferation of international institutions and their role in altering the dynamics of inter-state interactions).

thesis' maintain that an international legal order has emerged, the objective of which is no longer limited to facilitating interaction between juridically equal states, but that is committed to the deeper social purpose of protecting the rights and interests of human beings. This foundational transformation, scholars argue, is subjecting international law to the "pain of revolutionary change It is difficult to think of a structural aspect of international law which is not in a state of disorder, incoherence, and contention."²⁹

Jus ad bellum, like many other fields of international law, is said to have felt the reverberations of this 'revolution.' Instead of its traditional focus on minimizing inter-state violence, maintaining state independence, and protecting the territorial integrity of states, proponents of the humanitarian thesis argue that *jus ad bellum* is evolving towards prioritizing the protection of human security and human rights. To be fully appreciated, however, these claims about the changing nature of *jus ad bellum* should be placed within and viewed as part of the broader debate about the ongoing transformation of the international legal order. That is the purpose of this Part of the Article. It begins by describing how the humanitarian thesis fits within wider claims about the constitutionalization of international law. This is followed by outlining the main contours of the humanitarian thesis and a discussion of how the rules governing the resort to force by states are affected by this putative rise of humanitarianism as the overall animating purpose of international law.

A. From International Unsociety to Global Community

In keeping with what is a scholarly tradition, this brief overview of the evolving character of international law begins with the Peace of Westphalia of 1648. The series of agreements that concluded the Thirty Years War,³⁰ collectively known as the Peace of Westphalia, enjoy an almost mythical status in the

29. Philip Allott, *Reconstituting Humanity—New International Law*, 3 EUR. J. INT'L L. 219, 246 (1992).

30. The principal legal instruments that brought the Thirty Years War to an end were the Treaty of Münster and Treaty of Osnabrück which were concluded in October 1648. See Peace of Westphalia, Oct. 10, 1648, 1 Parry 271; 1 Parry 119.

history of both international law and international relations.³¹ These agreements are frequently cited as the foundation of modern international law,³² and as the moment at which state sovereignty became recognized as the ordering principle of international relations.³³

Since the Peace of Westphalia, diplomats and scholars alike imagined a world populated by territorially distinct, juridically equal, sovereign states. Two implications flow from this imagined reality.³⁴ First, a distinction was erected between the internal domain and the external realm. In the former, a hierarchical order existed in which an all-omnipotent sovereign reigned supreme by monopolizing both law-making authority and the legitimate use of force. This meant that sovereigns were free to adopt whichever system of governance they wished and were protected against outside interference in the internal administration of their states. Externally, all sovereigns coinhabited a horizontal plain in which none enjoyed inherent supremacy over another.³⁵ This meant that, in the absence of a supreme sovereign capable of maintaining peace between the sovereigns, an anarchic realm emerged,³⁶ in which, to use

31. For example, Hans Morgenthau considered the legal principles agreed upon in the Peace of Westphalia “the cornerstone of the modern state system.” HANS MORGENTHAU, *POLITICS AMONG NATIONS*, 294 (6th ed. 1985).

32. LORI DAMROSCH ET AL., *INTERNATIONAL LAW: CASES AND MATERIALS* xv (5th ed. 2009); see also Leo Gross, *The Peace of Westphalia 1648-1948*, 42 *AM. J. INT’L L.* 20 (1948); Sebastian Schmidt, *To Order the Minds of Scholars: The Discourse of the Peace of Westphalia in International Relations Literature*, 55 *INT’L STUD. Q.* 601 (2011).

33. For a short study on the Peace of Westphalia and the roots of the concept of sovereignty, see Derek Croxton, *The Peace of Westphalia of 1648 and the Origins of Sovereignty*, 21 *INT’L HIST. R.* 569 (1999).

34. I call this world “imagined” because in reality world politics never corroborated the theoretical postulates of the Westphalian order. States have continuously either willingly accepted or grudgingly succumbed to various forms of intervention in their internal affairs. Nonetheless, I use this simplistic conception of the Westphalian order to illustrate its most salient features and to shed light on the role of international law in this system. For a more realistic depiction of the Westphalian order, see Stephen Krasner, *Compromising Westphalia*, *INT’L SECURITY*, Winter 1995/1996, at 115.

35. The clearest judicial expression of this image of the international order appears in the decision in the *Island of Palmas* dispute. The arbitrator, Swiss jurist Max Huber, observed: “Sovereignty in the relation between States signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other state, the functions of a state.” *Island of Palmas Case* (U.S. v. Neth.), Hague Ct. Rep. 2d (Scott) 83 (Perm. Ct. Arb. 1932).

36. WALTZ, *supra* note 11, at 88–93.

Thomas Hobbes' graphic illustration, sovereigns are perpetually locked "in the state and posture of gladiators, having their weapons pointing, and their eyes fixed on one another, that is, their forts, garrisons, and guns upon the frontiers of their kingdoms, and continual spies upon their neighbors: which is a posture of war."³⁷

The second implication of this Westphalian worldview relates to the nature and function of international law. Because this order lacked a centralized law-making authority capable of promulgating laws binding its subjects, international law was predicated on the consent of sovereign states.³⁸ In other words, states could not be bound to legal obligations absent their voluntary consent.³⁹ As to its function, in this insecure, uncertain, and suspicious world populated by inherently competitive states, it was unlikely that law would aspire to much more than the circumscribed role of maintaining communication and facilitating interaction between these sovereign states. This legal system, aptly dubbed the international law of coexistence,⁴⁰ sought to merely "establish a minimum order between antagonistic entities that challenge any authority superior to themselves and which perceive their relations as a 'zero sum game' where one's gain is immediately perceived as another's loss."⁴¹

The dominant view today, however, is that the reality of global affairs mocks this Westphalian image.⁴² Most writings

37. THOMAS HOBBS, *LEVIATHAN* 89–90 (Richard Tucker ed., Cambridge Univ. Press 1991) (1651).

38. OPPENHEIM'S *INTERNATIONAL LAW* 15 (Sir Robert Jennings & Sir Aurthur Watts eds., 1992); *see also* JAMES BRIERLY, *THE LAW OF NATIONS* 51–52 (Sir Humphrey Waldock ed., 1963).

39. The canonical statement reflecting the theory that states could only bear legal obligation to which they consented appears in the *Lotus Case* wherein the Permanent Court of International Justice remarked that "International law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will Restrictions upon the independence of States cannot therefore be presumed." *S.S. Lotus (Fr. v. Turk.)* 1927 P.C.I.J. (ser. A) No. 10, at 18 (Sept. 7).

40. WOLFGANG FRIEDMANN, *THE CHANGING STRUCTURE OF INTERNATIONAL LAW* 60–61 (1964).

41. Georges Abi-Saab, *Whither the International Community?* 9 *EUR. J. INT'L L.* 248, 251 (1998).

42. This prompted many authors to announce the emergence of a post-Westphalian era. *See, e.g.,* RE-ENVISIONING SOVEREIGNTY: THE END OF WESTPHALIA?

collectively refer to the historical processes that contributed to this transformation of international relations under the broad and often ill-defined banner of globalization.⁴³ The impact of the political, economic, social, and ideational changes that occurred, especially since World War II,⁴⁴ are considered to have had the effect of revolutionary change on the structure of global affairs.⁴⁵ Coupled with the demise of the Soviet Union, the processes of globalization are argued to have succeeded in dethroning “the realist world order dominated by sovereign states.”⁴⁶

International law is also said to have evolved from the minimalist law of coexistence prevalent under the classical Westphalian image of world politics into a law designed to promote the interests of a global community of humankind. One storyline that traces this transformation of international law is the claim that international law is undergoing a process of constitutionalization.⁴⁷ The salient theme running throughout the constitutionalization literature and that captures its essence is the hierarchization of international law.⁴⁸ The constitutionalist claim is predicated on the emergence of a tripartite normative, valuative, and institutional hierarchy within the international legal system, all of which indicate that a global community

(Trudy Jacobsen et al., eds., 2008); *BEYOND WESTPHALIA? NATIONAL SOVEREIGNTY AND INTERNATIONAL INTERVENTION* (Gene Lyons & Michael Mastanduno eds., 1995).

43. DAVID HELD & ANTHONY MCGREW, *GLOBALIZATION/ANTI-GLOBALIZATION: BEYOND THE GREAT DIVIDE* 2–3 (2d ed. 2009).

44. For a concise and holistic overview of the changes and developments that brought about the phenomena that are frequently associated with globalization, see DAVID HELD ET AL., *GLOBAL TRANSFORMATIONS: POLITICS, ECONOMICS, AND CULTURE* 414–52 (1999).

45. DANIEL PHILPOTT, *REVOLUTIONS IN SOVEREIGNTY* 2 (2001) (speaking of the “overthrow” of the basic rules undergirding international relations).

46. Harold Hongju Koh, *A United States Human Rights Policy for the 21st Century*, 46 *ST. LOUIS U. L.J.* 293, 303 (2002).

47. For an introductory survey of the debate, see *TOWARDS WORLD CONSTITUTIONALISM: ISSUES IN THE LEGAL ORDERING OF THE WORLD COMMUNITY* (Ronald St. John Macdonald & Douglas M. Johnston eds., 2005).

48. Jan Klabbbers, *Setting the Scene*, in *THE CONSTITUTIONALIZATION OF INTERNATIONAL LAW* 18 (Jan Klabbbers, Anne Peters & Geir Ulfstein eds., 2009) (noting that “the various manifestations of verticalization tend to stem from constitutionalist sentiments”); see also Thomas Kleinlein, *Between Myths and Norms: Constructivist Constitutionalism and the Potential of Constitutional Principles in International Law*, 81 *NORDIC J. INT’L L.* 79, 97 (2012) (“Hierarchization of public international law is considered to be a crucial element of constitutionalism.”).

governed by law is replacing the anarchic universe of coequal sovereigns.⁴⁹

The normative hierarchization of international law has been the subject of much doctrinal debate.⁵⁰ The centerpiece of this normative growth is the recognition that certain principles, referred to as either *jus cogens* or peremptory norms,⁵¹ constitute supreme rules from which no derogation is permissible.⁵² While no exhaustive list of peremptory norms has been compiled, the prohibitions on aggression, slavery, genocide, war crimes, and crimes against humanity are frequently cited as constituting *jus cogens* norms.⁵³ The rationale underlying recognizing these principles as enjoying an elevated status within the international legal system relates to the *morally* reprehensible nature of the proscribed activities.⁵⁴ Thus, “the higher purposes and values represented by these superior norms, which are deemed non-derogable, constitute basic elements of a ‘world constitution’.”⁵⁵

49. Erika de Wet, *The International Constitutional Order*, 55 INT’L & COMP. L. Q. 51 (2006) (arguing that the international constitutional order consists of “an international community, an international value system, and rudimentary structures for its enforcement”).

50. For a brief introduction to the concept of normative hierarchy in international law, see Dinah Shelton, *International Law and ‘Relative Normativity’*, in INTERNATIONAL LAW 141, 145 (Malcolm Evans ed., 3d ed. 2003).

51. Vienna Convention on the Law of Treaties, art. 53, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention].

52. Thus, the International Law Commission (“ILC”) observed that “[w]here there is an apparent conflict between primary obligations, one of which arises for a State directly under a peremptory norm of general international law, it is evident that such an obligation must prevail.” Int’l Law Comm’n, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries*, at 207, U.N. Doc. A/56/10 (2001).

53. *Id.* Government statements, court decisions, and scholarly views have identified a broad panoply of obligations and rights as possibly having attained the status of *jus cogens* norms. These include: the right to self-determination, the prohibitions on torture, forced labor, racial discrimination, and the principles equality before the law and *non-refoulement*. See ALEXANDER ORAKHELASHVILI, PEREMPTORY NORMS IN INTERNATIONAL LAW 50–66 (Vaughan Lowe ed., 2006).

54. For example, Sir Hersch Lauterpacht described obligations enjoying a higher legal status as “expressive of rules of international morality.” Int’l Law Comm’n, *Report of the Special Rapporteur on the Law of Treaties*, 155, UN Doc. A/CN.4.63 (1953 Vol. II). Lord McNair also identified certain “rules of law and some principles of morality” that actors may not agree to violate. LORD MCNAIR, THE LAW OF TREATIES 213–14 (1961).

55. Pemmaraju Sreenivasa Rao, *The Concept of International Community in International Law: Theory and Reality*, in INTERNATIONAL LAW BETWEEN UNIVERSALISM AND FRAGMENTATION: Festschrift in Honor of Gerhard Hafner 93–94 (James Crawford et al. eds., 2008). The body of higher international legal principles also

Recognizing the normative hierarchization of international law is doubly significant for the purposes of this Article. First, proponents of the humanitarian thesis have underscored that many peremptory norms are rights of individuals,⁵⁶ which demonstrates the priority human rights enjoy over other values and interests in international law.⁵⁷ Second, the constitutionalization of international law and the recognition of certain principles as non-derogable overturn the Westphalian worldview of an international law predicated on state-consent. Indeed, a system where protecting “fundamental values is not to be left to the free disposition of states individually or *inter se* but is recognized and sanctioned by the law as a matter of concern to all States”⁵⁸ challenges the image of an order populated by territorially disjoint, hermetic, and competing sovereigns. Instead, what emerges is a global community bound by shared values and interests that are embodied in legal instruments.⁵⁹

Proponents of the constitutionalization of international law argue that these values and interests constitute the ‘mortar’ that holds this putative global community together.⁶⁰ In today’s

includes obligations *erga omnes*, which are frequently presented as the opposite side of the *jus cogens* coin. See M. Cherif Bassiouni, *International Crimes: Jus Cogens, and Obligatio Erga Omnes*, 59 *LAW & CONTEMP. PROB.* 63, 72 (1996).

56. Karl Zemanek, *The Unilateral Enforcement of International Obligations*, 47 *ZaöRV* 32, 39 (1987) (arguing that the Universal Declaration of Human Rights represents *jus cogens* norms); see also Bruno Simma & Philip Alston, *The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles*, 12 *AUST. Y.B. INT’L L.* 82 (1988-1989).

57. Anne Peters, *Global Constitutionalism Revisited*, 11 *INT’L LEGAL THEORY* 39, 49–50 (2005); see also Andrea Bianchi, *Human Rights and the Magic of Jus Cogens*, 19 *EUR. J. INT’L L.* 491, 494–95 (2008).

58. Bruno Simma, *Bilateralism and Community Interest in the Law of State Responsibility*, in *INTERNATIONAL LAW AT A TIME OF PERPLEXITY: ESSAYS IN HONOR OF SHABATI ROSENNE* 823 (Yoram Dinstein ed., 1989).

59. Thomas Kleinlein, *Summary: Constitutionalization in International Law*, 231 *MAX-PLANCK-GESELLSCHAFT ZUR FORDERUNG DER WISSENSCHAFTEN E.V.* 703, 709 (2012).

60. International constitutionalism is not the only school of thought that adopts an image of the international legal system predicated on and designed to achieve certain globally shared values. For example, the New Haven School, pioneered by Yale Law School Professor Myres MacDougal, has consistently viewed international law as a process that should be geared to the achievement of minimum world order and human dignity. See Siegfried Wiessner & Andrew Willard, *Policy Oriented Jurisprudence and Human Rights Abuses in Internal Conflict: Toward World Public Order of Human Dignity*, 93 *AM. J. INT’L L.* 316 (1999); see also Hengameh Saberi, *Love it or Hate it, But For the Right Reasons: Pragmatism and the New Haven School’s International Law of Human Dignity*, 35 *BC INT’L & COMP. L. REV.* 59 (2012). Liberal internationalists, such as Thomas Franck, Louis Henkin, and Anne-Marie Slaughter have also championed the cause of

world, the argument goes, the members of an all-inclusive global community⁶¹ have become cognizant of the fact that the provision of certain non-excludable 'public goods' requires their concerted cooperation.⁶² Examples of these include international peace and security, the prevention of aggression,⁶³ and the protection of human rights and fundamental freedoms which is dubbed "the noblest branch of international law,"⁶⁴ and proclaimed to be a foremost expression of globally valued ideals.⁶⁵ Ultimately, this interdependence and the global commitment to these values and interests lead members of this community to view their "existence, security, and well-being, but also their identity as inexorably linked. Therefore, they share a feeling of responsibility and have a common interest to protect and promote the referent values. As a result, their modes of

understanding the international legal system as advancing liberal ideas that give pride of place to basic human rights and democratic rule. See LOUIS HENKIN, *INTERNATIONAL LAW: POLITICS AND VALUES* (1995); THOMAS FRANCK, *FAIRNESS IN INTERNATIONAL LAW* (1995); Anne-Marie Slaughter, *A Liberal Theory of International Law*, 94 AM. SOC'Y INT'L L. PROC. 240 (2000).

61. By all-inclusive, I wish to indicate that the members of this community are not limited to states; quite to the contrary. Most authors emphasize that a global legal community extends well beyond the society of sovereign states to include a host of actors, both within and beyond the state including individuals, social and political groups, civil society actors, and supra-national organizations. See Robert McCroquodale, *International Community and State Sovereignty: An Uneasy Symbiotic Relationship*, in *TOWARDS AN 'INTERNATIONAL LEGAL COMMUNITY'? THE SOVEREIGNTY OF STATES AND THE SOVEREIGNTY OF INTERNATIONAL LAW* 241 (Colin Warbrick & Stephen Tierney eds., 2006).

62. Georges Abi-Saab, *Cours General de Droit International Public*, 207 RECUEIL DES COURS 1, 98-99 (1987-VII).

63. Santiago Villalpando, *The Legal Dimension of the International Community: How Community Interests Are Protected in International Law*, 21 EUR. J. INT'L L. 387, 398 (2010). The Kellogg-Briand Pact of 1928, which was the first international legal instrument to outlaw war, described the renunciation of war as ultimately necessary "to promote the welfare of mankind." General Treaty for Renunciation of War as an Instrument of National Policy, July 24, 1929, 46 Stat 2343, 94 L.N.T.S. 57 (Kellogg-Briand Pact).

64. Bruno Simma, *From Bilateralism to Community Interest in International Law*, 250 RECUEIL DES COURS 217, 242 (1994-VI).

65. For example, the Universal Declaration on Human Rights underscores that protection of "the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice, and peace in the world." Universal Declaration on Human Rights, G.A. Res. 217A (III), U.N. GAOR, 3d Sess., U.N. Doc. A/810 (1948). Similarly, the 1993 World Conference on Human Rights highlighted that "human rights is a matter of priority for the international community." World Conference on Human Rights, June 14-25, 1993, *Vienna Declaration and Program of Action*, U.N. Doc. A/Conf.157/23 (July 12, 1993).

socialization in the international field are value-loaded and purposeful.”⁶⁶ Eventually, these values and interests seep into the legal system and find expression in international legal instruments, which in a curiously circular move, are then frequently paraded as evidence of the emergence of a value-laden global community.⁶⁷ The conclusion of innumerable international legal instruments to enable an interdependent global community to achieve these common values and objectives “illustrates that there is a worldwide social consciousness at work today . . . far beyond the traditional rituals of governmental interaction.”⁶⁸

As a testament to this emerging global consciousness, constitutionalists point to the third manifestation of the hierarchization of international law, which takes the form of the emergence of a variety of international organizations to manage global efforts to achieve this panoply of common values and interests. The debate over the relocation of sovereign powers and authorities from states to supra-national entities, whether regional or global, enjoys considerable scholarly attention and is too broad to be covered here.⁶⁹ Two insights drawn from this debate, however, are relevant for the purposes of this Article. First, by transferring prerogatives traditionally associated with

66. Nicholas Tsagourias, *International Community, Recognition of States, and Political Cloning*, in *TOWARDS AN ‘INTERNATIONAL LEGAL COMMUNITY’? THE SOVEREIGNTY OF STATES AND THE SOVEREIGNTY OF INTERNATIONAL LAW*, *supra* note 61, at 211, 214–15.

67. See Santiago Villalpando, *supra* note 63, at 399–411. For a skeptical view regarding the role of globally shared ‘values’ as the animating force behind many of the international legal instruments that are frequently cited as evincing the emergence of a global valuative community, see Jean d’Aspremont, *The Foundations of the International Legal Order*, 18 *FINNISH Y.B. INT’L L.* 1 (2009).

68. Bruno Simma, *From Bilateralism to Community Interest in International Law*, 250 *RECUEIL DES COURS* 221, 234 (1994-VI); see also Dino Kritsiotis, *The Power of International Law as Language*, 34 *CAL. W. L. REV.* 397 (1997).

69. A collection of essays compiled by Neil Walker provides a useful introduction and overview of this debate. *RELOCATING SOVEREIGNTY* (Neil Walker ed., 2006). The terms ‘constitution’ and ‘constitutionalization’ have been used in different ways in relation to international organizations. One way that these terms have been employed is to refer to the study of the foundational treaties of international organizations and their internal governance. Some scholars call this “micro-constitutionalism.” Another way in which constitutionalism has been used in this context is to refer to the burgeoning role supranational institutions perform in global governance which challenges the traditional functions of nation-states. This form of constitutionalism is labeled “macro-constitutionalism.” See CHRISTINE SCHWOBEL, *GLOBAL CONSTITUTIONALISM IN INTERNATIONAL LEGAL PERSPECTIVE* 32 (2011).

the nation-state to supra-national entities, the institutional hierarchization of international law upends the image of an anarchical horizontal plain of autonomous coequal sovereigns.⁷⁰ The almost universally cited example of this form of institutional hierarchization is the European Union, which is proclaimed to have taken Europe into a post-national age.⁷¹ With its universal membership, general jurisdiction, and centrality in world affairs, the United Nations is also often presented as the legitimate representative and agent of the international community.⁷² Second, in the constitutionalist narrative, supranational institutions are not mere servants of their state-masters. Rather, these institutions take on a life of their own and become responsible for enforcing communal values and interests, regardless of the narrower interests or occasionally myopic views of any particular state or actor.⁷³ Ultimately, the progressive institutionalization of international affairs at both the regional and global levels is considered no less than “the fulfillment of the idea of community; it brings the community to perfection.”⁷⁴

The cumulative effect of this tripartite normative, valuative, and institutional hierarchization is that the world order is

70. Geir Ulfstein, *Institutions and Competence*, in THE CONSTITUTIONALIZATION OF INTERNATIONAL LAW, *supra* note 48, at 44 (highlighting that the “empowerment of international organizations is not an ordinary delegation of powers. It means that institutions other than the state can make decisions and adopt policies beyond the control of each individual member state”).

71. A seminal volume in this regard is J.H.H. WEILER & MARLNE WIND, EUROPEAN CONSTITUTIONALIZATION BEYOND THE STATE (2003). Other scholars have likened the new European political, legal, and institutional landscape to a new form of medievalism marked by multiple layers of governance and authority. See Jorg Friedrichs, *The Meaning of New Medievalism*, 7 EUR. J. INT’L REL. 475 (2001).

72. OTTO SPIJKERS, THE UNITED NATIONS, THE EVOLUTION OF GLOBAL VALUES AND INTERNATIONAL LAW (2011); see Bardo Fassbender, *The United Nations Charter as Constitution of the International Community*, 36 COLUM. J. TRANSNAT’L L. 529 (1998). For another, more cautious view regarding the UN Charter as the constitution of the international community, see James Crawford, *The Charter of the United Nations as a Constitution*, in THE CHANGING CONSTITUTION OF THE UNITED NATIONS 1, 10–16 (Hazel Fox ed., 1997).

73. Anne Peters, *Membership in the Global Constitutional Community*, in THE CONSTITUTIONALIZATION OF INTERNATIONAL LAW, *supra* note 48, at 209 (“Here the states have lost control to a significant degree, and the entities’ will does not simply express the sum of the member states’ positions. The traditional image of the states as masters of the treaties is inadequate to describe that complex reality.”).

74. P.H. Kooijmans, *quoted in* Don Greig, *International Community, Interdependence, and All That ... Rhetorical Correctness?*, in STATE, SOVEREIGNTY, AND INTERNATIONAL GOVERNANCE 583 (Gerard Kreijen ed., 2002).

purportedly moving from an “international unsociety”⁷⁵ to a global community. In many constitutionalist narratives, this community is not a community of states. Rather, it is a “composite legal community of mankind.”⁷⁶

B. *The Humanitarian Telos of International Law*

Given the implications that the hierarchization of international law entails for the Westphalian state-system, it is no wonder that human rights lawyers have been leading advocates of the constitutionalization claim.⁷⁷ International human rights law is considered the foundation of a global constitutionalist order, the overarching purpose of which is the promotion and protection of individual rights and freedoms.⁷⁸ The language used to describe the impact of the rise of human rights is both ostentatious and overwhelmingly celebratory.⁷⁹ Human rights, we are told, has “revolutionized the international system and international law,”⁸⁰ leading to no less than a “constitutive change” in the international legal order,⁸¹ that has altered the “deep structure of law in general.”⁸² Indeed, what in this Article I am calling the humanitarian thesis is predicated on the claim that the nature and function of international law have been transformed. The international law of coexistence, principally

75. Philip Allott, *The Concept of International Law*, 10 EUR. J. INT'L L. 31, 35 (1999).

76. Rao, *supra* note 55, at 93.

77. Thomas Cottier & Maya Hertig, *The Prospects of 21st Century Constitutionalism*, 7 MAX PLANCK Y.B. UN L. 261, 271 (2003).

78. Martin Scheinin, *Impact on the Law of Treaties*, in THE IMPACT OF HUMAN RIGHTS LAW ON GENERAL INTERNATIONAL LAW 29 (Menno Kamminga & Martin Scheinin eds., 2009). The European Court of Human Rights is frequently cited as corroborating the argument that human rights law embodies constitutional values. For example, in one decision, the Court observed that it must “have regard to the special character of the Convention as a constitutional instrument of *European* public order for the protection of individual human beings.” *Bankovic and Others v. Belgium and Others*, 44 Eur. H.R. Rep. SE5 (2001).

79. I say “overwhelmingly” and not unanimously because there are voices that have chronicled what are presented as the downsides and negative unintended consequences of the unprecedented international interest in human rights. *See, e.g.*, DAVID KENNEDY, *DARK SIDES OF VIRTUE* (2005).

80. Louis Henkin, *Human Rights and State “Sovereignty”*, 25 GA. J. INT'L AND COMP. L. 31, 43-44 (1995-1996).

81. W. Michael Reisman, *Sovereignty and Human Rights in Contemporary International Law*, 84 AM. J. INT'L L. 866, 873 (1990).

82. Armin von Bogdandy, *Constitutionalism in International Law: Comment on a Proposal from Germany*, 47 HARV. INT'L L.J. 223, 228 (2006).

committed to upholding the sovereignty, territorial integrity, and political independence of states, is progressively metamorphosing into a global legal system dedicated to upholding human values.⁸³ This transformation, it is argued, is “undeniable, irresistible, irreversible.”⁸⁴

Although some writings advocating the constitutionalist and humanitarian theses occasionally blur the line separating descriptive claims about the existing state of international law and normative prescriptions about their preferred vision of the future for the global legal system,⁸⁵ the theme underlying these arguments is that the purpose, or *telos*, of contemporary international law has become fulfilling the “needs and aspirations of humankind.”⁸⁶ This transformation is not confined to the global legal system. The humanitarian thesis suggests that the rise to preeminence of human rights law reflects a reconceptualization of the entire architecture of international relations. Because humanist considerations are arguably reconstituting international politics, a new set of actors, values, and institutions are touted as progressively occupying center stage in global affairs.⁸⁷

Beyond the legal and political realms, humanitarianism also purports to be part of a profound process of global social evolution. In a humanist legal order, the rights, freedoms, and interests of all individuals are protected solely by virtue of their humanity and regardless of their membership in any particular social group, including states. This legal order is thus founded on a cosmopolitan image of the world predicated on an “association that binds the human race.”⁸⁸ Other identities,

83. See Rafael Domingo, *Gaius, Vattel, and the New Global Law Paradigm*, 22 EUR. J. INT'L L. 627, 640–41 (2011).

84. Henkin, *supra* note 80, at 35.

85. Benedict Kingsbury & Megan Donaldson, *From Bilateralism to Publicness in International Law*, in FROM BILATERALISM TO COMMUNITY INTEREST: ESSAYS IN HONOR OF JUDGE BRUNO SIMMA 79 (Ulrich Fastenrath et al. eds., 2011) (noting that the notion of an international community is employed both as a descriptive device and as an embodiment of a normative view).

86. Antonio Augusto Trindade, *International Law for Humankind: Towards a New Jus Gentium*, 316 RECUEIL DES COURS 83 (2005).

87. Ruti Teitel, *Humanity's Law: Rule of Law for the New Global Politics*, 35 CORNELL INT'L L. J. 335, 359 (2002).

88. RUTI TEITEL, HUMANITY'S LAW 195 (2011). For an introductory discussion about the meaning and contours of cosmopolitanism as a philosophical position, see

allegiances, or loyalties appear to be ultimately subordinated to a universal cosmopolitan citizenship.⁸⁹

The full impact and import of these changes in the international legal order are not immediately apparent from the almost messianic language chronicling and lauding the rise of humanitarianism. The impact this shift on the foundations of international law from statism to humanitarianism is reported to have affected every branch and component of the global legal system.⁹⁰ First, the humanitarianism thesis echoes the broader constitutionalist claim regarding the normative hierarchization of international law. The recognition that certain principles, most of which protect human rights, have attained the status of *jus cogens* norms is assumed to have sounded “the death knell of narrow bilateralism and sanctified egoism for the sake of universal protection of certain fundamental norms relating, in particular, to human rights.”⁹¹

Second, in a frontal assault on a central tenet of international law, human rights principles are considered invulnerable to state consent, long assumed to be the basis of international legal obligation. This manifests itself in a variety of ways. For example, human rights recognized as *jus cogens* norms are argued to be binding on states regardless of their consent.⁹² Moreover, we are told that once states become parties to human rights treaties they are unable to either withdraw from or

Thomas Pogge, *Cosmopolitanism*, in *A COMPANION TO CONTEMPORARY POLITICAL PHILOSOPHY* 312, 313 (Robert Goodin et al. eds., 2008) (noting that cosmopolitanism is predicated on “assessments and prescriptions . . . based on taking equal account of the interests of all human beings”).

89. TEITEL, *supra* note 88, at 167.

90. Menno Kamminga, *Final Report on the Impact of International Human Rights Law on General International Law*, in *THE IMPACT OF HUMAN RIGHTS LAW ON GENERAL INTERNATIONAL LAW*, *supra* note 78, at 4 (indicating that “the impact of international human rights law on general international law is highly desirable in order to soften the international legal order’s predominantly state-centered nature”). Similarly, Michael Reisman considers these ongoing changes in international law to have caused a “qualitative change in virtually every component” of the legal system. Reisman, *supra* note 81, at 872.

91. Prosper Weil, *Towards Relative Normativity in International Law?*, 77 *AM. J. INT’L L.* 413, 432 (1983).

92. Evan Criddle & Evan Fox-Decent, *A Fiduciary Theory of Jus Cogens*, 34 *YALE J. INT’L L.* 331, 336 (2009).

renounce these instruments,⁹³ which departs from the assumption underlying the entire corpus of the law of treaties that states are bound to agreements only by virtue of their consent.⁹⁴ Furthermore, the rules governing state reservations against the provisions of treaties are deemed to be inoperable in relation to human rights instruments.⁹⁵ Recent scholarly opinion and state practice also suggests that human rights treaties are unaffected by state secession.⁹⁶ This multifaceted demotion of state consent, a premier feature of the anarchical order of coequal sovereigns, is considered an indelible confirmation of the shift towards “a shared humanity-based normativity.”⁹⁷

Having deposed state consent, the humanitarian thesis then moves to overthrow international law’s most hallowed principle:

93. The Human Rights Committee, established to monitor state compliance with the International Covenant on Civil and Political Rights (“ICCPR”), opined that:

[T]he Covenant is not the type of treaty which, by its nature, implies a right of denunciation . . . the Covenant codifies in treaty form the universal human rights enshrined in the Universal Declaration of Human Rights . . . [a]s such, the Covenant does not have a temporary character typical of treaties where a right of denunciation is deemed to be admitted.

Office of the High Commissioner for Human Rights, *General Comment No. 26: Continuity of Obligations*, U.N. DOC. CCPR/C/21/Rev.1/Add.8/Rev.1 (Aug 12, 1997).

94. ANTHONY AUST, *MODERN TREATY LAW AND PRACTICE* 94 (2d ed. 2007) (“To consent to be bound is therefore the most significant, positive act which a state can take in relation to any treaty.”).

95. The Vienna Convention on the Law of Treaties (“VCLT”) outlines the rules allowing states to enter reservations to multilateral treaties, presumably including human rights treaties. *See* Vienna Convention, *supra* note 51, arts. 19–23. The Human Rights Committee, however, declared that these rules were inapplicable to the ICCPR. In 1994, the Committee concluded that the provisions of the VCLT:

[O]n the role of State objections in relation to reservations are inappropriate to address the problem of reservations to human rights treaties. Such treaties, and the Covenant specifically, are not a web of inter-State exchanges of mutual obligations. They concern the endowment of individuals with rights. The principle of inter-State reciprocity has no place It necessarily falls to the Committee to determine whether a specific reservation is compatible with the object and purpose of the Covenant.

Office of the High Comm’r for Human Rights, *CCPR General Comment No. 24: Issues Relating to Reservations Made upon Ratification or Accession to the Covenant or the Optional Protocols thereto, or in Relation to Declarations under Article 41 of the Covenant*, U.N. DOC. CCPR/C/21/Rev.1/Add.6 (11 Apr. 1994).

96. Malcolm Shaw, *State Succession Revisited*, 5 FINNISH Y.B. INT’L L. 34, 84 (1994); Florintino Ruiz Ruiz, *The Succession of States in Universal Treaties on the Protection of Human Rights and Humanitarian Law*, 7 INT’L J. HUM. RTS. 42, 42–43 (2003).

97. TEITEL, *supra* note 88, at 172.

state sovereignty. Contemporary attacks on sovereignty⁹⁸ as an ordering principle of international relations came from many quarters. It appeared, especially in the post-Cold War years, as if forces from within and without the state conspired to deconstruct sovereignty.⁹⁹ Separatist movements, sub-national groups, ethnic minorities, and tribes in various countries challenged the supremacy of national governments leading in many cases to the disintegration of formerly sovereign states. Meanwhile, proponents of trade liberalization viewed sovereignty with its, at least theoretically, impregnable borders as antithetical to the ideal of open global markets. Similarly, climate change, avian flu, terrorism, financial crises, and innumerable other phenomena all ridiculed the image of a world of territorially disjointed, mutually exclusive states. In short, “sovereignty is no longer sovereign; the world has outgrown it.”¹⁰⁰

Advocates of the humanitarian thesis have been particularly aggressive in their criticism of sovereignty. So much so that the concept is treated as an epithet to be referred to as “the ‘S’ word” and is described as “a mistake, an illegitimate offspring.”¹⁰¹ Disdain of sovereignty by proponents of humanitarianism is understandable. The principal implication of sovereignty, as understood in classical international law, is that states are immune to outside intervention in their internal

98. Many scholars of international law exhibited varying degrees of discomfort regarding sovereignty long before the emergence of human rights as a subfield of international law. See Martti Koskenniemi, *Miserable Comforters: International Relations as New Natural Law*, 15 *EUR. J. INT’L REL.* 395, 403 (2009) (“From the late 19th century onwards, international lawyers have been critics of sovereignty as egoism, arbitrariness, and absolute power.”).

99. Even the way the word ‘state’ is written attests to its receding role. Previously, as a sign of reverence to the sole subject of international law, scholars routinely capitalized the ‘S’ in State, as if writing of a deity! Today, words like state, government, and contracting parties, are written in small caps. Notable exceptions to this trend are judgments of the International Court of Justice.

100. Thomas Weiss & Jarat Chopra, *Sovereignty Under Siege: From Intervention to Humanitarian Space, in BEYOND WESTPHALIA? STATE SOVEREIGNTY AND INTERNATIONAL INTERVENTION*, *supra* note 42, at 87, 97.

101. Louis Henkin, *The ‘S’ Word: Sovereignty, and Globalization, and Human Rights Et Cetera*, 68 *FORDHAM L. REV.* 1, 1–2 (1999).

affairs,¹⁰² including how governments treated their own citizens. The emergence and exponential growth of human rights law since World War II, however, pierced the veil of sovereignty.¹⁰³ International law was now regulating the relationship between governments and individuals within their jurisdiction. This expansion of the domestic reach of international law prompted observers to announce that the statist version of sovereignty, with its emphasis on non-intervention, had finally been displaced.

Instead, a humanitarian conception of sovereignty was emerging,¹⁰⁴ whereby the protection of individual rights and freedoms became the justification and rationale of sovereignty.¹⁰⁵ This reimagined sovereignty is ultimately defined as “the legal principle that human rights, interests, needs, and security must be respected and promoted, and that this humanistic principle is also the *telos* of the international legal system.”¹⁰⁶

Having disarmed sovereignty, humanitarianism then challenges another foundational assumption of international law that all states are juridically equal. In a humanitarian world order, “the autonomy of states is not intrinsically a human value.”¹⁰⁷ Autonomy and the continued exercise of the privileges of sovereignty are conditional on a state’s promotion and

102. IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 254 (1st ed. 1966) (describing the principle of the non-intervention in the internal affairs of states as “a master principle” of international law).

103. DAVID LUBAN, *LEGAL MODERNISM* 337 (1997) (depicting the criminalization of crimes against humanity and the prosecutions of former Nazi officials at Nuremburg as “piercing the veil of sovereignty”).

104. In its widely cited inaugural decision in the *Tadic* case, the International Criminal Tribunal for the Former Yugoslavia (“ICTY”) observed: “A State-sovereignty-oriented approach has been gradually supplanted by a human-being-oriented approach. Gradually the maxim of Roman law *hominum causa omne jus constitutum est* (all law is created for the benefit of human beings) has gained a firm foothold in the international community as well.” *Prosecutor v. Dusko Tadic*, Case No. IT-94-I-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, para. 97 (Int’l Crim. Trib. For the Former Yugoslavia Oct. 2, 1995).

105. Samantha Besson, *Sovereignty in Conflict*, in *TOWARDS AN ‘INTERNATIONAL LEGAL COMMUNITY’? THE SOVEREIGNTY OF STATES AND THE SOVEREIGNTY OF INTERNATIONAL LAW*, *supra* note 61, at 131, 160–61; *see also* Kofi Annan, *Two Concepts of Sovereignty*, *ECONOMIST* (London), Sept. 18, 1999, at 49.

106. Anne Peters, *Humanity as the A and Ω of Sovereignty*, 20 *EUR. J. INT’L L.* 513, 514 (2009).

107. Henkin, *supra* note 101, at 12.

protection of human rights. Some scholars go a step further and suggest that international law, especially in the post-Cold War era, recognizes liberal democracy as the premier system of government.¹⁰⁸ Therefore, humanitarians argue that states that are either unwilling or incapable of protecting human rights, or, in some views, those which fail to progress towards liberal democracy, could become prone to foreign intervention to protect individual rights and promote democracy.¹⁰⁹ In short, international law simply would neither recognize nor protect abusive or illiberal states.

The ambition of both the humanitarian thesis and the broader constitutionalist project is far more profound than merely challenging tenets of international law such as sovereignty, consent, and the equality of states. These intellectual endeavors are engaged in a bid to restructure international relations and transform global politics. So potent is this putative multifaceted hierarchization of international law and the humanitarian values underlying it that it is capable of reconstituting the international community.¹¹⁰ This, it is argued, warrants reversing Cicero's idiom *ubi soceitas; ibi jus* into *ibi ius gentium; ubi soceitas*.¹¹¹

In other words, the humanitarian international legal order is argued to be capable of vanquishing the world of sovereign states and giving birth to a universal community of humankind. As part of this process, the emergent humanist legal order remodels how foreign policy is crafted and reorients the

108. Niels Petersen, *The Principle of Democratic Teleology in International Law*, 34 *BROOK. J. INT'L L.* 33 (2008). On this basis, some scholars have proposed differentiating between liberal and illiberal states, with international law granting the former the right to intervene in the affairs of the latter to promote democracy and human rights. See, e.g., Anne-Marie Slaughter, *International Law in a World of Liberal States*, 6 *EUR. J. INT'L L.* 503, 516 (1995). The idea of differentiating between states on the basis of the nature of their domestic system was also famously adopted by the leading political philosopher John Rawls. See JOHN RAWLS, *THE LAW OF PEOPLES* (1999).

109. TEITEL, *supra* note 88, at 214; see also Thomas Franck, *The Emerging Right to Democratic Governance*, 86 *AM. J. INT'L L.* 46, 91 (1992); FERNANDO TESON, *A PHILOSOPHY OF INTERNATIONAL LAW* 39–66 (1998).

110. TESON, *supra* note 109, at 39.

111. James Crawford, *Responsibility for Breaches of Communitarian Norms: An Appraisal of Article 48 of the ILC Articles on Responsibility of States for Internationally Wrongful Acts*, in *FROM BILATERALISM TO COMMUNITY INTEREST: ESSAYS IN HONOR OF JUDGE BRUNO SIMMA*, *supra* note 85, at 224, 240.

purposes it serves.¹¹² State interests, national security, global strategy, and the pursuit of power, long considered language and logic of international relations, are being replaced by “a *depoliticized* legalist language of rights and wrongs, duties and obligations.”¹¹³ In the place of the egoism of *raison d'état*, the humanitarian thesis imagines an international community committed to the pursuit of collectively shared humanistic values.¹¹⁴ This dual rise of humanitarianism and expunging of politics from global affairs ultimately emancipates humanity from the anarchical Hobbesian state of nature and establishes a hierarchical cosmopolitan order.¹¹⁵

C. *Humanitarianism and the Transformation of Jus ad Bellum: From State Security to Human Security*

One area where the impact of the newly emergent humanist *telos* of international law is said to have been particularly patent is *jus ad bellum*. The rules governing the resort to force by states in international relations are argued to have changed dramatically to permit armed intervention to protect civilians against gross human rights abuses. This, many advocates of the humanitarian thesis contend, demonstrates the depth of the ongoing humanization of the international legal system. Because waging war has long been considered the *ultima ratio regum* of states in the pursuit of their interests,¹¹⁶ the adoption of the protection of human beings as an overarching

112. Teitel, *supra* note 87, at 356.

113. *Id.* at 372 (emphasis added); see also Paul Kahn, *Speaking Law to Power: Popular Sovereignty, Human Rights, and the New International Order*, 1 CHI. J. INT'L L. 1, 9 (2000) (“International law does not see this world of politics based on power, threat, and sacrifice. Indeed, its contemporary ambition is to overcome this world, to achieve a fundamentally depoliticized global order.”).

114. See Ian Ward, *The End of Sovereignty and the New Humanism*, 55 STAN. L. REV. 2091, 2106 (2003) (suggesting that “in the place of the tired notions of state sovereignty, the new world order must embrace once again the idea of a *ius humanitatis*, a conception of law and justice that is able to “transcend jurisdictions and cultures . . .”).

115. See von Bogdandy, *supra* note 82, at 240.

116. The phrase *ultima ratio regum* means: “the final argument of Kings,” and has been used to indicate that the resort to war is the ultimate weapons in the toolbox of sovereigns in their interactions in an anarchical world order. See e.g., Hans Morgenthau, *The Machiavellian Utopia*, 55 ETHICS 145, 146 (1945).

purpose of war would provide irrefutable evidence that human ideals are indeed displacing statist values in world affairs.

Before examining the humanitarianism claim about the transformation of *jus ad bellum*, it is necessary to illustrate the state-centric nature of *jus ad bellum* that the humanization of international law is said to have transformed. Because this Article is obviously not intended as a treatise on *jus ad bellum*, discussion will be limited to those features of this system that are relevant to the question of the use of force to protect individuals.¹¹⁷

The current legal regime governing the resort to force by states is principally embodied in the UN Charter.¹¹⁸ Having emerged from the horrors of World War II, the victorious allies set out to reconstruct the global security architecture. The centerpiece of this reconstituted world order was to be the UN Charter, which was drafted against the background of the still-recent memory of the demise of the League of Nations that was established to ensure that World War I was to be ‘the war to end all wars.’ “The preoccupation of the United Nations founders was with State security. When they spoke of creating a new system of collective security they meant it in the traditional military sense: a system in which States join together and pledge that aggression against one is aggression against all”¹¹⁹ It is,

117. Countless volumes have been authored on *jus ad bellum*. Despite being published over forty years ago, I believe that the *locus classicus* in this area remains, IAN BROWNLIE, *INTERNATIONAL LAW AND THE USE OF FORCE BY STATES* (1963), especially in that it provides a rich historical background to the UN Charter scheme on the use of force. For recent surveys of the field, see YORAM DINSTEIN, *WAR, AGGRESSION, AND SELF-DEFENCE* (5th ed. 2011); OLIVIER CORTEN, *THE LAW AGAINST WAR* (Emmanuelle Jouannet ed., Christopher Sutcliffe trans., 2010); MARY ELLEN O’CONNELL, *INTERNATIONAL LAW AND THE USE OF FORCE: CASES AND MATERIALS* (2009); CHRISTINE GRAY, *INTERNATIONAL LAW AND THE USE OF FORCE* (Malcolm D. Evans & Phoebe N. Okowa eds., 3d ed. 2008); and, slightly older, ANTHONY AREND & ROBERT BECK, *INTERNATIONAL LAW AND THE USE OF FORCE*, (1993).

118. I say “principally” because a number of documents drafted prior to 1945 constitute the foundation on which the UN Charter is predicated. The most significant of these is the General Treaty for Renunciation of War as an Instrument of National Policy, otherwise known as the 1928 Kellogg-Briand Pact, which was the first international legal instrument to unequivocally outlaw the resort to war. See Quincy Wright, *The Outlawry of War and the Law of War*, 47 *AM. J. INT’L L.* 365, 370 (1953).

119. U.N. Secretary-General, *A More Secure World: Our Shared Responsibility*, Report of the High-level Panel on Threats, Challenges and Change, Synopsis, U.N. Doc. A/59/565 (Dec. 2, 2004) [hereinafter UNSG High-Level Panel Report]. I should note, however, that many international relations scholars understand the term “collective security” to

therefore, unsurprising that the overarching purpose of the United Nations was originally conceived of as the maintenance of international peace and security,¹²⁰ where peace was understood as “a condition of absence of force in the relations among states.”¹²¹

The primacy of inter-state peace among the purposes of the United Nations finds its ultimate expression in article 2(4) of the Charter, which prohibits the resort to force by states.¹²² This principle is considered a *jus cogens* norm,¹²³ and has been described as a “fundamental or cardinal principal” of international law,¹²⁴ and as the “cornerstone of peace.”¹²⁵ The Charter lists three exceptions to this principle. First, all states may resort to armed force in self-defense.¹²⁶ Second, UN members were permitted to use force against any of the World War II Axis powers.¹²⁷ Third, the Security Council may resort to force to confront threats to, or breaches of, the peace, or acts of aggression.¹²⁸

denote a system whereby an act of aggression will be confronted by an *automatic* and *collective* response. See e.g., Mearsheimer, *supra* note 13. Judged by that standard, the UN Charter scheme, which I discuss in detail below, would not qualify as a collective security system especially in that it lacks any stipulation for an automatic response to acts of aggression.

120. See Rudiger Wolfrum, *Article 1*, in 1 THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 39, 42 (Bruno Simma et al. eds., 2d ed. 2002).

121. HANS KELSEN, THE LAW OF THE UNITED NATIONS 19 (1964).

122. Article 2(4) states: “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.” See U.N. Charter art. 2, para. 4.

123. See *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. V. U.S.), 1986 I.C.J. 14, 153 (June 27) (separate opinion of President Nagendra Singh); see also *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. Reports 136, 254 (July 9) (separate opinion of Judge Nabil Elaraby).

124. See *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. V. U.S.), 1986 I.C.J. 14, 90 (June 27).

125. C.H.M. Waldock, *The Regulation of the Use of Force by Individual States in International Law*, 81 RECUEIL DES COURS 455, 492 (1952).

126. See U.N. Charter art. 51.

127. See U.N. Charter art. 53, para. 1, and art. 107. These provisions are unanimously understood to be dead letter law, especially since all of the Axis powers have joined the UN, and some are even considered leading candidates to join the Security Council as Permanent Members.

128. Albrecht Randelzhofer, *Article 2(4)*, in 1 THE CHARTER OF THE UNITED NATIONS: A COMMENTARY, *supra* note 120, at 112, 125.

It appears, therefore, that the defining feature of the Charter-based *jus ad bellum* scheme is the prohibition of the unilateral use of force, except in self-defense, and the identification of the Security Council as the sole authority responsible for deploying armed force to protect international peace and security.¹²⁹ This historically unprecedented power vested in the institution of the Security Council warrants a closer look at its composition and functions.¹³⁰

As is well known, the Security Council is composed of fifteen states. Ten of these are elected to two-year terms, while five states enjoy permanent membership.¹³¹ In addition, the “P5,” as the permanent members are dubbed in UN-speak, wield a veto that enables them to block any decision of the Council on substantive matters, the most important of which is the resort to armed force.¹³² The privileges bestowed onto the P5 reflect the pragmatism of the drafters of the UN Charter and their desire to avoid replicating the institutional deformities of the League of Nations. Principal among these was the absence of leading states that either never joined the League, most notably the United States, or that acquired membership late in its short life, such as the Soviet Union. In addition, decisions of the League Council, the precursor of the Security Council, could only be taken by unanimity. Both of these elements severely hindered the effectiveness of the League. Without Great Powers capable of enforcing its decisions and crippled by the need to secure

129. Christine Gray, *The Charter Limitations on the Use of Force*, in *THE UNITED NATIONS SECURITY COUNCIL AND WAR* 86 (Vaughan Lowe et. al. eds., 2008). Kelsen confirms this by noting that the striking features of the UN Charter is that the resort to armed force “can be taken only by a central organ, the Security Council, and only after the Council has determined the existence of a threat to, or breach of, the peace.” KELSEN, *supra* note 121, at 725.

130. EDWARD LUCK, *UN SECURITY COUNCIL* 3 (Thomas G. Weiss & Rorden Wilkinson eds., 2006) (noting that the Security Council’s “enforcement authority is unique in the history of inter-governmental cooperation”).

131. The P5 are: China, France, Russia, the United Kingdom, and the United States. The remaining seats are divided among the regional groupings within the United Nations in the following manner: Africa and Asia: five seats, Western Europe and Other States: two seats, Latin America and the Caribbean: two seats, and Eastern Europe: one seat. See David Malone, *Eyes on the Prize: The Quest for Nonpermanent Seats on the UN Security Council*, 6 *GLOBAL GOVERNANCE* 3, 4-5 (2000).

132. See U.N. Charter art. 27, para. 3.

unanimity among its members, the League quickly lost credibility, especially in the eyes of the revisionist Axis powers.¹³³

Therefore, for the founders of the United Nations, strong incentives had to be provided for the Great Powers to remain within the new world organization.¹³⁴ These took the form of the permanent membership on the Security Council coupled with the guarantee, through the veto, that the United Nations would never jeopardize the security or interests of these states.¹³⁵ “Great Power status in the United Nations thus meant dominion over small powers The veto blocked UN action in any situation contrary to a Great Power’s interest, including conflicts with other Great Powers.”¹³⁶

In addition to the privileges enjoyed by the P5, the UN Charter grants the Security Council unmatched institutional powers. Article 24 of the Charter entrusts the Council with the “primary responsibility for the maintenance of international peace and security,”¹³⁷ which, given that the United Nations was principally intended to preserve inter-state peace, means that the Council occupies the very core of the UN system. To enable it to fulfill its responsibilities, the Charter endows the Council with a unique panoply of prerogatives. First, unlike any other UN organ, decisions adopted by the Council are obligatory on all member states.¹³⁸ Second, and more importantly, pursuant to

133. Leland Goodrich, *From League of Nations to United Nations*, 1 INT’L ORG. 3, 9–10 (1947) (describing how the unanimity rule, among other factors, rendered the League incapable of taking action against either Japan following its invasion of Manchuria or Italy for its invasion of Ethiopia).

134. Vaughan Lowe et. al, *Introduction*, in THE UNITED NATIONS SECURITY COUNCIL AND WAR *supra* note 129, at 12 (“The Charter as a whole was drawn up with the central aim of ensuring that the major powers would be willing to join, and remain in, the organization.”).

135. See PAUL KENNEDY, THE PARLIAMENT OF MAN 8–32 (2006).

136. Anne-Marie Slaughter, *The Liberal Agenda for Peace: International Relations Theory and the Future of the United Nations*, 4 TRANSNAT’L L. & CONTEMP. PROBS. 377, 384 (1994).

137. The use of the word “primary” in article 24 of the Charter led the International Court of Justice (“ICJ”) to observe that: “The responsibility conferred is ‘primary’, not exclusive. . . . It is only the Security Council which can require enforcement by coercive action against an aggressor. The Charter makes it abundantly clear, however, that the General Assembly is also to be concerned with international peace and security.” *Certain Expenses of the United Nations*, (Article 17, Paragraph 2, of the Charter), Advisory Opinion, 1962 I.C.J. 151, at 163 (Jul. 20).

138. U.N. Charter art. 25.

Chapter VII of the Charter the Security Council may resort to enforcement measures, which is the codeword denoting a range of options including armed force, to maintain international peace and security.

As a prerequisite to resorting to these measures the Council should “determine the existence of any threat to the peace, breach of the peace, or act of aggression.”¹³⁹ The Charter, however, does not define what constitutes a threat to or breach of the peace or an act of aggression, thereby granting the Council unlimited flexibility in identifying any particular crisis, situation, or incident as amounting to a threat or breach of the peace or act of aggression.¹⁴⁰ Moreover, even if the Council were to identify a threat to or breach of the peace or act of aggression, it is under no obligation to take any action to confront such a situation.¹⁴¹ In a further show of its broad margin of appreciation, should the Security Council decide to take enforcement action, it is free to determine those measures that it considers adequate to respond to the particular situation before it.

In other words, for the Security Council, the “freedom to decide when to apply coercive measures is matched by an equal discretion as to what measures may be taken Its discretion, thus, is virtually absolute in choosing the type of coercion which it considers best adapted to meet the situation at hand.”¹⁴² It should also be noted that, because the Charter prohibits the unilateral use of force, the mere identification by the Council of a threat to or breach of the peace or act of aggression does not constitute a license for states to use force to confront these situations. Until the Council authorizes the deployment of force,

139. U.N. Charter art. 39.

140. OSCAR SCHACHTER, *INTERNATIONAL LAW IN THEORY AND PRACTICE* 108 (1991) (describing the powers and authority of the Council in this regard as “virtually unlimited”).

141. See KELSEN, *supra* note 121, at 734. (“[I]t is not possible to maintain that it [the Security Council] is under an obligation to take enforcement measures after it has determined the existence of a threat to, or breach of, the peace.”).

142. Grayson Kirk, *The Enforcement of Security*, 55 *YALE L.J.* 1081, 1089 (1946).

“enforcement action by individual States on behalf of the United Nations is unlawful.”¹⁴³

A careful reading of the Charter also reveals that the prerogatives of the Security Council do not stop at the international boundaries of states. Article 39, not unintentionally, omits the word “international.” This indicates that threats to or breaches of the peace that could potentially unleash Council-authorized enforcement measures need not relate to inter-state tensions or conflicts.¹⁴⁴ Human rights abuses, civil strife, non-international armed conflicts, violations of humanitarian law occurring during such conflicts, or any other domestic situation, even if not involving any acts of violence, were all considered since the inception of the United Nations as possibly warranting Security Council intervention, including through the use of force.¹⁴⁵ Article 2(7) of the Charter confirms the power of the Council to authorize force in response to any occurrence inside a member state that in the Council’s view threatens or breaches the peace.¹⁴⁶ “This provision enables the [Council] to tackle root causes of a conflict before it reaches dimensions which are harder or impossible to manage.”¹⁴⁷

The exceptional privileges of the P5 and the boundless powers of the Security Council were not uncontroversial at the San Francisco conference during which the UN Charter was finalized. A number of countries decried the inequity of the veto and warned that requiring P5 unanimity or at least their acquiescence meant that the Security Council could be incapacitated when it was most needed.¹⁴⁸ These warnings

143. Jochen Frowein & Nico Krisch, *Chapter VII: Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression*, in 1 THE CHARTER OF THE UNITED NATIONS: A COMMENTARY, *supra* note 120, at 701, 713–14.

144. See KELSEN, *supra* note 121, at 731.

145. See Frowein & Krisch, *supra* note 143, at 721; see also KELSEN, *supra* note 121, at 19 (“However, a civil war, as any other situation within a state, may be interpreted by the competent organ of the United Nations as a threat to international peace . . .”).

146. “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.” U.N. Charter art. 2, para. 7.

147. Georg Nolte, *Commentary on Article 2(7)*, in 1 THE CHARTER OF THE UNITED NATIONS: A COMMENTARY, *supra* note 120, at 148, 168–69.

148. See LUCK, *supra* note 130, at 13–15.

proved prophetic given the innumerable situations during which the Council stood paralyzed in the midst of political and humanitarian crises, only the latest of which is the Syrian civil war. Therefore, some delegations suggested either eliminating the veto or limiting its use,¹⁴⁹ while others proposed setting guidelines to direct the Council's decisions.¹⁵⁰ Calls were also made to define specific circumstances, especially aggression, in which it would be obligatory for the Council to forcefully intervene.¹⁵¹ The P5, covetous of their unrivaled influence and standing in the United Nations, were implacable. Ideas circumscribing their powers or limiting the Council's flexibility were rejected. Ultimately, therefore, the United Nations, or at least its collective security scheme, had transformed "a wartime alliance into a big power oligarchy."¹⁵²

The humanitarian thesis challenges this vintage-1945 Charter scheme. *Jus ad bellum*, at least as conceived in the aftermath of World War II, is the quintessential expression of the international law of coexistence.¹⁵³ Its purpose is minimizing violence in international relations by outlawing armed force between territorially disjointed and mutually exclusive sovereign states. The emergence, however, of a global community of humankind, driven by the hierarchization of international law and the rise to preeminence of human rights, arguably undermines the premise underlying *jus ad bellum*.

Humanitarianism "reconceives security in terms of the protection and preservation of persons and peoples. Once the relevant subjects and goals in the international realm are reconceived in this way, the meaning and challenges of security in both war and peacetime become blurred."¹⁵⁴ In other words,

149. See DAVID BOSCO, *FIVE TO RULE THEM ALL* 23–24 (2009).

150. Edward Luck, *A Council for All Seasons: The Creation of the Security Council and its Relevance Today*, in *THE UNITED NATIONS SECURITY COUNCIL AND WAR*, *supra* note 129, at 61, 63, 67.

151. *Id.* at 69.

152. *Id.* at 63; see also Allen Buchanan & Robert Keohane, *Precommitment Regimes for Intervention: Supplementing the Security Council*, 25 *ETHICS & INT'L AFF.* 41, 47 (2011) (noting that "the UN Charter provides no checks on the Security Council: there are no constitutional constraints on what it can do. Indeed, when the Security Council acts, with the approval of all Great Powers and sufficient other support, its legal powers are essentially unlimited").

153. ABI-SAAB, *supra* note 41, at 254.

154. TEITEL, *supra* note 88, at 13.

humanitarianism dethrones the sovereign state as the beneficiary of the global security architecture, and identifies the protection of the interests, rights, and freedoms of human beings as the objective of security policy.¹⁵⁵

This shift from *state* security to *human* security calls into question many of the classical features of both war and security, and challenges key doctrinal and institutional components of post-World War II *jus ad bellum*. In 1945, just as it had been for centuries, security was imagined as intrinsically intertwined with geography. National borders were considered sacrosanct dividers between a domestic domain and an external realm. Sources of insecurity, it was thought, primarily emanated from the latter. Thus, threats emerged if an adversary amassed troops along a shared border, when a neighbor accumulated weapons at an alarming rate, or if enemies threatened strategically valuable territory.¹⁵⁶ Bringing human beings front and center, however, fundamentally revises the scope and content of ‘security.’ An assortment of issues, all of which affect the quality

155. Hisashi Owada, *Human Security and International Law*, in FROM BILATERALISM TO COMMUNITY INTEREST: ESSAYS IN HONOR OF JUDGE BRUNO SIMMA, *supra* note 85, at 505, 506 (“Human security is often distinguished from traditional security doctrines on the basis that it makes individuals the central concern of security policy.”). Human security was not developed as a foil against state security solely in the area of *jus ad bellum*. Proponents of human security imagine the concept as a paradigm shift affecting how a broad variety of issues should be dealt with. The 1994 United Nations Development Programme (“UNDP”) Human Development Report, considered a groundbreaking document in the elaboration of the content of human security, explained that the concept underlying this idea is that security should be reframed “from an exclusive stress on territorial security to a much greater stress on people’s security.” The report goes on to identify the following areas of security that should be reexamined in light of the rights and needs of individual human beings as opposed to the interests of states. These areas are: (1) Economic security, (2) Food security, (3) Health security, (4) Environmental Security, (5) Personal security, (6) Community security, and (7) Political Security. See U.N. DEVELOPMENT PROGRAMME, HUMAN DEVELOPMENT REPORT, NEW DIMENSIONS OF HUMAN SECURITY 22–47 (1994); see also Roland Paris, *Human Security: Paradigm Shift or Hot Air?*, INT’L SECURITY, FALL 2001, at 87; Astri Suhrke, *Human Security and the Interests of States*, 30 SECURITY DIALOGUE 265 (1999).

156. Edward Newman, *Human Security and Constructivism*, 2 INT’L STUD. PERSP. 239, 240 (2001) (“International security has traditionally been defined as military defense of territory. . . . National security therefore is the imperative of defending territory against, and deterring, “external” military threats.”). See generally Helga Haftendorn, *The Security Puzzle: Theory-Building and Discipline-Building in International Security*, 35 INT’L STUD. Q. 3, 5–6 (1991) (describing the emergence and meaning of “national security”).

of life of individuals, become potential sources of insecurity and gain a newfound urgency and importance.¹⁵⁷ Among the especially prominent components of human security are the protection and promotion of human rights and the advancement of democracy.¹⁵⁸ For proponents of the humanitarian thesis, armed force may therefore legitimately be employed in the quest to realize these aspects of human security.¹⁵⁹

Adopting humanist objectives for war also alters the nature of what counts as victory. Under a statist model of security, victory meant vanquishing enemies on the battlefield, signing armistices, concluding peace treaties, acquiring strategic deterrents, or establishing and maintaining spheres of influence. Success of armed intervention undertaken for humanitarian purposes, on the other hand, necessitates instituting deep political and social transformations in the country or territory subject to armed intervention. The intervening powers are obliged to ensure that governance structures are established that would guarantee basic human rights and enable the flourishing of democracy.¹⁶⁰ In short, pursuing human security through armed force requires, in many cases, engaging in the difficult process of nation-building.

Doctrinally, the humanitarian thesis, as discussed above, effectively neutralizes a number of the cardinal principles of international law, many of which are embodied in the UN Charter. Non-intervention in the internal affairs of states, the preservation of the political independence and territorial integrity of states, the inviolability of national boundaries, the freedom of states to adopt systems of government of their choice, and, ultimately, sovereignty are largely deactivated. None of these principles may be invoked to fend off intervention, including armed intervention, to achieve human security.¹⁶¹

157. See, e.g., Sakiko Fukuda-Parr, *New Threats to Human Security in the Era of Globalization*, 4 J. HUM. DEV. 167 (2003).

158. Gary King & Christopher Murray, *Rethinking Human Security*, 116 POL. SCI. Q. 585, 591 (2002).

159. TEITEL, *supra* note 88, at 201, 203.

160. See Gabriella Blum, *The Fog of Victory*, 24 EUR. J. INT'L L. 391, 400 (2013).

161. See Alex Bellamy & Matt McDonald, *The Utility of Human Security: Which Humans? What Security? A Reply to Thomas & Tow*, 33 SECURITY DIALOGUE 373, 375–76

Despite the profundity of these implications that the rise of human security entails for international law and international relations, the harshest attacks of the humanitarian thesis are reserved for the institutional components of the UN Charter *jus ad bellum* scheme. As discussed above, nothing in the UN Charter proscribes the use of armed force to pursue human security-related objectives. UN practice during and, more frequently, after the Cold War bears out this assertion. On a number of occasions, developments within the domestic affairs of states, some of which involved human rights abuses, were brought before the Security Council, which labeled them as threats to the peace and at times took enforcement measures in response to these situations.¹⁶² Undoubtedly, the politically permissive climate of the post-Cold War years and the increase in internal conflicts contributed to the Council's willingness and ability to authorize armed intervention for humanitarian purposes. These interventions, whether they took the form of UN peacekeeping operations or armed interventions sanctioned by the Council but led by regional organizations,¹⁶³ do not,

(2002) ("A discourse of human security that does not delegitimize states when they act as agents of human insecurity, does not devalue sovereignty when it protects the perpetrators of human wrongs . . . has, at best, very limited utility.").

162. For example, in 1960 the Security Council authorized the deployment of a large peacekeeping operation that, although first aimed at assisting the withdrawal of Belgian troops from the Congo, quickly evolved into an operation seeking to protect civilians, maintain law and order in a country threatened by civil war, and prevent the secession of its largest and wealthiest provinces. See Stanley Hoffman, *In Search of a Thread: The UN in the Congo Labyrinth*, 16 INT'L ORG. 331, 343–50 (1962). Another example of the Security Council's intervention in an internal conflict, albeit without authorizing the use of force, is its passage of a series of resolutions relating to the situation in the mandated territory of Palestine prior to the declaration of independence by the State of Israel. On April 1, 1948, the Council passed Resolution 43 in which it called on the Jewish and Arab communities to mandate Palestine to declare a truce and warned of the heavy responsibility that would befall the party that would violate that truce. See S.C. Res. 43, para. 3, UN Doc. S/RES/42 (Apr. 1, 1948). The Security Council's condemnation of the South African apartheid regime and its imposition of sanctions provides another example of UN intervention in the internal affairs of states that, at least partially, sought to uphold basic human rights. See David Johnson, *Sanctions and South Africa*, 19 HARV. INT'L L.J. 887, 902–03 (1978). For an overview of UN interventions in domestic situations that were considered a threat to the peace, see Paul Szasz, *Role of the United Nations in Internal Conflicts*, 13 GA. J. INT'L & COMP. L. 345 (1983).

163. The leading examples of post-Cold War interventions in internal conflicts, whether UN-led or UN-sanctioned, include the operations in the former Yugoslavia,

however, represent a fundamental revision of either the structure or substance of the UN Charter scheme. What these post-Cold War interventions indicate is that in light of the increasing incidence of internal armed conflicts and the human toll exacted by these crises, the Council palpably expanded its definition of the circumstances constituting threats to and breaches of the peace, and exhibited greater preparedness to authorize the use of force in response.¹⁶⁴

Nonetheless, it remains that whether at the height of Cold War tensions or in today's less bellicose international environment, the *sine qua non* for undertaking any such intervention is securing Security Council approval, which in effect means ensuring the consent, or at least the acquiescence, of the P5.¹⁶⁵ It is this institutional aspect of the Charter scheme that elicits the sharpest criticism from proponents of the humanitarian thesis. Especially after the tragic failure of a number of UN peacekeeping operations in the 1990s,¹⁶⁶ and repeatedly thereafter when, as in the Syrian situation, the United Nations failed to authorize forceful measures to protect civilians, proponents of humanitarianism became increasingly "[c]onvinced that the UN Security Council cannot be relied upon to address these problems, and that the United Nations . . . is somehow to blame, they argue for a right of 'unilateral humanitarian intervention', that is, a right to

Somalia, Rwanda, Haiti, East Timor, Sierra Leone, and Liberia. *See generally* ENFORCING RESTRAINT (Lori F. Damrosch ed., 1993).

164. *See* Ruth Gordon, *UN Intervention in Internal Conflicts: Iraq, Somalia and Beyond*, 15 MICH. J. INT'L L. 519, 545 (1994); *see also* Jennifer M. Welsh, *The Security Council and Humanitarian Intervention*, in *THE UNITED NATIONS SECURITY COUNCIL AND WAR* *supra* note 129 at 537–38 (speaking of the increased willingness of the Council to intervene in civil conflicts which reflects an "expanded definition of threats to international peace and security").

165. *See* Erik Voeten, *The Political Origins of the UN Security Council's Ability to Legitimize the Use of Force*, 59 INT'L ORG. 527, 531–32 (2005).

166. The story of the UN's peacekeeping failures has been told elsewhere and is not of direct relevance for the purposes of this paper. For a general overview, *see* LISE MORJÉ HOWARD, *UN PEACEKEEPING IN CIVIL WARS* 1–52 (2008); PAUL DIEHL, *PEACE OPERATIONS* 118–46 (2008); ALEX BELLAMY, PAUL WILLIAMS & STUART GRIFFIN, *UNDERSTANDING PEACEKEEPING* 75–93 (2004); U.N.S.C., *Rep. of the Panel on Peacekeeping Operations*, UN Doc. A/55/305-S/2000/809 (Aug. 21, 2000).

intervene for humanitarian purposes without the authorization of the Security Council.”¹⁶⁷

Skepticism regarding the necessity of Security Council approval for armed intervention climaxed in the aftermath of the 1999 Kosovo War. Unable to obtain the requisite Security Council authorization due to a prospective double Russo-Chinese veto, NATO commenced a 78-day bombing campaign to protect the ethnic Albanian community of Kosovo against mass atrocities being perpetrated by Serbian forces.¹⁶⁸ Commenting on NATO’s resort to armed force, former International Court of Justice (“ICJ”) Judge Bruno Simma noted that the situation in Kosovo presented a “hard case in which terrible dilemmas must be faced and imperative political and moral considerations may appear to leave no choice but to act outside the law.”¹⁶⁹ This divergence between, on the one hand, humanitarian imperatives and, on the other, the legalist Charter scheme, led to the oft-cited conclusion that the Kosovo War was “illegal but legitimate.”¹⁷⁰ The war was judged to be illegal due to the absence of a Security Council imprimatur, but was considered legitimate because it served the moral objective of protecting civilians from mass atrocities.

This finding represented a victory for the humanitarian thesis. The war, it was believed, had driven a wedge between an anachronistic legality and an emergent humanitarian legitimacy. It demonstrated that human values had infiltrated the statist realm of *jus ad bellum* and overturned its main tenets. In the months and years following the war, it was widely assumed that

167. MICHAEL BYRES, WAR LAW: UNDERSTANDING INTERNATIONAL LAW AND ARMED CONFLICT 92 (2007). For example, a former Canadian Foreign Minister and leading advocate of human security expressed exasperation at the impact the P5 prerogatives were having on the ability of the Security Council to address situations that threaten human security. See Lloyd Axworthy, *Human Security and Global Governance: Putting People First*, 7 GLOBAL GOVERNANCE 19, 21–22 (2001); see also Gerd Oberleitner, *Human Security: A Challenge to International Law*, 11 GLOBAL GOVERNANCE 185, 192 (2005) (“A Security Council that applied the concept of human security would look different from the Security Council we know now.”).

168. See generally IVO DAALDER & MICHAEL O’HANLON, WINNING UGLY: NATO’S WAR TO SAVE KOSOVO (2000).

169. Bruno Simma, *NATO, the UN, and the Use of Force: Legal Aspects*, 10 EUR. J. INT’L L. 1, 22 (1999).

170. INDEP. INT’L COMM’N ON KOSOVO, THE KOSOVO REPORT 4 (2000) [hereinafter THE KOSOVO REPORT].

the doctrinal and institutional components of international legality had become inadequate,¹⁷¹ leading to governmental, inter-governmental, and scholarly proposals to revisit the existing *jus ad bellum* scheme.

In addition to its legal consequences, the Kosovo War also had profound political implications. First, the war set a precedent that is regularly invoked in situations where the UN fails to take forceful action to prevent the perpetration of mass atrocities, such as during debates over whether the United States should intervene militarily in Syria.¹⁷² Second, the war was considered a milestone in the ongoing transformation of the values of the international system. In the old anarchical world of sovereign states, war was waged to pursue the national interest and protect state security. Its objectives were deterring aggression, maintaining balances of power, and expanding spheres of influence. In the emergent global community of humankind, however, war, as Kosovo demonstrated, is an instrument of humanity, and its purposes became the vindication of “moral ideals, self-determination, democracy, and human rights.”¹⁷³

II. *THE LEGITIMACIES OF HUMANITARIAN WAR*¹⁷⁴

For a few years after the Kosovo War, the question of humanitarian war was the *cause célèbre* of the global diplomatic community to the extent that UN Secretary General Kofi Annan

171. Peter Hilpod, *From Humanitarian Intervention to Responsibility to Protect: Making a Utopia True?*, in *FROM BILATERALISM TO COMMUNITY INTEREST: ESSAYS IN HONOR OF JUDGE BRUNO SIMMA*, *supra* note 85, at 462, 466.

172. See Jack Goldsmith, *What Happened to the Rule of Law?*, *N.Y. TIMES*, Aug. 31, 2013, <http://www.nytimes.com/2013/08/31/opinion/what-happened-to-the-rule-of-law.html>.

173. See Martti Koskenniemi, *‘The Lady Doth Protest Too Much’ Kosovo, and the Turn to Ethics in International Law*, 65 *MOD. L. REV.* 159, 161 (2002).

174. I prefer the term “humanitarian war” over “humanitarian intervention” for two reasons. The first is for the sake of semantic clarity. ‘Intervention’ denotes a broad set of policy tools, only one of which is the resort to force. Other measures include diplomatic censure, political pressure, economic sanctions, and arms embargoes all of which are frequently used to respond to humanitarian crises. Second, armed force is a special category of intervention. Because it is highly invasive, entails considerable human cost, and potentially violates the prohibition on the use of force in international relations, justifying war requires satisfying a higher and more complex standard of scrutiny than others forms of ‘intervention.’

dedicated his address during the opening of the 54th Session of the UN General Assembly to assessing the future of human security and intervention.¹⁷⁵ Juxtaposing the inaction during the Rwandan genocide against the intervention in Kosovo, Annan challenged world leaders to devise mechanisms that would ensure effective international responses to humanitarian crises without demolishing the post-World War II collective security architecture. The international community instantly took up Annan's challenge.¹⁷⁶ Countless governments, civil society organizations, and scholars working in fields including law, philosophy, ethics, political science, and military affairs generated a voluminous literature on both Kosovo and the broader question of humanitarian war.¹⁷⁷

The purpose of this Part is not to relive the debate over the legality of the Kosovo War or any particular conflict, such as the Libyan or Syrian civil wars, that posed difficult questions regarding the legality, legitimacy, or policy implications of forcefully intervening to protect civilians. Rather, the objective is to construct a typology of the justifications of the use of force for humanitarian purposes, especially those that emerged in the aftermath of Kosovo. I call this typology the legitimacies of humanitarian war.

The purpose of this typology is to demonstrate that shortly after the Kosovo War the international community was presented with a broad range of justifications for waging humanitarian war that, to varying degrees, would have entailed overturning the post-World War II *jus ad bellum* scheme. As I argue below, however, these legitimacies of humanitarian war were rejected. Instead, a conscious choice was made in favor of the rules, institutions, and state-centric values of the *jus ad bellum* scheme embodied in the UN Charter. This challenges claims advanced by proponents of the humanitarian thesis about the changing nature of international law and casts a shadow of

175. See U.N. GAOR, 54th Sess., 4th plen. mtg. at 2, U.N. Doc. A/54/PV.4, (Sept. 10, 1999).

176. I say "instantly" because the speaker immediately following Annan was the Algerian President who, speaking on behalf of Africa, warned against any diminution of sovereignty which was described as the "final defense against the rules of an unjust world." *Id.* at 14.

177. For an overview of this literature, see Adam Roberts, *The So-Called 'Right' of Humanitarian Intervention*, 3 Y.B. INT'L HUMANITARIAN L. 3 (2000).

doubt over contentions that global politics is evolving into a law-governed community of humankind.

Before proceeding, however, a few remarks should be borne in mind. First, as Simon Chesterman demonstrated in a highly illuminating volume, the debate on the resort to force to protect individuals against atrocities perpetrated by their own governments is far from novel.¹⁷⁸ For centuries, governments, lawyers, theologians, and philosophers examined the justifiability of waging war to protect civilians. Many of the arguments that appeared in the aftermath of Kosovo advocating the right to wage humanitarian war echoed intellectual moves made in earlier contexts.

Second, Kosovo was not the only crisis in recent history to spark criticism of the UN Charter-based *jus ad bellum* scheme. The 9/11 attacks, the war on terrorism, the proliferation of Weapons of Mass Destruction (“WMD”), and the doctrine of preemption all spawned governmental and scholarly challenges to the logic and relevance of the rules and institutions of *jus ad bellum*.¹⁷⁹ Third, as discussed below, a common thread running throughout the legitimacies of humanitarian war is the desire to either reinterpret or revisit *jus ad bellum* to bring it in line with the emergent humanist legitimacy. In other words, for proponents of the humanitarian thesis, the gap that the Kosovo War had revealed between legality and legitimacy was to be bridged by making the former comport with the latter.

Fourth, the project of reforming legality to reflect humanitarian values was principally adopted by western governments and scholars. Many countries and scholars, especially from the global south, harbored reservations regarding attempts to dismantle or modify the post-World War II *jus ad bellum* scheme. Most of these skeptical voices were not opposed to the use of force to protect civilians per se. Rather, their principal objection was to the *unilateral* resort to force without Security Council authorization.¹⁸⁰

178. See SIMON CHESTERMAN, *JUST WAR OR JUST PEACE?* 1–44 (2001).

179. See generally BEYOND PREEMPTION: FORCE AND LEGITIMACY IN A CHANGING WORLD (Ivo Daalder ed., 2007).

180. Nolte, *supra* note 147, at 164. For example, during the North American Treaty Organization’s (“NATO”) intervention in Kosovo, Egypt’s Foreign Minister Amre Moussa condemned the atrocities perpetrated against the Albanian community

Fifth, the structure of legitimation, especially when justifying the resort to war, is complex.¹⁸¹ Arguments supporting the use of force frequently draw on multiple forms of legitimation. Therefore, readers should keep in mind that, in reality, the resort to force is rarely justified on the basis of one single form of legitimation from among those in my typology.¹⁸²

Sixth, when dealing with global politics, a slight dose of cynicism is healthy. Justifications for the resort to war, especially war waged for humanitarian purposes, are routinely cloaked in the language of international law and universal morality.¹⁸³ These justifications could reflect genuine humanitarian concerns or may be deployed to conceal the pursuit of national self-interests. More realistically, however, forceful intervention to protect the citizens of foreign countries is driven by a diverse set of motivations, which include a mix of ideational and material

of Kosovo, but noted that “dealing with this issue falls within the jurisdiction of the UN and the Security Council.” The Indian Foreign Ministry also expressed concern regarding the use of force by NATO, which it warned would “seriously undermine the authority of the entire UN system.” These and other statements made in response to the Kosovo War are available in HEIKE KRIEGER, *THE KOSOVO CONFLICT AND INTERNATIONAL LAW: AN ANALYTICAL DOCUMENTATION 1974–1999* 424–99 (2001). The Non-Aligned Movement, which is the largest bloc at the United Nations, also repeatedly declared its opposition to “all unilateral military actions, or use of force or threat of use of force against the sovereignty, territorial integrity and independence,” of states and expressed “strong concern at the growing resort to unilateralism and unilaterally imposed measures that undermine the UN Charter and international law.” See Final Document of the XV Summit of the Heads of State and Government of the Non-Aligned Movement, Sharm El Sheikh, Egypt July 15–16 2009. NAM2009/FD/Doc.1, at paras. 19.4, 24.5.

181. Although writing in the context of judicial reasoning, Robert Summers’ observations about the structure and components of justification are relevant here, since the use of force, like adjudication, is a form of the exercise of coercion. See Robert Summers, *Two Types of Substantive Reasons: The Core of a Theory of Common-Law Justification*, 63 *CORNELL L. REV.* 707, 727–28 (1978).

182. The justifications presented by NATO member states in the aftermath of the Kosovo War attest to this complex and multifaceted structure of justification. During oral pleadings held before the ICJ in a case brought by Serbia against NATO member states, the agent for the United States noted that the war was justified on a number of grounds, which I categorize in different forms of legitimation. These grounds included the impending humanitarian catastrophe, the threat posed to neighboring countries by the conflict, the human rights perpetrated by Serbian forces, and previous UN Security Council resolutions. See Public Sitting in the Case Concerning the Legality of the Use of Force (*Yugoslavia v. USA*), 1999 I.C.J. 916, at 10 (May 11).

183. See Jack Goldsmith & Eric Posner, *Moral and Legal Rhetoric in International Relations: A Rational Choice Approach*, 31 *J. LEGAL STUD.* S115 (2002).

factors.¹⁸⁴ Nonetheless, whatever the underlying motivations driving the decision to resort to humanitarian war, the process of legitimation and providing justification for waging war, even if functioning solely as a façade for ulterior political motives, is important for two reasons.

First, legitimacy is a valuable commodity in international relations. All states, whether Great Powers or peripheral players, seek to justify their policies, especially the decision to resort to war, to a diverse audience of domestic constituencies, allies, adversaries, and a global civil society.¹⁸⁵ This is because all coercion, whether in the form of armed force, or even in its less bellicose manifestation, judicial decisions, requires legitimation to distinguish it from mere banditry or arbitrary tyranny.¹⁸⁶ This felt need to ensure that the exercise of power and influence enjoys legitimacy is a phenomenon that has long been recognized in domestic societies,¹⁸⁷ and that has only recently gained greater attention in the study of international politics.¹⁸⁸ Domestically, societies seek to subject coercion to “justifiable rules, and the powerful themselves will seek to secure consent to their power from at least the most important among their subordinates.”¹⁸⁹ Internationally, Great Powers, like dominant players in domestic politics, seek to transform their preponderant power into authority. This is because a legitimacy

184. ANDREAS KRIEG, *MOTIVATIONS FOR HUMANITARIAN INTERVENTION: THEORETICAL AND EMPIRICAL CONSIDERATIONS* 135 (2013) (concluding, after examining a series of case studies, that “humanitarian interventions were motivated by a set of mixed motivations comprising both altruistic and interest-related factors”).

185. CORNELIU BJOLA, *LEGITIMIZING THE USE OF FORCE IN INTERNATIONAL POLITICS* 7 (2009); see Schachter, *supra* note 140, at 110. The importance of domestic audiences to explaining state behavior, including during conflict situations, is an aspect of policy-making that structural realism is incapable of accounting for due to its singular focus on the international system. See Robert Putnam, *Diplomacy and Domestic Politics: The Logic of Two-Level Games*, 42 *INT’L ORG.* 427, 460 (1988) (discussing the “importance of targeting international threats, offers, and side-payments with an eye towards their domestic incidence at home and abroad”).

186. Matthew Lister, *The Legitimizing Role of Consent in International Law*, 11 *CHI. J. INT’L L.* 663, 667 (2010).

187. In his seminal work on the content and forms of legitimacy, Max Weber spoke of the “generally observable need of any power, or even any advantage of life, to justify itself.” MAX WEBER, 3 *ECONOMY AND SOCIETY* 953 (1968).

188. Jens Steffek, *Legitimacy in International Relations: From State Compliance to Citizens Consensus*, in *LEGITIMACY IN THE AGE OF GLOBAL POLITICS* 175 (Achim Hurrelmann et al. eds., 2007).

189. DAVID BEETHAM, *THE LEGITIMATION OF POWER* 3 (1991).

deficit “‘imposes heavy costs on the controllers.’ . . . The efficiency advantages of authority probably motivate the commonly observed impulse of the powerful to try to legitimate their power.”¹⁹⁰ Legitimacy is also valuable because it contributes to international stability. A widely shared perception of the legitimacy of the principal powers, institutions, ordering principles, and rules of global affairs is instrumental to the maintenance of stability in international affairs.¹⁹¹

Second, legitimacy is important because it has the potential to shape future behavior. Legitimation is a communicative act of giving reasons.¹⁹² As Frederick Schauer explains, giving reasons is a process of justifying particular actions in specific contexts on the bases of general abstract principles.¹⁹³ This structure of reason-giving is not unique to domestic politics. Justification in global politics, including in the high-stakes area of international security, functions in the same way.¹⁹⁴ This appeal to general principles, especially if done repeatedly, creates a commitment, or at least a felt need, to react to similar situations in the future in accordance with these previously invoked principles.¹⁹⁵ In other words, repeated justification creates precedents. Even if not determinative of every future case, precedent, if widely accepted, gradually contributes to shaping behavior by excluding policy options that are unjustifiable on the basis of established general principles.¹⁹⁶

190. Ian Hurd, *Legitimacy and Authority*, 53 INT’L ORG. 379, 388 (1999) (quoting ROBERT A. DAHL & CHARLES E. LINDBLOM, *POLITICS, MARKETS, AND WELFARE* 115 (Transaction Publishers, 2d ed. 1992 (1953))).

191. IAN CLARK, *LEGITIMACY IN INTERNATIONAL SOCIETY* 82 (2005).

192. Craig Matheson, *Weber and the Classification of Forms of Legitimacy*, 38 BRIT. J. SOC. 199, 200 (1987).

193. Frederick Schauer, *Giving Reasons*, 47 STAN. L. REV. 633, 641–42 (1995).

194. Martti Koskenniemi observed that justifications of Security Council action make “constant reference to normative codes, rules, or principles . . . They refer back to more general, systemic theories, assumptions, worldviews, and prejudices that provide the implicit matrix that makes description possible.” Martti Koskenniemi, *The Place of Law in Collective Security*, 17 MICH. J. INT’L L. 455, 468 (1995–1996).

195. Schauer, *supra* note 193, at 658.

196. Although speaking of precedent in the context of the Common Law, I think the following observation by David Strauss also applies to justification in international politics. Speaking of the role played by judgments of fairness and sound social policy in judicial decision, Strauss says: “Even in the small minority of cases in which the law is disputed, the correct answer will sometimes be clear. And—perhaps the most important point—even when the outcome is not clear, and arguments about fairness and good policy come into play, the precedents will usually limit the possible outcomes

States, including Great Powers, are cognizant of this power of principle and the pull of precedent.¹⁹⁷ This is exhibited in the care exercised by governments not to justify their policies in terms that may undermine their interests or freedom of action in future settings.¹⁹⁸ This is also manifested in the conscious attempts of states and many other actors active in global governance to promote, propagate, and ultimately establish as dominant, versions of legitimacy that conform to their normative commitments and interests. This process of shaping what counts as appropriate behavior in international affairs by instrumentally ‘engineering’ perceptions of legitimacy has been termed “strategic social construction.”¹⁹⁹

In a sense, therefore, the legitimacies of humanitarian war, to which we now turn, should be viewed not solely as attempts to

that a judge can reach.” DAVID STRAUSS, *THE LIVING CONSTITUTION* 39 (2010). Ryan Goodman makes a similar point in the context of justifying war waged for humanitarian purposes: “[T]he imagery and justifications that leaders use to build support for their policies at one stage of hostilities constrain their actions at later stages.” Ryan Goodman, *Humanitarian Intervention and Pretexts for War*, 100 AM. J. INT’L L. 107, 123 (2006). Nothing here should be read as suggesting that precedent, whether in judicial practice or international relations, will be determinative of each and every future political situation or case. Just as precedent can be overturned in the Common Law, precedent may be disregarded in international relations.

197. For example, in his *magna opus*, Henry Kissinger celebrated the genius of Austrian Foreign Minister Prince Klemens von Metternich for constructing the post-Napoleonic political order “not by marshalling superior force, but by obtaining a voluntary submission to his version of legitimacy.” HENRY KISSINGER, *A WORLD RESTORED* 321 (1957).

198. Incidentally, the Kosovo War and the subsequent declaration of independence by Kosovo are prime examples of the care exercised by Great Powers to avoid setting precedents that may undermine their interests in future settings. In the aftermath of the 1999 Kosovo War, US Secretary of State Madeline Albright was careful to signal that NATO’s intervention in Kosovo should not be viewed as a precedent for future intervention by the alliance for humanitarian purposes. See Madeleine Albright, US Sec’y of State, Prepared Remarks at the Council on Foreign Relations, June 28, 1999, available at <http://www.cfr.org/nato/prepared-remarks-secretary-state-madeleine-k-albright/p3189>. Similarly, countries that supported the independence of Kosovo repeatedly declared that this was a *sui generis* case that should not set a precedent in favor of secession in other regions of the world. See Rein Mullerson, *Precedents in the Mountains: On the Parallels and Uniqueness of the Cases of Kosovo, South Ossetia, and Abkhazia*, 8 CHINESE J. INT’L L. 2 (2009).

199. Strategic social construction is a process where actors make “detailed means-ends calculations to maximize their utilities, but the utilities they want to maximize involve changing the other players’ utility function in ways that reflect the normative commitments of the norm entrepreneurs.” Martha Finnemore & Kathryn Sikkink, *International Norm Dynamics and Political Change*, 52 INT’L ORG. 887, 910 (1998).

revisit the UN Charter *jus ad bellum* scheme, but also as a bid to establish a humanitarian version of legitimacy as the globally dominant normative framework. Realizing the potency of legitimacy, proponents of the humanitarian thesis sought to reshape perceptions of legitimacy as part of their project to establish a law-governed community of humankind. In other words, the humanitarian critique of the rules and institutions of *jus ad bellum* represents far more than “a minor exception or adjustment to the received organization of the human race. Instead, it arguably exemplified and acted as the doctrinal advance guard of the whole constellation of forces confronting the sovereign state’s once indisputable claim to be the principle locus of power and loyalty.”²⁰⁰

My typology of justifications of humanitarian war includes three categories. The differentiating feature between these categories is their relationship to the existing *jus ad bellum* scheme, which means the extent to which each category takes this Charter scheme as its point of departure to justify humanitarian war. To express this, I draw on the principles of *lex specialis* and *lex generalis*.²⁰¹ The first category of legitimation techniques seeks to fit humanitarian war *within* the structure of the UN Charter scheme. That is why I call this category ‘*Lex Specialis* Legitimacy.’ The second category I label ‘*Lex Generalis* Legitimacy’ because it justifies humanitarian war on the grounds of general international law as opposed to the specific rules of *jus ad bellum*. The third and final category is called ‘Moral Legitimacy’ because, instead of drawing on international law, it justifies humanitarian war on extra-legal bases inspired by the just war tradition.

200. Tom Farer, *Humanitarian Intervention Before and After 9/11: Legality and Legitimacy*, in HUMANITARIAN INTERVENTION: ETHICAL, LEGAL AND POLITICAL DILEMMAS 55 (J.L. Holzgrefe & Robert Keohane eds., 2003).

201. The maxim *lex specialis derogat legi generali* expresses the principle that ‘specific’ law shall overrule ‘general’ law. This means that should a conflict emerge between two principles of law, the more specialized law or the body of law most relevant to the question at hand shall overrule other general principles of international law. In the case of justifying humanitarian war, which is a question relating to the resort to armed force in international relations, the *lex specialis* is *jus ad bellum*. For a detailed examination of this maxim, see Bruno Simma & Dirk Pulkowski, *Of Planets and the Universe: Self-contained Regimes in International Law*, 17 EUR. J. INT’L L. 483 (2006).

A. *Lex Specialis Legitimacy*

Because of thy law am I content with thee, O state!

-Roscoe Pound²⁰²

Legitimizing exercises of coercion, such as the resort to war, on the grounds of preexisting rules is a well-trodden justificatory path. Indeed, etymologically, legitimacy, or *legitimus* as it was referred to in Roman law, was originally understood as acting in conformity with the law.²⁰³ The lure of legal legitimation is that it justifies policy, not on transient interests or arbitrary freedom, but on properly enacted preexisting rules.²⁰⁴ In this case, the relevant body of rules is the UN Charter-based *jus ad bellum* scheme, which, as discussed above, is predicated on a general prohibition on the use of force that admits two exceptions: self-defense and Security Council-authorized enforcement action. Therefore, attempts to fit unilateral humanitarian war within this legal structure take the form of intellectual moves that seek to expand the avenues through which armed force can legally be exercised in international relations.

1. Parsing the Words

The first move to justify humanitarian war according to the existing *jus ad bellum* scheme adopts a reading of article 2(4) of the UN Charter that considerably shrinks the breadth of the general prohibition on the use of force in international relations. According to this provision, UN 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.” Some proponents of the humanitarian thesis consider the words “territorial integrity and political independence” as constituting the limits of the general

202. Roscoe Pound, *The Case for Law*, 1 VAL. U. L. REV. 201, 214 (1967).

203. CLARK, *supra* note 191, at 17.

204. Matheson, *supra* note 192, at 210; *see also* Richard Fallon, “*The Rule of Law*” As a Concept in Constitutional Discourse, 97 COLUM. L. REV. 1, 18 (1997) (explaining that the rule of law is predicated on “reasoned elaboration of the connection between recognized, pre-existing sources of legal authority and the determination of rights and responsibilities in particular cases”).

prohibition on the use of force enacted by article 2(4). Some governments have also adopted this reading of the Charter, albeit in different circumstances.²⁰⁵

According to this approach, force used for purposes other than threatening the territorial integrity of states, such as by altering a country's boundaries, or undermining its political independence by for example imposing a political leadership, is justifiable according to the text of article 2(4).²⁰⁶ It is, therefore, argued that since a "genuine humanitarian intervention does not result in territorial conquest or political subjugation," waging war to protect civilians is not proscribed by the UN Charter.²⁰⁷

Furthermore, proponents of the humanitarian thesis maintain that the rise of human rights and the receding of sovereignty transformed the meaning of the phrase "political independence" as used in article 2(4). As Michael Reisman contends, the right of every state to enjoy political independence is conditional on upholding and protecting human rights. Failure to fulfill that obligation deactivates the right to political independence and constitutes permissible grounds for forcibly intervening to protect civilians.²⁰⁸

2. Implicit Approval and *Ex Post Facto* Ratification

The second move made to justify war fought for humanitarian purposes on the grounds of the existing *jus ad bellum* scheme seeks to broaden the means through which the

205. During the hearings of the Corfu Channel case before the ICJ, the United Kingdom argued that a right of forcible self-help continues to be recognized in international law as long as exercising this right does not entail threatening the territorial integrity or political independence of another state. Unlike uses of force for humanitarian purposes, self-help entails the use of force by a state to protect legal rights that have been infringed by another state. *See* Statement by Sir Eric Beckett on Nov. 12 1948. Some Third World countries and the former Soviet Union also used similar arguments when justifying uses of force to assist colonized peoples achieve independence. The prohibition on the use of force enshrined in Article 2(4), according to this argument, did not apply to situations of decolonization. *See* DINSTEIN, *supra* note 117, at 92.

206. *See for example*: Waldock, *supra* note 125, at 493.

207. FERNANDO TESON, HUMANITARIAN INTERVENTION: AN INQUIRY INTO LAW AND MORALITY 151 (2d ed. 1997); C.F. Amerasinghe, *The Conundrum of Recourse to Force—To Protect Persons*, 3 INT'L ORG. L. REV. 7 (2006).

208. W. Michael Reisman, *Kosovo's Antinomies*, 93 AM. J. INT'L L. 860, 861 (1999).

Security Council expresses its approval of enforcement action. Originally, the drafters of the Charter intended for the Security Council to take direct charge of the execution of enforcement measures through a Military Staff Committee composed of the Chiefs of Staff of the P5.²⁰⁹ The realities of the Cold War, however, prevented this committee from ever fulfilling its mandate or concluding agreements with member states pursuant to which their armed forces would have been available for deployment by the Security Council.²¹⁰

History, however, confirmed the prescience of Justice Holmes' remark that words are "the skin of living thought."²¹¹ UN practice evolved beyond the strictures of the Charter by permitting the Security Council to delegate individual states or coalitions of states to execute enforcement action on its behalf.²¹² The formula routinely used by the Security Council to express its assent to the resort to armed force is the adoption of a resolution under Chapter VII of the Charter in which it uses the phrase "all necessary measures," which is unanimously understood to mean an authorization to use force in the execution of the mandate contained in the resolution.²¹³ Passing such a resolution requires the affirmative vote of nine of the Council's fifteen members, including the P5, which, as in the cases of Kosovo and Syria, is not always forthcoming.

To circumvent this process of explicit authorizations of the use of force, advocates of the humanitarian thesis proposed alternative means through which Security Council may be considered to have approved enforcement action. One of these is "implicit authorization." In the days following the commencement of Operation Allied Force, as NATO's intervention in Kosovo was codenamed, a number of countries

209. U.N. Charter art. 2, para. 1.

210. See Richard Bruning, *The United Nations' Military Staff Committee: Future or Failure?* 13 *MIL. L. & WAR L. REV.* 35 (1974); Jonathan Soffer, *All for One or All for All: The UN Military Staff Committee and the Contradictions of American Internationalism*, 21 *DIPLOMATIC HISTORY* 45 (1997).

211. *Towne v. Eisner* 245 U.S. 418 (1918).

212. DANESH SAROOSHI, *THE UNITED NATIONS AND THE DEVELOPMENT OF COLLECTIVE SECURITY*, 3-50, 142-67 (1999); see also John Quigley, *The Privatization of Security Council Enforcement Action: A Threat to Multilateralism*, 17 *MICH. J. INT'L L.* 249, 277 (1995) (arguing that the practice of the Security Council suggests that the "Charter is being amended in a *de facto* way.").

213. See CORTEN, *supra* note 117, at 312-13.

and regional organizations declared that they considered the operation a breach of international law because it was unauthorized by the Security Council.²¹⁴ In response, the US Secretary of State and the French Foreign Minister intimated that previous Security Council resolutions provided bases for the ongoing bombing of Serbia.²¹⁵ The fact that the Security Council passed three resolutions under Chapter VII on the situation in Kosovo prior to the commencement of hostilities,²¹⁶ two of which declared the conflict to constitute a threat to international peace and security,²¹⁷ was viewed as providing implicit Security Council authorization for the use of force.²¹⁸ This argument was also employed to justify the forceful protection of civilians in other contexts, including the no-fly zones established by the United States, United Kingdom, and France over northern and southern Iraq following the 1991 Gulf War,²¹⁹ and the 1990 ECOMOG intervention in Liberia.²²⁰

214. Understandably, Russia's Ambassador to the United Nations issued a fiery statement that expressed outrage at the NATO operation and emphasized that "those, who are involved in this unilateral use of force against the sovereign FRY carries out in violation of the UN Charter and without authorization from the Security Council, should realize the serious responsibility they pay." Similarly, China announced that the bombing represented a "blatant violation of the UN Charter as well as the accepted norms in international law." The Rio Group also expressed "anxiety" at the hostilities, and argued that the Security Council is the entity charged with the primary responsibility to maintain international peace and security. See THE KOSOVO CONFLICT: A DIPLOMATIC HISTORY THROUGH DOCUMENTS 727-37 (Philip Auerswald & David Auerswald eds., 2000). South Africa's Ministry of Foreign Affairs also issued a statement in which it "noted with grave concern the current military action against the sovereign state of the Federal Republic of Yugoslavia. This is in violation of the UN Charter and accepted norms of international law The erosion of the UN Charter and the authority of the Security Council cannot be tolerated by the international community." KRIEGER, *supra* note 180, at 493.

215. THE KOSOVO CONFLICT: A DIPLOMATIC HISTORY THROUGH DOCUMENTS, *supra* note 214, at 742 (remarks by Secretary of State Albright); *id.*, at 735 (remarks by French Foreign Minister Vedrin).

216. S.C. Res. 1160, U.N. Doc. S/RES/1160 (1998); S.C. Res. 1199, U.N. Doc. S/RES/11 (1998); S.C. Res. 1203, U.N. Doc. S/RES/1203 (1998).

217. S.C. Res. 1199, U.N. Doc. S/RES/11(9) (1998); S.C. Res. 1203, U.N. Doc. S/RES/1203 (1998).

218. Ministry of Foreign Affairs of France, Legal Basis for the Action Taken by NATO, March 25, 1999; see Nico Krisch, *Unilateral Enforcement of the Collective Will: Kosovo, Iraq, and the Security Council*, 3 MAX PLANCK U.N.Y.B. 59, 82 (1999).

219. In the aftermath of the Gulf War, the Kurdish population of northern Iraq and the Shiite majority residing in the southern provinces led a rebellion against Saddam Hussein's regime. Expectedly, the latter unleashed a brutal campaign of repression, especially against the Kurds in the north, which led to an increase in

In addition to citing Security Council resolutions adopted *prior* to the commencement of hostilities, it was suggested that the Council could approve armed intervention undertaken to protect civilians *retroactively* by passing resolutions after the termination of armed operations. I call this form of legitimation *ex post facto* ratification. On June 10, 1999, the Security Council passed Resolution 1244 under Chapter VII, which established an international security and administrative presence in Kosovo and outlined the contours of a political settlement to the conflict. These aspects of the resolution were considered to constitute a form of recognition by the Council of the results of NATO's intervention, which, for some scholars, "effectively ratified what earlier might have constituted unilateral action questionable as a matter of law."²²¹

The failure of the Security Council to condemn an armed intervention, or reproach those executing it, has also been repeatedly advanced as a form of *ex post facto* ratification.²²² During Operation Allied Force, Russia, India, and Belarus submitted a joint draft resolution demanding the cessation of hostilities to the Security Council.²²³ The fact that this resolution was rejected has been considered indicative of the Council's acquiescence to the then-ongoing military operations in Kosovo. Similarly, in the aftermath of the ECOMOG intervention in Liberia, the Security Council issued a Presidential Statement

refugee flows from these areas into neighboring countries. As part of the international response to these developments, the no-fly zones were established to deny Saddam Hussein's troops the advantage of air superiority.

220. Economic Community of West African States Monitoring Group ("ECOMOG") was established by the Economic Community of West African States ("ECOWAS") to intervene in the Liberian civil war to, inter alia, restore law and order, release political prisoners, and prepare the country for free and fair elections. See Jules Lobel & Michael Ratner, *Bypassing the Security Council: Ambiguous Authorizations to Use Force, Cease-Fires and the Iraqi Inspection Regime*, 93 AM. J. INT'L L. 124, 126 (1999).

221. Louis Henkin, *Kosovo and the Law of Humanitarian Intervention*, 93 AM. J. INT'L L. 824, 827 (1999); see THE KOSOVO REPORT, *supra* note 170, at 172. For an extended discussion, see TARCISIO GAZZINI, *THE CHANGING RULES ON THE USE OF FORCE IN INTERNATIONAL LAW* 89–90 (2005).

222. An early example of this argument was used by the United States to justify its quarantine of Cuba during the Cuban Missile Crisis. See Abram Chayes, *Law and the Quarantine of Cuba*, 41 FOREIGN AFF. 550, 556 (1963) ("[S]urely it is no more surprising to say that failure of the Security Council to disapprove regional action amounts to authorization . . .").

223. For the text of the draft resolution and excerpts of the discussion that ensued in the Security Council on the proposed text, see KRIEGER, *supra* note 180, at 432.

and then adopted Resolution 788. Not only did these documents fail to condemn what had been an unauthorized use of force, they commended the intervention for its contribution to peace and stability in the region.²²⁴

B. *Lex Generalis Legitimacy*

The letter killeth, but the spirit giveth life

-2 *Corinthians* 3:6

To most states and many scholars, including some advocates of the humanitarian thesis, these justifications for waging humanitarian war were unconvincing. Oscar Schachter, for example, remarked that reading article 2(4) as permitting the resort to force to protect civilians “requires an Orwellian interpretation” of its terms.²²⁵ Meanwhile, Michael Reisman commented that theories such as implicit authorization and *ex post facto* ratification unsuccessfully attempt to weave a “retrospective tapestry of authority” on interventions that breach the relevant UN Charter rules.²²⁶

Desirous of deploying legality to legitimate humanitarian war, but cognizant of the difficulty of fitting this form of intervention within the doctrinal and institutional framework of the existing *jus ad bellum* scheme, a number of countries and scholars invoked principles and doctrines of general international law to justify war waged to protect civilians. I call this form of justification *lex generalis* legitimation.

224. See generally, S.C. Res. 788, U.N.Doc.S/RES/788 (Nov. 19 1992); Vera Gowlland-Debbas, *The Limits of Unilateral Enforcement of Community Objectives in the Framework of UN Peace Maintenance*, 11 EUR. J. INT'L L. 361, 375 (2000).

225. SCHACHTER, *supra* note 140, at 118; see Mehrdad Payandeh, *The United Nations, Military Intervention, and Regime Change in Libya*, 52 VA. J. INT'L L. 355, 359–360 (2011) (“[I]nternational courts and the majority of international lawyers have until now been unwilling to restrict the scope of Article 2(4) of the Charter or enlarge the possible grounds for the justification of the use of force.”); Richard Falk, *Kosovo, World Order, and the Future of International Law*, 93 AM. J. INT'L L. 847, 853 (1999) (“In essence, the textual level of analysis, upon which legalists rely, cannot give a satisfactory basis for NATO intervention. . . .”).

226. Reisman, *supra* note 208, at 860; see also Gray, *supra* note 129, at 91 (describing attempts to bestow Security Council authorization on interventions such as Kosovo as “extremely controversial.”).

1. Human Rights and the Purposes of the United Nations

The principal purpose of the United Nations is the prevention of war and the maintenance of inter-state peace.²²⁷ World War II and the atrocities perpetrated by the Axis powers convinced the organization's founding fathers, however, that achieving this central objective required enabling the United Nations to deal with the root causes of conflict, including the economic, social, and humanitarian sources of instability.²²⁸ Chapter I of the Charter, titled "The Purposes of the United Nations," bears evidence of this bold ambition. While article 1(1) tasks the organization with protecting peace and suppressing aggression, article 1(3) directs it to promote and encourage "respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion."²²⁹

This identification of the protection human rights as an aim to be pursued by the United Nations is routinely cited by proponents of the humanitarian thesis to demonstrate that the resort to armed force in the service of this objective comports with the overall purposes of the United Nations, and thus, with general international law.²³⁰ To support this claim, reference is also made to the closing line of article 2(4). As discussed above, this provision prohibits the resort to force in any "manner inconsistent with the Purposes of the United Nations."²³¹ Invoking these words in combination of the Charter provisions on human rights, some proponents of the humanitarian thesis argue that war waged to protect civilians is legally legitimate because it serves one of the purposes of the United Nations.²³²

227. Wolfrum, *supra* note 120, at 42 (considering the maintenance of international peace and security to be the "overarching purpose of the United Nations").

228. KENNEDY, *supra* note 135, 45–46.

229. UN Charter art. 1.

230. See Malvina Halberstam, *The Legality of Humanitarian Intervention*, 3 CARDOZO J. INT'L & COMP. L. 1, 4 (1995).

231. U.N. Charter art. 2, para. 4.

232. Marc Weller, *Forcible Humanitarian Action: The Case of Kosovo*, in REDEFINING SOVEREIGNTY: THE USE OF FORCE AFTER THE COLD WAR 319 (Michael Bothe, Mary Ellen O'Connell & Natalino Ronzitti eds., 2005). Ronald Dworkin adopted a similar approach in one of his final pieces, noting, "[w]e might understand the 'Purposes of the United Nations' cited in article 2(4) to be those that flow from the moral responsibility nations had to create that institution: the responsibility to protect people

2. Parallel Custom, Emerging Custom, and Instant Custom

Despite its monumental importance, the UN Charter remains only a single treaty within the broader universe of international law. The Charter, even in the area of the regulation of the use of force in international relations, does not incorporate the entire corpus of relevant rules of international law.²³³ This reality, coupled with the difficulty of interpreting the Charter as permitting unilateral humanitarian war,²³⁴ led many proponents of the humanitarian thesis to argue that waging war to protect civilians without Security Council authorization is legally legitimate on the basis of customary international law.

Invoking custom to justify humanitarian war has taken a number of forms. The first of these argues that a customary right of unilateral armed humanitarian intervention exists in parallel to the treaty-based *jus ad bellum* Charter scheme. Most scholars agree that prior to the adoption of the UN Charter in 1945, customary international law recognized a right of intervention to prevent the perpetration of mass atrocities.²³⁵ Advocates of the right to wage humanitarian war argue that this body of customary rules remained largely intact despite the entry into force of the UN Charter with its general prohibition on the use of force.²³⁶

from the dangers of the insulated sovereignty of the Westphalian system.” Ronald Dworkin, *A New Philosophy of International Law*, 41 PHIL. & PUB. AFF. 2, 23 (2013).

233. Military and Paramilitary Activities in and Against Nicaragua (Nicar. V. U.S.), 1986 I.C.J. 14, 94 (June 27) (separate opinion of President Nagendra Singh) (the UN Charter “by no means covers the whole area of the regulation of the use of force in international relations”).

234. For example, the UK House of Commons noted in a report published in the aftermath of the Kosovo War that, “*Operation Allied Force* was contrary to the specific terms of what might be termed the basic law of the international community—the UN Charter.” FOREIGN AFF. COMM., FOURTH REPORT, 1999–2000, H.C. 28-II, at para 48 (U.K.) available at <http://www.publications.parliament.uk/pa/cm199900/cmselect/cmfaff/28/2802.htm>.

235. See e.g., Jean-Pierre Fonteyne, *The Customary International Law Doctrine of Humanitarian Intervention: Its Current Validity Under the U.N. Charter*, 4 CAL. W. INT’L L.J. 203, 235 (1973).

236. Scholars making this argument usually frame their claim in terms of the continued existence of a right of ‘self-help’ that survived the adoption of the UN Charter. According to this view, a failure of the UN collective security mechanism unlocks a state’s right to use force to protect internationally guaranteed rights. This principle of self-help, the argument goes, also applies to the use of force to uphold internationally recognized human rights. See, e.g., Richard Lillich, *Forcible Self-Help By States to Protect Human Rights*, 53 IOWA L. REV. 325, 346 (1968). In a similar move,

Even if it were conceded that the UN Charter overruled earlier customary norms and proscribed the use of force to protect civilians except with the authorization of the Security Council, some scholars and states contended that customary law evolved since 1945 to recognize an emerging right of forceful humanitarian intervention. Speaking at Security Council meeting in the aftermath of the Kosovo War, the Dutch Ambassador to the United Nations encouraged delegations that had expressed reservations about the legality of NATO's intervention to "realize that the Charter is not the only source of international law," and to accept that "since the day it was drafted, the world has witnessed a gradual shift . . . making respect for human rights more mandatory and respect for sovereignty less absolute."²³⁷ As a result of this shift, it is argued that customary international law has come to recognize a right to the use of force unilaterally to protect civilians against mass human rights violations.²³⁸ To corroborate this claim, a number of armed interventions undertaken for humanitarian purposes since 1945 are cited as evidence of state practice supporting a customary right of forceful intervention.²³⁹

To further buttress claims of an emergent customary right of armed humanitarian intervention, proponents of the humanitarian thesis deploy arguments associated with the constitutionalization of international law discussed earlier in this paper. During oral pleadings in a case filed before the ICJ by Yugoslavia against NATO member states for their participation in the Kosovo War, Belgium submitted that international law had recognized that the prevention of the violent repression of human rights, including through the resort to force, was taking

Michael Glennon argued that repeated violations of the general prohibition on the use of force enshrined in article 2(4) of the Charter have effectively extinguished this rule, and reinstated the freedom of states to resort to force that existed in the pre-Charter era. See MICHAEL GLENNON, *LIMITS OF LAW, PREROGATIVES OF POWER: INTERNATIONAL LAW AFTER KOSOVO* 62–64 (2001).

237. U.N.S.C., Rep. of the Security Council, Jun. 10, 1999, U.N. Doc. S/PV.4011.

238. See Christopher Greenwood, *International Law and the NATO Intervention in Kosovo*, 49 *INT'L & COMP. L.Q.* 926, 931 (2000).

239. For a survey of these incidents and views regarding the precedential value of these examples of state practice, see SEAN MURPHY, *HUMANITARIAN INTERVENTION: THE UNITED NATIONS IN AN EVOLVING WORLD ORDER* 83–116 (1996). See also Christopher Greenwood, *Humanitarian Intervention: The Case of Kosovo*, *FINNISH Y.B. INT'L L.* 141, 161–71 (2002).

precedence over sovereignty. This, Belgium reasoned, was because intervention to protect civilians facing the threat of mass atrocities serves “essential values which also rank as *jus cogens*.”²⁴⁰ In other words, the normative hierarchization of international law and the rise to preeminence of human rights overturned basic tenets of international law, such as sovereignty and non-intervention, and cast doubts over the relevance and utility of the Charter *jus ad bellum* scheme.

Scholars have also echoed the view that the humanization of the values of international law challenges the doctrinal and institutional components of *jus ad bellum*. Michael Reisman, for example, has argued that sovereignty today is understood not as *state* sovereignty, but as *popular* sovereignty.²⁴¹ Therefore, the UN Charter, with article 2(4) at its epicenter, ought to be interpreted and implemented with view to protecting popular sovereignty and enhancing opportunities for self-determination. This inevitably transforms the standard against which the legitimacy of armed intervention is tested. Complying with the strictures of the Charter or obtaining Security Council authorization is no longer considered necessary for the legality of uses of force. Rather, waging war is evaluated on the basis of whether it increases “the probability of the free choice of peoples about their government and political structure.”²⁴² This means that forceful intervention in the pursuit of popular sovereignty may be undertaken not only to prevent mass atrocities, but also to remove despotic regimes and promote democracy.²⁴³

240. KRIEGER, *supra* note 180, at 507. These arguments were made during hearings held by the ICJ regarding the case filed by the Federal Republic of Yugoslavia against NATO member states for their participation in the Kosovo War. It is noteworthy that Belgium was the only NATO member state to justify its participation in the conflict on the basis of an emerging customary right to wage humanitarian war.

241. Lung-chu Chen, *Human Rights and World Public Order: Major Trends of Development 1980-2010*, in LOOKING TO THE FUTURE: ESSAYS ON INTERNATIONAL LAW IN HONOR OF W. MICHAEL REISMAN 460 (Mahnoush Arsanjani et. al. eds., 2010).

242. W. Michael Reisman, *Coercion and Self-Determination: Construing Charter Article 2(4)*, 78 AM. J. INT'L L. 642, 644 (1984).

243. W. Michael Reisman, *Humanitarian Intervention and Fledgling Democracies*, 18 FORDHAM INT'L L.J. 794, 804-05 (1995); see ANTHONY CLARK AREND & ROBERT BECK, INTERNATIONAL LAW AND THE USE OF FORCE 177-202 (1993); W. Michael Reisman, *Why Regime Change Is (Almost Always) a Bad Idea*, 98 AM. J. INT'L L. 516 (1998).

Uncertainties regarding the status of unauthorized humanitarian war as a customary principle²⁴⁴ led some scholars to argue that, despite having violated existing treaty-based and customary international law, the Kosovo War may still have been legitimate because it gave birth to a *novel* customary rule.²⁴⁵ Custom is defined as “general practice accepted as law.”²⁴⁶ This definition is unpacked into two components: an objective element formed of the actual practice of states; and a subjective element consisting of a belief held by states that their practice arises out of a sense of legal obligation.²⁴⁷ The claim that the Kosovo War established a customary rule permitting unilateral uses of force for humanitarian purposes is predicated on the theory of “instant custom.”²⁴⁸ Despite the terminological contradiction inherent in the phrase “instant custom,”²⁴⁹ this theory is based on the claim that only a limited amount of state practice needs to have accreted in a brief period of time to satisfy the constituent elements of custom.²⁵⁰ Therefore, a single

244. For example, a memorandum prepared by the Planning Staff of the UK Foreign and Commonwealth Office on the permissibility of armed intervention noted that “[t]he state practice to which advocates of the right of humanitarian intervention have appealed provides an uncertain basis on which to rest such a right. . . . In fact, the best case that can be made in support of humanitarian intervention is that it cannot be said to be unambiguously illegal.” Geoffrey Marston, *United Kingdom Materials on International Law 1986*, 57 BRIT. Y.B. INT’L L. 487, 618–19 (1986).

245. Antonio Cassese, *Ex iniuria ius oritur: Are We Moving Towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?*, 10 EUR. J. INT’L L. 23, 30 (1999) (observing that “it is not an exceptional occurrence that new standards emerge as a result of a breach of *lex lata*”).

246. Statute of the International Court of Justice, art. 38, June 26, 1945, 59 Stat. 1055, 33 U.N.T.S. 993 (annexed to U.N. Charter).

247. JAMES CRAWFORD, *BROWNIE’S PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 23–25 (8th ed. 2012).

248. The theory was first proposed in: Bin Cheng, *United Nations Resolutions on Outer Space: “Instant” International Customary Law?*, 5 INDIAN J. INT’L L. 23 (1965).

249. Maurice Mendelson, *The Formation of Customary International Law*, 272 RECUEIL DES COURS 155, 371 (1998).

250. Michael Scharf, *Seizing the “Grotian Moment”: Accelerated Formation of Customary International Law in Times of Fundamental Change*, 43 CORNELL INT’L L.J. 439, 440 (2010). In support of this theory, reference is usually made to the following segment of the judgment of the ICJ in the North Sea Continental Shelf case:

Although the passage of only a short period of time is not necessarily, or of itself, a bar to the formation of a new rule of customary international law on the basis of what was originally a purely conventional rule, an indispensable requirement would be that within the period in question, short though it might be, State practice, including that of States whose interests are specially

incident, such as the Kosovo War, if accepted, or at least not met with considerable objections, could establish, even instantly, a new customary rule.²⁵¹

3. Necessity, Mitigation, and Absurdity

General international law recognizes that in certain situations states may be compelled to violate international law to protect essential interests from grave and imminent peril.²⁵² The doctrinal expression of this rule is the concept of necessity, according to which these exceptional circumstances absolve states of the wrongfulness resulting from their violation of international law.²⁵³ Necessity, or variations thereof, has been repeatedly invoked by supporters of a right to wage unilateral humanitarian war. For example, speaking before the Security Council during NATO's intervention in Kosovo, the US representative noted that Operation Allied Force was "necessary to respond to Belgrade's brutal persecution of Kosovar Albanians. . . . We have begun today's action to avert this humanitarian catastrophe."²⁵⁴ Similarly, the British Permanent Representative declared that "[t]he action being taken is legal. It is justified as an exceptional measure to prevent an overwhelming humanitarian catastrophe."²⁵⁵ Similar arguments were also made during debates over the legality of military intervention in the Syrian civil war in the absence of an authorization from the Security Council.²⁵⁶

affected, should have been both extensive and virtually uniform in the sense of the provision invoked

Case Concerning the North Sea Continental Shelf (Ger. v. Den.), 1969 I.C.J. (Feb. 20).

251. Sean Murphy, *The Intervention in Kosovo: A Law-Shaping Incident?*, 94 PROC. AM. SOC'Y INT'L L. 302, 303 (2000) (suggesting that analysts of the Kosovo War "must consider the precedential value of Kosovo as a law-shaping incident"); see John Currie, *NATO's Humanitarian Intervention in Kosovo: Making or Breaking International Law?*, 36 CAN. Y.B. INT'L L. 303, 327 (1998).

252. Ian Johnstone, *The Plea of "Necessity" in International Legal Discourse: Humanitarian Intervention and Counter-terrorism*, 43 COLUM. J. TRANSNAT'L L. 337, 357 (2004).

253. Rep. of the Int'l Law Comm'n, 53d Sess., Apr. 23–June 1, July 2–Aug. 10, 2001, Draft Articles on Responsibility of States for Internationally Wrongful Acts ILC Draft Articles on State Responsibility, U.N. Doc. A/56/10 (2001).

254. KRIEGER, *supra* note 180, at 425.

255. *Id.*, at 429.

256. In a document released by the British Government outlining its position regarding the use of chemical weapons in Syria, it was argued that force may be used

The central move made by proponents of this form of justification is to invoke the exceptional nature of the circumstances faced by NATO during the Kosovo conflict that left no option but to resort to force without Security Council approval. The history of the Milosevic regime, the conflict that ravaged the Balkans during the early 1990s, the failure of attempts at a political settlement between Belgrade and the Kosovar Albanian leadership, the ethnic nature of the civil strife in Kosovo, the documentation of grave crimes committed by Serbian troops in Kosovo, and most significantly, the prospect of a Russo-Chinese double veto in the Security Council against proposals for forceful intervention were all case-specific facts that converged to establish a situation of necessity that justified the resort to force.²⁵⁷ Ultimately, “the unlawfulness of the act was mitigated, to the point of exoneration, in the circumstances in which it occurred.”²⁵⁸

In a sense, grounding the legitimacy of humanitarian war on the doctrine of necessity mimics the absurdity doctrine that is familiar in domestic legal systems.²⁵⁹ According to this doctrine, the plain meaning of a legal instrument, be it the Constitution or a statute, may be overturned if “the absurdity and injustice of applying the provision to the case would be so monstrous, that all mankind would, without hesitation, unite in rejecting the application.”²⁶⁰ Obviously, when drafting legal texts, legislators do not intend to produce absurd or, in the Supreme Court’s

without Security Council authorization as “exceptional measures in” order to “alleviate the scale of overwhelming humanitarian catastrophe. . . . Such a legal basis is available under the doctrine of humanitarian intervention” *Chemical Weapon Use By Syrian Regime: UK Government Legal Position*, UNITED KINGDOM (Aug. 29, 2013), <https://www.gov.uk/government/publications/chemical-weapon-use-by-syrian-regime-uk-government-legal-position/chemical-weapon-use-by-syrian-regime-uk-government-legal-position-html-version>.

257. THE KOSOVO REPORT, *supra* note 170, at 173–75.

258. Thomas M. Franck, *Interpretation and Change in the Law of Humanitarian Intervention*, in HUMANITARIAN INTERVENTION: ETHICAL, LEGAL AND POLITICAL DILEMMAS, *supra* note 200, at 204, 226 (J.L. Holzgrefe & Robert Keohane eds., 2003).

259. See Robert S. Summers & Michele Taruffo, *Interpretation and Comparative Analysis*, in INTERPRETING STATUTES, A COMPARATIVE STUDY (D. Neil MacCormick & Robert S. Summers eds., 1991).

260. *Sturges v. Crowninshield*, 17 U.S. 122, 203 (1819); see also *United States v. Kirby*, 74 U.S. 482, 486 (1868) (“All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence.”).

just-quoted words, “monstrous” results. Nonetheless, absurdity may occur because statutes are framed in general terms so as to apply to future unforeseeable situations. Given the bounded rationality of legislators and the imprecision of language, generally framed texts may generate either over-specificity or under-inclusiveness when applied in future settings that involve previously unimagined fact-patterns or circumstances.²⁶¹ Therefore, the absurdity doctrine enables courts to avoid applying the plain meaning of generally framed legal texts if it impinges on core social values.²⁶² Scholars sympathetic towards NATO’s intervention in Kosovo drew on the absurdity doctrine to justify the intervention. A clear and plain reading of the UN Charter, it was admitted, does not foresee the possibility of resorting to force for humanitarian purposes without Security Council approval. Nevertheless, complying with the strictures of the Charter in situations of extreme humanitarian necessity, such as the Kosovo conflict, would be an untenable *reductio ad absurdum*, which justifies an exceptional departure from the Charter-based *jus ad bellum* scheme.²⁶³

A noteworthy feature of legitimation on the bases of necessity, mitigation, absurdity or similar concepts is their relatively less consequential policy implications. The various forms of *lex specialis* legitimation and *lex generalis* legitimation on the grounds of either treaty provisions or customary law all modify the rules governing the resort to force in international relations. Whether one restricts the ambit of article 2(4), invokes article 1(3), cites customary law existing in parallel to the UN Charter, or contends that new custom has been established, all of these justifications broaden the grounds on which states may lawfully wage war. Invoking necessity, mitigation, or absurdity, however, entails an admission of the illegality of the resort to force without Security Council

261. See Frederick Schauer, *Authority and Indeterminacy*, in *AUTHORITY REVISITED*, NOMAS XXIX 31–33 (J. Roland Pennock & John W. Chapman eds., 1987).

262. John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2402 (2002); see also Glen Staszewski, *Avoiding Absurdity*, 81 IND. L.J. 1001, 1007 (2006) (“If an application of plain statutory language would undermine sufficiently important values of the legal system, courts presume that the legislature would not have intended such a result.”).

263. THOMAS M. FRANCK, *RECOURSE TO FORCE: STATE ACTION AGAINST THREATS AND ARMED ATTACKS* 171–72 (2002).

approval. In other words, this form of justification keeps the Charter scheme essentially intact, but seeks exculpation for specific cases in light of exceptional circumstances necessitating the use of force to avoid an impending peril. This explains why NATO member states and many scholars favored this approach to justify the Kosovo War. Deconstructing the general prohibition on the use of force enshrined in the Charter and undermining the authority of the Security Council would establish dangerous precedents that could be invoked by adversaries in future settings, and could increase incidences of violence in international relations. Therefore, many NATO countries sought to downplay the precedential value of Kosovo and insist that it represents a *sui generis* exception to what is generally considered a valid system of law.²⁶⁴

C. Moral Legitimacy

If one person is able to save another and does not save him,
he transgresses the commandment 'Neither shalt thou stand
idly by the blood of thy neighbor'

-Moshe ben Maimonides²⁶⁵

It is not inconceivable that in the operation of any legal system cases may arise where the properly enacted laws prescribe a certain course of action but where social morality, political necessity, or economic efficiency point in different directions.²⁶⁶ In these circumstances, especially when the apparent conflict pits the dictates of legality against the requirements of morality, a troubling predicament appears. "[M]oral agents would have good moral reasons for rejecting those claims of law that they believe to be morally erroneous, just as law has good moral reasons for imposing its legal will on those moral agents who,

264. Anthea Roberts, *Legality vs Legitimacy: Can Uses of Force Be Illegal But Justified?*, in *HUMAN RIGHTS, INTERVENTION, AND THE USE OF FORCE* 195–96 (Philip Alston & Euan MacDonald eds., 2008).

265. BRIAN LEPARD, *RETHINKING HUMANITARIAN INTERVENTION* 90 (2002) (quoting Moshe ben Maimonides).

266. Frederick Schauer, *Judging in a Corner of the Law*, 61 *S. CAL. L. REV.* 1717, 1728 (1988); see Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 *HARV. L. REV.* 1359, 1374 (1997) ("But at times, law requires us to do things that we think morally wrong, or prohibits us from doing things that we think morally correct.").

from the law's perspective, mistakenly refuse to accept the law's wise guidance."²⁶⁷ For countries and scholars who supported NATO's intervention in Kosovo and called on the international community to use force to protect civilians in Syria, and more broadly for promoters of the humanitarian thesis, the moral obligation to save civilians from mass atrocities overrides other considerations, including legal niceties requiring Security Council approval.²⁶⁸

The intellectual apparatus regularly employed to justify unilateral humanitarian war on moral grounds is the just war tradition,²⁶⁹ which is a "two thousand year old conversation about the legitimacy of war."²⁷⁰ Although most authors speak of just war *theory*,²⁷¹ I prefer the term the just war *tradition* which reflects the broad variety of views and occasional inconsistencies between writings in the field.²⁷² Despite this diversity of perspectives, the general normative project of the just war tradition is to contain and limit violence in international affairs through the identification of the circumstances in which waging war would be morally permissible and outlining the conditions for the just execution of war.²⁷³ Although numerous elements

267. Larry Alexander & Frederick Schauer, *Law's Limited Domain Confronts Morality's Universal Empire*, 48 WM. & MARY L. REV. 1579, 1587 (2007); see Larry Alexander, *The Gap*, 14 HARV. J. L. & PUB. POL'Y 695, 695–96 (1991).

268. For example, speaking to the nation on March 24, 1999, President Clinton described the unfolding humanitarian crisis in Kosovo and declared that "ending this tragedy is a moral imperative." See KRIEGER, *supra* note 180, at 415. Similarly, the Secretary General of NATO announced that the alliance had a "moral duty" to intervene in the Kosovo crisis. See *id.* at 304.

269. James Pattison, *The Ethics of Humanitarian Intervention*, 26 ETHICS & INT'L AFFAIRS 1, 4 (2011) (highlighting that discussions of the ethics of humanitarian intervention "draw heavily on just war theory."); see CORNELIU BJOLA, *supra* note 185, at 7 ("The prevalent ethical tradition addressing the moral conditions under which the use of force can be legitimated is that of the just war theory.")

270. ALEX BELLAMY, *JUST WARS: FROM CICERO TO IRAQ 2* (2006).

271. See, e.g., NICHOLAS FOTION, *WAR AND ETHICS: A NEW JUST WAR THEORY* (2007).

272. See Anthony Coates, *Humanitarian Intervention: A Conflict of Traditions*, in XLVII NOMOS: HUMANITARIAN INTERVENTION 58, 59 (Terry Nardin & Melissa Williams eds., 2005).

273. In other words, just war theory examines the morality of war from two angles. The first is judging the morality of waging war, while the second is evaluating whether war was conducted morally. This bifurcation of the questions examined by the just war tradition mimics the division of the body of international law dealing with armed conflict into a field relating to the legality of resorting to war; namely, *ius ad bellum*, and a field dealing with the means and methods of war, which is *ius in bello*. See STEVEN P.

have been proposed as criteria for evaluating the moral permissibility of waging war, three core indicators appear to enjoy the unanimous support of just war theorists. These are (1) just cause, (2) right intention, and (3) proper authority.²⁷⁴

The first of these criteria, just cause, is understood as “a sufficient reason for war, a goal or ‘cause’ capable of justifying the terrible forms of action that war inevitably involves.”²⁷⁵ Classical and modern writings in the just war tradition have proposed a broad range of causes justifying the resort to war, such as self-defense, deterring aggression, avenging wrongs, and protecting rights. Another just cause for waging war that has long been recognized by the just war tradition is saving foreign citizens from mass atrocities.²⁷⁶ A degree of uncertainty, however, surrounds the nature and gravity of the atrocities warranting forceful intervention. For some scholars, the threat or perpetration of crimes such as genocide, war crimes, and crimes against humanity constitute just causes for war, while others adopt the significantly lower threshold of preventing abuses of basic human rights.²⁷⁷

Cognizant of the possibility that the existence of a just cause may be exploited to justify war waged for ulterior political motives, just war theorists developed the second component of this triad: right intention. Classically, right intent was

LEE, *ETHICS AND WAR* 31 (2012). As discussed above, this Article does not examine *ius in bello*, and therefore, this Section will not examine debates about the moral justifiability of NATO’s conduct of military operations.

274. These three criteria were formulated by St. Thomas Aquinas on the basis of the earlier writings of St. Augustine. See DINSTEIN, *supra* note 117, at 66. Other principles that have been identified by just war theorists and that have been applied in discussion on the legitimacy of humanitarian war include: (1) *Last resort* in the sense that other peaceful forms of intervention should either be exhausted or be deemed ineffective, (2) the use of force should *produce more good than harm*, (3) *proportionality* should be maintained between the objectives of the operations and the means used, and (4) *reasonable prospects of success* in ending human suffering. See Nicholas Wheeler, *Legitimizing Humanitarian Intervention: Principles and Procedures*, 2 MELB. J. INT’L L. 550, 556–60 (2001).

275. Jeff McMahan, *Just War*, in *A COMPANION TO CONTEMPORARY POLITICAL PHILOSOPHY*, *supra* note 88, at 669, 670.

276. Gregory Reichberg, *Jus ad Bellum*, in *WAR: ESSAYS IN POLITICAL PHILOSOPHY*, 23 (Larry May ed., 2009).

277. See David Luban, *Just War and Human Rights*, 9 PHIL. & PUB. AFF. 160, 173–76 (1980) (proposing the protection of socially necessary human rights as a just cause of war).

understood as the requirement that war be waged with the intention of correcting evil or rectifying a wrong.²⁷⁸ In other words, a war waged in response to the just cause of a humanitarian crisis but with the intention of, for example, territorial aggrandizement, regime change, or assisting a particular belligerent, may be deemed unjust war for being fought for the wrong objectives.²⁷⁹ It was, therefore, unsurprising that British Prime Minister Tony Blair partially justified NATO's intervention in Kosovo by stating that "[t]his is a just war, based not on any territorial ambitions but on values."²⁸⁰

The third element of just war theory, proper authority, is perhaps its most pivotal component.²⁸¹ Faced with the potential for abuse generated by the indeterminacy inherent in just cause, right intent, and other just war criteria, theorists recognized the importance of identifying a centralized authority to ascertain whether the just war conditions have been met and to authorize the use of force. In classical iterations of just war theory, that authority was the sovereign or the ruling prince.²⁸²

Identifying the entity empowered to authorize waging humanitarian war was probably the most contentious aspect of the debate over the Kosovo War. Indeed, as discussed above, requiring Security Council approval to intervene to protect civilians has been the feature of the Charter-based *jus ad bellum*

278. STEPHEN NEFF, WAR AND THE LAW OF NATIONS, 51 (2005).

279. David Chandler, *The Responsibility to Protect? Imposing the Liberal Peace*, 11 INT'L PEACEKEEPING 59, 70 (2004).

280. Tom Buerkle, *Blair Grabs Role as Alliance Hawk*, N.Y. TIMES, Apr. 24, 1999, <http://www.nytimes.com/1999/04/24/news/24iht-blair.2.t.html>

281. Laurie Calhoun, *Legitimate Authority and 'Just War' in the Modern World*, 27 PEACE & CHANGE 37, 54 (2002) (explaining that because the other components of just war theory "are subject to rational dispute, *legitimate authority* becomes, in actual practice, the sole necessary condition for a nation's waging of war").

282. Farer, *supra* note 200, at 76 (explaining that St. Thomas Aquinas included proper authority among the just war criteria "to limit violence and strengthen order by delegitimizing the use of force by lords all up and down the medieval hierarchy as well as outlaw groups—pirates and unemployed mercenaries, for example"). Aquinas' rationale for identifying sovereigns as the sole authority capable of sanctioning the use of force also reflects the unique role ascribed to sovereigns in Aquinas' political philosophy. The right of the sovereign to authorize the use of force to avenge wrongs or punish evildoers is an extension of the broader responsibility of the sovereign to serve and protect the common good of the community. See James Turner Johnson, *Aquinas and Luther on War and Peace: Sovereign Authority and the Use of Armed Force*, 31 J. RELIGIOUS ETHICS 3, 10 (2003).

scheme subjected to the greatest criticism by proponents of the humanitarian thesis. Therefore, numerous alternatives to Security Council approval were proposed. For example, Michael Walzer, a leading contemporary scholar of the just war tradition, argued that morality does not proscribe “unilateral action, so long as there is no immediate alternative available” and concluded that “any state capable of stopping the slaughter has the right, at least, to try to do so.”²⁸³ Uncomfortable with the prospect of abuse entailed in an open license for all states to wage unilateral humanitarian war, some scholars proposed limiting this right to democratic states or states that protect basic human rights.²⁸⁴ Meanwhile, mindful of the unique legitimacy of decisions adopted in accordance with the formal procedures of multilateral organizations, such as NATO or the African Union, some opined that armed intervention for humanitarian purposes executed by these organizations would overcome the dangers of unfettered unilateralism.²⁸⁵ Another institutional option that was proposed to legitimate armed intervention to protect civilians is for the intervening state or coalition of states to accept *ex post facto* international judicial review exercised by the ICJ and/or the International Criminal Court (“ICC”).²⁸⁶

D. *RtoP*-Humanity’s Version

As aforementioned, a common thread running throughout these three categories of legitimation is that they seek to revisit the rules governing the resort to force by states in international relations to permit unilateral forceful intervention to protect civilians from mass atrocities. In other words, the gap that the Kosovo War had uncovered between legality as expressed in the UN Charter and an emergent humanitarian legitimacy was to be

283. MICHAEL WALZER, *JUST AND UNJUST WARS* 107–08 (4th ed. 2006).

284. Terry Nardin, *The Moral Basis for Humanitarian Intervention*, in *JUST INTERVENTION* 1, 22 (Anthony Lang ed., 2003); see also Allen Buchanan & Robert Keohane, *The Preventive Use of Force: A Cosmopolitan Institutional Proposal*, 18 *ETHICS & INT’L AFFAIRS* 1, 18–19 (2004).

285. Ruth Wedgwood, *NATO’s Campaign in Yugoslavia*, 93 *AM. J. INT’L L.* 828, 832 (1999).

286. Jonathan Charney, *Anticipatory Humanitarian Intervention in Kosovo*, 93 *AM. J. INT’L L.* 834, 838 (1999).

bridged by transforming the former to reflect the requirements of the latter.²⁸⁷

For many supporters of NATO's intervention in Kosovo, and more broadly, for proponents of the humanitarian thesis, the most effective approach for achieving this objective was to formulate and codify criteria to both guide international intervention and provide a standard against which to test the legitimacy of these interventions. The impulse underlying these calls to set criteria to guide the use of force for humanitarian purposes appears to be the fear of the misuse of an unregulated right of unilateral intervention and a faith in the ability of codified rules to shape both state policies and the actions of international institutions.²⁸⁸

Although countless sets of checklists and criteria were proposed by some governments²⁸⁹ and many scholars,²⁹⁰ the most prominent effort to devise guidelines to govern international intervention in humanitarian crises was the concept of the Responsibility to Protect ("RtoP") that was first proposed by the International Commission on Intervention and

287. Allen Buchanan, *Reforming International Law of Humanitarian Intervention*, in HUMANITARIAN INTERVENTION: ETHICAL, LEGAL AND POLITICAL DILEMMAS, *supra* note 200, at 131.

288. Jane Stormseth, *Rethinking Humanitarian Intervention: The Case for Incremental Change*, in HUMANITARIAN INTERVENTION: ETHICAL, LEGAL AND POLITICAL DILEMMAS, *supra* note 200, at 245.

289. Great Britain was among the leading advocates of adopting guidelines to determine the appropriateness of forceful intervention to protect civilians. For example, Prime Minister Tony Blair proposed a series of questions to guide decisions to intervene in humanitarian crises. These included: (1) Whether the intervening nations were sure of their case? (2) Whether diplomatic options had been exhausted? (3) Whether resorting to force is sensible and prudent? (4) Is there an exit strategy in place? (5) Are there national interests involved in the conflict? See The Right Honorable Tony Blair, Prime Minister, United Kingdom, Address at the Chicago Economic Club (Apr. 22, 1999), available at http://www.pbs.org/newshour/bb/international/jan-june99/blair_doctrine4-23.html. Australia's Foreign Minister, Gareth Evans, proposed a similar checklist that closely resembled the core components of just war theory. See Gareth Evans, *When Is it Right to Fight?*, 46 SURVIVAL 59, 75 (2004).

290. See Alexander Volsky, *Reconciling Human Rights and State Sovereignty, Justice and the Law*, in *Humanitarian Interventions*, 3 INT'L PUB. POL'Y REV. 40, 44–45 (2007); Mona Fixdal & Dan Smith, *Humanitarian Intervention and Just War*, 42 MERSHON INT'L STUD. REV. 283 (1998); Ian Holliday, *Ethics of Intervention: Just War Theory and the Challenge of the 21st Century*, 17 INT'L REL. 115 (2003); David Fisher, *The Ethics of Intervention*, 36 SURVIVAL 51 (1994); George R. Lucas Jr., *The Role of the 'International Community' in Just War Tradition—Confronting the Challenges of Humanitarian Intervention and Preemptive War*, 2 J. MIL. ETHICS 122 (2003).

State Sovereignty (“ICISS”).²⁹¹ Because the report issued by this commission has been thoroughly described, analyzed, applauded, and criticized in earlier works,²⁹² discussion will be limited here to outlining its salient features and identifying the changes it proposed to the existing *jus ad bellum* scheme.

RtoP, as proposed by the ICISS, is predicated on two theoretical moves. The first is the recasting of sovereignty from *control* to *responsibility*. Under the classical Westphalian framework described earlier in this Article, the state was presumed to enjoy limitless powers over individuals within its jurisdiction. The ICISS, however, argued that the emergence and growth of international human rights law and state practice since World War II upended this conception, thereby warranting the remolding of sovereignty into a responsibility of governments to uphold the rights and freedoms of their subjects.²⁹³ Second, RtoP shifted the debate from a *right* of intervention exercised by states to a *responsibility* towards individuals facing the threat of mass atrocities.²⁹⁴ While under the Westphalian anarchical image of the world states were viewed as autonomous, coequal sovereigns, this redefined

291. INT’L COMM’N ON INTERVENTION AND STATE SOVEREIGNTY, THE RESPONSIBILITY TO PROTECT (International Development Research Center, 2002) [hereinafter ICISS Report].

292. See Gareth Evans & Mohamed Sahnoun, *The Responsibility to Protect*, 91 FOREIGN AFF. 99 (2002); RAMESH THAKUR, THE UNITED NATIONS, PEACE AND SECURITY: FROM COLLECTIVE SECURITY TO THE RESPONSIBILITY TO PROTECT 245–86 (2006); THOMAS WEISS & DON HUBERT, THE RESPONSIBILITY TO PROTECT: RESEARCH, BIBLIOGRAPHY, AND BACKGROUND (International Development Research Center, 2001); Ramesh Thakur, *Outlook: Intervention, Sovereignty and the Responsibility to Protect: Experiences from the ICISS*, 33 SECURITY DIALOGUE 323 (2002); Jeremy Levitt, *The Responsibility to Protect: A Beaver Without a Dam?* 25 MICH. J. INT’L L. 153 (2003) (reviewing INT’L COMM. ON INTERVENTION AND STATE SOVEREIGNTY, THE RESPONSIBILITY TO PROTECT (2001) & THOMAS WEISS & DON HUBERT, THE RESPONSIBILITY TO PROTECT: RESEARCH, BIBLIOGRAPHY, BACKGROUND (2001)); Jennifer Welsh et al., *The Responsibility to Protect: Assessing the Report of the International Commission on Intervention and State Sovereignty*, 57 INT’L J. 489 (2002); Edward Newman, *Humanitarian Intervention, Legality and Legitimacy*, 6 INT’L J. HUM. RTS. 102 (2002); Ramesh Thakur, *A Shared Responsibility for a More Secure World*, 11 GLOBAL GOVERNANCE 281 (2005); Mary Ellen O’Connell, *Responsibility to Peace: A Critique of R2P*, J. INTERVENTION & STATEBUILDING 39 (2010).

293. Gareth Evans, *The Responsibility to Protect: From an Idea to an International Norm*, in RESPONSIBILITY TO PROTECT: THE GLOBAL MORAL COMPACT OF THE 21ST CENTURY 19 (Richard Cooper & Juliette Kohler eds., 2008).

294. *Id.*

conception of sovereignty proposed a world order in which states are dually responsible for the protection of individuals within their jurisdiction before their own citizenry and the international community.²⁹⁵

These moves, the Commission opined, are in line with the transformation of international relations “from a culture of violence to a more enlightened culture of peace,” which was spawned by the expansion of international human rights, humanitarian, and criminal law. These developments in international relations and international law ultimately discredited traditional understandings of security defined in terms of national borders and *raison d'état*, and gave rise to human security as an overarching paradigm through which to evaluate and determine security policy.²⁹⁶

Having laid its intellectual foundations, which recreate many of the claims advanced by the constitutionalist and humanitarian theses in international law, the ICISS then outlined the policy components of RtoP. Primarily, ICISS emphasized that armed intervention is merely one of many tools available for responding to humanitarian crises. These tools were presented as a broad continuum of options ranging from preventive diplomacy to post-conflict reconstruction.²⁹⁷ Second, drawing heavily on the just war tradition, the ICISS proposed six criteria to guide international intervention in situations where civilians face the threat of mass atrocities. The just causes for intervention identified by the ICISS were situations of actual or apprehended large-scale loss of life, whether it was the result of state action, neglect, inability, or a failed state situation, and actual or apprehended ethnic cleansing.²⁹⁸ These circumstances, the report clarified, may occur due to the commission of crimes such as genocide, crimes against humanity, war crimes, or due to the breakdown of a state's institutions, the eruption of a civil war, or the occurrence of a natural or environmental disaster. In these situations, it would be legitimate for the international

295. ICISS Report, *supra* note 2901, at 13.

296. *Id.* at 15.

297. *Id.* at 66–67.

298. *Id.* at 32–33.

community to forcefully intervene both anticipatorily and to stop ongoing atrocities.²⁹⁹

As to the right intention underlying forceful intervention, the report noted that the “primary purpose of the intervention must be to halt or avert human suffering,”³⁰⁰ thereby excluding regime change and territorial occupation as legitimate objectives of humanitarian war. The ICISS was cognizant, however, that domestic constituencies may require governments not use force except when necessary to serve national self-interests. Therefore, the report advocated a conception of ‘national’ interests that is both expansive and infused with a distinctive cosmopolitan flavor that would include matters of global concern, and argued that “these days, good international citizenship is a matter of national self-interest.”³⁰¹

The report’s third criterion for judging the legitimacy of armed humanitarian intervention is the requirement that force be employed as a last resort after peaceful measures had been explored. The fourth component of these criteria required that the force used be proportionate to the humanitarian objective of the intervention. Fifth, the report noted that the use of force would only be legitimate if it had reasonable prospects of succeeding in halting or preventing the loss of life.³⁰²

The sixth and final criterion for determining the legitimacy of the use of force presented the greatest challenge to the existing *jus ad bellum* scheme. Seeking to identify the entity empowered to authorize waging humanitarian war, the ICISS noted that “there is no better or more appropriate body than the Security Council to deal with military intervention issues for human protection purposes. It is the Security Council which should be making the hard decisions in the hard cases about overriding state sovereignty.”³⁰³ With Rwanda and Kosovo still recent history, however, the ICISS realized that Council’s unfettered powers and the unmatched influence of the P5 might

299. *Id.* at 33. It is noteworthy that ICISS excluded intervention both to prevent less egregious forms of human rights violations and to protect or install democratically elected regimes.

300. *Id.* at 35.

301. *Id.* at 36.

302. *Id.* at 37.

303. *Id.* at 49.

undermine its ability to effectively intervene to prevent mass atrocities. Therefore, the report advanced a number of proposals that alter the fundamental features of the UN Charter scheme.

First, the P5 were encouraged to adopt an informal code of conduct according to which they would practice what was dubbed “constructive abstention,” whereby they would avoid using their vetoes to obstruct Council action in humanitarian crises.³⁰⁴ Second, the report argued that the responsibility of the Council for the maintenance of international peace and security *required* effective and prompt intervention in situations involving large-scale loss of human life. Third, aware of the possibility that divergent interests among the P5 might lead the Council to deadlock, the report proposed resorting to two alternative institutions for securing approval for humanitarian war. The first was the General Assembly, which may legitimately authorize the resort to armed force for humanitarian purposes through the Uniting for Peace mechanism. A second alternative was for regional organizations to intervene in humanitarian crises and seek *ex post facto* Security Council approval.

Although these institutional aspects of the ICISS report represent the most obvious refashioning of the *jus ad bellum* scheme, the import and impact of the earlier five criteria should not be underappreciated. As described earlier, the drafters of the UN Charter envisaged the Security Council as an omnipotent body enjoying considerable discretion in deciding the appropriate policies to discharge its duties. Nothing, whether in the Charter or elsewhere, compels the Council to either deliberate on or respond to any crisis or conflict, including situations causing significant human suffering. However, adopting a set of just war-like criteria, even if worded in indeterminate terms such as “large-scale loss of life,” “proportionate means,” or “reasonable prospects of success,” diminishes the Council’s margin of appreciation. Such terms would invariably affect and shape debates on the Council and place pressure on its members to authorize intervention in humanitarian emergencies.³⁰⁵ In essence, the ICISS guidelines

304. *Id.* at 51.

305. Indeed, the co-chair of the ICISS, Gareth Evans, noted that these guidelines were proposed on the understanding that: “[T]he existence of agreed criteria would

would “lead to the ‘Gulliverization’ of the use of force by major global and regional powers, tying it with numerous threads of global norms and rules. Absent R2P, they have relatively more freedom, not less, to do what they want.”³⁰⁶

This transformation in the *modus operandi* of the Security Council fits well with the global constitutionalist project and the humanitarian thesis, which is why I call this scheme proposed by the ICISS: *RtoP-Humanity’s Version*. For advocates of these approaches, the Security Council should not function as a Great Power oligarchy dedicated to ensuring the peaceful coexistence of territorially disjointed coequal sovereign states. Rather, the United Nations, with the Council at its core, is perceived as an institutional apparatus committed to safeguarding the values and interests of a global community of humankind.³⁰⁷ And much like the executive branch of national governments, in discharging its duties the Council is not *legibus solutus*. “[I]n a constitutionalizing international system, the traditional view of Security Council actions in a basically law-free realm is no longer tenable.”³⁰⁸ Instead, the Council becomes law-bound to uphold and promote communal values at the apex of which is the protection of human dignity.³⁰⁹

Almost immediately, *RtoP-Humanity’s Version* attracted considerable academic attention and won important political endorsements, the most prominent of which came in a 2004 report prepared by a High-Level Panel appointed by the UN Secretary General to examine contemporary sources of global

change the nature of Security Council debate: Maximize the possibility of achieving council consensus around when it is appropriate or not to go to war; maximize international support for whatever it decides; and minimize the possibility of individual member states bypassing or ignoring it.” Gareth Evans, *From Humanitarian Intervention to the Responsibility to Protect*, 24 *WIS. INT’L L.J.* 703, 711 (2006).

306. Ramesh Thakur & Thomas Weiss, *R2P: From Idea to Norm—and Action?*, 1 *GLOBAL RESP. TO PROTECT* 22, 47 (2009).

307. See, e.g., Tomuschat, *supra* note 17, at 358.

308. Anne Peters, *The Responsibility to Protect: Spelling out the Hard Legal Consequences for the UN Security Council and its Members*, in *FROM BILATERALISM TO COMMUNITY INTEREST: ESSAYS IN HONOR OF JUDGE BRUNO SIMMA*, *supra* note 85, at 297, 307.

309. See von Bogdandy, *supra* note 82, at 240; see also Carlo Focarelli, *The Responsibility to Protect Doctrine and Humanitarian Intervention: Too Many Ambiguities for a Working Doctrine*, 13 *J. CONFLICT & SECURITY LAW* 191, 199 (2008) (“One is led to take for granted that the rationale of the responsibility to protect is respect for human dignity as a supreme value.”).

insecurity, and then from Kofi Annan himself in his report submitted to the 60th Session of the General Assembly. In the former report, most features of the ICISS report were replicated. First, although not openly jettisoning state security in favor of human security, the High-Level Panel emphasized the importance of taking the latter into consideration during the policy-making process at the United Nations.³¹⁰ Second, the High-Level Panel adopted five of the six criteria proposed by the ICISS to determine the legitimacy of armed humanitarian intervention. The situations warranting armed intervention were identified as actual or apprehended harm to state or human security, and conflicts involving “genocide and other large-scale killing, ethnic cleansing or serious violations of international humanitarian law, actual or imminently apprehended.”³¹¹ The purpose of intervention should be limited to halting or averting the threat to state or human security, and the scale, duration, and intensity of armed action should be restricted to the necessary means to achieve that purpose. Force should also be employed only as a last resort, and only after it had been determined that intervention stands a reasonable chance of success.³¹² In addition, the High-Level Panel advised the General Assembly and the Security Council to officially endorse these guidelines through declaratory resolutions.

On the all-important question of legitimate authority, however, the High-Level Panel diverged from *RtoP-Humanity’s Version* and reaffirmed faith in the Security Council as “international community’s collective security voice.”³¹³ Alternative forums for authorizing the use of force for humanitarian purposes were not entertained, thereby preserving a core component of the classical *jus ad bellum* scheme. Nonetheless, the High-Level Panel called on the P5 to refrain from exercising their veto on resolutions dealing with situations of genocide or large-scale human rights abuses, thereby limiting the prerogatives of the Great Powers.

310. Throughout the report, reference is made to both concepts as if to indicate that state and human security are two different approaches to security both of which should be considered in devising policies to confront sources of insecurity. *See, e.g.*, UNSG High-Level Panel Report, *supra* note 119, at 11.

311. *Id.* at 85–86.

312. *See id.*

313. *Id.* at 55.

In his report, the UN Secretary General lauded the reports prepared by the ICISS and the High-Level Panel and encouraged the UN member states to embrace RtoP.³¹⁴ Substantively, the Secretary General closely followed the lead of the High-Level Panel, proposed guidelines for Security Council intervention that mirrored those advanced by the panel, and avoided offering alternative institutions to authorize the use of force. Unlike the ICISS and the High-Level Panel, however, the Secretary General did not call on the P5 to refrain from using the veto in matters relating to mass atrocities.³¹⁵

To conclude this Part, what the preceding typology of the legitimacies of humanitarian war reveals is that by mid-2005 the world was presented with a broad selection, or, if you may, a menu, of approaches that justify the resort to force to prevent mass atrocities. Albeit to varying degrees, all these legitimacies entailed revising the doctrinal and institutional structure of *jus ad bellum*. Whether one applies *lex specialis* legitimation to shrink the general prohibition on the use of force, or adopts *lex generalis* legitimation to argue that either customary law or necessity permit waging humanitarian war, or uses just-war criteria to justify armed intervention to prevent mass atrocities, the result is the transformation of *jus ad bellum*. Moreover, not only did realigning *jus ad bellum* to permit waging humanitarian war enjoy considerable enthusiasm in western scholarly and non-governmental circles, but it also attracted palpable support from the global diplomatic officialdom.

Moreover, unlike other proposed modifications to the rules governing the resort to force by states, and there were many both before and after Kosovo,³¹⁶ these legitimacies of humanitarian war also represent an attempt at strategic social construction. As described above, *jus ad bellum* is a prime expression of the policy objectives and values of the law of coexistence, the purpose, or *telos*, of which is preserving peace

314. See U.N. Secretary-General, *In Larger Freedom: Towards Development, Security, and Human Rights for All*, 35, U.N. Doc. A/59/2005 (Mar. 21, 2005) [hereinafter *In Larger Freedom*].

315. See *id.* at 33.

316. See Olivier Corten, *The Controversies Over the Customary Prohibition on the Use of Force: A Methodological Debate*, 16 *EUR. J. INT'L L.* 803 (2006).

between states in an anarchic world. Arguments justifying humanitarian war and advocating RtoP-*Humanity's Version* are, however, manifestations of the broader political project seeking to transform international relations from an anarchic statist order to a global community of humankind predicated on universal values and the rule of law.³¹⁷

Ultimately, however, as I argue in the next and final Part of this Article, this bid at strategic social construction failed. A conscious decision was made to reject RtoP-*Humanity's Version*, and to reaffirm the existing rules, institutions, and statist values of *jus ad bellum*.

III. RtoP-REALPOLITIK, GREAT POWER CONCERT, AND THE LIMITS OF HUMANITARIANISM

The decision that I alluded to in the conclusion of the previous Part was taken at the 2005 World Summit, which was held at the opening of the 60th Session of the UN General Assembly.³¹⁸ At its conclusion, the Summit adopted—by consensus—the World Summit Outcome Document (“WSOD”), which dealt with a wide range of global issues and problems.³¹⁹ Perhaps the most important sections of this document, or at least the ones that attracted the most scholarly attention and journalistic praise,³²⁰ were those dealing with the appropriate international reaction to humanitarian crises, which appear under the section titled “Responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity.”

This section of the WSOD represents the culmination of the global governmental and academic debate on the legality, legitimacy, and appropriateness of waging war for humanitarian

317. M. Cherif Bassiouni, *Advancing the Responsibility to Protect Through International Criminal Justice*, in *RESPONSIBILITY TO PROTECT: THE GLOBAL MORAL COMPACT OF THE 21ST CENTURY*, *supra* note 293, at 38–39.

318. The Summit was described as the “largest gathering of world leaders in history.” See *Daily Press Briefing by the Office of the Spokesperson of the Secretary General*, UNITED NATIONS (July 6, 2005), <http://www.un.org/News/briefings/docs/2005/db050706.doc.htm>

319. See 2005 World Summit Outcome, G.A. Res. 60/1, UN Doc. A/Res/60/1, (Sept. 16, 2005).

320. Ian Williams, *Annan Has Paid His Dues*, *GUARDIAN* (London), Sept. 19, 2005, <http://www.guardian.co.uk/news/2005/sep/20/mainsection.commentanddebate2>.

purposes sparked by the Kosovo War. As discussed earlier, NATO's armed intervention in Kosovo was widely considered to have been legitimate despite having violated international law. To many commentators this demonstrated the need to revisit the tenets of *jus ad bellum*, which reflected an anachronistic law of coexistence, to bring it in line with an emergent humanitarian legitimacy. Attempts to bridge this gap between legality and legitimacy gave rise to the various legitimacies of humanitarian war catalogued in the previous Part. The most prominent proposal for justifying the resort to war to prevent mass human suffering was what I called *RtoP-Humanity's Version*, which not only enjoyed broad scholarly support, but also attracted endorsements from a number of governments and the UN Secretary General, who in his report submitted to the World Summit appealed to UN member states to "embrace the responsibility to protect, and when necessary, we must act on it."³²¹

At the 2005 World Summit, however, *RtoP-Humanity's Version* and all the other forms of legitimation that were proposed in the aftermath of Kosovo were rejected. Instead, an emasculated version of RtoP was adopted, which essentially kept the doctrinal architecture and institutional infrastructure of *jus ad bellum* intact. "The UN World Summit came to the very striking conclusion that no reform of the Charter provisions on collective security was needed."³²²

This becomes readily apparent once the relevant paragraphs of the WSOD are unpacked.³²³ As demonstrated in the table below, the various components of *RtoP-Humanity's Version* that challenged the classical rules governing the resort to force were either modified or entirely dropped.³²⁴ First, the

321. *In Larger Freedom*, *supra* note 314, para. 135.

322. Gray, *supra* note 129, at 91–92.

323. G.A. Res. 60/1, *supra* note 319, paras. 138, 139, 140.

324. Interestingly, a number of authors who commented on RtoP as it appeared in the World Summit Outcome Document ("WSOD") stated that the document avoided including any specific criteria to guide international intervention in humanitarian crises. *See e.g.*, Nicholas Wheeler, *A Victory for Common Humanity? The Responsibility to Protect after the 2005 World Summit*, 2 J. INT'L L. & INT'L REL. 95, 100 (2005) (noting that the opposition of some states to the inclusion of criteria "killed any attempt to develop agreed guidelines at the summit."). I disagree with this assessment. Paragraph 139 of the WSOD clearly includes criteria that determine the situations justifying the resort to force, require the exhaustion of peaceful means, identify a

categories of situations warranting resorting to war were narrowed to four specific crimes: genocide, war crimes, crimes against humanity, and ethnic cleansing. Gone was the broader language proposed by the ICISS and the High-Level Panel that would have required armed intervention to stop large-scale losses of life, regardless of whether they amounted to these crimes, and that also included natural and environmental disasters.

Second, the WSOD avoided indicating when intervention was required. Earlier versions of RtoP explicitly called for armed intervention in situations where loss of life was either apprehended or actually occurring. Third, whereas RtoP-*Humanity's Version* envisaged international armed intervention in cases where mass atrocities were imputable to direct state involvement, negligence or inability to protect civilians, or failed-state situations, the WSOD hinged the resort to force on demonstrating that national authorities were “manifestly failing” to protect civilians. Fourth, according to the WSOD, force would only be contemplated “should peaceful means be inadequate,” which is language that grants greater flexibility to the intervening powers than that suggested by both the ICISS and the High-Level Panel. Fifth, no mention was made in the WSOD of either the need to maintain proportionality between the humanitarian objectives of an intervention and the means adopted to execute the operation or the importance of ensuring that the protection of civilians was the principal intention of the intervening powers.

Sixth, the language and tenor of RtoP-*Humanity's Version* appear to confer on the international community a *duty* to intervene in situations where states fail to uphold their responsibility to protect civilians against mass atrocities. The WSOD, however, “points towards a voluntary, not mandatory, engagement . . . which again stands in contrast to the

certain level of state involvement in atrocities to warrant intervention, and, most importantly, that identify the Security Council as the sole entity empowered to authorize the resort to force. The difference between these criteria and those enshrined in both the ICISS and High-Level Panel reports is that they essentially replicate the existing rules of *jus ad bellum*.

assumption of a systematic duty.”³²⁵ This conclusion is gleaned from the noticeable difference in the nature of the international community’s commitment to, on the one hand, intervene peacefully to prevent mass atrocities, and on the other, to use armed force in these situations. The WSOD indicates that the international community bears a *responsibility* to intervene through peaceful means to prevent the perpetration of the four crimes mentioned above. If peaceful measures fail, however, the international community no longer bears a responsibility to intervene, but is only “*prepared* to take collective action . . . *on a case-by-case basis*.”³²⁶ In other words, according to the WSOD, should a situation arise—think of Libya, Syria, or similar conflicts—where genocide, war crimes, crimes against humanity, or ethnic cleansing occurs, nothing obliges the United Nations, the Security Council, or the international community at large to forcefully intervene to stop ongoing atrocities.

Seventh, on the fundamental question of the body empowered to authorize the use of force to prevent or halt the perpetration of mass human rights violations, the WSOD unequivocally identified the Security Council as the *sole* entity enjoying that prerogative, thereby rejecting all the institutional alternatives that were proposed in the ICISS report. Furthermore, unlike the ICISS and High-Level Panel reports, the WSOD did not call on the P5 to refrain from exercising their veto power when voting on resolutions intended to authorize international intervention to prevent mass atrocities.

325. Carsten Stahn, *Responsibility to Protect: Political Rhetoric or Emerging Legal Norm?*, 101 AM. J. INT’L L. 99, 109 (2007).

326. G.A. Res. 60/1, *supra* note 319, para. 139 (emphasis added).

RtoP: From Humanity to Realpolitik

	RtoP- <i>Humanity's Version</i>	RtoP- <i>Realpolitik</i>
Just Cause	<p>Actual or apprehended large-scale loss of life, with or without genocidal intent.</p> <p>Large scale “ethnic cleansing,” actual or apprehended, whether carried out by killing, forced expulsion, acts of terror or rape.</p> <p>Situations of state collapse and the resultant exposure of the population to mass starvation and/or civil war.</p> <p>Overwhelming natural or environmental catastrophes, where the state concerned is either unwilling or unable to cope, or call for assistance, and significant loss of life is occurring or threatened.</p>	<p>Genocide.</p> <p>Crimes against humanity.</p> <p>War crimes.</p> <p>Ethnic cleansing.</p>
Level of State Involvement in Atrocities	“[D]eliberate state action, or state neglect or inability to act, or a failed state situation”	“[N]ational authorities are <i>manifestly failing</i> to protect their populations”
Last Resort	“Every diplomatic and non-military avenue . . . must have been explored . . . there must be reasonable grounds for believing that, in all circumstances, if the measure had been	“. . . should peaceful means be inadequate”

	attempted it would not have succeeded”	
Right Intention	“The primary purpose of the intervention must be to halt or avert human suffering.”	No mention of right intention.
Proportionality	“The scale, duration and intensity of the planned military intervention should be the minimum necessary to secure the humanitarian objective in question.”	No mention of proportionality.
Nature of the Obligation	The international community has a “fallback <i>responsibility</i> ” to protect when states are unable or unwilling to fulfill their responsibility to protect. “[T]here are exceptional circumstances in which the very interest that all states have in maintaining a stable international order <i>requires</i> them to react.”	The international community is “ <i>prepared</i> to take collective action . . .” “[O]n a case-by-case basis”
Proper Authority	UN Security Council + Encouraging P5 not to exercise veto power in humanitarian crises. UN General Assembly through the Uniting for Peace mechanism. Regional organizations + Seeking <i>ex post facto</i> authorization.	UN Security Council <i>only</i> .

The tale of the twists and turns of the negotiations at the World Summit that led to this outcome, which as aforementioned was adopted by consensus, has been told elsewhere and need not be recounted here in full.³²⁷ A few observations, however, are noteworthy. First, contrary to popular perception,³²⁸ the debate over RtoP did not pit liberal western democracies eager to secure maximum protection for human rights against illiberal states or former colonies resistant to any diminution of their sovereignty. The picture is more complex.³²⁹ Those aspects of RtoP-*Humanity's Version* that challenged the existing *jus ad bellum* scheme were jettisoned due to reservations expressed by Great Powers, western and non-western democracies, illiberal states, and small underdeveloped countries. Second, despite the fact that it was the fear of a double Russo-Chinese veto that led NATO to launch Operation Allied Force without seeking Security Council approval, the P5, regardless of their domestic regime-type, were unanimous in rejecting any constraints on their freedom to exercise their coveted veto power.³³⁰ Third, although the Rwandan genocide demonstrated that occasionally it is not the threat of a P5 veto but rather international apathy and a lack of political will that lead to human tragedies,³³¹ the overwhelming majority of countries rejected proposals to make armed intervention in humanitarian crises mandatory. For powers with force-projection capabilities necessary for waging humanitarian war, a hard-and-fast rule requiring intervention to prevent mass atrocities would have placed the burden of responding to these crises on these countries and would have subjected them to increased pressure to intervene in situations where their

327. A thorough and well-written account appears in ALEX BELLAMY, *RESPONSIBILITY TO PROTECT* 83–91 (2009).

328. See e.g., Claire Applegarth & Andrew Block, *Acting Against Atrocities: A Strategy for Supporters of the Responsibility to Protect* 26 (Kennedy School of Government, Belfer Ctr. Student Paper Series #09-03), available at, <http://belfercenter.ksg.harvard.edu/files/xstandard/Student%20discussion%20paper%200903%20full.pdf>

329. See Edward Luck, *Sovereignty, Choice, and the Responsibility to Protect*, 1 *GLOBAL RESP. TO PROTECT* 10, 11 (2009).

330. Alex Bellamy, *Whither the Responsibility to Protect? Humanitarian Intervention and the 2005 World Summit*, 20 *ETHICS & INT'L AFFAIRS* 143, 164 (2006).

331. See SAMANTHA POWER, *A PROBLEM FROM HELL: AMERICA AND THE AGE OF GENOCIDE* (2003); ROMEO DALLAIRE, *SHAKE HANDS WITH THE DEVIL: THE FAILURE OF HUMANITY IN RWANDA* (2004).

interests are not necessarily implicated. Smaller nations also expressed concerns regarding an expansive version of RtoP. On the other hand, for many of these countries, codifying an obligation to forcefully prevent mass atrocities could be misused by powerful countries to intervene in their internal affairs.³³² Fourth, the vast majority of countries³³³ were reluctant to contemplate granting any institution other than the Security Council the power to authorize the resort to force for humanitarian purposes. For Russia and China, this would have significantly devalued their P5 status, while for smaller states, insisting on Security Council approval was a mechanism to guard against western interventionism.³³⁴

In essence, therefore, we had come full circle. In September 1999, Kofi Annan called for the development of a strategy that would both guarantee effective action to forestall humanitarian tragedies caused by international complacency, such as the Rwandan genocide, while avoiding undermining the post-World War II international legal order as NATO's illegal intervention in Kosovo threatened to do. After an extended diplomatic and academic debate during which numerous approaches to justify humanitarian war were proposed, in 2005 a choice was made to reaffirm and endorse the *jus ad bellum*

332. Andreas Zimmerman, *The Obligation to Prevent Genocide: Towards a General Responsibility to Protect?*, in FROM BILATERALISM TO COMMUNITY INTEREST: ESSAYS IN HONOR OF JUDGE BRUNO SIMMA, *supra* note 85, at 629, 631–32. The US position in this regard was the clearest. In a letter addressed to the Permanent Representatives of the UN member states, US Ambassador John Bolton stated:

[T]he Charter has never been interpreted as creating a legal obligation for Security Council members to support enforcement action in various cases involving serious breaches of international peace . . . We do not accept that either the United Nations as a whole, or the Security Council, or individual states, have an obligation to intervene under international law. We also believe that what the United Nations does in a particular situation should depend on the specific circumstances. Accordingly, we should avoid language that focuses on the obligation or responsibility of the international community and instead assert that we are prepared to take action.

Letter from Ambassador John Bolton, United States, to UN Permanent Representatives (Aug. 30, 2005) (on file with author).

333. The United States and United Kingdom, however, adopted the position that the unilateral use of force is not proscribed by international law. The impact of this position does not appear in the paragraphs relating to RtoP, but in paragraphs 79 and 80 on the Security Council's role in authorizing the use of force.

334. BELLAMY, *supra* note 166, at 83.

scheme as enshrined in the UN Charter.³³⁵ In other words, should a situation arise where incontrovertible evidence indicates that mass atrocities are being perpetrated, such as Darfur or the Syrian civil war,³³⁶ forceful intervention to protect civilians remains, as it was since 1945, dependent on the approval of the Security Council, which ultimately hinges on the consent of the P5. This is why I call the version of RtoP adopted by the 2005 World Summit: RtoP-*Realpolitik*.

Despite the deliberate choice that RtoP-*Realpolitik* represents in favor of the existing rules and institutions of *jus ad bellum* that are predicated on the values and purposes of the law of coexistence, many scholars applauded the adoption of RtoP by the World Summit and portrayed it as evidence of the humanization of international law and global affairs. So much so that RtoP has been described as the “most dramatic normative development of our time,”³³⁷ as embodying “an emerging constitutional norm,”³³⁸ and even as portending a “revolution in the consciousness of international relations.”³³⁹ These celebratory appraisals of RtoP, much like rejectionist views that condemn this concept as an attempt to resuscitate bygone pretexts for western colonization,³⁴⁰ are unwarranted.³⁴¹ Not

335. William Burke-White, *Adoption of the Responsibility to Protect*, in THE RESPONSIBILITY TO PROTECT: THE PROMISE OF STOPPING MASS ATROCITIES IN OUR TIME 27 (Jared Genser & Irwin Cotler eds., 2012).

336. On the conflict in Darfur, see REPORT OF THE INTERNATIONAL COMMISSION OF INQUIRY ON DARFUR TO THE UNITED NATIONS SECRETARY-GENERAL ESTABLISHED PURSUANT TO UN SECURITY COUNCIL RESOLUTION 1564 (2004), available at http://www.un.org/News/dh/sudan/com_inq_darfur.pdf (concluding that the Government of Sudan was responsible for acts that may amount to crimes against humanity and war crimes, and finding that rebel forces also perpetrated violations of international human rights and humanitarian law that may amount to war crimes). On the conflict in Syria, see what, at the time of this writing, is the latest report prepared by a Commission of Inquiry established by the UN Human Rights Council, which documents the perpetration of war crimes and crimes against humanity. See Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, Human Rights Council, June 4, 2013, U.N. Doc. A/HRC/23/58 (2013).

337. Thakur & Weiss, *supra* note 306, at 23.

338. Peters, *supra* note 73, at 189.

339. Christopher Joyner, “The Responsibility to Protect”: Humanitarian Concern and the Lawfulness of Armed Intervention, 47 VA. J. INT’L L. 693, 720 (2007).

340. See e.g., Mohamed Ayoob, *Humanitarian Intervention and State Sovereignty*, 6 INT’L J. HUM. RTS. 81, 84 (2002) (arguing that RtoP bears the features of the ‘standard of civilization’ that provided a pretext for European colonization).

only does RtoP-*Realpolitik* entrust the Security Council, which is ultimately a Great Power oligarchy, with the authority to wage humanitarian war, it also institutionalizes what Samantha Power, a leading champion of humanitarianism and the current US Permanent Representative to the United Nations, critically dubbed as “*a la cartism*” in dealing with humanitarian crises.³⁴² Regardless of the nature of the unfolding human tragedy, nothing in RtoP-*Realpolitik*, as has been the case since the entry into force of the UN Charter in 1945, requires international intervention to prevent or halt mass atrocities.

If anything, RtoP-*Realpolitik* appears to be purposefully designed to operate *within* the limits of the UN collective security apparatus established in the aftermath of World War II. Collective security, in its *ideal* form, obliges states to “abide by certain norms and rules to maintain stability and, when necessary, band together to stop aggression.”³⁴³ In other words, states participating in such a system view security as indivisible, agree to consider threats or acts of aggression against any state as aimed at all states, and make an *a priori* commitment to unconditionally aid victims and subdue aggressors. In a sense, therefore, under ideal collective security, the very definition of security is transformed. Formerly antagonistic coequal sovereigns perceive their individual security, and perhaps even their survival, as intertwined with that of the collectivity, thereby establishing what may be termed a genuine security community.³⁴⁴

341. See MICHAEL SCHARF, CUSTOMARY INTERNATIONAL LAW IN TIMES OF FUNDAMENTAL CHANGE: RECOGNIZING FUNDAMENTAL CHANGES 177 (2013) (discussing the limited changes in the existing structure of *jus ad bellum* caused by the adoption of RtoP.)

342. Samantha Power, *Force Full*, NEW REPUBLIC (Mar. 23, 2003), <http://www.newrepublic.com/article/srebena-liberalism-balkan-united%20nations>

343. Charles Kupchan & Clifford Kupchan, *The Promise of Collective Security*, 20 INT’L SECURITY 52, 52–53 (1995).

344. The term ‘security community’ was first introduced by Karl Deutsch to denote a situation where the security of states becomes so intertwined and interdependent to the extent that these states feel assured that they will never be subjected to attacks from other members of the community and that all disputes will be peacefully settled. See KARL DEUTSCH ET AL., POLITICAL COMMUNITY AND THE NORTH ATLANTIC AREA 3–6 (1957).

The United Nations, however, was neither intended nor has it functioned as an ideal collective security system.³⁴⁵ Rather, as John Ruggie remarks, “the UN design may be described as a concert placed within a collective security organization.”³⁴⁶ Unlike ideal collective security, a concert does not entail binding commitments or codified obligations to protect victims of aggression or vindicate legal rights. Furthermore, a concert does not expunge power politics or competition among its participants. In fact, it is driven by Great Powers and functions on the basis of consensus between these most influential players.³⁴⁷ Unsurprisingly, therefore, the *sine qua non* for the successful operation of such an arrangement is the convergence of the views and interests of the Great Powers, which, as the historical record demonstrates, is a transient state of affairs.³⁴⁸

These differences between ideal collective security and the concert-like UN security apparatus are comparable to the disparities distinguishing RtoP-*Humanity's Version* from RtoP-*Realpolitik* detailed above. More fundamentally, the divergence between, on one side, ideal collective security and RtoP-*Humanity's Version*, and on the other side, Great Power concert and RtoP-*Realpolitik*, are reflective of commitments to contrasting worldviews and normative projects. While I do risk painting these concepts with a rather broad brush, ideal collective security and RtoP-*Humanity's Version*, like global constitutionalism and the humanitarian thesis, ultimately operate on the foundation of a communitarian post-nation state image of the world.³⁴⁹ Whenever the principal beneficiary of security is identified as a collectivity beyond the state, be it a region, the entire world, or humanity, or when it is argued that

345. Hans Kelsen, *Collective Security and Collective Self-Defense Under the Charter of the United Nations*, 42 AM. J. INT'L L. 783, 789 (1948) (concluding that “[t]he Charter is far from fulfilling these requirements”).

346. John Gerard Ruggie, *Multilateralism: The Anatomy of an Institution*, 46 INT'L ORG. 561, 587 (1992); see John Gerard Ruggie, *The False Premise of Realism*, 20 INT'L SECURITY 62, 63 (1995) (describing how since its inception the United Nations was imagined as “a collective security organization based in a concert of power, to be used by, but not against, the permanent members of the Security Council”).

347. Charles Kupchan & Clifford Kupchan, *Concerts, Collective Security, and the Future of Europe*, 16 INT'L SECURITY 114, 120 (1991).

348. Ernst B. Haas, *Types of Collective Security: An Examination of Operational Concepts*, 49 AM. POL. SCI. REV. 40 (1955).

349. See *supra* notes 306–16 and accompanying text.

the international legal system has evolved into a hierarchical order predicated on humanitarian values, the impact of these intellectual moves is to challenge the primacy of the sovereign state as the leading actor in international affairs.

A security system based on a Great Power concert, however, is “a means of enforcing order between independent political communities [and] of achieving a degree of centralization *that does not radically threaten the independence and autonomy of states.*”³⁵⁰ A concert, therefore, is a political arrangement that, like the law of coexistence,³⁵¹ seeks to minimize conflict and manage relations between territorially disjoint, coequal sovereigns inhabiting an insecure world. It achieves this purpose by entrusting the most powerful states with special responsibilities in administering inter-state relations and maintaining stability in global politics. RtoP-*Realpolitik* is designed to operate *within* the bounds of this Great Power concert.

These are the limits of RtoP, and indeed, of humanitarianism in our contemporary world. Waging war to protect civilians from mass atrocities, including crimes shocking the conscious of humanity, remains subservient to and dependent on the vagaries and uncertainties of Great Power politics.

It appears, therefore, that the conscious choice made in 2005 to adopt RtoP-*Realpolitik*, despite the presence of numerous alternatives, including RtoP-*Humanity's Version*, casts doubts over claims that international law, especially *jus ad bellum*, is undergoing a systematic process of humanization whereby the *telos* of the international legal order is becoming the promotion, protection, and fulfillment of human security, rights, needs, and interests. Nothing in RtoP-*Realpolitik*, and the Great Power concert within which it functions, corroborates what proponents of the humanitarian thesis depict as a revolution in the nature of international law or a change in its deep structure.³⁵² Rather, it appears that the law of coexistence with its emphasis on protecting *state* security and maintaining *inter-state* peace and

350. Andrew Hurrell, *Collective Security and International Order Revisited*, 11 INT'L REL. 37, 41 (1992) (emphasis added).

351. See *supra* notes 40–41 and accompanying text.

352. See *supra* notes 340–50 and accompanying text.

stability, as opposed to *human* security, continues to constitute the underlying objectives and purposes of *jus ad bellum*.³⁵³

This conclusion should not, however, be read as suggesting that the adoption of RtoP by the 2005 World Summit, even if in attenuated form, was wholly inconsequential. Although RtoP-*Realpolitik* neither establishes novel legal rights or obligations nor challenges the fundamental features of the existing *jus ad bellum* scheme, it does express an endorsement of the expansion that occurred in the Security Council's definition of threats to and breaches of the peace.³⁵⁴ Since the early-1990s, the Security Council repeatedly found that internal conflicts or domestic strife, even if not causing regional repercussions, constitute threats to or breaches of the peace that warrant authorizing forceful intervention.³⁵⁵ The adoption of RtoP indicates that this practice has become firmly established. It also demonstrates that the protection of civilians from mass atrocities per se, regardless of whether it entails transboundary ramifications or causes interstate tensions, has become recognized as a legitimate policy objective to be pursued by the Security Council.³⁵⁶

Furthermore, since its adoption in 2005, RtoP has gradually become streamlined into UN practice and discourse.³⁵⁷ This has been propelled by repeated references to RtoP in Security Council discussions and resolutions,³⁵⁸ the issuance by the

353. After undertaking a review of developments throughout the entire *corpus* of international law, Bruno Simma notes that despite the undeniable shift of international law from a minimalist law of coexistence towards community law, "[O]ne must not forget that traditionally patterned, bilateralist international law still constitutes the basis on which the new developments are taking shape—and a rather pertinacious basis at that." Simma, *supra* note 64, at 229–30.

354. See *supra* notes 162–64 and accompanying text.

355. Bruce Cronin, *International Consensus and the Changing Legal Authority of the UN Security Council*, in *THE UN SECURITY COUNCIL AND THE POLITICS OF INTERNATIONAL AUTHORITY* 57 (Bruce Cronin & Ian Hurd eds., 2008).

356. Jon Western & Joshua S. Goldstein, *Humanitarian Intervention Comes of Age: Lessons From Somalia to Libya*, 90 *FOREIGN AFF.* 48, 54–55 (2011).

357. Alex J. Bellamy, *The Responsibility to Protect—Five Years On*, 24 *ETHICS & INT'L AFF.* 143 (2010).

358. UN Security Council Resolution 1674 (2006) was the first to cite RtoP. In addition, UN member states exchanged views on implementing RtoP during the annual debates held by the Security Council on the protection of civilians in armed conflict. For excerpts of the positions expressed on RtoP during these debates, see *Security Council Debate on Protection of Civilians in Armed Conflicts, International Coalition for the Responsibility to Protect* (May 10, 2011), http://www.globalr2p.org/media/files/rtop-statements_docs-poc-may-2011.pdf.

Secretary General of reports elaborating its scope, content, and methods of operationalization,³⁵⁹ and the convening of General Assembly debates on its implementation.³⁶⁰ This contributed to the gradual transformation of RtoP from a relatively novel and contentious concept into a recognized policy framework for guiding UN responses to mass atrocities.³⁶¹

The cumulative impact of this entrenchment of RtoP is that, even if restricted to whatever course of action is politically feasible within a Great Power concert, it has become harder for the society of states to turn a blind eye to threatened or ongoing atrocities. Although RtoP neither obliges nor guarantees either forceful or even diplomatic intervention to protect civilians, it is among the factors that contribute to generating a felt need and creating palpable pressure both on the Great Powers and the broader UN membership to take measures to protect civilians.³⁶²

The international reaction to the Libyan and Syrian civil wars, although strikingly different, bears out the forgoing observations about both the UN collective security apparatus and RtoP-*Realpolitik*. In responding to both these crises, the Security Council, in keeping with its purpose and design, acted as a Great Power concert. Nothing in the Charter or in RtoP obliged the Council to examine either of these conflicts or to take any measures to protect civilians against mass atrocities. Instead, whether these conflicts were brought before the

359. Secretary-General Ban Ki-moon issued two reports outlining the various aspects of RtoP and proposing approaches to implementing the concept. The first report, issued in 2009, was U.N. Secretary-General, *Implementing the Responsibility to Protect: Rep. of the Secretary-General*, U.N. Doc. A/63/677 (Jan. 12, 2009). In 2010, the Secretary General issued a follow-up report: U.N. Secretary-General, *Early Warning, Assessment, and the Responsibility to Protect: Rep. of the Secretary-General*, U.N. Doc. A/64/864 (July 14, 2010).

360. The General Assembly held two debates on the aforementioned reports of the Secretary General. As one observer noted, these debates indicated “a growing political consensus in support of the Responsibility to Protect . . . states are willing to accept the relatively minimalist construction of the Responsibility to Protect outlined in the World Summit Outcome Document . . .” Burke-White, *supra* note 335, at 33.

361. Alex J. Bellamy, *Libya and the Responsibility to Protect: The Exception and the Norm*, 25 *ETHICS & INT’L AFF.* 263 (2011).

362. Simon Chesterman, “*Leading from Behind*”: *The Responsibility to Protect, the Obama Doctrine, and Humanitarian Intervention in Libya*, 25 *ETHICS & INT’L AFF.* 279, 282 (2011) (arguing that “the true significance of RtoP is not in creating new rights or obligations to do ‘the right thing’; rather, it is in making it harder to do to the wrong thing or nothing at all”).

Council and the nature of its response principally depended on the positions of the P5. In addition, the glaring discrepancy between the Council's authorization of the use of force to protect civilians in the Libyan case and its failure for over two years to even pass a resolution censuring the Assad regime in Syria is partially imputable to the choice made during the 2005 World Summit.³⁶³ By leaving the Council's unlimited margin of appreciation untouched and ensuring that the P5's influence remained unscathed, RtoP-*Realpolitik* effectively codified and institutionalized the Council's policy of pragmatic "*ad hocism*"³⁶⁴ in dealing with humanitarian crises. Waging war to prevent mass human suffering, regardless of the egregiousness of the atrocities, continues to hinge—as it has since 1945—on the consent of the P5, and pursuing the humanitarian value of saving lives continues to operate within the restrictive bounds of the politically feasible in a world dominated by the Great Powers.

Nonetheless, these crises also demonstrate the impact RtoP, even in its severely mitigated form, has had on international debates on the prevention of mass atrocities. Never during deliberations held at the United Nations or elsewhere on the Libyan or Syrian conflicts was the responsibility of governments to prevent the perpetration of the most heinous crimes questioned. In other words, this core commitment contained in RtoP, which echoes broader customary obligations emanating from human rights and humanitarian law,³⁶⁵ continues to enjoy global support. Indeed, discussions principally centered on the appropriate response of the international community to the deteriorating situations in those two countries. In other words, the debate has shifted from *whether* the international community should do anything to prevent mass atrocities to *what* should be

363. I say partially because the strategic interests of the Great Powers undoubtedly played the central role in determining the outcomes of Security Council deliberations on Syria. It remains, however, that the fact that RtoP as adopted by the 2005 World Summit stated that situations in which mass atrocities were being perpetrated would be examined, essentially, "on a case-by-case basis."

364. Andrea Bianchi, *Ad-Hocism and the Rule of Law*, 13 EUR. J. INT'L L. 263, 269–70 (2002).

365. Stahn, *supra* note 325, at 107.

done.³⁶⁶ This shift is partially imputable to RtoP, which contributed to structuring international debates on these matters and excluded certain policy options, such as turning a blind eye to ongoing atrocities, that had become untenable.

CONCLUSION

Speaking on her final day as US Permanent Representative to the United Nations, Susan Rice criticized the Security Council for failing to protect Syrian civilians and condemned the Council's inaction due to Russo-Chinese vetoes as "a moral and strategic disgrace that history will judge harshly."³⁶⁷ Whether the Council's posture towards the Syrian civil war constitutes a "moral and strategic disgrace" is a subjective assessment which readers may or may not agree with.

The assertion, however, that the Security Council *failed* is a different matter. In this Article, I argued that the Security Council was conceived and continues to operate as a Great Power concert, not as an enforcer of either international law or morality. Nothing in the UN Charter or elsewhere obliges the Council to either deliberate on or authorize enforcement measures in response to any situation that threatens world peace, whether caused by an inter-state dispute or a domestic crisis, and whatever its human toll. In the aftermath of NATO's intervention in Kosovo, however, an opportunity appeared to revisit the doctrinal and institutional architecture governing the use of force in international relations. A gap had opened between the legality forged by the victorious Great Powers of World War II and an emergent humanitarian legitimacy that privileges universal human values. In a bid to bridge this gap, *RtoP-Humanity's Version* was advanced as a holistic policy framework to guide international intervention to prevent mass atrocities. If adopted, *RtoP-Humanity's Version* would have instituted considerable restraints both on the limitless institutional discretion of the Security Council and the

366. Mohamed Helal & Philippe Kirsch, *Case Studies: Libya, in THE UNITED NATIONS SECURITY COUNCIL IN THE AGE OF HUMAN RIGHTS* (forthcoming May 2014).

367. Susan E. Rice, Remarks at the Security Council Stakeout (June 25, 2013), available at <http://usun.state.gov/briefing/statements/211134.htm>.

unmatched influence of the P5 when confronted with grave humanitarian crises.

More profoundly, had this bid to alter the doctrinal and institutional components of *jus ad bellum* succeeded, it would have portended a perceptible shift in the core values and purposes of international law.³⁶⁸ Traditionally, international law operated as a set of rules that facilitated the peaceful coexistence of coequal sovereigns in an anarchic world order. RtoP-*Humanity's Version*, however, represented an attempt to relegate the state, its interests, security, and survival to the background, and prioritize human security, interests, and welfare as the overarching purposes of international law.

Ultimately, however, a version of RtoP prevailed that left the fundamental features of *jus ad bellum* intact. RtoP-*Realpolitik*, as I have called the outcome of the 2005 World Summit, represents a deliberate choice in favor of preserving the Security Council's broad margin of appreciation and making the protection of civilians against the most egregious crimes contingent on the consent of the P5. Indeed, humanitarian crises are to be dealt with like any source of insecurity in the world or any matter on the Council's agenda, be it global terrorism, the Arab-Israeli conflict, Kashmir, HIV-AIDS in Africa, territorial disputes, or the relatively mundane regular renewal of UN peacekeeping operations. This means that RtoP-*Realpolitik* reaffirmed the original understanding underlying the establishment of the Security Council in 1945: that this political body *par excellence* would maintain peace and security without impinging on whatever the P5 perceive as constituting their vital interests, thereby contributing to the continued peaceful coexistence between these Great Powers.

Thus, it appears that, contrary to Ambassador Rice's claim, when it came to Syria, even if in a grotesquely perverted way, the Security Council succeeded in executing its mandate. Russian

368. Martha Finnemore argued that "[h]ow force is used among members of a society, by whom, and to what purpose reveal a great deal about the nature of authority in the group and the ends that its members value." MARTHA FINNEMORE, *THE PURPOSE OF INTERVENTION: CHANGING BELIEFS ABOUT THE USE OF FORCE I* (2003). In other words, the values underpinning *jus ad bellum* and the social purposes it pursues serve as a seismograph of sorts for the values of the entire international legal order. Therefore, a change in the values and purposes underlying *jus ad bellum* would certainly signify a shift in the overarching *telos* of the international legal order.

strategic interests in Syria were unharmed and any settlement to the conflict remains dependent on Great Power agreement. This challenges claims that *jus ad bellum* is undergoing a profound process of humanization. The failure to overthrow the dominant statist values of *jus ad bellum* and making the pursuit of humanitarian objectives dependent on the uncertainties of Great Power politics, casts doubts over the extent to which humanitarianism is becoming recognized as the *telos* of this field of international law. The fact that, when given the opportunity, the international community consciously chose to reaffirm rules and institutions that reflect statist values suggests that humanitarian values are not progressively becoming the globally dominant values. This also indicates that, contrary to accounts proclaiming the rise of humanity's law and the emergence of a community of humankind governed by the rule of law, world politics remains an anarchical realm of competitive, mutually exclusive, self-regarding states, and that humanitarianism functions within the limits of this highly politicized world.