Evolving Human Rights Methodology: Have Incursions into State Sovereignty Gone Too Far?

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This Article will explore the evolving methodology of human rights and its impact on state sovereignty in the twenty-first century and review the trends driving that evolution. It will first identify the historical underpinnings for the classical methodology from as early as the eighteenth century and discuss its measured success, apparent failures, and contemporary application. It will then analyze developing methodology and events, including the Global War on Terrorism, that have fueled more pragmatic and interventionist initiatives. Above all, this Article is a cautionary tale in light of the heady successes of human rights, which calls for reining in an interventionist approach.

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I. INTRODUCTION

The human rights movement is often criticized as soft law without sufficient teeth to impact government and/or corporate policy, and its influence is marginal because it is largely based on an ineffectual scheme of voluntary self-policing.[1] Its methodology is one that allows for ever greater misappropriation of social justice norms because those most guilty of human rights abuses can disingenuously claim compliance without facing compelling sanctions or enforcement.[2] However, like the inexorable qualities of cascading water, human rights reforms have, over the long term, eroded obstacles to the exercise of greater human dignity. Cynicism aside, the development of the twentieth-century human rights

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1. *See generally* Pammela Quinn Saunders, *The Integrated Enforcement of Human Rights*, 45 N.Y.U. J. INT'L L. & POL. 97, 99-125 (2012) (providing an overview of human rights enforcement regimes).

2. *See* Emilie M. Hafner-Burton & Kiyoteru Tsutsui, *Human Rights in a Globalizing World: The Paradox of Empty Promises*, 110 AM. J. SOC. 1373, 1402 (2005).

regime has had to overcome numerous organic hurdles such as culture-based traditions, self-interested elites, and age-old biases and bigotry.[3] As an international legal reform movement, chief amongst those hurdles has been a dogged national insistence upon traditional notions of state sovereignty as old as the Westphalian revolution itself.[4] These sovereignty claims are what states have advanced as the authoritative basis for mistreatment of their nationals and as a reason to eschew international oversight.

When looking back, the struggle between state sovereignty and human rights can be seen in heightened international initiatives to eradicate piracy in the seventeenth and eighteenth centuries, to eradicate slavery in the eighteenth and nineteenth centuries, and to promote a complex legal order of individual rights in the twentieth and twenty-first centuries.[5] These developments and the relentless drive of long-standing trends in social justice milieus have resulted in changes to the modern understanding of national boundaries and responsibility in the international arena and have provided an ever-greater basis for the lawful intervention of international institutions within the domestic affairs of sovereign states. These trends have driven the development of a robust international jurisprudence that influences and alters traditional understandings and practices.

When looking forward, the human rights methodology itself seems to be undergoing greater changes as the doctrine of responsibility to protect (R2P) gains traction and traditional implements of slowly changing public and cultural norms are replaced with more forceful arguments. The human rights regime seems to be moving from soft law to enforcement via military intervention. Indeed, the human rights regime may be suffering from its own success because, as its more basic precepts become increasingly accepted, almost universally, the arguments for use of force take on greater credibility. This approach seems to possess many of the trappings of old-fashioned imperialism: military intervention (presumably by powerful industrialized states or coalitions) with independent, national, economic, and strategic objectives and the resultant denuding of domestic control. In a word, it forces compliance rather than adopting more measured approaches to human rights and proper respect for state sovereignty.

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3. *See, e.g.*, Ethan A. Nadelmann, *Global Prohibition Regimes: The Evolution of Norms in International Society*, 44 INT'L ORG. 479, 488 (1990).

4. *Id.*

5. *Id.* at 480-96.

This Article will explore the evolving methodology of human rights and its impact on state sovereignty in the twenty-first century and review the trends driving that evolution. It will first identify the historical underpinnings for the classical methodology from as early as the eighteenth century and discuss its measured success, apparent failures, and contemporary application. It will then analyze developing methodology and events, including the Global War on Terrorism, that have fueled more pragmatic and interventionist initiatives. Above all, this Article is a cautionary tale in light of the heady successes of human rights, which calls for reining in an interventionist approach.

II. HUMAN RIGHTS METHODOLOGY

Much of the modern human rights methodology was formulated in the nineteenth century. Some of these devices include human rights treaties between states; committees created by treaty to oversee state compliance; and the use of economic, diplomatic, and military sanctions.[6]

These methods can be clearly seen in early English abolition efforts.[7] During the seventeenth and eighteenth centuries, the Atlantic slave trade flourished, as did other massive slave enterprises in Asia and throughout the Ottoman Empire.[8] However, early in the nineteenth century, England banned slavery and the slave trade.[9] England became a zealous advocate of abolition and negotiated agreements and multilateral treaties calling for its criminalization.[10] Legal documents calling for human rights began to take shape. These efforts led to a series of international antislavery and antislave trade treaties between 1812 and 1822.[11] In these treaties, two diplomatic devices were invented: the use of international oversight committees and the use of economic sanctions during peacetime.[12]

In addition to implementing treaty provisions and utilizing economic sanctions and oversight committees, England took other

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6. *See, e.g.*, *id.* at 492.
7. *Id.*
8. *Id.* at 491.
9. *Id.* at 492.
10. *Id.* at 492-93. Among the international negotiations were the Paris Peace Conference of 1814, the Congress of Vienna in 1815, and the Congress of Verona in 1822. *Id.* at 492.
11. *Id.* at 492-93; *see* HAROLD NICOLSON, THE CONGRESS OF VIENNA: A STUDY IN ALLIED UNITY: 1812-1822 (1946).
12. *See* NICOLSON, *supra* note 11, at 209-14; *see also* Mark D. Kielsgard, *Reluctant Engagement: U.S. Policy and the International Criminal Court*, *in* 2 STUDIES IN INTERCULTURAL HUMAN RIGHTS 1, 34 n.29 (Siegfried Wiessner ed., 2010).

singular measures. It policed compliance within its own territories, and it attempted to influence other governments though a series of diplomatic channels.[13] In the earlier days, the English fleet patrolled the Atlantic and Indian Oceans in search of slave ships and expended considerable resources in its bid to enforce prohibition on the slave trade.[14]

These protections were subsequently expanded to include other rights such as the fair treatment of religious minorities.[15] At the conclusion of the Russian-Ottoman War in 1878, the great powers of Europe concluded a treaty[16] that laid out the new, reduced territorial boundaries of the Ottoman Empire.[17] Additionally, the treaty provided for the fair and humane treatment of religious minorities within the Empire.[18] The Armenians were a Christian people living in a largely Muslim territory.[19] Though the Ottoman Sultan subsequently persecuted the Armenians and the other treaty parties failed to take effective action, the inclusion of this human rights provision was noteworthy and was the basis for widespread popular dissent throughout Europe and the world.[20]

These treaties were remarkable as early covenants between sovereigns that called for the application of human rights norms, the abolition of slavery, and the protection of religious minorities pertaining to nationals of other sovereigns and within the other sovereign's domestic authority. Indeed, under nineteenth-century customary international law, a state's treatment of its own nationals was a matter exclusively within the jurisdiction of that state.[21] However, international norm did justify foreign intervention, including military incursion, for violation of treaty obligations.[22] Thus, treaty obligations could create an international legal

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13. Nadelmann, *supra* note 3, at 494 ("The governments that acquiesced to Britain's demands did so for a variety of reasons, including monetary and territorial compensation, trade advantages, a desire for some political advantage, fear of incurring British wrath, and . . . a common moral sentiment regarding the slave trade.").

14. *See id.* at 491-92.

15. Kielsgard, *supra* note 12, at 35.

16. Treaty Between Austria-Hungary, France, Germany, Great Britain, Italy, Russia and Turkey for the Settlement of Affairs in the East, July 13, 1878, 153 Consol. T.S. 171 [hereinafter Treaty of Berlin].

17. Mark D. Kielsgard, *Restorative Justice for the Armenians, Resolved: It's the Least We Can Do*, 24 CONN. J. INT'L L. 1, 5 (2008).

18. Treaty of Berlin, *supra* note 16, art. LXII.

19. *See* Kielsgard, *supra* note 17, at 6-8.

20. *See id.* at 5-8.

21. *See* H. LAUTERPACHT, INTERNATIONAL LAW AND HUMAN RIGHTS (1950).

22. J.L. BRIERLY, THE LAW OF NATIONS 402 (Sir Humphrey Waldock ed., 6th ed. 1963). The author also noted other pre-League of Nations justifications to include legitimate cases of reprisal, protection of nations abroad, and self-defense. *Id.*

basis for foreign intervention based solely on a state's treatment of its own nationals, though humanitarian intervention was rare.[23]

The modern human rights movement took shape after World War II and is predicated on a treaty regime calling for voluntary national concession to a minimum order of rights with the historic tools that began to develop in the nineteenth century.[24] These tools have borrowed from antiquity the treaty regime, oversight committees, diplomatic measures, and economic incentives.[25] The modern human rights methodology has also incorporated self-reporting requirements, a greater legal complexity of jurisprudence preserved in a multiplicity of instruments on the national and regional levels with nongovernmental organization (NGO) oversight and shadow reports, and judicial and quasi-judicial bodies reviewing state compliance as well as individual claims.[26] Perhaps the greatest source of human rights jurisprudence comes from the European Court of Human Rights, which has heard thousands of human rights claims.[27] The binding quality of the regional human rights courts is voluntary,[28] as is the ratification of treaties, and the enforcement is also largely a matter of voluntariness.[29] Critics of this regime contend that it is ineffective and point to its failure to assuage cataclysmic atrocity and conflict in the late twentieth century[30] or the failure of states parties to live up to their reporting requirements[31] and the propensity to misrepresent their conduct when they do report.[32]

On the other hand, though it relies on voluntary cooperation, this human rights methodology has arguably proven effective. To put it

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23. *See, e.g.*, Kielsgard, *supra* note 17, at 5-9. One startling example of the reluctance to intervene in another nation's humanitarian crisis took place in the Ottoman Empire when the Sultan Abdul Hamidi initiated the Great Massacres of the Armenian people in 1894-1896. Though this was expressly prohibited by the Treaty of Berlin, Great Britain refused to intervene for political reasons. *Id.*

24. *See* SASCHA-DOMINIK BACHMANN, CIVIL RESPONSIBILITY FOR GROSS HUMAN RIGHTS VIOLATIONS: THE NEED FOR A GLOBAL INSTRUMENT, at ix-x (2007).

25. *Id.* at ix-xi.

26. *Id.* at x.

27. TREATIES AND SUBSEQUENT PRACTICE 244 (Georg Nolte ed., 2013).

28. States may refuse to accept the contentious jurisdiction of some regional human rights courts such as the Inter-American Court of Human Rights. *See* ROBERT KOLB & GLORIA GAGGIOLI, RESEARCH HANDBOOK ON HUMAN RIGHTS AND HUMANITARIAN LAW 468 (2013).

29. *See* Saunders, *supra* note 1, at 99-125.

30. *See* Anne van Aaken, *Making International Human Rights Protection More Effective: A Rational-Choice Approach to the Effectiveness of Provisions for* Ius Standi, *in* INTERNATIONAL CONFLICT RESOLUTION 29, 30 (Stefan Voigt et al. eds., 2006).

31. *See* ANDREW T. GUZMAN, HOW INTERNATIONAL LAW WORKS: A RATIONAL CHOICE THEORY 141 (2008).

32. *See* Oona A. Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 YALE L.J. 1935, 2006-08 (2002).

another way, it encourages adherence by relentlessly building consensus, extolling the value of human rights compliance, and proportionately exposing violative behavior with varying degrees of publicity in order to inexorably bring about acquiescence.[33] It has been described as marshaling shame by exposing wrongful acts and making it more difficult for perpetrators to violate norms than to submit to them.[34] The diplomatic, trade, and economic sanctions that follow tend to persuade states to comply or sometimes lead to internal leadership changes or compromises that are more consistent with modern human rights ideology.[35] This methodology adopts a measured approach to state sovereignty that draws upon diplomatic, political, and economic efforts to reform domestic human rights practices but stops short of use of military force.[36]

The modern international human rights treaty regime has influenced domestic political and legal obligations and developed a greater standing for international organizations to assert jurisdiction.[37] Acceptance of the human rights treaties creates mutual obligations on all states parties under international law.[38] States enter into agreements for political benefit and, in exchange, also relinquish some sovereign rights.[39] For the benefit of public relations, favorable trade agreements, or foreign aid, states parties agree to respect and ensure the human rights of their own nationals, to allow monitoring by international organizations, and often to assume self-reporting obligations.[40] As more states parties ratify human rights treaties, they increasingly take on the character of customary international law and oblige universal adherence, even from states that are not parties to the original conventions.[41] For example, states are bound, at a minimum, to core human rights principles such as

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33. *See, e.g.*, Hafner-Burton & Tsutsui, *supra* note 2, at 1385-86.

34. *See id.* at 1401-02; *see also* Saunders, *supra* note 1, at 103.

35. MICHAEL O'FLAHERTY ET AL., HUMAN RIGHTS DIPLOMACY: CONTEMPORARY PERSPECTIVES 274 (2011).

36. *Id.*

37. JACK L. GOLDSMITH & ERIC A. POSNER, THE LIMITS OF INTERNATIONAL LAW 132-32 (2006). *See generally* ASSERTING JURISDICTION: INTERNATIONAL AND EUROPEAN LEGAL PERSPECTIVES (Patrick Capps et al. eds., 2003).

38. Barcelona Traction Case (Belg. v. Spain), Judgment, 1970 I.C.J. 3, ¶ 33 (Feb. 5).

39. THOMAS W.D. DAVIS & BRIAN GALLIGAN, HUMAN RIGHTS IN ASIA 5 (2011).

40. *See id.*

41. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 (1987). A caveat to this process is the rarely utilized persistent objector status whereby states that dissent during the development process of a norm of customary international law are not subsequently bound by it. *Id.* § 102 cmt. d; *see also* David A. Colson, *How Persistent Must the Persistent Objector Be?*, 61 WASH. L. REV. 957, 969 (1986).

jus cogens norms.[42] As this process has evolved, the advance of international human rights law corresponds with a retreat from strict positive law as matters that historically were under exclusive domestic control yield to growing international consensus.[43]

However, a more dramatic shift in human rights methodology has been evolving away from peaceful solutions and toward greater use of military intervention.[44] This has more serious implications for the free exercise of state sovereignty and thus for the self-determination of peoples in nonelite states. While there has been a historic legal propriety to initiate military action for failure to abide by treaty obligations that was recognized even in the nineteenth century, military incursions to enforce human rights obligations had been largely absent, except perhaps theoretically.[45] The contemporary theory of R2P represents a departure from conventional human rights methodology.[46] This doctrine makes allowances for the use of military force, though only as a last resort and only for massive human rights violations.[47] R2P's evolution can be tied to the Convention on the Prevention and Punishment of the Crime of Genocide of 1948 (Genocide Convention), which provides for a state duty to *prevent* and punish the crime of genocide.[48] The Genocide Convention requires states to predict forthcoming genocidal conduct and to step in to prevent it, typically through military intervention.[49] This provision had been largely aspirational throughout the Cold War when international consensus in the United Nations Security Council was elusive, but it has taken on a more practical application in the last twenty years.[50]

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42. BACHMANN, *supra* note 24, at 5.

43. Kielsgard, *supra* note 17, at 4.

44. ANTHONY OBERSCHALL, CONFLICT AND PEACE BUILDING IN DIVIDED SOCIETIES: RESPONSES TO ETHNIC VIOLENCE 127 (2007); *see also* BARBARA F. WALTER, COMMITTING TO PEACE: THE SUCCESSFUL SETTLEMENT OF CIVIL WARS 162 (2001).

45. NIGEL DOWER, THE ETHICS OF WAR AND PEACE 101 (2009).

46. SHAUL SHAY, THE AXIS OF EVIL: IRAN, HIZBALLAH, AND THE PALESTINIAN TERROR 32 (2005).

47. 1 PEACEMAKING: FROM PRACTICE TO THEORY 423 (Susan Allen Nan et al. eds., 2011).

48. Convention on the Prevention and Punishment of the Crime of Genocide art. I, Dec. 9, 1948, 78 U.N.T.S. 277 [hereinafter Genocide Convention]. Article I stipulates that ratified members agree to undertake to prevent genocide whether committed during war or peace time. Article IV specifically provides for the punishment of heads of state, and article VI allows for trial/punishment by an international tribunal if no state court is available. *Id.* arts. I, IV, VI.

49. *See* BRIAN D. LEPARD, RETHINKING HUMANITARIAN INTERVENTION: A FRESH LEGAL APPROACH BASED ON FUNDAMENTAL ETHICAL PRINCIPLES IN INTERNATIONAL LAW AND WORLD RELIGIONS 362-63 (2002).

50. This became apparent when Russia abstained in the Security Council concerning military intervention into former Yugoslavia in the early nineties and more recently in the Security Council approval of military action in Libya. For former Yugoslavia, see S.C. Res. 1244, U.N.

The signature event signaling this modification of human rights methodology was the Rwandan genocide. As U.N. peacekeepers stood helpless and hopelessly outnumbered, Hutus slaughtered more than 800,000 Tutsis in approximately 100 days.[51] Many suggest that with sufficient military reinforcement, the U.N. peacekeepers could have prevented at least part of the tragedy.[52] Among those influenced by this cataclysm was Susan Rice, the current U.S. National Security Advisor.[53] Such atrocities fuel calls for more binding sanctions and forceful interventions. The issue then becomes which human rights violations are sufficiently massive to justify military intervention and how to guard against the misuse or overuse of this methodology. During the United States-Iraq War, the Bush Administration justified use of military force in Operation Iraqi Freedom on the basis of bringing freedom to the Iraqis[54] (after it was shown that the Hussein regime had no terrorist ties or weapons of mass destruction).[55] This is particularly important in the twenty-first century, where many states seem obsessed with counterterrorism and are apparently willing to gravitate to any justification for the continuance of what has been described as a "state of permanent legal emergency."[56] Among the things that make this shift in human rights methodology possible is the modern diminution of the principles of state sovereignty.

III. THE RETREAT FROM STATE SOVEREIGNTY

As former U.N. Special Rapporteur on Terrorism and Human Rights Kalliopi Koufa observed, "[T]he basic duty of non-intervention in the domestic affairs of States has been subject to a process of reinterpretation in the human rights field since 1945, so that States can

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Doc. S/RES/1244 (June 10, 1999). For Libya, see S.C. Res. 1973, U.N. Doc. S/RES/1973 (Mar. 17, 2011).

51. *See* LILA PERL, CONTROVERSY! GENOCIDE: STAND BY OR INTERVENE? 57-66 (2011).

52. *See id.* at 67-70.

53. Spencer Ackerman, *A Window into Obama's Foreign Policy*, WASH. INDEP. (Nov. 14, 2008, 6:00 AM), http://washingtonindependent.com/18516/susan-rice. At the time of the genocide, Rice was Assistant Secretary of State for African Affairs. Rice has been described as a pragmatist who favors military intervention in situations involving massive human rights violations and called for U.S. military intervention into Darfur. *See id.*

54. *See* BETWEEN THE MIDDLE EAST AND THE AMERICAS: THE CULTURAL POLITICS OF DIASPORA 148 (Evelyn Alsultany & Ella Shohat eds., 2013).

55. SPENCER C. TUCKER & PRISCILLA ROBERTS, THE ENCYCLOPEDIA OF THE ARAB-ISRAELI CONFLICT: A POLITICAL, SOCIAL AND MILITARY HISTORY 487 (2008).

56. *See* Mark D. Kielsgard, *National Self-Defence in the Age of Terrorism: Immediacy and State Attribution*, *in* POST 9/11 AND THE STATE OF PERMANENT LEGAL EMERGENCY: SECURITY AND HUMAN RIGHTS IN COUNTERING TERRORISM 315, 336-37 (Aniceto Masferrer ed., 2012).

no longer plead it successfully as a bar . . . ."[57] Among the purposes listed under article 1 of the United Nations Charter (U.N. Charter) are the promotion of equal rights, self-determination of peoples, and "respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion."[58] Additionally, article 55 establishes universal respect and observance of human rights and fundamental freedoms.[59] These norms establish the priority of human rights in international law and serve as the catalyst for the multitude of subsequent international human rights instruments. However, implicit in the U.N. Charter is a tension between articles 1(3) and the responsibility to promote universal observance of human rights in article 55, as opposed to the strict mandate of article 2(1) that calls for the "principle of the sovereign equality of all its Members."[60] With a rich and varied history of social justice initiatives at its back, the scales seem tilted in favor of intervention, at least in response to a massive human rights violation, particularly in view of the chapter VII authorization.[61] Chapter VII authorizes U.N. intervention for situations threatening international peace and security and has increasingly been relied upon because of the

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57. Special Rapporteur on Terrorism and Human Rights, Comm. on Human Rights, ¶ 47, U.N. Doc. E/CN.4/Sub.2/2001/31 (June 27, 2001) (by Kalliopi K. Koufa).

58. U.N. Charter art. 1.

59. Article 55 in its entirety states:

> With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:
>
> a. higher standards of living, full employment, and conditions of economic and social progress and development;
> b. solutions of international economic, social, health, and related problems; and international cultural and educational cooperation; and
> c. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

Id.

60. *Id.* art. 2(1). Article 2(1) states in its entirety: "The Organization is based on the principle of the sovereign equality of all its Members."

61. *Id.* art. 2(7). The sovereign equality provision of article 2(1) is defined and limited by article 2(7), which states:

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

Id. Thus, sovereign equality means, at a minimum, noninterference with domestic affairs and no obligation to submit domestic issues to the United Nations for arbitration, but with the caveat that any matter that threatens international peace and security, whether domestic or not, is exempt from these protections.

transnational or transborder nature or impact of most modern human rights atrocities.[62]

The retreat from traditional models of state sovereignty, with regard to human rights, in the latter half of the twentieth and into the twenty-first centuries can be partly attributed to at least four developments in international law. First, the retreat can be attributed to the growing adherence to the obligations of states to assist in the prevention and punishment of *jus cogens* offenses, particularly as these violations become more devastating, more public, and more threatening to international peace and security in an increasingly interdependent world in a way that was unforeseeable in the nineteenth century.[63] Second, it can also be attributed to the development of the modern international human rights regime with its ubiquitous, nearly universal ratification of many human rights instruments that sometimes serve as a voluntary waiver of states' rights with regard to the treatment of their own nationals.[64] Third, the retreat may be attributed to the development and international acceptance of the doctrine of *erga omnes* under treaty and customary international law, which provides for state responsibility and obligations towards all other states.[65] Fourth, it may be attributed to the mounting trends in international security law that shift international competence from overseeing the conduct of states to nonstate actors and assuming the role traditionally reserved for the national police agencies.[66] As these trends strengthen, they undercut objection to foreign or international intervention grounded in traditional sovereignty arguments.

M. Cherif Bassiouni, writing in 1996, describes the duties of states under a theory of *erga omnes* as nonderogable, universal legal obligations owed by states that arise from the higher status of such crimes.[67] In his article, Bassiouni states:

> *Erga omnes* . . . however, is a consequence of a given international crime having risen to the level of *jus cogens*. It is not, therefore, a cause of or a condition for a crime's inclusion in the category of *jus cogens*.

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62. Sean D. Murphy, *The Security Council, Legitimacy, and the Concept of Collective Security After the Cold War*, 32 COLUM. J. TRANSNAT'L L. 201, 229-33 (1994).

63. SYSTEM CRIMINALITY IN INTERNATIONAL LAW 315 (Andre Nollkaemper & Harmen van der Wilt eds., 2009).

64. ENFORCING INTERNATIONAL HUMAN RIGHTS IN DOMESTIC COURTS 425 (Benedetto Conforti & Francesco Francioni eds., 1997).

65. *See generally* M. Cherif Bassiouni, *International Crimes:* Jus Cogens *and* Obligatio Erga Omnes, LAW & CONTEMP. PROBS., Autumn 1996, at 63, 73.

66. MODERN WARFARE: ARMED GROUPS, PRIVATE MILITARIES, HUMANITARIAN ORGANIZATIONS, AND THE LAW 6-7 (Benjamin Perrin ed., 2012).

67. Bassiouni, *supra* note 65, at 73.

> The contemporary genesis of the concept *obligatio erga omnes* for *jus cogens* crimes is found in the ICJ's [International Court of Justice] advisory opinion on *Reservations to the Convention on the Prevention and Punishment of Genocide*. The concept also finds support both in the ICJ's *South West Africa* cases as well as from the *Barcelona Traction* case. . . .
>
> It is still uncertain in [international criminal law] whether the inclusion of a crime in the category of *jus cogens* creates rights or, as stated above, non-derogable duties *erga omnes*. The establishment of a permanent international criminal court having inherent jurisdiction over these crimes would be a convincing argument for the proposition that crimes such as genocide, crimes against humanity, and war crimes are part of *jus cogens* and that obligations *erga omnes* to prosecute or extradite flow from them.[68]

Thus, the international legal principle of *erga omnes* extends to all states, and the obligations and duties to facilitate punishment of *jus cogens* offenses exist as a minimum bar to absolute sovereignty and may suggest that states are obliged to assist regardless of national preferences.[69] Recently, this has even been applied under a theory of universal jurisdiction in cases stripping immunity from heads of state for the commission of *jus cogens* offenses. This has been demonstrated by the ICJ case *Questions Relating to the Obligation To Prosecute or Extradite (Belgium v. Senegal)* concerning the extradition of a former head of state for alleged *jus cogens* violations,[70] and unequivocally stipulated in the earlier ICJ case *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, where the court held that immunities provided under international law for government officials are not a bar to criminal prosecution "before certain international criminal courts, where they have jurisdiction."[71]

As greater numbers of states are brought into the treaty regime, aside from customary international law, wider acceptance becomes the norm and with it comes broader legal responsibilities and greater collective efforts to ensure compliance. Modern international law enjoys the benefit of a century of development in human rights legal instruments with far more explicit and legally operative provisions than the relevant portions of nineteenth-century treaties, and thus it provides more binding legal authority for greater international intervention into

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68. *Id.* at 73-74.

69. Paul B. Stephan, *The Political Economy of* Jus Cogens, 44 VAND. J. TRANSNAT'L L. 1073, 1097 (2011).

70. Judgment, 2012 I.C.J. 1, 6, 37 (July 20).

71. Judgment, 2002 I.C.J. 3, 26 (Feb. 14).

traditional domestic issues and less justification for strict legal positivism.[72]

While states parties are not individually authorized to *sua sponte* enforce the treaty obligations under international law, especially with military action, they can act with U.N. authorization.[73] That responsibility falls to the Security Council in consultation with other organizations under the U.N. umbrella, including oversight committees connected to relevant treaties and competent international courts.[74] The Security Council is authorized under chapter VII to compel, if necessary, compliance with international law when states threaten international peace and security.[75] This provides the most vital international tool to counterbalance unfettered legal positivism and to check the exercise of potentially dangerous national sovereign action. Emerging international trends showcase massive human rights violations as global issues that transcend national boundaries. These violations are increasingly seen to create a threat to international peace and security under contemporary interpretation. For example, though an internal armed conflict, the Rwandan genocide, discussed above, threatened to, and ultimately did, spill over into neighboring Burundi, Democratic Republic of Congo, and other states, because both Hutus and Tutsis had significant populations outside Rwanda that were drawn into the hostilities.[76] A growing recognition of the interdependence of peoples and states in an age of globalization has led to an understanding that sovereigns who practice massive domestic human rights violations impact peoples of other states. Thus, the economic and political globalization of the late twentieth century has led to increased chapter VII applicability, even for matters

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72. Emma McClean, *The Dilemma of Intervention: Human Rights and the UN Security Council*, *in* EMERGING AREAS OF HUMAN RIGHTS IN THE 21ST CENTURY: THE ROLE OF THE UNIVERSAL DECLARATION OF HUMAN RIGHTS 24, 26 (Marco Odello & Sofia Cavandoli eds., 2011).

73. U.N. Charter arts. 42, 53(1); *see also* THE UNITED NATIONS SECURITY COUNCIL AND WAR: THE EVOLUTION OF THOUGHT AND PRACTICE SINCE 1945, at 229 (Vaughan Lowe et al. eds., 2010).

74. Bardo Fassbender, *The Security Council: Progress Is Possible but Unlikely*, *in* REALIZING UTOPIA: THE FUTURE OF INTERNATIONAL LAW 58-59 (Antonio Cassese ed., 2012); *see also* STEVEN C. ROACH, POLITICIZING THE INTERNATIONAL CRIMINAL COURT: THE CONVERGENCE OF POLITICS, ETHICS, AND LAW 171 (2006).

75. *See* ROSALYN HIGGINS, PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT 257-59 (1994).

76. Another example is seen in the death of the Burundi president as collateral damage when the Rwandan president's plane was shot down. MARK E. RUSHEFSKY, PUBLIC POLICY IN THE UNITED STATES: AT THE DAWN OF THE TWENTY-FIRST CENTURY 135 (4th ed. 2007); *see also* KARINA OBORUNE, ACHIEVEMENTS AND SHORTCOMINGS OF INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA 4 (2009).

traditionally considered domestic in nature, in order to correct massive human rights threats. As described by Bruno Simma:

> While the concept of threat to the peace in Art. 39 may have originally referred mainly to threats of inter-state conflicts, the SC [Security Council] soon abandoned such a strict reading. . . . After . . . the Cold War . . . the SC significantly reinforced such a broader interpretation, and it seems by now widely accepted that extreme violence within a State can give rise to Chapter VII enforcement action.[77]

In response to growing concerns over security matters, then U.N. Secretary-General Kofi Annan created the High-Level Panel on Threats, Challenges and Change (High-Level Panel).[78] Of the six clusters identified by the High-Level Panel that posed the greatest threat, one consisted of "violence within States, including civil wars, large-scale human rights abuses and genocide."[79] This "new vision of collective security for the 21st century" included a predisposition to treat massive human rights violations, even those confined within the boundary of a single state, as a threat to international peace and security, triggering chapter VII treatment.[80] "When a State fails to protect its civilians, the international community then has a further responsibility to act, through humanitarian operations, monitoring missions and diplomatic pressure—and with force if necessary, though only as a last resort."[81] Generally, the duty of a state to protect its own citizens has been exclusively a matter of sovereign privilege, but in the last half of the twentieth century, this privilege continued to erode with greater emerging international competence.[82]

Moreover, interventionism into domestic affairs and the application of chapter VII has been driven by factors other than human rights compliance.[83] Modern efforts to eradicate terrorism have led to increased

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77. 1 THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 723 (Bruno Simma ed., 2d ed. 2002) (citations omitted).

78. *See* U.N. Secretary-General, *Follow-Up to the Outcome of the Millennium Summit: Rep. of the Secretary General*, ¶ 1, U.N. Doc. A/59/565 (Dec. 2, 2004) [hereinafter *Millennium Summit Follow-Up*].

79. *A More Secure World: Our Shared Responsibility*, J. HUMANITARIAN MED. (July/Sept. 2005), http://www.iahm.org/journal/vol_5/num_3/text/vol5n3p34.htm. The threats identified by the report were broken down into six clusters as follows: "war between States; violence within States, including civil wars, large-scale human rights abuses and genocide; poverty, infectious disease and environmental degradation; nuclear, radiological, chemical and biological weapons; terrorism; and transnational organized crime." *Id.*

80. *Id.*

81. *Id.*

82. *See Millennium Summit Follow-Up*, *supra* note 78, ¶ 29.

83. BELINDA HELMKE, UNDER ATTACK: CHALLENGES TO THE RULES GOVERNING THE INTERNATIONAL USE OF FORCE 2 (2010).

international authority to intervene into domestic matters. In the late 1990s, increased transnational terrorist activities led to the development of new international tools to combat the violence of these nonstate actors.[84] A consensus developed that traditional (national) law enforcement techniques were inadequate to stem the tide of violence, but the authority of states to use military means was controlled by U.N. Charter article 51, which reserves the right to individual (state) or collective self-defense.[85] Though article 51 allows for the repelling of armed attacks until the Security Council can restore the peace, the unconventional nature of terrorist attacks differs from classic military tactics because they strike from concealed bases, without identifiable combatants, and often target nonmilitary objectives.[86]

Under article 51, states may use force on the territory of other states without prior Security Council approval if there is an eminent threat.[87] But along a parallel course, what constitutes an eminent threat has been subject to constant reinterpretation as the theory of anticipatory self-defense has become more accepted in international law.[88] This further reduces barriers to military intervention and allows states to use military force if they creditably anticipate an attack.[89] Moreover, with the state practice of targeting nonstate actors for anticipatory self-defense, usually terrorist groups, it has become increasingly easier to compromise the integrity of territorial borders and state sovereignty rights under this article 51 theory of self-defense.[90]

In 1999, the Security Council passed Resolution 1267 to combat terrorism and specifically sanction the Taliban regime, under chapter VII,

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84. *Millennium Summit Follow-Up*, *supra* note 78, ¶ 151.

85. U.N. Charter art. 51. Article 51 states:

> Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

86. CLAIRE FINKELSTEIN ET AL., TARGETED KILLINGS: LAW AND MORALITY IN AN ASYMMETRICAL WORLD 32 (2012); *see also* BLAKE W. MOBLEY, TERRORISM AND COUNTERINTELLIGENCE: HOW TERRORIST GROUPS ELUDE DETECTION 7 (2012).

87. *See* U.N. Charter art. 51.

88. Theresa Reinold, *State Weakness, Irregular Warfare, and the Right to Self-Defense Post-9/11*, 105 AM. J. INT'L L. 244, 247 (2011).

89. *A More Secure World: Our Shared Responsibility*, *supra* note 79.

90. Kielsgard, *supra* note 56, at 329-35.

as a state sponsor of the al-Qaeda terrorist organization.[91] This resolution was followed by a line of additional resolutions, particularly after the 9-11 attacks, and has arguably led to an enlargement of the original vision of Security Council authority and the use of chapter VII, expanding applicability from state actors to both state and nonstate actors and organizations.[92] With little qualification, use of chapter VII competence, especially article 42, in response to terrorist attacks redefines modern interventionism and extends international jurisdiction from stopping unilateral military actions to responding to actions that have historically been viewed as domestic police matters.[93]

International antiterrorist legal measures have a tradition not unlike human rights. International authority in this area has been growing since the 1960s with the development of a series of international antiterrorist treaties and conventions.[94] Similar to human rights instruments discussed

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91. S.C. Res. 1267, U.N. Doc. S/RES/1267 (Oct. 15, 1999).

92. Curtis A. Ward, *Commentary: Convergence of International Law and International Relations in Combating International Terrorism—The Role of the United Nations*, *in* INTERNATIONAL LAW AND INTERNATIONAL RELATIONS: BRIDGING THEORY AND PRACTICE 127, 128-139 (Thomas J. Biersteker et al., 2006); *see also* MAX HILAIRE, UNITED NATIONS LAW AND THE SECURITY COUNCIL 13 (2005).

93. RICHARD J. REGAN, JUST WAR: PRINCIPLES AND CASES 34 (1996).

94. See *Text and Status of the United Nations Conventions on Terrorism*, UNITED NATIONS, http://treaties.un.org/Pages/DB.aspx?path=DB/studies/page2_en.xml (last visited Nov. 22, 2013), for the U.N. database compiling conventions on terrorism. *See also* Convention on Offences and Certain Other Acts Committed on Board Aircraft, Sept. 14, 1963, 20 U.S.T. 2941; Convention for the Suppression of Unlawful Seizure of Aircraft, Dec. 16, 1970, 22 U.S.T. 1641; Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (Sabotage), Sept. 23, 1971, 24 U.S.T. 565; Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, *adopted on* Dec. 14, 1973, 28 U.S.T. 1975; Convention on the Physical Protection of Nuclear Material, *adopted on* Oct. 26, 1979, T.I.A.S. No. 11080; International Convention Against the Taking of Hostages, *adopted on* Dec. 17, 1979, T.I.A.S. No. 11081; Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, *concluded on* Mar. 10, 1988, 1678 U.N.T.S. 201; Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf, *concluded on* Mar. 10, 1988, 1678 U.N.T.S. 201; Convention on the Marking of Plastic Explosives for the Purpose of Detection, Mar. 1, 1991, 2122 U.N.T.S. 359; International Convention for the Suppression of Terrorist Bombings, Dec. 15, 1997, 2149 U.N.T.S. 256; International Convention for the Suppression of the Financing of Terrorism, Dec. 9, 1999, 2178 U.N.T.S. 197. Terrorism is also addressed in numerous regional conventions. *See* Convention To Prevent and Punish the Acts of Terrorism Taking the Form of Crimes Against Persons and Related Extortion That Are of International Significance, *concluded on* Feb. 2, 1971, 1438 U.N.T.S. 191; European Convention on the Suppression of Terrorism, *concluded on* Jan. 27, 1977, 1137 U.N.T.S. 93; South Asian Association for Regional Cooperation (SAARC) Regional Convention on Suppression of Terrorism, *done on* Nov. 4, 1987, http://treaties.un.org/doc/db/Terrorism/Conv18-english.pdf; The Arab Convention on the Suppression of Terrorism, Apr. 22, 1998, https://www.unodc.org/tldb/pdf/conv_arab_terrorism.en.pdf; Treaty on Cooperation Among the States Members of the Commonwealth of Independent States in Combating Terrorism, *done on* June 4, 1999, http://treaties.un.org/doc/db/Terrorism/csi-english.pdf; OAU Convention on the Prevention and Combating of Terrorism, July 14, 1999, 2219 U.N.T.S. 179; Convention of the

above, states have conceded larger measures of domestic authority in the interest of collective safety efforts.[95] Indeed, in 1993, the Vienna Declaration and Programme of Action explicitly linked counterterrorism to human rights,[96] as did the subsequent High-Level Panel report.[97] International human rights have been linked to international security and terrorism, and the cumulative effect is a wider use of chapter VII and a greater acquiescence to international organizations by sovereign states.[98] Thus, under contemporary interpretations of article 42 and 51 of the U.N. Charter, intervention on human rights grounds has become easier.

The Security Council referral of the Darfur situation to the International Criminal Court is another example of the use of chapter VII in an application probably not originally foreseen by the drafters of the U.N. Charter.[99] It can be advanced that the allegations of genocide, crimes against humanity, and war crimes in the Sudan do not significantly affect other states in the region in the sense of threatening international or unilateral transborder war. However, a case may be made that the huge influx of refugees into the territory of neighboring Chad, a state that has poor relations with Sudan, could incite an armed conflict between the two nations, but there is little hard evidence to support this conclusion and, when viewed in hindsight, little affirmation several years later.[100] What currently passes for threats to international peace and security seems to have become more inclusive, to encompass ever more vague threats—generalized threats instead of specific ones. The Security Council seems to have posited its referral more on a human rights basis then on quantifiable and traditional international security concerns.

Organization of the Islamic Conference on Combating International Terrorism, *adopted on* July 1, 1999, *reprinted in* U.N. Doc. A/54/637 Annex (Oct. 11, 2000).

95. *See* sources cited *supra* note 94.

96. World Conference on Human Rights, June 14-25, 1993, *Vienna Declaration and Programme of Action*, ¶ 17, U.N. Doc. A/CONF.157/23 (July 12, 1999). Paragraph 17 states:

> The acts, methods and practices of terrorism in all its forms and manifestations as well as linkage in some countries to drug trafficking are activities aimed at the destruction of human rights, fundamental freedoms and democracy, threatening territorial integrity, security of States and destabilizing legitimately constituted Governments. The international community should take the necessary steps to enhance cooperation to prevent and combat terrorism.

97. *See Millennium Summit Follow-Up*, *supra* note 78, ¶ 145.

98. ANDREJ ZWITTER, HUMAN SECURITY, LAW AND THE PREVENTION OF TERRORISM 133-34 (2010); *see also* Anja Seibert-Fohr, *The Relevance of International Human Rights Standards for Prosecuting Terrorists*, *in* TERRORISM AS A CHALLENGE FOR NATIONAL AND INTERNATIONAL LAW: SECURITY VERSUS LIBERTY? 125, 161 (Christian Walter ed., 2004).

99. S.C. Res. 1593, U.N. Doc. S/RES/1593 (Mar. 31, 2005).

100. JOHAN BROSCHÉ & DANIEL ROTHBART, VIOLENT CONFLICT AND PEACEBUILDING: THE CONTINUING CRISIS IN DARFUR 138 (2012).

Additionally, the United States has unilaterally taken it upon itself to use the restoration of human rights as a justification for the exercise of massive military power, even regime change, in its successful efforts to topple the Hussein government in Iraq.[101] Though many commentators believe the human rights justifications were after-the-fact excuses[102] used when the preemptive self-defense arguments collapsed with the nondiscovery of weapons of mass destruction, the Bush Administration may have unintentionally let the genie out of the bottle and set a powerful precedent in the trend line of international law for greater international competence, enforcement, and oversight of domestic human rights compliance. Other examples of unilateral military action against terrorist groups within the borders of other states include the Russian bombing missions into Georgia against the Chechens,[103] the Turkish attacks against the Kurdistan Worker's Party (PKK) in Iraq,[104] and Columbia's excursions into Ecuador launched against the Revolutionary Armed Forces of Colombia (FARC).[105] Thus, reversals in legal positivism and state sovereignty seem to be taking place even at the hands of those who would be their principal champions. This contradiction is encapsulated in the 2005 National Defense Strategy of the United States, in which the United States asserted that it had a "strong interest in protecting the sovereignty of nation states," yet disclaimed the protection of that sovereignty by limiting it to those states that "exercise their sovereignty responsibly," begging the question of who determines which states are acting responsibly and undermining the whole point of sovereignty, which empowers states to make their own determinations.[106]

IV. CONCLUSION

There can be no denying that nonintervention into the domestic affairs of states has taken on new meaning since the U.N. Charter was penned in 1944. A rapidly shrinking world has thrust states into a global community where domestic state action often has impact outside its

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101. *War in Iraq: Not a Humanitarian Intervention*, HUMAN RIGHTS WATCH (Jan. 25, 2004), http://www.hrw.org/print/news/2004/01/25/war-iraq-not-humanitarian-intervention.

102. *Id.*

103. Permanent Rep. of the Russian Federation to the U.N., Letter dated Sept. 11, 2002 from the Permanent Rep. of the Russian Federation to the United Nations addressed to the Secretary-General, U.N. Doc. S/2002/1012 (Sept. 12, 2002); *see also* Reinold, *supra* note 88, at 246.

104. Reinold, *supra* note 88, at 246.

105. *Id.*

106. U.S. DEP'T OF DEF., THE NATIONAL DEFENSE STRATEGY OF THE UNITED STATES OF AMERICA 1 (Mar. 2005).

borders. But reducing the barriers to nonpacific solutions may be out of proportion to the threats faced and contrary to the most basic principle of international law as encapsulated in article 2(4) of the U.N. Charter.[107] Though it is noted that there is a historical precedent for intervention for treaty violation under customary international law, this precedent took root in a nineteenth-century environment without the benefit of article 2(4) and during an imperialistic age of double standards.[108] Moreover, nineteenth-century international law, when it was applied at all, was usually only for the benefit of wealthy states at a time when most of the world's peoples and territories were fiefdoms of the industrialized nations.[109] In any event, a quick and easy resort to violent measures is a dangerous path to follow.

There has been a tug-of-war going on between state sovereignty and human rights norms as international organizations have sought greater compliance and states have fought this outside interference with domestic policy.[110] This balance seems to be breaking in favor of human rights. Part of this is due to developments in international law, such as obligations *erga omnes*, part is due to the Security Council's redefinition of "threats to international peace and security," and part is due to other international imperatives such as counterterrorism.[111] As terrorist activities become seen as human rights violations, the line between counterterrorism and human rights becomes blurred, as do the tools at the disposal for both. R2P is consistent with a newer, more authoritarian approach to human rights.[112] The doctrine does include various safeguards such as a requirement that states be first allowed to resolve problems internally, or with financial or other assistance, and it is only

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107. U.N. Charter art. 2(4) ("All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."); *see also* U.N. OFFICE OF LEGAL AFFAIRS, HANDBOOK ON THE PEACEFUL SETTLEMENT OF DISPUTES BETWEEN STATES 4 (1992).

108. KALEVI HOLSTI, TAMING THE SOVEREIGNS: INSTITUTIONAL CHANGE IN INTERNATIONAL POLITICS 152 (2004).

109. James Thuo Gathii, *Third World Approaches to International Economic Governance*, *in* INTERNATIONAL LAW AND THE THIRD WORLD: RESHAPING JUSTICE 260-61 (Richard Falk et al. eds., 2006).

110. DAVID P. FORSYTHE, HUMAN RIGHTS IN INTERNATIONAL RELATIONS 24-25 (3d ed. 2012).

111. KARI MOTTOLA, TRANSATLANTIC RELATIONS AND GLOBAL GOVERNANCE 38 (2006); *see also* DAVID C. WILLS, THE FIRST WAR ON TERRORISM: COUNTER-TERRORISM POLICY DURING THE REAGAN ADMINISTRATION 12 (2003).

112. MELISSA LABONTE, HUMAN RIGHTS AND HUMANITARIAN NORMS, STRATEGIC FRAMING, AND INTERVENTION: LESSONS FOR THE RESPONSIBILITY TO PROTECT 173 (2012); *see also* CARRIE BOOTH WALLING, ALL NECESSARY MEASURES: THE UNITED NATIONS AND HUMANITARIAN INTERVENTION 231 (2013).

reserved for the most threatening of situations.[113] But at its core, it calls for violent resolution to a human rights crisis or a threat of violence.[114] Though this Article does not authoritatively deal with R2P, it does, at least, observe that it is a departure from traditional human rights methodology. It is difficult to envisage how more violence will resolve human rights violations because the very people who seek protection are usually the most vulnerable to outside military action. It also opens the door to massive abuse, particularly by elite states. Arguably, this has already been the case in the U.S. intervention into Iraq, and similar criticisms have been leveled against military intervention into Libya[115] and proposed Security Council action in Syria.[116]

Modern populist efforts and the economics of preventing massive atrocity have impacted legal trends to create an international regime that seems prepared to sacrifice some measure of state sovereignty in the defense of the most basic rights of humanity. But achieving the right balance is challenging. The fundamental question remains: If this door is opened, where will it lead? This methodology does promise effective short-term results, but perhaps at a cost of long-term legitimacy. It stands in the way of self-determination and is subject to great abuse by powerful states. It also threatens to change the direction of human rights efforts drawing them away from the purer angels and giving vent to the dogs of war.

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113. *See* Christopher C. Joyner, *"The Responsibility To Protect": Humanitarian Concern and the Lawfulness of Armed Intervention*, 47 VA. J. INT'L L. 693, 709 (2007).

114. CRITICAL PERSPECTIVES ON THE RESPONSIBILITY TO PROTECT: INTERROGATING THEORY AND PRACTICE 5 (Philip Cunliffe ed., 2012); *see also* ALEX J. BELLAMY, RESPONSIBILITY TO PROTECT 99, 102-03 (2013).

115. PAUL B. STARES & MICAH ZENKO, COUNCIL ON FOREIGN RELATIONS, PARTNERS IN PREVENTIVE ACTION: THE UNITED STATES AND INTERNATIONAL INSTITUTIONS 23 (2011); *see also* RESPONSIBILITY TO PROTECT: FROM PRINCIPLE TO PRACTICE 364 (Julia Hoffmann & André Nollkaemper eds., 2012).

116. Christine Gray, *The Use of Force for Humanitarian Purposes*, *in* RESEARCH HANDBOOK ON INTERNATIONAL CONFLICT AND SECURITY LAW: *JUS AD BELLUM*, *JUS IN BELLO* AND *JUS POST BELLUM* 229, 254 (Nigel D. White & Christian Henderson eds., 2013).