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DEALING WITH THE WORLD AS IT IS: REIMAGINING COLLECTIVE INTERNATIONAL RESPONSIBILITY

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I. INTRODUCTION

"[I]n many countries there is a deep ambivalence about military action today, no matter the cause. And at times, this is joined by a reflexive suspicion of America, the world's sole military superpower."[1]

There is a specter haunting American progressives today when it comes to the use of American military power in international affairs. Bludgeoned over many decades by the misuse of such power, many progressives find comfort in the cold embrace of reflexive rejectionism. Unlike the foreign attitudes that President Obama referenced above,[2] the attitude of American

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   1. President Barack Obama, Remarks by the President at the Acceptance of the Nobel Peace Prize (Dec. 10, 2009) (transcript available at http://www.whitehouse.gov/the-press-office/remarks-president-acceptance-nobel-peace-prize).

   2. *See, e.g.*, *America's Image in the World: Findings from the Pew Global Attitudes Project*, PEW RES. CTR. (Mar. 14, 2007), http://www.pewglobal.org/2007/03/14/americas-image-in-the-world-findings-from-the-pew-global-attitudes-project ("But, as we have documented, anti-Americanism is the case in much of the world, not just Muslim countries, and certain aspects of American power and American policy are central to this. First, there is a general perception that the U.S. acts unilaterally in the international arena, failing to take into account the interests of other countries when it makes foreign policy decisions. Our polling since 2001 has shown a growing perception that the U.S. acts unilaterally, and the war in Iraq has crystallized that opinion."); Patrick Goodenough, *Of the 15 Biggest Recipients of US Aid, 14 Voted with the US Position at the United Nations Less than Half the Time*, CNSNEWS.COM (Feb. 17, 2011), http://cnsnews.com/news/article/15-biggest-recipients-us-aid-

progressives is not ambivalence. Increasingly, there appear to be no circumstances under which they can see much good coming out of the deployment of American military power.[3] Their skepticism extends well beyond the unilateral use of force, demonstrated by their strong opposition to an American role even in the United Nations-sanctioned multinational assaults on Ghadaffi's forces in Libya.[4] Arguably, this degree of skepticism about the use of force has reached epic cynical proportions.[5] The net effect is that American progressives have taken themselves effectively out of the dialogue on what to do concretely in the immediacy of persistent, widespread, and systematic assaults on the most vulnerable people in the world.

14-voted-us-position-united-nations-less-half-time; *see also* Michael Chossudovsky, *Obama and the Nobel Prize: When War Becomes Peace, When the Lie Becomes the Truth*, GLOBAL RES. (Oct. 11, 2009), http://www.globalresearch.ca/index.php?aid=15622&context=va.

3. *See* Eric A. Posner, Op-Ed., *The Humanitarian War Myth*, WASH. POST (Oct. 1, 2006), http://www.washingtonpost.com/wp-dyn/content/article/2006/09/29/AR2006092901435.html; Ramah Kudaimi, *Military Intervention Not the Answer in Syria*, PROGRESSIVE (Mar. 6, 2012), http://www.progressive.org/military_intervention_not_answer_in_syria.html; *see generally* Catherine Lu, *Whose Principles? Whose Institutions? Legitimacy Challenges for "Humanitarian Intervention," in* 47 HUMANITARIAN INTERVENTION: NOMOS 188 (Terry Nardin & Melissa S. Williams eds., 2006). For a discussion of historical debates around military intervention, see TAYLOR B. SEYBOLT, HUMANITARIAN MILITARY INTERVENTION 1–28 (2007).

4. Democratic Congressman Dennis Kucinich went so far as to call the intervention in Libya an impeachable offense. *Dennis Kucinich: Libya Air Strikes Could Be "Impeachable Offense,"* HUFFINGTON POST (Mar. 21, 2011, 4:27 PM), http://www.huffingtonpost.com/2011/03/21/dennis-kucinich-obama-impeachment_n_838502.html; *see also* Press Release, Dennis Kucinich, 10 Reasons to Oppose the War in Libya (June 21, 2011); Gary Young, *The Innocence of the Liberal Hawk*, NATION (Mar. 24, 2011), http://www.thenation.com/print/article/159449/innocence-liberal-hawk ("The question of whether the West should be involved in this region is moot. It has been intervening for several decades, arming despots (including Gaddafi), propping up dictators and ignoring human rights abuses. The question is how it intervenes and in whose interests."); Matthew Rothschild, *Obama's Libya War: Unconstitutional, Naïve, Hypocritical*, PROGRESSIVE (Mar. 19, 2011), http://www.progressive.org/wx031911.html ("It is naïve to expect millions of Libyans to cheer as their own country is being attacked by Western powers. . . . And it is naïve to expect the world to go along with the ruse that this is not a U.S.-led act of aggression."). *But cf.* Sahil Kapur, *Progressive Caucus Splits on Libya, Abandons Joint Resolution Opposing Intervention*, RAW STORY (Mar. 23, 2011), http://www.rawstory.com/rs/2011/03/23/progressive-caucus-splits-on-libya-abandons-joint-resolution-opposing-intervention (discussing how the Congressional Progressive Caucus lost its organizational momentum); Juan Cole, *An Open Letter to the Left on Libya*, NATION (Mar. 28, 2011), http://www.thenation.com/print/article/159517/open-letter-left-libya (explaining that "[l]eftists are not always isolationists.").

5. *See, e.g.*, Tom Engelhardt, *Washington's Militarized Mindset: The Lessons Washington Can't Draw From the Failure of the Military Operation*, COMMON DREAMS (July 5, 2012), http://www.commondreams.org/view/2012/07/05-5 ("From Pakistan and Afghanistan to Yemen and Somalia, the evidence is already in: such 'solutions' solve little or nothing, and in a remarkable number of cases seem only to increase the instability of a country and a region, as well as the misery of masses of people.").

Ironically, the American progressives' opposition to the use of force has not hindered American interventions abroad, UN-sanctioned or otherwise. On the contrary, the United States promotes its political, economic, and social interests, often mediated by military power, as robustly as ever.[6] The principal consequence of such abdication is that interventions occur without adequate input from progressives. Progressives are increasingly reduced to complaining, protesting, or sitting back in sullen disappointment or anger as American human and material resources are deployed in the service of other agendas.[7] They have not developed a strategy or capacity to influence the trajectory of American external interventions or to channel it to do the sort of work or produce the kind of outcomes progressives would prefer.

Progressives must deal with the world as it is, replete with evil, plain meanness, depredations, absurdities, and the like, not all of it the result of American policies or actions.[8] Demands that the United States first do no harm are a necessary but quite insufficient foundation for a human society congruent with progressive values. Failure to engage cannot be an option. The world sometimes needs the deployment of military power—and the use of American military power needs progressive involvement to enhance its capacity to do more good than harm.

An earlier generation of progressives understood that a *sine qua non* of civilization and progress is an appreciation of the deeply interconnected nature of human experience—a realization that evil (such as the Holocaust, Congo under Leopold, Cambodia under the Khmers, and Afghanistan under the Taliban) cannot be allowed to flourish in one part of the world unchallenged.[9] Violence and misery respect no human borders, natural or artificial. Thus one of the most important commitments generated by progressives of the post-World War II era was not to let atrocities proceed with security within artificial boundaries.[10] That

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6. *See generally* JOSEPH S. NYE, JR., THE PARADOX OF AMERICAN POWER (2002); CLYDE PRESTOWITZ, ROGUE NATION (2003); CHALMERS JOHNSON, THE SORROWS OF EMPIRE (2004); FRED KAPLAN, DAYDREAM BELIEVERS (2008).

7. *See* sources cited *supra* notes 3–4.

8. Ibrahim J. Gassama, *It's a Miserable World After All*, OREGONLIVE.COM (Oct. 23, 2011), http://www.oregonlive.com/opinion/index.ssf/2011/10/its_a_miserable_world_after_al.html.

9. NORRIE MACQUEEN, HUMANITARIAN INTERVENTION AND THE UNITED NATIONS 15–18 (2011). "[T]he United Nations began with a particularly sharp sense of its humanitarian responsibilities." *Id.* at 15. *See also* ADAM HOCHSCHILD, KING LEOPOLD'S GHOST (1998).

10. MACQUEEN, *supra* note 9, at 17–18 ("The Genocide Convention of 1948, for example, was one of the [UN's] first contributions to the onward development of international law even if the proposal for a court to enforce it failed. The Convention committed its signatories to take action—

generation of progressives advanced a commitment to confronting evil. This was not a conservative notion. The Genocide Convention,[11] the articulation of a category of crimes against humanity,[12] the creation of the United Nations with a Security Council empowered to counter threats to international peace and security,[13] and the development of an international bill of rights[14] all attest to this salutary progressive tradition. The Cold War pushed this flowering of progressive re-imagination of international relations to the side. Conservatism's internationalist partner, realpolitik,[15] with its dyspeptic and jaundiced view of humanity, took hold.[16] Hence we

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including by military intervention if necessary—to prevent or stop the crime of genocide wherever it took place.").

11. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 8 U.N.T.S. 277 [hereinafter Genocide Convention].

12. Charter of the International Military Tribunal art. 6, Aug. 8, 1845, 59 Stat. 1544, 82 U.N.T.S. 279. These crimes are currently codified in the foundational document of the International Criminal Court. *See* Rome Statute of the International Criminal Court art. 7, July 17, 1998, 2187 U.N.T.S. 90, U.N. Doc. A/CONF. 183/9; 37 I.L.M. 1002 (1998).

13. U.N. Charter arts. 24, 34, 36–38, 38–51, 54.

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

15. A good description of realpolitik can be found in SARA STEINMETZ, DEMOCRATIC TRANSITION AND HUMAN RIGHTS (1994):

Adherents of realpolitik assume states to be central actors in an anarchic and "essentially competitive" environment. Rationality, rather than the individual preferences of decision-makers or an assumed universal morality, guides foreign policy decisions. Such decisions are calculated in "terms of interest defined as power," where power is used as an end in itself, or as a means of achieving other national interest goals.

Id. at 3–4 (footnotes omitted).

16. *See* JUKKA LEINONEN, BEGINNING OF THE COLD WAR AS A PHENOMENON OF REALPOLITIK (2012). Leinonen discusses the role of realpolitik in the formation of the Cold War: "Insofar as the United States foreign relations after the Second World War were marked by [Secretary of State] Byrnes's foreign policy, they involved a balancing act typical of realpolitik between the demands of publicity, party politics and foreign powers." *Id.* at 351. Furthermore, Leinonen notes, "[D]uring Byrnes's secretaryship configurations in the field of power politics were created that could not subsequently be dismantled. Behind the birth of these configurations lay a new implementation of realpolitik, which in the real world was manifested in a dialogue between the Soviets' security policies and Byrnes's foreign policy." *Id.* at 357. Therefore, he concludes, "The elements of the Cold War were founded on the inevitable collision of the political realism of both sides . . . ." *Id.* at 358. This analysis has interesting implications for the time period:

An interpretation of Byrnes's political actions shows the origins of the Cold War mostly as a kind of farce, in which both sides very naively believed in the ability of realpolitik to produce peace arrangements. Thus the process was defined above all by a drift into an irreversible situation in the field of power politics. . . .

The origins of the Cold War as a phenomenon of realpolitik were defined by the execution of realpolitik on the one hand as the art of the possible and on other hand as the art of the impossible . . . . The connection between Byrnes's actions, realpolitik and the origins of the Cold War becomes evident as a type of game theory. Since becoming involved in the game meant at the same time drifting into the Cold War, realpolitik and the transition to the Cold War became mutually sustaining elements.

find ourselves in a world marked by varying measures of ambivalence, indifference, and hostility to the plight of the most fragile among us.

This Article first argues for recognizing not just the legal and political right to engage in humanitarian intervention, but also a legal obligation or duty on the part of the international community to respond with armed force when necessary to ameliorate massive human tragedies or threats of such calamities even where the acquiescence of national governments or those in effective control of the area may be lacking. The argument for a duty adopts a more prescriptive sense of responsibility than the international consensus that is emerging with the "responsibility to protect" doctrine.[17] This argument is especially targeted toward those who see themselves as progressives or liberals within present-day American society and have a general aversion to using military force in international affairs. With appreciation of the pitfalls and challenges of such a position, the Article outlines the case for the right and the duty of the global community to intervene collectively to protect the innocent where national governments and the ordinary structures[18] of the international community have failed. The argument here follows Professor Kok-Chor Tan's argument for the moral obligation to protect.[19]

Secondly, the Article argues that the legal and political legitimacy of humanitarian intervention—or its current iteration, the responsibility to protect—should be predicated upon the international community's acceptance of a broader collective responsibility, better stated as a duty, to assist those who are imperiled under less spectacular conditions of misery. In short, a legitimate collective right or duty to intervene across sovereign jurisdiction under crisis conditions must be founded upon an acceptance of broader responsibility for conditions that do not meet current definitions of "crisis." It should be emphasized that this acceptance of collective responsibility derives not from charitable sentiments, but from a clear recognition of obligations based on profit from historical and ongoing injurious policies and practices.[20] The world as it is today did not just

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Id. at 358–59. *See also* NYE, JR., *supra* note 6.

17. *See* discussion *infra* Part V.

18. By "ordinary structures," I am referring to various arms of the United Nations, the World Bank, regional entities, and even humanitarian agencies and non-governmental organizations.

19. *See* Kok-Chor Tan, *The Duty To Protect*, *in* 47 HUMANITARIAN INTERVENTION: NOMOS, *supra* note 3, at 84.

20. *See generally* WALTER RODNEY, HOW EUROPE UNDERDEVELOPED AFRICA (1972); SAMIR AMIN, NEO-COLONIALISM IN WEST AFRICA (1973); THOMAS PAKENHAM, THE SCRAMBLE FOR AFRICA (1991); BASIL DAVIDSON, THE BLACK MAN'S BURDEN (1992); PAUL FARMER, THE USES OF

happen. It is the result of conscious policies and practices that extend over the ages. A common humanity, as well as recognition of history's grossly unequal distribution of benefits and burdens, compels a communal political responsibility to engage the causes and the manifestations of immense suffering.[21] Such engagements must allow for the possible use of force against extreme and totalizing violations of human dignity, but only as long as force is part of a package that also covers communal responsibility for dealing with enduring structures of misery. This argument benefits substantially from the work done by Iris Marion Young and Thomas Pogge.[22]

The analysis is informed by critical concerns such as the indeterminacy and incoherence of legal principles and policies. It accepts the limits of our capacity to fully comprehend, let alone devise solutions to, longstanding and intractable issues implicated in persistent violence and misery within and across national boundaries. Yet the perspective offered here is entirely consistent with both accepted international legal principles and sound critical progressive traditions. It is in the best interests of humanity, in the sense of efficaciously dealing with misery, for progressives to work at incorporating a collective international duty to assist within the traditional humanitarian policy context. The alternative is for them to continue down the path of disengagement, cynicism, and despair. A failure to acknowledge our collective obligations and the necessity for engagement, which includes deploying armed forces when the occasion warrants, would continue to deprive American and other progressives of opportunities to help shape military and non-military interventions by powerful countries around the world.[23] A reflexive aversion to the use of military force would not reduce or eliminate interventions or military adventurism by the powerful. On the contrary, the main consequence would be that these interventions would continue on terms dictated by less benign traditions and voices, without the full input of those who might be in the best position to mediate such engagements around the world. The distance between the privileged "us" and the afflicted "them" would continue to widen.

HAITI (1994); SIBA N. GROVOGUI, SOVEREIGNS, QUASI-SOVEREIGNS, AND AFRICANS (1996); ADAM HOCHSCHILD, KING LEOPOLD'S GHOST (1998); RANDALL ROBINSON, AN UNBROKEN AGONY (2007).

21. *See, e.g.*, Iris Marion Young, *Responsibility and Global Labor Justice*, 12 J. POL. PHIL. 365 (2004); Marti Koskenniemi, *The Lady Doth Protest Too Much: Kosovo and the Turn To Ethics in International Law*, 65 MOD. L. REV. 159 (2002).

22. *See generally* IRIS MARION YOUNG, RESPONSIBILITY FOR JUSTICE (2011); THOMAS POGGE, WORLD POVERTY AND HUMAN RIGHTS (2d ed. 2008); THOMAS POGGE, POLITICS AS USUAL (2010).

23. *See* Young, *supra* note 4.

II. HUMANITARIANISM: ACCEPTING COLLECTIVE RESPONSIBILITY FOR
THE WORLD AS IT IS

Australian philosopher Peter Singer captured the essence of humanitarianism when he wrote about the humanitarian crisis in East Bengal (now Bangladesh) four decades ago:

> The suffering and death that are occurring there now are not inevitable, not unavoidable in any fatalistic sense of the term. Constant poverty, a cyclone, and a civil war have turned at least nine million people into destitute refugees; nevertheless, it is not beyond the capacity of the richer nations to give enough assistance to reduce any further suffering to very small proportions.[24]

Time, technological advances, and economic and cultural globalization have not reduced the need or occasions for "decisions and actions of human beings" to "prevent this kind of suffering."[25] Just since 2011, the world community has had to acknowledge the following instances of human perversity: hundreds of thousands of Somalis dying or at the risk of dying as drought, civil war, and anarchy induced a famine[26] that rolled over their dysfunctional land;[27] thousands of Syrians dying in an escalating struggle between armed rebels and a brutal dynastic regime;[28] government and rebel forces in Libya locked in a war of attrition with tens

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24. Peter Singer, *Famine, Affluence and Morality*, 1 PHIL. & PUB. AFF. 229, 229 (1972). For more information on this crisis, see BANGLADESH GENOCIDE ARCHIVE, http://www.genocide bangladesh.org (last visited Mar. 22, 2013).

25. Singer, *supra* note 24, at 229.

26. Sudarsan Raghavan, *U.N.: Famine in Somalia is Killing Tens of Thousands*, WASH. POST, July 20, 2011, at A1; Jeffrey Gettleman, *Somalis Waste Away as Insurgents Block Escape From Famine*, N.Y. TIMES, Aug. 1, 2011, at A1; *UK: 400k Somali Children to Die Without More Aid*, MSNBC.COM (Aug. 17, 2011), http://www.msnbc.msn.com/id/44171618/ns/world_news-africa/t/uk-k-somali-children-die-without-more-aid.

27. The term "country" can be only loosely applied to Somalia. Since the 1990s, the country has been rife with civil wars and an utter lack of central government. Benjamin Powell, *Somali "Anarchy" Is More Orderly than Somali Government*, IND. INST. (Dec. 22, 2006), http://www.independent .org/newsroom/article.asp?id=1880. The CIA still lists Somalia as "in the process of building a federated parliamentary republic." Cent. Intelligence Agency, *Africa: Somalia*, WORLD FACTBOOK (Aug. 22, 2013), https://www.cia.gov/library/publications/the-world-factbook/geos/so.html.

28. Liz Slye & Mary Beth Sheridan, *Tanks Converge on Besieged Syrian Opposition Stronghold*, WASH. POST (Aug. 2, 2011), http://articles.washingtonpost.com/2011-08-02/world/35269206_1_ syrian-activists-syrian-opposition-stronghold-al-assad; Nada Bakri, *Syria's Isolation Deepens As Minister is Removed*, N.Y. TIMES, Aug. 9, 2011, at A10.

of thousands of people displaced;[29] and a global financial crisis that effortlessly crisscrossed national borders, leaving economic devastation in its wake.[30] These were just the headlines of particular moments, and, as such, obscure far more than they reveal. The troubles of Haitians years after a devastating earthquake and the decades-long horrors of Eastern Congo, Darfur, North Korea, and Burma (Myanmar), to name a few, have also had their moments[31] and remain ready to be served up again as periodic reminders of the far reaches and great depths of tragedies that continue to define human existence. Some say it is a kind of compassion fatigue that quickly pushes these ongoing catastrophes from the front pages of our minds.[32]

Hour by hour, our modern world provides us with abundant reminders of the precariousness of our lives, the interconnectedness and banality of human suffering, whether occasioned by nature or by direct human device, and the importance of luck (or is it fate?). Technological advances have ensured the proliferation of communication devices so that horrors from distant locales more readily penetrate our hourly local newsbreaks. What can we do in the face of such suffering? What must we do? Why have our willingness and our capacity to intervene remained so far behind our abilities to behold? Various perspectives may be offered to justify different levels of international engagement, or lack thereof, in dealing with these large-scale human tragedies. The now largely forgotten debates around governmental responses to Hurricane Katrina show that these

29. William Booth, *In War-Torn Libya, No Pause for Ramadan*, WASH. POST (Aug. 1, 2011), http://articles.washingtonpost.com/2011-08-01/world/35270872_1_rebel-stronghold-misurata-rebel-fighters.

30. Koh Gui Qing & John Chalmers, *Market Rout Deepens Global Economic Crisis*, REUTERS, Aug. 9, 2011, *available at* http://www.reuters.com/article/2011/08/09/us-crisis-idUSL6E7J707B2011 0809; Paul Wiseman, *Plunge on Wall Street Threatens to Spook Consumers*, USA TODAY (Aug. 9, 2011), http://usatoday30.usatoday.com/money/markets/2011-08-09-markets-consumer-spending_n.htm.

31. *See, e.g.*, *Myanmar Invites Armed Ethnic Groups to Peace Talks*, GUARDIAN (Aug. 18, 2011), http://www.guardian.co.uk/world/feedarticle/9803602; Alex de Waal, *The Wars of Sudan*, NATION (Mar. 1, 2007), http://www.thenation.com/article/wars-sudan; *Crisis in the Democratic Republic of the Congo*, INT'L COALITION FOR THE RESPONSIBILITY TO PROTECT, www.responsibility toprotect.org/index.php/crisis/crisis-in-drc (last visited Nov. 8, 2013); Tom Miles, *North Korea Slams U.N. "Plot" to Investigate its Human Rights Record*, REUTERS, Mar. 11, 2013, *available at* http://www.reuters.com/article/2013/03/11/us-korea-north-inquiry-idUSBRE92A0TW20130311; Editorial, *In Burma, a Blow to Democracy and Human Rights*, WASH. POST, Apr. 3, 2013, at Opinions, *available at* http://articles.washingtonpost.com/2013-04-03/opinions/38243901_1_human-rights-watch-burmese-govern ment-buddhist.

32. *See, e.g.*, Dart Ctr. for Journalism & Trauma, *Traumatic Stress and the News Audience, Self-Study Unit 3: Photography & Trauma*, DARTCENTER.ORG, http://dartcenter.org/content/self-study-unit-3-photography-trauma-3 (last visited May 21, 2012); COMPASSION FATIGUE AWARENESS PROJECT, http://www.compassionfatigue.org (last visited May 22, 2012).

issues may also be found in the American domestic arena.[33] In the international realm, the perspectives range from those that say "leave well enough alone, that it is none of our business," to those that call for comprehensive totalizing responses justifying the supplanting of national regimes.[34]

At the base of the problem is the resilience of abject poverty.[35] The fact is that today's world is one of enormous social and economic deprivation that often exists in close proximity with enormous wealth and opportunity.[36] Inequality within nations and between nations continues to grow. Clearly, much of the wealth gains of this era have not trickled down. About forty percent of humanity easily qualifies today under the definition

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33. Anna Shoup, *FEMA Faces Intense Scrutiny*, PBS NEWSHOUR (Sept. 9, 2005), http://www .pbs.org/newshour/updates/government_programs/july-dec05/fema_09-09.html.

34. Compare the perspectives offered by Tom Engelhardt, *Washington's Militarized Mindset: The Lessons Washington Can't Draw From the Failure of the Military Operation*, COMMON DREAMS, (July 5, 2012), https://www.commondreams.org/view/2012/07/05-5, and Christopher Preble, *Recognizing Disaster: Please Mr. President, Don't Intervene in Syria*, NEW REPUBLIC (Dec. 14, 2012), http://www .newrepublic.com/blog/plank/111052/recognizing-disaster-please-mr-president-don't-intervene-in-syria, to Ruth Gordon, *Intervention by the United Nations: Iraq, Somalia, and Haiti*, 31 TEX. INT'L L.J. 43 (1996). Gordon concludes:

> Perhaps international society simply has not reached the stage where its members care more about the lives of others than the lives of its own. If the situation is to improve, the international community must develop a set of criteria to discern and remedy human rights abuses independently of the interests of powerful nations. It must also develop the means and will to intervene in all of the situations that fall within these criteria . . . .

Id. at 56.

35. *See* Press Release, World Bank, *World Bank Sees Progress Against Extreme Poverty, but Flags Vulnerabilities* (Feb. 29, 2012) (Press Release no. 2012/297/DEC, available at http://go.world bank.org/CNQZ3RXMQ0) ("Indeed, there was only a modest drop in the number of people living below $2 per day between 1981 and 2008, from 2.59 billion to 2.47 billion, though falling more sharply since 1999."); U.N. Dev. Programme, *The Real Wealth of Nations: Pathways to Human Development*, *in* 2010 HUMAN DEVELOPMENT REPORT 8 (2010) [hereinafter 2010 Human Development Report] ("About 1.75 billion people in the 104 countries covered by the MPI—a third of their population—live in multidimensional poverty—that is, with at least 30 percent of the indicators reflecting acute deprivation in health, education and standard of living. This exceeds the estimated 1.44 billion people in those countries who live on $1.25 a day or less (though it is below the share who live on $2 or less).").

36. Hope Yen, *Income Gap Widens: Census Finds Record Gap Between Rich and Poor*, HUFFINGTON POST BUSINESS (Sept. 28, 2010), http://www.huffingtonpost.com/2010/09/28/income-gap-widens-census-_n_741386.html ("The top-earning 20 percent of Americans—those making more than $100,000 each year—received 49.4 percent of all income generated in the U.S., compared with the 3.4 percent made by the bottom 20 percent of earners . . . ."); *see also* U.S. CENSUS BUREAU, AMERICAN COMMUNITY SURVEY BRIEFS, HOUSEHOLD INCOME INEQUALITY WITHIN U.S. COUNTIES: 2006–2010 1 (Feb. 2012), *available at* http://www.census.gov/prod/2012pubs/acsbr10-18.pdf ("Since 1967, U.S. household income inequality has grown 18 percent."); 2010 Human Development Report, *supra* note 35, at 87–94, 116. "Inequality in a range of dimensions and across groups—including women and men and poor and affluent—is a growing challenge to progress in human development." *Id.* at 116.

of poverty, either of the abject sort or the more acceptable, benign variety.[37] The plight of the less fortunate has long concerned the global community, and leaders and experts at all levels have assuredly devoted countless hours of meetings, conferences, retreats, initiatives, and the like to helping the poor and destitute.[38] Yet global poverty and gross inequality remain resolute.[39]

It is also a fact that misery and gross inequality are policed by violence.[40] Wars, both civil and international, have changed those in power, but the hard reality of misery for a huge mass of humanity has not been ameliorated.[41] The motivations behind armed conflicts have not changed much over time. Control of precious natural resources and the power to develop and exploit labor and markets are intimate aspects of the exploitative impulses that succeed only with violence and the misery that results.[42] Ideological faith offers salvation, but only for some true believers. Neither Communism nor its demise has changed the trajectory of poverty and inequality or the arc of violence.[43] The triumph of neo-liberalism and the acceptance of free-trade-anchored globalization have rearranged participants and brought some new leaders to the top without

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37. 2010 Human Development Report, *supra* note 35, at 96 ("2.6 billion people [are] estimated to be living on less than $2 a day.").

38. According to the Secretary-General:

During the past decade, the Millennium Declaration and the Millennium Development Goals have led to unprecedented commitments and partnerships reaffirmed in successive summits and meetings, including the 2002 International Conference on Financing for Development at Monterrey, Mexico, the 2002 World Summit on Sustainable Development, in Johannesburg, South Africa, and the 2005 World Summit in New York.

U.N. Secretary-General, *Keeping the Promise: a Forward-Looking Review to Promote an Agreed Action Agenda to Achieve the Millennium Development Goals by 2015*, ¶ 3, U.N. Doc. A/64/665 (Feb. 12, 2010). This statement comes from a report issued as a follow-up to another summit held in 2010.

39. *See* 2010 Human Development Report, *supra* note 35; World Bank, *supra* note 35; U.S. CENSUS BUREAU, *supra* note 36; Michael A. Fletcher, *Nearly One in Six in Poverty in the U.S.; Children Hit Hard, Census Says*, WASH. POST (Sept. 13, 2011), http://articles.washingtonpost.com/2011-09-13/business/35275047_1_poverty-rate-poverty-line-rate-for-white-children.

40. *See* PETER IADICOLA AND ANSON SHUPE, VIOLENCE, INEQUALITY, AND HUMAN FREEDOM 315–70 (2003); Pablo Fajnzylber et al., *Inequality and Violent Crime*, 45 J.L. & ECON. 1 (2002).

41. Gassama, *supra* note 8.

42. *See* ANTONY ANGHIE, IMPERIALISM, SOVEREIGNTY, AND THE MAKING OF INTERNATIONAL LAW (2004); Koskenniemi, *supra* note 21; *see also* JOSEPH CONRAD, HEART OF DARKNESS (Penguin Books 2007) (1902); PAKENHAM, *supra* note 20.

43. One source puts the number of major wars since 1945 at about 250 with over 50 million people killed as a result. *See War and Peace: What's it all About?*, PEACE PLEDGE UNION, http://www.ppu.org.uk/learn/infodocs/st_war_peace.html (last visited Apr. 14, 2013). *See also The World At War*, GLOBAL SECURITY, www.GlobalSecurity.org/military/world/war/ (last visited Apr. 14, 2013).

fundamentally affecting the relationship between the "haves" and the "have-nots."[44]

Grand gestures that are cast as agendas, summits, movements, declarations, or initiatives, designed to provide a comprehensive global response, have proven equally unavailing.[45] For example, the current mega global agenda to tackle poverty, the Millennium Development Goals, ushered in with considerable fanfare in 2000, now approach their target date of 2015 with little to celebrate except the resilience of happy talk.[46] The fears and divisions of the past remain as powerful roadblocks to substantive achievements.

Neither humanitarianism in general nor humanitarian intervention (including its current formulation under the responsibility to protect doctrine) in particular has provided a solution to these intractable problems.[47] In fact, having to talk more about humanitarianism is evidence of a collective failure. Such talk highlights the tragic gap between frequent

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44. *See* Josh Bivens, *Globalization, American Wages, and Inequality* (Econ. Policy Inst., Working Paper No. 279, 2007); Paul Krugman, *Trade and Wages, Reconsidered*, BROOKINGS PAPERS ON ECON. ACTIVITY 103, 134 (Spring 2008) ("The starting point of this paper was the observation that the consensus that trade has only modest effects on inequality rests on relatively old data—that there has been a dramatic increase in manufactured imports . . . . And it is probably true that this increase has been a force for greater inequality in the United States and other developed countries.").

Even free-trade advocates have noticed this. The Libertarian pro-free trade policy group, the Cato Institute, has criticized the International Monetary Fund, the leading international organization promoting neo-liberal trade policies:

If the goal is to help developing countries progress economically and to promote a liberal global economy, then, at the very least, rich countries should deny further funding for the IMF . . . . The IMF does not appear to have helped countries either to achieve self-sustaining growth or to implement market reforms.

CATO INST., CATO HANDBOOK FOR CONGRESS: POLICY RECOMMENDATIONS FOR THE 107TH CONGRESS 651–52 (2001). *See also* JOSEPH E. STIGLITZ, GLOBALIZATION AND ITS DISCONTENTS (2002).

45. *See, e.g.*, 2005 World Summit Outcome, G.A. Res. 60/1, U.N. Doc. A/RES/60/1 (Oct. 24, 2005); THE WORLD BANK & THE INT'L MONETARY FUND, 2005 REVIEW OF THE POVERTY REDUCTION STRATEGY APPROACH (2005), *available at* http://siteresources.worldbank.org/INTPRS1/Resources/PRSP-Review/2005_Review_Final.pdf; U.N. Secretary-General, *supra* note 38.

46. Press Release, World Bank & Int'l Monetary Fund, Developing World Lags on Global Targets Related to Food and Nutrition, Says IMF-World Bank Report (Apr. 20, 2012, Press Release No. 2012/397/DEC).

47. As one author describes the issue:

Not only does this representation of the emergencies not allow disclosure on the causes of the disparities between spectator and victim, but it also increases the distance between "us" and "them". Focusing the attention only to the immediacy of short-term efforts the fundraising campaigns impede longer-term attention to social change, inequality, and reconstruction.

Pierluigi Musarò, *Living in Emergency: Humanitarian Images and the Inequality of Lives*, 2 NEW CULTURAL FRONTIERS 13, 37–38 (2011). *See also* Andrew Anthony, *Does Humanitarian Aid Prolong Wars?*, OBSERVER (Apr. 24, 2010), http://www.guardian.co.uk/society/2010/apr/25/humanitarian-aid-war-linda-polman.

affirmations of common humanity and the harsh realities of life in the world we have created and sustained. Clearly lasting solutions cannot be found in the pleas to give more aid or to deploy military force to help our fellow humans in crisis. The persistent or recurrent nature of these demands burdens our vision and our body, and may soon wither our collective capacity for compassion, charity, and sacrifice. Indeed in the world that we have created and nurtured, who can credibly talk of solutions? Hasn't the world had enough already of the solutions movement and its assorted salespeople? Some measure of humility should propel us toward doing what we can when we can, avoiding grand pronouncements and totalizing theories.

The argument for the collective right and duty to save lives at risk under extreme circumstances is in no sense a claim about resolving longstanding and seemingly intractable problems. It actually sets a very low pragmatic bar of expectations for humanity. A duty to assist imposed on the international community, as a true collective, also does not promote use of force as a central feature. The option to use force would exist as an important component of our larger duties to each other, even if only as a last gasp response of humanity when the extremes of misery and violence begin to overwhelm us. However, as the Article emphasizes, no iteration of the norm of humanitarian intervention could ever attain the legitimacy it desires unless it is enhanced by a broader and deeper norm of duty or obligation to assist those in desperate need across sovereign boundaries. This broader obligation, to make a substantial difference, would be triggered long before the cameras arrive or the calls for the deployment of troops go out.[48]

III. FROM HUMANITARIAN INTERVENTION TO THE RESPONSIBILITY TO PROTECT

A. Humanitarian Intervention Defined

Humanitarian intervention has been defined as the "use of physical force within the sovereign territory of another state by other states or the United Nations for the purpose of either the protection of, or the provision

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48. The objections to this enhanced notion of responsibility incorporating an explicit duty to aid have been registered by the United States among others. *See* Mehrdad Payandeh, *With Great Power Comes Great Responsibility? The Concept of the Responsibility to Protect Within the Process of International Lawmaking*, 35 YALE J. INT'L L. 469, 501 (2010).

of emergency aid to, the population within the territory."[49] It is the use of force by one state or a combination of states to exercise authority within the jurisdiction of another state, without that state's permission, in order to protect innocent people from widespread and shocking levels of violence or other massive tragedies perpetrated or permitted by the government of the target state.[50] Historically, moral arguments were employed to justify resorting to what is in effect war, the ultimate anti-human condition, by claiming superior humanitarian ends.[51] The end of World War II saw a decided effort to strengthen law as it pertains to the declaration and conduct of war in general. The post-war trials of defeated political and military leaders and the development of international security and human rights institutions and standards have buttressed this process. Since that period, humanitarian intervention has been contested on both moral and legal grounds.[52]

Legal justification for intervention under humanitarian principles has found support mainly in interpretations of the U.N. Charter (the "Charter") provisions governing the legal use of force[53] in the context of U.N. Security Council practices.[54] U.N. Security Council practices are derived

49. Howard Adelman, *Humanitarian Intervention: The Case of the Kurds*, 4 INT'L J. REFUGEE L. 4, 18 (1992).

50. This elaboration is consistent with other definitions. *See* Terry Nardin, *Introduction*, *in* 47 HUMANITARIAN INTERVENTION: NOMOS, *supra* note 3, at 1.

51. *See* Terry Nardin, *The Moral Basis of Humanitarian Intervention*, 16 ETHICS & INT'L AFF. 57 (2002); Jarat Chopra & Thomas G. Weiss, *Sovereignty is No Longer Sacrosanct: Codifying Humanitarian Intervention*, 6 ETHICS & INT'L AFF. 95 (1992), *available at* http://repository.forced migration.org/pdf/?pid=fmo:2654 ("Four decades have been spent defining human rights, and they are now clearer as a justification for action than ever before."). *See generally* Joseph Boyle, *Traditional Just War Theory and Humanitarian Intervention*, *in* 47 HUMANITARIAN INTERVENTION: NOMOS, *supra* note 3, at 31; SEYBOLT, *supra* note 3, at 7–14.

52. *See* Richard A. Falk, *Humanitarian Intervention: Imperatives and Problematics*, in WESTON, FALK, CHARLESWORTH, AND STRAUSS, INTERNATIONAL LAW AND WORLD ORDER, A PROBLEM ORIENTED COURSEBOOK 315–23 (4th ed. 2006); Fernando R. Teson, *Collective Humanitarian Intervention*, 17 MICH. J. INT'L L. 323 (1996).

53. Specifically, see U.N. Charter art. 2, paras. 3–4 ("All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice are not endangered" and "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 id.* art. 34 ("The Security Council may investigate any dispute, or any situation which might lead to international friction or give rise to a dispute, in order to determine whether the continuance of the dispute or situation is likely to endanger the maintenance of international peace and security"); *id.* art. 39 ("The Security Council shall determine the existence of any threat to the peace, breach of peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.").

54. *See* Thomas Franck, *Legality and Legitimacy in Humanitarian Intervention*, *in* 47 HUMANITARIAN INTERVENTION: NOMOS, *supra* note 3, at 143.

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from the United Nations' two core purposes: to prevent war and to defend human dignity.[55] The Charter identifies these two aims as intimately connected and not in opposition to each other. The reason we want peace and security is to "save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind . . . ."[56] As such, the Charter places a premium on the preservation of international peace and security, the peaceful settlement of international disputes, and the removal of threats to international peace and security. In keeping with these aims, modern international law, or post-Charter international law, has narrowed the right of states to use force in international relations as well as in domestic situations. The legal right of state authorities to use force is limited in all circumstances.[57] The key factor is the impact such resort to force has on the core values behind the founding of the United Nations. While the threat to international peace and security is more readily seen where force is employed in international disputes, there was a clear understanding since the inception of the United Nations that even domestic disputes may also fester and expand into international disputes.

Generally, a country may resort to war only in self-defense (including the defense of others) or with prior approval of the United Nations Security Council.[58] The legal domination of this arena by the Security Council is complete, since in all cases the legal right of a state to use force ceases when the Security Council demands it.[59] The recent actions of the Security Council against the Gaddafi regime in Libya affirmed Security Council hegemony over the use of force by a state even in the domestic sphere.[60] The intense deliberations within the Security Council over

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55. *See* U.N. Charter pmbl. ("[T]o save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind . . . ."); *id.* art. 1, para. 1 ("To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the international peace, and for the suppression of aggression or other breaches of the peace . . . .").

56. U.N. Charter pmbl.

57. *Id.* arts. 33–34, 37, 44–50.

58. *See id.* art. 51 ("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-defense 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.").

59. *Id.*

60. *See* S.C. Res. 1973, U.N. Doc. S/RES/1973 (Mar. 17, 2011) (authorizing Member State action and creating a no-fly zone in Libya); S.C. Res. 2009, U.N. Doc. S/RES/2009 (Sept. 16, 2011) (establishing a U.N. ground force in Libya); U.N. Secretary-General, *Report of the Secretary-General*

international legal authorization of the U.S.-led invasion of Iraq in 2003 were another critical episode in the development of this legal hegemony.[61]

Other Charter provisions support the dominant role of the Security Council in this arena.[62] These provisions allow the Security Council wide latitude to become involved in disputes affecting one or more states. Article 34 of the Charter authorizes the Security Council to investigate any "dispute, or *any situation* which might lead to international friction or give rise to a dispute . . . ."[63] Thus when the governments of Tunisia and Turkey recently complained about the onslaught of refugees fleeing into their territories to escape escalating and widespread violence in Libya and Syria respectively, the Security Council was authorized to investigate.[64] Article 39 of the Charter further empowers the Security Council to determine whether situations or disputes amount to "the existence of any threat to the peace . . . ."[65] Articles 40 through 50 of the Charter capture the broad range of legal options available to the Security Council to act in furtherance of its mandate under the Charter.[66] Certainly the practices of the Security Council in response to breaches of international peace and security have been influenced as much by political reality as by legality.[67] But this would be true of any action taken by politically constituted bodies.

Operationally, the doctrine of humanitarian intervention was of little consequence during the Cold War period.[68] The many interventions of that era did not even bother to seriously engage the doctrine.[69] More explicitly

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on the United Nations Support Mission in Libya, U.N. Doc. S/2011/727 (Nov. 22, 2011) (discussing the effects of these actions).

61. *See generally* UCHENNA EMEAGWALI & JEANNIE GONZALEZ, LAWYERS' COMM. ON NUCLEAR POLICY, U.N. SECURITY COUNCIL DELIBERATIONS REGARDING IRAQ (July 2003), *available at* lcnp.org/global/reportSCIraq.pdf.

62. *See* U.N. Charter arts. 24–25.

63. *Id.* art. 34 (emphasis added).

64. *See* U.N. SCOR, 66th Sess., 6490th mtg. at 3, U.N. Doc. S/PV.6490 (Feb. 25, 2011); U.N. SCOR, 67th Sess., 6710th mtg. at 15, U.N. Doc. S/PV.6710 (Jan. 31, 2012).

65. U.N. Charter art. 39.

66. For example, "These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations." *Id.* art. 41.

67. *See* Falk, *supra* note 52; Thomas Frank, *Legality and Legitimacy in Humanitarian Intervention, in* 47 HUMANITARIAN INTERVENTION: NOMOS 143, *supra* note 3.

68. Karen Engle, *"Calling in The Troops": The Uneasy Relationship Among Women's Rights, Human Rights, and Humanitarian Intervention*, 20 HARV. HUM. RTS. J. 189, 205–06 (2007).

69. SEYBOLT, *supra* note 3, at 9–11. "The debates remained largely theoretical through the 1970s and 1980s, as no government seriously sought to justify military interventions on humanitarian grounds, even though the interveners used the term gratuitously on many occasions." *Id.* at 10. *See also* Engle, *supra* note 68, at 206 ("In many instances, states would claim to be protecting their own

political justifications, such as national interest, accompanied the many instances in which the West or the East acted to consolidate or expand their spheres of influence.[70] These were especially destructive interventions, particularly for those in the developing world.[71] Non-alignment proved as valuable to these people as it did to the inhabitants of Melos generations ago at the time of the Peloponnesian War.[72] Yet Cold War politics had one effect: responsibility for order around the world was at least roughly demarcated by might.[73]

The immediate post-Cold War period saw an explosion of humanitarian crises that challenged positive expectations of the time.[74] Without Cold War-era incentives to contain violence and disorder, powerful nations showed little enthusiasm for accepting the responsibilities and consequences of large-scale intervention. In the extreme cases like Somalia, the Balkans, and Rwanda, the world looked to a United Nations that proved to be woefully unprepared.[75]

Eventually, in a few select cases, the doctrine of humanitarian intervention made appearances, generally muddled, incoherent, and ineffectual.[76] As some scholars, policy-makers, and activists worked to explain, refine, and institutionalize the doctrine, others began to question its rationales, efficacy, and possible consequences.[77] Of greatest concern

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citizens in other countries or guarding their borders from refugee flows (both forms of self-defense) . . . .").

70. *See generally* DANIEL PATRICK MOYNIHAN, ON THE LAW OF NATIONS 120–77 (1990); IVAN MUSICANT, THE BANANA WARS: A HISTORY OF UNITED STATES MILITARY INTERVENTION IN LATIN AMERICA FROM THE SPANISH AMERICAN WAR TO THE INVASION OF PANAMA (1990), GREG GRANDIN, EMPIRE'S WORKSHOP: LATIN AMERICA, THE UNITED STATES, AND THE RISE OF THE NEW IMPERIALISM (2007); Alex de Waal, *Military Intervention in Africa: Intervention Unbound*, THE HORNET, UNIVERSITY OF PENNSYLVANIA-AFRICA STUDIES CENTER (Feb. 8, 1995), http://www.africa.upenn.edu/Hornet/milt_intv.html.

71. *See supra* note 69.

72. *See generally* THUCYDIDES, HISTORY OF THE PELOPONNESIAN WAR (1972).

73. *See* Michael Reisman, *Old Wine in New Bottles: The Reagan and Brezhnev Doctrines in Contemporary International Law and Practice*, 13 YALE J. INT'L L. 171 (1988).

74. At least one author has proposed that this rash of crises came as a result of the changes of the post-Cold War era. Martha Finnemore, *Paradoxes in Humanitarian Intervention*, *in* MORAL LIMIT AND POSSIBILITY IN WORLD POLITICS 197, 199–205 (Richard M. Price ed., 2008).

75. *See, e.g.*, Tobias Debiel et al., *Norm-building Through the Practice of Interventionism: How the U.N. Security Council Contributed to the Emergence of the R2P*, 5 J. INTERVENTION & STATEBUILDING (SPECIAL ISSUE) 72, 92–99 (2011); L.J. VAN DEN HERIK, THE CONTRIBUTION OF THE RWANDA TRIBUNAL TO THE DEVELOPMENT OF INTERNATIONAL LAW 24–30 (2005); Ibrahim J. Gassama, *World Order in the Post Cold War Era: The Relevance and Role of the United Nations After Fifty Years*, 20 BROOK. J. INTL'L L. 255 (1994).

76. Debiel, *supra* note 75, at 99–105.

77. Anne Orford, *Jurisdiction Without Territory: From the Holy Roman Empire to the Responsibility to Protect*, 30 MICH. J. INT'L L. 981, 998 (2009). *See generally* 47 HUMANITARIAN

to those opposed to such interventions were its implications for sovereignty and self-determination of peoples.[78] The fear of cloaking another round of imperial interventions in incoherent and indeterminate post-World War II legal doctrines was high and widespread.[79] Of significant concern was also the appropriateness of linking humanitarianism to war, both as a matter of principle as well as an effective means of resolving human tragedies.[80] A different set of objections was raised by those wedded to the continuation of power politics. They were troubled by institutionalized restraints on powerful nations and wanted such nations to have the freedom to define their self-interests and to act unilaterally.[81]

What seemed to be an escalation of crises in the immediate post-Cold War period, the well-publicized ineffectiveness of the international community in dealing with them, and doctrinal and operational resistance to the humanitarian intervention doctrine combined to spur a rethinking of how the international community could assist in large-scale humanitarian crises where national governmental structures have failed. This is the origin of the Responsibility to Protect Project.[82]

B. Responsibility to Protect (R2P)

The Responsibility to Protect Project sought to improve both international responses and the perception of such responses in the wake of massive humanitarian crises of the immediate post-Cold War era.[83]

INTERVENTION: NOMOS, *supra* note 3.

78. *See, e.g.*, Richard Falk, *The Haiti Intervention: A Dangerous World Order Precedent for the United Nations*, 36 HARV INT'L L.J. 341, 356 ("[T]he U.N. endorsed all necessary force in a setting in which the only threat to international peace and security arose from the outflow of refugees. Such endorsement raises serious questions about the promise in the Charter to avoid encroachments on 'domestic jurisdiction.'"); Orford, *supra* note 77, at 1003.

79. SEAN D. MURPHY, HUMANITARIAN INTERVENTION: THE UNITED NATIONS IN AN EVOLVING WORLD ORDER 293–94 (1996).

80. SEYBOLT, *supra* note 3, at 17–18 ("Advocates of the non-political nature of humanitarian aid dislike the idea of military intervention for humanitarian purposes. Not only is it an oxymoron—since military intervention is inherently political—but military intervention also causes humanitarian aid to become politicized. . . . Military intervention can also increase the intensity of the violence. . . .").

81. Ned Dobos, *Justifying Humanitarian Intervention to the People Who Pay for It*, 1 PRAXIS 34 (2008). For example, "Neo-conservative political realist Charles Krauthammer proposes that if and only if humanitarian intervention is 'strategically necessary' does the intervening government act within the limits of the authority vested in it by its people." *Id.* at 44. *See generally* JACK L. GOLDSMITH & ERIC A. POSNER, THE LIMITS OF INTERNATIONAL LAW (2005); NYE, JR., *supra* note 6.

82. *See* Press Release, U.N. Secretary-General, Secretary-General Presents His Annual Report to General Assembly (Sept. 20, 1999, U.N. Press Release SG/SM/7136 GA/9596).

83. INT'L COMM'N ON INTERVENTION & STATE SOVEREIGNTY [ICISS], THE RESPONSIBILITY TO

Specifically, the United Nations came under intense criticism for its failed responses to tragedies in the Balkans and Africa in the early 1990s.[84] U.N. Secretary-General Kofi Annan, who had been responsible for U.N. Peacekeeping operations during the Rwanda genocide, urged the development of "a new global consensus on intervention for human protection."[85] He encouraged an examination of international responsibility to protect vulnerable populations while "maintaining and even strengthening the sovereignty of states."[86]

The government of Canada took the lead and helped to sponsor the International Commission on Intervention and State Sovereignty (ICISS), a transnational non-governmental body composed of individuals who had achieved prominence in international affairs.[87] The commission's mandate was to "promote a comprehensive debate on the issues, and to foster global political consensus" that would lead to action within the U.N. system.[88] Specifically, the commission was expected to "find new ways of reconciling the seemingly irreconcilable notions of intervention and state sovereignty."[89]

The most important contribution of the Responsibility to Protect Project was its reformulation of the discourse from "the right to intervene" to "the responsibility to protect."[90] The new language of responsibility was adopted primarily to avoid the historical baggage of the term "intervention" and to respond to humanitarian activists who wanted to rescue the term "humanitarian intervention" from its association with the use of force. However, the commission did acknowledge that changing terminology did not resolve the substantive questions surrounding the

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PROTECT ¶¶ 1.1–1.4, 8.6 (2001) [hereinafter ICISS REPORT], *available at* http://www.responsibilityto protect.org/ICISS%20Report.pdf.

84. *See* SEYBOLT, *supra* note 3, at 61–78; *see also* Gassama, *supra* note 75.

85. *See* Press Release, U.N. Secretary-General, Secretary-General Addresses International Peace Academy Seminar on 'The Responsibility to Protect' (Feb. 15, 2002, U.N. Press Release SG/SM/ 8125).

86. *Id.*

87. ICISS REPORT, *supra* note 83, at 77–81. Canadian Prime Minister Jean Chrétien announced the formation of the commission at the U.N. Millennium Assembly in September, 2000, as a response to the Secretary-General's appeal. Two highly regarded diplomats, Gareth Evans, President of the International Crisis Group and former Australian Foreign Minister, and Algerian diplomat Mohamed Sahnoun, were appointed as co-chairs. The other members of the commission were: Gisèle Côté-Harper, Lee Hamilton, Michael Ignatieff, Vladimir Lukin, Klaus Naumann, Cyril Ramaphosa, Fidel Ramos, Cornelio Sommaruga, Eduardo Stein, and Ramesh Thakur. *Id*. at 81, Appendix A.

88. *Id.* at 81.

89. *Id.*

90. *Id.* ¶ 2.4.

protection of the vulnerable when national authorities are unwilling or incapable of doing so.[91]

At the core of this emerging norm of responsibility to protect is the axiom "that sovereign states have a responsibility to protect their own citizens from avoidable catastrophe," and the assertion "that when they are unwilling or unable to do so, that responsibility must be borne by the broader community of states."[92] The commission articulated an understanding of state sovereignty that was predicated on the state's responsibility to protect its people. The responsibility to protect was thus defined to incorporate both national and international dimensions. The international dimension was subordinated to the state dimension, but only when the affected state was carrying out its responsibilities.[93] The right of the international community, acting through the United Nations, to intervene where and when there has been state failure was made explicit.[94] The primacy of the U.N. Security Council in the process was also confirmed where and when there has been a failure of protection at the state level.[95] However, the commission's work fell short of clearly articulating a prescriptive norm of responsibility to protect.[96] It failed to support or defend a legal obligation on the part of the international community to intervene where its right to do so is clear. The commission opened up a path toward such an obligation, but in the end settled for a largely moral and political exhortation.[97]

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91. *Id.* ¶ 2.5.

92. Garth Evans & Mohamed Sahnoun, *Foreword to* ICISS REPORT, *supra* note 83, at viii.

93. ICISS REPORT, *supra*, note 83, ¶¶ 2.15, 2.30–2.31.

94. *Id.* ¶ 2.31, 4.1, 4.7–4.9.

95. *Id.* at xii–xiii, ¶¶ 6.12–6.24, 6.36–6.40.

96. Instead, the report classified the responsibility as a "continuum." *Id.* ¶ 7.50. *See also* Alex J. Bellamy, *Whither the Responsibility to Protect? Humanitarian Intervention and the 2005 World Summit*, 20 ETHICS & INT'L AFF. 143, 169; Jutta Brunnée & Stephen Toope, *Norms, Institutions and UN Reform: The Responsibility to Protect*, 2 J. INT'L L. & INT'L REL. 121, 136 (2005) ("Given the failure to locate the responsibility to protect in any U.N. structures apart from the Security Council, the difficulties inherent in Security Council reform could come to hinder normative progress around the responsibility to protect."); Gregory C. Shaffer & Mark A. Pollack, *Hard Versus Soft Law in International Security*, 52 B.C. L. REV. 1147, 1232 (2011).

97. *E.g.*, ICISS REPORT, *supra* note 83, ¶ 8.12 ("[P]leas for international action of the kind we are dealing with in this report need to be supported by arguments having four different kinds of appeal: moral, financial, national interest and partisan."); *accord* Gareth Evans, The Responsibility to Protect and September 11, Address at the UNU/Canadian Government Seminar on The Responsibility to Protect (Dec. 16, 2002) (transcript available at http://www.crisisgroup.org/en/publication-type/speeches/2002/the-responsibility-to-protect-and-september-11.aspx) ("We did not argue in our report that there is now a sufficiently strong basis in principle and practice to claim the existence of a formal new principle of customary international law. But we did argue that the 'responsibility to protect' is an emerging international norm, or guiding principle . . . .").

The commission implored the U.N. Security Council to "deal promptly with any request for authority to intervene . . ." and asked the five permanent members of the Security Council to "agree not to apply their veto power, in matters where their vital state interests are not involved to obstruct the passage of resolution authorizing military intervention for human protection purposes. . . ."[98] The commission had no realistic proposal for dealing with situations where the Security Council fails to act in the face of an international tragedy.[99] It plaintively reminded the Security Council that its failure could lead to unilateral action and hurt the stature and credibility of the United Nations.[100] Lessons from the recent past suggest that such considerations have not proven effective in getting the Security Council to act.[101]

In spite of its considerable baggage, the Responsibility to Protect Project is the most comprehensive effort to date by the international legal and political establishment to refine acceptable legal rationales for humanitarian intervention.[102] While the responsibility to protect doctrine has not fully resolved the many legal and political issues surrounding the use of force for humanitarian reasons, it has been received in official quarters as an important step in that direction because of its recasting of old debates over humanitarian intervention.[103]

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98. ICISS REPORT, *supra* note 83, at xii–xiii.

99. The report merely warns of the dangers of inaction. *See id.* ¶¶ 6.36–6.40.

100. *Id.* at xiii.

101. *See* Press Release, U.N. Security Council, Security Council Fails to Adopt Draft Resolution on Syria as Russian Federation, China Veto Text Supporting Arab League's Proposed Peace Plan (Feb. 4, 2012, U.N. Press Release SC/10536); Bellamy, *supra* note 96, at 168.

102. *See* ICISS REPORT, *supra* note 83, ¶ 1.6 ("In an address to the 54th session of the UN General Assembly in September 1999, Secretary-General Kofi Annan reflected upon 'the prospects for human security and intervention in the next century.' He recalled the failures of the Security Council to act in Rwanda and Kosovo, and challenged the member states of the UN to 'find common ground in upholding the principles of the Charter, and acting in defence of our common humanity.' The Secretary-General warned that 'If the collective conscience of humanity . . . cannot find in the United Nations its greatest tribune, there is a grave danger that it will look elsewhere for peace and for justice.' In his Millennium Report to the General Assembly a year later, he restated the dilemma, and repeated the challenge: . . . 'if humanitarian intervention is, indeed, an unacceptable assault on sovereignty, how should we respond to a Rwanda, to a Srebrenica—to gross and systematic violations of human rights that offend every precept of our common humanity?'").

103. The project members deliberately avoided the use of the term "humanitarian intervention" primarily because of its historical baggage. *See id.* ¶ 2.2. However, their focus was in no sense substantively different from the matters addressed by the older doctrine. Their notion of responsibility also differs from traditional understanding of the term since it lacks consequences for a failure to act on the part of those supposedly responsible.

IV. THE RESPONSIBILITY TO PROTECT: CRITICAL LEGAL AND POLICY
CONCERNS

This section briefly discusses longstanding issues surrounding the legality, as well as the politics, of employing force to provide aid to others outside the jurisdiction of the providers, whether cast as collective humanitarian intervention or in the guise of the newly minted responsibility to protect. Objections to humanitarian intervention, even when cast in legal terms, have actually revolved more around moral or broader political considerations than strictly legal ones.[104] The next section argues that the responsibility to protect doctrine, absent a *broader* obligation to assist under international law, is unlikely to meet the objections of progressive communities in the United States and elsewhere to the use of force in international affairs by the more powerful members of the international community.[105] As such, it is crucial to develop a doctrine of an ongoing legal obligation in international affairs to assist without regard to traditional sovereignty-based barriers or narrow humanitarian predicates as a supplement to the emerging norm of the responsibility to protect.[106]

Many of the difficulties progressives have with humanitarian intervention mirror their broader objections to the use of armed force in international affairs. For them, longstanding efforts to restrict the use of military force in international affairs would be undermined if the humanitarian intervention exception were allowed to flourish.[107] Thus the change in formulation from humanitarian intervention to responsibility to protect has not assuaged their concerns.[108] The issue here is not whether those in need should receive international assistance, but whether assistance delivered through the use of external military force is ever a necessary, effective, or otherwise acceptable vehicle by which such assistance is to be conveyed.

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104. *See, e.g.*, Falk, *supra* note 78, *passim. See generally* 47 HUMANITARIAN INTERVENTION: NOMOS, *supra* note 3.

105. For a discussion of some of these objections, see Jonah Eaton, Note, *An Emerging Norm? Determining the Meaning and Legal Status of the Responsibility to Protect*, 32 MICH. J. INT'L L. 765 (2011). *See also* Falk, *supra* note 78.

106. *See* Payandeh, *supra* note 48.

107. U.N. Charter art. 2, para. 4 (concerning the principle of restricting military force) codified these efforts.

108. Shaffer & Pollack, *supra* note 96, at 1235; *see, e.g.*, Alex De Waal, *Darfur and the Failure of the Responsibility to Protect*, 83 INT'L AFF. 1039 (2007).

A. *Humanitarian Intervention and R2P: The Legal Issues*

Many of the arguments against humanitarian intervention should be properly classified as political objections, as opposed to strictly legal ones, if one accepts that law reflects little more than settled politics. Those who attempted to renovate the traditional discourse of humanitarian intervention in terms of an emerging doctrine of responsibility to protect recognized that the problem was primarily one of obtaining political legitimacy.[109] Yet by focusing on the language and processes of legality, the Responsibility to Protect Project replicated an old and traditionally effective means of gaining political legitimacy through the language of law. The rest of this section will examine the limits of the debate over humanitarian intervention when cast in narrow legal or doctrinal terms.

Modern international law of the post-World War II era limited the right of nations to use force in international relations and brought the issue of forcible intervention against a sovereign power into the realm of law.[110] However, Cold War politics ensured no consensus on the matter for several decades. Major tragedies of the immediate post-Cold War era in the Balkans, Somalia, and Rwanda forced the international community to deal with both the legal right and political ability to intervene across borders of sovereignty in order to aid people in distress and save lives.[111]

A traditional legalist interpretation of the issues would conclude that there is general consensus today on the narrow legal question of whether the right exists under international law to engage in humanitarian intervention.[112] This consensus predated the emergence of the

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109.   *See* ICISS REPORT, *supra* note 83, at viii:

But the text on which we have found consensus does reflect the shared views of all Commissioners as to what is politically achievable in the world as we know it today. We want no more Rwandas, and we believe that the adoption of the proposals in our report is the best way of ensuring that. We share a belief that it is critical to move the international consensus forward, and we know that we cannot begin to achieve that if we cannot find consensus among ourselves. We simply hope that what we have achieved can now be mirrored in the wider international community.

110.   *See* U.N. Charter arts. 2, 24–26, 33, 39, 51.

111.   *See* Fernando R. Teson, *Collective Humanitarian Intervention*, 17 MICH. J. INT'L L. 323 *passim* (1996); MURPHY, *supra* note 79, at 145–46.

112.   ANTONIO CASSESE, INTERNATIONAL LAW 373 (2d ed. 2005); Eaton, *supra* note 105, at 800. *See generally* Anna Bergh, The Legal Status of Humanitarian Intervention (2008) (unpublished Master's thesis, Lund University) (available at http://lup.lub.lu.se/student-papers/record/1319977/ file/1319978.pdf); DANISH INST. OF INT'L AFFAIRS, HUMANITARIAN INTERVENTION: LEGAL AND POLITICAL ASPECTS (1999). Debate in this area is around unilateral intervention without prior authorization by the U.N. *See* Thomas M. Franck & Nigel S. Rodley, *After Bangladesh: The Law of Humanitarian Intervention by Military Force*, 67 AM. J. INT'L L. 275, 276 (1973); Payandeh, *supra*

responsibility to protect doctrine. Humanitarian interventions are presumed legal when done under the authority of the United Nations Security Council and in support of human rights.[113] This is especially the case when intervention is done collectively, even if through regional multinational entities or ad hoc coalitions of states. Years before the Responsibility to Protect Project affirmed it, Fernando Teson stated, "the international community now has accepted a norm that allows collective humanitarian intervention to respond to serious human rights abuses."[114] However, there is still considerable disquiet over unilateral interventions even when sanctioned by the United Nations.[115] It is important to acknowledge that this interpretation does not address critical questions about indeterminacy, coherence, and the substantive vision of international legal doctrines, nor the structure of international law and legal regimes in general. For the purpose of this Article, these questions are best considered under the policy objections to the doctrine set out below.

The liberal legalist consensus supporting the right to engage in collective humanitarian intervention minimized sovereignty-based objections rooted in an earlier conception of international law. This is not to suggest that Pre-World War II international law was a great respecter of national sovereignty. No conception of international law has worked to protect weaker nations from the designs of the more powerful.[116] In general, international law has accorded the concept of sovereign equality only enough weight as would allow it to be employed as a flexible shield and sword by nation-states in their interactions with each other.[117] Modern international law, culminating in the U.N. Charter, retained a place for the concept in the procedural organization of inter-state affairs.[118] But it

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note 48, at 505–09; Sarah Mazzochi, *Humanitarian Intervention in a Post-Iraq, Post-Darfur World*, 17 ANN. SURV. INT'L & COMP. L. 111, 123–28 (2011).

113. *See* U.N. Charter arts. 23–54.

114. Teson, *supra* note 111, at 324; *see also* Orford, *supra* note 77, at 996 ("Humanitarian intervention was largely conceived of as an exceptional measure undertaken in situations of extreme emergency and extreme human suffering. . . . the institutional and ideological conditions of the post-Cold War period led to the growth of support amongst policy makers and academics for the idea that force could legitimately be used . . . .").

115. *See* John Nichols, *Obama Tries, Without Success, to Explain an Undeclared War*, NATION (Mar. 28, 2011), http://www.thenation.com/blog/159526/obama-tries-without-success-explain-undeclared -war; ICISS REPORT, *supra* note 83, ¶ 6.9 ("Collective intervention blessed by the U.N. is regarded as legitimate because it is duly authorized by a representative international body; unilateral intervention is seen as illegitimate because self-interested").

116. *See generally* GROVOGUI, *supra* note 20.

117. *See* Karima Bennoune, *Sovereignty vs. Suffering? Re-examining Sovereignty and Human Rights Through the Lens of Iraq*, 13 EUR. J. INT'L L. 243 (2002).

118. U.N. Charter art. 2.

sucked it dry of critical substantive force. Thus even as modern international law extolled the sovereign equality of all states, large and small, strong and weak, it bound the international community of states inexorably in such a manner that the line of demarcation between the local and the global was thin and infinitely subject to manipulation in the service of intervention.[119]

The doctrinal foundation that supports humanitarian intervention consists of the vast network of internationally binding agreements that has developed since the end of World War II. The U.N. Charter, the Genocide Convention, international human rights treaties, and the Rome Statute creating the International Criminal Court represent collectively the willingness of nations, albeit with varying motivations, to assent to some measure of a collective say in the way they conduct their business (at least under some circumstances).[120]

At the apex of this ceding of traditional sovereign prerogative is the acceptance of the authority of the United Nations Security Council to decide its jurisdictional mandate, essentially limited only by its own politics.[121] Operationally the U.N. mandate to maintain international peace and security, and to promote human rights,[122] as well as the mandates of other related multinational institutions, such as national solvency, developing markets, and trade liberalization, have also contributed to erasing hard notions of sovereignty.[123]

Today's structure of globalized existence demands an extraordinary level of co-existence and mutual dependence. Multinational organizations such as the U.N., World Bank, International Monetary Fund (IMF), World

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119. While U.N. Charter art. 2, para. 1 declares that the U.N. was "based on the sovereign equality of all its members," and art. 2, para. 7 limits U.N. authority "in matters essentially within the domestic jurisdiction of any state," the Charter makes it clear that U.N. authority under Chapter VII transcends such limitations. *See* U.N. Charter arts. 24, para. 1, 39, 41, 42, 48.

120. *See supra* notes 10–14 and accompanying text. For example, the Genocide Convention allows "Any Contracting Party [to] call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide or any of the other acts enumerated . . . ." Genocide Convention, *supra* note 11, art. VIII.

121. *See* U.N. Charter art. 39 ("The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression . . . ."); *id.* art 2, para. 7 (protecting "matters which are essentially within domestic jurisdiction" from U.N. intervention, but exempting Security Council "enforcement measures under Chapter VII.").

122. *See* U.N. Charter pmbl., art. 1.

123. *See* Articles of Agreement of the International Monetary Fund art. 1, July 22, 1944, 60 Stat. 1401, 2 U.N.T.S. 39, *amended* Mar. 3, 2011; Articles of Agreement of the International Bank for Reconstruction and Development art. 1, Dec. 27, 1945, 60 Stat. 1440, 2 U.N.T.S. 134, *amended* Feb. 16, 1989; Marrakesh Agreement Establishing the World Trade Organization art. 3, Apr. 15, 1994, 1867 U.N.T.S. 154.

Trade Organization (WTO); trade regimes such as the General Agreement on Tariff and Trade (GATT), European Union (EU), North American Free Trade Agreement (NAFTA); and global corporations such as Apple, British Petroleum, General Electric, and Microsoft have connected virtually all national communities. These institutions and entities have made non-participation in the dynamic globalization processes of a new world order, prohibitively costly for virtually all communities and individuals.[124] The fact that this structure is hierarchical, undemocratic, and grossly unjust in the eyes of many does not change this reality.[125] The inconsistency in its operations and the negative consequences of its effects can hardly be disputed. Yet this structure exists with little evidence of sustained or effective objections from governments and institutions claiming to represent those who are still very much on the outside. The fact is that it creates law that binds effectively in its daily operations. A recent example: when two former colonial powers, France and the United Kingdom, later joined by the United States, decided to employ force against the Gaddafi regime in 2011, many regimes similarly situated to Colonel Gaddafi's acquiesced.[126] This acquiescence becomes a precedent for action later, perhaps in Syria or Iran. A more longstanding example in the economic sphere is the blatant refusal of the developed nations to follow free-trade rules and allow access to agricultural products from developing countries.[127] The dire consequences faced by poor countries because of domestic agricultural subsidies by advanced economies that are in clear violation of established free-trade rules are not in dispute.[128] Yet these violations proceed unabated even as the World Trade Organization retains the acquiescence of much of the world.[129] These anomalies have

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124. *See generally* STIGLITZ, *supra* note 44; AMY CHUA, WORLD ON FIRE (2003); RICHARD BARNET & JOHN CAVANAGH, GLOBAL DREAMS (1994); THE CASE AGAINST THE GLOBAL ECONOMY (Jerry Mander & Edward Goldsmith eds., 1996).

125. STIGLITZ, *supra* note 44; BARNET & CAVANAGH, *supra* note 124; THE CASE AGAINST THE GLOBAL ECONOMY, *supra* note 124.

126. Ethan Bronner & David E. Sanger, *Arab League Endorses No-Flight Zone over Libya*, N.Y. TIMES, Mar. 13, 2011, at A1.

127. *See* Max Borders & H. Sterling Burnett, *Farm Subsidies: Devastating the World's Poor and the Environment*, NAT'L CTR. FOR POLICY ANALYSIS BRIEF ANALYSIS NO. 547 (Mar. 24, 2006), www.ncpa.org/pdfs/ba547.pdf; Press Release, World Bank, World Bank Chief Economist Urges Cuts in Rich Country Agricultural Subsidies (Nov. 19, 2002) (available at http://go.worldbank.org/OAFJF JF260).

128. IAN F. FERGUSSON, CONG. RESEARCH SERV., RL32060, WORLD TRADE ORGANIZATION NEGOTIATIONS: THE DOHA DEVELOPMENT AGENDA (2011).

129. Recurrent controversies over the selection of leaders for the International Monetary Fund and the World Bank also show the dissatisfaction and impotence of those who are trying to adjust the status quo. *See* Ariel Buira, *The Bretton Woods Institutions: Governance Without Legitimacy?* (Centre

not affected the core legitimacy of these multinational institutions. Even their victims are invested in their continued operation.

These institutions operate with the understanding that it would be more costly for them to allow disruptive crises or tragedies anywhere in the world to fester than for them to respect sovereign independence.[130] The persistence of humanitarian crises, as dictated by degree of media interest, elevates concern in the public sphere and allows for growing doubts about the legitimacy, purpose, or value of these institutions. Therefore, it is not in their interest to be seen as too powerless in the face of much-publicized emergencies. For example, people who may otherwise reject the hegemony of the IMF or World Bank may question why they have not done something when economies go into a tailspin.[131] Those who may be skeptical of the U.N. commitment to sovereign equality might put aside their disdain during a well-covered famine. Thus pressures to justify their existence and satisfy the need for intervention sometimes propel these institutions toward taking actions that further weaken barriers posed by traditional notions of sovereignty.

Two other developments have eroded sovereignty concerns and enhanced prospects for humanitarian interventions. They are technological advancements, especially those in the communications industry, and an increasing recognition that the most critical problems facing humanity, such as environmental degradation and climate change, are resolvable only by collaboration across sovereign borders. These developments have helped to make actors of diverse ideological perspectives and interests more willing to weaken the barriers posed by hard notions of national sovereignty.[132]

In the face of this mix of global structures, institutions, and entities and with the confluence of interests brought about by technology, desires, and need, opposition to the legality of humanitarian intervention is increasingly anachronistic. An inflexible political distaste for humanitarian

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for the Study of Globalisation and Regionalisation, University of Warwick, CSGR Working Paper No. 180/05, 2005); Ian Talley, *Senior IMF Economist Resigns, Cites Suppression and Europe Bias*, REAL TIME ECON., WSJ BLOGS (July 4, 2013, 7:10 PM), http://blogs.wsj.com/economics/2012/07/20/senior-imf-economist-resigns-cites-suppression-and-europe-bias/; Annie Lowrey, *College President is Obama's Pick for World Bank Chief*, N.Y. TIMES, Mar. 23, 2012, at B1, *available at* http://www.nytimes.com/ 2012/03/24/business/global/dartmouth-president-is-obamas-pick-for-world-bank.html.

130. *See supra* quote accompanying note 98.

131. In the wake of the 1997 Asian financial crisis, for instance, the IMF and World Bank were subjected to new and widespread criticisms. Tyler Marshall, *IMF, World Bank: Dispensing Loans at a Price*, L.A. TIMES (Aug. 9, 1998), http://articles.latimes.com/1998/aug/09/business/fi-11497.

132. *See* Shaffer & Pollack, *supra* note 96, at 1181, 1229, 1237–38.

intervention finds little support in the international law and politics that operate today.

B. R2P and Humanitarian Intervention: Political Objections

> The U.S. just started another war. We're good at starting wars. We're not good at ending them, but we start them really well. They say this is for "humanitarian" reasons. Aren't they all? But we still haven't intervened in arguably the clearest humanitarian crisis: Darfur. . . . Muammar Gaddafi is crazy, and brutal, and dangerous. But the U.S. has known many dictators like that and has supported them faithfully for years, as long as they are compliant with our interests. But when their craziness makes them no longer compliant, we go to war against them for the humanitarian cause of protecting their people. Right. Oh, and then there's oil. . . . It's amazing how consistent U.S. foreign policy is from administration to administration . . . .[133]

Jim Wallis' skepticism of the 2011 U.S. intervention in Libya summarizes what may be termed the political objections of many, including American progressives, to humanitarian interventions.[134] Three sets of concerns may be discerned from their objections to humanitarian intervention: (1) motivation/moral standing, (2) coherence and consistency, and (3) effectiveness and resource allocation.

1. The Problems of Motivation and Moral Standing

Critics of humanitarian interventions question the motivation of those proposing the interventions.[135] This issue is closely linked to what may be termed the "moral standing" question. The ghosts of past interventions remain to haunt all interventions. Little from the past of big power involvement in weaker nations suggests benign motivation.[136] In the case of the United States, abundant evidence from past interventions in Cuba, the Philippines, Hawaii, Haiti, Congo, and Central America, among others,[137] point to imperial motivations camouflaged in humanitarian

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133. Jim Wallis, *The Hypocrisy of War*, HUFFINGTON POST WORLD (Mar. 22, 2011, 4:13 PM), http://www.huffingtonpost.com/jim-wallis/the-hypocrisy-of-war_b_839178.html.
134. *See, e.g.*, sources cited *supra* notes 3–4.
135. *See* Wallis, *supra* note 133.
136. *See* MURPHY, *supra* note 79, at 83–116.
137. *See, e.g.*, SIDNEY LENS, THE FORGING OF THE AMERICAN EMPIRE 333–65 (2d ed. 2003).

justifications, followed by occupation, resistance, pacification, and all their attendant horrible consequences for human rights. It is further argued that a broader history of conquest to acquire the human and material resources of weaker nations, as well as the processes of globalization marked by a continuing desire for exclusive and inexpensive access to the natural resources and markets of these nations, make the humanitarian claims behind armed intervention generally suspect.[138] To many, this ignoble history, combined with a desperate present, disqualifies the United States and the West in general from carrying the banner of humanitarian rights arbiter or enforcer.

One response to these concerns is to suggest that history implicates everyone in injustice, and that the standards and practices of the past should not remain a yolk on our present-day willingness and capacity to act for the common good. Without endorsing a progress narrative, one could still argue that resistance against the old order, with its marks of imperialism and colonialism, has succeeded to such a degree that we may now be on the outskirts of a dynamic new international arrangement. This new regime could be capable of developing and supporting a richer, more textured understanding of self-determination in the context of globalization and its consequences.

Also, no one should ignore the tremendous and often quite unexpected results of the interventions of the past—benign, malicious, or otherwise. For example, a Kenyan student, active in the anti-colonial struggles of his barely independent homeland, came to the United States just a few decades ago.[139] He fathered a child with an American woman from the nation's heartland while both were temporarily sojourning in one of the outposts of this infant empire. This child became the leader of this most powerful nation less than half a century later, less than half a century after American civil rights laws began to transform widespread *de jure* racial discrimination.[140] Neither the child's mother nor father lived long enough to see this development, but the evidence of such difficult-to-predict consequences should not be dismissed. The extraordinary fact that many Americans continue to doubt the legitimacy of President Obama's claim to office by questioning the authenticity of his birth certificate, even as he

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138. *See generally* PAKENHAM, *supra* note 20; HOCHSCHILD, *supra* note 9; CONRAD, *supra* note 42. *See also* GROVOGUI, *supra* note 20.

139. *See* BARACK OBAMA, DREAMS FROM MY FATHER (1995); *Though Obama Had to Leave to Find Himself, It Is Hawaii That Made His Rise Possible*, WASH. POST (Aug. 24, 2008), http://www.washingtonpost.com/wp-dyn/content/article/2008/08/23/AR2008082301620_3.html.

140. This trend began with the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241.

wields immense powers, alerts us to the possibilities and complexities of our age.[141] Old expectations and doctrines must be subject to the constantly changing evidence that we have before us. It is far better to engage with the possibilities of providing space for new politics to emerge than to accept the status quo or stew in despair.

Besides, it could be argued who are the "we" and who are the "us" in today's international affairs. The standard divisions are crumbling with every passing moment as globalization, mid-wifed by triumphant capitalism, takes unexpected twists and turns: Capitalist versus Socialist? East versus West? North versus South? Developed versus Developing? Black versus White? Rich versus Poor? The lines are not comfortably straight or solid, perhaps not even lines anymore. It is ironic that progressives of today sometime seem just as wedded to old, apparently stable, categories as conservatives were of old. But then again it must be asked: Conservatives versus Progressives? How stable are such categories anyway?

A critical approach should be rooted in some notion of substantive justice, but it must also welcome destabilized categories and unexpected developments because those often contain the seeds of radical change. In a world where misery and violence are unwelcome constants for too many, change offers possibilities and hope. The greatest threat to creating a better future lies in a reflexive unwillingness to challenge institutions and processes that may not have been responsive in the past. It was a good thing that the United States armed forces, with the support of the United Nations, helped remove military and paramilitary forces from power in Haiti in 1994.[142] It was a terrible thing that the world community aided President Aristide's removal from office in 2004.[143] It was a good thing that armed force was eventually used in the Balkans in 1998.[144] It was a good thing that the city of Benghazi was saved from Gaddafi's forces in

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141. Alex Spillius, *Barack Obama Fights Presidential Eligibility Claims*, TELEGRAPH (Mar. 2, 2009), http://www.telegraph.co.uk/news/worldnews/barackobama/4929005/Barack-Obama-fights-presidential-eligibility-claims.html. This fringe group is called the "birthers" and makes such claims as, "Hawaii did not issue Obama a Certificate of Live Birth, they issued him a *Certification* of Live Birth." *FAQ's*, BIRTHERS.ORG, http://birthers.org/faqs/FAQ.html (last visited June 14, 2012) (emphasis added).

142. Robert I. Rotberg, *Clinton Was Right*, 102 FOREIGN POL'Y 135 (1996).

143. RANDALL ROBINSON, AN UNBROKEN AGONY (2007); *Aristide Says U.S. Deposed Him in 'Coup d'Etat'*, CNN (Mar. 2, 2004), http://edition.cnn.com/2004/WORLD/americas/03/01/aristide claim.

144. Craig R. Whitney, *Conflict in The Balkans: The Overview; NATO to Conduct Large Maneuvers to Warn Off Serbs*, N.Y. TIMES, June 12, 1998, at A10, *available at* http://www.nytimes.com/1998/06/12/world/conflict-balkans-overview-nato-conduct-large-maneuvers-warn-off-serbs.html.

2011 by United Nations-sanctioned NATO firepower.[145] It would be bad if the United Nations, NATO, and other multinational institutions support the looting of Libya's natural resources by corrupt domestic elites and multinational oil companies.[146] It is a good thing that American forces are working with African Union forces to track Joseph Kony and his dwindling cadres of ignoble rebels.[147] It would be terrible if these forces help tyrants like Uganda's President Mousuveni or Rwanda's President Kagame retain power undemocratically.[148]

The key point is that bad results are not foreordained and do not turn on whether or not humanitarian intervention is good or bad in the abstract. The results depend on how those who are actively concerned work to manage interventions like these and how critically these actions are analyzed and challenged. One does not have to accept the stated motivations or believe in the moral standing of those who propose interventions. It is more important to develop principles of human coexistence that allow for critical analysis, evaluation, and dynamic mobilization. Progressives should engage in the ongoing dialogue and ensure their relevance. Their values may well persevere and prevail.

2. The Problems of Indeterminacy and Incoherence

This type of argument claims that there have been too many cases of similarly situated tragedies that inspire unequal international focus, condemnation, or demands for intervention. The doctrine of humanitarian intervention has been advocated and applied in an inconsistent manner while the problem has not been resolved by recasting the doctrine under the guise of responsibility to protect.[149] For example, in the 1990s, the doctrine was applied in Somalia and Haiti but not in the case of Rwanda,

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145. *Responsibility to Protect: The Lessons of Libya*, ECONOMIST (May 19, 2011), http://www .economist.com/node/18709571 ("The immediate goal of protecting Benghazi from massacre was achieved within days.").

146. *Intervention in Libya an Excuse to Plunder Resources, Cuba Tells UN*, U.N. NEWS CTR. (Sept. 26, 2011), http://www.un.org/apps/news/story.asp?NewsID=39809.

147. Jeffrey Gettleman, *In Vast Jungle, U.S. Troops Aid in Search of Kony*, N.Y. TIMES, Apr. 30, 2012, at A1, *available at* http://www.nytimes.com/2012/04/30/world/africa/kony-tracked-by-us-forces-in-central-africa.html.

148. Andrew Rice, *Made Man*, NEW REPUBLIC (Feb. 27, 2006), *available at* http://news.jonzu .com/wp-content/uploads/2012/03/Made-Man-M7.pdf; Richard Grant, *Paul Kagame: Rwanda's Redeemer or Ruthless Dictator?*, TELEGRAPH (July 22, 2010), http://www.telegraph. co.uk/news/world news/africaandindianocean/rwanda/7900680/Paul-Kagame-Rwandas-redeemer-or-ruthless-dictator.html.

149. *See* Wallis, *supra* note 133.

where genocide proceeded despite sufficient warnings.[150] In more recent times, the international community has been caught woefully unprepared to respond to a series of devastating conflicts in Sub-Saharan Africa that have resulted in massive social destruction and loss of life.[151] Even more recently, the Arab Spring exposed the problem of inconsistency, as an ad-hoc international coalition responded haphazardly with lethal force in Libya while allowing other similarly situated and lethal conflicts to proceed in Syria and Bahrain.[152] Tragedies involving sustained and massive loss of life in Burma and North Korea have undermined the rationales for humanitarian intervention.[153]

Whatever processes that exist for seeking and gaining humanitarian intervention seem driven more by press attention, propaganda, ideology, and dynamic calculations of national interests than by any objective evaluation of the enormity of humanitarian deprivation or the urgency of threats to human life. Underlying the doctrine's inconsistent application are questions of the indeterminacy and incoherence of legal doctrines and procedures in general, and of humanitarian intervention in particular. These questions have not been resolved by the renaming of forcible intervention.

The Responsibility to Protect Project responded to these concerns by outlining six criteria for military intervention: right authority, just cause, right intention, last resort, proportional means, and reasonable prospects.[154] The Project's identification of these criteria came with the diplomatic equivalent of a note of exuberance: "It is perhaps not as difficult as it appears at first sight to identify criteria for military intervention for humanitarian protection purposes about which people should be able to agree."[155] Their confidence ignores strong disagreements over whether there should ever be military interventions for humanitarian reasons and disagreements over the meaning, relative importance, and

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150. MURPHY, *supra* note 79, at 244–56.

151. GARY STEWART & JOHN AMMAN, BLACK MAN'S GRAVE (2007); *West Africa's Wars: A Region In Flames*, ECONOMIST (July 3, 2003), http://www.economist.com/node/1893195/; James Rupert, *African Coups Upset March of Democracy*, WASH. POST, June 29, 1997, at A20.

152. Mark Adomanis, *A Tale of Two Repressions: Bahrain and Syria*, FORBES (Feb. 13, 2012), http://www.forbes.com/sites/markadomanis/2012/02/13/a-tale-of-two-repressions-bahrain-and-syria/.

153. *See, e.g.*, NANCY HUDSON-RODD ET AL., INT'L LAB. ORG., STATE INDUCED VIOLENCE AND POVERTY IN BURMA (2004), *available at* www.ibiblio.org/obl/docs4/State-induced_violence_ and_ poverty.pdf; Julian Ryall, *North Korea's Undercover Journalists Reveal Misery of Life in Dictatorship*, TELEGRAPH (Nov. 28, 2010), http://www.telegraph.co.uk/news/worldnews/asia/south korea/8165274/North-Koreas-undercover-journalists-reveal-misery-of-life-in-dictatorship.html.

154. *See* ICISS REPORT, *supra* note 83, ¶¶ 4.15–4.31, 4.33–4.36, 4.37–4.38, 4.39–4.40, 4.41–4.43.

155. *Id.* ¶ 4.15.

constitutive elements of each of these criteria. Their conclusions fail to appreciate the problems of indeterminacy and incoherence.

The problems of indeterminacy and incoherence are firmly connected and feed off one another. No matter how specific the criteria for intervention are stated, the indeterminacy of these concepts in the abstract cannot be avoided. The aura of legality cannot mask the reality of international and domestic politics. The existing divisions within a particular society, including dynamic perceptions of interests not just by state parties but of a whole range of actors, inevitably will factor into any concrete application of these criteria. If only terms like genocide, ethnic cleansing, and failed state would make the journey from definition to application, with the ease with which bureaucrats intone them.[156]

Incoherence speaks first to the inherent difficulties of justifying the use of armed force—war, to put it directly—for supposedly humanitarian reasons. Here, several of the stated criteria are implicated, but the proportionality question looms large. Put bluntly, how much destruction and how many people may intervening forces kill in the name of saving other people?[157] This concern exists even if the use of force is thoroughly legitimate under "right authority," and is regarded as "exceptional and extraordinary,"[158] in response to ongoing international crimes such as genocide, crimes against humanity, and large scale ethnic cleansing.[159] Surely the lessons of humanitarianism are weakened when human life is deliberately taken even if in the service of saving others. Besides, on a practical level, once the facts of violence and destruction are exposed, objective assessments of motives and legitimacy become more difficult and unstable in the minds of witnesses. Violence and death are thus more apt to be seen in their stark quantitative relativity.

Incoherence is also found in the privileging of when and how people die or suffer. The predicates of humanitarian intervention relegate an enormous quantity and variety of human suffering to the jurisdiction of human rights, and thus accept them as normal and tolerable on an everyday basis, as not necessarily the result of emergencies or deliberate governmental failures. We must question why we occasionally decide to

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156. As Cass Sunstein states about the concept of rights, "The right must be specified in order to have concrete meaning. The specification will depend on premises not contained within the announcement of the right itself." Cass R. Sunstein, *Rights and Their Critics*, 70 NOTRE DAME L. REV. 727, 730 (1995).

157. *See* Engle, *supra* note 68.

158. ICISS REPORT, *supra* note 83, ¶¶ 4.17–4.18 ("Military intervention for human protection purposes must be regarded as an exceptional and extraordinary measure . . . .").

159. Engle, *supra* note 68, at 213–16, 224–26.

employ great drama, including military force, to save some sets of people, when we tolerate ongoing human suffering, misery, and deaths on an even greater scale. Is the spectacle of particular situations, as presented to us by media or skillful lobbying, sufficient to normatively separate the fates of some from those of others? Is the very definition of humanitarian emergency and imminence designed to mask the complicity of global arrangements, which condition us to accept widespread and bottomless misery, if accomplished with dignified silence?

The critique of incoherence (and indeterminacy) attacks the optimistic view that the international community, however defined, could abstractly define and consistently employ concepts such as humanitarianism or intervention in particular situations. These terms and their definitions contain important and controversial assumptions about the way the world is and ought to be. Employing the language of legality and expending substantial resources in codifying criteria for action will not obviate inevitable conflicts over resources, privileges, and power.

3. The Problem of Efficacy/Resource Allocation

Even if one accepts the motivation of those behind humanitarian interventions and discounts the problems of inconsistency, indeterminancy, and incoherence, there are still questions about whether interventions are an effective means to aid those in crises. Humanitarian interventions often require massive deployments of human and material resources to support the intervening forces as well as to pacify the sites of intervention.[160] Many opponents of interventions question whether this form of assistance represents the best allocation of scarce resources in the world community.[161]

In the first place, despite the enormous sums required to wage such interventions, they are generally not designed to deal with the root causes of conflicts.[162] Their immediate goal is a temporary halt to conflicts that are seen as endangering people and good order. Interventions are at best

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160. Benjamin A. Valentino, *The True Costs of Humanitarian Intervention*, 90 FOREIGN AFF. 60, 67–69 (2011).

161. *See* Finnemore, *supra* note 74, at 217. "Some inadequacies are clear and have been widely discussed: [international organizations] have insufficient resources and some, like the UN, were not designed for the kinds of military missions with which they have been charged in recent years." *Id. See also* Valentino, *supra* note 160, at 69–73. "Although these costs may seem low in absolute terms, in comparison to the other ways the United States' scarce resources might have been spent to save lives abroad, humanitarian intervention begins to look almost extravagant." *Id.* at 68–69.

162. *See* Valentino, *supra* note 160, at 66–68.

very costly short-term efforts designed to buy time to come up with longer term solutions. There is also the concern that armed interventions could result in hardened positions, escalated conflicts, and a deepening of the divisions that led to the crises in the first place.[163] Furthermore, one may question why the willingness to invest great resources in military intervention is not matched by a willingness to deploy sufficient resources to deal with foundational problems underlying the crises over the long term and well before emergencies arise.[164]

V. ENHANCING THE RESPONSIBILITY TO PROTECT DOCTRINE: INCORPORATING A DUTY TO AID

The question of action to protect civilians inside states has long been fraught with controversy. Yet it is being recognised more and more widely that the question is better framed not as one of a right to intervene, but of our responsibility to protect—a responsibility borne, first and foremost, by states. The panel members . . . have agreed that the principle of non-intervention in internal affairs cannot be used to protect those who commit genocide, large-scale ethnic cleansing, or other comparable atrocities.[165]

The Responsibility to Protect Project tries to deal with legal and policy concerns by locating humanitarian intervention within a more comprehensive understanding of collective responsibility. However, the effort falls quite short. The commission's usage of the term "responsibility" in this context suggests much more than it actually delivers. The responsibility to protect reformulation sought to develop international political consensus by providing more content to the doctrine of humanitarian intervention as well as broader procedural involvement on the part of the international community. It embraced three specific components of responsibility to protect: the responsibility to prevent, responsibility to react, and responsibility to build.[166] The elaboration of these three components is valuable to the discourse of intervention and

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163. *Id.* at 63–66.
164. *Id.* at 69–70.
165. U.N. Secretary-General Kofi A. Annan, Op-Ed., *Courage to Fulfill our Responsibilities*, ECONOMIST (Dec. 2, 2004), http://www.economist.com/node/3445764. This op-ed was in response to the 2004 report of a "High-Level Panel on Threats, Challenges and Change," that the Secretary-General had set up in 2003. The report was entitled, "A More Secure World: Our Shared Responsibility."
166. ICISS REPORT, *supra* note 83, at xi.

collective responsibility. It reminds the international community of the factual arc of crisis and the complexity of intervention politics. Clearly, as the subsequent U.N. debates showed, the effort needs much more before it can be accepted by communities, including progressives, that remain deeply skeptical of the motives and goals of those who come bearing aid behind the barrel of a gun.[167]

As it is, the old and discredited assertion of an indeterminate and incoherent right of the more powerful to intervene among the less powerful for supposedly humanitarian reasons is now couched in the new language of responsibility. If substance is to prevail over form, and if we are to take seriously the necessity of coming to the aid of other humans in tremendous distress, the policy demands substantial refinements.

The responsibility to protect is, admittedly, a more benign-sounding recasting of humanitarian intervention, but substantively, it needs something beyond an ambiguous language of responsibility to even justify current practices.[168] As it is now conceived, it is exactly what the international community claims to do today, and that it does quite poorly.

Calling the doctrine a reformulation is not meant to suggest that the effort was not valuable—it could be the beginning of the political dialogue needed to redefine global responsibilities.[169] The issue is less one of a responsibility (as presently conceived) than that of a duty. As one scholar puts it, "the responsibility to protect creates no further legal obligation on states. The concept avoids the language of legal obligations, relying

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167. For examples of objections raised during these debates, see U.N. GAOR, 59th Sess., 86th plen. mtg. at 4, 10, 14, 23, U.N. Doc. A/59/PV.86 (Apr. 6, 2005); U.N. GAOR, 59th Sess., 89th plen. mtg. at 21, U.N. Doc. A/59/PV.89 (Apr. 8, 2005) (the representative from Vietnam was not "convinced that responsibility to protect is an emerging norm of international law."). The Cuban Representative addressed hypocrisies of proponents of R2P and stated, "It would be suicidal to endorse the so-called right to intervention, which so often has been used in recent times in the context of a unipolar, neo-liberal global order." Id. at 12. See also Alex J. Bellamy, The Responsibility to Protect and the Problem of Military Intervention, 84 INT'L AFF. 615, 617.

[M]any governments continue to suspect that R2P is simply a "Trojan horse" for the legitimization of unilateral intervention. On the other hand, some supporters of R2P argue that the principle that emerged from the 2005 World Summit was inadequate because it did not provide clear guidance about the circumstances in which coercive military intervention might be justified . . . .

Id.

168. As the Algerian Representative stated during the General Assembly debates on the responsibility, "[It] is extremely difficult to distinguish from the idea of humanitarian intervention which the countries of the South formally rejected in 1999. . . . It would be overly hasty to define the 'responsibility to protect' as a new norm prescribing an international collective obligation." U.N. GAOR, 59th Sess., 86th plen. mtg. at 9, U.N. Doc. A/59/PV.86 (Apr. 6, 2005).

169. Gareth Evans, From Humanitarian Intervention to the Responsibility to Protect, 24 WIS. INT'L L.J. 703, 712–13 (2007).

instead on the weaker notion of responsibility."[170] The thin notion of responsibility that is promoted in the responsibility to protect doctrine is unlikely to gain the legitimacy needed to make a difference in global responses to humanitarian tragedies where military force would be essential to save large numbers of people. The doctrine of humanitarian intervention or responsibility to protect must be shorn of its false attitude of *noblesse oblige* on the part of the "civilized" who must periodically unleash their conscience in order to help the "savages" recover their humanity. The doctrine cannot gain legitimacy if it operates in isolation from the everyday existence of misery and tragedies that characterize our world. Only an acceptance of a broader and deeper common responsibility for the world that we have created will do so.

However, the duty to engage in collective humanitarian intervention is not as well developed as the right to do so. Traditional understandings of state sovereignty and the principle of non-interference in essentially domestic matters have served as durable legal barriers.[171] The Responsibility to Protect report focused on the right of the international community, cast albeit as a responsibility, to act against national sovereignty interests, where necessary, to protect and assist vulnerable populations on humanitarian grounds.[172] Arguably this recasting of the *right* to intervene as a *responsibility* to protect measurably moved the needle in the direction of a *duty* to act. Yet, the report reflected the work of a political body that went as far as it could go in an attempt to craft a binding legal obligation absent political consensus.[173] The result did not directly engage the urgent matter of whether there should be a legal obligation on the part of the international community to engage in humanitarian intervention. It certainly did not adequately engage the important issue of responsibility for the root causes of crises that lead to demands for humanitarian intervention.[174] Engaging the latter would have

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170. Payandeh, *supra* note 48, at 514.

171. *See* Eaton, *supra* note 105, at 795–98. Opponents of a more detailed and expansive responsibility to protect doctrine fear that misuse of the doctrine will "legitimize unilateral coercive measures or intervention in the internal affairs of States." U.N. GAOR, 63d Sess., 97th plen. mtg. at 5, U.N. Doc. A/63/PV.97 (July 23, 2009) (statement of Egypt on behalf of the Non-Aligned Movement). They based this objection on principles of "respect for the sovereignty and territorial integrity of States, non-interference in their internal affairs, and respect for fundamental human rights." *Id.* at 6.

172. ICISS REPORT, *supra* note 83, ¶¶ 2.7–2.15, 2.25–2.33. "What has been gradually emerging is a parallel transition from a culture of sovereign impunity to a culture of national and international accountability." *Id.* ¶ 2.18.

173. For an overview of the lack of consensus surrounding the issue, see Eaton, *supra* note 105, at 784–98.

174. The responsibility to prevent component of the responsibility to protect adopts too narrow an

provided a pathway toward a sovereignty-trumping rationale for humanitarian intervention. As such, the report did not propose a duty to act to ameliorate actions and conditions that develop and sustain seemingly tolerable widespread misery and violence. However, the report should be credited with opening up for examination the question of such a duty as an integral part of the emerging norm of responsibility to protect.

This Article makes two arguments in this section. First, it will argue for a duty to supplement the right, to engage in traditional humanitarian intervention. Second, it will argue for an even broader duty to act before crises develop, a common obligation to confront what is now seemingly tolerable widespread misery. A duty of humanitarian intervention or even its thinner version, the responsibility to protect, will not be sustainable absent a broader duty to aid those in extreme distress. The plight of these people does not satisfy the standards of the responsibility to protect doctrine. The language of duty, as opposed to the language of right, creates a better balance between those who have the capacity to act and those on whose behalf they could claim to be acting. The concept of duty in this context would create a thicker, prescriptive version of the responsibility to protect.[175] Crucially, a failure to act under either formulation of duty posited here should result in substantive consequences. A legal obligation should create rights for those aggrieved by bad acts or failures to act to seek redress.[176]

A. *Toward A Duty of Humanitarian Intervention*

But in recent years, some of the more urgent criticisms concerning intervention are directed not at unjustified interventions but at the failure to intervene to protect human rights. The case of Rwanda is an obvious example.[177]

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understanding of root causes. It is focused on preventing crises from developing but not on curtailing more fundamental faults. *See* ICISS REPORT, *supra* note 83, ¶¶ 3.2, 3.18–3.24.

175.   See Tan, *supra* note 19, on the moral obligation to protect.

176.   BLACK'S includes in its definition of "obligation" that:

"[T]he term obligation is in law the name, not merely of the duty, but also of the correlative right. It denotes the legal relation or *vinculum juris* in its entirety, including the right of the one party, no less than the liability of the other. Looked at from the point of view of the person entitled, an obligation is a right . . . ."

BLACK'S LAW DICTIONARY (9th ed. 2009) (quoting JOHN SALMOND, JURISPRUDENCE 460 (Glanville L. Williams ed., 10th ed. 1947)).

177.   Tan, *supra* note 19, at 84.

When should we call in the troops?[178] Professors Kok-Chor Tan and Carla Bagnoli have examined the moral dimension of the duty to protect.[179] Professor Tan agrees that the ICISS report on the responsibility to protect advances the debate towards a duty to protect by making the case for the right to intervene. Tan argues, "establishing the permissibility of intervention, is, of course, a necessary first step toward showing its obligatory character . . . ."[180] But Tan also points out that "permissibility alone does not necessarily generate an obligation."[181] However, Tan argues that under the stringent criteria of humanitarian intervention, "a permissible intervention must also be obligatory."[182] Tan asserts:

> If rights violations are severe enough to override the sovereignty of the offending state, which is a cornerstone ideal in international affairs, the severity of the situation should also impose an obligation on other states to end the violation. If the right of the offending state to nonintervention may be overruled in the name of human rights, so too, it seems to me, may the right of other states to stay disengaged.[183]

Tan concedes that the duty to act under his formulation is an imperfect duty, citing an argument made by Michael Walzer: "The general problem is that intervention, even when justified . . . is an imperfect duty—a duty that doesn't belong to any particular agent. Someone ought to intervene, but no specific state in the society of states is morally bound to do so."[184] Thus there is an agency problem. However, the imperfection problem of this obligation does not arise if the duty is seen to rest squarely on the United Nations, the international body that encompasses the collectivity of the globe and is charged with principal responsibility for the preservation and promotion of peace, security, and human rights.

For Professor Carla Bagnoli, "there is a strict moral duty to intervene when fundamental human rights are violated."[185] In her view, "neutrality is morally culpable and blameworthy."[186] Bagnoli starts from a Kantian

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178. This question is specifically asked in Engle, *supra* note 68.
179. *See* Tan, *supra* note 19; Carla Bagnoli, *Humanitarian Intervention As a Perfect Duty: A Kantian Argument*, *in* 47 HUMANITARIAN INTERVENTION: NOMOS, *supra* note 3, at 117.
180. Tan, *supra* note 19, at 88.
181. *Id.* at 89.
182. *Id.* at 90.
183. *Id.*
184. *Id.* at 94–95; *see* MICHAEL WALZER, JUST AND UNJUST WARS xiii (1977).
185. Bagnoli, *supra* note 179, at 118.
186. *Id.* at 119.

understanding of humanity as "what characterizes us as persons . . . [consisting of] the capacity to decide what is valuable and what is not."[187] She argues, "human rights are ways to express our humanity . . . the duty to intervene proceeds from respect for humanity."[188] Unlike Tan, she sees this duty as a perfect duty—one of justice, not mercy or charity, and one that is independent of special relationships or considerations such as proximity, friendship, capability, expertise, or effectiveness.[189] Rather, "[i]t is a perfect duty whose performance is morally obligatory. It is a duty that proceeds from respect for humanity."[190] According to Professor Bagnoli, precisely because the duty to intervene is a perfect one, the proper authority for exercising it must reside in an international organization.[191]

Professors Tan and Bagnoli did not address the legal or political basis for the duty to protect. However, a collective international legal and political obligation to act in the face of human calamity could be traced to one of the most significant developments of the human rights era, the Genocide Convention of 1948.[192] Additional legal doctrinal support for such a responsibility could be found in the panoply of other international human rights and humanitarian agreements that has emerged since the end of World War II.[193]

The Genocide Convention, one of the first treaties to emerge from the devastation of World War II, did more than highlight communal horror at the carnage of total warfare. It also reaffirmed the intimate connections between international disorder and the way a state treats its inhabitants. It reflected a conviction that the defense of human dignity, even across sovereign international boundaries, is essential to maintaining international peace and security.[194] The Convention consciously made genocide a crime under international law "whether committed in time of peace or in time of war."[195] Critical to the argument here, the Convention also created a responsibility "to prevent and punish" on the part of the parties to the Convention and the international community in general.[196]

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187. *Id.*
188. *Id.*
189. *Id.* at 120–21.
190. *Id.* at 125.
191. *Id.* at 136.
192. Genocide Convention, *supra* note 11.
193. *See id.*; Payandeh, *supra* note 48.
194. Genocide Convention, *supra* note 11; *see also* U.N. Charter pmbl.
195. Genocide Convention, *supra* note 11, art. I.
196. *Id.*

This responsibility to prevent and punish, coupled with the comprehensive definition of the crime of genocide itself and the broad set of punishable ancillary acts, established a high standard of international responsibility to protect victims of the most serious human rights abuses.[197] Any strengthening of the norm of humanitarian intervention or the responsibility to protect cannot be disconnected from this philosophical and doctrinal heritage. Today, the crime of genocide is without question the most odious expression of international criminality—a first among the category of peremptory norms of general international law or *jus cogens*.[198]

The U.N. Charter, the Universal Declaration of Human Rights, and subsequent standard-setting human rights treaties of the era have also helped to erase the legal and political barriers to collective transnational humanitarian intervention.[199] These normative achievements impel us further toward an understanding of human rights that promotes legal responsibility in the full sense of the term.[200] They obligate us to engage in humanitarian intervention in crisis situations when necessary and also to act more broadly to ameliorate serious, persistent, and pervasive violations of human rights that have not yet reached current definitions of a crisis. It is essential that human rights principles, not just humanitarian expectations, factor into the decisions of when and where to send in the troops.[201]

In conventional discourse, human rights treaties have been interpreted to make national governments primarily responsible for the defense and

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197. *Id.* arts. II–VI.

198. *See* Vienna Convention on the Law of Treaties art. 53, May 23, 1969, 1155 U.N.T.S. 331; M. Cherif Bassiouni, *International Crimes:* Jus Cogens *and* Obligatio Erga Omnes, 59 L. & CONTEMP. PROBS. 63, 68 (1996) ("The legal literature discloses that the following international crimes are *jus cogens*: aggression, genocide, crimes against humanity, war crimes, piracy, slavery and slave-related practices, and torture.").

199. *See* Teson, *supra* note 111, at 336 ("The content and purpose of state sovereignty have undergone profound changes since 1945, and more dramatically since 1989. Human beings have claims against their own states and governments that the international community cannot merely ignore."). *See also* ICISS REPORT, *supra* note 83, ¶¶ 6.2–6.11. "In the field of state-citizen relations, the totality of Charter clauses and instruments like the Universal Declaration of Human Rights restrict the authority of states to cause harm to their own people within territorial borders." *Id.* ¶ 6.10.

200. BLACK'S LAW DICTIONARY (9th ed. 2009) defines "responsibility" as "liability" and includes in its definition: "'Responsibility means answerability or accountability.'" (quoting ROLLIN M. PERKINS & RONALD N. BOYCE, CRIMINAL LAW AND PROCEDURE: CASES AND MATERIALS 399 (5th ed. 1977)).

201. "It would be a very narrow definition of justice indeed which would not include human rights in any context." Teson, *supra* note 111, at 340.

fulfillment of human rights.[202] This is also the case with humanitarian norms.[203] Thus, while human rights standards were mostly conceived, established, or promoted internationally, their realization was, in concept, left primarily to national capabilities. The development and spread of international non-governmental organizations have helped to moderate this division of responsibilities, but they have not eliminated it.[204] This bifurcation between the international and national has rebounded to the benefit of both malevolent domestic elites and politically and economically powerful transnational interests. Their combined short-term political and economic interests have supported this amoral, facile, and ultimately destabilizing division of what should be global communal responsibilities.[205]

Thus, under the current operative regime, developed nations and, in particular, their multinational corporate entities, have retained flexibility to defend and promote narrow national or corporate interests while preaching broader abstract and often quite noble global rules.[206] They have avoided specific responsibility for consequences (political, economic, and environmental, for example) outside their formal legal jurisdiction.[207] No conception of sovereignty or human rights has prevented them from acting

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202. *See generally* Hurst Hannum, *The UDHR in National and International Law*, 3 HEALTH & HUM. RTS. 145 (1998).

203. *What is International Humanitarian Law?*, INT'L COMM. OF THE RED CROSS [ICRC] (July 31, 2004), http://www.icrc.org/eng/assets/files/other/what_is_ihl.pdf.

204. *See generally* Amanda Murdie, *The Impact of Human Rights NGO Activity on Human Rights Practices*, 4 INT'L NGO J. 421 (2009).

205. *See* CATHERINE AGG, U.N. RESEARCH INST. FOR SOC. DEV., TRENDS IN GOVERNMENT SUPPORT FOR NON-GOVERNMENTAL ORGANIZATIONS (Civil Soc'y & Soc. Movements Programme Paper No. 23, 2006), *available at* http://unpan1.un.org/intradoc/groups/public/documents/un-dpadm/un pan040102.pdf.

206. For example, businesses can now participate in the Global Compact, where they can "voluntarily align their operations with ten universal principles in the areas of human rights, labour standards, the environment and anti-corruption . . ." Andreas Rasche & Georg Kell, *Introduction: the United Nations Global Compact—Retrospect and Prospect*, *in* THE UNITED NATIONS GLOBAL COMPACT: ACHIEVEMENTS, TRENDS AND CHALLENGES 1, 4 (Andreas Rasche & Georg Kell eds., 2010). However, one need only to look at the support Shell Oil is receiving in the U.S. Supreme Court from governments attempting to limit liability with regards to human rights to see that narrow interests are still very much at work. Shell Oil is a participant in the Global Compact. *See* Rosaria Burchielli & Annie Delaney, *Oil for Lives? When Governments Help Bad Corporations*, CONVERSATION (June 25, 2012), http://theconversation.edu.au/oil-for-lives-when-governments-help-bad-corporations-7634; Rebekah Kebede, *Shell Nigeria Case May Temper Big Oil Policies*, REUTERS, June 18, 2009, *available at* http://www.reuters.com/article/2009/06/18/us-nigeria-abuses-settlement-analysis-idUS TRE55H6A620090618.

207. U.N. Human Rights Council, Protect, Respect and Remedy: a Framework for Business and Human Rights: Rep. of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie, 8th Sess., ¶¶ 12–16, U.N. Doc. A/HRC/8/5 (Apr. 7, 2008).

to protect their particular interests or promote their agenda-of-the-moment in foreign lands. Instead, they eagerly hide behind a limited conception of national jurisdiction or sovereignty to avoid responsibility for human suffering and deaths in other places.[208] Their intimate roles in developing and maintaining the structures of global suffering are thus hidden in legal shadows.

For a time, the politics of the Cold War made it difficult to grapple with the inconsistencies between noble pronouncements and actual practices.[209] Now, in the post post-Cold War period, the global community should be expected to return to the unfinished business of building the architecture of collective international responsibility, going beyond narrow and myopic formulations. There is an opportunity now to bridge the divide between those who demand action against calamity and spectacular oppression and those who remain deeply skeptical of such actions because of the dangers of foreign interventions. As for those who are motivated by other goals, be it isolationism or imperial domination, they are unlikely to accept any efforts to develop legal standards that could regulate the abilities of the more powerful to act in their perceived interests.[210]

Ideally, an international agreement would be developed to confer on the U.N. an explicit obligation to intervene that integrates and enhances the responsibility to protect. Such an agreement would build on the work of the drafters of the responsibility to protect. The ICISS commission and subsequent U.N. deliberations were careful to contain the responsibility to protect doctrine to extreme cases, and to provide for a process that would

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208. *See* Burchielli & Delaney, *supra* note 206. The most recent case to develop this issue is Kiobel et al. v. Royal Dutch Petroleum Co. et al., 569 U.S. ____ (2013) (No. 10-1491), *slip opinion available at* http://www.supremecourt.gov/opinions/12pdf/10-1491_l6gn.pdf.

209. It is no surprise that the government of South Africa was perfecting racism under the policy of apartheid even as it played a role in the development of the UDHR in 1948. *See, e.g.*, Prohibition of Mixed Marriages Act 55 of 1949; Population Registration Act 30 of 1950. South Africa did abstain from voting on the UDHR in the General Assembly. Peter Bailey, *The Creation of the Universal Declaration of Human Rights*, UNIVERSALRIGHTS.NET, http://www.universalrights.net/main/creation .htm.

210. Letter from Ambassador John Bolton, Permanent Representative of the United States of America to the United Nations (Aug. 30, 2005), *available at* http://www.responsibilitytoprotect.org/ files/US_Boltonletter_R2P_30Aug05%5B1%5D.pdf. U.S. opposition to constraints on the ability of the United States to act as it chooses in international relations (expressed in the Bolton letter) is an old one that has been in tension with U.S. calls for international law.

>   In an early manifestation of concerns that would come to the fore during the George W. Bush administration, the Clinton Administration in the United States opposed criteria that could constrain its freedom of action and create a legal *obligation* for the United States to intervene where the proposed criteria were met.

Shaffer & Pollack, *supra* note 96, at 1218 (footnote omitted). *See generally* GOLDSMITH & POSNER, *supra* note 81. *See also* MOYNIHAN, *supra* note 70, at 120–77.

leave the decision over when force is to be employed in the hands of the most powerful states.[211] Emphasis was placed on strengthening national power over citizens under the guise of encouraging government responsibility for the welfare of people.[212] International responsibility was secondary and contingent. Incorporating a more meaningful international obligation to act would provide more balance to this process. If the failure of national governments to be responsible incurs the cost of reducing their national sovereignty, failure of the international community to respond should also have consequences. This change would enrich and strengthen a culture of collective responsibility. It would also push the international community to act urgently to deal with developing crises and indeed to be more fully engaged well before situations get to the crisis stage.[213]

The surest way to make such an obligation consequential for those victimized by the failure to intervene or by inadequate intervention is to give victims a substantial remedy. Take, for example, Rwandans, who had to settle for after-the-fact apologies from President Clinton and the UN.[214] Post-atrocity apologies, international tribunals, and self-criticism should at least be supplemented by legal sanctions against those who were broadly complicit or those who had the responsibility to act but failed to do so. In addition, there should be a legal determination of injury as well as material compensation for those individuals and groups harmed by the collective failure to act. Accountability for consequences of a failure to act could be realized, for example, through a new international agreement that could provide for access to the International Court of Justice, either through an advisory opinion or by way of a complaint brought by a state party.[215]

What fundamentally separates this thicker version of responsibility, better called duty, from the current conception of responsibility to protect

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211. ICISS REPORT, *supra* note 83, ¶¶ 4.10–4.17, 4.39–4.43; 2005 World Summit Outcome, *supra* note 45, paras. 138–39.

212. ICISS REPORT, *supra* note 83, ¶¶ 2.14–2.23.

213. *See* Tessa Davis, Note, *Taking International Law at Its Word and Its Spirit: Re-Envisioning Responsibility to Protect as a Binding Principle of International Law*, 38 FLA. ST. U. L. REV. 883, 906–09. "[N]ations must inevitably realize they have already made the commitment to act." *Id.* at 909.

214. International Day of Reflection on the 1994 Genocide in Rwanda, G.A. Res. 58/234, U.N. Doc. A/RES/58/234 (Dec. 23, 2003); President William J. Clinton, Remarks by the President to Genocide Survivors, Assistance Workers, and U.S. and Rwanda Government Officials (Mar. 25, 1998), *available at* http://clinton6.nara.gov/1998/03/1998-03-25-remarks-by-the-president-to-genocide -survivors.html.

215. *See* Statute of the International Court of Justice arts. 34, 36, 65, June 26, 1945, 59 Stat. 1031, 33 U.N.T.S. 993. This author fully appreciates the tremendous difficulties that would confront any effort at true international accountability. The critical point made here is that without such accountability, humanitarian intervention would continue to be deprived of the legitimacy it deserves within a broad segment of the international community, including Western progressives.

is what happens when there is a failure to act. By explicitly allowing consequences to be determined through a legal process, the international community's duty to act would adjust the current balance that is heavy with rhetoric and regret but light on real actions. Current international structures are supported in their incapacity or unwillingness to act both by those who benefit from crises as well as those who are ambivalent toward military intervention. They have little incentive to change.

Collective consequences would be a far better measure of the state of human rights and humanitarian standards than the rather obscene obsession with international trials for the very few who are later identified as appropriate culprits. The Special Court for Sierra Leone, operating out of the International Criminal Court, for example, has tried and convicted Charles Taylor for his role in the brutal conflicts that engulfed a broad slice of West Africa for more than a decade.[216] Yet that decade-long conflict was fueled largely by the substitution of gem diamonds as currency to purchase weapons and other attributes of raw power. It would be absurd to suggest a resolution of the conflicts without casting a broader net of responsibility for those who fostered the conflict from afar and those who failed to come to the aid of the millions victimized even when the costs of such assistance were relatively low. Such superficial interventions as we now have set the stage for other rounds of similarly motivated conflicts. The shame of our collective failures will not be erased by the central role given to the prosecution of a few warlords after the fact. The victims would be better served by having their claims against the complicit and those that failed to assist them heard in an international forum.

B. Towards A Broader Collective Duty To Assist in International Affairs

Each day, some 50,000 human beings—mostly children, mostly female and mostly people of color—die from starvation, diarrhea, pneumonia, tuberculosis, malaria, measles, perinatal conditions and other poverty–related causes . . . .

. . . This catastrophe [of vast poverty] was and is happening, foreseeably, under a global institutional order designed for the benefit of the affluent countries' governments, corporations and

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216. *Taylor Convicted of Sierra Leone Crimes*, USA TODAY (Apr. 26, 2012), http://www.usa today.com/news/world/story/2012-04-26/taylor-war-crimes/54549300/1; Press Release, Int'l Crim. Ct., The Special Court for Sierra Leone to use ICC Facilities for Trial of Charles Taylor (June 21, 2006, Press Release ICC-20060621-140).

citizens and of the poor countries' political and military elites. . . .
Even now severe poverty could be rapidly reduced through feasible
reforms that would modify the more harmful features of this global
order or mitigate their impact.[217]

1. Accepting Political Responsibility

"There are no innocents. There are, however, different degrees of
responsibility."[218]

To make a legitimate case for collective international responsibility to
engage in humanitarian intervention in extreme cases, the responsibility to
protect doctrine should be broadened to include a duty to act also against
non-spectacular, everyday, entrenched instances of violence and misery.
The work of political philosopher Iris Marion Young[219] provides a helpful
foundation for such a re-conceptualization of international responsibility.

Professor Young has written about the need for a deeper acceptance of
collective political responsibility for the global environment that has made
crises and widespread deprivation a constant of our existence.[220] She calls
this environment one of structural social injustice.[221] She asks specifically,
"[h]ow should agents think about responsibility in relation to structural
social injustice?"[222] Professor Young developed a theory of "political
responsibility" as distinct from the more widely accepted "liability model
of responsibility" as one answer.[223] Her elaboration of political

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217. Thomas Pogge, *Recognized and Violated By International Law: The Human Rights of the
Global Poor* (2005), *reprinted in* STEINER ET AL., INTERNATIONAL HUMAN RIGHTS IN CONTEXT 311,
312 (3d ed. 2007).

218. STIEG LARSSON, THE GIRL WHO PLAYED WITH FIRE 323 (Reg Keeland trans. 2010) (2006).

219. Cass Sunstein called Marion Young "one of the most important political philosophers of the
past quarter-century." She died in 2006. *Iris Marion Young, 1949–2006*, UNIV. CHI. NEWS OFFICE
(Aug. 2, 2006), http://www-news.uchicago.edu/releases/06/060802.young.shtml.

220. Young, *supra* note 21. *See generally* YOUNG, *supra* note 22.

221. Young, *supra* note 21, *passim*.

222. *Id.* at 388.

223. Young distinguishes between the two models in five respects:

(1) Unlike responsibility as liability, political responsibility does not isolate some
responsibility parties in order to absolve others. (2) Whereas blame or liability seeks remedy
for a deviation from an acceptable norm, usually by an event that has reached a terminus, with
political responsibility we are concerned with structural causes of injustice that are normal
and ongoing. (3) Political responsibility is more forward-looking than backward-looking. (4)
What it means to take up or assign political responsibility is more open and discretionary than
what it means to hold an agent blameworthy or liable. (5) An agent shares political
responsibility with others whose actions contribute to the structural processes that produce
injustice.

Id.

responsibility provides a theoretical approach that frees domestic as well as international institutions from the traditional constraints on thinking about international relations. Such restraints undergird the tragically thin notion of communal obligation that is at the heart of the responsibility to protect norm.

As Professor Young describes it, political responsibility is not limited by "the boundaries of a state or political jurisdiction" because structural injustice is within and across national boundaries and its scope is derived "from the connections generated by the structural processes."[224] Young provides a substantive vision of transnational responsibility that moves the discourse of responsibility toward what should be properly called a duty or obligation to act. Even though this understanding of responsibility is not based on a liability model, it is similar enough to create a parallel to municipal tort regimes that come with concrete consequences for failure to act where there is a duty.

Young's concept of political responsibility speaks to both the narrow justifications for international collective actions adopted by the drafters of the ICISS report and the broader obligation to act *before* the rather regular spectacular manifestations of structural injustices occur. Her conception of political responsibility would allow us to transcend the limitations of the "core principles" of the responsibility to protect outlined in the original ICISS report,[225] as well as the result of the U.N. debates on the doctrine that took place in 2005 and 2009.[226]

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224. *Id.*
225. ICISS REPORT, *supra* note 83, at xi.
226. *See* 2005 World Summit Outcome, *supra* note 45, paras. 138–39.

Responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity

138. Each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity. This responsibility entails the prevention of such crimes, including their incitement, through appropriate and necessary means. We accept that responsibility and will act in accordance with it. The international community should, as appropriate, encourage and help States to exercise this responsibility and support the United Nations in establishing an early warning capability.

139. The international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the Charter, to help protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. In this context, we are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities manifestly fail to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity. We stress the need for the General Assembly to continue consideration of the responsibility to protect populations from

The authors of the Responsibility to Protect report did not directly confront the overwhelming evidence of the role that structural social injustice plays in developing, nurturing, and defending the everyday culture of acceptable misery policed by necessary violence.[227] For one thing, they deliberately relegated human rights norms to secondary considerations while reaffirming traditional and narrow humanitarian considerations. Their conception of responsibility retains the position that humanitarian intervention is justified only in response to a particular species of extraordinary wrongs in an otherwise not-so-bad international community. Every call for humanitarian intervention in this scheme is thus appreciated as a separate, unique episode or a discrete instance of failure on the part of an otherwise acceptable global structure. In this light, the very adoption of a compromised and thin conception of responsibility covers up the breadth and depth of foundational issues and structural injustice. Their conclusions, therefore, help to absolve those arguably most responsible because of direct action, deliberate indifference to human suffering, complicity, or just plain unwillingness to act.

The original ICISS report could thus be seen as the diplomatic equivalent of "putting lipstick on a pig."[228] The lipstick in this case is humanitarian intervention, a much-discredited doctrine among all except the poor unfortunate masses who, in despair, sometimes turn to it in last ditch efforts to defend against certain destruction.[229] The pig is, of course,

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genocide, war crimes, ethnic cleansing and crimes against humanity and its implications, bearing in mind the principles of the Charter and international law. We also intend to commit ourselves, as necessary and appropriate, to helping States build capacity to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity and to assisting those which are under stress before crises and conflicts break out.

Id. See also U.N. Secretary-General, *Implementing the Responsibility to Protect: Report of the Secretary-General*, U.N. Doc. A/63/677 (Jan. 12, 2009). After extensive debates on the Secretary-General's report, the U.N. General Assembly passed a resolution that took note of the report and committed itself to keep discussing the responsibility to protect. Thus to the extent that there is an international political consensus, it is to the effect the responsibility to protect exists, and that it is probably legitimate only if confined to instances of violations of specific humanitarian laws: genocide, war crimes, ethnic cleansing, and crimes against humanity. U.N. GAOR, 63d Sess., 98th plen. mtg. at 3, 6, 13, 18, 23, U.N. Doc. A/63/PV.98 (July 24, 2009).

227. Arguably the responsibility to prevent and the responsibility to rebuild are components of the responsibility to protect that speak toward a broader conception of responsibility. Yet, it must be noted that none of these components are obligatory on the part of the international community.

228. The earliest use of this specific expression of the futility of trying to change the essence of something unpleasant, to make pretty something that is ugly, or to convert something that is useless to useful has been traced to a 1985 article in the Washington Post. *See* Ben Zimmer, *Who First Put "Lipstick on a Pig"?*, SLATE (Sept. 10, 2008), http://www.slate.com/articles/news_and_politics/ explainer/2008/09/who_first_put_lipstick_on_a_pig.html. Zimmer's occasion for writing was a mild controversy that had followed then-candidate Barack Obama's use of the expression.

229. *See, e.g.*, *Syrian Opposition Calls for International Military Intervention*, CNN (Mar. 12,

the world of misery and violence that is being covered up. The subsequent U.N. debates on the doctrine essentially exposed the insufficiency of the cover up. Many who were opposed to keeping the world as it is were not fooled. They hardly budged. Broadening and deepening international collective responsibility holds more promise to move the dialogue forward.

2. Mapping the Structure of Global Social Injustice

The evidence of global structural social injustice is so abundant that the matter of its existence and causes should be beyond dispute even if there is disagreement as to how to deal with its consequences. Numerous periodic reports from global institutions like the World Bank and the United Nations Development Program (UNDP), regional organizations, national authorities and nongovernmental organizations, and scholars in many disciplines testify comprehensively to the hardiness of misery in the world.[230]

According to the most authoritative sources, somewhere between 40% and 50% of humanity lives in a state of poverty.[231] This estimate is based on defining poor as those who live on less than $2.50 a day.[232] Focusing on those considered to be abjectly poor, the number hovers around the 20% mark, or over a billion people.[233] Both the World Bank and the UNDP have generally employed income-based definitions of poverty to provide a picture of poverty and inequality in the world. In 1990, the UNDP began to issue the Human Development Report, its seminal

2012), http://articles.cnn.com/2012-03-12/middleeast/world_meast_syria-unrest_1_idlib-syrian-national-council-syrian-opposition; Douglas Hamilton, *Syria Intervention Drive Mirrors Bosnia's History*, REUTERS, Feb. 19, 2012, *available at* http://www.reuters.com/article/2012/02/19/us-syria-bosnia-lessons-idUSTRE81I05920120219; Fatimah Shalash, Op-Ed, *Violence in Libya Demands International Intervention*, KY. KERNEL (Feb. 21, 2011), http://kykernel.com/2011/02/21/violence-in-libya-demands-international-intervention; Alex De Waal, *The Wrong Lessons: The Vanishing Legacy of Operation Restore Hope*, BOS. REV. (Dec. 2003–Jan. 2004), http://bostonreview.net/BR28.6/dewaal.html; Luke Glanville, *Somalia Reconsidered*, J. HUMANITARIAN ASSISTANCE 1, 3 (2005), http://sites.tufts.edu/jha/files/2011/04/a178.pdf.

230. *See generally, e.g.*, 2010 Human Development Report, *supra* note 35. The World Bank also publishes regular World Developments Reports. That these reports need to be published year after year illustrates the intractability of misery and the inadequacies of current politics.

231. Anup Shah, *Poverty Facts and Stats*, GLOBAL ISSUES (Sept. 20, 2010), http://www.global issues.org/article/26/poverty-facts-and-stats#src1. The data comes from The World Bank's world development indicators of 2008. *See also* 2010 Human Development Report, *supra* note 35, at 8.

232. Shah, *supra* note 231.

233. *Id.*

publication on the human condition.[234] Over more than two decades, the reports have tracked the state of humanity from a perspective that employs a broad and complex understanding of human development. They have provided highly regarded and vital maps of the structures of global social injustice.

A core feature of the report is the Human Development Index (HDI), a set of comprehensive data on economic and social factors that has proven invaluable to scholars and policy-makers.[235] The reports initially focused on income, health, and education factors in assessing the state of human development within and across countries, which is then captured in various indices that make up the HDI. However, in the 2010 Human Development Report, the HDI was broadened to reflect concerns that it "'captures a few of people's choices and leaves out many that people may value highly—economic, social and political freedom, and protection against violence, insecurity and discrimination . . . .'"[236] The report conceded that "[s]ignificant aggregate progress in health, education and income is qualified by high and persistent inequality, unsustainable production patterns and disempowerment of large groups of people around the world."[237] It introduced three multidimensional measures of inequality and poverty to provide a better picture of the complex forces that have made global misery so resilient:[238]

> 1. "The Inequality-Adjusted HDI (IHDI), estimated for 139 countries, captures the losses in human development due to inequality in health, education and income."[239]

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234. *History of the Human Development Report*, HUMAN DEVELOPMENT REPORTS, http://hdr. undp.org/en/humandev/reports (last visited July 8, 2012). Two renowned economists, Mahbub ul Haq and Amartya Sen, were the leading forces behind the reports that sought to put people at the center of discourse about economics and development. *About Human Development*, HUMAN DEVELOPMENT REPORTS, http://hdr.undp.org/en/humandev (last visited July 8, 2012).

235. The report analyzes data on life expectancy at birth, adult literacy, school enrolment, and GDP per capita to come up with various rankings and indices, including a comprehensive HDI value for each country. Thus Norway, Sweden, and Canada were the top three HDI ranked countries in 2002 with HDI values above 0.94. Sierra Leone, and Niger ranked at the bottom, with HDI values below 0.30. U.N. Dev. Programme, *Deepening Democracy in a Fragmented World*, 2002 HUMAN DEVELOPMENT REPORT 149, 152 (2002).

236. 2010 Human Development Report, *supra* note 35, at 85 (quoting U.N. Dev. Programme, 1990 HUMAN DEVELOPMENT REPORT 16).

237. *Id.*

238. *Id.* at 86.

239. *Id.* The IHDI is designed to be "directly comparable to the HDI, reflecting inequality in each dimension of the HDI for a large number of countries." *Id.* at 87. However, "the IHDI takes into account not only a country's average human development, as measured by health, education and income indicators, but also how it is distributed." *Id.* Thus the "HDI can be viewed as an index of

2. "The Gender Inequality Index (GII), estimated for 138 countries, reveals gender disparities in reproductive health, empowerment and labour market participation."[240]

3. "The Multidimensional Poverty Index (MPI) identifies overlapping deprivations suffered by households in health, education and living standards."[241]

These innovations were designed to better capture the "full picture" of deprivation that average statistics tend to minimize.[242] The results affirmed even more graphically the breadth and depth of deprivation in a world of considerable abundance.

Perhaps the index's principal accomplishment is to show the many and complex ways in which poverty and inequality are developed and maintained among a solid proportion of humanity. It also provides substantial evidence of broad complicity and indifference among those who are prospering in the global environment where poverty and inequality thrive. All the indices suggest that those who were at the bottom of the well have generally stayed there. For example, "[p]eople in sub-Saharan Africa suffer the largest HDI losses because of substantial inequality across all three dimensions, followed by South Asia and the Arab States."[243] On the other hand, "[p]eople in developed countries experience the least inequality in human development."[244] With regard to gender, the report confirmed a strong correlation "between gender inequality and the loss due to inequality in the distribution of the HDI. This suggests that countries with an unequal distribution of human development also experience high inequality between women and men and that countries with high gender inequality also have an unequal distribution of human development."[245]

'potential' human development (or the maximum IHDI that can be achieved if there were no inequality) while the IHDI is the actual level of human development (accounting for inequality)." *Id.*

240. *Id.* at 86. The GII includes "educational attainment, economic and political participation and female-specific health issues" and accounts "for overlapping inequalities at the national level." *Id.* at 89. The GII is designed to meet some of the criticisms directed at earlier measures such as the Gender Development Index (GDI), and the Gender Empowerment Measure (GEM). It "captures the loss of achievement in key dimensions due to gender inequality." *Id.* at 90.

241. *Id.* at 86. "The MPI is grounded in the capability approach. . . . [It] complements monetary-based methods by taking a broader approach." *Id.* at 94.

242. *Id.* at 85.

243. 2010 Human Development Report, *supra* note 35, at 87.

244. *Id.*

245. *Id.* at 93.

The MPI tracked measures of income-poverty while capturing "overlapping but still distinct aspects of poverty. Plotting the national headcounts of those who are income poor (using the $1.25 a day poverty line) against those who are multidimensionally poor shows that in most countries . . . the number of people who are multidimensionally poor is higher."[246] Further, the report found that the "aggregate estimate of 1.75 billion multidimensionally poor people exceeds the 1.44 billion people estimated to be living on less than $1.25 a day in the same countries, but it is below the 2.6 billion people estimated to be living on less than $2 a day."[247] The report also tracked regional rates of multidimensional poverty and confirmed traditional expectations. The rate varied from "around 3 percent in Europe and Central Asia to 65 percent in Sub-Saharan Africa."[248] It also found that "South Asia is home to the largest number of people living in multidimensional poverty, followed by Sub-Saharan Africa."[249]

Thomas Pogge is a leading figure whose work has focused on the structural injustices that undergird these grave statistics.[250] His moral, political, and legal arguments complement Professor Young's idea of political responsibility. He argues that the persistence of abject misery is a direct and eminently foreseeable result of historical and contemporary political and economic choices on the part of dominant actors in the global community.[251] His work deconstructs the architecture of rationalization that allows the rich to evade responsibility for the plight of the poor. He also exposes the intimate connections forged over time between the powerful in the developed world and domestic elites in the poor countries as wealth was extracted from the latter while misery and violence were left behind.[252] Most critically, he rejects the notion that charity is a sufficient and effective substitute for responsibility owed.[253] He urges moral, political, and legal responsibility on the part of the international

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246. *Id.* at 96.
247. *Id.*
248. *Id.* at 97.
249. *Id.*
250. *See* POGGE, WORLD POVERTY AND HUMAN RIGHTS, *supra* note 22; Thomas Pogge, *Severe Poverty as a Violation of Negative Duties*, 19 ETHICS & INT'L AFFS. 55 (2005); Thomas Pogge, *Severe Poverty as a Human Rights Violation, in* FREEDOM FROM POVERTY AS A HUMAN RIGHT: WHO OWES WHAT TO THE VERY POOR 11 (Thomas Pogge ed., 2007).
251. Pogge, *Severe Poverty as a Violation of Negative Duties*, *supra* note 250, at 55.
252. *Id.* at 71–74.
253. Pogge, *Severe Poverty as a Human Rights Violation*, *supra* note 250, at 28–29.

community, specifically the rich countries, for the persistent state of human deprivation in the poorer countries.[254]

The command responsibility of these transnational elite actors derives not only from acting to create the structures of violence and misery but also from deliberate failures to act to ameliorate the results of their wrongs—failures that in cases could amount to deliberate indifference.[255] Young's argument for understanding political responsibility more broadly helps to bridge the gulf of suspicion undergirding the opposition to the use of force even in extreme cases. Understandably, many first want a demonstration of true community before accepting the episodic expressions of concern or solidarity behind calls for humanitarian intervention.

In this vein, Nobel Prize winner Nadine Gordimer wrote in 1997 about Nigerian military dictator General Sani Abacha and the intimate connections between the global oil industry (the foundation of wealth and prosperity in many developed countries), on the one hand, and political repression, economic inequality, and environmental devastation that characterized Nigeria on the other.[256] She pointed out that the oil fields managed by Western multinationals, like Shell Oil, provided 80% of the revenues of a military regime that persecuted human rights and environmental activists like Ken Saro Wiwa, and threatened oil industry workers with the death penalty for striking.[257] Gordimer did not write about the overwhelming state of corruption that ensured gross poverty and inequality amidst enormous revenues for oil, but that has been chronicled by others.[258]

Another article by *New York Times* reporter Howard French provided a broader picture of the deeply interconnected nature of wealth in the developed world with abject poverty and gross inequality in Sub-Saharan Africa, the poorest and most unequal region in the world.[259] Mr. French wrote about Africa's "geological scandals," countries with abundant mineral resources that are beset by instability, violence, repression,

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254. *Id. passim.*

255. *See* Pogge, *Severe Poverty as a Violation of Negative Duties*, *supra* note 250, at 78–83.

256. The celebrated Ken Saro Wiwa and many of his colleagues were executed by the regime despite international outcry. Nadine Gordimer, *In Nigeria, the Price of Oil is Blood*, N.Y. TIMES, May 25, 1997, at E11.

257. *Id.*

258. *See, e.g.*, POGGE, WORLD POVERTY AND HUMAN RIGHTS, *supra* note 22, at 112–14 (2008).

259. Howard W. French, *The Curse of Riches: In Africa, Wealth Often Buys Only Trouble*, N.Y. TIMES (Jan. 25, 1998), http://www.nytimes.com/1998/01/25/weekinreview/the-world-the-curse-of-riches-in-africa-wealth-often-buys-only-trouble.html.

corruption, endemic poverty, and gross inequality.[260] Countries such as Angola, Congo, Liberia, Sierra Leone, and Sudan have experienced devastating civil wars fueled by transnational competition to control their natural resources, which, in many cases, were used to support the conflicts.[261] Accoring to Mr. French, "judging from the experience of many countries, international business interests are acutely aware of the weaknesses in the political and economic systems of the new African countries, and rush to exploit them to their advantage whenever they can."[262] He noted the particular example of the French oil company, Elf, operating in the Republic of Congo, which provided large sums of money up front to contending groups in order to secure long-term contracts.[263] Another example he offered was the South Africa-based mining giant, Anglo-American, gaining a disputed contract to exploit copper and cobalt in the former Zaire shortly after one side emerged victorious from a brutal civil war.[264] Mr. French also wrote about Westerners rushing to do business with the then-new government of Liberia under Charles Taylor.[265] Taylor was subsequently convicted of war crimes by an international tribunal.[266]

These examples provide additional evidence to support the comprehensive data on poverty and inequality collected by the UNDP and other authorities. They help illustrate the historic and ongoing complicity of institutions, policies, and practices of the powerful in the misery of the dispossessed. As such, these examples, like the socioeconomic statistics, also support the case for collective international political responsibility for endemic global poverty and growing inequality. They should give urgency to the task of finding a mechanism for holding accountable those who are complicit or who fail to act.

3. From Political Responsibility To Legal Responsibility

A fuller discussion of the form and substance of proposed legal accountability will not be presented here. However, an outline is offered with full appreciation of the political reality that the rich and powerful

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260. *Id.*
261. *See generally* PAKENHAM, *supra* note 20; HOCHSCHILD, *supra* note 9; STEWART & AMMAN, *supra* note 151.
262. French, *supra* note 259.
263. *Id.*
264. *Id.*
265. *Id.*
266. *Taylor Convicted of Sierra Leone Crimes*, *supra* note 216.

have no real incentives to take on this responsibility and that the poor have no means of making them do so. Increasingly, law in the international context seems to matter least where it should matter most. The quick and spectacular demise of the international right to development movement, outside of academic circles, provides ample testimony to this reality.[267]

In a 1982 address to the U.N. General Assembly entitled, "No Development Without Peace, No Peace Without Development," Ambassador Mohammed Bedjaoui of Algeria observed:

> In 1980 fifty million human beings perished from hunger. Although it gave rise to no general surge of indignation, this was surely a holocaust on a planetary scale. The Second World War took five years to reach similarly macabre results. Non-assistance to peoples in peril may indeed be the proper term to use when more than 500 billion dollars are earmarked for world wide military expenditure, while the report Global 2000 . . . informs us that the amount of grain necessary to eliminate malnutrition in the world could be purchased for the price of five submarines.[268]

In his speech, Ambassador Bedjaoui argued that, "under-development, like war, is not foreordained. Under-development is the product of an organized system of domination and exploitation. That system runs counter to the hopes for prosperity harbored by two thirds of mankind. It is a denial of their legitimate right to development."[269] He urged "a democratic dialogue" that would foster "a new political and economic world for our times."[270]

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267. *See* Declaration On the Right To Development, G.A. Res. 41/128, U.N. Doc. A/RES/41/128 (Dec. 4, 1986); Human Rights Council, Rep. of the Working Group on the Right to Development on Its 8th Sess., Feb. 26–Mar. 2, 2007, U.N. Doc. A/HRC/4/47 (Mar. 13, 2007). *See also* Georges Abi-Saab, *The Legal Formulation of a Right To Development*, *in* THE RIGHT TO DEVELOPMENT AT THE INTERNATIONAL LEVEL, HAGUE ACADEMY OF INTERNATIONAL LAW WORKSHOP 167 (René-Jean Dupuy ed., 1980); Mohammed Bedjaoui, *The Right To Development*, *in* INTERNATIONAL LAW: ACHIEVEMENTS AND PROSPECTS (M. Bedjaoui ed., 1991); Philip Alston, *Ships Passing in the Night,* 27 HUM. RTS. Q. 755 (2005). *But see* Jack Donnelly, *In Search of the Unicorn: The Jurisprudence and Politics of the Right To Development*, 15 CAL. W. INT'L L.J. 473 (1985). All of these sources were first obtained from the valuable section on human right and development in STEINER ET AL., *supra* note 217.

268. Mohammed Bedjaoui, Address to the 36th Session of the U.N. General Assembly: No Development Without Peace, No Peace Without Development, *reprinted in* 27 INT'L FOUND. FOR DEV. ALTERNATIVES DOSSIER, 55, 55–56 (1982), *available at* http://www.dhf.uu.se/ifda/readerdocs/pdf/doss_27.pdf.

269. *Id.* at 56–57.

270. *Id.* at 61. *See also* Declaration On The Establishment of A New International Economic Order, G.A. Res. 3201 (S-VI), U.N. Doc. A/RES/S-6/3201 (May 1, 1974); Johan Galtung, *The New International Economic Order and the Basic Needs Approach*, 4 ALTERNATIVES 463 (1979).

The three-plus decades since his address have not been kind to the vision of global community he advocated for on behalf of many in the less developed world. The absolute total of dispossessed, hungry, diseased, dying, oppressed, and barely surviving has actually increased even if the proportions have remained generally stable. According to Thomas Pogge:

> Roughly one third of all human deaths, some 18 million annually, are due to poverty-related causes, easily preventable through better nutrition, safe drinking water, mosquito nets, re-hydration packs, vaccines and other medicines. This sums up to 300 million deaths in just the 17 years since the end of the Cold War—many more than were caused by all the wars, civil wars, and government repression of the entire 20th Century.[271]

The time has come to push the political dialogue over collective responsibility to a serious consideration of how the world community could be held accountable not only for a narrow category of spectacular assaults on humanity but also for an endemic global culture of violence and the extreme deprivations that nurture and protect such depredations.

The move from political responsibility to legal responsibility could be justified on the basis of post-Cold War practices of the international community and the sense of legal obligation that has developed from them. The obligations contained in the U.N. Charter and core human rights agreements also support this duty. Together, these sources could be the foundation for a customary law justification for much broader obligations to assist.[272] Thomas Pogge, for one, has rejected the view that the responsibility of the rich countries to the poor ones lies in charity as opposed to demands for justice.[273] He argues for a quasi-legal obligation of the rich countries derived from Articles 25 (1) and 28 of the Universal Declaration of Human Rights (UDHR).[274]

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271. Thomas Pogge, *Poverty and Human Rights*, *in* THE ESSENTIALS OF HUMAN RIGHTS 286, 286 (Rhona K.M. Smith & Christien van den Anker eds., 2006) (citing U.N. CHILDREN'S FUND [UNICEF], THE STATE OF THE WORLD'S CHILDREN 2005 (2004), *available at* http://www.unicef.org/sowc05/english/sowc05.pdf), *available at* http://www2.ohchr.org/english/issues/poverty/expert/docs/Thomas_Pogge_Summary.pdf.

272. Similar customary law arguments are already being made for R2P. *E.g.*, Eaton, *supra* note 105, at 801–04.

273. Pogge, *supra* note 271.

274. UDHR, *supra* note 14, art. 25, para. 1 ("Everyone has the right to a standard of living adequate for the health and well-being of himself and his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his

However, current interpretation of the legal effects of the UDHR weakens such arguments.[275] It must also be conceded at this point that there is insufficient legal basis for finding customary law obligations on the part of the international community to assist those in peril whether under the circumstances covered by the responsibility to protect doctrine or a under a proposed broader duty to assist doctrine.[276] The work being done to hold multinational corporations more accountable for their contributions to violence and misery in poor countries is valuable, but not exactly on point.[277] The broad communal obligations that are the focus of this Article would require a negotiated international agreement with

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control."); *id.* art. 28 ("Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized.").

275. The UDHR, like all similar international declarations, is not considered legally binding under international law. *See* J.L. BRIERLY, THE LAW OF NATIONS 294 (6th ed. Oxford 1963). However, as Brierly noted, "Nevertheless, it has gained considerable authority as a general guide to the content of fundamental rights and freedoms . . . ." *Id.*

276. An international customary law obligation would require evidence of general and consistent practice on the part of rich nations to provide assistance to poorer nations done from a sense of legal obligation on the part of rich countries. Such evidence is absent both in the actions of states and in their binding international legal commitments. Charity, bilateral and multilateral development assistance, and grand international agendas are not done with any sense of legal obligation presently. "Custom is generally considered to have two elements: state practice and *opinio juris*. State practice refers to a general and consistent practice by states, while *opinio juris* means that the practice is followed out of a belief of legal obligation." Anthea Elizabeth Roberts, *Traditional and Modern Approaches to Customary International Law: A Reconciliation*, 95 AM. J. INT'L L. 757 (2001). *See also* Statute of the International Court of Justice art. 38(1)(b), June 26, 1945, 59 Stat. 1031, 1055.

277. *See, e.g.*, Owen Bonheimer et al., Steptoe & Johnson, LLP, *U.N. Guiding Principles for Business & Human Rights: Issuance of Ruggie Principles Portends Increasing Need for Multinational Businesses to Focus on Human Rights Compliance*, STEPTOE.COM (Apr. 20, 2011), http://www.step toe.com/publications-newsletter-172.html. Professor Ruggie's efforts are oriented toward getting existing systems and processes to incorporate human rights concerns. They are not revolutionary in any sense:

Professor Ruggie's Guiding Principles are the product of six years of research commissioned by former U.N. Secretary General Annan in July 2005. In June 2008, Professor Ruggie presented a report titled Protect, Respect and Remedy: a Framework for Business and Human Rights to the U.N. Human Rights Council (the "*Framework*"). The *Framework* consists of three core principles: 1) the duty of States to protect against human rights abuses by third parties, including business enterprises; 2) the corporate responsibility to respect human rights; and 3) the need for greater access by victims to effective judicial and non-judicial remedies. The U.N. Human Rights Council welcomed the *Framework* and requested that Professor Ruggie offer "concrete and practical recommendations" for its implementation. In November 2010, Professor Ruggie responded by issuing a draft of the Guiding Principles on Business and Human Rights ("Draft Principles"). The Draft Principles were open for comment for three months and received approximately 90 submissions from the business community, NGOs, international organizations, academics, and governments. After considering these written submissions and engaging in consultations with various stakeholders, Professor Ruggie submitted the revised and final text of the Guiding Principles to the Human Rights Council in March 2011.

Id.

appropriate consequences for breaches to attain the force of law. It should be conceded that employing law in this manner is not a misperception of the totally political nature of the endeavor. Law here is not an escape from politics.[278] The turn to law here would merely confirm that the international community has reached a mature consensus over global responsibility that is important enough to be concretized.[279] Scholars and policymakers concerned about the current state of global affairs should turn their attention to this important task.

VI. CONCLUSION: RECLAIMING THE PROGRESSIVE VISION

This Article has argued for resistance to apathy, resignation, or ambivalence in the face of a revolving panorama of atrocities, persistent human misery, and the violence that accompanies and sustains it. This Article has argued for a binding collective international obligation, not just a moral duty or a (permissible) right under international law, to intervene to stop atrocities, and to ameliorate everyday extreme suffering that is readily within our capacity to affect. The Article argues that this obligation should not rest on charity but on a foundation of international responsibility that gives those victimized by a failure to act or by inadequate action recourse against the international community as a whole.

Over a century ago, a trenchant observer of the processes of transnational human interactions wrote:

> The conquest of the earth, which mostly means the taking it away from those who have a different complexion or slightly flatter noses than ourselves, is not a pretty thing when you look into it too much. What redeems it is the idea only. An idea at the back of it; not a sentimental pretence but an idea . . . .[280]

The writer, Joseph Conrad, employed the device of multiple, interconnected, and unresolved journeys through what he described as the Darkness, to push all of us to meditate on our collective responsibilities for

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278. *See generally* MARTTI KOSKENNIEMI, FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT (2006).

279. Stanley Hoffmann makes the point about what law does in these contexts: "law is not merely a policy among others in the hands of statesmen, [but] a tool with very *special characteristics and roles* . . . . Most important is the fact that law has a distinct solemnity of effects: it is a normative instrument that creates rights and duties. . . . it enshrines, elevates, consecrates the interests or ideas it embodies." Stanley Hoffmann, *The Study of International Law and the Theory of International Relations*, 57 AM. SOC'Y INT'L L. PROC. 26, 34–35 (1963).

280. CONRAD, HEART OF DARKNESS, *supra* note 42, at 7.

human suffering.[281] Conrad's world was forged as a percipient witness to imperialism in then Belgian Congo and other places.[282] He reminds us that a lot of evil has happened everywhere, including places where humans have claimed good intentions and embraced the civilizing mission. Evil, which must include structured misery, is not the property of just the particular location or time period that he puts to focus.[283] Human beings, he insists, need to look within themselves to find "The Heart of Darkness."[284] The motivations, pronouncements, and even actions of those presiding over grand processes of progress cannot be relied upon to provide a true compass to the consequences of even the most benign sounding or appearing conduct. After all, the infamous Mr. Kurtz was also an agent for the fictional humanitarian institution, the "International Society for the Suppression of Savage Customs."[285] Generations later, another writer, Stieg Larsson, expressed similar sentiments, "There are no innocents. There are, however, different degrees of responsibility."[286] The essential question, then, is the degree of responsibility possessed by all, including those who seem to be outside of evil but with the knowledge and means to act, for the abject conditions of those who just happen to constitute the least among us.

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281. Several of Conrad's other works captured this concern about collective responsibility as well as the human incapacity to properly assess motivations, understand complexity and devise enduring and just solutions. *See* JOSEPH CONRAD, NOSTROMO (1904) and JOSEPH CONRAD, LORD JIM (1900).

282. For more on the atrocities in Congo and collective international responsibility for them, see HOCHSCHILD, *supra* note 9. For an examination of the roots of broader international responsibility toward sub-Saharan Africa, see also PAKENHAM, *supra* note 20, and HUGH THOMAS, THE SLAVE TRADE (1997).

283. Conrad began the story with the narrator, Marlowe, aboard "The Nellie, a cruising yawl," in the company of several other men, enjoying an excursion on the Thames river in London. Conrad seemed eager to alert the reader that this was not just a story about another place and time by emphasizing the ever present danger of "darkness" enveloping peace: "The air was *dark* above Gravesend, and farther back still seemed condensed into a mournful gloom, brooding motionless over the biggest, and the greatest, town on Earth." CONRAD, HEART OF DARKNESS, *supra* note 42, at 3. Marlowe's first sentence emphasized this insight: "And this also, said Marlowe suddenly, has been one of the *dark* places on earth." *Id.* at 5. Marlowe continued along the same vein, setting the stage, before mentioning his experience in the Congo: "I was thinking of very old times, when the Romans first came here, nineteen hundred years ago—the other day. . . . We live in the flicker—may it last as long as the old earth keeps rolling! But *darkness* was here yesterday. . . . They were men enough to face the *darkness" Id.* at 6–7. For Conrad, humans in the end must recognize that we have "to live in the midst of the incomprehensible, which is also detestable." *Id.* at 7. *See also generally* ALBERT CAMUS, THE PLAGUE (1947).

284. CONRAD, HEART OF DARKNESS, *supra* note 42.

285. "All Europe contributed to the making of Mr. Kurtz; and by and bye I learned that, most appropriately, the International Society for the Suppression of Savage Customs . . . ." *Id.* at 61.

286. LARSSON, *supra* note 218, at 323.

The foundation of our collective international responsibility begins and ends with recognition of our common humanity. Recognition of our common humanity is all we should need to understand that there has to be a duty to act, to intervene, not just to prevent atrocities, narrowly defined, but also to alleviate the conditions that give rise to such depravities in the first place. If one should need a more precise reason, it must be that failure to act inexorably works to cheapen the value of common humanity. More than six decades after the end of the Second World War and the founding of the United Nations, we do not need further examples of the consequences of such failures.