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**ABSTRACT**

*State sovereignty has long held a revered post in international law, but it received a blow in the aftermath of World War II, when the world realized the full extent of atrocities perpetrated by the Nazis on their own citizens. In the postwar period, the idea that individuals possessed rights independent of their own states gained a foothold in world discussions, and a proliferation of human rights treaties guaranteeing fundamental rights followed. These rights were, for the most part, unenforceable, though, and in the 1990s, a number of humanitarian catastrophes (in Kosovo, Rwanda, and Somalia) galvanized the international community to develop a doctrine to protect the fundamental rights of all individuals. The resulting "responsibility to protect" individuals from genocide, ethnic cleansing, and crimes against humanity stood as a radical rejection of the prewar concept of state sovereignty and assured that states could no longer hide behind the shield of territorial integrity. But the doctrine created another disconnect in international law: it picked out only a few fundamental rights for protection, leaving citizens to rely on the*

* Special thanks to Ryan Goodman, Rachel Brewster, and Richard Parker for their encouragement and assistance.

*whim of their states to protect their other rights. This Article argues that this state of the law is no longer sustainable, as it is still beholden in important ways to the now-eroded concept of state sovereignty. The responsibility to protect should be expanded to include protection of fundamental rights in general and the freedom of speech in particular. The inclusion of the freedom of expression in the pantheon of protected rights is broadly consistent with the moral, legal, and consequentialist arguments in favor of the international norm of responsibility to protect. Moreover, an expansive reading of the obligation to intervene, particularly in nontraditional ways, will increase the legitimacy of the international system.*

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## I. INTRODUCTION

International law has long recognized the state as the primary—even sole—actor in international affairs, reserving to countries a number of powerful prerogatives such as the right to territorial integrity.[1] This important principle of international law, however, began to erode after the end of the Second World War, when the atrocities perpetrated by the Nazi regime upon its own citizens shocked the conscience of the entire world.[2] For the first time, the idea that international law should protect the rights of individuals started to gain traction in legal circles, leading to a proliferation of international human rights treaties in the postwar era.[3] These treaties guaranteed a widening array of fundamental human rights: life, liberty, freedom from torture, freedom of speech, and many others.[4] But this development led to a contradiction in the international legal regime: suddenly, individual rights ascended to the level of international law, but the long-held principles of inviolable state sovereignty remained. Treaties promised certain

1. *See* FREDRICK EDWIN SMITH, INTERNATIONAL LAW 28 (BiblioLife 2009) (1906) ("States and states alone enjoy a *locus standi* in the law of nations: they are the only wearers of international personality.").

2. Sheila McLean, *The Right to Reproduce*, *in* HUMAN RIGHTS: FROM RHETORIC TO REALITY 99, 111 (Tom Campbell et al. eds., 1986).

3. *Id.*

4. *See, e.g.*, International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (Dec. 16, 1966) [hereinafter ICCPR]; Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948) [hereinafter UDHR].

rights to individuals, but at the same time, states were granted sole control over their internal matters.[5] There was little or no way to enforce the provisions of the human rights treaties on recalcitrant states.

All this changed in the 1990s after a series of humanitarian disasters in far-flung parts of the world such as Kosovo, Rwanda, and Somalia. The world community recognized that there existed a moral duty to intervene to prevent the massacre of minority populations in these countries, but the contemporary legal framework forbade any intervention in the "internal" matters of states.[6] As long as states persecuted only their own citizens, there was little that other states could do legally to stop the violence. In some cases, such as Kosovo, the international community did intervene, leading to fierce debates about the legality of bombing campaigns.[7] These debates created pressure on the United Nations (UN) and the world's powers to establish a new legal norm—one allowing for humanitarian intervention in certain limited situations. This pressure, in turn, led to the formation of the doctrine of a responsibility to protect.[8] The rule held that individual states have a responsibility to protect their citizens from genocide, ethnic cleansing, or other large-scale loss of life, and if a country were unable or unwilling to do so, the responsibility would fall upon the broader community of states.[9] The use of military force to protect citizens from such catastrophic harms would be permitted.[10]

That is where the norm stands today. But the establishment of a responsibility to protect under international law has led to yet another contradiction. The fundamental problem with the pre-World War II legal regime was that it acknowledged state sovereignty as inviolable, leaving individual citizens at the whim of their governments.[11] The concept of international law's peculiar nation-to-nation character—giving the state the principal role in global

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5. U.N. Charter art. 2, para. 7.

6. *See infra* text accompanying notes 74–75 (discussing the view that currently international law does not permit intervention in any matter that is considered an internal matter of a state).

7. *See* Dan Sarooshi, *The Security Council's Authorization of Regional Arrangements to Use Force: The Case of NATO, in* THE UNITED NATIONS SECURITY COUNCIL AND WAR: THE EVOLUTION OF THOUGHT AND PRACTICE SINCE 1945 226, 242–44 (Vaughan Lowe et al. eds., 2008) (outlining historical discussions of the legality of the NATO campaign in Kosovo).

8. *See generally* INT'L COMM'N ON INTERVENTION AND STATE SOVEREIGNTY, THE RESPONSIBILITY TO PROTECT 11–16 (2001) (discussing the development of the doctrine of the responsibility to protect under international law).

9. *Id.* at XI.

10. *See id.* at 31 (discussing the use of force as an extreme resort).

11. JACK MAHONEY, THE CHALLENGE OF HUMAN RIGHTS: ORIGIN, DEVELOPMENT, AND SIGNIFICANCE 42–53 (2007).

relations—was crucial to the pre-World War II era.[12] This logic, however, became unsustainable after World War II when the extent of Nazi atrocities became known.[13] It was this development that paved the way for the creation of the responsibility to protect doctrine. And yet, that same pre-World War II logic prevails in international law's treatment of other fundamental rights such as the freedom of speech.[14] So the freedom of speech, although guaranteed by a number of important international treaties, is still considered an internal matter.[15] The international community has no responsibility to protect the freedom of expression, and indeed, states may invoke the principle of nonintervention when confronted with criticisms of the suppression of speech inside their borders.[16] Under the current understanding of the international law of free speech then, the state has exclusive control over its territory and people, a position darkly reminiscent of the pre-World War II era.

But a world that demands respect for human rights cannot coexist with a world that demands absolute respect for state sovereignty. The dominant theory of the post-World War II era is that the nonintervention principle is legitimately subject to certain exceptions because states have obligations to their citizens.[17] What is not adequately understood today, but what is undeniably valid, is that this logic applies equally to both interventions to protect populations from widespread violations of their right to free expression and interventions to protect populations from genocide. Here, as elsewhere, human rights treaties have guaranteed to all individuals certain rights—rights that now form part of the nucleus of international law. The respect for state sovereignty cannot trump these rights any more in the area of free speech than in the area of genocide.

This is not to argue that violations of free speech rights should warrant military invasion. Indeed, such a proposition might even weaken, rather than strengthen, the legitimacy of the international system. Instead, nontraditional forms of intervention would, in most cases, provide a more acceptable form of protecting the freedom of speech from infringement. The proactive use of technologies—such as

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12. *See* SMITH, *supra* note 1, at 28.

13. *See* McLean, *supra* note 2, at 111 ("The [Nazis'] large-scale abuse of noncombatants which characterized [World War II] made discussion of human rights in general more urgent and more meaningful.").

14. *See infra* Part IV (discussing state sovereignty and free speech).

15. *Id.*

16. *See infra* text accompanying notes 204–205 (discussing the invocation of non-intervention by certain states when they were criticized for suppression of free speech by the international community).

17. *See infra* Part IV (discussing the erosion of the theory that states have absolute control over their own internal affairs in favor of a recognition that states owe their citizens certain basic obligations).

the internet, radio, and television—is just one example of potential forms of intervention.

This Article explores these assertions about the proper role of international law in the protection of the freedom of expression. Part II provides a brief history of the development of the doctrine of a responsibility to protect from the end of the Second World War to today. Part III examines the relevant documents elaborating what exactly the freedom of speech protects in international law. Part IV describes the interaction between sovereignty and free speech. Part V briefly surveys the major arguments (moral, legal, and consequential) in favor of the current responsibility to protect rule, and Part VI applies these arguments to a more expansive view of the responsibility to protect that includes protection of free speech. Part VII addresses potential criticisms of this argument, particularly those relating to its practicality and the use of humanitarian intervention as a pretext for war.

## II. THE DEVELOPMENT OF A RESPONSIBILITY TO PROTECT

### A. *From National Sovereignty to Human Rights*

The development of the concept of a responsibility to protect came as a logical outgrowth of a larger trend in international legal doctrine under which individuals increasingly became a subject of and an actor in international law. For hundreds of years, states acted as the sole participants in international law: only states created international law and only they were subject to it.[18] But this long-heralded principle of international law began to erode in the period after World War II, as both the atrocities of that period and political exigencies put pressure on states to bring individual rights under the wing of international protection.[19] After a series of international catastrophes and humanitarian interventions in the 1990s and 2000s,[20] the responsibility to protect norm gradually gained

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18. *See* JEFFREY L. DUNOFF, STEPHEN R. RATNER & DAVID WIPPMAN, INTERNATIONAL LAW: NORMS, ACTORS, PROCESS: A PROBLEM-ORIENTED APPROACH 111 (2d ed. 2006) ("Orthodox international law doctrine has regarded states as the primary, or even sole, actors in international law . . . since only] they could create and be the direct subject of international legal obligations.").

19. *See* McLean, *supra* note 2, at 111.

20. *But see* Mats Berdal, *The Security Council and Peacekeeping*, *in* THE UNITED NATIONS SECURITY COUNCIL AND WAR: THE EVOLUTION OF THOUGHT AND PRACTICE SINCE 1945, *supra* note 7, at 175, 191–93 (noting the poor record of UN peacekeeping missions in the 1990s, but citing different reasons for those operational failures, including the large increase in volume and complexity of UN field operations, and the occasional tensions and conflicts among UN member countries, especially the P5).

widespread consensus and today stands as an important—even if controversial—pillar of international law.[21]

As the Earl of Birkenhead put it in 1927, less than twenty years before the radical changes in international law facilitated by World War II, "States and states alone enjoy a *locus standi* in the law of nations: they are the only wearers of international personality."[22] In other words, only states possessed full international legal personality, a status that allowed them to have both rights and duties under international law. This situation made sense when international law dealt primarily with relations between states: the creation of treaties, the laws of war, maritime law, jurisdiction over territories, etc.[23] So, Grotius' *De Jure Belli ac Pacis* established such foundational principles as the applicability of the laws of war to all parties without regard to the justness of the war, extraterritoriality of ambassadors, and freedom of the seas.[24] Of course, some of these rules dealt with the rights of individuals, but actions could only be considered violations of international law to the extent that they were injuries to the state.[25]

After World War I, treaties and international organizations began to recognize the importance of protecting groups, and not just states, under international law.[26] The instability created in Europe by the presence of large minorities in many countries gave rise to

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21. INT'L COMM'N ON INTERVENTION AND STATE SOVEREIGNTY, *supra* note 8, at 11–16 (discussing the development of the doctrine of the responsibility to protect under international law).

22. SMITH, *supra* note 1, at 28.

23. *See* WERNER LEVI, CONTEMPORARY INTERNATIONAL LAW 10 (2d ed. 1991) (explaining that early writers on international law focused primarily on topics of just wars and the rules for conducting them, the laws of treaties, extraterritoriality, and the theoretical foundations of international law).

24. 2 HUGO GROTIUS, DE JURE BELLI AC PACIS LIBRI TRES [ON THE LAW OF WAR AND PEACE: THREE BOOKS] 599, 602, 629 (Francis W. Kelsey et al. trans., Clarendon Press 1925) (1625) (asserting (1) that what is permissible in war arises, in part, from the law of nature; (2) that a warring state does not possess the right to interfere with trade in goods not useful in war; and (3) the extraterritoriality of ambassadors).

25. In 1924, the Permanent Court of International Justice stated,

> It is an elementary principle of international law that a State is entitled to protect its subjects, when injured by acts contrary to international law committed by another State, from whom they have been unable to obtain satisfaction through ordinary channels. By taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own right . . . to ensure, in the person of its subjects, respect for the rules of international law.

Mavrommatis Palestine Concessions (Greece v. U.K.), 1924 P.C.I.J. (ser. A) No. 2, at 12 (Aug. 30).

26. *See* INIS L. CLAUDE, JR., NATIONAL MINORITIES: AN INTERNATIONAL PROBLEM 16–30 (Greenwood Press 1969) (describing the system of protecting minority groups under the League of Nations).

intensified interest in the rights of those minorities.[27] Woodrow Wilson's Fourteen Points, aiming at installing a durable international system, invoked the concept of self-determination to ensure the right of nations to choose their own governments.[28] Indeed, the victors of World War I worried that the presence of national minorities in a state could lead to another war, either through discriminatory treatment of the minority by the government or through excessive demands on the government by the minority.[29] Therefore, in the 1919 Paris Peace Conference, the victors imposed treaties on the defeated or reconfigured states aimed at guaranteeing fair treatment to members of minority groups.[30] These guarantees mandated that the states enable minorities to maintain their unique cultural, linguistic, religious, and other differences.[31] At the same time, efforts to improve working conditions for laborers started to operate at the international level. The International Labour Office (now the International Labour Organization) was founded in 1919 to promote

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27. *See* David Wippman, *The Evolution and Implementation of Minority Rights*, 66 FORDHAM L. REV. 597, 599–600 (1997) (stating that in the aftermath of WWI, the claims of national groups concerning the rights of minorities "dominated the international legal agenda").

28. Woodrow Wilson's Fourteen Points are reprinted in MARGARET MACMILLAN, PARIS 1919: SIX MONTHS THAT CHANGED THE WORLD 495–96 (2001). He described the concept of self-determination more thoroughly in a speech at Billings, Montana in 1919:

> 'The fundamental principle of [self-determination] is a principle never acknowledged before, a principle which had its birth and has had its growth in this country: that the countries of the world belong to the people who live in them, and that they have a right to determine their own destiny and their own form of government and their own form of policy, and that no body of statesmen, sitting anywhere, no matter whether they represent the overwhelming physical force of the world or not, has the right to assign any great people to a sovereignty under which it does not care to live.'

WILSON'S IDEALS 109 (Saul K. Padover ed., 1942) (quoting President Woodrow Wilson, Speech at Billings, Montana (Sept. 11, 1919)). For a good description of the development of the idea of self-determination, see ANTONIO CASSESE, SELF-DETERMINATION OF PEOPLES 11–33 (1995).

29. CLAUDE, *supra* note 26, at 13–14; Wippman, *supra* note 27, at 599–600.

30. CLAUDE, *supra* note 26, at 13–15.

31. *See, e.g.*, Minority Schools in Albania, Advisory Opinion, 1935 P.C.I.J. (ser. A/B) No. 62, at 17 (April 6) (noting that one purpose of the treaty was to "ensure for the minority elements suitable means for the preservation of their racial peculiarities, their traditions, their national characteristics"); U.N. Econ. & Soc. Council [ECOSOC], Sub-Comm'n on Prevention of Discrimination & Prot. of Minorities, *Study of the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities*, ¶ 100, U.N. Doc. E/CN.4/Sub.2/384/REV.1 (1979) (*prepared by* Francesco Capotorti) ("[P]rovision was made for special measures deriving from the idea of safeguarding the values peculiar to each minority group, namely, language, religion and culture.").

better conditions for workers and their families.[32] But despite the fact that groups were increasingly being recognized as important actors in the international arena, these efforts were limited in their focus and dealt to a large extent with individual states.[33] States still considered the treatment of their citizens as an internal matter.[34]

After World War II, though, the international consensus on what amounted to internal affairs began to shift, and the individual became a more central party in international law.[35] The atrocities committed during the war by the Nazi regime forced states to reconsider the status of individuals in the international legal system.[36] Traditionally, the doctrine of state responsibility held that states could be held accountable for injuries to aliens, that is, non-citizens.[37] But if a state was persecuting its own citizens, it could hardly be expected to hold itself accountable. In order to remedy this situation, the victorious Allied Powers thus committed themselves to prosecuting the members of the Nazi regime responsible for the most reprehensible crimes committed during the war.[38] In the ensuing Nuremberg trials, individuals were prosecuted for crimes against peace, war crimes, and crimes against humanity, including crimes committed by a state against its own nationals.[39]

In the postwar period, pressure to create a kind of "international bill of rights" for individuals began to mount.[40] The Holocaust had exposed the flaws in the prevalent international legal regime, and many organizations believed that the only way to correct the flaws was to enshrine the human rights of individuals in an international treaty.[41] Therefore, in the negotiations leading to the creation of the UN, groups like the American Law Institute, the International

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32. For a history of the International Labour Organization, see Carlos R. Carrion Crespo, *When Labor Law Went Global: The Road to the International Labor Organization*, 37 REV. JUR. U.I.P.R. 129, 142–47 (2002).

33. PAUL SIEGHART, THE INTERNATIONAL LAW OF HUMAN RIGHTS 14 (2003).

34. *Id.*

35. *See* McLean, *supra* note 2, at 111 (stating that in response to the Nazi atrocities, the U.N. "promulgated a number of agreements protecting the sanctity of the individual, and states and courts began to review their policies in light of changing world opinion").

36. *See id.*

37. *See* TAL BECKER, TERRORISM AND THE STATE: RETHINKING THE RULES OF STATE RESPONSIBILITY 11 (2006) (discussing the evolution of State responsibility including responsibility for wrongful conduct against non-nationals).

38. *See* Charter of the International Military Tribunal art. 1, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279 (establishing an International Military Tribunal for the "trial and punishment of the major war criminals of the European Axis").

39. *See id.* art. 6 (listing the offenses to be tried by the International Military Tribunal).

40. *See* CLAUDE, *supra* note 26, at 163 (describing failed proposals before the U.N. General Assembly for a multilateral convention toward establishing minority rights following World War II).

41. *Id.*

Labour Organization, the American Jewish Committee, and the American Bar Association drafted potential bills of rights to be included in the UN Charter.[42] Latin American states lobbied for the inclusion of a bill of rights as well, with twenty-one states coming out in favor of the bill after the Inter-American Conference on War and Peace.[43] While the Charter did not contain such a bill of rights, it did include a number of references to human rights. The Preamble states the determination of the signatories to "reaffirm faith in fundamental human rights."[44] Article 55 commits the UN to promote "universal respect for, and observance of, human rights and fundamental freedoms for all . . . ."[45] Article 56 commits the members to "take joint and separate action . . . for the achievement" of universal respect for human rights.[46] Perhaps most importantly, Article 68 of the Charter calls for the creation of a commission for the promotion of human rights.[47] These commitments led President Harry Truman to say in his final address to the drafting conference that "[u]nder this document we have good reason to expect the framing of an international bill of rights, acceptable to all nations involved," one that "will be as much a part of international life as our own Bill of Rights is a part of our Constitution."[48]

In the aftermath of the foundation of the UN, treaties and agencies devoted to the protection of individual human rights proliferated.[49] In 1946, the Human Rights Commission was formed.[50] In 1948, both the Convention on the Prevention and Punishment of

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42. DUNOFF, RATNER & WIPPMAN, *supra* note 18, at 443.

43. INTER-AMERICAN CONFERENCE ON PROBLEMS OF WAR AND PEACE, MEXICO CITY, FEBRUARY 21–MARCH 8, 1945 (1945), *reprinted in* THE INTERNATIONAL CONFERENCES OF AMERICAN STATES 1942–1954 51, 51 (Pan American Union ed., 2d Supp. 1958).

44. U.N. Charter pmbl.

45. *Id.* art. 55(c).

46. *Id.* art. 56.

47. *Id.* art. 68.

48. President Harry Truman, Address at the United Nations Conference on International Organization Final Plenary Session (June 26, 1945), *in* DEP'T ST. BULL., July 1945, at 5.

49. *See* McLean, *supra* note 2, at 111; PAUL SIEGHART, *supra* note 33, at 14–15 (describing the influx of intergovernmental organizations and treaties "specifically concerned with the relations between governments and their own subjects"); LOUIS B. SOHN & THOMAS BUERGENTHAL, INTERNATIONAL PROTECTION OF HUMAN RIGHTS 505–35 (1973) (discussing the U.N. and human rights); Anthony A. D'Amato, *The Concept of Human Rights in International Law*, 82 COLUM. L. REV. 1110, 1128 (1982) (referencing the many resolutions of the U.N. General Assembly that have been passed in the years following the creation of the U.N. Charter toward the advancement of aspirations defined in Article 56 of the Charter); Louis Henkin, *The International Human Rights Treaties: Some Problems of Policy and Interpretation*, 126 U. PA. L. REV. 886, 886–88 (1978) (describing the Carter administration's reliance on treaties as a means toward promoting human rights in the international sphere).

50. ECOSOC Res. 5 (I), ¶ 1, U.N. Doc. E/20 (Feb. 15, 1946) (creating the Human Rights Commission).

the Crime of Genocide[51] and the Universal Declaration of Human Rights[52] were adopted. In 1966, the International Covenant on Civil and Political Rights (ICCPR) was created.[53] Together, these treaties protect an impressive array of individual rights, from freedom of expression and religion to freedom from discrimination.[54]

While the codification of individual human rights into international treaty regimes undoubtedly created socialization effects throughout the international system,[55] there remained a significant disconnect between the broad range of rights protected and the limited recourse that individuals had to enforce those rights.[56] The limitations were twofold: first, the treaties only bound the states that ratified them; and second, the individuals were forced to rely primarily on their own states to protect their rights, even if it was that very state that was violating these rights.[57]

A fundamental tenet of customary international law and treaty interpretation holds that treaties become binding on a state only once

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51. Convention on the Prevention and Punishment of the Crime of Genocide, G.A. Res. 260 A (III), U.N. GAOR, 3d Sess., 179th plen. mtg., U.N. Doc. A/RES/3/260 (Dec. 9, 1948).

52. UDHR, *supra* note 4.

53. Other important treaties protecting individual human rights include: the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, Dec. 10, 1984, S. Treaty Doc. No. 100-20, 1465 U.N.T.S. 85; the Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13; the Final Act of the Conference on Security and Co-operation in Europe, Aug. 1, 1975, 14 I.L.M. 1292; the International Convention on the Suppression and Punishment of the Crime of Apartheid, Nov. 30, 1973, 1015 U.N.T.S. 243; ICCPR, *supra* note 4; the International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3; the International Convention on the Elimination of All Forms of Racial Discrimination, Dec. 21, 1965, 660 U.N.T.S. 195; Declaration on the Granting of Independence to Colonial Countries and Peoples, G.A. Res. 1514 (XV), 15th Sess., 947th plen. mtg., U.N. Doc. A/RES/15/1514 (Dec. 14, 1960); the Convention on the Political Rights of Women, Dec. 20, 1952, 193 U.N.T.S. 135; and the Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137.

54. *See, e.g.*, ICCPR, *supra* note 4, art. 19 ("Everyone shall have the right to freedom of expression . . . ."); International Convention on the Elimination of All Forms of Racial Discrimination, *supra* note 53, art. 2(1) ("States Parties...undertake to pursue . . . a policy of eliminating racial discrimination in all its forms . . . ."); UDHR, *supra* note 4, art. 18 ("Everyone has the right to freedom of thought, conscience and religion . . . .").

55. For a discussion of the socializing effect of international human rights law, see Ryan Goodman & Derek Jinks, *How to Influence States: Socialization and International Human Rights Law*, 54 DUKE L.J. 621 (2004).

56. *See infra* text accompanying note 61 (describing the very limited means that individuals had to pursue their rights, despite the relatively broad scope of those rights).

57. *See, e.g.*, International Convention on the Elimination of All Forms of Racial Discrimination, *supra* note 53, arts. 2, 4 (imposing obligations on state signatories, but providing no avenue for individuals to vindicate the rights the Convention affords).

they have been ratified by that state.[58] This rule is not merely a *de minimis* restriction on the enforcement of individual rights. The United States, for example, habitually declines to ratify treaties that it has played an influential role in shaping. It has not ratified the Convention on Economic, Social and Cultural Rights (ICESCR); the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW); or the Convention on the Rights of the Child (CRC).[59] Furthermore, it took twenty-six years for the Senate to ratify the ICCPR.[60]

In addition, individuals whose rights were violated generally had to rely on their own state, rather than a separate entity, to remedy the wrong, even when it was the state that was violating the rights.[61] With respect to the fulfillment of rights, only rarely does a treaty grant an individual the right to petition an international agency for redress against the violations of a state. One example is the Optional Protocol to the ICCPR, which states that an individual has an extremely limited right to submit a brief to an international committee of experts, which in turn can decide to commence an investigation of the purportedly violating state.[62] CEDAW embodied the more traditional treaty form: the signatories committed themselves to protecting various rights of women, and a committee was formed to monitor compliance, but no right was bestowed upon individuals to petition for redress of particular violations of the treaty.[63] Only in 2000 did the General Assembly of the UN adopt an Optional Protocol to CEDAW, thereby granting individual women the right to petition a committee of experts to investigate violations of their rights.[64]

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58. This tenet of international law was codified in the Vienna Convention on the Law of Treaties. According to Article 34 of that document, "[a] treaty does not create either obligations or rights for a third State without its consent." Vienna Convention on the Law of Treaties art. 34, May 23, 1969, 1155 U.N.T.S. 321.

59. *See, e.g.*, Joe Stork, *Human Rights and U.S. Policy*, FOREIGN POL'Y IN FOCUS, Mar. 31, 1999, http://www.fpif.org/reports/human_rights_and_us_policy (discussing the many treaties that Washington has failed to ratify and the implications of those failures to ratify).

60. *See id.* (noting that the U.S. did not ratify the ICCPR until 1992).

61. LEVI, *supra* note 23, at 181.

62. Optional Protocol to the International Covenant on Civil and Political Rights arts. 1–5, Dec. 16, 1966, 999 U.N.T.S. 302; U.N. Human Rights Comm., *Introduction* to *Selected Decisions Under the Optional Protocol (Second to Sixteenth Sessions)*, ¶ 3, U.N. Doc. CCPR/C/OP/1 (1985).

63. *See* Convention on the Elimination of All Forms of Discrimination Against Women, *supra* note 53, art. 17 (establishing the Committee on the Elimination of Discrimination against Women to monitor the progress made in implementing the convention).

64. Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women, Oct. 6, 1999, 2131 U.N.T.S. 83. For a discussion of the importance of the Optional Protocol, see Felipe Gomez Isa, *The Optional Protocol for the Convention on the Elimination of All Forms of Discrimination Against Women:*

### B. *Evolution of the Responsibility to Protect*

In the period after World War II and extending into the 1990s, the international community increasingly subscribed to an expansive view of individual rights under international law.[65] This awareness gave rise to the innumerable human rights treaties and organizations that exist to this day. At the same time, the concept of the inviolability of state sovereignty existed in uneasy equilibrium with the new world of human rights. In the 1990s, mass atrocities in far-flung parts of the globe pricked the consciences of many democratic publics, leading to humanitarian interventions to stop the conflicts.[66] The juxtaposition of the moral imperative of intervention with its concomitant illegality in the international system led to pressure to change the legal rules governing the use of force. The result was the development in the early 2000s of the concept of the responsibility to protect, a radical departure from the foundations of international law but a logical response to the steady progression of individual rights.[67]

It should be noted at this point that the inviolability of state sovereignty was codified in as important a document as the UN Charter of 1945. Article 2(7) of that document states that "[n]othing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state . . . ."[68] While this provision relates solely to the competence of the UN, intervention in the domestic matters of states by other states is also prevented by a customary norm of international law.[69] Despite the fact that the UN Charter was

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*Strengthening the Protection Mechanisms of Women's Human Rights*, 20 ARIZ. J. INT'L & COMP. L. 291 (2003).

65. *See* McLean, *supra* note 2, at 111.

66. *See generally* NICHOLAS J. WHEELER, SAVING STRANGERS: HUMANITARIAN INTERVENTION IN INTERNATIONAL SOCIETY 172–284 (2000) (discussing humanitarian intervention in the various cases of Somalia, Rwanda, Bosnia and Kosovo). *But see* Berdal, *supra* note 20, at 191–93 (noting the poor record of U.N. peacekeeping missions in the 1990s).

67. International Coalition for the Responsibility to Protect, http://www.responsibilitytoprotect.org (last visited Mar. 8, 2010) ("The responsibility to protect is a new international security and human rights norm to address the international community's failure to prevent and stop genocides, war crimes, ethnic cleansing and crimes against humanity.").

68. U.N. Charter art. 2, para. 7. For an in-depth discussion of the meaning of Article 2(7), see Kristen Walker, *An Exploration of Article 2(7) of the United Nations Charter as an Embodiment of the Public/Private Distinction in International Law*, 26 N.Y.U. J. INT'L L. & POL. 173 (1994).

69. IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 284 (7th ed. 2008). *See also* Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625 (XXV), pmbl., U.N. GAOR, 25th Sess., Supp. No. 28, U.N. Doc. A/8082 (Oct. 24, 1970) (noting that customary norms prevent states from interfering in the domestic affairs of other states); Island of Palmas (Neth. v. U.S.), 2 R. Int'l Arb.

drafted before the proliferation of human rights treaties in the postwar period, it is clear that the noninterference principle was meant to include human rights issues, as the Charter mentioned the promotion of human rights as one of the UN's purposes.[70] In other words, it was never foreseen that the violation of human rights could become a justification for the use of force. This abrogation of one *jus ad bellum* was incorporated into Article 2(4) of the UN Charter, which stated, "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 . . . ."[71]

The reaffirmation of the principle of nonintervention in the UN Charter came in the face of the Nuremberg trials, which seemed to indicate that actors involved in the widespread violation of human rights could be prosecuted in the international system.[72] After all, the drafters of the charter for the military tribunals at Nuremberg included a reference to crimes against humanity as a crime within the jurisdiction of the court.[73] But the principle of noninterference, according to the UN Charter, took precedence.[74] As one scholar has described the situation, "In this normative context, other rules of international law—including the principles of human rights—are only valid insofar as they are compatible with the basic norm of the non-use of force and the subsequent norm of non-interference in internal affairs."[75]

The Charter did contain one escape valve, though. Under Article 42, the Security Council could use such force "as may be necessary to maintain or restore international peace and security," if it considered that other measures would be inadequate.[76] In other words, the UN

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Awards 829, 838 (Apr. 4, 1928) (explaining that the "principle of the exclusive competence of the State in regard to its own territory [has developed] in such a way as to make it the point of departure in settling most questions that concern international relations"); M.S. RAJAN, UNITED NATIONS AND DOMESTIC JURISDICTION 5–6 (2d ed.1961) (discussing sovereignty, including the right of the state to regulate its own domestic affairs, and stating that "the recognition of the independence of states is a fundamental rule of international law").

70. U.N. Charter art. 1, para 3.

71. *Id.* art. 2, para. 4. *See also* HANS KÖCHLER, THE CONCEPT OF HUMANITARIAN INTERVENTION IN THE CONTEXT OF MODERN POWER POLITICS 18 (2001) (noting that this principle was incorporated into article 2(4) of the United Nations Charter).

72. *See* Charter of the International Military Tribunal, *supra* note 38, art. 1.

73. *Id.* art. 6(c).

74. U.N. Charter art. 103 ("In the event of a conflict between the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.").

75. KÖCHLER, *supra* note 71, at 19.

76. U.N. Charter art. 42. For a discussion of the use of force under the U.N. Charter, see Thomas Franck, *Who Killed Article 2(4)?: Changing Norms Governing the Use of Force by States*, 64 AM. J. INT'L L. 809 (1970); *The United Nations Charter and the Use of Force: Is Article 2(4) Still Workable?*, 78 AMER. SOC. INT'L L. PROC. 68 (1984).

Charter unequivocally bans the use of force by individual states and gives that right to the collectivity of states under the leadership of the Security Council.[77] But this sole method for maintaining international peace and, presumably, protecting individuals from widespread violations of their rights functioned abysmally in practice.[78] Paralyzed by the rivalry between the Soviet Union and the United States during the Cold War, the UN system betrayed its promise to be the source of a stable and durable peace.[79] The overlapping system of human rights treaties only served to highlight the impotence of the Security Council. So, in the 1970s, when Pol Pot was massacring millions in Cambodia, the world stood by.[80] Indeed, when Vietnam entered Cambodia to stop the Khmer Rouge, Vietnam was condemned for violating international law.[81]

With the fall of the Berlin Wall in 1989 and the end of the Cold War, hopes rose that the UN could assume the role envisioned for it by the founders. George H.W. Bush announced the beginning of a "New World Order" in which the UN and the United States would act together to maintain an "enduring peace."[82] Indeed, this optimistic

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77. It is not entirely accurate to say that the U.N. Charter bans the use of force. Article 51 preserves the right of states to defend against an armed attack. U.N. Charter 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.

*Id.*

78. *See* J.P.D. Dunbabin, *The Security Council in the Wings: Exploring the Security Council's Non-involvement in Wars*, *in* THE UNITED NATIONS SECURITY COUNCIL AND WAR: THE EVOLUTION OF THOUGHT AND PRACTICE SINCE 1945, *supra* note 7, at 494, 494–503 (exploring several reasons for the generally inactive Security Council during the Cold War, including the American-Soviet rivalry, the over-use of the Security Council veto, and the U.N.'s lack of resources); *see generally* ANDREW BOYD, FIFTEEN MEN ON A POWDER KEG: A HISTORY OF THE UN SECURITY COUNCIL (1971) (discussing the history of the U.N. Security Council, including successes and failures).

79. *See* Dunbabin, supra note 78, at 494–503.

80. *See* Rajan Menon, *Pious Words, Puny Deeds: The "International Community" and Mass Atrocities*, 23.3 ETHICS & INT'L AFF. 235, 239 (2009) ("Despite his oft-repeated commitment to human rights, President Carter took a hands-off position while the Khmer Rouge methodically killed over a quarter of Cambodia's population between 1975 and 1978.").

81. Gareth Evans, *From Humanitarian Intervention to the Responsibility to Protect*, 24 WIS. INT'L L.J. 703, 705 (2006).

82. In a 1991 speech to Congress, George H.W. Bush said:

> Now, we can see a new world coming into view. A world in which there is the very real prospect of a new world order. In the words of Winston Churchill, a 'world order' in which 'the principles of justice and fair play . . . protect the weak against the strong . . . .' A world where the United Nations, freed from cold war stalemate, is poised to fulfill the historic vision of its founders. A world in which freedom and respect for human rights find a home among all nations.

pronouncement came after the successful completion of the Gulf War to force Iraq to retreat from its invasion of Kuwait, a war that was authorized by the UN and led by the United States and the United Kingdom to force Iraq to retreat from its invasion of Kuwait.[83]

It soon became clear, though, that the end of the Cold War did not clear the impasse in the Security Council. The 1990s saw a number of intrastate conflicts erupt, from the former Yugoslavia to Somalia, and the Security Council proved helpless to stop the violence.[84] In some instances, force was authorized but the response was minimal and unhelpful—for example, in Rwanda and Somalia.[85] In some instances, the Security Council faced internal opposition and could not act—for example, in Kosovo in 1999.[86] In the latter case, the international community did end up intervening to prevent further violence between Serbian forces and Albanians, although this intervention lacked the UN imprimatur and thus faced criticism.[87]

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President George H.W. Bush, Address to the U.S. Congress After the Gulf War (Mar. 6, 1991); *see also* DAVID M. MALONE, THE INTERNATIONAL STRUGGLE OVER IRAQ 67–68, 211–12 (2006) (discussing Bush's remarks and the changed view of the world that they reflected).

83. *See generally* MALONE, *supra* note 82, at 54–78 (providing a historical account of the Gulf War).

84. *See generally* Rupert Smith, *The Security Council and the Bosnian Conflict: A Practitioners View*, *in* THE UNITED NATIONS SECURITY COUNCIL AND WAR: THE EVOLUTION OF THOUGHT AND PRACTICE SINCE 1945, *supra* note 7, at 442, 442–51 (describing the U.N.'s involvement in the 1990s conflict in the Balkans); Susan L. Woodward, *The Security Council and the Wars in the Former Yugoslavia*, *in* THE UNITED NATIONS SECURITY COUNCIL AND WAR: THE EVOLUTION OF THOUGHT AND PRACTICE SINCE 1945, *supra* note 7, at 406, 406–41 (describing the U.N.'s response to the break-up of the former Yugoslavia, and commenting that the U.N.'s involvement in the conflict "tarnished [its] reputation . . . so deeply that many feared it might not recover").

85. Estevao Gomes Pinto de Abreu, United Nations and the Use of Force in Peace Operations: Agenda for Peace Enforcement?, Presentation to the Organizing Committee of the Joint International Conference ISA-ABRI 2009 2 (July 22, 2009), http://www.allacademic.com//meta/p_mla_apa_research_citation/3/8/1/0/7/pages381070/p381070-4.php.

86. Press Release, Security Council, Security Council Rejects Demand for Cessation of Use of Force Against Federal Republic of Yugoslavia, U.N. Doc SC/6659 (Mar. 26, 1999).

87. For a discussion of the legality of the Kosovo intervention, see generally DAVID CHANDLER, FROM KOSOVO TO KABUL: HUMAN RIGHTS AND INTERNATIONAL INTERVENTION 120–157 (2002) (discussing the challenge of using international law to deal with human rights issues in situations like Kosovo); Anne-Sophie Massa, *NATO's Intervention in Kosovo and the Decision of the Prosecutor of the International Criminal Tribunal for the Former Yugoslavia Not to Investigate: An Abusive Exercise of Prosecutorial Discretion?*, 24 BERKELEY J. INT'L L. 610, 618–26 (2006) (arguing that the intervention may have been illegal and, furthermore, that NATO may have committed war crimes in the course of intervening); Nigel S. Rodley & Basak Cali, *Kosovo Revisited: Humanitarian Intervention on the Fault Lines of International law*, 7 HUM. RTS. L. REV. 275, 279–82 (2007) (reviewing various lines of reasoning that could be used to classify the intervention as legal or illegal); Ruth Wedgwood, *NATO's Campaign in*

The intervention in Kosovo jump-started a serious debate about the legality of humanitarian intervention in cases involving severe violations of human rights on a wide scale.[88] The North Atlantic Treaty Organization (NATO) had conducted the bombing raids on Serbia because it was obvious that Russia—and perhaps China—would have vetoed any attempts to authorize a resolution in favor of the use of force.[89] Some observers, including the Independent International Commission on Kosovo headed by former South African Supreme Court Justice Richard Goldstone, believed that the intervention was clearly illegal under international law because the UN Charter banned the use of force by states lacking explicit Security Council authorization.[90] The Former Republic of Yugoslavia (FRY) itself argued, in a case brought in front of the International Court of Justice (ICJ), that the war could not be legitimized by recourse to the concept of humanitarian intervention.[91] Professor Ian Brownlie, a professor of international law at Oxford University assisting the FRY, articulated the view thus:

> [T]he overwhelming majority of contemporary legal opinion comes down against the existence of a right of humanitarian intervention, for three main reasons: first, the UN Charter and the corpus of modern international law do not seem specifically to incorporate such a right; secondly, state practice in the past two centuries, and especially since 1945, at best provides only a handful of genuine cases of humanitarian intervention, and, on most assessments, none at all; and finally, on

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*Yugoslavia*, 93 AM. J. INT'L L. 828, 828–31 (1999) (arguing that there was a "lack of any simple [legal] principle for the air campaign").

88. *See, e.g.*, Rodley & Cali, *supra* note 87, at 279–83 (reviewing the arguments on both sides as to the legality of the NATO intervention).

89. DUNOFF, RATNER & WIPPMAN, *supra* note 18, at 940.

90. The Independent International Commission concluded that the bombing campaign was "illegal but legitimate." INT'L INDEP. COMM'N ON KOSOVO, THE KOSOVO REPORT: CONFLICT, INTERNATIONAL RESPONSE, LESSONS LEARNED 4 (2000). *See* Jonathan I. Charney, *Anticipatory Humanitarian Intervention in Kosovo*, 93 AM. J. INT'L L. 834, 834 (1999) ("Indisputably, the NATO intervention . . . violated the United Nations Charter and international law."). For a more nuanced view of the illegality of the intervention, see generally Antonio Cassese, *A Follow-Up: Forcible Humanitarian Countermeasures and Opinio Necessitatis*, 10 EUR. J. INT'L L. 791, 792–93 (1999) (noting that even though very few states have recognized the legality of the intervention, many have recognized that it was morally and politically necessary); Antonio Cassese, *Ex Iniuria Ius Oritur: Are We Moving Towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?*, 10 EUR. J. INT'L L. 23, 23–24 (1999) [hereinafter Cassese, *Ex Iniuria Ius Oritur*] (arguing that the intervention was contrary to international law but nevertheless necessary from a moral point of view); Bruno Simma, *NATO, the UN and the Use of Force: Legal Aspects*, 10 EUR. J. INT'L L. 1, 1–4 (1999) (noting that "only a thin red line separates NATO's action from international legality").

91. Legality of Use of Force (Yugo. v. U.S.) (Application Instituting Proceedings) (filed Apr. 29, 1999), *available at* http://www.icj-cij.org/docket/files/114/7173.pdf (last visited Mar. 8, 2010).

> prudential grounds, that the scope for abusing such a right argues strongly against its creation."[92]

On the other hand, some commentators believed that the NATO intervention in Kosovo was legal, justified by some combination of previous Security Council Resolutions regarding Serbia's treatment of ethnic Albanians, the importance of preventing further humanitarian catastrophe, and a state of necessity.[93] As State Department spokesman James Rubin explained, "the Serb side is so far out of line with accepted norms of international behavior, and the dangers of not taking preventative action are so great in terms of humanitarian suffering and further violations of international law that we believe we have legitimate grounds to act."[94]

The prevalent view, however, was that the intervention was "illegal but legitimate."[95] The dilemma, concisely stated, was that intervention was simultaneously a moral imperative and a violation of the law. Richard Falk thus argued that the intervention was necessary but impossible: "It was necessary to prevent a humanitarian catastrophe in the form of ethnic cleansing. It was impossible because of the political unavailability of an appropriate means."[96]

In 2000, UN Secretary General Kofi Annan called this contradiction in the international legal system into stark relief: "[I]f 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 . . . ?"[97] Annan initially answered the question by arguing that the claims of national sovereignty should be weighed against the claims of individual sovereignty, but the fundamental dilemma remained.[98]

To meet the challenge laid down by Annan, Canada established the independent International Commission on Intervention and State Sovereignty.[99] Its task was to develop clearer norms to guide

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92. Legality of Use of Force (Yugo. v. Belg.), 1999 I.C.J. Pleadings 14 (May 10, 1999), *reprinted in* 1986 BRIT. Y. B. INT'L L. 614, 619.

93. *Id.*

94. James P. Rubin, U.S. Dep't of State, Daily Press Briefing (Mar. 16, 1999), *available at* http://www.hri.org/news/usa/std/1999/99-03-16.std.html.

95. INT'L INDEP. COMM'N ON KOSOVO, *supra* note 90, at 4.

96. Richard A. Falk, *Kosovo, World Order, and the Future of International Law*, 93 AM. J. INT'L L. 847, 852 (1999).

97. The Secretary-General, *Millennium Report of the Secretary-General, We the People: The Role of the United Nations in the 21st Century*, at 48, U.N. Doc A/54/20 (2000), *available at* http://www.un.org/millennium/sg/report/ch3.pdf.

98. Kofi Annan, *Two Concepts of Sovereignty*, ECONOMIST, Sept. 18, 1999, at 49, 49.

99. *See* ICISS, The Responsibility to Protect, http://www.iciss.ca/menu-en.asp (last visited Mar. 8, 2010) ("The independent International Commission on Intervention and State Sovereignty was established by the Government of Canada in September 2000 . . . .").

decision-makers faced with humanitarian disasters in the future.[100] After a year of research and discussions, the Commission issued a report concluding "that sovereign states have a responsibility to protect their own citizens from avoidable catastrophe—from mass murder and rape, from starvation—but that when they are unwilling or unable to do so, that responsibility must be borne by the broader community of states."[101]

More particularly, the Commission concluded that any humanitarian intervention must be for a just cause and must concord with certain precautionary principles.[102] "Just cause" included interventions to prevent (1) "large scale loss of life" or (2) "large scale 'ethnic cleansing.'"[103] The precautionary principles were (1) right intention, meaning for the purpose of halting human suffering; (2) last resort, meaning only after every nonmilitary option had been explored; (3) proportional means, meaning that the "scale, duration and intensity of the . . . intervention should be the minimum necessary to secure the defined human protection objective"; and (4) reasonable prospects, meaning that there "must be a reasonable chance of success in halting or averting the suffering."[104] The Commission cited such developments in international law as the proliferation of human rights accords, changing state practice, and the responsibility of the Security Council for the maintenance of international peace.[105] These developments had elevated individual rights to a new level of importance in the international system, resulting in constraints on national sovereignty.[106]

The Commission's report was followed up by the Secretary-General's High-Level Panel on Threats, Challenges, and Change, which embraced to a large extent the Commission's recommendations.[107] The Panel stated:

> We endorse the emerging norm that there is a collective international responsibility to protect, exercisable by the Security Council authorizing military intervention as a last resort, in the event of genocide and other large scale killing, ethnic cleansing or serious

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100. *See* DUNOFF, RATNER & WIPPMAN, *supra* note 18, at 955.

101. INT'L COMM'N ON INTERVENTION AND STATE SOVEREIGNTY, *supra* note 8, at VIII.

102. *Id.* at XII.

103. *Id.*

104. *Id.*

105. *Id.* at XI.

106. *See id.* at 12 ("[T]he authority of the state is not regarded as absolute, but constrained and regulated internally by constitutional power sharing arrangements.").

107. The Secretary-General, *Report of the Security-General's High-level Panel on Threats, Challenges and Change, A More Secure World: Our Shared Responsibility*, ¶¶ 2–3, *delivered to the General Assembly*, U.N. Doc. A/59/565 (Dec. 2, 2004), *available at* http://www.un.org/secureworld/report2.pdf.

> violations of international humanitarian law which sovereign Governments have proved powerless or unwilling to prevent.[108]

The Panel listed the criteria for intervention as the following:

> *Seriousness of threat.* Is the threatened harm to State or human security of a kind, and sufficiently clear and serious, to justify *prima facie* the use of military force? In the case of internal threats, does it involve genocide and other large-scale killing, ethnic cleansing or serious violations of international humanitarian law, actual or imminently apprehended?
>
> *Proper purpose.* Is it clear that the primary purpose of the proposed military action is to halt or avert the threat in question, whatever other purposes or motives may be involved?
>
> *Last resort.* Has every non-military option for meeting the threat in question been explored, with reasonable grounds for believing that other measures will not succeed?
>
> *Proportional means.* Are the scale, duration and intensity of the proposed military action the minimum necessary to meet the threat in question?
>
> *Balance of consequences.* Is there a reasonable chance of the military action being successful in meeting the threat in question, with the consequences of action not likely to be worse than the consequences of inaction?[109]

The responsibility to protect populations from genocide, war crimes, ethnic cleansing, and crimes against humanity, as expressed in the Panel's report, has since received acceptance in the international community, including the Security Council. In 2005, the Outcome Document of the 2005 World Summit of the United Nations General Assembly explicitly recognized this duty as a binding norm of international law.[110] The Security Council reaffirmed the same principle in a 2006 resolution.[111] But, importantly, the UN has excised references to "serious violations of international humanitarian law" as imposing a responsibility to protect on the international community.[112] As the norm stands

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108. *Id.* ¶ 203.

109. *Id.* ¶ 207.

110. The document states:

> Each individual State has the responsibility to protect its 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 are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity.

G.A. Res. 60/1, ¶¶ 138–39, U.N. Doc. A/Res/60/1 (Oct. 24, 2005).

111. S.C. Res. 1674, ¶ 4, U.N. Doc. S/RES/1674 (Apr. 28, 2006).

112. *See* G.A. Res. 60/1, *supra* note 110, ¶¶ 138–39 (pulling back from the stated standard).

today, then, the UN has only endorsed a responsibility to protect populations from genocide, war crimes, ethnic cleansing, and crimes against humanity. The progress from the days when state sovereignty was considered inviolate is breathtaking, but the historical arc beginning after World War II and culminating in the post-Kosovo War period just how logical and necessary the doctrine of responsibility to protect.

### C. *Free Speech and the Responsibility to Protect*

For hundreds of years, the concept of inviolable state sovereignty pinned up the international legal regime, allowing states to act with impunity within their borders—even while constrained outside of them. But in the post-World War II period, the perceived exigency of protecting civilians from the predations of their own governments forced a reconsideration of that time-honored tradition. Beginning with the Nuremberg trials, then with the UN Charter, and finally with the numerous human rights treaties signed in the following years, actors on the international stage began to enshrine the rights of individuals in international law.[113] These treaties protected a vast panoply of rights: free speech, freedom from discrimination, freedom of movement, and others.[114] But there remained a disconnect between the aspirations of the reformers and state practice: the treaties only bound states willing to submit themselves to their obligations, and individuals continued to rely mainly on their own states to protect their rights.[115] In the 1990s, though, a series of violent conflicts in various parts of the world such as Rwanda, Somalia, and Yugoslavia led many states to conclude that the current legal regime designed to protect the rights of individuals was flawed.[116] Morality conflicted with law, and pressure built for the main actors to resolve the tension. Thus, the UN adopted the doctrine of a responsibility to protect: states had an affirmative duty to protect their citizens from genocide, war crimes, ethnic cleansing, and crimes against humanity, and if they failed in this duty, it fell upon the international community to step in and do it for them.[117]

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113. MAHONEY, *supra* note 11, at 42–53.

114. UDHR, *supra* note 4, arts. 7, 13.

115. Louis Henkin, *Human Rights and State "Sovereignty,"* 25 GA. J. INT'L & COMP. L. 31, 40 (1995).

116. INT'L COMM'N ON INTERVENTION AND STATE SOVEREIGNTY, *supra* note 8, at 1–2; *see also* Ved P. Nanda, *Tragedies In Somalia, Yugoslavia, Haiti, Rwanda and Liberia-Revisiting the Validity of Humanitarian Intervention Under International Law* (pt. 2), 26 DENV. J. INT'L L & POL'Y 827, 830 n.15 (1998) (noting the United States' reaction following the crises).

117. *See generally* INT'L COMM'N ON INTERVENTION AND STATE SOVEREIGNTY, *supra* note 8, at XI–XIII (outlining the tenets and duties of the new intervention doctrine).

Unfortunately, this development has only created another internal contradiction: the world community's commitment to protect individuals from mass murder has betrayed the broader promise of the post-World War II period to grant individuals a wide range of rights under the international legal system. So, today, the UN and the world's most powerful states have promised to intervene to protect the right to life in some limited—if admittedly extreme—cases, but they have reneged on the assurances of the multitudes of human rights treaties to protect other basic individual rights.[118] This contradiction is striking because the justifications for the responsibility to protect apply just as strongly, if not more, in respect to many of the other rights not included as justifications for intervention. Part III thus discusses the most storied "first freedom," the freedom of expression, in light of the creation of the emerging norm of a responsibility to protect.

## III. THE FREEDOM OF SPEECH IN INTERNATIONAL LAW

### A. *Historical Origins*

The concept of an individual right to free speech dates back at least to Athens and the writings of Plato and Euripides.[119] Milton's translation of Euripides' play, *The Suppliants*, for example, contains these lines:

> This is true Liberty when free born men
> Having to advise the public may speak free,
> Which he who can, and will, deserves high praise,
> Who neither can nor will, may hold his peace;
> What can be juster in a State than this?[120]

Looking beyond the Western world, an individual's right to freedom of expression was also recognized in the Muslim world.[121] But despite a

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118. *See, e.g.*, Roger Cohen, *The Making of an Iran Policy*, N.Y. TIMES, July 30, 2009, http://www.nytimes.com/2009/08/02/magazine/02Iran-t.html (noting the Obama administration's decision not to intervene in the post-election government crackdown); Nicholas Kristof, *Sneaking in Where Thugs Rule*, N.Y. TIMES, Feb. 4, 2009, http://www.nytimes.com/2009/02/05/opinion/05kristof.html (detailing unchecked human rights abuses in Myanmar); Edward Wong, *China Rebuffs Clinton on Internet Warning*, N.Y. TIMES, Jan. 22, 2010, http://www.nytimes.com/2010/01/23/world/asia/23diplo.html (commenting on one form of China's free speech abuses).

119. ROBERT HARGREAVES, THE FIRST FREEDOM: A HISTORY OF FREE SPEECH 4–9 (2002) (describing the free speech enjoyed by Athenians at this time).

120. EURIPIDES, THE SUPPLIANTS (11.438–441), *translated in* JOHN MILTON, AEROPAGITICA (1644), *reprinted in* THE OXFORD AUTHORS: JOHN MILTON 236, 237 (Stephen Orgel & Jonathan Goldberg eds., 1991).

long line of distinguished supporters of the freedom of expression,[122] it was not until 1789 that free speech was first incorporated in a country's bill of rights.[123] In The Declaration of the Rights of Man and the Citizen, the National Assembly of France declared that "the free communication of ideas and opinions is one of the most precious of the rights of man."[124] Then, in 1791, the United States Constitution, in its First Amendment, stated that "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."[125] Since then, an individual's right to freedom of speech has become accepted in countries around the world.[126]

When individual rights started to appear in international treaties after World War II, the freedom of expression was, without fail, included in the lists of fundamental rights.[127] A vast array of international and regional instruments set out the basic human rights that all individuals were entitled to, and each described the rights in slightly different fashions. A brief look at the variety of treaties will give a better understanding of the importance that freedom of speech bears in international law.

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121. In the seventh century, the caliph Omar pronounced, "Only decide on the basis of proof, be kind to the weak so that they can express themselves freely and without fear, deal on an equal footing with litigants by trying to reconcile them." Marcel A. Broisard, *On the Probable Influence of Islam on Western Public and International Law*, 11 INT'L J. MIDDLE EAST STUD. 429, 440 (1980).

122. So, in 1516, Erasmus, in his *Education of a Christian Prince*, says, "In a free state, tongues too should be free." DESIDERIUS ERASMUS, THE EDUCATION OF A CHRISTIAN PRINCE 232 (Lisa Jardine ed., Cambridge Univ. Press 1997) (1516). Likewise, John Milton, in his famous tract, *Areopagitica*, argued against restrictions on the press. John Milton, *supra* note 120, at 237–73.

123. The French document, The Declaration of the Rights of Man, was the first document positing that all individuals possessed a right to freedom of expression. In 1689, the English Bill of Rights, adopted after William and Mary overthrew James II, contained provisions granting freedom of speech in Parliament. Official Website of the British Monarchy, History of the Monarchy: The Stuarts—Mary II and William III, http://www.royal.gov.uk/HistoryoftheMonarchy/KingsandQueensoftheUnitedKingdom/TheStuarts/MaryIIWilliamIIIandTheActofSettlement/MaryIIWilliamIII.aspx (last visited Mar. 8, 2010).

124. 1789 Declaration des droits de l'Homme et du citoyen [Declaration of the Rights of Man and of the Citizen] art. 11. The Declaration is incorporated into France's current constitution. 1958 CONST. pmbl. (Fr.).

125. U.S. CONST. amend. I.

126. *See* RONALD J. KROTOSZYNSKI, JR., THE FIRST AMENDMENT IN CROSS-CULTURAL PERSPECTIVE: A COMPARATIVE ANALYSIS OF THE FREEDOM OF SPEECH, at xiv (2006) ("Virtually all constitutional democracies purport to respect the freedom of speech . . ."); *see also* Elizabeth F. Defeis, *Freedom of Speech and International Norms: A Response to Hate Speech*, 29 STAN. J. INT'L L. 57, 57 (1992) (stating that freedom of speech "is recognized throughout the world as an essential component of a just society").

127. *See, e.g.*, UDHR, *supra* note 4, pmbl.

### B. *International Instruments Concerning Free Speech*

#### 1. The Universal Declaration of Human Rights

The UN Human Rights Commission, formed in 1946 in the aftermath of World War II, had the express purpose of preparing an international bill of rights that would describe the human rights component of the UN Charter.[128] Unsure whether to prepare a declaration or a treaty, it decided to do both: first, a nonbinding declaration, and then a binding convention.[129] In 1948, the General Assembly adopted the Commission's declaration, the Universal Declaration of Human Rights.[130] The Universal Declaration sets out individuals' basic civil and political rights, including the rights to life, security of one's person, fair trial, freedom of movement, and freedom of religion and expression.[131] With respect to free speech, the Universal Declaration provides, "Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers."[132] This right is not absolute, though. According to the Universal Declaration, countries may place restrictions "solely for the purpose of securing . . . respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society."[133]

The Universal Declaration, as an international instrument, has had an unprecedented level of influence on international norms and state practice. While the Declaration was considered nonbinding by some countries when it was adopted,[134] it was generally understood as being truly universal.[135] Indeed, the Universal Declaration has achieved such widespread acceptance that one commentator has stated that it has "become a part of the common law of the world

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128. DUNOFF, RATNER & WIPPMAN, *supra* note 18, at 446.

129. *Id.*; *see also* Vratislav Pechota, *The Development of the Covenant on Civil and Political Rights*, *in* THE INTERNATIONAL BILL OF RIGHTS 32, 32–33 (Louis Henkin ed., 1981) (discussing the buckpassing of the U.N. Charter to subsequent enforceable arrangements).

130. UDHR, *supra* note 4.

131. *Id.* pmbl., art 1.

132. *Id.* art. 19.

133. *Id.* art. 29.

134. Saudi Arabia protested against the articles in the Declaration declaring equal marriage rights and the right to change one's religion or beliefs. DUNOFF, RATNER & WIPPMAN, *supra* note 18, at 447.

135. The Secretary General, *United Nations Action in the Field of Human Rights*, ¶ 67, U.N. Doc. ST/HR/2/Rev.2 (1983) ("[The Universal Declaration] is, as its title implies, truly universal in its application and applies to every member of the human family, everywhere, regardless of whether or not his Government accepts its principles or ratifies the Covenants . . . .")

community; and, together with the Charter of the United Nations, it has achieved the character of the world law superior to all other international instruments and to domestic laws."[136] Many countries have incorporated the document into their own constitutions,[137] and many more have based their constitutions' bill of rights on the protections enumerated in the Declaration.[138]

2. The International Covenant on Civil and Political Rights

Pressed to complete an international bill of rights, the Human Rights Commission decided to draft a binding covenant in addition to the aspirational Universal Declaration of Human Rights. The result, the International Covenant on Civil and Political Rights (ICCPR), shared many of the provisions included in the Declaration but elaborated more fully on them. The ICCPR also included a (limited) mechanism for hearing complaints from individuals regarding violations of the treaty.[139]

Again, freedom of expression held an exalted position in the demarcation of rights. According to the ICCPR, the right to hold opinions "without interference" was absolute.[140] No restrictions for any reason were permitted.[141] In addition, freedom of expression included the "freedom to seek, receive and impart information of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice."[142] The positive content of the freedom of expression was limited by "special duties and responsibilities."[143] Therefore, the exercise of the freedom of expression could be subject to restrictions that were necessary (1) "for respect of the rights or reputations of others" or (2) "for the protection of national security or of public order, or of public health or morals."[144] The individual right of freedom of expression was

136. Louis B. Sohn, *The Universal Declaration of Human Rights*, 8 J. INT'L COMMISSION JURISTS 17, 26 (1967).

137. Countries such as Algeria, the Ivory Coast, Madagascar, and Cameroon have incorporated substantial parts of the Declaration. JAMES AVERY JOYCE, HUMAN RIGHTS: INTERNATIONAL DOCUMENTS 146 (1978).

138. Most Caribbean countries base their constitutional instruments on the UDHR. Stephen Vasciannie, *Human Rights in the Caribbean: Notes on Perception and Reality*, *in* THE CARIBBEAN INTEGRATION PROCESS: A PEOPLE CENTERED APPROACH 167, 168 (Kenneth Hall ed., 2007).

139. ICCPR, *supra* note 4, art. 41.

140. *Id.* art. 19.

141. *Id.*

142. *Id.* art. 19, para. 2.

143. *Id.* art. 19, para. 3.

144. *Id.*

protected not just from governmental action but also from the actions of individuals.[145]

The inclusion of a reference to "special duties and responsibilities" accompanying the exercise of the freedom of expression was a controversial proposition.[146] Countries supporting the inclusion of such a clause argued that free speech was a "precious heritage" that held tremendous power in public opinion and international affairs, thus justifying reference to the responsibilities of speakers.[147] But other states, including the United States, argued that all rights carry countervailing duties, and thus any specific reference to the duties inherent to free speech was unnecessary.[148] In the end, consensus was reached on a clause that provided for special duties and responsibilities but narrowly limited the kinds of restrictions that could be imposed on the right.[149] The resulting definition of the right to freedom of expression was surprisingly broad, given the difficulty of getting so many divergent countries to agree on one version.[150]

### 3. Convention for the Protection of Human Rights and Fundamental Freedoms

In the period immediately after the adoption of the Universal Declaration in 1948, many commentators in Europe worried that a binding treaty regarding international human rights would be difficult if not impossible under the auspices of the UN.[151] Driven by the revulsion towards the recently perpetrated abuses of the Nazi regime, the Council of Europe drafted a Convention for the Protection of Human Rights and Fundamental Freedoms (the European Convention) designed to make the promises of the Universal

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145. *See* Defeis, *supra* note 126, at 79 (noting the dually restrictive outcome of the speech limitation debate).

146. *See* MARC J. BOSSUYT, GUIDE TO THE "TRAVAUX PREPARATOIRES" OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS 379 (1987) (noting debate over the proposal).

147. *Id.* at 393. Some states even argued for limitations on expressions that are obscene and expressions that defame the reputations of others. These limitations were not included in the final draft. *Id.* at 387.

148. *Id.* at 386.

149. *Id.* at 386–87.

150. Today, 162 countries have ratified the convention. The Office of the High Commissioner for Human Rights keeps a full list of parties to the ICCPR. United Nations Treaty Collection, International Covenant of Civil and Political Rights, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en (last visited Mar. 8, 2010).

151. Defeis, *supra* note 126, at 94.

Declaration binding on its member states.[152] Today, the European Convention stands as the most successful and robust system to protect human rights in the world.

The European Convention created two bodies, the European Commission of Human Rights and the European Court of Human Rights, to ensure that member states comply with their obligations.[153] An optional protocol empowers individuals to petition the Commission directly for any alleged violation of their rights under the European Convention.[154]

The European Convention's provisions regarding freedom of speech are naturally very similar to those provisions in the ICCPR because both documents are based on the Universal Declaration of Human Rights.[155] The one exception is the inclusion of a long list of limitations on the freedom of expression in the European Convention. Article 10 of the European Convention states:

> 1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. . . .
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.[156]

The extensive list of restrictions on an individual's right to exercise his freedom of speech stems from the fewer number of participants in the negotiations and the consequently higher level of consensus

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152. Convention for the Protection of Human Rights and Fundamental Freedoms art. 10, para. 2, Nov. 4, 1950, 213 U.N.T.S. 22 [hereinafter European Convention].

153. *Id.* art.19.

154. All twenty-two members of the Council of Europe have adopted the optional protocol. *See* MARK W. JANIS & RICHARD S. KAY, EUROPEAN HUMAN RIGHTS LAW 22–32 (1990) (providing a history of formation of the protocol).

155. *Compare* European Convention, *supra* note 152, art. 10 ("Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.") *with* ICCPR, *supra* note 4, art. 19

> 1. Everyone shall have the right to hold opinions without interference. 2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

156. European Convention, *supra* note 152, art. 10.

between member states as compared to the ICCPR.[157] The temporal and geographical closeness of the war created a stronger unity in Europe with respect to this issue.[158] The United States itself would not go so far. Indeed, in the ICCPR negotiations the United States was one of the most active proponents of a relatively unrestricted freedom of speech, for the reason that its own jurisprudence was consistent with such a view.[159]

4. American Convention on Human Rights

In 1948, twenty-one countries in Latin America joined together to defend their territorial integrity and promote peace and justice under the Organization of American States.[160] In the same year, a few months before the UN adopted the Universal Declaration, they adopted the American Declaration of the Rights and Duties of Man.[161] Just as with the Universal Declaration, a subsequent document, the American Convention on Human Rights elaborates upon the extent of the obligations provided for in the American Declaration.[162] The American Convention, like the European Convention, set up an Inter-American Commission on Human Rights to review alleged human rights violations and an Inter-American Court of Human Rights to hear appeals.[163]

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157. *See* Defeis, *supra* note 126, at 94 (noting a policymaking stalemate).

158. *See id.* (noting the immediate backdrop of the human rights abuses of WWII).

159. A huge literature exists on the conflict between United States free speech law and free speech law in the rest of the world. For comparative commentary on various bodies of speech law, see *id.* (discussing the impact of international norms on hate speech); Claudia E. Haupt, *Regulating Hate Speech—Damned if You Do and Damned if You Don't: Lessons Learned from Comparing the German and U.S. Approaches*, 23 B.U. INT'L L. J. 299 (2005) (providing a comparison of U.S. and German approaches to free speech protections; Krotoszynski, *supra* note 126 (comparing speech law); Ziyad Motala, *The First Amendment and Hate Speech: An Illustration of Why the United States Supreme Court's Approach Represents an Anomaly*, 46 HOW. L.J. 507 (2003) (discussing the U.S. approach to hate speech and how it represents an anomaly in the international community); Robert A. Sedler, *An Essay on Freedom of Speech: The United States Versus the Rest of the World*, 2006 MICH. ST. L. REV. 377 (2006) (reviewing U.S. free speech protections and comparing them with those found in the rest of the world).

160. Organization of American States Charter, Apr. 30, 1948, 2 U.S.T. 2394, 119 U.N.T.S. 3, [hereinafter OAS Charter].

161. Organization of American States, American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36, 1114 U.N.T.S. 123 [hereinafter American Convention].

162. *Id.*

163. Thomas Buergenthal, *The Inter-American System for Protection of Human Rights*, *in* HUMAN RIGHTS IN INTERNATIONAL LAW: LEGAL POLICY ISSUES 439, 460–67 (Theodore Meron ed., 1984); Thomas Buergenthal, *Human Rights in the Americas: View From the Inter-American Court*, 2 CONN J. INT'L L. 303, 306–09 (1987).

The right to freedom of expression contained in the American Convention is almost identical to that found in the International Covenant.[164] Article 13 of the American Convention states that "[e]veryone has the right to freedom of thought and expression."[165] It also prohibits indirect methods of restricting expression, such as unfair allocation of newsprint or broadcasting frequencies, a restriction that applies both to private persons as well as the government.[166] On the other hand, it requires states to prohibit war propaganda and advocacy of national, racial, or religious hatred.[167]

The American Convention's free speech clauses are the most far-reaching of any human rights treaty.[168] Indeed, the American Court has articulated the view that the American Convention's guarantees of freedom of expression are "more generous" than those guaranteed in the European Convention.[169] The treaty's provisions with regard to free speech evince an intent to reduce to the absolute minimum restrictions on the free exercise of speech.[170]

### 5. African Charter on Human and Peoples' Rights

Until 1986, African countries adhered to the doctrine of non-interference with the internal affairs of other member states of the Organization for African Unity (OAU).[171] But in response to serious human rights abuses in Africa during the 1970s and 1980s, as well as Tanzania's invasion of Uganda, the OAU decided to draft an African

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164. *Compare* American Convention, *supra* note 161, art. 13 ("Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice.") *with* ICCPR, *supra* note 4, art. 19 ("Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.").

165. American Convention, *supra* note 161, art. 13, para. 1.

166. *Id.* art. 13, para. 3.

167. *Id.* art. 13, para. 5.

168. Notably, the American Convention has several features that go beyond other human rights instruments. For one, the American Convention explicitly states that the exercise of the right of freedom of expression "shall not be subject to prior censorship." *See* GLOBAL INTERNET LIBERTY CAMPAIGN, REGARDLESS OF FRONTIERS (1998), *available at* http://gilc.org/speech/report/. The rule against prior censorship is also reinforced by Article 14, which provides for a right of reply by anyone inured by inaccurate or offensive statements or ideas disseminated to the general public. *See id.*

169. Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts. 13 & 29 of the American Convention on Human Rights), Adv. Op. OC-5/85, Inter-Am. Ct. H.R. (ser. A), No. 5, ¶ 50 (Nov. 13, 1985), *available at* http://www1.umn.edu/humanrts/iachr/b_11_4e.htm.

170. 1985 INTER-AM. Y.B. ON HUM. RTS. 1176.

171. Ziyad Motala, *Human Rights in Africa: A Cultural, Ideological, and Legal Examination*, 12 HASTINGS INT'L & COMP. L. REV. 373, 396 (1989).

Charter on Human and Peoples' Rights to promote individual and group rights in Africa.[172]

The Charter establishes a framework for protection of human rights that is generally considered weaker than the frameworks of other comparable human rights treaties.[173] True, the Charter creates a Commission "to promote human and peoples' rights and ensure their protection in Africa."[174] But the Commission's investigations of violations of the treaty must be confidential unless authorized by the Assembly of Heads of State of the OAU.[175] A former Secretary General of the OAU has described the Commission as "far from being an organ with jurisdiction for protection of human rights."[176] The Charter also contained no provision for a court of human rights. Instead, it opted for mediation, consensus, and conciliation, in order to conform with African customs and practices.[177] In 2004, however, an African Court on Human and Peoples' Rights was formed to rule on compliance with the African Charter.[178] It has had limited success.[179]

The Charter guarantees every individual's right "to receive information" and "to express and disseminate his opinions within the law."[180] It does not have any express reference to restrictions on the right of free expression, although it is subject to the general restrictions set forth later in the document, which clarify that individuals must exercise their freedoms "with due regard to the rights of others, collective security, morality and common interest."[181]

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172. *Id.*; B. Obinna Okere, *The Protection of Human Rights in Africa and the African Charter on Human and Peoples' Rights: A Comparative Analysis with the European and American Systems*, 6 HUM. RTS. Q. 141,144 (1984).

173. Claude E. Welch, Jr., *The African Commission on Human and Peoples' Rights: A Five-Year Report and Assessment*, 14 HUM. RTS. Q. 43, 43 (1992).

174. African Charter on Human and Peoples' Rights art. 30, June 27, 1981, 21 I.L.M. 58, OAU Doc. CAB/LEG/67/3 rev. 5, *entered into force* Oct. 21, 1986, 21 I.L.M. 58 [hereinafter African Charter].

175. *Id.* art. 59.

176. Edem Kodjo, *The African Charter on Human and Peoples' Rights*, 11 HUM. RTS. L.J. 271, 279 (1990).

177. Burns H. Weston et al., *Regional Human Rights Regimes: A Comparison and Appraisal*, 20 VAND. J. TRANSNT'L L. 585, 611 (1987).

178. Rebecca Wright, *Finding an Impetus for Institutional Change at the African Court for Human and Peoples' Rights*, 24 BERKELEY J. INT'L LAW 463, 476 (2006).

179. *See id.* (showing the development of the court from a rational design theory perspective).

180. African Charter, *supra* note 174, art. 9.

181. *Id.* art. 27.

### C. *The International Law on Free Speech as Expressed by International Treaties*

The number of international and regional legal instruments protecting the freedom of speech demonstrate just how established that right is as an international norm. While the treaties each express the right in a slightly different way, there are some basic concepts to which all ascribe. Together, the treaties cover the overwhelming majority of the world's countries and therefore have vast importance for the explanation of any truly universal right to freedom of speech.

Countries ratifying any of the abovementioned human rights treaties accept two obligations: (1) to adopt statutes or other measures necessary to protect the rights guaranteed by the treaty and (2) to remedy any violations of the rights.[182] The ability of individuals to petition for redress of violations, however, varies significantly. The European Convention provides a robust system for individual complaints, while the ICCPR contains none, except in the Optional Protocol.[183]

The content of the guarantee of the freedom of expression in the various treaties is, for the most part, relatively uniform. An individual right to hold opinions without interference is declared by both the Universal Declaration of Human Rights and the ICCPR, and the American and European Conventions are understood to protect the right as well.[184] The African Charter makes no mention of the right.[185] The right to seek, receive, and impart information and ideas is explicitly provided for in the Universal Declaration, the International Covenant, and the American Convention.[186] Both the European Convention and the African Charter are assumed to protect this right as well.[187]

All the treaties also establish a test for determining the legitimacy of restrictions on the freedom of speech. They generally require that any restriction must (1) be provided by law; (2) serve one of the legitimate purposes enumerated in their texts; and (3) be necessary.[188] Although some of the treaties detail the legitimate

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182. INT'L CTR. AGAINST CENSORSHIP, THE ARTICLE 19 FREEDOM OF EXPRESSION HANDBOOK: INTERNATIONAL AND COMPARATIVE LAW, STANDARDS AND PROCEDURES 15 (1993).

183. *Id.* at 224–25, 226.

184. *Id.* at 15.

185. *Id.*

186. *Id.*

187. *Id.* at 15–16.

188. *Id.* at 16.

reasons for restrictions with greater specificity,[189] all provide some variation on the themes of respect for the rights of others, public order, and morals.[190]

International treaties thus show substantial consensus on the broad contours of the individual right to freedom of expression. The Universal Declaration provides the most widely accepted articulation of that freedom, achieving the status of "world law superior to all other international instruments and to domestic laws."[191] Regional treaties have tweaked the individual right, but for the most part they have reaffirmed the concept. The problem, though, lies in implementation. Other than the European Convention, the mechanisms for enforcing the obligations of states under the treaties are faulty or non-existent. The ICCPR, which elaborates on the meaning of the Universal Declaration, is enforceable only to the extent that states ratify the Optional Protocol, and even then is of questionable value.[192] The African Charter created no court of human rights, and such a court was formed only in 2004.[193] The American Convention does have a court, but its duties are limited

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189. For example, the European Convention states that it does "not prevent States from requiring the licensing of broadcasting, television or cinema enterprises." European Convention, *supra* note 152, art. 10.

190. The UDHR, *supra* note 4, art. 29, para. 2, permits restrictions on the freedom of speech to secure "due recognition and respect for the rights and freedoms of others and . . . the just requirements of morality, public order and the general welfare . . . ." The ICCPR, *supra* note 4, art. 19, para. 3(b), permits restrictions to protect "the rights or reputations of others," national security, public order, and "public health or morals." The American Convention, *supra* note 161, art. 13, uses the same language as the ICCPR. The European Convention, *supra* note 152, art. 10, allows restrictions to protect "national security, territorial integrity or public safety," health, morals, the rights of others, and the impartiality of the judiciary, as well as to prevent disorder or the disclosure of confidential information. The African Charter, *supra* note 174, art. 27, permits restrictions to protect "the rights of others, collective security, morality, and common interest."

191. Sohn, *supra* note 136, at 26.

192. The experience of Sri Lanka is illustrative. Sri Lanka acceded to the ICCPR in 1980 and the Optional Protocol in 1997. *Sri Lanka's Supreme Court Decision Undermines Human Rights Protection*, REFWORLD, Oct. 17, 2006, http://www.fidh.org/spip.php? article3731. But in 2006, the Sri Lankan Supreme Court issued a decision stating that "the [ICCPR] does not have internal effect and the rights under the ICCPR are not rights under the law of Sri Lanka." Singarasa v. Attorney General, [2006] SC (SPL) L.A. No. 182/99, at *7 (Sri Lanka). As for the Optional Protocol, the Court held that its ratification was unconstitutional and thus individuals "cannot seek to 'vindicate and enforce' [their] rights through the [Human Rights Committee]." *Id.* at *6. In a case later that year, when a plaintiff complained that the Supreme Court was the final court of appeals, the Chief Justice jokingly responded, "Well, try the Optional Protocol," and laughed. Press Release, Asian Human Rights Comm'n, Sri Lanka: The Optional Protocol to the ICCPR is Openly Subjected to Ridicule by Sarath N. Silva, the Chief Justice, (Oct. 12, 2006), *available at* http://www.ahrchk.net/pr/mainfile.php/2006mr/398/.

193. Wright, *supra* note 178, at 476.

and its ability to hear cases is entirely dependent on the decision of a separate commission.[194]

So, the human rights treaties make a number of promises to individuals about their right to free speech, but they provide scant means of enforcement. And without enforcement, the impressive guarantees made by human rights instruments lose much of their force. States that do not expect to have their commitments enforced on them feel free to make them willy nilly.[195] If that is true, then how can one close the gap between rights and remedies in international law? The next Part will address precisely this question.

## IV. THE RESPONSIBILITY TO PROTECT, SOVEREIGNTY, AND FREE SPEECH

Returning to the issue of state sovereignty, the exclusion of free speech, among other fundamental rights codified in international treaties of the twentieth century, from the pantheon of rights, the violation of which called for the intervention of the international community, was reminiscent of the pre-World War II period, in which states were the primary—even sole—actors in international affairs and international law. Indeed, the position of the General Assembly and the Security Council, with respect to the violation of individual rights not involving genocide and crimes against humanity, seems to wholeheartedly affirm the position of Yugoslavia in 1999 that "[n]o State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State."[196] While the ICJ dismissed the case for lack of jurisdiction and thus did not address the merits of Yugoslavia's position, that position is by now nearly universally discredited.

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194. *See* Morse H. Tan, *Upholding Human Rights in the Hemisphere: Casting Down Impunity Through the Inter-American Court of Human Rights*, 43 TEX. INT'L L.J. 243, 277–84 (2008) (explaining the referral system and describing the Court's previous lack of effectiveness).

195. *See* Oona A. Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 YALE L.J. 1935, 1962–89 (2002) (a quantitative study to determine whether states act in their own self-interest with respect to their attitude on human rights law); Oona A. Hathaway, *Why Do Countries Commit to Human Rights Treaties?*, 51 J. CONFLICT RESOL. 588, 592 (2007) (arguing that "the effect of a treaty on a state—and hence the state's willingness to commit to it – is largely determined by the domestic enforcement of the treaty and the treaty's collateral consequences.").

196. OAS Charter, *supra* note 161, art. 15 ("No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State."); Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty, G.A. Res. 2131 (XX), ¶ 1, U.N. Doc. A/Res/20/2131 (Dec. 21, 1965) ("No State has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State.").

The essential problem with the pre-World War II legal regime was that it acknowledged state sovereignty as the building block of international relations and therefore treated it as inviolable. This system left individual citizens at the whim of their governments, only able to enforce their rights to the extent that the state considered appropriate.[197] Even after the proliferation of human rights treaties delineating the rights of individuals under international law, the inviolability of state sovereignty remained a tenet of the law of nations. For example, in the famous case of *Banco Nacional de Cuba v. Sabbatino*, the U.S. Supreme Court upheld the act of state doctrine, by which the decisions of foreign countries relating to their internal affairs would not be questioned.[198] The court explained as follows:

> Because of [international law's] peculiar nation-to-nation character the usual method for an individual to seek relief is to exhaust local remedies and then repair to the executive authorities of his own state to persuade them to champion his claim in diplomacy or before an international tribunal.[199]

And this redefining of international law's peculiar nation-to-nation character—giving the state the principal role in global discourse—was crucial to the pre-World War II era.[200] Any interference with the internal affairs of states was seen as illegal and unnecessary meddling. Foreign intervention, even by a group of states, was a violation of the baseline rule of inviolable state sovereignty, at least as far as it concerned intrastate conflict.

As the historical discussion above makes clear, however, this line of thought became unsustainable after World War II, when the full extent of the horrors of the Holocaust became clear. The atrocities committed by the Nazi regime on its own citizens shocked the conscience of the world and demanded a rethinking of the fundamental contours of the previous legal system. Thus, in treaty after treaty, nation states agreed that individual rights were an important component of international law.[201] With the relatively recent development of a responsibility to protect individuals from certain severe crimes, such as genocide and crimes against humanity, legal scholars and international organizations have paved the way for

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197. *See* LEVI, *supra* note 23, at 181.

198. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 439 (1964).

199. *Id.* at 422–23.

200. *See id.* at 408–09 (citing cases permitting sovereign states to sue in the courts of the United States).

201. *See* LYNN HUNT, INVENTING HUMAN RIGHTS: A HISTORY (2007); MICHELINE R. ISHAY, THE HISTORY OF HUMAN RIGHTS: FROM ANCIENT TIMES TO THE GLOBALIZATION ERA 173–229 (2004) (tracing the history of human rights); MAHONEY, *supra* note 11, at 42–64 (examining the treaties of the modern human rights movement).

a more morally intuitive approach towards evaluating the legality of intervention. The right of state sovereignty had to be balanced against the competing claims of individuals to their own rights. Kofi Annan, writing in 1999, described the situation as follows:

> State sovereignty, in its most basic sense, is being redefined—not least by the forces of globalisation and international co-operation. States are now widely understood to be instruments at the service of their peoples, and not vice versa. At the same time individual sovereignty—by which I mean the fundamental freedom of each individual, enshrined in the charter of the UN and subsequent international treaties—has been enhanced by a renewed and spreading consciousness of individual rights. When we read the charter today, we are more than ever conscious that its aim is to protect individual human beings, not to protect those who abuse them.[202]

This view of the concept of state sovereignty was explicitly adopted both by the UN General Assembly and the Security Council, giving it full recognition in international law.[203]

In its core assumptions, the international legal system's treatment of free speech is eerily similar to the pre-World War II treatment of internal affairs. Take, for example, the case of Tibet. Human rights organizations such as Human Rights Watch have documented widespread violations of free speech: thousands of Tibetans have been sent to prison for exercising the freedom of expression concerning Tibetan independence, freedom to profess one's religion has been severely limited, and other violations abound.[204] But when the Chinese government was confronted with criticism of its treatment of Tibetans, it responded with a typical state sovereignty argument:

> What happens in Tibet is an internal affair of China. The Chinese Government resolutely opposes any interference in the Tibet issue, which is our internal affair. We urge relevant countries to respect China's sovereignty and territorial integrity, respect the universally recognized norms governing international relations, and do not support the Dalai Clique's separatist activities in any form under any excuse. I would like to stress that the Chinese Government has the

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202. Annan, *supra* note 98, at 49.

203. *See* Emma McClean, *The Responsibility to Protect: The Role of International Human Rights Law*, 13 J. CONFLICT & SEC. L. 123, 128–29 (2008) (showing Annan's influential role in the development of humanitarian intervention and the responsibility to protect, ultimately adapted by the United Nations at the 2005 World Summit).

204. *See* TIBET SINCE 1950: SILENCE, PRISON OR EXILE 30–175 (Melissa Harris & Sidney Jones eds., 2000) (photo-history of human rights violations in Tibet since 1950); Laura S. Ziemer, *Application in Tibet of the Principles on Human Rights and the Environment*, 14 HARV. HUM. RTS. J. 233, 234–38 (2001) (connecting human rights standards and the environment in Tibet); Amnesty International, Our Statement to U.N. Human Rights Council regarding Tibet (Mar. 26, 2008), *available at* http://www.amnesty.org.au/news/ comments/11342/ (calling on the Human Rights Council to address the human rights situation in the Tibetan Autonomous Region and in the neighboring provinces which have experienced unrest).

> determination and capability to safeguard our sovereignty and territorial integrity.[205]

Therefore, the language of inviolable state sovereignty still holds traction in international legal discourse. For this reason, China saw intervention to prevent violations of the numerous fundamental rights guaranteed by binding international treaties as a violation of the more important international norm of sovereignty and non-interference. Indeed, the Chinese position does appear to be an accurate restatement of the current state of the law. While the General Assembly and Security Council resolutions with regard to genocide and ethnic cleansing established a new international norm with respect to those very limited circumstances, the position of free speech in the international system remains subordinate to state sovereignty. Just as the execution of a state's own citizens once was considered an internal matter not warranting international concern, so too the freedom of expression now stands an internal matter not brooking any kind of foreign meddling.

Under the current understanding of the international law of free speech and the previous understanding of genocide and ethnic cleansing, the old fundamental tenet of the law of nations, state sovereignty, remains alive: the state has exclusive control over its territory and people.[206] But the assumptions underlying that concept have eroded since World War II, and it has become clear that the state owes certain obligations to its citizens.[207] A world that demands respect for human rights, including within the borders of a state, cannot coexist with a world that demands absolute respect for state sovereignty.[208] Despite all the advantages (i.e., stability, clarity, and national security) of sovereignty, the nonintervention principle is legitimately subject to certain exceptions—at least to a limited extent—if the purpose of intervention is for just reasons and sufficient benefits are expected to accrue from it.[209] This, at least, is the dominant theory of the post-World War II era. What is not sufficiently realized today, but what is undeniably valid, is that this logic applies equally to both interventions to protect populations from

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205. Ministry of Foreign Affairs of the People's Republic of China, Chinese Foreign Ministry Spokesperson Qin Gang's Regular Press Conference on March 27, 2008, (Mar. 27, 2008), *available at* http://www.fmprc.gov.cn/eng/xwfw/s2510/t419160.htm.

206. *A More Secure World: Our Shared Responsibility*, *supra* note 107, ¶ 29.

207. *See* INT'L COMM'N ON INTERVENTION AND STATE SOVEREIGNTY, *supra* note 8, at 12 (an international survey of opinions on the moral, legal, operational, and political questions related to humanitarian intervention); *A More Secure World: Our Shared Responsibility*, *supra* note 107, ¶¶ 183–209 (outlining a system of international collective security); Annan, *supra* note 98, at 49 (arguing for international humanitarian intervention despite state sovereignty).

208. Annan, *supra* note 98, at 49.

209. *Id.*

widespread violations of their right to free expression and interventions to protect from genocide. Here, as elsewhere, human rights treaties have guaranteed to the people of the world certain rights—rights that now form part of the nucleus of international law.[210] The respect for state sovereignty does not trump these rights any more in the area of free speech than in the area of genocide. Indeed, if one looks to the rationales for state sovereignty, one sees that respect for free speech and other human rights embodied in the multitude of human rights treaties serves these purposes better.

The lack of any intervention norm with regards to speech is to a certain extent even more surprising than the previous position of international law with regard to crimes against humanity. Free speech is one of the oldest and most respected rights in the history of civilization, one that is often referred to as the "first freedom."[211] A long and respected jurisprudence protecting citizens' right to freedom of expression exists in almost every state. Efforts to protect free speech require relatively less commitment than efforts to protect populations from forceful and determined military actions. International intervention to preserve individuals' free speech rights should not be regarded as an impermissible interference or an assault on state sovereignty. The foundations of the concept of state sovereignty have eroded since World War II, and the power of states within their own borders is constantly changing. In some ways, globalization has expanded the power of states to express their message and monitor their citizens. In others, it has disassembled the very idea of a sovereign country.[212] In any case, a system that

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210. *But see* JACK L. GOLDSMITH & ERIC A. POSNER, THE LIMITS OF INTERNATIONAL LAW 21–44 (2005) (using state interest to explain the realities of international law); JOHN C. YOO, THE POWERS OF WAR AND PEACE: THE CONSTITUTION AND FOREIGN AFFAIRS AFTER 9/11 (2005) (arguing that American presidents have the power to act decisively on the world stage without a declaration of war); Curtis A. Bradley, *A New American Foreign Affairs Law?*, 70 U. COLO. L. REV. 1089, 1104–07 (1999) (describing a "new" view of American foreign affairs law); Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 870–73 (1997) (arguing that customary international law, including human rights law, should not have the status of federal law in the United States). For a discussion of how America's participation in international institutions is threatened by a vocal group of intellectuals seeking to guard U.S. sovereignty at all costs, see Peter Spiro, *The New Sovereigntists: American Exceptionalism and Its False Prophets*, FOREIGN AFF., Nov.–Dec. 2000, at 9, 9–15.

211. *See* ROBERT HARGREAVES, THE FIRST FREEDOM: A HISTORY OF FREE SPEECH 1–22 (2002) (describing protections of the freedom of speech since the times of the Ancient Greeks).

212. *See* Anne-Marie Slaughter, *Disaggregated Sovereignty: Towards the Public Accountability of Global Government Networks*, *in* GLOBAL GOVERNANCE AND PUBLIC ACCOUNTABILITY 35, 35–66 (David Held & Mathias Koenig-Archibugi eds., 2005) (contending that, in the face of globalization, the representatives of sovereign nations must be directly accountable); Anne-Marie Slaughter, *Global Government Networks, Global Information Agencies, and Disaggregated Democracy*, 24 MICH. J. INT. L. 1041,

promises "universal" respect for human rights cannot simultaneously posit that state sovereignty stands as a higher value than those rights. The international community's responsibility to protect must encompass not just the protection of a limited selection of individual rights but also the wide range of fundamental rights guaranteed by international human rights treaties.

## V. RATIONALES FOR THE RESPONSIBILITY TO PROTECT

The responsibility to protect as a doctrine in international law has developed in fits and starts. Its primary proponents, including the UN, have used a miscellany of justifications without properly identifying how each applies.[213] Scholars have generally approached the question using the lens of policy analysis and thus have muddied the waters.[214] In general, though, arguments in favor of and against the adoption of a responsibility to protect in international law fall into three categories: moral, legal, and consequential. Moral arguments about the responsibility to protect tend to focus on the deontological obligations of the international community towards individuals subject to violations of their rights.[215] In other words, it would be wrong for the international community not to intervene when a state is engaged in a campaign of genocide against a portion of its population. Legal arguments, on the other hand, look at the UN Charter, subsequent human rights treaties, and interpretations of international law to argue that states have a legal duty to intervene in certain situations.[216] Any such arguments have to confront the interminable problem of the UN Charter's outlawing of the use of force outside of self-defense.[217] Finally, consequential arguments

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1066–73 (2003) (arguing that, rather than having a world state, disaggregated nations in a post-globalization world must work together to create accountable global government networks and global information agencies).

213. The two founding documents of the responsibility to protect doctrine in international law are the ICISS's *The Responsibility to Protect* and the High-level Panel's *A More Secure World*, never enumerate the rationales underlying their policy recommendations. *See generally* INT'L COMM'N ON INTERVENTION AND STATE SOVEREIGNTY, *supra* note 8; *A More Secure World: Our Shared Responsibility*, *supra* note 107.

214. For example, a classic explanation of the dilemma of humanitarian intervention, Richard Falk's *Kosovo, World Order, and the Future of International Law*, mixes legal and moral arguments without clearly delineating where one ends and where the other begins. He concludes that intervention in Kosovo was "necessary to prevent a humanitarian catastrophe . . . [but] impossible because of the political unavailability of an appropriate means." Falk, *supra* note 96, at 852. What is impossible is finding out what he means by "necessary" and "impossible."

215. *Id.* at 852–53.

216. *Id.* at 854–56.

217. *See* U.N. Charter art. 2, para. 4 ("All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or

tend to focus on the bad results that would occur if the international community did not intervene in cases of genocide, crimes against humanity, or ethnic cleansing. Such bad results range from spreading instability, to excessive human suffering, to a breakdown of international law.

Inevitably, these arguments tend to run together. Moral arguments about the need to intervene usually consider the effects of not intervening.[218] Legal arguments have to look both at international norms and at consequences. Indeed, the two most important documents describing the international doctrine of responsibility to protect seem to use all three justifications.[219] But this Part will attempt to look at the various justifications in turn and separately in order to flesh out the assumptions underlying the concept of a responsibility to protect. Only after doing so can one begin to understand the compelling need for a broader concept of a responsibility to protect—one that, at a bare minimum, includes the protection of the freedom of speech.

### A. *Moral Arguments for the Responsibility to Protect*

States, international organizations, and scholars of international law have deployed a wide variety of moral arguments to justify the adoption of a responsibility to protect, and it is beyond the scope of this Article to consider all of them.[220] However, in recent years, three

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political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."); *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 the measures necessary to maintain international peace and security.").

218. *See, e.g.*, Falk, *supra* note 96, at 852–53 (noting the disastrous consequences that would occur in the event of non-intervention).

219. INT'L COMM'N ON INTERVENTION AND STATE SOVEREIGNTY, *supra* note 8, at XI–XIII; *A More Secure World: Our Shared Responsibility*, *supra* note 107, ¶¶ 17–43.

220. *See* HUMANITARIAN INTERVENTION: ETHICAL, LEGAL AND POLITICAL DILEMMAS 91–174 (J.L. Holzgrefe & Robert O. Keohane, eds., 2004) (discussing the context, ethics, law, and politics of humanitarian intervention); FERNANDO R. TESÓN, HUMANITARIAN INTERVENTION: AN INQUIRY INTO LAW AND MORALITY 3–18 (2d. ed. 1997) (arguing that the rights of states derive from human rights and consequently wars in defense of human rights are just); Mirko Bagaric & John R. Morss, *Transforming Humanitarian Intervention from an Expedient Accident to a Categorical Imperative*, 30 BROOK. J. INT'L L. 421, 423 (2005) ("[A]ltruism needs to be established in an administrative manner."); Gareth Evans, *From Humanitarian Intervention to the Responsibility to Protect*, 24 WIS. INT'L L.J. 703, 704–12 (2006) (discussing the development of "the responsibility to protect"); Ryan Goodman, *Humanitarian Intervention and Pretexts for War*, 100 AM. J. INT'L L. 107, 107 (2006) ("contend[ing] that legalizing UHI [unilateral humanitarian intervention] should in important respects *discourage* wars with ulterior motives"); Thomas H. Lee, *The Augustinian Just War Tradition and the Problem of Pretext in Humanitarian Intervention*, 28 FORDHAM INT'L L.J. 756, 757–62 (2005) (attempting to show how the present laws of war might be viewed as consistent with the Augustinian just war tradition); James W. Smith III,

leading accounts of the morality of intervention have emerged. They are (1) the higher moral value placed on individual rights than on state integrity; (2) John Rawls's argument in favor of an international law of well-ordered peoples; and (3) Michael Walzer's appeal to the virtue of communal autonomy.

First, some commentators argue that individual rights take moral precedence over any right of states to nonintervention.[221] Kofi Annan has expressed this viewpoint, stating that "even harder experience has led us to grapple with the fact that no legal principle—not even sovereignty—should ever be allowed to shield genocide, crimes against humanity and mass human suffering."[222] Indeed, the international law scholar Fernando Tesón begins with the proposition that, from an "ethical standpoint," governments are solely agents of their people and "[those governments'] international rights derive from the rights of the individuals who inhabit and constitute the state."[223] Thus, when a government violates the rights of its citizens, it ceases to hold a legitimate claim to respect of its territorial integrity.

A second line of thought is espoused by John Rawls in his book *The Law of Peoples*, in which he argues that international law should adopt the principles that all would adopt in a negotiation, unaffected by different distributions of power among representatives of people whose institutions and political culture are "well-ordered."[224] The participants in such negotiations would adopt a principle to "observe

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*Unilateral Humanitarian Intervention and the Just Cause Requirement: Should the Denial of Self-Determination to Indigenous People Be a Valid Basis for Humanitarian Intervention? Yes*, 31 AM. INDIAN L. REV. 699, 701–03 (2007) (discussing unilateral intervention and its connection to indigenous populations); Fernando R. Tesón, *The Vexing Problem of Authority in Humanitarian Intervention: A Proposal*, 24 WIS. INT'L L.J. 761, 771–72 (2006) [hereinafter Tesón, *Vexing Problem*] (proposing a Court of Human Security to oversee all responses to humanitarian crises including intervention).

221. *See, e.g.*, KOFI ANNAN, THE QUESTION OF INTERVENTION 3–19 (1999) (containing public statements by former Secretary-General Kofi Annan regarding intervention); TESÓN, *supra* note 220, at 3–155 (providing a philosophical defense of humanitarian intervention); Tesón, *Vexing Problem*, *supra* note 220, at 761–62 ("[T]he institutions for humanitarian intervention should serve *the cosmopolitan interests of humanity*, as opposed to the national interests of states and governments.").

222. The Secretary-General, *In Larger Freedom: Towards Development, Security and Human Rights for All*, ¶ 129, *delivered to the General Assembly*, U.N. Doc. A/59/2005 (Mar. 21, 2005). Another former Secretary-General, Javier Perez de Cuellar, expressed a similar sentiment when he said, "It is now increasingly felt that the principle of non-interference with the essential domestic jurisdiction of States cannot be regarded as a protective barrier behind which human rights could be massively or systematically violated with impunity." The Secretary-General, *Report of the Secretary-General on the Work of the Organization*, ¶ IV, *delivered to the General Assembly*, U.N. Doc. A/4/61 (Sept. 13, 1991), *available* at http://www.undemocracy.com/A-46-1.pdf.

223. TESÓN, *supra* note 220, at 111.

224. JOHN RAWLS, THE LAW OF PEOPLES 35 (1999).

a duty of non-intervention," but not an absolute one.[225] This nonintervention norm requires a high standard of political order: the state must provide substantive freedom and equality for all citizens.[226] For Rawls, this prescription means that all citizens must be able to participate in the political process in an effective and informed way.[227] If a regime is not well-ordered, then the nonintervention norm loses its force. Such would be the case, Rawls postulates, in a modern-day Aztec society that "holds its lower class as slaves, keeping the younger members available for human sacrifices in temples."[228] There would be no moral objection to intervening in this case because the society so obviously lacks the basic requirements of a well-ordered society.

A final moral argument in favor of a responsibility to protect is that the self-determination of political communities has inherent moral importance.[229] As articulated by Walzer, the basic moral principle is "always act so as to recognize and uphold communal autonomy."[230] One corollary of this principle is that there is a strong presumption that any intervention would violate the right to self-determination of the political community.[231] These norms facilitate respect for cultural differences and political preferences. But in some situations, the presumptions should be disregarded. Most importantly, even though "'ordinary' oppression" does not call for intervention,[232] intervention is acceptable to end massive violations of human rights that are so severe that "we must doubt the very existence of a political community to which the idea of self-determination might apply."[233] In this case, no deference should be given to the decisions of a sovereign state.

The moral arguments justifying a responsibility to protect, then, revolve around the idea that, at least in severe cases of violations of individual rights, it is morally defensible—if not obligatory—for the international community to intervene in a state's internal affairs to prevent further such violations. Deontologically, the argument goes, humanitarian intervention is right, and, to the extent that law should

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225. *Id.* at 37.
226. *Id.* at 61.
227. *Id.*
228. *Id.* at 93–94 n.6.
229. MICHAEL WALZER, JUST AND UNJUST WARS 90–91 (1977).
230. *Id.* at 90.
231. Michael Walzer, *The Moral Standing of States: A Response to Four Critics*, 9 PHIL. & PUB. AFF. 209, 210 (1980).
232. *Id.* at 218.
233. *Id.* at 101. The other justifications for intervention arise when (1) one political community revolts against another political community, preventing it from asserting its independence and (2) another foreign government intervenes to favor one side while a civil war is in progress. *Id.* at 90.

track morality, it should also be legal. The next subpart examines the legal arguments behind the responsibility to protect.

### B. *Legal Arguments for the Responsibility to Protect*

Much of the debate surrounding the responsibility to protect has focused on whether humanitarian intervention is legal under the existing international legal framework. Thus, arguments tend to look to the foundational sources of international law: the UN Charter, treaties, and customary international law. Legal arguments in favor of humanitarian intervention have a long history in international relations, but this Article focuses on the more recent debate.[234]

The UN Charter does not explicitly authorize humanitarian intervention or the responsibility to protect. Indeed, it appears to do the opposite: according to Article 2 of the Charter, "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."[235] The Charter does, however, commit the UN to promote "universal respect for, and observance of, human rights and fundamental freedoms for all . . . ."[236]

The combination of these two provisions has led some lawyers to argue that the Charter authorizes, or even commands, intervention to protect individuals from human rights violations through the assertion that such interventions are not aimed at the "territorial integrity" or "political independence" of a state.[237] In this line of thought, the UN Charter was intended to prevent wars of aggression and was not intended to protect states from international judgment on crimes committed against its citizens.[238] When the international community intervenes, it does so with pure intentions, and thus the responsibility to protect does not fall afoul of the Charter's prohibition against the use of force.

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234. Purportedly humanitarian interventions were undertaken by France, Britain, and Russia to redress the Turkish massacre of the Greeks in 1830, by Austria, France, Britain, and others in Syria in 1860, and by Russia to prevent Turkish persecution of Christians in Eastern Europe in 1877. Richard B. Lillich, *Humanitarian Intervention: A Reply to Ian Brownlie and a Plea for Constructive Alternatives*, *in* LAW AND CIVIL WAR IN THE MODERN WORLD 229, 232 (John Norton Moore ed., 1974).

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

236. *Id.* art. 55.

237. *See* AHMED M. RIFAAT, INTERNATIONAL AGGRESSION: A STUDY OF THE LEGAL CONCEPT: ITS DEVELOPMENT AND DEFINITION IN INTERNATIONAL LAW 120–21 (1979) (explaining Article 2(4)); Lillich, *supra* note 234, at 236–37 (arguing that humanitarian intervention does not violate the U.N. Charter).

238. *See* U.N. Charter art. 1, para. 1 (noting that the purposes of the United Nations include maintenance of "international peace and security" and "the suppression of acts of aggression or other breaches of the peace" but not protection of states from international judgments for crimes committed against their own citizens).

The UN's High-Level Panel on Threats, Challenges and Change reached its legal conclusion that the responsibility to protect is a legally obligatory norm by looking at the 1948 Genocide Convention as well.[239] According to the High-Level Panel, "Since then it has been understood that genocide anywhere is a threat to the security of all and should never be tolerated."[240] The UN Charter states that the maintenance of peace and security is one of the UN's principal aims.[241] Therefore, the High-Level Panel concluded the following:

> The principle of non-intervention in internal affairs cannot be used to protect genocidal acts or other atrocities, such as large-scale violations of international humanitarian law or large-scale ethnic cleansing, which can properly be considered a threat to international security and as such provoke action by the Security Council.[242]

Even if the UN Charter does not provide for a responsibility to protect, some scholars have argued that when the Security Council is deadlocked, a preexisting right of humanitarian intervention under customary international law should revive.[243] A rule of customary international law develops through state practice with a sense of legal obligation (*opinio juris*), generally repeated over time by a significant number of states.[244] In the case of humanitarian intervention, states have long justified the use of force to protect civilians from the predations of their own governments.[245] Professor Rusen Ergec, speaking before the ICJ, highlighted India's intervention in Eastern Pakistan, Tanzania's intervention in Uganda, Vietnam's intervention in Cambodia, and the West African countries' interventions in Liberia and Sierra Leone.[246] If one adds to this list interventions in the 1990s, it becomes clearer and clearer that states do routinely practice the responsibility to protect, and they often couch their arguments in the language of legal discourse.[247]

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239. *A More Secure World: Our Shared Responsibility*, *supra* note 107, ¶ 200.

240. *Id.*

241. *See* U.N. Charter art. 1, para. 1 (stating that one of the purposes of the United Nations is "to maintain international peace and security").

242. *A More Secure World: Our Shared Responsibility*, *supra* note 107, ¶ 200.

243. *See, e.g.*, Stanley Hoffman, *Intervention: Should It Go On, Can It Go On?*, *in* ETHICS AND FOREIGN INTERVENTION 26, 30 (Deen K. Chatterjee & Don E. Scheid eds., 2003) (discussing alternatives to Security Council authorization).

244. BROWNLIE, *supra* note 69, at 7.

245. *See Legality of Use of Force*, *supra* note 92, at 12–13 (highlighting various interventions justified by the purpose of protecting civilians from their own governments).

246. *Id.* at 12. Ergec limited his examples to interventions in the twentieth century. For examples of humanitarian interventions prior to the 20th century, see *supra* note 234 and accompanying text.

247. For example, James Rubin, the State Department spokesman before the NATO campaign in Kosovo, stated that "the Serb side is so far out of line with accepted norms of international behavior, and the dangers of not taking preventative action are so great in terms of humanitarian suffering and further violations of international law

Critics of this viewpoint note that in the seminal case of *Nicaragua v. United States*, the ICJ concluded that custom did not permit unilateral humanitarian intervention.[248] But the ICJ decided this case long before the widely accepted interventions in the 1990s and the adoption by both the General Assembly and the Security Council of resolutions pronouncing the responsibility to protect.[249] These developments have significantly changed the state of customary international law.

Some observers argue that even if a rule of customary international law in favor of a responsibility to protect does not exist, general principles of international law, in particular the doctrine of necessity, require intervention in severe cases of violations of human rights.[250] A state of necessity is defined as "the situation of a State whose sole means of safeguarding an essential interest threatened by a grave and imminent peril is to adopt conduct not in conformity with what is required of it by an international obligation to another State."[251] As applied to humanitarian intervention, the state of

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that we believe we have legitimate grounds to act." James P. Rubin, Spokesman, U.S Dep't. of State, Daily Press Briefing (Mar. 16, 1999), *available at* http://usembassy-israel.org.il/publish /press/state/archive/1999/march/sd2317.htm.

248. Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, 134–35 (June 27) ("The use of force . . . for the preservation of human rights in Nicaragua cannot afford a legal justification for the conduct of the United States.").

249. *See id.*; *see also A More Secure World: Our Shared Responsibility*, *supra* note 107, ¶ 200 (condemning non-intervention that serves to protect "atrocities, such as large scale violations of international humanitarian law").

250. *See A More Secure World: Our Shared Responsibility*, *supra* note 107, ¶ 200 ("The principle of non-intervention in internal affairs cannot be used to protect genocidal acts or other atrocities, such as large-scale violations of international humanitarian law or large-scale ethnic cleansing.").

251. *Commentary (First Reading) on Article 33*, 35 U.N GAOR Supp. (No. 10), U.N. Doc. A/35/10, *reprinted in* [1980] 2 Y.B. INT'L L. COMM'N 34, U.N. Doc. A/CN.4/SER.A/1980 (Part 2). The International Law Commission has expressed the state of necessity in a slightly different way. It says the following:

> 1. Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State, unless the act:
>
> (a) Is the only way for the State to safeguard an essential interest against a grave and imminent peril; and
>
> (b) Does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole.
>
> 2. In any case, necessity may not be invoked by a State as a ground for precluding wrongfulness if:
>
> (a) The international obligation in question excludes the possibility of invoking necessity; or
>
> (b) The State contributed to the situation of necessity.

*Draft Articles on Responsibility of States for Internationally Wrongful Acts* art. 26, 56 U.N. GAOR Supp. (No. 10) at 43, U.N. Doc. A/56/10, *reprinted in* [2001] 2 Y.B. INT'L L.

necessity argues that while intervention may violate the UN Charter's prohibition of the use of force, the intervenor's essential interest excuses the act as a matter of international law.[252] Some proposed essential interests, the values of which exceed the value of nonintervention, include "the commission of genocide[,] . . . widespread or systematic attacks against a civilian population, or serious violations of recognised and fundamental international human rights."[253]

Necessity, then, is a kind of safety valve through which the international community can avoid the undesirable consequences of a strict adherence to international rules governing the use of force.[254] There is some debate about whether a state of necessity makes an otherwise illegal act legal or whether it just makes it excusable;[255] regardless, it has been invoked as a justification in numerous occasions. For example, Belgium, brought before the ICJ for NATO's intervention in Kosovo, gave the following defense listing the elements of necessity:

> First, what rule has been breached? We do not accept that any rule has been breached. However, for the sake of argument, let us say that it is the rule prohibiting the use of force. Where is the imminent peril, the grave and imminent peril? There it was—. . . there it is still—the humanitarian catastrophe recorded in the resolutions of the Security Council—an impending peril. What are the higher values which this intervention attempts to safeguard? They are rights of *jus cogens*. It is the collective security of an entire region.[256]

Necessity, a general principle common to many national legal systems and universally recognized as a part of international law, has

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COMM'N 26, U.N. Doc. A/CN.4/SER.A/2001/Add.1 (Part 2). The final articles appear in JAMES CRAWFORD, THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT AND COMMENTARIES 61 (2002).

252. *See* Frederik Harhoff, *Unauthorized Humanitarian Interventions—Armed Violence in the Name of Humanity?*, 70 NORDIC J. INT'L L. 65, 112–19 (2001) (discussing humanitarian intervention in light of the prohibition of the use of force); Ian Johnstone, *The Plea of "Necessity" in International Legal Discourse: Humanitarian Intervention and Counter-terrorism*, 43 COLUM. J. TRANSNAT'L L. 337, 387–88 (2005) (arguing that intervention may be legal under the doctrine of necessity); Jens Elo Rytter, *Humanitarian Intervention without the Security Council: From San Francisco to Kosovo—and Beyond*, 70 NORDIC J. INT'L L. 121, 133–36 (2001) (discussing the validity of interventions without Security Counsel authorization); Ole Spiermann, *Humanitarian Intervention as a Necessity and the Threat or Use of Jus Cogens*, 71 NORDIC J. INT'L L. 523, 542–43 (2002) (discussing issues related to necessity and the use of force).

253. Harhoff, *supra* note 252, at 114.

254. Johnstone, *supra* note 252, at 339.

255. *See* Michael D. Bayles, *Reconceptualizing Necessity and Duress*, *in* JUSTIFICATION AND EXCUSE IN THE CRIMINAL LAW: A COLLECTION OF ESSAYS 429, 429–458 (Michael Louis Corrado ed., 1994); *see generally* JUSTIFICATION AND EXCUSE: COMPARATIVE PERSPECTIVES (Albin Eser & George P. Fletcher eds., 1987) (discussing the doctrine of necessity in international law).

256. Legality of Use of Force, *supra* note 92, at 13–14.

served as a legal bastion and a strong justification for the responsibility to protect. It at once allows the principle of nonintervention to stand as a legal rule while creating some wiggle room for states to intervene in extreme cases. In the end, however, it must make some reference to the consequences of inaction and engage in some balancing of harms and benefits. The following subpart addresses consequential arguments in favor of a responsibility to protect.

### C. *Consequentialist Arguments for a Responsibility to Protect*

Consequential, or utilitarian, arguments in favor of a responsibility to protect tend to focus on the ability of intervening nations to stop widespread harm at some minimal cost.[257] Sometimes, the analysis is limited to the particular crisis—such as Kosovo and the cost of a bombing campaign to stop the persecution of ethnic Albanians.[258] Sometimes, the analysis looks at more long-term results, such as the precedent that humanitarian intervention would set.[259] What draws all the arguments together is the assertion that, looking at the costs and benefits of intervention, adoption of a responsibility to protect is justified.[260] At their core, of course, consequential arguments are moral, in that their ultimate conclusion, based on a cost-benefit analysis, is that intervention is right.[261] But they differ from the deontological moral arguments described above because they do not argue that the acts in themselves are moral but that, as a result of a balancing of harms, the action is justified.[262]

A utilitarian approach to international humanitarian law is widely accepted in both the law and scholarly publications. According to the Geneva Conventions, the legality of attacking a particular target depends on whether the incidental damage that is to be expected from the attack is excessive in relation to the anticipated

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257. *See* Fernando Tesón, *Defending International Law*, 11 INT'L LEGAL THEORY 87, 95 (2005) [hereinafter Tesón, *Defending International Law*] (describing and rejecting the utilitarian approach to humanitarian intervention).

258. *See, e.g.*, Wedgwood, *supra* note 87, at 829 (focusing on Kosovo and the result of NATO's bombing campaign).

259. *See, e.g., id.* at 834 (discussing the potential impact that NATO's bypass of the U.N. Security Council may have on future humanitarian interventions).

260. *See* Tesón, *Defending International Law*, *supra* note 257, at 93–95 (describing how different theoretical approaches justify the responsibility to protect).

261. *Id.* at 94.

262. For a discussion of utilitarian and deontological approaches to humanitarian intervention, see *id.* (arguing that "[t]he argument for humanitarian intervention is located midway between strict deontological approaches and consequential ones like utilitarianism").

military advantage.[263] Indeed, the very definition of a responsibility to protect appears to adopt a utilitarian approach. The ICISS's report, A Responsibility to Protect, states that the responsibility to protect is "the idea that sovereign states have a responsibility to protect their own citizens from avoidable catastrophe—from mass murder and rape, from starvation—but that when they are unwilling or unable to do so, that responsibility must be borne by the broader community."[264] The report thus endorses the view that a state has a responsibility to intervene if it can avoid a catastrophe. The term "avoidable" appears to make some reference to a cost-benefit analysis because, if the costs of stopping a catastrophe exceed the benefits, then it would create another type of catastrophe.[265] Or, as a prominent philosopher has expressed it:

> If the saving of lives is crucial, it may well be that the lives of more citizens of any particular state would be better protected by the initiation of war than by the virtually unqualified respect for territorial integrity . . . [I]t seems to me that it must . . . be shown that fewer lives will be lost in the process [of intervention].[266]

Both of these approaches, then, focus narrowly on the cost of intervention and the benefits in terms of lives saved.

Other utilitarian theories of a responsibility to protect consider a wider variety of consequences of intervention. Instead of focusing solely on the intervention itself, they look to the long-term consequences for the international system and global governance. The UN's High-Level Panel itself worried about the consequences of not adopting a responsibility to protect. They argued that it would be unacceptable if states could invoke the principle of nonintervention in internal affairs to protect genocidal acts or other atrocities.[267] Setting such a precedent would only encourage countries to persecute politically unfavorable or powerless groups with full knowledge that they could do so with impunity.[268]

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263. Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 51, June 8, 1977, 1125 U.N.T.S. 3.

264. INT'L COMM'N ON INTERVENTION AND STATE SOVEREIGNTY, *supra* note 8, at VIII.

265. *See id.* at 44 (discussing the financial consequences of intervention).

266. Richard Wasserstrom, Book Review, 92 HARV. L. REV. 536, 543 (1978) (reviewing MICHAEL WALZER, JUST AND UNJUST WARS: A MORAL ARGUMENT WITH HISTORICAL ILLUSTRATIONS (1977)).

267. *A More Secure World: Our Shared Responsibility*, *supra* note 107, ¶ 200.

268. *See* Ausma Zehanat Khan, *The Unquiet Dead: Humanitarian Intervention, the Fall of Srebrenica, and Political Will as a Normative Linchpin*, 42 OSGOODE HALL L.J. 704, 705 (2004) (arguing that realization of a doctrine of humanitarian intervention is critical because "the danger of unwillingness to articulate and stand by conditions and circumstances that require states to intervene is that future Srebrenicas will occur undeterred and with impunity").

Establishing a robust principle of the responsibility to protect, on the other hand, would send a strong signal to countries around the world: criminal acts against a state's own citizens will not go unpunished. This concept is one of the main goals of international law, that is, to establish internal law as a binding obligation that cannot just be followed when convenient and ignored when needed.[269] Indeed, some observers have argued that the development of a responsibility to protect is essential to the survival of the current international legal system.[270] The strength of a legal system is connected above all to its legitimacy in the eyes of its constituents.[271] A system that makes it illegal to act in the face of "the universally recognized imperative of effectively halting gross and systematic violations of human rights with grave humanitarian consequences"[272] loses its legitimacy in the eyes of both populations and states themselves.[273]

## VI. THE CASE FOR A RESPONSIBILITY TO PROTECT THE FREEDOM OF SPEECH

A brief survey of the major rationales used to justify the adoption of a responsibility to protect in international law demonstrates the strength of the argument for extending such a responsibility to protect to the freedom of speech. Every rationale for the adoption of a responsibility to protect has equal application in the case of violations of the freedom of expression as it does in the case of genocide, crimes against humanity, and ethnic cleansing. In some cases, the argument that the international community has a responsibility to protect the freedom of speech of individuals may be even stronger.

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269. The literature on the binding nature of international law is vast. Fernando Tesón has summarized, "There is a generalized sense that sovereign governments pay only lip-service to international law, and that, when they do refer to international rights and duties, their apparently public-spirited statements are not statements of law, but self-serving utterances cloaked in legal language." Fernando R. Tesón, *International Law, in* THE OXFORD HANDBOOK OF LEGAL STUDIES 941, 941 (Peter Cane & Mark Tushnet eds., 2003).

270. *See* INT'L COMM'N ON INTERVENTION AND STATE SOVEREIGNTY, *supra* note 8, at 51–52 (discussing the sources of the legitimacy of the United Nations).

271. *A More Secure World: Our Shared Responsibility*, *supra* note 107, ¶ 204 ("The effectiveness of the global collective security system, as with any other legal order, depends ultimately not only on the legality of decisions but also on the common perception of their legitimacy . . .").

272. Press Release, Kofi Annan, Secretary-General, Two Concepts of Sovereignty, U.N. Doc. SG/SM/7136 (Sept. 18, 1999).

273. In the run-up to the Iraq War, Bush asked the United Nations General Assembly, "Will the United Nations serve the purpose of its founding, or will it be irrelevant?" John King & Suzanne Malveaux, *Bush: U.S. Will Move on Iraq If U.N. Won't*, CNN.com, Sept. 13, 2002, http://archives.cnn.com/2002/US/09/12/bush.speech.un/.

### A. *Moral Arguments*

Moral arguments that place the value of individual rights above the value of territorial sovereignty naturally apply to the freedom of expression. Free speech is indubitably a fundamental human right, as expressed in every major international human rights instruments since World War II.[274] Protection of this right, then, carries greater importance than upholding the now antiquated notion of inviolable state sovereignty.

A different logic applies with moral arguments that propose an international law based on the choices of a well-ordered society. Rawls argues that such a society would choose to incorporate a doctrine of nonintervention in order to give due regard to cultural differences.[275] Such a system would seem to preclude the intervention of the international community in order to protect the freedom of speech of another country's citizens. But Rawls is careful to note that the nonintervention norm applies only when the state guarantees freedom and equality for all, a condition met by allowing all citizens to participate in the political process.[276] Freedom of speech is essential to participating effectively in the political process.[277] Without the ability to express one's ideas in an effective way, a citizen cannot meaningfully participate in government debates. If the freedom of speech is squelched, then Rawls's preconditions for a well-ordered society are not met, and a state loses its presumption of territorial integrity. The international community must intervene in order to allow the effective speech.

Walzer's moral position that the intervention of the international community violates the right to self-determination of political communities also creates a nonintervention presumption. In other words, "[i]ntervention usually thwarts, to some extent, political processes and aspirations which are, to some extent, worthy of respect."[278] But Walzer himself admits that oppression of one's citizens may negate the presumption.[279] The presumption should be

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274. *See* African Charter, *supra* note 174, art. 9, ¶ 2 (outlining the free speech rights); ICCPR, *supra* note 4, art. 19, ¶ 2 (establishing free speech as a fundamental human right); UDHR, *supra* note 4, art. 19 (including freedom of expression as a fundamental human right protected by the instrument); European Convention, *supra* note 152, art. 10 (establishing freedom of speech in European nations).

275. RAWLS, *supra* note 224, at 25.

276. *Id.* at 24.

277. Participation in the political process is one of the main purposes of the freedom of speech. *See, e.g.*, Thomas Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 882 (1963) ("The third main function of a system of freedom of expression is to provide for participation in decision-making.").

278. Richard W. Miller, *Respectable Oppressors, Hypocritical Liberators: Morality, Intervention and Reality*, *in* ETHICS AND FOREIGN INTERVENTION, *supra* note 243, at 215, 237 (Deen K. Chatterjee & Don E. Scheid eds., 2003).

279. *Id.* at 220–21.

overridden, he argues, when "we must doubt the very existence of a political community to which the idea of self-determination might apply."[280] Cases of genocide, ethnic cleansing, and crimes against humanity definitely amount to such massive violations of human rights, but so too do violations of the freedom of expression. Indeed, self-determination within the context of a political community depends to a great extent on the ability of citizens to debate and air their ideas. When such debate is stifled, the decisions of the government as representative of the will of the people must be doubted. The international community, then, if it truly wants to respect the self-determination of peoples, must protect above all the freedom of speech.

### B. *Legal Arguments*

Like moral arguments, legal arguments in favor of a responsibility to protect appear to apply equally to violations of the freedom of expression as they do to violations such as genocide and crimes against humanity. The relevant legal precedents, with the exception of the most recent developments actually articulating the responsibility to protect,do not differentiate between genocide and gross violations of human rights.[281]

The UN Charter, for example, outlaws the use of force but refers to its commitment to promoting universal respect for, and observance of, human rights.[282] It makes no distinction between genocide and other violations of human rights.[283] Some scholars argue that intervention due to a responsibility to protect is not aimed at the territorial integrity or political independence of a state.[284] This argument would appear to apply equally to any kind of human rights violation. The established nature of the freedom of expression in international law, as evidenced by the multiple human rights treaties, certainly allows the conclusion that intervention to protect this fundamental right is legal under the UN Charter.

The argument from the perspective of customary international law holds just as much force. The question here is whether, as a matter of customary international law, states have repeated a practice with a sense of legal obligation.[285] It is true that most

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280. WALZER, *supra* note 229, at 101.

281. *See, e.g.*, ICCPR, *supra* note 4, arts. 6–27 (referring to human rights generally).

282. U.N. Charter art. 2, para. 4; *id.* art. 55.

283. *See id.* art. 55 (not differenting between genocide and other violations of human rights).

284. *See* RIFAAT, *supra* note 237, at 120–21 (examining the responsibility to protect in light of territorial sovereignty rights); Lillich, *supra* note 234, 235–44 (discussing the responsibility to protect).

285. BROWNLIE, *supra* note 69, at 7.

humanitarian interventions in the past century have been intended to stop the mass killings of civilians.[286] At the same time, however, they also often involve the suppression of expression, particularly religious expression.[287] Obviously, debates about customary international law will always revolve around how broadly or narrowly one should interpret a custom, but one legitimate interpretation is that custom allows intervention in the affairs of a state in order to prevent widespread suppression of the freedom of speech—especially if such intervention is carried out by an international coalition with proper purposes.[288]

Likewise, the state of necessity provides a legal basis for a responsibility to protect in cases of severe violations of the freedom of expression. In order for necessity to justify an action, a state must have an essential interest threatened by a grave and imminent peril, and the sole means of safeguarding that interest must be to act not in conformity with a particular rule of international law.[289] The essential interest involved here is the protection of a fundamental human right: the freedom of speech. In fact, commentators generally seem to accept the notion that severe violations of fundamental rights should be included as essential interests.[290] If the sole means of preventing a state from depriving its citizens of such a fundamental right as the freedom of speech is to intervene, then the doctrine of necessity provides firm ground for doing so.

### C. *Consequential Arguments*

What of utilitarian arguments? At the broader level, in terms of setting a standard that states cannot deny their citizens basic human rights, the argument seems to apply perfectly to the freedom of speech. International treaties establish a clear commitment of the world community to protecting the right of an individual to communicate and receive ideas.[291] If international law wants to ensure the protection of this right, it would make sense to create a

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286. *See* Lillich, *supra* note 234, at 232 (describing examples of humanitarian intervention in the past century).

287. Examples include the French, British, and Russian intervention to prevent the Turkish massacre of Greeks in 1830, and the Russian intervention to prevent Turkish persecution of Christians in Eastern Europe in 1877. *See id.*

288. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 702 cmt. m (1987) (including suppression of the freedom of speech amongst the violations of human rights justifying intervention under customary international law).

289. *Commentary (First Reading) on Article 33*, *supra* note 251, at 33.

290. *See, e.g.*, Harhoff, *supra* note 252, at 114 (arguing that the prevention of "serious violations of recognised and fundamental international human rights" is an essential interest of a state).

291. *See, e.g.*, ICCPR, *supra* note 4, art. 19, ¶ 2 ("Everyone shall have the right to freedom of expression; this right shall include the freedom to seek, receive and impart information and ideal of all kinds.").

norm by which countries have an obligation to intervene to prevent a government from depriving its citizens of the right. States considering actions that would suppress the freedom of expression of their citizens would therefore know that they would face a backlash from the international community. They would know that they could not hide behind the shield of sovereignty.

So, too, would the extension of the responsibility to protect to include the freedom of speech have positive consequences for the legitimacy of the international legal system. The proliferation of human rights treaties after World War II raised expectations that individual rights would no longer be subject to the whims of nation-states.[292] International instruments like the Covenant on Civil and Political Rights and the Universal Declaration of Human Rights guarantee certain rights to all citizens.[293] But the lack of enforceable provisions makes these guarantees illusory. A system that simultaneously promises universal respect for the freedom of speech and refuses to take steps to protect that freedom faces severe contradictions, contradictions that threaten the legitimacy of the system. If the international community adopted a broader responsibility to protect, this discrepancy could be solved, with favorable consequences for the entire legal system.

A more difficult situation arises when one considers just the immediate consequences of intervention to protect freedom of expression. If the equation of costs and benefits includes only lives saved and lost, the suppression of expression may seem like a trivial crime because it does not directly cause the loss of any lives. Any military intervention to protect this freedom would probably lead to the loss of human life, thereby causing costs to exceed benefits. For this reason, intervention must be considered in a broader sense. Intervention does not necessarily need to be military intervention. Kofi Annan himself has recognized the imperative of considering intervention as something encompassing more than just the use of force. In 1999, after the Kosovo bombing campaign, he wrote in *The Economist*, "A tragic irony of many of the crises that go unnoticed or unchallenged in the world today is that they could be dealt with by far less perilous acts of intervention than the one we saw this year in Yugoslavia."[294]

One potential form of intervention could involve using the internet to spread the message of individuals whose speech is being suppressed. This technique would allow those individuals more effective access to an audience. Radio and television are still

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292. *See, e.g.*, ICCPR, *supra* note 4, arts. 1–27 (discussing the civil and political rights of individuals); UDHR, *supra* note 4, arts. 1–29 (creating binding international obligations for nation-states to respect certain, enumerated individual rights).

293. ICCPR, *supra* note 4, arts. 1–27; UDHR, *supra* note 4, arts. 1–29.

294. Annan, *supra* note 98, at 49.

powerful methods of communication as well, and interventions similar to the broadcast of Radio Free Europe into the affected countries could have strong effects.[295] Such interventions would have to be aimed at granting citizens the ability to communicate and receive ideas that would otherwise be suppressed by the government.

This is not to dismiss the ultimate option of military intervention. Active suppression of political dissent in a wide subset of society, including through the use of torture and imprisonment to exclude groups from asserting their political will, might justify the use of military force. This is instead meant to explain that military intervention need not be considered the sole form of intervention and that the spread of internet access, among other communication outlets, opens new avenues for citizens to share information and debate ideas.

## VII. CRITICISMS

Two major criticisms arise in any discussion of expanding the international community's responsibility to protect the rights of citizens: First, is it realistic?[296] Second, will it serve as a pretext for war?[297] In the case of freedom of expression, there is some question whether states will be able to summon the political will to use military force in another country in order to prevent the closing off of certain avenues of expression. Furthermore, because the freedom of expression is a somewhat amorphous concept, its violation may provide an excuse for states interested in intervening in another country for ulterior motives. This Part will address these two concerns.

### A. *Enforcement of the Responsibility to Protect Free Speech*

Expanding the concept of the responsibility to protect to include the right to free speech entails some difficult questions. One of these questions is whether it is politically feasible or desirable. After all, closing down newspapers and preventing public speeches are crimes that pale in comparison to the crimes of genocide, ethnic cleansing, and crimes against humanity. More importantly, the use of force to

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295. *See, e.g.*, Johanna Granville, *Radio Free Europe's Impact on the Kremlin in the Hungarian Crisis of 1956: Three Hypotheses*, 39 CAN. J. HIST. 515, 516–18 (2004) (describing the impact of Radio Europe).

296. *See* D'Amato, *supra* note 49, at 1112 (discussing the views expounded by critics of international law).

297. *See, e.g.*, Cassese, *Ex Iniuria Ius Oritur*, *supra* note 90, at 23 (expressing concern that departure from U.N. standards will open a "Pandora's box" of military interventions).

prevent such violations of international law seems grossly disproportionate: troops marching into a country to restore free speech could, in certain circumstances, appear quite incongruous. Furthermore, states might struggle to summon the political will necessary to send in such troops. A seminal question thus arises: Would an expanded view of the responsibility to protect be enforceable in a politically acceptable way? There are at least three primary reasons why such a view of the responsibility to protect is enforceable.

First, the idea that widespread violations of the freedom of speech are outlawed under international law is not radical at all but rather a fundamental precept of customary law. According to the Restatement of Foreign Relations Law of the United States, "A state violates international law if, as a matter of state policy, it practices, encourages, or condones . . . (g) a consistent pattern of gross violations of internationally recognized human rights."[298] The numerous human rights treaties of the postwar period, including the Universal Declaration of Human Rights and the ICCPR, clearly establish the right to free speech as an internationally recognized human right.[299] The jump from recognizing a fundamental right to protecting it is a small one indeed. The UN itself has recognized that victims of gross violations of international human rights law must have a remedy for such violations.[300]

Second, the responsibility to protect is not just about the use of force: it is about an obligation on the part of the international community to protect certain rights.[301] This obligation includes, but is not limited to, the use of force.[302] Indeed, the ramifications of the responsibility to protect, even in its traditional, non-expansive form, are far-reaching. For example, if the international community has a *responsibility* to protect citizens from certain violations of their rights, then perhaps individual countries have an affirmative

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298. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 702.

299. ICCPR, *supra* note 4, art. 19; UDHR, *supra* note 4, art. 19.

300. *See* G.A. Res. 60/147, Annex, ¶ 3, U.N. Doc. A/RES/60/147 (Mar. 21, 2006) (obligating the states to provide remedies for victims of human rights violations).

301. The General Assembly adopted the following language concerning the responsibility to protect:

> Each individual State has the responsibility to protect its 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 are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity.

G.A. Res. 60/1, *supra* note 110, ¶¶ 138–39.

302. *Id.* ¶¶ 119, 138–39.

obligation to vote in certain ways in the Security Council. Thus, a veto by one of the five permanent members of measures aimed at protecting citizens might be considered an invalid veto from the point of view of international law.[303] Ignoring the veto of a permanent member might be politically implausible, but the legal status of an invalid veto could conceivably affect the legitimacy of acting outside the ambit of the Security Council. Similarly, states might have an *obligation*, rather than just a right, to criticize countries for their violations of free speech.

Third, the responsibility to protect already incorporates precautionary principles that prevent the kinds of abuses that some commentators worry about. The International Commission proposed that any intervention use "proportional means" or, in other words, that the "scale, duration and intensity of the . . . intervention should be the minimum necessary to secure the defined human protection objective."[304] The international community, in considering any intervention, would have to weigh the proportionality of the response to the severity of the violation of international law. Intervention may come in many forms, as mentioned above. It need not only—or even primarily—involve the use of military force. The prevalence of the internet today opens new pathways for communicating with wide audiences. Radio and television broadcasts are still effective tools of message diffusion, as seen to terrible consequences in Rwanda. At least one commentator has argued that international law should sanction the jamming of radio frequencies to prevent dissemination of incitements to genocide.[305] Alternatively, countries could transmit "counterbroadcasts" to communicate messages that have been suppressed.[306]

But all of these questions raise a larger point about the definition of the freedom of expression. As the importance of free speech increases in the modern world, the simple language of human rights treaties on what free speech includes will no longer suffice. The international community must engage in a broader discussion about how to conceive the freedom of expression in international law. Much time has already been spent arguing over the status of hate

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303. *See* INT'L COMM'N ON INTERVENTION AND STATE SOVEREIGNTY, *supra* note 8, at XIII ("The Permanent Five members of the Security Council should agree not to apply their veto power, in matters where their vital state interests are not involved, to obstruct the passage of resolutions authorizing military intervention for human protection purposes for which there is otherwise majority support.").

304. *Id.* at XII.

305. Jamie Frederic Metzl, *Rwandan Genocide and the International Law of Radio Jamming*, 91 AM. J. INT'L. L. 628, 650–51 (1997).

306. *See* SAMANTHA POWER, A PROBLEM FROM HELL: AMERICA AND THE AGE OF GENOCIDE 371 (2003) ("The United States could destroy the antenna. It could transmit 'counterbroadcasts' urging perpetrators to stop the genocide. Or it could jam the hate radio station's broadcasts.").

speech in international law.[307] But if the freedom of expression is to be taken seriously as a norm of international law, its contours must be sketched out more fully. Does the international community have an affirmative obligation to provide methods of communication to foreign citizens? Must it restrict the speech of some in order to empower the speech of others? What kinds of interventions are needed to strengthen the freedom of expression? These are not easy questions, but they must be addressed if the international community is to truly fulfill the promise of human rights for all.

### B. *The Responsibility to Protect as a Pretext for War*

Perhaps the greatest worry that scholars and countries have expressed concerning the concept of a responsibility to protect is that it could be used as a pretext for war.[308] Critics of a responsibility to protect in particular and humanitarian intervention in general point out that aggressors rarely explain wars as solely self-interested ones.[309] Instead, the initiators of war generally couch their positions in the language of self-defense or morality.[310] History contains many such incidents. For example, in 1815, Prince Metternich of Austria formed a "Holy Alliance" to restore the balance of power in Europe

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307. *See, e.g.*, Defeis, *supra* note 126, at 60–78 (describing regulation of hate speech); Stephanie Farrior, *Molding the Matrix: The Historical and Theoretical Foundations of International Law Concerning Hate Speech*, 14 BERKELEY J. INT'L L. 1 (1996) (discussing differing approaches to dealing with hate speech); Friedrich Kubler, *How Much Freedom for Racist Speech?: Transnational Aspects of a Conflict of Human Rights*, 27 HOFSTRA L. REV. 335, 340–54 (1998) (addressing the problem of hate speech); Sedler, *supra* note 159, 378–84 (comparing the United States' approach to that of other countries).

308. For thorough explanations of the debate, *see, e.g.*, DANISH INST. INT'L AFF., HUMANITARIAN INTERVENTION: LEGAL AND POLITICAL ASPECTS 77–95 (1999) (discussing the legal and political aspect of interventions); Tom J. Farer, *An Inquiry into the Legitimacy of Humanitarian Intervention*, *in* LAW AND FORCE IN THE NEW INTERNATIONAL ORDER 185, 192–93 (Lori Fisler Damrosch & David J. Scheffer eds., 1991); Adam Roberts, *The So-Called "Right" of Humanitarian Intervention*, 2000 Y.B. INT'L HUMANITARIAN L. 3, 29–51 (describing the debate regarding the responsibility to protect).

309. *See* MARTHA FINNEMORE, THE PURPOSE OF INTERVENTION: CHANGING BELIEFS ABOUT THE USE OF FORCE 15 (2003) (articulating ways states justify intervention).

310. *See id.* (discussing state justification for intervention). According to Finnemore,

> [e]very intervention leaves a long trail of justification in its wake . . . . When states justify their interventions, they draw on and articulate shared values and expectations that other decision makers and other publics in other states hold. Justification is literally an attempt to connect one's actions with standards of justice or, perhaps more generically, with standards of appropriate and acceptable behavior.

*Id.* at 15.

after the Napoleonic Wars and to protect the current regimes against revolution.[311] However, in justifying the alliance, he said that the "Holy Alliance was not an institution for the suppression of the rights of nations."[312] It "was solely an emanation of the pietistic feelings of the Emperor Alexander and the application of the principles of Christianity to politics."[313]

Any acceptance of a right—or even a duty—to intervene in the internal affairs of a state will thus give even greater room for states to engage in war, because they will have firm legal backing for their position. Oscar Schacter, an international law scholar, argues that "it is highly undesirable to have a new rule allowing humanitarian intervention, for that could provide a pretext for abusive intervention."[314] He concludes that "it is better to acquiesce in a violation . . . than to adopt a principle that would open a wide gap in the barrier against unilateral use of force."[315]

According to this line of thought, then, the expansion of the controversial responsibility to protect doctrine to include freedom of expression will only increase the potential that states will use the doctrine as a pretext for war. They need only cite some violation of individuals' freedom of expression to justify a war. In the eyes of such critics, the better approach would be to cabin the discretion of countries to intervene.[316] If a responsibility to protect must be accepted in international law, the argument goes, it should be narrowly limited to a few exceptionally egregious violations of human rights: genocide, ethnic cleansing, and crimes against humanity.

The response to this critique of an expansive version of the responsibility to protect is twofold. First, the responsibility to protect already has well-defined limits. Its application should never be unilateral. The relevant UN documents make clear that the use of force should be authorized by the Security Council.[317] The responsibility to intervene only applies when the individual state is unable or unwilling to protect its citizens from violations of their rights.[318] Intervention should be proportionate, meaning that the

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311. Martin Spah, *Holy Alliance, in* 7 THE CATHOLIC ENCYCLOPEDIA (1910), *available at* http://www.newadvent.org/cathen/07398a.htm.

312. *Id.*

313. *Id.*

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

315. *Id.*

316. *See id.* at 128 ("My position, in a nutshell, is that international law does not, and should not, legitimize the use of force across national lines except for self-defense (including collective defense) and enforcement measures ordered by the Security Council.").

317. G.A. Res. 60/1, *supra* note 110, ¶ 138; S.C. Res. 1674, *supra* note 111, ¶ 4.

318. G.A. Res. 60/1, *supra* note 110, ¶¶ 138–39.

least harmful means of stopping the violation should be adopted, preferably through nonviolent methods.

Furthermore, the development of a broader and more consistent notion of the responsibility to protect may actually decrease the occurrence of wars with ulterior motives. Using social science and political science research, Ryan Goodman has described the process by which law and legitimacy regulate state behavior.[319] According to his model, "encouraging aggressive states to justify using force as an exercise of humanitarian intervention can facilitate conditions for peace between those states and their prospective targets."[320] Forcing governments to cast their justifications for the use of force as protection of human rights, including free speech, will thus alter domestic situations in the intervening state and lead to less war. Legal, moral, and utilitarian approaches can hardly argue with this result.

## VIII. CONCLUSION

This Article has attempted to demonstrate the importance of expanding the responsibility to protect to include freedom of expression. In other words, the international community has an obligation to intervene in a country where the state is violating the free speech rights of its own citizens. Currently, however, the UN has interpreted the "responsibility to protect" as arising only in cases of genocide, ethnic cleansing, or other large-scale loss of life. As this Article has argued, this interpretation is clearly inconsistent with the expectations created by the numerous post-World War II human rights treaties, which guarantee to all people a wide panoply of individual rights. Furthermore, the arguments justifying an international obligation to intervene in the case of genocide are just as valid, if not more, when applied to an obligation to intervene in the case of widespread violations of free expression. In order to close this gap in international law, the international community should adopt a broader concept of the responsibility to protect—one that includes protection of the right to free speech.

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319. *See* Goodman & Jinks, *supra* note 55, at 630–55 (analyzing the interplay between law, legitimacy and state behavior).

320. Goodman, *supra* note 220, at 110.