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A. Mark Weisburd

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International Law and the Problem of Evil

A. Mark Weisburd*

ABSTRACT

In response to recent violations of human rights, some within the international legal community have called not only for intervention but for the establishment of an international court with jurisdiction to hear claims against persons alleged to have committed those violations. This Article questions the premise that it is necessary, or even desirable, for the international legal community to mandate intervention in such circumstances.

First, the Article examines the authority for international intervention to forestall massive human rights violations. Using the recent examples including Kosovo and East Timor, the Author compares scholarly responses with respect to both the human rights violations and the subsequent interventions. While the Author concludes that there may be some reason to believe that humanitarian interventions are legal, there is no clear authority that states have an affirmative obligation to forestall massive human rights violations in other states.

Second, the Article questions whether it is possible to implement a rule requiring international intervention to prevent such outbreaks of violence. Recognition of the difficulty of responding to human rights violations around the world complicates any formulation of a rule requiring action against evil.

* Professor of Law, University of North Carolina at Chapel Hill. The author thanks the North Carolina Law Foundation for its support of this project.

Third, the Author questions the propriety of such a rule given other, sometimes conflicting, international rules. For example, many norms of international law seek to minimize interstate uses of force. In addition, principles of self-determination act against the adoption of a rule requiring intervention.

Finally, the Author casts doubt on the rationales for legal rules specifying international reactions to outbreaks of violence and the creation of institutions to respond to them. The Author questions the utility and appropriateness of such policies and institutions while conceding the purposes for their creation may be valid.

While multinational, humanitarian responses may be appropriate in certain circumstances, they should not be legally mandated. The Author concludes that legalization of international responses to evil would be a mistake.

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I. INTRODUCTION

More and more frequently, one encounters the view that, as a matter of international law, the international community should, or even must, respond to instances of massive and extreme social evils. For example, Kofi Annan, Secretary-General of the United Nations, at the opening of the General Assembly's session in September 1999, called for "unity behind the principle that massive and systematic violations of human rights—wherever they may take place—should not be allowed to stand," and made reference to the "developing international norm in favour of intervention to protect civilians from wholesale slaughter."¹ The Secretary-General repeated this point in November 1999 in his report to the General Assembly on the capture of the UN "safe area" at Srebrenica in Bosnia-Herzegovina in July 1995:

The cardinal lesson of Srebrenica is that a deliberate and systematic attempt to terrorize, expel[,] or murder an entire people must be met decisively with all necessary means, and with the political will to carry the policy through to its logical conclusion. In the Balkans, in this decade, this lesson has had to be learned not once, but twice. In both instances, in Bosnia and in Kosovo, the international community tried to reach a negotiated settlement with an unscrupulous and murderous regime. In both instances it required the use of force to bring a halt to the planned and systematic killing and expulsion of civilians.²

The report prepared for the United Nations regarding the 1994 genocide in Rwanda reached a similar conclusion: "The United Nations—and in particular the Security Council and troop-contributing countries—must be prepared to act to prevent acts of genocide or gross violations of human rights wherever they may take

1. SECRETARY-GENERAL PRESENTS HIS ANNUAL REPORT TO GENERAL ASSEMBLY, U.N. Doc. SG/SM/7136 GA/9596 (Sept. 20, 1999).

2. *Report of the Secretary-General Pursuant to General Assembly Resolution 53/35: The Fall of Srebrenica*, 54th Sess., Agenda Item 42, para. 502, at 108, U.N. Doc. A/54/549 (1999).

place. The political will to act should not be subject to double standards.”³

The report by the International Panel of Eminent Personalities appointed by the Organization of African Unity (OAU) to investigate the Rwanda genocide (IPEP Report)⁴ carried this reasoning one step further. After concluding that various states and the United Nations had failed to take steps that could have averted the genocide or at least reduced the number of deaths,⁵ the report asserted:

Apologies alone are not adequate. In the name of both justice and accountability, reparations are owed to Rwanda by actors in the international community for their roles before, during, and since the genocide. The case of Germany after World War Two is pertinent here. We call on the UN secretary-general to establish a commission to determine a formula for reparations and to identify which countries should be obligated to pay, based on the principles set out in the report, titled *The Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms*, submitted January 18, 2000, to the UN Economic and Social Council.⁶

The response within the international legal community to massive outbreaks of evil has not been limited to insistence upon a duty of intervention; it also can be seen to include the establishment of an international—or, more properly, supranational—court with jurisdiction to try individuals alleged to have committed certain human rights violations. In the summer of 1998, a large number of

3. *Report of the Independent Inquiry into the Actions of the United Nations During the 1994 Genocide in Rwanda*, at 7, U.N. Doc. S/1999/1257 (Dec. 15, 1999), at <http://www.un.org/News/press/docs/1999/s19991257.html> [hereinafter *UN Rwanda Report*].

4. ORGANIZATION OF AFRICAN UNITY, INTERNATIONAL PANEL OF EMINENT PERSONALITIES TO INVESTIGATE THE 1994 GENOCIDE IN RWANDA AND THE SURROUNDING EVENTS (July 7, 2000), at <http://www.oau-oua.org/Document/ipep/ipep.htm> (last visited Feb. 5, 2001).

5. *Id.* ch. 10.

6. *Id.* ch. 24, para. 4.12. It should be noted that the Economic and Social Council Document to which the International Panel of Eminent Personalities Report refers was prepared for the Commission on Human Rights by its Special Rapporteur, M. Cherif Bassiouni. Bassiouni's report describes itself as a draft of the principles that Bassiouni believed governed the subject. *The Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms: Final Report of the Special Rapporteur, Mr. M. Cherif Bassiouni, Submitted in Accordance with Commission Resolution 1999/33*, paras. 1-10, at 1-2, U.N. Doc. E/CN.4/2000/62 (Jan. 18, 2000). His draft principles would appear to address state responsibility with respect to domestic human rights violations, though there is perhaps some ambiguity on this point. *Compare id.*, Annex, paras. 2-3, at 7, *with id.*, Annex, para. 16, at 9. The Commission on Human Rights responded to this report by requesting the Secretary-General to circulate it for comments to the member states of the United Nations. *The Right to Restitution, Compensation and Rehabilitation for Victims of Grave Violations of Human Rights and Fundamental Freedoms*, U.N. Commission on Human Rights Res. 2000/41, U.N. ESCOR, 56th Sess., 60th mtg. at 190-91, U.N. Doc. E/2000/23 E/CN.4/2000/167 (2000).

states negotiated a treaty called the Rome Statute of the International Criminal Court (Rome Statute); under the Rome Statute, this International Criminal Court (ICC) comes into existence when the Statute goes into effect.⁷ The Rome Statute further provides that the ICC can assert jurisdiction in cases against individuals alleged to have perpetrated a number of different types of human rights violations⁸ if such individuals are nationals of states parties to it or are alleged to have committed offenses within the Court's jurisdiction on the territory of a state party.⁹ The jurisdiction of the court is concurrent with that of individual countries; matters that a state has either prosecuted or investigated and decided not to prosecute are "inadmissible" before the ICC, unless the state in question is "unwilling or unable genuinely" to investigate or to prosecute.¹⁰ The Statute, however, vests in the ICC the authority to decide whether a given case meets the criteria for inadmissibility. In these circumstances, as Professor Alvarez has pointed out, it is difficult to determine the extent to which the ICC, assuming it eventually begins functioning, will in fact defer to investigations and prosecutions by states.¹¹

Taken together, the statements quoted above and the negotiation of the Rome Statute illustrate a number of propositions. First, some states and some persons whose views are entitled to weight clearly see the international community as possessing the capacity to decide whether to impose duties on states to forestall massive human rights violations and to punish individuals for engaging in such violations. Second, there is a widespread view that such duties have in fact been imposed, and take the form of quite general rules, applicable without regard to the cultural peculiarities important in particular situations. Third, the duties are owed to the international community. This point is most obvious with respect to states' duties to forestall human rights violations, since the duty is asserted to be created by a rule promulgated by the international

7. The treaty, known as the Rome Statute of the International Criminal Court, goes into effect sixty days after "the deposit of the 60th instrument of ratification, acceptance, approval or accession with the Secretary-General of the United Nations." United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome Statute of the International Criminal Court, art. 126, U.N. Doc. A/CONF.183/9 (July 17, 1998) [hereinafter Rome Statute].

8. The offenses include genocide, crimes against humanity, war crimes, and the crime of aggression. *Id.* art. 5. The Rome Statute defines each of these. *Id.* arts. 6-8. The ICC will also have jurisdiction over the crime of aggression, once that crime is addressed by an amendment to the Rome Statute. *Id.* art. 5(2).

9. *Id.* art. 12(2).

10. *Id.* art. 17(1)(a).

11. José E. Alvarez, *Crimes of States/Crimes of Hate: Lessons from Ruanda*, 24 YALE J. INT'L L. 365, 476-78 (1999).

community. It also applies, however, to the duty of individuals to refrain from violating human rights because, as noted above, the ICC is vested with the ultimate authority to decide whether a state's treatment of any particular case is "genuine." Further, a corollary of this latter proposition is that the authority of the ICC should supersede that of states in those cases in which a state has not exercised its authority in a way the ICC decides was genuine.

How can one assess the argument that international law imposes, and should impose, duties regarding massive outbreaks of evils? This Article attempts to do so by considering four aspects of this proposition. The first is the question of authority—by what process are these rules supposed to have acquired the status of law? The answer to this question is obvious with respect to the ICC, but much less clear with respect to the existence of a right or duty on the part of states to forestall massive human rights violations. The second question is the implementability of the rule: would it be physically possible to actually put the rule into force? The third question is that of the fit of such rules into the general corpus of international law. Would rules of the type described above conflict with other rules, promulgated for other purposes? The last question is the desirability of the apparent objective of the rule—why is it thought that institutionalizing such rules would be a good thing?

As will be shown by the discussion of these aspects of the question of the legalization of international responses to massive evil, this Article concludes that such legalization would be a mistake. The point, emphatically, is not that such international responses are never appropriate. It is, instead, that massive violations of human rights differ so much from one another in the issues they present that no limited menu of responses, such as a legal rule would require, can be adequate to deal with either the questions of how outside states ought to react to a given atrocity, or how, and by whom, the perpetrators of atrocities should be called to account. While international approaches will be optimal, or at least acceptable, in some cases, in others they may do actual harm. Indeed, as will be argued below, the difficulties in internationalizing such matters are so great that it would appear that the preference for international approaches is more of a faith-based conviction than a conclusion based on sober analyses of the legalities of the matter and of the policy dilemmas such situations present.

II. THE DUTY TO FORESTALL EVIL: THE BASIS OF AUTHORITY

A. Introduction

This section examines the authority of the duty to forestall massive violations of human rights, the existence of which seems to be taken for granted in the speech and report of Secretary-General Annan, the report on the fall of Srebrenica, and the OAU report on the Rwanda genocide, all quoted above.¹² No similar issue presents itself regarding the authority of the ICC because it will come into existence only if the treaty creating it becomes effective. The mechanism for examining this question will be an examination of the Spring 1999 NATO bombing campaign undertaken in response to continued human rights violations in Kosovo, and of events subsequent to that campaign.

B. *The Intervention in Kosovo: The Facts*

Some of the factual elements of the intervention in Kosovo are uncontroversial. In the summer of 1998 the government of the Federal Republic of Yugoslavia (FRY) intensified its efforts to repress a rebellion in Kosovo, a region legally part of Serbia but of which ninety percent of the inhabitants were ethnic Albanians.¹³ Yugoslav efforts included widely reported massacres of civilians, and led hundreds of thousands of ethnic Albanians to flee their homes, seeking safety within Kosovo.¹⁴ Other states demanded that the FRY cease what was considered its oppression in Kosovo. The FRY did not alter its policies,¹⁵ however, even after the Security Council, acting under Chapter VII of the United Nations Charter, expressed alarm at "the impending humanitarian catastrophe" in Kosovo and demanded that the FRY cease its operations against civilians.¹⁶ In the fall of 1998, NATO put its air forces on alert, the last step prior to launching a bombing campaign intended to coerce the FRY to alter its policies. At that point, the FRY agreed to a cease-fire to be

12. See *supra* notes 1-4 and accompanying text.

13. Steven Erlanger, *U.S. and Allies Set Sanctions on Yugoslavia*, N.Y. TIMES, Mar. 10, 1998, at A10; Philip Shenon, *U.S. Eyes Curbs on Belgrade as Albanian Deaths Mount*, N.Y. TIMES, Apr. 25, 1998, at A4.

14. Jane Perlez, *Massacres by Serbian Forces in 3 Kosovo Villages*, N.Y. TIMES, Sept. 30, 1998, at A1.

15. See generally *id.*

16. S.C. Res. 1199, U.N. SCOR, 53d Sess., 3930th mtg. pmbll., U.N. Doc. S/RES/1199 (1998).

monitored by a group of unarmed civilians.¹⁷ The Security Council “endorsed” this agreement, and demanded that the FRY adhere to it.¹⁸ The cease-fire quickly collapsed, however, and FRY security forces perpetrated more massacres of civilians.¹⁹ In March 1999 under great pressure from NATO, representatives of the FRY and of the leading Albanian guerrilla group—the Kosovo Liberation Army (KLA)—attended a conference in Rambouillet, France, aimed at settling the crisis.²⁰ The FRY refused to accept an agreement, however. After last minute negotiations failed, NATO began a bombing campaign directed against FRY forces in Kosovo and against FRY infrastructure within Serbia proper.²¹ NATO’s objective was to coerce the FRY into accepting a settlement.²² NATO’s leaders were moved not only by events in Kosovo itself but also by memories of the wide-spread atrocities perpetrated by Bosnian Serb forces during the war in Bosnia-Herzegovina with the connivance of the government of the FRY.²³ The bombing was expected to lead to FRY capitulation after a few days of attacks.²⁴ The FRY held on stubbornly, however, finally agreeing to terms acceptable to NATO only in June 1999, after a bombing campaign lasting over two months,²⁵ and only after NATO let it be known that it had begun serious planning for a ground campaign against the FRY.²⁶ On June 10 the Security Council adopted a resolution providing that the United Nations would take responsibility for administering Kosovo during its period of reconstruction, and thus helped to implement the agreement between NATO and the FRY.²⁷ In effect, the Security Council accepted the result of the bombing campaign and deprived the FRY of effective

17. Jane Perlez, *Milosevic Accepts Kosovo Monitors, Averting Attack*, N.Y. TIMES, Oct. 14, 1998, at A1.

18. S.C. Res. 1203, U.N. SCOR, 53d Sess., 3937th mtg. para. 1, U.N. Doc. S/RES/1203 (1998).

19. Craig R. Whitney, *NATO Threatens Military Action to Stem the Violence in Kosovo*, N.Y. TIMES, Jan. 29, 1999, at A1.

20. Carlotta Gall, *Hopes for Kosovo Deal Rise as a Guerilla Chief Resigns*, N.Y. TIMES, Mar. 3, 1999, at A1.

21. Francis X. Clines, *NATO Opens Broad Barrage Against Serbs as Clinton Denounces Yugoslav President*, N.Y. TIMES, Mar. 25, 1999, at A1; Jane Perlez, *NATO Authorizes Bomb Strikes; Primakov, in Air, Skips U.S. Visit*, N.Y. TIMES, Mar. 24, 1999, at A1.

22. *Id.*

23. *Id.*

24. Blaine Harden, *Surprising Lesson: Bombing Can Work*, N.Y. TIMES, June 5, 1999, at A6.

25. Craig R. Whitney, *Bombing Ends as Serbs Begin Pullout*, N.Y. TIMES, June 11, 1999, at A1.

26. Michael R. Gordon & Eric Schmitt, *Shift in Targets Let NATO Jets Tip the Balance*, N.Y. TIMES, June 5, 1999, at A1.

27. S.C. Res. 1244, U.N. SCOR, 54th Sess., 4011th mtg., U.N. Doc. S/RES/1244 (1999).

sovereignty over Kosovo, at least temporarily.²⁸ A Russian resolution condemning the bombing, offered shortly after the campaign commenced, was rejected by the Security Council by a margin of 12 votes against to 3 in favor.²⁹

During the period from March to June 1999, FRY forces intensified their actions against ethnic Albanians in Kosovo, forcing hundreds of thousands of civilians to take refuge in Albania and Macedonia or to flee their homes while remaining in Kosovo.³⁰ Further, it is estimated that about 3,000 civilians were killed by FRY forces during this period.³¹ NATO's bombing, for its part, killed approximately 500 civilians in Kosovo and in the FRY proper;³² NATO pilots, ordered to limit their vulnerability to the FRY's anti-aircraft defenses, carried out some missions at altitudes too high to permit them to avoid mistaking what were in fact civilian targets for military objectives.³³

C. *The Intervention in Kosovo: Legal Analysis*

If the basic facts of the Kosovo war are not subject to much dispute, there is nonetheless considerable controversy among legal scholars concerning the legality of NATO's bombing. One view, expressed by Professor Charney, is that the bombing was patently illegal.³⁴ He stresses that it was not authorized by the Security Council, and that, lacking such authorization, it was a violation of Article 2(4) of the UN Charter, a provision which he characterizes as *ius cogens*.³⁵ He acknowledges that the Charter itself gives weight to the protection of human rights, but sees that objective as subordinate to that of preventing uses of force that are neither authorized by the Security Council nor undertaken in self-defense.³⁶ Charney agrees that states could have come to interpret the Charter as giving greater

28. *Id.*

29. Judith Miller, *Russia's Move to End Strikes Loses; Margin Is a Surprise*, N.Y. TIMES, Mar. 27, 1999, at A7.

30. John Kifner, *How Serb Forces Purged One Million Albanians*, N.Y. TIMES, May 29, 1999, at A1.

31. Jonathan Steele, *Serb Killings "Exaggerated" by West: Claims of Up to 100,000 Ethnic Albanians Massacred in Kosovo Revised to Under 3,000 as Exhumations Near End*, THE GUARDIAN (London), Aug. 18, 2000, at 3, 2000 WL 25687419.

32. INT'L CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA, FINAL REPORT TO THE PROSECUTOR BY THE COMMITTEE ESTABLISHED TO REVIEW THE NATO BOMBING CAMPAIGN AGAINST THE FEDERAL REPUBLIC OF YUGOSLAVIA para. 90 (2000).

33. Eric Schmitt & Steven Lee Myers, *NATO Planes Flying Lower, Increasing Risk of Being Hit*, N.Y. TIMES, May 4, 1999, at A19.

34. Jonathan I. Charney, *Anticipatory Humanitarian Intervention in Kosovo*, 93 AM. J. INT'L L. 834, 841 (1999).

35. *Id.* at 835.

36. *Id.* at 835-36.

weight to the protection of human rights than would be apparent from its text.³⁷ He denies, however, that such a development has in fact occurred.³⁸ He addresses the question of the form any new law on this subject could take and suggests a list of quite restrictive criteria.³⁹ Applying these criteria to the Kosovo bombing, he concludes that it would have been unlawful even under this standard, among other reasons, because the human rights violations in the months immediately preceding the bombing campaign were not sufficiently grave to justify humanitarian intervention.⁴⁰

Professor Brownlie's views are similar, though he does not characterize Article 2(4) as *jus cogens*. He stresses his conclusion that most scholars of international law deny the lawfulness of humanitarian intervention and asserts that a campaign of aerial bombing concentrating on the targets which NATO attacked could not be considered humanitarian.⁴¹ In addition to his conclusion that the bombing campaign was unlawful, he asserts that the NATO threats of bombing, beginning with those made in October 1998, were unlawful.⁴²

Judge Cassese also asserts quite unequivocally that the bombing was unlawful as contrary to the Charter.⁴³ He freely acknowledges, however, the possibility of the future emergence of a new rule of customary law permitting humanitarian intervention in limited circumstances.⁴⁴ He suggests a list of requirements for legality somewhat less extensive than that proposed by Professor Charney.⁴⁵

Professor Reisman takes a completely opposite view. He insists that as a consequence of the growth in legal importance of the protection of human rights, the interpretation of Article 2(4) was necessarily affected by the shrinking scope of Article 2(7), forbidding

37. *Id.* at 836.

38. *Id.*

39. *Id.* at 836-37.

40. *Id.* at 839.

41. Ian Brownlie, *Memorandum, in* SELECT COMM. ON FOREIGN AFFAIRS, HOUSE OF COMMONS (U.K.), FOURTH REPORT: KOSOVO app. 2, paras. 36-80, 96-98 (2000) [hereinafter HOUSE OF COMMONS KOSOVO REPORT]. It should be noted that Professor Brownlie represented the FRY in the proceedings the FRY brought against in the International Court of Justice (ICJ) against a number of NATO members, seeking relief with respect to what the FRY characterized as NATO's illegal bombing. *Id.* para. 3.

42. *Id.*

43. 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, 29 (1999).

44. *Id.*

45. *Id.* at 27. In a subsequent comment, Judge Cassese concluded that such a rule cannot be said to have come into existence yet. Antonio Cassese, *A Follow-Up: Forcible Humanitarian Countermeasures and Opinio Necessitatis*, 10 EUR. J. INT'L L. 791, 791-99 (1999).

UN action with respect to matters within the domestic jurisdiction of its members.⁴⁶ Indeed, he describes the international law of human rights as requiring the use of force where needed to prevent serious human rights violations.⁴⁷ Reisman describes the international legal process which has given rise to this law as including "intergovernmental organizations, private entities, the mass media, nongovernmental organizations[,] and individuals"⁴⁸ He does not specifically address the question of the degree of seriousness of human rights violations required to trigger a right to humanitarian intervention, stating only that the right does not depend on the occurrence of an event "on the scale of the Holocaust."⁴⁹ Professor Reisman also notes that the international protection of human rights has been characterized as *jus cogens*, which he describes as having come to mean, "[i]n human rights discourse . . . a type of super-custom, based on trans-empirical sources and hence not requiring demonstration of practice as proof of its validity."⁵⁰

Professor Greenwood has taken a position consistent with that of Professor Reisman, laying particular stress on relatively recent state practice.⁵¹ In particular, he has pointed to two actions not authorized by the Security Council: the intervention by troops of the Economic Community of West African States (ECOWAS) in the Liberian civil war, which the Council formally supported only some time after it took place, and the establishment of safe havens for refugees in northern Iraq and a "no-fly" zone in southern Iraq.⁵² According to Professor Greenwood, these instances of practice led to the conclusion that customary international law permits humanitarian intervention, stressing the increasing importance of human rights principles in international law and adding:

Furthermore, an interpretation of international law which would forbid intervention to prevent something as terrible as the Holocaust, unless a permanent member could be persuaded to lift its veto, would be

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

47. *Id.* at 860-62.

48. *Id.* at 862.

49. *Id.* at 861.

50. W. Michael Reisman, *Unilateral Action and the Transformations of the World Constitutive Process: The Special Problem of Humanitarian Intervention*, 11 EUR. J. INT'L L. 3, 15 n.29 (2000).

51. See generally *Minutes of Evidence, Memorandum Submitted by Christopher Greenwood, Q.C.*, in HOUSE OF COMMONS KOSOVO REPORT, *supra* note 41 [hereinafter *Greenwood Memorandum*]. It should be noted that Professor Greenwood represented the government of the United Kingdom in the proceedings before the ICJ in which Professor Brownlie represented the FRY. *Id.* para. 2.

52. *Id.* paras. 15, 16.

contrary to the principles on which modern international law is based as well as flying in the face of the developments of the last 50 years.⁵³

He further asserts that the circumstances in Kosovo justified such an intervention, pointing to the Security Council's reference to an "impending humanitarian catastrophe" in the fall of 1998 and to the large numbers of persons displaced as a result of the actions of the government of the FRY.⁵⁴ Professor Greenwood does not refer, in this context, to the concept of *jus cogens*.⁵⁵

Most commentators take positions more equivocal than those quoted above. Professor Henkin asserts that the use of force without Security Council approval should be considered unlawful, unless retrospectively approved, as he concludes was the case with regard to Kosovo.⁵⁶ Professor Wedgwood, while not taking a definite position, stresses the practice-based character of international law and places weight both on the refusal of the Security Council to condemn NATO's action and on the implicit, post hoc approval accorded by the Security Council to the ECOWAS interventions in Liberia and Sierra Leone.⁵⁷ Professor Chinkin, though apparently willing to entertain the argument that humanitarian intervention could be lawful, or at least morally required, criticizes both the disregard of the Security Council by an alliance led by the United States and the disproportionate character of the military action.⁵⁸ She also criticizes the failure of the states that intervened in Kosovo to take similar actions in other cases in which widespread human rights violations occurred.⁵⁹ Professor Falk also criticizes the manner in which NATO conducted its campaign and questions as well whether NATO had done all that was possible diplomatically to resolve the situation prior to initiating the bombing.⁶⁰ He rejects, however, the argument that intervention could not have been legal, treating protection of human rights as a crucial element of international law, and seeing a "global ethos of responsibility" as having superseded any merely literal reading of the Charter which would preclude responses to a "humanitarian imperative."⁶¹

53. *Id.* para. 17.

54. *Id.* paras. 11-18, 20-26.

55. *See generally id.*

56. Louis Henkin, *Kosovo and the Law of "Humanitarian Intervention,"* 93 AM. J. INT'L L. 824, 827 (1999).

57. Ruth Wedgwood, *NATO's Campaign in Yugoslavia,* 93 AM. J. INT'L L. 828, 830-31, 832 (1999).

58. Christine M. Chinkin, *Kosovo: A "Good" or "Bad" War ?,* 93 AM. J. INT'L L. 841, 843-44, 844-45 (1999).

59. *Id.* at 847.

60. Richard A. Falk, *Kosovo, World Order, and the Future of International Law,* 93 AM. J. INT'L L. 847, 852-53, 854-56 (1999).

61. *Id.*

Professor Franck sees the campaign as not substantially weakening the force of Article 2(4)'s prohibition uses of force not authorized by the Security Council, despite the Council's apparent condoning of NATO's actions in light of its objectives. He also observes that "[o]ne [lesson of the action in Kosovo] is that [the] egregious repression of minorities is not a risk-free venture, particularly for smallish states. That cannot be a statement of law, but, like law, it is a fairly accurate predictor of state behavior."⁶² Professor Simma, addressing NATO's threats of uses of force made prior to the bombing and not the bombing itself, concluded that such threats were clear violations of Article 2(4), which he characterizes as *jus cogens*, rejecting the argument that the legal effect of the Charter could be altered by any means other than a change in the Charter itself.⁶³ He also concludes, however, that "only a thin red line separates NATO's action on Kosovo from international legality,"⁶⁴ relying for this conclusion on the extent of the humanitarian emergency in Kosovo, on the fact that NATO acted to prevent developments which the Security Council itself had condemned in the strongest terms, and on the characterization by NATO members of their actions as properly seen as a compelled response to an extraordinary situation and not intended to have precedential effect.⁶⁵ In this connection, it is interesting to note that Professor Simma attaches no weight, in evaluating the threats of force by which NATO obtained the FRY's agreement to the cease-fire of October 1998, to the *post hoc* endorsement of the cease-fire by the Security Council in its resolution 1203.⁶⁶ He bases this conclusion primarily on the fact that Russia had made clear, prior to the adoption of resolution 1203, that it was unalterably opposed to the use of force in this situation, making unreasonable an interpretation of that resolution as reflecting an approval of the actions taken to bring the cease-fire into being.⁶⁷ Further, he notes that "the Security Council, as a political organ entrusted with the maintenance or restoration of peace and security rather than as an enforcer of international law, will in many instances have to accept or build upon facts or situations based on, or involving, illegalities."⁶⁸

62. Thomas M. Franck, *Lessons of Kosovo*, 93 AM. J. INT'L L. 857, 859 (1999).

63. Bruno Simma, *NATO, the UN and the Use of Force: Legal Aspects*, 10 EUR. J. INT'L L. 1, 1-6 (1999).

64. *Id.* at 22.

65. *Id.* at 12-13.

66. *Id.* at 11.

67. *Id.*

68. *Id.*

D. *The Intervention in Kosovo: Analysis of the Analysis*

Perhaps the most striking thing about the foregoing section is the great diversity of opinion among the scholars quoted. They disagree, not simply as to the legality of the intervention in Kosovo, but also as to sources from which international legal rules may be derived. One can identify a number of competing approaches. Some of the scholars quoted give decisive weight to the text of the Charter, perhaps fortifying that conclusion by the argument that Article 2(4) is *jus cogens*. Others rely on the text, supplemented by practice within the organization—though different scholars draw quite different conclusions from the same examples of practice. Other scholars give as much or more weight to the actual practice of states, though only Professor Wedgwood of those quoted seems to have considered the NATO campaign itself as an instance of practice that bore on the campaign's legality.⁶⁹ Finally, Professors Falk and Reisman appear to place great weight on the support of entities other than states for the proposition that protection of human rights is an international legal principle superseding all others in importance.

The positions taken by these scholars can, of course, be evaluated as well as described. With respect to his treatment of the facts, Professor Charney's focus on the human rights situation just prior to NATO's bombing ignores the suspicions that could reasonably have been entertained regarding the FRY's intentions in light of that government's close ties to the Bosnian Serb forces during the civil war in Bosnia-Herzegovina⁷⁰ and of the atrocities perpetrated by those forces. On the law, Professor Charney seeks to argue that any departure from the text of the Charter must necessarily be seen as a violation of the provisions of that instrument.⁷¹ Professor Simma seems to share this view.⁷² This position seems difficult to maintain. Practice under both the substantive and the procedural provisions of the Charter has significantly deviated over the years from that which would appear to be required by the Charter's text. Regarding substantive provisions, the significant weakening of Article 2(7)'s prohibition on interferences by the UN in matters essentially within the domestic jurisdiction of a member state, as by the intervention in Somalia authorized by the Security Council, is hard to square with the text of that article. Similarly, the effective rejection by the ICJ of the

69. Wedgwood, *supra* note 57, at 832, 833.

70. See A. Mark Weisburd, *The Emptiness of the Concept of Jus Cogens, as Illustrated by the War in Bosnia-Herzegovina*, 17 MICH. J. INT'L L. 1, 5-6 (1995).

71. See generally Charney, *supra* note 34.

72. See generally Simma, *supra* note 63.

application to the organs of the UN of the principle of *ultra vires*—in the context of a challenge to the legality of certain UN operations because those operations were authorized by a UN organ other than the one competent to authorize them⁷³—makes it difficult to argue that the Charter's procedural provisions must be applied literally. Leaving aside questions regarding his interpretation of the Charter, the long list of conditions that Professor Charney would require lawful humanitarian interventions to meet seems to be difficult to reconcile with the emergency situation in which any humanitarian intervention would take place, and to give strikingly wide scope for subsequent judicial second guessing of the decisions made by political and military leaders operating under considerable pressure.

Professor Brownlie's position acknowledges that state practice contrary to that required by the Charter can change international law,⁷⁴ but gives no weight to the actions of the nineteen states who elected to bomb within the FRY over the Kosovo matter or to those of the members of the Security Council who refused to condemn their behavior. Professors Wedgwood and Greenwood both place some weight on actions taken by ECOWAS in Liberia, even though that intervention—at least ostensibly aimed at dealing with chaos in a failed state—was different from NATO's intervention that was intended to weaken the authority of a fully functioning state over a portion of its territory. The positions of Professors Chinkin and Falk and of Judge Cassese resemble that of Professor Charney in seeking simultaneously to permit humanitarian intervention while hedging the practice with a list of conditions that are unlikely to be clearly met in any situation. Finally, Professors Falk and Reisman seek to defend the legality of at least some humanitarian interventions on the basis of positions taken by groups and individuals whose capacity to make law seems doubtful.

Particularly in this last connection, it is necessary to consider reliance on the concept of *jus cogens*. Such legal status as this concept possesses derives from its inclusion in the Vienna Convention on the Law of Treaties⁷⁵ (Vienna Convention), an instrument to which fewer than half the members of the United Nations are parties,⁷⁶ and which therefore cannot be seen as embodying rules of customary international law solely because of the number of states who have adhered to it. To further complicate matters, the

73. Certain Expenses of the United Nations, 1962 I.C.J. 151, 168 (July 20).

74. See generally Brownlie, *supra* note 41.

75. Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331, U.N. Doc. A/CONF. 39/27 [hereinafter Vienna Convention].

76. There are currently 185 members of the United Nations. MULTILATERAL TREATIES DEPOSITED WITH THE SECRETARY-GENERAL: STATUS AS AT 30 APRIL 1999, at 3 (1999). The Vienna Convention has only eighty-nine parties and does not include such states as France, India, and the United States. *Id.* at 811-12.

discussions cited above use the term in a way that appears to differ from its usage in the Vienna Convention. That treaty defines the term as follows:

A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.⁷⁷

As Professor Reisman himself observes, the idea of *jus cogens* as deriving from trans-empirical sources is quite different from the concept as used in the Vienna Convention.⁷⁸ Even the usage employed by Professors Charney and Simma seems problematic. As the Vienna Convention requires that a *jus cogens* concept be recognized as such by the "international community of states as a whole,"⁷⁹ application of that concept necessarily turns on the practice of states. If state practice is the test of the *jus cogens* character of a rule, it seems difficult to reconcile an assertion that a particular rule is of *jus cogens* status with the simultaneous acknowledgment that nineteen important states have violated the rule and that twelve of the fifteen members of the Security Council have refused to condemn the violation.

As the Author has suggested elsewhere,⁸⁰ arguments based on notions of *jus cogens* grounded on sources other than the positive acts of states suffer from a number of fundamental difficulties. For present purposes, it is enough to mention two. First, how is it that the entities listed by Professor Reisman as part of the international legal process, and which presumably are part of the source of the international ethos to which Professor Falk refers,⁸¹ acquire the authority to make law? Even if one argues that law is somehow an emanation from Holmes' "brooding omnipresence in the sky,"⁸² it can have effect in human communities only if it is recognized. This point forces one to ask, whose recognition counts? Particularly if it is argued that a given rule at least justifies, if it does not require, military operations—which is to say, killing—the person enunciating the rule must have some claim to authority beyond a pure heart. The

77. Vienna Convention, *supra* note 75, art. 53 (Treaties Conflicting with a Peremptory Norm of General International Law ("Jus Cogens")).

78. Reisman, *supra* note 50, at 15 n.29.

79. Vienna Convention, *supra* note 75, art. 53.

80. Weisburd, *supra* note 70, at 24-40.

81. See generally Falk, *supra* note 60.

82. Southern Pac. Co. v. Jensen, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting).

groups to which Professor Reisman refers, however, would seem to have no other basis for their claim to a capacity to make law.

The second problem with the invocation of *jus cogens* is the degree of disagreement as to its content. In this case, for example, Professors Charney and Simma label Article 2(4) *jus cogens*, rendering NATO's actions in Kosovo clearly illegal.⁸³ Professor Reisman argues that a rule forbidding massive violations of human rights is *jus cogens*,⁸⁴ at least permitting and perhaps requiring at least some use of force in Kosovo. The other scholars quoted ignore the concept. In these circumstances, it seems impossible to be confident as to the content of *jus cogens*. Yet the idea of deriving legal rules from "trans-empirical sources" presumably depends on the existence of a set of rules whose correctness is so obvious to all concerned that no further justification is required. If, however, there is no agreement as to which rules merit this description, it can hardly be true that there are rules as obviously correct as the trans-empirical *jus cogens* concept presupposes.

Drawing this discussion together, it can be seen that there is little agreement among scholars as to the permissibility of NATO's actions in Kosovo. In considering the authority for the proposition that international law requires states to forestall massive human rights violations, however, it is also necessary to consider events that have taken place since the Kosovo bombing.

E. *Humanitarian Intervention Since Kosovo*

In July 1999 after the inhabitants of East Timor had voted overwhelmingly against remaining a part of Indonesia, militia groups favoring continued Indonesian control of the area began a campaign of great violence. Many were killed, hundreds of thousands were displaced, and the infrastructure of the area was greatly damaged. The Indonesian military not only failed to prevent the violence, but apparently provided the militia groups with various kinds of support. Many states strongly criticized Indonesia; however, no steps were taken to implement a forcible intervention without the consent of Indonesia. Instead, intense effort was expended to persuade the Indonesian government to agree to UN administration of East Timor pending independence. Indonesia finally agreed to this arrangement in August 1999, and the Security Council in turn authorized a UN operation.⁸⁵

83. Charney, *supra* note 34, at 837; Simma, *supra* note 63, at 3.

84. Reisman, *supra* note 46, at 862.

85. S.C. Res. 1264, U.N. SCOR, 54th Sess., 4045th mtg., U.N. Doc. S/RES/1264 (1999); James Traub, *Inventing East Timor*, FOREIGN AFF., July-Aug. 2000, at 74, 77-80.

The second incident relevant to this discussion began in the summer of 1999. Armed groups of Chechen guerillas, operating from Chechnya, attacked Dagestan, a part of Russia adjacent to Chechnya.⁸⁶ Russia repulsed the attack, and subsequently began military operations against Chechnya.⁸⁷ Originally portrayed as an effort to limit Chechen attacks on Russia, the operation clearly became one to reconquer Chechnya, which had attained de facto independence from Russia after bitter fighting during the period 1994-1996.⁸⁸ The Russian operations in Chechnya led to heavy civilian casualties due to the tactics employed.⁸⁹ Aside from muted criticism of Russia, however, states did not respond to these operations.⁹⁰

Another relevant incident began attracting attention in early 2000. United Nations peacekeepers, operating in Sierra Leone pursuant to a July 1999 agreement ending the civil war in that country, were denied access to the portion of the country controlled by the Revolutionary United Front (RUF), a group whose opposition to the elected government had led to the civil war and that had been allotted a share of power by the 1999 agreement.⁹¹ The situation quickly degenerated into renewed warfare in Sierra Leone, as the RUF apparently sought to renew the war.⁹² The ensuing violence led to international calls to tear up the peace agreement and institute trials for violations of humanitarian law.⁹³ These reactions were prompted to a great extent by the RUF's brutal tactics during the war, which had focused on terrorizing civilians by the use of widespread maiming.⁹⁴ Although the leader of the RUF was subsequently arrested for his role in the Spring 2000 violence, only the United Kingdom provided any assistance to the peacekeepers and to the army of Sierra Leone.⁹⁵

These incidents share a number of characteristics and will require further discussion below. For present purposes, it is enough

86. OXFORD ANALYTICA, CHECHNYA—ILLUSORY ENDGAME (Feb. 23, 2000), at <https://www.cc.columbia.edu/sec/dlc/ciao/pbei/oxan/oxa000223.html> (on file with author).

87. *Id.*

88. See Jonathan I. Charney, *Self-Determination: Chechnya, Kosovo and East Timor*, 34 VAND. J. TRANSNAT'L L. 455, 462-63 (2001).

89. OXFORD ANALYTICA, *supra* note 86.

90. Michael R. Gordon, *Russia Promises Escape Route for Civilians to Flee Grozny*, N.Y. TIMES, Nov. 29, 1999, at A10.

91. Norimitsu Onishi & Jane Perlez, *How U.S. Left Sierra Leone Tangled in a Curious Web*, N.Y. TIMES, June 4, 2000, at A6.

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*; Barbara Crossette, *Singling Out Sierra Leone, U.N. Council Sets Gem Ban*, N.Y. TIMES, July 6, 2000, at A9.

to note that each involved significant human rights violations, and that no outside states intervened militarily in response to those violations without the permission of the territorial sovereign. Therefore, the international reaction to these situations is clearly inconsistent with some blanket rule requiring states to forestall massive human rights violations elsewhere and suggests what are at least prudential limitations on the right to intervene in such circumstances.

F. Authority for Humanitarian Intervention: Conclusion

What then can be gleaned from all of this? Determining the state of international legal authority for humanitarian intervention is difficult at best, and more likely impossible. As noted above, scholars differ on the most fundamental questions regarding the nature of authority in international law. There appear to be, roughly, three approaches. One focuses on treaties, particularly the United Nations Charter, and applies them as written. According to this approach, practice contrary to a treaty is irrelevant. A second approach likewise ignores practice, but relies on more diffuse sources as the basis for rules that states are presumed to be powerless to alter. The third approach would place primary emphasis on state practice in determining the content of rules of international law.

The first two approaches lead to quite different conclusions on these facts. The Charter-centered focus leads to the conclusion that the Kosovo bombing, and presumably any humanitarian intervention, is unlawful unless authorized by the Security Council. The trans-empirical approach, with its stress on the absolute primacy of human rights, could treat the Kosovo bombing as lawful. Though these two ways of thinking about authority in international law lead to different results in this case, they share a conviction that there are rules of international law that states simply cannot change, except perhaps by amending the Charter. Both of these approaches share the defect that this immutable character they assign to certain rules of international law is inconsistent with the nature of the international legal system. Except for cases in which Chapter VII of the Charter applies, states have not subordinated themselves to institutions that can compel their adherence to rules the states themselves reject. In such a situation, to assert that a given legal rule is unchangeable necessarily begs the question of how states could place beyond their power the ability to change the rule. Rather, unsatisfactory as it may be from a number of perspectives, the international legal system can hardly be thought to include rules that states, in fact, simply do not follow.

If one accepts this approach to authority, one has effectively adopted the third approach. From this perspective, an assessment of

the Kosovo campaign is easy. An action taken collectively by nineteen states, the reaction to which from all but a few other states is a more or less approving silence, can be labeled illegal only if the source of the alleged illegality is some sort of fixed rule, not dependent on acceptance by states for its effectiveness. If one denies the existence of such rules, then one has no basis for labeling the Kosovo bombing campaign illegal. By extension, other similar actions would likewise not be illegal. The only caveat that must be invoked here is that Kosovo represented an extreme situation. Not only were the actions of the FRY reprehensible, but they appeared to be motivated by nothing more than hatred of the Kosovo Albanians. At the same time, reacting forcibly to those actions posed relatively little risk of a serious international conflict, given the vast disproportion between the resources of NATO and those of the FRY. If an intervention was launched against actions not so easily ascribed to simple hatred, or in circumstances where the risks created by the intervention were greater than was true in Kosovo, states could well react differently than they did to NATO's bombing campaign.

Further, it is impossible to ignore in this connection the varying international reactions to the incidents in East Timor, Chechnya, and Sierra Leone. The refusal of the international community to act in Chechnya, the insistence on Indonesian assent with regard to East Timor, and the tepid reactions to events in Sierra Leone are simply inconsistent with any acceptance by states of a duty to act triggered whenever significant violations of human rights take place.

The tentative conclusion on this point, then, can be that at least some humanitarian interventions appear to be lawful, even without Security Council authorization. There is, however, not only no clear authority for the proposition that states have an affirmative obligation to do what may be needed to forestall massive human rights violations in other states, but also considerable practice inconsistent with the existence of such a duty.

III. IMPLEMENTABILITY

A. *Preliminaries*

The foregoing Section demonstrates that there is little to support the argument that international law requires states to forestall massive outbreaks of evil in other states. It also shows that the legality of humanitarian intervention has been tested and arguably accepted only for a limited number of situations. To say that a rule does not exist, however, is hardly to say that such a rule could not be

brought into existence. This Section therefore examines this aspect of the question of mandating international legal reactions to evil.

One basic question asks: can the rules that are the subject of this discussion accomplish their objectives? This in turn breaks down into two questions. First, assume that a given rule is implemented. Will applying the rule accomplish the purpose for which the rule was crafted? Second, assume that application of the given rule will indeed achieve the purpose for which the rule was crafted. Is it physically possible to apply the rule?

The answer to the first of the two questions depends on whether one is focusing on the putative rule requiring intervention to forestall massive human rights violations or on the rule requiring international criminal punishment of persons proven to have perpetrated serious violations of human rights. The first of these two rules requires achieving a particular objective; hence, if the rule is applied, its application must by definition accomplish the objective of the rule.

The objectives to be furthered by establishing the ICC are less directly linked to the operation of the Rome Statute. Those objectives are numerous. The Rome Statute itself refers to ending impunity for those responsible for massive human rights violations and to deterring such violations.⁹⁶ Others add as objectives for such a body the establishment of a historical record, promotion of reconciliation in a state in which human rights violations have taken place by fixing responsibility for those violations on individuals, and providing a sense of closure.⁹⁷ The first objective—ending impunity—is seen in part as an end in itself and will be discussed below.⁹⁸ The other objectives have been the object of thoughtful analysis by others, who have shown that it is by no means obvious that the ICC could achieve any of them.⁹⁹

Since there already exist excellent discussions of the reasons for doubt that the ICC could accomplish its objectives if it functioned as planned, the following will address the second implementability issue: could these rules in fact be put into practice? What would actual implementation of these rules require? Is such implementation possible?

96. Rome Statute, *supra* note 7, pmb1.

97. *E.g.*, LYAL S. SUNGA, *THE EMERGING SYSTEM OF INTERNATIONAL CRIMINAL LAW: DEVELOPMENTS IN CODIFICATION AND IMPLEMENTATION* 324-332 (1997).

98. *See infra* text accompanying note 195.

99. *See generally* MARTHA MINOW, *BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE* (1998); Alvarez, *supra* note 11; Carrie Gustafson, *Gandhi's Philosophy of Satyagraha: Cautionary Notes for the International Penal Lobby*, in *RELIGION AND HUMAN RIGHTS: COMPETING CLAIMS?* 88 (Carrie Gustafson & Peter Juviler eds., 1999); David Wippman, *Atracities, Deterrence, and the Limits of International Justice*, 23 *FORDHAM INT'L L.J.* 473 (1999).

B. *Acting Against Evil: From the Abstract to the Concrete*

Any discussion of preventing massive human rights violations or of putting human rights violators on trial is incomplete if it focuses solely on the end to be achieved. A complete discussion also requires paying some attention to the means whereby the end is to be achieved. Those means will be very costly because in many cases the means will necessarily be war.

Perhaps that observation merely belabors the obvious. Certainly, experience has demonstrated that at least a credible threat of force will be necessary in many cases, and the actual use of force will be required in some cases, to halt human rights violations. Likewise, perhaps it is clear that a willingness to use force may well be required if persons alleged to have violated human rights are to be put on trial. Persons criticizing the failure of NATO forces to arrest individuals indicted by the International Criminal Tribunal for the Former Yugoslavia have not asserted that such arrests could be effected easily, but rather have argued that NATO should be prepared to suffer casualties in order to bring war criminals to trial.¹⁰⁰

It may be less clear, however, that still other sorts of situations could present themselves. Suppose, for example, that one side in a civil war perpetrates human rights violations clearly sufficient to trigger the jurisdiction of the ICC, although not of the magnitude of those that took place in Bosnia-Herzegovina, or Rwanda, or were feared in Kosovo. Suppose the war ends rather quickly, with the side perpetrating the violations in such a weak position that its leaders agree to cease fighting simply in return for an amnesty. The ICC would be able to try such persons only if they could be seized.¹⁰¹ Thus, the ICC could in such a case operate effectively only if the local government was willing to risk reigniting the civil war by arresting the persons accused, or if a foreign state were willing to invade to accomplish the same purpose.

Further, even if it is obvious that war will likely be required in many cases to end massive human rights violations and to seize the perpetrators of those violations, that fact is in itself reason to hesitate to recognize a flat obligation for states to take such actions. Are we really prepared to say that the states of the world are legally obliged to go to war against Russia in order to end human rights violations in

100. *E.g.*, Edward Cody, *New Line in Bosnia?: Raid to Seize Serbs Bolsters NATO Image*, INT'L HERALD TRIB., July 14, 1997, at 10.

101. The ICC may not try persons in absentia. Rome Statute, *supra* note 7, art. 63.

Chechnya and to seize for trial all persons who caused such violations to occur?

Turning from the fact that war would be necessary to implement an international response to evil, there is a second element of this matter which requires consideration but that has received little attention. That is, what happens after the intervention has taken place? If massive human rights violations take place in a particular state, one of two circumstances will very likely exist. Either the government of that state is incapable of maintaining order, meaning that the government is unable to protect the population from non-government groups intent on perpetrating human rights violations, or else the government itself is violating the rights of some portion of the population. Whichever is true, it follows that a key precondition for the events that required humanitarian intervention was a problem with the government, either of weakness or of malevolence.

Under such circumstances, whatever entities carry out the intervention are faced with two unattractive alternatives. If they simply halt the human rights violations, perhaps disarm the perpetrators, and then leave, the circumstances that produced the problem may well recur, forcing another intervention. If the intervenors seek to address the circumstances that produced the problem, however, they must necessarily seize control of the state and remain in control until there exists an indigenous government strong enough to maintain order but not disposed to perpetrate human rights violations. Such a government will hardly appear by magic, however. Indeed, if, as argued above, the flaws of the government produced by local political processes were necessarily important elements of the environment that led to massive human rights violations, it is at least possible that the normal workings of local politics would, if allowed to function unchecked, simply produce another weak or vicious government. If the intervenors feel they cannot leave until a reliable government is in place, and if the local political system must be changed significantly before they are likely to produce a reliable government, it follows that the intervention cannot end until the state in which the intervention took place has, in important respects, been fundamentally restructured. In other words, the intervenors' alternatives are ending the immediate crisis and leaving the locals to pick up the pieces, or imposing what amounts to a benevolent colonial regime aimed at enabling the locals to select their own government without opening the door for further horrors.

The problem this situation presents arises from the difficulties of restructuring the target of the intervention. As the world has learned, it is not easy for even well-intentioned foreigners to enter

another state and alter its fundamentals. The effort to reconstruct Somalia was, of course, a failure.¹⁰² Although Haiti no longer experiences the repression that predated the restoration of President Aristide, it remains a state in deep difficulty,¹⁰³ despite an extensive “nation-building” operation following the restoration.¹⁰⁴ The results of the United Nations’ effort to reconstruct Cambodia were decidedly mixed,¹⁰⁵ and its current effort in Kosovo is likewise encountering serious difficulties.¹⁰⁶

Further, such reconstruction efforts can be costly. Foreign military units sent to maintain the peace may incur casualties, as took place in East Timor in the summer of 2000.¹⁰⁷ Nor are the monetary costs insignificant. For example, President Clinton’s proposed Fiscal Year 2001 budget sought \$1,387.8 million for American military operations in Bosnia-Herzegovina and \$1,650.4 million for such operations in Kosovo.¹⁰⁸ The General Assembly has voted to provide \$200 million for the operation of the United Nations Mission in Kosovo for the period 2000-2001.¹⁰⁹ Of course the other states providing troops for the NATO operations in both these areas are also incurring financial costs.

Humanitarian intervention thus cannot be assumed to involve merely a war to halt human rights violations. Such interventions will also in many cases necessarily involve the assumption by some states or international organization of the duty of creating a political system that will both refrain from human rights violations itself and prevent others from perpetrating such violations. This is true despite the spotty record of such efforts at nation-building and in spite of the costs—in money and potentially in lives—that such efforts must generate.

102. KARIN VON HIPPEL, *DEMOCRACY BY FORCE: U.S. MILITARY INTERVENTION IN THE POST-COLD WAR WORLD* 55-91 (2000).

103. David Gonzalez, *2 Elections on an Island, So Close, So Far Apart*, N.Y. TIMES, June 4, 2000, § 4, at 4; David Gonzalez, *Political Violence at Home Made Haitians Flee, Boat Survivors Say*, N.Y. TIMES, Apr. 29, 2000, at A1.

104. VON HIPPEL, *supra* note 102, at 92-126.

105. Seth Mydans, *Fragile Stability Slowly Emerges in Cambodia*, N.Y. TIMES, June 25, 2000, § 1, at 1.

106. Michael Ignatieff, *The Reluctant Imperialist*, N.Y. TIMES, Aug. 6, 2000, § 6 (Magazine), at 42, 42-47.

107. Rajiv Chandrasekaran, *Indonesian Militias Target U.N. Forces in East Timor*, WASH. POST, Aug. 12, 2000, at A14.

108. DEFENSE TECHNICAL INFORMATION CENTER, OVERSEAS CONTINGENCY OPERATIONS TRANSFER FUND, FY 2001 PRESIDENT’S BUDGET SUBMISSION 5 (2001), at http://www.dtic.mil/comptroller/fy2001budget/budget_justification/pdfs/overseas/fy01pb_overseas.pdf (last visited Feb. 5, 2001).

109. UNITED NATIONS, U.N. INTERIM ADMINISTRATION MISSION IN KOSOVO (Oct. 19, 2000), at http://www.un.org/peace/kosovo/pages/kosovo_status.htm (last visited Feb. 5, 2001).

C. *Humanitarian Intervention: Physical Limitations*

The foregoing discussion addresses some of the implications of accepting a duty to intervene to prevent human rights violations or to seize individuals alleged to have perpetrated such violations. That discussion, however, begs an important question. Suppose timely action is physically impossible?

Modern systems of communication and transportation permit governments both to learn about events in distant places and to dispatch troops to such places much more quickly than could be done even twenty years ago. But it is one thing to say that obtaining information and arranging movement is much easier than in the past; it is quite another to assert that it is possible to obtain information from anywhere on the planet instantly, or to move military units to any country as quickly as would be possible if there were available matter transporters similar to those of the *U.S.S. Enterprise* (the starship, not the aircraft carrier).

Of course, no one has actually asserted that it is possible instantaneously either to obtain information or to move troops.¹¹⁰ Nevertheless, few of the discussions of obligations to forestall massive human rights violations discuss the practical question of how outside states are to learn of the evils being perpetrated, what sort of military units could be sent in response, or how quickly those units could arrive.

Obviously such questions are central. One cannot respond to an event of which one is unaware. Further, even if one is aware of an emergency in another state, it may be physically impossible to react. Imagine a land-locked, remote country, reachable only by air. If an intervention were to be attempted in such a country, airlift capacity would thus be crucial. Suppose the country had only one airport with a runway long enough and parking areas large enough to service a Boeing 747 jet airliner, though the runway was only just long enough and the parking areas could handle no more than six 747's at once. Could the United States, for instance, intervene quickly in such a country?

Answering this question must start with a consideration of the means available for such an intervention. The long-distance transport aircraft used by the U.S. Air Force are the C-141, C-5, and C-17. As of December 2000 there were available a total of 170 C-141's, of which 96 were assigned to reserve and national guard units;

110. Some writers, however, do come close. See David M. Smolin, *The Future of Genocide: A Spectacle for the New Millennium?*, 23 *FORDHAM INT'L L.J.* 460, 462-63 (1999) ("Technological advances in transportation and in military capability make it increasingly obvious that we—or more important our Western, powerfully armed nations—could, if they [sic] so choose, intervene forcefully anywhere in the world.").

126 C-5's, some of which were assigned to reserve units; and 64 C-17's, of which 6 were assigned to national guard units. The C-141 is the least useful of the three, as its cargo capacity is only 60% of that of the C-17 and only 34.25% of that of the C-5. Further, unlike the other two aircraft, the C-141 cannot carry outsize cargo, such as tanks.¹¹¹ Both in terms of its capacity and in terms of the numbers available, the C-5 is currently the most significant aircraft in the Air Force's transport fleet. But the C-5 requires both a longer runway and a larger parking area than does the Boeing 747.¹¹² In other words, our hypothetical country may not be accessible to a C-5, even though it is accessible to a 747. If the United States found itself forced to deploy troops by air to this country, one-third of the air force's transport aircraft, amounting to approximately sixty-one percent of its cargo capacity, could not be used.¹¹³ In such a case, a quick deployment would necessarily be difficult.

A few concrete examples can highlight this point. The genocide in Rwanda has been held up as an example of international indifference to massive human rights violations.¹¹⁴ Yet it is by no means clear that intervention in time to halt that genocide was physically possible. The genocide began on April 7, 1994, and spread throughout the country by April 13.¹¹⁵ Very large numbers of persons had been murdered no later than the end of the month.¹¹⁶ Yet, according to a careful analysis of this event by Alan J. Kuperman, the government of the United States would not have known that genocide was taking place until about April 20.¹¹⁷ Thus, even if the United States had been disposed to intervene, the necessary orders could not have been given before that date. According to Kuperman, if such orders had been given on April 20, a force large enough to act throughout Rwanda could not have completed its deployment from the United States until about May 30, given the inaccessibility of Rwanda except by air, the limited capacity of the airport at Kigali, and the number of troops and weight of equipment to be transported.¹¹⁸ While operations would have

111. AIR MOBILITY COMMAND FACT SHEET 00-01 (2000) (on file with author).

112. SANFORD S. TERRY, STRATEGIC AIRLIFT: MILITARY VERSUS COMMERCIAL AIRCRAFT 6 (1994).

113. See *supra* note 111.

114. E.g., *UN Rwanda Report*, *supra* note 3, at 1, 25-26; Chinkin, *supra* note 58, at 847.

115. Alan J. Kuperman, *Rwanda in Retrospect*, FOREIGN AFF., Jan.-Feb. 2000, at 94, 98-100.

116. *Id.*; ORGANIZATION OF AFRICAN UNITY, *supra* note 4, ch. 14, paras. 23-27, ch. 15, para. 18.

117. Kuperman, *supra* note 115, at 101-103; Alan J. Kuperman, *Kuperman Replies*, FOREIGN AFF., May-June 2000, at 142, 142-44. See also ORGANIZATION OF AFRICAN UNITY, *supra* note 4, ch. 14, para. 29.

118. Kuperman, *supra* note 115, at 105-107.

commenced before all troops were assembled, and large-scale genocide could have been stopped perhaps as early as May 15, Kuperman estimates that such an operation would have saved only twenty-five percent of those who were actually murdered.¹¹⁹ A somewhat quicker deployment would have been possible if the objectives of the forces deployed were more limited than that of halting the genocide throughout Rwanda; however, fewer persons would have been saved.¹²⁰

A second example is provided by a hypothetical deployment suggested in a study of the airlift needs of the American military.¹²¹ The writer hypothesized a deployment of the 82nd Airborne Division to eastern Zaire.¹²² His calculations showed that, using the most capable American cargo aircraft, the C-17, it would take

119. *Id.* at 106.

120. *Id.* at 108-10. The different views expressed in SCOTT R. FEIL, PREVENTING GENOCIDE: HOW THE EARLY USE OF FORCE MIGHT HAVE SUCCEEDED IN RWANDA (1998), at <http://www.ccpde.org/pubs/rwanda/rwanda.htm> (last visited Feb. 5, 2001), a report prepared for the Carnegie Commission on Preventing Deadly Conflict, appear to be mistaken. Feil argues that "a modern force of 5,000 troops, drawn primarily from one country and sent to Rwanda sometime between April 7 and 21, 1994, could have significantly altered the outcome of the conflict." *Id.* at 3. There are two problems with this analysis. First, it is based on a misapprehension of the situation in Rwanda. Feil states that "[t]he window of opportunity offering the best chance for success in Rwanda in 1994 was a small one The conference participants generally agreed that any action after the last week in April 1994 would have required massive amounts of force because the situation had expanded to the countryside." *Id.* at 12-13. The difficulty with this conclusion is that it assumes that the genocide did not spread to the Rwanda countryside until after the end of April. As pointed out above, see *supra* text accompanying note 115, the killing had in fact spread to the countryside before the middle of the month. The second problem with Feil's analysis is that it does not address the question of the time at which orders to intervene could have been issued. His analysis focuses on an intervention prior to April 21. If the U.S. government would not have had information that the events in Rwanda constituted genocide until April 20, moving even 5,000 troops to that country could hardly have been possible during the window of opportunity Feil pinpoints. It should also be noted that his report devotes little attention to the logistic issues. For example, although it suggests the Division Ready Brigade of the 101st Airborne Division (Air Assault) as a possible intervention force, it acknowledges that an important part of that unit's mobility assets—its CH-47 helicopters—would have had to "self-deploy." *Id.* at 12, 30 n.23. How a helicopter with a range of 230 nautical miles is supposed to "self-deploy" from Fort Campbell, Kentucky to Central Africa is not explained. See BOEING CORP., CH-47D SPECIFICATIONS, at <http://www.boeing.com/rotorcraft/military/ch47d/ch47dspec.htm> (last visited Feb. 5, 2001).

Despite these analytical problems, the International Panel of Eminent Personalities Report quotes Feil's analysis approvingly. ORGANIZATION OF AFRICAN UNITY, *supra* note 4, ch. 10, paras. 9-10. The report itself, however, demonstrates that the genocide spread throughout Rwanda much earlier than the end of April, contrary to Feil's assumption. *Id.* ch. 14, paras. 23-28. The report also cites Kuperman's analysis. *Id.* ch. 10, para. 10.

121. RICHARD W. ROBINSON, AIR TRANSPORT SYSTEMS: A COMPARISON OF ALTERNATIVES AND A METHODOLOGY FOR CONTEXTUAL ANALYSIS 85-95 (1993).

122. *Id.*

approximately twenty days to accomplish this deployment; if for some reason sufficient C-17's were unavailable, the deployment could take as long as thirty days.¹²³

One further point is relevant in this connection. The resources necessary for quick intervention are not evenly distributed among states. Aside from Russia, whose current capacity for long-distance military intervention is not likely to be great, only the United States maintains a sizeable fleet of transport aircraft capable of long-distance movement. Currently, the 360 American aircraft mentioned above¹²⁴ represent something more than ninety percent of the long-distance air transport fleet of all the NATO states.¹²⁵ Not only is long-distance movement dependent on the vagaries of airport capacities; it is also an operation that can be performed by only one state.

The point by now is clear. It is simply not physically possible to move large military units instantaneously. If preventing a given massive human rights violation would require very quick movement of troops to a very remote area, preventing the human rights violation might not be possible and would in any case be possible only for the United States.

Recognition of this situation necessarily complicates formulating any legal rule requiring action against evil. While some of these difficulties are best discussed below, it is appropriate to note some of the implications of these problems in execution. Legal rules are supposed to indicate what behavior is required, permitted, or forbidden in clearly designated categories of circumstances. If a set of circumstances is incapable of categorization, it would seem badly suited to legal regulation.

It would seem that the determinations of whether and how to launch a major military operation is a classic instance of a matter that does not lend itself to legal categorization. Assuming no rule would be interpreted as requiring an action which was literally impossible—such as moving a division from the United States to Rwanda in twenty-four hours—the judgment calls involved seem badly suited to any sort of legal analysis. Suppose, for example, a

123. *Id.*

124. *See supra* text accompanying note 111.

125. RENÉ J. FRANCILLON & CAROL A. MCKENZIE, *THE NAVAL INSTITUTE GUIDE TO WORLD MILITARY AVIATION 1997-98*, at 34-35, 59-60, 86-87, 89, 113, 123, 129, 140-41, 163-64, 222-23, 231, 251, 255-56, 288, 318, 332-33 (1997); INT'L INST. FOR STRATEGIC STUDIES, *THE MILITARY BALANCE 1999-2000*, at 48-78 (1999). This conclusion is reinforced by the fact that France was forced to charter the large aircraft it required when it deployed troops in Rwanda in 1994. Gérard Prunier, *Opération Turquoise: A Humanitarian Escape from a Political Dead End*, in *THE PATH OF A GENOCIDE: THE RWANDA CRISIS FROM UGANDA TO ZAIRE* 281, 291 (Howard Adelman & Astri Suhrke eds., 1999).

government declined to intervene in a particular situation because it concluded that even the slightest chance of success would require commitment of at least a division, but transportation and logistical problems were judged to make deployment of more than a brigade impossible. Would a judge attempt to second-guess the determination that only a division was adequate to the task at hand? Would a prosecutor try to argue that the logistical difficulties were in fact not as daunting as the state in question had concluded? What would count as a violation of the rule? Would a decision that action was impossible, made in good faith but debatable, be a basis for a legal challenge?

In sum, consideration of a requirement of international action against evil makes little sense if one considers the difficulties of implementing the duty or of determining in concrete cases what counts as compliance with the duty.

IV. VALUE CONFLICTS

The discussion thus far has shown that a rule of international law requiring states to prevent massive human rights violations in other states is not supported by authority, and that such a rule, as well as any effort to establish the ICC, would encounter serious problems of implementation. In addition to these difficulties, these rules also would conflict with other rules of international law. This section explores those conflicts.

A. *Reacting to Evil Versus Article 2(4)*

The most obvious conflict is between Article 2(4) of the Charter and the concept of humanitarian intervention. Article 2(4) seeks to prevent interstate uses of force; humanitarian intervention involves interstate use of force in what is supposed to be a good cause. This conflict would be particularly acute if it becomes legitimate to argue that there exists a duty of humanitarian intervention. If, as the report to the United Nations on the Rwanda genocide states, "the United Nations—and in particular the Security Council and troop contributing countries—must be prepared to act to prevent acts of genocide or gross violations of human rights wherever they may take place,"¹²⁶ then states have an obligation, not merely an option, to use force as needed for humanitarian reasons. The conflict is particularly acute because of the uncertain character of any obligation to intervene. If gross violations of human rights other than genocide

126. *UN Rwanda Report*, *supra* note 3, at 37.

trigger a duty to act, the occasions for intervention will be relatively numerous. Further, if the obligation is one of prevention, there is an obvious argument that early intervention is to be encouraged. In this context, however, early intervention would be justified, not by the occurrence of gross violations of human rights, but by the argument that such gross violations would have taken place but for the intervention. Even if there were agreement on what should count as a gross violation of human rights, the prevention rationale could have troubling consequences. Obviously, prevention is most successful if there occurs no wrongdoing whatsoever. That observation suggests that any intervention in a state that has seen, at worst, limited human rights violations could be portrayed as a particular triumph, with the intervenor claiming that chaos was averted only by the intervention. Refuting this claim would require showing that no large scale human rights violations would have taken place in any event—an argument that cannot be made with confidence in many situations.

For example, consider the intervention in Grenada in 1983 by the United States and a number of other states in the region. That action was prompted by a military coup by a hardline Marxist faction in Grenada.¹²⁷ The coup aroused U.S. concern because of the ideology of the new government and because of fears that a U.S. failure to act, coming as it would on the heels of the bombing of the Marine barracks in Beirut, would have suggested weakness on the part of the United States. The neighboring states shared the U.S. concern with the new government's ideology, and were also revolted by the violence employed in the coup.¹²⁸ In other words, the motives of the intervenors were to a great extent, though not exclusively, ideological.

Suppose, however, that the United States and the other intervenors had argued, in 1983, that this unusually violent coup, coupled with the hardline character of the new government, raised fears that the coup would be followed by massive violations of the human rights of Grenadans generally, thereby not merely permitting but obliging other states to overthrow that new government. Opponents of the intervention could have questioned whether the invasion was in fact disinterested, but would have been hard put to argue that human rights violations would not have occurred. Yet if no such argument could have been made, and a duty to prevent such violations existed, then the legality of the intervention would have been difficult to challenge.

127. A. MARK WEISBURD, *USE OF FORCE: THE PRACTICE OF STATES SINCE WORLD WAR II* 235-36 (1997).

128. *Id.*

This dilemma is somewhat exacerbated by the Rome Statute. Article 86 of that instrument imposes on States Parties a general duty to cooperate with the ICC.¹²⁹ That duty is certainly not defined as extending to invading other states in order to capture persons indicted. Further, it would appear that the Statute takes cognizance of a failure to cooperate only when that failure follows an explicit request for cooperation from the Court; the only response to such failures specified in the Statute is a reference from the ICC to the Assembly of States Parties or, in matters referred by the Security Council, to the Security Council.¹³⁰ It might be further argued that, in light of Article 103 of the UN Charter, giving obligations under the Charter priority over obligations under all other international instruments,¹³¹ the duty to cooperate with the ICC could not trump states' obligations under the Charter.

This argument for the primacy of the Charter, however, is hard to reconcile with those arguments which subordinate states' duties under Article 2(4) to humanitarian imperatives, even when no treaty explicitly creates either a right or a duty to invade a state in order to prevent gross human rights violation. If violations of 2(4) are justified for humanitarian reasons even without a treaty obligation, would such violations not be even easier to justify when such obligations exist?

The problem here is not that the Rome Statute will be invoked to drive unwilling states to war. The difficulty, rather, is that it will provide a pretext for states desirous of invading other states for reasons unrelated to humanitarian goals. In that context, the fact that the Statute provides no penalties for failures to cooperate with the ICC is beside the point. The issue is not inducing cooperation, but restraining states only too eager to "cooperate."

Finally, objections can be raised against any proposed deviation from Article 2(4): that war is in itself an evil that outweighs whatever other evils it may be intended to prevent, and alternatively, that even if categories of just wars can be envisaged, to recognize such categories is to open the door to bad faith reliance on them to justify otherwise proscribed uses of force.

129. Rome Statute, *supra* note 7, art. 86.

130. *Id.* arts. 87(1)(a), 87(7).

131. U.N. CHARTER art. 103.

B. *Reacting to Evil Versus Self-determination*

Article 1 of both the International Covenant on Civil and Political Rights¹³² and the International Covenant on Economic, Social and Cultural Rights¹³³ provides:

1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
- . . .
3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.¹³⁴

This right of self-determination has arguably entered customary international law.¹³⁵ Although the boundaries of the right are most unclear,¹³⁶ even the narrowest construction of the term would presumably read it as protecting the inhabitants of a recognized state from being subjected to political control by persons not deriving their authority from that state.

Institutionalizing humanitarian intervention and the establishment of an ICC would undermine the principle of self-determination in three distinct ways. First, the states likely to be the object of international enforcement actions are smaller third-world states. Legitimizing humanitarian intervention would thus, in a sense, recreate the world in which powerful states respected one another's sovereignty while ignoring that of weaker polities. Second, such actions would forcibly replace local authority with alien control in particular cases. Third, the rationale for these international legal doctrines has the potential to destroy the intellectual underpinnings of the concept of self-determination.

The first of these points is the easiest to establish. As shown above, the type of response evoked by a particular violation of human rights depends, not simply on the character of the violation, but on

132. International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171.

133. International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3.

134. International Covenant on Civil and Political Rights, *supra* note 132, art. 1; International Covenant on Economic, Social and Cultural Rights, *supra* note 133, art. 1.

135. Robert McCorquodale, *Introduction to SELF-DETERMINATION IN INTERNATIONAL LAW* xi, xiii (Robert McCorquodale ed., 2000).

136. *Id.* at xiv-xix.

the identity of the state in which the violation is taking place. Regarding humanitarian intervention, Yugoslavia, a weak state and a pariah in its region, received harsh treatment. The sovereignty of Russia and Indonesia—both powerful and important states—was respected. In this connection, Professor Greenwood's rejection of "an interpretation of international law which would forbid intervention to prevent something as terrible as the Holocaust"¹³⁷ rings somewhat hollow. It is most unlikely that a contemporary state as powerful as was Nazi Germany in the 1930s and 1940s, and not already at war, would find itself the object of forcible intervention, no matter how horrible the human rights violations it perpetrated.

The writ of the ICC is also unlikely to run equally to all states. Although the jurisdiction of the ICC extends to all states who become parties to the Rome Statute without distinction, the strongest states—the United States, Russia, and China—are most unlikely to become parties. In such a case, crimes committed by the nationals of these states would fall within the ICC's jurisdiction only if carried out on the territory of a state party. More to the point, nationals of these states accused of such crimes could be brought before the Court only if they ventured onto the territory of a state party and that state party was willing to risk the displeasure of the home state of the accused by effecting an arrest. Thus, in practice, the states whose nationals are most likely to appear before the ICC are the same states likely to be the objects of humanitarian intervention.

The second sense in which international regulation of evil obscures the concept of self-determination also is easily demonstrated. In the words of the General Assembly's Declaration on Friendly Relations, self-determination is defined as not being subject to "alien . . . domination."¹³⁸ A duty to carry out humanitarian intervention imposed by international law amounts to alien domination, in that it deprives communities of control of one of the most basic imaginable political decisions: whether to go to war. Proponents of this duty would say to the inhabitants of states that in cases of threats to humanitarian values, they are obliged to sacrifice their lives and those of their children to the extent necessary to end the threat. The scope of this claim is breathtaking. At the level of political philosophy, it would seem the antithesis of self-determination to take from the hands of a group so crucial a decision. It might be added that such a duty would be contrary to the values of many peoples; while many religions and ethical systems praise

137. *Greenwood Memorandum*, *supra* note 51, para. 17.

138. Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625, U.N. GAOR, 25th Sess., Supp. No. 28, Annex, at 121, U.N. Doc. A/8028 (1971).

persons who sacrifice themselves for others, few if any consider persons who do not risk their lives for the benefit of strangers as failing in their duty.

Humanitarian intervention subjects persons to alien rule in an additional context. As shown above, humanitarian intervention in a territory will very frequently be followed by a period of international administration of the territory, as the intervening states or other organizations seek to address the circumstances which led to the intervention. During this period, the people involved are governed by outsiders. For example, accounts of the current UN efforts in East Timor¹³⁹ and in Kosovo¹⁴⁰ make clear that, temporarily at least, local people have very limited roles in their own government.

The ICC's authority to determine whether a state's prosecution or investigation of an individual was "genuine"¹⁴¹ can also have the effect of substituting international control of the state's judicial process for local control. If the ICC notifies a state of its intention to proceed against an individual, then the state must begin an investigation of that individual within a month, or the ICC seizes jurisdiction of the matter. In such a case, there appears to be no way the state can oust the ICC of authority in the matter.¹⁴²

It might be argued that such international administration is the lesser evil in cases of humanitarian intervention, because either the intervention itself, as in Kosovo, or the events which provoked the intervention, as in East Timor, may have destroyed whatever government structures formerly existed. The same argument cannot be made regarding the ICC, however, because that body's authority depends only on a territorial state's failure to prosecute or investigate a crime, not simply on its inability to do so.

There is an additional and more speculative concern regarding humanitarian intervention in particular cases, and it relates not so much to the right of self-determination as to its necessity. There may be conflicts that cannot be resolved until the parties have exhausted their capacities to rely on violence.¹⁴³ In such cases, the argument goes, halting violence may actually inhibit resolution of the conflict, because the basis for disagreement for the parties will persist until some or all of the actors acknowledge their inability to prevail by force.¹⁴⁴ If such cases exist, intervention merely postpones an

139. Traub, *supra* note 85, at 82-86, 89.

140. Ignatieff, *supra* note 106, at 47.

141. Rome Statute, *supra* note 7, art. 17.

142. *Id.* art. 18.

143. Edward N. Luttwak, *Give War a Chance*, FOREIGN AFF., July-Aug. 1999, at 36.

144. *Id.*

inevitable reckoning; it delays rather than prevents the human rights violations it seeks to forestall.

Beyond difficulties in particular cases, however, the idea of international intervention to prevent human rights abuses and to punish violators of human rights assumes that international standards and institutions may properly displace domestic standards and institutions in circumstances determined at the international level. Proponents of such intervention might argue that, while this statement may be true in the sense that an intervention that, for example, ousts a brutal dictatorship can be said to interfere with a local institution, the sorts of activities against which interventions and ICC proceedings would be directed would be illegitimate even under local standards. That is, international action would be taken only in cases so extreme that it is difficult to imagine objections from nationals of the state that is the target of the intervention.

This argument fails, however, in that it confuses practical limitations with legal limits on discretion. It is certainly true that currently few major powers would be likely to intervene without the justification of truly barbarous acts. Likewise, though the definition of crimes against humanity in the Rome Statute is fairly vague,¹⁴⁵ it would be surprising if the ICC were to go out of its way to read that term broadly. The point, however, is that nothing limits the discretion of intervening states or of the ICC.

One danger this situation presents is that practices generally considered lawful in a given state may be challenged as oppressive, either by humanitarian intervenors or by the ICC. For example, the Rome Statute forbids persecution of members of groups on the grounds of gender¹⁴⁶—meaning sex¹⁴⁷—and defines “persecution” as “the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group. . . .”¹⁴⁸ Could it be argued that the various discriminations against women established in the law of certain Islamic states meet this definition?¹⁴⁹ More precisely, could it conclusively be established

145. The Rome Statute defines crimes against humanity as including murder, extermination, enslavement, deportation of forced population transfer, deprivation of liberty in violation of fundamental rules of international law, torture, grave sexual violence, persecution of a group on grounds considered impermissible in international law, enforced disappearances, and apartheid. Rome Statute, *supra* note 7, art. 7(1)(a)-(j). The Rome Statute then adds the following catch-all category: “Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.” *Id.* art. 7(1)(k).

146. *Id.* art. 7(1)(h).

147. *Id.* art. 7(3).

148. *Id.* art. 7(2)(g).

149. *Report of the Preparatory Commission for the International Criminal Court, Finalized Draft Text of the Elements of Crimes*, at 15, U.N. Doc. PCNICC/2000/1/Add.2 (Nov. 2, 2000), provides that the crime of persecution is committed only if the acts

that such discrimination does not meet that definition? It is difficult to answer this second question in the affirmative. But failing an affirmative answer, neither external intervention nor ICC action could be considered legally precluded, assuming the establishment of both a duty of humanitarian intervention and of the ICC.

The third threat that humanitarian intervention poses for self-determination—the conceptual conflict between the right of self-determination and the international control of evil—runs deeper. In essence, permitting such control at the international level amounts to the assertion that leaders of governments are, in the final analysis, primarily accountable to the international community, not to the citizens of the state that they govern. If the international community may define the content of gross human rights violations and overthrow by force a government engaged in such violations, even when that government acts with the full consent of the majority of its people, principles of popular control of government are necessarily treated as less important than whatever human rights principles the government has violated. Again, the ICC need not respect a local decision to grant amnesties to persons arguably guilty of serious human rights violations;¹⁵⁰ to that extent, local control of local affairs, even if exercised reasonably and in good faith, need not be respected by this non-local institution.

This point bears some emphasis because an objection to human rights enforcement on the grounds of interference with local decision making is frequently dismissed as simply a talking point for dictators. In many cases, of course, that is true. But the principle that international rules and institutions can ignore local authority when those international institutions deem such action appropriate has no necessary limit.

The states vulnerable to this sort of interference, at least under the Rome Statute, are almost sure to be states that have chosen to subject themselves to such treatment. This follows because the ICC's jurisdiction is limited to crimes that were committed in the territory of States Parties or by nationals of States Parties, or that have been referred to the Court by the Security Council.¹⁵¹ In the case of a crime covered by a local amnesty, as for example crimes committed by dictatorships formerly governing various states, the odds are very high that the alleged perpetrator will be a national of the state where

alleged took place “as part of a widespread or systematic attack directed against a civilian population.” This document also states, however, that the attack “need not constitute a military attack.” *Id.* at 9. The uncertainty noted above thus remains.

150. John T. Holmes, *The Principle of Complementarity, in THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE, ISSUES, NEGOTIATIONS, RESULTS* 41, 77 (Roy S. Lee ed., 1999) [hereinafter *THE INTERNATIONAL CRIMINAL COURT*].

151. Rome Statute, *supra* note 7, arts. 12, 13.

the crime was committed and that granted the amnesty. In such a case, the ICC could hear the case only if that state itself had become a party to the Rome Statute, leaving aside the unlikely situation where the Security Council refers a matter to the Court in such circumstances.

This limitation, however, need not persist. The provisions of the Rome Statute governing the ICC's jurisdiction clearly embrace the principle that the ICC may exercise jurisdiction notwithstanding the absence of consent from the state of the defendant's nationality. Under the Statute, the Court could exercise jurisdiction in such a case if the crime had been committed within the territory of a State Party. In essence, the admitted jurisdiction of the state where the crime took place is transferred, through that state's adherence to the Statute, to the ICC. But if states may transfer to the ICC jurisdiction based on a crime having been committed in their territories or by their nationals, presumably they may also transfer jurisdiction grounded on other bases. International law recognizes that criminal jurisdiction may be exercised by states unrelated to the crime or the criminal on the basis of universal jurisdiction—that is, jurisdiction based on the crime being of universal concern.¹⁵² Although the suggestion that the ICC should be able to exercise universal jurisdiction was rejected at the Rome Conference,¹⁵³ nothing in the Rome Statute prevents the ICC's jurisdiction from being expanded by an amendment that would, in effect, transfer to the ICC such universal jurisdiction as the parties to the Statute should choose to vest in it. Such a development would permit the ICC to pass on the domestic responses to universal jurisdiction crimes in any state whatsoever.

The point here is not that the Rome Statute is likely to be amended to bring about such a result, but rather to make clear that international law has come to include concepts that, if combined, would permit international institutions to override domestic decisions made by states that have not even consented to the authority of such institutions. International law, therefore, seems to be moving toward accepting the principle that governments derive their just powers from the consent, not of the governed, but of the international community. It is hard to see how the right of self-determination could survive the acceptance of such a principle.

152. 1 RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 404 (1987).

153. Elizabeth Wilmschurst, *Jurisdiction of the Court, in THE INTERNATIONAL CRIMINAL COURT*, *supra* note 150, at 127, 132-39.

C. *Reacting to Evil: Conclusion*

The foregoing discussion demonstrates that both the idea of a duty of humanitarian intervention and the structure of the ICC conflict with other fundamental principles of international law. Of course, the fact that legal principles may conflict with one another is hardly startling. Legal institutions must frequently resolve such conflicts. In such cases, it is necessary to consider the rationales of each of the conflicting principles in order to decide which should control. The next section of this Article, then, takes a close look at the rationales for both a duty of humanitarian intervention and for the creation of an ICC. As will be seen, the problem with both ideas is not that they conflict with other legal principles, but that their rationales for institutionalizing international responses to evil is surprisingly weak.

V. INTERNATIONAL LEGAL RULES REQUIRING RESPONSES TO EVIL: WHY?

A. *Why Have Rules Requiring Response to Evil: Introduction*

The discussion has thus far examined the twin propositions that states have a legal obligation to prevent massive human rights violations and that persons alleged to be responsible for such violations should be subject to international prosecution, at least if neither prosecuted nor cleared by a state. As has been shown, the first of these propositions is unsupported by authority (the second would be implemented only pursuant to a treaty). Further, both propositions raise significant problems of practical application, and both conflict with other significant principles of international law.

The most fundamental issue, however, remains to be addressed: why would it be a good idea for international law to establish obligations and institutions intended to suppress evil? At first blush, the question seems silly. Evil is, well, *evil*. Is not the desirability of combating evil self evident?

Reflection, however, raises doubts about that conclusion. Before one can act confidently against evil, one must be able to identify it. What counts as evil? While there will of course be some fairly easy determinations—the Nazi genocides, the genocides in Rwanda and Bangladesh—there will also be some difficult cases. Was the atomic bombing of Hiroshima justified? What about the bombing of Nagasaki? The idea of international law requiring a response to evil assumes that the international legal system has developed a clear

and legitimate method of identifying evil and thus dealing with the difficult cases. Is this assumption justified?

In addition to the question of determining what counts as evil, a second issue must be confronted: who should decide what to do about an evil? Some possible responses to evil—for example, attacking Russia to force it to modify its tactics in Chechnya—would arguably cause more harm than the actions they seek to forestall. Because choices must be made between reactions to evil, someone must make the choices. The idea that international law requires a response to evil assumes that the choices should ultimately be made at the international level. Does that assumption withstand analysis?

This Section of the Article addresses these two concerns. It seeks to show that the two assumptions described in the preceding paragraphs are problematic at best.

B. *Identifying Evil*

How can it be determined whether a particular practice is evil enough to justify either humanitarian intervention or classification as a crime against humanity under the Rome Statute? As noted above,¹⁵⁴ no clear standards exist to answer this question. Yet the idea of requiring international responses to evil and establishing a criminal court to punish particular acts assumes that standards can not only be articulated, but can be fairly applied to all states and all persons. What is the source of the belief that such universal standards exist?

Making such determinations would be easy if all peoples had common views in this area. That is not the case, however. On the contrary, there are immense differences among the peoples of the world regarding very basic moral questions. Peoples differ as well in their views of the international legal status of particular rules intended to legalize particular moral views.

The legal and philosophical questions are not identical. Even philosophers who derive principles of morality from natural law do not argue that if an act is morally required, permitted, or prohibited, it is—solely because of its moral status—necessarily legally required, permitted, or prohibited.¹⁵⁵ Presumably everyone can imagine acts he would classify as immoral, but that he would hesitate to make illegal. Likewise, it is easy to identify rules that were clearly rules of law but that could easily be branded immoral—such as the Jim Crow laws that were formerly common in the southern United States.

154. See *supra* text accompanying notes 145-48.

155. ROBERT P. GEORGE, IN DEFENSE OF NATURAL LAW 228 (1999).

If the legal and philosophical inquiries are not identical, however, neither are they unrelated. At the most basic level, laws perceived by those they govern to flout moral requirements are presumably less likely to be obeyed without coercion. In a world in which the concept of alien domination has been so decisively rejected, it is especially important to establish that legal rules intended to be universally applicable are not seen as drawn from the value systems of powerful states and simply forced on the less powerful.

In these circumstances, it is impossible to ignore differences in moral conceptions among the different peoples of the world in considering the justifiability of particular legal rules. To repeat, those differences in moral conceptions are striking. Consider the question of human sacrifice. It seems safe to predict that almost everyone who reads this Article would regard that practice with abhorrence. This reaction is not simply based on the fact that human sacrifice necessarily involves killing a person in circumstances that could probably be described as murder under Western definitions of that term; rather, the disgust generated by the thought of human sacrifice reflects as well the idea that such killings are utterly wrongheaded, carried out for reasons of pure superstition and possible only in an atmosphere of abject ignorance. Persons who are devout followers of the monotheistic religions may add to these feelings a reaction of horror at the thought that God would be pleased rather than angered by such an offering.

All the world does not see human sacrifice in this way. Stephen Ellis has shown that in Liberia human sacrifice, followed by consumption of the flesh of the victim, is widely seen as an especially effective means of acquiring spiritual power.¹⁵⁶ Acquisition of spiritual power has significance far beyond the realm of religion because all forms of earthly power, including the political, are seen as entirely dependent on the spirit world.¹⁵⁷

A second example is provided by a controversy that figured prominently a few years ago in U.S. law reviews. At that time, a number of writers addressed the issue of female genital surgery as practiced particularly in Africa. The debate revealed that a number of Western writers simply assumed that the practice could only be considered a species of torture, while a number of African writers insisted upon the importance of an understanding of its cultural context to any evaluation of the practice.¹⁵⁸ African writers also noted that Western criticism of this African practice existed despite

156. See generally STEPHEN ELLIS, *THE MASK OF ANARCHY: THE DESTRUCTION OF LIBERIA AND THE RELIGIOUS DIMENSION OF AN AFRICAN CIVIL WAR* 220-80 (1999).

157. *Id.*

158. E.g., Colloquium, *Bridging Society, Culture, and Law: The Issue of Female Circumcision*, 47 CASE W. RES. L. REV. 263-552 (1997).

the existence in the West of arguably comparable practices, such as cosmetic surgery and circumcision of male infants.¹⁵⁹

One last example not only illustrates differences in moral conceptions, but also reflects the interplay between moral principles and legal rules. Life imprisonment is the maximum sentence available to the International Criminal Tribunal established to address violations of humanitarian law committed during the Rwanda genocide.¹⁶⁰ Furthermore, under its Statute, the jurisdiction of the International Tribunal for Rwanda takes precedence over that of the courts of Rwanda.¹⁶¹ In Rwanda, however, not only is the death penalty permitted, but that punishment is mandatory for persons convicted of committing the most serious acts in the course of the genocide.¹⁶² In other words, the instruments establishing the existing Rwanda tribunal render unavailable for persons convicted of very serious crimes the penalty thought appropriate for those crimes by the people of the state where the crimes took place. As Professor Alvarez has pointed out, this situation has contributed to dissatisfaction with the tribunal among Rwandans.¹⁶³ He has also noted that despite the doubtful legitimacy of refusing to apply to crimes committed in Rwanda the penalties deemed appropriate by Rwandans, this issue was not even expressly addressed when the International Tribunal for Rwanda was established. Rather, it was apparently simply taken for granted that the death penalty would not be available, given the strong opposition to the death penalty among international lawyers and human rights advocates,¹⁶⁴ and despite the difficulty of sustaining an argument that international law forbids imposing the death penalty on perpetrators of genocide.¹⁶⁵

This discussion is not intended to suggest that human sacrifice, female genital surgery, or the death penalty are necessarily worthwhile institutions.¹⁶⁶ But the existence of differences in thinking about these issues demonstrates the distinctions among peoples regarding their understandings of morality, and the

159. L. Amede Obiora, *Bridges and Barricades: Rethinking Polemics and Intransigence in the Campaign Against Female Circumcision*, 47 CASE W. RES. L. REV. 275, 318-20 (1997).

160. Statute of the International Criminal Tribunal for Rwanda, S.C. Res. 955, U.N. SCOR, 49th Sess., 3453d mtg. art. 23, U.N. Doc. S/RES/955 (1994).

161. *Id.* art. 8.

162. Alvarez, *supra* note 11, at 406-07.

163. *Id.* at 407-08.

164. *Id.* at 408-10.

165. *Id.* at 408 n.215.

166. Indeed, even within Liberia, as Ellis points out, human sacrifice has provoked criticism and criminal prosecution. ELLIS, *supra* note 156, at 220-23. Likewise, there are certainly African women who oppose the practice of female genital surgery. *E.g.*, James T. Dixon, *Introduction to Bridging Society, Culture, and Law: The Issue of Female Circumcision*, 47 CASE W. RES. L. REV. 263, 268-69 (1997).

corresponding difficulty of any effort to globalize basic legal standards. The difficulty is that establishing a unitary legal system assumes unitary legal standards: a crime committed by a person in one place is also a crime if committed by another person somewhere else. To the extent that there exists a divergence in values among the different societies of the world, acts that would be considered so evil as to be criminal in one place may not be considered evil in another. Even if an act is widely considered evil, differences in views as to what counts as a justification of the act or as a mitigating circumstance would necessarily affect assessments of the way in which any particular occurrence of the act should be addressed by a putative international system.¹⁶⁷

In the face of such examples, one might expect to encounter justifications for the assumption that there exist universally applicable standards in such matters. Regrettably, proponents of universal standards provide remarkably little support for the universal legitimacy of such standards. For instance, Professor Donnelly sees the philosophical source of those rights in the concept of human dignity, characterizing rights as those needs of human beings that must be met to permit a life of dignity, the denial of

167. The difficulties such situations can present have already manifested themselves in the operations of the International Criminal Tribunal for the former Yugoslavia. In *Prosecutor v. Erdemovic*, the Appeals Chamber of that Tribunal was faced with the case of a defendant who had admitted to taking part in the massacre of civilian prisoners captured by the Bosnian Serbs in the town of Srebrenica. *Prosecutor v. Erdemovic*, Judgment, Case No. IT-96-22, ICTY Appeals Chamber (Oct. 7, 1997), at <http://www.un.org/icty/erdemovic/appeal/judgment/erd-aj971007e.htm> (last visited Feb. 5, 2001). The defendant asserted, and the Tribunal accepted, that the defendant took part in this atrocity only because he was reasonably convinced that he would have been killed himself had he not done so. *Id.* para. 4. Further, the Tribunal accepted that the defendant's refusal to take part would not have prevented the crime from being committed. The Chamber was thus faced with the question whether the defense of duress was available. *Id.* para. 16. Noting that common law jurisdictions did not allow the defense in cases of murder, while civil law jurisdictions—including the former Yugoslavia—did, the majority concluded that international law was uncertain on the relevant point, and on policy grounds concluded that the defense should not be available, though without clearly explaining why the policy behind the civil law rule was so obviously inferior to the policy behind the common law rule or why the judges in the majority saw themselves as empowered to prefer the approach taken by one of the world's major legal systems over that taken by another major legal system. *Prosecutor v. Erdemovic*, Joint Separate Opinion of Judge McDonald and Judge Vohrah, Case No. IT-96-22, ICTY Appeals Chamber, paras. 67, 75-78, at <http://www.un.org/icty/erdemovic/appeal/judgment/erd-asojmcd971007e.htm> (last visited Feb. 5, 2001). This approach was met by a vigorous dissent from Judge Cassese, who insisted that the Tribunal had no authority to make policy judgments in such cases. If international law was ambiguous, he argued, the Court should have applied the law of the former Yugoslavia or, as a last resort, resolved doubts in favor of the accused. *Prosecutor v. Erdemovic*, Separate and Dissenting Opinion of Judge Cassese, Case No. IT-96-22, ICTY Appeals Chamber, para. 49, at <http://www.un.org/icty/erdemovic/appeal/judgment/erd-adojcas971007e.htm> (last visited Feb. 5, 2001).

which denies a person's humanity.¹⁶⁸ Professor Schachter similarly asserts that "[p]olitical leaders, jurists[,] and philosophers have increasingly alluded to the dignity of the human person as a basic ideal so generally recognized as to require no independent support."¹⁶⁹ Neither Donnelly nor Schachter explains how the idea of one person's dignity creates rights that others are obliged to respect.¹⁷⁰ The omission seems crucial because the fact that a particular act would be inconsistent with respect for a person's dignity does not establish an obligation on the part of another to refrain from the act unless that other has a previous obligation to respect that person's dignity. An invocation of dignity does not advance the inquiry because the question is whether the other has any obligations to that person at all. Surely expressions of opinion by political leaders, jurists, and philosophers, without more, cannot suffice to overcome the doubts of those whose opinions are dissimilar.

A different, but no less problematic, approach has been taken by Professor Henkin. He justifies his claims regarding human rights by reference to "some contemporary universal version of natural law, *whether religious or secular*, by appeal to a common moral intuition of *human dignity*."¹⁷¹ Again, he does not explain how this justification operates regarding persons whose intuitions differ from his.

Further, there are other, quite respectable, approaches to moral questions that do not seek to derive answers to such questions from assumptions about the moral nature of human beings. As has been noted by Donnelly himself, some schools of psychology and sociology reject the idea that beliefs about right and wrong have any connection to ideas concerning the nature of humans. Utilitarianism grounds its analysis of morals on concepts of social welfare, and of course, there is a long history throughout the world, of grounding beliefs about right and wrong in the commands of God, rather than in the nature of humans.¹⁷² Indeed, Islam does not merely ground its approach to morals in divine commandments, but rejects the

168. JACK DONNELLY, *UNIVERSAL HUMAN RIGHTS IN THEORY AND PRACTICE* 16-21 (1989).

169. Oscar Schachter, *Human Dignity as a Normative Concept*, 77 *AM. J. INT'L L.* 848, 848-49 (1983).

170. Donnelly has subsequently acknowledged that other philosophical perspectives are inconsistent with the idea of rights inhering in individuals simply because they are human, at least outside a religious context. JACK DONNELLY, *INTERNATIONAL HUMAN RIGHTS* 20-22 (2d ed. 1998).

171. Louis Henkin, *Human Rights: Religious or Enlightened?*, in *RELIGION AND HUMAN RIGHTS: COMPETING CLAIMS?* 31, 35 (Carrie Gustafson & Peter Juviler eds., 1999).

172. See DONNELLY, *supra* note 168, at 20-22.

possibility of humans determining the proper way to live without the guidance of God.¹⁷³

Rather than seek to show the philosophical basis for claims of universal validity of rights arguments, proponents of universal ideas of rights tend to point to the broad acceptance by states of human rights principles. Donnelly, for example, asserts:

We thus have a considerable variety of possible moral justifications, as well as an array of theories that deny or radically devalue human rights I will assume that there are human rights, that is, that we have accepted some sort of philosophical defense. This theoretical evasion is justified by the fact that almost all states acknowledge the existence of human rights.¹⁷⁴

In essence, Donnelly relies on the acts of governments to justify a philosophical position, rather than demonstrating the correctness of a philosophical position in order to develop a standard for evaluating the acts of governments. One difficulty with this approach is that it makes universal rights, which are supposed to constrain governments regardless of their consent, in fact dependent upon governmental consent. Aside from this contradiction, this approach makes the solidity of the argument for the existence of rights contingent on continued acceptance by governments.

This is a serious problem because Donnelly overstates the extent that governments see themselves as constrained by human rights norms. To be sure, very large numbers of states have become parties to treaties requiring adherence to a broad range of human rights.¹⁷⁵ The actual scope of these obligations, however, is difficult to specify. Violations of such obligations are quite common,¹⁷⁶ but, while such violations may draw criticism from other parties to the treaties, they rarely evoke any stronger reaction. Violations of these treaties, in other words, do not produce the consequences one would expect if the norms violated were seen as international legal obligations. Further, the treaties themselves contain no provisions regarding actual enforcement. While several treaties include provisions under which States Parties may permit individuals to bring claims against them before the bodies established to monitor observance of the treaties, states routinely ignore the disposition of such complaints by the treaty-monitoring bodies.¹⁷⁷ In short, the sense in which states have "acknowledged the existence of human rights" is not clear.

173. Universal Islamic Declaration of Human Rights, pmb. para. d, *reprinted in* C.G. WEERAMANTRY, *ISLAMIC JURISPRUDENCE: AN INTERNATIONAL PERSPECTIVE* app. B, at 176 (1988).

174. DONNELLY, *supra* note 168, at 22.

175. A.M. Weisburd, *Implications of International Relations Theory for the International Law of Human Rights*, 38 COLUM. J. TRANSNAT'L L. 45, 53-55 (1999).

176. *Id.* at 55-57.

177. *Id.* at 57-60.

The foregoing obligations highlight the problems with the arguments for the philosophical basis for human rights. Unable to establish such a basis on grounds that in fact would be universally accepted, proponents of human rights seek to avoid the problem by stressing states' actual acceptance of obligations. Upon examination, however, the degree of such acceptance seems unclear. There remains, therefore, no clear, uncontroversial philosophical basis for a system of universal rights.

While this is, of course, an undesirable situation, one could imagine that the states of the world had agreed to bind themselves to certain human rights principles, notwithstanding differences in reasons for accepting those principles. In fact, however, the legal status of human rights rules is also uncertain.

States' apparent indifference to their obligations under human rights treaties, discussed above, may or may not raise questions about the legal status of the treaties themselves. Clearly, however, this record of state practice raises difficulties for any argument that human rights norms have become rules of customary international law. In one sense, there is little dispute on this point. No one contends that states generally respect human rights in the belief that international law requires them to do so. Nor do those who argue that human rights norms have nonetheless become rules of customary international law deny that a rule of customary international law cannot exist unless evidenced by state practice actually reflecting the rule. Those supporting the customary law status of human rights norms avoid this seeming contradiction by labeling as "state practice regarding human rights" certain acts which do not by themselves involve actually respecting human rights. The argument is phrased in the *Restatement (Third) of the Foreign Relations Law of the United States* as follows:

Practice accepted as building customary human rights law includes: virtually universal adherence to the United Nations Charter and its human rights provisions, and virtually universal and frequently reiterated acceptance of the Universal Declaration of Human Rights even if only in principle; virtually universal participation of states in the preparation and adoption of international agreements recognizing human rights principles generally, or particular rights; the adoption of human rights principles by states in regional organizations in Europe, Latin America, and Africa (see Introductory Note to this Part); general support by states for United Nations resolutions declaring, recognizing, invoking, and applying international human rights principles as international law; action by states to conform their national law or practice to standards or principles declared by international bodies, and the incorporation of human rights provisions, directly or by reference, in national constitutions and laws; invocation of human rights principles in national policy, in diplomatic practice, in international organization activities and actions; and other diplomatic communications or action by states reflecting the view that certain practices violate international human rights law, including

condemnation and other adverse state reactions to violations by other states.¹⁷⁸

An alternative approach is to evade the absence or ambiguity of state practice by labeling a rule as "emerging." For example, Professor Franck, in an effort to show that there exists an emerging rule of international law requiring states to adopt a democratic form of government, supports his claim by reference to forms of practice not actually supportive of his conclusion. He places great weight on the increasingly common practice of states, particularly those moving from undemocratic to democratic systems of government, of making requests to international bodies for electoral observers to vouch for the fairness of an election.¹⁷⁹ He also notes that the European Union insists that states seeking membership have democratic forms of government.¹⁸⁰ To be sure, he mentions that states have criticized United Nations electoral monitoring even when requested by the state holding the elections and acknowledges that "any effort to transform an election monitoring *option*, exercisable at the discretion of each government, into an *obligation* owed by each government to its own people and to the other States of the global community is likely to be resisted."¹⁸¹ He then goes on to suggest, however, that a voluntary rule "may" seem less fair and have less legitimacy than an obligation, to invoke "the natural right of all people to liberty and democracy," and to note the difficulty populations may have in overthrowing despotic governments.¹⁸² He also relies on various non-binding statements issued by individual states and by international organizations which, while certainly supporting the conclusion that states' internal political arrangements are matters of international concern, certainly do not purport to establish a legal requirement of democracy.¹⁸³ Professor Franck relies on these examples of states voluntarily submitting to international monitoring, choices not to enter into treaty relations with other states, non-binding assertions

178. 2 RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 701 reporter's n.2 (1987).

179. Thomas M. Franck, *Legitimacy and the Democratic Entitlement*, in DEMOCRATIC GOVERNANCE AND INTERNATIONAL LAW 25, 32-41 (Gregory H. Fox & Brad R. Roth eds., 2000).

180. *Id.* at 41-42.

181. *Id.* at 44.

182. *Id.* at 44, 45, 46.

183. *Id.* at 46 (citing *Resolution on Representative Democracy*, O.A.S. Gen. Ass. Res. 1080(XXI-O/91), O.A.S. Doc. OEA/Ser.P/AG/RES.1080(XXI-O/91)); Conference on Security and Co-operation in Europe: Charter of Paris for a New Europe and Supplementary Document to Give Effect to Certain Provisions of the Charter, Nov. 21, 1990, pmb., 30 I.L.M. 190, 193 (1991); Conference on Security and Co-operation in Europe: Document of the Moscow Meeting on the Human Dimension, Emphasizing Respect for Human Rights, Pluralistic Democracy, the Rule of Law, and Procedures for Fact-Finding, Oct. 3, 1991, 30 I.L.M. 1670 (1991)).

of principle, and natural law as a basis for predicting that collective international actions taken to compel states to respect democracy "are likely to be generally welcomed."¹⁸⁴

There is obviously a very large gap between requesting international assistance and submitting to international control. Fortified by his reference to natural law, however, Franck leaps that gap. In doing so, he ignores a large body of evidence contradicting his conclusion,¹⁸⁵ reinforcing the supposition that states' actual willingness to submit to control on this point is not, in Professor Franck's view, controlling.

The difficulty with the approaches of the Restatement and Professor Franck is, as Professor Kelly has pointed out, that "[c]ustomary norms are social facts perceived as normatively required by the community, not the creation of experts."¹⁸⁶ He adds that the methods of determining customary international law exemplified by the approaches of the Restatement or Professor Franck are not based on the inductive method and cannot be justified as a social fact.¹⁸⁷ That is, these authorities seem to examine almost everything except whether states actually respect human rights—in the case of the Restatement—or whether states in fact see themselves as obliged to organize themselves democratically—in the case of Professor Franck. Similarly, Professors Alston and Simma have noted serious flaws in the argument that the sorts of behavior on which Professor Franck and the Restatement rely can create rules of customary law.¹⁸⁸

In short, both the philosophical and legal bases of claims for the universality of the values embodied in international human rights rules seem uncertain. It remains undetermined why respected scholars nonetheless insist on the validity of their philosophical and legal positions regarding rights.

C. *The Rationale for Internationalization*

Suppose that somehow the points made in the foregoing section could be addressed—that is, that some set of values could be identified, and that the importance of enforcing those values was universally agreed. The question of how that enforcement should be carried out would remain to be addressed. One possible answer to that question is to deal with the matter at the international level:

184. Franck, *supra* note 179, at 46.

185. See James Crawford, *Democracy and the Body of International Law, in DEMOCRATIC GOVERNANCE AND INTERNATIONAL LAW*, *supra* note 179, at 91, 117-18.

186. J. Patrick Kelly, *The Twilight of Customary International Law*, 40 VA. J. INT'L L. 449, 477 (2000).

187. *Id.* at 475-77.

188. Bruno Simma & Philip Alston, *The Sources of Human Rights Law: Custom, Jus Cogens and General Principles*, 12 AUSTL. Y.B. INT'L L. 82, 88-100 (1992).

enact a rule of international law which would require, in the case of massive human rights violations, that other states intervene with force, if no other method would serve to end the human rights violations. With respect to individuals responsible for such violations, one could establish a permanent international court, ready to act if governments fail to do so for reasons the international court considers inadequate. This portion of the discussion examines these answers to the question of how the world should respond to massive evil.

Preliminarily, it should be noted that the superiority of an international level approach to these matters is not obvious. Professor Alvarez, in a very thoughtful article, has identified a number of problems with assuming such superiority.¹⁸⁹ He suggests that the triumph of global institutions is not inevitable, and that existing institutions have hardly met the most ambitious goals of their supporters.¹⁹⁰ He notes skepticism from a number of quarters as to the truly universal character of the values these international institutions espouse.¹⁹¹ Alvarez stresses their lack of accountability, and the serious flaws in the operation of certain existing supranational bodies, casting doubt on the assumption of the superiority, at least in those cases.¹⁹²

Certainly, the rationales for the particular sorts of international control addressed in this article seem quite weak. With regard to the argument in favor of an international rule requiring humanitarian intervention, this point is made clearer if one examines the purposes such a rule could serve.

An argument that such a rule is needed to permit humanitarian interventions is clearly false. Any violation of human rights massive enough to trigger calls for intervention is likely to be characterized as a threat to international peace and security. As such, the Security Council would be permitted to take whatever action it thought proper in response.¹⁹³ The NATO intervention in Kosovo and the ECOWAS interventions in Liberia and Sierra Leone show that states will, under at least some circumstances, carry out such interventions even if the Security Council does not act. A change in law is thus not needed simply to allow interventions to go forward. Conversely, if the Security Council were to conclude that an ostensibly humanitarian intervention was nonetheless a violation of the Charter, that determination would presumably be conclusive,

189. José E. Alvarez, *Multilateralism and Its Discontents*, 11 EUR. J. INT'L L. 393 (2000).

190. *See generally id.*

191. *Id.* at 396-97.

192. *Id.* at 394-403.

193. U.N. CHARTER art. 39.

notwithstanding any claims intervenors might make regarding their duties under international law. Any other conclusion seems impossible to square with the Charter.

Thus, it would appear that the hypothetical rule would be relevant only if the Security Council had neither authorized nor condemned humanitarian intervention in a particular case and if no state appeared willing to act in that case. Then what role would a legal rule play in such circumstances? Would states, seeing the inaction of the Security Council, and of other states, consider the situation serious enough to act? More importantly, would the political considerations that inhibited states' willingness to act be outweighed by arguments based on an abstract legal rule? If some entity disadvantaged by the absence of intervention were to rely on the rule as the basis for a claim against a non-intervening state, and in the unlikely event that some tribunal would entertain the claim, how could the judges assess the claim? Since, by hypothesis, the issue could arise only if international law has come to recognize a duty to intervene to prevent massive human rights violations, the issue before the court would be primarily factual, or more precisely, counter-factual. That is, the court would have to determine what would have happened if the state in question had behaved differently. If a state explained its failure to intervene by reference to practical difficulties of obtaining intelligence and moving military units adequate to affect the situation, would a tribunal really second-guess a state on such technical military questions? Such a rule would seem, in short, to be pointless.

The rationale for the ICC likewise seems unclear. As noted above, other authors have raised serious doubts as to whether the ICC will be able to accomplish the objectives its proponents have set for it any better than those goals could be met by existing institutions. That is, there is serious reason to doubt whether such an institution would deter violations of human rights, or create a historical record, or permit closure for the states involved or a sense of vindication for victims and their survivors.¹⁹⁴

The Rome Statute and its proponents give particular prominence to the objective of ending impunity for violators of human rights,¹⁹⁵ but it is by no means clear how the establishment of the ICC can further that goal, nor is it clear that the goal is always desirable. The ICC will possess no police force and thus will rely entirely on states to take into custody persons it seeks to try. In those circumstances, how will it be able to obtain custody of persons who not only commit horrific acts, but also retain positions of such power so as to be above

194. See *supra* note 99 and accompanying text.

195. Rome Statute, *supra* note 7, pmbl.

the law within their own states? Since such states are hardly likely either to become parties to the Rome Statute or to cooperate with the ICC, there is reason to wonder whether the Court will have any impact on the Saddam Husseins of the world. Second, it is by no means obvious that ending impunity is necessarily a worthy objective in every case. As has often been pointed out, if a wrong-doer can be induced to surrender his power to do more wrong only by undertakings that include promises of impunity, it is by no means obvious that carrying out such promises cannot be justified. If someone is not only willing and able to cause harm, but cannot be prevented from causing harm if he chooses to do so, it can surely be argued that removing that person from a position where he can do more damage is more important than retaining the option of bringing him to account for past wrongs.

As with the idea of seeking to establish a duty for states to intervene to prevent humanitarian catastrophes, it thus is difficult to see what concrete benefits would flow from the creation of an ICC. Why then have quite distinguished people called for establishment of such a duty and insisted on the importance of creating the ICC?

D. Speculations on Rationales for the ICC and for a Duty to Intervene

The foregoing sections have shown that it is difficult to justify, either philosophically or legally, assertions of the universally binding character of the values to be vindicated by humanitarian intervention or by the ICC, and that it is hard to justify functionally either a rule requiring humanitarian intervention or the establishment of the ICC. The question thus presents itself: why then do so many people insist on both the correctness of the values in question and the value of the proposed international rule and of the ICC?

In considering these questions, it is helpful to start with the reliance on natural rights and natural law by Professors Franck and Henkin, and on Professor Reisman's reference to trans-empirical sources of law. These scholars would, in effect, derive international law from moral principles, rather than from the acts of human institutions. At least implicitly, this approach rejects any suggestion that law is a social institution created by human beings, and argues instead that human beings are legally obliged to obey rules that they did not create and cannot alter. These scholars, after all, are not merely arguing that it would be a good thing if states were to seriously institutionalize a body of human rights rules, but are insisting that those rules are already universally binding, despite the disagreements from a number of schools of philosophy and the ambiguity of the legalities of the matter under conventional legal analysis. Their position, in short, seems most accurately characterized as a matter of faith.

Other writers have noted the similarity between religious convictions and the attitudes of those insisting on the high significance of human rights rules in international law.¹⁹⁶ Perhaps it is some notion that human rights principles are a sort of revealed truth that explains the willingness of supporters of these principles to insist on their primacy over all other principles whatsoever, including those of religion. Such an attitude may explain Professor Henkin's apparent insistence that religion is to be evaluated according to the degree it is compatible with human rights principles, rather than seeking to justify human rights principles by reference to religion.¹⁹⁷ To the same effect is Professor Mayer's analysis of the conflicts between Islamic law and international human rights standards.¹⁹⁸ Professor Mayer acknowledges that many Muslim countries have entered reservations to a number of human rights conventions, a circumstance that complicates any analysis of the content of the human rights obligations those states may be said to have assumed on the basis of consent.¹⁹⁹ Yet Professor Mayer's clear assumption that those reservations have no effect on the legal obligations of those states, together with her reliance upon the Universal Declaration of Human Rights, suggests that she would derive the legal obligations on which she relies from non-treaty sources.²⁰⁰ As pointed out above, however, the basis for claims of the legal status of human rights rules outside the treaty context is rather weak, and best understood as faith based. In other words, Professor Mayer takes the somewhat paradoxical position that Muslims are obliged to subordinate what they understand to be the commands of God to a body of rules whose justification depends on a faith Muslims do not share.

But if what we are encountering is something akin to a religious faith urged to be a source of law, it seems reasonable to inquire who the interpreters of this faith are—whose views may be seen as exemplifying these principles that all states, and presumably all persons, are obliged to share? As others have pointed out, the relevant views seem to be those of international lawyers and non-governmental organizations (NGOs) supportive of human rights.²⁰¹

196. Kenneth Anderson, *Secular Eschatologies and Class Interests of the Internationalized New Class*, in RELIGION AND HUMAN RIGHTS: COMPETING CLAIMS?, *supra* note 171, at 107, 107-12.

197. Henkin, *supra* note 171, at 34.

198. Anne Elizabeth Mayer, *Islamic Law and Human Rights: Conundrums and Equivocations*, in RELIGION AND HUMAN RIGHTS: COMPETING CLAIMS?, *supra* note 171, at 177.

199. *Id.*

200. *Id.* at 179.

201. Anderson, *supra* note 196, at 112-15; Kenneth Anderson, *The Ottawa Convention Banning Landmines, the Role of International Non-Governmental Organizations and the Idea of International Civil Society*, 11 EUR. J. INT'L L. 91, 114-19

As Professor Sohn asserted, with a surprising degree of frankness, "I submit that states really never make international law on the subject of human rights. It is made by the people that care; the professors, the writers of textbooks and casebooks, and the authors of articles in leading international law journals."²⁰² In other words, human rights principles are law because many international lawyers think they ought to be.

A similar explanation may account for the support that many scholars have shown for the ideas of requiring humanitarian intervention and for the ICC. Certainly, there is an important current of opinion among scholars of international law that subordinating states to the international community is a desirable end in itself, without regard to the effects of such a policy in particular cases. For example, Professor Hathaway decries the U.S. refusal to adhere to the recently concluded treaty banning landmines²⁰³ and its "resistance to most of the international human rights project[s]"²⁰⁴ and describes with disapproval the unwillingness of the United States to subscribe to a "multilateralism of a kind that either defines or enforces basic values . . ."²⁰⁵ Yet nowhere does he assert that U.S. practices regarding human rights are somehow generally inferior to those of the rest of the world, or that the United States is a significant contributor to the problems that the landmines convention was intended to address. Indeed, in that latter connection, Professor Malanczuk has noted that there is in fact little or nothing objectionable in the actual practice of the United States as regards those weapons.²⁰⁶ Again, Professor Lobel has stated that "the real test of the twenty-first century will be to find ways to strengthen international institutions and to subject all nations, even hegemonic ones, to the rule of law."²⁰⁷ Other scholars similarly have affirmed the inherent desirability of subsuming states within an over-arching international system.²⁰⁸ Indeed, some would appear to

(2000); Martti Koskenniemi, *Whose Intolerance, Which Democracy?*, in DEMOCRATIC GOVERNANCE AND INTERNATIONAL LAW, *supra* note 177, at 436, 437-40.

202. Louis B. Sohn, *Sources of International Law*, 25 GA. J. INT'L. & COMP. L. 399, 399 (1995-96).

203. Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction, Sept. 18, 1997, 36 I.L.M. 1507 (1997).

204. James C. Hathaway, *America, Defender of Democratic Legitimacy?*, 11 EUR. J. INT'L L. 121, 133 (2000).

205. *Id.* at 134.

206. Peter Malanczuk, *The International Criminal Court and Landmines: What Are the Consequences of Leaving the US Behind?*, 11 EUR. J. INT'L L. 77, 86-87 (2000).

207. Jules Lobel, *Benign Hegemony? Kosovo and Article 2(4) of the U.N. Charter*, 1 CHI. J. INT'L L. 19, 36 (2000).

208. *E.g.*, Pierre-Marie Dupuy, *International Law: Torn Between Coexistence, Cooperation and Globalization. General Conclusions*, 9 EUR. J. INT'L L. 278 (1998);

believe that such a supranational system has in fact come into being. Thus President McDonald of the International Criminal Tribunal for the former Yugoslavia has characterized the task of her court as ensuring "that those responsible for perpetrating, in the former Yugoslavia, the most unspeakable affront to the dignity of *humankind* are held accountable before the bar of *humanity*" (emphasis added).²⁰⁹ Similarly, Adriaan Bos, Chairman of the United Nations Preparatory Committee on the Establishment of an International Criminal Court, has stated that "the point of classifying an offense as a crime under international law is to express a universal belief that certain crimes deserve punishment regardless of who the perpetrator is within the international community, and that a crime of this nature is an affront to *the international community*"²¹⁰ (emphasis added).

The difficulty with this approach is that when it is applied to concrete cases, its weaknesses become manifest. This point is illustrated by considering the nature of Professor Alvarez's criticisms of the International Criminal Tribunal for Rwanda. He has faulted that institution as unlikely to preserve a collective memory of the roles played by certain outside states in the genocide, because the Tribunal is financially dependent on the Security Council.²¹¹ The Security Council includes several of those states, and its bench includes nationals of some of those states as well.²¹² Collective memory will also be poorly served by proceedings which necessarily cannot deal with more than a few of a very large number of potential defendants.²¹³ Moreover, the Tribunal's bench includes no Rwandans despite the greater legitimacy within Rwanda that would be accorded judgments from a court on which both Hutus and Tutsis were seated.²¹⁴ He points out the likely negative consequences for affirming the legitimacy of Rwanda's own legal system from the international decision to deprive that system of authority to try the most prominent defendants.²¹⁵ He emphasizes the limited utility for the survivors of the genocide of trials conducted in a foreign country, in a foreign language, with no possibility for any local input into the

Bruno Simma & Andreas L. Paulus, *The "International Community": Facing the Challenge of Globalization*, 9 EUR. J. INT'L L. 266 (1998).

209. Gabrielle Kirk McDonald, *The International Criminal Tribunal for the Former Yugoslavia*, 13 AM. U. INT'L L. REV. 1422, 1439 (1998).

210. Adriaan Bos, *The International Criminal Court: A Perspective*, in THE INTERNATIONAL CRIMINAL COURT, *supra* note 150, at 463, 467.

211. See generally Alvarez, *supra* note 11, at 392-418.

212. *Id.*

213. *Id.*

214. *Id.*

215. *Id.*

process and no weight given to local views as to the appropriate punishment for the crimes the Tribunal addresses.²¹⁶

Most readers are likely to agree that Professor Alvarez has identified serious weaknesses in the assumptions underlying the International Tribunal for Rwanda. It is crucial, however, to make explicit the implications of that conclusion. To criticize the operation of an international institution dealing with Rwanda on the grounds that it poorly serves the interests of the people of Rwanda is to say that those interests should be the prime focus of such an institution. If that is true, then why are outside states justified in establishing any tribunal, other than one entirely under the control of Rwanda? Setting up such a body like the existing tribunal, with its complete independence from Rwanda, makes sense only if the Rwanda genocide is seen as an offense against all the world, not simply against Rwanda—the view President McDonald apparently takes regarding the various enormities perpetrated in the former Yugoslavia.²¹⁷ If the offense is against the whole world, however, why privilege the needs and values of Rwanda? In domestic criminal prosecutions, after all, the focus is on applying the standards thought appropriate by the whole community, speaking through its legislature. It is by no means assumed that the needs and values of the victim, or his survivors, ought to take precedence over those of the community.

If Professor Alvarez's criticisms make sense, it is because we believe, in fact, that the genocide in Rwanda was primarily a crime against Rwandans, and only secondarily, if at all, against the international community. Accordingly, we do not believe in the existence of an international community whose interests supersede those of the groups which comprise it. We do not believe that the Rwandans have no more claim to control the treatment of those guilty of genocide in that state than a domestic crime victim has to demand the right to determine the punishment for the person who victimized him.

If in concrete cases, we are uncomfortable with the consequences of subordinating national control of problems to international and supranational approaches, how then are we to account for the apparently taken-for-granted assumptions of the superiority of international approaches to massive evil, held by so many distinguished people? Once again, an analogy to religion suggests itself. As Professor Alvarez has stated:

International lawyers share an appealing evangelistic, even messianic, agenda. We are on a mission to improve the human condition. For many, perhaps most of us, this mission requires preferring the

216. *Id.*

217. McDonald, *supra* note 209, at 1439.

international "over the national, integration over sovereignty." Multilateralism is our shared secular religion. Despite all of our disappointments with its functioning, we still worship at the shrine of global institutions like the UN.²¹⁸

While the tone of this passage is tongue-in-cheek, the point it makes should not be dismissed out of hand. After all, if international lawyers' insistence on the legal character of human rights principles is best understood as akin to religious faith, as suggested above, it would hardly be surprising if there were a similar basis for international lawyers' almost knee-jerk assumption of the necessity of regulating behavior by means of international law and of the inherent superiority of international or supranational institutions to any system which treats preservation of state sovereignty as important.

Yet if the faith in institutions depends on assumptions we are not prepared to make in concrete cases, as suggested by the consideration of the International Criminal Tribunal for Rwanda, the faith in the principles those institutions seek to vindicate is likewise suspect. If an international institution affecting a state can be faulted for wrongly devaluing the interests of the people of that state, why should international rules, antithetical to the values of a particular group, be imposed on the group? Surely the values to be vindicated by the institution are at least as crucial to the group in question as is the identity of the persons making up the institution. If we insist on the importance of the responsiveness of the institution to the affected group, implicitly we admit the importance of according primacy to local values over any which might be preferred by persons acting at the international level. Once we make that admission, we have questioned the legitimacy of any international approach to evil other than one that is responsive to all the states in the world and not imposed on any. At least, we are forced to question values and institutions whose claims to superiority and universality seem to rest on no more than mere assertion.

One may concede that international lawyers and members of human rights groups are well-motivated and disinterested, at least in a material sense, and still deny their right to make law for the world. If the rationale, however, for particular legal rules and institutions comes down simply to the international lawyers' belief that the rules and institutions are inherently good, despite the different views of other people, international lawyers are making law for the world. Such a situation would amount to treating international lawyers as philosopher-kings, entitled to rule simply by virtue of their wisdom. Attractive as the prospect may be to international lawyers, one may

218. Alvarez, *supra* note 189, at 394 (quoting Martti Koskenniemi, *International Law in a Post-Realist Era*, 16 AUSTL. Y.B. INT'L L. 1, 1 (1995)).

doubt whether the rest of the planet is or should be prepared to accept the principle of law professors' inherent right to sovereignty.

E. Rules Requiring Responses to Evil: Closing Thoughts

The bulk of the discussion in this section of this paper has cast doubt on the rationales for legal rules specifying international responses to serious outbreaks of evil and for the establishment of institutions to enforce international legal rules against individuals accused of perpetrating evil. A reader could be pardoned for believing that the Article, in essence, advocates ignoring horrible things happening a long way away.

To reject legal institutionalization of responses, however, is not to reject the idea of a response. It is rather to reject the idea that the proper policy for the individual cases of massive violations of human rights can be specified by rule. Clearly, such an approach would not mean that humanitarian interventions would never take place, but it does mean that two different situations will be treated differently, even when great suffering is common to both. This is unsatisfactory only if one believes that the sole concern relevant to responding to such situations is the nature of the wrong done. If one allows that, for example, a choice to attack Russia to forestall its actions in Chechnya would impose very different costs on the world than did the choice to attack Serbia because of its actions in Kosovo, it is not obvious why the two situations should be treated identically. Likewise, if one ascribes any value at all to communities' ability to control the important decisions affecting their members, surely there is something to be said for leaving decisions on whether to wage war—even for a good cause—to those whose lives would be at risk.

Similarly, to cast doubt on the utility of the ICC is not to express indifference to the idea of reducing, as far as possible, the incidence of violations of humanitarian law. It is rather to say that much can be done at the national level, possibly with more effect than an ICC could ever have. Indeed, in this connection, it should be stressed that legal institutions at any level are not necessarily the most important tools for minimizing the inevitable inhumanity of war. The distinguished military historian Sir John Keegan has observed:

In the most perceptive sentence in *The Laws of War*, Adam Roberts observes, during his survey of the effect of the Hague Conventions of 1895 and 1907, that "the experience of land war in two world wars must raise a question as to whether formal legal codification is necessarily superior to notions of custom, honour, professional standards, and natural law" in making for battlefield decencies. He might have made his point more emphatically. There is no substitute for honour as a medium of enforcing decency on the battlefield, never has been and never will be. There are no judges, more to the point, no policemen at the place where death is done in combat; that may be, in fact, the intended, and all too often true, meaning of "silent leges inter arma."

All turns on the values of the junior leader present at the moment when the opponent's capacity or will to resist fails, when he ceases to be a combatant and he must hope for the mercy of the suddenly stronger.²¹⁹

Questioning the ICC also involves asking why, if the international community is not in a position to address the stresses a given society will experience if it deals with the perpetrators of evil in one way rather than another, the international community should presume to determine how those perpetrators should be addressed. It simply is not true that, for example, citizens of the United States will be affected by the way South Africa deals with those who maintained the system of apartheid as much as South African citizens will be. Why should citizens of the United States, Germany, or India claim some say in what the response should be if South Africans must bear the vast bulk of the costs of responding to apartheid?

Leaving international law and international legal institutions out of the equation in addressing massive evil will doubtless seem unsatisfactory to international lawyers. It is by no means clear, however, that such an approach will necessarily have negative consequences for the way the world responds to such situations.

VI. CONCLUSION

This Article has sought to show that international law regarding states' rights or duties to respond to massive evil is hopelessly confused. It has added that requiring efforts to forestall evil, as well as establishing international institutions to deal with evil's perpetrators, raises serious practical problems, threatens values supposed to be fundamental in international law, assumes the universality of values which are not universally held but which, like a preference for moving governance questions to the international level, derive more from faith than from reason.

Surely persons who seek to reduce the level of suffering in the world are aiming at objectives which can only be applauded. Lawyers, however, should be expected to support arguments as to the proper shape of the law and legal institutions with something more than proof of their good intentions.

219. John Keegan, *If You Won't, We Won't: Honour and the Decencies of Battle*, TIMES LITERARY SUPPLEMENT (London), Nov. 24, 1995, at 11.

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