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FOR RECOGNITION OF A PEOPLES' RIGHT TO U.N. AUTHORIZED ARMED INTERVENTION TO STOP MASS ATROCITIES

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This Article calls for recognition under international law of a conditional peoples' right to United Nations (U.N.) authorized armed intervention to stop mass atrocities. The condition is that non-violent strategies must have failed or must reasonably be expected to fail in achieving this goal.

If recognized, the new right will for the first time place power to obtain armed intervention in the people who are most at risk and impose a correlative duty on the U.N. to provide that intervention in qualifying cases. The right will concomitantly lift people out of the passivity of victimhood and make them active agents of their own deliverance—an amelioration consistent with and furthering human dignity.

Juridically, the new right stands on remarkably strong ground. This Article relies on standard legal reasoning to discern compelling bases for the right within no less than three different categories of international law, i.e., human rights law, jus in bello, and jus ad bellum.

To give the new right optimal leverage, this Article also urges certain structural reforms in the U.N. system. These include the addition of thematic mandates dedicated to stopping mass atrocities and the creation of another U.N. court, this one limited exclusively to reviewing and countermanding, where appropriate, Security Council deadlocks over or rejections of armed interventions thwarting mass atrocities.

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I. INTRODUCTION

It is the victims who obviously stand to benefit the most from a U.N. authorized armed intervention to stop mass atrocities. Yet, in the scholarly literature there is barely a whisper about empowering those in harm's way to demand and obtain such deliverance.[1]

1. Obviously, it is impossible to cite nonexistent sources. I can only attest that I have scoured the scholarly literature without finding sources unambiguously and wholly embracing a peoples' right

History has repeatedly shown that international law has been, in the main, inadequate in assuring deliverance when military clout is needed.[2] The time is long past due, and unconscionably so, for international lawmakers to rectify the governing legal regime. The thesis of this Article is that a major step in the right direction would be recognition of a conditional peoples' right to armed intervention conducted or authorized by the United Nations (both types called "U.N. armed intervention") for the purpose of halting ongoing or imminent mass atrocities.

It bears emphasizing that the focus here is confined to *armed* interventions. Though there is no single accepted definition of "armed humanitarian intervention," this is not the problem it might seem.[3] The many definitions on offer yield essential common features which, taken together, yield a workable formulation in this context, as follows: military action by or approved by the U.N., in the territory of a state and without that state's consent, which is significantly justified by a humanitarian concern for the citizens undergoing or imminently facing mass atrocities in the state.[4]

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to U.N. armed intervention to stop mass atrocities. There are, however, sources that flirt with the idea. *See*, *e.g.*, Lois E. Fielding, *Taking the Next Step in the Development of New Human Rights: The Emerging Right of Humanitarian Assistance to Restore Democracy*, 5 DUKE J. COMP. & INT'L L. 329, 329-30, 340-77 (1995) (urging recognition of a victim's right to receive armed humanitarian intervention, but only in order to promote democracy where "circumstances constitute a humanitarian crisis involving human rights atrocities"); Celeste Poltak, *Humanitarian Intervention: A Contemporary Interpretation of the Charter of the United Nations*, 60 U. TORONTO FAC. L. REV. 1, 30-33 (2002) (conceiving a right to armed humanitarian intervention limited to alleviating the imminent danger of large-scale loss of life (but not to large-scale wounding or maiming)). Also, some sources advocate for the existence of a legal duty to intervene militarily to stop mass atrocities, but these writers do not address whether a correlative legal right to such intervention flows from the duty. *See*, *e.g.*, Ibrahim J. Gassama, *Dealing with the World as It Is: Reimagining Collective International Responsibility*, 12 WASH. U. GLOBAL STUD. L. REV. 695, 731-38 (2013); Nico Krisch, *Review Essay: Legality, Morality and the Dilemma of Humanitarian Intervention After Kosovo*, 13 EUROPEAN J. INT'L L. 323, 333 (2002) (mentioning in passing that "perhaps that there is a duty of the world organization" to intervene in a humanitarian crisis).

2. *See* AIDAN HEHIR, THE RESPONSIBILITY TO PROTECT: RHETORIC, REALITY AND THE FUTURE OF HUMANITARIAN INTERVENTION 30 (2012) [hereinafter HEHIR, RESPONSIBILITY] (referring to Simon Chesterman for the proposition that "historically the problem has been the regularity of 'inhumanitarian non-intervention' rather that a surfeit of purportedly 'humanitarian' interventions"); CHARLES W. KEGLEY WITH EUGENE R. WITTKOPF, WORLD POLITICS: TRENDS AND TRANSFORMATION 252 (2006) (referring to the "persistence of horrendous atrocities" despite the strengthening of international human rights law); *see also* Keith A. Petty, *Human and National Security: The Law of Mass Atrocity Response Operations*, 34 MICH. J. INT'L L. 745, 746, 749, 776 (2013) (noting the failure of international institutions to thwart mass atrocities including the ongoing crimes occurring in Syria).

3. *See* HEHIR, RESPONSIBILITY, *supra* note 2, at 160 (writing of the "myriad" definitions of the phrase "humanitarian intervention").

4. *Id*. (quoting from AIDAN HEHIR, HUMANITARIAN INTERVENTION: AN INTRODUCTION 20 (2010) [hereinafter "HEHIR, INTRODUCTION"].

A denouement involving combat should, of course, never be a first choice.[5] But, when peaceful conflict-resolution fails, the persuasiveness of coaxing or coercive words tends to evaporate. It is a terrible reality that sometimes there is no alternative to armed force if humanity, as noun and adjective, is to prevail.[6] The proposed right thus is conceived solely to effectuate relief in such a situation. That is why the right is framed as conditional, i.e., dependent on a showing that non-violent strategies have failed or may reasonably be expected to fail.

From what has been said above, it is self-evident that the proposed intervention right is not applicable to or useful for long-term prevention or post-conflict nation-building. This economy of scope is not meant to deride the critical importance of these sorts of intercessions. It is merely a case of author's preference; I prefer to focus on the most urgent situation for the people under attack and where, as it happens, the current law is nearly impotent in saving them.[7]

The new right's objectives are also limited to humanitarian interventions against those mass atrocities caused by or which are a part of genocide, war crimes, crimes against humanity, or ethnic cleansing.[8] The fact is that most mass atrocities are engendered by or constitutive of one of the foregoing malefactions, and that the limitation has become a received norm.

Nevertheless, the proposed right is not envisioned, despite its relative audacity, as a failsafe way of guaranteeing suppression of all mass atrocities. This Article sees the right as serving the much humbler and, hopefully, more realistic mission of making international law substantially more instrumental in causing legitimate U.N. armed interventions to happen and happen successfully when the aim is halting mass atrocities.

It should not be lost sight of either, that although the right would be available to all victims, their successful assertion of it would require

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5. *Id*. at 150 (observing that "[o]ne must certainly have reservations about the utilization of often massive military force and its resultant causalities, in the name of humanitarianism").

6. *See* Gassama, *supra* note 1, at 699, 706, 711, 715 (discussing the reluctance of some to pin hopes for achieving humanitarian objectives on military means, but nevertheless arguing for a legal duty to use physical force to stop mass atrocities "as a last gasp response").

7. *See infra* notes 18-25, 75-87, 90-91 and accompanying text.

8. CRISTINA GABRIELA BADESCU, HUMANITARIAN INTERVENTION AND THE RESPONSIBILITY TO PROTECT: SECURITY AND HUMAN RIGHTS 133 (2011); HEHIR, RESPONSIBILITY, *supra* note 2, at 149, 162-64; *but see* Julie Mertus, *Reconsidering the Legality of Humanitarian Intervention: Lessons from Kosovo*, 41 WM. & MARY L. REV. 1743, 1770-74 (2000) (positing, as justification for armed humanitarian intervention, goals consistent with the purposes of the United Nations, including amelioration of gross and systemic human rights abuses); Poltak, *supra* note 1, at 30-32 (proposing that humanitarian intervention by armed force should be restricted to cases where the right to life is presently or imminently imperiled on a large scale).

fulfillment only under the condition mentioned above and would be advanced most advantageously with the help of procedures detailed later in these pages.[9] For now, it should be noted that the recommended procedures would entail at least four reforms in the U.N. system; and, it may as well be confessed at the outset that one of those would affect Security Council veto powers, though exclusively with respect to the subject of whether to authorize armed interventions against mass atrocities.[10]

I suspect that the mere mention of tampering with the veto is enough to induce many readers to heave a sigh of weariness. It is common knowledge that the Council's permanent members are extremely jealous of the veto and resistant to any weakening of it.[11] Thus, a mere eight paragraphs in, some readers may conclude that advocacy of the new right, in tandem with circumscribing this aspect of big-power dominance, is dead on arrival. Let me suggest that, like Mark Twain's first obituary, a pronouncement of death at this juncture is premature.[12] Though the idea of the peoples' right, supported by this sort of profound structural reform, is admittedly iconoclastic, the idea still deserves a full hearing. After all, the life and limb of many people are at stake; nothing has yet solved the problem of rescuing them from atrocity when peaceful means are unavailing, and the proposed remedial scheme of a peoples' right has rarely been considered and, even then, only in a cursory or ambivalent way.[13]

Indeed, one era's iconoclasm may well become a later era's conventional wisdom. The accuracy of this observation can be corroborated by just a few miscellaneous historical illustrations, e.g., before the adoption of the Nineteenth Amendment in 1920, American women had no right to vote, and, to many at the time, female suffrage was

9. *See infra* notes 220-60 and accompanying text.

10. *See infra* notes 239-52 and accompanying text.

11. *See* Richard Butler, *Reform of the United Nations Security Council*, 1 PENN ST. J. L. & INT'L AFF. 23, 31 (2012) (contending that the veto-holders on the Security Council view the veto as their right and entitlement); Saira Mohamed, *Shame in the Security Council*, 90 WASH. U. L. REV. 1191, 1210-13 (2013) (tracing the history of the permanent members' insistence on having a veto in the Security Council).

12. *See Mark Twain Quotes*, BRAINYQUOTE, http://www.brainyquote.com/quotes/quotes/m/marktwain141773.html (setting forth Mark Twain's witticism that, "The reports of my death have been greatly exaggerated").

13. *See*, *e.g.*, Sara Dillon, *Yes, No, Maybe: Why No Clear "Right" of the Ultra-Vulnerable to Protection Via Humanitarian Intervention?*, 20 MICH. ST. INT'L. L. REV. 179, 181-82, 188 (2012) (arguing for a right of only the "extremely vulnerable" to humanitarian intervention against mass attacks); Adam Roberts, *The So-Called "Right" of Humanitarian Intervention*, *in* 3 Y.B. OF INT'L HUMANITARIAN L. 3, 3, 50-51 (H. Fischer & Avril McDonald eds., 2000) (asking whether it is productive to think of humanitarian intervention as a right).

unthinkable.[14] The U.N. Convention on the Rights of the Child, as of 1989, invested the child who is mature enough to form his or her own views, with "the right to express those views freely in all matters affecting the child;"[15] before then, popular sentiment was that children should be seen and not heard.[16] And, during the Spanish Inquisition, could anyone have contemplated promulgation of a *legal* right to be free of torture?[17]

A new idea may seem strange when initially articulated and also turn out to be a bad idea. I am confident that a peoples' right to U.N. armed intervention to stop mass atrocities is far from being a bad idea for two reasons. From a juridical perspective, the new right conceptually fits within or arises from other rights and principles of international law, and that is so without the least belaboring or distortion.[18]

A second reason for recognizing a peoples' right to U.N. armed intervention stems from urgent policy considerations; again, that business of protecting life and limb. Since the fall of the Soviet Union, most armed conflicts have occurred intrastate as have war crimes, genocide, crimes against humanity, and ethnic cleansing.[19] In response, the world has usually stood on the sidelines or intervened without sufficient peacekeepers and materiél to provide full-scale relief.[20] The bloody specters of Rwanda and Sierra Leone during the 1990s manifest the persistence of this pattern,[21] and, as of this writing, the trend continues

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14. *See* U.S. CONST. amend XIX (prohibiting U.S. citizens from being denied the right to vote "on account of sex"); *see also 19th Amendment*, HISTORY.COM, http://www.history.com/topics/womens-history/19th-amendment (describing the women's suffrage movement in the United States as a "70-year battle").

15. Convention on the Rights of the Child art. 12, ¶ 1, *opened for signature* Nov. 20, 1989, 1577 U.N.T.S. 3 (entered into force Sept. 2, 1990). [hereinafter Children's Convention].

16. *See* Karen Hellisvig-Gaskell, *What Does "Kids Should Be Seen & Not Heard" Mean?* GLOBALPOST, http://everydaylife.globalpost.com/kids-should-seen-not-heard-mean-13068.html (noting that the phrase means that a child's role is to be quiet, an idea that has "lingered well into the 20th century").

17. *See* Shanna Freeman, *How the Spanish Inquisition Worked*, HISTORY: HOW STUFF WORKS, http://history.howstuffworks.com/historical-figures/spanish-inquisition3.htm (recounting that torture was regularly used during the Spanish Inquisition to extract confessions).

18. *See infra* notes 92-218 and accompanying text.

19. *See* MICHAEL V. BHATIA, WAR AND INTERVENTION: ISSUES FOR CONTEMPORARY PEACE OPERATIONS 31 (2003) (recounting that, over the past fifty years, war has been much more prevalent within nations than between them).

20. *See* Rajan Manon, *Pious Words, Puny Deeds: The "International Community" and Mass Atrocities*, *in* INTERNATIONAL INTERVENTION IN LOCAL CONFLICTS: CRISIS MANAGEMENT AND CONFLICT RESOLUTION SINCE THE COLD WAR 243, 243-52 (Uzi Rabi ed., 2010) (commenting on the global community's disinclination to stop mass atrocities with armed intervention).

21. For a detailed description of the 1994 genocide in Rwanda, *see* ROMÉO DALLAIRE, SHAKE HANDS WITH THE DEVIL: THE FAILURE OF HUMANITY IN RWANDA *passim* (2003). Mass atrocities were perpetrated in Sierra Leone in the late 1990s and early 2000s. ALEX J. BELLAMY, MASSACRES AND MORALITY: MASS ATROCITIES IN AN AGE OF CIVILIAN IMMUNITY 300 (2012); *see also* Lee

particularly in Africa and the Middle East.[22] Elsewhere, and because no community is immune, people may be haunted by an underlying fear that they too could someday suffer such a fate. And, are we not all slowly and imperceptibly brutalized by the frequent spectacle of indiscriminate carnage allowed to proceed to the last bloody drop? These are no small psychological burdens, whether they operate consciously or subconsciously.[23]

In any event, surely the victims of mass atrocity should be the primary rights-holders empowered to demand protection against it. They are the ones who die or are maimed, they are the ones who watch the rape and killing of family and friends, and they are the ones who are frequently left destitute and homeless. For the survivors of such an attack, the accompanying emotional trauma is incalculable; gruesome memories, their mental prison and destiny.[24]

Any civilized legal regime worth the name should, at a minimum, avoid aggravating the victims' plight. It is therefore appalling to realize that international law actually worsens the situation by leaving the afflicted legally helpless to help themselves. The law effectively delivers a one-two punch, first, by allowing disregard of victims' physical safety, and, second, by vitiating their human dignity. In having failed to grant victims juridical power to invoke a U.N. armed response, it is entirely discretionary whether an intervention occurs.[25] The result is that victims are relegated to charity cases, and the charity is a notoriously

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Ferran, Charles Taylor, African Warlord, Convicted for Role in Sierra Leone Atrocities, ABC NEWS (Apr. 26, 2012), http://abcnews.go.com/Blotter/charles-taylor-african-warlord-convicted-sierra-leone-atrocities/story?id=16218011 (referring to the conviction, by the Special Court for Sierra Leone, of Charles Taylor for perpetrating atrocities in that country).

22. *See*, *e.g.*, *Genocide in Darfur*, UNITED HUMAN RIGHTS COUNCIL, www.unitedhumanrights.org/genocide/genocide-in-sudan.htm (referring to an "ongoing genocide" in Darfur, which claims five thousand lives every month); *Countries at Risk*, GENOCIDEWATCH, http://genocidewatch.net/alerts-2/new-alerts/ (noting the existence of continuing genocides in Somalia and Nigeria); Nick Cymming-Bruce, *United Nations Investigators Accuse ISIS of Genocide Over Attacks on Yazidis*, N.Y. TIMES (Mar. 19, 2015), http://www.nytimes.com/2015/03/20/world/middleeast/isis-genocide-yazidis-iraq-un-panel.html?_r=0 (reporting on ISIS attacks on the Yazidis in Iraq, with apparent intent to eliminate them as a group); Kareem Shaheen, *Syrian War: "Unthinkable Atrocities" Document in Report on Aleppo*, THE GUARDIAN (May 5, 2015), https://www.theguardian.com/world/2015/may/05/syria-forces-war-crime-barrel-bombs-aleppo-amnesty-report (citing a 2015 Amnesty International Report on the widespread atrocities perpetrated on civilians in Syria).

23. *See* ROBERT J. LIFTON & GREG MITCHELL, HIROSHIMA IN AMERICA 338-40 (1996) (analyzing the phenomenon of psychic numbing as it affects persons other than the direct victims of mass violence).

24. Though told from the vantage point of a blue helmet rather than from that of a victim of mass atrocity, Lieutenant-General (Ret'd) Dallaire's description of the 1993-1994 Rwandan genocide is incomparable in conveying the victims' physical and mental anguish. *See* DALLAIRE, *supra* note 21, *passim*.

25. *See supra* notes 29-86 and accompanying text.

parsimonious and unreliable one at that. The law, instead of expressly affirming victims' natural right to fight back in a meaningful way,[26] ignores their status as full-fledged human beings with the autonomy to determine their own fate at the most basic level. This omission all but proclaims the unworthiness of the fallen.

An armed response to mass atrocity is, of course, a complex, daunting enterprise involving many actors from a variety of disciplines;[27] law is but a single factor in the mix. One cannot, therefore, prophesize that optimizing international law as a corrective will definitely make a big difference for the victims and potential victims. Yet, who would be so morally daring as to decline open-minded consideration of a juridical innovation devised to spare their fellows?

This Article is organized along the following lines. Part II has dual purposes. It is a description of the present state of international law on U.N. armed intervention to stop mass atrocities. This Part is also a critique inasmuch as it simultaneously analyzes the deficiencies in the international laws governing these interventions.[28] Part III lays out the juridical bases for a peoples' right to U.N. armed intervention to stop mass atrocities.[29] Finally, Part IV proposes certain reforms to the U.N. system in order to fully effectuate that right.[30]

II. INTERPRETATION OF CURRENT INTERNATIONAL LAW PERMITTING BUT NOT REQUIRING U.N. AUTHORIZED ARMED INTERVENTIONS TO STOP MASS ATROCITIES: A JURISTIC SILENCE OF THE GRAVE

The U.N. Charter[31] is part of *jus ad bellum*, the corpus of international law placing limits on the reasons for engaging in armed aggression.[32] In this capacity, the Charter governs the United Nations' reasons for fielding or authorizing other entities to field military forces.[33] As discussed in detail below, treaty interpretation demonstrates that the Charter does

26. *See* JOHN LOCKE, THE SECOND TREATISE OF GOVERNMENT, (1690), *reprinted in* JURISPRUDENCE TEXT AND READINGS ON THE PHILOSOPHY OF LAW 239, 242, 256, 264, 272 (George C. Christie & Patrick H. Martin eds., 1995).

27. The United Nations' Peacekeeping website identifies various types of blue helmets, including infantry soldiers, police, engineers, transport companies, and communications and medical personnel. *Military*, U.N. PEACEKEEPING, http://www.un.org/en/peacekeeping/issues/military/index.shtml.

28. *See infra* notes 29-91 and accompanying text.

29. *See infra* notes 92-218 and accompanying text.

30. *See infra* notes 92-218 and accompanying text.

31. U.N. Charter, June 26, 1945, 59 Stat. 1031 (entered into force Oct. 24, 1945).

32. *See infra* notes 219-60 and accompanying text.

33. *See infra* note 195 and accompanying text.

permit U.N. armed intervention to stop mass atrocities. But neither the document's explicit language nor its interpretation creates a right to invoke and a conjunct duty to provide such intervention. It is this void that has rendered international law mostly unresponsive and irresponsible when armed intervention is needed to stop mass atrocities, a juristic silence which has begotten the silence of victims' graves.

U.N. armed intervention is authorized by Chapter VII of the Charter if certain prerequisites are met.[34] The Security Council must preliminarily determine the existence of a threat to the peace, breach of the peace, or act of aggression;[35] and, if the Council so finds, it must next assess whether measures not involving use of armed force—the sorts of pacific measures specified in article 41[36]—would be or have proven inadequate to maintain or restore international peace and security.[37] Only upon a finding of such inadequacy may the Council "take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security."[38] As per Chapter VIII, armed interventions by other entities may legally take place solely if instituted by regional arrangement or agencies which have first obtained Security Council permission.[39]

The Charter, it is true, does not explicitly refer to "armed interventions" or "mass atrocities." This has led to some niggling among some international law experts as to whether the Charter really does provide for U.N. armed interventions to stop mass atrocities.[40] As will be shown, the naysaying is easily rebutted by other Charter provisions in light of accepted principles of treaty interpretation.[41]

However, before delving further into the legal aspects of U.N. intervention, it is probably appropriate to first deal with the two elephants in the room, i.e., this Article's disinclination to cover armed humanitarian interventions by one nation or a group of them sans U.N. approval ("unilateral armed intervention"), and the Article's inattention to the

34. U.N. Charter ch. VII.
35. *Id*. art. 39.
36. U.N. Charter Article 41 provides:

> The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.

Id. art. 41.
37. *Id*. art. 42.
38. *Id*.
39. *Id*. arts. 52-53.
40. *See infra* notes 73, 77 and accompanying text.
41. *See infra* notes 56-85 and accompanying text.

responsibility to protect project ("R2P"). It should be noted that controversy has dragged on for years over the legality of unilateral interventions.[42] Then, with the 2010 adoption of the Kampala Compromise[43] international lawmakers placed a heavy damper on the pro-legality advocates. The Compromise's tacit but transparent rebuff is provided as an amendment to the Rome Statute, for the activation in 2017 of the International Criminal Court's ("ICC") subject-matter jurisdiction over the crime of aggression.[44] The crime of aggression is delineated thereunder as consisting of, among other elements, an act of aggression which constitutes "the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent" with the U.N. Charter.[45]

The only recognized exception to the crime of aggression is the Charter's allowance for nations, individually or collectively, to use physical force in self-defense against another nation. There is no exception for nations to carry out unilateral armed humanitarian interventions.[46] Thus, as of 2017, non-U.N. authorized armed interventions with the goal of halting mass atrocities, could subject individuals executing the interventions to prosecution before the ICC for having perpetrated the crime of aggression.[47] In other words, the Compromise should disable and

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42. *See* CRISTINA GABRIELA BADESCU, HUMANITARIAN INTERVENTION AND THE RESPONSIBILITY TO PROTECT: SECURITY AND HUMAN RIGHTS 1-2 (2011) (giving an overview of the disagreements and dilemmas that have long surrounded the legality and morality of unilateral armed humanitarian intervention); Maj. Jeremy A. Haugh, *Beyond R2P: A Proposed Test for Legalizing Unilateral Armed Humanitarian Intervention*, 221 MIL. L. REV. 1, 3-5 (2014) (tacitly acknowledging the historical and present illegality of unilateral armed humanitarian intervention, while expressly urging creation of a relevant new governing legal regime); Sean D. Murphy, *Criminalizing Humanitarian Intervention*, 41 CASE W. RES. J. INT'L L. 341, 341 (2009) (stating that the *dominant* belief among scholars is that unilateral armed humanitarian intervention is illegal).

43. Review Conference of the Rome Statute, Amendments to the Rome Statute of the International Criminal Court on the Crime of Aggression, Res. RC/Res. 6, Annex 1 *adopted on* June 11, 2010 [hereinafter New Def].

44. Rome Statute of the International Criminal Court art. 5, ¶ 1, *adopted on* July 17, 1998, 2187 U.N.T.S. 91 (entered into force July 1, 2002) [hereinafter Rome Statute]. The language on the crime of aggression, as originally set forth in the Rome Statute, was essentially a placeholder:

> The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations.

45. New Def, *supra* note 43.

46. See Jennifer Trahan, *A Meaningful Definition of the Crime of Aggression: A Response to Michael Glennon*, 33 U. PA. J. INT'L L. 907, 927 (2012) (maintaining that a nation's or nations' exercise of individual or collective self-defense is permissible under Article 51 of the U.N. Charter and "thus are uses of armed force *consistent* with the . . . Charter, and clearly *not* acts of aggression").

44. Surendran Koran, *The International Criminal Court and Crimes of Aggression: Beyond the*

discourage future arguments for the legality of unilateral armed intervention to stop mass atrocities.

On the policy front, it is fair to say that these sorts of interventions against atrocities are fraught with negative unintended consequences. Foremost is the damage that such interventions may wreak upon the United Nations and the rule of international law. Because the intervenors act outside of and in violation of the U.N. Charter's prescriptions, they implicitly transmit the message that the United Nations and its Charter are not the only show in town, and, ultimately, do not matter very much when it comes to ending these crises.[48] Moreover, these interventions have often been led by big-power countries, each of which has usually had a national interest at stake in addition to or in lieu of humanitarianism.[49] This circumstance has been and is apt to stoke fears that intervening states are using mass atrocities as a convenient pretext for underlying imperialist and neo-colonial agendas[50]—fears that may be generalized toward helping

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Kampala Convention, 34 HOUS. J. INT'L L. 231, 256 (2012).

48. *See* Oona A. Hathaway et al., *Consent-Based Humanitarian Intervention: Giving Sovereign Responsibility Back to the Sovereign,* 46 CORNELL INT'L L. J. 499, 535 (2013) (opining that attempts to carve out exceptions to the current international law governing humanitarian intervention may end up swallowing the rule of international law); Michael L. Burton, *Note*, *Legalizing the Sublegal: A Proposal for Codifying a Doctrine of Unilateral Humanitarian Intervention*, 85 GEO. L. J. 417, 429 (1996) (averring that unlawful unilateral humanitarian intervention degrades international law).

Incidentally, this Article's concern about undermining the United Nations and international law is not meant to suggest that they are presently adequate to the task of halting mass atrocities. Indeed, this Article argues to the contrary. *See infra* notes 56-85 and accompanying text.

In the interests of fair play, it is only right to mention an argument in support of the legality of unilateral armed humanitarian intervention. Before the advent of the U.N. Charter, customary international law existed which authorized this sort of intervention. However, there is disagreement over whether this norm survived the Charter's inception. Richard B. Lillich, *A United States Policy of Humanitarian Intervention and Intercession*, *in* HUMAN RIGHTS AND AMERICAN FOREIGN POLICY 278, 287-88 (Donald P. Kommers & Gilburt D. Loescher eds., 1979). I decline to dwell on the argument or the controversy surrounding it for two reasons. First, regardless of the legal status of the norm, I prefer U.N. armed intervention to halt mass atrocities for policy reasons laid out in the text above. Second, even if this customary international law still persists, its usefulness should be greatly diminished by the Kampala Compromise. *See supra* notes 40-44 and accompanying text.

49. The U.S. military intervention in Iraq is a prime example of the syndrome in which a big-power nation dons the mantle of humanitarianism to invade another country for self-serving purposes. GARY J. BASS, FREEDOM'S BATTLE: THE ORIGINS OF HUMANITARIAN INTERVENTION 379 (2008); Kenneth Roth, *War in Iraq: Not a Humanitarian Intervention*, *in* HUMAN RIGHTS IN THE "WAR ON TERROR" 143-45 (Richard Ashby Wilson ed., 2005).

Conversely, the U.S. has declined to intervene militarily to stop mass atrocities—most infamously in 1994 Rwanda—on the grounds that U.S. national interests were not implicated. Lieutenant Commander Glenn T. Ware, JAGC, USN, *The Emerging Norm of Humanitarian Intervention and Presidential Decision Directive 25*, 44 NAVAL L. REV. 1, 2-3 (1997).

50. *See* HEHIR, RESPONSIBILITY, *supra* note 2, at 198-99 (elucidating that, given the developing world's historical experiences under colonialism, it is understandable that such nations would fear unilateral humanitarian intervention, based, as it is, on hierarchies rather than law); TERRENCE E. PAUPP, REDEFINING HUMAN RIGHTS IN THE STRUGGLE FOR PEACE AND DEVELOPMENT 406-07 (2014) (pointing out that the United States and NATO, for example, have "attempted to revive the old systems

hands extended by all outsiders even if motivated by purely humanitarian concerns.[51]

It may be argued that the deleterious ripple effects of unilateral armed interventions cannot do much damage to U.N. prestige inasmuch as the latter has already done quite a bit to impugn its own credibility.[52] The United Nations is admittedly dysfunctional in many ways. Nevertheless, *it is there*. And, its mere existence is no minor asset. To undercut or thoroughly subvert it and begin anew is hardly cost-efficient in view of the fact that the organization provides, at the very least, the foundation for making international governance responsive to the modern era. On all counts, the best course appears to be to reserve armed humanitarian intervention solely for the United Nations, the tack taken from hereon.

This Article's disregard of the responsibility to protect project[53] is predicated on equally solid ground. R2P began as an ostensible attempt to, among other things, assure that U.N. armed intervention would occur on a more dependable basis so as to prevent and/or stop large-scale loss of human life.[54] While R2P has become a darling of the United Nations, [55] the doctrine's finer points and positive aspects are altogether nugatory to the instant endeavor. My harsh evaluation stems from a simple fact: R2P is

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of domination under the banner of [unilateral] 'humanitarian intervention'" and that this has stoked fears in the Global South).

51. *See* HEHIR, RESPONSIBILITY, *supra* note 2, at 203-04 (discussing how third-world nations are suspicious of humanitarian intervenors hailing from most quarters because of the self-serving politics driving powerful governments, whether the latter operate on their own or through Security Council machinations).

52. *Id*. at 203 (highlighting the Security Council's "inconsistency and evident politicization" vis-à-vis "military intervention for humanitarian purposes"); Richard Falk, *Humanitarian Intervention After Kosovo*, *in* HUMAN RIGHTS AND CONFLICT: EXPLORING THE LINKS BETWEEN RIGHTS, LAW, AND PEACEBUILDING 185, 203-04 (Julie Mertus & Jeffrey W. Helsing eds., 2006) (critiquing the United Nations' "enforcement capabilities," the veto power of the Security Council's permanent members, and the latter's tendency to give more weight to geopolitical interests than to humanitarian needs); Henry J. Richardson III, *Critical Perspectives on Intervention* 29 MD. J. INT'L L. 12, 29-35 (2014) (expatiating on the corrupting effect of the Security Council's veto power on humanitarian intervention).

53. *See infra* notes 51-54 and accompanying text.

54. *See* REPORT OF THE INTERNATIONAL COMMISSION ON INTERVENTION AND STATE SOVEREIGNTY, THE RESPONSIBILITY TO PROTECT 19-44 (2001) (articulating early principles of R2P); INTERNATIONAL COALITION FOR THE RESPONSIBILITY TO PROTECT, AN INTRODUCTION TO THE RESPONSIBILITY TO PROTECT, www.responsibilitytoprotect.org/index.php/about-rtop/learn-about-rtop (describing a more modern version of R2P).

55. *See* OFFICE OF THE SPECIAL ADVISER ON THE PREVENTION OF GENOCIDE, THE RESPONSIBILITY TO PROTECT (April 16, 2014), www.un.org/en/preventgenocide/adviser/responsibility.shtml (evidencing the United Nations' embrace of R2P); HEHIR, RESPONSIBILITY, *supra* note 2, at 90-103 (detailing some of the historical development of the United Nations' implementation of R2P).

not law.[56] The concept is just that—a concept. R2P does not bind any person or entity; R2P creates no rights, obligations or accountability. R2P instead relies exclusively on moral suasion, a game plan with a notoriously poor record of spurring armed force for humanitarian ends.[57] At any rate, this is a law review article about law and making law's mandated compulsions more effective in bringing about the needed military assistance. R2P heads in exactly an opposite and inapposite direction.

Having ushered the elephants in the room well out of it, we return to Part II's main theme of presenting and interrogating the international law governing U.N. armed intervention to stop mass atrocities. This Part's opening paragraphs canvass in their bare essentials those U.N. Charter provisions most germane to serving as a legal underpinning for U.N. armed interventions. It will be recalled that these provisions under Charter Chapter VII endow the Security Council with power to use or authorize the use of armed force if certain preconditions are met by the Council and if the use is necessary to maintaining or restoring international peace and security.[58] Indeed, the plain language of Charter article 42 baldly proclaims that the Council may "take . . . action by air, sea, or land forces" in fulfillment of its maintaining and restoring roles.[59]

But, does article 42 implicitly give the Security Council power to take or authorize military steps for the purpose of stopping mass atrocities? Inasmuch as the answer to this question is not immediately obvious from the provision's wording, the matter requires interpretation, though not too much is needed. All treaty interpretation is governed by article 31 of the Vienna Convention on the Law of Treaties ("Vienna Convention").[60] Article 31 states, in pertinent part:

> 1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
> 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble…[61]

Article 31's rule that a treaty term must be construed in keeping with its "ordinary meaning" presupposes that a term may be capable of more than

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56. *See* HEHIR, RESPONSIBILITY, *supra* note 2, at 119-22 (criticizing R2P's reliance on moral pressure alone to stop mass atrocities).

57. *Id*. at 128-30.

58. *See supra* notes 31-36 and accompanying text.

59. U.N. Charter art. 42.

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

61. *Id*. art. 31, ¶¶ 1-2.

one meaning.[62] According to Webster's dictionary, a long-established definition of the adjective "ordinary" is "of a kind to be expected in the normal order of events."[63] Article 31, paragraph 1 thus automatically refers the treaty interpreter to his or her own life experiences and knowledge-base in order to distinguish ordinariness from its opposite. Leafing through any modern English-language dictionary readily demonstrates that a word may often encompass several different meanings, some of which may strike us as ordinary and some not. A perfect example of such a multifaceted word coincidentally is the word "ordinary," for which Webster's, in addition to the definition quoted above, supplies two others, with one of those still further subdivided into two different senses.[64]

Human rights and humanitarian law treaties often employ sweeping or nebulous language,[65] a perfect candidate for a plurality of connotations. Under Article 31, there is no bar to interpreting an explicit treaty term as encompassing implied multiple meanings as long as any implied meaning is also an ordinary one.[66] Underlying these adjurations is Article 31's ambition to assure that explicit treaty language not be construed in an "arcane, or crabbed manner, devoid of" language's natural and sometimes unstated richness.[67]

Were the above-described interpretive device the only one properly involved in treaty interpretation, it could and should be objected that Security Council-authorized interventionist use of force to stop mass atrocities is probably not an ordinary meaning easily flowing from Charter Article 42's wording. However, the Vienna Convention supplements its "ordinary meaning" rule with further interpretive precepts. The Convention's Article 31 directs that ordinary meaning must be determined in the "context [of the treaty] and in the light of its object and purpose," with context understood to include the treaty's preamble plus the entire remainder of the treaty text.[68]

Turning to the Charter's preamble and text beyond Article 42, it

62. *See* Susan H. Bitensky, *The Mother of All Human Rights: The Child's Right to Be Free of Corporal Punishment as Hard International Law*, 36 OHIO N.U. L. REV. 701, 717-19 (2010) [hereinafter Bitensky, *Hard International Law*].

63. WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 831 (1983).

64. *Id*.

65. *See* Susan H. Bitensky, *The Poverty of Precedent for School Corporal Punishment's Constitutionality Under the Eighth Amendment*, 77 U. CIN. L. REV. 1327, 1381 (2009) [hereinafter Bitensky, *Poverty of Precedent*].

66. *See* Vienna Convention, *supra* note 60, art. 31.

67. Bitensky, *Hard International Law*, *supra* note 62, at 718.

68. Vienna Convention, *supra* note 60, art. 31, ¶¶ 1-2.

becomes clear that the preservation and promotion of human rights is a principal commitment of the United Nations. The preamble avouches that U.N. objectives include, among other things, reaffirming "faith in *fundamental human rights, in the dignity and worth of the human person*"; establishing "conditions under which justice and respect for . . . international law can be maintained"; striving to "live together in peace with one another as good neighbors"; and "ensuring . . . that armed force shall not be used, *save in the common interest*[.]"[69]

Charter Article 1 also avers that a *raison d'être* of the United Nations is "[t]o achieve international cooperation in solving international problems of an economic, social, cultural, or *humanitarian character*" as well as "in promoting and encouraging respect for *human rights and fundamental freedoms for all*."[70] Articles 55 and 56 jointly transform Article 1's declaration of purpose into a firm commitment of the U.N. and of states parties to the Charter that they will promote "*universal respect for, and observance of, human rights and fundamental freedoms for all*[.]"[71]

In sum, the Charter's preamble and its Articles 1, 55, and 56 elucidate an "overall object and purpose" and interpretive "context" of upholding human rights; and, Article 42 should consequently be informed thereby. Stopping mass atrocities is tantamount to securing an array of human rights from trespass.[72] Under international human rights law ("IHRL"), each person has the rights to survival,[73] privacy,[74] and freedom from torture and other "cruel, inhuman or degrading treatment or punishment[,]" among many other rights.[75] Mass atrocities perforce deprive victims of any or all of these human rights. Hence, the ordinary meaning of Article 42's stipulation that the Security Council may approve military forays "necessary to maintain or restore international peace and

69. U.N. Charter preamble.

70. *Id*. art. 1, ¶ 3 (emphasis added).

71. *Id*. art. 55, ¶ (c), art. 56 (emphasis added).

72. *See* Julie Mertus, *supra* note 7, at 1770-74 (proposing that the international human right to life includes "the right to emergency assistance"); Roberts, *supra* note 12, at 8–9 (suggesting that the U.N. Charter's references to human rights may allow for humanitarian intervention); Gassama, *supra* note 1, at 733-35 (finding that the U.N. Charter and subsequent human rights treaties have helped to "erase the legal . . . barriers to collective transnational humanitarian intervention"); *cf.* Anne Peters, *Humanity as the A and Ω of Sovereignty*, 20 EUR. J. INT'L L. 513, 539, 544 (2009) (contending that when the needs of humanity are threatened, the Security Council has a duty to intervene).

73. *E.g.*, International Covenant on Civil and Political Rights art. 6, ¶ 1, *opened for signature* Dec. 19, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR]; Children's Convention, *supra* note 14, art. 6.

74. *E.g.*, ICCPR, *supra* note 73, art. 17; European Convention for the Protection of Human Rights and Fundamental Freedoms art. 8¶ 1, 213 U.N.T.S. 222 (entered into force Sept. 3, 1953) [hereinafter European Convention].

75. *E.g.*, ICCPR, *supra* note 73, art. 7; Children's Convention, *supra* note14, art. 37, ¶ (a); American Convention on Human Rights art. 5, ¶ 2, Nov. 22, 1969, 1144 U.N.T.S. 123 (entered into force July 18, 1978) [hereinafter American Convention].

security"[76] should logically embrace Council-authorized use of armed force to secure such human rights (a point which, despite its logic, has attracted a vocal faction of deniers).[77] The logical understanding of Article 42 is incidentally buttressed by the Charter's recurring affirmation of the close reciprocal relationship between human rights, on the one hand, and peace and security, on the other: neither is possible for long by itself, and each is a fundamental postulate to the long-term existence of the other.[78]

It may be contended that the above interpretation of Article 42 must inevitably stumble upon the fact that the Charter's concern is solely with *international* peace and security as opposed to *intrastate* peace and security. Article 42 itself specifically refers to international peace and security and is silent about the intrastate variety.[79] It is also indisputable that mass atrocities generally occur within a single state.[80] The contrarian could reasonably take these circumstances as grounds for saying that Article 42 does not allow authorization of armed force to end intrastate perpetration of mass atrocities.[81]

Because the Charter was adopted against the backdrop of World War II and the Holocaust, and was made in reaction to their barbarities, the document is very much a creature of that era. It can be no surprise that the anxieties of citizenry and governments at the time fixated on international disputes and international wars,[82] and that the Charter naturally reflects

76. U.N. Charter art. 42.

77. Lois E. Fielding, *Taking the Next Step in the Development of New Human Rights: The Emerging Right of Humanitarian Assistance to Restore Democracy*, 5 DUKE J. COMP. & INT'L L. 329, 355–56, 372–73 (1995) (arguing that U.N. Charter Article 42 empowers the Security Council to use force to restore democracy and alleviate suffering); Mertus, *supra* note 8, at 1770–73; *but see* MOURTADA DEME, LAW, MORALITY, AND INTERNATIONAL ARMED INTERVENTION: THE UNITED NATIONS AND ECOWAS IN LIBERIA 24 (2013) (maintaining that U.N. Charter Article 42 does not embrace armed humanitarian intervention to protect human rights).

78. *E.g.*, U.N. Charter, *supra* note 31, art. 55 (linking fulfillment of human rights to maintenance of peace); *see* Mertus, *supra* note 8, at 1770 (asserting that "international peace and security must mean more than the absence of an internationally recognized war, [and that] human rights violations short of all-out war also constitute major breaches of peace and security").

79. U.N. Charter, *supra* note 31, art. 42.

80. *See* HEHIR, INTRODUCTION *supra* note 4, at 318 (remarking that intrastate atrocities occur "periodically"); STEPHEN MCLOUGHLIN, THE STRUCTURAL PREVENTION OF MASS ATROCITIES: UNDERSTANDING RISK AND RESILIENCE 31 (2014) (observing that since World War II most mass atrocities have occurred as part of intrastate wars).

81. Professor Aidan Hehir has summarized the contrarian thesis as raising "some doubt" on "[w]hether the application of Chapter VII powers to intra-state humanitarian crises was consistent with the Charter." HEHIR, RESPONSIBILITY, *supra* note 2, at 60.

82. *See* JUSSI M. HANHIMÄKI, THE UNITED NATIONS: A VERY SHORT INTRODUCTION 3 (2008) (chronicling that the United Nations' founders desired to avoid a repeat of World War II); DAVID T. ZABECKI, WORLD WAR II IN EUROPE: AN ENCYCLOPEDIA 172 (describing the impetus for establishing the United Nations as prevention of "another *world* war") (emphasis added).

this preoccupation.[83] However, unless the Charter is to be reduced to a worthless trinket, its interpretation must be responsive to changing dilemmas and exigencies.[84] This dynamic approach is consistent with the Vienna Convention's ordinary-meaning rule of treaty construction since what treaty interpreters deem ordinary meanings are also likely to evolve over successive epochs.[85]

The dynamic approach additionally is of a piece with Vienna Convention's directive that treaties must be interpreted in good faith.[86] If a treaty is in force, can an interpretation which would transform it, or parts of it, into a dead letter, be an "interpret[ation] in *good faith*"? Effectively destroying a substantive part of the Charter by confining it to obsolete meanings is not good faith interpretation when the Charter is capable of different, ordinary constructions relevant to its overarching objects and purposes in the contemporary world.[87]

Threats to or breaches of international peace and security are now few and far between,[88] and confining Article 42's applicability solely to

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83. *E.g.*, U.N. Charter, *supra* note 31, at preamble, art. 1, ¶ 1, art. 2, ¶¶ 3, 6, art. 11, ¶¶ 1-3; art. 15, ¶ 1, arts. 24, 26, art. 33, ¶ 1, art. 34, art. 37 ¶ 2, arts. 39, 42-43, art. 47, ¶ 1, art. 48, ¶ 1, art. 51, art. 52, ¶ 1, art. 54, art. 73, ¶ (c), art. 76¶ (a), arts. 84, 99. In its introductory clause, Article 55 substitutes for "international peace and security" the analogous wording "peaceful and friendly relations among nations." *Id.* art 55.

84. The notion that a treaty should be a "living document" is sometimes advanced as a legal rationale for interpretations making the instrument applicable to evolving circumstances. For example, the European Court of Human rights has repeatedly said of the European Convention that the latter is a "living instrument which must be interpreted in the light of present-day conditions." *See* Selmouni v. France, 1109 Eur. Ct. H.R. 403 at ¶ 101 (2000) (*See*, e.g., Tyrer v. the United Kingdom, App. No. 5856/72, 26 Eur. Ct. H.R. (Ser. A) at 15-16 (1978); Soering v. United Kingdom, 161 Eur. Ct. H.R. (ser. A) at 33 (1989); and Loizidou v. Turkey, 310 Eur. Ct. H.R. (ser. A) at 310 (1995)). In *Selmouni*, the European Court was considering petitioner's claim that his treatment by police violated the Convention's Article 3, i.e., the prohibition on cruel and degrading treatment and on torture. *Id*. *Selmouni,* 29 Eur. Ct. H.R. at ¶ 101. The Court relied upon the living-document rationale to announce

> that certain acts which were classified in the past as "inhuman and degrading treatment" as opposed to "torture" could be classified differently in the future. It [the Court] takes the view that the increasingly high standard being required in the area of the protection of human rights and fundamental liberties correspondingly and inevitably requires greater firmness in assessing breaches of the fundamental values of democratic societies.

Id. *Cf*., *e.g.*, Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 682 (1952) (Vincent, J., dissenting) ("[c]ases do arise presenting questions which could not have been foreseen by the Framers. In such cases, the Constitution has been treated as a living document adaptable to new situations."). The living-document principle espoused by various Justices of the U.S. Supreme Court are, of course, not international law. Nevertheless, that the principle has been invoked in relation to a foundational instrument such as the Constitution points to the appropriateness of using the principle in relation to the U.N. Charter, a foundational international law instrument. *See* Myres S. McDougal & Richard N. Gardner, *The Veto and the Charter: An Interpretation for Survival*, 60 YALE L.J. 258, 282 (1951) ("[t]he Charter, like every written constitution, will be a living instrument").

85. Vienna Convention, *supra* note 60, art. 31, ¶ 1.

86. *Id*.

87. *See supra* notes 75-82 and accompanying text.

88. *See supra* note 18 and accompanying text.

interstate threats and breaches would be equivalent to erasing the provision from the Charter. Not only does such a result fail the good faith test, it falls far shy of the requirement that the Charter's terms be given their ordinary meaning inasmuch as ordinary meanings of words cannot be null sets. Finally, the Security Council has long authorized armed humanitarian intervention to deal with intrastate emergencies. Indeed, Council usage appears to have overtaken and cut short the theoretical quibbling.[89]

Even for one familiar with the U.N. Charter, it can still be disquieting upon revisiting it to note again the absence of any explicit empowerment vis-à-vis armed intervention to stop mass atrocities. One would think that by now this delegation of authority would be expressly stated, preferably in bold typeface or neon lights. It is therefore most fortuitous that run-of-the-mill, accustomed interpretation of relevant Charter provisions, as analyzed above, shows that such legal power does exist. And it does not hurt that the international community has been acting upon that assumption.

Legal empowerment is one thing, though, and institutional implementation quite another. The U.N.'s history of implementation in this context has been rife with political gamesmanship, inconsistency, missed opportunities, gross ineptitude, and a breathtaking indifference to mass atrocities' abominations.[90] Perhaps the kindest thing that may be said of U.N. praxis at the moment is that it is utterly unreliable and unpardonably stingy in authorizing armed force against mass atrocity. Both the law which has allowed such "implementation" and the bad practices themselves attest to an international regime in dire want of profound reform—reform making continuing political machinations and stony lassitude quite beside the point. The reform that appears to have the most potential for accomplishing this feat is a peoples' right to U.N. armed

89. *See* SIMON CHESTERMAN, JUST WAR OR JUST PEACE? HUMANITARIAN INTERVENTION AND INTERNATIONAL LAW 130 (2001) (stating that since 1991, the Security Council has been more apt to categorize internal conflicts as threats to international peace); HEHIR, RESPONSIBILITY, *supra* note 2, at 59 (explaining that since the 1990s, the Security Council has "expanded its interpretation of its Chapter VII powers to include intra-state humanitarian crises"); Gassama, *supra* note 1, at 708–09 (advising that there has been a clear understanding even from the very beginning of the United Nations that a local conflict may expand into one threatening international peace and security); Peters, *supra* note 69, at 538 (enunciating that, since the 1990s, it has been indisputable that the Security Council may authorize coercive interventions to address domestic human rights violations as threats to peace).

90. *See* BADESCU, *supra* note 8, at 1 (summarizing the many instances when the United Nations did not react to stop humanitarian crises); ROSA FREEDMAN, FAILING TO PROTECT: THE UN AND THE POLITICIZATION OF HUMAN RIGHTS xvi (2015) (assessing that the United Nations, on balance, has had "vastly more failures than successes" in protecting people from mass atrocities).

intervention, which when properly asserted, should be regardfully honored and the intervention undertaken.[91]

Actually, there is no dearth of references to a legal right in aid of terminating atrocities, but it is jarring to realize that, thus far, the right is conceptualized as held exclusively by nation states and, perhaps, by intergovernmental organizations ("IGOs").[92] Legal history shows that nations have traditionally been understood to enjoy many rights under international law, e.g., rights to self-preservation, independence, equality, respect, and intercourse; nor have the sovereign's rights yet faded from the legal lexicon.[93] However, due to the Kampala Compromise, a sovereign's ability to engage in armed humanitarian intervention will soon run into major obstacles under international criminal law.[94] It would be both poetic and real-world justice if the sovereign's expiring intervention right serendipitously was supplanted by a new peoples' right to U.N. armed intervention. Not only would this work a bold and beneficial stroke towards democratization by putting the right in peoples rather than sovereigns, but, more immediately and crucially, the conversion should drastically improve the odds of halting or at least decreasing mass atrocities.[95]

Despite its potentiality and appeal, the projected right will obviously not be of much use if it is stalled at wishful thinking; and so on to the vitally important exercise of establishing a juridical basis for its recognition. The task is gratifying as the tenable bases are many.

III. JURIDICAL BASES FOR RECOGNITION OF A CONDITIONAL PEOPLES' RIGHT TO REQUIRE U.N. AUTHORIZED ARMED INTERVENTION TO STOP MASS ATROCITIES

91. *See infra* notes 93, 98, 102-05, 108, 112-15, 132, 152-68 and accompanying text.

92. *E.g.*, ANDREW CLAPHAM, BRIERLY'S LAW OF NATIONS: AN INTRODUCTION TO THE ROLE OF INTERNATIONAL IN INTERNATIONAL RELATIONS 47 (2012); Antonio Cassese, *States: Rise and Decline of the Primary Subjects of the International Community*, *in* THE OXFORD HANDBOOK OF THE HISTORY OF INTERNATIONAL LAW 49, 55 (Bardo Fassbinder et al., eds, 2014); Krisch, *supra* note 1, at 326; Jeremy Levitt, *Humanitarian Intervention by Regional Actors in Internal Conflicts: The Cases of ECOWAS in Liberia and Sierra Leone*, 12 TEMP. INT'L & COMP. L.J. 333, 333 (1998); Elias Davidsson, *Comment on Fernando Teson's Article: "Defending International Law*," 11 INT'L LEGAL THEORY 99, 103 (2005); Halil Rahman Basaran, *Identifying the Responsibility to Protect*, 38-WTR FLETCHER R. WORLD AFF. 195 196 (2014); Margaret M. DeGuzman, *When Are International Crimes Just Cause for War?,* 55 VA. J. INT'L L. 73, 115 (2014).

93. CHRISTOPHER C. JOYNER, INTERNATIONAL LAW IN THE 21ST CENTURY: RULES FOR GLOBAL GOVERNANCE 50–51 (2005); *see generally* Louis B. Sohn, *The New International Law: Protection of the Rights of Individuals Rather Than States*, 32 AM. U. L. REV. 1, 1 (1982) (referring to sovereign states' pre-1945 "lordly privilege of being the sole possessors of rights under international law").

94. *See supra* notes 39-44 and accompanying text.

95. *See infra* notes 93, 98, 102-05, 108, 112-15, 132, 152-68 and accompanying text.

It is a staple of legal analysis to deduce the existence of one right from another, existing right.[96] Nor is it at all unusual for the deduced right to be one that is instrumental in effectuating the "host" right from which it originated.[97] On the domestic front, for instance, the U.S. Supreme Court has often employed this technique in interpreting the Constitution (sometimes even recognizing an implied fundamental constitutional right as stemming from another implied constitutional right).[98] The European Court of Human Rights ("European Court") has done the equivalent in interpreting the European Convention.[99] International law experts have likewise frequently argued for inferring human rights from extant ones.[100] Accordingly, this Article relies upon the same general technique to find, latent in present-day international law, a peoples' right to U.N. armed intervention to stop mass atrocities.

1. The Easy Case: Deriving the Peoples' Right From Existing International Human Rights Laws Against Violence

Each mass atrocity is necessarily comprised, in its component parts, of serious, violent human rights abuses.[101] The new right would enable people to demand that they be meaningfully protected from those abuses—abuses already deemed legal violations. Couched in this way, it may sound like the new right would be a pointless redundancy—until the element of scale is introduced. To state the irrefutable, what demarcates violent human rights violations suffered individually or in small clusters

96. *See* Susan H. Bitensky, *Theoretical Foundations for a Right to Education Under the U.S. Constitution: A Beginning to the End of the National Education Crisis*, 86 NW. U. L. REV. 550, 574 (1992) (explaining that implied rights under the U.S. Constitution are not aberrational); Nicholas A.J. Croquet, *The European Court of Human Rights' Norm-Creation and Norm-Limiting Processes: Resolving a Normative Tension*, 17 COLUM. J. EUR. L. 307, 308 (2011) (asserting that the European Court uses "a mechanism of implied inference" to protect certain implied human rights); Thio Li-ann, *Reading Rights Rightly: The UDHR and Its Creeping Influence on the Development of Singapore Public Law*, 2008 SING. J. LEGAL STUD. 264, 285–87 (2008) (contending that an implied right to a fair trial may be inferred from the Singapore constitution, in accordance with judicial precedents).

97. *See*, *e.g.*, Dubetska and Others v. Ukraine, App. No. 30499/03 Eur. Ct. H.R., ¶¶ 24–30 (2011) (holding that an express treaty right to private and family life implicitly gives rise to a right to be free of environmental hazards); Griswold v. Connecticut, 381 U.S. 479, 483 (1965) (the right of association "is not expressly included in the First Amendment [but] its existence is necessary in making the express guarantees fully meaningful").

98. *See*, *e.g.*, *Griswold*, 381 U.S. at 482–86 (finding that a fundamental marital privacy right implicitly derives from the constitutional right of association—itself a right inferred from the explicit provisions of the First Amendment).

99. *See infra* notes 157-68 and accompanying text.

100. *See infra* notes 184, 190-94 and accompanying text.

101. *See infra* notes 99-115 and accompanying text.

from mass atrocities, is that in the latter the casualties always occur on a grand scale in terms of numbers of people victimized. Both situations clamor for a protective response, but in connection with mass atrocities, precisely because they are en masse, the only remedy (when non-violent tactics fail or are reasonably expected to fail) is troops and armaments. Settling for less in that instance is to give *carte blanche* to the worst human rights violators—those whose bloodlust craves hordes of victims. The new right, then, would not be redundant, and would cohere with the substance and spirit of IHRL. That the intervention right also designates the mechanism for effectuating protection, as it must in order to subdue the assailants, is hardly anomalous; IHRL currently contains numerous rights with included designations of the mechanisms of fulfillment, though not usually of the military sort.[102]

Most of the recognized human rights which protect against the various constitutive acts of mass atrocities, are set forth in human rights treaties. The International Covenant on Civil and Political Rights ("ICCPR") is the most comprehensive treaty articulating such rights, i.e., the civil and political ones.[103] For example, Article 6, paragraph 1 provides, in pertinent part: "Every human being has the inherent right to life. . . . No one shall be arbitrarily deprived of his life."[104] The Human Rights Committee ("HRC"), the ICCPR's treaty-monitoring body, has repeatedly proclaimed that the right to life "is the supreme right,"[105] and, ICCPR article 4 makes it a right from which no derogation is permitted.[106] Providing a rule of construction, the HRC has cautioned that the right to life must be

102. *See*, *e.g.*, International Covenant on Economic, Social and Cultural Rights art. 2, ¶ 1, Jan. 3, 1976, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976) [hereinafter ICESCR] (directing states parties as to how to fulfill ICESCR rights, i.e., by taking "steps . . . to the maximum of its available resources, with a view to achieving progressively the full realization of the rights . . . by all appropriate means"); *Id*. art. 6, ¶ 2 (spelling out steps to be taken by states parties in fulfilling the ICESCR's right to work); ICCPR, *supra* note 73, art. 3, ¶ (a)-(c) (binding each state party to provide and enforce remedies for violation of ICCPR rights); *Id*. at Part IV (detailing manner of implementing ICCPR); Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment of Punishment arts. 4, 14, 1465 U.N.T.S. 85 (entered into force June 26, 1987) [hereinafter CAT] (mandating that each state party must criminalize acts of torture and attach appropriate penalties for such acts, and that each state party's legal system must ensure that torture victims have an enforceable right to compensation); Convention on the Prevention and Punishment of the Crime of Genocide art. VIII, 78 U.N.T.S. 277 (entered into force Dec. 9, 1948) [hereinafter Genocide Convention] (empowering a state party to call upon the United Nations to take action for the prevention and suppression of genocide); Protocol for the Prohibition of the Use of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare ¶ 2, June 17, 1925, 26 U.N.T.S. 571 (committing states parties to induce other nations to accede to the Gas Protocol).

103. ICCPR, *supra* note 70.

104. *Id*. art. 6, ¶ 1.

105. U.N. Human Rights Committee, General Comment 6, Article 6 (16th Sess.) U.N. Doc. HRI\GEN\1\Rev.1, ¶ 1 (1982) [hereinafter HRC on ICCPR Art. 6].

106. ICCPR, *supra* note 73, art. 4, ¶ 2.

understood as integral to all human rights and "should not be interpreted narrowly."[107] Mass atrocities kill people in violation of Article 6. As the HRC put it: "[A]cts of mass violence continue to be a scourge of humanity and take the lives of thousands of innocent human beings every year."[108] Those facts, said the HRC, impose "the supreme duty to prevent" acts of "genocide and other acts of mass violence causing arbitrary loss of life."[109] Though treaty monitoring committee pronouncements are non-binding soft law, they are nonetheless deemed weighty and authoritative.[110] That is because the pronouncements are interpretations by committee members who are chosen for their expertise in the subject matter of the treaty and who are presumably more knowledgeable about the treaty's terms than virtually anyone else.[111]

Informed by this HRC interpretation, the legal argument of interest is that when violations of ICCPR Article 6 are caused by mass atrocities, that provision should be liberally read so as to implicitly give rise to a peoples' right to stop the atrocities, i.e., the flip side of the human rights law duty to stop the atrocities enunciated by the HRC; and, when mass atrocities can only be stopped by collective armed intervention, there should be further inferred from Article 6 a peoples' right to U.N. armed intervention to halt them. Otherwise, the right to life is delusory when it is being most outrageously and rampantly defied. International law scholars have used similar reasoning in predicating a human right to peace on the ICCPR's right to life.[112]

The Covenant contains additional provisions also bearing on protection

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107. HRC on ICCPR Art. 6, *supra* note101, at ¶¶ 1–2, 5.

108. *Id*. at ¶ 2.

109. *Id*.

110. *See* JOSÉ E. ALVAREZ, INTERNATIONAL ORGANIZATIONS AS LAW-MAKERS 599, 601 (2005) (stating that monitoring committee treaty interpretations can be authoritative, especially in the human rights area); Yuji Iwasawa, *The Domestic Impact of International Human Rights Standards: The Japanese Experience*, *in* THE FUTURE OF UN HUMAN RIGHTS TREATY MONITORING 245, 258–59 (Philip Alston & James Crawford eds., 2000) (averring that soft law, such as treaty monitoring committee pronouncements, carry "great weight").

111. ICCPR, *supra* note 73, art. 28, ¶¶ 1–2. In general, monitoring committee interpretations of treaties may be gradually moving towards more of a hard-law status because an increasing amount of "lawmaking" in the human rights area is occurring through this means. *See* ALVAREZ, *supra* note 110, at 506–07, 596, 599–601. This movement is happening regardless of the fact that article 38 the Statute of the International Court of Justice does not enumerate such interpretations as a source of hard international law. *Id*. at 505.

112. A.A. Tikhonov, *The Interrelationship Between the Right to Life and the Right to Peace*, *in* THE RIGHT TO LIFE IN INTERNATIONAL LAW 97, 103 (B.G. Ramcharan ed., 1985); Schabas, *infra* note 140, at 48; Alfred de Zayas, *Peace as a Human Right: The Jus Cogens Prohibition of Aggression*, *in* MAKING PEOPLES HEARD: ESSAYS ON HUMAN RIGHTS IN HONOUR OF GUDMUNDUR ALFREDSSON 27, 37 (Asbjørn Eide et al. eds., 2011).

of human life and physical integrity. Notably, Article 7 states, in pertinent part, that "[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."[113] It is tautological to assert that mass atrocities inflict, not only loss of life, but torture or other gross mistreatment of the victims.[114] By analogy, it is as strong an argument to deduce the proposed armed intervention right from Article 7 as it is from Article 6, when mass atrocity is the culprit.

Perhaps even more to the point is the Convention on the Prevention and Punishment of the Crime of Genocide[115] ("Genocide Convention"), a treaty which is classified as part of IHRL, though it "draws upon" international humanitarian law ("IHL").[116] The Convention creates a duty committing states parties to prevent and punish genocide,[117] and gives them authority to call upon the U.N. "to take such action under the Charter . . . as they consider appropriate for the *prevention and suppression of acts of genocide*."[118] (Emphasis added.) Some commentators have persuasively argued that, given the odiousness of genocide, these two provisions amount to a duty to "call in the troops."[119] In any event, acts of genocide are typically perpetrated through mass atrocities; prevention and suppression of such acts may therefore involve calling upon the U.N., when peaceful options will not work, to militarily intervene for those purposes. Hence, the Genocide Convention authorizes exactly the same U.N. armed intervention which the proposed peoples' right does, except that the Convention limits intervention to the genocidal, while the peoples' right aims to stop both genocidal mass atrocities and those arising from crimes against humanity, war crimes, and ethnic cleansing. Deducing the right from the aforesaid treaty duty probably stands on the most cogent ground of all under IHRL.

Finally, the concept of *erga omnes* should also serve to support the

113. ICCPR, *supra* note 73, art. 7.

114. The reference to "torture" in the text above is intended to signify "torture" as the word is understood in the ICCPR rather than as set forth in article 1 of the Torture Convention.

115. Genocide Convention, *supra* note 98.

116. WILLIAM A. SCHABAS, GENOCIDE IN INTERNATIONAL LAW: THE CRIME OF CRIMES 5-6 (2000).

117. Genocide Convention, *supra* note 102, art. I.

118. *Id*. art. VIII.

119. Gassama, *supra* note 1, at 732–34; *cf*. Stephen J. Toope, *Does International Law Impose a Duty Upon the UN to Prevent Genocide?*, 46 MCGILL L.J. 187, 192–94 (2000) (positing that both states parties to the Genocide Convention and the United Nations have a duty to prevent genocide, based on the Convention's articles I and VIII, and implying that such "prevention" may occur when a genocide is already in progress); *but see* Alex J. Bellamy & Ruben Reike, *The Responsibility to Protect and International Law*, 2 GLOBAL RESP. PROTECT 267, 283–84 (2010) (opining that the "majority view" is that the Genocide Convention does not give rise to a duty to intervene to prevent or stop genocide).

proposed peoples' right as a constituent of present-day IHRL. The International Court of Justice (ICJ) first advanced the concept of *erga omnes* as a dictum in the *Barcelona Traction* case,[120] defining it as "obligations of a State towards the international community as a whole" such that "all states can be held to have a legal interest in their protection."[121] The opinion further descries *erga omnes* in "the principles and rules concerning the basic rights of the human person."[122] The Court specified that the sources of *erga omnes* rights are to be found in either customary international law or "international instruments of a universal of quasi-universal character."[123]

The prohibitions on taking human life and on genocide are customary international law and[124] necessarily bear on the "basic rights of the human person"[125] inasmuch as violation of the prohibitions destroys human life. These prohibitions therefore must be *erga omnes*.[126] Indeed, the *Barcelona Traction* case virtually acknowledges that conclusion by stating that prohibitions on acts of aggression and genocide are exemplars of *erga omnes*.[127] Since mass atrocities take human life and, if accompanied by the requisite persecutory intent, both take human life and perpetrate genocide, prohibitions on mass atrocities must be *erga omnes* elements of customary international law.

Analysis based on treaty law is different but yields the same outcome. It has been said that the "legal regime governing obligations *erga omnes partes* first and foremost depends on the express or *implied* terms of the

120. Case Concerning Barcelona Traction, Light and Power Co. (Belgium v. Spain), Second Phase, [1970] I.C.J. Rep. 3, at 32 ¶¶ 33–34 [hereinafter Barcelona Traction Case].

121. *Id.* ¶ 33.

122. *Id.* ¶ 34.

123. *Id.*

124. *See* W. Paul Gormley, *The Right to Life and the Rule of Non-Derogability: Peremptory Norms of Jus Cogens*, *in* THE RIGHT TO LIFE IN INTERNATIONAL LAW 120, 122 (B.G. Ramcharan ed., 1985) (referring to the right to life as customary international law); JENNY GROTE STOUTENBERG, DISAPPEARING ISLAND STATES IN INTERNATIONAL LAW 347 (2015) (contending that the right to life is not only customary international law, but that it has also attained the status of *jus cogens*); Richard L. Herz, *Litigating Environmental Abuses Under the Alien Tort Claims Act: A Practical Assessment*, 40 VA. J. INT'L LAW 545, 575–76 (2000) (observing that the right to life is customary international law); BOLESLAW ADAM BOCZEK, INTERNATIONAL LAW: A DICTIONARY 164 (2005) (declaring that the prohibition on genocide is customary international law); Michael P. Scharf & Margaux Day, *The Ad Hoc Criminal Tribunals: Launching a New Era of Accountability*, *in* ROUTLEDGE HANDBOOK OF INTERNATIONAL CRIMINAL LAW 51, 55 (William A. Schabas & Nadia Bernazeds., 2011) (describing that a decision by the International Criminal Tribunal for former Yugoslavia characterized the prohibition on genocide as *jus cogens)*.

125. Barcelona Traction Case, *supra* note 120, at ¶ 34.

126. CHRISTIAN J. TAMS, ENFORCING OBLIGATIONS ERGA OMNES IN INTERNATIONAL LAW 120 (2005).

127. Barcelona Traction Case, *supra* note 120, at ¶ 34.

treaty of which they form part."[128] Accordingly, an implied treaty term may be *erga omnes partes*. Whether an implied right legitimately arises from the express terms of a treaty is a matter of treaty interpretation governed by the Vienna Convention,[129] and the Convention, it will be remembered, directs that "[a] treaty shall be interpreted in good faith" concordant with the terms' "ordinary meaning" in light of the treaty's "object and purpose."[130] Because the above-described express treaty prohibitions on extinguishing human life and on genocide would be absurd unless they encompassed an implied prohibition on mass atrocities, and given that these treaties' overriding purpose is protection of human rights, the prohibitions must be *erga omnes partes* as well as *erga omnes*.

At this juncture, it may fairly be asked how the *erga omnes* status of the right to life and of interdiction on genocide and, by necessary inference, the *erga omnes* status of the prohibition on mass atrocities, has any connection to this Article's proposal for recognition of a peoples' right to U.N. armed intervention to stop mass atrocities. The answer may be found in the scholarly literature advocating a legal duty to enforce *erga omnes* obligations.[131] A number of commentators have asserted that enforcement may include military force.[132] Most relevant, a few have

128. *See* TAMS, *supra* note 126, at 125 (emphasis added).

129. Vienna Convention, *supra* note 60, art. 31, ¶ 1.

130. *Id*.

131. *See*, *e.g.*, International Committee of the Red Cross, *Rule 144: Ensuring Respect for International Humanitarian Law Erga Omnes*, ICRC.ORG, https://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule144 (reciting the ICRC rule providing, in part, that states *must* exert their influence, to the degree possible, to stop violations of international humanitarian law which are all "norms *erga omnes*"); James Bacchus, *The Garden*, 28 FORDHAM INT'L L. J. 308, 331–32 (observing that *erga omnes* norms impose duties to enforce the same); Toope, *supra* note 115, at 193–94 (2000) (arguing that the Security Council has a duty to prevent genocide, an *erga omnes* crime); Christopher P. DeNicola, *Comments, A Shield for the "Knights of Humanity": The ICC Should Adopt a Humanitarian Necessity Defense to the Crime of Aggression*, 30 U. PA. J. INT'L L. 641, 658–59 (2008) (noting that some pundits urge that there is an *erga omnes* obligation to intervene militarily to stop massive human rights abuses); Amnesty International, *Chapter Five: Universal Jurisdiction: The Duty of States to Enact and Enforce Legislation*, at 13-14 https://www.amnesty.org/en/documents/ior53/008/2001/en/ (analyzing that because the prohibition on crimes against humanity is *jus cogens* and *erga omnes*, there is a duty to extradite or try persons suspected of their perpetration); M. Cherif Bassiouni, *International Crimes: Jus Cogens and Obligatio Erga Omnes*, 59 LAW & CONTEMP. PROBS. 63, 63 (Autumn 1996) (positing that, with respect to international crimes which are *obligato erga omnes*, there are multiple duties including duties to prosecute, extradite, suspend applicable statutes of limitations, and to exercise universal jurisdiction over perpetrators); *cf.* Peter Hilpold, *Humanitarian Intervention: Is There a Need for a Legal Reappraisal?*, 12 EUR. J. INT'L L. 437, 453 (2001) (opining that an *erga omnes* obligation under international humanitarian law could give rise to a duty on the part of states to engage in humanitarian intervention, but that making states the duty-holders would be illegal).

132. *See* Jost Delbrück, *The Impact of the Allocation of International Law Enforcement Authority on the International Legal Order*, *in* ALLOCATION OF LAW ENFORCEMENT AUTHORITY IN THE INTERNATIONAL SYSTEM 135, 152–53 (Jost Delbrück & Ursula E. Heinz eds., 1995) (maintaining that there is no basis in the U.N. Charter for denying that "states are bound to participate in forcible

posited that the existence of *erga omnes* human rights concomitantly creates a duty to intervene militarily to "prevent massive violations of human rights."[133] Based on the familiar axiom that where there is a duty, there is a right to have that duty fulfilled (and vice versa),[134] there may logically be inferred from that duty an *erga omnes* peoples' right to armed intervention to stop mass atrocities.

The *erga omnes* line of argument, it must be conceded, is not the sturdiest foundation for recognition of the proposed peoples' right. To begin with, the ICJ's creation of the *erga omnes* doctrine is a dictum the meaning of which is not at all certain.[135] Most of the scholarship about the dictum has confined discussion to the duty/right of nations, not of peoples or of the United Nations, to enforce *erga omnes* human rights.[136] And, there is scholarship repudiating any positive duty to enforce as arising from the doctrine,[137] let alone a peoples' right of the sort described here.

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collective action . . . as decided by the Security Council" to enforce *erga omnes* norms); TAMS, *supra* note 126, at 9 (remarking that international law scholar W. Michael Reisman has identified military intervention as a primary means for enforcing some *erga omnes* human rights norms); DeNicola, *supra* note 131, at 658–59 (referring to commentators who hold that there is an *erga omnes* obligation to intervene militarily to stop larger-scale human rights violations); *cf.* CARL WELLMAN, THE MORAL DIMENSIONS OF HUMAN RIGHTS 122–23 (2011) (suggesting that it is unsettled in international law whether states may use military force if the latter has not been authorized by the U.N. Security Council).

133. *See* Toope, *supra* note 119, at 193–94 (asserting that the U.N. Security Council may have a duty to enforce *erga omnes* prohibitions on genocide, including enforcement by "use of force"); *cf.* Hilpold, *supra* note 131, at 453 (offering that a legal duty to use humanitarian intervention to enforce *ergo omnes* obligations "could" exist); DeNicola, *supra* note 131, at 658-59 (mentioning that the Genocide Convention creates an *erga omnes* obligation to intervene militarily to prevent mass atrocities, and stating that some authorities seek "to extend this duty to other atrocities").

134. *See* Samantha Besson, *The Legitimate Authority of International Human Rights*, *in* THE LEGITIMACY OF INTERNATIONAL HUMAN RIGHTS REGIMES: LEGAL, POLITICAL AND PHILOSOPHICAL PERSPECTIVES 32, 75 (Andreas Føllesdal et al. eds., 2014) (describing international human rights as having "corresponding duties"); John Henry Knox, *Climate Change and Human Rights Law*, 50 VA. J. INT'L L. 163, 171 n.30 (2009) (stating that all human rights treaties impose duties); Jordan J. Paust, *The Other Side of Right: Private Duties Under Human Rights Law*, 5 HARV. HUM. RTS. J. 51, 56-62 (1992) (seeing private and state duties as the "other side of right").

135. TAMS, *supra* note 126, at 100; WOUTER G. WERNER, STATE SOVEREIGNTY AND INTERNATIONAL LEGAL DISCOURSE, *in* GOVERNANCE AND INTERNATIONAL LEGAL THEORY 125, 142 (Ige F. Dekker & Wouter G. Werner eds., 2004).

136. *See*, *e.g.*, ANDRÉ DE HOOGH, OBLIGATIONS *ERGA OMNES* AND INTERNATIONAL CRIMES: A THEORETICAL INQUIRY INTO THE IMPLEMENTATION AND ENFORCEMENT OF THE INTERNATIONAL RESPONSIBILITY OF STATES *passim* (1996); GLEIDER I. HERNÁNDEZ, THE INTERNATIONAL COURT OF JUSTICE AND THE JUDICIAL FUNCTION 227 (2014) (averring that the ICJ "clearly set *erga omnes* obligations within the traditional State-centric framework"); *but see* DARAGH MURRAY, HUMAN RIGHTS OBLIGATIONS OF NON-STATE ARMED GROUPS 146 (2016) (contending that when states cannot live up to obligations *erga omnes*, "the international legal order must intervene").

137. *See*, *e.g.*, ISABELLA D. BUNN, THE RIGHT TO DEVELOPMENT AND INTERNATIONAL ECONOMIC LAW: LEGAL AND MORAL DIMENSIONS 137 (2012) (pointing out that, as articulated in the *Barcelona Traction* case, *erga omnes* obligations were first conceived as negative in nature); *cf.* 3

The infirmities of the *erga omnes* argument must not, however, be understood to in any way undermine the more general legal argument otherwise advanced in this Part III.1.[138] The latter's reliance on commonplace legal analysis to deduce the peoples' right from more established human rights, stands completely on its own and without need of *erga omnes* reasoning. Indeed, I wrestled with whether to skip *erga omnes* altogether out of concern that the doctrine's presence would hurt rather than help the general argument, as a weak secondary theory may sometimes do. Nonetheless, on balance, it seemed worth the risk. At a minimum the *erga omnes* construct conveys the sacrosanctity of the prohibitions on taking life and on genocide, and the imperativeness of suppressing mass atrocities by providing a mechanism, like the proposed peoples' right, to reliably stop them.

INTERNATIONAL CRIMINAL LAW: INTERNATIONAL ENFORCEMENT 13 (M. Cherif Bassiouni ed., 2008) (stating that it is unsettled in international law as to whether *ergo omnes* doctrine imposes a right or a duty of enforcement).

138. *See supra* notes 97-115 and accompanying text.

2. Interconnection Between the Peoples' Right and Solidarity Human Rights

IHRL has often been thought of as divided into three non-hierarchical groups, called "generations," of rights. First-generation rights are civil and political; second-generation rights are social, economic, and cultural; and third-generation rights, also called "solidarity rights," are those distinguished as collectively held and collectively fulfilled.[139] The term "generation" is not meant to denote sets of rights successively superseding each other as happens over time in the plant and animal world; the three generations of human rights are conceived instead as coexisting with each other.

a. Intermezzo: Nature and Legal Status of Solidarity Rights

Solidarity rights are of particular interest to this Article. They include the right to peace,[140] the right to development,[141] and the right to a healthy or clean environment.[142] Though solidarity rights-holders are cohorts of

139. ANTHONY E. CASSIMATIS, HUMAN RIGHTS RELATED TRADE MEASURES UNDER INTERNATIONAL LAW: THE LEGALITY OF TRADE MEASURES IMPOSED IN RESPONSE TO VIOLATIONS OF HUMAN RIGHTS OBLIGATIONS UNDER GENERAL INTERNATIONAL LAW 40, n.101 (2007); Stephen P. Marks, *Emerging Human Rights: A New Generation for the 1980s?* 33 RUTGERS L. REV. 435, 441 (1981); Carl Wellman, *Solidarity Rights, the Individual and Human Rights*, 22 HUM. RTS. Q. 639, 641 (2000); Jason Morgan-Foster, *Third Generation Rights: What Islamic Law Can Teach the International Human Rights Movement*, 8 YALE HUM. RTS. & DEV. L. J. 67, 84–89 (2005) (adding a caveat that solidarity rights contain an individual-duty component); Natsu Taylor Saito, *Beyond Civil Rights: Considering "Third Generation" International Human Rights Law in the United States*, 28 U. MIAMI INTER-AM. L. REV. 387, 395–96 (1997).

140. *See* DOUGLAS ROCHE, THE HUMAN RIGHT TO PEACE 122–43 (2003) (making a persuasive case for the existence of a solidarity right to peace, though characterizing the right as "newly emerging"); Marks, *supra* note 139, at 445-46 (characterizing the solidarity right to peace as "one of the emerging rights of the 1980s"); William A. Schabas, *The Human Right to Peace*, *in* MAKING PEOPLES HEARD: ESSAYS ON HUMAN RIGHTS IN HONOR OF GUDMUNDUR ALFREDSSON 43, 43-48 (Asbjørn Eide et al. eds., 2011) [hereinafter PEOPLES HEARD] (presenting a compelling argument that the solidarity right to peace exists); de Zayas, *supra* note 108, at 27, 37–40 (calling the third-generation human right to peace hard international law of "paramount" importance); Adam Lopatka, *The Right to Live in Peace as a Human Right*, 11 SECURITY DIALOGUE 361, 365 (1980) (averring that the third-generation solidarity right to peace "[t]oday . . . is a law proclaimed by the UN" but is "not yet an internationally and legally established human right"); Philip Alston, *Peace as a Human Right*, 11 SECURITY DIALOGUE 319, 325, 328 (1980) (claiming that there is a human right to peace under international law, but expressing concern that the right's content had then not been fully defined).

141. Marks, *supra* note 139, at 444–45; Sohn, *supra* note 93, at 52–56.

142. Johan D. van der Vyver, *The Environment: State Sovereignty, Human Rights, and Armed Conflict*, 23 EMORY INT'L L. REV. 85, 93–94 (2009); *see* Jennifer A. Downs, Note, *A Healthy and Ecologically Balanced Environment: An Argument for a Third Generation Right*, 3 DUKE J. COMP. & INT'L L. 351, 376–78 (1993) (arguing for a third-generation right to a healthy and ecologically balanced environment).

people, the rights may also be concurrently held on an individual basis.[143] One analyst rather neatly dissected the intrinsic duality: "because collective rights are always ultimately destined for individuals, they are [also] ipso facto . . . individual rights."[144] Be that as it may, such rights-holders' juristic twin—the entities that are duty-bound to fulfill a solidarity right—must function in groups too, e.g., groups of countries, IGOs, and perhaps of other global or regional actors. A consortium of such respondents is, in each case, necessitated by the fact that rights of this ilk involve problems no single nation or individual actor has the capability of resolving alone.[145]

However, a threshold question remains as to whether solidarity rights are yet part of the canon of IHRL. A circle of eminent scholars on the subject are confident that solidarity rights are already extant legal rights.[146] Other experts maintain that solidarity rights are presently more in the nature of aspirations or moral pronouncements than of legal rights;[147] some of the latter offer as a rationale for this view that solidarity rights are not set forth in treaty form.[148] In between these two camps is still another which describes solidarity rights as "emerging" international legal rights.[149]

The first camp is easily the most persuasive. Decisive to this assessment is Article 38 of the Statute of the International Court of Justice,[150] which enumerates the valid sources of international law:

143. *Compare* de Zayas, *supra* note 112, at 40 (observing that the solidarity right to peace is exercised both individually and collectively) *and* Sohn, *supra* note 93, at 48, 58 (same), *with* Wellman, *supra* note 139, at 644 (alleging that solidarity rights are not individual rights).

144. Subrata Roy Chowdhury, *Intergenerational Equity: Substratum of the Right to Sustainable Development*, *in* THE RIGHT TO DEVELOPMENT IN INTERNATIONAL LAW 233, 246 (Subrata Roy Chowdhury et al., eds. 1992).

145. Roche, *supra* note 140, at 134; Marks, *supra* note 139, at 441.

146. *See*, *e.g.*, Sohn, *supra* note 93, at 57 (respecting the right to peace); Schabas, *supra* note 140, at 43–48 (regarding the right to peace); de Zayas, *supra* note 112, at 37–40 (concerning the right to peace); Alston, *supra* note 140, at 328 (regarding the right to peace).

147. *See*, *e.g.*, Burns H. Weston, *Human Rights*, *in* HUMAN RIGHTS IN THE WORLD COMMUNITY: ISSUES AND ACTION 14, 19-20 (Richard Pierre Claude & Burns H. Weston eds., 1992) (asserting that the majority of solidarity rights tend to be aspirational rather than juridical); Rebecca J. Cook, *U.S. Population Policy, Sex Discrimination, and Principles of Equality Under International Law*, 20 N.Y.U. J. INT'L & POL. 93, 115 (1987) (same).

148. *See*, *e.g.*, Lopatka, *supra* note 140, at 365 (arguing that the right to peace must be the subject of a treaty in order to become a "legally established human right").

149. *See*, *e.g.*, Roche, *supra* note 140, at 136 (referring to "newly emerging" third-generation rights); Marks, *supra* note 139, at 442–52 (characterizing a host of solidarity rights as "emerging"); A.A. Tikhonov, *The Inter-relationship Between the Right to Life and the Right to Peace; Nuclear Weapons and Other Weapons of Mass-Destruction and the Right to Life*, *in* THE RIGHT TO LIFE IN INTERNATIONAL LAW 97, 98–99 (B.G. Ramcharan ed., 1985) (referring to the right to peace as in "progressive development").

150. Statute of the International Court of Justice art. 38, June 26, 1945, 59 Stat. 1055, 33 U.N.T.S. 993.

treaties, customary international law, general principles of law recognized by civilized nations, judicial decisions, and "teachings of the most highly qualified publicists of the various nations," the last two sources constituting a "subsidiary means for the determination of rules of law."[151]

Solidarity rights are not, to date, customary international law.[152] But, the ones specified above are indisputably treaty law.[153] The solidarity rights to peace, economic development, and a healthy environment are expressly stated in major regional human rights treaties as well as in certain other multilateral treaties. For instance, the solidarity rights to peace, development, and an acceptable environment are all explicitly embraced in at least one major regional treaty, i.e., the African Charter on Human and Peoples' Rights,[154] and the solidarity right to development is also clearly contained in the multilateral International Labour Organization's Convention No. 169.[155] The foregoing instruments are binding treaties and the aforementioned solidarity rights are unambiguously set forth in them. It is thus plainly erroneous to claim that such rights cannot yet be part of IHRL because they are supposedly not in treaties.

This conclusion is bolstered by the fact that solidarity rights are also recognized as extant international legal rights by, as we have seen, publications of some of the "most highly qualified" international law scholars.[156] Further, some solidarity rights are recognized by judicial decision.[157] The European Court of Human Rights ("European Court"), arguably the world's most prestigious international human rights court, has ruled that the right to a healthy environment is, in effect, implied in Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("European Convention").[158] Article 8, paragraph 1 provides that "[e]veryone has the right to respect for his private and family life, his home and his correspondence."[159] In *Dubetska and Others v. Ukraine*, the applicants complained of a violation of this

151. *Id*.

152. *See*, *e.g.*, Downs, *supra* note 142, at 375 (stating that the solidarity right to a healthy environment does not qualify as customary international law).

153. *See infra* notes 153-68 and accompanying text.

154. African [Banjul] Charter on Human and Peoples' Rights, arts. 22–24, *adopted on* June 27, 1981, 21 I.L.M. 58 (1982) (entered into force Oct. 21, 1986).

155. Convention Concerning Indigenous and Tribal Peoples in Independent Countries art. 7, ¶¶ 1-2, *adopted on* June 1, 1989, 72 ILO Official Bull. 59 (entered into force Sept. 5, 1991).

156. *See supra* note 145 and accompanying text.

157. *See infra* notes 157-68 and accompanying text.

158. European Convention, *supra* note 71, art. 8, ¶ 1.

159. *Id*.

article due to a coal mine and factory operating near their residence, producing pollution levels which damaged applicants' health, living environment, and home.[160] The Court reiterated its established jurisprudence that "an arguable claim under Article 8 may arise where an environmental hazard attains a level of severity resulting in significant impairment of the applicant's ability to enjoy his home, private or family life."[161] The Court applied this principle in *Dubetska* to hold that the government's failure to rectify the applicants' situation violated Article 8.[162]

Likewise, the European Court has repeatedly ruled that various warlike acts committed during armed conflict, i.e., acts which are necessarily the antithesis of peace, constitute violations of European Convention provisions.[163] Just one of many examples is *Benzer and Others v. Turkey*, where applicants alleged that the Turkish military bombed their villages by aircraft so as to kill more than 30 of their close relatives, to physically injure some of the applicants, and to destroy most of their property and livestock.[164] The Court held, among other things, that the bombing violated European Convention Article 2 (right to life)[165] and Article 3 (prohibition on inhuman or degrading treatment).[166] Though the Court did not specifically discuss a human right to peace, the ruling that certain acts of war contravene these Convention provisions leads to an inevitable inference that applicants possessed a human right to be free of those acts. Support for the inference is contained in the Court's expatiation on the

160. Dubetska v. Ukraine, App. No. 30499/03, ¶¶ 24–30 (Eur. Ct. H.R. 2011), http://hudoc.echr.coe.int/eng?i=001-103273.

161. *Id*. at ¶ 105.

162. *Id*. at ¶¶ 109–23, 146–56.

163. *See*, *e.g.*, Tangiyeva v. Russia, App. No. 57935/00, ¶¶ 8–22, 96–101 (Eur. Ct. H.R. 2007), http://hudoc.echr.coe.int/eng?i=001-83578 (finding a substantive violation of European Convention article 2's protection of the right to life, caused by armed conflict resulting in shooting deaths); Esmukhambetov v. Russia, App. No. 23445/03, ¶¶ 150–51, 191 (Eur. Ct. H.R. 2011), http://hudoc.echr.coe.int/eng?i=001-104159 [hereinafter Esmukhambetov] (finding substantive violation of European Convention article 2 as well as violation of Convention article 3's prohibition on inhuman treatment, due to killings from indiscriminate bombings during armed conflict); Benzer v. Turkey, App. No. 23502/06, ¶¶ 7–19, 176–85, 209, 212–13 (Eur. Ct. H.R.) (2013), http://hudoc.echr.coe.int/eng?i=001-128036 [hereinafter Benzer] (holding that Turkey substantively violated article 2 of the European Convention by killing applicants' close relatives through aerial bombardments, and also holding that Turkey violated article 3 of the Convention by bombing applicants' homes so as to render them uninhabitable), *judgment revised on other grounds*, http://hudoc.echr.coe.int/eng?i=001-150231.

164. Benzer, *supra* note 163, at ¶¶ 7-19.

165. *Id*. at ¶¶ 176–85 (ruling that the bombing constituted a substantive violation of European Convention article 2).

166. *Id*. at ¶¶ 209, 212–13 (judging that it violated article 3 of the European Convention for government bombing to cause applicants to witness the violent deaths of close relatives and to collect and bury the remains of those victims).

legal principles governing Articles 2 and 3 in this context. The *Benzer* Court supplemented Article 2 with principles from the laws of war, announcing that use of force must be "strictly proportionate" to achieving any legal goals[167] and that accountability may attach for unintentional as well as intentional killings.[168] Similarly, the Court had no trouble finding that aerial bombing of applicants' residences so as to leave them homeless, a common part of war, was inhuman treatment contravening Article 3.[169] The Court's application of IHL governing armed conflict and its conclusions that discrete acts of war fit within the prohibitions of Articles 2 and 3, amounts to tacit recognition of applicants' implied solidarity right to peace under the European Convention.

In sum, the solidarity rights to peace, development, and a healthy environment are either set forth in treaties; recognized by the most highly esteemed international law experts and international courts; or all of the above. The outcome is that, as per the standards of Article 38 of the Statute of the International Court of Justice, these solidarity rights *are* IHRL.

It may be some added comfort to any doubting Thomases that the bigger picture is as consistent with this conclusion as the analytical minutiae. It is myopic to the point of distortion to regard human rights as static over time or as rigidly compartmentalized. Human rights law is kinetic; it tends to respond with new protections to new historical events and to humankind's expanding knowledge.[170] For example, the contemporary inception of this body of law was, in large part, a response to the atrocities of the Holocaust and World War II.[171] Moreover, human rights are kinetic in relation to each other, operating interdependently and reciprocally vis-à-vis development of their content.[172] Solidarity rights,

167. Benzer, *supra* note 163, at ¶ 163.

168. *Id*. at ¶ 184.

169. *Id*. at ¶ 212.

170. *See* Marks, *supra* note 139, at 436 (referring to the "dynamic aspect of human rights . . . in international law"); Scott Sheeran & Sir Nigel Rodley, *The Broad Review of International Human Rights Law*, *in* ROUTLEDGE HANDBOOK OF INTERNATIONAL HUMAN RIGHTS LAW 3, 3 (Scott Sheeran & Sir Nigel Rodley eds., 2013) (describing international human rights law as dynamic and marked by impressive growth); CRISTINA GABRIELA BADESCU, HUMANITARIAN INTERVENTION AND THE RESPONSIBILITY TO PROTECT: SECURITY AND HUMAN RIGHTS 33 (commenting that the "international human rights regime has grown in width and depth" and is evolving); *cf.* Sohn, *supra* note 93, at 1–6 (tracing some of the developments in international human rights law over time).

171. University of Minnesota, Human Rights Here and Now: Celebrating the Universal Declaration of Human Rights, Part 1: Human Rights Fundamentals, A Short History of Human Rights (Nancy Flowers ed.), http://hrlibrary.umn.edu/edumat/hreduseries/hereandnow/Part-1/short-history.htm.

172. Sohn, *supra* note 93, at 62–63.

building on the right to life, etc., partake of this shared ontogeny.

b. Correspondence Between the Peoples' Right and the Solidarity Rights Category

Having defined the category of solidarity rights and confirmed the existence of at least three of them as law, the question next arises concerning whether a peoples' right to U.N. armed intervention to stop mass atrocities, should be among their number. The constitutive attributes of this right, as conceived here, are on all fours with the constitutive attributes of solidarity rights in general. That is, the holders of the proposed right would be any group of people subjected or imminently about to be subjected to mass atrocity;[173] and the group would seek cessation of the atrocity, or of its commencement, through the remedy of armed concerted action authorized by the U.N.[174]

At first glance, casting the U.N. in the role of duty-holder may seem to ignore the solidarity rights paradigm as entailing fulfillment by the cooperative actions of multiple actors, i.e., assemblages of nations, IGOs, NGOs, and/or individuals.[175] The divergence, though, is one of degree rather than kind. The duty-bearer regarding this right is, after all, an IGO whose membership consists of almost all of the world's countries.[176]

It may also be objected that none of the three major solidarity rights discussed earlier explicitly name a mandated means for their fulfillment while the right proposed in this Article unequivocally does so in calling for U.N. armed intervention.[177] But, does this dissimilarity make the new right inappropriate for inclusion among solidarity rights? The answer must be no. By definition, the three major solidarity rights—to peace, economic development, and a healthy environment—do prescribe means of fulfillment insofar as they each require collectives to fulfill the rights.[178]

An additional snag in trying to slot the proposed right under the solidarity rights rubric might be the fact that fulfillment of the former would entail the use of force, i.e., U.N. or U.N. authorized military intervention. None of the aforementioned three solidarity rights demands

173. The proposal in the text above is my own original invention.
174. The proposal in the text above is my own original invention.
175. *See supra* note 138 and accompanying text.
176. As of December 2015, member countries of the United Nations numbered 193. *See* GENERAL ASSEMBLY OF THE UNITED NATIONS, www.un.org/en/ga/#.
177. *See supra* notes 139-44 and accompanying text; *see infra* notes 177-80 and accompanying text.
178. *See supra* note 138 and accompanying text.

this form of relief,[179] and it may seem that the solidarity right to peace, in particular, should contraindicate any right to humanitarian intervention by blue-helmet attack. Nevertheless, things are not always what they seem. It should be noted that, overall, "human rights law has never been pacifistic, in the sense of a principled and intransigent opposition to the use of force under all circumstances."[180] The wisdom of this insight is borne out by simple logic because armed force is *not always and intrinsically* destructive of peace. Instead, the relation of armed force to peace depends on the purpose for which the force is deployed, and that purpose is quintessentially a political and moral decision. In other words, the gun may either enable the dove or hunt it down. While the historical instances of armed force enabling peace do not overwhelm, that they exist at all makes the point.[181]

This more pragmatic approach of making a military solution the sometime surety for peace, is on conspicuous display in international law. We need look no further than the U.N. Charter's Article 42 which empowers the Security Council, under certain conditions, to "take . . . action by air, sea, or land *forces* as may be necessary to maintain or restore international *peace* and security."[182] U.N. armed intervention is linguistically and substantively subsumed by Article 42's language, and the Security Council has repeatedly acted upon that assumption.[183]

It turns out that, on closer inspection, there is really nothing heterodox or contradictory about enrolling in the solidarity rights roster a peoples' right to U.N. armed intervention to stop mass atrocities. That it is so, however, does not yet deal with the issue of whether there are acceptable legal foundations for the right—a subject which this Article now directly addresses.

c. The Peoples' Right Is Implicit in the Solidarity Right to Peace

179. *See supra* note 177 and accompanying text.

180. Schabas, *supra* note 140, at 50.

181. For example, today's relative peace in the Balkans undoubtedly was facilitated by NATO's use of armed force in the then roiling region. *NATO's Role in Relation to the Conflict in Kosovo*, NATO, www.nato.int/kosovo/history.htm.

182. U.N. Charter, *supra* note 31, art. 42.

183. *See*, *e.g.*, Council on Foreign Relations, *CFR Backgrounders*, www.cfr.org/international-organizations-and-alliances/un-security-council-unsc/p31649 (noting that the Security Council has authorized 51 peacekeeping operations since the Cold War's end, and that some of those with "more muscular mandates" have "combined military operations—including less restrictive rules of engagement that allow for civilian and refugee protection"; and, noting further that increasingly the Council has authorized use of force by regional organizations for humanitarian purposes).

As discussed previously, there is no intrinsic antithesis between the right to peace and a right to armed intervention to stop mass atrocities. At least in the present era, armed force is sometimes the only way to a peace which would otherwise be impossible. That on too many occasions armed force has failed to achieve this objective speaks only to shortcomings in implementation, not to the potential instrumentality of arms in aid of peace.[184] The analytical takeaway, in legal terms, is that when mass atrocity has commenced or is about to commence and non-violent deterrence is of no avail, then there must be an implied right to such armed intervention; otherwise, peace will be unattainable at the very moment when attainment is most essential. Thus, using standard deductive methodology, there is a bona fide legal basis for recognizing that the human right to peace inferentially gives rise to a right to U.N. armed intervention to stop mass atrocities, i.e., to maintain peace in violent situations where there are no non-violent solutions.

This interpretation of solidarity rights and particularly the solidarity right to peace is, I think, a development whose time has come. Though the proposed peoples' right to armed intervention has not received much of a hearing in scholarly legal literature, a lone commentator or two has used the argot of solidarity rights in hovering around the concept. In an article about an alleged nascent right to humanitarian assistance for purposes of restoring democracy, Lois Fielding claims that the United Nations' right and duty to provide armed humanitarian assistance to stop atrocities "is based in the strength of the solidarity of humanity";[185] elsewhere in the article she refers to the "right of a *population* to be free from internal as well as external aggression."[186] It is intriguing that, if she had considered these two rights in direct interrelationship with each other, a variation on the peoples' solidarity right to U.N. armed intervention to stop mass atrocities theoretically might have resulted.

B. Bases in Jus In Bello, i.e., in International Humanitarian Law

Jus in bello ("international humanitarian law" or "IHL") and IHRL are separate bodies of international law (though they have recently begun to

184. The paradigmatic case is when U.N. peacekeepers were unable to stop genocide in 1994 Rwanda because of initial limits on the scope of the mission and a shocking shortfall in troops and *matériel*. DALLAIRE, *supra* note 20, at 41–42, 207–08.

185. Lois E. Fielding, *Taking the Next Step in the Development of New Human Rights: The Emerging Right of Humanitarian Assistance to Restore Democracy*, 5 DUKE J. COMP. & INT'L L. 329, 355 (1995).

186. *Id*. at 330.

merge in some respects).[187] IHL applies only in times of armed conflict, IHRL applies during both war and peace.[188] Jus in bello protects only limited classes of people during armed conflict, i.e., people who are not or are no longer participating in hostilities. These consist of sick, wounded and shipwrecked persons not taking part in hostilities, prisoners of war and other detainees, and civilians.[189] IHRL, in contrast, protects all people. Thus, members of the IHL cohorts are rights-holders under jus in bello while every individual is a rights-holder under IHRL.[190]

It is my contention that IHL should implicitly give rise to a peoples' right to U.N. armed intervention to stop mass atrocities just as IHRL does. As early as 1981, Professor Stephen Marks asserted that, the "right to humanitarian assistance already exist[ed] as a legal right in international humanitarian law."[191] The law review article containing this statement does not expressly refer to "armed" assistance, but it also does not expressly exclude use of physical force in aid of saving people from "death on a wide scale." As authority for the assertion, the article cites the Geneva Conventions of 1949[192] and their Additional Protocols,[193] providing for the care of the wounded, sick, and shipwrecked, prisoners of war, and civilians. Marks stressed that the Conventions' *rights* to such care are absolute, so much so that the beneficiaries cannot renounce them.[194] While he took the position that the rights under these instruments must be fulfilled by states parties, he extrapolated that the "idea of a right to international humanitarian assistance would go beyond these instruments, while incorporating certain provisions of them."[195] This is an arresting analysis; it is but the tiniest of steps from this analytical foothold to the conclusion that the Geneva Conventions of 1949 and Additional Protocols,

187. Orna Ben-Naftali, *Introduction: International Humanitarian Law and International Human Rights Law—Pas de Deux*, *in* INTERNATIONAL HUMANITARIAN LAW AND INTERNATIONAL HUMAN RIGHTS LAW PAS DE DEUX 3, 4 (Orna Ben-Naftali ed., 2011).

188. International Committee of the Red Cross, *IHL and Human Rights*, https://www.icrc.org/en/war-and-law/ihl-other-legal-regimies/ihl-human-rights.

189. *Id*.

190. Paola Gaeta, *Are Victims of Serious Violations of International Humanitarian Law Entitled to Compensation?*, *in* INTERNATIONAL HUMANITARIAN LAW AND INTERNATIONAL HUMAN RIGHTS LAW PAS DE DEUX 305, 318 (Orna Ben-Haftali ed., 2011).

191. Marks, *supra* note 139, at 449–50.

192. *See*, *e.g.*, Geneva Convention for the Amelioration of the Condition of the Wounded and Sick art. 7, Aug. 12, 1949, 6 U.S.T. 3115, T.I.A.S. No. 3362.

193. International Committee of the Red Cross, Protocol Added to the Geneva Convention of Aug. 12, 1949, at 11, 95 (1977).

194. Marks, *supra* note 139, at 450.

195. *Id*; *see* Sohn, *supra* note 93, at 60.

central components of IHL, implicitly give rise to the proposed peoples' right to U.N. armed intervention to stop mass atrocities.

C. Bases in Jus Ad Bellum

Jus ad bellum is the third area of international law which may serve as a legal underpinning for a peoples' right to U.N. armed intervention to stop mass atrocities. Jus ad bellum is the law governing the reasons for going to war, and the U.N. Charter is the source of that law.[196] Under jus ad bellum *aggressive* use of armed force is forbidden.[197] This prohibition is jus cogens, a preemptory norm which can only be overridden by a contrary jus cogens norm.[198] There are, generally speaking, five types of aggressive attacks which run afoul of the prohibition: full-scale invasion, secret warfare (indirect aggression), creation of a parallel state within a state, terrorism, and indiscriminate mining of international waterways.[199] As the enumeration implies, jus ad bellum does not impose a total ban on all use of armed force.[200] Modern jus ad bellum excludes from the prohibition self-defense and the use of armed force under the Security Council's Chapter VII powers.[201]

It is the latter powers which are germane here. One is Security Council authorization of armed force in accordance with the prerequisites of Charter Articles 39 and 42, i.e., there must be a threat to peace, breach of peace, or act of aggression, and measures not involving use of armed force would be inadequate or have been proven so.[202] Article 42 additionally describes the purpose for which authorized armed force may be deployed: to maintain or restore international peace and security.[203] Though this is the sole permissible purpose, the statement of it leaves ambiguities. Does Article 42, for example and most pertinently, countenance U.N. armed interventions to stop mass atrocities?

The answer requires not only scrutiny of Articles 39 and 42, but also

196. International Committee of the Red Cross, *IHL and Other Legal Regimes*, https://www.icrc.org/eng/war/ihl-other-legal-regimies/jus-in-bello-jus-in-bello.htm; BRIAN OREND, THE MORALITY OF WAR 33 (2d ed., 2013).

197. U.N. CHARTER, *supra* note 31, art. 2, ¶ 4; *see e.g.*, Stephan Sonnenberg, *Why Drones Are Different*, *in* PREVENTIVE FORCE: DRONES, TARGETED KILLING, AND THE TRANSFORMATION OF CONTEMPORARY WARFARE 115, 120 (Kerstin Fisk & Jennifer M. Ramos eds., 2016).

198. JOHN NORTON MOORE & ROBERT F. TURNER, NATIONAL SECURITY LAW 70 (2005).

199. John Norton Moore, *Jus Ad Bellum Before the International Court of Justice*, 52 VA. J. INT'L L. 903, 907–08 (2012).

200. *Id*. at 904.

201. *Id*.; Mirko Bagaric & John R. Morss, *Transforming Humanitarian Intervention From an Expedient Accident to a Categorical Imperative*, 30 BROOK. J. INT'L L. 421, 449 (2005).

202. U.N. CHARTER, *supra* note 31, arts. 39, 42.

203. *Id*. art. 42.

consideration of Charter Article 55 which commits the United Nations to, among other things, promoting "universal respect for, and observance of, human rights and fundamental freedoms for all."[204] This commitment is, according to the Charter, one of the four overarching purposes of the United Nations as an institution—no mean distinction.[205] Hence, reading the Charter as a whole, as the Vienna Convention counsels, the Security Council is invested with the power under Article 42 of Chapter VII to deploy armed force for the end of upholding human rights where violation of those rights is a threat to or breach of the peace or an act of aggression. Since, it will be recalled, mass atrocities are necessarily comprised of multiple violent human rights violations, then Security Council authorization of armed interventions to stop mass atrocities will usually comport with this template.[206]

Helpful though the foregoing analysis should be to this Article's agenda, it does not bring us any closer to discovering in jus ad bellum an implied *peoples' right* to such interventions. As presently construed, the Security Council's power under Charter Article 42 still seems wholly discretionary; the provision's wording imposes no obligation on the Council to authorize any armed intervention, even to halt the most sickening and massive human rights violations. The unadorned language of Article 42 leaves no doubt on this score, delineating forcible measures which the Security Council "*may take*" and the conditions under which they may be taken.

Nevertheless, the plain meaning rule, so sensible and familiar in American statutory construction, is not the end of the story when a treaty like the Charter is being interpreted. Reverting once more (and with apologies for the repetition) to Article 31 of the Vienna Convention,[207] "[a] treaty *shall* be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose," with "context" comprising, in addition to the text, a treaty's preamble and annexes.[208] Ergo, Charter Article 42 has to be interpreted in keeping with these directives; legally, there is no latitude to ignore the Charter's overall object and purpose, its full text, or its preamble, if they have any bearing on Article 42's interpretation.

204. *Id*. art. 55(c).
205. *Id*. art. 1, ¶ 3.
206. Gassama, *supra* note 1, at 734.
207. Vienna Convention, *supra* note 60, art. 31.
208. *Id*.

In this case, the Charter's object and purpose, text, and preamble[209] have a significant bearing on the meaning of Article 42. As was touched upon previously, one of the four stated purposes of the United Nations and the Charter is set forth in Article 1, paragraph 3 as "promoting and encouraging respect for human rights."[210] The centrality of this object to the Charter is confirmed by Articles 55 and 56 of the instrument, each of which, respectively, commits the United Nations and all member nations to furthering human rights.[211] The preamble prominently reaffirms the commitment as well.[212] So, it is both the purpose and object of the Charter as well as a legal duty contained within it to champion human rights.

But, can one extrapolate from the United Nations' duty to promote human rights a Security Council duty to authorize armed interventions to stop mass atrocities, i.e., massive human rights abuses? In order to answer this key question, there must be taken into account not only the Charter's repeated embrace and extolment of human rights, but also some as yet untapped Charter verbiage declaring that, for purposes of implementing the Charter's goals, "armed force shall not be used, save in the common interest."[213] Whatever else "the common interest" may be, it must include upholding human rights in keeping with Charter Article 1, paragraphs 3 and 4.[214] Not only does paragraph 3 make human rights a primary rationale for the United Nations' existence, but paragraph 4 makes the institution "a center for harmonizing the actions of nations in the attainment of *these common ends*."[215] Linguistically, the phrase "these common ends" encompasses paragraph 3's commitment to human rights and is synonymous, or nearly so, with "the common interest" which the preamble makes the *sine qua non* of U.N. authorized armed force. The upshot is that *if* the Security Council authorizes use of armed force pursuant to Article 42, the Council must adhere to the caveat that the use be for the common interest which includes upholding human rights.

However, the devil is in the detail of that "if." I employ the preposition intentionally to signify that, despite my keenest wishes, the "common ends" clause has still not made for a Security Council duty to authorize armed humanitarian interventions. What may save the analytical progression from becoming a wild goose chase is yet another Charter provision—Article 24, paragraphs 1 and 2 which provide:

209. U.N. CHARTER, *supra* note 31, at preamble.
210. *See supra* note 67 and accompanying text.
211. U.N. Charter, *supra* note 31, arts. 55, 56.
212. *Id*. at preamble.
213. *Id*.
214. *Id*. art. 1, ¶¶ 3–4.
215. *Id*. (emphasis added).

> 1. In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out *its duties* under this responsibility the Security Council acts on their behalf.
> 2. In discharging *these duties* the Security Council shall act in accordance with the Purposes and Principles of the United Nations. The specific powers granted to the Security Council for the discharge of *these duties* are laid down in Chapters VI, *VII*, VIII and XII.[216]

Reading the two paragraphs together, the Security Council's Article 42 power to use force, a Chapter VII power, is for the discharge of Council duties; and, since there is a Council duty to maintain international peace and security, the Article 42 power may also rise to the level of a Council duty where there are no other means of assuring that peace and security.[217] Put less reductively and considering that stopping mass atrocities is one way of maintaining peace and security,[218] Articles 24 and 42 arguably further impose a *duty* on the Council to authorize armed force to stop calamitous human rights violations including mass atrocities. This conclusion becomes virtually unavoidable when Articles 24 and 42 are infused with the other Charter provisions discussed above, i.e., the Preamble and Articles 1, 55 and 56.[219] Finally, from the common maxim that duties give rise to rights,[220] it should be all but in the stars that under jus ad bellum a peoples' right to U.N. armed intervention to end mass atrocities ensues.

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216. *Id*. art. 24, ¶¶ 1–2 (emphasis added).

217. *See* Toope, *supra* note 119, at 193–94 (seeing U.N. Charter article 24, paragraph 1 as placing a duty on the Security Council to maintain peace and security and to prevent genocide); Andreas Zimmermann, *The Obligation to Prevent Genocide: Towards a General Responsibility to Respect*, *in* FROM BILATERALISM TO COMMUNITY INTEREST: ESSAYS IN HONOUR OF JUDGE BRUNO SIMMA 629, 639 (Ulrich Fastenrath et al. eds., 2011) (construing U.N. Charter article 24 as mandating that the Security Council must "react . . . in some way" when genocide, crimes against humanity, or war crimes have been perpetrated so as to threaten peace); *cf.* Gassama, *supra* note 1, at 731–38 (contending that the Security Council has a duty to authorize armed intervention to stop mass atrocities, but without relying on U.N. Charter article 24); Nico Krisch, *Legality, Morality and the Dilemma of Humanitarian Intervention After Kosovo*, 13 EUR. J. INT'L L. 323, 333 (2002) (advocating, on moral and philosophical grounds, a Security Council duty with respect to humanitarian intervention); Fielding, *supra* note 1, at 355–56 (looking to U.N. Charter article 24 as a basis for the Security Council to provide humanitarian assistance).

218. *See supra* pp. 257-263.

219. *See supra* notes 201-16 and accompanying text.

220. *See supra* note 133 and accompanying text.

D. Reprise

Three separate juridical bases are laid out above, any one of which independently supports recognition of a peoples' right to U.N. armed intervention to stop mass atrocities. Of the three, the analyses founded on IHRL and jus in bello are probably the most persuasive, though the jus ad bellum basis is viable and should be taken seriously. Each basis' analytical role is the result of straightforward lawyering; methodologically, the analyses are truly unremarkable. Moreover, that there are not one, but rather multiple sound legal bases should put international lawmakers on notice that the proposed peoples' right has lain dormant for long enough—a right which we ignore at the peril of atrocities' future victims and of our own consciences.

IV. PROPOSED REFORMS AT THE UNITED NATIONS TO MAXIMIZE EFFECTIVENESS OF A PEOPLES' RIGHT TO U.N. AUTHORIZED ARMED INTERVENTION TO STOP MASS ATROCITIES

Throughout this Article, a peoples' right to armed intervention to stop mass atrocities has been promoted with the conviction that productive enforcement would fare best with new procedures and processes at the U.N. I have deferred identifying these mechanisms until policy and legal bases for recognition of the right were established. That done, it is now appropriate to articulate the mechanisms and investigate how the United Nations should be modernized to incorporate them in accommodation of the peoples' right.

Before proceeding, however, I wish to make perfectly clear that the following catalogue of proposed reforms is not meant to suggest the least animus towards the U.N. There is no gainsaying its tremendous contributions on behalf of peace, security, and human rights,[221] and there is no comprehending how many people would have been left hobbled in their personal lives or cut down altogether without U.N. assistance. These facts are not negated by accepting that the U.N. also has made egregious mistakes along the way and is crippled by structural weaknesses, the most crucial of which allows the domination of big-power politics in the Security Council. In acknowledgment of the institution's importance, complexity and paradoxes, this Article therefore adopts an attitude towards it of critical but most vigorous support.

The first mechanism needed to facilitate the proposed right regards

221. *See United Nations Seventieth Anniversary*, UNITED NATIONS, www.un.org/un70/en/content/70ways.

how actual or soon-to-be victims of mass atrocities would assert the right before the U.N. in order to trigger the latter's attention and decision-making processes about a particular occurrence of mass atrocity. This Article urges that a new class of U.N. special rapporteurs should be created for the purpose. As things stand, the U.N. currently has a battery of country and thematic rapporteurs whose job, among other things, is to be notified of, investigate, monitor, and report on certain human rights violations and to pressure the offenders to cease engaging in the illegal conduct.[222] Each country rapporteur oversees the human rights situation in a particular nation while each thematic rapporteur oversees treatment of a particular human rights topic around the world.[223] There are, to date, over 40 thematic rapporteurs; none of them have a mandate focused on mass atrocities and/or the need for armed intervention to stop the atrocities.[224]

The recommended new class of special rapporteurs would be thematic special rapporteurs in terms of their geographical reach, i.e., anywhere in the world that a problem within the rapporteur's subject-matter jurisdiction manifests.[225] Like existing thematic special rapporteurs, who either operate singly or in a designated group, these would oversee a distinct human rights theme and that theme would be mass atrocities, including procuring U.N. action to terminate the atrocities. (For ease of reference going forward, mass atrocity special rapporteurs are hereinafter denominated as "MASRs."). For MASRs to be effective, there would need to be enough of them so that they could attend to such incipient and full-blown catastrophes wherever they materialize, a responsibility which could conceivably entail working individually or as a unit of all or some MASRs with respect to each occurrence.

Though I may be the first to suggest that there should be new thematic mandates and rapporteurs on mass atrocities, commentators have

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222. *See* UNITED NATIONS HUMAN RIGHTS OFFICE OF THE HIGH COMMISSIONER, SPECIAL PROCEDURES OF THE HUMAN RIGHTS COUNCIL, www.ohchr.org/EN/HRBodies/SP/Pages /Introduction.aspx (explaining the Special Procedures of the Human Rights Council as "independent human rights experts with mandates to report and advise on human rights from a thematic or country-specific perspective"). As of this writing, there are 41 thematic experts, also called "rapporteurs" among other titles, each of whom is responsible for a different human rights issue. UNITED NATIONS HUMAN RIGHTS OFFICE OF THE HIGH COMMISSIONER, THEMATIC MANDATES, spinternet.ohchr.org/_Layouts/SpecialProceduresInternet/ViewAllCountryMandates.aspx?Type=TM. As of this writing, there are 14 country rapporteurs each of whom oversees the human rights situation, whatever the issue, in a particular assigned country. UNITED NATIONS HUMAN RIGHTS OFFICE OF THE HIGH COMMISSIONER, spinternet.ohchr.org/_Layouts/SpecialProceduresInternet/ViewAllCountry Mandates.aspx.

223. *Id*.

224. *Id*.

225. *Id*.

periodically proposed that the United Nations should appoint additional rapporteurs on other themes.[226] There is, in fact, nothing aberrant in proposing an increase in the numbers of rapporteurs or in human rights topics for them to oversee. The U.N. Human Rights Council has done this fairly regularly.[227] For example, as recently as 2015, the Council established three new thematic mandates involving a total of seven additional rapporteurs.[228]

MASRs ideally would be charged with such responsibilities as: receiving information about any relevant occurrences or threats; pro-actively gathering information about the same on the ground or otherwise; where possible, issuing urgent appeals to perpetrators or would-be perpetrators that they must immediately refrain from beginning or continuing mass atrocities; notifying the U.N. Human Rights Council and Security Council of all real occurrences or imminent threats of mass atrocity; and, above all, demanding in appropriate cases that the Security Council immediately determine whether to authorize armed intervention to stop the atrocities from beginning or continuing.[229] Of course, the definition of "immediately," as applied to the Security Council decision-making process under Charter Article 42, would need to be pinned down. Security Council members will not be happy about a directive to act with speed, but the invariable imperativeness of a quick determination—with

226. *See* Kevin Boyle & Sigmund Simonsen, *Human Security, Human Rights and Disarmament*, *in* 3 DISARMAMENT FORUM 5, 13 (Kerstin Vignard ed., 2004) (reiterating proposal "for a separate [U.N.] special rapporteur or expert to examine the vital question of military disarmament, human rights and lasting peace"); *cf.* Bertrand Ramcharan, *Human Rights and Human Security*, *in* 39 DISARMAMENT FORUM 39, 45 (2004) (raising whether the United Nations should develop "rapidly deployable contingents of . . . observers . . . to trouble spots where the deployment might serve to mitigate the excesses of conflict").

227. *See* UNITED NATIONS HUMAN RIGHTS OFFICE OF THE HIGH COMMISSIONER, THEMATIC MANDATES, *supra* note 222 (showing the dates on which the Human Rights Council established new thematic mandates); *See also* Surya P. Subedi, *Human Rights Experts in the United Nations: A Review of the Role of United Nations Special Procedures*, *in* THE ROLE OF "EXPERTS" IN INTERNATIONAL AND EUROPEAN DECISION-MAKING PROCESSES 241, 245 (Monika Ambrus et al. eds., 2014) (advising that "[o]ver time, an increasing number of Special Rapporteurs, Independent Experts and Working Groups have been appointed").

228. In 2015, the Human Rights Council established a thematic mandate on people of African descent and appointed a five-person working group to monitor it; a thematic mandate on human rights of people with albinism, with one rapporteur; and a thematic mandate on the right to privacy, also with one new rapporteur. UNITED NATIONS HUMAN RIGHTS OFFICE OF THE HIGH COMMISSIONER, THEMATIC MANDATES, *supra* note 222.

229. Many of the Mass Atrocities Special Rapporteurs' (hereinafter MASRs) responsibilities, envisioned in the text above, are the same as or similar to the responsibilities already shouldered by existing thematic special rapporteurs or experts. *See* UNITED NATIONS HUMAN RIGHTS OFFICE OF THE HIGH COMMISSIONER, SPECIAL PROCEDURES OF THE HUMAN RIGHTS COUNCIL: INTRODUCTION, www.ohchr.org/EN/HRBodies/SP/Pages/Welcomepage.aspx (listing typical duties of U.N. special rapporteurs, but also noting that "[t]heir tasks are defined in the resolutions creating or extending their mandates").

lives hanging in the balance—should justify giving less preference to diplomatic niceties.

If instituted as an adjunct to the proposed peoples' right, MASRs would complement, support, and enhance other resources recently put in place at the U.N. to combat mass atrocities more effectively.[230] For example, the organization now has a Special Adviser on the Responsibility to Protect and a Special Adviser on the Prevention of Genocide;[231] the two jointly head an office tasked with, among other things, alerting other U.N. personnel to the risk of genocide, war crimes, ethnic cleansing, and crimes against humanity, and improving U.N. capacity to prevent these depredations.[232] Although it was hoped that these Special Advisers would have superior access to data about actual trouble spots on the ground, which, in turn, would allow them to give an early warning to the Security Council that a mass atrocity was in the making, the U.N.'s internal rules and culture have made the Special Advisers nearly futile in preventing atrocities.[233] Critics of the arrangement have highlighted that the Special Advisers have no right to appear before the Security Council,[234] a deficiency compounded by the fact that the Council, for its part, has not been receptive to hearing from them.[235] Moreover, the Special Advisers have no mandate to spend time in looming crisis zones so as to unearth warning signs of impending mass atrocities;[236] nor do the Special Advisers even have access to pertinent information collected by other U.N. subdivisions which apparently tend to act like jealous fiefdoms when it comes to sharing evidence.[237]

In an effort to learn from these deficiencies, this Article proposes that MASRs should be *entitled* to appear before the Security Council whenever, in the rapporteur's judgment, it would be advisable for that body to authorize armed intervention to stop mass atrocities. And, as was intimated previously, MASRs should be under a definite mandate to spend

230. *See infra* notes 229-35 and accompanying text.

231. UNITED NATIONS, OFFICE OF THE SPECIAL ADVISER ON THE PREVENTION OF GENOCIDE, www.un.org/en/preventgenocide/adviser/.

232. *Id*.

233. HEHIR, RESPONSIBILITY, *supra* note 2, at 92–103; Aidan Hehir, *An Analysis of Perspectives on the Office of the Special Adviser on the Prevention of Genocide*, 5 GENOCIDE STUDIES AND PREVENTION: AN INTERNATIONAL JOURNAL 258 *passim* (2010) [hereinafter Hehir, *Special Adviser*].

234. Hehir, *Special Adviser*, *supra* note 233, at 270–71.

235. HEHIR, RESPONSIBILITY, *supra* note 2, at 98–99; Hehir, *Special Adviser*, *supra* note 233, at 266.

236. Hehir, *Special Adviser*, *supra* note 233, at 261.

237. *Id*. at 266.

time in the field so as to discover any alarming symptomology.[238] Finally, like other U.N. Special Rapporteurs, MASRs should be appointed to this role only if they possess the requisite expertise and have a stature demonstrating their capacity for reliable exercise of judgment informed by long experience.[239]

This scheme for creating and using MASRs should be a required route, though not necessarily the only route, by which people could assert the right to U.N. armed intervention to stop mass atrocities; the intent here is not to restrict opportunities to assert the right. The MASR set-up would have a dual role, on behalf of both the right-holders and the duty-bearer. The right-holders, people in the midst of or imminently facing mass atrocity, would have the lifeline of MASRs personnel who are especially credible on and dedicated to stopping mass atrocities, and who would have special access to U.N. decision-making bodies concerning armed intervention.[240] The duty-bearer, the United Nations, would benefit from the MASRs' informed decision-making in bringing before the Security Council only those situations genuinely warranting armed intervention.

A second reform which should ideally accompany recognition of a peoples' right to U.N. armed intervention to stop mass atrocities, is removal of the veto power from each of the Security Council's five permanent members ("P5") solely in connection with decisions about armed intervention to stop mass atrocities.[241] It is well known that the veto has enabled big-power politics to dictate the direction of numerous Council deliberations in the past.[242] But, given the P5s' diverse national interests and agendas, the veto power is unlikely to be relinquished voluntarily—even respecting just one issue.

There are political-legal impediments to relinquishment as well. Charter Article 27, paragraph 3 requires an affirmative vote of nine Security Council members, including the concurring votes of the P5, on all non-procedural matters; and, partial abrogation of the veto is

238. *See supra* notes 227, 231, 234-35 and accompanying text.

239. UNITED NATIONS HUMAN RIGHTS OFFICE OF THE HIGH COMMISSIONER, SPECIAL PROCEDURES OF THE HUMAN RIGHTS COUNCIL, www.ohchr.org/EN/HRBodies/SP/Pages/Introduction.aspx.

240. *See supra* notes 235-73 and accompanying text.

241. *See* Richard Falk, *Humanitarian Intervention After Kosovo*, *in* HUMAN RIGHTS & CONFLICT: EXPLORING THE LINKS BETWEEN RIGHTS, LAW, AND PEACEBUILDING 185, 203–04 (Julie Mertus & Jeffrey W. Helsing eds., 2006) (suggesting that the veto held by the P5 should be "restrict[][ed]"); Alexander Benard & Paul J. Leaf, *Notes*, *Modern Threats and the United Nations Security Council: No Time for Complacency (A Response to Professor Allen Weiner*), 62 STAN. L. REV. 1395, 1436 (2010) (summarizing that in recent years, scholars and policymakers have viewed the Security Council as in need of reform and have proposed "abolish[ing] or limit[ing] the veto power of the P5").

242. *See supra* notes 19, 86 and accompanying text.

unquestionably non-procedural.[243] Thus, because the provision demands P5 concurrence,[244] any abridgement of the veto is a sure nonstarter. Should the contraction also necessitate a Charter amendment, a similar difficulty would arise inasmuch as article 108 prescribes P5 ratification.[245]

Assuming that the veto is here to stay for the foreseeable future, another way to counteract its corrupting effects is the inauguration of a separate judicial institution within the U.N. system, a court which would have jurisdiction strictly limited to ruling upon assertions of the peoples' right to armed intervention to stop mass atrocities whenever the Security Council rejects or is deadlocked on authorizing such relief.[246] A new U.N. court would not be an incongruity. If established, it would coexist with a previously established U.N. court, the International Court of Justice previously created pursuant to U.N. Charter chapter XIV.[247] Helpfully, chapter XIV, Article 92 intimates that adding more, as of yet unidentified U.N. courts, would be in sync with the Charter's scheme of things. Article 92 states, in pertinent part, that "[t]he International Court of Justice shall be the *principal* judicial organ of the United Nations."[248] The use of the word "principal" implies that other, non-principal judicial bodies may be created, and because the second U.N. court would have only single-issue jurisdiction (far narrower than that of the ICJ), it could not and would not be a "principal" U.N. judicial organ.

The Charter offers several legal bases for a second U.N. court of this kind. Article 7, paragraph 2 provides that "[s]uch subsidiary organs [of the U.N.] as may be found necessary may be established in accordance with the present Charter,"[249] and Article 22 states that "[t]he General Assembly may establish such subsidiary organs as it deems necessary for the

243. U.N. Charter, *supra* note 31, art. 27, ¶ 3.

244. *Id*.

245. *Id*. art. 108.

246. The precise peoples' right advanced in this Article, and which would be asserted in the new U.N. court advocated for in the text above, is my own invention; but, a new U.N. court to help ameliorate Security Council inaction with respect to mass atrocities has had other progenitors. *See*, *e.g.*, HEHIR, RESPONSIBILITY, *supra* note 2, 232–35, 248–49 (proposing a U.N. court to consider and possibly override instances of Security Council deadlock on or collective refusal to authorize armed humanitarian intervention to stop genocide, crimes against humanity, war crimes, and ethnic cleansing); *cf.* Babback Sabahi, *The ICJ's Authority to Invalidate the Security Council's Decisions Under Chapter VII: Legal Romanticism or the Rule of Law?*, 17 N.Y. INT'L L. REV. 1, 37 (2004) (mentioning that conceivable methods for "checking" the Security Council's decisions under Chapter VII include establishing a "new specialized judicial body").

247. U.N. Charter, *supra* note 31, arts. 92–96.

248. *Id*. art. 92.

249. *Id*. art. 7, ¶ 2.

performance of its function."[250] Needless to say, the phraseology "subsidiary organs" is broad enough to include judicial ones. Under Charter Article 18, paragraph 2, General Assembly decisions on "important questions" must be made by a two-thirds majority of the members present and voting.[251] The General Assembly partakes of U.N. goals and commitments to human rights, peace, and security,[252] making the cessation of mass atrocities integral to the Assembly's mission. So, the launching of this new U.N. court would presumably be an important question which the Assembly could pass upon.

It is not feasible within the scope of this Article to lay out the many aspects of the new U.N. court's functioning, but its possible subject matter jurisdiction and the triggers for asserting that jurisdiction are so interrelated with success that at least some preliminary thoughts on them seem desirable at this point. As conceived here, the jurisdiction of the new court would be to decide, *de novo*, colorable assertions of the peoples' right to U.N. armed intervention to stop intrastate mass atrocities.[253] For purposes of assuring colorability, the claim would have undergone preliminarily vetting by one or more of the MASRs, who would also be primarily responsible for bringing the case, not only first to the Security Council, but then to the new court upon a Council denial or deadlock. Due to the singular nature of the court's subject matter jurisdiction, the bench should be filled by the most highly respected international law experts, authoritative military specialists in armed humanitarian intervention, and individuals most knowledgeable about providing humanitarian aid.[254] A

250. *Id*. art. 22.

251. *Id*. art. 18, ¶ 2.

252. *Id*. art. 1.

253. I make the jurisdiction *de novo* in order that the new court would have the most complete factual basis for reviewing, not only the Security Council's decision-making rationales and procedures, but also the facts on the ground. Furthermore, I would limit the new U.N. court to hearing mass atrocity situations occurring intrastate. There are two reasons for this limitation. First, mass atrocity situations do not usually occur so as to straddle a national border. Second, the limitation might make the establishment of the new court easier to accept if the Security Council retains final say over authorizing armed intervention where the atrocities and/or participants in them are from more than one country. *Cf*. HEHIR, RESPONSIBILITY, *supra* note 2, at 232 (similarly confining such a court to hearing only matters occurring intrastate for the reason that there arguably is "some merit to the idea that the Security Council should have exclusive authority to determine how to respond to inter-state crises").

254. In recommending that the composition of the proposed court should include military specialists, particularly those knowledgeable about armed humanitarian interventions, I have been influenced by U.N. Charter article 47, paragraph 1 which provides as follows:

> There shall be established a Military Staff Committee to advise and assist the Security Council on all questions relating to the Security Council's military requirements for the maintenance of international peace and security, the employment and command of forces placed at its disposal, the regulation of armaments, and possible disarmament.

Id. art. 47, ¶ 1. If a "Military Staff Committee" would bring helpful expertise to military-related deliberations of the Security Council, then surely military expert judges would bring helpful

decision by the court in favor of upholding the right should automatically result in authorizing and deploying an armed intervention to stop the mass atrocities where they are occurring or imminently about to occur.

The final reform advanced by this Article concerns provision of sufficient troops and materiél essential to efficacious fulfillment of the proposed peoples' right. Charter Article 43 states that "[a]ll Members of the United Nations . . . undertake to make available to the Security Council, on its call and in accordance with a special agreement or agreements, armed forces, assistance, and facilities . . . necessary for the purpose of maintaining international peace and security."[255] Charter Article 45 enunciates that U.N. members "*shall hold immediately available* national air-force contingents for combined international enforcement action."[256] Shamefully, history shows that member nations with heavyweight militaries have routinely ignored Articles 43 and 45.[257] Their collective blind-eye in this regard has indirectly allowed mass atrocities to go unchecked.[258] In 1994 Rwanda, for example, if the Commander of U.N. Peacekeeping Forces had been provided sufficient boots on the ground and equipment, it is plausible that genocidaires would not have won the day.[259]

The solution to this problem, urged by many commentators, is the formation of a U.N. standing army.[260] Professor Aidan Hehir, also a proponent of erecting a second U.N. court akin to the one proposed here, has taken the idea of the standing army a step further by suggesting that it should be "at the disposal of the new (judicial) body mandated to

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specialized knowledge to the new court's decision-making as well.

255. *Id*. art. 43, ¶ 1.

256. *Id*. art. 45 (emphasis added).

257. *See* UNITED STATES GENERAL ACCOUNTING OFFICE, REPORT TO CONGRESSIONAL COMMITTEES, UNITED NATIONS LIMITATIONS IN LEADING MISSIONS REQUIRING FORCE TO RESTORE PEACE 27 (1997) (stating that "[t]o date, no nation has ever arranged to provide armed forces to the United Nations as called for under article 43"); Adam Roberts, *Proposals for UN Standing Forces: A Critical History*, *in* THE UNITED NATIONS SECURITY COUNCIL AND WAR: THE EVOLUTION OF THOUGHT AND PRACTICE SINCE 1945, 107 (Vaughan Lowe et al. eds., 2008) (observing that thus far the United Nations has "lacked the capacity" to deploy "a convincing military presence" at a crisis' commencement).

258. *See supra* notes 19-21 and accompanying text.

259. *See supra* note 20 and accompanying text.

260. *See*, *e.g.*, HEHIR, RESPONSIBILITY, *supra* note 2, at 231–36; Aidan Hehir & A. F. Lang, *The Impact of the Security Council on the Efficacy of the International Criminal Court and the Responsibility to Protect*, 26 CRIM. L. F. 153 (2015) (authors' unpaginated copy); NADÈGE SHEEHAN, THE ECONOMICS OF UN PEACEKEEPING 151 (2011); Satya Brata Das, *Sustainable Peace*, *in* BUILDING SUSTAINABLE PEACE 263, 267 (Tom Keating & W. Andy Knight eds., 2004); *see also* RONALD M. BEHRINGER, THE HUMAN SECURITY AGENDA: HOW MIDDLE POWER LEADERSHIP DEFIED U.S. HEGEMONY 48–49 (2012) (relating that, in a 1992 speech, President Ronald Reagan called for the creation of a UN standing army).

undertake coercive action should states [under U.N. aegis] be unwilling to deploy their troops."[261] Hehir proffered, as a selling point, that the number of instances where the new court would deploy such a military force would be "very small" given the court's limited jurisdictional triggers.[262] But, even if the force was used more than a very small number of times, so be it; very large numbers of lives are at stake.

V. CONCLUSION

Legal scholarship is sparse, timid and vacillating concerning recognition of a peoples' right to U.N. armed intervention to stop mass atrocities. There is no reason why things must be this way. The academy and the bar can and should be meditating often and robustly about the possibility of such a right.

It is hard to understand what principled considerations have inhibited the discussion from taking place. In light of human rights values, it makes eminent good sense to empower those most immediately imperiled—the actual and potential victims of mass atrocities. Endowing people with the legal personhood which enables them to save themselves and their loved ones via U.N. armed force—and thereby to turn their victimhood into victory—is but to actualize human life and dignity in the most elemental way. These are the core values at the heart of human rights law and its reason for being.[263]

Whatever the cause for the legal profession's tacit disapproval or disinterest, it is prompted by a more clinical wisdom than I can muster. In this, I claim no moral high ground, but rather take a page from Virgil who optimistically proclaimed "audentes fortuna juvat": fortune helps the daring.[264] Would that this Article, a little bit of juristic derring-do, may contribute to eliciting fortune's help, armed and committed in the U.N.'s name to rescuing mass atrocities' next terrified victims.

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261. Hehir & Lang, *supra* note 260 (authors' unpaginated copy).

262. *Id*.

263. Protection of human life is set forth in multiple human rights instruments. *E.g.*, ICCPR, *supra* note 73, art. 6, ¶ 1; European Convention *supra* note 74, art. 2, ¶ 1; G.A. Res. 217 (III) A, Universal Declaration of Human Rights U.N. Doc. A/810, at 71 (Dec. 10, 1948) [hereinafter UDHR]. Protection of human dignity is also set forth in major human rights instruments. *See, e.g.*, ICCPR, *supra* note 73, at preamble, art. 10, ¶ 1 (guaranteeing that persons deprived of their liberty must be treated "with respect for the inherent dignity of the human person"); African [Banju] Charter on Human and Peoples' Rights, *supra* note 153, art. 5; UDHR, art. 1.

264. I have never read Virgil. I got the quote from another law review article: Sohn, *supra* note 93, at 63–64 (1982). It was an irresistible note upon which to end an Article like this one.