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Critical Perspectives on Intervention

HENRY J. RICHARDSON III †

INTRODUCTION

I am honored to be invited to this discussion.

Our current inquiry about intervention must start with the global community. It is a community in its comprehensive empirical, factual linkages and intersecting processes among all states and peoples of the world. We can only affirm that we are now living in McLuhan's Global Village of simultaneous communications and claims to norms.¹

This globalization is necessary context for familiar debates about global governance, for example, whether state consent must serve as its basis, or whether it can only be defined through a globally centralized command structure, etc.

But other necessary questions from the global context also arise. The intense actual and value linked processes defining the global community present us, as McDougal, Lasswell, and Reisman began to discuss a half century ago, with the inescapable responsibility of identifying the constitutive process of this community.² That is, the

† Professor of Law, Beasley School of Law, Temple University. I appreciate the excellent research assistance of Ms. Nicole Leach, JD expected 2015, and the earlier background research of Ms. Laura Cook, JD 2013. All errors remain my own.

1. *See* THOMAS R. MCFaul, THE FUTURE OF PEACE AND JUSTICE IN THE GLOBAL VILLAGE 3–14 (2006) (discussing McLuhan's image of the "global village" and the transforming effects of globalization).

2. *See* W. MICHAEL REISMAN, THE QUEST FOR WORLD ORDER AND HUMAN DIGNITY IN THE TWENTY-FIRST CENTURY: CONSTITUTIVE PROCESS AND INDIVIDUAL COMMITMENT 72–77, 112–33 (2010) (discussing the increasingly globalized nature of international affairs and constitutive structures for the enforcement of international norms).

flow of decisions, which establishes, maintains, adjusts, and changes the institutions and procedures by which all other decisions are taken. On this basis, actors in processes of more specific decisions allocate basic values—such as power, wealth, rights, loyalties, and authority—and the access to global resources.³

In this regard, in any human community, there is always “governance,” though it may well rest on patterns of Hobbesian banditry and Machiavellian contingency in unfamiliar, non-institutionalized arrangements. As scholars, we have the responsibility to identify and understand this global constitutive process. And in exercising this responsibility, we confront a major question about the current law of the global community, because there will inevitably be Law in the sense of constitutive decisions as noted above.

The major continuing question for international law in our Global Village is whether, as a dynamic legal process of authority and control, it will in its decisions, interpretations, and large range of actors simply reflect the dominant patterns of power and control that arise from unappraised sources in the Village. Or, whether its decisions and interpretations will normatively aim to steadily shape a better global community towards greater sharing of human values, more protection of personal rights, less conflict, and more cooperation towards human dignity. This jurisprudential question continues today to be one of great tension and great camouflage.⁴

But this question underpins our discussion today on intervention under international law: whether international law will simply bless existing intervention patterns of global power and practice, unilateral or collectively authorized, or whether as a legal system it will define norms to meet the responsibility under Article 13(1) of the UN Charter of fostering truly “the progressive development of

3. *Id.* at 112–13.

4. Competing jurisprudential and intellectual approaches proposing best ways to understand international law and international relations reflect these tensions and provide frameworks for much of the camouflage. How a jurisprudential school—from positivism through realism, through natural law, through sociological realism, through feminist jurisprudence, through critical race theory and TWAIL, through constructivism—does or does not, for example, give authority and relevance to evidence of human rights violations regarding Rights Accountability under international law of states or private parties is only one of numerous possible examples of such tension and camouflage.

international law.”⁵

An inescapable inquiry arising from this constitutive question is whether regarding intervention—however we define it—international law has ceased to reflect and bless the raw patterns of power, domination, subordination, and race that it did structure and bless for some four centuries, prior to confirming the formal illegality of European and other colonialism in the mid-twentieth century. Anthony Anghie and other scholars have shown that colonial aims and doctrines persist, to the point where current international law at the constitutive level continues to be racialized as between Northern Tier peoples and states pursuing various versions of an imperial project, and racialized “other” peoples and states in the Southern Tier, and also towards such diasporic peoples in the Northern Tier within the North’s own territories and cities.⁶

Colonial conquest, its mobilization of law and institutions to serve dominating policies, and its permitted military force to conquer and induce Southern peoples and leaders under the tent of empires, represent the first pertinent *global* model of intervention, a model of manipulated and purposeful penetration of foreign peoples and their cultures, backed by military force and rationalized subordination. These were the global precedents and strategies that fixed the claims to authority to intervene, as a global dynamic moving from the Northern Tier to and against Southern peoples. Today, there is a heavy burden on all who would argue that this colonial dynamic in international law has become so neutralized and equitable as to no longer shape meaningful North/South narratives and analysis about authoritative interveners and strategies.

Further, in this necessarily contextual Introduction, the presence or absence of international law is not a pertinent jurisprudential question in critical discussions of intervention. As I noted, some constitutive process of international law and governance—whether or not in Westphalian form—will always exist in the Global Village.

5. U.N. Charter art. 13, para. 1.

6. See ANTHONY ANGHIE, *IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW* 268–69 (2005) (arguing that non-Western countries are held up to Western experiences and norms and then subjected to international law that promotes and safeguards Western interests).

Our question is: for what constitutive and policy ends is this law to be shaped? Included here is the necessary question of how authority, jurisprudence, and process are to be globally allocated, regarding decisions and influence about the *formation* of international law on intervention-related issues.⁷ Whoever controls or strongly affects the jurisprudence of international law formation does so as well for the major allocations of legal authority and justice in the Global Village, including under progressive interpretations of the UN Charter.

Let us also note here that under the Charter the use of military force is conventionally authorized only by Article 51 on self-defense, and by the collective authority of the Security Council, the latter being the principal legal avenue for many significant military interventions. But we must also note the Charter's reaffirmation of the constitutive doctrine of sovereign equality of states, and its legal significance for the decolonization movement, to be discussed herein.⁸ We must further note, regarding state intentions at its San Francisco negotiating conference, the opposition of Western states led by the United States to making clear in its text that the Charter outlawed colonialism and racism against colonized peoples, leaving the confirmation of these prohibitions to emerge later under

7. An example here of this tension—and thus, certification of the importance of the question—is the 60 year old contested global narrative generally between Northern and Southern Hemispheric States on whether the UN General Assembly through its resolutions should be understood as an arena for the formation of international law. The narrative was framed by the newly-sovereign states from the decolonization movement, which was quickly established in the 1960s as an assembly voting majority dedicated to renovating post-colonial international law to support, or at least not exclude, third and fourth world constitutive interests. See Michael Barnett, *The New United Nations Politics of Peace: From Juridical Sovereignty to Empirical Sovereignty*, 1 GLOBAL GOVERNANCE 79, 84 (1995) (discussing the UN's decolonization agenda). Key early battles centered on jurisdictional doctrines and the legal authority of the norm of Permanent Sovereignty over National Resources and the Assembly's subsequent Charter on Economic Rights and Duties of States. See generally G.A. Res. 1803 (XVII), U.N. Doc. A/1803(XVII) (Dec. 14, 1962); G.A. Res. 3281 (XXIX), U.N. Doc. A/3281(XXIX) (Dec. 12, 1974). The obvious importance of the contested jurisprudence around this narrative goes to, *inter alia*, whether Southern Hemisphere States will have a pathway to leverage important contributions to the formation of international law, as do Northern hemispheric States (especially the P-5) through their control of the UN Security Council operating under Article 25 of the Charter. Tensions around this narrative continue today in various forms.

8. See *infra* Parts II, III.

international law.⁹ And finally, what homage should be paid the Charter's domestic jurisdiction clause, which was so abused by South Africa to protect apartheid and by France to preserve colonial dominion over Algeria, until better legal interpretation prevailed?¹⁰

Additionally, we note proposed Charter interpretations allowing the unilateral use of force for "humanitarian intervention" as a permissive principle of customary international law. This doctrinal claim had both pre- and post-Charter history in supporting Northern arguments to intervene in Southern States to rescue the former's citizens threatened there with harm. This doctrine has been much abused, including in the definition of "citizens" expanding to "European kith and kin" as empowering rescue interventions by any European state, and incorporating the general practice of invoking the doctrine for supposed rescue missions while the intervening troops, once in country, tended to also modify the local governance of the state more towards European interests.¹¹ All in all, this history frames

9. HENRY J. RICHARDSON III, *THE ORIGINS OF AFRICAN-AMERICAN INTERESTS IN INTERNATIONAL LAW*, at xxxiii, xxxviii–xl (2008).

10. South Africa's consistent invocation of its freedom from international scrutiny of apartheid in the 1950s and 1960s under the Charter's domestic jurisdiction provision is well known, as is the ultimate global community reactive legal interpretation, which removed systematic violations of human rights from matters essentially under a State's domestic jurisdiction. See Kevin Hopkins, *Assessing the World's Response to Apartheid: A Historical Account of International Law and Its Part in the South African Transformation*, 10 U. MIAMI INT'L & COMP. L. REV. 241, 250–54 (2002) (discussing South Africa's attempts to evade international pressure in regard to apartheid, and the UN's, response). Perhaps less well known is France's attempt during the Algerian War to completely foreclose the questions of both colonial conquest and domestic jurisdiction and international scrutiny of its treatment of Algerians by amending its national constitution to make Algerian a *department* and thus an integral part of its metropolitan territory. See Cybelle H. McFadden, *Franco-Algerian Transcultural Tension and National Allegories*, 74 S. ATLANTIC REV. 112, 114, 114 n.5 (2009) (discussing Algeria's unique colonial position as a department of France).

11. European interventions in the Congo (including re Katanga) and the 1986 U.S. intervention in Libya are two instances. See generally Janeen Klinger, *Stabilization Operations and Nation-Building: Lessons from United Nations Peacekeeping in the Congo, 1960-1964*, 29 FLETCHER F. WORLD AFF. 83, 87–93 (2005) (discussing the Congo Crisis and Belgium and the United Nations' intervention in that country); Gregory Francis Intocchia, *American Bombing of Libya: An International Legal Analysis*, 19 CASE W. RES. J. INT'L L 177, 179–80, 189–92 (1987) (discussing the United States' 1986 bombing campaign against

a significant question on intervention. It concerns the conventional interpretation of the Charter that it changed international law by restricting the use of unilateral force only to self defense (now including anticipatory self defense under *Caroline Case* limitations) and the use of force otherwise only to Security Council authorization.¹² The question is, what, if any, acceptable international legal and policy basis can be claimed to add *additional* permissions under the Charter to legalize further unilateral state uses of military force for any kind of intervention?

Lastly, we know that “intervention” is an ambiguous legal term. Especially in the Global Village, there are many diplomatic, ideological, cybertechnic, economic, para-military, and military strategies of various intensities.¹³ Indeed, the very notion of “intervention” calls for an interrogation of the authority and sovereignty of the State beyond the limits of this Lecture. I will discuss some of these intervention strategies, for example relating to human rights, while others, such as Northern policies of nation-building and of premature recognition of governments, or non-military violations of Article 2(4) of the Charter, will be omitted. And I will discuss military intervention: when deployed it threatens the widest range of immediate damage to human rights and values; but occasionally, unfortunately, its proper deployment is necessary as an initial strategy to prevent or mitigate an impending human catastrophe. As will be discussed, the procedures, aims, and legal authority for such deployment are as important as the military action and its consequences.

From this Introduction, I will now briefly address the following questions regarding intervention: the power of human rights; American Interventions against Southern democracies and the

Libya, the international response to that bombing, and America’s claimed justification of self-defense).

12. See John Moore, *The Caroline*, in 3 A DIGEST OF INTERNATIONAL LAW 2419, 2420–21 (1906); James Dever & John P. Dever Jr., *Making Waves: Refitting the Caroline Doctrine for the Twenty-First Century*, 31 QUINNIPIAC L. REV. 165, 166–67 (2013).

13. See W. Michael Reisman, *Humanitarian Intervention and Fledgling Democracies*, 18 FORDHAM INT’L L.J. 794, 803–05 (1995) (discussing economic sanctions and unilateral intervention as a tools to preserve vulnerable democracies).

importance of the *Nicaragua* case;¹⁴ the critical importance of the global decolonization movement, and its insufficiency to prevent the march of colonial aims into post-colonial international law; counter-terrorism, global policy, failed states, and intervention as claimed self-defense; the UN Security Council as an international lawgiver, the need to interrogate its decision process as a bulwark of Northern racializing of law, and its authority over regional organizations; the Responsibility to Protect (R2P);¹⁵ and a final proposal addressing the issue of R2P and unilateral military intervention.

I. THE POWER OF HUMAN RIGHTS

The rise of international human rights law produced an international legal obligation on states and others to protect the rights of individuals amidst their conduct of international relations and amidst their relations with their own people within their own territories.¹⁶

For the first time, a duty on states emerged directly under international law to protect individuals' human rights, amidst even the most intense state claims of traditional sovereign initiatives and prerogatives. This duty supports, *inter alia*, a general international obligation to look inside of each state regarding the protection of its peoples' rights, a duty for all states towards all peoples, and at a minimum a duty to report and expose significant threats from that host state to the rights of peoples within its borders.

But as Third World Approaches to International Law (TWAIL II) scholars note, this duty demands two further interrogations: (1) of the authoritarian conditions within the post-colonial Northern and Southern states; and (2) of the abuse by Northern states of this duty to protect human rights abroad, by carrying forward proto-colonial "civilizing" goals to "save" those peoples from themselves, even by

14. *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), Reports of Judgments, Advisory Opinions and Orders, 1986 I.C.J. 14 (June 27) [hereinafter *Nicaragua*].

15. The emerging doctrine of R2P is more fully discussed herein in connection with Security Council authority. *See infra* Part VI.

16. Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948).

use of military force to intervene and control those governments.¹⁷

The principle of protecting individual human rights is now obligatory. It must now be invoked by States and non-state actors in a variety of situations. Thus, basic issues of human decency and harm to persons must be addressed in the Global Village through all of its intersecting value processes. Among the international actors obligated to invoke the human rights protection of people in particular situations are those states, the majority in the Northern Tier which are most equipped to intervene in Southern States by diplomatic, economic, ideological, and military means, and thus now must at least be seen to implement their national policies under their human rights obligations. Hence, this is the new power of human rights regarding intervention in foreign (Southern) states.

II. AMERICAN INTERVENTIONS AGAINST SOUTHERN DEMOCRACIES AND THE IMPORTANCE OF THE NICARAGUA CASE

The sample of Iran, Guatemala, Nicaragua, Chile, and Grenada represents democratically elected leaders militarily overthrown by the United States and Northern Tier states because of the former's policies on protecting Northern foreign investment profits in their countries and because of the perceived insufficiency of their responses to U.S. cold war demands. These interventions confirmed that Southern national democracy was no safeguard against U.S. and Northern military intervention if Washington or its major corporate clients disagreed with the content of Southern governments' policies.

These Southern countries were racially "othered" beyond the political commonality of democratic government and therefore eligible for Northern interventionary control to select local Southern leaders suitable to Northern leaders.

Thus the United States projected its domestic policies of subordination of racial minorities abroad. At home, majority officials and law enforcement agencies have consistently monitored minority leadership, especially among African Americans, of their own groups for majority-"approved" leaders, and discouraged, undermined, or

17. See Antony Anghie & B.S. Chimni, *Third World Approaches to International Law and Individual Responsibility in Internal Conflicts*, 2 CHINESE J. INT'L L. 77, 83 (2003) (discussing TWAII II scholarship's criticism of authoritarianism and emphasis on preserving the rights of Third World peoples).

ejected all others, as well as opposed all processes seeking Black autonomy in choosing Black leadership.

Inter-American reaffirmation of non-intervention doctrine, plus Calvo Clause doctrine, plus the notion of economic aggression emerged as inter-American counterclaims to hegemonic intervention, plus mobilization of regional organizational (Organization of American States) legal opposition to actions of U.S. hegemony occurred during the twentieth century under the rise of regional non-intervention doctrine.¹⁸

The United States and former empire/hegemonic states, including Russia, have persistently attempted to construct international authority from International Relations theory: namely, its support for the historical inevitability of the rise of hegemonic states to fill vacuums in regional public order, which they argue and demand should be supported by international law as beneficial to global governance.¹⁹

A. *Nicaragua*

It is appropriate now to address the 1984 International Court of Justice (ICJ) contentious case of *Nicaragua v. United States*.²⁰ The

18. IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW, 707–08 (6th ed. 2003); See David E. Graham, *The Calvo Clause: Its Current Status as a Contractual Renunciation of Diplomatic Protection*, 6 TEX. INT'L L. F. 289, 289–94 (1971) (discussing the Calvo Clause and Latin American countries' use of the clause to limit intervention by other countries, including the United States); Wenhua Shan, *From "North-South Divide" to "Private Public Debate": Revival of the Calvo Doctrine and the Changing Landscape in International Investment Law*, 27 NW. J. INT'L L. & BUS. 631, 631–35 (2007) (discussing the history and resurgence of the Calvo Doctrine in Latin America); Martin Domb, *Defining Economic Aggression in International Law: The Possibility of Regional Action by the Organization of American States*, 11 CORNELL INT'L L.J. 85, 85–88 (1978) (discussing the concept of economic aggression and several Latin American countries' attempt to prevent such aggression through the Organization of American States).

19. ROBERT KEOHANE, AFTER HEGEMONY: COOPERATION AND DISCORD IN THE WORLD POLITICAL ECONOMY (1984); JEFFERY L. DUNOFF, INTERDISCIPLINARY PERSPECTIVES ON INTERNATIONAL LAW AND INTERNATIONAL RELATIONS: THE STATE OF THE ART (2013).

20. *Nicaragua*, *supra* note 14.

case raises clear issues under classical non-intervention doctrine: the unconsented hostile mining of Nicaragua's harbor by American covert forces; and the funding and command of proxy paramilitary forces from El Salvador across Nicaraguan borders to oppose its government. Our attention is drawn to, first, the international relations context of this case, and second, to the theory under customary law of the ICJ's majority opinion which upheld the continuing authority of the non-intervention doctrine under international law.

On the first, with Nicaragua finding a treaty basis to establish ICJ jurisdiction over the United States, notwithstanding U.S. counter-strategies aiming to avoid that result, by consenting to that jurisdiction the Court put itself at a stark crossroads at that moment in the international community. In facing the massive weight of the United States in its undeclared war against Nicaragua on one side, and the grounded claims of sovereign equality and authority of the non-intervention doctrine by Nicaragua on the other, the ICJ in a grand sense, through whatever its jurisprudence and best interpretation of international law regarding liability between these states, had to choose whether this case should be decided under embedded propositions of international relations or under embedded doctrines of international law. The international relations case would stand on propositions embedded in the field's general scholarship for a few generations. Namely, that this was a clear case of a regional hegemonic state moving through its own power, to impose regional discipline under its own public order goals against smaller states in its own, and globally acknowledged, regional "backyard" or "sphere of influence." The rise of this and other hegemonic states at various points in history was necessary to prevent interstate conflict from getting out of hand and to impose needed public order in various parts of the globe. Thus, not only were there strong factual and historical indicators that such hegemonic states periodically emerged to exercise their hegemony, but there were normative perspectives that argued such organizing and coercing of smaller states as beneficial to the global good.

For the United States as an Inter-American hegemon, practices of its exercising interventionary hegemony in the region for ensuring "democracy" and prompt payment of debts stretched back to the first half of the nineteenth century, and then forward in new definitions to address its perceptions of a socialist government in Nicaragua. In this regard, the international relations propositions pose the challenge

to post-World War II, post-colonial international law of whether that legal system must find some doctrine and interpretation among its sources of authority to bless and legalize the policies and “discipline” of the hegemonic state when it chooses to intervene in its own backyard. Indeed, this was the basic argument of the United States in this case, presented as an assertion of sovereign prerogative to intervene regarding both its attempted manipulation of the ICJ’s jurisdiction and its subsequent, futile attempt to absent itself from the merits proceedings.²¹

But Nicaragua was standing on an ultimately different foundation. It rested its case on the UN Charter-reaffirmed principle of sovereign equality of states, historically a principle of both international relations and international law, and on the doctrine of non-intervention as not only reaffirmed in the UN Charter, but finding strong underpinnings and legal expressions arising from Inter-American states in response to the same hegemonic activities of the United States during the previous and present centuries.²² Reinforced by treaty and regional organization findings and declarations in the name of the Americas, the doctrine of non-intervention in its military expression existed as a living bundle of expectations under both regional and general international law, and particularly for small states, notwithstanding that they could only rarely oppose such US military action when it occurred.

Thus, the ICJ faced, as a court of law but functioning in the actual world, the decision of whether this case was to be decided under international relations (although cloaked in legalisms), or under international law. And as we know, it decided upon the latter, thus

21. *Id.* at 32; *United States: Statement on the U.S. Withdrawal from the Proceedings Initiated by Nicaragua in the International Court of Justice*, 24 INT’L LEGAL MATERIALS 246, 246 (1985) [hereinafter *Statement on the U.S. Withdrawal*].

22. *See generally* Charter of the Organization of American States art. 2, para. b, Apr. 30, 1948, 2 U.S.T. 2394, 119 U.N.T.S. 3. Indeed the decision by Nicaragua to sue the United States for illegal intervention in 1984 is an expression of the same inter-American opposition to American intervention. *See* *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, Reports of Judgments, Advisory Opinions and Orders, 1984 I.C.J. 169, ¶ 32 (May 10) (discussing Nicaragua’s claims based on its sovereignty, non-intervention, and the right of self-determination, among others).

incurring the immediate enmity of the legally thwarted United States.²³ The notion that, when international relations clashes with international law on questions of intervention, international law should prevail, has clear ramifications for the authority of non-intervention doctrine in the Global Village.

Further, the Court's holding on non-intervention and customary law was, in a different way, equally significant.

We see that the International Court of Justice here handed down a major decision against hegemonic subordination of small, regional, "other" states and peoples, against the U.S. military intervention in Nicaragua. Its holding on international law formation was favorable to the South: the norm of non-intervention remains good law with only general state practice because of community *opinio juris*.²⁴ Thus, the notion of the *violation* of the non-intervention norm was preserved, and applied against U.S. military action against Nicaragua. The Court, faced with a choice of the claimed international relations authority to intervene of a hegemonic state, and the international legal authority of the non-intervention norm as well as the norm of sovereign equality of states, by legal reasoning which accepted the customary law challenge, chose to determine U.S. liability under international law. The subsequent anger of the United States and its two-year campaign against the Court certified the importance of the Nicaragua case.²⁵

III. THE CRITICAL IMPORTANCE OF THE GLOBAL DECOLONIZATION MOVEMENT AND ITS INSUFFICIENCY TO PREVENT THE MARCH OF COLONIAL AIMS INTO POST-COLONIAL INTERNATIONAL LAW

This historic Decolonization Movement, coalescing in the 1950s

23. See Theodore M. Lieverman, *Law and Power: Some Reflections on Nicaragua, the United States, and the World Court*, 10 MD. J. INT'L L. & TRADE 295, 298 n.16 (1986) (discussing the United States' Security Council veto of Nicaragua's attempt to enforce the ICJ judgment); Frederic L. Kirgis, Jr., *Nicaragua v. United States as a Precedent*, 79 AM. J. INT'L L. 652, 656-57 (1985) (noting that the United States attempted to limit the jurisdictional reach of the ICJ under different treaties).

24. *Nicaragua*, *supra* note 14, at 18.

25. *Statement on the U.S. Withdrawal*, *supra* note 21, at 246-49 (arguing that the Court's finding of jurisdiction over the matter is "contrary to law and fact" and that a judicial tribunal with questionable impartiality is not the proper venue to resolve the US-Nicaragua conflict).

through the 1970s, changed global politics and international law by adding some 140 sovereign states to the international community. It further revised the politics and authority of the United Nations and other international organizations. In its early post-colonial years, it mounted a formidable challenge through the UN General Assembly to Northern normative, legal, and economic dominance of the Global Village.²⁶ It reaffirmed the need to revise the international legal system and its jurisprudence towards the equitable participation of smaller states and Southern peoples of color, and it invigorated notions of sovereign accountability under international law.

Further, the Decolonization Movement challenged Northern control and domination of the processes of international law formation, including through the UN General Assembly, the Resolutions on Permanent Sovereignty over Natural Resources,²⁷ and the Charter of the Economic Rights and Duties of States,²⁸ plus the rise of a body of Southern Tier-oriented international legal scholarship.

The Movement represented a convergence of the newly confirmed *jus cogens* right of self-determination of peoples, and the doctrine of sovereign equality of states, which had to be applied to all of these new states under the UN Charter. This convergence, a principal outcome of decolonization, formed the refutation of rights claimed by ex-colonial metropolitans and other Northern states to

26. See NASSAU A. ADAMS, *WORLDS APART: THE NORTH-SOUTH DIVIDE AND THE INTERNATIONAL SYSTEM* 53–55 (1993) (discussing the growing influence of post-colonial countries in the General Assembly during the 1950s).

27. Permanent Sovereignty over Natural Resources, G.A. Res. 1803 (XVII), U.N. Doc. A/RES/1803(VXII) (Dec. 14, 1962).

28. Charter of Economic Rights and Duties of States, G.A. Res. 8281 (XXIX), U.N. Doc. A/RES/29/3281(XXIX) (Dec. 12, 1974) (declaring that every State has the right to “regulate and exercise authority over foreign investment . . . in accordance with national objectives and priorities. No state shall be compelled to grant preferential treatment to foreign investment.”); *see also* Declaration on the Granting of Independence to Colonial Countries and Peoples, G.A. Res. 1514 (XV) U.N. Doc. A/Res/1514(XV) (Dec. 14, 1960) (“Immediate steps shall be taken, in Trust and Non-Self-Governing Territories or all other territories which have not yet attained independence, to transfer all powers to the peoples of those territories, without any conditions or reservations, in accordance with their freely expressed will and desire . . .”).

continue to intervene in their former colonies by economic and military strategies.

But then came the Northern counter-attack to regain jurisprudential and organizational dominance in the Global Village. Economic strategies against smaller states were coupled with periodic military interventions, such as the periodic French incursions in French West Africa and the US intervention in Vietnam under the thin guise of the doctrine of collective self-defense (on which the Nicaragua case subsequently put important limits).²⁹ In this period also arose the general Northern Tier aim to escape international legal accountability for the racial, economic, and cultural abuses of colonialism and apartheid, and, where possible, to shift any such liability to Southern States by holding them strictly responsible for all events and misgovernance within their borders, no matter what their origins.

In this connection, there was the notable refusal of Northern Governments to significantly intervene in the South African apartheid state and to make it impossible for the UN Security Council to do so.³⁰ This Northern refusal to “other” the apartheid state and thus privilege its claimed cold war interests to cooperate with Pretoria represented a privileging of Northern racial solidarity with white South Africa against its Black majority, and implicitly against all African heritage peoples in the Global Village. In the United States, it took the historic African American-led anti-apartheid movement to change U.S. foreign policy to more support the South African anti-apartheid struggle.³¹ Gernot Kohler’s important jurisprudential proposal—that law and law making in the entire Global Village could accurately be reflected as a mirror of South African apartheid—was a direct reflection of the inability of most Northern scholars to acknowledge race as a moving force in international relations, even

29. Nicaragua, *supra* note 14, at 32.

30. See S.C. Res. 581, U.N. Doc. S/RES/581 (Feb. 13, 1986) (condemning the apartheid state, but not taking significant steps to intervene). Indeed during the 1980s, notwithstanding wide international pressure on States to levy economic sanctions on South African apartheid government, the UN Security Council was only able to enact a single arm embargo against apartheid South Africa in 1977. S.C. Res. 418, ¶ 2, U.N. Doc. S/RES/418 (Nov. 4, 1977).

31. Henry J. Richardson III, *Reverend Leon Sullivan's Principles, Race, and International Law: A Comment*, 15 TEMP. INT'L & COMP. L.J. 55, 67–69 (2001).

given the brutal clarity of apartheid.³² It was further a reflection of the reasons and consequences of a pattern of confirmed Northern decisions to refuse to intervene in apartheid South Africa, while being quite willing to do so elsewhere in the Southern Tier, and being quite willing to do so, using heavy economic strategies, upon the advent of post-apartheid South Africa in 1994.³³

Thus, the Global Village saw the continuation in modern international law of old Northern colonial doctrines: to make political concessions on forms of Southern state independence, while continuing economic and periodic military intervention strategies, and arguing their legality so as to leverage Southern states from within their national territories and within their governments for the benefit of Northern interests.

IV. COUNTER-TERRORISM GLOBAL POLICY, FAILED STATES, AND INTERVENTION AS CLAIMED SELF-DEFENSE

There appears to be a current U.S. policy of mobilizing all national African militaries, plus African Union (AU) regional authorized forces, to U.S. counter-terrorism aims.³⁴ This is a new kind of great power intervention, with induced consent of Southern states, under potential self-defense claims that descend on thin grounds from the Global Village's post-9/11 gift to the United States of a valid self-defense claim in inaugurating the Afghanistan war, a gift subsequently undermined by the 2003 Iraq invasion. Thus, issues of whether counter-terrorism overseas military strategies rest on "self-defense" or "police enforcement" rationales may be somewhat beside the point. Both seem to lead to attempts to legalize foreign Northern pre-emptive military interventions into the South, while failing so far to halt the now-dispersed threat of global terrorism as

32. See Gernot Kohler, *The Three Meanings of Global Apartheid: Empirical, Normative, Existential*, 20 ALTERNATIVES 403, 403–05 (1995) (discussing the impact of race in our society).

33. Hopkins, *supra* note 10, at 250; African National Congress [ANC], *Economic Transformation*, 53d Nat'l Conference Resolutions, ANC Decl. 3 at 20 (Dec. 16–20, 2012).

34. See generally *AFRICOM*, THE REPORTER, no. 4, 2011 at 193 (describing the role of Air Force Judge Advocates in U.S.-led counterterrorism efforts in Africa).

attacks on innocent civilians.³⁵

Further, there is the closely related question of whether unilateral interventions into “failed states” will be legalized, as interventions into the “renamed racial others.” Ruth Gordon has discussed the early twenty-first century proposed and demanded revitalization of the UN Trusteeship Council to be the global legal repository of de-sovereignized “failed states,” plus the demand to resolve the transitional international legal questions to make this happen, as “The Ultimate Intervention.”³⁶ However, international legal doctrine, despite many Northern scholarly proposals that it as a legal system should do so, and despite disputed arguments that U.S. counterterrorism policy may validly claim prerogatives of military intervention into failed states to preempt sources of terrorist threats, has not incorporated these demands and policy goals. It has particularly refused to incorporate a formally reduced standard of sovereignty for “failed states” that would permit greater military intervention into their territories under any notion of reduced sovereignty. The International Court of Justice made this clear in its holding in the *Congo v. Uganda*³⁷ case regarding Uganda’s lack of special cross-border interventionary prerogatives into the Congo, notwithstanding the latter’s indexed status as a failed state.³⁸ In the same vein, other judicial holdings have refused to lower the threshold of state responsibility. For example, Somalia as a failed state did not mitigate foreign criminal penalties for pirates sailing from its territory.³⁹

35. See Bill Briggs, *Study: US Drone Strikes More Likely to Kill Civilians Than US Jet Fire*, NBC NEWS (July 2, 2013, 8:34 PM), <http://www.nbcnews.com/news/>

investigations/study-us-drone-strikes-more-likely-kill-civilians-us-jet-v19254842 (discussing the impact of airstrikes for counterterrorism purposes).

36. Ruth Gordon, *Saving Failed States: Sometimes a Neocolonialist Notion*, 12 AM. U. J. INT’L L. & POL’Y 903, 904–07 (1997).

37. *Armed Activities on Territory of Congo (Dem. Rep. Congo v. Uganda)*, 2005 I.C.J. 168 (Dec. 19).

38. *Id.* ¶ 259.

39. “[P]iracy should never be the solution to a people operating in a failed state as it inflicts and continues to inflict pain and suffering onto humanity in different ways, a fact of which the accused are well aware.” *R v Ise* (2011) SLR 220 at ¶3 (Syc.). We may interpret this part of the holding further as prohibiting the use or support by a failed (African) state of piracy and its activities because of their harm to humanity, under historically grounded law, and thus its citizens can claim no

This international legal refusal to diminish the sovereignty of “failed states” in the face of heavy Northern official and scholarly demands that they be subject to forms of preemptive intervention, not limited by requirements to find “imminent danger” to invading states, represents the more desirable legal policy. It holds the line against further racializing of international legal approaches to failed states, when the very concept represents great racializing. And in doing so, as Jeremy Levitt discusses, it preserves space for the continued evolution of regional doctrines of obligations to assist failed states to resolve their problems, while prescribing obligations and rights protecting peoples within those states.⁴⁰ Such examples arise in Africa under the African Union Treaty prescribing rights of democratic governance, of freedom from military coups, and rights to remedial regional assistance.⁴¹ Regional policies are prescribed of assistance for “collapsed states,” plus regional approval and authorization of military intervention into regional situations of human rights catastrophe, such as Nigeria into Sierra Leone and Liberia under the Economic Community of West African States

defense or mitigation for such activities, no matter what their personal or needful circumstances. There is no ‘failed state’ privilege to impose piracy costs on the international community. The Court’s holding continued, and directly implied that the Seychelles as a sovereign state may exercise its protective jurisdiction against such threatening actions in the Indian Ocean to protect its vital interests, as it is doing here. Citizens of ‘failed states’ have no grounds for, nor do they deserve a waiver of liability when acts from their territory create a threat to other states. By the Court upholding criminal sentences beyond the minimum all around in this case, it implicitly held that African ‘failed states’ retain full sovereign responsibility for actions emanating from their territory, and their citizens, no matter their personal hardships, retain full international criminal liability for their actions, especially as these personal and territorial actions are shown to threaten the vital interests of a neighboring state.

40. See JEREMY I. LEVITT, *ILLEGAL PEACE IN AFRICA: AN INQUIRY INTO THE LEGALITY OF POWER SHARING WITH WARLORDS, REBELS, AND JUNTA* 145–48 (2012) (discussing the UN Charter’s recognition of broad rights and protections, including self-determination, and how certain power agreements in Africa have so far failed to meet these standards).

41. African Charter on Democracy, Elections and Governance art. 4–5, 23–24, Jan. 30, 2007, http://www.au.int/en/sites/default/files/AFRICAN_CHARTER_ON_DEMOCRACY_ELECTIONS_AND_GOVERNANCE.pdf.

(ECOWAS) Treaty.⁴²

V. THE UN SECURITY COUNCIL AS AN INTERNATIONAL LAWGIVER:
THE NEED TO INTERROGATE ITS DECISION PROCESS AS A
BULWARK OF NORTHERN RACIAL AUTHORITY

Much current scholarship on the legality of the use of force to intervene in states where human rights are threatened, where international crimes are being committed, or to bring “democracy” for wider regional or geopolitical purposes, is focused on the UN Security Council, as both a law-giver and as the preferred legal arena for these proposed actions.⁴³ Many interim issues are raised, including threatened Council inaction in the face of widely agreed and credibly documented international crimes, for example Syria, and chemical weapons, and thousands of deaths, but for the moment let us put them aside.

The point is that the argued heightened legal necessity of Security Council approval throws an intense spotlight on the need for a new normative assessment of Security Council decision making, beyond an analysis of its Charter and other authority, as essential to understanding current military interventions under international law. This need is framed, on the one hand, by the asserted role of the Council as the chief custodian of collective authority under international law and the most desirable source of legal permission to use force, and on the other hand, by the total lack of global momentum towards any Security Council reform that would revise the procedures by which it as a Charter body decides to allocate authority to member states and prescribe interpretations of international law. We are left, therefore, with the current narratives of Council decision making, especially under Chapter VII authority, that feature a domination/subordination two tier system of P-5 collaboration and debates to resolve veto/abstention questions in that group, from which the rotating Council members are generally excluded. There follows the polling and assembling of a Council voting majority which often features applications of varying

42. Treaty of the Economic Community of West African States art. 58, May, 28, 1975, <http://www.comm.ecowas.int/sec/?id=treaty&lang=en>.

43. See generally Allen S. Weiner, *The Use of Force and Contemporary Security Threats: Old Medicine for New Ills?* 59 STAN. L. REV. 415, 419–20 (2006) (arguing that the UN Security Council is well-suited to address modern international threats of force).

pressures by individual or several P-5 members on smaller, more vulnerable rotating members to construct a voting majority for the proposed Council decision.⁴⁴

I suggest that this decision narrative can no longer be accepted as a legally permissible and excusable exercise of Northern sovereign autonomy and cross-pressures within the Council arena. This narrative falls under the classic Groatian axiom that we must not fail to normatively assess every significant act of international relations.

In assessing the Council's decision process, we note certain continuing issues. We note the original Charter intent that the P-5, emerging as governmental directors of the world community out of World War II and also as declining metropolitans of threatened empires, would cast their Council vetoes only on the sincere belief that a particular resolution would significantly imperil the global community welfare.⁴⁵ We do so, only to then note that fairly early on, this hope and the original Charter intent was dashed, first by the Soviet Union and soon after by the United States, by establishing precedents in which vetoes were cast to do nothing more than protect their exclusive foreign policy interests and allies.

As Kenneth Roth recently observed regarding Syria, "One frustrating element of the Security Council's structure is that it permits the Five Permanent Members to use their vetoes to block action for any reason, partisan or parochial, even in the case of mass atrocities."⁴⁶ And thus there subsequently arise short-lived debates about whether the use of the veto can be limited under the law of the Charter, ending in negative futility from P-5 refusals and barriers. For example, recently in the current UN narrative refining the R2P principle, the Secretary-General urged the P-5 to publicly and

44. Henry J. Richardson, III, *U.S. Hegemony, Race, and Oil in Deciding United Nations Security Council Resolution 1441 on Iraq*, 17 TEMP. INT'L & COMP. L.J. 27, 53, 55 (2003).

45. 1 THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 927-933 (Bruno Simma et al. eds., 3d ed. 2012).

46. Kenneth Roth, *Syria: What Chance to Stop the Slaughter?*, N.Y. REV. BOOKS, Nov. 21, 2013, available at <http://www.nybooks.com/articles/archives/2013/nov/21/syria-what-chance-stop-slaughter/>.

voluntarily commit to refrain from casting vetoes of any Chapter VII resolution authorizing R2P intervention for credible, well-grounded reasons.⁴⁷ That recommendation is still pending.⁴⁸

A second continuing issue is that of the limits of Security Council legal authority. We are all familiar with the Lockerbie Case,⁴⁹ which gave the ICJ the opportunity to rule on this issue, which it promptly deflected.⁵⁰ A longer strand of argument holds that Council authority is necessarily limited by the Charter Articles 1 and 2, Purposes and Principles of the United Nations. This argument has never been either refuted or confirmed, due to the wide constitutive text of those Articles, as well as the proposition that while the argument could be ultimately valid, the Council has not yet been perceived to act at the limits of whatever authority Articles 1 & 2 might represent. More might be done on this question, given the right opportunity, for a Southern Tier actor (most likely) to actually and concretely frame an argument of Council *ultra vires* by action or inaction in a particular situation violating Articles 1 & 2, but this has not yet happened.

But these issues do not comprise a normative assessment of the Council's decision making in exercising collective authority to authorize R2P or other military intervention, in particular states, which are most likely located in the Southern Tier. We must focus on the question of the corruption of the Council by either the P-5 collectively or by the United States as the sole great power in alliance with other P-5 members. That question goes to whether the Council's decision making is so dominated by any or all of the P-5 that significant decisions, especially under Chapter VII, can best be

47. U.N. Secretary-General, *Implementing the Responsibility to Protect: Rep. of the Secretary-General*, ¶ 61, U.N. Doc. A/63/677 (Jan. 12, 2009).

48. U.N. S.C. Rep. of the Secretary-General, July 25, 2012, U.N. Doc A/66/874-S/2012/578; GAOR, 66th Sess., (2012)

49. "On December 21, 1988, Pan American Flight 103, on its way to New York's John F. Kennedy Airport, exploded over Lockerbie, a town in southern Scotland. All 259 passengers on board were killed. Eleven Lockerbie residents also were killed as the shattered civilian carrier crashed to the ground." Scott S. Evans, *The Lockerbie Incident Cases: Libyan-Sponsored Terrorism, Judicial Review and the Political Question Doctrine*, 18 MD. J. INT'L. L. & TRADE 21, 27 (1994) (footnotes omitted).

50. Questions of Interpretation and Application of 1971 Montreal Convention Arising from Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. U.S.), Provisional Measure, 1992 I.C.J. 114, 127 (Apr. 14).

understood as consistently implementing the national foreign policy and security goals of one or more P-5 Members, using international law under the Charter as its vehicle, and not as the exercise of lawful global collective authority to use force within the world community. The collective P-5 drive to intervene in the Southern Tier, through the vehicle of international law and the Charter, has seemingly become so determined and intense that it overwhelms the normal issues about the interplay of P-5 foreign policy and the obligations of each such country in the Council.

The corruption here is of the very notion of collective authority under modern international law. The masquerade of national power and aims being cloaked by the forms of collective decision making, to reach public conclusions of legality of military and other strategies against target states, only reaffirms the corruption. Such corruption destroys this vital global safeguard against arbitrary military force. Notions of collective authority were evolved over more than a century to create such safeguards and to further guard against international legal prescription governing critical values being corrupted at the core of the authorizing process by the cloaked aims of unilateral national power.⁵¹

Further, this corruption raises even more profound questions. As the Council is corrupted by P-5 foreign policy aims, we must know that those aims cannot be understood apart from the following: these states' active shaping of the legal history of international law, the global North/South domination/subordination narrative, and the continuing narratives of colonialist and neo-colonial aims and policies being extended from the era of legal colonialism by policies and actions of the same now ex-metropolitan states towards the same territories of their ex-colonies and subordinated peoples. Further, they cannot be understood apart from continuing aims to extend control under international law from the North into the South to not only protect foreign investments, secure resources for their national needs, and protect their exclusive security claims. Equally, the North uses that lawful control to deflect accountability for global problems, inequities, and crimes from North to South, and to generally block

51. *See generally* JOSÉ E. ALVAREZ, INTERNATIONAL ORGANIZATIONS AS LAW-MAKERS (2005) (discussing the evolution of international organizations and the treaty making process).

that accountability from being returned to the North.

Their foreign policy aims in the Council cannot be understood apart from their roles in the rise of international human rights law, from their early, commendable (if cold-war laced), general fostering of states' obligations to protect and extend the growing list of international human rights of individual persons, to their retreat in suspicion and paranoia—factual, doctrinal, and theoretical—from the effective enforcement of these rights in their own and other jurisdictions as they collided with their national prerogatives and traditions of “othering” foreign peoples. Moreover, this corruption is not addressed by proposals for Security Council procedural reforms towards a duty to decide or explain, such as those made by Professor Spain, though such reforms might provide more grounds for Council *ultra vires* issues under the Purposes and Principles of the Charter.⁵²

Permanent Members' Council aims cannot be understood apart from their behaviors and public perspectives attempting to use the human rights process to continue the Northern colonial civilizing mission towards Southern peoples, as shown by Makau Mutua,⁵³ by favoring doctrines and interpretations urging those peoples to be ashamed of their own cultures in favor of neo-liberal principles friendly to foreign investment being labeled as “democracy,” and by finding jurisprudential excuses to undermine the legal authority of essential economic, social, and cultural rights.⁵⁴ They cannot be understood apart from their general opposition to obligations of reparations for past colonial and racial wrongs to oppressed southern peoples, which were so clearly sponsored, financed, and largely implemented by Northern metropolitans, beginning with the

52. Anna Spain, *The U.N. Security Council's Duty to Decide*, 4 HARV. NAT'L SEC. J. 320, 320 (2013).

53. See Makau Mutua, *The Complexity of Universalism in Human Rights*, in HUMAN RIGHTS WITH MODESTY: THE PROBLEM OF UNIVERSALISM 51, 61 (András Sajó ed., 2004) (“International human rights fall within the historical continuum of the European colonial project in which whites pose as the saviors of a benighted and savage non-European world.”).

54. Henry Richardson III, *Patrolling the Resource Transfer Frontier: Economic Rights and the South African Constitutional Court's Contributions to International Justice*, 9 AFR. STUD. Q., Fall 2007, at 81, 82–83 (discussing the South African Court's response to dominant Northern Tier limiting interpretations of economic human rights.).

international slave trade.⁵⁵

These aims, finally, cannot be understood apart from the international legal history of permissible doctrines of diplomatic, ideological, economic, and military intervention, from legal colonialism forward, being evolved to legalize the coercion of Southern Tier political cooperation and their resources, plus to force their recognition of Northern hegemonic authority, and the superiority of Northern sovereign state authority over Southern sovereign state authority. And not only is the Council's collective authority used to certify the legality of Northern *jus ad bellum* intervention actions, but also often after the fact to certify the *jus in bello* legalities of the same actions as they move into a later stage. The latter occurs even when the Council manages, by a P-5 split, to retain and exercise truly collective authority to refuse to authorize a clearly illegal intervention, such as the 2003 invasion and conquest by the United States of Iraq that was refused under Resolution 1441.⁵⁶ There, a basic question was whether the United States was guilty of the crime of aggressive war and colonial conquest.⁵⁷ Security Council resolutions beginning almost immediately after the invasion constructed a fig-leaf for the United States against such crimes by, in its quasi-judicial role, finding that Iraq retained its sovereignty and was not reduced to a colony, notwithstanding the total destruction of its government by the United States, the complete military occupation of its entire territory, and the U.S. construction of several years of occupation regimes synonymous with American goals and policies.⁵⁸

So, if the Security Council is corrupted at the very heart of its collective authority under the Charter by the domination aims of its

55. See *14 Caribbean Nations Sue European Countries for Slavery Reparations*, AL JAZEERA AM. (Sept. 27, 2013, 7:42 PM), [http://america.aljazeera.com/articles/20](http://america.aljazeera.com/articles/2013/9/27/14-caribbean-nations-sue-european-countries-for-reparation-over-slavery.html)

13/9/27/14-caribbean-nations-sue-european-countries-for-reparation-over-slavery.html (describing Caribbean nations' recent lawsuit seeking reparations from European powers for their role in the Atlantic slave trade).

56. Richardson, *supra* note 44, at 53.

57. *Id.* at 65

58. 104 AISL Porc. 214 (2011). S.C. Res. 1511, 1, U.N. Doc. S/RES/1511 (Oct. 16, 2003).

Permanent Members, we must consider alternatives for governing the legality of military intervention, particularly as such intervention tends to be planned and launched in the North and targeted, implemented, and pushed towards Northern- approved consequences in the South. Even if we have no immediate formal constitutive alternative to the Council under the Charter, we must consider, even if only to accurately assess the costs, whether it is wise and equitable policy in the progressive development of international law to continue to funnel collective authority decisions about such interventions through this body, especially under those conditions of greatest potential human rights tragedy and need.

It might be the better global policy to, first, continue present trends of interpretation under Articles 52 and 53 of the Charter to widen the competence of regional organizations vis-a-vis the Security Council to authorize peacekeeping and other humanitarian operations for assisting regional states and peoples.⁵⁹ And second, to now adjust

59. Articles 52 and 53 of the U.N. Charter state:

1. Nothing in the present Charter precludes the existence of regional arrangements or agencies for dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action provided that such arrangements or agencies and their activities are consistent with the Purposes and Principles of the United Nations. 2. The Members of the United Nations entering into such arrangements or constituting such agencies shall make every effort to achieve pacific settlement of local disputes through such regional arrangements or by such regional agencies before referring them to the Security Council. 3. The Security Council shall encourage the development of pacific settlement of local disputes through such regional arrangements or by such regional agencies either on the initiative of the states concerned or by reference from the Security Council. 4. This Article in no way impairs the application of Articles 34 and 35.

U.N. Charter art. 52.

1. The Security Council shall, where appropriate, utilize such regional arrangements or agencies for enforcement action under its authority. But no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council, with the exception of measures against any enemy state, as defined in paragraph 2 of this Article, provided for pursuant to Article 107 or in regional arrangements directed against renewal of aggressive policy on the part of any such state, until such time as the Organization may, on request of the Governments concerned, be charged with the responsibility for preventing further aggression by such a state. 2. The term enemy state as used in paragraph 1 of this Article applies to any state which during the Second World War has been an enemy of any signatory of the present Charter.

U.N. Charter art. 53; THE CHARTER OF THE UNITED NATIONS: A

the legal balance between the Council and regional organizations on authorizing “enforcement actions” under Article 53, towards confirming regional authority to initially authorize such actions, particularly in providing needed emergency responses to imminent human rights catastrophes in a regional state, whether or not such response is invited by that government. In practice, except for Kosovo, there has been either *ex ante* or *post hoc* Security Council action that implied approval for such regional interventions, even regarding the ECOWAS intervention led by Nigeria into Liberia and Sierra Leone.⁶⁰ However, an African Union Treaty provision (Article 4(h) of the Constitutive Act) seems to enable the African Union to authorize enforcement actions independently of the Security Council.⁶¹ Its enactment can be understood as a direct response to UN inaction on the Rwanda genocide.⁶²

For emergency responses to impending human rights catastrophes, Article 53 needs to be interpreted towards the legality of such operations, especially where the Security Council has not or cannot act timely. As we see, the policy aim of giving the Council the sole Charter competence to authorize enforcement actions in the world community vis-a-vis regional organizations, a debate which arose in the San Francisco Conference, is now, due to the corruption of the Council, increasingly a problem. Not only do P-5 veto battles often prevent the Council from making timely authorizing decisions in urgent situations, but the racialized biases that the Permanent Members bring to questions of intervention in the Southern Tier risk insufficient strategies and neo-colonial responses when the Council does exercise collective authority. One possible interpretative remedy would be to confirm the initial competence of regional organizations to authorize enforcement actions in regional situations of imminent human rights catastrophe, under a presumption of Council approval of such emergency actions, even if the regional organization thus shares with the Council the authority to infringe Article 2(4) of the

COMMENTARY, *supra* note 45, at 1496–1505.

60. *Id.* at 1487–90.

61. Constitutive Act of the African Union art. 4(h), Jul. 11, 2000, 2158 U.N.T.S. 3.

62. THE CHARTER OF THE UNITED NATIONS: A COMMENTARY, *supra* note 45, at 1490–93.

Charter.⁶³ The burden would then be on the Council and the P-5 to subsequently disown the regional action.

We must further consider whether it is the best international legal policy to continue the evolution of R2P as a legal doctrine through invocations and implementation through the Security Council, following its first invocation in the Libyan situation.⁶⁴ Or, whether R2P should desirably continue to evolve through regional organizational decision-making as the overall less-corrupt sources of collective authority. The corruption of the Security Council makes it impossible to wait for effective and just Security Council reform in order to interpret international law to implement more just and equitable actions of military intervention into the Southern Tier. Other sources of collective authority, which promise better safeguards against dominating and racializing national state behavior relative to decisions about military intervention, must be found.

VI. R2P

This now brings us to the bundle of issues and emerging norms known as Responsibility to Protect (R2P), already mentioned. As an emerging legal norm of permissibility for outside states to intervene in a state in the midst of or imminently facing tragic violations of the human rights of its citizens, under collective authority or unilateral obligation, there is much confusion here. And we must note that R2P comprises claims and expectations that Northern Tier states will generally, even if not exclusively, be intervening in Southern Tier states under the rubric of preventing human rights tragedies. There are no expectations that, for example, Nigeria will be intervening in Spain under African Union authority or unilaterally to prevent major rights crimes towards the Basque people, or that the United States will be intervening in Australia to remedy racial tragedies against Aboriginal peoples.

That Northern states generally have superior resources to project military force in the implementation of global authority compared to Southern states only sharpens, without resolving, R2P issues. It cannot be a prong of neutral analysis, particularly when this capacity is linked with Northern Tier control or near control over key international organizational processes and decisions authorizing the

63. *Id.* at 1500–05.

64. *Id.* at 1489–90.

lawful use of force, beginning with the UN Security Council. Thus, R2P risks providing another doctrinal framework for the North to leverage and control decisions about using force or other coercion to enforce human rights law, and then to exercise additional leverage to secure what Southern agreement is possible in order to claim global legitimacy. This risk must be compared to the goal of the Northern and Southern Tier evolving to share equal authority to determine lawful use of force in particular situations, whether in Northern or Southern States, and to determine liability for such human rights violations.

We must also step back and understand the R2P doctrine as an historical successor to the old doctrine of humanitarian intervention: quite possibly another North to South projection of international legal authority. It comprises legal permission to intervene to rescue and protect local endangered persons.⁶⁵ However, there is a doctrinal distinction. R2P is grounded on the rights of people to be protected from human rights tragedy, while the old abused humanitarian intervention was grounded on one state's right to intervene in another.⁶⁶ We do not yet know if the North/South R2P consequences will be more globally equitable, and the recent Libyan situation through the Security Council invoking R2P is not encouraging.⁶⁷

Regarding humanitarian intervention, we should briefly recall various claims about its legality under the UN Charter, because similar issues must be resolved about the use of at least unilateral military force under R2P, also under the Charter. Proponents of humanitarian intervention argued it as a doctrine of customary international law, which the Charter did not abrogate—a customary river running beneath the Charter, as indeed the ICJ holding in

65. U.N. Secretary-General, *Implementing the Responsibility to Protect: Rep. of the Secretary General*, ¶ 11(c), U.N. Doc. A/63/677 (Jan. 12, 2009).

66. *Id.* ¶ 7.

67. The Security Council authorized military action by States, which just happen to be ex-colonial states of Libya prior to its independence, and pursuant to the beginning of military conflict ignored all Africa attempts to find a more peaceful ending to the conflict. *See* S.C. Res. 1973, U.N. Doc. S/RES/1973, at 4 (Mar. 17, 2011). And, there has been a decided lack of success in applying the same R2P principles to the massive deaths and oppression by Syrian government against its people. *See* David Rieff, Op-Ed., *R2P, R.I.P.*, N.Y. TIMES (Nov. 8, 2011), <http://www.nytimes.com/2011/11/08/opinion/r2p-rip.html?pagewanted=all>.

Nicaragua v. U.S. permits.⁶⁸ Specifically, unilateral humanitarian intervention represented a use of nonconsensual military force intervening in a target state.⁶⁹ Let us recall the Charter goals to change international law to limit permissible uses of force by a state to (1) use in self defense under Article 51, which does to a degree incorporate self defense custom as well as anticipatory self defense with the limits of the *Caroline* case, but not pre-emptive self-defense, and (2) that military force authorized by Security Council decision. The Charter aim was to abolish war as authorization for military force and channel unilateral permissibility into a single (widening) grant of international constitutive authority. Unilateral force otherwise was to be illegal, including under Article 2(4) for violating the territorial integrity or political independence of a state, contrary to UN Purposes and Principles.⁷⁰

The issue becomes whether and on what legal basis can we add R2P as a unilateral, or non-Security Council-authorized use of force, as a new and additional permission under the Charter, not amounting to self defense, to use unilateral force within a foreign sovereign state. The customary law argument for R2P does not apply, at least not yet, and not without more clarified evidence of a global consensus. Is it wise to then claim that a second, newer customary river permitting unilateral force runs beneath the Charter, thus opening the door to defining a third and fourth such rivers? This threatens to become a recipe for expanding the permissibility for national state military force to pre-Charter levels addressing mere foreign policy objectives. It would compromise the foundational aim of international law to reduce military conflict both among and within states. And given that the majority of the 30 or so states which have effective capacities to project military force well beyond their borders lie in the Northern Tier, this is a recipe for expanding permissible Northern intervention into and onto Southern peoples.

Taking a moment to reflect on the above, let me address Rwanda in the ambiguous R2P narrative.

68. *Nicaragua*, *supra* note 14, at 94–95.

69. Ryan Goodman, *Humanitarian Intervention and Pretexts for War*, 100 AM. J. INT'L L. 107, 111 (2006).

70. DANISH INST. OF INT'L AFFAIRS, HUMANITARIAN INTERVENTION: LEGAL AND POLITICAL ASPECTS 81 (1999), *available at* http://subweb.diis.dk/graphics/Publications/Andet/Humanitarian_Intervention_1999.pdf.

A. Rwanda

A proposed doctrine of R2P rose into international community expectations following the Rwanda genocide. The failure of the Arusha Accords in 1992-93, leading to that tragedy, relative to the collectively authorized peacekeeping effort by the UN Security Council, demonstrates that the opportunity of existing UN peacekeeping military forces in Rwanda, to halt or mitigate the predicted, oncoming, planned, and directed genocide, was not taken because of the European (Belgian) and Security Council P-5-imposed great reduction of those forces, to the point of ineffectiveness.⁷¹ Thus, Rwanda shows that if Security Council-authorized collective authority is the preferred legal mode of implementation of R2P, moving as it would from North to South, the Council cannot be depended on to overcome the foreign policy interests (led by the United States) of the P-5 and enable itself as a law-giver to effectively decide on sufficiently strong and timely military force (here largely already in the country) to halt a planned and directed genocide. The Council's response was indeed to weaken such forces and make it clear that they were not to interfere. A stronger force deployed could have mitigated or prevented the killing of up to 1 million civilians.

This failure of the Northern-controlled response to this genocide, in the Council as the arena of Northern decisional and international legal preference, indicates, first, that the P-5 retain the deficits within the Council of racialized international law towards the Southern Tier, notwithstanding the most serious crimes converging with Northern availability of military capacity. Second, it indicates that this P-5/UN failure in the quintessential R2P situation frames anew the issue of the legality of unilateral intervention in an imminent danger R2P situation. This is particularly so, since the P-5/UN response in Rwanda, at the critical point, arguably violated the Purposes and Principles of the UN Charter by deliberately neutering the Council and allowing a predicted genocide.

71. U.N. S.C. Rep. of Secretary-General, July 4, 2010, U.N. Doc. A/64/864 GAOR, 64th Sess. (2010); U.N. Secretary-General, Letter dated Dec. 15, 1999 from the Secretary-General addressed to the President of the Security Council, 37, U.N. Doc. S/1999/1257 (Dec. 16, 1999).

Thus, this history challenges the asserted policy preference of the Council as the primary R2P lawgiver regarding collective authority to protect people facing human rights catastrophes. The challenge is not resolved by the Libyan action based on the Council's interpretation of R2P, because clearly the majority of P-5 foreign policy interests favored getting rid of Ghaddafi at the first opportunity,⁷² and if by collective authorization, so much the better.

The subsequent apologies of several Northern and UN international leaders, who publicly wished *ex post* that they had done more, in the face of their own clear realistic capacity to act, to interrupt or perhaps even prevent that horrific Rwanda genocidal program, rang somewhat hollow.⁷³ But they did lead to proposals for an obligatory doctrine of intervention binding on states in a position to do so, to halt ongoing or impending human rights atrocities (and not lesser degrees of violation, however understood). Various proposals followed in the UN system. But fairly quickly this version of R2P was challenged by the issue of whether such intervention to prevent human rights atrocities must only lie under some collective exercise of authority, desirably the UN Security Council, but perhaps as in Africa for Sierra Leone, by regional authority. These ambiguities were debated to and fro, until the Libyan question before the Security Council in 2011. There, the Council, acting under Chapter VII authority and under its quasi-judicial authority, prescribed, in finding Libyan government actions to be a threat to international peace and security, that government's duty under international law to protect its citizens and refrain from causing them deadly harm. It described that duty as Responsibility to Protect.⁷⁴ Thus, this doctrine became a standing duty of state governments to refrain from deadly harm to their citizens, enforceable by Security Council collective authorization of outside state military intervention under the Charter.

R2P was thus narrowed from its original unilateral intervention

72. See Barack Obama, David Cameron & Nicolas Sarkozy, Op-Ed., *Libya's Pathway to Peace*, N.Y. TIMES (Apr. 14, 2011), <http://www.nytimes.com/2011/04/15/opinion/15iht-edlibya15.html> (“[A]ny deal that leaves [Ghaddafi] in power would lead to further chaos and lawlessness. . . . Neither Europe, the region, or the world can afford a new safe haven for extremists.”).

73. See Jason A. Edwards, *The Mission of Healing: Kofi Annan's Failed Apology*, 16 ATLANTIC J. COMM. 88, 88 (2008).

74. S.C. Res. 1973 U.N. Doc. S/RES/1973 (Mar. 17, 2011).

context. The issue of the critical importance of deployment in time to prevent a human catastrophe was submerged in favor of debate and decision by the Northern-controlled Security Council, and the risk was added of one or more Permanent Member vetoes abrogating any intervention, no matter how horrific the facts on the ground. It is true that R2P has now been quasi-judicially prescribed by the Council as a doctrinal duty on all state governments to refrain from deadly harm to their citizens, particularly to ensure their own regime survival. But now we see that this prescription is in danger of becoming *sui generis* and attracting no precedential authority, as the Security Council both refuses and may be unable to apply it to other similar, or worse situations, as is now the case with Syria.⁷⁵ The R2P doctrine may be available to levy against the Assad regime, but any intervention to prevent or mitigate the carnage on the ground against Syrian citizens is bottled up in the narrowness of vetoes and post-Libyan international politics. Where, even in theory, do we go from here?

VII. A FINAL PROPOSAL

I will conclude with a proposal regarding unilateral military intervention.

In the recent Libyan situation, R2P was prescribed by the Security Council as a duty on all states to protect their citizens from state-sponsored harm and destruction, and its violation was invoked by the Council as a threat to international peace and security by the Libyan government.⁷⁶ But that invocation was inextricable from the proto-colonial narrative running through the Security Council process. Military force was authorized against Libya to be carried out by three ex-colonial metropolitans (Italians, British, French) of Libyan territory when it was a colony, through Council decision making where at least three of the P-5 states had their own long-standing foreign policy reasons for removing Ghaddafi as a national leader.⁷⁷ African initiatives for a more negotiated approach to the

75. Rieff, *supra* note 67.

76. S.C. Res. 1973, U.N. Doc. S/RES/1973, at 1–2 (Mar. 17, 2011).

77. See Ewen MacAskill, *Obama Hails Death of Muammar Gaddafi as Foreign Policy Success*, GUARDIAN (Oct. 21, 2011, 4:13 PM), <http://www.theguardian.com>

situation were roundly rebuffed, while the Arab League gave the Council reluctant support, which was quickly claimed in Northern narratives to legitimize the entire operation.⁷⁸

However, answering the legal challenge of those situations where an immediate military response to an imminent human rights catastrophe may well necessarily have to be, in the short term, a unilateral military response (as would have likely been the case in Rwanda), seems to involve R2P as an emerging international legal doctrine that would give a limited unilateral legal permission to use military force to avoid an human rights catastrophe.

The question then becomes: what changes can be made to mitigate the racializing dangers of R2P and its projected implementation in this regard, as between the Northern and Southern Tiers? There is a considerable process of legal development in the United Nations, particularly involving the General Assembly and the Office of the Secretary-General, focused on R2P as an emerging legal doctrine. One notable outcome is the limitation of the coverage of the doctrine to situations involving genocide and other stated international crimes.⁷⁹ We can ask whether this limitation will help curtail potential North to South racializing abuses under R2P, as well as help universalize the R2P norm of preventing human rights catastrophes in both the Northern and the Southern Tier.

But a more immediate task in this regard is to separate decisions

/world/2011/oct/20/obama-hails-death-gaddafi (“Obama . . . chalked up Libya as another foreign policy success . . .”); Patrick Kane, *Mali, Algeria, Libya and the New Front Line In ‘Energy Diplomacy,’* HUFFINGTON POST (Feb. 14, 2013, 4:19 PM), http://www.huffingtonpost.co.uk/patrick-kane/mali-algeria-libya-energy-diplomacy_b_2687432.html (discussing the U.K.’s increasing reliance on North Africa’s resources); Immanuel Wallerstein, *France’s Aggressive Foreign Policy*, AL JAZEERA (Dec. 2, 2013, 6:15 AM), <http://america.aljazeera.com/opinions/2013/12/france-foreign-policy-military-intervention.html> (arguing Africa represents France’s opportunity to “reassume a major role” in the international relations arena).

78. Stewart Patrick, *The Unruled World: The Case for Good Enough Global Governance*, FOREIGN AFF. (Jan./Feb. 2014), <http://www.foreignaffairs.com/articles/140343/stewart-patrick/the-unruled-world>.

79. U.N. Secretary-General, *The Role of Regional and Sub-Regional Arrangements in Implementing the Responsibility to Protect: Rep. of the Secretary-General*, ¶ 3, U.N. Doc. A/65/877-S/2011/393 (June 27, 2011).

about military action by Northern officials from assessments and recognition of the *imminence* of a human rights catastrophe in a particular state or situation. In other words, we must ensure the authority of the *Caroline* requirement of imminence as a permissive condition to use military force.⁸⁰ This task particularly arises around the current Security Council-related issues of, first, the “authority” of a Security Council Chapter VII veto blocking military or other Council action following discussion of a situation threatening international peace and security, where there were either strong expectations by key P-5 Members of Council authorization in which they would play a key role, or strong international community expectations that the Council should authorize forceful action. Much interpretation has arisen about the “permission” given by a Council veto for action nonetheless, by, for example, “coalitions of the willing” organized by the strength and will of the United States for action, such as in Iraq in 2003.

Similarly, following Kosovo and NATO action lacking Council approval, there followed scholarly interpretations that the military action was “illegal but legitimate.”⁸¹ The latter bifurcation, while understandable, raised more unanswered issues about interpreting both the UN Charter and general international law. Thus, the question becomes that of regulating the determination of one or more P-5 members and other states who were primed for their own military action and wished it to be collectively authorized, but it was not, and therefore they remained determined and rationalized to carry it through nonetheless. The companion question is that of regulating state and public international demands for military action considered “legitimate” to forestall a human rights tragedy, but with collective authorization blocked by the wrong-headed veto “failure” of the Council.

80. See John Moore, *The Caroline*, in 3 A DIGEST OF INTERNATIONAL LAW 2419, 2424–28 (1906); see also Letter from Daniel Webster to Lord Ashburton (Aug. 6, 1842), in 2 A DIGEST OF INTERNATIONAL LAW, at 412 (John Bassett Moore ed., 1906) (“[W]hile it is admitted that exceptions growing out of the great law of self-defence do exist, those exceptions should be confined to cases in which the necessity of that self-defence is instant, overwhelming, and leaving no choice of means, and no moment for deliberation.”).

81. INDEP. INT’L COMM’N ON KOS., THE KOSOVO REPORT: CONFLICT, INTERNATIONAL RESPONSE, LESSONS LEARNED 4 (2000).

The correlative questions posit that, first, the obligation to rescue people from human catastrophes must take legal priority over blocking geopolitical and national governmental claims of impossibility of meaningful response. And second, that the national deployment of military force for other purposes beyond the above more or less credible self-defense, not validly authorized under international law, must be prohibited by law to the extent possible. Such a prohibition will help mitigate the continuing danger of Northern military intervention being justified, for other national policy objectives, by claims of that state(s) acting to protect human rights in a target Southern state.

To address both of these latter questions, I propose that dedicated authority to make assessments and formally certify the imminence of a human rights catastrophe anywhere in the world community—and only to publicly broadcast and recognize the *imminence* of such impending horrors—be lodged in the UN Department of Peacekeeping Operations (DPKO), as it is linked to the Secretary-General. The DPKO already possesses clear capacity towards such global monitoring, in its responsibilities to do assessments of threatening conflicts in advance of forthcoming Security Council discussion, in providing the Secretary-General with necessary Council information, as well as in assessing the requirements of implementing a peacekeeping operation authorized by the Council.⁸² Part of this process already is the convoking by the Secretary-General, independently of the Security Council and its mandates, a “Strategic Assessment” of impending situations that includes relevant resources and information from elsewhere in the UN Secretariat, and which may be followed by the dispatch of special envoys for further assessment of the situation.⁸³ All of this strongly suggests, especially with additional resources, that the DPKO in conjunction with the Secretary-General, and upon his authority, could perform the global monitoring necessary to timely and loudly publicly proclaim the imminence of a human rights catastrophe arising anywhere in the world community, especially a planned and directed genocide or other R2P-stated international crimes. It further

82. Muna Ndulo, *United Nations Peacekeeping Operations and Security and Reconstruction*, 44 AKRON L. REV. 769, 770, 788 (2011); see also DEP'T OF PEACEKEEPING OPERATIONS & DEP'T OF FIELD SUPPORT, UNITED NATIONS, UNITED NATIONS PEACEKEEPING OPERATIONS: PRINCIPLES AND GUIDELINES (2008), available at http://pbpu.unlb.org/pbps/library/Capstone_Doctrine_ENG.pdf [hereinafter Capstone Doctrine].

83. Capstone Doctrine, *supra* 82, at 48.

suggests that this Department is sufficiently independent of undue corrupting pressures by Member states for it to do this critically important job.

However, now the DPKO must ensure that its monitoring and assessment function is equally extended to the Northern Tier, following the precedent through the UN Human Rights Council of the Universal Periodic Review of the internal human rights conditions of all states, and the growing precedents of UN human rights reports for conditions in the United States and elsewhere in the North. This extension is critical to mitigate the racializing of the R2P process.

Operationally, the DPKO under this proposal—having hopefully learned its lessons since Rwanda—would certify, where no other timely options through the United Nations or elsewhere could be mobilized, that a human rights catastrophe was imminent in a particular state and that its government was unwilling or unable to protectively respond. This would be a loud, global certification, perhaps analogous to a global imminent tsunami warning with the full weight of the Secretary-General behind it. *Only* upon that certification of imminence of an human rights catastrophe featuring international crimes would any unilateral national state or states, in a position to timely and appropriately deploy rights-protective military force to the designated state, acquire the legal authority to so intervene for the sole purpose of preventing or mitigating the rights catastrophe until further international assistance could arrive (including that authorized by the Council or a regional organization).

Such DPKO certification of imminence would only be a pre-condition, and itself would create no right or duty on states to respond. However, in addition to the halting of R2P international crimes already having been confirmed as an obligation *erga omnes*, military and territorial factors plus the contextual relationship of the unilateral actor(s) to the targeted territory and its people, would shape the unilateral state's duty to act to mitigate or prevent the impending catastrophic crimes. Should that state now fail to respond where its capacity to do so is apparent, global demands would hopefully arise for it to immediately justify its refusing its duty to protect those gravely endangered people on behalf of the international community.

Those states responding would be bound by international humanitarian law where there is military conflict, and also by international human rights law where applicable. An important part of their global accountability would be an assessment of the strategies and aims of their military deployments. The latter must be tailored for preventing a human rights catastrophe and immediately delivering the humanitarian assistance and protection of local people directly implied, and not for prevailing in a civil war and shaping the governance of the country for other ends. Such military intervention must be then tailored to withdraw once the catastrophe is prevented and other suitable international assistance arrives.

To define the legal basis for any country using unilateral force under this proposal requires us to recall that the legal norm of R2P emphasizes the needs of the victims to be protected, rather than an alleged right to intervention. We must address the issue of unilateral military responses to claimed human rights catastrophes for at least three reasons: (1) because of the inevitability that some states will sometimes claim a right to do so, in relation or not to Security Council action, and therefore the need for better international legal regulation of this issue; (2) the history of collective authorization for emergency human rights responses being often that of such authorization coming, if at all, quite late to actually protect the potential victims on the ground, or not coming at all because of P-5 conflicting politics and racializing aims blocking Security Council action under Chapter VII, in addition to similar possible delays in regional organizations; and (3) sometimes, as rarely and accurately judged as possible, timely properly deployed military action even by a single state even with its inherent violence and other risk of abuse, is the only effective first-stage hope for threatened people in an R2P situation. There are already proposals being made in the legal relationship between the Council under Chapter VII and regional organizations under Chapter VIII of the Charter for carving out exceptions for regional military action in emergency R2P situations.⁸⁴ This proposal advocates the acceleration of that process, with the inclusion of these DPKO-certified conditions and safeguards.

I have previously suggested that regional organizations might authorize enforcement action in emergency R2P situations under a presumption of *post hoc* Security Council approval. I now expand

84. THE CHARTER OF THE UNITED NATIONS: A COMMENTARY, *supra* note 45, at 1457–59.

that recommendation to the regional level, to cover presumptive regional authorization—if it is not given timely per the DPKO certification of imminence—for a single or a few states in a position for an immediate properly-deployed military response for R2P prevention. They would exercise their duty to unilaterally act to prevent a criminal catastrophe. The burden would be, first, on the regional organization to disown, if it wishes, the unilateral R2P protective mission, and then on the Security Council. I suggest that disowning such actions that are uniquely triggered by DPKO certifications of imminence, that are publicly and properly deployed for only that purpose, and whose deployment quickly includes publicized goals, arrangements, and timetables for military action and then withdrawal from the territory after averting or mitigating a catastrophe, would rarely happen. Thus, the legal basis for unilateral action would primarily rest on the emerging authority of regional organizations to order enforcement actions *only* in emergency R2P situations, and the implied regional authorization to those unilateral state actors deploying military force subsequent to DPKO certifications of imminence. Any implied Security Council approval *post hoc* would only support that legality.

More risky arguments might also be made on the legality of this emergency, unilateral R2P action based on General Assembly or other appropriate process of limited re-interpretation of Article 2(4) of the UN Charter that this unilateral use of force against a designated state for this R2P purpose, and only under these DPKO-certified conditions and safeguards, presumptively does not constitute a threat to the territorial integrity or the political independence of the intervened-in state. Such tightly defined action upholds Charter human rights obligations, constitutes a valid emergency exception absent Security Council action not otherwise addressed by the Charter, and therefore constitutes a lawful use of limited unilateral force under the UN Charter. Professor D'Amato has shown how the Charter *travaux* support such an interpretation of Article 2(4).⁸⁵

85. Anthony D'Amato, *The Meaning of Article 2(4) in the U.N. Charter* 15 (Northwestern Pub. Law and Legal Theory Series, Paper No. 13-30, 2013), available at <http://ssrn.com/abstract=2321806>. See also Robert F. Turner, *International Law Studies*, Vol.67, Chapter III, State Sovereignty, *International Law, and the Use of Force in Countering Low-Intensity Aggression in the Modern World* 48, 65; Barry M. Benjamin, "Unilateral Humanitarian Interventions:

All in all, this proposed legal basis for unilateral R2P DPKO-certified emergency military intervention, and for regional organizations authorizing enforcement action for the same purpose, represents more desirable international community policy, than the current Northern-led debates on the authority to act militarily conferred by a Security Council veto-refusal of Chapter VII decisions to authorize protective military action, and than the dilemma for international lawyers following Kosovo of designating emergency catastrophe-mitigating regional action absent Council authorization as “illegal but legitimate.”

Again, the DPKO and the Secretary General must be equally prepared and willing to give such global certifications of imminence to situations in the Northern Tier where its timely assessment requires. If no outside military forces respond, the threatened people within a Northern state will at least gain some added local protection, plus other possible globally mobilized strategies of non-military intervention, from this special global spotlight focused on their oppression.

CONCLUSION

It is an open question whether international law will develop to only bless current patterns of power regarding North to South practices of intervention, or whether better international law will resolve this challenge through a less racialized process. The power of human rights is hopeful, but insufficient without more incorporation of the lessons of the Decolonization Movement, and without R2P successfully emerging as a non-racialized norm of protection in imminently catastrophic situations. The United Nations, in spite of the Security Council in its current process, must play an important, safeguarding role. I always hold out hope for better international law.

Thank you.