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DARFUR, THE AUTHORITY OF LAW, AND UNILATERAL HUMANITARIAN INTERVENTION

*Samuel Vincent Jones**

I. INTRODUCTION

THE early morning sun bakes the calcified clay dirt of Sudan's Darfuri landscape as families weep for the loss of loved ones from the previous night's onslaught by Janjaweed Arab militia forces.¹ Blood coats the already slow-cooked earth. Babies clamor for something to eat, but with bones made flaccid by malnutrition, they are unable to scavenge to satisfy their hunger. As members of the African Zaghawa tribe make their way to water wells, planes suddenly approach and bomb the area around the wells.² While the murder of the innocent from the air continues, Sudanese soldiers and Jangaweed militia forces surround the area and resume their indiscriminate killing of the defenseless Zaghawa.³ The killing and screaming continues all day and does not stop until nightfall.⁴

The next day, a man sits under a tree groaning from a gunshot wound to the neck and jaw, "left for dead [on top of] a pile of corpses."⁵ Under an adjacent tree, widows cry over the bodies of their husbands who were shot to death.⁶ Seeking shelter nearby, "a four-year-old orphan girl [attempts to care] for her

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1. The introduction is loosely drawn from Samantha Power, *Dying in Darfur*, NEW YORKER, Aug. 30, 2004, at 58, and Nicholas D. Kristof, *Reign of Terror*, N.Y. TIMES, Sept. 11, 2004, at A15.

2. Power, *supra* note 1, at 58.

3. *Id.*

4. *Id.*

5. Kristof, *supra* note 1, at A15.

6. *Id.*

starving [one] year-old brother.”⁷ Under the tree next to her is the body of “a woman whose husband [was] killed, along with her [two young sons], just before she was gang-raped and mutilated.”⁸

Such atrocities have become the norm in Darfur, Sudan. This may explain why, on May 28, 2006, tens of thousands of chanting refugees confronted then UN Secretary General Kofi Annan about the ethnic cleansing campaign and widespread rapes occurring in Darfur. The refugees carried signs saying, “We are looking for freedom and justice,” and “lined the muddy streets of Darfur’s largest refugee camp.”⁹ In recent years, Darfur has experienced some of the worst violence in world history. In addition to systematic and widespread murder, maiming, and rape, the people of Darfur are threatened by the worst food shortage in decades.¹⁰ The Sudanese government has reportedly restricted humanitarian relief efforts, denied the existence of a humanitarian crisis, and astonishingly, contended that fewer than 9,000 people have been killed.¹¹ Yet, media reports indicate that “more than 200,000 people have been [murdered] ... [since] 2003,”¹² and another 2.5 million people have been displaced from their homes.¹³ The violence in Darfur and limited international response is strikingly reminiscent of the genocide that occurred in Rwanda in 1994. During which time, approximately 800,000 civilians were killed—mostly with machetes—at a rate approaching 8,000 per day.¹⁴ Meanwhile, the United Nations and its member states sat idly by and watched on CNN.¹⁵

At least one member state has taken a different approach to the Darfurian atrocities than it did with respect to the Rwandan genocide. The United States characterized the atrocities in Sudan as genocide and called upon the United

7. *Id.*

8. *Id.*

9. *Annan Hears Refugees Tell of Sudan War*, N.Y. TIMES, May 29, 2005, § 1, at 6.

10. The United Nations estimates that 70,000 deaths in Darfur are attributable to hunger. See Robyn Dixon, *U.N. Suspends Operations in Sudan—World Food Program’s Decision to Pull Out of the Darfur Region Due to Renewed Violence Leaves 300,000 Without Help*, L.A. TIMES, Nov. 26, 2004, at A3.

11. Alex Massie, *No Genocide or Famine in Darfur, Insists Sudan*, DAILY TELEGRAPH (U.K.), Nov. 28, 2006, at 17, available at <http://www.telegraph.co.uk/news/main.jhtml?xml=/news/2006/11/28/wdarfur28.xml>.

12. *African Union Picks Ghanaian as Its Leader, in Snub to Sudan*, N.Y. TIMES, Jan. 30, 2007, at A3 [hereinafter *African Union*].

13. *U.N. Humanitarian Official Says Darfur Crisis Is at Crucial Moment*, N.Y. TIMES, Nov. 19, 2006, § 1, at 120.

14. Daniel Ellsberg, *Contemplating a Fatal Mistake*, N.Y. TIMES, May 21, 1999, at A27.

15. Despite mounting evidence that indicated growing conflict between the Hutu and Tutsi tribes in Rwanda, and that the Tutsi minority was being registered to facilitate the means by which they would be exterminated, approximately 800,000 Tutsis were murdered because no state intervened to stop the mass murders. See Joshua Kagan, *Speeding Up the International Community’s Response Time in Addressing Acts of Genocide: Deferring to the Judgment of Nongovernmental Organizations*, 34 INT’L J. LEGAL INFO. 145, 148, 151-52 (2006); Jaime Frederic Metzl, *Rwandan Genocide and the International Law of Radio Jamming*, 91 AM. J. INT’L L. 628, 632 (1997).

Nations to take action.¹⁶ Ostensibly guided by the public conscience, the U.S. Congress, in an unprecedented undertaking, has urged its President to “seriously” consider “unilateral intervention to stop [the] genocide in Darfur, Sudan should the United Nations Security Council (“UNSC”) fail to act.”¹⁷ Given the growing number of deaths in Darfur, it might seem that the United States’ consideration of unilateral humanitarian intervention¹⁸ should be met with approbation rather than cynicism, but nothing could be further from the truth. Despite the massive atrocities observed, first in Rwanda and now in Darfur, a wide number of observers oppose the idea of unilateral humanitarian intervention.¹⁹

Contemporary posture typifies the idea that legal recognition of unilateral humanitarian intervention would destabilize world order because some member states would instigate ill-motivated hostilities under the guise of humanitarianism, thereby reducing the efficacy and primacy of the UN Charter. This article offers a new challenge to the pretext claim. By clarifying various

16. *The Crisis in Darfur: Hearing Before the S. Comm. on Foreign Affairs*, 108th Cong. (2004) (statement of Colin L. Powell, U.S. Sec’y of State), available at <http://www.state.gov/secretary/former/powell/remarks/36042.htm>.

17. H.R. CON. RES. 467, 108th Cong. ¶10 (2004).

18. *Unilateral humanitarian intervention* is a military intervention undertaken by a state, group of states, or international organization, without target-state invitation or United Nations authorization, to facilitate the restoration of human rights in another state. See Daphné Richemond, *Normativity in International Law: The Case of Unilateral Humanitarian Intervention*, 6 YALE HUM. RTS. & DEV. L.J. 45, 49-50 (2003); Barry M. Benjamin, Note, *Unilateral Humanitarian Intervention: Legalizing the Use of Force to Prevent Human Rights Atrocities*, 16 FORDHAM INT’L L.J. 120, 141 (1992-93).

19. See, e.g., Ian Brownlie, *Thoughts on Kind-Hearted Gunmen*, in HUMANITARIAN INTERVENTION AND THE UNITED NATIONS 139, 147-48 (Richard B. Lillich ed., 1973) (arguing that recognition of a right of unilateral intervention would act as a “general license” for vigilantes and opportunists); SIMON CHESTERMAN, *JUST WAR OR JUST PEACE?* 235-36 (2001); YORAM DINSTEIN, *WAR, AGGRESSION AND SELF DEFENCE* 67 (3d ed. Cambridge Univ. Press 2001) (advancing notion that unilateral humanitarian intervention is too subject to abuse); LOUIS HENKIN, *HOW NATIONS BEHAVE: LAW AND FOREIGN POLICY* 144-45 (2d ed. 1979) (arguing that attempts to modify the use-of-force provisions of the UN Charter on humanitarian grounds are “dangerous” because unilateral humanitarian intervention is vulnerable to being used as a “pretext” for aggression); OSCAR SCHACHTER, *INTERNATIONAL LAW IN THEORY AND PRACTICE* 126 (1991) (recognizing that although humanitarian intervention is desirable, “it could provide a pretext for abusive intervention”); Richard B. Bilder, *Kosovo and the “New Interventionism”: Promise or Peril?*, 9 J. TRANSNAT’L L. & POL’Y 153, 160 (1999) (stating that humanitarian intervention has typically been a pretext for war aimed at advancing the selfish agenda of the intervening nation); Thomas M. Franck & Nigel S. Rodley, *After Bangladesh: The Law of Humanitarian Intervention by Military Force*, 67 AM. J. INT’L L. 275, 304 (1973) (questioning the credibility of unilateral humanitarian intervention because of its potential to authorize nations to oppress other nations); Jules Lobel & Michael Ratner, *Bypassing the Security Council: Ambiguous Authorizations to Use Force, Cease Fires and the Iraqi Inspection Regime*, 93 AM. J. INT’L L. 124, 153 (1999) (reasoning that unilateral humanitarian intervention could provide a blueprint for world powers to pursue “geopolitical interest”); Jianming Shen, *The Non-Intervention Principle and Humanitarian Interventions Under International Law*, 7 INT’L LEGAL THEORY 1, 10-12 (2001) (reasoning that humanitarian intervention is nothing more than a “high sounding and convenient tool” for “powerful nations” to conceal their intent to “dominate weaker states”); Bruno Simma, *NATO, the UN and the Use of Force: Legal Aspects*, 10 EUR. J. INT’L L. 1, 5 (1999) (recognizing the merit of arguments disfavoring unilateral humanitarian intervention because of the opportunity for abuse).

ideas about the meaning and limits of law and examining how law emerges as a practical authority, this article illustrates basic distinctions about the relationship between law and morality. It ascribes validity to the integrative, condition based approach to unilateral humanitarian intervention and renders doubtful the pretextualist claim that the noninterventionist framework of the United Nations Charter ("Charter") functions as an effective juridical construct.²⁰ In so doing, this article accepts the possibility of altruistic unilateral humanitarian intervention.

II. THE POTENTIALITY FOR PRETEXTUAL WAR DOES NOT JUSTIFY NONINTERVENTION

The ongoing human rights atrocities occurring in Darfur have drawn attention to a preexisting debate and induced widespread concern regarding the international community's remedial response to human rights crises.²¹ The concern is thoroughly justified with respect to Darfur for several reasons.

First, although the Sudanese government has reportedly abused its sovereignty through its complicity in the killings,²² the Sudanese government claims that any UN deployment without Sudan's consent would violate its sovereignty.²³ As a result, the Sudanese government states that it would fight any uninvited foreign peacekeepers.²⁴ Sudan's claim is supported by a strict reading of Article 2(7) of

20. Part II examines the intuitive plausibility of viewing the current noninterventionist regime of the Charter as an effective legal framework, given the aims and purposes of the Charter as a whole. Part III considers whether the noninterventionist regime of the Charter, when strictly read, is an authority capable of directly prohibiting a state's use of force. Finally, part IV introduces an approach that would better enable the Charter to assert practical authority and more effectively direct member state practice.

21. In 2004, the UNSC, in recognizing the widespread violations of human rights and international humanitarian law exacted against civilian Darfurians, including rapes, murder, displacement and indiscriminate attacks, determined that the situation in Darfur constituted a "threat to international peace and security and to stability in the region." S.C. Res. 1556, U.N. Doc. S/RES/1556 (July 30, 2004), available at <http://daccessdds.un.org/doc/UNDOC/GEN/N04/446/02/PDF/N0444602.pdf?OpenElement>. In 2007, the UNSC expressed grave concern over the continued deterioration of the humanitarian situation in Darfur and the impact on the region and continued violence on civilians. See S.C. Res. 1755, U.N. Doc. S/RES/1755 (April 30, 2007), available at <http://daccessdds.un.org/doc/UNDOC/GEN/N07/325/27/PDF/N0732527.pdf?OpenElement>.

22. M. Rafiqul Islam, *The Sudanese Darfur Crisis and Internally Displaced Persons in International Law: The Least Protection for the Most Vulnerable*, 18 INT'L J. REFUGEE L. 354, 370 (2006).

23. It is widely accepted among commentators that the Charter's prohibition on the use of force is only directed at "non-consensual interventions." See MICHAEL BYERS, WAR LAW 64-65 (2005); Shen, *supra* note 19, at 6 ("[A] state is not subject to any form of foreign interference in its own domestic matters except by consent.").

24. Lydia Polgreen, *Sudan Releases an American Journalist from Jail in Darfur*, N.Y. TIMES, Sept. 10, 2006, § 1, at 114; David B. Kopel et al., *Is Resisting Genocide a Human Right?*, 81 NOTRE DAME L. REV. 1275, 1302-04 (2006). The UNSC can decide at any time that the effects of Sudan's anarchy are intolerable and authorize military action simply by finding that the "magnitude of human tragedy" created by the conditions in Darfur constitute a threat to international peace. This position, without question, was the basis for the United Nation's military intervention in

the Charter,²⁵ which is “premised on respect for sovereignty, territorial integrity, and political independence, and is an adjunct to the principle of the nonuse of force embodied in Article 2(4)²⁶ of the United Nations Charter.”²⁷ Together, these provisions have generally been accepted as creating a “duty of nonintervention.”²⁸ This purported duty prohibits one state from interfering in the internal affairs of another sovereign state without the consent of the target state or authorization from the UNSC,²⁹ except in matters of self-defense pursuant to Article 51³⁰ of the Charter.

Second, political wrangling in the United Nations stymies remedial progression and precludes UNSC authorization of military intervention without Sudan’s consent. The UN, therefore, is ill positioned to stop the atrocities in Darfur, even though it is empowered to give such authorization pursuant to Articles 41 and 42 of the Charter.³¹ For example, Russia, a permanent member

Somalia. See David Wippman, *Military Intervention, Regional Organizations, and Host-State Consent*, 7 DUKE J. COMP. & INT’L L. 209, 233-34 (1996) (citing S.C. Res. 794, ¶ 3, U.N. Doc. S/RES/794 (Dec. 3, 1992)).

25. U.N. Charter art. 2, para. 7 (“Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state ... but this principle shall not prejudice the application of enforcement measures under Chapter VII.”).

26. U.N. Charter art. 2, para. 4 (“All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.”).

27. Ved Nanda, *Tragedies in Northern Iraq, Liberia, Yugoslavia, and Haiti—Revisiting the Validity of Humanitarian Intervention under International Law—Part I*, 20 DENV. J. INT’L L. & POL’Y 305, 307 (1991).

28. The General Assembly classifies the obligation as a “duty not to intervene in matters within the domestic jurisdiction of any State.” See Shen, *supra* note 19, at 5 (citing G.A. Res. 2625 (XXV), at 122, U.N. Doc. A/1889 (Oct. 24, 1970) (emphasis added)).

29. U.N. Charter art. 39 (“The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.”). Observers interpret this provision to reserve to the UNSC the right to use military force. Daniel W. Abbot, *The United Nations and Intrastate Conflict: A Legislative History of Article 39 of the United Nations Charter*, 8 U.C. DAVIS J. INT’L L. & POL’Y 275, 275 (2002).

30. U.N. Charter art. 51 (“Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.”).

31. U.N. Charter art. 41 (“The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.”); U.N. Charter art. 42 (“Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to

of the UNSC, sells fighter jets to Sudan and is unlikely to support interventionist UN initiatives against Sudan without the acquiescence of the Sudanese government.³² China, also armed with veto power as a permanent member of the UNSC, “imports more than 64 percent of Sudan’s oil”³³ and has helped “Sudan resist pressure [from] the United Nations ... to end [the] violence ... in Darfur.”³⁴ China forced the United Nations to accept a condition that Sudan consent to any deployment of UN forces.³⁵

Third, the United Nations International Commission of Inquiry on Darfur (“Commission”) disagreed with the United States’ characterization of the atrocities in Darfur as genocide.³⁶ Chaired by Antonio Cassese, a critic of the Genocide Convention, who has long viewed the treaty as “ineffective” and a proven “failure,”³⁷ the Commission found that despite widespread mass killings, genocide had not occurred in Sudan.³⁸ It did, however, find that the Sudanese government’s conduct constitutes crimes against humanity.³⁹

The Commission’s findings on the issue of genocide in Sudan have produced disagreement among observers.⁴⁰ One contention is that the Commission’s failure to establish a case for genocide substantially impedes any effective international effort to stop the ongoing armed attacks against the unarmed

maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.”).

32. *Sudan Can’t Wait*, ECONOMIST, July 31, 2004, at 11.

33. Howard W. French, *Chinese Leader to Visit Sudan for Talks on Darfur Conflict*, N.Y. TIMES, Jan. 25, 2007, at A6.

34. Keith Bradsher, *Chad’s Switch to Beijing’s Side Draws Angry Response in Taiwan*, N.Y. TIMES, Aug. 8, 2006, at A6. See also Richard A. Falk, *The Adequacy of Contemporary Theories of International Law—Gaps in Legal Thinking*, 50 VA. L. REV. 231, 249-50 (1964) (reasoning that problems of international law are especially prominent when controverted behavior is committed by a member state that is able to block or influence censure in the political organs of the United Nations).

35. Stephen Rademaker, *Unwitting Party to Genocide*, WASH. POST, Jan. 11, 2007, at A25. A recent UNSC initiative to authorize deployment of up to 26,000 peacekeepers to Darfur, under the day to day control of the African Union, proceeded only after the Sudanese government agreed to allow the UN peacekeepers to enter Darfur. See S.C. Res. 1769, ¶ 2, U.N. Doc. S/RES/1769 (July 31, 2007), available at <http://daccessdds.un.org/doc/UNDOC/GEN/N07/445/52/PDF/N0744552.pdf?OpenElement>; John Sullivan, *U.N. Security Council Approves Joint Force of Up to 26,000 Peacekeepers for Darfur*, N.Y. TIMES, Aug. 1, 2007, at A8.

36. Warren Hoge, *U.N. Finds Crimes, Not Genocide in Darfur*, N.Y. TIMES, Feb. 1, 2005, at A3.

37. ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 97 (2003).

38. Int’l Comm’n on Darfur, *Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General*, ¶ 640, (Jan. 25, 2005) [hereinafter Int’l Comm’n Report to the Secretary-General], available at http://www.un.org/News/dh/sudan/com_inq_darfur.pdf (“[T]he crucial element of genocidal intent appears to be missing, at least as far as the central Government authorities are concerned. Generally speaking the policy of attacking, killing and forcibly displacing members of some tribes does not evince a specific intent to annihilate, in whole or in part, a group distinguished on racial, ethnic, national or religious grounds.”).

39. See *id.* ¶ 293.

40. Nsongurua J. Udombana, *An Escape from Reason: Genocide and the International Commission of Inquiry on Darfur*, 40 INT’L LAW. 41, 41-42 (2006).

civilian population in Darfur.⁴¹ On the other hand, Schabas observes that discord over whether the Sudanese government's conduct "constitutes genocide or one of its cognates, such as crimes against humanity," is relatively insignificant.⁴²

Even if the Commission found that the Sudanese government implemented a policy of genocide against its citizens, and thus violated the Genocide Convention, such a finding would not impose any duty upon any member state to act outside its own territory.⁴³ The legal duties imposed under the Genocide Convention have been interpreted to be very limited in scope, only requiring member parties to prevent genocide from occurring within their own states.⁴⁴ This juridical construct appears to virtually eliminate any prospect of stopping genocide in circumstances in which the government is complicit in the killings.⁴⁵ The United States' call upon the UNSC to stop the killings in Darfur, in fact, represents the only time any party to the Genocide Convention has ever invoked it as a mechanism to stop genocide since the treaty was adopted.⁴⁶

Prior to the enactment of the Genocide Convention, the specific crime of genocide lacked a significant presence within international criminal law. It was not an even an offense considered by the International Military Tribunal at Nuremberg.⁴⁷ Instead, conduct that could accurately be described as genocide was essentially encompassed by the "persecution" part of the crimes against

41. *Id.*

42. William A. Schabas, *Genocide, Crimes Against Humanity, and Darfur: The Commission of Inquiry's Finding on Genocide*, 27 CARDOZO L. REV. 1703, 1704-05 (2006). See also Int'l Comm'n Report to the Secretary-General, *supra* note 38, at 4 ("The conclusion that no genocidal policy has been pursued and implemented in Darfur by the Government authorities, directly or through the militias under their control, should not be taken in any way as detracting from the gravity of the crimes perpetrated in that region. International offences such as the crimes against humanity and war crimes that have been committed in Darfur may be no less serious and heinous than genocide.").

43. David Luban, *Calling Genocide by Its Rightful Name: Lemkin's Word, Darfur and the UN Report*, 7 CHI. J. INT'L L. 303, 305 (2006); Beth Van Schaack, *Darfur and the Rhetoric of Genocide*, 26 WHITTIER L. REV. 1101, 1137 (2005) ("[T]he Genocide Convention does not create a right or duty to engage in any form of humanitarian intervention over and above what conventional and customary law may already provide.").

44. Luban, *supra* note 43, at 305 n.20 ("Article 1 of the Genocide Convention obligates its parties to 'undertake to prevent and to punish' the crime of genocide, but Article 6 makes it clear that the 'obligation to punish genocide applies only to genocide committed within the state's own territory, and international lawyers generally assume that the legal obligation to prevent genocide has no wider extension than genocide within a state's own territory.'"). This conclusion is reinforced by Article 8, which states that parties to the Convention may call on the UN Security Council to take actions for prevention and suppression of genocide. Convention on the Prevention and Punishment of the Crime of Genocide art. 8, Dec. 8, 1948, 78 U.N.T.S. 277. There is no suggestion that states must act on their own to suppress genocide in other states. *Id.* See also WILLIAM A. SCHABAS, GENOCIDE IN INTERNATIONAL LAW 491-502 (2000).

45. GEORGE J. ANDREOPOULOS, GENOCIDE: CONCEPTUAL AND HISTORICAL DIMENSIONS 3 (1994) (recognizing that one of the most fundamental problems with the Genocide Convention is its reliance on the perpetrator of genocide, the state, to be responsible for its prosecution).

46. Scott Straus, *Darfur and the Genocide Debate*, FOREIGN AFF., Jan.-Feb. 2005, at 123.

47. Madeline Morris, *Genocide, Politics, and Policy: Conference Remarks*, 35 CASE W. RES. J. INT'L L. 205, 206 (2003).

humanity offense contained in Article 6(c) of the Nuremberg Charter.⁴⁸ In addition, the term “genocide” is not incorporated anywhere in the text of the Charter. Rather, behavior that amounts to genocide is addressed by the human rights provisos of the Charter.⁴⁹ A specific finding of genocide by an investigative committee, quite simply, does not create or dispel any legal rights or duties relative to international efforts to prevent the continued murder and rape of Darfurian civilians.

Despite the limited legal significance of the exact label, some observers attribute the Commission’s inability to treat the atrocities as genocide as the central reason for the United Nations’ dismal response to the tragedy.⁵⁰ Meanwhile, the dire circumstances in Darfur reveal a truth of paramount importance to the inquiry regarding unilateral humanitarian intervention—the Darfur atrocities constitute an ongoing, government-inflicted human rights catastrophe that must be stopped. But is unilateral humanitarian intervention an appropriate remedy?

No international court has clearly addressed the issue of whether the unilateral humanitarian intervention urged by the U.S. Congress is a viable legal mechanism for stopping genocide or massive human rights atrocities.⁵¹ Despite voluminous research on the question of unilateral humanitarian intervention,⁵² a definitive resolution of the legal issues has evaded seekers.⁵³ The fact that the Sudanese government has been complicit in the mass killings of its citizens, and the UNSC is virtually paralyzed by vetoes, or anticipation thereof, may lend some support to the position that consideration of unilateral humanitarian intervention is both legally and morally appropriate. Others disagree.

48. Charter of the Int’l Military Tribunal art. 6(c), available at <http://www.yale.edu/lawweb/avalon/imt/proc/imtconst.htm#art6> (last visited July 24, 2007) (“Crimes Against Humanity: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.”).

49. See Carsten Stahn, Note & Comment, *Responsibility to Protect: Political Rhetoric or Emerging Legal Norm*, 101 AM. J. INT’L L. 99, 112 (2007).

50. Luban, *supra* note 43, at 304 (“The UN no longer knew what to do, because without the word ‘genocide,’ the mandate for action disappears.”).

51. The author recognizes that Military and Paramilitary Activities, (Nicar. v. U.S.), 1986 I.C.J. 14, (June 27), can be viewed as a rejection of unilateral humanitarian intervention, but posits that the conclusion reached by the ICJ is more accurately limited to the “conduct of the United States” under the facts before the ICJ at the time the case was heard.

52. For discussion regarding the great weight of scholarship that militates against the legality or existence of unilateral humanitarian intervention, see Ian Brownlie, *Humanitarian Intervention*, in LAW AND CIVIL WARS IN THE MODERN WORLD 218-19 (John Norton Moore ed., 1974).

53. Some scholars contend that there is a right to intervene in the event of genocide, but recognize that the question is less clear with respect to other human rights violations. See Clinton W. Alexander, *Ignoring the Lessons of the Past: The Crisis in Darfur and the Case for Humanitarian Intervention*, 15 J. TRANSNAT’L L. & POL’Y 1, 42 (2005); Gareth Evans, *The Responsibility to Protect: Rethinking Humanitarian Intervention*, 98 AM. SOC’Y INT’L L. PROC. 78, 79 (2004); Todd Howland, *Evolving Practice in the Field: Informing the International Legal Obligation to “Protect,”* 34 DENV. J. INT’L L. & POL’Y 89, 91 (2006) (“[T]here is not yet even agreement on when there is an obligation to intervene in cases of massive refugees or genocide.”).

Considerable scholarship weighs heavily against the legality of intervention on the grounds that the alleged right of unilateral humanitarian intervention is a legal and moral fiction.⁵⁴ Many scholars argue that the duty of nonintervention, specifically enunciated under the Charter, must be recognized.⁵⁵ The predominant assertion is that legal recognition of a unilateral humanitarian intervention right would undermine the United Nation's authority, under its Charter, to curtail aggression.⁵⁶ Observers claim that states would use unilateral humanitarian intervention as a pretext for waging war.⁵⁷ Essentially, the noninterventionist argument is that international order is maximized through strict adherence to the text of Articles 2(4) and 2(7) of the Charter.⁵⁸

A typical empirical premise of the noninterventionist argument is that states historically have not engaged in unilateral humanitarian intervention because of the authoritatively binding nature of the nonintervention framework, and that this constraint will continue to guide the actions of state actors. This stance fails to consider that behavior consistent with the law may actually be the result of something other than obedience to the law by taking for granted the practical effectiveness of the nonintervention juridical framework.⁵⁹

When strictly read, the text of the Charter precludes unilateral humanitarian intervention. There have been, admittedly, relatively few unilateral humanitarian interventions.⁶⁰ While this fact appears to support the proposition that the strict rule against intervention is preventing "pretextual" war, it is possible that what seems to be obedience to the Charter's nonintervention framework may actually be the result of something else.⁶¹

As legal philosopher Kent Greenawalt noted in his work on the limits of law, "behavior [that is] in accord with [a] law does not necessarily [signify that law's] effectiveness."⁶² Rather, the behavior "may be the product of something other" than observance of the strictures of that law.⁶³ For example, "if an automobile is capable of going only 30 miles per hour, it is not the law that keeps the driver

54. Nico Krisch, *Legality, Morality, and the Dilemma of Humanitarian Intervention after Kosovo*, 13 EUR. J. INT'L L. 323, 323 (2002).

55. See Simma, *supra* note 19, at 5 (citing United Kingdom Foreign Office Policy Document No. 148, reprinted in 57 BRIT. Y.B. INT'L L. 614 (1986) (stating that the three main reasons weighing "against the existence of a right of humanitarian intervention" are: (1) "the UN Charter and corpus of ... international law do not ... specially incorporate ... a right of [humanitarian intervention];" (2) "[s]tate practice in the past two centuries ... provides only a handful of genuine cases of humanitarian intervention;" and (3) the scope of possible abuse of the right to intervention)).

56. See *supra* note 19.

57. *Id.*

58. See Bartram S. Brown, *Humanitarian Intervention at a Crossroads*, 41 WM. & MARY L. REV. 1683, 1702 (2000).

59. See Kent Greenawalt, *Some Related Limits of Law*, in THE LIMITS OF LAW 76 (J. Roland Pennock & John W. Chapman eds., 1974).

60. MICHAEL WALZER, JUST AND UNJUST WARS 101 (1977) ("[C]lear examples of what is called 'humanitarian intervention' are very rare.").

61. Greenawalt, *supra* note 59, at 77.

62. *Id.* at n.1.

63. *Id.*

from exceeding a speed limit of 35 miles per hour," even though the speed limit has not been violated.⁶⁴ Similarly, Ronald Dworkin notes that not every act that, in some literal sense, adheres to a principle or moral stricture constitutes obeisance to the principle.⁶⁵ For instance, a person who supplies their own answers to a spelling test is not necessarily intentionally and consciously observing the moral requirement not to cheat.⁶⁶ They may know the answers or simply may be unable to see their neighbor's answers.

With these jurisprudential principles in mind, let us assume that there have been few instances of unilateral humanitarian intervention. While most noninterventionists attribute the rarity of these instances to the effectiveness of the nonintervention framework,⁶⁷ the rarity of such conduct is probably more accurately ascribed to a historical lack of appreciation for the human rights standards that now significantly influence international norms.⁶⁸

The Charter was created to regulate interstate relations rather than internal, intrastate violations of human rights law.⁶⁹ Commentators note that only recently has the international order developed "the relatively [simple] institutional structures needed [to protect and] monitor compliance with basic human rights."⁷⁰ This suggests that the rarity of unilateral humanitarian interventions is

64. *Id.*

65. See Ronald Dworkin, *Philosophy, Morality, and Law—Observation Prompted by Professor Fuller's Novel Claim*, 113 U. PA. L. REV. 668, 675 (1965).

66. *Id.*

67. The author concedes that as a matter of theoretical soundness, the lack of unilateral humanitarian intervention may conceivably be explained by the lack of human rights violations sufficiently severe enough to justify intervention. Such a finding is dismissive for practical reasons given the atrocities that occurred in Rwanda. See Ellsberg, *supra* note 14, at A27.

68. Alexander, *supra* note 53, at 13 ("[A]s human rights have emerged as a major issue in world politics over the years, international law has evolved to accommodate exceptions to the principles of national sovereignty and nonintervention in international law."); Evans, *supra* note 53, at 82 ("The case for thinking of sovereignty in these terms is much strengthened by the ever-increasing impact of international human rights norms and the increasing impact in international discourse of the concept of human security. Sovereignty as responsibility is being increasingly recognized in state practice. The adoption of new standards of conduct for states in protecting and advancing international human rights has been one of the great achievements of the post-World War II era. The Universal Declaration and the Covenants on civil and political and on economic, social, and cultural rights mapped out the international human rights agenda, set the benchmark for state conduct, inspired many national laws and international conventions, and have led to creation of national infrastructures for protecting and promoting human rights. Accompanying all this has been a gradual transition from a culture of sovereign impunity to a culture of national and international accountability, with the international human rights norms and instruments being used as the concrete point of reference against which to judge state conduct."); Jack Alan Levy, *As Between Prince and King: Reassessing the Law of Foreign Sovereign Immunity as Applied to Jus Cogens Violators*, 86 GEO. L.J. 2703, 2706-07 (1998) (recognizing that the corpus of *jus cogens humanum* evolves over time because of the discovery and recognition of additional norms); A.P.V. Rogers, *Humanitarian Intervention and International Law*, 27 HARV. J. L. & PUB. POL'Y 725, 733 (2004) (reasoning that a recent trend in international practice has been to deviate from the long-accepted practice of noninterference when serious human rights violations have occurred).

69. Rogers, *supra* note 68, at 728.

70. ALLEN BUCHANAN, JUSTICE, LEGITIMACY, AND SELF DETERMINATION 225 (2004); M. Cherif Bassiouni, *The Perennial Conflict Between International Criminal Justice and Realpolitik*,

the result of a gap between preexisting norms and emerging social values, rather than obedience to the strictures of noninterventionist legal constructs. That said, even if one assumes that the rarity of unilateral humanitarian intervention can be substantially attributed to strict observance of the Charter's nonintervention framework by some states, the pretextualist argument is unpalatable. Indeed, the avoidance of some pretextual wars due to strict observance of a nonintervention regime comes at a terrible cost and calls into question its effectiveness.

Legal jurisprudence recognizes that a law is ineffective if it fails to contribute to the realization of the goals it was intended or desired to further.⁷¹ When examined under the lens of this jurisprudential principle, the premise of the pretextualist claim becomes unsustainable when examined in relation to the Charter's aim to protect and preserve human rights. Article 1(3) of the Charter states that the United Nations exists to "achieve international cooperation ... in promoting and encouraging respect for human rights and for fundamental freedom for all."⁷² The Charter's human rights provisions are phrased in terms of encouraging cooperation to promote human rights.⁷³ Articles 55 and 56 of the Charter also provide that all member states "pledge themselves to take joint and separate action in cooperation with the Organization for the achievement of ... universal respect for, and observance of, human rights."⁷⁴

Although the status of the human rights clauses of the Charter has been the subject of much controversy,⁷⁵ international legal scholars have long established that the member states' pledge to preserve human rights cannot be interpreted as a mere declaration devoid of legal obligation.⁷⁶ To make sense of this claim, we must assume that the Charter's major aim is to preserve and protect international human rights⁷⁷ while maintaining international security and peace.⁷⁸ Certainly,

22 GA. ST. U. L. REV. 541, 542 (2006) ("In the last 50 years, national legal systems have qualitatively advanced far more than during the preceding 7,000 years. This advance is largely due to the impact of international human rights norms on national legislation [T]o some extent, this permeation of international human rights norms and standards has also occurred in the international legal system.").

71. For example, few would deny that "a law against hunting deer, passed solely to protect deer, would be ineffective if the consequence of obeying its commands is overpopulation of deer, depletion of their food supply, and finally the starvation of them all." See Greenawalt, *supra* note 59, at 78.

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

73. See Jennifer L. Czernecki, Comment, *The United Nations' Paradox: The Battle Between Humanitarian Intervention and State Sovereignty*, 41 DUQ. L. REV. 391, 394 (2003).

74. U.N. Charter arts. 55(c), 56.

75. See Richard B. Lillich, *Invoking International Human Rights Law in Domestic Courts*, 54 U. CIN. L. REV. 367, 371-85 (1985).

76. H. LAUTERPACHT, *INTERNATIONAL LAW AND HUMAN RIGHTS* 145-46 (reprint 1968) (1950).

77. Article 1(3) of the U.N. Charter states that among the UN's purposes is to "achieve international co-operation ... in promoting and encouraging respect for human rights and for fundamental freedom for all." U.N. Charter art. 1, para. 3. The UN Charter's human rights provisions are phrased in terms of encouraging cooperation to promote human rights. Czernecki, *supra* note 73, at 394. Articles 55 and 56 of the UN Charter provide that all member states "pledge themselves to take joint and separate action in co-operation with the Organization for the achievement of ... universal respect for, and observance of, human rights." U.N. Charter arts. 55(c), 56.

the failure of the United Nations to abate atrocities, in Rwanda,⁷⁹ Sudan,⁸⁰ Bosnia,⁸¹ and Iraq,⁸² lends alarming support to this thesis and substantially undermines the premise that strict adherence to nonintervention promotes a just and efficient international order more effectively than unilateral humanitarian intervention. The more critical point, for present purposes, is that if states resist engaging in unilateral humanitarian intervention, despite witnessing mass human rights atrocities, primarily because of obedience to the strict text of the nonintervention framework, the Charter fails as an effective law. Primacy should not be substituted for exclusivity. The Charter must be interpreted in a manner that permits its human rights imperatives to be weighed equally alongside its peace and security provisions. Such an interpretation would ban unilateral humanitarian intervention only in cases where a territorial change is sought or the political independence of the state is challenged. Without such findings, unilateral humanitarian intervention not only fails to offend the nonintervention framework, but would be consistent with the most fundamental purposes of the Charter while facilitating its practical effectiveness.

The next section of this article considers whether the Charter's nonintervention framework is capable of functioning as an authoritative instrument if strict adherence to its literal terms becomes morally objectionable because of human rights catastrophes. It argues that the nonintervention legal framework can provide states with a reason to act or refrain from acting only if its obvious justifications and aims are weighed against the moral imperatives inherent in the corpus of the Charter's human rights text.

III. THE CHARTER IS INCAPABLE OF PRACTICAL AUTHORITY UNLESS THE NONINTERVENTION FRAMEWORK IS WEIGHED AGAINST HUMAN RIGHTS IMPERATIVES

States, like people, are fundamentally autonomous beings, responsible for making moral judgments about how they ought to act.⁸³ When an international law demands that a state refrain from doing something, the demand interferes with the state's autonomy, including the legal and moral right to deliberate, make decisions, and take responsibility for its own actions.⁸⁴ Adherents of

78. U.N. Charter art. 1, para. 1 ("To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace.").

79. *Supra* note 15.

80. More than 200,000 Sudanese people have been killed in Darfur. See *African Union, supra* note 12, at A3.

81. In 1995, 7,000 men were executed in Srebrenica. See Marlise Simons, *Court Still Weighing Genocide Case from Milosevic Era*, N.Y. TIMES, June 18, 2006, § 1, at 16.

82. Approximately 50,000 Kurds were murdered in Iraq in 1988. See Damien Cave, *Defiant Hussein Hails Insurgents and Clashes with His Judge*, N.Y. TIMES, July 27, 2006, at A12.

83. Frank J. Garcia, *Globalization and the Theory of International Law*, 11 INT'L LEGAL THEORY 9, 11 (2005).

84. See W. Bradley Wendel, *Legal Ethics and the Separation of Law and Morals*, 91 CORNELL L. REV. 67, 94 (2005).

nonintervention support this notion, arguing that by virtue of its legal obligations under the Charter a member state has no right to exercise independent moral judgment in determining what it will do in response to massive human rights atrocities occurring within another state.

The noninterventionists' claim is that the Charter does not authorize any state "to act, unilaterally, in the domain of human rights" despite the occurrence of massive and repeated human rights atrocities; therefore, states may not intervene.⁸⁵ To the extent this argument rests on the proposition that the Charter's nonintervention framework postulates practical authority⁸⁶ capable of issuing exclusionary reasons for obedience, it departs from well established jurisprudential principles. According to noninterventionist claims, the mere fact that the Charter enunciates nonintervention provides states with a reason and mandate for obedience that virtually supplants all reasons that could lead a state to disobey the Charter and intervene. This understanding of the noninterventionist claim regarding the authority of the Charter's nonintervention regime is strikingly similar to the legal theory advanced and defended by Columbia Law Professor Joseph Raz, who is recognized as the "most influential" legal theorist on the law's authority.⁸⁷

Raz asserts that it is the very nature of authority that its directives do not simply stand alongside other reasons for action, to be evaluated and weighed among those other reasons.⁸⁸ In order for the Charter to carry practical authority, it must be regarded as an authoritative directive. Thus, when a state contemplates unilateral humanitarian intervention, the Charter must be taken as an instrument that supplants a state's reasons to intervene and removes the possibility of unilateral action. The Charter should not constitute merely a single powerful consideration to be weighed among the state's other considerations.⁸⁹

For Raz, the law functions as a mediator when viewed in this fashion.⁹⁰ His assertion is that before receiving an authoritative directive, "people are in direct touch with a variety of moral and other reasons for and against actions they might [take]."⁹¹ Raz further contends that as

[a]uthority, [law] interposes itself between people and their reasons by weighing and balancing those reasons and issuing a new, consolidating directive that replaces those multitudinous considerations and factors with a

85. DINSTEIN, *supra* note 19, at 85 (reasoning that no state is "authorized" to act unilaterally, despite mounting human rights atrocities, without UNSC authority).

86. JOSEPH RAZ, *ETHICS IN THE PUBLIC DOMAIN* 195 (1994) ("Legitimate authority is either practical or theoretical. The directives of a person or institution with practical authority [are reasons] for actions for their subjects, whereas the advice of a theoretical authority [is reason] for belief for those regarding whom that person or institution has authority.").

87. Heidi M. Hurd, *Justifiably Punishing the Justified*, 90 MICH. L. REV. 2203, 2222 (1992).

88. RAZ, *supra* note 86, at 196-97.

89. *Id.*

90. *Id.* at 209-10.

91. Ronald Dworkin, *Thirty Years On*, 115 HARV. L. REV. 1655, 1671 (2002) (reviewing JULES COLEMAN, *THE PRACTICE OF PRINCIPLE: IN DEFENSE OF A PRAGMATIST APPROACH TO LEGAL THEORY* (2001)).

single, exclusionary instruction. Those who accept the authority will henceforth exclude [other] reasons [which] the authority has [already] weighed for them from their own calculations [regarding] action and will rely only on the new, authoritative, [directive].⁹²

To offer a simplified example of authority viewed in this way, consider the following: Passenger A and passenger B disagree about whether a certain road is a shortcut route to an important meeting. If they agree, they can travel quickly on the possible shortcut. Additionally, neither has reason to think a map will distort the character of a road, as might be the case with a winding mountain road; therefore, they believe they “can resolve [their] disagreement by looking at a map.”⁹³ “The message communicated in graphic form by the map does not become merely another reason [weighing] in favor of [one] passenger’s [position]. Instead, the map’s statement becomes the only [basis or] reason on which [the passengers will] act.”⁹⁴ This illustrates “what it means for something to be [authoritative]”⁹⁵ The only way for the map to become an authority is if disputants adopt it as a reason for action that supplants the reasons that created the disagreement.⁹⁶ “It does not matter whether [passenger A] thought the road was a shortcut because it headed off in a southerly direction, or whether” passenger A believed they used a shorter route in the past.⁹⁷ If the two passengers continue “to consider those sorts of reasons after consulting the map, [they will] be treating the map as something [less] than an authority.”⁹⁸ Raz posits that if the law is to be authoritatively binding, it must be accepted, as is the map, “without reference to the underlying reasons that had formerly counted for or against the competing positions.”⁹⁹

The reason that motivated the passengers to consent to the map’s directive is the basis for the map’s binding effect.¹⁰⁰ At the same time, the reasons are independent of each passenger’s beliefs.¹⁰¹ That is, each passenger agrees to abide by the map even if the map does not comport with his or her view of the most efficient route.¹⁰² This conception of authority relies on one set of reasons the passengers share—the desire for cooperation and use of the shortest route—while not relying on the reasons about which they disagreed.¹⁰³ For the

92. *Id.* at 1671 (citing RAZ, *supra* note 86, at 196-97). This conception of authority is not one that everyone adopts. *See id.* at 1668.

93. This example is drawn from Professor Bradley’s analysis of the work of Joseph Raz. *See Wendel, supra* note 84, at 106.

94. *Id.*

95. *Id.*

96. *Id.* (citing RAZ, *supra* note 86, at 212).

97. *Id.*

98. *Id.*

99. *Id.* (citing RAZ, *supra* note 86, at 218).

100. *Id.*

101. *Id.*

102. *Id.*

103. *See id.* at 106-07.

passengers, the map exerts practical authority because it is a reason for action.¹⁰⁴ The map functions as a reliable standard for resolving the disagreement¹⁰⁵ because its authority cannot be called into question by either passenger's view of the map's validity or accuracy.¹⁰⁶

For the noninterventionist, the authority accorded the nonintervention framework enunciated under the Charter resembles a Razian view of the map. In this stance, the Charter interposes itself between states and provides a settled, public, and dependable set of standards for resolving conflict. Further, the Charter's force cannot be called into question by an individual state's conception of the Charter's morality or ineffectiveness. The noninterventionist accords the noninterventionist framework the same authority given to the map. That is, it must be obeyed without recourse to other reasons or considerations.¹⁰⁷

Although it may appear that the noninterventionist thesis fully comports with that of Raz, nothing could be further from the truth. Unlike noninterventionists, Raz concedes that a law may lack authority if its directives are morally deficient.¹⁰⁸ As Raz observes, a person's authority may be denied or challenged on the ground that he or she is morally incompetent or a wicked person.¹⁰⁹ In this regard, Raz's concept of the law stands alongside that of Hart and Holmes, in his assertion that the law is limited by morality and that the obligation to obey it may be overridden in extreme cases.¹¹⁰

There is much that can be said about the Razian concept of the law. Raz bequeaths to us an idea of the limits of the law's practical authority that regulates the dimensions of virtually any command. For example, if the map's directive is to take a certain route that would severely damage the local food supply of a starving community or injure deaf children who are wandering lost in the area; the map's authority may be overridden because adherence to its commands would engender an extremely severe and morally objectionable result. The same can be said with respect to the commands enunciated in the Charter's nonintervention framework. If adherence to its strict terms would facilitate the continuation of a human rights catastrophe or moral atrocities, its authority may be overridden, or at least reduced, and a state may intervene unilaterally.

This is not to say that a state may unilaterally intervene in the affairs of another state to stop *any* immoral act. Such action would be incongruent with well-established jurisprudential principles since one "may have a moral right to

104. *Id.* at 106.

105. *See id.*

106. *See id.*

107. *Id.* at 106-07; Dworkin, *supra* note 91, at 1671 (characterizing Raz's position as an argument for exclusive positivism).

108. RAZ, *supra* note 86, at 199 ("A legal system may lack legitimate authority. If it lacks moral attributes required to endow it with legitimate authority then it has none."); *id.* at 218 ("A person's authority may be denied on the grounds that he is morally incompetent or wicked.").

109. *Id.*

110. H.L.A. HART, *THE CONCEPT OF LAW* 225 (1961) (reasoning that the obligation to obey law may be overridden in extreme cases); O.W. HOLMES, *The Path of the Law*, 10 HARV. L. REV. 457, 460 (1897) ("[T]he law, if not a part of morality, is limited by it.").

do something ... [morally] wrong,"¹¹¹ which includes a right not to be interfered with in doing the wrong.¹¹² For instance, many might describe viewing adult pornography, having an abortion, or spending millions on luxuries while loving family members starve to death as morally wrongful acts; still, most would agree that a person may claim the moral liberty to engage in such activities without interference.

With respect to a state that instigates a policy of genocide or crimes against humanity against its own citizens, no such moral "right to do wrong" exists. "[O]ne cannot have a liberty right to do something that one has a duty not to do."¹¹³ The UN Charter and the Genocide Convention, as well as various human rights instruments, such as the International Covenant on Civil and Political Rights,¹¹⁴ the African Charter on Human and Peoples' Rights,¹¹⁵ the American Convention on Human Rights,¹¹⁶ and the European Convention on the Protection of Human Rights and Fundamental Freedoms,¹¹⁷ inhere in states a duty to respect and ensure the rights protected. This duty consists of a "negative duty not to infringe on [human] rights." The duty renders dismissive any assertion that a member state may claim a liberty right not to be interfered with when that state breaches its duty and the interference is intended to enforce that duty.¹¹⁸

Despite the protestations of noninterventionists, the demands of practical rationality and jurisprudential reasoning dictate that inherent in the duty to ensure protection of human rights is the right to weigh the consequences of adherence to the strict text of the nonintervention regime against those that would ensue from a broader interpretation. This especially applies when a literalist approach induces or allows massive human rights atrocities. Reliance on this principle is

111. Jeremy Waldron, *A Moral Right to Do Wrong*, 92 ETHICS 21, 21 (1981-82).

112. *Id.* at 29 ("P has a right to do A is the correlative claim that other people are morally required to refrain from interfering with P's performance of A. If P has a right to do A, then it follows that it is wrong for anyone to try to stop P from doing A.").

113. ROBERT P. GEORGE, MAKING MEN MORAL 120 (1993).

114. G.A. Res. 2200A (XXI), at 52, U.N. Doc. A/6316 (Dec. 16, 1966) [hereinafter ICCPR]. In Article 2, the ICCPR obligates states to "undertake to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized" in the ICCPR. *Id.* at art. 2.

115. Adopted by the eighteenth Assembly of Heads of State and Government on June 27, 1981, OAU Doc. OAU/CAB/LEG/67/3/Rev.5, reprinted in 21 I.L.M. 58 (1982) (entered into force-Oct. 21, 1987), available at http://www.achpr.org/english/info/charter_en.html. Article 2 guarantees rights and freedoms "without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status." *Id.* at art. 2.

116. (Nov. 22, 1969), O.A.S.T.S. No. 36, 1144 U.N.T.S. 123, 9 I.L.M. 673, (entered into force July 18, 1978) [hereinafter American Convention], available at http://www.hrcr.org/docs/American_Convention/oashr.html. Article 1 outlines State obligations to respect and protect rights and freedoms. *Id.* at art. 1.

117. (Nov. 4, 1950), 213 U.N.T.S. 222, amended by Protocols No. 3, 5 & 8 (entered into force Sept. 21, 1990, Dec. 20, 1971, and Jan. 1, 1990, respectively) [hereinafter European Convention], available at <http://conventions.coe.int/Treaty/en/Treaties/Word/005.doc>. Article 14 recognizes the obligation of States to "secure" the "enjoyment of the rights and freedoms" enunciated under the European Convention. *Id.* at art. 14.

118. See HELEN DUFFY, THE 'WAR ON TERROR' AND THE FRAMEWORK OF INTERNATIONAL LAW 301 (2005).

particularly apt in situations when the UNSC is paralyzed by veto or anticipated veto, and strict adherence to nonintervention would create, for the target government, a liberty right to establish policies that “shock the moral conscience” and violate universal notions of humanity.¹¹⁹

Although this stance may be disturbing to legal positivists,¹²⁰ it is not by any means novel within the sphere of international jurisprudence. International law has long permitted notions of morality and public conscience to shape the contours of international norms.¹²¹ Even the foundational documents delineating international humanitarian laws that regulate war include a provision known as the *Martens clause*, which highlights the moral bases of humanitarian obligations by referencing sentiments to humanity.¹²² The clause requires a person faced with two possible interpretations, to proceed with the interpretation most aligned with principles of humanity and morality.¹²³ The Charter should and must be approached in a similar, if not the same, manner.

The next section introduces a practical approach to unilateral humanitarian intervention that attempts to safeguard moral objectivity and facilitate legal order. This approach uses a condition based design that encourages member states to balance the Charter’s nonintervention framework with the emerging moral values imbued in its international human rights imperatives without sacrificing the general utility of law for moral arbitrariness. In doing so, it fosters a solution that recognizes the general affinities between the interventionists and noninterventionist claims relative to international legal order. The framework also sets forth the proper relationship between law and morality as a means to reduce dysfunctional and ineffective operandi attendant with UNSC paralysis or inaction during international human rights catastrophe.

IV. A MORALLY EFFICIENT AND PRACTICAL APPROACH TO UNILATERAL HUMANITARIAN INTERVENTION IS IDENTIFIED

Not every law is moral or has a moral purpose. A rule of law may simply exist because it is convenient, codifies common practice, or is necessary to establish clear, fixed procedures relating to a particular problem or potential problem.¹²⁴ For instance, a law requiring four days’ notice for document filing may very well be adopted even though a three-day notice law would suffice.¹²⁵ Indeed, there

119. WALZER, *supra* note 60, at 107 (stating that “the reference [is] to the moral convictions of ordinary men and women, acquired in the in the course of their everyday activities,” rather than that of political leaders, who are typically “required to repress their normal feelings of indignation and outrage”).

120. It is generally accepted that legal positivist summarily dismiss the thesis that unjust or immoral laws are not valid laws that must be obeyed. JEROME HALL, *FOUNDATIONS OF JURISPRUDENCE* 23 (1973).

121. Beth Van Schaack, *The Crime of Political Genocide: Repairing the Genocide Convention's Blind Spot*, 106 YALE L.J. 2259, 2284-85 (1997).

122. *Id.*

123. *Id.*

124. HART, *supra* note 110, at 223.

125. *See id.* at 223-24.

are a multitude of laws that establish arbitrary distinctions, formalities, and details. These laws have no moral component, but still constitute a comprehensible feature or process of a legal system.¹²⁶ As Hart observed, it is for this reason that society expects law, rather than morality, to advise it of how many witnesses a validly executed will must have or how long one has to file an appeal.¹²⁷

Of course, this is not the status of the Charter. It cannot be viewed as a moralistically void legal construct, given its proclamations with regard to human rights and its need to assert practical authority. Any approach that fails to consider the moral imperatives inherent in its human rights provisions reduces the Charter to a law devoid of moral purpose or validity.

While morality is not uniform or universal and can engender uncertainty and unpredictability, the law facilitates order.¹²⁸ Hence, moral principle alone may not constitute sufficient grounds for unilateral humanitarian intervention. States can reasonably disagree about the appropriate moral response to genocide and other massive human rights atrocities. Any approach that relies predominantly on the moral judgment of member states as the proper mechanism for international responses to human rights atrocities might indeed facilitate ubiquitous subjectivity and selectivity in the application of military force. To allay such concerns, the threshold for unilateral humanitarian intervention must meet specific requirements, which Nicholas Wheeler asserts must include: (1) "a supreme humanitarian emergency"; (2) "the use of force ... [as] a last resort"; (3) the use of force must be limited by the proportionality standards enunciated under International Humanitarian Law; and (4) "a high probability"¹²⁹ that the use of force will achieve a positive humanitarian outcome."¹³⁰ While this criterion encompasses vital safeguards, unilateral humanitarian intervention should be limited to circumstances in which the UNSC is paralyzed by veto or anticipated veto and a majority of General Assembly members, after having considered the abovementioned criteria, agree, via resolution, that unilateral humanitarian intervention is warranted.

These additional conditions are appealing in at least two regards beyond recognizing the primary responsibility of the UNSC to decide such matters when unobstructed by veto. First, although General Assembly resolutions are usually

126. *See id.*

127. *See id.*

128. Any level of unpredictability in this regard, however, may be appropriate, given that an approach that makes a government that enacts a policy of genocide or crimes against humanity against its citizens susceptible to unpredictable military intervention is less morally objectionable than an approach that permits such a government to commit human rights atrocities with impunity because it can predict that the UNSC will not authorize military intervention.

129. Few would deny that there are risks and unknowns associated with the use of military force. For this reason, this author accepts the premise that there can be no guarantees of a favorable outcome to any armed conflict and, therefore, any discrepancy between the legitimate justification for unilateral humanitarian intervention and the outcome of the campaign does not disprove its moral validity or weaken the legitimating reasons that are claimed to have motivated the unilateral humanitarian intervention.

130. NICHOLAS J. WHEELER, *SAVING STRANGERS* 33-34 (2000).

not binding on states,¹³¹ such resolutions may represent persuasive authority with respect to what international law should be relative to unilateral humanitarian intervention.¹³² Second, this General Assembly based resolution approach is consistent with the General Assembly's authority to study and make recommendations regarding "the realization of human rights and fundamental freedoms for all," found in Article 13 of the Charter.¹³³ In addition, precedent for this approach was established by the *Uniting for Peace* Resolution,¹³⁴ which was specifically designed to create a decision-making role for the General Assembly in situations when, as with the crisis in Sudan, the UNSC becomes paralyzed by veto or bias and fails to discharge its responsibilities.¹³⁵

Upon General Assembly recommendation, unilateral humanitarian intervention should be deemed appropriate when it meets certain conditions, which Richard Lillich argues have generated broad consensus. The conditions, for which I concur, include:

- (1) The intent of the [intervening state] must be to intervene for as short as time possible, with the [intervening state] disengaging as soon as the specific limited purpose is accomplished;
- (2) Where at all possible, the [intervening state] must try and obtain an invitation to intervene from the recognized government and thereafter, to cooperate with the recognized government;
- (3) The [intervening state], before its intended intervention, must request a meeting [with the UNSC] in order to inform it that the humanitarian intervention will take place only if the [UNSC] does not act first; and
- (4) Before intervening, the [intervening] state must deliver a clear ultimatum or peremptory demand to the concerned state insisting that positive actions [must] be taken to terminate or ameliorate the gross human rights violations.¹³⁶

131. Jean-Marie Henckaerts, *Study on Customary International Humanitarian Law: A Contribution to the Understanding and Respect for the Rule of Law in Armed Conflict*, 87 INT'L REV. RED CROSS 175, 179 (2005).

132. Samuel V. Jones, *Has Conduct in Iraq Confirmed the Moral Inadequacy of International Humanitarian Law? Examining the Confluence Between Contract Theory and the Scope of Civilian Immunity During Armed Conflict*, 16 DUKE J. COMP. & INT'L L. 249, 287 (2006).

133. U.N. Charter art. 13, para. 1(b).

134. G.A. Res. 377(V), ¶ 1, U.N. GAOR, 5th Session, Supp. No. 20 at 10, U.N. Doc. A/1775 (Nov. 3, 1950), available at <http://www.un.org/Depts/dhl/landmark/pdf/ares377e.pdf>.

135. HANS J. MORGENTHAU, *POLITICS AMONG NATIONS*, 309-10 (3d ed. 1962); G.A. Res. 377, *supra* note 134, at 10 ("Conscious that failure of the Security Council to discharge its responsibilities on behalf of all the Member States, particularly those responsibilities referred to in the two preceding paragraphs, does not relieve Member States of their obligations or the United Nations of its responsibility under the Charter to maintain international peace and security, *Recognizing* in particular that such failure does not deprive the General Assembly of its rights or relieve it of its responsibilities under the Charter in regard to the maintenance of international peace and security.").

136. WHEELER, *supra* note 130, at 42 (citing THIRD INTERIM REPORT OF THE SUBCOMM. ON THE INT'L PROT. OF HUMAN RIGHTS BY GEN. INT'L LAW, ILA REPORT OF THE FIFTY-SIXTH CONFERENCE 217 (New Delhi 1974)).

In addition to the aforementioned conditions, it appears appropriate to require that: (1) the intervening state agrees not to use its military force to change the territorial integrity of the targeted state; (2) the findings of a United Nations Commission of Inquiry indicate that the targeted state's government is complicit in actions that constitute massive human rights atrocities against its own citizens; (3) the intervention is supported by at least two permanent members of the UNSC; (4) the intervening state has enacted national legislation or published a policy recognizing unilateral humanitarian intervention as a viable option under its domestic laws and defined the circumstances under which intervention will be deemed proper; and (5) criminal charges against the targeted government were referred to the International Criminal Court or brought before the International Court of Justice.¹³⁷ It is hard to deny that the "United Nations, [as an] international organization composed of sovereign states and committed to the [preservation] of sovereignty and territorial integrity, is [inaptly suited] to generate proceedings against fellow member states."¹³⁸ Recognizing that any establishment of a pragmatic legal regime relative to unilateral humanitarian intervention would be vulnerable to political and economic constraints, these conditions should not be construed as exhaustive.

V. CONCLUSION

Given the gross atrocities presently occurring in Darfur and previous international crises, it cannot be denied that the nonintervention framework enunciated under the Charter effectively accomplishes its protective goals to a limited extent. This article has attempted to clarify various ideas about the meaning and limits of law and examine how law emerges as a practical authority capable of providing its subjects or signatories with a reason to act. By weighing the noninterventionist interpretation of the Charter against contemporary theory, this article illustrates basic distinctions about the relationship of law to morality and how morality may inform the normative character of international law.

The approach proposed here, if applied objectively, would provide a viable blueprint for member states to balance the Charter's nonintervention framework against emerging international human rights imperatives,¹³⁹ the corpus of which

137. The Commission's findings regarding Darfur were referred to the International Criminal Court. See Mike Corder, *Suspect Named in Darfur War Crime Case*, S.F. GATE, Feb. 27, 2007, available at <http://www.sfgate.com/cgi-bin/article.cgi?file=/n/a/2007/02/27/international/i033053S19.DTL>. On February 27, 2007, the ICC prosecutor named former Sudanese Junior Minister, Ahmed Muhammed Harun, and a militia leader, Ali Mohammed Ali Abd-al-Rahman, as suspects in war crimes and crimes against humanity in Darfur. *Id.* Sudan, however, rejected the authority and jurisdiction of the ICC and claimed it will not hand the two men over. *Id.*

138. ANDREPOULOS, *supra* note 45, at 3.

139. Klinton Alexander, *NATO's Intervention in Kosovo: The Legal Case for Violating Yugoslavia's National Sovereignty in the Absence of Security Council Approval*, 22 Hous. J. INT'L L. 403, 441-42 (2000) (recognizing that NATO's authority to intervene in Kosovo did not arise from provisions of the Charter, but from "an emerging [moral imperative] codified in the body of international law that permits intervention for humanitarian purposes"); Howland, *supra* note 53, at 114 ("It is becoming increasingly clear that at least in the human rights area, many actors have a responsibility or legal obligation."); Nanda, *supra* note 27, at 306.

is largely regarded as a peremptory norm or *jus cogens*.¹⁴⁰ If the conditions proposed under this approach are adhered to, the contemplated intervention would not offend the duty of nonintervention delineated in the Charter since the intervention would not facilitate a change in the territorial integrity of the targeted state.¹⁴¹ To the extent a state's unilateral humanitarian intervention under the conditions advanced in this article can be said to violate the strict boundaries of the noninterventionist framework, the deviation is acceptable for several reasons. First, international jurisprudence has long recognized the right of a state to depart knowingly from what had been established law or treaty interpretation in the hope of changing the law.¹⁴² Second, a state that breaches its duty not to commit crimes under international law may not claim a right of non-interference relating to the commission of those crimes. Finally, any harm to state sovereignty that may result from interventions initiated under the model proposed here is outweighed by moral imperatives attendant to altruistic objectives aimed at restoring human rights.

The claim that states will coerce or dominate their neighbors under the guise of humanitarianism or moral imperatives does not require or warrant a noninterventionist to deny the need for intervention. Rather, such a claim only requires a noninterventionist to deny intervention legal recognition while, simultaneously, accepting it as a viable moral choice of states outside the realm of law.¹⁴³ The assertion that unilateral humanitarian intervention may be morally permitted, but should not be legalized because of the danger that such a legal right would be abused, is untenable as it merely underscores an apparent conflict between morality and legality that fatally weakens international law.¹⁴⁴ Moreover, this position implies "that international law is incapable of ensuring respect for socially indispensable standards of morality."¹⁴⁵

Not only does this posture jeopardize the practical authority of international law, it is inconsistent with long standing juridical principles regarding sovereignty. A review of the legislative history of the Genocide Convention reveals that since the Nuremberg Tribunals, international scholars have recognized that a state relinquishes certain sovereign rights when it severely

140. See OPPENHEIM'S INTERNATIONAL LAW 7-8 (Sir Robert Jennings & Sir Arthur Watts eds., 9th ed. 1992) (It is a doctrine of treaty law that is codified under Article 53 of the 1969 Vienna Convention on the Law of Treaties.); Van Schaack, *supra* note 121, at 2272 ("*Jus cogens* ... norms sit at the apex" of the international law hierarchical framework.); *id.* at 2272-73 ("A *jus cogens* norm is a binding and nonderogable rule of law which is peremptory in the sense that it is binding irrespective of the will of the individual parties, in contrast to *jus dispositivum*, a rule capable of being modified by contractual engagements."). See also Alexander, *supra* note 53, at 41 (reasoning that "humanitarian intervention is justified to prevent" genocide because genocide is a *jus cogens*); Schabas, *supra* note 42, at 1718.

141. Jean-Pierre L. Fonteyne, *The Customary International Law Doctrine of Humanitarian Intervention: Its Current Validity under the U.N. Charter*, 4 CAL. W. INT'L L.J. 203, 253-54 (1974).

142. Louis Henkin, *The Invasion of Panama under International Law: A Gross Violation*, 29 COLUM. J. TRANSNAT'L L. 293, 311 (1991).

143. WALZER, *supra* note 60, at 106.

144. WHEELER, *supra* note 130, at 41.

145. *Id.*

abuses human rights.¹⁴⁶ As Louis Henkin observed, imperatives regarding the preservation of human rights have significantly eroded traditional notions of state sovereignty.¹⁴⁷ According to former UN Secretary General Kofi Annan, “no legal principle—not even sovereignty—should ever be allowed to shield genocide, crimes against humanity, and mass human suffering.”¹⁴⁸

Sovereign states, such as Sudan, “that systematically murder, rape, [and displace] their own citizens, [are not] shielded against intervention [because of sovereignty].”¹⁴⁹ To the extent the Charter can be interpreted as granting Sudan, or any rogue regime, an unfettered right to sovereignty despite its policy of genocide, crimes against humanity, or other massive human rights violations, this article calls for an interpretation that permits a state to unilaterally intervene on humanitarian grounds. This posture, which recognizes the right of states to unilaterally intervene on humanitarian grounds, without the consent of the sovereign state, in order to protect the targeted state’s citizens from massive human rights violations, is recognized by many scholars.¹⁵⁰ Moreover, both

146. S. REP. NO. 100-333, at 3-4 (1988) (“The tribunal was a watershed in international criminal law, as it eroded the previously accepted principle of exclusive domestic jurisdiction in the area of human rights.”). See also WALZER, *supra* note 60, at 101 (“[W]hen a government turns savagely upon its own people, we must doubt the very existence of a political community to which the idea of self determination might apply.”).

147. Louis Henkin, *That “S” Word: Sovereignty, and Globalization, and Human Rights, Et Cetera*, 68 FORDHAM L. REV. 1, 3-4 (1999).

148. The Secretary-General, *Report of the Secretary-General, In Larger Freedom: Towards Development, Security and Human Rights for All*, ¶129, U.N. Doc. A/59/2005 (2005), available at <http://www.un.org/largerfreedom/> [hereinafter Secretary-General, *In Larger Freedom*].

149. BYERS, *supra* note 23, at 92. See also Secretary-General, *In Larger Freedom*, *supra* note 148; OPPENHEIM’S INTERNATIONAL LAW, *supra* note 140, at 442-43 (recognizing that there is a substantial body of opinion and of practice supporting the view that when a state commits cruelties against its people and denies them fundamental human rights, humanitarian intervention may be legally permissible); Kopel et al., *supra* note 24, at 1322 n.194 (“The Genocide Convention [represents] a limited waiver of sovereignty and it obliges signatory states to disregard another nation’s sovereignty when necessary to halt genocide.”); Michael J. Levitin, *The Law of Force and the Force of Law: Grenada, the Falklands, and Humanitarian Intervention*, 27 HARV. INT’L L.J. 621, 652 (1986) (reasoning that states that commit massive human rights violations forfeit their legitimacy).

150. BUCHANAN, *supra* note 70, at 430; W.E. HALL, A TREATISE ON INTERNATIONAL LAW 302-03 (4th ed. 1895); AMOS HERSHEY, ESSENTIALS OF INTERNATIONAL PUBLIC LAW AND ORGANIZATION 239 (1927); Adam Roberts, *The So-Called “Right” of Humanitarian Intervention*, in YEARBOOK OF INTERNATIONAL HUMANITARIAN LAW: VOL 3, 2000, at 3, 50 (H. Fischer & Avril McDonald eds., 2000); Jeremy Levitt, *Humanitarian Intervention by Regional Actors in Internal Conflicts: The Cases of ECOWAS in Liberia and Sierra Leone*, 12 TEMP. INT’L & COMP. L.J. 333, 375 (1998) (“[T]here has been a shift in the law *de lege ferenda*, permitting unilateral humanitarian intervention by groups of states and regional actors in internal conflicts.”); Anthea Elizabeth Roberts, *Traditional and Modern Approaches to Customary International Law: A Reconciliation*, 95 AM. J. INT’L L. 757, 768 (2001) (commenting that due to NATO’s intervention against the former Yugoslavia, unilateral humanitarian intervention may be established as a legal right); Fernando R. Teson, *Collective Humanitarian Intervention*, 17 MICH. J. INT’L L. 323, 340-41 (1996); Steve G. Simon, Comment, *The Contemporary Legality of Unilateral Humanitarian Intervention*, 24 CAL. W. INT’L L.J. 117, 144 (1993) (“[N]ations do possess the right to intervene unilaterally for humanitarian purposes in both rescue and non-rescue cases so long as the intervention is done properly.”). See generally INDEPENDENT INTERNATIONAL COMMISSION ON

recognition and championing of this stance are necessary if the Charter's nonintervention framework is to be an effective instrument that carries practical authority.

