

R2P AND PROTECTIVE INTERVENTION

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This essay focuses on important issues raised by Professor Henry Richardson in a keynote address on Critical Perspectives on Intervention¹ at the University of Maryland School of Law. While deeply concerned about the need for effective protection of human rights of all persons,² including protection through the use of outside military force to stop atrocities within a foreign state,³ Professor Richardson cautions that States “in the Northern Tier . . . are most equipped to intervene in Southern States”⁴ but, given “both pre- and post-[United Nations] Charter history” of “unilateral use of force for ‘humanitarian intervention’” in abusive support of Northern ambitions, power, and colonialist consequences,⁵ we should “step back and understand that [use of] the R2P doctrine” [or Responsibility to Protect⁶] to support intervention which might lead to “possibly another North to

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1. See generally Henry J. Richardson III, *Critical Perspectives on Intervention*, 29 MD. J. INT’L L. 12 (2014).

2. See *id.* at 19 (“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.”).

3. See *id.* at 13, 29 (discussing the scholarship on the legality of the use of outside forces to intervene in states where human rights are threatened); see also *id.* at 35 (“[W]e must consider alternatives [to the U.N. Security Council] for governing the legality of military intervention.”); see also *id.* at 37 (“[There is] 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.”).

4. See *id.* at 39 (“[. . .]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.”).

5. See *id.* at 18 (“[There has been] 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.”). See also MYRES S. MCDUGAL, HAROLD D. LASSWELL, LUNG-CHU CHEN, HUMAN RIGHTS AND WORLD PUBLIC ORDER 246, 246–47 (1980) (“[T]his remedy is highly susceptible to abuse The characterization by an intervening state . . . [is] a provisional determination . . . and remains subject to the contemporaneous appraisal of other states and to any subsequent review the organized community may eventually exercise.”); Evan J. Criddle, *Three Grotian Theories of Humanitarian Intervention*, 16 THEORETICAL INQUIRIES L. 473, 476–77, 486 (2015) (recognizing potential abuse).

6. See G.A. Res. 60/1, ¶ 138 (Oct. 24, 2005) (“Each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity [and therefore to not commit such crimes against portions of its own population.]”); 2005 World Summit Outcome Document, U.N. G.A. Res. 60/1, ¶ 138 (Oct. 24, 2005). The U.N. Secretary General has recognized that this paragraph is “firmly anchored in well-established principles of international law.” U.N. Secretary-General, *Implementing the Responsibility to Protect*, ¶ 3, U.N. Doc. A/63/677 (Jan. 12, 2009). See U.N. S.C. Res. 1894, pmb. (Nov. 11, 2009) (“[R]eaffirming the relevant provisions of the 2005 World Summit Outcome Document . . . including paragraphs 138 and 139 thereof regarding the responsibility to protect.”); U.N. S.C.

South projection of international legal authority”⁷ and “simply bless existing intervention patterns of global power and practice.”⁸

Consequently, Professor Richardson suggests the need to affirm limitations on Security Council authority that are based on the United Nations (U.N.) Charter;⁹ to reinvigorate authoritative use of force by appropriate regional organizations;¹⁰ to create authority “lodged in the [U.N.] Department of Peacekeeping Operations (DPKO)” to “formally certify the imminence of a human rights catastrophe” as a precondition of the right of “a single or a few states . . . for an immediate properly-deployed military response for R2P prevention;”¹¹ and to interpret Article 2(4) of the U.N. Charter to allow “unilateral use of force against a designated state for this R2P purpose . . . [but] only under . . . DPKO-certified conditions and safeguards, [which] presumptively does not constitute a threat to the territorial integrity or the political independence of the intervened-in state . . . and therefore constitutes a lawful use of limited unilateral force under the [U.N.] Charter.”¹²

This essay will address three of his suggestions: (1) Charter-based limitations of Security Council authority, (2) permissible regional action by regional organizations, and (3) a textually sound and policy-serving interpretation of Article 2(4) of the U.N. Charter that can serve human rights, the self-determination of peoples, and the underlying purposes of R2P. Also addressed are the propriety of related forms of self-determination assistance and collective self-defense at the request of a victimized people.

I. LIMITATIONS OF SECURITY COUNCIL AUTHORITY

With respect to limitations of Security Council authority, the express mandate in Article 24(2) of the U.N. Charter requires that “[i]n discharging . . . [its] duties the Security Council shall act in accordance with the Purposes and Principles of the United Nations.”¹³ Among the purposes, principles and obligations that are Charter-based and that the Security Council must “act in accordance with” are

Res. 1706, ¶ 2 (Aug. 31, 2006) (noting that its earlier Resolution 1674 (Apr. 28, 2006) reaffirmed provisions of paragraphs 138 and 139 of the 2005 United Nations World Summit Outcome Document); G.A. Res. 25/15, ¶ 8 (Apr. 15, 2014) (“stresses that all human rights are universal . . . and that the international community must treat human rights globally in a fair and equal manner.”). *See generally* U.N. GAOR, 55th Sess., at 3, U.N. Doc. A/RES/55/107 (Dec. 4, 2000); U.N. Doc. S/RES/1894 (2009).

7. Richardson, *supra* note 1, at 38.

8. *Id.* at 13.

9. *See id.* at 31–35 (focusing on Articles 1 and 2 of the Charter); *id.* at 33–35 (suggesting the need to affirm Charter-based limitations on Security Council authority because of Permanent Members’ Council aims using human rights process to continue the Northern colonial civilizing mission towards Southern peoples and a corruption by the domination aims of its Permanent Members).

10. *Id.* at 35–37, 47.

11. *Id.* at 45–48.

12. *See id.* at 48, n.85 (“[This form of military intervention] upholds Charter human rights obligations . . . [and] constitutes a lawful use of limited unilateral force under the [U.N.] Charter, [which Professor Anthony D’Amato] has shown [is supported by] the Charter *travaux*.”).

13. U.N. Charter art. 24, ¶ 2.

those recognized in the preamble to and in Articles 1(3) (regarding human rights), and Article 55, of the U.N. Charter, which includes the express duty of the U.N. to promote “universal respect for and observance of human rights.”¹⁴ Necessarily, Article 55(c) conditions the authority of the U.N. and its components, including the Security Council (which is a major organ of the U.N.). Necessarily also, the duty set forth in Article 55 to promote universal respect for and observance of human rights (and therefore, to not violate human rights) is infused in the limitation of Security Council authority contained in the express requirement in Article 24(2), that the Security Council act in accordance with the purposes and principles of the Charter.¹⁵ For these reasons, a decision by the Security Council to violate customary human rights would be without authority and *ultra vires*.¹⁶

Additionally, under Article 25 of the U.N. Charter, “[t]he Members of the United Nations” must “carry out the decisions of the Security Council in accordance with the present Charter.”¹⁷ Therefore, either (1) the members must only carry out decisions of the Security Council that were made in accordance with the Charter (including the Charter-based obligation to promote universal respect for and observance of human rights), or (2) the members must only carry out any decision of the Security Council in such a way that the purposes and principles of the Charter are served.¹⁸ Whichever interpretation of Article 25 is proper, it is clear that the Security Council has an additional Charter-based obligation to respect and observe human rights under Articles 1(3), 24(2), and 55(c), and that members of

14. U.N. Charter art. 55, ¶ c; *see id.* pmb. (“[R]eaffirms faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women.”); *see also* art. 1, ¶ 3 (stating that among purposes of the U.N. is the need to promote and encourage respect for human rights and fundamental freedoms for all).

15. Jordan J. Paust, *Peace-Making and Security Council Powers: Bosnia-Herzegovina Raises International and Constitutional Questions*, 19 SO. ILL. U. L.J. 131, 139–41 (1994) [hereinafter Paust, *Peace-Making*]. *See* The Prosecutor v. Tadic, IT-95-1-AR72, ¶ 28 (Oct. 2, 1995), reprinted in 35 I.L.M. 32, 42 (1996) (indicating that the Appeals Chamber of the ICTY for Former Yugoslavia recognized that Article 24(2) limits Security Council powers).

16. *See, e.g.*, MCDUGAL ET AL. *supra* note 5, at 332–34 (indicating actions by the Security Council violating human rights norms would be contrary to the U.N. Charter). JORDAN J. PAUST, JON M. VAN DYKE, LINDA A. MALONE, *INTERNATIONAL LAW AND LITIGATION IN THE U.S.* 52 (3rd ed. 2009), and references cited (drawing attention to Articles 1, 2, 24, and 25 which limit the U.N. Council’s power); THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 920, 923 (Bruno Simma *et al.*, eds., 2 ed. 2002) [hereinafter COMMENTARY] (describing the international non-discrimination principle in World War II upon which article 55 was founded); Richardson, *supra* note 1, at 31 (indication that “argument of Council *ultra vires* action” can be made using Articles 1 & 2); *supra* note 15. *See also* Thomas M. Franck, *The “Powers of Appreciation”: Who Is the Ultimate Guardian of UN Legality?*, 86 AM. J. INT’L L. 519, 522–23 (1992) (arguing that the Security Council will be limited by its charter and by other members of the U.N.); Vera Gowlland-Debbas, *Security Council Enforcement Action and Issues of State Responsibility*, 43 INT’L & COMP. L.Q. 55, 94, 96–98 (1994) (indicating that limitations to the Security Council’s power can be found in the abuse of rights doctrine in Article 2); Michael Reisman, *The Constitutional Crisis in the United Nations*, 87 AM. J. INT’L L. 83, 92, 94 (1993) (discussing the Court’s lack of judicial review of the Security Council in practice and within the charter).

17. U.N. Charter art. 25.

18. Paust, *Peace-Making*, *supra* note 15, at 141–42, n.33.

the U.N. have an additional obligation to do the same under Article 56, which incorporates Article 55(c) by reference and requires members “to take joint and separate action . . . for the achievement of the purposes set forth in Article 55.”¹⁹

As noted in prior writings, peremptory norms *jus cogens* must also condition the competence of U.N. entities, because norms *jus cogens* are a part of universally applicable and peremptory customary international laws that are binding on all actors (public and private) and that prevail over any inconsistent treaty.²⁰ In a case before the International Court of Justice (ICJ) in 1993, Judge Lauterpacht affirmed that norms *jus cogens* limit the authority of the Security Council and must prevail over inconsistent Security Council resolutions.²¹ Rights and prohibitions *jus cogens* include the prohibitions of genocide,²² crimes against humanity,²³ and violations of various fundamental human rights²⁴—each of which is within the matrix of state

19. See U.N. Charter, arts. 55(c), 56 (indicating that the U.N. and all members will respect human rights); see also Jordan J. Paust, *U.N. Peace and Security Powers and Related Presidential Powers*, 26 GA. J. INT'L L. 15, 15–16 (1996) (stating that according to Article 2 and Article 56, U.N. Members should not be required to perform any aggressive actions); Paust, *Peace-Making* *supra* note 15, at 141–42, n.33 (stating that Members must act in accordance with the principles of the Charter).

20. See Vienna Convention on the Law of Treaties, arts. 53, 64 (1969) 1155 U.N.T.S. 331 (indicating that treaties are void if they conflict with already existing international law or norms of governing bodies); see also Paust, *Peace-Making*, *supra* note 15, at 139–40 (indicating that *jus cogens* was the reasoning in the Lockerbie decision).

21. Further Requests for the Indication of Provisional Measures, 1993 I.C.J. (Sept. 13) (Lauterpacht, J., separate opinion), ¶ 99, 101–102; Paust, *Peace-Making*, *supra* note 15, at 140.

22. See, e.g., RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 702(a) & cmnt. n (1987) [hereinafter RESTATEMENT] (indicating that genocide violates customary international law); IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 512–15 (1990) (listing prohibitions of the use of armed force, genocide, other crimes against humanity, race discrimination, slave trading, and piracy as well accepted *jus cogens*); ANTONIO CASSESE, INTERNATIONAL LAW 202 (2d ed. 2005) (indicating the ILC recognized fundamental norms such as genocide); Jordan J. Paust, *Congress and Genocide: They're Not Going to Get Away With It*, 11 MICH. J. INT'L L. 90, 92–93 & n.3 (1989) (arguing genocide is not permitted under *jus cogens*); *Hirsh v. State of Israel*, 962 F. Supp. 377, 381 (S.D.N.Y. 1997) (stating the plaintiff's argument that Germany waived immunity by *jus cogens* by committing genocide during the Holocaust).

23. See, e.g., BROWNLIE, *supra* note 22 (indicating that crimes against humanity are *jus cogens*); CASSESE, *supra* note 22, at 203 (indicating the International Criminal Tribunal for the Former Yugoslavia in *Zoran Kupreskic et al.* discussed crimes against humanity as an international norm); *In re Agent Orange Product Liability Litig.*, 373 F. Supp. 2d 7, 136 (E.D.N.Y. 2005) (stating: “crimes against humanity are also deemed to be part of *jus cogens*”), quoted in *Almog v. Arab Bank, PLC*, 471 F. Supp. 2d 257, 274 (E.D.N.Y. 2007).

24. See RESTATEMENT, *supra* note 22, at § 702(b)–(g) (listing slavery, murder, torture, arbitrary detention, systematic racial discrimination, and a gross violation of human rights as *jus cogens*); Human Rights Committee, General Comment No. 24, General Comment on Issues Relating to Reservations Made Upon Ratification or Accession to the Covenant or the Optional Protocols, ¶ 8, U.N. Doc. CCPR/C/21/Rev.1/Add.6 (Nov. 11, 1994) (indicating crimes such as inhuman and degrading treatment would be incompatible with the purposes of the covenant). See also *Enahoro v. Abubakar*, 408 F.3d 877, 893 (7th Cir. 2005) (Cudahy, J., dissenting) (indicating courts do not grant immunity for *jus cogens* acts beyond their authority); *In re Estate of Marcos*, 978 F.2d 493, 500 (9th Cir. 1992) (indicating the Department of Justice supported international torture laws); *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 717 (9th Cir. 1992),

responsibilities to protect that underlay the R2P doctrine.²⁵ At least three other Judges of the ICJ have indicated that the Court should be able to review the legality of Security Council decisions to assure compliance with relevant Charter-based obligations.²⁶

II. PERMISSIBLE REGIONAL ACTION BY REGIONAL ORGANIZATIONS

For a number of regional organizations, an important grant of authority exists in the U.N. Charter “for dealing with such matters relating to the maintenance of international peace and security as are appropriate for *regional action*, provided that such arrangements . . . and their activities are consistent with the Purposes and Principles of the United Nations.”²⁷ The need to serve peace, security, self-determination of peoples, and human rights are among the manifest purposes and principles of the U.N.²⁸ As noted, Articles 55 and 56 of the Charter recognize the duty of members to take joint and separate action to promote “universal respect for, and observance of, human rights and fundamental freedoms.”²⁹ In the face of human atrocities within a state or region, regional action involving responsive use of protective force that is authorized by a regional organization can serve charter-based purposes and principles of long-term peace, regional security, self-determination of peoples, and human rights of direct and indirect victims. Increasing human interdependence will likely result in greater use of regional action to serve such purposes. As noted with respect to authorized regional action

cert. denied, 507 U.S. 1017 (1993) (indicating that acts of torture violate *jus cogens*).

25. See World Summit Outcome Document, *supra* note 6 (“[e]ach individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity”); see also *Implementing the Responsibility to Protect*, *supra* note 6 (indicating the U.N. Secretary General has recognized that this paragraph is “firmly anchored in well-established principles of international law.”); U.N. S.C. Res. 1894 *supra* note 6 (“[r]eaffirming the relevant provisions of the 2005 World Summit Outcome Document . . . including paragraphs 138 and 139 thereof regarding the responsibility to protect”); U.N. S.C. Res. 1706 *supra* note 6 (noting that its earlier Resolution 1674 reaffirmed provisions of paragraphs 138 and 139 of the 2005 United Nations World Summit Outcome Document); Promotion of a Democratic and Equitable International, *supra* note 6 (“all human rights are universal . . . the international community must treat human rights globally in a fair and equal manner”).

26. Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya v. U.K.; Libya v. U.S.), 1992 I.C.J. 3 (Apr. 14), 17–18 (Oda, J.), 26–27 (Lachs, J.), 28 (Shahabudeen, J.).

27. U.N. Charter art. 52, ¶ 1 (emphasis added). Relevant regional organizations include NATO, the Organization of American States (OAS), the Organization of African Unity (OAU), and the League of Arab States. See 1 COMMENTARY, *supra* note 16, at 828 ¶ 64, 66. The O.A.S., O.A.U., and League of Arab States are among well-recognized regional arrangements or agencies dealing with matters relating to the maintenance of international peace and security within the meaning of Article 52. A prior distinction “between collective self-defence, seen as directed against an external aggressor, and collective security, viewed as measures taken against a member State of the organization, is no longer valid” and “[s]uch a distinction is found neither in Article 51 nor in Chapter VIII,” which contains Articles 52–53. *Id.*

28. See, e.g., U.N. Charter arts. 1, 55, 56.

29. See generally U.N. Charter, *supra* notes 14, 19 and accompanying text for discussion of articles 55 and 56.

in Kosovo, although too many do not seem to realize, NATO's actions in Kosovo in 1999 are an example of regional peace and security actions that were permissible under Article 52 of the U.N. Charter, especially because they were consistent with the serving of peace, security, self-determination, and human rights in the area.³⁰ Moreover, such a regional competence is partly enhanced by the Charter-based duties of every state to take joint and separate action for the universal respect for and observance of human rights. Article 53 of the U.N. Charter does not limit "regional action" permitted in Article 52 (Article 52 states that nothing in the Charter precludes regional arrangements for such action), but Article 53 does prohibit regional organizations from engaging in "enforcement action" that is actually "under the authority" of the Security Council "without the authorization of the Security Council."³¹

Although Professor Richardson has rightly articulated the need "to confirm the initial competence of regional organizations to authorize enforcement actions in regional situations of imminent human rights catastrophe,"³² it is important to note that although the Security Council can involve regional organizations in Security Council enforcement actions, permissible "regional action" by a regional organization under Article 52 is not an "enforcement action," which necessarily would be subject to control by the Security Council. For example, when the Security Council is veto-deadlocked with respect to its ability to make "decisions" to authorize "enforcement action," permissible regional military actions under Article 52 are neither "enforcement action" nor "under the authority of" the Security Council, at least until the Council can act and actually decide on measures under Chapter VII of the Charter. When the Council is veto-deadlocked, it is unable to decide on measures "to give effect to its decisions" or to decide on "action required to carry out" its decisions, and it is unable to decide to "utilize" a regional arrangement "for enforcement action under its authority" within the meaning of Article 53.³³

An added advantage of permissible "regional action" is that regional values might be more adequately served, although they must be consistent with the purposes and principles of the U.N. Additionally, with respect to R2P and protective intervention, permissible regional action authorized by a regional

30. Jordan J. Paust, *Use of Armed Force against Terrorists in Afghanistan, Iraq, and Beyond*, 35 CORNELL INT'L L.J. 533, 545–47 (2002). See Julie Mertus, *Reconsidering the Legality of Humanitarian Intervention: Lessons from Kosovo*, 41 WM. & MARY L. REV. 1743, 1772–75 (2000) (stating that the intervention was lawful). See, e.g., Ved P. Nanda, *NATO's Armed Intervention in Kosovo and International Law*, 10 U.S. A.F. ACAD. J. LEGAL STUD. 1, 4 (1999–2000); cf. YORAM DINSTEIN, *WAR, AGGRESSION AND SELF-DEFENCE* 310–14 (4 ed. 2005); see also Shinya Murase, *The Relationship Between the UN Charter and General International Law Regarding Non-Use of Force: The Case of NATO's Air Campaign in the Kosovo Crisis of 1999*, in 2 LIBER AMICORUM JUDGE SHIGERU ODA 1543, 1544–45, 1551–52 (Nisuke Ando, Edward McWhinney, Rudiger Wolfrum eds. 2002) (arguing that NATO's air strikes on Kosovo were in violation of Article 2(4) of the U.N. Charter).

31. Jordan J. Paust, *Use of Military Force in Syria by Turkey, NATO, and the United States*, 34 U. PA. J. INT'L L. 431, 437 (2013).

32. Richardson, *supra* note 1, at 36.

33. Paust, *supra* note 31, at 438.

organization might more adequately serve Charter-based purposes and principles than unilateral intervention, especially given the potential for abuse in the absence of collective decision-making.

III. ARTICLE 2(4) OF THE U.N. CHARTER AND PROTECTIVE INTERVENTION

The text of Article 2(4) of the U.N. Charter expressly prohibits merely three types of force: (1) the threat or use of force “against the territorial integrity” of another state, (2) the threat or use of force “against . . . the political independence of” another state, and (3) the threat or use of force “in any other manner inconsistent with the Purposes of the United Nations.”³⁴ One can recognize that a selective use of military force merely to protect persons from human atrocities (even by their own government) will not constitute a use of armed force in violation of the first two forms of force that are proscribed, because a selective use of armed force in such a circumstance, and for such a purpose, would not actually be force used “against the territorial integrity or political independence of” another state, especially if territorial boundaries and authoritative regimes are not changed or directly disrupted.³⁵

34. See, e.g., U.N. Charter art. 2, ¶ 4. McDougal, Lasswell, Chen, *supra* note 5, at 240; JULIUS STONE, AGGRESSION AND WORLD ORDER 95 (1958). Fernando R. Tesón, HUMANITARIAN INTERVENTION: AN INQUIRY INTO LAW AND MORALITY 192-97 (3rd ed. 2005); W. Michael Reisman, *Humanitarian Intervention to Protect the Ibos*, in HUMANITARIAN INTERVENTION AND THE UNITED NATIONS 167, 177 (Richard B. Lillich ed. 1973); Jordan J. Paust, remarks, 78 PROC., AM. SOC'Y. INT'L L. 92-93 (1984).

35. McDougal, Lasswell, Chen, *supra* note 5, at 241. See 1 LASA OPPENHEIM, INTERNATIONAL LAW 312 (Hirsh Lauterpacht ed., 8 ed. 1955) (“[W]hen a State renders itself guilty of cruelties against and persecution of its nationals in such a way as to deny their fundamental human rights and to shock the conscience of mankind, intervention in the interest of humanity is legally permissible”); see also W. Michael Reisman, *Kosovo’s Antinomies*, 93 AM. J. INT’L L. 824,860-61 (1999) (“Article 2(4) was changed by the contraction of Article 2(7), which, by effectively eliminating for serious human rights violations the doctrine of domestic jurisdiction, removed from the sphere of the ‘political independence’ of a state the right to violate in grave fashion and with impunity the human rights of its inhabitants”); Argument of Belgium before the ICJ, *Legality of Use of Force (Yugoslavia v. Belgium)*, CR 99/15 (May 10, 1999) (“[NATO’s use of force in Kosovo was] an armed intervention compatible with article 2, paragraph 4, of the Charter, which covers only intervention against the territorial integrity or political independence of a State”); Int’l Comm. on Intervention and State Sovereignty, *The Responsibility to Protect*, 4.18, 4.37 (2001) <http://responsibilitytoprotect.org/ICISS%20Report.pdf> (“Military intervention for human protection purposes must be regarded as an exceptional and extraordinary measure, and for it to be warranted, there must be serious and irreparable harm to human beings, or imminently likely to occur”, and humanitarian intervention is permissible as a “last resort”) [hereinafter ICISS]; James A.R. Nafziger, *Self-Determination and Humanitarian Intervention in a Community of Power*, 20 DENV. J. INT’L L. & POL’Y 9, 23 (1991) (opining that prompt withdrawal following rescue missions does not significantly involve force against the territorial integrity or political independence of any state); Anne Peters, *Humanity as the A and Q of Sovereignty*, 20 EUR. J. INT’L L. 513, 521-22 (2009) (stating that under a shifting paradigm, only an internally legitimate state would enjoy full external sovereignty and freedom from intervention); Milena Sterio, *Humanitarian Intervention Post-Syria: A Grotian Moment?*, 20 ILSA J. INT’L & COMP. L. 343, 350-54 (2014) (suggesting that humanitarian intervention is an emerging norm of customary international law). What is implicit in the recognition by Professor

Others might claim that the mere crossing of a border by an armed force to stop atrocities will constitute a use of force “against” the territorial “integrity” of a state or “against” its political “independence.” But the phrase “in any other manner” compels recognition that the first two forms of prohibited force are, but also must be, force used in a “manner inconsistent with the purposes of the United Nations.” Therefore, when cross-border force is not inconsistent with the purposes of the U.N., it would not amount to force “against” the territorial “integrity” or political “independence” of a state. Moreover, in contrast to claims to unlimited “political independence,” state sovereignty has not been and should not be absolute under international law or impervious to its reach.³⁶

A significant number of writers offer a different reading of Article 2(4) and

Peters is the salient point that sovereignty rests with the people or state and not with a particular government, and clearly not with an illegitimate government or one that is committing widespread atrocities against the people. With respect to the human rights test for legitimacy of a government. PAUST, VAN DYKE, MALONE, *supra* note 16, at 1093 (remarks of Anthony D’Amato); STONE, *supra* note 34, at 95; TESÓN, *supra* note 34. Anthony D’Amato, *The Invasion of Panama Was a Lawful Response to Tyranny*, 84 AM. J. INT’L L. 494,516 (1990); Richard B. Lillich, *A Reply to Ian Brownlie and a Plea for Constructive Alternatives*, in LAW AND CIVIL WAR IN THE MODERN WORLD 229, 236–37 (John Norton Moore ed., 1974); Richard B. Lillich, *Forcible Self-Help to Protect Human Rights*, 53 IOWA L. REV. 325, 334–35 (1967); Mertus, *supra* note 30; Reisman, *supra* note 34; Richardson, *supra* note 1, at 48.

36. See Ved P. Nanda, *The Protection of Human Rights under International Law: Will the U.N. Human Rights Council and the Emerging New Norm “Responsibility to Protect” Make a Difference?*, 35 DENV. J. INT’L L. & POL’Y 353, 373 (2007) (“[N]o longer can a government hide behind the shield of sovereignty, claiming non-intervention by other States in its internal affairs, if it fails to protect the people under its jurisdiction from massive violations of human rights”); see also Jordan J. Paust, *International Law, Dignity, Democracy, and the Arab Spring*, 46 CORNELL INT’L L.J. 1, 8 & n.34 (2013); Catherine Powell, *Libya: A Multilateral Constitutional Moment?*, 106 AM. J. INT’L L. 298, 300, 306 (2012) (“[P]aradigm shift – from sovereignty as a right to sovereignty as a responsibility – [that] began at least as early as the 1960s”); ICISS, *supra* note 35, at 2.31 (“[A] residual responsibility also lies with the broader community of states. This fallback responsibility is activated when a particular state is clearly either unwilling or unable to fulfill its responsibility to protect or is itself the actual perpetrator of crimes or atrocities; or where people living outside a particular state are directly threatened by actions taking place there.”). See, e.g., McDougal, Lasswell, Chen, *supra* note 5, at 239 (quoting E. BORCHARD, THE DIPLOMATIC PROTECTION OF CITIZENS ABROAD OR THE LAW OF INTERNATIONAL CLAIMS 14 (1922)); Reisman, *supra* note 35. Article 2, paragraph 7, of the Charter declares that “[n]othing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state. . . but this principle shall not prejudice the application of enforcement measures under Chapter VII.” U.N. Charter, art. 2(7). Yet, what is “essentially within” domestic jurisdiction as opposed to what is merely partly domestic and is within the community’s international or regional institutional forms of jurisdiction or within the universal jurisdiction of all states is relative and depends on context and legal policies at stake. *Id.* Genocide, other crimes against humanity, customary war crimes, and violations of customary human rights are among international legal infractions that implicate universal prescriptive jurisdiction. See, e.g., RESTATEMENT, *supra* note 22, § 404 & cmnt. a. PAUST, VAN DYKE, MALONE, *supra* note 16, at 642–58. They are not essentially domestic or internal matters or simplistically the affairs “of” a single state. *Id.* Further, the parties to the Genocide Convention “undertake to prevent” genocide, although the propriety of use of force to prevent genocide is not expressed. Convention on the Prevention and Punishment of the Crime of Genocide, art. I, 9, Dec. 1948, 78 U.N.T.S. 277.

claim that, despite its language, it prohibits any use of armed force.³⁷ However, neither the text nor the declared purposes of the U.N. support such a sweeping prohibition. On the contrary, the “Purposes of the United Nations” are expressly infused into the text of Article 2(4) and must be considered for proper interpretation of its terms which, as noted, leave space for cross-border force that is not inconsistent with the purposes of the U.N. More generally, the text of any treaty is to be interpreted “in light of its object and purpose.”³⁸

Article 2(4) prohibits a third form of armed force – the threat or use of force “in any other manner inconsistent with the Purposes of the United Nations.” As noted in part, relevant purposes include the need to serve peace, security, equal rights and self-determination of peoples, human rights and fundamental freedoms,³⁹ to achieve justice, and to ensure that “armed force shall not be used, save in the common interest.”⁴⁰ It is evident that, on balance, a selective use of armed force to protect persons from human atrocities will not thwart most of these purposes and, in fact, will serve the majority of these purposes (*e.g.*, long-term peace, security, human rights and freedoms, justice, and use of force “in the common interest”).⁴¹

37. COMMENTARY, *supra* note 16, at 123 ¶ 36; IAN BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES 222, 226, 342 (1963). *See also* MARY ELLEN O’CONNELL, INTERNATIONAL LAW AND THE USE OF FORCE 234 (2d ed. 2009) (reading Article 2(4) as “banning any use of armed force by states except in self-defense and possibly those of a very limited or *de minimis* nature”). *See, e.g.*, OSCAR SCHACHTER, INTERNATIONAL LAW IN THEORY AND PRACTICE 118 (1991); Dino Kritsiotis, *Reappraising Policy Objections to Humanitarian Intervention*, 19 MICH. J. INT’L L. 1005, 1020–21 (1998); Nathan J. Miller, *International Civil Disobedience: Unauthorized Intervention and the Conscience of the International Community*, 74 MD. L. REV. 315, 337–39 (2015); Mary Ellen O’Connell, *Responsibility to Peace: A Critique of R2P*, 4 J. INTERVENTION & STATEBUILDING 39 (2010); Sreenivasa Rao Pemmaraju, *International Organizations and Use of Force*, in 2 LIBER AMICORUM JUDGE SHIGERU ODA 1575, 1591 (Nisuke Ando, Edward McWhinney, Rudiger Wolfrum eds. 2002). *Cf* Michael Byers, *Terrorism, The Use of Force and International Law After 11 September*, 51 INT’L & COMP. L.Q. 401, 406–07 (2002) (“[M]ost such responses will violate the territorial integrity of a State,” but some such “uses of force have been accepted”). *See* Harold Hongju Koh, *The War Powers Resolution and Humanitarian Intervention*, 53 HOUS. L. REV. 971, 1005–06 (2016) (“[A] ‘per se illegal’ rule is plainly overbroad... under certain highly constrained circumstances, a nation could lawfully use or threaten force for genuinely humanitarian purposes”; *Id.* at 1015 (proposing “a narrow ‘affirmative defense’ to Article 2(4) . . . that would clarify the contours of an emerging lawful [humanitarian] exception to a rigid rule”).

38. Vienna Convention on the Law of Treaties, *supra* note 20, art. 31(1).

39. U.N. Charter, art. 1(1)–(3).

40. *Id.* pmb1. The preamble to a treaty is used as one of the multiple bases for interpretation of its text. Vienna Convention on the Law of Treaties, *supra* note 20, art. 31(2). In this instance, the preambular concern that armed force be used merely “in the common interest” can be an aid for interpretation of Article 2(4) and clarification of circumstances where force can be used consistently “with the Purposes of the United Nations.” *Id.*

41. *See, e.g.*, MCDUGAL, ET AL., *supra* note 5, at 241–42 (itemizing various examples of human rights deficiencies via deprivation of political power.); *see also* John Norton Moore, *Toward an Applied Theory for the Regulation of Intervention*, LAW AND CIVIL WAR IN THE MODERN WORLD, *supra* note 35, at 3, 24–25 (proposing: “[i]ntervention for the protection of human rights is permissible if it meets . . . [certain] conditions”); Nafziger, *supra* note 35, at 23–24 (“[E]nhancing self-determination” can serve Charter purposes); Johan D. Van der Vyver, *The*

Therefore, a protective use of force to stop human atrocities, tested contextually and in view of various purposes and principles recognized in the U.N. Charter, should be permissible under Article 2(4) of the U.N. Charter.

IV. RELATED SELF-DETERMINATION ASSISTANCE AND COLLECTIVE SELF-DEFENSE

Importantly, self-determination is a Charter-based right of peoples and not of states or governments.⁴² When atrocities are being committed by a government against its own people or another people within its territory, protective intervention can also be justified on the basis of self-determination assistance if governmental atrocities contribute to the denial of political self-determination of a people and they request military assistance. As noted in another writing,

self-determination assistance can be permissible under international law. The 1970 Declaration on Principles of International Law affirms that self-determination assistance can be permissible under the United Nations Charter when recognizing that “[e]very State has the duty to refrain from any forcible action which deprives peoples . . . of their right to self-determination” and “[i]n their actions against, and resistance to, such forcible action in pursuit of the exercise of their right to self-determination, such peoples are entitled to seek and to receive support in accordance with the purposes and principles of the Charter.” Moreover, as the 1970 Declaration implicitly affirms, the territorial integrity of states can be disrupted and changed if they are not conducting themselves in compliance with the principle of equal rights and self-determination of peoples. The 1974 Declaration of Aggression also seems to allow for the right of a people to self-determination assistance by declaring that “[n]othing in this definition . . . could in any way prejudice the right to self-determination . . . of peoples forcibly deprived of that right. . . .; nor the right of these peoples to struggle to that end and to seek and receive support, in accordance with the principles of the Charter.”⁴³

In 1981, the African Charter on Human and Peoples’ Rights⁴⁴ recognized that “[c]olonized oppressed peoples shall have the right to free themselves from the bonds of domination by resorting to any means recognized by the international community.”⁴⁵ Additionally, the African Charter affirmed that “[a]ll peoples shall

ISIS Crisis and the Development of International Humanitarian Law, 30 EMORY INT’L L. REV. 531, 550–51 (2016) (“Humanitarian intervention will only be warranted in exceptional circumstances of extreme and ongoing violations of human rights . . . [and] collective rather than unilateral action must be the norm”).

42. U.N. Charter, arts. 1(2), 55; Declaration on Principles of International Law Concerning Friendly Relations and Co-Operation Among States in Accordance with the Charter of the United Nations, U.N. G.A. Res. 2625 (1970), 25 U.N. GAOR, Supp. No. 28, at 121, U.N. Doc. A/8028 (1971) [hereinafter Declaration on Principles of International Law]. Self-determination is also a human right. See, e.g., International Covenant on Civil and Political Rights, art. 1, 999 U.N.T.S. 171 (1966) (“All peoples have the right to self-determination”).

43. Paust, *supra* note 36, at 17–18 (internal citations omitted).

44. African Charter on Human and Peoples’ Rights, 1520 U.N.T.S. 217 (1981).

45. *Id.* art. 20(2).

have the right to the assistance of the States Parties to the present Charter in their liberation struggle against foreign domination.”⁴⁶ In 1984, while addressing the illegal regime in South Africa, the U.N. General Assembly affirmed the permissibility of self-determination assistance and “recogniz[ed] the legitimacy of . . . [the] struggle [of the people of South Africa] to eliminate apartheid and establish a society based on majority rule with equal participation by all the people of South Africa,” condemned “the South African racist regime for . . . persisting with the further entrenchment of apartheid, a system declared a crime against humanity and a threat to international peace and security;” and urged “all Governments and organizations . . . to assist the oppressed people of South Africa in their legitimate struggle for national liberation”⁴⁷

In the mid-Eighteenth Century, Emmerich de Vattel had written similarly, and with respect to a recognized right of revolution,⁴⁸ that “if a prince, by violating the fundamental laws, gives his subjects a lawful cause for resisting him; if, by his insupportable tyranny, he brings a national revolt against him, any foreign power may rightfully give assistance to an oppressed people who ask for its aid.”⁴⁹ Related claims for “legitimate defense” of foreign human rights victims have also been made more recently.⁵⁰ Some are reminiscent of claims made in the 1600s by the Dutch scholar Hugo Grotius. As explained by another author:

Rulers who have “abandoned all the laws of nature” through the inhumane treatment of their own people “lose the rights of independent sovereigns, and can no longer claim the privilege [of freedom from foreign intervention] under the law of nations.” Once the relationship

46. *Id.* art. 20(3).

47. G.A. Res. 39/2, (Sept. 28, 1984) (calling on the U.N. Security Council to address conflict in South Africa).

48. Concerning the right of revolution, see Universal Declaration of Human Rights, *supra* note 40, pmbl. (“Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law . . .”). See, e.g., Paust, *supra* note 36, at 12–14.

49. 3 EMMERICH DE VATTEL, THE LAW OF NATIONS OR THE PRINCIPLES OF NATURAL LAW bk. II, at 131 (Charles G. Fenwick trans., Carnegie Institute of Washington 1916) (1758).

50. See GEORGE P. FLETCHER, JENS DAVID OHLIN, DEFENDING HUMANITY: WHEN FORCE IS JUSTIFIED AND WHY (2008) (examining multiple theories on self-defense before arguing in favor of “legitimate defense”); see also Criddle, *supra* note 5, at 488 & n.66 (“discretionary powers that states exercise during lawful humanitarian intervention derive from the confluence of two sources . . . [one being] an oppressed people’s legal right to defend themselves against grave human rights abuse”); *id.* at 505 (“[E]xercising foreign peoples’ legal rights to self-defense on their behalf”); Paust & Blaustein, *supra* note 46, at 11–12 n.39 (“Outside states cannot precipitate violence, but where an armed attack has occurred against a people seeking self-determination it is not improper to assist those being attacked.”). Although U.N. Charter Article 51 addresses the inherent right of U.N. members to self-defense, this right is also the right of a non-member state, nation, or people under customary international law, especially since international law has never been merely state-to-state and nations and peoples have had formal participatory roles as well as rights and obligations in the international legal process. See, e.g., Jordan J. Paust, *Nonstate Actor Participation in International Law and the Pretense of Exclusion*, 51 VA. J. INT’L L. 977, 979–84 (2011).

between a state and its people has been ruptured by systematic atrocities, Grotius concludes, other states may use force in order to render temporary “assistance of protection.”⁵¹

Therefore, “Grotius asserts that the law of nature permits intervening states to exercise an oppressed people’s natural rights of collective self-defense on their behalf.”⁵²

Grotius also recognized that crimes against the law of nations are “offenses which affect human society at large . . . and which other states or their rulers have a right to deal with.”⁵³ Grotius recognized the propriety of a “war” against a ruler who engages in a “manifest oppression” of his or her people, noting that such a military response was “undertaken to protect the subjects of another ruler from oppression” and to assure that they are not further denied “the right of all human society” to freedom from oppression.⁵⁴ In that sense, “war” against the oppressor-ruler was a form of sanction strategy in response to acts of political oppression.

Today, democracy is a core value that is interconnected with political self-determination⁵⁵ and counterposed to political oppression.⁵⁶ In the 2005 World Summit Outcome Document, the international community expressed its commitment “to actively protecting and promoting all human rights, the rule of law and democracy” and recognized that these “are interlinked and mutually reinforcing and that they belong to the universal and indivisible core values and principles of the United Nations.”⁵⁷ The Document reaffirmed the widely shared expectation “that democracy is a universal value based on the freely expressed will of people to determine their own political, economic, social and cultural systems.”⁵⁸

51. See Criddle, *supra* note 5, at 482–83 (analyzing humanitarian intervention as a fiduciary relationship between sovereigns and subjects).

52. *Id.* at 483.

53. Jordan J. Paust, *Aggression against Authority: The Crime of Oppression, Politicide and Other Crimes against Human Rights*, 18 CASE W. RES. J. INT'L L. 283, 294–95, n. 74–75 (1986) (see, e.g., HUGO GROTIUS, II ON THE LAW OF WAR AND PEACE, ch. 18, § 6, ch. 21, § 3, ch. 25 (§ 8) (Francis W. Kelsey trans., Oxford University Press 1925) (1625)).

54. *Id.* See Malvina Halberstam, *The Legality of Humanitarian Intervention*, 3 CARDOZO J. INT'L & COMP. L. 1, 2 (1995) (explaining early trends in the use of force as humanitarian intervention).

55. See Paust, *supra* note 36, at 4–7 (drawing political self-determination hand-in-hand with human rights of expression, assembly, participation in government, and freedom from discrimination).

56. See *id.* at 4 & n.14 (“Such forms of political oppression also violate other relevant human rights, including the right of a people to political self-determination and prohibitions of unlawful governmental force.”); see also *id.* at 9–10 (“Where a government engages in a strategy to deny political participation of persons in a process of self-determination . . . such government engages . . . in a process of political oppression and politicide.”)

57. See 2005 World Summit Outcome Document, *supra* note 6, at ¶ 119 (calling on all U.N. parts to promote human rights and fundamental freedoms).

58. *Id.* at ¶ 135. See also Universal Declaration of Human Rights, *supra* note 40, art. 21(3) (“The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.”).

From the above, it is evident that R2P protective intervention against atrocities committed by a government against its own people or another people within its territory can be justified as self-determination assistance or collective self-defense at the request of a victimized people. When a government is unable or unwilling to stop atrocities committed by non-state actors against its own people or another people within its territory, its failure to protect is obvious and self-determination assistance or collective self-defense at the request of a victimized people can be justified. Some might theorize that, when a government is unable or unwilling to fulfill its responsibility to protect, the international community has a residual and transforming authority to assume such a responsibility.⁵⁹ Whether or not this theory is apt, a victimized people can request and receive lawful self-determination assistance or assistance as part of lawful collective self-defense.

V. CONCLUSION

This essay has focused on a number of issues raised by Professor Henry Richardson concerning the propriety of the use of outside military force to stop atrocities in a foreign state. Three issues concern limitations of Security Council authority, use of regional organizations to stop atrocities, and a textually sound and policy-serving interpretation of U.N. Charter Article 2(4). The propriety of self-determination assistance and use of collective self-defense to stop atrocities were also explored. Protective intervention when the Security Council is veto-deadlocked can be permissible as regional action authorized by a regional organization, self-determination assistance or collective self-defense as the request of a given people, or unilateral and joint action that is not proscribed by U.N. Charter Article 2(4).

59. This was basically the concept of “residual responsibility” of the international community offered by an independent commission on R2P in 2001. *See* ICISS, *supra* note 35, at 17 ¶ 2.31 (quoted *supra* note 36) (“This fallback responsibility is activated when a particular state is clearly either unwilling or unable to fulfill its responsibility to protect or is itself the actual perpetrator of crimes or atrocities; or where people living outside a particular state are directly threatened by actions taking place there.”).