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# ARTICLE

## DECIDING TO INTERVENE

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### ABSTRACT

Decisions about intervention into today's armed conflicts are difficult, dangerous, and politically complicated. There are no safe choices. Amid the climate of urgency and uncertainty in which intervention decision-making occurs, international law serves as a guide by providing rules about the legality of intervention. These rules assert that, except for in cases of self-defense, choices about when and how to intervene are to be made by the United Nations Security Council. What the rules do not provide, however, is effective guidance for the political choices the Council makes, such as how to prioritize among competing norms. When, for example, should the Council uphold the sovereignty-based norm of nonintervention and when should it authorize humanitarian intervention in alignment with the emerging norm of the Responsibility to Protect? Absent such guidance, some hold that international law becomes an after-the-fact justification for whatever decision is made or that it has no influence whatsoever.

Rejecting this view, this Article proposes that international law informs political choices about intervention through its purposive intent. The idea of law's purposive intent—that rules

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and norms should be interpreted in light of their object and purpose—is rooted in legal process theory. The Article further posits that the purposive intent of international law is the promotion of peace. Under this approach, any decision to intervene must have as its overriding purpose the promotion of long-term, positive peace. This thesis offers a novel contribution to the literature on intervention by applying legal process theory to an area of inquiry dominated by substantive legal perspectives. More fundamentally, it presents a vision that reshapes the paradigm of intervention from one that mistakenly focuses on combating violence with force to one that takes seriously the daunting task of building peace.

*[T]he task of the international lawyer over the next few years is surely not to go on repeating the rhetoric of dead events which no longer accord with reality, but to try to assist the political leaders to identify what is the new consensus about acceptable and unacceptable levels of intrusion.*

— Dame Rosalyn Higgins<sup>1</sup>

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## I. INTRODUCTION

To intervene or not to intervene? That is the preeminent foreign policy question of our day. As the varied views about how to respond to the recent conflict in Syria demonstrate, decisions about intervention into armed conflicts are difficult, dangerous, and politically complicated.<sup>2</sup> There are no safe choices. It is challenging to make smart decisions about if and how intervention can address crises amid a climate of urgency and uncertainty.<sup>3</sup> International law serves as a guide by providing

2. See, e.g., Steven A. Cook, Op-Ed., *Striking Syria May Destroy It*, WASH. POST, Sept. 1, 2013, at B1 (arguing that the conflict in Syria has evolved past the point where intervention would have been viable and that a U.S. limited response would cause instability in the country for years to come); Richard N. Haass, *America Must Respond to the Atrocities in Syria*, COUNCIL ON FOREIGN RELATIONS (Aug. 22, 2013), [http://www.cfr.org/syria/america-must-respond-atrocities-syria/p31268?cid=nlc-public-the\\_world\\_this\\_week-link3-20130823&sp\\_mid=42385357&sp\\_rid=YW5uYS5zcGFpbkBjb2xvcmFkby5lZHUS1](http://www.cfr.org/syria/america-must-respond-atrocities-syria/p31268?cid=nlc-public-the_world_this_week-link3-20130823&sp_mid=42385357&sp_rid=YW5uYS5zcGFpbkBjb2xvcmFkby5lZHUS1) (arguing that America must intervene in order to maintain a strong norm against the use of chemical weapons and recommending two strategies for doing so that fall short of full military-on-the-ground intervention); Ed Husain, Op-Ed., *Why Western Intervention in Syria Will Leave Chaos*, CNN (Aug. 30, 2013), <http://www.cnn.com/2013/08/28/opinion/syria-husain-opinion/index.html> (arguing that the situation in Syria is "not America's problem" and that military intervention in Syria would back the Assad government into a corner, increasing the risk of further chemical attacks and arguing that a post-Assad Syria would lead to greater instability in Syria); Stewart M. Patrick, *MLK, Obama, and the Audacity of Intervention in Syria*, COUNCIL ON FOREIGN RELATIONS (Aug. 26, 2013), [http://blogs.cfr.org/patrick/2013/08/26/mlk-obama-and-the-audacity-of-intervention-in-syria/?cid=nlc-public-the\\_world\\_this\\_week-link5-20130830&sp\\_mid=42442367&sp\\_rid=YW5uYS5zcGFpbkBjb2xvcmFkby5lZHUS1](http://blogs.cfr.org/patrick/2013/08/26/mlk-obama-and-the-audacity-of-intervention-in-syria/?cid=nlc-public-the_world_this_week-link5-20130830&sp_mid=42442367&sp_rid=YW5uYS5zcGFpbkBjb2xvcmFkby5lZHUS1) (arguing that the use of chemical weapons in Syria and the Responsibility to Protect doctrine create a situation where "ethical realism" obligates President Obama to intervene in Syria).

3. See generally ALEX MINTZ & KARL DEROUEN JR., UNDERSTANDING FOREIGN POLICY DECISION MAKING (2010); JONATHAN M. ROBERTS, DECISION-MAKING DURING

rules about the legality of intervention and the use of force.<sup>4</sup> Under the U.N. Charter, all nations are prohibited from using force, except in self-defense.<sup>5</sup> Furthermore, the Charter places the authority to make decisions about intervention with the United Nations Security Council (UNSC or Council).<sup>6</sup>

Despite these rules, there is significant scholarly debate about the legality of intervention under international law.<sup>7</sup> One

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INTERNATIONAL CRISES 231 (1988) (“[International law] is not, however, essentially geared to deal with crises that arise from situations in which the major policy goals and aspirations of major powers are in conflict.”); YAACOV Y.I. VERTZBERGER, *RISK TAKING AND DECISION MAKING: FOREIGN MILITARY INTERVENTION DECISIONS* (1998). A recollection by a survivor of the Rwandan genocide provides important context:

[The militiamen] had arrived in a great number of cars. We trembled when we saw all this. . . . My wife could not run because she was pregnant and my children were small. . . . As I was running, I fell in a ditch . . . I stayed there, trembling in fear. . . . In the evening, when the militiamen had gone, I left the ditch. I couldn’t find the way because there were bodies everywhere.

AFRICAN RIGHTS, *RESISTING GENOCIDE: BISESERO, APRIL–JUNE 1994*, at 35–36 (1998).

4. This Article uses the term “intervention” to refer to measures under the U.N. Charter Chapters VI and VII, including the use of force. Intervention is defined in Part II. See HIGGINS, *supra* note 1, at 281 (“When one is dealing with military intervention in the context of Article 2(4) of the UN Charter, one is really simply dealing with the lawful and unlawful use of force.”).

5. 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.”); *id.* 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 the 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.”); see IAN BROWNLIE, *INTERNATIONAL LAW AND THE USE OF FORCE BY STATES* 252–56 (1963) (describing the effect that different international laws have on the right to use force in self-defense); Albrecht Randelzhofer, *Article 51*, in 1 *THE CHARTER OF THE UNITED NATIONS: A COMMENTARY* 788, 805 para. 42 (Bruno Simma et al. eds., 2d ed. 2002) (describing the constraints of proportionality and necessity).

6. U.N. Charter arts. 41–42; *id.* art. 39 (providing procedural guidance to the UNSC by requiring the Council to “determine the existence of any threat to the peace, breach of the peace, or act of aggression and . . . make recommendations, or decide what measures shall be taken in accordance with Articles 41 [peaceful measures] and 42 [forceful measures], to maintain or restore international peace and security”). *But see* ALEXANDER ORAKHELASHVILI, *COLLECTIVE SECURITY* 336–37 (2011) (“The issue of abuse of the Council’s competence (or action ultra vires) can be raised when the Council adopts a decision inimical to the aims stated in the Charter or bypassing the ‘due process’ requirements, especially through any bargain behind the decision making which is alien to the Charter purposes.”).

7. See MICHAEL J. GLENNON, *THE FOG OF LAW: PRAGMATISM, SECURITY, AND INTERNATIONAL LAW* 122–23 (2010) (“No advance in the art of legal drafting can bridge the enormous gulf that divides the international community over what constitutes the acceptable use of force . . . .”); Ian Hurd, *Is Humanitarian Intervention Legal?: The Rule of Law in an Incoherent World*, 25 *ETHICS & INT’L AFF.* 293, 293 (2011) (“The debate

of the central inquiries is whether nations should be permitted to use force to engage in humanitarian intervention. The conventional view among scholars mirrors the legal framework provided for in the U.N. Charter—absent self-defense, interventions involving the use of force are not permissible under international law unless authorized by the UNSC.<sup>8</sup> However, a contrasting view is emerging that the unauthorized use of force is sometimes necessary to prevent genocide or to alleviate humanitarian crises that cause widespread human suffering.<sup>9</sup>

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suggests that humanitarian intervention is either legal or illegal depending on one's understanding of how international law is constructed, changed, and represented. Since these questions cannot be answered definitively, the uncertainty remains fundamental, and the legality of humanitarian intervention is essentially indeterminate.”); *see also* William Abresch, *A Human Rights Law of Internal Armed Conflict: The European Court of Human Rights in Chechnya*, 16 EUR. J. INT'L L. 741, 743–44 (2005) (discussing intervention through the lenses of human rights law and international humanitarian law); Rosa Ehrenreich Brooks, *War Everywhere: Rights, National Security Law, and the Law of Armed Conflict in the Age of Terror*, 153 U. PA. L. REV. 675, 701–02 (2004) (discussing intervention in regards to national security); Ian Brownlie, *International Law and the Activities of Armed Bands*, 7 INT'L & COMP. L.Q. 712, 718–28 (1958) (discussing intervention in regards to international criminal law).

8. *See* BROWNIE, *supra* note 5, at 265 (interpreting the U.N. Charter as prohibiting unauthorized use of force except in cases of self-defense); Michael Bothe, *Terrorism and the Legality of Pre-emptive Force*, 14 EUR. J. INT'L L. 227, 228, 230–31 (2003) (noting that “any specific use of force can be lawful only if it can be based on an exception to [the prohibition of the use of force],” which includes both self-defense and authorization by the UNSC); Mary Ellen O'Connell, *Lawful Self-Defense to Terrorism*, 63 U. PITT. L. REV. 889, 899–901 (2002) (arguing against intervention but recognizing an exception when a state cannot control a nonstate actor operating within its territory); Mary Ellen O'Connell, *Unlawful Killing with Combat Drones: A Case Study of Pakistan, 2004–2009*, in SHOOTING TO KILL: THE LAW GOVERNING LETHAL FORCE IN CONTEXT 19, 20–23 (forthcoming) (finding that one limitation under international law is that force may not be used to target civilians and only a state's armed forces or persons taking direct part in hostilities may be targeted); *see also* Saira Mohamed, *Restructuring the Debate on Unauthorized Humanitarian Intervention*, 88 N.C. L. REV. 1275, 1326–27 (2010) (arguing that “unauthorized humanitarian interventions—regardless of their merits—are violations of the [United Nations] Charter and customary international law”); Colum Lynch & Karen DeYoung, *U.S. Efforts to Build Legal Case for Strikes Run into Questions*, WASH. POST, Aug. 29, 2013, at A10 (showing that the “doctrine of humanitarian intervention could set a bad precedent that would be more likely to be used by other countries like Russia and China or some African countries . . . in attacking their enemies” (internal quotation marks omitted)).

9. *See* Rosa Ehrenreich Brooks, *The New Imperialism: Violence, Norms, and the “Rule of Law,”* 101 MICH. L. REV. 2275, 2289 (2003) (accepting the “basic premise that there are many situations in which it is justifiable and beneficial for the U.S. and other actors to seek to promote human rights and the rule of law abroad, and that at times even military interventions are a necessary and justifiable part of this effort”); Beth Van Schaack, *“The Grass That Gets Trampled When Elephants Fight”: Will the Codification of the Crime of Aggression Protect Women?*, 15 UCLA J. INT'L L. & FOREIGN AFF. 327, 385–87 (2010) (supporting humanitarian intervention in instances where egregious acts are being committed against women); *see also* Austin Glassman, *The Evolution of the Prohibition on the Use of Force and Its Conflict with Human Rights Protection: Balancing Equally Forceful Jus Cogens Norms*, 16 UCLA J. INT'L L. & FOREIGN AFF. 345, 369–70 (2011) (supporting an increased use of force in interventions in order to protect human rights);

This view finds support in the Responsibility to Protect doctrine, which states that when a state fails to protect its own people from certain harms, the rights afforded to it by the doctrine of sovereignty give way to the international community's responsibility to protect.<sup>10</sup> Although these views fail to persuade all,<sup>11</sup> they persist and so does the debate about the legality of humanitarian intervention.

The purpose of this Article is to examine international law's influence in determining whether intervention ought to take place, even if it is legally permissible. To do this, the Article evaluates international law's role in informing, and ultimately improving, decisions about intervention as determined by the one body authorized to make them, the U.N. Security Council. Following an international legal process theory perspective, the Article identifies critical challenges that Council decision-makers face and considers how international law can provide guidance in this context. For example, Council diplomats have trouble determining which norm they ought to prioritize when they make

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Jasmeet Gulati & Ivan Khosa, *Humanitarian Intervention: To Protect State Sovereignty*, 41 DENV. J. INT'L L. & POL'Y 397, 414–15 (2013) (arguing that intervention for human rights is intervention for preservation of state sovereignty because the protection of a state's population is an implicit responsibility of the state).

10. INT'L COMM'N ON INTERVENTION & STATE SOVEREIGNTY, THE RESPONSIBILITY TO PROTECT 11–17 paras. 2.1–2.31 (2001), available at <http://responsibilitytoprotect.org/ICISS%20Report.pdf>; JAMES PATTISON, HUMANITARIAN INTERVENTION AND THE RESPONSIBILITY TO PROTECT: WHO SHOULD INTERVENE? 2 (2010) (“Even those who are deeply suspicious of armed humanitarian intervention and deeply skeptical about its prospects of success may still admit that it might, in theory, be justified when a humanitarian crisis is sufficiently serious.”); Bartram S. Brown, *Humanitarian Intervention at a Crossroads*, 41 WM. & MARY L. REV. 1683, 1689–90 (2000) (“When the Security Council fails to act to stop a continuing humanitarian crisis, these two basic pillars of the post-World War II legal order come into dramatic conflict.”); Monica Hakimi, *State Bystander Responsibility*, 21 EUR. J. INT'L L. 341, 354–55 (2010) (examining when states have obligations under international human rights to protect people from abuses committed by third parties); Anne Peters, *Humanity as the A and Ω of Sovereignty*, 20 EUR. J. INT'L L. 513, 521 (2009) (arguing that a state's treatment of its internal constituents in accordance with human rights should be a condition of its external sovereignty).

11. See ANTONY ANGHIE, IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW (2005); DAVID KENNEDY, OF WAR AND LAW 8 (2006) (“We need to remember what it means to say that compliance with international law ‘legitimizes.’ It means, of course, that killing, maiming, humiliating, wounding people is legally privileged, authorized, permitted, and justified.”); BALAKRISHNAN RAJAGOPAL, INTERNATIONAL LAW FROM BELOW: DEVELOPMENT, SOCIAL MOVEMENTS, AND THIRD WORLD RESISTANCE 97–98 (2003) (arguing that every intervention “mechanically reproduces unjust capitalistic relations between the West and the Third World”); Martti Koskeniemi, *The Place of Law in Collective Security*, 17 MICH. J. INT'L L. 455, 460–63 (1996) (claiming that the Council is “notorious[ly]” selective when deciding to use force); Makau Mutua, *What is TWAIL?*, 94 AM. SOC'Y INT'L L. PROC. 31, 35–37 (2000) (arguing that third world states remain marginal and find themselves at the mercy of Western capital).

choices about intervention. Substantive legal rules about the legality of intervention are not helpful here because they are often based on conflicting norms. On the one hand, the U.N. Charter upholds the principle of nonintervention secured by “the principle of the sovereign equality of all its Members.”<sup>12</sup> On the other hand, sovereignty should not recuse a state from protecting its people from an array of harms including atrocities, armed conflict, or humanitarian disasters.<sup>13</sup>

Furthermore, the Council seeks guidance about *why* it should authorize intervention. As its resolutions regarding Libya and the Democratic Republic of the Congo (DRC) demonstrate,<sup>14</sup> the Council has moved beyond the traditional Article 39 grounds for intervention in its recent consideration of humanitarian imperatives.<sup>15</sup> With fifteen state Members, five of which are permanent Members that enjoy the right to veto a substantive decision, reaching consensus about using force against a sovereign nation is a difficult endeavor.<sup>16</sup> What the Council

12. U.N. Charter art. 2, para. 1 (“The Organization is based on the principle of the sovereign equality of all its Members.”); see J.H. LEURDIJK, INTERVENTION IN INTERNATIONAL POLITICS 57 (1986) (defining the norm of nonintervention and arguing that it is a legal principle that informs political practice); ANN VAN WYNEN THOMAS & A.J. THOMAS, JR., NON-INTERVENTION: THE LAW AND ITS IMPORT IN THE AMERICAS 67–74 (1956) (articulating a standard of equality among nation-states in the intervention context); Tom J. Farer, *A Paradigm of Legitimate Intervention*, in ENFORCING RESTRAINT: COLLECTIVE INTERVENTION IN INTERNAL CONFLICTS 316, 316–19 (Lori Fisler Damrosch ed., 1993) (describing the rights that a nation-state has in the U.N. with respect to intervention); see also U.N. Charter art. 51; *supra* note 5.

13. INT’L COMM’N ON INTERVENTION & STATE SOVEREIGNTY, *supra* note 10, at 11–17 paras. 2.1–2.31 (redefining sovereignty as including the responsibility of a nation to protect its population and allowing a limitation on its sovereign right to be free from external intervention if it fails to do so).

14. The UNSC has traditionally reserved authorizing interventions for situations that constitute a threat to or breach of the peace. However, its recent practice has departed from this tradition (e.g., UNSC-authorized intervention into Libya to protect civilians “by all necessary means”; the recently UNSC-created Intervention Brigade in the Democratic Republic of the Congo). S.C. Res. 1973, ¶ 4, U.N. Doc. S/RES/1973 (Mar. 17, 2011) (Libya) (“Authorizes Member States that have notified the Secretary-General, acting nationally or through regional organizations or arrangements, and acting in cooperation with the Secretary-General, to take all necessary measures, notwithstanding paragraph 9 of resolution 1970 (2011), to protect civilians and civilian populated areas under threat of attack . . . .”); S.C. Res. 1493, ¶ 8, U.N. Doc. S/RES/1493 (July 28, 2003) (Democratic Republic of the Congo) (authorizing the use of “all necessary steps to prevent further violations of human rights and international humanitarian law”). Furthermore, unauthorized interventions (e.g., Kosovo) and those conducted against nonstate actors inside another nation’s territory in the name of self-defense (e.g., Afghanistan) have complicated the rules. S.C. Res. 1386, U.N. Doc. S/RES/1386 (Dec. 20, 2001) (Afghanistan); S.C. Res. 1244, U.N. Doc. S/RES/1244 (June 10, 1999) (Kosovo).

15. INGER ÖSTERDAHL, THREAT TO THE PEACE: THE INTERPRETATION BY THE SECURITY COUNCIL OF ARTICLE 39 OF THE UN CHARTER § 2.2.1, at 18–21 (1998).

16. MICHAEL J. MATHESON, COUNCIL UNBOUND: THE GROWTH OF UN DECISION MAKING ON CONFLICT AND POSTCONFLICT ISSUES AFTER THE COLD WAR 33–37 (2006)

needs, and what substantive legal rules fail to provide, is a clear basis for the purpose of intervention. Without a shared understanding about why intervention should take place, it becomes very difficult for the Council to reach consensus about whether or not to intervene.<sup>17</sup>

In response, this Article proposes that international law guides choices about intervention by providing purposive intent.<sup>18</sup> The idea of law's purposive intent—that rules and norms should be interpreted in light of their object and purpose—is rooted in legal process theory and enjoys legitimate recognition as a guide for decision-making in other areas of law.<sup>19</sup>

This Article further posits, based on legal history and legal theory, that the purposive intent of international law is the promotion of peace.<sup>20</sup> Under this approach, any decision to

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(discussing how “decisions under Chapter VII take precedence over other sources of international law” and how the Council also has the authority to “require states to take actions that would otherwise be prohibited by other treaties”).

17. See, e.g., JANE STROMSETH, DAVID WIPPMAN & ROSA BROOKS, CAN MIGHT MAKE RIGHTS? BUILDING THE RULE OF LAW AFTER MILITARY INTERVENTIONS 5 (2006) (“[W]hat goals, if any, justify military interventions?”).

18. This Article builds upon my earlier work describing the decision-making processes of the UNSC, their challenges, and procedural solutions. See Anna Spain, *The U.N. Security Council's Duty to Decide*, 4 HARV. NAT'L SECURITY J. 320 (2013) (arguing that the Council has a duty to affirmatively decide whether or not to address international crises that constitute threats to or breaches of the peace).

19. The concept of purposive intent has its foundation in legal process theory. See AHARON BARAK, PURPOSIVE INTERPRETATION IN LAW xiii (Sari Bashi trans., 2005) (“Purposive interpretation begins with the idea that interpretation is about pinpointing the legal meaning of a text along the spectrum of its semantic meanings.”); 1 ABRAM CHAYES, THOMAS EHRLICH & ANDREAS F. LOWENFELD, INTERNATIONAL LEGAL PROCESS: MATERIALS FOR AN INTRODUCTORY COURSE x–xii (1968) (discussing the “allocation of decision-making competence”); THOMAS EHRLICH & MARY ELLEN O'CONNELL, INTERNATIONAL LAW AND THE USE OF FORCE 268–75 (1993) (showing that international law provides a framework on what type of activity is acceptable and what type of activity is unacceptable); William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1496–98 (1987) (“[I]nterpretation itself inevitably involves the ‘creation’ of meaning from the interaction of the text, historical context, and evolutive context.”); Steven Graines & Justin Wyatt, *The Rehnquist Court, Legal Process Theory, and McCleskey v. Kemp*, 28 AM. J. CRIM. L. 1, 5 (2000) (“The primary features of legal-process theory are (1) the purposiveness of law and the centrality of process, (2) the commitment to neutrality and neutral principles, and (3) the principle of institutional settlement or institutional competence.”); Mary Ellen O'Connell, *New International Legal Process*, 93 AM. J. INT'L L. 334, 338 (1999) (stating that NILP considers what law is “for” and the values of the system and the “procedures that decision makers should follow in reaching them”).

20. U.N. Charter art. 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, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace . . .”); *Certain Expenses of the United Nations*, Advisory Opinion, 1962 I.C.J. 151, 171–72 (July 20) (holding that the main purpose of the

intervene must align with the aim of promoting peace. Hans Kelsen's theory of the Grundnorm, which posits that all legal systems are grounded in one basic norm that serves to unify all other norms, provides a useful conceptual framework for understanding the promotion of peace as the purpose of international law.<sup>21</sup>

The purposive intent thesis is not without its challenges, and this Article considers two. First, if the Council is going to approach decisions about intervention such that they align with the aim of promoting peace, it needs to define peace in order to make it a useful concept for organizing and guiding decisions about intervention. Second, the purposive intent approach will require reforming how decisions about intervention are made at the Council, as well as who gets to make them. This Article examines these challenges and offers several suggestions about how to address them.

In considering how international law can improve UNSC decision-making about intervention through purposive intent, this Article makes several important contributions to the existing literature on intervention and the use of force. First, it offers important insights about how the UNSC uses international law to inform its choices about intervention and the challenges it faces therein. In doing so, this Article answers the call for international legal scholarship that engages the role of norms

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United Nations is to promote a peaceful settlement); *id.* at 215 (separate opinion of Judge Fitzmaurice); LELAND M. GOODRICH, EDVARD HAMBRO & ANNE PATRICIA SIMONS, CHARTER OF THE UNITED NATIONS: COMMENTARY AND DOCUMENTS 296 (3d ed. 1969) (providing examples of limiting intervention to promote peace); ÖSTERDAHL, *supra* note 15, § 2.2.2, at 25 ("As to the question of the relative importance of the goal of maintaining or restoring international peace and security (Article 1(1)) and the goal of encouraging respect for human rights (Article 1(3)) respectively, to the extent that the two can be separated, there is no doubt that the former was considered to be superior to the latter when the Charter was drafted.").

21. See HANS KELSEN, GENERAL THEORY OF LAW AND STATE 115–16, 121–22 (Anders Wedberg trans., 1961) (1945) [hereinafter KELSEN, GENERAL THEORY] (identifying the theory of a Grundnorm, or basic norm, that provides the basis for a legal system through which other laws are legitimized and interpreted and which, in international law, could serve as superior to the normative interests of individual states); HANS KELSEN, LAW AND PEACE IN INTERNATIONAL RELATIONS: THE OLIVER WENDELL HOLMES LECTURES, 1940–41, at 27 (1942) [hereinafter KELSEN, LAW AND PEACE]; HANS KELSEN, PURE THEORY OF LAW 31 (Max Knight trans., 2d ed. 2006) (1967) [hereinafter KELSEN, PURE THEORY] ("An 'order' is a system of norms whose unity is constituted by the fact that they all have the same reason for their validity; and the reason for the validity of a normative order is a basic norm . . . from which the validity of all norms of the order are derived."). But see H.L.A. HART, THE CONCEPT OF LAW 292–93 nn. 1–4 (2d ed. 1994) (1964) (arguing against Kelsen's Grundnorm on several grounds); Joseph Raz, *Kelsen's Theory of the Basic Norm*, 19 AM. J. JURIS. 94, 99 (1974) (arguing that Kelsen's theory "cannot solve the problem of identity and unity of legal systems" and that "[t]here is nothing in the theory to prevent two legal systems from applying to the same territory").

and international legal process.<sup>22</sup> Second, this Article recognizes the Council's dysfunctional practices and takes seriously the task of addressing them with realistic, pragmatic solutions.<sup>23</sup> Third, this Article's normative focus on the promotion of peace advances the view that the paradigm of intervention should be reformed from one that focuses on combating violence with force to one that aims to build a positive, long-term peace.<sup>24</sup> Finally, this

22. There is a growing recognition of the need for international legal scholarship that examines the role of norms and international legal process. See MIREILLE DELMAS-MARTY, ORDERING PLURALISM: A CONCEPTUAL FRAMEWORK FOR UNDERSTANDING THE TRANSNATIONAL LEGAL WORLD 115–28 (Naomi Norberg trans., 2009) (examining the interactions between the speed of decision-making and the changing of norms over time); Ian Hurd, *Legitimacy and Authority in International Politics*, 53 INT'L ORG. 379, 379–80 (1999) (arguing that norms are more likely to be adopted when the initiator of the norm enjoys legitimacy); Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599, 2634, 2649 (1997) (urging scholars to attempt a “thick” description of transnational legal process); Jaya Ramji-Nogales, *Designing Bespoke Transitional Justice: A Pluralist Process Approach*, 32 MICH. J. INT'L L. 1, 8 (2010) (looking at norm-based decision-making in the context of recovery from incidents of mass violence, and noting that “[f]or legal institutions to successfully perform an expressive function, the community whose norms are at issue must trust those who aim to alter these norms, and individuals with authority in the message receiving communities must participate in the process of clarifying and establishing new social norms”); Andrew K. Woods, *A Behavioral Approach to Human Rights*, 51 HARV. INT'L L.J. 51, 71–72 (2010) (proposing that “rather than assuming an international norm and asking how that norm can be enforced . . . [one instead should ask] how international human rights regimes could pay more attention to the social situations that give or deny its norms social meaning”); see also TOM R. TYLER ET AL., SOCIAL JUSTICE IN A DIVERSE SOCIETY 75 (1997) (noting criticism by social-justice researchers “about the completeness of outcome-oriented justice models” and advocating for an “expanded model recognizes that people are concerned about how decisions are made as well as about what those decisions are”); Maggi Carfield, *Participatory Law and Development: Remapping the Locus of Authority*, 82 U. COLO. L. REV. 739, 743 (2011) (suggesting the important question regarding normative decision-making in the law and development context is “[i]n what ways, if any, does a community want to change the rules it operates by, and how can external actors assist in that process?”); Amy J. Cohen, *Thinking with Culture in Law and Development*, 57 BUFF. L. REV. 511, 517 (2009) (examining within law and development “an effort to enable ordinary citizens to instill within themselves normative desires for particular configurations of modern legal rules, processes, and institutions”).

23. See, e.g., Yoram Dinstein, *Sovereignty, the Security Council and the Use of Force*, in REDEFINING SOVEREIGNTY: THE USE OF FORCE AFTER THE COLD WAR 111, 117 (Michael Bothe, Mary Ellen O'Connell & Natalino Ronzitti eds., 2005) (“There have been many academic proposals to abolish (or appreciably reduce) the veto power. Such proposals remain an academic—and entirely moot—exercise. There is no indication whatever that the five permanent members might be willing to consider divesting themselves of the veto power.”); C. Eduardo Vargas Toro, *UN Security Council Reform: Unrealistic Proposals and Viable Reform Options*, Global Policy Forum (Nov. 25, 2008), <http://www.globalpolicy.org/component/content/article/200/41138.html>.

24. See Mary Ellen O'Connell, *Responsibility to Peace: A Critique of R2P*, in CRITICAL PERSPECTIVES ON THE RESPONSIBILITY TO PROTECT: INTERROGATING THEORY AND PRACTICE 71, 71 (Philip Cunliffe ed., 2011) (arguing that the current paradigm of military intervention does not promote peace); A.P.V. Rogers, *Humanitarian Intervention and International Law*, 27 HARV. J.L. & PUB. POL'Y 725, 735–36 (2004) (arguing that humanitarian intervention should be a last resort in achieving peace).

Article seeks to provide meaningful analysis of intervention that examines how the Security Council's choices are informed not just by law but also through law.<sup>25</sup>

The Article proceeds as follows. Part II defines the concept of intervention, describes the legal rules governing its use, and traces its evolution from peacekeeping to humanitarian intervention. Part III describes the challenges that decision-makers at the Security Council face when making choices about intervention as a norm conflict in international law and considers how such conflicts can be addressed. Part IV asserts the central claim of this Article, that international law's purposive intent can and should guide decisions about intervention. It then describes the meaning of purposive intent and provides support for the view that the purposive intent of international law is the promotion of peace. The Article concludes in Part V by identifying and addressing two challenges that arise from adopting the purposive intent view.

## II. THE MEANING OF INTERVENTION

### A. Defining Intervention

Defining intervention is a complex endeavor, as "there is no satisfactory agreement among jurists as to the meaning and content of intervention in international law."<sup>26</sup> Intervention implies a breach of a nation's sovereignty, premised on the definition of the norm of nonintervention,<sup>27</sup> which the United States officially adopted in 1933 at the Seventh International Conference of American States.<sup>28</sup> As a legal matter, it is

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25. Vera Gowlland-Debbas, *The Security Council and Issues of Responsibility Under International Law*, in 353 RECUEIL DES COURS: COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW, 185, 199, 201 (2011) ("Any meaningful analysis of Chapter VII today therefore requires going beyond the framework of Charter legality to examine the role of the Security Council within the broader international legal system. The functions which it plays within that order—and by function we mean not only the way it operates, but also the tasks it performs by law and through law . . .").

26. See THOMAS & THOMAS, *supra* note 12, at 67; Rogers, *supra* note 24, at 727–36 (arguing that humanitarian intervention should be a last resort in achieving peace).

27. See LEURDJIK, *supra* note 12, at 57 ("The norm of non-intervention in the internal affairs of other States can be derived from the conception of the international system as essentially an inter-State order."). See generally Farer, *supra* note 12, at 316–18.

28. Montevideo Convention on the Rights and Duties of States, art. 8, Dec. 26, 1933, 49 Stat. 3097, 3100; see also Organization of American States [OAS], Res. No. 1, at 1, OAS Doc. 8/89 (May 17, 1989); Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty, G.A. Res. 2131 (XX), ¶¶ 1, 7, U.N. Doc. A/RES/20/2131 (Dec. 21, 1965) ("No State [or group of States] has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State.").

important to distinguish intervention from the use of force.<sup>29</sup> Sanctions, for example, constitute an “intervention against a state’s domestic jurisdiction” even though they do not violate a state’s territorial jurisdiction or sovereignty.<sup>30</sup>

Articles 41 and 42 of the U.N. Charter categorize the intervention options for taking “Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression.”<sup>31</sup> The former lists options that do not involve the use of force (sanctions and interruption of diplomatic relations),<sup>32</sup> and the latter covers the use of force (military intervention, blockades, and demonstrations).<sup>33</sup> Military intervention denotes “coercive military intrusion into the internal or foreign affairs of another state.”<sup>34</sup> Humanitarian intervention is the use of force by one or more states against another state for the purpose of protecting people from human rights abuses and overwhelming suffering.<sup>35</sup> U.N. Peacekeeping operations and other operations providing humanitarian assistance are sometimes erroneously referred to as intervention, but the distinction is that they take place with UNSC authorization after consultation with the state in question, and therefore do not violate a state’s domestic jurisdiction.<sup>36</sup>

29. Rosalyn Higgins, *Intervention and International Law*, in INTERVENTION IN WORLD POLITICS 29, 40 (Hedley Bull ed., 1984) [hereinafter Higgins, *Intervention and International Law*] (cautioning against conflating the terms aggression and intervention as a legal matter); *id.* at 38 (“One thus has constantly the problem of identifying the reality, and measuring it against the rhetoric.”); *see also* Rosalyn Higgins, *Internal War and International Law*, in 3 THE FUTURE OF THE INTERNATIONAL LEGAL ORDER 81, 90–93 (Cyril E. Black & Richard A. Falk eds., 1971) (emphasizing that humanitarian efforts during armed conflict “are not to be regarded as unfriendly acts”).

30. HIGGINS, *supra* note 1, at 274.

31. U.N. Charter ch. VII.

32. *Id.* art. 41.

33. *Id.* art. 42.

34. VERTZBERGER, *supra* note 3, at 3. *See generally* Philip Windsor, *Superpower Intervention*, in INTERVENTION IN WORLD POLITICS, *supra* note 29, at 45, 62–63.

35. *See* IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 742–45 (7th ed. 2008) (“A state which had abused its sovereignty by brutal and excessively cruel treatment of those within its power, whether nationals or not, was regarded as having made itself liable to action by any state which was prepared to intervene.”); *see also* DANIEL THÜRER, INTERNATIONAL HUMANITARIAN LAW: THEORY, PRACTICE, CONTEXT 290 (2011) (stating that “if a State is not able or not willing to protect its people, international intervention must be an option in cases of genocide” and crimes against humanity, state collapse, mass starvation and civil war); Hakimi, *supra* note 10, at 346–48, 356–60 (discussing state obligation to protect internal populations arising in the context of international human rights).

36. *See, e.g.*, S.C. Res. 770, ¶¶ 1–3, U.N. Doc. S/RES/770 (Aug. 13, 1992) (requesting that Member States assist in the coordination of humanitarian assistance in parts of Bosnia and Herzegovina); *see also* ROBERT NALBANDOV, FOREIGN INTERVENTIONS IN ETHNIC CONFLICTS 9–24 (2009) (describing theories of third-party intervention); Nancy D. Arnison, *International Law and Non-Intervention: When Do Humanitarian Concerns*

This Article examines how international law informs the U.N. Security Council's choices about intervention. Given this focus, the Article primarily considers interventions involving the use of military force, as well as peacekeeping, while recognizing that there are additional approaches.<sup>37</sup>

The legality of intervention is governed by international legal rules regarding the use of force by states, which are codified in treaties, notably the U.N. Charter, and in international customary law.<sup>38</sup> The Charter prohibits nations from engaging in the use of force, except in self-defense pursuant to Article 51 and subject to the requirements of necessity, proportionality, and immediacy.<sup>39</sup> One question that has arisen is whether or not the self-defense exception authorizes a nation to use force in defense of others.<sup>40</sup> Representing Yugoslavia in its application before the International Court of Justice (ICJ), Ian Brownlie argued that the right to use force pursuant to Article 51 of the U.N. Charter does not cover the defense of others, even to provide humanitarian protection.<sup>41</sup> Furthermore, if a nation threatens to

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*Supersede Sovereignty?*, 17 FLETCHER F. WORLD AFF. 199, 203–04 (1993) (“[C]onsent of the target country ‘should’ be obtained before providing humanitarian assistance.”).

37. See, e.g., MARTHA FINNEMORE, *THE PURPOSE OF INTERVENTION: CHANGING BELIEFS ABOUT THE USE OF FORCE* 52–54 (2003); LINDSAY MOIR, *REAPPRAISING THE RESORT TO FORCE* 5–39 (2010) (offering a general legal framework for the rules of *jus ad bellum*); THOMAS G. WEISS, *HUMANITARIAN INTERVENTION: IDEAS IN ACTION* (2007); Higgins, *Intervention and International Law*, *supra* note 29, at 30 (defining the spectrum of intervention); Natalino Ronzitti, *The Current Status of Legal Principles Prohibiting the Use of Force and Legal Justifications of the Use of Force*, in *REDEFINING SOVEREIGNTY: THE USE OF FORCE AFTER THE COLD WAR*, *supra* note 23, at 91, 91–104; Quincy Wright, *Non-Military Intervention*, in *THE RELEVANCE OF INTERNATIONAL LAW: ESSAYS IN HONOR OF LEO GROSS* 5, 8–9 (Karl Deutsch & Stanley Hoffmann eds., 1968).

38. See BROWNLIE, *supra* note 5, at 113 (“By reason of the universality of the [United Nations] it is probable that the principles of [Article 2.4] constitute general international law. In any case the difference between [Article 2.4] and ‘general international law’ is the merest technicality. The Charter [together with the Kellogg-Briand Pact] . . . form[s] the essential juridical basis of the world legal order and of world peace.” (footnotes omitted)).

39. U.N. Charter art. 51; *supra* note 5.

40. *Oversight of the U.S. Department of Justice: Hearing Before the S. Comm. on the Judiciary*, 112th Cong. 33–34 (2011) (statement of Eric Holder, Att’y Gen. of the United States) (“[L]et me make something very clear. The operation in which Osama bin Laden was killed was lawful. . . . [I]t was justified as an act of national self-defense. . . . [Bin Laden was] a lawful military target. And the operation was conducted in a way that is consistent with our law, with our values.”); see also Brownlie, *supra* note 7, at 731–32 (“Military action across a frontier to suppress armed bands, which the territorial sovereign is unable or unwilling to suppress, has been explained in terms of legitimate self-defence on a limited number of occasions in the present century.”); Oscar Schachter, *The Legality of Pro-Democratic Invasion*, 78 AM. J. INT’L L. 645, 648 (1984) (claiming that a rule against unilateral force has been prevalent since the inception of the United Nations Charter, except when in self-defense).

41. See *Case Concerning Legality of Force (Yugoslavia v. Belg.)*, Verbatim Record, 34, 36–38 (May 10, 1999, 10 AM), <http://www.icj-cij.org/docket/files/105/4473.pdf> (“Humanitarian

use force, that threat is deemed unlawful if the use of force itself would be unlawful.<sup>42</sup>

The U.N. Charter also provides that, absent self-defense, only the UNSC has the authority to permit the use of force in order to “maintain or restore international peace and security.”<sup>43</sup> Article 2.7 of the U.N. Charter further clarifies 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 or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.<sup>44</sup>

The Charter-based rules about the use of force support the conclusion that, absent self-defense or UNSC authorization, nations are not permitted to use force under international law.<sup>45</sup>

In 2001, the International Commission on Intervention and State Sovereignty issued a report entitled *The Responsibility to Protect*, which defined sovereignty as having an element of responsibility wherein a state must protect its people and articulated a normative legal framework for intervention with humanitarian dimensions.<sup>46</sup> This prompted significant debate about the legality of unauthorized humanitarian intervention. Proponents argue that it enjoys widespread acceptance and even state practice, thus becoming

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intervention . . . has no legal authenticity whatsoever.”); *Legality of the Use of Force*, (Yugoslavia v. Belg.), Application of the Federal Republic of Yugoslavia, 1999 I.C.J. 105 (Apr. 29). The ICJ declined to hear the case on the grounds that it lacked compulsory jurisdiction under Article 36.2 of the ICJ Statute on the basis that Yugoslavia had not accepted jurisdiction prior to the events in question.

42. *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 95, 246 (July 8). (“The notions of ‘threat’ and ‘use’ of force under Article 2, paragraph 4, of the Charter stand together in the sense that if the use of force itself in a given case is illegal—for whatever reason—the threat to use such force will likewise be illegal.”).

43. 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 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.”).

44. *Id.* art. 2, para. 7.

45. *See id.* arts. 52–53 (holding that, generally, no enforcement action should take place without the authorization of the Security Council); S.C. Res. 1199, ¶ 4, U.N. Doc. S/RES/1199 (Sept. 23, 1998); S.C. Res. 1160, ¶ 8, U.N. Doc. S/RES/1160 (Mar. 31, 1998).

46. *See* INT’L COMM’N ON INTERVENTION & STATE SOVEREIGNTY, *supra* note 10, at 11–17 paras. 2.1–2.31 (redefining sovereignty as including the responsibility of a nation to protect its population and imposing limits on its sovereign right to be free from external intervention if it fails to do so).

an emerging norm.<sup>47</sup> However, as international legal scholars Oona A. Hathaway and Scott J. Shapiro explain,

Some argue that international law provides for a “responsibility to protect” that allows states to intervene during humanitarian disasters, without Security Council authorization. They point to NATO’s 1999 intervention in Kosovo. But in 2009 the United Nations secretary general, Ban Ki-moon, rejected this view, finding that “the responsibility to protect does not alter, indeed it reinforces, the legal obligations of Member States to refrain from the use of force except in conformity with the Charter,” a position he affirmed on Tuesday.<sup>48</sup>

This helps to explain the prevailing view among international legal scholars that unauthorized interventions, even for humanitarian purposes, are illegal under international law.<sup>49</sup>

47. See FINNEMORE, *supra* note 37, at 54 (arguing that sovereignty no longer trumps humanitarian action); TAYLOR B. SEYBOLT, HUMANITARIAN MILITARY INTERVENTION: THE CONDITIONS FOR SUCCESS AND FAILURE 1–15 (2007) (claiming that the modern international system holds that sovereign states have a right to nonintervention but that humanitarian intervention has been gaining widespread acceptance); Peters, *supra* note 10, at 543 (arguing that sovereignty is no longer a first principle of international law but a second-order norm that derives its meaning from overriding priorities of protecting human rights and interests); Nina Schou, *Instances of Human Rights Regimes*, in DELEGATING STATE POWERS: THE EFFECT OF TREATY REGIMES ON DEMOCRACY AND SOVEREIGNTY 209, 219–28 (Thomas M. Franck ed., 2000); Bruno Simma, *NATO, the UN and the Use of Force: Legal Aspects*, 10 EUR. J. INT’L L. 1, 6 (1999) (suggesting that while unauthorized humanitarian interventions constitute violations of international law, there are other considerations that should affect decisions about intervention); Jeremy Waldron, *Are Sovereigns Entitled to the Benefit of the International Rule of Law?*, 22 EUR. J. INT’L L. 315, 325 (2011) (opining that states are “trustees for the people committed to their care”).

48. Oona A. Hathaway & Scott J. Shapiro, *On Syria, a U.N. Vote Isn’t Optional*, N.Y. TIMES, Sept. 4, 2013, at A23.

49. See BROWNIE, *supra* note 5, at 342 (“[I]t is extremely doubtful if this form of intervention has survived the express condemnations of intervention which have occurred in recent times or the general prohibition of resort to force to be found in the United Nations Charter.” (footnotes omitted)); OSCAR SCHACHTER, INTERNATIONAL LAW IN THEORY AND PRACTICE 128 (1991) (“Neither human rights, democracy or self-determination are acceptable legal grounds for waging war, nor for that matter, are traditional just war causes or righting of wrongs.”); Louis Henkin, *Kosovo and the Law of “Humanitarian Intervention,”* 93 AM. J. INT’L L. 824, 824–25 (1999) (finding that humanitarian intervention is prohibited unless authorized by the Security Council, but that a single permanent Member could prevent authorization); Mary Ellen O’Connell, *The UN, NATO, and International Law After Kosovo*, 22 HUM. RTS. Q. 57, 70 (2000) (finding that there is no right under customary international law or any treaty permitting a state to undertake a humanitarian intervention without Security Council authorization); W. Michael Reisman, *Acting Before Victims Become Victims: Preventing and Arresting Mass Murder*, 40 CASE W. RES. J. INT’L L. 57, 79 (2008) (“[N]o major participating government relied exclusively or primarily on some sort of theory of humanitarian intervention, or on an international responsibility to act to arrest mass killing.”); THÜRER, *supra* note 35, at 52–53 (“Human beings deserve the same protection, regardless of whether they are affected by a battle taking place within one country or across borders. That is why the

*B. The Evolution of Intervention: From Peacekeeping to Humanitarian Intervention*

For much of the post-WWII and Cold War era, the UNSC authorized forceful intervention to address acts of aggression and threats to and breaches of international peace and security pursuant to Article 39 of the Charter.<sup>50</sup> Then, in the late 1980s, the basis for intervention began to include humanitarian concerns.<sup>51</sup> The shift started with the expansion of peacekeeping operations in response to new circumstances presented by

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Security Council and other international bodies, when demanding respect for international humanitarian law, pay no heed to the legal classification of a conflict.”); *see also* OLIVIER CORTEN, *THE LAW AGAINST WAR: THE PROHIBITION ON THE USE OF FORCE IN CONTEMPORARY INTERNATIONAL LAW* 497–511 (Christopher Sutcliffe trans., 2010) (examining the illegality of humanitarian intervention in international law both explicitly and implicitly).

50. 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.”).

51. S.C. Res. 2098, ¶ 9, U.N. Doc. S/RES/2098 (Mar. 28, 2013) (creating the “Intervention Brigade”); *id.* ¶ 12, (“Authorizes MONUSCO, through its military component, in pursuit of the objectives described in paragraph 11 above, to take all necessary measures to perform the following tasks, through its regular forces and its Intervention Brigade as appropriate . . .”); S.C. Res. 2085, ¶ 9, U.N. Doc. S/RES/2085 (Dec. 20, 2012) (Mali) (“Decides to authorize the deployment of an African-led International Support Mission in Mali (AFISMA) for an initial period of one year, which shall take all necessary measures, in compliance with applicable international humanitarian law and human rights law and in full respect of the sovereignty, territorial integrity and unity of Mali to carry out the following tasks . . .”); S.C. Res. 1973, *supra* note 14, ¶ 4 (“Authorizes Member States that have notified the Secretary-General, acting nationally or through regional organizations or arrangements, and acting in cooperation with the Secretary-General, to take all necessary measures, notwithstanding paragraph 9 of resolution 1970 (2011), to protect civilians and civilian populated areas under threat of attack . . .”); S.C. Res. 1769, U.N. Doc. S/RES/1769 (July 31, 2007) (peacekeeping force authorized); S.C. Res. 1706, U.N. Doc. S/RES/1706 (Aug. 31, 2006) (Sudan) (peacekeeping force authorized but lacked consent); S.C. Res. 1701, U.N. Doc. S/RES/1701 (Aug. 11, 2006) (Israel/Lebanon); S.C. Res. 1546, U.N. Doc. S/RES/1546 (June 8, 2004) (Iraq II); S.C. Res. 1545, U.N. Doc. S/RES/1545 (May 21, 2004) (Burundi); S.C. Res. 1528, U.N. Doc. S/RES/1528 (Feb. 27, 2004) (Côte d’Ivoire); S.C. Res. 1497, U.N. Doc. S/RES/1497 (Aug. 1, 2003) (Liberia); S.C. Res. 1493, *supra* note 14 (Democratic Republic of the Congo); S.C. Res. 1272, U.N. Doc. S/RES/1272 (Oct. 25, 1999) (East Timor); S.C. Res. 1270, U.N. Doc. S/RES/1270 (Oct. 22, 1999) (Sierra Leone); S.C. Res. 1267, U.N. Doc. S/RES/1267 (Oct. 15, 1999) (Afghanistan); S.C. Res. 1244, *supra* note 14 (Kosovo); S.C. Res. 1127, U.N. Doc. S/RES/1127 (Aug. 28, 1997) (Angola); S.C. Res. 1101, U.N. Doc. S/RES/1101 (Mar. 28, 1997) (Albania); S.C. Res. 1080, U.N. Doc. S/RES/1080 (Nov. 15, 1996) (Great Lakes region, Zaire); S.C. Res. 940, U.N. Doc. S/RES/940 (July 31, 1994) (Haiti); S.C. Res. 929, U.N. Doc. S/RES/929 (June 22, 1994) (Rwanda); S.C. Res. 836, U.N. Doc. S/RES/836 (June 4, 1993) (Bosnia and Herzegovina); S.C. Res. 794, U.N. Doc. S/RES/794 (Dec. 3, 1992) (Somalia); S.C. Res. 717, U.N. Doc. S/RES/717 (Oct. 16, 1991) (Cambodia); S.C. Res. 688, U.N. Doc. S/RES/688 (Apr. 5, 1991) (Iraq/Kurds); S.C. Res. 678, U.N. Doc. S/RES/678 (Nov. 29, 1990) (Iraq/Kuwait); *see also* MICAH ZENKO, *BETWEEN THREATS AND WAR: U.S. DISCRETE MILITARY OPERATIONS IN THE POST-COLD WAR WORLD 2* (2010) (finding that the United States is the dominant international actor and has increasingly used limited force against other states or nonstate actors to achieve policy goals).

noninternational armed conflicts,<sup>52</sup> such as the need to provide enforcement for regional peace agreements in Afghanistan, Southern Africa, Central America, and Cambodia.<sup>53</sup> These operations began to consider how to protect civilian populations from famine, disease, and atrocities that occurred during and sometimes as a result of armed conflict.

The term “humanitarian intervention” emerged to give a name to the use of force inside a sovereign nation for humanitarian purposes, thus extending beyond Article 39 grounds. It has been defined variously as “[e]mploying military means for humanitarian ends”<sup>54</sup> and as “the external use of force to stop genocide or widespread human rights abuse.”<sup>55</sup> Boutros Boutros-Ghali’s 1992 *An Agenda for Peace*, which identified preventative diplomacy, peacemaking, peacekeeping, and peacebuilding as tools for addressing conflict, furthered the recognition that intervention was multifaceted.<sup>56</sup>

The 1991 intervention into northern Iraq, Operation Provide Comfort, is recognized as the first humanitarian intervention of the post-Cold War era.<sup>57</sup> In its Resolution 688, issued on March 20, 1991, the Security Council articulated for the first time that an internal armed conflict—the repression of Iraqi civilians (primarily Kurds) by Iraq—constituted a threat to international peace and security.<sup>58</sup> Under this purview, but without explicit UNSC authorization, a U.S.-led operation was

52. See MEREDITH REID SARKEES & FRANK WHELOM WAYMAN, RESORT TO WAR: A DATA GUIDE TO INTER-STATE, EXTRA-STATE, INTRA-STATE, AND NON-STATE WARS, 1816-2007, at 562 (2010) (reporting the rise of intrastate wars since the mid-1960s); USE OF FORCE COMM., INT’L LAW ASS’N, FINAL REPORT ON THE MEANING OF ARMED CONFLICT IN INTERNATIONAL LAW 28–32 (2010), available at <http://www.ila-hq.org/download.cfm/docid/2176DC63-D268-4133-8989A664754F9F87> (defining noninternational armed conflict); Nils Petter Gleditsch et al., *Armed Conflict 1946–2001: A New Dataset*, 39 J. PEACE RES. 615, 616–23 (2002) (confirming that internal conflict is the dominant form of conflict since the 1950s).

53. JACOB BERCOVITCH & RICHARD JACKSON, CONFLICT RESOLUTION IN THE TWENTY-FIRST CENTURY 103–04 (2009).

54. Jim Whitman, *A Cautionary Note on Humanitarian Intervention*, 34 GEOJOURNAL 167, 172 (1994).

55. MICHAEL PUGH, PEACEKEEPING AND HUMANITARIAN INTERVENTION, ISSUES IN WORLD POLITICS 134–56 (Brian White et al. eds., 1997); see also OLIVER RAMSBOTHAM & TOM WOODHOUSE, HUMANITARIAN INTERVENTION IN CONTEMPORARY CONFLICT: A RECONCEPTUALIZATION 113 (1996) (addressing the suggestion by some scholars that “non-forcible humanitarian intervention” should cover a range of activities).

56. U.N. Secretary-General, *An Agenda for Peace: Preventative Diplomacy, Peacemaking and Peace-Keeping: Rep. of the Secretary-General*, ¶ 15, U.N. Doc. A/47/277-S/24111 (June 17, 1992).

57. SEYBOLT, *supra* note 47, at 49.

58. S.C. Res. 688, *supra* note 51, ¶ 1 (“Condemns the repression of the Iraqi civilian population in many parts of Iraq, including most recently in Kurdish-populated areas, the consequences of which threaten international peace and security in the region . . .”).

launched in April 1991 to address the refugee situation along the Iraq–Turkey border to avoid further humanitarian crises after reports emerged that as many as 400 of the 400,000 refugees stranded in the mountains were dying every day.<sup>59</sup> Operation Provide Comfort is credited with saving over 7,000 Kurdish refugees in a crisis where over 46,000 people died.

During the early 1990s, several other humanitarian crises gained international attention and the question of intervening for humanitarian purposes was once again in the spotlight. The civil war and subsequent lapse of the state in Somalia and the drought of 1990 led to famine and a humanitarian crisis where an estimated 192,000 people died in less than two years.<sup>60</sup> Responding to the recommendations of U.N. Secretary–General Boutros Boutros-Ghali, the UNSC adopted Resolution 751 by which it decided that the continuation of “the magnitude of the suffering caused by the conflict . . . constitute[d] a threat to international peace and security” and established the U.N. Operation in Somalia (UNOSOM) to provide humanitarian aid.<sup>61</sup> Humanitarian assistance continued over the next two years.<sup>62</sup> Then, in December 1992, the UNSC established UNOSOM II and authorized the mission to employ Chapter VII measures, including the use of force, in order to ensure “the delivery of humanitarian assistance.”<sup>63</sup> This operation, famously depicted in the film *Black Hawk Down*, was criticized for being ineffective and costing lives.<sup>64</sup> During the same time period, the humanitarian crises caused by

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59. SEYBOLT, *supra* note 47, at 47–49 (discussing how the Iraqi military targeted Kurdish communities to punish them for rebelling—alongside the Shia Arabs in the south—against the Sunni government of Saddam Hussein).

60. *Id.* at 52–53 (noting that the war killed an estimated 15,000–40,000 people and the famine killed an additional estimated 131,000–152,000 people between January 1991 and August 1992).

61. S.C. Res. 751, at 57–58 & ¶ 2, U.N. Doc. S/RES/751 (Apr. 24, 1992); SEYBOLT, *supra* note 47, at 52–61 (discussing how UNOSOM I was active from September 1992 until March 1993 and sought to achieve a ceasefire agreement to allow for the delivery of food aid under the mandate “to establish as soon as possible a secure environment for humanitarian relief operations in Somalia” (internal quotation marks omitted)).

62. *See, e.g.*, S.C. Res. 767, ¶¶ 2, 6, U.N. Doc. S/RES/767 (July 27, 1992) (establishing that the aim of Operation Provide Relief was to assist in emergency delivery of aid by U.N. agencies and NGOs); S.C. Res. 775, ¶ 7, U.N. Doc. S/RES/775 (Aug. 28, 1992).

63. S.C. Res. 794, *supra* note 51, ¶ 7; *see also* S.C. Res. 814, ¶ 4, U.N. Doc. S/RES/814 (Mar. 26, 1993) (authorizing “assist[ance] in the provision of relief and in the economic rehabilitation of Somalia . . . the repatriation of refugees and displaced persons . . . promot[ion] and advance[ment of] political reconciliation,” among other aims).

64. Rep. of the Comm’n of Inquiry Established Pursuant to Security Council Resolution 885 (1993) to Investigate Armed Attacks on UNOSOM II Personnel Which Led to Casualties Among Them, ¶¶ 137–162, U.N. Doc. S/1994/653 (June 1, 1994). The film was based on the book written by Mark Bowden. MARK BOWDEN, *BLACK HAWK DOWN: A STORY OF MODERN WAR* (1999).

the war in Bosnia and Herzegovina was met by a U.N. Peacekeeping Operation and a North Atlantic Treaty Organization (NATO) bombing operation known as Operation Deliberate Force, which were later criticized for not doing enough to protect Bosnian civilians.<sup>65</sup> Then, in the spring of 1994, an estimated 800,000 people were killed in Rwanda in fewer than 100 days due to genocide.<sup>66</sup> These crises, and the varied international responses to them, cemented an emerging consensus that the use of force might be necessary at times to avert humanitarian crises.

This history provides important background for understanding the context of NATO's unauthorized use of force to intervene into the Kosovo War.<sup>67</sup> Kosovars sought independence from Yugoslavia while Yugoslavia sought to maintain its sovereignty over the Kosovo region.<sup>68</sup> Non-Albanian minorities living in the Kosovo territory did not have the same interests as Kosovars.<sup>69</sup> On March 31, 1998, the UNSC adopted Resolution 1160, which imposed an arms embargo on the former Federal Republic of Yugoslavia (FRY) because of its violence targeting the independence-seeking Kosovo Liberation Army.<sup>70</sup> Recognizing the deteriorating situation as a "threat to peace," the UNSC then adopted Resolution 1199 on September 23, 1998, which expressed grave concern at the reports of excessive and indiscriminate force by FRY against Kosovar civilians and called upon FRY to take steps to address and "avert the impending humanitarian catastrophe."<sup>71</sup>

The next day, NATO issued an "activation warning" signaling its readiness to engage in an air strike campaign.<sup>72</sup> This

65. S.C. Res. 743, ¶ 5, U.N. Doc. S/RES/743 (Feb. 21, 1992) (authorizing the U.N. Protection Force or UNPROFOR "to create the conditions of peace and security required for the negotiation of an overall settlement of the Yugoslav crisis"). For a comprehensive history of the events there, see SEYBOLT, *supra* note 47, at 61–70.

66. GÉRARD PRUNIER, *THE RWANDA CRISIS: HISTORY OF A GENOCIDE* 263–65 (1995); Max Boot, *Paving the Road to Hell: The Failure of U.N. Peacekeeping*, FOREIGN AFF., Mar./Apr. 2000, at 143, 143; *Genocide in Rwanda*, U.N. HUMAN RIGHTS COUNCIL, [http://www.unitedhumanrights.org/genocide/genocide\\_in\\_rwanda.htm](http://www.unitedhumanrights.org/genocide/genocide_in_rwanda.htm) (last visited Feb. 5, 2014).

67. For a detailed history of the Kosovo War, including the implications from the previous war in Bosnia and Herzegovina, see SEYBOLT, *supra* note 47, at 78–86.

68. *Id.* at 61–63.

69. *Id.* at 78–79.

70. S.C. Res. 1160, *supra* note 49, ¶ 8.

71. S.C. Res. 1199, *supra* note 49. Over 300,000 internally displaced persons faced humanitarian disaster with the onset of winter and lack of adequate shelter. HUMAN RIGHTS WATCH, *HUMANITARIAN LAW VIOLATIONS IN KOSOVO* 61 (1998).

72. Press Release, NATO, Statement by the Secretary General Following the ACTWARN Decision (Sept. 24, 1998), *available at* <http://www.nato.int/docu/pr/1998/p980924e.htm>.

prompted a series of diplomatic measures, including peace talks led by Richard Holbrooke, which ultimately failed to achieve a ceasefire.<sup>73</sup> In the face of continued atrocities against civilian Kosovars, NATO launched a bombing campaign against FRY that started on March 24, 1999, and continued for eleven weeks.<sup>74</sup> NATO's stated purpose was to remove FRY forces, institute peacekeepers, and provide for the safe return of refugees. Its use of force to achieve these goals was significant. NATO engaged in over 38,000 air strikes over the course of 78 days. President Slobodan Milošević ultimately accepted a ceasefire to be followed by a NATO-led peacekeeping force, and NATO ended its operations on June 10, 1999.<sup>75</sup>

Ultimately, the UNSC recognized the need for Kosovo to enjoy substantial autonomy within FRY and supported the development of a provisional constitution, established a UN mission in Kosovo, and took other steps to assist Kosovo's transition into a democratic, independent state.<sup>76</sup> U.N. Secretary-General Kofi Annan appointed special envoy Martti Ahtisaari (former President of Finland) to conduct negotiations with Kosovo and Serbia with the aim of achieving peaceful and stable independence for Kosovo.<sup>77</sup> The Kosovo Status Settlement was adopted by the UNSC and received financial support from the Organization for Security and Co-operation in Europe, paving the way for the declaration of Kosovo's independence on February 17, 2008.<sup>78</sup> At Serbia's request, the ICJ issued an advisory opinion as to the legality of Kosovo's independence, finding it to be valid under international law.<sup>79</sup>

After the end of hostilities, Russia requested that the Security Council consider the "extremely dangerous situation caused by the unilateral military action of NATO against the

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73. *A Kosovo Chronology*, FRONTLINE PBS, <http://www.pbs.org/wgbh/pages/frontline/shows/kosovo/etc/cron.html> (last visited Feb. 5, 2014). The UN Security Council later threatened to use force against FRY absent its compliance. S.C. Res. 1203, ¶¶ 1–4, U.N. Doc. S/RES/1203 (Oct. 24, 1998).

74. *A Kosovo Chronology*, *supra* note 73.

75. *Id.*

76. S.C. Res. 1244, *supra* note 14.

77. Press Release, United Nations, Secretary-General Appoints Former President Martti Ahtisaari of Finland as Special Envoy for Future Status Process for Kosovo (Nov. 15, 2005), *available at* <http://www.un.org/News/Press/docs/2005/sga955.doc.htm>.

78. See Fatos Bytyci, *Kosovo Says Now Recognized by 100 Countries*, REUTERS, (June 26, 2013), <http://www.reuters.com/article/2013/06/26/us-kosovo-egypt-recognition-idUSBRE95P19M20130626?feedType=RSS&feedName=worldNews> (stating that Kosovo's independence is now recognized by 100 nations).

79. Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, 2010 I.C.J. 403, ¶ 84 (July 22).

Federal Republic of Yugoslavia.”<sup>80</sup> Russia argued that the doctrine of humanitarian intervention is “in no way based on the Charter or other generally recognized rules of international law.”<sup>81</sup> Belarus, Yugoslavia, China, and India all agreed that NATO’s intervention was a violation of international law because it was interfering in the internal affairs of another state and that only the UNSC can authorize this based on Article 39 purposes.<sup>82</sup> Russia, India, and Belarus introduced a resolution (which was defeated 12 to 3) that the use of force by NATO constituted “a threat to international peace and security.”<sup>83</sup>

Proponents of humanitarian intervention in Kosovo, such as the United Kingdom, argued that NATO’s actions were legal and were “justified as an exceptional measure to prevent an overwhelming humanitarian catastrophe.”<sup>84</sup> The Netherlands agreed that the UNSC should make such decisions, but noted its inability to do so:

[D]ue to one or two permanent members’ rigid interpretation of the concept of domestic jurisdiction, such a resolution is not attainable, [but] we cannot sit back and simply let the humanitarian catastrophe occur. In such a situation we will act on the legal basis we have available, and what we have available in this case is more than adequate.<sup>85</sup>

Canada recognized that “[h]umanitarian considerations underpin our action.”<sup>86</sup> Other countries commented on the inability of the UNSC to take decisive and immediate action and the need to act anyway.<sup>87</sup>

Thus, even though NATO’s actions were illegal at the time, afterward, they were viewed as legitimate, being justified on

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80. Letter from the Russian Federation to the Security Council, U.N. Doc. S/1999/653 (Mar. 24, 1999).

81. U.N. SCOR, 44th Sess., 3988th mtg. at 4, U.N. Doc. S/PV.3988 (Mar. 24, 1999).

82. *Id.* at 12–16.

83. S.C. Draft Res., U.N. Doc. S/1999/328 (Mar. 16, 1999).

84. S/PV.3988, *supra* note 81, at 12; *see also* Planning Staff of the Foreign and Commonwealth Office, Foreign Pol’y Doc. No. 148, ¶ 1.3, *reprinted in United Kingdom Materials on International Law 1986*, 1986 BRIT. Y.B. INT’L L. 614, 619 (Geoffrey Marston ed., 1987) (“[I]t cannot be said to be unambiguously illegal [however] . . . the overwhelming majority of contemporary legal opinion comes down against the existence of a right of humanitarian intervention.”).

85. S/PV.3988, *supra* note 81, at 8.

86. *Id.* at 6.

87. *See id.* at 7 (Gambia) (“[A]t times the exigencies of a situation demand, and warrant, decisive and immediate action. We find that the present situation in Kosovo deserves such treatment.”); *id.* at 10 (Malaysia) (finding it necessary to act outside of the UNSC).

moral grounds in light of the atrocities that had taken place.<sup>88</sup> Outside of the Council's debate, others stated their support for humanitarian intervention. The Independent International Commission on Kosovo concluded that "the NATO [military intervention] was illegal, yet legitimate."<sup>89</sup> U.S. Secretary of State Madeleine Albright argued that NATO "has the legitimacy to act to stop a catastrophe."<sup>90</sup> U.N. Secretary-General Kofi Annan acknowledged that there are times when force is legitimate in pursuit of peace, albeit with UNSC involvement.<sup>91</sup>

Since Kosovo, the UNSC has authorized additional interventions based, at least in part, on humanitarian concerns. In its authorization of the use of force in East Timor in 1999, the Council indicated that the aim was both to restore peace and security and to facilitate humanitarian assistance.<sup>92</sup> The UNSC's authorization of NATO's intervention into Libya "to protect civilians and civilian populated areas under threat of attack" through "all necessary measures" is a recent example of intervention involving the use of authorized force based on

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88. See INDEP. INT'L COMM'N ON KOSOVO, THE KOSOVO REPORT: CONFLICT, INTERNATIONAL RESPONSE, LESSONS LEARNED 163 (2000) (construing the Security Council's adoption of Resolution 1244 after NATO's intervention as adding a "sense of ex-post UN legitimacy to the operation"); Noam Chomsky, *The Skeleton in the Closet: The Responsibility to Protect in History*, in CRITICAL PERSPECTIVES ON THE RESPONSIBILITY TO PROTECT, *supra* note 24, at 11, 11–15; Aidan Hehir, *The Responsibility to Protect in International Law*, in CRITICAL PERSPECTIVES ON THE RESPONSIBILITY TO PROTECT, *supra* note 24, at 84, 84–85 (noting that the aftermath of Kosovo and other humanitarian crises indicate a responsibility to protect people); Henkin, *supra* note 49, at 824–25 (arguing that unilateral intervention should remain illegal); Tara McCormack, *The Responsibility to Protect and the End of the Western Century*, in CRITICAL PERSPECTIVES ON THE RESPONSIBILITY TO PROTECT, *supra* note 24, at 35, 35–37; Anthea Roberts, *Legality vs Legitimacy: Can Uses of Force Be Illegal but Justified?*, in HUMAN RIGHTS, INTERVENTION AND THE USE OF FORCE 179, 182–83 (Philip Alston & E. MacDonald eds., 2008).

89. See INDEP. INT'L COMM'N ON KOSOVO, *supra* note 88, at 186 (explaining that NATO's response in Kosovo illustrated the balance between interfering within a state's domestic jurisdiction and the need to respond to humanitarian challenges).

90. Madeleine Albright, Sec'y of State, Dep't of State, Press Conference on Kosovo, Brussels, Belgium (Oct. 8, 1998), available at <http://1997-2001.state.gov/www/statements/1998/981008.html>.

91. See Press Release, Global Policy Forum, Statement by Kofi Annan on Kosovo Crisis, The Effectiveness of the International Rule of Law in Maintaining International Peace and Security (May 18, 1999), available at <http://www.globalpolicy.org/component/content/article/190/38833.html>.

92. S.C. Res. 1264, ¶ 3, U.N. Doc. S/RES/1264 (Sept. 15, 1999) ("Authorizes the establishment of a multinational force under a unified command structure, pursuant to the request of the Government of Indonesia conveyed to the Secretary-General on 12 September 1999, with the following tasks: to restore peace and security in East Timor, to protect and support UNAMET in carrying out its tasks and, within force capabilities, to facilitate humanitarian assistance operations, and authorizes the States participating in the multinational force to take all necessary measures to fulfill this mandate . . .").

humanitarian purposes.<sup>93</sup> This history of the evolution of peacekeeping and humanitarian intervention helps explain why decisions about intervention are controversial and how they are informed by competing norms.

### III. CHALLENGES DECISION-MAKERS FACE

Decision-making at the UNSC is rife with challenges.<sup>94</sup> One of the central constraints is that formal resolutions are adopted by consensus. Yet it is difficult for the Council to reach consensus about whether or not to authorize intervention measures if they do not agree on the reason for intervention. This, in turn, rests on understandings about why intervention should be authorized. International law's substantive rules simply provide that the Council has the authority to make such decisions but does not address what the underlying purpose for intervention should be. This Part examines these and related decision-making challenges.

#### A. *Finding a Reason for Intervening*

The Security Council is the one organization under international law that may authorize the use of force in interventions into sovereign nations.<sup>95</sup> As a decision-making entity, it faces many challenges—political, procedural, and otherwise. One reason the Council has difficulty reaching consensus about political choices regarding intervention is because it lacks consensus about the *reason* for intervening.

A U.N. Security Council diplomat explains the problem. International legal rules do play “somewhat of a role . . . but [they are] not a predominant force” in shaping political decisions about intervention.<sup>96</sup> “We have something we want to do, the lawyers

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93. S.C. Res. 1973, *supra* note 14, ¶ 4 (“Authorizes Member States that have notified the Secretary-General, acting nationally or through regional organizations or arrangements, and acting in cooperation with the Secretary-General, to take all necessary measures, notwithstanding paragraph 9 of resolution 1970 (2011), to protect civilians and civilian populated areas under threat of attack . . .”); see President Barack Obama, Remarks at Joint Press Conference (Mar. 3, 2011), available at <http://www.whitehouse.gov/the-press-office/2011/03/28/remarks-president-address-nation-libya> (“Qaddafi had lost the confidence of his people and the legitimacy to lead, and I said that he needed to step down from power.”); Ethan Bronner & David E. Sanger, *No-Flight Zone in Libya Backed by Arab League*, N.Y. TIMES, Mar. 13, 2011, at A1. The endorsement by the Arab League of a no-fly zone was significant because they were willing to allow a foreign military presence capable of enforcement. *Id.*

94. See, e.g., MATHESON, *supra* note 16.

95. Nations can also make such decisions pursuant to self-defense under U.N. Charter art. 51.

96. Telephone Interview with U.N. Security Council diplomat (Nov. 1, 2013) [hereinafter Interview] (on file with Author). The source wishes to remain anonymous. The purpose of this

craft language. [They] don't ever say you cannot do the objective you want to do" because it goes against international law. "The aim [of intervention]—what we are trying to do—increasingly shapes UNSC decision-making about intervention." The diplomat then described the Council's recent decision to authorize MONUSCO to use force in the Democratic Republic of the Congo (DRC) to protect civilians, humanitarian personnel, and human rights defenders as an example.<sup>97</sup> The diplomat explained that

the Council is not just motivated by each member's national interests anymore . . . . Few members have national interests in this region. The support for this U.N. Mandate was based on other reasons, reasons having to do with concern for human lives. The problem is that international law is invoked to support different and competing decisions. Syria has become synonymous with R2P. People use R2P as a way to create a hierarchy of international legal norms.<sup>98</sup>

This interview suggests that, in this case, the Council's motivation for authorizing intervention was to protect human life. It also suggests that the Council seeks clarity about the general purpose for intervention.

Upon first glance, Article 39 of the U.N. Charter provides such guidance. It says that the UNSC "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

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interview was to gather insights about how the UNSC makes decisions about intervention. This interview is not a part of a broader survey and does not intend to provide empirical support.

97. The United Nations Organization Stabilization Mission in the Democratic Republic of the Congo or 'MONUSCO' has a description of its mandate available at <http://www.un.org/en/peacekeeping/missions/monusco/mandate.shtml> ("MONUSCO took over from an earlier UN peacekeeping operation—the United Nations Organization Mission in Democratic Republic of the Congo (MONUC)—on 1 July 2010. The original mandate of the mission was established by Security Council resolution 1255 of 28 May to reflect the new phase reached in the country. It was authorized to use all necessary means to carry out its mandate relating, among other things, to the protection of civilians, humanitarian personnel and human rights defenders under imminent threat of physical violence and to support the Government of the DRC in its stabilization and peace consolidation efforts."); see INT'L COMM. OF THE RED CROSS, DEMOCRATIC REPUBLIC OF THE CONGO: OPINION SURVEY AND IN-DEPTH RESEARCH 38 (2009), <http://www.icrc.org/eng/assets/files/other/drc.pdf> (observing that, since 1996, millions have died as a result of the hostilities in the country); Jeffrey Gettleman, *The World's Worst War*, N.Y. TIMES, Dec. 16, 2012, at SR1 (naming the conflict in the Democratic Republic of the Congo "one of the bloodiest conflicts since World War II, with more than five million dead").

98. Interview, *supra* note 96; see also EDWARD C. LUCK, UN SECURITY COUNCIL: PRACTICE AND PROMISE 85 (2006) (highlighting the importance of the "humanitarian imperative" associated with acts of intervention today).

maintain or restore international peace and security.”<sup>99</sup> Historically, the Council has stuck to these grounds. In the conflict in Cyprus, the Council determined that the situation in Cyprus “is likely to threaten international peace and security” if allowed to continue, and authorized the establishment of a peacekeeping force.<sup>100</sup> In its resolution regarding the Iran–Iraq war, the UNSC recalled provisions of Article 2 and determined that the reestablishment of “peace and security in the region require[d] strict adherence to these provisions.”<sup>101</sup>

However, the U.N. Charter does not define what actions constitute such threats, breaches, or acts of aggression. The negotiating history of the U.N. Charter reveals why. During the San Francisco rounds, the Third Committee decided “to leave to the Council the entire decision . . . as to what constitutes a threat to the peace, a breach of the peace, or an act of aggression.”<sup>102</sup> This provided the Council with the flexibility and discretion to act as it deemed necessary in any given context.<sup>103</sup>

This understanding of Article 39 gives the Council the discretion to authorize intervention for new reasons, such as humanitarian concerns, by interpreting new crises as constituting threats to or breaches of the peace. The Council’s recent decisions authorizing intervention suggest that it is doing just that. In 1991, the Council’s Resolution 688 articulated that the internal armed conflict—the repression of Iraqi–Kurdish

99. U.N. Charter art. 39 (establishing the U.N.’s authority with respect to threats to the peace, breaches of peace, and acts of aggression); U.S. DEP’T OF STATE, POSTWAR FOREIGN POLICY PREPARATION, 1938–1945 (1950), *reprinted in* RUTH B. RUSSELL & JEANNETTE E. MUTHER, A HISTORY OF THE UNITED NATIONS CHARTER: THE ROLE OF THE UNITED STATES 1940–1945 app. F, at 993 (1958) (noting that as the negotiating history of the U.N. Charter reveals in the 1943 Outline Plan, it was intended that the Council be given authority to “(c) determine the existence of a threat or act of aggression, and (d) to institute measures to repress such threat or act”); *see also* Frederic L. Kirgis, Jr., *The Security Council’s First Fifty Years*, 89 AM. J. INT’L L. 506, 516 (1995) (stating that the UNSC is “the best (in fact, the only) judge of what amounts to a threat to international peace for the purposes of chapter VII”).

100. S.C. Res. 186, U.N. Doc. S/RES/186 (Mar. 4, 1964); Christopher Greenwood, *The United Nations as a Guarantor of International Peace and Security: Past, Present and Future – A United Kingdom View*, in THE UNITED NATIONS AT THE AGE OF FIFTY: A LEGAL PERSPECTIVE 59, 63–64 (Christian Tomuschat ed., 1995).

101. S.C. Res. 514, at 19, U.N. Doc. S/RES/514 (July 12, 1982).

102. *Verbatim Minutes of the First Meeting of Commission III* at 6, U.N. Doc. 943 III/5 (June 12, 1945), *reprinted in* 11 DOCUMENTS OF THE UNITED NATIONS CONFERENCE ON INTERNATIONAL ORGANIZATION, 12, 17 (photo. reprint 1998) (1945); RUSSELL & MUTHER, *supra* note 99, at 669–72.

103. *See* RUSSELL & MUTHER, *supra* note 99, at 670 (“Because it was not always possible to distinguish clearly between a threat and a breach, the important thing was to leave the evaluation of circumstances to the Council, giving it the flexibility to use the most appropriate of the measures available. With only minor verbal changes, the Coordination Committee made this provision Article 39 of the Charter.”).

civilians by the government—constituted a threat to international peace and security.<sup>104</sup> In 2011, the UNSC authorized Member States “to protect civilians and civilian populated areas under threat of attack” in Libya through “all necessary measures.”<sup>105</sup> More recently, the Council authorized intervention into the DRC via the creation of the “Intervention Brigade,”<sup>106</sup> mandated to “carry out targeted offensive operations” “with the responsibility of neutralizing armed groups.”<sup>107</sup> As in Libya, the UNSC based the Brigade’s purpose on humanitarian grounds, calling upon it to “prevent the expansion of all armed groups . . . and to disarm them in order to contribute to the objective of reducing the threat posed by armed groups on state authority and civilian security in eastern DRC and to make space for stabilization activities.”<sup>108</sup> These decisions suggest a broadening of the Council’s basis for authorizing use of force that extends beyond traditional Article 39 grounds into concerns arising from humanitarian crises in noninternational armed conflicts.<sup>109</sup> But not all Council members agree. Without a shared understanding for the reason for intervention, consensus-based decision-making is severely hindered.<sup>110</sup>

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104. S.C. Res. 688, *supra* note 51, ¶ 1 (“Condemns the repression of the Iraqi civilian population in many parts of Iraq, including most recently in Kurdish-populated areas, the consequences of which threaten international peace and security in the region . . .”).

105. See S.C. Res. 1973, *supra* note 14, ¶ 4 (authorizing Member States to “take all necessary measures”); see also Paul R. Williams & Colleen (Betsy) Popken, *Libya and the Evolution of the Law of Humanitarian Intervention*, 44 CASE W. RES. J. INT’L L. 225, 226 (2012) (“Resolution 1973 and its subsequent implementation provide a blueprint for effective humanitarian intervention.”).

106. S.C. Res. 2098, *supra* note 51, ¶¶ 9, 12 (“Authorizes MONUSCO, through its military component, in pursuit of the objectives described in paragraph 11 above, to take all necessary measures to perform the following tasks, through its regular forces and its Intervention Brigade as appropriate . . .”).

107. *Id.*; Press Release, Security Council, “Intervention Brigade” Authorized as Security Council Grants Mandate Renewal for United Nations Mission in Democratic Republic of Congo, U.N. Press Release SC/10964 (Mar. 28, 2013).

108. S.C. Res. 2098, *supra* note 51, ¶ 12(b).

109. See Kenneth Anderson, *United Nations Collective Security and the United States Security Guarantee in an Age of Rising Multipolarity: The Security Council as the Talking Shop of the Nations*, 10 CHI. J. INT’L L. 55, 87–88 (2009) (describing the United States’ role in UNSC-authorized interventions as driven by “collective security altruism”).

110. See Provisional Rules of Procedure of the Security Council, U.N. Doc. S/96/Rev.7 (Dec. 21, 1982) (describing the decision-making processes of the Security Council); MATHESON, *supra* note 16; Madeleine O. Hosli et al., *Squaring the Circle? Collective and Distributive Effects of United Nations Security Council Reform*, 6 REV. INT’L ORGANIZATIONS 163, 165–67, 174 (2011) (explaining that Council decisions require support of all five permanent Members as well as nine of fifteen total votes, and observing that “common notions of fairness or shared values are hard to come by”).

*B. Prioritizing Among Norms**1. Sovereignty or Humanitarian Protection?*

In the absence of agreement about the basis for authorizing the use of force to intervene into armed conflicts, the Council's decision-making process disintegrates into a debate about competing priorities.<sup>111</sup> A decision to intervene for humanitarian purposes prioritizes certain norms (e.g., humanitarian protection and human rights) above the sovereignty-based norm of nonintervention.<sup>112</sup> The central decision that the Council faces is determining when the norm of nonintervention should give way to other norms.<sup>113</sup> Although this decision is a political choice, it is one that is informed by international law. What the Council seeks, and what international law fails to provide, is a mechanism for prioritizing among these competing norms.<sup>114</sup>

The Council faced this dilemma in its treatment of the crisis in Syria. The armed conflict there was categorized as a civil war, which originally was not thought to invoke Article 39 conditions, until reports of human rights abuses and mass human suffering began to emerge. In 2013, the Syrian government was accused of using chemical weapons, specifically the gas sarin, against civilians. In response, the Council was called upon by the United States and others to authorize the use of force. U.S. President Barack Obama, arguing before the U.N. General Assembly, said:

I want to outline where the United States of America stands on these issues. With respect to Syria, we believe that as a starting point, the international community must enforce the ban on chemical weapons. . . . The ban

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111. Gowlland-Debbas, *supra* note 25, at 216–19 (describing the changing functions of the Security Council—e.g., its response to changes in collective security—to address these norm conflicts).

112. While not all cases of intervention raise this challenge, some do. See Gulati & Khosa, *supra* note 9, at 400–02 (arguing that proponents claim intervention is consistent with the purpose of the U.N. Charter, but that opponents claim intervention is inconsistent with the principle of sovereignty); Nico Krisch, *Legality, Morality and the Dilemma of Humanitarian Intervention After Kosovo*, 13 EUR. J. INT'L L. 323, 327–29 (2002) (“[T]he main problem of humanitarian intervention consists in the divergence of law and morality: while considerations of justice and human rights demand the recognition of a right to intervention, international law prevents this by anachronistically relying on order and on state sovereignty.”); see also FINNEMORE, *supra* note 37, at 73–84 (explaining how normative prioritization changes and affects the interplay between conflicting norms).

113. See Krisch, *supra* note 112, at 327 (arguing that “the main problem of humanitarian intervention consists in the divergence of law and morality,” “law” as represented by “order and . . . state sovereignty” and “morality” as represented by “considerations of justice and human rights”).

114. Interview, *supra* note 96.

against the use of chemical weapons, even in war, has been agreed to by 98 percent of humanity.

....

... [W]ithout a credible military threat, the Security Council had demonstrated no inclination to act at all. . . .

....

... If we cannot agree even on this, then it will show that the United Nations is incapable of enforcing the most basic of international laws.

....

... [S]overeignty cannot be a shield for tyrants to commit wanton murder, or an excuse for the international community to turn a blind eye.<sup>115</sup>

Syrian President Bashar al-Assad's response to intervention into Syria was to invoke its sovereignty and argue that it is "fighting a regional and global battle and must have more time to resolve [it]."<sup>116</sup> Permanent Security Council member Russia echoed Syria's protest, "deem[ing] unacceptable any external interference in Syrian affairs."<sup>117</sup> Of course, leaders of nations facing intervention routinely invoke international law to argue that intervention is not permissible.<sup>118</sup> For example, during the "Arab Spring" in Egypt, then-President Muhammad Hosni El Sayed Mubarak invoked the principle of sovereignty, arguing that "[i]ntervention in our internal affairs is strange, unacceptable and we will not allow it."<sup>119</sup>

115. President Barack Obama, Address to the United Nations General Assembly (Sept. 24, 2013), *available at* [http://gadebate.un.org/sites/default/files/gastatements/68/US\\_en\\_0.pdf](http://gadebate.un.org/sites/default/files/gastatements/68/US_en_0.pdf).

116. See Mona Mahmood & Luke Harding, *Bashar al-Assad Says There Is No End in Sight to Syrian Civil War*, GUARDIAN (Aug. 29, 2012) (alteration in original), <http://www.guardian.co.uk/world/2012/aug/29/bashar-al-assad-syria-war?newsfeed=true> (showing the U.N.'s continuing involvement in Syria by protecting refugees); see also STEPHEN D. KRASNER, SOVEREIGNTY: ORGANIZED HYPOCRISY 21 (1999) ("Weaker states have always been the strongest supporters of the rule of nonintervention."); Kit Daniels, *Assad: Syria is a Sovereign Country Fighting al-Qaeda*, INFOWARS.COM (Aug. 27, 2013), <http://www.infowars.com/assad-syria-is-a-sovereign-country-fighting-al-qaeda/> (reporting that Assad claims that Syria is not a puppet government and that they are fighting rebels who are connected with al-Qaeda).

117. U.N. SCOR, 66th Sess., 6520th mtg. at 26–27, U.N. Doc. S/PV.6520 (Apr. 21, 2011).

118. See KRASNER, *supra* note 116, at 21 ("Weaker states have always been the strongest supporters of the rule of nonintervention."); *Saddam Addresses Iraqi People*, CNN (Mar. 20, 2003), <http://www.cnn.com/2003/WORLD/meast/03/20/irq.war.saddam.transcript/>.

119. *Mubarak Should Leave in "Honorable" Way: Egypt's PM*, AL ARABIYA NEWS (Feb. 3, 2011), <http://www.alarabiya.net/articles/2011/02/03/136159.html> (providing a statement made in Cairo, Egypt, by Omar Suleiman, former Army General).

Who is right? A decision to intervene is necessarily a decision about priorities. Should sovereignty trump humanitarian imperatives or should the concern for grave loss of human life trump sovereignty?<sup>120</sup> The Council has struggled with this choice. Compare the Council's press release "call[ing] upon the Syrian authorities to allow immediate, full and unimpeded access of humanitarian personnel to all populations in need of assistance, in accordance with international law,"<sup>121</sup> to its agenda reaffirming its "strong commitment to the sovereignty, independence, and territorial integrity of Syria."<sup>122</sup> To date, the Council has not authorized the "Libyan" intervention option in Syria.<sup>123</sup> The Council has taken other measures, including its unanimous decision on September 27, 2013, to eliminate Syria's stockpile of chemical weapons.<sup>124</sup>

The Council's decisions about intervention turn on the international legal concept of sovereignty. As Sir Hersch Lauterpacht once observed, "any inquiry of a general character in the field of international law finds itself at the very start confronted with the doctrine of sovereignty."<sup>125</sup> Historically, the concept has been defined in various ways.<sup>126</sup> In its 1927 *Lotus*

120. LUCK, *supra* note 98, at 85 (discussing the "humanitarian imperative" associated with acts of intervention today).

121. Press Release, Security Council, Press Statement on Syria, U.N. Press Release SC/10564 (Mar. 1, 2012) ("The members of the Security Council call upon the Syrian authorities to allow immediate, full and unimpeded access of humanitarian personnel to all populations in need of assistance, in accordance with international law and guiding principles of humanitarian assistance.").

122. U.N. SCOR 66th Sess., 6598th mtg. at 2, U.N. Doc. S/PV.6598 (Aug. 3, 2011).

123. Interview, *supra* note 96. One challenge resulting from recent actions authorized by the Security Council, particularly in Libya, is that they will constrain similar action by the Council in the future. See Michael Ignatieff, *The Duty to Rescue*, NEW REPUBLIC, Sept. 24, 2008, at 41 (examining political factors and attitudes that may hamper Security Council authorization of humanitarian actions); see also Anthony Faiola, *In Loss for Cameron, Parliament Rejects Push for Military Action*, WASH. POST, Aug. 30, 2013, at A6 (discussing Britain's refusal to join U.S. forces in military action in Syria and noting that the result may have been "the biggest rupture in the U.S.-British 'special relationship'" in over thirty years).

124. See S.C. Res. 2118, ¶ 3, U.N. Doc. S/RES/2118 (Sept. 27, 2013) (endorsing the decision of the Executive Council of the Organization for the Prohibition of Chemical Weapons calling for and planning the destruction of Syria's chemical weapons).

125. HERSCH LAUTERPACHT, *THE FUNCTION OF LAW IN THE INTERNATIONAL COMMUNITY* ch. 2, § 1, at 3 (2000 ed.).

126. JEAN BODIN, *SIX BOOKS OF THE COMMONWEALTH* 48-49 (M.J. Tooley trans., 1955) (1576) (asserting that sovereignty should never be "granted out" to a foreigner because it would provide a "stepping-stone" where the grantee could become the sovereign); JOSEPH A. CAMILLERI & JIM FALK, *THE END OF SOVEREIGNTY?: THE POLITICS OF A SHRINKING AND FRAGMENTING WORLD* 16-18 (1992) (describing legal sovereignty of a state as resting in its authority and its power to enforce that authority); THOMAS HOBBS, *LEVIATHAN* 121 (Michael Oakshott ed., 1957) (1651) (describing sovereign power as indivisible).

decision, the Permanent Court of International Justice held that “[r]estrictions upon the independence of States cannot therefore be presumed.”<sup>127</sup> They did not want to be bound by a higher authority. This was also the view taken by most nations in the negotiations that led to the development of the United Nations.<sup>128</sup> The Charter provides that the U.N. is “based on the principle of the sovereign equality of all its members,” but it does not define the term “sovereignty.” Through other treaties, customs, and state practices, the term “sovereign equality” has come to mean

- (1) [t]hat states are juridically equal; (2) [t]hat they enjoy the rights inherent in their full sovereignty; (3) [t]hat the personality of the state is respected, as well as its territorial integrity and political independence; [and]
- (4) [t]hat the state should, under international order, comply faithfully with its international duties and obligations.<sup>129</sup>

Scholars have sought to further clarify the meaning of sovereignty. Krasner identifies four types: domestic sovereignty (public authority within a state and its ability to assert effective control); interdependence sovereignty (ability to control transborder activity); international legal sovereignty (mutual recognition of states); and Westphalian sovereignty (exclusion of external actors from internal affairs).<sup>130</sup> Hinsley describes sovereignty as an assumption about power and authority that attempts to define the rules of how they relate to each other in order to establish the interstate system.<sup>131</sup> Jackson argues that the “grundnorm of such a political arrangement is the basic prohibition against foreign intervention which simultaneously imposes a duty of forbearance and confers a right of independence on all statesmen.”<sup>132</sup>

By contrast, the emerging view of sovereignty today theorizes that it is a limited right that exists in relation to other

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127. S.S. “Lotus” (Fr. v. Turk.), Judgment, 1927 P.C.I.J. (ser. A) No. 10, at 18 (Sept. 7).

128. See RUSSELL & MUTHER, *supra* note 99, at 198–99.

129. *Report of Rapporteur of Subcommittee I/1/A to Committee I/1* at 1–2, U.N. Doc. 739 I/1/A/19(a) (June 1, 1945), reprinted in 6 DOCUMENTS OF THE UNITED NATIONS CONFERENCE ON INTERNATIONAL ORGANIZATION 717, 717–18 (photo. reprint 1998) (1945).

130. KRASNER, *supra* note 116, at 9.

131. See F.H. Hinsley, *The Concept of Sovereignty and the Relations Between States*, in IN DEFENSE OF SOVEREIGNTY 275, 275 (W.J. Stankiewicz ed., 1969) (“Authority and power are facts . . . [S]overeignty is not a fact. . . . It is an assumption about authority.”).

132. ROBERT H. JACKSON, QUASI-STATES: SOVEREIGNTY, INTERNATIONAL RELATIONS, AND THE THIRD WORLD 6 (1990) (emphasis omitted).

rights, responsibilities, and interests.<sup>133</sup> The archetype example is the Responsibility to Protect doctrine, which redefines sovereignty as a responsibility owed by states to their citizens.<sup>134</sup> R2P holds that “the primary responsibility for the protection of its people lies with the state itself,” but when a state is “unwilling or unable” to provide such protection “the principle of nonintervention yields to the international responsibility to protect.”<sup>135</sup> When a state fails to fulfill its responsibility to protect its population from international crimes, then its right to be free from external intervention is rendered conditional.<sup>136</sup>

The foundations of this view predate R2P. In 1995 for example, in *Prosecutor v. Tadic*, the International Criminal Tribunal for the Former Yugoslavia stated that

State-sovereignty-oriented approach[es] [have] been gradually supplanted by a human-being-oriented approach. . . . Why protect civilians from belligerent violence or ban rape . . . . when two sovereign States are engaged in war, and yet refrain from enacting the same bans or providing the same protection when armed

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133. INT’L COMM’N ON INTERVENTION & STATE SOVEREIGNTY, *supra* note 10, at 12 para. 2.7.

134. *Id.* at XI (“State sovereignty implies responsibility, and the primary responsibility for the protection of its people lies with the state itself.”).

135. GARETH EVANS, THE RESPONSIBILITY TO PROTECT: ENDING MASS ATROCITY CRIMES ONCE AND FOR ALL 39–43 (2008) (providing additional framework for the concept including both the state responsibility to protect and a corresponding right of other states and the international community to intervene). Types of intervention include prevention through early warning, assessing root causes and direct prevention, reaction through military and peaceful means and rebuilding, occupation and imperialism, and post-intervention obligations among others. *See id.*; *see also* U.N. Secretary-General, *Implementing the Responsibility to Protect*, ¶¶ 11–12, U.N. Doc. A/63/677 (Jan. 12, 2009) (outlining the three pillars that the World Summit Outcome document suggests); S.C. Res. 1674, ¶ 4, U.N. Doc. S/RES/1674 (Apr. 28, 2006) (reaffirming the World Summit Outcome document regarding the responsibility to protect); G.A. Res. 60/1, ¶¶ 138–140, U.N. Doc. A/RES/60/1 (Oct. 24, 2005) (establishing widespread state support for the principle of R2P); INT’L COMM’N ON INTERVENTION & STATE SOVEREIGNTY, *supra* note 10, at XI, 15–16 paras. 2.24–2.27, (establishing R2P as an emerging norm in international law). *See generally* Monica Serrano, *The Responsibility to Protect: Libya and Côte D’Ivoire*, AMSTERDAM L.F., Summer 2011, at 92 (documenting UNSC responses to mass atrocities and arguing that there is a notable shift representing a consensus about R2P).

136. *See* INT’L COMM’N ON INTERVENTION & STATE SOVEREIGNTY, *supra* note 10, at XI (“Where a population is suffering serious harm, as a result of internal war, insurgency, repression or state failure, and the state in question is unwilling or unable to halt or avert it, the principle of non-intervention yields to the international responsibility to protect.”); *see also* Arnison, *supra* note 36, at 199 (“State sovereignty—a cornerstone of the international legal system—poses a formidable obstacle to humanitarian intervention.”); James B. Steinberg, *International Involvement in the Yugoslavia Conflict*, in ENFORCING RESTRAINT: COLLECTIVE INTERVENTION IN INTERNAL CONFLICTS, *supra* note 12, at 27, 52–54 (describing the justification for intervening to prevent human rights violations with respect to the Bosnian conflict).

violence has erupted 'only' within the territory of a sovereign State?<sup>137</sup>

Speaking in 1999 in response to the Genocide in Rwanda, then UN Secretary-General Kofi Annan acknowledged that "[s]tate sovereignty was being redefined by the forces of globalization and international cooperation" and that "[t]he State was now widely understood to be the servant of the people and not vice versa."<sup>138</sup> This view is embraced by those seeking a democratization of sovereignty as well as those that believe that sovereign rights are based in people and not in territory.<sup>139</sup>

The debate at the Council about intervention is representative of the larger debate about the meaning of sovereignty in today's world and whether it is, in fact, an obsolete concept. Many agree that globalization is "bringing an evolution of the international system past the sovereign Westphalia state."<sup>140</sup> Javier Solana, the former Secretary-General of NATO argued that "humanity and democracy [are] two principles essentially irrelevant to the original Westphalian order."<sup>141</sup> Thus, emerging circumstances, such as the integration of Europe, are making sovereignty obsolete because "[t]he core of the concept of Europe after 1945 was and still is a rejection of the European balance of power principle and the hegemonic ambitions of individual states that had emerged following the Peace of

137. Prosecutor v. Tadic, Case No. IT-94-1, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, ¶ 97 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995), available at <http://www.icty.org/case/tadic/4>.

138. See Press Release, General Assembly, Implications of International Response to Events in Rwanda, Kosovo Examined by Secretary-General, U.N. Press Release GA/9595 (Sept. 20, 1999).

139. See, e.g., LUCK, *supra* note 98, at 85 (highlighting the importance of the "humanitarian imperative" associated with acts of intervention today); Samantha Besson, *The Authority of International Law: Lifting the State Veil*, 31 SYDNEY L. REV. 343, 343 (2009) (arguing that the key to the authority of international law requires "focusing on the individual as the ultimate subject of authority in international law"); Jean L. Cohen, *Whose Sovereignty? Empire vs. International Law*, ETHICS & INT'L AFF., Winter 2004/2005, at 1, 3-4 (contending that the democratization of international relations requires, among other things, "the creation of a global rule of law that protects both the sovereign equality of states . . . and human rights"); W. Michael Reisman, *Sovereignty and Human Rights in Contemporary International Law*, 84 AM. J. INT'L L. 866, 867-69, 872, 874-76 (1990) (discussing the convergence of sovereignty-limiting theories as a de facto matter within the legal scholarship but also arguing that such views may not be wise or close to settled law).

140. TATAH MENTAN, *THE STATE IN AFRICA* 139 (2010); see also A. Claire Cutler, *Critical Reflections on the Westphalian Assumptions of International Law and Organization: A Crisis of Legitimacy*, 27 REV. INT'L STUD. 133, 149 (2001).

141. Javier Solana, Former Secretary-General, NATO, Speech at the Symposium on the Political Relevance of the 1648 Peace of Westphalia: Securing Peace in Europe (Nov. 12, 1998), available at <http://www.nato.int/docu/speech/1998/s981112a.htm>.

Westphalia in 1648.”<sup>142</sup> For these reasons and more, U.N. Secretary-General Kofi Annan declared that

[s]tate sovereignty, in its most basic sense, is being redefined . . . States are now widely understood to be instruments at the service of their peoples, and not vice versa. . . . When we read the Charter today, we are more than ever conscious that its aim is to protect individual human beings, not to protect those who abuse them.<sup>143</sup>

These debates about the meaning of sovereignty and the importance of humanitarian protection present challenges for the Security Council as its members strive to reach agreement about if and how to address today’s threats to the peace.

2. *Norms and Norm Conflicts in International Law.* The debate about whether to choose sovereignty or humanitarian protection in the context of intervention can be understood as a norm conflict in international law. Norms express “the meaning that something ought to be, or ought to be done.”<sup>144</sup> The purpose of norms is to regulate behavior.<sup>145</sup> For a norm to have legal effect there must be a general belief in its ability to influence behavior.<sup>146</sup> Within international law *jus cogens* are peremptory norms that express a fundamental principle of international law from which there is no derogation.<sup>147</sup> To be a *jus cogens* norm, the norm must be recognized by the “international community of

142. Joschka Fischer, Speech at Humboldt University in Berlin, Germany: From Confederacy to Federation: Thoughts on the Finality of European Integration (May 12, 2000), available at [http://www.cvce.eu/obj/speech\\_by\\_joschka\\_fischer\\_on\\_the\\_ultimate\\_objective\\_of\\_european\\_integration\\_berlin\\_12\\_may\\_2000-en-4cd02fa7-d9d0-4cd2-91c9-2746a3297773.html](http://www.cvce.eu/obj/speech_by_joschka_fischer_on_the_ultimate_objective_of_european_integration_berlin_12_may_2000-en-4cd02fa7-d9d0-4cd2-91c9-2746a3297773.html).

143. Kofi Annan, *Two Concepts of Sovereignty*, ECONOMIST, Sept. 18, 1999, at 49; see also Reisman, *supra* note 139, at 869 (arguing that the modern notion of sovereignty is “the people’s sovereignty rather than the sovereign’s sovereignty”).

144. See Hans Kelsen, *On the Basic Norm*, 47 CALIF. L. REV. 107, 107 (1959) (“[A] legal norm is a prescription or permission or authorization. . . . [T]he norm is created or posited by an act of will; then it is a positive norm. The law as a system of norms created by acts of human will is positive law.”).

145. JOOST PAUWELYN, *CONFLICT OF NORMS IN PUBLIC INTERNATIONAL LAW: HOW WTO LAW RELATES TO OTHER RULES OF INTERNATIONAL LAW* 158–59 (2003) (describing norms as commanding, prescribing, permitting, or exempting certain behaviors).

146. W. Michael Reisman, *The Concept and Functions of Soft Law in International Politics*, in 1 ESSAYS IN HONOR OF JUDGE TASLIM OLAWALE ELIAS 135, 135–36 (Emmanuel G. Bello & Bola A. Ajibola eds., 1992).

147. Vienna Convention on the Law of Treaties, art. 53, May 23, 1969, 1155 U.N.T.S. 331, 344 (“A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.”).

states as a whole,” which is a high standard to meet. The general prohibition on the use of force is an accepted *jus cogens* norm given its existence in the U.N. Charter as expressed in Article 2(4).<sup>148</sup> Arguments have been made that prohibitions against genocide, slavery, racial discrimination, and violations of self-determination are also *jus cogens*.<sup>149</sup>

Norm conflicts are inherent to every legal system. A conflict between norms arises when “[o]ne of the two norms constitutes, in and of itself, breach of the other norm.”<sup>150</sup> This can occur when the fulfillment of rights or obligations under one norm breaches another norm.<sup>151</sup> As a practical matter, when a nation cannot uphold two norms—widely construed to include permissions, prohibitions, and obligations—there is a conflict.<sup>152</sup> For example, international trade treaties have created economic rights for states that violate other existing environmental obligations.<sup>153</sup>

148. U.N. Charter art. 2, para. 4; *see also* Treaty Between the United States and Other Powers Providing for Renunciation of War as an Instrument of National Policy (Kellogg-Briand Pact), art. 1, Aug. 27, 1928, 46 Stat. 2343, 2345–46, 94 L.N.T.S. 57, 59 (“The High Contracting Parties solemnly declare . . . that they condemn recourse to war for the solution of international controversies, and renounce it as an instrument of national policy in their relations with one another.”).

149. *See generally* Mary Ellen O’Connell, *Jus Cogens: International Law’s Higher Ethical Norms*, in *THE ROLE OF ETHICS IN INTERNATIONAL LAW* 78, 78, 81–87 (Donald Earl Childress III ed., 2012) (finding that there is no consensus concerning the scope of the *jus cogens* definition and explaining how these norms have ethical foundations).

150. PAUWELYN, *supra* note 145, at 275.

151. There is an abundance of literature describing other norm conflicts in international law. *See, e.g., id.* at 184–88 (identifying categories of norm conflict); C. Wilfred Jenks, *The Conflict of Law-Making Treaties*, 30 BRIT. Y.B. INT’L L. 401, 442–45 (1953) (discussing the *lex prior* principle and the factors used to determine which conflicting treaty has priority); Marko Milanović, *Norm Conflict in International Law: Whither Human Rights?*, 20 DUKE J. COMP. & INT’L L. 69, 72–74, 76–79 (2009) (describing norm conflicts in human rights law and presenting practical approaches for addressing them); Erich Vranes, *The Definition of ‘Norm Conflict’ in International Law and Legal Theory*, 17 EUR. J. INT’L L. 395, 410–12 (2006) (describing why norm conflicts also exist between competing obligations and rights).

152. Vranes, *supra* note 151, at 411–12. Some scholars advocate a broad definition of norm conflict. *See, e.g.,* HANS Kelsen, *GENERAL THEORY OF NORMS* 100–01 (Michael Hartney trans., 1991) (1979) (discussing the possibility of certain behaviors that are simultaneously forbidden and commanded by different norms); PAUWELYN, *supra* note 145, at 5–9 (defining such as a conflict arising between legally binding norms that invoke the rights and obligations of states that cannot be resolved through harmonious interpretation and distinguishing this from a conflict of laws); *id.* at 199 (describing a conflict of norms as “a situation where one norm breaches, has led to or may lead to breach of, another norm”).

153. *See* Sabrina Shaw & Risa Schwartz, *Trade and Environment in the WTO: State of Play*, 36 J. WORLD TRADE 129, 132–37 (2002) (discussing issues arising between the World Trade Organization and Multilateral Environmental Agreements); *see also* PAUWELYN, *supra* note 145, at 187 (providing an example of how a WTO rule may conflict with a treaty obligation); BRAD R. ROTH, *SOVEREIGN EQUALITY AND MORAL DISAGREEMENT* 218–20 (2011) (discussing the tensions that arise when competing interests conflict—e.g., law’s responsibility to protect order and uphold a nation’s

Norm conflicts in international law invoke questions about the nature of the right or obligation, whether moral, legal, or both, and about who is responsible (e.g., the international community, a state, individuals, etc.).<sup>154</sup> In addition, tensions caused by norm conflicts occur over substance (e.g., the sources of legal rules and the meaning of the norms underlying them) and authority (e.g., the institutions or entities who produce, interpret, and apply law).<sup>155</sup> The recent proliferation of international law and fragmentation among its sources has called attention to the prevalence of norm conflicts and the potential threats they pose to the legitimacy of the international legal system.<sup>156</sup>

3. *Addressing Norm Conflicts.* What, then, are the options for addressing norm conflicts? First, norm conflicts can be resolved through hierarchy, which creates an ordering mechanism for distinguishing the relationship that should be in force when there is a conflict. In U.S. law, for example, the Supremacy Clause serves as an absolute hierarchy that resolves conflicts between laws based on their sources, with the Constitution reigning as the highest source of law.<sup>157</sup> In the event of a conflict between federal and state laws, federal law displaces state law. However, no such hierarchy exists in international law because it does not prioritize among its norm-creating sources (treaties, custom, general principles, and state practice).<sup>158</sup> There

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constitution versus protecting the right of self-determination of the majority as well as minority rights).

154. See James Crawford, *Multilateral Rights and Obligations in International Law*, in 319 RECUEIL DES COURS: COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW 328, 342–44 (2006) (discussing the distinction between norm and obligation and the consequences that may arise when multilateral treaties pose a conflict between competing norms and obligations); Bruno Simma, *From Bilateralism to Community Interests in International Law*, in 250 RECUEIL DES COURS: COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW 217, 229–33 (1994) (describing some duties as owed only by virtue of agreement between states and others owed to the international community as a whole).

155. Tomer Broude, *Fragmentation(s) of International Law: On Normative Integration as Authority Allocation*, in THE SHIFTING ALLOCATION OF AUTHORITY IN INTERNATIONAL LAW: CONSIDERING SOVEREIGNTY, SUPREMACY AND SUBSIDIARITY 99, 101–04 (Tomer Broude & Yuval Shany eds., 2008).

156. PAUWELYN, *supra* note 145, at 12–13; see also U.N. Rep. of the Int'l Law Comm'n, 54th Sess., Apr. 29–June 7, July 22–Aug. 16, 2002, ¶ 512, U.N. Doc. A/57/10 (commissioning a study on the diversification of international law, which was to include review of the hierarchy of international obligations).

157. See U.S. CONST. art. VI, cl. 2 (“This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land . . .”).

158. See, e.g., U.N. Charter art. 103 (“In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their

are plural priorities among the norms themselves, and the sources of such norms do not provide for enhanced or diminished status.<sup>159</sup>

Absent addressing norm conflicts through a preexisting hierarchy, the matter can be resolved through interpretation based on the substantive meaning of the norms.<sup>160</sup> When the norm conflict is inherent—meaning that one norm conflicts with another norm of *jus cogens*—the conflict can be resolved by determining that one norm gives way to the other (because it is illegal or it ceases to exist).<sup>161</sup> The more common approach is to interpret the requisite obligations or rights in a way that eliminates or obscures the conflict.<sup>162</sup> The ICJ, for example, has followed a practice of harmonization, finding that “[i]t is a rule of interpretation that a text emanating from a Government must, in principle, be interpreted as producing and as intended to produce effects in accordance with existing law and not in violation of it.”<sup>163</sup> In other words, the decision-maker interprets the requisite obligations or rights in a way that eliminates or obscures the conflict.<sup>164</sup>

An alternative interpretive approach for addressing norm conflicts is through the application of principle-based rules. For example, the principle of *lex specialis* provides that “the more

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obligations under any other international agreement, their obligations under the present Charter shall prevail.”); Statute of the International Court of Justice art. 38, June 26, 1945, 59 Stat. 1055, 1060 (enumerating the types of international law to be applied by the ICJ while rendering decisions, but not ranking or according greater weight to any type over any other); see also Gerald Fitzmaurice, *Some Problems Regarding the Formal Sources of International Law*, in SYMBOLAE VERZIJL 153, 160 (Martinus Nijhoff et al. eds., 1958) (noting that judicial decisions and the opinions of learned scholars are generally not viewed as sources of law that create norms but instead that they reflect already existing norms); Dinah Shelton, *International Law and ‘Relative Normativity,’* in INTERNATIONAL LAW 145, 146 (Malcolm D. Evans ed., 2003).

159. See PAUWELYN, *supra* note 145, at 94–95, 155–56 (describing general versus particular international law, whether custom continues to exist separate from treaties that codify its norms, whether particular laws can be exempt from general laws, and other related problems of the hierarchy of laws and their sources).

160. *Id.* at 22 (“The shift from all norms of international law being equal toward the recognition that some norms, based on their substantive content, are more important than others, has further contributed to the potential for conflict between norms.”).

161. See *id.* at 275–80, 298–99 (discussing the resolution of inherent normative conflicts through determinations of invalidity or illegality).

162. See *id.* at 272 (making a distinction between apparent conflicts and genuine conflict and arguing that the latter cannot be resolved through interpretation).

163. Right of Passage over Indian Territory (Port. v. India), Preliminary Objections, 1957 I.C.J. 125, 142 (Nov. 26); see also PAUWELYN, *supra* note 145, at 240–41 (“When faced with two possible interpretations, one of which harmonises the meaning of the two norms in question, the meaning that allows for harmonisation of the two norms—and hence avoids conflict—ought to be preferred.”).

164. See PAUWELYN, *supra* note 145, at 272.

special norm prevails over the more general norm” because it is a more precise or effective expression of the law.<sup>165</sup> In other situations, the more general rule prevails on the basis that it is primary and thus more essential.<sup>166</sup> For example, the ICJ found that Libya’s obligations under U.N. Charter Article 25 to surrender the suspects in the Lockerbie bombing to the United Kingdom and the United States prevailed over its rights provided in the 1971 Montreal Convention to keep the suspects for trial in Libya.<sup>167</sup> If two conflicting rules created simultaneously by the same legal authority contradict each other, there is a logical contradiction, and the latter rule should supersede the former.<sup>168</sup> Applying this test or the *lex specialis* test to the U.N. Charter, both would determine that the right to use force in self-defense provided by the latter rule in Article 51 should supersede the general prohibition on the use of force established by Article 2(4). These and other approaches aim to provide means for integrating differing norms in order to preserve the integrity of the international legal system.<sup>169</sup>

However, norm conflicts are not always resolvable through legal approaches. In rare cases, it may be that the legal decision-maker (e.g., judge or arbitrator) is unable to find a basis in international law for discerning which of the two competing norms should prevail. This is called a *non liquet*, or a situation where no law applies.<sup>170</sup> The ICJ pronounced a *non liquet* in its

165. See *id.* at 385, 387.

166. See *id.* at 386 (explaining that *lex specialis* as a conflict rule is subject to “*jus cogens*, Arts. 41/58 of the Vienna Convention and explicit conflict clauses”).

167. See Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. U.S.), Provisional Measures, 1992 I.C.J. 114, ¶¶ 2, 6, 42 (Apr. 14); Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. U.K.), Provisional Measures, 1992 I.C.J. 3, ¶¶ 2, 6, 39 (Apr. 14).

168. See Kelsen, PURE THEORY, *supra* note 21, at 206 (arguing that if two norms contradict each other, the latter supersedes the former, and therefore there is no conflict); see also Vranes, *supra* note 151, at 413–14 (offering a Test of Joint Compliance, which asks whether it is possible for an actor to comply with the second norm after complying with the first, and offering a Breach of Norms Test: “[a] conflict between two norms occurs if in obeying or applying one norm, the other one is necessarily or possibly *violated*” (alteration in original) (quoting Hans Kelsen, *Derogation*, in ESSAYS IN JURISPRUDENCE IN HONOR OF ROSCOE POUND, 339, 349 (Ralph A. Newman ed., 1962))).

169. Broude, *supra* note 155, at 99–100 (arguing that approaching international law as a coherent legal system maintains the “meaningful interrelationships” between its norms and avoids the concept of international law as “not just an inherently problem-ridden anarchical society but a chaotic one” (footnote omitted)).

170. See PAUWELYN, *supra* note 145, at 150–51 (describing *non liquet* and the debate among legal scholars as to whether or not it can exist, correlating to whether or not international law is a complete system); *id.* at 419–21 (noting that this is an exceptional circumstance and describing the WTO appellate case of *US-Certain Products* as a

Advisory Opinion on the Legality of Nuclear Weapons because it determined that

in view of the current state of international law, and of the elements of fact at its disposal, the Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake.<sup>171</sup>

In his separate opinion, ICJ Judge Fleischhauer explained

there is no rule in international law according to which one of the conflicting principles would prevail over the other. . . . The principles and rules of the humanitarian law and the other principles of law applicable in armed conflict, such as the principle of neutrality on the one side and the inherent right of self-defence on the other, which are through the very existence of the nuclear weapon in sharp opposition to each other, are all principles and rules of law. None of these principles and rules is above the law, they are of equal rank in law and they can be altered by law. They are justiciable. Yet international law has so far not developed—neither in conventional nor in customary law—a norm on how these principles can be reconciled in the face of the nuclear weapon. As I stated above (paragraph 3 of this separate opinion), there is no rule giving prevalence of one over the other of these principles and rules. International politics has not yet produced a system of collective security of such perfection that it could take care of the dilemma, swiftly and efficiently.<sup>172</sup>

In the event of a *non liquet*, the choice becomes a political one.<sup>173</sup> For example, in U.S. constitutional law, when faced with the substantive law question of how broadly or how narrowly to define the scope of presidential power under Article II—which in difficult cases requires a choice of whether to privilege the Constitution's efforts to protect liberty or instead privilege security through the horizontal separation of powers—justices

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potential example); Daniel Bodansky, "Non Liqueur and the Incompleteness of International Law," in *INTERNATIONAL LAW, THE INTERNATIONAL COURT OF JUSTICE AND NUCLEAR WEAPONS*, 153, 153–70 (Laurence Boisson de Chazournes & Philippe Sands eds., 1999).

171. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 266 (July 8).

172. *Id.* at 307–08 (separate opinion of Judge Fleischhauer).

173. See PAUWELYN, *supra* note 145, at 421 (arguing that, in order to avoid the declaration of a *non liquet* nullifying the conflicting treaties or treaty provisions, "[s]tates should then realise that it will not suffice to let potential conflicts linger without political solution").

often defer to Congress's views.<sup>174</sup> As *Youngstown Sheet & Tube Co. v. Sawyer* demonstrates, this practice, at least in theory, privileges legislative decision-making as a better proxy for determining the people's will.<sup>175</sup>

In the case of the Security Council, decisions about intervention are a matter of political choice that is not constrained by international law. Article 39 can be interpreted at the Council's discretion. If understood as a norm conflict between sovereignty and humanitarian protection, international law provides no hierarchy that resolves which norm should prevail. There are potentially different means available for resolving the norm conflict through interpretation, but arguably, the situation presents a *non liquet*. Yet, even in the case of a *non liquet*, as Part IV will argue, international law has a role to play. It organizes decision-makers' choices by providing international law's purposive intent.

#### IV. INVOKING LAW'S PURPOSIVE INTENT

This Part argues that even in the event of a *non liquet*, international law can inform the Security Council's choices about intervention by providing purposive intent, which creates a common value that guides decision-making by providing a unifying way to think about what should be done. Furthermore, this Part seeks to demonstrate that there is significant support for understanding the purpose of international law to be the promotion of peace. The purposive intent framework is not the answer to the norm conflict; it does not offer the ultimate legal solution for resolving the tensions described here. Instead, purposive intent is a decision-making tool. It provides a mechanism for international law to guide decisions by providing a basis for political choices about which priorities to emphasize.

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174. For an example outside of the Article II context, see *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938), which explains that the Court should generally defer to the policy choices of politically accountable legislatures, except in situations where there is reason to suspect that political remedies will not adequately protect constitutional commitments—e.g., where legislatures target “discrete and insular minorities” with limited political power.

175. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635–38 (1952) (Jackson, J., concurring) (identifying three “zones” of presidential authority with regard to conducting foreign affairs). However, not all of the Justices agreed with this deferential approach. See *id.* at 610–11 (Frankfurter, J., concurring) (asserting that the President possesses powers that, though not enumerated in the Constitution, are constitutionally sound because of longstanding “systematic, unbroken, executive practice, long pursued to the knowledge of Congress and never before questioned”); *id.* at 683–84, 710 (Vinson, J., dissenting) (disagreeing with the deferential approach and finding on different grounds that the President acts constitutionally unless and until Congress affirmatively disapproves).

Decisions about intervention must be grounded by the purpose of promoting peace.

A. *The Concept of Purposive Intent*

Every legal system is built upon values. As Higgins explains, “[i]nternational law is not rules. It is a normative system . . . harnessed to the achievement of common values.”<sup>176</sup> Legal scholars Chayes, Ehrlich, and Lowenfeld argued that “[l]aw is rooted in shared values and shared purposes.”<sup>177</sup> Thus, the concept of purposive intent is the idea that law’s purpose forms the foundation upon which the international legal infrastructure of (a) principles, (b) norms, (c) rules, and (d) decision-making procedures are based.<sup>178</sup> Purpose is used to formulate standards of state behavior, provide procedures for interpreting such behavior, and provide procedures for implementing such interpretations.<sup>179</sup>

In the decision-making context, law’s purposiveness provides guidance for decisionmakers that informs the choices they make.<sup>180</sup> Decision-makers should look to the purpose of international law when making determinations about whether or not to intervene in a particular crisis. As legal scholar Mary Ellen O’Connell explains, this is because they

must take the sources of law as the authoritative starting points . . . [which] in international law [means starting] with treaties, → customary international law and → general principles of law. To the extent the law is ambiguous or needs updating, the decision-maker should

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176. Rosalyn Higgins, *International Law and the Avoidance, Containment and Resolution of Disputes: General Course on Public International Law*, in 230 RECUEIL DES COURS: COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW 23, 23–24 (1991); see HART, *supra* note 21, at 84 (“Rules are conceived and spoken of as imposing obligations when the general demand for conformity is insistent and the social pressure brought to bear upon those who deviate or threaten to deviate is great.”).

177. 1 CHAYES, EHRLICH & LOWENFELD, *supra* note 19, at xiv.

178. Stephen D. Krasner, *Structural Causes and Regime Consequences: Regimes as Intervening Variables*, in INTERNATIONAL REGIMES (Stephen D. Krasner ed., 5th ed. 1989) (offering a typology of norms for use in a definition of regimes); see also FRIEDRICH V. KRATOCHWIL, RULES, NORMS, AND DECISIONS 181–98 (1989) (discussing the interaction and relationship between principles, rules, and the law in the context of third party decision-making).

179. CHARLES O. LERCHE, JR. & ABDUL A. SAID, CONCEPTS OF INTERNATIONAL POLITICS 170–71 (2d ed. 1970).

180. HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW xci–xcii (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994) (describing Hart and Sack’s Theory of Reasoned Elaboration, which posits that where rules or statutes do not provide adequate guidance to decision-makers about what to do in a given situation, the law’s purposiveness should).

look first to the purposes of the relevant law. Decision-makers must also bear in mind the purpose of law generally and the values of international society.<sup>181</sup>

Therefore, decisions about intervention should be based on thoughtful and explicit consideration of the underlying norms for intervening or not, which should be based on the ultimate purpose of international law.<sup>182</sup> As legal scholar Rosa Brooks explains,

[t]he international rule of law hinges on the existence of a shared lexicon accepted by states and other actors in the international system. With no independent judicial system capable of determining (and enforcing) the meaning of words and concepts, states must develop shared interpretations of the law and the concepts and terms it relies on, and be willing (mostly) to abide by those shared interpretations.<sup>183</sup>

In order to achieve this aim, decision-makers need to understand the relationship between and among the norms underlying intervention, including misassumptions about the relationship among violence, conflict, law and order.<sup>184</sup>

The idea of purposive intent is rooted in theoretical understandings about how law informs behavior through its functions and procedures, and through the normative influence of its processes. The origins of this school of thought can be found in the work of Hart and Sacks, who pioneered the American Legal Process School in the 1950s as a way to think about a dynamic public law that considers law's purposiveness, the coordination of institutions, and the legitimizing role of procedure.<sup>185</sup> This school

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181. Mary Ellen O'Connell, *Legal Process School*, in 6 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 797, ¶ 18, at 800 (2012) (emphasis omitted).

182. See Brooks, *supra* note 9, at 2285 ("The rule of law is not something that exists 'beyond culture' and that can be somehow added to an existing culture by the simple expedient of creating formal structures and rewriting constitutions and statutes. In its substantive sense, the rule of law *is* a culture, yet the human-rights-law and foreign-policy communities know very little—and manifest little curiosity—about the complex processes by which cultures are created and changed.").

183. Rosa Brooks, *Drones and the International Rule of Law*, 28 ETHICS & INT'L AFF. (forthcoming 2014), available at <http://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=2296&context=facpub>.

184. See Brooks, *supra* note 9, at 2339 ("[This Article] also suggests that before we will be able to intervene effectively to change the degree and distribution of violence in conflict-ridden societies, we will need to let go of some of our basic assumptions about the relationship between law, order, and violence.").

185. See William N. Eskridge, Jr. & Philip P. Frickey, *An Historical and Critical Introduction to The Legal Process*, in HART & SACKS, *supra* note 180, at li, liii (explaining that legal process theory "went well beyond the traditional law story" to describe law as "essential to the satisfaction of basic human wants and needs and to the advancement of humankind").

emphasized that understanding process was essential in determining what law is and what it ought to be.<sup>186</sup> Their work influenced and was influenced by the New Haven School (NHS), where Myres McDougal and Harold Lasswell highlighted policy approaches that focused on public law, arguing that “the most viable conception of law . . . [is] that of a process of authoritative decision by which the members of a community clarify and secure their common interests.”<sup>187</sup>

Influenced by ALP and NHS, Abram Chayes, Thomas Ehrlich, and Andreas Lowenfeld introduced International Legal Process (ILP) theory in the 1960s.<sup>188</sup> ILP examines the extent to which international legal processes influence decision-making in international affairs, asking “[h]ow—and how far—do law, lawyers, and legal institutions operate to affect the course of

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186. See *id.* at xciv (“[A] procedure ‘which is soundly adapted to the type of power to be exercised is conducive to well-informed and wise decisions. An unsound procedure invites ill-informed and unwise ones.’” (quoting HENRY M. HART & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 173 (1958)); see also HART & SACKS, *supra* note 180, at 646–47 (examining types of disputes suitable and not suitable for adjudication as a method of settlement); Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1282–85 (1976) (arguing that the “traditional conception of adjudication” established the courts as “an adjunct to private ordering, whose primary function was the resolution of disputes about the fair implications of individual actions” but that in “modern federal litigation . . . lawsuits do not arise out of disputes between private parties about private rights. Instead, the object of litigation is the vindication of constitutional or statutory policies.”); Owen M. Fiss, *The Supreme Court, 1978 Term—Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 2 (1979) (defining adjudication as “the social process by which judges give meaning to our public values” and describing structural reform as a “type of adjudication, distinguished by the constitutional character of the public values, and . . . by the fact that it involves an encounter between the judiciary and the state bureaucracies”); Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 354 (1978) (defining adjudication to include “adjudicative bodies which owe their powers to the consent of the litigants expressed in an agreement of submission, as in labor relations and in international law”).

187. 1 HAROLD D. LASSWELL & MYRES S. MCDUGAL, *JURISPRUDENCE FOR A FREE SOCIETY: STUDIES IN LAW, SCIENCE AND POLICY* xxi (1992); see also Myres S. McDougal, *Law and Power*, 46 AM. J. INT’L L. 102, 108–109 (1952) (arguing that people identify and demand values “that transcend national boundaries because they have come to know that the conditions under which they can secure their values transcend such boundaries,” that in order to obtain these values they organize institutions that range from governments to political parties and private associations, and that “[d]ecisions which affect the world distribution of power and other values are made at all points in this complicated matrix of inter-related institutions . . .”).

188. See 1 CHAYES, EHRLICH & LOWENFELD, *supra* note 19, at xi (discussing “[t]he study of the international legal process itself” and noting that “[f]or an adequate understanding of the norm we need to see . . . by what institutions and procedures it is brought to bear in particular cases”); see also Steven R. Ratner & Anne-Marie Slaughter, *Appraising the Methods of International Law: A Prospectus for Readers*, in *THE METHODS OF INTERNATIONAL LAW* 1, 6 (Steven R. Ratner & Anne-Marie Slaughter eds., 2004) (noting that international legal process as developed by Chayes, Ehrlich, and Lowenfeld “has seen the key locus of inquiry of international law as the role of law in constraining decision makers and affecting the course of international affairs”).

international affairs?”<sup>189</sup> Abram and Antonia Chayes later introduced the concept of “managerial” ILP, arguing that compliance with international law should focus on cooperation, capacity-building, and problem solving.<sup>190</sup> Harold Koh extended ILP by considering the “transnational” dimension of interplay between domestic actors and nations.<sup>191</sup> Koh and subsequent theorists argued that process matters in international law because it creates and changes norms, which became known as New International Legal Process (NILP).<sup>192</sup>

The NILP approach envisions that decision-makers will assume their roles in a manner that is timely and reflects the range of values “still to be distilled from many different participants in the international community, and will thus make new law.”<sup>193</sup> NILP is suited for addressing problems that should be informed by normative concerns and global values.<sup>194</sup>

In addition to ALP, ILP, and NILP, the purposive intent model is informed by literature on “dynamic” decision-making.<sup>195</sup> The following approaches show how decision-makers, typically judges or legislatures, should use the law to inform their decision-making: formalist (Constitution vests authority in Congress), economic (statutes are contracts to be enforced), and legal process (it is illegitimate for nonelected judges to make policy in a majoritarian political system).<sup>196</sup> Eskridge introduced

189. See 1 CHAYES, EHRLICH & LOWENFELD, *supra* note 19, at xi.

190. See ABRAM CHAYES & ANTONIA HANDLER CHAYES, *THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS* 22–28 (1995).

191. See Harold Hongju Koh, *Transnational Legal Process*, 75 NEB. L. REV. 181, 183–84 (1996) (explaining transnational legal process as describing “the theory and practice of how public and private actors . . . interact in a variety of public and private, domestic and international fora to make, interpret, enforce, and ultimately, internalize rules of transnational law”).

192. See Koh, *supra* note 191, at 188 (describing the critical reaction to the Legal Process movement that “viewed lawmaking as not merely the rubberstamping of a pluralistic political process, but as a process of value-creation in which courts, agencies, and the people engage in a process of democratic dialogue”); O’Connell, *supra* note 19, at 338 (discussing the emergence of the NILP approach, with an “agenda . . . to balance form and substance, to view the legal system as a purposive whole, and to explore both functionally and formally institutional competence and the role of process”).

193. Anne-Marie Slaughter & Steven R. Ratner, *The Method Is the Message*, 93 AM. J. INT’L L. 410, 418–19 (1999) (describing the NILP approach to legal prescription).

194. *Id.* at 420, 422.

195. See Eskridge & Frickey, *supra* note 185, at xci–xcii (setting forth a purpose-based approach to statutory interpretation); see also Eskridge, *supra* note 19, at 1496 (arguing for the use of purposive intent by institutional decision-makers).

196. Eskridge, *supra* note 19, at 1479, 1481 (“Statutes . . . should . . . be interpreted ‘dynamically,’ that is, in light of their present societal, political, and legal context.” (footnote omitted)); William N. Eskridge, Jr. & Philip P. Frickey, *Legislation Scholarship and Pedagogy in the Post-Legal Process Era*, 48 U. PITT. L. REV. 691, 695–96 (1987) (explaining that the Hart and Sacks approach to statutory interpretation rested upon the

a fourth approach, dynamic decision-making, to be used when the law is obsolete or the circumstances have materially changed.<sup>197</sup> He envisions decision-makers “as diplomats, whose ordering authority is severely limited but who must often update their orders to meet changing circumstances.”<sup>198</sup> His idea built upon Hart and Sacks’s earlier “intentionalism” model.<sup>199</sup> It also built upon Dworkin’s model that decision-making should be driven by law’s “integrity” when legal rules develop and change.<sup>200</sup>

Dworkin argued that “integrity in legislation . . . is so much part of our political practice that no competent interpretation of that practice can ignore it.”<sup>201</sup> Integrity in decision-making requires those making legal rules to strive for moral coherence among them as “propositions of law are true if they figure in or follow from the principles of justice, fairness, and procedural due process that provide the best constructive interpretation of the community’s legal practice.”<sup>202</sup> Dynamic decision-making integrates moral meaning and public standards into acts of interpreting law. Judges, for example, “should decide hard cases by interpreting the political structure of their community . . . by trying to find the best *justification* they can find, in principles of political morality, for the structure as a whole.”<sup>203</sup> Following this approach requires “accommodation among bearers of conflicting interests and values.”<sup>204</sup>

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assumptions that statutes have rational purposes and that judges can find and apply those purposes).

197. Eskridge, *supra* note 19, at 1481 (“[S]tatutes, like the Constitution and the common law, should be interpreted dynamically. . . . Even under . . . conventional assumptions, however, original legislative expectations should not always control statutory meaning. This is especially true when the statute is old and generally phrased and the societal or legal context of the statute has changed in material ways.”).

198. *Id.* at 1482, 1484 (“The dynamic model, however, views the evolutive perspective as most important when the statutory text is not clear and the original legislative expectations have been overtaken by subsequent changes in society and law. In such cases, the pull of text and history will be slight, and the interpreter will find current policies and societal conditions most important. The hardest cases, obviously, are those in which a clear text or strong historical evidence or both, are inconsistent with compelling current values and policies.”).

199. *Id.* at 1481–82, 1544–45 (explaining the dynamic model as exhibiting similarities to Hart and Sacks’s approach but also differing in key ways and thus providing a superior alternative).

200. *See id.* at 1549–54 (expressing deep appreciation for Dworkin’s “law as integrity” theory but also doubts as to whether the “legislative principle of integrity [is] a fair statement of our political morality”).

201. *See id.* at 1549 (quoting RONALD DWORKIN, *LAW’S EMPIRE* 175–76 (1986)) (internal quotation marks omitted).

202. *See id.* (quoting DWORKIN, *supra* note 201, at 225) (internal quotation marks omitted).

203. Ronald A. Dworkin, “*Natural*” *Law Revisited*, 34 U. FLA. L. REV. 165, 165 (1982).

204. ROTH, *supra* note 153, at 11 (arguing that this makes it necessary to favor principle over process).

Although the Security Council is not a judicial body, it does have both quasi-judicial and quasi-legislative features.<sup>205</sup> It is a decision-making body vested with the international legal authority to make binding decisions that express what the law is. Therefore, although they will need to be adapted to the Council's unique constitution, the theoretical concepts provided here serve to illuminate the role that law's purpose can and should play in shaping decisions about intervention.<sup>206</sup> When the rules are uncertain and the norms are in conflict with each other, decision-makers ought to align their decisions with the purpose, or conscious intent, of international law.<sup>207</sup>

### *B. Peace as the Purpose of International Law*

If choices about intervention ought to align with international law's purposive intent, then what is the purpose of international law? To be sure, there is no shared consensus in international law about the answer to this question. However, based on historical and theoretical support, this Subpart posits that international law's central purpose, the reason for which it was created and exists, is and always has been the promotion of peace.

1. *Historical Origins: Peace as a First Principle of International Law.* Peace is a first principle of international law because it has always been a fundamental aim of the law.<sup>208</sup> For

205. Gowlland-Debbas, *supra* note 25, at 257–63 (describing the UNSC's role in identifying breaches to the peace pursuant to Article 39 of the UN Charter as quasi-judicial and describing some of the Council's recent resolutions, such as Resolution 1373 (2001) as created through quasi-legislative process).

206. See Eskridge, *supra* note 19, at 1549 (discussing Dworkin's influence); O'Connell, *supra* note 19, at 335, 338 (describing the development of legal process theory).

207. Brooks, *supra* note 9, at 2283 ("The very concept of the rule of law is rarely examined or understood by key U.S. and international decisionmakers, although 'promoting the rule of law' has become a mantra for many in the foreign-policy, human-rights, and international-development communities. . . . Decisionmakers and commentators tend to conflate formal and procedural aspects of the rule of law (such as structurally independent courts, 'modernized' legislation, etc.) with a more substantive conception (such as respect for individual and minority rights, a commitment to nonviolent means of resolving disputes, substantive due process, and so on).") (footnotes omitted); John V. Orth, *Exporting the Rule of Law*, 24 N.C. J. INT'L L. & COM. REG. 71, 71 (1998) ("The Rule of Law is routinely prescribed these days for what ails the post-Communist World."); see also Thomas Carothers, *The Rule of Law Revival*, FOREIGN AFF., Mar./Apr. 1998, at 95, 95–96 (explaining that for rule-of-law reform to work, citizens must be part of the process and "the fundamental problem of leaders who refuse to be ruled by the law" must be addressed).

208. Eric De Brabandere, *The Responsibility for Post-Conflict Reforms: A Critical Assessment of Jus Post Bellum as a Legal Concept*, 43 VAND. J. TRANSNAT'L L. 119, 138 (2010) (assessing Immanuel Kant's argument that establishing eventual peace is the sole justification for the resort to force).

example, Roman law introduced concept of *humanitas* or “[t]he humane tendency as an ethical commandment, benevolent consideration for others.”<sup>209</sup> Hugo Grotius advanced this concept into *jus in bello* and *jus ad bellum*,<sup>210</sup> taking the view that those laws could bind nations and encourage more humane behavior among peoples.<sup>211</sup> He wrote that “[t]he disputes arising among those who are held together by no common bond of civil laws to decide their dissensions . . . who formed no national community, or the numerous unconnected communities . . . all bear a relation to the circumstances of war or peace.”<sup>212</sup> This stimulated a new way of thinking about the relationship between law and people and the role of the nation-state in mediating that relationship.<sup>213</sup>

These theoretical foundations influenced the subsequent development of norms, rules, and practices to promote and achieve peace through international law.<sup>214</sup> During the negotiations that resulted in the Peace of Westphalia, the parties negotiating the *pax universalis* professed to be ready for peace, if conditions were met.<sup>215</sup> Certain practices became regularized that helped to establish the norm of peace talks.<sup>216</sup> The comprehensive

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209. ADOLF BERGER, *ENCYCLOPEDIA OF ROMAN LAW* 489 (1953); *see also* ALBERICO GENTILI, *DE JURE BELLI LIBRI TRES* (William Whewell trans., 1853) (1589); RUTI G. TEITEL, *HUMANITY'S LAW* 24–25 (2011); RICHARD TUCK, *THE RIGHTS OF WAR AND PEACE: POLITICAL THOUGHT AND THE INTERNATIONAL ORDER FROM GROTIUS TO KANT* 34 (1999).

210. H. Lauterpacht, *The Grotian Tradition in International Law*, 23 *BRIT. Y.B. INT'L. L.* 1, 35–39 (1946) (discussing *jus ad bellum*, the doctrine distinguishing wars that are just and lawful from those that are not).

211. HUGO GROTIUS, *THE RIGHTS OF WAR AND PEACE* 290 (A.C. Campbell trans., 1901) (1625).

212. *Id.* at 17.

213. TUCK, *supra* note 209, at 80–81 (observing that aggression by Dutch companies in seeming violation of “some of the most fundamental principles of international relations” forced Grotius to revise those principles in order to defend the Dutch actions, and that “in the process . . . he fundamentally revised Western political thought itself”). *See generally* Martin van Gelderen, *The Challenge of Colonialism: Grotius and Vitoria on Natural Law and International Relations*, 14/15 *GROTIANA* 3 (1993–1994).

214. *See* Lauterpacht, *supra* note 210, at 51 (observing the continuing impact of Grotius' theories upon positive law).

215. Konrad Repgen, *Negotiating the Peace of Westphalia: A Survey with an Examination of the Major Problems*, in 1 1648—WAR AND PEACE IN EUROPE 355, 355 (Klaus Bussmann & Heinz Schilling eds., 1998) (“A condition of peace as the basic norm of state relations between the Christian powers of Europe was generally not questioned . . .”).

216. Heinz Duchhardt, *Peace Treaties from Westphalia to the Revolutionary Era*, in *PEACE TREATIES AND INTERNATIONAL LAW IN EUROPEAN HISTORY: FROM THE LATE MIDDLE AGES TO WORLD WAR ONE* 45, 52 (Randall Lesaffer ed., 2004) (showing that two methods for peace talks emerged: direct bilateral dialogue and talks facilitated by mediators, and that in some cases, all war parties were physically present in one location, while in other instances secret diplomatic talks occurred prior to the formal meeting in order to facilitate speedy outcomes).

documentation of peace talks formed the *ius publicum Europaeum* (European international law), helping to establish the norm of ongoing negotiations as well as inform diplomats who work from a standardized body of knowledge.<sup>217</sup> The Hague Peace Conferences of 1899 and 1907 further established the promotion of peace as a normative aim of international law.<sup>218</sup> These two conferences helped “justify the belief that the world has entered upon an orderly process through which . . . there may be continual progress toward making the practice of civilized nations conform to their peaceful professions.”<sup>219</sup> This was a remarkable development given that the parties began from a position

that two principles of public law are generally recognized as fundamental. One is the perfect equality and entire independence of all di[s]tinct States. . . . This is the great foundation of public law, which it mainly concerns the peace of mankind, both in their politic and private capacities, to preserve inviolate.<sup>220</sup>

The creation of the United Nations after World War II solidified the promotion of peace as the aim of international law as codified in the U.N. Charter.<sup>221</sup> During the negotiations that led to the development of the U.N. Charter, there was difficulty in determining how to improve the machinery for “promoting conditions of peace by diminishing the sources of conflict between nations. Politically, this was part of the

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217. See, e.g., GROTIUS, *supra* note 211, at 385–86 (describing former peace talks).

218. THE HAGUE CONVENTIONS AND DECLARATIONS OF 1899 AND 1907, xiv–xvi (James Brown Scott ed., 1915) (detailing how the original conference came about when Russia circulated a proposal for initiating such a peace conference, stating “[t]he maintenance of general peace and a possible reduction of the excessive armaments which weigh upon all nations present themselves, in the existing condition of the whole world, as the ideal towards which the endeavors of all Governments should be directed. . . . The preservation of peace has been put forward as the object of international policy.”).

219. S. DOC. NO. 60-444, at 63 (1st Sess. 1908) (statement of Elihu Root, U.S. Sec’y of State).

220. *Le Louis*, 165 Eng. Rep. 1464, 1475 (1817) (“The second is, that all nations being equal, all have an equal right to the uninterrupted use of the unappropriated parts of the ocean for their navigation.”).

221. U.N. Charter art. 1, para. 1; see *supra* note 20. The possibility of actually achieving peace has been a matter of philosophical debate. See Bernard R. Boxill, *The Duty to Seek Peace*, SOC. PHIL. & POL’Y, July 2010, at 274, 274 (contrasting the views of Kant, who “declared that ‘seeking the state of peace’ is ‘a matter of unmitigated duty’” with those of Hobbes and those of Rousseau, who posited that “barring a world state which would be practically impossible to establish, the best we could hope for was a stand-off between countries deterred from attacking each other out of fear of devastating retaliation—a situation which was still a state of war”).

general problem of enforcing peace, which . . . ran into the dilemma of what to do about states not fulfilling their undertakings to settle dispute peacefully.”<sup>222</sup>

Several approaches emerged. The first was the creation of the Council of the World Organization (which would become the Security Council) that would have the authority to advise states on what it considered necessary to reach peace.<sup>223</sup> There was also a proposed Equity Tribunal and the requirement that “all members [be] obligated to settle peacefully, by means of their own choice, any disputes that might threaten international peace and security.”<sup>224</sup> The negotiating history provides context for understanding the challenges nations faced in defining the obligation to promote peace and creating the necessary institutional frameworks for doing so.<sup>225</sup>

2. *Understanding Peace as Sovereignty’s Purpose.* Further historical analysis reveals an essential yet obscure connection between the principle of peace and the concept of sovereignty. The development of sovereignty as a legal concept advanced the international community’s aim of promoting peace, thus cementing this aim as the purposive intent of international law.<sup>226</sup> In Roman law, the authority of the state was derived from *summa potestas*, or the idea that a political community’s power was based on the unlimited obedience of its citizens.<sup>227</sup> During the Middle Ages in Europe, the legal concept of sovereignty began to formalize as a mechanism for maintaining social order.<sup>228</sup> French philosopher Jean Bodin used the term “sovereignty” to describe this relationship of authority between the people and the state.<sup>229</sup>

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222. RUSSELL & MUTHER, *supra* note 99, at 210.

223. *Id.* at 278–82.

224. *Id.* at 286.

225. *Id.* at 286–87 (finding that a blanket obligation to settle disputes would unnecessarily engender international tension as a result of minor disputes).

226. Scholars have acknowledged the relationship between peace and sovereignty. See, e.g., KAL RAUSTIALA, DOES THE CONSTITUTION FOLLOW THE FLAG?: THE EVOLUTION OF TERRITORIALITY IN AMERICAN LAW 11–12 (2009) (“The animating vision behind the shift to territorial division was stability and peace.”); Cohen, *supra* note 139, at 12 (“Inherent in this conception of sovereign equality, the newly generalized principle of nonintervention, together with strictures regarding the peaceful settlement of disputes and the principle of nonaggression in the UN Charter, are meant to protect state sovereignty while also limiting it.”); Hinsley, *supra* note 131, at 283–88 (describing the need for international law that governs peace).

227. CAMILLERI & FALK, *supra* note 126, at 16.

228. The term “sovereignty” was coined and defined in 1576 by the French political philosopher Jean Bodin. BODIN, *supra* note 126, at 25; see also LAUREN BENTON, A SEARCH FOR SOVEREIGNTY: LAW AND GEOGRAPHY IN EUROPEAN EMPIRES 1400–1900, at 287–88 (2010).

229. See CAMILLERI & FALK, *supra* note 126, at 16.

After the Eighty Years' War and the Thirty Years' War, the concept of sovereignty took on meaning as nations began to recognize each other's sovereignty and respect a sovereign's right, as a matter of law, to protect its territory from external threats and to permit its people the right to practice the religion of that domain.<sup>230</sup> The treaties that ended these wars and established a new order are known collectively as the Peace of Westphalia.<sup>231</sup> These treaties have become some of the most oft-cited doctrinal sources of sovereignty, even though there is no explicit definition for sovereignty in the treaties.<sup>232</sup> Their translation into the vernacular languages of Italian, Swedish, German, and French was novel for the times and fraught with challenges in trying to describe the then-emerging concept of sovereignty.<sup>233</sup> For example, sovereignty, as a legal term, was used in French constitutional law, but it did not exist in Imperial Law.<sup>234</sup> So in negotiating the clause of cession over areas of authority, France used the recognized juridical term of *superioritas sublimis territorii jus*, or "territorial superiority," but also referred to a *jus supreme dominii*, or the "law of supreme dominion," to denote sovereignty.<sup>235</sup> The 1648 German translation uses the words *Herrschaften* and *Herrschaft*, which represent both the concept of authority as well as a formal title ("The Sovereign"), respectively.<sup>236</sup> It further provides that all

230. See Derek Croxton, *The Peace of Westphalia of 1648 and the Origins of Sovereignty*, 21 INT'L HIST. REV. 569, 579 (1999) ("The emphasis on territory in the peace of Westphalia may be evidence for a changing conception of the state from rule over people to rule over territory, but is hardly a definitive indication of sovereign statehood.").

231. The treaties that ended the Thirty Years' War include the 1648 Peace of Münster (PM) between the Dutch Republic and Spain; the Instrumentum Pacis Osnabrugensis (IPO) between the Holy Roman Emperor and Sweden and their allies; and the Instrumentum Pacis Monasteriensis (IPM) between the Holy Roman Emperor and Spain and their allies on October 24, 1648. *Id.* at 569; Marcilio Toscano Franca Filho, *Westphalia: A Paradigm? A Dialogue Between Law, Art, and Philosophy of Science*, 8 GER. L.J. 955, 963 & n.38 (2007). The IPM preamble provides that the treaty is being negotiated as a result of an internal war in the Holy Roman Empire that has taken over the stakeholders, including Germany and France. *Treaty of Westphalia, Between Holy Roman Empire and France*, Oct. 24, 1648, I.S.N., reprinted in MILESTONE DOCUMENTS IN WORLD HISTORY 722 (2010).

232. Croxton, *supra* note 230, at 569, 581–82.

233. See, e.g., *id.* at 573–74 (noting that the German and French translations of the Latin term "ius territoriale" diverged from each other as well as modern notions of sovereignty).

234. Repgen, *supra* note 215, at 367.

235. *Id.*

236. Treaty of Westphalia art. III (German trans. 1649) (1648), available at <http://www.pax-westphalica.de/> (IPM and IPO). Translation assistance was provided by Professor Helmut Muller-Sievers, Professor of German and Director of the Center for the Humanities and Arts at the University of Colorado. Professor Muller-Sievers holds an MA in German and Latin Literature from FU Berlin (1985) and a Ph.D. in German and the Humanities from Stanford (1990).

Dukes should have free use of *Juris Territorialis* (the right of the land) over religious and worldly aspects.<sup>237</sup>

This historical context is essential to understanding the role that the emerging concept of sovereignty played in the development of international law and the promotion of peace. Both Bodin and Hobbes viewed the development of sovereignty necessary as a means for creating public order.<sup>238</sup> In Bodin's view, sovereignty was defined as a grant of absolute power so that a state may restore order—*souveraineté, majestas, summa potestas*—and that this authority was indivisible.<sup>239</sup> His ideas were derived from the Roman legal doctrines of *imperium* and *legibus solutus*.<sup>240</sup> Bodin's driving priority was the urgency for internal order and peace. In Hobbes's view, sovereignty is necessarily absolute because people are incapable of cooperation without it.<sup>241</sup> Hobbes believed that, if left alone, society would devolve into chaos and conflict as "man to man is an arrant wolf";<sup>242</sup> his view of sovereignty was that it needed to impart the power and authority to maintain order in these dismal conditions.<sup>243</sup> This early focus on achieving public order was driven by the then-existing context in Europe that peace required

237. Instrumentum Pacis Monasteriensis § 62 (German trans. 1649) (1648), available at <http://www.pax-westphalica.de/>; Instrumentum Pacis Osnabrugensis art. VIII (German trans. 1649) (1648), available at <http://www.pax-westphalica.de/>; see Instrumentum Pacis Monasteriensis § 118 (illustrating the difficulty that the negotiators must have faced in trying to convince one another that their respective areas should be entitled to exclusive authority over their territory as a matter of agreement bound by law); Instrumentum Pacis Osnabrugensis art. XVII (same); Croxton, *supra* note 230, at 570 ("No piece of paper can ever establish exclusive authority . . . The most the paper can do is convince people that states *ought* to have exclusive territorial authority."); see also John Gerard Ruggie, *Continuity and Transformation in the World Polity: Toward a Neorealist Synthesis*, 35 WORLD POL. 261, 276 (1983) (stating that sovereignty "signifies a form of legitimization").

238. BODIN, *supra* note 126, at 199–200 (arguing that people are predisposed to submit to a single, powerful leader); see also HOBBS, *supra* note 126, at 110–11 (arguing that people submit to a sovereign's authority to avoid a state of constant war, and offering reasons why individuals cannot avoid war without a sovereign).

239. See BODIN, *supra* note 126, at 25–27; CAMILLERI & FALK, *supra* note 126, at 18. But note that Bodin was an early believer that sovereignty was a legal relationship between the ruler and the subject not necessarily linked to territory. See BODIN, *supra* note 126, at 25–28. This view has been taken up by geographers. See, e.g., THE DICTIONARY OF HUMAN GEOGRAPHY 744–45 (Derek Gregory et al. eds., 5th ed. 2009) (referring to geographic control as an aspect of human territoriality).

240. See Donald Kelley, *The Influence of Roman Law*, in THE OXFORD HANDBOOK OF THE HISTORY OF POLITICAL PHILOSOPHY 156, 157 (George Klosko ed., 2011); see also BODIN, *supra* note 126, at 44–45; ROTH, *supra* note 153, at 18.

241. GEORGE SHELTON, MORALITY AND SOVEREIGNTY IN THE PHILOSOPHY OF HOBBS 227 (1992).

242. THOMAS HOBBS, DE CIVE 1 (Sterling P. Lamprecht ed., 1949) (1651).

243. *Id.* at 13–14; THOMAS HOBBS, THE ELEMENTS OF LAW, NATURAL AND POLITIC 104–05 (Ferdinand Tönnies ed., 1889); SHELTON, *supra* note 241, at 218.

a clear division of power vested in states.<sup>244</sup> To prevent interstate clashes, it made sense to provide legal protection for each state to have absolute sovereign control over its domains. This understanding held for several centuries, and it was codified in the Covenant of the League of Nations almost 300 years later.<sup>245</sup>

This historical view into the relationship between peace and sovereignty shows an interdependent relationship: sovereignty promoted peace between nations, and peace incentivized a legal system built on sovereignty. But the central difference now is that we have shifted from a world in which peace had to be secured between states to one in which peace must be secured within the state between peoples.<sup>246</sup> This shift demands revisiting what the purpose of international law and the promotion of peace means amid changed circumstances.

3. *Peace as International Law's Grundnorm.* A useful conceptual framework for considering the promotion of peace as the purpose of international law is Hans Kelsen's theory of the Grundnorm. Kelsen argued that in all legal systems there is one basic norm, the Grundnorm, that is nonpositivist, rooted in moral and legal authority, and serves to unify all other norms.<sup>247</sup> Kelsen believed that "[t]he basic norms must be considered self-evident." It is objective. It has not been invented. Writing during WWII, Kelsen further posited that the Grundnorm for international law was peace and that "war or any other use of force [could] be prevented within the international community" by uniting individual states into a "world-state."<sup>248</sup>

As Grundnorm, the promotion of peace would serve to unify all other norms of international law.<sup>249</sup> This would then require

244. Cutler, *supra* note 140, at 134–35 (noting that the Thirty Years' War ended with the Peace of Westphalia, the birth of international law, and the emerging state system).

245. League of Nations Covenant art. 15.

246. See THOMAS M. FRANCK, *THE POWER OF LEGITIMACY AMONG NATIONS* 11–24 (1990) (discussing the evolution of legitimacy of a state in the context of the shifting dynamic of international law); HANS KELSEN, *PEACE THROUGH LAW* 16–18 (2000 ed.) (1944) (arguing that all individual states should be united to secure world peace).

247. See KELSEN, *GENERAL THEORY*, *supra* note 21, at 58–59, 111, 116; KELSEN, *PURE THEORY*, *supra* note 21, at 8–10. *But see* HART, *supra* note 21, at 292–93 nn. 1–4 (arguing against Kelsen's Grundnorm on several grounds).

248. KELSEN, *LAW AND PEACE*, *supra* note 21, at 27; *see also* Hans Kelsen, *Collective Security and Collective Self-Defense Under the Charter of the United Nations*, 41 *AM. J. INT'L L.* 783, 788–89 (1948) (describing Kelsen's view that the U.N.'s mechanisms for collective security were meant to enforce peace in addition to law); Hans Kelsen, *The Preamble of the Charter—A Critical Analysis*, 8 *J. POL.* 134, 157 (1946) (commenting that Members of the United Nations are obligated to settle disputes through peaceful means); *see also* ORAKHELASHVILI, *supra* note 6, at 16–19 (discussing the character of the enforcement actions of the U.N. Charter).

249. See THOMAS R. VAN DERVORT, *INTERNATIONAL LAW AND ORGANIZATION: AN INTRODUCTION* 40–41 (1998) (observing that Article 2 of the U.N. Charter formulated

that “[c]oercive acts ought to be performed under the conditions and in the manner which the historically first constitution, and the norms created according to it, prescribe.”<sup>250</sup> In other words, the purpose of intervention would be to promote peace. An intervention capable of achieving this aim would be in concert with international law’s purposive intent, whereas an intervention that would escalate violence and frustrate the aim of peace would not. Although there are serious critiques about the viability of Kelsen’s Grundnorm theory, it does offer an important framework for understanding the basis for and implications of conceptualizing the promotion of peace as international law’s purposive intent.<sup>251</sup>

## V. INTERVENING FOR PEACE

The purposive intent approach asks whether intervention, or alternatively, nonintervention furthers the aim of promoting peace. Adopting this view has complex implications worthy of more exposition than this Article provides. The aim here is modest. This Part identifies two challenges and offers some preliminary perspectives about how to overcome them. First, the promotion of peace must be defined such that it becomes a useful analytical concept capable of guiding decisions about whether and when to intervene. Second, determining whether or not to intervene for the purpose of promoting peace will require the Security Council to adapt its decision-making practices and operations.

### A. *Defining Peace*

A central conceptual challenge that the purposive intent decision-making framework highlights, and must overcome, is that there is no definition of peace or shared understanding about what it means to promote peace under international law. How peace is defined directly impacts the Council’s responsibilities. In the armed conflict in the Democratic Republic of the Congo, for example, should the Council’s choices aim to restrict war, should the Council try to promote security in order

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peace as the norm of international law and that norms are a fundamental concept in the development of the law).

250. Raz, *supra* note 21, at 97.

251. See *id.* at 99 (arguing that Kelsen’s theory “cannot solve the problem of identity and unity of legal systems” and that “[t]here is nothing in the theory to prevent two legal systems from applying to the same territory”); see also H.L.A. Hart, *Kelsen’s Doctrine of the Unity of Law*, in *ETHICS AND SOCIAL JUSTICE* 171, 171–94 (Howard E. Kiefer & Milton K. Munitz eds., 1970).

to protect civilian lives, or should the Council aim to help establish the conditions for political solutions that can establish long-term peace? The purpose behind the Council's choices rests on the definition of peace and the Council's obligations regarding peace. The lack of clarity results in confusion about the reasons for intervention and intervention's putative role in promoting peace.<sup>252</sup>

The U.N. Charter, the main treaty-based source of modern international law, uses "peace" throughout but does not define the term.<sup>253</sup> The Charter does clarify the purposes of the U.N.<sup>254</sup> There is no affirmative obligation upon states under international law to promote peace, *per se*. Instead, the Charter obligates states to refrain from using force, unless in self-defense, and requires that states undertake peaceful means for settling disputes.<sup>255</sup> The Charter also provides that the Security Council holds the primary responsibility for taking measures necessary "to maintain or restore international peace and security."<sup>256</sup> Seeking to provide clarification, the U.N. General Assembly adopted the *Essentials of Peace* resolution in 1949, which declared

that the Charter of the United Nations, the most solemn pact of peace in history, lays down basic principles

252. See Spain, *supra* note 18, at 330 (noting that the U.N. Charter's absence of definitions of "peace" and "security" has caused "decades of debate about the meanings of these important terms"); see also Klinton 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, 43 (2005) (arguing that the Security Council's failure to intervene in Darfur was a breach of both legal and moral obligations); Boxill, *supra* note 221, at 281–82 (evaluating Immanuel Kant's observation that the hardships of war will lead even self-interested people to enter into a pacific federation of states largely out of "prudence, fear, and material self-interest").

253. See, e.g., U.N. Secretary-General, *A More Secure World: Our Shared Responsibility*, ¶¶ 73–85, U.N. Doc. A/59/565 (2004) [hereinafter *A More Secure World*] (discussing the need for a new and more comprehensive definition of collective security).

254. U.N. Charter art. 1, para. 1; see *supra* note 20; see also *The United Nations at a Glance*, UNITED NATIONS, <http://www.un.org/en/aboutun/index.shtml> (last visited Feb. 5, 2014) (identifying the maintenance of peace as the first goal of the United Nations).

255. U.N. Charter art. 2, paras. 3–4 (calling all Members to settle disputes peacefully and to refrain from the use of force); *id.* art. 33, paras. 1–2 (providing the available peacemaking mechanisms); *id.* art. 37, para. 1 (requiring parties to a dispute to refer the matter to the UNSC if peacemaking mechanisms fail); see also Greenwood, *supra* note 100, at 60–61 (observing restrictions on use of force as the means by which the U.N. Charter supports peace).

256. U.N. Charter art. 24 ("In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf."); *id.* 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.").

necessary for an enduring peace; that disregard of these principles is primarily responsible for the continuance of international tension; and that it is urgently necessary for all Members to act in accordance with these principles in the spirit of co-operation on which the United Nations was founded.<sup>257</sup>

One interpretation of this guidance is that “the concept of peace is firmly premised on the observance of fundamental principles of international law, and that compliance with international law is a condition for peace.”<sup>258</sup>

Despite the UNGA’s assertion, the Charter does not provide the Security Council with adequate guidance about what is necessary for an enduring peace. The Security Council’s motivations for authorizing intervention or other actions are based on multiple objectives, ranging from humanitarian concerns, regime change, the protection of national security, the promotion of human rights, and other basic principles of international law and the enforcement of international law. The general principles in the Charter do not explain how these aims align with the promotion of peace. Furthermore, despite the complex infrastructure of U.N. bodies, intergovernmental organizations, regional arrangements, and multilateral alliances that engage in peace promotion activities, this rich practice has not resulted in a shared consensus about what promoting peace means or how to achieve it.<sup>259</sup>

For these and other reasons, it is imperative that the international community revisit the task of defining peace and what it means to engage in the promotion of peace under international law. A definition is a prerequisite to the Council’s ability to make responsible determinations about if and when forceful interventions are necessary. Historically, the concept of peace was understood in the negative, as the absence of violence or war.<sup>260</sup> Today, in light of new practical and theoretical understandings about how to build and promote peace effectively, the concept has taken on new meaning.<sup>261</sup> According to Galtung,

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257. G.A. Res. 290 (IV), ¶ 1, U.N. Doc. A/RES/67/290 (Dec. 1, 1949).

258. ORAKHELASHVILI, *supra* note 6, at 19.

259. *See id.* at 288–335 (describing the framework for peace operations at the U.N.); *see, e.g., A More Secure World*, *supra* note 253, ¶¶ 5, 28, 30 (discussing the need for a new and more comprehensive definition of collective security).

260. Robert J. Delahunty & John Yoo, *From Just War to False Peace*, 13 CHI. J. INT’L L. 1, 35 (2012) (interpreting Article 1 as meaning that “the central purpose of the Charter is to prevent war, not promote justice or correct justice”).

261. BERCOVITCH & JACKSON, *supra* note 53, at 169–71; *see also* Johan Galtung, *Three Approaches to Peace: Peacekeeping, Peacemaking and Peacebuilding*, in 2 PEACE, WAR AND DEFENCE: ESSAYS IN PEACE RESEARCH 282, 282–304 (Christian Ejlertsen ed., 1975);

peace defined in the “positive” is understood as promoting the conditions necessary for the development of long-term, sustainable conditions marked not only by the absence of widespread violence but also by the presence of security, the fulfillment of basic human needs, social justice, human rights, and effective governance.<sup>262</sup>

To propose a further definition that creates legal rights and obligations remains the task of nations. However, my own view is that saving lives is not, on its own, a justification for using force. When saving lives becomes essential to the objective of building up the conditions necessary for long-term, stable peace, then the use of force aligns with the purpose of promoting peace. Naturally, the question of what constitutes the right amount and the right kind of force remains. But, under my view, the prevention of genocide or crimes against humanity becomes a justifiable reason for the Security Council to authorize forceful intervention for the following reason. The Council cannot very well fulfill its mandate of restoring or maintaining international peace when such egregious violations of a culture of international peace are allowed to occur unchecked. The Council does not have to stop genocide, but it does have to try. Acts like this destabilize the very infrastructure of international law and the values upon which it is based.

This interpretation of the standard—intervention must align with the promotion of peace understood to be the promotion of conditions necessary for a long-term societal stability where nonviolence becomes the norm—will be unsatisfactory to many. This view does not readily lend itself to allowing for forceful intervention aimed at regime change, for example, to address human rights violations. Nor should it.<sup>263</sup> However unsatisfactory, the international legal system offers other options for redress. The use of force should not be the dominant means for achieving these goals.<sup>264</sup> Furthermore, the individuals

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Diane Marie Amann, *International Law and the Future of Peace* 4–6 (Univ. of Georgia Sch. of Law Research Paper Series, Paper No. 2013-15, 2013), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2245372](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2245372).

262. JOHAN GALTUNG, *PEACE BY PEACEFUL MEANS: PEACE AND CONFLICT, DEVELOPMENT AND CIVILIZATION* 2 (1996) (explaining the concept of positive peace, a concept that Galtung is credited for introducing); see also JOHN PAUL LEDERACH, *BUILDING PEACE: SUSTAINABLE RECONCILIATION IN DIVIDED SOCIETIES* (1997); DIETER SENGHAAS, *ON PERPETUAL PEACE: A TIMELY ASSESSMENT* 33–42 (Ewald Osers trans., 2007).

263. Alexander, *supra* note 252, at 13 (“The framers of the [U.N.] Charter did not envision Members interfering in the internal affairs of other Members to prevent human rights violations short of genocide.”)

264. See O’Connell, *supra* note 24, at 71 (arguing that the current paradigm of intervention is premised upon the notion that force is the dominant means by which to

responsible for intervening are ill-equipped with the skills and vision necessary to achieve more diverse, nonmilitary goals.<sup>265</sup> Perhaps, in time, intervention can evolve to serve these aims. However, given the present circumstances, the UNSC should not authorize military-led interventions on the basis of wrongful acts or humanitarian crises unless they pose a serious risk to the establishment of a positive peace.

*B. Deciding for Peace*

The prevailing paradigm of intervention today is one that is associated with the use of military force. The existing authorizations provided for in international law have been built around a contextual understanding that war occurs between nations, and, further, that the use of force, acts of aggression, and the state machinery of militarized war, are threats to be prevented.<sup>266</sup> For the average person, intervention has become synonymous with air strikes, bombing campaigns, and, more recently, drones. Military leaders are called upon to answer tactical questions. Can our missiles strike targets accurately to ensure no civilian casualties? Will our intelligence still be good in two weeks? Can we change course and back a different political leader?

But what if the vision of intervention was different?<sup>267</sup> What if peacebuilders, mediators, medical personnel, and humanitarian aid workers were in charge? What if the focus was promoting peace instead of using force? With this vision in mind, what changes would the Council need to undertake in order to build capacity for conducting interventions that sought to promote peace? What would the Security Council need to reform in order to decide for peace?

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achieve desired goals); *see also* SEYBOLT, *supra* note 47, at 276 ("It is necessary to be ruthlessly modest about what humanitarian intervention can do. It can, under the right circumstances, 'stop the dying' in the short term and it can protect some fundamental human rights.").

265. Karl W. Eikenberry, *The Limits of Counterinsurgency Doctrine in Afghanistan: The Other Side of the COIN*, FOREIGN AFF., Sept./Oct. 2013, at 59, 64 ("The U.S. intervention required improvisation in a distant, mountainous land with de jure, but not de facto, sovereignty; a traumatized and divided population; and staggering political, economic, and social problems. Achieving even minimal strategic objectives in such a context was never going to be quick, easy, or cheap. . . . The typical 21-year-old marine is hard-pressed to win the heart and mind of his mother-in-law; can he really be expected to do the same with an ethnocentric Pashtun tribal elder?").

266. KELSEN, *supra* note 246, at 3 ("To guarantee peace the social order does not exclude all kinds of coercive acts; it authorizes certain individuals to perform such acts under certain conditions.").

267. THOMAS J. SCHOENBAUM, INTERNATIONAL RELATIONS—THE PATH NOT TAKEN: USING INTERNATIONAL LAW TO PROMOTE WORLD PEACE AND SECURITY viii (2006).

First, who decides matters.<sup>268</sup> The problem with the current decision-making process is that those with nonmilitary ideas for intervention are not a part of the decision-making process early, enough, or early enough. While the UNSC holds the ultimate authority regarding decisions affecting international peace and security, several other institutions have greater capacity to inform decision-making about building long-term peace in noninternational armed conflicts.<sup>269</sup> Among these are U.N. Peacekeeping,<sup>270</sup> the U.N. Peacebuilding Commission,<sup>271</sup> and the U.N. Mediation Support Unit.<sup>272</sup> They share the same purposive intent as the UNSC.<sup>273</sup> Yet, the organic evolution of different institutions within the U.N., populated with people who come from diverse national and disciplinary backgrounds, has resulted in institutional rivalries, struggles to “add value,” and flawed relations with the UNSC, which remains the ultimate authority on all matters pertaining to international peace and security.<sup>274</sup>

268. MINTZ & DEROUEN, *supra* note 3, at 18–21; VERTZBERGER, *supra* note 3, at 66–79; Brooks, *supra* note 9, at 2334 (“And to a significant extent, the governmental and intergovernmental bureaucrats involved in these interventions (and the NGO actors as well) fall back on previously existing understandings and consensus about goals—which means that more theoretical discussion of goals, abstracted from a given conflict or transition, may help ensure that interventions can get off the ground quickly and effectively.”).

269. See, e.g., Spain, *supra* note 18, at 331 (describing how the Security Council delegated decisions in Libya’s recent internal conflict to the Sanctions Committee because of the Sanctions Committee’s superior decision-making capacity); see also S.C. Res. 1970, ¶ 24, U.N. Doc. S/RES/1970 (Feb. 26, 2011).

270. “In addition to maintaining peace and security, peacekeepers are increasingly charged with assisting in political processes; reforming judicial systems; training law enforcement and police forces; disarming and reintegrating former combatants; [and] supporting the return of internally displaced persons and refugees.” *About Us*, UNITED NATIONS PEACEKEEPING, <http://www.un.org/en/peacekeeping/about/> (last visited Feb. 5, 2014).

271. S.C. Res. 1645, ¶ 2, U.N. Doc S/RES/1645 (Dec. 20, 2005) (providing that the Peacebuilding Commission operates as a subsidiary organ of the UNSC with the mandate “[t]o bring together all relevant actors to marshal resources and to advise on and propose integrated strategies for post-conflict peacebuilding and recovery”).

272. The U.N. Mediation Support Unit operates within the U.N. Department of Political Affairs and manages the U.N. Standby Team of Mediation Experts and the online U.N. Peacemaker tool. *United Nations Department of Political Affairs—Mediation Support*, UNITED NATIONS, [http://www.un.org/wcm/content/site/undpa/mediation\\_support](http://www.un.org/wcm/content/site/undpa/mediation_support) (last visited Feb. 5, 2014) (explaining the purpose of the Mediation Support Unit and its role within the United Nations organizational hierarchy).

273. *About Us*, *supra* note 270 (discussing promotion of peace as the purpose of U.N. Peacekeeping); *Mandate of the Peacebuilding Commission*, UNITED NATIONS, <http://www.un.org/en/peacebuilding/mandate.shtml> (last visited Feb. 5, 2014) (discussing promotion of peace as purpose of U.N. Peacebuilding Commission); *United Nations Department of Political Affairs—Mediation Support*, *supra* note 272 (discussing promotion of peace as the purpose of U.N. Mediation Support Unit).

274. Telephone Interview with Necla Tschirgi, Professor, University of San Diego School of Peace Studies (Sept. 5, 2013) [hereinafter Tschirgi Interview]. This interview

Furthermore, these entities are often better suited than the UNSC to understand how to address the peace and security implications of noninternational armed conflicts.<sup>275</sup> Yet they suffer from lack of funding, lack of human resources, high turnover among employees, lack of information, and lack of UNSC support.<sup>276</sup> The UNSC, for example, prevented the U.N. Peacebuilding Commission from taking action to address the crisis in Guinea-Bissau until after the UNSC issued a statement.<sup>277</sup>

This dilemma highlights a structural problem about how competence and authority are allocated within the U.N. There are cultural norms within these U.N. bodies that prevent the flow of information, coordination, and collaborative decision-making.<sup>278</sup> The flawed relationship that exists between the UNSC and the other U.N. bodies with expertise in peace and security is partly due to the identity of the people that inhabit each group. UNSC officials are typically self-described “diplomats” who have expertise in political decision-making.<sup>279</sup> This skill set was and is essential for negotiating decisions that seek to prevent armed conflict between powerful nations.<sup>280</sup> However, on their own, diplomats lack the sufficient knowledge to design and troubleshoot plans for intervening into

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was conducted to gather anecdotal information about the UN Peacebuilding Commission. It is not part of a survey and is not intended to provide empirical support. *See also* Necla Tschirgi, *Escaping Path Dependency: A Proposed Multi-Tiered Approach for the UN's Peacebuilding Commission* 8–10, 14 (2010) (unpublished manuscript), *available at* <http://cips.uottawa.ca/eng/documents/Tschirgi.pdf> (observing that competition for membership in the Peacebuilding Commission (PBC) has resulted in it being “highly susceptible to member state politics to the extent of disrupting the Commission’s work,” and noting that the PBC’s avoidance of “hard” peacebuilding cases renders it vulnerable to damaged relations with the UNSC). Professor Necla Tschirgi formerly served as in-house consultant/Senior Policy Advisor with the Peacebuilding Support Office at the United Nations Secretariat in New York.

275. *See* Liliana Lyra Jubilut, *Towards a New Jus Post Bellum: The United Nations Peacebuilding Commission and the Improvement of Post-Conflict Efforts and Accountability*, 20 MINN. J. INT’L L. 26, 29, 32–33 (2011) (observing that the PBC was created to respond to intrastate conflicts); *see also* Tschirgi Interview, *supra* note 274.

276. Tschirgi, *supra* note 274, at 10–11.

277. *See id.* (noting that the PBC was barred from taking any action in Guinea-Bissau for over a year until the country’s request was forwarded to the PBC by the UNSC).

278. *See id.*

279. *See* Jubilut, *supra* note 275, at 34–35 (describing the makeup of the PBC’s committees and noting that their significant size could lead to slow, inefficient results due to the reliance on consensus-based decision-making).

280. *See About the United Nations Security Council*, UNITED NATIONS, <http://www.un.org/en/sc/about/> (last visited Feb. 5, 2014) (discussing the UNSC’s role in maintaining peace and security).

noninternational armed conflicts.<sup>281</sup> Such decisions often require knowledge about long-term peacebuilding, reconciliation, sanctioning of private companies, and “conflict trade.”<sup>282</sup> To effectively make decisions about peace and security, the UNSC needs to be knowledgeable about these and other implications affecting postconflict peacebuilding work.

This highlights the second implication of deciding for peace. How decisions are made matters.<sup>283</sup> Instead of having the type of intervention drive the decision-making process, the process of decision-making should drive choices about how to intervene. Decisions about whether or not to intervene should be inclusive of and coordinated with the decisions that will necessarily follow intervention.<sup>284</sup> The Security Council can achieve this by adopting a model of integrated decision-making. Integrated decision-making would mean that the Council undertakes a duty to consult those most knowledgeable and most affected by decisions about intervention and bring them into the decision-making process.<sup>285</sup> It would require that the Council take measures to address the disconnect between decision-making about intervention and decision-making about postconflict peacebuilding through institutional and interpersonal reforms.<sup>286</sup>

To do so, the U.N. system needs to evaluate its present structural design barriers as well as the institutional cultural

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281. See INT’L PEACE INST., SECURITY COUNCIL ISTANBUL RETREAT: AT THE CROSSROADS OF PEACEMAKING, PEACEKEEPING, AND PEACEBUILDING 2 (2010), available at [http://www.ipinst.org/media/pdf/publications/security\\_council\\_retreat\\_epub.pdf](http://www.ipinst.org/media/pdf/publications/security_council_retreat_epub.pdf) (“An overarching lesson from the UN’s experience in the Balkans is the importance of recognizing the limitations that political context puts on the Council.”).

282. Tschirgi Interview, *supra* note 274 (discussing the 2010 and 2011 Security Council Retreats where Members were introduced to these and other topics by outside experts, and referencing the PBC strategies for addressing conflicts in Sierra Leone, DRC, and Guinea-Bissau).

283. GARY GOERTZ, INTERNATIONAL NORMS AND DECISION MAKING: A PUNCTUATED EQUILIBRIUM MODEL 108 (2003) (“[D]ecision-making rules usually are very important in determining choice.”); Koskeniemi, *supra* note 11, at 456–57 (suggesting that the United Nations has a bias against unilateral decision-making and advocating the use of collective decision-making).

284. INT’L PEACE INST., *supra* note 281, at 4 (recommending increased coordination between the UNSC and other U.N. bodies engaged in peace and security work); John C. Dernbach, *Achieving Sustainable Development: The Centrality and Multiple Facets of Integrated Decisionmaking*, 10 IND. J. GLOBAL LEGAL STUD. 247, 250 (2003) (discussing the importance of integrated decision-making); Slaughter & Ratner, *supra* note 193, at 413–14 (comparing a limited view that state representatives are the sole decision-makers to a wider view incorporating anyone affected by international law).

285. See Spain, *supra* note 18, at 353–58 (arguing that the Council has a duty to consult and describing a consultation process that would promote consensus-based decision-making).

286. INT’L PEACE INST., *supra* note 281, at 7 (asserting that peacekeeping and peacebuilding should be integrated).

barriers that prevent integrated decision-making from taking place.<sup>287</sup> The UNSC itself has a leadership role to play. The Council has within its own authority the means to undertake such reforms.<sup>288</sup> It can, for example, invite other U.N. bodies to participate in deliberations about intervention through informal consultations.<sup>289</sup> It can encourage the use of informal consultations with Security Council Members as well as informal interactive discussions and Arria-formula meetings to which non-Council Members may be invited.<sup>290</sup> Furthermore, it can delegate its own decision-making authority to a subsidiary body that is better suited to make decisions on a particular matter.<sup>291</sup>

In today's world, "[p]eace is everyone's responsibility."<sup>292</sup> Envisioning peace as a public good promotes the understanding that individuals, in addition to states, have rights and obligations under international law. Advancements in the substructures of international law, specifically human rights and international criminal law, have highlighted the need for and value of individual accountability.<sup>293</sup> International humanitarian law has successfully developed a norm of individual accountability over the past two decades. The prosecutions of Slobodan Milošević, Ratko Mladić, and Charles Taylor have served as high-profile examples that individuals are accountable for war crimes and crimes against humanity.<sup>294</sup> The normative focus of these practices is an emphasis on the direct rights of individuals, which has become an important discourse among international legal scholars.<sup>295</sup> These

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287. See *id.* at 3 ("Regional and subregional arrangements need improvement. Desk-to-desk cooperation is an encouraging development, but there is a continued problem at the strategic and political levels.").

288. Broude, *supra* note 155, at 120 (noting that the "path of normative integration is easier to follow when it is chosen by decision-makers, not forced upon them, and so does not lead to a threatening integration of authority").

289. SEC. COUNCIL AFFAIRS DIV., UNITED NATIONS, 2011 HIGHLIGHTS OF SECURITY COUNCIL PRACTICE Annex 2 (2012) (explaining that the UNSC may consult with non-Council Members on an informal basis).

290. *Id.*; see also *Working Methods Handbook: "Arria-formula" Meetings*, UNITED NATIONS SEC. COUNCIL, <http://www.un.org/en/sc/about/methods/arriaformula.shtml> (last visited Feb. 5, 2014) (describing the "common understanding" of the Arria-formula meeting procedures for maintaining flexibility and informality).

291. MATHESON, *supra* note 16, at 26–31.

292. Pamela Baxter & Vick Ikobwa, *Peace Education Programmes: Why and How?*, FORCED MIGRATION REV., Jan. 2005, at 28, 29 (discussing the importance of peace education, its methodology, and the UNHCR's recent efforts in the DRC and Uganda).

293. TEITEL, *supra* note 209, at 7.

294. *International Justice: Infamous War Crimes Cases*, CBC NEWS, <http://www.cbc.ca/news/world/international-justice-infamous-war-crimes-cases-1.773125> (last updated Apr. 26, 2012).

295. See 1 David Donat Cattin et al., *Europe: Regional Report*, in *THE PURSUIT OF INTERNATIONAL CRIMINAL JUSTICE: A WORLD STUDY ON CONFLICTS, VICTIMIZATION, AND*

changes are also beginning to influence legal rules, norms, and practices of peacebuilding.<sup>296</sup> Peace promotion must be led from within but supported from the outside.<sup>297</sup> Close attention must be paid to how authority, and subsequently accountability, is distributed. Local communities cannot promote peace if they lack the authority and resources to do so. Furthermore, people will not take responsibility for promoting peace if they have had no say in the vision for peace.

Thus, deciding for peace requires the Security Council to change its practices. It will need to identify and include into its decision-making process those who are essential to the process of deciding how to intervene effectively.<sup>298</sup> The Council will need to reconsider how it makes decisions and adopt new practices such as integrated decision-making. Finally, the Council will need to reevaluate its role in building capacity for nonmilitary forms of intervention.<sup>299</sup> Deciding for peace calls for renewed focus given to how peacekeepers can provide the necessary security within ongoing hostilities wherein peace talks can occur.<sup>300</sup> Political and diplomatic interventions that facilitate arrangements for formal peace agreements and postconflict frameworks such as disarmament, reconstruction, and reconciliation should be improved and streamlined.<sup>301</sup> Humanitarian aid, both through

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POST-CONFLICT JUSTICE 803, 894–900 (M. Cherif Bassiouni ed., 2010) (studying approaches to international criminal justice, identifying certain criteria for effectiveness, such as inclusiveness (of victims in particular), and prioritizing elements that will support long-term resolution, reconciliation, and peacebuilding).

296. For scholarship addressing post-conflict peacebuilding, see generally JUS POST BELLUM: TOWARDS A LAW OF TRANSITION FROM CONFLICT TO PEACE (Carsten Stahn & Jann K. Kleffner eds., 2008); Brabandere, *supra* note 208; Michael J. Matheson, *United Nations Governance of Postconflict Societies*, 95 AM. J. INT'L L. 76 (2001); Roland Paris, *Post-Conflict Peacebuilding*, in THE OXFORD HANDBOOK ON THE UNITED NATIONS 404 (Thomas G. Weiss & Sam Daws eds., 2007).

297. Birger Heldt, *Peacekeeping and Transitions to Democracy*, in BUILDING PEACE, CREATING CONFLICT?: CONFLICTUAL DIMENSIONS OF LOCAL AND INTERNATIONAL PEACE-BUILDING 47, 68–69 (Hanne Fjelde & Kristine Höglund eds., 2011) (finding that U.N. Peacekeeping operations appear to have a positive effect on the transition to democracy in war-torn nations).

298. Cf. RICHARD SNYDER, HENRY BRUCK & BURTON SAPIN, DECISION-MAKING AS AN APPROACH TO THE STUDY OF INTERNATIONAL POLITICS (1954); Koskeniemi, *supra* note 11, at 467–68 (finding that “the assumption of a unitary national interest fails to account for . . . the contrasting interest of a local population, minority, or women”); Jonathan Renshon & Stanley A. Renshon, *The Theory and Practice of Foreign Policy Decision Making*, 29 POL. PSYCHOL. 509, 511 (2008) (arguing that no crisis or war can be understood “without direct reference to the decision making of individual leaders”).

299. Rogers, *supra* note 24, at 727–36 (arguing that humanitarian intervention should be a last resort in achieving peace).

300. See generally LISE MORJÉ HOWARD, UN PEACEKEEPING IN CIVIL WARS (2008).

301. See Chen Kertcher, *Same Agenda, Different Results: The UN Interventions in Cambodia and Somalia after the Cold War*, in INTERNATIONAL INTERVENTION IN LOCAL CONFLICTS 19, 20 (Uzi Rabi ed., 2010); Marvin G. Weinbaum, *Lost Faith, Forfeited Trust:*

the influx of financial and in-kind resources, as well as aid workers who provide necessary medical and other services, must become a central priority.<sup>302</sup>

### C. MONUSCO and the Intervention Brigade

The Security Council's treatment of the armed conflict in the Democratic Republic of the Congo suggests that the Council is moving toward a *deciding for peace* paradigm in several important ways. On May 28, 2010, the Council issued Resolution 1925, which renamed the earlier United Nations Organization Mission in the Democratic Republic of the Congo (MONUC), MONUSCO, to reflect a new mandate. The Council decided to empower peacekeepers, who are normally restricted to using force only in self-defense, "to use all necessary means" to protect "civilians, . . . humanitarian personnel and human rights defenders, under imminent threat of physical violence . . . [and to] [s]upport the Government of the Democratic Republic of the Congo . . . [in its] [s]tabilization and peace consolidation [efforts]."<sup>303</sup> After some success but also renewed cycles of violence, the Security Council created the "Intervention Brigade" on March 28, 2013.<sup>304</sup> The significance of this resolution is that it authorized the peacekeeping force to take measures to "neutralize armed groups."<sup>305</sup> The Intervention Brigade's purpose, in part, is to reduce the threat of violence against civilians, with a focus on sexual violence against women and children; establish political stability and effective governance; and provide support to efforts to establish national and international judicial processes to prosecute war crimes and

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*Afghan Responses to Post-9/11 International Intervention in State-Building and Insurgency*, in INTERNATIONAL INTERVENTION IN LOCAL CONFLICTS, *supra*, at 222, 223; Farer, *supra* note 12, at 329–30.

302. See RAMSBOTHAM & WOODHOUSE, *supra* note 55, at 225–27 (providing Framework Principles for Humanitarian Intervention).

303. S.C. Res. 1925, ¶¶ 10–12, U.N. Doc S/RES/1925 (May 28, 2010).

304. S.C. Res. 2098, *supra* note 51, ¶¶ 9–10.

305. *Id.* ¶ 9 ("Decides to extend the mandate of MONUSCO in the DRC until 31 March 2014, takes note of the recommendations of the Special Report of the Secretary-General on the DRC and in the Great Lakes Region regarding MONUSCO, and decides that MONUSCO shall, for an initial period of one year and within the authorized troop ceiling of 19,815, on an exceptional basis and without creating a precedent or any prejudice to the agreed principles of peacekeeping, include an 'Intervention Brigade' consisting inter alia of three infantry battalions, one artillery and one Special force and Reconnaissance company with headquarters in Goma, under direct command of the MONUSCO Force Commander, with the responsibility of neutralizing armed groups as set out in paragraph 12 (b) below and the objective of contributing to reducing the threat posed by armed groups to state authority and civilian security in eastern DRC and to make space for stabilization activities . . .").

crimes against humanity.<sup>306</sup> The Council's resolution also discussed the future, providing a transition whereby the Intervention Brigade would turn over its responsibilities to a Congolese-led Rapid Response Force.<sup>307</sup>

This resolution marks an evolution in the Council's approach to intervention. It coupled the authorization to use force with other features necessary for the establishment of long-term peace and stability. Among these are special protections for women and children, who face unique risks and consequences during armed conflict, and support for developing forums for prosecuting international crimes.<sup>308</sup> The Council's approach to the crisis in the DRC is comprehensive and robust while reflecting a long-term vision. It reflects operational changes as well. For example, the Council informed MONUSCO leaders about its concern that peacekeepers could become active parties to the armed conflict. Given this, MONUSCO leaders have been careful about the way they engage armed rebel groups and have remained in close consultation with the Council about their ground operations.<sup>309</sup>

By contrast, the Council's decision to authorize the use of force in Libya lacked these features.<sup>310</sup> The Council's resolution there authorized U.N. Member States to take "all necessary measures" to protect civilians and "requests" that such states inform the U.N. Secretary-General of the measures they intend to take.<sup>311</sup> The Council's resolution did not provide the level of

306. *Id.* ¶¶ 11–12.

307. *Id.* ¶ 10.

308. See generally Beth Van Schaack, *Engendering Genocide: The Akayesu Case Before the International Criminal Tribunal for Rwanda*, in HUMAN RIGHTS ADVOCACY STORIES 193 (Deena R. Hurwitz et al. eds., 2009) (discussing the importance of and absence of protection for women and children from sexual violence under international law).

309. Interview, *supra* note 96.

310. S.C. Res. 1973, *supra* note 14; see also Office of the Legal Advisor, U.S. Dep't of State, Address at the 2nd Annual "Live from L" at the George Washington University School of Law (Feb. 24, 2012). The UNSC took up the matter, with the British circulating a draft proposal authorizing the creation and enforcement of a no-fly zone as well as authorizing the protection of civilians. At issue was the question of how the resolution should specify the terms of enforcement. Unilateral action would not be welcomed and a NATO-led operation was not politically acceptable. Russia circulated a draft proposal that removed the authority of civilian protection. Louis Charbonneau, *U.S. Joins France and UK in Urging Swift U.N. Libya Action*, REUTERS (Mar. 16, 2011), <http://www.reuters.com/article/2011/03/16/us-libya-un-idUSTRE71P26Z20110316>; Erwin van Veen, *From Spring into Summer: Key Peacebuilding Actions for Libya*, OPEN DEMOCRACY (Sept. 25, 2011), available at <http://www.opendemocracy.net/erwin-van-veen/from-spring-into-summer-key-peacebuilding-actions-for-libya> (arguing that after a successful intervention, peacebuilding institutions are needed to help transition a post-Gaddafi Libya).

311. S.C. Res. 1973, *supra* note 14, ¶ 4 ("Authorizes Member States that have notified the Secretary-General, acting nationally or through regional organizations or arrangements, and acting in cooperation with the Secretary-General, to take all

detail it did in the case of the DRC about who would intervene, what type of force could be used, and what would happen in the long term. Though the intervention into Libya saved the lives of many civilians, it also resulted in regime change with new fragmented governance structures that lacked effective control. Furthermore, former Libyan leader Muammar Gaddafi was not prosecuted for his alleged criminal acts; he was killed. These outcomes, intended and unintended, made the Council's authorization of intervention into Libya controversial.<sup>312</sup>

The contrast of these two cases suggests that the Council's decision in each turn began with the desire to address humanitarian crisis and prevent loss of civilian life. The difference in the outcome had much to do with process. In the case of the DRC, the Council has been in close consultation with the intervening authority. This approach is more in alignment with the purpose of promoting long-term peace and, thus, provides an early example of how the purposive intent decision-making approach might function.

## VI. CONCLUSION

The purpose of international law remains the promotion of peace. Although this foundational value has been the bedrock of the international legal system since its inception, its meaning is evolving. Promoting peace in the face of genocide, crimes against humanity, or massive humanitarian crises requires a new paradigm, one that is focused on building long-term peace. Though the use of force may remain a necessary tool under international law, it cannot be the primary tool by which nations strive to promote peace.

With this view in mind, this Article has sought to examine if and how international law can guide the Council in order to help

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necessary measures, notwithstanding paragraph 9 of resolution 1970 (2011), to protect civilians and civilian populated areas under threat of attack in the Libyan Arab Jamahiriya, including Benghazi, while excluding a foreign occupation force of any form on any part of Libyan territory, and *requests* the Member States concerned to inform the Secretary-General immediately of the measures they take pursuant to the authorization conferred by this paragraph which shall be immediately reported to the Security Council . . . .")

312. See, e.g., *Chinese President Meets French Counterpart, Saying Force Is No Solution to Libyan Issue*, XINHUA (Mar. 30, 2011), [http://news.xinhuanet.com/english2010/china/2011-03/30/c\\_13805658.htm](http://news.xinhuanet.com/english2010/china/2011-03/30/c_13805658.htm); Joshua Foust, *Syria and the Pernicious Consequences of Our Libya Intervention*, ATLANTIC (Feb. 6, 2012), <http://www.theatlantic.com/international/archive/2012/02/syria-and-the-pernicious-consequences-of-our-libya-intervention/252631/>; Zhang Xinyi, *Libya Intervention: Driven by Oil or Humanitarianism?*, PEOPLE'S DAILY ONLINE (Mar. 23, 2011), <http://english.peopledaily.com.cn/90001/90780/91343/7329108.html>.

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it improve its decision-making about intervention. This Article has posited that the very purpose of international law, which it has argued in the promotion of peace, provides a unifying basis for the U.N. Security Council's decisions about intervention.

This perspective reimagines the debate over whether to intervene as a conversation about the promise and perils of promoting peace. It also highlights the value of international law, beyond rules, as a system of embedded values that serve to guide decision-makers as they engage in purposive, dynamic decision-making.

The task of the future is to build capacity for addressing modern threats to the peace through nonforceful means. When forceful intervention is undertaken, it must be done with an eye toward establishing peace in the long term. The Council should take seriously the work of determining what kinds of intervention work best in different crises. Intervention by force may have a place in the future international legal order, but, if so, deciding to intervene deserves more careful consideration than has been given in recent decades.