

# “Calling in the Troops”: The Uneasy Relationship Among Women’s Rights, Human Rights, and Humanitarian Intervention

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In the spring of 1988, the *Harvard Human Rights Yearbook* (as it was then called) was about to publish its first volume. I was a second-year law student, and decided to write my third-year paper on women’s human rights. I recall my advisor, Duncan Kennedy, asking me whether I believed that the concerns about women I hoped to see addressed internationally warranted “calling in the troops.” He was not, of course, proposing that we call in the troops for anything, but I gather he was pushing me to articulate the extent to which I considered violations against women to be serious, and to be precise about how I believed they should be addressed. The question challenged me on a number of levels. The cultural feminist in me at the time wondered whether it would be a “victory” for feminism if troops were called in on women’s behalf. The recovering pacifist in me was curious whether, if I resisted the desire to send in soldiers, I would be suggesting that women’s rights were not human rights. The human rights student in me knew that there were many ways to respond to human rights violations without military intervention. Indeed, few human rights activists seemed to be talking about using military force to respond to human rights violations against anyone, male or female.

International human rights law and discourse have changed markedly since I wrote my third-year paper. As the *Harvard Human Rights Journal* celebrates its twentieth anniversary, women’s rights have become largely accepted as human rights, and military humanitarian intervention<sup>1</sup> has be-

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I am grateful to the many people who have given me comments on the presentations of various stages of this draft at the American Society of International Law, American University in Cairo, University of North Carolina School of Law, and University of Toronto Faculty of Law. Special thanks to Dan Danielson, Adrienne Davis, Janet Halley, David Kennedy, Karen Knop, Mark Weisburd, and Deborah Weissman for important discussions and feedback on the project. I am also indebted to Jeremy Freeman, Mary Beth Hickcox-Howard, Lucas Lixinski, and Jessica Roberts for their research assistance, and to the *Harvard Human Rights Journal* staff, particularly Scott Paltrowitz, for excellent editing suggestions.

1. Unless indicated otherwise, when I use the term “humanitarian intervention” in this piece, I mean forceful military intervention primarily justified with humanitarian reasons.

come a response to certain human rights violations increasingly accepted and advocated by both conservatives and liberals. Conservatives have begun to use the discourse of human rights, even women's rights, to justify their calls for intervention, and liberals have begun to use military discourse and rhetoric to support their commitment to human rights. The U.S. intervention in Afghanistan provides an example of the first trend, while calls for military intervention in Kosovo and Bosnia and Herzegovina by those who call themselves "human rights hawks" offer an example of the latter.

In this Article, I explore these changes in human rights law and discourse and suggest that feminists have participated in, even contributed to, the shift in discourse on both the right and the left. For the most part, for example, women's rights advocates opposed neither the U.S. invasion of Afghanistan nor the use of women's human rights to justify the invasion.<sup>2</sup> Moreover, some of the women's rights advocates who sought intervention in Bosnia and Herzegovina to respond to what they considered "genocidal rape" hoped to appeal to conservative hawks as well as liberal human rights advocates. Both of these appeals to or support for military force to respond to women's rights in the 1990s participated in the development of an emerging consensus on humanitarian intervention.

I am critical of this emerging consensus because I am uneasy with the idea that destroying life and infrastructure is a way to demonstrate concern for a particular place or situation, especially when most of history has shown that such intervention—regardless of motivation—rarely improves the lives of the individuals who are the stated subjects of intervention. More importantly for this Article, I object to the way that calls for military intervention feed into a crisis mentality. As military intervention increasingly becomes the norm for protecting victims of "serious" human rights violations, those who seek to redress a particular problem are increasingly pressured to couch it in terms of a crisis that only immediate military intervention can resolve. This focus often distorts the nature of the violation or harm and displaces an awareness of the extent to which both military and nonmilitary interventions—such as colonialism, economic and military assistance, and lack of such assistance—have helped produce the crises. International law itself has condoned, if not facilitated, such crisis-generating interventions.<sup>3</sup>

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2. I have discussed and analyzed elsewhere the ways that women's rights were used to justify the invasion, as well as the tacit or direct support of the initial invasion by many feminists. See Karen Engle, *Liberal Internationalism, Feminism, and the Suppression of Critique: Contemporary Approaches to Global Order in the United States*, 46 HARV. INT'L L.J. 427 (2005). For other critical perspectives on the representation of women used to justify the invasion of Afghanistan, see Ranjana Khanna, *Taking a Stand for Afghanistan: Women and the Left*, 28 SIGNS 464 (2002); Vasuki Nesiah, *From Berlin to Bonn to Baghdad: A Space for Infinite Justice*, 17 HARV. HUM. RTS. J. 75 (2004).

3. This argument is indebted to Martti Koskenniemi's work on Kosovo. See Martti Koskenniemi, *'The Lady Doth Protest Too Much': Kosovo, and the Turn to Ethics in International Law*, 65 MOD. L. REV. 159, 171 (2002), discussed *infra* text accompanying notes 153–55; see also ANTONY ANGHIE, *IMPERIALISM*,

In the feminist context, the proliferation of calls for intervention based on existing or impending genocides suggests a new motivation for claiming that rape is genocide. Moreover, as some feminists have succeeded in equating rape and genocide, rape itself has become a significant justification for intervention. Documentation of rape helped drum up support, for example, for sending troops into Darfur.<sup>4</sup> Although some may view an increased call to action on this basis as a victory for women's human rights, the emphasis on a genocidal crisis produced by rape downplays the significance of the other, "ordinary" harms that occur during war and peace (including rape).

The purpose of this Article is to evaluate critically the growing enthusiasm for military intervention by human rights advocates, including non-governmental and intergovernmental organizations. I consider various proposals for expanding the legal bases for military intervention, and then reconsider and situate the debate among feminists in the 1990s over the treatment of rape in Bosnia and Herzegovina.<sup>5</sup> Through this analysis, I hope to demonstrate how some feminists who insisted that rape constituted genocide both responded to and helped fuel human rights advocates' mounting enthusiasm for military humanitarian intervention.

The Article proceeds as follows. Part I uses the publications of the *Harvard Human Rights Journal* over the past twenty years to consider the developments within human rights scholarship and activism regarding women's human rights and humanitarian intervention. Part II explores the consensus that is building around understanding humanitarian intervention as an "emerging norm," and discusses how human rights and humanitarian non-governmental and intergovernmental organizations have increasingly embraced military intervention as the ultimate mechanism for enforcing human rights. Part III considers the international law surrounding that emerging norm, and what the norm might include. It examines the leading justifications for military intervention, noting the primacy of genocide in the hierarchy of justifications. Part IV returns to feminist debates of the 1990s over whether rape constituted genocide in Bosnia and Herzegovina, re-reading those debates in light of the emerging norm of humanitarian intervention. It then examines advocacy on behalf of intervention in Darfur as a recent example of the conflation of rape and genocide. Part V concludes by encouraging reconsideration of the potential consequences of increased calls for the use of force to protect human rights, not just for those involved

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SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW (2004); Makau wa Mutua, *Why Redraw the Map of Africa: A Moral and Legal Inquiry*, 16 MICH. J. INT'L L. 1113 (1995).

4. See, e.g., Television Commercial: *How Will History Judge Us?* (CNN television broadcast Oct. 2006), available at [http://www.savedarfur.org/pages/advertising\\_campaign](http://www.savedarfur.org/pages/advertising_campaign) (arguing that history will judge us if we allow rape to continue without our intervention); see also *infra* notes 148–50 and accompanying text.

5. For an extended discussion of this debate, see Karen Engle, *Feminism and Its (Dis)Contents: Criminalizing Wartime Rape in Bosnia*, 99 AM. J. INT'L L. 778–816 (2005).

in or directly affected by the military action, but for international law and policy more generally.

## I. TWENTY YEARS OF HUMAN RIGHTS: WOMEN'S RIGHTS AND MILITARY INTERVENTION

This Part uses the *Harvard Human Rights Journal's* publications as a lens through which to trace the development of academic discourse regarding both women's rights and military humanitarian intervention over the past twenty years. While obviously not claiming to embody all trends in the academic literature on these subjects, the *Journal* provides a surprisingly representative reflection of how women's human rights law and politics have developed, and a good window into the issues surrounding humanitarian intervention.<sup>6</sup> At the very least, the *Journal's* publications track the shift from skepticism to acceptance of both women's human rights and military humanitarian intervention.

### A. *Women's Human Rights*

In the spring of 1988, fellow students at Harvard Law School and I worked with the Harvard Human Rights Program to organize a conference entitled "Women's Rights and Human Rights: Possibilities and Contradictions."<sup>7</sup> As far as I know, that conference was the first academic conference to consider women's rights as human rights, and it met both resistance and enthusiasm. Some of the resistance came from mainstream human rights non-governmental organizations ("NGOs"), which insisted that because many women's rights issues were focused on the private sphere and did not involve state action, they did not fall under the organizations' mandates. To the extent that we were discussing issues in which there was clear state action, such as torture or cruel or inhuman treatment of women detained by the state, the NGOs argued that there was no reason to consider women's human rights as distinct from human rights.

There was also enthusiasm. The conference generated interest both among activists who had long been working on women's rights and those

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6. I am also taking advantage of this issue's twentieth anniversary theme to provide a retrospective.

7. The conference was held on April 15 and 16, 1988, and consisted of an introduction by Henry Steiner, a keynote address by Arvonne Fraser, a panel entitled "The Struggle for Women's Rights: Perspectives from Around the World" (with Charlotte Bunch, Annette Liu, Marjori Agosin, Kekelwa Dall, Kumari Jayawardena, and Alison Weatherfield), and a panel entitled "Putting Women's Issues on the International Human Rights Agenda: Can We? Should We?" (with Philip Alston, Michael Posner, Felice Gear, John Carey, Aida Gonzalez, Rebecca Cook, and Fran Hosken). The conference also included film, poetry, and working groups on "Developed and Developing Countries: Perspectives on Women's Rights"; "Non-Governmental Organizations: Thinking Globally, Acting Locally"; "Women's Health: A Human Rights Issue"; "Lesbian Rights: A Strategy for Recognition"; "Women in Popular and Revolutionary Struggles: A Focus on Latin America"; and "Women and Violence: A Case Study of India's Rape Laws." The student organizing committee included a number of individuals who continue to work in women's human rights, including Stacy Brustin, Brenda Cossman, Ratna Kapur, and Suzanne Goldberg.

who were starting to turn their organizations in that direction. The Harvard Human Rights Program supported the conference, and a new generation of students focused on the "possibilities" we referenced in the title of the conference.

That same spring, the first issue of the *Harvard Human Rights Journal* was published. One of its four principal pieces focused on human rights activists in Latin America who were women. In that article, Jennifer Schirmer, who had convened a workshop at the conference on a similar topic, discussed the prominent role women relatives of the disappeared played in Latin American human rights movements.<sup>8</sup> Schirmer demonstrated how these activists had used traditional state valorization of motherhood and family to challenge violations of human rights.<sup>9</sup> Schirmer emphasized that the activists did not see themselves as feminists and were not making women's rights claims. Indeed, the rights they aimed to protect were those of their male children and husbands, or even of the family itself.<sup>10</sup> The article introduced an analysis of gender to the study of human rights, and demonstrated that women were not passive victims but were actively involved in human rights struggles.<sup>11</sup>

When I began writing my law school third-year paper in 1988, a multidisciplinary search for scholarly work on women's human rights only turned up a few articles. Thus it was no surprise that, in its first decade, the *Harvard Human Rights Journal* only published two other volumes that contained pieces explicitly focused on women. In 1993, Celina Romany brought a critical lens to the public/private distinction that some mainstream human rights NGOs had invoked at or in response to our conference,<sup>12</sup> marking the *Journal's* first full-length article on women's human

8. Jennifer G. Schirmer, "Those Who Died for Life Cannot be Called Dead": *Women and Human Rights Protest in Latin America*, 1 HARV. HUM. RTS. Y.B. 41 (1988).

9. *Id.* at 42 ("Using the language of sacrifice and the traditional values associated with motherhood as both political protection and political tools, these women have been willing to take public action during the worst years of repression in Argentina, Guatemala and Chile.")

10. *See id.* at 68 ("All three groups say they are fighting the 'disintegration' and daily dismemberment of families of today and tomorrow: 'The family [is] the basis of society: as wives and mothers we are grieving the insecurity and future of our children and grandchildren.'") (quoting *Abogan por Desaparecidos*, EL GRÁFICO, Aug. 5, 1984).

11. The first volume of the *Journal* also included a short, reflective piece on gender, also by someone who had participated in the conference. Stacy Brustin had returned from a summer in Mexico where she had worked with a women's organization that worked on issues of violence against women. The organization, Brustin maintained, had a lot to offer women's rights advocates in the United States who were also combating rape and domestic violence. Unlike many organizations in the United States that simply provided legal services to individual women, the Mexican organization created grassroots movements to push for social and legal change. Working to raise consciousness about problems facing women in their neighborhoods, the Mexican organization began to re-conceive the crime of rape as a crime against women's integrity. Like Schirmer, Brustin focused on women's activism in Latin America, only Brustin wrote about women who specifically addressed *women's* human rights violations. Stacy Brustin, *La Integridad de la Mujer: Woman and Human Rights in Mexico City*, 1 HARV. HUM. RTS. Y.B. 310, 314 (1988).

12. Celina Romany, *Women as Aliens: A Feminist Critique of the Public/Private Distinction in International Human Rights Law*, 6 HARV. HUM. RTS. J. 87 (1993). The volume also included a "Recent

rights. The *Journal* again addressed women's human rights in the 1996 volume with a piece that explored marriage payments in Zimbabwe.<sup>13</sup>

The second decade of the *Journal* marked a change in the prominence of the discussion of women's human rights. Six of the nine volumes contained at least one piece on women's human rights, and my guess is that the *Journal* did not have to search hard to find the articles. Much of the human rights work in the past decade has involved women's human rights; indeed, the literature on the subject has expanded exponentially.<sup>14</sup> Moreover, as subsequent issues of the *Journal* discuss, women's human rights have become mainstreamed in the United Nations ("U.N."),<sup>15</sup> and feminists have succeeded in increasing the international legal protections against rape and sexual assault.<sup>16</sup> Further, both states and NGOs have at times invoked women's rights to justify military intervention.<sup>17</sup>

Development" on violence against women, Pamela Goldberg & Nancy Kelly, Recent Development, *International Human Rights and Violence Against Women*, 6 HARV. HUM. RTS. J. 195 (1993), and another on women's empowerment and HIV/AIDS, Wendy L. Patten & Andrew J. Ward, Recent Development, *Empowering Women to Stop AIDS in Cote D'Ivoire and Uganda*, 6 HARV. HUM. RTS. J. 210 (1993).

13. Angeline Shenje-Peyton, *Balancing Gender, Equality, Cultural Identity: Marriage Payments in Post-Colonial Zimbabwe*, 9 HARV. HUM. RTS. J. 105 (1996). The same volume also contained an article about sexual orientation and human rights. Laurence R. Helfer & Alice M. Miller, *Sexual Orientation and Human Rights: Toward a United States and Transnational Jurisprudence*, 9 HARV. HUM. RTS. J. 61 (1996).

14. See Karen Knop, *Introduction to GENDER AND HUMAN RIGHTS 1*, 1 (Karen Knop ed., 2004) (citing Rebecca Cook, *The International Right to Nondiscrimination on the Basis of Sex: A Bibliography*, 14 YALE J. INT'L L. 161 (1989); Women's Human Rights Programme, Women's Human Rights Resources, <http://www.law-lib.utoronto.ca/diana/index.htm> (last visited Dec. 10, 2006) (noting that between 1989 and 2003, Rebecca Cook's working bibliography, hosted by the Women's Human Rights Programme website, grew from 142 publications and 10 cases into a website listing 700 articles, 766 legal documents, and 346 links to websites).

15. For a critical examination of this mainstreaming, see Hilary Charlesworth, *Not Waving but Drowning: Gender Mainstreaming and Human Rights in the United Nations*, 18 HARV. HUM. RTS. J. 1 (2005); see also SARI KOUVO, *MAKING JUST RIGHTS? MAINSTREAMING WOMEN'S HUMAN RIGHTS AND A GENDER PERSPECTIVE* (2004).

16. The *Journal's* pieces on this issue were not fully celebratory. See Valarie Oosterveld, *The Definition of Gender in the Rome Statute of the International Criminal Court: A Step Forward or Back for International Criminal Justice?*, 18 HARV. HUM. RTS. J. 55 (2005) (detailing the backlash surrounding the inclusion of the word "gender" in the treaty at the behest of feminists); see also Binaifer Nowrojee, *Making the Invisible War Crime Visible: Post-Conflict Justice for Sierra Leone's Rape Victims*, 18 HARV. HUM. RTS. J. 85, 87 (2005) (arguing "[a]lthough rape and other forms of sexual violence often legally constitute torture, genocide, mutilation and enslavement, they have, with rare exceptions, not been treated with the same seriousness as other war crimes.").

For a critique of the feminist "successes" in this area as "governance feminism," see Janet Halley et al., *From the International to the Local in Feminist Legal Responses to Rape, Prostitution/Sex Work, and Sex Trafficking: Four Studies in Contemporary Governance Feminism*, 29 HARV. J.L. & GENDER 335, 342 (2006) (using the International Criminal Tribunal for the Former Yugoslavia ("ICTY") and the International Criminal Tribunal for Rwanda ("ICTR") as examples of governance feminism); JANET HALLEY, *SPLIT DECISIONS: HOW AND WHY TO TAKE A BREAK FROM FEMINISM* 21 (2006).

17. See Nesiah, *supra* note 2, at 90 (discussing Afghanistan as an instance where feminists and "military hawks" both cited women's rights as a reason to invade); see also Engle, *supra* note 2, at 427, 428 (discussing how the Bush Administration's use of women's human rights to justify the invasion of Afghanistan encountered little opposition from women's human rights organizations).

### B. *Military Humanitarian Intervention*

The past two decades have also seen changes in the attitude toward using force to respond to human rights violations. While “humanitarian purposes” (including saving women) have long been used to justify colonialism and other interventions, today’s human rights NGOs, intergovernmental organizations, and scholars increasingly support military intervention. At the very least, there seems to be a growing consensus that there is an emerging norm of military intervention in instances of genocide, ethnic cleansing, and systematic human rights abuses. The *Journal’s* table of contents over the years is somewhat representative of the trend.

The *Journal* began publishing at the end of the Reagan Administration. Although it published articles both skeptical and supportive of Reagan’s human rights record,<sup>18</sup> there was little discussion of military intervention being justified by human rights or democracy (such as in Nicaragua, Granada, or Panama), or of intervention at all. Even after the Clinton Administration’s Bureau of Democracy, Human Rights, and Labor began to support military intervention to promote human rights and democracy, in Haiti and Bosnia and Herzegovina, for example, the *Journal* did not contain articles on the matter. It took a while for the *Journal’s* scholarship to catch up with the activity on the ground. Its first academic inquiries into humanitarian intervention focused on non-military interventions, such as the international criminal tribunals set up by the Security Council.<sup>19</sup>

The *Journal* did not squarely address military humanitarian intervention until Volume 17 in 2004, after the attack on the U.N. headquarters in Baghdad. Provocative pieces by Nicolas de Torrente,<sup>20</sup> Paul O’Brien,<sup>21</sup> Ken-

18. Compare Richard Schifter, *Building Firm Foundations: The Institutionalization of United States Human Rights Policy in the Reagan Years*, 2 HARV. HUM. RTS. Y.B. 3, 3 (1989) (arguing that the Reagan Administration “institutionalize[d] human rights as an essential element of United States foreign policy”), with Jerome J. Shestack, *An Unsteady Focus: The Vulnerabilities of the Reagan Administration’s Human Rights Policy*, 2 HARV. HUM. RTS. Y.B. 25, 39–45 (1989) (countering that, by trying to limit the definition of human rights to exclude economic and social rights, the Reagan Administration marked a step backward for human rights).

19. See, e.g., Hiraad Abtahi, *The Protection of Cultural Property in Times of Armed Conflict: The Practice of the International Criminal Tribunal for the Former Yugoslavia*, 14 HARV. HUM. RTS. J. 1 (2001) (discussing the destruction of irreplaceable cultural artifacts and historic buildings as a tactic of war and the ICTY’s response); M. Cherif Bassiouni, *From Versailles to Rwanda in Seventy-Five Years: The Need to Establish a Permanent International Criminal Court* 10 HARV. HUM. RTS. J. 11 (1997) (arguing that the frequency of ad hoc international criminal tribunals illustrates the need for a permanent court to ensure that atrocities are punished and to limit the influence of politics on the proceedings); Gerry Azzata, Book Note, *Keeping Up With the War Crimes Tribunal: Human Rights Research in the Twenty-First Century*, 9 HARV. HUM. RTS. J. 323 (1996) (reviewing VIRGINIA MORRIS & MICHAEL P. SCHARF, AN INSIDER’S GUIDE TO THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA: A DOCUMENTARY ANALYSIS (1995), and discussing the need for easier access to materials from the ICTY); Suzanne Katzenstein, Note, *Hybrid Tribunals: Searching for Justice in East Timor*, 16 HARV. HUM. RTS. J. 245, 245–47 (2003) (analyzing the strengths and weaknesses of the “hybrid tribunal,” a judicial system jointly run by the U.N. and the state government).

20. Nicolas de Torrente, *Humanitarian Action Under Attack: Reflections on the Iraq War*, 17 HARV. HUM. RTS. J. 1 (2004).

neth Anderson,<sup>22</sup> and Vasuki Nesiiah<sup>23</sup> went to the heart of many growing concerns about humanitarian intervention and its relationship to military activity, considering what constitutes humanitarian intervention, whether it is necessarily partial and not neutral, and what it might mean to have a “responsibility to protect.”

Perhaps in this sense, the *Journal*'s publications are not as representative of the mounting support of human rights advocates for military intervention as they are of the trend toward the acceptance of women's human rights. Aside from a couple of book reviews, the *Journal* did not chronicle in detail the criticisms of the U.N.'s failure to prevent the Rwandan genocide,<sup>24</sup> nor did it discuss the debates around the North Atlantic Treaty Organization's (“NATO”) intervention in Kosovo and whether those interventions were “legitimate,” if not legal.<sup>25</sup> Finally, no articles covered the 2001 Responsibility to Protect (“R2P”) document, originally authored by an international commission sponsored by the Canadian government and later endorsed by the U.N.<sup>26</sup> In 2004, the *Journal* surpassed the development in enthusiasm for interventions to go straight to the critiques of them. By that time, as the *Journal* articles on the topic indicate, the occupation of Iraq had begun to challenge the meaning of, and enthusiasm for, humanitarian intervention.

I aim for this Article to fill in some of the gap in the *Journal*'s narrative by studying the growth of enthusiasm among human rights advocates for military humanitarian intervention throughout the 1990s and into the be-

21. Paul O'Brien, *Politicized Humanitarianism: A Response to Nicolas de Torrente*, 17 HARV. HUM. RTS. J. 31 (2004).

22. Kenneth Anderson, *Humanitarian Inviolability in Crisis: The Meaning of Impartiality and Neutrality for U.N. and NGO Agencies Following the 2003–2004 Afghanistan and Iraq Conflicts*, 17 HARV. HUM. RTS. J. 41 (2004).

23. Nesiiah, *supra* note 2, at 94.

24. The *Journal* published two reviews of books discussing the U.N.'s failure in Rwanda, one in 1997 and one in 2006, but no articles on the topic. Amos Jones, Book Note, 19 HARV. HUM. RTS. J. 299 (2006) (reviewing STEPHAN LANDSMAN, *CRIMES OF THE HOLOCAUST: THE LAW CONFRONTS HARD CASES* (2005)); Peter Rosenblum, *Dodging the Challenge*, 10 HARV. HUM. RTS. J. 313 (1997) (reviewing DEPARTMENT OF PUBLIC INFORMATION, *THE UNITED NATIONS AND RWANDA, 1993–1996* (1996)). However, two articles tangentially discussed the U.N.'s failure to intervene in Rwanda. See Payam Akhavan, *Enforcement of the Genocide Convention: A Challenge to Civilization*, 8 HARV. HUM. RTS. J. 229, 231–38, (1995) (listing the U.N.'s failure to act in situations such as Rwanda as one of many reasons why the Genocide Convention is ineffective); Kofi A. Annan, *Strengthening United Nations Action in the Field of Human Rights: Prospects and Priorities*, 10 HARV. HUM. RTS. J. 1, 7 (1997) (engaging in brief, mild self-criticism of the U.N.'s failure to act in the face of the Rwandan genocide).

25. For discussions of this debate, see *infra* note 74 and accompanying text.

26. INT'L COMM'N ON INTERVENTION AND STATE SOVEREIGNTY, *THE RESPONSIBILITY TO PROTECT* (2001), available at <http://www.iciss.ca/pdf/Commission-Report.pdf>. For further discussion of this document and the endorsement of its ideas in subsequent U.N. documents, see *infra* notes 36, 37, 76, 77, 81, 105–08, and accompanying text. In 2006, a Recent Developments piece discussed the development of the R2P doctrine, but primarily focused on responses to the report and on R2P in Iraq and Darfur. Rebecca J. Hamilton, Recent Development, *Responsibility to Protect: From Document to Doctrine—But What of Implementation?*, 19 HARV. HUM. RTS. J. 289, 290 (2006) (arguing that Iraq and Darfur show that the “growth in political commitment to the R2P principles” has not yet been matched by “the operational capacity required to meet that commitment”).



gining of the twenty-first century. In 2004, Vasuki Nesiah described the “marriage” of feminists and hawks in the context of the war in Afghanistan.<sup>27</sup> I will consider other stages of that marriage, or at least courtship, beginning with Bosnia and Herzegovina and continuing through the contemporary pleas for intervention in Darfur. Calls for military intervention to respond to rape in Bosnia and Darfur, and the attempts by some to equate rape and genocide, can only be understood in the context of the general trend toward the acceptance of military intervention to protect human rights. The next two Parts outline that trend.

## II. A BUILDING CONSENSUS: “RESPONSIBILITY TO PROTECT”

As human rights and humanitarian advocates have become increasingly enamored of military action to respond to certain systematic human rights violations, they have called for expanded justifications for humanitarian intervention.<sup>28</sup> If troops—especially internationally authorized troops—were called in to protect certain human rights, it would indicate that at least those human rights were being taken seriously. For many “human rights hawks,” as some have begun to call themselves,<sup>29</sup> treaty-based regime mechanisms, U.N. reports and rapporteurs, investigations or condemnation by the Human Rights Council, truth commissions, and international crimi-

27. Nesiah, *supra* note 2, at 90.

28. This enthusiasm for military intervention mirrors the views of policymakers and foreign policy experts in the West more generally. As David Rieff explains:

The enthusiasm in the U.S. Congress during the summer of 2004 to declare that the ethnic cleansing in the western Sudanese region of Darfur constituted genocide in the legal sense of the term; the demand by candidate John Kerry that President Bush go to the UN and help organize a humanitarian military intervention; the support that these demands received in much of Europe; the offer by both Britain and Australia to commit troops to any “humanitarian” deployment: all of these things testified to the extent to which faith in the idea of imposing human rights or alleviating humanitarian suffering norms at the point of a gun remained a powerful and compelling idea.

DAVID RIEFF, *AT THE POINT OF A GUN: DEMOCRATIC DREAMS AND ARMED INTERVENTION* 3 (2006). Indeed, the central argument of Rieff’s book is that “the tendency [toward using force to ensure the prevention of “humanitarian or human rights disasters”] is so widespread that it unites American neoconservatives and human rights activists, humanitarian relief groups and civilian planners in the Pentagon.” *Id.* at 5.

29. Kenneth Roth, Executive Director, Human Rights Watch, and John Shattuck, former U.S. Asst. Sec’y of State for Democracy, Human Rights, and Labor, both use this term to describe themselves. See Fernando Teson, Kenneth Roth & Paige Arthur, *Ending Tyranny in Iraq: A Debate*, Remarks at the Carnegie Council for Ethics and International Affairs (Oct. 6, 2005), available at <http://www.cceia.org/resources/transcripts/5268.html>; John H.F. Shattuck & Joanne J. Myers, *Freedom on Fire: Human Rights Wars and America’s Response*, Remarks at the Carnegie Council for Ethics and International Affairs (Nov. 20, 2003), available at <http://www.cceia.org/resources/transcripts/1078.html>.

While these terms have not been defined anywhere that I could find, a “hawk” is considered to be “a person who advocates an aggressive or warlike policy, especially in foreign affairs.” *THE NEW OXFORD AMERICAN DICTIONARY* 781 (2001). This term is in contrast to a “dove,” which is “a person who advocates peaceful or conciliatory policies, especially in foreign affairs.” *Id.* at 512. Thus, when someone describes herself as a “human rights hawk” or “humanitarian hawk,” she would seem to support military action over negotiation.

nal courts and tribunals would all seem to pale in comparison to the ultimate enforcement regime: military intervention for humanitarian reasons.<sup>30</sup>

This increasing support for forceful humanitarian intervention has pressured some warring factions and their advocates to argue that opponents are committing atrocities worthy of intervention.<sup>31</sup> Humanitarian intervention—which has long relied on neutrality for its legitimacy<sup>32</sup>—is often proposed or encouraged by those who would like to see assistance given to one side of a conflict.<sup>33</sup> Today, such claims are buttressed by an emerging consensus among states and many NGOs that such intervention is justified, if not required, under R2P. The next Part will discuss the various justifications states and NGOs alike offer for humanitarian intervention. The remainder of this Part will describe how the consensus has emerged that, at least in principle, military intervention may be considered a legitimate response to human rights violations.

30. See, e.g., JOHN SHATTUCK, *FREEDOM ON FIRE: HUMAN RIGHTS WARS AND AMERICA'S RESPONSE* 139–40 (2003) (discussing his conclusion as Assistant Secretary of State for Democracy, Human Rights, and Labor in the first part of the Clinton Administration that, while the United States needed to strengthen the power of the ICTY, “the United States would never be able to play more than a limited role in Bosnia so long as the deployment of U.S. ground forces continued to be ruled out.”). *But see id.* at 295–96 (setting forth criteria for limiting instances of such intervention); *id.* at 299–301 (discussing the important role of international criminal justice).

31. Alan Kuperman argues that opposition groups often engage in what he calls “suicidal rebellions,” where they attack under the belief that the international community will intervene militarily to protect them if their actions generate a state response that is viewed as genocide. Alan J. Kuperman, *Suicidal Rebellions and the Moral Hazard of Humanitarian Intervention*, in *GAMBLING ON HUMANITARIAN INTERVENTION: MORAL HAZARD, REBELLION AND CIVIL WAR* 1, 2 (Timothy W. Crawford & Alan J. Kuperman eds., 2006).

32. See, e.g., David Rieff, *Humanitarianism in Crisis*, *FOREIGN AFF.*, Nov.–Dec. 2002, at 111, 120 (asserting that humanitarianism is definitionally neutral or it becomes a “contradiction in terms”). *But see* Anderson, *supra* note 22, at 43 (arguing humanitarian intervention reflects “serious political commitments to democracy, pluralism, and human rights, including the rights of women,” which are “not neutral in nature”); Nesiiah, *supra* note 2, at 80 (stating that since the Cold War, “[e]ven humanitarian workers began to unpack the myth of political neutrality that had been the mainstay of their work in the past.”).

33. Neutrality and impartiality have been important themes surrounding humanitarian intervention. Michael Barnett and Martha Finnemore describe some of the discussions around the issues with regard to the U.N.’s humanitarian missions:

Consider the conflict between the UN’s humanitarian missions and the value it places on impartiality and neutrality. Within the organization there are many who view impartiality as a core constitutive principle of UN action. On the one hand, the UN’s moral standing, its authority, and its ability to persuade all the rest on this principle. On the other hand, the principles of humanitarianism require the UN to give aid to those in need—values that are particularly strong in a number of UN relief and humanitarian agencies. These two norms of neutrality and humanitarian assistance, and the parts of the bureaucracy most devoted to them, come into direct conflict in those situations where providing humanitarian relief might jeopardize the UN’s vaunted principle of neutrality.

Michael N. Barnett & Martha Finnemore, *The Politics, Power, and Pathologies of International Organizations*, 53 *INT’L ORG.* 699, 724–25 (1999); see also *supra* notes 20–23 (referencing 2004 articles in the *Journal*).

Similarly, many human rights NGOs have grappled with whether support for humanitarian intervention compromises their status as neutral organizations, a status which lends them institutional legitimacy. See *infra* notes 43–56 and accompanying text.

### A. R2P and the Emerging Consensus Among States

Contemporary discussions about humanitarian intervention followed the U.N.'s failure to prevent genocide in Rwanda and NATO's unauthorized attack on Kosovo. In his report to the 2000 U.N. General Assembly, then-Secretary-General Kofi Annan "challenged the international community to try to forge consensus, once and for all, around the basic questions of principle and process involved: when should intervention occur, under whose authority, and how."<sup>34</sup> Annan urged states to

think afresh about how we manage our joint activities and our shared interests, for many challenges that we confront today are beyond the reach of any state to meet on its own. . . . We must . . . adapt international institutions . . . to the realities of the new era. We must form coalitions for change, often with partners well beyond the precincts of officialdom.<sup>35</sup>

Nearly seven years later, there seems to be a relatively clear consensus that Security Council intervention is justified in instances of genocide.

Support is also burgeoning for the position that intervention is justified in response to other crimes against humanity, as evidenced by the Outcome Document of the 2005 World Summit. In that document, the General Assembly pledged its commitment to R2P:

[W]e are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities manifestly fail to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity.<sup>36</sup>

Political scientists often speak of the "emerging norm of intervention,"<sup>37</sup> which they base partly on U.N. statements over the past few years. The Report of the Secretary-General's High-level Panel on Threats, Challenges, and Change, for example, stated in 2004:

34. See International Commission on Intervention and State Sovereignty, *Annan Calls for Endorsement of Responsibility to Protect*, <http://www.iciss.ca/menu-en.asp> (paraphrasing the remarks of the Secretary-General) (last visited Jan. 26, 2006).

35. The Secretary-General, *Millennium Report of the Secretary-General, We the Peoples: The Role of the United Nations in the Twenty-first Century*, 7, U.N. Doc. A/54/2000 (Apr. 3, 2000), available at <http://www.un.org/millennium/sg/report/full.htm>.

36. 2005 World Summit Outcome, G.A. Res. 60/1, ¶ 139, U.N. Doc. A/RES/60/1 (Oct. 24, 2005).

37. See, e.g., Kuperman, *supra* note 31, at 1 (citing in part Nicholas J. Wheeler, *The Humanitarian Responsibilities of Sovereignty: Explaining the Development of a New Norm of Military Intervention for Humanitarian Purposes in International Society*, in *HUMANITARIAN INTERVENTION AND INTERNATIONAL RELATIONS* 29 (Jennifer M. Welsh, ed., 2004)).

We endorse the emerging norm that there is a collective international responsibility to protect, exercisable by the Security Council authorizing military intervention as a last resort, in the event of genocide and other large-scale killing, ethnic cleansing or serious violations of international humanitarian law which sovereign Governments have proved powerless or unwilling to prevent.<sup>38</sup>

The General Assembly's statement in the Outcome Document would also seem to endorse that position.<sup>39</sup>

### B. Human Rights, NGOs, and Military Intervention

Many international human rights and humanitarian NGOs that support R2P celebrated the General Assembly's 2005 commitment to that principle. The World Federalist Movement's Responsibility to Protect project, for example, runs an ongoing headline on its website that reads, "R2P: Now an International Doctrine."<sup>40</sup> The World Federalist Movement is, of course, not alone among human rights NGOs in its assumption that humanitarian intervention is an accepted—or at least emerging—norm, and that such a development is welcome.<sup>41</sup>

This increasing support for military intervention in certain circumstances is a new position for many of these NGOs. To the extent that these groups had previously been involved with military issues, their focus had been on ensuring that all sides to a conflict respected *jus in bello*, or international humanitarian law during war, rather than exploring *jus ad bellum*, or whether a war itself is just. But times have changed, as Human Rights Watch ("HRW") Executive Director Kenneth Roth explains: "Ordinarily, Human Rights Watch stays completely away from *jus ad bellum*. The only exception we make to get into that is on the question of humanitarian intervention, because it's a human rights question."<sup>42</sup> Thus, in recent years, human rights and humanitarian organizations have struggled to create guidelines for when and how they might support military intervention. I consider below the changing positions of a number of such organizations, including HRW, Amnesty International ("AI"), the International Com-

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38. The Secretary-General, *Report of the Secretary-General's High-level Panel on Threats, Challenges, and Change*, 57, ¶ 203, delivered to the General Assembly, U.N. Doc. A/59/565 (Dec. 2, 2004) [hereinafter *High-level Panel*] (discussing when the Security Council can and should intervene to protect peace and security).

39. 2005 World Summit Outcome, *supra* note 36, at ¶¶ 138–40.

40. See Responsibility to Protect: Engaging Civil Society, <http://www.responsibilitytoprotect.org/> (last visited Dec. 22, 2006).

41. For a list of NGOs that support R2P, see Civil Society Participants, <http://www.responsibilitytoprotect.org/index.php/pages/17?page=3&theme=alt1> (last visited Dec. 22, 2006). The list includes Human Rights Watch, Amnesty International, and Oxfam International Advocacy, among dozens of others.

42. Teson et al., *supra* note 29, at 8.

mission of Jurists ("ICJ"), the International Committee of the Red Cross ("ICRC"), and CARE International.

In 1995, when officials of the Clinton State Department were trying to build support for deploying U.S. troops as part of a NATO peacekeeping mission in Bosnia and Herzegovina, human rights NGOs in the United States resisted their efforts. As John Shattuck described it:

A decade earlier, Amnesty had sharply criticized human rights atrocities arising from the U.S. military role in Nicaragua and other parts of Central America, and now it was reluctant to embrace a different kind of U.S. military intervention to protect human rights in Bosnia. Amnesty had no policy on military intervention, [Washington director Jim] O'Dea said. That was also true of the other major organizations like Human Rights Watch and the Lawyer's Committee for Human Rights that were following the Balkans.<sup>43</sup>

Samantha Power specifically criticized the position of Helsinki Watch, HRW's predecessor in Europe, during this time:

[Helsinki Watch] criticized both the perpetrator state *and* the Western powers that were doing so little to curb the killing. But for all of their outrage, many individuals within the organization were uncomfortable appealing to the United States to use armed force . . . . [W]hen it came to the question of military intervention, it punted:

"It is beyond the competence of Helsinki Watch to determine all the steps that may be required to prevent and suppress the crime of genocide. It may be necessary for the United Nations to employ military force to that end. It is not the province of Helsinki Watch to determine whether such force is required. Helsinki Watch believes that it is the responsibility of the Security Council to address this question."

The Security Council was made up of countries, including the United States, steadfastly opposed to using armed force.<sup>44</sup>

While HRW did not necessarily oppose Security Council Chapter VII use of force, it did not endorse it or lobby the body to intervene militarily (although it did encourage it to intervene in other ways, such as by establishing the International Criminal Tribunal for the Former Yugoslavia ("ICTY")). And it certainly did not push individual states to use force in the absence of Security Council approval.

43. SHATTUCK, *supra* note 30, at 199.

44. SAMANTHA POWER, *A PROBLEM FROM HELL: AMERICA AND THE AGE OF GENOCIDE* 258 (2002) (quoting HELSINKI WATCH, *1 WAR CRIMES IN BOSNIA-HERZEGOVINA* 2 (1992)).

Sometime during the war in Bosnia and Herzegovina, HRW began to support military intervention. In 1993, Helsinki Watch and HRW called for the use of force to ensure that humanitarian aid was successfully delivered.<sup>45</sup> While the organizations' policies at the time appear to have supported force only to ensure the delivery of aid, in retrospect, HRW Executive Director Kenneth Roth claims that the organization has had a "longstanding policy on the subject," which he sees as "[u]nusual among human rights groups":<sup>46</sup>

War often carries enormous human costs, but we recognize that the imperative of stopping or preventing genocide or other systematic slaughter can sometimes justify the use of military force. For that reason, Human Rights Watch has on rare occasion advocated humanitarian intervention, for example, to stop ongoing genocide in Rwanda and Bosnia.<sup>47</sup>

Roth has continued to put forth this position, even in his refusal to justify invading Iraq without proof of genocide by Saddam Hussein.<sup>48</sup> The task for the organization would no longer seem to be whether military intervention can be justified by humanitarian reasons in general, but which specific conditions justify intervention.

AI, too, has been revisiting its position (or lack thereof) on the use of armed force for humanitarian purposes. Until recently, its general stance has been that "Amnesty International is an independent and impartial human rights organization that generally takes no position on the desirability or otherwise of particular military interventions or other forms of armed conflict, other than to demand that all participants must respect international human rights and humanitarian law."<sup>49</sup> AI's new draft guidelines on the use of force, however, flesh out a position that permits it both to oppose and to support intervention in certain circumstances:

In exceptional circumstances, taking full account of its country strategies, commitment to women's human rights, and other relevant considerations, Amnesty International may: oppose the use or threat of use of military intervention that is particularly likely to lead to an increase in human rights abuses; call for or endorse

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45. HUMAN RIGHTS WATCH & HELSINKI WATCH, WORLD REPORT 1994 (1994), available at [http://www.hrw.org/reports/1994/WR94/Helsinki-04.htm#P128\\_48297](http://www.hrw.org/reports/1994/WR94/Helsinki-04.htm#P128_48297) ("On January 14, Helsinki Watch and Human Rights Watch sent a letter to U.N. Secretary-General Boutros-Ghali asking that the UN-PROFOR mandate in Bosnia be expanded to allow for the use of force to ensure delivery of humanitarian aid.")

46. Kenneth Roth, *War in Iraq: Not a Humanitarian Intervention*, in HUMAN RIGHTS WATCH, WORLD REPORT 2004: HUMAN RIGHTS AND ARMED CONFLICT 13 (2004), available at <http://www.hrw.org/wr2k4/3.htm>.

47. *Id.*

48. See *supra* note 29.

49. AMNESTY INT'L, DRAFT GUIDELINES ON THE USE OF ARMED FORCE AND MILITARY INTERVENTION (2006).

ceasefires or urge the parties to a conflict to negotiate; call for the use of armed force (including military or law-enforcement forces) to alleviate, prevent or end imminent or on-going widespread and grave abuses of international human rights or humanitarian law (such as genocide, crimes against humanity, and war crimes), or the actual threat of such a situation . . . .<sup>50</sup>

A report presented during AI's discussion on changing its guidelines quotes then-Secretary-General Kofi Annan as saying that "[t]he fact that we cannot protect people everywhere is no reason for doing nothing when we can. Armed intervention must always remain the option of last resort but in the face of mass murder it is an option that cannot be relinquished."<sup>51</sup>

Other human rights organizations, while not necessarily totally revamping their position on the subject, have supported military intervention in particular situations. The ICJ, for example, apparently seeing no conflict with "its impartial, objective and authoritative legal approach to the protection and promotion of human rights through the rule of law,"<sup>52</sup> supported NATO's intervention in Kosovo. After calling on the Security Council to adopt measures under Chapter VII, the ICJ concluded: "If such measures remain ineffective, on the basis of Article 42 of the U.N. Charter, the only way to stop President Milosevic's wanton reign of terror in Kosovo is for the international community to live up to its responsibilities and intervene in Kosovo in order to protect innocent civilian lives."<sup>53</sup> Note that the organization not only supported intervention, but believed it might be required.<sup>54</sup>

50. *Id.*

51. AMNESTY INT'L, STUDY ON THE USE OF FORCE AND MILITARY INTERVENTION. PART 2: INITIAL OPTIONS PAPER 7 (2004) (quoting *Millennium Report of the Secretary-General*, *supra* note 35).

52. International Commission of Jurists, *About Us*, [http://www.icj.org/rubrique.php?id\\_rubrique=11&lang=en](http://www.icj.org/rubrique.php?id_rubrique=11&lang=en) (last visited Dec. 22, 2006).

53. Press Release, International Commission of Jurists, *Serbia and Montenegro—ICJ Calls for International Intervention in Kosovo and Sanctions on Serbia* (Sept. 30, 1998), *available at* [http://www.icj.org/news.php?id\\_article=3331&lang=en](http://www.icj.org/news.php?id_article=3331&lang=en).

54. Other human rights and humanitarian organizations have begun to take similar positions. The International Committee of the Red Cross ("ICRC"), for example, has historically taken what it considers a position of neutrality regarding its willingness to support military humanitarian intervention, maintaining "[i]nternational humanitarian law cannot serve as a basis for armed intervention in response to grave violations of its provisions; the use of force is governed by the United Nations Charter." Anne Ryniker, *The ICRC's Position on Humanitarian Intervention*, 482 INT'L R. RED CROSS 527-32 (2001), *available at* <http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/57jr5y?opendocument>. Whether neutrality is the best policy, however, has been a question debated by the Red Cross in recent years. In 1994, the organization spoke out for the first time in support of military intervention to stop the mass killing taking place in Rwanda. Denise Delvaux, *The Politics of Humanitarian Organizations: Neutrality and Solidarity* (2005) (master's thesis), *available at* <http://eprints.ru.ac.za/146/01/delvaux-ma.pdf>. While not going as far as Amnesty to amend its policy to allow specifically for support of the use of force, even the ICRC, among the most dedicated to neutrality of the humanitarian NGOs, sometimes supports the use of force.

More recently, CARE International pushed for humanitarian intervention in Afghanistan under R2P.<sup>55</sup> In a press release, CARE President Porter Bell stated that “[t]he military can be crucial in facilitating humanitarian assistance,” but was careful to separate the role of peacekeepers from that of the U.S. military, adding that “it will be absolutely critical to maintain a very clear distinction between forces of the U.S.-led Coalition and any separate force deployed for peace-keeping or humanitarian purposes.”<sup>56</sup>

Debates over the invasion of Iraq also demonstrate wide acceptance of the emerging norm of intervention. States and NGOs alike have generally opposed the invasion on one or several grounds. These groups see the invasion as illegal because it lacked Security Council authorization, was not a credible act of self-defense, and failed to meet the standards for justification set forth in R2P and similar documents. Thus, the focus of inquiry has shifted. When military intervention is justified, when it is required, who is permitted (or required) to use military force, and how much of it is permissible are the most significant issues for consideration today. The next Part considers the dominant responses to the first two questions, laying the groundwork for an analysis of the role that some women’s human rights advocacy has played in the determination of those responses.

### III. INTERNATIONAL LAW, THE UNITED NATIONS CHARTER, AND JUSTIFICATIONS FOR INTERVENTION

Many states, international organizations, and international legal scholars and practitioners have begun to call for an expansion of the permissible uses of force beyond those explicitly outlined in the U.N. Charter. Some have called for international legal acceptance of military intervention to respond to certain violations of human rights and humanitarian law. Genocide, ethnic cleansing, and mass human rights violations are the most commonly cited justifications, with genocide constituting the one atrocity that most would agree warrants, if not requires, military intervention.<sup>57</sup>

This Part revisits the U.N. Charter and the justifications for military action that the Charter was seen (or argued) to contain through the Cold War. It then turns to justifications given more recently to support or even require military action authorized by the Security Council or, in some instances, by states individually or collectively when the Security Council fails

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55. Nesiah, *supra* note 2, at 94.

56. Press Release, CARE International, CARE Outlines the Role of International Forces to Protect and Assist Afghan People (Nov. 30, 2001), *available at* [http://www.care.org/newsroom/articles/2001/11/11302001\\_afghanistan.asp?](http://www.care.org/newsroom/articles/2001/11/11302001_afghanistan.asp?)

57. Kenneth Roth, for example, has suggested an exception to his own argument that “true” motive must be used for legitimate justification of humanitarian intervention: “That said, if Saddam were committing genocide in March 2003, I would have no qualms about urging the U.S. to intervene. ‘Dirty hands’ is not much of an answer when people are being killed.” Teson et al., *supra* note 29, at 2.



to intervene. This latter discussion mirrors that of many of the justifications offered by human rights groups in the previous Part.

#### A. *The U.N. Charter and Use of Force During the Cold War*

As a general rule, the U.N. Charter protects territorial sovereignty and limits the use of force.<sup>58</sup> Article 2(3) of the Charter states: "All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered."<sup>59</sup> Article 2(4) reads, "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."<sup>60</sup>

The Charter contains two exceptions to this general prohibition on the use of force. Article 51 recognizes the rights of individual states to use military action for the purpose of self-defense without Security Council authorization,<sup>61</sup> and Article 42 permits the Security Council to authorize use of force when it determines that measures short of force have not been able to respond adequately to a threat to international peace and security.<sup>62</sup>

During the Cold War, it was nearly impossible for a state to receive Security Council authorization for its use of force, but that did not mean that the U.N. Charter did not permit it. As David Kennedy emphasizes, "The United Nations legal order prohibited war—except as authorized by the U.N. Charter. That is the key point: not as authorized *by the U.N.*, but as authorized by the Charter."<sup>63</sup> Thus, states have long justified their use of force as self-defense. Indeed, the number of military hostilities in the first twenty-five years of the Charter led Tom Franck to declare the death of Article 2(4) in 1970.<sup>64</sup> Over time, self-defense claims took a variety of forms and received mixed responses.<sup>65</sup> As Franck noted in 2002, thirty-two years after his Article 2(4) death pronouncement, a number of geopolitical developments "combined to make unworkable a strictly literal interpreta-

58. For a discussion of the recent emergence of limits to territorial sovereignty in international law, see Hamilton, *supra* note 26.

59. U.N. Charter art. 2, ¶ 3.

60. *Id.* art. 2, ¶ 4.

61. *Id.* art. 51.

62. *Id.* art. 42.

63. DAVID KENNEDY, *OF WAR AND LAW* 79 (2006).

64. Tom M. Franck, *Who Killed Article 2(4)? Or: Changing Norms Governing the Use of Force by States*, 64 AM. J. INT'L L. 809 (1970). Louis Henkin responded to Franck's piece almost immediately with a commentary in the *American Journal of International Law*. See Louis Henkin, *The Reports of the Death of Article 2(4) Are Greatly Exaggerated*, 65 AM. J. INT'L L. 544 (1971). For a discussion of Franck's position and the debate it engendered, see Mary Ellen O'Connell, *Re-Leashing the Dogs of War*, 97 AM. J. INT'L L. 446, 447–49 (2003).

65. See generally TOM FRANCK, *RECOURSE TO FORCE* (2002) (delineating among those arguments for self-defense based on terrorism, ideological subversion, and attacks on civilians abroad, as well as among those arguments based on anticipatory self-defense, "self-help," and "purely humanitarian" intervention).

tion of the Charter's collective security system. Instead, the member states, in applying the Charter, have interpreted it to accord with changing circumstances and social values."<sup>66</sup> Kennedy asserts that the interpretive exercises were so successful that "it was hard to think of a use of force that *could not* be legitimated in the Charter's terms."<sup>67</sup>

In the Cold War years following the U.N. Charter, a practice of "humanitarian intervention" emerged. In many instances, states would claim to be protecting their own citizens in other countries or guarding their borders from refugee flows (both forms of self-defense),<sup>68</sup> but began to include humanitarian concerns as an additional justification. Interventions that were justified to some extent on humanitarian grounds included Belgium in the Congo in 1960, the United States in the Dominican Republic in 1965 and Panama in 1989, India in East Pakistan (Bangladesh) in 1971, and France in Central Africa in 1979.<sup>69</sup> Even during this time period, states continued to seek international approval for their actions through, for example, the U.N. General Assembly's "Uniting for Peace" resolution passed in 1950. That resolution, introduced by the United States, allows the General Assembly to recommend collective responses to breaches to peace and security about which the Security Council's permanent members have failed to find unanimous agreement.<sup>70</sup>

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66. *Id.* at 21 (naming the geopolitical developments, including "the unexpected momentum, powered by public opinion, of concern for decolonization and human rights: the 'justice' factor subordinated at San Francisco in 1945 by security concerns").

67. KENNEDY, *supra* note 63, at 80.

68. As Jonathan Charney has explained:

Unfortunately, humanitarian intervention is not an exception to the Charter prohibitions on the use of force. No reference to such a right is found in the Charter . . . . Most situations in which this theory is arguably applied actually involve actions by states to protect their citizens abroad from alleged mortal danger. Such intervention probably falls under the doctrine of self-defense.

Jonathan I. Charney, *Anticipatory Humanitarian Intervention in Kosovo*, 32 VAND. J. TRANSNAT'L L. 1231, 1235 (1999) (mentioning the U.S. intervention in the Dominican Republic in 1965 and Belgium's in the Congo in 1960).

69. For an example of the invocation of humanitarian justifications for such invasions, see *infra* note 95. For a short discussion of "humanitarian interventions" from 1945–1989, see A. Mark Weisburd, *Humanitarian Intervention, 1945–1989*, in AMERICAN DIPLOMACY (2001), [http://www.unc.edu/depts/diplomat/archives\\_rol/2001\\_07-09/hum\\_intervention/hum\\_04\\_weisburd.html#Anchor\\_bio](http://www.unc.edu/depts/diplomat/archives_rol/2001_07-09/hum_intervention/hum_04_weisburd.html#Anchor_bio).

70. Uniting for Peace, G.A. Res. 377, U.N. Doc. A/Res/377 (Nov. 3, 1950). For a discussion of the passage and subsequent use of the resolution, which ultimately led to significant blue helmet presence, see FRANCK, *supra* note 65, at 33–40; see also Hamilton, *supra* note 26, at 294, (discussing briefly the potential for using Uniting for Peace resolutions in these circumstances). Although the Uniting for Peace Resolution has never been used in combination with R2P, it has been invoked ten times since 1950. Duncan Currie, *Convening an Emergency Session of the General Assembly Under the 'Uniting for Peace' Resolution 377(A)(V)* (Feb. 25, 2003), <http://www.greenpeace.org/raw/content/international/press/reports/uniting-for-peace-resolution.pdf>; see also Michael Ratner & Jules Lobel, A U.N. Alternative to War: "Uniting for Peace" (Feb. 10, 2003), available at <http://jurist.law.pitt.edu/forum/forumnew95.php> (discussing the resolution's use during the Suez Canal crisis when the United Kingdom and France vetoed a cease fire and to rebuke Russia for military action in Hungary in 1956).

The Uniting for Peace Resolution has been making a comeback today as its use has been proposed both by those supporting interventions unauthorized by the Security Council and those opposing them. The Center for Constitutional Rights, for example, attempted to get states to use the resolution to

### B. *Military Intervention Justified After the End of the Cold War*

With the end of the Cold War, a new role for international institutions emerged. It was imagined that the stalemates that created inaction by the Security Council due to the veto, or threat of veto, would dissipate. In principle, the Security Council would determine whether breaches to peace and security existed that could not be adequately attended to with peaceful means and, if so, would intervene with peacekeeping forces or other military intervention it deemed appropriate. Such use of force would fit securely under Article 42. In the 1990s, the Security Council did in fact authorize an unprecedented number of peacekeeping and peacebuilding missions, including some under Article 42, in countries such as Haiti, Bosnia, Somalia, and Rwanda.<sup>71</sup> As Nathaniel Berman cautions, the Security Council's ability to eventually reach unanimous agreement to intervene in these cases should not be confused with a strong, coherent "international community" during the period; instead, "[w]ords like Srebrenica and Rwanda should be enough to remind us of internationalism's *incoherence* during that period, due to the selectivity of its attentions."<sup>72</sup>

In fact, the Security Council also refused to intervene militarily on a number of occasions, most notably in Kosovo, leading to a crisis of its own sort for liberal internationalists. Berman continues: "Words like Kosovo should remind us of [internationalism's] uncertain *status*, due to the intermittence of respect shown by states to the need to subordinate their action to the authority of the formally constituted international community."<sup>73</sup> The crisis was not simply over what to do when the Security Council refused to intervene, but how to respond to the fact that NATO eventually intervened militarily without Security Council authorization. Many argued that NATO's intervention was both "illegal" and "legitimate," a conclusion most famously reached in the Goldstone Commission's independent report on Kosovo.<sup>74</sup> Initially, such a conclusion led to calls for an amend-

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oppose U.S. intervention in Iraq. Press Release, Center for Constitutional Rights, Center for Constitutional Rights Urges General Assembly to Prevent War: *Nations Have Power To "Maintain Peace" Under "Uniting For Peace" Resolution When Security Council Fails To Act* (Jan. 27, 2003), <http://www.ccr-ny.org/v2/newsroom/releases/pReleases.asp?ObjID=TA4sn9vT2F&Content=180>. For a list of other organizations that pressed for a Uniting for Peace Resolution in response to the impending invasion of Iraq and a discussion of U.S. reaction to this effort, see Jeremy Brecher, *Uniting for Peace*, Global Policy Forum (March 20, 2003), <http://www.globalpolicy.org/security/issues/iraq/attack/armtwist/2003/0320unitingfor.htm> (including Greenpeace, a group of women's rights organizations that met in New Delhi, and the Vatican).

71. For a unique on-the-ground critique of some of these missions, see KENNETH CAIN, HEIDI POSTLEWAIT & ANDREW THOMSON, *EMERGENCY SEX AND OTHER DESPERATE MEASURES: A TRUE STORY FROM HELL ON EARTH* (2004).

72. Nathaniel Berman, *Intervention in a 'Divided World': Axes of Legitimacy*, 17 EUR. J. INT'L L. 743, 745 (2006).

73. *Id.*

74. THE INDEP. INT'L COMM'N ON KOSOVO, *KOSOVO REPORT 4* (2000), available at <http://www.reliefweb.int/library/documents/thekosovoreport.pdf> ("The Commission concludes that the NATO military intervention was illegal but legitimate. It was illegal because it did not receive prior approval from

ment to the U.N. Charter.<sup>75</sup> Support for an amendment seems to have diminished over the past few years, however, with attempts to interpret breaches to peace and security as sufficient bases for such intervention.<sup>76</sup>

Disagreements continue over whether collective or individual actions by states should, or even must, be taken in certain circumstances when the Security Council has failed to act.<sup>77</sup> For the most part, I will not address

the United Nations Security Council. However, the Commission considers that the intervention was justified because all diplomatic avenues had been exhausted and because the intervention had the effect of liberating the majority population of Kosovo from a long period of oppression under Serbian rule.”).

The literature on Kosovo is vast. See, e.g., Michael J. Matheson, *United Nations Governance of Postconflict Societies*, 95 AM. J. INT’L L. 76 (2001); Bruno Simma, *NATO, the U.N. and the Use of Force: Legal Aspects*, 10 EUR. J. INT’L L. 1 (1999); John Yoo, *Kosovo, War Powers, and the Multilateral Future*, 148 U. PA. L. REV. 1673 (2000); Christine M. Chinkin, Editorial Comment, *Kosovo: A ‘Good’ or ‘Bad’ War?*, 93 AM. J. INT’L L. 841, 846 (1999). For a discussion of the debate over legitimacy itself, see Koskeniemi, *supra* note 3.

75. Such was the proposal of the Independent International Commission on Kosovo itself:

The Commission is of the opinion that the best way to [close the gap between legality and legitimacy] is to conceive of an emergent doctrine of humanitarian intervention that consists of a process of three phases:

- a recommended framework of principles useful in a setting where humanitarian intervention is proposed as an international response and where it actually occurs;
- the formal adoption of such a framework by the General Assembly of the United Nations in the form of a Declaration on the Right and Responsibility of Humanitarian Intervention, accompanied by UNSC interpretations of the UN Charter that reconciles such practice with the balance between respect for sovereign rights, implementation of human rights, and prevention of humanitarian catastrophe;
- the amendment of the Charter to incorporate these changes in the role and responsibility of the United Nations and other collective actors in international society to implement the Declaration on the Right and Responsibility of Humanitarian Intervention.

THE INDEPENDENT INTERNATIONAL COMMISSION ON KOSOVO, *supra* note 74, at 187.

76. As explained by the 2005 U.N. Secretary-General Report:

Where threats are not imminent but latent, the Charter gives full authority to the Security Council to use military force, including preventively, to preserve international peace and security. As to genocide, ethnic cleansing and other such crimes against humanity, are they not also threats to international peace and security, against which humanity should be able to look to the Security Council for protection?

The Secretary-General, *Report of the Secretary-General, In Larger Freedom: Towards Development, Security and Human Rights for All*, U.N. GAOR, 59th Sess., ¶ 125, U.N. Doc. A/59/2005 (Mar. 21, 2005) [hereinafter *In Larger Freedom*], available at [http://www.ohchr.org/english/Bodies/hrcouncil/docs/gaA.59.2005\\_En.pdf](http://www.ohchr.org/english/Bodies/hrcouncil/docs/gaA.59.2005_En.pdf).

The report goes on to suggest that the Security Council outline the circumstances under which it would authorize humanitarian intervention:

When considering whether to authorize or endorse the use of military force, the Council should come to a common view on how to weigh the seriousness of the threat; the proper purpose of the proposed military action; whether means short of the use of force might plausibly succeed in stopping the threat; whether the military option is proportional to the threat at hand; and whether there is a reasonable chance of success . . . . I therefore recommend that the Security Council adopt a resolution setting out these principles and expressing its intention to be guided by them when deciding whether to authorize or mandate the use of force.

See *id.* ¶ 126.

77. *In Larger Freedom*, for example, makes its position clear: “The task is not to find alternatives to the Security Council as a source of authority but to make it work better.” *Id.* ¶ 126.

these rather significant disagreements here.<sup>78</sup> Whether stated in the context of justifications for Security Council use of force or state or collective force in instances in which the Security Council has chosen not to act, many seem to agree that genocide, ethnic cleansing (sometimes equated with genocide), crimes against humanity, and mass human rights violations are possible triggers for intervention.<sup>79</sup> The R2P document is arguably a bit narrower, focusing on mass killings done “with genocidal intent or not” and on large-scale “ethnic cleansing,” which may be carried out by acts of rape.<sup>80</sup> The 2005 World Summit Outcome document stated that “[e]ach individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity.”<sup>81</sup>

These latter documents, outlining when the Security Council has an obligation to act (but not when states may use force in the absence of such authorization), deliberately expanded the list of justifications beyond genocide.<sup>82</sup> Yet, as the current debate over intervention in Darfur demonstrates, both those who call for and those who oppose intervention in a particular situation continue to see the power of a finding of genocide. Genocide is particularly useful as a justification when the Security Council has refused to intervene. The next Part of this Article will discuss how some feminists used claims of genocide to encourage intervention in Bosnia and Herzegovina during the early 1990s. Before turning there, however, this section will study more generally the meaning and use of genocide both before and after its feminist uses in the 1990s. It will also consider the deployment of claims of ethnic cleansing and other mass human rights violations as bases for intervention.

### 1. *Genocide*

If there were one instance that most would agree warrants intervention—even in the absence of Security Council action—it would be genocide. Ge-

78. It is quite possible that a correlation could be found between one's position on what situations would justify intervention and that same person's view on who is authorized to conduct the intervention. My hunch, for example, is that one would be willing to accept a more expansive list of justifications if one were to argue that the Security Council had the sole authority to intervene.

79. See *supra* notes 36, 38, 47, and 50 and accompanying text.

80. THE RESPONSIBILITY TO PROTECT, *supra* note 26, ¶ 4.19. The document states:

[M]ilitary intervention for human protection purposes is justified in two broad sets of circumstances, namely in order to halt or avert:

- large scale loss of life . . . with genocidal intent or not, which is the product either of deliberate state action, or state neglect or inability to act, or a failed state situation; or
- large scale “ethnic cleansing,” . . . whether carried out by killing, forced expulsion, acts of terror or rape.

These limitations, however, have not assuaged critics who believe that R2P can easily be used to justify neocolonial intervention. See Hamilton, *supra* note 26, at 293 (citing Mohammed Ayoob, *Third World Perspectives on Humanitarian Intervention and International Administration*, 10 GLOBAL GOVERNANCE 99, 115 (2004)).

81. 2005 World Summit Outcome, *supra* note 36.

82. See *supra* notes 26, 36.

nocide in Rwanda prompted the U.N. to revisit its understanding of what constitutes a “breach of peace and security,” and the argument that genocide was occurring in Kosovo (itself a contested proposition) fueled a justification for NATO intervention. The slogan “Never Again” invokes the Holocaust and World War II, indicating that, even though we had hoped to have installed an international criminal and human rights regime to prevent further genocides, we know there are times when we must resort to force when all else fails. Because genocide is the most agreed-upon basis for intervention, the definition of genocide has become contested, and advocates for intervention have spent much energy attempting to convince potential interveners that military assistance is necessary to respond to or prevent genocide.

In Bosnia and Herzegovina, the question of whether what was happening could be considered genocide was central to determining the role the United States would play in promoting military intervention. Samantha Power details the debate surrounding the “g-word”<sup>83</sup> in the early 1990s and notes that opponents of intervention were careful not to discuss the conflict in terms of genocide. Indeed, “[t]he Bush administration assiduously avoided using the word. ‘Genocide’ was shunned because a genocide finding would create a moral imperative.”<sup>84</sup> As a result, officials opposing intervention spoke in terms of ethnic cleansing: “[National Security Advisor] Scowcroft believes genocide would have demanded a U.S. response, but ethnic cleansing, which is the label he uses for what occurred in Bosnia, did not . . . .”<sup>85</sup> Scowcroft explained that “there is something of a national interest in preventing genocide because the United States needs to appear to be upholding international law.”<sup>86</sup> For Scowcroft, at least, ethnic cleansing would not require the same response.

This reluctance to label the Bosnian conflict genocide resurfaced during Clinton Administration’s treatment of both Bosnia and Rwanda. John Shattuck, then-Assistant Secretary of State for Democracy, Human Rights, and Labor, has since explained:

The genocide debate, which had begun in the Bush administration and would be repeated in the spring of 1994 in the case of Rwanda, reflected the reluctance of U.S. policymakers to confront the responsibility of countries that had ratified the Genocide Convention “to prevent and punish” crimes determined to constitute genocide. For this reason I could not get State Depart-

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83. POWER, *supra* note 44, at 290 (referring to the debate surrounding whether to label the conflict in the Balkans a genocide as “the ‘g-word’ controversy”).

84. *Id.* at 288.

85. *Id.*

86. *Id.* at 289.

ment clearance to use the term “genocide” to describe what was happening in Bosnia or Rwanda.<sup>87</sup>

As an illustration of this general equation of “genocide” and the responsibility to intervene, both Shattuck and Power refer to a State Department memorandum in 1994 that cautioned against investigating the possibility of Genocide Convention violations: “Be careful. Legal at State was worried about this yesterday—genocide finding could commit the U.S. government to actually ‘do something.’”<sup>88</sup> Shattuck notes, “Although this memo mischaracterizes the State Department Legal Adviser’s objection to official use of the term ‘genocide’ as based on ‘legal’ rather than ‘policy’ issues, it certainly reflects the bureaucracy’s nervousness over the issue.”<sup>89</sup>

If avoiding the label of genocide is a way to prevent intervention, the opposite is also true: calling something genocide is a way to *require* intervention. Thus when the U.S. Congress declared in the summer of 2004 that ethnic cleansing in Darfur constituted genocide,<sup>90</sup> presidential candidate John Kerry demanded that President Bush organize a U.N. military intervention. Eventually, the Bush Administration called the events in Darfur “genocide” and began to pressure the U.N. to do the same.<sup>91</sup> Of course, by that time, Iraq had cost the Bush Administration a significant amount of credibility, and the United States likely was unable to provide the troops necessary for intervention.<sup>92</sup>

The vast majority of the policymakers and international law scholars who equate a finding of genocide with a responsibility to protect, and vice versa, rely on the Genocide Convention to make their argument. In particular, advocates for intervention often find legal basis in Article 1 of the Convention, which states that genocide is a “crime under international law” and that parties to the Convention agree to “undertake to prevent and punish”

87. SHATTUCK, *supra* note 30, at 131.

88. *Id.* at 343 n.43 (citing POWER, *supra* note 44, at 359).

89. *Id.*

90. Congress found that:

The Government of Sudan has engaged in an orchestrated campaign of genocide in Darfur, Sudan, and has severely restricted humanitarian and human rights workers’ access to Darfur in an attempt to inflict further harm on the Fur, Masalit, and Zaghawa people of Darfur and to prevent the collection of evidence of war crimes and crimes against humanity.

Comprehensive Peace for Sudan Act, S. 2705, 108th Cong. § 2(1) (2004).

91. See Jim VandeHei, *In Break with U.N., Bush Calls Sudan Killings Genocide*, WASH. POST, June 2, 2005, at A19.

Using the declaration of genocide to demonstrate an increase in its commitment to finding peace in Darfur, the United States eventually led the efforts to secure a peace agreement in the summer of 2006. As that accord failed to hold, the United States began to back U.N. Security Council Resolutions on the topic. See *infra* notes 110–16 and accompanying text.

92. A report of the Foreign Policy Centre, a European policy think tank, suggested that intervention in Iraq both prevented intervention in Darfur and provided political cover for avoiding the issue: “Some political leaders would have us believe that there is no ‘political will’ in their communities for firm action, especially in the case of the USA and UK with their forces heavily committed in Iraq. This is a ploy.” GREG AUSTIN & BEN KOPPELMAN, *DARFUR AND GENOCIDE: MECHANISMS FOR RAPID RESPONSE, AN END TO IMPUNITY* 39 (2004), available at <http://fpc.org.uk/fsblob/285.pdf>.

acts of genocide.<sup>93</sup> Even though the Convention is nearly sixty years old, this form of argument seems to only have been made this way in the past few years.<sup>94</sup>

As already discussed, the Genocide Convention was at the heart of internal Clinton Administration debates about how to label the conflicts in Bosnia and Rwanda,<sup>95</sup> and the understanding that a finding of genocide triggers humanitarian intervention under the Convention has permeated public as well as scholarly discourse. Journalist David Rieff, for example, has said when discussing Rwanda that “U.N. and Western officials—and officials of a good many African states as well—tried to avoid using the word ‘genocide’ for as long as possible.”<sup>96</sup> The reluctance to use the word “genocide” exists because it “has entailments. Its use confers obligations. Had it been used while the killing was going on, those countries that had ratified the Genocide Convention of 1948 would have been required to intervene to bring it to an end.”<sup>97</sup> When President Bush, in a somewhat surprising reversal, broke with the U.N. and referred to the events in Darfur as genocide rather than a crime against humanity, the *Washington Post* attributed the semantic debate to the Genocide Convention: “Deputy Secretary of State Robert B. Zoellick, recently dispatched by Bush to survey the situation in Darfur, has said he was trying to avoid the debate over what to call the killing of tens of thousands of Africans over the past two years.”<sup>98</sup> The *Post* then matter-of-factly informed its readers by way of explanation: “The United States, under the 1948 U.N. convention on genocide, is committed to preventing such killings and punishing the killers if it deems a genocide is taking place.”<sup>99</sup>

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93. Convention on the Prevention and Punishment of the Crime of Genocide art. 1, Dec. 9, 1948, 78 U.N.T.S. 278 [hereinafter Genocide Convention]. For examples of advocacy from this position, see Leslie A. Burton, *Kosovo: To Bomb or Not to Bomb? The Legality is the Question*, 7 ANN. SURV. INT’L & COMP. L. 49, 57 (2001) (“The Genocide Convention in particular calls upon the United Nations to take such action as appropriate for the prevention and suppression of acts of genocide . . . . The crime of genocide transcends the inviolability of states, and using force to prevent it is legal. The crime of genocide was occurring in Kosovo. Because NATO intervened to prevent it, NATO’s action was legal.”) (internal citation omitted); Petition to President George W. Bush, Military Intervention Required to Stop Genocide in Sudan, <http://www.petitiononline.com/d1a2r3/petition.html> (last visited Dec. 22, 2006); Save Darfur, <http://www.savedarfur.org/home> (including an on-line petition intended to “pressure President Bush to support a stronger multi-national force to protect the civilians of Darfur”) (last visited Dec. 22, 2006).

94. This is not to say the Genocide Convention was never invoked to support claims for intervention, but until recently, a finding of genocide was not seen to trigger automatically the requirement for such intervention. For an example of earlier uses, see U.N. SCOR, 26th Sess., 1608th mtg., at 27 (Dec. 6, 1971) (quoting the Indian representative’s statement to the Security Council defending its intervention in Bangladesh—“I wonder why we should be shy about speaking of human rights . . . . What happened to the Convention on genocide?”) (quoted in FRANCK, *supra* note 65, at 140).

95. See *supra* notes 87–89 and accompanying text; see also SHATTUCK, *supra* note 30, at 43–44, 131, 295.

96. RIEFF, *supra* note 28, at 74.

97. *Id.* at 75.

98. See VandeHei, *supra* note 91.

99. *Id.*



For some, deploying the Genocide Convention to justify intervention provides a legal basis for distinguishing between the consequences of findings of genocide and that of findings of crimes against humanity or even ethnic cleansing. The latter might permit or even require humanitarian intervention—as the U.N. currently maintains, even with regard to Darfur—but decisions would presumably have to be made on a case-by-case basis. In the interpretation commonly given to the Genocide Convention today, though, once a conflict meets the genocide threshold, there seems to be significant agreement that signatory states have some responsibility to respond.<sup>100</sup> The Genocide Convention, then, both offers a vehicle to limit intervention and raises the stakes for those who would like to see intervention in a given situation.

However justified, the exceptional status given to genocide generates special consideration for claims that violations of human rights—whether killings, torture, or rape—constitute genocide. If one wants to see military intervention for reasons other than self-defense, genocide provides the firmest ground. Particularly in situations that might otherwise be characterized as civil war, genocide is the trump card that permits, if not requires, intervention.

Of course, the more it is accepted that genocide demands intervention, the more the question of what constitutes genocide becomes contested. And the more intervention is limited to genocide, the more the definitional boundaries of genocide will be challenged by those making claims for intervention. Former Secretary-General of *Médecins Sans Frontières* Alain Destexhe complained in 1995 that the term “genocide” had become “dangerously commonplace,”<sup>101</sup> and that it was increasingly being used to “shock people [into paying attention] to contemporary situations that reflect varying degrees of violence or injustice.”<sup>102</sup> Concerned that genocide has become “the victim of its own success,”<sup>103</sup> Destexhe calls for a limited definition of genocide, one that would only recognize three genocides in the twentieth century (that of the Armenians by the Young Turks, the Jews and Gypsies by the Nazis, and the Tutsis by the Hutus).<sup>104</sup> Although I do not necessarily agree with Destexhe’s definition, I do agree with his observation about how the term “genocide” has been deployed for its shock, or crisis, value.

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100. For a discussion of an alternative interpretation put forward during the conflict in Bosnia and Herzegovina, see POWER, *supra* note 44, at 321 (discussing a memo out of the State Department’s Intelligence and Research division that pointed out that even if the events in Bosnia were determined to be genocide, the Convention “cannot be read as imposing an obligation on outside states to take all measures whatsoever as may prove necessary—including the use of armed force—in order to ‘prevent’ genocide.”).

101. ALAIN DESTEXHE, *RWANDA AND GENOCIDE* 6 (1995).

102. *Id.*

103. *Id.*

104. *See generally id.*

## 2. *Ethnic Cleansing and Other Mass Human Rights Violations*

While some have attempted to expand the meaning of genocide to justify military intervention, others have instead tried to offer additional justifications for intervention. Recall that the R2P document does not require a finding of genocidal intent.<sup>105</sup> Even though the U.N. Secretariat,<sup>106</sup> the U.N. High-level Panel report,<sup>107</sup> and the 2005 World Summit Outcome report<sup>108</sup> endorse justifications beyond genocide, questions regarding the significance of findings of ethnic cleansing or crimes against humanity remain.

Darfur provides one example. When the Security Council passed Resolution 1556, using Chapter VII to threaten economic (not military) sanctions against the Sudan if a peaceful resolution to the conflict were not found, it nowhere mentioned genocide, and it even condemned violence by all parties.<sup>109</sup> Not surprisingly, the resolution was full of compromises designed to obtain the votes and abstentions necessary to pass.<sup>110</sup> In addition to avoiding the term “genocide,” the resolution did not threaten military intervention or immediately authorize economic sanctions. Had the Security Council included a finding of genocide in its resolution, it would have been difficult not to allow for military intervention.

105. See *supra* notes 26, 80 and text accompanying note 80.

106. At least with regard to when military action might be taken by the Security Council, U.N. Secretary-General Kofi Annan wrote in 2005:

I ask them to embrace the principle of the “Responsibility to Protect,” as a basis for collective action against genocide, ethnic cleansing and crimes against humanity—recognising that this responsibility lies first and foremost with each individual state, but also that, if national authorities are unable or unwilling to protect their citizens, the responsibility then shifts to the international community; and that, in the last resort, the United Nations Security Council may take enforcement action according to the Charter.

The Secretary-General, Statement to the General Assembly, March 21, 2005, available at <http://www.un.org/largerfreedom/sg-statement.html>.

107. See *High-level Panel*, *supra* note 38 and accompanying text (“authorizing military intervention as a last resort, in the event of genocide and other large-scale killing, ethnic cleansing or serious violations of international humanitarian law which sovereign Governments have proved powerless or unwilling to prevent”).

108. See 2005 World Summit Outcome, *supra* note 36, at 31–32.

109. See S.C. Res. 1556, at 1, U.N. Doc. S/RES/1556 (July 30, 2004):

Reiterating its grave concern at the ongoing humanitarian crisis and widespread human rights violations, including continued attacks on civilians that are placing the lives of hundreds of thousands at risk,

Condemning all acts of violence and violations of human rights and international humanitarian law by all parties to the crisis, in particular by the Janjaweed, including indiscriminate attacks on civilians, rapes, forced displacements, and acts of violence especially those with an ethnic dimension, and expressing its utmost concern at the consequences of the conflict in Darfur on the civilian population, including women, children, internally displaced persons, and refugees . . . .

110. See Mikael Nabati, *The U.N. Responds to the Crisis in Darfur: Security Council Resolution 1556*, ASIL INSIGHTS (August 2004), available at <http://www.asil.org/insights/insigh142.htm>; Press Release, Security Council, Security Council Demands Sudan Disarm Militias in Darfur, U.N. Doc. SC/8160 (July 30, 2004) [hereinafter Security Council Demands], available at <http://www.un.org/News/Press/docs/2004/sc8160.doc.htm>.

Despite significant disagreement over whether genocide is occurring in Darfur and whether the Security Council should intervene militarily, all parties appeared to see the resolution as a victory. A U.N. press release reported:

[U.S. Representative John Danforth] said that many people concerned about Darfur would say that the text did not go far enough, particularly that it did not refer to the atrocities in the region as genocide. Perhaps they were right, but it was important not to get bogged down over words, he said. It was essential that the Council act quickly and decisively and with unity. "We need to fix this humanitarian problem now." The current resolution did explicitly condemn the acts of violence "with an ethnic dimension" in Darfur and anticipated sanctions against the Government if the regular monthly cycle of reporting revealed a lack of compliance.<sup>111</sup>

In fact, the United States has continued to push the Security Council to move forward not by relying on a finding of genocide, but by using the fact that the U.N. has called Darfur "the greatest humanitarian crisis today."<sup>112</sup>

Subsequent resolutions have continued to condemn Darfur and call for intervention in a way that refuses explicitly to justify the intervention on the basis of genocide. Security Council Resolution 1706,<sup>113</sup> passed on August 31, 2006, "reaffirms paragraphs 138 and 139 of the 2005 United Nations World Summit outcome document," which incorporate R2P.<sup>114</sup>

111. *Id.* The representative from the Philippines seemed to agree:

LAURO L. BAJA (Philippines) said he had voted for the resolution in response to the humanitarian crisis. Whether what happened in Darfur was genocide or ethnic cleansing should not be a question. The fact was that people were dying, and that there was destruction and plundering and that the international community must stop the catastrophe. If a State was unable or unwilling to stop violations of human rights, the international community had the responsibility to help the State do so, until it had the will or the capacity.

*Id.*

112. See Jendayi Frazer, *Stopping Genocide in Darfur: Ongoing U.S. Efforts and Working with the U.N. Security Council* (Aug. 24, 2006), <http://www.state.gov/p/af/rls/rm/2006/71515.htm> ("We believe fully that we must act now. Stopping the genocide in Darfur remains one of the highest priorities of the Bush Administration. The U.N., by its own admission, has called it the greatest humanitarian crisis today.")

113. S.C. Res. 1706, U.N. Doc. S/RES/1706 (Aug. 31, 2006).

114. See 2005 World Summit Outcome, *supra* note 36. These paragraphs specifically state: 138. Each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity. This responsibility entails the prevention of such crimes, including their incitement, through appropriate and necessary means. We accept that responsibility and will act in accordance with it. The international community should, as appropriate, encourage and help States to exercise this responsibility and support the United Nations in establishing an early warning capability.

139. The international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the Charter, to help protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. In this context, we are prepared to take collec-

Even without directly calling the situation genocide, the Security Council is inching toward greater intervention in Darfur, although thus far resolutions have depended on the consent of the Sudanese government. Requiring Sudan's permission to deploy troops might be a byproduct of the failure to call the situation genocide. It is also a reminder that the U.N. is only meant to intervene when "sovereign Governments have proved powerless or unwilling to prevent" the violations.<sup>115</sup>

Even though the United States has continued to refer to events in Darfur as genocide, it has not taken the position that a finding of genocide is required before either the Security Council or other states may intervene. Indeed, the U.S. response to September 11 created entirely new justifications for intervention. If the United States defended its invasion of Afghanistan on the basis of self-defense without meeting much controversy,<sup>116</sup> the invasion of Iraq rested on less clear footing. Although the United States and the United Kingdom insisted that the Security Council had authorized the use of force at some level, few took that argument seriously. Post-hoc justifications for the intervention—particularly when the coalition did not find weapons of mass destruction—have ranged from human rights violations to the need to overthrow "severe tyranny"<sup>117</sup> to the need to respond to terrorism.<sup>118</sup> Although it would seem that such arguments have ultimately been rejected by most human rights scholars and activists—particularly as Iraq has come to be seen by most Americans as a mistake—the human rights justification held surprising traction and led to substantial debate.<sup>119</sup> Even those who believed the action was illegal without Security Council authori-

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itive action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities manifestly fail to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity. We stress the need for the General Assembly to continue consideration of the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity and its implications, bearing in mind the principles of the Charter and international law. We also intend to commit ourselves, as necessary and appropriate, to helping States build capacity to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity and to assisting those which are under stress before crises and conflicts break out.

*Id.* ¶¶ 138–39. When these paragraphs were first referred to in a more general Security Council Resolution in April 2006, Oxfam considered the resolution to be "historic." S.C. Res. 1674, ¶ 4, U.N. Doc. S/RES/1674 (Apr. 28, 2006); Press Release, Oxfam, Security Council Passes Landmark Resolution—World Has Responsibility to Protect People from Genocide (April 28, 2006), [http://www.oxfam.org.uk/press/releases/unsc\\_280406.htm](http://www.oxfam.org.uk/press/releases/unsc_280406.htm).

115. See *High-level Panel*, *supra* note 38, and accompanying text.

116. See O'Connell, *supra* note 64. *But see* Engle, *Liberal Internationalism, Feminism, and the Suppression of Critique*, *supra* note 2, at 427.

117. Teson et al., *supra* note 29 (arguing that humanitarian intervention is justified in Iraq because it is aimed at "severe tyranny").

118. See, e.g., Tom Raum, *Bush Keeps Revising War Justification*, WASH. POST, Oct. 14, 2006, available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/10/14/AR2006101400446.html>.

119. See, e.g., MICHAEL IGNATIEFF, *THE LESSER EVIL: POLITICAL ETHICS IN AN AGE OF TERROR* (2004); Lee Feinstein & Anne-Marie Slaughter, *Duty to Prevent*, 83 FOREIGN AFFAIRS 136 (2004); Teson et al., *supra* note 29; Richard Falk et al., *Humanitarian Intervention: A Forum*, THE NATION, July 14,

zation sometimes argued that, like Kosovo, the intervention was legitimate.<sup>120</sup>

In an article entitled *Women's September 11th*, Catharine MacKinnon calls for the Security Council to attend to violations of women's rights. She bases much of her argument for intervention on the ground that terrorism is a recognized justification for humanitarian intervention.<sup>121</sup> I believe she overstates the acceptance of this justification by international law scholars, practitioners, and institutional actors. Given that she ultimately calls for considering humanitarian intervention to respond to large-scale violations of (women's) human rights, however, she may not need to rely on the existence of terrorism as a justification.<sup>122</sup>

#### IV. RAPE AND GENOCIDE: FROM BOSNIA AND HERZEGOVINA TO DARFUR

As the previous Parts demonstrate, calling a particular situation genocide—or at least ethnic cleansing or a mass human rights violation—would seem to signal that the situation needs international attention and maybe even military intervention. If such naming demonstrates that a particular issue matters, calling troops in for women would indicate that women's rights matter. Feminists have long been aware of the power of this naming, and have, I would argue, contributed to its power.

MacKinnon's *Women's September 11th*, for example, relates attacks on women to acts of terrorism and gross human rights violations to indicate a crisis in need of immediate response. Noting a trend in the increase of calls for military intervention,<sup>123</sup> she proposes that the treatment of women "be injected into all levels of discussion of humanitarian intervention . . ." <sup>124</sup> In particular, she suggests that the U.N. Security Council consider using Chapter VII to respond militarily to certain systematic forms of violence

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2003, available at <http://www.thenation.com/doc/20030714/forum> (consisting of twelve short pieces on humanitarian intervention focusing on the humanitarian justification for the Iraq war).

120. For a discussion of these positions, see Berman, *supra* note 72, at 752 (citing as an example Anne-Marie Slaughter, *Good Reasons for Going Around the U.N.*, N.Y. TIMES, Mar. 18, 2003, at A33).

121. Catharine A. MacKinnon, *Women's September 11th: Rethinking The International Law Of Conflict*, 47 HARV. INT'L L.J. 1, 9–14 (2006), reprinted in CATHARINE A. MACKINNON, ARE WOMEN HUMAN? AND OTHER INTERNATIONAL DIALOGUES 259 (2006).

122. MacKinnon acknowledges that the acts of September 11 constituted crimes against humanity, but disapproves of the fact that "crimes against humanity have been widely legally unimplemented." *Id.* at 13.

123. MacKinnon writes:

Should the U.N. Charter be revised so that what have been humanitarian crimes of *ius in bello* or human rights violations can also be *ius ad bellum* triggers? If this question is being increasingly asked, it is so far never suggested that brutal systematic violence against women . . . could legally justify resort to force unless it occurs as part of a conflagration in which men are also attacking other men.

MacKinnon, *supra* note 121, at 24–25.

124. *Id.* at 29.

against women. MacKinnon argues that as long as the United States and the “international community” are rethinking justifications for humanitarian intervention and are willing to intervene to respond to actions by private actors against private actors, they should rethink when and how to intervene to protect women from multiple forms of violence. She focuses in particular on what she calls “brutal systematic violence against women.”<sup>125</sup> Her article oscillates between pointing to the hypocrisy of the United States and the U.N. more generally—arguing that international legal response on behalf of private actors is accepted when men’s security is at risk—and suggesting calling in the troops to protect women, assuming that these troops do not further abuse women.<sup>126</sup>

As suggested above, I believe that MacKinnon overstates the extent to which the “international community” accepts terrorism as a justification for war. At the same time, she understates the extent to which humanitarian intervention has often been used to protect the “private” from the “private,” especially to “protect” women. Gayatri Spivak and others have shown how England largely justified colonialism as an attempt to save “brown women from brown men.”<sup>127</sup> Deborah Weissman reminds us that the United States has long justified military intervention—in Cuba, the Philippines, Hawaii—in large part to “protect” women.<sup>128</sup>

MacKinnon herself has appealed in the past to the use of military and other types of intervention to protect women. Indeed, her work on Bosnia and Herzegovina in the early 1990s embroiled her in a debate among feminists—both in the United States and abroad—over how international law should treat rape in the Balkans, and particularly over whether rape should be seen as genocidal.

In this Part, I revisit the debate among feminists during that time period. The debate provides a concrete example of how advocates have promoted an understanding of a harm as genocide to call for intervention on one side of a conflict. Reading the debate in this way translates an appar-

125. *Id.* at 25.

126. The sexual abuse of women by peacekeeping forces is an issue that the Security Council recently addressed in setting up its mission (U.N. Mission in Sudan) in Darfur in March of 2005. Expressing “grave concern at the allegations of sexual exploitation and misconduct by UN personnel,” it reaffirmed a “zero-tolerance policy of sexual exploitation.” S.C. Res. 1590, at 2, U.N. Doc. S/Res/1590 (March 24, 2005).

MacKinnon addressed the potential military abuse of women by suggesting that “[m]aybe all the blue helmets on such missions should be women.” *Id.* at 30. Her proposal fails to account for the ways that women can be perpetrators as well as victims of sexual violence. For a discussion of women as perpetrators in the context of Abu Ghraib, see Barbara Ehrenreich, *Prison Abuse; Feminism's Assumptions Upended; A Uterus is Not a Substitute for a Conscience, Giving Women Positions of Power Won't Change Society by Itself*, L.A. TIMES, May 16, 2004, at M1 (“What we have learned from Abu Ghraib . . . is that a uterus is not a substitute for a conscience.”).

127. Gayatri Chakravorty Spivak, *Can the Subaltern Speak?*, in MARXISM AND THE INTERPRETATION OF CULTURE 271, 296 (Cary Nelson & Lawrence Grossberg eds., 1988).

128. Deborah M. Weissman, *The Human Rights Dilemma: Rethinking the Humanitarian Project*, 35 COL. HUM. RTS. L. REV. 259, 268–70 (2004).

ently internal disagreement among feminists over the meaning of rape into a discussion over the meaning of justifiable war. Ultimately, accords were drafted, peacekeepers sent in, and tribunals established to try individual perpetrators of war crimes and crimes against humanity. Feminists were of course not solely or even primarily responsible for these interventions, but those feminists that called attention to the rapes as genocidal played a role in producing support for the various levels of intervention.

Feminists also played a role in the form the interventions took. I have discussed elsewhere, for example, how the rape as genocide position informed the ICTY's jurisprudence, with two perhaps unintended consequences: the essentialization of ethnic differences in the region, and the reinforcement of women as victims rather than perpetrators, resisters, or sexual beings.<sup>129</sup> These outcomes, I now want to suggest, were due in large part to an idea that claims of genocide or ethnic cleansing (and the two were often equated) would be taken more seriously than "ordinary" war crimes. Pressure built to find at the very least large-scale crimes against humanity. The emerging consensus with regard to R2P explains and reinforces such pressure.

There is an additional consequence to the conflation of rape and genocide. The contemporary discussions about Darfur show how rape is used alongside and often indistinguishably from genocide to call for intervention. The more rape is seen as genocidal, the more those calling for intervention invoke rape as a justification. Somewhat ironically, charges of rape are used much the way they have long been invoked—to demonstrate harm against a particular ethnic group (i.e., rape means genocide). Invoking rape in this way often displaces the attention from the harm to women as a group that advocates for defining rape as a war crime and a crime against humanity had hoped to instill.

#### A. *Bosnia and Herzegovina: Re-Reading Feminist Debates from the 1990s*

Revisiting the feminist debates surrounding the conflict in Bosnia and Herzegovina shows how feminists both enhanced the call for humanitarian intervention in the region and used that call to attempt to further the protection of women's human rights. As discussed in the previous Part, the 1990s saw a flurry of humanitarian intervention that was not simply overlooked or implicitly sanctioned by the U.N., but was rather directly authorized by the Security Council. At the same time that the U.N. was feeling its way in its new role as "peacekeeper," the issue of how to approach the rapes in Bosnia and Herzegovina vexed feminists throughout the world. Many turned to the international arena and sought diplomatic as well as military and judicial intervention to end the widespread rape in the region. Some feminists seemed to understand that claims of genocide or even ethnic

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129. See Engle, *supra* note 5, at 807–15.

cleansing might solicit international intervention. In this way, they both contributed to and took advantage of the rhetorical appeal of genocide in pleas for military intervention.

Several issues dominated the discussions among feminists during this time, and they were significantly intertwined. Were some or all of the rapes genocidal? If so, which ones? How should the "international community" respond to the rapes? Should it choose sides and, if so, on what basis? The ICTY ultimately responded to these issues by recognizing that rapes occurred on all sides, but also by seeing rapes by Serbs as constituting a higher order of crimes (crimes against humanity) than those rapes committed by other parties to the conflict.<sup>130</sup> I attempt here to step back and consider the debates *before* the ICTY was selected as the principal mechanism for resolving the conflict. What was the significance of considering the rapes as genocidal for the purposes of military intervention?

Catharine MacKinnon was one of the most vocal proponents of the position that the rape in the Balkans by Serbs was "genocidal." In her recent work, she suggests that violence against women is genocidal, aimed at women as a group.<sup>131</sup> Ironically, this argument is similar to that made by some of her feminist opponents in the 1990s.<sup>132</sup> In the 1990s, however, MacKinnon attempted to articulate an international legal understanding of rape in the Balkans that would distinguish everyday wartime rape committed on "all sides" from the wartime rape committed by Serbs. The latter was seen as genocidal, while the former was not. Other feminists disagreed. Rhonda Copelon, for example, argued that "to emphasize as unparalleled the horror of genocidal rape is factually dubious and risks rendering rape invisible once again."<sup>133</sup>

Those who argued that the rapes should not be considered genocidal seemed the least likely to support or even suggest military intervention. The feminist antiwar group Women in Black, for example, argued that distinguishing between perpetrators, but more importantly between victims, was problematic and counter to women's interests: "We refuse the politics of instrumentalization of victims. A victim is a victim, and to her

130. See *id.* at 798.

131. See MacKinnon, *supra* note 121, at 14 ("One evocative definition of terrorism is 'bit by bit genocide.' If women were seen to be a group, capable of destruction as such, the term genocide would be apt for violence against women as well.") (citing Catharine A. MacKinnon, *Genocide's Sexuality, in POLITICAL EXCLUSION AND DOMINATION* (Stephen Macedo & Melissa S. Williams eds., 2005).

132. See Engle, *supra* note 5, at 786–87.

133. Rhonda Copelon, *Surfacing Gender: Reconceptualizing Crimes Against Women in Time of War, in MASS RAPE: THE WAR AGAINST WOMEN IN BOSNIA-HERZEGOVINA* 197, 198 (Alexandra Stiglmayer ed., 1994) [hereinafter *MASS RAPE*]. For Copelon, "Women are targets not simply because they 'belong to' the enemy . . . They are targets because they too *are* the enemy; . . . because rape embodies male domination and female subordination." *Id.* at 207.



the number of other victims does not decrease her own suffering and pain."<sup>134</sup>

Nationalists inside the former Yugoslavia, on the other hand, generally supported intervention and insisted on distinguishing victims from perpetrators.<sup>135</sup> For them, rapes by Serbs were a part of genocide and ethnic cleansing, and should be treated differently from other rapes during the conflict. A 1993 letter from what was called the nationalist, or patriotic, branch explains:

[M]ass rapes under orders of the Serbian-occupied territories of Bosnia-Herzegovina and Croatia are part of a Serbian policy of genocide against non-Serbs. That means that non-Serbian women—most prominently Muslims and Croatians—are not only tortured by rape as are all women, but are being raped as a part of a Serbian policy of “ethnic cleansing” on the basis of their sex and ethnicity both; most of these rapes end in *murder*. And this is *not* happening to all women.<sup>136</sup>

Thus, the rape-as-genocide argument identified a perpetrator one could target with military intervention. The label of genocide and the call for intervention often went hand-in-hand. As Alexandra Stiglmayer noted at the time, “Bosnian and Croatian feminists contend that the mass rapes of their countrywomen are an attempt at genocide, unique in the history of rapes, and many of them demand military intervention to rescue the women.”<sup>137</sup>

In the same vein, MacKinnon referred to the Holocaust to provoke a reaction to rapes by Serbs. If genocide is the clearest and most commonly agreed-upon justification for intervention, the Holocaust would seem to provide the clearest and most commonly agreed-upon example of genocide. Thus, as the terrain of the debate has largely shifted to the precise meaning of genocide, the question is often whether a particular crisis is more or less like the Holocaust. The closer the situation is to the Holocaust, the more likely that a call for intervention will go unchallenged. Following this logic, MacKinnon at one point asserted: “These rapes are to everyday rape what the Holocaust was to everyday anti-Semitism. Without everyday anti-

134. Jelena Batinic, *Feminism, Nationalism, and War: The ‘Yugoslav Case’ in Feminist Texts*, 3 J. INT’L WOMEN’S STUD. (2001), available at <http://www.bridgew.edu/SoAS/jiws/fall01/batinic.pdf> (quoting Women in Black, *Women in Black Against War: A Letter to the Women’s Meeting in Amsterdam on the 8th of March 1993*, WOMEN MAGAZINE, Dec. 1993, at 17–18).

135. Batinic portrays Yugoslav feminists as divided between those who gave greater priority to their national affiliations (what she calls “patriotic” or “nationalist” branches) and those who favored solidarity regardless of nationality (what she calls “non-nationalist” or “antinationalist”). *Id.* at 3–4.

136. *Id.* at 7 (quoting a letter published in *Serbia’s War Against Bosnia and Croatia*, 23 OFF OUR BACKS (spec. pull-out sec.) 1, 10 (1993)). This quotation links the rapes to murder, though feminist arguments for considering the rapes as genocidal in Bosnia and Herzegovina did not generally rely on murder to support the argument.

137. Alexandra Stiglmayer, *The Rapes in Bosnia-Herzegovina*, in MASS RAPE, *supra* note 133, at 82, 162.

Semitism a Holocaust is impossible, but anyone who has lived through a pogrom knows the difference."<sup>138</sup> MacKinnon simultaneously invoked the Holocaust and critiqued those feminists who refused to see the rapes as uniquely genocidal as involved in a cover-up that functioned "to exonerate the rapists and to deflect intervention."<sup>139</sup>

Other feminists who saw the rapes as genocidal criticized the international community for its lack of a serious military response to Serbian aggression. Alexandra Stiglmayer asserted that "[t]he escalation of the war in the former Yugoslavia is the result of an unchecked act of aggression that has meanwhile grown into a campaign of annihilation. A significant share of responsibility for it must be attributed to the international community."<sup>140</sup> While partly documenting the ways that the international community had attempted to respond, Stiglmayer argued that much more was needed. At one point, she wrote: "[I]n March 1992 the UN Security Council sent UN soldiers into former Yugoslavia. Their mandate, however, defines them as a 'peacekeeping force' and not as a 'peacemaking force'; this means that they may not use force in any of their activities. And their mere presence has not impressed anyone."<sup>141</sup> She also attributed the failure of the first Bosnian peace plan to the lack of political will to use military force.<sup>142</sup>

For those who called for intervention against the Serbs, labeling the rape genocide served at least two complementary functions. The focus on genocide demonstrated that the rape constituted a serious crime worthy of international attention, and the focus on systematic rape addressed the intent requirement for genocide.<sup>143</sup> Together, they supported a call for military intervention.

### B. Darfur: Rape as Representation of Genocide

If connecting rape and genocide is a way for some to call attention to the horrors of rape, it provides others a way to focus on genocide. Once the two are connected in a certain way, the rapes come to represent the genocide, and both rape and genocide can equally be offered to justify or demand the use of force.

Various calls for military intervention in Darfur demonstrate the use of rape as a stand-in for genocide. A 2005 column by Nicholas Kristof in the

138. Catharine A. MacKinnon, *Rape, Genocide and Women's Human Rights*, in MASS RAPE, *supra* note 133, at 186–87.

139. *Id.* at 189.

140. Alexandra Stiglmayer, *The War in the Former Yugoslavia*, in MASS RAPE, *supra* note 133, at 1, 22.

141. *Id.* at 23.

142. *Id.* at 24 ("Because it lacks a commitment to use military force if necessary, the first Bosnia-Herzegovina peace plan, developed by the two negotiators Lord David Owen and Cyrus Vance, has failed.")

143. See Genocide Convention, *supra* note 93, art. 2 (defining genocide with the "intent to destroy, in whole or in part"). See generally ENGLE, *supra* note 5 (discussing the multiple ways in which rape and genocide were linked by those who argued that the rapes were genocide).

*New York Times*, for example, is entitled *A Policy of Rape*, and the opening lines read: "All countries have rapes, of course. But here in the refugee shantytowns of Darfur, the horrific stories that young women whisper are not of random criminality but of a systematic campaign of rape to terrorize civilians and drive them from 'Arab lands'—a policy of rape."<sup>144</sup> Especially after the U.S. Congress and President Bush had declared that genocide was occurring in Darfur, some supporters of military intervention used a focus on the rapes to call for military action. Rocky Anderson, Mayor of Salt Lake City, speaking on behalf of the U.S. Conference of Mayors with regard to a resolution sent to Congress in spring 2006, appealed for intervention by stressing the rapes: "Wouldn't we each do what we could to stop a rape in our front yards? Why do so few people pick up a pen to demand that our President and . . . Congress take immediate action to stop the brutal rapes of women in Darfur . . . ?"<sup>145</sup>

Others have equated rape and genocide more directly in attempts to incite action. HRW and AI, for example, have connected rape and genocide in their various calls for action in Darfur.<sup>146</sup> The U.S. Holocaust Memorial Museum has issued a "genocide emergency" for Darfur, and begins its "overview" of the situation by stating that "[t]ens of thousands of civilians have been murdered and thousands of women raped in Sudan's western region of Darfur by Sudanese government soldiers and members of the government-supported militia sometimes referred to as the Janjaweed."<sup>147</sup> An organization called "Save Darfur," a coalition of over 140 NGOs in the United States,<sup>148</sup> has produced a television commercial which shows the photograph of a young woman and asks: "How will history judge us . . . if she is raped . . . again?"<sup>149</sup> The advertisement, which clearly links rape to genocide, concludes by urging President Bush to pressure the U.N. to take action.<sup>150</sup>

There is an irony here. While it would seem that such references to rape are a success for the feminists who have long been calling attention to the use of rape in war, the reference to rape as a war crime is not new. Indeed, a

144. Nicholas D. Kristof, Op-Ed., *A Policy of Rape*, N.Y. TIMES, June 5, 2005, at 4.

145. Ross C. "Rocky" Anderson, Mayor, Salt Lake City, Speech at Rally to End the Genocide in the Darfur Region of Sudan (Apr. 30, 2006), available at <http://www.ci.sl.c.ut.us/mayor/speeches/2006%20speeches/SPdarfurrrally43006.pdf>.

146. See, e.g., Human Rights Watch, Frequently Asked Questions, <http://www.hrw.org/english/docs/2004/05/05/darfur8536.htm> (repeatedly mentioning rape and genocide side by side in the FAQ section of the website) (last visited Dec. 6, 2006); Amnesty Int'l, Sudan in Crisis—Background, <http://web.amnesty.org/pages/sdn-background-eng> (listing rape and widespread killing as evidence of genocide) (last visited Dec. 6, 2006).

147. United States Holocaust Memorial Museum's Committee on Conscience, Sudan: Darfur Overview, <http://www.ushmm.org/conscience/alert/darfur/contents/01-overview/> (last visited Jan. 24, 2006).

148. For the list of member organizations, see Save Darfur, Organizational Members, [http://www.savedarfur.org/pages/organizational\\_members](http://www.savedarfur.org/pages/organizational_members) (last visited Jan. 24, 2006).

149. Save Darfur, *How Will History Judge Us?*, [http://www.savedarfur.org/pages/advertising\\_campaign](http://www.savedarfur.org/pages/advertising_campaign) (last visited Dec. 6, 2006).

150. *Id.*

finding of rape in war has long been seen as a way to incite action and/or intervention; men have complained that other men have raped “their” women. The conflation of rape and genocide suggests that what is unique about the rapes in question is that they are based on ethnic hatred. But that distinction, whether made in the context of Bosnia and Herzegovina or Darfur, or made by feminists or nationalists or both, often distorts the understanding of rape that many feminists have long promoted. It fails to attend to the extent to which rape is quite common—inside and outside of war and within and across ethnic groups. It also fails to recognize that women often engage in non-forced sexual activity, even in war, and even with men who are fighting on the opposing side.

## V. CONCLUSION: BEYOND CRISIS

Feminists who labeled rapes by Serbs in Bosnia and Herzegovina as genocide both capitalized on emerging trends toward humanitarian intervention and furthered those trends. Even with the expanded justifications for military humanitarian intervention that have arisen since R2P, the emerging consensus suggests that forceful humanitarian intervention is reserved for crisis situations. States and international organizations are called to intervene or shamed for not intervening because the situation is urgent, because many people have already died or been raped, and because “tomorrow we will be killed.”<sup>151</sup> If crisis is the point at which harm is attended to, every harm must be made into a crisis to receive attention.

This focus on crisis both displaces and distorts attention to “the everyday,” whether it be “everyday” killing, rape, hunger, or gross wealth disparity. It also reinforces a pre-realist understanding of intervention: imagining a world in which not acting militarily is “not acting,” and refusing to see the ways in which many of the same powers that ultimately send in the troops often have played a significant role in creating conditions ripe for a crisis.<sup>152</sup>

In a provocative discussion of the debates around Kosovo and the normalizing bureaucratic discourse over whether the loss of five hundred civilian lives was “worth” the intervention and disregard of U.N. Charter rules, Martti Koskenniemi argues that such discourse “relegates [international law’s] own founding violence into the shadow.”<sup>153</sup> “[W]hat about the violence of a global system,” he asks, in which “more than 30,000 children die every day of malnutrition, and the combined wealth of the 200 richest fam-

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151. PHILIP GOUREVITCH, *WE WISH TO INFORM YOU THAT TOMORROW WE WILL BE KILLED WITH OUR FAMILIES: STORIES FROM RWANDA* 42 (1998) (referencing a letter sent by seven Tutsi pastors to a Hutu pastor seeking intervention on their behalf).

152. For an elaboration of the role that the international legal system played in creating and supporting colonialism, see generally ANGHIE, *supra* note 3.

153. Koskenniemi, *supra* note 3, at 172.

ilies in the world was eight times as much as the combined wealth of the 582 million people in all the least developed countries.”<sup>154</sup> He continues by arguing that “[t]he more international lawyers are obsessed by the effectiveness of the law to be applied in ‘crisis,’ the less we are aware of the subtle politics whereby some aspects of the world become defined as ‘crisis’ whereas others do not.”<sup>155</sup>

Perhaps human rights activism, however, can only operate in a “crisis” mentality. In an article that historian Ken Cmiel wrote in the late 1990s comparing the methods of historians with those of human rights activists, he explained the function of “thin description” for human rights activists. In short, “[c]ontemporary historians tend to explore the complexities of cultures . . . . Such thick descriptions are a staple of much contemporary historiography. Yet the way human rights talk has circulated throughout the globe since the 1970s is a reminder of the power of thin descriptions.”<sup>156</sup> Cmiel pins this power of thin description on neurological limitations:

Human rights politics expects us to keep the whole world in our sights. Yet that is impossible. Our neural synapses will not allow it. We can only assimilate so much. Every time Bosnia is on the front page, something else—Rwanda, say—is pushed to page 12. And still other things—violence against women or the use of chemical sprays and stun guns in United States prisons—are cut entirely that day . . . .<sup>157</sup>

Thin descriptions are thus, according to Cmiel, inherent in human rights activism, given the popular, public responses it hopes to invoke.

Within this setting, human rights activists have power. They make choices about what to bring to the public’s attention and how to do so. As Cmiel explains:

When the larger public becomes interested in a brutality somewhere in the world, it is usually because some image has successfully conjured up the icon “human rights.” From Chile in the 1970s to Rwanda in the 1990s, I think it is safe to say, bursts of public sympathy have not depended upon a “thick” understanding of those cultures. They have depended upon reliable and concrete information about infractions making its way to key media and political elites, convincing them that the horrors are really taking place . . . .<sup>158</sup>

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154. *Id.*

155. *Id.* at 173.

156. Kenneth Cmiel, *The Emergence of Human Rights Politics in the United States*, 86 *J. AM. HIST.* 1231, 1249–50 (1999).

157. *Id.* at 1250.

158. *Id.*

Human rights non-governmental and intergovernmental organizations (both feminist and non-feminist) have played an important role in providing such “reliable and concrete” information. In doing so, they have exercised significant power in producing public sympathy for particular causes. Increasingly in the past decade, in attempting to convince “key media and political elites” that “horrors are really taking place,” human rights activists have begun to name those horrors in ways they believe would most likely justify military intervention.

And at what cost? In his book *The Dark Side of Virtue*, David Kennedy urges humanitarians to recognize their own will to power—to acknowledge that they are not only speaking for *them* but for *us*, and that there are significant costs to doing so.<sup>159</sup> I would urge feminist humanitarians to do the same. At least some feminists, as Janet Halley has put it, have been involved in a project of governance.<sup>160</sup> In the context of military intervention, I hope to have demonstrated how they have not only aligned with, but strengthened, the positions of human rights hawks.

Halley has argued for taking “a break from feminism. Not kill it, supersede it, abandon it; immure, immolate, or bury it—merely spend some time outside it exploring theories of sexuality, inhabiting realities, and imagining political goals that do not fall within its terms.”<sup>161</sup> Similarly, in the final chapter of Kennedy’s book, considering what international humanitarianism “should become,” he suggests:

Imagine an international humanitarianism which took a break from preoccupation with the justifications for “intervention.” Which no longer imagined the world from high above, on the “international plane,” in the “international community.” Which saw itself in a location, among others, as an interest among others, as a culture among others . . . Such a heuristic might . . . prevent us from overestimating the possibilities for a costless, neutral engagement in far away places, or underestimating our ongoing political role in governance.<sup>162</sup>

The current emerging consensus toward the use of military humanitarian intervention makes it increasingly difficult to imagine taking a break from either humanitarianism or from feminism. Taking full and self-conscious advantage of the very crisis mentality I have critiqued, I would call for such a break now, before the consensus is fully formed.

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159. DAVID KENNEDY, *THE DARK SIDES OF VIRTUE: REASSESSING INTERNATIONAL HUMANITARIANISM* (2004).

160. See Halley et al., *supra* note 16.

161. HALLEY, *supra* note 16, at 10.

162. KENNEDY, *supra* note 159, at 351.