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Todd Howland

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EVOLVING PRACTICE IN THE FIELD: INFORMING THE INTERNATIONAL LEGAL OBLIGATION TO "PROTECT"

TODD HOWLAND*

I. INTRODUCTION

This article highlights the need for greater scholarly and practitioner attention to what legal obligations "to protect" exist for a range of actors that are not States. The obligation to protect can be defined as a duty to maximize the respect for the rights of individuals.

The idea that many actors—beyond the State—have obligations under human rights law is not particularly new.¹ Of particular interest to academics and practitioners have been United Nations (UN) bodies (e.g., peacekeepers), international financial institutions (e.g., World Bank) and multinational corporations. Slightly more innovative is the idea that there is a sliding scale of responsibility to protect human beings from numerous entities depending on the level of influence they ex-

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1. See Ved P. Nanda, *Accountability of International Organizations: Some Observations*, 33.3 DENV. J. INT'L L. & POL'Y 379, 379-380 (2005).

Questions have arisen about the accountability, responsibility, and legal liability of the United Nations or its constituent organs, such as the Security Council, the U.N. member states, and individuals for alleged violations of human rights and humanitarian law regarding U.N. peacekeeping, peace enforcement, and peace-building operations, as well as economic sanctions imposed by the Security Council. Who is responsible and to what extent for tortuous acts? Privileges and immunities accorded to the United Nations are implicated Similar questions have been raised concerning alleged ordinary tort and breach of contract claims as well as claims related to alleged human rights violations against other IOs. Also, critics of globalizing continue to demonstrate and shout that there is a lack of openness and transparency in World Trade Organization (WTO) decision-making, especially its dispute resolution mechanisms, which they find undemocratic and unacceptable.

ert in the situation.² While this idea is not new in terms of a legal concept,³ in that one's duty to another varies depending on the circumstance, its application to international human rights law has been seen as controversial. One main reason for this is the dated idea that international law is limited to relations between or among States. This limitation has been difficult for human rights law to shake.⁴

This article is developed from my own personal experience as member and leader of the Human Rights Division (HRD) of the UN mission to Angola.⁵ During my time there, it became clear that many people, non-governmental organizations (NGOs), diplomats, and even UN entities spoke of the need to protect individual Angolans, but most seemed to be assuming different legal frameworks. While an incredible number of scholars and practitioners continue to hold onto the idea that only the State has a legal obligation to protect, they did not experience the shrill and significant criticism from human rights groups, humanitarian organizations, and other UN entities that the HRD was not meeting its obligations to protect Angolans.

Oddly, the staff of the HRD was being held accountable to protect Angolans, but those further up our food chain—those diplomats and bureaucrats enjoying views of the Hudson River at UN headquarters—have not yet fully grasped the legal nature of the UN's obligations to protect. This reaction by UN officials is not new. Legal protections and actions to protect (or to take one's legal obligations seriously) do not usually get much, or any, attention in circumstances of ongoing human rights abuses. In situations of massive human refugee flows or genocide, there is usually at least some discussion related to the obligations of the international community to intervene.⁶ But beyond that point, the idea that any entity

2. This concept can be restated by attaching a non-state actor's level of responsibility to the degree to which these actors impact an individual's or group's human rights. This 'impact-based' reasoning has been used to argue for the assignment of responsibilities to many types of international non-state actors including corporations and guerilla groups. This concept helps detach "the concept of sovereignty from the state . . . [so it] can gradually give way to a more fluid, relational, and global one." Frédéric Mégret & Florian Hoffmann, *The UN as a Human Rights Violator? Some Reflections on the United Nations Changing Human Rights Responsibilities*, 25 H.R.2 HUM. RTS. Q. 314, 321 (2003).

3. This concept is often used in tort and contract cases. The assignment of damages where an array of actors is held liable is an example of this concept.

4. International law is a "system of rules and customary practices which regulate relations between nations. The sources of international law are set out in Art. 42 of the Statute of the International Court of Justice." JAMES R. FOX, *DICTIONARY OF INTERNATIONAL AND COMPARATIVE LAW* 167 (3rd ed. 2003).

The emergence of international human rights law in the mid-20th century . . . speedily established individuals as well as states as subjects of international law. . . . Insofar as international law is meant to protect states from interference of other states, international human rights law still poses a real conflict.

MARK W. JANIS, JOHN E. NOYES, *INTERNATIONAL LAW CASES AND COMMENTARY* 355 (2nd ed. 2001).

5. Todd Howland worked for the Human Rights Division of the peacekeeping and peace-building missions of the United Nations in Angola from August 1998 to November 2001. Todd Howland, *U.N. Human Rights Field Presence as Proactive Instrument of Peace and Social Change: Lessons from Angola*, 26 HUM. RTS. Q. 1, 1 (2004).

6. See, e.g., The Convention on the Prevention and Punishment of the Crime of Genocide, art. 8,

other than the State has obligations to protect is seen by most mainstream scholars at the UN as a bit odd, given that there is not yet even agreement on when there is an obligation to intervene in cases of massive refugee flows or genocide.⁷ These scholars obviously did not spend much time with me as a UN employee in Angola being criticized for failing to protect Angolans.⁸

This article is not about shifting blame, but about highlighting the need to better define what obligations to protect exist for entities other than States (e.g., a UN field operation). Further definition will lead to clearer legal obligations, which will hopefully maximize each entity's contribution to improving the level of respect for human rights.

II. THE ELUSIVE NATURE OF THE TERM "PROTECTION"

Protection of human beings, through international law and international actions, should be well understood given that the stakes are high. If anything in international law should grab attention, it should be the failure to protect which violates human rights, humanitarian, or refugee law.

Human rights law defines duty or obligation as follows: *respect, promote, protect, and fulfill*⁹ with many treaties using these terms as the operative language in their text.¹⁰ Too many entities holding legal obligations prefer to focus on re-

Apr. 1, 1951, Office of the United Nations High Commissioner for Human Rights [hereinafter as OHCHR], http://www.unhcr.ch/html/menu3/b/p_genoci.htm (last visited July 18, 2005) ("Any Contracting Party may call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide or any of the other acts enumerated in article III."). See also William Shabas' speech during the 2004 Rwanda Forum in London where he discussed nation-states' arguments that the Convention on Genocide provides a simply right for states to intervene in order to prevent crimes of genocide, while he argues that the agreement creates a duty for states to act. *The Rwanda Forum*, at http://london.iwm.org.uk/upload/package/33/rwanda/pdf/William_Shabas.pdf (last visited Sept. 26, 2005).

7. Witness the present debate at the UN regarding the duty to protect within UN reforms. The duty relates directly to genocide and massive crimes against humanity.

8. "During 1999, the Human Rights Division was unable to play the role it envisaged; it could perform little serious investigative work on rights abuses and it produced no publication. In addition, the Government of Angola sought to limit the Division to institutional capacity-building, instead of documenting human rights abuses." Written Statement submitted by Human Rights Watch, a non-governmental organization in special consultative status to the United Nations, Advisory Services and Technical Cooperation in the Field of Human Rights, U.N. ESCOR Com. of Hum. Rts., 56th Sess., at 2, U.N. Doc. E/CN.4/2000/NGO/25 (Feb. 1 2000), at 2, available at OHCHR, [http://www.unhcr.ch/Huridocda/Huridoca.nsf/0/8bd031e8d3199578802568ac00531f36/\\$FILE/G0010508.pdf](http://www.unhcr.ch/Huridocda/Huridoca.nsf/0/8bd031e8d3199578802568ac00531f36/$FILE/G0010508.pdf) (last visited July 18, 2005).

9. "States play a central role in the promotion and protection of human rights. As the principal 'duty-bearers', they are required under binding human rights instruments to take a range of measures, including legislative, economic, social and cultural measures, to *respect, protect and fulfill* all human rights." Background Note, Seminar on Good Governance Practices for the Promotion of Human Rights, Jointly organized by the Office of the United Nations High Commissioner for Human Rights and the United Nations Development Programme, Seoul, Sept. 15-16, 2004, p. 4, HR/SEL/GG/SEM/2004/2 available at <http://www.ohchr.org/english/issues/development/docs/sem2004-2.doc> (last visited Sept. 26, 2005).

10. See, for example, The Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment which states, "Considering the obligation of States under the Charter, in par-

spect however, given that it allows them to narrowly define obligation as a duty to not take a specific action that violates the law.¹¹ By focusing on this duty to respect, as opposed to protect or fulfill, and by hiding behind the State as the holder of primary responsibility to protect its citizens from abuses, these entities have managed to create a collective mystification about their level of responsibility, even when they exercise real influence in a situation.

Although non-state actors tend to focus on the word 'respect' to define their obligations under international law, the term 'protect' seems to actually be a higher duty, one demanding action to insure no violation occurs.¹² Violation makes us think of the victim. Framing the discussion of human rights violations as a failure to protect should make us think about not only the perpetrator but also who has the ability and obligation to respect the rights of the victim.

ticular Article 55, to *promote* universal respect for, and observance of, human rights and fundamental freedoms." The Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, Preamble, Apr. 6, 1987, OHCHR, <http://www.ohchr.org/english/law/cat.htm>, (last visited Sept. 26, 2005). See also the Convention on the Rights of the Child which states that "Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members." Convention on the Rights of the Child, art. 2, § 2, April 11, 1989. The Convention on the Rights of the Child also states that "Parties shall respect and promote the right of the child to participate fully in cultural and artistic life." Convention on the Rights of the Child, art. 31, § 2, Apr. 11, 1989, OHCHR, <http://www.unhcr.ch/html/menu3/b/k2crc.htm>. (last visited Sept. 26, 2005).

11. The Secretary-General of the United Nations addressing the Stockholm Forum on Preventing Genocide stated that "... the prevention of genocide may be considered one of the original purposes of the United Nations. At the time of its founding, the words 'never again' were on everyone's lips. Yet despite the coming into force of the Genocide Convention in 1951 ... genocide happened again in Rwanda and Yugoslavia, 'and States even refused to call it by its name, to avoid fulfilling their obligations.'" Press Release, Activities of Secretary-General in Stockholm, 25-26 January, Jan. 25-26, 2004, SG/T/2395, ¶ 4, available at <http://www.un.org/News/Press/docs/2004/sgt2395.doc.htm> (last visited Sept. 26, 2005).

See also the Rapporteur's Notes of the United Nations Association of the United States of America meeting, quoting Monica Anderson, Senior Adviser, International Law, Human Rights and Treaty Law Department, Swedish Ministry of Foreign Affairs as stating, "we are here to discuss how to prevent violations from occurring Most importantly . . . we need to foster the political will to act", while H.E. Mr. Stanislas Kamanzi, Permanent Representative of Rwanda to the United Nations said "genocide happens as a result of a lack of the international community's attention to escalating problems, because we do not have effective measures to prevent genocide, and because the international community takes a passive attitude towards genocide." UNITED NATIONS ASS'N OF THE USA, THE SPECIAL ADVISOR TO THE UN SECRETARY-GENERAL ON THE PREVENTION OF GENOCIDE: BUILDING PARTNERSHIPS WITH MEMBER STATES, MEETING SUMMARY 2005, ¶¶ 2, 7, available at <http://www.unausa.org/atf/cf/{49C555AC-20C8-4B43-8483-A2D4C1808E4E}/Building%20Partnerships%20with%20Member%20States.pdf> (last visited April 5, 2006).

12. "[The responsibility to protect is] the idea that sovereign states have a responsibility to protect their own citizens from avoidable catastrophe - from mass murder and rape, from starvation - but that when they are unwilling or unable to do so, that responsibility must be borne by the broader community of states." THE RESPONSIBILITY TO PROTECT, REPORT OF THE INTERNATIONAL COMMISSION ON INTERVENTION AND STATE SOVEREIGNTY, VIII (Int'l Development Research Centre, 2001).

From domestic laws,¹³ to human rights law,¹⁴ to refugee law,¹⁵ to humanitarian law (rules of war),¹⁶ all provide human beings "protection" from others. In ad-

13. For examples, see the following excerpts from national constitutions: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1, Legal Information Institute, <http://www.law.cornell.edu/constitution/constitution.overview.html> (last visited July, 2005); "No one can be compelled to render personal services without due remuneration and without his full consent, excepting labor imposed as a penalty by the judiciary." Constitución Política de los Estados Unidos Mexicanos, art. 5 (Mexico), Cámara de Diputados H. Congreso de la Unión, <http://www.cddhcu.gob.mx/leyinfo/pdf/1.pdf> (Last visited Sept. 26, 2005); "Everyone is equal before the law and has the right to equal protection and benefit of the law." Const. of the Rep. of S.A. (As adopted and amended by the Constitutional Assembly in 1996) ch. 2 (Bill of Rights), § 9, pt. 1, <http://www.polity.org.za/html/govdocs/constitution/saconst.html?rebookmark=1> (last visited Sept. 26, 2005).

14. For examples, see the following human rights treaty excerpts: "Bearing in mind that, as indicated in the Declaration of the Rights of the Child, 'the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth.'" Convention on the Rights of the Child, Sept. 2, 1990, Preamble, G.A. res. 44/25, annex, 44 GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (1989), University of Minnesota Human Rights Library, <http://www1.umn.edu/humanrts/instree/k2crc.htm> (last visited Sept. 26, 2005); "Realizing that the individual, having duties to other individuals and the community to which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognized in the present Convention." Preamble, Jan. 3, 1976, OHCHR, <http://www.ohchr.org/english/law/cescr.htm> (last visited Sept. 26, 2005); "Considering the obligation of States under the Charter of the United Nations to promote universal respect for, and observance of, human rights and freedoms." The United Nations International Covenant on Civil and political Rights, Preamble, March 23, 1976, OHCHR, <http://www.ohchr.org/english/law/ccpr.htm> (last visited Sept. 26, 2005); "The fulfillment of duty by each individual is a prerequisite to the rights of all. Rights and duties are interrelated in every social and political activity of man. While rights exalt individual liberty, duties express the dignity of that liberty." American Declaration of the Rights and Duties of Man, Preamble, adopted by the Ninth International Conference of American States, 1948, O.A.S. Res. XXX, University of Minnesota Human Rights Library, <http://www1.umn.edu/humanrts/oasinstr/zoas2dec.htm> (last visited Sept. 2005); "In 1948, concurrent with its establishment of the Organization of American States (OAS), the Ninth Pan-American Conference adopted the American Declaration on the Rights and Duties of Man, which, unlike the Universal Declaration of the UN adopted seven months later, set out the duties as well as the rights of individual citizens." HUMAN RIGHTS, ENCYCLOPEDIA BRITANNICA (Encyclopedia Britannica Premium 2005) <http://www.britannica.com/eb/article-219346> (last visited Aug. 1, 2005).

15. James C. Hathaway, *Making International Refugee Law Relevant Again: A Proposal for Collectivized and Solution-Oriented Protection*, 10 HARV. HUM. RTS. J. 115, 117 (1997).

In principle, refugee protection . . . is intended to be a situation-specific human rights remedy: when the violence or other human rights abuse that induced refugee flight comes to an end, so does refugee status. Nor is this a duty of limited duration logically assigned on the basis of accidents of geography or the relative ability of states to control their borders. Governments have regularly endorsed the importance of international solidarity and burden sharing, but collectivized efforts to date have been ad hoc and usually insufficient.

16. Humanitarian law can be defined as:

[T]he principles and rules which limit the use of violence in times of armed conflict. The aims are: to protect persons who are not, or are no longer, directly engaged in hostilities-the wounded, shipwrecked, prisoners of war and civilians; to limit the effects of violence in fighting to the attainment of the objectives of the conflict.

dition, there are international instruments that clarify protection for various individuals and groups, from the internally displaced¹⁷ to children.¹⁸ There is some

FACT SHEET NO.13, INTERNATIONAL LAW AND HUMAN RIGHTS 1991, OHCHR, <http://www.ohchr.org/english/about/publications/docs/fs13.htm> (last visited Sept., 2005).

The Geneva Conventions and their Additional Protocols are at the core of International Humanitarian Law in that they provide for the first time provisions that protect civilians during war time. The four conventions are: Convention [I] for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, *opened for signature*, August 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31, <http://www.yale.edu/lawweb/avalon/lawofwar/geneva05.htm> (last visited Sept. 26, 2005); Convention [II] for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, *opened for signature*, August 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85, <http://www.yale.edu/lawweb/avalon/lawofwar/geneva06.htm>, (last visited Sept. 7, 2005); Convention [III] for the Relative to the Treatment of Prisoners of War; *opened for signature*, August 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135, <http://www.yale.edu/lawweb/avalon/lawofwar/geneva03.htm> (Last visited Sept. 26, 2005); Convention [IV] for Relative to the Protection of Civilian Persons in Time of War, *opened for signature*, August 18, 1949, 6 U.S.T.3516, 75 U.N.T.S. 287, <http://www.yale.edu/lawweb/avalon/lawofwar/geneva07.htm> (last visited Sept., 2005); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, Dec. 12, 1977, 1125 U.N.T.S. 3 [hereinafter Additional Protocol I] Additional Protocol II to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, *adopted* 8 June 1977, *entered into force* 7 Dec. 1978, U.N. Doc. A/32/144 Annex II, 1125 U.N.T.S. 609 [hereinafter Additional Protocol II].

Article 3 common to all four 1949 Geneva Conventions . . . states, 'persons taking no active part in the hostilities, including members of the armed forces who have laid down their arms and those placed *hors de combat* [out of combat] by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria. To this end, the following acts are and shall remain prohibited at any time and at any place whatsoever with respect to the above cited persons: (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; (b) taking hostages; (c) outrages upon personal dignity, in particular humiliating and degrading treatment; (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court . .

Capt. Stephen Eriksson, *Humiliating and Degrading Treatment Under International Humanitarian Law: Criminal Accountability, State Responsibility, and Cultural Considerations*, 55 A.F. L. REV. 269, 269-270 (2004).

17. The Guiding Principles of Internal Displacement, Feb. 11, 1998, E/CN.4/1998/53/Add.2. "Introduced into the U.N. Commission on Human Rights in 1998, [The Guiding Principles of Internal Displacement] set forth the rights of internally displaced persons and the obligations of governments and the obligations of governments and the international community towards these population The Guiding Principles recast sovereignty as a form of national responsibility towards one's vulnerable populations with a role provided for the international community when governments do not have the capacity or willingness to protect their uprooted populations." Roberta Cohen, *The Guiding Principles on Internal Displacement: An Innovation in International Standard Setting*, 10 GLOBAL GOVERNANCE 459, 459 (2004).

18. Convention on the Rights of the Child, Sept. 2, 1990, G.A. res. 44/25, U.N. Doc. A/44/49 (1989). The Convention on the Rights of the Child (CRC) is one of the most universally ratified conventions. Combining humanitarian and human rights law, the CRC "creates a focus on adolescents, which would have otherwise been ignored. It forces us to listen to young people and allow them to participate in decisions" Although the CRC has been widely accepted, many are still uncertain of its application, even those within the NGO community. Vendergrift, Kathy, *Challenges in Implementing*

interesting academic work that shows how individuals are covered by multi-layers of legal protections, given that the concentric spheres of influence of these areas overlap.¹⁹ In fact, some scholars see the area of overlaps between these spheres as growing overtime.²⁰ So we should wonder with all this legal protection each individual on the planet is packing, why do human rights violations persist? The answer lies, in part, with the glacial pace of change regarding who is responsible for protection.

and Enforcing Children's Rights, 37 CORNELL INT'L L.J. 547, 549 (2004).

19. Donna E. Arzt, *Three Degrees of Separation: The Evolving Convergence of Human Rights Law, Humanitarian Law, and Refugee Law*, in *WAR IN THE TWENTIETH CENTURY - REFLECTIONS AT CENTURY'S END* (Michael A. Hennessy & B.J.C. McKercher, eds.) (2003) (on file with author).

20. *Id.* at 179-181. Arzt argues that:

In the past decade, international actors and institutions have been intentionally promoting the links between all three fields of international law by means of operations with parallel or integrated functions. For instance in the Balkans, *both* the United Nations High Commissioner for Human Rights, Mary Robinson, and the office of the prosecutor for the UN's International Criminal Tribunal for the Former Yugoslavia, Justice Louise Arbour, interviewed Kosovo refugees in order to collect evidence of summary executions, rapes and other atrocities: acts simultaneously constituting both war crimes and gross violations of human rights. Because these crimes are being committed in 'real time,' Robinson's and Arbour's investigators were seen to be 'riding in on the shoulders' of the NATO forces and courting the allies for classified surveillance data collected to assess bomb damage but that promised to provide hard evidence to use in court. Meanwhile, the UNHCR administered emergency relief to the same refugees in Albania and Macedonia.

Similarly, throughout the 1990's, UN peacekeeping missions deployed to El Salvador, Cambodia, Haiti and elsewhere with explicit mandates to monitor human rights and promote the institutional infrastructure in order to entrench human rights. . . . In such an 'integrated mandate,' each function is mutually reinforcing and reflexive. 'Peacekeeping' is increasingly coming to mean 'justice promoting' as an essential step in 'peace building.'

III. DIFFERING CONCEPTS OF PROTECTION

How one speaks of the obligation to protect varies.²¹ Two scenarios are discussed frequently, the third much less so even though it perhaps occurs most frequently.

A. Massive Refugee Movements

The legal framework for addressing massive refugee movements is established by the Convention on the Status of Refugees.²² The UN High Commissioner for Refugees (hereafter referred to as HCR) is the lead organization created by the members of the UN to respond to these types of situations.²³ Its primary objective is the protection of the rights of the refugee.

21. With regard to protecting refugees, it has been stated that:

The cornerstone of the international system of refugee protection is the 1951 U.N. Convention Relating to the Status of Refugees, and its 1967 Protocol. The Convention and its Protocol are supplemented by various regional agreements and a wider body of human rights and humanitarian law to create the folder of rights which may be claimed by refugees. Through the auspices of the host country, the international community takes on the role of providing protection to the refugee where national protection can no longer be relied upon.

Human Rights First, Human Rights and Post War Iraq, *available at* http://www.humanrightsfirst.org/iraq/iraq_03.htm. (last visited September 23, 2005).

On the issue of protecting vulnerable persons:

States have an obligation to create and maintain adequate measures at the national level, in particular in the fields of education, health and social support, for the promotion and protection of the rights of persons in vulnerable sectors of their populations and to ensure the participation of those among them who are interested in finding a solution to their own problems.

Vienna Declaration and Programme of Action, pt. 24, June 25, 1993, U.N. Doc. A/CONF. 157/23, (1993), [http://www.unhcr.ch/huridocda/huridoca.nsf/\(Symbol\)/A.CONF.157.23.En?OpenDocument](http://www.unhcr.ch/huridocda/huridoca.nsf/(Symbol)/A.CONF.157.23.En?OpenDocument)).

With regard to protecting persons from acts of genocide:

[W]e now understand that the issue is not one of a right to intervention, but rather of a responsibility – in the first instance, a responsibility of all States to protect their own populations, but ultimately a responsibility of the whole human race, to protect our fellow human beings from extreme abuse wherever and whenever it occurs.”

United Nations Press Release, Genocide is Threat to Peace Requiring Strong United Action, Secretary-General Tells Stockholm International Forum (Jan. 26, 2004), *available at* <http://www.preventgenocide.org/prevent/UNdocs/KofiAnnanStockholmGenocideProposals26Jan2004.htm>.

22. OHCHR, Convention relating to the Status of Refugees (April 22, 1954) *available at* <http://www.ohchr.org/english/law/refugees.htm> (last visited July 18, 2005).

23. See United Nations High Commissioner for Refugees [hereinafter UNHCR], Basic Facts, <http://www.unhcr.ch/cgi-bin/texis/vtx/basics> (last visited July 18, 2005).

The Office of the United Nations High Commissioner for Refugees was established on December 14, 1950 by the United Nations General Assembly. The agency is mandated to lead and co-ordinate international action to protect refugees and resolve refugee problems worldwide. Its primary purpose is to safeguard the rights and well-being of refugees. It strives to ensure that everyone can exercise the right to seek asylum and find safe refuge in another State, with the option to return home voluntarily, integrate locally or to resettle in a third country.

International NGOs working in the context of massive refugee flows normally work under the HCR's umbrella.²⁴ In this case, HCR acts like a quasi-state entity and normally spends little time working with the host government.²⁵

Although HCR has extensive experience working with refugees crossing national borders, attempts to transfer these working methods to massive movements of people that remain in their own country, or internally displaced persons (IDPs), have created some confusion in relation to the international community's obligations to protect within the borders of a UN Member State in relation to its own population. While the "Guiding Principles on Internal Displacement" are careful to compile laws and obligations already owed to IDPs as human beings,²⁶ those working in IDP camps most often come from a background with HCR and refugee camps. Thus, their desire and demand for a more robust international response to protect the rights of IDPs is natural. International actors' ability and understanding is normally limited in these situations, but they may in fact exercise enough influence to have real obligations to protect. It is unlikely, however, that the obligation will be the same in refugee camps or even from one IDP camp to another.

24. See UNHCR, Donors/Partners, <http://www.unhcr.ch/cgi-bin/texis/vtx/partners?id=3bb0773ec> (Last visited July 18, 2005).

The United Nations High Commissioner for Refugees collaborates with hundreds of NGOs to help carry out the agency's principal mandate – protecting refugees Annually, UNHCR channels 20% – 25% of its entire budget through more than 500 NGOs in some 1,000 contracts world wide. The cooperation agreements include assisting refugees and other persons of concern in the areas of health, nutrition, water supply, sanitation, community development, education, and site construction and maintenance. UNHCR also cooperates with NGOs through emergency response and standby agreements, protection capacity, joint training, advocacy and fund-raising.

25. Consider, for example, the Rwanda refugee experience from 1994 to 1996:

Although 2.5 million refugee-seekers were allowed to cross into Zaire, Burundi, and Tanzania, no capacity existed to make individual refugee determinations, nor was any attempt made to build such a capacity. In fact, the sheer numbers of people created a humanitarian nightmare that motivated a huge international response. As neighboring countries let the refugee-seekers cross into their territories, the HCR was at the forefront of the response. From August 1994 until late 1996, there were refugee camps in three countries in four main regions. These camps were served by the HRC and a significant number of NGOs, and cost about \$1,000,000 a day to operate. The single largest influence in these camps was the HRC.

Todd Howland, *Refoulement of Rwandan Refugees: The UNHCR'S Lost Opportunity to Ground Temporary Refuge in Human Rights Law*, 4 U.C. DAVIS J. INT'L L. & POL'Y 73, 78-79 (1998).

26. Roberta Cohen, *The Guiding Principles on Internal Displacement: An Innovation in International Standard Setting*, 10 GLOBAL GOVERNANCE 459, 459 (2004).

Introduced into the U.N. Commission on Human Rights in 1998, [the Guiding Principles on Internal Displacement] set forth the rights of internally displaced persons and the obligations of governments and the international community towards these populations. While acknowledging that primary responsibility rests with national authorities, the Guiding Principles recast sovereignty as a form of national responsibility toward one's vulnerable populations with a role provided for the international community when governments did not have the capacity or the willingness to protect their uprooted populations.

B. Massive Human Rights Abuse—Genocide and Crimes Against Humanity

In the case of massive human rights abuses, both humanitarian law and human rights law are relevant, but most often discussions for action are usually framed in terms of humanitarian law.²⁷

Typically the forum for discussion is the UN Security Council and the method for intervening is sending blue helmets, or UN peacekeepers. Most often this type of intervention occurs when the home country is unwilling or unable to protect its own citizens. The issue of whether there is a responsibility to protect in this case is hotly debated²⁸ and examples include the intervention in Rwanda and Darfur.²⁹

Massive human rights abuses attract both press and academic treatments, but often more noise is created than action. Too often the concept of protection is re-

27. International Humanitarian Law has been defined as the principles and rules, which limit the use of violence during periods of armed conflict. These principles and rules have continued to evolve since their inception during the early decades of the 20th century. The United Nations commitment to establish rules for the prevention and punishment of crimes against humanity, of which the crime of genocide pertains, is part of this evolution and:

[H]as added a new and important dimension to international humanitarian law. The Convention on the Prevention and Punishment of the Crime of Genocide, approved by the General Assembly in 1948 was one of the earliest steps in this field. The Convention confirms that genocide, whether committed in peace or in war, is a crime under international law which the States parties undertake to prevent and punish.

OHCHR, Fact Sheet No.13, International Law and Human Rights, available at <http://www.ohchr.org/english/about/publications/docs/fs13.htm> (last visited July 18, 2005).

28. E.g., THE RESPONSIBILITY TO PROTECT WEBSITE, THE RESPONSIBILITY TO PROTECT: REPORT OF THE INTERNATIONAL COMMISSION ON THE INTERVENTION AND STATE SOVEREIGNTY, available at <http://www.iciss.ca/report2-en.asp> (Dec. 2001).

29. United Nations Observer Mission Uganda-Rwanda (UNOMUR) was established to monitor the border between Uganda and Rwanda and verify that no military assistance was being provided across it. The operation began in June of 1993 and officially closed on 21 September 1994. The United Nations, Completed Peacekeeping Operations: Uganda- Rwanda, available at http://www.un.org/Depts/dpko/dpko/co_mission/unomur.htm (last visited Aug. 3, 2005). The members of the UN Security Council failed to protect Rwandans due to a late reaction to the growing refugee crisis and the occurrences of genocide. For more on Rwanda see R.A. Dallaire & B. Poulin, *UNAMIR, Mission to Rwanda*, JFQ 66, 68-9 (Spring 1995), available at http://www.dtic.mil/doctrine/jel/jfq_pubs/jfq1607.pdf. The international community has failed to provide effective protection measures in the Darfur region of the Sudan, primarily due to a lack of clarity.

To understand and learn from the still unfolding tragedy of Darfur, the international community must go beyond 'never again' rhetoric and ask hard questions about why the U.N. has been unable to translate its post-Rwanda commitments into effective practice. International policymakers must confront the assumptions and interests that hobble the Security Council's ability to respond quickly and decisively to human rights crises in Africa and elsewhere. The United Nations must find ways to deter potential human rights abusers and act on early warning signs to protect civilians before the death toll begins to mount. Security Council members must address the yawning gap that exists between the peacekeeping challenge that they are asking the African Union to assume in Darfur and the capacity of that nascent organization to meet that challenge.

MICHAEL CLOUGH, HUMAN RIGHTS WATCH, DARFUR: WHOSE RESPONSIBILITY TO PROTECT?, available at <http://www.hrw.org/wr2k5/darfur/darfur.pdf> (Jan. 2, 2005),

duced to the debate surrounding whether in these cases there is an obligation to intervene or protect, or simply that states or quasi-state entities have a right to a humanitarian intervention to stop massive violations if they should so choose.³⁰

The Secretary General of the UN is attempting to reframe the ongoing debate about humanitarian intervention into a discussion about the responsibility to protect.³¹ This shifts the debate to defining when events qualify to kick-in the UN Member State's obligation to act. Clarity in this area is long overdue; therefore, the success of this reform is critical to finally defining the circumstances when the international community has an obligation to intervene to stop massive human rights violations. The idea that States, through the UN, have an obligation to protect or intervene during massive human rights violations is already supported by a number of States, such as Canada³² and the Nordic countries.³³

30. The following are a range of ideas regarding the obligation to intervene. All of the commentators cited recognize that this obligation has not been concretely defined under international law. "An observer must . . . acknowledge the absence of a general consensus on the definition of humanitarian intervention, the set of criteria to judge its permissibility or impermissibility under international law, and the safeguards necessary to prevent abuse." 20 DENV. J. INT'L L. & POL'Y 305, 311 (1992). "By the dawn of the new century, the debate remained wholly inconclusive. Intense disagreement persisted as to whether there was a right of intervention and if so, how and when it should have been exercised, and under whose authority." Gareth Evans, *The Responsibility to Protect: Rethinking Humanitarian Intervention*, 98 AM. SOC'Y INT'L L. PROC. 78, 79 (2004).

There are those who say humanitarian intervention is unlawful. . . . [S]ome say that while humanitarian intervention is presently unlawful, it may one day become lawful [Some lawyers] are keen to develop principles for humanitarian intervention but still within the United Nations Charter system. This would involve acceptance by the international community of a duty to protect human beings from large-scale loss of life or large-scale "ethnic cleansing." In such cases the principle of non-intervention would yield to the duty to protect. . . ."

A.P.V. Rogers, *Humanitarian Intervention and International Law*, 27 HARV. J. L. & PUB. POL'Y 725, 730-31 (2004).

31. On March 21, 2005, Secretary General Kofi Annan presented his five-year progress report, *In Larger Freedom: Towards Development, Security, and Human Rights for All* to the General Assembly of the United Nations. The purpose of the speech was to push states toward the political will necessary to achieve the four priorities of the Millennium Declaration that are development, security, human rights, and global institutions. Part IIV of his report entitled *Freedom to Live in Dignity* outlined his desire that states embrace the principle of the responsibility to protect:

I believe that we must embrace the responsibility to protect, and, when necessary, we must act on it. This responsibility lies, first and foremost, with each individual State, whose primary *raison d'être* and duty is to protect its population. But if national authorities are unable or unwilling to protect their citizens, then the responsibility shifts to the international community to use diplomatic, humanitarian and other methods to help protect the human rights and well-being of civilian populations. When such methods appear insufficient, the Security Council may out of necessity decide to take action under the Charter of the United Nations, including enforcement action, if so required.

In Larger Freedom: Towards Development, Security and Human Rights for All: Report of the Secretary-General, U.N. GAOR, 59th Sess., at 34, U.N. Doc. A/59/2005 (2005).

32. Canada has enacted a Responsibility to Protect initiative in order to meet its international obligations to protect:

[Canada's] [r]esponsibility to Protect initiative will demand a long-term commitment to advance international rules and the international community's sense of

C. Systematic Human Rights Violations

In this third case, human rights law provides a framework for protection, but which entity has what obligation to protect is not well understood and defined. While the State maintains the prime duty, there is a growing recognition of a collective duty or a duty that applies to entities other than the State-citizen scenario.³⁴ Although this area is vastly understudied and discussed, surprisingly, it is the scenario most frequently faced by the international community and an area which often exerts an enormous amount of influence.

Non-state entities often work in countries suffering from systematic human rights abuses, during peace related missions, development or humanitarian efforts, and through international business endeavors. While the host state maintains primary responsibility for preventing abuses, the economic and political resources available to international actors may actually lead to a significant obligation to protect based on the entity's overall influence in a particular situation. For example, it would be difficult to argue that a small country like Haiti should bear sole respon-

obligation to intervene to prevent widespread atrocities [T]o better meet the need of responding quickly to international crises, the Government will establish an ongoing Stabilization and Reconstruction Task Force (START) in Foreign Affairs, to gauge the extent of crises and consolidate the Government's response.

Canadian International Diplomacy, Policy Positions: *Building a More Secure World*, available at <http://www.dfait-macchi.gc.ca/cip-pic/IPS/IPS-Diplomacy6-en.asp> (last modified Apr. 15, 2005),

33. For example, the following is an excerpt taken from a letter that was sent to Secretary General Annan from the Foreign Ministers from the Council of Nordic Countries:

We fully align ourselves with the strong statement made in the HLP [High Level Panel of the U.N. Security Council] report regarding the international responsibility to protect individuals in the event of genocide or other serious violations of international humanitarian law. Sovereign governments always have the primary responsibility to protect their own citizens, but when they are unable or unwilling to do so, the responsibility rests with the wider international community, in accordance with the Charter of the UN and the Universal Declaration of Human Rights. The Security Council has the responsibility to act with authority, efficiency, and without hesitance in the event of genocide and other large-scale killings, ethnic cleansing or serious violations of international humanitarian law. We emphasize that the responsibility to protect must be coupled with a responsibility to prevent. We need to build greater consensus around the need for collective action and early diplomatic response, which can prevent the need for military intervention.

Letter from Per Stig Møller, Minister for Foreign Affairs, Denmark, Ulla Tørnæs, Minister for Development Cooperation, Denmark, Erkki Tuomioja, Minister for Foreign Affairs, Finland, Paula Lehtomäki, Minister for Foreign Trade and Development, Finland, Jan Petersen, Minister for Foreign Affairs, Norway, Hilde F. Johnson, Minister for International Development, Norway, Laila Freivalds, Minister for Foreign Affairs, Sweden, Carin Jämtin, Minister for Development Cooperation, Sweden, and David Oddsson, Minister for Foreign Affairs, Iceland to Secretary General of the United Nations, Kofi Annan (March 7, 2005), available at <http://odin.dep.no/filarkiv/239952/nordiskfmbrev.pdf>.

34. The International Commission on Intervention and State Sovereignty states in its report that "[w]here a population is suffering serious harm, as a result of internal war, insurgency, repression or state failure, and the state in question is unwilling or unable to halt or avert it, the principle of non-intervention yields to the international responsibility to protect." THE RESPONSIBILITY TO PROTECT WEBSITE, THE RESPONSIBILITY TO PROTECT: REPORT OF THE INTERNATIONAL COMMISSION ON THE INTERVENTION AND STATE SOVEREIGNTY, *supra* note 28.

sibility to protect while the annual UN peacekeeping budget in Haiti is twice that of the Haitian government. Often the UN entities are much better resources, in terms of vehicles, communication, and the number of individuals with graduate degrees and relevant experience, than the host government.³⁵ Private entities like Exxon Mobil operating in a country like Chad often dwarf their host state in terms of global reach and wealth.³⁶ Some UN Member States, like the United States, may exercise more perceived political clout than the host state thereby giving the United States greater influence over the outcome of a particular situation.³⁷

35. The current United Nations Stabilization Mission in Haiti (MINUSTAH) approved budget for 07/05–06/06 is \$494.89 million (gross). This budget is expected to fund: (a) 6,229,263 troops, (b) 1,437,401 civilian police, (c) 425,423 international civilian workers, (d) 443 local civilian workers, and (e) 139,147 UN volunteers. UNITED NATIONS, BACKGROUND NOTE: UNITED NATIONS PEACEKEEPING OPERATIONS, available at <http://www.un.org/Depts/dpko/dpko/bnote.htm#minustah> (Aug. 31, 2005). The Haitian government's annual budget is approximately \$US 300 million. Lidice Valenzeula, *Haiti, A Coup Without Consultation*, Global Policy Forum (March 15, 2004), available at <http://www.globalpolicy.org/security/issues/haiti/2004/0315consultation.htm>

36. The Exxon Mobil Corporation belongs to a three-company oil consortium that inaugurated its Chad-Cameroon Pipeline project on October 10, 2003. The \$3.7 billion publicly financed project represents the biggest investment in Africa to date. Many international organizations and the Chadian civil society argue that a development project of this magnitude will only allow more funds to flow to the corrupt Chadian government and damage important natural resources while doing little to help bring economic development to the Central-African region. It has been reported that the government has already used its \$4.5 million signing bonus from the oil companies to purchase arms. Press Release, Environmental Defense, Banks and Exxon Celebrate Chad-Cameroon Pipeline, International Organizations Support Chadian Day of Mourning (Oct. 10, 2003), available at <http://environmentaldefense.org/pressrelease.cfm?ContentID=3129>. There is an enormous economic power disparity between the Exxon Mobile Corporation and Chadian government. The corporation's 2003 financial report states that its net income was \$21.5 billion. EXXON MOBIL, 2004 FINANCIAL & OPERATING REVIEW, available at <http://www.exxonmobil.com/corporate/files/corporate/ExxonMobilFO2004.pdf> (Last visited May 22, 2006). The World Bank *Chad Country Profile* reports that Chad's 2003 GDP was \$2.6 billion. THE WORLD BANK GROUP, CHAD DATA PROFILE, available at <http://devdata.worldbank.org/external/CPProfile.asp?SelectedCountry=TCD&CCODE=TCD&CNAME=Chad&PTYPE=CP> (Last visited July 29, 2005). It is therefore easy to see how a corporation like Exxon Mobil can easily overshadow small economy countries like Chad in terms of global influence and net worth.

37. An example of this is the United States presence in Liberia:

[T]he United States has 'special' ties with [Liberian] peoples and had invested in the area during the Cold War. For example, Liberia was a major African recipient of US aid, with the regime led by Doe receiving about \$500 million in US aid between 1980 and 1985. The US also had strategic interests in Liberia including the Omega navigation station and the Voice of America's largest transmitting station in Africa. Nonetheless, by the late 1980s when the conflict between Taylor and Doe was beginning to destabilize the region, there was faint hope that the US would physically intervene As the situation in Liberia rapidly deteriorated, the US, with 2,000 marines off the Liberian coast, preferred to 'watch from a distance.'

Rasheed Draman & David Carment, *Managing Chaos in the West African Sub-Region: Assessing the Role of ECOMOG in Liberia*, 6 J. MILITARY & STRATEGIC STUDIES 1, 6-7 (Fall 2003), available at <http://www.jmss.org/2003/fall-winter/documents/carment-draman.pdf> (Last visited Aug. 1, 2005).

Often many actors and many responses are involved in situations of systemic human rights violations. Apart from the host State,³⁸ a variety of international entities are often present such as the UN Security Council,³⁹ the UN Office of the High Commissioner for Human Rights,⁴⁰ international NGOs,⁴¹ international financial institutions,⁴² and multinational corporations.⁴³

38. Within the context of systematic human rights abuses, the host state maintains sovereignty over the geographic area where human rights abuses are occurring and holds the primary responsibility for the protection of its people. THE RESPONSIBILITY TO PROTECT WEBSITE. THE RESPONSIBILITY TO PROTECT: REPORT OF THE INTERNATIONAL COMMISSION ON THE INTERVENTION AND STATE SOVEREIGNTY, *supra* note 28.

39. The United Nations Security Council has primary responsibility, under the UN Charter, for the maintenance of international peace and security. For more information on the UN Security Council, visit the UN Security Council's website at <http://www.un.org/Docs/sc/> (Last visited Aug. 3, 2005).

40. The Office of the United Nations High Commissioner for Human Rights (OHCHR) is based at the Palais Wilson in Geneva, Switzerland, with an office at United Nations Headquarters in New York. OHCHR aims to ensure the practical implementation of universally recognized human rights norms. It is committed to strengthening the United Nations human rights programme and providing the United Nations treaty monitoring bodies and special mechanisms established by the Commission on Human Rights. OHCHR, ABOUT OHCHR, MISSION STATEMENT, *available at* <http://www.ohchr.org/english/about/mission.htm> (Last visited Aug. 3, 2005).

41. There are many non-governmental organizations (NGOs) that work internationally and are actively involved in the protection of civilians from human rights abuses. For example, Human Rights Watch (HRW)—HRW is the largest human rights organization based in the United States. HRW researchers conduct fact-finding investigations into human rights abuses in all regions of the world and then publishes those findings in dozens of books and reports every year, generating extensive coverage in local and international media. HUMAN RIGHTS WATCH, ABOUT HRW, <http://www.hrw.org/about/whoware.html> (Last visited Aug. 3, 2005). The International Committee of the Red Cross (ICRC), established in 1863, is an impartial, neutral and independent organization whose exclusively humanitarian mission is to protect the lives and dignity of victims of war and internal violence and to provide them with assistance. INTERNATIONAL COMMITTEE OF THE RED CROSS, THE MISSION, <http://www.icrc.org/HOME.NSF/060a34982cae624ec12566fe00326312/125ffe2d4c7f68acc1256ae300394f6e?OpenDocument> (Last visited Aug. 3, 2005). The International Rescue Committee (IRC), founded in 1933, works in 25 different countries and is a world leader in relief, rehabilitation, protection, post-conflict development, resettlement services, and advocacy for those uprooted or affected by violent conflict or oppression. INTERNATIONAL RESCUE COMMITTEE, WHAT IS THE INTERNATIONAL RESCUE COMMITTEE?, <http://www.theirc.org/about/index.cfm> (Last visited Aug. 3, 2005).

42. The International Monetary Fund (IMF) and the World Bank (Bank) are two prominent international financial institutions that help countries through financial support and development. The IMF is an organization of 184 countries that works to foster global monetary cooperation, secure financial stability, facilitate trade, promote high employment and sustainable economic growth, and reduce poverty. INTERNATIONAL MONETARY FUND, <http://www.imf.org/> (Last visited Aug. 3, 2005); The Bank provides loans, policy advice, technical assistance, and knowledge sharing services to low and middle income countries. It's mission is to fight poverty and improve living standards of people in the developing world. THE WORLD BANK GROUP, <http://web.worldbank.org/WSITE/EXTERNAL/EXTABOUTUS/0,,pagePK:50004410~piPK:36602~theSitePK:29708,00.html> (Last visited Aug. 3, 2005).

43. See Investor Dictionary.com, <http://www.investordictionary.com/definition/multinational+corporation.aspx>. (Last visited Aug. 3, 2005).

A multinational corporation (MNC) or transnational corporation (TNC) is one that spans multiple nations; these corporations are often very large. Such compa-

Finally, the host State is often debilitated and/or dysfunctional. It therefore is unable to meet its obligations of traditional sovereignty, such as caring for its people,⁴⁴ displacing and compensating individuals (e.g., for mineral extraction),⁴⁵ and resolving conflicts.⁴⁶ As a result, these tasks may be carried out by various entities that are not the host State thereby expanding the scope of those who exercise sovereign-like power over a situation and therefore have the capacity to protect. In fact, the State in certain places may be close to non-existent or playing a role of preying-off of as opposed to serving its citizens.⁴⁷

nies have offices and/or factories in different countries. They usually have a centralised head office where they coordinate global management. Very large multinationals have budgets that exceed those of many countries. They can be seen as a power in global politics.

44. Many UN executive agencies such as the United Nations Children's Fund (UNICEF) and the UN High Commissioner for Refugees (UNHCR) take over caring for a state's citizens from time to time, especially during times of economic and political instability. UNICEF provides economic and logistical support for countries in order to ensure that every child's right to health, education, equality, and protection are respected. UNICEF, WHAT WE DO, <http://www.unicef.org/whatwedo/index.html> (Last visited Aug. 3, 2005); The UNHCR "is mandated to lead and co-ordinate international action to protect refugees and resolve refugee problems worldwide." UNHCR, UNHCR BASIC FACTS, <http://www.unhcr.ch/cgi-bin/texis/vtx/basics> (Last visited Aug. 3, 2005).

45. In 1999, Manhattan Minerals Corporation, a "junior" Canadian mineral extraction corporation, became interested in developing a mining project in the Tambogrande region of the Piura Province located along the northern coast of Peru. The estimated cost of the project was \$240 million and nearly 8,000 of the Tambogrande town residents would have had to be relocated, which would be paid for by the company. STÉPHANIE ROUSSEAU & FRANÇOIS MELOCHE, INT'L CTR. FOR HUMAN RIGHTS AND DEMOCRATIC DEVELOPMENT, GOLD AND LAND: DEMOCRATIC DEVELOPMENT AT STAKE, REPORT ON THE OBSERVATION MISSION OF THE TAMBOGRANDE MUNICIPAL CONSULTATION PROCESS IN PERU ¶¶ 24, 26, 28-29 (2002) <http://ichrdd.ca/english/commdoc/publications/demDev/tambograndeReportEng.html> (Last visited Sept. 24, 2005).

46. The Department of Peacekeeping Operations (DPKO) assists "Member States and the Secretary-General in their efforts to maintain international peace and security. The Department's mission is to plan, prepare, manage and direct UN peacekeeping operations." Each peacekeeping operation works on different projects, but all share certain common goals—"to alleviate human suffering, and create the conditions and build institutions for self-sustaining peace." U.N. DEPT. OF PEACEKEEPING OPERATIONS, MISSION STATEMENT, ¶¶ 1, 3, <http://www.un.org/Depts/dpko/dpko/info/page3.htm> (Last visited Aug. 3, 2005).

47. Present day Haiti and Liberia are examples of this phenomenon. In Haiti, after thirty years of dictatorship under Jean-Claude Duvalier and a difficult and incomplete transition to democracy under Jean-Bertrand Aristide, Haiti again descended into violence resulting from mounting outcries against the government's failures to enact economic and political reform. Ben J. Scott, *Order in the Court: Judicial Stability and Democratic Success in Haiti*, 37 VAND. J. TRANSNAT'L L. 555, 558 (2004). In 2004, then President Aristide was forced to flee the country. A U.S. backed interim council has been put into place to lead the country. Haiti's future is uncertain. *Id.* at 560. The number and severity of the country's problems is startling. Apart from the country's conditions of extreme poverty, environmental concerns, and continued violence, Haiti also maintains an oligarchic class "... which has held so much power in Haiti in recent decades has a motive to stand in the way [of democratization] as well: a true free market economy, a more likely path for Haiti under a true democracy ... could threaten the control those elites have over Haiti's scarce markets and resources." *Id.* at 563.

Former Liberian President Charles Taylor was elected in 1997. His presidency proved to be more of a dictatorship which lasted until he was ousted in 2003 and forced to flee the country to Nigeria. Taylor's Presidency has been described as a:

It is rare to find a country today that is not influenced by the international community in some way. This is especially true of those countries with a problematic history of human rights abuses. In these cases, it is more likely that the international community will have a larger presence.⁴⁸

One could argue that the existence of these missions and efforts by the international community in countries where there is a history of human rights violations is an implicit recognition of the international community's duty to protect.⁴⁹ Of

[R]eign through terror. Political murders are rampant as are abductions, floggings, or beatings of political opposition, students, journalists, and human rights activists. Under Executive Order, contravening a Supreme Court decision, trial by ordeal (Sassywood [or ritualistic killings]) is commonly implemented. Unofficial detention centers for secret detainees have sprouted; one of which, located at the Executive Mansion, is completely off limits to NGO investigations and is alleged that they are centers of torture.

Levi Woodward, *Taylor's Liberia and the U.N.'s Involvement*, 19 N. Y.L. SCH. J. HUM. RTS. 923, 935 (2003).

48. Examples from the United Nations International Community: (1) UN Peacekeeping Missions—There are currently 17 UN Peacekeeping missions operating throughout the world with an approved 2005 budget of \$US 4.47 billion. UNITED NATIONS PEACEKEEPING OPERATIONS, BACKGROUND NOTE (2005), <http://www.un.org/peace/bnote010101.pdf> (Last visited Aug. 3, 2005); (2) The United Nations Development Programme (UNDP)—The UNDP is the UN's global development network that works with 166 countries world wide and helps connect them to knowledge, experience and resources in order to assist them with their development needs. UNITED NATIONS DEVELOPMENT PROGRAMME, WHO WE ARE & WHAT WE DO, <http://www.undp.org/about/> (Last visited Aug. 3, 2005); (3) The World Bank (WB)—The WB is one of the United Nations' specialized agencies, and is made up of 184 member countries. In 2004, the WB provided \$US 20.1 billion for 245 projects in developing countries world-wide. THE WORLD BANK GROUP, WHAT IS THE WORLD BANK, <http://web.worldbank.org/WBSITE/EXTERNAL/EXTABOUTUS/0,,contentMDK:20040558~menuPK:34559~pagePK:51123644~piPK:329829~theSitePK:29708,00.html> (Last visited Aug. 5, 2005).

49. The legal principle that an individual who volunteers to engage in protective activity assumes an affirmative duty to act is not new. The principle of affirmative duty is articulated in § 324A of The Restatement (Second) of Torts which states that:

[o]ne who being under no duty to do so, takes charge of another who is helpless adequately to aid or protect himself is subject to liability to the other for an bodily harm caused to him by: a) the failure of the actor to exercise reasonable care to secure the safety of the other while within the actor's charge, or b) the actor's discontinuing his aid or protection, if by so doing he leaves the other in a worse position than when the actor took charge of him.

ARTHUR BEST, & DAVID W. BARNES, CASES, STATES, & PROBLEMS 508 (Aspen Publishers, Inc., 2003).

The tort principle of affirmative duty is applicable to the UN's peacekeeping efforts. Although the national sovereign holds primary responsibility to protect and care for those residing within its borders, once the international community intervenes and assumes some sovereign responsibilities, it in affect assumes duties similar to the sovereign itself. In effect, the UN has volunteered itself, as a Good Samaritan, to aid, and therefore acquires responsibilities it would not have had if it had remained inactive. Rwanda is a real world scenario for the application of the above stated principles. Once the Member States of the UN agreed to send a peacekeeping mission to Rwanda, it took upon itself a duty to provide security for the country's population. The resulting genocide would stand in contrast to any assertions that the Member States of the UN met their obligation to take reasonable care to protect Rwandans or that by leaving, the peacekeepers did not harm those who were relying upon its protection. I would argue further that the very existence of UN peacekeeping missions and human rights conventions create a duty on UN Member States and other entities. Why else have human rights conventions

course, most practitioners and scholars will hide behind the idea that these missions were fielded not out of duty (that would mean the mission would actually need to measurably change the situation), but out of a choice to try to be helpful.⁵⁰ Well, even if this façade for the motivation to intervene is maintained, just like the Good Samaritan principle in tort law, after the intervention is undertaken then there is an obligation to do something to incrementally and measurably contribute to the situation.⁵¹

As an example, let's examine the UN blue helmets that had been in Angola to monitor the ceasefire between the Angolan government and the UNITA⁵² rebels until the late 1990s when they were asked to leave by the host State.⁵³ Many felt the peacekeepers did precious little to protect Angolans and created frustration in many quarters.⁵⁴ Although the violations were daily and serious, they were not

or peacekeeping missions if they do nothing or very little during the times that they are most needed?

50. Since its creation, the United Nations has consistently seen itself as a "benevolent promoter of human rights." In doing so, it has kept itself at a safe distance from the responsibilities for guaranteeing and promoting human rights, which has always lied with the sovereign state. Frédéric Mégret, & Florian Hoffmann, *The UN as a Human Rights Violator? Some Reflections on the United Nations Changing Human Rights Responsibilities*, 25 HUM. RTS. Q. 314, 315 (2003).

51. The concept of the international community's duty to protect is continually evolving. Currently there is a trend towards creation of duty through the assumption of quasi-state functions where international entities exert "'sovereign control' over certain persons through exercise of select functions of sovereignty. One example is the United Nations and the effort to promote international criminal justice, notably through ad hoc tribunals [Rwanda & Yugoslavia] For those in UN prisons . . . the United Nations may well be the closest thing [those accused of human rights abuses] have to a sovereign, at least during their detention." Frédéric Mégret, Florian Hoffmann, *The UN as a Human Rights Violator? Some Reflections on the United Nations Changing Human Rights Responsibilities*, 25 HUM. RTS. Q. 314, 339-340 (2003). Following this argument, if the United Nations or some other international entity assumes a function that is sovereign-like in nature, and the nation state is unable or unwilling to fulfill its sovereign duty to protect, then that quasi-sovereign entity assumes a duty to protect limited by the nature of the sovereign function. This would apply to all forms of sovereign actions such as the provision of emergency food and shelter for refugees or the performance of security functions like peacekeeping mission in countries of conflict. Similar to the Good Samaritan laws, once an international entity gratuitously offers to provide a sovereign function, it will assume an obligation to perform the sovereign responsibility in good faith and to the best of its ability.

52. União Nacional para a Independência Total de Angola (UNITA) is an Angolan political faction. The group was formed by Jonas Savimbi after the politicized split of the Angolan independence movement in 1966. Mr. Savimbi led UNITA during the civil war until his death in 2002. National Union for Total Independence of Angola, Wikipedia, the Free Encyclopedia, <http://en.wikipedia.org/wiki/UNITA> (Last visited Aug. 12, 2005).

53. Angola-MONUA Background (2001), United Nations Website, <http://www.un.org/Depts/DPKO/Missions/Monua/monuab.htm> <http://www.un.org/Depts/DPKO/Missions/Monua/monuab.htm> (Last visited Aug. 4, 2005).

[T]he Secretary-General assessed that the conditions for a meaningful United Nations peacekeeping role had ceased to exist. He noted that the Angolan Government did not support the extension of MONUA [United Nations Observer Mission in Angola] beyond its current mandate, which was to expire on 26 February 1999. All MONUA team sites and regional headquarters were to be withdrawn to the capital Luanda by mid-February and most of UN peacekeeping personnel repatriated by 20 March.

54. See, e.g., Augusta Conchiglia, *The Opposition Cannot Be Disarmed: United Nations Fails in Angola*, LE MONDE DIPLOMATIQUE (English Edition), July 1999,

genocide nor were they of the character that typically demand the Member States of the UN to intervene somehow and stop them.⁵⁵ There were systematic violations and there was definitely a feeling among some people in government, certainly among the population and within many NGOs, that if the blue helmets were in Angola, then they should actually contribute to improving the situation.⁵⁶

Monitoring a ceasefire was not enough to insure the return to peace. A more proactive mission was needed that would prevent the UNITA rebels from rearming and help to lay the groundwork for a transformation to a more democratic State.⁵⁷ Eventually, the blue helmets were kicked out for failing to prevent UNITA from rearming during the ceasefire.⁵⁸ Someone thought that the UN had a responsibility that it did not meet.

After the pullout of the blue helmets, this left the HRD as the largest substantive component of the new UN Security Council presence in Angola.⁵⁹ We in the

<http://mondediplo.com/1999/07/11angola> (Last visited Aug. 4, 2005); U.N. ESCOR Com. of Hum. Rts., 56th Sess., U.N. Doc. E/CN.4/2000/NGO/25 (Feb. 1 2000), [http://www.unhchr.ch/Huridocda/Huridoca.nsf/0/8bd031e8d3199578802568ac00531f36/\\$FILE/G0010508.pdf](http://www.unhchr.ch/Huridocda/Huridoca.nsf/0/8bd031e8d3199578802568ac00531f36/$FILE/G0010508.pdf) (Last visited July 18, 2005); HUMAN RIGHTS WATCH, ANGOLA UNRAVELS: THE RISE AND FALL OF THE LUSAKA PEACE PROCESS, <http://www.hrw.org/reports/1999/angola/Ang1998-10.htm> (Last visited Aug. 4, 2005).

55. See, e.g., Howland, *supra* note 5.

56. See, e.g., HUMAN RIGHTS WATCH WORLD REPORT 2002: AFRICA: ANGOLA, available at <http://www.hrw.org/wr2k2/africa1.html>. "On 22 December the Angolan Government's Council of 'Ministers' Standing Commission complained of the 'passive and complacent manner in which the international community witnessed UNITA's repeated failures to adhere to the Lusaka Protocol, despite complaints made at the appropriate time.'" *UN Prepares to Withdraw MONUA*, 5(V) ANGOLA PEACE MONITOR, Jan. 22 1999, <http://www.africaaction.org/docs99/ang9901.htm> (Last visited Aug. 4, 2005).

The Angolan government also endorses the withdrawal of MONUA forces on February 26. Last December the Council of Ministers' Standing Commission noted in a declaration that it is difficult 'to understand that thousands of UN observers deployed in Angola . . . never realized what was happening especially when they endorsed UNITA's formal declaration issued in mid-1998 to the effect that it had disarmed and demilitarized its forces completely.

United Nations Secretary General Calls for Pullout of MONUA Peacekeepers, O PENSADOR (Electronic Edition) (Jan./Feb. 1999), available at <http://www.angola.org/news/pensador/february99/unout.html> (Last visited Aug. 4, 2005).

57. A Human Rights Watch report criticized this strategy:

U.N.'s strategy of refraining from disclosure of public action against violations of the accords, its lack of transparency, and its failure to implement U.N. embargos undermined any respect that UNITA or the government had to observe the Lusaka Protocol. With the collapse of the Lusaka peace process this strategy of see no evil, speak no evil appears to have backfired badly. Twice this strategy has been used and twice the peace accords have collapsed and the country has returned to war. This could have been avoided if the U.N. had deployed its peacekeepers promptly and empowered them to undertake "sensitive" monitoring and reporting of cease-fire and embargo violations and gross human rights violations.

HUMAN RIGHTS WATCH, *supra* note 54.

58. O PENSADOR, *supra* note 56.

59. OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS, HUMAN RIGHTS FIELD PRESENCE IN ANGOLA, (UNCT) <http://www.unhchr.ch/html/menu2/5/angola.htm> (Last visited Sept. 26, 2005).

At the request of the Angolan Government, the United Nations Security Council,

HRD took the perspective that the Angolan government was first and foremost responsible for protecting the rights of its citizens and furthermore that the international community, recognizing that they too had some responsibility, organized a human rights mission to Angola to contribute to improving the situation. How a group of 20 individuals (some international and some local) was going to do more than the approximately 7,000 international UN personnel that had been kicked-out of the country to protect Angolans was a bit unclear. But even with the criticisms of the HRD, it probably was able to do more than the 7,000 troops simply because it recognized it had a role to play and attempted to take its duty seriously. This recognition of a role to facilitate measurable improvement in the human rights situation is critical. Often the UN would prefer to hide behind the host State, no matter how feeble, in order to avoid responsibility or the idea that they have a duty.

This criticism of the blue helmets and later of the HRD helped to clarify the issue. When human rights were violated, various legal protections held by the individual were ignored. But who is responsible and who was responsible to protect that individual? Beyond the host State's responsibility, others (e.g., the UN and companies operating in the host State) have a responsibility but their responsibilities are far from clear.

IV. THE PROTECTION CRISIS IN ANGOLA

Angola was a basket case after about thirty years of civil war, most of that time a hot conflict that was part of the cold war played out in an area where most people did not know and could care less whether Lenin or Barry Goldwater had clearer visions for the world's future.⁶⁰ Some observers thought that about half of the population had been displaced by the war that had basically been ongoing since independence in 1975.⁶¹ The first University in Angola did not even open until a year before independence.⁶² Most had no access to running water and modern

in an unprecedented resolution (n°1229 of February 1999), directed the HRD to continue its activities during MONUA's liquidation period. Thus, the HRD focused on some essential components of a peace-building process such as strengthening government/state human rights institutions and raising awareness of human rights standards.

60. See generally PEPETELA, *A GERAÇÃO DU UTOPIA: ROMANCE*, Coleção Letras Angolanas 1, Luanda (1st ed. 1999), a novel set during the Angolan war for independence and the civil war that followed.

61. OCHA, LESSONS LEARNED REVIEW: OCHA-ANGOLA 2000-2002 7, <http://ochaonline.un.org/GetBin.asp?DocID=2110> (Last visited Sept. 26, 2005).

62. "In 1962, the Estudos Gerais Universitários de Angola was created in Luanda as part of the Portuguese university system, providing facilities for the study of agriculture, forestry, civil engineering, medicine, veterinary medicine, and education." PAULO DE CARVALHO ET AL., INT'L NETWORK FOR HIGHER EDUC. IN AFR., COUNTRY HIGHER EDUC. PROFILES, http://www.bc.edu/bc_org/avp/soe/cihe/inhea/profiles/Angola.htm (Last visited Sept. 26, 2005); See also PAULO DE CARVALHO ET AL., *AFRICAN HIGHER EDUCATION: AN INTERNATIONAL REFERENCE HANDBOOK* 162-75 (Damtew Teferra, & Phillip G. Altbach, eds., Indiana University Press, 2003) (detailing account on the state of higher education in Angola).

sanitation.⁶³ Public health was a nightmare.⁶⁴ Less than five percent of the people had the means to have a car.⁶⁵

Diamonds were fueling UNITA, whose leader, revered by Ronald Reagan, was an ideological chameleon who frequently violated human rights and was obsessed with being president.⁶⁶ Oil was fueling the government of the Popular Movement for the Liberation of Angola (MPLA) and their war effort.⁶⁷ While some top government authorities did make some significant cash through extractive industries, the oil and diamond majors have profited handsomely from Angola and I can vouch that the vast majority of the people of Angola have not made out so handsomely.

In 2000, Angola was rated by the United Nations Children's Fund (UNICEF) to be the worst place on earth to be born into.⁶⁸ That same year however, Angola became the second largest exporter of oil in sub-Saharan Africa after Nigeria.⁶⁹ It appears UNICEF did not have a high expectation that the oil money would help the kids.

This was the context within which the HRD began its work. Although those working for the HRD never signed-up to single handedly protect each and every eleven million or so Angolans,⁷⁰ we were criticized by international human rights

63. The UNDP Report on Water, Sanitation, and Nutritional Status found that only 37% of Angola's population had sustainable access to an improved water source. Sustainable access to an improved water source is defined as:

[T]he share of the population with reasonable access to any of the following types of water supply for drinking: household connections, public standpipes, boreholes, protected dug wells, protected springs and rainwater collection. Reasonable access is defined as the availability of at least 20 litres a person per day from a source within one kilometre of the user's dwelling.

HUMAN DEVELOPMENT REPORTS, INDICATORS, WATER, SANITATION, NUTRITIONAL STATUS (2000) http://hdr.undp.org/statistics/data/pdf/hdr04_table_7.pdf (Last visited Aug. 10, 2005).

64. The Angolan health sector has been crippled by decades of under-financing and incompetent national officials. Making matters worse, the country's limited resources are disproportionately skewed towards urban areas with 50% of public funding going to large urban hospitals and 70% of doctors being concentrated in the capital. Meanwhile, the rural health care system is severely hampered by a shortage of rural health care workers and massive levels of destruction of the country's rural healthcare infrastructure that will require huge inflows of capital to repair. Access to medicine is an additional difficulty as pharmaceuticals are marked by lack of financial inputs and drug scarcity is common. WORLD HEALTH ORGANIZATION HEALTH ACTION IN CRISES: ANGOLA, 2 (2005), http://www.who.int/hac/crises/ago/background/Angola_Mar05.pdf. (last updated Mar. 2005)

65. Angola Institute for Economic and Social Research did a study commissioned by the HRD in 2001. Study on file with author.

66. Barry Mason, *Angola: MPLA inflicts new defeats on UNITA*, WORLD SOCIALIST WEBSITE, Nov. 16, 1999, <http://www.wsws.org/articles/1999/nov1999/ango-n16.shtml>.

67. *Id.*

68. AMANDA BLAKELY, ET AL., WORLD BANK, CSR IN THE OIL SECTOR IN ANGOLA: WORLD BANK TECHNICAL ASSISTANCE STUDY 4 (2003), available at http://sitesources.worldbank.org/INTPSD/Resources/Angola/Angola_CSR_Report_-_FINAL3.pdf (stating that Angola has the worst child minority child rate in the world.)

69. TONY HODGES, ANGOLA: FROM AFRO-STALINISM TO PETRO-DIAMOND CAPITALISM 125 (2001).

70. CIA, WORLD FACTBOOK, ANGOLA, www.cia.gov/cia/publications/factbook/geos/ao.html

groups,⁷¹ humanitarian NGOs,⁷² and UN commissions and entities⁷³ for our failure to protect Angolan citizens.⁷⁴ While we in the HRD toyed with our role as a type of human rights super hero action figure, ready to protect these eleven million in an instant, in the end we puzzled over what these critics thought we ate for breakfast, given the HRD had neither the capacity nor desire to protect the Angolans – at least not as was being demanded of us. Even so, the HRD had an appreciation for the systematic violations of economic and social rights, the ever too frequent extrajudicial killings, and the matter of daily life arbitrary detentions that afflicted many Angolans. A good deal of discussion, thought, and action went toward contributing to improving the generally problematic human rights situation of the country.⁷⁵

Given nobody likes to be the target of high-pitched criticism, the first reaction was not what an interesting article this would eventually make. After reading and listening to the numerous complaints and criticisms, it became clear that while everyone was talking about protection, many had differing ideas about the legal grounding of their idea of protection and each a particular way of determining who was responsible for providing it.

That is how the HRD could come under criticism for failing to protect. Some argue—even though implicitly—that the international community's human rights obligations to protect are robust and that the HRD was created to play a role similar to the HCR in the refugee camps.

Others confused operational methods with protection. For example, there is a dated debate that UN human rights work is divided into monitoring and technical cooperation, where monitoring and denunciations of abuses are protection activities and technical cooperation is not.⁷⁶ Given protection is about maximizing the

(Sept. 26, 2005).

71. See, e.g., AMNESTY INTERNATIONAL, ANGOLA AND NAMIBIA: HUMAN RIGHTS ABUSES IN THE BORDER AREA (2000), <http://www.amnestyusa.org/children/document.do?id=326730DAEC1C5A998025689E00476ED0>; See also Clough, *supra* note 29.

72. See e.g., MEDECINS SANS FRONTIERES/DOCTORS WITHOUT BORDERS, INTERNATIONAL ACTIVITY REPORT: ANGOLA (2002), <http://www.doctorswithoutborders.org/publications/ar/i2002/angola.cfm> (Last visited Sept. 26, 2005).

73. The Representative of the Secretary-General, Report of the Representative of the Secretary-General on Internally Displaced Persons, ¶ 99, submitted pursuant to Commission on Human Rights resolution 2000/53, U.N. Doc. E/CN.4/2001/5/Add.5 (Jan. 25, 2001). The Inter-Agency Network on Internal Displacement visited Angola in 2001 and found that the HRD/UNOA urgently needed to strengthen its presence and activities at provincial level. The Network visit was led by Dennis McNamara working for the UN Office on Humanitarian Coordination. REPORT OF THE SENIOR INTER-AGENCY NETWORK ON INTERNAL DISPLACEMENT: MISSION TO ANGOLA, www.reliefweb.int/idp/docs/reports/Angolamarch2001iarep.pdf (Last visited Sept. 26, 2005).

74. See generally, Andrea Lari & Rob Kevlihan, *International Human Rights Protection in Situations of Conflict and Post Conflict: A Case Study of Angola*, 13(4) AFRICA SECURITY REVIEW 29 (2004), available at <http://www.iss.co.za/pubs/ASR/13No4/ContentsPDF.htm>.

75. See generally, S.C. Res. 1295, U.N. Doc. S/RES/1295 (Apr. 18, 2000), available at <http://www.un.int/usa/sres1295.htm> (Last visited Sept. 26, 2005) (reiterating the Security Councils decision to remain actively engaged in Angola as a result of the continued environment of violence).

76. See generally, IAN MARTIN, SELF-DETERMINATION IN EAST TIMOR (2001) (describing and discussing a U.N. peacekeeping mission that was dispatched to East Timor).

respect for the rights of individuals, both techniques can contribute and both techniques can be irrelevant. What is more important is that there is either a concrete preventive action⁷⁷ or a real case-based intervention to protect an individual's rights.⁷⁸

The HRD mission in Angola took the latter approach. Our idea was that protection would be best achieved through empowering the people. While imperfect, the HRD worked to create a system of complaint that we hoped would provide a foundation for systemic change towards a culture that respects human rights. The complaint system was able to function in areas where the population was made aware of its rights, where assistance in exercising those rights was provided by human rights counselors, paralegals or lawyers, and where the government had the capacity to respond to individual or communal complaints.⁷⁹ Angola was lucky to have at least a partially functioning court in each of its eleven States.⁸⁰

In addition to operational methodology, promotion and protection are also often confused. Promotion is often thought of as being some kind of soft educational action, while protection some hard driving action.⁸¹ Certainly teaching human rights in the abstract without providing a means to apply them can be a waste of

77. The accompaniment work of Peace Brigade International (PBI) is an example of concrete protection action. PBI teams accompany individuals and organizations that are threatened with political violence. Their presence serves as a walking embodiment of the pressure the international community is ready to apply in the event of an abusive act. The hope is that PBI's accompaniment work will create a sphere of security that will allow national human rights workers to continue their human rights efforts. PEACE BRIGADES INT'L, HOW DOES PEACE BRIGADES INTERNATIONAL WORK?, http://www.peacebrigades.org/britain/pbiipack_aboutpbi.pdf (Last visited Sept. 26, 2005).

78. See, e.g., Howland, *supra* note 5, at 2-3.

79. The HRD in Angola: (1) developed case tracking systems with the prosecutors, police, prisons, and courts, designed to provide a means to improve respect for liberty and due process rights; (2) provided professional and human rights training for police, prisons, prosecutors, and judges, designed to improve the capacity for respect of human rights within the justice system; (3) created a municipal justice project, designed to extend and improve access to and delivery of justice by increasing the number of municipalities served by a functioning justice system through training and infrastructure support; (4) supported the 9th Commission of National Assembly to improve its capacity to respond to citizen complaints of human rights violations; (5) supported the Ministry of Foreign Relations in its production of useful and fact-based reports to treaty bodies; (6) supported the Supreme Court to make its decisions available to the public thereby augmenting rule of law in Angola; (7) supported the Angolan Army to implement a human rights educational project designed to reach all soldiers and to reinforce the willingness and ability of citizens to complain about violations committed by soldiers; and (8) promoted human rights awareness efforts with the Ministry of Justice and National Radio. Howland *supra* note 5, at 16-17.

80. Of the 164 municipalities or counties, possibly only six were functioning in 2000. By 2002, the number of courts was expanded to 14 with the support of the HRD.

81. Human rights promises a way of knowing—just and unjust, universal and local, victim and violator, harm and remedy—which it cannot deliver. Justice is something that must be made, experienced, articulated, performed each time anew. Human rights may well offer an index of ways in which past experiences of justice-achieved have retrospectively been described, but the usefulness of this catalog as a stimulus to emancipatory creativity is swamped by the encouragement such lists give to the idea that justice need not be made, that it can be found or simply imported.

David Kennedy, *The International Human Rights Movement: Part of the Problem?*, 15 HARV. HUM. RTS. J. 101, 116 (2002), available at <http://www.law.harvard.edu/students/orgs/hrj/iss15/kennedy.shtml#fn1>.

money and even counterproductive (e.g., people begin to think human rights are like religious concepts, not a tool to be used to change their reality).⁸² But learning about one's rights and creating a government capacity to respond to those rights is an action in empowerment and achieves the end goal of individuals using law to protect their rights. In the end, the goal of promotion actions must be to fully respect, protect and fulfill our rights. Otherwise, the intervention or project will not be worthwhile.

Given the political space and resources the HRD had available and those which we created for ourselves, HRD's intervention efforts worked on improving the demand and supply of human rights in Angola. For our operation, demand meant that human rights are about people. If people do not know and apply their rights, it is unlikely that others will respect those rights. It may have seemed strange that we were operating in the context of past colonial repression,⁸³ a past one party state,⁸⁴ and an ongoing war,⁸⁵ but these are the things that human rights are about. As the second half of the equation, supply was about creating greater government capacity (willingness, physical infrastructure, and knowledge) to respond to its citizens' demands.

82. The Angola Institute for Economic and Social Research study commissioned by the HRD in 2001, found that a significant number of Angolans thought human rights were similar to religious concepts and showed no knowledge of how they could be applied legally, administratively or politically to change their own reality. Study on file with author.

83. The Portuguese colonized Angola in the 16th century, although the country was not completely dominated until the late 1800s. Much of the European-Angolan relationship of that time was characterized by the slave trade with most of those enslaved sent to Brazil. Colonial Portuguese rule continued into the 20th century in the form of a dictatorship that built its economy upon the backs of African labor. By the 1950s and 1960s, Angola's economy began to expand through the exploitation of its natural resources in the form of coffee, diamonds, and oil. Native Angolans did not benefit from their nation's natural wealth however, and by 1961, began the fight for their independence. Unfortunately, the Angolan people were not untied in this fight, and these divisions would end up tearing their country apart after independence was won in 1975. AFRICAN POLICY INFORMATION CENTER (APIC), BACKGROUND PAPER: ANGOLA, PAPER 001, ¶¶ 8-1614 (1995), <http://www.hartford-hwp.com/archives/37/009.html> (Last visited Aug. 18, 2005).

84. After independence in 1975, Angola entered into the era of MPLA one-party rule that remained in office during the thirty years of civil war that followed. The MPLA defended its position of power against the opposing political forces of UNITA, the Frente Nacional para a Libertação de Angola (FNLA), Angola National Liberation Front, and armed factions of the separatist Frente para a Libertação do Enclave de Cabinda (FLEC), Cabinda Enclave Liberation Front. All of these armed groups were accused of gross human rights abuses during the conflict. AMNESTY INTERNATIONAL, ANGOLA: FROM WAR TO...WHAT? NO RECONCILIATION WITHOUT ACCOUNTABILITY, AFR 12/06/96, 1, 2 (Oct. 1996), available at [http://web.amnesty.org/library/pdf/AFR120061996ENGLISH/\\$File/AFR1200696.pdf](http://web.amnesty.org/library/pdf/AFR120061996ENGLISH/$File/AFR1200696.pdf) (Last visited Aug. 18, 2005).

85. The Angolan people suffered terribly during the thirty-year civil war. Nearly 1.7 million people were displaced and almost five million individuals were in need of humanitarian assistance. Both the government and UNITA forces targeted innocent civilians who were suspected of assisting either side and were often accused of torture, arbitrary killings or mutilations, all violations of international human rights and humanitarian law. AMNESTY INTERNATIONAL, ANGOLA, FREEDOM OF EXPRESSION UNDER THREAT, AFR 12/16/1999 1, 1-2 (Nov. 1999), available at [http://web.amnesty.org/library/pdf/AFR120161999ENGLISH/\\$File/AFR1201699.pdf](http://web.amnesty.org/library/pdf/AFR120161999ENGLISH/$File/AFR1201699.pdf) (Last visited Aug. 18, 2005).

This approach made sense, given that the first responsibility is on the Angolan government to protect its citizens. While it did directly violate its citizens' rights, it was willing to improve its practices. Importantly, however, it did not put enough of its money into justice, education, and health. Most money was controlled by the president and those running the war against UNITA. Some argued that war with UNITA needed to be won before human rights could be improved. We argued that to win the war on UNITA human rights respect needed to improve.

While the HRD was working toward protecting the rights of Angolans, it did not do so alone. First, its work in Angola was made possible under the Security Council mandate under which the HRD operated.⁸⁶ Apart from the Security Council, the HRD worked in collaboration with local groups, like the Justice and Peace Commission of the Catholic Church, community groups and public interest groups. While these efforts were overly concentrated in Luanda, there was an operation in the Benguela Province that operated without official UN blessing, given the UN did not want its peace-building mission to operate beyond Luanda, even when the government had invited it to operate throughout the country.⁸⁷ Other efforts were made to partner with NGOs and embassies to expand the reach of the HRD. This approach was both lauded and criticized.⁸⁸

86. The United Nations human rights presence in Angola evolved during the latter part of the 1990s. The United Nations Verification Mission in Angola (UNAVEM II) was the first to have a human rights component that was comprised of a small contingent of international human rights officers. In 1997, this group was expanded into UNAVEM III, and then became the United Nations Observer Mission in Angola (MONUA) that included a Human Rights Division (HRD). MONUA was established by Security Council Resolution 1118. See S.C. Res. 1118, U.N. SCOR, 3795th mtg. at 2., U.N. Doc. S/RES/1118 (1997), available at <http://daccessdds.un.org/doc/UNDOC/GEN/N97/178/44/PDF/N9717844.pdf?OpenElement> (Last visited Aug. 18, 2005). Secretary General Annan (SG) articulated MONUA's mandate in his July 5, 1997 progress report on UNAVEM III that he presented to the Security Council. In his report, the SG stated that "the overall mandate of the follow-on mission [MONUA] would be to assist the Angolan parties in consolidating peace and national reconciliation, enhancing confidence-building and creating an environment conducive to long-term stability, democratic development and rehabilitation of the country." *Progress Report of the Secretary-General On the United Nations Angola Verification Mission (UNAVEM III)*, U.N. SCOR, at 9, U.N. Doc. S/1997/438 (1997), available at <http://daccessdds.un.org/doc/UNDOC/GEN/N97/149/50/IMG/N9714950.pdf?OpenElement> (Last visited Aug. 18, 2005). Referring specifically to the mandate of the Human Rights Division, the SG stated: the enhanced presence of human rights observers and related United Nations activities . . . would contribute to the promotion of human rights and prevention of their abuse in the country. These activities would be aimed at developing the capacity of national institutions and other non-governmental organizations in the field of human rights to investigate violations and to initiate the appropriate action *Id.* at 10-11.

87. *Report of the Secretary-General on the United Nations Office in Angola (UNOA)*, U.N. SCOR, at 4-5, U.N. Doc. S/2000/23 (2000), available at <http://daccessdds.un.org/doc/UNDOC/GEN/N00/242/37/PDF/N0024237.pdf?OpenElement> (Last visited Aug. 18, 2005).

88. See, e.g., MARGO PICKEN, SUMMARY REPORT FOR THE SWEDISH EMBASSY ON PROGRAMS AND STRATEGIES IN THE AREA OF HUMAN RIGHTS AND THE ADMINISTRATION OF JUSTICE IN ANGOLA 7 (Apr. 2001) (on file with the author). ANGOLA INSTITUTE FOR ECONOMIC AND SOCIAL RESEARCH, R EPORT 2001, *supra* note 65.

The case-based approach used in Benguela and Luanda was a capacity or institution building method that helped build demand and supply while responding to some specific human rights violations. Although the task was enormous, much more could have been done. Unfortunately, the UN Member States and the well-endowed multinationals operating in Angola failed to take their obligation to protect seriously and did not provide the HRD with the human and monetary resources to actually operate throughout the country and maximize our contribution to improving the demand and supply of human rights in Angola.

The HRD did attempt to maximize its contribution toward improving the human rights situation in Angola. It could have done more with its human and financial resources, but the HRD was limited in both geography and by the non-existent program budget assigned to by the Security Council. It is doubtful that the UN (meaning the HRD on the ground), UN headquarters and the Members of the Security Council did enough to protect the rights of Angolans. Part of the reason for this was the lack of clarity that the UN had an obligation to do this in the first place.

V. WHO HAS THE DUTY TO PROTECT?

Part of the problem is that everyone and every entity does in fact have some legal obligation to protect,⁸⁹ but do not always do so. Many will argue that in a

89. The UN Charter outlines the purposes of the United Nations. This statement of purposes confers to the organization the ability and obligation to perform stated tasks in order to meet the Charter's goals. The purposes of the United Nations that relate to the duty to protect are:

1. To maintain international peace and security . . . ;
2. To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace;
3. To achieve international cooperation in solving international problems of economic, social, cultural, or humanitarian character . . . ; and
4. To be a centre for harmonizing the actions of nations in the attainment of these common ends.

U.N. CHARTER art. 1, para. 1-4, <http://www.unhchr.ch/pdf/UNcharter> (Last visited Aug. 18, 2005).

There are several international human rights agreements that also outline international obligations to protect. Examples of language from these agreements include: "Realizing that the individual, having duties to other individuals and to the community to which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognized in the present Covenant . . ." International Covenant on Economic, Social and Cultural Rights, *opened for signature* Dec. 16, 1966, preamble, S. TREATY DOC. NO. 95-19, 993 U.N.T.S. 3, 5, http://www.unhchr.ch/html/menu3/b/a_cescr.htm (Last visited Aug. 18, 2005); "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration." Convention on the Rights of the Child, *opened for signature* Nov. 20, 1989/Sept. 2, 1990, art. 3, para. 1, S. TREATY DOC. NO. 106-37, 1577 U.N.T.S. 44, 46, <http://www.unhchr.ch/html/menu2/6/crc/treaties/crc.htm> (Last visited Aug. 18, 2005);

The following acts shall be punishable: (a) Genocide; (b) Conspiracy to commit genocide; (c) Direct and public incitement to commit genocide; (d) Attempt to commit genocide; (e) Complicity in genocide. Persons committing genocide or any of the other acts enumerated in article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals.

Convention on the Prevention and Punishment of the Crime of Genocide, *opened for signature* Dec. 9,

particular case or another that they could in fact act, but do not have to. This problem has to do with both the layers of responsibility and the historic importance of the nation state to international law.

Layers of responsibility are perhaps more interesting than the historic limit of international law to nation states. It is becoming increasingly clear that at least in the human rights area, many actors have responsibility or legal obligations.⁹⁰ First and foremost is the State.⁹¹ States signed and ratified the human rights instruments. They are certainly first to have responsibility, and it is clear when they are violating their responsibility (each time a violation occurs). States have obligations not only to their citizens, but to all individuals.⁹² Of course, the legal obliga-

19481951, art. 3-4, S. Treaty Doc. No. 81-1, 78 U.N.T.S. 277, 280 http://www.unhcr.ch/html/menu3/b/p_genoci.htm (Last visited Aug. 18, 2005).

90. There is a growing recognition of the international community's obligations to promote international human principles and doctrines as expressed in the Preamble of the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms.

[T]he international community shall fulfill, jointly and separately, their solemn obligation to promote and encourage respect for human rights and fundamental freedoms for all without distinction of any kind, including distinctions based on race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, or other status, and reaffirming the particular importance of achieving international cooperation to fulfill this obligation according to the Charter.

Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, G.A. Res. 53/144, U.N. GAOR, 54th Sess., 85th plenary mtg., Annex, Preamble, U.N. Doc. A/RES/53/144 (Mar. 8, 1999) *available at* [http://www.unhcr.ch/huridocda/huridoca.nsf/\(Symbol\)/A.RES.53.144.En?OpenDocument](http://www.unhcr.ch/huridocda/huridoca.nsf/(Symbol)/A.RES.53.144.En?OpenDocument) (Last visited Aug. 18, 2005).

91. Submission of the International Commission of Jurists to Mr. Dzidek Kedzia, Chief, Research and Right to Development Branch, Office of the High Commissioner for Human Rights, 1 (Oct. 26, 2004), <http://www.ohchr.org/english/issues/globalization/business/docs/icj.doc> (Last visited July 12, 2005).

92. The crime of genocide provides a prime example of states' obligations towards non-citizens living within their national borders and beyond their sovereign territories. It articulates signatory states ability to protect individuals from genocide and punish those who perpetrate it, "the prohibition of genocide is [also] a peremptory norm of customary international law (*jus cogens*) giving rise to non derogable obligations *erga omnes* that is, enforcement obligations owed by each nation State to the international community as a whole . . ." *Nulyarimma v. Thompson*, [1999], 96 F.C.R. 153, 177] FCA 1192, (Merkel, J.), para. 81. Refugee law is another area where the international community has a duty to protect individuals during circumstances where their state sovereign can no longer or is unwilling to do so.

In the 1951 Convention, the international community enshrined the protection principle of non-refoulement and created for the first time a functioning system to tackle the protection needs of those who flee...the 1951 Convention, together with its 1967 Protocol, has become in effect a universal charter on refugee law. Statement by Mary Robinson, United Nations Commissioner for Human Rights, to the Ministerial Meeting of State Parties to the 1951 Convention and/or Protocol relating to the status of Refugees, ¶4 (Geneva, Dec. 12, 2001), <http://www.unhcr.ch/hurricane/hurricane.nsf/0/4F86955BB27ECA3FC1256B210030BD62?opendocument> (Last visited Aug. 18, 2005). The Canadian Supreme Court has also observed:

[T]he international community was meant to be a forum of second resort for the persecuted, a 'surrogate,' approachable upon the failure of local protection. The

tion states owe to the citizens within their territorial limits is clearer and tighter, but the level of responsibility states have to others is and should be a matter of debate. But states are far from alone. Multinational corporations have obligations,⁹³ so do international organizations⁹⁴—like the UN⁹⁵—as well as international

rationale upon which international refugee law rests is not simply the need to give shelter to those persecuted by the state, but . . . to provide refuge to those whose home state cannot or does not afford them protection from persecution.

Attorney General v. Ward, 103 D.L.R. (4th), 1, 38-39 (1993) cited in James C. Hathaway, *International Refugee Law: The Michigan Guidelines on the Internal Protection Alternative*, ¶1, (Apr. 1999), <http://www.refugeecaselaw.org/guidelines.pdf> (Last visited Aug. 18, 2005).

93. The area of direct corporate responsibility is an expanding area of international law. The OECD Guidelines for Multinational Enterprises (Guidelines) is one example. The Guidelines are recommendations addressed by government to multinational enterprises operating in or from adhering countries. They provide voluntary principles and standards for responsible business conduct in a variety of areas including employment and industrial relations, human rights, environment, information disclosure, combating bribery, consumer interests, science and technology, competition, and taxation. For a discussion of the Guidelines, see OECD GUIDELINES FOR MULTINAT'L ENTERPRISES, REVISION 2000, <http://www.oecd.org/dataoecd/56/36/1922428.pdf> (Last visited Aug. 15, 2005). The ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy (ILO Tripartite), adopted in 1977, is another authoritative document by some governments that states that corporations have a responsibility to uphold certain human rights. The ILO Tripartite's aim is "to encourage positive contributions which multinational enterprises make to economic and social progress and to minimize and resolve the difficulties to which their various operations may give rise." INTERNAT'L LABOUR ORG., ILO TRIPARTITE DECLARATION OF PRINCIPLES CONCERNING MULTINAT'L ENTERPRISES AND SOCIAL POL'Y, <http://www.ilo.org/public/english/standards/norm/sources/mne.htm> (Last visited Aug. 15, 2005). Both the Guidelines and the ILO Tripartite were revised in 2000.

94. The twin Bretton Woods institutions, the World Bank (Bank) and the International Monetary Fund (IMF), are international financial entities whose development projects have come under increased scrutiny for their negative social and environmental impacts. At the same time, the concept of development has become re-conceptualized, impacting the IMF's and the Bank's obligations to protect and promote human rights.

Development is no longer measured in economic terms only, but understood as "a comprehensive economic, social, cultural and political process, which aims at the constant improvement of the well-being of the entire population and of all individuals." According to this new paradigm, human rights are considered to be the end purpose of development. In tune with this new approach, various United Nations bodies, in particular UN treaty bodies, such as the Committee on Economic, Social and Cultural Rights have in recent years repeatedly declared that "the realms of trade, finance and investment are in no way exempt from human rights obligations and principles, and that the international organizations with specific responsibilities in these areas should play a positive and constructive role in relation to human rights." Christina Gille & Stephanie Ricarda Roos, *World Bank, IMF and Human Rights: Conference held at Tilburg University, 11-13 October 2001*, 3 Ger. L.J. ¶¶ 1, 2, (Feb. 1, 2002), <http://www.germanlawjournal.com/article.php?id=131> (Last visited Aug. 15, 2005). See also, *The Declaration on the Right to Development*, G.A. Res. A/RES/41/128, 41st Sess., 97th plen. mtg. (1986), for language pertaining to international development entities' obligations to protect human rights, <http://www.ohchr.org/english/law/rtd.htm> (Last visited Aug. 15, 2005).

95. The UN Charter conferred on the United Nations an international personality that created specific rights and obligations that are similar, although not equal, to a nation state. In particular, the Charter confers specific political tasks, including the maintenance of international peace and security, which outlines the scope of the UN's international rights and duties. INTERNATIONAL COURT OF JUSTICE, CASE SUMMARIES, Advisory Opinion of 11 April 1949, *Reparation for Injuries Suffered in the Service of the United Nations*, ¶ 8, at <http://www.icj-cij.org/icjwww/idecisions/isummaries/iisunsummary490411.htm> (last visited Aug. 15, 2005) (summarizing full opinion available at 1949 I.C.J. 174).

NGOs.⁹⁶ Other than the host State's obligations, no entity really has clarity on what its obligation to protect means. So, for the most part these entities do not take their legal responsibility seriously. Now not only does each global citizen have a plethora of legal protections, it seems like any entity of any significance has a legal obligation to protect. Moving to make these obligations understood and acted upon is a challenge that needs to be met.

What level of responsibility each actor has could relate to the degree of power or capacity each entity has to act. The level of responsibility can be defined according to the number of sovereign characteristics that the actor is performing. International legal history can help to illuminate that this is not a new idea. Dating back to 1757, the case of East India Trading highlights that entities that are not States, but exercise aspects of a sovereign power, may be held responsible for those actions.⁹⁷ Similarly, the UN also takes on sovereign duties normally held by the State when its agencies take over the responsibilities for the provision of food and shelter for refugees or for national security, as with peacekeeping missions.

Updating and applying the concept of sovereignty today could perhaps be done, as discussed earlier, by borrowing from other areas of law that are already comfortable with multiple actors having various levels of responsibility and liability. The level of responsibility or obligation can be defined by the relative power and influence that the entities have as well as their ability to act. This paper did not intend to define what these levels of responsibility are, but to stimulate further inquiry into this area.

VI. RECOMMENDATION AND CONCLUSION

Once the Secretary General achieves his much needed reform of the responsibility to protect in situations of genocide, he should then further develop what obligations to protect exist in situations outside context of refugees and genocide.

First, there should be a sliding scale regarding which entity has the real ability to address the situation, considering political and financial capacity and the degree to which the entity is exercising aspects of sovereignty. In Angola, the list might

96. "Although no international conventions compel international NGOs to provide protection, the universal responsibility for promoting and protecting human rights, together with their own mission statements, commit many to doing so." Enrique Eguren, *The Protection Gap: Policies and Strategies*, 17 HUMANITARIAN EXCHANGE, Oct. 2000, at 32, <http://www.odihpn.org/documents/humanitarianexchange017.pdf> (Last visited Aug. 5, 2005).

97. In 1757, the British Monarchy defeated the forces of the Nawab of Bengal and the East India Company found itself transformed from an association of traders to rulers exercising political sovereignty over a largely unknown land and people. By 1765, the Company acquired the Diwani of Bengal, or the right to collect revenues on behalf of the Mughal Emperor, in Bengal, Bihar, and Orissa provinces. Vinay Lal, *British India*, ¶ 2, Manas: History and Politics, at <http://www.sscnet.ucla.edu/southasia/History/British/BrIndia.html> (Last visited Aug. 18, 2005). Professor Antony Anghie, of the University of Utah S.J. Quinney College of Law, presented the idea of a more expansive definition of sovereignty during his presentation entitled "International Obligation to Protect Human Rights: Historical Prospective." Professor Anthony Anghie, Discussion at the University of Denver Sturm College of Law Sutton Colloquium (Apr. 9, 2005). See <http://www.law.du.edu/Sutton/> for a record of the speakers and topics they addressed (Last visited Aug. 5, 2005).

have looked something like: the government of Angola, the UN Security Council, the oil companies, the diamond companies, UN organizations, NGOs and the international financial institutions.

The parameters for the obligation should be defined. There needs to be an administrative and/or legal mechanism in place to challenge whether positive measurable change has been achieved. Baseline statistics demonstrating the level of respect for each human right need to be established and updated regularly. The production and maintenance of these statistics should be considered a joint enterprise of all entities with some responsibility to protect. Goals for improvement of that baseline should be articulated, as well as which entities are empowered or expected to facilitate the change (e.g., HRD) and with what financial support (from UN Member States and multinationals operating in Angola).

The lack of baseline measures, a clear articulation of a goal for positive change, and the lack of understanding of who is responsible (partially and collectively) creates a situation where violations continue and no entity seems to be responsible – even though plenty of legal obligations to protect exist.

A significant amount of attention is needed to make this change. If the goal is to make legal protections real, then the question of who has a duty to protect needs to become a much more interesting and nuanced discussion.

