After International Law:
Non-Juridical Responses to Mass Atrocity

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Introduction

Some of the most prominent efforts to restrain and redress mass atrocities in our time, heartening from almost any view of global justice, are largely non-legal and extra-judicial in character, in the sense that they rely scarcely at all on the application of binding international rules by international courts. They bear only the most equivocal, attenuated, tangential relation to international law, strictly speaking, and in fact sometimes sit quite uneasily with it. Why is this so, and what does it mean for assessing the proper place of international law – and its alternatives -- in the world’s response to mass atrocity?

Consider, in this regard, the following developments of recent years:

1) Under the rubric of voluntary “corporate social responsibility,” managers of multinational corporations find themselves increasingly pressed to tread much more cautiously in countries whose rulers covertly employ forced migration and involuntary labor to assist foreigners’ construction projects.

2) Fearing the opprobrium of global opinion, military leaders in democratic states are impelled to unprecedented efforts at reducing innocent civilian casualties in war, in ways the international law of war crimes does not itself require.

3) Without quite affirming its legal status, diplomats everywhere earnestly proclaim their countries’ “responsibility to protect” the denizens of distant societies from mass atrocity by local despots.

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1 “Mass atrocity” is not a legal term of art, and is here employed only as an ideal-type of possible heuristic value, referring to large-scale episodes of genocide, crimes against humanity, or grave breaches of the Geneva Conventions (which are also often major war crimes). As its aims are social-theoretical rather than doctrinal, the present inquiry will rarely concern itself with the legal definition of these wrongs, despite some enduring controversy over significant details.

2 This is not to assume, of course, that law’s social impact is confined to that of judicially enforceable rules, for its influence may sometimes be greatest when less direct, as in framing issues and helping constitute the self-understanding of social actors. This fact highlights the endogeneity problem with any unqualified assertion, highly improbable, that the initiatives here examined were wholly uninfluenced by contemporaneous developments in international law, i.e., by so salient a feature of their immediate moral environment.

3 They do not even involve applying international law in national courts, where such law’s influence is advancing. The Europeanisation of International Law: the Status of International Law in the E.U. and its Member States, Jan Wouters, André Nolkaemper, & Erika de Wet, eds. (2008).
4) Inspired by a growing global expectation of “effective remedies” for mass atrocity’s victims, national legislators in many countries engage in anguished deliberations over how best to provide such persons with some form of civil compensation or administrative redress.

5) Heads of state in Turkey suffer worldwide chastisement in parliamentary resolutions for failing to acknowledge and apologize for their distant predecessors’ policies of genocide, despite the absence of any legal duty to issue such proclamations. (Japanese leaders become increasing targets of similar official condemnation by regional neighbors, victimized by Japan’s crimes of WWII.)

Each of these initiatives naturally invites several questions: to what extent and for what reasons has it evaded or eluded juridicization? What influence, if any, does international law nonetheless exercise upon its workings, if only indirectly or at the margins, and what influence in turn has it had, or may likely have, upon such law? When does the particular initiative work to buttress the commitments of international law, to resist such law, and when does it simply stand aloof, charting a different but compatible path? If we compare and contrast the five cases, what overall patterns emerge from the answers to such questions? And can such patterns be explained by any existing or imaginable theory of international law’s place in the world? To the five developments, this book poses these questions, treating each (in consecutive chapters) as a species of the larger genus of non-juridical atrocity-response.

The non-juridical aspects of these responses present a puzzle, if not an outright embarrassment, for anyone concerned with strengthening the response of international law and international tribunals to mass atrocity. The mainstream view within the field, and among lawyers and rights advocates more generally, is that atrocity responses should be governed by law and undertaken to substantial degree by legal institutions, often international ones. Yet much of the most promising and intriguing action today lies elsewhere.

To imply that there is a necessarily problem here might be to succumb to a certain “legalism,” our professional tendency to view the delivery of justice as properly the monopoly of the state and its law, or of only those international institutions to which states formally delegate law-making and enforcing authority. Such “legalism” in responses to mass atrocity has been subject to trenchant criticism.

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4 The terms “non-juridical,” “non-legal,” and “extra-legal” will be used interchangeably here.

5 This view reaches it apogee in the contention that any genuine “rule of law” at the international level requires a full “constitutionalization,” by which all applicable legal sources and rule-making or enforcing bodies are arranged in a single hierarchy. See, e.g., Bardo Fassbender, The United Nations Charter as the Constitution of the International Community (2009) (arguing that the UN charter has constitutional status); Ruling the World? Constitutionalism, International Law, and Global Governance (Jeffrey L. Dunoff & Joel P. Trachtman eds., 2009) (collecting papers discussing world constitutionalism). Social scientists in the new field of “transitional justice,” to be sure, do not share the assumption of international lawyers here, and in fact often emphasize the superiority of non-juridicized responses to atrocity at the national and subnational levels.

6 See, e.g., Bronwyn Anne Leebaw, Justice, Memory, and Community After Atrocity, Cambridge Univ. Press, forthcoming 2010 (arguing that optimal responses to mass atrocity have in many places been distorted and misdirected due to liberal law’s inherent predisposition to ascribe collective wrong and structural injustice to the intentional conduct of discrete individual persons). An influential early criticism of legalism in the world’s response to mass atrocity is Judith Shklar, Legalism: Law, Morals and Political Trials (1964).
More generously, we might see the “problem” of international law’s relative absence from these initiatives as simply a legitimate expression of our desire to lend a helpful hand, with (what we consider to be) relevant expertise, to such morally salutary developments. And since the non-legal initiatives seek to coerce conduct, they necessarily raise questions about the legitimacy of limiting freedom without the accompanying protections of formality, neutrality, and accountability which law may uniquely provide.7

International lawyers are not the only people vexed by the conundrum. No one thinks international law must truly “occupy the field,”8 to be sure. Yet many of their creators and proponents view such initiatives -- as unstable, precarious, in need of support and consolidation by international law, through the forms of institutionalization it alone can provide, they believe. Leading advocates of a “responsibility to protect,” for instance, leave no doubt about their wish to see this normative aspiration reflected eventually within customary international law, curtailing the U.N. Charter provisions with which armed humanitarian intervention would otherwise be incompatible.9

In fact, all five initiatives invoke plausible moral arguments in drawing up close to the point, at least, of demanding much more of international law than it has ever contemplated. Why it should not accede to these emergent expectations has surely ceased to be obvious to many citizens of the world. And let us grant, without fear of strenuous dissent, that morality – on almost any understanding of its scope and sources -- demands more of us in preventing and redressing mass atrocity than international law has traditionally required.10

Our several non-juridical efforts do suggest, at the very least, there is little danger that responses to mass atrocity will be effectively restricted to what international law currently endorses to this end. Such law has not achieved any

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7 This concern finds keen expression, for instance, in Joost Pauwelyn,’The Rise and Challenges of “Informal Law,” Hague Institute for the Internationalization of Law, Expert Think Pieces, at http://www.lawofthefuture.org/expert-think-pieces/ at 3, (pondering whether international lawyers should insist on formalism and exclude “informal law” from its scope to maintain international law’s independence and stress the point that “informal law” may be inappropriate as a power instrument of the strong…”).

8 In fact, international lawyers have generally been careful to restrict the scope of international legal institutions where national ones can adequately respond to mass atrocity. Hence, under the “complementarity” doctrine, the jurisdiction of the International Criminal Court is limited to circumstances where national courts prove themselves “unwilling or unable” to investigate or prosecute. Eric Posner defines “global legalists” as people who “believe that international political disputes should, as much as possible, be resolved according to law and by legal institutions.” The Perils of Global Legalism 25 (2009). Public international lawyers in the real world, however, are much more savvy operators, acutely attentive to such law’s limitations, and to the potential strengths of national institutions, than this characterization suggests. Posner confesses that he is referring mostly to professors of international law; though not a straw man, this intellectual adversary is not as deserving of our extended attention as other interlocutors.


10 This raises a variant of liberal jurisprudence’s perennial puzzle: to what extent should law incorporate the full range of morality’s claims upon us, and to what degree should we be instead content to rely upon informal public mores, diffuse sociopolitical pressures, and private conscience to ensure moral conduct. That question normally arises in connection with the most intimate and personal of behavior, as in the famous Hart-Devlin debate. Here it presents itself in a context at once global in scale, empirically complex, and likely to prove deeply disruptive of well-entrenched institutional arrangements, both national and international.
monopoly, in other words, over the range of relevant response. In imagining effective ways to restrain and redress mass atrocity, the undoubted influence of legal analogy and legal thinking has not been to narrow the breadth of ethical reasoning and political action, for virtually no one denies that international law has often been grossly inadequate to the task.

In their central aim and overall import, the new non-juridical initiatives sketched above at first seem of a piece with the major progress of recent years in holding perpetrators of mass atrocity accountable for their wrongs. That progress takes a decidedly juridical form, in the creation of several criminal tribunals (international and hybrid national-international), in the significant number of high-profile cases they have processed, and in their judicial development of legal doctrines imposing clearer, more stringent demands upon those who employ force in service of their political aims. The creation of an International Criminal Court, in particular, reflects a great emboldening of international law’s moral agenda in this area.

National courts as well, increasingly applying rules of international law, have been integral to the legalizing turn. The upshot has been a growing juridification or “legalization”\(^\text{11}\) of the world’s response to mass atrocity, in the sense of a collective insistence on extricating the terms of that response from the influence of “politics,” in a word, an influence perceived as almost invariably corrupting.\(^\text{12}\) It should not pass without brief observation here, at least, that many millions of people throughout the world now look to these developments with great hope and yearning.

All these considerations make the conspicuously non-juridical aspect of the initiatives mentioned above that much more perplexing, and worthy of reflection. We must ask: are these concerted efforts to improve the world’s response to mass atrocity likely to continue in their currently non-juridical form? Or do they show signs of likely assimilation to the more prominent forces of legalization just noted? If they will persist in standing significantly apart from these forces, do they merely represent curious contingencies, anomalous outliers to deeper trends and abiding tendencies, disclosing no general significance – practical or theoretical? Or do they hint at serious and even inherent limits to the process of juridification, suggesting places where it cannot and will never successfully go? If so, then study of these conscientious initiatives should help identify the likely future contours of international juridification itself. This in turn will educate us lawyers about where

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\(^{11}\) See generally \textit{Legalization and World Politics}, Judith Goldstein, et al., eds. (2001) (defining legalization in terms of three variables: obligation, precision, and delegation of disputes to third-party adjudication); \textit{Law and Legalization in Transnational Relations}, Christian Brutsc & Dirk Lehmkuhl, eds. (2007). The term juridicization (and its cognates), though less familiar, will be preferred here to legalization, despite a substantial scholarly literature employing the latter, because legalization has a common lay meaning that would be quite misleading here, referring as it generally does to legal permissibility, as contrasted with legal prohibition.

\(^{12}\) International lawyers have also shown, to be sure, acute recognition of the need to accommodate political forces that insist upon the right to influence the functioning of international legal institutions aimed at redressing mass atrocity. These are political forces which, if not placated, could effectively nullify the operation of such legal institutions altogether. This sort of accommodation is particularly apparent in how the Rome Statute for the International Criminal Court accords the permanent members of the U.N. Security Council considerable influence over the cases and situations that the Office of the Prosecutor may investigate.
and how we might most effectively press forward, make a valuable contribution -- and where not.

**The Central Argument**

Despite some significant differences between them, the organized initiatives here examined all find their chief inspiration and institutional footing in social forces and political processes -- domestic and transnational -- largely insusceptible by nature to international juridification. That these efforts have operated in ways exogenous to the field of international law is not a contingent fortuity, but an ineluctable fact. It would be misguided, even counter-productive at key points, to insist on somehow rendering them into international legal form. We international lawyers should resist the temptation to take on board these salubrious responses to mass atrocity, according them juridical recognition and endorsement, in hopes of bolstering their prospects. These efforts will and should remain mostly beyond our professional ken, notwithstanding the revealing and occasionally-fruitful interactions between it and them. International law makes its own contributions, and need not yoke these other developments to its professional carriage “so as to remain sociologically relevant,” in the telling words of one legal scholar.13

This conclusion may at first seem obtuse, even willfully perverse. If the extra-legal developments sketched above hold out some realistic hope for a better world, why should international law not find some way to accommodate them, at least incorporate them by reference, in the process making them formally its own? Why should this burgeoning body of law, preeminently concerned today with confronting mass atrocity, not benefit from and lend sustenance to other laudable achievements to this end now emanating from distinct sociopolitical springs? Why not then, for instance, a legal duty to protect others against mass atrocity, or to apologize after the fact for one’s role in its occurrence? There is no longer any self-evident basis for a negative answer to such questions, if there ever were.

Yet differences between the legal and extra-legal responses to mass atrocity ultimately prove more salient, sometimes strikingly so, than the congruences, limiting the scope of effective interchange and frictionless reciprocal endorsement. Our instances of response to atrocity often find effective expression, take organizational form, in ways that international law fails even conceptually to cognize, much less practically advance. These pragmatic and theoretical ‘failures,’ if they may be so described, owe to reasons that no measure of good intentions and professional ingenuity on our part, as international lawyers, can hope -- or should therefore seek -- to overcome. What might these reasons be?

**Reasons for Non-Juridification**

Two principal hypotheses – one material, the other ideal -- suggest themselves in explaining the lay of the land, the limits of law’s reach in our case studies of atrocity response.

First, perhaps the limitations lie chiefly in familiar considerations of realpolitik, the sort highlighted by “realist” accounts of international politics. Powerful states have no interest in, and effectively prevent, juridicization from going further, on this view, since that process is a means of “moralizing” the resolution of questions which states prefer to leave to the play of power. Such considerations loom vaguely in the background within most of our case studies, to be sure.

Yet these cases also disclose other political forces at work that strengthen, rather than hamper, atrocity-response beyond what international law itself seeks. The relative weight and effect of political power -- both realist and non-realist conceptions of it -- will necessarily concern us throughout, in making sense of where juridification does and does not occur. For instance, the increasing willingness of large, multinational corporations to submit to voluntary U.N./NGO monitoring of their labor practices surely reflects at once their power to resist a more juridicized alternative and their fear that altogether dismissing such non-juridical initiatives could ultimately lead to precisely that, whether in home or host states. It is the weakness of states and their inability to press their interests that are most apparent here, as well as the strength of non-state actors to play even the most powerful states off against one another. This is not the world as depicted by state-centric, geopolitical “realists,” even if machinations of power do figure ubiquitously within it.

A second hypothesis would be that international law’s stance toward these salubrious developments may be limited not so much by external geopolitical constraints on its sphere of operation as by its own normative commitments, particularly its implicit liberalism, i.e., the moral and political theory underlying much of Western legality. For instance, an official apology for mass atrocity (or other extensive human rights abuse), delivered on behalf of an entire national population, for the misconduct of unelected prior leaders who ruled long ago, over an altogether distinct governmental entity (e.g., the Ottoman Empire vs. modern Turkey), sits uneasily with most understandings of liberalism. So does the extensive public provision of “reparations” to beneficiaries bearing only the most indirect relation to immediate victims of atrocity. Yet mass atrocity often calls forth both such remedies today, in many countries.

In such situations, we have more reason to be concerned about the undesirability of extending international law’s reach in requiring such practices than with the practical impossibility of so doing. We might understandably wish to see international law take no position at all on such contentious issues, steer clear altogether. For the question of just how liberal a national society we truly wish to inhabit is likely best resolved by elected representatives more sensitive to domestic public sentiment than us international humanitarian lawyers, with our promiscuous proclivity for propagating (what we consider to be) universalistic moral truths. An international law uncompromisingly committed to liberal principle might foreclose

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14 Multinational corporations can threaten, for instance, to relocate their headquarters to other countries, thereby potentially defeating the exercise of legislative and adjudicatory jurisdiction (including taxation authority) over them by states of initial incorporation.
collectivized atrocity-responses of a sort now widely adopted in post-conflict societies, as part of their “transitional justice” processes.\textsuperscript{15}

Closely related, our anti-atrocity initiatives may implicate a species of duties that remain too unclear about whom they bind, in which ways, to be rendered into precise rules, justiciable before courts, establishing the basis for liability. In this sense, such duties are “imperfect,” as Kant puts it.\textsuperscript{16} The “responsibility to protect” potential victims of mass atrocity in other countries is surely a plausible candidate, at least, for such characterization.\textsuperscript{17} So are, in differing measure, some of the other initiatives here examined. Appreciation of such considerations may help explain some of the hesitation about extending international law into these areas. The rights corresponding to imperfect duties are best honored and protected, writes Amartya Sen, through acts of “social recognition [via ‘naming and shaming’ of violators],\textsuperscript{18} informational monitoring, and public agitation…”\textsuperscript{19} Such actions involve “ethical argument” in “public reasoning,”\textsuperscript{20} but not necessarily as steps toward legislation or litigation. Our case studies of atrocity-response present much evidence of such methods vigorously in operation.\textsuperscript{21}

There might nonetheless be some reason to enshrine such duties formally into law even where there is no intention to implement them coercively. Domestically, at least, certain norms of conduct -- once legally codified -- sometimes seem to have greater salutary impact on behavior than if left to float freely, with the measure of compliance determined only by informal social sanction. This is not because the police and courts will thereafter proceed to enforce such rules, which would often be preposterous.\textsuperscript{22} Rather, it is simply that the inherent “authority of law” elicits greater


\textsuperscript{16} Immanuel Kant, Critique of Practical Reason (1997 ed.) (1788).

\textsuperscript{17} In fact, it may be that many of today’s international human rights, particularly social, economic and cultural rights, may fall under the category of imperfect duties. This would mean that “there is a huge world of legitimate human rights beyond the limits of law.” Amartya Sen, “Human Rights and the Limits of Law,” 27 Cardozo L. Rev. 2913, 2927 (2006); see also Amartya Sen, “Normative Evaluation and Legal Analysis,” lecture, Wash. Univ., St. Louis, March 31, 2001. “Many human rights can serve as important constituents of social norms, and have their influence and effectiveness through personal reflection and public discussion, without their being necessarily diagnosed as pregnant with potential legislation.” Id., at 7. Sen is here chiefly examining the nature of human rights, but he can also be seen as implicitly seeking to “save” human rights discourse from self-professed adherents who, in claiming too much for it (i.e., in legal recognition and coercive means of enforcement), threaten to call the larger enterprise into disrepute. Much the same spirit informs the present study, in its argument that our several anti-atrocity initiatives do more good by continuing to operate independently of international law than by being given a greater foothold within it. In the relation between these initiatives and international law, each side will often do better without too close a link to the other.

\textsuperscript{18} Sen, “Human Rights,” id., at 2925.

\textsuperscript{19} Id., at 2927.

\textsuperscript{20} These processes, insofar as they affect the self-understanding of states, their leaders, and other relevant actors, occupy a central place in “constructivist” theories of international relations, which will therefore play a role in the ensuing analysis.

\textsuperscript{21} Sen’s position here tell us nothing, to be sure, about how to proceed when even the best-reasoned, most urgent calls to honor imperfect, non-juridical duty fall on deaf ears, as they regularly do.

\textsuperscript{22} This is likely the case, for instance, of prohibitions against the spanking of children, conduct formally criminalized in certain Scandinavian states.
compliance from many people to the norm, i.e., once it has passed through the constitutional procedures necessary to become binding upon community members. As citizens, we can recognize domestic legal norms as the result of democratic self-determination and hence an expression of our collective will, even when we disagree with their content.

It is highly questionable, however, whether many people accord such natural deference to international law, afford it great authority independent of its effective enforcement powers or intrinsic normative appeal. Normative appeal does indeed provide international prohibitions of mass atrocity with the considerable legitimacy they now enjoy. One suspects that international law’s inherent authority, its mere status as law, does little work in either restraining potential perpetrators or impelling others to resist their misdeeds. If so, then Sen’s argument against juridifying imperfect duties convincingly resists the claim that law’s authority, the deference it naturally evokes, is reason enough to enshrine such duties in positive law.

We must also consider the possibility that obstacles to further juridification of the world’s response to mass atrocity turn out to be quite different in each of our cases, disclosing no overarching pattern, belying efforts at generalization. Call this the null hypothesis. If vindicated, then international law and lawyers would have to find their way case by case, discovering their possible means of assistance to such initiatives without aid of more systematic understanding, testing the value of their learning and professional tools in an ad hoc fashion.

To answer convincingly the questions raised above would go some way toward a general theory of the proper place of international law in confronting mass atrocity. Such a theory will ultimately require this form of inquiry, no less than attention to international criminal law’s cutting edge, where it has recently made, or sought to make, its most ambitious advances. As a matter of method, we can surely learn as much about international law’s necessary and proper role by focusing on responses to mass atrocity that little depend upon such law as by concentrating on its more glamorous moments in the sun, those fleeting occasions when it enjoys the world’s enthralled attention.

A full understanding of international law’s relative capacities requires, then, that we compare not only its own successes and failures in dealing with mass atrocity, but also the now-considerable efforts to that end originating elsewhere and operating through quite different causal mechanisms. In fact, the key moral principles and policy aims underlying recent reforms to international criminal law, reforms greatly enlarging and empowering that enterprise, often continue to find stronger

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23 On how this may occur, see Joseph Raz, The Authority of Law: Essays on Law and Morality 29-33, 116-7 (2009, 2nd Ed.).
24 This generalization would exclude, to be sure, the countless (but politically inconsequential) professors of international law and academic theorists of global justice, who do often accord intrinsic authority to international law.
25 The several initiatives would then occupy only a residual category, defined by what they are not, rather than displaying common features setting them affirmatively apart from juridified atrocity-response and the circumstances eliciting it.
endorsement and more effective enforcement through causal pathways that treat legal doctrine and judicial institutions as marginal, if not quite inconsequential.26

This is true beyond the immediate context of mass atrocity, in the usual sense. The study of martial restraint must be concerned, more broadly, with the causes of unnecessary suffering in war. It would treat limitation by belligerents in their use of force as the dependent variable (in the idiom of social science), and regard both law and non-legal considerations as alternative independent variables. The relative causal weight of such competing factors presents an empirical question, open to investigation, permitting differing conclusions in various historical contexts and contemporary conflicts. We will thus ask, for instance, both how well-juridified is the proportionality norm (prohibiting excessive “collateral damage” to civilians), and how much does that legal norm actually limit battlefield violence, compared to non-juridical restraints?

The present project might fairly be described as undertaking a charge that is essentially ‘negative,’ identifying areas where international law cannot make much headway in enlarging its effective sphere of operation against atrocity. This method carries us only so far. It would need to be combined with others’ efforts to fathom international law’s demonstrable strengths in atrocity-response. A full vision of international criminal justice will begin to emerge only from such a conjunction of complementary efforts.27

Still, putting international law “in its place,” one might say, is an admitted aim of the current inquiry. This is not to disparage such law’s genuine achievements, past or present, merely to help identify its proper sphere. The contours of that domain may admittedly evolve and likely enlarge as non-juridical practices and the humanitarian movements spawning them begin to influence legal norms (as well as vice versa). Recognition of this dynamic, diachronic relationship between the two realms should give pause to any attempt at atemporal typology, seeking simply to identify the many ways they may interact. An adequate portrait, any comprehensive theory, would have to include some account of change, past and prospective, with all the contingencies and imponderables this entails.

It may be, in particular, that that the informality of recent non-legal regulatory initiatives at the international level, though presently necessary, proves a passing phase in their longer-term development. International law might therefore, as one leading scholar speculates, “insist on its formalities, be increasingly marginalized, but do so in the hope that the tides will turn again and actors will realize that cooperating under law is more sustainable and power-neutral.”28 One might even take this wishful prediction as something deeper, as a claim to discern a latent dialectic by

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26 This is not to deny that recent progress in international criminal law may have sometimes circuitously influenced non-legal initiatives like those examined here, if only as a source of inspiration to their entrepreneurs. Yet such rudimentary methods as social science has developed to discern such subtle, indirect influences, applied to present evidence, do not permit any robust causal claims to this effect.

27 A thorough account of this sort would also need to include and assess the proper place of national truth commissions and efforts at “restorative justice,” which often rely on traditional methods of dispute-resolution, only partly juridicized in a conventional (i.e., Western or international-legal) sense.

28 Pauwelyn, supra note, at 3.
which the very advance of non-juridical response -- joined to increasing awareness of
the shackles under which it continues to labor -- will at some point call forth, willy-
nilly, a recognizable need and irresistible demand for more law. That scenario
succumbs, alas, to the logical fallacy in all functionalist social explanation, 29 i.e., to
the fact that even a society’s most pressing “needs” -- despite identification and
acknowledgement as such -- never possess sufficient wherewithal to ensure and
secure their own fulfillment.

Functionalism also fails to explain the circumstances under which our non-
legal initiatives emerge and acquire some measure of efficacy. One might be tempted
to suppose that such efforts appear when legal efforts clearly fail, and the urgent need
to “do something” becomes inescapable. Yet alas, many mass atrocities still go
entirely without any organized response, belying any such account of successes,
which remain all too rare. Very often – as with the Asian “comfort women” of World
War II and the mass rape of women in today’s Congo,30 for example -- neither legal
nor extra-legal efforts bear much fruit in prevention of mass atrocity, compensation of
its victims, or even eliciting official acknowledgement of its occurrence.

By comparing our five cases, it may prove possible inductively to derive some
general lessons about the optimal place of international law in the world’s response to
mass atrocity. We will focus especially on those pressure points where these non-
juridical responses encounter, run up against, sometimes operate almost at cross
purposes vis-à-vis, the workings of a more stolid, international legal machinery. We
will wish to contrast, for instance, the operation of non-juridical U.N./ngo-devised
mechanisms seeking greater “corporate social responsibility” by foreign direct
investors in repressive states with the fully juridicized Alien Tort Claims litigation in
U.S. courts, increasingly aimed at the very same ends. The latter, lawyerly endeavors
prove decidedly less promising, standing alone, than the former, non-juridicized ones.
Yet it is also true that the litigation, the prospect of multi-million dollar liability it
now plausibly presents, has sometimes contributed to corporate willingness to
participate seriously in the U.N. initiative.

Democratic Opinion: the Continuing Place of Politics

In recent years international law has devoted great efforts to reduce, if not
quite eliminate, the distorting influences of power politics in how the world responds
to mass atrocity. This effort has not failed, exactly.31 In fact, the aspiration for a

29 A functionalist explanation is one that sees institutions as coming into being because of the systemic functions
they serve, that is, apart from the interests, ideals, and intentions of those who might create, or resist the creation,
of such institutions. On the failures of functionalism as social explanation, see Jon Elster, “Functional
Explanation: Social Science,” in Readings in the Philosophy of Social Science, Michael Martin & Lee McIntyre,
eds. (1994).
(“Approximately 500 women were raped in eastern Congo in July and August, demonstrating that both rebel
militias and government troops used sexual violence as a weapon, two U.N. officials said Tuesday.”)
31 To observe this success in rule-creation is not to deny, of course, the frequent failure in implementing such
norms, often owing to constraints of realpolitik. As a leading defense counsel in international prosecutions rightly
observes, “international criminal justice still operates selectively within the cracks that international politics have
http://www.internationallawbureau.com/blog/?p=1457. See also Elizabeth P. Allen, “Cowering in Fear,” The New
body of international criminal law that is morally meaningful and relatively
determinate has been so broadly achieved in recent years that the central and harder
questions we must now ask of this field are quite different from those of the last
century. The proper place of political considerations, of democratic opinion
especially, in determining official response to such crimes must be reassessed and, in
key respects, revalorized.

The prospect of liability before courts of law, national or international, remains
and will remain far less significant than the influence of such political forces, broadly
speaking, in restraining and redressing mass atrocity. There is no reason why such
political pressures should necessarily find full expression through formal legal
mechanisms. This is true even as the pressures here at issue work to give additional
effect to aims unequivocally embraced by international law as well.

The political processes that make possible our non-juridical responses to mass
atrocity are invariably managed by elites. Even so, they generally reflect widespread,
well-considered public sentiment throughout much of the world and, in that sense,
can be called democratic in spirit. But in observing the inexpungible vitality of
politics in these initiatives, our aim is not to celebrate some agonistic account of
democracy,32 fearful of dispensing conflict through the rule of law. Rather, it is that in
our case studies we find forces of democratic opinion, national and international,
frequently pressing accountable parties toward responses to mass atrocity more
ethically satisfactory – and always more exigent – than anything international law
within international courts has attempted or is capable of achieving, without straying
perilously from its core commitments. If these innovative efforts could be trained to
operate entirely within law’s empire, there would be no reason to banish them from it
-- certainly not the impulse to preserve them from disciplinary domestication.33

The most compelling objection to international juridification, here as in other
areas, has always been its apparent “democracy deficit,” the relative unaccountability
of international decision-makers to those affected by their decisions at the national
level, i.e., those asked to entrust international legal institutions with governance
authority over them.34 The initiatives here assayed may seem to offer an alluring
counterpoint in this regard, for they hold out the prospect of greater accountability to
the world community – for both those perpetrating mass atrocity and those claiming
authority to redress it – through forms of normative ordering that avoid the delegation
of coercive legal powers beyond the nation-state. These organized efforts may

Republic, Aug. 3, 2010 (noting how Sudan’s President Omar Al Bashir, though indicted by the International
Criminal Court, travels officially to several other African states that have ratified the Court’s Statute, which
obligates them to honor the Court’s extradition orders).
32 For instance, Chantal Mouffe, On the Political 20 (2005); Wendy Brown, “‘The Most We Can Hope For’:
33 Conversely, neither do the proponents of these atrocity-responsive projects disclose any urgent desire to resist
the clutches of juridicizing encroachment, seen as some latent evolutionary process with the wind of history at its
tail. To be sure, some proponents occasionally display a certain doubt about whether international law and
international courts ultimately have much to offer in furtherance of their efforts. They pose to themselves, in other
words, many of the same questions this book also poses.
34 Jed Rubenfeld, “Unilateralism and Constitutionalism,” 79 N.Y.U. L. Rev. 1971 (2004); but see Robert Keohane,
therefore seem, for some readers, to offer the provisional basis for an alternative model of international response to atrocity.\(^{35}\)

That is to ask too much of them, however. We should rather view them as offering simply a necessary supplement to more juridified approaches. That they will continue to elude law’s grasp need not be taken, then, as an implicit critique of international legality, even if Promethean claims for the latter are indeed exaggerated. As scholars, we need to identify the actual and proper domain of non-legal initiatives vis-à-vis that of international law -- no less than, as citizens of the world, we need to make both enterprises more effective in securing justice.

**False Leads: an Inventory of Tantalizing Missteps**

Familiar notions and nostrums come quickly to mind for characterizing the five initiatives. Yet none proves to fit their facts very closely. For instance, none of these efforts operates “in the shadow” of the law,\(^{36}\) for that term refers to situations where parties negotiate in light of how they anticipate a court, applying pertinent legal rules, would decide their dispute. Here, by contrast, international legal rules are largely absent or not directly applicable, and international courts lack jurisdiction over the parties or contested subject matter.

Second, one might be tempted to say that these initiatives occupy the penumbral zone of normative ordering vaguely called “global governance.”\(^{37}\) That term, however, is not especially helpful here, because our initiatives often lack stable social organization; they reflect more spontaneous, ephemeral outbursts of diffuse mobilizational activity.\(^{38}\)

\(^{35}\) Though our initiatives often display genuine democratic inspiration, some readers may wonder whether a darker force lurks beneath. A common fear is that, though their apparent innocuousness now assures them wide support, their proponents actually harbor a long-term, incremental strategy which is more questionable. This begins with creating non-legalized global authority over the least controversial matters, then juridicizing such response when non-legal measures fail, as they regularly will, finally advancing the law -- of international human rights, in particular -- into deeply contested issue-areas, by which point it will become much more difficult for countries skeptical of such law’s (likely illiberal) direction, to exempt themselves from its widening gyre. Jide Nzelibe, “Is There a Partisan Logic to Conflicts Over The Scope of Presidential Power,” unpublished ms., Sept. 2010.

Thus, mass atrocity – because of its surpassing moral exigency – will enthusiastically call forth voluntary initiatives at first requiring no complex global legal apparatus. Over time their limited efficacy will reveal, however, the unavoidable need to put the world’s response to such recurrent crises on stronger institutional footing, an objective which juridification surely advances. Beginning, then, with an International Criminal Court, prosecuting only the world’s most grievous wrongdoing, the empire of international law will expand willy-nilly. By demonstrating its increasing efficacy, it will move into territory where staunchly liberal societies like the U.S. may not wish to follow. Whether initiatives like those here explored seriously risk our descent along such a slippery slope to serfdom is a question over which readers may differ. Such concerns may hover gloweringly in the backdrop of our analysis, but cannot receive close attention within it.


\(^{38}\) This should be said, for instance, of the efforts to condemn Turkey for failing to apologize for genocide, as well as of impromptu efforts to criticize states of excessive force in war. The term global governance is, in any event, of uncertain analytic value, for it is ‘defined’ less in terms of what it entails than by way of what it is not:
A third way to think about these developments, because of their voluntary and extra-judicial character, might be as expressions of “soft law.” But that term implies agreement upon some norm, and there yet exists no genuinely settled norm in our cases, as with the demand to apologize for genocide. In others cases, as with the “responsibility to protect,” the emergent norm – if it may be so described -- finds only very limited expression in any formal document to which states have agreed, a basic element of “soft law.” Other endeavors, like the pressure for corporate social responsibility in repressive states, do not originate with states, either the states of foreign investors or those hosting such investment. This initiative presents no particular choice for states, then, between hard and soft governance, which is the question of institutional design at the center of all discussions about international “soft law.”

Fourth, we might first be inclined to see these initiatives as forms of “law in action,” as contrasted with the “law on the books.” This distinction refers, however, only to situations, unlike those here, where formal legal sources apply directly to the conduct under examination, enabling us to speak meaningfully of deviations between de jure rules and the de facto operation of practices and institutions nominally governed by them. In any event, most invocation of the “law in action” sounds in a tragic key, because in practice much law falls short of its drafters’ aspirations. Yet in all five cases we find significant advances, in the ‘societal’ response to mass atrocity, beyond anything required -- even authorized, at times -- by international law.

Finally, it is initially beguiling to see our several atrocity-aversive efforts as emanations of what is sometimes called “living law.” This term refers to convergent human behavior and norms endorsing it that spring up spontaneously, without design, almost without active human agency, within the social life of organizations and communities. There might thus be -- or come into being, at some point -- a living law from and for an emergent “international community,” in particular. But the concept of living or incipient law suggests greater social harmony than we find in our empirical materials, which disclose much contestation over how

neither formal, judicially enforceable, legal regulation, nor complete anomic, anarchy, utterly uninhibited self-regard. Even the term “normative order,” as here employed, is indefensibly ambiguous, until clarified and qualified by some account what would count as adequate evidence that such order actually existed, exercised significant influence over conduct, and was considered legitimate by those so governed.


40 In 2005, a U.N. General Assembly resolution endorsed the concept of a “responsibility to protect,” though the nature and terms of this duty remained ill-defined by that document. World Summit Outcome, Draft resolution referred to the High-level Plenary Meeting of the General Assembly by the General Assembly at its fifty-ninth session, at http://www.who.int/hiv/universalaccess2010/worldsummit.pdf.


best to treat with atrocity, and where consensus over optimal response often exists over only glittering generalities.\textsuperscript{44}

To the case studies themselves, then, we now turn.

\textsuperscript{44} Jeremy Webber, “Naturalism and Agency in the Living Law,” in Hertogh, \textit{id.}, at 201, 202-203.
Chapter 1: Proportionality in the Law of War Crimes:

Introduction

Among those who think seriously about the law of proportionality in armed conflict, there is virtual unanimity on a conclusion that is initially quite startling and unsettling: current rules are far too vague either to guide combatant conduct ex ante or permit imposition of liability ex post in all but the very most extreme of circumstances, those in which anyone of good conscience would already know what to do, i.e., without law’s guidance. In the vast majority of battlefield situations, uncertainty abounds. Here, conventional morality – its exhortation not employ obviously excessive force, causing wanton civilian harm -- offers no transparent counsel. And at such times international law adds almost nothing of practical value in guiding decision-making by a conscientious commander. Serious disagreement arises only over the reasons for this problem and what can be done, by increasing law’s clarity and stringency, to reduce if not fully eliminate it.

On closer look, this entire understanding of the problem, and attendant approaches to its solution, prove misguided. There are, in fact, good reasons why international law demands so little of military decision-makers, reasons grounded in the vagaries of armed conflict itself, considerations to which legal scholars pay scant attention. This conclusion would be highly dispiriting, were it not for the fact that the principal sources of restraint in the use of military force by modern states are, and have always been, extra-juridical.

These restraints, moreover, have strengthened considerably in recent years, to the point where they are more significant than anything international law can or should require. It is to such forces that anyone genuinely concerned with minimizing unnecessary suffering in war should pay greatest heed and most seek to strengthen. These forces draw inspiration from the very same moral concerns underlying the pertinent international law: the near-universal yearning to eliminate superfluous suffering. Yet it proves impossible, for reasons here examined, to give these salutary forces greater footing or standing within international law itself.

The primary obstacles to greater moderation in war, then, do not lie in law’s deficiencies (regarding excessive force, at least), and the principal grounds for hope of greater restraint by combatants reside in factors that operate independently of such law -- beyond its reach, insusceptible to juridification, and rightly so. The upshot is that, on its own, current legal doctrine (and its judicial interpretation or scholarly critique) tell us less of value, speak less perspicaciously to the essential issues, than a close look at the sociopolitical forces at work in military decision-making. These have proven more amenable to efforts at humanitarian influence than is generally recognized, or than most “realist” accounts of international politics would lead one to imagine possible.
The first part of this chapter examines the many weaknesses with extant legal rules concerning proportionality in war. We conclude that the proportionality norm has not, and is unlikely ever to become genuinely juridified, in the simple sense of having sufficient clarity and coherence to provide those governed by it with meaningful guidance in their conduct. The chapter’s second part elucidates the compensating strengths of non-legal norms and sociopolitical pressures for restraints on force. There should be no implication here, however, that the latter strengths fully overcome the former frailties, at least in the many parts of the world – the location of most armed conflicts today -- where these offsetting considerations scarcely exist.

Part 1: The Law’s Fatal Frailties

International law displays three profound deficiencies: its limited external reach, its internal incoherence, and its practical insignificance. We examine each in turn, and conclude that the rules cannot be rendered more determinate, coherent or ethically demanding in ways consistent at once with due process principles and with the steadfast, implacable nature of what they seek to govern.

A. The Law’s Limited Aspirations

The international law of armed conflict prohibits uses of force which can be expected to cause disproportionate harm to civilian life and property. Courts have interpreted this requirement, however, in ways that initially strike most people, other than military professionals, as highly indulgent. Judges have shown great deference to the professional discretion of military decision-makers and sensitivity to the often-limited nature of the information in their possession.

This is because it is often impossible for soldiers to know how much force will prove necessary to accomplish a given military goal. There is also no established method for balancing an operation’s contemplated military gains against possible losses of innocent civilian life and property, as the law purports to require, a problem examined later herein. International law cannot go further here without quickly running afoul of due process concerns, arising from the limits of what officers know and can be expected to learn. These cognitive or epistemic shortfalls, as we will call them, are likely to endure, as they have diminished little if at all over the course of history. They have made it impossible to devise demanding, bright-line rules that could accord commanders fair notice of what international law expects of them in most circumstances. The law of proportionality therefore contents itself with barring only the most manifestly egregious wrong.

The central problem is that, despite millennia of experience with war and significant advances in its scientific aspects, those who professionally make (and study) it have few clear answers to many of its perennial puzzles, little ability to predict results (tactical, operational or strategic) even in the short-term, much less to anticipate its shifting contours over time. This is why we have learned so little about how law should regulate war and, in particular, about where exactly to draw the line – amidst the ubiquitous violence intrinsic to the activity – between its lawful and illegal features. The rules cannot assume, in particular, that war is more susceptible to
scientific mastery, in the efforts of belligerents to calibrate means to ends, than it has actually proven to be.

When seeking legislative authorization for new weapons systems (prominently including recent, non-lethal ones), military leaders invariably emphasize the hard science from which such technological innovations derived. Yet the efficacy of these weapons turns out to vary greatly with the contingencies of combat with different types of adversaries in a variety of operational contexts. Military leaders should count themselves fortunate that, when evaluating “collateral damage” from such modern weaponry, international law has not taken literally their often-exaggerated claims to “surgical” precision. Such leaders should not be surprised, however, that the rest of world has increasingly sought to hold them more closely accountable on these claims, and so been much quicker to condemn resulting civilian injury as excessive. It is the prospect of such informal condemnation – its repercussions for both the careers of individual officers and the global reputation of states they serve – that today provides the principal check against superfluous civilian suffering in war. This increasingly effective source of restraint does not lend itself to juridification, however.

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