

# Sanctions as Rescue?

## Why the WTO Members May have an Obligation to Use Trade-Restricting Measures to Help Others

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*The question examined here is one not often asked: is there a situation in which a positive duty to impose trade regulations to advance social policies may exist? Unlike analyses that posit whether such regulations must (or ought to) be allowed by a particular treaty regime within the broader international legal system, the issue brought up here is based on a state's obligations toward the international community. The topic is approached by a background in the concept of "beneficence" as examined through the philosophical lens of ethics and then turned legal by looking at a similar problem in private law: the topic of duty to rescue. In public international law, the idea of duties of states is just beginning to be studied, but there are signs that lend support to the hypothesis that in limited situations, there may indeed be a legal obligation for a state to act to either rescue individuals from peril or to stop harm from occurring. A full realization of this duty would be a leap forward in the creation of a true international community based on law.*

### 1. The Problem

In earlier work, I have examined the use of trade measures as social regulations. Focussing the inquiry around the law of the World Trade Organization (WTO), that book compared the international legality of WTO Members' choices to use economic regulatory tools as instruments for pursuing a policy goal in non-trade areas (such as environment, human health, or culture) with the WTO legal system's treatment of such measures.

The WTO's main concern is to prevent opportunistic usages of trade regulations – regulations imposed solely to protect rent-seeking domestic industries or regulations used to pursue selfish values. The concern of the international community is that the WTO's monopoly over the use of regulatory trade measures may inhibit the enforcement and (more significantly) the development of

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international law necessary to the flourishing of the community. Thus, the WTO's approach to a Member's choice to use trade regulations that aim to advance social policies must be a differentiated one, taking the development of the international community and the well-being of each of the individuals comprising this community as the ultimate measure of the regulations' legitimacy. The use of equitable principles can assist in evaluating the legitimacy of a particular trade regime in light of the competing interests of the international legal system.

The social regulation inquiry does not end here. There is a significant issue remaining to be answered that regards the question of whether the use of trade regulations is optional – indeed, the development of the international community and the well-being of each of the individuals comprising this community may place more demands on states than the states would voluntarily undertake. *To what extent, then, is the use of social trade regulations obligatory under international law?*

## 2. From Just War to Responsibility to Protect

The general concept of “just war” can be traced back to the beginning of history, and its systematic analysis set forth first by St. Augustine<sup>1</sup>, and then by St. Thomas Aquinas, in his *Summa Theologicae*<sup>2</sup>. Passing through the theoretical development by scholars such as Vittoria, Suarez, and Grotius, the just war concept evolved into the idea of morally-required “humanitarian intervention” in the Nineteenth Century.<sup>3</sup> Never disappearing entirely, for today's international lawyers the

<sup>1</sup> Paul Ramsey, *The Just War According to St Augustine* in: Jean Bethke Elshtain, ed., *Just War Theory* 8-22, 8 (Oxford/Cambridge, MA: Blackwell, 1992) (calling St. Augustine the “first great formulator of the theory that war might be ‘just’”).

<sup>2</sup> Peter Borschberg, *Hugo Grotius “Commentarius in Theses XI”: An Early Treatise on Sovereignty, the Just War, and the Legitimacy of the Dutch Revolt* 58 (Bern/Berlin/Frankfurt/New York/Paris/Vienna: Peter Lang, 1994) (noting that Aquinas' *Secunda Secundae* “provided the foundation not only for Cardinal Cajetan and the late Spanish scholastics such as Vitoria, de Soto, Covarrubias y Leyva, Bañez, and Suárez, but also for many theorists of the ‘just war’ in Protestant Europe”). Ramsey makes an interesting observation about the development of the just war idea from St. Augustine to Thomas Aquinas:

Two main alterations of the just war doctrine took place between Augustine and Aquinas. First, a shift from voluntarism to rationalism in understanding the nature of political community, and therefore an increasing emphasis upon the natural-law concept of justice in analysis of the cause that justifies participation in war. This is what is usually meant by the doctrine of just war. ... Secondly, rules for the right *conduct* of war were drawn up, particularly for the protection of non-combatants. This is usually dismissed as the weakest part of the traditional theory of the just war.”

Ramsey at 19-20 (continuing to argue for reconsidering the “just conduct” question, in view of the fact that “natural reason falters in attempting to make large comparison of the justice inherent in great regimes in conflict but is quite competent to deliver a verdict upon a specific action that is proposed in warfare”).

<sup>3</sup> Alex Moseley, *Just War Theory*, Internet Encyclopedia of Philosophy, <http://www.iep.utm.edu/j/justwar.htm>.

question of whether humanitarian-motivated military sanctions are legally justifiable gained real prominence with NATO's 1999 intervention in Kosovo and the United States-led ousting of Saddam Hussein's regime in Iraq in 2003. Each of these events spurred the publication of multiple articles discussing the law of humanitarian interventions and the moral implications of the law. While much of the discussion of these two actions centered on whether the unilateral use of (military) force *may* be used<sup>4</sup> – in particular in the face of Security Council opposition to taking action – the fundamental question of whether there is a positive duty to act in the face of violations of law contributed to the debate as well<sup>5</sup>.

Then, in 2005, the concept of a Responsibility to Protect was formalized in the Outcome Document of the High-Level Plenary Meeting of the General Assembly. Paragraphs 137 and 138 of that Outcome Document note:

138. Each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity. This responsibility entails the prevention of such crimes, including their incitement, through appropriate and necessary means. ... The international community should, as appropriate, encourage and help States to exercise this responsibility and support the United Nations in establishing an early warning capability.

139. The international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI

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<sup>4</sup> E.g., Louis Henkin, *Kosovo and the Law of "Humanitarian Intervention"*, 93 *Am. J. Int'l L.* 824 (1999) (calling for maintaining the illegality of unilateral humanitarian intervention because of the dangers of unilateral action rather than on the basis of any concerns about the target's sovereignty); Oscar Schachter, *The Legality of Pro-Democratic Invasions*, 78 *Am. J. Int'l L.* 645 (1984) (basing his criticism of humanitarian intervention on the implied rejection of the prohibition on the use of force); Bruno Simma, *NATO, the UN and the Use of Force: Legal Aspects*, 10:1 *Europ. J. Int'l L.* 1 (1999); Ruth Wedgwood, *NATO's Campaign in Yugoslavia*, 93 *Am. J. Int'l L.* 828 (1999) (considering that Kosovo may indicate the beginning of a new view of military action taken outside of the Security Council, but emphasizes the multilateral nature of the NATO action, distinguishing it from unilateral actions).

<sup>5</sup> See Theodor Schilling, *Zur Rechtfertigung der einseitigen gewaltsamen humanitären Intervention als Repressalie oder als Nothilfe*, 35:4 *Archiv des Völkerrechts* 430, 434 (1997) („In gewissen Umfang kennt die Moral sogar eine Pflicht zur Beistandsleistung für in Not befindliche Mitmenschen. In extremen Fällen der Verletzung von Menschenrechten durch den eigenen Staat der Verletzten wird sich annehmen lassen, dass diese Pflicht zur Beistandsleistung die Form einer Pflicht zur humanitären Intervention annimmt“).

and VIII of the Charter, to help protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. (...)

Currently soft-law as well as being limited to an obligation to protect only populations facing the most serious violations of their human and humanitarian rights, the concretization of the Responsibility to Protect into legal text is nevertheless a significant marker in the development of the international community.

An investigation of whether there is a duty to act is equally relevant for the study of social trade regulations' legitimacy in international law. The following hypothesizes that there may be a legal – as well as a moral - duty to impose trade restrictions in the face of threatened danger to persons or objects (environmental or cultural) by another regime. The existence or inexistence of such a duty depends on the type and level of violation causing the danger and does not countenance regulatory programs that are more destructive of international community interests than are being helped.

### 3. The Ethical Aspects of Rescue: the Principle of Beneficence

The ethical (as opposed to legal) aspect of the duty to aid others is referred to as an obligation of beneficence. While the term “beneficence” on its own is often used loosely to mean simply “doing good”<sup>6</sup>, a principle of beneficence implies more. The principle of beneficence, in its starkest form, requires that “if it is in our power to prevent something very bad happening, without thereby

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<sup>6</sup> ACLU et al., Amicus Curiae Brief in *Chevron v. Eschazabal*, 536 U.S. 73 (2002) (No. 00-1406) at 6 (asserting that civil rights legislation attempts to prevent „mistaken beneficence“, described as harming the interests of another while trying to do what is good for him or her; the ACLU equates mistaken beneficence with paternalism); Petitioner's Reply Brief, *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001) (No. 99-2047) at 15 („If the [Respondent's] theory of Property were to be accepted, then the principle that property is a fundamental right ... would have to succumb to the positivist notion that all property ... [is] a result of state beneficence“). There are also references to the duty of beneficence in the ethical codes of the health professions, indicating an obligation to help others as well as to prevent harm from coming to the patient. See, e.g., American Dental Association, Principles of Ethics and Code of Professional Conduct, Section 3 („Principle: Beneficence („do good“) („The dentist has a duty to promote the patient's welfare“); Goh Lee Gan, Practical Approach to Ethics in Clinical Care (listing beneficence as one of the four principles of medical ethics, explaining it as the duty to „do only that which benefits the patient“) ([www.med.nus.edu.sg](http://www.med.nus.edu.sg)).

sacrificing anything of comparable moral significance, we ought to do it”.<sup>7</sup> It is the principle of beneficence that says a passer-by has a moral obligation to save a stranger from impending death if the passer-by is capable of doing so, even if she would incur some cost to herself in making the rescue. The typical example is that of a medal-winning swimmer, on his way to the airport to catch a plane, who sees a child drowning in a pond. Beneficence would dictate that the swimmer risk missing his plane to save the child.

Beneficence does not require complete sacrifice, however. If the rescuer would place his life in danger by assisting the other, there is no ethical duty to attempt the rescue – “comparable moral significance” is the limiting factor on the duty (although, according to Unger, that could still require most of us in the industrialized world to adhere to “A Pretty Demanding Dictate” in order to live a morally decent life<sup>8</sup>).

While most widely acceptable in contexts of easy rescue from mortal danger, the principle of beneficence extends beyond the immediacies of life-threatening situations within our physical proximity to demand that each individual who has enough wealth to live also has a moral obligation to act so as to save those who do not possess enough resources to survive (or to live a life of dignity).<sup>9</sup> As an ethical norm, this duty disregards geopolitical borders, placing upon the consciences of all possessors of relative wealth the burden of caring for the destitute.<sup>10</sup> In its pure form, the

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<sup>7</sup> Peter Singer, *Practical Ethics*, 2d edition, 230 (New York: Cambridge Univ. Press, 1993). This is Singer’s “First Premise” in arguing for an obligation to assist, and he characterizes it as acceptable “by people who hold a variety of ethical positions”. (Id. at 231). His discussion continues with premises two, three, and four, each more troublesome than the previous, but still undeniable to nearly anyone in at least certain contexts:

Second premise: Absolute poverty is bad.

Third premise: There is some absolute poverty we can prevent without sacrificing anything of comparable moral significance.

Conclusion: We ought to prevent some absolute poverty.

Id.

<sup>8</sup> Unger, *Living High and Letting Die: Our Illusion of Innocence* 134 (New York: Oxford Univ. Press, 1996). Singer suggests a round figure of ten percent of our annual income as an ethically defensible tithe to charities for the alleviation of absolute poverty. Singer, *Practical Ethics* at 246.

<sup>9</sup> Singer at 232-234 (responding to arguments for preferring “our own” to strangers in need); Peter Unger, *Living High and Letting Die*, supra (a book-length treatment of the ethical duty to aid those in need, focusing mainly on the duty of persons living in wealthy societies to help persons in underdeveloped societies).

<sup>10</sup> Peter Unger’s prominent example of the global extent of our duties of beneficence is that of the UNICEF envelope requesting donations to help fund a measles vaccination campaign among young children in the developing world. By throwing the envelope away, according to Unger (and other “Liberationists”), each of us is as morally culpable as if we had continued past the drowning child in order to remain dry and punctual. Unger, *Living High and*

principle also ignores otherwise relevant legal obligations. Peter Unger argues, for example, that stealing items to give to the poor may be morally demanded.<sup>11</sup>

#### 4. Legal Duties of Beneficence? Good Samaritan Statutes and the Limits of Duties to Rescue

Although the principle of beneficence shares much with the teachings of the world's major religions, any attempt to transpose the principle en bloc into a legal obligation on the international level would prove extremely difficult. An obvious difficulty with such a task would be the need to reconcile the differing views of community and individual responsibilities to others reflected in the major legal systems of the world. The specific inclusion of a general duty to rescue varies greatly between common law and civil law jurisdictions – with the common law refusing to recognize a general principle of duty to rescue – as well as across those jurisdictions that have such duties.<sup>12</sup> And, although in civil law countries the duty to rescue is in some cases grounded in both civil and

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Letting Die, supra at 7-8 (“Is it seriously wrong not to do anything to lessen distant suffering; or is it quite all right to do nothing? In this book, I’ll argue that the first of these thoughts is correct and that, far from being just barely false, the second conflicts strongly with the truth about morality”); see id. at 135-139 (comparing the stories of Bob’s Bugatti and Ray’s Big Request to vividly illustrate the inconsequence of the common response to ignoring the suffering and death of masses of poor overseas while feeling repulsed by a refusal to save a child within reach).

<sup>11</sup> Peter Unger, *Living High and Letting Die: Our Illusion of Innocence* 13, n. 18 and accompanying text (New York: Oxford Univ. Press, 1996). Unger posits, however, that the situations in which stealing or other illegal activities would be necessary are unlikely to arise for most of us in the industrialized world, given our abundant prosperity and corresponding ability to give much without threatening our material comfort significantly (Id. at 14).

<sup>12</sup> In the Common Law, although there is no general duty to rescue, there are situations in which a duty to rescue does exist in tort law based on the relationship of the victim to the potential rescuer (family member or business associate) or on the rescuer’s profession or business (hospital, police officer). Marc A. Franklin and Robert L. Rabin, *Tort Law and Alternatives*, 7th ed., 155 (Foundation Press: New York, 2001). There are also a few statutory regimes in the United States that impose criminal liability on persons who fail to execute an „easy rescue“. Tomlinson, *The French Experience* at 462, notes 38-44 and accompanying text (listing Minnesota, Rhode Island, Vermont, and Wisconsin statutes). See Jan M. Smits, *The Good Samaritan in European Private Law: On the Perils of Principles without a Program and a Programme for the Future* 31 (Deventer: Kluwer, 2000) (explaining the acceptance of a duty to rescue in the private law of European states while such a duty is non-existent in common law jurisdictions by different, nationally-specific, views of the relationship between law and morals).

criminal statutes, juridical application of the relevant rules is hesitant, even within the carefully circumscribed scope of the legislation.<sup>13</sup>

Why the variation? The most convincing reasoning points to the fundamentally moral-directing nature inherent in the duty and the different views of the role of law in society that exists among separate jurisdictions. In the Anglo-American tradition (including the former British colonies), the (admittedly simplified) main argument of those who oppose the creation of a duty to rescue is that the law should not dictate individuals' morality. As the state is the institution behind the law, "coerced benevolence"<sup>14</sup> goes beyond what the state can legitimately demand of people. The state is given negative powers by the people, and may not exceed the bounds of protecting individual freedoms.<sup>15</sup> Practical legal issues, such as the difficulty of defining when a potential rescuer may be presumed to have misjudged the danger to either the victim or to herself or unwittingly not exhausted all possibilities for aid, also bring forth criticism of such an obligation<sup>16</sup>, albeit "not very convincing" ones<sup>17</sup>.

The proponents of a (domestic) legal duty to rescue – including most civil law jurisdictions - may begin from the moral position that the state is created with the positive duty to assist each citizen. A legal duty on all individuals is therefore legitimate because it is the only way in which to ensure that help will be lent when necessary. Others may hold the state to a duty to educate its citizens to be able to fulfill their civic duties, requiring law to "provide a moral compass that points society in its proper direction".<sup>18</sup> More nuanced support comes from those who argue that a rule requiring rescue

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<sup>13</sup> Edward A. Tomlinson, The French Experience with Duty to Rescue: A Dubious Case for Criminal Enforcement, 20 N.Y.L. Sch. J. Int'l & Comp. L. 451, 495-496 (2000) (criticizing the inconsistent application of the duty to rescue legislation as well as the courts' failure to define more precisely the content of its elements).

<sup>14</sup> Term used in the context of describing the duty to rescue in the context of classical Anglo-American tort law. Donald J. Kochan, The Pervasive Duty to Rescue (text found at <http://www.aapsonline.org> ).

<sup>15</sup> Andrew Lacy, Should the common law develop to [recognise and enforce a positive duty to prevent harm from been done to another] and in which areas? Why? (located at <http://www.bark.net.au/Society/socart2.htm>).

<sup>16</sup> Edward A. Tomlinson, The French Experience with Duty to Rescue: A Dubious Case for Criminal Enforcement, 20 N.Y.L. Sch. J. Int'l & Comp. L. 451, 455-456 (2000). For a fuller discussion of the arguments against the imposition of a general duty to rescue see Robert Justin Lipkin, Beyond Good Samaritans and Moral Monsters: An Individualistic Justification of the General Legal Duty to Rescue, 31 UCLA L. Rev. 252, 267-278 (1983) (listing the problems of causation, identifying the tortfeasor, and prior knowledge, as well as that of individualistic political theory as reasons for the common law's failure to recognize a duty to rescue).

<sup>17</sup> Smits, at 31.

<sup>18</sup> Smits at 33. The idea that civil law duties to rescue originate in the Roman law principle of *negotiorum gestio* explains why the current law in most Continental systems consider the rescuer to be a praiseworthy "manager of another's affairs" rather than the condemnable "officious intermeddler". John P. Dawson, Rewards for the Rescue

is not incompatible with the values of individualism<sup>19</sup> and from the argument that the individual has duties to the community that justify imposing an obligation to help others within that community.<sup>20</sup>

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of Human Life? in: Kurt Nadelmann, Arthur T. von Mehren, and John N. Hazard, eds., *XXth Century Comparative and Conflicts Law: Legal Essays in Honor of Hessel E. Yntema* 142-159, 142 (Leyden: A.W. Sythoff, 1961). Alberto Cadoppi suggests that the real reason for Civil Law's tradition to include a duty to rescue is that recent history (particularly the German and Italian experience with totalitarianism, which favored strong duties to rescue) and modern codification efforts (which bolster public acceptance if presented as community-oriented) supported the inclusion of duties to rescue in criminal codes. Failure to Rescue and the Continental Criminal Law in: Michael A. Menlowe and Alexander McCall Smith 93-130 (Aldershot/Brookfield/HongKong/Singapore/Sydney: Dartmouth, 1993). Cadoppi mentions, however, that while the Egyptians, Greeks, and ancient Germanic peoples all had strong duties to rescue in their legal codes, the Romans did not. *Id.* at 97-98.

The situation of the legality of a duty to rescue in Soviet law is interesting: there was much debate, and ultimately much hesitation, to recognize any such duty despite the "rules of socialist intercourse". See John N. Hazard, *Soviet Socialism and the Duty to Rescue* in: Kurt Nadelmann, Arthur T. von Mehren, and John N. Hazard, eds., *XXth Century Comparative and Conflicts Law: Legal Essays in Honor of Hessel E. Yntema* 160-171 (Leyden: A.W. Sythoff, 1961). "It cannot be said that the Soviet Constitution's requirement that "citizens observe the rules of socialist intercourse creates in law a greater duty than exists in the American legal system, and certainly not as great a duty as French law has already established." *Id.* at 171.

<sup>19</sup> Robert Lipkin explains this view of individualism's compatibility with a duty of rescue by distinguishing a complete duty to rescue with a duty merely of easy rescue:

... compelling a person to attempt dangerous rescues entails risking loss of life and permanent injury in exchange for the knowledge that others are required to attempt a dangerous rescue on his behalf. In dangerous rescues there is always the chance that the rescuer will fail in his rescue attempt. The benefit in a dangerous rescue -- saving the victim -- is considerably less than certain; the burden -- injury to the rescuer -- is more than just possible. It is precisely this trade-off which is not entailed by individualistic values. Individualists may reasonably disagree over whether a principle of dangerous rescue is desirable; hence, such a principle is not fully justified on individualistic grounds.

The result is different when we turn to easy rescues. Since an easy rescue involves minimal danger, and with modern technology can usually be achieved quickly and with certainty, the individualist receives two kinds of benefits from a law requiring easy rescue. First, pertaining to actual rescues, such a law increases the likelihood of his being rescued should he need to be. In exchange for this the individual suffers only minor inconvenience should he ever be required to rescue someone else. Second, even if a person is never in need of rescue himself, the individualist still benefits from a law requiring easy rescue. In this case, the existence of such a law gives the individualist reason to believe that, should he be in need of rescue, the law requires action on his behalf. This knowledge makes him better able to plan his activities and, therefore, enhances his freedom. ...

In addition, the fact that in nearly all European<sup>21</sup> and Latin American legal regimes make a requirement of “easy rescues” (a rescue that is not likely to result in bodily harm or financial costs to the rescuer) supports the practical workability of such a duty despite its acknowledged vagueness in the relevant legislation. Problems of line-drawing doubtlessly exist, but this should hardly act as a bar to an otherwise desirable law. As one commentator noted,

“... we are wise to be cautious - but is it really so difficult to draw lines? Courts routinely engage in individualized determinations that depend on subjective intent and a range of excuses and mitigating considerations. Why not trust the legal system to reach individualized judgments just as fairly where omissions are concerned?”<sup>22</sup>

Moreover, that a general duty to rescue may be incompatible with the differing views of the role of law in society does not mean that beneficence is completely rejected by common law legal systems. In fact, the actual practice of Anglo-American courts is often quite similar in the results of Continental rescue cases because of the exceptions to the general rule against duty to rescue. There are namely several “special relationships” between rescuer and victim that the common law recognizes as entailing a duty of rescue: parent-child, property owner-invitee/licensee, certain professional relationships, certain contractual relationships, certain statutory relationships, and so

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Beyond Good Samaritans and Moral Monsters: An Individualistic Justification of the General Legal Duty to Rescue, 31 *UCLA L. Rev.* 252, 288-290 (1983) (footnotes omitted).

<sup>20</sup> See Steven J. Heyman, *Foundations of the Duty to Rescue*, 47 *Vand. L. Rev.* 673 (1994) (supporting a legal duty to rescue within a Hegelian framework of the individual’s relationship, and resulting duties to the other members of his or her community); Margalynne Armstrong, *Can Good Samaritan Laws Fit Into the United States Legal/Political Framework? A Brief Response to Elspeth Farmer, Joshua Dressler, and Marc Franklin*, 40 *Santa Clara L. Rev.* 1027 (2000) (noting that civic republicanism requires that individuals have a responsibility to the community, and can be held to an obligation to serve society’s interests); Kathleen M. Ridolfi, *Law, Ethics, and the Good Samaritan; Should There be a Duty to Rescue?* 40 *Santa Clara L. Rev.* 957, 963 (2000) (noting that in a „dot-com“ age, a duty to rescue might help maintain a sense of community).

<sup>21</sup> Sweden is an exception, being a civil law jurisdiction but having no duty to rescue. Tomlinson, n. 2 and accompanying text.

<sup>22</sup> Ridolfi, *Should there be a Duty to Rescue?* 40 *Santa Clara L. Rev.* at 966. See also Smits at 31 (evaluating the policy reasons against having a legal duty to rescue, Smits concludes that “no reasons of a practical legal nature stand in the way of the acceptance of a general duty to rescue”).

forth.<sup>23</sup> The civil law, for its part, restricts the duty to act depending on the level of danger facing the victim and the existence of danger to the rescuer, in general only aiming to ensure “easy rescues”.<sup>24</sup> It is from this common ground that the evolution of a principle of beneficence in international law can begin to be hypothesized, with the result that economic sanctions might be seen as required in certain contexts.

### a) Beneficence in International Law?

To avoid any misunderstandings, let me assert right away that it is not possible to speak of any widely-accepted, general principle of beneficence in international law as it stands today. While the Responsibility to Protect was accepted by the General Assembly, its scope is narrow and its legal characterization still that of soft law. Moreover, the concept has not been called into use in those situations where its applicability is established.

That said, there are signs that the still-highly positivist approach to international law is yielding in some areas to a more naturalist approach, and with such a shift come the possibilities of recognizing not only rights of states to protect extraterritorially, but also of limited duties to do so.

The arguments surrounding the adoption of a standard of beneficence in public international law are similar to those voiced in national debates – on a theoretical level, the merging of morality and law has been in disfavor since the mid-Seventeenth Century.<sup>25</sup> While the positivists reaching their zenith two hundred years later, the influence of their basic separation of law from morals remains dominant in the present international legal system. Thus, in comparing domestic law discussions of duty to rescue with similar debates in international law, the national ideas of the individuality of the citizen and civil liberty morph into discussions of state sovereignty. Accordingly, resistance to claiming a legal duty to rescue are based in part on the separation of moral norms and legal norms (what is morally required need not be legally required) and in part on the concern that law not unduly burden the individual (state) by imposing on its (sovereign) will a command to act or not to act.

In the case of states, the arguments are even stronger for the critics of a duty to rescue than on the national level, as there is no international “government” to which states have granted powers of

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<sup>23</sup> For a detailed discussion of the common law approach to rescue, see Alexander McCall Smith, *The Duty to Rescue and the Common Law* in: Michael A. Menlowe and Alexander McCall Smith 55-91 (Aldershot/Brookfield/HongKong/Singapore/Sydney: Dartmouth, 1993); Liam Murphy, *Beneficence, Law, and Liberty: The Case of Required Rescue*, 89 *Geo. L.J.* 605, 611-625 (2001) (giving an overview of both criminal and tort law as it is and the theoretical arguments against/for duties to rescue in common law jurisdictions).

<sup>24</sup> For a detailed discussion of the civil law approach to rescue, see Alberto Cadoppi, *Failure to Rescue and the Continental Criminal Law*, *supra*. See particularly *id.* at 104-111 (explaining seven of the common elements of Continental European “Bad Samaritan” laws and comparing their use).

<sup>25</sup> Stephen C. Neff, *Rescue Across State Boundaries: International Legal Aspects of Rescue* in: Michael A. Menlowe and Alexander McCall Smith, eds., *The Duty to Rescue: The Jurisprudence of Aid* 159-204, 164 (Aldershot/Brookfield: Dartmouth, 1993).

authority over all of their various actions with the idea of helping each state achieve its full potential. While constitutional societies acknowledge a willingness to be fettered for the sake of the individual's ultimate benefit, there is no consensus that international society has done so. Moreover, whether or not states have accepted that their sovereignty may be infringed by international law<sup>26</sup>, they certainly have not offered to sacrifice their national "morality" to some universal code of ethics.

Second, there is bound to be resistance to any imposition of a positive duty on states to "rescue" other states' populations from harm (whether physical, economic, environmental, or cultural) in the basis of practical politics – there is great self-interested political interest in preserving a right of non-involvement. Recall, for example, the enormous difficulty facing humanitarian organizations in securing financial assistance to serve those populations threatened with imminent starvation or the inability of the Security Council to agree to taking decisive action in regions where even genocide has been recognized. States have consistently maintained, and the International Court of Justice has equally supported, the view that, *where permissible at all*, aid (financial or military) is voluntary. The only widely-applicable and generally-acceptable exception to this postulate is in the case of Security Council sanctions issued under Chapter VII authority.

But the traditional theoretical argument becomes weaker as the international legal framework matures, and such sovereignty arguments lack plausibility when examined on their legal merits (their strength resting with their resonance in the diplomatic community and general public). It cannot be claimed, for instance, that international law is solely negative law: although there are many restrictions on what a state may do (in relation to its citizens, its environment, its neighbors), there are also numerous obligations on states to do something (whether substantive or procedural), most of which are voluntarily assumed, but some accepted only grudgingly. At its core, then, it would not be a problem to require action of states in reaction to events.

More significant to the project of establishing an international legal duty of beneficence lies on the one hand on the ethical level – should there really be such a duty, and if so for what sorts of violations is there a duty to act? and on the other hand, on a practical level – the problem of how to finance the conscientious fulfillment of such a duty.<sup>27</sup> Each question is difficult, and necessarily the answers will only be able to emerge out of a dialogue at the level of the international community.

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<sup>26</sup> Although there is a copious amount of literature on the question of sovereignty's health, the idea that the international system may legitimately reduce sovereignty is rarely supported by state officials. More often, the reality of international obligations and legal limits on state action is viewed as a voluntary acceptance of duties, and therefore not a restriction on sovereignty, but rather an exercise of it.

<sup>27</sup> See Lea Brilmayer, *What's the Matter with Selective Intervention?* 37 *Ariz. L. Rev.* 955, 957-958 (1995). Brilmayer cites two authors of particular relevance to the present discussion in her cursory discussion of the topic: Peter Singer, *Famine, Affluence, and Morality*, 1 *Phil. & Pub. Aff.* 229 (1972); Liam Murphy, *The Demands of Beneficence*, 22 *Phil. & Pub. aff.* 267 (1993).

## b) Should there be a Duty of Rescue in International Law?

The answer to this question is necessarily subjective. Yet, if one accepts the goal of establishing an international community and if the ideal of the community is one of all citizens enjoying a life in which individual potentials can be fulfilled, it is difficult to argue convincingly that a duty to rescue is not a requirement for ensuring the achievement of such a community. Once the community is well-established, the duty can be reevaluated. If norm-internalization has occurred, there may be no need to supplement a moral view of right with a legal obligation to protect others from harm. Until then, I fear, there must be a recognized obligation for states to act where they are able in order to ensure the protection of the community's inhabitants and resources.

### i. *From Duty to Rescue to an Obligation to Punish Non-Rescuers*

The move from duties to rescue to an obligation to punish one who fails to fulfil (or to attempt) this duty is an important one. Law-enforcement in most jurisdictions is characterized by prosecutorial discretion. That is, it is generally up to the enforcer herself to determine if she is going to pursue a claimed violation of rights (this is true whether the violation creates a civil liability or criminal liability). The *right* to make a claim thus has no corresponding *duty* to do so.

At least that was the view of the courts traditionally and it still is so in major jurisdictions (such as in the United States). This view is far from uniform, however, and while duties themselves have long been an important part of the legal tradition in Islamic and African societies<sup>28</sup>, even in Western Europe (including Great Britain), the duty to protect has expanded to include a duty to punish those who fail to protect others from violations – even when the state is the object of punishment.

Interestingly, the reluctance of some states to admit to a duty to protect their own citizens has not prevented the development of a duty to punish other states for failing to protect subjects of

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<sup>28</sup> The following discussion is limited to a comparison of the main Western legal systems. I am not versed sufficiently in Islamic Law to integrate its doctrines into my work at this time. However, it is of potentially tremendous significance, based as it is on the concept of *duties* rather than on that of *rights*. See Jason Morgan-Foster, *Third-Generation Rights: What Islamic Law Can Teach the International Human Rights Movement*, 8 Yale H.R. & Dev. L.J. 67, 82, 106-110 (2005) (explaining the significance of, and various legal categories of, duties in Islamic Law). My comments on the possible need to develop an enforceable duty to assist in international law may therefore find support in the legal regimes of the Arab world.

Also of interest, and again not integrated here for lack of deeper knowledge, is the role of duty in the legal systems of African nations. Mutua responds to criticism leveled at the use of individual duties in the African Charter on Human and Peoples' Rights with a call for more sensitivity to the historical importance of duties to ensure the well-being of individuals in African communities, and arguing that a combination of rights and duties is not inherently unworkable. Makau wa Mutua, *The Banjul Charter and the African Cultural Fingerprint: An Evaluation of the Language of Duties*, 35 Va. J. Int'l L. 339 (1995).

international interest. In fact, it is the United States – whose Supreme Court reaffirmed even more blatantly than before the absence of a governmental duty to protect vulnerable individuals – that pushes the idea of a “right” to intervene in other States’ jurisdictions on behalf of victimized populations (to the discomfort of many Europeans).

Outside situations of humanitarian intervention, the duty to punish non-protectors is less controversial. While dispute settlement systems are notoriously weak in international law (the WTO system is an exception to this rule), a small number of treaties do specifically envision punishment of violators of their provisions. While the remedies are often left open, to be determined by arbitration or litigation, the Montreal Protocol, which prohibits Parties from trading certain ozone-depleting substances with non-parties<sup>29</sup>, indicates that there will be consequences of a violation<sup>30</sup> (to be determined “at their first meeting”) as does the Cartagena Protocol on Biosafety<sup>31</sup>. Although - admittedly - the consequences are still not yet determined, the fact that consequences of violation is even a topic of negotiation is a positive step. Further along on enforceability is the Kimberley Process Certification Scheme.<sup>32</sup> The “Scheme” requires the cutting off of trade in diamonds with any country that does not maintain a certification process for its diamond production or processing industry<sup>33</sup>, and will refuse recognition of governments that fail to adhere to the Process’ reporting or licensing requirements once they become participants. The failure of several signatories to gain participant-status upon the commencement of the Scheme in January 2003 testifies to the leaders’ commitment to enforceability.<sup>34</sup>

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<sup>29</sup> Montreal Protocol on Substances That Deplete the Ozone Layer, adopted 16 September 1987, in force on 1 January 1989, Article 4(1)-(2) (negotiated under the auspices of the Vienna Convention on the Protection of the Ozone Layer). The Montreal Protocol has been amended four times to add substances to the list of production and/or consumption controls and to specify trade restrictions and licensing requirements: London Amendment (1990); Copenhagen Amendment (1992); Montreal Amendment (1997); and the Beijing Amendment (1999). See UNEP, Amendments to Montreal Protocol (available at <http://www.unep.org>).

<sup>30</sup> Montreal Protocol, Article 8.

<sup>31</sup> Cartagena Protocol on Biosafety, adopted Article 34 (negotiated under the auspices of the Convention on Biological Diversity).

<sup>32</sup> The Kimberley Process Certification Scheme is a technically “political, not a legal” arrangement (Chair’s Report to Plenary, Kimberley Process Plenary Meeting, Gatineau, Canada, 27-29 October 2004), but it requires Members to implement national legislation in accordance with its rules as well as requiring data submission in order to remain a member. See [www.kimberleyprocess.org](http://www.kimberleyprocess.org).

<sup>33</sup> Kimberley Process Certification Scheme, Section III (c).

<sup>34</sup> Comparing the list of states signaling an intention to participate just prior to January 2003 with the List of Participants from end of July 2003 reveals a difference of 19 states. See Krista Nadakavukaren Schefer, *Stopping Trade in Conflict Diamonds*, *supra* at 394, n. 13.

Beyond treaty law, the idea that states could be punished for inaction in response to violations of international law remained essentially unconsidered until the summer of 2004. Until that time, works on obligations to rescue that addressed the international aspects of the obligation may have evaluate humanitarian intervention from the point of view of whether there is a “right” to intervene, legal analyses of whether there is an obligation to do so were absent. Then, in July 2004, the International Court of Justice handed down its advisory opinion in response to the General Assembly’s request for an analysis of the legal situation accompanying Israel’s erection of a “fence” in the border areas of the Palestinian Occupied Territories.<sup>35</sup> Without saying so directly, this opinion quite strikingly set out a basis for conceiving of the international duty to protect important international rules as *enforceable under threat of punishment*.

Discussed in more detail below, it suffices here to bring out the novelty of the *Legal Consequences* statement: a violation by one state of its duties owed to the international community requires other states to act positively to bring the state back into compliance with international norms. Perhaps this is the budding of a mature duty to protect.

ii. *From What Types of Violations Ought There to be a Duty on States to Rescue?*

This second question regarding international duties on states to rescue/protect is possibly even more debatable than the first. The most obvious response would be to require rescues in situations of violations of jus cogens.<sup>36</sup> Given that norms of jus cogens are peremptory, the community of states must accord highest priority to ensuring the upholding of such norms. The Articles of State Responsibility already require that the consequences of violations of jus cogens not be recognized by other states, implying that a duty to protect against such violations exists as well.

Jus cogens norms, however, do not exhaust the realm of a state’s duty to rescue. The wider grouping of norms implicating obligations erga omnes must also be included. This stems from the ideal of an international community and the definition of erga omnes obligations as ones of concern to the entire international community.<sup>37</sup> Although the scope of obligations erga omnes is often presented in

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<sup>35</sup> Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004, p. 186.

<sup>36</sup> Accepted examples of jus cogens obligations include the prohibitions on the unlawful use of force, slavery and slave-like practices, genocide, and piracy. Torture and discrimination are often considered violations of jus cogens as well, but these are still open to some discussion. Malcolm N. Shaw, *International Law*, 6<sup>th</sup> ed. 126, footnote 238 and accompanying text (Cambridge: Cambridge Univ. Press, 2008).

<sup>37</sup> Among the numerous works on the topic, perhaps the best-regarded is Maurizio Ragazzi, *The Concept of International Obligations Erga Omnes* (Oxford: Clarendon Press, 1997).

combination with discussions of the norms of *jus cogens*<sup>38</sup>, recent developments suggest that there are more obligations *erga omnes* than there are peremptory norms of law.

The International Court of Justice (ICJ) discussed both self-determination and “a great many rules of humanitarian law” as obligations *erga omnes* in its advisory opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory.<sup>39</sup> Invoking the character of self-determination and the rules of humanitarian law as *erga omnes* first in order to controvert Israel’s claim that the Palestinians had no right to claim the benefits of their protection, the Court first looks at their nature as rights. Interestingly, the Court said nothing about the concept of *jus cogens* being linked to the status of obligations incumbent on all states. Instead, it recalled that the principle of self-determination has been “enshrined in the United Nations Charter and reaffirmed by the General Assembly in resolution 2625 (XXV)”.<sup>40</sup> The Court further points out the principle’s codification in the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights and its own reference to self-determination in earlier decisions as evidence of its importance to the international community.<sup>41</sup> Based on this, the Court reaffirms its determination made in 1995 that it is “clear that the right of peoples to self-determination is today a right *erga omnes*”.<sup>42</sup>

As to humanitarian law, the Court is even more surprising – it bases its characterization of the “law applicable in armed conflict” as being *erga omnes* on their former advisory opinion’s reasoning, which concluded that the “rules ... are so fundamental to the respect of the human person and ‘elementary considerations of humanity’ ... that they are ‘to be observed by all States whether or not they have ratified the conventions that contain them, because they constitute intransgressible

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<sup>38</sup> See particularly Ragazzi at 190-210 (examining the relationship between obligations *erga omnes* and norms of *jus cogens*, addressing both whether all obligations *erga omnes* arise from norms of *jus cogens* and whether all norms of *jus cogens* result in obligations *erga omnes*, ultimately answering no to each); see also André de Hoogh, *Obligations Erga Omnes and International Crimes: A Theoretical Inquiry into the Implementation and Enforcement of the International Responsibility of States* 53-56 (The Hague/London/Boston: Kluwer Law International, 1996) (suggesting that the ICJ intended to conflate the two concepts in *Barcelona Traction*).

<sup>39</sup> ICJ, *Legal Consequences of Wall*. The Court relied upon its earlier decision of *East Timor* and its *Advisory Opinion of Nuclear Weapons* in its *Legal Consequences* analysis.

<sup>40</sup> ICJ, *Legal Consequences of Wall*, para. 88.

<sup>41</sup> ICJ, *Legal Consequences of Wall*, para. 88.

<sup>42</sup> ICJ, *Legal Consequences of Wall*, para. 88. See also *East Timor*, ICJ Rep. 1995, p. 102, para. 29 (“the right of peoples to self-determination, as it evolved from the Charter and from United Nations practice, has an *erga omnes* character”).

principles of international customary law”<sup>43</sup>. Thus, customary international law joins with the UN Charter and UN practice to become a source for obligations *erga omnes*.

Having established that Israel had violated the *erga omnes* rights of self-determination and humanitarian rules, the ICJ proceeds to look at the results of such a violation. First, says the Court, Israel has the obligation to stop its illegal acts and to remedy the damage caused by them. There is nothing surprising about this finding, reflecting well-established law of state responsibility.

The consequence of the characterization of obligations as *erga omnes* is more significant when the ICJ approaches the question of the obligations of other States. In this context, the Court says that not only may no State be an aider or abetter of violations of norms *erga omnes*, but that “[i]t is for all States, while respecting the United Nations Charter and international law, to see to it that any impediment ... to the exercise ... of [an *erga omnes* right] is brought to an end”<sup>44</sup>.

The ICJ goes no further to explain the contours of its declaration. It remains, therefore, unclear exactly *how* an individual State can respond to its duty (this is the focus of Judge Kooijmans’ dissent from that portion of the opinion<sup>45</sup>), and even whether the phrase “all States” is used in the joint or several meaning. Certainly, the opinion of East Timor, denying the Court’s ability to rule on a violation of an *erga omnes* right without the presence of the violator, weakens substantially the “grip” of *erga omnes* obligations in the judicial system. But for all its vagueness, there is an incontrovertible statement of the community’s duty to act positively to protect *erga omnes* rights.

For purposes of determining what rights may implicate positive duties of protection by states, it is the clear idea of a *developing* international law of rights *erga omnes* that is most striking. Recall the exact words used by the ICJ in paragraph 88 of their Wall opinion:

The Court [in the East Timor case<sup>46</sup>] indeed made it clear that the right of peoples to self-determination is today a right *erga omnes*.

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<sup>43</sup> ICJ, Legal Consequences of Wall, para. 157 (quoting from Advisory Opinion, Legality of the Threat or Use of Nuclear Weapons, ICJ Rep. 1996(I), p. 257, para. 79).

<sup>44</sup> ICJ, Legal Consequences of Wall, para. 159.

<sup>45</sup> ICJ, Legal Consequences, Separate Opinion of Judge Kooijmans, paras. 37-50 (elaborating on his disagreement with the Court’s treatment of the “legal consequences” on the basis of its vagueness in implicating action, but not specifying further results of a duty to act). Judge Kooijmans captures the essence of his argument in his introduction:

And, third, I find the Court’s conclusions as laid down in subparagraph (3) (D) of the *dispositif* rather weak; apart from the Court’s finding that States are under an obligation “not to render aid or assistance in maintaining the situation created by [the] construction [of the wall]” (a finding I subscribe to) I find it difficult to envisage what States are expected to do or not to do in actual practice. In my opinion a judicial body’s findings should have a direct bearing on the addressee’s behaviour; neither the first nor the last part of operative subparagraph (3) (D) meets this requirement.

Id. at para. 1, seventh paragraph.

<sup>46</sup> East Timor (Portugal v. Australia), Judgement, I.C.J. Reports 1995, p. 102, para. 29.

The use of “today” in this sentence captures the evolutionary nature of the obligation. It indicates a growing sense of the need to press states into acting in a way that will lead to a community, rather than simply letting them observe the tide of legal progression.

The consequent implications for an international duty to rescue are tremendous. Can it be that the contents of the Charter, if also the subject of a General Assembly resolution (itself non-binding) and of provisions in the Human Rights Covenants, impose – without more – obligations on each state to ensure their protection and – even more – obligations of states to punish those who violate them? Can provisions of customary international law, if they relate to “elementary considerations of humanity”, become the subject of duties of rescue on all States? It is too early to know the full impact of the *Legal Consequences* decision, but certainly the fourteen-to-two decision on other states’ obligations lends some credence to the idea that states may have duties to rescue others from violations of international law, whether the violation be against a norm of jus cogens, a Charter principle, a norm of customary international law, or – perhaps – even a “non-binding” statement captured in a General Assembly resolution.

### c) Evidence of Existing Principles of Beneficence in International Law

One need not rely solely on the statements of the International Court of Justice to detect a possible duty to rescue in international law. Such a duty already can be found by glancing at existing sources of international law. There are three areas that most apparently point toward an existing (or emerging) principle of beneficence beyond the law of human rights: in the law of military alliances, in international environmental law, and in international humanitarian law. Each of these contains significant treaty-based obligations of protection as well as norms that some claim to be customary international law. The international law of human rights is where there are signs of a duty to protect that extend beyond treaty law. It is in the area of humanitarian intervention that there are calls for recognizing a duty of – not just a right to – protect one’s neighbor from grave violations of the law.

The following does not pretend to be anything more than a very summary glance at current international law’s tendencies to obligate states into protecting particular rights. It is meant to indicate areas beyond the scope of recognized jus cogens in which duties to rescue might exist, and to stimulate thought on where other duties might be found or emerge.

#### i. *Law of Military Alliances*

The principle of obligatory help is most apparent in regional military agreements in the form of a binding obligation to assist allies in case of armed attack. The North Atlantic Treaty, for example, binds its twenty-six members to an obligation to “assist” in maintaining each other’s defensive capabilities and to participate in collective self-defence efforts if any member is attacked.<sup>47</sup> Basing

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<sup>47</sup> North Atlantic Treaty, done at Washington, 4 April 1949. The relevant provisions state:

Article 3

In order more effectively to achieve the objectives of this Treaty, the Parties, separately and jointly, by means of continuous and effective self-help and mutual aid, will maintain and develop their individual and collective capacity to resist armed attack.

(\*\*\*)

Article 5

The Parties agree that an armed attack against one or more of them in Europe or North America shall be considered an attack against them all and consequently they agree that, if such an armed

their collective action obligation on the UN Charter's provision for self-defence, the NATO members engage in a strong form of beneficence – assuming the full burden of the one in need. The “assistance”, or “rescue”, then is legally an obligation, but conceptually could be viewed as an act to maintain the self.

More clearly “other”-directed are the obligations of the UN Charter regarding military assistance. Given a Security Council decision that there is a situation that threatens the security of a state, the Members of the UN may be placed under an obligation to help protect the “peace and security” of the international community. “The action required to carry out the decisions of the Security Council for the maintenance of international peace and security”, states Article 48, “*shall be taken* by all the Members of the United Nations or by some of them, as the Security Council may determine.”<sup>48</sup> The provision is clearly obligatory, discretion – on the part of the Members themselves – is not foreseen.<sup>49</sup> Moreover, it is aimed at protecting the international system as well as the directly threatened inhabitants of the target region.

## ii. *Environmental Law*

While aspects of the principle of beneficence is less apparent than in the area of armed alliances law just mentioned, a duty to protect may be emerging in international environmental law. There are no prohibitions on acts resulting in environmental damage that have reached the level of being a recognized norm of *jus cogens*, but the fact that perpetrators of severe environmental damage can be

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attack occurs, each of them, in exercise of the right of individual or collective self-defence recognised by [Article 51 of the Charter of the United Nations](#), will assist the Party or Parties so attacked by taking forthwith, individually and in concert with the other Parties, such action as it deems necessary, including the use of armed force, to restore and maintain the security of the North Atlantic area.

<sup>48</sup> UN Charter, Article 48.1 (emphasis supplied).

<sup>49</sup> See Separate opinion of Judge Lauterpacht in Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Provisional Measures, Order of 13 September 1993, ICJ Rep. 1993, p. 325 (at para. 98: “Once the Security Council indicated that it was acting “under Chapter VII”, it was no longer constrained by the necessity of obtaining the consent of any State to the measures that it considered the circumstances to require”).)

held responsible for their actions before the International Criminal Court gives reason to believe that there could be a development of just such a peremptory norm in the future.<sup>50</sup>

Environmental treaty law, too, shows signs of developing beneficence norms that could emerge as customary international law over time. The Precautionary Principle, for example, codified in the Vienna Convention Framework Convention on Climate Change<sup>51</sup>, the Biosafety Protocol<sup>52</sup>, the Berlin Rules on Water Resources<sup>53</sup> and numerous regional<sup>54</sup> treaties, is a modest form of

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<sup>50</sup> Environmental damage may be a war crime, and thus within the jurisdiction of the International Criminal Court under Article 8(2)(b)(iv) of its statutes:

“Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated”.

For further discussion of the concept of environmental crimes in the context of the ICC, see Joe Sills, Jerome C. Glenn, Elizabeth Florescu, and Theodore J. Gordon, *Environmental Crimes in Military Actions and the International Criminal Court (ICC): UN Perspectives* (text available at <http://www.acunu.org/millennium/es-icc.html>, viewed 9 August 2005) (concluding that there is little likelihood of an environmental crime allegation succeeding in the ICC because of the strict jurisdictional requirements, particularly if the charge was made against a UN-sponsored military action).

Another interesting development was the determination by the United Nations Compensation Commission in its June 2005 Fifth Report to hold Iraq liable for environmental damage arising out of its (illegal) invasion of Kuwait. The clear violation of the prohibition on the use of force makes the finding of liability itself unremarkable, but the recognition of damage claims for purely environmental damage is noteworthy. United Nations Compensation Commission, Report and recommendations made by the Panel of Commissioners concerning the fifth instalment of "F4" claims, UN Doc. S/AC.26/2005/10 (2005).

<sup>51</sup> United Nations Framework Convention on Climate Change, in effect as of 21 March 1994, Article 3.3.

<sup>52</sup> Cartagena Protocol on Biosafety

<sup>53</sup> International Law Association, Berlin Rules on Water Resources Article 23.1 (2004).

<sup>54</sup> E.g., Bamako Convention on Hazardous Wastes within Africa, 30 January 1991, Article 4; Convention on the Protection of the Marine Environment of the Baltic Sea Area 1992, Article 3.2; Danube River Protection Convention, Article 2.4.

beneficence.<sup>55</sup> It requires that states not remain inactive in the face of serious threats of damage just because of scientific uncertainty about the risk.<sup>56</sup> While there is certainly not the same force in the precautionary principle as in the absolute form of the principle of beneficence, it cannot be validly claimed that there is no evidence of such a belief in environmental duties to protect.

The rules governing the transport and disposal of hazardous waste – both at the national level and at the international level – also aim at protecting the environment from potentially catastrophic damage that might occur if the waste were to escape from its containers. Prior informed consent documents from importers, required under the Basel Convention on Transboundary Movements of Hazardous Waste, to take a prominent example, are in essence attempts to ensure that the private actors of one state are not harming the inhabitants of another state.<sup>57</sup> Article 4.2(d), states, for example, that

“Each Party shall take the appropriate measures to: ... Ensure that the transboundary movement of hazardous wastes and other wastes ... is conducted in a manner which will protect human health and the environment against the adverse effects which may result from such movement”.

While this is not a complete obligation of beneficence, the legal requirement of the lesser principle of a one-step-removed protection makes the idea of an explicit duty to aid the environment more conceivable.

Finally, the soft law provisions of the Rio Declaration lend support to the idea of positive duties to protect the environment.<sup>58</sup> Principle 2, for example states: “States have ... the sovereign right to exploit their own resources ... and the *responsibility to ensure that activities within ... their control do not cause damage to the environment of other States*”.<sup>59</sup> With this language, one could argue that

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<sup>55</sup> For an introduction to the Precautionary Principle, see James E. Hickey, Jr. and Vern R. Walker, Refining the Precautionary Principle in International Environmental Law, 14 Va. Env'tl L.J. 423 (1995) (gives a history as well as current difficulties in defining the precautionary principle).

<sup>56</sup> See particularly Hickey and Walker, Refining the Precautionary Principle at 432-436 (comparing the numerous formulations of the principle in various legal instruments).

<sup>57</sup> Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal Adopted by the Conference of the Plenipotentiaries on 22 March 1989 (entered into force May 1992).

<sup>58</sup> André Nollkaemper, Rethinking States' Rights to Promote Extra-Territorial Environmental Values in: Friedl Weiss, Erik Denters, and Paul de Waart, eds., International Economic Law with a Human Face 175-201 (The Hague/Dordrecht/Boston: Kluwer Law International, 1998) (discussing affirmative duties to protect the environment).

<sup>59</sup> UNEP, Rio Declaration on Environment and Development (1992).

states have an obligation to act to prevent harm to foreign environments – including through trade sanctions, if necessary.<sup>60</sup>

*iii. Humanitarian Law*

The humanitarian law codified in the Geneva Conventions of 1949 and the customary international law reflecting the obligations of the Hague Conventions are stronger examples of duties of beneficence in international law. In fact, humanitarian law may be the area of international law that exhibits most clearly aspects of beneficence at present.

Existing humanitarian law is descended from legal instruments and military codes of behavior emphasizing “humanity and chivalry” as much as military necessity.<sup>61</sup> It is thus understandable that the idea of assisting the stranger in need has been carried over into current humanitarian law. Similar to the ethical principles of the medical community, the rules of humanitarian law require states’ military forces to care for non-combatants not only by not harming them (a duty of non-maleficence) but also by caring for those in need of help (beneficence).<sup>62</sup> Beneficent treatment is to extend particularly to the sick or wounded, expectant or nursing mothers, children and the elderly.

Individual combatants, too, are to be treated decently: “military necessity does not admit of cruelty” (Article 16 of the Lieber Code<sup>63</sup>) has become the basis for prohibitions on the use of biological and

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<sup>60</sup> As Nollkaemper pointed out, the United States included a footnote in its defense to the Tuna-Dolphin II panel that reasoned that the U.S. was using its jurisdiction over its import activities to fulfil its international obligation of preventing environmental damage. Nollkaemper sets this out as a plausible argument, but notes that the panel did not address this issue. Nollenkaemper at 199.

<sup>61</sup> Louise Doswald-Beck and Sylvian Vité, *International Humanitarian Law and Human Rights Law*, Int’l Rev. of the Red Cross 95 (March-April 1993) (adding the comment that chivalry “seems out of place in the modern world” – a view I would dispute in light of the principle of beneficence that I set forth here as being alive and growing in significance).

<sup>62</sup> See particularly, Convention (IV) relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), 12 August 1949.

<sup>63</sup> The “Lieber Code” is the commonly used label for Francis Lieber’s booklet to guide the U.S. Army during the Civil War, *Instructions for the Government of Armies in the Field*, 24 April 1863. The Hague Conventions of 1899 and 1907 build in part on the Lieber Code. Doswald-Beck and Vité at 95-96, fnt. 6 and accompanying text.

chemical weapons<sup>64</sup> as well as any other weapon that “inflict suffering greater than that required to take a combatants ‘out of action’”<sup>65</sup>, on torture<sup>66</sup> and slavery<sup>67</sup>, but just as importantly, for the (positive) duty to afford prisoners of war humane treatment while in captivity<sup>68</sup>. Thus, the captors must provide medical treatment and necessities to the prisoners, and any “unlawful act or omission” to do so, resulting in the prisoner’s harm or death, “*will be* regarded as a serious breach” of the Convention.<sup>69</sup>

#### iv. *Law of Human Rights*

The law of human rights is the area of international law most likely to recognize a broad principle of beneficence, given the priority placed by the law on achieving (or maintaining) human dignity. Looking to the law of human rights, one soon encounters that one of the most publicized problems

<sup>64</sup> E.g., Protocol for the Prohibition of the Use of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, Geneva, 17 June 1925; Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction Opened for Signature at London, Moscow, and Washington, 10 April 1972 (in effect as of 26 March 1975).

<sup>65</sup> International Committee of the Red Cross, Weapons and International Humanitarian Law (text available at <http://www.icrc.org>) Included in this ban are poison and poisoned weapons and any other type of weapon that is intended to “cause unnecessary suffering”. (Regulations annexed to the Hague Convention No. IV of 1907, Article 23 (a), (e)).

<sup>66</sup> Article 3 of each of the four Geneva Conventions of 12 August 1949, for example, demands that:

“In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de 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 in any place whatsoever with respect to the above-mentioned persons:

(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

(\*\*\*)“.

<sup>67</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977, Article 4(2)(f).

<sup>68</sup> See generally Convention (III) relative to the Treatment of Prisoners of War, Geneva 12 August 1949 (Third Geneva Convention).

<sup>69</sup> Convention (III) relative to the Treatment of Prisoners of War, Geneva 12 August 1949, Article 13.

of the past decade includes a beneficence aspect: the issue of intervention to protect human rights and specifically, whether there is a duty on states to intervene forcibly in a situation in which massive suffering is occurring. Particularly significant to the present work are the questions surrounding unilateral interventions – those actions taken without the prior blessing of the United Nations Security Council.<sup>70</sup>

With highly esteemed scholars taking positions on either side of the question as to the legality of forcible unilateral intervention (often distinguishing the legality from the morality of such actions), there has been no definitive conclusion of the debate on if a state may act in protection of others outside its territory beyond the Responsibility to Protect, discussed above. *Yet, the basic framework for recognizing a principle of beneficence in conditions of manmade catastrophes doubtlessly exists:* beginning with the recognized peremptory norms of law, violations of the rules of *jus cogens* themselves implicate mandated benevolence. The prohibitions on genocide, torture, slavery, and systematic racial discrimination themselves impose fundamentally negative duties on states – prohibitions that are absolute and unexcusable. Moreover, the prohibitions are supreme law. Consequently, their violation supersedes any other violation and each member of the international community is thereby victimized. Thus, the idea that there is an obligation – going beyond a right to do so - on other members of the community of states to prevent or stop violations of *jus cogens* is logical. M. Cherif Bassiouni’s view of states’ obligations regarding prosecution of serious international crimes is persuasive. Admitting that the question of whether there is a duty on states to “proceed against perpetrators” of *jus cogens* violations “has neither been resolved in international law nor addressed by [international criminal law] doctrine”<sup>71</sup>, Bassiouni continues:

“To this writer, the implications of *jus cogens* are those of a duty and not of optional rights; otherwise *jus cogens* would not constitute a peremptory norm of international law. Consequently, these obligations are non-derogable in times of war as well as peace. Thus, recognizing certain international crimes as *jus cogens* carries with it the duty to prosecute or extradite ....

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The gap between legal expectations and legal reality is therefore quite wide. It may be bridged by certain international pronouncements and scholarly writings, but the question remains

<sup>70</sup> „Unilateral“ humanitarian intervention is distinguishable from general humanitarian intervention because of the UN Security Council’s „monopoly“ over the use of force by its members. The term „unilateral“ does not, however, imply that only one state is acting, as the NATO intervention in Kosovo made clear. Daphne Richemond, Normativity in International Law: The Case of Unilateral Humanitarian Intervention, 6 Yale H.R. & Dev. L.J. 45, 49 (2003).

<sup>71</sup> M. Cherif Bassiouni, International Crimes: *Jus Cogens* and *Obligatio Erga Omnes*, 59 Law & Contemp. Probs. 63, 65 (1996).

whether such a bridge can be solid enough to allow for the passage of these concepts from a *desideratum* to enforceable legal obligations ..., creating state responsibility in case of non-compliance.”<sup>72</sup>

The International Court of Justice and the International Law Commission both recognize this. In a series of opinions beginning with *Barcelona Traction*<sup>73</sup>, and continuing with *Nicaragua*<sup>74</sup>, and the advisory opinion in *Nuclear Weapons*<sup>75</sup>, the ICJ set forth the obligation of all states to protect individuals from acts of genocide, torture, slavery, and discrimination as duties the states owe to the international community as a whole – and thus superior to claims of sovereignty.<sup>76</sup> In *Bosnia-Herzegovina v. Yugoslavia*, the ICJ reaffirmed its 1951 decision that stated that the characterization of genocide as an international crime makes its prohibition “binding on States, even without any conventional obligation” and thus, that States have an “obligation ... to prevent and to punish the crime of genocide [that] is not territorially limited”.<sup>77</sup>

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<sup>72</sup> Id. at 65-67.

<sup>73</sup> *Barcelona Traction, Light and Power Co. Ltd.*, ICJ Rep. 1970.

<sup>74</sup> *Nicaragua v. USA*, ICJ Rep. 1986.

<sup>75</sup> *Advisory Opinion on Nuclear Weapons*, ICJ Rep. 1996??.

<sup>76</sup> See also Hermann-Josef Blanke, *Menschenrechte als völkerrechtliche Interventionstitel*, 36:3 *Archiv des Völkerrechts* 257, 259-261 (1998) (explaining the fundamental human rights as set forth in relevant international law).

<sup>77</sup> ICJ Reports para. 31 (1996) (quoting from *Advisory Opinion of 28 May 1951 relating to the Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, ICJ Rep. 1951, p. 23). Judge Oda's disagreement with the majority's decision on the material jurisdictional question relates to Bosnia-Herzegovina's claim of a dispute over the interpretation and application of the Convention rather than on any disagreement over the universal nature of the crime of genocide itself. See Declaration of Judge Oda, ICJ Reports 1996. Judges Shi and Vereshchetin also see the Convention on Genocide as an instrument for punishing individuals rather than States for acts of genocide. Joint Declaration of Judge Shi and Judge Vereshchetin, ICJ Reports 1996. Their disagreement with the majority's paragraph 32, however, does not deny that States have a responsibility to pursue the violators. Therefore, their comments are similarly unproblematic for the argument that there might be positive obligations for states to act to stop genocide. Even ad hoc Judge Kreca's dissent from the relevant findings does not dispute that genocide itself is universally punishable – his arguments are rather that the enforcement of the Convention on Genocide limits this universal character to territories of Parties and that under current international

Similarly, the ILC's Code on State Responsibility, albeit in soft terms, calls on states (jointly and severably) to assist in encouraging the perpetrator of serious violations of peremptory norms of international law to cease and make reparations:

1. States shall cooperate to bring an end through lawful means any serious breach ....
2. \*\*\*
3. This article is without prejudice to ... such further consequences that a [serious] breach ... may entail under international law.<sup>78</sup>

While not explicit in its aim of helping the victims, the Code implicates beneficent behavior as an obligation on each state. Mario Bettati and Bernard Kouchner's idea of a duty on states to assist persons facing catastrophes caused great discomfort when publicized, but *lex lata* supports it, at least

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law, States cannot be held responsible for the commission of crimes. Dissenting opinion of Judge ad hoc Kreca, id. at paras. 99-105.

See also current ICJ Judge Bruno Simma's comment in his article NATO, the UN and the Use of Force: Legal Aspects 10:1 *Europ. J. Int'l L.* 1 (1999), where he points out that "[i]n the face of genocide, the right of states, or collectivities of states, to counter breaches of human rights most likely becomes an obligation". Id. at 2. Simma cites the Yugoslavia case as support (id. at note 3), but does not further expand on this thought, as he bases his article on the absence of genocide in Kosovo at the time of the NATO action.

<sup>78</sup> Articles on State Responsibility, Article 41 (Particular consequences of a serious breach of an obligation under this chapter).

in the realm of upholding peremptory norms.<sup>79</sup> The ILC's report on the 2001 Articles underlines this interpretation of international legal developments.<sup>80</sup> Admitting that Article 41 does not spell out precisely what the duties of a State are in relation to the call to "cooperate to bring an end" to serious breaches in a particular situation, Rapporteur Crawford continues:

It is, however, made clear that the obligation to cooperate applies to States whether or not they are individually affected by the serious breach. What is called for in the face of serious breaches is a joint and coordinated effort by all States to counteract the effects of those breaches. It may be open to question whether general international law at present prescribes a positive duty of cooperation, and paragraph 1 in that respect may reflect the progressive development of international law. But in fact such cooperation, especially in the framework of international organizations, is carried out already in response to the gravest breaches of international law and it is often the only way of providing an effective remedy. Paragraph 1 seeks to strengthen existing mechanisms of cooperation, on the basis that all States are called upon to make an appropriate response to the serious breaches referred to in article 40.<sup>81</sup>

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<sup>79</sup> Le devoir d'ingérence; peut-on les laisser mourir? (Paris: Denoël, 1987). Originally conceived as a duty on the part of NGOs to intervene in states' affairs, the concept has expanded to encompass a duty on states to react to large scale violations of human rights in other states' territories. Alain Pellet, Brief Remarks on the Unilateral Use of Force, 11:2 *Europ. J. Int'l L.* 385, 386 at n. 4 and accompanying text (2000); see also Mario Bettati, *Un droit d'ingérence?* *Rev. générale de droit international public* 644 (1991). Significantly, the duty of intervention has also been extended to lead to a 'Right to Intervene' (*droit d'Ingérence*). The duty-right difference lies to a significant extent in the stricter framework surrounding the fulfillment of a duty than in the exercise of a right. While a right permits discretion, a duty would require action even if it were not in the political interests of the state under obligation. Much of the criticism surrounding Bettati and Kouchner's work could be answered by insisting upon the restrictiveness of the duty, and the non-extension of such a duty to the realm of rights. On this same topic see Olivier Corten and Pierre Klein, *Droit d'ingérence ou obligation de réaction?* 2d ed. (Brussels: Bruylant, 1996).

<sup>80</sup> United Nations International Law Commission, Report on the work of its fifty-third session (23 April – 1 June and 2 July – 10 August 2001), General Assembly Supplement No. 10 (A/56/10), 286-287.

<sup>81</sup> *Id.* at 287, para. (3).

Only somewhat less authoritative than *jus cogens* are the contents of the United Nations Charter and the interpretive Universal Declaration of Human Rights.<sup>82</sup> Here, the striking aspect is the direct call for states to take steps to improve the life of the individuals of the international community. Article 55 of the Charter set out the purposes of the UN as the promotion of:

- a. higher standards of living, full employment, and conditions of economic and social progress and development;
- b. solutions of international economic, social, health, and related problems; ...;
- c. universal respect for, and observance of, human rights and fundamental freedoms for all ....<sup>83</sup>

Following the statement of purposes, Article 56 is of utmost importance: “All Members pledge themselves to *take joint and separate action* in cooperation with the Organization *for the achievement of the purposes* set forth in Article 55”.<sup>84</sup> The pledge, one notices first, is not limited to obeying the human rights guarantees themselves. The Members accept the obligation to ensure that such guarantees are protected by other states as well. While this does not directly translate into a duty to sanction those that do not abide by their human rights obligations, it unquestionably leans in that direction. Second, the “joint and separate” language reinforces the need for positive – and if necessary unilateral – steps to be taken in ensuring the pursuit of the individual-oriented goals of well-being. Again, the implication of an enforceable duty is reinforced.

For violations of non-peremptory norms of human rights, the existence of a principle of mandated state beneficence is less clear. Customary international law, binding on all states that do not explicitly reject it, does not recognize a general principle of beneficence. Sovereignty concerns remain too strong for such a development. The violation of an international obligation can lead to the injured state’s right to remedies, but there is no rule that would require a state to intervene to stop another from violating a treaty, particularly if the violating state was not acting in a way so as to directly injure the to-be-rescuing state. Indeed, the Code on State Responsibility specifically limits even the right to receive damages to an affected state (the “injured” state), carefully ensuring that third states’ interest remains marginalized.

Yet, although extending beneficent duties beyond the (shadowy) contours of *jus cogens* will need to wait a further consolidation of international community-concepts in international law, it may not have to wait forever. In the meantime, it is wise to keep an open view of such duties in relation to the WTO. Nollkaemper’s views about positive environmental protection duties are apt for more general application:

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<sup>82</sup> There are some who consider the Universal Declaration of Human Rights itself to be *jus cogens*, others who see it as binding on all states as an instrument of customary international law, and others who regard it as binding only on its ratifiers. Paul Sieghart, *The International Law of Human Rights* 53, n. 10-11 and accompanying text (New York: Oxford Press, 1993).

<sup>83</sup> UN Charter, Article 55.

<sup>84</sup> UN Charter Article 56 (emphasis supplied).

“All this is rather speculative, and the determination of the legal consequences of the argument need further elaboration. However, the above does suggest that there is some plausibility in the argument that when states have accepted an obligation to protect certain ... values, it would be inconsistent to construe international (trade) law as prohibiting states from exercising this responsibility. In this respect, in particular cases such obligations may at a minimum grant legitimacy to attempts of states to curb their trade so as to prevent them from contributing to the harm ... in other states. In this respect, a rigid construction of a (WTO-)shield around states’ sovereign policies to determine their own policies may hide complicated and hardly discussed legal issues.”<sup>85</sup>

#### d) Implementing Beneficence Duties

Of course, even if the international legal community could agree to the existence of some duty of beneficence on the international level, the question of how to implement such a duty – let alone how to enforce it – arises as an immediate problem. This indeed is the focus of many critics of the principle of beneficence, and it is intuitively appealing.<sup>86</sup> If a state took seriously the command to stop – let alone remedy – all violations of international law perpetrated by other international actors (even that being a small fraction of the situations of human need toward which full beneficence would require action), it would be faced with a potentially limitless number of required reactions. Even if only the most serious violations of law called for a response, the problem of “overdemandingness” could arise and leave the reacting state unable to fulfil its obligation.<sup>87</sup> While

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<sup>85</sup> Nollkaemper at 201.

<sup>86</sup> Overdemandingness is also a problem with the principle of beneficence as applying to individuals. Early common law jurists rejected the duty to rescue in part on this ground, and it remains the strongest argument against beneficence today. See Liam Murphy, *Beneficence, Law, and Liberty: The Case of Required Rescue*, 89 *Geo. L.J.* 605, 607-608 (2001) (explaining Lord Macaulay’s objections to the 1837 Indian Penal Code’s duty to rescue on the basis of being obliged to offer medical services to the multitude of Indian beggars as being based on overdemandingness rather than on objections to infringements on liberty, and continuing to argue that this remains a problem with legally imposed duties to rescue).

<sup>87</sup> Brilmayer, 37 *Ariz. L. Rev.* 955, 958. But see Thomas Pogge, *World Poverty and Human Rights* 7-8 (Polity Press: Cambridge, 2002) (labeling the overdemandingness objection to the alleviation of extreme poverty an “easy reason to ignore world poverty” and discrediting it with empirical data showing that a transfer of 1.2% of the annual gross national income of high-income countries would suffice to eliminate such extreme poverty).

on the ethical level one can legitimately argue whether “the ought” may be modified by “the can” or whether the absolute principle would be thereby destroyed, completely ignoring the practical aspects of implementation of international law must be troubling to even the non-positivist observer.<sup>88</sup>

Here this author must admit of having no solution beyond mandating that each state do what it can to resolve the problems of non-compliance with international law. Neither does the ICJ, ILC, or any other international body.<sup>89</sup> That not all problems will be solved with the resources available at present cannot in itself invalidate the principle of beneficence. Moreover, a demonstrated will to ensure adherence to legal norms can in turn increase the propensity of states to abide by such norms

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<sup>88</sup> Bob Corbett criticizes Peter Singer’s view of beneficence because of its near-impossibility for individuals to comply with it:

„Both [James] Rachels and Singer maintain, however, that we should keep up the fiction and do what we can. This position seems to violate the spirit, if not the letter, of Kant’s useful moral dictum tht the ought implies the can. Their view is that this ought only implies that we ought to do what we can, and that this can will be significantly less than we ought.“

Moral Obligations to Distant Others, <http://www.webster.edu/>.

<sup>89</sup> There has been little, to this author’s knowledge, done on the topic of beneficence in international law beyond identifying that there is a moral duty to assist others. The extent of the duty is left open, as are the consequences of a state’s failure to fulfil its obligations to the international community. One commentator prefers that the duty remain a moral one and not a legal one (at least in cases of military intervention for human rights) in order, presumably, to maintain the clear standard against uses of force. Theodor Schilling, *Zur Rechtfertigung der einseitigen gewaltsamen humanitären Intervention*, 35:4 *Archiv des Völkerrechts* 430, 452-458 (1997).

– be this for reasons of solidarity with the international community (“acculturation”<sup>90</sup>), norm internalization<sup>91</sup>, or a heightened sense of the legitimacy of the norms themselves<sup>92</sup>.

Admittedly, the difficulties overdemandingness poses to the acceptance of a principle of beneficence threaten to overpower any arguments that can be made on the ethical or theoretical level in favor of recognizing such a principle. But the legal difficulties of overdemandingness might also be overestimated. As seen above, emanations of the principle of beneficence already exist in international legal instruments. Carefully limited, their calls for assisting others are well within the range of the possible for the international community (it is the will to assist rather than the financial

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<sup>90</sup> Ryan Goodman and Derek Jinks, *How to Influence States: Socialization and International Human Rights Law*, 54 *Duke L.J.* 621 (2004) (acculturation is highly dependent upon membership in an organization, and the influence it has is therefore dependent upon membership/non-membership status).

<sup>91</sup> Norm internalization is an idea that can be traced to the moral psychology of David Hume. *Treatise of Human Nature*, III, II, §I in: Henry D. Aiken, ed., *Hume’s Moral and Political Philosophy* 49-69 (New York: Hafner Press, 1948) (citation in David A. Welch, *Can We Think Systematically About Ethics and Statecraft?* 8 *Ethics & Int’l Affairs* 23, n. 18 (1994)). Harold Koh is one of the most prominent current legal scholars promoting the effectiveness of internalization for compliance and has written numerous articles explaining his theory of transnational legal process as an occurrence by which international rules become a part of the domestic legal system – and accepted by citizens of that system – through the actions of a network of “agents of internalization”. See, e.g., Harold Hongju Koh, *Bringing International Law Home*, 35 *Hous. L. Rev.* 623, 641-662 (1998) (discussing and illustrating how international law is internalized). According to Koh, internalization answers the question “why do nations obey international law”. *Id.* at 640-641. Making international rules effective, then, requires using various agents to make following the rule a part of the value-set of the individual nation and its citizens.

<sup>92</sup> Thomas Franck writes of the effectiveness of laws as being dependent in (large) part on the laws’ perceived fairness. One aspect of this fairness is the consistent enforcement of such laws. Thomas M. Franck, *Fairness in International Law and Institutions*, 7-8 (Oxford: Clarendon Press, 1995) (describing one aspect of fairness as being legitimacy, or procedural fairness: “Legitimacy thus expresses the preference for order, which may or may not be conducive to change. Nevertheless, it is a key factor in fairness, for it accommodates a deeply felt popular belief that for a system of rules to be fair, it must be firmly rooted in a framework of formal requirements about how rules are made, interpreted, and applied. ... [A] belief in the law’s legitimacy re-enforces the perception of its fairness and encourages compliance”).

ability to do so that is the ultimate limit).<sup>93</sup> Even if a general principle of beneficence would be recognized explicitly by an international law instrument, the boundaries of the principle would not need to be set at their furthest conception. Legislators, or, if called upon, courts are eminently capable of limiting the justiciable demands on states (or other actors in the international community) to what is reasonable in a particular context. That aspirations for a better life for all can survive progressive realization has been demonstrated throughout history (the legal systems of civil liberties, labor standards, human rights, environmental protection have all been developed through just such a process). It does not have to be different here.

Finally, even overdemandingness may be lessened if states' efforts to maintain the international legal system were more consistent in enforcing states' existing promises to assist one another. If the economic plight of the world's poor were to improve, for instance, the ethical duty on the international community's wealthier citizens would diminish – not only would the need for monetary transfers lessen, but the requirements of medical treatment, education, technical assistance, and technology transfers would decrease as the interrelated aspects of life in poverty were improved. Improved living standards tend, in turn, to lower birth rates, increase efforts to improve the natural environment, and promote equality. *Beneficence contains within itself an end to the obligations of assistance.*

#### e) What Does This Have To Do with the Use of Social Trade Regulations?

In the context of social trade regulations, recognizing a beneficence-based obligation to protect as a principle of international law could place a duty on states to do everything in their power to ensure that other governments adhere to the legal - and, perhaps, the ethical - norms of protecting the dignity of all persons, the integrity of the natural environment, and the sustainability of cultural heritage. If trade regulations could assist states in enforcing such norms, not only would social trade regulations be permitted under international law, they could be positively *required* by it.

Such a requirement is certain to disturb the foundations of traditional international law, with its conception of sovereignty-as-independence, but is not the first concept to do so. Nor does beneficence require the destruction of the rescuer/state – neither the ethical nor the legal constellation necessarily depends on the absence or presence of states. Rather, it depends on a common recognition – by individuals and communities, sub- and supra-states – that actions must be taken to ensure that each other individual and community can survive and develop its inherent potentials to contribute to the greater international community.

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<sup>93</sup> In the area of humanitarian interventions, Professor Tom Farer is one scholar who has come up with a framework in which to analyze the conditions of intervention that could indicate the action's legitimacy or illegitimacy. Presentation given at the Harvard/Duke Conference on Humanitarian Intervention in April 2001 (manuscript on file with author). Another set of „guidelines ... offered to stimulate debate about the circumstances under which humanitarian intervention should be authorized“ is found in Douglas Stuart, *Reconciling Non-intervention and Human Rights*, 38:2 *United Nations Chronicle Online Edition* (2001).

f)           Duty to Protect as an Obligation to Regulate

So, back to the original focus of social trade regulations – what beneficence, as a positive duty to assist, includes is a parallel duty to hinder the imposition of harm. While harm may arise from natural circumstances, human causes are equally threatening to the lives of millions. Beneficence may, then, demand that governments attempt to prevent such harm by stopping the actions of such persons. Where diplomatic pressure does not succeed and military action would be disproportionately severe, trade measures may be required. Again, they will be *required* because of an ethical/legal duty to act despite other rules governing the relations between the parties. International trade obligations under WTO agreements to maintain market access, to avoid the use of quantitative restrictions, to afford all trading partners equivalent conditions of competition may *have* to be violated in order to comply with the duties of beneficence owed to the international community. What should the WTO do about this?

In short, my answer to this does not differ from my view of the use of trade regulations for any other social purpose. The question of ethically mandated regulations is simply a stronger case for calling for the WTO to recognize the demands of community over the rules of trade multilateralism. If only one Member is willing (or able) to heed its duty of beneficence, neither the fact that some of its nationals will gain some commercial advantage over their competitors, nor the measure's unilateralism ought to be grounds for refusing to recognize the legitimacy of taking such a measure.

Because of beneficence's positive duty to protect, the efforts of the trading system in such cases of harm-preventing or harm-stopping unilateral trade measures to further social policy goals should focus on encouraging other trading partners to join in the efforts to stop the harm – whether by increasing their own diplomatic pressure, by implementing additional trade restrictions, or by simply lending declaratory support for the one acting Member's position.