THE DEVELOPMENT OF THE RESPONSIBILITY TO PROTECT: AN EXAMINATION OF THE DEBATE OVER THE LEGALITY OF HUMANITARIAN INTERVENTION

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INTRODUCTION

In 2000, UN Secretary-General Kofi Annan asked the world, "[I]f humanitarian intervention is, indeed, an unacceptable assault on sovereignty, how should we respond to a Rwanda, to a Srebrenica—to gross and systematic violations of human rights that offend every precept of our common humanity?"[1] Thirteen years later, the international community still has not reached a consensus on this question. In a September speech before the UN General Assembly on Syria's use of chemical weapons, U.S. President Barack Obama echoed Annan's query:

> Different nations will not agree on the need for action in every instance, and the principle of sovereignty is at the center of our international order. But sovereignty cannot be a shield for tyrants to commit wanton murder, or an excuse for the international community to turn a blind eye. . . . [S]hould we really accept the notion that the world is powerless in the face of a Rwanda or Srebrenica?[2]

Due to the diplomatic resolution of the Syrian crisis, the international community again did not resolve this difficult issue. Yet states have drawn firm lines in the sand on the appropriate contours of an international response to crises like Syria. This Note traces the history and development of the responsibility to protect doctrine from its inception to the Syrian crisis and advocates for reform to better effectuate the doctrine's ideals.

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1. KOFI A. ANNAN, WE THE PEOPLES: THE ROLE OF THE UNITED NATIONS IN THE 21ST CENTURY 48 (2000), *available at* http://www.unmillenniumproject.org/documents/wethepeople.pdf.

2. Remarks to the United Nations General Assembly in New York City, 2013 DAILY COMP. PRES. DOC. 655, at 8 (Sept. 24, 2013).

I. THE PRE-UNITED NATIONS HISTORY OF HUMANITARIAN INTERVENTION

Though many believe humanitarian intervention[3] to be a product of the 1990s, it is widely considered to be a creation of the 19th century.[4] Throughout the 1800s, in addition to wars of conquest and colonialism, states engaged in wars with varying levels of humanitarian justifications.[5] Many of these interventions were undertaken by powerful European states to end massacres of Christian civilians in the territory of the Ottoman Empire. British philhellenes steered the UK into a war to save the Greeks from extinction at the hands of the Ottoman Empire in the 1820s.[6] In 1860, Napoleon III dispatched French legions to save Syrian Christians from being massacred by the Druze.[7] In 1876, British newspapers implored Prime Minister Benjamin Disraeli for intervention in Bulgaria, as reporters detailed the slaughter and burning of between 5000 and 25,000 Bulgarian villagers,[8] mostly women and children, by Ottoman forces.[9]

In the 1800s, the majority of scholars agreed that the use of force,

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3. Humanitarian intervention can be defined as action

> 1. Carried out in, or intended to affect events within, a foreign state or states – it is an intervention;
>
> 2. Aimed at the government of the target state(s), or imposed on and only accepted reluctantly by it/them – it is thus coercive, albeit not necessarily involving use of force; [and]
>
> 3. Intended, at least nominally (and at least to some extent actually), to avert, halt, and/or prevent recurrence of large-scale mortality, mass atrocities, egregious human rights abuses or other widespread suffering caused by the action or deliberate inaction of the *de facto* authorities in the target state(s).

D. J. B. Trim & Brendan Simms, *Towards a History of Humanitarian Intervention*, *in* HUMANITARIAN INTERVENTION: A HISTORY 4 (Brendan Simms & D. J. B. Trim eds., 2011).

4. Though one can argue that the Crusades were a type of religious humanitarian intervention (at least in the view of the Catholic Church), states only began justifying intervention in humanitarian terms in the nineteenth century. Jean-Pierre L. Fonteyne, *The Customary International Law Doctrine of Humanitarian Intervention: Its Current Validity Under the U.N. Charter*, 4 CAL. W. INT'L L.J. 203, 205–06 (1974); *see also* GARY J. BASS, FREEDOM'S BATTLE: THE ORIGINS OF HUMANITARIAN INTERVENTION 5 (2008) (arguing that nineteenth-century European states were the first to undertake humanitarian interventions).

5. For example, Greece (1827–1830), Syria (1860–1861), Crete (1866–1868), Bosnia-Herzegovina and Bulgaria (1876–1878), and Macedonia (1903–1908, 1912–1913). *See* Fonteyne, *supra* note 4, at 207–13 (describing each of these conflicts). For a deeper look into humanitarian intervention in the 19th century, see generally BASS, *supra* note 4.

6. BASS, *supra* note 4, at 47–49. The Greek cause also inspired support from the American public and from prominent American politicians such as Thomas Jefferson. *Id.* at 88–99. Though such support pressured the Monroe administration to support the Greeks, the United States did not become involved in the conflict. *Id.*

7. *Id.* at 155–57.

8. The newspapers disagreed dramatically on how many Bulgarians were killed. Bass estimates it was "probably in the range of 12,000." *Id.* at 260.

9. *Id.* at 256–265.

including humanitarian intervention, was legal under international law.[10] After the devastation of World War I, however, several powerful states created the League of Nations and agreed to end conquest, legally restricting the use of force for the first time.[11] Between World War I and World War II, scholars debated whether humanitarian intervention had been assimilated into customary international law.[12] After World War II, the United Nations further restricted the use of force and invested in a paradigm of collective security.

II. THE RESPONSIBILITY TO PROTECT AND THE UNITED NATIONS

The UN Charter explicitly bans the threat of or use of force against another state.[13] The only exceptions to this prohibition are actions in individual or collective self-defense[14] or actions approved by the Security Council.[15] As such, the Charter and international law do not permit retaliation for violations of international law norms or provide an enforcement mechanism for such violations.[16] The Charter authorizes members to utilize regional security arrangements[17] but prohibits such entities from taking enforcement actions without authorization from the Security Council.[18]

The responsibility to protect was conceptualized under this framework of collective security by Francis Deng.[19] Under this doctrine, Deng

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10. Fonteyne, *supra* note 4, at 223.

11. *See* League of Nations Covenant arts. 10, 12, 15; *see also* CORNELIU BJOLA, LEGITIMISING THE USE OF FORCE IN INTERNATIONAL POLITICS: KOSOVO, IRAQ AND THE ETHICS OF INTERVENTION 45–46 (2009) (noting that the Covenant of the League of Nations "represented the first serious attempt to legally restrict the use of force by formal means, although mainly through procedural, not substantive, provisions").

12. Fonteyne, *supra* note 4, at 223–26.

13. U.N. Charter art. 2, para. 4.

14. U.N. Charter art. 51. The parameters of self-defense or collective self-defense are interpreted restrictively. *See* Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, 77–79 (June 27) (rejecting the assertions of self-defense by the United States and adopting a narrow reading of justifiable self-defense under Chapter 51 and customary international law).

15. U.N. Charter arts. 39–42.

16. Michael N. Schmitt, *The Syrian Intervention: Assessing the Possible International Law Justifications*, 89 INT'L L. STUD. 744, 750 (2013).

17. U.N. Charter art. 52.

18. U.N. Charter art. 53, para. 1.

19. *See* FRANCIS M. DENG ET AL., SOVEREIGNTY AS RESPONSIBILITY: CONFLICT MANAGEMENT IN AFRICA (1996). Deng was appointed the UN Secretary-General's Special Representative on Internally Displaced Persons in 1993. ALEX J. BELLAMY, GLOBAL POLITICS AND THE RESPONSIBILITY TO PROTECT: FROM WORDS TO DEEDS 10 (2011). At this post, he argued that states, as a part of their sovereign responsibility, are obligated to accept international aid when they are unable to provide for

emphasized the responsibility inherent in sovereignty. He argued that at the core of this responsibility is the state's obligation to protect its citizens from violence.[20] If a state fails to protect its nationals from harm, the international community must undertake the responsibility to do so.[21] Subsequently, Secretary-General Annan endorsed Deng's theory. In the wake of the Kosovo intervention, he insisted that traditional notions of sovereignty have been redefined: "States are now widely understood to be instruments at the service of their peoples."[22] Implicit in this statement is the idea that sovereignty encompasses not only the privileges of power but also responsibilities to the citizenry.

Two years later, after the UN's failure to prevent genocide in Rwanda, Secretary-General Annan asked the international community to address humanitarian intervention.[23] The result was Canada's creation of the International Commission on Intervention and State Sovereignty (ICISS).[24] The ICISS brought the discourse on "sovereignty as responsibility" to the forefront and expanded and elaborated on Deng's framework. In its 2001 Report, the ICISS identified three elements of the responsibility to protect,[25] which are applicable to situations involving crimes that shock the conscience of mankind, such as genocide or ethnic cleansing.[26] The first is the responsibility to prevent, under which states should tackle the root causes of conflicts before emergencies erupt.[27] Under the second element, the responsibility to react, states should respond to crises through sanctions, military interventions, or other appropriate measures.[28] The final element, the responsibility to rebuild, involves states providing assistance to states

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the well-being of their citizens. *Id.* at 10–11; *see also* THERESA REINOLD, SOVEREIGNTY AND THE RESPONSIBILITY TO PROTECT: THE POWER OF NORMS AND THE NORMS OF THE POWERFUL 54–55 (2013) (describing Deng's theory as a "dual social contract" between a government and its citizens and between states and the international community).

20. DENG ET AL., *supra* note 19, at 32–33.

21. *Id.* at 212–23.

22. Kofi Annan, *Two Concepts of Sovereignty*, ECONOMIST, Sept. 18, 1999, at 49, 49, *available at* http://www.economist.com/node/324795.

23. Press Release, General Assembly, Secretary-General Presents His Annual Report to General Assembly, U.N. Press Release GA/9596 (Sept. 20, 1999); *see also* INT'L COMM'N ON INTERVENTION & STATE SOVEREIGNTY, THE RESPONSIBILITY TO PROTECT vii (2001), *available at* http://responsibilityto protect.org/ICISS%20Report.pdf (describing Secretary-General Annan's speech and the creation of the ICISS).

24. INT'L COMM'N ON INTERVENTION & STATE SOVEREIGNTY, *supra* note 23, at vii.

25. *Id.*

26. *Id.* at 31.

27. *Id.* at 19–23.

28. *Id.* at 29–35.

recovering from crises.[29]

Following the publication of the ICISS report, the responsibility to protect remained a topic of discussion within the international community and gained widespread support. At the 2005 World Summit, 190 states produced an agreement declaring, in part, that every state has a responsibility to protect its citizenry and to prevent genocide, war crimes, ethnic cleansing, and crimes against humanity.[30] Furthermore, should a state fail to uphold this mandate, the international community has the responsibility to use appropriate diplomatic and peaceful means to protect the civilian population.[31] In the event that such means are inadequate, the Security Council should be prepared to take "timely and decisive" action in accordance with Chapter VII of the UN Charter.[32] These commitments were affirmed by the Security Council in 2006 and reaffirmed by the General Assembly in 2009.[33]

Secretary-General Ban Ki-moon has also embraced the responsibility to protect, publishing three reports on its status and implementation.[34] His conceptualization of the responsibility to protect contains three "pillars," similar to the ICISS' three elements.[35] The pillars are non-sequential and of equal significance.[36] The first pillar is the state's responsibility to protect its citizenry, originating in the basic tenets of sovereignty.[37] The second pillar revolves around the responsibility of the international community to help states fulfill the responsibilities described in the first pillar.[38] The final pillar concerns intervention consistent with the UN Charter if a state is "manifestly failing" to protect its citizens as described

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29. *Id.* at 39–44.

30. *See* 2005 World Summit Outcome, G.A. Res. 60/1, ¶ 138, U.N. Doc. A/RES/60/1 (Sept. 16, 2005). The World Summit Outcome was adopted unanimously by the General Assembly. Alex Bellamy & Ruben Reike, *The Responsibility to Protect and International Law*, *in* THE RESPONSIBILITY TO PROTECT AND INTERNATIONAL LAW 81, 89 (2011).

31. G.A. Res. 60/1, *supra* note 30, ¶ 139.

32. *Id.*

33. Bellamy & Reike, *supra* note 30, at 81.

34. *See* U.N. Secretary-General, *Early Warning, Assessment, and the Responsibility to Protect: Rep. of the Secretary-General*, U.N. Doc. A/64/864 (July 14, 2010); U.N. Secretary-General, *Implementing the Responsibility to Protect: Rep. of the Secretary-General*, U.N. Doc. A/63/677 (Jan. 12, 2009) [hereinafter *Implementing the Responsibility to Protect*]; U.N. Secretary-General, *The Role of Regional and Subregional Arrangements in Implementing the Responsibility to Protect: Rep. of the Secretary-General*, U.N. Doc. A/65/877-S/2011/393 (June 28, 2011).

35. *See Implementing the Responsibility to Protect*, *supra* note 34, ¶ 11.

36. *See* BELLAMY, *supra* note 19, at 35.

37. *Implementing the Responsibility to Protect*, *supra* note 34, ¶ 11(a). The Secretary-General identifies four crimes that are at the core of a state's protection responsibilities: genocide, ethnic cleansing, war crimes, and crimes against humanity. *Id.* ¶ 13.

38. *Id.* ¶ 11(b).

in the first pillar.[39] Like the World Summit Outcome and the ICISS report, Secretary-General Ban's reports assigned exclusive rights to authorize an intervention under the responsibility to protect to the UN Security Council.[40]

III. INTERVENTION IN PRACTICE

The Security Council has been bitterly divided over whether humanitarian intervention is justified by the responsibility to protect, especially with respect to unilateral intervention.[41] Indeed, the responsibility to protect has been described as "the most difficult thematic debate in the Security Council."[42] This discord has been reflected in several conflicts over the last two decades. Several interventions, both through the Security Council and through unilateral action, have been justified on humanitarian grounds.[43] In other instances, the international community has failed to intervene during or prevent the commission of devastating human rights violations, including genocide.[44] The following section highlights this debate.

A. Kosovo

In the late 1990s, tensions between the various ethnic groups of the former Federal Republic of Yugoslavia (FRY) escalated into civil war.[45] As the state dissolved, the UN was unable to prevent ethnic cleansing, widespread bloodshed, and horrific war crimes from sweeping across the region.[46] Kosovo, a small region in the FRY, was pulled into the violent political vacuum.[47] After failing to prevent atrocities in neighboring Balkan states, the Security Council passed a series of Chapter VII

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39. *Id.* ¶ 11(c).

40. *Id.*

41. In this Note, unilateral action refers to both intervention undertaken by collective security arrangements, such as NATO, and individual state action.

42. REINOLD, *supra* note 19, at 61.

43. *See* S.C. Res. 940, U.N. Doc. S/RES/940 (Jul. 31, 1994); S.C. Res. 794, U.N. Doc. S/RES/794 (Dec. 3, 1992); S.C. Res. 688, U.N. Doc. S/RES/688 (Apr. 5, 1991).

44. *See infra* Part III.C.

45. For a more detailed history of the conflict, see generally Marie-Janine Calic, *Kosovo in the Twentieth Century: A Historical Account*, *in* KOSOVO AND THE CHALLENGE OF HUMANITARIAN INTERVENTION: SELECTIVE INDIGNATION, COLLECTIVE ACTION, AND INTERNATIONAL CITIZENSHIP 19 (Albrecht Schnabel & Ramesh Thakur eds., 2000).

46. Albrecht Schnabel & Ramesh Thakur, *Kosovo, the Changing Contours of World Politics, and the Challenge of World Order*, *in* KOSOVO AND THE CHALLENGE OF HUMANITARIAN INTERVENTION: SELECTIVE INDIGNATION, COLLECTIVE ACTION, AND INTERNATIONAL CITIZENSHIP, *supra* note 45, at 1, 2–7.

47. *Id.*

enforcement resolutions attempting to address the violent conditions in Kosovo.[48] The resolutions described the situation in Kosovo as a threat to international peace and security, but the Security Council could not agree on a course of action.[49]

Meanwhile, the human rights situation in Kosovo was deteriorating. The NATO states, weary of the UN's failure to prevent the massacre in Srebrenica,[50] were growing restless. U.S. President Bill Clinton cited human rights concerns in 46% of the hundreds of remarks that he made justifying intervention in Kosovo.[51] After failed peace efforts, NATO began to discuss a limited air campaign against the Serbian forces accused of terrorizing the civilian population.[52] Before initiating airstrikes, Germany, France, and the UK preferred to secure authorization for the use of force from the Security Council, while the United States argued that NATO independently possessed the legitimacy to use force.[53] U.S. National Security Advisor Sandy Bergen, articulating the Clinton administration's position, stated, "We always prefer to operate pursuant to a U.N. resolution. But we've always taken the position that NATO has the authority in situations it considers to be threats to the stability and security of its area to act by consensus without explicit U.N. authority."[54] After further diplomatic measures failed, NATO began a bombing campaign in Kosovo.[55]

Russia and China harshly criticized NATO's military strikes. Russian officials, nevertheless, arguably pushed the NATO powers into independent action. In private, Russian diplomats reportedly assured NATO foreign ministers, "If you take it the UN we'll veto it. If you don't

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48. *See* S.C. Res. 1203, U.N. Doc. S/RES/1203 (Oct. 24, 1998) (demanding cooperation with OSCE and NATO verification missions); S.C. Res. 1199, U.N. Doc. S/RES/1199 (Sept. 23, 1998) (expressing "deep[] concern" and calling for a ceasefire); S.C. Res. 1160, U.N. Doc. S/RES/1160 (Mar. 31, 1998) (imposing an arms embargo under Chapter VII).

49. TIM JUDAH, KOSOVO: WAR AND REVENGE 182–85 (2000) (describing the conflicting positions of the permanent five Security Council members before NATO initiated its bombing campaign).

50. In July of 1995, the UN "safe area" protecting Srebrenica collapsed, and 8000 Muslim civilians were massacred. *Id.* at 120.

51. NICHOLAS KERTON-JOHNSON, JUSTIFYING AMERICA'S WARS: THE CONDUCT AND PRACTICE OF US MILITARY INTERVENTION 63–64 (2011).

52. JUDAH, *supra* note 49, at 121.

53. For a discussion of the positions of the permanent five Security Council members (the P5) and other states in the Kosovo debate, see generally KOSOVO AND THE CHALLENGE OF HUMANITARIAN INTERVENTION: SELECTIVE INDIGNATION, COLLECTIVE ACTION, AND INTERNATIONAL CITIZENSHIP, *supra* note 45, at 83–148.

54. Sandy Berger, Nat'l Sec. Advisor, United States, Press Briefing (Mar. 25, 1999) (transcript available at http://www.presidency.ucsb.edu/ws/?pid=47833).

55. Schnabel & Thakur, *supra* note 46, at 4.

we'll just denounce you. . . . [W]e'll just make a lot of noise."[56] Publicly, Russian officials condemned the NATO campaign, arguing, "Enforcement elements have been excluded from the draft resolution, and there are no provisions in it that would directly or indirectly sanction the automatic use of force."[57] Russia submitted to the Security Council a draft resolution describing NATO actions as a "flagrant violation of the United Nations Charter,"[58] which was defeated by twelve votes to three.[59] China similarly condemned NATO action, maintaining, "When the sovereignty of a country is put in jeopardy, its human rights can hardly be protected effectively. Sovereign equality, mutual respect for State sovereignty and non-interference in the internal affairs of others are the basic principles governing international relations today."[60]

After NATO action ceased, the UN created the Independent International Commission on Kosovo to investigate the intervention.[61] The Commission concluded that NATO intervention was "illegal but legitimate."[62] It further determined that "the intervention [had been] justified because all diplomatic avenues had been exhausted and because the intervention had [had] the effect of liberating the majority population of Kosovo from a long period of oppression under Serbian rule."[63] In order to better respond to future crises, the Commission encouraged the international community to work through the UN and to close the gap between legality and legitimacy.[64]

B. Libya

The conflict began in February 2011, as protests against General Muammar Qaddafi's regime spread to cities throughout Libya.[65] General

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56. JUDAH, *supra* note 49, at 183.

57. U.N. SCOR, 53d Sess., 3937th mtg. at 11, U.N. Doc. S/PV.3937 (Oct. 24, 1998).

58. S.C. Res. 328, U.N. Doc. S/1999/328 (Mar. 26, 1999); Press Release, Security Council, Security Council Rejects Demand for Cessation of Use of Force Against Federal Republic of Yugoslavia, U.N. Press Release SC/6659 (Mar. 26, 1999).

59. U.N. Press Release SC/6659, *supra* note 58. China, Namibia, and Russia voted for the Resolution. *Id.* Argentina, Bahrain, Brazil, Canada, France, Gabon, Gambia, Malaysia, the Netherlands, Slovenia, the United Kingdom, and the United States rejected the resolution. *Id.*

60. U.N. GAOR, 54th Sess., 8th plen. mtg. at 16, U.N. Doc. A/54/PV.8 (Sept. 22 1999).

61. INDEP. INT'L COMM'N ON KOSOVO, THE KOSOVO REPORT: CONFLICT, INTERNATIONAL RESPONSE, LESSONS LEARNED 14 (2000), *available at* http://reliefweb.int/sites/reliefweb.int/files/resources/6D26FF88119644CFC1256989005CD392-thekosovoreport.pdf.

62. *Id.* at 4.

63. *Id.*

64. *Id.* at 10–11.

65. Aidan Hehir, *Introduction: Libya and the Responsibility to Protect*, *in* LIBYA: THE RESPONSIBILITY TO PROTECT AND THE FUTURE OF HUMANITARIAN INTERVENTION 1, 1–11 (Aidan

Muammar Qaddafi responded violently, and his forces killed dozens of demonstrators.[66] On February 20, 2011, the protests escalated into rebellion, and rebel forces captured several Libyan cities, including Benghazi.[67] In response to General Qaddafi's threats to take action against civilians, the Security Council passed Resolution 1973, which implemented a no-fly zone over Libyan airspace and authorized Member States to "take all necessary measures" to protect Libyan civilians.[68] NATO airstrikes, led by the United States, France, and the UK, commenced hours after the resolution was passed.[69]

The United States defended the legitimacy and desirability of such strikes on humanitarian grounds. President Obama argued, "[W]hen someone like Qaddafi threatens a bloodbath that could destabilize an entire region; and when the international community is prepared to come together to save many thousands of lives—then it's in our national interest to act. And it's our responsibility. This is one of those times."[70] Echoing the president, State Department Legal Advisor Harold Koh advised the American Society of International Law that

> [Qaddafi's] illegitimate use of force not only is causing the deaths of substantial numbers of civilians among his own people, but also is forcing many others to flee to neighboring countries . . . . Qaddafi has *forfeited his responsibility to protect* his own citizens and created a serious need for immediate humanitarian assistance and protection . . . .[71]

Other states, however, did not support Western military intervention. Russia and China, along with several developing states, were infuriated about the extent of NATO air strikes, contending that NATO states overextended Resolution 1973's civilian protections as a pretext for Libyan regime change.[72] Some commentators argued that advocates of the Libyan

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Hehir & Robert Murray eds., 2013).

66. *Id.*

67. *Id.*

68. S.C. Res. 1973, ¶ 8, U.N. Doc. S/RES/1973 (Mar. 17, 2011). Russia and China abstained from voting on the resolution. Press Release, Security Council, Security Council Approves "No-Fly Zone" over Libya, Authorizing "All Necessary Measures" to Protect Civilians, by Vote of 10 in Favour with 5 Abstentions, U.N. Press Release SC/10200 (Mar. 17, 2011).

69. David D. Kirkpatrick et al., *Allies Open Air Assault on Qaddafi's Forces in Libya*, N.Y. TIMES, Mar. 19, 2011, http://www.nytimes.com/2011/03/20/world/africa/20libya.html.

70. The President's Weekly Address, 2011 DAILY COMP. PRES. DOC. 203, at 1 (Mar. 26, 2011).

71. Harold Hongku Koh, Legal Advisor, U.S. Dep't of State, Statement Regarding Use of Force in Libya before the American Society of International Law Annual Meeting (Mar. 26, 2011) (emphasis added) (transcript available at http://www.state.gov/s/l/releases/remarks/159201.htm).

72. Simon Tisdell, *The Consensus on Intervention in Libya Has Shattered,* GUARDIAN, Mar. 23,

intervention had impaired the development of the responsibility to protect by intensifying Russian and Chinese distrust of humanitarian interventions.[73] Further, others believed that the Obama administration and other NATO states had wrongly applied the responsibility to protect.[74]

C. Genocide—and the Responsibility to Protect—Ignored?

While the success of the international efforts to alleviate human rights violations in Kosovo and Libya are debatable, the international community has wholly failed to respond to several other severe human rights violations.[75] Secretary-General Annan created an independent inquiry into the UN's failed response to the Rwandan genocide.[76] The inquiry determined that over the course of about 100 days in the spring of 1994, approximately 800,000 Rwandans were killed.[77] According to the inquiry, the international community's failure to prevent or to stop those killings was attributable to a "persistent lack of political will by Member States to act, or to act with enough assertiveness."[78] This lack of political will—and, in some cases, the presence of political opposition—characterizes the failure to act in several of the most severe human rights violations since World War II.

The complicated conflict in Sudan also tested the international community's resolve in the face of significant civilian causalities, a pattern of human rights abuses, and substantial internal displacement.[79] The

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2011, 11:11 EDT, http://www.theguardian.com/commentisfree/2011/mar/23/libya-ceasefire-consensus-russia-china-india.

73. *Id.*

74. *See, e.g.*, Steven Groves, *Obama Wrongly Adopts U.N. "Responsibility to Protect" to Justify Libya Intervention*, HERITAGE FOUND. (Mar. 31, 2011), http://www.heritage.org/research/reports/2011/03/libya-intervention-obama-wrongly-adopts-un-responsibility-to-protect (arguing that R2P could constrain future U.S. action); David Rieff, Op-Ed., *R2P, R.I.P.*, N.Y. TIMES, Nov. 7, 2011, http://www.nytimes.com/2011/11/08/opinion/r2p-rip.html (arguing that NATO "distorted" the doctrine, threatening the legitimacy of the international system).

75. Though it occurred before ICISS's report, the international community's response to the Vietnamese intervention in Cambodia is also notable in this regard. When Vietnam intervened in Cambodia to oust Pol Pot from power, approximately 800,000 Cambodians had been killed. Sophie Quinn-Judge, *Fraternal Aid, Self-Defence, or Self-Interest? Vietnam's Intervention in Cambodia*, *in* HUMANITARIAN INTERVENTION: A HISTORY, *supra* note 3, at 343, 343–62. Thousands more were starving and/or enslaved. *Id.* Yet, the coup was almost universally condemned. *Id.*

76. U.N. Secretary-General, Letter dated Mar. 18, 1999 from the Secretary-General addressed to the President of the Security Council, U.N. Doc. S/1999/339 (Mar. 26, 1999).

77. Indep. Inquiry into the Actions of the U.N. During the 1994 Genocide in Rwanda, Rep., transmitted by letter dated Dec. 15, 1999 from the Secretary-General addressed to the President of the Security Council, at 3, U.N. Doc. S/1999/1257 (Dec. 15, 1999).

78. *Id.*

79. U.N. High Comm'r for Human Rights, *Situation of Human Rights in the Darfur Region of the*

conflict was centered in Darfur, a region of Western Sudan where desertification and drought had led to starvation and underdevelopment.[80] The Sudanese government was unable or unwilling to alleviate the suffering in Darfur, and as a result, unrest in the area grew.[81] Tension between non-Arab and Arab tribes over access to resources mounted.[82] In 2003, violence escalated, and two non-Arab rebel groups, the Justice and Equality Movement (JEM) and the Sudan Liberation Movement (SLM), declared an open rebellion against the government.[83] In response, the Sudanese government employed Arab tribal militias[84] to supplement the army and to quash the JEM and SLM uprising.[85] A UN report found that "the armed forces and their proxy militias punished certain populations collectively for belonging to the same ethnic group as the rebels, and inflicted terror upon them."[86] Despite recent peace agreements and the partition of the country into two states, violence has continued, and the region remains unstable.[87] The UN estimates that 300,000 Sudanese have died as a result of the violence, and 2.7 million Sudanese are displaced,[88]

Sudan, at 3, U.N. Doc. E/CN.4/2005/3 (May 7, 2004).

80. *See generally* NOAH R. BASSIL, THE POST-COLONIAL STATE AND CIVIL WAR IN SUDAN: THE ORIGINS OF CONFLICT IN DARFUR (2013) (providing a more detailed account of the origins and complexities of the conflict in Darfur).

81. REINOLD, *supra* note 19, at 66–67.

82. *Id.* Racial and religious tensions were not new problems in Sudan. British colonizers had stitched together a diverse group of ethnicities and tribes among arbitrary boundaries and ruled Sudan as two states. *See* KWASI KWARTENG, GHOSTS OF EMPIRE: BRITAIN'S LEGACIES IN THE MODERN WORLD 253–72 (2011) (describing Britain's partition and colonization of Sudan). Colonialism undermined the creation of a national Sudanese identity and instead produced tribalism, segregation, and racism among the Sudanese citizenry. BASSIL, *supra* note 80, at 88.

83. BASSIL, *supra* note 80, at 88. The conflict was, however, far more complicated than a racial or religious war. *Id.* at 1–2. Race and religion were important factors in the conflict, but there were other issues involved. The Islamist state had alienated the periphery of the country and lacked complete control. *Id.*

84. REINOLD, *supra* note 19, at 67 (describing the indiscriminate use by many militias of a "scorched earth" policy against civilians and rebels); Julie Flint, *Beyond 'Janjaweed:' Understanding the Militias of Darfur* (Small Arms Survey, Human Sec. Baseline Assessment, Working Paper No. 17, 2009), *available at* http://www.smallarmssurveysudan.org/fileadmin/docs/working-papers/HSBA-WP-17-Beyond-Janjaweed.pdf (describing the Arab militias' composition of nomadic Arab tribesman, radicalized Islamists, former criminals, and the unemployed).

85. *See* U.N. High Comm'r for Human Rights, *supra* note 79, at 3, 6 (noting that the Sudanese government initially denied supporting or arming the militias but that its use of the militias has been well-documented by the UN).

86. *Id.* at 17.

87. Rick Gladstone, *Number of Darfur's Displaced Surged in 2013*, N.Y. TIMES, Jan. 23, 2014, http://www.nytimes.com/2014/01/24/world/africa/number-of-darfurs-displaced-surged-in-2013.html; Nicholas Kulish, *Civilians Trying to Flee South Sudan Violence Are Caught Between Two Sides*, N.Y. TIMES, Dec. 28, 2013, http://www.nytimes.com/2013/12/29/world/africa/south-sudan.html?_r=0.

88. *UN Welcomes Accord Signed Between Sudan and Darfur Rebel Group*, UN NEWS CENTRE

with 300,000 citizens displaced in 2013 alone.[89]

Despite international media attention and widespread calls for intervention, UN Member States lacked the political commitment to invoke the responsibility to protect or to take any decisive action to prevent these ongoing widespread human rights violations.[90] Limited UN intervention, such as the supervised disarmament of Arab militias, deployment of a limited number of specially trained troops, and/or the enforcement of a no-fly zone, could have mitigated or prevented the crisis.[91] This lack of action led one scholar to remark, "If Darfur is the first 'test case' of the responsibility to protect, there is no point in denying that the world has failed the entry exam."[92]

IV. THE RESPONSIBILITY TO PROTECT AND SYRIA

On August 21, 2013, a chemical weapons attack was perpetrated against Syrian citizens in the Ghouta region of Damascus.[93] According to reports, this incident was the culmination of a series of chemical attacks perpetrated by the Assad regime against Syrian civilians.[94] Syria's use of chemical weapons violated its treaty commitments and customary international law; the 1925 Geneva Protocol[95] and the 1993 Chemical

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(July 14, 2011), http://www.un.org/apps/news/story.asp?NewsID=39044&Cr=Darfur&Cr1.

89. U.N. Secretary-General, *Report of the Secretary-General on the African Union-United Nations Hybrid Operation in Darfur*, ¶ 74, U.N. Doc. S/2013/420 (July 12, 2013).

90. *See* EKKEHARD STRAUSS, THE EMPEROR'S NEW CLOTHES?: THE UNITED NATIONS AND THE IMPLEMENTATION OF THE RESPONSIBILITY TO PROTECT 116–17 (2009) (arguing that the absence of political will led to a UN response that lacked "any coherent strategy").

91. *See* INT'L CRISIS GRP., AFRICA REPORT NO. 89, DARFUR: THE FAILURE TO PROTECT i–iii (2005), *available at* http://www.crisisgroup.org/~/media/Files/africa/horn-of-africa/sudan/Darfur%20The%20Failure%20to%20Protect.pdf (recommending various measures to respond to the crisis).

92. LEE FEINSTEIN, DARFUR AND BEYOND: WHAT IS NEEDED TO PREVENT MASS ATROCITIES 1, 38 (Council on Foreign Relations, CSR No. 22, 2007), *available at* http://i.cfr.org/content/publications/attachments/DarfurCSR22.pdf.

93. United Nations Mission to Investigate Allegations of the Use of Chemical Weapons in the Syrian Arab Republic, Report on the Alleged Use of Chemical Weapons in the Ghouta Area of Damascus on 21 August 2013, transmitted by letter dated Sept. 13, 2013 addressed to the Secretary-General, *available at* http://www.un.org/disarmament/content/slideshow/Secretary_General_Report_of_CW_Investigation.pdf (finding evidence of sarin gas use in the Ghouta region). While the international community has almost universally condemned these attacks, the Assad regime vehemently denied that it is responsible. Brian Stelter, *Assad Denies Chemical Attack in Interview for U.S. Viewers*, N.Y. TIMES, Sept. 8, 2013, http://www.nytimes.com/2013/09/09/business/media/assad-denies-attack-in-interview-with-charlie-rose.html?_r=0.

94. *See, e.g.*, Letter from Jon Day, Chairman, Joint Intelligence Committee, to David Cameron, Prime Minister, United Kingdom, Syria: Reported Chemical Weapons Use (Aug. 29, 2013), *available at* https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/235094/Jp_115_JD_PM_Syria_Reported_Chemical_Weapon_Use_with_annex.pdf.

95. Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases,

Weapons Convention[96] explicitly ban the use of chemical weapons, although they contain no enforcement provisions.

Yet even before the use of chemical weapons, tension among the Security Council powers over Syria was mounting. Russia and China vetoed several resolutions authorizing sanctions on the Assad regime.[97] After the third veto, the British ambassador, Sir Mark Lyall Grant, stated that the UK was "appalled by the decision of Russia and China to veto this resolution aimed at ending the bloodshed in Syria."[98] U.S. ambassador Susan Rice stated that the vote reflected that "two permanent members of the Council are prepared to defend Assad to the bitter end."[99] The chemical weapons attacks further increased tensions in the Security Council. Before a diplomatic solution[100] was reached, the governments of the permanent members articulated starkly different policy positions. This section traces the views of the permanent members of the Security Council (the P5) on the responsibility to protect and concludes by examining the ways in which these positions have affected the doctrine.

A. The United States

The United States' response to the responsibility to protect has varied by administration. The Clinton administration was the first to engage with the responsibility to protect as articulated by the ICISS and Secretary-General Annan,[101] seeming to endorse a neo-Wilsonian worldview with

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and of Bacteriological Methods of Warfare, June 17, 1925, 26 U.S.T. 571.

96. Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, *opened for signature* Jan. 13, 1993, 1974 U.N.T.S. 45.

97. Press Release, Security Council, Security Council Fails to Adopt Draft Resolution on Syria That Would Have Threatened Sanctions, Due to Negative Votes of China, Russian Federation, U.N. Press Release SC/10714 (July 19, 2012).

98. Rick Gladstone, *Friction at the U.N. as Russia and China Veto Another Resolution on Syria Sanctions*, N.Y. TIMES, July 19, 2012, http://www.nytimes.com/2012/07/20/world/middleeast/russia-and-china-veto-un-sanctions-against-syria.html.

99. *Id.*

100. *See* S.C. Res. 2118, U.N. Doc. S/RES/2118 (Sept. 27, 2013) (condemning the use of chemical weapons in Syria and authorizing a UN-led team to destroy Syrian chemical stockpiles).

101. However, the United States has long debated the merits of humanitarian justifications for military action. For example, in 1903, President Theodore Roosevelt argued that the United States has a duty to intervene when crimes committed abroad are "'so vast a scale and of such peculiar horror," that "[i]n extreme cases action may be justifiable and proper," and that "we could interfere by force of arms . . . to put a stop to intolerable conditions." BASS, *supra* note 4, at 3. Similarly, President William McKinley declared, "The American people never shirk a responsibility and never unload a burden that carries forward civilization." Mike Sewell, *Humanitarian Intervention, Democracy, and Imperialism: The American War with Spain, 1898, and After*, *in* HUMANITARIAN INTERVENTION: A HISTORY, *supra* note 3, at 303. Contrast President McKinley's and President Roosevelt's statements with the realist perspective of Secretary of State Henry Kissinger, who, after the Kosovo intervention, admonished British Prime Minister Tony Blair for not respecting traditional sovereignty principles. BASS, *supra*

respect to intervention and the use of force.[102] Some commentators labeled this the Clinton Doctrine, namely "that the United States cannot respond to all humanitarian disasters and human rights transgressions, but that it will use its power and good offices if doing so will make a difference and the costs are acceptable."[103]

In contrast, the Bush administration was far more skeptical of the responsibility to protect and humanitarian intervention. Though it never "flatly rejected" the responsibility to protect, it demonstrated reluctance to be "forced to save strangers."[104] Further, UN ambassador John Bolton stated, "[T]his so-called right of humanitarian intervention . . . is just a gleam in one beholder's eye but looks like flat-out aggression to someone else."[105]

Throughout his term in office, President Obama has been vague about his administration's perspective on the legality of humanitarian intervention without a Security Council Resolution.[106] Throughout the Syrian crisis, the importance that the Obama administration seemed to attach in its use of force calculus to the use of chemical weapons became evident.[107] In August 2012, President Obama, albeit in an unscripted

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note 4, at 11. Similarly, Kissinger had no qualms about dealing with the Khmer Rouge, advising a colleague, "Tell the Cambodians that we will be friends with them. They are murderous thugs, but we won't let that stand in our way." *Id.* at 11–12.

102. Tony Smith, *Wilsonianism*, *in* 3 ENCYCLOPEDIA OF AMERICAN FOREIGN POLICY 617 (Alexander DeConde et al. eds., 2d ed. 2002) (noting that after World War I, Wilson forcefully argued that the United States should prioritize the promotion abroad of democratic governance and of national self-determination).

103. G. John Ikenberry, *The Costs of Victory: American Power and the Use of Force in the Contemporary Order*, *in* KOSOVO AND THE CHALLENGE OF HUMANITARIAN INTERVENTION: SELECTIVE INDIGNATION, COLLECTIVE ACTION, AND INTERNATIONAL CITIZENSHIP, *supra* note 45, at 85, 87. President Clinton stated, "[W]here we can, at an acceptable cost . . . we ought to prevent the slaughter of innocent civilians and the wholesale uprooting of them because of their race, their ethnic background, or the way they worship God." Interview with Jim Lehrer of PBS' "Newshour," 1999 WEEKLY COMP. PRES. DOC. 1091, 1095–96. As discussed in Section IV, the Clinton administration demonstrated this worldview through interventions in Somalia and Kosovo.

104. REINOLD, *supra* note 19, at 61–62 (noting that the Bush administration sought to prevent *opinio juris* from forming around the concept). In short, the Bush administration wished to preserve the freedom to intervene without the obligation to do so. *Id.*

105. BASS, *supra* note 4, at 15.

106. However, even before the use of chemical weapons, the Obama administration endorsed the possibility of intervention in Syria without a Security Council resolution. For example, Secretary of Defense Leon Panetta used a NATO-led force as an example of a legally sound basis for intervention. *Hearing to Receive Testimony on the Situation in Syria Before the S. Comm. on Armed Servs.*, 112th Cong. 43–45 (2012) (statement of Leon Panetta, Secretary of Defense, United States) (citing NATO's Bosnia intervention as legally sound precedent under international law).

107. Here, the administration could have been seeking to combine humanitarian justifications with national security interests on arms control. *See* Krista Nelson, *Syria Insta-Symposium: The Significance of Chemical Weapons Use Under International Law*, OPINIO JURIS (Sept. 6, 2013, 1:30 PM EDT),

comment, described the transport or use of chemical weapons as a "red line" that would alter his position on the situation in Syria.[108] He seemed to suggest that the universal acceptance in the international community of the chemical weapons ban and the longevity of this consensus factor into his analysis of the use of force without a Security Council authorization.[109] In a UN speech, he argued that the international community must "meaningfully enforce a prohibition whose origins are older than the United Nations itself."[110]

The American push for action met with fierce opposition from other states, including Russia and China.[111] This discord led the Obama administration to express willingness to act outside a Security Council mandate. President Obama opined, "[G]iven Security Council paralysis on this issue, if we are serious about upholding a ban on chemical weapons use, then an international response is required and that will not come through Security Council action."[112] Shortly after making this statement, the White House circulated a joint statement supporting the President's position, signed by eleven of the G20 nations.[113] In part, this statement warned, "The world cannot wait for endless failed processes that can only lead to increased suffering in Syria and regional instability."[114] However,

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http://opiniojuris.org/2013/09/06/syria-insta-symposium-significance-chemical-weapons-use-international-law/ (describing the Obama administration's use of arms control and humanitarian justifications when calling for action in Syria).

108. *See* The President's News Conference, 2012 DAILY COMP. PRES. DOC. 656, at 6 (Aug. 20, 2012). In a press meeting the following day, the administration did not discredit this characterization. *See* Josh Earnest, Principal Deputy Press Sec'y, White House, Press Gaggle en route Columbus, OH (Aug. 21, 2012) (transcript available at http://www.whitehouse.gov/the-press-office/2012/08/21/press-gaggle-principal-deputy-press-secretary-josh-earnest-en-route-colu). Subsequently, President Obama characterized the red line as the world's "red line." The President's News Conference with Prime Minister John Fredrik Reinfeldt of Sweden in Stockholm, Sweden, 2013 DAILY COMP. PRES. DOC. 599, at 6 (Sept. 4, 2013).

109. *See* 2013 DAILY COMP. PRES. DOC. 655, *supra* note 2, at 2 (stating that the chemical weapons ban "has been agreed to by 98 percent of humanity and "is strengthened by the searing memories of soldiers suffocating in the trenches; Jews slaughtered in gas chambers; Iranians poisoned in the many tens of thousands"); 2013 DAILY COMP. PRES. DOC. 599, *supra* note 108 (describing the President's views and "calculus" on Syria).

110. 2013 DAILY COMP. PRES. DOC. 655, *supra* note 2, at 2.

111. *Syria Crisis: Russia and China Step up Warning over Strike*, BBC NEWS (Aug. 27, 2013, 05:52 ET), http://www.bbc.co.uk/news/world-us-canada-23845800.

112. The President's News Conference in St. Petersburg, Russia, 2013 DAILY COMP. PRES. DOC. 606, at 3 (Sept. 6, 2013).

113. *See* Joint Statement by the United States of America, the Commonwealth of Australia, Canada, the French Republic, the Italian Republic, Japan, the Republic of Korea, the Kingdom of Saudi Arabia, the Kingdom of Spain, the Republic of Turkey, and the United Kingdom, 2013 DAILY COMP. PRES. DOC. 607 (Sept. 6, 2013).

114. *Id.* at 1.

the Obama administration found few states with the resources and political will to contribute to military action and began to make preparations to act alone.[115]

Political obstacles faced by the Obama administration further obscured the U.S. position on the responsibility to protect. Perhaps as a result of underwhelming support from the international community, President Obama announced that he would seek approval from Congress[116] for military action against Syria.[117] Even limited military intervention proved to be unpopular with the American public, making congressional support for action improbable.[118] Further, critics argued that seeking congressional approval made President Obama, and by extension the United States, appear "weak" to the international community.[119] Others maintained that President Obama's actions were indicative of his

115. *See* Mark Lander et al., *Obama Set for Limited Strike on Syria as British Vote No*, N.Y. TIMES, Aug. 30, 2013, http://www.nytimes.com/2013/08/30/us/politics/obama-syria.html (reporting that after Prime Minister Cameron lost the vote, U.S. officials emphasized that "eroding support would not deter Mr. Obama"). Further, the Navy moved a fifth destroyer into the eastern Mediterranean Sea. *Id.*

116. Scholars debate whether such approval is necessary under the Constitution. *Compare* Charles A. Lofgren, *War-Making Under the Constitution: The Original Understanding*, 81 YALE L.J. 672, 701 (1972) ("Evidence from the years immediately following ratification of the Constitution thus corroborates the conclusion that Americans originally understood Congress to have at least a coordinate, and probably the dominant, role in initiating all but the most obviously defensive wars, whether declared or not."), *with* John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CALIF. L. REV. 167, 174 (1996) ("The Framers established a system which was designed to encourage presidential initiative in war, but which granted Congress an ultimate check on executive actions. Congress could express its opposition to executive war decisions only by exercising its powers over funding and impeachment. . . . The President was seen as the protector and representative of the People. In contrast, the Framers expressed a deep concern regarding the damage that Congress, and the interest groups that could dominate it, might cause in the delicate areas of war and foreign policy.").

117. Peter Baker & Jonathan Weisman, *Obama Seeks Approval by Congress for Strike in Syria*, N.Y. TIMES, Aug. 31, 2013, http://www.nytimes.com/2013/09/01/world/middleeast/syria.html; *see also* Letter to Congressional Leaders Transmitting Draft Legislation Regarding Authorization for Use of United States Armed Forces in Connection with the Conflict in Syria, 2013 DAILY COMP. PRES. DOC. 597 (Aug. 31, 2013).

118. President Obama faced difficulty advocating for intervention in Syria to the international community and domestically. *See* CABLE NEWS NETWORK & ORC, POLL 8, INTERVIEWS WITH 1,022 ADULT AMERICANS CONDUCTED BY TELEPHONE (2013), *available at* http://i2.cdn.turner.com/cnn/2013/images/09/09/6a.poll.syria.pdf (finding that less than half of Americans supported military intervention, 69% believed that intervention was not in the interest of the United States, and 72% believed that intervention would not accomplish significant American goals).

119. *See, e.g.*, Thom Shanker & Lauren D'Avolio, *Former Defense Secretaries Criticize Obama on Syria*, N.Y. TIMES, Sept. 18, 2013, http://www.nytimes.com/2013/09/19/world/middleeast/gates-and-panetta-critical-of-obama-on-syria.html ("[Former Defense Secretary Leon] Panetta said that the president 'has to retain the responsibility and the authority on this issue,' and that it was wrong to 'subcontract' the decision to Congress."). The article also quotes Panetta saying, "[T]here's no question in my mind [Iran is] looking at the situation, and what they are seeing right now is an element of weakness." *Id.*

unwillingness to take full political responsibility for a Syrian intervention.[120] To pitch the President's position, Secretary of State John Kerry presented the Senate Foreign Relations Committee with a draft resolution authorizing the use of force.[121] During his remarks, Secretary Kerry seemed to make a responsibility to protect-based appeal, stating, "This is not the time for armchair isolationism. This is not the time to be spectators to slaughter."[122]

B. The United Kingdom

The United Kingdom, unlike the United States, has explicitly endorsed the responsibility to protect as a legal basis for the use of force, with or without a Security Council resolution.[123] During the Balkan War in the late 1990s, the United Kingdom defended NATO actions as a legal humanitarian intervention. During Security Council debates, the United Kingdom's representative argued that "[t]he action being taken was legal . . . . It was justified as an exceptional measure to prevent an overwhelming humanitarian catastrophe. . . . [T]here was convincing evidence that such a catastrophe was imminent."[124]

After the chemical attacks in Syria, the British government elaborated on its Kosovo position. The Prime Minister's Office circulated a memorandum outlining three conditions for humanitarian intervention:

> (i) there is convincing evidence, generally accepted by the international community as a whole, of extreme humanitarian distress on a large scale, requiring immediate and urgent relief;
>
> (ii) it must be objectively clear that there is no practicable alternative to the use of force if lives are to be saved; and

120. *See, e.g.*, Eric Posner, *Obama is Only Making His War Powers Mightier*, SLATE (Sept. 3, 2013, 1:07 PM), http://www.slate.com/articles/news_and_politics/view_from_chicago/2013/09/obama_going_to_congress_on_syria_he_s_actually_strengthening_the_war_powers.html ("The president's announcement should be understood as a political move, not a legal one. . . . If Congress now approves the war, it must share blame with the president if what happens next in Syria goes badly. If Congress rejects the war, it must share blame with the president if Bashar al-Assad gases more Syrian children.").

121. John Kerry, Sec'y of State, U.S. Dep't of State, Opening Remarks Before the United States Senate Committee on Foreign Relations (Sept. 3, 2013) (transcript available at http://www.state.gov/secretary/remarks/2013/09/212603.htm).

122. *Id.*

123. *Guidance: Chemical Weapons Use by Syrian Regime: UK Government Legal Position*, PRIME MINISTER'S OFFICE (Aug. 29, 2013), https://www.gov.uk/government/publications/chemical-weapon-use-by-syrian-regime-uk-government-legal-position/chemical-weapon-use-by-syrian-regime-uk-government-legal-position-html-version [hereinafter *Syrian Guidance*].

124. Press Release, Security Council, NATO Action Against Serbian Military Targets Prompts Divergent Views as Security Council Holds Urgent Meeting on Situation in Kosovo 9–10, U.N. Press Release SC/6657 (Mar. 24, 1999).

> (iii) the proposed use of force must be necessary and proportionate to the aim of relief of humanitarian need and must be strictly limited in time and scope to this aim (i.e. the minimum necessary to achieve that end and for no other purpose).[125]

However, the British Parliament foreclosed direct military involvement in Syria by defeating an authorizing resolution.[126]

C. France

France has been one of the most vocal advocates of the responsibility to protect. In 2009, Ambassador Ripert explained, "France is particularly attached to the concrete implementation of the concept of the responsibility to protect. It is an ambitious concept: It calls for intervening not only at the height of crises to stop the most atrocious crimes. It calls for acting in advance to prevent them."[127] With the support of the Security Council,[128] France sent military forces into Mali to prevent humanitarian catastrophes and to regain control of the northern part of the country, where Al-Qaeda-backed Islamists had imposed sharia law.[129] At a General Assembly dialogue on the responsibility to protect, Ambassador Araud called for action in Syria:

> [T]he Syrian government is in the process of murdering its own people. More than 100,000 people have died. The Syrian government, while showing complete indifference, used its air assets and then artillery against civilian neighborhoods, in violation of international humanitarian law, and is now using chemical weapons. It first of all tested the waters by using them in a limited way. It's now using them on a massive scale, which doesn't surprise anyone. I would like to reiterate that all our meetings focusing on "never again" will do absolutely nothing to respond to the brutality of a regime that wants to murder its own people.[130]

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125. *Syrian Guidance*, *supra* note 123.

126. Lander et al., *supra* note 115.

127. Jean-Maurice Ripert, Permanent Representative of Fr. to the United Nations, Statement on the Protection of Civilians (Jan. 14, 2009) (transcript available at http://www.franceonu.org/france-at-the-united-nations/press-room/statements-at-open-meetings/security-council/january-2009-1025/article/14-january-2009-debate-on-the) [hereinafter Ripert Statement].

128. S.C. Res. 2085, U.N. Doc. S/RES/2085 (Dec. 20, 2012).

129. Adam Nossiter & Eric Schmitt, *France Battling Islamists in Mali*, N.Y. TIMES, Jan. 11, 2013, http://www.nytimes.com/2013/01/12/world/africa/mali-islamist-rebels-france.html.

130. Gérard Araud, Permanent Representative of Fr. to the United Nations, Statement on Informal Interactive Dialogue on the Responsibility to Protect (Sept. 11, 2013) (transcript available at http://www.franceonu.org/france-at-the-united-nations/press-room/statements-at-open-meetings/general-assembly/article/11-september-2013-general-assembly).

France also led a UN-sanctioned military campaign in the Central African Republic (CAR) to prevent escalating retaliatory attacks between the Muslim and Christian populations.[131] Further, in an effort to prevent gridlock, France has argued that permanent Security Council members should refrain from using vetoes when mass atrocities have occurred.[132]

D. China

From the outset, China has flatly rejected the reconceptualization of sovereignty advocated by Secretary-General Annan and proponents of the responsibility to protect. It believes that "opposition to international intervention is consistent with internationally recognized standards of morality, international law, and pragmatism."[133] During a 2009 General Assembly debate, Ambassador Liu Zhenmin stated:

> [T]he implementation of "R2P" [the responsibility to protect] should not contravene the principle of state sovereignty and the principle of non-interference of internal affairs [of States]. Although the world has undergone complex and profound changes . . . . [t]here must not be any wavering over the principles of respecting state sovereignty and non-interference of internal affairs.[134]

The way in which the responsibility to protect could be implemented under these parameters is unclear.[135] China warned that intervention in Syria "would have dire consequences for regional security and violate the norms governing international relations."[136] China has been clear about its

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131. John Irish & Bate Felix, *France Says EU Countries to Send Troops to C. African Republic*, REUTERS, Dec. 17, 2013, 4:26 PM EST, *available at* http://www.reuters.com/article/2013/12/17/us-centralafrican-france-idUSBRE9BG0Y020131217.

132. Araud, *supra* note 130.

133. Jia Qingguo, *China*, *in* HUMANITARIAN INTERVENTION: THE EVOLVING ASIAN DEBATE 19, 21–22 (Watanabe Koji ed., 2003) (noting that Chinese policy opposed international intervention because intervention: (1) was driven by Western domination of international affairs and the continuation of colonial power structures, (2) lacks political legitimacy, (3) violates the UN Charter, (4) is generally a façade for the intervening state's interests, and (5) is counterproductive and exacerbates existing problems).

134. Liu Zhenmin, Chinese Ambassador to the United Nations, Statement at the Plenary Session of the General Assembly on the Question of "Responsibility to Protect" (Jul. 24, 2009) (transcript available at http://responsibilitytoprotect.org/Statement%20by%20Ambassador%20Liu%20Zhenmin.pdf).

135. Alex de Waal, *"My Fears, Alas, Were Not Unfounded": Africa's Responses to the Libya Conflict*, *in* LIBYA: THE RESPONSIBILITY TO PROTECT AND THE FUTURE OF HUMANITARIAN INTERVENTION, *supra* note 65, at 58, 58–61.

136. *Obama Advocates Limited Strikes in Syria,* AL JAZEERA (Aug. 29, 2013), http://www.

belief that intervention absent a Security Council resolution is per se illegal.[137] Further, it has emphasized that, even with a Security Council resolution, intervention violates both the principles of sovereignty and the prohibition on the use of force in the UN Charter.[138]

E. Russia

Since the 1990s, Russia has generally acted as a "bulwark of the traditional legal order centred on the UN Charter framework. . . . tend[ing] to outflank China as the Security Council member most insistent in the defence of a pluralist, sovereignty-focused view of international order."[139] The NATO-led interventions in Kosovo prompted Mikhail Gorbachev to decry the NATO agenda as an attempt to "offer the world its military intervention in any internal conflict, in exchange for principles of international law."[140] Unlike China, however, Russia has occasionally supported humanitarian interventions that work through the Security Council, as long as the state in crisis can retain veto rights over any proposed intervention.[141]

After President Obama articulated support for airstrikes in Syria, Russia reiterated its opposition to military action absent a Security Council authorization. Russian Prime Minister Vladimir Putin wrote an editorial in the New York Times, seeking the support of the American public against a Syrian campaign.[142] He argued that the proposed intervention would be "unacceptable under the United Nations Charter and would constitute an act of aggression."[143] Russia also has traditional ties with and geographic proximity to states, such as Iran, Syria, and Serbia.[144] These links have

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aljazeera.com/news/middleeast/2013/08/20138295234621459.html.

137. Qingguo, *supra* note 133, at 22.

138. *Id.*

139. ROY ALLISON, RUSSIA, THE WEST, AND MILITARY INTERVENTION 13 (2013). Allison further notes that this position may reflect Russia's "relatively weak position [compared to that of the United States and NATO] in the distribution of global power." *Id.* at 19.

140. *Id.* at 56.

141. *Id.* at 61, 65–66.

142. *See* Vladimir V. Putin, Op-Ed., *A Plea for Caution from Russia: What Putin Has to Say to Americans About Syria*, N.Y. TIMES, Sept. 11, 2013, http://www.nytimes.com/2013/09/12/opinion/putin-plea-for-caution-from-russia-on-syria.html.

143. *Id.*

144. *See, e.g.*, David M. Herszenhorn, *For Syria, Reliant on Russia for Weapons and Food, Old Bonds Run Deep*, N.Y. TIMES, Feb. 18, 2012, http://www.nytimes.com/2012/02/19/world/middleeast/for-russia-and-syria-bonds-are-old-and-deep.html?pagewanted=all (describing the economic and political ties between Russia and Syria); *To Russia, with Love*, Sept. 18, 2012, 12:17, http://www.economist.com/blogs/easternapproaches/2012/09/russia-and-serbia (describing the depth of the Russian/Serbian relationship).

prompted especially strong reactions against perceived U.S. and NATO "hegemony" in this region.[145]

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As discussed in the previous sections, the responsibility to protect remains controversial among powerful states. The developing world is also divided between states that prioritize traditional notions of sovereignty[146] and those that want the international community to be more involved in humanitarian pursuits.[147] The Syrian crisis did not foster consensus among states and perhaps deepened the divide. Some commentators argue that the lack of international intervention in Syria—over both the use of chemical weapons and the staggering civil war civilian death toll—represent significant setbacks for the responsibility to protect doctrine.[148]

V. *DE LEGE LATA*: THE STATUS OF THE RESPONSIBILITY TO PROTECT UNDER CUSTOMARY INTERNATIONAL LAW

International law is based primarily on treaties and customary international law (CIL). To date, states have not concluded a treaty codifying the responsibility to protect. This section, drawing on the examples of state practice in the sections above, considers the legality of each under customary international law.

CIL has two components: state practice and *opinio juris sive necessitatis* (*opinio juris*).[149] In other words, CIL is shown by "a general and consistent practice of states followed by them from a sense of legal obligation."[150] State practice is discerned from observing the behavior of

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145. ALLISON, *supra* note 139, at 13–14. Russia views U.S. and NATO efforts to circumvent the Security Council as the perpetuation of a hegemonic international order. *Id.* From its perspective, great powers (including Russia) should collectively determine norms and rules, similar to the original understanding of the UN. *Id.*

146. *See* Edward C. Luck, *Sovereignty, Choice and the Responsibility to Protect*, *in* THE RESPONSIBILITY TO PROTECT AND INTERNATIONAL LAW 13–14 (Alex J. Bellamy et al. eds., 2011) ("[S]ome smaller and developing countries have had reservations about embracing the concept.").

147. South American and African states (especially those who have been suffered genocide) have been vocally supportive. For a summary of states' positions, see WORLD FEDERALIST MOVEMENT–INST. FOR GLOBAL POL'Y, STATE-BY-STATE POSITIONS ON THE RESPONSIBILITY TO PROTECT (2005) [hereinafter STATE-BY-STATE POSITIONS], *available at* http://www.responsibilitytoprotect.org/files/Chart_R2P_11August.pdf.

148. *See, e.g.*, Stuart Gottlieb, *Syria and the Demise of the Responsibility to Protect*, NAT'L INT., Nov. 5, 2013, http://www.nationalinterest.org/commentary/syria-the-demise-the-responsibility-protect-9360 ("There is no sugar-coating the damage done to the cause of humanitarian intervention by the global wavering over Syria.").

149. JEFFREY L. DUNOFF ET AL., INTERNATIONAL LAW: NORMS, ACTORS, PROCESS: A PROBLEM-ORIENTED APPROACH 77–79 (3d ed. 2010).

150. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) (1987). The ICJ has also repeatedly endorsed this two-part framework. *See, e.g.*, Continental Shelf

states over time.[151] Behavior can include a wide range of activity, such as military action, official statements, and voting records in international institutions.[152] Practice need not be universal but must be "virtually uniform" and "extensive and representative."[153] The length of time required for state practice to become custom depends on the circumstances; the inquiry should focus on the "density" of the practice, not the length.[154] *Opinio juris*, known as the subjective component of international law, reflects the rationale for a state's behavior.[155] It results from a sense of legal obligation, not merely one of convenience or courtesy.[156] Although states may not explicitly reference international law norms when acting, *opinio juris* can be inferred from the nature and circumstances of their behavior.[157]

The responsibility to protect could be represented in CIL in three ways. First, states may feel that they are legally obligated to protect others from atrocities in all cases. This is a non-starter, however. If the responsibility to protect obligates states to act, then failure to protect should trigger legal sanctions,[158] which have never been contemplated by the international community. Additionally, if states were legally bound to protect, political willpower would not be the determining factor in whether intervention occurs.

Second, states may feel legally authorized under CIL to act when the Security Council votes to approve humanitarian intervention.[159] Lastly, a CIL norm could allow states to intervene without a UN resolution. These

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(Libya v. Malta), 1985 I.C.J. 13, ¶ 27 (June 30); North Sea Continental Shelf (Ger. v. Den., Ger. v. Neth.), 1969 I.C.J. 3, ¶ 7 (Feb. 20). *But see* Maurice Mendelson, *The Subjective Element in Customary International Law*, 66 BRIT. Y.B. INT'L L. 177, 201 (1995) (arguing that evidence of *opinio juris* is "definitely unhelpful" for ascertaining whether customary international law has been created).

151. ERIC A. POSNER & ALAN O. SYKES, ECONOMIC FOUNDATIONS OF INTERNATIONAL LAW 50–57 (2013).

152. DUNOFF ET AL., *supra* note 149.

153. Jean-Marie Henckaerts, *Study on Customary International Humanitarian Law: A Contribution to the Understanding and Respect for the Rule of Law in Armed Conflict*, 87 INT'L. REV. RED CROSS 175, 180 (2005).

154. COMM. ON FORMATION OF CUSTOMARY (GEN.) INT'L LAW, INT'L LAW ASS'N, FINAL REPORT OF THE COMMITTEE: STATEMENT OF PRINCIPLES APPLICABLE TO THE FORMATION OF GENERAL CUSTOMARY INTERNATIONAL LAW 20 (2000).

155. DUNOFF ET AL., *supra* note 149.

156. *Id.* at 79.

157. *Id.*

158. STRAUSS, *supra* note 90, at 39.

159. CIL dictates the interpretation of the Security Council's powers and fills in the gaps in the UN Charter. *See, e.g.*, Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, ¶¶ 434–502 (June 27) (using CIL to interpret the parameters of self-defense under the UN Charter).

last two potential grounds for intervention are described below.

A. Action Through the Security Council's Chapter VII Powers

1. State Practice

Over the past fifteen years, states, scholars, and international institutions have published extensively on humanitarian intervention. Diplomats have produced agreements such as the World Summit Outcome, a product of the largest ever gathering of heads of state.[160] Similarly, two consecutive Secretaries-General have prioritized effectuating the doctrine and have published extensively on its value.[161] These documents allocate the responsibility to intervene to the Security Council.[162] In addition to statements and publications, the Security Council has authorized humanitarian interventions through its Chapter VII powers. Although the UN Charter restricts Security Council action to threats to "international peace and security,"[163] this textual limit has not prevented Security Council intervention in Libya or the CAR.[164]

2. *Opinio Juris*

Today, few states challenge the legal authority of the Security Council to take action in other states for humanitarian purposes. Many states that do not authorize or support humanitarian intervention have endorsed the legality of Security Council-led interventions. For example, Russia and China, strong critics of the responsibility to protect, signed the World Summit Outcome and have abstained from voting on or have voted in favor of interventions.[165] Russia has accepted the legality of Security Council action when extreme human rights abuses are occurring, whether the state offers permission or not,[166] but China has continued to insist that

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160. *UN World Summit Adopts Landmark Outcome Document on Raft of Crucial Issues*, UN NEWS CENTRE (Sept. 16, 2005), http://www.un.org/apps/news/story.asp?NewsID=15853.

161. *See supra* notes 22–23, 34–40 and accompanying text.

162. *See supra* notes 39–40 and accompanying text.

163. U.N. Charter art. 39.

164. *See supra* Part III.B and note 131 and accompanying text.

165. Libya, Mali, and the CAR are examples. *See, e.g.*, Press Release, Security Council, Security Council Grants Year-Long Mandate Extension for United Nations Integrated Peacebuilding Office in Central African Republic, U.N. Press Release SC/11264 (Jan. 28, 2014); *see also* ALLISON, *supra* note 139, at 36–37 (detailing Russian support for the intervention in Kuwait). The Security Council has also created an "intervention brigade" to keep the peace in Congo. *U.N. Approves New Forces to Pursue Congo's Rebels*, N.Y. TIMES, Mar. 28 2013, http://www.nytimes.com/2013/03/29/world/africa/un-approves-new-force-to-pursue-congos-rebels.html?_r=0.

166. ALLISON, *supra* note 139, at 69. Under Putin's leadership, however, Russian has become less supportive of its legality. *Id.* at 69–70.

humanitarian intervention must respect traditional conceptions of sovereignty.[167]

B. Unilateral Action Without Security Council Approval

1. State Practice

Some state practice supports the legality of the responsibility to protect without Security Council authorization. NATO invoked humanitarian considerations when intervening in Kosovo.[168] Several states joined or supported NATO action.[169] Further, the African Union Constitutive Act authorizes the Union to intervene in a Member State "pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity."[170] Similarly, the Economic Community of West African States (ECOWAS) established its own Mediation and Security Council to "decide on all matters relating to peace and security."[171] Finally, through official statements and legal memoranda, the UK, France, and the United States have expressed willingness to act outside the Security Council in Syria.[172]

Several states, however, including Russia and China, strongly objected to NATO actions in Kosovo and to the proposed unilateral intervention in Syria.[173] The majority of states have rejected unilateral action as a response to humanitarian crises.[174] Thus, state action with respect to intervention without Security Council approval has been inconsistent and seems to fall short of the virtual uniformity necessary for recognition as customary international law.[175]

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167. *See infra* Part VI.B.

168. *See supra* Part III.A.

169. *See supra* Part III.A.

170. Constitutive Act of the African Union art. 4(h), *adopted* July 11, 2000, 2158 U.N.T.S. 3.

171. Economic Community of West African States, Protocol Relating to the Mechanism for Conflict Prevention, Management, Resolution, Peace-Keeping and Security art. 10 (Dec. 10, 1998), *available at* http://www.comm.ecowas.int/sec/index.php?id=ap101299&lang=en. The ECOWAS Mediation and Security Council can authorize military missions when "serious and massive" human rights violations occur or if a rebel group threatens to overthrow a democratically elected government. *Id.* art. 1. The Protocol requires ECOWAS to inform the Security Council of an intervention but does not require a Security Council resolution. *Id.*

172. *See supra* Part IV.

173. *See* Tisdell, *supra* note 72.

174. *See* STATE-BY-STATE POSITIONS, *supra* note 147.

175. BELLAMY, *supra* note 19, at 68–70 (describing the inconsistencies in how the responsibility to protect has been implemented).

2. *Opinio Juris*

Some states, such as Belgium and the UK, have explicitly articulated legal justifications for humanitarian intervention. Before NATO bombing began, FRY officials filed applications against several NATO countries in the International Court of Justice (ICJ).[176] While most countries solely contested the ICJ's jurisdiction,[177] Belgium addressed the issue of humanitarian intervention during oral argument. Belgium's representative, Professor Ergec, argued that NATO's actions were consistent with the UN Charter because NATO was not acting "against" the territorial integrity of the FRY.[178] Instead, he maintained that

> NATO intervened to protect fundamental values enshrined in the *jus cogens* and to prevent an impending catastrophe . . . . Thus this is not an intervention against the territorial integrity or independence of the former Republic of Yugoslavia. The purpose of NATO's intervention is to rescue a people in peril, in deep distress.[179]

Thus, according to Belgium, NATO's bombing campaign did not violate the prohibition on the use of force in Article 2(4) of the Charter. Similarly, the UK has outlined a legal framework that supports unilateral intervention if it fits into certain parameters.[180]

Unilateral intervention, however, is not widely viewed as legally authorized under international law. Many states, including China, believe that such intervention would violate international law, not put the state in conformity with it.[181] A UN-sponsored investigative panel labeled the intervention in Kosovo "illegal but legitimate" because NATO did not receive Security Council authorization before intervention.[182] Further, Secretary-General Ban maintains that the "responsibility to protect does not alter, indeed it reinforces, the legal obligations of Member States to refrain

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176. *See e.g.* Press Release 1999/33, Int'l Court of Justice, The Court Rejects the Request for the indication of Provisional Measures Submitted by Yugoslavia and Dismisses the Case (June 2, 1999); Press Release 1999/32, Int'l Court of Justice, The Court Rejects the Request for the Indication of Provisional Measures Submitted by Yugoslavia, but Remains Seized of the Case (June 2, 1999).

177. *See, e.g.*, Preliminary Objections of the French Republic, Legality of Use of Force (Yugoslavia v. Fr.) ¶¶1–3 (July 5, 2000), *available at* http://www.icj-cij.org/docket/files/107/10873.pdf; Preliminary Objections of the United Kingdom, Legality of Use of Force (Yugoslavia v. U.K.) ¶1.1 (June 5, 2000), *available at* http://www.icj-cij.org/docket/files/113/10883.pdf.

178. Legality of the Use of Force (Yugoslavia v. Belg.), Verbatim Record, at 12 (May 10, 1999, 3:00 p.m.), http://www.icj-cij.org/docket/files/105/4473.pdf.

179. *Id.* at 11–12.

180. *See supra* Part IV.B.

181. *See supra* Part IV.D.

182. KOSOVO REPORT, *supra* note 61, at 4.

from the use of force except in conformity with the Charter."[183]

VI. *DE LEGE FERENDA*: THE RESPONSIBILITY TO PROTECT AS A CIL NORM

If effectuated, the responsibility to protect doctrine can serve as the basis for states to prevent atrocities and mitigate disaster abroad. This section argues that the Security Council's capacity to authorize humanitarian interventions should be definitively established in CIL. Thus, the responsibility to protect should act as an effective legal tool to prevent atrocities, rather than a convenient justification to circumvent international law.

A. Addressing Sovereignty Concerns

The UN was founded in the wake of the devastation of war and the horrors of genocide. The international community vowed, through multilateral cooperation, to prevent such atrocities from occurring again.[184] The Security Council is a product of these aspirations.[185] Therefore, implementing a doctrine, such as the responsibility to protect, that seeks to effectuate these goals should be a priority of the institution.

Critics of the responsibility to protect argue that traditional notions of sovereignty prevent uninvited intrusions into domestic affairs, even if widespread atrocities are taking place.[186] Yet sovereignty is not and has never been an absolute.[187] Here the option of humanitarian intervention only exists if the state is manifestly failing to protect its citizenry. Indeed, a "sovereign" state that has failed in this most basic duty can hardly complain about violations of sovereignty.

Others condemn the responsibility to protect as too easy to manipulate or abuse, arguing that it is merely a platform for states to pursue selfish motivations or a thin veil for Western imperialism.[188] In the West, some critics view humanitarian intervention as impracticable in a post-9/11 world.[189] In response to these criticisms, Bass argues that (1) imperialism

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183. U.N. Secretary-General, *Implementing the Responsibility to Protect*, ¶ 3, U.N. Doc. A/63/677 (Jan. 12, 2009).

184. U.N. Charter pmbl., art. 1.

185. U.N. Charter pmbl., arts. 1, 7.

186. *See supra* Parts IV.D–E.

187. *See* BASS, *supra* note 4, at 352–56 (arguing that the definition of sovereignty has changed throughout history). Further, Bass maintains that respect for "territorial integrity" often serves as "the best argument of the butchers in the Rwandan and Serbian governments." *Id.* at 355.

188. BASS, *supra* note 4, at 376–82.

189. *Id.* (describing arguments against humanitarian intervention centered on national security and

and humanitarianism should not be equated or blurred, (2) humanitarian intervention is possible, even in a world where terrorism and security threats are prevalent, and (3) humanitarian intervention can be a part of promoting democratic governments and dissuading radicalism.[190] Again, such concerns are also mitigated by the extreme circumstances required for an intervention under the responsibility to protect.

B. Practical Considerations: Bringing Intervention Back to the Security Council

Currently, powerful states have the resources and incentives to work outside the UN system, in violation of international law. Though Russia and China can veto a resolution authorizing humanitarian intervention or can threaten to do so, the United States, France, and the UK have acted outside the Security Council and have explicitly stated that they believe it is in their rights to do so.[191] In support of these assertions, former U.S. legal advisor Harold Koh and former British Legal Adviser Daniel Bethlehem have argued for a broader understanding of permissible uses of force under Article 2(4) of the UN Charter.[192] Others believe that the procedural unfairness surrounding the P5 in the Security Council allows states to pursue illegal but otherwise justified interventions.[193] Yet working outside the UN undermines the credibility of the international legal system's most stable and powerful body,[194] further threatening the principles that the UN was founded to promote and protect.

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terrorism concerns).

190. *Id.* at 379–82.

191. *See supra* Parts IV.A–C.

192. *See* Daniel Bethlehem, *Stepping Back a Moment – The Legal Basis in Favour of a Principle of Humanitarian Intervention*, EJIL: TALK! (Sept. 12, 2013), http://www.ejiltalk.org/stepping-back-a-moment-the-legal-basis-in-favour-of-a-principle-of-humanitarian-intervention/; Harold Hongju Koh, *Syria and the Law of Humanitarian Intervention (Part II: International Law and the Way Forward)*, JUST SECURITY (Oct. 10, 2013, 9:00 AM), http://justsecurity.org/2013/10/02/koh-syria-part2/.

193. *See, e.g.*, Ilya Somin, *Does It Matter If US Intervention in Syria Violates the UN Charter?*, VOLOKH CONSPIRACY (Sept. 8, 2013, 6:38 PM), http://www.volokh.com/2013/09/08/matter-us-intervention-syria-violates-un-charter/.

194. *See* Oona A. Hathaway & Scott J. Shapiro, Op-Ed., *On Syria, a U.N. Vote Isn't Optional*, N.Y. TIMES, Sept. 3, 2013, http://www.nytimes.com/2013/09/04/opinion/on-syria-a-un-vote-isnt-optional.html?_r=0 (questioning whether "employing force to punish Mr. Assad's use of chemical weapons is worth endangering the fragile international order that is World War II's most significant legacy"); *see also* PAUL F.J. ARANAS, SMOKESCREEN: THE U.S., NATO AND THE ILLEGITIMATE USE OF FORCE 143–50 (2012) (describing how violations of the UN Charter by powerful states, such as the United States, undermine the legitimacy of the UN as an institution).

VII. A FRAMEWORK FOR REFORM

Past failures and the limitations of the current system demonstrate the need for reform and a framework to decide when an intervention should take place under the responsibility to protect. This section advocates for such a framework.

A. What Situations?

As Deng articulated in the conception of the doctrine, the responsibility to protect is the original duty of the host state. Only a failure of this duty can trigger international oversight.

When the state fails this duty, under circumstances described below, the international community is authorized, but not obligated, to act.[195] Facially, this construction creates tension with a responsibility to protect and prompts theoretical questions of whether humanitarian intervention is a right or a duty.[196] While the conceptualization of the responsibility as a general duty has great force, current realities counsel a more flexible approach. Practically speaking, an obligation to protect is unlikely to garner the necessary support to be implemented. Additionally, this framework provides a baseline in hopes that, after successful humanitarian interventions, a sense of obligation will begin to coalesce. Eventually, this sense of obligation may form *opinio juris.*

The crimes must be of a severity and type that warrant international attention. Consensus has emerged around four crimes: genocide, war crimes, ethnic cleansing, and crimes against humanity.[197] In addition, the international community's response to unsuccessful appeals to the

195. *See, e.g.*, ANNE ORFORD, INTERNATIONAL AUTHORITY AND THE RESPONSIBILITY TO PROTECT 25–26 (2011) (describing the position that the word "responsibility" does not impose obligations for states but rather confers authority). This position was articulated in "Dear Colleague" letters sent to the 190 other participants of the World Summit. *See, e.g.*, Letter from John R. Bolton, U.S. Ambassador to United Nations, to UN Member States 2 (Aug. 30, 2005), *available at* http://www.responsibilitytoprotect.org/files/US_Boltonletter_R2P_30Aug05[1].pdf (relaying U.S. amendments to the draft Outcome Document being prepared for the High-Level Event on the Responsibility to Protect). Ambassador Bolton stated that the United States does not believe that the United Nations has "an obligation to intervene under international law. . . . [UN Action] should depend on the specific circumstances. Accordingly, we should avoid language that focuses on the obligation or responsibility of the international community and instead assert that we are prepared to take action." *Id.* These changes are largely reflected in the World Summit Outcome. *See generally* G.A. Res. 60/1, *supra* note 30.

196. *See* JAMES PATTISON, HUMANITARIAN INTERVENTION & THE RESPONSIBILITY TO PROTECT 15–20 (2010) (comparing duties and rights arguments and concluding that sufficiently legitimate states have a general, unassigned duty to intervene, which translates into an assigned duty for the most legitimate state).

197. G.A. Res. 60/1, *supra* note 30.

responsibility to protect seemingly imposes two additional requirements on situations involving these four crimes: "(1) a requirement that the use of coercion be preceded by compelling evidence of genocide or mass atrocities; (2) a relatively narrow interpretation of 'crimes against humanity' that excludes crimes not associated with the deliberate killing and displacement of civilians."[198] These requirements ensure that only the most egregious human rights violations are addressed. The international community does not possess the political will or resources to intervene in every human rights violation.

B. Process

The interests of the international community are best served if enforcement action decisions are made in the Security Council, but it has ineffectively addressed severe human rights violations. These reforms could confront the deadlock that has plagued the Security Council in crises like those in Syria, Darfur, and Kosovo.

1. A UN agency should be established to determine if one of the four crimes above has taken place and if diplomatic solutions have been exhausted or would be ineffective

When a state or group of states intervenes in another state, the motives of the intervening states are questioned. Ascertaining a state's "true" motive for any behavior is difficult, however. Often, several factors guide a state's behavior, such that "humanitarian motives may be genuine but may be only one part of a larger constellation of motivations driving state action."[199] Transferring the responsibility to an independent agency could alleviate some of these motive-based concerns by ensuring that a legitimate basis for intervention exists.

This agency, established by the Secretary-General, would collect evidence to determine whether one of the four actionable violations has occurred. Definitions of the relevant human rights violations are well established by treaties[200] and *jus cogens*.[201] An investigation could be initiated (1) at the request of a General Assembly member, (2) by the

198. BELLAMY, *supra* note 19, at 69.

199. Martha Finnemore, *Constructing Norms of Humanitarian Intervention*, *in* THE CULTURE OF NATIONAL SECURITY: NORMS AND IDENTITY IN WORLD POLITICS 153, 158 (Peter J. Katzenstein ed., 1996).

200. *See, e.g.*, Rome Statute of the International Criminal Court, *adopted* July 17, 1998, 2187 U.N.T.S. 3.

201. *See generally* RAFAEL NIETO-NAVIA, INTERNATIONAL PEREMPTORY NORMS (*JUS COGENS*) AND INTERNATIONAL HUMANITARIAN LAW (2001), *available at* http://www.iccnow.org/documents/WritingColombiaEng.pdf.

Secretary-General, or (3) by the agency itself. UN members would be obligated to grant the agency technological assistance, monetary support, and safe passage. Further, member states would be obligated to cooperate fully with any investigation.

2. If this agency found compelling evidence of an actionable violation, it would issue a recommendation of action to the Security Council and the General Assembly.

An independent agency could also address the political will problems that doomed the interventions in Darfur and Rwanda. If the agency were to determine that genocide or a mass atrocity were occurring, the Security Council would likely face international and domestic pressure to act. Additionally, the General Assembly would have access to the report and could further pressure Security Council action.

In democratic states, three institutions create pressure: "a free press, free civil society, and governments that respond to public opinion."[202] Mass media has played a significant role in increasing public awareness of human rights crises, thus acting as a "crucial first step toward a humanitarian intervention."[203] A finding of genocide from a credible, independent UN agency would intensify the attention and scrutiny of international media. Such scrutiny would ramp up public pressure for action. Russia and China, however, remain insulated from these pressures.[204] To respond to this political insulation and lack of will to act, France has suggested that P5 states formally or informally agree to refrain from vetoing resolutions aimed at stopping human rights abuses.[205] Given Russian and Chinese distrust of Western-led interventions, this concession, though perhaps desirable, is highly unlikely.

The establishment of an agency can still serve several important functions, however. It can cement the status of the responsibility to protect as a CIL norm. States can further discuss desirable parameters for intervention and alleviate concerns of Western imperialism. Additionally,

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202. BASS, *supra* note 4, at 28.

203. *Id.* at 25.

204. *See, e.g.*, REPORTERS WITHOUT BORDERS, WORLD PRESS FREEDOM INDEX 2013 (2013), *available at* http://fr.rsf.org/IMG/pdf/classement_2013_gb-bd.pdf. The report describes how Russia's free press ranking (148 out of 179 countries) "has fallen again because, since Vladimir Putin's return to the presidency, repression has been stepped up . . . . The country also continues to be marked by the unacceptable failure to punish all those who have murdered or attacked journalists." *Id.* at 5. The report also details that China, which ranks 173 out of 179, "still refuse[s] to grant [its] citizens the freedom to be informed. The control of news and information is a key issue for [China], which [is] horrified at the prospect of being open to criticism." *Id.* at 10.

205. *See* Ripert Statement, *supra* note 127.

supplying monetary support and focusing international attention on human rights violations could both increase political pressure to respond and even inspire change on the ground.

CONCLUSION

The responsibility to protect could be a valuable tool for preventing widespread human rights violations. When atrocities occur, the legitimacy and purposes of the UN and international law are best served by having intervening states work through the UN system. Establishing a framework for action through an independent UN agency could help the responsibility to protect bridge the gap between legitimacy and legality in humanitarian intervention. Bridging this gap is not only important for international law and the UN system but also for protecting potential victims of human rights abuses.