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MOVING FORWARD WITH THE RESPONSIBILITY TO PROTECT: USING POLITICAL INERTIA TO PROTECT CIVILIANS

STEVEN J. ROSE*

Abstract: First formulated in 2005, the Responsibility to Protect has emerged onto the international legal landscape. This doctrine recently was expressed in the 2011 United Nations-authorized humanitarian intervention in Libya. Despite this promising start, the doctrine—designed to protect civilians from violence caused by their government or violence which the government is powerless to stop—has done nothing for the civilians in Syria. This Note explores the history of the Responsibility to Protect, identifies its flaws, analyzes proposed reforms, and ends with a suggested revision to the doctrine. This suggested revision would allow the political inertia of states to work for, rather than against, civilians.

INTRODUCTION

On March 19, 2011, U.S. warplanes targeted and destroyed military targets within Libya.¹ President Barack Obama did not have Congressional approval for such actions.² Instead, President Obama relied upon authorization from the United Nations Security Council and later the North Atlantic Treaty Organization.³ Two days prior to the United States' actions, the Security Council passed Resolution 1973, authorizing member countries and regional organizations to use all necessary measures to protect civilians in Libya.⁴ The resolution also implemented a no-flight zone and called on member countries to enforce an arms embargo.⁵ On March 22, 2011, NATO indicated that it would enforce the arms embargo,⁶ and by March 25, 2011, agreed to assume

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¹ Jordan J. Paust, *Constitutionality of U.S. Participation in the United Nations-Authorized War in Libya*, 26 EMORY INT'L L. REV. 43, 44 (2012).

² See *id.* at 45–46, 55.

³ *Id.*

⁴ S.C. Res. 1973, ¶ 4, U.N. Doc. S/RES/1973 (Mar. 17, 2011).

⁵ *Id.* ¶¶ 6, 13.

⁶ Press Release, Statement by the NATO Sec'y Gen. on Libya Arms Embargo (Mar. 22, 2011), http://www.nato.int/cps/en/natolive/news_71689.htm?mode=pressrelease; see

control over the international military effort.⁷ The United Nations-backed intervention has been considered the clearest example of the emerging “responsibility to protect” doctrine.⁸

For more than two and a half years, conflict has raged in Syria, resulting in an estimated 115,000 deaths as of October 2013.⁹ The rising death toll and recurrence of atrocities committed against civilians have led to a call by more than fifty countries to refer the situation in Syria for prosecution in the International Criminal Court (ICC).¹⁰ Despite this plea, neither the Security Council, NATO, nor any other regional organization has invoked the responsibility to protect doctrine to authorize the use of force.¹¹

Part I of this Note discusses the history of the conflict and intervention in Libya and the history of the conflict in Syria. Part II delineates the historic policy of non-intervention as well as the evolution and emergence of the responsibility to protect doctrine. Part III dissects two issues: whether the responsibility to protect doctrine is truly a responsibility, thus entailing an affirmative duty to act; and whether a country can use this doctrine as justification to act in the absence of Security Council authorization. Finally, this Note argues that the responsibility to protect doctrine should be approached similarly to the doctrine of self-defense.

James G. Neuger, *NATO to Intervene in Libyan Conflict, Enforce Arms Embargo*, BLOOMBERG NEWS (Mar. 22, 2011), <http://www.bloomberg.com/news/2011-03-22/nato-to-intervene-in-libyan-conflict-enforce-arms-embargo-1.html>.

⁷ Elisabeth Bumiller & David D. Kirkpatrick, *NATO to Assume New Role in Libya*, N.Y. TIMES, Mar. 25, 2011, at A9.

⁸ See Saira Mohamed, *Taking Stock of the Responsibility to Protect*, 48 STAN. J. INT'L L. 319, 330–32 (2012).

⁹ Dominic Evans, *More Than 115,000 Killed in Syrian Conflict—Monitoring Group*, REUTERS (Oct. 1, 2013), <http://uk.reuters.com/article/2013/10/01/uk-syria-crisis-toll-idUKBRE9900KD20131001>.

¹⁰ Michelle Nichols, *Over 50 Countries Ask Security Council to Refer Syria to Court*, REUTERS (Jan. 14, 2013), <http://www.reuters.com/article/2013/01/14/syria-crisis-un-icc-idUSL2N0AJ78L20130114>.

¹¹ See Yara Bayoumy & Alistair Lyon, *Syria Military Intervention No Closer Despite Rising Death Toll*, HUFFINGTON POST (Jan. 4, 2013), http://www.huffingtonpost.com/2013/01/04/syria-military-intervention_n_2407281.html; Louis Charbonneau, *U.S. Gives Up on U.N. Security Council in Syria Crisis, Blames Russia*, REUTERS (Sep. 5, 2013), <http://www.reuters.com/article/2013/09/05/us-syria-crisis-un-usa-idUSBRE9840W420130905>; Joe Sterling & Salma Abdelaziz, *As Unrest Spreads, Syrian Government Promises to Respond*, CNN WORLD (Mar. 25, 2011), <http://www.cnn.com/2011/WORLD/meast/03/24/syria.unrest/>.

I. BACKGROUND

A. *Libya*

On September 1, 1969, at age twenty-seven, Muammar Al-Gaddafi (Gaddafi) became the ruler of Libya following the overthrow of King Idris.¹² For much of the following decades, Gaddafi's relations with Western leaders were strained due to associations with extremist groups and suspicions of complicity in the 1998 bombing of Pan Am 103 over Lockerbie, Scotland.¹³ In the late 1990s, tensions with the West eased, prompting the U.N. to reduce the sanctions leveled against Libya by the U.N. in 2001.¹⁴ The spread of the political protests in Tunisia and Egypt, also known as the Arab Spring, however, did not leave Gaddafi immune.¹⁵

On January 14, 2011, twenty-eight days after the start of the Arab Spring, protesters forced Zine al-Abidine Ben Ali, the president of Tunisia out of office and out of the country.¹⁶ Fewer than two days later, Gaddafi condemned the uprisings in Tunisia, just as protests began in Libya.¹⁷ On February 11, 2011, more than two weeks of mass protests resulted in the removal from power of Hosni Mubarak, the former President of Egypt.¹⁸

¹² Tara Kelly, *Muammar Gaddafi Biography: The Rise and Fall of the Colonel*, HUFFINGTON POST (Oct. 20, 2011), http://www.huffingtonpost.com/2011/10/20/muammar-gaddafi-biography_n_1021902.html#s243765; *Muammar al-Qaddafi Biography*, BIOGRAPHY.COM, <http://www.biography.com/people/muammar-al-qaddafi-39014> (last visited Dec. 20, 2013) [hereinafter *Qaddafi Biography*]. Colonel Muammar al-Qaddafi's last name is frequently spelled either as "Qaddafi" or "Gaddafi." See Zoe Fox, *How Do You Spell 'Gaddafi'? The Linguistics Behind Libya's Leader*, TIME (Feb. 23, 2011), <http://newsfeed.time.com/2011/02/23/how-do-you-spell-gaddafi-the-linguistics-behind-libyas-leader/>. This Note adopts the spelling "Gaddafi," as used in prior issues of the *Boston College International & Comparative Law Review*. See, e.g., Vanessa Arslanian, *Beyond Revolution: Ending Lawlessness and Impunity During Revolutionary Periods*, 36 B.C. INT'L & COMP. L. REV. 121, 121 (2013).

¹³ See Kelly, *supra* note 12; *Qaddafi Biography*, *supra* note 12.

¹⁴ See Kelly, *supra* note 12; *Qaddafi Biography*, *supra* note 12.

¹⁵ See *Egypt-Inspired Protests Spread to Libya*, FOX NEWS (Feb. 16, 2011), <http://www.foxnews.com/world/2011/02/16/anti-government-protests-spread-libya/>.

¹⁶ See Angelique Chrisafis & Ian Black, *Zine al-Abidine Ben Ali Forced to Flee Tunisia as Protesters Claim Victory*, GUARDIAN (Jan. 14, 2011), <http://www.guardian.co.uk/world/2011/jan/14/tunisia-president-flees-country-protests>; Edward Cody & Joby Warrick, *Unrest Continues in Tunisia as President Ben Ali Flees Country*, WASH. POST (Jan. 15, 2011), <http://www.washingtonpost.com/wp-dyn/content/article/2011/01/14/AR2011011401131.html>.

¹⁷ Matthew Weaver, *Muammar Gaddafi Condemns Tunisia Uprising*, GUARDIAN (Jan. 16, 2011), <http://www.guardian.co.uk/world/2011/jan/16/muammar-gaddafi-condemns-tunisia-uprising>.

¹⁸ See Chris McGreal & Jack Shenker, *Hosni Mubarak Resigns—and Egypt Celebrates a New Dawn*, GUARDIAN (Feb. 11, 2011), <http://www.guardian.co.uk/world/2011/feb/11/hosni>

The following weeks saw protests in Libya along with the use of military troops by Gaddafi in an attempt to quell the unrest, including an incident where two pilots from the Libyan Air Force defected to Malta, claiming that they had been ordered to bomb civilian protesters.¹⁹ Navi Pillay, the U.N. High Commissioner for Human Rights, decried the reports of violations of human rights, and called for the immediate end to the use of machine guns, artillery, and aircraft on civilians in Libya.²⁰ The Security Council passed a resolution on February 26, 2011, which demanded an end to the violations of international humanitarian law and attacks on civilians.²¹ The Security Council also voted unanimously to refer the situation in Libya to the Office of the Prosecutor of the ICC following reports of Gaddafi's forces killing hundreds of protesters.²²

Even after this resolution, Gaddafi continued using the Libyan military in an attempt to defeat the rebels, whom he referred to as rats and armed gangs.²³ The first push for outside use of force came on March 11, 2011, when then French President Nicholas Sarkozy called for the enforcement of a no-fly zone.²⁴ President Sarkozy also suggested that the use of airstrikes to protect civilians in Libya may be justified.²⁵

mubarak-resigns-egypt-cairo; *Egypt Crisis: President Hosni Mubarak Resigns as Leader*, BBC (Feb. 12, 2011), <http://www.bbc.co.uk/news/world-middle-east-12433045>.

¹⁹ See John Hooper & Ian Black, *Libya Defectors: Pilots Told to Bomb Protesters Flee to Malta*, GUARDIAN (Feb. 21, 2011), <http://www.guardian.co.uk/world/2011/feb/21/libya-pilots-flee-to-malta>; Christopher Scicluna, *Two Libyan Fighter Pilots Defect, Fly to Malta*, REUTERS (Feb. 21, 2011), <http://www.reuters.com/article/2011/02/21/us-libya-protests-malta-idUSTRE71K52R20110221>.

²⁰ See Ian Black, *Gaddafi Urges Violent Showdown and Tells Libya 'I'll Die a Martyr'*, GUARDIAN (Feb. 22, 2011), <http://www.guardian.co.uk/world/2011/feb/22/muammar-gaddafi-urges-violent-showdown>.

²¹ See S.C. Res. 1970, ¶¶ 1–2, U.N. Doc. S/RES/1970 (Feb. 26, 2011).

²² See *id.* ¶ 4; Press Release, Security Council, In Swift, Decisive Action, Security Council Imposes Tough Measures on Libyan Regime, Adopting Resolution 1970 in Wake of Crackdown on Protesters; Situation Referred to International Criminal Court, U.N. Press Release SC/10187/Rev.1 (Feb. 26, 2011).

²³ Peter Beaumont, Ian Traynor & Nicholas Watt, *Gaddafi Takes Key Towns as NATO Squabbles over Libya Action*, GUARDIAN (Mar. 10, 2011), <http://www.guardian.co.uk/world/2011/mar/10/gaddafi-libya-nato>; *Qaddafi Vows To "Cleanse" Rebel-Held City of "Armed Gangs,"* FOX NEWS (Mar. 16, 2011), <http://www.foxnews.com/world/2011/03/16/libyan-forces-bombard-rebels-east-west/>.

²⁴ See Michael Gregory & Caren Bohan, *Obama Says Gaddafi Squeezed, Libyan Rebels Want More*, REUTERS (Mar. 11, 2011), <http://www.reuters.com/article/2011/03/11/us-libya-idUSTRE7270JP20110311>; Ruth Sherlock & Richard Spencer, *Libya: France Risks NATO Split over Call for Gaddafi Talks*, TELEGRAPH (U.K.) (July 11, 2011), <http://www.telegraph.co.uk/news/worldnews/africaandindianocan/libya/8630778/Libya-France-risks-Nato-split-over-call-for-Gaddafi-talks.html>; Nicholas Watt, *Nicolas Sarkozy Calls for Air Strikes on Libya if Gad-*

Within a week, the Security Council passed a resolution authorizing member countries to enforce a no-fly zone.²⁶ The same resolution authorized member countries to use all necessary measures to protect civilians in Libya.²⁷ Fewer than forty-eight hours after the Security Council passed Resolution 1973, British and American warships began firing cruise missiles against Libyan air defense systems.²⁸ At the same time, French warplanes began operating over the opposition-held city Benghazi in Eastern Libya.²⁹ British Prime Minister David Cameron proclaimed the strikes both legal and necessary to prevent Gaddafi from using his military against Libyan civilians.³⁰

On February 24, 2011, the United States and other coalition nations transferred command of the forces enforcing Resolution 1973 to NATO.³¹ While Admiral James Stavridis, NATO's Supreme Allied Commander in Europe at the time, ran day-to-day operations, political oversight came not from NATO but from the individual member countries.³² President Obama did, however, issue a presidential finding that authorized the use and operation of covert U.S. forces within Libya to aid the rebel forces.³³

After two weeks of air strikes, the United States withdrew its forces from NATO command, leaving the French and British forces conduct-

dafi Attacks Civilians, GUARDIAN (Mar. 11, 2011), <http://www.guardian.co.uk/world/2011/mar/11/nicolas-sarkozy-libya-air-strikes>.

²⁵ See Watt, *supra* note 24.

²⁶ See S.C. Res. 1973, *supra* note 4, ¶¶ 6–12; Watt, *supra* note 24.

²⁷ S.C. Res. 1973, *supra* note 4, ¶ 4.

²⁸ See Chris Lawrence, *U.S. Fires on Libyan Air Defense Targets*, CNN (Mar. 19, 2011), http://articles.cnn.com/2011-03-19/world/libya.us.missiles_1_military-action-libyan-people-pentagon-official?_s=PM:WORLD; Chris McGreal et al., *Allied Strikes Sweep Libya as West Intervenes in Conflict*, GUARDIAN (Mar. 19, 2011), <http://www.guardian.co.uk/world/2011/mar/19/libya-air-strikes-gaddafi-france>.

²⁹ See *Airstrikes Begin on Libya Targets*, AL JAZEERA (Mar. 19, 2011), <http://www.aljazeera.com/news/africa/2011/03/2011319175243968135.html>.

³⁰ See McGreal et al., *supra* note 28.

³¹ See Robert Burns & Erica Werner, *NATO Agrees to Take over Command of Libya No-Fly Zone, U.S. Likely to Remain in Charge of Brunt of Combat*, HUFFINGTON POST (Mar. 24, 2011), http://www.huffingtonpost.com/2011/03/24/nato-command-no-fly-libya-us-combat_n_840408.html; *NATO to Take over Libya No-fly Zone*, CBS NEWS (Mar. 24, 2011), http://www.cbsnews.com/2100-202_162-20046982.html.

³² See Nicholas Watt, Nick Hopkins & Ian Traynor, *NATO to Take Control in Libya After US, UK and France Reach Agreement*, GUARDIAN (Mar. 22, 2011), <http://www.guardian.co.uk/world/2011/mar/22/libya-nato-us-france-uk>.

³³ Mark Hosenball, *Exclusive: Obama Authorizes Secret Help for Libya Rebels*, REUTERS (Mar. 30, 2011), <http://www.reuters.com/article/2011/03/30/us-libya-usa-order-idUSTRE72T6H220110330>; Jake Trapper, Jon Karl & Russell Goldman, *President Obama Authorizes Covert Help for Libyan Rebels*, ABC NEWS (Mar. 30, 2011), <http://abcnews.go.com/International/president-obama-authorizes-covert-libyan-rebels/story?id=13259028>.

ing the majority of the NATO missions.³⁴ By this point, the NATO forces had destroyed thirty percent of Gaddafi's military capabilities.³⁵ Eleven days later, President Obama recommitted U.S. troops to the NATO mission, issuing a joint statement with Britain and France indicating that the mission would continue until Gaddafi left power.³⁶

Around this time, the ICC Prosecutor revealed that investigators had uncovered evidence that Gaddafi developed plans for the intentional use of lethal force against Libyan citizens.³⁷ The investigators reported that in fewer than two weeks, Gaddafi's forces killed more than 560 unarmed civilians.³⁸ These reports raised concerns over the potential abduction, torture, and killing of civilians targeted as Gaddafi's enemies.³⁹ The ICC Prosecutor described these killings as systematic.⁴⁰ On June 27, 2011, the ICC issued warrants of arrest for Gaddafi and one of his sons.⁴¹ After two more months of fighting, anti-Gaddafi forces, backed by NATO airstrikes, launched an assault on the Libyan capital, Tripoli.⁴²

Following the death of Muammar Gaddafi in mid-October, 2011,⁴³ NATO ended its mission in Libya.⁴⁴ On March 8, 2012, the U.N. Hu-

³⁴ See Ian Traynor & Richard Norton-Taylor, *NATO Lacking Strike Aircraft for Libya Campaign*, GUARDIAN (Apr. 5, 2011), <http://www.guardian.co.uk/world/2011/apr/05/nato-lacking-strike-aircraft-libya>.

³⁵ *Id.*

³⁶ See Mussab Al-Khairalla, *Obama Says Libya in Stalemate, but "Gaddafi Will Go,"* REUTERS (Apr. 15, 2011), <http://www.reuters.com/article/2011/04/15/us-libya-idUSTRE7270JP20110415>; Allegra Stratton, *Obama, Cameron and Sarkozy: No Let-up in Libya Until Gaddafi Departs*, GUARDIAN (Apr. 14, 2011), <http://www.guardian.co.uk/world/2011/apr/15/obama-sarkozy-cameron-libya#history-link-box>.

³⁷ See Aaron Gray-Block, *Exclusive: Gaddafi Pre-planned Attacks on Civilians: Prosecutor*, REUTERS (Apr. 5, 2011), <http://www.reuters.com/article/2011/04/05/us-libya-icc-exclusive-idUSTRE73443V20110405>.

³⁸ *See id.*

³⁹ Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi, Case No. ICC-01/11, Prosecutor's Application Pursuant to Article 58 as to Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi ¶¶ 2-3 (May 16, 2011), <http://www.icc-cpi.int/iccdocs/doc/doc1073503.pdf>.

⁴⁰ *See id.*

⁴¹ Bruno Waterfield, *ICC Issues Arrest Warrants for Gaddafi, His Son and Security Chief*, TELEGRAPH (U.K.) (June 27, 2011), <http://www.telegraph.co.uk/news/worldnews/africaandindianocan/libya/8601400/ICC-issues-arrest-warrants-for-Gaddafi-his-son-and-security-chief.html>.

⁴² *See Libyan Rebels Take Fight to Tripoli*, CBS NEWS (Aug. 20, 2011), http://www.cbsnews.com/2100-202_162-20095027.html.

⁴³ Barry Malone, *Gaddafi Killed in Hometown, Libya Eyes Future*, REUTERS (Oct. 20, 2011), <http://www.reuters.com/article/2011/10/20/us-libya-idUSTRE79F1FK20111020>.

man Rights Council issued a report in which it documented violations of human rights law by Gaddafi's forces, specifically: murder, rape, torture, and attacks on civilians and protected persons.⁴⁵

B. Syria

The unrest in the Middle East and North Africa spread to Syria in March 2011.⁴⁶ In a day denoted "a day of rage," civilians took to the streets demanding reform within the regime of Syrian President Bashar Al-Assad.⁴⁷ Amid rising international criticism of the Syrian government's violent crackdown on the protesters, Assad promised reform and forced his cabinet to resign.⁴⁸ Despite such assurances, protests continued, prompting a violent response from Assad's forces.⁴⁹ Reports indicated that forces loyal to Assad shot several Syrian soldiers who refused to fire on protesters.⁵⁰ Even Assad's decision to end forty-eight years of emergency rule in April 2011 did not quell the protests.⁵¹

The first multinational action came on May 23, 2011, when the European Union imposed sanctions on Syria, as human rights groups estimated that more than 700 civilians had been killed to that date.⁵²

⁴⁴ CNN Wire Service, *NATO Ending Libya Mission*, CNN (Oct. 28, 2011), http://articles.cnn.com/2011-10-28/africa/world_africa_belgium-nato-libya_1_nato-s-libya-moammar-gadhafi-saif-al-islam-gadhafi?_s=PM:AFRICA.

⁴⁵ See generally Rep. of the Int'l Comm'n of Inquiry on Libya, U.N. Human Rights Council, 19th Sess., Feb. 25–Mar. 23, 2012, U.N. Doc. A/HRC/19/68 (Mar. 8, 2012) (outlining evidence of excessive use of force, unlawful killing, arbitrary detentions, torture, sexual violence, and attacks on civilians).

⁴⁶ See Sterling & Abdelaziz, *supra* note 11.

⁴⁷ Elizabeth Flock, *Syria Revolution: A Revolt Brews Against Bashar al-Assad's Regime*, WASH. POST (Mar. 15, 2011), http://www.washingtonpost.com/blogs/blogpost/post/syria-revolution-revolt-against-bashar-al-assads-regime/2011/03/15/ABrwnEX_blog.html.

⁴⁸ Martin Chulov, *Syrian President Sacks Cabinet in Effort to Quell Protests*, GUARDIAN (Mar. 29, 2011), <http://www.guardian.co.uk/world/2011/mar/29/syrian-president-sacks-cabinet>; Michael Slackman, *Syria's Cabinet Resigns; Concessions Expected*, N.Y. TIMES, Mar. 30, 2011, at A12.

⁴⁹ See Katherine Marsh, *Syrian Security Forces Crack Down on Friday of Martyrs*, GUARDIAN (Apr. 1, 2011), <http://www.guardian.co.uk/world/2011/apr/01/syria-security-forces-crack-down>.

⁵⁰ Katherine Marsh, *Syrian Soldiers Shot for Refusing to Fire on Protesters*, GUARDIAN (Apr. 12, 2011), <http://www.guardian.co.uk/world/2011/apr/12/syrian-soldiers-shot-protest>; Douglas Stanglin, *Activists: Syrian Army Units Fighting Each Other over Crackdown*, USA TODAY (Apr. 28, 2011), <http://content.usatoday.com/communities/ondeadline/post/2011/04/video-syrian-soldiers-who-refuse-to-fire-on-civilians-are-being-shot/1#.UPzQmCc8B8E>.

⁵¹ See Khaled Yacoub Oweis, *Syria's Assad Ends State of Emergency*, REUTERS (Apr. 21, 2011), <http://www.reuters.com/article/2011/04/21/us-syria-idUSTRE72N2MC20110421>.

⁵² Justyna Pawlak & David Brunnstrom, *EU Imposes Sanctions on Syria's Assad*, REUTERS (May 23, 2011), <http://www.reuters.com/article/2011/05/23/us-syria-idUSLDE73N02P20110523>; Justyna Pawlak & David Brunnstrom, *EU Imposes Sanctions on Syria's Assad*,

The next round of international action against Assad came on August 18, 2011, when President Obama and the EU called for Assad's resignation.⁵³ President Obama also imposed further sanctions on Syria after reports by U.N. investigators indicated evidence of murder, torture, and abuse of children by Assad's forces.⁵⁴ On October 4, 2011, the Security Council voted on a resolution to impose sanctions on Syria, but Russia and China voted against the measure, which ultimately prevented its passage.⁵⁵ Prior to the vote, the Security Council reworded the resolution three times in efforts to avoid such a veto, even removing the word "sanctions" from the proposed resolution.⁵⁶ The United States blamed the veto on the Chinese and Russian desire to sell arms to the Syrian government.⁵⁷ Russia vehemently denied this theory.⁵⁸ At the time, Russia imported the largest amount of arms to Syria.⁵⁹ In response, Russia expressed concern that the proposed resolution evinced a "philosophy of confrontation," and closed off opportunities for a peaceful settlement.⁶⁰ The U.N. estimated at this time that approximately 2,700 civilians died in the violence.⁶¹ By December 13, 2011, the death toll passed 5,000 people.⁶² Between the October 2011 veto and the Decem-

REUTERS (May 23, 2011), <http://www.reuters.com/article/2011/05/23/us-syria-idUSLDE73N02P20110523>.

⁵³ See Joshua Hersh, *Obama: Syrian President Assad Must Step Down*, HUFFINGTON POST (Aug. 18, 2011), http://www.huffingtonpost.com/2011/08/18/obama-assad_n_930229.html; Chris McGreal & Martin Chulov, *Syria: Assad Must Resign, Says Obama*, GUARDIAN (Aug. 18, 2011), <http://www.guardian.co.uk/world/2011/aug/18/syria-assad-must-resign-obama>.

⁵⁴ See Jason Ukman & Liz Sly, *Obama: Syrian President Assad Must Step Down*, WASH. POST (Aug. 18, 2011), http://www.washingtonpost.com/blogs/checkpoint-washington/post/obama-syrian-president-assad-must-step-down/2011/08/18/gIQAM75UNJ_blog.html.

⁵⁵ See Neil MacFarquhar, *With Rare Double U.N. Veto on Syria, Russia and China Try to Shield Friend*, N.Y. TIMES, Oct. 6, 2011, at A6; Press Release, Security Council, Security Council Fails to Adopt Draft Resolution Condemning Syria's Crackdown on Anti-Government Protestors, Owing to Veto by Russian Federation, China, U.N. Press Release SC/10403 (Oct. 4, 2011).

⁵⁶ *Russia and China Veto UN Resolution Against Syrian Regime*, GUARDIAN (Oct. 4, 2011), <http://www.guardian.co.uk/world/2011/oct/05/russia-china-veto-syria-resolution>.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ See Thomas Grove & Erik Solomon, *Russia Boosts Arms Sales to Syria Despite World Pressure*, REUTERS (Feb. 21, 2012), <http://www.reuters.com/article/2012/02/21/us-syria-russia-arms-idUSTRE81K13420120221>.

⁶⁰ *Russia and China Veto UN Resolution*, *supra* note 56.

⁶¹ *Id.*

⁶² See Khaled Yacoub Oweis, *Syria Death Toll Hits 5,000, as Insurgency Spreads*, REUTERS (Dec. 13, 2011), <http://www.reuters.com/article/2011/12/13/us-syria-idUSTRE7B90F520111213>.

ber report, the Arab League and the EU each imposed additional sanctions.⁶³

As protests and government violence persisted, the Security Council once again attempted to pass a resolution condemning the violence and calling for its end.⁶⁴ Russia and China also voted down this resolution.⁶⁵ After the veto, the United States began flying unmanned aerial vehicles over Syria, strictly for observational purposes.⁶⁶ NATO, however, issued a statement announcing that it had no intention to intervene in Syria, even if the Security Council issued a mandate to protect civilians.⁶⁷

By the end of February 2012, U.N. estimates put the civilian casualty count in excess of 7,500 people.⁶⁸ In April of that year, the U.N. Special Envoy, Kofi Annan, attempted to broker a ceasefire between Assad's forces and the rebels.⁶⁹ Despite these efforts, U.N. Secretary-General Ban Ki-Moon announced more than a week later that Assad failed to implement the ceasefire measures.⁷⁰

On April 21, 2012, the Security Council passed Resolution 2043, calling for all parties to abide by the peace plan, and authorizing a ninety-day monitoring mission by unarmed U.N. observers.⁷¹ By June 16, 2012 the U.N. suspended its observer mission, due to increasing

⁶³ See Neil MacFarquhar & Nada Bakri, *Isolating Syria, Arab League Sets Broad Sanctions*, N.Y. TIMES, Nov. 28, 2011, at A1; Justyna Pawlak, *EU Imposes Sanctions on Syrian Oil Companies*, REUTERS (Dec. 2, 2011), <http://www.reuters.com/article/2011/12/02/syria-eu-sanctions-idUSL5E7N21KG20111202>.

⁶⁴ Joseph Logan & Patrick Worsnip, *Anger After Russia, China Block U.N. Action on Syria*, REUTERS (Feb. 5, 2012), <http://www.reuters.com/article/2012/02/05/us-syria-idUSTRE80S08620120205>; CNN Wire Service, *Russia, China Veto U.N. Action on Syria; Opposition Group Calls for Strike*, CNN (Feb. 4, 2012), <http://www.cnn.com/2012/02/04/world/meast/syria-unrest/index.html>.

⁶⁵ Logan & Worsnip, *supra* note 64; *Russia, China Veto U.N. Action on Syria*, *supra* note 64.

⁶⁶ See *Chinese Diplomat in Syria for Talks on Unrest*, AL JAZEERA (Feb. 18, 2012), <http://www.aljazeera.com/news/middleeast/2012/02/201221805334292171.html>.

⁶⁷ See Simon Cameron-Moore & Tulay Karadeniz, *NATO to Stay Out of Syria Even if U.N. Mandate Emerges*, REUTERS (Feb. 17, 2012), <http://www.reuters.com/article/2012/02/17/us-syria-nato-idUSTRE81G0ZF20120217>.

⁶⁸ CNN Wire Service, *U.N.: Syria Death Toll 'Well Over' 7,500*, CNN (Feb. 28, 2012), <http://edition.cnn.com/2012/02/28/world/meast/syria-unrest/index.html>.

⁶⁹ Neil MacFarquhar & Rick Gladstone, *Syria Commits to April 10 Deadline for Pulling Troops, Envoy Says*, N.Y. TIMES, Apr. 3, 2012, at A6.

⁷⁰ See *U.N. Chief: Syria Failing to Meet Cease-fire Conditions*, USA TODAY (Apr. 19, 2012), <http://usatoday30.usatoday.com/news/world/story/2012-04-18/syria-un-monitors-flee-violence/54402594/1>.

⁷¹ See S.C. Res. 2043, ¶¶ 1–2, 5–6 U.N. Doc. S/RES/2043 (Apr. 21, 2012).

danger to the observers.⁷² By then, U.N. estimates put the death toll upwards of ten thousand casualties.⁷³ One month later, Russian and Chinese votes defeated a third Security Council resolution to impose sanctions on Syria.⁷⁴

Fighting between Assad's forces and the Syrian rebels continues as of the time of this writing, and U.N. estimates in October 2013, place the estimated civilian death toll at one hundred-fifteen thousand.⁷⁵ Over the past thirty months, the U.N. Human Rights Council has repeatedly condemned violations of international humanitarian law.⁷⁶ The Independent International Commission of Inquiry for the Syrian Arab Republic has also issued multiple reports detailing such violations, including extrajudicial killings, torture, sexual violence, and the killing of children by Assad's forces.⁷⁷ As of October 2013, the U.N. has not authorized the use of force to ensure civilian safety.⁷⁸

⁷² Mike Harrison, *Violence in Syria Causes Suspension of UN Mission*, BLOOMBERG NEWS (June 16, 2012), <http://www.bloomberg.com/news/2012-06-16/un-suspends-observer-mission-in-syria-over-escalating-violence.html>.

⁷³ See *id.*

⁷⁴ See Rick Gladstone, *Friction at the U.N. as Russia and China Veto Another Resolution on Syria Sanctions*, N.Y. TIMES, Jul. 20, 2012, at A8; Michelle Nichols, *Russia, China Veto U.N. Security Council Resolution on Syria*, REUTERS (July 19, 2012), <http://www.reuters.com/article/2012/07/19/us-syria-crisis-un-idUSBRE86I0UD20120719>.

⁷⁵ Evans, *supra* note 9.

⁷⁶ See, e.g., H.R.C. Res. S-19/1, ¶¶ 1–2, U.N. Doc. A/HRC/RES/S-19/1 (June 1, 2012) (condemning in the strongest possible terms such an outrageous use of force against the civilian population); H.R.C. Res. S-18/1, ¶ 2, U.N. Doc. A/HRC/RES/S-18/1 (Dec. 2, 2011) (strongly condemning the continued widespread, systematic, and gross violations of human rights by the Syrian authorities); H.R.C. Res. S-16/1, ¶ 1, U.N. Doc. A/HRC/RES/S-16/1 (Apr. 29, 2011) (unequivocally condemning the use of lethal force against peaceful protesters by the Syrian authorities).

⁷⁷ See, e.g., Oral Update of the Independent Int'l Comm. of Inquiry on the Syrian Arab Republic, Human Rights Council, 20th Sess., U.N. Doc. A/HRC/20/CRP.1 (June 26, 2012) (detailing the massacre at Al-Houla); Rep. of the independent int'l comm. of inquiry on the Syrian Arab Republic, Human Rights Council, 17th Sess., U.N. Doc. A/HRC/S-17/2/Add.1 (Nov. 23, 2011) (outlining violations of international human rights law, international humanitarian law, and international criminal laws); Rep. of the United Nations High Comm'r for Human Rights on the Situation of Human Rights in the Syrian Arab Republic, Human Rights Council, 18th Sess., U.N. Doc. A/HRC/18/53 (Sep. 15, 2011) (detailing patterns of violence such as murder, disappearances, torture, deprivation of liberty, and persecution).

⁷⁸ Bayoumy & Lyon, *supra* note 11; Charbonneau, *supra* note 11; Sterling & Abdelaziz, *supra* note 11.

II. DISCUSSION

A. *Foundation of the Right to Protect*

The international community founded the U.N. shortly after World War II⁷⁹ with the main purpose of preventing the recurrence of war like that which had just ended.⁸⁰ In the aftermath of the war, respect for the sovereignty of nations, regardless of size or power, ensured peace.⁸¹ This respect for sovereignty is embodied in the U.N. Charter, which requires countries to refrain from the threat or use of force against other countries.⁸² Under the U.N. Charter, a country may only use force against another country in two circumstances: pursuant to authorization by the Security Council; or as necessary for self-defense.⁸³ The U.N. Charter further prohibits the U.N. from intervening in the domestic jurisdiction of a country, unless it is necessary for the maintenance or restoration of international peace and security.⁸⁴ In order to authorize measures taken against a country, including the use of force, nine of the fifteen members of the Security Council must vote for such use.⁸⁵ Additionally, a single vote against such a measure by one of the permanent members of the Security Council will defeat the measure.⁸⁶ A country taking action in self-defense must report such actions to the Security Council, which retains the right to authorize other measures.⁸⁷

From this doctrine of non-intervention the theory of the “responsibility to protect” arose as a result of humanitarian crises in the 1990s.⁸⁸ The first of these crises was the Rwandan genocide in 1994, which exemplified the U.N.’s failure to act.⁸⁹ In order to maintain peace and security during the transition of governments following the Arusha Peace Agreement, the U.N. sent a peacekeeping force of 2,548

⁷⁹ United Nations, *UN at a Glance*, U.N., <http://www.un.org/en/aboutun/index.shtml>.

⁸⁰ *Id.*; U.N. Charter pmb1.

⁸¹ See Jean Bricmont, Talk Given Before the General Assembly of the United Nations: A More Just World and the Responsibility to Protect (July 23, 2009), *available at* www.un.org/ga/president/63/interactive/protect/jean.pdf.

⁸² See U.N. Charter art. 2, para. 4.

⁸³ *Id.* arts. 42, 51.

⁸⁴ *Id.* art. 2, para. 7, art. 42.

⁸⁵ *Id.* art. 27.

⁸⁶ See *id.* The permanent five members of the Security Council are the United States of America, the United Kingdom of Great Britain and Northern Ireland, France, China, and the Russian Federation. *Id.* art. 23.

⁸⁷ *Id.* art. 51.

⁸⁸ See Mohamed, *supra* note 8, at 321–22.

⁸⁹ See *id.*

troops to Rwanda.⁹⁰ Canadian Brigadier-General Romeo Dallaire, the Force Commander of the U.N. Peacekeepers in Rwanda specifically requested authorization to use force in the event of acts of crimes against humanity.⁹¹ The U.N. Headquarters never formally acted upon the requested rules of engagement.⁹² Following the death of Belgian soldiers, who at the time were members of the U.N. peacekeeping force, Belgium withdrew the remainder of its personnel from Rwanda.⁹³ Following this withdrawal, the Security Council reduced the remaining peacekeeping force to 270 troops.⁹⁴ It was not until half a million people died that the Security Council authorized action by the French military.⁹⁵ In 2000, the Security Council accepted responsibility for not ending the genocide that killed 800,000 Rwandans.⁹⁶

The international community reacted more swiftly in 1998 when violence broke out between Serbian forces and ethnic Albanians fighting for an independent Kosovo.⁹⁷ In response to such violence, the Security Council passed Resolution 1160, which called for peace talks and political dialogue, while also implementing an arms embargo.⁹⁸ The violence continued despite the Security Council resolution, leading to another resolution that demanded a stop to the violence and indicated that further U.N. action may be taken if violence continued.⁹⁹ Despite the push by the United States and other nations for the Security Council to authorize the use of force, the Security Council took no such action due to threats by Russia and China to veto resolutions authorizing force.¹⁰⁰ Without authorization by the Security Council, NATO undertook an air campaign against Serbian President Slobodan Milosevic's

⁹⁰ See Rep. of the Indep. Inquiry into the Action of the United Nations During the 1994 Genocide in Rwanda, 7–8, U.N. Doc. S/1999/1257 (1999) [hereinafter Rwanda Report].

⁹¹ See *id.* at 9.

⁹² *Id.*

⁹³ *Id.* at 36.

⁹⁴ See Mohamed, *supra* note 8, at 322.

⁹⁵ See *id.*

⁹⁶ *UN Admits Rwanda Genocide Failure*, BBC NEWS (Apr. 15, 2000), <http://news.bbc.co.uk/2/hi/africa/714025.stm>.

⁹⁷ See Clinton W. Alexander, *NATO's Intervention in Kosovo: The Legal Case for Violating Yugoslavia's National Sovereignty in the Absence of Security Council Approval*, 22 HOUS. J. INT'L L. 403, 431 & n.133 (1999–2000).

⁹⁸ See S.C. Res. 1160 ¶¶ 4, 8, U.N. Doc. S/RES/1160 (Mar. 31, 1998).

⁹⁹ See S.C. Res. 1199 ¶¶ 4, 16, U.N. Doc. S/RES/1199 (Sept. 23, 1998); Alexander, *supra* note 97, at 431–32.

¹⁰⁰ See Mohamed, *supra* note 8, at 323.

troops.¹⁰¹ Seventy-two days after the air campaign began, President Milosevic agreed to a cease-fire plan.¹⁰²

B. *A Modern Formulation of the Responsibility to Protect*

In 2000, the former Secretary-General of the U.N., Kofi Annan delivered his Millennium Report.¹⁰³ He designed this report to reflect on the progress made by the U.N. in the preceding years, while also identifying the areas requiring development and the future role of the U.N.¹⁰⁴ In the report, the Secretary-General addressed criticism directed at the calls for increased intervention to prevent or end humanitarian crises.¹⁰⁵ The Secretary-General acknowledged the concerns that “humanitarian intervention” could be used to unnecessarily interfere with the internal affairs of another state, the possibility that a secessionist movement might deliberately induce human rights crimes to prompt outside intervention, and the inconsistent responses by countries when intervening.¹⁰⁶

In response to these concerns, the Secretary-General posed a simple question: “if 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?”¹⁰⁷ The Secretary-General explicitly rejected the use of national sovereignty as a shield for crimes against humanity, stating that the Security Council has a moral duty to act when peaceful efforts to stop such crimes have failed.¹⁰⁸

Canada, along with major foundations, created the International Commission on Intervention and State Sovereignty (ICISS) to answer the question posed by Secretary-General Annan.¹⁰⁹ The mandate of the

¹⁰¹ See *id.*; Alexander *supra* note 97, at 436–37.

¹⁰² Walter Rogers, *Milosevic Accepts Peace Plan, Finnish Envoy Says*, CNN (June 3, 1999, 9:12 AM), <http://www.cnn.com/WORLD/europe/9906/03/kosovo.peace.04/>.

¹⁰³ See *Reports of the Secretary General*, U.N. MILLENNIUM PROJECT, http://www.unmillenniumproject.org/press/report_sg.htm (last visited Nov. 21, 2013).

¹⁰⁴ See *id.*; U.N. Secretary-General, *We the Peoples: the Role of the United Nations in the Twenty-first Century, Rep. of the Secretary-General*, ¶¶ 3, 7, 12, U.N. Doc. A/54/2000 (Mar. 27, 2000) [hereinafter *Millennium Report*].

¹⁰⁵ See *Millennium Report*, *supra* note 104, ¶¶ 215–216.

¹⁰⁶ *Id.* ¶ 216.

¹⁰⁷ *Id.* ¶ 217.

¹⁰⁸ *Id.* ¶ 219.

¹⁰⁹ INT’L COMM’N ON INTERVENTION AND STATE SOVEREIGNTY, THE RESPONSIBILITY TO PROTECT, vii, (2001) [hereinafter *RESPONSIBILITY TO PROTECT*]. The ICISS consisted of members from around the world, including: Gareth Evans from Australia, Mohamed Sahnoun from Algeria, Gisèle Côté-Harper from Canada, Lee Hamilton from the United

ICISS was to promote global political consensus about how to take action through the U.N., reconciling state sovereignty and intervention.¹¹⁰ The ICISS took the next step in the transition toward a responsibility to protect doctrine in 2001 with the publication of its report, *The Responsibility To Protect*.¹¹¹ This report is founded on the premise that sovereign countries have a responsibility to protect their citizens from avoidable humanitarian harm and when a country is incapable or unwilling to do so, the responsibility passes to the international community.¹¹²

The ICISS deliberately changed the terminology in the debate surrounding humanitarian intervention from “the right to intervene” to “the right to protect.”¹¹³ In doing so, the ICISS hoped to focus on the needs of the civilians in need of protection.¹¹⁴ This also ensured the international community only bore the burden of the responsibility to protect when the civilians’ own country failed in its responsibility or became the perpetrator.¹¹⁵ By focusing on protection, rather than intervention, the ICISS also hoped to emphasize the importance of preventative, as well as remedial, actions.¹¹⁶

In implementing the responsibility to protect doctrine, the ICISS identified three specific responsibilities: to prevent, to react, and to rebuild.¹¹⁷ The responsibility to prevent, as outlined by the ICISS, involves actions taken by countries to prevent humanitarian crises.¹¹⁸ Within this responsibility are three main elements: early warning, a “preventative toolbox,” and political will.¹¹⁹ The early warning element refers to systems designed to detect the precursors to such crises, along with the identification of root causes of potential conflicts in order to

States of America, Michael Ignatieff from Canada, Vladimir Lukin from Russia, Klaus Naumann from Germany, Cyril Ramaphosa from South Africa, Fidel Ramos from the Philippines, Cornelio Sommaruga from Switzerland, Edwardo Stein Barillas from Guatemala, Ramesh Thakur from India. *Id.* at 77–79. The Advisory Board for the ICISS included individuals from Canada, Chile, the United Kingdom, Palestine, Poland, Mexico, the United States of America, Egypt, Thailand, and Argentina. *Id.* at 82. This board provided a basis in political realities for the ICISS. *See id.*

¹¹⁰ *Id.* at 81.

¹¹¹ *See id.*

¹¹² *See id.* at vii–viii.

¹¹³ *Id.* at 16–17.

¹¹⁴ *See id.* at 17.

¹¹⁵ *See id.*

¹¹⁶ *Id.*

¹¹⁷ *See id.* at xi–xiii.

¹¹⁸ *See id.* at 19.

¹¹⁹ *Id.* at 20.

enable organizations to prevent their occurrence.¹²⁰ The “preventative toolbox” described by the ICISS is the range of direct prevention efforts available.¹²¹ Such efforts include political and diplomatic efforts, economic support or sanctions, legal recourse such as arbitration or adjudication before the ICC, and military action.¹²²

The ICISS identified the responsibility to react in the event that preventative measures have proven ineffective or an offending country refuses to redress a situation as the core of a responsibility to protect.¹²³ The ICISS preferred measures short of military intervention, including the use of sanctions targeting the offending government or organization, or arms embargos.¹²⁴ The ICISS recognized military intervention as an acceptable measure, limited to extreme cases.¹²⁵ The ICISS identified six criteria for the use of military force: right authority; just cause; right intention; last resort; proportional means; and reasonable prospects.¹²⁶ Of these criteria, the two most important are just cause and right authority.¹²⁷

With regard to just cause, in the view of the ICISS there are only two sets of circumstances which would justify resorting to military force under a responsibility to protect doctrine.¹²⁸ Such circumstances are a large scale loss of life—as the product of state action, or the inability of a state to act—and a large scale “ethnic cleansing” through killing, forced expulsion, terror, or rape.¹²⁹ The ability to use military action as a preventative measure is necessary to enable countries to prevent

¹²⁰ *Id.* at 21–23.

¹²¹ *Id.* at 23.

¹²² *Id.* at 23–25.

¹²³ *Id.* at 29.

¹²⁴ *Id.* at 29–30.

¹²⁵ *Id.* at 31.

¹²⁶ *Id.* at 32. In referring to a requirement of right intention, the ICISS discusses the primary objective of any military action being the alleviation of human suffering. *Id.* at 35. The ICISS describes the criteria of last resort as requiring that the responsibility to react be discharged before military action can be taken. Responsibility to Protect, *supra* note 109, at 36. While not every possible option must have been tried and failed, there must be reasonable grounds to believe that the measures not taken would have been unsuccessful. *See id.* The criteria of proportional means adopts the doctrine from the laws of war, in requiring that the scale, duration and intensity of the military action be proportional to the ends to be achieved. *See id.* at 37. Reasonable prospects requires that military action be justified by a reasonable chance of averting the suffering which justifies the actions. *Id.*

¹²⁷ *See id.* at 32.

¹²⁸ *Id.*

¹²⁹ *Id.* The report specifically disclaims any requirement for the loss of life to have a genocidal intent by the perpetrators. *Id.*

genocides and other atrocities, rather than being required to wait until such atrocities begin before taking action.¹³⁰

The primary authority for sanctioning the use of military force in the context of the responsibility to protect is the Security Council, according to the ICISS.¹³¹ The U.N. Charter contains explicit prohibitions on intervention, with no exception for humanitarian interests.¹³² As such, Security Council authorization must be sought prior to any military intervention, though the Security Council also has a responsibility to deal expediently with such requests.¹³³ The ICISS did suggest a reform to the Security Council, due to the ability of any of the permanent members to hold hostage any vote authorizing the use of force.¹³⁴ This reform consists of the adoption of a code of conduct regarding the use of the veto on votes authorizing the use of force in response to large scale losses of life.¹³⁵ The code would call upon the permanent members to refrain from vetoing an otherwise majority vote on such an authorization, if the member did not have significant state interests at stake.¹³⁶ The ICISS did recognize that due to conflicts between the permanent five members, or differences in opinion as to how to react to a particular situation, the Security Council may be unable or unwilling to act.¹³⁷ In such a circumstance, the ICISS envisions a role for the U.N. General Assembly, or a regional organization such as NATO to act.¹³⁸

The final responsibility inherent to a responsibility to protect is rebuilding.¹³⁹ This responsibility refers not only to the reconstruction of infrastructure which was destroyed, but also the reconstruction of the society impacted.¹⁴⁰ The ICISS identified the reintegration and reconciliation of former combatants as the most important form of re-

¹³⁰ *See id.* at 33.

¹³¹ *Id.* at 49.

¹³² *See* U.N. Charter art. 2, paras. 4, 7; RESPONSIBILITY TO PROTECT, *supra* note 109, at 49.

¹³³ RESPONSIBILITY TO PROTECT, *supra* note 109, at 50. The ICISS also suggests that in the course of responding to such requests, the Security Council should seek information about the alleged situations in order to confirm or deny the accuracy of the information prompting the request. *See id.*

¹³⁴ *Id.* at 51.

¹³⁵ *See id.*

¹³⁶ *See id.*

¹³⁷ *Id.* at 53.

¹³⁸ *See id.* at 53–54.

¹³⁹ *See id.* at Synopsis.

¹⁴⁰ *Id.* at 39.

building.¹⁴¹ The most effective way to achieve such reconciliation is not by having the rebuilding efforts performed only by the interveners, but by the former combatants themselves.¹⁴² Rather than focusing on the actual construction of infrastructure, the primary responsibility of the intervening forces is to provide security throughout the process, including rebuilding local police and security forces.¹⁴³ The long-term goals of the intervening countries are the development and growth of the affected state.¹⁴⁴ As such, the intervening countries have a responsibility to end economic and other non-military sanctions which had been imposed on the affected state.¹⁴⁵

The report by the ICISS ended with a series of suggestions for both the U.N. General Assembly and the Security Council.¹⁴⁶ These recommendations included adopting the principals outlined by the report, a definition of the threshold for military action, and the agreement by the permanent members of the Security Council regarding the use of the veto power in calls for military intervention to preserve human life.¹⁴⁷ While the U.N. has not implemented all of the recommendations by the ICISS, the ideas contained within the report have been influential in the international community.¹⁴⁸

C. Modern Implementations of the Responsibility to Protect

After the U.N. World Summit in 2005, the U.N. General Assembly affirmed the idea that a country is responsible for the protection of its citizens from genocide, war crimes, ethnic cleansing, and crimes against humanity in its World Summit Outcome document.¹⁴⁹ In one breath the General Assembly affirmed the concept of international action when a country fails in this duty to protect, and reaffirmed the necessity of a Security Council resolution to authorize military action.¹⁵⁰ The General Assembly expressly advocated for states to participate in the implementation of responsibility to protect doctrine through re-

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.* at 40–41.

¹⁴⁴ *See id.* at 42–43.

¹⁴⁵ *See id.* at 42.

¹⁴⁶ *Id.* at 74–75.

¹⁴⁷ *Id.*

¹⁴⁸ *See* discussion *infra* Part II.C.

¹⁴⁹ 2005 World Summit Outcome, G.A. Res. 60/1, ¶ 138, U.N. Doc. A/RES/60/1 (Oct. 24, 2005) [hereinafter Summit Outcome].

¹⁵⁰ *See id.* ¶ 139.

gional and sub-regional groups.¹⁵¹ The adoption of these principals was well received in the international community, even called “the only unequivocal success in September 2005.”¹⁵² The U.N. describes the responsibility to protect as standing for the proposition that a country can no longer use state sovereignty as a shield from outside interference in the event of genocide or other crimes against humanity.¹⁵³

Since the adoption of the Summit Outline, the U.N. Secretary-General held one formal debate and two informal interactive dialogues to better define the extent and application of the responsibility to protect.¹⁵⁴ In 2009, the U.N. Secretary-General identified three pillars essential to his plan for implementing a responsibility to protect: first, the protection responsibilities of the state; second, international assistance and capacity-building; and third, timely and decisive response.¹⁵⁵ In a report two years later, the Secretary-General focused on the importance of using regional and sub-regional groups to implement his three pillars.¹⁵⁶ The Secretary-General indicated that participation by regional and sub-regional groups was important in each of the dozen situations in which responsibility to protect ideals had been implemented in the previous three years.¹⁵⁷ A global-regional-sub-regional partnership is considered the “surest path for advancing the responsibility to protect [doctrine].”¹⁵⁸

The responsibility to protect doctrine has proven to be more than mere words since its inception, with the U.N. Secretary-General citing the use of responsibility to protect principals as informing U.N. actions in Darfur, Kenya, Kyrgyzstan, Côte d’Ivoire, Yemen, Abyei, Syria, and Libya.¹⁵⁹ In each situation except Libya, the responsibility to protect took effect without the use of military force.¹⁶⁰

¹⁵¹ *Id.*

¹⁵² See Thomas G. Weiss, *R2P After 9/11 and the World Summit*, 24 WIS. INT’L L.J. 741, 745 (2006) (quoting Gert Rosenthal, former President of the U.N. Economic and Social Council).

¹⁵³ See Office of the Special Adviser on the Prevention of Genocide, *The Responsibility to Protect*, U.N., <http://www.un.org/en/preventgenocide/adviser/responsibility.shtml>.

¹⁵⁴ See U.N. Secretary-General, *The Role of Regional and Sub-Regional Arrangements in Implementing the Responsibility to Protect: Rep. of the Secretary-General*, ¶ 1, U.N. Doc. A/65/877-S/2011/393 (June 27, 2011) [hereinafter *Regional Role Report*].

¹⁵⁵ U.N. Secretary-General, *Implementing the Responsibility to Protect: Rep. of the Secretary-General*, ¶ 11, U.N. Doc. A/63/677 (Jan. 12, 2009) [hereinafter *Implementing R2P Report*].

¹⁵⁶ See *Regional Role Report*, *supra* note 154.

¹⁵⁷ *Id.* ¶ 4.

¹⁵⁸ *Id.* ¶ 44.

¹⁵⁹ *Id.* ¶ 30.

¹⁶⁰ *See id.*

In 2004, the Security Council exercised its Chapter VII powers to create the U.N. Operation in Côte d'Ivoire (UNOCI).¹⁶¹ UNOCI's mandate included monitoring the ceasefire, monitoring the movement of armed groups, assisting in disarmament, demobilization, reintegration, repatriation, resettlement, and assistance in the fields of human rights and law and order.¹⁶² In 2010, Côte d'Ivoire was set to hold its first election in ten years after the former president Laurent Gbagbo postponed elections six times following the end of his term in 2005.¹⁶³ After the U.N. certified vote, the electoral commission named Gbagbo's challenger, Alassane Ouattara the winner.¹⁶⁴ Despite the U.N. declaring Ouattara the winner, Gbagbo refused to leave office, naming his own cabinet.¹⁶⁵ For nearly six months following the election, forces loyal to Gbagbo and Ouattara battled throughout Côte d'Ivoire.¹⁶⁶

On March 30, 2011, the Security Council passed Resolution 1975, which reiterated the responsibility of the government of Côte d'Ivoire to protect its civilians, and authorized the UNOCI to use 'all necessary means' to protect civilians.¹⁶⁷ Five days later, UNOCI forces targeted and destroyed military installations belonging to Gbagbo in the city of Abidjan.¹⁶⁸ Within hours of this operation, Gbagbo's forces either deserted or negotiated for surrender.¹⁶⁹ A week later, former president Gbagbo was captured by forces loyal to Ouattara.¹⁷⁰ Gbagbo is currently

¹⁶¹ S.C. Res. 1528, ¶ 1, U.N. Doc. S/RES/1528 (Feb. 27, 2004).

¹⁶² *Id.* ¶ 6.

¹⁶³ Adam Nossiter, *After Delays, Citizens Vote for a President in Ivory Coast*, N.Y. TIMES, Nov. 1, 2010, at A4.

¹⁶⁴ See Rukmini Callimachi, *African Leaders Call on Gbagbo to Step Down*, WASH. TIMES (Dec. 8, 2010), <http://www.washingtontimes.com/news/2010/dec/8/un-envoy-ivory-coast-election-has-1-winner/?page=all>.

¹⁶⁵ See *id.*; Xan Rice, *Conflict Looms over Ivory Coast While Poll-loser Gbagbo Refuses to Cede Control*, GUARDIAN (Dec. 6, 2010), <http://www.guardian.co.uk/world/2010/dec/06/ivory-coast-election-stalemate-gbagbo>.

¹⁶⁶ See *Ivory Coast: 12 Charged in Postelection Violence*, N.Y. TIMES, Aug. 11, 2011, at A7.

¹⁶⁷ S.C. Res. 1975, ¶ 6, U.N. Doc. S/RES/1975 (Mar. 30, 2011).

¹⁶⁸ See Alex Perry, *The Specter of Genocide*, TIME (Apr. 18, 2011), available at <http://www.time.com/time/magazine/article/0,9171,2063870,00.html>. While not the capital, Abidjan is the largest city in Côte d'Ivoire, its commercial center, and home to the seat of government and the U.S. embassy. Bureau of Consular Affairs, *Côte d'Ivoire Country Specific Information*, U.S. DEP'T OF STATE, http://travel.state.gov/travel/cis_pa_tw/cis/cis_1094.html (last visited Nov. 12, 2013).

¹⁶⁹ Perry, *supra* note 168.

¹⁷⁰ See Xan Rice & Nicholas Watt, *Ivory Coast's Laurent Gbagbo Arrested—Four Months On*, GUARDIAN (Apr. 11, 2011), <http://www.guardian.co.uk/world/2011/apr/11/ivory-coast-former-leader-arrested>.

awaiting trial for crimes against humanity before the ICC, which found him fit to stand trial.¹⁷¹

During the 2011 uprising in Libya, the international response to Gaddafi's actions was a near unanimous condemnation.¹⁷² When the Security Council adopted resolution 1970, enacting an arms embargo against Libya, it specifically referred to the responsibility of the Libyan authorities to protect the Libyan population.¹⁷³ When the Security Council adopted resolution 1973, fewer than three weeks later, it relied upon the responsibility to protect as justification for authorizing the use of force and the implementation of a no-fly zone.¹⁷⁴ In authorizing the use of force, the Security Council asserted authority under Chapter VII of the U.N. Charter, even though it did not specifically cite a threat to international peace.¹⁷⁵

III. ANALYSIS

A. *Remaining Questions*

There are several questions still remaining from the modern implementation of the responsibility to protect.¹⁷⁶ The first of these arises from the name of the doctrine itself: does the responsibility to protect actually constitute a responsibility?¹⁷⁷ That is, does it impose an obligation to act?¹⁷⁸ By the language of the ICISS report, it is clear that each country has an affirmative action to protect its own citizens.¹⁷⁹ The

¹⁷¹ See *Ivory Coast's Laurent Gbagbo Fit for Hague Trial*, BBC NEWS AFRICA (Nov. 2, 2012), <http://www.bbc.co.uk/news/world-africa-20185558>; Prosecutor v. Laurent Gbagbo, Case No. ICC-02/11-01/11, Charges, http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/icc0211/related%20cases/icc02110111/Pages/icc02110111.aspx (last visited Dec. 20, 2013).

¹⁷² See Mehrdad Payandeh, *The United Nations, Military Intervention, and Regime Change in Libya*, 52 VA. J. INT'L L. 355, 372, 374–75 (2012) (identifying condemnation by the U.N. High Commissioner for Human Rights and the U.N. Human Rights Council, the European Union, the Organization of the Islamic Conference, the Peace and Security Council of the African Union, the African Commission on Human and People's Rights, the suspension of Libya from the U.N. Human Rights Council and the Arab League, and the description of the actions as genocide by the Gulf Cooperation Council and the foreign minister of Luxembourg).

¹⁷³ S.C. Res. 1970, *supra* note 21, pmb1.

¹⁷⁴ See S.C. Res. 1973, *supra* note 4, pmb1, ¶¶ 4, 6.

¹⁷⁵ See *id.* pmb1; Payandeh, *supra* note 172, at 376.

¹⁷⁶ See Carlo Focarelli, *The Responsibility to Protect Doctrine and Humanitarian Intervention: Too Many Ambiguities for a Working Doctrine*, 13 J. CONFLICT & SEC. L. 191, 200–05 (noting different opinions among states towards the responsibility to protect doctrine).

¹⁷⁷ See *id.*

¹⁷⁸ See *id.*

¹⁷⁹ See RESPONSIBILITY TO PROTECT, *supra* note 109, at 17.

ICISS makes clear that other countries face a responsibility to protect only when the host country fails in its own responsibilities.¹⁸⁰ The U.N. adopted both of these premises in its 2005 World Summit Outcome.¹⁸¹ It is less clear, however, whether other countries have an affirmative duty to act when the host country fails in its responsibilities.¹⁸²

The language in the ICISS report may signal the existence of such an affirmative duty, including the statement “[w]hen preventative measures fail to resolve or contain the situation and when a state is unable or unwilling to redress the situation, then interventionary measures by other members of the broader community of states may be required.”¹⁸³ In discussing the use of military force in a responsibility to protect scenario, the ICISS is similarly definitive in stating that in certain situations other countries are required to act when a host country has degenerated to the point that massacre, genocide, or other ethnic cleansings are possible.¹⁸⁴ The corresponding paragraphs in the World Summit Report are less forceful than the ICISS report, stating only that the international community, acting through the U.N., has the responsibility to use appropriate means, including military force if authorized by the Security Council.¹⁸⁵ The retreat from a more forceful obligation is striking due to the fact that a lack of political commitment was the primary reason for the U.N.’s failure to prevent genocide in Rwanda.¹⁸⁶

The ICISS report also goes beyond the World Summit Outcome by addressing a situation in which the Security Council refuses or fails to act.¹⁸⁷ The ICISS identified several avenues of action for countries to implement the responsibility to protect in such an event—namely action by the U.N. General Assembly, action by a regional or sub-regional group against a member country, or action by a regional group against a non-member country followed by seeking *ad hoc* authorization by the General Assembly or Security Council.¹⁸⁸ The ICISS recognized that failure of the Security Council to act would not necessarily cause other

¹⁸⁰ See *id.* at 29.

¹⁸¹ See Summit Outcome, *supra* note 149, ¶¶ 138–139.

¹⁸² See Naomi Rao, *The Choice to Protect: Rethinking Responsibility for Humanitarian Intervention*, 44 COLUM. HUM. RTS. L. REV. 697, 711–27 (2013).

¹⁸³ RESPONSIBILITY TO PROTECT, *supra* note 109, at 29.

¹⁸⁴ *Id.* at 31.

¹⁸⁵ See Summit Outcome, *supra* note 149, ¶ 139.

¹⁸⁶ See Rwanda Report, *supra* note 90, at 30; *Implementing R2P Report*, *supra* note 155, ¶ 6.

¹⁸⁷ See RESPONSIBILITY TO PROTECT, *supra* note 109, at 53–55.

¹⁸⁸ See *id.* at 53–54.

countries to rule out taking action despite the lack of authorization.¹⁸⁹ More importantly, the report recognized that such a failure would damage the credibility and stature of the U.N. as a whole.¹⁹⁰

Despite these concerns, the U.N., through the World Summit Outcome, does not specifically address states' obligations in the event that the Security Council does not act.¹⁹¹ The World Summit Outcome states that military actions are to be implemented through the Security Council's Chapter VII authority, even though it leaves open the possibility of countries taking non-military actions similar to those outlined in the ICISS report.¹⁹² While no affirmative duty to implement the responsibility to protect doctrine exists, a customary norm may be developing that requires some form of action that is less than the use of military force.¹⁹³ State practice lends support to the conclusion that no positive duty exists to use military force, even when authorized by the Security Council, reflected in the language used in the resolution, which authorizes rather than mandates the use of force.¹⁹⁴ Indeed, the only Security Council resolution authorizing member countries to use force resulted in action taken only by NATO.¹⁹⁵ It appears that at this time the term "responsibility" is a misnomer, imposing no affirmative duty to protect.¹⁹⁶

The second remaining question is whether, and to what extent, a country or regional organization may take action to implement the responsibility to protect without U.N. authorization.¹⁹⁷ At first glance the language of the ICISS report appears to foreclose the possibility of tak-

¹⁸⁹ See *id.* at 55.

¹⁹⁰ See *id.*

¹⁹¹ See generally Summit Outcome, *supra* note 149, ¶¶ 138–139 (stating that only Chapter VII powers require Security Council action).

¹⁹² See Summit Outcome, *supra* note 149, ¶ 139; RESPONSIBILITY TO PROTECT, *supra* note 109, at 29–31 (including non-military sanctions such as: arms embargos, ending military cooperation, financial sanctions, restrictions on access to petroleum products, restrictions on diplomatic representation, restriction on travel, and suspension or expulsion from international or regional bodies).

¹⁹³ See Rachel VanLandingham, *Politics or Law? The Dual Nature of the Responsibility to Protect*, 41 DENV. J. INT'L L. & POL'Y 63, 82–85 (2012) (arguing that an affirmative duty to take some condemnatory action is in the process of becoming customary international law).

¹⁹⁴ Compare S.C. Res. 1973, *supra* note 4, ¶ 4 (“[a]uthorizes Member States . . . to take all necessary measures . . . to protect civilians.”), with S.C. Res. 1970, *supra* note 21, ¶ 9 (“Decides that all Member States shall immediately take the necessary measures to prevent the direct or indirect supply . . . of arms and related materiel.”) (emphasis added).

¹⁹⁵ See Bumiller & Kirkpatrick, *supra* note 7.

¹⁹⁶ See Mohamed, *supra* note 8, at 328 (describing the significance of replacing “responsibility” with “preparedness” as indicating a retreat from an affirmative duty).

¹⁹⁷ See Rao, *supra* note 182, at 735–37.

ing action without authorization.¹⁹⁸ This requirement for authorization is supported by the U.N. Charter itself, which recognizes only two instances involving the legal use of force against another country: as authorized by the Security Council exercising its Chapter VII authority, or in self-defense.¹⁹⁹ The Secretary-General of the U.N. has endorsed this interpretation of the responsibility to protect by requiring Security Council authorization for military action.²⁰⁰ The weight of scholarly works also falls on the side of declaring unilateral humanitarian intervention in contravention to the U.N. Charter and international law.²⁰¹ Among the primary concerns underlying the prohibition on action without U.N. authorization is the potential to use humanitarian intervention as a pretext for war.²⁰²

Although such arguments appear to end the inquiry, the ICISS report specifically addresses scenarios in which the use of force may be appropriate absent Security Council authorization.²⁰³ One of the major flaws identified by the ICISS in relying on the Security Council as the sole authority for military force is the possibility that the Security Council will fail to act.²⁰⁴ Specifically, the ICISS identified the possibility for the U.N. General Assembly to convene in an emergency special session under the “Uniting for Peace” procedures.²⁰⁵ The General Assembly does not have the authority possessed by the Security Council to enable military action, although such a meeting could give legitimacy—

¹⁹⁸ See RESPONSIBILITY TO PROTECT, *supra* note 109, at 47–49 (“Because the prohibitions and presumptions against intervention are so explicitly spelled out in the Charter, and since no ‘humanitarian exception’ to these prohibitions is explicitly provided for, the role of the Security Council becomes of paramount importance.”).

¹⁹⁹ See U.N. Charter art. 2, para. 4, arts. 42, 51.

²⁰⁰ See U.N. Secretary-General, *Responsibility to Protect: Timely and Decisive Response: Rep. of the Secretary-General*, ¶ 32, U.N. Doc. A/66/874-S/2012/578 (July 25, 2011) [hereinafter *Timely and Decisive Response Report*].

²⁰¹ See, e.g., Sean D. Murphy, *Criminalizing Humanitarian Intervention*, 41 CASE W. RES. J. INT’L L. 341, 341–42 (2009) (arguing that under current international law unilateral humanitarian intervention is considered illegal); Ryan Goodman, *Humanitarian Intervention and Pretexts for War*, 100 AM. J. INT’L L. 107, 111 (2006) (“[I]t is difficult to escape the conclusion that international law forbids the unilateral use of force to rescue victims of a humanitarian catastrophe.”).

²⁰² See Robert J. Delahunty & John Yoo, *From Just War to False Peace*, 13 CHI. J. INT’L L. 1, 35, 37, 44–45 (2012); Bricmont, *supra* note 81; Jide Nzelibe, *Courting Genocide: The Unintended Effects of Humanitarian Intervention*, 97 CAL. L. REV. 1171, 1178 (2009); Goodman, *supra* note 201, at 112–16; David M. Kresock, “Ethnic Cleansing” in the Balkans: *The Legal Foundations of Foreign Intervention*, 27 CORNELL INT’L L.J. 203, 238 (1994).

²⁰³ See RESPONSIBILITY TO PROTECT, *supra* note 109, at 53–54.

²⁰⁴ See *id.*

²⁰⁵ *Id.* at 53.

if not legality—to the actions.²⁰⁶ The biggest drawback to this procedure is the improbability that the required two-thirds majority could be assembled to legitimize actions taken without Security Council approval.²⁰⁷

The ICISS also foresaw a role for regional and sub-regional organizations to implement the responsibility to protect.²⁰⁸ The U.N. Secretary-General echoed the important role of regional and sub-regional groups in ensuring the responsibility to protect is carried out, calling more effective collaboration with such groups a “key plank” in his strategy to implement the responsibility.²⁰⁹ Although the ICISS report specifically contemplates leeway in allowing regional or sub-regional groups to take military action and seeking Security Council authorization after the fact,²¹⁰ the role envisioned for such groups by the Secretary-General predicates any military action upon prior Security Council authorization.²¹¹

Allowing regional and sub-regional organizations such as NATO or the African Union to take action against member countries has significant advantages.²¹² Not only are these organizations typically in a better position to act, but they also often have a greater understanding of the context and background of the issues giving rise to the need for intervention.²¹³ Moreover, some regional and sub-regional groups have expressly given themselves the right to intervene in the event of humanitarian crises, without expressly requiring Security Council authorization.²¹⁴ This ability presents a solution to the problem of a lack of political commitment by the Security Council and minimizes the risk of pretextual war, because the intervening countries may be subject to intervention themselves.²¹⁵ Regional groups also have the ability to set higher levels of

²⁰⁶ See *id.*

²⁰⁷ See *id.*

²⁰⁸ See *id.* at 53–54.

²⁰⁹ See *Regional Role Report*, *supra* note 154, ¶ 4.

²¹⁰ RESPONSIBILITY TO PROTECT, *supra* note 109, at 54.

²¹¹ See *Regional Role Report*, *supra* note 154, ¶ 5.

²¹² See RESPONSIBILITY TO PROTECT, *supra* note 109, at 53–54.

²¹³ *Id.*

²¹⁴ See Jeremy I. Levitt, *The Peace and Security Council of the African Union: The Known Unknowns*, 13 *TRANSNAT'L L. & CONTEMP. PROBS.* 109, 127–28 (2003) (arguing that although the provisions granting such rights conflict with the U.N. Charter they are not necessarily unlawful or invalid).

²¹⁵ See RESPONSIBILITY TO PROTECT, *supra* note 109, at 54; Rwanda Report, *supra* note 90, at 30.

humanitarian standards and have the most at stake to ensure the maintenance of such standards.²¹⁶

There is a more fundamental problem with assuming that the language of the ICISS report and the U.N. Charter prohibit intervention without prior authorization because such an assumption focuses only on implementation of the responsibility to protect through its last resort: military intervention.²¹⁷ The responsibility to protect is not a choice between sitting idly by and using military force to intervene.²¹⁸ In fact, both the ICISS and the Secretary-General focused on the use of force only as a last resort, preferring less or non-coercive means to uphold the responsibility to protect.²¹⁹ Even within the coercive measures identified, the use of military force is but one option, less preferable than economic, political, and military sanctions.²²⁰ Unlike the prohibition on the use of force without Security Council authorization or in self-defense, the U.N. Charter does not prohibit sanctions to uphold its principles, even those the U.N. does not specifically authorize.²²¹ In addition to individual countries imposing unilateral economic sanctions, the U.N. Charter allows regional or sub-regional groups to do the same.²²²

The ability of regional groups to impose economic sanctions has been reinforced most markedly by the response of the U.N. and the Secretary-General to the Arab League's suspension of Libya.²²³ This suspension preceded a similar suspension by the U.N. General Assem-

²¹⁶ Michael C. Davis, *International Intervention in an Age of Crisis and Terror: U.N. Reform and Regional Practice*, 15 TUL. J. INT'L & COMP. L. 1, 36 (2006).

²¹⁷ See *Implementing R2P Report*, *supra* note 155, ¶ 40; see also Summit Outcome, *supra* note 149, ¶ 139 (predicating the use of force on the failure of peaceful means and a manifest failure by the host state to uphold its responsibility to protect).

²¹⁸ See *Implementing R2P Report*, *supra* note 155, ¶ 7 ("Humanitarian intervention posed a false choice between two extremes: either standing by in the face of mounting civilian deaths or deploying coercive military force to protect the vulnerable and threatened populations.").

²¹⁹ See *id.* ¶ 40; *Implementing R2P Report*, *supra* note 155, ¶ 40; RESPONSIBILITY TO PROTECT, *supra* note 109, at 29.

²²⁰ RESPONSIBILITY TO PROTECT, *supra* note 109, at 29–31.

²²¹ See Sarah H. Cleveland, *Norm Internalization and U.S. Economic Sanctions*, 26 YALE J. INT'L L. 1, 51–52 (2001).

²²² GEORG RESS, *Article 53*, in *THE CHARTER OF THE UNITED NATIONS: A COMMENTARY* 722, 731–32 (Bruno Simma ed., 1994). Economic sanctions are not considered enforcement actions for purposes of the U.N. Charter. *Id.* Under the U.N. Charter Article 53, a regional or sub-regional group or agency must get authorization from the Security Council before it may take any enforcement actions. U.N. Charter art. 53, para. 1.

²²³ See *Regional Role Report*, *supra* note 154, ¶ 34; *Arab League Suspends Libya Delegation—TV*, REUTERS (Feb. 22, 2011), <http://www.reuters.com/article/2011/02/22/libya-protests-league-idUSLDE71L2GK20110222>.

bly, and both suspensions took place before any action by the Security Council.²²⁴ Notably, the Secretary-General did not condemn such unilateral action, but rather held it out as an instance of cooperation between regional and global organizations, and suggested expanding the use of such actions.²²⁵ Similarly, Syria has remained suspended from the Arab League, despite the lack of Security Council action.²²⁶ Like the Arab League, the EU recently renewed its own sanctions against Syria.²²⁷ These economic measures are the type of targeted sanctions envisioned by the ICISS because they continue the arms embargo against Syria while allowing “non-lethal” aid to the civilian population.²²⁸ Not only did these sanctions come without Security Council authorization, but they came only months after the Security Council vetoed a resolution to impose economic sanctions on Syria.²²⁹ Actions to implement the responsibility to protect which do not involve military action, therefore, enjoy greater acceptance than using military force without Security Council authorization, which remains potentially legitimate, but not legal.²³⁰

B. *Moving the Responsibility to Protect Forward*

Scholars have offered varied suggestions for reforms to make the responsibility to protect doctrine more efficacious.²³¹ The ICISS in its report suggested a modification to the veto power exercised by the

²²⁴ *Regional Role Report*, *supra* note 154, ¶ 34.

²²⁵ *See id.*

²²⁶ *See* Bayoumy & Lyon, *supra* note 11; Yasmine Saleh & Ayman Samir, *Arab League Suspends Syria as Global Pressure Rises*, REUTERS (Nov. 13, 2011), <http://www.reuters.com/article/2011/11/13/us-arabs-syria-idUSTRE7AB0CP20111113>; Sterling & Abdelaziz, *supra* note 11.

²²⁷ *EU's Syria Sanctions to Help Civilians*, SKY NEWS (Feb. 19, 2013), <http://www.allnewsau.com/news/eu-s-syria-sanctions-to-help-civilians>.

²²⁸ *See id.*; Jones Hayden & Jonathan Ferziger, *EU Amends Sanctions Against Syria to Boost Aid for Civilians*, BLOOMBERG NEWS (Feb. 18, 2013, 2:53 PM), <http://www.bloomberg.com/news/2013-02-18/eu-amends-syria-sanctions-to-boost-aid-for-protecting-civilians.html>.

²²⁹ *See* Gladstone, *supra* note 74 (indicating that the resolution garnered eleven votes in favor of passage, with Pakistan and South Africa abstaining, and Russia and China providing the votes against passage which vetoed the resolution; and that the resolution came to the Security Council under Chapter VII of the U.N. Charter).

²³⁰ *See* RESPONSIBILITY TO PROTECT, *supra* note 109, at 53–54 (noting instances in which authorization was sought after the fact); Ress, *supra* note 222, at 731; Cleveland, *supra* note 230, at 51–52.

²³¹ *See, e.g.*, Davis, *supra* note 216 (arguing for a two-track approach consisting of reforms to the U.N., and development of regional institutions); *infra* note 232 and accompanying text.

permanent members of the Security Council.²³² The ICISS found it unconscionable that one permanent member, through the exercise of its veto power, could effectively overrule the opinion of the rest of the world about issues of humanitarian concern.²³³ To address these concerns, the ICISS suggested that the permanent members agree to a code of conduct, in which they would forgo the use of their veto powers for resolutions to end or prevent a humanitarian crisis unless their own vital national interests were at stake.²³⁴ Although one draft of the World Summit Outcome included an invitation to the permanent members to refrain from using their veto powers on resolutions dealing with crimes implicating the responsibility to protect, this language was cut from the final document.²³⁵ Adoption of such a proposal would prevent the unilateral veto of an otherwise approved resolution.²³⁶ Such a change would not be a perfect solution, particularly for the “overriding failure” of the U.N. action or inaction in Rwanda—the lack of political will.²³⁷ In the ongoing situation in Syria, despite the fact that a proposed resolution garnered eleven of fifteen possible affirmative votes, it still took more than four months for a Security Council statement simply condemning the violence in Syria.²³⁸

Another suggested development for the responsibility to protect is a shift in the oversight responsibility to regional or sub-regional groups.²³⁹ The basis for this reform would be to allow regional or sub-regional groups to develop independent human rights standards, and would predicate non-intervention of the regional group on the maintenance of these standards.²⁴⁰ This reform however, possesses several problems.²⁴¹ As articulated, the change lacks any timetable for the de-

²³² RESPONSIBILITY TO PROTECT, *supra* note 109, at 51.

²³³ *Id.*

²³⁴ *Id.*

²³⁵ President of the General Assembly, Revised Draft Outcome Document of the High Level-Plenary Meeting of the General Assembly of September 2005, 119, U.N. Doc.A/59/HLPM/CRP.1/Rev.2 (Aug. 5, 2005). The U.S. Representative to the U.N. indicated that the United States would not accept any legal obligation on the Security Council based on the responsibility to protect. Letter from John R. Bolton, Representative of the U.S. to the United Nations (Aug. 30, 2005), *available at* [www.responsibilitytoprotect.org/files/US_Boltonletter_R2P_30Aug05\[1\].pdf](http://www.responsibilitytoprotect.org/files/US_Boltonletter_R2P_30Aug05[1].pdf).

²³⁶ *See* RESPONSIBILITY TO PROTECT, *supra* note 109, at 51; *Russia and China Veto UN Resolution*, *supra* note 56.

²³⁷ Rwanda Report, *supra* note 90, at 30.

²³⁸ *See* Gladstone, *supra* note 74; *Russia and China Veto UN Resolution*, *supra* note 56.

²³⁹ *See* Davis, *supra* note 216, at 31, 36 (describing a two-track approach for reform consisting of U.N. reform and development of regional organizations).

²⁴⁰ *See id.* at 36–37.

²⁴¹ *See infra* notes 242–245 and accompanying text.

velopment for such human rights standards.²⁴² More concerning is the fact that it does nothing to solve the overriding failure leading to the genocide in Rwanda because it still requires other members of the regional group to have the political will to act.²⁴³ Unlike the U.N., the neighboring countries within the regional or sub-regional group may not wish to take steps to intervene, knowing that they may face the same intervention in the future.²⁴⁴ Notably, the African Union rejected the Security Council-authorized intervention in Libya, even though its charter includes the right to economic and political intervention in member countries which failed to comply with its decisions and policies.²⁴⁵

A final unsatisfactory proposal is the development and adoption of a binding agreement that outlines the responsibility to protect doctrine and constrains the signatories to its terms.²⁴⁶ Such an agreement would predicate intervention under the responsibility to protect doctrine on the occurrence of one of the events outlined in the World Summit Outcome: genocide, war crimes, ethnic cleansing, and crimes against humanity.²⁴⁷ The proposed agreement goes on to say that if the Security Council becomes aware of the occurrence of one of these events, it can presume the host country has manifestly failed to protect its civilians.²⁴⁸ The proposed agreement further adopts a version of the reforms to the Security Council veto power described above.²⁴⁹ Such a reform would prohibit a permanent member of the Security Council

²⁴² See *id.*

²⁴³ See Rwanda Report, *supra* note 90, at 30.

²⁴⁴ See RESPONSIBILITY TO PROTECT, *supra* note 109, at 54.

²⁴⁵ See George Grant, *Libya and the African Union: Right in Principle, Wrong in Practice*, TELEGRAPH (U.K.) (Apr. 12, 2011), <http://www.telegraph.co.uk/news/worldnews/africaandindianocean/libya/8445465/Libya-and-the-African-Union-Right-in-Principle-Wrong-in-Practice.html>. Article 23 of the Constitutive Act of the African Union provides that “any Member State that fails to comply with the decisions and policies of the Union may be subjected to other sanctions . . . and other measures of a political and economic nature to be determined by the Assembly.” African Union Constitutive Act art. 23, para 2.

²⁴⁶ See Focarelli, *supra* note 176, at 202–03; Letter from John R. Bolton, *supra* note 235 (indicating that states are reluctant to enter into such a binding agreement).

²⁴⁷ See Summit Outcome, *supra* note 149, ¶ 138.

²⁴⁸ Tessa Davis, Note, *Taking International Law at its Word and Its Spirit: Re-Envisioning Responsibility to Protect as a Binding Principle of International Law*, 38 FLA. ST. U. L. REV. 883, 899–905 (2011) (arguing for the adoption of a binding legal principal of the responsibility to protect). Though the presumption created by such evidence would be rebuttable, the proposed agreement does not lay out how a State would rebut this presumption. *Id.* The World Summit Outcome requires that a State be “manifestly failing to protect [its] populations” before the Security Council could authorize the use of force. Summit Outcome, *supra* note 149, ¶ 139.

²⁴⁹ Davis, *supra* note 148, at 903–05.

from using its veto power upon the occurrence of a triggering event, unless vital national interests of the permanent member are at stake.²⁵⁰ Though the proposed agreement has the benefit of narrowly tailoring its reforms on the veto power, it is unlikely that the permanent members would agree any more easily to a binding resolution depriving them of their veto power in even a limited role,²⁵¹ given that they made clear that they did not want to heed the call for an informal agreement to produce the same restrictions.²⁵²

There is, however, a different way to deal with the problems—notably, the forestalling of Security Council action due to a lack of political will—plaguing the responsibility to protect doctrine.²⁵³ The responsibility to protect should be implemented in a manner similar to self-defense, adapted to the requirements of the responsibility.²⁵⁴ This proposal incorporates the threshold incidents from the World Summit Outcome, genocide, war crimes, ethnic cleansing, or crimes against humanity, before giving rise to a right to take military action.²⁵⁵ Limiting the trigger events to these crimes gives clear limits to when the responsibility may be invoked, avoiding the broad definitions from the ICISS report.²⁵⁶ As identified by the Secretary-General, information regarding the occurrence of these events is rarely lacking.²⁵⁷ This proposed implementation of the responsibility to protect also incorporates the precautionary principals outlined in the ICISS report, motivation to halt human suffering, last resort, the use of means proportionate to the objective, and reasonable prospects for success.²⁵⁸

This proposed implementation of the responsibility to protect differs from the current model or other proposed changes in its determi-

²⁵⁰ *Id.* In order for a proposal to pass, at least nine affirmative votes must be cast, including at least one from a permanent member. *Id.* at 905.

²⁵¹ *See id.* at 903–05.

²⁵² *See* Letter from John R. Bolton, *supra* note 235.

²⁵³ *See Implementing R2P Report, supra* note 155, ¶ 61; RESPONSIBILITY TO PROTECT, *supra* note 109, at 51–52; Rwanda Report, *supra* note 90, at 30.

²⁵⁴ *Cf.* U.N. Charter art. 51 (requiring action be taken in self-defense, rather than the protection of foreign civilians suggested by the proposed implementation of the responsibility to protect doctrine). Under the U.N. Charter, a state may take action for individual or collective self-defense until the Security Council takes measures to ensure international peace. *Id.* Any such measures must be reported to the Security Council. *Id.*

²⁵⁵ *See* Summit Outcome, *supra* note 149, ¶ 138.

²⁵⁶ *But cf.* RESPONSIBILITY TO PROTECT, *supra* note 109, at XII (using as the threshold for invocation of the responsibility to protect: a serious and irreparable harm to human beings, involving a large scale loss of life or large scale ethnic cleansing).

²⁵⁷ *Implementing R2P Report, supra* note 155, at 31.

²⁵⁸ Responsibility to Protect, *supra* note 109, at XII.

nation of when a country may intervene.²⁵⁹ Similar to the doctrine of self-defense under the U.N. Charter, a country would be allowed to intervene following the occurrence of one of the threshold events, until the Security Council takes action.²⁶⁰ Drawing further from the self-defense doctrine, any country taking such action would be required to report its actions to the Security Council.²⁶¹ After reporting, the country taking action to protect the civilians of the host country would be allowed to continue to act until the Security Council acts.²⁶² By implementing the responsibility to protect in this way, the inertia of the Security Council, along with any lack of political will to act, would work to the benefit of the civilians in danger.²⁶³

This proposal would also benefit from a built-in protection against a country claiming to implement the responsibility to protect doctrine as a pretext for other motives.²⁶⁴ Because the subject of a Security Council resolution mandating intervention be replaced with peaceable dispute resolution mechanisms would be the country or countries intervening, those countries would not have a vote on the Security Council resolution.²⁶⁵ As such, if the country taking protective acts under the responsibility to protect doctrine is a permanent member of the Security Council, that country could not use its position to automatically veto any resolution ordering it to withdraw its troops.²⁶⁶ Moreover, if the protective actions are taken by a regional or sub-regional group, such as NATO, the resolution can incorporate the participating constituent states so as to ensure that they could not veto the resolution.²⁶⁷ This adaptation of the self-defense doctrine would also benefit from the U.N. Charter's notice provision: any time a country takes action under this proposed implementation, they would be required to report it to

²⁵⁹ *But cf.* RESPONSIBILITY TO PROTECT, *supra* note 109 (urging the adoption of a modified Security Council veto power); Davis, *supra* note 216 (arguing for reforms to the U.N., and development of regional organizations).

²⁶⁰ See U.N. Charter art. 51.

²⁶¹ See *id.*

²⁶² See *id.*

²⁶³ *But cf.* RESPONSIBILITY TO PROTECT, *supra* note 109 (urging the adoption of a modified Security Council veto power to reduce the possibility for one country to prevent collective action); Davis, *supra* note 216 (arguing for reforms to the U.N., and development of regional organizations).

²⁶⁴ Cf. Kresock, *supra* note 202, at 238; Nzeli, *supra* note 202, at 1178.

²⁶⁵ See U.N. Charter art. 27, para. 3.

²⁶⁶ See *id.* The U.N. Charter draws no distinction between permanent members and non-permanent members of the Security Council for the purposes of this provision. *Id.*

²⁶⁷ See James E. Hickey, Jr., *Challenges to Security Council Monopoly Power over the Use of Force in Enforcement Actions: The Case of Regional Organizations*, 10 IUS GENTIUM 77, 84–87 (2004).

the Security Council, ensuring that the Security Council would be aware of the events and could pass a resolution.²⁶⁸

Another protective measure that could be implemented in a new proposal would be a “heads-up” notice requirement.²⁶⁹ Under such a requirement, before a country may take protective actions, it must give notice of its mission objectives and plan for engagement, within a specified timeframe—for instance four weeks—prior to implementing those plans.²⁷⁰ This period would serve several purposes, including giving both the acting country or countries and the U.N. time to continue gathering information to ensure that the host country has in fact manifestly failed to protect its civilians.²⁷¹ This notice period would also allow the Security Council to act before the intervening countries began operations—either explicitly authorizing such actions, or requiring use of a pacific resolution mechanism—pursuant to U.N. Charter Article 48.²⁷² The Security Council could modify the intervening states’ outlined objectives and plans, such as encouraging countries to use non-military measures like an arms embargo or a no-flight zone.²⁷³

The main benefit of this proposed reform to the responsibility to protect comes from its effect on a situation in which the Security Council fails to act.²⁷⁴ Under current implementations of the responsibility to protect doctrine, the Security Council’s failure to act prohibits countries from taking military action.²⁷⁵ By contrast, in the proposed implementation, such inertia would allow countries to offer protection until the Security Council chose to act, rather than require the world to stand by idly.²⁷⁶

The ongoing situation in Syria serves as a prime example of the potential effects of this proposed reform.²⁷⁷ The Security Council has

²⁶⁸ See U.N. Charter art. 51.

²⁶⁹ Cf. George K. Walker, *United States National Security Law and United Nations Peacekeeping or Peacemaking Operations*, 29 WAKE FOREST L. REV. 435, 491–94 (1994) (noting that the fifteen-day advance notice of funding for United States participation in U.N. peacekeeping operations—as required by the Foreign Relations Authorization Act—could compromise security and military surprise).

²⁷⁰ Cf. *id.* (using the loss of military surprise as a benefit rather than a drawback).

²⁷¹ Cf. Summit Outcome, *supra* note 149, ¶ 139.

²⁷² See U.N. Charter art. 48, para. 1 (requiring countries to carry out the decisions of the Security Council).

²⁷³ See S.C. Res. 1973, *supra* note 4, ¶¶ 4, 6–18.

²⁷⁴ *But cf.* RESPONSIBILITY TO PROTECT, *supra* note 109, at 53–54 (noting that the General Assembly lacks the power to require action be taken, along with the fact that the Security Council must authorize actions taken by regional organizations).

²⁷⁵ See *Timely and Decisive Response Report*, *supra* note 200, ¶ 32.

²⁷⁶ See *id.*

²⁷⁷ See *infra* notes 275–279 and accompanying text.

voted on three resolutions aimed at ending the violence in Syria—all three of which have been vetoed by Russia and China.²⁷⁸ As a result, an estimated 115,000 people have been killed as of October 2013.²⁷⁹ Under the proposed reforms to the responsibility, countries which developed mission objectives and plans and gave the Security Council sufficient notice could take protective action unless the Security Council prohibited such countries from acting.²⁸⁰ This proposed reform would repurpose the lack of political will and allow the responsibility to protect doctrine to focus on the proper goal, “the requirements of those who need or seek assistance,”²⁸¹ while building in safeguards against abuse of the system.²⁸²

CONCLUSION

The responsibility to protect doctrine is the next step in the evolution of the role of the U.N. and the international community in protecting civilians from the worst abuses. The U.N. was born out of a desire to prevent future wars. Kosovo and Rwanda were poignant lessons of occasions when a civilian’s greatest threat comes from his or her own government, especially behind the shield of sovereignty. The answer came in the form of the responsibility to protect doctrine, affirming the need for a government to protect its citizens from the worst crimes, and laid the foundation for international response in the event the host country failed in its responsibility. Although problems still exist with the doctrine, implementing the responsibility to protect doctrine as a modified form of self-defense will use the inertia of the political process to protect civilians. The need for such a reform is, unfortunately, heightened by the more than 115,000 killed in Syria, as the world watches, estopped from intervening by politics in the Security Council.

²⁷⁸ Charbonneau, *supra* note 11; Gladstone, *supra* note 74.

²⁷⁹ See Evans, *supra* note 9.

²⁸⁰ See U.N. Charter art. 48, para. 1; *supra* notes 256–273 and accompanying text.

²⁸¹ See RESPONSIBILITY TO PROTECT, *supra* note 109, at 18.

²⁸² See *id.* at 35; see also Delahunty, *supra* note 202, at 44–45; Goodman, *supra* note 201, at 112–16; Kresock, *supra* note 202, at 238; Nzeliibe, *supra* note 202, at 1178.