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Amnesty for Even the Worst Offenders

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AMNESTY FOR EVEN THE WORST OFFENDERS

JAY BUTLER*

ABSTRACT

In recent years, global policy makers have declared that heads of state must be held accountable through criminal prosecution for internationally wrongful acts. Scholars too have insisted that the international system's embrace of accountability excludes or renders illegal the granting of amnesty. This Article argues that that position is too narrow and uses the ongoing conflict in Syria, as well as other contemporary examples, to examine some of consequences of the clamor for prosecution.

The Article rejects the binary juxtaposition of amnesty and accountability in current international legal scholarship, and instead seeks to broaden the terms of the conversation by considering amnesty from the perspective of the Responsibility to Protect (R2P) principle.

The Article suggests that viewing amnesty as a conflict resolution mechanism that may discharge R2P highlights important values and tradeoffs that the debate over amnesty and its relation to accountability has heretofore neglected.

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INTRODUCTION

“[I]n seasons of insurrection or rebellion, there are often critical moments, when a well-timed offer of pardon to the insurgents or rebels may restore the tranquility of the commonwealth; and which, if suffered to pass unimproved, it may never be possible afterwards to recall.”¹

In February 2012, Martti Ahtisaari, former Finnish Prime Minister and then envoy for a group of retired international statesmen known as The Elders, sought to broker peace negotiations in Syria. Ahtisaari visited each delegation of the UN Security Council's five permanent members in search of a consensus solution. Russia had been adamant in its public support for the sitting regime of President Assad, but in private, Russian Ambassador Vitaly Churkin admitted to Ahtisaari that the international community should find “an elegant way for Assad to step aside.”²

It is unclear whether Assad would have accepted exile in some third state.³ However, the Russian Ambassador's private admission that his country favored amnesty and asylum for Assad provided a brief opening for an internationally brokered resolution.

Instead, according to Ahtisaari, Western powers rebuffed the possibility of immunity for Assad on the assumption that opposition groups in Syria would soon topple the regime militarily.⁴ Several days after Ahtisaari's overtures, U.S. Secretary of State, Hillary Clinton, branded Assad a war criminal, and the US and its allies have since pressed the Security Council to refer the situation in Syria to the International Criminal Court (ICC) for

1. THE FEDERALIST NO. 74, at 386 (Alexander Hamilton) (The Gideon Ed., 2001).

2. Julian Borger and Bastien Inzaurre, *West 'Ignored Russian Offer in 2012 to Have Syria's Assad Step Aside'*, THE GUARDIAN (Sept. 15, 2015), <http://www.theguardian.com/world/2015/sep/15/west-ignored-russian-offer-in-2012-to-have-syrias-assad-step-aside>.

3. Indeed, the Assad family tacitly declined overtures from the Qatari royal family suggesting exile in Doha. See *Assad Emails: 'I'm Sure You Have Many Places to Turn to, Including Doha'*, THE GUARDIAN (Mar. 14, 2012), <http://www.theguardian.com/world/2012/mar/14/bashar-al-assad-syria9> (“[L]ooking at the tide of history and the escalation of recent events—we’ve seen two results—leaders stepping down and getting political asylum or leaders being brutally attacked [I] only pray that you will convince the president to take this as an opportunity to exit without having to face charges.”) (emphasis in the original).

4. *Id.* See also Steven Mufson, ‘Assad Must Go’: These 3 Little Words are Huge Obstacle for Obama on Syria, Wash. Post (Oct. 19, 2015), https://www.washingtonpost.com/business/economy/assad-must-go-these-three-little-words-present-a-huge-obstacle-for-obama-on-syria/2015/10/19/6a76baba-71ec-11e5-9cbb-790369643cf9_story.html?utm_term=.b93a45f0911c.

investigation and prosecution.⁵

Rather than a swift end with a speedy exit for Assad, the conflict has now been fought to a devastating stalemate.⁶ A few years on and the Assad regime has entrenched itself, with mass civilian suffering seemingly the only tangible result of the years-long uprising.⁷

International responses to the conflict in Syria are often weighed according to the responsibility to protect (R2P).⁸ That principle, first proposed by a commission of experts in 2001 and since endorsed in modified form by UN member states during the 2005 World Summit, insists that the international community has a duty (not merely a right) to intervene diplomatically or, as a last resort, militarily when a government is unwilling or unable to protect its people from large-scale loss of life.⁹

Though the principle that the international community has an affirmative obligation to act in order to rescue people in a state where grave abuses are occurring may seem intuitive or even obvious to some, any embrace of the

5. Clinton: Assad 'Fits Definition' of War Criminal, BBC NEWS (Feb. 28, 2012), <http://www.bbc.com/news/world-middle-east-17199446>; U.N. SCOR, 69th Sess., 7180th Mtg. at 4, U.N. Doc. S/PV.7180 (May 22, 2014); S.C. Draft Res. S/2014/348 (vetoed by China and Russia) (May 22, 2014).

6. Statement of the Secretary-General, UN Security Council, 7774th Mtg., UN Doc. S/PV.774 (Sept. 21, 2016) ("The Syrian tragedy shames us all. The collective failure of the international community should haunt every member of the Security Council. Well over 300,000 Syrians have been killed, half of the country's population has been uprooted and much of its infrastructure lies in ruins.").

7. Rep. of the Indep. Int'l Comm'n of Inquiry on the Syrian Arab Republic, U.N. Doc. A/HRC/30/48, ¶ 8 (Aug. 13, 2015) ("None of the belligerents seem either close to collapse or positioned to secure an outright military triumph. After more than four years of fighting, all have secured sufficient support channels, territorial gains and operational capabilities to sustain them for several more years. Without stronger efforts to bring parties to the peace table, ready to compromise, current trends suggest that the Syrian conflict—and the killing and destruction it wreaks—will continue for the foreseeable future.").

8. See U.N. Secretary-General, *Informal Interactive Dialogue on Fulfilling our Collective Responsibility: International Assistance and the Responsibility to Protect*, U.N. General Assembly (Sept. 8, 2014), <http://www.un.org/sg/statements/index.asp?nid=7974>; U.N. Secretary-General, *Responsibility to Protect: State Responsibility and Prevention*, U.N. Doc. A/67/929-S/2013/399 (July 9, 2013); Thomas H. Lee, *The Law of War and the Responsibility to Protect Civilians: A Reinterpretation*, 55 HARV. INT'L L.J. 251, 259 (2014); Saira Mohamed, *Omissions, Acts, and the Security Council's (In)actions in Syria*, 31 B.U. INT'L L.J. 413, 420 (2013); Jordan J. Paust, *International Law, Dignity, Democracy and the Arab Spring*, 46 CORNELL INT'L L.J. 1, 9 (2013); Ved P. Nanda, *The Future under International Law of the Responsibility to Protect after Libya and Syria*, 21 MICH. ST. INT'L L. REV. 1, 14 (2013); Saira Mohamed, *Shame in the Security Council*, 90 WASH. U. L. REV. 1191, 1227 (2013); Michael N. Schmitt, *The Syrian Intervention: Assessing the Possible International Law Justifications*, 89 INT'L L. STUD. 744, 752 (2013); Neomi Rao, *The Choice to Protect: Rethinking Responsibility for Humanitarian Intervention*, 44 COLUM. HUM. RTS. L. REV. 697, 698 (2013); Paul R. Williams et al., *Preventing Mass Atrocity Crimes: The Responsibility to Protect and the Syria Crisis*, 45 CASE W. RES. J. INT'L L. 473, 488 (2012).

9. Int'l Comm'n on Intervention & State Sovereignty, *The Responsibility to Protect* (2001), <http://responsibilitytoprotect.org/ICISS%20Report.pdf>; G.A. Res. 60/1, 2005 World Summit Outcome, ¶¶ 138–40 (Sept. 16, 2005).

responsibility to protect represents a massive shift in thinking within international law.¹⁰ After the Second World War, states were concerned most with preventing another war between states.¹¹ To accomplish this end, they adopted a binding legal arrangement in the form of the UN Charter that prohibited foreign interference in the domestic affairs of another state and forbade any use of military force except in self-defense or with the approval of the Security Council.¹² Moreover, just a few decades ago, the UN General Assembly adopted a resolution expressing the aspirations of its newly independent, formerly colonized member states in which it affirmed that “[n]o State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State.”¹³ And, the International Court of Justice has cited this declaration as an indicium of a customary international law prohibition

10. See Saira Mohamed, *Taking Stock of the Responsibility to Protect*, 48 STAN. J. INT’L L. 319, 319 (2012) (noting that the responsibility to protect “has unsettled traditional understandings of state sovereignty, destabilized the principle of nonintervention, and inspired a robust debate on the use of military force to protect human rights”); Carsten Stahn, *Responsibility to Protect: Political Rhetoric or Emerging Legal Norm?*, 101 AM. J. INT’L L. 99, 99–101 (2007) (describing the development of the responsibility to protect as “almost like a fairy tale,” declaring that “[t]he articulation of the concept of the responsibility to protect is a remarkable achievement” and observing that the concept’s endorsement by states “is testimony to a broader systemic shift in international law, namely, a growing tendency to recognize that the principle of state sovereignty finds its limits in the protection of ‘human security’”).

11. Indeed, the UN Charter’s Preamble begins by stating this concern, declaring that “[w]e the peoples of the United Nations determined to save succeeding generations from the scourge of war, which twice in our lifetime brought untold sorrow to mankind” See U.N. Charter preamble. Article 1 of the Charter continues this theme, stating that “[t]he Purposes of the United Nations are: (1) To maintain international peace and security . . . (2) To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace” See U.N. Charter art. 1.

12. U.N. Charter art. 2, ¶ 7 (“Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII”); U.N. Charter art. 2, ¶ 4 (“All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.”); see generally THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 1174–1175 (Simma et al., eds., 3d ed. 2012).

13. G.A. Res. 2625 (XXV), (Oct. 24, 1970). As an illustration of the stringency of this approach, when Vietnam invaded Cambodia to overthrow the genocidal regime of the Khmer Rouge, the US and its allies objected that Vietnam’s actions violated the UN Charter and refused to allow the successor regime installed by Vietnam to take up Cambodia’s seat at the UN. Moreover, Vietnam had to justify its intervention on the basis of self-defense (the only exception to the necessity of Security Council authorization for military force) not its intent to stop the genocide. As such, in the absence of Security Council authorization, international law actually required states not to intervene in such situations. See W. Michael Reisman, *Acting Before Victims Become Victims: Preventing and Arresting Mass Murder*, 40 CASE W. RES. J. INT’L L. 57, 63–64 (2007); Thomas Franck, *When, If Ever, May States Deploy Military Force Without Prior Security Council Authorization?*, 5 WASH. U. J. L. & POL’Y 51, 65–66 (2001).

against foreign intervention in the affairs of another state.¹⁴

However, swayed by global inaction in the face of genocidal violence in Rwanda and Bosnia, the international community began to appreciate that a different approach may be required.¹⁵ Some states from the 1990s onward articulated a *right* of humanitarian intervention to justify the discretionary deployment of military force without a Security Council mandate in order to avert human suffering, as was the case with NATO's rationale for its intervention in Kosovo.¹⁶ Responsibility to protect carries this trend a step further, asserting in its strongest formulation that there is not merely a right, but a *positive duty* incumbent on all states to act (either non-militarily or, as a last resort, militarily) to bring an end to grave abuses occurring within a state (even if the underlying conflict itself is only domestic or internal in nature).¹⁷ Accordingly, recognition of the responsibility to protect would represent a radical shift in what is required of states under international law.

Just as the responsibility to protect may be viewed as the manifestation of an international trend against inaction in the face of serious crimes, a concurrent shift has been witnessed in the last couple of decades away from so-called impunity for serious crimes (the notion that perpetrators too often escape unpunished) and toward accountability for such offences.¹⁸ R2P

14. Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Merits, Judgment, 1986 I.C.J. Rep.14, 106, ¶ 202 (June 27) (“The principle of non-intervention involves the right of every sovereign State to conduct its affairs without outside interference; though examples of trespass against this principle are not infrequent, the Court considers that it is part and parcel of customary international law A particular instance of this is General Assembly resolution 2625 (XXV), the Declaration on the Principles of International Law concerning Friendly Relations and Co-operation among States.”).

15. See, e.g., Press Release, General Assembly, Secretary-General Presents His Annual Report to General Assembly (Sept. 20, 1999) (“If, in those dark days and hours leading up to the [Rwandan] genocide, a coalition of States had been prepared to act in defence of the Tutsi population, but did not receive prompt Council authorization, should such a coalition have stood aside and allowed the horror to unfold?”).

16. Christopher Greenwood, *Humanitarian Intervention: the Case of Kosovo*, in ESSAYS ON WAR IN INTERNATIONAL LAW 593 (2006); Thomas Franck, *Legality and Legitimacy in Humanitarian Intervention*, in HUMANITARIAN INTERVENTION 143 (2006); but see Sean D. Murphy, HUMANITARIAN INTERVENTION: THE UNITED NATIONS IN AN EVOLVING WORLD ORDER 294–296 (1996).

17. Carsten Stahn, *Responsibility to Protect: Political Rhetoric or Emerging Legal Norm?*, 101 AM. J. INT'L L. 99 (2007).

18. See, e.g., Payam Akhavan, *Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?*, 95 AM. J. INT'L L. 7 (2001); Antonio Cassese, *On the Current Trends Towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law*, 9 EUR. J. INT'L L. 2, 3–4 (1998); MARTHA MINOW, BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE 25 (1998); Dianne F. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 YALE L.J. 2537, 2540 (1991) (arguing that “the central importance of the rule of law in civilized societies requires, within defined but principled limits, prosecution of especially atrocious crimes” and that “recently developed principles of international law, both customary and conventional, already impose significant obligations in this

itself has been cast as an accountability mechanism, requiring that the international community not allow a government to invoke its state's sovereignty to shield it from outside intervention and that the community not use that sovereignty as an excuse for collective inaction.¹⁹

Indeed, the report that launched R2P framed the principle as part of an emerging “transition from a culture of sovereign impunity to a culture of national and international accountability” and asserted that R2P's recasting of sovereignty as responsibility “means that the agents of state are responsible for their actions; that is to say, they are accountable for their acts of commission and omission.”²⁰ Moreover, in assessing appropriate means through which the international community might implement R2P and as an illustration of this prevailing assumption, the UN Secretary-General has observed simply that “[r]esponsibility requires accountability.”²¹

As such, a variety of punitive measures, from economic sanctions to outside military intervention, have been contemplated as tools to discharge R2P.²² And, from the first R2P report onward, officials have assumed that accountability through criminal prosecution either before the ICC or domestically would serve as a natural application of R2P.²³

regard”); Naomi Roht-Arriaza, *State Responsibility To Investigate and Prosecute Grave Human Rights Violations in International Law*, 78 CAL. L. REV. 449, 452 (1990).

19. Louise Arbour, *The Responsibility to Protect as a Duty of Care in International Law and Practice*, 34 REV. INT'L STUD. 445, 450, 457 (2008) (observing that “countries have lost their ‘right’ to intervene, a discretionary prerogative, and willingly acquired, instead, a responsibility for a failure to act, a failure for which, I suggest, they could be held accountable” and that “the international community's ‘default’ responsibility to protect . . . is one of the tools through which perpetrators can be both deterred and held to account”); Ibrahim J. Gassama, *Dealing with the World as it is: Reimagining Collective International Responsibility*, 12 WASH. U GLOBAL STUD. L. REV. 695, 737–738 (2013) (arguing that the responsibility to protect may provide a basis for holding states to account for inaction in the face of grave abuses).

20. Int'l Comm'n on Intervention & State Sovereignty, *The Responsibility to Protect*, 14, ¶ 2.18 & p.13, ¶ 2.15 (2001).

21. U.N. Secretary-General, *The Role of Regional and Sub-regional Arrangements in Implementing the Responsibility to Protect*, ¶ 19, U.N. Doc. A/65/877-S/2011/393 (June 28, 2011).

22. Int'l Comm'n on Intervention & State Sovereignty, *The Responsibility to Protect*, 8, ¶¶ 1.37–1.38 (2001).

23. See, e.g., *id.* at 8, ¶ 1.38 (noting that “we [the authors] are also very much concerned with alternatives to military action, including all forms of preventive measures, and coercive intervention measures—sanctions and criminal prosecutions—falling short of military intervention”); U.N. Secretary-General, *Responsibility to protect: timely and decisive response*, ¶ 29, U.N. Doc. A/66/874-S/2012/578 (July 25, 2012) (“The threat of referrals to ICC can undoubtedly serve a preventive purpose and the engagement of ICC in response to the alleged perpetration of crimes can contribute to the overall response. More generally, the emergence of a system of international criminal justice has had a positive influence on the development of the concept of RtoP.”); U.N. Secretary-General, *Implementing the Responsibility to Protect*, 12, ¶ 18, U.N. Doc. A/63/677 (Jan. 12, 2009) (“By seeking to end impunity, the International Criminal Court and the United Nations-assisted tribunals have added an essential tool

Therefore, it is perhaps not surprising that the first R2P report is silent on the question of amnesty or the compatibility of such a mechanism with R2P. Similarly, in his nine reports on implementing R2P, the UN Secretary-General has often praised international criminal law, but has never once mentioned amnesty as a possible tool for conflict resolution.²⁴ Amnesty or asylum for perpetrators of serious crimes would seem to run contrary to contemporary international law's embrace of accountability, and many scholars have argued that amnesty, as the suspension of criminal accountability, violates international law.²⁵

for implementing the responsibility to protect, one that is already reinforcing efforts at dissuasion and deterrence.”); Fatou Bensouda, *The Responsibility to Protect: Born out of Necessity*, YOUTUBE (Apr. 2, 2015), <https://www.youtube.com/watch?v=j07p8ZhioHw>.

24. See U.N. Secretary-General, *Implementing the Responsibility to Protect: Accountability for Prevention*, U.N. Doc. A/71/1016-S/2017/556 (Aug. 10, 2017); U.N. Secretary-General, *Mobilizing Collective Action: The Next Decade of the Responsibility to Protect*, ¶ 56, U.N. Doc. A/70/999-S/2016/620 (22 July 2016) (“Ensuring accountability for past crimes not only makes future transgressions less likely but it also strikes a general blow against the culture of impunity that future generations of potential perpetrators will be forced to consider as they weigh their options.”); U.N. Secretary-General, *A Vital and Enduring Commitment: Implementing the Responsibility to Protect*, U.N. Doc. A/69/981-S/2015/500 (July 13, 2015); U.N. Secretary-General, *Fulfilling our Collective Responsibility: International Assistance and the Responsibility to Protect*, U.N. Doc. A/68/947-S/2014/449 (July 11, 2014); U.N. Secretary-General, *Responsibility to Protect: State Responsibility and Prevention*, ¶ 41, U.N. Doc. A/67/929-S/2013/399 (July 9, 2013) (“The removal of statutory limitations, amnesties or immunities that obstruct the prosecution of State officials and other individuals responsible for atrocity crimes and therefore fall short of international standards, strengthens national legal frameworks for accountability.”); U.N. Secretary-General, *Responsibility to Protect: Timely and Decisive Response*, U.N. Doc. A/66/874-S/2012/578 (July 25, 2012); U.N. Secretary-General, *The Role of Regional and Sub-regional Arrangements in Implementing the Responsibility to Protect*, U.N. Doc. A/65/877-S/2011/393 (June 28, 2011); U.N. Secretary-General, *Early Warning, Assessment and the Responsibility to Protect*, U.N. Doc. A/64/864 (July 14, 2010); U.N. Secretary-General, *Implementing the Responsibility to Protect*, U.N. Doc. A/63/677 (Jan. 12, 2009).

25. See PRINCETON PROJECT ON UNIVERSAL JURISDICTION, THE PRINCETON PRINCIPLES ON UNIVERSAL JURISDICTION 31 (2001), https://lapa.princeton.edu/hosteddocs/unive_jur.pdf (“Amnesties are generally inconsistent with the obligation of states to provide accountability for serious crimes under international law.”); Steven R. Ratner, *New Democracies, Old Atrocities*, 87 GEO. L.J. 707, 737, 744–45 (1999) (using interchangeably “accountability” and “criminal accountability” and noting that amnesties equate with a “lack of accountability” or “inconsistency . . . with the purported norm of accountability”); see also Juan Carlos Portilla, *Amnesty: Evolving 21st Century Constraints under International Law*, 38 FLETCHER F. WORLD AFF. 169, 190 (2014) (“[T]he doors of both customary international law, and, for many states . . . treaty law are now closed to amnesties. *Jus cogens* norms, state practice, *opinio juris sive necessitates*, and the codification of customary international humanitarian law completed by the ICRC together demonstrate that under a coalesced norm of customary international law, states also have a duty to domestically prosecute international crimes. Though amnesties are not explicitly forbidden in the Rome Statute regime, states under contemporary international law must prosecute international crimes.”); Scott W. Lyons, *Ineffective Amnesty: The Legal Impact on Negotiating the End to Conflict*, 47 WAKE FOREST L. REV. 799, 818 (2012) (asserting that “amnesty is invalid when there is a duty to prosecute resulting from either treaties or international customary law”); William W. Burke-White, *Reframing Impunity: Applying Liberal International Law Theory to an Analysis of Amnesty Legislation*, 42 HARV. INT’L L.J. 467, 467 (2001) (observing that amnesty legislation “violates a state’s international obligations to prosecute certain crimes and to provide citizens with specific rights of redress”). *But see*

Yet, in settings where amnesty has the potential to diffuse conflict, this Article asks whether its grant might be understood as an action in discharge of R2P. To make the issue concrete, we might ask: would a state that negotiated an amnesty for President Assad and offered him political asylum in 2012 so as to facilitate “an elegant way for him to step aside” have undertaken such action in fulfillment of the responsibility to protect?

This question is of vital importance for any state evaluating potential responses to situations of ongoing conflict, since the grant of asylum could place the offering state in violation of the duty to cooperate with international criminal proceedings that seek to prosecute the recipient of the amnesty. Worse, a state that offers this option may open itself to allegations of unlawful complicity with the grave abuses perpetrated by the fleeing head of state for its failure to punish the official now resident in its jurisdiction.²⁶

This Article aims to broaden the debate over amnesty and accountability by proposing that amnesty as a conflict resolution tool may be understood within the R2P framework. It does not seek to resolve R2P’s various conceptual and practical challenges, nor does it aspire to determine conclusively when amnesty or asylum will be appropriate. The likely success of amnesty or asylum in diffusing conflict is a highly fact and context specific evaluation whose detailed treatment in every scenario is beyond the intended scope of the present inquiry. Instead, the Article pries ajar a door once seemingly slammed shut to argue that amnesty or asylum may be permissible when aligned with R2P. The Article treats R2P in conjunction with amnesty for two reasons.

First, R2P provides a base for thinking through the problem-solving role of international actors not directly engaged in hostilities. Accounts of transitional justice often focus on the choices (prosecute or absolve) available to the state wherein strife has occurred. Yet, little consideration

The Transitional Justice Institute at the University of Ulster, *The Belfast Guidelines on Amnesty and Accountability* 10–11 (2013), http://peacemaker.un.org/sites/peacemaker.un.org/files/BelfastGuidelines_TJI2014.pdf (declaring that “[a]ccountability should be pursued for international crimes and gross violations of human rights but international law allows states some flexibility and discretion with respect to considering amnesties” and arguing that there is not “an established, explicit and categorical customary prohibition of amnesties for international crimes”).

26. David J. Scheffer, *Staying the Course with the International Criminal Court*, 35 CORNELL INT’L L.J. 47, 52 (2002) (“There can no longer be the gap in the international system that has existed in the past; namely, the possibility that an individual in a leadership position of significant political character or military or paramilitary or police rank can plan or otherwise participate in the commission of atrocity crimes and yet enjoy virtual impunity.”); William W. Burke-White, *Reframing Impunity: Applying Liberal International Law Theory to an Analysis of Amnesty Legislation*, 42 HARV. INT’L L.J. 467, 479 (2001) (“Basic norms of customary and treaty law would bar any legislation which sought to grant amnesty in relation to the aforementioned acts [torture, crimes against humanity, genocide], even in the face of overwhelming domestic and international support for the amnesty.”).

has been given to the role of other states that seek to broker amnesty or asylum agreements. Introducing R2P, a principle explicitly designed to conceptualize the place of outside states seeking to react constructively to conflict, may enrich our consideration of the role of the community of states in mediating conflict through mechanisms of accountability or amnesty.

Second, in so far as it prioritizes human security, R2P may furnish an international value or counter-narrative in support of peace through amnesty. Domestic grants of amnesty are frequently criticized for purporting to absolve serious violations of international law that are the concern of the global community at large.²⁷ All states, it is asserted, have an interest in punishing breaches of human rights treaties and international criminal law.²⁸ Framing amnesty as a device in discharge of R2P introduces a countervailing international norm (a global interest in ensuring peace) that may be deployed to garner support, and not merely international approbation, for amnesty.

To undertake this consideration, the Article proceeds as follows. Part I examines the responsibility to protect more fully and discusses unanswered questions within the doctrine that the apparent tension between amnesty and accountability highlights.

Part II discusses the orientation of contemporary international law toward ending impunity and charts the hostility of international tribunals, regional courts and a range of other treaty arrangements to amnesties.

Part III scrutinizes the basis on which amnesty and accountability are often thought to be opposed and questions whether accountability need only be pursued through criminal prosecution. It examines whether amnesty is a violation or erosion of the underlying prohibition (against genocide, torture,

27. See OFFICE OF THE U.N. HIGH COMM'R FOR HUMAN RIGHTS, RULE-OF-LAW TOOLS FOR POST-CONFLICT STATES: AMNESTIES, 11 U.N. Sales E.09.XIV.1 (2009), http://www.ohchr.org/documents/publications/amnesties_en.pdf ("Under various sources of international law and under United Nations policy, amnesties are impermissible if they (a) Prevent prosecution of individuals who may be criminally responsible for war crimes, genocide, crimes against humanity or gross violations of human rights, including gender-specific violations; (b) Interfere with victims' right to an effective remedy, including reparation; or (c) Restrict victims' and societies' right to know the truth about violations of human rights and humanitarian law."); *Barrios Altos v. Peru*, Inter-Am. Ct. H.R. (ser. C) No. 75, 14 ¶ 41 (Mar. 14, 2001), http://www.corteidh.or.cr/docs/casos/articulos/seriec_75_ing.pdf (declaring that "all amnesty provisions, provisions on prescription and establishment of measures designed to eliminate responsibility are inadmissible, because they are intended to prevent the investigation and punishment of those responsible for serious human rights violations . . . all of them prohibited because they violate non-derogable rights recognized by international human rights law").

28. See, e.g., *Prosecutor v. Kallon*, Case No. SCSL-2004-15-AR72(E), Decision on Challenge to Jurisdiction, ¶ 84 (Mar. 13, 2004) ("Even if the opinion is held that Sierra Leone may not have breached customary law in granting an amnesty, this court is entitled in the exercise of its discretionary power, to attribute little or no weight to the grant of such amnesty which is contrary to the direction in which customary international law is developing and which is contrary to the obligations in certain treaties and conventions the purpose of which is to protect humanity.").

war crimes, crimes against humanity and so on) or rather a derogation from the right to judicial remedy (which is itself a right sometimes recognized as amenable to limitation in the face of other vital societal requirements). As such, this part discusses whether amnesty may be viewed not as the total absence of remedy (since it often results in removal from office and hopefully an end to open hostilities), but instead as a decision to suspend access to one particular remedy (criminal prosecution).

Part IV grapples further with the use of amnesty or asylum in discharge of R2P. It confronts the tragic choices which abound in this area and argues that understanding amnesty as a tool within the framework of the responsibility to protect might be useful in adding another policy instrument short of military intervention through which the international community may respond to conflict.

I. RESPONSIBILITY TO PROTECT

Since its launch through an expert report published in 2001 and subsequent endorsement in more limited form by UN member states in 2005, scholars and policymakers have produced a vast literature that attempts to hammer out the character, content and consequences of the responsibility to protect (R2P).²⁹ R2P stands for the proposition that sovereignty not only expresses a state's "control" over its territory and the

29. See 2005 World Summit Outcome, ¶¶ 138–140, U.N. Doc. A/RES/60/1 (Oct 24, 2005); Saira Mohamed, *Taking Stock of the Responsibility to Protect*, 48 STAN. J. INT'L L. 319, 328 (2012) (observing that "[t]he responsibility to protect emerged from the World Summit significantly bruised" and that the Summit Outcome's statement of preparedness to take action limited that determination to a case by case basis "[w]ithout a recognition of responsibility"); see also RESPONSIBILITY TO PROTECT (R2P): A NEW PARADIGM OF INTERNATIONAL LAW? (Peter Hilpold ed., 2015); ALEX J. BELLAMY, THE RESPONSIBILITY TO PROTECT: A DEFENCE (2015); Monica Hakimi, *Toward a Legal Theory on the Responsibility to Protect*, 39 YALE J. INT'L L. 247 (2014); Thomas H. Lee, *The Law of War and the Responsibility to Protect Civilians: A Reinterpretation*, 55 HARV. INT'L L.J. 251 (2014); AFRICA AND THE RESPONSIBILITY TO PROTECT: ARTICLE 4(H) OF THE AFRICAN UNION CONSTITUTIVE ACT (Dan Kuwali & Frans Viljoen eds., 2014); Anne Orford, *Moral Internationalism and the Responsibility to Protect*, 24 EUR. J. INT'L L. 83 (2013); AIDAN HEHIR, THE RESPONSIBILITY TO PROTECT: RHETORIC, REALITY AND THE FUTURE OF HUMANITARIAN INTERVENTION (2012); ANNE ORFORD, INTERNATIONAL AUTHORITY AND THE RESPONSIBILITY TO PROTECT (2011); RAMESH THAKUR, THE RESPONSIBILITY TO PROTECT: NORMS, LAWS, AND THE USE OF FORCE IN INTERNATIONAL POLITICS (2011); PROTECTING THE DISPLACED: DEEPENING THE RESPONSIBILITY TO PROTECT (Sara Davies & Luke Glanville eds., 2010); ALEX J. BELLAMY, RESPONSIBILITY TO PROTECT: THE GLOBAL EFFORT TO END MASS ATROCITIES (2009); RESPONSIBILITY TO PROTECT: THE GLOBAL MORAL COMPACT FOR THE 21ST CENTURY (Richard H. Cooper & Juliette Voinov Kohler eds., 2009); GARETH EVANS, THE RESPONSIBILITY TO PROTECT: ENDING MASS ATROCITY CRIMES ONCE AND FOR ALL (2008); Carsten Stahn, *Responsibility to Protect: Political Rhetoric or Emerging Legal Norm?*, 101 AM. J. INT'L L. 99 (2007); FROM RIGHTS TO RESPONSIBILITIES: RETHINKING INTERVENTIONS FOR HUMANITARIAN PURPOSES (Oliver Jütersonke and Keith Krause eds., 2006).

concomitant power to exclude others, but that sovereignty also requires “responsibility” for the wellbeing of that state’s population.³⁰ Though a state retains “primary responsibility” for its populace, R2P purports to empower the “international community” or “broader community of states” to invoke a “default responsibility” and intervene when a sovereign state is manifestly failing to act in the best interests of its people.³¹

However, as with any principle, R2P does not necessarily dictate a particular course of conduct or outcome.³² And, this open-endedness has unsettled many states, fearful that R2P may morph into an excuse for powerful states to intervene at will.³³

This part more closely examines the R2P project and highlights some of the important questions that its authors and proponents have so far left unanswered. It discusses the nature and application of the purported obligation in order to provide a framework for the Article’s subsequent analysis of the possible relationship between amnesty and R2P.

A. *The Obligation*

Scholars and officials have split over the source, content and character of the obligation that the responsibility to protect purports to generate. While the first R2P report grounds the principle alternatively in natural law language concerning common humanity and the express provisions of the UN Charter, subsequent commentators have also argued over whether R2P constitutes a legal or moral obligation and the consequences of that

30. Int’l Comm’n on Intervention & State Sovereignty, *supra* note 9, at 13, ¶ 2.14.

31. *Id.*, at 17, ¶¶ 2.30–2.31.

32. See U.N. Secretary-General, *A Vital and Enduring Commitment: Implementing the Responsibility to Protect*, U.N. Doc. A/69/981-S/2015/500 (July 13, 2015) (describing R2P as a principle); Monica Hakimi, *Toward a Legal Theory on the Responsibility to Protect*, 39 YALE J. INT’L L. 247, 249 (2014) (observing that “R2P is said to fall simultaneously on all outside states or to favor their collective action. As for what these states should do, the possibilities are almost endless” and that “the vision for R2P that dominates current thinking is incredibly diffuse and open-ended”); Ronald M. Dworkin, *The Model of Rules*, 35 U. CHI. L. REV. 14, 26 (1967–1968) (highlighting the distinction in jurisprudence between rules and principles).

33. U.N. GAOR, 59th Sess., 85th Plen. Mtg. at 22, Statement of Mr. Chimphamba of Malawi, U.N. Doc. A/59/PV.85 (Apr. 6, 2005) (observing that “it is important to point out the difficulty of defining collective security solely in terms of the responsibility to protect. The protection of citizens should not be used as a pretext to undermine the sovereignty, independence and territorial integrity of States”); U.N. GAOR, 59th Sess., 86th Plen. Mtg. at 9, Statement of Mr. Baali of Algeria, U.N. Doc. A/59/PV.86 (Apr. 6, 2005) (noting that “there is no legal basis in the Charter or in international law for a right or duty to intervene”, that “[i]t would be overly hasty to define the ‘responsibility to protect’ as a new norm prescribing an international collective obligation” and that “it is legitimate to question whether the ‘responsibility to protect’ would apply to all States of the world, or only to the smallest and weakest among them”).

distinction.³⁴

Monica Hakimi, for example, contends that R2P is grounded in “existing legal arrangements” and articulates bundles of “legal duties” that flow from the concept; whereas Stefan Kadelbach argues that “R2P is not a legal concept as such, but a compound of rules and principles which competent institutions can use as a guideline” and Saira Mohamed asserts that R2P “remains merely a concept, with no legal force” even though the principle “undoubtedly has emerged in world politics with an unusual amount of engagement, discussion, and prominence.”³⁵ Catherine Powell identifies R2P’s requirement that a state protect its own people as “firmly established . . . as part of a wider transformative reinterpretation of the ‘original bargain’ struck in the UN Charter,” but argues that R2P’s collective action duties “are not established legal norms.”³⁶ However, Powell argues that these collective action requirements exert “compliance pull” or “normative pull, regardless of their lack of formal legal status” and that “constitutional moments” like NATO’s intervention in Libya show that R2P’s objectives “represent emerging, influential norms” essential for the “process of legalization.”³⁷

Similarly, William Burke-White has asserted that “[a]lthough the Responsibility to Protect has not yet emerged as binding international law, it is well grounded in existing law and shaping international discourse”, such that “[t]he power of the Responsibility to Protect ultimately lies in its ability to generate political pressure and compliance pull.”³⁸ Moreover, Carsten Stahn has proposed that R2P “should be understood partly as a political catchword . . . and partly as ‘old wine in new bottles.’”³⁹

34. Int’l Comm’n on Intervention & State Sovereignty, *supra* note 9, at ¶¶ 1.28 & 6.39 (observing that states should act, even without proper legal authorization, in “conscience-shocking” situations and rooting the new responsibility in notions of common human dignity), ¶ 2.14 (noting that the responsibility may be derived from the UN Charter, “an international obligation voluntarily accepted by member states”), ¶ 2.26 (relying on “fundamental natural law principles” to support “an emerging guiding principle in favour of military intervention for human protection purposes”).

35. Monica Hakimi, *Toward a Legal Theory on the Responsibility to Protect*, 39 YALE J. INT’L L. 247, 250 (2014); Stefan Kadelbach, *The Responsibility to Protect: A New Legal Paradigm?* in THE EUROPEAN UNION’S RESPONSIBILITY TO PROTECT 241 (Peter Hilpold ed., 2015); Saira Mohamed, *Taking Stock of the Responsibility to Protect*, 48 STAN. J. INT’L L. 319, 338–339 (2012).

36. Catherine Powell, *Libya: A Multilateral Constitutional Moment?*, 106 AM. J. INT’L L. 298, 300 (2012).

37. *Id.* at 301.

38. William W. Burke-White, *The Adoption of the Responsibility to Protect*, in THE RESPONSIBILITY TO PROTECT AND THE PROMISE OF STOPPING MASS ATROCITIES IN OUR TIME (Jared Genser & Irwin Cotler eds., 2011).

39. Carsten Stahn, *Responsibility to Protect: Political Rhetoric or Emerging Legal Norm?*, 101 AM. J. INT’L L. 99, 102 (2007).

Yet, smaller and developing states concerned at R2P's potential manipulation to support unilateral intervention by powerful states have insisted that the principle be cabined within the current UN Charter framework and exercised only according to the instruction of the Security Council.⁴⁰ As such, the 2005 World Summit that debated and adopted the responsibility to protect purported to limit its application to settings in which the Security Council has already determined that international action is appropriate.⁴¹

However, consensus within the Council needed to obtain institutional authorization does not always exist.⁴² And, R2P was proposed to ensure that institutional gridlock no longer thwarts international action in response to humanitarian crises.⁴³ Moreover, R2P follows the model of Security Council practice, providing a basis for states to undertake a course of action rather than commanding states to alleviate in a particular way the distress of another.⁴⁴

Therefore, it may be appropriate to conceptualize R2P as a form of narrative justification; an interpretive or rhetorical gloss on international law that states may invoke to support their chosen course of action.⁴⁵

40. Press Release, U.N. General Assembly, More than 40 Delegates Express Strong Skepticism, Full Support as General Assembly Continues Debate on Responsibility to Protect (July 24, 2009), <http://www.un.org/press/en/2009/ga10849.doc.htm>.

41. 2005 World Summit Outcome, ¶¶ 138–140, U.N. Doc. A/RES/60/1 (Sept. 16, 2005); see also Saira Mohamed, *Taking Stock of the Responsibility to Protect*, 48 STAN. J. INT'L L. 319, 328 (2012) (observing that “[t]he responsibility to protect emerged from the World Summit significantly bruised” and that the Summit Outcome’s statement of preparedness to take action limited that determination to a case by case basis “[w]ithout a recognition of responsibility”).

42. For example, in the case of Syria that this Article began with, it was exactly this split over whether international intervention was required that stymied Security Council authorization and blocked international action at the outset of the crisis. Russia and China at first advocated allowing the conflict to be resolved domestically and argued that outside intervention would only aggravate the conflict; whereas, the US and its allies pushed for early diplomatic and economic sanctions. See U.N. SCOR, 66th Sess., 6524th mtg., U.N. Doc. S/PV.6524 (Apr. 27, 2011); U.N. SCOR, 66th Sess., 6627th mtg., U.N. Doc. S/PV.6627 (Oct. 4, 2011).

43. Int'l Comm'n on Intervention & State Sovereignty, *supra* note 9, at ¶¶ 6.28–6.40 & 8.6–8.7.

44. The Security Council often demands that states refrain from a particular action (whether trade, supplying arms, maintaining diplomatic relations or financing terrorist groups) in order to punish a wrongdoer, but rarely imposes an affirmative obligation on one state or a group of states to undertake a particular act to help another state. See S.C. Res. 678, ¶ 2 (Nov. 29, 1990) (the Security Council “[a]uthorizes Member States co-operating with the Government of Kuwait . . . to use all necessary means to uphold and implement resolution 660 (1990) and all subsequent relevant resolutions and to restore international peace and security in the area”); S.C. Res. 1973, ¶ 4 (Mar. 17, 2011) (the Security Council “[a]uthorizes Member States that have notified the Secretary-General, acting nationally or through regional organizations or arrangements, and acting in cooperation with the Secretary-General, to take all necessary measures . . . to protect civilians and civilian populated areas under threat of attack in the Libyan Arab Jamahiriya . . .”).

45. See Thomas H. Lee, *The Law of War and the Responsibility to Protect Civilians: A*

Because states are both subjects and enforcers of international norms, a state must often convince other states of the propriety of its actions in order to avoid sanction.⁴⁶ R2P provides a means for this sort of justification in the absence of express Security Council authorization so as to discourage inaction by states fearful that their interpretation of the law will be rejected by the community and in turn result in sanction.

One may argue that, though R2P sometimes provides a useful narrative tool for weaker states to justify their actions, powerful states care little for the niceties of public reasoning. Powerful actors, to paraphrase Thucydides' famous Melian dialogue, do what they can and the weak suffer what they must.⁴⁷ Yet, the invocation of R2P by both the US and Russia to support their most recent uses of military force in Libya and Crimea respectively would seem to run contrary to this strong assertion.⁴⁸ If R2P had no normative weight, why, one might ask, would either state bother to invoke it. Both Russia and the US are permanent members of the Security Council and so could veto any sanction against their conduct which that institution attempted to adopt.

It would seem, instead, that even powerful states care about being seen to act in a lawful or, at least, communally beneficial fashion. Perhaps such states do not care very much, but they do care at least enough to attempt to deploy R2P in support of their actions.

Therefore, it may be useful for a state contemplating the grant of amnesty or asylum to explain its actions according to a principle (R2P) that has already been invoked and accordingly endorsed (even if tacitly) by powerful states. Since these powerful states would likely be essential for the adoption and enforcement of any sanction against that asylum-granting state, justification of amnesty according to a principle (R2P) previously utilized by such states might reduce the risk of sanction for that amnesty-granting state.

This is not to say that R2P is settled law (*lex lata*), nor does the Article

Reinterpretation, 55 HARV. INT'L L.J. 251, 272–274, 294–295 (2014) (describing R2P in terms of its justificatory function).

46. Ian Hurd, *Law and the Practice of Diplomacy*, 66 INT'L J. 581, 581–82 (2011) (asserting that “[s]eeing diplomacy in terms of international legal justification provides a novel perspective on the behavior of states and on their interaction with international law”).

47. See Robert Howse, *Thucydides and Just War: How to Begin to Read Walzer's Just and Unjust Wars*, 24 EUR. J. INT'L L. 17, 18 (2013).

48. *Remarks by the President in Address to the Nation on Libya*, WHITE HOUSE (Mar. 28, 2011), <https://obamawhitehouse.archives.gov/the-press-office/2011/03/28/remarks-president-address-nation-libya>; *Russian Option to Send Troops is Only to Protect Human Rights—Lavrov*, RT (Mar. 3, 2014), <https://www.rt.com/news/lavrov-human-rights-ukraine-542/> (quoting Russian Foreign Minister Sergei Lavrov, arguing that “we are talking here about protection of our citizens and compatriots, about protection of the most fundamental of the human rights”).

seek to resolve that question. However, in the fluid mix of law and politics that is international law, reasoned justification by a state under R2P may augment the probability of communal acceptance of the state's preferred course of conduct.

B. Actors and Actions

The first R2P report and subsequent iterations argue against impunity or indifference on multiple levels. First, sovereignty cannot be used as an excuse that enables murderous leaders to abuse their populations in whatever manner they see fit. Though a state has "primary responsibility" for its population, the international community cannot stand by and witness this destruction. Instead, it must invoke its default responsibility to intervene. Accordingly, the community serves as the failsafe against impunity for national leaders.⁴⁹

Yet, while the Security Council is the institution that the community has entrusted with "primary responsibility" (to quote from Article 24 of the UN Charter) for the peace and security of the community at large such that the Council should intervene to stop the murderous impunity of national leaders, when the Council itself fails to act, other institutions (the General Assembly, Regional Organizations or even *ad hoc* coalitions of states) may exercise the community's default responsibility to act.⁵⁰ As such, states acting outside the prescribed process for collective authorization may serve as a backstop when such collective processes have become dysfunctional.

Thus, the responsibility to protect has been deployed by states acting in a variety of different contexts. Russia invoked the doctrine to justify its invasion of the Ukrainian territory of Crimea and its detachment of the territories of South Ossetia and Abkhazia from Georgia;⁵¹ while the US and its allies relied on the responsibility to protect to conduct a regime change mission in Libya in apparent excess of the limited civilian protection

49. Int'l Comm'n on Intervention & State Sovereignty, *supra* note 9, at ¶ 2.15. See also U.N. Secretary-General, *A vital and enduring commitment: implementing the responsibility to protect*, U.N. Doc. A/69/981-S/2015/500 (July 13, 2015).

50. Int'l Comm'n on Intervention & State Sovereignty, *supra* note 9, at ¶¶ 6.28–6.35; U.N. Charter art. 24, ¶ 1 ("In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf.")

51. *Russian Option to Send Troops is Only to Protect Human Rights—Lavrov*, *supra* note 48 (quoting Russian Foreign Minister, Sergei Lavrov justifying Russian incursion into Crimea on the basis of protecting civilians); Gareth Evans, *Russia and the 'Responsibility to Protect'*, L.A. TIMES (Aug. 31, 2008), <http://www.latimes.com/la-oe-evans31-2008aug31-story.html>.

mission authorized by the Security Council.⁵²

Yet, in their capacious embrace of action in a multiplicity of possible forms (so long as presumably beneficial to the population of the state in question), the authors of the original responsibility to protect report left little guidance as to how the international community might judge what are appropriate invocations of the doctrine and by whom. The first R2P report endorsed a wide array of diplomatic, development assistance and institution building measures the community may utilize to steady fragile states and non-military sanctions that may be deployed to punish repressive states.⁵³ And, the report argues that the international community should intervene militarily in cases of “actual or apprehended” genocidal killing or ethnic cleansing on a “large-scale.”⁵⁴

Fundamentally, though, the report presumes that international action will and should enhance accountability for abuses committed at the behest of the national leader. The report cites with approval various international criminal justice mechanisms and the expansion of universal jurisdiction by domestic courts acting against serious abuses.⁵⁵ Moreover, the report asserts that ending impunity in a particular instance will not only vindicate the interests of the population *in quo*, but that accountability (either through international criminal justice or through military intervention) serves a prevention function, compelling leaders contemplating similar abuses in other states to reconsider.⁵⁶

However, nowhere does the report countenance the possibility of

52. Catherine Powell, *Libya: A Multilateral Constitutional Moment?*, 106 AM. J. INT'L L. 298 (2012).

53. Monica Hakimi, *Toward a Legal Theory on the Responsibility to Protect*, 39 YALE J. INT'L L. 247, 249 (2014).

54. Int'l Comm'n on Intervention & State Sovereignty, *supra* note 9, at ¶ 4.19

55. *Id.* at ¶¶ 2.18–2.20, 3.30–3.31; *see also* U.N. Secretary-General, *Responsibility to Protect: State Responsibility and Prevention*, ¶ 41, U.N. Doc. A/67/929-S/2013/399 (July 9, 2013) (“The removal of statutory limitations, amnesties or immunities that obstruct the prosecution of State officials and other individuals responsible for atrocity crimes and therefore fall short of international standards, strengthens national legal frameworks for accountability.”).

56. Int'l Comm'n on Intervention & State Sovereignty, *supra* note 9, at ¶¶ 1.25–1.26 & 3.29–3.30; *see also* U.N. Secretary General, *Implementing the Responsibility to Protect: Accountability for Prevention*, U.N. Doc. A/71/1016, ¶ 25 (“Ensuring accountability and redress for past and present atrocity crimes is crucial to ensure their non-recurrence. . . . Addressing past grievances and violations can help restore the dignity of victims, acknowledge and facilitate redress of violations and enable reconciliation. This is likely to help re-establish the rule of law and restore confidence in the State, promote stable and durable peace, and deter further atrocity crimes.”); U.N. Secretary-General, *A vital and Enduring Commitment: Implementing the Responsibility to Protect*, ¶ 20, U.N. Doc. A/69/981-S/2015/500 (July 13, 2015) (“Ending impunity is neither optional nor negotiable. Accountability not only contributes to preventing the recurrence of atrocity crimes but also makes national institutions stronger and more legitimate.”).

amnesty (in a way, the decided removal or absence of an accountability mechanism) as a conflict resolution device, nor have subsequent treatments of the principle.⁵⁷ Yet, if amnesty has the effect of helping to resolve the conflict and protection of the affected population through conflict resolution is the overall aim of the responsibility to protect, should a state not be able to offer such an alternative on a unilateral basis and in a manner that thwarts the alternative objective of accountability? The offer of amnesty might well assist in the cessation of the conflict, but what of the interests of the injured who seek justice or the message sent to other repressive leaders through such a seemingly easy escape?

C. Unanswered Questions

When we highlight the issues above, other aspects of uncertainty underlying the R2P principle are revealed.

First, who must be protected? It is unclear what temporal or geographic category of victims the international community's responsibility ought to be aimed toward protecting. The report argues that international justice mechanisms may dissuade leaders from committing serious abuses, thereby protecting populations in states where such abuses have not yet occurred. Knowledge that the commission of serious crimes will lead to prosecution and punishment, so the report assumes, will prevent the commission of such crimes and accordingly protect unknown future potential victims. Moreover, criminal prosecution vindicates the interests of the aggrieved: those already injured by a leader's crimes.

However, there is a further category of future victims within the specific state whose population has been identified for protection that may not be assisted by international prosecution. Indeed, for a leader whose regime has already committed indictable offences, the threat of international prosecution may harden that leader's will to remain in power (in control of territory in which he may seek refuge) and resolve to fight any conflict to its bitter end.

In the first months of the conflict in Libya, for example, that state's former foreign minister acknowledged "[h]e [Muammar Gaddafi] is maneuvering for three things—to leave the country, to have money and to be shielded from the International Criminal Court."⁵⁸ None was granted and instead Gaddafi's forces continued to wage war for several months

57. See *supra* note 22.

58. *Leading Defector Predicts Gaddafi Will Quit Libya*, REUTERS (June 23, 2011), <http://uk.reuters.com/article/2011/06/23/uk-libya-envoy-idUKTRE75M5L120110623?mod=related&channelName=worldNews>

thereafter.

A whole category of persons may be harmed when conflict is prolonged because the leader sees no viable alternative and abuses designed to buttress power may accelerate as necessary to combat any perceived threat whether external or internal. However, the responsibility to protect report does not consider this category of potential victims, instead trumpeting only the positive, signaling effects of international criminal justice for preventing crimes.

Further, the category of R2P beneficiaries to be preferred or “protected” and the hierarchy of interests when the wishes of different members of that beneficiary class clash may legitimately be contested. For example, those who have already suffered injury might be thought more likely to prefer punishment through criminal process; whereas, those not yet victimized might wish a swift end to the conflict (perhaps through amnesty or asylum) before they join the class of injured persons. It is unclear to which group of beneficiaries the obligation should be owed and the determination of this question may well be a measure of the permissibility of amnesty or asylum.

It may be that these two categories of persons and interests in fact represent what is known in choice of law theory as a “false conflict.”⁵⁹ Indeed, if this problem represents a conflict of norms (accountability on the one hand, and peace or conflict resolution on the other), it may be appropriate to deploy conflicts methodology to reason through the problem.⁶⁰

Consequently, where asylum would have no effect on the leader (and thus no hope of procuring peace) or where past victims do not wish to pursue prosecution (perhaps because of fear of reopening old wounds or because the crimes involved are of a particularly embarrassing or socially sensitive nature with stigma assigned even to victims), a false conflict exists because one seemingly implicated group of beneficiaries in fact has no real interest that conflicts with that of the other. A false conflict might also be said to exist if the interests of both groups in fact align; such that a solution that embraces both conflict resolution and accountability can be formulated. Indeed, this dual function is often cited as a benefit of the South African

59. BRAINERD CURRIE, *SELECTED ESSAYS ON THE CONFLICT OF LAWS* 107–110, 163–166 (1963); Lea Brilmayer, *The Role of Substantive and Choice of Law Policies in the Formation and Application of Choice of Law Rules*, 252 *RECUEIL DES COURS* 9, 61 (1995) (“One of the goals of modern choice of law theory has been to identify ‘false conflicts’; cases, in other words, where all the relevant interests connect the dispute to a single State.”).

60. See generally Ralf Michaels & Joost Pauwelyn, *Conflict of Norms or Conflict of Laws?: Different Techniques in the Fragmentation of Public International Law*, 22 *DUKE J. COMP. & INT’L L.* 349 (2012).

model of truth-telling in the aftermath of apartheid.⁶¹

False conflicts help to clarify the determination of appropriate outcome because the interest calculus points in one direction. Yet, more difficult are situations of true conflict, where the interests of different groups of beneficiaries involved are diametrically opposed. In such scenarios, the international community may have to play the role of tie-breaker, but how the will of the community is to be deciphered, particularly in cases of systemic gridlock, represents an ongoing challenge.

Quick resolution of the conflict may not be just, nor will the terms of such an *ad hoc* arrangement necessarily constitute a desirable precedent. Yet, if such action is able to end the conflict and thereby protect a category of persons who would otherwise be harmed by its continuation, it is not clear why a state that offers amnesty to the leader in order to effectuate resolution of the conflict ought not to be understood as acting under the aegis of the responsibility to protect.

A second question is that of who may act when there are competing claims of similar authority? Internal conflicts of the sort that the responsibility to protect addresses do not merely present the international community with two options: inaction or action. Instead, as the report's authors contemplate in listing off all the various means of conflict resolution, there is often an array of options. Where the Security Council, as the institution that the report acknowledges to possess the greatest legitimacy to act, articulates a course of conduct, doubts as to which option is to be pursued may be alleviated, even if not completely resolved. Indeed, it may be that a state disagrees with the Security Council's preferred approach, but given the authority of the Council, that state is under a duty (per article 25 of the UN Charter) to comply.⁶²

Yet, if the Council is deadlocked and other institutions or *ad hoc* configurations of states intend to act, whose claim to action should preempt. For example, in Syria, Western countries have been arming rebel insurgent groups for some time. Yet, Russia has criticized this approach and instead called for an arms embargo. Both are actions within the list given by the report's authors, but the report gives little guidance as to how divided opinion over which option is to be preferred should be resolved.

Third, even where only one state wishes to act, how do we judge appropriate action and determine that it is, in fact, a proper invocation of the responsibility to protect? If the objective is simply action that brings about

61. Diane F. Orentlicher, *Swapping Amnesty for Peace and the Duty to Prosecute Human Rights Crimes*, 3 ILSA J. INT'L & COMP. L. 713, 714 (1996–1997).

62. U.N. Charter art. 25 (“The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.”).

peace, does it matter the manner through which such action is undertaken? Indeed, the report leaves open the fundamental question of whether ends justify means.

The Article now discusses the current structure of international law and the global quest to end impunity so as to illustrate further why amnesty presents unresolved conceptual challenges for the responsibility to protect.

II. INTERNATIONAL CRIMINAL LAW, HUMAN RIGHTS AND UNIVERSAL JURISDICTION

Since the end of the Cold War, the international system has been oriented toward ensuring that state conduct complies with norms of international human rights and international humanitarian law.⁶³ Where state conduct has fallen short, the community has expressed its wish that the perpetrators of such violations be held to account in international criminal fora and that individuals be allowed to vindicate their rights before regional tribunals.⁶⁴

This part charts the rise of accountability as the prevailing ethos of this period of international law by examining its implementation through international and domestic avenues. The trend toward accountability would seem at odds with the apparent evasion of accountability through amnesty. As such, the part examines a powerful tension between amnesty and accountability that must be confronted if we are to reconcile amnesty with the responsibility to protect.

A. *International Criminal Court and Ad hoc Tribunals*

The Rome Statute of the International Criminal Court (ICC) does not specifically address amnesty or political asylum, nor does it discuss the compatibility of these devices with ICC procedures. Yet, the Statute's preamble declares that the new ICC's purpose is to ensure that "the most serious crimes of concern to the international community as a whole must not go unpunished" and "to put an end to impunity for the perpetrators of these crimes."⁶⁵ Indeed, this push for accountability would seem fundamentally at odds with resolution through amnesty.

The ICC functions according to the principle of complementarity.⁶⁶ That

63. MALCOLM N. SHAW, *INTERNATIONAL LAW* 265–66 (2009).

64. *Id.* at 397.

65. Rome Statute of the Int'l Criminal Court, preamble, U.N. Doc. A/CONF.183/9 (July 17, 1998) [hereinafter Rome Statute of the ICC].

66. *Id.* at preamble & art. 1.

principle requires that the ICC act only when a domestic court is unwilling or unable to exercise jurisdiction. Consequently, the Rome Statute requires that a case before the ICC is inadmissible unless the ICC determines that a state with jurisdiction over the case is “unwilling or unable genuinely to carry out the investigation or prosecution” or that a state’s decision not to prosecute “resulted from the unwillingness or inability of the State genuinely to prosecute.”⁶⁷ The Statute does not qualify the reasons for this domestic ‘unwillingness or inability’; such that an amnesty would appear technically to constitute failure by the domestic forum and consequent admissibility of the ICC prosecution.

Indeed, in a recent decision upholding the admissibility of an ICC case against various Kenyan officials accused of coordinating violence in the wake of disputed elections in 2007, the ICC Appeals Chamber made clear that, “[i]f a State challenges the admissibility of a case, it must provide the Court with evidence with a sufficient degree of specificity and probative value that demonstrates that it is indeed investigating the case.”⁶⁸ Thus, by implication, failure to investigate because of an amnesty is not an excuse that precludes ICC prosecution, just as any other domestic constraint does not provide a justifiable reason for evasion of an international legal obligation more generally.⁶⁹

Moreover, other states parties (those that may not have jurisdiction over the crime in question but are still ICC members) are under a general duty to “cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court [ICC].”⁷⁰ As such, the ICC has initiated violation proceedings against a number of member states that failed to comply with the Court’s arrest warrant for Sudanese President Omar Al-Bashir.⁷¹ Moreover, the duty to cooperate with the ICC may arguably be

67. *Id.* at arts. 17(1)(a) & 17(1)(b). *See also* Prosecutor v. Francis Kirimi Muthaura et al, ICC-01/09-02/11 OA, Judgement, ¶ 36 (Aug. 30, 2011) (“Article 17 stipulates the substantive conditions under which a case is inadmissible before the Court. It gives effect to the principle of complementarity (tenth preambular paragraph and article 1 of the Statute), according to which the Court ‘shall be complementary to national jurisdictions.’ Accordingly, States have the primary responsibility to exercise criminal jurisdiction and the Court does not replace, but complements them in that respect.”).

68. Prosecutor v. Francis Kirimi Muthaura et al, ICC-01/09-02/11 OA at ¶ 2.

69. Int’l Law Comm’n, *Responsibility of States for Internationally Wrongful Acts*, art. 32 (Aug. 3, 2001) (“The responsible State may not rely on the provisions of its internal law as justification for failure to comply with its obligations under this part.”).

70. Rome Statute of the ICC, at art. 86.

71. *See id.* at art. 87(7); *see also* Order requesting submissions from the Republic of South Africa for the purposes of proceedings under article 87(7) of the Rome Statute, ICC-02/05-01/09 (Sept. 4, 2015); The Office of the Prosecutor, Int’l Criminal Court, *Twenty-First Report of the Prosecutor of the International Criminal Court to the UN Security Council Pursuant to UNSCR 1593 (2005)* (June 29, 2015), http://www.icc-cpi.int/iccdocs/otp/21st-report-of-the-Prosecutor-to-the-UNSC-on-Dafur_%20S

extended to the entirety of UN members (a larger class of states than ICC members) when the Security Council has referred a particular situation to the ICC; since, UN members agree through Article 25 of the UN Charter “to accept and carry out the decisions of the Security Council”⁷²

However, the Rome Statute does arguably leave room for amnesty. The Security Council may request the ICC to defer proceedings for twelve months and the Prosecutor may herself decide to suspend prosecution before the Court when she considers such suspension to be in the ‘interests of justice.’⁷³ Though the Security Council repeatedly refused entreaties from the African Union to suspend the ICC’s prosecution of Kenyan officials, the Council has acted previously to request deferral of any investigation by the Court into activities of UN peacekeepers drawn from states not party to the Court’s statute.⁷⁴ Indeed, in making this request for deferral, the Council made clear that “it is in the interests of international peace and security to facilitate Member States’ ability to contribute to operations established or authorized by the United Nations Security Council”; thereby, contemplating a balance between the interests of peace and the enforcement of international criminal law by the ICC.⁷⁵

It may be argued, according to the treaty interpretation principle of *effet utile*, that the inclusion of this twelve-month deferral renders defunct the possibility of amnesty because this specified deferral period would have little practical effect if the Council could itself simply endorse full and indefinite amnesty. However, the twelve-month deferral mechanism may instead be characterized as a sort of default or *lex generalis* position, which the Council can amend to create a *lex specialis* framework when it sees fit. Indeed, even though it referred the situation in Darfur to the ICC for investigation in Resolution 1593, the Council in that same resolution made clear that nationals of states not party to the ICC, other than those from

udan.pdf.

72. U.N. Charter art. 25; see also Dapo Akande, *The Legal Nature of Security Council Referrals to the ICC and its Impact on Al Bashir’s Immunities*, 7 J. INT’L CRIM. JUST. 333, 343–44 (2009) (arguing that the Security Council can require all states to cooperate with the ICC when it refers a situation to the Court).

73. Rome Statute of the ICC, at arts. 16 & 53.

74. See U.N. SCOR, 68th Sess., 7060th Mtg., U.N. Doc. S/PV.7060 (Nov. 15, 2013) (failing to adopt draft resolution S/2013/660 which would have deferred the Kenya prosecutions for twelve months); African Union, *Decision on Africa’s Relationship with the International Criminal Court (ICC)*, 1, Ext/Assembly/AU/Dec (Oct. 2013), https://www.iccnw.org/documents/Ext_Assembly_AU_Dec_Decl_12Oct2013.pdf; Neha Jain, *A Separate Law for Peacekeepers: The Clash between the Security Council and the International Criminal Court*, 16 EUR. J. INT’L L. 239 (2005).

75. S.C. Res. 1422 (July 12, 2002); see also S.C. Res. 1487 (June 12, 2003) (extending the deferral period mandated in Resolution 1422 for a further twelve months).

Sudan, would not be subject to the jurisdiction of the ICC. The Council did not limit itself then to excluding such jurisdiction for a period of only 12 months, but instead adopted that exclusion on an indefinite basis.⁷⁶

The jurisprudence and core documents of other international tribunals present a clearer picture as to the incompatibility of amnesty and asylum with international criminal law. The Statutes of the ICTR and ICTY required prosecution of enumerated offences and the Security Council resolution establishing each tribunal required all states to cooperate with the work and requests of such bodies.⁷⁷ Indeed, national proceedings “designed to shield the accused from international criminal responsibility” were listed among the circumstances requiring each Tribunal to intervene to prosecute.⁷⁸ Moreover, the ICTY explicitly ruled in *Prosecutor v. Furundžija* that amnesties and grants of asylum for perpetrators of torture are void and unlawful by virtue of the peremptory status (as a norm of *jus cogens*) of the prohibition against torture in international law.⁷⁹

B. Human Rights Bodies and Regional Courts

International bodies charged with implementing and adjudicating human rights agreements tend to view amnesties as suspect. Amnesties, for such bodies, represent either complicity with the original violation or a subversion of victims’ rights to adequate judicial redress. And, on both

76. S.C. Res. 1593, ¶ 6 (Mar. 31, 2005) (deciding that “nationals, current or former officials or personnel from a contributing State outside Sudan which is not a party to the Rome Statute of the International Criminal Court shall be subject to the exclusive jurisdiction of that contributing State for all alleged acts or omissions arising out of or related to operations in Sudan established or authorized by the Council or the African Union, unless such exclusive jurisdiction has been expressly waived by that contributing State”); see also S.C. Res. 1497, ¶ 7 (Aug. 1, 2003) (exempting UN peacekeepers originating from non-state parties to ICC Statute and serving in Liberia from ICC prosecution).

77. U.N. Secretary-General, Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993) arts. 10(2)(b), 18, 29, U.N. Doc. S/25704 (1993); Statute of the International Criminal Tribunal for Rwanda, arts. 9(2)(b), 15 & 28 (1994); S.C. Res. 827 (May 25, 1993) (establishing the International Criminal Tribunal for the Former Yugoslavia and requiring that “all states shall cooperate fully with the International Tribunal”); S.C. Res. 955 (Nov. 8, 1994) (establishing the ICTR and deciding that “all states shall cooperate fully with the International Tribunal”).

78. ICTY *supra* note 77, at art. 10(2)(b); ICTR *supra* note 76, at art. 9(2)(b).

79. *Prosecutor v. Furundžija*, Case No. IT-95-17/1-T, Judgment, ¶¶ 155–57 (Int’l Crim. Trib. For the Former Yugoslavia Dec. 10, 1998) (“It would be senseless to argue, on the one hand, that on account of the *jus cogens* value of the prohibition against torture, treaties or customary rules providing for torture would be null and void *ab initio*, and then be unmindful of a State say, taking national measures authorizing or condoning torture or absolving its perpetrators through an amnesty law. If such a situation were to arise, the national measures, violating the general principle and any relevant treaty provision, would . . . not be accorded international legal recognition” and noting that “torture may not be covered by a statute of limitations, and must not be excluded from extradition under any political offence exemption.”).

accounts, amnesties themselves may therefore constitute violations of fundamental human rights.

Both the UN Human Rights Committee and the Committee against Torture have implied that amnesty is an impermissible device for conflict resolution because it undermines both the rights of victims and the coherence of the prohibition of such acts itself. In its General Comment No. 20, the UN Human Rights Committee (the body charged with overseeing compliance with the International Covenant on Civil and Political Rights) asserted that amnesties for acts of torture “are generally incompatible with the duty of States to investigate such acts; to guarantee freedom from such acts within their jurisdiction; and to ensure that they do not occur in the future” and that “[s]tates may not deprive individuals of the right to an effective remedy, including compensation and such full rehabilitation as may be possible.”⁸⁰ Similarly, the UN Committee against Torture, which oversees implementation of the Convention against Torture, observed in its General Comment No. 2 that “the prohibition against torture is absolute and non-derogable” and that “amnesties or other impediments which preclude or indicate unwillingness to provide prompt and fair prosecution and punishment of perpetrators of torture or ill-treatment violate the principle of non-derogability.”⁸¹

Regional tribunals have followed a similar line in asserting that amnesties are prohibited. Thus, the Inter-American Court on Human Rights has affirmed that amnesties are contrary to the rights guarantees contained in the Inter-American Convention on Human Rights. That Court declared categorically in the *Barrios Altos* case concerning Peruvian amnesty laws that, “all amnesty provisions, provisions on prescription and establishment of measures designed to eliminate responsibility are inadmissible, because they are intended to prevent the investigation and punishment of those responsible for serious human rights violations . . . all of them prohibited because they violate non-derogable rights recognized by international human rights law.”⁸²

The Inter-American Court explained further in *Almonacid-Arellano*, a case concerning a challenge to the legality of a Chilean amnesty law, that states must try and punish those who commit international crimes because

80. U.N. Human Rights Comm., General Comment 20, Article 7, at ¶ 15, U.N. Doc. HRI/GEN/1/Rev.1 at 32–33 (July 29, 1994).

81. Comm. Against Torture, General Comment 2, Implementation of Article 2 by States Parties, U.N. Doc. CAT/C/GC/2/CRP.1/Rev.4 (Nov. 23, 2007).

82. *Barrios Altos v. Peru*, Merits, Inter-Am. Ct. H.R., ¶ 41 (Mar. 14, 2001), http://www.cor.teidh.or.cr/docs/casos/articulos/seriec_75_ing.pdf.

states parties to human rights conventions commit to uphold such rights. Accordingly, this legal commitment requires that states “organize the entire government system, and in general, all agencies through which the public power is exercised, in such manner as to legally protect the free and full exercise of human rights,” so that “[i]f the State agencies act in a manner that such violation goes unpunished . . . it can be concluded that such State has not complied with its duty to guarantee the free and full exercise of those rights to the individuals who are subject to its jurisdiction.”⁸³

Moreover, the European Court of Human Rights has repeatedly held that amnesties are incompatible with the right to effective judicial process and that a failure to investigate an alleged violation of a right is itself a violation of that same right. Indeed, in *Ould Dah v. France*, in which the complainant claimed a Mauritanian amnesty law as a defense to judicial proceedings in France for alleged acts of torture that occurred in Mauritania, the Court noted that “an amnesty is generally incompatible with the duty incumbent on the States to investigate such acts [of torture].”⁸⁴ Further, the Court observed in *Margus v. Croatia* the “growing tendency in international law is to see such amnesties as unacceptable because they are incompatible with the unanimously recognised obligation of States to prosecute and punish grave breaches of fundamental human rights.”⁸⁵

As such, a state’s efforts to shield perpetrators from prosecution may lead to that state being accused not only of undermining the prohibition but also of violating the right to effective judicial process of those parties seeking prosecution of such offenders.

C. National Courts and the Obligation to Extradite or Prosecute

National courts are bound by a vast and intricate web of international agreements that require states to criminalize certain violations of fundamental rights and to extradite or prosecute alleged perpetrators of such violations. Notable examples include Article 7 of the Convention against Torture,⁸⁶ Articles I and V of the Genocide Convention,⁸⁷ the four Geneva

83. Almonacid-Arellano et al v. Chile, Preliminary Objections, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 154, ¶ 110 (Sept. 26, 2006), http://www.corteidh.or.cr/docs/casos/articulos/seriec_154_ing.pdf.

84. *Ould Dah v. France*, App. No. 13113/03, Eur. Ct. H.R. (2009).

85. *Margus v. Croatia*, App. No. 4455/10, Eur. Ct. H.R. at 57 (2014).

86. G.A. Res. 39/46, Convention Against Torture, art. 7 (June 26, 1987) (“The State Party in the territory under whose jurisdiction a person alleged to have committed any offence referred to in article 4 is found shall in the cases contemplated in article 5, if it does not extradite him, submit the case to its competent authorities for the purpose of prosecution.”).

87. Convention on the Prevention and Punishment of the Crime of Genocide, arts. 1 & 5, 78

Conventions of 1949⁸⁸ and so many others that the International Law Commission undertook a study concerning just this particular obligation.⁸⁹

These treaty obligations leave little room for amnesty as a conflict resolution technique and make it a violation for a third state simply to give refuge to a perpetrator of one of the crimes enumerated. Indeed, just recently, the International Court of Justice ruled that Senegal had violated the obligation to extradite or prosecute incumbent upon it as a state party to the Convention against Torture because Senegal had failed to pursue either action in respect of Hissène Habré.⁹⁰

Threatened with military insurrection, Hissène Habré fled to Senegal in 1990.⁹¹ Habré had, for several years, ruled the state of Chad with an iron fist, torturing and executing opponents and allegedly leading a campaign of ethnic cleansing against particular groups within Chad. Yet, his exit was swift and he remained in Senegal for decades undisturbed.

In 2000, criminal proceedings against Habré were initiated in Belgium, alleging torture and crimes against humanity perpetrated against Chadians who had subsequently come to reside in Belgium.⁹² In 2005, Belgium formally requested that Senegal extradite Habré or undertake his prosecution. Both Senegal and Belgium were and still are parties to the Convention against Torture (CAT), which requires that a state extradite or

U.N.T.S. 277 (affirming that “[t]he Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish” and that “[t]he Contracting Parties undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention, and, in particular, to provide effective penalties for persons guilty of genocide or any of the other acts enumerated in article III”).

88. Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, art. 49, 75 U.N.T.S. 31 (Aug. 12, 1949) (“Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts.”); Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, art. 50, 75 U.N.T.S. 85 (Aug. 12, 1949); Convention (III) relative to the Treatment of Prisoners of War, Art 129, 75 U.N.T.S. 135 (Aug. 12, 1949); Convention (IV) relative to the Protection of Civilian Persons in Time of War, art. 146 (Aug. 12, 1949).

89. The Obligation to Extradite or Prosecute (*aut dedere aut judicare*), 2014 Y.B. Int’l L. Comm’n 2, ¶ 65 *et seq*; Int’l Law Comm. A survey of multilateral conventions may be relevant for the work of the International Law Commission on the topic: “The Obligation to Extradite or Prosecute (*aut dedere aut judicare*)”, U.N. Doc. A/CN.4/630 (2010).

90. Questions relating to the Obligation to Prosecute or Extradite (Belg. v. Sen.), Judgment, 2012 I.C.J. Rep. 422, ¶ 122 (July 20).

91. The historical information discussed in this part is recounted in the case between Belgium and Senegal before the International Court of Justice. *See generally* Questions relating to the Obligation to Prosecute or Extradite (Belg. v. Sen.), Judgment, 2012 I.C.J. Rep., p.422.

92. *See* Questions relating to the Obligation to Prosecute or Extradite (Belg. v. Sen.), Judgment, 2012 I.C.J. Rep., 422, ¶¶ 19–27; *see also* Dustin N. Sharp, *Prosecutions, Development, and Justice: The Trial of Hissène Habré*, 16 HARV. HUM. RTS. J. 147 (2003).

prosecute an individual alleged to have been involved in acts of torture.⁹³ Senegal did neither, first demurring that its criminal code did not allow for such prosecution, but also refusing to extradite Habré.⁹⁴

After several years of diplomatic and judicial exchanges between Belgium and Senegal, Belgium lodged a case against Senegal before the International Court of Justice, arguing that Senegal had violated the Convention against Torture's extradite or prosecute requirement. The Court ruled in Belgium's favor, finding that Senegal had, in fact, violated this legal obligation.⁹⁵ In its own defense, Senegal acknowledged this strict reading of the Convention, but argued that it was an upstanding international citizen that had acted only out of concern for regional peace and stability.⁹⁶ Having informally served as broker of some resolution to the crisis by offering safe haven to Habré and, in so doing, avoided a long, protracted conflict between the factions supporting either side in the power struggle within the Chadian state, Senegal was now itself in the dock faced with accusations that it violated fundamental norms of international law. Rather than a prolonged conflict, Habré's swift departure allowed for a period of transition. However, Senegal, whose role in facilitating this option was critical, had its international reputation besmirched before the Court for its failure to indict Habré or deport him.⁹⁷

III. AMNESTY, ASYLUM AND THE RIGHT TO A REMEDY

Thus far, this Article has treated amnesty in the state where abuses occurred and political asylum in some third state together. Yet, it may be objected that they are conceptually distinct for purposes of the responsibility to protect. Indeed, if "primary responsibility" for protection falls on the state wherein the abuses occur by virtue of its sovereignty over said territory, then perhaps also that state ought to have primary responsibility for any remedy. Consequently, if the state itself decides that amnesty is the best way

93. See G.A. Res. 39/46, Convention Against Torture, art. 7 (June 26, 1987); *see also*, Questions relating to the Obligation to Prosecute or Extradite (Belg. v. Sen.), Judgment, 2012 I.C.J. Rep., 422, ¶¶ 13, 14 & 70; Convention against Torture, https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-9&chapter=4&lang=en

94. Questions relating to the Obligation to Prosecute or Extradite (Belg. v. Sen.), Judgment, 2012 I.C.J. Rep., at 422, ¶¶ 18, 22, 85–88 & 117.

95. Questions relating to the Obligation to Prosecute or Extradite (Belg. v. Sen.), Judgment, 2012 I.C.J. Rep., at 462, ¶ 122.

96. Questions relating to the Obligation to Prosecute or Extradite (Belg. v. Sen.), Verbatim Record, ¶ 6 (Mar. 15, 2012), <http://www.icj-cij.org/en/case/144>.

97. See Questions relating to the Obligation to Prosecute or Extradite (Belg. v. Sen.), 2012 I.C.J. Rep. 462, ¶ 122 (July 20).

forward, then one might argue that this decision ought to be respected by the community at large. Examples of such decisions abound in the various jurisdictions that have adopted truth and reconciliation commissions rather than criminal punishment in the aftermath of conflict or long-term repression.⁹⁸

On the other hand, if the state where the abuses occurred or the state of nationality of some of the victims of these abuses (where the two are not co-terminus) wishes to prosecute, but the perpetrator is shielded by virtue of amnesty in some third state, this third state may be said to intervene unduly in the affairs of the injured state. However, for such third state asylum to be justified according to R2P, we need some coherent understanding of the category of victims to be protected (whether past or future and whether in the state of injury or elsewhere).

Moreover, if the effectiveness of asylum as a conflict resolution device is to be communicated to other leaders considering exit rather than prolonged conflict to remain in power, then such grants of asylum must be permanent and cannot be subject to the later expressed will of the state of injury. Such agreements suffer from significant commitment challenges. Once the leader has accepted the deal and left office, he or she gives up the leverage utilized to procure the agreement in the first place (control over the state's means of violence). If a precedent is set that asylum will last only for a few years until a change of government in the injured state brings forth a regime that would prefer prosecution and this subsequent change requires extradition of the perpetrator (and consequent scrapping of the asylum), asylum is unlikely to operate as an effective incentive for ending conflict in the future.

Indeed, this very scenario occurred with Charles Taylor, former President of Liberia. Taylor fled to Nigeria in 2003 as part of a peace deal to end Liberia's long-running civil war. Yet, in 2006 Nigeria agreed to release Taylor to stand trial before the Special Court for Sierra Leone for charges stemming from Taylor's involvement in Sierra Leone's civil war.⁹⁹ That tribunal, having earlier set aside an amnesty provision in the Lomé Accords which brought Sierra Leone's civil war to an end,¹⁰⁰ convicted

98. See Matiangai V.S. Sirleaf, *The Truth about Truth Commissions: Why They Do Not Function Optimally in Post-Conflict Societies*, 35 *CARDOZO L. REV.* 2263, 2265–67 (2014); Matiangai V.S. Sirleaf, *Beyond Truth and Punishment in Transitional Justice*, 54 *VA. J. INT'L L.* 223, 226 (2014); John Dugard, *Dealing with Crimes of a Past Regime: Is Amnesty Still an Option*, 12 *LEIDEN J. INT'L L.* 1001 (1999).

99. Prosecutor v. Taylor, Case No. SCSL-03-01-T, Judgment, ¶ 9 (May 18, 2012), <http://www.rscsl.org/Documents/Decisions/Taylor/1283/SCSL-03-01-T-1283.pdf>.

100. Prosecutor v. Kallon et. al, Decision on Challenge to Jurisdiction: Lomé Accord Amnesty,

Taylor for aiding and abetting various serious violations of international law and sentenced him to a fifty-year prison sentence, which he continues to serve.¹⁰¹

The consequences of Taylor's crimes were undoubtedly horrific and his punishment is just cause for celebration. Yet, the international community ought to be wary that the message from his demise is not simply that wrongdoers will be punished, but that resignation and exile may lead to prosecution.

Despite the distinctions between amnesty and asylum outlined, both are, according to the jurisprudence discussed in Part II, impermissible devices because they shield perpetrators of grave abuses from justice. An important and related question, however, is the basis of this conclusion, as the reasoning differs. For the Inter-American Court of Human Rights, amnesty and asylum are themselves derogations from non-derogable rights (the prohibition of the abuses for which prosecution is sought).¹⁰² Other courts have instead framed the problem of amnesty and asylum as an incursion of the right to effective judicial process.¹⁰³ The two are quite different, since judicial process is itself often understood as a right that can be limited in times of emergency or because of other reasons of necessity.¹⁰⁴ No

Case Nos. SCSL-2004-15-AR72(E) & SCSL-2004-16-AR72(E), Appeals Chamber, ¶¶ 67, 72, 82 & 88 (Mar. 13, 2004).

101. Prosecutor v. Taylor, Case No. SCSL-03-01-T, Judgment, ¶ 6953 (May 18, 2012); Prosecutor v. Taylor, Case No. SCSL-03-01-T, Sentencing Judgment, at 40 (May 30, 2012) <http://www.rscsl.org/Documents/Decisions/Taylor/1285/SCSL-03-01-T-1285.pdf>.

102. See *supra* Part IIb; Barrios Altos v. Peru, Inter-Am. Ct. H.R. (ser. C) No. 75, ¶ 44 (Mar. 14, 2001), http://www.corteidh.or.cr/docs/casos/articulos/seriec_75_ing.pdf (declaring the “manifest incompatibility” of amnesty laws and the American Convention on Human Rights and concluding that “the said laws lack legal effect and may not continue to obstruct the investigation of the grounds on which this case is based or the identification and punishment of those responsible”); see also Christina Binder, *The Prohibition of Amnesties by the Inter-American Court of Human Rights*, 12 GERMAN L.J. 1203, 1208 (2011).

103. See *Yaman v. Turkey*, App. No. 32446/96, Eur. Ct. H.R., ¶ 55 (Nov. 2, 2004) (“The Court further points out that where a State agent has been charged with crimes involving torture or ill-treatment, it is of the utmost importance for the purposes of an ‘effective remedy’ that criminal proceedings and sentencing are not time-barred and that the granting of an amnesty or pardon should not be permissible.”); *Aksoy v. Turkey*, App. No. 21987/93, Eur. Ct. H.R., ¶¶ 94–100 (Dec. 18, 1996) (analyzing the question and finding bar on prosecution constituted violation of right to effective remedy under Article 13 of the European Convention on Human Rights).

104. For example, Article 4 of the International Covenant on Civil and Political Rights allows for derogation from all rights guarantees in times of exigency apart from those granted under Articles 6 (right to life), 7 (prohibition of torture), 8 (prohibition of slavery), 11 (prohibition of prison for failure to fulfill contractual obligation), 15 (imprisonment only for criminal offences that were unlawful when committed), 16 (right to recognition as a person), and 18 (freedom of thought, conscience and religion). International Covenant on Civil and Political Rights Art. 4, ¶ 2, Dec. 19, 1966, 999 U.N.T.S. 171; see also Convention for the Protection of Human Rights and Fundamental Freedoms, art. 15, Nov. 4, 1950, 213 U.N.T.S. 221 (providing for “[d]erogation in time of emergency” from rights guaranteed in the

emergency, however, may justify torture, crimes against humanity, war crimes or genocide.

The question goes to the very foundations of a legal system. Indeed, it implicates the question of whether one can possess a right in the absence of an effective remedy.¹⁰⁵ For the Inter-American Court, the answer is no. As such, any limitation on the effectiveness of the remedy is itself an encroachment on the right. Since the right is non-derogable, then there can be no derogation from the remedy for enforcement of a violation of the right.

However, this is not the position generally in public international law concerning state conduct. Indeed, the International Court of Justice (ICJ) has made clear on multiple occasions that the violation of a norm of *jus cogens* does not itself provide a basis for jurisdiction. Indeed, in *Democratic Republic of the Congo v. Rwanda*, the Court affirmed that “the mere fact that rights and obligations *erga omnes* or peremptory norms of general international law (*jus cogens*) are at issue in a dispute cannot in itself constitute an exception to the principle that its jurisdiction always depends on the consent of the parties.”¹⁰⁶ Similarly, in the case concerning *Jurisdictional Immunities of the State*, the ICJ concluded that the gravity of the violations alleged does not remove one state’s fundamental entitlement to sovereign immunity before the courts of another state.¹⁰⁷ In that case the

Convention, apart from those affirmed in Articles 2 (right to life), 3 (prohibition of torture), 4 (prohibition of slavery) and 7 (no punishment without law)); U.S. CONST. art. I, § 9, cl. 2. *But see*, American Convention on Human Rights: “Pact of San José, Costa Rica,” art. 27, 1144 U.N.T.S. 17955 (allowing for suspension of rights guarantees in time of emergency, except for the “suspension of [eleven rights] . . . or of the judicial guarantees essential for the protection of such rights”); African Charter on Human and Peoples’ Rights, June 27, 1981, 1520 U.N.T.S. 26363 (lacking any derogation clause).

105. See, e.g., Miles M. Jackson, *The Customary International Law Duty to Prosecute Crimes Against Humanity: A New Framework*, 16 TUL. J. INT’L & COMP. L. 117, 120 (2007) (arguing that “without a corresponding obligation that potential crimes against humanity must be investigated, prosecuted, and punished, the substantive prohibition itself and the protections it grants are undermined”); M. Cherif Bassiouni, *Searching for Peace and Achieving Justice: The Need for Accountability*, 59 LAW & CONTEMP. PROBS. 9, 17 (1996) (“The crimes establish inderogable protections and the mandatory duty to prosecute or to extradite accused perpetrators, and to punish those found guilty, irrespective of locus since universal jurisdiction presumably applies.”).

106. Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Rwanda), Judgment, 2006 I.C.J. Rep. 6, ¶ 125 (Feb. 3) (citation omitted).

107. Jurisdictional Immunities of the State (Ger. v. It.), Judgment, 2012 I.C.J. Rep. 99, ¶¶ 91 & 93. Here, the Court observed that:

The rules of State immunity are procedural in character and are confined to determining whether or not the courts of one State may exercise jurisdiction in respect of another State. They do not bear upon the question whether or not the conduct in respect of which the proceedings are brought was lawful or unlawful. . . . For the same reason, recognizing the immunity of a foreign State in accordance with customary international law does not amount to recognizing as lawful a situation created by the breach of a *jus cogens* rule, or rendering aid and assistance in maintaining that situation

Court observed that “[t]o the extent that it is argued that no rule which is not of the status of *jus cogens* may be applied if to do so would hinder the enforcement of a *jus cogens* rule, even in the absence of a direct conflict, the Court sees no basis for such a proposition.”¹⁰⁸ Accordingly, the violation (even if of a peremptory norm) cannot necessitate whatever remedy sought.

However, even if we agree to the Inter-American Court’s approach that the absence of a remedy denotes itself the undermining of the right, the approach does not adequately grapple with the full reality of amnesty or asylum. Indeed, that view presumes that the absence of one, particular remedy (formal, court-based criminal prosecution) is itself a derogation from the right and ignores other potential remedies.

The remedies obtained through amnesty and asylum might be said to include removal from office, pledges of non-repetition and the future installation of a government more likely to refrain from the abuses suffered previously. As such, amnesty and asylum arguably might be described as the absence of a judicial remedy, rather than the absence of any remedy at all. Neither amnesty nor asylum need be taken to condone the underlying violation, since they often encompass other sanctions. Moreover, a state that offers asylum might be said to enable the subversion of the right to judicial remedy, but does not perform a violation of a peremptory norm obligatory for all states (prohibition of torture, genocide, and crimes against humanity).

When this distinction between judicial remedy and non-derogability is highlighted, the amenability of amnesty and asylum as devices suitable for deployment within the responsibility to protect framework becomes clearer. The responsibility to protect is premised on a hierarchy or conflict of norms. Accordingly, neither the orthodox legal strictures of sovereignty, nor the formalities of approval for military intervention through the Security Council should be allowed to block the vindication of collective interests (peace and human security) by members of the community.¹⁰⁹

In the same way, it may be asserted that amnesty and asylum may aid the goal of peace, against the objective of effective judicial remedy. The injury or harm, to which the right to judicial remedy attaches, has already been inflicted and suffered by the category of victims whose right to judicial remedy would be limited by the amnesty. Yet, the infliction of that same harm on others could, perhaps, be avoided if the right to redress is suspended or limited by a conflict-ending amnesty. Indeed, it is perhaps unfortunate

Id. at ¶ 93.

108. *Id.* at ¶ 95.

109. *The Responsibility to Protect*, *supra* note 9.

that a series of guidelines on the right to a remedy first promulgated by the UN Commission on Human Rights and later endorsed without a vote by the General Assembly, focus solely on past victims and give little attention to the relation between insistence on a particular remedy and the potential prolongation of conflict.¹¹⁰ As such, the guidelines appear to overlook the interest of future victims in preventing such an occurrence.

Whether the responsibility to protect is categorized as a legal or political norm, its fundamental thrust is that the community ought not to allow a restrictive understanding of the procedures of international decision-making to compound human suffering. Thus, where the choice is between continuation of conflict so as to secure an eventual right to judicial redress for those already harmed and an offer of amnesty that assists in resolving the conflict and thereby prevents future harm, the responsibility to protect perhaps should tolerate or accept the grant of amnesty.

This discussion should also help us to distinguish amnesty from other potential devices for the vindication of the responsibility to protect that might themselves constitute a more serious violation of international law. For example, torture (even if to stop a terrorist attack) would appear to fall outside R2P's bounds because it would itself constitute a grave crime against international law (*jus cogens* violation). In contrast, an embrace of amnesty would not necessarily contravene a fundamental prohibition of international law (as would torture of another), but would instead abridge a right (judicial redress) that states often limit in times of emergency.

Law, and international law perhaps in particular, is not merely synonymous with courts and a right need not merely be enforced in court for it to exist and be recognized.¹¹¹ Courts play an important role as authoritative articulators and enforcers of rights, but that function need not be exclusive for the right to be sustained effectively.¹¹² Since it can include

110. Comm. on Human Rights, Report of the Sixty-First Session, U.N. Doc. E/2005/23, E/CN.4/2005/135, at 140 (2005); G.A. Res. 60/147 (Mar. 21, 2006).

111. ROSALYN HIGGINS, PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT 1 (1994) ("International law is not rules. It is a normative system. . . . The role of law is to provide an operational system for securing values that we all desire"); James Crawford, *Chance, Order and Change: The Course of International Law*, 365 RECUEIL DES COURS 9, 138–46 (2013) (affirming that "[t]here is an international social process, defective no doubt, but existent, made up of the actions, interactions and programmes of Governments and significant others").

112. See W. Michael Reisman, Editorial Comment, *Assessing Claims to Revise the Laws of War*, 97 AM. J. INT'L L. 82, 83 (2003).

Specialists in international law in particular tend to rally behind inherited arrangements; they assume that because the international legal system is weak, a principal duty is to defend existing prescriptions, whatever the consequence. . . . Lost in the righteous fury is a dispassionate assessment of the extent to which the old arrangements are likely to work in contexts different from those in which they were originally established or the extent to which the new

removal from office, exile or some systemic conditions to ensure non-repetition of previous abuses, amnesty may be said to constitute its own non-judicial remedy. Thinking about amnesty more broadly might accordingly allow us to reconcile it with the prevailing orientation of international law toward accountability and to appreciate amnesty, when deployed to end conflict, as a mechanism in service of R2P.

Amnesty is an uncomfortable choice, a sort of second or third best option in response to the realities of a particular situation. Indeed, we might think of amnesty and asylum as grey areas of “acoustic separation” between conduct and decision rules.¹¹³ Accordingly, the conduct rule which entails an obligation to respect norms of *jus cogens* is maintained and communicated to leaders through the persistence of institutions of international criminal justice, but the community might tacitly acknowledge an alternative decision rule that states will not be punished if asylum is granted to resolve conflict.

Viewing amnesty as suspension of the right to remedy rather than itself a *jus cogens* violation allows states the space to exercise discretion to end conflict (by permitting an alternative decision rule) rather than excluding pragmatic approaches by insisting dogmatically on the most stringent forms of enforcing international law. In distinguishing between conduct and decision rules, Dan-Cohen has argued in favor of the benefits of a sort of echo chamber that might provide some acoustic separation between the subjects of the conduct rule and the enforcers of the decision rule.¹¹⁴ It may be that the responsibility to protect, when amnesty is brought within its framework, could serve as this sort of echo chamber construction. R2P, and its embrace of international criminal law, communicates the conduct rule

arrangements may better secure, in possible future contexts, law’s fundamental goals.

Id.

113. See Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625, 625–26, 630 (1983). In that article, Dan-Cohen builds on Jeremy Bentham’s distinction between conduct rules which are “addressed to the general public” and decision rules which are “rules addressed to officials.” *Id.* at 625. Dan-Cohen quotes Bentham’s example that the conduct rule may be “*Let no man steal*,” while the decision rule (outlining the official response to theft) may be “*Let the judge cause whoever is convicted of stealing to be hanged*.” *Id.* at 626. As such, there is a distinction between the two rules; though, as both Dan-Cohen and Bentham acknowledge, the severity of the decision rule may implicitly communicate a conduct rule. Dan-Cohen articulates an “imaginary universe” in which it may be possible, or even desirable, to enforce a separation between the addressees or hearers of the conduct rule and of the decision rule. *Id.* at 625. In his imaginary universe, “each of the two groups occupies a different, acoustically sealed chamber” and are thus held in a condition of what he terms “acoustic separation.” *Id.* at 630.

114. *Id.* at 630, 651 (proposing that “[w]e may conclude that in a world of perfect acoustic separation the law, while promulgating criminal conduct rules that were fully coextensive with the relevant moral precepts, might at the same time apply decision rules that were more precisely defined and narrowly drawn than the corresponding conduct rules”)

prohibiting violations of international law to leaders. Yet, if amnesty can discharge R2P's protective function, R2P may be an appropriate vehicle through which to signal the availability of an alternative decision rule to states enforcing that decision rule.

In order for such a scheme to operate effectively, however, the international community must ensure that states relying on this alternative decision rule in granting amnesty are not unduly subject to sanction and that amnesty is deployed in a communally beneficial manner. It is to the examination of these challenges that the next part now turns.

IV. WHEN?: AMNESTY AS R2P

R2P stands for the proposition that gross violations of international law (genocide, torture, crimes against humanity, and war crimes) that result from state breakdown or the pernicious orientation of a regime are common problems that require action, regardless of where they take place. Ideally, the state where such abuses occur will put a stop to these crimes or the Security Council will intervene. Yet, when neither happens, the responsibility to protect asserts that other states cannot simply stand by and wring their hands at the results of this systemic dysfunction. Instead, states should act.¹¹⁵

Consequently, R2P incorporates a sort of hierarchy in decision making regarding responses to conflict that might apply also to amnesty: first, the state where the abuses are occurring, second, the Security Council, and then third, some other configuration of states (whether acting through the General Assembly, a regional organization or otherwise).¹¹⁶

However, the invocation of R2P presumes that the government of the state in which the violations are occurring has already defaulted on its obligation to protect its population, such that that state's sovereignty can no longer be used to shield it from some form of international intervention.¹¹⁷ Without sovereignty, it would seem that a regime's exercise of sovereign power, through say the adoption of a self-amnesty law, would be void. Thus, a self-amnesty enacted by the regime itself to facilitate transition need not be thought to fit within R2P, even if it has an effect in ending abuses, because it was not granted by an appropriate R2P actor. Self-amnesties are often the target of the most stringent scrutiny by tribunals and commentators

115. *The Responsibility to Protect*, *supra* note 9, at ¶ 6.28–40.

116. *Id.* at ¶¶ 6.7, 6.11, 6.14, 6.28–6.35, 6.40.

117. *Id.* at ¶ 2.31.

because of their potential for manipulation by self-interested wrongdoers.¹¹⁸ Even if R2P might embrace some form of amnesty, self-amnesty would appear to fall outside R2P's bounds since it will have been adopted by an entity deprived of sovereign authority by virtue of the very terms of R2P.¹¹⁹

Instead, amnesty may be negotiated between the parties to the conflict or, when some form of intervention by the international community is required, the Security Council may authorize amnesty.¹²⁰ Indeed, the Council recently endorsed an amnesty provision as part of the Minsk Agreements to halt the ongoing conflict in eastern Ukraine.¹²¹ Council support for amnesty would both bind UN member states that might prefer to pursue prosecution (including the successor regime in the state of injury) and shield a state that offers asylum to a perpetrator as part of such an accord from subsequent liability for violating contrary treaty obligations that require extradition or prosecution.¹²² Moreover, a Security Council

118. See, e.g., *Barrios Altos v. Peru*, Inter-Am. Ct. H.R. (ser. C) No. 75, ¶ 43 (Mar. 14, 2001), http://www.corteidh.or.cr/docs/casos/articulos/seriec_75_ing.pdf (“Self-amnesty laws lead to the defenselessness of victims and perpetuate impunity; therefore, they are manifestly incompatible with the aims and spirit of the Convention.”); *Almonacid-Arellano et. al v. Chile*, Inter-Am. Ct. H.R. (ser. C) No. 154, ¶ 7 (Sept. 26, 2006) (Trindade, J., concurring), http://www.corteidh.or.cr/docs/casos/articulos/serie_c_154_ing.pdf (describing self-amnesties as “not true laws” and noting that “[t]hey are only designed to keep certain facts from justice, cover gross rights violations and ensure impunity for some individuals. They do not satisfy the minimum requirements of laws; on the contrary, they are illegal aberrations”); Leila Nadya Sadat, *Exile, Amnesty and International Law*, 81 NOTRE DAME L. REV. 955, 1025 (2006) (arguing that “many immunities are granted by regimes to themselves just before they step down” and that this situation “is a classic example of law that is blatantly self-interested and probably illegitimate”).

119. For an example in another context of a governmental entity acting unilaterally, but without sovereign authority and without any consequence for international law, see Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, 2010 I.C.J. Rep. 403, ¶¶ 105, 109 (observing that “the Court considers that the authors of [the] declaration [of independence] did not act, or intend to act, in the capacity of an institution created by and empowered to act within that legal order but, rather, set out to adopt a measure the significance and effects of which would lie outside that order” and holding that “the authors of the declaration of independence of 17 February 2008 did not act as one of the Provisional Institutions of Self-Government within the Constitutional Framework, but rather as persons who acted together in their capacity as representatives of the people of Kosovo outside the framework of the interim administration”).

120. See Diane F. Orentlicher, *Swapping Amnesty for Peace and the Duty to Prosecute Human Rights Crimes*, 3 ILSA J. INT'L & COMP. L. 713, 714 (1997).

121. S.C. Res. 2202, ¶ 5 (Feb. 17, 2015) (committing the parties to the conflict to “[e]nsure pardon and amnesty by enacting the law prohibiting the prosecution and punishment of persons in connection with the events that took place in certain areas of the Donetsk and Luhansk regions of Ukraine”); cf. Sadat, *supra* note 118, 1032–33 (noting that if the Security Council endorsed amnesty under its Chapter VII powers, the question of the compatibility of such an action with international law and the obligation of states to obey such a measure would be “quite difficult” because “[t]he question, of course, remains whether such a resolution would be *ultra vires*” and that “it is unclear how the International Criminal Court, for example, would treat an amnesty imposed pursuant to Security Council Resolution, although the court would presumably think hard before disregarding it out of hand”).

122. U.N. Charter art. 103 (“In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international

resolution authorizing amnesty might communicate to the perpetrator or perpetrators to whom amnesty is offered the binding nature of the agreement and perhaps may render this option more attractive to such persons.

Alternatively, the Council may endorse prosecution when some state or group of states would prefer amnesty. The African Union and its members have consistently voiced their opposition to the International Criminal Court's (ICC) prosecution of President Al-Bashir of Sudan.¹²³ However, that prosecution is based on a Security Council referral in a Chapter VII resolution concerning the situation in Darfur.¹²⁴ The Council has spoken and given R2P's clear affirmation of the primacy of the Security Council as enforcer, actions contrary to the express will of the Council would appear to constitute international civil disobedience rather than an exercise of the responsibility to protect.¹²⁵ Actions contrary to the Council's decision may well serve a protective function by ending conflict, but it would be difficult to align them with R2P because of the principle's articulated hierarchy of enforcers.

Moreover, if the Council has endorsed amnesty and some state instead insists on initiating prosecution, the analysis would be similar. Prosecution by an individual state in defiance of a binding Security Council resolution approving amnesty is possible, but such action would both contravene the state's obligations under the UN Charter and run against the decision hierarchy recognized by R2P.¹²⁶ The state seeking prosecution might invoke human rights in a manner akin to the reasoning of the European Court of

agreement, their obligations under the present Charter shall prevail.”).

123. See, e.g., African Union, Decision on Africa's Relationship with the International Criminal Court (ICC) at 1, EXT/ASSEMBLY/AU/DEC (Oct. 2013), http://www.iccnw.org/documents/Ext_Assembly_AU_Dec_Decl_12Oct2013.pdf (reiterating “AU's concern on the politicization and misuse of indictments against African leaders by ICC”); African Union, Decision on the Abuse of the Principle of Universal Jurisdiction, ASSEMBLY/AU/DEC.243(XIII) (July 2009), https://au.int/sites/default/files/decisions/9560-assembly_en_1_3_july_2009_auc_thirteenth_ordinary_session_decisions_declarations_message_congratulations_motion_0.pdf.

124. S.C. Res. 1593, ¶ 1 (Mar. 31, 2005).

125. See *The Responsibility to Protect*, *supra* note 9, at ¶ 6.14. The Report observes that:

It is the Security Council which should be making the hard decisions in the hard cases about overriding state sovereignty. And it is the Security Council which should be making the often even harder decisions to mobilize effective resources, including military resources, to rescue populations at risk when there is no serious opposition on sovereignty grounds. . . . The task is not to find alternatives to the Security Council as a source of authority, but to make the Security Council work much better than it has.

Id.; see also G.A. Res. 60/1, *supra* note 9, ¶¶ 138–40; see generally, ANTONIOS TZANAKOPOULOS, *DISOBEYING THE SECURITY COUNCIL: COUNTERMEASURES AGAINST WRONGFUL SANCTIONS* (2011).

126. See generally *Jurisdictional Immunities of the State* (Ger. v. It.), Judgment, 2012 I.C.J. Rep. 99, ¶¶ 82, 93.

Justice (ECJ) in *Kadi*.¹²⁷ There, the Court initially suspended the implementation of the Security Council's anti-terrorist sanctions within the European Union because it found the procedure for the adoption of such measures to contravene the fundamental rights of the applicants.¹²⁸ A compromise might be reached in the context of amnesty and criminal prosecution if a domestic or regional court recognizes the remedial function of amnesty outlined above or if some statement of guilt akin to a declaratory judgment that recognizes the violations that have occurred is made in the manner to be articulated below. However, per Article 103 of the UN Charter, states must give primacy to their UN obligations.¹²⁹

To say that enforcement action (whether amnesty or prosecution) is lawful because approved by the Council or that states should obey the decisions of the Council is merely to highlight aspects of R2P that restate the requirements of the UN Charter.¹³⁰ R2P's major contribution or innovation may well be its contention that states should act or intervene even absent a mandate from the Security Council.¹³¹ Situations of deadlock in the Council because one or another of its permanent members has exercised the veto power are well known. Indeed, with regard to the war in Syria, the General Assembly overwhelmingly passed a resolution "deploring the failure of the Security Council to agree on measures to ensure the compliance of Syrian authorities with its decisions."¹³²

When the Security Council has failed to express its preference for amnesty or prosecution or to pronounce any related enforcement measure for putting a stop to conflict or gross violations of international law, it may be worthwhile to articulate some criteria that states may follow if contemplating the grant of amnesty in line with their responsibility to protect.

This is not to say that amnesty or asylum will be desirable in all cases or that either mechanism should be utilized before or instead of other tools. Indeed, in any given situation, states may well differ as to their preferred response. And, apart from noting that military intervention should be

127. Joined Cases C-402 P & C-415/05 P, *Kadi, Al Barakaat Int'l Found. v. Council & Comm'n*, 2008 E.C.R. I-6351, ¶¶ 298-99; Joined Cases C-584/10 P, C-593/10 P & C-595/10 P, *Comm'n v. Kadi*, 2013 E.C.R. I-518. See also Gráinne de Búrca, *The European Court of Justice and the International Legal Order After Kadi*, 51 HARV. INT'L L.J. 1 (2010).

128. *Id.*

129. U.N. Charter art. 103 ("In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.")

130. U.N. Charter arts. 25, 39, 41 & 42.

131. *The Responsibility to Protect*, *supra* note 9, at ¶¶ 4.11-4.13, 6.28.

132. G.A. Res. 66/253 B, 2 (Aug. 7, 2012).

considered only as a last resort, R2P offers little guidance to states faced with a choice between different non-military measures.¹³³ Rather than attempting to articulate a hierarchy of policy responses that determines when one instrument should be deployed in favor of another, what follows merely endeavors to offer factors according to which a state might justify its offer of amnesty or asylum under the rubric of R2P and against which other states might evaluate the propriety of such conduct.

First, the amnesty or asylum should protect or serve some protective function. That is to say, it should have a strong likelihood of resolving the conflict and preventing reoccurrence. Amnesty or asylum that merely gives safe haven to perpetrators and allows such person's time and succor to regroup thwarts the protective purpose underlying the responsibility to protect itself. Indeed, it may be advisable for amnesty or asylum to be promulgated with an explicit condition that makes its continuing effectiveness dependent on the end of conflict, no further interference by the immunized perpetrator and non-repetition of the abuses that occurred. If the beneficiary of such immunity uses this grant to continue intervening in the affairs of his or her state of origin and further fan the flames of conflict, this amnesty or asylum might be withdrawn.

In this manner, the amnesty or asylum may constitute a constructive step toward the protection of a future class of victims. If this protective function is absent, the amnesty or asylum grant would seem to serve no legitimate purpose within the responsibility to protect framework.

Second, the amnesty or asylum should constitute or, at least approximate, an exchange in which consideration flows from either side. In order to get something (immunity from judicial process), the perpetrators should give up something (their ability to prolong the conflict).

A consequence of this factor is that amnesty or asylum should not be granted to leaders already deposed or on the very brink of such a fate. In this setting, the leader has little to bargain away, since he or she would be unlikely to prolong the conflict because of a lack of military capacity. As such, amnesty or asylum would not serve to end the conflict, since such action will have been taken militarily. And, amnesty or asylum is not exchanged for a realistic prospect of protection. Instead, the damage has been done and any amnesty or asylum would simply serve to insulate its instigators.

The presence of consideration helps to distinguish negotiated amnesties

133. *The Responsibility to Protect*, *supra* note 9, at XII ("Military intervention can only be justified when every non-military option for the prevention or peaceful resolution of the crisis has been explored, with reasonable grounds for believing lesser measures would not have succeeded.").

between parties to a conflict from self-amnesties that appear to fall outside R2P for reasons given above. Further, requiring consideration might serve as incentive for leaders to exit earlier (even while they still possess the ability to fight).

Third, the perpetrator benefiting from the amnesty or asylum grant or some representative speaking on his or her behalf should make some admission of guilt or wrongdoing. A concern repeatedly expressed regarding immunity from judicial process is that it sends the wrong signal to others contemplating violations of the law and that it erodes the force of the prohibition itself. International criminal process is often lauded for the expressive function it serves: that perpetrators of serious crimes will be punished and that the horrific stories of victims will be recorded for all of time.¹³⁴ A statement from the recipient of the immunity that his or her conduct was wrong and a violation of relevant standards of law is not the same as days of recorded testimony and third-party international adjudication, but it might go some way toward fulfilling (even if incompletely) this expressive function.

These are merely criteria suggested for the grant of amnesty or asylum to be aligned with the responsibility to protect framework. A state may simply view justification by the responsibility to protect as unnecessary for its endeavor, but the doctrine's invocation may give the state offering the amnesty or asylum useful legal cover in the face of allegations of non-cooperation with international proceedings. Indeed, reputation is important for states, and states also face economic or diplomatic sanctions if they fail to comply with international law.¹³⁵ Justification of amnesty or asylum with reference to the responsibility to protect might allow the state implementing such a mechanism to invoke an alternative norm (human security or peace rather than accountability through criminal process) in order to explain its derogation from the right of past victims to effective judicial process.

134. See Margaret M. DeGuzman, *Choosing to Prosecute: Expressive Selection at the International Criminal Court*, 33 MICH. J. INT'L L. 265, 270 (2012); cf. Robert D. Sloane, *The Expressive Capacity of International Punishment: The Limits of the National Law Analogy and the Potential of International Criminal Law*, 43 STAN. J. INT'L L. 39, 50 (2007).

135. On the importance of reputation in securing compliance with international law, see Oona Hathaway & Scott J. Shapiro, *Outcasting: Enforcement in Domestic and International Law*, 121 YALE L.J. 252, 258 (2011) (Arguing that "outcasting involves denying the disobedient the benefits of social cooperation and membership" and that outcasting "is a form of law enforcement that is ubiquitous in modern international law."); Andrew T. Guzman, *A Compliance-Based Theory of International Law*, 90 CAL. L. REV. 1823, 1825 (2002) ("International law can affect state behavior because states are concerned about the reputational and direct sanctions that follow its violation."). But see Rachel Brewster, *Unpacking the State's Reputation*, 50 HARV. INT'L L.J. 231 (2009) (challenging the importance of reputation for ensuring compliance with international law).

As an illustration of the criteria advanced above, it may be useful to consider the case of Syria with which this Article began. After five years of fighting, over 250,000 deaths, almost five million refugees and the establishment of a caliphate by the so-called Islamic State (ISIS) in regions of Syria outside government control, the Syrian conflict has caused vast human devastation and flattened much of the infrastructure that Syria will need to rebuild and recover.¹³⁶ Yet, what if the Assad family had, in 2012, accepted an informal offer of asylum from Qatar?¹³⁷

In 2012, the Syrian conflict rapidly escalated from street protests against an unpopular regime to outright civil war. Indeed, in its second report in February 2012, the Independent International Commission of Inquiry on the Syrian Arab Republic warned that “[t]he present situation risks further radicalizing the population, deepening inter-communal tensions and eroding the fabric of society.”¹³⁸ And, by its third report in August 2012, the Commission noted that from February to August the uprising had evolved to “meet the legal threshold for a non-international armed conflict” or civil war.¹³⁹

Yet, by 2012, Syria’s combined opposition and its Western allies had made clear that no settlement to the conflict could be agreed that left President Assad in power.¹⁴⁰ Assad faced two choices: stay and fight or

136. U.N. Human Rights Council, *Rep. of the Indep. Int’l Comm’n of Inquiry on the Syrian Arab Rep.*, U.N. Doc. A/HRC/33/55 (Aug. 11, 2016); U.N. Human Rights Council, *Rep. of the Indep. Int’l Comm’n of Inquiry on the Syrian Arab Rep.*, U.N. Doc. A/HRC/30/48 (Aug. 13, 2015).

137. I choose to highlight Qatar because an informal offer of asylum was actually extended. Though it is possible that Russia may offer asylum to Assad eventually, Russia’s unique place as a permanent member of the Security Council allows it to insulate itself from collective sanction (through use of the veto to block any measure intended to punish non-compliance with international criminal process) in a manner lacking for states that do not enjoy the privilege of the veto. As an indication of Qatar’s offer, see *Assad Emails: ‘I’m Sure You Have Many Places to Turn to, Including Doha’*, THE GUARDIAN (Mar. 14, 2012), <http://www.theguardian.com/world/2012/mar/14/bashar-al-assad-syria9> (“[L]ooking at the tide of history and the escalation of recent events—we’ve seen two results—leaders stepping down and getting political asylum or leaders being brutally attacked . . . [I] only pray that you will convince the president to take this as an opportunity to exit without having to face charges.”) (emphasis in the original).

138. U.N. Human Rights Council, *Rep. of the Indep. Int’l Comm’n of Inquiry on the Syrian Arab Rep.*, U.N. Doc. A/HRC/19/69 (Feb. 22, 2012).

139. U.N. Human Rights Council, *Rep. of the Indep. Int’l Comm’n of Inquiry on the Syrian Arab Rep.*, U.N. Doc. A/HRC/21/50, ¶ 3 (Aug. 16, 2012).

140. See, e.g., *Syrian Opposition ‘Will Negotiate with Government Officials Once Assad Goes,’* THE GUARDIAN (Aug. 5, 2012), <http://www.theguardian.com/world/2012/aug/05/syrian-opposition-negotiate-government-assad>; Richard Wolf, *Obama: Syria’s Assad Must Step Down*, USA TODAY (Aug. 18, 2011), <http://content.usatoday.com/communities/theoval/post/2011/08/obama-syrias-assad-must-step-down/1#.VhnIjs7R-AE>; *Sarkozy: Assad Must Step Down Over Massacres*, USA TODAY (last updated Jan. 3, 2012), <http://usatoday30.usatoday.com/news/world/story/2012-01-03/france-syria-massacres/52360064/1>.

leave and seek refuge elsewhere. However, it was also announced that Assad should be held to account by any successor regime for his past crimes.¹⁴¹ Since serious international crimes ordinarily carry no statute of limitations when prosecuted domestically and because jurisdiction to prosecute by the ICC can be allowed to date back as far as the entry into force of the Court's Statute, Assad faced the real possibility that exile elsewhere might lead shortly thereafter to a cell in The Hague or the gallows in Damascus.¹⁴²

For Assad, exile in Qatar at that juncture procured through promise not to prosecute him for past crimes could well have fulfilled the R2P-compatible criteria the Article has outlined above.

First, such exile would have removed the figurehead of the Syrian regime and might well have opened the way for political talks even without fighting. Indeed, the opposition repeatedly acknowledged their willingness to talk, so long as Assad did not continue in power.¹⁴³ As such, it could have served the "protect" function, by avoiding or at least removing a key factor underlying the continuation of the conflict.

Second, Syria in 2012 was a much different country from Syria at present and the devastation that might have been avoided could arguably have constituted an appropriate exchange for the promise of immunity. Qatar, as

141. See, e.g., Hillary Clinton, U.S. Sec'y of State, *Intervention at the Friends of Syria Meeting*, US DEPARTMENT OF STATE (Feb. 24, 2012), <https://2009-2017.state.gov/secretary/20092013clinton/rm/2012/02/184606.htm> (former U.S. Secretary of State, Hillary Clinton, declared that "there must be accountability for senior figures of the regime," noting that "Assad's rule is unsustainable" and observing that transition would require "Assad's departure"); *Remarks by Harold Hongju Koh*, 106 AM. SOC'Y INT'L L. PROC. 216, 219–20 (2012) (noting that "a commitment to ensuring that the Assad regime cedes power and a commitment to denying impunity for gross human rights violations can and should be maintained simultaneously" and that "[t]he international community must continue to work to uncover and tell the truth about what Assad and his thugs are doing, and ultimately, as Secretary Clinton has said, 'there must be accountability for senior figures of the regime'").

142. See Rome Statute of the International Criminal Court, arts. 11, 12, 13, 86 & 89, U.N. Doc. A/CONF. 183/9 (1998) (Outlining the bases and scope of the Court's jurisdiction and requiring that states parties cooperate with the Court and surrender persons requested by the Court); Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity art. 1, Nov. 11, 1970, 754 U.N.T.S. 73; M. Cherif Bassiouni, *Searching for Peace and Achieving Justice: The Need for Accountability*, 59 LAW & CONTEMP. PROBS. 9, 17–18 (1996) (observing that for serious international crimes states are under a duty, among other things, "to eliminate statutes of limitations" and that "there can be no statutory limitations for these crimes"); Louis Joinet (Special Rapporteur), *Study on Amnesty Laws and Their Role in the Safeguard and Promotion of Human Rights* at 17, U.N. Doc. E/CN.4/Sub.2/1985/16 (June 21, 1985).

143. See, e.g., Neil MacFarquhar & Nada Bakri, *Diplomats Jockey Over Assad's Future as Syrian Troops Press Attacks Near Capital*, N.Y. TIMES, Jan. 31, 2012 (noting that the opposition Syrian National Council rejected a proposal for negotiations with the government "unless Mr. Assad stepped down first"); Dasha Afansieva, *Syria Opposition Accepts Peace Talks, Says Assad Must Go*, REUTERS, Nov. 10, 2013 (reporting that "Syria's Western-back opposition agreed on Monday to attend planned peace talks in Geneva but said President Bashar al-Assad could play no part in a transitional government").

the state offering asylum, would likely have required some sort of guarantee that it would not be subject to sanction for non-cooperation if a court in Syria or elsewhere or some international entity decided later to seek Assad's extradition in contemplation of prosecution. Indeed, this guarantee to Qatar could have come in the form of an affirmative Security Council resolution endorsing the outcome.

Third, it may have been difficult to procure some statement of guilt from Assad, but such a statement could have been offered by the state granting amnesty instead. Accordingly, Qatar could have declared that it was accepting the Assad family fully cognizant of the serious crimes Assad's regime had committed but so as to pursue the end of assisting with conflict resolution. Perhaps, Qatari authorities could have organized a public judicial hearing that would formally approve the grant of asylum, but as a part of which victims of Assad's crimes could testify so as to have recorded for posterity their suffering. As such, the wrongfulness of prior conduct would have been voiced and those not then harmed by what has now become a seemingly unending civil war could perhaps have been spared.

This is an area replete with very difficult choices and the criteria for R2P-compatible amnesty are open to legitimate criticism. Various line drawing and signaling problems may be posited in response to these proposed conditions.

For example, with regard to the first criterion, how is a state that once grants amnesty to ensure that its recipient does not interfere in the affairs of his or her former state? First, asylum could be made contingent on non-interference in the affairs of the state from which the leader has been removed. Yet, because of non-refoulement, the doctrine in international refugee law and human rights law that a person is not to be sent to a place where his or her rights are likely to be violated, deportation may not be an available remedy in the face of breach of an asylum agreement.¹⁴⁴ However, the state that has offered asylum may invoke other measures in order to ensure compliance; cutting the former leader's allowance, monitoring his or her communications, or interfering with the comfort of his or her lodgings. But this is perhaps the simplest of concerns to address.

Though in Syria, the continued rule of Assad has been an explicit factor in the civil war and his removal would appear to constitute a necessary precondition for a negotiated peace; in other situations, the potential of

144. U.N. Human Rights Comm., General Comment 20, Article 7, at ¶ 9 UN Doc. HRI/GEN/1/Rev.9 (Vol. I) (Mar. 10, 1992); Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 30 (July 29, 1994).

amnesty or asylum to resolve conflict may not be so clear. It will then be for a state utilizing such a mechanism to explain, through a process of public reasoning, to the community of states at large (enforcers of norms of international law) that its actions had some protective potential and it will then be for the community to judge whether that state's interpretation was appropriate. Moreover, where the potential of amnesty or asylum to end conflict is ambiguous, states might well be more hesitant to deploy such a mechanism.

If the message conveyed by amnesty or asylum is that gross violations of international law will be punished simply with removal from office and a penthouse suite in some far away locale, any subsequent leader (either in that jurisdiction or elsewhere) may be said to have little incentive to comply with international law. It may be argued that amnesty communicates impunity for crimes to other leaders contemplating such bad acts.¹⁴⁵ Indeed, the deterrence function of international criminal law is often highlighted as one of its key benefits.¹⁴⁶

But this concern may be mitigated by the fact that the grant of amnesty is likely to be unpredictable and discretionary. No leader is entitled to the grant of amnesty or asylum in some other state. And a leader relying on a future offer of amnesty while committing crimes may well be disappointed.

Instead, amnesty is an immediate response to a pressing problem, proffered to avoid further harm. The recognition of amnesty or asylum as a tool within the R2P framework is not intended to displace entirely the framework of international criminal law and its institutions. The continued operation of these institutions is useful for communicating the efficacy of

145. See Michael P. Scharf, *Swapping Amnesty for Peace: Was There a Duty to Prosecute International Crimes in Haiti?*, 31 TEX. INT'L L.J. 1, 11 (1996). The author asserts:

When the international community encourages or even merely condones an amnesty for human rights abuses, it sends a signal to other rogue regimes that they have nothing to lose by instituting repressive measures; if things start going badly, they can always bargain away their crimes by agreeing to restore peace.

Id.

146. For example, see Kelly Dawn Askin, *"Never Again" Promise Broken Again. Again. And Again.*, 27 CARDOZO L. REV. 1723, 1728 (2006), in which the author observes:

[T]he simple threat of prosecution now causes high-level and powerful people to go into hiding, and they risk assets being frozen and travel bans issued against them; they no longer feel as free to travel to other countries for pleasure, business, or medical needs, and they are forced to use their valuable resources for protection and loyalty. At a minimum, the new culture of accountability causes perpetrators stress and creates huge hassles and burdens for them, so adding some misery to their lives by the threat of prosecution is a positive side effect in the accountability endeavor. Justice is crucial when atrocity crimes have been committed. Only by holding those most responsible for mass atrocities accountable can the rule of law be respected and peace be more sustainable.

Id.

the conduct rule (“do not commit grave abuses”) to potential perpetrators. Further, just as the Security Council does not always respond in the same way to situations seemingly similar to Syria (authorizing the use of force against Libya, but not against Syria for example), it may be that the deployment of amnesty would be uncertain (particularly with the possibility that the Security Council may express a preference for prosecution in a given scenario).

Even more problematic, however, is the potential failure of amnesty to address systemic challenges within a regime. Indeed, while removal of a head of state may assist in ending the immediate conflict, it does little to uproot the repressive modalities of governance that facilitated that leader’s crimes. There is no guarantee that, once the former head of state is out of office, the subsequent head of state will rule in a better fashion. Further, where a state is held together by one repressive figurehead or “strongman,” that person’s swift exit might lead to a power vacuum and conflict among rival government or societal factions over succession.

Asylum for a leader might be an immediate component of conflict resolution, but systemic change would also have to be enacted in order to ensure that whatever successor regime renounced the policies and instruments that facilitated abuse. Others have suggested the consideration of a notion of collective or “state-enabled crimes” in international adjudication to ensure that policies that enabled international crimes are exposed and thereafter eradicated.¹⁴⁷ And, the U.N. Peacebuilding Commission, established via General Assembly and Security Council resolutions, is undertaking valuable work to assist in institution building in post-conflict societies.¹⁴⁸ Further, truth and reconciliation processes stretching beyond the initial grant of amnesty may also constitute important measures to ensure transparent reform.

However, it may be objected that true reconciliation and social rebuilding are impossible without some vindication of the injuries sustained. Scholars have, for example, advanced various retributivist theories of the function of international punishment.¹⁴⁹ Moreover, as Hannah Arendt once

147. See Rebecca J. Hamilton, *State-Enabled Crimes*, 41 YALE J. INT’L L. 302 (2016); Gabriella Blum, *The Crime and Punishment of States*, 38 YALE J. INT’L L. 57 (2013).

148. G.A. Res. 60/180, ¶ 1 (Dec. 30, 2005); S.C. Res. 1645, ¶ 1 (Dec. 20, 2005).

149. See Alexander K.A. Greenawalt, *International Criminal Law for Retributivists*, 35 U. PA. J. INT’L L. 969 (2014); Andrew K. Woods, *Moral Judgments & International Crimes: The Disutility of Desert*, 52 VA. J. INT’L L. 633, 640 (2012) (describing a “retributive impulse” that underlies international criminal law); Jens David Ohlin, *Towards A Unique Theory of International Criminal Sentencing*, in INTERNATIONAL CRIMINAL PROCEDURE: TOWARDS A COHERENT BODY OF LAW 373, 392 (Goran Sluiter & Sergey Vasiliev eds., 2009) (observing that “at the most foundational level, the warrant for

observed, “men are unable to forgive what they cannot punish and . . . they are unable to punish what has turned out to be unforgivable.”¹⁵⁰

As such, the enmities accumulated as a consequence of the old regime’s abuses cannot simply be forgotten. Such group wounds may destabilize the society and diminish the chances of lasting peace. And, the adjudication of crimes pronounces to the world the injustice of past treatment that victims have suffered.

Yet, the advantage of a well-timed offer of asylum to a leader facing insurrection is its ability to diffuse conflict quickly. When deployed effectively, such a device might avoid the sort of fighting witnessed in Syria and elsewhere as oppressive leaders fight to hang on to power. Ending conflict earlier, in turn, has the potential to reduce the class of persons harmed and thus, the number of wrongs that must be forgiven for societal reconciliation and rebuilding to move forward.

Strategic manipulation is as possible (and perhaps likely) in this area of international law as in any other.¹⁵¹ A state may offer asylum or broker amnesty simply to advance its own interests. Yet, when state interest coincides with the interests of a population suffering grave abuses, such that a state’s self-interested action produces a beneficial result, that state should be allowed and encouraged to act.¹⁵²

This Article has sought to reduce the opportunity for self-interested behavior that is not in the collective interest by arguing that self-amnesty and amnesty contrary to the express will of the Security Council are two types of amnesty that would likely fall outside the responsibility to protect. Self-amnesty seems particularly open to abuse, since it allows the wrongdoer maximum control over the timing and conditions of his or her exit. And, amnesty contrary to the explicit instruction of the Security Council undermines that institution’s authority as prime decision-maker within the schema of the UN Charter and R2P.¹⁵³

Yet, it may be objected that by empowering states to act absent Security Council coordination, R2P generally and particularly as applied to amnesty

punishing international crimes is retributivist—the perpetrators deserve to be punished”).

150. HANNAH ARENDT, *THE HUMAN CONDITION* 241 (1958).

151. See JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* (2005). But see JENS DAVID OHLIN, *THE ASSAULT ON INTERNATIONAL LAW* (2015).

152. Guzman, *supra* note 135, at 1847; Ryan Goodman, *Humanitarian Intervention and Pretexts for War*, 100 AM. J. INT’L L. 107, 110 (2006).

153. *The Responsibility to Protect*, *supra* note 9, at ¶ 6.9 (“Those who challenge or evade the authority of the UN as the sole legitimate guardian of international peace and security in specific instances run the risk of eroding its authority in general and also undermining the principle of a world order based on international law and universal norms.”).

might allow a state to intervene too early and thereby preempt the decision of the Council. The Council could reverse a state's unilateral grant of amnesty by requiring extradition or prosecution and the state itself would have little choice but to comply.¹⁵⁴ However, the concern for overly swift action would seem insufficient to justify inaction in the face of mass suffering while the Council deliberates. That early action is to be encouraged is at the heart of R2P.¹⁵⁵ Indeed, it is suspicion over the motivations of states that arguably leads to the very sort of gridlock and inaction that R2P was formulated to avoid.

The responsibility to protect itself includes three subcomponents: a responsibility to prevent, a responsibility to react, and a responsibility to rebuild.¹⁵⁶ While a speedy grant of asylum to enable exit of a reviled leader to diffuse potential civil strife may be grouped within the responsibility to prevent and both amnesty and asylum may fall under the responsibility of states to react constructively to ongoing conflict, the consideration of the necessity of conditions after such waiver of the usual modes of accountability indicates that any responsibility to rebuild in the aftermath of amnesty ought to include the facilitation of systemic reform to ensure that such an amnesty mechanism need not be deployed in future.

If responsibility to protect is truly an invitation for the international community and its various members to involve themselves in constructive solutions, it may be useful to expand the range of tools that states of varying capacities may employ. Indeed, though much of the attention and rancorous debate surrounding R2P have focused on its role in justifying military intervention, the reality is that few states will have the strategic capacity, political will or financial resources to carry out such a mission.¹⁵⁷ Even economic sanctions can harm a state's own economy if targeted against a major trading partner and such sanctions will only likely be effective if the state imposing them has some real wealth or economic influence. A grant of asylum or negotiating amnesty is a relatively low-cost way for a state to contribute to solving conflict.¹⁵⁸ However, this option is only low-cost if it

154. See Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. U.S.), Provisional Measures, 1992 I.C.J. Rep. 114 (Apr. 14). Cf. Org. of African Unity [OAU], *The Crisis Between the Great Socialist People's Libyan Arab Jamahiriya and the United States of America and the United Kingdom*, at ¶ 2, AHG/Dec.127 (XXXIV) (June 8–10, 1998) (deciding not to comply any longer with two Security Council resolutions "if the United States of America and the United Kingdom refuse that the two suspects be tried in a third neutral country pursuant to the verdict of the [ICC]").

155. *The Responsibility to Protect*, *supra* note 9, at ¶¶ 3.10–.11.

156. *Id.* at XI.

157. Jay Butler, *Responsibility for Regime Change*, 114 COLUM. L. REV. 503, 561–62 (2014).

158. Though this Article has focused on the Syrian conflict, the framework it articulates may be

does not expose the state granting it to other sanction (whether reputational, legal or economic) for non-compliance with international criminal proceedings.

Enabling a wider range of states to participate in achieving conflict resolution could in turn broaden support and strengthen legitimacy for the responsibility to protect itself.¹⁵⁹ Indeed, if smaller, weaker states could rely on R2P to proffer options for conflict resolution so as to regard themselves as R2P enforcers and not merely potential R2P targets, the doctrine might cease to be regarded solely as a justification for the unilateralist predilections of rich and powerful states.¹⁶⁰

CONCLUSION

This Article has not sought to argue that amnesty and asylum are always to be preferred over other policy instruments. Instead, it has articulated the position that these mechanisms may be understood to fall within the responsibility to protect framework.

Amnesty or asylum may be compatible with R2P and vindicate the principle's aims when used to protect a population through cessation or prevention of open hostilities, exchanged in consideration for the amnesty recipients' foregone ability to continue the conflict and accompanied by some statement of guilt to acknowledge the harm done and to affirm the validity of the core norms whose breach is the subject of the amnesty.

Reevaluating amnesty through the lens of R2P also shines new light on the values and tradeoffs of the long-running debate over the compatibility

applicable elsewhere. For example, Cuba facilitated negotiations to bring to an end the long-running civil war in Colombia. As part of the peace agreement, rebel fighters were offered amnesty in exchange for laying down their weapons. A state acting to broker an end to conflict through the promulgation of amnesty would, per this Article's thesis, be viewed as discharging the responsibility to protect rather than frustrating the aims of international criminal justice by declining to insist on prosecution. See Alan Gomez, *Cuba Plays Critical Role in Colombia Peace Deal*, USA TODAY (Aug. 25, 2016), <https://www.usatoday.com/story/news/world/2016/08/25/cuba-colombia-farc-peace-deal/87432410/>; Nicolas Casey, *Colombia Signs Peace Agreement with FARC after 5 Decades of War*, NY Times (Sept 26, 2016), <https://www.nytimes.com/2016/09/27/world/americas/colombia-farc-peace-agreement.html?mcubz=3>.

159. See E. Tendayi Achiume, *Syria, Cost-sharing, and the Responsibility to Protect Refugees*, 100 MINN. L. REV. 687, 750–52 (2015) (arguing that “a focus on less controversial, non-coercive RtoP commitments such as refugee cost-sharing increases the likelihood that states with concerns about pretextual (or any) use of collective coercive measures would actually cooperate under the RtoP framework” and that “[p]rioritizing non-coercive measures would deepen the support of middle powers such as India, Brazil and South Africa for RtoP”).

160. U.N. GAOR, 59th Sess., 87th Plen. Mtg. at 18, U.N. Doc. A/59/PV.87 (Apr. 7, 2005) (statement of Mr. Zarif of Iran: “There is a grave concern that the concept of ‘responsibility to protect’ could be invoked by certain countries to pursue their own political agenda and that, through that idea, some parts of the world may become potential theatres for their intervention.”).

of amnesty and accountability when states attempt to assist in resolving conflict. The Article has proposed that amnesty may constitute a form of remedy not wholly incompatible with the evolving orientation of the international system toward an embrace of accountability, but also that recognizing amnesty as a tool within R2P may provide states with the sort of flexible decision rule necessary to diffuse conflicts otherwise insoluble through an absolutist insistence on accountability through criminal process alone.

This Article does not deny the value of such international criminal prosecutions for affirming the norm that serious violations of international law will be punished, but instead has sought to highlight some of the overlooked consequences when alternatives for ending conflict are ignored.