

POLITICS OR LAW? THE DUAL NATURE OF THE RESPONSIBILITY TO PROTECT

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No longer wholly an aspirational doctrine, the responsibility to protect concept, *as international law*, obligates nation-states to protect their people against mass grievous human rights violations, and also obligates the international community to respond in some manner to mass atrocities when a state has failed to fulfill its original sovereign protective responsibility. While this doctrine is multifaceted, only these two components have attained the status of customary international law, and the latter responsive facet in a rather embryonic and amorphous manner. Though not a black and white discussion, it is important to consider responsibility to protect's role on the world stage, since such consideration lends to more accurate assessments of national obligations and future actions. It also separately highlights the messy process of the formation of international law.

Customary international law can be rather opaque, and constitutes a spectrum ranging from aspirational ideals on one end, to settled legal precepts and *jus cogens* on the other. The state's obligation to protect its own people is farther to the right on this spectrum, toward settled legal precepts, than the nascent obligation of the international community to respond in some manner to gross human rights abuses. However, this essay's premise—that there is some type of obligation, binding on the international community of nation-states, to react in some condemnatory manner to atrocities previously solely within a sovereign state's domain—highlights how customary international law evolves. In 2005, as nation-states began to operationalize the responsibility to protect theory on the world stage, they formally agreed to assist nations in satisfying their individual state protection responsibility, and also pledged to consider taking collective action when a nation-state fails its own protection mission. These commitments currently exist as indeterminate pledges to engage in unspecified action, and have yet to become customary international law in the particular form articulated at the 2005

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United Nations World Summit gathering.¹ This essay briefly demonstrates how and why responsibility to protect has otherwise evolved into customary international law by sketching its lineage and citing examples of how it has been utilized. This piece also summarily addresses why the distinction between policy/politics and law matters. The transformation from a political and moral commitment to protect human rights to a legal rule is not purely theoretical; it matters because the responsibility to protect as law forecasts how national leaders will react to mass human rights abuses, and informs their future decision-making.²

In 2009, the United Nations Secretary-General re-formulated the responsibility to protect into three distinct pillars: “[t]he protection responsibilities of the State”; “[i]nternational assistance and capacity-building”; and “[t]imely and decisive response.”³ Based on the language of the original international consensus on responsibility to protect as stated at the 2005 World Summit, as well as the global community’s reaction to this formulation and actual practice regarding this issue, this essay declines to find that the Secretary-General’s second pillar has attained customary law status, and explains how only a generalized version of the third has reached the same. The first pillar, however, seems to have become non-controversial international law.

I. BACKGROUND: WHAT IT IS AND WHY IT MATTERS

As agreed to unanimously by the United Nations General Assembly in 2005,⁴ and twice thereafter reaffirmed by the United Nations Security Council,⁵ the responsibility to protect legal paradigm first and foremost requires nation-states to protect their populations from genocide, war crimes, ethnic cleansing, and crimes against humanity.⁶ It concomitantly obliges the international community to use peaceful means to help protect populations from the four scourges; if these means are inadequate and “national authorities are manifestly failing to protect their

1. Not only are the specific actions the international community is required to take unclear, whether or not responsibility to protect is a legal requirement itself remains controversial. *See* Ved Nanda, Director of International Legal Studies at the University of Denver Sturm College of Law, Remarks at the University of Denver Sturm College of Law Annual Sutton Colloquium: The Arab Spring and its Unfinished Business (Nov. 5, 2011) (referring to responsibility to protect generally as customary international law, while disagreeing with then-United Nations Special Advisor Dr. Edward Luck, who, at the same forum, stated that the doctrine is only political and not legal).

2. It will surely continue to evolve, but in the words of the United Nations Secretary General, “this fundamental principle of human protection is here to stay.” Press Release, Secretary-General, ‘Responsibility to Protect’ Came of Age in 2011, Secretary-General Tells Conference, Stressing Need to Prevent Conflict before it Breaks Out, U.N. Press Release SG/SM/14068 (Jan. 18, 2012).

3. U.N. Secretary-General, *Implementing the Responsibility to Protect: Rep. of the Secretary-General*, at 2, U.N. Doc. A/63/677 (Jan. 12, 2009) [hereinafter *Implementing R2P*].

4. 2005 World Summit Outcome, G.A. Res. 60/1, U.N. Doc. A/RES/60/1 (Oct. 24, 2005) [hereinafter 2005 World Summit Outcome].

5. S.C. Res. 1894, U.N. Doc. S/RES/1894 (Nov. 11, 2009); S.C. Res. 1674, ¶ 4, U.N. Doc. S/RES/1674 (Apr. 28, 2006).

6. 2005 World Summit Outcome, *supra* note 4, ¶¶ 138-40; *see also* S.C. Res. 1894, *supra* note 5; S.C. Res. 1674, *supra* note 5, ¶ 4 (providing confirmation by United Nations Security Council of the 2005 United Nations General Assembly responsibility to protect commitments).

populations” from same, responsibility to protect allows the international community to take non-consensual “Chapter 7” collective action.⁷ This latter collective action, presumably to stop such atrocities, is to be conducted via the United Nations Security Council but is not mandated in every instance of mass atrocities.⁸ The international consensus agreement regarding the responsibility to protect, as reflected in the United Nations documents, stops short of requiring coercive action, stating instead that the international community is “prepared to take” such action on a “case-by-case basis.”⁹

The first obligation—that of nation-states to protect their inhabitants—has progressed from a theory, to a norm, to customary international law.¹⁰ But surprisingly, this evolution of state sovereignty has elicited little concern on the international stage. This quiet acceptance is perhaps due to the fact that the other main prong of responsibility to protect, that of intervention by the international community into the internal affairs of states when they have not fulfilled their protection responsibility, directly challenges the Westphalian model of sovereignty, and its controversial nature has overshadowed the idea that state sovereignty includes a responsibility of the state to its people.¹¹

7. 2005 World Summit Outcome, *supra* note 4, ¶ 139; S.C. Res. 1894, *supra* note 5; S.C. Res. 1674, *supra* note 5, ¶ 4. While Article 139 of the World Summit Outcome has been interpreted as imposing a duty to engage in collective action under Chapter 7 of the United Nations Charter if states fail to protect their populations, the clear language states that the international community is “prepared to take” such action but does not say it is required. Its use of “case-by-case basis” language also supports the conclusion that the responsibility to protect legal paradigm allows for such action but does not require it; instead, it obligates the international community to consider such action based on the individual extant dynamics of the situation. See Carsten Stahn, Note and Comment, *Responsibility to Protect: Political Rhetoric or Emerging Legal Norm?*, 101 AM. J. INT’L L. 99, 109 (2007); Alex J. Bellamy, *Preventing Future Kosovos and Future Rwandas: The Responsibility to Protect After the 2005 World Summit*, Carnegie Council Policy Brief No. 1, at 13 (2006), available at http://www.cceia.org/media/Bellamy_Paper.pdf.

8. Stahn, *supra* note 7, at 109-10.

9. 2005 World Summit Outcome, *supra* note 4, ¶ 139; S.C. Res. 1894, *supra* note 5; S.C. Res. 1674, *supra* note 5, ¶ 4.

10. Alex J. Bellamy, *The Responsibility to Protect—Five Years On*, 24 CARNEGIE COUNCIL FOR ETHICS & INT’L AFF., no. 2, 143, 160 (2010) (defining norms as “shared expectations of appropriate behavior for actions with a given identity”).

11. Dave O. Benjamin, *Prosecuting Crimes Against Humanity, The Revolution in International Criminal Law*, in INTERNATIONAL LAW: CONTEMPORARY ISSUES AND FUTURE DEVELOPMENTS 13, 15-17 (Sanford R. Silverburg ed., 2011) (discussing the Peace of Westphalia as establishing the legal standard of an autonomous state as “the power of central authority” and the Montevideo Convention of 1933 as listing the criteria of sovereign statehood; and explaining that the United Nations Charter via Article 2(7) establishes the non-interference principle as a component of sovereignty: that the United Nations, as well as other states, cannot interfere in the domestic affairs of another state, unless authorized by the United Nations Security Council. Benjamin also claims that the Westphalian model does not “adequately address . . . the responsibility of the state to its population.”). See also Guilherme M. Dias, *Responsibility to Protect: New Perspectives to an Old Dilemma*, in INTERNATIONAL LAW: CONTEMPORARY ISSUES AND FUTURE DEVELOPMENTS 48, 52-53 (Sanford Silverburg ed., 2011) (highlighting that the central feature of the Westphalian notion of sovereignty is nonintervention by states into the internal affairs of fellow states); Sanford R. Silverburg, *Introduction*, in INTERNATIONAL LAW: CONTEMPORARY ISSUES AND FUTURE DEVELOPMENTS 1, 2-3 (Sanford R. Silverburg ed., 2011)

The traditional notion of state sovereignty rests on the tenet that the central state authority controls everything within its territorial jurisdiction and that fellow states cannot interfere in this domestic sphere: this is the international law principle of non-intervention.¹² This Westphalian model of sovereignty does not specify a state's relationship to its own population, making the responsibility to protect's fundamental tenet, that states possess a legally-binding duty to protect their populations from mass atrocities, superficially revolutionary. However, as recognized by the United Nations Secretary-General, "[p]rotection was one of the core purposes of the formation of States and the Westphalian system."¹³ This attribute of sovereignty is really "old wine in new bottles";¹⁴ its lineage can be traced to Hobbes' social contract theory: that people covenant with a sovereign authority in exchange for fundamental protection from life's vicissitudes.¹⁵

The fact that the first tenet of the responsibility to protect doctrine is well-grounded in existing international law and political philosophy does not mean that leaders such as the United Nations Secretary-General have admitted it constitutes customary international law; perhaps they fear partitioning the general doctrine, with its controversial intervention prong, into distinct components with differing legal status.¹⁶ Despite this lack of formal recognition, even nations such as Iran, a staunch proponent of non-intervention, implicitly support the concept of a nation-state's responsibility to protect its people.¹⁷ The Iranian Ambassador to the United Nations has stated that Syria had an obligation to its people to stop the then-extant human rights abuses there, regardless of who was perpetrating them, while vehemently condemning any attempt by other nations to take coercive action against the Syrian government.¹⁸

In contrast to the relatively non-controversial acceptance of the concept of the state's responsibility to protect its population, the status of the responsibility to protect's prong which posits a collective obligation by other states to help prevent and stop ongoing instances of one of four mass human rights violations in a fellow

(explaining that the traditional notion of state sovereignty focuses on the ability of the state to control everything within its borders).

12. U.N. Charter art. 2, para. 7.

13. Press Release, Secretary-General, Secretary-General Defends, Clarifies 'Responsibility to Protect' at Berlin Event on 'Responsible Sovereignty: International Cooperation for a Changed World,' U.N. Press Release SG/SM/11701 (July 15, 2008) [hereinafter Secretary-General Defends R2P].

14. Stahn, *supra* note 7, at 111.

15. *Hobbes's Moral and Political Philosophy*, ¶ 7, in STANFORD ENCYCLOPEDIA OF PHILOSOPHY (rev. ed. 2008), <http://plato.stanford.edu/entries/hobbes-moral/#EstSovAut> ("Political legitimacy depends not on how a government came to power, but only on whether it can effectively protect those who have consented to obey it . . .").

16. Secretary-General Defends R2P, *supra* note 13 ("Today, the responsibility to protect is a concept, not yet a policy; an aspiration, not yet a reality.").

17. Interview by Charlie Rose with Mohammad Khazaei, Iranian Ambassador to U.N., Charlie Rose TV Show (Jan. 18, 2012), <http://www.charlierose.com/view/interview/12093>.

18. *Id.*

state is much more controversial.¹⁹ But with sufficient caveats as explained below, it also appears to have evolved into the most elementary level of customary international law. That is, responsibility to protect's second customary international law component is a requirement for some type of censorious action by the international community in response to genocide, crimes against humanity, war crimes, and ethnic cleansing.²⁰ This obligation is a vague one, which involves a spectrum of responses. It does not require one particularized type of action, such as the use of non-consensual military force within the territory of another nation-state to interdict mass atrocities (the 1990's concept of humanitarian intervention, with Kosovo being a prime example).

Rather, responsibility to protect as law provides that (1) national sovereignty confers to the nation-state an obligation to protect their populations from the four stated grave human rights abuses, and (2) when a nation-state is unwilling or unable to render such protection, the international community is legally required to engage in some type of condemnatory action, ranging from critical discussion to coercive military intervention.²¹ While the latter proposition seems to imply that mere global hand-wringing is sufficient to prove that responsibility to protect has evolved into customary law, such reactive discussion is a type of behavior and its ubiquitous nature does in fact indicate international law status.

II. LAW VERSUS POLITICS: DOES IT MATTER?

The United Nations Special Advisor for the Responsibility to Protect, Dr. Edward C. Luck, has emphasized that the responsibility to protect is “not law, it's politics.”²² Of course the responsibility to protect involves politics—all law involves some level of politics, as legal realism has long avowed.²³ Simply because the implementation of responsibility to protect involves political calculations by nation states does not innately negate its status as customary international law. The adherence to law by nation states in the international arena rarely fails to include a weighing of national interests, resources, and other dynamics: in other words, politics. If responsibility to protect is not law because it

19. INT'L COMM'N ON INTERVENTION AND STATE SOVEREIGNTY, *RESPONSIBILITY TO PROTECT* 32-33 (2001) [hereinafter ICISS REPORT], available at <http://responsibilitytoprotect.org/ICISS%20Report.pdf>.

20. 2005 World Summit Outcome, *supra* note 4, ¶ 139.

21. *Id.* ¶¶ 138-39; ICISS REPORT, *supra* note 19, at 29.

22. Edward C. Luck, U.N. Special Adviser, Remarks at the University of Denver Sturm College of Law Annual Sutton Colloquium: The Arab Spring and its Unfinished Business (Nov. 5, 2011); see also Edward C. Luck, *The Responsibility to Protect: Growing Pains or Early Promise?*, 24 ETHICS & INT'L AFF. J. 349, 349 (2010) (characterizing responsibility to protect as “a policy tool”). Dr. Luck argues that responsibility to protect is not only a policy tool but “a principle,” and that policy measures implementing it are inherently political, and therefore the principle's import cannot be judged by how little or much it is operationalized via policy. He therefore claims that responsibility to protect is merely a policy tool, while simultaneously claiming it is a principle that cannot be judged by its implementation into policy. *Id.* at 352-53.

23. Michael C. Dorf, *Is There A Distinction between Law and Politics? Yes, and the Bush v. Gore Decision Proves It*, FINDLAW (Dec. 27, 2000), <http://writ.news.findlaw.com/dorf/20001227.html>.

involves politics, than none of what comprises international law can be considered law.²⁴ By downplaying responsibility to protect's nature as customary international law, Dr. Luck risks diluting some of its potency as, in Alex J. Bellamy's words, a "catalyst for action."²⁵

Dr. Luck's mischaracterization resembles one of the classic critiques of the nature of international law itself: that it is not "law" and instead merely national interests pursued on the global stage.²⁶ While this Austinian cum Goldsmithian argument is interesting and highlights the diverse views of the nature of law, it is increasingly moot in today's world of global interdependence, which relies on a structural framework of international law.²⁷ This legal framework is clearly demonstrated by the omnipresent references to international law as justification for both action and inaction by nation states and other international actors.²⁸ What is considered international law frames the international discussion and helps shape behavior of its actors; responsibility to protect both is a product of politics and a shaper of same as its essential elements drive state policy.

Another way to distinguish international law from pure politics is to consider the sanctions-based perspective. International law generally distinguishes itself from social, moral and other rules based on the potential for sanction, with this sanction taking many forms.²⁹ This sanction-based litmus test for distinguishing international law from moral, ethical, and other dynamics is relevant to this essay's thesis that components of responsibility to protect constitute customary international law: the failure of a nation-state to protect its population from mass human rights abuses generally prompts some form of counter-measure by the international community, be it condemnation via individual national statements or global resolutions, loss of credibility, boycotts, trade sanctions, criminal

24. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 101 (1987) (referring to international law as "rules and principles of general application dealing with the conduct of states and of international organizations and with their relations inter se, as well as with some of their relations with persons, whether natural or juridical").

25. Bellamy, *supra* note 10, at 160.

26. PETER MALANCZUK, AKEHURST'S MODERN INTRODUCTION TO INTERNATIONAL LAW 5 (7th ed. 1997) (critiquing the international community's lack of an enforcement mechanism to sanction violations of its rules); see also MARY ELLEN O'CONNELL, THE POWER AND PURPOSE OF INTERNATIONAL LAW: INSIGHTS FROM THE THEORY AND PRACTICE OF ENFORCEMENT 62-66 (2008) (highlighting the legal theories for and against international law as law, and concluding that the availability of sanctions distinguishes international law as a legal system).

27. See O'CONNELL, *supra* note 26, at 2-4 (reviewing Austin's classic formulation of international law and Jack Goldsmith's modern espousal of same).

28. WILLIAM R. SLOMANSON, FUNDAMENTAL PERSPECTIVES ON INTERNATIONAL LAW 54-57 (5th ed. 2007).

29. O'CONNELL, *supra* note 26, at 6-7 (discussing the Grotian view that sanctions signal the rule, but noting international law "does not rely on 'effective' sanctions for its classification as law"). O'Connell notes that every rule of international law is backed at least by a "general-purpose countermeasure," while also discussing Hart's view that community acceptance is central to law's characterization as law. *Id.*

indictments of national leaders, or coercive military force.³⁰ These censorious reactions help prove the international law status of the rule which has been broken. In today's globally-interdependent and politically-conscious world, nation-states simply cannot intentionally commit, allow, or fail to prevent mass human rights abuses within their territories without eliciting some type of sanction-type reaction by the global community. This reaction demonstrates the legal status of the obligation not to engage in such behavior in the first place.

Because of the reality that nation states, as well as other international actors, use international law precepts as a basis for common ground, as well as to justify and guide their actions, it is important to call a spade a spade, and highlight what components of the responsibility to protect doctrine have evolved into international law. This exercise is "useful to reduce the complexity and uncertainty in international relations . . . [and to clarify] the external relevant terms of legal reference for the conduct of states in their international relations . . . [as] they are members of an existing international community."³¹ In concrete terms, responsibility to protect, as law, structures the debate regarding on-going killings of civilians by various governments and helps guide policy makers as they struggle to craft a solution.

III. THE RESPONSIBILITY TO PROTECT DOCTRINE

Since customary international law status is demonstrated by analyzing how states act—including what they say—and why they do so, it is critical to briefly review the evolution and context of the responsibility to protect doctrine because its development reveals the beliefs of the international community.³² The following will clarify the consensus the international community has reached regarding the various tenets of this theory, and will lay the foundation for this essay's analysis regarding whether that consensus is of a legally binding nature. An understanding of the history of responsibility to protect is also helpful to place in context the components of the theory of responsibility to protect which have yet to become binding law.

The responsibility to protect doctrine evolved in the late 1990s and early 2000s in response to the failures of nation-states and the world community to prevent mass human rights atrocities, such as the genocidal tragedy in Rwanda and mass human rights abuses in Somalia, as well as in reaction to NATO's unilateral

30. *See, e.g.*, Prosecutor v. Omar Hassan Ahmed al Bashir, Case No. ICC-02/05-01/09, Warrant of Arrest (Mar. 4, 2009); S.C. Res. 1593, U.N. Doc. S/RES/1593 (Mar. 31, 2005); S.C. Res. 1591, U.N. Doc. S/RES/1591 (Mar. 29, 2005); Catherine Ashton, High Rep. for Foreign Affairs and Sec. Policy and Vice President of the European Commission, Eur. Union, Speech on Syria (Dec. 13, 2011); *Syria Unrest: Arab League Adopts Sanctions in Cairo*, BBC NEWS (Nov. 27, 2011), <http://www.bbc.co.uk/news/world-middle-east-15901360>.

31. MALANCZUK, *supra* note 26, at 7.

32. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §102(2) (1987) ("Customary international law results from a general and consistent practice of states followed by them from a sense of legal obligation."); *North Sea Continental Shelf* (F.R.G./Den.; F.R.G./Neth.), Judgment, 1969 I.C.J. 3, ¶ 74 (Feb. 20).

(not approved by the United Nations) intervention in Kosovo on humanitarian grounds.³³ The move to develop responsibility to protect was also motivated by various attempts to outline a consistent framework to apply when a nation-state fails to protect individuals within its borders: in the aftermath of Rwanda and Kosovo, it sought to answer the questions of when and how nation-states should take both consensual and non-consensual action to prevent and/or stop grave human rights abuses within another state.³⁴

The pivotal dilemma of this period was how to reconcile state sovereignty, as reflected in the United Nations Charter's non-interference principle and prohibition against the use of force, with the urge to stop mass human rights abuses within the territories of other nation-states which were either perpetrating such abuses or failing to stop them.³⁵ The desire to stop such atrocities stemmed from both the growing internationalization of human rights that had occurred since the U.N. Charter's signing, and from increasing public awareness of human rights abuses due to evolving technology and access to it.³⁶ Despite these dynamics, much of the global community remained concerned that humanitarian intervention—the non-consensual use or threat of use of military force against a state for the purpose of protecting people within that state—was a guise for power politics, and would be used by stronger powers to dominate the weak via expansionist invasions prompted by imperialist motivations.³⁷ This fear was compounded by the United Nations Security Council's failure to authorize effective action in cases such as Rwanda and Kosovo, leaving the international community with the choice of either doing nothing or using force illegally to stop the abuses and thereby violating the United Nations Charter and the invaded state's sovereignty.³⁸

Despite these fears that humanitarian protection would merely serve as a pretext for coercive action motivated by other goals, by the late 1990s there existed a growing belief by politicians and legal theorists in a “right” of humanitarian intervention: that state sovereignty did not provide a shield to allow a state to violate its populations human rights.³⁹ This right, tracing its lineage to Hugo

33. NAOMI KIKOLER, RESPONSIBILITY TO PROTECT 4 (2009), available at <http://www.rsc.ox.ac.uk/pdfs/keynotepaperkikoler.pdf>.

34. ICISS REPORT, *supra* note 19, at 1-3.

35. Compare U.N. Charter art. 2, paras. 4, 7, with ICISS REPORT, *supra* note 19, at 1-3.

36. ICISS REPORT, *supra* note 19, at 6-7; see Dave O. Benjamin, *Prosecuting Crimes Against Humanity: The Revolution in International Criminal Law*, in INTERNATIONAL LAW: CONTEMPORARY ISSUES AND FUTURE DEVELOPMENTS 13, 15-18 (Sanford R. Silverburg ed., 2011).

37. ICISS REPORT, *supra* note 19, at 7-8; Ramesh Thakur, *Outlook: Intervention, Sovereignty and the Responsibility to Protect: Experiences from ICISS*, 33 SECURITY DIALOGUE 323, 328-30 (2002) (outlining fears of nations opposed to humanitarian intervention).

38. THOMAS M. FRANCK, FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS 304-05 (1995); see also W. Michael Reisman, Editorial Comment, *Sovereignty and Human Rights in Contemporary International Law*, 84 AM. J. INT'L L. 866, 875 (1990) (discussing the ambiguity behind decisions to intrude upon a nation's sovereignty).

39. See J.L. Holzgrefe, *The Humanitarian Intervention Debate*, in HUMANITARIAN INTERVENTION: ETHICAL, LEGAL, AND POLITICAL DILEMMAS 15, 26-27 (J.L. Holzgrefe & Robert O.

Grotius, the great naturalist and father of international law, was articulated in the late 1980s by French politician Bernard Kouchner and initially primarily referred to the “right of states to provide humanitarian relief even when the violating state refused to give permission,” and was implemented by the United Nations in Iraq in 1991, in Somalia in 1992, and by France in Rwanda in 1994.⁴⁰

Following the failures of such humanitarian interventions—which focused on delivery of aid versus stopping the conflicts which were causing the crises—the concept of a “right” to intervene via aid delivery instead evolved into the right to use military force to stop the dynamics which were actually causing the suffering.⁴¹ This latter right was used to justify NATO’s unilateral military intervention in Kosovo in 1999.⁴² Former British Prime Minister Tony Blair went the farthest in outlining trigger mechanisms for this intervention, and his theory, as well as the Kosovo intervention itself, became known for the position that United Nations approval was not required to use military force against another sovereign nation for the purposes of stopping or preventing grave human rights abuses.⁴³

Of course humanitarian intervention as a “right” did little to lessen fears of many states that such a right was a promotion of “hegemonism under the pretext of human rights.”⁴⁴ It was within this context of humanitarian intervention versus state sovereignty that the then-United Nations Secretary-General issued a challenge to the global community in 1999 to reconcile the tensions between the United Nations paradigm for authorizing force (specifically its prohibition against unilateral action on humanitarian or other grounds without United Nations Security Council approval), and the prevention of mass human rights violations within states when the state itself has failed to protect its inhabitants from such violations:

The inability of the international community in the case of Kosovo to reconcile these two equally compelling interests—universal legitimacy and effectiveness in defence of human rights—can only be viewed as a tragedy. It has revealed the core challenge to the Security Council and to the United Nations as a whole in the next century: to forge unity behind the principle that massive and systematic violations of human

Keohane eds., 2003) (articulating a tenet of natural law theory that views humanitarian intervention as a discretionary right versus a moral obligation).

40. Chris Abbott, *Rights and Responsibilities: Resolving the Dilemma of Humanitarian Intervention*, HUMANITARIAN ASSISTANCE 2-3 (Oct. 29, 2005) (discussing history of humanitarian intervention as ‘droit d’ingence humanitaire’), available at <http://sites.tufts.edu/jha/files/2011/04/a180.pdf>; Holzgrefe, *supra* note 39, at 26-27 (articulating a tenet of natural law theory that views humanitarian intervention as a discretionary right versus moral obligation); see also HUGO GROTIUS, ON THE LAW OF WAR AND PEACE 207-8, 247-8 (A.C. Campbell trans., 2001) (1625). Grotius believed that states have a discretionary right to intervene, by force if necessary, in another state to prevent grave human suffering but that states do not have an obligation to do so. *Id.*

41. Abbott, *supra* note 40, at 2-3.

42. *Id.* at 3.

43. *Id.* at 4-5.

44. Thomas M. Franck, *Interpretation and Change in the Law of Humanitarian Intervention*, in HUMANITARIAN INTERVENTION: ETHICAL, LEGAL, AND POLITICAL DILEMMAS 204, 225 (J.L. Holzgrefe & Robert O. Keohane, eds., 2003).

rights—wherever they may take place—should not be allowed to stand.⁴⁵

The Canadian government, via the independent International Commission on Intervention and State Sovereignty (“ICISS”), published their response to this challenge in December 2001.⁴⁶ Their resultant responsibility to protect theory, promulgated shortly after the September 11, 2001 attacks, attempted to re-define the issue away from the non-interference versus human rights dichotomy to instead focus on the state’s responsibility as a sovereign: from “sovereignty as control to sovereignty as responsibility.”⁴⁷ The ICISS theory of responsibility to protect trumped the non-interference attribute of state sovereignty in that if a state fails to fulfill its responsibilities to protect its population, the international community has a responsibility to act.⁴⁸ It further detailed the international community’s obligations as threefold: a responsibility to prevent, a responsibility to react, and a responsibility to rebuild.⁴⁹ The Commission’s theory prioritized the international community’s prevention responsibility, stating that it had an obligation to “address both the root causes and direct causes of internal conflict and other man-made crises putting populations at risk.”⁵⁰

The sovereign as protector approach built upon the concept of sovereignty as responsibility originally articulated by Francis Deng, the United Nations Representative on Internally Displaced Persons and later the United Nations Special Advisor on Genocide.⁵¹ Deng posited that “absolute sovereignty . . . never was;” that sovereignty has always resided in the people; and the legitimacy of the government derives from both moral and material responsibilities for the population.⁵² If these responsibilities are not met the state loses legitimacy as a sovereign.⁵³ He and Koffi Annan, the former United Nations Secretary-General, together articulated that sovereignty involves both an internal and an external

45. U.N. GAOR, 54th Sess., 4th plen. mtg. at 2, U.N. Doc. A/54/PV.4 (Sept. 20, 1999).

46. See ICISS REPORT, *supra* note 19, at XI-XIII.

47. Abbott, *supra* note 40, at 8.

48. ICISS REPORT, *supra* note 19, at 75. The “non-interference” mentioned in the ICISS report refers to both Article 2(7) of the United Nations Charter which prohibits the United Nations from interfering in the domestic matters of a state, as well as the general international rule stemming from the 1648 Peace of Westphalia that states are likewise prohibited from the internal affairs of another state. See Nico Schrijver, *The Changing Nature of State Sovereignty*, 70 BRIT. Y.B. INT’L L. 65, 65 (1999).

49. Guilherme M. Dias, *Responsibility to Protect: New Perspectives to an Old Dilemma*, in INTERNATIONAL LAW: CONTEMPORARY ISSUES AND FUTURE DEVELOPMENTS 48, 54-56 (Sanford R. Silverburg ed., 2011); see also Abbott, *supra* note 40, at 8.

50. ICISS REPORT, *supra* note 19, at XI.

51. Roberta Cohen, *Humanitarian Imperatives are Transforming Sovereignty*, BROOKINGS INSTITUTION (Winter 2008), <http://www.brookings.edu/research/articles/2008/01/winter-humanitarian-cohen>.

52. Benjamin, *supra* note 36, at 15.

53. *Id.* at 16.

component, in the form of accountability to their populations and to the international community, a theme echoed in the ICISS report.⁵⁴

The ICISS report's acceptance of the subordination of the non-interference principle in cases of failure by the state to protect its people seemingly inverted Westphalian sovereignty's emphasis on a state's dominion over all activities within its borders and remains the most controversial component of the responsibility to protect doctrine. However, the final ICISS document also emphasized the primacy of the state as possessing the original protection responsibility, thus attempting to assure those nations fearing illegitimate intervention in the guise of human rights.⁵⁵ It concluded that only when the state fails to meet its responsibility to protect its people would the international community shoulder a positive responsibility to act.⁵⁶ That is, the Commission's report in general focused on the state as the repository of primary responsibility to prevent human suffering within its borders; only if the state failed to shoulder this responsibility would it shift to the international community, with military intervention only as a last resort.⁵⁷

Additionally, the ICISS theory definitively embraced the United Nations Security Council as the appropriate body to "authorize military intervention for human protection purposes."⁵⁸ While it emphasized a requirement to seek United Nations authorization prior to any military intervention on humanitarian grounds, it provided options when such approval was not forthcoming: the General Assembly should consider the matter under the "Uniting for Peace" procedure and action by regional organizations under Chapter VIII of the United Nations Charter as long as they seek subsequent UNSC authorization.⁵⁹

The ICISS responsibility to protect doctrine's "human protection purposes" focused on a population suffering "serious and irreparable harm" (or such harm was imminently likely), which involved "large scale loss of life" due to "deliberate state action, or state neglect or inability to act, or a failed state situation, or large scale 'ethnic cleansing' . . . whether carried out by killing, forced expulsion, acts of terror or rape."⁶⁰ It also outlined six criteria for military intervention, including right authority, just cause, right intention, last resort, proportional means, and reasonable prospects.⁶¹ The Commission's report did not distinguish between the state as perpetrator and situations in which the state failed to protect its population

54. *Id.*; Cohen, *supra* note 51; ICISS REPORT, *supra* note 19, at 8; Kofi Annan, *Two Concepts of Sovereignty*, ECONOMIST, Sept. 16, 1999, available at <http://www.economist.com/node/324795> (the former Secretary-General explicitly linked sovereignty to the individual and not just the people).

55. ICISS REPORT, *supra* note 19, at 7-8.

56. *Id.* at XI.

57. *Id.*

58. *Id.* at XII.

59. *Id.* at 53 (outlining the procedure by which the General Assembly can take measures where the Security Council has failed).

60. *Id.* at XII.

61. *Id.* at 32.

from above acts, and emphasized that its doctrine did not involve human rights violations which did not involve “outright killing” or ethnic cleansing.⁶²

IV. RESPONSIBILITY TO PROTECT AS CUSTOMARY INTERNATIONAL LAW:
METHODOLOGY AND ANALYSIS

In 2001 the ICISS report provided a well-reasoned theory of the responsibility to protect, but despite its aims, the result did not represent an international consensus on the contours of such a doctrine; the global community has yet to adopt the ICISS formula.⁶³ However, several of its components evolved, with much prompting by the United Nations Secretary-General, into a consensus reached at the 2005 United Nations World Summit.⁶⁴ The outcome of the Summit was this unanimous agreement by the United Nations General Assembly:

Responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity.

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

139. The international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the Charter, to help to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. In this context, we are prepared to take collective action, in a timely and decisive manner, through the

62. *Id.* at 34.

63. Ramesh Thakur, *The Responsibility to Protect and the North-South Divide*, in INTERNATIONAL LAW: CONTEMPORARY ISSUES AND FUTURE DEVELOPMENTS 34, 36 (Sanford R. Silverburg ed., 2011); Bellamy, *supra* note 10, at 146; Edward C. Luck, U.N. Special Adviser, Remarks at the University of Denver Sturm College of Law Annual Sutton Colloquium: The Arab Spring and its Unfinished Business (Nov. 5, 2011); *see also* 2005 World Summit Outcome, *supra* note 4, ¶ 138–39 (recognizing the responsibility of the states and international community to “protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity”); S.C. Res. 1674, *supra* note 5, ¶ 4 (reaffirming the responsibility outlined in the 2005 World Summit Outcome).

64. Thakur, *supra* note 63, at 38; *see also* Rep. of the High-Level Panel on Threats, Challenges and Change, *A More Secure World: Our Shared Responsibility*, U.N. Doc. A/59/565 (Dec. 2, 2004); U.N. Secretary-General, *In Larger Freedom: Towards Development, Security and Human Rights for All: Report of the Secretary-General*, ¶ 135, U.N. Doc. A/59/2005 (Mar. 21, 2005) (demonstrating the U.N. Secretary-General’s efforts to move the global community toward consensus).

Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity. We stress the need for the General Assembly to continue consideration of the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity and its implications, bearing in mind the principles of the Charter and international law. We also intend to commit ourselves, as necessary and appropriate, to helping States build capacity to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity and to assisting those which are under stress before crises and conflicts break out.⁶⁵

So what to make of the fact that there was consensus within the international community regarding these two paragraphs in 2005, as demonstrated by their unanimous acceptance within the General Assembly and by re-affirming United Nations Security Council resolutions in 2006 and 2009?⁶⁶ Does the above-articulated responsibility to protect doctrine represent international law: because there was consensus, is it consequently binding upon states and the international community?⁶⁷ To answer this query one must determine what the international community intended by the above resolution; in 2009 the General Assembly once again debated the doctrine of responsibility to protect, shedding some light on its intentions.

Specifically, not only did consensus exist regarding the above-quoted 2005 commitment to responsibility to protect, it was also present when the United Nations General Assembly reconsidered the 2005 document in 2009; resulting in a General Assembly resolution reaffirming the 2005 World Summit document's commitments.⁶⁸ The 2009 General Assembly debate which produced this resolution revolved around Secretary-General Ban Ki-Moon's report of the same year, "Implementing the Responsibility to Protect," which attempted to clarify the 2005 agreement as well as provide implementing methods and modalities.⁶⁹ It was this report which structured responsibility to protect as a three-legged stool, identifying its legs as state responsibility; assistance to states; and timely and

65. 2005 World Summit Outcome, *supra* note 4, ¶ 138-139.

66. S.C. Res. 1674, *supra* note 5; S.C. Res. 1894, *supra* note 5 (re-affirming 2005 World Summit Outcome).

67. *See* Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶¶ 68-73 (July 8); Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, ¶ 188 (June 27); RESTATEMENT (THIRD) FOREIGN RELATIONS LAW OF U.S. § 101 (1987).

68. Responsibility to Protect, G.A. Res. 63/308, U.N. Doc. A/RES/63/308 (Oct. 7, 2009); Bellamy, *supra* note 10, at 147 (discussing the General Assembly's approval of the Secretary-General's three-pillar approach).

69. *Implementing R2P*, *supra* note 3, ¶ 2; Bellamy, *supra* note 10, at 146.

decisive action by the international community.⁷⁰ Specifically, it defined the three pillars as: (1) the protection responsibilities of the state, (2) international assistance and capacity-building, and (3) timely and decisive response to prevent and halt genocide, ethnic cleansing, war crimes and crimes against humanity.⁷¹

A comparison of these three pillars with the original wording in the 2005 World Summit document reveal little if any substantive difference, though the last pillar does arguably appear to strengthen the original commitment. It adds “to prevent and halt” the four categories of human rights abuses, whereas the original language speaks in terms of collective coercive actions the international community is prepared to take on a case-by-case basis when a nation has failed in its responsibility to protect its people from one of the four named abuses, without specifying to what ends.⁷² Hence it appears that the third pillar’s re-formulation of the original responsibility to protect’s action element turns it from one to act on a case-by-case basis, without guaranteeing a prevention or cessation of atrocities, to one of a beefed-up commitment to actually prevent or halt all cases in which the state has failed to protect its people from war crimes, ethnic cleansing, crimes against humanity, and genocide.

However, the original 2005 document’s commitment to “be prepared to take . . . timely and decisive action” when a nation has failed to protect its people must be read in concert with the preceding sentence, which commits the international community to take the appropriate peaceful means to protect populations from the four scourges.⁷³ Therefore one can conclude that the subsequent sentence which speaks to collective coercive action must also be read with the intent to protect these same populations from the same violations; one can surmise that the Secretary-General’s “to prevent and halt” charge is equivalent to the “to protect” language in the original resolution. Hence this third pillar clarifies what “to protect” means, but goes even further because it fails to emphasize the case-by-case nature of the original 2005 commitment, as well as glosses over the 2005 “be prepared” language. Taken together, the original 2005 language appears to leave more room for flexibility by the international community by signaling an intention to be prepared to take coercive action, but not necessarily committing it to do so in every instance—only on a “case-by-case” basis.

The international community, in 2009, also appeared to have some difficulty reconciling the third pillar’s language with that found in the 2005 resolution. Fifty of the 180 states represented during the General Assembly session debate on responsibility to protect endorsed the proposed “three pillars” strategy as formulated by the Secretary-General.⁷⁴ While there was unanimity within the

70. *Implementing R2P*, *supra* note 3, ¶ 11.

71. *Id.*

72. 2005 World Summit Outcome, *supra* note 4, ¶ 139.

73. *Id.*

74. GLOBAL CENTRE FOR THE RESPONSIBILITY TO PROTECT, IMPLEMENTING THE RESPONSIBILITY TO PROTECT THE 2009 GENERAL ASSEMBLY DEBATE: AN ASSESSMENT 1, 1-2 (2009), *available at* http://globalr2p.org/media/pdf/GCR2P_General_Assembly_Debate_Assessment.pdf.

entire assembly on the first two pillars, many states expressed concern regarding the third, regarding appropriate circumstances to take coercive action as well as fears regarding misuse of intervention by more powerful states.⁷⁵ Despite these concerns, the “majority of the speakers affirmed that it was necessary for the Security Council to be ready to take timely and decisive action to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity, should their government be manifestly failing to do so,” thereby re-affirming the international community’s original 2005 commitment.⁷⁶

A. Sovereignty as Responsibility: General Practice Accepted as Law?

The consensus regarding the 2005 World Summit Outcome document’s responsibility to protect commitments, as reflected in the 2009 debate, provides the foundation with which to determine what parts of the broad responsibility to protect theory have attained customary international law status. As detailed above, the 2005 resolution as re-affirmed by the General Assembly in 2009 narrowed the broader Canadian ICISS doctrine to four types of crimes, and created three categories of duties. While the World Summit Outcome document and the subsequent General Assembly resolutions are indicative of customary international law, they are not *per se* such: they are usually not legally binding.⁷⁷ However, this World Summit document, as well as both General Assembly and Security Council resolutions, go far in proving the customary international law status of responsibility to protect, as explored below.

Classically, customary international law is demonstrated via demonstrations of state practice and *opinio juris*.⁷⁸ Regarding state practice, the International Court of Justice in the North Continental Shelf cases noted that both a selection of state practice and an assessment of the same are required to analyze whether a practice constitutes customary international law.⁷⁹ Both verbal and physical acts of states constitute state practice, including the negotiation and passage of resolutions of international bodies, as well as individual states’ explanations of their votes.⁸⁰ Critically, the “value accorded to any particular resolution in the assessment of the formation of a rule of customary international law depends on its content, its degree of acceptance and the consistency of related State practice. The greater the

75. *Id.* at 2.

76. *Id.* at 4.

77. North Sea Continental Shelf (F.R.G./ Den.; F.R.G./Neth.), Judgment, 1969 I.C.J. 3, ¶¶ 73-74 (Feb. 20); RESTATEMENT (THIRD) FOREIGN RELATIONS LAW OF THE U.S. §§ 102 cmt. g, 103 cmt. c (1987); Jean-Marie Henckaerts, *Study on Customary International Humanitarian Law: A Contribution to the Understanding and Respect for the Rule of Law in Armed Conflict*, 87 INT’L REV. RED CROSS 175, 179 (Mar. 2005).

78. U.N. Charter, Statute of the International Court of Justice art. 38(1), June 26, 1945; RESTATEMENT (THIRD) FOREIGN RELATIONS LAW OF THE U.S. §§ 102 cmt. c, 103 cmt. a (1987).

79. *North Sea Continental Shelf*, 1969 I.C.J. ¶¶ 73-74; Henckaerts, *supra* note 77, at 180-81.

80. Henckaerts, *supra* note 77, at 179.

support for the resolution, the more importance it is to be accorded.”⁸¹ In assessing state practice, it has to be “general and consistent,”⁸² though some international law studies claim it must be “virtually uniform, extensive and representative” in order to form customary international law.⁸³ Regarding the second element of customary international law—whether or not state practice was conducted out of a sense of legal obligation—one can actually refer back to the state act itself, as it often also reflects both state practice as well as *opinio juris*.⁸⁴

The first, and arguably most important, pillar of the responsibility to protect as articulated in the 2005 World Summit document has attained customary international law status when analyzed using the above framework. “Each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity.”⁸⁵ State practice is reflected in the unanimity of the text’s original passage in 2005, the two reaffirming Security Council Resolutions, and the 2009 General Assembly resolution.⁸⁶ State practice, as evidenced by verbal acts, is also found in numerous Security Council resolutions passed since 2005 which highlight a particular state’s responsibility to protect: these resolutions contain specific reminders to certain states that they have an obligation to protect their people from mass atrocities. The first, passed in 2006, was Security Council Resolution 1706, which authorized the deployment of peacekeeping troops to Darfur; it cited both the responsibility to protect paragraphs from the World Summit Outcome document as well as Security Council Resolution 1674.⁸⁷ More recently, Security Council Resolutions 1970 and 1973 both reminded Libya of its responsibility to protect its population.⁸⁸ The Security Council passed numerous resolutions with similar language in-between the Darfur and Libya bookends: in total, since 2005 the United Nations Security Council has included language reminding a state that it possesses the primary responsibility to protect its citizens in the realm of human rights over ten times,⁸⁹ not including

81. *Id.*; see also Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶¶ 70-73 (July 8) (outlining the indicia of law surrounding such resolutions).

82. RESTATEMENT (THIRD) FOREIGN RELATIONS LAW OF THE U.S. § 102 (1987).

83. Henckaerts, *supra* note 77, at 180; see also *North Sea Continental Shelf*, 1969 I.C.J. ¶ 74 (describing criteria with which to assess whether state practice establishes customary international law).

84. RESTATEMENT (THIRD) FOREIGN RELATIONS LAW OF THE U.S. § 102 cmt. c (1987) (“*opinio juris* can be inferred from acts or omissions”); Henckaerts, *supra* note 77, at 182 (stating that an act can manifest both state practice and *opinion juris*).

85. 2005 World Summit Outcome, *supra* note 4, ¶ 138.

86. G.A. Res. 63/308, *supra* note 68, pmbl.

87. S.C. Res. 1706, U.N. Doc. S/RES/1706 (Aug. 31, 2006).

88. S.C. Res. 1970, U.N. Doc. S/RES/1970 (Feb. 26, 2011); S.C. Res. 1973, U.N. Doc. S/RES/1973 (Mar. 17, 2011).

89. S.C. Res. 2021, pmbl., U.N. Doc. S/RES/2021 (Nov. 29, 2011); S.C. Res. 2014, pmbl., U.N. Doc. S/Res/2014 (Oct. 21, 2011); S.C. Res. 2010, ¶ 22, U.N. Doc. S/RES/2010 (Sept. 30, 2011); S.C. Res. 2008, pmbl., U.N. Doc. S/RES/2008 (Sept. 16, 2011); S.C. Res. 2003, pmbl., ¶¶ 3, 22, U.N. Doc. S/RES/2003 (July 29, 2011); S.C. Res. 1973, *supra* note 88, pmbl.; S.C. Res. 1925, pmbl., U.N. Doc. S/RES/1925 (May 28, 2010); S.C. Res. 1906, pmbl., U.N. Doc. S/RES/1906 (Dec. 23, 2009); S.C. Res. 1894, pmbl., U.N. Doc. S/RES/1894 (Nov. 11, 2009); S.C. Res. 1834, pmbl., U.N. Doc. S/RES/1834

those resolutions which specifically focus only on war crimes and/or noncombatant deaths during armed conflicts.⁹⁰

The resolutions include language such as that found in S/RES/2021 (2011): “[s]tressing the primary responsibility of the Government of the Democratic Republic of the Congo for ensuring security in its territory and protecting its civilians with respect for the rule of law, human rights and international humanitarian law.”⁹¹ This is echoed in Resolution 2031: “[u]nderscores the primary responsibility of the Government of the Central African Republic to promote security and protect its civilians with full respect for the rule of law, human rights, and international humanitarian law”⁹² and 2014: “[r]ecalling the Yemeni Government’s primary responsibility to protect its population.”⁹³

The verbal acts of passing the 2005 World Summit Outcome document and its subsequent General Assembly and Security Council reaffirmations, in addition to the above-cited state-specific resolutions which cite to a particular state’s responsibility, provide significant examples of state practice to demonstrate that states now possess a binding legal obligation to prevent or halt (i.e., protect) crime against humanity, genocide, ethnic cleansing, and war crimes within their borders.⁹⁴ Furthermore, the reasons given by states when passing these various resolutions reflect the general consensus that this duty is a legal derivative of statehood: with sovereignty comes responsibility. Examples include the Prime Minister of Iceland’s statement, “[i]t is therefore right that this summit underlines the responsibility that governments have to their people,”⁹⁵ and the Prime Minister of the United Kingdom’s statement, “[f]or the first time at this Summit we agree that states do not have the right to do what they will within their own borders.”⁹⁶

Of course there were some dissenters to this viewpoint, primarily prior to 2009. For example, during the 2005 Security Council debate on the protection of civilians during armed conflict, the majority of states reiterated the state’s responsibility to protect, as demonstrated by the South African statement: “[t]he international community agreed during the 2005 World Summit that each

(Sept. 24, 2008); S.C. Res. 1794, pmb., U.N. Doc. S/RES/1794 (Dec. 21, 2007); S.C. Res. 1778, pmb., U.N. Doc. S/RES/1778 (Sept. 25, 2007); S.C. Res. 1739, ¶ 2(f), U.N. Doc. S/RES/1739 (Jan. 10, 2007).

90. See sources cited *supra* note 89.

91. S.C. Res. 2021, *supra* note 89, pmb.

92. S.C. Res. 2031, ¶ 11, U.N. Doc. S/RES/2031 (Dec. 21, 2011).

93. S.C. Res. 2014, *supra* note 89, pmb.

94. See generally *Excerpted Statements on the Open Debate on Protection of Civilians in Armed Conflict*, INT’L COALITION FOR THE RESP. TO PROTECT (Nov. 20, 2007), http://www.responsibilitytoprotect.org/files/EXCERPTED%20STATEMENTS%20ON%20THE%20OPEN%20DEBATE%20ON%20PROTECTION%20OF%20CIVILIANS%20IN%20ARMED%20CONFLICT%20_2.pdf (quoting delegates endorsing the responsibility to protect as a binding obligation).

95. Halldór Ásgrímsson, Prime Minister of Ice., Statement at the Sixtieth Session of the General Assembly of the United Nations 2 (Sept. 15, 2005), available at <http://www.un.org/webcast/summit2005/statements15/iceland050915eng.pdf>.

96. Tony Blair, Prime Minister of U.K., Speech to the General Assembly at the 2005 UN World Summit 2 (Sept. 14, 2005), available at <http://www.un.org/webcast/summit2005/statements/uk-blair050914eng.pdf>.

individual State has the responsibility for the protection of its populations from genocide, war crimes, ethnic cleansing and crimes against humanity.”⁹⁷ However, Pakistan reflected a position expressed by a minority: it specifically called for a treaty to make a state’s responsibility international law, thus inferring that it had not yet become a binding legal obligation.⁹⁸

But Pakistan’s request in 2005 that a state’s responsibility to protect its own populations from mass atrocities be made into treaty law (thus implying it was not already international law) was vastly overshadowed by the resolutions cited above reminding various states of this extant responsibility. It is telling that proposed Security Council resolutions after 2005 involving responsibility to protect which failed to pass were not vetoed because the vetoing states felt that a sovereign possessed no such obligation. For example, Russia and China vetoed a draft resolution on Burma in 2007, citing lack of threat to international peace and security and that the Security Council had no role in the internal affairs of the state.⁹⁹ They did not state that Burma lacked an obligation to protect. This failure to deny that the state itself has an obligation to protect was similarly reflected in Russia and China voting against a 2008 United Nations Security Council resolution proposing sanctions against Zimbabwe.¹⁰⁰

By the time the 2009 United Nations General Assembly debate occurred on responsibility to protect, the international community’s belief that states have a legal obligation to protect their peoples had strengthened. Even Russia stated in 2009 that, “[w]e believe that the initial responsibility to protect people from genocide, war crimes, ethnic cleansing and crimes against humanity lies with States. States should constantly strengthen and expand their own means to uphold that responsibility.”¹⁰¹ China similarly stated in 2009 that, “[g]overnments bear the primary responsibility of protecting their civilians.”¹⁰² When the Security Council

97. Xolisa Mabhongo, S. Afr. Charge d’Affairs, Statement in the Open Debate of the Security Council on the Protection of Civilians in Armed Conflict (Dec. 9, 2005).

98. Munir Akram, Ambassador and Permanent Rep. of Pakistan to the U.N., Statement in Open Debate of the Security Council on the Protection of Civilians in Armed Conflict (Dec. 9, 2005) (stating that Pakistan desired that a state’s responsibility to protect its own populations from genocide and war crimes via formation of a treaty), *available at* www.responsibilitytoprotect.org/files/Pakistan_POC_09Dec05.pdf.

99. Vitaly Churkin, Ambassador for Russ. Fed’n, Statements from the Security Council Meeting on the Situation in Burma (Jan. 12, 2007); Wang Min, Ambassador for China, Statements from the Security Council Meeting on the Situation in Burma (Jan. 12, 2007), both *available at* <http://www.responsibilitytoprotect.org/ICRtoP%20Latest%20Developments%20at%20the%20UN%202011.pdf>.

100. Press Release, Security Council, Security Council Fails to Adopt Sanctions Against Zimbabwe Leadership as Two Permanent Members Cast Negative Votes, U.N. Press Release SC/9396 (Jul. 11, 2008).

101. Mikhail Margelov, Permanent Rep. of Russ. Fed’n to the U.N., Statement at the July 2009 General Assembly Debate on Responsibility to Protect (2009), *available at* [www.ResponsibilitytoProtect.org/RussianFederation\(1\).doc](http://www.ResponsibilitytoProtect.org/RussianFederation(1).doc).

102. Zhenmin Liu, Ambassador for China, Statement at the Security Council Open Debate on Protection of Civilians in Armed Conflict (Jan. 14, 2009), *available at* <http://www.china-un.org/eng/smhwj/2009/t532205.htm>.

passed Security Council Resolution 1894¹⁰³ in 2009, reaffirming the World Summit Outcome document commitments, “[m]ore than twenty States mentioned RtoP in their statements, recognizing that sovereignty comes with the responsibility to protect populations from mass atrocities.”¹⁰⁴

B. Significance of States’ Failures to Fulfill their Legal Responsibility

While there have been various instances since 2005 of states failing to uphold this legal requirement, these failures serve more to prove the legal nature of the fundamental rule instead of to undermine it. The failures to protect demonstrated by a state’s intentional killing of its own people (Darfur, Libya, Syria) and the state’s failure to prevent war crimes and crimes against humanity from occurring within its borders (Somalia, Afghanistan, Iraq, Kyrgyzstan, Yemen) arguably signify the lack of a consistent state practice of the first pillar of responsibility to protect. However, as the International Court of Justice has highlighted, the international condemnation of these tragedies, as well as the excuses, justifications, and denials issued by the states themselves, underscore the existence of the “state as protector” rule itself.¹⁰⁵ Condemnation by the international community against such atrocities in all the above cases was widespread, and the denials and justifications offered by the responsible states just as indicative.¹⁰⁶

As highlighted in this essay’s introduction, Iran’s statement regarding the 2011-12 mass atrocities in Syria is telling: although Iran opposed coercive sanctions against the Syrian government, it placed the responsibility to end such acts squarely at the feet of the Syrian government.¹⁰⁷ Syria itself did not argue against its responsibility to protect its people: instead, it denied that it was committing such atrocities and instead blamed them on opposition forces, justifying its actions as merely a reaction to same.¹⁰⁸ The vetoes against a draft Security Council resolution in early 2011, condemning the violence in Syria, were not cast because Syria lacked any responsibility to protect its people. Instead, China and Russia, the only members of the Security Council to use their veto,

103. S.C. Res. 1894, *supra* note 5.

104. INT’L COAL. FOR THE RESPONSIBILITY TO PROTECT, KEY DEVELOPMENTS ON THE RESPONSIBILITY TO PROTECT AT THE UNITED NATIONS 2005-2011 5 (2011), available at <http://www.responsibilitytoprotect.org/ICRtoP%20Latest%20Developments%20at%20the%20UN%202011.pdf>.

105. See *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), 1986 I.C.J. 14, ¶ 186 (June 27); Henckaerts, *supra* note 77, at 180.

106. See, e.g., G.A. Res. 66/176, U.N. Doc. A/RES/66/176 (Dec. 19, 2011); Ayman Samir & Erika Solomon, *Arab League Suspends Syria Mission as Violence Rages*, REUTERS (Jan. 28, 2012), <http://www.reuters.com/assets/print?aid=USTRE8041A820120128>; *Syria Calls Arab Sanctions ‘Economic War,’* AL JAZEERA (Nov. 28, 2011), <http://www.aljazeera.com/news/middleeast/2011/11/20111128141649702695.html>; *Syria crisis: Obama Condemns Onslaught on Homs*, BBC NEWS (Feb. 9, 2012), <http://www.bbc.co.uk/news/world-middle-east-16976889>.

107. Interview by Charlie Rose with Mohammad Khazae, *supra* note 17.

108. *Syria Government and Rivals Trade Blame for Aleppo Blasts*, BBC NEWS (Feb. 11, 2012), <http://www.bbc.co.uk/news/world-middle-east-16993591>; see also *Syria categorically Rejects the Arab League’s Resolutions as Hostile Act*, NSNBC (Feb. 13, 2012), <http://nnsbc.wordpress.com/2012/02/13/syria-categorically-rejects-the-arab-leagues-resolutions-as-hostile-act/>.

explained it was due to the resolution's failure to hold opposition forces accountable.¹⁰⁹ This is similar to their veto of a related resolution in October 2011 also against Syria: their veto was due to the failure of the resolution to appropriately call on the opposition to disassociate with extremists, and because they, along with India, Brazil, and South Africa, were concerned that the resolution was a pretext for armed intervention similar to what they believed occurred in Libya.¹¹⁰

The above-cited state practice and *opinio juris* underscore why scholars such as Professor Alex J. Bellamy have stated that "the basic proposition that states are legally and morally required not to intentionally kill civilians is well established" and that the first pillar of responsibility to protect is "best understood as a reaffirmation and codification of already existing norms."¹¹¹ Professor Ramesh Thakur believes something similar: that these two paragraphs constitute "a clear, unambiguous, and unanimous acceptance of individual state responsibility to protect populations," from the four specific abuses: war crimes, crimes against humanity, genocide, and ethnic cleansing.¹¹² The United Nation's Dr. Luck has schizophrenically denied that responsibility to protect has any binding legal qualities while simultaneously admitting that parts of it do.¹¹³ Based on the evidence above, he should go one step further and call a spade a spade: the fundamental essence of responsibility to protect—a state's protection responsibility as an attribute of its sovereignty—is customary international law.

C. *The Rest of Responsibility to Protect: A Nascent Legal Obligation to Do . . . Something*

While the first pillar of responsibility to protect (and the doctrine's very foundation) has attained the status of customary international law, the other two pillars have not, at least not in the specific forms as articulated in the 2005 World Summit Outcome document. There is no general and consistent practice regarding assistance to states, nor is there one of "timely and decisive action" when states have failed their pillar one obligation.¹¹⁴ As Professor Bellamy convincingly showed in his 2010 analytical work, "state practice . . . suggests that mutual recognition of a positive duty to exercise pillars two and three is inconsistent at best."¹¹⁵ Regarding the second pillar, that of international assistance and capacity

109. Michael Schwartz, *Russia Rejects Criticism of Its U.N. Veto on Syria*, N.Y. TIMES (Feb. 6, 2012), http://www.nytimes.com/2012/02/07/world/europe/russia-rejects-criticism-of-its-un-veto-on-syria.html?_r=1.

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

111. Bellamy, *supra* note 10, at 160.

112. Thakur, *supra* note 63, at 38; *see also* 2005 World Summit Outcome, *supra* note 4, ¶ 138 (citing the four specific abuses).

113. Luck, *The Responsibility to Protect*, *supra* note 22, at 359-360.

114. *See* 2005 World Summit Outcome, *supra* note 4, ¶ 139.

115. Bellamy, *supra* note 10, at 161 (reviewing whether the international community possesses a positive duty to prevent mass atrocities based on cited legal developments).

building, there appears to be numerous examples of state practice, usually through the United Nations.¹¹⁶ However, there is little to no evidence of states' belief that this assistance is legally required.

So while this essay posits that the latter two commitments articulated in the 2005 World Summit document do not represent specific, binding obligations demonstrated by consistent state practice followed out of a sense of legal obligation, the third pillar has consistently manifested itself in one regard, elevating it beyond mere aspiration. Since 2005, mass atrocities within states, on a large enough scale, have routinely prompted some type of international response, ranging from national statements of condemnation to military intervention. This censorious response continuum itself represents a legal obligation: the international community feels that it can no longer simply remain silent when human rights abuses within states pass a certain threshold.

When states manifestly fail to protect their populations from one of the four human rights violations, the international community has felt compelled to act in some manner. This consistent practice of state reaction to mass atrocities in other states demonstrates a recognition by states that they are required to do "something" when faced with their fellow states' manifest failure to protect.¹¹⁷ The type of responsive act by the international community has ranged from individual states' public condemnations; formal regional discussions; referral to and subsequent indictments by the International Criminal Court; General Assembly debates and resolutions; Security Council debates; individual state and regional sanctions; Security Council resolutions condemning the atrocities and calling for the state in question to fulfill its first pillar obligations; and Security Council resolutions authorizing international sanctions, peacekeepers, and armed intervention to stop the on-going atrocities.¹¹⁸ It is impossible to cite a situation since 2005 which involved significant human rights abuses within a state that has not elicited some type of response by the international community.

116. *Implementing R2P*, *supra* note 3, at 15-21.

117. 2005 World Summit Outcome, *supra* note 4, ¶ 139. The World Summit Outcome document does not include a quantitative definition of "manifestly fail," but since it was agreed to by the community of nations in 2005, when a state has either perpetrated or failed to prevent a sufficiently significant amount of mass atrocities within its borders, there has been some type of international response.

118. Bellamy, *supra* note 10, at 162 (listing international responses to various mass atrocities, such as Security Council debates regarding Darfur; international criticism of Sri Lanka, Israel, and Hamas; use of military forces in the Democratic Republic of the Congo, Sudan, and Somalia; etc); *see generally* S.C. Res. 1973, U.N. Doc. S/RES/1973 (Mar. 17, 2011); S.C. Res. 1975, U.N. Doc. S/RES/1975 (Mar. 30, 2011); S.C. Res. 1591, U.N. Doc. S/RES/1591 (Mar. 29, 2005); S.C. Res. 1725, U.N. Doc. S/RES/1725 (Dec. 6, 2006); S.C. Res. 1724, U.N. Doc. S/RES/1724 (Nov. 29, 2006); *Arab League: Report Publicly on Syria Mission*, HUMAN RIGHTS WATCH (Jan. 20, 2012), <http://www.hrw.org/news/2012/01/20/arab-league-report-publicly-syria-mission>; *Kenya: Prosecute Perpetrators of Post-Election Violence*, HUMAN RIGHTS WATCH (Dec. 9, 2011), <http://www.hrw.org/news/2011/12/09/kenya-prosecute-perpetrators-post-election-violence>; *U.N.: Rights Council Condemns Violations in Kyrgyzstan*, HUMAN RIGHTS WATCH (Jun. 21, 2010), <http://www.hrw.org/news/2010/06/21/un-rights-council-condemns-violations-kyrgyzstan>.

While states' actual verbal or physical reactions to mass atrocities can be discerned by reviewing newspapers since 2005's framing of responsibility to protect, it is more difficult to determine what has motivated the international community's responses to mass atrocities. Are they prompted by a sense of legal obligation? The fact that no situation of grave enough magnitude has gone without some type of international response (at least discussed within the General Assembly) supports a conclusion that the majority of states feel obligated to at least demonstrate concern regarding the particular atrocities at hand. One can argue that this sense of obligation to exhibit some type of concerned reaction is politically and/or morally driven, motivated by a sense of legal requirement, hence leaving it devoid of the second criterion of customary international law.¹¹⁹ But when placed in context of the numerous international legal developments regarding human rights over the last half century, capped by the 2005 World Summit Outcome document, one cannot avoid the sense that there is at least a germ of *opinio juris* behind these actions.¹²⁰

Categorizing an indeterminate requirement to act as customary international law, with the particular required action falling along a broad spectrum of possible responses, is admittedly a bit of a stretch: arguably, the cited state practice is too inconsistent, and *opinio juris* too nebulous, to definitively conclude the existence of such an internationally binding rule. These are valid criticisms, and ones this author hopes to address in the future. It is difficult to deny that some type of state obligation currently exists to react in a condemnatory fashion when faced with compelling evidence of genocide, war crimes, crimes against humanity, and ethnic cleansing in another state.

V. CONCLUSION

The fact that there has been a consistent practice of reaction, along a broad continuum, to mass atrocities since 2005 does not demonstrate a causal link

119. Bellamy, *supra* note 10, at 166.

120. See U.N. Charter arts. 1, 55. The first article in the Charter establishes the purposes of the United Nations as: "To maintain international peace and security"; "[t]o 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"; "[t]o achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction . . ."; and "[t]o be a center for harmonizing the actions of nations in the attainment of these common ends." *Id.* art. 1. U.N. Charter art. 55 states that the United Nations shall promote the following economic and social concerns in order to pursue its goals of international peace, stability, and friendly cooperation: "higher standards of living, full employment, and conditions of economic and social progress and development"; "solutions of international economic, social, health, and related problems; and international cultural and educational cooperation"; and "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion." *Id.* art. 55. See generally Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948); International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 (highlighting the growing priority the international community is placing on human rights).

between the World Summit Outcome document and this reactive practice.¹²¹ But whether or not the 2005 document produced this general rule does not make the rule less real. It was generated by the evolution of the protection of human rights on the international stage, of which the responsibility to protect general theory is but one component. This growing superstructure of protection of human rights, which includes the responsibility to protect doctrine, is a general catalyst to “galvanize the world into action,” if one is willing to define the type of action as falling along a continuum vice one finite act.¹²²

The United Nations-approved NATO military intervention in Libya in 2011 and the subsequent reaction of the world community to the mass atrocities in Syria demonstrate that the principle of responsibility to protect has attained the status of customary international law in two ways. First, they are the latest manifestations of the belief by the world community that states, as a derivative of their sovereignty, possess a legal obligation to protect their populations from genocide, war crimes, crimes against humanity, and ethnic cleansing. Second, they reflect the sense of the majority of states that they cannot ignore on-going instances of threshold levels of the four human rights crimes in fellow states and must react in some manner aimed at their cessation. While this latter obligation exists as a continuum of soft actions consisting of a legal duty to verbally and/or economically (via sanctions) condemn instead of physically act through military force, it represents the current state of the last pillar of responsibility to protect. If history is any lesson, this latest crystallization of the responsibility to protect’s status as customary international law indicates it will continue to transform into a more finite legal duty to act.

Responsibility to protect as customary international law will exert greater influence on global politics as nation-states sporadically fail to shoulder their legal obligation to protect their peoples. Just as the Arab Spring will continue for years to come as states wrestle with governance after decades of tyrannical rule, responsibility to protect’s transition from hortatory doctrine to customary international law will likewise continue to evolve.

121. Bellamy, *supra* note 10, at 166.

122. *Id.* (concluding that responsibility to protect is a policy agenda and has little utility in generating international responses to mass atrocities).