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## The Law of War and the Responsibility to Protect Civilians: A Reinterpretation

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Thomas H. Lee\*

*Two seemingly unrelated crises implicating the law of war and the responsibility to protect civilians have arisen in recent years. In 2013, the United States considered military intervention without U.N. Security Council preapproval in Syria after discovering that the government had exterminated its own people with chemical agents. In 2014, Russia sent troops into Crimea, a part of Ukraine, to protect ethnic Russians that Russia claimed were in danger after a political coup in the country. In both cases, the military acts contemplated or undertaken were of dubious legality, albeit under different rubrics. This Article aims to show how analysis of the lawfulness of military intervention in Syria and Crimea is illuminated by recognizing that both are subspecies of the same problem and may thus be seen as one customary doctrine of international law governing the grounds for war. By custom, a sovereign state may use force in another unconsenting sovereign state without U.N. Security Council authorization or a self-defense justification to protect civilians facing imminent risk of group extermination—a threshold that was arguably met in Syria but seemingly not in Crimea. The right to use armed force in such instances is further constrained by the proportionality and exhaustion-of-other means requirements that generally apply to the law of war.*

*This customary legal right to use force was traditionally limited to protecting the lives of the intervening state's own civilians for two related reasons. First, the bedrock principle of exclusive sovereignty shielded a target state's treatment of its civilians within its borders. Second, there was a consensus that international law did not permit the use of armed force to enforce the right against death of civilians in another country absent the nexus of nationality to the victims. However, in the past dozen years, both principles have been fatally undermined by the norm of the "responsibility to protect" civilians, which pierces the veil of sovereignty for states that harm or fail to protect their own peoples. Consequently, the present customary international law of war can reasonably be construed as extending the ancient unilateral civilian-protection use-of-force easement to the use of force to protect all civilians facing state-sponsored mass killings, regardless of nationality.*

*The life-saving easement on sovereign territory logically covers only cases where civilians are facing group death—genocide, massacre killings, or lethal use of atomic, biological, or chemical weapons—initiated by the host state which is violating its duty to protect the people within its territory. U.N. Security Council authorization or a self-defense justification is still required for military interventions in response to other mass atrocities such as ethnic cleansing, war crimes, state-initiated individual killings, non-lethal crimes against humanity (for example, systemic torture), or the possession (or non-lethal use) of weapons of mass destruction, and to humanitarian crises where deaths are not caused by the state or its agents. Of course, any intervening state's decision to use armed force to protect its own or foreign civilians in an unconsenting state is ultimately a matter of its own domestic law and policy choice, but international law does not prohibit such a choice in the face of state-initiated mass killings.*

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## INTRODUCTION

The “Responsibility to Protect” civilians, commonly known by the acronym “R2P,” began as a twenty-first century repackaging of humanitarian intervention after the world community’s inconsistent, and sometimes indifferent, reactions to the great human rights disasters of the last decade of the twentieth century. R2P is not just one concept but rather a cluster of ideas centered upon a sovereign state’s responsibility to protect its people. It has three key premises: (1) a sovereign state has a basic responsibility to protect civilians within its borders; (2) the rest of the world has a responsibility to ensure that every state honors its responsibility to protect; and (3) if a state fails in its responsibility, then other states may use all necessary means, including armed force, to protect the lives of the civilians at risk.<sup>1</sup> The deep purpose of R2P is to undermine the principle of exclusive sovereignty—the idea that a sovereign state has autonomy within its own territory and that no other state has the right or responsibility to interfere in how it treats its people, especially by force of arms.

This Article focuses on the use-of-force component of R2P, which is referred to herein as “forcible R2P.” But military intervention is only one of a range of measures that other countries may take to support the responsibility to protect in troubled states. Indeed, in recent years, R2P advocates focused most of their attention on R2P’s non-coercive and preventative features<sup>2</sup> until the U.N. Security Council’s invocation of the responsibility to protect civilians as justification for forcible intervention in Libya in 2011 brought R2P’s military aspect front and center.<sup>3</sup> Although the responsibility to protect, and specifically forcible R2P, has generated much commentary, it remains unclear how it relates to the international law of war governing the reasons for the use of armed force, which is known by the Latinism *ius ad bellum*.

R2P may be a relatively new concept, but since ancient times, the law of war has recognized the unilateral right of a sovereign to use armed force within the territory of another unconsenting state in order to protect the

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1. See generally INT’L COMM’N ON INTERVENTION & STATE SOVEREIGNTY, THE RESPONSIBILITY TO PROTECT (2001) [hereinafter ICISS REPORT]. This Report, commissioned by the Canadian government, is the urtext of the R2P movement. An early academic formulation of basic R2P concepts in response to the humanitarian crises of the 1990s in sub-Saharan Africa is a monograph published by the Brookings Institution. FRANCIS M. DENG ET AL., SOVEREIGNTY AS RESPONSIBILITY: CONFLICT MANAGEMENT IN AFRICA (1996). My description of R2P’s three key components tracks the three “pillars” of R2P articulated in the ICISS Report and other R2P literature.

2. See, e.g., GARETH EVANS, THE RESPONSIBILITY TO PROTECT: ENDING MASS ATROCITY CRIMES ONCE AND FOR ALL (2008).

3. See *infra* Part I.B. See also Alex J. Bellamy, *The Responsibility to Protect – Five Years On*, 24 ETHICS AND INT’L AFF. 143 (2010). Bellamy gives a thorough account of the demilitarization of R2P shepherded by U.N. Secretary-General Ban Ki-Moon and its non-military invocations with respect to the human rights situations in various countries between 2003 and 2009. American scholars tend to give short shrift to the non-armed force aspects of R2P, which, though less spectacular, constitute the majority of its invocations at the United Nations and in international policy circles.

lives of its *own* civilians there, or the foreign civilians of allied states. The right of a state under international law to use armed force to protect its civilians abroad was extremely robust as late as the early twentieth century. In fact, for centuries, the modern law of war sanctioned the right of a state to use armed force to protect not only the *lives* of their civilians in other countries, but also their *property*. The perceived legality of war to protect the property interests of nationals declined precipitously in the decade after the end of the Second World War. It was effectively retired after the abortive 1956 British-French-Israeli invasion of Egypt to protect foreign shareholders' interests in the Suez Canal, which Gamal Abdel Nasser had nationalized. But the idea that a state has the right under international law to use force in unconsenting foreign states to protect the bodily interests of its own civilians—or the civilians of other third countries—has endured to the present day, as witnessed by its invocation to help justify military interventions by Belgium in the Congo in 1960, by Israel in Uganda in 1976, by the United States in Grenada in 1982 and Panama in 1989, by France in Chad in 2006, and by Russia in South Ossetia in 2008 and in Crimea in 2014.<sup>4</sup> This Article shall call the centuries-old international law “right to protect” civilians of the intervening state or its friends “r2p.” r2p, unlike R2P, is law of ancient vintage, but it is uncelebrated and unloved by international lawyers because they often see powerful states with far-flung interests invoking it as a pretext to attack weaker states.

This Article's basic claim is that r2p and R2P are conceptually homologous and that together they constitute a single customary international law ground for unilateral humanitarian intervention in an unconsenting state where civilians are facing group extermination. Despite their common civilian-protection feature, forcible R2P and r2p have never been linked before. There is a sociological and a conceptual reason for the oversight. First, fans of one concept tend to be critics of the other. R2P proponents are cosmopolitans who believe that all people have fundamental human rights regardless of where they live. They believe that wealthy, militarily powerful states have a responsibility to protect foreign civilians who are subject to mass atrocities in their home states, even if it requires the use of armed force. r2p, by contrast, is about a sovereign state's unilateral use of armed force abroad to protect its own citizens or the citizens of allied states. R2P seeks to make sovereignty irrelevant; r2p celebrates it. Advocates of R2P thus typically distinguish R2P from r2p,<sup>5</sup> which they see as a tainted relic of the *ancien regime*, not as a precedent for their cause in logic or law.

Second, when international lawyers do talk about r2p in an unconsenting state, they almost always categorize it as a sub-species of self-defense which

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4. See *infra* Part I.B. See generally RICHARD B. LILICH, LILICH ON THE FORCIBLE PROTECTION OF NATIONALS ABROAD (Thomas C. Wingfield & James E. Meyen eds., 2002).

5. See, e.g., Gareth Evans, *Russia, Georgia and the Responsibility to Protect*, 1 AMSTERDAM L. F. 25 (2009).

may or may not be lawful as applied in a particular case.<sup>6</sup> This automatic assumption that any extraterritorial use of force to protect one's nationals is grounded in a self-defense claim is wrong.<sup>7</sup> Thinking that such military missions are necessarily done in self-defense is particularly dangerous at a time when resurgent nationalism in great-power states and their diasporas makes it a convenient legal justification for using armed force in contested territories, most recently by Russia in Crimea and other parts of Ukraine in 2014.<sup>8</sup> By contrast it seems more correct to conclude that military interventions on behalf of endangered nationals far away from a state's borders are usually *not* self-defense, because their distant endangerment does not implicate the territorial integrity or political independence of the state as protected under U.N. Charter Article 2(4), which is often read as a gloss on Article 51's preservation of "the inherent right of individual or collective self-defence."<sup>9</sup> An important exception to this conclusion is the extraterritorial use of force to protect state officials (such as the attempt to rescue U.S. embassy hostages in Tehran in 1980), property (such as a warship or embassy), or instrumentalities (such as national-flagged passenger ships or aircraft). These are more plausible instances of self-defense because the targets attacked or threatened are organs (or quasi-organs) of the state, and attacks on them are reasonably perceived as attacks on the state as a polity.<sup>10</sup>

Indeed, U.S. international lawyers of a prior generation commonly referred to the use of armed force to rescue civilian nationals overseas as "humanitarian intervention," not self-defense. For example, in 1973, Harvard

6. See, e.g., JAMES CRAWFORD, *BROWNIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW* (8th ed. 2012); YORAM DINSTEIN, *WAR, AGGRESSION AND SELF-DEFENCE* (4th ed. 2005).

7. U.S. constitutional law scholar Henry Monaghan made a similar point about the constitutional power of the U.S. President by asserting a unilateral power to use armed force to protect U.S. officials, property, and instrumentalities, but questioning whether such a power extended to the protection of civilian U.S. citizens abroad. See Henry P. Monaghan, *The Protective Power of the Presidency*, 93 COLUM. L. REV. 1, 71–72 (1993).

8. For example, Russia was reported to have distributed Russian passports to residents of South Ossetia (then a contested part of Georgia) in order to supply a legal basis for invasion in 2008. See Damien McElroy, *South Ossetian Police Tell Georgians to take a Russian Passport, or Leave their Homes*, THE TELEGRAPH (Aug. 30, 2008, 8:40 AM), <http://www.telegraph.co.uk/news/worldnews/europe/georgia/2651836/South-Ossetian-police-tell-Georgians-to-take-a-Russian-passport-or-leave-their-homes.html>. In 2014, Russia offered Russian passports to members of the Ukrainian riot police and considered measures to ease the way for ethnic Russians and other Ukrainians to obtain Russian passports. See Peter Kenyon, *Russia May Expedite Passports for Ukraine's Ethnic Russians*, NPR.ORG (Mar. 6, 2014, 5:00 AM), <http://www.npr.org/2014/03/06/286646521/russia-moves-to-expedite-passports-for-ethnic-russians-in-ukraine>; *Ukraine Crisis: Russia Mulls New Land-Grab Law*, BBC NEWS (Feb. 28, 2014, 9:32 AM), <http://www.bbc.com/news/world-europe-26381454>.

9. See DINSTEIN, *supra* note 6, at 177; CHRISTINE GRAY, *INTERNATIONAL LAW AND THE USE OF FORCE* 118 (2008).

10. That is not to say that the self-defense rationale is unlimited with respect to state persons or property. For example, although Congress has authorized the U.S. President to use armed force to rescue any American soldier held by the International Criminal Court, it would likely be a violation of international law for the President to do so without prior resort to peaceful measures. See American Servicemembers' Protection Act of 2002, 22 U.S.C. § 7427 (2002) ("The President is authorized to use all means necessary and appropriate to bring about the release of any" U.S. servicemember or contractor detained on behalf of the International Criminal Court.).

Law School professor Richard Baxter defined humanitarian intervention primarily in terms of r2p:

I assume that humanitarian intervention, for better or for worse, is a short-term use of armed force by a government, in what would otherwise be a violation of the sovereignty of a foreign State, for the protection from death or grave injury of nationals of the acting State—and incidentally, perhaps, nationals of other States—by their removal from the territory of the foreign State. Now we can talk about genocide, we can talk about Bangladesh, we can talk about ICRC operations, and so forth, but this is presumably the core meaning of this concept.<sup>11</sup>

Louis Henkin, who replaced Baxter as Chief Reporter of the Restatement (Third) of U.S. Foreign Relations Law, similarly observed that: “In principle, the right to intervene to save lives applies whether the endangered persons are nationals of the intervening state, local citizens, or nationals of a third country. In practice, states have claimed such rights of intervention only on behalf of their own citizens.”<sup>12</sup> Today, the words “humanitarian intervention” are usually limited to R2P, or “the threat or use of force by a state, group of states, or international organization primarily for the purpose of protecting the *nationals of the target state* from widespread deprivations of internationally recognized human rights.”<sup>13</sup>

The conclusion that using armed force abroad to protect nationals is humanitarian intervention and not self-defense is reinforced when one considers motives. An attack or imminent risk of attack on a very large number of one’s nationals—for instance, a migrant-labor population numbering in the hundreds of thousands, or millions—might be perceived as tantamount to an attack on the homeland. But the decisionmakers of a state that uses military force when a few hundred or thousands of nationals are at risk far away typically act out of a sense that the state has a humanitarian “responsibility” to rescue its citizens in harm’s way, just as they might feel a responsibility to use the state’s military resources to rescue them from a deadly hurricane or earthquake. That is very different from acting because of a perceived threat to the state’s territorial integrity, political independence, or a general need to defend the country. Moreover, this humanitarian motivation is not

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11. Remarks of Richard R. Baxter, *Conference Proceedings, Part II: The Present*, in HUMANITARIAN INTERVENTION AND THE UNITED NATIONS 53 (Richard B. Lillich ed., 1973).

12. Louis Henkin, *The Invasion of Panama under International Law: A Gross Violation*, 29 COLUM. J. TRANSNAT’L L. 293, 297 n.15 (1991); see Louis Henkin, *Use of Force: Law and U.S. Policy*, in RIGHT v. MIGHT: INTERNATIONAL LAW AND THE USE OF FORCE 37, 41–42 (Louis Henkin et al. eds., 2d ed. 1991).

13. SEAN D. MURPHY, HUMANITARIAN INTERVENTION: THE UNITED NATIONS IN AN EVOLVING WORLD ORDER 11–12 (1996) (emphasis added); see NATALINO RONZITTI, RESCUING NATIONALS ABROAD THROUGH MILITARY COERCION AND INTERVENTION ON GROUNDS OF HUMANITY XIV–XV (1985) (excluding military missions to protect nationals from the definition of humanitarian intervention).

so different in kind from a concern for the welfare of endangered civilians who lack common nationality—a fact most evident when allegedly endangered civilians in a foreign country share ethnic ties with the invaders, like the ethnic Russians in Crimea.

Not only do R2P and r2p share an identity as forms of humanitarian intervention, but both also fit uncomfortably into the conventional view of the international law of permissible reasons for resort to armed force, which relies heavily on the words of the U.N. Charter. The Charter explicitly permits states to use armed force only “in individual or collective self-defence if an armed attack occurs against a Member of the United Nations”<sup>14</sup> or pursuant to U.N. Security Council authorization of force “to maintain or restore international peace and security.”<sup>15</sup> The prevailing, textualist view among international lawyers today—what I call the bifocal orthodoxy—denies any role for custom in defining *jus ad bellum* and asserts instead that the two grounds codified in the U.N. Charter are the *only* two lawful justifications for war. As Vladimir Putin, a Russian adherent of the bifocal orthodoxy, once put it: “Under current international law, force is permitted only in self-defence or by the decision of the Security Council. Anything else is unacceptable.”<sup>16</sup> All other uses of armed force in international affairs, so it goes, are prohibited by Article 2(4)’s command that “[a]ll 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.”<sup>17</sup> For this reason, many believe that a R2P intervention is lawful only with U.N. Security Council authorization and that a lawful r2p intervention must fall within the rubric of self-defense.

Despite the textualist and pacifist appeal of constraining *jus ad bellum* to the two grounds enumerated in the U.N. Charter, the prescriptions of the bifocal orthodoxy do not fit real life and are also normatively problematic. As a descriptive matter, the military intervention of North Atlantic Treaty Organization (“NATO”) countries in Kosovo in 1999 was neither preauthorized by the U.N. Security Council nor easily justifiable as self-

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14. U.N. Charter art. 51. The self-defense right has a sunset provision: “until the Security Council has taken measures necessary to restore international peace and security.”

15. *Id.* art. 42.

16. Vladimir Putin, *A Plea for Caution From Russia*, N.Y. TIMES, Sept. 11, 2013, <http://www.nytimes.com/2013/09/12/opinion/putin-plea-for-caution-from-russia-on-syria.html>.

17. U.N. Charter art. 2, para 4. Invitation or the consent of a sovereign state is a third category of legal justification (in addition to humanitarian intervention) that is not expressly codified in the U.N. Charter. See GRAY, *supra* note 9, at 67–113 (3d ed. 2008). It, too, has roots in basic U.N. Charter principles, namely a sovereign state’s autonomy within its borders, art. 2 ¶ 7, and the principle of sovereign equality, art. 2 ¶ 1. Furthermore, the U.N. Charter’s *jus ad bellum* prohibitions might plausibly be construed to apply on their face to international conflicts only, which would not include foreign interventions in civil wars at the invitation of a legitimate government. There is a cluster of issues implicated by the doctrine of invitation, such as recognition—whether a rebel or secessionist group can claim sovereignty or a government can claim it when it has lost effective control of territory or population—and the principle of counter-intervention to balance out prior foreign interventions.

defense because it occurred beyond the NATO countries' borders and treaty responsibilities. Accordingly, the majority of international lawyers have concluded that Kosovo was "legitimate but unlawful," in line with the bifocal orthodoxy.<sup>18</sup> Furthermore, there have been instances such as Rwanda in 1994, Darfur in 2003 to 2004, and Syria in 2012 to 2014, where mass killings occurred or persisted because of U.N. Security Council inaction or paralysis.

With regard to r2p, there have been multiple military interventions on behalf of civilians abroad in the post-World War II era without U.N. Security Council authorization—most famously the Israeli raid into Entebbe, Uganda in 1976, the United States' invasions of Grenada in 1982 and Panama in 1989, and Russia's invasion of South Ossetia in 2008 and intervention in Crimea in 2014. These cases have been reconciled with the bifocal orthodoxy, first by generally classifying all r2p cases as a sub-species of self-defense,<sup>19</sup> and, second, by asserting that some invocations are lawful (for example, Entebbe) and others are unlawful (for example, Grenada, Panama, South Ossetia, and Crimea).<sup>20</sup> But, as noted above, presuming that every instance where a state uses force abroad to protect its nationals is a case of self-defense—whether lawful or unlawful—defies the logic of the concept. And yet, some cases where military force was used to protect civilian nationals at risk of group death in the target state have been viewed—and should be viewed—as lawful, albeit under a different doctrinal rubric than self-defense.

What is needed is a departure from the U.N. Charter-based bifocal orthodoxy, namely, the recognition of a third customary international law ground for war under which the extraterritorial use of armed force to protect civilians at imminent risk of group death is justified without U.N. Security Council pre-approval or as self-defense. In the past, this customary category of unilateral humanitarian intervention was limited to the use of armed force to protect civilians of the intervening state (r2p) or of third countries, but, since the late 1990s, with the advent of the R2P cluster of norms, it has expanded to include the use of force to protect civilians of the target state.<sup>21</sup>

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18. See, e.g., Jonathan I. Charney, *Anticipatory Humanitarian Intervention in Kosovo*, 93 AM. J. INT'L L. 834, 834 (1999) ("Indisputably, the NATO intervention through its bombing campaign violated the United Nations Charter and International Law."); Louis Henkin, *Kosovo and the Law of "Humanitarian Intervention"*, 93 AM. J. INT'L L. 824, 826 (1999) ("In my view the law is, and ought to be, that unilateral intervention by military force by a state or group of states is unlawful unless authorized by the Security Council.")

19. See, e.g., DINSTEN, *supra* note 6, at 234 ("As an exercise of the right of self-defence, the protection of nationals abroad must not be confused with 'humanitarian intervention.'"); *id.* at n.79 ("The present writer cannot accept the proposition advocated by, e.g., . . . Henkin . . . that a so-called Entebbe principle—as a legitimate form of humanitarian intervention—constitutes an exception to the general prohibition of the use of inter-State armed force pursuant to Article 2(4) of the Charter, irrespective of the provision of Article 51.")

20. See, e.g., Henkin, *The Invasion of Panama under International Law: A Gross Violation*, *supra* note 12, at 296–97.

21. See *infra* Figure 1.

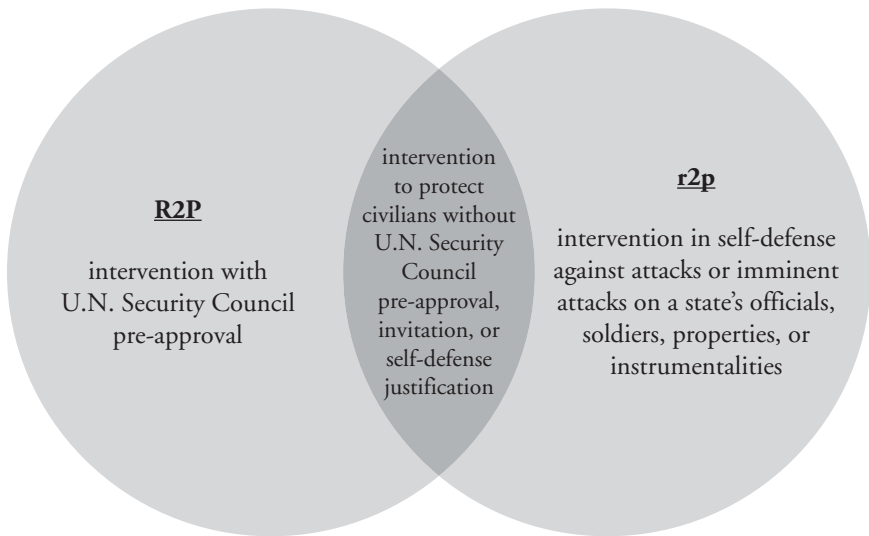


The category encompasses cases where a use-of-force easement is implied at law within the territory of an unconsenting sovereign state where civilians face an imminent risk of group extermination. In traditional r2p cases, the relevant group facing death consists of foreign nationals; in R2P cases, the group comprises local noncombatants or civilians. The specific customary rule, distilled from r2p state practice and commentary, has the same threat, proportionality, and exhaustion elements shared by all *jus ad bellum*, namely that the military expedition within the territory of an unconsenting foreign state is: (1) mounted to protect civilians facing imminent risk of group extermination sponsored or sanctioned by the target state; (2) narrowly tailored to achieve the specific goal of preventing such an atrocity; and (3) all other reasonable means have been exhausted.<sup>22</sup> “Group extermination” means not only genocide (that is, the extinction of an affinity group typically defined by race, religion, or ethnicity) but also mass killings where the state directs or knowingly permits the simultaneous deaths of a “group” (in the sense of a large number, for example, a hundred or more) of unarmed human beings without a colorable law enforcement or national security objective. Massacres of a large group of unarmed and restrained civilians, or the *use* of atomic, biological, or chemical weapons in heavily civilian-populated areas are notable examples. Military interventions to address mass atrocities or international law violations that do not involve group extermination, such as ethnic cleansing, war crimes, the *possession* of weapons of mass destruction, non-lethal crimes against humanity, and lethal crimes against humanity short of massacres, would still require U.N. Security Council authorization, consent, or a valid self-defense justification.

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22. Cf. U.N. Charter ch. VII (setting forth a sequence for U.N. Security Council authorization of force that requires: (1) a determination “of the existence of any threat to the peace, breach of the peace, or act of aggression,” art. 39; (2) provides for provisional measures and “measures not involving the use of force,” arts. 40 & 41; and (3) use of force as “necessary” if peaceful measures “would be inadequate or have proved to be inadequate,” art. 42).

FIGURE 1: THREE CATEGORIES OF LAWFUL USE OF FORCE TO PROTECT PERSONS ABROAD



Integrating R2P and r2p into a unitary concept of a customary *jus ad bellum* to protect civilians has doctrinal and methodological benefits. Doctrinally, integration clarifies the notoriously opaque customary international law of reasons for going to war and articulates a highly constrained—and thus normatively appealing—customary law rider to the textualist bifocal orthodoxy. Integration suggests that U.N. Security Council preauthorization is not always necessary for R2P and that a sovereign state may not unilaterally launch an r2p intervention based on its own subjective assessment of danger to its civilian nationals. In so doing, doctrinal integration sharpens the international legal analysis of cases like Syria and Crimea.

Methodologically, integration gives an example of how to cut a middle path in public international law between globalists who prefer top-down norm formation like R2P and sovereigntists who prefer bottom-up norm formation like r2p by logging the practices common to all or nearly all states, particularly the most powerful ones. In so doing, this Article attempts to bridge the gap between the cosmopolitan vision of R2P and the practical difficulty of implementing that vision in a world in which sovereignty remains the basic building block of international life and there is great disparity in the relative military power of sovereign states.

This Article has four parts. Part I summarizes the current state of debate about the international law of grounds for war or *jus ad bellum*. Part II traces the ancient roots and modern evolution of the right of the state under customary international law to use armed force in an unconsenting state to protect its civilians (“r2p”). Until the 1970s, international lawyers com-

monly referred to such uses of force as humanitarian interventions. Part III describes the late twentieth-century origins and subsequent development of the Responsibility to Protect civilians (“R2P”)—a more cosmopolitan form of humanitarian intervention that included a forcible component. Part IV—the normative part—explains the homology of unilateral r2p and forcible R2P interventions, how they may be distinguished from self-defense and U.N. Security Council authorized uses of force, respectively, and proposes that the two should be understood as forming one customary international law doctrine of *jus ad bellum* in addition to the two grounds for war expressly enumerated in the U.N. Charter.

### I. JUS AD BELLUM TODAY: THE U.N. CHARTER REGIME

When does international law permit one or more states to use armed force within the territory of another sovereign state without its consent? The question persists despite the world community’s efforts to restrict the international use of armed force after the devastation of the twentieth century’s two world wars. The international law dimension of the campaign to end war is codified in the U.N. Charter. Article 2(4) states: “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.”<sup>23</sup> For the first four decades of the life of the U.N. Charter, decolonization and the Cold War spawned armed conflicts that were often legally justified by narrow constructions of what constituted a “threat or use of force against the *territorial integrity* or *political independence* of any state.”<sup>24</sup>

But, in the 1990s, after the end of the Cold War, most international lawyers stopped hypertextual parsing of Article 2(4) and coalesced around the view that the only two lawful uses of force in the territory of an unconsenting sovereign state were enumerated elsewhere in the U.N. Charter. First, Article 42 specifies that the U.N. Security Council “may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security.”<sup>25</sup> Second, Article 51 provides: “Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United

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23. U.N. Charter art. 2 ¶ 4.

24. *Id.* (emphasis added). See generally, e.g., Tom J. Farer, *Human Rights in Law's Empire: The Jurisprudence War*, 85 AM. J. INT'L L. 117 (1991); Thomas M. Franck, *Who Killed Article 2(4)?*, 64 AM. J. INT'L L. 809 (1970); Louis Henkin, *The Reports of the Death of Article 2(4) are Greatly Exaggerated*, 65 AM. J. INT'L L. 544 (1971); W. Michael Reisman, *Kosovo's Antimonies*, 93 AM. J. INT'L L. 860 (1999); W. Michael Reisman, *Coercion and Self-Determination: Construing Charter Article 2(4)*, 78 AM. J. INT'L L. 642 (1984); Oscar Schachter, *The Legality of Pro-Democratic Invasion*, 78 AM. J. INT'L L. 645 (1984).

25. U.N. Charter art. 42.

Nations, until the Security Council has taken measures necessary to maintain international peace and security.”<sup>26</sup>

From a normative standpoint, this bifocal orthodoxy of *jus ad bellum* has much to commend to it and commands great approval among international lawyers and non-experts alike. First, given the destructive nature of war, it is comforting to believe that international law now only recognizes two reasons for war. Moreover, one of the two reasons, self-defense, is logically restricted to the use of force to defend the same “territorial integrity” and “political independence” referenced in Article 2(4)’s prohibition on the use of force. Threats to a state’s “political independence” or “territorial integrity” are only rarely posed by events or conditions far away from its own territory.<sup>27</sup> Thus, the self-defense justification is largely limited to uses of force within or near the territory of the sovereign state (or states) using armed force. Additionally, Article 51’s specification of the “inherent” right of self-defense articulates two other significant limitations: a trigger—“if an armed attack occurs against a Member of the United Nations”—and a sunset provision—“until the Security Council has taken measures necessary to maintain international peace and security.”<sup>28</sup>

Second, the bifocal orthodoxy diminishes the possibility that the most powerful states (the United States being the most militarily powerful by a vast margin today) can wage unilateral wars in distant places without the brake effect of international illegality. Powerful states are more likely than weak states to have national interests beyond their borders. A state with military power in excess of what is reasonably necessary to defend its territory may seek to use it extraterritorially to advance its national interests. The bifocal orthodoxy of *jus ad bellum* requires a militarily powerful state to frame any international law case for using armed force extraterritorially in terms of host-state consent, self-defense, or U.N. Security Council authorization. The rationales of consent and self-defense may seem ambiguous and prone to pretextual invocations, but they also have logical limits. Consent requires a functioning regime in the target state with a plausible claim to sovereign recognition. Self-defense under Article 51 of the U.N. Charter, as noted above, requires colorable assertions of an “armed attack” and a threat to the intervening state’s “territorial integrity” or “political independence.”<sup>29</sup> The most powerful states will not perceive the reduction of the reasons for war to two as a benefit, as the reduction drastically limits their

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26. *Id.* art. 51.

27. Three notable exceptions are: (1) the September, 11, 2001, terrorist attacks on the United States which were launched by a group that had base areas and training camps in Afghanistan; (2) the 1976 hijacking of an Air France flight with a majority of Israeli passengers by pro-Palestinian terrorists who were allowed to land in Entebbe, Uganda; and (3) the distant presence of weapons of mass destruction that are easily transportable and which the intervening state reasonably fears may be used against it.

28. U.N. Charter art. 51.

29. Or the imminent risk of an armed attack, which has been broadly accepted to authorize some measure of preemptive self-defense.

freedom of action. But it is still a reason for the people of every other sovereign state (190 or so today) to prefer a two-pronged *jus ad bellum*.

Proponents of the bifocal orthodoxy would do well to remember that the other, U.N. Charter-codified use of force—U.N. Security Council authorization—is a special accommodation of the five most powerful states on the winning side of the Second World War. U.N. Security Council voting rules mean that armed force will likely be lawful when approved or permitted by the five countries that are permanent members of the Council (the “P5”)—China, France, Russia, the United Kingdom, and the United States.<sup>30</sup> Five votes for war are much more difficult to get than one,<sup>31</sup> particularly when the political, strategic, and military interests of the second- and third-strongest permanent members are opposed to those of its most powerful permanent member and its fourth- and fifth-ranked allies. Thus, the current balance of power internal to the U.N. Security Council seems particularly effective in curtailing resort to this prong of the *jus ad bellum* as a legal basis for war. At the same time, the normative basis of this reason for lawful war seems inferior to self-defense because it is both rooted in an anachronistic snapshot of the world balance of power and also hostage to the national-interest calculations of the five permanent members.

The third reason for the popularity of the bifocal orthodoxy is a prevailing jurisprudential mindset in favor of written documents over unwritten customs as the principal source of law. In international law, this textualist mindset manifests itself in an emphasis on treaty law, particularly multilateral treaties like the U.N. Charter itself, which have proliferated exponentially and into new subject areas. Before the twentieth century, international customs, or customary international law—the “general and consistent practice[s] of states followed by them from a sense of legal obligation” (or *opinio juris*)<sup>32</sup>—constituted the largest and prime source of international laws.<sup>33</sup> Thus, the two most important sorts of references for ascertaining international law rules were: (1) treatises by respected writers like Hugo Grotius (seventeenth century), Emmerich de Vattel (eighteenth century), and Henry Wheaton (nineteenth century), which drew out general principles from sweeping surveys of state practice; and (2) comprehensive digests of state

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30. U.N. Charter art. 27, ¶ 3 (“Decisions of the Security Council on all other matters shall be made by an affirmative vote of nine members *including the concurring votes of the permanent members.*”) (emphasis added).

31. In the case of the United States, the decision to use armed force is further constrained by a domestic constitutional order formed at a time of national weakness to make it hard for the national government to use armed force outside of the United States except defensively in cases of invasion or rebellion. See Thomas H. Lee, *The Tobacco Republic* (manuscript on file with author).

32. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES (1986).

33. The point was well put by a canonical international law treatise in 1963: “The best view is that international law is in fact just a system of customary law, upon which has been erected, almost entirely within the last two generations, a superstructure of ‘conventional’ or treaty-made law, and some of its chief defects are precisely those that the history of law teaches us to expect in a customary system.” J. L. BRIERLEY, *THE LAW OF NATIONS: AN INTRODUCTION TO THE INTERNATIONAL LAW OF PEACE* 71 (Humphrey Waldock, 6th ed. 1963).

practice, such as the American John B. Moore's *A Digest of International Law*, compiled in eight volumes and published by the U.S. State Department in 1906. Today, treaty provisions can be looked up online and read instantly. By contrast, ascertaining customary international law rules requires an encyclopedic knowledge of state practice, sometimes as much as hundreds of instances. Furthermore, it has become much more difficult to identify consensus today because international law's coverage has expanded in terms of subject matter and the number and diversity of sovereign states whose practices comprise the grist of custom. The upshot is that contemporary international lawyers tend to downplay or neglect customary international law rules in many areas, including *jus ad bellum*. And when they do refer to customary rules, it is most commonly by reference to written documents such as the Universal Declaration of Human Rights or provisions in treaties that a particular state has not ratified but which are argued to be binding by way of custom.<sup>34</sup>

It is unsurprising, then, that today's international lawyers forget that before the twentieth century, customary law alone was the source of *jus ad bellum*. The *ancien regime*, formed by the practice of states in belligerent times, was as permissive as the U.N. Charter regime is now restrictive. One of the most capacious lawful reasons for the use of armed force in international affairs was to prevent or redress injury to one's people in a foreign country.<sup>35</sup> As the global economy, assisted by the technology of travel, grew more interdependent, the nationals of the most powerful states spread throughout the world. Their presence in foreign lands presented not just opportunities for trade and commerce that might accrue to the wealth of a nation, but also convenient hooks to ground legal justifications for war in the event of alleged ill-treatment. Unsurprisingly, civilian protection became a preeminent reason given for war before the First World War.

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34. A good example of this is the typical method of proof in U.S. federal courts for customary international law violations in litigation under the Alien Tort Statute. See, e.g., *Sosa v. Alvarez-Machain*, 542 U.S. 692, 734 (2004) (plaintiff pleading a violation of customary international law "traces the rule against arbitrary arrest not only to the Declaration [of Human Rights], but also to article nine of the International Covenant on Civil and Political Rights . . . to which the United States is a party, and to various other conventions to which it is not").

35. EDWIN M. BORCHARD, *THE DIPLOMATIC PROTECTION OF CITIZENS ABROAD OR THE LAW OF INTERNATIONAL CLAIMS* 448 (1915) ("The army or navy has frequently been used for the protection of citizens or their property in foreign countries in cases of emergency where the local government has failed, through inability or unwillingness to afford adequate protection to the persons or property of the foreigners in question.").

## II. THE CUSTOMARY INTERNATIONAL LAW RIGHT TO PROTECT ONE'S CIVILIANS ("r2p")

### A. *Origins and Evolution of r2p*

Understanding the importance in international law of the right to use armed force to protect one's nationals abroad requires a brief overview of the origins of the sovereign state and the project of modern international law. The primary aim of leading eighteenth- and nineteenth-century international lawyers such as Emmerich de Vattel and Henry Wheaton was essentially English political theorist John Locke's project on the international level. Locke theorized private property over which an individual had exclusive domain as the basic building block of a successful domestic polity. Accordingly, the best domestic legal order was one that recognized and reinforced this fundamental rule. Similarly, it was the sovereign state's entitlement to exclusive use and rule within its own territory—analogueous to the individual's exclusive use of his or her property—that was the key to a successful *international* political system. And so the best international legal order was one that maintained the exclusive autonomy of the nation-state—not the human beings who constituted it—as the basic and irreducible unit of the world community.<sup>36</sup> This fixation on exclusive sovereignty was especially attractive and vital to militarily weak republics that had broken from powerful monarchic states, like the Dutch and Swiss republics in Europe, the United States in the eighteenth century, and the Latin American republics of the nineteenth century.<sup>37</sup> A doctrine of indefeasible exclusive sovereignty within one's territory was a powerful argument for non-intervention by former imperial states in the domestic affairs of liberated colonies.

But the dogma of exclusive rule within borders reinforced an enduring dilemma: if each sovereign state was autonomous and numinous within its territory, how could another sovereign state guarantee the safety of its people who might travel there? A crucial goal of early modern international law was to solve this centuries-old problem exacerbated by the principle of exclusive sovereignty.<sup>38</sup> Thus, leading jurists like Hugo Grotius emphasized the ancient roots of the rule to do no violence to strangers who have come to one's land in peace.<sup>39</sup> The failure to honor the rule was the very definition of

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36. See generally THOMAS HOBBS, *LEVIATHAN* (A.P. Martinich ed., 2002); STEPHEN KRASNER, *SOVEREIGNTY: ORGANIZED HYPOCRISY* (1999). For a recent effort to revise the inward-looking *telos* of the sovereign state, see Eyal Benvenisti, *Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders*, 107 AM. J. INT'L L. 296 (2013).

37. See Thomas H. Lee, *International Law, International Relations Theory, and Preemptive War: The Vitality of Sovereign Equality Today*, 64 L. & CONTEMP. PROBS. 147 (2004).

38. The definitive work on the topic is former Yale Law School professor Edwin Borchard's *The Diplomatic Protection of Citizens Abroad or the Law of International Claims* (1915). See BORCHARD, *supra* note 35.

39. See HUGO GROTIUS, *THE RIGHTS OF WAR AND PEACE* 446 (Jean Barbeyrac & Richard Tuck eds., 2005) (Bk. II, Ch. II) (1625); see also SAMUEL PUFENDORF, *ON THE LAWS OF NATURE AND OF NATIONS*

uncivilized conduct, of barbarism.<sup>40</sup> In the late medieval and modern periods, European states and their progeny developed an elaborate regime for the protection of the persons and properties of peaceful aliens—called “safe conducts”—which formed the touchstone of the classical international legal order in place from the mid-seventeenth to the mid-twentieth century.<sup>41</sup> By formulating a framework that ensured credible protection of merchants across borders, international law nurtured international commerce and peaceful relations, increasing the welfare of all humankind.

The ultimate means by which a state could redress (and deter) the failure of another host state to honor its responsibility to protect its nationals was to wage war on it. The law-of-nations writers of the period generally preferred peaceful means such as diplomacy or arbitration, but there was no customary rule requiring states to use such means first or exclusively.<sup>42</sup> Thus, early modern international law recognized the right of a sovereign to use armed force to protect its civilians in a foreign state. In fact, according to Grotius, the idea that a polity was justified in using armed force for the protection of its people in distant lands was older, even, than classical antiquity:

Our Ancestors, says Cicero to the Romans, often commenced a War, if but one of their Merchants and Mariners had been ill dealt with: And in another Passage, How many Wars, (says he) have our Fathers engaged in, upon their hearing that any Roman Citizens have been injured, . . . The same Romans, tho' they refused to take up Arms in behalf of their Allies, did yet, as soon as ever

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(George Carew & Jean Barbeyrac eds., 2005) (Bk. III, Ch. III) (1729) (“Among the duties of humanity . . . is that of admitting strangers.”). Grotius asserted that the law of nations gave aliens the right to stay for a short time in a foreign country for innocent reasons like their health (for example, shipwrecked sailors), see GROTIUS, *supra*, at 446, and even that “a fixed Abode ought not to be refused to Strangers, who being expelled [by] their own Country, seek a Retreat elsewhere.” *Id.* at 447. He was writing at an early point in the rise of exclusive sovereignty as the dominant ordering principle of the world system. By the mid- to late-eighteenth century as the dogma of exclusive sovereignty reached apogee, international law publicists, most notably Emmerich de Vattel, asserted that a sovereign had a near-absolute right to exclude aliens subject only to a narrowed emergency exception. See EMMERICH DE VATTEL, *THE LAW OF NATIONS OR PRINCIPLES OF THE LAW OF NATURE APPLIED TO THE CONDUCT AND AFFAIRS OF NATIONS AND SOVEREIGNS* (Joseph Chitty ed., 2005) (1758) (“*Emer de Vattel*” according to some sources and editions). To counterbalance this, he and other writers such as the Englishman William Blackstone theorized a broad range of ways a sovereign had expressly or impliedly consented to the admission of peaceful aliens under the concept of the “safe conduct”—a sovereign at peace with another sovereign was viewed as having granted the other’s subjects a promise to protect their persons and properties within its borders so long as the aliens submitted to the host sovereign’s laws. WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAW OF ENGLAND* 68–69 (photo. reprint 1983) (1769).

40. See GROTIUS, *supra* note 39, at 447 (Bk. II, Ch. II).

41. Thomas H. Lee, *The Safe-Conduct Theory of the Alien Tort Statute*, 106 COLUM. L. REV. 830, 880–82 (2006).

42. See BORCHARD, *supra* note 35, at 439–56. Specifically, “[h]aving become a matter for international adjustment, the person injured has no control over the measure of redress to be demanded or the means to be employed, matters entirely within the discretion and control of the government.” *Id.* at 439.



those Allies had thrown themselves under their Protection, and so became their Subjects, think themselves obligated to do it.<sup>43</sup>

A troublesome consequence of recognizing a robust legal right to use armed force against a host state that failed to live up to its responsibility to protect aliens was the potential for pretextual invocation. Cicero's remark about how Rome would not take up arms to protect allies but would when those allies "became their Subjects" suggests the role of power calculations in decisions to use force to protect subjects abroad. Other people knew that if they submitted to Rome, they would get Rome's protection. And those who contemplated violence to Romans abroad were taught the lesson of Roman power even at great distances from Rome.

Even in the modern era, injury or the threat of injury to a citizen was a common legal ground for war until the middle decades of the twentieth century that often masked deeper political calculations behind the use of force. A merchant, a settler, or a missionary would be attacked or otherwise suffer injury to their persons or property in a foreign country. The mother country would demand compensation on behalf of its aggrieved subject or subjects from the foreign sovereign or perhaps some other suitable reparations. When no compensation was proffered or what was proffered was deemed inadequate, the home sovereign could decide whether to wage war on the foreign sovereign, do nothing, or take some intermediate measure like cutting off trade or credit. This basic scenario transpired not only between Western European powers and the rest of the world but also between European powers. As international exchange thickened, so did the scrapes and bruises to foreigners in strange lands. As a result, r2p became a handy hook on which to hang a *casus belli* (a case for war), even when the real reason for war may have been unrelated to the specific injury to the person or property of its subject that the home sovereign pleaded. The r2p rationale was also a very useful tool for stirring up domestic political support and popular sentiment in favor of a foreign war. Consequently, r2p was a ubiquitous ground for war before the last century.

As a general matter, the law of war before the mid-twentieth century was markedly different from the current U.N. Charter-based *jus ad bellum* described in Part I. The use-of-armed-force rules in the Charter reflect the culmination of a trend toward restrictive regulation of the resort to armed force in international relations that started in the early twentieth century. The goal was to shrink as much as possible the set of permissible legal justifications for war and other armed encounters between sovereign states. The aim was a return to the past—that is, to the earlier just-war tradition of medieval and early modern Christian writers who had sought to identify and cabin a set of morally legitimate (and thus lawful, in their view—an equa-

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43. GROTIUS, *supra* note 39, at 115–52 (Bk. II, Ch. XXV).

tion of morality and legality considered more suspect today<sup>44</sup>) reasons to go to war.<sup>45</sup> The period in between—most notably the seventeenth century up to the First World War—was one in which armed force was generally viewed as lawful; national leaders and international lawyers saw a sovereign state's use of armed force up to and including declared war as an upper band of sanctions in a spectrum of acceptable political tools to vindicate its national interests.<sup>46</sup>

Pre-World War II international law generally did not have anything to say about how a state acted within its borders, which was viewed as a matter of internal governance protected by the bedrock principle of exclusive sovereignty. This included the basic human rights of the state's native citizens.

But the property-like rule of a sovereign state's right to exclude was subject to exceptions independent of the sovereign's consent—easements so to speak, to build on the property law analogy. Two of these easements implicated armed force. First, there was the right of innocent passage;<sup>47</sup> a sovereign could not deny a reasonable request by a fellow sovereign whose army or warship had to either pass through its territorial lands and waters to get somewhere else, or else was forced to take refuge there or in its territorial waters, for example, because of a bad storm at sea.<sup>48</sup> Second, and more relevant, there was r2p—the idea that another sovereign could use force to protect the property or persons of nationals, usually merchants, reasonably perceived to be at risk in a foreign land because the foreign sovereign was incapable, unwilling, or hostile.<sup>49</sup> In the nineteenth century, the right to protect one's nationals was often built into larger so-called “unequal treaties” which ceded wholesale extraterritorial rights to Western powers. But even absent such a treaty, a robust r2p right to use force to protect the persons and property of nationals was fully recognized as international law by way of custom.

The twentieth-century trend toward reducing the lawful reasons to go to war scaled back the right to protect, most significantly by eliminating it with respect to the use of force to protect against or vindicate past injury to

44. Although less so in the law of war, see, for example, MICHAEL WALZER, *JUST AND UNJUST WARS: A MORAL ARGUMENT WITH HISTORICAL ILLUSTRATIONS* (2006).

45. See, e.g., LESLIE C. GREEN, *ESSAYS ON THE MODERN LAW OF WAR* (1999); RICHARD TUCK, *THE RIGHTS OF WAR AND PEACE: POLITICAL THOUGHT AND THE INTERNATIONAL ORDER FROM GROTIUS TO KANT* (2000). See generally, DINSTEIN, *supra* note 6; GRAY, *supra* note 9.

46. Thus Von Clausewitz's famous maxim, “war is merely the continuation of policy by other means,” was an accurate statement of the contemporaneous norms on the law of war. See CARL VON CLAUSEWITZ, *ON WAR* 87 (Colonel J.J. Graham trans. 2008) (1832).

47. See *Corfu Channel Case* (U.K. v. Alb.), 1949 I.C.J. 4 (Apr. 9).

48. See, e.g., *The Schooner Exch. v. McFaddon*, 11 U.S. 116 (1812). Technically, innocent passage might not be viewed as an exception *per se*, since the sword stays sheathed during transit or refuge. But a foreign army or warship within one's territory was a dangerous thing, and it was a significant act of trust which international law sought to enable to accept that the requesting sovereign's intentions were entirely peaceful, and not a ruse or reconnaissance in advance of invasion.

49. See EDWIN BORCHARD, *DIPLOMATIC PROTECTION OF CITIZENS ABROAD* (1907); JOHN BASSETT MOORE, *INTERNATIONAL LAW DIGEST* (1906).

the *property* interests of an intervening sovereign's nationals. The first such r2p curtailment initiative, indeed, the first modern constraint on jus ad bellum by multilateral treaty, was the 1907 Convention Respecting the Limitation of Force for the Recovery of Contract Debts negotiated at the second Hague Conference (the "1907 Hague Convention").<sup>50</sup> The historical record of the nineteenth and early twentieth centuries had been studded with military interventions by the European powers in rest-of-the-world sovereign states, ostensibly for the protection of the property interests of their nationals. Attitudes toward this trend began to change near the turn of the century under American leadership. The specific impetus for the 1907 Hague Convention had been a joint British-German naval bombardment of Venezuela for failure to pay up on bonds held by British and German private banks. The Convention provided that "the Contracting Powers agree not to have recourse to armed force for the recovery of contract debts claimed from the Government of one country by the Government of another country as being due to its nationals."<sup>51</sup>

Although there was no exact analogue to the 1907 Hague Convention on Contract Debts with regard to nationals' property-law interests in a foreign state (that is, protections against expropriation or exercises of eminent domain), customary international law evolved to prohibit that type of r2p too. Since foreign-owned property was still property within the territory of the host sovereign state, it would seem that r2p for property interests was foreclosed by the explicit operation of Article 2(4) of the U.N. Charter: "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity . . . of any state."<sup>52</sup> But it was the subsequent failed United Kingdom-France-Israel intervention in the Suez Crisis of 1956 that marked the actual death knell for the idea that armed force could be used to protect against injury to the purely economic interests of one's nationals, whether grounded in contract law or property law. When Egyptian President Gamal Abdel Nasser nationalized the Suez Canal, there was a plausible argument that its treaty-protected status as an international waterway meant that a foreign military intervention to preserve the status did not breach Egypt's "territorial integrity" or "political independence" as protected by Article 2(4).<sup>53</sup> Regardless, the world community, led by the United States, ultimately rejected the validity of the use of armed force to protect the property interests of foreign nationals, and there has been no

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50. Convention Respecting the Limitation of the Employment of Force for the Recovery of Contract Debts, Oct. 18, 1907, 36 Stat. 2241, U.N.T.S. 537.

51. *Id.* art. 1. The provision further states that: "This undertaking is, however, not applicable when the debtor State refuses or neglects to reply to an offer of arbitration, or, after accepting the offer, prevents any *compromis* [agreement to arbitrate] from being agreed on, or, after the arbitration, fails to submit to the award." *Id.* However, customary international law gradually extended beyond the literal terms of the treaty to prohibit the use of force to protect the contract interests of nationals even if the debtor state refused to arbitrate.

52. U.N. Charter art. 2(4).

53. See TAREK OSMAN, EGYPT ON THE BRINK: FROM NASSER TO MUBARAK (2011).

subsequent notable attempt to invoke it again. If r2p did not justify the use of force with respect to a public-good property interest like the Suez Canal, it is hard to see where it might have any traction at all in the realm of economic, as opposed to bodily, interests.

Despite the transformative evolution of the world community and its laws since the Second World War, the core human-protection aspect of r2p appears alive and well, unlike the protection of nationals' property. Two theoretical points are worth noting before discussing the cases. First, r2p is a luxury that only powerful states need and can afford. The state contemplating its use must have nationals flung across all parts of the world and the raw military power to exercise armed force in those places.<sup>54</sup> Second, the world is a generally safer place for aliens than it was during the heyday of r2p. The safety of one's nationals in most parts of the world is assured by diplomatic relations without the need for the threat of armed force in the event that a citizen is harmed. By the same token, civilians who end up in some corner of the world where there is an imminent risk of harm likely put themselves there having understood (and therefore arguably assumed) the risk that they were going to a dangerous place. The upshot of the greater level of safety around the world is that it is questionable whether r2p is still needed to guarantee the safety of people traveling outside of their own country. And the upshot of the fact that people are generally on notice of where there is danger in the world is doubt about whether a state still has a humanitarian *responsibility* to protect its nationals facing an imminent risk of group death, even if it has the *right* to use armed force to do so, if those nationals knew or should have known that they were putting themselves in harm's way but went there anyway. Both points are worth keeping in mind as we survey the modern landscape of the customary right to use armed force extraterritorially to protect one's own civilians.

### B. *The Contemporary Understanding of r2p*

The r2p case study *par excellence* is the 1976 intervention by Israeli commandoes in Entebbe, Uganda. The facts are well-known. Pro-Palestinian terrorists hijacked an Air France flight from Tel Aviv after a stop-over in Athens, Greece. The hijackers flew the plane to Entebbe, Uganda, where they received a warm reception from Idi Amin, the infamous military

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54. Dick Baxter put it this way in 1973:

I am reminded of the two ladies in Newport who met in the morning, and one said to the other, 'I thought one was not supposed to wear diamonds in the morning.' And the lady who was wearing the diamonds said, 'I thought so too—until I had them.' The fact is that there are very few powers in the world today who have these diamonds, that is to say, large numbers of nationals abroad and the naval and aerial capacity for mounting an operation to remove these endangered nationals from foreign territories. I venture to say that if Bolivia or Bahrain had this potential, it would make use of it.

Baxter, *supra* note 11, at 53.

strongman who then ruled the country. Many of the non-Israeli hostages were released; it is debated whether those who continued to be held as hostages were singled out because of their Israeli nationality or because they were Jewish. The terrorists held on to 106 hostages in total, approximately twenty of whom were Air France pilots and crew members who volunteered to stay behind.

Negotiations were attempted with the mediation of Egypt but ultimately broke down. The terrorists threatened to kill the hostages unless Israel and other Western European countries released certain prisoners. Israel launched a daring raid with the assistance of the Kenyan government that supplied intelligence and granted armed overflight and refueling rights to the Israeli force.<sup>55</sup> The Israeli soldiers succeeded in rescuing 102 of the hostages, killing all the terrorists and about 40 Ugandan soldiers in the process. They also destroyed several Ugandan fighter aircrafts at Entebbe Airport to preclude aerial pursuit after the Israeli force took off for home.

The world community's reaction to the Entebbe Raid was mixed. U.N. Secretary-General Kurt Waldheim condemned the raid as "a serious violation of the national sovereignty of a United Nations member state."<sup>56</sup> China, the Soviet Union, India, and most of the U.N. members from Africa, the Middle East, and the Communist bloc also condemned the raid as a blatant violation of Uganda's territorial sovereignty. The U.N. Security Council, however, took no action due to the support of the United States, the United Kingdom, and France for Israel. Israel and its allies justified the operation as an act of self-defense.<sup>57</sup> The statement of the Israeli ambassador to the United Nations also sounded a humanitarian theme:

We come with a simple message to the Council: We are proud of what we have done because we have demonstrated to the world that . . . the dignity of man, human life and human freedom constitute the highest values. We are proud not only because we have saved the lives of over a hundred innocent people—men, women and children—but because of the significance of our act for the cause of human freedom.<sup>58</sup>

As for international legal opinion today, there is consensus that Israel acted lawfully in undertaking the Entebbe raid despite the blatant violation of Uganda's territorial sovereignty. Most international lawyers continue to justify it as self-defense. The unique circumstances of Israel's founding, the Holocaust, and the then-recent murder of Israeli hostages at the 1972 Mu-

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55. In retaliation, Idi Amin ordered the massacre of hundreds of Kenyans in Uganda and sent a hit team that assassinated the Kenyan minister (and British intelligence officer) who helped to secure Kenya's support of the Israeli mission.

56. U.N. SCOR, 31st Sess., 1939th mtg. at ¶¶ 13–14, U.N. Doc. S/PV.1939 (1976).

57. See Thomas C. Wingfield, *Forcible Protection of Nationals Abroad*, 104 DICK. L. REV. 439, 453–54 (2000).

58. CHAIM HERZOG, *HEROES OF ISRAEL* 284 (1989).

nich Olympics all added up to a strong case that taking military action in Entebbe was essential to Israel's "political independence" and therefore constituted an act of self-defense. These factors are highly unlikely to be present in other r2p cases conducted by countries that do not have Israel's special history. Moreover, even as applied to Israel, it is a stretch of the self-defense logic to apply it to justify the use of force in a distant country like Uganda that posed no direct threat to Israel. Thus, some international lawyers like Lou Henkin focused on the humanitarian aspect of the mission and suggested that the Entebbe principle was a freestanding exception to the U.N. Charter's Article 2(4) prohibition on the use of armed force.<sup>59</sup> That position drew fire from adherents to the majority view, including the Israeli law-of-war scholar Yoram Dinstein. He could not "accept the proposition advocated by . . . Henkin . . . that a so-called Entebbe principle—as a legitimate form of humanitarian intervention—constitutes an exception to the general prohibition of the use of inter-state armed force pursuant to Article 2(4) of the Charter, irrespective of the provision of Article 51."<sup>60</sup>

Notwithstanding this clash of legal titans about whether r2p as it was applied at Entebbe was a sub-species of the Article 51 self-defense right or a separate rule of customary law, there is general agreement on the content of the rule. The rule's three elements—necessity or imminent risk, proportionality, and exhaustion of peaceful alternatives, are common to the two other jus ad bellum codified in the U.N. Charter.<sup>61</sup> For example, Article 42, which is the provision granting the U.N. Security Council the power to authorize the use of armed force, also has a peaceful-measures exhaustion term. It authorizes the U.N. Security Council to use force when measures specified in Article 41 "not involving the use of armed force"<sup>62</sup> are "inadequate or have proved to be inadequate."<sup>63</sup> As for the other two elements—necessity and proportionality—they are not only implicit in the U.N. Charter's specification of U.N. Security Council force authorizations, they are also a "part of the basic core of self-defence."<sup>64</sup> Thus, as applied to Entebbe, it was lawful to use armed force in an unconsenting foreign state: (1) to protect civilians facing imminent risk of group death; (2) when the use of force was narrowly tailored to protect the civilians; and (3) when all other reasonable means have been exhausted, including diplomatic negotiations for release of the hostages.<sup>65</sup> Also possibly relevant to an analysis of the legality of the r2p intervention was the fact that the hostages at Entebbe were

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59. See Henkin, *The Invasion of Panama under International Law: A Gross Violation*, *supra* note 12, at 296–97; Henkin, *Use of Force: Law and U.S. Policy*, in *RIGHT V. MIGHT: INTERNATIONAL LAW AND THE USE OF FORCE*, *supra* note 12, at 56.

60. DINSTEIN, *supra* note 6, at 234 n.79.

61. See *supra* note 22.

62. U.N. Charter art. 41.

63. *Id.* art. 42.

64. GRAY, *supra* note 9, at 148.

65. See ANDREW CLAPHAM, *BRIERLY'S LAW OF NATIONS* 453–54 (7th ed. 2012) (quoting John Dugard, *Int'l Law Comm'n*, 52nd Sess., May 1–June 9, July 10–Aug. 18, 2000, U.N. Doc. A/CN.4/506

brought to a foreign state involuntarily, a fact that is unlikely to recur in most cases.

The Israeli operation in Entebbe may have been the most spectacular instance of r2p in the modern era, but the United States has used the doctrine the most in recent decades, although Russia has been more active of late. This is unsurprising since the United States has been the dominant economic and military power in the postwar period.<sup>66</sup> Consequently, it has not only had large numbers of its nationals abroad, but has also had the military capacity to project power effectively into foreign countries. President Lyndon Johnson sent troops to protect American lives in the Dominican Republic in 1965. President Jimmy Carter used r2p to justify the failed military attempt to rescue U.S. hostages seized by Iranian revolutionaries in the takeover of the U.S. Embassy in Tehran in 1980. President Ronald Reagan's 1983 invasion of Grenada was justified in part by what may be the most aggressive articulation of a U.S. civilian-protection mission, with respect to U.S. medical school students believed to be at risk given political turmoil in the country.<sup>67</sup> And the protection of American nationals and property was part of the justification for the invasion of Panama by President George H.W. Bush in 1989.<sup>68</sup> Bush also sent American military forces into Liberia with authorization to fire in order to evacuate U.S. citizens in 1990.<sup>69</sup> Other countries have also exercised the right to protect their nationals: Belgium intervening in the Congo in 1964 with the United States, and France in the Central African Republic, Cote d'Ivoire, Liberia in 2002 to 2003 and Chad in 2006.

Russia has invoked the right to protect its nationals, as well as ethnic Russians, as a ground for military interventions in South Ossetia in 2008 and most recently in Crimea in 2014. In February 2014, following months of increasingly violent political protests in Ukraine, the pro-Russian president Viktor Yanukovych hastily fled to Russia chastened by disclosures of his opulent lifestyle and corruption.<sup>70</sup> The Ukrainian parliament subsequently ousted him and installed a new pro-Western government.<sup>71</sup> Shortly thereafter, unmarked soldiers lacking insignia but using vehicles with Russian license plates entered southern Ukrainian territory in the Crimean peninsula near the Black Sea. They encircled government buildings and

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(2000)). This part of Dugard's report was a proposed draft article for conditions for lawful interventions that was never ratified. *Id.*

66. See LILLICH, *supra* note 4.

67. See Ronald H. Cole, *Operation Urgent Fury: The Planning and Execution of Joint Operations in Grenada, 12 October – 2 November 1983*, Joint History Office, Office of the Chairman of the Joint Chiefs of Staff (1997), available at <http://www.dtic.mil/doctrine/doctrine/history/urgfury.pdf>.

68. See Henkin, *supra* note 12.

69. Ann Devroy & Molly Moore, *61 Americans Evacuated from Liberia*, WASH. POST (Aug. 6, 1990), <http://www.washingtonpost.com/wp-dyn/content/article/2006/07/28/AR2006072800568.html>.

70. Alison Smale & Steven Erlanger, *Ukraine Mobilizes Reserve Troops, Threatening War*, N.Y. TIMES, Mar. 1, 2014, [http://www.nytimes.com/2014/03/02/world/europe/ukraine.html?hp&\\_r=1](http://www.nytimes.com/2014/03/02/world/europe/ukraine.html?hp&_r=1).

71. *Id.*

military bases, occupied the region's airports, and seized communication hubs.<sup>72</sup>

Russia offered three legal arguments justifying the military intervention in Ukrainian sovereign territory. First, they argued *r2p*, extending the basic rationale not just to those alleged to have Russian nationality but also to ethnic Russians who spoke the language.<sup>73</sup> As a matter of domestic law, the Russian parliament granted President Vladimir Putin authority to use force to protect Russian citizens and soldiers throughout Ukraine who were threatened by violence.<sup>74</sup> Second, Putin argued consent through invitation by ex-President Yanukovich and Crimea's pro-Russian Prime Minister.<sup>75</sup> Russia asserted that Yanukovich's overthrow was an unconstitutional coup, and, accordingly, that he had the sovereign authority to give consent to Russia's intervention.<sup>76</sup> The Russians also claimed that they were invited into the Ukrainian district of Crimea by local officials who represented the popular will of the people of the region (primarily ethnic Russians) in rejecting the legitimacy of Ukraine's new government and in seeking secession and possible reunification with Russia.<sup>77</sup> Third, the Russian government invoked a self-defense rationale based on allegations of some 675,000 Ukrainian refugees entering Russia and constituting a "humanitarian catastrophe."<sup>78</sup>

The Russian military intervention into Crimea has been condemned as a violation of international law, although the U.N. Security Council has not acted given Russia's status as a veto-wielding permanent member. The United States has called the occupation "a breach of international law," a "clear violation" of Ukrainian sovereignty, and "a threat to peace and security."<sup>79</sup> British Prime Minister David Cameron similarly stated that "there can be no excuse for outside military intervention."<sup>80</sup> Acting Ukrainian Prime Minister Arseniy Yatseniuk has called the Russian intervention "a declaration of war" and has called up military reserves to defend the rest of Ukraine.<sup>81</sup> Such condemnations have not specifically addressed Russia's *r2p* justification, although the clear implication is that all three legal justifica-

72. *Id.*

73. Christian Ignatzi, *Crimea: A Breach of International Law*, DEUTSCHE WELLE (Mar. 8, 2014), <http://www.dw.de/crimea-a-breach-of-international-law/a-17483425> (discussing the legality of Russia's intervention from international law and Western European points of view).

74. Smale & Erlanger, *supra* note 70.

75. *Id.*

76. Nick O'Malley, *War of the Words at UN over Russia's Crimea Move*, SYDNEY MORNING HERALD (Mar. 4, 2014), <http://www.smh.com.au/world/war-of-words-at-un-over-russias-crimea-move-20140304-hvg0c.html>.

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. Shaun Walker & Ian Traynor, *Russian Military Moves in Crimea are Declaration of War, Says Ukrainian PM*, THE GUARDIAN (Mar. 2, 2014, 8:46 AM), <http://www.theguardian.com/world/2014/mar/02/ukraine-russia-war-crimea-nato>.



tions offered by Russia were doubtful because there was no real or apparent threat to Russian nationals and soldiers, or to ethnic Russians in Ukraine.

To be sure, the earlier U.S. interventions in Grenada in 1983 and Panama in 1989 were also highly controversial and condemned as violations of international law,<sup>82</sup> but such criticism did not question the invocation of r2p as a legal principle. (Nor, for that matter, did the critics of Russian military intervention in the Crimea assert that Russia would not have been legally justified in intervening if ethnic Russians were in fact being slaughtered by Ukrainian forces.) Rather, critics of American military interventions in those instances questioned whether American nationals were really at risk and whether the measures taken were proportional.<sup>83</sup> With respect to the proportionality issue, invasion and regime change appeared wildly disproportionate to the goal of protecting U.S. civilians, particularly by comparison to the Entebbe example. For instance, evacuation would surely have sufficed in the case of Grenada where there were very few American civilians. The gross disproportionality suggested that r2p was a pretext for other non-humanitarian reasons for intervention such as the Reagan Administration's desire to showcase American military might in Grenada.

In summary, it seems that r2p is viewed as unproblematic in principle when applied to the use of force to protect nationals in a foreign country facing a real, imminent risk of group death as at Entebbe. Exhaustion of peaceful measures and proportionality of the use of force are additional requirements. Any misgivings about r2p focus upon the cases in which it seems that powerful countries are using civilian protection as a reason for disproportionate military interventions when their nationals (or people of the same ethnic origin) are not really at risk—a danger most recently underscored by the Russian military intervention in Crimea in 2014.

Importantly, the concept of r2p has been routinely extended in practice to the use of armed force in unconsenting states to protect or rescue *foreign* civilians who are citizens or subjects of third countries who are also in the danger zone. Entebbe is once again a good example of this principle inasmuch as twenty of the hostages rescued were French national crewmembers, and some of the hostages were of the Jewish faith but not Israeli nationals. It might be argued, however, that since the majority of the hostages were Israelis, the rescue of the third-country nationals was merely incidental and that an Israeli mission to rescue them alone would have been unlawful.

But there have been several other interventions in unconsenting states where a very large number of civilians protected or evacuated by armed force were third-country nationals—that is, non-nationals of the intervener or the target state. In 1990, U.S. troops evacuated approximately 1,000 U.S. and

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82. See, e.g., LOUIS HENKIN ET AL., *RIGHT V. MIGHT: INTERNATIONAL LAW AND THE USE OF FORCE* 54 (2d ed. 1991); Ved P. Nanda, *The Validity of United States Intervention in Panama Under International Law*, 84 AM J. INT'L L. 494, 496 (1990).

83. See Henkin, *The Invasion of Panama*, *supra* note 12, at 296–97.

foreign nationals from Liberia without the approval of the Liberian government.<sup>84</sup> The overwhelming majority of civilians were not Americans. Professor Richard Lillich viewed the incident as an affirmation of r2p's survival as state practice:

The renewed assertion by the United States of the right of forcible protection of its nationals during the Liberian disorder, the fact that hundreds of other foreign nationals from dozens of States were evacuated with what must have been the enthusiastic (if not explicit) approval of their governments, and the near-complete absence of legal or other criticism of the rescue operation all combine to indicate that the international community, now more than ever in the post-Cold War period is prepared to accept, endorse or, at the very least tolerate the forcible protection of nationals abroad in appropriate cases.<sup>85</sup>

The next year, in 1991, French and Belgian troops—with American planes—evacuated 6,500 of their own citizens and 2,500 foreign nationals of over thirty European, African, and Middle Eastern states from Zaire during a military mutiny.<sup>86</sup> President Mobutu did not approve of the military intervention and accused the European powers of trying to destabilize his country.<sup>87</sup> Again, Lillich found these to be “legitimate case[s] of forcible protection” of civilians.<sup>88</sup> The instance of using force to protect foreign nationals that may come closest to R2P occurred in 1996. U.S. military forces flew into northern Iraq, set up a defensive perimeter against Saddam Hussein's forces, and evacuated approximately 6,500 pro-American Kurds living in northern Iraq.<sup>89</sup> None of the civilians at risk were U.S. nationals; in fact, they were technically Iraqi nationals who belonged to an ethnic minority.

These cases suggest that whatever the contours of a state's right under customary international law to use armed force to protect or rescue its own citizens in an unconsenting state, the right also extends to rescuing third-country nationals, even if their sovereign states do not formally request the protection. This conclusion appears consistent with Article 45(c) of the Vienna Convention on Diplomatic Relations, which allows a state that has recalled its mission to entrust “the protection . . . of its nationals to a third State.”<sup>90</sup> If r2p encompasses the international legal right of a state to use armed force within the territory of another unconsenting state in order to

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84. Thomas C. Wingfield, *Forcible Protection of Nationals Abroad*, 104 DICK. L. REV. 439, 460 (2000).

85. *Id.* (citing Richard Lillich, *Forcible Protection of Nationals Abroad: the Liberian “Incident” of 1990*, 35 GERMAN Y.B. INT'L L. 205, 206 (1993)).

86. LILLICH, *supra* note 4, at 105–06.

87. *Id.*

88. *Id.*

89. *Operation Pacific Haven/Quick Transit*, GLOBALSECURITY.ORG, [http://www.globalsecurity.org/military/ops/pacific\\_haven.htm](http://www.globalsecurity.org/military/ops/pacific_haven.htm) (last visited Mar. 28, 2014).

90. Vienna Convention on Diplomatic Relations, art. 45(c), Apr. 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95.

protect not only its own civilians but also civilians who are nationals of a third country, then we are very close to forcible R2P itself. And the only difference—the perceived sovereign autonomy of the target state to do whatever it wants to its *own* civilians including killing certain groups of them—has been significantly eroded in the twenty-first century by the proliferation of R2P norms as discussed in the next Part.

### III. THE RESPONSIBILITY TO PROTECT CIVILIANS (R2P)

The “Responsibility to Protect” civilians—commonly abbreviated as RtoP or R2P—is ubiquitous in current international policy and law discussions. Vaclav Havel and Desmond Tutu called it “the most significant development in the defense of human rights since . . . the Universal Declaration of Human Rights in the aftermath of World War II and the Holocaust.”<sup>91</sup> It was unanimously adopted by more than 170 heads of state at the 2005 United Nations World Summit.<sup>92</sup> The U.N. Security Council has passed two thematic resolutions addressing R2P,<sup>93</sup> and, most importantly, one operational resolution under Chapter VII invoking R2P as a justification for the use of military force in the Libyan civil war in 2011.<sup>94</sup> U.N. Secretary-General Ban Ki-Moon has issued a report card each year from 2009 to 2012 monitoring its implementation and progress.<sup>95</sup> And R2P commentary and scholarship in blogs, newspapers, foreign policy magazines, law journals, and books are ubiquitous.<sup>96</sup>

91. VACLAV HAVEL & DESMOND M. TUTU, *THE RESPONSIBILITY TO PROTECT: THE PROMISE OF STOPPING MASS ATROCITIES IN OUR TIME* xxv (Jared Genser & Irwin Cotler eds., 2012).

92. U.N. Secretary-General, *Implementing the Responsibility to Protect: Rep. of the Secretary-General*, ¶ 71, U.N. Doc. A/63/677 (Jan. 12, 2009) [hereinafter *Implementing the Responsibility to Protect*].

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

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

95. U.N. Secretary-General, *Responsibility to Protect: Timely and Decisive Response: Rep. of the Secretary-General*, 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: Rep. of the Secretary-General*, U.N. Doc. A/65/877-S/2011/393 (June 27, 2011); U.N. Secretary-General, *Early Warning, Assessment and the Responsibility to Protect: Rep. of the Secretary-General*, U.N. Doc. A/64/864 (July 14, 2010); *Implementing the Responsibility to Protect*, *supra* note 92.

96. See, e.g., Jose E. Alvarez, *The Schizophrenias of R2P*, in *HUMAN RIGHTS, INTERVENTION, AND THE USE OF FORCE* 275 (Philip Alston & Euan Macdonald eds., 2008); ALEX BELLAMY, *RESPONSIBILITY TO PROTECT: THE GLOBAL EFFORT TO END MASS ATROCITIES* (2009); EVANS, *supra* note 2; Saira Mohamed, *Taking Stock of the Responsibility to Protect*, 48 *STAN. J. INT'L L.* 319 (2012); Merhdad Payandeh, *With Great Power Comes Great Responsibility? The Concept of the Responsibility to Protect Within the Process of International Lawmaking*, 35 *YALE J. INT'L L.* 469 (2010); Catherine Powell, *Libya: A Multilateral Constitutional Moment?*, 106 *AM. J. INT'L L.* 298, 303 (2012); Neomi Rao, *The Choice to Protect: Rethinking Responsibility for Humanitarian Intervention*, 44 *COLUM. HUM. RTS. L. REV.* 697 (2013); Noele Crossley, *The Responsibility to Protect in 2012: R2P fails in Syria, Brazil's 'RWP' Emerges*, *GLOBAL POL'Y* (Dec. 28, 2012), <http://www.globalpolicyjournal.com/blog/28/12/2012/responsibility-protect-2012-r2p-fails-syria-brazil%E2%80%99s-%E2%80%98RWP%E2%80%99-emerges>; Stewart Patrick, *A New Lease on Life for Humanitarianism: How Operation Odyssey Dawn Will Revive RtoP*, *FOREIGN AFF.* (Mar. 24, 2011), <http://www.foreignaffairs.com/articles/67674/stewart-patrick/a-new-lease-on-life-for-humanitarianism>;

There is, however, a surprising lack of clarity about what exactly R2P is. The responsibility to protect has been called, among other things, a “concept,” a “principle,” a “norm,”<sup>97</sup> an “initiative,”<sup>98</sup> a “policy agenda”<sup>99</sup> and a “framework.”<sup>100</sup> Where to find a working definition in the clutter? The U.N. Secretary-General’s most recent annual R2P report from 2012 seems a logical place to start. It states that the “responsibility to protect provides a political framework based on fundamental principles of international law for preventing and responding to genocide, war crimes, ethnic cleansing, and crimes against humanity.”<sup>101</sup>

Secretary-General Ban’s definition deftly handles one aspect of R2P on which there appears to be a general consensus: R2P is not yet “law.” According to the Secretary-General’s report, R2P is not international law but rather “a political framework based on fundamental principles of international law.”<sup>102</sup> An International Criminal Court official, in 2007, concluded that R2P was not even a “political framework,” but rather “a political catchword rather than a legal norm.”<sup>103</sup> William Burke-White summed it up this way in 2012:

What the Responsibility to Protect is not, however, is an international legal *rule*. It has not been codified in an international treaty; it lacks the state practice and sufficient *opinio juris* to give rise to customary international law; and it does not qualify as a general princip[le] of law. Instead, the Responsibility to Protect is best understood as a norm of international conduct.<sup>104</sup>

But what is the relevant “norm of international conduct” signified by R2P? To get a sense of what the responsibility to protect has come to mean today, it is necessary to understand the recent history of human rights crises and interventions (and non-interventions) that led to R2P’s creation.

There have been three phases in R2P’s evolution during the dozen or so years of its existence: (1) 2001 to 2005: genesis as a workaround to the obstacle posed by exclusive sovereignty for military intervention in humanitarian crises; (2) 2005 to 2011: interlude as a twenty-first century agenda for

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David Rieff, Op-Ed., *R2P, R.I.P.*, N.Y. TIMES, Nov. 11, 2007, [http://www.nytimes.com/2011/11/08/opinion/r2p-rip.html?pagewanted=all&\\_r=1&](http://www.nytimes.com/2011/11/08/opinion/r2p-rip.html?pagewanted=all&_r=1&).

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

98. Lloyd Axworthy & Allan Rock, *R2P: A New and Unfinished Agenda*, 1 GLOBAL RESP. TO PROTECT 54, 63 (2009).

99. Bellamy, *supra* note 3, at 158.

100. Sheri P. Rosenberg, *Responsibility to Protect: A Framework for Prevention*, 1 GLOBAL RESP. TO PROTECT 442, 442 (2009).

101. U.N. Secretary-General, *Responsibility to Protect: Timely and Decisive Response: Rep. of the Secretary-General*, ¶ 59, U.N. Doc. A/66/874-S/2012/578 (July 25, 2012).

102. *See id.*

103. *See Stahn, supra* note 97, at 120.

104. William Burke-White, *Adoption of the Responsibility to Protect*, in THE RESPONSIBILITY TO PROTECT 17, 34 (Jared Genser & Irvin Cotler eds., 2011).

engaging the world community in state-building and democracy promotion in oppressive or failed states; and (3) 2011 to the present: resurgence as a term to describe a process and justification for military intervention in foreign states in Southwest Asia and Africa. In the third and present phase, the juxtaposition of the NATO military intervention in Libya and the non-interventions to date in Syria and South Sudan raises difficult questions about the future of R2P. Part IV of this Article will argue that these questions can be addressed by a two-track framework for forcible R2P that distinguishes between: (1) a requirement of U.N. Security Council authorization in all cases not involving state-sponsored mass killings and (2) an alternative track for military intervention in cases involving an imminent risk of group extermination, such as genocide, massacre crimes against humanity, and the use of weapons of mass destruction. The idea that a state can intervene without U.N. Security Council authorization to save people facing group death in an unconsenting foreign state is the logical extension of r2p in an era where the R2P norm has pierced the veil of exclusive sovereignty which formerly shielded a state's conduct toward its people from the coverage of international law and the scrutiny of other states. But before making this normative claim, it is necessary to describe in detail the origin and history of R2P.

#### *A. R2P's Genesis: A Call to Arms*

R2P originated in reaction to the world community's controversial responses to the great humanitarian crises of the 1990s. With the end of the Cold War and the stunning victory against Saddam Hussein in the First Gulf War, the start of the decade inspired great hope for the United Nations, international leaders, and global human rights advocates. The dream of one world community without war and with basic rights for all human beings seemed achievable. A specific cause for hope was the potential for a productive marriage of opposites: state-organized monopolies of violence and global human rights. The military might of the United States and its estimable NATO allies was now deprived of a worthy sovereign state enemy; why not deploy it to protect people at risk around the world? The basic right of every human being to life resonated deeply with the democratic foundation myth and ideals of the United States. And, from a practical perspective, it was a brilliant tactic to align the interests of an American military-industrial complex searching for new missions to justify defense spending with the interests of human rights activists and non-governmental organizations ("NGO"), in a reverse Molotov-Ribbentrop pact to save lives.<sup>105</sup>

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105. From the end of the First Gulf War in 1992 until September 11, 2001, there was a search for new military missions to justify American defense spending. The one enduring Cold War conflict during that period, North Korea's development of nuclear weapons, reached a crisis point in July 1994, but was substantially mitigated by the negotiation of the Nuclear Framework Agreement in late 1994. Thus, in addition to the humanitarian interventions in Somalia and the former Yugoslavia, American troops were

### 1. *Somalia, Rwanda, Bosnia*

It had started well. In late 1992, the United States sent more than twenty thousand hard-charging marines into Somalia to assist in famine relief as part of a U.N. Security Council authorized mission<sup>106</sup> during a bloody civil war that would claim an estimated 800,000 lives.<sup>107</sup> A year and a half later, after the deaths of eighteen American soldiers in the disastrous battle of Mogadishu recounted in the book and movie “Black Hawk Down,”<sup>108</sup> American troops were pulled out, even as the crisis in the failed Somali state endured.<sup>109</sup> The ignominious withdrawal occurred amidst U.S. accusations of botched planning and mission creep by the United Nations, and other countries’ rejoinders of the U.S. military’s obsession with punitive missions against one anti-American Somali warlord. Stung by Mogadishu, the United States stood by when the genocide of more than half a million Tutsis by radical Hutus in Rwanda started in April 1994, one month after the last American soldier had been withdrawn from Somalia.<sup>110</sup> The rest of the world followed suit, with a token U.N. peacekeeping force and a few foreign aid

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used in the mid-late 1990s in counter-drug operations in the Caribbean and Latin American, enforcement of economic sanctions against Iraq, noncombatant evacuations in Liberia, and new types of intelligence and reconnaissance operations around the world.

106. The U.N. Security Council first took action on January 23 through Resolution 733 (1992), which urged all parties of the Somali conflict to cease hostilities and requested all states to immediately implement an arms embargo to the country. As the civil war continued and deaths from famine and war mounted, the U.N. Security Council adopted resolutions to establish an official United Nations Operation in Somalia (UNOSOM I) to monitor a ceasefire, sponsor peace talks, and stem the famine. S.C. Res. 746, U.N. Doc. S/RES/746 (Mar. 17, 1992); S.C. Res. 751, U.N. Doc. S/RES/751 (Apr. 24, 1992). After these measures failed to solve the crisis, the U.N. Security Council, acting under Chapter VII of the Charter, issued Resolution 794 (1992) authorizing the use of “all necessary means to establish as soon as possible a secure environment for humanitarian relief operations in Somalia.” The Resolution called on member states that were in a position to do so to provide military forces for the United Task Force (UNITAF), which was deployed in Mogadishu on December 9, 1992. S.C. Res. 775, U.N. Doc. S/RES/775 (Aug. 28, 1992); S.C. Res. 794, ¶ 10, U.N. Doc. S/RES/794 (Dec. 3, 1992). U.S. military forces led and constituted the majority of troops in UNITAF: some 25,000 of the 37,000 in the contingent.

107. The United Nations estimates that 300,000 Somalis died in the civil war and hunger crisis in the early 1990s alone. *Somalia-UNOSOM I: Background*, UNITED NATIONS, <https://www.un.org/en/peacekeeping/missions/past/unosom1backgr2.html> (last visited Mar. 28, 2014). Organizations such as the Center for American Progress estimate that between 450,000 and 1.5 million people have lost their lives and nearly 800,000 have become refugees due to violence or hunger in the ongoing conflict. The international community has contributed an estimated \$55 billion responding to the crisis since 1991. \$20 billion alone has been spent on peacekeeping, military intervention, diplomacy, and humanitarian and development aid. John Norris and Bronwyn Bruton, *Twenty Years of Collapse and Counting: The Cost of Failure in Somalia*, CTR. AM. PROGRESS (Sept. 2011), <http://www.americanprogress.org/issues/2011/09/pdf/somalia.pdf>.

108. MARK BOWDEN, *BLACK HAWK DOWN: A STORY OF MODERN WAR* (1999).

109. Arguably, the withdrawal was driven by domestic politics. President Bill Clinton was relatively new in office, and the Somalia intervention was something that his predecessor George H. W. Bush had started. One can imagine a different reaction if the crisis had broken in Clinton’s second term, by which time he had developed a much more forceful and experienced position on foreign policy and the use of force abroad.

110. *Leave None to Tell the Story: Genocide in Rwanda*, HUM. RTS. WATCH, <http://www.hrw.org/reports/1999/rwanda/Geno1-3-04.htm> (last updated Mar. 13, 2009).

workers on the ground in Rwanda incapable of saving more than a handful of lives through scattered instances of individual heroism.<sup>111</sup>

The subsequent, more forceful reaction of the United States and its NATO allies to humanitarian crises in the former Yugoslavia may have saved lives, but it also complicated the legal, political, and moral calculus of military interventions for humanitarian ends. Between 1992 and 1995, an estimated 200,000 people died in the Republic of Bosnia and Herzegovina during a bloody civil war between Bosnian Muslims, Croats and Serb separatists aided by Serbia.<sup>112</sup> Bosnian Serb bombings of towns and villages suspected of harboring enemy fighters caused many deaths. The Bosnian Serbs launched a campaign to carve out exclusively Serbian enclaves in the country by forcing everyone else to leave—a practice known as “ethnic cleansing.” The nadir of the crisis for the United Nations came when Bosnian Serbs crossed the line between ethnic cleansing and genocide. In July 1995, close to 8,000 Muslims (mostly men) who had sought refuge in a U.N. “safe area” in Srebrenica disappeared while in the custody of Bosnian Serb forces led by Ratko Mladic.<sup>113</sup> A small group of Dutch U.N. peacekeepers was on the ground but they did nothing to intervene.<sup>114</sup>

Once news of the Srebrenica massacre and other mass atrocities in Bosnia came to light, then U.N. Secretary-General Boutros Boutros Ghali met with U.S., EU, and other world leaders to discuss more forcible measures in Bosnia. The discussions resulted in a working agreement between the U.N. Security Council and NATO countries for NATO to conduct air strikes on Serb military forces subject to veto by the military Special Representative of the Secretary-General.<sup>115</sup> The bombings forced the parties to the negotiating table. The United States and Russia, Serbia’s major ally, brokered a peace agreement, the Dayton Accords of 1995.<sup>116</sup> The Accords established a framework that ended the civil war and set up a unitary sovereign state consisting of two autonomous republics composed of majority Bosnian Muslims and Croats (Federation of Bosnia and Herzegovina) and Bosnian Serbs (Republika Srpska).<sup>117</sup>

111. ICISS REPORT, *supra* note 1.

112. Estimate made by the ICRC. Statement by Dr. Haris Silajđić, Chairman of the Presidency of Bosnia and Herzegovina, Head of Delegation of Bosnia and Herzegovina at 63rd Session of the General Assembly, on the occasion of General Debate (Sept. 23, 2008), [http://www.un.org/ga/63/generaldebate/pdf/bosniaherzegovina\\_en.pdf](http://www.un.org/ga/63/generaldebate/pdf/bosniaherzegovina_en.pdf).

113. *The Fall of Srebrenica and the Failure of UN Peacekeeping: Bosnia and Herzegovina*, HUM. RTS. WATCH (Oct. 1995), at 69, available at <http://www.hrw.org/sites/default/files/reports/bosnia1095web.pdf>

114. *Id.* at 14–17.

115. AIR UNIV., DELIBERATE FORCE: A CASE STUDY IN EFFECTIVE AIR CAMPAIGNING 45 (Col. Robert C. Owen ed., 2000); Eric Schmitt, *NATO Shifts Focus of its Air Attacks on Bosnian Serbs*, N.Y. TIMES, Sept. 11, 1995, <http://www.nytimes.com/1995/09/11/world/nato-shifts-focus-of-its-air-attacks-on-bosnian-serbs.html?pagewanted=all&src=pm>.

116. General Framework Agreement for Peace in Bosnia and Herzegovina, Nov. 30, 1995, U.N. Doc. A/50/790, available at <http://www.ucdp.uu.se/gpdatabase/peace/BoH%2019951121.pdf>.

117. See generally *id.*

Other ethnic groups in the former Yugoslavia watched the Dayton Accords, hoping for similar great-power brokered accommodations. Russia and the United States and its NATO allies, however, viewed the Accords as a one-time deal to end the war in Bosnia, not as a comprehensive plan for peace in all of former Yugoslavia. Frustrated hopes led to renewed war.

## 2. *Kosovo*

The next flashpoint was Kosovo, a relatively autonomous province of Yugoslavia that remained administratively a part of Serbia but with a population that was ninety percent Albanian. Starting in 1996, Kosovar Albanian hostility to Serbian rule took an increasingly violent turn led by a guerrilla force that called itself the Kosovo Liberation Army (“KLA”). From 1996 to 1998, an estimated one million ethnic Albanians were forcibly relocated or fled violence in the region, giving rise to claims of ethnic cleansing.<sup>118</sup>

Although there was no large massacre of unarmed civilians as in Bosnia, and deaths from fighting were not as numerous (11,000 as estimated by the prosecutor for the International Criminal Tribunal for Yugoslavia (“ICTY”)),<sup>119</sup> the war was ugly and bloody, with allegations of war crimes by both Serbian forces and the KLA.<sup>120</sup> A ceasefire was brokered in late 1998 by Richard Holbrooke, prime mover behind the Dayton Accords while at the State Department, and monitored by the Organization for Security and Cooperation in Europe (“OSCE”).<sup>121</sup> But the ceasefire broke down in late 1998, and Serbian forces renewed an offensive against the KLA.<sup>122</sup> Between March and June 1999, NATO launched a serious and sustained bombing campaign against targets in Kosovo and other Serbian parts of former Yugoslavia to stem the offensive.<sup>123</sup> Over 6,303 tons of ordnance was dropped on targets including troop formations, military hardware, power stations, and government buildings and facilities. There were 38,004 sorties run with, miraculously, no casualties to NATO airmen and soldiers attributed to en-

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118. Peter Finn, *Refugees Want Kosovo Free of Serbs*, WASH. POST (June 6, 1999), <http://www.washingtonpost.com/wp-srv/inatl/longterm/balkans/stories/refugees060699.htm>.

119. Press Briefing, War Crimes Tribunal Prosecutors (Nov. 10, 1999), <http://www.un.org/News/briefings/docs/1999/19991110.delponte.br.doc.html>.

120. *Kosovo/Albania: Investigate Alleged KLA Crimes*, HUM. RTS. WATCH (Dec. 15, 2010), <http://www.hrw.org/news/2010/12/15/kosovoalbania-investigate-alleged-kla-crimes>; Nicholas Schmidle, *Bring up the Bodies: Kosovo's leaders have been accused of grotesque war crimes. But can anyone prove it?*, NEW YORKER (May 6, 2013), [http://www.newyorker.com/reporting/2013/05/06/130506fa\\_fact\\_schmidle](http://www.newyorker.com/reporting/2013/05/06/130506fa_fact_schmidle).

121. Interview by PBS Frontline with Richard Holbrooke, Diplomat and Former United States Ambassador to the United Nations, available at <http://www.pbs.org/wgbh/pages/frontline/shows/kosovo/interviews/holbrooke.html> (last visited Mar. 28, 2014).

122. *Id.*

123. See United Nations International Criminal Tribunal for Yugoslavia Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, available at [www.icty.org/x/file/Press/nato061300.pdf](http://www.icty.org/x/file/Press/nato061300.pdf) (last visited Mar. 29, 2014). It was revealed after the fact that a NATO ground invasion was a serious possibility pushed especially by the British and that secret plans were drawn up. See Dana Priest, *Kosovo Land Threat May Have Won War*, WASH. POST (Sept. 19, 1999), <http://www.washingtonpost.com/wp-srv/national/daily/sept99/airwar19.htm>. It would have been the first war fought by NATO troops.



emy fire, and an estimated 500 casualties to Serbian military and civilians.<sup>124</sup> Serbia ultimately capitulated. A framework for peace was negotiated that essentially preserved status quo autonomy for Kosovo, with Serbia forced to concede sovereignty on the ground to a U.N. peacekeeping force.

NATO's decisive intervention in Kosovo raised at least two sets of difficult questions. First, for international lawyers, the burning process question was whether the bombings were legal in the absence of U.N. Security Council preauthorization.<sup>125</sup> Russia, by tradition Serbia's ally and NATO's foe, was a permanent member of the U.N. Security Council and a surefire veto against any authorization of military force in Kosovo. China, another permanent member, had its own problems with ethnic minorities clamoring for self-determination. It was naturally sympathetic to the Serbian position and generally suspicious of the geopolitical agenda of the United States and its Western European allies who were permanent members—the United Kingdom and France. The NATO allies did seek and obtain a U.N. Security Council resolution after the fact, affirming the negotiated peace in Kosovo.<sup>126</sup> The resolution might charitably be construed as a post-hoc ratification of the bombings that had led to the peace. And, after all, the bombings were not the unilateral acts of one sovereign, but rather collective action by a regional security alliance (that is, NATO), albeit one that did not count the target country of intervention as a member. But neither mitigating factor justified the NATO bombings as measured against the bright-line orthodoxy that the use of armed force in international affairs is only lawful in self-defense or with U.N. Security Council preauthorization.

Second, deeper political and moral questions were raised by the troubling juxtaposition of the more effective military interventions in Europe and the failure of interventions in sub-Saharan Africa, despite the far greater scale of human suffering in the latter. Deaths in Rwanda were in the half million to million range, with most of the genocide of Tutsis occurring over a span of several weeks.<sup>127</sup> Estimates of deaths in three years of war in Bosnia were about 300,000 lives; in the two years of sustained conflict in Kosovo, about 11,000.<sup>128</sup> Were the differing outcomes to be explained by morally indefensible perceptions of the relative worth of the lives saved? Did the facts suggest that a European life was perceived by the citizens and leaders of states with the military power to intervene to be worth between two and fifty times more than a human life in sub-Saharan Africa, with the presumptive values of lives in West Asia or North Africa somewhere in between? Such

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124. W.J. Fenrick, *Targeting and Proportionality during the NATO Bombing Campaign against Yugoslavia*, 12 EUR. J. INT'L L. 489, 490, 492 (2001).

125. Henkin, *supra* note 18, at 824.

126. S.C. Res. 1244, U.N. Doc. S/RES/1244 (June 10, 1999), <http://daccess-dds-ny.un.org/doc/UN-DOC/GEN/N99/172/89/PDF/N9917289.pdf?OpenElement>.

127. ALISON DES FORGES, *LEAVE NONE TO TELL THE STORY: GENOCIDE IN RWANDA* 1 (1999).

128. MICHAEL MANN, *THE DARK SIDE OF DEMOCRACY*, 356–57 (2005).

uncomfortable questions were natural and insistent, particularly from the perspective of global human rights advocates.

But what if the main reason for the stark disparity across the cases was not unconscionable prejudice but rather the political self-interest of sovereign states? The lesson, then, may have been that powerful states or NATO will intervene in their backyards (Kosovo was 500 miles from Athens, 570 miles from Istanbul, and 1,100 miles from Berlin and Rome)<sup>129</sup> or where their material interests are implicated, but not to save strangers in faraway places. Regardless of whether the pattern of past interventions was caused by prejudice or self-interest as a descriptive matter, it seems imperative from a normative perspective that any international law doctrine permitting humanitarian intervention should be free from either bias in application. One logical way to ensure this would be to enforce a more permissive standard for authorizing the use of armed force in the most severe humanitarian crises.

### 3. *The 2001 ICISS Report and the Foundational Articulation of R2P*

It was shortly after Kosovo that the Responsibility to Protect entered mainstream international policy discussions. The crucial event was the December 2001 release of the report of the International Commission on Intervention and State Sovereignty (“ICISS”), which had been formed at Canada’s urging at the U.N. Millennium Assembly in September 2000.<sup>130</sup> The Commission’s goal was to build an “international consensus on how to respond in the face of massive violations of human rights and humanitarian law.”<sup>131</sup> R2P was the conceptual fulcrum of the Commission’s effort to overcome the sovereignty obstacle to humanitarian intervention, and, indeed, to change the terms of the discourse about humanitarian intervention itself.

As set forth in the Commission’s report, the responsibility to protect was not one concept but rather a cluster of ideas centered upon a sovereign state’s responsibility to protect its people. The cluster had three “pillars”: (1) a sovereign state has a basic responsibility to protect civilians within its borders; (2) the rest of the world has a responsibility to ensure that every state honors its responsibility to protect; and (3) if a state fails in its respon-

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129. Furthermore, the Czech Republic, Hungary and Poland had formally joined NATO on March 12, 1999, twelve days before the NATO bombing campaign started on March 24, 1999. Paul E. Gallis, CONG. RESEARCH SERV., RL30374, KOSOVO: LESSONS LEARNED FROM OPERATION ALLIED FORCE 17–19 (1999). Hungary shared a border with Serbia and its capital Budapest was only 350 miles from Kosovo. *Id.* Prague and Warsaw were 620 miles and 660 miles away from Kosovo, respectively. *Id.* Overall, the Czech Republic, Hungary, and Poland were somewhat wary of the NATO campaign. None of the three nations contributed combat troops or air support; however, they all expressed at least tacit approval and granted overflight rights. *Id.* Poland was the most removed actor but the Polish government vocally supported the air strikes, calling the campaign “justified.” *Id.* Hungary and the Czech Republic offered their air space and facilities despite a split in public opinion polls amongst their citizens and conflicting rhetoric from government officials. *Id.*

130. ICISS REPORT, *supra* note 1, at VII.

131. *Id.* at 81.

sibility, then other states may use armed force to protect the lives of the civilians at risk instead.<sup>132</sup> The ICISS Report went on to describe the sorts of mass atrocities the commission of which would trigger other states' responsibility to intervene militarily. These predicate offenses were genocide, crimes against humanity, ethnic cleansing, and war crimes. An implicit point of the enumeration was that forcible R2P was an extreme measure to redress serious transgressions of human rights, not all violations of international law or of international human rights. The Commission did not define these four offenses in great detail, relying instead on their formulation in international law.

The third of the three pillars mentioned above, "forcible R2P," was the centerpiece of the Commission's foundational conceptualization of R2P in 2001. The Commission also discussed peaceable measures that other states could take to end mass atrocities, what it called the "responsibility to prevent" and the "responsibility to rebuild." But, unsurprisingly in the wake of controversy over the legality of the Kosovo intervention, the use of armed force was the clear focal point of the Commission's report. The phrase "military intervention" appeared ninety-six times in its seventy-five pages.<sup>133</sup> The ICISS Report began: "This report is about the so-called 'right of humanitarian intervention': the question of when, if ever, it is appropriate for states to take coercive—and in particular military—action, against another state for the purpose of protecting people at risk in that other state."<sup>134</sup> Although, as noted above, the ICISS Report acknowledged alternatives to military intervention, the heart of the ICISS Report addressed "planning for," "carrying out," and "following up" on military intervention. This emphasis on forcible R2P was characteristic of early responsibility-to-protect commentary in the first couple years of the new millennium.<sup>135</sup>

Another interesting feature of the 2001 ICISS Report was its position on whether U.N. Security Council authorization was legally required—the burning question after Kosovo. The Report implied that U.N. authorization, although highly desirable, was not absolutely necessary.<sup>136</sup> The Commission did require an initial attempt to get U.N. Security Council preapproval, memorably referring to the U.N. Security Council as the "first port of call on any matter relating to military intervention for human protection purposes."<sup>137</sup> The ICISS Report clearly stated that "Security Council

132. See *id.* at XI.

133. See *id. passim.*

134. *Id.* at VII.

135. See, e.g., Eleanor Lumsden, *An Uneasy Peace: Multilateral Military Intervention in Civil Wars*, 35 N.Y.U. J. INT'L L. & POL. 795 (2002–2003); Nicholas J. Wheeler, *Legitimizing Humanitarian Intervention: Principles and Procedures*, 2 MELB. J. INT'L L. 550 (2001).

136. See ICISS REPORT, *supra* note 1, at 49–55.

137. *Id.* at 53.

authorization must in all cases be *sought* prior to any military intervention,"<sup>138</sup> but it did not say that such authorization was required.

Indeed, in an intriguing part of the ICISS Report entitled "When the Security Council Fails to Act," the Commission outlined two options in the event of U.N. Security Council inertia or inaction.<sup>139</sup> The first option was to get an "overwhelming majority"<sup>140</sup> of affirmative votes in the General Assembly under the "Uniting for Peace" Resolution ("UFP"), which was sponsored in 1950 by the United States as a workaround to U.N. Security Council deadlock.<sup>141</sup> The UFP mechanism has been relegated to international law purgatory today; the United States acknowledges paternity but has become an estranged parent, given the changed demographics of the General Assembly. Nonetheless, it was not altogether unreasonable for the Commission to assert that it remained customary law despite its tension with the U.N. Charter's direct provisions on the use of force, given its U.S.-origin pedigree and the large margin of approval just five years after the U.N. Charter was ratified (eighty-eight percent of all U.N. members—fifty-

138. *Id.* at 50 (emphasis added).

139. *See id.* at 53–55. "In the view of the Council's past inability or unwillingness to fulfill the role expected of it, if the U.N. Security Council expressly rejects a proposal for intervention when humanitarian or human rights issues are significantly at stake, or the Council fails to deal with such a proposal within a reasonable time it is difficult to argue that alternative means of discharging the responsibility to protect can be entirely discounted." *Id.* at 53–55. In a newspaper editorial, former U.S. State Department Legal Adviser John B. Bellinger III expressed a similar sentiment with respect to the crisis in Syria, writing that "when the Security Council is blocked from protecting civilians against the most egregious atrocities, the United States should be prepared to intervene when other avenues have been exhausted and there is sufficient international consensus to support intervention." John B. Bellinger III, *U.N. rules and Syrian intervention*, WASH. POST (Jan. 17, 2013), [http://articles.washingtonpost.com/2013-01-17/opinions/36410395\\_1\\_syrian-opposition-assad-regime-intervention](http://articles.washingtonpost.com/2013-01-17/opinions/36410395_1_syrian-opposition-assad-regime-intervention).

140. ICISS REPORT, *supra* note 1, at 53.

141. Uniting for Peace, G.A. Res. 377 (V), U.N. Doc. A/RES/377 (V) (Nov. 3, 1950). The Resolution states, in relevant part:

*Reaffirming* the importance of the exercise by the Security Council of its primary responsibility for the maintenance of international peace and security, and the duty of the permanent members to seek unanimity and to exercise restraint in the use of the veto. . . .

. . . .

*Recognizing* in particular that such failure does not deprive the General Assembly of its rights or relieve it of its responsibilities under the Charter in regard to the maintenance of international peace and security. . . .

. . . .

*Resolves* that if the Security Council, because of lack of unanimity of the permanent members, fails to exercise its primary responsibility for the maintenance of international peace and security in any case where there appears to be a threat to the peace, breach of the peace, or act of aggression, the General Assembly shall consider the matter immediately with a view to making appropriate recommendations to Members for collective measures, including in the case of a breach of the peace or act of aggression *the use of armed force when necessary*, to maintain or restore international peace and security. (final emphasis added).

*Id.* It was principally drafted and proposed by the United States, and, for that reason, is also known as the "Acheson Plan" after then-Secretary of State Dean Acheson. The resolution was passed by a super-majority vote of fifty-two to five—with Soviet bloc members voting no and two abstentions (India and Argentina).

two yes, five no, two abstentions).<sup>142</sup> The Commission suggested a supermajority threshold of a two-thirds majority of affirmative votes in the General Assembly as the trigger for an R2P military intervention.<sup>143</sup> This was a sufficiently high threshold that the Commission acknowledged the “unlikelihood” of obtaining General Assembly authorization “in any but very exceptional case[s],” but opined that “Kosovo and Rwanda might just conceivably have been such cases.”<sup>144</sup> The Commission presented the General Assembly UFP option as a substitute to U.N. Security Council preauthorization, although it stated that its main purpose in outlining the “mere possibility” of the option was to create “an important additional form of leverage on the Security Council to encourage it to act decisively and appropriately.”<sup>145</sup>

The second option was “collective intervention to be pursued by a regional or sub-regional organization acting within its defin[ed] boundaries.”<sup>146</sup> Neighboring countries that are specially affected by humanitarian disasters because of refugee flows and rebels operating across borders are generally “more familiar with the actors and personalities involved in the conflict, and have a greater stake in overseeing a return to peace and prosperity.”<sup>147</sup> Moreover, the involvement of regional organizations of states is contemplated in Chapter VIII of the U.N. Charter, which, however, explicitly requires U.N. Security Council authorization.<sup>148</sup> The Commission added the lawyerly argument that a *post hoc* authorization might suffice for purposes of the Charter, pointing out that “there are recent cases when approval has been sought . . . after the event (Liberia and Sierra Leone) and there may be certain leeway for future action in this regard.”<sup>149</sup> With respect to regional interventions, the ICISS Report made one more important point: “It is much more controversial when a regional organization acts, not against a member or within its area of membership, but against a non-member.”<sup>150</sup> The rider was obviously addressed to the air bombing by NATO forces in the former Yugoslavia in 1999, since Serbia was not a NATO member. The Commission pointed out that NATO justified its intervention by invoking

142. U.N. GAOR, 5th Sess., 302d plen. mtg. at 7, U.N. Doc. A/PV.302 (Nov. 3, 1950).

143. The Commission likely chose two-thirds based on Article 18 of the U.N. Charter, which states, “Decisions of the General Assembly on important questions shall be made by a two-thirds majority of the members present and voting. These questions shall include: recommendations with respect to the maintenance of international peace and security . . .” U.N. Charter art. 18(2).

144. Rwanda maybe, but Kosovo? It may be true that a two-thirds vote of the General Assembly (129 of the 193 current members) will be easier to get than an affirmative vote of nine of the fifteen U.N. Security Council members without a veto from one of the five permanent members.

145. ICISS REPORT, *supra* note 1, at 53.

146. *Id.*

147. *Id.* at 54.

148. “[N]o enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council . . .” U.N. Charter art. 53(1).

149. ICISS REPORT, *supra* note 1, at 54.

150. *Id.*

the same “spill over” and “severe disruption” arguments used by regional organizations intervening in member states.<sup>151</sup>

To summarize, the foundational R2P Report of the International Commission on Intervention and State Sovereignty focused on military intervention or forcible R2P and concluded that U.N. Security Council preauthorization was not required in all cases. The ICISS Report said that such authorization should always be sought before the use of armed force, but that supermajority approval of the General Assembly or collective measures by regional organizations in member states were alternative options in case of U.N. Security Council inaction or deadlock. In the case of regional interventions, the Commission strongly urged seeking U.N. Security Council authorization after the fact if not obtained *ex ante*, and singled out the controversiality of interventions by regional organizations in non-member states but did not condemn them. The Commission’s ICISS Report did not discuss these two alternatives in terms of legality but rather as policy options consistent with R2P.

### B. *Farewell to Arms: The Demilitarization of R2P*

A year or so before the unanimous adoption of R2P by state leaders at the 2005 U.N. World Summit, there was a shift in the characterization of R2P away from the military aspect that dominated the 2001 ICISS Report. Instead, R2P discussions within the United Nations and among international lawyers and policy experts focused more on articulating and implementing a framework or strategy for encouraging responsibility within troubled states and involvement by other states before a humanitarian crisis erupted.

R2P advocates thus elevated the responsibility to *prevent* to center stage; R2P’s peace corps replaced its marine corps. In 2007, the United Nations created the position of a special adviser for R2P as a focal point for peacetime initiatives that transcended the sovereignty obstacle. The most positive press about the responsibility to protect civilians during this period concerned its peaceable role in ending a violent standoff between ethnic groups in Kenya after contested elections in December 2007 that had claimed 1,500 lives.<sup>152</sup> When, in May 2008, a cataclysmic cyclone killed 150,000 people and displaced 1.5 million others in Myanmar, a lively discussion at the U.N. Security Council revolved around whether R2P was “in play” such that other countries could render humanitarian assistance without a sovereign state’s consent when it was incapable of caring for its people in the wake of natural disaster, yet wary of inviting foreign assistance.<sup>153</sup> Military

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151. *Id.*

152. See Bellamy, *supra* note 3, at 154 (“In sharp contrast to the treatment of Darfur, the diplomatic response to the ethnic violence that erupted in the aftermath of the disputed December 2007 elections in Kenya is widely trumpeted as the best example of RtoP in practice.”).

153. See Julian Borger & Ian MacKinnon, *Bypass Junta’s Permission for Aid, US and France Urge*, THE GUARDIAN (May 9, 2008), <http://www.theguardian.com/world/2008/may/09/cyclonenargis.burma>.

operations were no longer framed as the main event, but rather as a “last resort” in case of failure of an ongoing process of preventative assistance and monitoring to save civilian lives in target states.<sup>154</sup>

Nowhere was this shift in R2P identity more evident than in the 2009 Report of the U.N. Secretary-General entitled *Implementing the Responsibility to Protect*.<sup>155</sup> Addressing the General Assembly, the Secretary-General decried the false choice presumed by humanitarians and world leaders in the last years of the twentieth century and the first years of the twenty-first of “either standing by in the face of mounting civilian deaths or deploying coercive military force to protect the vulnerable and threatened populations.”<sup>156</sup> Instead, he argued: “What is most needed, from the perspective of the responsibility to protect, are assistance programmes that are carefully targeted to build specific capacities within societies that would make them less likely to travel the path to crimes relating to the responsibility to protect.”<sup>157</sup> The Secretary opined that this capacity building, paired with human rights monitoring, advocacy, and education, represented the greatest hope for avoiding the predicate crimes that would trigger the need for military action with all its grave domestic and international consequences. The Secretary’s perspective was shared by many in the academy and policy circles:<sup>158</sup> the center of the R2P cluster of ideas had migrated away from enforcement and the use of

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154. S.C. Res. 1894, U.N. Doc. S/RES/1894 (Nov. 11, 2009) (reaffirming a commitment to the protection of civilians in zones of armed conflict and calling for the creation of conditions to allow humanitarian assistance); S.C. Res. 1674, U.N. Doc. S/RES/1674 (Apr. 28, 2006) (reaffirming a commitment to human rights and calling on member states to support and enable states to meet their responsibilities to their citizens). *Implementing the Responsibility to Protect*, *supra* note 94; U.N. Secretary-General, *Responsibility to Protect: Timely and Decisive Response: Rep. of the Secretary-General*, U.N. Doc. A/66/874-S/2012/578 (July 25, 2012) (emphasizing the close relationship between prevention and response); U.N. Secretary-General, *The Role of Regional and Sub-regional Arrangements in Implementing the Responsibility to Protect: Rep. of the Secretary-General*, U.N. Doc. A/65/877-S/2011/393 (June 27, 2011) (articulating the three pillar strategy of promoting state internalization of humanitarian norms, capacity building and international assistance, and timely and decisive responses to responsibility to protect crimes); U.N. Secretary-General, *Early Warning, Assessment and the Responsibility to Protect: Rep. of the Secretary-General*, U.N. Doc. A/64/864 (July 14, 2010) (reaffirming the importance of early warning and assessment in responding to responsibility to protect crimes).

155. *Implementing the Responsibility to Protect*, *supra* note 92.

156. *Id.* ¶ 7.

157. *Id.* ¶ 44.

158. See, e.g., Bellamy, *supra* note 3, at 163–67.

armed force to prevention, democracy promotion,<sup>159</sup> and state building under the R2P label.<sup>160</sup>

Understanding why R2P was pacified between genesis in 2001 and the 2005 World Summit and subsequent years requires an understanding of the geopolitical context. There were, in my view, three reasons for the shift. First, independent of world political developments, it is possible that the change in emphasis resulted in part from normative concerns. On the one hand, international policymakers may have held or developed a good-faith belief that it was more important to invest in crime prevention in states where civilians appeared at risk rather than enforcement after the risk had matured into deaths and suffering.<sup>161</sup> The “pull” of this belief likely interacted with the “push” factor of the resistance of states with poor human rights records against the heightened prospect of outside military intervention represented by forcible R2P. This concern was surely exacerbated by the substantive ambiguity of definitions of war crimes, crimes against humanity, and ethnic cleansing, and by the insinuation of the 2001 ICISS Report that U.N. Security Council preauthorization was not a requirement for forcible R2P.

The second and third reasons for the shift had a common thread in the United States’ 2003 invasion of Iraq. The invasion started in March, which was around the time civil war in the Darfur region of Sudan erupted. The worst of the carnage in Darfur occurred from 2003 to 2004, with credible evidence of group murders, hacking off of limbs, and gang rapes of civilians, particularly by pro-government paramilitary herders (the so-called

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159. A little discussed prototype of R2P was the sequence of actions in Haiti during the early 1990s, which was overshadowed by the more cataclysmic humanitarian crises in Somalia and Rwanda. In 1991, a military coup had toppled the democratically elected president Jean-Bertrand Aristide. The U.N. Security Council initially passed economic sanctions and set up a U.N. Mission to monitor the situation on the ground, but when these proved ineffective in spurring a return to democratic government, the Security Council authorized member states to stand up “a multinational force” with permission “to use all necessary means to facilitate the departure from Haiti of the military leadership, . . . the prompt return of the legitimately elected President and the restoration of the legitimate authorities of the Government of Haiti.” S.C. Res. 940, U.N. Doc. S/RES/940 (July 31, 1994). The Resolution thus framed the principal reason for the military intervention in terms of democratic regime change (or restoration) but it also declared that the Council was motivated to act because it was “[g]ravelly concerned by the significant further deterioration of the humanitarian situation in Haiti, in particular the continuing escalation by the illegal de facto regime of systematic violations of civil liberties, [and] the desperate plight of Haitian refugees.” *Id.* In September 1994, just as the U.N.-authorized military force, comprised almost entirely of U.S. air, ground, and naval forces, was on the verge of invading Haiti, former U.S. president Jimmy Carter negotiated a peaceful exchange of power with the military regime.

160. The change in the framing of R2P as an ongoing and reiterative process rather than a substantive norm or doctrine is not unlike policymakers’ description of the GATT/WTO international trade law regime as a process toward harmonization rather than as a raft of substantive legal rules embodying the norm of free trade. World Trade Org., *Understanding the WTO* (5th ed. 2011), at 9, available at [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/understanding\\_e.pdf](http://www.wto.org/english/thewto_e/whatis_e/tif_e/understanding_e.pdf).

161. See generally, e.g., ALAN J. KUPERMAN, *THE LIMITS OF HUMANITARIAN INTERVENTION: GENOCIDE IN RWANDA* (2001) (asserting that military intervention would have been too late to stop the genocide).



“Janjaweed”).<sup>162</sup> Hundreds of thousands of civilians fled to escape the violence. There was a good case to be made for crimes against humanity, war crimes, ethnic cleansing, and even incipient genocide, but the atrocities in Darfur coincided with the brunt of U.S. combat operations in Iraq. Human right advocates and U.N. leaders repeatedly invoked the R2P mantra but to no avail. Neither the United States nor any country with the military wherewithal to make a difference seriously contemplated military enforcement in a part of the world that had little strategic or economic value. To be sure, there was a good chance of a veto from China (an ally of Sudan) if the matter had been brought before the Security Council for a discussion about a military intervention, but no one attempted it.<sup>163</sup>

One lesson to be drawn from the failure of forcible R2P in Darfur was that it was pointless to invoke it in a dramatically altered geopolitical context. Even as the landmark ICISS report on R2P was “largely completed,”<sup>164</sup> 9/11 had signaled the end of a rare decade of relative peace for the world’s most powerful states, including the United States, the leading military power and an indispensable party for large-scale humanitarian intervention given its unique capacity to project and support armed force across great distances. In March 2003, the United States, with George W. Bush as President, was fighting not just Saddam Hussein but also a global war against terror in Afghanistan. Even now, with U.S. military involvement in Iraq over and the war in Afghanistan winding down, the exponential rise of Chinese economic power and accompanying military might, strains on U.S.-Russia relations, the collapse of the Framework Agreement with North Korea and Iranian initiatives to develop nuclear weapons, have all combined to create a more perilous threat environment for the United States than before 9/11, even as an economic downturn has created pressure to decrease military spending. This reality has significantly diminished the prospect that R2P advocates will be able to mobilize American military participation in a humanitarian intervention. Thus, a second reason for the demilitarization of R2P among international leaders and policymakers may be skepticism about the availability of the resources and political will for armed humanitarian interventions.

A third possible reason why the R2P community grew more skeptical about forcible R2P was a concern about pretextual invocations. The invasion of Iraq in 2003 was a case in point. Before the war, the Americans and British had justified invasion principally as an enforcement action based on their evidence that Saddam Hussein had weapons of mass destruction in

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162. HUMAN RIGHTS WATCH, *Abuses in Darfur by Government Forces*, in *DARFUR IN FLAMES: ATROCITIES IN WESTERN SUDAN* (2004), available at <http://www.hrw.org/reports/2004/sudan0404/4.htm>.

163. See Cristina Badescu & Linnea Bergholm, *Responsibility to Protect and the Crisis in Darfur*, 40 *SECURITY DIALOGUE* 287, 297 (2009).

164. ICISS REPORT, *supra* note 1, at VIII.

violation of pre-existing U.N. Security Council Resolutions.<sup>165</sup> It soon became clear that there were no weapons of mass destruction. At this point, some pro-war apologists seized on what had previously been a minor theme—the rationale of humanitarian intervention on behalf of Kurds and oppressed Iraqis—as justification for the invasion.<sup>166</sup> This struck many international lawyers as pretextual.<sup>167</sup> If the experience of the 1990s had taught globalists the danger of doing nothing, the Second Gulf War reinforced the danger of pretextual invocations.<sup>168</sup>

Fears of forcible R2P as pretext were reinforced by hostilities between Georgia and Russia a few months prior to the Secretary-General's January 2009 Report. In August 2008, Georgian government forces launched an offensive to reclaim South Ossetia, a Lilliputian republic (estimated population of 70,000 in 2007) that had broken away from Georgia in 1992 after an armed conflict concluded by a Russia-brokered ceasefire. The Georgian invasion resulted in the deaths of several Russian peacekeepers deployed in the region under the 1992 peace agreement. Russia intervened with overwhelming military force, launching a counter-offensive that not only pushed Georgian forces out of South Ossetia but also expanded fighting into Georgia proper. As justification Russia invoked both self-defense, based on the deaths of the peacekeepers and threat to residents to whom it offered Russian nationality as a fig leaf for r2p, and R2P, based on allegations of ethnic cleansing of South Ossetians.<sup>169</sup>

R2P advocates cried foul. Gareth Evans, former Australian foreign minister and co-chair of the ICISS Committee that wrote the 2001 Report, asserted that the R2P norm was inapplicable to Russia's intervention insofar as it was undertaken to protect Russian citizens.<sup>170</sup> He continued that even if the R2P norm did apply with respect to Georgian oppression of South Ossetian civilians, Russia did not adhere to R2P's established contours by failing to present credible evidence of predicate offenses like war crimes or crimes against humanity, by not going to the Security Council first to seek

165. See U.N.S.C., 4701st mtg. at 2, U.N. Doc. S/PV.4701 (Feb. 5, 2003); Press Release, Briefing Security Council, U.S. Secretary of State Powell Presents Evidence of Iraq's Failure to Disarm, U.N. Press Release SC/7658; Michael R. Gordon & Judith Miller, *Threats and Responses: The Iraqis; U.S. Says Hussein Intensifies Quest for A-Bomb Parts*, N.Y. TIMES, Sept. 8, 2002, <http://www.nytimes.com/2002/09/08/world/threats-responses-iraqis-us-says-hussein-intensifies-quest-for-bomb-parts.html?pagewanted=all&src=pm>.

166. See generally, e.g., Jean-Bethke Elshstain, *The Just War Tradition and Natural Law*, 28 FORDHAM INT'L L. J. 642 (2004).

167. See Thomas H. Lee, *The Augustinian Just War Tradition and the Problem of Pretext in Humanitarian Intervention*, 28 FORDHAM INT'L L. J. 756 (2005).

168. But see Ryan Goodman, *Humanitarian Intervention and Pretexts for War*, 100 AM. J. INT'L L. 107, 107 (2006) (contending that legalizing unilateral humanitarian intervention would "discourage ulterior motives for war).

169. See Official Statement of President Medvedev upon Invading South Ossetia (Aug. 8, 2008), available at [http://www.sras.org/statements\\_on\\_russia\\_georgia\\_conflict\\_2](http://www.sras.org/statements_on_russia_georgia_conflict_2).

170. My disagreement with Evans' view that r2p is fundamentally different from R2P is a basic premise of this article.

action against Georgia's invasion, and by responding with disproportionate force.<sup>171</sup> Evans speculated that R2P might have been a pretext:

While one purpose of the Russian military intervention may have been to protect South Ossetian civilians under attack, it is highly questionable whether that was the primary motive: others appear to have been to establish full Russian control over both South Ossetia and Abkhazia (in the latter of which there was not even claimed to be a threat of mass atrocity crimes); to dismantle Georgia's entire military capability; to scuttle its NATO ambitions; and to send a clear signal to other former parts of the Soviet Union as to what would and would not be tolerated by Moscow.<sup>172</sup>

Another possible motive, which Evans did not mention, was Russia's desire to seek payback for the proto-R2P intervention by NATO against Serbia in Kosovo, which Western European countries had recognized as a sovereign state earlier that month.<sup>173</sup>

Regardless of whether it was because of a change of heart, a pragmatic acceptance of the unlikelihood of securing support for armed humanitarian interventions in a less hospitable geopolitical environment, or the risk of pretext by powerful states, R2P had evolved into much more than a repackaging of humanitarian military intervention by early 2011.<sup>174</sup> The 2005 to 2011 version of R2P was a policy agenda to recast state-building and democracy promotion in the less interventionist and non-normative framing of "civilian protection." Complementing and sometimes complicating this function, the language of R2P constituted a vocabulary susceptible of at least three different usages: it could be used as a clarion call or "hortatory norm" both to troubled states to shape up and to other states to help them;<sup>175</sup> it could be "danger words" used by diplomats to signal a humanitarian crisis on the brink; or it could be a self-justificatory mantra uttered by leaders of powerful states to disguise self-interested motives for military action. What unified all of this diversity of opinion was the basic point of R2P—undermining the exclusive sovereignty obstacle to outside involvement in mass atrocities in foreign states.

171. See Gareth Evans, *Georgia, Russia, and the Responsibility to Protect*, 1 AMSTERDAM L. F. (2009), available at <http://ojs.uvu.vu.nl/alf/article/view/58/115>.

172. *Id.*

173. See Clifford J. Levy, *Russia Backs Independence of Georgian Enclaves*, N. Y. TIMES, (Aug. 26, 2008), [http://www.nytimes.com/2008/08/27/world/europe/27russia.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2008/08/27/world/europe/27russia.html?pagewanted=all&_r=0).

174. The history of the evolution of the R2P norm in international life, rhetoric, policymaking, and law is itself an interesting case study in the interaction of ideational and material factors in international politics.

175. See Burke-White, *supra* note 104.

C. R2P.2: *The Arab Spring and the Return of Forcible R2P*

The revival of armed force as R2P's driving impetus was triggered by the so-called Arab Spring of popular uprisings that rippled through North Africa and Southwest Asia in early 2011. Long-lived dictators were forced out by mass demonstrations in Tunisia (Ben Ali), Egypt (Mubarak, in round one), and Yemen (Saleh). But their counterparts in Libya (Qaddafi), Syria (Bashar al-Assad), and Bahrain (King Hamad al-Khalifa) did not give way to popular demands for democratic reforms, opting instead to crack down on the protesters with varying degrees of brutality. In the cases of Libya and Syria, the result was prolonged civil war. In Bahrain, a smaller island nation,<sup>176</sup> intervention by Saudi Arabian troops and UAE security forces, coupled with conciliatory measures by King Hamad (for example, a cash gift of \$1,000 to all Bahrainis and appointment of an independent commission to investigate the government's conduct during the uprising) led to a more stable although still volatile situation.

1. *Libya*

It was the NATO bombing and robust enforcement of a no-fly zone in Libya pursuant to a U.N. Security Council Resolution that brought the military face of R2P back into the limelight. In mid-February 2011, inspired by popular uprisings in Tunisia, its neighbor to the west, and Egypt next door in the east, opposition to the rule of Muammar Qaddafi in Libya manifested itself in mass protests. The demonstrations turned violent—some protesters threw rocks, fired guns, and tossed Molotov cocktails and gas bombs. Qaddafi's forces stood their ground, calling in gunfire support from snipers and helicopters in some instances to disperse rioters. Scores of protesters and some government troops were killed and wounded. The violence

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176. Bahrain has about 1.3 million people, less than half of whom are Bahraini nationals. Three hundred thousand are Indian-national laborers. CIA, *Bahrain*, in THE WORLD FACTBOOK (2013), available at [https://www.cia.gov/library/publications/the-world-factbook/docs/contributor\\_copyright.html](https://www.cia.gov/library/publications/the-world-factbook/docs/contributor_copyright.html). By contrast, Libya had a population of about 6 million, 98 percent of whom are Libyan nationals and Syria 22.5 million, almost all of whom are Syrian nationals. CIA, *Libya*, in THE WORLD FACTBOOK (2013), available at <https://www.cia.gov/library/publications/the-world-factbook/geos/ly.html>; CIA, *Syria*, in THE WORLD FACTBOOK (2013), available at <https://www.cia.gov/library/publications/the-world-factbook/geos/sy.html>. Bahrain is also politically very close to the United Kingdom and the United States; the U.S. Fifth Fleet has its headquarters there and Bahrain is the main base for U.S. military operations in the Middle East region. U.S. NAVAL FORCES CENTRAL COMMAND: U.S. FIFTH FLEET, <http://www.cusnc.navy.mil> (last visited Mar. 29, 2014). Kuwait and Morocco, U.S. allies in the region, also had uprisings resulting in moves toward democratic reform, without the eruption of large-scale civil conflicts. In Kuwait, protests led to the resignation of Prime Minister Nasser Mohammed Al-Ahmed Al-Sabah and the dissolution of the Parliament. Fiona MacDonald, *Kuwait Government Resigns Amid Growing Opposition Protests*, BUS. WEEK, (Nov. 28, 2011), <http://www.businessweek.com/news/2011-11-28/kuwait-government-resigns-amid-growing-opposition-protests.html>; J. David Goodman, *Kuwaiti leader dissolves parliament*, N.Y. TIMES, Dec. 6, 2011, <http://www.nytimes.com/2011/12/07/world/middleeast/kuwaiti-leader-dissolves-parliament.html>. In Morocco, protests led to political concessions by King Mohammed VI and a referendum on constitutional reforms. Borzou Daragahi, *Morocco's King Proposes Constitutional Reforms*, L.A. TIMES, (June 18, 2011), <http://articles.latimes.com/2011/jun/18/world/la-fg-morocco-king-reforms-20110618>.

escalated, and the riots turned into outright rebellion as government forces and posts were overrun throughout the country, especially in the eastern and central parts including the port city of Ras Lanuf, the principal pipeline terminus for oil exports. But on March 7, 2011, Qaddafi's forces launched a counter-offensive that quickly overcame rebel opposition and re-established control of most of the major cities including Ras Lanuf, with the important exception of the rebel stronghold of Benghazi in the east. By March 16, 2011, Qaddafi's ground forces were poised to retake Benghazi.<sup>177</sup> It seemed only a matter of time before Qaddafi would win the civil war and regain control of the country by force of arms.

The next day, the U.N. Security Council passed Resolution 1973. The Resolution authorized the use of force by member states in Libya and thus changed the course of the civil war and ultimately led to Qaddafi's death and regime change in Libya. Three things are noteworthy about Resolution 1973: (1) what it says about the *process* and *substance* of forcible R2P; (2) the limitations it placed on military operations; and (3) the importance of buy-in from other states in the region.

First, the Security Council adopted a resolution that explicitly invoked R2P as the reason for authorizing the use of force. It was the first time the U.N. Security Council had authorized a military intervention for humanitarian purposes since the abortive invasion of Haiti in 1995. In 1999, it was fear of a Russian veto that had pushed NATO to intervene without trying for Security Council preauthorization in Kosovo. And, during the Darfur crisis, pro-intervention advocates (the United States under the Bush Administration was not one of them) did not press for a Security Council vote in large part because of fear of a Chinese veto. Thus, the fact that Russia and China abstained rather than vetoed the Libya R2P Resolution was a crucial "process" victory for forcible R2P. One possible conclusion to be drawn from the Libya case was clarification that Security Council preauthorization was a necessary condition for forcible R2P, and that Kosovo was an unlawful outlier.<sup>178</sup>

In terms of substance, the Resolution repeatedly referred to the responsibility to protect civilians as the reason for authorizing forceful measures. The Security Council expressed "grave concern at the deteriorating situation, the escalation of violence, and the heavy civilian casualties."<sup>179</sup> It underscored

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177. Anthony Shadid & David Kirkpatrick, *Libyan Rebels Defiant but in Disarray, as Qaddafi's Forces Gain Momentum*, N.Y. TIMES, Mar. 11, 2011, <http://www.nytimes.com/2011/03/12/world/africa/12libya.html?pagewanted=all>; Sudarsan Raghaven, *In Libya, Gaddafi's Tanks Split Rebel Forces*, WASH. POST, (Mar. 16, 2011), [http://www.washingtonpost.com/world/in-libya-gaddafis-forces-mount-heavy-assault-on-strategic-town/2011/03/15/ABDpckX\\_story.html](http://www.washingtonpost.com/world/in-libya-gaddafis-forces-mount-heavy-assault-on-strategic-town/2011/03/15/ABDpckX_story.html).

178. Mary Ellen O'Connell, *The United Nations Security Council and the Authorization of Force: Renewing the Council Through Law Reform*, in THE SECURITY COUNCIL AND THE USE OF FORCE, THEORY AND REALITY—A NEED FOR CHANGE? 47, 55 (Niels Blokker & Nico Schrijver eds., 2005) (asserting the necessity of Security Council preauthorization for humanitarian intervention before Libya).

179. S.C. Res. 1973, *supra* note 94, ¶ 3.

“its determination to ensure the protection of civilians and civilian populated areas and the rapid and unimpeded passage of humanitarian assistance and the safety of humanitarian personnel.”<sup>180</sup> Resolution 1973 actually authorized three military measures; two of these—inspections to enforce a standing arms embargo and establishing a no-fly zone in Libyan airspace “in order to protect civilians”<sup>181</sup>—were widely discussed and relatively uncontroversial. From a military perspective, however, a no-fly zone seemed a feeble step given the then-precarious position of the rebels in Benghazi. Furthermore, a no-fly zone would not have affected ground maneuver or bombardment and would have been harder to enforce against low-flying rotary-wing aircraft,<sup>182</sup> which constituted Qaddafi’s strengths. Thus, at American insistence,<sup>183</sup> the Security Council authorized a third, more open-ended use of force to protect civilians. The key provision of the Resolution stated that the Council:

Authorizes Member States that have notified the Secretary-General . . . to take all necessary measures . . . to protect civilians and civilian populated areas under threat of attack in the Libyan Arab Jamahiriya, including Benghazi, while excluding a foreign occupation force of any form on any part of Libyan territory.<sup>184</sup>

This passage showcased the second key aspect of the Security Council’s Libya Resolution, namely, its constraints on the scope of authorized military operations. Even if deemed operationally necessary to protect civilians, “a foreign occupation force” was categorically excluded.<sup>185</sup> And “all necessary measures” were to be defensive: “to protect civilians and civilian populated areas *under threat of attack*.”<sup>186</sup> Military force could not, it appeared, be used to help the rebels counter-attack or to go on the offensive, or to work a regime change by eliminating Qaddafi. Of course, the line was much harder to enforce in practice than in theory. For instance, government tanks and troops moving away from Benghazi might be targeted on the view that they were regrouping, not retreating for good. Or, when Qaddafi agreed to a

180. *Id.* ¶ 30. The resolution included an explicit exception for humanitarian flights (“[d]ecid[ing] further that the ban imposed by paragraph 6 shall not apply to flights whose sole purpose is humanitarian . . .”).

181. *Id.* ¶ 29.

182. Qaddafi relied heavily on helicopter gunships for aerial fire support missions against protesters and rebels. See, e.g., Damien McElroy, *Libya protests: Colonel Muammar Gaddafi Turns Helicopter Gunships on Own People*, TELEGRAPH, (Feb. 17, 2011), <http://www.telegraph.co.uk/news/worldnews/africaandindian-ocean/libya/8331117/Libya-protests-Colonel-Muammar-Gaddafi-turns-helicopter-gunships-on-own-people.html>.

183. Michael Lewis, *Obama’s Way*, VANITY FAIR, Oct. 5, 2012, available at <http://www.vanityfair.com/politics/2012/10/michael-lewis-profile-barack-obama>.

184. S.C. Res. 1973, *supra* note 94, ¶ 8.

185. *Id.* ¶ 27. This might plausibly be construed to exclude offensive ground forces, although not necessarily small teams of military advisers or special operators for intelligence and air control support, etc.

186. *Id.* (emphasis added).

ceasefire, a widespread pattern of breaches might ground the conclusion that there was never any serious intent to halt hostilities, permitting continued bombing of government troops and equipment around Benghazi. Regardless, the intent of the Security Council's R2P force authorization was not to end the civil war between government and rebel armies but rather to ensure that both sides did not cause unnecessary civilian deaths and suffering in fighting the war. It is worth pointing out that the Resolution's limitations are not logically compelled by the R2P norm. For example, although Resolution 1973 expressly ruled them out, foreign occupation armies have a long history of serving a civilian protection mission after a prolonged conflict has degraded peacetime governance institutions.

Third, the Security Council expressed special deference and solicitude for neighboring countries and the regional organization of the League of Arab States. Resolution 1973 "recognize[d] the important role of the League of Arab States in matters relating to the maintenance of international peace and security in the region."<sup>187</sup> The Security Council "request[ed] the member states of the League of Arab States to co-operate with other member states" in implementing the civilian-protection mission.<sup>188</sup> The endorsement of the Arab League was apparently a key reason why China and Russia declined to veto the resolution. In explaining his abstention,<sup>189</sup> China's U.N. representative stated for the record that China "had not blocked the passage of the resolution . . . because it attached great importance to the requests of the Arab League and the African Union."<sup>190</sup> The Russian ambassador expressed misgivings about the authorization of force for civilian protection, and an alternative preference for a resolution requesting an immediate ceasefire. He acknowledged, however, "that there was a need to avoid further destabilization in the region."<sup>191</sup>

When we examine closely how facts developed on the ground, it becomes more difficult to assess what the Libya precedent means for forcible R2P in the future, particularly with respect to the three enumerated themes of: (1) a paradigm responsibility-to-protect civilians case in terms of procedure and substance; (2) compliance with the proportionality limitations set by the Security Council; and (3) the role and importance of regional states in operationalizing forcible R2P.

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187. *Id.* ¶ 28.

188. *Id.*

189. By longstanding custom, an abstention is considered a "concurring vote," not a veto, for purposes of the voting requirement of U.N. Charter art. 27(3). See *Voting System and Records*, UNITED NATIONS SECURITY COUNCIL, <http://www.un.org/en/sc/meetings/voting.shtml> (last visited Feb. 16, 2014); Sydney D. Bailey, *New Light on Abstentions in the UN Security Council*, 50 INT'L AFF. 554, 571 (1974).

190. Press Release, Security Council, Security Council Approves 'No-Fly Zone' Over Libya, Authorizing 'All Necessary Measures' to Protect Civilians, by Vote of 10 in Favour with Five Abstentions, U.N. Press Release SC/10200 (Mar. 17, 2011).

191. *Id.*

First, how are we to interpret the fact that the Security Council managed, for the first time, to enact a resolution authorizing military intervention that invoked R2P? Should we view it as a major win for globalism and a potential paradigm shift decentering the sovereign state in international law and politics? One legal scholar, Catherine Powell, has called Libya “a multilateral constitutional moment” potentially “facilitating a normative shift with implications for the underpinnings of the multilateral system—specifically here, the U.N. Charter.”<sup>192</sup> Or should we be more realist and dismiss the globalist rhetoric of R2P as window dressing for traditional sovereignty-based calculations of national interests, most importantly on the part of the United States? Another legal scholar, Saira Mohammed, has asserted that “the decision of the United States to support intervention in Libya . . . should be recognized for what it was: a decision defended primarily by the national interest and only secondarily by a sense of responsibility.”<sup>193</sup>

The answer may lie somewhere in the middle: it was a real break from past respect for exclusive sovereignty that the Security Council authorized a military intervention in an unconsenting sovereign state to protect civilians, but the authorization itself was a result of great-power politics. The two crucial events that enabled the ten yes, five abstention Security Council vote on Resolution 1973’s unprecedented civilian-protection force authorization were: (1) American leadership and pressure on the other Security Council members for something more than a no-fly zone or a ceasefire and (2) Russia’s and China’s decisions not to cast votes. As journalist Michael Lewis’s account of President Obama’s decision-making reveals, there is evidence that it was his strong personal desire to actually stop Qaddafi’s killing of civilians which led Obama to insist on something more than the no-fly zone which the Arab League and European allies were urging.<sup>194</sup> And the prospect of domestic political blowback because of the absence of congressional pre-approval and the prospect of losing a U.S. airman in a new military operation with two ongoing wars was a very strong “national interest” factor pushing in the opposite direction. Thus, although Mohammed may be correct that U.S. national interests drove its support for Resolution 1973,<sup>195</sup> it is also fair to say that the R2P norm had succeeded in penetrating the decisionmaking of the President of the United States<sup>196</sup> to the extent of balancing out hefty domestic and material reasons not to intervene in Libya.

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192. Catherine Powell, *Libya: A Multilateral Constitutional Moment?*, 106 AM. J. INT’L L. 298, 303 (2012).

193. Saira Mohammed, *Taking Stock of the Responsibility to Protect*, 48 STAN. J. INT’L L. 319, 339 (2012).

194. See Lewis, *supra* note 183, at 5.

195. See also *Authority to Use Military Force in Libya*, 35 Op. O.L.C. 1 (2011).

196. Lewis’s article gives some clues as to how this happened. Lewis, *supra* note 183. Certainly, the presence of humanitarian intervention advocates in his inner circle like Samantha Power and Susan Rice had something to do with it. But it is also likely President Obama’s military advisers told him that Libya’s surface-to-air defense capabilities were limited (for instance, by comparison to Syria) and that the military picture with rebels trapped in Benghazi, and a country with mostly desert and a few big cities,



But what about the decisions by China and Russia to abstain? Here the argument that R2P swayed decisions seems implausible. The evidence indicates that for China and likely also for Russia, the support of the League of Arab States for some use of force against Qaddafi was the crucial factor in abstaining. Indeed, it was the League that had gone to the U.N. Security Council requesting a no-fly zone in the first place.<sup>197</sup> The League had suspended Libya in February 2011 for its brutal response to protests, and of the remaining 21 members, all but Algeria and Syria voted in favor of a no-fly zone.<sup>198</sup> The reality was that Libya, because of Qaddafi's bizarre personality and the fact that continuing his rule did not align with either Shiite or Sunni Muslim interests, was a pariah in the Arab community even though he had recently reconciled with the United States and Western Europe. Accordingly, China and Russia did not see any reason not to go with what the Arab League wanted, which was some coercive action to stop Qaddafi from killing too many civilians. From a geopolitical perspective, Qaddafi was isolated low-lying fruit in charge of a major oil-producing country, and this factor, more than President Obama's humanitarian impulse and the R2P war hawks in the U.S. State Department or the ideational norm pull of R2P, may have accounted for why Resolution 1973 happened, at least in terms of explaining China and Russia's critical abstentions.<sup>199</sup>

What about the predicate offenses for R2P in Libya? There were two plausible justifications: crimes against humanity and war crimes. Resolution 1973 pointed to crimes against humanity as a predicate: "the widespread and systematic attacks currently taking place in the Libyan Arab Jamahiriya against the civilian population may amount to crimes against humanity."<sup>200</sup> Although there was no documented massacre or mass execution of civilians, there was justifiable fear of what Qaddafi would unleash on the residents of Benghazi had he broken the rebel defenses. Moreover, the government's security forces had fired into crowds, its tanks had rumbled forward and fired their machine guns to disperse protesters, snipers and helicopter gunships had fired from above at armed protesters they deemed violent or inflammatory. By the time the protests had gelled into a more organized rebellion, government troops had killed scores of civilians along with fighters in their

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was conducive to an accurate and effective aerial bombardment campaign. Cf. GRAHAM T. ALLISON & PHILLIP ZELIKOW, *ESSENCE OF DECISION: EXPLAINING THE CUBAN MISSILE CRISIS* (2d ed. 1999) (demonstrating how an understanding of organizational process and bureaucratic politics helps to explain the Kennedy Administration's decisions during the Cuban Missile Crisis).

197. Council of the League of Arab States, *The Implications of the Current Events in Libya and the Arab Position*, ¶ 8, Min. Conf. Res. No. 7360 (Mar. 12, 2011), available at [http://responsibilitytoprotect.org/Arab%20Ministerial%20level%20statement%2012%20march%202011%20-%20english\(1\).pdf](http://responsibilitytoprotect.org/Arab%20Ministerial%20level%20statement%2012%20march%202011%20-%20english(1).pdf).

198. *Arab League Backs Libya No-fly Zone*, B.B.C. NEWS (Mar. 12, 2011), <http://www.bbc.co.uk/news/world-africa-12723554>.

199. Cf. Aidan Hehir, *The Permanence of Inconsistency: Libya, the Security Council, and the Responsibility to Protect*, 38 INT'L SEC. 137, 153–56 (2013).

200. S.C. Res. 1973, *supra* note 94, ¶ 5.

counter-offensive to recover rebel-occupied towns and positions. War crimes were likely committed: government forces were reported to have shelled and bombed indiscriminately in civilian areas, enforced curfews in contested areas by shooting, and refused treatment of wounded rebels.<sup>201</sup> Reliable estimates indicate that more than 1,000 protesters and rebels were killed between February 15 and March 16.<sup>202</sup> Thus, even without factoring in a prospective massacre in Benghazi, there was credible evidence of crimes against humanity and war crimes.

But even if the facts did ground a plausible case for R2P under the rubrics of crimes against humanity or war crimes, it had not yet ripened into the same kind of mass atrocity or humanitarian crisis that the world witnessed in Somalia, Rwanda, Bosnia, or even Kosovo. The month-long crisis in Libya from February to March 2011 was precipitated by a long-lived authoritarian regime using lethal violence to crack down on a pro-democracy popular uprising. It was more like the Tiananmen Massacre in China in 1989 (400 to 2,600 estimated deaths) or the Kwangju Massacre in South Korea in 1980 (1,000 to 2,000 estimated deaths).<sup>203</sup>

In sum, even if as a descriptive matter, the Libya intervention was solidly consistent with R2P theory in terms of *process* (Security Council preauthorization) and formal *substance* (colorable claims of crimes against humanity and possibly war crimes as predicate offenses), it was not a textbook mass atrocity situation. Thus, the harder normative question going forward is whether the Libya case means that R2P has evolved into a burgeoning customary international law norm prohibiting the ruling regime of a state from killing civilians who protest its rule. If so, then Libya is truly a revolutionary precedent with far-reaching implications, to the effect that the world community has a responsibility to intervene militarily against oppressive regimes that kill civilians in cracking down on pro-democracy uprisings.

The problem with embracing this interpretation of the Libya events is that it may be going too far too fast in decentering sovereignty. There are many powerful countries that have relatively recently used lethal force to crack down on prodemocracy or self-determination movements within their

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201. Louis Charbonneau, *Strong Proof of Libya Crimes Against Humanity: ICC*, REUTERS, May 2, 2011, <http://www.reuters.com/article/2011/05/02/us-libya-warcrimes-idUSTRE7417VU20110502>; Nick Carey, *Gaddafi War Crimes in Misrata Widespread: Report*, REUTERS, Aug. 30, 2011, <http://www.reuters.com/article/2011/08/30/us-libya-misrata-warcrimes-idUSTRE77T0J520110830>.

202. Spencer Zifcak, *The Responsibility to Protect After Libya and Syria*, 13 MELB. J. INT'L L. 1, 2 (2012).

203. Estimates of the number of people killed in the Tiananmen Square Massacre vary widely; however, it seems most plausible that a dozen or so policemen were killed along with 400 to 800 civilians. Nicholas D. Kristof, *A Reassessment of How Many Died in the Military Crackdown in Beijing*, N.Y. TIMES, June 21, 1989, <http://www.nytimes.com/1989/06/21/world/a-reassessment-of-how-many-died-in-the-military-crackdown-in-beijing.html>. Estimates place the number of casualties of the Kwangju Massacre in South Korea anywhere from 200-2,000, with the most reliable estimates in the 1,000 to 2,000 deaths range. *Flashback: The Kwangju Massacre*, B.B.C. NEWS (May 17, 2000), <http://news.bbc.co.uk/2/hi/asia-pacific/752055.stm>.

borders—China and Russia for instance. Some of these countries, like Bahrain and Egypt, are important U.S. allies. What virtually guarantees that R2P will not be invoked in these cases is a procedural fact and a procedural presumption. The procedural fact is that the five permanent members of the Security Council—the so-called P5 countries (United States, United Kingdom, France, China, and Russia)—have a veto. The presumption is that Security Council preauthorization is necessary for an R2P intervention.

Accordingly, a key but unforeseen negative consequence of counting the factual predicate in Libya as a successful and lawful instance of forcible R2P is pressure to conclude that Security Council preauthorization is an absolute requirement for lawful humanitarian intervention. Otherwise, states could use relatively low-level R2P violations by oppressive governments as a reason to use armed force against them unilaterally, and there would be no way to call them unlawful for lack of Security Council authorization. It is unsurprising, then, that R2P commentary has backed off the 2001 ICISS Report's suggestion of substitutes for Security Council preapproval. By contrast, the party line uttered by most commentators in the last few years is that R2P has not changed the bifocal orthodoxy of the U.N. Charter's *jus ad bellum* regime,<sup>204</sup> with the possible exception of some ambiguous language in the U.N. Secretary-General's 2009 Report referencing the General Assembly's authority under its UFP resolution.<sup>205</sup>

When one thinks about these implications of the Libya precedent, the way R2P played out in Libya may have set back rather than advanced the cause of applying military force to the most severe humanitarian crises.<sup>206</sup> R2P is about preventing civilian deaths in a humanitarian crisis, not pro-democratic regime change. The point is often obscured because in reality a long-term solution to a humanitarian crisis will often require regime change.

The way to resolve this tension is to distinguish between what U.N. Security Council Resolution 1973 expressly authorized and what the United States-led intervention in Libya actually did. The resolution had specified

204. "Only the Security Council can authorize the use of force, under Chapter VII, Article 42, of the Charter." U.N. Secretary-General, *Responsibility to Protect: Timely and Decisive Response: Rep. of the Secretary-General*, ¶ 32, U.N. Doc. A/66/874-S/2012/578 (July 25, 2012). "In this context, we are prepared to take collective action, in a timely and decisive manner, through the 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." 2005 World Summit Outcome, G.A. Res. 60/1, ¶ 139, U.N. Doc. A/RES/60/1 (Oct. 24, 2005).

205. *Implementing the Responsibility to Protect*, *supra* note 92.

206. Indeed, one political scientist has gone so far as to argue that the military intervention ended up aggravating and not ameliorating the humanitarian situation in Libya. Alan Kuperman has asserted that if the United States had not started its bombing campaign when it did, Qaddafi's forces would have promptly retaken Benghazi and reestablished control, saving thousands of lives by cutting the civil war short by several months. See Alan J. Kuperman, *A Model Humanitarian Intervention? Reassessing NATO's Libya Campaign*, 38 INT'L SEC. 105 (2013).

that force was authorized to protect civilians only when they were “under threat of attack.”<sup>207</sup> The Arab League, dominated by Saudi Arabia, Qatar, and other autocratic oil-rich U.S. allies, had initially wanted just a no-fly zone. The intent of the Resolution, and the reason for the Arab League’s support of it, was that military intervention was to stop beleaguered autocrats (like Qaddafi in Libya but also consider King Hamad Al-Khalifa in Bahrain) from inhumanely killing civilians to stamp out democratic mass protests and armed rebellions against their rule, not to help the rebels win. The Resolution was supported by the Arab League and not vetoed by China and Russia precisely because it was perceived to be regime-change neutral.<sup>208</sup>

As things turned out, however, the NATO bombing of government forces continued when the rebels went on the offensive. News reports indicate that NATO warplanes gave close-air support to rebel ground operations, and that U.S. intelligence was used to help rebel forces hunt and kill Qaddafi and his key supporters.<sup>209</sup> Unsurprisingly, China and Russia objected that the United States and NATO were acting beyond the scope of Resolution 1973 and therefore in violation of international law.<sup>210</sup> It is doubtful that China and Russia would have abstained from a Security Council resolution authorizing forcible R2P measures up to and including regime change. Because the United States and NATO did not have an alternative legal basis for their continuing military operations in support of the Libyan rebels—NATO could not plausibly claim self-defense in North Africa and the doc-

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207. S.C. Res. 1973, *supra* note 94, ¶ 4.

208. As I wrote at the time:

Now that initial air strikes to disable Qaddafi’s systemic air-defense capabilities have been concluded, the United States, the United Kingdom, and France should stay within the bounds of the two explicit missions of protecting civilians and enforcing the no-fly zone set forth in U.N. Security Council Resolution 1973. This means that military operations to “take out” Qaddafi or topple his government and to engage in close air . . . support of rebel forces advancing against Qaddafi’s forces . . . (as opposed to rebel forces defending civilian population centers) should be foreclosed. Rebel forces engaged in combat are not themselves civilians under the customary law of war, and, accordingly, there is no mandate in the S.C. resolution to help them win a civil war. In other words, the United States and its allies should make a good-faith attempt to make sure that military intervention is limited to the explicit terms of the Security Council resolution, despite a lack of assurances that there will be regime change in Libya or that Libya will continue to exist as one country.

Thomas H. Lee, *Following International Law Helps the US in Libya*, HUFFINGTON POST (Mar. 29, 2011), [http://www.huffingtonpost.com/thomas-h-lee/following-international-l\\_b\\_841890.html](http://www.huffingtonpost.com/thomas-h-lee/following-international-l_b_841890.html).

209. Xan Rice, *NATO Warplanes Bombard Tripoli After Gaddafi Vows Fight to the Death: Coalition Forces Carry out Attacks Within Hours of Libyan Leader’s Defiant Television Speech*, THE GUARDIAN, June 8, 2011, <http://www.theguardian.com/world/2011/jun/08/nato-strikes-tripoli-gaddafi-speech>; *NATO Forces Helping Rebels in Hunt*, THE INDEPENDENT, Aug. 25, 2011, <http://www.independent.co.uk/news/world/africa/nato-forces-helping-rebels-in-hunt-for-gaddafi-2343689.html>.

210. Patrick Goodenough, *Russia, China Accuse West of Exceeding UN Resolution, Making Libyan Crisis Worse*, CNS NEWS (Mar. 29, 2011), <http://cnsnews.com/news/article/russia-china-accuse-west-exceeding-un-resolution-making-libyan-crisis-worse>.

trine of invitation was not in play given the disorganized state of the rebellion at the time—the assertion of *ultra vires* illegality is not without merit.

Whether the United States and its NATO allies violated the international law of war by exceeding the Security Council's mandate in Libya is a serious legal question,<sup>211</sup> but the more important practical question for the purposes of this Article is what the allegation means for the future of R2P.<sup>212</sup> One reasonable lesson to be inferred from the course of events in Libya was that putting limitations into a Security Council authorization of forcible R2P against an autocratic government was a pointless exercise. Once R2P provides cover for a military intervention by the United States and other powerful democracies, it is unlikely that the interveners will stop when the short-term humanitarian crisis is over, or more generally that they will be neutral between the two sides to the civil war that generated the crisis. Knowing this, any state reflexively concerned about regime change will never allow forcible R2P again, including states that may be veto-holding permanent members of the U.N. Security Council. If this prediction is correct, then what happened with R2P in Libya was a serious setback to the cause of globalism and human rights not because more lives were lost in Libya than if an intervention had not occurred as Kuperman has argued, but because NATO's conduct in Libya virtually ensured that a Security Council resolution authorizing forcible R2P against an autocratic regime would never happen again barring significant regime change in China and Russia or a procedural reform of Security Council voting rules to eliminate the veto. Neither event seems likely in the foreseeable future.

## 2. Syria

This newfound reluctance of the Security Council to authorize forcible R2P is a fairly accurate account of what has been going on in Syria. As in Tunisia, Egypt, Bahrain, and Libya, popular demonstrations against Bashar al-Assad's government started in late February 2011. Facially conciliatory measures gave way to coercion, as al-Assad deployed his army to control protests that were proliferating around the country. As Spencer Zifcak has meticulously detailed, the level of violence ratcheted up severely over the next several months.<sup>213</sup> The protesters shifted from demands for reform to outright regime change. The army and paramilitary militias counter-shifted to using armed force first, not as a last resort, and without regard for the presence of unarmed civilians. Armed rebels, for their part, attacked not only government forces but also suspected sympathizers and Alawite Shiites, members of al-Assad's minority sect of Islam. Thousands were arrested; hundreds of thousands fled the violence. The Security Council met throughout

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211. See Eric A. Posner, *Outside the Law*, FOREIGN POL'Y, Oct. 25, 2011, available at [http://www.foreignpolicy.com/articles/2011/10/25/libya\\_international\\_law\\_qaddafi\\_nato?page=full](http://www.foreignpolicy.com/articles/2011/10/25/libya_international_law_qaddafi_nato?page=full).

212. See Zifcak, *supra* note 202.

213. See *id.* at 14–23.

to discuss the situation but without passing any definitive measures. Zifcak relates developments on the eve of a crucial Security Council meeting in early 2012 to vote on a resolution for decisive action in Syria:

The vote on the resolution was scheduled for 4 February [2012]. On the evening of 3 February, the Syrian authorities launched the first of many rocket attacks upon the city of Homs. Rebel-held suburbs of the city were shelled relentlessly without regard for any distinction between rebel fighters and civilians. At least 210 people were killed and hundreds more were wounded in one weekend of shelling. It was the bloodiest weekend of violence in the 11 months since the uprising began. The total number of Syrian people killed climbed past 6000.<sup>214</sup>

Thirteen of the fifteen members of the Security Council voted in favor of the proposed resolution under consideration at the February 4, 2012, meeting, but it failed because the other two members—China and Russia—vetoed it. What is most remarkable about the result is that the double veto was cast to abort a toothless resolution that did not come close to authorizing the use of force. The resolution condemned the violence and civilian deaths and called upon the Syrian government to stop using its military to clamp down on popular protests, to allow access to humanitarian assistance and Arab League monitors, and to undertake reforms to open up the political process to greater participation.<sup>215</sup> The proposed Security Council resolution did not authorize any of the forms of military force in Resolution 1973—interdiction to enforce an arms embargo (Russia was still openly supplying arms to al-Assad) or a no-fly zone, much less a free-ranging R2P defense mission. In fact, it expressly stated that nothing in the resolution authorized any coercive measures under Chapter VII of the U.N. Charter.

What likely motivated China's and Russia's vetoes was the possibility that any Security Council resolution might end up facilitating regime change like Resolution 1973 did in Libya. The minutes of the meeting record the Russian representative as having stated for the record that while Russia "was committed to finding a solution to the crisis, some influential members of the international community had been undermining the possibility of a peaceful settlement by advocating a change of regime."<sup>216</sup> The Chinese representative emphasized that Syria's "sovereignty, independence, and territorial integrity must be respected."<sup>217</sup> While the proposed resolution might have been a paper tiger, in the view of both China and Russia it could have set the stage for subsequent more forceful measures.

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214. *Id.* at 25.

215. See S.C. Res. 77, ¶ 17, U.N. Doc. S/2012/77 (Feb. 4, 2012).

216. Press Release, Security Council, Security Council Fails to Adopt Draft Resolution on Syria as Russian Federation, China Veto Text Supporting Arab League's Proposed Peace Plan, U.N. Press Release SC/10536 (Feb. 4, 2012).

217. *Id.*

Tensions further escalated after reports of the Syrian government's use of chemical weapons against civilians came to light. On June 13, 2013, the United States reported definitive evidence that Syrian government forces had used chemical weapons against rebels on a number of occasions, with an estimated 100 to 150 fatalities.<sup>218</sup> Two months later, the United States reported evidence that Syrian government forces had used nerve agents against civilian areas in the Damascus suburbs on August 21, 2013, with an estimated 1,429 fatalities, 426 of which were children.<sup>219</sup> Approximately 3,600 patients reached Damascus hospitals in the three hours following the attack displaying symptoms consistent with nerve agent exposure.<sup>220</sup> In the following weeks, the Obama Administration planned a military strike to deter future chemical weapons usage.<sup>221</sup> The combination of a Russia-proposed compromise and the strong possibility that such military action would not receive congressional approval led the administration to focus instead on diplomatic efforts.<sup>222</sup>

The Russian-U.S. compromise resulted in the unanimously approved Security Council Resolution 2118 (2013) ordering Syria to destroy its chemical weapons stockpile and dismantle its capabilities to produce them by mid-2014.<sup>223</sup> While the resolution mentions the August 21 attacks, it falls far short of even holding the Syrian government responsible.<sup>224</sup> To date, while the Syrian government seems to be cooperating with the resolution, American officials have expressed concern that Syria has identified only twenty-three of the forty-five suspected chemical weapons sites.<sup>225</sup>

By October 2013, the death toll in more than two years of civil war in Syria had surpassed 100,000 lives, many of them civilians.<sup>226</sup> Hundreds of thousands fled the country; millions have been displaced. There have been at least three documented massacres committed by government-controlled militias, with civilians and prisoners killed execution-style with hands bound behind their backs with plastic ties. The government has continued its in-

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218. Mark Mazzetti, Michael R. Gordon & Mark Landler, *U.S. Is Said to Plan to Send Weapons to Syrian Rebels*, N. Y. TIMES, June 13, 2013, [http://www.nytimes.com/2013/06/14/world/middleeast/syria-chemical-weapons.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2013/06/14/world/middleeast/syria-chemical-weapons.html?pagewanted=all&_r=0).

219. The White House, Office of the Press Secretary, Government Assessment of the Syrian Government's Use of Chemical Weapons on August 21, 2013 (Aug. 30, 2013), available at <http://www.whitehouse.gov/the-press-office/2013/08/30/government-assessment-syrian-government-s-use-chemical-weapons-august-21>.

220. *Id.*

221. Mark Landler & Jonathan Weisman, *Obama Delays Syria Strike to Focus on a Russian Plan*, N.Y. TIMES, Sept. 10, 2013, [http://www.nytimes.com/2013/09/11/world/middleeast/syrian-chemical-arsenal.html?\\_r=0](http://www.nytimes.com/2013/09/11/world/middleeast/syrian-chemical-arsenal.html?_r=0).

222. *Id.*

223. S.C. Res. 2118, Annex I, U.N. Doc. S/RES/2118 (Sept. 27, 2013).

224. *Id.* at 1-2.

225. Nick Cumming-Bruce & Michael R. Gordon, *Syria Meets Deadline for Submitting Destruction Plan for Chemical Weapons*, N. Y. TIMES, Oct. 27, 2013, [http://www.nytimes.com/2013/10/28/world/middleeast/syria-meets-deadline-for-arms-destruction-plan.html?\\_r=0](http://www.nytimes.com/2013/10/28/world/middleeast/syria-meets-deadline-for-arms-destruction-plan.html?_r=0).

226. Erika Solomon, *Syria Death Toll Hits Nearly 126,000: Monitoring Groups*, REUTERS, Dec. 2, 2013, <http://www.reuters.com/article/2013/12/02/us-syria-crisis-toll-idUSBRE9B10ES20131202>.

discriminate shelling of rebel-held towns and positions with a fury that suggests intent to terrorize any and all residents, not a desire for discrete military advantage.<sup>227</sup> Most importantly, the Syrian government's chemical attacks on both rebel forces and civilians—attacks that the Security Council decried as a “serious violation of international law”<sup>228</sup>—caused approximately 1,600 fatalities.<sup>229</sup>

Despite the ongoing tragedy of the humanitarian crisis in Syria, the United States and the rest of the world are reluctant to use armed force to resolve it<sup>230</sup> given a negotiated settlement of the chemical-weapons issue. But what if a negotiated deal had not presented itself, or what if Syria ultimately fails to comply with reasonable disarmament and verification measures? Would it be lawful under international law for the United States to intervene militarily without Security Council approval? Harold Hongju Koh, former Legal Adviser to the U.S. State Department, has asserted the legality of such action;<sup>231</sup> others have vociferously countered his claim. In Koh's view, since Kosovo, “international law has evolved sufficiently to permit morally legitimate action to prevent atrocities by responding to the deliberate use of chemical weapons.”<sup>232</sup> A large part of that evolution was due to the creation and norm pull of R2P as described above. What is missing in Koh's account is a lawyerly solution that draws from past cases to articulate a customary international law doctrine that can constrain the countervailing potential that a right of humanitarian intervention might be abused, as some might assert was the case in Libya when a limited R2P mission was expanded to the aim of regime change. The challenge is to design the doctrinal architecture of forcible R2P in such a way that it constrains pretexts while permitting military interventions in extreme cases where the Security Council is deadlocked by one or more vetoes.

The next Part of this Article argues that this can be done by borrowing from r2p doctrine to shape R2P doctrine consistently with past state practice, and more fundamentally, by integrating the two into one customary international law doctrine of *jus ad bellum*. Perhaps what U.N. Security Council deadlock in Syria shows is that despite the hope engendered by

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227. See HUMAN RIGHTS WATCH SAFE NO MORE: STUDENTS AND SCHOOLS UNDER ATTACK IN SYRIA (2013), available at <http://www.hrw.org/sites/default/files/reports/syria0613webcover.pdf>.

228. S.C. Res. 2118, *supra* note 223, at 1–2.

229. Mark Mazzetti, Michael R. Gordon & Mark Landler, *U.S. Is Said to Plan to Send Weapons to Syrian Rebels*, N.Y. TIMES, June 13, 2013, [http://www.nytimes.com/2013/06/14/world/middleeast/syria-chemical-weapons.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2013/06/14/world/middleeast/syria-chemical-weapons.html?pagewanted=all&_r=0).

230. Of the NATO countries, only Turkey has intervened militarily, and it has a unique interest and plausible self-defense justification owing to refugee flows and instability along its long border with Syria.

231. See Harold Hongju Koh, *Syria and the International Law of Humanitarian Intervention Part II: International Law and the Way Forward*, JUST SECURITY (Oct. 2, 2013), <http://justsecurity.org/2013/10/02/koh-syria-part2>; Kevin Jon Heller, *Four Thoughts on Koh's Defence of Unilateral Humanitarian Intervention*, OPINIO JURIS (Oct. 2, 2013, 8:26 PM), <http://opiniojuris.org/2013/10/02/four-thoughts-kohs-defence-unilateral-humanitarian-intervention>; David Kaye, *Guest Post: Harold Koh's Case for Humanitarian Intervention*, JUST SECURITY (Oct. 7, 2013), <http://justsecurity.org/2013/10/07/kaye-kohs-case>.

232. Koh, *supra* note 231.



Libya, it may be premature to see R2P as a freestanding norm of conduct in international affairs given its amorphous quality and the threat it poses to traditional notions of sovereignty dear to key great-power states. Whatever the drawbacks of the principle of exclusive sovereignty, its basic idea that what goes inside a state is its own business and nobody else's remains an extremely powerful one today. Given this practical reality, the better course may be a more modest one: to see the homology between r2p and R2P, to sharpen a unitary customary international law doctrine in light of the problems illuminated by the homology, and to use the more focused and modest doctrine as a means for legal authorization of humanitarian intervention with Security Council authorization in only the most serious cases, regardless of nationality.

#### IV. AN INTEGRATED RESPONSIBILITY TO PROTECT CIVILIANS

Parts II and III detailed the origins and evolution of the customary international law right to protect civilians (r2p) and the new norm of the responsibility to protect civilians (R2P), respectively. To summarize, r2p is a centuries-old international law right to use armed force abroad to protect one's own civilians or those of third-country allies. It was essential to the promotion of trade and commerce across borders but is no longer as important for those purposes. R2P is a cluster of norms of much more recent vintage, born and shaped in the past couple decades. One thread in the R2P cluster—forcible R2P—concerns the responsibility of other states to use armed force to protect civilians who are endangered by their state. The emergence of forcible R2P has revised existing customary law-of-war doctrine by eliminating nationality as both the reason for feeling responsible for the fate of civilians in a foreign land and a condition precedent to the use of armed force to protect them.

Pretext is a problem for both r2p and R2P. It is a problem for r2p because powerful states have nationals spread throughout the world and can easily plead danger to them as a reason for using armed force, when the real reason is to gain or recover territory or otherwise assert national interests by force. And pretext is the reason why many fear relaxing the Security Council approval requirement for forcible R2P. What is needed is a reformulation of the customary international law doctrine of unilateral humanitarian intervention to limit its applicability to the most serious cases, to encourage states to exhaust other measures, to act multilaterally, if possible, and to narrowly tailor the use of armed force to the civilian protection mission.

##### A. *Forcible R2P as Workable Jus ad Bellum*

The preceding history of R2P has demonstrated that the requirement of U.N. Security Council authorization for military interventions presents a

formidable obstacle to forcible R2P even in instances like Syria that present severe humanitarian crises. But, as the ICISS Report intimated, nowhere is it written in stone that U.N. Security Council authorization is an infeasible legal precondition for humanitarian intervention. But how should we determine when forcible R2P does not require Security Council authorization? Is it not required for all mass atrocities? Or only the most severe mass atrocities? If the latter, how is one to draw the line between cases that require Security Council authorization and cases that do not?

The solution to this dilemma builds upon extrapolation from lawful instances of r2p. Once again, Entebbe is the paradigm example. What made the case for Israeli military intervention so compelling was the fact that the civilians in question were: (1) targeted for death (2) because of their group affiliation, whether Israeli nationality or Jewish faith. That is to say, for the pro-Palestine terrorists, the lives of the involuntary hostages had no intrinsic value as the lives of co-equal human beings. What mattered was their group identity; what the terrorists threatened and were on the verge of doing was exterminating them because of their group affiliation.

By the same token, in the forcible R2P context, the worst mass atrocity is group extermination. When a government sniper scores a successful kill shot on a protester, the resulting death was a function of the implicit belief that the protester posed a specific danger. When state police interrogate a suspected political dissident by torturing her and in so doing cause her death, the death came about because the state believed the dissident to be a threat. When civilians are killed by an artillery strike on a refugee compound because the shooters believe that enemy combatants have taken shelter in the compound, they have been negligently killed in an attempt to accomplish an imminent military objective. But some mass atrocities like the Nazi genocide of Jews, the Srebrenica massacre, or the use of atomic, biological, or chemical weapons in a heavily civilian area with minor military objectives, demonstrate intent to exterminate a particular ethnic, racial, or religious group without regard for the individuality of the persons killed. For a sovereign state, entrusted as it is with the responsibility to protect its people, to do such a thing is the most direct violation of its responsibility—not only is the state intentionally violating its duty to protect civilians, it is implicitly denying their individual humanity. This sort of group extermination is the very worst sort of mass atrocity.

The upshot of this analysis is that R2P theory is overbroad insofar as it treats the four predicate offenses of genocide, crimes against humanity, ethnic cleansing, and war crimes as equivalent for purposes of forcible R2P. The point is best brought home by analogy to the architecture of deadly state sanctions as against individuals for violent *domestic* crimes. The authorization of the death penalty for the most heinous domestic crimes is not unlike the authorization of deadly force via forcible R2P as against sovereign states for serious international law violations: underlying both authorizations is the

principle that the worst violations merit a 180-degree reversal of the state's basic responsibility to protect human lives, so that future lives might be saved.<sup>233</sup> The majority of countries with the death penalty sharply constrain the predicate offenses to which it may be applied, usually to crimes against the country like treason, terrorism (even non-lethal), and espionage, and, as to the ordinary crime of murder.<sup>234</sup> Indeed, in many advanced industrial countries, capital punishment is only administered in particularly heinous murder cases such as those involving the killing of multiple persons, pregnant women, or children.<sup>235</sup>

Human rights advocates are more expansive about the predicate offenses for R2P military interventions, which are culled in a common law fashion from documented abuses in the post-World War era, especially those in Bosnia and Kosovo. Unlike rights-favoring progressives in domestic criminal law, rights-favoring progressives in international law want to criminalize as much as possible because they want to create law where there is none. The resultant, expansive list of forcible R2P predicate offenses contains the four aforementioned categories of mass atrocities: genocide, war crimes, crimes against humanity, and ethnic cleansing.<sup>236</sup>

Genocide is the most serious of these, and no one doubts that it should be a predicate offense to R2P military intervention. It is defined in the Genocide Convention as killing, seriously injuring, or deliberately inflicting conditions of life calculated to bring about the physical destruction of any national, ethnic, racial or religious group, or preventing births or separating the children of the group "with intent to destroy, in whole or in part" the group "as such."<sup>237</sup> One hundred and forty-two countries have ratified the Genocide Convention.<sup>238</sup>

"Crimes against humanity" encompass a systemic pattern or policy of severe oppression of a civilian population. Although there is no treaty like the Genocide Convention defining such crimes and binding states to refrain

233. The analogy is a rough one, because in the domestic criminal context, the death penalty is applied after prosecution and sentencing.

234. See, e.g., *Kennedy v. Louisiana*, 554 U.S. 407 (2008) (holding 5-4 that the Eighth Amendment prohibits the death penalty for child rape); *Coker v. Georgia*, 433 U.S. 584 (1977) (holding that the Eighth Amendment forbids the death penalty for rape of a woman).

235. For example, although both Japan and South Korea have statutes authorizing capital punishment, the practice in both countries is to restrict the death penalty in individual crimes to those that are most heinous and result in the victim's death. *The Death Penalty in Japan: A Report on Japan's Legal Obligations under the International Covenant on Civil and Political Rights and an Assessment of Public Attitudes to Capital Punishment*, DEATH PENALTY PROJECT (Mar. 2013), <http://www.deathpenaltyproject.org/wp-content/uploads/2013/03/DPP-Japan-report.pdf>; Park Si-soo, *Minister Hints at Resuming Death Row Executions*, KOREA TIMES (Mar. 16, 2010), [http://www.koreatimes.co.kr/www/news/nation/2010/03/113\\_62499.html](http://www.koreatimes.co.kr/www/news/nation/2010/03/113_62499.html).

236. See, e.g., ICISS REPORT, *supra* note 1, at 33.

237. United Nations Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, art. 2, 78 U.N.T.S. 277.

238. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, ICRC, (May 14, 2012), available at [http://www.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp\\_viewStates=XPages\\_NORMStatesParties&xp\\_treatySelected=357](http://www.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPages_NORMStatesParties&xp_treatySelected=357).

from them, the category of crimes against humanity has been elucidated in international criminal law, most importantly in the Rome Statute and in prosecutions at the International Crimes Tribunals for Yugoslavia and Rwanda as Leila Sadat has thoroughly described.<sup>239</sup> The key theme of crimes against humanity is that they are systematic—either an affirmative part of government policy or so widespread and open that we can presume state acquiescence.<sup>240</sup> Genocide, although separately codified, is conceptually speaking also a crime against humanity, the worst imaginable; it is the state seeking to exterminate a particular group of people within its jurisdiction. Other characteristic crimes against humanity include governmental programs of non-judicial killings, disappearances, torture, imprisonment, rape, religious persecution, and large-scale denials of civil and political rights. Enslavement and apartheid—the systematic subordination of ethnic groups within the population—are also crimes against humanity.

Ethnic cleansing, although it is commonly listed as a separate predicate offense in R2P literature, is analytically a crime against humanity. It is fueled by the same desire for ethnic purity as genocide, but without the deliberate intent to kill to achieve the end.<sup>241</sup> The term was developed in the early 1990s in reference to Serbian efforts to deport or displace by intimidation other ethnic groups in the former Yugoslavia.<sup>242</sup> The criminalization of ethnic cleansing, like the label, is of relatively recent vintage. But the conduct itself has a long pedigree, for instance in the global displacement of indigenous groups by Western and Westernized nation-states in the eighteenth through early twentieth centuries.<sup>243</sup> During that time, many considered such ethnic cleansing morally reprehensible but lawful, even as genocide and war crimes came to be perceived as violations of international law.

We can crystallize our discussion of predicate offenses so far by categorizing the different sorts of offenses that fall within the concept of “crimes against humanity.” The general category may be divided into lethal and non-lethal crimes against humanity. Non-lethal crimes include ethnic cleansing, which is now separately enumerated in public international law

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239. See Leila Nadya Sadat, *Crimes Against Humanity in the Modern Age*, 108 AM. J. INT’L L. 334 (2013); Prosecutor v. Kunarac, Case Nos. IT-96-23 & IT-96-23/1-A ¶ 98 (June 12, 2002) (determining that for a crime against humanity, “proof that the attack was directed against a civilian population and that it was widespread or systematic, are legal elements of the crime”); Darryl Robinson, *Defining “Crimes Against Humanity” at the Rome Conference*, 93 AM. J. INT’L L. 43, 47–49 (1999).

240. A controversial issue with respect to individual, not state, responsibility for crimes against humanity in whether the offense may be chargeable to actors who engage in systemic oppression of populations but are not acting on behalf of states or “quasi-state-like organizations.” See Sadat, *supra* note 239, at 336. That issue is interesting but inapposite to our discussion of crimes against humanity as a predicate offense enabling R2P military intervention, which presumes that agents of the target state are the perpetrators.

241. See, e.g., EVANS, *supra* note 2, at 12–13.

242. See, e.g., CLOTILDE PEGORIER, *ETHNIC CLEANSING: A LEGAL QUALIFICATION* 1–12 (2013).

243. See generally, e.g., STUART BANNER, *HOW THE INDIANS LOST THEIR LAND: LAW AND POWER ON THE FRONTIER* (2005).

commentary, as well as apartheid, enslavement, and other systemic infringements (usually state-sponsored) of individual rights by non-lethal violence (for example, rape, torture, and harsh confinement) or extreme discrimination short of apartheid. Lethal crimes, which comprise state policies of systemic killings, can be further subdivided for the purposes of this article. The most serious lethal crimes against humanity involve those in which the state systematically kills groups of unarmed civilians or noncombatants. This subcategory includes genocide, which is separately codified and enumerated in public international law literature, but also offenses that I will refer to as massacres. By “massacre” I mean the intentional and organized killing of a group of civilians or unarmed prisoners without any pretense to killing for the purposes of law enforcement or state security. This definition is meant to distinguish a more prevalent subcategory of lethal crimes against humanity in which the state or organization undertaking systemic killing does offer such justifications, whether explicitly (for example, killing protesters or political prisoners after show trials) or implicitly (for example, disappearances of dissidents). Massacres are usually explosive events of the sort we identify as “mass atrocities,” whereas non-massacre lethal crimes against humanity are typically state policies or campaigns that target individuals over longer periods of time.

A sovereign state may commit genocide, crimes against humanity, and ethnic cleansing in peacetime, but such mass atrocities most often occur during wars. The dehumanizing face of war fuels violence and resentments suppressed during peace. Moreover, war supplies opportunities and pretexts for violence and persecution of political opponents, traditional enemies, and rivals. The confusion and chaos of hostilities also increase the chance that atrocities will not be detected or key evidence destroyed. Nevertheless, there is an important conceptual divide between genocide, crimes against humanity, and ethnic cleansing in the wartime context on the one hand, and war crimes as the concept is invoked in R2P on the other. War crimes can only occur during an armed conflict, and they are the results or byproducts of fighting.

Policymakers and commentators usually define the war crimes that constitute a predicate offense for R2P as “serious” or “grave”<sup>244</sup> breaches of the law of war, by which is meant how a war is fought or the “law in war” (*jus in bello*).<sup>245</sup> *Jus in bello* is mostly codified today in the Hague and Geneva

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244. See, e.g., Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and Charter of the International Military Tribunal (“London Charter”) art. 6, Aug. 8, 1945, 82 U.N.T.S. 280; Rome Statute of the International Criminal Court art. 8(2)(a), July 1, 2002, 2187 U.N.T.S. 90 (“grave breaches of the Geneva Conventions of 1949”) and (b) (“other serious violations of the laws and customs applicable in international armed conflict”). Cf. S.C. Res. 955, annex, art. 1, 4, U.N. Doc. S/RES/955 (Nov. 8, 1994); Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991, art. 1–2 U.N. Doc. S/25704/Add.1 (1993).

245. There are *jus ad bellum* war crimes too, namely, planning or conspiring a war of aggression. Such charges were among those made at Nuremberg albeit unsuccessfully. Some have accused American

Conventions, but custom is still an important source of rules.<sup>246</sup> Vague words such as “serious” and “grave” are prone to subjective interpretation, and they may fairly be construed to refer to either the quantity or quality of breaches. Nevertheless, there are some commonly cited examples of war crimes: (1) killing prisoners of war or fighters trying to surrender;<sup>247</sup> (2) forcing enemy civilians or soldiers to perform hard labor without pay like slaves or torturing them for information;<sup>248</sup> (3) using prohibited nuclear, chemical, and biological weapons;<sup>249</sup> and (4) indiscriminate killing of civilians and destruction of civilian targets,<sup>250</sup> for instance by shelling cities or destroying dams to cause flooding of inhabited or arable areas.<sup>251</sup>

A practical circumstance that distinguishes war crimes from the other three predicate offenses is that they may be charged to powerful advanced democracies like the United States and not just autocratic, troubled, or failed states. It is rare to hear allegations of genocide, ethnic cleansing, or crimes against humanity committed by the United States or Western European countries today. But even the most sophisticated professional army of a rights-protective state may commit war crimes given the chaotic nature and stresses of armed conflict. This was a main reason why the United States did not sign on to the Rome Statute establishing the International Criminal Court.<sup>252</sup> For instance, the U.S. policy of “enhanced interrogation techniques” for unlawful enemy combatants captured in the Afghanistan and

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and British leaders who engineered the Second Iraq War of fomenting a war of aggression, particularly in light of the pathetic evidence of weapons of mass destruction (“WMD”) discovered during the war. WMD was of course the principal legal, moral, and political justification offered by the United States.

246. See, e.g., *Hamdi v. Rumsfeld*, 542 U.S. 507, 520 (2004) (O’Connor, J.) (citing customary law as one of many factors when considering the bounds of the legality of detaining enemy combatants during the duration of hostilities).

247. Geneva Convention Relative to the Treatment of Prisoners of War art. 3(d), Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Third Geneva Convention]; Regulations concerning the Laws and Customs of War on Land art. 23(c), annexed to Convention (IV) respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, 1 Bevans 631 [hereinafter Hague Convention].

248. Third Geneva Convention, *supra* note 247, arts. 51–53; Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 51, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Fourth Geneva Convention]; Hague Convention, *supra* note 247, art. 44.

249. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶ 105 (July 8); Convention on the Prohibition of the Development, Production, and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction, Apr. 10, 1972, 22 U.S.C. 75, 1015 U.N.T.S. 163.

250. Hague Convention, *supra* note 247, art. 23, 25 (codifying a largely customary standard).

251. Air bombing with the principal aim of “breaking the morale and fighting spirit of the civilian population” was widely practiced by both sides in World War II and was viewed as consistent with the relevant customs of war at the time. GEOFFREY BEST, *WAR AND LAW SINCE 1945 199–205* (1994). *But see* Hague Draft Rules of Air Warfare (1923), art. 22, 24, available at [http://www.lib.byu.edu/index.php/The\\_Hague\\_Rules\\_of\\_Air\\_Warfare](http://www.lib.byu.edu/index.php/The_Hague_Rules_of_Air_Warfare). The present view is that such bombings are unlawful by operation of customs against intentional attacks against civilians and civilian objects, which are manifested in the 1997 Protocol I Additional to the Geneva Conventions arts. 48–60. See, e.g., DEP’T OF DEF., *CONDUCT OF THE PERSIAN GULF WAR, INTERIM REPORT TO CONGRESS* (July 1991), 12-2, 12-4, available at [http://www.dod.gov/pubs/foi/operation\\_and\\_plans/PersianGulfWar/305.pdf](http://www.dod.gov/pubs/foi/operation_and_plans/PersianGulfWar/305.pdf).

252. See Allison Marston Danner, *Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court*, 97 AM. J. INT’L L. 510, 516 (2003); Mark D. Kielsgard, *War on the International Criminal Court*, 8 N.Y. CITY L. REV. 1, 36–37 (2005); Megan E. Lantto, Note, *The United*

Iraq wars may reasonably be viewed as torture—a serious violation of the law of war.<sup>253</sup>

To be sure, the majority of war crimes are likely to be committed by armies that lack the professionalism and discipline of the U.S. military, or by rebels fighting government forces. Examples of such war crimes are: (1) fighters who do not wear uniforms or insignia to distinguish them from civilians;<sup>254</sup> (2) widespread use of civilians or civilian places and buildings like temples, schools, hospitals, or refugee camps as shields;<sup>255</sup> or (3) repeated use of crude weapons like improvised explosive devices in ways and places that indiscriminately kill fighters and civilians alike.<sup>256</sup> The common thread of today's generic war crimes is a disproportionately high rate of civilian or noncombatant deaths during an internal war in an autocratic, divided, or failed state. When the disproportion is shockingly high, regardless of whether the belligerent is a state or a rebel force, one might infer that the underlying intent is to kill as many people as possible, regardless of whether they are fighters or not. And, when it is the state engaging in such deliberate and systematic wholesale killing, it would be a lethal crime against humanity as well as a war crime.<sup>257</sup>

A state fighting a war in its territory cannot protect civilians within its borders as effectively as it can in peace. The logical consequence of this is that the state's responsibility to protect civilians, although implicated, is not as strong as it would be in the case of a predicate offense committed in peacetime. If so, then the R2P rationale does not, and should not, generate as strong a case for military intervention on the basis of evidence of war crimes *alone*, as it would if the war crimes constitute genocide or some other lethal crimes against humanity. It is worth pointing out that raising the bar for when state responsibility for war crimes might enable a military intervention under the R2P rationale does not mean rejecting individual responsibility for them. On the contrary, international or national tribunals after the fact have traditionally been, and will likely continue to be, the most efficacious means of punishing and deterring war crimes.<sup>258</sup> It is the idea that war crimes are and should be equal to genocide as a predicate offense for outside military intervention that is problematic.

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*States and the International Criminal Court: A Permanent Divide?*, 31 SUFFOLK TRANSNAT'L L. REV. 619, 636 (2008).

253. See TORTURE PAPERS (Karen J. Greenberg et al. eds., 2005).

254. Third Geneva Convention, *supra* note 247, art. 4.

255. *Id.* art. 23; Fourth Geneva Convention, *supra* note 248, art. 28.

256. Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as amended on 3 May 1996 (1996 Amended Protocol II) art. 3, May 3, 1996, U.N. Doc. CCW/CONF.I/16 (Part I) (entered into force Dec. 3, 1998).

257. It would not be a massacre since the fact of war suggests a state security justification unless there is not even a plausible military objective for the operations that resulted in the killings.

258. See generally KEVIN JON HELLER, THE NUREMBERG MILITARY TRIBUNALS AND THE ORIGINS OF INTERNATIONAL CRIMINAL LAW (2011).

Similarly, when the state has violated its responsibility to protect civilians by ethnic cleansing alone, it does not present as compelling a case for military intervention as lethal violations of R2P. It should, accordingly, be subject to tougher evidentiary standards or process constraints before forcible intervention is authorized. This is not meant to deny that ethnic cleansing is at present a violation of international law, nor that it is morally reprehensible. But on the theory of R2P, if a sovereign state is trying to force people to leave their homes in order to create homogenous enclaves but does not want to kill the people it is forcing to leave, then it seems natural to think more carefully about whether other countries should commit deadly force to stop it.

To sum up, international leaders and human rights advocates formulate R2P in the broadest terms possible. For them, the responsibility to protect civilians is a holistic framework with many cross-cutting ends, ranging from inculcating a respect for human life among the leaders of troubled sovereign states, to persuading leaders and people of powerful states to feel responsible for at-risk lives in troubled states, even to the point of fighting to protect them if necessary. With these ends in mind, the literature focuses on four predicate offenses that it treats as equally serious violations of R2P warranting forcible intervention as a last resort. However, they are not the same either in terms of the theory of R2P or of the quantum of justification to use deadly force to stop them.

The prescription to be drawn from this conclusion may be that there should be stricter scrutiny for the lawful use of armed force where the implicated mass atrocities are strictly war crimes, ethnic cleansing, or non-massacre lethal crimes against humanity, or non-lethal crimes against humanity like apartheid. Strict scrutiny might be operationalized by requiring U.N. Security Council preauthorization prior to military intervention.<sup>259</sup> Additionally, or alternatively, stricter evidentiary standards might be applied for military interventions on the basis of these offenses. And states are, of course, free to take non-forcible measures unilaterally, such as breaking off diplomatic relations and economic sanctions. By the same token, forcible R2P in the face of group-extinction atrocities should not necessarily be undertaken unilaterally. A multilateral process involving prior resort to the Security Council and coordination with regional states and organizations is still good policy and perhaps even compelled as a matter of customary international law.

A sensible way to organize these instincts may be to divide forcible R2P interventions into two different procedural tracks depending on the predicate offenses at issue. Track-one cases involving clear and convincing evidence of genocide, massacre crimes against humanity, or the lethal use of

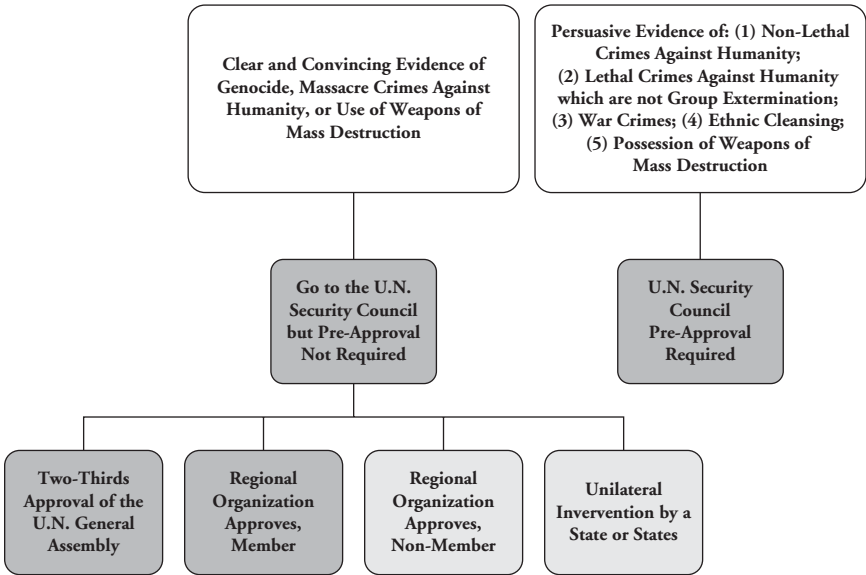
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259. I am talking prescriptively here, not descriptively. For example, the historical case of Kosovo in 1999 is inconsistent with the prescription.



weapons of mass destruction against civilians would *not* require U.N. Security Council preauthorization for military interventions. At the same time, multilateral initiatives such as bringing the matter up before the Security Council, acting through the General Assembly’s UFP procedure or through regional organizations should be attempted before resort to unilateral force. Track-two cases involving credible evidence of war crimes, ethnic cleansing, the possession or non-lethal use of weapons of mass destruction, non-lethal crimes against humanity, or lethal crimes against humanity short of massacre would require U.N. Security Council preauthorization. The two-track framework is illustrated in Figure 2 below (darker-shaded boxes signify clearly lawful forcible R2P cases, lighter-shaded boxes signify plausibly lawful cases).

FIGURE 2: Two-Track Process for R2P Interventions



In concluding, it bears repeating that what distinguishes genocide, massacres, and the lethal use of nuclear, biological, or chemical weapons from all other mass atrocities is their singular disrespect for human life. When the state commits non-lethal crimes against humanity, it is not taking life. When the state commits lethal war crimes or crimes against humanity, however, it is killing people. But, among lethal crimes, a line may be drawn between those in which people are killed based on some individualized or

objectively reasonable assessment of law enforcement or national security need. But gassing a large group of people, or binding a large group of people, lining them up against the wall, and shooting them, is different from torturing people to death, or shooting protesters to death with snipers, or killing them by indiscriminate shelling of military targets in areas with large civilian populations. Killing groups of people at one blow without a pretense of a law enforcement or security justification suggests intent to eliminate the targeted group as a group. In this sense, death by group extermination shows both disrespect to life and disrespect to the singularity or uniqueness of the life taken, which is not evidenced by torture-death, sniper-death, or bomb-death incidental to a military objective.

### B. *Integrating R2P and r2p*

The preceding Subpart elaborated on the proposition that forcible R2P doctrine should be framed along two tracks, with the track for mass killings modeled on the customary international law of forcible r2p. This Subpart asserts that r2p and forcible R2P are really one and the same concept today and that they can be treated as one customary international law ground for war that has subsumed the old right to use force to protect one's own nationals which used to be called humanitarian intervention as well. Both are exceptions to the principle of exclusive sovereignty and the monopoly of the sovereign state to coercive power within its territory. They also share the underlying presumptions that a sovereign state has a basic responsibility to protect civilians within its borders and that other states can intervene if the state fails to carry out the responsibility. The only real difference between the two is the nationality of the civilians whose lives are to be protected. Nationality is foundational to *domestic* law in which rights-holders are defined by allegiance to the sovereign state (or presence therein). And it is still important with respect to peacetime international law and diplomatic relations. But it is no longer self-evident why nationality should matter for *international use-of-force* rules in a world informed by R2P which has fatally undermined the notion that exclusive sovereignty can shield a state that is killing its civilians.

One objection to the integration of R2P and r2p is the argument that using force to protect one's nationals abroad falls under the legal rubric of self-defense, which is difficult to claim for the use of force to protect foreigners. As noted earlier, however, force may be used to protect not only one's own nationals in a distant country, but also third-country nationals. In the latter case, a possible rejoinder would be to plead "collective self-defence," which is explicitly authorized in Article 51 of the U.N. Charter.<sup>260</sup> But if the international law concept of collective self-defense is powerful enough to allow Country A to use force in Country C to protect Country B's civilians,

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260. U.N. Charter art. 51.

it is logically powerful even enough to protect Country C's civilians. In legal and logical terms, it is the idea that "what Country C does to Country C's civilians, even killing them in groups, is Country C's business only" that is doing the work, and in the past dozen years R2P has been successful in disabusing the world of that idea.

The foregoing is a sensible doctrinal rejoinder to the belief that r2p is merely a corollary of self-defense, but more significant are real-world perceptions of what is at stake in a particular instance where armed force is used in reaction to attacks on a state's affiliates in distant places. It seems fair to say that when a state's officials, properties, or instrumentalities (such as national-flagged civilian aircraft) are attacked in another country, then the case can be made for self-defense. These people and things are the government, in a very real sense.<sup>261</sup> A good example is the abortive attempt in 1980 to rescue the U.S. embassy hostages in Iran—that was an instance of the extra-territorial use of armed force to protect U.S. nationals (who were embassy officials) in self-defense. Another example would be U.S. military attacks against the terrorist groups that bombed the U.S. embassies in Tanzania and Kenya in August 1998 to the extent that such operations were for the purpose of preventing future attacks on U.S. embassies or officials abroad. The Russian military intervention in Crimea in 2014 might similarly be justified under this self-defense rubric if there were any evidence that attacks on Russian military bases there were imminent rather than imaginary.

But it is not so clear that self-defense is applicable when a state's civilians are at risk abroad. It is in theory possible that when a very large number of civilian nationals are threatened with death, it is tantamount to an invasion and therefore a case of self-defense. But if there is a smaller number of nationals who are endangered, even if they are killed, it is hard to see how the killings can be equated to an attack on the state itself. Entebbe presents the strongest possible case of a self-defense rationale along these lines. The killing of eighty Israeli citizens in 1976 who were hijacked on an international flight by pro-Palestinian terrorists would plausibly have been perceived by Israel and the world community as an attack on the new state of Israel, given its history and the backdrop of the Arab-Israeli conflict. But the case may have been *sui generis*, and it is hard to imagine another case with equally compelling facts.

Another way to rebut the idea that r2p is self-defense is to focus on the intervener's motives, to think about the decision to use armed force from the perspective of the state. We have already discussed the shift in definitions of "humanitarian intervention" among U.S. international lawyers from one that viewed the protection of an intervening state's own nationals as the core of the concept to one that specifically excluded it.<sup>262</sup> Consider, in that vein,

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261. Cf. Monaghan, *The Protective Power of the Presidency*, *supra* note 7, at 12.

262. See *supra* notes 11–13 and accompanying text.

the following passage from the fifth edition of *Brierly's Law of Nations* by the noted English international lawyer Humphrey Waldock:

Whether the landing of a detachment of troops to save the lives of nationals under imminent threat of death or serious injury owing to the breakdown of law and order may be justifiable is a delicate question. Cases of this form of intervention have not been infrequent in the past and, when not attended by suspicion of being a pretext for political pressure, have generally been regarded as justified by the sheer necessity of instant action to save the lives of innocent nationals, whom the local government is unable or unwilling to protect. Clearly every effort must be made to get the local government to intervene effectively and, failing that, to obtain its permission for independent action; equally clearly every effort must be made to get the United Nations to act. But, if the United Nations is not in a position to move in time and the need for instant action is manifest, it would be difficult to deny the legitimacy of action in defence of nationals *which every responsible government would feel bound to take, if it had the means to do so.*<sup>263</sup>

A military intervention to save nationals in a foreign country is typically undertaken because the government feels “responsible” and wants to save the lives of its nationals if it can. Waldock does not imply that the mission is to be undertaken because the danger presented is an attack on the state itself (by contrast to Entebbe, from the Israeli perspective). The passage in general shows how closely Waldock’s understanding of r2p tracked forcible R2P. If the one word “nationals” is changed to “civilians,” then the passage is a textbook statement of the forcible R2P rationale. Indeed, the very point of R2P is to effect this equation as a matter of international law.

If r2p is not self-defense, then it can be put in a customary category of lawful use of armed force to protect civilians against group extermination that comprises both r2p and a subset of forcible R2P. This would be a customary international law-authorized ground for war additional to the U.N. Charter codified exceptions of self-defense and U.N. Security Council approved military operations. The category comprises the use of armed force in an unconsenting sovereign state when (1) intended to protect civilians facing imminent risk of group extermination by the state; (2) narrowly tailored to prevent such deaths; and (3) all other reasonable means have been exhausted. Military interventions to address other sorts of mass atrocities committed against foreign civilians, such as ethnic cleansing, war crimes, or non-lethal crimes against humanity, would still require U.N. Security Council approval.

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263. ANDREW CLAPHAM, *BRIERLY'S LAW OF NATIONS* 452–53 (7th ed. 2012) (emphasis added).

There are two natural differences in how the basic doctrine will be applied as to r2p cases versus R2P cases. First, because there will be far fewer of one's own nationals at risk in any foreign country (numbering in the thousands at most, as opposed to hundreds of thousands or millions), r2p missions will usually be more narrowly tailored. For instance, it may be possible to simply evacuate the threatened civilians, especially if the host state is otherwise peaceful and does not pose a threat to its own civilians.

Second, "an imminent risk of group extermination" in the r2p context will typically entail a pervasive threat against one's nationals or foreign nationals (for example, anti-Americanism or anti-Europeanism) in a foreign state that has not yet materialized in actual deaths. It is fair to say that the proportionate use of armed force is nonetheless lawful so long as there is good evidence of an imminent risk of group extermination. Thus, for example, if there were credible evidence that violent Ukrainians were indeed on the verge of killing Russian nationals and ethnic Russians, then the Russian military intervention in the Crimea would have been lawful. By contrast, the threshold imminent-risk determination in an R2P case would require clear and convincing evidence of past group deaths, given the more extensive scope of the contemplated military intervention and the implausibility of using armed force for the proportionally limited purpose of evacuating or rescuing all of the endangered civilians.

In all other respects, the two concepts of R2P and r2p may be treated as one for purposes of international law. Specifically, customary international law permits one or more states to use armed force in an unconsenting sovereign state to protect civilians facing an imminent risk of group extermination regardless of their nationality. If a state has surplus military power to use armed force beyond its borders, and we accept as lawful its narrowly tailored use of armed force to protect its own or third-country civilians facing imminent group death, then we should accept as equally lawful such use of armed force to protect home-country civilians facing imminent group death. Whether the state can and will use force as a matter of its own domestic law and politics is a different question. But there is no reason to conclude that current customary *international* law, as informed by the R2P norm, prohibits such a use of armed force. What prevented this integration of r2p and R2P in the past was the principle of exclusive sovereignty—the view that a sovereign state had a monopoly of armed force within its borders and was free to do whatever it wanted to civilians within its territory, subject to the r2p easement with respect to *foreign* civilians. The basic office of R2P has been to demolish these features of exclusive sovereignty.

## CONCLUSION

When does international law permit a state to use armed force in another state without its consent? The question has been recently and starkly posed

by what appear to be two very different cases: (1) the possibility of U.S. intervention in Syria to protect local civilians from future gas attacks by the state in 2013, and (2) the Russian intervention in the Crimea region of the Ukraine in 2014 premised on threats to ethnic Russians there. The conventional, textualist answer, which I have called the bifocal orthodoxy, is that force is only lawful under the two grounds for war codified in the U.N. Charter, namely, self-defense and the use of force pursuant to U.N. Security Council authorization. Under this view, U.S. intervention in Syria would not be lawful unless pre-authorized by the U.N. Security Council, and Russian intervention in Crimea would not be lawful unless it was justified by self-defense or consent.

This Article has argued that there is a third, customary ground for lawful war: a state may use armed force in another unconsenting state to protect the lives of *any* civilians who have suffered group extermination or are facing an imminent risk of it. Specifically, the customary legal justification applies whether the civilians are citizens of the intervening state, the target state, or some other state or states. For centuries, this special right was limited to protecting civilians who were nationals of the intervening state or its allies, but that has changed in the past dozen years in large part due to the influence of the cluster of ideas known as the responsibility to protect citizens, or R2P. This Article does not make the claim that a state *should* use armed force under such circumstances if it has the military resources to do so: that is a decision controlled by the domestic law and politics of the intervening state.

Although the armed-force component of R2P started as a repackaging of humanitarian intervention for foreign civilians, its novel formulation lays bare the genetic resemblance to the ancient right to use armed force to protect one's own civilians or r2p, and also helps international lawyers see that R2P and r2p constitute a single category of jus ad bellum. Grasping this homology yields at least four powerful insights about R2P, r2p, the law of war, and international law more generally.

First, we can see that using force to save one's own civilians in a foreign land is not the same as self-defense, and that it is, at the same time, not so different from using force to save foreign civilians in that land. The insight was understood by international lawyers of a prior generation, but it was lost as mainstream international lawyers came to conceive of their subject as conceptually discrete from national law and interests. An important corollary of this conceptual insight is the fallacy of the bifocal orthodoxy: if r2p is *not* self-defense but still lawful, consistent state practice in the post-World War era, then it follows that what is codified in the U.N. Charter (self-defense or Security Council preclearance) has never constituted the complete enumeration of lawful grounds for war or jus ad bellum.

Second, recognizing that there is a single customary law rule for when a state can use armed force in another unconsenting state to protect civilians

regardless of nationality generates critical attention on the need to tighten the concept of predicate offenses. Civilian-protection military interventions without Security Council preapproval or a self-defense justification, whether of the R2P or r2p variety, are only lawful in cases presenting clear and convincing evidence that civilians have been or are in imminent risk of state-sanctioned group extermination. This clarification of the customary rule will in theory constrain powerful states from using threats to nationals abroad as a legal basis for the use of force (as Russia did in Crimea in 2014) and also provide a constrained capacity for unilateral intervention in extreme cases of mass killings where the U.N. Security Council is deadlocked (as in Syria in 2013).

Third, excavating the pre-history of r2p and its affinity to forcible R2P helps international lawyers understand how the responsibility to protect has evolved and its influence on relevant international law. For instance, we can see the consequences and implications of its sovereignty veil-piercing rationale. We can also grasp how forcible R2P informs and fits into international law governing the reasons for war.

Finally, connecting R2P and r2p illuminates a larger debate about the method and content of international law between top-down globalists and bottom-up sovereigntists. Public international lawyers today too often resort exclusively to top-down efforts at lawmaking or norm development like R2P, whether through U.N. Security Council resolutions, multilateral treaties, or norm entrepreneurship by NGOs or the U.N. General Assembly. The bifocal orthodoxy itself can be viewed as a feature of this tendency to look for easy answers in universal texts. International lawyers need to combine this type of global, top-down norm articulation with the more traditional and unwieldy bottom-up work of international lawmaking by empirical documentation of prevalent customs or “general” principles of municipal law observed by all or nearly all nations, like r2p,<sup>264</sup> and by focusing on incentives and interests at the sovereign state level. As Michael Glennon has advised: “[r]ather than starting with principles, doctrines, and other historically controversial abstractions and then seeking consensus,” international lawyers should “look first to the empirical data to see what consensus actually exists.”<sup>265</sup> The need to reconcile norms with what states are

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264. Some countries do not accept r2p for the simple reason that only powerful countries can do it. See, e.g., Jean-Pierre L. Fonteyne, *Forcible Self-Help by States to Protect Human Rights: Recent Views from the United Nations*, in HUMANITARIAN INTERVENTION AND THE UNITED NATIONS app. B, at 216–17 (Richard B. Lillich ed., 1973). But the fact that practically all the countries that can do it accept r2p as lawful is a powerful argument that it is binding custom.

265. Michael J. Glennon, *Law, Power and Principles*, 107 AM. J. INT’L L. 378, 379–80 (2013). See generally MICHAEL J. GLENNON, *THE FOG OF LAW: PRAGMATISM, SECURITY AND INTERNATIONAL LAW* (2010). Cf. Anthea E. Roberts, *Traditional and Modern Approaches to Customary International Law: A Reconciliation*, 95 AM. J. INT’L L. 757 (2001) (describing this difference in approaches). The constant challenge, of course, is to balance sovereignty and globalist aspirations, which is an underlying aim of this Article. For a provocative new article that seeks to strike this balance by re-conceptualizing sovereign states as trustees for humanity, and not merely their own nationals, see Benvenisti, *supra* note 36.

actually doing out of a common sense of legal right or obligation is especially important with respect to international legal issues concerning the use of armed force. Hersch Lauterpacht put it best: "If international law is, in some ways, at the vanishing point of law, the law of war is, perhaps even more conspicuously, at the vanishing point of international law."<sup>266</sup> Bringing a bottom-up focus back into international law is especially important if international lawyers aspire to engage powerful individual states like the United States in international law making and enforcement. The hard course, which this Article has attempted, is to strike the right balance between the globalist impulse and the sovereigntist reality.

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266. Hersch Lauterpacht, *The Problem of the Revision of the Law of War*, 29 BRIT. Y.B. OF INT'L L. 360, 382 (1952).



