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THE CHOICE TO PROTECT: RETHINKING RESPONSIBILITY  
FOR HUMANITARIAN INTERVENTION

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*Rethinking Responsibility for Humanitarian Intervention*

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## **Abstract**

This Essay reexamines the responsibility to protect (“R2P”) from the perspective of states called to intervene—explaining the novelty of a third-party duty to help people in other states and the insufficiency of justifications offered for this moral responsibility. The Essay concludes that R2P will ultimately be defined by states contemplating intervention, in part because there are no agreed standards for responsibility and the doctrine has various triggering conditions that must be assessed by states, including the seriousness of the humanitarian crimes and the proportionality of any response. Moreover, domestic bureaucratic competition and conflict may make it difficult for a state to make a decision to intervene on primarily humanitarian grounds.

## **Keywords**

Responsibility to protect, humanitarian intervention, R2P, moral duty, genocide, crimes against humanity





“There can be no political morality without prudence; that is without consideration of the political consequences of seemingly moral action. ... Ethics in the abstract judges action by its conformity with the moral law; political ethics judges action by its political consequences.”<sup>1</sup>

## Introduction\*

Faced with impending humanitarian crisis in Libya, President Obama said that the United States had a “responsibility to act”<sup>2</sup> to prevent the slaughter of civilians by Moammar Qaddafi’s forces. The call for responsibility—Qaddafi’s failed responsibility to his own people and the international responsibility of other states to respond to humanitarian crimes—makes it timely to assess critically the concept of responsibility to protect (“R2P”). In particular, this Essay reexamines R2P from the perspective of the intervening state, as opposed to of the failing state and its victimized people.

When victims in one state—People V (victims of human rights violations) request help not from their own State V, but rather another State R (a responsible state), they make a positive claim for assistance and rescue from the failures of their own government.<sup>3</sup> Nearly all of the literature on R2P emphasizes the rights of People V and the sovereign rights of State V, and whether State R has a legal right to intervene.<sup>4</sup> Many articles and books seek to explain why serious human rights violations diminish State V’s right to non-intervention or diminish other requirements of international law. Yet this glosses over a harder question about R2P, which is not whether such intervention is permissible, but whether states have a responsibility to help people in other states, and if so, whether they will act on it. As Thomas Pogge has said, it is not international law that prevents humanitarian interventions, but rather the lack of will to commit resources for the benefit of others.<sup>5</sup>

This Essay rethinks the meaning of responsibility for states called to intervene—explaining the novelty of a third-party duty to help people in other states and the insufficiency of justifications offered for this moral responsibility. Despite the assertion of moral responsibility, intervention remains

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<sup>1</sup> HANS J. MORGENTHAU, *POLITICS AMONG NATIONS* 10 (1955).

\* This Essay benefitted from the comments of Robert Chesney, David Luban, Mark Moller, David Schleicher, Elina Treyger, Rachel VanLandingham, Stephen Vladeck, and participants at the National Security Law Workshop and the George Mason Levy Workshop.

<sup>2</sup> President Barack Obama, Remarks by the President in Address to the Nation on Libya, March 28, 2011, available at <http://www.whitehouse.gov/the-press-office/2011/03/28/remarks-president-address-nation-libya> (“For generations, the United States of America has played a unique role as an anchor of global security and as an advocate for human freedom. Mindful of the risks and costs of military action, we are naturally reluctant to use force to solve the world’s many challenges. That’s what happened in Libya over the course of these last six weeks.”).

<sup>3</sup> For ease of reference, throughout this paper I will refer to the victims of human rights violations as People V living in State V, which is either violating the rights of its people or standing by while private actors and groups violate human rights. State R refers to a state considering whether and how to fulfill a responsibility to protect People V.

<sup>4</sup> See, e.g., Thomas M. Franck, *Interpretation and change in the law of humanitarian intervention*, in *HUMANITARIAN INTERVENTION: ETHICAL, LEGAL, AND POLITICAL DILEMMAS* 204 (identifying a conundrum between the requirements of international law and the moral obligations of intervention and discussing and suggesting that intervention is illegal but may be excused) (J.L. Holzgrefe and Robert O. Keohane eds. 2003); Richard B. Bilder, *The Implications of Kosovo for International Human Rights Law*, in *HUMAN RIGHTS, INTERVENTION, AND THE USE OF FORCE* 178 (Philip Alston & Euan MacDonald eds. 2008) (calling for a careful consideration of the legality and consequences of the “new interventionism” and suggesting that action in humanitarian crises requires new “doctrines and modalities”); Sir Adam Roberts, *The United Nations and Humanitarian Intervention*, in *HUMANITARIAN INTERVENTION AND INTERNATIONAL RELATIONS* (Jennifer M. Walsh ed., 2004) (discussing the conflict between humanitarian intervention and the UN Charter).

<sup>5</sup> Thomas Pogge, *Moralizing Humanitarian Intervention: Why Jurying Fails and How Law Can Work*, in *Humanitarian Intervention*, *NOMOS XLVII* p. 116 (Terry Nardin & Melissa S. Williams, eds.) (“The question is not: What additional human suffering the United States and its allies could avert if international law gave them a freer hand to use military force abroad? Rather the correct question is: What additional human suffering would the United States and other states avert and produce if international law gave them a freer hand to use military force abroad?”).

a choice of states. Although I highlight the insufficiency of R2P, at the outset I should emphasize that I do not question the moral seriousness of genocide, ethnic cleansing, and other triggering conditions for R2P. Nor do I question the need or desirability of states intervening for humanitarian purposes. Rather, if serious crimes require some State R to help People V, there must be some firm foundation for this requirement. R2P has not created an obligation of states to help people in other states. Instead, intervention continues to turn on the judgment and choices of states called to intervene.

Part I begins by providing background about the responsibility to protect, explaining briefly the history and basic principle of R2P, which is that each state has a responsibility to protect its population from genocide, war crimes, ethnic cleansing, and crimes against humanity. When states fail in this responsibility the international community has a responsibility to protect people from these serious human rights violations.

Part II considers in more detail the implications of sovereignty as responsibility. Responsibility of a state for its own people is a familiar aspect of the basic relationship between the government and the governed—a very minimal duty to protect persons from genocide, ethnic cleansing, and crimes against humanity. Yet what creates a responsibility for State R to assist People V? When State V fails in its responsibilities, where does the *duty* arise for other states to step in? Even more problematic, where does the duty of a particular State R arise? The responsibility of one state to people in another state raises different issues than the responsibility of a state to its own people. I evaluate some of the justifications offered for the responsibility of State R to provide diplomatic, financial, and military support to People V. Although a number of scholars have sought to posit a duty, whether perfect or imperfect, they fail to explain why State R *must* protect People V. Consequentialist arguments for responsibility are more honest about the trade-offs, but they raise difficult questions about how a state must determine what best promotes human security. Once a state is balancing various interests, it is difficult to find a principled reason to exclude some interests, particularly those closer to home. In addition, in this context People V make a positive claim for assistance from State R, yet even the strongest proponents of a responsibility to protect cannot say precisely what State R must do to ensure that People V's rights are respected. The positive right to protect remains highly contingent on a number of factors unrelated to the seriousness of the human rights violations.

Part III examines a neglected principle of international law—the neutral rights of State R. Much of the literature on R2P focuses on the sovereign rights of State V and considers whether intervention is legally permissible—that is, whether State R can overcome the principle of non-intervention or the limits on the use of force in the UN Charter for humanitarian purposes. Yet there is virtually no attention to the sovereign rights of State R, in particular whether State R can assert neutrality in this context and whether the asserted “responsibility” overcomes neutrality rights. Even though some consider neutrality an outmoded concept, it still persists, as it has in some form or another for hundreds of years. More attention needs to be given to neutrality because it is grounded in many of the same principles as non-intervention, including state sovereignty and the international interest in avoiding escalation of armed conflict. Yet the rationales that diminish the sovereign rights of State V—its culpability for human rights violations or ineffectiveness in the face of such violations—does not support imposing a duty on a neutral state that has committed no wrongdoing. The positive obligation of a neutral state to intervene or to assist others must rest on different justifications and yet supporters of R2P have largely overlooked this question. Although a comprehensive consideration of neutrality and R2P is outside the scope of this Essay, I suggest neutrality poses some difficult questions about the possibility of a true responsibility of states to intervene on behalf of victims in other states.

Part IV explains why the responsibility to protect ultimately will be defined by the state contemplating intervention. The standards of responsibility are open-ended and there are no agreed institutions for judging what responsibility exists in any circumstance. The UN Security Council has failed to establish a consistent benchmark for responsibility that can provide a principled distinction to explain, for example, why intervention in Libya but not Syria. Moreover, even accepting basic principles

of a responsibility to protect, the doctrine has a number of limitations, including triggering conditions that must be assessed by states, such as whether the crimes are serious and widespread enough to warrant intervention; what intervention would be proportionate; and whether a state has sufficient capacity for intervention. Whatever the moral obligation of states, states will necessarily assess responsibility from their own perspective.

Finally, Part V analyzes how states might make decisions about intervention to protect individuals in other states by considering the domestic processes for making the legal and policy determinations leading to intervention. I focus on the domestic agencies in the United States as an example of the difficulty of reaching a decision to intervene on primarily humanitarian grounds. Drawing from my previous work on international law decision making in the executive branch,<sup>6</sup> I argue that executive branch agencies assessing the responsibility to protect will often reach different conclusions about the requirements for intervention under domestic law. Moreover, bureaucratic competition and failures of coordination will make it difficult for the state or even the unitary executive branch to behave as a moral agent. Agencies will assess the factors relevant for intervention from their own perspectives. Public choice explains why agency officials seek to retain discretion to distinguish one humanitarian crisis from another. Agencies must compete for control over international policy and in this environment they will have strong incentives to maintain flexibility with regard to the standards for humanitarian intervention. A precedent that hardened into specific criteria would remove the flexibility that reflects the long-term interest of agencies and also the states of which they are a part. Although administrative processes and legal requirements will differ from state to state, most governments will face difficulties of bureaucratic coordination and this is something that needs further research and attention for those who would like to entrench a responsibility to protect.

## **I. The Responsibility to Protect**

This Part briefly explains the development of the responsibility to protect. In the past few decades, military intervention for humanitarian purposes has proved controversial both when it happened, such as in Somalia, Bosnia, and Kosovo, and when it failed to happen in places like Rwanda and Sudan.<sup>7</sup> In response to these challenges, the international community has sought to articulate and implement standards for intervention by positing a responsibility to protect. Under this doctrine, states have a primary responsibility to protect their citizens from genocide, war crimes, ethnic cleansing, and crimes against humanity. If they cannot provide such protection or refuse to do so, other nations acting through the United Nations may intervene to provide humanitarian assistance, by military means if necessary.

The foundational and aspirational document for this doctrine is a 2001 Report on Responsibility to Protect<sup>8</sup> by the International Commission on Intervention and State Sovereignty (ICISS). Several years later, Kofi Annan, Secretary-General of the United Nations, commissioned a High-Level Panel on Threats, Challenges and Change to assess current threats to international peace and security. This so-called High-Level Panel produced a 2005 Report dealing with the shared responsibility for a secure world.<sup>9</sup> These reports together set out the basic principles and justifications for R2P.

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<sup>6</sup> See Neomi Rao, *Public Choice and International Law Compliance: The Executive Branch is a They Not an It*, 96 MINN. L. REV. 194 (2011).

<sup>7</sup> Responsibility to Protect, Report of the International Commission on Intervention and State Sovereignty Foreword (December 2001).

<sup>8</sup> Responsibility to Protect, Report of the International Commission on Intervention and State Sovereignty ¶ 1.34 (December 2001).

<sup>9</sup> A more secure world: our shared responsibility, Report of the High-level Panel on Threats, Challenges and Change (2005).

The interest in R2P generated several actions within the United Nations. In October 2005, at its World Summit the General Assembly adopted a Resolution that included several paragraphs on the responsibility to protect and set forth what have since been categorized as three pillars. The first pillar of the Resolution requires states to bear the primary responsibility for protecting those within their borders from the most serious crimes against humanity:

Each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity. This responsibility entails the prevention of such crimes, including their incitement.<sup>10</sup>

The international community also has obligations:

[Second pillar] to use appropriate diplomatic, humanitarian and other peaceful means, ... to help to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. [Third pillar] 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 organization 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.<sup>11</sup>

This provision emphasizes that the international community has obligations to protect victims of serious crimes through various peaceful means, and as a final resort, to protect victims through military intervention. The first pillar of the Resolution makes clear that states have a firm, categorical responsibility for their own people; however, with regard to the third pillar, states have recognized only a collective, contingent, and “case-by-case” responsibility to take military actions for the people in other states.<sup>12</sup> The World Summit Resolution demonstrates commitment to considerably less than the ICISS Report. Yet R2P remains an aspiration and part of the language of humanitarian intervention.

R2P places responsibility on states to protect their populations and repeatedly emphasizes that states remain the focus of this responsibility: “[S]overeignty does still matter. It is strongly arguable that effective and legitimate states remain the best way to ensure that the benefits of the internationalization of trade, investment, technology and communication will be equitably shared. ...[I]n security terms, a cohesive and peaceful international system is far more likely to be achieved through the cooperation of effective states, confident of their place in the world, than in an environment of fragile, collapsed, fragmenting or generally chaotic state entities.”<sup>13</sup>

Yet R2P goes well beyond a state’s responsibility for human security within its own borders. It requires responsibility for human security potentially everywhere. The 2001 Report on R2P turns on cosmopolitan concerns<sup>14</sup> and highlights the breadth of the aspiration of R2P to protect “human

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<sup>10</sup> 2005 World Summit Outcome, G.A. Res. 60/1, ¶ 138, U.N. Doc. A/RES/60/1 (Oct. 24, 2005).

<sup>11</sup> 2005 World Summit Outcome, G.A. Res. 60/1, ¶ 139, U.N. Doc. A/RES/60/1 (Oct. 24, 2005).

<sup>12</sup> See ALEX BELLAMY, *GLOBAL POLITICS AND THE RESPONSIBILITY TO PROTECT: FROM WORDS TO DEEDS* 92 (2011) (“[T]he main reason for RtoP’s inability to generate additional political will to respond to crises is the indeterminacy of its third pillar, which stands in sharp contrast to the relative determinacy of pillar one. To date, in practice all states have to do to appear compliant with pillar three in the face of an episode of mass killing is not support genocidaires and accept the proposition that international community should do something. Beyond that, it is not clear what RtoP demands in any particular case.”).

<sup>13</sup> Responsibility to Protect, Report of the International Commission on Intervention and State Sovereignty ¶ 1.34 (December 2001).

<sup>14</sup> The ICISS 2001 Report reflects ideals of global cosmopolitanism by focusing on human interests rather than the interests of states. As Charles Beitz explains, “At the deepest level, cosmopolitan liberalism regards the social world as composed of persons, not collectivities like societies or peoples, and insists that principles for the relations of societies should be based on a consideration of the fundamental interests of persons.” Charles R. Beitz, *Rawls’s Law of Peoples*, 110 ETHICS 669, 677 (2000). See also CHARLES R. BEITZ, *POLITICAL THEORY AND INTERNATIONAL RELATIONS* (1979).

security.” For example, the Report explains that issues of sovereignty and intervention affect not just states, but also individual human beings and that the term “‘responsibility to protect’ ... focuses attention where it should be most concentrated, on the human needs of those seeking protection or assistance. ... The traditional, narrow perception of security leaves out the most elementary and legitimate concerns of ordinary people regarding security in their daily lives.”<sup>15</sup> The Report argues that the terms of the debate must shift away from the rights of humanitarian intervention because such terms inappropriately focus “attention on the claims, rights and prerogatives of the potentially intervening states much more so than on the urgent needs of the potential beneficiaries of the action.”<sup>16</sup>

The 2005 High-Level Panel Report similarly adopts an ideal of human security focused on individuals. The High-Level Panel asserts that the most serious threats to collective security arise with respect to “economic and social threats, including poverty, infectious disease and environmental degradation.” After these socio-economic concerns, the High-Level Panel discusses, in order of importance, inter-state conflict, international conflict, nuclear and biological weapons, terrorism, and transnational organized crime.<sup>17</sup> Placing socio-economic development as the primary concern emphasizes the relative importance of human security and well being as opposed to traditional concerns of state sovereignty.<sup>18</sup>

R2P begins with state sovereignty, but at its core the doctrine posits a new conception of sovereignty, or at least a new emphasis. The 2001 Report explains that when a State signs the UN Charter, it accepts certain responsibilities – most importantly it accepts a conception of “sovereignty as responsibility in both internal functions and external duties.”<sup>19</sup> The Report explains that states must meet certain standards of conduct with regard to the protection of human rights. Such obligations stem from a variety of sources, including the Universal Declaration of Human Rights as well as other international human rights instruments and norms. These sources serve “as the concrete point of reference against which to judge state conduct.”<sup>20</sup> State sovereignty remains important, but the international community may judge and evaluate this sovereignty in light of modern human rights norms. The crux of the responsibility to protect then is that when states fail to meet basic human rights standards, they may be held accountable for their actions by the international community.

## **II. The Responsible Sovereign**

R2P reconceptualizes “sovereignty as responsibility.” In the literature on R2P, the responsibilities of a state to its own people are often elided with a state’s responsibility to those outside of its borders. Yet these are distinct responsibilities and must rest on different foundations. The responsibility of a state to its people has a long historical tradition in the development of the nation-state—this is a familiar

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<sup>15</sup> Responsibility to Protect, Report of the International Commission on Intervention and State Sovereignty ¶ 2.22-2.23 (December 2001).

<sup>16</sup> Responsibility to Protect, Report of the International Commission on Intervention and State Sovereignty ¶ 2.28 (December 2001).

<sup>17</sup> High-Level Report, A/59/565 p. 25.

<sup>18</sup> ICISS Report at § 2.22 (“One of the virtues of expressing the key issue in this debate as ‘the responsibility to protect’ is that it focuses attention where it should be most concentrated, on the human needs of those seeking protection or assistance. The emphasis in the security debate shifts, with this focus, from territorial security, and security through armaments, to security through human development with access to food and employment, and to environmental security.”).

<sup>19</sup> Responsibility to Protect, Report of the International Commission on Intervention and State Sovereignty ¶ 2.14 (December 2001).

<sup>20</sup> Responsibility to Protect, Report of the International Commission on Intervention and State Sovereignty ¶ 2.18 (December 2001).

aspect of the basic relationship between the government and the governed. Although international judgment and accountability of these sovereign standards reflects recent development of human rights law, the idea of a state's responsibility to its people is well established. The ICISS Report noted that no country challenged this requirement. By contrast, the idea of a state's responsibility for people in other states, presents a very different type of obligation, one with global reach, but ultimately a very uncertain scope.

This Part looks more closely at the new international responsibilities of states and separates out the difference between responsibility between State V and People V and the responsibility between State R and People V. The first represents a traditional and well-established relationship between a state and its people, although it adds an element of oversight by the international community. That is, when State V fails to protect its own people, intervention by other states may be permissible or even required. Most of the literature focuses the sovereign "rights" of State V, and whether State R can intervene under international law.<sup>21</sup> I do not address the sovereignty of the vicious or impotent state, or the unsettled question of whether intervention is permissible in international law, as it is a topic covered extensively by others. Commentators have generally concluded that intervention is permissible under international law, or because while not lawful, it can be undertaken and then excused.

What is novel in R2P, however, and without any clear foundation is the responsibility of State R to People V—why does State R have a duty to People V? To the extent such a duty exists, it does not rest on the same foundations as the responsibility between a state and its people. An affirmative duty to the people of another state, as opposed to merely permissible assistance, poses difficult theoretical problems, problems not adequately addressed by proponents of R2P. In this Part, I identify and examine some of the justifications offered and explain why they ultimately fail, even on their own terms, to establish a responsibility that goes beyond the political choices made by states contemplating intervention.

### ***A. Sovereignty as responsibility: A State and its People***

Responsibility to protect requires first that states protect their own people. As the ICISS Report explains,

[R]esponsibility to protect resides first and foremost with the state whose people are directly affected. This fact reflects not only international law and the modern state system, but also the practical realities of who is best placed to make a positive difference.... When solutions are needed, it is the citizens of a particular state who have the greatest interest and the largest stake in the success of those solutions, in ensuring that the domestic authorities are fully accountable for their actions or inactions in addressing these problems.<sup>22</sup>

This principle restates a simple and familiar model of accountability between a state and its people. When harms occur within a state, the people can and should identify those harms and work out appropriate solutions through their political institutions.

Internal responsibility of a government to its own people reiterates the Lockean social contract of a government created by and for its people. Whatever the social contract includes, it must include basic human security. If a state perpetuates genocide and ethnic cleansing, tolerates these crimes, or is powerless to halt them, it violates basic aspects of the social contract. Even if state practice belies

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<sup>21</sup> See, e.g., Olivier Corten, *Human Rights and Collective Security: Is There an Emerging Right of Humanitarian Intervention?*, in HUMAN RIGHTS, INTERVENTION, AND THE USE OF FORCE 87 (Philip Alston & Euan MacDonald eds. 2008) (evaluating whether international law is evolving in the direction of recognizing a right of humanitarian intervention).

<sup>22</sup> Responsibility to Protect, Report of the International Commission on Intervention and State Sovereignty ¶ 2.31 (December 2001).

these basic principles, states have widely accepted these principles as *opinio juris*, with no state contesting this basic responsibility to their own people.<sup>23</sup>

This internal responsibility is also reflected in various human rights treaties and agreements. For example, the Genocide Convention reflects international condemnation of the crime of genocide, even though it does not require states to take action to prevent or halt genocide in other countries.<sup>24</sup>

R2P goes further than these existing agreements by explicitly providing international recognition of certain minimum aspects of this bargain between people and their government and creating accountability when states fail in their obligations. R2P in part posits that domestic failures may erode the recognition of a state's sovereignty by the international community. The ICISS Report posits that state conduct can be judged with regard to its adherence to human rights. Responsibility to protect includes judgment by the international community. The 2005 World Summit Resolution, although more limited, affirms that collective action may be taken when states fail to protect their people from mass killing. When states fail to meet basic human rights standards, the international community may hold them accountable for their actions.

Helen Stacy refers to this as a new "relational sovereignty" in which "[t]he sovereign must answer not only to its own citizens for its failures of responsibility, but also directly to the international community; and in this new generation of negotiations, the stakes are high because the international community may decide to overrule sovereignty completely and simply enter the state with its peacekeeping forces."<sup>25</sup> Similarly, Anne-Marie Slaughter notes: "[M]embership in the United Nations is no longer a validation of sovereign status and a shield against unwanted meddling in a state's domestic jurisdiction. It is rather the right and capacity to participate in the United Nations itself, working in concert with other nations to sit in judgment of and take action against threats to human security whenever and wherever they arise."<sup>26</sup> Slaughter notes that the responsibility to protect creates a sort of "conditional sovereignty," by which sovereignty is recognized only through compliance with UN norms.<sup>27</sup> Membership in the UN no longer confirms a state's sovereignty; rather it defines essential components of how sovereign power must be exercised.

R2P's conception of sovereignty breaks with traditional Westphalian sovereignty in which international law largely did not concern itself with the domestic activities of states. A conditional sovereignty instead opens states up to the judgment of other states and the international community. Yet R2P has not created a firm mechanism for accountability, either for individual states or for states acting collectively through the United Nations. While this external accountability reconceives international relations, it may be seen as continuous with other developments in international human rights law, which since World War II has expanded to address matters traditionally of domestic concern. Even if such standards lack strong external enforcement, by reinforcing the responsibility of

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<sup>23</sup> See Alex. J. Bellamy, *The Responsibility to Protect—Five Years On*, 24 ETHICS & INT'L AFFAIRS 143, 160 (2010) ("Although there are arguments about their scope (especially concerning crimes against humanity) and the extent to which they are embedded or habitual, the basic proposition that states are legally and morally required not to intentionally kill civilians is well established. RtoP's first pillar is therefore best understood as a reaffirmation and codification of already existing norms.").

<sup>24</sup> See, e.g., Henry Shue, *Limiting Sovereignty*, in HUMANITARIAN INTERVENTION AND INTERNATIONAL RELATIONS 19 (Jennifer M. Welsh ed. 2004) (noting that the Genocide Convention is "strictly permissive concerning implementation, merely inviting any state that should take a notion to do something in order to prevent or punish genocide to approach the International Court of Justice, but binding no one to anything. States routinely ignore it in fact.").

<sup>25</sup> Helen Stacy, *Relational Sovereignty*, 55 STAN. L. REV. 2029, 2036 (2003).

<sup>26</sup> Anne-Marie Slaughter, *Security, Solidarity, and Sovereignty: The Grand Themes of UN Reform*, 99 Am. J. Int'l L. 619, 620 (2005).

<sup>27</sup> Anne-Marie Slaughter, *Security, Solidarity, and Sovereignty: The Grand Themes of UN Reform*, 99 Am. J. Int'l L. 619, 628 (2005).

states to their own people it at least permits intervention to stop mass atrocities.<sup>28</sup> Whether such conditional sovereignty will ultimately serve to bolster or to weaken human rights remains an open question and one outside of the scope of this Essay.

The responsibility of a state towards its own citizens is part of a strong historical and philosophical tradition. Although this traditionally has been a domestic matter between people their state, R2P aims to give international accountability for these traditional state responsibilities. R2P reiterates that a state's legitimacy and recognition by the international community depend on preserving a very minimum degree of safety and security for its citizens, and frankly, not much more than this.<sup>29</sup> R2P aspires to bring international accountability to this responsibility by threatening intervention when states fail to meet their basic domestic duties.

### ***B. Responsibility of states to people outside their borders***

The responsibility of a state to its people reiterates or brings international recognition to the basic social contract. While not uncontroversial, this aspect of R2P reinforces a traditional understanding of the state's most basic responsibility to its people. By contrast, responsibility to protect the victims in other states posits a new duty. This international, third party responsibility is not about legal permission to intervene, but emphatically about responsibility and obligation to intervene in certain circumstances.<sup>30</sup> The view rests on an assumption that individuals have basic rights to life and freedom from grievous harms and such rights create a responsibility of the international community of states to protect those rights.

Yet the responsibility of a state that stands by, causes no harm, but offers no help, is a completely different type duty to assist. The state has engaged in no wrongdoing to its own people nor has it harmed the people of another state, and yet it has a natural law or moral duty to help those people when their basic security is threatened. This new responsibility does not and cannot rest on the same foundation as a state's duty to its own people.

This Part first considers the nature of the right to protection asserted by victims against other states and explains how it is inherently a positive right to assistance or rescue, not a negative right to be left alone or a political demand for protection. Given that the right is a positive one to the resources and lives of citizens of the intervening state, what creates such an obligation? I evaluate some of the

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<sup>28</sup> See Lee Feinstein & Erica De Bruin, *Beyond Words: U.S. Policy and the Responsibility to Protect*, in RESPONSIBILITY TO PROTECT: THE GLOBAL MORAL COMPACT FOR THE 21<sup>ST</sup> CENTURY 186, 188 (Richard H. Cooper & Juliette Voinov Kohler, eds.) (2009) ("The responsibility to protect places individual citizens and their most basic human right—as the Declaration of Independence says, 'the right to life'—at the center of the international system. In doing so, the responsibility to protect erodes the classic rationale for inaction, namely that intervention to prevent mass atrocities constitutes illegal interference in the sovereign affairs of a UN member.").

<sup>29</sup> Fernando Teson has suggested that intervention should not be limited to egregious cases but should extend also to other "situations of serious, disrespectful, yet not genocidal, oppression." FERNANDO R. TESON, HUMANITARIAN INTERVENTION: AN INQUIRY INTO LAW AND MORALITY 16 (1997). Some have even argued for the responsibility to protect other rights, such as well-being, welfare, and speech rights. [CITES] The core of the doctrine, however, repeatedly emphasizes its limitation to certain egregious crimes against humanity.

<sup>30</sup> See ALLEN BUCHANAN, JUSTICE, LEGITIMACY, AND SELF-DETERMINATION: MORAL FOUNDATIONS FOR INTERNATIONAL LAW 430 (2004) (explaining that although the ICISS Report "stops short of declaring explicitly that there is an obligation to protect, it comes very close to it, and clearly goes beyond the traditional assumption that at most intervention is permissible. The idea of an international legal order based on obligations to protect human rights may already be becoming less radical."); Louise Arbour, *The responsibility to protect as a duty of care in international law and practice*, 34 REVIEW OF INT'L STUD. 445, 449 (2008) ("The emergence of the new norm has, in my view, serious implications for the putative 'intervener'. No longer holders of a discretionary right to intervene, all States are now burdened with the responsibility to take action."); see also *id.* at 450 (explaining that potential intervenors "have lost their 'right' to intervene, a discretionary prerogative, and willingly acquired, instead, a responsibility for a failure to act, a failure for which, I suggest, they could be held accountable").



different justifications and explain why they ultimately fail to support the creation of a responsibility or duty to intervene.

### 1. A positive right for protection

Although many defenders of R2P prefer to de-emphasize the question of “rights,”<sup>31</sup> the development of a responsibility assumes some rights of victims of humanitarian crimes. To posit an affirmative duty or responsibility of State R to People V requires some understanding and analysis of these rights. A closer look suggests that fulfillment of these rights depends on whether it is asserted against one’s own government or a foreign government. In both instances the right generally includes a negative right to be left alone, to not be harmed by one’s state or other states. It may also include a positive right to be protected from harms by private individuals or groups. This affirmative claim for protection has a different character when asserted against by people against their own government as opposed to a foreign one.

The responsibility to protect between a state and its people includes in part the negative right to be left alone, the right to enjoy one’s life without interference or harm from the state. Many people would also say that a state owes more than this—that within a political society individuals have some right to be kept safe, for the state to ensure certain conditions of safety to person and property. This is a positive claim for protection from harm by private actors and virtually all governments provide some form of this protection through their criminal justice systems. This demand, however, is a political one within the state about what sort of public resources should be allocated to crime prevention, police, incarceration, and rehabilitation. People will work through their political institutions to determine the degree and sort of protection provided by the state. Different societies will strike their own balance of state protection and self-protection.

It is instructive that even within most liberal, rights-respecting countries there is no free-floating right to safety or protection from private actors. In the United States, the Supreme Court has made clear that the government does not have an affirmative obligation to protect individuals, even though it may have an obligation to refrain from harmful activities.<sup>32</sup> Even when the government may have a special relationship with a person, there is no right to state protection absent the clearest indication that the government has assumed such an obligation.<sup>33</sup> Many civil law countries impose duties to rescue on other individuals, but not the state. These duties, however, are cabined by various requirements that assistance be reasonable in the circumstances and that a person need not endanger his own safety to provide assistance.<sup>34</sup> Good Samaritan laws are always conditioned on the requirement that rescue must be undertaken only if it can be done without imperiling the rescuer.<sup>35</sup> The qualifications on the duty mean that in practice it will depend a judgment on the part of the would-be rescuer as to whether rescue can be undertaken safely.

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<sup>31</sup> See Gareth Evans, *End of the Argument: How we won the debate over stopping genocide*, Foreign Policy (Dec. 2011) (explaining that the responsibility to protect concept caught on so quickly in part because “we used language that was inherently less confrontational—emphasizing no one’s ‘right’ but everyone’s ‘responsibility’”).

<sup>32</sup> See, e.g., *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189 (1989) (holding that the failure to protect a child from his abusive father even after the child was within the social services system did not violate the Due Process Clause of the Fourteenth Amendment).

<sup>33</sup> See, e.g., *Castle Rock v. Gonzales*, 545 U.S. 748 (2005).

<sup>34</sup> See, e.g., John T. Pardun, *Good Samaritan Laws: A Global Perspective*, 20 LOY. L.A. INT’L & COMP. L. REV. 591 (1998) (examining good Samaritan laws in various jurisdictions).

<sup>35</sup> See David Luban, *Intervention and Civilization: Some Unhappy Lessons of the Kosovo War*, in GLOBAL JUSTICE AND TRANSNATIONAL POLITICS: ESSAYS ON THE MORAL AND POLITICAL CHALLENGES OF GLOBALIZATION 94 (De Grief & Cronin, eds.) (discussing good Samaritan laws in the context of humanitarian intervention and observing that states have no genuine obligation to intervene when it would risk lives, even if we should feel ashamed not to intervene). [CITE on good Samaritan laws in U.S. states or abroad?]

Similarly, with R2P, the responsibility, such as it is, does not impose an absolute duty on states to risk the lives of its citizens. Instead, it turns on the judgment of an intervening state as to whether rescuing the victims of humanitarian crimes can be done without disproportionate cost. As Jose Alvarez notes, humanitarian intervention, much like Good Samaritan laws, allows an intervening state an excuse against a charge of unlawful action. R2P, however, requires states to be responsible for humanitarian crimes in other states, a move that will likely “prove to be a step too far internationally (if not nationally).”<sup>36</sup>

Some countries list rights to personal security and safety as a constitutional right, but beyond ordinary criminal process, protections must be provided through political institutions, through legislation allocating resources for crime prevention. The political process negotiates different expectations about what the state must provide and how. These are difficult political questions—particularly since the benefits of increased security must be balanced against civil liberties and other values, not to mention costs.

In the domestic context, state protection from private actors is a positive good and is provided through a political demand between people and their government. In the international realm where People V make a demand for protection from foreign states, the demand is similarly a positive one but without the political process for invoking such a demand.

Initially, I should note that People V have negative rights to be left alone by State R, but these are not at issue in the context of R2P. Although there is a well-recognized negative right of non-intervention, proponents of R2P go to some trouble to explain why State V relinquishes this right to be left alone when it harms its people or stands by while its people are harmed. The responsibility to protect does away with the relevant negative rights to be left alone. There may be some other very basic negative rights at issue, such as State R might have an obligation to refrain from taking actions that might make the situation in State V worse.

In the invocation of a responsibility to protect by third parties, People V claim a positive right to protection from State R—a right to what essentially amounts to rescue from the harms inflicted either by their government or by other actors while their government stands by. The request or right to military or other assistance is a positive one, a demand to be liberated from conditions of violence prevailing in one’s own state.

Yet unlike in the domestic context, People V cannot make a political demand for State R to provide protection. People V are not part of State R’s political society. The leaders of State R are not politically accountable to People V. Rather State R’s politicians face their own political pressures—domestic and international. The claims of People V will present a moral demand to assist individuals in need.<sup>37</sup> The plight of People V may even create political pressure through interest groups, the media, or international organizations, but whatever pressure exists will be part of a political balance in which these interests are not directly represented. This is not the case of a government weighing how to use its resources for the benefit of its own people. Instead it is a government weighing how to use its resources for the benefit of people in another state. State R will balance using its resources for humanitarian intervention against domestic needs. Only the most naïve account of politics would suggest that the balancing takes the same form in one case as the other.

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<sup>36</sup> Jose E. Alvarez, *The Schizophrenias of R2P*, in HUMAN RIGHTS, INTERVENTION, AND THE USE OF FORCE 283 (Philip Alston & Euan MacDonald eds. 2008).

<sup>37</sup> See David Luban, *Intervention and Civilization: Some Unhappy Lessons of the Kosovo War*, in GLOBAL JUSTICE AND TRANSNATIONAL POLITICS: ESSAYS ON THE MORAL AND POLITICAL CHALLENGES OF GLOBALIZATION 94, 99 (De Grieff & Cronin, eds.) (arguing that even if we do not have an obligation to prevent violations of human rights we may have moral reasons for helping because “We shame ourselves by not living up to important standards that we have advertised to others; even if failure is not culpable, it diminishes us. Professing to believe in the value of human beings, then refusing to protect them as they are murdered or driven from their homes, is paradigmatically shameful.”).

It is important to stress here that the fact that People V lack representation in State R or are not part of the political community of State R is not to say that they do not have human rights. It is not necessary even that State R's domestic politics have moral priority (although perhaps they should).<sup>38</sup> Rather, this is a recognition that whatever right to protect People V may have, at present the scope of this protection depends on political determinations about resources and appropriate actions given all the circumstances. The political determinations may turn on any number of factors, including what the nation feels that it must provide for intervention—including the costs in terms of military support and soldiers' lives. State R will fulfill any responsibility through its own particular political calculus, as discussed in greater detail in Part IV.

Although some proponents would shift the discussion away from "rights," understanding international responsibility depends in part on having some basic concept of the rights of People V with regard to states not their own. They may have a negative right to be free from violence from their own and other states. Yet when they ask the international community or any other particular State R for assistance, they ask for the fulfillment of a positive right. This basic concept highlights that such rights when asserted against the international community are positive ones and glossing over this fact does not change the nature of the claim.

## 2. Possible foundations for third-party responsibility

As explained above, the responsibility of a state to protect its own people is grounded in traditional understandings of the social contract and the relationship between a state and its people. The real crux of R2P, however, relates to the third-party responsibility to protect people in another state. This responsibility is properly understood as a positive claim of People V to protection from the grievous conditions prevailing in their state. Does R2P create or identify a duty to fulfill this claim? The responsibility might be legal or moral and I consider each in turn.

### *a. No legal obligation to intervene*

States might have a legal responsibility to protect people in another state through (1) an international agreement or (2) because such responsibility is a requirement of customary international law. There are no treaties or other specific legal commitments to a responsibility to protect, although it is often suggested that responsibility to protect is *implicit* in some international agreements and human rights treaties.<sup>39</sup> Many states have expressed approval of R2P in various non-binding statements, but have not taken further legal steps, such as by embodying the requirement in a treaty or other agreement.

The 2005 World Summit Resolution recognizes some general contours of the responsibility to protect, which included a firm statement about the responsibility of each individual state to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity. With regard to third-party responsibility, however, the Resolution recognized only that states were prepared to take "collective action" through the Security Council and on a "case-by-case basis."<sup>40</sup> This hardly suggests recognition or agreement for states to assume responsibility for people in other countries.

Some have suggested that the Genocide Convention might support responsibility to protect. The International Court of Justice's decision in the Bosnia genocide case recognized state responsibility for

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<sup>38</sup> See Allen Buchanan, *The Internal Legitimacy of Humanitarian Intervention*, 7 J. OF POLITICAL PHILOSOPHY 71, 80-81 (1999).

<sup>39</sup> See ICISS Report, section 6.17 page 50 (noting that the emerging principle of responsibility to protect is "grounded in a miscellany of legal foundations (human rights treaty provisions, the Genocide Convention, Geneva Conventions, International Criminal Court statute and the like" as well as developing state practice and Security Council practice).

<sup>40</sup> 2005 World Summit Outcome, G.A. Res. 60/1, ¶ 138, U.N. Doc. A/RES/60/1 (Oct. 24, 2005).

genocide and held that states have a duty not to perpetrate genocide.<sup>41</sup> Some have argued that the decision goes further and stands for the principle that the Genocide Convention creates some responsibility of states to prevent genocide even outside their borders.<sup>42</sup> Yet most commentators seem to consider this an expansive or perhaps aspirational reading of the Convention and one not supported by state practice.<sup>43</sup>

Moreover, responsibility to protect has not been recognized by states as a norm of customary international law, which is traditionally defined as a “customary practice of states followed from a sense of legal obligation.”<sup>44</sup> For example, the United States has endorsed the concept, but has stressed that the responsibility is not a legal obligation, but a moral one, different in nature from the obligation of a state to its own citizens.<sup>45</sup> Similarly, although Canada strongly endorses R2P, the government also notes that the state has the first responsibility followed by the international community’s moral obligation in the face of grave crisis.<sup>46</sup> The United Kingdom and other states have noted that responsibility to victims must be fulfilled on a case-by-case basis.<sup>47</sup> Other states such as China, India, and Russia have not endorsed the concept and have expressed doubts about its meaning and application.<sup>48</sup>

Most commentators have rightly concluded that there is no customary international norm regarding the third-party responsibility to protect.<sup>49</sup> Moreover, R2P has not addressed the difficulties of treating the “responsibility” as a legal one on states or the United Nations.<sup>50</sup> Although there are examples of

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<sup>41</sup> See Judgment of 26 February 2007, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, ICJ Reports (2007).

<sup>42</sup> See Mark Toufayan, *The World Court’s Distress When Facing Genocide*, 40 TEX. INT’L L. J. 233, 236 (2005) (arguing for a purposive reading of the Genocide Convention that includes a duty to prevent genocide wherever it occurs); Louise Arbour, *The responsibility to protect as a duty of care in international law and practice*, 34 REVIEW OF INT’L STUD. 445, 451 (2008) (arguing that the ICJ Bosnia decision stands for the principle that “the prevention of genocide is a legal obligation, and it is a justiciable obligation that one State effectively owes to the citizens of another State, outside its own territory”).

<sup>43</sup> See Yuval Shany, *The Road to the Genocide Convention and Beyond*, in THE UN GENOCIDE CONVENTION—A COMMENTARY 24 (Paola Gaeta, ed. 2009) (noting that an expansive interpretation of the Genocide Convention to include prevention and intervention would “far exceed in scope the extent of the customary norm”); Henry Shue, *Limiting Sovereignty*, in HUMANITARIAN INTERVENTION AND INTERNATIONAL RELATIONS 20 (Jennifer M. Welsh ed. 2004) (noting that there is no obligation to rescue victims of genocide as “the Genocide Convention requires no one to take any action; the UN Charter permits but does not require action; and Security Council practice is not to send troops or, if as in Rwanda troops are already there, to yank them out in order to avoid danger to them and embarrassment to the Council.”).

<sup>44</sup> RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) (1986).

<sup>45</sup> See Lee Feinstein & Erica De Bruin, *Beyond Words: U.S. Policy and the Responsibility to Protect*, in RESPONSIBILITY TO PROTECT: THE GLOBAL MORAL COMPACT FOR THE 21<sup>ST</sup> CENTURY 186 (Richard H. Cooper & Juliette Voinov Kohler, eds.) (2009) (noting that in World Summit negotiations the United States wanted to insure that “the responsibility of the international community to prevent atrocities discussed in the outcome document did not create a new legal obligation, but instead referred to a moral responsibility. ... [T]he United States argued that the responsibility of the international community was different from—and secondary to—that of individual states.”).

<sup>46</sup> See State-by-State Positions on the Responsibility to Protect, available at [www.responsibilitytoprotect.org/files/Chart\\_R2P\\_11August.pdf](http://www.responsibilitytoprotect.org/files/Chart_R2P_11August.pdf).

<sup>47</sup> See State-by-State Positions on the Responsibility to Protect, available at [www.responsibilitytoprotect.org/files/Chart\\_R2P\\_11August.pdf](http://www.responsibilitytoprotect.org/files/Chart_R2P_11August.pdf).

<sup>48</sup> See State-by-State Positions on the Responsibility to Protect, available at [www.responsibilitytoprotect.org/files/Chart\\_R2P\\_11August.pdf](http://www.responsibilitytoprotect.org/files/Chart_R2P_11August.pdf).

<sup>49</sup> See, e.g., Alex. J. Bellamy, *The Responsibility to Protect—Five Years On*, 24 ETHICS & INT’L AFFAIRS 143, 160 (2010) (“[T]he state practice documented in the previous section suggests that mutual recognition of a positive duty to exercise pillars two and three [of the 2005 Resolution] is inconsistent at best.”).

<sup>50</sup> See Jose E. Alvarez, *The Schizophrenias of R2P*, in HUMAN RIGHTS, INTERVENTION, AND THE USE OF FORCE 282-3 (Philip Alston & Euan MacDonald eds. 2008) (discussing some of the doctrinal difficulties of imposing “legal responsibility” on

intervention and subsequent approval or endorsement of some interventions, responding to humanitarian crimes is far from consistent state practice. Historically there are far more examples of states committing atrocities than of other states intervening to protect the victims of those crimes. As Michael Walzer has observed, “[M]urder on a smaller scale [than the holocaust] is so common as to be almost ordinary. On the other hand—or perhaps for this very reason—clear examples of what is called ‘humanitarian intervention’ are very rare.”<sup>51</sup> Existing state practice and examples of intervention do not rise to the level of customary international law. Although proponents of R2P have expressed the view that R2P is developing into a norm of customary international law or should be treated as one, they recognize that it has not reached this status.<sup>52</sup> Whatever responsibility exists is generally not framed as a legal duty to others.

*b. Strict moral duty*

Understandably, much of the focus of the literature is on the rights of victims and the moral priority of these rights. A harder question is whether these rights create a moral responsibility for other states to act. Several scholars have taken up the question of whether states have a moral duty to respond. Some argue that states have a strict moral duty not only to respect the rights of individuals but also to ensure that other states and private actors respect the rights of individuals.

For example, Fernando Teson suggests that states may be culpable for failure to act at least in some circumstances because of the respect we owe to others as human agents.<sup>53</sup> In the broadest terms, “Because human rights are rights held by individuals by virtue of their personhood, they are independent of history, culture, or national borders.”<sup>54</sup> Teson suggests that states are created to serve the rights and interests of individuals and this extends to serving the rights and interests of individuals even outside of a state’s borders.<sup>55</sup>

Similarly, Carla Bagnoli argues that states have a perfect duty to help victims in other states.<sup>56</sup> She criticizes the focus on permissibility of intervention, because “[t]his implies that states have the right to remain neutral in the face of human rights violations in other countries and that their neutrality is not morally objectionable.”<sup>57</sup> Bagnoli argues instead that basic human rights are claims of all persons that require certain duties of respect and mutual recognition.<sup>58</sup> From this principle she asserts, “It

(Contd.) \_\_\_\_\_

states or the UN and observing that “the concept of R2P cannot plausibly short-circuit the difficult political negotiations that would be necessary to overcome such difficulties”).

<sup>51</sup> Michael Walzer, *Just and Unjust Wars* 101 (1977) (4<sup>th</sup> ed 2006).

<sup>52</sup> See ICISS Report, §2.24 at page 15 (“While there is not yet a sufficiently strong basis to claim the emergence of a new principle of customary international law, growing state and regional organization practice as well as Security Council precedent suggest an emerging guiding principle.”); see also *id.* at § 6.17 at page 50 (“it may eventually be that a new rule of customary international law to this effect comes to be recognizes, but ... it would be quite premature to make any claim about the existence now of such a rule”).

<sup>53</sup> Fernando R. Teson, *The liberal case for humanitarian intervention*, in *HUMANITARIAN INTERVENTION: ETHICAL, LEGAL, AND POLITICAL DILEMMAS* 121-122 (J.L. Holzgrefe and Robert O. Keohane eds. 2003).

<sup>54</sup> Fernando R. Teson, *The liberal case for humanitarian intervention*, in *HUMANITARIAN INTERVENTION: ETHICAL, LEGAL, AND POLITICAL DILEMMAS* 94 (J.L. Holzgrefe and Robert O. Keohane eds. 2003).

<sup>55</sup> See FERNANDO R. TESON, *HUMANITARIAN INTERVENTION: AN INQUIRY INTO LAW AND MORALITY* 16 (1997) (“[F]rom an ethical standpoint, the rights of states under international law are properly derived from individual rights. I therefore reject the notion that states have any autonomous moral standing—that they hold international rights that are independent from the rights of individuals who populate the state.”).

<sup>56</sup> Carla Bagnoli, *Humanitarian Intervention as a Perfect Duty: A Kantian Argument*, in *Humanitarian Intervention*, *NOMOS XLVII* 118 (Terry Nardin & Melissa S. Williams, eds.).

<sup>57</sup> Carla Bagnoli, *Humanitarian Intervention as a Perfect Duty: A Kantian Argument*, in *Humanitarian Intervention*, *NOMOS XLVII* 118 (Terry Nardin & Melissa S. Williams, eds.).

<sup>58</sup> Carla Bagnoli, *Humanitarian Intervention as a Perfect Duty: A Kantian Argument*, in *Humanitarian Intervention*, *NOMOS XLVII* 126 (Terry Nardin & Melissa S. Williams, eds.).

follows from it that neutrality is morally inadmissible, that the decision not to intervene calls for blame and other moral sanctions. The perfect duty to coerce the offender is complementary to the perfect duty to protect the victim.”<sup>59</sup>

These arguments support the idea that State R must refrain from harming its own people as well as people in other states. These arguments even support the principle that intervention by State R to protect People V can be morally justified and even morally praiseworthy. Yet they often fail to fill in the hardest part of argument—why *must* State R protect People V? If people have natural human rights to safety and security, this may require that State R not harm People V, the basic negative right of not being harmed. Yet these human rights do not necessarily give rise to an obligation on behalf of foreign states to intervene to ensure security and safety.<sup>60</sup> Even if states are the instruments of individuals, as Teson argues, this does not explain why State R must be used as the instrument of People V. States are entities for their people. State R may thus be an instrument to meet the needs of People R but that logic does not make State R an instrument of people in need everywhere. Teson’s argument may explain why intervention into State V is permissible, as State V has failed to protect its own people. Yet this argument does not provide a justification for why any State R must intervene to protect People V. This is particularly true because this obligation is a positive one to do something—to provide assistance through diplomatic, financial, or military means.

Moreover, the most rigorous assertions of cosmopolitan moral duties are often short on details about how such duty will be implemented. “The appeal to fundamental human rights only determines that intervention is a strict moral duty. Who should perform the duty is a separate question, one that must be decided by reconsidering the grounds for proper authority.”<sup>61</sup> Of course, some might argue that it is precisely this question of who performs the duty that matters in the face of genocide and other mass killings.

### c. *Imperfect moral duty*

Recognizing the difficulty of asserting that any particular State R has a duty to People V, other scholars have suggested that the responsibility to protect is an imperfect obligation. Kok-Chor Tan observes that the ICISS Report does not explain why permissible intervention also generates a responsibility, because “permissibility alone does not necessarily generate an obligation.”<sup>62</sup> He argues that there is a duty to protect that arises from the “moral seriousness of humanitarian intervention.”<sup>63</sup> Yet he notes that it does not belong to any particular state agent— “[s]omeone ought to intervene, but no specific state in the society of states is morally bound to do so.”<sup>64</sup>

<sup>59</sup> Carla Bagnoli, *Humanitarian Intervention as a Perfect Duty: A Kantian Argument*, in *Humanitarian Intervention*, NOMOS XLVII 130 (Terry Nardin & Melissa S. Williams, eds.).

<sup>60</sup> David Luban makes a similar point: “The right not to be tortured imposes a demand on all of humanity, and that conclusion follows from the bare acknowledgement that we have a right not to be tortured. But from the conceptual point alone all that follows is the negative demand that everyone must refrain from torture, not the positive requirement that anyone must intervene to stop others from torturing.” David Luban, *Intervention and Civilization: Some Unhappy Lessons of the Kosovo War*, in *GLOBAL JUSTICE AND TRANSNATIONAL POLITICS: ESSAYS ON THE MORAL AND POLITICAL CHALLENGES OF GLOBALIZATION* 94 (De Grief & Cronin, eds.).

<sup>61</sup> Carla Bagnoli, *Humanitarian Intervention as a Perfect Duty: A Kantian Argument*, in *Humanitarian Intervention*, NOMOS XLVII 131 (Terry Nardin & Melissa S. Williams, eds.).

<sup>62</sup> Kok-Chor Tan, *The Duty to Protect*, in *Humanitarian Intervention*, NOMOS XLVII p. 89 (Terry Nardin & Melissa S. Williams, eds.).

<sup>63</sup> Kok-Chor Tan, *The Duty to Protect*, in *Humanitarian Intervention*, NOMOS XLVII p. 94 (Terry Nardin & Melissa S. Williams, eds.).

<sup>64</sup> Kok-Chor Tan, *The Duty to Protect*, in *Humanitarian Intervention*, NOMOS XLVII p. 95 (Terry Nardin & Melissa S. Williams, eds.).

Tan argues strenuously that this does not diminish the seriousness of the duty—it only creates a duty of the international community “to *make perfect*, through cooperation and coordination, what might be otherwise an *imperfect* duty to protect.”<sup>65</sup> Yet what precisely must be done to take the duty seriously is hard to pin down. A special relationship to the victims may generate expectations and states may be required to create international organizations for the protection of human rights. Yet it is not clear why having an imperfect duty creates an obligation to perfect that duty either through individual state action or institutional cooperation. Tan acknowledges, “It is a strategic problem: there is no identifiable agent who can be called upon to act.”<sup>66</sup>

Allen Buchanan notes that states have a negative duty to refrain from harming individuals in other states because of “the moral importance of human beings as such, and the role which the fulfillment of negative duties in question plays in protecting certain fundamental interests in liberty and wellbeing that human beings as such have.”<sup>67</sup> From this familiar negative duty to leave alone, however, Buchanan argues that certain positive duties must follow as well. The basic moral rights of persons require that states fulfill positive duties to all persons, within and outside of their borders.<sup>68</sup>

Regardless of how appealing this moral vision may be, Buchanan does not explain the extension from negative obligations to leave people alone to positive obligations to assist them. In part, this may be because Buchanan misidentifies the reason for negative duties. Such negative duties between states to leave each other alone stemmed originally from the reciprocal relationship between states to not harm each other (and by extension their people).<sup>69</sup> The value of persons undoubtedly bolsters this negative duty, but historically it was not the primary reason for forbearance by states in international law. Buchanan simply asserts that if people have certain negative rights “then surely one ought not only to respect persons’ rights by not violating them. One ought also to contribute to creating arrangements that will ensure that persons’ rights are not violated.”<sup>70</sup> Henry Shue makes a similar

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<sup>65</sup> Kok-Chor Tan, *The Duty to Protect*, in *Humanitarian Intervention*, NOMOS XLVII p. 116 (Terry Nardin & Melissa S. Williams, eds.); *see also id.* at 111 (“That the duty to protect is imperfect in the absence of institutionalized procedures for intervention should not be seen as a limitation against arguments for obligatory humanitarian intervention ... That a duty is imperfect points only to the need for coordinating efforts and the need to cooperate. It does not mean that the duty need not be taken seriously by anyone.”).

<sup>66</sup> Kok-Chor Tan, *The Duty to Protect*, in *Humanitarian Intervention*, NOMOS XLVII p. 102 (Terry Nardin & Melissa S. Williams, eds.).

<sup>67</sup> Allen Buchanan, *The Internal Legitimacy of Humanitarian Intervention*, 7 J. OF POLITICAL PHILOSOPHY 71, 80-81 (1999)

<sup>68</sup> Allen Buchanan, *The Internal Legitimacy of Humanitarian Intervention*, 7 J. OF POLITICAL PHILOSOPHY 71, 81 (1999) (“[T]he same arguments that show that the state has positive as well as negative duties to its own citizens show that it is arbitrary to soften the harsh implications of the discretionary association view by admitting negative duties to noncitizens while denying any positive duties to noncitizens.”).

<sup>69</sup> *See generally* EMER DE Vattel, *THE LAW OF NATIONS* (1853) (observing that the main duty of a nation is to leave other nations alone and “[t]his general principle forbids nations to practise any evil maneuvers tending to create disturbance in another state, to foment discord, to corrupt its citizens, to alienate its allies, to raise enemies against it to tarnish its glory, and to deprive it of its natural advantages. ... However, it will be easily conceived that negligence in fulfilling the common duties of humanity, and even the refusal of these duties or offices, is not an injury. To neglect or refuse contributing to the perfection of a nation, is not impairing that perfection.”)

<sup>70</sup> Allen Buchanan, *The Internal Legitimacy of Humanitarian Intervention*, 7 J. OF POLITICAL PHILOSOPHY 71, 84 (1999); *see also id.* at 85 (“[I]f the basic moral rights of persons are grounded in the morally important characteristics that all persons possess, then it is difficult to maintain a separation between respecting persons’ rights and making some effort to see that their rights are respected.”); ALLEN BUCHANAN, *JUSTICE, LEGITIMACY, AND SELF-DETERMINATION: MORAL FOUNDATIONS FOR INTERNATIONAL LAW* 86 (2004) (identifying a “Natural Duty of Justice” as the “limited moral obligation to contribute to ensuring that all persons have access to just institutions, where this means primarily institutions that protect basic human rights”).

point that negative rights to be secure include certain protections that involve positive duties, and that such duties can extend even to people in other countries.<sup>71</sup>

Even accepting the reasoning suggested by Buchanan that positive and negative rights exist on a continuum—still there is a sizable gap between requiring State R to leave others alone and obliging it to provide assistance to People V. Buchanan recognizes some of these limits when he acknowledges that the natural duty to assist people everywhere may only be an imperfect one and not enforceable<sup>72</sup> and the duty to help exists only if a state can assist “without excessive costs.”<sup>73</sup> These practical concessions do more to explain the contours of state obligation than abstract duties of justice because they acknowledge the contingent, qualified nature of the obligation.

Although Tan and Buchanan aim to find a theoretical source for obligation and duty, they recognize limits on the duty and the difficulty of attaching the duty to any particular actor. In any particular circumstance no state has a duty to act and no state has a duty when action would impose excessive costs. These limitations, however, call into question whether the obligation to assist others is truly a duty, as opposed to a call for beneficence by others to act on behalf of the victims.

#### *d. Consequentialist duty*

The articulation of R2P by interest groups and the United Nations has a distinctly consequentialist component, perhaps acknowledging the reality of how such a responsibility will work in practice between states. The ICISS report, for example, assigns responsibility, but remains mindful of consequences when it limits intervention to a narrow category of extreme cases and ensures proportionality between the response and likely benefits or intervention. Similarly, the 2005 World Summit Resolution first pillar recognizes a state’s responsibility for its people. Yet the third pillar recognizes consequential concerns when it affirms only a collective responsibility for states to people in other states to be exercised on a case-by-case basis.

Although the scholarly literature has tended to focus on the importance of rights and duties, others have sought to provide a justification for intervention along consequentialist lines. Eric Heinze, for instance, suggests that states must weigh the welfare of individuals taking into account the costs and benefits of intervention.<sup>74</sup> His chosen metric is “human security as the general account of human well-being—or ‘good’—that the conduct of humanitarian intervention ought to promote or maximize.”<sup>75</sup> He would have states consider whether, given the circumstances at the time, intervention would promote human security.<sup>76</sup>

<sup>71</sup> See Henry Shue, *Limiting Sovereignty*, in HUMANITARIAN INTERVENTION AND INTERNATIONAL RELATIONS 26-27 (Jennifer M. Welsh ed. 2004) (arguing that positive duties may be owed to non-compatriots when it is impossible for a state to protect its own people and also when each state contributes only its “fair share”).

<sup>72</sup> Allen Buchanan, *The Internal Legitimacy of Humanitarian Intervention*, 7 J. OF POLITICAL PHILOSOPHY 71, 87 (1999).

<sup>73</sup> Allen Buchanan, *The Internal Legitimacy of Humanitarian Intervention*, 7 J. OF POLITICAL PHILOSOPHY 71, 85 (1999); see also ALLEN BUCHANAN, JUSTICE, LEGITIMACY, AND SELF-DETERMINATION: MORAL FOUNDATIONS FOR INTERNATIONAL LAW 428-29 (2004) (recognizing it is difficult to know what constitutes “excessive costs” but noting that it is “not so difficult to determine that some of us have not done enough”).

<sup>74</sup> ERIC A. HEINZE, WAGING HUMANITARIAN WAR: THE ETHICS, LAW, AND POLITICS OF HUMANITARIAN INTERVENTION 11-12 (2009) (“[I]f we are truly concerned with the welfare of individuals, then we must weigh the benefits of humanitarian intervention against the costs in terms of some measure of human well-being. This balance of benefits and costs requires an account of human well-being as well as a consequentialist calculation aimed at maximizing it, both of which statism and cosmopolitanism fail to provide.”).

<sup>75</sup> Eric A. Heinze, *Waging Humanitarian War: The Ethics, Law, and Politics of Humanitarian Intervention* 12 (2009).

<sup>76</sup> ERIC A. HEINZE, WAGING HUMANITARIAN WAR: THE ETHICS, LAW, AND POLITICS OF HUMANITARIAN INTERVENTION 41 (2009).



Consequentialist reasoning attempts to more realistically consider how states should behave. Moreover, it honestly acknowledges the consequentialist component of most theories of R2P. Virtually all accounts of the responsibility apply only to serious crimes or widespread cases of genocide and mass killing. If the responsibility truly stems from the human rights of people to be free of violence, it is difficult to explain why the responsibility must be limited to serious violations of human rights. Yet most supporters at least implicitly recognize that intervention requires trade-offs, including that states have limited resources and that intervention may cause an escalation in violence. Even those who posit a moral duty on behalf of states recognize the consequentialist reasoning involved when states use force and must determine how to maximize human rights observance<sup>77</sup> or that interventions are obliged only when they can be done without excessive costs.<sup>78</sup> Similarly, states with the “right” motives cannot be certain that their interventions will have good results.<sup>79</sup>

Even focusing only on the good of human security, balancing requires the exercise of judgment by states. Often it will be unknown and contested whether intervention will promote security. As Heinze admits, predicting the consequences of action in most circumstances is difficult to do.<sup>80</sup> After the fact, observers and states often disagree about whether an intervention promoted security. For example, many hail the Libya intervention as a success in toppling Qaddafi and halting violence,<sup>81</sup> whereas others suggest intervention unnecessarily escalated violence and led to even more deaths than if the uprising had taken its course without outside interference.<sup>82</sup> A year after the intervention, debate continues about the legal and practical consequences of the intervention.

Yet once R2P is seen as a consequentialist doctrine, subject to the balancing of the need of human security, it simply opens up the question of what other interests and goods a state can take into account. Can a state balance human security against domestic politics or other geopolitical concerns? Can a state weigh the security of its citizens and the lives of its military personnel more heavily than victims in other states? Although consequentialists want to focus on human security abstractly, a state will likely consider questions of well-being in the context of their particular needs. Despite the acknowledgment and concern for the moral seriousness of these humanitarian crimes, the uncertainty of assessing the effects of intervention on People V and their security suggests that when contemplating intervention states will focus on factors that might be more readily apparent, such as domestic political pressures, national security, and costs.

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<sup>77</sup> Fernando R. Teson, *The liberal case for humanitarian intervention*, in HUMANITARIAN INTERVENTION: ETHICAL, LEGAL, AND POLITICAL DILEMMAS 114 (J.L. Holzgrefe and Robert O. Keohane eds. 2003) (explaining how “[t]he liberal case for humanitarian intervention, for instance, contains both deontological elements (a principled commitment to human rights) and consequentialist ones (the requirement that interventions cause more good than harm.)”; see also *id.* at 115 (noting that “[j]ustified intervention aims to maximize human rights observance”).

<sup>78</sup> See ALLEN BUCHANAN, JUSTICE, LEGITIMACY, AND SELF-DETERMINATION: MORAL FOUNDATIONS FOR INTERNATIONAL LAW 428-29 (2004).

<sup>79</sup> See Lea Brilmayer, *Realism Revisited: The Moral Priority of Means and Ends in Anarchy*, in *Nomos XLI: Global Justice* (Ian Shapiro & Lea Brilmayer eds. 1999) (noting that in international arena “[w]hen the institutions for enforcing moral norms are imperfect (or absent), it is harder to have confidence that engaging in ‘right’ actions will have ‘good’ consequences. The consequentialist cost of obeying deontological norms is high, and therefore the allure of realism is strongest. In international anarchy, moral confidence is lacking”).

<sup>80</sup> ERIC A. HEINZE, WAGING HUMANITARIAN WAR: THE ETHICS, LAW, AND POLITICS OF HUMANITARIAN INTERVENTION 45 (2009) (“[I]t is exceedingly difficult to measure the good and bad consequences of an action in complex situations where full information is unavailable. In such circumstances, the situation to be avoided is most often a matter of speculation as opposed to calculation.”).

<sup>81</sup> See, e.g., NPR, *NATO’s Intervention in Libya Deemed a Success* (Oct. 21, 2011) (discussing widespread conviction that intervention in Libya was effective and successful).

<sup>82</sup> See, e.g., Mary Ellen O’Connell, *How to Lose a Revolution*, in *THE RESPONSIBILITY TO PROTECT: CHALLENGES AND OPPORTUNITIES IN LIGHT OF THE LIBYAN INTERVENTION* (November 2011) (arguing that intervention in Libya was never demonstrated to be necessary and the deaths of tens of thousands of people was not justified).

### 3. Difficulty of theoretical justifications

Proponents of R2P have failed to identify the particular duty that State R owes to People V and to provide an adequate foundation for it. Even theorists that posit a serious moral obligation of states to people everywhere recognize that this obligation is circumscribed by some important limitations. The moral duty to others generally arises only for very serious transgressions of human rights, including genocide, war crimes, ethnic cleansing, and crimes against humanity. In addition, it does not exist at all costs, but only for states with capacity to exercise the duty. Given these important limits, both in theory and in practice determinations about when State R must help People V will turn on a number of open-ended standards, contingent upon judgments regarding effectiveness and cost that will necessarily be highly contested.

These limitations derive in part from the nature of the asserted duty, which is a positive one. A duty to help or rescue victims in another state requires the use of diplomatic, economic, and, in serious cases, military resources and the lives of citizens—only a state with certain capacities can fulfill this obligation. Although some express skepticism about whether there is a clean line between negative and positive rights, such skepticism makes most sense in the domestic context where the state and people are intertwined in so many ways. In the international context, at least at present where there is no international authority that enforces or mandates intervention, the negative/positive distinction is more straightforward. Negative rights between State R and People V are relatively clear. The negative right is one of non-interference, non-intervention in another state. These are reciprocal rights in the international realm—the fundamental rule of non-interference. When State R leaves State V and its people alone, without harming them or discriminating against their interests, State R fulfills its negative duties.

By contrast, it is unclear whether State R has a responsibility to People V. Moreover, even if one simply posits such a duty based on the seriousness of basic human rights, the positive right to protection for one's human rights does not have any fixed content. The strongest proponents of R2P cannot say precisely what State R must do to ensure protection for People V. As Alex Bellamy has noted: "It is seldom—if ever—clear what RtoP requires in a given situation. This is partly because of the indeterminacy of the norm itself and its place relative to other norms, such as noninterference. Indeterminacy is produced by a combination of uncertainty about what is expected, disagreements about what ought to be expected, and an interest in preserving flexibility for the future."<sup>83</sup> Even assuming agreement on basic principles of responsibility, there remain difficult questions about what action best respects rights; what will serve to promote human rights and security overall; and what capability a state has to halt violations of human rights. The duty will be contingent on political, military and other circumstances and uncertain in any particular instance.

The assessment of the responsibility to protect will thus depend on the state undertaking the intervention. This suggests that whatever duty exists may be better characterized as beneficence. As President Obama said in the context of the intervention in Libya, in which American national interest was far from clear, we have a "responsibility to act." He phrased it as a responsibility, but really it was a choice to intervene in Libya, but not Syria, Sudan or Iran. The choice turned on an assessment by the government of myriad factors, including presumably predictions about what American involvement would accomplish and at what cost. This moral choice, a choice to assist, by its nature will be defined by those exercising it. In this context, states may assume a responsibility, but they do so when they believe the circumstances warrant it and also to the extent they believe necessary and appropriate in the circumstances.

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<sup>83</sup> Alex. J. Bellamy, *The Responsibility to Protect—Five Years On*, 24 ETHICS & INT'L AFFAIRS 143, 162 (2010).

### III. Overcoming neutrality

Whether and to what extent states have rights to neutrality further complicates the assertion of a “responsibility.” Much of the literature on R2P and humanitarian intervention considers whether states can overcome the principle of non-intervention spelt out in the UN Charter. This inquiry focuses on the *permissibility* of intervention under international law—whether State R can use force to halt crimes against individuals in State V. Yet as discussed above, the real crux of the responsibility between states is not one of permissibility, but instead the *obligation* of State R to use resources to halt crimes in State V. As a matter of international law then, it is surprising that there has been almost no attention paid to whether this the “responsibility” can overcome State R’s assertion of neutrality.<sup>84</sup>

Responsibility to protect depends on State R to protect People V and take actions that are costly in terms of lives and other resources, often have uncertain results, and perhaps only a tenuous connection to their national interests. In light of all this, why can states simply not stand aside? Do states have any right under international law to not be involved? Regardless of whether such a position generates our moral condemnation, do states have this right? It seems as though a consideration of the question of neutrality may be at least as important as non-intervention, if not more so. The reasons given for allowing intervention in State V—that it has given up aspects of sovereignty by failing to fulfill the most basic social contract—simply do not apply to State R as bystander.

This Part considers briefly aspects of the modern status of neutrality and examines some historical analogies to positive duties of neutral states to belligerents. Although support for neutrality has waxed and waned over the last century, it continues to survive.<sup>85</sup> The doctrine of R2P has not provided a justification for overriding a state’s assertion of neutrality rights when confronted with violations of human rights in another state.

#### A. Modern doctrine of neutrality

There has been scant scholarly attention paid to neutrality since World War II. Some scholars have argued that the United Nations made neutrality obsolete. The UN Charter restricts the use of force and resort to war<sup>86</sup> and requires that all member states provide “every assistance in any action [the United Nations] takes in accordance with the present Charter, and shall refrain from giving assistance to any state against which the United Nations is taking preventive or enforcement action.”<sup>87</sup> Moreover, the Security Council has authority to determine whether a state is unlawful aggressor.<sup>88</sup> In this circumstance, other states are bound not to lend assistance to the aggressor state and may lend assistance to any state that is a victim of an act of aggression.<sup>89</sup> Stephen Neff explains that along with

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<sup>84</sup> Detlev F. Vagts, *The Traditional Legal Concept of Neutrality in a Changing Environment*, 14 AM. U. INT’L L. REV. 83 (1998) (noting that a country acting against genocide “confronts a set of problems under international law but not that of neutrality. The discussion of the existence of a right or an obligation to take action to prevent genocidal episodes is largely carried out under a somewhat different heading and with a somewhat different angle. Books and articles about humanitarian intervention tend to discuss the issue whether intervention to prevent genocidal or similar misbehavior is permissible under the United Nations Charter.”).

<sup>85</sup> See generally Stephen C. Neff, *The rights and duties of neutrals: A general history* 193 (2000).

<sup>86</sup> See United Nations Charter, Article 2.4 (“All Members shall refrain...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”); Article 2.7 (prohibiting the United Nations from interfering “in matters which are essentially within the domestic jurisdiction of any state”). But see Article 24 (Security Council has responsibility for “maintenance of international peace and security”).

<sup>87</sup> United Nations Charter, Article 2.5.

<sup>88</sup> United Nations Charter, Article 39.

<sup>89</sup> See Article 2.5. See also San Remo Manual on International law Applicable to Armed Conflicts at Sea, para. 7, available at <http://www.icrc.org>.

the creation of the United Nations and the ideal of collective security came the resurgence of a suspicion of neutrality: “The hope was that there would no longer be gladiators and onlookers, belligerents and neutrals. In their place, there would only be aggressors, on the one hand, and victims and policemen, on the other.”<sup>90</sup>

Yet neutrality law, though perhaps modified, continues to survive in at least some form. Neff offers a number of observations for its durability, including that despite the UN Charter, it often remains difficult to identify the “right” and “wrong” side of international conflicts.<sup>91</sup> Moreover, there is “general consensus” that the traditional law of neutrality codified in the Hague Conventions of 1907 and the London Naval Protocol of 1936 remains in effect.<sup>92</sup> Despite some uncertainty about the precise contours of neutrality law, states have continued to assert neutrality in armed conflicts, even after the Security Council has acted.<sup>93</sup>

### ***B. Some thoughts on neutrality and R2P***

Scholars disagree about the applicability and content of the law of neutrality, and in practice, states assert and enforce neutrality on a case-by-case basis. Yet neither in theory nor practice have neutral states been required to provide affirmative support for belligerents or their victims. Given the staying power of the law of neutrality even after the creation of the UN, proponents of R2P should take seriously the possibility that claims of neutrality may trump any responsibility to protect. It is beyond the scope of this essay to thoroughly consider the relationship between neutrality and R2P, but even a brief consideration of neutrality in this context raises some difficult questions.

First, does the law of neutrality apply to humanitarian interventions? Traditionally, the law of neutrality applies when there is a “state of war”; however, it is unclear when there is a state of war, short of a declaration, which rarely occurs.<sup>94</sup> For example, Christopher Greenwood notes that states have not agreed to an objective definition of war and so each state must determine for itself whether a state of war exists and whether it chooses to declare itself neutral.<sup>95</sup> According to Wolff Heintschel von Heinegg, modern practice suggests that the law of neutrality applies, at least in part, to any armed conflict and “the applicability of the law of neutrality depends on functional considerations that will, in most cases, result in a differential or partial applicability of that body of law.”<sup>96</sup> The ongoing war on terror further raises questions about what constitutes a state of war and the rights and obligations of states with regard to the global war on terror.<sup>97</sup>

Second, and related to the first question, how does the law of neutrality apply to intra-state conflicts, which make up most circumstances calling for intervention? Neutrality traditionally applied to international armed conflicts, because it was triggered by a state of war. The traditional understanding of sovereignty required that states not interfere in civil wars or other disputes within

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<sup>90</sup> Stephen C. Neff, *The rights and duties of neutrals: A general history* 193 (2000).

<sup>91</sup> STEPHEN C. NEFF, *THE RIGHTS AND DUTIES OF NEUTRALS: A GENERAL HISTORY* 196 (2000).

<sup>92</sup> STEPHEN C. NEFF, *THE RIGHTS AND DUTIES OF NEUTRALS: A GENERAL HISTORY* 198-99 (2000).

<sup>93</sup> STEPHEN C. NEFF, *THE RIGHTS AND DUTIES OF NEUTRALS: A GENERAL HISTORY* 200-214 (2000) (discussing state practice since 1945 that suggest the ongoing robustness of the law of neutrality).

<sup>94</sup> Wolff Heintschel von Heinegg, ‘Benevolent’ *Third States in International Armed Conflicts: The Myth of the Irrelevance of the Law of Neutrality*, in *INTERNATIONAL LAW AND ARMED CONFLICT: EXPLORING THE FAULTLINES* 558-59 (Michael N. Schmitt & Jelena Pejic, eds. 2007).

<sup>95</sup> Christopher Greenwood, *The Concept of War in Modern International Law*, 36 INT’L & COMP. L. Q. 283, 301 (1987).

<sup>96</sup> Wolff Heintschel von Heinegg, ‘Benevolent’ *Third States in International Armed Conflicts: The Myth of the Irrelevance of the Law of Neutrality*, in *INTERNATIONAL LAW AND ARMED CONFLICT: EXPLORING THE FAULTLINES* 561 (Michael N. Schmitt & Jelena Pejic, eds. 2007).

<sup>97</sup> See, e.g., JACK L. GOLDSMITH, *POWER AND CONSTRAINT: THE ACCOUNTABLE PRESIDENCY AFTER 9/11* (2012).

another state. Yet in practice, states have often intervened in various ways in such armed conflicts. Many have argued that in such circumstances, third states can adopt a position of “benevolent” neutrality in which one party to a conflict has violated the *jus ad bellum*.<sup>98</sup> “[W]ith the modern *jus ad bellum* distinguishing at least in theory between lawful and unlawful use of force—or rather between lawful and unlawful wars—States are entitled to support the victim of aggression under the right of collective self-defense. ... If States are entitled to militarily assist a victim of aggression by actively joining in the hostilities, then a fortiori they must be entitled to distinguish between the aggressor and assist the alleged victim by means short of war.”<sup>99</sup> Given the changing nature of warfare and in light of previous uncertainty about when a state of war existed, there are ample reasons for considering that even civil conflicts trigger at least some aspects the law of neutrality.<sup>100</sup> Moreover, there might be some disconnect in assuming that domestic humanitarian crimes are a matter of international concern, but then not recognizing that such domestic conflicts trigger the laws of war, including of neutrality. At least this is something that R2P should confront as a possibility.

Third, does Security Council action eliminate state claims of neutrality? The UN Charter creates a distinction between just and unjust belligerents, particularly once the UN Security Council identifies an aggressor state. But as von Heinegg observes, often the Security Council does not make an authoritative determination and so “A UN member State is prohibited from taking a neutral stance only if the Security Council has authoritatively identified the aggressor or if it has decided on enforcement measures under Chapter VII.”<sup>101</sup> Even in the face of Security Council action, states have asserted their neutrality, for example during the Korean War and the Persian Gulf War.<sup>102</sup> In addition, states often simply fail to provide assistance. State practice suggests that neutrality remains a part of international law.

Fourth, what positive duties might a neutral state have to victims of belligerent action? Although neutrality law remains uncertain on a number of points, neither theories of neutrality nor state practice included a requirement of neutral states to assist belligerent states or victims of war within that state.<sup>103</sup> The rights of belligerents did not include positive assistance by neutral states. Historically, belligerents had certain rights including some ability to transgress the territory or requisition the

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<sup>98</sup> Wolff Heintschel von Heinegg, ‘Benevolent’ Third States in International Armed Conflicts: The Myth of the Irrelevance of the Law of Neutrality,” in *INTERNATIONAL LAW AND ARMED CONFLICT: EXPLORING THE FAULTLINES* 548 (Michael N. Schmitt & Jelena Pejic, eds. 2007).

<sup>99</sup> Wolff Heintschel von Heinegg, ‘Benevolent’ Third States in International Armed Conflicts: The Myth of the Irrelevance of the Law of Neutrality,” in *INTERNATIONAL LAW AND ARMED CONFLICT: EXPLORING THE FAULTLINES* 552 (Michael N. Schmitt & Jelena Pejic, eds. 2007).

<sup>100</sup> See generally François Bugnion, *Jus ad Bellum, Jus in Bello and Non-International Armed Conflicts*, 6 *YEARBOOK OF INT’L HUMANITARIAN LAW* 167 (2003) (discussing the application of the laws of war to civil conflicts).

<sup>101</sup> Wolff Heintschel von Heinegg, ‘Benevolent’ Third States in International Armed Conflicts: The Myth of the Irrelevance of the Law of Neutrality,” in *INTERNATIONAL LAW AND ARMED CONFLICT: EXPLORING THE FAULTLINES* 557 (Michael N. Schmitt & Jelena Pejic, eds. 2007). See also Neff, *supra* note , at 196.

<sup>102</sup> See Neff, *supra* note , at 196.

<sup>103</sup> Reviewing the theories of neutrality detailed by Stephen Neff, it appears that although the rights and duties of neutrals varied over time, they never included positive rights of assistance to belligerents. Although belligerents could make various claims against the people and property of the neutral state through force or necessity, such as transporting troops and goods over a neutral’s land or conscripting soldiers in a neutral country. See generally STEPHEN C. NEFF, *THE RIGHTS AND DUTIES OF NEUTRALS: A GENERAL HISTORY* (2000). Moreover, the right of angary allowed for some requisitioning of neutral property and foreign ships could be impressed into service of the belligerent. Although there was controversy as to whether such a right existed and whether the requisitioning government must pay compensation, the practice survived to some extent in World War I and II with a right of compensation. See generally ARTHUR NUSSBAUM, *A CONCISE HISTORY OF THE LAW OF NATIONS* 91 (1947) (noting that “In the legal doctrine each and every phase of the right was controversial: whether it was recognized by international law at all; if so, what was its legal basis (*jus necessitates*, eminent domain, sovereignty); what were its prerequisites; whether it included the right of impressing the crew into the service of the requisitioned ship; whether the requisitioning government was liable to pay compensation, and if so, to what extent.”).

property of neutral states. These rights, however, were secured by force. Neutral states were not expected to simply offer up assistance—the belligerent’s rights were a concession to force and necessity rather than any requirement of the neutral state.

There is, of course, a material difference between a belligerent taking something from a neutral and the neutral being obliged to provide assistance to the warring state. These belligerent rights do not logically extend to affirmative duties of neutrals to help victims in other states. The rights of belligerents were justified based on necessity and what the belligerents could take. These justifications do not support an obligation of humanitarian aid by the neutral state. When human rights are being violated, R2P and related doctrines posit a humanitarian necessity for assistance. Yet while People V may need assistance, practically they are not in a position to command it. Just as a weak belligerent could not require the assistance of a neutral state—People V must depend on a neutral State R to help. This reality is one of the reasons why R2P depends on a moral claim, because individuals in this circumstance cannot command assistance.

These questions highlight just some of the potential difficulties that the law of neutrality might pose for the responsibility to protect. In general, the law of neutrality *restrains* both belligerents and neutrals.<sup>104</sup> Neutrality imposes certain duties, but these are largely negative duties to refrain from certain actions. Even if neutrality does not prevent humanitarian intervention against State V, states called to assist People V can choose neutrality over intervention.<sup>105</sup>

The principles of non-intervention and neutrality both derive from state sovereignty. In this classic view, states have a sovereign right not to be interfered with in their domestic matters and they have a right to remain neutral in the disputes and armed conflicts of other states. Both concepts are supported by similar values of avoiding the expansion of armed conflict and promoting peaceful relations between states. R2P posits that states give up the right of non-intervention when they fail to respect the basic human rights of their people. Although it should be noted that even the permissibility of intervention remains controversial, the conditional view of sovereignty at least depends on the wrongdoing of the state or its inability to protect its people. Peaceful conditions are not prevailing within the state and therefore other states *may intervene* to protect human rights. The sovereignty of State V yields because it is perpetrating, tolerating, or is powerless to halt crimes against humanity.

No similar justification *requires* a neutral state to affirmatively assist the people of other states. The crimes occurring in State V do not automatically eliminate State R’s sovereignty, including assertions of neutrality—which is to say that there is no account of why State R’s sovereignty would be conditional on harms in State V. Humanitarian concerns may remove the prohibition against State R intervening in a domestic armed conflict; however, they have not arisen to an obligation for State R to intervene in such a conflict.

Whatever lack of clarity surrounds the law of neutrality, this uncertainty does not extend to whether People V can demand that State R relinquish its neutrality and provide assistance. Since the eighteenth century, neutral states have never had positive duties to assist belligerents, much less the victims of armed conflict. Therefore, even a minimal conception of neutrality supports the view that states have a choice about intervention to help victims of humanitarian crimes. R2P purports to remove the choice, yet the laws of neutrality suggests further support for the idea that the responsibility to People V will be defined by State R, rather than by the needs of People V.

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<sup>104</sup> See Christopher Greenwood, *The Concept of War in Modern International Law*, 36 INT’L & COMP. L. Q. 283, 305 (1987) (observing that the law of neutrality may set an upper limit to the rights of belligerents).

<sup>105</sup> See MICHAEL WALZER, *JUST AND UNJUST WARS* 96 (1977) (4<sup>th</sup> ed 2006) (“Now, neutrality is conventionally regarded as an optative condition, a matter of choice, not of duty.”).

#### **IV. A Choice to Protect**

Although proponents of R2P emphasize the abstract right of victims, states faced with serious violations of human rights in other states must decide whether to intervene, and if so, in what manner and to what extent. Whatever right People V have to be protected, State R will determine the obligations arising from those rights.

This Part explains why the assertion of a responsibility to protect will turn on the judgment of each state called to fulfill the responsibility to victims in another state. First, the standards for responsibility are open-ended and broad and there are no agreed mechanisms for judging what responsibility exists in any particular case. The Security Council has not articulated consistent standards and it operates on a case-by-case basis. Similarly, even when states intervene on humanitarian grounds, as in Libya, they repeatedly state that their actions do not establish precedents for future interventions. Second, even if one accepts a general moral duty to protect, this responsibility includes a number of limitations that must be assessed by states, including *inter alia*, whether the crimes are serious and widespread enough to warrant intervention; what intervention might be proportionate; whether a state has sufficient capacity for intervention; and some grounds for believing that intervention will cause more good than harm. On its own terms, R2P turns on a number of practical contingencies that call for difficult state judgments. These practical assessments eclipse the asserted moral obligation by turning obligation into a pragmatic, consequentialist calculation by states.

Assertion of responsibility has not changed the fact that ultimately intervention is a state's choice. Even states that might be disposed to humanitarian intervention or to recognize a moral duty must judge the circumstances for themselves and their judgment will invariably turn on their particular assessments of the facts on the ground.

##### ***A. Indeterminate scope of responsibility***

The responsibility to protect presents stark moral imperatives, but indeterminate standards and no reliable or consistent mechanism for defining responsibility in particular circumstances. The responsibility to protect people in other countries has been defined broadly as requiring the international community to protect populations from genocide, war crimes, ethnic cleansing, and crimes against humanity.<sup>106</sup> The 2005 World Summit Resolution commits to collective action, but only on a case-by-case basis. As Alex Bellamy has noted: “[O]nce states agree that something ought to be done, RtoP grants the international community a relatively free hand to determine what. This indeterminacy severely restricts RtoP’s compliance-pull, and hence its ability to encourage states to find consensus and commit additional resources to the protection of civilians.”<sup>107</sup> The indeterminacy of the responsibility requires states to make individual assessments in the context of any particular humanitarian crisis.

Proponents of R2P often suggest that the U.N. Security Council can articulate the specific responsibility of member states as threats to human security emerge.<sup>108</sup> Yet they also recognize, as they must based on past experience, that the Security Council is at best unreliable in these matters and at worst a failure in the face of serious human rights violations.<sup>109</sup> For example, the Security Council

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<sup>106</sup> See *supra* Part I.A.

<sup>107</sup> Alex. J. Bellamy, *The Responsibility to Protect—Five Years On*, 24 ETHICS & INT’L AFFAIRS 143, 162 (2010)

<sup>108</sup> See ICISS Report ¶ 6.14 (“It is the Security Council which should be making the hard decisions in the hard cases about overriding state sovereignty. And it is the Security Council which should be making the often even harder decisions to mobilize effective resources, including military resources, to rescue populations at risk”).

<sup>109</sup> See Sir Adam Roberts, *The United Nations and Humanitarian Intervention*, in HUMANITARIAN INTERVENTION AND INTERNATIONAL RELATIONS (Jennifer M. Walsh ed., 2004) (evaluating and critiquing the relationship between the UN and

sometimes fails to act. Over the past year the Security Council has repeatedly debated whether or not to issue a resolution concerning the events in Syria. Although over 9,000 people (at the time of this draft) have reportedly been killed by the government crackdown, for months China and Russia refused to allow a resolution, even one as anodyne as a statement condemning the attacks and calling for sanctions if the situation continues.<sup>110</sup> Only recently did the Council approve a “supervision mission” to Syria of 300 unarmed military observers. In some circumstances, the Security Council issues resolution after resolution, with little ultimate effect, as with respect to the genocide and ethnic cleansing in Sudan.

In other instances the Security Council has been unable to patrol the limits of its resolutions. In Libya, the Security Council Resolution called for a no-fly zone and protection of civilians. The NATO-led forces arguably went beyond the terms of the resolution in pursuing goals other than protection of civilians. Russia and China have cited the alleged over-extension of force in Libya to justify not taking action in Syria. In all of these instances—inaction, ineffective action, and unconstrained action—the Security Council resolutions ultimately prove incidental to the judgment and action of member states.

Moreover, it is widely acknowledged that the Security Council cannot always lead or define with regard to the responsibility to protect. Kofi Annan has maintained that responsibility to protect must be kept under the provisions of the United Nations, but he admits that “in the toughest and most visible cases, when prevention fails and peaceful means are inadequate, it will be up to the Member States to prove their mettle as well as the value of the world body.”<sup>111</sup> There is a practical component here—only states have the capacity to engage in serious humanitarian interventions. R2P depends on strong states to preserve human security within and without their borders. But then, it must be recognized that states will judge for themselves whether circumstances exist that can justify the use of force for primarily humanitarian purposes and once they use force what the extent of engagement will be. Recognition that the Security Council often cannot provide international consensus or agreement on when the responsibility to protect is triggered further highlights how R2P depends primarily on individual state judgments.

Quite by design, states have recognized some moral responsibility but prudently declined to specify the content or to bind themselves to a specific responsibility. In these circumstances, nations can recognize a standard of responsibility and yet still retain the authority to define what it means when confronted with specific human rights violations. They will interpret the responsibility depending on the context. They may do this in what others consider to be bad faith, manipulating the terms of responsibility to suit their own interests in interfering with another nation. Indeed, when nations state humanitarian reasons for intervention, they are often second-guessed and sometimes for good reason as with Russia’s intervention in Georgia.<sup>112</sup> Disputes about whether asserted humanitarian interventions are truly humanitarian demonstrates the inevitability of widespread disagreement over what is properly included in this category. These disagreements often have more to do with politics than human rights.<sup>113</sup> Even acting in good faith, however, nations will interpret the scope of the

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humanitarian intervention); ICISS Report ¶ 6.28 (discussing alternatives when the Security Council fails to act “[i]n view of the Council’s past inability or unwillingness to fulfill the role expected of it”).

<sup>110</sup> See Explanation of Vote by Ambassador Susan E. Rice, U.S. Permanent Representative to the United Nations, at a Security Council Adoption on the Situation in the Middle East (Syria), Oct. 4, 2011, available at <http://usun.state.gov/briefing/statements/2011/175027.htm>.

<sup>111</sup> Remarks of Kofi Annan, January 15, 2010, published in The Stanley Foundation, Implementing the Responsibility to Protect, available at <http://ssrn.com/abstract=1576664>.

<sup>112</sup> See, e.g., Gareth Evans, *Interview: The R2P Balance Sheet After Libya*, in THE RESPONSIBILITY TO PROTECT: CHALLENGES AND OPPORTUNITIES IN LIGHT OF THE LIBYAN INTERVENTION 37 (November 2011).

<sup>113</sup> See, e.g., George Friedman, *Immaculate Intervention: The Wars of Humanitarianism*, Stratfor, available at <http://www.stratfor.com/weekly/20110404-immaculate-intervention-wars-humanitarianism> (April 5, 2011) (“[F]or the humanitarian warrior, there are other political considerations. In the case of the French, the contrast between their



responsibility differently based on how they perceive their duty in particular circumstances. The urgency of a humanitarian responsibility may depend on politics, national values, and global priorities more than on the particular harm to victims.

### ***B. Using military force and judging its conditions***

Although the responsibility to protect may be indeterminate, it undoubtedly raises serious moral questions with respect to how we value and protect human life. The impetus for R2P clearly reflects the imperative that someone should do something about widespread atrocities. Yet even taking the responsibility at face value, there are various conditions that must be satisfied before State R can use military force. These conditions require states to exercise individual judgment to fulfill the responsibility. Consider just some of the factors included as part of the decision to intervene in the ICISS Report and elsewhere: (1) intervention is only for “extreme and exceptional cases,” sometimes described as violence that shocks the conscience; (2) intervention must be a last resort; (3) the means used must be proportional and the minimum necessary for the humanitarian objective; and (4) intervention can be justified only if it has a reasonable chance of success.

Each of these factors depends on states to make vital judgments about intervention. First, States must determine when responsibility is triggered, but what presents an extreme or exceptional case? Consider in this regard that last year Secretary of State Clinton has described the brutal crackdown in Syria as essentially “police actions which frankly have exceeded the use of force that any of us would want to see.”<sup>114</sup> In recent months, Secretary Clinton has used much stronger language condemning the escalating violence.

Second, assessing when intervention is a last resort raises difficult questions about what more can be done to halt a serious humanitarian crisis. Disputes may particularly arise when a state reasonably believes that killing of civilians is imminent. Preemptive action to protect individuals may be especially hard to determine with any certainty—and yet a state may conclude that there is sufficient evidence of imminent violence to justify intervention. President Obama used Qaddafi’s threat of imminent and widespread violence to justify America’s involvement—stressing that we had a responsibility to do something *before* more innocent people were massacred in Benghazi. Needless to say, many disagreed about the timing for action, the imminence of widespread violence, and whether other non-military steps should be taken first.

Third, what constitutes proportional means for accomplishing the purpose of an intervention? In Libya did this include toppling Qaddafi? How far should the NATO-led forces have gone? These are evidently questions about which reasonable minds differ. It may be that for an intervention to succeed substantial resources will have to be committed—low-cost diplomatic interventions may not have much impact. But then to incur higher costs, governments must be able to predict with some certainty that intervention will result in substantial benefits.<sup>115</sup> Today with the continuation of violence in Syria, what is the proportionate response? Many have argued that it should be more than 300 U.N. observers.

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absolute opposition to Iraq and their aggressive desire to intervene in Libya needs to be explained. I suspect it never will be.”).

<sup>114</sup> Lucy Madison, *Clinton: No military action in Syria for now*, CBS Face the Nation, March 27, 2011.

<sup>115</sup> Susan E. Mayer, *In Our Interest: The Responsibility to Protect*, in *RESPONSIBILITY TO PROTECT: THE GLOBAL MORAL COMPACT FOR THE 21<sup>ST</sup> CENTURY* 51 (Richard H. Cooper & Juliette Voinov Kohler, eds.) (2009) (“The payoff to any intervention will have to be proportional to the costs and risk involved. Low-impact, noncoercive, and diplomatic interventions are low cost and low risk and therefore may frequently be used to show displeasure with nations that commit atrocity crimes. But low-cost and low-risk interventions are also likely to be ineffective. Because more coercive interventions in another nation can be risky and costly, the expected payoff for such interventions would have to be high for a nation to act alone.”).

The question of proportionality also relates to the specific means employed in intervention. R2P recognizes a continuum of responses, culminating with military force. States, however, will have to determine what they are willing to risk. Perhaps it will be monetary support in the form of aid and goods. Some military responses involve little risk of human life, such as the use of drones.

Fourth, a state must act only when there is a reasonable prospect of success and intervention would not led to significant escalation and expansion of armed conflict. As discussed above, determining whether an armed intervention will promote human security or undermine it can be a difficult calculus of lives and resources.

These are just some of the important limitations on the responsibility to protect. Each one requires a state to assess myriad factors and make complicated judgments in the face of uncertainty. The Security Council may at times resolve some of these questions, determining that conditions for intervention have been triggered or outlining what it views as the proportionate response to the harms. Yet ultimately the choice to intervene and the scope of military force will depend on states making these calculations. States will assess their moral obligations based on the particular context.

Moreover, states must only intervene if they have the capacity to do so, or put another way, they can intervene without excessive costs on their own people. Although responsibility to other people is treated as a moral duty, because it is a positive obligation, nations cannot fulfill their responsibility unless they have financial and military capacity.<sup>116</sup> Poor nations, or nations with few military resources, or strained resources, will not have the capacity to help victims in other nations. Accordingly, the scope of responsibility will vary not only on how nations assess all of the factors above, but also on the extent to which they have resources to intervene.

The question of capacity is one that states must particularly determine for themselves. Consider that capacity in this context is necessarily a domestic political calculation, particularly for those wealthy states called upon to intervene. The assessment of capacity for the strongest and most capable states will be a relative one—intervene in Libya or another country; forego intervention and spend more money on social welfare programs or tax cuts. The question of capability and capacity turns on an internal judgment of each state and reinforces the idea that intervention remains a choice.

These variables also highlight the importance of securing domestic legitimacy for interventions, for ensuring that moral claims of People V are weighed alongside all the other priorities of People R. As David Luban explains, “Once we acknowledge that it will be states that intervene, however, we must acknowledge as well that the domestic political process by which a state decides whether or not to commit its children and its fisc to war is relevant to just-war theory. The decision to intervene must be politically legitimate back home as well as morally legitimate abroad.”<sup>117</sup>

Even assuming agreement on the basic principles of R2P, these principles include a number of factors that require difficult assessment by states contemplating intervention. In this context, it is hardly a surprise that states have insisted on determining the scope of responsibility to protect on a case-by-case basis. The moral duty does not get around the fact that intervention remains a choice of states. Given the limitations of R2P, states must judge whether the conditions are met and how the intervention should proceed from their own perspective. States will inevitably have to assess for themselves when and how to implement these standards.

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<sup>116</sup> See Lee Feinstein & Erica De Bruin, *Beyond Words: U.S. Policy and the Responsibility to Protect*, in *RESPONSIBILITY TO PROTECT: THE GLOBAL MORAL COMPACT FOR THE 21<sup>ST</sup> CENTURY* 194 (Richard H. Cooper & Juliette Voinov Kohler, eds.) (2009) (“[A]greeing on the principle of the responsibility to protect is not the same thing as acting on it....The lack of actual capacity—diplomatic, military, and otherwise—reinforces political barriers to effective action.”).

<sup>117</sup> Luban, *supra* note , at 85.

## **V. Public choice: domestic processes and intervention**

Despite attempts to theorize R2P, humanitarian intervention remains a thorny practical problem, and the decision about whether or not to intervene does not ultimately turn on morality, but on the politics and practicalities of the situation. Anyone who doubts this should attempt to distinguish the violence in Libya from the violence in Syria. As discussed above, the responsibility to protect involves a state's choice to assume responsibility and define its content.

This Part examines how states make decisions about protecting individuals in other states by considering the domestic processes for making the legal and policy determinations leading to intervention. In particular, I look more closely at how the United States government makes decisions about intervention, using the recent intervention in Libya as an example. I focus on the United States in part because this is the government with which I am most familiar, but also because the United States is often the nation most capable and willing to intervene to halt atrocities.

In addition, focusing on the processes in one nation provides an example for discussing disaggregation and bureaucratic conflict within a state. This is an area ripe for comparative work. Although each state will have its own bureaucratic difficulties, administration within the United States provides a starting point for considering the problem and I hope will encourage comparative work by those familiar with other state processes and administration. Conflict at the substate level and failures of coordination further support the conclusion that determinations about intervention will necessarily occur on a case-by-case basis that depends in part on how different agencies and departments of the government negotiate their assessments of responsibility in a particular situation.

### ***A. Bureaucratic disputes over international and domestic law***

As I have explained in an earlier article, executive branch agencies advising the President on matters of international law and policy often have different interests and incentives with regard to the proper course of action.<sup>118</sup> Shaped by these interests and incentives, executive agencies frequently disagree about the requirements and application of international law and policy. Although the President serves as the unitary head of the executive branch, he must contend with agencies that often have very different perspectives about the desirability and feasibility of proposed diplomatic and military involvement.

This dynamic has particular relevance for R2P, because decisions about humanitarian intervention require agencies to make a number of difficult legal and political assessments in areas of uncertainty. Agencies must assess questions of international law; but usually of greater urgency they must consider questions about domestic authority for the use of force. Liberal democracies usually have legal standards for the use of force as well as particular institutions and mechanisms for making decisions about the use of force. These standards and the mechanisms for determining them may be particularly contested in the context of humanitarian missions in which national interests may be attenuated.

The decision by the United States to intervene in Libya provides an excellent example of this dynamic at work, particularly because of the leaks and reporting that allow for at least a partial glimpse of conflicts between executive branch agencies, including the Department of Justice, Defense Department, and State Department. These agencies disagreed about domestic legal authority as well as the political consequences of intervention.<sup>119</sup>

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<sup>118</sup> Neomi Rao, *Public Choice and International Law Compliance: The Executive Branch is a They Not an It*, 96 MINN. L. REV. 194 (2011).

<sup>119</sup> At least some of the international law questions about the lawfulness of intervention were answered by the Security Council's resolution instituting a no-fly zone over Libya and calling for member states to use all necessary force to protect civilians in Libya. U.N. Security Council Resolution 1973 (2011), available at <http://www.un.org/News/Press/docs/2011/sc10200.doc.htm>. It has not been reported whether or to what extent concerns

The key questions about the legality of intervention were domestic—whether the President could intervene in Libya without congressional authorization. The Department of Justice Office of Legal Counsel drafted a careful memorandum that reasoned congressional authorization was not required in certain very limited circumstances in which the United States involvement did not involve ground troops and had limited goals short of territorial occupation or conquest.<sup>120</sup> Questions about whether President Obama should have obtained approval from Congress under the War Powers Resolution after the engagement had gone on for 60 days also presented difficulties. Here, it was reported that the Department of Justice pressed for the applicability of the Resolution, whereas the State Department determined that the actions in Libya did not constitute “hostilities” for the purposes of the War Powers Resolution.<sup>121</sup> State Department Legal Advisor Harold Koh’s legal gymnastics over this interpretation met with criticism from many fronts.<sup>122</sup> Reports of disagreement between the President’s advisors served to undermine the authority of his legal claims.

The President’s lawyers disagreed about the proper legal standards to be applied for the use of force in these circumstances. This had nothing to do with the scope of the “responsibility to protect” or international law. Rather, it had everything to do with the requirements of domestic statutes and also the constitutional authority of the President to send the military on this type of mission. Ultimately the President made a decision not to seek congressional authorization, but the choice had political costs.

In addition to legal conflicts, agencies may reasonably disagree about the politics of intervention. As explained above, the responsibility to protect requires states to make a number of determinations including whether the threats to human security are great enough; whether intervention has a reasonable chance of success; whether intervention will further human security overall; and whether the state has the capacity for intervention.<sup>123</sup> Within a bureaucracy, each agency may reach different conclusions about the answers to these difficult questions. Agencies focus on issues from their particular perspectives, in light of their missions, and with what information they have available.<sup>124</sup>

For example in the context of the Libya intervention, the State Department and the Defense Department disagreed about how to respond to the violence. Secretary of Defense Robert Gates publicly stated that intervention in Libya was not of “vital interest” to the United States.<sup>125</sup> Secretary of State Hillary Clinton supported the intervention early on when calls for a no-fly zone came from the

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about international law affected the Administration’s deliberations. A number of commentators, however, have questioned whether the NATO action violated international law. See Eric Posner, “Outside the Law,” *Foreign Policy*, October 25, 2011 (arguing that the Libya intervention occurred outside of international law as well as domestic requirements); Open Letter of Concerned Africans, Libya, Africa, and the New World Order, August 11, 2011 (arguing that UN Security Council overstepped its mandate in “outsourcing” implementation of the Libya Resolution to NATO and that NATO’s actions in Libya violated international law), available at <http://allafrica.com/stories/printable/201108120282.html>.

<sup>120</sup> Office of Legal Counsel, Authority to Use Military Force in Libya, April 1, 2011 (concluding that “[t]he President had the constitutional authority to direct the use of military force in Libya because he could reasonably determine that such use of force was in the national interest”; and “[p]rior congressional approval was not constitutionally required to use military force in the limited operations under consideration.”).

<sup>121</sup> See Charlie Savage, *Two Top Lawyers Lost to Obama in Libya Policy Debate*, N.Y. TIMES, June 17, 2011, at A1 (reporting on legal disputes between the Department of Justice and the State Department); Charlie Savage, *White House Weighs Limits of Terror Fight*, N.Y. TIMES, September 16, 2011, at A1 (detailing disputes between Defense Department counsel and State Department legal advisor).

<sup>122</sup> See, e.g., Bruce Ackerman, *Obama’s Unconstitutional War*, FOREIGN POLICY (March 24, 2011) (arguing that by unilaterally going to war against Libya, President Obama is “breaking new ground in its construction of an imperial presidency—an executive who increasingly acts independently of Congress at home and abroad”).

<sup>123</sup> See *supra* Part IV.B.

<sup>124</sup> See Neomi Rao, *Public Choice and International Law Compliance: The Executive Branch is a They Not an It*, 96 MINN. L. REV. 194 (2011).

<sup>125</sup> Robert Gates, NBC Meet the Press (March 27, 2012) (noting that Libya is not a “vital interest” for the United States, “But we clearly have interests there. It is part of the region which is a vital interest for the United States.”).

Arab world and England and France. Eventually Secretary Gates agreed that humanitarian crimes in Libya justified military action. But this “unity came only after a fraught internal debate, in which they and other senior officials had to weigh humanitarian values against national interests.”<sup>126</sup>

The internal conflict and the ensuing conflict with Congress make it difficult to articulate a precedent for intervention. In addition, government actors officially reject any precedent from the Libya intervention. For example, Secretary Clinton strongly advocated intervention in Libya, but has repeatedly stated that Libya should not serve as a precedent for Syria.<sup>127</sup> Her statements and those of other Administration officials openly express the importance of preserving flexibility to act on a case-by-case basis. They also frustrate the development of R2P as an emerging norm of customary international law.

Public choice explains why agency officials seek to retain discretion and maintain the ability to distinguish one humanitarian crisis from another. Depending on agency priorities and perspectives there may be substantial variation between agencies on questions about the need for intervention and its scope. The many variables for assessing intervention create a strong incentive for agency officials to maintain flexibility with regard to potential interventions. Agencies prefer flexibility for a number of reasons, including that it allows them to tailor their responses to particular circumstances. Moreover, agencies regularly compete for the attention of the White House and uncertainty in legal standards provides space for agencies to pursue different policy priorities. A precedent that hardened into specific criteria would remove the flexibility that reflects the long-term interest of agencies.

The insistence on flexibility by agency officials mirrors the state’s interest in flexibility. States have sought to avoid the establishment of firm criteria for intervention and even those states recognizing some collective responsibility to protect have carefully limited it to case-by-case evaluations. Similarly, the Security Council, made of states that might be called to halt humanitarian disasters, has also been careful not to solidify precedents for humanitarian intervention. The reluctance to do so may stem in part from the difficulty of articulating such standards and in part because states have persistent political disagreements and would prefer to retain the discretion to object to any particular intervention.<sup>128</sup>

These bureaucratic difficulties also make it difficult to predict whether any particular state will intervene on predominantly humanitarian grounds.<sup>129</sup> Lack of predictability also makes it difficult to overcome collective action problems of finding a state that will intervene to halt humanitarian

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<sup>126</sup> Mark Landler & Thom Shaker, *Gates and Clinton Unite to Defend Libya Intervention, and Say It May Last Awhile*, NY Times (Mar. 27, 2011).

<sup>127</sup> “Clinton: Syria not another Libya, political solution needed, available at [http://worldnews.msnbc.msn.com/\\_news/2012/01/31/10278452-clinton-syria-not-another-libya-political-solution-needed?lite](http://worldnews.msnbc.msn.com/_news/2012/01/31/10278452-clinton-syria-not-another-libya-political-solution-needed?lite) (January 31, 2012) (noting that Secretary Clinton stated that action against Syria would not result in another Libya and that this was a “false analogy”).

<sup>128</sup> Emma McClean, *The Responsibility to Protect: The Role of International Human Rights Law*, 13 J. of Conflict & Security L. 123, 137 (2008) (explaining that the Security Council is “circumspect to guard against bestowing precedential value on resolutions that pertain to human rights” and wish to retain their discretionary power in this area). *See also* Wellens, *The UN Security Council and the New Threats to the Peace: Back to the Future*, 8 J. Conflict & Security L. 15, 33 (2003) (noting that the Security Council will not prejudice “its ability to respond to situations on a case-by-case basis and to respond rapidly and flexibly, as circumstances require”).

<sup>129</sup> *See* Susan E. Mayer, *In Our Interest: The Responsibility to Protect*, in *RESPONSIBILITY TO PROTECT: THE GLOBAL MORAL COMPACT FOR THE 21<sup>ST</sup> CENTURY* 51 (Richard H. Cooper & Juliette Voinov Kohler, eds.) (2009) (“When nations are unlikely to intervene except to protect their own interests and when the decision to intervene depends on complex domestic and international political and economic considerations and the influence of nonstate actors, it will be hard to predict when any particular nation will be willing to intervene.”).

disaster.<sup>130</sup> If states and their respective agencies predict that other countries will take up the burden of intervention, they may choose to wait rather than incur the costs of immediate action.

### ***B. The Moral State***

As a doctrine and aspiration, responsibility to protect assumes that states will develop and act on moral obligation to victims in other states. Yet there is little consideration about whether states can behave as moral agents. Public choice analysis in the context of the United States demonstrates the difficulty of this assumption. The “they” of the executive branch makes it difficult for the state to behave as a moral agent. If humanitarian intervention can generate significant disputes with regard to the legal requirements of domestic law as well as political calculations about the costs and benefits of military action, identifying the scope and application of a moral responsibility to protect poses even greater difficulties. Many nations acknowledge the horrors of humanitarian crimes in the abstract or condemn such crimes as they occur. Yet when it comes to taking action against these horrors, the moral claims remain indeterminate—no one can say what is required in any humanitarian crisis. There is always a difficult balance of humanitarian claims, sovereign rights, and the casualties of armed conflict—not to mention complicated domestic and geopolitical interests. The indeterminacy of moral obligation has several consequences for humanitarian intervention.

First, only a strong chief executive will be able to recognize and act upon the duty. In the United States, this requires the President to make an appeal to the people and Congress about the importance of such intervention. The President will gauge national commitment to a particular humanitarian issue; or use his office to raise awareness of a particular conflict. It requires the President to direct his disparate agencies to work together to avert humanitarian disaster using all available tools, such as diplomacy and aid, and as a last resort, military force. For example, in the Libya context, on February 25, 2011, President Obama’s first official action was to issue an Executive Order imposing economic sanctions on Qaddafi, his government and his close associates.<sup>131</sup> The Executive Order imposed a freeze on assets of the Government of Libya in the United States. The State Department revoked visas held by these officials and others responsible for human rights violations in Libya. This was a month before the President directed the military to help establish a no-fly zone and protect civilians in Libya.

The President has to make the moral case, connecting intervention with our national interests, with our sense of moral obligation, to explain why financial and human resources should be used to halt atrocities in other countries. If the President does not take a strong interest in the intervention, it is difficult to pinpoint another location for the moral responsibility. Executive branch agencies are generally not designed to assume moral duties. Rather they have a variety of constituencies, including congressional committees, outside groups, and the White House. Agencies must act in a way that satisfies these constituencies. Starting from the top, if the White House has little interest in a humanitarian crisis, agencies may not wish to use their political capital to push the issue. Agencies have limited political and financial resources to devote to their projects and may not want to devote those resources to moral causes without widespread support.

Agencies have different goals and missions and they interpret legal requirements and political consequences of intervention in light of their particular interests. Because of conflicting assessments, agencies often find themselves in competition with other agencies for control over foreign

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<sup>130</sup> See Susan E. Mayer, *In Our Interest: The Responsibility to Protect*, in *RESPONSIBILITY TO PROTECT: THE GLOBAL MORAL COMPACT FOR THE 21<sup>ST</sup> CENTURY* 52-53 (Richard H. Cooper & Juliette Voinov Kohler, eds.) (2009); Luban, *supra* note , at 90 (noting that when other states fail to do their duty, this “creates a perverse incentive for nations to engage in game of humanitarian chicken where each waits for another to take up the burden of intervention”).

<sup>131</sup> See Executive Order No. 13566, *Blocking Property and Prohibiting Certain Transactions Related to Libya*, 76 Fed. Reg. 11315 (February 25, 2011).

policymaking.<sup>132</sup> The White House often finds it difficult to coordinate such differences and indeed, it may be the case that such differences benefit the President in some respects.<sup>133</sup> Yet persistent differences of opinion and lack of consistent coordination make it especially difficult to envision agencies adopting a consistent moral position on humanitarian intervention. Rather, agencies will tailor their advice to suit the particular constellation of interests involved in any given circumstance. Even the State Department, which often speaks of international law in terms of “conscience” and supports development of international human rights, has not committed to any clear standards of responsibility to protect people in other states and regularly reaffirms that intervention in one place does not become a requirement for intervention in others.

Another focus of moral obligation might be Congress. Could Congress lead on humanitarian intervention if the President fails to do so? Congress cannot order in the troops, but it can indicate its support for military action through the authorization of force and appropriations for the use of force. Members and committees can exhort the President to action or create pressure through actions short of the use of force—imposing sanctions, increasing humanitarian aid, etc. Yet 535 Members of Congress lack the institutional capacity for easily directing the nation’s moral action, and of course, they cannot call out the troops (or drones). Without Presidential leadership legislative exhortations are likely to be of limited effect. Moreover, getting a majority of both houses of Congress to support humanitarian intervention through legislative action often proves difficult. This is in part because Congress would prefer the President to make and be responsible for decisions to use military force. President Obama did not seek approval for the Libya intervention in part because he was informed that Congress would not authorize the intervention.

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Serious humanitarian crimes continue to occur in places like Sudan and Syria. Responsibility to protect suggests when a country terrorizes its own citizens and even when a country is powerless to prevent mass killings within its borders that other states have a duty to respond. This Essay has sought to show that although the victims of these crimes have an urgent need for assistance, the need does not define the assistance. Instead states contemplating intervention will define the scope and extent of the protection provided. This is not to underestimate the seriousness of the harm or the desirability of intervention in certain circumstances, only that nothing in international law or R2P has established a responsibility of states to assist.

An honest assessment of the positive claims of the victims of humanitarian crimes suggests that the decision of whether to intervene, how, and with what force, will remain a choice of states. The reluctance of states to commit to intervention in other states and the reluctance to treat interventions as precedents for other situations has emphasized the unique circumstances of each humanitarian crisis. The unique circumstances, however, rarely turn on an assessment of the harm to individuals, but instead depend on domestic and international politics, feasibility, and will. Case-by-case determination suggests that whatever moral obligation may exist is a highly contingent one, driven not only (or even primarily) by the harms to persons, but rather by the particular interests, politics, and capabilities of states called to intervene. Abstract obligations of R2P have not changed these realities. Responsibility for human security continues to depend, in some places perilously, on states protecting their own people. Proponents of responsibility to protect between states need to find a firmer foundation for this wider responsibility.

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<sup>132</sup> See Neomi Rao, *Public Choice and International Law Compliance: The Executive Branch is a They Not an It*, 96 MINN. L. REV. 194 (2011).

<sup>133</sup> See Neomi Rao, *Public Choice and International Law Compliance: The Executive Branch is a They Not an It*, 96 MINN. L. REV. 194 (2011).

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