THE CHOICE TO PROTECT: RETHINKING RESPONSIBILITY FOR HUMANITARIAN INTERVENTION

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HUMANITARIAN INTERVENTION

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Against the background of President Barack Obama’s invocation of the responsibility to protect (R2P) in Libya and the failure of the international community to assume responsibility for humanitarian crimes in countries such as Syria, this Article reexamines the R2P doctrine from the perspective of states called to intervene. The approach here is novel and fills a gap in the existing literature about R2P, which has emphasized the harm to victims and abstract principles of international responsibility. This Article demonstrates that the responsibility of one state to the people of another state posits a new international duty and that justifications offered for this duty have proven insufficient. Moreover, R2P has not changed the reality that any responsibility 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. Whatever the moral obligation of states, they will necessarily assess responsibility from their own perspective. In addition, domestic bureaucratic competition and conflict demonstrate how the choice about whether to intervene includes many factors unrelated to humanitarian concerns. All of this suggests that a commitment to human security through intervention requires focusing more closely on the states called to intervene.

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“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.”¹

Faced with an impending humanitarian crisis in Libya, President Barack Obama said that the United States had a “responsibility to act” to prevent the slaughter of civilians by Muammar Gaddafi’s forces.² The call for responsibility in Libya—Gaddafi’s failed responsibility to his own people and the international responsibility of other states to respond to humanitarian crimes—stands in sharp contrast to the failure of the international community to take responsibility for humanitarian crimes in other countries, such as Syria. This selective invocation of the responsibility to protect (R2P) makes it timely for a critical assessment of the doctrine. In particular, this Article reexamines R2P from the perspective of the intervening state, as opposed to the failing state and its victimized people. Assertion of responsibility has not changed the fact that intervention is ultimately a state’s choice. Even states that might be disposed to humanitarian intervention will judge the circumstances for themselves and their judgment will turn on their particular assessment of facts on the ground. Recognizing that states invariably make a choice to protect shifts the focus back to the political grounds for intervention and ultimately provides a more realistic foundation for promoting human security.

When People V (victims of human rights violations) request help from State R (a responsible state), they make a positive claim for assistance and rescue from the failures of State V (their own government).³ Nearly all of the literature on R2P emphasizes the

². “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. But when our interests and values are at stake, we have a responsibility to act. That’s what happened in Libya over the course of these last six weeks.” President Barack Obama, Remarks by the President in Address to the Nation on Libya (Mar. 28, 2011), available at http://www.whitehouse.gov/the-press-office/2011/03/28/remarks-president-address-nation-libya.
³. For ease of reference, throughout this Article, I will refer to the victims of human rights violations as People V living in State V, which is either violating
human rights of People V, the sovereign rights of State V, and the legal rights of State R to intervene in State V. Many have sought 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.

This Article rethinks the meaning of responsibility for states called to intervene by explaining the novelty of a third-party duty to help people in other states and the insufficiency of justifications offered for this new responsibility. Despite the assertion of moral responsibility, intervention remains a choice of states. Although I highlight the insufficiency of R2P, I want to emphasize that I do not


question the moral seriousness of genocide, ethnic cleansing, and other crimes addressed by R2P. Nor do I question the need or desirability for states sometimes to intervene for humanitarian purposes. Rather, if People V are threatened with or are suffering from serious harm, this requires a realistic consideration of how to promote security in State V. 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. Recognition of this basic political reality—that states choose to intervene—will help direct efforts at the level of domestic politics, where states make the choice to commit resources to promote human security.

This Article fills a gap in the existing literature on R2P by providing a critical consideration of the nature and scope of the responsibility of states to people outside their borders. Part I begins by briefly explaining the history and basic principles behind R2P. The doctrine states 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 and individual states have a responsibility to protect people from serious human rights violations.

Part II evaluates the two distinct responsibilities in R2P in order to highlight the difficulty of a state's responsibility for people in another state. R2P first includes the responsibility of a state for its own people. This reflects a traditional understanding of the social contract—State V has a responsibility to provide a certain minimum level of security for People V. Second, R2P posits an unprecedented responsibility of all states to assist victims of humanitarian crimes in other states. Although proponents of R2P often elide these responsibilities, the responsibility of State R for People V raises a novel obligation. I explore some of the justifications offered for this new responsibility and explain why they ultimately fail to establish a responsibility that goes beyond the political choices made by states contemplating intervention. Some scholars have posited a moral duty of states; however, they have not provided a convincing account of why State R must protect People V.7 Others have suggested consequentialist justifications for responsibility based on the promotion of human security.8 While this approach is more honest about trade-offs, it raises difficult questions about how a state

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7. See infra notes 70–76 and accompanying text.
8. See infra Part II.B.2.d.
determines what best promotes human security and the weight it gives to domestic interests. Moreover, in this context, People V make a positive claim for assistance—in the form of aid, military support, and possibly military lives—from State R. Yet even the strongest proponents of R2P cannot say precisely what State R must do to ensure that People V’s rights are respected. The asserted principle that State R has a responsibility to protect People V remains contingent on a number of factors unrelated to the seriousness of the human rights violations.

Given the affirmative nature of State R’s purported responsibility, 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 U.N. Charter for humanitarian purposes. There is virtually no attention, however, to the sovereign rights of State R, including whether State R can assert neutrality in this context and whether the purported responsibility overcomes neutrality rights. More attention should be given to neutrality because it is grounded in the same principles as non-intervention, including state sovereignty and the international interest in avoiding escalation of armed conflict. The rationale for permitting intervention and overriding the sovereign rights of State V—its culpability for human rights violations or its ineffectiveness in the face of such violations—does not support requiring intervention by a state that has committed no wrongdoing. Neutrality may remain a viable and legal option for states facing a request to intervene. Therefore, supporters of R2P need to explain how a positive obligation to intervene can be imposed on a neutral state. Although a comprehensive consideration of neutrality and R2P is outside the scope of this Article, the persistence of 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 R2P ultimately will be defined by the state contemplating intervention. Even on its own terms, the standards of responsibility are open-ended, and there are no agreed institutions for judging what responsibility exists in any circumstance. The U.N. Security Council has failed to establish a consistent benchmark for responsibility that can provide a principled distinction to explain, for example, why intervention is permitted 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. For example, states must consider 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, states will necessarily assess these factors from their own perspective.

Finally, Part V analyzes the domestic processes for making the legal and policy determinations leading to intervention. I focus on the 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, I argue that executive branch agencies assessing whether to respond to humanitarian atrocities will often reach different conclusions about the requirements for intervention under domestic law. Moreover, bureaucratic competition and coordination failures 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. Rigid criteria for intervention would hamper flexibility and therefore be inimical to the long-term interests of government actors. Thus, it is unsurprising that flexibility is preserved by agencies at the domestic level and consistently reaffirmed by states at the international level. Although administrative processes and legal requirements will differ from state to state, most governments will face difficulties with bureaucratic coordination, an issue that needs further research and attention from those who would like to entrench a responsibility to protect.

Without a central authority to define and enforce R2P, the doctrine presents a moral call to action with regard to human security but does nothing to change the essentially political nature of the sovereign choice that states must make about intervention. Although R2P aspires to focus on harms to persons, fulfilling the responsibility requires states to make judgments that will invariably be filtered

through domestic interests and institutions. This reality suggests that proponents of a responsibility to protect should think more carefully about the domestic and international politics that might lead states to choose intervention for primarily humanitarian purposes.

I. THE RESPONSIBILITY TO PROTECT

This part briefly explains the development of R2P, both the aspirational doctrine and the more practical principles adopted by states. In the past few decades, “[e]xternal military intervention for human protection purposes has been controversial both when it happened—as in Somalia, Bosnia, and Kosovo—and when it failed to happen, as in Rwanda.”\(^\text{10}\) In response to these challenges, the international community 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 states 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 by the International Commission on Intervention and State Sovereignty (ICISS), Responsibility to Protect, which details the principles and application of R2P.\(^\text{11}\) Several years later, former U.N. Secretary-General Kofi Annan commissioned a High-level Panel on Threats, Challenges and Change to assess current threats to international peace and security.\(^\text{12}\) The High-level Panel produced a report in 2004 articulating the shared responsibility for a secure world.\(^\text{13}\) These reports together set out the basic principles and justifications for R2P.

The real-world adoption of R2P by states, however, has been more modest. At the U.N. World Summit in October 2005, the U.N. General Assembly adopted a resolution that included several paragraphs on the responsibility to protect and set forth what have

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11. Id.
since been categorized as three pillars of R2P. The first pillar of the resolution requires states to bear the primary responsibility for protecting people 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.” The second and third pillars state the obligations of the international community. Under the second pillar, “[t]he international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means . . . to help to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity.” The third pillar states:

In this context, we are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity.

The first pillar of the Resolution makes clear that states have a firm, categorical responsibility to protect their own people. Responsibility for other people, however, in the third pillar, consists only of a collective, contingent, and “case-by-case” responsibility to take military action for victims in other states. The 2005 World Summit Outcome demonstrates international commitment to considerably less than what the ICISS report posited. Yet the

15. Id. ¶ 138.
16. Id. ¶ 139.
17. Id.
18. “[T]he main reason for [R2P]’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 [R2P] demands in any particular case.” Alex J. Bellamy, Global Politics and the Responsibility to Protect: From Words to Deeds 92 (2011).
principles in the ICISS report remain a frequent point of reference for the more aspirational and expansive doctrine of R2P.

R2P includes two distinct responsibilities. The first responsibility requires 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.19

The second responsibility extends a state’s obligation for human security potentially everywhere—that is, states must work to prevent humanitarian crimes in others states and intervene when necessary to prevent such crimes. In this respect, the ICISS report turns on cosmopolitan concerns20 and highlights the breadth of the aspiration of R2P to protect human security. For example, the report explains that issues of sovereignty and intervention affect not just states, but also individual human beings:

‘[R]esponsibility 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


20. The ICISS 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 181–82 (1979) (describing a cosmopolitan conception of international morality as one that “is concerned with the moral relations of members of universal community in which state boundaries have a merely derivative significance”).
legitimate concerns of ordinary people regarding security in their daily lives.21

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.”22

R2P posits a new conception of sovereignty, or at least a new emphasis. The ICISS report explains that when a state signs the U.N. Charter, it accepts certain responsibilities, including, most importantly, a conception of “sovereignty as responsibility in both internal functions and external duties.”23 The report explains that states must meet certain standards of conduct with respect to the protection of human rights.24 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.25 These sources serve “as the concrete point of reference against which to judge state conduct.”26 State sovereignty remains important, but the international community may judge and evaluate this sovereignty in light of modern human rights norms. This highlights the two responsibilities at issue—first, State V must ensure a minimum level of security for People V; and second, if State V fails in this responsibility, each State R must protect People V, by intervention if necessary.

22. Id. ¶ 2.22, at 15, ¶ 2.28, at 16 (“[I]ssues of sovereignty and intervention are not just matters affecting the rights or prerogatives of states.”). The 2004 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 “[e]conomic and social threats, including poverty, infectious disease and environmental degradation.” High-level Panel on Threats, Challenges & Change, supra note 12, at 2. 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. Id. at 25.
25. See id. ¶¶ 2.16–.17, at 14.
26. Id. ¶ 2.18, at 14.
II. THE RESPONSIBLE SOVEREIGN

R2P re-conceptualizes “sovereignty as responsibility,” but often fails to separate the two responsibilities at issue. This part distinguishes between the responsibilities of State V and State R for People V. In the existing 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 State V for People V reflects well-established understandings about the nation state; it is a familiar aspect of the basic relationship between the government and the governed that the state must protect its people. The ICISS report noted that this first responsibility was not controversial, and with respect to the World Summit Outcome, states agreed to this responsibility without qualification.28

By contrast, the idea of a state’s responsibility for people in other states presents a novel and very different type of obligation—one with global reach but ultimately a very uncertain scope. Why does State R have a responsibility to People V? To the extent that 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 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

R2P 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

27. Id. ¶ 2.14, at 13.
28. See id. ¶ 8.2, at 69 (“We found broad willingness to accept the idea that the responsibility to protect [a state’s] people from killing and other grave harm was the most basic and fundamental of all the responsibilities that sovereignty imposes.”); 2005 World Summit Outcome, G.A. Res. 60/1, supra note 14, ¶ 9; see also infra note 31 and accompanying text.
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...

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. Even the most minimal social contract 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. Although state practice may belie these principles, states have widely accepted them as opinio juris. Indeed, no state contested the basic responsibility to its own people in the 2005 World Summit.

Various human rights treaties and instruments also reflect this internal responsibility. For example, the U.N. Convention on the Prevention and Punishment of the Crime of Genocide (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. The Universal

30. See generally John Locke, Second Treatise of Government §§ 123–24 (1690) (observing that men will quit the freedom of nature “to join in society with others... for the mutual preservation of their lives, liberties and... property” and that “[t]he great and chief end, therefore, of men’s uniting into commonwealths, and putting themselves under government, is the preservation of their property”).
31. See 2005 World Summit Outcome, G.A. Res. 60/1, supra note 14, ¶ 9. “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. [R2P]’s first pillar is therefore best understood as a reaffirmation and codification of already existing norms.” Alex J. Bellamy, The Responsibility to Protect—Five Years On, 24.2 Ethics & Int’l Aff. 143, 160 (2010).
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Declaration of Human Rights similarly states that “[e]veryone has the right to life, liberty and security of person.”

R2P goes further than these existing international instruments by attempting to create international recognition and accountability for certain minimum aspects of the bargain between a people and its government. R2P, in part, posits that domestic failures to protect human security may erode the recognition of a state’s sovereignty by the international community. The ICISS report explains why state conduct should be judged with regard to its adherence to human rights. R2P incorporates judgment by the international community. The 2005 World Summit Outcome, 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:

The 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.

Similarly, Anne-Marie Slaughter notes:

Membership in the United Nations is no longer a validation of sovereign status and a shield against unwanted meddling in a state’s domestic jurisdiction.

note 4, at 11, 19 (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” and that “[s]tates routinely ignore it in fact”).


34. Int’l Comm’n on Intervention & State Sovereignty, supra note 10, ¶ 2.15, at 13, ¶ 3.2, at 19 (explaining that sovereignty now means responsibility to citizens rather than control and stating that protecting human rights is key to preventing conflict).

35. High-level Panel on Threats, Challenges & Change, supra note 12, at 34.

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.37 Slaughter also posits that R2P creates a sort of “conditional sovereignty,” by which sovereignty is recognized only through compliance with U.N. norms.38 Membership in the United Nations 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.39 Conditional sovereignty opens states up to the judgment of other states and the international community. 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. By reinforcing the responsibility of states to their own people, conditional sovereignty at least permits intervention to stop mass atrocities.40 Whether such a conception of sovereignty will ultimately serve to bolster or to weaken human rights remains an open question outside of the scope of this Article.

The responsibility of a state toward its own citizens is part of a strong historical and philosophical tradition. Although this has customarily been a domestic matter between people and their state, R2P aims to provide international accountability for these traditional state responsibilities. R2P reiterates that a state’s legitimacy and 37. Anne-Marie Slaughter, Security, Solidarity, and Sovereignty: The Grand Themes of UN Reform, 99 Am. J. Int’l L. 619, 620 (2005).
38. Id. at 628.
40. “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 rational[e] for inaction, namely that intervention to prevent mass atrocities constitutes illegal interference in the sovereign affairs of a UN member.” 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 21st Century 179, 188 (Richard H. Cooper & Juliette Voinov Kohler eds., 2009).
recognition by the international community depend on preserving a very minimum degree of safety and security for its citizens and, frankly, not much more. 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, a responsibility to protect victims in other states posits an entirely new duty. This international, third-party responsibility is not about legal permission to intervene but emphatically about the responsibility and obligation to intervene in certain circumstances. This view rests on the assumption that individuals have basic rights to life and freedom from grievous harms and that such rights create an international responsibility to protect those rights.

Yet the responsibility of a state that stands by—causing no harm, but offering no help—is different from the responsibility that exists in the domestic context. State R has engaged in no wrongdoing to its own people nor has it harmed the people of another state. State R nonetheless has a duty—perhaps moral or natural—to help People V when their basic security is threatened. This new responsibility

41. Fernando Tesón 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. Tesón, Humanitarian Intervention: An Inquiry into Law and Morality 16 (1997). The core of the doctrine, however, repeatedly emphasizes its limitation to certain egregious or shocking crimes against humanity.

42. Allen Buchanan, for example, explains that although the ICISS report “stops short of declaring explicitly that there is an obligation to protect, it . . . 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.” Allen Buchanan, Justice, Legitimacy, and Self-Determination: Moral Foundations for International Law 430 (2004). Louise Arbour also argues: “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 . . . .” Louise Arbour, The Responsibility to Protect as a Duty of Care in International Law and Practice, 34 Rev. Int’l Stud. 445, 449–50 (2008) (explaining that potential interveners “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”).
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 demand for 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 demanding the resources and lives of citizens of the intervening state, what creates such an obligation? I evaluate some of the 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,” the development of a responsibility implicitly 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 to protection differ depending on whether they are 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.

A responsibility to protect between a state and its people includes foremost the negative right to be left alone, the right to enjoy one’s life without interference or harm from the state. The social contract, however, includes more than this because, within a political society, individuals have some claim to be kept safe—for the state to ensure certain conditions of safety to one’s person and property. This is a positive claim for protection from harm by private actors, and

43. See Gareth Evans, End of the Argument: How We Won the Debate Over Stopping Genocide, Foreign Pol’y (Nov. 28, 2011), http://www.foreignpolicy.com/articles/2011/11/28/gareth_evans_end_of_the_argument (explaining that the R2P concept caught on so quickly in part because the ICISS “used language that was inherently less confrontational—emphasizing no one’s ‘right’ but everyone’s ‘responsibility’ . . .”).

44. 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, supra note 4, at 87, 89 (evaluating whether international law is evolving in the direction of recognizing a right of humanitarian intervention).
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, law enforcement, incarceration, and rehabilitation. People will work through their political institutions to strike a balance between 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. Even when the government may have a special relationship with an individual, there is no right to state protection absent the clearest indication that the government has assumed such an obligation. Some countries list rights to personal safety and security as a constitutional right, but beyond ordinary criminal processes, protections must be provided through political institutions and 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 individuals and their government.

By contrast, in the international realm, People V's claim for protection from foreign states is also a positive one, but without the

45. See DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189, 191 (1989) (holding that the failure to protect a child from his abusive father even after the child was placed within the social services system did not violate the Due Process Clause of the Fourteenth Amendment).

46. See Castle Rock v. Gonzales, 545 U.S. 748, 764-66 (2005) (holding that a beneficiary of a restraining order was not entitled to police enforcement of the order because despite a statute mandating enforcement, police retained enforcement discretion and therefore the restraining order did not create a property interest within the meaning of the Due Process Clause of the Fourteenth Amendment).

47. See, e.g., S. Afr. Const., 1996, § 12.1(c) (providing that “[e]veryone has the right to freedom and security of the person, which includes the right . . . to be free from all forms of violence from either public or private sources”).
political process for invoking such a demand. 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. This is not a political demand within a political society.

A better analogy may be to Good Samaritan laws which impose some duty to rescue on private individuals. These duties, however, are cabined by various requirements that assistance be reasonable under the circumstances and that a person need not endanger his own safety to provide assistance. Good Samaritan laws are always conditioned on the requirement that rescue be undertaken only if it can be done without imperiling the rescuer. The qualifications of the duty signify that, in practice, the scope of the duty will depend on the judgment of the would-be rescuer as to whether rescue can be undertaken safely.

Similarly, in the context of humanitarian intervention, the responsibility 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 costs. As José Alvarez notes, humanitarian intervention, much like Good Samaritan laws, provides an intervening state an excuse against “a charge of unlawful action.” The R2P doctrine, however, requires states to be responsible

48. Of course, 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. R2P does away with the relevant negative rights to be left alone. However, there may be some other very basic negative rights at issue. For example, State R might have an obligation to refrain from taking actions that might make the situation in State V worse.


50. 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 79, 94 (De Grieff & Cronin eds., 2002) (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 they should feel ashamed not to intervene).

for humanitarian crimes in other states, a move that will likely “prove to be a step too far internationally (if not nationally).”

Moreover, unlike the relationship between People V and State V in the domestic context, People V have no special political relationship to State R. People V are not part of State R's political society, and the leaders of State R are not politically accountable to People V. State R’s politicians face their own political pressures—domestic and international. The claims of People V undoubtedly present a moral demand to assist individuals in need. 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 People V’s interests are not directly represented. The decision to protect does not involve a government allocating resources for the benefit of its people. Instead, the decision requires a government choosing to allocate resources for the benefit of people in another state. State R will inevitably balance its responsibility to protect others against domestic needs.

The fact that People V lack representation in State R and are not part of the political community of State R does not mean 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). Rather, the lack of representation and relationship to State R highlights that, whatever right to protection People V may have, the scope of this protection depends on State R's political determinations about resources and appropriate action given all the circumstances. State R will fulfill any responsibility through its 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. These rights go beyond the negative

52. Id. at 283.
53. See Luban, supra note 50, at 99 (arguing that even if states do not have an obligation to prevent violations of human rights in other states, they may have moral reasons for helping). “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.” Id.
right to be free from violence. When People V ask the international community or any particular State R for assistance, they ask for the fulfillment of a positive right 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 its own people is grounded in traditional understandings of the social contract and the relationship between State V and People V. The other responsibility under the R2P doctrine, however, posits an unprecedented third-party responsibility of State R to People V. This part explains how proponents of R2P have failed to identify a legal or moral duty of states to protect people in other states.

a. No Legal Obligation to Intervene

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

The 2005 World Summit Outcome recognizes some general contours of R2P, including 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 that states were only prepared to take “collective action” through the U.N. Security Council and on “a case-by-case basis.” This hardly suggests recognition or agreement among states to assume responsibility for people in other countries.

56. 2005 World Summit Outcome, G.A. Res. 60/1, supra note 14, ¶ 138.
57. Id. ¶ 139.
Some have suggested that the Genocide Convention might provide support for R2P. The International Court of Justice’s decision in the Bosnia genocide case recognized state responsibility for genocide and held that states have a duty not to perpetrate genocide. 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. Most commentators, however, consider this an expansive or aspirational reading of the Genocide Convention not supported by state practice.

Moreover, R2P has not been recognized by states as a norm of customary international law, which is defined as a “customary practice of states followed by them from a sense of legal obligation.” For example, even though the United States has endorsed the concept of R2P, it has stressed that the responsibility is not a legal obligation but rather a moral one, different in nature from the duty of a state to its own citizens. Similarly, although Canada strongly endorses R2P,

59. See, e.g., Arbour, supra note 42, at 451 (arguing that the International Court of Justice’s Bosnia genocide 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”); 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).
60. See, e.g., Yuval Shany, The Road to the Genocide Convention and Beyond, in The UN Genocide Convention: A Commentary 3, 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 has also noted 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.” Shue, supra note 32, at 20.
62. During the 2005 World Summit negotiations, the United States wanted to “ensure 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.” Feinstein & De Bruin, supra note 40, at 186.
its government also emphasizes that the affected state has the first responsibility, followed by the international community’s moral obligation. The United Kingdom and other states have noted that responsibility to victims must be fulfilled on a case-by-case basis.

Other powerful states such as China, India, and Russia have not endorsed the concept of R2P and have expressed doubts about its meaning and application.

Most commentators have rightly concluded that there is no customary international norm regarding a third-party responsibility to protect. Moreover, R2P has not addressed the difficulties of treating the “responsibility” as a legal one for states or the United Nations. Although there are examples of interventions and even subsequent approval or endorsement of such interventions, responding to humanitarian crimes is far from consistent state practice. Historically, there are far more examples of states committing atrocities than of states intervening to protect the victims of those crimes. As Michael Walzer has observed, “murder 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.” Existing state practice and examples of interventions 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

64. See id.
65. See id.
66. See, e.g., Bellamy, supra note 31, at 161 ("[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 World Summit Outcome] is inconsistent at best."). But see Sari Bernstein, The Responsibility to Protect After Libya: Humanitarian Prevention as Customary International Law, 38 Brooklyn J. of Int’l L. 305 (2012) (arguing that prevention of humanitarian crimes "stands alone as customary international law ("CIL"), meaning that nations already operate under an obligation to prevent mass atrocities independent of the R2P doctrine").
67. See Alvarez, supra note 52, at 282–83 (discussing some of the doctrinal difficulties of imposing “legal responsibility” on states or the United Nations and observing that “the concept of R2P cannot plausibly short-circuit the difficult political negotiations that would be necessary to overcome such difficulties").
recognize that it has not yet reached this status. Whatever responsibility may exist is generally not framed as a legal duty to others.

b. Strict Moral Duty

In the absence of a legal duty, 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 Tesón 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. In the broadest terms, “[b]ecause human rights are rights held by individuals by virtue of their personhood, they are independent of history, culture, or national borders.” Tesón 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.

Similarly, Carla Bagnoli argues that states have a perfect duty to help victims in other states. 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.” Bagnoli argues instead that basic human rights

69. “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 . . . .” Int’l Comm’n on Intervention & State Sovereignty, supra note 10, ¶ 2.24, at 15. “[I]t may eventually be that a new rule of customary international law to this effect comes to be recognized, but . . . it would be quite premature to make any claim about the existence now of such a rule.” Id. ¶ 6.17, at 50.


71. Id. at 94.

72. See Tesón, supra note 41, at 16 (“[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.”).

73. Carla Bagnoli, Humanitarian Intervention as a Perfect Duty: A Kantian Argument, in Humanitarian Intervention, supra note 6, at 117, 118.

74. Id.
belong to all persons and that these rights require certain duties of respect and mutual recognition. 75 “It follows . . . 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.” 76

These arguments advanced by Bagnoli and Tesón 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 the 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. These human rights, however, do not necessarily give rise to an obligation on behalf of foreign states to intervene to ensure safety and security. 77

Even if states are the instruments of individuals, as Tesón argues, 78 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 (the people of State R) but that logic does not make State R an instrument of people in need everywhere. Tesón’s argument may explain why intervention in State V is permissible, as State V has failed to protect its own people. Nevertheless, 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 duties will be implemented. As Bagnoli admits, “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

75. Id. at 126.
76. Id. at 130.
77. 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.” Luban, supra note 50, at 93.
78. See supra note 72 and accompanying text.
decided by reconsidering the grounds for proper authority.\textsuperscript{79} Of course, arguably 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 creates a responsibility since “permissibility alone does not necessarily generate an obligation.”\textsuperscript{80} He argues that there is a duty to protect that arises from the “moral seriousness of humanitarian intervention.”\textsuperscript{81} He observes, however, that it does not belong to any particular state agent: “Someone ought to intervene, but no specific state in the society of states is morally bound to do so.”\textsuperscript{82}

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.”\textsuperscript{83} 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. It remains unclear, however, why having an imperfect duty creates an obligation to perfect that duty either through individual state action or institutional cooperation. Tan acknowledges that “[i]t is a strategic problem: there is no identifiable agent who can be called upon to act.”\textsuperscript{84}

\textsuperscript{79} Bagnoli, supra note 73, at 131.
\textsuperscript{80} Kok-Chor Tan, The Duty to Protect, in Humanitarian Intervention, supra note 6, at 84, 89.
\textsuperscript{81} Id. at 94.
\textsuperscript{82} Id. at 95.
\textsuperscript{83} Id. at 116. “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.” Id. at 111.
\textsuperscript{84} Id. at 102.
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.” 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.

Regardless of how appealing this moral vision may be, Buchanan does not explain the extension from the negative obligations to leave people alone to the positive obligations to assist them. Although Buchanan focuses on the importance of individuals, the 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). 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: “[T]hen 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.”

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85. Buchanan, supra note 54, at 80–81.
86. Id. at 81 (“[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.
87. Emer de Vattel has observed that the main duty of a nation is to leave other nations alone and that “[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.” Emer de Vattel, The Law of Nations: Or Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns 142 (Joseph Chitty & Edward D. Ingraham eds., 1853).
88. Buchanan, supra note 54, at 84. “[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.” Id. at 85–86 (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”).
Henry Shue makes a similar point that negative rights to be free from harm include certain protections that involve positive duties, and that such duties can extend even to people in other states.\textsuperscript{89}

Even accepting the reasoning suggested by Buchanan that positive and negative rights exist on a continuum, there is still a sizable gap between requiring State R to leave State V 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 because it is unenforceable and the duty to help exists only if a state can assist “without excessive costs.”\textsuperscript{90} Far more than abstract duties, these practical concessions provide the real contours of a state’s obligation to others by acknowledging the contingent, qualified nature of such duties.

Although Tan and Buchanan aim to find a theoretical source for R2P, they recognize limits on the duty and the difficulty of attaching the duty to a particular state. These limitations, however, call into question whether the obligation to assist others is truly a duty, as opposed to a call for beneficence.

d. Consequentialist Duty

While the scholarly literature has tended to focus on the importance of rights and duties in the context of R2P, the United Nations and groups advocating for R2P have been more consequentialist, perhaps in recognition of the reality of how such a responsibility might work in practice. 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 the anticipated benefits of intervention.\textsuperscript{91} Similarly, the 2005 World Summit Outcome’s first pillar recognizes a state’s unqualified responsibility for its people.\textsuperscript{92} Its third pillar, on the other hand, affirms only a collective

\textsuperscript{89.} See Shue, supra note 32, at 27 (arguing that positive duties may be perceived as 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”).

\textsuperscript{90.} Buchanan, supra note 54, at 85, 87, 428–29 (recognizing that 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”).

\textsuperscript{91.} See Int’l Comm’n on Intervention & State Sovereignty, supra note 10, at xi–xiii.

\textsuperscript{92.} 2005 World Summit Outcome, G.A. Res. 60/1, supra note 14, ¶ 138.
responsibility for states to people in other states, to be exercised on “a case-by-case basis.”

Some scholars have also justified R2P along consequentialist lines. Eric Heinze, for instance, suggests that states must consider the welfare of individuals and weigh the costs and benefits of intervention. 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.” He would have states consider whether, given the circumstances at the time, intervention would promote human security.

Consequentialist reasoning considers more realistically 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 from violence, it is difficult to explain why the responsibility must be limited to serious or widespread violations of human rights. Nonetheless, most supporters of R2P at least implicitly recognize that intervention requires trade-offs, in part because states have limited resources and intervention may cause an escalation in violence. Even those who posit a moral duty for states recognize the inevitability of consequentialist reasoning when states must determine how to maximize human rights observance while using force or that the obligation to intervene depends in part on costs. Similarly, states

93. Id. ¶ 139.
94. “[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.” Eric A. Heinze, Waging Humanitarian War: The Ethics, Law, and Politics of Humanitarian Intervention 11–12 (2009).
95. Id. at 12.
96. Id. at 41.
97. Tesón, supra note 70, at 114–15 (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,” and noting that “[j]ustified intervention aims to maximize human rights observance”).
98. See Buchanan, supra note 42, at 428–29.
with the “right” motives cannot be certain that their interventions will have good results.99

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.100 After the fact, observers and states often disagree about whether an intervention promoted security. For example, many hail the NATO-led Libya intervention as a success in toppling Gaddafi and halting violence,101 whereas others suggest intervention unnecessarily escalated violence and led to even more deaths than if the uprising had taken its course without outside interference.102 A year after the intervention, debate continues about the legal and practical consequences of the intervention.

Once R2P is seen as a consequentialist doctrine, however, it 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 give greater weight to the security of its citizens and the lives of its military personnel than to the safety of victims in other states? State R will consider questions of human security in the context of its particular needs. The government of State R may have genuine concerns about humanitarian crimes and yet face substantial

99. In the 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 . . . therefore the allure of realism is strongest. In international anarchy, moral confidence is lacking.” Lea Brilmayer, Realism Revisited: The Moral Priority of Means and Ends in Anarchy, in Global Justice 192, 207 (Ian Shapiro & Lea Brilmayer eds., Am. Soc’y for Political & Legal Philosophy, NOMOS XLI, 1999).

100. Heinze, supra note 94, at 45 (“[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.”).

101. See, e.g., NATO’s Intervention in Libya Deemed a Success, NPR (Oct. 21, 2011, 4:00 AM), http://www.npr.org/2011/10/21/141578820/europe-reacts-to-gadhafis-death (discussing widespread conviction that intervention in Libya was effective and successful).

102. 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 15, 15 (Alex Stark ed., 2011) (arguing that intervention in Libya was never demonstrated to be necessary and that the deaths of tens of thousands of people was not justified).
uncertainty about the effects of intervention on People V and their security. The costs will often be easier to identify and to quantify than the long-term benefits. The difficulty of assessing human security and stability suggests that when contemplating intervention, State R will focus on factors that might be closer to home and therefore easier to perceive, such as domestic political pressures, national security, and costs.

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 the 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 costs 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 as well as 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 the most sense in the domestic context where the state and its people are intertwined in so many ways.

In the international context, at least at present where there is no international authority to enforce or mandate 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-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, there is no foundation for State R's affirmative responsibility to People V. Even assuming such a duty based on the
seriousness of basic human rights, the positive right to protection of 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 [R2P] 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.\(^{103}\)

Accepting 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 will be uncertain in any particular instance. The inevitable indeterminacy of these questions casts doubt on the meaning and content of the responsibility to protect.

Any assessment of a state’s responsibility will thus depend on the state undertaking the intervention. In the context of the intervention in Libya, in which American national interest was far from clear, President Obama said that Americans had a “responsibility to act.”\(^{104}\) He phrased it as a responsibility, but really it was a choice to intervene in Libya, but not Iran, North Korean, Syria, or Sudan. 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 only to the extent they believe appropriate under the circumstances.

**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 in the U.N.

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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 rather 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 “responsibility” can overcome State R’s assertion of neutrality.105

R2P depends on State R protecting People V by taking actions that may be costly in terms of lives and resources and that often have uncertain results and only a tenuous connection to national interests. In light of all this, perhaps states can simply stand aside. Regardless of whether such a position generates moral condemnation, do states have the right to remain uninvolved? 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—namely 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 a 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.106 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

Since World War II, the topic of neutrality has been a scholarly and doctrinal backwater. In part, this is because, as

105. Vagts notes that any 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 [of] whether intervention to prevent genocidal or similar misbehavior is permissible under the United Nations Charter.” Detlev F. Vagts, The Traditional Legal Concept of Neutrality in a Changing Environment, 14 Am. U. Int’l L. Rev. 83, 95 (1998).

Stephen Neff explains, the creation of the United Nations and the ideal of collective security brought a 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.”¹⁰⁷ The U.N. Charter restricts the use of force and resort to war¹⁰⁸ 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.”¹⁰⁹ Moreover, the U.N. Security Council has authority to determine whether a state is an unlawful aggressor.¹¹⁰ In this circumstance, other states cannot lend assistance to an aggressor state but may lend assistance to any state that is a victim of an act of aggression.¹¹¹

Though perhaps modified by the U.N. Charter, neutrality law continues to survive in some form. Neff offers a number of observations about its durability and notes that, despite the U.N. Charter, it often remains difficult to identify the “right” and “wrong” sides of international conflicts.¹¹² 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.”¹¹³ Despite some uncertainty about the precise

¹⁰⁷.  Id. at 193.
¹⁰⁸.  See U.N. Charter, art. 2, para. 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.”); Id. at art. 2, para. 7 (prohibiting the United Nations from interfering “in matters which are essentially within the domestic jurisdiction of any state”). But see Id. at art. 2, para. 4 (noting that the U.N. Security Council has responsibility for “maintenance of international peace and security”).
¹⁰⁹.  Id. at art. 2, para. 5.
¹¹⁰.  Id. at art. 39, para. 1.
¹¹¹.  See Id. at art. 2, para. 5; see also Int’l Inst. of Humanitarian Law, San Remo Manual on International Law Applicable to Armed Conflicts at Sea, para. 7, at 7–8 (1995) (stating that neutral states “are bound not to lend assistance other than humanitarian assistance to [a State which the Security Council has found to be an aggressor State] and . . . may lend assistance to any State which has been the victim of a breach of the peace or an act of aggression by that State”).
¹¹².  Neff, supra note 106, at 196.
¹¹³.  Id. at 198–99.
contours of neutrality law, states have continued to assert neutrality in armed conflicts, even after the Security Council has acted.\textsuperscript{114}

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 in 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 United Nations, 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 Article to consider thoroughly 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 often unclear when there is a state of war short of a declaration, which rarely occurs.\textsuperscript{115} 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.\textsuperscript{116} 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.”\textsuperscript{117} The ongoing war on terror, for instance, further raises questions about what constitutes a state of war and the rights and obligations of states in this context.\textsuperscript{118}

\textsuperscript{114} Id. at 200–14 (discussing state practices since 1945 that suggest the ongoing robustness of the law of neutrality).


\textsuperscript{116} Christopher Greenwood, The Concept of War in Modern International Law, 36 Int’l & Comp. L.Q. 283, 301 (1987).

\textsuperscript{117} Heintschel von Heinegg, supra note 115, at 561.

Second, and related to the first question, how does the law of neutrality apply to intra-state conflicts, which make up most of the circumstances calling for intervention? Neutrality traditionally applied to international armed conflicts because it was triggered by a state of war. Sovereignty required that states not interfere in civil wars or other disputes within another state. Yet in practice states have often intervened in intra-state conflicts or civil wars. Many have argued that in such circumstances, third states can adopt a position of “benevolent/differential’ neutrality in cases where one party to a conflict has violated the jus ad bellum”:119

[With 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.120

Given the changing nature of warfare and in light of previous uncertainty about when a state of war exists, there are ample reasons for considering that even civil conflicts trigger at least some aspects of the law of neutrality.121 Moreover, there might be some disconnect between assuming that domestic humanitarian crimes are a matter of international concern, as R2P does, and failing to recognize that such domestic conflicts trigger the laws of war, including laws of neutrality. Proponents of R2P should at least address the application of neutrality law as a possibility.

Third, does U.N. Security Council action eliminate state claims of neutrality? The U.N. Charter creates a distinction between just and unjust belligerents, particularly once the Security Council has identified an aggressor state. As Heintschel von Heinegg observes, however, the Security Council often does not make an authoritative determination, and so “[a] UN member State is

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119. Heintschel von Heinegg, supra note 115, at 548–49 (noting that “an increasing number of international lawyers” have advocated for “benevolent/differential’ neutrality” in lieu of “the traditional law of neutrality”).
120. Id. at 552.
121. See generally François Bugnion, Jus ad Bellum, Jus in Bello and Non-International Armed Conflicts, 6 Y.B. of Int’l Humanitarian L. 167 (2003) (discussing the application of the laws of war to civil conflicts).
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 of the U.N. Charter.\(^{122}\) Even in the face of Security Council action, states have asserted their neutrality, for example, during the Korean War and the Persian Gulf War.\(^{123}\) In addition, states often simply fail to provide assistance. This state practice suggests that neutrality remains an operative part of international law.

Fourth, what positive duties might a neutral state have toward victims of belligerent action? Although neutrality law remains uncertain on a number of points, neither theories of neutrality nor state practice require neutral states to assist belligerent states or victims of war within belligerent states. The rights of belligerents do not include affirmative assistance by neutral states. Historically, belligerents had certain rights including some ability to transgress the territory or to requisition the property of neutral states. These rights, however, were secured by force.\(^{124}\) Neutral states were not required to simply offer up assistance.

\(^{122}\) Heintschel von Heinegg, *supra* note 115, at 557; see also Neff, *supra* note 106, at 196.

\(^{123}\) See Neff, *supra* note 106, at 196.

\(^{124}\) 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. Nonetheless, belligerents could make various claims against the people and property of the neutral state through force or necessity, such as by transporting troops and goods over a neutral state's land or conscripting soldiers in a neutral country. See generally Neff, *supra* note 106 (describing the rights of not only neutral states but also belligerents throughout history). Moreover, the right of angary allowed for some requisitioning of neutral property, and foreign ships could be impressed into the service of the belligerent. See 2 L. Oppenheim, *International Law: A Treatise* §§ 364–67 (2d ed. 1912). There was controversy, however, as to whether such a right existed and whether the requisitioning government must pay compensation. As Arthur Nussbaum noted: “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.” Arthur Nussbaum, *A Concise History of the Law of Nations* 91 (1947). Nevertheless, the practice of angary survived to some extent during World Wars I and II with a right of compensation. See Neff, *supra* note 106, at 148–50, 183; Oppenheim, *supra* at § 365 (“[I]t may safely be maintained that a duty to pay indemnities for any damage done by exercising the right of angary must nowadays be recognised.”).
There is, of course, a material difference between a belligerent state taking something from a neutral state and the neutral state being obliged to provide assistance to the belligerent state. These belligerent rights do not logically create affirmative duties of neutral states to help victims in other states. The rights of belligerents were justified based on necessity and on what the belligerents could take. These justifications do not support an obligation of humanitarian aid by a 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, they are not practically in a position to command it. Just as a weak belligerent could not require the assistance of a neutral state, People V cannot oblige other states to provide aid. Rather, 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—individuals in these circumstances cannot command assistance.

These questions highlight just some of the potential difficulties that the law of neutrality might pose for R2P. In general, the law of neutrality restrains both belligerent and neutral states. Neutrality imposes certain duties, but these are largely negative duties to refrain from certain actions. In light of the foregoing, states called to assist People V can presumptively choose neutrality over intervention.

The principles of non-intervention and neutrality both derive from state sovereignty. Under this classical view, states have a sovereign right to be free from interference in their domestic matters as well as 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. This conditional view of sovereignty depends in part on the wrongdoing of the state or its inability to protect its people. If peaceful conditions do not prevail within the state, other states may intervene to protect human rights. The sovereignty of State V yields because it is perpetrating, tolerating, or is powerless to halt mass atrocities.

125. See Greenwood, supra note 116, at 305 (observing that the law of neutrality may set an upper limit to the rights of belligerents).

126. See Walzer, supra note 68, at 96 (“Now, neutrality is conventionally regarded as an optative condition, a matter of choice, not of duty.”).
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 its assertions of neutrality. R2P provides 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 State V’s domestic armed conflict; however, these concerns do not oblige State R to give up its neutrality and 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. As the concept of neutrality has developed 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 to help victims of humanitarian crimes. R2P purports to replace the choice with an obligation, yet the laws of neutrality provide 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.

IV. A CHOICE TO PROTECT

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

This part explains why the assertion of R2P will turn on the judgment of each state called to fulfill its responsibility to victims in another state. First, the standards for this responsibility are open-ended and broad and there are no agreed mechanisms for judging what specific responsibility exists in any particular case. The U.N. 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, making it difficult to draw a standard from state practice. 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
The Choice to Protect

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 criteria that states must evaluate. These practical assessments eclipse the asserted moral obligation by turning obligation into a pragmatic, consequentialist calculation by states.

A. Indeterminate Scope of Responsibility

R2P 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.”\textsuperscript{127} The 2005 World Summit Outcome commits to collective action, but only on “a case-by-case basis.”\textsuperscript{128} As Bellamy has noted: “[O]nce states agree that something ought to be done, [R2P] grants the international community a relatively free hand to determine what. This indeterminacy severely restricts [R2P]’s compliance-pull, and hence its ability to encourage states to find consensus and commit additional resources to the protection of civilians.”\textsuperscript{129} 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 responsibilities of member states as threats to human security emerge.\textsuperscript{130} Based on past experience, they also recognize that the Security Council is at best unreliable in these matters and at worst a failure in the face of serious human rights violations.\textsuperscript{131} For example, the Security Council sometimes fails

\begin{itemize}
\item \textsuperscript{127} 2005 World Summit Outcome, G.A. Res. 60/1, \textit{supra} note 14, ¶ 139.
\item \textsuperscript{128} \textit{Id.}
\item \textsuperscript{129} Bellamy, \textit{supra} note 31, at 162.
\item \textsuperscript{130} See \textit{Int’l Comm’n on Intervention & State Sovereignty, supra} note 10, ¶ 6.14, at 49 (“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.”).
\item \textsuperscript{131} See \textit{id.} ¶ 6.28, at 53 (discussing alternatives when the U.N. Security Council fails to act “[i]n view of the Council’s past inability or unwillingness to fulfill the role expected of it”); \textit{see also} Roberts, \textit{supra} note 4, at 78–97 (evaluating
\end{itemize}
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 it is estimated that at least 60,000 people have been killed in the Syrian conflict as of January 2013,\(^\text{132}\) 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.\(^\text{133}\) Only recently did the Security Council approve a “supervision mission” to Syria of 300 unarmed military observers.\(^\text{134}\) 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.\(^\text{135}\)

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.\(^\text{136}\) 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.\(^\text{137}\) In all of these instances—inaction, and critiquing the relationship between the United Nations and humanitarian intervention).


\(^{137}\) See Kenneth Rapoza, Russia and China Team Up Against NATO Libya Campaign, Forbes (June 17, 2011, 12:33 AM), http://www.forbes.com/sites/kennrapoza/2011/06/17/russia-and-china-team-up-against-nato-libya-campaign/ (noting that Russia and China issued a joint declaration stating that “nations must ‘not allow the willful interpretation and expanded application’ of the resolutions”).
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 define or lead with respect to the principle of R2P. Kofi Annan has maintained that R2P 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.” 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 outside their borders. It follows from this that states will judge for themselves whether circumstances exist that can justify the use of force for primarily humanitarian purposes and, if they decide to use force, what the extent of the engagement will be. Recognition that the Security Council often cannot provide international consensus or agreement on when R2P is triggered further highlights how R2P depends primarily on individual state judgments.

Quite by design, states have recognized some moral responsibility to protect but prudently declined to specify its content or to bind themselves to specific obligations. States have agreed to only an indeterminate responsibility with regard to other states, allowing nations to recognize some shared responsibility while retaining the authority to choose their response to specific human rights violations. States 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, sometimes for good reason, as with Russia’s intervention in


139. See John Yoo, Fixing Failed States, 99 Calif. L. Rev. 95, 98 (2011) (“Supra-national governments, trusteeships, or non-governmental organizations, among other forms of international institutions, have proved ineffective at fixing failed states without the backing of strong states.”).
Disputes about whether asserted humanitarian interventions are truly humanitarian demonstrate 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. Even acting in good faith, nations may interpret the scope of the responsibility differently based on how they perceive their duties 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 R2P may be indeterminate, it undoubtedly raises serious moral questions with respect to how we value and protect human life. The impetus for R2P reflects the imperative that someone should do something about widespread atrocities. Even taking the responsibility at face value, however, 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 the ICISS Report includes as part of the decision to intervene: (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 in 2011, then-Secretary

140. 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, supra note 102, at 34, 37 (“[T]he coalition invasion of Iraq in 2003 and Russia’s invasion of Georgia in 2008 were not justified in responsibility to protect terms. . . .”).

141. See, e.g., George Friedman, Immaculate Intervention: The Wars of Humanitarianism, Stratfor (Apr. 5, 2011), http://www.stratfor.com/weekly/20110404-immaculate-intervention-wars-humanitarianism (“[F]or the humanitarian warrior, there are other political considerations. In the case of the French, the contrast between their absolute opposition to Iraq and their aggressive desire to intervene in Libya needs to be explained. I suspect it will not be.”).

142. Int’l Comm’n on Intervention & State Sovereignty, supra note 10, ¶ 4.10, at 31, ¶ 4.39 at 37, ¶ 4.41 at 37, ¶ 7.3 at 57.
of State Hillary Clinton blandly 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.” In 2012, Secretary Clinton used much stronger language condemning the 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 arise particularly when a state reasonably believes that killing of civilians is imminent. Whether preemptive action is warranted 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 Gaddafi’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 have been taken first.

Third, what constitutes proportional means for accomplishing the purpose of an intervention? In Libya did this include toppling Gaddafi? 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 because low-cost diplomatic interventions may not have much impact. But under proportionality analysis to justify higher costs governments must be able to predict with some certainty that

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145. See President Barack Obama, supra note 2 (“[I]f we waited one more day, Benghazi . . . could suffer a massacre that would have reverberated across the region and stained the conscience of the world.”).
intervention will result in substantial benefits.146 Today with the continuation of violence in Syria, what is the proportionate response? This question looms large in the international community.

The question of proportionality also relates to the specific means employed in intervention. R2P recognizes a continuum of responses, culminating in 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. Some military responses involve little risk of human life, such as the use of drones. States will calibrate the costs—in lives and monetary resources—with respect to the predicted benefit of action.

Fourth, a state must act only when there is a reasonable prospect of success and intervention would not lead 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 R2P. Each qualification requires a state to assess myriad factors and make complicated judgments in the face of uncertainty. The U.N. 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 certain harms. Yet ultimately the choice to intervene and the scope of action will depend on states making these calculations. States will assess their moral obligations based on the particular context before them.

Moreover, states must only intervene if they have the capacity to do so—when they can intervene without excessive costs to 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

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146. “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.” Susan E. Mayer, In Our Interest: The Responsibility to Protect, in Responsibility to Protect: The Global Moral Compact for the 21st Century, supra note 40, at 43, 51.
capacity. States with few military resources or strained resources will not have the capacity to help victims in other states. Accordingly, the scope of responsibility will depend 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, especially for wealthy states called upon to intervene. The assessment of capacity for the strongest and most capable states will be a relative one—intervene to halt atrocities or 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, in order to ensure that the 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 . . . 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.\(^\text{148}\)

Even assuming agreement on the basic principles of R2P, these principles include a number of factors that require difficult assessments by states contemplating intervention. In this context, it is hardly surprising that states have insisted on determining the scope of R2P 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.

\(^{147}\) See Feinstein & De Bruin, supra note 40, at 194 (“[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.”).

\(^{148}\) See Luban, supra note 50, at 85.
V. PUBLIC CHOICE: DOMESTIC PROCESSES AND INTERVENTION

Despite attempts to theorize R2P, humanitarian intervention remains a thorny practical problem. The decision about whether or not to intervene does not ultimately turn on morality, but instead 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, R2P 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 U.S. 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 that I hope will encourage comparative work by those familiar with processes and administration in other states. Conflicts at the sub-state level and failures of coordination further support the conclusion that determinations about intervention will necessarily occur on a case-by-case basis and depend in part on how different agencies and departments in a 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.149 Shaped by these interests and incentives, executive agencies frequently disagree about the requirements and applications 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

149. See Rao, supra note 9, at 197.
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 the requirements of international law, but ensuring domestic authority for the use of force invariably has greater urgency. Liberal democracies generally 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 institutions for evaluating 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 information leaks and reporting that allow for at least a partial glimpse of conflicts between executive branch agencies, including the Department of Justice, the Department of Defense, and the Department of State. These agencies disagreed about domestic legal authority as well as the political consequences of intervention.150

The key question about the legality of intervention was one of domestic law—whether the President could intervene in Libya without congressional authorization. The Department of Justice’s Office of Legal Counsel drafted a careful memorandum reasoning that congressional authorization was not required in certain very limited circumstances in which U.S. intervention did not involve ground troops and had discrete goals short of territorial occupation or

150. At least some of the international law questions about the lawfulness of intervention were answered by the U.N. Security Council’s resolution instituting a no-fly zone over Libya and calling on member states to use all necessary force to protect civilians in Libya. S.C. Res. 1973, supra note 136, ¶¶ 4, 6. It has not been reported whether or to what extent concerns about international law affected the Obama administration’s deliberations. A number of commentators, however, have questioned whether the NATO action violated international law. See, e.g., Eric Posner, Outside the Law, Foreign Pol’y (Oct. 25, 2011), http://www.foreignpolicy.com/articles/2011/10/25/libya_international_law__ qaddafi_nato (“The basis for the intervention [in Libya] under international law was dubious from the start.”); Libya, Africa and the New World Order—An Open Letter, AllAfrica (Aug. 11, 2011), http://allafrica.com/stories/201108120282.html?viewall=1 (arguing that the U.N. Security Council overstepped its mandate in “outsourcing” implementation of the Libya resolution to NATO and that NATO’s actions in Libya violated international law).
Questions about whether President Obama should have obtained approval from Congress under the War Powers Resolution after the engagement had gone on for sixty days also presented difficulties. Here, it was reported that the Department of Justice pressed for the applicability of the War Powers Resolution, whereas the Department of State determined that the actions in Libya did not constitute “hostilities” for the purposes of the Resolution. The legal gymnastics of Harold Koh, then-Department of State Legal Adviser, over this interpretation was met with criticism from many fronts. Reports of disagreement between the President’s advisers and lawyers served to undermine the authority of the President’s legal claims for intervention.

The President’s lawyers disagreed about the proper domestic legal standards to be applied for the use of force in these circumstances. This had nothing to do with the scope of R2P 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 without congressional authorization. Ultimately, the President decided 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, R2P

151. Authority to Use Military Force in Libya, 35 Op. O.L.C. 1, 1 (2011) (concluding that “the 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 that “prior congressional approval was not constitutionally required to use military force in the limited operations under consideration”).


154. See, e.g., Bruce Ackerman, Obama’s Unconstitutional War, Foreign Pol’y (Mar. 24, 2011), http://www.foreignpolicy.com/articles/2011/03/24/obama_s_unconstitutional_war (arguing that by unilaterally going to war against Libya, the Obama administration is “breaking new ground in its construction of an imperial presidency—an executive who increasingly acts independently of Congress at home and abroad”).

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.156 Within a bureaucracy, each agency may reach different conclusions about the answers to these difficult questions. Agencies focus on issues in light of their individual missions and using what information they have available.157

For example, in the context of the Libya intervention, the Department of State and the Department of Defense disagreed about how to respond to the violence. Then-Secretary of Defense Robert Gates publicly stated that intervention in Libya was not in the United States’ “vital interest as a country.”158 Secretary Clinton, on the other hand, supported the intervention early on when calls for a no-fly zone came from the Arab world, the United Kingdom, and France.159 Eventually, Secretary Gates agreed with Secretary Clinton 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.”160

This internal disagreement and the ensuing conflict with Congress have made 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 for intervention in Libya but has repeatedly stated that Libya should not serve as a precedent for Syria.161 Her statements and those of other senior administration

156.  See supra Part IV.B.
157.  See Rao, supra note 9, at 277.
158.  Meet the Press Transcript for March 27, 2011, NBC News (Mar. 27, 2011, 12:29 PM), http://www.nbcnews.com/id/42275424/ns/meet_the_press_transcripts/t/meet-press-transcript-march/#.UVcpqlfheSq (noting that Libya in particular is not “a vital interest for the United States, but we clearly have interests there, and it’s a part of the region which is a vital interest for the United States”).
159.  Mark Landler & Thom Shanker, Gates and Clinton Unite to Defend Libya Intervention, and Say It May Last Awhile, N.Y. Times, Mar. 28, 2011, at A9 (noting that Secretary Clinton, “hearing the growing chorus of calls for a no-fly zone, particularly in the Arab world” as well as requests from “allies like Britain and France,” emphasized the need “for a stronger international response”).
160.  Id.
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 priorities and perspectives, agencies may diverge over the need for intervention and its scope. The many variables for assessing intervention allow 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 for intervention 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. Even those states recognizing some form of collective responsibility to protect have carefully limited it to case-by-case evaluations. Similarly, the U.N. Security Council, comprised of states that could be called on 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. But it also reflects persistent political disagreements between powerful states that would prefer to retain discretion to object to any particular intervention.162

These bureaucratic difficulties also make it difficult to predict whether any particular state will intervene on predominantly

10278452-clinton-syria-not-another-libya-political-solution-needed?lite (noting that Secretary Clinton stated that action against Syria would not result in “another Libya” and that this was “a false analogy”).

humanitarian grounds.\textsuperscript{163} Lack of predictability, in turn, makes it difficult to overcome the collective action problem of finding a state that is willing to initiate intervention to halt humanitarian disaster.\textsuperscript{164} If states and their respective agencies predict that other countries will take up the burden of intervention, they may choose to wait rather than to incur the costs of immediate action.

B. The Moral State

As a doctrine and an aspiration, R2P assumes that states will develop and act on moral obligations 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 requirements of domestic law, as well as different 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. When it comes to taking action against these horrors, however, the moral claims remain indeterminate—no one can say what is required in any humanitarian crisis. There is always a difficult balance to strike between 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 to Congress about the importance of such intervention. The President will gauge national commitment to a particular humanitarian issue or use his office to

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\item \textsuperscript{163} See Mayer, \textit{supra} note 146, at 51 ("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.").
\item \textsuperscript{164} See \textit{id.} at 52–53; Luban, \textit{supra} note 50, at 90 (noting that when other states fail to fulfill their duties, this "creates a perverse incentive for nations to engage in a game of humanitarian chicken where each waits for another to take up the burden of intervention").
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raise awareness of a particular conflict. Moreover, the President will be required to direct his disparate agencies to work together to avert humanitarian disaster using all available tools, such as diplomacy, 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 Gaddafi, his government, and his close associates. The executive order imposed a freeze on the assets of the Libyan government in the United States. The Department of State 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 and 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. They 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. Occasionally agencies will have leaders that take up humanitarian causes as a priority, but this depends on the appointment of individuals who maintain their humanitarian focus when faced with competing agency objectives.

Agencies also have different goals and missions, and they interpret the legal requirements and political consequences of intervention in light of their particular interests. Because of

166. Id. at 11,315–16.
168. See President Barack Obama, supra note 2 (“And so nine days ago [on March 19, 2011], after consulting the bipartisan leadership of Congress, I authorized military action to stop the killing and enforce U.N. Security Council Resolution 1973.”).
conflicting assessments, agencies sometimes compete for control over foreign policymaking.\textsuperscript{169} 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.\textsuperscript{170} Persistent differences of opinion and a lack of 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 Department of State, which often speaks of international law in terms of “conscience” and supports development of international human rights,\textsuperscript{171} has not committed to clear standards of responsibility to protect people in other states and regularly reaffirms that intervention in one place does not create a requirement for intervention in others.\textsuperscript{172}

Another focus of moral obligation might be Congress. Could Congress lead on the issue of humanitarian intervention if the President fails to do so? Congress cannot order in the troops (or drones), but it can indicate its support for military action through the authorization of force and appropriations for the use of force. Members and committees have some power to exhort the President to action or to create pressure through actions short of the use of force, such as by imposing sanctions or increasing humanitarian aid. Yet the 535 Members of Congress lack the institutional capacity to easily direct the nation’s moral action. 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 has generally deferred to a system of executive primacy in foreign affairs and in practice

\textsuperscript{169} See Rao, \textit{supra} note 9, at 198 (“The uncertainty and instability of coordination provide an incentive for executive branch officials to compete for control of international policymaking in the White House.”).

\textsuperscript{170} Id.

\textsuperscript{171} See, e.g., Harold Hongju Koh, U.S. Dep’t of State Legal Adviser, The Obama Administration and International Law, Remarks at the Annual Meeting of the American Society of International Law (Mar. 25, 2010), \textit{available at} http://www.state.gov/s/l/releases/remarks/139119.htm (noting that the U.S. Department of State’s legal adviser “serve[s] as a conscience for the U.S. Government with regard to international law” and describing the Department of State’s “commitment to human rights” (internal quotation marks omitted)).

\textsuperscript{172} See, e.g., \textit{supra} note 161 and accompanying text.
regularly leaves the President to make and be responsible for decisions to use military force.173

Considering the processes for domestic decision-making about humanitarian intervention further emphasizes the inherently state-based political calculations that will be made in such circumstances. It also highlights the importance of various domestic actors who may conflict in their assessments about the need for intervention and its scope. These processes will vary from country to country, but in most instances, the evaluation of R2P will depend on myriad domestic standards and institutions.

VI. CONCLUSION

Serious humanitarian crimes continue to occur in places such as Sudan, Syria, and North Korea. R2P suggests that when a country terrorizes its own citizens, and even when a country is powerless to prevent mass killings within its own borders, other states have a duty to respond. This Article 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, but only to highlight that nothing in international law or the R2P doctrine 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 as well as the refusal to treat interventions as precedents for action in other situations has emphasized the unique circumstances of each humanitarian crisis. The response to crisis rarely turns on an assessment of the extent of harm to individuals but instead depends on domestic and international politics, feasibility, and will. Case-by-case determinations suggest that whatever moral obligation may exist is a highly contingent one, driven not only (or even primarily) by

173. See, e.g., Eric A. Posner & Adrian Vermeule, The Executive Unbound: After the Madisonian Republic (2011) (explaining the concentration of authority in the President as an inevitable historical development). Perhaps Congress should have greater involvement as a constitutional or normative matter, but as a practical matter, Congress often leaves difficult foreign policy choices to the President.
the harms to persons, but rather by the particular interests, politics, and capabilities of states called to intervene. The 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 an international responsibility to protect need to find a firmer foundation for this global duty.