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The Responsibility to Protect After Libya: Humanitarian Prevention as Customary International Law

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THE RESPONSIBILITY TO PROTECT AFTER LIBYA: HUMANITARIAN PREVENTION AS CUSTOMARY INTERNATIONAL LAW

So I'd be very happy, maybe not in five but ten years from now, if we simply could go out of business – that [The Responsibility to Protect] becomes so much a part of international and national behavior that there is no need anymore for the U.N. to keep pushing it.

Edward Luck, Special Advisor to the Secretary-General of the United Nations, August 2011

INTRODUCTION

In February 2011, Colonel Muammar Qaddafi ordered his forces to massacre more than one thousand Libyans on account of their peaceful protests against his regime.¹ This led to the U.N. Security Council's passage of Resolution 1970² on February 26, 2011, which invoked the Libyan leadership's responsibility to safeguard its people, criticized the violence against its citizens, and imposed sanctions as a first means of international pressure to stop the violence.³ On March 17, after

1. Hon. Gareth Evans, Chancellor, Australian National University and President Emeritus, International Crisis Group, Second Renate Kamener Oration: Ending Mass Atrocity Crimes (Jul. 31, 2011) [hereinafter Evans, Kamener Oration], *available at* <http://www.gevans.org/speeches/speech443.html>. Col. Qaddafi was killed on October 20, 2011. Kareem Fahim, Anthony Shadid & Rick Gladstone, *Violent End to an Era as Qaddafi Dies in Libya*, N.Y. TIMES (Oct. 20, 2011), <http://www.nytimes.com/2011/10/21/world/africa/libyan-fighters-say-qaddafi-stronghold-has-fallen.html?hp>.

2. S.C. Res. 1970, U.N. Doc. S/RES/1970 (Feb. 26, 2011). The United Nations is an international organization founded in 1945 to promote peace and security, economic, social, and human rights, and to aid in the development of friendly relations among nations. *UN at a Glance*, UNITED NATIONS, <http://www.un.org/en/aboutun/index.shtml> (last visited Sept. 29, 2012). The General Assembly, with 193 member states of the United Nations, sets the agenda and priorities for the organization. *Main Bodies*, UNITED NATIONS, <http://www.un.org/en/mainbodies/> (last visited Sept. 29, 2012). The Security Council, with five permanent members and 10 non-permanent members, is charged under the U.N. Charter with maintaining international peace and security. *Id.*

3. See Evans, Kamener Oration, *supra* note 1.

it became clear that Col. Qaddafi was planning a major attack on Benghazi, the U.N. Security Council passed Resolution 1973,⁴ allowing for coercive military action to take “‘all necessary measures’ to enforce a no-fly zone, and ‘all necessary measures . . . to protect civilians and civilian populated areas under threat of attack.’”⁵

In pursuing these objectives, Resolution 1973 implemented an international legal doctrine known as the Responsibility to Protect (“R2P”).⁶ R2P proposes that when a country fails to protect its citizens from one of four mass atrocities—genocide, war crimes, ethnic cleansing, and crimes against humanity—it is the responsibility, and indeed the duty, of the international community to prevent the atrocity from going forward.⁷ The impetus for R2P came from a series of humanitarian catastrophes in the twentieth century.⁸ Some of these garnered Securi-

4. See S.C. Res. 1973, U.N. Doc. S/RES/1973 (Mar. 17, 2011). Resolution 1973 passed with five abstentions. See Alex J. Bellamy & Paul D. Williams, *The New Politics of Protection? Côte d'Ivoire, Libya and the Responsibility to Protect*, 87 INT'L AFF. 825, 844 (2011). China and Russia, two permanent members of the Security Council with veto powers, abstained, as did Brazil, India, and Germany. See United Nations Bibliographic Information System, Voting Record, S/RES/1973 (2011), <http://unbisnet.un.org:8080/ipac20/ipac.jsp?session=13K0E06308K86.62787&pro-file=voting&uri=full=3100023~!942775~!0&ri=1&aspect=power&menu=search&source=~!horizon>.

5. Evans, Kamener Oration, *supra* note 1 (citing S.C. Res. 1973, *supra* note 4).

6. See, e.g., 2005 World Summit Outcome, G.A. Res. 60/1, ¶¶ 138–139, U.N. Doc. A/RES/60/1 (Sept. 15, 2005); see also Interview by U.N. News Centre with Edward Luck, Special Advisor to the Secretary-General (Aug. 1, 2011), [available at http://www.un.org/apps/news/newsmakers.asp?NewsID=38](http://www.un.org/apps/news/newsmakers.asp?NewsID=38).

7. See U.N. Secretary-General, Remarks on Responsible Sovereignty: International Cooperation for a Changed World at Berlin Event, U.N. Doc. SG/SM/11701 (July 15, 2008) [hereinafter Remarks on Responsible Sovereignty]; see also Elizabeth F. Defeis, *The Responsibility to Protect and International Justice*, 10 J. INT'L BUS. & L. 91, 98 (2011) (“The goal [of the R2P] is to develop an international legal norm or policy, which achieves international protection, international accountability, and the prevention and deterrence of further occurrences of mass atrocities and serious crimes.”).

8. See, e.g., Samantha Power, *Bystanders to Genocide*, ATLANTIC (Sept. 2001), <http://www.theatlantic.com/magazine/archive/2001/09/bystanders-to-genocide/4571/> (reporting that approximately 800,000 Tutsi Rwandans were murdered by the Hutu).

ty Council resolutions that authorized military intervention or other action under Chapter VII of the U.N. Charter,⁹ including episodes in Somalia,¹⁰ Liberia,¹¹ Rwanda,¹² Haiti,¹³ Sierra Leone¹⁴ and Kosovo.¹⁵ Yet while the passage of these resolutions led some scholars to assume an emerging challenge to traditional notions of state sovereignty,¹⁶ the Security Council's efforts did not have a profound physical effect on halting the killing of innocent people.¹⁷ Ethnic cleansing in Kosovo, in particu-

9. U.N. Charter, ch. VII.

10. See S.C. Res. 751, ¶ 2, U.N. Doc. S/RES/751 (Apr. 24, 1992); S.C. Res. 814 ¶¶ 5–6, U.N. Doc. S/RES/814 (Mar. 26, 1993).

11. See S.C. Res. 788, U.N. Doc. S/RES/788 (Nov. 19, 1992).

12. See S.C. Res. 929, ¶ 3, U.N. Doc. S/RES/929 (June 2, 1994).

13. See S.C. Res. 940, ¶ 4, U.N. Doc. S/RES/940 (July 31, 1994).

14. See S.C. Res. 1181, U.N. Doc. S/RES/1181 (July 13, 1998).

15. See S.C. Res. 1244, ¶ 9, U.N. Doc. S/RES/1244 (June 10, 1999).

16. See Rebecca J. Hamilton, *The Responsibility to Protect: From Document to Doctrine: But What of Implementation?*, 19 HARV. HUM. RTS. J. 289, 289 (Spring 2006).

17. See, e.g., Department of Public Information, *Somalia: U.N. OSOM I*, UNITED NATIONS, <http://www.un.org/Depts/DPKO/Missions/unosomi.htm> (last updated Mar. 21, 1997).

By 1992, almost 4.5 million people, more than half the total number in the country, were threatened with starvation, severe malnutrition and related diseases. The magnitude of suffering was immense. Overall, an estimated 300,000 people, including many children, died. Some 2 million people, violently displaced from their home areas, fled either to neighbouring countries or elsewhere within Somalia. All institutions of governance and at least 60 per cent of the country's basic infrastructure disintegrated.

Id.; HUMAN RIGHTS WATCH, WORLD REPORT 1992–LIBERIA (Jan. 1 1992), available at <http://www.unhcr.org/refworld/docid/467fca40c.html> (“[T]he human rights situation in Liberia continues to be marked by abuses ranging from extrajudicial killing and torture to restrictions on freedom of movement and intolerance of dissent.”); *Rwanda: How the Genocide Happened*, BBC NEWS (Dec. 18, 2008), <http://news.bbc.co.uk/2/hi/1288230.stm> (“Between April and June 1994, an estimated 800,000 Rwandans were killed in the space of 100 days.”); *Jane Doe et al. v. Emmanuel “Toto” Constant*, THE CENTER FOR JUSTICE & ACCOUNTABILITY, <http://www.cja.org/section.php?id=75> (last visited Oct. 16, 2012) (“An estimated 4,000 civilians were killed and several hundred thousand were tortured, imprisoned, or forced into exile by the Haitian Armed Forces and a paramilitary organization called FRAPH—a play on the French and Creole verb ‘frapper,’ meaning ‘to hit’ or ‘to beat.’”); *Sierra Leone*, FOREIGN AFFAIRS & INTERNATIONAL TRADE CANADA, http://www.international.gc.ca/sanctions/sierra_leone.aspx?lang=eng&view=d (last visited Oct. 16, 2012).

lar, emphasized the failings of the U.N.'s traditional approach and fueled the development of R2P.¹⁸ By 2008, Secretary-General Ban Ki-Moon stated that R2P "is a concept, not yet a policy; an aspiration, not yet a reality."¹⁹

Yet, after Resolution 1973's passage in 2011, R2P is no longer just a concept; it is a reality for Libyans, the United States, and the North Atlantic Treaty Organization ("NATO").²⁰ It is not merely an aspiration of those members of the international community who support military intervention. While the response to the Libyan crisis was not the first use of R2P,²¹ it was the first time the doctrine had been used to impose military force in order to protect civilians.²² As a result, world leaders, international and foreign policy experts, and humanitarian organizations have had a moment to reflect on the successes and failures of R2P.²³

On October 8, 1997, acting under Chapter VII of the *Charter of the United Nations*, the United Nations Security Council adopted Resolution 1132 imposing sanctions against Sierra Leone in response to the violence and loss of life and deteriorating humanitarian conditions in Sierra Leone following the military coup of May 25, 1997.

Id.; *Flashback to Kosovo's war*, BBC NEWS (July 10, 2006, 15:02 GMT 16:02 UK), <http://news.bbc.co.uk/2/hi/europe/5165042.stm> ("Meanwhile, a campaign of ethnic cleansing against Kosovo Albanians was initiated by Serbian forces. Hundreds of thousands of refugees fled to Albania, Macedonia and Montenegro. The international tribunal in The Hague said its investigators had found at least 2,000 bodies.").

18. Gareth Evans & Mohamed Sahnoun, *Forward to INT'L COMM. ON INTERVENTION AND STATE SOVEREIGNTY, THE RESPONSIBILITY TO PROTECT: REPORT OF THE INT'L COMM. ON INTERVENTION AND STATE SOVEREIGNTY*, at vii (2001) ("NATO's intervention in Kosovo in 1999 brought the controversy [of external military intervention for human protection purposes] to its most intense head.").

19. Remarks on Responsible Sovereignty, *supra* note 7.

20. See, e.g., Fahim, Shadid & Gladstone, *supra* note 1.

21. See *infra* Part III.

22. See *infra*; Alex J. Bellamy, *Libya and the Responsibility to Protect: The Exception and the Norm*, 25 ETHICS & INT'L AFF. 1, 1 (Fall 2011) [hereinafter Bellamy, *The Exception and the Norm*]; Bellamy & Williams, *supra* note 4, at 825 ("[T]he situation in Libya marked the first time the council had authorized the use of force for human protection purposes against the wishes of a functioning state.").

23. See, e.g., Luck, *supra* note 6. For example, the government of Brazil proposed a parallel concept to R2P called "Responsibility While Protecting." Gareth Evans, Co-Chair, Global Centre for the Responsibility to Protect,

This Note will argue that preventing humanitarian atrocities (hereinafter “humanitarian *prevention*”) stands alone as customary international law (“CIL”), meaning that nations already operate under an obligation to prevent mass atrocities independent of the R2P doctrine.²⁴ The question whether humanitarian intervention, or unauthorized military intervention (hereinafter “military intervention”) is CIL is not a new one, and this Note does not attempt to look again at whether R2P advances the legality of unilateral military intervention.²⁵ Rather, this Note supports a statement made by Gareth Evans, co-chair of the International Commission on Intervention and State Sovereignty Report, arguing against the narrow view that “R2P is just another name for military intervention,”²⁶ by recognizing that prevention and rebuilding—two fundamental elements of R2P, as will be discussed in detail below—expand

Keynote Address at the Stanley Foundation Workshop: Responsibility While Protecting: What’s Next? (Aug. 23, 2012). The focus of Responsibility While Protecting is to enhance guidelines under which the Security Council contemplates military intervention and monitors any authorized intervention. *See id.*

24. For more information on the legal duties imposed by R2P, see generally Päivi Asikainen, *The Responsibility to Protect of the International Community: A Study on the Protection Duties of the United Nations and Its Member States* (Autumn 2011) (unpublished LLM thesis, Uppsala University School of Law), available at http://www.uppsalajuristernasalumnistiftelse.se/wp-content/uploads/2012/02/2011_paivi.pdf.

25. Unlike some scholars who have discussed whether unilateral military action, or military intervention, is customary international law, this Note focuses only on the preventive aspect of R2P. *See, e.g.,* Nicholas J. Wheeler, *Legitimizing Military Intervention: Principles and Procedures*, 2 MELB. J. INT’L L. 550 (2001); *see generally* Eve Massingham, *Military Intervention for Humanitarian Purposes: Does the Responsibility to Protect Doctrine Advance the Legality of the Use of Force for Humanitarian Ends?*, 91 INT’L REV. OF THE RED CROSS 803, 830 (Dec. 2009) (opining on the effect of R2P on the legality of unilateral military intervention and concluding that it “does not provide a real reassessment of military intervention such as to change the prospects of the world’s most vulnerable”); Michael L. Burton, *Legalizing the Sublegal: A Proposal for Codifying a Doctrine of Unilateral Military Intervention*, 85 GEO. L.J. 417 (1996) (arguing that unilateral military intervention, versus collective military intervention through the Security Council, should be codified in international law). For a good discussion of the classic arguments in support of and against military intervention as customary international law, see Ian Hurd, *Is Military Intervention Legal? The Rule of Law in an Incoherent World*, 25 ETHICS & INT’L AFF. 293 (2011); *see also* Burton, *supra* note 25.

26. GARETH EVANS, *THE RESPONSIBILITY TO PROTECT: ENDING MASS ATROCITY CRIMES ONCE AND FOR ALL* 56 (2008).

the doctrine beyond such a narrow scope.²⁷ In other words, there is sufficient evidence that humanitarian prevention— independent of its role as a component of R2P—enjoys CIL status,²⁸ regardless of the legal status of military intervention.²⁹

27. See INT'L COMM. ON INTERVENTION AND STATE SOVEREIGNTY, THE RESPONSIBILITY TO PROTECT: REPORT OF THE INT'L COMM. ON INTERVENTION AND STATE SOVEREIGNTY ch. 3, 5 (2001) [hereinafter ICISS REPORT]. The ICISS Report acknowledges that at the time of its publication, there was not a “sufficiently strong basis to claim that [military intervention for human protection purposes is] a new principle of customary international law.” *Id.* ¶ 2.24.

28. Discussed *infra* in Part III.

29. There are two lines of argument that question the legality of military intervention. First, the case that military intervention is illegal rests most obviously in the language of the U.N. Charter. Article 2(4), which plainly prohibits the use of force by states. U.N. Charter art. 2, para. 4. Even where the scope of the U.N. provision could be narrowed to outlaw force only “against the territorial integrity or political independence” of states, in practice, this argument has failed. See, e.g., *Corfu Channel* (U.K. v. Albania), 1949 I.C.J. 4 (Apr. 9) (Britain arguing, and the ICJ rejecting, the argument that its unwelcomed sweep for mines in Albanian waters did not meet the level of intervention prohibited by Article 2(4)). Thus, any customary international law would have to overcome the strong presumption that military intervention is illegal. Second, in 2006, years before R2P’s use in Libya, some scholars viewed R2P as a comprehensive approach to military intervention. See Hamilton, *supra* note 16, at 293; see also Bellamy, *The Exception and the Norm*, *supra* note 22, at 1 (“Where it was once a term of art employed by a handful of like-minded countries, activists, and scholars, but regarded with suspicion by much of the rest of the world, [R2P] has become a commonly accepted frame of reference for preventing and responding to mass atrocities.”); Thomas G. Weiss, *RtoP Alive and Well After Libya*, 25 ETHICS & INT’L AFF. 1, 1 (Fall 2011) (“With the exception of Raphael Lemkin’s efforts on behalf of the 1948 Genocide Convention, no idea has moved faster in the international normative arena than [the R2P.]”); but see Helene Cooper & Scott L. Malcolmson, *Welcome to My World, Barack*, N.Y. Times, Nov. 13, 2008, (Magazine), at 44, 49 (quoting former Secretary of State Condoleezza Rice, “[W]e thought the Responsibility to Protect meant something . . . [but] in the Darfur case it has turned out to be nothing but words. I think it has been an enormous embarrassment for the Security Council and for multilateral diplomacy.”). However, a universally recognized approach to humanitarian crises does not necessarily mean that military intervention itself is recognized CIL. See Vesel, *supra* note 96, at 14 (“The difficult question to answer is whether the U.N. Security Council’s power to evaluate threats to international peace and security is a power granted primarily to the Security Council or exclusively to it.”). For example, those legal scholars who support military intervention often call for it to be codified in the U.N. Charter or a General Assembly Resolution. *Id.*; see generally Burton, *supra* note 25.

Part I of this Note discusses the background of R2P leading up to its formal recognition by the U.N. General Assembly in 2005.³⁰ Part II reviews one modern approach to defining customary international law, under which humanitarian prevention may best be analyzed. Finally, Part III identifies humanitarian prevention as customary international law and addresses R2P and Libya, considering how the crisis in Libya may have resulted in an exceptional application of R2P.

I. BACKGROUND OF R2P

A. *The Impetus for R2P*

The international conflicts of the early twentieth century, including both World Wars, encouraged the development of the U.N. Charter. That Charter was deliberately crafted to place a strong emphasis on state sovereignty.³¹ But by the end of the century, numerous instances of humanitarian crises—often the very kind proscribed by the U.N. Charter³²—forced the international community to consider how to respond to mass atrocity when traditional notions of state sovereignty counseled against any kind of interference.³³ Though by no means the only example of humanitarian crisis in the late twentieth century,³⁴ this

30. G.A. Res. 60/1, *supra* note 6, ¶¶ 138–139.

31. See U.N. Charter art. 2, para. 4.

32. See, e.g., the Genocide Convention, G.A. Res. 260, U.N. Doc. A/RES/260 (Dec. 8, 1948).

33. ICISS REPORT, *supra* note 27, at para. 1.35 (“The defen[s]e of state sovereignty, by even its strongest supporters, does not include any claim of the unlimited power of a state to do what it wants to its own people.”). Brookings Institution scholar Francis Deng, who was later appointed the U.N.’s Special Advisor for the Prevention of Genocide, co-authored *Sovereignty as Responsibility*. See FRANCIS M. DENG ET AL., *SOVEREIGNTY AS RESPONSIBILITY* (1996).

34. Following the 1994 Rwandan genocide, the international community struggled once again as it considered how to respond to the humanitarian crisis in Kosovo in 1998–1999. See Gregory C. Shaffer & Mark A. Pollack, *Hard Versus Soft Law in International Security*, 52 B.C. L. REV. 1147, 1211 (Sept. 2011). There, the Federal Republic of Yugoslavia (“FRY”) reportedly performed major crimes against humanity—such as rape, mutilation, and murder—on the Kosovo-Albanian population. See *Horrors of Kosovo Revealed*, BBC NEWS (Dec. 6, 1999), <http://news.bbc.co.uk/2/hi/europe/551875.stm>. At the beginning of the crisis, approximately 500,000 Albanians in Kosovo fled their homes to seek safety. See *Rapid Needs Assessment Among Kosovar Refugees Hosted by Albanian Families and Assessment of Human Rights Violations Committed in Kosovo*,

section will review the Rwandan genocide in some detail in order to demonstrate the strong motivation for adopting R2P.

In March of 1998, President Clinton issued what would later be termed the "Clinton apology"³⁵ on the tarmac of the Rwandan airport.³⁶ His apology came four years after Hutu militiamen murdered some 800,000 Tutsi Rwandans.³⁷ Samantha Power, the Senior Director for Multilateral Affairs in the National Security Council in the Obama Administration,³⁸ has

DOCTORS WITHOUT BORDERS (1999), <http://www.doctorswithoutborders.org/publications/article.cfm?id=1464&cat=special-report>. The Security Council reacted with a series of resolutions between 1998 and 1999, though none of these resolutions authorized military intervention. *See, e.g.*, S.C. Res. 1160, U.N. Doc. S/RES/1160 (Mar. 31, 1998); S.C. Res. 1199, U.N. Doc. S/RES/1199 (Sept. 18, 1999); S.C. Res. 1203, U.N. Doc. S/RES/1203 (Oct. 24, 1998); S.C. Res. 1239, U.N. Doc. S/RES/1239 (May 14, 1999); S.C. Res. 1244, U.N. Doc. S/RES/1244 (June 10, 1999). Regardless, in 1999 collective North Atlantic Treaty Organization ("NATO") forces intervened in the autonomous Yugoslav region to quell the violence. *See* Shaffer & Pollack, *supra* note 34, at 1210–11. Yugoslavia responded with a legal challenge at the International Court of Justice ("ICJ"), claiming that NATO had violated Yugoslavia's recognized sovereignty under the U.N. Charter. *See id.* at 1211; *see also* Legality of Use of Force (Serb. & Montenegro v. Belg.), Judgment, 2004 I.C.J. 279, ¶ 22 (Dec. 15). The ICJ never formally resolved the issue, but instead dismissed the case for lack of jurisdiction. *See id.* ¶ 129.

35. Power, *Bystanders to Genocide*, *supra* note 8, at 2.

36. *See id.* The author quotes President Clinton's speech:

It may seem strange to you here, especially the many of you who lost members of your family, but all over the world there were people like me sitting in offices, day after day after day, who did not fully appreciate [pause] the depth [pause] and the speed [pause] with which you were being engulfed by this unimaginable terror.

Id. Clinton also said:

The international community, together with nations in Africa, must bear its share of the responsibility for this tragedy . . . We did not act quickly enough after the killing began. We should not have allowed the refugee camps to become safe havens for the killers. We did not immediately call these crimes by their rightful name: genocide.

John Ryle, *A Sorry Apology from Clinton*, GUARDIAN (Apr. 13, 1998), <http://www.guardian.co.uk/Columnists/Column/0,5673,234216,00.html> (criticizing Clinton's apology as being disingenuous because the lack of intervention was in fact U.S. policy, not an administrative oversight).

37. *See* Power, *Bystanders to Genocide*, *supra* note 8, at 1.

38. Power is also a winner of the Pulitzer Prize for her book, *A Problem from Hell: America and the Age of Genocide*. *See generally*, SAMANTHA POWER,

suggested that the cause of the United States' delayed recognition of the Rwandan atrocity stemmed from the existence of two competing narratives.³⁹ To those on the ground, she explains, Hutu actions clearly constituted *genocide*; whereas, in the minds of U.S. policymakers, Rwanda was engaged in a *civil war*.⁴⁰ In Washington, the images of brutal killing in Rwanda immediately brought back memories of the failed peacekeeping efforts in Somalia in 1993.⁴¹ As a result, one United States official recalled, “[a]nytime you mentioned peacekeeping in Africa . . . the crucifixes and garlic would come up on every door.”⁴² Although the United States eventually voted in the Security Council to send peacekeeping troops to Rwanda,⁴³ it conveyed in no uncertain terms that it would not be sending U.S. troops.⁴⁴ By May of 1994, six weeks after the most serious fighting began, then-U.S. Secretary of State Warren Christopher finally acknowledged that the extermination of Tutsi was a genocide.⁴⁵ Whatever responses under the Genocide Convention this admission implicated, hundreds of thousands of Tutsi were already dead.⁴⁶

In 2000, after the majority of violence had abated in both the Rwanda and Kosovo conflicts, then-U.N. Secretary-General Kofi Annan asked the international community, “if military intervention is, indeed, an unacceptable assault on sovereignty, how should we respond to a Rwanda, to a Srebrenica—to gross and systematic violations of human rights that affect every precept of our common humanity?”⁴⁷ With the blessing of the U.N., the

A PROBLEM FROM HELL: AMERICA AND THE AGE OF GENOCIDE (Harper Perennial 2007) (2002).

39. See Power, *Bystanders to Genocide*, *supra* note 8, at 8.

40. See *id.* (emphasis added).

41. See *id.* During peacekeeping efforts in Somalia in 1993, which lasted for over ten months, a firefight broke out in which images of wounded U.S. soldiers, and one dead U.S. Ranger, were broadcast on Somali television. At least eighteen American soldiers died and seventy-three were wounded throughout the conflict. See *id.*

42. *Id.*

43. *Id.*

44. *Id.*

45. See Power, *Bystanders to Genocide*, *supra* note 8, at 15.

46. See *id.* at 14. By May 18, humanitarian agencies put the death toll at between 200,000 and 500,000, mostly Tutsi, civilians. See *id.* On either side of the estimation, these numbers easily met the stipulations of the Genocide Convention. See *id.*

47. ICISS REPORT, *supra* note 27, at vii (2001).

government of Canada and world organizations endeavored to answer this question.⁴⁸

B. The International Commission on Intervention and State Sovereignty

Following Secretary-General Kofi Annan's challenge, Canada established the International Commission on Intervention and State Sovereignty ("ICISS").⁴⁹ The goal of the ICISS was to articulate a fresh perspective on the issues that encompass the sovereignty-intervention debate.⁵⁰ The ICISS presented its Report ("Report") in December 2001,⁵¹ and in doing so, succeeded in shifting the discussion from one of sovereignty versus military intervention to one that focused on a state's inherent responsibility to protect its citizens.⁵² The Report ushered in a major linguistic and conceptual change by assuming that sovereignty includes a responsibility for states to protect their national citizenry from crimes against humanity.⁵³ Furthermore, the Report went so far as to say that when states fail to protect their own populations, it is permissible, indeed incumbent upon, other states to prevent violence against innocent civilians.⁵⁴

48. See generally *id.* Despite its role in the ICISS Report, in early fall of 2012, Canada reneged its support for the R2P. See Kyle Matthews, *Canada's Abandonment of the Responsibility to Protect*, CENTRE FOR INT'L POLICY STUDIES (Sept. 20, 2012), <http://cips.uottawa.ca/canadas-abandonment-of-the-responsibility-to-protect/>.

49. See generally *id.* The ICISS was composed of the Government of Canada together with a group of major foundations. See *id.*, at vii.

50. See *id.*, ¶ 1.41.

51. See Charles Homans, *Responsibility to Protect: A Short History*, FOREIGN POL'Y (Nov. 2011), http://www.foreignpolicy.com/articles/2011/10/11/responsibility_to_protect_a_short_history.

52. See Matthew H. Charity, *The Criminalized State: The International Criminal Court, the Responsibility to Protect, and Darfur, Republic of Sudan*, 37 OHIO N.U. L. REV. 67, 90 (2011) (citing ICISS REPORT, *supra* note 27, ¶¶ 2.14–2.15); Neville F. Dastoor, *The Responsibility to Refine: The Need for a Security Council Committee on the Responsibility to Protect*, 22 HARV. HUM. RTS. J. 25, 28 (Winter 2009).

53. See ICISS REPORT, *supra* note 27, ¶ 1.41; see also Massingham, *supra* note 25, at 816 ("[T]here seems to be consensus that speaking in terms of a responsibility to protect rather than right to intervene provides a very significant departure from the 1990s articulations of military intervention. Indeed, this language shift is seen by many as being very powerful.")

54. See Dastoor, *supra* note 52, at 28.

While the crux of the Report addresses the question of which circumstances make it appropriate for states to take coercive military action against another state in order to protect people at risk,⁵⁵ it also lays the foundation for the creation of the customary international law of preventing humanitarian crises.⁵⁶ The Report presented this analysis in three parts: the “responsibility to prevent,”⁵⁷ the “responsibility to react,”⁵⁸ and, when the proper reaction calls for military intervention, the “responsibility to rebuild.”⁵⁹

1. The Responsibility to Prevent

The Report identifies three essential conditions that states must meet in order to effectively prevent the large-scale human suffering and loss about which the ICISS is concerned.⁶⁰ These conditions are: (1) “early warning,”⁶¹ or knowledge of an imminent conflict situation and the dangers that accompany it; (2) the so-called “preventive toolbox,”⁶² wherein policy measures are available to make a positive difference with respect to that conflict; and (3) the “political will”⁶³ to implement the policies that will prevent the pending humanitarian crisis. The goal of the ICISS was not to reinvent the wheel on conflict prevention, yet the Report goes into some detail about the three conditions above and continuously mentions the importance of prevention as a precursor to military intervention.⁶⁴

55. See generally, ICISS REPORT, *supra* note 27.

56. See ICISS REPORT, *supra* note 27, ¶ 4.1

When preventive measures fail to resolve or contain the situation and when a State is unable or unwilling to redress the situation, then intervention measures by other members of the broader community of States may be required. These coercive measures may include political, economic or judicial measures, and in extreme cases—but only in extreme cases—they may also include military action.

Id.

57. *Id.* ch. 3.

58. ICISS REPORT, *supra* note 27, ch. 4.

59. *Id.* ch. 5.

60. See *id.* ¶ 3.9.

61. *Id.*

62. *Id.*

63. *Id.*

64. See, e.g. *id.*, ¶¶ 3.9, 4.1, 4.13, 4.38; see also Charity, *supra* note 52, at 93.

2. The Responsibility to React

The ICISS clarifies that the responsibility to react must first and foremost limit state actions to those of equal proportion to the seriousness of the crisis.⁶⁵ Possible reactions include political, economic, or judicial measures, and, in the most extreme cases, they may also include military intervention.⁶⁶ The Report identifies six criteria that together form the predicate to any military intervention: “right authority, just cause, right intention, last resort, proportional means and reasonable prospects.”⁶⁷ The ICISS does not attempt to supersede domestic, sovereign control of the state—the sanctity of which is reflected

65. See ICISS REPORT, *supra* note 27, ¶ 4.39 (“The scale, duration and intensity of the planned military intervention should be the minimum necessary to secure the humanitarian objective in question.”).

66. See *id.* ¶ 4.1. The Commission also notes that measures short of military intervention should be implemented with as much care. See *id.* ¶ 4.5. Economic sanctions, in particular, have been criticized for having much harsher outcomes on civilian populations than the leaders against whom the sanctions were originally imposed. See *id.* ¶ 4.5.

67. *Id.* ¶ 4.16 (original emphasis omitted). There have been numerous discussions, and literature is extensive, on what conditions are required to trigger military intervention in reaction to a humanitarian crisis. See, e.g., *id.* ¶ 4.15 (“It is true that there are presently almost as many different lists of [criteria for military intervention] as there are contributions to the literature and political debate on this subject.”). However, there is substantial indication that the Security Council is unlikely to endorse either the ICISS’s recommendations for conditions that elicit military intervention or any other inflexible triggers. See, e.g. Evans, Kamener Oration, *supra* note 1; see also Wheeler, *supra* note 25, at 552, 559, 564 (discussing the positions of China, Russia and the United States in response to a British proposal that permits military intervention without Security Council authorization in the event of a humanitarian crisis. Each of those three permanent members of the Security Council rejected the proposal.); Letter from Ambassador John Bolton, Permanent Representative of the United States of America, to the United Nations (Aug. 30, 2005) (on file with author). U.S. Ambassador John Bolton acknowledged:

[T]he international community has a responsibility to act when the host state allows such atrocities. But the responsibility of the other countries in the international community is not of the same character as the responsibility of the host . . . We do not accept that either the United Nations as a whole, or the Security Council, or individual states, have an obligation to intervene under international law.

Id.

in Articles 2(4)⁶⁸ and 2(7)⁶⁹ of the U.N. Charter—and therefore recommends that the Security Council approve all military action under Chapter VII.⁷⁰ This was the method used to authorize intervention in Libya, pursuant to Resolutions 1970 and 1973.⁷¹ The Report then acknowledges that intervention may not be available in every circumstance, but rejected this line of reasoning as an excuse to avoid *any* intervention efforts.⁷² This insight is particularly relevant given the current debate, as of this writing, over why military intervention was invoked in Libya but has not been used in the same capacity in Syria.⁷³

3. The Responsibility to Rebuild

Finally, the Report mandates an obligation to rebuild post-intervention.⁷⁴ Whenever an intervening body considers military intervention, the Report suggests, it should also formulate a post-intervention strategy to prevent the resurgence of whatever factors originally instigated the crisis.⁷⁵ The Report goes on to address some of the main impediments to effective post-intervention strategy, such as security, justice and reconcilia-

68. U.N. Charter art. 2, para. 4 (“All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.”).

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

Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to [settlement] under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.

Id.

70. U.N. Charter, ch. VII. See ICISS REPORT, *supra* note 27, ¶ 6.13; see also Defeis, *supra* note 7, at 93 (noting that initial resistance to the R2P lay in concerns that addressing human rights as member states would violate Article 2(7) of the U.N. Charter).

71. See S.C. Res. 1970, *supra* note 2; see also S.C. Res. 1973, *supra* note 4.

72. See ICISS REPORT, *supra* note 27, ¶ 4.43; see also James Pattison, *The Ethics of Military intervention in Libya*, 25 ETHICS & INT’L AFF. 1, 7 (2011) (“[W]hen compared to no action in Libya or anywhere else . . . saving some lives is better than saving none.”) (emphasis omitted).

73. See *infra* note 217 and accompanying text.

74. See ICISS REPORT, *supra* note 27 at ch. 5.

75. See *id.* ¶ 5.

tion, and economic development.⁷⁶ Providing recommendations for addressing these concerns, the Report emphasizes that, though valid, such difficulties must be viewed as obstacles to overcome rather than excuses for abstaining from needed intervention.⁷⁷

C. High-Level Panel on Threats, Challenges and Change and the "Three-Pillar" Approach

In 2005, the U.N. Secretary-General's High-Level Panel on Threats, Challenges and Change issued a report ("High-Level Panel Report") entitled *A More Secure World: Our Shared Responsibility*.⁷⁸ By citing Chapter VII and the Convention on the Prevention and Punishment of the Crime of Genocide ("Genocide Convention"),⁷⁹ the High-Level Panel Report counters the conception that non-intervention is an appropriate response to humanitarian atrocities.⁸⁰ It adopts the ICISS's view that when member states sign the U.N. Charter, they not only benefit from establishing themselves as sovereign nations but also accept the responsibility to protect human lives from atrocities.⁸¹ The High-Level Panel Report also acknowledges that history provides numerous examples of sovereign states having been either unable or unwilling to protect its citizens, and in doing so the report places some of the responsibilities to protect on the international community.⁸²

76. ICISS REPORT, *supra* note 27, at ch. 5.

77. *Id.* ¶ 5.6–5.7.

78. See U.N. Secretary-General, *A More Secure World: Our Shared Responsibility*, ¶ 203, U.N. Doc. A/59/565 (Dec. 1, 2004) [hereinafter High-Level Panel Report]. The report states:

We endorse the emerging norm that there is a collective international responsibility to protect, exercisable by the Security Council authorizing military intervention as a last resort, in the event of genocide and other large-scale killing, ethnic cleansing or serious violations of international humanitarian law which sovereign Governments have proved powerless or unwilling to prevent.

Id.

79. See G.A. Res. 260, *supra* note 32.

80. See High-Level Panel Report, *supra* note 78, ¶ 200.

81. See *id.* ¶ 29.

82. See *id.* Any collective action on behalf of the international community should be done in strict accordance with the U.N. Charter and the Universal Declaration of Human Rights. *Id.*

Once the High-Level Panel Report was released in 2004, the General Assembly codified its support for R2P in the Outcome Document from the 2005 World Summit.⁸³ Though nonbinding, the General Assembly's resolution required significant negotiation and represented a substantial step forward in affirming international commitment to R2P.⁸⁴ Shortly thereafter, in April 2006, the Security Council expressly adopted the language of R2P in Resolution 1674 on the Protection of Civilians in Armed Conflict.⁸⁵

Secretary-General Ban Ki-Moon has shown particular interest in and support for R2P.⁸⁶ He has given a number of speeches on the topic since the beginning of his term as Secretary-General,⁸⁷ perhaps most notably in 2008 when he laid out the succinct "three pillars" approach, encapsulating the ICISS's original framework for R2P.⁸⁸ The first pillar states that individual nations unanimously affirm their responsibility to protect their populations from four crimes, whether acted or incited: genocide,⁸⁹ war crimes,⁹⁰ ethnic cleansing⁹¹ and crimes

83. G.A. Res. 60/1, *supra* note 6, ¶¶ 138–139.

84. However, because of the negotiations, paragraphs 138 and 139 of the Outcome Document support the concept in general but exclude some of the measures that would guide its implementation. *See* Shaffer & Pollack, *supra* note 34, at 1232.

85. *See* S.C. Res. 1674, U.N. Doc. S/RES/1674 (Apr. 28, 2006).

86. *See, e.g.*, Remarks on Responsible Sovereignty, *supra* note 7 (focusing on the function of regional and sub-regional arrangements in accordance with the R2P).

87. *See, e.g.*, U.N. Secretary-General, *Implementing the Responsibility to Protect: Rep. of the Secretary-General*, ¶ 11, U.N. Doc A/63/677 (Jan. 12, 2009) [hereinafter *Implementing*].

88. *See generally, id.*; *see also* Remarks on Responsible Sovereignty, *supra* note 7.

89. *See* G.A. Res. 260, *supra* note 32 ("In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group . . ."). For example, genocide occurred when Hutu murdered 800,000 Tutsi in Rwanda. *See* Power, *Bystanders to Genocide*, *supra* note 8, at 15.

90. War crimes are "grave breaches" to the 1949 Geneva Convention, such as "wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly." Geneva Convention, art. 50, Aug. 12, 1949, 6 U.S.T. 3516.

91. U.N. Secretary-General, Letter Dated 24 May 1994 from the Secretary-General to the President of the Security Council, U.N. Doc. S/1994/674, ¶ 130

against humanity.⁹² The second pillar states that the international community endorses this goal by demanding preventive steps that neither require Security Council unanimity nor come after images of devastation and death that “shock the conscience of the world.”⁹³ The third pillar insists that U.N. member states respond to the four listed crimes quickly and decisively, and in accordance with the U.N. Charter.⁹⁴ Such a response may draw upon a range of U.N. resources and should preempt the atrocity from unfolding while emphasizing flexibility and durability.⁹⁵

It is with this in mind that this Note turns to a brief discussion of Customary International Law and ultimately considers whether the second pillar—centering on humanitarian prevention—is an international norm.

II. CONTEMPORARY CUSTOMARY INTERNATIONAL LAW

CIL has frequently been discussed in the context of R2P and military intervention.⁹⁶ For the purposes of this Note, military intervention refers to unilateral military action without the Security Council’s authentication under Chapter VII of the U.N. Charter.⁹⁷ Military action invoked under the R2P framework is legally authorized by the Security Council, and therefore is contemplated separately from military *intervention*.⁹⁸ Such U.N. authorizations abide by the U.N. Charter by seeking to “maintain or restore international peace and security” to the

(May 27, 1994) (“[T]he Commission confirms its earlier view that ‘ethnic cleansing’ is a purposeful policy designed by one ethnic or religious group to remove by violent and terror-inspiring means the civilian population of another ethnic or religious group from certain geographic areas.”).

92. See Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9, Art. 7, 1999–2002); See generally Remarks on Responsible Sovereignty, *supra* note 7.

93. Remarks on Responsible Sovereignty, *supra* note 7.

94. See *id.*

95. See *id.*

96. See, e.g., Wheeler, *supra* note 25; Hamilton, *supra* note 16, at 292; David Vesel, *The Lonely Pragmatist: Military Intervention in an Imperfect World*, 18 *BYU J. PUB. L.* 1, 13–19 (2003); Massingham, *supra* note 25.

97. See U.N. Charter art. 42; Vesel, *supra* note 96, at 13 (“The issue here is unilateral intervention, which for the purposes of this article is defined as any intervention outside of a specific U.N. Security Council resolution, as authorized under Article 42 of the U.N. Charter.”).

98. See U.N. Charter ch. VII; see also ICISS REPORT, *supra* note 27, ¶ 6.13.

world.⁹⁹ Section A will discuss the traditional view of CIL. Section B will introduce one contemporary view of CIL in which state action is deemphasized.¹⁰⁰ This contemporary approach will then be applied in Part III to show that humanitarian prevention is CIL.

A. Traditional View of Customary International Law

For most of the twentieth century, treaties, such as the U.N. Charter or other multilateral agreements between two or more nations, have governed international laws.¹⁰¹ Before the start of the first World War, however, CIL was the principle form of international law, in both the sphere of public international law—laws governing nations—and that of private international law—laws governing private disputes between international parties.¹⁰²

CIL has historically been composed of two sources: state practice and *opinio juris*.¹⁰³ “State practice,” objectively measured, refers to those actions that have become internationally legitimized through “general and consistent” usage.¹⁰⁴ *Opinio juris* is “a subjective feeling of legal obligation regarding the practice in question.”¹⁰⁵ For example, it is fair to assume that *opinio juris* cautions state leaders against committing genocide.

99. U.N. Charter art. 42; *see also* Vesel, *supra* note 96, at 13–14 (discussing how customary international law may justify intervention where the U.N., through Art. 42, has not).

100. *See infra*; *see also* Curtis A. Bradley & Mitu Gulati, *Customary International Law and Withdrawal Rights in an Age of Treaties*, 21 DUKE J. COMP. & INT’L L. 1, 3 (Fall 2010) [hereinafter Bradley & Gulati, *Withdrawal Rights*]. (“Far from being well understood and accepted, the theory of CIL today is riddled with uncertainty.”).

101. *Id.*

102. Curtis A. Bradley & Mitu Gulati, *Withdrawing from International Custom*, 120 YALE L.J. 202, 208 (Nov. 2010) [hereinafter Bradley & Gulati, *Withdrawing*].

103. *See* Vesel, *supra* note 96, at 13. A small subset of norms are considered “preemptory norms,” or “*jus cogens* norms,” which are so absolute in their character that they do not permit any exceptions. Bradley & Gulati, *Withdrawing*, *supra* note 102, at 212. Examples of *jus cogens* norms that cannot be overridden, even by treaty or prior persistent objection, are genocide, slavery, and torture. *Id.* at 212–13.

104. *See* Restatement (Third) Foreign Relations Law of the United States § 102(2) cmt. b (1987).

105. Michael Byers, *Power, Obligation, and Customary International Law*, 11 DUKE J. COMP. & INT’L L. 81, 83 (2001).

Because opinio juris is “generally contained within a particular dense [state] practice,” it does not usually require its own showing unless there is a specific ambiguity concerning when the norm is invoked.¹⁰⁶ Using the same example, because states generally do not engage in genocide, a separate showing of subjective opinio juris is not necessary to demonstrate that genocide is illegal under CIL.

Traditionally, as long as state practice and opinio juris attach to a specific action, that action is considered legitimate under international law and may be binding without an international agreement, treaty, or international court decision.¹⁰⁷ As a result, CIL can bind states universally and may be based significantly less on explicit consent than treaties or other international agreements,¹⁰⁸ which are only binding on party states.¹⁰⁹ Moreover, as they are based on implicit understandings and custom, there is typically no opportunity for a state to unilaterally “withdraw” from observation of a CIL, as it might do with a statute.¹¹⁰

B. One Contemporary View of Customary International Law

There is significant debate about what sources are acceptable for fulfilling the requirements of CIL.¹¹¹ For example, some

106. Peter Stockburger, *The Responsibility to Protect Doctrine: Customary International Law, An Emerging Legal Norm, or Just Wishful Thinking?*, 5 INTERCULTURAL HUM. RTS. L. REV. 365, 391 (2010).

107. Various scholars treat this standard definition differently; some seek to deemphasize the subjective element (opinio juris) and others have attempted to deemphasize the objective element (state action). See Bradley & Gulati, *Withdrawing*, *supra* note 102, at 210.

108. *Id.* at 214.

109. *Id.*

110. *Id.*

111. *Id.* In a subsequent article, Professors Bradley and Gulati expound,

It is not clear, for example, what counts as state practice. Should a nation's treaty practice count? Can evidence of opinio juris, such as positions taken in international institutions, also constitute state practice? How much state practice must there be, and for how long? Similar questions abound for opinio juris. For example, to what extent do the views expressed by a state with respect to international resolutions or treaty norms count as evidence of opinio juris for CIL? To what extent can opinio juris be inferred from practice? More fundamentally, if CIL requires that nations believe that they are legally obligated, how does that belief arise in the first place?

scholars cite treaties as evidence of state practice in order to justify a new principle of CIL,¹¹² a practice that other scholars question.¹¹³ And though the International Court of Justice (“ICJ”) has accepted some international resolutions, such as those promulgated by the U.N. General Assembly, as evidence of a new CIL,¹¹⁴ critics have questioned how nonbinding agreements can satisfy the requirements of state practice and *opinio juris*.¹¹⁵ This is particularly relevant to establishing humanitarian prevention as CIL in light of the General Assembly’s endorsement of the R2P at the 2005 World Summit.¹¹⁶

With the conception of establishing CIL in flux, Professors Curtis A. Bradley and Jack L. Goldsmith identified a contemporary way to analyze the creation of CIL, which challenges the traditional approach in three ways.¹¹⁷ First, it relies less frequently on state practice than previous conceptions of CIL.¹¹⁸ Second, it posits that CIL has the potential to develop quickly.¹¹⁹ And third, it considers the ways in which CIL can regulate the relationship between the state and its citizens, rather than the relationship between two nations.¹²⁰ Under this approach, an abundance of human rights violations are now widely accepted as CIL that would not be otherwise.¹²¹

Bradley & Gulati, *Withdrawal Rights*, *supra* note 100, at 4.

112. *See, e.g.*, JACK L. GOLDSMITH & ERIC. A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* 23 (2005) (“Treaties, especially multilateral treaties, but also bilateral ones, are often used as evidence of customary international law, but in an inconsistent way.”).

113. *See, e.g.*, Jonathan I. Charney, *International Agreements and the Development of Customary International Law*, 61 WASH. L. REV. 971, 972 (1986) (discussing the ambiguities raised by the question of “which circumstances of negotiation and conclusion of international agreements contribute to new rules of customary law”).

114. *See* Bradley & Gulati, *Withdrawing*, *supra* note 102, at 213.

115. *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 254–55 (July 8) (“[General Assembly resolutions] can, in certain circumstances, provide evidence important for establishing the existence of a rule or the emergence of an *opinio juris*.”).

116. *See generally* G.A. Res. 60/1, *supra* note 6, ¶¶ 138–139.

117. Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 839 (Feb. 2007).

118. *Id.* at 842.

119. *Id.*

120. *Id.*

121. *Id.* Bradley and Goldsmith go on to state:

1. Deemphasizing State Practice

The contemporary understanding of CIL is less tied to state practice than the traditional model, evidenced in large part by the acceptance of "General Assembly resolutions, multilateral treaties, and other international pronouncements" as sufficient evidence of state practice.¹²² Put another way, nations' verbal or written commitments regarding a specific action are themselves considered state action. Human rights norms are more likely to be governed by CIL under this trend because a country may find itself party to a General Assembly resolution committed to preventing humanitarian crises when that country may not have independently committed to do so otherwise.¹²³

For example, in an ICJ case about U.S. military intervention in Nicaragua, the court relied significantly upon General Assembly resolutions and multilateral treaties to prove the existence of CIL principles regarding the acceptable use of force and non-intervention.¹²⁴ In regards to state practice, the ICJ said

The Court does not consider that, for a rule to be established as customary, the corresponding practice must be in absolutely rigorous conformity with the rule. In order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of States should, in general, be consistent with such rules, and that instances of State conduct inconsistent with a given rule should generally have been treated

There is widespread agreement that CIL now protects the rights to be free from genocide, slavery, summary execution or murder, "disappearance," "cruel, inhuman or degrading treatment," "prolonged arbitrary detention," and "systematic racial discrimination." An intergovernmental human rights committee recently asserted that CIL also protects "freedom of thought, conscience and religion," a presumption of innocence, a right of pregnant women and children not to be executed, and a right to be free from expressions of "national, racial, or religious hatred."

Id. at 841–842 (citing Restatement (Third) of the Foreign Relations Law of the United States § 702 (1987); United Nations, Human Rights Committee, General Comment Adopted by the Human Rights Committee Under Art. 40, ¶ 4, of the International Covenant on Civil and Political Rights, General Comment No. 24(52) at 3, U.N. Doc. CCPR/C/21/Rev.1/Add.6 (1994)).

122. Bradley & Goldsmith, *supra* note 117, at 839.

123. *See infra*.

124. *See* Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, 98–109 (June 27).

as breaches of that rule, not as indications of the recognition of a new rule.¹²⁵

The ICJ assumes the existence of a rule before demonstrating state practice in support of the CIL and then concludes state actions to the contrary are evidence of a breach of the rule.¹²⁶ The need for independent, concrete examples of state practice *in order to establish* a CIL is thus diminished. Responding to this statement, one scholar—endorsing the traditional conception of CIL—lamented that “[t]he Court thus completely misunderstands customary law.”¹²⁷

The United States has demonstrated the same decreased emphasis on state practice embraced by the ICJ. The United States Court of Appeals for the Second Circuit, in *Filartiga v. Peña-Irala*,¹²⁸ consistently referred to treaties, the U.N. Charter, and General Assembly resolutions to satisfy the state practice requirement and thus establish a CIL principle against the use of torture.¹²⁹ It even acknowledged the frequency with which states do not comport to this rule, but then rejected the conclusion that this fact prevented them from finding evidence of a CIL.¹³⁰ While some have criticized the decreased importance of state practice in identifying CIL,¹³¹ the development has no doubt been instrumental to determining that many human rights violations are CIL.¹³² Indeed, it is also instrumental in finding that humanitarian prevention is a CIL, as there is evidence that some states have failed to prevent humanitarian atrocities.

125. *Id.* at 98.

126. *See id.*

127. Anthony D’Amato, *Trashing Customary International Law*, 81 AM. J. INT’L L. 101, 102 (1987).

128. *Filartiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980) (applying the Alien Tort Statute to hold aliens liable for tortious conduct, committed abroad, that violates the law of nations or a treaty of the United States).

129. *See id.* at 882–885.

130. *Id.* at 884 (“The fact that the prohibition of torture is often honored in the breach does not diminish its binding effect as a norm of international law.”).

131. For example, in response to the ICJ’s opinion in the Nicaragua case, Professor D’Amato stated, “[i]t reveals the August judges of the International Court of Justice as collectively naive about the nature of custom as the primary source of international law.” D’Amato, *supra* note 127, at 105.

132. *See id.*

2. Quick Development

A second difference between the traditional concept of CIL and this more modern approach is the opportunity under the latter for CIL to develop rapidly.¹³³ For example, the ICJ stated that “the passage of only a short period of time is not necessarily, or of itself, a bar to the formation of a new rule of customary international law.”¹³⁴ One reason for this reduced temporal emphasis, proponents suggest, is that developments in communication technology allow a state’s actions to be publicized quickly.¹³⁵ Another reason is that the proliferation of international organizations and institutions “accelerate[s] the process of customary law formation by relying upon the unique form of state practice which occurs in multilateral organizations like the United Nations.”¹³⁶ Thus, the fact that R2P was not codified until the early twenty-first century should not count against the argument for humanitarian prevention as CIL.

3. Relationship between Nations and Their Citizens

Finally, the nature of the relationships traditionally covered by international law has changed.¹³⁷ Rather than only governing relations among nations, CIL is now implicated in the relationship between the ruling party of a nation and its citizens.¹³⁸ But with the rise of human rights norms that are recognized as CIL, such as genocide and ethnic cleansing, many of which focus on the treatment of citizens by their state, there has been a natural move toward viewing CIL as laws that govern the relationship between a nation and its citizens.¹³⁹ This is clearly implicated by R2P when a leader fails to uphold his responsibility to protect the state’s civilians.

133. Bradley & Goldsmith, *supra* note 117, at 840.

134. *North Sea Continental Shelf (F.R.G. v. Den., F.R.G. v. Neth.)*, 1969 I.C.J. 4, at 43 (Feb. 20).

135. Restatement (Third) of the Law of Foreign Nations, § 102, reporter’s n.2 (1987).

136. Jeffrey M. Blum & Ralph G. Steinhardt, *Federal Jurisdiction over International Human Rights Claims: The Alien Tort Claims Act After Filartiga v. Peña-Irala*, 22 HARV. INT’L L.J. 53, 72 (1981).

137. Bradley & Goldsmith, *supra* note 117, at 840.

138. *Id.* at 841.

139. *Id.*

III. HUMANITARIAN PREVENTION: AN EMERGING PRINCIPLE OF CUSTOMARY INTERNATIONAL LAW

The military intervention in Libya has given the international community a moment to reflect on the successes and failures of the R2P framework. In a 2010 article examining the role of R2P five years after the 2005 World Summit, Alex Bellamy, a professor of Peace and Conflict Studies at University of Queensland, argued that the first pillar of R2P (as articulated by Secretary-General Ban Ki-Moon) simply restates human rights law.¹⁴⁰ The prohibition of genocide, war crimes, ethnic cleansing, and crimes against humanity is already well established in CIL.¹⁴¹ But pillars two and three, he continues, are not CIL themselves.¹⁴² He makes this determination partly by recognizing the inconsistent and shallow evidence of state practice.¹⁴³ Yet considering the modern conception of CIL discussed in Part II, wherein state practice is less important to establishing human rights principles of CIL, Bellamy's hesitancy to recognize pillar two—preventive measures—as an international norm may be overly cautious, considering contemporary efforts to prevent mass atrocities. Section A will demonstrate how humanitarian prevention is CIL when evaluated under Bradley and Goldsmith's framework. Section B will identify the anomaly of Libya, in light of the military intervention there in 2011. Finally, Section C will briefly note the crisis in Syria, currently unfolding in 2012, and how the relevant actors there are still adhering to humanitarian prevention despite ongoing violence.

140. Alex J. Bellamy, *The Responsibility to Protect—Five Years On*, 24 *ETHICS & INT'L AFF.* 143, 160 (2010) [hereinafter Bellamy, *Five Years On*].

141. *Id.* (“[The] R2P's first pillar is therefore best understood as a reaffirmation and codification of already existing norms.”).

142. *See id.* at 160–62. The extent to which pillars two and three can be considered norms is whether there is a shared expectation that “1) governments and international organizations will exercise this responsibility, that 2) they recognize a duty and right to do so, and that 3) failure to act will attract criticism from the society of states.” *Id.* at 161. Further, even if pillars two and three are norms, they are weakened by indeterminacy, or the R2P's flexibility regarding when and how best to respond to humanitarian crises. *See id.* at 161–62.

143. *Id.* at 161.

A. Humanitarian Prevention

The international community's responsibility for humanitarian prevention is itself CIL. Not only does this mean that there exists a legal obligation for states to prevent humanitarian crises, but also—if preventive measures are applied effectively¹⁴⁴—that there is less need for the Security Council to invoke military intervention under the reaction prong of R2P before intervening countries may take legally justified action. Therefore, even while military intervention in the form of unilateral military intervention has not yet been established in CIL,¹⁴⁵ humanitarian prevention certainly has¹⁴⁶ when considered under the three prongs of Bradley and Goldsmith's framework: de-emphasis on state practice, rapid development, and CIL as

144. Importantly, past attempts at prevention techniques have not always been successful. For example, peacekeeping preventive efforts in Rwanda were too little, too late. See Power, *Bystanders to Genocide*, *supra* note 8, at 5. The U.N., commanded by Romeo Dallaire and other human rights organizations, were tasked with demilitarizing the Hutu so that the Tutsi could return without fear of being killed. See *id.* at 4. Dallaire was told that the 5,000 soldiers he thought would be necessary to keep peace would never be fulfilled, so he trimmed his request to 2,500. See *id.* This allotment was not nearly sufficient to control the Hutu extremists. See *id.*; see also Homans, *supra* note 51 (describing when Bosnian Serbs massacred more than seven thousand Muslim men and boys while Dutch U.N. peacekeepers could do nothing to prevent the violence). Similarly, during the 1993 Somalia dispute, peacekeeping efforts were likely insufficient to have a successful outcome. See Power, *Bystanders to Genocide*, *supra* note 8, at 8. Also in Somalia in 2006, after an increase in violence, the African Union and then-U.S. President George W. Bush called for a United Nations peace deployment. Bellamy, *The Exception and the Norm*, *supra* note 22, at 6. This deployment of peacekeepers, however, has not been entirely successful. See generally Paul D. Williams, *Into the Mogadishu Maelstrom: The African Union Mission in Somalia*, 16 INT'L PEACEKEEPING 514 (2009).

145. See *supra* note 25 and accompanying text.

146. The ICJ supports this argument with its decision in the 2007 case of *Bosnia & Herzegovina vs. Serbia & Montenegro*. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), 2007 I.C.J. 91, ¶ 430 (Feb. 26) (holding that a state incurs responsibility “if the State manifestly failed to take all measures to prevent genocide which were within its power, and which might have contributed to preventing the genocide”). One scholar has argued that this judgment simply reiterates the core legal premise of R2P, which is the prevention and punishment of genocide, as written in the Genocide Convention. See Louise Arbour, *The Responsibility to Protect as a Duty of Care in International Law and Practice*, 34 REV. OF INT'L STUD. 445, 450–51 (2008).

applied between a nation and its citizens. Established in Part II above, humanitarian prevention satisfies the latter two prongs because of the prolific action taken in the first decade of this century and the underlying purpose of R2P as a nation's responsibility to protect its citizens from atrocity. Thus, the analysis below focuses only on *opinio juris* and state action.

1. Evidence of *Opinio Juris*: Voicing Support for Humanitarian Prevention

The ICISS Report identifies a strong commitment to prevention in R2P,¹⁴⁷ evidenced in large part by its call for the international community to close the gap between rhetoric supporting preventive measures and actions that actually demonstrate a commitment to prevention.¹⁴⁸ Moreover, after consultations with experts around the world, the ICISS reported that all prevention techniques must be fully exhausted before implementing military intervention,¹⁴⁹ prompting some scholars to note that prevention is the most important aspect of R2P.¹⁵⁰

Though the military intervention prong of R2P gets the most attention and is arguably the most likely to be challenged,¹⁵¹ states' concerns about sovereignty are less acute than they once were.¹⁵² Indeed, according to one assessment during 2005-2009

147. See ICISS REPORT, *supra* note 27, ¶ 3.1–3.3.

148. *Id.* ¶ 3.1; see also Charity, *supra* note 52, at 91 (“[P]revention is the most important dimension, to which far more resources must be dedicated.”). Charity questions whether prevention is actually the most important dimension of the doctrine, noting that approximately two-thirds of the synopsis and the majority of the ICISS Report is dedicated to “the most controversial” means of intervention. *Id.*

149. ICISS REPORT, *supra* note 27, ¶ 3.1.

150. *E.g.*, Defeis, *supra* note 7, at 96. Prevention measures can take any form and be invoked by the individual state or the international community. See *id.*; but see Weiss, *supra* note 29, at 1 (“The increasing and, at times, virtually exclusive emphasis on prevention in the interpretation of [the R2P] was politically correct but counterproductive.”).

151. See, *e.g.*, Shaffer & Pollack, *supra* note 34, at 1222 (“With respect to military intervention—the most controversial aspect of the R2P, and the one creating the most obvious conflicts with state sovereignty. . .”).

152. See Defeis, *supra* note 7, at 91–92 (“Although at one time, sovereignty stood as a barrier to the recognition of human rights as a matter of international concern, today the concept of sovereignty has eroded.”); see also Louis Henkin, *That “S” Word: Sovereignty, and Globalization, and Human Rights, Et Cetera*, 68 *FORDHAM L. REV.* 1, 4 (Oct. 1999) (explaining that since the Hol-

of states' support of R2P, those portions of the ICISS Report regarding peace and prevention are fairly uncontroversial.¹⁵³ Even during times where nations, particularly the United States, opposed sending their own troops to prevent mass atrocities, those same nations often acknowledge that certain peacekeeping efforts are the Security Council's obligation to fulfill.¹⁵⁴ Such was the case during the Rwandan genocide, when the United States used this obligation to defend the position that the peacekeeping efforts must be tenable.¹⁵⁵

After Resolution 1973 was passed and NATO military forces went into Libya, many anticipated a backlash against R2P at the General Assembly debate in July 2011.¹⁵⁶ This anticipation was largely unwarranted.¹⁵⁷ Rather than encountering criticism that NATO had gone too far in its military attack against Libya, and that Resolution 1973 itself was too much of an affront to traditional notions of sovereignty,¹⁵⁸ "there was overwhelming support for the basic concept[] and absolutely no move to overturn it."¹⁵⁹ Some countries, such as Cuba, Vene-

ocaust, how a leader treats his own people is a matter of international concern, politics, and law).

153. Jonah Eaton, Note, *Determining the Meaning and Legal Status of the Responsibility to Protect*, 32 MICH. INT'L L.J. 765, 799 (Summer 2011) (citing U.N. GAOR, 63d Sess., 98th plen. mtg. at 4, U.N. Doc. A/63/PV.98 (July 24, 2009)); but see Gareth Evans, *The Responsibility to Protect: An Idea Whose Time Has Come . . . And Gone?*, 22 INT'L REL. 283, 288–89 (2008) (citing those regions that after the 2005 World Summit Outcome Document showed signs of "buyer's remorse" regarding the R2P: sub-Saharan Africa, the Arab-Islamic, Latin American, and Asia).

154. See Power, *Bystanders to Genocide*, *supra* note 8, at 18.

155. See *id.*

156. Evans, Kamener Oration, *supra* note 1; see also Dastoor, *supra* note 52, at 26.

157. See *id.*

158. Since the July 2011 United Nations discussion, there has been some negativity towards NATO's execution of the Security Council's mandate in Resolution 1973. See Shaffer & Pollack, *supra* note 34, at 1236. Russia, China, and South Africa in particular, have accused NATO of overstepping its bounds with the intense military campaign it waged against Col. Qaddafi's regime. See, e.g., Bellamy & Williams, *supra* note 4, at 845.

159. Evans, Kamener Oration, *supra* note 1; see also Eaton, *supra* note 153, at 795. Gauging attitudes towards the R2P from 2005–2009, "[i]t appears as if support for a detailed responsibility to protect doctrine as actually decreased." However, those who were outright opposed to the doctrine, such as "North Korea, Iran, and Sudan are, to varying degrees, pariahs for their human rights records and belligerency." *Id.*

zuela, and Iran, voiced objections, but even their opposition to R2P was less vehement than in past instances.¹⁶⁰ More than anything, in fact, the discussion at the July 2011 General Assembly meeting showed overwhelming and enthusiastic support for preventive measures.¹⁶¹ As in earlier debates, though perhaps stronger here, states were generally comfortable with their responsibility to protect their own citizens and to assist in that protection should another leader's own efforts willingly or unwillingly fail.¹⁶² Those who voiced discomfort lay their concerns in the more intrusive forms of engagement, such as military intervention.¹⁶³

In 2009, Secretary-General Ban Ki-Moon released his "three pillars" report, "Implementing the Responsibility to Protect," which challenged the U.N. member states to further their commitment to R2P "from words into deeds."¹⁶⁴ In the General Assembly debate following the release of Mr. Ban's report, ninety-four speakers, representing 180 member states, participated in the conversation.¹⁶⁵ They overwhelmingly voiced their support for the prevention and halting of mass atrocities.¹⁶⁶ Most significant to the establishment of humanitarian prevention as CIL, the member states unanimously conceded to the "importance of the first two pillars and the fundamental obligation to prevent mass atrocity crimes."¹⁶⁷

160. Evans, Kamener Oration, *supra* note 1.

161. *See infra*.

162. *See* Evans, Kamener Oration, *supra* note 1.

163. *Id.*

164. Remarks on Responsible Sovereignty, *supra* note 7; *see also Implementing*, *supra* note 87. The General Assembly formally committed itself to giving further consideration to the Secretary-General's proposals; G.A. Res. 63/308, U.N. Doc A/RES/63/308 (Oct. 7, 2009).

165. GLOBAL CTR. FOR THE RESPONSIBILITY TO PROTECT, IMPLEMENTING THE RESPONSIBILITY TO PROTECT: THE 2009 GENERAL ASSEMBLY DEBATES: AN ASSESSMENT 1 (Aug. 2009).

166. *See id.*

167. *Id.* at 2. The assessment continues,

From Algeria to Vietnam, member states agreed on the fundamental obligation to prevent mass atrocity crimes. As the representative of Nigeria emphasized, prevention rather than intervention was the priority. Even the few member states that struck a skeptical tone, such as Pakistan and Venezuela, were more welcoming on this point. This suggested a clear avenue for action by the member states.

Id. at 6.

2. Institutional Support for Humanitarian Prevention

Since R2P's conception, multiple government and institutional mechanisms have been established to support the doctrine.¹⁶⁸ One example, The Global Centre for the Responsibility to Protect, was founded by international scholars and academics to transform the intellectual concept of R2P into a practical guide to proper state practice, and has been joined in its efforts by the International Crisis Group, Human Rights Watch, Oxfam International, Refugees International, and WFM-Institute for Global Policy.¹⁶⁹ The International Coalition for the Responsibility to Protect was also established by regional and non-governmental organizations to promote normative consensus around R2P.¹⁷⁰

At the U.N. level, two positions have been created to oversee the implementation of the R2P principle. Francis Deng was appointed by Secretary-General Ban Ki-Moon as Special Advisor on the Prevention of Genocide.¹⁷¹ Edward Luck was appointed as the Special Adviser to the Secretary-General for the Responsibility to Protect.¹⁷² The designation of these positions is particularly important to humanitarian prevention because they act as early warning systems to the Security Council when specific situations could result in mass atrocity.¹⁷³

3. State Practice Supporting Humanitarian Prevention

Adopting the formula of CIL outlined in Part II, the following demonstrates sufficient state action in support of humanitarian prevention as CIL. Section a will offer evidence of state practice

168. *See infra.*; *see also* Bellamy, *Five Years On*, *supra* note 140, at 144 ("Five years on from its adoption, [R2P] boasts a Global Centre and a network of regional affiliates dedicated to advocacy and research, an international coalition of nongovernmental organizations (NGOs), a journal and book series, and a research fund sponsored by the Australian government.").

169. *Who We Are*, GLOBAL CTR. FOR THE RESPONSIBILITY TO PROTECT, <http://globalr2p.org/whoweare/index.php> (last visited Nov. 25, 2011).

170. *Learn About the International Coalition for the Responsibility to Protect*, INT'L COAL. FOR THE RESPONSIBILITY TO PROTECT, <http://www.responsibilitytoprotect.org/index.php/about-coalition> (last visited Nov. 25, 2011).

171. *See Office of the Special Adviser on the Prevention of Genocide*, UNITED NATIONS, <http://www.un.org/en/preventgenocide/adviser/> (last visited Oct. 16, 2012).

172. *See id.*

173. *See id.*

in the form of binding and nonbinding international agreements. Section b will then provide evidence of state action undertaken by the Security Council.

a. International Agreements

The 2005 World Summit Outcome, codifying U.N. member states' commitment to the three pillars of the R2P, provides the clearest demonstration of humanitarian prevention as state practice.¹⁷⁴ The Security Council provided further evidence in this direction in 2006 when it adopted the language of the 2005 Outcome Document in Resolution 1674.¹⁷⁵ Then, following the 2009 General Assembly debate regarding the Secretary-General's "Implementing the Responsibility to Protect" report,¹⁷⁶ a General Assembly resolution codified the member states' intention to give real consideration to the Secretary-General's recommendations about how to turn the concept of R2P into state practice.¹⁷⁷

b. Preventative Measures in Action

U.N. peacekeeping missions over the last decade have focused primarily on the protection of civilians.¹⁷⁸ While some have argued that protecting civilians is an activity distinct from preventing mass atrocity under R2P,¹⁷⁹ they are in fact

174. See G.A. Res. 60/1, *supra* note 6, ¶¶ 138–139.

175. S.C. Res. 1674, *supra* note 85. Prior to Libya, the Security Council remained relatively quiet on the R2P, instead focusing on its agenda called the Protection of Civilians ("PoC"). See Jennifer Welsh, *Civilian Protection in Libya: Putting Coercion and Controversy Back into RtoP*, 25 ETHICS & INT'L AFF. 1, 2 (2011). Welsh points out that those countries who are less supportive of the R2P have emphasized the more decisive threats to peace and security addressed by the PoC, as opposed to the broader human rights initiative sought by the R2P. *Id.* at 3.

176. See G.A. Res. 63/308, *supra* note 164.

177. *Id.* ("Recalling the 2005 World Summit Outcome, especially paragraphs 138 and 139 thereof . . . [d]ecides to continue its consideration of the responsibility to protect.") (emphasis omitted).

178. Bellamy & Williams, *supra* note 4, at 828. Note that some Security Council members have complained that civilian protection can be a ruse for hidden agendas. *Id.* at 847; see also U.N. SCOR, 66th Sess., 6531 st mtg., U.N. Doc. S/PV.6531 (May 10, 2011) (discussing the protection of civilians in armed conflict).

179. Jennifer Welsh addresses this issue, arguing

two sides of the same coin: protecting civilians cannot be seen as entirely distinct from preventing their deaths, even where both situations do not involve a leader's having shirked his or her responsibility to protect the nation's civilians. As a result, Security Council-imposed peacekeeping missions can be used as evidence of preventative action.¹⁸⁰ Even though these actions were taken under Chapter VII authority, with the consent of the recognized government, they nonetheless dedicate a strong commitment to preventing harm to civilians.

More recent focus on preventative measures is evidenced within the United Nations itself.¹⁸¹ In a recent interview, Edward Luck cited a number of examples where the U.N. implemented R2P prior to Libya.¹⁸² In all of these cases, R2P consist-

It is important to underscore, however, that while the Protection of Civilians ("PoC") and [the R2P] overlap, they are not the same: the PoC is in one sense narrower, in that it only refers to situations of armed conflict (and [R2P] crimes can occur outside that context); but it is also broader in that the rights of civilians in armed conflict extend beyond protection from mass atrocities . . . In its concentration on situations of armed conflict, the PoC directs the energies of the Council toward more clear-cut threats to peace and security, as opposed to the more contested area of mass human rights violations (the broad rubric of the [R2P]).

Welsh, *supra* note 175, at 3; see also *The Relationship between the Responsibility to Protect and the Protection of Civilians in Armed Conflict*, GLOBAL CTR. FOR THE RESPONSIBILITY TO PROTECT (May 9, 2011), http://globalr2p.org/media/pdf/The_Relationship_Between_POC_and_R2P_Updated.pdf.

180. See S.C. Res. 1270, U.N. Doc. S/RES/1270 (Oct. 22, 1999) (establishing the United Nations Mission in Sierra Leone); S.C. Res. 1509, U.N. Doc. S/RES/1509 (Sept. 19, 2003) (establishing the United Nations Mission in Liberia); S.C. Res. 1528, U.N. Doc. S/RES/1528 (Feb. 27, 2004) (establishing the United Nations Operation in Côte d'Ivoire); S.C. Res. 1542, U.N. Doc. S/RES/1542 (Apr. 30, 2004) (establishing the United Nations Stabilizing Mission in Haiti); S.C. Res. 1545, U.N. Doc. S/RES/1545 (May 21, 2004) (establishing the United Nations Operation in Burundi); S.C. Res. 1590, U.N. Doc. S/RES/1590 (Mar. 24, 2005) (establishing the United Nations Mission in the Sudan); S.C. Res. 1925, U.N. Doc. S/RES/1925 (May 28, 2010) (establishing the United Nations Stabilization Mission in the Democratic Republic of Congo).

181. Several member states noted that the Security Council's focus is increasingly dedicated to civilian protection. See *generally* U.N. SCOR, 65th Sess., 6351st mtg., U.N. Doc. S/PV.6351 (June 30, 2010).

182. Luck, *supra* note 6 ("If you look at the last several years, we've invoked the responsibility to protect . . . eight or nine times.").

ed either of quiet diplomacy—diplomacy that did not require the use of sanctions of military force—or some kind of action less than military force.¹⁸³ Under the lens of R2P, these U.N.-backed actions focused on prevention.¹⁸⁴

For example, in Kyrgyzstan in 2010, the U.N. sent educators to help the central government gain control over what looked like the potentiality for an ethnic cleansing of the Uzbek community.¹⁸⁵ Similarly, in Guinea, the U.N. worked with regional and sub-regional organizations to iterate to the Guinean government its duties under R2P.¹⁸⁶ And in Cote d'Ivoire, supporters of President Gbagbo, who lost the 2010 presidential election but retained control of the country's military forces, took steps to indicate that genocide or ethnic cleansing may be imminent.¹⁸⁷ The U.N. took this as a serious sign of the possibility for ethnic cleansing or genocide.¹⁸⁸ Though the U.N.'s early reaction did not prevent the thousands of deaths that unfolded before Gbagbo was arrested in April 2011,¹⁸⁹ Luck points out, “[y]ou never know what the hypothetical might have been: what would have happened if you didn't do anything?”¹⁹⁰ This statement highlights the emphasis the U.N. now places on prevention. In an ideal world, the U.N. would never need to consider how to respond with military force *after* considerable death, but rather, only how to successfully prevent those deaths before they occur.¹⁹¹

Although the process to build the needed capacity to prioritize prevention of mass atrocities has been slow, Secretary-

183. *Id.*

184. *See infra.*

185. *See* Luck, *supra* note 6; *see also* Maxton Walker, *Kyrgyzstan: The Scars of Ethnic Conflict Run Deep*, GUARDIAN (June 10, 2011, 12:53 EDT), <http://www.guardian.co.uk/world/2011/jun/10/kyrgyzstan-ethnic-conflict-osh-uzbekistan>.

186. Luck, *supra* note 6.

187. *Id.*; *see also* Côte d'Ivoire: U.N. Reinforces Peacekeepers as Officials Warn of Risks of Genocide, U.N. NEWS CENTRE (Jan. 19, 2011), <http://www.un.org/apps/news/story.asp?NewsID=37311&Cr=ivoire&Cr1>.

188. Luck, *supra* note 6.

189. *U.N. Rights Expert Arrives in Ivory Coast*, UNITED PRESS INT'L (Nov. 14, 2011, 12:24 PM), http://www.upi.com/Top_News/Special/2011/11/14/U.N.-rights-expert-arrives-in-Ivory-Coast/UPI-25071321291461/. Prior to his arrest, fourteen rounds of negotiation were insufficient to quell the violence. Bellamy & Williams, *supra* note 4, at 834.

190. Luck, *supra* note 6.

191. *See id.*

General Ban Ki-Moon has persistently emphasized its essentiality.¹⁹² In the Libyan example,¹⁹³ after it became clear of Col. Qaddafi's intention to mutilate protestors, U.N. High Commissioner for Human Rights, Navi Pillay, issued a statement on February 22, 2011, that "[p]rotection of civilians should always be the paramount consideration in maintaining order and the rule of law. [Libyan] authorities should immediately cease such illegal acts of violence against demonstrators. Widespread and systematic attacks against the civilian population may amount to crimes against humanity."¹⁹⁴ Also on February 22, Deng and Luck issued a statement reminding Col. Qaddafi of his 2005 pledge to adhere to the principles of R2P.¹⁹⁵ On February 23, the Secretary-General echoed the call for Libya to take responsibility for the safety of its citizens,¹⁹⁶ thus setting the stage for Resolution 1970, "which condemned attacks on the [Libyan] civilian population that it deemed could amount to crimes against humanity. . . ."¹⁹⁷ Despite its robust command, the preventive measures outlined in Resolution 1970 were "relatively uncontroversial."¹⁹⁸

192. Bellamy, *The Exception and the Norm*, *supra* note 22, at 2. *But see* Welsh, *supra* note 175, at 6–7 (arguing the need to elaborate on the coercive tools available to the international community either to prevent, or react to, mass atrocity). As Welsh points out, "the Libyan case suggests that preventive action does not end with the onset of pillar three. Indeed, the majority of the policy tools and measures considered and implemented through Resolution 1970 fall within what Ban Ki-Moon calls 'timely and decisive response.'" *Id.* at 7.

193. For a detailed account of the events leading up to Resolutions 1970 and 1973, see Bellamy & Williams, *supra* note 4.

194. *Pillay calls for international inquiry into Libyan violence and justice for victims*, UNITED NATIONS HUMAN RIGHTS (Feb. 22, 2011), <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=10743&LangID=E>.

195. Press Release, U.N. Secretary-General Special Adviser on the Prevention of Genocide Francis Deng, and Special Adviser on the Responsibility to Protect, Edward Luck, on the Situation in Libya (Feb. 22, 2011), <http://www.un.org/en/preventgenocide/adviser/statements.shtml>.

196. Bellamy, *The Exception and the Norm*, *supra* note 22, at 2–3.

197. *Id.* at 3. The measures in Resolution 1970, which included an arms embargo, assets freeze, travel bans, and referral of the case to the International Criminal Court, were robust for Security Council standards. Weiss, *supra* note 29, at 289.

198. Bellamy & Williams, *supra* note 4, at 840. *See also* U.N. Security Council, U.N. Doc. S/PV.6491 (Feb. 26, 2011).

When Resolution 1970 did not succeed in halting the violence, the Secretary-General took it upon himself to phone Col. Qaddafi in an attempt to persuade him to comply with Resolution 1970.¹⁹⁹ Only when these preventive measures failed did the Security Council resort to military force under Resolution 1973, paving the way for the NATO intervention.

B. R2P and Libya: A Special Case?

Prior to the Libyan intervention, much of the literature on R2P encouraged development of the doctrine by focusing on conceptualizing and institutionalizing the norm.²⁰⁰ The most pivotal moment for such forward movement of R2P, and indeed its most obvious invocation, was in Security Council Resolution 1973, which authorized use of all necessary force to protect Libyan civilians from Col. Qaddafi's military attacks.²⁰¹ The obvious question follows: if military action was invoked under a R2P framework in Libya but is not in other similarly volatile and deadly conflicts, is R2P effective and, in turn, worth promoting? This section discusses why Libya may have been a special case and thus an outlier in the R2P discussion.

Four important points provide context for an honest reflection about the intervention in Libya and its effects on the future of R2P. First, Libya was exceptional because of the viciousness with which Col. Qaddafi attacked the protesting Libyan citizens.²⁰² In particular, Col. Qaddafi identified his targets as "cockroaches," the exact term used by the Hutu in Rwanda to identify the Tutsi who were slaughtered.²⁰³ He later identified the protesters as "rats" and "vermin" who must be "eliminated" such that their "blood flow[ed] from the streets."²⁰⁴ These words were indications to the U.N. that the probability of mass atrocity was imminent and high.²⁰⁵

Second, prior to Security Council action, regional multi-state organizations, which are normally most concerned with protecting the sovereignty of their members, called for an inter-

199. See Bellamy, *The Exception and the Norm*, *supra* note 22, at 3.

200. See Shaffer & Pollack, *supra* note 34, at 1235 n.441.

201. See *id.* at 1235.

202. See Shaffer & Pollack, *supra* note 34, at 1236.

203. Luck, *supra* note 6.

204. *Id.*

205. *Id.*

vention.²⁰⁶ The Arab League, the African Union, and the Gulf Cooperation Council all advocated for a no-fly zone before the Security Council responded to Col. Qaddafi's behavior.²⁰⁷ Their strong public stance made clear that Col. Qaddafi "had few friends in the region"²⁰⁸ and ultimately pressured China and Russia to abstain from vetoing Resolution 1973.²⁰⁹

Third, the time frame for the crisis to unfold was extremely short.²¹⁰ Conflict was not widely anticipated, evidenced by the fact that none of the world's risk-assessment organizations considered Libya as a possible place of mass atrocity before the uprising began.²¹¹ For example, the International Crisis Group did not issue a risk alert until after the conflict began.²¹² The speed with which Qaddafi began killing civilians did not leave time for the Security Council to implement some of the more gradual precautions, such as mediation, before it issued Resolution 1970.²¹³ Resolution 1973, which came shortly thereafter, preempted the fall of Benghazi by days, at most.²¹⁴ Had Qaddafi's actions been less swift, it is possible that the preventative measures included in Resolution 1970, such as tough economic sanctions, an arms embargo, freezing Col. Qaddafi's assets, and referring the case to the International Criminal Court ("ICC"), would have been enough.

And finally, any real analysis of whether the Libyan intervention was a success is, only a year later, at least incomplete if not premature.²¹⁵ Though Col. Qaddafi is dead, leaving room

206. *See id.*; *see also* Shaffer & Pollack, *supra* note 34, at 1236.

207. *See* Luck, *supra* note 6; *see also* Bellamy & Williams, *supra* note 4, at 841.

208. Bellamy, *The Exception and the Norm*, *supra* note 22, at 4.

209. *Id.*

210. *Libya Profile: Timeline*, BBC NEWS (Dec. 1, 2011; 11:24 ET), <http://www.bbc.co.uk/news/world-africa-13755445>; *see also* Bellamy, *The Exception and the Norm*, *supra* note 22, at 4.

211. *See* Bellamy & Williams, *supra* note 4, at 838 n.52; *see also* Bellamy, *The Exception and the Norm*, *supra* note 22, at 4 n.6.

212. Bellamy, *The Exception and the Norm*, *supra* note 22, at 4.

213. *See id.*

214. *See id.*

215. *See, e.g.*, Simon Chesterman, "Leading from Behind": The Responsibility to Protect, the Obama Doctrine, and Military Intervention, 25 ETHICS & INT'L AFF. 1, 6 (2011) ("At this writing, it is far from clear how the Libyan conflict will play out, but that outcome will have consequences that reach far beyond Libya itself.").

for an entirely new Libyan government to form,²¹⁶ only time will tell whether this intervention made way for a positive future for Libya and the Middle East, particularly Syria.²¹⁷ If

216. See Shadi Hamid, *The First True Arab Intervention*, N.Y. TIMES (Oct. 5, 2011, 4:56 PM), <http://www.nytimes.com/roomfordebate/2011/08/22/lessons-of-the-libyan-endgame/the-first-true-arab-revolution>;

Democracy is about much more than removal of dictators and elections. The rule of law, due process, human rights and the vital need for a democratic culture is yet to emerge in the region. In the absence of the manifestation of these principles, we are seeing Christians being killed in Egypt, cinemas being burnt in Tunisia, and demands for hard-line interpretations of sharia as state law being made by Salafist groups.

Ed Husain, *The Real Risks of Chaos*, N.Y. TIMES (Oct. 21, 2011, 5:54 PM), <http://www.nytimes.com/roomfordebate/2011/10/20/qaddafis-end-the-mideasts-future/the-real-risks-of-chaos>.

217. One of the biggest challenges facing the R2P, at least in terms of the perception that it is an established international norm, is how R2P can lead to military intervention in Libya, but not Syria, where, as of this writing, an estimated 20,000 civilians have been killed since protests broke out in March of 2011. See Steven Lee Myers & Jane Perlez, *No Movement on Major Disputes as Clinton Meets with Chinese Leaders*, N.Y. TIMES, A10, Sept. 5, 2012. An additional 240,000 Syrian refugees have fled the country. *Id.*; see also Pattison, *supra* note 72, at 276 (“The intervention in Libya is morally problematic because the NATO-led coalition has failed to act in response to similar situations in Bahrain, Syria, and Yemen.”). Shadi Hamid, the director of research at the Brookings Doha Center and a fellow at the Saban Center for Middle East Policy at the Brookings Institution, says that without military intervention, the “Libyans would not be enjoying their newfound freedom.” Shadi Hamid, *Will Syrians Seek Outside Help?*, N.Y. TIMES (Oct. 21, 2011, 4:40 PM), <http://www.nytimes.com/roomfordebate/2011/10/20/qaddafis-end-the-mideasts-future/libyas-lessons-for-syria>. But, Hamid also comments that the Libyan model is only useful to the extent that it can be replicated. See *id.* In the months following the outbreak of violence, Syrians began to call for more help in the form of no-fly zones, ground troops and arms transfers. See *id.*; see also *Syria Unrest: Arab League Denounces Civilian Killings*, BBC NEWS (Oct. 29, 2011, 4:24 ET) [hereinafter *Syria Unrest*], <http://www.bbc.co.uk/news/world-middle-east-15503350>. But see Jonathon Marcus, *Why China and Russia Rebuffed the West on Syria*, BBC NEWS (Oct. 5, 2011, 7:35 ET), <http://www.bbc.co.uk/news/world-middle-east-15180732> (discussing the meaning of China’s and Russia’s vetoes of a Security Council resolution condemning the crackdown by President al-Assad in Syria). As in Libya, the Arab League has put significant pressure on the Assad regime to “take the necessary measures” to protect Syrian civilians. See *Syria Unrest*. However, to date the Security Council has not taken steps to quell the violence in Syria that are nearly as aggressive as was Resolution 1973.

general consensus among the international community regards Libya as unsuccessful, this will pave the way for critics of R2P to reiterate their doubts about the doctrine's legitimacy.²¹⁸

C. Looking Forward: Syria and Beyond

Alex Bellamy argues that “[d]ebates about preventing and responding to mass atrocities are no longer primarily about *whether* to act, but about *how* to act.”²¹⁹ The Libyan case provides an example that early assessment and pooling capacities can play a positive role in planning and executing prevention strategies.²²⁰ But more than this, it demonstrates the degree to which humanitarian prevention is CIL. The question was not whether to stop Col. Qaddafi from taking over Benghazi, but how best to stop him.²²¹

In 2011 and 2012, Syria has been frequently cited as evidence that R2P is merely wishful thinking on the part of military interventionists and that Libya is an outlier.²²² However, the extent to which this is true can only be in regards to military intervention, not prevention tactics. The United States, Europe-

218. Weiss, *supra* note 29, at 287.

219. *Id.* Bellamy cites the United Nations' and regional organizations' responses to crises in Kenya, Guinea, Côte d'Ivoire, Darfur, eastern Democratic Republic of Congo, and the 2011 referendum in Sudan as examples where the decision was not whether, but how, to react to developing problems. *Id.* See also Welsh, *supra* note 175, at 1 (“There is much wisdom in Thomas Weiss’s statement that today ‘the main challenge facing the responsibility to protect is how to act, not how to build normative consensus.’”) (citing Weiss, *supra* note 29, at 291).

220. Bellamy, *The Exception and the Norm*, *supra* note 22, at 2.

221. An in-depth article on President Obama presents another point of view: that Resolution 1973’s biggest advocate was the president of the United States and that it was his advocacy, rather than humanitarian prevention’s status as CIL, that led to action in Libya. Michael Lewis, *Obama’s Way*, VANITY FAIR, Oct. 2012, at 211. In a discussion of the days leading up to President Obama’s role in the authoring of Resolution 1973, Lewis represents that by the time the President made his decision to get behind the U.N. resolution, “[n]o one in the Cabinet was for it There was no constituency for doing what he did.” *Id.* at 262 (quoting a witness who was present for the relevant deliberations). Rather, it seems from Lewis’s portrayal that not intervening was never really on the table for President Obama once Col. Qaddafi was clear about cleansing the city of Benghazi. See *id.* He quotes the President as responding to a non-intervention strategy with, “That’s not who we are,” which Lewis takes to mean, that is not who the President is; Lewis writes that “[t]he decision was extraordinarily personal” for him. *Id.*

222. See *supra* note 178 and accompanying text.

an Union, and Arab League all imposed tough economic sanctions on Syria in the late fall of 2011.²²³ On November 22, 2011, the General Assembly passed a resolution condemning the Syrian government under President Bashar al-Assad for not upholding its responsibility to protect Syrian civilians.²²⁴ Seven months later on June 30, 2012, the United Nations-backed Action Group on Syria (“AGS”), agreed on a six-step plan for a transition to peace to be implemented by former Secretary-General Kofi Annan, as well as criticized the continuing violence.²²⁵ As of this writing, the U.N. Office for the Coordination of Humanitarian Affairs was ramping up its ground presence in Syria, providing aid to the more than 200,000 internally displaced persons.²²⁶ In addition, U.N. Security Council resolution 2043²²⁷ sent the United Nations Supervision Mission in Syria

223. See Nada Bakri & Neil MacFarquhar, *Isolating Syria, Arab League Approves Sanctions Against Syria*, N.Y. TIMES (Nov. 27, 2011), <http://www.nytimes.com/2011/11/28/world/middleeast/arab-league-prepares-to-vote-on-syrian-sanctions.html?hp> [hereinafter Bakri & MacFarquhar]. See also Matt Bradley & Nour Malas, *Arab League Overwhelmingly Imposes Sanctions on Syria*, WALL ST. J. (Nov. 27, 2011), <http://online.wsj.com/article/SB10001424052970204753404577064063742590718.html> (“The sanctions include travel bans on high-level regime officials, freezing . . . their bank accounts, blocking the sale of ‘nonessential’ commodities to Syria, halting transactions with the Syrian central bank and ending financing for all Arab-funded projects in Syria. More than half of Syria’s nonoil exports are sold to Arab countries.”).

224. See Statement by the Global Centre for the Responsibility to Protect, *United Nations General Assembly Vote on Syria* (Nov. 22, 2011), http://globalr2p.org/media/pdf/GCR2P_Statement_on_U.N._General_Assembly_Vote_on_Syria_22_Nov_2011.pdf. See also Press Release, General Assembly, General Assembly Adopts Six Resolutions, Concluding Debates on Question of Palestine, Wider Middle East Situation, U.N. Press Release GA/11180 (Nov. 30, 2011) (“On the matter of Syria, meanwhile, Japan’s representative said his country had repeatedly called on the Syrian Government to end the use of force against its own people.”).

225. *U.N.-backed Action Group agrees on measures for peaceful transition in Syria*, U.N. NEWS CENTRE (June 30, 2012), <http://www.un.org/apps/news/story.asp?NewsID=42367&Cr=Syria&Cr1#.UEuMwqTybwc>.

226. *U.N. refugee agency scales up operations in Syria as number of displaced continues to grow*, U.N. NEWS CENTRE (Sept. 7, 2012), <http://www.un.org/apps/news/story.asp?NewsID=42823&Cr=Syria&Cr1#.UEuQKKTybwc>.

227. S.C. Res. 2043, U.N. Doc. S/RES/2043 (Apr. 21, 2012).

to monitor violence and provide support for the six-point plan adopted by the AGS.²²⁸

Regretfully, the Action Group's Joint Envoy resigned from its mission, in part due to disagreements among the five permanent Security Council members on the best approach to the worsening situation.²²⁹ Yet, the actions above still suggest that the international community recognizes its legal obligation to halt mass atrocity, which is heavily embedded in the R2P doctrine. The fact that military intervention has not yet been imposed in Syria does not necessarily indicate an R2P failure.²³⁰ Rather, if prevention techniques can prove successful, it is a signal of two important points: first, that Edward Luck's wish that the U.N. be able to stop pushing the doctrine is coming true. Second, it is evidence that the international community recognizes its obligation under CIL to prevent humanitarian atrocity.

CONCLUSION

R2P codified a nation's responsibility to protect its citizens from mass atrocities and the international community's role in assisting in that endeavor. In doing so, R2P paved the way for the emergence of a new international norm, one that mandates the prevention of human destruction. Humanitarian prevention—under an approach to CIL that minimizes state practice, allows CIL to develop quickly, and states that CIL governs the conduct between a nation and its citizens—is a binding law on nations. But such a designation is not in itself a solution to human destruction; nations and international institutions must be steadfast in adhering to its call. This will require per-

228. *Mission Home*, UNITED NATIONS SUPERVISION MISSION IN SYRIA, UNITED NATIONS, <http://www.un.org/en/peacekeeping/missions/unsmis/> (last visited Oct. 16, 2012). The supervision mission has since been suspended, owing to the escalation of violence and the use of heavy weapons. *Id.*

229. U.N. Secretary-General, Secretary-General's Remarks to the General Assembly on Syria (Aug. 3, 2012), <http://www.un.org/sg/statements/index.asp?nid=6224>.

230. For example, "Mr. Jassem, the Qatari foreign minister, said the goal of the sanctions was stopping such killing, and to try to do so without foreign military intervention." Bakri & MacFarquhar, *supra* note 223. He continued, "All the work we are doing is to avoid foreign intervention," he said. "But if the international community does not take us seriously in this then I cannot guarantee that there will be no foreign interference." *Id.*

sistence, patience, and creativity in approach, to ensure that citizens are not innocent casualties of their state's misconduct.

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