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## **Taking International Law At Its Word and Its Spirit: Re-envisioning Responsibility to Protect as a Binding Principle of International Law**

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TAKING INTERNATIONAL LAW AT ITS WORD AND ITS  
SPIRIT: RE-ENVISIONING RESPONSIBILITY TO  
PROTECT AS A BINDING PRINCIPLE OF  
INTERNATIONAL LAW

TESSA DAVIS\*

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“*What decides wars is what starts them—politics.*”<sup>1</sup>

“*The great play of sovereignty, with all its pomp and panoply, can now be seen for what it hides: a posturing troupe of human actors, who when off-stage are sometimes prone to rape the chorus.*”<sup>2</sup>

Sovereignty rests at the core of debates over the validity of humanitarian intervention in situations of grave crisis and loss of life. All too frequently, opponents of sovereignty use the concept to halt international action aimed at stopping or lessening human suffering in a sovereign state. Sovereignty as a blockade, however, is an incomplete understanding of the doctrine. While sovereignty protects the right of a nation to exist and govern itself, proponents of the Responsibility to Protect (hereinafter RTP) as a norm of international law recognize that sovereignty entails the responsibility to protect populations from human rights abuses. Finding its grounding in multiple international treaties and the concept of sovereignty itself, the RTP doctrine makes strides in overcoming the non-intervention norm. As a non-binding norm, however, RTP cannot overcome a second common block to intervention: lack of political will. To ensure

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1. William Langewiesche, *The Distant Executioner*, VANITY FAIR, Feb. 2010, at 94, available at <http://www.vanityfair.com/politics/features/2010/02/sniper-201002> (quoting Martin Pegler, a preeminent warfare scholar). As discussed *infra*, political will is a significant block to international intervention in conflicts which threaten human rights.

2. State sovereignty and non-intervention exist alongside political will as significant blocks to intervention. GEOFFREY ROBERTSON, *CRIMES AGAINST HUMANITY: THE STRUGGLE FOR GLOBAL JUSTICE* 399 (2d ed. 2002).

international action will proceed in the face of grave human rights abuses, scholars and proponents of RTP must better delimit the doctrine and transition RTP to a binding principle of international law, as well as advocate for reform of the U.N. Security Council veto power.

### I. HONORING THE SPIRIT OF INTERNATIONAL LAW

Following General Augusto Pinochet's 1998 arrest, the British House of Lords, over the course of three decisions, addressed the question of whether Pinochet, as a head of state, could be legally responsible for torture and similar crimes against humanity perpetrated under his rule.<sup>3</sup> The case presented a high profile opportunity to address the issue of sovereign immunity<sup>4</sup>—an issue courts had yet to fully explore due to nations' reticence to prosecute other heads of state.<sup>5</sup> Ultimately, the House of Lords "confirmed the trend [started at] Nuremberg,"<sup>6</sup> finding that sovereign immunity does not shield responsibility for crimes against humanity.<sup>7</sup> Human rights scholar and lawyer Geoffrey Robertson identifies one key aspect of the decision that goes beyond its precedential value for issues of sovereign immunity: "[the] conclusion [is] a striking example of a court taking a treaty not just at its word but (in the absence of express words) at its spirit."<sup>8</sup> The *Pinochet* court refused to yield to the unspoken truth of "cynical diplomacy"<sup>9</sup>: the concept that many nations sign treaties for public relations more than out of the intent to be bound to the treaty's substance.<sup>10</sup> Rather, the court "took the Torture Convention to mean what it said"<sup>11</sup>: for torturers, no matter what position they hold or how immune they may have believed themselves to be, there is "no safe haven."<sup>12</sup>

RTP—the concept that a nation is responsible for protecting its citizens from atrocities within its borders and that its failure to do so opens the door to international intervention<sup>13</sup>—presents an opportu-

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3. *Id.* at 393-95, 414-18.

4. *See id.* at 414, 417.

5. *Id.* at 395 ("Never before had a former head of state, visiting another friendly country, been held legally amenable to its criminal process.").

6. *Id.* at 421.

7. *Id.* at 420-21.

8. *Id.* at 421.

9. *Id.* at 422.

10. *See id.* at 422.

11. *Id.*

12. *Id.* at 421.

13. INT'L COMM'N ON INTERVENTION AND STATE SOVEREIGNTY, THE RESPONSIBILITY TO PROTECT xi (2001), available at <http://www.iciss.ca/report-en.asp> [hereinafter ICISS REPORT] (asserting that "State sovereignty implies responsibility, and the primary responsibility for the protection of its people lies within the state itself. . . . Where a population is suffering serious harm, as a result of internal war, insurgency, repression, or state failure, and the state in question is unwilling or unable to halt or avert it, the principle of non-intervention yields to the international responsibility to protect.").

nity to do for humanitarian intervention what the *Pinochet* cases did for the concept of sovereign liability for crimes against humanity. In *Pinochet*, the principle treaty at issue was the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment (CAT).<sup>14</sup> Article 1 of the Convention defines torture as:

any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, *when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.*<sup>15</sup>

If the U.K. court interpreted the CAT as leaving sovereign immunity unaltered, it would have arrived at the following “self-defeating syllogism: Only public officials can commit torture. Public officials are immune from prosecution. Nobody can ever be prosecuted for torture.”<sup>16</sup> Rejecting this outcome, the court advanced the CAT by coming to the only decision that could uphold both the words and the core meaning of the treaty: that sovereign immunity did not survive the ratification of the CAT.<sup>17</sup>

RTP draws its strength from even richer ground than that of sovereign liability: the U.N. Charter, the Universal Declaration of Human Rights, the Convention on the Prevention and Punishment of the Crime of Genocide, the Geneva Conventions and its Additional Protocols, the Rome Statute establishing the ICC, the International Convention on Civil and Political Rights, and the concept of sovereignty itself.<sup>18</sup> How lawyers and policymakers delimit and implement RTP in the coming years will influence whether the international community will continue to advance the spirit, as well as the letter, of these documents, or whether it will stand idly by as the next Rwanda, Darfur, or Congo unfolds.

In its current form, RTP succeeds in addressing one of the principle blocks to intervention—the non-intervention norm. The non-

14. ROBERTSON, *supra* note 2, at 421.

15. Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment art. 1, *adopted and opened for signature* Dec. 10, 1984, S. Treaty Doc. No. 100-20,1465 U.N.T.S. 85 (emphasis added).

16. ROBERTSON, *supra* note 2, at 419.

17. *Id.* at 419-21.

18. See ICISS REPORT, *supra* note 13, para. 2.26; HIGH COMM’R FOR HUMAN RIGHTS, *Involvement of Sudanese Security Personnel in Attacks on the Bulbul Area of South Darfur from January to March 2007*, 10 (May 18, 2007), available at [www2.ohchr.org/SPdocs/Countries/7thOHCHR18may07.doc](http://www2.ohchr.org/SPdocs/Countries/7thOHCHR18may07.doc) (identifying the International Convention on Civil and Political Rights as a foundation for a nation’s responsibility to protect its citizens).

intervention norm is the concept that sovereignty demands foreign nations refrain from interjecting themselves into the domestic affairs of another nation.<sup>19</sup> This success aside, RTP's status as a non-binding norm does little to address the other principle block to international intervention in humanitarian crises—lack of political will. Scholars and policymakers have laid the foundation, but RTP requires further work. To succeed in preventing future atrocities—to honor the spirit and letter of foundational international law—RTP must transition from a non-binding norm to a binding principle of international law. The proposals of this Note combine existing U.N. action on RTP, the International Commission on Intervention and State Sovereignty (ICISS) proposals, and scholarship on intervention to construct an RTP doctrine which is broad enough to be effective while narrow enough to be adopted by the international community.

## II. PRINCIPLE BARS TO INTERVENTION

### A. *Sovereignty and the Non-Intervention Norm*

Sovereignty lends itself to multiple definitions. Less cynical scholars define it as:

the notion that in every system of government there must be some absolute power of final decision . . . [It is] the legal identity of the state in international law, an equality of status with all other states, and the claim to be the sole official agent acting in international relations on behalf of a society.<sup>20</sup>

Others view the doctrine more cynically, defining it as “the doctrine of non-intervention in the internal affairs of nation states asserted by all governments which have refused to subject the treatment they mete out to their citizens to any independent external scrutiny.”<sup>21</sup> Sovereignty is, in part, a relational concept, as nations must respect the sovereign status of other nations for the system to flourish.<sup>22</sup> Regardless of how scholars define the concept, however, it is a foundation of international law and domestic governance.<sup>23</sup> Advocates of RTP ground the doctrine in the concept that sovereignty does not confer only power, but also responsibility.<sup>24</sup> However, nations and policymakers interpreting sovereignty have not always been as similarly progressive as RTP advocates.

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19. See ROBERTSON, *supra* note 2, at xxx.

20. Ramesh Thakur, *In Defence of the Responsibility to Protect*, 7 INT'L J. HUM. RTS. 160, 165 (2003).

21. ROBERTSON, *supra* note 2, at xxx.

22. Thakur, *supra* note 20, at 166 (“A condition of any one state's sovereignty is a corresponding obligation to respect every other state's sovereignty.”).

23. See *id.* at 165-66.

24. ICISS REPORT, *supra* note 13, at xi; see Thakur, *supra* note 20, at 165-66.

Until recently, the international community largely understood the non-intervention norm to be the necessary corollary to sovereignty.<sup>25</sup> Non-intervention essentially requires that one nation not interfere with the sovereign, domestic affairs of another nation.<sup>26</sup> The U.N. Charter reifies the concept in Article 2(7)<sup>27</sup>:

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.<sup>28</sup>

Even advocates of RTP emphasize the continued importance of non-intervention to maintaining international stability.<sup>29</sup> However, as discussed *infra*, the RTP doctrine recognizes the non-intervention norm without granting it the power to paralyze international response to atrocities within a sovereign state.<sup>30</sup>

Lord Millet, who heard the *Pinochet* cases, cautioned against fetishizing<sup>31</sup> sovereignty so as to make it a cloak concealing all manner of sins of the sovereign. Only a few years after the landmark *Pinochet* decisions, then Secretary-General Kofi Annan echoed Lord Millet's warning. Noting the difficulties of answering when and how humanitarian intervention should proceed, Annan emphatically asserted that "surely no legal principle—not even sovereignty—can ever shield crimes against humanity."<sup>32</sup> RTP, as a doctrine, both expresses agreement with Annan's statement and provides a means of ensuring that those who would fetishize sovereignty will no longer dominate the discussion on international responsibility in the face of atrocities.

### *B. Weak or Absent Political Will*

The current Secretary-General of the U.N., Ban Ki-moon of the Republic of Korea, found the recent crisis in Darfur to have "highlighted how inadequate our policy tools are and *how fleeting is the*

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25. See William R. Pace & Nicole Deller, *Preventing Future Genocides: An International Responsibility to Protect*, 36 WORLD ORDER 15, 16-17 (2005). See also Thakur, *supra* note 20, at 165.

26. U.N. Charter art. 2, para. 7; see ROBERTSON, *supra* note 2, at xxx; Thakur, *supra* note 20, at 165.

27. ICISS REPORT, *supra* note 13, para 2.8.

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

29. ICISS REPORT, *supra* note 13, paras. 2.7-2.8.

30. *Id.* paras. 4.10-4.14. The report asserts that nations have a "responsibility to react to situations of compelling need for human protection." *Id.* para. 4.1. This responsibility logically requires a "departure" from the non-intervention norm. *Id.* para. 4.11.

31. ROBERTSON, *supra* note 2, at 420 (footnote omitted).

32. U.N. Secretary-General, *We the Peoples: The Role of the United Nations in the Twenty-First Century*, ¶ 219, delivered to the General Assembly, U.N. Doc A/54/2000 (Mar. 27, 2000) [hereinafter U.N. Secretary-General, *We the Peoples*].

*political will to use them.*"<sup>33</sup> Scholars advocating RTP nearly universally recognize lack of political will as a plague that cripples any chance of intervention in humanitarian crises.<sup>34</sup> This plague is particularly virulent when it squelches political will of the U.S.<sup>35</sup> and the other four permanent members of the Security Council (China, the United Kingdom, France, and Russia) because of their veto power to halt Security Council action.<sup>36</sup> Perhaps more than any other single factor, political will, by its presence or absence, determines whether the international community will intervene in a foreign crisis.<sup>37</sup>

States are inconsistent in mustering political will to intervene in crisis or punish their perpetrators.<sup>38</sup> Liberal, legalist states—nations which believe in the protection of individual civil and political rights through the legal system<sup>39</sup>—like the U.S., exist in constant tension between the “push-and-pull of idealism and selfishness.”<sup>40</sup> This idealism, which both the government and the popular conscience of their citizenry hold, embraces the concept that there are “[u]niversal human rights [which] do not respect ‘geographical morality’ or sovereignty.”<sup>41</sup> A liberal state’s idealism, however, repeatedly conflicts with the nation’s self-interest.<sup>42</sup> As an outgrowth of this self-interest, nations consistently hesitate to intervene in a foreign conflict unless they themselves have been harmed.<sup>43</sup> This self-interest squelches political will, particularly when a nation’s citizens are ambivalent about a conflict.<sup>44</sup> Scholars note that it is not wholly surprising “that even liberal states value the lives of their own more than those of foreigners, but [surprising] how *radically* the lives of foreigners are dis-

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33. U.N. Secretary-General, *Implementing the Responsibility to Protect*, ¶ 59, delivered to the General Assembly, U.N. Doc. A/63/677 (Jan. 12, 2009) [hereinafter U.N. Secretary-General, *Implementing*] (emphasis added).

34. See, e.g., ICISS REPORT, *supra* note 13, paras. 8.1-8.24; see also Rebecca J. Hamilton, Recent Development, *The Responsibility to Protect: From Document to Doctrine—But What of Implementation?* 19 HARV. HUM. RTS. J. 289, 294 (2006).

35. Samantha Power, *Raising the Cost of Genocide*, in THE NEW KILLING FIELDS: MASSACRE AND THE POLITICS OF INTERVENTION 245, 260 (Nicolaus Mills & Kira Brunner, eds., 2002) (“Without U.S. leadership, the last century showed, others will be unwilling to step forward to act and genocide will continue.”).

36. Amnesty Int’l, *UN: Governments Must Act Promptly and Effectively on Important Human Rights Commitments in 2005 World Summit Document*, AI Index IOR 41/062/2005 (Sept. 26, 2005), available at <http://www.amnesty.org/en/library/info/IO41/062/2005>.

37. See Power, *supra* note 35, at 256; SAMANTHA POWER, “A PROBLEM FROM HELL:” AMERICA AND THE AGE OF GENOCIDE 508-10 (2003).

38. See GARY JONATHAN BASS, STAY THE HAND OF VENGEANCE: THE POLITICS OF WAR CRIMES TRIBUNALS 5-8 (2001) (focusing his work on explaining the inconsistencies of international support for war crimes tribunals).

39. *Id.* at 20-23.

40. *Id.* at 8.

41. *Id.* at 22.

42. See *id.* at 8, 29-32.

43. See *id.* at 276 (“The single best guarantee of a stung and moralistic reaction from a liberal state has been its own victimization.”).

44. *Id.* at 28-32.

counted,”<sup>45</sup> in light of the idealistic principles of such nations.<sup>46</sup> A proposal for a binding RTP must build upon the idealism of liberal, legalist states and be structured to prevent the inherent selfishness of states from winning the day.

### C. Rwanda: A Failure of Political Will

Critics of the international community’s failure to prevent atrocities frequently look to the Rwandan Genocide of 1994.<sup>47</sup> It stands as a profoundly chilling example of the devastating effects of inaction.<sup>48</sup> Rwanda is a small, densely-populated country in East Africa whose pre-genocide population was between 7 and 8 million.<sup>49</sup> During its colonial occupation, Belgium reified what had been fluid ethnic boundaries, “racializ[ing]” the three ethnic groups: Tutsi, Hutu and Twa.<sup>50</sup> Before the Genocide, the Tutsi constituted approximately fifteen percent of the population, making Hutu the dominant ethnic identity.<sup>51</sup> In the span of one hundred days, beginning on April 6, 1994, the Interahamwe (a Hutu militia) and the Hutu-dominated Rwandan Army murdered at least 800,000 Tutsi and “politically moderate Hutu.”<sup>52</sup> All the while, the international community watched from afar what “would prove to be the fastest, most efficient killing spree of the twentieth century.”<sup>53</sup>

The Rwandan Genocide provides a devastating case study of the international community’s failure to muster political will. Then Republican Senator Bob Dole made a telling statement regarding whether the U.S. should intervene: “I don’t think we have any national interest there . . . . The Americans are out, and as far as I am concerned, in Rwanda, that ought to be the end of it.”<sup>54</sup> Selfishness defeated idealism. Though the international community had extensive intelligence on what was occurring,<sup>55</sup> it simply fell in step with

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45. *Id.* at 29.

46. *See id.* at 21-29.

47. *See, e.g.*, U.N. Secretary-General, *We the Peoples*, *supra* note 32, at ¶ 217 (“But to the critics [of humanitarian intervention] I would pose this question: if humanitarian intervention is, indeed, an unacceptable assault on sovereignty, how *should* we respond to a Rwanda . . . to gross and systematic violations of human rights that offend every precept of our common humanity?”).

48. *See, e.g.*, Human Rights Watch, *Rwanda: Lessons Learned Ten Years After the Genocide* (Mar. 29, 2004), <http://www.hrw.org/english/docs/2004/03/29/rwanda8308.htm>.

49. Luc De Huesch, *Rwanda: Responsibilities for a Genocide*, 11 ANTHROPOLOGY TODAY 3, 6 (1995).

50. MAHMOOD MAMDANI, WHEN VICTIMS BECOME KILLERS: COLONIALISM, NATIVISM, AND THE GENOCIDE IN RWANDA 87-88 (2001).

51. PHILIP GOUREVITCH, WE WISH TO INFORM YOU THAT TOMORROW WE WILL BE KILLED WITH OUR FAMILIES 29 (1998).

52. POWER, *supra* note 37, at 329-35.

53. *Id.* at 334.

54. *Id.* at 352.

55. *Id.* at 338-39, 354-55, 504-06.



the U.S., which refused to even label the situation genocide.<sup>56</sup> While the U.S. called for a full withdrawal from Rwanda, ultimately the U.N. kept a paltry and ineffective UNAMIR force of 270 troops in Rwanda.<sup>57</sup> The American public did not call for action, so the U.S. government spearheaded the campaign for apathy, and won.<sup>58</sup>

After the Genocide, the international community searched for explanations and made apologies.<sup>59</sup> Then Secretary-General Annan commissioned an inquiry into Rwanda to attempt to explain how the international community could have ignored the atrocity.<sup>60</sup> The Commission came to a simple conclusion: “The failure of the United Nations . . . to stop the genocide in Rwanda was a failure by the United Nations system as a whole . . . . There was a persistent lack of political will by the Member States to act, or to act with enough assertiveness.”<sup>61</sup> Political will was determinative in Rwanda. A binding RTP doctrine can ensure that a lack of political will does not permit another Rwanda by mandating action for certain international crimes.

### III. RESPONSIBILITY TO PROTECT: DEFINING THE DOCTRINE

While many have addressed the question of whether humanitarian interventions are morally, legally, or pragmatically justified, this Note seeks to determine how to galvanize existing support for and delimit the boundaries of RTP as an avenue to intervention. Still, a brief discussion of why the international community should intervene provides necessary background to an analysis of RTP. The reasons to intervene are straightforward: moral principles and the simple, pragmatic reality that doing so saves lives.

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56. See MOHAMED C. OTHMAN, ACCOUNTABILITY FOR INTERNATIONAL HUMANITARIAN LAW VIOLATIONS: THE CASE OF RWANDA AND EAST TIMOR 33-34 (2005); see also POWER, *supra* note 37, at 359 (“American officials again shunned the g-word. They were afraid that using it would have obliged the United States to act under the terms of the 1948 genocide convention . . . . A discussion paper on Rwanda, prepared by an official in the Office of the Secretary of Defense . . . testifies to the nature of official thinking[;] . . . ‘Be Careful. Legal at State was worried about this yesterday—Genocide finding could commit [the U.S. government] to actually ‘do something.’”).

57. POWER, *supra* note 37, at 369.

58. See *id.* at 373. The detrimental impact of the American public’s apathy exemplifies how the public’s ambivalence fuels a nation’s selfishness and therein prevents intervention. BASS, *supra* note 38, at 28-32.

59. See, e.g., POWER, *supra* note 37, at 386 (“With the grace of one grown practiced at public remorse, [Clinton] issues something of an apology. ‘We in the United States and the world community did not do as much as we could have and should have done to try to limit what occurred . . . .’”).

60. See generally U.N. SECURITY COUNCIL, *Report of the Independent Inquiry Into the Actions of the United Nations During the 1994 Genocide in Rwanda*, 3, U.N. Doc. S/1999/1257 (Dec. 15, 1999).

61. *Id.*

Whether based in a complex moral code or grounded in “simple decency,”<sup>62</sup> the fact that thousands and sometimes millions of individuals are killed, tortured, or otherwise degraded and denied fundamental human rights demands action. Rwanda is sufficient proof of the atrocities man perpetrates, which “offend every precept of our common humanity” and which the international community must not ignore.<sup>63</sup> Beyond the moral weight in favor of action, the efficacy of past interventions supports future action.<sup>64</sup> The last-act NATO intervention into Kosovo saved as many as 1.7 million Albanians from persecution.<sup>65</sup> Even in Rwanda, the miniscule U.N. force saved the lives of 25,000 Rwandans.<sup>66</sup> Intervention is thus, both an effective tool, as well a moral endeavor.<sup>67</sup> RTP doctrine advances both the moral and practical goals of intervention.

#### A. Foundations of RTP

As early as 1988 the international community recognized a theoretical forerunner to RTP in the *Velásquez Rodríguez* case.<sup>68</sup> The Inter-American Court of Human Rights heard the case, which raised the issue of Honduras’s state liability for detaining and causing the disappearance of Angel Manfredo Velásquez Rodríguez.<sup>69</sup> Ultimately, the court found that Honduras violated Articles 4 (right to life), 5 (right to humane treatment), and 7 (right to personal liberty) of the American Convention on Human Rights.<sup>70</sup> Most importantly for RTP, the court recognized that a state has a duty of due diligence to persons within its borders.<sup>71</sup> Specifically, a state, even if it does not commit the violation of rights in question, has a duty of “due diligence to prevent the violation or to respond to it.”<sup>72</sup> The court found the due diligence principle in the obligation each State has under Ar-

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62. Michael Walzer, *Arguing for Humanitarian Intervention*, in THE NEW KILLING FIELDS: MASSACRE AND THE POLITICS OF INTERVENTION, *supra* note 35, at 19, 21.

63. U.N. Secretary-General, *We the Peoples*, *supra* note 32 at ¶¶ 217-19.

64. Power, *supra* note 35, at 255.

65. *Id.*

66. *Id.*

67. Critics of intervention argue that states will use the concept to engage in pretextual humanitarian interventions in the name of more selfish aims or that interventions are too costly, ineffective, or inconsistent. U.N. Secretary-General, *We the Peoples*, *supra* note 32, at ¶ 216 (citing frequent objections to intervention). The proposals of this paper seek to address those concerns by further defining RTP. A full discussion of these arguments is, however, beyond the scope of this paper. For a discussion of such arguments and their counter-arguments, see Ken Roth, Human Rights Watch, *Human Rights Watch World Report 2004 - War in Iraq: Not a Humanitarian Intervention*, (JANUARY 1, 2004), available at <http://www.unhcr.org/refworld/pdfid/402ba99f4.pdf>.

68. *See generally* Velásquez-Rodríguez v. Honduras, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 4, (July 29, 1988).

69. *Id.* ¶¶ 1-4.

70. *Id.* ¶¶ 2, 194.

71. *Id.* ¶ 172.

72. *Id.*

ticle 1(1) of the Convention to “ ‘ensure’ the free and full exercise of the rights” of its citizens.<sup>73</sup> By failing to take sufficient action to protect citizens’ rights, the state failed to exercise its duty of due diligence.<sup>74</sup> Though the court was not in a position to extend that responsibility to the international community, by developing the “due diligence principle” it opened the door to finding a state responsible for its failure to protect those within its borders,<sup>75</sup> and therein laid a brick in the foundation of RTP.

The RTP doctrine first emerged under its now acronym-worthy title in 2001.<sup>76</sup> Between 2000 and 2001, the International Commission on Intervention and State Sovereignty (ICISS) conducted multinational meetings around the world to determine the “global political consensus” on the relationship between sovereignty and humanitarian intervention.<sup>77</sup> Participants formed the Commission to respond to then Secretary-General Annan’s call to determine how the international community should react to mass atrocities such as Rwanda.<sup>78</sup> The Canadian government spearheaded the meetings that yielded the Commission’s 2001 report, *The Responsibility to Protect*.<sup>79</sup> While, as discussed *infra*, the U.N. followed its own course in recognizing and defining RTP, a thorough understanding of the ICISS conception of the doctrine is important as it provided the foundation for the U.N. and gave guidance on structuring and implementing the doctrine.

Within its report, the ICISS articulates the guiding principles, legal foundations, and doctrinal outlines of the RTP.<sup>80</sup> The core concept the Commission advances is that a state’s sovereignty carries with it the responsibility to protect the people within the state.<sup>81</sup> When a state fails in its duty through either inability or deliberate inaction, sovereignty and its sister “principle of non-intervention [must] yield[] to the international responsibility to protect”—shifting the responsibility to protect to the international community.<sup>82</sup> This foundational concept—that the state owes a duty to its citizens, the neglect or

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73. *Id.* ¶¶ 165-66.

74. *Id.* ¶¶ 165-75.

75. See Robert P. Barnidge, Jr., *The Due Diligence Principle Under International Law* 8 INT’L COMMUNITY L. REV. 81, 81-82, available at <http://ssrn.com/abstract=1156773>.

76. See generally ICISS REPORT, *supra* note 13.

77. *Id.* paras. 1.7-1.9.

78. *Id.* at vii.

79. *Id.* at vii, paras. 1.7-1.9. Commentators note that the September 10, 2001 release of the report, merely one day before the World Trade Center attacks, contributed to delays in discussion of the doctrine following the release of the report. See, e.g., LEE FEINSTEIN, COUNCIL ON FOREIGN RELATIONS, CSR No. 22, DARFUR AND BEYOND: WHAT IS NEEDED TO PREVENT MASS ATROCITIES 8 (2007).

80. See generally ICISS REPORT, *supra* note 13.

81. *Id.* at xi.

82. *Id.*

flouting of which opens the door to international intervention—is the core of RTP.

The Commission grounds its reconceptualization of sovereignty in three sources.<sup>83</sup> First, the reconceptualization is grounded in the concept of sovereignty itself, which, by its definition, places responsibility for the internal affairs of a state within the hands of that state.<sup>84</sup> Second, the ICISS grounds its conception of sovereignty in states' existing legal obligations in international law, asserting "state sovereignty . . . cannot be an excuse for . . . non-performance"<sup>85</sup> of existing human rights and international law obligations.<sup>86</sup> Third, the Commission looks to the discourse and action of states and international organizations, which support defining sovereignty as responsibility.<sup>87</sup>

The Commission builds upon the concept of sovereignty as responsibility to further define RTP. The ICISS articulates the triggering conditions for RTP, which it terms the "Just Cause Threshold."<sup>88</sup> To justify military intervention under RTP, the ICISS requires that:

serious and irreparable harm [is] occurring to human beings, or [is] imminently likely to occur, of the following kind:

**A. large scale loss of life**, actual or apprehended, with genocidal intent or not, which is the product either of deliberate state action, or state neglect or inability to act, or a failed state situation; or

**B. large scale 'ethnic cleansing'**, actual or apprehended, whether carried out by killing, force expulsion, acts of terror or rape.<sup>89</sup>

Thus, the ICISS does not define the triggers of RTP through the language of international criminal and human rights law. It eschews terms such as genocide or crimes against humanity—though the Commission understands these thresholds to be inclusive of many such crimes—in favor of more discretionary, descriptive guidelines.<sup>90</sup> This stands in marked contrast to the U.N.'s reports and resolutions that name specific crimes that trigger RTP.

Integral to the ICISS's conception of RTP are three component responsibilities which combine to form the responsibility to protect: the "responsibility to prevent," "responsibility to react," and the "respon-

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83. *See id.*

84. *See* INT'L COMM'N ON INTERVENTION AND STATE SOVEREIGNTY, THE RESPONSIBILITY TO PROTECT: RESEARCH, BIBLIOGRAPHY, BACKGROUND 6 (2001) [hereinafter ICISS RESEARCH]; *see also* ICISS REPORT, *supra* note 13, at xi.

85. ICISS RESEARCH, *supra* note 84, at 7.

86. ICISS REPORT, *supra* note 13, at xi; ICISS RESEARCH, *supra* note 84, at 7.

87. *See* ICISS REPORT, *supra* note 13, at xi; ICISS RESEARCH, *supra* note 84, at 10-12.

88. ICISS REPORT, *supra* note 13, at xii.

89. *Id.* at xii.

90. *Id.* paras. 4.21-4.25.

sibility to rebuild.”<sup>91</sup> The Commission places distinct and strong emphasis on the primacy of prevention of conditions of widespread killing and rights abuses.<sup>92</sup> While the duties nations have to aid in prevention could easily be the substance of a discussion of RTP, the focus of this paper is on the use of military intervention under the responsibility-to-act division of responsibility to protect.<sup>93</sup> As such, readers should simply note that the focus of responsibility to protect is not solely upon justifying military intervention, but rather has a more comprehensive scope.

Importantly, the ICISS further outlines specific conditions under which the international community can invoke RTP to justify military intervention. As an examination of U.N. action regarding RTP will show, though the U.N. did not wholesale adopt the ICISS conditions, the Committee’s recommendations are integral to a discussion of how to advance RTP. In addition to articulating the just cause threshold that must be met before RTP is triggered, the Commission articulates four “[p]recautionary principles”<sup>94</sup>: “[r]ight intention,” “last resort,” “proportional means,” and “reasonable prospects.”<sup>95</sup> The Commission envisions the principles as necessarily strong limits placed upon military intervention to ensure against abuse and to further clarify when the international community may address a crisis through the extreme tactic of military intervention.<sup>96</sup>

Each principle addresses common critiques of a doctrine that justifies intervention. Though right intention does not preclude states having mixed-motives in their desire to intervene, it requires that the “primary purpose . . . be to halt or avert human suffering;” thereby addressing the concern that RTP could become a tool used by those with less laudable intentions.<sup>97</sup> The last resort principle ensures that all peaceful or non-military coercive measures be attempted or considered prior to use of military intervention;<sup>98</sup> precluding action by those who would move first to military intervention. This principle does, however, permit the deliberating nations to consider but not

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91. *Id.* at xi.

92. *Id.* (“Prevention is the single most important dimension of the responsibility to protect.”) (emphasis omitted). *Id.*

93. *Id.*

94. *Id.* at xii.

95. *Id.*

96. *Id.* para. 4.32 (“When both these and the threshold ‘just cause’ principle are taken together . . . the Commission believes that they will strictly limit the use of coercive military force for human protection purposes. Our purpose is not to license aggression with fine words, or to provide strong states with new rationales for doubtful strategic designs, but to strengthen the order of states by providing for clear guidelines to guide concerted international action in those exceptional circumstances when violence within a state menaces all peoples.”).

97. *Id.* at xii.

98. *Id.*

ultimately employ a given peaceful tactic, if there exists “reasonable grounds for believing . . . [said tactics] would not have succeeded.”<sup>99</sup> Proportional means requires that the military intervention be the “minimum necessary” to address the conflict.<sup>100</sup> By mandating the minimum intervention necessary, this principle speaks to concerns that RTP will end in drawn-out and costly foreign occupations.<sup>101</sup> Lastly, the reasonable prospect principle mitigates against ill-conceived interventions as it requires there to be, at the time of making the decision to intervene, a “reasonable chance of success” of the intervention.<sup>102</sup> The role of these four principles in addressing common concerns regarding any doctrine permitting intervention and in structuring comprehensive framework for RTP as a doctrine is discussed in detail later.

The aforementioned principles delimit the doctrine but do not address who determines whether such principles are satisfied. The Commission views the U.N. Security Council as holding primary responsibility for implementing RTP.<sup>103</sup> Vesting this power in the Security Council recognizes the Council’s powers to address issues of international security under Articles 24 and 39-42 of the U.N. Charter.<sup>104</sup> Doing so also accomplishes the goal of ensuring that any intervention is a multilateral, rather than unilateral, action which links back to the precautionary principle of right intention, as no one nation’s desire determines whether an intervention proceeds.<sup>105</sup> Under Article 99, the ICISS recommends the Secretary-General or the Security Council authorize independent investigations into a crisis to determine if the situation meets the triggering conditions and principles.<sup>106</sup> In addition to the results of such inquiries, the Security Council should consider regular reports of both U.N. agencies and NGOs.<sup>107</sup> The ICISS goes so far as to recognize alternative avenues of intervention should the Security Council fail to act on such information, including emergency action by the General Assembly or extra-U.N. action (either multi- or unilateral), though it disfavors these options.<sup>108</sup> All the recommendations of this Note require the Security

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99. *Id.*

100. *Id.*

101. For a discussion of why such principles should guide any intervention doctrine, see Jane Stromseth, *Rethinking Humanitarian Intervention: The Case for Incremental Change*, in *HUMANITARIAN INTERVENTION: ETHICAL, LEGAL, AND POLITICAL DILEMMAS* 232, 245-72 (J.L. Holzgrefe & Robert O. Keohane, eds., 2003).

102. ICISS REPORT, *supra* note 13, at xii.

103. *Id.* at xii, paras. 6.2-6.3.

104. *Id.* paras. 6.3, 6.16.

105. *Id.* at xii, para. 6.12.

106. *Id.* paras. 4.29-4.31.

107. *Id.*

108. *Id.* at xii-xiii (“The Security Council should take into account . . . that, if it fails to discharge its responsibility to protect . . . concerned states may not rule out other means

Council to act as the authorizing agent for RTP. Therefore this Note does not examine these alternative avenues in detail.

### B. RTP at the U.N.

Since 2000, both the United Nations General Assembly and the Security Council have developed an increasingly well-defined understanding of RTP. Then Secretary-General Annan laid the foundation for recognizing the doctrine in a 2000 report. In that report, Annan unequivocally puts a powerful question before the international community:

I . . . accept that the principles of sovereignty and non-interference offer vital protection to small and weak states. But to critics I would pose this question: if humanitarian intervention is, indeed, an unacceptable assault on sovereignty, how *should* we respond to Rwanda, to a Srebrenica—to gross and systematic violations of human rights that offend every precept of our common humanity?<sup>109</sup>

Annan goes on to specifically challenge sovereignty, stating: “surely no legal principle—not even sovereignty—can ever shield crimes against humanity.”<sup>110</sup> In closing, the Secretary-General then recognizes the Security Council’s “moral duty to act on behalf of the international community” when other attempts to stop atrocities fail.<sup>111</sup> Members of the ICISS formed the Commission and drafted its foundational report on RTP doctrine as a response to “compelling pleas.”<sup>112</sup> The 2000 report, however, was only the beginning of discussion of RTP at the U.N.

The General Assembly built upon Annan’s first plea and the subsequent ICISS report in two crucial reports in 2004 and 2005: *A More Secure World: Our Shared Responsibility* and *In Larger Freedom: Towards Development, Security and Human Rights for All*.<sup>113</sup> In the 2004 report, the General Assembly does not adopt specific language defining RTP.<sup>114</sup> However, the report makes two crucial contributions

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[to intervention] . . . and that the stature and credibility of the United Nations may suffer thereby.”)

109. U.N. Secretary-General, *We the Peoples*, *supra* note 32, ¶ 217.

110. *Id.* ¶ 219.

111. *Id.*

112. ICISS REPORT, *supra* note 13, at vii.

113. See generally U.N. Secretary-General, *In Larger Freedom: Towards Development, Security and Human Rights for All*, delivered to the General Assembly and the Security Council, U.N. Doc A/59/2005 (Mar. 25, 2005) [hereinafter U.N. Secretary-General, *In Larger Freedom*]; U.N. Secretary-General, *A More Secure World: Our Shared Responsibility*, ¶¶ 199-203, delivered to the Security Council and the General Assembly, U.N. Doc A/59/565 (Dec. 2, 2004) [hereinafter U.N. Secretary-General, *A More Secure World*].

114. See generally U.N. Secretary-General, *A More Secure World*, *supra* note 113, ¶¶ 199-203. Rather than adopting specific language, the report states that: “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

to RTP doctrine. First, the report affirms the doctrine as an “emerging norm,”<sup>115</sup> thereby increasing the doctrine’s credibility in the international community. Second, the report grounds the doctrine in the existing obligation states possess under the Convention on the Prevention and Punishment of the Crime of Genocide.<sup>116</sup> The responsibility States have under the Convention requires that the “principle of non-intervention”<sup>117</sup> yield to the “‘responsibility to protect’ of every State when it comes to people suffering from avoidable catastrophe.”<sup>118</sup> By finding a basis for RTP in already existing obligations, the G.A. report further reinforces RTP as a valid development in international law, rather than a figment of its imagination.

The 2005 report builds upon this foundation. In this report, the Secretary-General expressly asks heads of state to “[e]mbrace the ‘responsibility to protect’ as a basis for collective action against genocide, ethnic cleansing and crimes against humanity, and [to] *agree to act on this responsibility . . .*”<sup>119</sup> Thus, the Secretary-General asks nations to not only recognize the principle of RTP but to recognize it as a doctrine that requires action, rather than merely an aspirational principle. Taken together, the General Assembly’s reports of 2004 and 2005 culminated in the General Assembly Resolution 2005 World Summit Outcome.

The 2005 World Summit Outcome provides the definition of RTP the U.N. General Assembly adopted at the close of discussion on RTP. The actual language the General Assembly adopted in its resolution is as follows:

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

139. The international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the Charter, to help to protect populations from geno-

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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.* ¶ 203.

115. *Id.* ¶ 203.

116. *Id.* ¶ 200 (“Under the . . . [Genocide Convention], States have agreed that genocide . . . is a crime under international law which they undertake to prevent and punish.”).

117. *Id.*

118. *Id.* ¶ 201.

119. U.N. Secretary-General, *In Larger Freedom*, *supra* note 113, Annex, ¶ 7(a)- (b) (emphasis added).



cide, war crimes, ethnic cleansing and crimes against humanity. In this context, we are prepared to take collective action, in a timely and decisive manner, *through the Security Council*, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities *are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity*. We stress the need for the General Assembly to continue consideration of the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity and its implications, bearing in mind the principles of the Charter and international law. We also intend to commit ourselves, as necessary and appropriate, to helping States build capacity to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity and to assisting those which are under stress before crises and conflicts break out.<sup>120</sup>

The language the General Assembly adopts narrows the ICISS's proposed definition in two important ways. Recall that the ICISS defines the triggering crimes for RTP as "large scale loss of life or large scale 'ethnic cleansing.'" <sup>121</sup> The U.N. is more specific, identifying four triggering crimes: genocide, war crimes, ethnic cleansing, and crimes against humanity.<sup>122</sup> Additionally, the U.N. places the duty to exercise RTP exclusively in the hands of the Security Council.<sup>123</sup> This decision contrasts with the ICISS proposal, which allows for action through the General Assembly or multinational organizations.<sup>124</sup> These changes are critical to constructing an RTP that is sufficiently broad to be effective, but also narrow enough that nations will agree to be bound by the doctrine.

The 2005 World Summit Outcome defines RTP for the international community. Subsequent U.N. action further elucidated the boundaries of the doctrine and strengthened the international community's commitment to RTP. In two separate resolutions, the Security Council reaffirmed its recognition of and commitment to advancing the doctrine.<sup>125</sup> At a 2008 Berlin conference on responsible sovereignty, Secretary-General Ban Ki-moon emphasized the continued importance of implementing RTP, which he characterized as "narrow

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120. 2005 World Summit Outcome, G.A. Res. 60/1, ¶¶ 138-39, U.N. Doc A/RES/60/1 (Oct. 24, 2005) (emphasis added).

121. ICISS REPORT, *supra* note 13, at xii.

122. G.A. Res. 60/1, *supra* note 120, ¶ 138 (emphasis added).

123. *Id.* ¶ 139.

124. ICISS REPORT, *supra* note 13, at xiii; *see also* Pace & Deller, *supra* note 25, at 29.

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

but deep.”<sup>126</sup> Finally and most recently, the Secretary-General issued the 2009 report, *Implementing the Responsibility to Protect*.<sup>127</sup> Principally, this document calls for the U.N. to shift from discussing the boundaries of RTP to developing the U.N. “strategy, standards, processes, tools and practices for the responsibility to protect.”<sup>128</sup> The Secretary-General understands that it is time to determine the future of RTP, as should the international community.

U.N. documents from 2000-2009 chronicle the development of RTP doctrine, define its boundaries, and underscore the importance of the international community committing to RTP. The U.N. has left us with a call to determine how to implement RTP,<sup>129</sup> a call that mirrors the plea Annan made in 2000 for the international community to construct an intervention doctrine.<sup>130</sup> The proposals of this Note answer that call by recommending how the U.N. can build upon its existing conception of RTP to create a doctrine that should become binding international law.

#### IV. MOVING FORWARD WITH RTP

RTP is a young doctrine, having only entered into international discussion under that title in 2001. No binding U.N. resolution has focused on it, though the U.N. has a well-developed framework for the doctrine. No states have drafted international treaties regarding its contents and applicability.<sup>131</sup> As such, the doctrine still has room to breathe, to evolve, and, where necessary, to expand. What follows is a discussion of how to proceed in crafting an RTP that is robust and broad enough to honor the doctrine’s fundamental goal of protecting vulnerable persons, while also being sufficiently narrow and well-conceived to appease critics of a doctrine which requires intervention.

As the doctrine currently rests, it successfully removes one of the blocks to intervention: the non-intervention norm. Where countries could previously cloak their inaction in the concept of non-intervention,<sup>132</sup> RTP eradicates that pre-textual block to intervention by requiring the international community to intervene in the face of certain atrocities.<sup>133</sup> While this is a decisive step forward, it is not sufficient. As a non-binding norm, RTP does little to address the second,

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126. U.N. Secretary-General, *Secretary-General Defends, Clarifies ‘Responsibility to Protect’ at Berlin Event*, U.N. Doc. SG/SM/11701 (July 15, 2008) [hereinafter U.N. Secretary-General, *Secretary-General Defends*].

127. See generally U.N. Secretary-General, *Implementing, supra* note 33.

128. *Id.* at summary.

129. *Id.*

130. See U.N. Secretary-General, *We the Peoples, supra* note 32, ¶¶ 217-19.

131. See *supra* text accompanying notes 109-30.

132. ROBERTSON, *supra* note 2, at xxx.

133. G.A. Res. 60/1, *supra* note 120, ¶¶ 138-39.

and perhaps most fatal block to intervention: lack of political will.<sup>134</sup> History shows us that the international community's failure to act "in response to each of the major genocides of the twentieth century [was] not the accidental product[] of neglect[,] [but rather a] concrete choice[] made by the world's most influential decision makers after implicit and explicit weighing of costs and benefits."<sup>135</sup> Absent a requirement to act, selfishness will defeat idealism and atrocities will continue.<sup>136</sup> A binding RTP can enter the fight on the side of idealism. Existing scholarship on RTP, combined with aspects of the U.N. and ICISS's conceptions of the doctrine, provide a roadmap for articulating a binding doctrine.

At this juncture in the development of international law and RTP, the Security Council must control the implementation of RTP. Though the ICISS proposal permits extra-Security Council action, this option takes RTP too far outside the current structure of international law.<sup>137</sup> Per the language of the U.N. Charter, the U.N., as a collectivity "maintain[s] international peace and security" and serves as a "center for harmonizing the actions of nations in the attainment of . . . common ends."<sup>138</sup> As such, this proposal advances RTP in line with U.N. interpretations of the doctrine which place authority in the hands of the Security Council.<sup>139</sup>

Though the focus of his critique of RTP is the failure of the international community to develop the preventative aspect of the doctrine, Hitoshi Nasu provides a helpful framework for considering the principle areas of RTP which require further development: the "scope, stage, and strength" of the doctrine.<sup>140</sup> "Scope" encompasses which crimes/actions in a conflict will trigger RTP.<sup>141</sup> "Stage" refers to when the duty to protect becomes that of the international community or, stated differently, when the "sovereign state" has failed to fulfill its RTP.<sup>142</sup> Lastly, "strength" embraces the level and "choice of methods"

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134. See U.N. Secretary-General, *Secretary-General Defends*, *supra* note 126 ("Today the responsibility to protect is a concept, not yet a policy; an aspiration, not yet a reality."). *But see* Pace & Deller, *supra* note 25, at 20 ("Meeting the criteria would encourage action where political will is otherwise lacking or is obstructed by one country's strategic interests.").

135. Power, *supra* note 35, at 256.

136. BASS, *supra* note 38, at 8.

137. See ICISS REPORT, *supra* note 13, at xiii; *see also* ICISS RESEARCH, *supra* note 84, at 7 (identifying the U.N. as the "principle institution for . . . using the authority of the international community.").

138. U.N. Charter art. 1, para. 1, 4.

139. See G.A. Res. 60/1, *supra* note 120, ¶ 139.

140. Hitoshi Nasu, *Operationalizing the 'Responsibility to Protect' and Conflict Prevention: Dilemmas of Civilian Protection in Armed Conflict*, 14 J. CONFLICT AND SECURITY L. 209, 213 (2009).

141. *Id.*

142. *Id.*

of intervention permissible in a given conflict.<sup>143</sup> The scope and stage elements of RTP form the primary focus for the following discussion.

Defining both the scope and stage is critical to articulating a more complete doctrine by better conceptualizing the triggering conditions for international intervention. Scope speaks to what types of conflict or which on the ground situations fall within the bounds of RTP. Assuming the conflict falls within the scope of RTP, when is it eligible for international action or intervention? Defining what it means for a state to have failed in its responsibility to protect, either through deliberate inaction or inability, delimits the stage and therein addresses this concern.

While the ICISS report first defined RTP, the U.N. reports and resolutions on the doctrine better define its scope. Recall that the U.N. 2005 World Summit Outcome names the four crimes, which trigger RTP: genocide, war crimes, ethnic cleansing, and crimes against humanity.<sup>144</sup> Four triggering crimes, as opposed to the discretionary categories of “large scale loss of life or large scale ‘ethnic cleansing’ ”<sup>145</sup> which the ICISS report proposes. By limiting RTP’s application to only these four crimes, the U.N. limits the scope of the doctrine. This limitation significantly narrows which factual scenarios can trigger RTP which, in turn, undermines concerns that the doctrine will be used to intervene in any situation the international community desires. Logically, increased specificity of the triggering factual scenarios decreases the margin for abuse of the doctrine.<sup>146</sup>

To further narrow the scope of RTP, a doctrine must go beyond the definition adopted by the U.N. Definitions of the four triggering crimes appear in, the Rome Statute, Genocide Convention and Security Council Resolutions establishing the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), as well as precedent of the International Court of Justice (ICJ) and the International Criminal Court (ICC).<sup>147</sup> Any resolution or treaty creating a binding RTP must explicitly limit the scope of the four triggering crimes to their definitions in current international law. As Secretary-General Ban Ki-moon states in his 2009 report, “the best way to discourage States or groups of

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143. *Id.*

144. G.A. Res. 60/1, *supra* note 120, ¶ 138 (emphasis added).

145. ICISS REPORT, *supra* note 13, at xii.

146. See U.N. Secretary-General, *Secretary-General Defends*, *supra* note 126 (“Likewise, if United Nations rules procedures and practices are developed . . . there is less likelihood of RTP principles being used to justify extra-legal interventions for other purposes.”). *Id.*

147. See, e.g., Rome Statute of the International Criminal Court, art. 7, July 17, 1998, 2187 U.N.T.S. 90. (defining crime against humanity: “For the purpose of this Statute, ‘crime against humanity’ means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: (a) Murder; (b) Extermination . . .”).

States from misusing [RTP] for inappropriate purposes would be to develop fully” the doctrine and guidelines for implementation.<sup>148</sup> By limiting the scope of the doctrine to four trigger crimes, the 2005 World Summit resolution takes a step toward that goal. This proposal for a binding RTP takes that task a step further by explicitly incorporating current international law definitions of the trigger crimes and thereby decreasing the potential for abuse of RTP.

Having further narrowed the scope of RTP, it is necessary to shift to defining the stage for RTP. Here again, the U.N. resolution on RTP productively narrows the definition while protecting the efficacy of the doctrine. Recall that if the ICISS found a state “unwilling or unable” to prevent or stop a crisis, it considered RTP to come into effect.<sup>149</sup> The U.N. increases this threshold requirement as it mandates that a state be “manifestly failing to protect [its] population[] from” the four triggering crimes.<sup>150</sup> *Manifestly failing* is markedly stronger language than *unable or unwilling*. Consequently, it narrows the stage on which the international community will have to perform its responsibility to protect. This stronger language brings the stage requirement into line with the narrower scope of crimes that trigger RTP which the U.N. adopted and which this Note supports. Narrower scope and stage requirements will make RTP more palatable to skeptical states, as the more refined the trigger conditions, the more limited is RTP; for example, there will be fewer situations which will trigger the doctrine and therefore fewer interventions to which a state must commit. Simultaneously, though these requirements narrow RTP, they do not dilute it; the doctrine remains strong enough to require intervention in the worst atrocities.

While the U.N. language productively narrows RTP’s stage, it does little to clarify how to determine the level of state inaction that constitutes a manifest failure. Recall that this Note endorses the ICISS proposal that the Security Council utilize independent inquiries into a crisis to evaluate the presence of RTP trigger factors. Most scholars recognize that insufficient intelligence is no longer the principle challenge in intervention cases.<sup>151</sup> Rather, in the era of high-speed communication, “it is much harder to kill [people] in secret.”<sup>152</sup> In keeping with that reality, this Note proposes that if a Security Council inquiry into a crisis establishes evidence of a triggering crime in the state in question, that finding creates a rebuttable presumption that

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148. U.N. Secretary-General, *Implementing*, *supra* note 33, at summary.

149. ICISS REPORT, *supra* note 13, at xi.

150. G.A. Res. 60/1, *supra* note 120, ¶ 139.

151. See, e.g., POWER, *supra* note 37, at 354-55 (describing the intelligence missions and reports the U.S. directed and drafted regarding Rwanda); see also U.N. Secretary-General, *Implementing*, *supra* note 33, ¶ 6 (noting that there were “warning signs” for each of recent history’s “worst human tragedies”).

152. Walzer, *supra* note 62, at 19.

the state is manifestly failing to address the crisis. Any state that opposes intervention would then have to definitively establish the falsity of the presumption. This proposal links the high standards for the scope and stage of RTP in a logical manner—the evidence of an atrocity tends to prove that the state responsible to prevent it has failed to do so—while providing a safety valve should the facts not, in reality, require intervention. As such, the proposed conception of RTP again strikes a balance between appeasing reluctant states and maintaining the strength of the doctrine.

In addition to embracing language to refine the scope and stage of RTP, a binding conceptualization of RTP should adopt all of the proposed ICISS precautionary principles: “[r]ight intention,” “last resort,” “proportional means,” and “reasonable prospects.”<sup>153</sup> Each principle reinforces the inherent nature of intervention under RTP as a humanitarian endeavor.<sup>154</sup> The ICISS proposes, however, that the principles form part of a threshold evidentiary requirement that the Security Council must establish before intervening.<sup>155</sup> As threshold evidentiary requirements, the principles are too unwieldy. The Security Council can look to international treaties and case law to determine if a given situation satisfies, for example, the definition of genocide and therein triggers RTP. There are no similar sources for these precautionary principles. Thus, rather than evidentiary requirements, the proposed conceptualization of RTP adopts the principles as policy guidelines, conceptual checkpoints the Security Council should look to as it evaluates an intervention strategy once it has established that a triggering crime is occurring. Keeping the principles as policy guidelines advances the goals of the ICISS in drafting them,<sup>156</sup> without adding an amorphous and highly discretionary step to the process of determining whether a situation triggers RTP.

The final proposal of this Note shifts attention from definitions of RTP and which factual patterns trigger international intervention to the issue of the Security Council veto power. Many scholars and proponents of RTP call for the five permanent members of the Security Council to forego their veto power when considering intervention under RTP.<sup>157</sup> In his report on implementing RTP, Secretary-General Ban Ki-Moon speaks on the solemn responsibility of the five permanent members of the Security Council:

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153. ICISS REPORT, *supra* note 13, at xii.

154. *Id.* para. 4.32. For a full discussion of the principles, see *supra* text accompanying notes 94-102.

155. *Id.* paras. 4.28-4.32.

156. *Id.* para. 4.32. (identifying the role of the principles in shaping policy of RTP).

157. See, e.g., U.N. Secretary-General, *Implementing*, *supra* note 33, ¶ 61; Amnesty Int'l, *supra* note 36.

[T]he Secretary-General bears particular responsibility for ensuring that the international community responds in a 'timely and decisive' manner, as called for in paragraph 139 of the Summit Outcome. . . . Within the Security-Council, the five permanent members bear particular responsibility because of the privileges of tenure and the veto power they have been granted under the Charter. I would urge them to refrain from employing or threatening to employ the veto in situations of manifest failure to meet obligations relating to the responsibility to protect . . . and to reach a mutual understanding to that effect.<sup>158</sup>

The Secretary-General both draws attention to the gravity of the veto power, as well as calls upon the permanent members to "reach a mutual understanding" that they ought to forego that power in the RTP context.<sup>159</sup> At the proposal of a representative of one of the five permanent members, the ICISS endorsed a similar concept of "constructive abstention" of a state's veto power in "matters where [that state's] vital national interests were not claimed to be involved."<sup>160</sup> While such proposals are constructive, they are insufficient as they leave RTP to the whim of the political will and self-interest of five nations.

Per Article 23 of the U.N. Charter, the U.S., the U.K., France, China and Russia sit as the permanent members of the Security Council.<sup>161</sup> In its current form, the veto power permits any one of the five permanent members of the Security Council to determine the action or inaction of the Council; should one permanent member object to an action, the Council cannot proceed.<sup>162</sup> In recent years, China has used the veto power to cripple Security Council action in Darfur<sup>163</sup> due, at least in part, to its economic interests in Sudan and Sudanese oil.<sup>164</sup> Many policymakers call for general reform of the veto power, labeling it "the greatest flaw in the U.N.'s constitutional edifice."<sup>165</sup> This paper calls not for a sweeping reform of the veto power, but rather a reform which pertains only to its exercise in situations which trigger RTP.

To fully address the challenge of overcoming the veto power of the five permanent members of the Security Council, RTP must include a binding provision which overrides that power once a situation triggers the doctrine. The ICISS proposal calls for voluntary, constructive abstention of the veto power by the permanent members when

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158. U.N. Secretary-General, *Implementing*, *supra* note 33, ¶ 61 (emphasis omitted).

159. *Id.*

160. ICISS REPORT, *supra* note 13, para. 6.21.

161. U.N. Charter, art. 23.

162. NIGEL D. WHITE, THE UNITED NATIONS SYSTEM: TOWARD INTERNATIONAL JUSTICE 140 (2002).

163. Feinstein, *supra* note 79, at 13.

164. See Press Release, Human Rights First, China's Oil Interests in Sudan Fueling Darfur Violence, Mar. 12, 2008, available at <http://www.commondreams.org/news2008/0312-04.htm>.

165. See, e.g., WHITE, *supra* note 162, at 303.

there was a majority in favor of intervention.<sup>166</sup> Rather than a non-binding mutual agreement, the existence of a majority in support of intervention must trigger a binding requirement that no member of the permanent five use its veto power. To trigger the prohibition of the veto, however, the majority in favor of intervention must be a “majority +”—*meaning it must include one or more members of the Security Council*. The doctrine should, however, draw upon the ICISS proposal to provide an escape valve. Should a nation’s “vital state interests”<sup>167</sup> be threatened, that member could exercise her veto power, regardless of the existence of a “majority +” rule.

The proposed reform to the veto power has two advantages: one moral and one practical. First, creating a binding bar to the veto power precludes the “unconscionable [reality] that one veto can override the rest of humanity on matters of grave humanitarian concern.”<sup>168</sup> Second, a limited, context-specific reform of the veto power may be more palatable to the permanent five than would a sweeping overhaul of the system. Requiring at least one member of the permanent five to be within the majority ensures that the will of the non-permanent members cannot wholly override that of the permanent five, a concession to the controlling status of the permanent five. At least one permanent member of the Security Council supported an agreement by the five to refrain from use of the veto power within RTP context, which suggests that there may be a foundation of support upon which to build in order to create a binding provision.<sup>169</sup> Though they recognize it as an “uphill battle,” activists have identified both the U.K. and France as likely the most open to reform of the veto.<sup>170</sup> Getting the permanent members of the Security Council to sign onto a document which, however limited in scope, reforms their veto power, is inevitably an uphill battle. It is, however, a battle worth fighting because absent such a reform, RTP will be a markedly weaker doctrine.<sup>171</sup>

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166. ICISS REPORT, *supra* note 13, at xiii.

167. *Id.* para. 8.29(2).

168. *Id.* para. 6.20 (highlighting the profound detrimental impact of the veto power in human rights crises).

169. *See id.* para. 6.21. *But see*, HUMAN RIGHTS CENTER, THE RESPONSIBILITY TO PROTECT (R2P): MOVING THE CAMPAIGN FORWARD 54 (2007) (“[I]n general, P5 members expressed their opposition to the abolition of the veto or to modifications that would be ratified through Charter amendment, including General Assembly guidelines on how the veto shall be exercised.”), available at <http://www.law.berkeley.edu/HRCweb/pdfs/R2P-Final-Report.pdf>.

170. HUMAN RIGHTS CENTER, *supra* note 169, at 56.

171. *See id.* at 52-54 (“The use of the veto by P5 members has hindered the Security Council’s ability to respond to conflict situations where mass atrocities, including genocide and crimes against humanity, are being committed.”).



A. *Why Nations Should Adopt a Binding RTP*

Proponents of the slow evolution of international law argue against a deliberate attempt to define the bounds of a doctrine in favor of an “incremental development of normative consensus.”<sup>172</sup> Such critics fail to give full credit to the support and consensus RTP has already garnered. RTP already stands upon solid ground. The 2005 World Summit recognized the norm in “language . . . sufficiently strong to be considered an endorsement of a new set of principles”<sup>173</sup>:

Each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity. This responsibility entails the prevention of such crimes, including their incitement, through appropriate and necessary means. *We accept that responsibility and will act in accordance with it.*<sup>174</sup>

Since 2005, the U.N. has only strengthened its commitment to RTP through repeated reports and resolutions which affirm and further refine the doctrine.<sup>175</sup> The Secretary-General has shifted focus to implementing the RTP doctrine.<sup>176</sup> The proposals of this Note further delimit and define RTP, framing it in accordance with Secretary-General Ban Ki-moon’s conception of it providing “deep,” significant protections in “narrow” circumstances.<sup>177</sup> We have a principle; now we must move forward with it.

First and perhaps most urgently, states should accede to a binding RTP because the lives of thousands if not millions of individuals hang in the balance. How the international community reacts to a future Rwanda could be determinative of whether thousands live or die. “[T]he last decade of the twentieth century was one of the most deadly in the grimmest century on record”,<sup>178</sup> without a binding norm, the world is free to watch as other people die. The sheer moral force of what is at stake—thousands of human lives—puts a thumb on the scale of solidifying RTP doctrine into a binding principle of international law. At its inception, the Nuremberg Tribunal was unprecedented.<sup>179</sup> The profound human suffering of the Holocaust incensed the international community, driving it to create a new institution to hold responsible the perpetrators of the atrocities.<sup>180</sup> If states accede

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172. Stromseth, *supra* note 101, at 245 (emphasis omitted).

173. Pace & Deller, *supra* note 25, at 27.

174. G.A. Res. 60/1, *supra* note 120, ¶ 138 (emphasis added).

175. See, e.g., S.C. 1894, *supra* note 125, pmbl.; U.N. Secretary-General, *Implementing*, *supra* note 33.

176. See generally U.N. Secretary-General, *Implementing*, *supra* note 33.

177. U.N. Secretary-General, *Secretary-General Defends*, *supra* note 126.

178. Power, *supra* note 35, at 251.

179. See ROBERTSON, *supra* note 2, at xxii.

180. *Id.*

to a binding RTP, they advance international law in the same vein as the creation of Nuremberg; unprecedented as it was, the tribunal was also an unquestionable good. Annan knew in 2000 that nations have a “moral duty” to protect their brethren.<sup>181</sup> Now, those nations must honor their idealism over self-interest and accept that this duty compels them to accept RTP as a binding precept.<sup>182</sup>

Over and above the moral duty that compels action, existing obligations under international law support the proposition that states must intervene to prevent atrocities and should do so through RTP. The Genocide Convention provides the clearest example of this existing obligation. The Convention defines genocide and states, in Article 1: “The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish.”<sup>183</sup> One hundred and forty-one nations acceded to the treaty and are thus bound by its substance.<sup>184</sup> By grounding RTP in these nations’ existing duty to prevent genocide, the 2004 and 2009 General Assembly reports strengthen the argument that RTP is simply an articulation of principles that already bind states to intervene in the face of atrocities.<sup>185</sup> As such, nations should accede to a binding treaty or support a resolution on RTP as an affirmation of their existing obligations under international law.

In 2007, the International Court of Justice strengthened the link between RTP and an existing obligation to prevent genocide under the Genocide Convention.<sup>186</sup> The case addressed Serbia and Montenegro’s liability for genocide against citizens of Bosnia and Herzegovina in the early 1990s.<sup>187</sup> By analyzing the plain language of the Convention, the court identified the responsibilities to prevent and to punish

181. U.N. Secretary-General, *We the Peoples*, *supra* note 32, ¶ 219.

182. *See generally* BASS, *supra* note 38, at 8, 21-32 (discussing the battle between idealism and selfishness of liberal states).

183. Convention on the Prevention and Punishment of the Crime of Genocide art. 1, Jan. 12, 1948, 78 U.N.T.S. 277, available at, [http://treaties.un.org/Pages/ViewDetails.aspx?src=UNTSOnline&tabid=2&mtdsg\\_no=IV-1&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=UNTSOnline&tabid=2&mtdsg_no=IV-1&chapter=4&lang=en).

184. *See* U.N. Treaty Collection, *Chapter IV: Human Rights Convention on the Prevention and Punishment of the Crime of Genocide*, Apr. 23, 2010, [http://treaties.un.org/Pages/ViewDetails.aspx?src=UNTSOnline&tabid=2&mtdsg\\_no=IV-1&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=UNTSOnline&tabid=2&mtdsg_no=IV-1&chapter=4&lang=en).

185. *See* U.N. Secretary-General, *Implementing*, *supra* note 33, ¶ 3 (RTP is “firmly anchored in well-established principles of international law. Under conventional and customary international law, States have obligations to prevent and punish genocide, war crimes and crimes against humanity.”); U.N. Secretary-General, *A More Secure World*, *supra* note 113, ¶ 200.

186. *See generally* Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Mont.), 2007 I.C.J. 169, ¶¶ 425-32 (Feb. 26). *See also* W. Michael Reisman, *Acting Before Victims Become Victims: Preventing and Arresting Mass Murder* 40. CASE W. RES. J. INT’L L. 57, 80-82 (2008) (“the judgment expanded the responsibility of individual states to act to prevent and arrest genocide.”). *Id.* at 81.

187. Application of the Convention on the Prevention and Punishment of the Crime of Genocide, 2007 I.C.J. 169, ¶¶ 231-34.

genocide as “two distinct yet connected obligations.”<sup>188</sup> While the court recognized how closely related the two principles are, it firmly stated “it is not the case that the obligation to prevent has no separate legal existence of its own.”<sup>189</sup> Rather, the duty to prevent “is one of conduct [meaning] that a State cannot be under an obligation to succeed . . . the obligation of States parties is rather to employ all means reasonably available to them, so as to prevent genocide so far as possible.”<sup>190</sup> Though the court did not expressly discuss RTP, its decision supports the link between RTP and existing obligations under the Genocide Convention by finding a duty to act in the Convention’s language of prevention. RTP advances the duty to act embodied in the Genocide Convention and similar treaties by synthesizing their content to create a unified principle which requires the international community to intervene in the face of the worst human crises: genocide, war crimes, crimes against humanity, and ethnic cleansing.

#### V. FULFILLING PROMISES: CONCLUSION

Those who hesitate to recognize a binding RTP may challenge that it is sufficient as an aspirational doctrine. After all, as little as ten years ago, no one was even discussing the responsibility to protect as such. While scholar Gary Bass writes on the problem of placing too much faith in international tribunals, his observation applies to placing too much faith in an aspirational principle:

The idea that all international problems will dissolve with the establishment of an international court with compulsory jurisdiction is an invitation to political indolence. It allows one to make no alterations in domestic political action and thought, to change no attitudes, to try no new approaches and yet to appear to be working for peace.<sup>191</sup>

A non-binding RTP is just that: a commitment a nation can make, give itself a pat on the back, and then continue on with the status quo. That possibility is unacceptable. The stakes are too high. Too many lives are at risk.

In its current form, RTP gets the international community over the hurdle of the non-intervention norm, but that feat alone is not enough. History and scholarship on intervention teach us that, more often than not, nations lack the political will to intervene to save the lives of strangers.<sup>192</sup> This Note proposes that nations adopt a binding RTP that is an amalgamation of U.N. and ICISS definitions of the

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188. *Id.* at ¶ 425.

189. *Id.* ¶¶ 426-27.

190. *Id.* ¶ 430.

191. BASS, *supra* note 38, at 282 (citation omitted).

192. *See, e.g.*, Power, *supra* note 35, at 256.

doctrine, as well as scholarship on intervention and reforming the veto power. Mustering the necessary political will to bind themselves to RTP requires nations to critically examine their existing obligations under the Genocide Convention and other major international treaties, alongside the compelling moral arguments in favor of intervention. Upon doing so, nations must inevitably realize they have *already* made the commitment to act. RTP stands ready to advance the language and spirit of international human rights and humanitarian law—it is simply waiting for the international community to fulfill its promises.