An Emerging Norm - Determining the Meaning and Legal Status of the Responsibility to Protect

Jonah Eaton
University of Michigan Law School

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STUDENT NOTE
AN EMERGING NORM? DETERMINING THE MEANING AND LEGAL STATUS OF THE RESPONSIBILITY TO PROTECT

Jonah Eaton*

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* J.D., University of Michigan Law School; B.A., Political Science, Swarthmore College; B.S., Engineering, Swarthmore College. Thanks to Judge Bruno Simma, Professor Monica Hakimi and Visiting Research Scholar Fiona Le Diraison for their feedback and guidance; and to my editors and the staff of the Michigan Journal of International Law for their patience and hard work on this Note.
INTRODUCTION

The responsibility to protect, from its recent nativity in the 2001 report of the International Commission on Intervention and State Sovereignty (ICISS), is the latest round in an old debate pitting the principle of nonintervention in the internal affairs of states against allowing such intervention to prevent gross and systematic violations of human rights. Advocates for the concept see it as an important new commitment by the international community, injecting new meaning into the tragically threadbare promise to never again allow mass atrocities to occur unchallenged. ICISS offered the concept of responsibility to protect as a new way to confront these calamities that addressed the concerns of some nations that humanitarian intervention was merely a license to invade. This idea made its way in four short years from the 2001 ICISS Report into the 2005 Summit Outcome Document (Summit Outcome), unanimously adopted by the Sixtieth Session of the U.N. General Assembly. A frequently repeated phrase in the commentary on responsibility to protect is that it is an "emerging norm," representing the coalescence of a new international consensus around the duties and powers of the international community in confronting massive human rights violations. While many advocates and commentators have been cautious on this subject, one interpretation is that, as an "emerging norm," responsibility to protect is somewhere on the path to becoming customary international law. "[W]ith the weight behind it of a unanimous General Assembly resolution at head of state and government level, the responsibility to protect can already be properly described as a new international norm: a new standard of behavior . . . for every state."
Although "new international norm" suggests that responsibility to protect is becoming customary international law, even champions of the concept accept that it is not currently customary international law. Customary international law is created through action (state practice) and statements showing repeated state practice being motivated by a sense of legal obligation (opinio juris). The opinio juris requirement, first articulated in the nineteenth century, provides a means to distinguish repeated actions that are merely traditional or social, and thus bear no legal weight (for example, not charging diplomats for their parking violations), from those that create legally binding obligations. As codified by the Statute of the International Court of Justice, customary law is "evidence of a general practice accepted as law." The International Court of Justice in its landmark North Sea Continental Shelf case on customary international law has written that "[n]ot only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it." The literature on customary international law is vast, and the demarcation between state practice and opinio juris and what should count as either is difficult and controversial. The concept can be broadly divided into traditional and modern approaches. The traditional approach is inductive, finding custom from the repeated actions of states and then testing those actions for the existence of opinio juris. The modern approach is deductive, more heavily driven by opinio juris, or what states say the law is rather than what they do. While gallant attempts have

5. E.g., id. at 4.
7. François Gény, Méthode D'Interprétation et Sources en Droit Privé Privé Positif § 110 (1899), quoted in D'Amato, supra note 6, at 48–49.
8. Brownlie, supra note 6, at 6.
11. Id. ¶ 77.
13. Id. Human rights lawyers and advocates have been criticized for being too quick to reach for custom in order to codify human rights principles into binding law, often relying
been made to reconcile the differences between these camps, a simpler proposition shared, to some degree, by both schools is that in both cases norms—whether as customary law or as a more general sociological phenomenon—require some level of agreement, or general recognition, as to both their existence and their content. While this agreement need not amount to unanimity, it must not “disclose so much uncertainty and contradiction, so much fluctuation and discrepancy . . . that it is not possible to discern . . . any constant and uniform usage, accepted as law.”

extensively on *opinio juris* and ignoring practice. Bruno Simma & Philip Alston, *The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles*, 12 Austl. Y.B. Int’l L. 82, 83 (1992). As states tend not to broadcast their violations of human rights instruments and espouse them in public, this “modern” approach to customary law allows the incorporation of the Universal Declaration of Human Rights into binding international law without the support of state practice. The danger of this approach is that it weakens the very authority of customary law, since the “law” in this case is being routinely broken. This highlights the slippery and difficult nature of customary law; repeated practice may result in a binding legal obligation, but it may be difficult to determine where violations of that obligation simply amount to individual violations or, perhaps, the “seeds” of a new customary norm. See D’Amato, *supra* note 6, at 97–98.


[O]n the sliding scale, very frequent, consistent state practice establishes a customary rule without much (or any) affirmative showing of an *opinio juris*, so long as it is not negated by evidence of non-normative intent. As the frequency and consistency of the practice decline in any series of cases, a strong showing of *opinio juris* is required. At the other end of the scale, a clearly demonstrated *opinio juris* establishes a customary rule without much (or any) affirmative showing that governments are consistently behaving in accordance with the asserted rule.

Id. Anthea Roberts attempts to negotiate a path between the “traditional” and “modern” approaches to customary law by applying Ronald Dworkin’s interpretive approach to law. Roberts, *supra* note 12, at 774. Dworkin’s theory maps well onto practice or *opinio juris* considerations, as he incorporated both a backward-looking descriptive element (how well does the rule reflect past practice) and a forward-looking normative element (what the rule should be). *Id.* at 775. State practice is descriptive and *opinio juris* is normative—the challenge is correctly balancing these two considerations. “In hard cases, there will be inconsistent levels of state practice or *opinio juris*, which can give rise to multiple eligible interpretations.” *Id.* at 772. *Opinio juris* can help inform what state practice should be counted (the long standing practice of giving foreign aid should not create a legally binding obligation). *Id.*

15. Thus, in the *Fisheries* case, the International Court of Justice (ICJ) refused to accept a particular rule regarding the extent of Norway’s territorial waters since “other States have adopted a different limit.” *Fisheries* (U.K. v. Nor.), 1951 I.C.J. 116, 131 (Dec. 18).


17. *Asylum Case* (Colom. v. Peru), 1950 I.C.J. 265, 277 (Nov. 20). The court stated:

The facts brought to the knowledge of the Court disclose so much uncertainty and contradiction, so much fluctuation and discrepancy in the exercise of diplomatic asylum and in the official views expressed on various occasions, there has been so much inconsistency in the rapid succession of conventions on asylum, ratified by some States and rejected by others, and the practice has been so much influenced
The responsibility to protect doctrine has been debated twice in the past five years in the General Assembly: once during the lead up to the 2005 World Summit, and again in July 2009. Examining the statements of U.N. member states' representatives will shed light on both the acceptance and the content of the doctrine. The 2005 World Summit debates were structured on the U.N. Secretariat's *In Larger Freedom* report and produced the 2005 World Summit Outcome, which incorporated the responsibility to protect, although in a somewhat altered form from the proposed doctrine. The 2009 debate was a direct response to a report produced by the Secretariat that attempted to take the two brief paragraphs of the Summit Outcome dealing with responsibility to protect and translate it into U.N. policy. Based on this record and the text of the 2005 World Summit Outcome, it is widely expected that the international community must respond to mass atrocity crimes. But while the claim that genocide is an unacceptable evil is an almost trivially easy normative statement, the road from there to a workable legal doctrine is cluttered with political landmines. In the instances where there appears to be an agreement on the existence of responsibility to protect, the discussion on what the doctrine allows or requires is more difficult.

This Note will first briefly review the history of responsibility to protect from the late 1990s, analyzing the concept in the context of the debate about humanitarian intervention. The content of the responsibility to protect doctrine has been interpreted, like humanitarian intervention, to allow greater leeway to an outside actor to intervene in the affairs of a state by reducing the political costs for violating the norm of

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by considerations of political expediency in the various cases, that it is not possible to discern in all this any constant and uniform usage, accepted as law, with regard to the alleged rule of unilateral and definitive qualification of the offence.

*Id.*


21. For example, the Egyptian representative noted that the states in the Non-Aligned Movement, whose summit Egypt had just hosted,

expressed grave concern at instances wherein the Security Council fails to address cases involving genocide, crimes against humanity or war crimes. . . . [In such instances where the Security Council has not fulfilled its primary responsibility for the maintenance of international peace and security, the General Assembly should take appropriate measures in accordance with the Charter to address the issue.]

nonintervention. Similarly, the doctrine may also be prescriptive to the extent to which, through the language of responsibility, it places an affirmative duty on outside actors to act in cases of massive human rights violations.

Through the record of General Assembly floor statements, this Note will attempt to answer three questions: (1) Is a norm "emerging"? (2) Is there a consensus understanding of what responsibility to protect means? And (3) if the first two questions can be answered affirmatively, has this created new rights or imposed new duties on states, either individually or collectively? While evidence of an increasing international consensus about third party legal and policy responses to mass atrocity crimes is not sufficient to create legally binding customary law, it is necessary.

I. RESPONSIBILITY TO PROTECT FROM ICISS TO THE GENERAL ASSEMBLY

A. Ghosts of Humanitarian Intervention

The responsibility to protect debate echoes the earlier debate on humanitarian intervention, a doctrine that would allow states to legally enforce human rights through force. The central point of controversy is essentially the same. Humanitarian intervention offered an exception to the ban on the use or threat of force in Article 2(4) of the U.N. Charter. Article 2(4) states: "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations." This fundamental principle of the post-World War II international legal order is subject to two exceptions found in the U.N. Charter: the self-defense provisions of Article 51 and the enforcement power of the Security Council under Chapter VII. Article 2(7) states that "[n]othing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state . . . . [T]his principle shall not prejudice the application of enforcement measures under Chapter VII." Thus, between Articles 2(4) and 2(7) there exists a powerful defense of the "Westphalian sovereignty" of states. However, using this

23. Id.
24. Stephen Krasner defines Westphalian (or Westphalian/Vattelian) sovereignty as noninterference in the internal affairs of other states, and each state can “determine its own institutions of government.” Stephen D. Krasner, The Hole in the Whole: Sovereignty, Shared
absolute sovereignty as a means to shield states from scrutiny of human rights violations raises moral concerns and questions about the very legitimacy of that sovereignty. As one commentator observed:

Sovereignty; it is the reciprocal protection of torturers. And yet, for decades, the discourse of international law courts repeated that the principle of non-intervention constituted the foundation of all global equilibrium. Professors of law, chancelleries and international organizations celebrated the cult of absolute sovereignty, which could only be limited by international accords as precarious as the good faith of those who signed them.

Within this absolutist perspective, humanitarian intervention doctrine was built to protect the human rights principles found in international law.

Among the principles or “purposes of the United Nations” are “promoting and encouraging respect for human rights and for fundamental freedoms.” Member states must promote “universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.” They must also “pledge themselves to joint and separate action” to achieve these goals.

This creates a potential conflict between the human rights protecting purposes of the United Nations and the maintenance of peace and stability through noninterference—a conflict between justice and peace. Thus, humanitarian intervention was a mechanism to protect human rights where their violation might be shielded from scrutiny by a state invoking Articles 2(4) or 2(7), positing an additional exception to Article 2(4) to allow intervention in order to prevent gross violations of human rights.

Other scholars have examined whether a “right” of humanitarian intervention has emerged as customary international law and to that end,


26. Id. (translated from the original French by the author). This argument among French academics was sparked by Bernard Kouchner and Professor Bettati with their book, MARIO BETTATI & BERNARD KOUCHNER, LE DEVOIR D’INGÉRENCE (Denoël 1987). Kouchner, when he was the foreign minister of France from 2007 to 2010, pushed an expansive view of responsibility to protect.

27. U.N. Charter art. 1, para. 3.

28. Id. art. 55.

29. Id. art. 56.

30. See Sean D. Murphy, Criminalizing Humanitarian Intervention, 41 Case W. Res. J. Int’l L. 341, 341 (2009) (noting that while many states do not view humanitarian intervention as a justified use of force, “[s]ome states and scholars, however, see international law as permitting such intervention”).
they have evaluated state practice conducted with a subjective belief in the existence of a legal right or obligation.\(^\text{31}\) Franck and Rodley, in their study of forcible humanitarian intervention, reviewed the history of “humanitarian” justifications for intervention, pointing out a long pattern of abuse by Western colonial powers in the nineteenth and early twentieth centuries, and by both sides during the Cold War.\(^\text{32}\) This abuse of humanitarian intervention as justification for essentially colonialist enterprises would reverberate in the recent General Assembly debates.\(^\text{33}\) One commentator noted during the debates on the responsibility to protect: “Let us be very wary of developing any doctrine for humanitarian intervention. Any principle of intervention can readily be abused . . . or become a charter for imperial occupation.”\(^\text{34}\) Franck and Rodley conclude that their case studies do “not constitute the basis for a definable, workable, or desirable new rule of law which . . . would make certain kinds of unilateral military interventions permissible.”\(^\text{35}\)

The NATO bombing of Serbia during the Kosovo crisis was conducted without Security Council authorization and again raised the controversy over “unilateral” or “unauthorized” humanitarian intervention. There was a heated debate over whether NATO essentially got away with an international law violation even when the action was partially legitimized after-the-fact by the Security Council’s subsequent authorization of a NATO-led peace keeping force.\(^\text{36}\) Antonio Cassese suggested from these events that there may be an emerging norm allowing for unilateral intervention under narrow circumstances in cases of humanitarian crisis.\(^\text{37}\) Following in the analytical path of Franck and Rodley, Cassese based this analysis on what he identified as emerging trends regarding humanitarian intervention, which included the actions of the Organization of African Unity (now the African Union) in Liberia and the actions of the United States and United Kingdom to protect Kurds in northern Iraq and Shiites in the south.\(^\text{38}\) Professor (now Judge) Bruno Simma re-


\(^{32}\) Id. at 284.

\(^{33}\) See infra notes 151–152 and accompanying text.

\(^{34}\) Alex de Waal, No Such Thing as Humanitarian Intervention: Why We Need to Rethink How to Realize the “Responsibility to Protect” in Wartime, Harv. Int’l Rev. (Mar. 21, 2007), http://hir.harvard.edu/no-such-thing-as-humanitarian-intervention?page=0.3.

\(^{35}\) Franck & Rodley, supra note 31, at 276. Their conclusion was based on the finding that state practice overwhelmingly tended towards nonintervention in cases of humanitarian crisis, as well as on the restrictions on intervention in the U.N. Charter. Id. at 302–03.


\(^{38}\) Id.
sisted this position by arguing that "offensive self-help by threats or use
of armed force without a basis in Chapter VII has been outlawed by the
jus cogens of the [U.N.] Charter."39 NATO did not have Security Council
authorization to bomb Serbia, and thus under Chapter VII, could not le-
gally intervene.40 NATO’s legal position was particularly tenuous in that it
was executing an enforcement action against a nonmember that did not
attack a NATO member—making an Article 51 collective self-defense
claim impossible.41

After the NATO air war against Serbia, the membership of the Non-
Aligned Movement (NAM)42 issued a statement at Cartagena, Colombia,
that “reject[ed] the so-called ‘right’ of humanitarian intervention, which
has no legal basis in the UN Charter or in the general principles of inter-
national law”43 and included the “firm condemnation of all unilateral
military actions including those made without proper authorization from
the United Nations Security Council.”44 Similar language would later be
deployed against responsibility to protect.45

B. The International Commission on Intervention
and State Sovereignty

The responsibility to protect doctrine was very much the child of the
humanitarian intervention debate. After the controversy of the NATO
bombing of Serbia, then Secretary-General Kofi Annan challenged the
international community to determine what the approach should be to
the next humanitarian crisis, stating “if humanitarian intervention is, in-
deed, 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?”46 The Cana-
dian government responded, establishing the International Commission

39. Bruno Simma, NATO, the UN and the Use of Force: Legal Aspects, 10 EUR. J.
40. Id. at 10.
41. Id.
42. The Non-Aligned Movement (NAM) is a group of 115 mostly developing states. The
organization was formed to both support post-colonial states as well as resist being pulled into
the orbit of the United States or Soviet Union during the Cold War. See The Non-Aligned Move-
ment: Description and History, NON-ALIGNED MOVEMENT [NAM],
43. NAM, XIII Ministerial Conference, Apr. 8–9, 2000, Cartagena, Colom., Final Docu-
xiiiiminconf/minconf.pdf.
44. Id. ¶ 11.
45. See infra Part II.
46. U.N. Secretary-General, We the Peoples: The Role of the United Nations in the
Twenty-First Century: Rep. of the Secretary-General, ¶ 217, U.N. Doc. A/54/2000 (Mar. 27,
2000).
on Intervention and State Sovereignty (ICISS), which produced a report titled *The Responsibility to Protect*,\(^47\) coining the term in the process.

ICISS took pains at the outset to distance itself from humanitarian intervention. As Thomas Weiss, the Research Director for ICISS, has written, ICISS wanted to "drive a stake through the heart of the term 'humanitarian intervention.'"\(^{48}\) The report begins by noting "'[h]umanitarian intervention' has been controversial both when it happens, and when it has failed to happen" and goes on to discuss the troubled history of its application, or nonapplication, in Rwanda, Kosovo, Bosnia, and Somalia.\(^{49}\) The chapter ends with an explicit decision to jettison the language of humanitarian intervention in favor of a redefinition of sovereignty that includes responsibility to one's own population.\(^{50}\) The central premise is that the Westphalian conception of state sovereignty as unhindered control over a particular territory by an internationally recognized government should give way to a conception of sovereignty as a bundle of both rights and duties. The duty to protect one's own population from egregious human rights violations accompanies the right to noninterference from other states.\(^{51}\) If a state fails in its protective responsibility, this responsibility shifts to the international community,\(^{52}\) opening the door for possible intervention and thus a loss of Article 2(7) protections.\(^{53}\) The ICISS panel saw this effort as documenting an ongoing process:

Rather than create a new norm, ICISS registered and dramatized a norm shift already underway and found language to make it more palatable to nay-sayers . . . [B]ased on state practice, Council precedents, established and emerging norms, and evolving customary international law, the International Commission

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\(^{47}\) ICISS REPORT, supra note 1, at vii.


\(^{49}\) ICISS REPORT, supra note 1, ¶¶ 1.1–4.

\(^{50}\) Id. ¶¶ 8.31–32.

\(^{51}\) See id. ¶ 2.15.

\(^{52}\) There is a parallel here with the "surrogate protection" theory of international refugee law. Cf. Convention Relating to the Status of Refugees, art. I(A)(2), July 28, 1951, 189 U.N.T.S. 150. Under this theory, the Geneva Convention Relating to the Status of Refugees established an international obligation to provide substitute, or surrogate, protection to those persons who have lost the protection of their home country, suffered persecution on one of the enumerated grounds articulated by the Convention, and had fled abroad as a result of this persecution. Thus, responsibility to protect might be a more active complement to surrogate protection in that when faced with grievous abuse by a state (which would certainly give rise to refugee protection), the international community can directly intervene in the affairs of that state.

on Intervention and State Sovereignty held that the proscription against intervention is not absolute.54

Indeed, this idea is not new. There is ancient precedent for the idea that sovereignty confers certain responsibilities on the sovereign, and that the legal protection of sovereignty encompasses some normative utility in furthering justice and stability. The idea of sovereignty as an instrument for the protection of the life and safety of subjects is at least as old as Hugo Grotius,55 who made “the first authoritative statement of the principle of humanitarian intervention—the principle that exclusiveness of domestic jurisdiction stops when outrage upon humanity begins.”56 Even within the Hobbesian concept of absolute internal sovereignty, the very purpose of the Leviathan was to provide for “Peace and the Common Defence,”57 and to enforce the “Lawes of Nature (as Justice, Equity, Modesty, Mercy, and (in summe) doing to others, as wee would be done to),”58

The ICISS framework combines a rather tentative legal doctrine addressing the rights and duties of the international community, with a policy proposal, recommending the allocation of funds towards development assistance or peace-building efforts.59 The doctrine encompasses three tenets: the international community bears a responsibility to prevent by addressing the root causes of a conflict before they boil over into a full-fledged crisis,60 a responsibility to react by responding with appropriate action, including coercive measures;61 and a responsibility to rebuild in the aftermath of a crisis.62 This three-part scheme represents a graduated approach to protection—through the responsibility to prevent and react, ICISS establishes a prescriptive responsibility for intervention at the earlier stages of a crisis through a broad range of means, including coercive measures such as sanctions, international criminal prosecution,

54. Thakur & Weiss, supra note 3, at 26, 53. Thakur and Weiss were both involved in ICISS; Thakur as an ICISS commissioner, and Weiss as the research director for the ICISS Report.
58. Id. at 223.
59. ICISS REPORT, supra note 1, ¶ 5.1–2.
60. Id. ¶¶ 3.18–19.
61. Id. ¶ 4.1.
62. Id. ¶ 5.1.
and, ultimately, military intervention. In order to warrant military intervention, the crisis must meet a “just cause” threshold, which includes large-scale loss of life, ethnic cleansing, or both. Thus, military intervention should be employed to halt only the most egregious violations and conflicts.

C. From ICISS to the General Assembly

The U.S.-led invasion of Iraq in 2003 again threw the conversation on the legality of unauthorized intervention into turmoil. In response, Kofi Annan convened the High-level Panel on Threats, Challenges and Change (High-level Panel), which produced its own report, *A More Secure World: Our Shared Responsibility.* This report represented a significant shift in thinking about international law, and while it in many ways echoed the ICISS Report, it was more remarkable in that it came out of the U.N. system itself. Professor Anne-Marie Slaughter hailed *A More Secure World* as “an extraordinary document, one that opens the door to rethinking not only the United Nations but also some fundamental assumptions of the international legal system for the twenty-first century.”

The report urged the Security Council to adopt the “emerging norm” that there existed a responsibility to protect in cases of “genocide and other large-scale killing, ethnic cleansing or serious violations of humanitarian law.” The report stated that, in the case of intervention, the Security Council should consider five factors:

1. The seriousness of the threat: is the threatened harm sufficiently clear and serious to justify, prima facie, the use of military force?
2. Proper purpose: is the *primary purpose* of the proposed action to halt or avert the threat?
3. Last resort: have non-military options been exhausted?
4. Proportional means: is the response the minimum necessary?

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63. *Id.* ¶ 4.19.
64. *Id.* ¶ 4.10.
5. Balance of consequences: is the response likely to succeed, and are the consequences not likely to outweigh the threat?68

The panel also specified that any coercive action should occur through the Security Council, under the auspices of its Chapter VII powers, thus restricting the powers granted to individual states.69

This story took one more turn before it came to its conclusion during the 2005 World Summit, when Secretary-General Annan distributed a report that would serve as the basis of discussion for the World Summit. This report, *In Larger Freedom: Towards Development, Security and Human Rights for All*, touched on a wide range of issues from the Millennium Development Goals, to environmental sustainability, to Security Council reform.70 Indeed, while Security Council reform was arguably the most contentious and highest-priority issue raised for discussion, responsibility to protect, as advocated in *A More Secure World*, was endorsed in the report.71 *In Larger Freedom* took a more sensitive approach to the controversies inherent in that debate regarding fears by some states of impositions on their sovereignty, placing the collective action imperative alongside development.72 However, via *In Larger Freedom*, the original ICISS concept of responsibility to protect was transmitted relatively unaltered to the General Assembly for debate.73

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68. *Id.* at 58, ¶ 207. These requirements in general, and the balance-of-consequences requirement in particular, seem to strike a balance between “peace” and “justice” in favor of peace, recognizing that it is better to not intervene if an intervention is more likely to cause instability in the long run.

69. *Id.* at 57, ¶¶ 202–203; see also U.N. Charter arts. 39–51 (naming the Security Council in each of these articles as the main body dealing with threats to the peace).

70. See *In Larger Freedom*, supra note 18, ¶¶ 9, 169.

71. *Id.* ¶ 135.


73. *In Larger Freedom* endorses the ICISS Report and responsibility to protect, describing the doctrine thus:

This responsibility lies, first and foremost, with each individual State, whose primary raison d'être and duty is to protect its population. But if national authorities are unable or unwilling to protect their citizens, then the responsibility shifts to the international community to use diplomatic, humanitarian and other methods to help protect the human rights and well-being of civilian populations. When such methods appear insufficient, the Security Council may out of necessity decide to take action under the Charter of the United Nations, including enforcement action, if so required. In this case, as in others, it should follow the principles set out in section III above.

*In Larger Freedom*, supra note 18, ¶ 135.
II. THE U.N. DOCUMENTS ON RESPONSIBILITY TO PROTECT

A. The World Summit Outcome

Working from the recommendations presented by In Larger Freedom, the General Assembly debated responsibility to protect alongside a wide range of other issues, and the doctrine was written into the 2005 World Summit Outcome document in two paragraphs, 138 and 139.\(^{74}\) Given the failure to address many of the high priority issues during the Summit, the incorporation of responsibility to protect was arguably the Summit’s most important achievement. Paragraph 138 states that “[e]ach individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity. . . . The international community should, as appropriate, encourage and help States exercise this responsibility.”\(^{75}\) Paragraph 139 states “[t]he 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 protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity.”\(^{76}\) The Summit Outcome also pledges:

\(^{74}\) Summit Outcome, supra note 2, ¶ 138–139:

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 genocide, 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.

\(^{75}\) Id. ¶ 138.

\(^{76}\) Id. ¶ 139.
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.\(^7\)

This reflects previous iterations of the concept, in particular the first two parts of the three-part responsibility articulated in the ICISS Report—the responsibility to prevent and the responsibility to react.\(^7\) The Summit Outcome language of “helping States build capacity to protect their populations . . . and . . . assisting those which are under stress before crises and conflicts break out”\(^7\) has some overlap with the ICISS responsibility to prevent, although with less emphasis on coercive diplomatic and economic measures.\(^8\) The responsibility to react or “take collective action”\(^8\) will be “in a timely and decisive manner;” but only when “peaceful means are inadequate and national authorities are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity.”\(^8\) This commitment is qualified by a “case-by-case” determination, which seems to explicitly reject the prescriptive proposals of the ICISS Report.\(^8\) The Summit Outcome, however, does not address ICISS’s “responsibility to rebuild.”

One critical compromise that made the Summit Outcome language palatable was that, unlike any of the supporting documents that led up to it, paragraphs 138 and 139 explicitly predicated the responsibility to protect on four enumerated crimes: genocide, war crimes, ethnic cleansing, and crimes against humanity.\(^\text{84}\) Jean Ping, President of the General Assembly during the negotiations, said that the idea for limiting responsibility to protect to the four crimes came from the representative

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\(^7\) Summit Outcome, supra note 2, ¶ 139 (closely tracking the ICISS Report).

\(^7\) Stahn, supra note 72, at 108-09.

\(^7\) Stahn, supra note 72, at 108-09.

\(^7\) Stahn, supra note 72, at 109.

\(^8\) Summit Outcome, supra note 2, ¶ 139.

\(^8\) Id.

\(^8\) Id.

\(^8\) Summit Outcome, supra note 2, ¶ 139.

\(^8\) Summit Outcome, supra note 2, ¶ 139.
of Pakistan and was a breakthrough in the negotiations, as it limited the scope of responsibility to protect by adding a restrictive element.85

Furthermore, the four-crimes predicate limited the applicability of responsibility to protect in international humanitarian law. Responsibility to protect is only applicable in cases of genocide, as defined by the Genocide Convention of 1948,86 war crimes,87 crimes against humanity,88 and

87. Convention for the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277. The crime of genocide is defined by the Genocide Convention of 1948 as one or more of several listed criminal acts inflicted against a particular religious or ethnic group with the intent to destroy "in whole or in part, a national, ethnic, racial or religious group." Id. art. 2. Article 3 establishes conspiracy, incitement, attempt, and complicity liability. While under Article 8 "any contracting party may call upon the competent organs of the [United Nations] to take such action under the Charter . . . for the prevention and suppression of acts of genocide," the convention is primarily a criminal statute, focused on punishment of genocidaires as opposed to preventing or stopping ongoing genocide.
88. War crimes more generally include conduct proscribed by the various treaties negotiated in either The Hague or Geneva from 1864 to 1949 that form the core of international humanitarian law (IHL), regulating the conduct of warring parties. See, e.g., Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, June 17, 1925, 26 U.N.T.S. 571, 94 L.N.T.S. 65. The International Law Commission's Nuremberg Principles set basic principles in the criminal prosecution of international crimes, including war crimes. Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal, with Commentaries, [1950] 2 Y.B. Int'l L. Comm'n 374, 374–76, U.N. Doc. A/CN.4/SER.A/1950/Add.1 (including the principles that all persons who violate intentional law are liable, and that it is no defense if the accused were following orders or that their actions were legal in their home country).
89. Crimes against humanity were first invoked in the Allied condemnation of the Armenian Genocide during World War I. See Telegram from U.S. Dep't of State to U.S. Embassy, Constantinople (May 29, 1915), available at http://0.tqn.com/d/middleeast/1/0/t/5/-l-/telelgram.jpg. The Allied Powers condemned the mass killing of Armenians as "crimes of Turkey against humanity and civilization" and served warning "to the Sublime Porte that they will hold personally responsible for those crimes all members of the Ottoman government . . . who are implicated." Id.

Crimes against humanity now include "widespread or systematic attack" against a civilian population, not necessarily during a war. Rome Statute of the International Criminal Court, art. 7(1), Jul. 17, 1998, 2187 U.N.T.S. 3. The International Criminal Tribunal for the former Yugoslavia explained

It is by now a settled rule of customary international law that crimes against humanity do not require a connection to international armed conflict. Indeed, as the Prosecutor points out, customary international law may not require a connection between crimes against humanity and any conflict at all. Thus, by requiring that crimes against humanity be committed in either internal or international armed conflict, the Security Council may have defined the crime in Article 5 more narrowly than necessary under customary international law.

Ethnic cleansing.\textsuperscript{90} Thus, these four crimes present relatively well-defined standards that states will be held to in terms of their protection responsibilities, which should enhance the predictability in its application.

The Summit Outcome was hailed as a decisive break with absolute sovereignty: "[N]o longer is it necessary to finesse the tensions between sovereignty and human rights in the Charter; they can now be confronted. Sovereignty no longer implies the license to kill."\textsuperscript{91} In attempting to determine its legal status, Louise Arbour has suggested that the Summit Outcome imposes an affirmative duty of care on the Security Council for persecuted populations, standing parallel to their responsibility for international peace and security.\textsuperscript{92} Alicia Bannon has argued that the Summit Outcome is far more permissive, and may even allow for unilateral action.\textsuperscript{93} Bannon reasons that the Summit Outcome can be equated with an endorsement of the ICISS view of sovereignty, which includes a duty to protect.\textsuperscript{94} This idea, in conjunction with Articles 55 and 56 of the U.N. Charter establishing observance of "human rights

\textsuperscript{90} Ethnic cleansing was first used to describe the expulsion of civilians during the Yugoslav war of the 1990s. The General Assembly condemned violence against Bosnian Muslims, referring to "the abhorrent policy of 'ethnic cleansing', which is a form of genocide." G.A. Res. 47/121, U.N. Doc. A/RES/47/121 (Dec. 18, 1992). However, the International Court of Justice took pains to distinguish the two in The Bosnian Genocide Case, holding that

\begin{quote}
neither the intent, as a matter of policy, to render an area 'ethnically homogeneous', nor the operations that may be carried out to implement such policy, can as such be designated as genocide: the intent that characterizes genocide is 'to destroy, in whole or in part' a particular group, and deportation or displacement of the members of a group, even if effected by force, is not necessarily equivalent to destruction of that group . . . .
\end{quote}

Application of Convention on Prevention and Punishment of Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), 2007 I.C.J. 108, ¶ 190 (Feb. 26). Thus, by the Court's reasoning, genocide is the destruction of a group and ethnic cleansing is the removal of that group.

There is both some redundancy and some controversy surrounding this term. Certain actions taken in the course of ethnic cleansing, i.e., mass expulsion of a certain population or the use of widespread killing, intimidation, and rape are included under crimes against humanity. As Professor Drazen Petrovic argues, the term ethnic cleansing also has somewhat dubious roots; it was arguably invented to describe the actions of Bosnian Serbs to avoid the word "genocide," which might have triggered an obligation under the Genocide Convention. See Drazen Petrovic, Ethnic Cleansing—An Attempt at Methodology, 5 EUR. J. INT'L L. 342, 359 (1994).

\textsuperscript{91} Thakur & Weiss, supra note 3, at 23.

\textsuperscript{92} Louise Arbour, The Responsibility to Protect as a Duty of Care in International Law and Practice, 34 REV. INT'L STUD. 445, 453 (2008).

\textsuperscript{93} Alicia L. Bannon, Comment, The Responsibility to Protect: The U.N. World Summit and the Question of Unilateralism, 115 YALE L.J. 1157, 1162–63 (2005) (arguing that there is a limited justification for unilateral action under responsibility to protect where the Security Council is deadlocked); see also Stahn, supra note 72, at 109 (pointing out that paragraph 139 of the Summit Outcome does not explicitly preclude unilateral action).

\textsuperscript{94} Bannon, supra note 93, at 1161.
and fundamental freedoms for all," would allow for a member state to unilaterally intervene where the Security Council, and thus the U.N. as an institution, has failed to address one of the four crimes. Bannon, equating sovereignty with a defense that can be raised in the face of interference, argues that "[i]f nations have no sovereign right to commit or passively permit atrocities against their own populations, then they cannot object on sovereignty grounds to coercive actions halting the commission of those atrocities."

However, in many ways the Summit Outcome is a compromise document without a decisive interpretation. Perhaps the 2005 Summit Outcome strayed too far from the important and positive elements of the ICISS Report by abandoning many of the prescriptive elements that would have placed greater pressure on the Security Council to act (by potentially limiting the veto, for example) while allowing too much vagueness in the permissive aspect of responsibility to protect that may open the door for abuse of the doctrine to justify interventions based on self-interest, rather than concern for local populations. Additionally, the Security Council has failed to act in the past due to a lack of political will, and the Summit Outcome has been extensively criticized for not providing a mechanism to escape the core political problems that plague collective interventions.

95. U.N. Charter, art. 55(c).
96. Bannon, supra note 93, at 1162.
97. Id.
98. See Bellamy, supra note 22, at 152-53; see also Bannon, supra note 93, at 1160 (noting that "the Summit Agreement does not address the structural issues that thwart effective U.N. action to protect vulnerable populations").
99. See, e.g., Wheeler, supra note 86, at 103. The Summit Outcome was left so vague by the negotiations that went into its drafting that "[t]he difficulty is that states can sign up to the principle of the responsibility to protect but disagree over its application in particular cases." Id. See also Bellamy, supra note 22, at 169, who adds:

It is imperative that states now return to some of the fundamental questions the ICISS raised: Who, precisely, has a responsibility to protect? When is that responsibility acquired? What does the responsibility to protect entail? And how do we know when the responsibility to protect has been divested? If they do not, there is a real danger that states of all stripes will co-opt the language of the responsibility to protect to legitimate inaction and irresponsibility.

Id.

Rebecca Hamilton pointed out similar problems in her article, stating that "[t]here is much 'in principle' support for the R2P from state actors, civil society, and, in recent months, the U.N. as a whole. However, three key challenges threaten actual implementation: a lack of political will, a lack of authorization, and a lack of operational capacity." Rebecca J. Hamilton, The Responsibility to Protect: From Document to Doctrine—But What of Implementation?, 19 Harv. Hum. Rts. J. 289, 296 (2006).

Williams and Bellamy have documented the lack of political will in confronting the Darfur crisis, pointing out that this is one of the major obstacles in implementing the
B. The Secretary-General’s Report on Implementation of Responsibility to Protect

After the 2005 World Summit approved responsibility to protect through the Summit Outcome, the U.N. secretariat began the process of incorporating the Summit Outcome into policy. The new Ban Ki-moon administration produced the 2009 report Implementing the Responsibility to Protect: Report of the Secretary-General, which detailed the Secretary-General’s interpretation of responsibility to protect. Calling paragraphs 138 and 139 of the Summit Outcome “the authoritative framework . . . [which] can seek to give a doctrinal, policy and institutional life to the responsibility to protect,” the Secretary-General’s Report lays out the policy implications of responsibility to protect based on three pillars: (1) the protection responsibilities of the state, (2) international assistance and capacity-building, and (3) timely and decisive response. In attempting to give more useful content to the Summit Outcome language, the report drew on the pre-2005 lineage of documents that stretch back to the ICISS Report. The Secretary-General’s Report largely reiterates that responsibility to protect first resides with the state and outlines actions that can be taken at the state level to prevent catastrophe. The report also covers assistance and capacity-building, including an “active partnership” between the international community and the state, which can include various measures from diplomatic engagement to preventative deployment of peacekeepers.

Most notably, the Secretary-General’s Report also calls for a “timely and decisive” response in certain circumstances. Here the report—like the ICISS threshold formulation—suggests a sliding scale, where “[t]he more robust the response, the higher the standard for authorization.” The report cites the response to political violence in Kenya in 2008, where there was energetic and early international involvement aimed at halting domestic political violence despite no explicit authorization from the Security Council, as an example of a “less robust” response comprising political pressures. Also echoing the ICISS Report, the

responsible to protect. See Paul D. Williams & Alex J. Bellamy, The Responsibility to Protect and the Crisis in Darfur, 36 SECURITY DIALOGUE 27, 44 (2005).

100. Secretary-General’s Report, supra note 20, ¶ 2.
101. Id. ¶ 2.
102. Id. ¶ 11.
103. Id. ¶ 9.
104. Id. ¶ 13.
105. Id. ¶ 28.
106. Id. ¶¶ 30, 41.
107. Id. ¶ 11(c).
108. Id. ¶ 50.
109. Id. ¶ 51.
Secretary-General explicitly urged the five permanent members of the 
Security Council to refrain from exercising the veto "in situations of 
manifest failure" by a state to meet its obligation to protect its popula-
tion. In calling for restraint in the use of a Security Council veto, the 
Secretary-General's Report takes a slight step toward binding the Secu-
rity Council with a duty to act.

While the report took pains to establish its foundation in the Sum-
mit Outcome, a significant number of states did not vote to endorse it, 
despite the fact they had endorsed the unanimously passed Summit 
Outcome. One reason might be that the Secretary-General's Report 
was more detailed and had more substance than the Summit Outcome. 
While not at odds with the Summit Outcome's commitment to "take 
collective action, in a timely and decisive manner, through the Security 
Council, . . . on a case-by-case basis," the Secretary-General's Report 
dials back the highly discretionary language of the Summit Outcome, 
most significantly dropping the "case-by-case" basis language, and 
adding the (non-binding) commitment to reign in the use of the veto.

Given the strong similarities between the ICISS Report and the Sec-
retary-General's Report, both rounds of debate focused on very similar 
notions of what the doctrine meant. The first round produced the sub-
stantially less detailed Summit Outcome. The test in 2009 was whether 
the member states would accept a more detailed articulation of the doc-
trine than was widely accepted in 2005.

III. The General Assembly Debates

Responsibility to protect was debated twice in the General Assembly. 
The first debate occurred during the plenary sessions leading up to 
the World Summit which produced the 2005 World Summit Outcome, 
cementing responsibility to protect, however briefly articulated, as the 
position of the General Assembly's member states. The Secretary-
General's Report, which outlined a more detailed conception of the 
doctrine more in line with the ICISS Report, was then debated in 2009 
and was well-received by responsibility to protect advocates. However, 
the General Assembly simply "took note" of this report, unable to pass a

110. Id. ¶ 61.
111. Summit Outcome, supra note 2, ¶ 139.
112. See, e.g., "Implementing the Responsibility to Protect": Responding to the UN 
Secretary-General's Report on the Responsibility to Protect Populations from Genocide, War 
Crimes, Ethnic Cleansing and Crimes Against Humanity, GLOBAL CTR. FOR RESP. TO 
PROTECT, 3 (June 2009), http://globalr2p.org/media/pdf/Responding_to_the_SGs_Report_on_ 
R2P_.June_16_Final.pdf.
more substantive resolution indicating approval. Thus, of the relevant documents, we have the Summit Outcome, which is vague and highly qualified but unanimously endorsed by the General Assembly and Security Council, and the Secretary-General's Report, which is detailed but has failed to produce a supporting resolution. While this is telling in itself, this Part will explore in more detail the statements of representatives of the member states during the two debates.

A. Debating In Larger Freedom—The 2005 World Summit Debate

The 2005 World Summit was held to coincide with the Sixtieth Session of the General Assembly, and it culminated in the largest gathering of world leaders in history. In the plenary meetings leading up to the Summit, the General Assembly was grappling with a broad range of issues put forward by Secretary-General Kofi Annan in the In Larger Freedom document, as part of what was the most ambitious attempt at U.N. reform in its history. The most controversial and talked-about agenda item at the time was Security Council reform. While many of these efforts failed, responsibility to protect was discussed and incorporated into the Summit Outcome. Given the failure of much of the rest of the Summit's agenda, this was the most notable achievement of the Summit, made all the more impressive given the presence of so many heads of state and government, whose presence lent greater symbolic weight to the Summit Outcome.

While the debate was nominally about the ICISS framework, as articulated by In Larger Freedom, floor statements tended toward generality. Of the twenty-eight states that addressed responsibility to protect in 2005, seven addressed the issue in neutral terms, twelve in favorable terms, and seven in negative terms. The strongest support came from the European Union, which endorsed responsibility to protect. Representatives who did not explicitly address responsibility to protect, but simply associated themselves with the E.U. position, can also be counted as supportive states. These include the non-E.U. states that were then candidates for E.U. membership, namely Turkey, Romania, and Bulgaria. It is also possible to consider E.U. states that

114. The verbatim records show the various positions taken in the debate at the summit. See U.N. GAOR, 59th Sess., 85th plen. mtg. at 7, U.N. Doc. A/59/PV.85 (Apr. 6, 2005) (introducing the debates, which are contained in several different records compiled over several days).
115. Id. at 10.
116. E.g., id. at 20.
117. The E.U. representative stated:
remained completely silent during the plenary as being supportive of responsibility to protect.

The E.U. position was presented by the representative from Luxembourg, who stated:

The European Union endorses the concept of the "responsibility to protect." Responsibility for security lies primarily with States, but it also falls to the international community when a State fails to protect its citizens. Flagrant human rights violations and acts of genocide call for a strong response from and resolute action by the international community.118

Neutral comments came from Argentina (speaking on behalf of the Rio Group), Azerbaijan, Japan, Malawi (speaking for the African Group), South Korea, Uganda, and Viet Nam. These comments can be summarized as condemnations of mass atrocities with a very general call to discuss responsibility to protect. These were essentially non-committal on both the permissive and prescriptive elements but did not call for greater restrictions. For example, Japan's representative stated:

Japan embraces the assessment of the Secretary-General that... the time is now upon us to look into the issue of "responsibility to protect." However, even if military intervention as a last resort cannot be completely excluded... there are many instances in which measures other than military means can and should be exhausted by the international community to deal with a given situation, and that will have to be further explored. We need to re-emphasize here our concept of human security, to which I alluded before, that puts primary emphasis on the protection and empowerment of individuals as a basic guiding principle to realizing prevention and the consolidation of peace in post-conflict situations.119

The representative of Uganda stated:

I have the honour to speak on behalf of the European Union (EU). The acceding countries Bulgaria and Romania, the candidate countries Turkey and Croatia and the countries of the stabilization and association process and potential candidates Albania, the former Yugoslav Republic of Macedonia and Serbia and Montenegro align themselves with this statement.

Id. at 7.

118. Id. at 10–11.

The notion of the "responsibility to protect" is welcome, but its parameters should be well defined to avoid the temptation to interfere in the internal affairs of States. It should be confined to cases of genocide, ethnic cleansing and crimes against humanity, and the prior authorization of the Security Council should be obtained before there is such intervention to protect citizens.\(^{120}\)

While the Rio Group\(^ {121}\) and Group of African States\(^ {122}\) were neutral, the spokespersons for other caucuses, including the Group of Seventy-Seven plus China and the NAM, did not address responsibility to protect.\(^ {123}\)

The representative of the United States did not mention responsibility to protect in his speech to the General Assembly.\(^ {124}\) However, several days prior, U.S. Ambassador John Bolton sent an open letter outlining the position of the U.S. government that while there may exist a "moral obligation" to act,

the Charter has never been interpreted as creating a legal obligation for Security Council members to support enforcement action in various cases involving serious breaches of international peace. Accordingly, we believe just as strongly that a determination as to what particular measures to adopt in specific cases cannot be predetermined in the abstract but should remain a decision within the purview of the Security Council.\(^ {125}\)

Ambassador Bolton also suggested that states "should not preclude the possibility of action absent authorization by the Security Council. There may be cases that involve humanitarian catastrophes [sic] but for which there is also a legitimate basis for states to act in self-defense."\(^ {126}\) Bolton was the most outspoken critic of any prescriptive element to

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121. The Rio Group, represented by the representative of Argentina, rather vaguely stated that "[s]pecial attention must always be devoted to preventing genocide or massive human rights abuses. Such a debate should encompass a legal framework that conforms to the Charter of the United Nations." Id. at 2.
122. The Group of African States took a more skeptical view, with the representative of Malawi stating: "[I]t is important to point out the difficulty of defining collective security solely in terms of the responsibility to protect. The protection of citizens should not be used as a pretext to undermine the sovereignty, independence and territorial integrity of States." U.N. GAOR, 85th plen. mtg. at 22, U.N. Doc. A/59/PV.85 (Apr. 6, 2005).
123. See id. at 13–15 (representative of Malaysia speaking for the Non-Aligned Movement); id. at 16–17 (representative of Jamaica speaking for the Group of 77 plus China).
126. Id.
responsibility to protect, which was reflected in the Summit Outcome’s “case-by-case basis” language, while also being an advocate for a permissive element that would allow unilateral intervention in the face of Security Council inaction.\(^{127}\)

Negative reactions often touched on this very concern, that powerful states such as the United States would act without Security Council approval, using responsibility to protect as a pretext. Nine states—Algeria, Cuba, Egypt, Indonesia, Iran, Pakistan, Syria, Venezuela, and Vietnam—voiced opposition to responsibility to protect. These “strong sovereignty” states all voiced similar suspicions regarding responsibility to protect as being too permissive. The Egyptian representative stated:

\[\text{[T]he “responsibility to protect,” advocated in the report, could become a threat to the principle of the national sovereignty of States and could usher in a new era of intervention in the internal affairs of countries, particularly given that the legal underpinnings of the theory remain unclear and that it relies on an increasing division of responsibilities among the State, the international community and the Security Council. The concept has no legal or practical basis within the international community.}\]\(^{128}\)

Other states explicitly linked responsibility to protect with humanitarian intervention. The Algerian representative stated:

\[\text{[The responsibility to protect] is extremely difficult to distinguish from the idea of humanitarian intervention which the countries of the South formally rejected . . . . In that regard, I would point out that there is no legal basis in the Charter or in international law for a right or duty to intervene.}\]\(^{129}\)

Cuba, Iran, and Venezuela were particularly blistering in their criticism, arguing that it could be abused as a pretext for intervention and displaying hostility towards the Security Council. Venezuela’s delegate argued that:

\[\text{[T]his “responsibility,” which is a pretext for interfering in the internal affairs of States—the weak ones, of course—applying double standards and concealing unmentionable motives, must, according to the Secretary-General, be given to the Security Council so that it can adopt coercive measures against the}\]

\(^{127}\) Id.


\(^{129}\) Id. at 9.
Status of the Responsibility to Protect

States—States of the South— which, on the basis of the views of just a few, would be stigmatized as systematic violators of collective human rights and punished through “humanitarian intervention.”

Iran’s delegate stated: “There is a grave concern that the concept of ‘responsibility to protect’ could be invoked by certain countries to pursue their own political agenda and that, through that idea, some parts of the world may become potential theatres for their intervention.” This sentiment was also echoed by the Pakistani delegate: “The endorsement of the so-called ‘responsibility to protect’ would steer the United Nations along the same interventionist path. The big and powerful States, not small and weaker ones, will decide where and when to intervene to protect people at risk.”

Cuba associated responsibility to protect with the invasion of Iraq, accusing the supporters of responsibility to protect of hypocrisy:

When the illegal war against Iraq broke out, some of the most ardent defenders of the so-called “responsibility to protect” decided to remain silent, while others allied themselves with the attacker. As a result, hundreds of thousands of Iraqi civilians died in a cruel attack. Nor did such defenders blink an eye when we learned of the indescribable torture committed in the jails of Iraq and Afghanistan and at the Guantánamo naval base.

Thus, opposition to responsibility to protect hinged on concerns that it is indistinguishable from “humanitarian intervention” and thus an inexcusable breach of “sovereignty” and Article 2(7) of the U.N. Charter. Additional arguments included that it would be inconsistently applied or that it would be biased and controlled by the global north.

The general picture that emerged from the 2005 discussion was of most states taking a neutral stance toward responsibility to protect, with supportive states outnumbering a small group of strongly opposed states.

B. Debating the Secretary-General's Report—2009

The 2009 debates that considered the interpretation of the 2005 Summit Outcome in the Secretary-General's Report were much more focused than the 2005 debate. Exactly three times as many representatives spoke on the issue: ninety-three in 2009 compared to thirty-one in 2005, not counting the statements by the permanent observer missions of Palestine and the Holy See.135 While the debate centered on the implementation scheme of the Secretary-General's Report, as proposed by Secretary-General Ki-moon, it also quickly became clear that serious disagreements over the doctrine remained, and the discussion returned to more basic definitional issues, especially as related to the responsibility to react. Thus, from the 2009 debates, it is clear that support for responsibility to protect has not significantly grown.

ICISS had attempted to sidestep the issue by declaring humanitarian intervention a thing of the past. As ICISS Co-Chair Gareth Evans stated:

coercive military intervention, so far from being the heart and soul of the doctrine—as was the case with “humanitarian intervention”—should be considered only as an absolute last resort, after a number of clearly defined criteria have been met, and the approval of the Security Council has been obtained.136

However well the ICISS Report places coercive intervention into a broader context, still it re-emerged as the central point of contention in 2009.137 As the representative from Pakistan candidly stated:

If members have not noticed, let me point out that everyone agrees to pillars one and two.138 . . . Pillar three was introduced 10 or 15 years ago under another name—the right of intervention. It is that and remains that. The Assembly voted vehemently against it. . . . Pillar three is the right of intervention, no matter how one looks at it or how one does not look at it.139

136. Evans Comments, supra note 4, at 3.
138. The Pakistani representative meant the protection responsibility of states, and international assistance and capacity building, respectively. See supra note 102 and accompanying text.
There was near unanimous support for responsibility to protect as diplomatic and development policy (in most cases, pillars one and two from the Secretary-General's Report). States that supported the “timely and decisive response” pillar of the Secretary-General’s Report were counted as having a positive opinion of responsibility to protect, while those urging further discussion were neutral, and those that attacked the doctrine were counted as negative.

Again the European Union supported the Secretary-General’s Report, and many E.U. counties rose and spoke in their national capacities. Non-E.U. members Turkey, Croatia, Macedonia, Albania, Bosnia and Herzegovina, Montenegro, Ukraine, the Republic of Moldova, Armenia, and Georgia aligned themselves with the E.U. statement. The E.U. position echoed its position in 2005 and emphasized that “if a State is manifestly failing to protect its populations, the international community has a responsibility to help protect those populations and thereby also to help maintain international peace and security.”

The United States fully supported the Secretary-General’s Report. The representative of Jamaica rose and spoke for the Caribbean Community (CARICOM), and while the CARICOM position was not as enthusiastic as the E.U.’s, it was generally positive and offered conditional support for pillar three. The Jamaican representative emphasized the prescriptive element and voiced the concern that the “Security Council will refrain from the use of the veto and... be stymied into inaction in future cases where crimes of genocide, ethnic cleansing, war crimes and crimes against humanity have occurred.” He went on to propose Security Council reform as the solution to these possible impasses.

Several states seemed to address detractors by explicitly dissociating responsibility to protect from humanitarian intervention. The representative of Mexico stated: “Unlike other concepts with which it is associated, such as humanitarian intervention, the concept of the responsibility to protect has a much sounder basis in international law, since it was adopted by the General Assembly at the highest possible level and

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141. Id. at 4.
142. Id. at 17.
144. Id. at 7.
145. Id. The In Larger Freedom report argued that “[i]t is therefore of vital importance, not only to the Organization but to the world, that the Council should be equipped to carry out this responsibility and that its decisions should command worldwide respect.” In Larger Freedom, supra note 70, ¶ 167. To accomplish this, the report urges reforms that would give the Security Council greater geographic representation. Id. ¶ 170.
endorsed by the Security Council.” The representative of Morocco stated: “A clear distinction has been established between the responsibility to protect and what is called the right to humanitarian intervention. The responsibility to protect has also been limited to four categories of crime: genocide, war crimes, ethnic cleansing and wars against humanity.”

The representative of Egypt spoke for the 115 members of the NAM:

Many elements of the Secretary-General’s report have received support . . . . Meanwhile, mixed feelings and thoughts on implementing [responsibility to protect] persist. There are concerns about the possible abuse of [responsibility to protect] by expanding its application to situations that fall beyond the four areas defined in the 2005 World Summit Outcome, and by misusing it to legitimize unilateral coercive measures or intervention in the internal affairs of States. There are also pertinent questions about the role to be played by each of the principal organs of the United Nations within their respective institutional mandates and responsibilities in that regard.

The representative further stated: “The Secretary-General’s report offers some initial ideas on how to go about it and constitutes an important input for the General Assembly to continue consideration of [responsibility to protect] and its implications.” Three members of the NAM explicitly endorsed the entirety of the Secretary-General’s Report, effectively going further than the common statement.

During the 2009 discussion a similar, but smaller group of states than in 2005 rose in opposition to responsibility to protect. Cuba, Venezuela, and Iran again expressed their opposition and were joined by Bolivia, Ecuador, North Korea, and Sudan. Press accounts of the debates over the summer suggested there was a well-organized opposition to responsibility to protect and the Secretary-General’s Report led by the President of the General Assembly and Nicaraguan diplomat Father Mi-

149. Id. at 6.
150. See U.N. GAOR, 63d Sess., 100th plen. mtg. at 6, 21, 27, U.N. Doc. A/63/PV.100 (July 28, 2009) (statements of Jamaica, Swaziland, and Benin in support of the responsibility to protect).
guel d’Escoto Brockmann. Father Brockmann opened the debate in the General Assembly stating:

The problem for many nations, I believe, is that our system of collective security is not yet sufficiently evolved to allow the doctrine of responsibility to protect . . . to operate in the way its proponents intend, in view of the prevailing lack of trust in developing countries when it comes to the use of force for humanitarian reasons.152

The sentiment that responsibility to protect is overly permissive, which has been reflected by some academic commentators,153 reflects a strong distrust of Western power generally and the Security Council in particular. In fact, some commentators who are supportive of humanitarian intervention have made just this sort of permissive argument—that responsibility to protect could justify unilateral action—that so alarms people like Father Brockmann.154

Ultimately, the only action the General Assembly would take was to pass a neutral resolution on the Secretary-General’s Report, which “[t]ook] note” of the report and committed the Assembly “to continue its consideration of the responsibility to protect.”155 The original language of the resolution was “[t]akes note with appreciation of the report of the Secretary-General” but the words “with appreciation” were removed in order to secure passage.156 Even given this weak language, the delegates of Venezuela, Cuba, Syria, Sudan, Iran, Ecuador, and Nicaragua all rose

151. Father Brockmann had been involved with the Sandinista movement in Nicaragua since the 1980s, having served as foreign minister during the Contra War. Brockmann organized an informal roundtable before the General Assembly debate, where such luminaries of the left as Noam Chomsky and Jean Bricmont laid out an attack on responsibility to protect as a pretext for Western imperialism and linking it to humanitarian intervention. Gareth Evans was also on the panel and defended the doctrine. Brockmann’s campaign is described in Responsibility to Protect: An Idea Whose Time Has Come—and Gone?, ECONOMIST, July 25, 2009, at 58, available at http://www.economist.com/node/14087788?story_id=14087788&CFID=157379714&CFTOKEN=87423715.


153. See Ayoob, supra note 134, at 101; De Waal, supra note 34, at 4 (“Let us be very wary of developing any doctrine for humanitarian intervention. Any principle of intervention can readily be abused—as by the French in central Africa—or become a charter for imperial occupation.”); Williams & Bellamy, supra note 99, at 36 (noting that the Iraq war has made many states suspicious of humanitarian objectives in intervention).

154. Bannon, supra note 93, at 1162–63 (arguing that there is a limited justification for unilateral action under responsibility to protect where the Security Council is deadlocked).


156. GLOBAL CTR. FOR RESP. TO PROTECT, GCR2P SUMMARY OF STATEMENTS ON ADOPTION OF RESOLUTION RES A/63/L80 REV 1, at 1 (2009), http://globalr2p.org/media/pdf/GCR2P_Summary_of_Statements_on_Adoption_of_Resolution_on_R2P.pdf.
and either reiterated their opposition to the doctrine\(^{157}\) or emphasized that the vote for the resolution was simply procedural and created no legal obligations express or implied.\(^{158}\)

## IV. THE LEGAL STATUS OF RESPONSIBILITY TO PROTECT—NORMS, CONSENSUS, AND NEW RIGHTS OR DUTIES?

### A. Question 1—Is a Norm Emerging?

**Table 1: Statements of General Assembly Members**

<table>
<thead>
<tr>
<th></th>
<th>Negative</th>
<th>Neutral</th>
<th>Positive</th>
</tr>
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<tbody>
<tr>
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<td></td>
<td></td>
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</tr>
<tr>
<td>Floor Statements</td>
<td>9</td>
<td>8</td>
<td>14</td>
</tr>
<tr>
<td>+ silent E.U. members</td>
<td>9</td>
<td>8</td>
<td>40</td>
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<tr>
<td>+ silent E.U. members</td>
<td>16%</td>
<td>14%</td>
<td>70%</td>
</tr>
<tr>
<td>+ silent Africa Group members</td>
<td>9</td>
<td>57</td>
<td>40</td>
</tr>
<tr>
<td>+ silent African Group members</td>
<td>8%</td>
<td>54%</td>
<td>38%</td>
</tr>
<tr>
<td><strong>2009 GA</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Floor Statements</td>
<td>7</td>
<td>27</td>
<td>60</td>
</tr>
<tr>
<td>+ silent E.U. &amp; CARICOM members</td>
<td>7</td>
<td>27</td>
<td>87</td>
</tr>
<tr>
<td>+ silent E.U. &amp; CARICOM members</td>
<td>6%</td>
<td>22%</td>
<td>73%</td>
</tr>
<tr>
<td>+ silent NAM members</td>
<td>7</td>
<td>85</td>
<td>87</td>
</tr>
<tr>
<td>+ silent NAM members</td>
<td>4%</td>
<td>47%</td>
<td>49%</td>
</tr>
</tbody>
</table>

Gauging changing attitudes toward the doctrine between 2005 and 2009 will illustrate if responsibility to protect is gaining broader traction. While the full unraveling of responsibility to protect as suggested by some press reports in July 2009 did not occur and the 2005 Summit Outcome language went unchanged, it is highly relevant that the Secretary-General's Report was not endorsed and the General Assembly decided to defer greater clarification of the doctrine. The disposition of state representatives is also varied. Table 1 above presents the distribution of statements in 2005 and 2009, as numbers and percentages of the whole.


\(^{158}\) Id. at 3–7.
“Silent” E.U., NAM, Africa Group, or CARICOM members indicate states whose representative did not rise and speak, but were associated with a common position taken on behalf of all member states of that respective organization.

It appears as if support for a detailed responsibility to protect doctrine has actually decreased. The difference in support may reflect a general discontent with providing greater detail to the doctrine. The seven states that so strongly oppose responsibility to protect largely represent a small and somewhat peculiar group within the General Assembly. North Korea, Iran, and Sudan are, to varying degrees, pariahs for their human rights records and belligerency. Venezuela and Cuba both reflect a Cold War mentality, invoking anti-imperialist rhetoric and demonstrating a deep distrust of the motives of Western countries. These states exhibit a strong suspicion of Western power and the Security Council as an institution, and thus reject responsibility to protect on the assumption that it will be used as a pretext for imperialist intervention. The elections of Evo Morales in Bolivia and Rafael Correa in Ecuador, both left-wing politicians, between 2005 and 2009 may help explain these states joining the opposition to responsibility to protect (as the election of Barack Obama may explain the change in the U.S. position in 2009 from its position in 2005).

Far more relevant than these few opposing states are the members of the NAM who are still cautious with regard to the concept. While in 2005, the NAM made no comment on the responsibility to protect, it did in 2009 and its considerable numbers added to the “neutral” column resulted in the positive and neutral camps being evenly divided. Despite the reluctance on the part of the NAM to openly embrace the Secretary-General’s Report, the long-standing position of the group, as articulated both in the Cartagena Statement in 2000 and the official statement in 2009, is not actually at odds with the Secretary-General’s Report.

In the Cartagena Statement, the members of the NAM reiterate[d their] firm condemnation of all unilateral military actions including those made without proper authorisation [sic] from the United Nations Security Council or threats of military action against the sovereignty, territorial integrity and independence of the members of the Movement which constitute acts of

aggression and blatant violations of the principle of non-intervention and non-interference.  

In 2009, the Egyptian representative, speaking on behalf of the NAM, expressed the concern that an expansive application of responsibility to protect would lead to abuse and interference. The representative concluded his statement with a tempered commitment to end mass atrocity crime, invoking "respect for the sovereignty and territorial integrity of States, non-interference in their internal affairs and respect for fundamental human rights." These concerns seem misplaced. It is hard to imagine how responsibility to protect could be construed to operate outside of the bounds of the four crimes, but even so, it is the clear position of the Summit Outcome and Secretary-General's Report that enforcement under responsibility to protect must be done under the Security Council's Chapter VII powers.

The NAM's position in the 2009 debates also showed more flexibility than its position in the Cartagena Statement, expressing support for intervention carried out by the African Union under Article 4(h) of the Constitutive Act of the African Union, which uses the same four crimes language as the Summit Outcome. Given its support for the right of the African Union to intervene, the NAM cannot be making a purely strong sovereignty argument. One is left wondering why exactly it did not fully support the Secretary-General's Report, as it is hard to find any substantive difference between the report and the Cartagena Statement.

The NAM statement also expressed grave concern at instances wherein the Security Council fails to address cases involving genocide, crimes against humanity or war crimes. . . . [I]n such instances where the Security Council has not fulfilled its primary responsibility for the maintenance of international peace and security, the General As-

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163. Id. at 6.
164. See Summit Outcome, supra note 2, ¶ 139; Secretary-General's Report, supra note 20, ¶ 11.
165. Constitutive Act of the African Union art. 4(h), July 11, 2002, 2158 U.N.T.S. 3 (providing for the "right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity").
such concerns regarding past Security Council failures were the original impetus for creating the doctrine in the first place. The idea that the General Assembly could have a role in human rights enforcement can also be traced to the original ICISS plan, which contemplated the General Assembly’s involvement via the Uniting for Peace resolution in the case of a Security Council failure.

Much of the impetus behind responsibility to protect was frustration when the Security Council failed to act. Over thirty-five states echoed the Secretary-General’s Report’s call that Security Council members refrain from using the veto in situations where people are at risk of mass atrocities. The Iranian representative argued in July 2009:

"[T]here is no illusion that tragic cases of genocide, crimes against humanity and outrageous acts of aggression have been left unanswered not because of a lack of empowering legal norms, but simply due to a lack of political will dictated by power politics—that is, political and strategic considerations—on the part of certain major Powers permanently seated in the Security Council."

167. ICISS Report, supra note 1, ¶ 6.7. The Uniting for Peace resolution would allow the General Assembly to step in when the Security Council’s permanent members are deadlocked, but there are sufficient votes to refer the matter to the General Assembly, which could then recommend the use of force. The resolution states in part:

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

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

Given that endorsement of the Secretary-General's Report represents an additional commitment to act, supported by three of five permanent Security Council members (however weakly), it is less clear substantively why Iran or the NAM is objecting.

The strongest possibility seems to be that, while those states objecting to the Secretary-General's Report may not have strong substantive differences with the actual text of the report, they are unwilling to allow such a detailed policy document to proceed as the "official" interpretation of the Summit Outcome. While the objections in 2009 may not be entirely coherent in terms of the actual content of the Secretary-General's Report, they may indicate a strong reluctance to allow the doctrine to be better articulated and thus have greater utility as a doctrine. The underlying motive may be political, likely animated by a deep distrust of the Security Council.

Ultimately, responsibility to protect has made little progress between 2005 and 2009, and the basic position of the NAM has not significantly changed from the Cartagena Statement to the 2009 debates, with the important exception of the endorsement of the African Union's "regional" approach to responsibility to protect. While this position is not significantly at odds with responsibility to protect generally, or the Secretary-General's Report specifically, the failure of the General Assembly to pass any substantive resolution other than calling for continued debate indicates that the "norm" appears stalled, and should not be considered emerging.170

B. Question 2—Is There a Consensus Understanding of Responsibility to Protect?

1. Basic Agreement

Even if there is no growing support for the doctrine, it is possible to reach several strong conclusions about what states think the doctrine means. Despite some rumblings that the General Assembly might actually retract paragraphs 138 and 139 of the Summit Outcome, the

170. International relations scholars have examined the formation of norms from a sociological standpoint. Martha Finnemore and Kathryn Sikkink have studied norm dynamics and divide the adoption of a new norm into three stages: (1) norm emergence, (2) norm cascade, and (3) internalization. By this scheme, norms emerge mostly through the actions of norm entrepreneurs who spread the concept of the new norm and, through lobbying and advocacy, bring it to the attention of decision makers. The second stage is norm cascade where, through socialization and conformity, the idea of the norm is spread. The final stage is norm internalization, where a norm has a taken-for-granted quality. Martha Finnemore & Kathryn Sikkink, International Norm Dynamics and Political Change, 52 INT'L ORG. 887, 895 (1998). In the case of the responsibility to protect, the norm probably has not yet reached stage two.
majority of states in 2009 agreed that the Summit Outcome language on responsibility to protect was final. Only Cuba, Sudan, and Venezuela disagreed. Benin, Costa Rica, Denmark, Liechtenstein, Lesotho, and the E.U. all explicitly defined mass atrocities as threats to international peace and security and thus under the clear purview of the Security Council.

The "softer" parts of the Secretary-General’s Report dealing with capacity and peace building appear to be completely uncontroversial. As succinctly stated by Pakistan’s delegate, “everyone agrees to pillars one and two.” Most relevantly, this includes the pillar one formulation of sovereignty as including a responsibility to protect. Thus the central conceptual innovation of the ICISS Report in reframing sovereignty as responsibility has been broadly accepted.

There is almost unanimous support for the idea of responsibility to protect being based on the four enumerated crimes discussed above, with many states echoing the language of the Secretary-General’s Report that the “scope should be kept narrow, [and] the response ought to be deep.” Only France, in what seems like a reference to Myanmar’s response to Tropical Cyclone Nargis in 2008, expressed willingness to go beyond the four crimes, stating that it would remain vigilant to ensure that natural disasters, when combined with deliberate inaction on the part of a Government that refuses to provide assistance to its population in distress or to ask the international community for aid, do not lead to human tragedies in which the international community can only look on helplessly.

The refusal of other states to adopt this idea shows that it has little support. Almost all states are willing to accept the basic formulation that

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174. Secretary-General’s Report, supra note 20, at 8.
175. U.N. GAOR, 63d Sess., 97th plen. mtg. at 9, U.N. Doc. A/63/PV.97 (July 23, 2009). It is interesting to note that this stance strongly comports with Professor Mario Bettati’s writings where he has argued that humanitarian intervention includes free access to victims of disasters. See Mario Bettati, The Right of Humanitarian Intervention or the Right of Free Access to Victims, 49 REV. INT’L COMM’N JURISTS 1, 1 (1992). Professor Bettati has long been associated with current French foreign minister Bernard Kouchner—the two co-authored a book on humanitarian intervention. See supra note 26.
there exists some responsibility to respond to mass atrocity crimes. For example, even the Venezuelan representative said that "[s]uch crimes must be condemned and prevented wherever they occur in the world."176

2. Right to Intervene—Is Responsibility to Protect Permissive?

The debates over responsibility to protect have generated considerable evidence of opinio juris on the issue of unilateral intervention, almost all of which points to a lack of legal right on the part of individual states. The Summit Outcome language emphasizes the centrality of the Security Council. Indeed, the "Pakistan proposal" discussed above,177 which limits responsibility to protect to the four crimes, suggests that responsibility to protect actually narrows the possibility of an emerging norm of unilateral intervention. The Secretary-General’s Report also rejects unilateralism: "[T]he responsibility to protect does not alter, indeed it reinforces, the legal obligations of the Member States to refrain from the use of force except in conformity with the Charter."178 Thus, those scholars who have suggested such a right exists should consider this stubborn resistance to the idea. Instead, despite the concerns of its detractors, the debate on responsibility to protect may actually be closing the door on the debate around unilateral humanitarian intervention.

3. A Duty to Intervene—Is Responsibility to Protect Prescriptive?

There is still a lack of clarity and considerable suspicion about what would trigger responsibility to protect. As the CARICOM statement asked: “At what stage and under which circumstances will the Security Council be authorized to take action under Chapter VII of the Charter, including authorizing the use of force?”179 Pakistan and Switzerland echoed these sentiments.180 However tentatively the Secretary-General’s Report tried to push the doctrine in a prescriptive direction, it failed largely because of the fear that it would simultaneously create a more permissive doctrine as well. It still appears that the concerns of critics who feel that responsibility to protect is not sufficiently prescriptive181 remain unanswered, as many member states have similar concerns, and there is little consensus on what prescriptive force the doctrine now has.

177. See supra notes 84–86 and accompanying text.
178. Secretary-General’s Report, supra note 100, ¶ 3.
181. See supra notes 93–98 and accompanying text.
A central theme that emerged from the 2009 debate is that, despite four years “on the books” and some agreement, there is still a great deal of incoherence about what exactly responsibility to protect means, especially in how it would shape the international community’s response to the next humanitarian crisis. The NAM’s statement makes it clear that many non-Western and developing states harbor serious reservations about any legal development that increases the permissiveness of intervention. This concern was clearly voiced in the roundtable held by Father Brockmann before the 2009 debates and echoed in Mohammed Ayoob’s article *Third World Perceptions on Humanitarian International Intervention*,182 as well as Alex de Waal’s warning about the potential abuse of responsibility to protect.183

C. Question 3—Has Responsibility to Protect Created Any Legal Obligations?

Textually, the use of the word “responsibility” implies a prescriptive element to the doctrine and a degree of duty on the international community to respond. However, positive answers to Questions 1 and 2 are threshold questions to Question 3. There is still a fairly even split on the basic support for the doctrine, as discussed in Part IV.A, and this split seems motivated by a general disagreement on what the doctrine means, as discussed in Part IV.B. Those areas of the doctrine for which there is agreement and support, for example that it is applicable only when one of the four crimes occurs, do not create new legal duties. The four-crimes clause is simply a limitation on the scope of the doctrine and thus has little legal force independent of the doctrine itself. Thus, the answer to Question 3 must be no.

While there may be no new legal obligation, as past history has shown, and as expressed by the member states during the responsibility to protect debates, the next time there is a humanitarian crisis, all eyes will fall on the Security Council to respond and responsibility to protect will likely be a central part of the discourse. There is now a heavy accumulated weight of *opinio juris*, both from opponents and advocates of responsibility to protect, that the Security Council should act in cases of mass atrocity crimes, despite the considerable degree of mistrust revealed towards the Security Council.184

While a few states touched on the lack of prescriptive force in the doctrine during their 2005 and 2009 floor speeches, the debate largely focused on the permissiveness of the doctrine. Thus the many academic

184. See, e.g., *supra* text accompanying note 168.
critics who worry about a positive obligation on the Security Council to act, or even an agreement to not exercise a veto in the face of one of the four crimes, will find little comfort in the outcome of the 2009 debates.

CONCLUSION

The inclusion of responsibility to protect in the Summit Outcome, while an important new development, does not offer any significant way out of the political problems that have plagued Security Council action in the past. As Nicholas Wheeler persuasively argues, the Rwandan Genocide would not have been prevented if responsibility to protect as formulated in the Summit Outcome had been in place in 1994, as the lack of political will after the Somalia debacle was simply too strong. Ever present in this debate is also the dreary reality of global politics. The last exchanges in the General Assembly during the 2009 debate consisted of Russia and Georgia trading barbs over their recent war fought in South Ossetia and Abkhazia, with each accusing the other of a litany of human rights abuses and U.N. Charter violations. Russia had invoked responsibility to protect as a pretext for its invasion, realizing exactly the fears of states worried about its abuse. The action was clearly taken outside the boundaries of legitimate action under responsibility to protect as there was neither mention of the four crimes nor Security Council approval. Yet, while invocation of the doctrine in this case instilled no actual international legitimacy, these sorts of actions undermine the legitimacy of the doctrine and point toward lingering political problems within the Security Council.

The long debate between human rights and nonintervention instilled in the U.N. Charter has moved gradually toward the human rights direction, and perhaps this is the very slow crystallization of a new norm of behavior. Indeed, the international community’s intervention in Somalia during the early 1990s under U.N. mandate may arguably have been inspired by a then inchoate sense of responsibility to protect and a hope that, after the end of the Cold War, the instruments of international organization could be utilized to tackle the world’s most difficult problems. It is also a minor triumph that the ICISS definition of sover-

186. Wheeler, supra note 86, at 102–03.
eighty as responsibility has been crystallized into general acceptance. The responsibility to protect is therefore an important new political commitment, perhaps akin to soft law, that the international community will act the next time there are gross violations of human rights.
## ANNEX 1: DOCUMENT TABLE

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<th>Source</th>
<th>Responsibility to prevent</th>
<th>Responsibility to react</th>
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<tr>
<td>ICISS REPORT, supra note 1, at 19.</td>
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</tr>
<tr>
<td>Not addressed</td>
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<tr>
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<td>2) Proper purpose of</td>
</tr>
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<tr>
<td></td>
<td></td>
<td>3) Last resort</td>
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<tr>
<td></td>
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<td>4) Proportional means</td>
</tr>
<tr>
<td></td>
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<td>5) Balance of</td>
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<td>Pillar 1—responsibility to protect first</td>
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<tr>
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