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Adoption of the Responsibility to Protect

By William W. Burke-White*

Understandings of state sovereignty have changed fundamentally, as outlined in the previous chapter, giving rise to and being shaped by the development of the Responsibility to Protect. RtoP is a powerful analytic construct and an emerging norm of international conduct around which actors' expectations and state behavior are beginning to conform. Although the Responsibility to Protect has not yet emerged as binding international law, it is well grounded in existing international law and shaping international discourse on sovereignty, atrocity prevention, and international intervention. This chapter examines the processes of adoption and development of the Responsibility to Protect, arguing that while not yet an independent rule of international law, the RtoP has significant normative power and potential political impact. Yet both the processes of its adoption and the imprecision of its substantive content have limited RtoP's transformation from norm to law.

The process of the adoption of RtoP also suggests that debates about the norm's legal status may be overdrawn. Advocates of RtoP often overstate that status in an effort to advance the sense of legal obligation. In contrast, this chapter suggests that by embracing the normative, rather than legal, status of RtoP to date, the process of legal development will be more effective and ultimately better serve underlying objectives of human security. Moreover, even without legal obligation, RtoP is already having concrete impact; it has shifted understandings of state sovereignty and increased the political and moral costs of inaction in the face of atrocity. Ultimately this chapter is both an exploration of the processes of development of the Responsibility to Protect, and a call for prudence in its legal codification.

This chapter proceeds as follows. First, it examines the initial articulation of the Responsibility to Protect in the 2001 Report of the International Commission on Intervention and State Sovereignty. Thereafter it considers the adoption of the Responsibility to Protect by the United Nations General Assembly during the 2005 World Summit. Next, it turns to the reaffirmation of

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RtoP by the Security Council in 2006 and the 2009 General Assembly debates on the topic. The chapter concludes by arguing that the while RtoP remains a non-legally binding norm, human security is best served through gradual development rather than immediate legal codification.

I. The Origins of the Responsibility to Protect

The early origins of the Responsibility to Protect can be traced back to the international community's failures to respond to the genocide in Rwanda and, later, to prevent atrocities in Bosnia and Kosovo. As the consequences of those failures became apparent, thinking about the nature of sovereignty and the duties of states began to shift in both academic and policy communities. In a Security Council statement in 1992, then UN Secretary-General Boutros Boutros-Ghali recognized the interdependence of the international system, whereby domestic atrocity anywhere could have systematic impact everywhere:

Civil wars are no longer civil, and the carnage they inflict will no longer let the world remain indifferent. The narrow nationalism that would oppose or disregard the norms of a stable international order and the micro-nationalism that resists healthy economic or political integration can disrupt a peaceful global existence. Nations are too interdependent and national frontiers are too porous and transnational realities . . . too dangerous to permit egocentric isolationism.¹

Soon thereafter, Francis Deng built on this interconnectivity, by reframing the concept of sovereignty as responsibility rather than right² such that along with the benefits that attach to sovereignty, states should be seen as bearing responsibilities toward their own citizens and the international community. As outlined in the previous chapter, Deng sought to shift understanding of sovereignty from the classic Westphalian model—according to which the sovereign enjoyed exclusive power over his or her territory and had an absolute right to exclude others from entering onto that territory³—toward a framing of sovereignty founded on both rights and responsibilities.⁴

¹ UN Security Council, *Security Council Summit Statement Concerning the Council's Responsibility in the Maintenance of International Peace and Security*, UN Doc S/23500, Jan. 31, 1992, at 8–10.

² FRANCIS M. DENG, et al., *SOVEREIGNTY AS RESPONSIBILITY: CONFLICT MANAGEMENT IN AFRICA* (Brookings Institution Press 1996).

³ *Schooner Exchange v. McFaddon*, 11 US (7 Cranch) 116, 135 (1812).

This shift in analytic framing uprooted a nearly 400-year tradition of sovereignty as exclusive authority and laid the groundwork for the Responsibility to Protect.

Deng's efforts were academic and, while his writings did lead to broader developments in the academic literature, it was not until 2001 that changing notions of sovereignty entered the political space through the report of the International Commission on Intervention and State Sovereignty (ICISS). The Commission, convened by Canadian Prime Minister Jean Chrétien at the UN Millennium Assembly in September 2000, sought to build an "international consensus on how to respond in the face of massive violations of human rights and humanitarian law."⁵ The Commission's Report, issued in December 2001, reframed the debate surrounding humanitarian intervention by setting forth the concept of the Responsibility to Protect as an alternative to humanitarian intervention discourse.

The report begins with the proposition that "sovereignty implies responsibility, and the primary responsibility for the protection of its people lies with the state itself."⁶ This basic proposition is followed by a second—that "[w]here a population is suffering serious harm, as a result of internal war, insurgency, repression, or state failure, and the state in question is unwilling or unable to halt or avert it, the principle of non-intervention yields to the international responsibility to protect."⁷

The first proposition is inherent in the traditional concept of sovereignty, though the Commission frames it in a more forward-leaning way. Stephen Krasner defines domestic sovereignty as "the formal organization of political authority within the state and the ability of public authorities to exercise effective control within the borders of their own polity."⁸ The corollary to that effective control of a polity is the primary responsibility of the state for its people. While, of course, traditional sovereignty would not impose the ends to which that responsibility and authority is exercised—allowing, for example, torture as well as protection—the ICISS Report argues that

⁴ See *Id.* But see STEPHEN D. KRASNER, *SOVEREIGNTY: ORGANIZED HYPOCRISY* (Princeton University Press 1999). See also ABRAM CHAYES & ANTONIA HANDLER CHAYES, *THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS* (Harvard University Press 1998).

⁵ INTERNATIONAL COMMISSION ON INTERVENTION AND STATE SOVEREIGNTY (ICISS), *THE RESPONSIBILITY TO PROTECT: REPORT OF THE INTERNATIONAL COMMISSION ON INTERVENTION AND STATE SOVEREIGNTY* (International Development Research Centre 2001), available at <http://www.iciss.ca/report-en.asp> [hereinafter ICISS REPORT].

⁶ *Id.*, at XI.

⁷ *Id.*, at XI.

⁸ KRASNER, *supra* note 3, at 4.

sovereignty must be exercised consistent with fundamental rules of international law prohibiting genocide, war crimes, and crimes against humanity.

The second proposition of the ICISS Report—namely that where a population is suffering and the state that has the primary responsibility to act fails to do so, the obligation to protect the polity passes from the territorial state to the international community—is a radical departure from traditional sovereignty, yet grounded in the transformations outlined in the previous chapter. In short, the Commission asserts that sovereignty is not absolute and can yield to other norms of international conduct. This shift essentially posits that human security can trump sovereign authority, allowing international action where the territorial state’s exercise of sovereignty conflicts with its responsibility toward its people.

After laying out these basic principles, the ICISS Report establishes the ends toward which a state’s exercise of sovereignty ought to be exercised and the circumstances within which the exclusive sovereignty of the territorial state gives way to the responsibility of the international community. The report also shifts existing debates by moving beyond the criteria for humanitarian intervention—a tired and often thorny debate to which moral or legal answers remain elusive. Instead the report speaks of a “responsibility to prevent” mass atrocities, such as genocide, war crimes, and crimes against humanity, for which the territorial state has the initial duty but the international community also holds a subsidiary responsibility. The report then turns to what it terms a “responsibility to react,” namely that “When preventive measures fail to resolve or contain the situation and when a state is unable or unwilling to redress the situation, then interventionary measures by other members of the broader community of states may be required.”⁹ Such measures may take a variety of forms, up to and including the use of military force. Finally, the report articulates a “responsibility to rebuild.”¹⁰ In the wake of international intervention, there should be a genuine commitment to helping to build a durable peace, and promoting good governance and sustainable development.

While the report’s overall goal is to establish the duty of the territorial state and the international community to prevent atrocity, it is perhaps most notable for its argument that the international

⁹ ICISS REPORT, *supra* note 5, at 29.

¹⁰ *Id.*, at 39.

community has a duty to protect where national governments fail to do so. This duty takes a number of forms, including the provision of technical assistance and capacity-building to assist national governments in exercising their primary duty to protect; building the political will and consensus to pressure unwilling national governments to protect their populations; utilizing tools of pressure such as international sanctions to force national governments to act; and, in appropriate circumstances, advocating for forcible international intervention to prevent or halt mass atrocities. The report thereby articulates a deep and escalating set of international obligations to protect, but clearly recognizes that those international obligations are secondary to the territorial state's primary duties.

Perhaps the most controversial element of RtoP as outlined in the report is a discussion of the legal authorities under which collective intervention is justified. The report's discussion of authority for intervention starts from the basic rule of international law that intervention should be authorized by the United Nations Security Council, consistent with Articles 2(4) and 42 of the UN Charter. Yet the report also asserts that the Security Council has a responsibility to act in the face of mass atrocity and must not abdicate that responsibility for political expediency or internal division.¹¹ More drastically, the report's assessment of the legal authority for intervention suggests that, where the Security Council fails to act, the General Assembly has residual authorities to act under the "Uniting for Peace" process.¹² The report is careful to note that the "General Assembly lacks the power to direct that action be taken, [but that] a decision by the General Assembly in favour of action . . . would provide a high degree of legitimacy for an intervention which subsequently took place, and encourage the Security Council to rethink its position."¹³ The report goes on to recognize that regional organizations may also have legal authority for collective intervention. The discussion of legal authority for intervention concludes with an argument that, should the Security Council fail to act in cases of serious atrocity, its own effectiveness and legitimacy could be undermined.¹⁴ Departing from traditional international law, the report suggests alternative sources of legal authorization for international intervention beyond Article 42 of the UN Charter.

¹¹ *Id.*, at 50.

¹² *Id.*, at 53.

¹³ *Id.*

¹⁴ *Id.*, at 55.

Ultimately, the ICISS Report is a significant normative statement about both the transformation of sovereignty and the legal obligations of the territorial state and the international community to prevent atrocities. By introducing the concept of the Responsibility to Protect, the report fundamentally shifts existing academic and political debates from a focus on humanitarian intervention to a broader conversation about the responsibility of states to protect their own populations and of the international community to react to violations. The ICISS Report is not, however, a source of international law, nor even a statement of *opinio juris*, that backed by appropriate state practice could give rise to a rule of customary international law.¹⁵ It is, instead, a politically astute and legally aware statement by a highly distinguished group of individuals.¹⁶ It recognizes and embraces existing legal rules, such as the requirements to prevent war crimes, crimes against humanity, and genocide, as well as the rules governing intervention included in the UN Charter.¹⁷ Yet it also questions the adequacy of those rules.

II. The World Summit Outcome Document

By shifting the debate from humanitarian intervention to the Responsibility to Protect, the ICISS Report created new political openings to advance the discussion of atrocity prevention and human security. The transition of the debate from the largely academic to the political space occurred remarkably quickly. By 2005, the Responsibility to Protect was on the agenda of the World Summit, one of the largest gatherings of heads of government in history.¹⁸ Over 170 heads of government participated in the discussions from September 14–16, 2005, leading to the World

¹⁵ ICJ Statute Art. 38.

¹⁶ ICISS REPORT, *supra* note 5, at III. The Commission was co-chaired by Gareth Evans and Mohamed Sahnoun, and its members were Gisèle Côté-Harper, Lee Hamilton, Michael Ignatieff, Vladimir Lukin, Klaus Naumann, Cyril Ramaphosa, Fidel Ramos, Cornelio Sommaruga, Eduardo Stein, and Ramesh Thakur.

¹⁷ Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field [hereinafter First Geneva Convention], Aug. 12, 1949, 75 U.N.T.S. 31; Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea [hereinafter Second Geneva Convention], Aug. 12, 1949, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War [hereinafter Third Geneva Convention], Aug. 12, 1949, 75 U.N.T.S. 135; Convention Relative to the Protection of Civilian Persons in Time of War [hereinafter Fourth Geneva Convention], Aug. 12, 1949, 75 U.N.T.S. 287; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts [hereinafter Protocol I], Jun. 8, 1977, 1125 U.N.T.S. 3; Protocol Additional to the Geneva Conventions of Aug. 12, 1949, and relating to the Protection of Victims of Non-International Armed Conflicts [hereinafter Protocol II], Jun. 8, 1977, 1125 U.N.T.S. 609; Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the Adoption of an Additional Distinctive Emblem [hereinafter Protocol III], Dec. 8, 2005 [hereinafter Geneva Conventions]; Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277 [hereinafter Genocide Convention]; Guénaël Mettraux, *Crimes Against Humanity in the Jurisprudence of the International Criminal Tribunals for the Former Yugoslavia and for Rwanda*, 43 HARV. INT'L L.J. 1, 237 (2002).

¹⁸ UNITED NATIONS DEPARTMENT OF PUBLIC INFORMATION, UN SUMMIT TAKES ON TOUGH GLOBAL ISSUES (2005), available at http://www.un.org/summit2005/press_release_global.pdf.

Summit Outcome Document, which was formally adopted by the General Assembly in Resolution 60/1 (2005).¹⁹

In paragraphs 138–140 of the World Summit Outcome Document, heads of government and the General Assembly affirm the “responsibility to protect . . . populations from genocide, war crimes, ethnic cleansing and crimes against humanity.”²⁰ The text of those paragraphs provides the operative basis for the Responsibility to Protect:

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.

¹⁹ GA Res. 60/1, UN GAOR, 60th Sess., UN DocA/60/L.1 (Oct. 24, 2005) [hereinafter Resolution 60/1].

²⁰ *Id.* at ¶¶ 138–40.

A. The Status of the World Summit Outcome Document

Despite its adoption by heads of government at the 2005 World Summit, the Outcome Document is not an international treaty or other formal legal instrument.²¹ International legal rules can only be created through international treaties, customary law consisting of state practice backed by *opinio juris*, or general principles of international law.²² The authority of the Outcome Document arises from its adoption by the General Assembly in Resolution 60/1. Yet even a resolution of the General Assembly is not a formal source of international law. Articles 10–14 of the United Nations Charter lay out the powers of the General Assembly in this regard, which are limited to discussing matters within the scope of the UN Charter and the maintenance of international peace and security, referring matters or making recommendations to the Security Council, or undertaking studies to promote international cooperation.²³ Hence, while the General Assembly’s adoption of the World Summit Outcome Document has significance, it does not create legal obligations.

Some legal scholars have asserted that the adoption of the World Summit Outcome Document by the General Assembly ought to classify it as “soft law.” For example, Jennifer Welsh and Maria Banda argue that “RtoP is an example of soft law.”²⁴ This approach is both analytically unhelpful and risks prompting a political backlash. So-called soft law is subject to multiple definitions and often-inaccurate usage. The two main streams of legal scholarship define soft law as either imprecise legal obligations²⁵ or non-legally binding obligations.²⁶ Classifying the Outcome Document under the first definition inaccurately suggests that it is legally binding, if imprecise. Neither the ICISS Report nor the Outcome Document has the capacity to establish international legal obligations. Under the second definition of soft law, the Responsibility to Protect is an hortatory norm, rather than a legal rule. That definition is accurate, but, even so, the terminology of soft law is both confusing and unhelpful. Terming a non-legally binding norm as “law” creates the misperception of a legally binding rule and may lead states worried about creeping legalization to denounce the norm in an effort to avoid its legal codification.

²¹ See ICJ Statute Art. 38(1)(a).

²² ICJ Statute Art. 38.

²³ UN Charter Arts. 10–14.

²⁴ Jennifer M. Welsh & Maria Banda, *International Law and the Responsibility to Protect: Clarifying or Expanding States’ Responsibilities?* 2 GLOBAL RESPONSIBILITY TO PROTECT 3, 213 (2010).

²⁵ Kenneth W. Abbott & Duncan Snidal, *Hard and Soft Law in International Governance*, 54 INT’L ORG. 3, 421, 422 (2000).

²⁶ See generally, Kal Raustiala, *Form and Substance in International Agreements*, 99 AJIL 581 (2005).

Rather than speak of “soft law,” positive international law makes clear that the Outcome Document and the Responsibility to Protect contained therein are not a new source of international law. In contrast, the relevant provisions of the Outcome Document are political statements by heads of government and the General Assembly reiterating existing international legal rules, potentially laying the groundwork for the establishment of new legal obligations in the future. More specifically, the document reaffirms existing rules of treaty and customary law prohibiting and requiring the prevention of war crimes, crimes against humanity, and genocide. While shifting the focus from the prosecution of such crimes to their prevention, the Outcome Document builds on, rather than creates legal rules.

In terms of the process of law creation, the Outcome Document may serve as an example of *opinio juris* for certain elements of the Responsibility to Protect that go beyond existing rules of law. *Opinio juris* consists of political statements that provide evidence that a state or states believe they are bound by legal obligation. But for such *opinio juris* to give rise to legal obligation, it must be backed by widespread state practice, which does not yet exist with respect to the Responsibility to Protect.²⁷

B. The Meaning of the Responsibility to Protect in the World Summit Outcome Document

Notwithstanding that the General Assembly’s adoption of the Responsibility to Protect does not in and of itself give rise to a new rule of international law, the World Summit Outcome Document and the General Assembly’s adoption thereof has shaped discourse, altered expectations, and impacted state behavior. Given, however, that the World Summit Outcome Document is not an international treaty, but rather a document adopted by the General Assembly, it is not subject to the rules of treaty interpretation contained in the Vienna Convention on the Law of Treaties.²⁸ The analysis here, therefore, is based on a plain-text interpretation, with reference to background rules of international law.

²⁷ See, e.g., North Sea Continental Shelf (F.R.G. v. Neth.), 1968 I.C.J.; North Sea Continental Shelf (F.R.G. v. Den.), 1968 I.C.J.; The Paquette Habana, 175 US 677 (1900).

²⁸ See Vienna Convention on the Law of Treaties, Arts. 31–32, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention].

The section of the World Summit Outcome Document devoted to the Responsibility to Protect begins with an affirmation of existing international legal rules. Specifically, paragraph 138 provides that “Each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity.”²⁹ This statement summarizes legal rules contained in, among other instruments, the Convention on the Prevention and Punishment of the Crime of Genocide,³⁰ the four Geneva Conventions of 1949,³¹ and customary legal rules regarding crimes against humanity as articulated through the jurisprudence of the International Criminal Tribunal for the Former Yugoslavia, for example.³² Those rules, requiring states to prevent and punish certain international crimes are well established in treaty and custom, and bind on all states. The only significant departure from existing legal norms in this opening line is the inclusion of “ethnic cleansing” in the list of crimes from which states have a responsibility to protect their populations. While the specific definitions of the crimes giving rise to a Responsibility to Protect are addressed in detail in a subsequent chapter, it is worth noting here that “ethnic cleansing” likely would also constitute one of the other crimes listed in the sentence—genocide, war crimes, or crimes against humanity—and does not therefore seek to establish new legal obligations.

The second sentence of paragraph 138 again reflects existing international law by affirming that “[t]his responsibility entails the prevention of such crimes, including their incitement, through appropriate and necessary means.” The underlying international treaties establishing international criminal responsibility for genocide and war crimes and the customary rules prohibiting crimes against humanity also include an obligation to prevent crimes, including the prevention of incitement. The Genocide Convention, for example, provides that “The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish.”³³ Yet the shift in emphasis in paragraph 138 from punishment to prevention is significant. Treaties focusing on these sets of crimes tend to be backward-looking, providing for the assessment of *individual* criminal responsibility to promote accountability for the commission of international crimes. While there are prevention obligations

²⁹ Resolution 60/1, *supra* note 18, at ¶ 138.

³⁰ Genocide Convention, *supra* note 16.

³¹ Geneva Conventions, *supra* note 16.

³² *See generally*, Mettraux, *supra* note 16.

³³ Genocide Convention Art. 1, *supra* note 16.

inherent in the Genocide Convention and Geneva Conventions, RtoP provides for an opportunity for assessment of the actual or *potential* commission of these crimes by *states* as a trigger for preventative action by the international community.

The third sentence of the paragraph merely provides that states “accept that responsibility,” something that they of course do automatically with respect to the underlying international legal rules to which they are party under the doctrine of *pacta sunt servanda*.³⁴

The fourth sentence of paragraph 138 does, however, mark an important departure from existing international law and an innovation of the Responsibility to Protect. The sentence provides that “[t]he international community should, as appropriate, encourage and help States to exercise this responsibility . . .” This sentence seeks to transform the direct legal obligation of the territorial state to prevent and punish atrocity into an affirmative duty on behalf of all states to assist the territorial state in its efforts. This statement departs from the normal rules governing international treaties, according to which treaties cannot create obligations for third states.³⁵ The treaties that establish the responsibility of the territorial state to prosecute international crimes cannot give rise to an obligation for international assistance beyond the “extradite or prosecute” requirements contained in, for example, the Geneva Conventions.³⁶ Where international crimes occur due to the inability or unwillingness of the territorial state to protect its own people, a potential duty of assistance can go far to improve human security.

While the rhetorical shift toward prevention and the focus on international assistance in paragraph 138 are significant, paragraph 139 of the Outcome Document offers key innovations that seek to advance international law. That paragraph begins with the proposition that “[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 to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity.”³⁷ While the treaties or customary rules which seek the prevention and punishment of genocide, war crimes, and crimes against humanity focus on the obligations of the

³⁴ See Vienna Convention Art. 31(1), *supra* note 30.

³⁵ *Id.*, Art. 34.

³⁶ First Geneva Convention Arts. 49–54, *supra* note 16; Second Geneva Convention, Arts. 50–53, *supra* note 16; Third Geneva Convention, Arts. 82–88, *supra* note 16; Fourth Geneva Convention, Arts. 45, 70, 121, & 131, *supra* note 16.

³⁷ Resolution 60/1, *supra* note 18, at ¶ 139.

territorial or national state, paragraph 138 of the Outcome Document asserts an obligation of the international community to use peaceful means to protect populations. The Outcome Document seeks to establish a secondary layer of prevention, complementary yet subordinate to protection by national authorities. As the complementary jurisdictional regime of the International Criminal Court has shown, the potential for complementary international action can both encourage action by national governments and provide a backstop where national governments are unable or unwilling to act.³⁸ While the concept of an international obligation to prevent atrocity is new, the means of collective action in this sentence of the Outcome Document are limited to measures short of the use of force undertaken by the Security Council, consistent with Chapters VI and VIII of the Charter specifically, Articles 32–38 and 52–54.³⁹

The second sentence of the paragraph goes on to discuss more active forms of collective action: “[i]n 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.”⁴⁰ This sentence expressly recognizes that atrocities occur not just where states are unable to protect their populations, but also where they are unwilling to do so. Left unstated is the reality that it isn’t always about a failure of protection but that states sometimes are actively responsible for the commission of these crimes.

While the sentence has strong rhetorical power, boldly stating that the international community is prepared to act where national authorities fail to do so, its legal significance is limited. Rather than seeking to create an affirmative duty for international intervention, the sentence articulates a political reality—the preparedness to act—that may or may not actually be true in any particular case. Note, for example, the difference in language between the recognition of an affirmative “responsibility to use appropriate diplomatic, humanitarian and other peaceful means” and the

³⁸ See William W. Burke-White, *Complementarity in Practice: The International Criminal Court as Part of a System of Multi-Level Global Governance in the Democratic Republic of Congo*, 18 LEIDEN J. INT’L L. 557 (2005); William W. Burke-White, *Proactive Complementarity: The International Criminal Court and National Courts in the Rome System of International Justice*, 49 HARV. INT’L L.J. 53 (2008).

³⁹ UN Charter, Arts. 32–38 & 52–54.

⁴⁰ Resolution 60/1, *supra* note 18, at ¶ 139.

statement that states are “prepared to take collective action” under Chapter VII. That preparedness to take action is far short of an obligation to act.

What is perhaps most noteworthy in this second sentence of paragraph 139 is the statement that collective action under Chapter VII should be “timely and decisive.” All too often, as illustrated from cases ranging from Rwanda to Bosnia, collective responses are *ad-hoc* or *post-hoc*, undermining their effectiveness at prevention. Too often, the Security Council has stalled until evidence of crimes is so clear that political pressure to act becomes irresistible. And even when it does act, the Security Council’s response is rarely decisive, leaving any intervention unauthorized or ill-equipped to meet the challenges on the ground.⁴¹ As a result, prevention far too often fails. The emphasis on “timely and decisive” action by the Security Council is a critical, if rhetorical, step toward effective prevention and impact amelioration. Yet the Outcome Document does not provide a mechanism for turning that political imperative for timely and decisive response into action.

The next sentence of the paragraph is merely a call for the “General Assembly to continue consideration of the responsibility to protect . . . bearing in mind the principles of the Charter and international law.”⁴² This ongoing consideration is, in fact, important given the ambiguities and omissions in the Outcome Document itself—discussed in the next section—and the need to increase the precision of RtoP for it to more effectively impact state behavior.

The final sentence of paragraph 139 again turns to international assistance and capacity-building, noting “[w]e also intend to commit ourselves, as necessary and appropriate, to helping States build capacity to protect their populations . . . and to assisting those which are under stress before crises and conflicts break out.” While the emphasis on prevention and international assistance is again important, the statement itself remains rhetorical. It merely expresses an intent to commit as necessary and appropriate. Ultimately, such intent must be translated into action to build the prevention and response capacities of territorial states and the international community. Once again, however, the Outcome Document fails to provide a mechanism to translate intent into action.

⁴¹ ROMÉO DALLAIRE, *SHAKE HANDS WITH THE DEVIL: THE FAILURE OF HUMANITY IN RWANDA* (Carroll & Graf Publishers 2003); SAMANTHA POWER, *A PROBLEM FROM HELL: AMERICA IN THE AGE OF GENOCIDE* (Basic Books 2002).

⁴² Resolution 60/1, *supra* note 18, at ¶ 139.

Despite its limitations, the Outcome Document is a powerful political statement. It reaffirms critical rules of international law. It shifts the focus from response to prevention. It draws attention to the obligations of states to assist one another in preventing international crimes. And it pulls all of these elements together into an overall concept with normative significance. But the Outcome Document is neither novel nor groundbreaking. The obligations referenced in it are grounded in existing rules of international law. The elements of collective response are confined to the existing mechanisms already available under the UN Charter. And the commitments to collective action or international assistance are hortatory rather than obligatory.

In comparison with the ICISS Report, the Outcome Document is conservative. While it embraces the responsibility to prevent atrocities and affirms a need to react, it does not seek to establish an affirmative duty to react, and largely ignores the responsibility to rebuild included in the ICISS Report. It does not propose a set of criteria or circumstances justifying armed and collective intervention, even under existing Security Council authorities. And, unlike the ICISS Report, the Outcome Document does not consider options when the Security Council fails to react to anticipated or ongoing international crimes. While that conservatism might be viewed as a step back, the fact that the Responsibility to Protect was included in the Outcome Document at all and adopted by the General Assembly is a significant step forward.⁴³ It is a clear recognition of both how far states have come toward recognizing the Responsibility to Protect as a political imperative and a reminder of ongoing skepticism of the bolder version of the Responsibility to Protect in the ICISS Report.⁴⁴

C. The Omissions and Ambiguities of the World Summit Outcome Document

While rightfully seen as an important endorsement of the Responsibility to Protect, the text of the Outcome Document leaves open as many questions as it answers about the scope and nature of RtoP. These key unanswered questions relate to: (1) a tension between a necessary trigger mechanism for the Responsibility to Protect and the ultimate goal of atrocity prevention, (2) appropriate forms of international assistance, and (3) the failure to consider the possibility of

⁴³ See Ramesh Thakur & Thomas G. Weiss, *RtoP: From Idea to Norm—and Action?*, 1 GLOBAL RESPONSIBILITY TO PROTECT 1, 22, 39 (2009).

⁴⁴ See, e.g., Jutta Brunnée & Stephen J. Toope, *The Responsibility to Protect and the Use of Force: Building Legality?*, 2 GLOBAL RESPONSIBILITY TO PROTECT 3 (2010).

Security Council inability or unwillingness to act. Each of these omissions and ambiguities results from political compromises necessary for adoption of the Outcome Document, but have costs that limit the impact of the Responsibility to Protect.

First, as articulated in the ICISS Report and inherent in the first sentence of paragraph 138 of the Outcome Document, the ultimate goal of the Responsibility to Protect is atrocity prevention. To prevent atrocities, domestic or international action must precede crimes. While paragraph 138 makes clear that the territorial state has an affirmative duty to prevent international crimes before they occur, paragraph 139 is far less clear as to when the complementary duty of the international community is triggered. That paragraph begins by affirming a duty on the part of the international community to help protect populations from such crimes through peaceful means under Chapter VI and VIII of the UN Charter, but does not specify whether such crimes must already be underway for the obligation for an international response to attach. This ambiguity unfortunately creates the possibility that significant crimes will occur in advance of any international response—even one limited to actions under Chapter VI or VIII of the UN Charter. And, given the past practice of the Security Council, delayed action is far more likely than anticipatory action.

With respect to the use of forcible measures, the ambiguity of the Outcome Document is even more acute. Paragraph 139 provides that collective action under Chapter VII of the UN Charter should be undertaken in a “timely and decisive manner” where “national authorities are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing, and crimes against humanity.” While a reference in paragraph 138 to “timely and decisive” action and the need to prevent incitement would seem to suggest that the mere potential for atrocity could trigger international action, the requirement of a manifest failure of national authorities to protect could well be interpreted as limiting at least responses under Chapter VII to circumstances in which actual crimes are ongoing and national authorities are evidently failing to prevent them. For the Responsibility to Protect to meaningfully advance human security, this ambiguity must be resolved in favor of allowing—if not requiring—international action, including under Chapter VII, when international crimes are merely imminent.

A second unfortunate ambiguity in the Outcome Document is the lack of clarity as to the allowable and necessary forms of international response. The document is silent on the types of

assistance to be provided to national authorities in their own prevention efforts. Without specifics, the document creates only limited political pressure for states to provide assistance. It is, of course, easy for a state to claim that even inadequate assistance has discharged any potential duties to assist when the nature of requisite assistance is undefined.

With respect to potential international responses, the document simply references Chapters VI, VII, and VIII, again without providing specifics. While the reference to all three chapters of the UN Charter opens the door for the full range of coercive enforcement actions available to the Security Council, the lack of specificity fails to establish a commitment to use those powers and again creates the possibility of an under-reaction that is insufficient to prevent potential crimes or stop those underway. Again, for the Responsibility to Protect to have bite, this ambiguity must be resolved in favor of clear articulation of international assistance and response.

A third troubling ambiguity in the Outcome Document and a significant departure from the ICISS Report is the failure to consider circumstances in which the Security Council itself fails to respond. Whereas the ICISS Report seeks to establish an affirmative duty for the Security Council to react to international crimes, offers a stern warning regarding the consequences of Security Council failure to respond, and strongly hints at possible alternatives in the face of Security Council inaction, the Outcome Document merely notes that states are prepared to take action through the Security Council. It does not suggest an affirmative duty of the Security Council to act nor does it address political stalemate. Likewise, it does not consider any residual obligations or authority that might reside with the General Assembly or regional organizations.⁴⁵ It is understandable that the General Assembly might seek to refrain from commenting on the powers of the Security Council, but the UN Charter recognizes steps that the General Assembly can take to recommend action to the Security Council that is not discussed in the Outcome Document.⁴⁶ This omission creates the strong potential, as illustrated all too clearly by the failure to respond to the genocide in Rwanda, that despite hortatory statements and even international commitment to react, the Responsibility to Protect will not be discharged by the Security Council and international crimes will continue unabated. Again, for the Responsibility to Protect to have impact, mechanisms must be developed

⁴⁵ UN Charter Art. 12; ICISS REPORT, *supra* note 5, at XII–XIII.

⁴⁶ UN Charter Arts. 11(2)–(3).

to ensure Security Council response or alternative pathways to legitimate collective international response will have to develop.

Each of these ambiguities created by the agreed text of the Outcome Document limit the effectiveness of the Responsibility to Protect as an international norm and hamper its potential transformation into law. As a political matter, the scope of paragraphs 138–40 reflects the scope of agreement among states in 2005 with respect to the Responsibility to Protect, but also highlights their unwillingness to operationalize it beyond the reaffirmation of existing legal rules.

III. Security Council Resolution 1674

The next important development in the Responsibility to Protect was its inclusion in Security Council Resolution 1674 in April 2006. In operative paragraph 4 of that Resolution, on the protection of civilians in armed conflict, the Security Council “*Reaffirms* the provisions of paragraphs 138 and 139 of the 2005 World Summit Outcome Document regarding the Responsibility to Protect populations from genocide, war crimes, ethnic cleansing, and crimes against humanity.”⁴⁷ The inclusion is the first explicit endorsement of the Responsibility to Protect by the Security Council. As a political matter, that recognition is significant. Members of the Security Council were willing to join the General Assembly’s endorsement and the five permanent members of the Council did not exercise their veto powers to block adoption. Yet, the Security Council’s endorsement followed six months of difficult negotiations in which Algeria, Brazil, China, the Philippines, and Russia argued that it was premature for the Security Council to endorse RtoP.⁴⁸ Ultimately, the reaffirmation by the Council required a watering down of the language in the resolution to merely “reaffirm” the relevant paragraphs of the Outcome Document and hard-fought political negotiation to secure adoption. Yet, even this more limited result generated political momentum for the development of the Responsibility to Protect.

⁴⁷ S.C. Res. 1674, S/RES/1674, Apr. 28, 2006, at ¶ 4 [hereinafter Resolution 1674].

⁴⁸ Alex J. Bellamy, *The Responsibility to Protect—Five Years On*, 24 ETHICS IN INT’L AFF. 143, 145 (2010); SECURITY COUNCIL, UPDATE REPORT NO. 5: PROTECTION OF CIVILIANS IN ARMED CONFLICT, Jun. 21, 2006, *available at* http://www.securitycouncilreport.org/site/c.glKWLeMTIsG/b.1806823/k.A5D7/Update_Report_No_5BRProtection_of_Civilians_in_Armed_ConflictBR21_June_2006.htm; SECURITY COUNCIL, UPDATE REPORT NO. 1: PROTECTION OF CIVILIANS IN ARMED CONFLICT, Jun. 18, 2007, *available at* http://www.securitycouncilreport.org/site/c.glKWLeMTIsG/b.2821453/k.AB59/Update_Report_No_1BRProtection_of_Civilians_in_Armed_ConflictBR18_June_2007.htm; SECURITY COUNCIL, UPDATE REPORT NO. 1: PROTECTION OF CIVILIANS IN ARMED CONFLICT, Mar. 8, 2006, *available at* http://www.securitycouncilreport.org/site/c.glKWLeMTIsG/b.1466469/k.EF40/Update_Report_no1brProtection_of_Civilians_in_armed_conflictbr8_March_2006.htm.

From a legal perspective, the key significance of the Security Council's reaffirmation of the relevant paragraphs of the World Summit Outcome Document stems from Article 25 of the Charter, according to which, "[t]he Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter." While the Council's language in Resolution 1674 falls short of a formal decision requiring that member states implement the Responsibility to Protect, it is part of an ongoing process of legalization.⁴⁹ At the very least, the Council's reaffirmation of the Responsibility to Protect strengthens the claim that member states have legal duties to advance the political commitment contained in paragraphs 138 and 139 of the Outcome Document.

A number of factors do, however, limit the legal impact of Resolution 1674. First, the Council merely *reaffirms* the relevant paragraphs of the Outcome Document that are themselves either already binding legal obligations or hortatory, rather than norm-creating. As a result, Resolution 1674 should be read largely as yet another political reaffirmation of the Responsibility to Protect, albeit an affirmation by the critical body ultimately responsible for discharging the international response contemplated by the Responsibility to Protect.

A second limitation is the context of the reference in Resolution 1674. While the reference occurs in an operative, rather than preambular paragraph, it is divorced from any particular case of crimes and does not contain a specific demand for action by member states. Without such a particular case or call for action, the Security Council's statements are difficult to translate into precise expectation, obligation, or action.

Third, given that the operative paragraph of the Resolution does not reference Chapter VII and does not find the existence of a threat to international peace and security, as well as the fact that reference to collective intervention in the underlying World Summit Outcome Document is of a general, non obligatory, and case-by-case nature, the resolution creates no binding legal obligation on member states of the United Nations.

⁴⁹ For a discussion of the circumstances in which decisions of the Security Council are legally binding on member states, see HANS KELSEN, *THE LAW OF THE UNITED NATIONS: A CRITICAL ANALYSIS OF ITS FUNDAMENTAL PROBLEMS* 95 (E.A. Prager: 1950). Mere recommendations or affirmations of the Council are presumably not intended to create legal obligations for member states. See *Id.*

Finally, the Resolution fails to resolve the ambiguities inherent in the text of the Outcome Document noted above. By merely reaffirming that earlier language through reference, the ambiguities are imported into Resolution 1674. The Security Council, like the General Assembly before it, fails to take on the challenging task of resolving those ambiguities in a manner that would both effectively achieve the purposes of the Responsibility to Protect and be acceptable to the Security Council membership.

IV. The 2009 General Assembly Debate

In early 2009, the Secretary-General released a report, entitled “Implementing the Responsibility to Protect,”⁵⁰ that seeks to “contribute to a continuing dialogue among Member States . . . on the responsibility to protect.”⁵¹ The report begins conservatively, providing that the discussion of the Responsibility to Protect in the Outcome Document “does not alter, indeed it reinforces, the legal obligations of Member States to refrain from the use of force except in conformity with the Charter.”⁵² The report then examines potential means for implementing three pillars of the Responsibility to Protect: “[t]he protection responsibilities of the State,”⁵³ “[i]nternational assistance and capacity-building,”⁵⁴ and “[t]imely and decisive response.”⁵⁵

The lengthy discussions of each of these pillars are likewise conservative, suggesting possible means of implementation of RtoP consistent with both existing international law and the agreed text of the Outcome Document. For example, with respect to “[t]he protection responsibilities of the State,” the report suggests that states “should become parties to the relevant international instruments on human rights . . . as well as . . . the International Criminal Court”⁵⁶ and that they should strengthen individual criminal responsibility.⁵⁷ Regarding international assistance and capacity-building, the report highlights the need to make states aware of the costs of the perpetration of international crimes and the need for region-to-region learning processes particularly

⁵⁰ The Secretary-General, *Report of the Secretary-General on Implementing the Responsibility to Protect*, UN Doc. A/63/677, Jan. 12, 2009.

⁵¹ *Id.*, at 5.

⁵² *Id.*

⁵³ *Id.*, at 8.

⁵⁴ *Id.*, at 9.

⁵⁵ *Id.*

⁵⁶ *Id.*, at 11.

⁵⁷ *Id.*, at 12–13.

as related to human security.⁵⁸ Perhaps more boldly, regarding state-to-state assistance, the report suggests the need for assistance programs “to build specific capacities within societies that would make them less likely to travel the path to crimes relating to the responsibility to protect.”⁵⁹

Finally, the report turns to the implementation of timely and decisive response. While reaffirming the need for states to operate within existing legal authorities, the report also focuses on the ultimate goal of “saving lives through ‘timely and decisive’ action.”⁶⁰ The report draws on the Outcome Document’s recognition of the need to prevent incitement as a means of promoting a timely response that in fact serves a preventative function. Thereafter, it explores the potential actions that could be taken by the Security Council and member states, including the use of targeted sanctions.⁶¹ Importantly, the report goes beyond the text of the Outcome Document by acknowledging the need for permanent members of the Security Council to refrain from exercising the veto on issues related to the Responsibility to Protect and the role of the General Assembly, under the Uniting for Peace procedure to address issues including the Responsibility to Protect where the Security Council fails to do so.⁶² However, even these discussions do not go so far as to suggest that there are alternatives to the UN Security Council for legitimating collective action in response to atrocity. The report does, however, provide the most detailed discussion of the Responsibility to Protect in an official document to date and offers concrete ways to advance and implement the Outcome Document.

The release of the Secretary-General’s Report’s gave rise to a lengthy debate in the General Assembly about the Responsibility to Protect and whether the report itself should be adopted in some way by the General Assembly. Those debates got off to a rather unfavorable start. The president of the General Assembly, Father Miguel d’Escoto Brockmann of Nicaragua, released a concept note to frame the discussion that was deeply critical of the Responsibility to Protect and sought to reopen a more general discussion as to its validity and appropriateness.⁶³ Delegates from Cuba, Nicaragua, Sudan, and Venezuela explicitly called for a reopening of general debate. Yet,

⁵⁸ *Id.*, at 16–17.

⁵⁹ *Id.*, at 20.

⁶⁰ *Id.*, at 22.

⁶¹ *Id.*, at 25.

⁶² *Id.*, at 27.

⁶³ Office of the President of the General Assembly, *Concept Note on Responsibility to Protect Populations from Genocide, War Crimes, Ethnic Cleansing and Crimes Against Humanity* (undated), available at www.un.org/ga/president/63/interactive/protect/conceptnote.pdf.

throughout the course of discussions, 94 speakers, representing more than 180 governments, spoke, with the vast majority supportive of the Responsibility to Protect and at least some of the implementation steps included in the Secretary-General's report.⁶⁴ Most speakers recognized a narrow set of responsibilities to which deep obligations of direct prevention and indirect assistance would attach.⁶⁵

After intense discussions, the General Assembly voted to endorse the Secretary-General's report. While a strongly worded endorsement was initially contemplated, resistance from states such as Cuba, Ecuador, Iran, Nicaragua, Sudan, Syria, and Venezuela, led the endorsement to a more toned down statement.⁶⁶ Ultimately, General Assembly Resolution 63/308 (2009) "*recall[s]* the 2005 World Summit Outcome," "*takes note* of the report of the Secretary-General and of the timely and productive debate organized by the President of the General Assembly," and "*Decides* to continue [the General Assembly's] consideration of the responsibility to protect."⁶⁷ Again, the General Assembly's decision to take note of the report lent additional legitimacy and political support to the report of the Secretary-General, without creating new legal obligations.

The Secretary-General's report and the debates that followed suggest a growing political consensus in support of the Responsibility to Protect. Despite the efforts of a few detractors, states are willing to accept the relatively minimalist construction of the Responsibility to Protect outlined in the World Summit Outcome Document, even when concrete implementation steps are also contemplated. Second, the report begins to address many of the ambiguities and omissions in the Outcome Document, particularly as regards the forms of assistance states may be able to provide, the need to react with sufficient speed to prevent crimes, and the possibility of the Security Council's failure to act. While the report does not fully resolve those ambiguities and omissions, it recognizes the need to consider them and builds the political momentum that may ultimately lead to their resolution.

V. Recent Developments

⁶⁴ Bellamy, *supra* note 50, at 147.

⁶⁵ For detailed discussions of the positions of various states, see UNITED NATIONS DEPARTMENT OF PUBLIC INFORMATION, MORE THAN 40 DELEGATES EXPRESS STRONG SKEPTICISM, FULL SUPPORT AS GENERAL ASSEMBLY CONTINUES DEBATE ON RESPONSIBILITY TO PROTECT, GA/10849, Jul. 24, 2009, *available at* <http://unispal.un.org/UNISPAL.NSF/0/81137EA84576A7C38525760000492F53>.

⁶⁶ Bellamy, *supra* note 50, at 147.

⁶⁷ GA Res. 63/308, UN GAOR, 63d Sess., UN Doc. A/RES/63/308 (Oct. 7, 2009).

The most recent developments in the Responsibility to Protect were the release on a follow-on report by the Secretary-General in July 2010 and a subsequent General Assembly dialogue. The report, entitled “Early warning, assessment, and the responsibility to protect” further seeks to operationalize RtoP and focuses on the mechanisms available to provide early warning and prevent, rather than merely respond to, atrocity. The report recognizes gaps in the United Nation’s early warning capabilities and notes significant improvements in information-sharing over the past decade. It calls upon United Nations entities to improve “the flow of information from the field to headquarters” and analytic assessment tools.⁶⁸

While information flow, assessment, and early warning are essential, operationalization of the Responsibility to Protect is more often a political than informational challenge. Without addressing the problem of political will head-on, the report does seek to foster mechanisms to link early warning to preventive action. It calls upon the Special Advisor to the Secretary-General on the Prevention of Genocide and the Special Advisor on the Responsibility to Protect to “to convene an urgent meeting of key Under-Secretaries-General to identify a range of multilateral policy options, whether by the United Nations or by Chapter VIII regional arrangements, for preventing such mass crimes and for protecting populations.”⁶⁹ While such a meeting will not necessarily lead to the action that is needed, it is an important step to facilitating connection between early warning and prevention.

One month after the release of the follow-on report, the president of the General Assembly convened an informal, interactive dialogue on early warning and assessment. Contributions from 42 member states again stressed the importance of prevention and the need for early warning mechanisms within the UN system.⁷⁰ While a few states expressed concern about the ongoing development of RtoP, the overall focus of the discussion remained on concrete steps to advance its implementation, including the creation of a joint office for the Secretary-General’s Special Advisors on Genocide Prevention and the Responsibility to Protect. Ultimately, the dialogue should be viewed as a further recognition of a deepening consensus on both the need for and substance of the

⁶⁸ The Secretary-General, *Report of the Secretary-General on Early Warning, Assessment, and the Responsibility to Protect*, A/64/864, Jul. 14, 2010, at 4.

⁶⁹ *Id.*, at 7.

⁷⁰ *See generally*, GLOBAL CTR. FOR THE RESPONSIBILITY TO PROTECT, EARLY WARNING, ASSESSMENT, AND THE RESPONSIBILITY TO PROTECT: INFORMAL INTERACTIVE DIALOGUE OF THE GENERAL ASSEMBLY HELD ON 9 AUGUST 2010, Sept. 2010.

Responsibility to Protect, but a consensus still marked by lingering concerns about the ways in which RtoP may be implemented.

VI. Conclusion

The Responsibility to Protect has developed with extraordinary speed. The ICISS Report was released just a decade ago. Since then, the concept has been advanced, framed in terms of concrete implementation steps by the Secretary-General, endorsed twice by the General Assembly, and reaffirmed by the Security Council. In a world of international politics, where change is slow and international legal codification even slower, this rapid trajectory from idea to norm is remarkable. It reflects an expanding view that far more must be done to prevent atrocities and stop international crimes, that historic approaches to sovereignty are outdated, and that both states and the international community have moral and legal obligations to prevent and react when international crimes are imminent or underway.

What the Responsibility to Protect is not, however, is an international legal *rule*. It has not been codified in an international treaty; it lacks the state practice and sufficient *opinio juris* to give rise to customary international law; and it does not qualify as a general principal of law. Instead, the Responsibility to Protect is best understood as a norm of international conduct. As defined by Cass Sunstein, norms are “social attitudes of approval and disapproval, specifying what ought to be done and what ought not to be done.”⁷¹ In other words, norms are expectations around which actors’ understandings and behavior ought to conform. Over time, such norms may develop into legal obligations, either through codification into international treaties or through the development of customary law. Or they may remain non-legal, but nonetheless influential understandings that structure the expectations and behavior of actors in the international system. The trajectory of the Responsibility to Protect over the past decade is strongly suggestive of its development toward a rule of international law, but further political development and legal process will be required. That process must clarify both how the Responsibility to Protect goes beyond existing rules of law and the precise obligations on all states to prevent and react to international atrocities.

⁷¹ Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 4, 903, 914 (1996).

While advocates of the Responsibility to Protect may advocate its early adoption as a legal obligation, its present normative status should be welcomed and its gradual development toward law embraced. First, the underlying prohibitions of international crimes and obligations to prevent them are already codified in long-standing legal obligations. Reliance on those existing legal obligations will be more effective as a legal matter than basing a claim on a potential new legal rule.

The power of the Responsibility to Protect ultimately lies in its ability to generate political pressure and compliance pull.⁷² The key challenge to human security is ensuring that territorial states do in fact prevent crimes and that the international community responds where territorial states do not. As a political statement and reflection of an expanding political consensus, the Responsibility to Protect goes far to induce the preventive and responsive actions that are so urgently needed.

Second, as the debates at the World Summit and, subsequently, in the General Assembly indicate, most states today are willing to recognize the fact that sovereignty carries with it responsibility. Yet, those same states are unwilling to alter the basic legal rules governing when international interventions to prevent or stop atrocity are allowable, remaining firmly rooted in the UN Charter and the necessity of Security Council approval. Hence, were the Responsibility to Protect to be codified as binding law today, it would result in a relatively thin rule that neither addresses nor resolves the challenge of international intervention in the face of Security Council inaction.

Third, despite the efforts of the Secretary-General in his report on the implementation of the Responsibility to Protect to resolve many of the outstanding ambiguities in the World Summit Outcome Document, the 2009 General Assembly debates suggest that there still exists considerable disagreement on specific forms of assistance to be provided by third states and the appropriate scope of international intervention. Early adoption of the Responsibility to Protect as international law would result in either a legal rule of limited precision (and, hence, limited effectiveness) or an international treaty with very few states parties.

⁷² THOMAS M. FRANCK, *THE POWER OF LEGITIMACY AMONG NATIONS* (Oxford University Press 1990).

Finally, the processes of the past ten years suggest a strong and growing consensus around the Responsibility to Protect. Yet, as is often the case in international law and politics, when states are asked to transform norm to law, political considerations get in the way. Moving too fast risks undermining that consensus as some states step back from forward-leaning rhetorical positions to avoid legal codification.

Ultimately, the power of any norm or rule of international law is its ability to alter the cost-benefit calculations, preference sets, or value choices of actors in the international system. The Responsibility to Protect has already done so and will continue to do so. As the chapters that follow demonstrate, the norm has already shifted academic and political debates; altered conceptions of sovereignty; changed the way states and international actors talk about international crimes and their prevention; and shifted discussions on the appropriateness and duties of intervention. Because of the emergence of the Responsibility to Protect over the past decade, it is today more costly—in terms of political capital, international sanction, and moral identity—for states to perpetrate international atrocities or to allow them to unfold unhindered. And it is more difficult for the international community to stand by—as it did all too often in the past—when atrocity is perpetrated.

The further codification of the Responsibility to Protect as binding international law would, undoubtedly, increase the costs on states that perpetrate international crimes or allow them to occur. Framing the norm as law would facilitate greater condemnations of violations and might give rise to new sanctions for violation. Yet as history all too clearly shows, even international law is not inviolable and the legal codification of the Responsibility to Protect would offer no guarantees of human security.

Ultimately, timing is everything. The desire to legalize the Responsibility to Protect must be balanced against its further substantive development and expanding political consensus of support. For the time being, a course of patient prudence significantly outweighs the marginal increase in effectiveness of formal legalization. And there is reason for optimism that the Responsibility to Protect will develop over time in ways that make it more precise, more expansive, and more

effective. While that development unfolds, the norm itself will continue, as it already has, to shape and impact the behavior of states and the cause of human security.