

ARTICLE

USING FORCE AGAINST THE “WEAPONS OF THE WEAK”: EXAMINING A CHEMICAL-BIOLOGICAL WEAPONS USAGE CRITERION FOR UNILATERAL HUMANITARIAN INTERVENTION UNDER THE RESPONSIBILITY TO PROTECT

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The civil war in Syria has demonstrated the international community’s inability to act to protect civilians caught in mass atrocities during cases of U.N. Security Council deadlock, with permanent member vetoes presenting a significant legal obstacle to international humanitarian intervention.

The Responsibility to Protect (R2P) construct, created in response to the NATO intervention in Kosovo, was originally designed to overcome such Security Council paralysis by transforming the debate from the “right” of states to intervene to the “responsibility” of the entire international community to protect civilians as well as open the door to legitimate unilateral humanitarian intervention in cases of Security Council deadlock. However, despite the innovations of these “hard R2P” principles, the R2P framework was weakened during U.N. adoption into a “soft R2P” that is reflected in the current legal impasse over Security Council authorization for humanitarian intervention.

This article examines a chemical and biological weapons (CBW) usage criterion as a condition legitimizing unilateral humanitarian intervention under R2P. A CBW usage criterion for R2P intervention can provide the international community with a framework for legitimate humanitarian intervention to end chemical and biological weapons attacks against civilians and deter such attacks in the future. Such a criterion would increase support for a

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principle of R2P intervention across realist, institutionalist and cosmopolitan perspectives, strengthening a norm of humanitarian intervention in cases of CBW attack and promoting the international community's overall ability to protect civilians in war.

To provide legitimacy to act against future such atrocities, the international community should thus begin efforts to develop within the U.N. framework an R2P principle authorizing intervention in cases of CBW use against civilians.

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We need not impale ourselves on the horns of a dilemma between respect for sovereignty and the protection of human rights.¹

I. INTRODUCTION

The civil war in Syria has brought unimaginable horrors for the country's people.² The March 2011 arrest of graffiti-writing schoolchildren unleashed a protest movement that soon transformed into a budding insurgency,³ resulting in a bloody and stalemated civil war.⁴ As of February 2014, the violence had by some estimates killed over 100,000 people, including almost 40,000 civilians,⁵ and created over 2.4 million refugees,⁶ the “world's worst refugee crisis in decades.”⁷ The crisis was severe enough to lead the U.N. to call for funds in the vicinity of \$5 billion from member states, the largest-ever

¹ U.N. Secretary-General, *Report of the Secretary-General on the Work of the Organization*, ¶ 6, U.N. Doc. A/46/1, Supp. No. 1 (Sept. 13, 1991).

² See David Jolly, *Death Toll in Syrian Civil War Near 93,000, U.N. Says*, N.Y. TIMES (June 13, 2013), <http://www.nytimes.com/2013/06/14/world/middleeast/un-syria-death-toll.html>.

³ Nada Bakri, *Armed Groups Are on Rise in Syria, as Are Civil War Fears*, N.Y. TIMES (Nov. 17, 2011), <http://www.nytimes.com/2011/11/18/world/middleeast/armed-attacks-on-syrian-sites-appear-to-rise.html>; Michael Slackman, *Syrian Troops Open Fire on Protesters in Several Cities*, N.Y. TIMES (Mar. 25, 2011), <http://www.nytimes.com/2011/03/26/world/middleeast/26syria.html>; Katherine Zoepf, *New Grievances Broaden Syria's Protest Movement*, N.Y. TIMES (Apr. 13, 2011), <http://www.nytimes.com/2011/04/14/world/middleeast/14syria.html>; *In Syria, Crackdown after Protests*, N.Y. TIMES (Mar. 19, 2011), <http://www.nytimes.com/2011/03/19/world/middleeast/19syria.html>.

⁴ C. J. Chivers, *Rubble and Despair of War Redefine Syria Jewel*, N.Y. TIMES, Dec. 19, 2012, at A1; See Janine Di Giovanni, *Bleary-Eyed Troops Fight a Building at a Time in Syria*, N.Y. TIMES, Oct. 25, 2012, at A1.

⁵ Alan Cowell, *War Deaths in Syria Said to Top 100,000*, N.Y. TIMES (June 26, 2013), <http://www.nytimes.com/2013/06/27/world/middleeast/syria.html>; see also Ian Black, *Syria Deaths Near 100,000, says U.N.—and 6,000 are Children*, THE GUARDIAN (June 13, 2013), <http://www.guardian.co.uk/world/2013/jun/13/death-toll-syrian-conflict-93000>. However, due to uncertainty in verifying casualty counts, the U.N. High Commissioner for Human Rights stopped updating Syrian civil war deaths in January 2014, noting that the previously-reported figure of 100,000 deaths could not be verified. Kashmira Gander, *UN to Stop Updating Death Toll in Syria Conflict*, THE INDEPENDENT (2014), <http://www.independent.co.uk/news/world/middle-east/un-to-stop-updating-death-toll-in-syria-conflict-9045096.html> (last visited Feb 12, 2014).

⁶ For updated information regarding the Syrian refugee crisis, see *Stories from Syrian Refugees: Discovering the Human Faces of Tragedy*, U.N. HIGH COMM'R FOR REFUGEES, <http://data.unhcr.org/syrianrefugees/syria.php> (last visited Jan. 11, 2013).

⁷ Phoebe Greenwood, *Syria: World 'Sleep Walking' into Greatest Ever Refugee Crisis*, THE TELEGRAPH (June 20, 2013, 6:00 PM), <http://www.telegraph.co.uk/news/worldnews/middleeast/syria/10132558/Syria-world-sleep-walking-into-greatest-ever-refugee-crisis.html>.

U.N. appeal for humanitarian aid.⁸ In reviewing the impact of the civil war, U.N. High Commissioner for Refugees Antonio Guterres stated: “If one looks at the impact on the population, or the percentage of the total population in need I have no doubt that this is the most serious [geo-political crisis] that we have ever dealt with.”⁹

In 2013, another perilous element was introduced into the conflict with the use of chemical weapons by the Syrian government against civilians around the country,¹⁰ including a deadly attack in Damascus that killed hundreds.¹¹ The effects of chemical weapons can be horrific; the nerve agent believed to have been used in Damascus, sarin, causes convulsions, vomiting, paralysis, respiratory failures, and eventually a ghastly death.¹² The use of these terrible weapons against civilians has been symptomatic of the brutality and cruelty of the Syrian civil war.

Despite such horror, however, the international community has been paralyzed in its efforts to protect civilians caught in the civil war, with the U.N. Security Council deadlocked over any form of

⁸ Nick Cumming-Bruce & Rick Gladstone, *In Its Biggest Appeal Ever, U.N. Requests \$5 Billion in Humanitarian Aid for Syria*, N.Y. TIMES (June 7, 2013), <http://www.nytimes.com/2013/06/08/world/middleeast/syria.html>; see also *U.N. Announces Largest Ever Humanitarian Appeal for Conflict-Torn Syria*, U.N. NEWS CTR. (June 7, 2013), <http://www.un.org/apps/news/story.asp?NewsID=45112#.UdSJCW0m80N>.

⁹ Michael Reid, *The Most Brutal of Them All*, ECONOMIST, (Apr. 24, 2013), <http://www.economist.com/blogs/pomegranate/2013/04/syria%E2%80%99s-civil-war>.

¹⁰ Dan Roberts, *US Says It Will Arm Syrian Rebels Following Chemical Weapons Tests*, THE GUARDIAN (June 13, 2013), <http://www.guardian.co.uk/world/2013/jun/13/syria-chemical-weapons-us-confirm>; see also *Syria Envoy: U.N. Told Of 13 Alleged Chemical Attacks*, RADIO FREE EUR./RADIO LIBERTY (July 23, 2013), <http://www.rferl.org/content/syria-un-chemical-investigation/25054920.html>. The Syrian government’s chemical weapons use crossed a U.S. “red line,” leading the Obama administration to arm Syrian rebels. Adam Entous & Julian E. Barnes, *U.S. to Arm Syrian Rebels*, WALL ST. J. (June 14, 2013), http://online.wsj.com/article/SB10001424127887324188604578543820387158806.html?mod=wsj_nview_latest; Mark Mazzetti et al., *U.S. Is Said to Plan to Send Weapons to Syrian Rebels*, N.Y. TIMES, June 14, 2013, at A1.

¹¹ Ben Hubbard, *Possible Attack With Gas Puts Focus on Syria*, N.Y. TIMES (Aug. 24, 2013), <http://www.nytimes.com/2013/08/25/world/middleeast/syria-updates.html>; Ben Hubbard, *Signs of Chemical Attack Detailed by Aid Group*, N.Y. TIMES (Aug. 24, 2013), <http://www.nytimes.com/2013/08/25/world/middleeast/syria-updates.html>.

¹² *Facts About Sarin*, CTR. FOR DISEASE CONTROL AND PREVENTION, <http://www.bt.cdc.gov/agent/sarin/basics/facts.asp> (last visited July 7, 2013).

enforcement action or humanitarian intervention.¹³ While much of the paralysis stems from a dearth of easy policy options, the paralysis within the U.N. Security Council over responses has presented a significant legal obstacle to U.S. consideration of forceful action in Syria.¹⁴ With Russian and Chinese opposition in the Security Council blocking any possibility of outside intervention, the U.S. could not legally act to prevent such chemical attacks even if it intended to.¹⁵

The Responsibility to Protect (R2P) construct, created following the Security Council’s impasse over the NATO intervention in Kosovo, was originally designed to overcome Security Council paralysis during such humanitarian emergencies.¹⁶ By seeking to transform the debate from a “right” to intervene to the “responsibility” of the entire international community to protect civilians, R2P was intended to

¹³ Multiple high-level U.N. human rights commissions had found systematic human rights violations by the Syrian government, including summary executions, war crimes, and crimes against humanity, and at least fifty-seven countries had called for referral of the Syrian government to the International Criminal Court (ICC). See Human Rights Council, Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, 19th Sess., U.N. Doc. A/HRC/19/69 (Feb. 22, 2012); Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, A/HRC/23/58 (June 4, 2013); Letter from Thomas Gürber, Deputy Permanent Representative of Switzerland to the U.N., to Mohammad Masood Kahn, President of the U.N. Security Council (Jan. 14, 2013), available at <http://www.responsibilitytoprotect.org/Switzerland%20letter%20to%20UNSC.pdf>; see also U.N. Security Council: *Heed Call for Justice in Syria*, HUMAN RIGHTS WATCH (Jan. 14, 2013), <http://www.hrw.org/news/2013/01/14/un-security-council-heed-call-justice-syria>. However, despite Syria’s signatory status to the ICC, Syria has not acceded to the treaty and thus remains outside of ICC jurisdiction without a U.N. Security Council referral. See Ian Black, *Syria Need not Fear the International Criminal Court—For Now*, THE GUARDIAN (Dec. 13, 2011), <http://www.theguardian.com/world/2011/dec/13/syria-un-international-criminal-court>.

¹⁴ See Gordon Lubold, *Is Anyone In Charge Of U.S. Syria Policy?*, FOREIGN POL’Y, (June 20, 2013), http://www.foreignpolicy.com/articles/2013/06/20/who_is_in_charge_of_us_syria_policy (reviewing the debate between the Department of Defense and the State Department over intervening in Syria); see also Adam Entous, *Legal Fears Slowed Aid to Syrian Rebels*, WALL ST. J. (July 14, 2013), <http://online.wsj.com/news/articles/SB10001424127887323848804578606100558048708>; see also Mark Landler & Michael R. Gordon, *Air War in Kosovo Seen as Precedent in Possible Response to Syria Chemical Attack*, N.Y. TIMES (Aug. 23, 2013), <http://www.nytimes.com/2013/08/24/world/air-war-in-kosovo-seen-as-precedent-in-possible-response-to-syria-chemical-attack.html> (quoting President Barack Obama stating: “If the U.S. goes in and attacks another country without a U.N. mandate and without clear evidence that can be presented, then there are questions in terms of whether international law supports it . . .”); see also Rosa Brooks, *So You Want to Intervene in Syria Without Breaking the Law?*, FOREIGN POL’Y (June 20, 2013), http://www.foreignpolicy.com/articles/2013/06/20/so_you_want_to_intervene_in_syria_without_breaking_the_law?page=0,0.

¹⁵ See Entous, *supra* note 14.

¹⁶ Gareth Evans, *The Responsibility to Protect: Rethinking Humanitarian Intervention*, 98 AM. SOC’Y INT’L L., PROC. OF THE ANN. MEETING 78, 80 (2004).

legitimize international action with a goal of ending mass civilian atrocities, even in cases of Security Council impasse. Such a principle could be deemed “hard R2P,” emphasizing the legitimate use of force to end atrocities even without Security Council authorization. Despite the initial innovations of the Responsibility to Protect project, however, the framework was weakened following the U.S. invasion of Iraq into a “soft R2P” that is reflected in the paralysis of current international law.

This article examines the current state of international law and finds that the original “hard R2P” interventionist principles should be revived and improved to provide legitimacy to external states to use force to end civilian atrocities, even in cases of Security Council deadlock. Despite widespread support for international action, a deadlock can be instigated through the threat of a veto by even a single permanent member of the Security Council for politically-motivated purposes. Though subsequent debates in the U.N. have weakened the international responsibility—and authorization—to intervene under R2P, this article finds that “hard R2P” supporters should continue to develop mechanisms to legitimize international intervention during mass civilian atrocities as outlined in the “The Responsibility to Protect” report.¹⁷

Specifically, this article proposes the establishment of a chemical and biological weapons (CBW) usage criterion as a condition triggering such authorization to intervene under R2P. A CBW usage criterion for R2P intervention can provide the international community with a tool to end mass atrocities involving chemical and biological weapons attacks. Additionally, such a criterion would increase support for R2P intervention across a range of theoretical perspectives currently opposed to such intervention, increasing the likelihood of international action to protect civilians in civil war.

“Hard R2P,” or unilateral humanitarian intervention under the R2P framework, continues to face opposition within the international community.¹⁸ Critics of unilateral humanitarian intervention under R2P fall into three primary perspectives of international relations theory: realists, institutionalists, and cosmopolitans. A CBW usage criterion for force would mitigate many of the objections across these perspectives.

¹⁷ See *infra* note 86.

¹⁸ Unilateral humanitarian intervention refers to humanitarian intervention that has not been authorized by the U.N. Security Council under Chapter VII of the Charter. In this article, it is used interchangeably with “unauthorized humanitarian intervention.” See Robert O. Keohane, *Introduction to HUMANITARIAN INTERVENTION: ETHICAL, LEGAL, AND POLITICAL DILEMMAS* 15 (J. L. Holzgrefe & Robert O. Keohane eds., 2003); see also Saira Mohamed, *Restructuring the Debate on Unauthorized Humanitarian Intervention*, 88 N.C. L. REV. 1275, 1290 (2009).

Realism, a perspective held by many state regimes, emphasizes possible abuse of intervention criteria, emphasizing the role of power and security in international politics. A CBW criterion increases realist support to R2P by specifying a strict condition for intervention, limiting the possibility for abuse, as well as providing an impression of legitimacy to counter CBW-using regimes that pose a danger to international stability.

Institutionalism, a perspective shared by many legal scholars, conversely emphasizes the role of international institutions in facilitating international stability. Much institutionalist opposition to unilateral humanitarian intervention under “hard R2P” lies in the construct’s subjective and ambiguous legal threshold for intervention; institutionalists fear that such a legal standard may ultimately undermine international law. The addition of a CBW criterion for interventions under the R2P framework provides a clear, objective, bright-line rule to legitimizing unilateral humanitarian intervention, mitigating the criticisms of ambiguity and arbitrariness that afflicts the current R2P criteria. By allowing states to act to protect civilians in limited but legitimate conditions, even during Security Council deadlock, such a threshold can thus actually strengthen adherence to international law and thus produce greater institutionalist support for the R2P framework.

Finally, cosmopolitanism emphasizes the protection of international human rights, highlighting the problems inherent in a legal standard that can open the door to military adventurism and ultimately create more harm for civilians. A CBW usage criterion increases support for such R2P interventions by creating a clear rule that limits the possibility for abuse while still empowering states to act to end massive human rights violations.

The addition of a CBW criterion for international intervention under the R2P framework would thus generate greater support from realists, institutionalists, and cosmopolitans alike, and it would help to strengthen a norm of humanitarian intervention in cases of chemical and biological attack, promoting the international community’s overall ability to protect civilians in war.

A CBW usage standard would not mitigate all opposition to unilateral humanitarian intervention under R2P. Many analysts will oppose any framework that opens the door to intervention outside of the Security Council, and this aspect of the debate will remain at an impasse in the international community. However, an objective, qualitative threshold for action—a regime’s use of CBW prohibited under international law—overcomes many of the problems of subjective and

quantitative thresholds for intervention that plague both the current and the original R2P standards for intervention. Creating a clear, objective, bright-line criterion for international intervention will thus do much to alleviate the concerns of R2P opponents who prioritize international stability, the strength of the international legal regime, and the protection of human rights.

Providing legitimacy under international law for states to take action in humanitarian crises will encourage states to act to end cases of mass atrocity. Since its inception in 2001, R2P has become the *de facto* common language within the international community regarding international humanitarian intervention. The original R2P principles legitimizing intervention in cases of Security Council deadlock must be reconsidered in the U.N., beginning with the creation of mechanisms to authorize humanitarian intervention in cases of governmental CBW use. R2P supporters should work to establish such mechanisms in international law, initiating dialogue within the U.N. and other international organizations to promote the creation of means to sanction legitimate interventions against CBW use. Ultimately, R2P supporters must push for the adoption of such R2P intervention principles in the U.N. General Assembly and the U.N. Security Council, providing legitimacy for international action even during cases of Security Council paralysis. A CBW use criterion will mitigate much opposition to R2P intervention and facilitate these efforts. The international community should thus reconsider the adoption of "hard R2P" principles to provide legitimacy for intervention in future cases of CBW use against civilians.

The remainder of this article will examine the international community's deadlock over humanitarian intervention and how a CBW usage criterion can generate greater support for R2P intervention across a wide theoretical spectrum. Part Two will review the legal debate over unilateral humanitarian intervention provoked by NATO's intervention in Kosovo, a debate that underlies the R2P construct and continues to divide the international community to this day. Part Three will review the development of the R2P framework, an innovative normative standard that was designed to transform the debate over humanitarian intervention. Significant opposition during the process of U.N. adoption weakened the original "hard R2P" standard into a "soft R2P" that omitted any recognition of a norm of unilateral humanitarian intervention, reflecting the current state of international law on humanitarian intervention. Part Four will review this opposition to R2P

rooted in three international relations perspectives: realism, institutionalism, and cosmopolitanism.¹⁹ Part Five will then examine whether CBW usage warrants inclusion as a R2P intervention-triggering criterion, demonstrating how chemical and biological weapons use is a violation of some of the most fundamental taboos of the international community as well as some of the most authoritative rules of international law. This section will show that a CBW usage criterion is thus an appropriate candidate for inclusion as an R2P action-triggering criterion. Finally, Part Six will demonstrate how a CBW usage criterion for R2P intervention can mitigate criticism of the R2P construct, increase support for R2P action across different theoretical perspectives, and strengthen the overall norm of humanitarian intervention.

The inclusion of a CBW usage criterion should thus be part of efforts to revitalize the original R2P principle of unilateral humanitarian intervention and encourage forceful international action to protect civilians, deter such future attacks, and protect civilians caught in the midst of horrific civil wars.

II. THE DEBATE OVER HUMANITARIAN INTERVENTION IN INTERNATIONAL LAW

The U.N. Charter regime on the use of force rests on the divergent principles of the protection of state sovereignty and the promotion of human rights. This dichotomy provides the analytical foundation for the thorny concept of humanitarian intervention in international law. This section will first review the Charter’s provisions on sovereignty and human rights, and next examine NATO’s 1999 intervention in Kosovo, which crystallized the international legal debate between order and justice.

A. Order and Justice in the U.N. Charter System

Interstate politics is increasingly linked with international legal regimes, and today the use of force by states is regulated by the U.N. Charter system, the most authoritative statement of legitimate practice

¹⁹ Cosmopolitanism is a theory that has its basis in constructivism, a broader school of thought that holds that ideas, norms, and identity drive behavior in international politics. *See infra* Part IV.

in the international community.²⁰ The Charter was created from the ashes of World War II, and as a result two fundamental values run through it: community order and humanitarian justice, expressed in international law in terms of sovereignty and human rights.²¹

Sovereignty and the prohibition of interstate force are conceptually united at the center of the U.N. Charter framework.²² Sovereignty is conventionally defined as “the international independence of a state, combined with the right and power of regulating its internal affairs without foreign dictation.”²³ While globalization has eroded the classical concept of sovereignty by increasing the prominence of supranational and subnational actors, the state remains preeminent, and

²⁰ See Anne-Marie Slaughter Burley, *International Law and International Relations Theory: A Dual Agenda*, 87 AM. J. INT'L L. 205, 205 (Apr. 1993) (“International legal rules, procedures and organizations are more visible and arguably more effective than at any time since 1945.”); see also INTERNATIONAL LAW: CASES AND MATERIALS 868, 884 (L. Henkin et al. eds., 3d ed. 1993) [hereinafter CASES AND MATERIALS] (“Membership in the United Nations and adherence to the Charter have been the aim of every entity that aspired to and achieved statehood.”).

²¹ The Preamble of the U.N. Charter proclaims that the U.N. is created “to save succeeding generations from the scourge of war . . . to reaffirm faith in fundamental human rights . . .” U.N. Charter pmbl. See also LOUIS HENKIN, INTERNATIONAL LAW: POLITICS, VALUES AND FUNCTIONS 255 (1989):

The impressive array of international standards adopted in the various covenant and conventions indicates the readiness of the international State system in principle to sacrifice State values of autonomy and impermeability in order to promote the human values of human rights. The character of the enforcement machinery established by the agreements indicates how strong still is the commitment to State values, and how resistant States still are to derogations from their autonomy and to the penetration of their society, even for purposes of promoting the human values they have willingly embraced.

²² See Klinton W. Alexander, *NATO's Intervention in Kosovo: The Legal Case for Violating Yugoslavia's National Sovereignty in the Absence of Security Council Approval*, 22 HOUS. J. INT'L L. 403, 408 (2000) (“Underpinning this concept of sovereignty is the basic rule that nation states must refrain from intervening in the domestic affairs of another state.”).

²³ BLACK'S LAW DICTIONARY 1396 (6th ed. 1990). Sovereignty is, however, a complex concept in both international law and international relations scholarship; see *Corfu Channel* (U.K. v. Alb.), 1949 I.C.J. 4, 43 (1949) (Alvarez, J., opinion):

We can no longer regard sovereignty as an absolute and individual right of every State, as used to be done under the old law founded on the individualist régime, according to which States were only bound by the rules which they had accepted. . . . The sovereignty of States has now become an *institution*, an *international social function* of a psychological character, which has to be exercised in accordance with the new international law.

sovereign states are given great latitude to conduct their internal affairs under the U.N. system.²⁴

The U.N. Charter places a primary emphasis on the sovereignty of all states in the international system. The Charter enshrines the legal sovereignty of states in Article 2(1),²⁵ and confirms the value of exclusive domestic jurisdiction in Article 2(7).²⁶ In addition, one of the most important clauses in the U.N. Charter is Article 2(4), which outlines the prohibition of the use of force against other states, a foundational principle of the Charter.²⁷ Relatedly, the Charter also reserves to states an inherent right of self-defense under Article 51,²⁸ a standard that allows a state to defend itself against an armed attack or an immediate or imminent imperilment.²⁹ The primary purpose of this emphasis on sovereignty, and the prohibition of force, is the

²⁴ See generally Martin Wolf, *Will the Nation-State Survive Globalization?*, 80 FOREIGN AFF. 178, 190 (2001) (“Global governance will come not at the expense of the state but rather as an expression of the interests that the state embodies. As the source of order and basis of governance, the state will remain in the future as effective, and will be as essential, as it has ever been.”).

²⁵ “The Organization is based on the principle of the sovereign equality of all its Members.” U.N. Charter art. 2, para. 1.

²⁶ Stating that:

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

Id. art. 2, para. 7.

²⁷ “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.” *Id.* art. 2, para. 4.

²⁸ Stating that:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

Id. art. 51.

²⁹ The conditions for “anticipatory” self-defense were stated by U.S. Secretary of State Daniel Webster in an 1842 diplomatic note to Great Britain after the *Caroline* incident; such action must be confined to cases where “the necessity of that self-defense is instant, overwhelming, and leaving no choice of means, and no moment of deliberation.” See CASES AND MATERIALS, *supra* note 20, at 927.

maintenance of peace and order in the international community.³⁰ These provisions lay at the heart of the U.N. Charter framework.

Contrasting this norm are the Charter's extensive provisions promoting justice and human rights. Article 1(3) lists as one of the primary purposes of the Charter "promoting and encouraging respect for human rights and for fundamental freedoms for all."³¹ Similarly, Article 55(c) mandates that the United Nations shall promote "universal respect for, and observance of, human rights and fundamental freedoms,"³² and under Article 56 all members pledge "to take joint and separate action . . . for the achievement of the purposes set forth in Article 55."³³ Furthermore, Article 13(1)(b) states that the General Assembly shall make recommendations to promote international cooperation "in the realization of human rights and fundamental freedoms for all."³⁴ This emphasis on human rights indicates the high degree of importance that the drafters of the Charter placed upon humanitarian justice. Thus, along with the promotion of sovereignty and community order, the protection of human rights is also at the heart of the U.N. Charter system.³⁵

B. Humanitarian Intervention in International Law

These contending values of order and justice within the U.N. Charter, are what make humanitarian intervention, the paradoxical

³⁰ See Oscar Schachter, *The Nature and Process of Legal Development in International Society*, in *THE STRUCTURE AND PROCESS OF INTERNATIONAL LAW: ESSAYS IN LEGAL PHILOSOPHY DOCTRINE AND THEORY* 745, 748 (R. St. J. Macdonald & Douglas M. Johnston, eds., 1991) (internal citation omitted), *quoted in* *CASES AND MATERIALS*, *supra* note 20, at 2-3:

In the present society of sovereign states, the most promising candidate for that supreme interest would be self-preservation of the state. . . . These duties and rights, focused on the concept of sovereignty, define the basic structure of international society and provide, one might say, the centre of political gravity in a continuously changing social environment. As postulates of the existing international order, they provide a measure of coherence to the multifarious changes of international law.

³¹ U.N. Charter art. 1, para. 3.

³² *Id.* art. 55.

³³ *Id.* art. 56.

³⁴ *Id.* art. 13, para. 1(b).

³⁵ See *CASES AND MATERIALS*, *supra* note 20, at 2; *but see* Tom J. Farer, *An Inquiry into the Legitimacy of Humanitarian Intervention*, in *LAW AND FORCE IN THE NEW INTERNATIONAL ORDER* 185, 190 (L. F. Damrosch & D. J. Scheffer eds., 1991):

Anyone who considers with some measure of objectivity the Charter's normative logic, its allocation of coercive jurisdiction, its omissions, as well as the preferences manifested by most participants in the drafting process . . . cannot help concluding that the promotion of human rights ranked far below the protection of national sovereignty and the maintenance of peace as organizational goals.

concept of employing force to protect human rights, such a vexing dilemma in international law.³⁶

While humanitarian intervention has captured the public imagination in recent decades, the practice has a lengthy historical precedent. Early cases include the intervention of Great Britain, France and Russia in Turkish-held Greece in 1827 in response to Turkish massacres of Greek Christians³⁷ and the intervention of France in Syria in 1860 in response to massacres of Syrian Christians.³⁸ Recent examples of the practice include India’s invasion of East Pakistan in 1971 in response to massive human rights abuses,³⁹ and Tanzania’s 1979 invasion of Uganda undertaken in part to end a major refugee crisis there.⁴⁰

Due to the lack of universal consensus over the identification of “humanitarian” values and the meaning of “intervention,”⁴¹ humanitarian intervention is not easily defined.⁴² Despite the lack of clarity over these conceptual issues, however, humanitarian intervention can usefully be defined as “the threat or use of force by a state, group of states, or international organization primarily for the purpose of

³⁶ See Louis Henkin, *Use of Force: Law and U.S. Policy*, in *RIGHT V. MIGHT: INTERNATIONAL LAW AND THE USE OF FORCE* 37 (1991) (“Even during the Charter honeymoon, respectable voices questioned the ‘legalistic-moralistic approach to international problems’ that sought ‘to suppress the chaotic and dangerous aspirations of governments’ by ‘legal rules and restraints.’ Four decades later that skepticism is rampant.”) (internal citations omitted).

³⁷ SEAN D. MURPHY, *HUMANITARIAN INTERVENTION: THE UNITED NATIONS IN AN EVOLVING WORLD ORDER* 52 (1996) (citing the Treaty for the Pacification of Greece, Gr. Brit.-Fr.-Rus., July 6, 1827.).

³⁸ MURPHY, *supra* note 37, at 53.

³⁹ *Id.* at 97-100 (“Ultimately, the intervention in East Pakistan stands as a good example of how an intervention that yields significant human rights benefits may nevertheless raise considerable concerns about its effect on the maintenance of international peace.”). *Id.* at 100.

⁴⁰ See MARTHA FINNEMORE, *THE PURPOSE OF INTERVENTION: CHANGING BELIEFS ABOUT THE USE OF FORCE* 76-77 (2003).

⁴¹ MURPHY, *supra* note 37, at 8.

⁴² Intervention can involve any action a state takes to affect the policies of another state; by this definition all states “intervene” in different degrees in the internal affairs of others. See generally G.A. Res. 3314 (XXIX), 29th Sess., U.N. Doc. A/RES/3314 (Dec. 14, 1974), cited in *BASIC DOCUMENTS SUPPLEMENT TO INTERNATIONAL LAW: CASES AND MATERIALS* (Louis Henkin et al. eds., 3d ed. 1993) [hereinafter *BASIC DOCUMENTS*]; see also Ian Brownlie, *Humanitarian Intervention*, in *LAW AND CIVIL WAR IN THE MODERN WORLD* 219, 219 (John Norton Moore ed., 1974); R. J. VINCENT, *NONINTERVENTION AND INTERNATIONAL ORDER* 3 (Princeton Univ. Press 1974); J. L. BRIERLY, *THE LAW OF NATIONS: AN INTRODUCTION TO THE INTERNATIONAL LAW OF PEACE* 402 (H. Waldock ed., 6th ed. 1963) (“*Intervention* is a word which is often used quite generally to denote almost any act of interference by one state in the affairs of another”).

protecting the nationals of the target state from widespread deprivations of internationally recognized human rights.”⁴³

In the modern era, the U.N. Security Council is the primary organ within the U.N. for addressing matters of international security, and it is the only body that can authorize humanitarian interventions.⁴⁴ Chapter VII of the Charter mandates that the U.N. Security Council “shall determine the existence of any threat to the peace, breach of the peace, or act of aggression” in response to humanitarian and other crises.⁴⁵ With the determination of such a breach, the Security Council can authorize sanctions (“measures not involving the use of armed force”) under Article 41,⁴⁶ or, if such sanctions fail, it can authorize the use of force (“take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security”) under Article 42.⁴⁷ Under Chapter VIII Articles 53⁴⁸ and 54,⁴⁹ the Security Council may also utilize regional arrangements for Article 42 enforcement

⁴³ See MURPHY, *supra* note 37, at 11-12. Intervention to protect a state’s own nationals residing in a foreign state has also steadily gained acceptance in the post-Charter era as a variant of humanitarian intervention, despite controversy regarding its legality under the Charter. See 2 MAX PLANCK INSTITUTE FOR COMPARATIVE PUBLIC LAW, ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 926-29 (1995).

⁴⁴ See MURPHY, *supra* note 37, at 68; U.N. Charter arts. 33-54. The Security Council is composed of five permanent members (the U.S., the U.K., France, Russia, and the Peoples’ Republic of China) and ten rotating members. U.N. Charter art. 23, para. 1; see also U.N. Charter arts. 33-54.

⁴⁵ U.N. Charter art. 39.

⁴⁶ *Id.* art. 41:

The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.

⁴⁷ *Id.* art. 42:

Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of the Members of the United Nations.

⁴⁸ *Id.* art. 53, para. 1:

The Security Council shall, where appropriate, utilize such regional arrangements or agencies for enforcement action under its authority. But no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council . . . until such time as the Organization may, on request of the Governments concerned, be charged with the responsibility for preventing further aggression by such a state.

⁴⁹ *Id.* art. 54: “The Security Council shall at all times be kept fully informed of activities undertaken or in contemplation under regional arrangements or by regional agencies for the maintenance of international peace and security.”

actions. As a result, under the Charter system the Security Council holds a monopoly on bestowing “legality” on any international use of force, including humanitarian intervention. Apart from self-defense, the Security Council must approve any international intervention—including humanitarian interventions—in order to accord with international law.

The Security Council’s practice on humanitarian intervention has experienced great change since the end of the Cold War, and indeed since the inception of the U.N. As recently as the early 1990s, there was considerable consensus that a state had virtually inviolable sovereignty regarding the treatment of its own nationals.⁵⁰ Following the end of the Cold War, however, the international system experienced a spate of U.S.-led humanitarian interventions in Somalia, Bosnia, northern Iraq, and elsewhere.⁵¹ Such interventions, undertaken with U.N. Security Council authorization, helped to establish the legitimacy of U.N.-authorized humanitarian interventions under international law.⁵² Soon thereafter, however, the 1999 Kosovo crisis brought a much more difficult legal issue to the fore: humanitarian intervention without U.N. Security Council authorization, also known as unilateral humanitarian intervention.

C. Kosovo and the Legal Debate over Humanitarian Intervention

The debate over the Kosovo intervention illustrates the controversial nature of unilateral humanitarian intervention in international law. On March 24, 1999, NATO initiated hostilities against Yugoslavia in a campaign to end government atrocities against ethnic-Albanian Kosovars.⁵³ After seventy-seven days, the Yugoslavian government ended its attacks and acceded to negotiations,

⁵⁰ See OSCAR SCHACHTER, *INTERNATIONAL LAW IN THEORY AND PRACTICE* 9, 143 (1991); see also LASSA OPPENHEIM ET AL., *OPPENHEIM’S INTERNATIONAL LAW* 442-43 (1992); THOMAS M. FRANCK, *RECOURSE TO FORCE: STATE ACTION AGAINST THREATS AND ARMED ATTACKS* 135-70 (Cambridge Univ. Press 2002).

⁵¹ See TAYLOR B. SEYBOLT, *HUMANITARIAN MILITARY INTERVENTION: THE CONDITIONS FOR SUCCESS AND FAILURE* 46-70, 78-86 (2007).

⁵² Ved P. Nanda et al., *Tragedies in Somalia, Yugoslavia, Haiti, Rwanda, and Liberia—Revisiting the Validity of Humanitarian Intervention Under International Law—Part II*, 26 *DENV. J. INT’L L. & POL’Y* 827, 862 (1998).

⁵³ See Sean D. Murphy, *Contemporary Practice of the United States Relating to International Law*, 93 *AM. J. INT’L L.* 628, 632 (1999) [hereinafter *Contemporary Practice*]; see also Barton Gellman, *U.S., Allies Launch Air Attack on Yugoslav Military Targets*, *WASH. POST*, Mar. 25, 1999, at A1.

leading to a peace agreement and the imposition of the peacekeeping Kosovo Force (KFOR).⁵⁴

NATO's action threw the existing legal framework on humanitarian intervention into disarray. The Security Council had not provided authorization for NATO's use of force against Yugoslavia: Russia had threatened to veto any Security Council resolution authorizing the intervention, leading NATO to intervene without explicit Council authorization. As a result, the intervention presented international legal scholars with what seemed to be a humanitarian but nonetheless illegal action.

The tension between order and humanitarian justice in NATO's action produced a crisis in the international legal community. The intervention created a raging and unresolved debate between "legal positivists" (also referred to as textualists), emphasizing international order, and "legal realists," emphasizing justice and human rights.⁵⁵ As one commentator bluntly put it, "No one knew the answer . . . although you will not find an international lawyer or a foreign minister admitting this, the [legal] situation [was] a mess."⁵⁶ This debate—pitting sovereignty against human rights, and legal positivism against legal realism—underlies the contemporary debate over R2P.

1. Legal Positivism: An Emphasis on Order

Legal positivism emphasizes the "created" nature of law and stresses the importance of treaties, state practice and other forms of state consent in the formation of international law.⁵⁷ Positivism focuses on the textual rules and the existence of law as it is formally declared,

⁵⁴ INDEP. INT'L COMM'N ON KOSOVO, THE KOSOVO REPORT (Oct. 19, 2000), available at <http://reliefweb.int/report/world/kosovo-report>.

⁵⁵ Sean D. Murphy, Calibrating Global Expectations Regarding Humanitarian Intervention 2 (Feb. 6, 2001) (unpublished manuscript) (on file with author), [hereinafter Calibrating Global Expectations]. A similar classification for the legal debate over humanitarian intervention is that of "classicists" versus "realists," elaborated on by Tom J. Farer, *Humanitarian Intervention Before and after 9/11: Legality and Legitimacy*, in HUMANITARIAN INTERVENTION: ETHICAL, LEGAL AND POLITICAL DILEMMAS 53, 61 (J. L. Holzgrefe & Robert O. Keohane eds., 2003).

⁵⁶ TIM JUDAH, KOSOVO: WAR AND REVENGE 179 (Yale Univ. Press 2000); cf. John C. Yoo, *The Dogs That Didn't Bark: Why Were International Legal Scholars MIA on Kosovo?*, 1 CHI. J. INT'L L. 149, 149 (2000) ("International legal scholars' inconsistent positions on war powers suggest that scholarship in the field has failed to progress because it is too attached to the ambiguous normative goal of promoting international justice.").

⁵⁷ *Contemporary Practice*, supra note 53; J.L. Holzgrefe, *The Humanitarian Intervention Debate*, in HUMANITARIAN INTERVENTION: ETHICAL, LEGAL AND POLITICAL DILEMMAS 15, 35-36 (Robert O. Keohane & J. L. Holzgrefe eds., 2003); see also H.L.A. HART, THE CONCEPT OF LAW 181-82 (2d ed. 1994).

emphasizing the binding nature of the plain meaning of a treaty’s text.⁵⁸ As an analytic doctrine, it views norms as authoritative only if they are lawful and enacted according to accepted procedures.⁵⁹

In the debate over Kosovo, positivists stressed the role of sovereignty in maintaining peace and order among states, making three key arguments against the NATO intervention.⁶⁰ First, positivists held that the intervention was a breach of Article 2(4) of the U.N. Charter and thus a violation of international law on the use of force.⁶¹ Because the intervention did not qualify as collective or self-defense, NATO could not rely on the Article 51 self-defense exception on the use of force.⁶²

Second, positivists held that there was no legal basis for unilateral humanitarian intervention not authorized by the Security Council under chapters VI or VII.⁶³ Positivists denied the validity of humanitarian intervention in international law, noting that historical U.N. discussions

⁵⁸ Legal positivism is also often categorized as legal classicism. See Farer, *supra* note 55, at 61. Similarly, legal positivism shares with the English School pluralist perspective an emphasis on “how the rules of international society provide for an international order among states sharing different conceptions of justice.” See NICHOLAS J. WHEELER, *SAVING STRANGERS: HUMANITARIAN INTERVENTION IN INTERNATIONAL SOCIETY* 11 (2000).

⁵⁹ See Holzgrefe, *supra* note 57, at 35.

⁶⁰ Not all positivists opposed unilateral humanitarian intervention in Kosovo. See Thomas M. Franck, *Interpretation and Change in the Law of Humanitarian Intervention*, in *HUMANITARIAN INTERVENTION: ETHICAL, LEGAL, AND POLITICAL DILEMMAS* 204, 215-16 (J. L. Holzgrefe & Robert O. Keohane eds., 2003); Jane Stromseth, *Rethinking Humanitarian Intervention: The Case for Incremental Change*, in *HUMANITARIAN INTERVENTION: ETHICAL, LEGAL AND POLITICAL DILEMMAS* 232-72 (J. L. Holzgrefe & Robert O. Keohane eds., 2003).

⁶¹ See Professor Ian Brownlie (counsel for the Federal Republic of Yugoslavia), *Legality of the Use of Force (Yugoslavia v. Belg. et al.) Verbatim Record*, 34 (May 10, 1999), <http://www.icj-cij.org/docket/files/114/4491.pdf>.

⁶² See Daniel Wolf, *Humanitarian Intervention*, 9 MICH. Y.B. INT’L LEGAL STUD. 333, 339 (1988) (“It was the unabashed intent of the [Charter’s] framers to assure that there would be no exceptions to the prohibition on the use of force other than for self-defense.”). See also Louis Henkin, *Kosovo and the Law of “Humanitarian Intervention”*, 93 AM. J. INT’L L. 824, 826 (1999) (“In my view, the law is, and ought to be, that unilateral intervention by military force by a state or group of states is unlawful unless authorized by the Security Council.”).

⁶³ Although the Security Council had passed prior resolutions, these resolutions did not authorize the use of force. See Bruno Simma, *NATO, the UN and the Use of Force: Legal Aspects*, 10 EUR. J. INT’L L. 1 (1999) (concluding that the intervention was a breach of international law):

[I]f the Security Council determines that massive violations of human rights occurring within a country constitute a threat to the peace, and then calls for or authorizes an enforcement action to put an end to these violations, a “humanitarian intervention” by military means is permissible. In the absence of such authorization, military coercion . . . constitutes a breach of Article 2(4) of the Charter. Further, as long as humanitarian crises do no transcend borders . . . and lead to armed attacks against other states, recourse to Article 51 [self-defense] is not available.

Id. at 5.

revealed not even a “substantial minority” in favor of the legality of unilateral humanitarian intervention.⁶⁴ Furthermore, neither modern state practice nor state rhetoric revealed any *opinio juris* legitimizing a new rule on unilateral humanitarian intervention.⁶⁵

Third, positivists argued that an expanded right of humanitarian intervention would in the long term destabilize the international order.⁶⁶ In this respect, the Kosovo intervention was seen as yet another example of Western states employing their power in the name of a global “civilizing” mission.⁶⁷ Such unauthorized use of force, according to positivists, could only weaken the norm of non-intervention, leading to further instability and war.

In short, positivists emphasized the role of international stability and maintained that the Kosovo intervention violated the written proscriptions of international law, breached international norms relating to use of force, and would ultimately lead to a destabilization of international order.

⁶⁴ Brownlie, *supra* note 42, at 218-19. Professor Brownlie states that:

The *Repertory of Practice of United Nations Organs* provides no support; nor does the International Law Commission’s Draft Declaration of the Rights and Duties of States. . . . [I]t is the writer’s view that these authorities are reporting and reflecting the universal consensus of . . . both policy in the sense of the reasonable expectations of states and the normative quality of rules based on *consensus*.

Id. at 219.

⁶⁵ Indeed, NATO gave no legal justifications for its action, highlighting the lack of *opinio juris*. Many major states opposed the intervention. Austria closed its airspace to NATO strike aircraft, Russia withdrew its ambassador to NATO, and Belarus, China, Cuba, India, the Ukraine, and Yugoslavia joined in Russia’s condemnation of the airstrikes. Sean D. Murphy, *Contemporary Practice of the United States Relating to International Law*, 93 AM. J. INT’L L. 628, 631, 633-34 (1999).

⁶⁶ “Every nation has an interest in NATO’s actions being classified as the exception, not the rule.” Thomas M. Franck, *Lessons of Kosovo*, 93 AM. J. INT’L L. 857, 859 (1999).

Neither the U.S. Department of State nor NATO seriously attempted to justify the war in international legal terms. They clearly did not want their actions to legitimate a reversion to the pre-Charter era when states or regional organizations could claim an uncircumscribed right of unilateral recourse to military force. Such revisionism would have been fraught with potential for even greater mischief than Yugoslavia’s policies in Kosovo.

Id.

⁶⁷ Christine M. Chinkin, *Kosovo: A “Good” or “Bad” War?*, 93 AM. J. INT’L L. 841 (1999) (“[T]he Kosovo intervention shows that the West continues to script international law, even while it ignores the constitutional safeguards of the international legal order. . . . [Previous interventions] serve to undermine the Charter on an ad hoc selective basis without providing clear articulation of the underlying principles.”). *Id.* at 846-47.

2. Legal Realism: An Emphasis on Justice

Countering this perspective were legal realists, who emphasized the role of justice and the protection of human rights in arguing for the legality of the NATO intervention. Legal realists focus on the broad purposes and principles of legal texts, and they privilege policy responses based on societal needs.⁶⁸ Legal realists argue that an international legal regime that privileges order over justice will ultimately fail.⁶⁹

In the Kosovo debate, legal realist scholars emphasized a contextual legal analysis that justified the NATO intervention in the context of all the factors surrounding the intervention.⁷⁰

First, legal realists held that the intervention did not violate the purposes of the U.N. Charter and did not endanger the “sovereignty” of states that Article 2(4) is designed to protect.⁷¹ Under this analysis, the

⁶⁸ Farer, *supra* note 55, at 61. Legal realism must be distinguished from the political realism of IR theory, as outlined *infra* at section IV. Legal realism is closely identified with legal naturalism, which emphasizes the moral necessity of acting to protect human rights during mass atrocities. See Sean D. Murphy, *The Intervention in Kosovo: A Law-Shaping Incident?*, 94 AM. SOC’Y INT’L L. 302, 302 (2000).

⁶⁹ See MYERS S. MCDUGAL & FLORENTINO P. FELICIANO, *THE INTERNATIONAL LAW OF WAR, TRANSNATIONAL COERCION AND WORLD PUBLIC ORDER* 127-28 (1994).

An absolute interdiction of all coercion . . . is hardly within the limits of the achievable. A certain degree of coercion is almost always exhibited in all the value-institutional processes that take place in the world arena . . . If, on the other hand, the deliberate choice is made to pursue at least a minimum of order in the world arena, the coercion that is to be prohibited clearly must be distinguished from that which is to be permitted.

Id. Sean Murphy echoes this point, noting that recent developments in warfare and human rights norms have shaken the modern understanding of the legality of using force:

But in the long-term, if the *jus ad bellum* is to survive, a more formal way should be found either to reject the notion of protean *jus ad bellum* or to accept it. If states chose the latter course, then they need to try to identify the contemporary rules in this area, either through formal amendment of the U.N. Charter, through authoritative interpretations by the principal organs of the United Nations or regional organizations, or through other means.

Sean D. Murphy, *Protean Jus Ad Bellum*, 27 BERKELEY J. INT’L L. 22, 24 (2009).

⁷⁰ See Abraham D. Sofaer, *International Law and Kosovo*, 36 STAN. J. INT’L L. 1, 9 (2000). This approach is similar to the “New Haven” School of legal analysis. See generally Myres S. McDougal & Harold D. Lasswell, *The Identification and Appraisal of Diverse Systems of Public Order*, in INTERNATIONAL RULES: APPROACHES FROM INTERNATIONAL LAW AND INTERNATIONAL RELATIONS 113-43 (Robert J. Beck et al. eds., 1996).

⁷¹ *Calibrating Global Expectations*, *supra* note 55, at 3. See also Julie Mertus, *Reconsidering the Legality of Humanitarian Intervention: Lessons from Kosovo*, 41 WM. & MARY L. REV. 1743, 1751 (2000). Exceptions to the prohibition of the use of force under the U.N. Charter are for 1) anticipatory self-defense (Article 51); 2) Security Council enforcement actions (Chapter VII); and 3) implementation of international peace and security by regional organizations (Chapter VIII). See *id.* at 1756-63.

intervention into Kosovo was justified because it did not affect the territorial integrity or political independence of Yugoslavia, and it was consistent with the underlying principles of the Charter.⁷²

Second, legal realists argued that the intervention actually promoted the purposes of the Charter, including the protection of human rights.⁷³ Such commentators noted that the U.N. Security Council determined that the situation in Kosovo was a threat to international peace in previous resolutions.⁷⁴ Furthermore, legal realists asserted that the intervention supported the human rights protections established in other treaties, such as the Universal Declaration of Human Rights and the Genocide Convention.⁷⁵

Third, legal realists argued that the U.N. Charter mechanisms, including the Security Council's ability to protect human rights, were broken and therefore required the activation of other processes to promote human rights⁷⁶ and international peace.⁷⁷ Legal realists hold that international law is "not a suicide pact," to paraphrase Justice Oliver Wendell Holmes, and states must have the capacity to act legitimately against new threats to international order.⁷⁸

⁷² According to this view, the intervention was mandated under the human rights provisions of multiple international conventions (U.N. Charter Articles 1, 55, and 56, as well as the Universal Declaration of Human Rights, the Genocide Convention, and the 1949 Geneva Conventions). *See id.* at 1763-78.

⁷³ W. Michael Reisman, *Unilateral Action and the Transformations of the World Constitutive Process: The Special Problem of Humanitarian Intervention*, 11 EUR. J. INT'L L. 3, 17-18 (2000).

⁷⁴ S.C. Res. 1199, U.N. SCOR, 53d Sess., 3930th mtg., U.N. Doc. S/RES/1199 (Sept. 23, 1998).

⁷⁵ The Universal Declaration of Human Rights states in its preamble that the members of the General Assembly shall "promote respect for these rights and freedoms by progressive measures," and states in Article 2 that "[e]veryone is entitled to all the rights and freedoms set forth in this declaration. . . ." Universal Declaration of Human Rights, G.A. Res. 217 A (III), U.N. Doc. A/RES/3/217 A, pmb., art. 2 (Dec. 10, 1948). Similarly, the Genocide Convention declares genocide "a crime under international law [which Parties] undertake to prevent and punish." Convention on the Prevention and Punishment of the Crime of Genocide art. 1, *adopted* Dec. 9, 1948, 78 U.N.T.S. 277 (entered into force Jan. 12, 1951).

⁷⁶ *See* Mertus, *Reconsidering the Legality of Humanitarian Intervention*, *supra* note 71, at 1749 ("Legitimacy is central to the enforcement of human rights. Accordingly, only human rights processes and bodies perceived as legitimate will be taken seriously, and only states perceived as legitimate can enforce human rights norms successfully.") (footnotes omitted).

⁷⁷ The Security Council's ability to deploy its own forces under Article 42 has never been implemented, and, as in Kosovo, the "permanent member veto" has allowed a single power to effectively shut down all Security Council action, thereby debilitating the Security Council through most of its history. *See* W. Michael Reisman, *Kosovo's Antinomies*, 93 AM. J. INT'L L. 860, 860 (1999).

⁷⁸ *See* Michael J. Glennon, *The New Interventionism: The Search for a Just International Law*, 78 FOREIGN AFF. 2 (1999); *see also* Reisman, *supra* note 77, at 860.

Finally, legal realists pointed to the reaction of the international community, which indicated broad support for the intervention. Realists noted that the NATO intervention was multilateral,⁷⁹ that reactions from outside of NATO were generally supportive,⁸⁰ that both the Security Council and General Assembly declined on numerous occasions to condemn the NATO action,⁸¹ and that the Security Council in effect “blessed” the intervention with Resolution 1244, which approved U.N. supervision of the post-intervention political situation in Kosovo.⁸² Legal realist scholars and intervention supporters decried the ability of one or two members of the Security Council to veto a humanitarian intervention that was strongly supported throughout the international community. Thus, despite the seemingly explicit proscriptions of the U.N. Charter, the global reaction to the intervention combined with the broader purposes of the intervention indicated for legal realists that the NATO intervention was both legitimate and legal in the international system.

In the end, the international community deadlocked over the legality of the Kosovo intervention, incapable of finding an acceptable solution to the ethical and legal dilemma. The majority of scholars

⁷⁹ *Calibrating Global Expectations*, *supra* note 55, at 4.

⁸⁰ *Id.* at 4. States that supported the action included (surprisingly) some of the members of the Organization of the Islamic Conference. OIC representatives stated that, “in view of the failure of all diplomatic efforts, due to the intransigence of the Belgrade authorities, a decisive international action was necessary to prevent humanitarian catastrophe and further violations of human rights.” *Contemporary Practice*, *supra* note 53, at 633.

⁸¹ The Security Council on March 26, 1999 vetoed (12-3) a Russian resolution to condemn the airstrikes as “a threat to international peace” and a “flagrant violation” of the U.N. Charter proposed by Russia. U.N. SCOR, 54th Sess., 3989th mtg., U.N. Doc. S/PV.3989 (Mar. 26, 1999). The twelve states voting against the resolution were: Argentina, Bahrain, Brazil, Canada, France, Gabon, Gambia, Malaysia, Netherlands, Slovenia, the U.K., and the U.S.; the 3 states in favor were Russia, China, and Namibia. *Id.* A Russian draft resolution before the U.N. Commission on Human Rights that called for “immediate cessation of the fighting” failed eleven to twenty-four, with eighteen states abstaining. *Calibrating Global Expectations*, *supra* note 55, at 4 (*citing* Report of the Commission on Human Rights, 55th Sess., Mar. 22-Apr. 30, 1999, U.N. Doc. E/CN.4/1999/167, Supp. No. 3, ¶¶ 34-42 (1999)). The General Assembly also chose not to condemn the intervention. “While the silence of the General Assembly should not be interpreted as a wholesale endorsement of the intervention, to the extent that positivists previously viewed General Assembly condemnation of an intervention as probative in assessing legality, then silence surely bears some relevance as well.” *Calibrating Global Expectations*, *supra* note 55, at 5. Additionally, legal realists noted that U.N. Secretary General Kofi Annan gave implicit validation to the intervention when he stated, “there are times when the use of force may be legitimate in the pursuit of peace.” Judith Miller, *Conflict in the Balkans: The U.N.; The Secretary General Offers Implicit Endorsement of Raids*, N.Y. TIMES, Mar. 25, 1999, at A13; *but see* Judith Miller, *Conflict in the Balkans: United Nations; Annan Takes Critical Stance on U.S. Actions in Kosovo*, N.Y. TIMES, May 19, 1999, at A11.

⁸² *Calibrating Global Expectations*, *supra* note 55, at 5. For the debate in the Security Council, *see* U.N. SCOR, 54th Sess., 4011th mtg., U.N. Doc. S/PV.4011 (June 10, 1999).

found such unilateral intervention unlawful.⁸³ Many scholars, caught between the irresolvable tension between international order and humanitarian justice, argued the seemingly untenable position that the intervention was both “illegal and justified,” a position ultimately also adopted by the Independent International Commission on Kosovo.⁸⁴ Such assessments provided few satisfactory answers for those seeking to balance the demands of both sovereignty and justice in the international system.

III. R2P AND THE HUMANITARIAN INTERVENTION DEBATE

As a response to the paralysis created by the Kosovo intervention, scholars searched for solutions that navigated the demand of both protecting sovereignty while also promoting human rights. U.N. Secretary-General Kofi Annan called for a solution in his Millennium Report to the U.N. General Assembly in 2000, stating:

I recognize both the force and the importance of these arguments. I also accept that the principles of sovereignty and non-interference offer vital protection to small and weak states. But to the critics I would pose this question: if humanitarian intervention is, indeed, an unacceptable assault on sovereignty, how should we respond to a Rwanda, to a Srebrenica . . . Armed intervention must always remain the option of last resort, but in the face of mass murder it is an option that cannot be relinquished.⁸⁵

A. The ICISS Report and the Development of “Hard R2P”

Heeding this call, the Canadian-sponsored International Commission on Intervention and State Sovereignty (ICISS) issued a

⁸³ See, e.g., Ryan Goodman, *Humanitarian Intervention and Pretexts for War*, 100 AM. J. INT'L L. 107, 108 n.7 (2006) (“In the past five years, more than 133 states (representing approximately 80 percent of the world’s population) have issued individual or joint statements rejecting the legalization of UHI. . . . The weight of academic opinion is also against it.”).

⁸⁴ See, e.g., Thomas M. Franck, *Sidelined in Kosovo? The United Nations’ Demise Has Been Exaggerated*, 78 FOREIGN AFF. 116, 118 (1999) (“Law gives those taking such illegal but necessary action several well-established defensive strategies. . . . If, in a particular instance, a general law inhibits doing justice, then it is up to each member of the community to decide whether to disobey that law.”); Reisman, *supra* note 77, at 862 (“The procedures for deciding and appraising the lawfulness of the Kosovo action were not those contemplated by the Charter. That is not good and, no matter how noble and urgent the outcome, it will not be good when it happens in the future. Yet, if the circumstances require, it should—it must—be done again!”). See also INDEP. INT’L COMM’N ON KOSOVO, *supra* note 54.

⁸⁵ KOFI A. ANNAN, U.N. SECRETARY-GENERAL, WE THE PEOPLES: THE ROLE OF THE UNITED NATIONS IN THE 21ST CENTURY (Apr. 2000), available at <http://www.un.org/millennium/sg/report/full.htm>.

report that would come to redefine the global discussion of humanitarian intervention: “The Responsibility to Protect,”⁸⁶ a fundamental reframing of the humanitarian intervention issue.⁸⁷

The tension between the competing values of sovereignty and human rights lies at the heart of the original Responsibility to Protect (“R2P”) construct. The report attempted to recast the discussion of humanitarian intervention to respect sovereignty while setting the defense of human rights as a core obligation of both individual states and the global community.⁸⁸ Accordingly, the report transformed the debate’s language from the “right” to intervene to the more comprehensive concept of a “responsibility” of all members of the international community to protect human rights.⁸⁹ As such, the R2P concept has become the *de facto* common language in the international community for discussions of international humanitarian intervention.

The report first emphasized a holistic approach to protecting civilians in humanitarian emergencies, highlighting three primary elements: the *responsibility to prevent*, focusing on root causes; the *responsibility to react*, focusing on responding to emergency situations; and the *responsibility to rebuild*, focusing on recovery and reconciliation following humanitarian emergencies.⁹⁰

The commission also addressed the legitimacy of humanitarian interventions, especially in cases of Security Council deadlock. It identified five criteria, based in the Christian just war perspective, to guide the Security Council in assessing the legitimacy of any R2P interventions: just cause, right intention, last resort, proportional means, and reasonable prospect of success.⁹¹ The commission supported the primacy of the Security Council in authorizing such use of force, noting

⁸⁶ See INT’L COMM’N ON INTERVENTION AND STATE SOVEREIGNTY [ICISS], THE RESPONSIBILITY TO PROTECT (Dec. 2001), available at <http://responsibilitytoprotect.org/ICISS%20Report.pdf>. The *ad hoc* commission was sponsored by the Canadian government and organized by Gareth Evans and Mahmoud Sahnoun. Though not a government-sponsored commission, its membership consisted of representatives of U.N. General Assembly members. It was among a number of other commissions created during that time to address the issue of the legality of humanitarian intervention. See Mohamed, *supra* note 18, at 1323.

⁸⁷ Gareth Evans et al., *Correspondence: Humanitarian Intervention and the Responsibility to Protect*, 37 INT’L SECURITY 199, 202 (2013).

⁸⁸ See Ved P. Nanda, *The Protection of Human Rights under International Law: Will the U.N. Human Rights Council and the Emerging New Norm “Responsibility to Protect” Make a Difference?*, 35 DENV. J. INT’L L. & POL’Y 353, 365 (2007).

⁸⁹ ICISS, *supra* note 86, ¶¶ 2.4, 2.7; see also Gareth Evans, *From Humanitarian Intervention to the Responsibility to Protect*, 24 WIS. INT’L L.J. 703, 708 (2006).

⁹⁰ ICISS, *supra* note 86, ¶¶ 3.1-5.31; Evans, *supra* note 89, at 709.

⁹¹ ICISS, *supra* note 86, at XII-XIII.

that “[t]he task is not to find alternatives to the Security Council . . . but to make the Security Council work better than it has.”⁹² As such, the commission advocated for Security Council members to refrain from vetoing “legitimate” humanitarian interventions where their vital interests were not at stake.⁹³

The commission identified a number of “just cause” conditions that could trigger such international action, stating:

To be warranted, there must be serious and irreparable harm occurring to human beings, or imminently likely to occur, of the following kind:

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

B. large scale ‘ethnic cleansing’, actual or apprehended, whether carried out by killing, forced expulsion, acts of terror or rape.⁹⁴

Importantly, however, in reviewing “right authority” for interventions, the commission looked for solutions to humanitarian crises that resulted in Security Council deadlock. The commission opened the door to legitimacy outside of the Security Council, reviewing several options for “unauthorized” international action. In cases where the threat of veto from one or two members paralyzed the Security Council, the commission offered alternative options for action. First, the report highlighted the role of the “Uniting for Peace” procedure, whereby the General Assembly can consider an issue in a special emergency session in order to spur the Security Council to act on issues of international peace.⁹⁵ Second, the report noted the possibility for action by regional organizations “subject to their seeking subsequent authorization from the Security Council,” somewhat similar to NATO’s intervention in Kosovo (albeit with explicit subsequent Council authorization).

Finally, the report found that in such cases of Security Council paralysis, concerned states could take “other means and forms of action” including “intervention by *ad hoc* coalitions or individual states,” in order to meet the “gravity and urgency” of the humanitarian crisis.⁹⁶ In such cases, the report noted, there may be “enduringly serious consequences for the stature and credibility of the U.N. itself.”⁹⁷

⁹² *Id.* at XII.

⁹³ *Id.* ¶ 6.21.

⁹⁴ *Id.* at XII.

⁹⁵ *Id.* at XIII.

⁹⁶ *Id.* ¶ 6.39.

⁹⁷ *Id.* ¶ 6.40.

Above all, while the ICISS report maintained that the Security Council had primary authority for humanitarian action, it left open the possibility that states might legitimately act in some form of unilateral intervention in cases of Security Council deadlock. Such an act ultimately would result in a weakened Security Council and U.N. system, but the report acknowledged that it might be necessary under extreme humanitarian emergencies. Ultimately, the report asserted, “[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.”⁹⁸ This remarkable passage identified what could be called the “hard R2P” standard of the R2P construct, leaving open the possibility of legitimacy for unilateral humanitarian intervention outside of the Security Council. As will be discussed below, however, the R2P principles that were eventually adopted by the U.N. demonstrated a much weaker standard for international action.

B. U.N. Adoption and the Development of “Soft R2P”

The R2P principles gained some notable support within the U.N. community soon after their publishing. However, following the U.S. invasion of Iraq in 2003, the international community evidenced deep distrust for any legal principles that opened the door to politically-based interventions by powerful states. In this context, many members of the international community again strongly embraced norms requiring Security Council authorization for the use of force. In 2004, a U.N. High Level Panel established by Secretary-General Annan endorsed the “emerging norm” of a collective international responsibility to protect, supporting intervention authorized solely by the Security Council in the face of human rights emergencies.⁹⁹ Since this High Level Panel report,

⁹⁸ *Id.* at XI.

⁹⁹ The Panel also added “serious violations of international humanitarian law, actual or imminently apprehended” to the list of criteria for action. The Panel was established to identify major threats facing the international community and identify new ideas and policies to confront these challenges, particularly in advance of the 2005 General Assembly World Summit. Notably, the Panel conducted its review in the context of the 2003 U.S. invasion of Iraq, which had a significant influence on the debate by creating deep skepticism of interventions in the international community. See U.N. Secretary-General, *A More Secure World: Our Shared Responsibility: Report of the High-Level Panel on Threats, Challenges and Change*, ¶¶ 203, 207(a), U.N. Doc. A/59/565 (Dec. 2, 2004); see also Nanda, *supra* note 88, at 370.

the extent and reach of R2P principles has become the subject of intense debate within the international legal system.¹⁰⁰

In 2005, the U.N. General Assembly unanimously adopted by consensus the Responsibility to Protect principle in the World Summit Outcome Document,¹⁰¹ which became the “authoritative standard” for the R2P construct.¹⁰² Despite this U.N.-wide adoption, the R2P framework that was recognized was significantly weaker than that originally proposed in the ICISS report. Notably, the World Summit Outcome Document devoted only two paragraphs to the R2P principles.¹⁰³ The R2P concept in the World Summit Outcome Document did not provide any standards for the use of force in humanitarian emergencies, and it omitted original R2P provisions regarding an international responsibility to intervene.¹⁰⁴ Instead, the World Summit Outcome Document only expressed states’ willingness—not “responsibility”—to take action if necessary to prevent such atrocities, stating:

[W]e 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 manifestly fail to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity.¹⁰⁵

Further restricting the principle, the World Summit Outcome Document notably limited the scope of responsibility under R2P to only four categories of specific international crimes: genocide, ethnic cleansing, war crimes, and crimes against humanity.¹⁰⁶

The World Summit Outcome Document did demonstrate a consensus among member states that each state has the responsibility to protect its people from massive human rights violations.¹⁰⁷ However, taken together, the restrictions marked a significant weakening of the R2P construct, omitting the role of the international community in

¹⁰⁰ Saira Mohamed, *Taking Stock of the Responsibility to Protect*, 48 *STAN. J. INT'L L.* 319, 326 (2012).

¹⁰¹ 2005 World Summit Outcome, G.A. Res. 60/1, U.N. Doc. A/RES/60/1 (Sept. 16, 2005) [hereinafter World Summit Outcome Document]. The R2P principle is only addressed in two paragraphs of the World Summit Outcome Document, paragraphs 138 and 139. *Id.* ¶¶ 138-39.

¹⁰² Evans et al., *supra* note 87, at 204.

¹⁰³ World Summit Outcome Document, *supra* note 101, ¶¶ 138-39.

¹⁰⁴ *Id.*; Nanda, *supra* note 88, at 372-73.

¹⁰⁵ World Summit Outcome Document, *supra* note 101, ¶ 139.

¹⁰⁶ *Id.* ¶¶ 138-39.

¹⁰⁷ See Nanda, *supra* note 88, at 373.

intervening to protect human rights and limiting the conditions under which the outside entities could act. The alterations were significant enough that some experts noted that the World Summit had not adopted R2P but “R2P-lite.”¹⁰⁸ This version of the R2P construct could also be termed “soft R2P,” or R2P that eschews any concept of unilateral humanitarian intervention and has had very little effect in changing current international law.

The Security Council has subsequently adopted the principles of “soft R2P” in a number of resolutions. In April 2006, the Security Council took steps toward recognizing these R2P principles in Resolution 1674, where it endorsed paragraphs 138 and 139 of the 2005 World Summit Outcome Document.¹⁰⁹ The Council later referred to the R2P principles in Resolution 1706 deploying peacekeepers to Sudan,¹¹⁰ Resolution 1769 establishing a U.N.-African Union peacekeeping force for Darfur,¹¹¹ and in Resolution 1973 authorizing intervention in Libya.¹¹²

In 2007, the Secretary General appointed a Special Advisor on the Responsibility to Protect to act jointly with the Special Advisor on the Prevention of Genocide.¹¹³ In 2009, the Secretary General issued the report *Implementing the Responsibility to Protect*, which reaffirmed the primary role of the U.N. Charter system and re-characterized the R2P approach in terms of “three pillars”: the responsibility of the state to protect its citizens’ human rights; the responsibility of the international community to support the state’s first pillar efforts; and the responsibility of the international community to respond in accordance with the U.N. Charter in a “timely and decisive” manner and to a state’s failure to protect its citizens.¹¹⁴ Following up on this report, the General Assembly adopted a resolution reaffirming the principles of the

¹⁰⁸ Thomas G. Weiss, *R2P after 9/11 and the World Summit*, 24 WIS. INT’L L.J. 741, 750-51 (2006); see also Mohamed, *supra* note 100, at 328 (“The responsibility to protect emerged from the World Summit significantly bruised”); Carsten Stahn, *Responsibility to Protect: Political Rhetoric or Emerging Legal Norm?*, 101 AM. J. INT’L L. 99, 101 (2007) (noting that the Outcome Document reveals “considerable doubt” as to what extent states intended to establish a legal norm of R2P).

¹⁰⁹ S.C. Res. 1674, ¶ 4, U.N. Doc. S/RES/1674 (Apr. 28, 2006).

¹¹⁰ S.C. Res. 1706, ¶ 12(a), U.N. Doc. S/RES/1706 (Aug. 31, 2006).

¹¹¹ S.C. Res. 1769, U.N. Doc. S/RES/1769 (July 31, 2007).

¹¹² S.C. Res. 1973, ¶¶ 4, 8, U.N. Doc. S/RES/1973 (Mar. 17, 2011).

¹¹³ Mehrdad Payandeh, *With Great Power Comes Great Responsibility? The Concept of the Responsibility to Protect Within the Process of International Lawmaking*, 35 YALE J. INT’L L. 469, 477 (2010) (Opponents of the R2P principles were later able to eliminate the “responsibility to protect” language from the appointment title).

¹¹⁴ U.N. Secretary-General, *Implementing the Responsibility to Protect*, U.N. Doc. A/63/677 (Jan. 12, 2009).

Responsibility to Protect as outlined in the World Summit Outcome Document.¹¹⁵

What has been the ultimate effect of R2P on international law? On the one hand, R2P has helped to further establish international norms that emphasize state responsibility in preventing atrocities and protecting civilians. Additionally, R2P has helped to highlight a growing norm of the responsibility of the international community to act using a holistic approach protect human rights.¹¹⁶

Despite these advances, however, the weakening of the R2P concept has resulted in little change to the legal framework on humanitarian intervention. None of the relevant U.N. documents on R2P make explicit or implicit claims for the legality of unilateral humanitarian intervention, and R2P has not changed current law regarding interventions lacking Security Council authorization.¹¹⁷ Critical language regarding the recognition of the “responsibility” of the international community was weakened,¹¹⁸ and states now express only their willingness to intervene in particular cases with U.N. approval, giving no recognition of a general duty—or even a right—to do so.¹¹⁹

Even the humanitarian intervention in Libya, often cited as a leading example of the influence of the R2P construct,¹²⁰ actually failed to reveal widespread acceptance of R2P principles regarding the international community’s responsibility to protect.¹²¹ R2P had seemed to gain further acceptance in the U.N. Security Council in the Security Council resolution for force in Libya, which sanctioned the use of “all

¹¹⁵ G.A. Res. 63/308, U.N. Doc. A/RES/63/308 (Oct. 7, 2009).

¹¹⁶ Evans et al., *supra* note 87, at 203.

¹¹⁷ Payandeh, *supra* note 113, at 487-88. See Evans, *supra* note 89, at 716 (“A General Assembly resolution is helpful in identifying relevant principles, but the Security Council is the institution that matters most when it comes to executive action.”). *But see* Chittharanjan F. Amerasinghe, *The Conundrum of Recourse to Force—To Protect Persons*, 3 INT’L ORG. L. REV. 7, 46-47 (2006); Alicia L. Bannon, *The Responsibility to Protect: The U.N. World Summit and the Question of Unilateralism*, 115 YALE L.J. 1157, 1162-63 (2005) (holding that R2P has significantly changed international law regarding humanitarian intervention).

¹¹⁸ Mohamed, *supra* note 100, at 328.

¹¹⁹ *Id.* at 330.

¹²⁰ See, e.g., Thomas G. Weiss, *RtoP Alive and Well after Libya*, 25 ETHICS & INT’L AFF. 287, 287-92 (2011); Paul D. Williams, *The Road to Humanitarian War in Libya*, 3 GLOBAL RESP. TO PROTECT 248, 248-59 (2011).

¹²¹ David Berman & Christopher Michaelsen, *Intervention in Libya: Another Nail in the Coffin for the Responsibility-to-Protect?*, 14 INT’L COMMUNITY L. REV. 337, 350-354 (2012); cf. Alex J. Bellamy & Paul D. Williams, *The New Politics of Protection? Côte d’Ivoire, Libya and the Responsibility to Protect*, 87 INT’L AFF. 825 (2011) (“[W]hile the Council’s response to the crises . . . might reflect a new politics of protection, it is clearly much easier to agree on a principle that people should be protected from serious crimes than it is to agree on what to do in specific circumstances.”). *Id.* at 826.

necessary measures” to protect civilians and cited Libya’s responsibility to protect its citizens.¹²² However, the “responsibility to protect” language included in Resolution 1973 addressed Libya’s responsibility to protect its citizens in the *preamble*, not in the operative portions of the resolution, and nowhere did the resolution address the “responsibility” of the international community to intervene militarily.¹²³

The end result is that the R2P framework remains muddled and unclear within international law. Most states generally accept a norm of a state’s duty to protect its citizens. Fewer states, however, accept that foreign entities may forcibly intervene to end mass atrocities, especially without Security Council authorization, and still fewer states accept that foreign entities have a positive duty to act in such humanitarian crises.¹²⁴

The R2P framework has been notably less effective at protecting human rights than its founders had envisioned. Opposition in the international community has significantly weakened the principles of R2P from the “hard R2P” envisioned by the ICISS, which recognized the possibility of international humanitarian action outside of a paralyzed Security Council. “Soft R2P” has become the international standard, and as a result, R2P has had little effect on international law of humanitarian intervention. As the next section will show, this opposition to R2P has come from a broad range of perspectives.

IV. OPPOSITION TO UNILATERAL HUMANITARIAN INTERVENTION UNDER “HARD R2P”

Policymakers, scholars and other analysts, explicitly or implicitly, adopt particular understandings of international behavior rooted in different perspectives of international relations theory. Critics of unilateral humanitarian intervention under the original R2P construct base their objections in three principal schools of international relations

¹²² S.C. Res. 1973, *supra* note 112, ¶¶ 4, 8; *see also* Mohamed, *supra* note 100, at 331.

¹²³ *See* S.C. Res. 1973, *supra* note 112; Berman & Michaelsen, *supra* note 121, at 351; *see also* Mohamed, *supra* note 100, at 331.

¹²⁴ *See* Stahn, *supra* note 108, at 118-20.

theory: realism, institutionalism, and cosmopolitanism.¹²⁵ International relations theory thus provides the foundations for these varying critiques of R2P.

International relations theory reflects a spectrum of beliefs concerning actors' behavior in the international system.¹²⁶ International relations theory in and of itself is explanatory, not prescriptive, in nature, examining the origination, structuring, and influence of international institutions and international law.¹²⁷ This task is related, but distinct, from that of most international law scholarship, which seeks to understand the content of the law as well as proscribe its normative goals.¹²⁸ Analysts operating from a particular theoretical foundation in international relations will embrace assumptions from that framework and emphasize particular aspects of the international system.¹²⁹ This analytical framework consequently determines one's normative framework. For example, analysts who thus adopt a realist theoretical understanding of the international system will employ a realist normative framework, emphasizing rules and policies that recognize the preeminence of power and security in interstate interactions. International relations theory thus provides the theoretical foundation upon which legal and policy analysis rests.

This section will examine the realist, institutionalist, and cosmopolitan perspectives of international relations, reviewing each

¹²⁵ In recent decades, three paradigms have become predominant in international relations theory: realism, liberalism (including institutionalism), and constructivism. See Stephen M. Walt, *International Relations: One World, Many Theories*, FOREIGN POL'Y, Spring 1998, at 38. Other commentators also include "world system/Marxist" theories, which have fallen out of academic favor since the Cold War. See Ole R. Holsti, *Theories of International Relations and Foreign Policy: Realism and Its Challengers*, in CONTROVERSIES IN INTERNATIONAL RELATIONS THEORY: REALISM AND THE NEOLIBERAL CHALLENGE 35, 46 (Charles W. Kegley, Jr. ed., 1995).

¹²⁶ International relations and international law are both heterogeneous disciplines with a great variety of approaches, and categorization of approaches is not always clear-cut. This analysis has necessarily omitted some approaches for the sake of analytical clarity. See Robert J. Beck, *International Law and International Relations: The Prospects for Interdisciplinary Collaboration*, in INTERNATIONAL RULES: APPROACHES FROM INTERNATIONAL LAW AND INTERNATIONAL RELATIONS 3, 4-8 (Robert J. Beck et al. eds., 1996).

¹²⁷ See *id.*

¹²⁸ *Id.*

¹²⁹ Theory is a lens by which facts are selected and interpreted for explanation and prediction of behavior in the international system. Kenneth N. Waltz, *Realist Thought and Neorealist Theory*, in CONTROVERSIES IN INTERNATIONAL RELATIONS THEORY: REALISM AND THE NEOLIBERAL CHALLENGE 68 (Charles W. Kegley, Jr. ed., 1995). International relations scholars break down their analysis to three "images" or levels (the *nature of humanity*, the *state*, and *systemic factors*) in order to describe and predict the interactions of the international community. See generally KENNETH N. WALTZ, *MAN, THE STATE AND WAR: A THEORETICAL ANALYSIS* (Columbia Univ. Press 1959).

perspective’s theoretical assumptions about the nature of the international system and how this understanding leads to a normative framework that produces objections to R2P intervention.

A. Realism

Realism is the most venerable and persistent model of international relations, and it forms the theoretical foundation for much opposition to the R2P intervention framework.¹³⁰ While there is variation within the paradigm, realists today generally share key core premises about the international system.¹³¹ Nation-states are viewed as the central actors in the international system, with international and subnational actors holding secondary importance.¹³² Realists also assume that state behavior is rational and based on the fundamental concern for state security and survival.¹³³ The lack of any global governing authority creates a “security dilemma” by which states must rely on themselves for security in the face of the relative power gains of their neighbors, often creating a self-reinforcing spiral of tension and suspicion.¹³⁴

Rejecting the view that non-security interests drive state policy, realism is skeptical of force for ostensibly humanitarian purposes,

¹³⁰ Realism has been the dominant model for international relations since Thucydides’ *Peloponnesian War*, informing much of the analysis of the contemporary era. A number of early scholars from a range of disciplines helped to develop *classical* realism, including historian E.H. Carr, political theorist Hans J. Morgenthau, theologian Reinhold Niebuhr, and diplomat George F. Kennan, architect of the U.S. Cold War containment strategy. *See generally* Holsti, *supra* note 125, at 36-65. Stanley Hoffman has noted that “[w]e have all been shaped by the dominant school of the past half century, Realism—whether we embraced it, amended it, or resisted it.” Stanley Hoffman, *Sovereignty and the Ethics of Intervention*, in *THE ETHICS AND POLITICS OF HUMANITARIAN INTERVENTION* 12, 16 (Stanley Hoffman ed., 1996).

¹³¹ *See* Holsti, *supra* note 125, at 36-37; *see also* Peter D. Feaver et al., *Brother Can You Spare a Paradigm? (Or Was Anybody Ever a Realist?)*, 25 *INT’L SECURITY* 165, 174-75 (2000).

¹³² KENNETH N. WALTZ, *THEORY OF INTERNATIONAL POLITICS* 93-94 (2010).

¹³³ Neorealism, or “structural realism,” the prevailing strand of international relations realism today, focuses on structural or systemic approaches to determining the causes of war in international politics. Unlike classical realism, neorealism posits that states ultimately seek security, not power and the very nature of the international system itself is the ultimate source of conflict in international interactions. *See generally id.*; *see also* Holsti, *supra* note 125, at 39-41.

¹³⁴ *See* John H. Herz, *Idealist Internationalism and the Security Dilemma*, 2 *WORLD POL.* 157, 157 (1950).

focusing instead on the geopolitical interests behind intervention.¹³⁵ As such, realists note that R2P can be used as a veil justifying state interventionism,¹³⁶ and they expect that an expanded norm of humanitarian intervention would encourage states to use such interventions for their own power-seeking national interests.¹³⁷

Realists also hold that R2P lacks a clear standard in specifying a threshold of atrocities necessary to justify the use of force, allowing states to claim humanitarian purposes in ambiguous cases.¹³⁸ Even the conditions for action outlined in the current U.N.-adopted R2P framework—genocide, ethnic cleansing, war crimes and crimes against humanity—are ambiguous in defining specific levels of violence and require a subjective measurement of perpetrators' intent.¹³⁹

Realism forms the basis for much state opposition to unilateral humanitarian intervention under the original R2P construct. Weaker states understandably fear the abuse of this legal principle to legitimize aggression, especially from more powerful states. Recent international practice seems to confirm realists' fear that R2P can be used by powerful states to justify interventionist policies: the U.S. and United Kingdom both used R2P principles to justify the invasion of Iraq,¹⁴⁰ and Russian Foreign Minister Sergei Lavrov employed the R2P concept to promote Russia's 2008 intervention in Georgia.¹⁴¹ As a result, weaker

¹³⁵ See, e.g., Martha Finnemore, *Constructing Norms of Humanitarian Intervention*, in *THE CULTURE OF NATIONAL SECURITY: NORMS AND IDENTITY IN WORLD POLITICS* 153, 156 (Peter J. Katzenstein ed., 1996) ("Realists would expect to see some geostrategic or political advantage to be gained by intervening states. . . . [but it] is difficult to identify the advantage for the intervener in most post-1989 cases."); Daniel W. Drezner, *Why Obama is Arming Syria's Rebels: It's the Realism, Stupid*, *FOREIGN POL'Y* (June 14, 2013, 7:55 AM), http://drezner.foreignpolicy.com/post/2013/06/14/why_obama_is_arming_syrias_rebels_its_the_realism_stupid.

¹³⁶ Evans et al., *supra* note 87, at 207.

¹³⁷ See, e.g., Catherine Lu, *Humanitarian Intervention: Moral Ambition and Political Constraints*, 62 *INT'L J.* 942, 945 (2006); Jeremy Moses, *Sovereignty as Irresponsibility? A Realist Critique of the Responsibility to Protect*, 39 *REV. INT'L STUD.* 113 (2013).

¹³⁸ See Evans et al., *supra* note 87; see also Robert A. Pape, *When Duty Calls: A Pragmatic Standard of Humanitarian Intervention*, 37 *INT'L SECURITY* 41, 43 (2012) (Pape has created an alternative proposal to clarify the standards under which humanitarian interventions should be taken, with three prerequisites: 1) an ongoing, government-sponsored mass homicide campaign; 2) a viable plan for international intervention with estimates of low casualties for intervening forces; and 3) a workable strategy for lasting security for the threatened population).

¹³⁹ World Summit Outcome Document, *supra* note 101, ¶¶ 138-39.

¹⁴⁰ Evans, *supra* note 89, at 717.

¹⁴¹ Sergey V. Lavrov, Minister of Foreign Affairs, Russian Fed'n, Remarks at the Council of Foreign Relations: A Conversation with Sergey Lavrov (Sept. 24, 2008), available at <http://www.cfr.org/russian-federation/conversation-sergey-lavrov/p17384> ("So we exercised the human security maxim, we exercised the responsibility to protect, and did so in strict compliance with Article 51 of the charter.").

states such as the “Non-Aligned Movement” have helped to form the backbone of opposition to a doctrine of unilateral humanitarian intervention.¹⁴² Recent debates in the U.N. have borne out this realist opposition to R2P-based intervention. In the debate over humanitarian intervention and R2P, many states demonstrated concern for Western neo-colonialism.¹⁴³ More recently, Russia and China, backed by Brazil, India, and South Africa, blocked assertive U.S. and European action in Syria for fear of abuse by Western powers,¹⁴⁴ especially in light of NATO’s perceived adventurism in Libya.

Normatively, realists oppose interventions that are not focused on ensuring national security or maintaining state power vis-à-vis other powers.¹⁴⁵ Realists thus object to humanitarian interventions under R2P for employing military force for non-vital security interests. They caution that humanitarian intervention requires the significant

¹⁴² See Alex J. Bellamy, *Whither the Responsibility to Protect? Humanitarian Intervention and the 2005 World Summit*, 20 ETHICS & INT’L AFF. 143, 152-53 (2006); Carlo Focarelli, *The Responsibility to Protect Doctrine and Humanitarian Intervention: Too Many Ambiguities for a Working Doctrine*, 13 J. CONFLICT & SECURITY L. 191, 202 (2008).

¹⁴³ See, e.g., Bellamy, *supra* note 142, at 147; Ian Hall, *Tilting at Windmills? The Indian Debate over the Responsibility to Protect after UNSC Resolution 1973*, 5 GLOBAL RESP. PROTECT 84, 99-100 (2013).

¹⁴⁴ Russia and China both vetoed October 2011 and February 2012 draft U.N. Resolutions that threatened the use of “other options” or sanctions against the Syrian regime. Colum Lynch, *Russia, China Veto Syria Resolution at the United Nations*, WASH. POST (Oct. 4, 2011), http://www.washingtonpost.com/world/national-security/russia-china-block-syria-resolution-at-un/2011/10/04/gIQArcFBML_story.html; see also Yousuf Basil et al., *Russia, China Veto U.N. Action on Syria; Opposition Group Calls for Strike*, CNN (Feb. 4, 2012, 9:36 PM), <http://www.cnn.com/2012/02/04/world/meast/syria-unrest/index.html>. Noting its concern with Western interventionism, Russian U.N. envoy Vitaly Churkin stated: “The situation in Syria cannot be considered in the council apart from the Libya experience.” Ariel Zirulnick, “A cheap ruse”: *US Slams Russia and China for Vetoing U.N. Resolution on Syria*, CHRISTIAN SCI. MONITOR (Oct. 5, 2011, 8:53 AM), <http://www.csmonitor.com/World/terrorism-security/2011/10/05/A-cheap-ruse-US-slams-Russia-and-China-for-vetoing-UN-resolution-on-Syria>; see also Mohamed, *supra* note 100, at 335 (“Simply as a matter of descriptive accuracy, it is important to recognize that the justifications put forward by the United States for intervening in Libya demonstrate a preoccupation with national interests”).

¹⁴⁵ See, e.g., Sebastian Rosato & John Schuessler, *A Realist Foreign Policy for the United States*, 9 PERSP. ON POL. 803, 804 (2011).

investment of military power and inevitably involves broader costs that can affect a state's national security interests.¹⁴⁶

Realists do, however, support interventions that promote a state's national security interests, such as interventions to combat international and regional instability, prevent state failures, end refugee flows, counter terrorism and improve relationships with regional allies.¹⁴⁷ R2P interventions that increase state security would thus find more support. Smaller states may support clear humanitarian intervention rules that present little opportunity for abuse or adventurism and that facilitate the countering of real threats to international peace and stability. An R2P framework that limits the possibility for abuse and incorporates state and international security objectives into its principles would thus find greater support among realists and greater support among states throughout the international system.

B. Institutionalism

Institutionalism, also known as institutional liberalism, forms the theoretical foundation for other critics of humanitarian intervention under R2P. Institutionalism is based in the international relations theory of classical liberalism, which contrasts with realism by focusing on

¹⁴⁶ Stephen Zunes, *Despite Horrific Repression, the U.S. Should Stay Out of Syria*, FOREIGN POL'Y FOCUS (May 15, 2013), http://fpif.org/despite_horrific_repression_the_us_should_stay_out_of_syria/; see also James Carroll, *No Military Intervention in Syria*, BOSTON GLOBE (June 10, 2013), <http://www.bostonglobe.com/opinion/2013/06/09/calls-for-military-action-syria-ignore-american-inability-help/nlhd3X6CAyA4ehtF0LMHdL/story.html>. In Syria, realists argue that despite the terrible humanitarian costs, the lack of strategic interests and latent instability in the crisis means the U.S. should not intervene. See PBS Newshour: As Assad Makes Gains, Will New U.S. Strategy for Syria Change the Dynamics?, Interview by Jeffrey Brown with Zbigniew Brzezinski, fmr. U.S. Nat'l Sec'y Adviser, and Vali Nasr, Dean at the Johns Hopkins Sch. of Adv. Int'l Stud. (PBS television broadcast June 14, 2013) (transcript available at http://www.pbs.org/newshour/bb/world/jan-june13/syria2_06-14.html).

¹⁴⁷ Michael Doran & Max Boot, *5 Reasons to Intervene in Syria Now*, N.Y. TIMES (Sept. 27, 2012), http://www.nytimes.com/2012/09/27/opinion/5-reasons-to-intervene-in-syria-now.html?_r=0&pagewanted=print; see also Jackson Diehl, *Why the U.S. Should Intervene in Syria*, WASH. POST (Mar. 18, 2012), http://www.washingtonpost.com/opinions/why-the-us-should-intervene-in-syria/2012/03/15/gIQAGbpSLS_story.html (quoting Sen. Joseph Lieberman: "But if we don't, we are going to find out eventually not only that doing nothing was wrong but that we missed a strategic opportunity.").

broader aspects of the international environment.¹⁴⁸ Institutionalism shares realism’s recognition of the role of state interest in world politics, but it rejects realism’s emphasis on security and power as the primary driver of state behavior.¹⁴⁹ The theory focuses on the interaction of states and international institutions, and it is the theoretical foundation for much international legal scholarship.

Institutionalism holds that rules and institutions can structure international politics and that international law can be a vital force in international relations.¹⁵⁰ Institutions serve as functionalist organizations which states use to solve collective action problems, set mutual expectations about legitimate behavior, create regime enforcement mechanisms and ultimately produce joint gains for the institution’s parties.¹⁵¹ Institutionalists hold that international institutions can suppress realist security dilemmas and facilitate cooperation among states.¹⁵² Institutional analyst thus prioritize the strengthening of international law and institutions as a means of securing peace and stability in the international system.

Not surprisingly, many legal scholars, including legal positivists, embrace the institutionalist perspective. Legal positivists share the philosophical foundations of institutionalism, focusing on the textual rules of the legal regime and emphasizing strong international legal

¹⁴⁸ Institutionalism is also known as “neoliberal institutionalism,” and it is one of the most significant variants of classical liberal theory. There are many variations of liberal theory, including economic liberalism, social liberalism, republican (regime) liberalism, and institutional liberalism, but all challenge realism’s perceived overemphasis on war and the nation-state in international relations. Liberal theories encompass a varied number of explanations focusing on different aspects of the international system. A good overview of the liberal theory variants can be found in Andrew Moravcsik, *Taking Preferences Seriously: A Liberal Theory of International Politics*, 51 INT’L ORG. 513, 513 (1997); see also Holsti, *supra* note 125, at 43.

¹⁴⁹ On institutionalism, see generally ROBERT O. KEOHANE, *AFTER HEGEMONY: COOPERATION AND DISCORD IN THE WORLD POLITICAL ECONOMY* 7-9 (Princeton Univ. Press 1984); see also ARTHUR A. STEIN, *WHY NATIONS COOPERATE: CIRCUMSTANCE AND CHOICE IN INTERNATIONAL RELATIONS* (Cornell Univ. Press 1990); Anne-Marie Slaughter et al., *International Law and International Relations Theory: A New Generation of Interdisciplinary Scholarship*, 92 AM. J. INT’L L. 367 (1998).

¹⁵⁰ Robert O. Keohane, *International Relations and International Law: Two Optics*, 38 HARV. INT’L L.J. 487, 487-88 (1997); see also Burley, *supra* note 20, at 220-21.

¹⁵¹ See generally KEOHANE, *supra* note 149; see also Robert O. Keohane, *International Institutions: Two Approaches*, 32 INT’L STUD. Q. 379 (1988).

¹⁵² See generally KEOHANE, *supra* note 149; see also Keohane, *International Institutions: Two Approaches*, *supra* note 151.

institutions to facilitate peace.¹⁵³ Central for institutionalists is the nature of the rules of the regime: clear and objective rules help to strengthen cooperation and facilitate peaceful relations between states.¹⁵⁴ Thomas Franck's institutionalist legitimacy model emphasizes that a rule's "determinacy" (clarity) and "coherence" (objectivity) influence compliance with international law: rules that are perceived to be clearer are seen as more authoritative and will achieve greater compliance.¹⁵⁵ Similarly, other studies have found that rule ambiguity is a major cause of noncompliance with international legal agreements.¹⁵⁶

As the debate over the Kosovo intervention made clear, legal positivist scholars within the institutionalist perspective also prioritize the formal, codified nature of international law on the use of force, which facilitates stability by specifying the rules of interaction.¹⁵⁷ Critics in the institutionalist perspective find that unilateral humanitarian intervention can be used for self-serving purposes by powerful states at the expense of weaker states in the international

¹⁵³ See William J. Aceves, *Institutionalist Theory and International Legal Scholarship*, 12 AM. U. INT'L L. REV. 227 (1997); Burley, *supra* note 20. Not all legal theorists adopt a positivist-institutionalist perspective, however; other theorists recognize a constructivist and culture-based foundation to compliance with international law. See, e.g., Jutta Brunnee & Stephen J. Toope, *International Law and Constructivism: Elements of an Interactional Theory of International Law*, 39 COLUM. J. TRANSNAT'L L. 19 (2000); see also Keohane, *supra* note 150, at 496 ("[C]onstructivist lawyers and political scientists have made a strong case that the roles that representatives of states assume, and even their conceptions of self-interest, depend significantly on the rules and practices of international institutions.").

¹⁵⁴ See generally KEOHANE, *supra* note 149.

¹⁵⁵ THOMAS M. FRANCK, *FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS* 30 (1995). Franck is often categorized in the constructivist perspective, but his emphasis on the necessity of prioritizing international law similarly has roots in institutionalist thought. See also Jules Lobel & Michael Ratner, *Bypassing the Security Council: Ambiguous Authorizations to Use Force, Cease-Fires and the Iraqi Inspection Regime*, 93 AM. J. INT'L L. 124, 125 (1999) ("To ensure that UN-authorized uses of force comport with [U.N. Charter] values . . . authorizations should clearly articulate and limit the objectives for which force may be employed, and ambiguous authorizations should be narrowly construed").

¹⁵⁶ See ABRAM CHAYES & ANTONIA HANDLER CHAYES, *THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS* (1995) (arguing that ambiguity in international legal agreements is a major cause of noncompliance).

¹⁵⁷ This institutionalist understanding has led U.S. lawyers in the Obama administration to oppose strong involvement or intervention in the Syria crisis due to the lack of Security Council authorization and the potential for violation of international law. See Entous, *supra* note 14; see also Brooks, *supra* note 14.

system.¹⁵⁸ Such interventions destabilize the international community, violate the ‘rules of the game’ and can have a corrosive effect on the international legal regime by undermining the authority of the U.N. and other international organizations.¹⁵⁹ Any humanitarian intervention not conducted with Security Council authorization is thus illegal and inimical to international peace and stability.

Institutionalist critiques of R2P echo this concern; the indeterminacy of R2P’s third pillar on international involvement has been criticized as too ambiguous, allowing for abuse by powerful states.¹⁶⁰ The ICISS report outlined standards for intervention that consisted of “large scale loss of life” by deliberate state action or neglect, or “large scale ethnic cleansing.”¹⁶¹ Both conditions can be problematic in institutionalist analysis, requiring subjective and quantitatively-based judgments of what constitutes “large scale” and deliberate action or neglect. Action-triggering categories in the current U.N.-adopted R2P framework—genocide, ethnic cleansing, war crimes and crimes against humanity—likewise are open to subjective definition and debate over the triggering of such action. Critics argue that this version of the R2P construct likewise embodies unclear, imprecise and subjective standards to justify intervention and the level of atrocity necessary to trigger action.¹⁶² These critics have noted that assessments of factual evidence are never politically neutral and that an emphasis on factual determination for these R2P triggering conditions gives powerful states an opportunity to influence others by bringing financial,

¹⁵⁸ SCHACHTER, *supra* note 50, at 144 (“The reluctance of governments to legitimize foreign invasion in the interest of humanitarianism is understandable in light of past abuses by powerful States. States strong enough to intervene and sufficiently interested in doing so tend to have political motives.”); *see also* Stanley Hoffmann, *The Problem of Intervention*, in *INTERVENTION IN WORLD POLITICS* 7, 24 (Hedley Bull ed., Oxford Univ. Press 1984) (“[T]here seems to be agreement . . . [that] humanitarian intervention is deemed legitimate: . . . The problem with this argument is that in the real world things are more ambiguous; it is hard to know whether an intervention which starts as a humanitarian move does not later become self-serving.”).

¹⁵⁹ *See* Mohamed, *supra* note 18, at 1279; *see also* Benjamin A. Valentino, *The True Costs of Humanitarian Intervention: The Hard Truth about a Noble Notion*, 90 *FOREIGN AFF.* 60, 66 (2011).

¹⁶⁰ *See* Alex J. Bellamy, *The Responsibility to Protect—Five Years On*, 24 *ETHICS & INT’L AFF.* 143, 161 (2010).

¹⁶¹ ICISS, *supra* note 86, ¶ 4.19.

¹⁶² Pape, *supra* note 138, at 51.

military, and political pressure to bear.¹⁶³ As a result, such categorizations leave open the potential for abuse and aggression by powerful states.

Institutionalists argue that these ambiguous standards lead to selectivity in the application of the R2P norm.¹⁶⁴ Such critics argue that the R2P framework was abused when the Security Council authorized force in Libya before pursuing negotiations and other peaceful options,¹⁶⁵ while atrocities in Syria and elsewhere went ignored.¹⁶⁶ Illustrative of this suspicion of the ambiguity in R2P's standards for action, some states have sought to further limit the principles of R2P. In 2011, Brazil introduced a "Responsibility while Protecting" (RWP) legal framework, which would limit the criteria authorizing humanitarian intervention and require greater accountability and consultation with the U.N. Security Council.¹⁶⁷

Institutionalism thus demonstrates preferences for clear and objective rules that specify mutual expectations of legitimacy in the international system. For this reason, institutionalists are more likely to support R2P rules of humanitarian intervention that are clear, precise and objective, and limit potential for *ad hoc* interventions that destabilize international law.

¹⁶³ See Bellamy, *supra* note 160, at 162-66; cf. Samantha Power, *Bystanders to Genocide*, THE ATLANTIC (Sept. 1, 2001), <http://www.theatlantic.com/magazine/archive/2001/09/bystanders-to-genocide/304571/>. ("[N]ongovernmental groups had already begun to call on the Administration to use the term 'genocide,' causing diplomats and lawyers at the State Department to begin debating the word's applicability soon thereafter. In order not to appreciate that genocide . . . was under way, U.S. officials had to ignore public reports and internal intelligence and debate."). See also Paul D. Williams & Alex J. Bellamy, *The Responsibility To Protect and the Crisis in Darfur*, 36 SECURITY DIALOGUE 27, 29 (2005) (noting that lack of political will or strategic interest lead Western states to abstain from intervening to end mass atrocities in Darfur).

¹⁶⁴ See Rodger Shanahan, *R2P: Seeking Perfection in an Imperfect World*, in THE RESPONSIBILITY TO PROTECT: CHALLENGES AND OPPORTUNITIES IN LIGHT OF THE LIBYAN INTERVENTION 26, 26 (Alex Stark ed., 2011), available at <http://www.e-ir.info/wp-content/uploads/R2P.pdf>.

¹⁶⁵ Mary Ellen O'Connell, *How to Lose a Revolution*, in THE RESPONSIBILITY TO PROTECT: CHALLENGES AND OPPORTUNITIES IN LIGHT OF THE LIBYAN INTERVENTION 15, 16 (Alex Stark ed., 2011), available at <http://www.e-ir.info/wp-content/uploads/R2P.pdf> (noting that force was authorized before negotiations or sanctions were really attempted).

¹⁶⁶ Conversely, institutionalists find that the indeterminacy of the requirements for action under R2P also weakens its compliance-pull and reduces the overall effectiveness of the framework. Such scholars argue that outside of the Libya intervention, R2P has had little success in mobilizing a timely and decisive response from the international community, largely due to the indeterminacy of the framework and conflicting understandings by different states of what it requires. See Bellamy, *supra* note 160, at 165-66.

¹⁶⁷ U.N. Doc. A/66/551-S/2011/701 (Nov. 11, 2011).

C. Cosmopolitanism

Analysts in the cosmopolitan perspective are generally more supportive of unilateral humanitarian intervention under R2P than either realists or institutionalists. Cosmopolitanism is based in a fundamental belief in universal human rights for all individuals, and cosmopolitan scholars advocate a vigorous defense of human rights in the international community.¹⁶⁸

Cosmopolitanism is rooted in a constructivist understanding of international relations, which emphasizes the role of ideas, norms and culture in shaping political behavior.¹⁶⁹ Under constructivism, norms are understood to be the collective expectations for appropriate behavior that can determine an actor's preferences and actions.¹⁷⁰

¹⁶⁸ Cosmopolitans share many similar philosophical beliefs with liberal internationalists, particularly in an emphasis on protection of human rights. See Oliver P. Richmond, *Emancipatory Forms of Human Security and Liberal Peacebuilding*, 62 INT'L J. 459, 459-60 (2006) (holding that both liberal and "emancipatory" perspectives call for protection of human security and peacekeeping during humanitarian crises); see also STEPHEN A. GARRETT, DOING GOOD AND DOING WELL: AN EXAMINATION OF HUMANITARIAN INTERVENTION 23 (1999) ("Perhaps the most basic of these concerns the whole issue of one political community's responsibility for the fate and welfare of other such communities."). Liberal internationalists voiced strong support for intervention following the successful war in Libya. See, e.g., Lionel Beehner, *Why We Need to Intervene in Syria*, USA TODAY (Apr. 28, 2013, 3:48 PM), <http://www.usatoday.com/story/opinion/2013/04/25/we-need-to-intervene-in-syria-column/2113433/>; Roger Cohen, *Score One for Interventionism*, N.Y. TIMES (Aug. 29, 2011), <http://www.nytimes.com/2011/08/30/opinion/30iht-edcohen30.html>; Geoff Dyer, *Obama, Syria and the Return of the Liberal Hawks*, FIN. TIMES (June 5, 2013, 9:23 PM), <http://blogs.ft.com/the-world/2013/06/obama-syria-and-the-return-of-the-liberal-hawks/>. However, the two philosophies differ in the role of the nation state and the individual: cosmopolitanism privileges the subordination of the state to the liberal value of individual freedom, whereas liberal internationalists recognize the role of the state in the international system but wrestle with the proper balance of individual freedom and state sovereignty. See MARTIN GRIFFITHS & TERRY O'CALLAGHAN, INTERNATIONAL RELATIONS: THE KEY CONCEPTS 182 (2002); see also Garrett Wallace Brown, *Moving From Cosmopolitan Legal Theory to Legal Practice: Models of Cosmopolitan Law*, in THE COSMOPOLITANISM READER 248, 256 (Garrett Wallace Brown & David Held eds., 2010) ("Therefore, unlike liberal internationalism, cosmopolitans argue for a system of global justice that is more robust than a simple state-centric commitment to international law.").

¹⁶⁹ See generally Alexander Wendt, *Collective Identity Formation and the International State*, 88 AM. POL. SCI. REV. 384, 388-90 (1994); Alexander Wendt, *Anarchy Is What States Make of It: The Social Construction of Power Politics*, 46 INT'L ORG. 391, 394 (1992). However, constructivism is an "approach, not a theory. And if it is a theory, it is a theory of process, not substantive outcome." Ted Hopf, *The Promise of Constructivism in International Relations Theory*, 23 INT'L SECURITY 171, 196 (1998); see also Walt, *supra* note 125, at 40-41.

¹⁷⁰ See Peter J. Katzenstein, *Introduction: Alternative Perspectives on National Security*, in THE CULTURE OF NATIONAL SECURITY: NORMS AND IDENTITY IN WORLD POLITICS 1 (Peter J. Katzenstein ed., Columbia Univ. Press 1996); Dale C. Copeland, *The Constructivist Challenge to Structural Realism: A Review Essay*, 25 INT'L SECURITY 187 (2000); see generally Wendt, *Collective Identity Formation and the International State*, *supra* note 169.

Constructivism recognizes that political actors can broaden their conception of who in the international system is deserving of basic human rights and protections, allowing for humanitarian impulses for citizens in other states.¹⁷¹ Constructivism thus demonstrates how norms and identities can lead to support for humanitarian intervention.¹⁷²

Cosmopolitanism embraces the view that all humans are part of the same global community and share inherent values of humanity, and it focuses on a global agenda of human dignity, human rights, political justice and the protection of civilians in war.¹⁷³ Many analysts based in the cosmopolitan understanding emphasize the role of human rights and the need for force to protect vulnerable civilian populations.¹⁷⁴ In the

¹⁷¹ ALEXANDER WENDT, *SOCIAL THEORY OF INTERNATIONAL POLITICS* 273, 305 (1999). International interests are now part of the national interest, not just interests that states have to advance in order to advance their separate national interest; “friendship is a preference over an outcome, not just a preference over a strategy.” *Id.* Importantly, constructivism finds that the growth of global humanitarian norms generally accounts for the growing acceptance of humanitarian intervention in international politics. As humanitarian norms become more prevalent within domestic actors in the state, states adopt these humanitarian norms, which in turn transform state preferences to use force to protect foreign citizens. *See* Finnemore, *supra* note 135; FINNEMORE, *supra* note 40, at 19-20.

¹⁷² FINNEMORE, *supra* note 40, at 15; *see also* Thomas M. Franck, *Are Human Rights Universal?*, 80 *FOREIGN AFF.* 191, 200 (2001) (“Although these [human rights developments] occurred first in the West, they were caused not by some inherent cultural factor but by changes occurring, at different rates, everywhere: universal education, industrialization, urbanization. . . . It is these trends, and not some historical or social determinant, that—almost as a byproduct—generated the move to global human rights.”).

¹⁷³ Christian Reus-Smit, *Imagining Society: Constructivism and the English School*, 4 *BRIT. J. POL. & INT'L REL.* 487, 499 (2002). Social liberalism and cosmopolitanism share many of the same philosophical foundations. The key difference between the two, however, is that “social liberalism privileges domestic-level societies by according them an independent ethical status, whereas cosmopolitan liberalism takes the well-being of individuals as fundamental and interprets the values of society as derivative.” Charles R. Beitz, *Social and Cosmopolitan Liberalism*, 75 *INT'L AFF.* 515, 520 (1999); *see also* JOHN TOMLINSON, *GLOBALIZATION AND CULTURE* 185 (Univ. of Chicago Press 1999); N.J. Rengger, *On Cosmopolitanism, Constructivism and International Society: Some Reflections on British International Studies at the Fin de siècle*, 3 *ZEITSCHRIFT FÜR INTERNATIONALE BEZIEHUNGEN* 183, 193 (1996) (reviewing the shared theoretical foundations of constructivist and cosmopolitan scholars). On cosmopolitanism, *see generally* KWAME ANTHONY APPIAH, *COSMOPOLITANISM: ETHICS IN A WORLD OF STRANGERS* (2006); DANIELE ARCHIBUGI, *THE GLOBAL COMMONWEALTH OF CITIZENS: TOWARD COSMOPOLITAN DEMOCRACY* (Princeton Univ. Press 2008) (proposing cosmopolitan democracy as an approach to global politics); *see also* EMANUEL ADLER, *COMMUNITARIAN INTERNATIONAL RELATIONS: THE EPISTEMIC FOUNDATIONS OF INTERNATIONAL RELATIONS* (2005) (exploring the role of communities of practice and social mechanisms in improving human societies); SIMON CANEY, *JUSTICE BEYOND BORDERS: A GLOBAL POLITICAL THEORY* 267 (Oxford Univ. Press 2006).

¹⁷⁴ Not all cosmopolitans support the use of force in humanitarian interventions to protect human rights. *See infra* note 182.

Syria case, human rights activists have used cosmopolitan logic in advocating for state action in ending massive human rights abuses.¹⁷⁵

Many legal scholars root their legal analysis in a cosmopolitan perspective that prioritizes the protection of human rights in the global community. In this view, states derive their legitimacy in the international system from their affirmation of the rights of the political community they represent.¹⁷⁶ Mere sovereignty itself has no independent moral or legal value; states must “earn” their legitimacy in the international system.¹⁷⁷ States that fail to earn this international legitimacy lay themselves open to rightful and lawful intervention.¹⁷⁸ As Fernando Tesón has forcefully declared:

The rights of states under international law are properly derived from individual rights. I therefore reject the notion that states have any autonomous moral standing—that they have international rights that are independent from the rights of individuals who populate the state. Because the ultimate justification of the existence of states is the protection and enforcement of the natural rights of the citizens, a government that engages in substantial violations of human rights betrays the very purpose for which it exists and so forfeits not only its domestic legitimacy, but its international legitimacy as well.¹⁷⁹

Legal realists, while recognizing the priority of states in the international community, tend to sympathize with this cosmopolitan perspective in advocating for a vigorous defense of human rights and humanitarian justice through force.

Cosmopolitans in general support R2P principles, but cosmopolitans make two contending critiques of humanitarian intervention under R2P. The first cosmopolitan critique of the current “soft R2P” framework is that it does not go far enough in legitimating force to protect human rights.¹⁸⁰ Commentators note that the failure of the international community to create a more robust R2P norm “mocks the value of the emerging R2P norm and ultimately may further erode

¹⁷⁵ See Tom Andrews & Dan Sullivan, *Preventing Atrocities Is Everyone's Business*, UNITED TO END GENOCIDE (June 5, 2013), <http://endgenocide.org/preventing-atrocities-is-everyones-business/>.

¹⁷⁶ See Martti Koskenniemi, *Legal Cosmopolitanism: Tom Franck's Messianic World*, 35 N.Y.U. J. INT'L L. & POL. 471, 474-75 (2002).

¹⁷⁷ Fernando Tesón, *The Liberal Case for Humanitarian Intervention*, in HUMANITARIAN INTERVENTION: ETHICAL, LEGAL AND POLITICAL DILEMMAS 93, 93 (J.L. Holzgrefe & Robert O. Keohane eds.).

¹⁷⁸ See GARRETT, *supra* note 168, at 30.

¹⁷⁹ FERNANDO R. TESÓN, HUMANITARIAN INTERVENTION: AN INQUIRY INTO LAW AND MORALITY 15-16 (1988).

¹⁸⁰ See ALEX J. BELLAMY, RESPONSIBILITY TO PROTECT 67 (2009); see also THOMAS G. WEISS, HUMANITARIAN INTERVENTION: IDEAS IN ACTION 127 (2d ed. 2012).

public support for the United Nations.”¹⁸¹ As noted above, some cosmopolitans critique the current U.N.-adopted manifestation of R2P as “R2P-lite” that has led to a failure of the international community to protect human rights in preventing further atrocities in humanitarian crises such as Syria.

Second, cosmopolitans conversely share the realist and institutionalist concern that unilateral humanitarian intervention could be used as a justification for adventurism by powerful states that ultimately leads to more harm to civilians. Some cosmopolitan critics go so far as to call humanitarian intervention “an ideological weapon” used for “Western imperialism.”¹⁸² Such analysts fear that interventions from powerful states can lead to greater use of force by powerful states against weaker states, encouraging non-humanitarian oriented interventions resulting in increased civilian suffering and death.¹⁸³

Despite these concerns, however, cosmopolitans generally support strong international action in cases of true humanitarian emergencies. For cosmopolitans, the ability of the international community to act and save lives against abusive state authority is paramount. Thus, many cosmopolitans generally support broader conditions for unauthorized action under R2P and the addition of objective, just criteria that could be invoked to stop mass atrocities.

These three international relations perspectives form the basis of much opposition to an R2P norm of humanitarian intervention. As such analysis has shown, opponents to “hard R2P” interventionism oppose R2P criteria that ignore state security interests, outline subjective, ambiguous thresholds for action, destabilize international law, and open the door to abuse by powerful states that can lead to harm for civilians. An R2P standard for humanitarian intervention that addresses these

¹⁸¹ Weiss, *supra* note 108, at 759-60. “[T]he [World Summit] did nothing to change the geopolitical reality that ‘never again’ is an inaccurate description of the actual impact of the 1948 Genocide Convention—‘here we go again’ would be more like it.” *Id.* at 757; *see also* Michael Byers, *High Ground Lost on UN’s Responsibility to Protect*, WINNEPEG FREE PRESS (Sept. 18, 2005), <http://www.ligi.ubc.ca/?p2=/modules/liu/news/view.jsp&id=142>.

¹⁸² Ajamu Baraka, *Syria and the Sham of Humanitarian Intervention*, COUNTERPUNCH (June 4, 2013), <http://www.counterpunch.org/2013/06/04/syria-and-the-sham-of-humanitarian-intervention/>; *see also* JEAN BRICMONT, HUMANITARIAN IMPERIALISM: USING HUMAN RIGHTS TO SELL WAR (2006); Noam Chomsky, *Humanitarian Imperialism: The New Doctrine of Imperial Right*, 60 MONTHLY REV. (2008), *available at* <http://monthlyreview.org/2008/09/01/humanitarian-imperialism-the-new-doctrine-of-imperial-right>; David Rieff, *Humanitarian Vanities*, N.Y. TIMES (June 1, 2008), <http://www.nytimes.com/2008/06/01/magazine/01wwln-lede-t.html>.

¹⁸³ *See generally* Chomsky, *supra* note 182.

concerns, however, would likely find greater support from opponents and have a greater chance of being adopted into international law.

V. EXAMINING CHEMICAL AND BIOLOGICAL WEAPONS USAGE IN INTERNATIONAL LAW

An R2P criterion authorizing humanitarian intervention against CBW-using regimes would authorize action to protect civilians and may help to mitigate the opposition outlined above. Before such a criterion can be included in the R2P framework, however, it first must be determined whether CBW use is warranted as an action-triggering condition in the R2P framework.

The “soft R2P” framework outlined in the U.N. World Summit Outcome Document holds that acts of genocide, ethnic cleansing, war crimes, and crimes against humanity are violations severe enough to merit Security Council-authorized action.¹⁸⁴ The “hard R2P” ICISS report lists “large scale loss of life” and “large scale ‘ethnic cleansing’” as violations that should trigger R2P.¹⁸⁵ Does CBW-usage against civilians rise to such standards, and could it be included in conditions triggering unilateral humanitarian intervention under R2P? This section assesses the status of CBW use under international law and examines whether such use is indeed a violation of international law significant enough for inclusion in the R2P framework.

A. Chemical-Biological Weapons and State Practice

Chemical and biological weapons remain two of the great scourges of humanity, and the use of chemical and biological weapons has been seen as particularly abhorrent throughout history.¹⁸⁶ Poisons, chemicals

¹⁸⁴ World Summit Outcome Document, *supra* note 101, ¶ 138.

¹⁸⁵ ICISS, *supra* note 86, ¶ 4.19.

¹⁸⁶ See generally Leonard A. Cole, *The Poison Weapons Taboo: Biology, Culture, and Policy*, 17 POL. & LIFE SCI. 119 (1998) (exploring biological and cultural explanations for the widespread taboos against chemical and biological weapons use).

and biological weapons¹⁸⁷ have historically been viewed as a particularly odious¹⁸⁸ means of warfare, often considered to be the “weapon[s] of the weak.”¹⁸⁹

The first widespread use of chemical weapons in the modern age occurred in World War I, during which German chemical attacks and Allied reprisals led to an estimated 1.3 million casualties.¹⁹⁰ Since then, chemical weapons have been employed in a number of international and non-international armed conflicts by such states as Italy, the Soviet Union, the United States,¹⁹¹ Yemen, Vietnam, Laos, Cambodia, and Iraq.¹⁹² Perhaps the most notorious example of chemical weapons use prior to the August 2013 Damascus attacks occurred in the late 1980s, when Iraq used chemical weapons against Kurdish civilians to horrifying effect, killing 5,000 in the village of Halabja alone.¹⁹³

¹⁸⁷ “Chemical weapons” can be defined as “Munitions and devices, specifically designed to cause death or other harm through the toxic properties of those toxic chemicals . . . which would be released as a result of the employment of such munitions and devices.” A “toxic chemical” is any chemical which “through its chemical action on life processes can cause death, temporary incapacitation or permanent harm to humans or animals.” Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, arts. II(1)(b), II(2), Jan. 13, 1993, 32 I.L.M. 800, S. TREATY DOC. NO. 21 (1993) [hereinafter Chemical Weapons Convention]. Traditionally there are four general categories of chemical weapons: choking agents, blister agents, blood agents, and nerve agents. See *Brief Description of Chemical Weapons*, ORG. FOR THE PROHIBITION OF CHEM. WEAPONS, <http://www.opcw.org/about-chemical-weapons/what-is-a-chemical-weapon/> (last visited Oct. 13, 2013).

¹⁸⁸ Such weapons have often been termed the “poor man’s” atom bomb. See generally NEIL C. LIVINGSTONE & JOSEPH D. DOUGLASS, JR., *CBW: THE POOR MAN’S ATOMIC BOMB* (1984).

¹⁸⁹ Richard Price, *A Genealogy of the Chemical Weapons Taboo*, 49 INT’L ORG. 73, 98 (1995).

¹⁹⁰ Megan Eshbaugh, *The Chemical Weapons Convention: With Every Step Forward, We Take Two Steps Back*, 18 ARIZ. J. INT’L & COMP. L. 209, 212 (2001).

¹⁹¹ The U.S. employed “riot control agents” during the Vietnam conflict but objected that international law did not prohibit the use of weapons with temporary effects. U.S. policy now adopts the Chemical Weapons Convention’s prohibition of riot control agents as a “method of warfare” under the convention’s language, but the U.S. reserves the right to use such agents defensively to save lives. The U.S. also challenged the categorization of its use of white phosphorous in the Iraq War as a toxic, anti-personnel use in violation of the Chemical Weapons Convention. David Turns, *Weapons in the ICRC Study on Customary International Humanitarian Law*, 11 J. CONFLICT & SECURITY L. 201, 222-24 (2006). On the U.S. interpretation, see generally Ernest Harper, *A Call for A Definition of Method of Warfare in Relation to the Chemical Weapons Convention*, 48 NAVAL L. REV. 132 (2001).

¹⁹² See EDWARD M. SPIERS, *CHEMICAL AND BIOLOGICAL WEAPONS: A STUDY OF PROLIFERATION* 33-35 (Palgrave MacMillan 1994); see also David B. Merkin, *The Efficacy of Chemical-Arms Treaties in the Aftermath of the Iran-Iraq War*, 9 B.U. INT’L L.J. 175, 181-87 (1991).

¹⁹³ See generally Kristina M. Kurjiaka, Comment, *The Iraqi Use of Chemical Weapons Against the Kurds: A Case Study in the Regulation of Chemical Weapons in International Law*, 9 DICK. J. INT’L L. 121, 121-22 (1991).

Today, fifteen states are known or suspected of maintaining covert chemical weapons programs, including Iran, Israel, North Korea, Pakistan, and Syria.¹⁹⁴

Biological weapons were used by Germany in World War I, by Japan in World War II, and in the twentieth century, states such as Belgium, Canada, France, the Netherlands, Poland, the U.S., the U.K., the Soviet Union, and Iraq all developed biological warfare programs.¹⁹⁵ At least six states, including China, Iran, North Korea, and Syria, are suspected of still maintaining offensive biological weapons capabilities today.¹⁹⁶

The use of chemical and biological weapons historically has been seen as fundamentally contrary to accepted norms of state behavior, similar to the normative prohibitions against genocide and ethnic cleansing.¹⁹⁷ Chemical warfare has particularly been stigmatized as abhorrent and contrary to international norms.¹⁹⁸ The basis for such a strong opposition to these weapons lies in many factors, including their apparent “uncivilized” nature, the lack of defenses against such weapons, and their historical usage by “weak” states.¹⁹⁹ The end result is a general view of CBW usage as one of the most horrific practices of warfare.

B. Current International Law on Chemical and Biological Weapons Use

Current international law focuses on the control of the development and use of chemical and biological weapons. The primary sources of international law on such weapons are the 1907 Hague

¹⁹⁴ Jean Pascal Zanders, *The CWC Ten Years Ahead: What is at Stake?*, in *THE FUTURE OF THE CWC IN THE POST-DESTRUCTION PHASE 5, 6-7* (Jean Pascal Zanders ed., 2013), available at <http://www.iss.europa.eu/publications/detail/article/the-future-of-the-cwc-in-the-post-destruction-phase/>; see also Technical Secretariat, Office of the Legal Adviser, Org. for the Prohibition of Chemical Weapons, *Status of Participation in the Chemical Weapons Convention (CWC) as at 21 May 2009*, Doc. S/768/2009 (May 27, 2009), available at <http://www.opcw.org/about-opcw/member-states/status-of-participation-in-the-cwc/>.

¹⁹⁵ Stefan Riedel, *Biological Warfare and Bioterrorism: A Historical Review*, 17 *BAYLOR U. MED. CENTER PROC.* 400, 401 (2004).

¹⁹⁶ *Chemical and Biological Weapons: Possession and Programs Past and Present*, JAMES MARTIN CTR. FOR NONPROLIFERATION STUD., <http://cns.miis.edu/cbw/possess.htm> (last visited Oct. 13, 2013).

¹⁹⁷ See RICHARD MACKAY PRICE, *THE CHEMICAL WEAPONS TABOO* 26-27 (1997) (arguing that forms of war such as chemical weapons use and mass extermination run counter to more “accepted” forms of war as a political practice which are “impregnated with social norms rather than devoid of them”).

¹⁹⁸ Price, *supra* note 189, at 90.

¹⁹⁹ *Id.* at 103.

Convention, the 1925 Geneva Protocol, the 1972 Biological Weapons Convention, and the 1993 Chemical Weapons Convention.²⁰⁰

The 1907 Hague Convention represented the first comprehensive codification of the customary law of war²⁰¹ and Article 23 of the Convention prohibits the use of “poison or poisonous weapons” and weapons intended to “cause unnecessary suffering.”²⁰² The Hague Convention was an important first step toward banning the use of CBW international law. However, the treaty covered only the use of gas-carrying “arms, projectiles, or material” and not gas itself.²⁰³ As a result, the treaty was not effective in controlling the weapons’ use: both sides engaged in widespread chemical weapons attacks during World War I, leading to over a million casualties.²⁰⁴

The 1925 Geneva Protocol was established in reaction to the excesses of World War I,²⁰⁵ and it has been ratified by 138 states, the large majority of states in existence today.²⁰⁶ The protocol restated existing customary law banning the use of chemical and biological weapons and it corrected some of the deficiencies of the Hague Convention, including covering the use of all chemical weapons.²⁰⁷ Despite this advance, however, the treaty was ineffective at preventing the use and spread of chemical and biological weapons, covering only interstate war, and many states reserved the right to employ such weapons as reprisals or against non-parties.²⁰⁸ Additionally, the protocol failed to prohibit the production and stockpiling of such weapons.²⁰⁹ Most importantly, because the treaty had no verification or

²⁰⁰ Michael P. Scharf, *Clear and Present Danger: Enforcing the International Ban on Biological and Chemical Weapons Through Sanctions, Use of Force, and Criminalization*, 20 MICH. J. INT’L L. 477, 480 (1999).

²⁰¹ *Id.*

²⁰² Convention (IV) Respecting the Laws and Customs of War on Land and its annex: Regulations Concerning the Laws and Customs of War on Land, art. 23, Oct. 18, 1907, 189 C.T.S. 227 (entered into force Jan. 26, 1910).

²⁰³ *Id.*

²⁰⁴ Gerard J. Fitzgerald, *Chemical Warfare and Medical Response During World War I*, 98 AM. J. PUB. HEALTH 611, 612 (2008).

²⁰⁵ 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.S.T. 571, 94 L.N.T.S. 65 (entered into force Feb. 8, 1928) [hereinafter Geneva Protocol of 1925].

²⁰⁶ U.N. Office for Disarmament Affairs, *Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare*, <http://disarmament.un.org/treaties/t/1925> (last visited June 29, 2013).

²⁰⁷ See *id.*; see also Eshbaugh, *supra* note 190, at 217; Scharf, *supra* note 200, at 481.

²⁰⁸ Scharf, *supra* note 200, at 481.

²⁰⁹ *Id.* See also Turns, *supra* note 191, at 220-21.

enforcement measures, no sanctions were ever imposed by the international community for numerous violations of the treaty.²¹⁰

In 1972, the Biological Weapons Convention (BWC) was adopted as a response to the 1925 Geneva Protocol's flaws in controlling biological weapons²¹¹ and, with 170 parties, it has been almost universally adopted.²¹² Under the treaty, parties agree not to produce, stockpile or acquire biological agents or toxins and associated delivery weapons, and they also agree to destroy existing stockpiles.²¹³ The treaty represented a marked advance in focusing not just on control but complete biological weapons disarmament, representing a break from the previous arms control regime.²¹⁴ Despite this improvement, however, the BWC suffers from the same major flaw that plagued earlier arms control conventions because it contains no verification or enforcement mechanisms.²¹⁵ Today, despite issues with universal enforcement, the BWC remains a powerful statement of the international community's stand against biological weapons.

Because of the critical weaknesses of the 1907 Hague and 1925 Geneva treaties in regulating chemical warfare, the international community created the Chemical Weapons Convention (CWC) in 1993.²¹⁶ Like the BWC, the CWC bans the entire class, prohibiting the development, production, stockpiling and acquisition of chemical

²¹⁰ See, e.g., Eshbaugh, *supra* note 190, at 217; Merkin, *supra* note 192, at 188; Scharf, *supra* note 200, at 481.

²¹¹ Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction, Apr. 10, 1972, 26 U.S.T. 583, 1015 U.N.T.S. 163 (entered into force Mar. 26, 1975) [hereinafter Biological Weapons Convention].

²¹² In 2013, four new states joined the Biological Weapons Convention: Cameroon, Nauru, Guyana and Malawi. Alexandra Schmitt, *Four New States Join BWC*, ARMS CONTROL ASS'N (May 2013), http://www.armscontrol.org/act/2013_05/Four-New-States-Join-BWC. As of February 2014, sixteen states have neither signed nor ratified the convention: Andorra, Angola, Chad, Comoros, Djibouti, Eritrea, Guinea, Israel, Kiribati, Mauritania, Micronesia (Federated States of), Namibia, Niue, Samoa, South Sudan, and Tuvalu. Ten states have signed but not ratified the convention: Central African Republic, Côte d'Ivoire, Egypt, Haiti, Liberia, Myanmar, Nepal, Somalia, Syrian Arab Republic, and the United Republic of Tanzania. *Membership of the Biological Weapons Convention*, U.N. OFFICE AT GENEVA, [http://www.unog.ch/_80256ee600585943.nsf/\(httpPages\)/7be6cbbea0477b52c12571860035fd5c?OpenDocument&ExpandSection=2%2C3#_Section2](http://www.unog.ch/_80256ee600585943.nsf/(httpPages)/7be6cbbea0477b52c12571860035fd5c?OpenDocument&ExpandSection=2%2C3#_Section2) (last visited Jan. 20, 2014); see also *Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction*, U.N. OFFICE FOR DISARMAMENT AFFAIRS, <http://disarmament.un.org/treaties/t/bwc> (last visited February 11, 2014).

²¹³ See Biological Weapons Convention, *supra* note 211, arts. I, II.

²¹⁴ David P. Fidler, *International Law and Weapons of Mass Destruction: End of the Arms Control Approach*, 14 DUKE J. COMP. & INT'L L. 39, 60 (2004).

²¹⁵ See Scharf, *supra* note 200, at 482.

²¹⁶ Chemical Weapons Convention, *supra* note 187.

weapons.²¹⁷ Additionally, the treaty mandates that parties must eliminate all chemical weapons and chemical weapons development facilities within ten years of treaty adoption.²¹⁸ Seven states—Albania, India, Iraq, Libya, South Korea, Russia, and the United States—have declared chemical weapons stockpiles under the CWC and are in various stages of destroying their stockpiles.²¹⁹

Importantly, the CWC breaks from previous arms treaties and establishes compliance verification measures under the Organization for the Prohibition of Chemical Weapons (OPCW).²²⁰ The CWC also requires that state parties adopt national implementation legislation.²²¹ The treaty does maintain some of the deficiencies of the previous arms control conventions, such as lacking mandatory sanctions to ensure enforcement, and it does not apply to non-signatories or non-state actors.²²² Despite these shortcomings, however, the treaty represents the almost universal condemnation of chemical weapons by the international community. As of January 2014, 190 states have ratified or acceded to the convention, making it the second-most widely adopted arms control agreement after the Nuclear Non-Proliferation Treaty.²²³

As a result of these international conventions and the practice of states over the past century, it is clear that CBW development and use have become illegitimate practices in the international community.²²⁴ The use of chemical weapons is a clear violation of customary

²¹⁷ *Id.* art. I.

²¹⁸ *Id.* art. IV.

²¹⁹ This represents the destruction of 71,196 agent tonnes and 8.67 million chemical weapons items, including munitions, containers, and other weapons-related material. Zanders, *supra* note 194, at 6-7; *see also* Technical Secretariat, *supra* note 194.

²²⁰ *See* Chemical Weapons Convention, *supra* note 187, art. III; *see also* *About the OPCW*, ORG. FOR THE PROHIBITION OF CHEM. WEAPONS, <http://www.opcw.org/about-opcw/> (last visited June 28, 2013).

²²¹ Zanders, *supra* note 194, at 7.

²²² Scharf, *supra* note 200, at 485.

²²³ *OPCW Member States*, ORG. FOR THE PROHIBITION OF CHEM. WEAPONS, <http://www.opcw.org/about-opcw/member-states/> (last visited Jan. 20, 2014); *see also* Zanders, *supra* note 194, at 8 (“Given the complexities of multilateral disarmament diplomacy, the CWC is a success story by any measure.”); Technical Secretariat, *supra* note 194. As of January 2014, the following states had not signed the CWC: Angola, Egypt, North Korea, and South Sudan. Israel and Burma/Myanmar had signed but not ratified the treaty. *Non-Member States*, ORG. FOR THE PROHIBITION OF CHEM. WEAPONS, <http://www.opcw.org/about-opcw/non-member-states/> (last visited Jan. 20, 2014).

²²⁴ *See* Kara Allen et al., *Chemical and Biological Weapons Use in the Rome Statute: A Case for Change*, 14 VERTIC BRIEF 1, 4 (2011), available at <http://www.isn.ethz.ch/Digital-Library/Publications/Detail/?ots591=0c54e3b3-1e9c-be1e-2c24-a6a8c7060233&lng=en&id=126753> (“Indeed, a review of the literature on the subject shows that most commentators regard it as a given that CBW use is against international customary law.”).

international law, based on the wide acceptance of the 1925 Geneva Protocol and Chemical Weapons Convention, as well as general state practice.²²⁵ In 1971, even before the creation of the Chemical Weapons Convention, the Stockholm International Peace Research Institute (SIPRI) noted that, “the majority of international lawyers today concur . . . that a customary prohibition of CBW is indeed part of international law.”²²⁶ More recently, the appellate chamber of the International Criminal Tribunal for the Former Yugoslavia (ICTY) found in the *Tadić* case that the 1925 Geneva Protocol was customary international law applying to non-international armed conflicts, noting that “there undisputably emerged a general consensus in the international community on the principle that the use of [chemical] weapons is also prohibited in internal armed conflicts.”²²⁷ The almost universal ratification of the CWC has further reinforced the legitimacy of this norm. Accordingly, the International Committee of the Red Cross (ICRC) compendium on customary international law found that the ban on the use of chemical weapons is part of modern customary law.²²⁸ Indeed, the prohibition on chemical weapons use appears even to have reached the status of a non-derogable *jus cogens* norm.²²⁹

Similarly, biological weapons use is a violation of customary international law, although the international community’s injunctions against such weaponry are less extensive.²³⁰ This may be due to the fact that biological weapons have less utility on the battlefield and,

²²⁵ Turns, *supra* note 191, at 221 (“[T]here is *prima facie* a stronger case for supporting the proposition that the ban on chemical weapons has become a rule of customary international law.”); see also Price, *supra* note 189, at 102-03 (“[T]he CW taboo is also testimony to the genuine moral rejection of a means of modern warfare that arose at a particular historical juncture . . . [that created] a tradition of practice that forbids the use of CW and characterizes it as abnormal behavior among the society of states.”).

²²⁶ ANDERS BOSERUP, STOCKHOLM INT’L PEACE RESEARCH INST. (SIPRI), 3 THE PROBLEM OF CHEMICAL AND BIOLOGICAL WARFARE: CBW AND THE LAW OF WAR 126 (1971).

²²⁷ Prosecutor v. Tadic, Case No. IT-94-1-I, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 124 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995) [hereinafter Prosecutor v. Tadic].

²²⁸ JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, INT’L COMM. OF THE RED CROSS, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW: VOLUME 1: RULES 259-63 (2005).

²²⁹ Keith Wilson, *Standing the Test of Time—Efforts to Achieve Universality of the CWC*, in THE CHEMICAL WEAPONS CONVENTION: IMPLEMENTATION, CHALLENGES AND OPPORTUNITIES 150, 169 (Ramesh Thakur & Ere Haru eds., 2006); see also Ian Brownlie, *Legal Aspects of CBW*, in CHEMICAL AND BIOLOGICAL WARFARE 142-69 (Steven Rose ed., 1968). On *jus cogens* generally, see 1969 Vienna Convention on the Law of Treaties art. 53, May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679 (entered into force Jan. 27, 1980) [hereinafter Vienna Convention]; M. Cherif Bassiouni, *International Crimes: “Jus Cogens” and “Obligatio Erga Omnes.”* 59 L. & CONTEMP. PROBS. 63, 67-72 (1996).

²³⁰ Allen et al., *supra* note 224, at 4.

therefore, have historically been used less in combat.²³¹ Biological weapons development and use is clearly a violation of international law; in addition to the widespread ratification of the 1925 Geneva Protocol and the BWC, several U.N. General Assembly resolutions have mandated that states work to ensure nonproliferation of biological weapons.²³² The ICRC likewise found in its survey of the law that biological weapons use is prohibited under customary international law.²³³ Thus, based on the overwhelming body of national and international laws, statements and practice, it is almost certain that the use of biological weapons is also a violation of customary international law.²³⁴ It is possible that the prohibition of biological weapons use has risen to the status of a non-derogable *jus cogens* norm as well.²³⁵

As this review shows, CBW use violates some of humanity's most fundamental norms enshrined in international law. In addition to multiple widely-adopted treaties on the issue, the prohibition of chemical weapons use is clearly customary international law, and the biological weapons use prohibition is likely so as well.

Reflecting this understanding, CBW use is in the process of being criminalized under developing international criminal law. Indeed, the Rome Statute prohibits the use of "poison or poisoned weapons" as well as "asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices" in interstate war²³⁶ and the Kampala Review

²³¹ This is likely due to their uncontrolled nature and the uncertainty in determining when such weapons have actually been used. Biological weapons injuries often mimic symptoms of naturally-occurring diseases, making the establishment of such weapons usage difficult. *See id*; *see also* Rebecca Katz & Burton Singer, *Can an Attribution Assessment Be Made for Yellow Rain?: Systematic Reanalysis in a Chemical-and-Biological-Weapons Use Investigation*, 26 *POL. & LIFE SCI.* 24, 24 (2007) ("Our analysis strongly supports the hypothesis that CBW were used in Southeast Asia and Afghanistan in the late 1970s and early 1980s, although a definitive judgment cannot be made.").

²³² *See, e.g.*, G.A. Res. 66/65, ¶ 1, U.N. Doc A/Res/66/65 (Dec. 13, 2011); *see also* HENCKAERTS & DOSWALD-BECK, *supra* note 228, at 258. The U.N. Security Council has likewise mandated that member states act to prevent proliferation of biological weapons and other weapons of mass destruction to non-state actors. *See* S.C. Res. 1540, U.N. Doc. S/RES/1540 (Apr. 28, 2004), *reprinted in* 43 *I.L.M.* 1237 (2004).

²³³ *See also* HENCKAERTS & DOSWALD-BECK, *supra* note 228, at 256-58; *but cf.* Turns, *supra* note 191, at 221 ("[The ICRC's assertion] is hardly sufficient to justify the prohibition of biological weapons as a rule of customary international law applicable in all armed conflicts.").

²³⁴ *See* Allen et al., *supra* note 224, at 5.

²³⁵ Barry Kellman, *An International Criminal Law Approach to Bioterrorism*, 25 *HARV. J.L. & PUB. POL'Y* 721, 725 (2001).

²³⁶ Rome Statute of the International Criminal Court art. 8, ¶ 2(b), July 17, 1998, U.N. DOC. A/CONF.183/9* *reprinted in* 37 *I.L.M.* 999, 2187 *U.N.T.S.* 90 (1998) (uncorrected version), *available at* <http://www.un.org/law/icc/> [hereinafter Rome Statute]. It is uncertain, however, whether this provision specifically addresses chemical weapons.

Conference to the Rome Statute applied such prohibitions to non-international armed conflict as well.²³⁷ In addition, there has been broad support for an amendment specifically criminalizing the use of biological weapons and chemical weapons in international and non-international armed conflict, though efforts remain necessary to incorporate these into international law.²³⁸

Based on this evidence, it is clear that the international community overwhelmingly condemns chemical and biological weapons use as illegitimate and contrary to both international conventions and customary international law. The prohibition of CBW is one of the fundamental norms of the international system. As such, CBW use clearly is a significant enough violation of international norms to be applied as a triggering international action under the R2P framework.

VI. ANALYSIS: THE IMPACT OF A CBW USE CRITERION ON HUMANITARIAN INTERVENTION UNDER R2P

The above analysis has shown that CBW use is a violation of international norms and international law grave enough to be included as an intervention triggering condition under the R2P intervention framework. Borrowing the language of the Chemical and Biological Weapons Conventions, the ICISS R2P criteria could be amended to authorize intervention based on the use of chemical or biological agents by a government against its people.

²³⁷ Rome Statute of the International Criminal Court (1998), amended by Resolution RC/Res.5 (June 10, 2010) [hereinafter Amendment to the Rome Statute]. In addition to these elements, the amendment also added a prohibition to “employing bullets which expand or flatten easily in the human body” in non-international armed conflicts as well. *Id.*; see also Amal Alamuddin & Philippa Webb, *Expanding Jurisdiction over War Crimes under Article 8 of the ICC Statute*, 8 J. INT’L CRIM. JUST. 1219, 1220 (2010). As of October 2013, eleven states had ratified the amendment: Andorra, Botswana, Cyprus, Estonia, Germany, Liechtenstein, Luxembourg, Samoa, Slovenia, Trinidad and Tobago, and Uruguay. See *10.b Amendments on the Crime of Aggression to the Rome Statute of the International Criminal Court*, U.N. TREATY COLLECTION, http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10-b&chapter=18&lang=en (last visited Oct. 10, 2013).

²³⁸ An amendment specifically applying the prohibitions of the use of chemical and biological weapons had broad support during the treaty drafting sessions, but it was dropped from the Rome Statute due to a dispute as to whether nuclear weapons use should be included in the Statute. See Allen et al., *supra* note 224, at 6-7; see also Roger S. Clark, *Building on Article 8(2)(b)(xx) of the Rome Statute of the International Criminal Court: Weapons and Methods of Warfare*, 12 NEW CRIM. L. REV. 366, 376 (2009) (noting that the opponents of including the chemical-biological weapons amendment held a view that “if nuclear weapons were not to be included, then the poor person’s weapons of mass destruction, chemical and biological weapons, should not be either”); Matthew Meselson & Julian Robinson, *A Draft Convention to Prohibit Biological and Chemical Weapons under International Criminal Law*, 28 FLETCHER F. WORLD AFF. 57, 61 (2004).

A CBW usage provision could add the following language to the ICISS criteria legitimizing R2P intervention: “where the government is found by a U.N.-authorized international commission to have employed for hostile purposes against civilians bacteriological (biological) agents or toxins as defined by the 1972 Biological Weapons Convention, or chemical weapons as defined by the 1993 Chemical Weapons Convention, not to include riot control agents used for domestic law enforcement.”²³⁹ Such a definition would cover chemical weapons as defined by the CWC but would exclude riot control agents (RCAs) such as tear gas often used legitimately to keep civil peace. This provision would provide the international community with a tool to protect human rights, especially in the direst conditions, where governments have used CBW against their people. Such a condition would have the normative benefit of giving the international community greater flexibility to stop CBW use against civilians and save innocent lives in limited cases of CBW use.

What effect would a CBW usage criterion have on support for a doctrine of unilateral humanitarian intervention under “hard R2P”? This section will examine the effect of a CBW usage criterion on R2P critics grounded in the realist, institutionalist, and liberal cosmopolitan perspectives.

A. Realist Critiques

As outlined above, realism recognizes the primary role of power and security in international relations, and it maintains that morality and human rights have little place in international law or state policy.²⁴⁰ Realists in particular are concerned with the maintenance of national security and international stability, including the countering of actors that can threaten either of these interests. Realists are skeptical of humanitarian interventions as both a squandering of military resources and a cover for state military adventurism.

The addition of a CBW criterion to the R2P framework would mitigate realist criticisms of R2P and would generate greater realist support for humanitarian intervention under the framework. States that develop or use CBW demonstrate a capability to undermine international stability through the refugee flows and civil war dynamics

²³⁹ Riot control agents are banned as a “method of warfare” under the CWC, but what behavior constitutes a “method of warfare” has been a subject of intense debate. See Harper, *supra* note 191, at 133; Sean P. Giovanello, *Riot Control Agents and Chemical Weapons Arms Control in the United States*, 5(4) J. STRATEGIC SECURITY 1 (2012).

²⁴⁰ See *supra*, Part IV.A.

created by such weapons and, potentially, pose a security threat to other states through the delivery of such weapons through air, ballistic missile, or terrorist attack.²⁴¹ Through these delivery systems, a CBW-possessing state could potentially inflict CBW attacks on any state around the world, including states not geographically-contiguous with the CBW possessing state. The rise of state-sponsored international terrorism means that such states can now employ CBW strikes against adversaries with little or no warning.²⁴² Such a possibility creates a potential security threat for states throughout the international system.

Regimes that develop and use chemical and biological weapons in war are regimes that violate some of the most significant strictures of international law. By covertly stockpiling and even using chemical or biological weapons, regimes employing CBW during civil wars violate numerous widely-ratified treaties and some of the most fundamental rules of customary international law. By definition, such states can be seen as “rogue” states that are willing to violate the norms of the international community. CBW-possessing states thus demonstrate both the capability and potential willingness to use such weapons in violation of international law. Given their propensity to violate basic norms of international law on CBW use, these states may also show greater willingness to violate international norms against the aggressive use of force, posing an even greater threat to international peace.

Similarly, chemical and biological weapons use can destabilize already volatile civil wars, unleashing new and unpredictable dynamics,

²⁴¹ See, e.g., *Chemical and Biological Weapons Status at a Glance*, ARMS CONTROL ASS'N (Oct. 2013), <http://www.armscontrol.org/factsheets/cbwprolif>; Lord Lyell, *Chemical and Biological Weapons: the Poor Man's Bomb*, COMM. OF THE N. ATL. ASSEMBLY (Oct. 4, 1996), <http://www.fas.org/irp/threat/an253stc.htm>; see also AUDREY KURTH CRONIN, CONG. RESEARCH SERV., RL31831, TERRORIST MOTIVATIONS FOR CHEMICAL AND BIOLOGICAL WEAPONS USE: PLACING THE THREAT IN CONTEXT (Mar. 28, 2003), available at <http://www.fas.org/irp/crs/RL31831.pdf>.

²⁴² See PAUL K. KERR, CONG. RESEARCH SERV., RL30699, NUCLEAR, BIOLOGICAL, AND CHEMICAL WEAPONS AND MISSILES: STATUS AND TRENDS 3-4 (Feb. 20, 2008). The Bush Administration's “one percent doctrine” was motivated by the security threat posed by this unlikely but perilous scenario. See RON SUSKIND, *THE ONE PERCENT DOCTRINE: DEEP INSIDE AMERICA'S PURSUIT OF ITS ENEMIES SINCE 9/11* 121 (2006).

and furthering the possibility for regional war.²⁴³ Such regional destabilization can have global implications for international peace and national security of states around the world.

Many realists thus may welcome the addition of the CBW usage criterion that broadens potential intervention criteria and provides a robust legal tool against threats to international peace and security. Powerful states would likely provide greater support for such CBW-usage criterion, which would allow action against smaller states that rely on such “weapons of the weak.”²⁴⁴ Such a criterion would likely be supported by Western powers and other states in the international system that are concerned about the use and spread of CBW to “rogue” states. Even states that historically have been skeptical of humanitarian intervention would likely be more inclined to support such a clear, bright-line rule that could not be used for non-CBW-related aggression. For smaller states that fear aggression by major powers, a CBW-usage criterion would protect their security from abuse of the standard while providing a legal tool for the countering of destabilizing CBW-using regimes. Thus, a CBW-usage criterion would likely be supported by powerful states as well as weaker states that possess no CBW capability and harbor no intent to use such weapons in conflict.

Clearly, not all realists would support a CBW-usage criterion for intervention. A doctrine of humanitarian intervention under R2P would still face opposition from realists concerned with abuse.

However, the addition of such a criterion would provide greater international support to act not only within a significant humanitarian

²⁴³ See Tim Lister, *5 Reasons Syria's War Suddenly Looks More Dangerous*, CNN (May 10, 2013), <http://edition.cnn.com/2013/05/08/world/meast/syria-more-dangerous/>. Chairman of the Joint Chiefs of Staff General Martin Dempsey alluded to this possibility in discussing the regional destabilization caused by the Syria conflict, including the use of chemical weapons, noting the need to “think about it as a 10-year regional issue.” Matt Smith, *Syria is a “10-year issue,” Top General says*, CNN (July 8, 2013), <http://www.cnn.com/2013/07/07/us/syria-dempsey>; see also James Kitfield, *The Global Dangers of Syria's Looming Civil War*, THE ATLANTIC (Feb. 13, 2012), <http://www.theatlantic.com/international/archive/2012/02/the-global-dangers-of-syrias-looming-civil-war/252988/>.

²⁴⁴ In response to Syria's August 2013 use of chemical weapons in Damascus, U.S. defense secretary Chuck Hagel stated before the Senate Foreign Relations Committee that: “[t]he use of chemical weapons in Syria is not only an assault on humanity It is a serious threat to America's national security interests and those of our closest allies.” Mark Landler et al., *House Leaders Express Their Support for Syria Strike*, N.Y. TIMES (Sept. 3, 2013), <http://www.nytimes.com/2013/09/04/us/politics/obama-administration-presses-case-on-syria.html>. Israeli Prime Minister Benjamin Netanyahu likewise proclaimed that “[t]he most dangerous regimes in the world must not be allowed to possess the most dangerous weapons in the world.” Scott Shane & Ben Hubbard, *Confident Syria Used Chemicals, U.S. Mulls Action*, N.Y. TIMES (Aug. 25, 2013), <http://www.nytimes.com/2013/08/26/world/middleeast/syria-says-un-will-get-access-to-site-of-possible-chemical-attack.html>.

crisis—a goal important to non-realist actors—but against potentially significant national security threats as well. For many realists, such a doctrine is likely to be strongly embraced as a means of ensuring both international stability and national security while also reigning in military adventurism. As such, realists would provide greater support for a R2P framework that embraced a CBW-use criterion in its conditions for action.

B. Institutional Critiques

Institutionalism emphasizes strong international regimes and the stable rules that facilitate state interactions.²⁴⁵ A critical element of effective international institutions is a robust legal regime with objective and authoritative rules. As such, institutionalists privilege rules that are clear, objective and seen as authoritative by the members of the international community. The addition of the CBW criterion improves the effectiveness of the R2P framework by codifying an intervention rule that is clear, objective, and minimizes the potential for destabilizing international law.

CBW usage is a clear qualitative standard for intervention. The definition of these weapons has already been established under the Biological and Chemical Weapons Conventions, thus eliminating much of the debate over whether particular weapons would apply under the provision.²⁴⁶ Similarly, the standard is objective, applying equally to and is enforceable against all states that use CBW against civilians. Under a CBW usage criterion, there could be little debate about the applicability of R2P to an incident of chemical weapons use. In such cases, the only disputable issue would be the factual question of the act itself. Once any given use of CBW against civilians was confirmed by a U.N.-authorized commission, there would be no legal question as to the applicability of the international community’s authority to act, and there would be no need to debate whether the nature or intensity of such atrocities rose to the threshold of “genocide,” “ethnic cleansing,” “war crime,” or “crime against humanity.” Unlike the subjective quantitative determination necessary to establish these crimes, numbers of deaths or the level of atrocities would not be relevant. The simple qualitative determination by a U.N.-authorized commission of such CBW use would trigger this condition.

²⁴⁵ See *supra* Part IV.B.

²⁴⁶ See, e.g., Jack M. Beard, *The Shortcomings of Indeterminacy in Arms Control Regimes: The Case of the Biological Weapons Convention*, 101 AM. J. INT’L L. 271, 277 (2007); Giovanello, *supra* note 239; Harper, *supra* note 191.

This is not to minimize the difficulty in determining the existence of such CBW attacks and their responsible parties in the chaos of civil war. As the Syrian case has shown, determining the incidence and origination of chemical attacks can require an extremely difficult and complicated investigation that may never come to definitive conclusions.²⁴⁷ However, particularly in cases of extensive CBW use, such determinations often can be conclusively made and the responsible parties can be identified with some certainty.

A standard of CBW usage for humanitarian intervention in R2P will still likely face significant opposition from institutionalists who prioritize U.N. Security Council authorization for all uses of force outside of self-defense. The lack of such a legal requirement will create an obstacle for many institutionalists who support the Security Council as the sole source of authorization for such interventions. However, the clear and objective CBW standard will help to mitigate much of the institutionalist concern regarding the potential for subjective interpretation of the R2P framework.

Additionally, such a rule will help to limit the abuse of the framework for military adventurism and help promote international stability. As many institutionalists and legal realists have noted, the lack of a legal regime that takes into account states' legitimate interests in protecting human rights and countering instability-spreading CBW regimes may in the end bring about the destabilization it attempts to prevent.²⁴⁸ Supporters of R2P argue that, without the framework, such interventions are "more likely to be ad hoc, unilateral, self-interested and deeply divisive."²⁴⁹ A legal regime that provides a clear, objective and bright-line rule for humanitarian intervention, even in the case of Security Council paralysis, may actually, in the long run, strengthen international law and adherence to the U.N. Charter system.

As a result, the clarity and objectivity of the CBW criterion will provide R2P framework greater rule legitimacy, creating greater

²⁴⁷ See Noah Shachtman & Colum Lynch, *The Fog of Chemical War: After Eight Months Of Allegations, Why Do We Know So Little About Syria's Nerve Gas Attack?*, FOREIGN POL'Y (Aug. 19, 2013), http://www.foreignpolicy.com/articles/2013/08/19/syria_chemical_weapons_attacks_united_nations. As history shows, chemical and biological weapons usage may not be confirmed for weeks, months, or years after the employment of such weapons. See Katz & Singer, *supra* note 231, at 24-25. However, once such a determination is made, the legal question of the applicability of the R2P framework would be straightforward.

²⁴⁸ See ICISS, *supra* note 86; see also Scharf, *supra* note 200, at 509.

²⁴⁹ Ramesh Thakur, *R2P, Libya and International Politics as the Struggle for Competing Normative Architectures*, in THE RESPONSIBILITY TO PROTECT: CHALLENGES AND OPPORTUNITIES IN LIGHT OF THE LIBYAN INTERVENTION 12, 12 (Alex Shark ed., 2011).

compliance-pull and, in turn, strengthen compliance with the R2P principles. Because a CBW usage criterion can strengthen international law and compliance with international institutions, this additional standard can mitigate many institutionalist objections and increase institutionalist support for an R2P interventionist framework.

C. Cosmopolitan Critiques

Cosmopolitanism is the third theoretical perspective from which skeptics have critiqued the R2P intervention framework. Cosmopolitanism, rooted in its constructivist foundation, embraces the role of norms in international politics and emphasizes the promotion of human dignity. As noted above, cosmopolitans in general support the R2P framework and favor the protection of human rights, even sanctioning the use of limited and discriminate force. Cosmopolitans critique the current "soft" incarnation of the R2P framework for not going far enough in this protection of individual justice and human rights.²⁵⁰

As such, cosmopolitans would likely support the addition of a CBW usage criterion to the "hard R2P" interventionist framework for three reasons. First, cosmopolitans support expanding conditions under which the international community can act to protect human rights. The CBW usage criterion would authorize R2P-based international action in cases of chemical and biological attack, a criterion not currently covered in international law. Additionally, such an objective standard may permit intervention whether or not mass atrocities rise to a level that qualify as "large scale loss of life," as defined in the ICISS report,²⁵¹ or are recognized as "genocide, ethnic cleansing, war crimes or crimes against humanity" as specified in the World Summit Outcome Document.²⁵² Such a standard would make the R2P framework more relevant in cases of CBW-associated mass atrocities. As the Rwandan genocide demonstrated, states can engage in labored debate over legal technicalities of identifying genocide, ethnic cleansing, war crimes or crimes against humanity, in order to elude any legal obligations to intervene. In cases of CBW use, the quantification of human rights abuses would not matter: a CBW criterion would provide authorization to act under R2P. This broadening and clarification of triggering conditions for R2P means that there would be more opportunities for

²⁵⁰ See *supra* Part IV.C.

²⁵¹ ICISS, *supra* note 86, ¶ 4.19.

²⁵² World Summit Outcome Document, *supra* note 101.

legitimate humanitarian action to protect human rights during mass atrocities, a core goal of cosmopolitans.

Second, cosmopolitans would support the strengthening of the R2P framework with the inclusion of a clear and objective triggering rule that is difficult to abuse or circumvent. Such a clear standard would reduce chances of abuse by powerful states by requiring a clear standard of actual CBW use as determined by a U.N.-authorized commission.

Third, as noted above, the addition of the CBW usage criterion would mitigate the objections of realists and institutionalists and increase overall support for R2P from scholars and policymakers operating from both of these perspectives. Greater support for humanitarian intervention under R2P would reduce opposition in international organizations and increase the likelihood of humanitarian intervention under R2P during cases of Security Council deadlock. For these reasons, cosmopolitans would also likely support the addition of the CBW usage criterion to the R2P framework.

VII. CONCLUSION

Humanitarian intervention can be an effective tool for ending mass atrocities and protecting civilians against government violence during civil conflicts.²⁵³ Unfortunately, as this article has demonstrated, current international law creates the conditions for paralysis during humanitarian crises when one or two Security Council members can prohibit out of political self-interest a forceful international response. The current R2P framework adopted by the U.N. facilitates this paralysis by requiring Security Council authorization for humanitarian intervention.

Those who support R2P as a means of protecting human rights should thus continue to promote efforts for the development and adoption of broader R2P principles that legitimize the international community's ability to respond to cases of mass atrocity even during Security Council deadlock. Supporters of forceful humanitarian action in the international community should work to revive the original "hard R2P" principles recognizing legitimate unilateral humanitarian intervention as outlined in the 2001 ICISS report. In particular, R2P supporters should promote an R2P norm authorizing unilateral interventions in cases of government CBW usage against civilians, gearing efforts toward ultimately securing U.N. General Assembly and

²⁵³ See Jon Western & Joshua S. Goldstein, *Humanitarian Intervention Comes of Age: Lessons from Somalia to Libya*, 90 FOREIGN AFF. 48 (2011).

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Security Council recognition of such a norm. CBW use violates multiple international law conventions, customary international law, and likely *jus cogens* norms. The employment of such weapons in civil war is thus a grave violation of international law warranting inclusion as an R2P triggering condition. A CBW usage criterion for unilateral intervention under R2P would permit forceful responses to such instances of chemical and biological attacks, encouraging the international community to intervene to save lives during cases of mass atrocity.

Additionally, such a criterion can help to generate greater support for such unilateral humanitarian action from many perspectives across the political spectrum, including realist, institutionalist and cosmopolitan traditions. Realists, including many state regimes, would likely support such a criterion that counters destabilizing, CBW-using states while limiting the potential for abuse. Institutionalists, including many legal scholars, would support such a criterion for intervention that sets a clear and objective rule authorizing intervention, limits the potential for abuse, and dissuades states from undertaking *ad hoc*, unilateral intervention outside the strictures of international law. Finally, cosmopolitans would likely support a criterion that provides the international community a legal tool to protect civilians from government chemical and biological attacks while also reducing the potential for abuse. Such a bright-line rule thus would present a path for legitimate humanitarian intervention, even in cases of Security Council deadlock.

A CBW usage criterion will not counter all objections to R2P intervention. Realists will continue to be wary of power influences underlying purported humanitarian interventions, and many institutionalists will continue to oppose any intervention undertaken outside of the U.N. Security Council. Many cosmopolitans will also continue to distrust any principle of unilateral humanitarian intervention and the harm such a principle potentially could impose on civilians. This core debate between sovereignty and human rights will continue to underlie the debate over R2P. However, such a criterion's effects in promoting realist interests in international security, institutionalists' interests in maintaining clear and objective standards for the humanitarian use of force, and cosmopolitans' interests in legitimate intervention to protect human rights can alleviate much of the current opposition to unilateral humanitarian intervention.

A CBW usage criterion for R2P intervention would encourage international community action in dire cases of mass atrocity, allowing states to act when governments turn some of the most abhorrent

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weapons in existence against their own people. Such a development in international law will help to promote human rights, deter future CBW attacks, and increase protection for civilians in war.