ARTICLE

When Are International Crimes Just Cause for War?

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At the 2005 World Summit, states unanimously acknowledged their responsibilities to protect people from genocide, war crimes, ethnic cleansing, and crimes against humanity, and they declared their readiness to use collective force to that end if necessary. This endorsement of the "responsibility to protect" (RtoP) represents an important step on the road to developing a norm of legitimate humanitarian intervention. However, there is a critical flaw in the way states framed RtoP at the World Summit: They equated the just cause threshold for humanitarian intervention with the commission of international crimes. This was a mistake because just cause for intervention should depend on the gravity of actual or threatened harm, not on whether that harm constitutes a crime, let alone an international crime. This Article argues that there are three deleterious consequences of framing RtoP in this way: (1) It excludes situations of catastrophic, unintentional harm where intervention may be morally justified; (2) it impedes efforts to prevent all levels of harm by requiring a finding that crimes are occurring or threatened before RtoP applies; and (3) it threatens to undermine the international criminal law regime by encouraging people to think of international crimes exclusively as "atrocities" and by obscuring the difference between humanitarian intervention and aggression.

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INTRODUCTION

The responsibility to protect (RtoP) is an important effort to explain when it is legitimate for a state or group of states to intervene, including by military force, to protect people in another state. RtoP is not a binding legal norm, although its proponents hope that it is evolving in that direction.[1] Nor, despite the claims of some commentators, is RtoP widely recognized as a binding moral norm.[2] Instead, RtoP is a language or rhetoric about the moral, and perhaps legal, legitimacy of intervention for humanitarian purposes.[3] Rhetorics serve to promote norms with respect to contested issues.[4] The language of RtoP aims to convince the international

1. *See, e.g.*, Gareth Evans, *From Humanitarian Intervention to the Responsibility to Protect*, 24 WIS. INT'L L.J. 703, 704 (2006) [hereinafter Evans, *From Humanitarian Intervention*].

2. *See, e.g.*, Mehrdad Payandeh, Note, *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, 471 (2010) (describing RtoP "as a legal norm *de lege ferenda*, as an emerging norm of customary international law").

3. *See, e.g.*, Jack M. Balkin, *Respect-Worthy: Frank Michelman and the Legitimate Constitution*, 39 TULSA L. REV. 485, 486 (2004) (referring to the term "legitimate" to mean "worthy of respect" in a normative sense). The norms conferring legitimacy can be legal or moral in nature or both. *See* Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787 (2005).

4. *See* ANTHONY G. AMSTERDAM & JEROME BRUNER, MINDING THE LAW: HOW COURTS RELY ON STORYTELLING, AND HOW THEIR STORIES CHANGE THE WAYS WE UNDERSTAND THE LAW — AND OURSELVES 165 (2000) (noting that rhetorics "denote the various linguistic processes" that enable speakers to "create, address, avoid or shape" contested issues); *see also* Francis J. Mootz III, *Argument, Political Friendship and Rhetorical Knowledge: A Review of Garver's* For the Sake of Argument, 110 PENN ST. L. REV. 905, 910 (2006) ("Rhetorical theorists celebrate the role of rhetoric in building community . . . .").

community that states should intervene in various ways, including sometimes by force, to protect people in other states.

This Article will argue that the version of RtoP that states adopted at the 2005 World Summit, and that dominates RtoP discourse, contains a critical flaw: It limits legitimate intervention under RtoP to situations involving international crimes.[5] This restriction was included to ensure a "just cause" threshold for one type of intervention: intervention by military force. Other forms of intervention, such as diplomatic and economic sanctions, have never required such a threshold. In contrast, all efforts to elaborate a norm of legitimate military intervention, including, most notably, the doctrine of "humanitarian intervention,"[6] include a just cause threshold. The just cause threshold explains how serious the harm, or threatened harm, within a state must be for military intervention to be legitimate.

RtoP was not always restricted to international crimes. When RtoP was first articulated, it extended the possibility of military intervention to situations involving large-scale loss of life and large-scale ethnic cleansing, and contained no threshold for nonmilitary forms of intervention.[7] However, when states adopted RtoP in the World Summit Outcome Document (Outcome Document), they restricted all forms of intervention

5. RtoP applies to "ethnic cleansing," which is not an independent international crime, although it often entails one or more of the three other crimes. *See* U.N. Comm'n of Experts, Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992), ¶ 150, U.N. Doc. S/1994/674 (May 27, 1994) (explaining that leaders who participate in ethnic cleansing "are also susceptible to charges of genocide[,] crimes against humanity," and war crimes). For convenience, this Article's references to the "international crimes" that trigger RtoP include ethnic cleansing.

6. The term "humanitarian intervention" is subject to various definitions, and is sometimes used to refer to a "right" to intervene. *See* Int'l Comm'n on Intervention & State Sovereignty [ICISS], *The Responsibility To Protect*, at VII (Dec. 2001), *available at* http://responsibilitytoprotect.org/ICISS%20Report.pdf [hereinafter ICISS Report] (calling humanitarian intervention a right to use military action to protect people). In this Article "humanitarian intervention" simply means the use of military force with the primary objective of protecting people. *See* SEAN D. MURPHY, HUMANITARIAN INTERVENTION: THE UNITED NATIONS IN AN EVOLVING WORLD ORDER 11–12 (1996) (defining humanitarian intervention as the "threat or use of force by a state, group of states, or international organization primarily for the purpose of protecting the nationals of the target state from widespread deprivations of internationally recognized human rights"); Jennifer M. Welsh, *Introduction*, *in* HUMANITARIAN INTERVENTION AND INTERNATIONAL RELATIONS 1, 3 (Jennifer M. Welsh ed., 2004) (defining humanitarian intervention as "coercive interference in the internal affairs of a state, involving the use of armed force, with the purposes of addressing massive human rights violations or preventing widespread human suffering" (emphasis omitted)). Some of the RtoP literature and documents prefer the term "military intervention, for human protection purposes" rather than "humanitarian intervention," in light of the controversy associated with the latter. *See* ICISS Report, *supra*, ¶ 1.39 (internal quotation marks omitted). However, the substitution is unwieldy and has not been adopted broadly in the literature.

7. *See* ICISS Report, *supra* note 6, ¶ 4.13.

under RtoP to protecting people from genocide, war crimes, crimes against humanity, and ethnic cleansing.[8]

Although the Outcome Document's formulation of RtoP has received substantial criticism, the limitation to international crimes has been widely embraced. Indeed, supporters of RtoP, including some of its creators, as well as the United Nations Secretary-General, have strongly resisted efforts to extend RtoP beyond international crimes, instead seeking to bolster the just cause threshold by referring to the relevant crimes as "atrocity crimes."[9]

This Article will argue that, contrary to common belief, limiting RtoP to international crimes, or even "atrocity crimes," does not represent an appropriate just cause threshold for humanitarian intervention. Although international crimes are generally thought to be extremely serious, as the word "atrocity" suggests, in fact the gravity elements of these crimes are unclear in both law and theory. What is clear, however, is that not all international crimes are sufficiently grave to constitute just cause for humanitarian intervention.[10]

At the same time, the restriction to international crimes precludes military intervention under RtoP in circumstances where it is likely justified under relevant moral norms. This is because international crimes generally require an evil intent[11] that is not necessary for military intervention to be morally justified. Rather, as this Article will argue, just cause for military intervention depends on the gravity of the harm occurring or threatened in a state, measured in terms of both scale and qualitative factors. Therefore, situations justifying humanitarian intervention include, for instance, large-scale serious harm due to natural disaster that the state is unable or unwilling to address.

Not only does RtoP's limitation to international crimes fail to capture the just cause threshold for military intervention, it also undermines RtoP's principal goal of preventing people from suffering serious harms. RtoP seeks to prevent harm by encouraging states to accept a broad range of responsibilities for the human rights and security of people inside and outside their borders. To qualify as an "RtoP situation" under the World

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8. 2005 World Summit Outcome, G.A. Res. 60/1, ¶¶ 138–39, U.N. Doc. A/RES/60/1 (Sept. 16, 2005) [hereinafter Outcome Document].

9. *E.g.*, David Scheffer, *Genocide and Atrocity Crimes*, 1 GENOCIDE STUD. & PREVENTION 229, 229 (2006) (describing the need to "transform the terminology used in scholarship, public documents, and public dialogue regarding the crime of genocide, crimes against humanity (including ethnic cleansing), and war crimes into a more adaptable and accurate vehicle for the collective description of these crimes, and that the relevant term should be 'atrocity crimes'"); *see also infra* Parts II.C. & IV.B.

10. *See infra* Part II.B.

11. *See* Rome Statute of the International Criminal Court art. 30, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute] (requiring that war crimes, crimes against humanity and genocide be committed with "intent and knowledge" of the relevant conduct and circumstances).

Summit formulation, however, a determination must be made that international crimes are occurring or threatened.[12] The time and effort required to make such a finding may impede or delay preventive efforts. Moreover, the requirement of such a finding will likely concentrate RtoP efforts in the developing states where international criminal courts have been most active, promoting the perception that RtoP is a tool of powerful states.

Finally, linking RtoP to international crimes also threatens to undermine the international criminal law regime in several ways. First, it encourages the world to think of international crimes exclusively as "atrocities" that require very large-scale harm. Focusing international criminal prosecutions only on large-scale crimes will detract from the regime's ability to prevent a wide range of crimes through its expressive and deterrent functions. Second, in order to avoid acknowledging a responsibility to intervene, states may resist identifying events as international crimes, thereby impeding the development of international criminal law. Third, by obscuring the question of when harm is grave enough to warrant humanitarian intervention, RtoP fails adequately to differentiate such intervention from the crime of aggression. Although the Outcome Document limits humanitarian intervention to Security Council-authorized actions,[13] some states have indicated that they do not accept that limitation.[14] When states engage in unilateral humanitarian intervention, it will be particularly important to have a widely accepted just cause threshold to guide international prosecutors.

Fixing RtoP's just cause threshold is important not because RtoP currently dictates intervention outcomes, but because it helps to frame international discourse regarding the legitimacy of intervention. Labeling something an "RtoP situation" influences decisionmakers, at least some of the time.[15] Moreover, if its powerful supporters are successful, RtoP may eventually become a legal norm that governs intervention.

The argument will unfold in four parts. Part I will describe the evolution of RtoP, showing how its various articulations seek to capture the just cause threshold. Part II will explain why international crimes do not

12. *See* Outcome Document, *supra* note 8, ¶ 139.

13. *See id.* (allowing collective action "through the Security Council").

14. Letter from the Rt. Hon. Hugh Robertson MP, U.K. Minister of State, Foreign & Commonwealth Office, to the Rt. Hon. Sir Richard Ottaway MP, U.K. House of Commons (Jan. 14, 2014), *available at* http://justsecurity.org/wp-content/uploads/2014/01/Letter-from-UK-Foreign-Commonwealth-Office-to-the-House-of-Commons-Foreign-Affairs-Committee-on-Humanitarian-Intervention-and-the-Responsibility-to-Protect.pdf [hereinafter Letter from Robertson].

15. *See infra* note 59 and accompanying text (discussion of Kenya situation); Saira Mohamed, *Taking Stock of the Responsibility to Protect*, 48 STAN. J. INT'L L. 319, 339 (2012) (arguing that the United States' decision to support intervention in Libya was influenced primarily by national interest, but also by RtoP).

provide an appropriate just cause threshold for humanitarian intervention. Part III will argue that the association between RtoP and international criminal law decreases RtoP's ability to prevent harm and threatens to undermine the effectiveness of the international criminal law regime. Finally, Part IV will suggest how RtoP should be restructured and will counter the claims of some RtoP supporters that it would be a mistake to revisit the Outcome Document consensus.

I. CRAFTING RTOP: THE SEARCH FOR JUST CAUSE

Supporters of RtoP often point out that, unlike humanitarian intervention, RtoP is not only, or even primarily, about military intervention.[16] It encompasses a whole range of responsibilities and forms of intervention aimed at preventing people from being harmed and restoring societies recovering from catastrophic harms. Nonetheless, because RtoP purports to explain when it is legitimate to intervene militarily to protect people, each articulation of RtoP has included some sort of just cause threshold.

A. The ICISS Report

In 1999, UN Secretary-General Kofi Annan called on states to elaborate a normative and legal framework to prevent the kinds of calamities that had occurred in the Former Yugoslavia and Rwanda.[17] NATO had controversially intervened in Kosovo without Security Council authorization, an act that an international commission labeled "illegal but legitimate."[18] Annan wanted states to answer the following question: "If humanitarian intervention is, indeed, an unacceptable assault on sovereignty, how should we respond to a Rwanda, to a Srebrenica — to gross and systematic violations of human rights that offend every precept of our common humanity?"[19] In response, the Canadian government convened the International Commission on Intervention and State

16. *See, e.g.*, Evans, *From Humanitarian Intervention*, *supra* note 1, at 709 (asserting that RtoP is about "much more than intervention").

17. Press Release, Secretary-General, Secretary-General Says Renewal of Effectiveness and Relevance of Security Council Must Be Cornerstone of Efforts to Promote International Peace in Next Century, U.N. Press Release SG/SM/6997 (May 18, 1999).

18. INDEP. INT'L COMM'N ON KOSOVO, THE KOSOVO REPORT: CONFLICT, INTERNATIONAL RESPONSE, LESSONS LEARNED 4 (2000) [hereinafter THE KOSOVO REPORT], *available at* http://reliefweb.int/sites/reliefweb.int/files/resources/6D26FF88119644CFC1256989005CD392-thekosovoreport.pdf.

19. U.N. Secretary-General, *We the Peoples: The Role of the United Nations in the Twenty-First Century: Rep. of the Secretary-General*, ¶ 217, U.N. Doc. A/54/2000 (Mar. 27, 2000) (emphasis omitted).

Sovereignty (ICISS or Commission), a group of independent experts that answered Annan's question by proposing RtoP.[20]

Although the ICISS Report declares that it is "about the so-called 'right of humanitarian intervention,'" in fact, the report is much broader, elaborating on a whole range of state responsibilities to prevent "human catastrophe," respond to it, and rebuild after it.[21] According to the Report, states' internal responsibilities include the entirety of human rights and human security norms, and their responsibilities to protect populations in other states similarly span a wide spectrum — from providing development assistance to imposing sanctions.[22]

Indeed, the breadth of the ICISS Report's response to Annan's question was largely due to the Commission's desire to distinguish RtoP from humanitarian intervention,[23] a doctrine that is unpopular with many states, as Annan's question suggests.[24] The doctrine of humanitarian intervention is often framed as a right,[25] and sometimes even a duty,[26] to intervene militarily to protect people in other states from serious harm. Many states resist the notion that there is a right to military intervention under any circumstances short of self-defense.[27] In 2000, 130 nations adopted the Declaration of the South to publicly state their opposition to the "'right' of humanitarian intervention."[28]

To distinguish its answer to the question of when military intervention is legitimate for protection purposes — RtoP — from the doctrine of humanitarian intervention, ICISS proposed a reconceptualization of sovereignty. According to the ICISS Report, states should understand

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20. ICISS Report, *supra* note 6, at VII–VIII.

21. *Id.* at VII–VIII & ¶ 2.32.

22. *Id. passim*.

23. *Id.* ¶¶ 1.39–41.

24. *See, e.g.*, Alex J. Bellamy, *Whither the Responsibility to Protect? Humanitarian Intervention and the 2005 World Summit*, 20 ETHICS & INT'L AFF. 143, 152 (2006); R. George Wright, *A Contemporary Theory of Humanitarian Intervention*, 4 FLA. INT'L L.J. 435, 437 (1989).

25. *See, e.g.*, Gareth Evans et al., *Correspondence: Humanitarian Intervention and the Responsibility to Protect*, 37 INT'L SECURITY 199, 202 (2013) (mentioning that "humanitarian intervention" was often equated with a "right to intervene" before ICISS successfully redefined "humanitarian intervention" as "right to protect").

26. Fernando R. Tesón, *The Liberal Case for Humanitarian Intervention*, *in* HUMANITARIAN INTERVENTION: ETHICAL, LEGAL, AND POLITICAL DILEMMAS 93, 97 (J.L. Holzgrefe & Robert O. Keohane eds., 2003) [hereinafter Tesón, *The Liberal Case*] ("The right to intervene thus stems from a general duty to assist victims of grievous injustice.").

27. *See* Nicholas J. Wheeler & Justin Morris, *Humanitarian Intervention and State Practice at the End of the Cold War*, *in* INTERNATIONAL SOCIETY AFTER THE COLD WAR: ANARCHY AND ORDER RECONSIDERED 135, 162 (Rick Fawn & Jeremy Larkins eds., 1996) ("Many non-Western states question the West's (and especially [the United States']) motives in advocating humanitarian intervention, seeing it as a new form of 'imperialism' which will leave the weak vulnerable to the cultural preferences of the strong.").

28. Group of 77 South Summit, Havana, Cuba, Apr. 10–14, 2000, *Declaration of the South Summit*, ¶ 54, *available at* http://www.g77.org/summit/Declaration_G77Summit.htm.

sovereignty not primarily as a right to control what happens within their borders, but rather as a responsibility they bear to protect their populations and those in other states.[29] This reorientation led ICISS to include within the ambit of RtoP the whole range of states' internal and external responsibilities, rather than simply their responsibilities related to military intervention.

The ICISS Report also sought to improve upon the doctrine of humanitarian intervention by providing more precise guidance about when military intervention is legitimate. Much of the criticism of the doctrine of humanitarian intervention rests on the claim that it is unclear, and thus easily used as a pretext for self-interested intervention.[30] The Report states that "[t]here are continuing fears about a 'right to intervene' being formally acknowledged. If intervention for human protection purposes is to be accepted, including the possibility of military action, it remains imperative that the international community develop consistent, credible and enforceable standards to guide state and intergovernmental practice."[31] To that end, the Report proposes a "just cause threshold" along with four "precautionary criteria" for military intervention.[32] The precautionary criteria require that the intervenor have the right intention, that the intervention be a last resort, that proportional means be used, and that the intervention have reasonable prospects of success.[33] The just cause threshold aims to ensure that military intervention is reserved for the "exceptional and extraordinary" circumstances of attempting to "halt or avert":

> 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 large scale "ethnic cleansing," actual or apprehended, whether carried out by killing, forced expulsion, acts of terror or rape.[34]

The Report includes as situations that "typically" meet these conditions genocide, war crimes, and crimes against humanity.[35] Also included in the list of "conscience-shocking situation[s]" are:

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29. *See* ICISS Report, *supra* note 6, ¶¶ 2.14–2.15. In this regard, the ICISS Report draws on the work of Francis Deng, former UN Special Representative on Internally Displaced Persons. *See* Luke Glanville, *The Responsibility to Protect Beyond Borders*, 12 HUM. RTS. L. REV. 1, 9 (2012).

30. *See* Ryan Goodman, *Humanitarian Intervention and Pretexts for War*, 100 AM. J. INT'L L. 107 (2006).

31. ICISS Report, *supra* note 6, ¶ 2.2.

32. *Id.* at XII & ¶ 4.32. Although the Report asks when intervention is "defensible," its focus on "responsibility" suggests that intervention is actually required when the criteria are met. *See id.* ¶¶ 4.1–4.2; Glanville, *supra* note 29, at 10.

33. ICISS Report, *supra* note 6, ¶¶ 4.32–4.43.

34. *Id.* ¶¶ 4.18–4.19 (emphasis omitted).

35. *Id.* ¶ 4.20.

> different manifestations of "ethnic cleansing," including the systematic killing of members of a particular group in order to diminish or eliminate their presence in a particular area; the systematic physical removal of members of a particular group from a particular geographical area; acts of terror designed to force people to flee; and the systematic rape for political purposes of women of a particular group (either as another form of terrorism, or as a means of changing the ethnic composition of that group); . . . situations of state collapse and the resultant exposure of the population to mass starvation and/or civil war; and overwhelming natural or environmental catastrophes, where the state concerned is either unwilling or unable to cope, or call for assistance, and significant loss of life is occurring or threatened.[36]

The ICISS Report's just cause threshold thus requires that the harm occurring or threatened in the target state be both qualitatively and quantitatively grave. The Report emphasizes loss of life — the most qualitatively grave harm — and also includes acts designed to forcibly remove a group of people from an area. Other serious human rights abuses, such as systematic torture not aimed at ethnic cleansing, are excluded no matter how massive their scale.

Quantitative gravity is also critical to the ICISS Report's just cause threshold. Loss of life must be "large scale" or "significant," ethnic cleansing must be "systematic," and starvation must be "mass." The only situation on the list that appears to meet the threshold without the qualifications of "large scale" or "systematic" is state collapse leading to civil war — a situation where there is no sovereign power to object to intervention. Later, however, the Report seems to foreclose the possibility of intervention to stop smaller-scale violations in situations of state collapse when it states: "In both the broad conditions we identified — loss of life and ethnic cleansing — we have described the action in question as needing to be 'large scale' in order to justify military intervention."[37]

Indeed, the Report specifies that the just cause threshold applies equally to situations of state action and state collapse, asserting that in "determining whether the circumstances are grave enough to justify intervention, it makes no basic moral difference whether it is state or non-state actors who are putting people at risk."[38]

The Report declines to specify what it means by "large scale," simply asserting that, in practice, most cases will not generate much disagreement

36. *Id.*
37. *Id.* ¶ 4.21.
38. *Id.* ¶ 4.22.

on this question.[39] It takes the position that situations that meet the just cause threshold usually also threaten international peace and security for purposes of Chapter VII of the UN Charter.[40]

Importantly, the just cause threshold applies only to military intervention. The Report recognizes that "[f]or political, economic and judicial measures the barrier can be set lower."[41] With regard to such other forms of intervention, the Report uses only such vague language as "humanitarian crisis" to delimit the scope of cases eligible for RtoP intervention.[42]

In sum, as originally articulated in the ICISS Report, RtoP included a wide range of forms of intervention not subject to any particular threshold of harm. Legitimate military intervention, on the other hand, was subject to a just cause threshold requiring large scale loss of life or ethnic cleansing. The commission or threat of genocide, war crimes, or crimes against humanity was neither necessary nor sufficient to legitimize intervention under the Report.

B. UN Reports in Preparation for the World Summit

In preparation for the 2005 World Summit, the UN Secretariat issued two reports endorsing RtoP, although in slightly different terms than the ICISS Report. The report of the UN High-Level Panel of Experts (High-Level Panel Report), entitled, *A More Secure World: Our Shared Responsibility*, and undertaken at the request of the Secretary-General, aimed to assess threats to the world's peace and security and to propose policies to address those threats.[43] Like the ICISS Report, the High-Level Panel Report focuses significantly on the responsibilities states bear to protect their own populations and on the responsibilities of the international community to assist states in this endeavor. For instance, it recommends actions to combat global poverty, disease, and environmental degradation,[44] and it suggests the development of UN frameworks for the protection of minority rights and democratically elected governments.[45] However, the High-Level Panel Report does not use the phrase "responsibility to

39. *Id.* ¶ 4.21.

40. *Id.* ¶ 4.23. Chapter VII grants the Security Council authorization to take action to "maintain or restore international peace and security." U.N. Charter art. 39. The report also notes that some of the Security Council's actions under Chapter VII have involved situations with minimal cross-border implications, which can be understood as evidence of an emerging RtoP principle. ICISS Report, *supra* note 6, ¶¶ 6.16–6.17.

41. ICISS Report, *supra* note 6, ¶ 4.2.

42. *See id.* ¶ 4.3.

43. Rep. of the High-Level Panel on Threats, Challenges and Change, A More Secure World: Our Shared Responsibility, U.N. Doc. A/59/565 (Dec. 2, 2004) [hereinafter High-Level Panel Report].

44. *Id.* ¶¶ 44–73.

45. *Id.* ¶ 94.

protect" in these contexts. Instead, it reserves the term for its discussion of intervention, including military intervention. In that context, the High-Level Panel Report mirrors the ICISS Report to a significant extent. It states:

> There is a growing recognition that the issue is not the "right to intervene" of any State, but the "responsibility to protect" of *every* State when it comes to people suffering from avoidable catastrophe — mass murder and rape, ethnic cleansing by forcible expulsion and terror, and deliberate starvation and exposure to disease.[46]

With respect to the use of military force for protection purposes, the High-Level Panel Report proposes five criteria of legitimacy for the Security Council to address in determining whether to grant authorization.[47] These basically reflect the ICISS Report's just cause threshold and precautionary criteria.[48] In determining the "seriousness of threat," the High-Level Panel Report urges the Security Council to consider the following questions:

> Is the threatened harm to State or human security of a kind, and sufficiently clear and serious, to justify prima facie the use of military force? In the case of internal threats, does it involve genocide and other large-scale killing, ethnic cleansing or serious violations of international humanitarian law, actual or imminently apprehended?[49]

The main difference between this formulation of the just cause threshold and that in the ICISS Report is the inclusion of "serious violations of international humanitarian law." This addition extends the scope of RtoP beyond large-scale loss of life and ethnic cleansing, but without clarifying what qualities render a violation of international humanitarian law sufficiently "serious" to meet the threshold for intervention.

In contrast, Secretary-General Annan's report, entitled, *In Larger Freedom: Towards Development, Security and Human Rights for All*, does not elaborate a just cause threshold for military intervention, but does urge states to "[e]mbrace the 'responsibility to protect' as a basis for collective

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46. *Id.* ¶ 201.

47. *Id.* ¶ 207.

48. *See supra* notes 32–34 and accompanying text. Although the ICISS Report also recognized that the primary authority for authorizing intervention is the UN Security Council, it left open the possibility that the UN General Assembly and regional organizations could assume the responsibility to react if the Security Council failed to respond appropriately to a compelling proposal for intervention. *See* ICISS Report, *supra* note 6, ¶¶ 6.28–6.35.

49. High-Level Panel Report, *supra* note 43, ¶ 207(a). The other criteria, which essentially reflect ICISS's "precautionary principles," are "proper purpose," "last resort," "proportional means," and "balance of consequences." *Id.* ¶ 207(b)–(e).

action against genocide, ethnic cleansing and crimes against humanity."[50] This was the first time that RtoP was framed exclusively as a means of addressing international crimes. The Secretary-General's report therefore set the stage for states to adopt this limitation in the Outcome Document.

Annan's report also addresses the "use of force," although in a separate section from that discussing RtoP. The report lists criteria for the Security Council to consider in determining whether to authorize force:

> [T]he Council should come to a common view on how to weigh the seriousness of the threat; the proper purpose of the proposed military action; whether means short of the use of force might plausibly succeed in stopping the threat; whether the military option is proportional to the threat at hand; and whether there is a reasonable chance of success.[51]

Although these criteria are quite similar to those proposed in the ICISS Report, the decision to include them under "use of force" rather than in the section dealing with RtoP may have encouraged states to omit any reference to criteria from the Outcome Document's endorsement of RtoP.[52]

C. World Summit Outcome Document

In September 2005, the member states of the United Nations unanimously approved the Outcome Document,[53] which includes the following paragraphs regarding RtoP:

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

50. U.N. Secretary-General, *In Larger Freedom: Towards Development, Security and Human Rights for All: Rep. of the Secretary-General*, ¶ 7(b), U.N. Doc. A/59/2005, Annex (Mar. 21, 2005).

51. *Id.* ¶ 126.

52. *See* Bellamy, *supra* note 24, at 163.

53. Another international organization, the African Union, adopted a provision similar to RtoP well before the World Summit. *See* Constitutive Act of the African Union art. 4(h), July 11, 2000, O.A.U. Doc. No. CAB/LEG/23.15 (granting the African Union "the right . . . to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity"). This provision equates the "grave circumstances" that may warrant intervention — that is, the just cause threshold — entirely with three international crimes. The act was later amended to extend the right to intervene to "a serious threat to legitimate order." Protocol on Amendments to the Constitutive Act of the African Union art. 4(h), July 11, 2003, *available at* http://www.au.int/en/content/protocol-amendments-constitutive-act-african-union.

> responsibility and support the United Nations in establishing an early warning capability.
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> 139. The international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the Charter, to help to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. In this context, we are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity.[54]

This articulation of RtoP differs from the concept set forth in the ICISS Report in several respects. First, and most importantly, states did not recognize a responsibility to intervene militarily, but only asserted their readiness to do so, and only through collective action authorized by the Security Council. Second, states limited intervention under RtoP, whether military or otherwise, to protecting populations from genocide, war crimes, ethnic cleansing, and crimes against humanity. The reason for this limitation appears to have been the concern among some states of the Global South that a broader RtoP norm could be abused by powerful states to the detriment of the less powerful.[55]

The Outcome Document also omits any other criteria for determining when intervention is appropriate. Such criteria were opposed both by states like China, that feared the criteria would be abused, and by states like the United States, that wanted to maintain discretion in deciding when to intervene.[56] Even a paragraph committing states to further discuss criteria was ultimately removed.[57]

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54. Outcome Document, *supra* note 8, ¶¶ 138–39.

55. Jean Ping, Chairperson, African Union Comm'n, Keynote Address: The Responsibility to Protect in Africa (Oct. 23, 2008), *in* INT'L PEACE INST. ET AL., THE RESPONSIBILITY TO PROTECT (RTOP) AND GENOCIDE PREVENTION IN AFRICA 11–12 (Jenna Slotin et al. eds., 2009), *available at* http://www.isn.ethz.ch/Digital-Library/Publications/Detail/?id=126691 (explaining that the limitation was introduced by the Ambassador from Pakistan to address concerns raised by states of the Global South). The United States unsuccessfully suggested adding "other large-scale atrocities" to the threshold "to avoid legalistic debates" about whether the definitions of crimes are met and "to clarify that this document does not cover all war crimes, but only those that are of sufficient scale." Letter from John R. Bolton, U.S. Ambassador to the United Nations (Aug. 30, 2005), *available at* http://www.responsibilitytoprotect.org/files/US_Boltonletter_R2P_30Aug05[1].pdf.

56. *See* Bellamy, *supra* note 24, at 166.

57. *Id.* at 168.

The Outcome Document creates no legal rules regarding intervention: It neither commits states to intervening in particular circumstances, nor limits the options available for intervention under the Security Council's mandate to maintain and restore peace and security. The Security Council, acting under Chapter VII of the United Nations Charter, remains free to authorize intervention when international crimes are neither underway nor threatened. Nonetheless, because it represents a consensus,[58] the Outcome Document has become the dominant articulation of RtoP, framing at least some discussions concerning intervention.[59]

II. INTERNATIONAL CRIMES ARE NOT THE RIGHT JUST CAUSE THRESHOLD

Although members of ICISS and other advocates of RtoP were disappointed that the Outcome Document omits "precautionary criteria,"[60] they have fully embraced the limitation to international crimes.[61] Indeed, they have made statements suggesting that they believe the restriction sets an appropriately high threshold for military intervention. For instance, Gareth Evans, who co-chaired the ICISS, has responded to the criticism that the Outcome Document sets the threshold for humanitarian intervention too low by asserting that the limitation to international crimes constitutes a high bar.[62] Alex Bellamy also asserts that the Outcome Document's reference to international crimes constitutes "a high just cause threshold."[63]

The vast majority of the scholarly commentary on RtoP also supports the restriction to international crimes.[64] Some commentators justify the restriction on the grounds that it sets a morally appropriate boundary for military intervention, while others assert that it clarifies the circumstances legitimizing military intervention, thereby rendering RtoP less subject to

58. *See id.* at 164 ("[T]he responsibility to protect paragraphs in the World Summit [O]utcome [D]ocument represent the emergence of a consensus.").

59. *See, e.g.*, Alex J. Bellamy, *The Responsibility to Protect: Five Years on*, 24 ETHICS & INT'L AFF. 143, 153–55 (2010) (stating that RtoP reached opposite results in Darfur, where it is "typically rated an abject failure in that it failed to galvanize international action or, worse, exacerbated the situation by distracting the relevant actors," and Kenya, where it "is widely credited with having helped diplomatic efforts to stave off the escalation of violence"); Mohamed, *supra* note 15, at 331 (noting that the Security Council resolution authorizing intervention in Libya mentioned Libya's responsibility to protect its population but did not discuss the international community's responsibility to protect).

60. Evans et al., *supra* note 25, at 205; *see also* Thomas G. Weiss, *R2P After 9/11 and the World Summit*, 24 WISC. INT'L L.J. 741, 750 (2006).

61. Evans et al., *supra* note 25, at 205.

62. *Id.* at 204.

63. *See* Bellamy, *supra* note 24, at 164.

64. *See, e.g.*, Eyal Benvenisti, *Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders*, 107 AM. J. INT'L L. 295, 299 n.22 (2013).

abuse.[65] Two authors have gone so far as to argue that application of RtoP should depend on a determination by the International Criminal Court (ICC) that international crimes have been committed.[66] They assert that this process would "remove all legal ambiguity as to whether or not international human rights standards are being violated" and thus help to avoid "unauthorised military interventions."[67]

Many commentators agree that the Outcome Document's restriction to international crimes sets a higher threshold for military intervention than that contained in the ICISS Report.[68] Indeed, those who have criticized the restriction generally do so on the basis that the threshold is too high. For instance, Michael Byers asserts that the Outcome Document requires a higher threshold than was reflected in the Security Council's practice regarding humanitarian intervention in the 1990s, and thus "moral high ground" has been lost.[69]

This Part argues that the Outcome Document does not contain a high threshold for humanitarian intervention. Instead, tying RtoP to international crimes renders it both under- and over-inclusive as a norm of legitimate humanitarian intervention. After reviewing the scholarship on the just cause threshold, it argues that international crimes do not inherently require a level of gravity appropriate for humanitarian intervention. Of course, some instances of such crimes would meet any just cause threshold, but many would not. Nor does the effort to frame the crimes as "atrocity crimes" adequately clarify the threshold. Moreover, the moral norms underlying most theories of just cause for humanitarian intervention suggest that the commission of international crimes should not be a necessary component of just cause.

A. Theories of Just Cause for Humanitarian Intervention

Theories of humanitarian intervention are rooted in the Christian just war tradition, which includes the idea that only wars in pursuit of a just cause are morally legitimate.[70] Such theories were advanced to justify the

65. Mónica Serrano, for instance, states that in "confining the norm to the most heinous crimes, the 2005 agreement had clearly added to the norm's clarity and specificity." Mónica Serrano, *The Responsibility to Protect and its Critics: Explaining the Consensus*, 3 GLOBAL RESP. TO PROTECT 1, 5 (2011); *see also* Jennifer M. Welsh, *Conclusion: The Evolution of Humanitarian Intervention in International Society*, *in* HUMANITARIAN INTERVENTION AND INTERNATIONAL RELATIONS, *supra* note 6, at 176, 187 (stating that the scope is "carefully delineated" compared to the ICISS Report).

66. Michael Contarino & Selena Lucent, *Stopping the Killing: The International Criminal Court and Juridical Determination of the Responsibility to Protect*, 1 GLOBAL RESP. TO PROTECT 560, 568 (2009).

67. *Id.*

68. *See, e.g.*, JAMES PATTISON, HUMANITARIAN INTERVENTION AND THE RESPONSIBILITY TO PROTECT: WHO SHOULD INTERVENE? 14 (2010); Weiss, *supra* note 60, at 745.

69. Michael Byers, *High Ground Lost on UN's Responsibility to Protect*, WINNIPEG FREE PRESS, Sept. 18, 2005, at B3.

70. *See* Augustine of Hippo, *Against Faustus the Manichaean*, *in* AUGUSTINE: POLITICAL WRITINGS

use of force for protective purposes as early as the sixteenth and seventeenth centuries.[71] Early theories of just cause focused on freeing populations from "tyrannical" rulers and stopping persecution, often of religious minorities.[72] A sixteenth-century text entitled, *Vindiciae contra tyrannos*, argues that "princes had a duty to defend the subjects of other princes against egregiously abusive tyranny and oppression."[73] Likewise, Hugo Grotius wrote in 1625 that intervention is justified when leaders "provoke their people to despair and resistance by unheard of cruelties."[74] In the late eighteenth century, Edmund Burke opined that "a positively vicious and abusive government" should be replaced.[75]

Later theories of just cause came to include slavery and "'uncivilized' governance."[76] As D. J. B. Trim explains, in the nineteenth century, "[u]ncivilised peoples and kingdoms . . . were thought to be at a more primitive stage of development, which meant they were inherently likely to commit acts of appalling barbarism, brutality and cruelty," justifying intervention.[77]

In the twentieth century, Michael Walzer helped reinvigorate just war theory with his 1977 book, *Just and Unjust Wars*.[78] According to Walzer, "[h]umanitarian intervention is justified when it is a response . . . to acts 'that shock the moral conscience of mankind.'"[79] Here he echoes Oppenheim's assertion that intervention is appropriate when "a state

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220, 222 (Ernest L. Fortin & Douglas Kries eds., Michael W. Tkacz & Douglas Kries trans., 1994) (asserting that just war can only be waged for the right reasons, and under proper authority); *see also* John F. Coverdale, *An Introduction to the Just War Tradition*, 16 PACE INT'L L. REV. 221, 229 (2004).

71. D.J.B. Trim, *Conclusion: Humanitarian Intervention in Historical Perspective*, *in* BRENDAN SIMMS & D. J. B. TRIM, HUMANITARIAN INTERVENTION: A HISTORY 381, 386 (2011) (advancing sixteenth and seventeenth century precedents as the starting point for doctrine of humanitarian intervention).

72. *Id.* at 386–87.

73. *Id.* at 32–33, 36.

74. HUGO GROTIUS, DE JURE BELLI AC PACIS, 288–89 (A.C. Campbell trans., 1901) (1625).

75. Brendan Simms, *'A False Principle in the Law of Nations': Burke, State Sovereignty, [German] Liberty, and Intervention in the Age of Westphalia*, *in* HUMANITARIAN INTERVENTION: A HISTORY, *supra* note 71, at 89, 106.

76. Trim, *supra* note 71, at 387.

77. *Id.* at 395.

78. MICHAEL WALZER, JUST AND UNJUST WARS: A MORAL ARGUMENT WITH HISTORICAL ILLUSTRATIONS (4th ed. 2006) [hereinafter WALZER, JUST AND UNJUST WARS]. The work of John Rawls has also been very influential. *See* John Rawls, *The Law of Peoples*, 20 CRITICAL INQUIRY 36, 61 (1993) ("[T]he only legitimate grounds of the right to war against outlaw regimes is the defense of the society of well-ordered peoples and, in grave cases, of innocent persons subject to those regimes and the protection of their human rights."); *see also* Rex Martin, *Walzer and Rawls on Just Wars and Humanitarian Interventions*, *in* INTERVENTION, TERRORISM, AND TORTURE 75 (2007) (comparing Walzer's and Rawls's contributions to just war theory).

79. WALZER, JUST AND UNJUST WARS, *supra* note 78, at 107; *see also* MICHAEL WALZER, ARGUING ABOUT WAR 69 (2004); Michael Walzer, *The Argument About Humanitarian Intervention*, *in* ETHICS OF HUMANITARIAN INTERVENTIONS 21, 23 (Georg Meggle ed., 2004); Terry Nardin, *From Right to Intervene to Duty to Protect: Michael Walzer on Humanitarian Intervention*, 24 EUR. J. INT'L L. 67, 69 (2013).

renders itself guilty of cruelties and persecution of its nationals in such a way as to deny their fundamental human rights and to shock the conscience of mankind."[80] The idea that the threshold requires humanity's conscience to be shocked, which Walzer calls "old-fashioned language," continues to permeate discussions of the just cause threshold.[81] Although Walzer gives few indications of what conduct is sufficiently shocking to humanity, he asserts that the threshold must be high in order to leave societies generally free to choose their governments.[82]

Walzer devotes relatively little attention to developing the threshold, apparently because he believes it will be intuitively obvious when the threshold is met. He states that he "[does not] mean to describe a continuum that begins with common nastiness and ends with genocide, but rather a radical break, a chasm, with nastiness on one side and genocide on the other."[83] Walzer does not mean to suggest here that the technical definition of genocide must be met, but rather uses the term as it is popularly understood: large-scale attacks on groups of people.[84] He thus also includes "the 'ethnic cleansing' of a province or country" as meeting the threshold.[85]

Much of the more recent theoretical writing about the just cause threshold for humanitarian intervention responds to Walzer. For instance, Larry May aligns himself with Walzer's "minimalist view" of the human rights violations that can justify intervention. He asserts that war can be justified "in order to prevent mass atrocity or to protect people from other serious harms."[86] However, in addition to genocide, May lists torture as a violation that may justify intervention.[87]

Fernando Tesón, in contrast, takes a broader view of the circumstances that may justify humanitarian intervention, which include "[t]yranny and

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80. L. OPPENHEIM, INTERNATIONAL LAW: A TREATISE 312 (H. Lauterpacht ed., 1955).

81. *See, e.g.*, Kok-Chor Tan, *The Duty to Protect*, *in* HUMANITARIAN INTERVENTION 84, 89 (Terry Nardin & Melissa S. Williams eds., 2007) ("[I]t is generally agreed that intervention is permissible when the human rights violations in a country are so extreme as to 'shock the conscience of mankind . . . .'").

82. *See* WALZER, JUST AND UNJUST WARS, *supra* note 78, at 88, 106.

83. MICHAEL WALZER, THINKING POLITICALLY: ESSAYS IN POLITICAL THEORY 238 (David Miller ed., 2007) [hereinafter WALZER, THINKING POLITICALLY].

84. *See* Perry S. Bechky, *Lemkin's Situation: Toward a Rhetorical Understanding of Genocide*, 77 BROOK. L. REV. 551, 554–55 (2012) (describing legal, political, and popular usage and definitions of genocide).

85. WALZER, THINKING POLITICALLY, *supra* note 83, at 239.

86. Larry May, *The International Community, Solidarity, and the Duty to Aid*, 38 J. SOC. PHIL. 185, 201 (2007).

87. *Id.* at 188. Christine Chinkin also lists torture as a violation of a fundamental right that may justify military intervention and adds the "systematic denial of food." Christine Chinkin, *The Legality of NATO's Action in the Former Republic of Yugoslavia (FRY) Under International Law*, 49 INT'L & COMP. L.Q. 910, 920–21 (2000). Chinkin also suggests that a "good guide" for determining whether humanitarian intervention is justified is whether the violations constitute crimes against humanity. *Id.*

anarchy."[88] In his 1997 book, he states: "[H]umanitarian intervention is justified not only to remedy egregious cases of human rights violations, such as genocide, enslavement or mass murder, but also to put an end to situations of serious, disrespectful, yet not genocidal, oppression."[89] In a later article, he asserts that "[t]he situations that trigger humanitarian intervention are acts such as crimes against humanity, serious war crimes, mass murder, genocide, widespread torture, and the Hobbesian state of nature (war of all against all) caused by the collapse of social order."[90] For Tesón, therefore, mass murder and widespread torture, as well as violence stemming from anarchy, all meet the just cause threshold for humanitarian intervention.[91]

Andrew Altman and Christopher Wellman would expand the threshold even further. They assert that the consensus "that [armed] force is morally permissible only if it is necessary to prevent or end massive human rights violations amounting to a 'supreme humanitarian emergency' . . . should be abandoned."[92] Instead, according to these authors, such intervention should be permitted "when (a) the target state is illegitimate and (b) the risk to human rights is not disproportionate to the rights violations that one can reasonably expect to avert."[93]

James Pattison formulates a threshold somewhere between what he characterizes as Walzer's high bar and Tesón's lower one.[94] On the one hand, he asserts that the threshold must be high in order to ensure that the harm caused by intervening does not exceed the harm the intervention prevents.[95] To avoid this outcome, he argues that there must be both qualitative and quantitative limits on when military intervention is justified. Qualitatively, the violations to be prevented must concern basic rights, such as the rights "not to be subject to murder, rape, and assault"; quantitatively, "there must be a substantial number of individuals whose basic rights are being violated."[96] These observations lead Pattison to

88. Tesón, *The Liberal Case*, *supra* note 26, at 93; *see also* FERNANDO TESÓN, HUMANITARIAN INTERVENTION: AN INQUIRY INTO LAW AND MORALITY 119–21 (2d ed. 1997) [hereinafter TESÓN, HUMANITARIAN INTERVENTION].

89. TESÓN, HUMANITARIAN INTERVENTION, *supra* note 88, at 16.

90. Tesón, *The Liberal Case*, *supra* note 26, at 94–95.

91. Charles Beitz has articulated a similarly broad theory of humanitarian intervention. *See* CHARLES R. BEITZ, POLITICAL THEORY AND INTERNATIONAL RELATIONS 92 (1979) (asserting that in light of the many factors that can influence the justice of intervention, "it does not seem possible simply to enumerate the kinds of actions forbidden by the nonintervention principle with respect to unjust states").

92. ANDREW ALTMAN & CHRISTOPHER HEATH WELLMAN, A LIBERAL THEORY OF INTERNATIONAL JUSTICE 9 (2009).

93. *Id.*

94. *See* PATTISON, *supra* note 68, at 20, 22.

95. *Id.* at 22.

96. *Id.* at 23.

"generally endorse a just cause criterion similar to that outlined by the ICISS."[97] However, Pattison also states that intervention to prevent less serious harm may be legitimate if the intervention will itself cause little harm.[98] He gives as an example a situation where the assassination of a large number of political prisoners can be prevented without risking significant loss of life.[99]

David Luban's answer to the question "which human rights are worth going to war over?" is that intervention should be limited to addressing acts "that are not merely wrong but wrong to the point of being barbaric."[100] He worries that the "distinction between the civilized and the barbaric is fluctuating and fraught with relativism,"[101] but ultimately concludes that we know intuitively when the line has been crossed, because "[t]he perpetrators become incomprehensible to us; the victims' sufferings overwhelm our imaginations."[102] While Luban does not specify which acts cross the line into barbaric, he does indicate that only "gross" human rights violations are likely to do so.[103]

Jennifer Welsh argues that Walzer's notion of universal morality is too weak, and his emphasis on self-determination too strong.[104] She notes the difficulty of identifying a threshold for what "'shock[s] the conscience of mankind'" but ultimately agrees with the ICISS Report that intervention is morally justified in two situations: "where there is a large-scale loss of life . . . that results from deliberate state action or the massive failure of state structures; and where there is large-scale 'ethnic cleansing' carried out by killing, rape, torture, or mass expulsion."[105]

While most of these authors assert that a large quantity of harm is required to justify humanitarian intervention, like the ICISS Report, they avoid specifying what that means. This reticence stems at least in part from the arbitrariness of identifying a particular number of victims as part of the just cause threshold. However, at least one author has been willing to suggest a numerical component to the just cause threshold. Robert Pape argues that humanitarian intervention should be limited to situations

97. *Id.*

98. *Id.* at 24.

99. *Id.*

100. David Luban, *Intervention and Civilization: Some Unhappy Lessons of the Kosovo War*, *in* GLOBAL JUSTICE AND TRANSNATIONAL POLITICS: ESSAYS ON THE MORAL AND POLITICAL CHALLENGES OF GLOBALIZATION 79, 101 (Pablo de Greiff & Ciaran Cronin eds., 2002).

101. *Id.* at 105.

102. *Id.* at 107.

103. *See id.* at 80.

104. *See* Jennifer M. Welsh, *Taking Consequences Seriously: Objections to Humanitarian Intervention*, *in* HUMANITARIAN INTERVENTION AND INTERNATIONAL RELATIONS, *supra* note 6, at 52, 61; *see also* Henry Shue, *Limiting Sovereignty, in* HUMANITARIAN INTERVENTION AND INTERNATIONAL RELATIONS, *supra* note 6, at 11, 26.

105. Welsh, *supra* note 104, at 61 (citation omitted).

involving an "ongoing campaign of mass homicide sponsored by the local government in which thousands have died and thousands more are likely to die."[106] The threshold of "mass homicide" is met when a government "has killed several thousand of its citizens (i.e., 2,000 to 5,000 unarmed protesters, bystanders, or those commonly called 'civilians') in a concentrated period of time (i.e., one to two months), and it is likely to kill many times that number (i.e., 20,000 to 50,000) in the near future."[107] According to Pape, this approach, which he terms "pragmatic humanitarian intervention," is superior to RtoP, which he argues sets the bar for military intervention too low.[108]

Finally, one author argues that the number of victims is irrelevant to the just cause threshold.[109] In a book-length critique of Walzer's theory of humanitarian intervention, Kimberly Hudson argues that his threshold is too high because it excludes many of the crimes listed in the ICC Statute.[110] Hudson's argument is entirely qualitative: She asserts that, contrary to Walzer's view, *all* crimes in the Rome Statute "shock the conscience of humanity" by their nature.[111] She therefore proposes an "atrocity standard" whereby any crime in the ICC statute would justify humanitarian intervention.[112]

According to Hudson, the number of victims harmed or threatened is not relevant to the just cause threshold, but only to the requirement of proportionality — that military intervention must not do more harm than it prevents.[113] This argument stands in contrast to most theories of just cause, including those discussed above, which require a threshold of gravity that is both qualitative and quantitative in nature. Only once that threshold is crossed does the question arise whether the proposed force is proportionate to the harm at issue.

As this brief survey of just cause theories demonstrates, there is general agreement that the threshold requires substantial qualitative and quantitative harm, but there is plenty of disagreement about what those requirements entail. With regard to the quality of harm required, Pape argues that loss of life — the ultimate harm — is necessary.[114] Many others, like the authors of the ICISS Report, add "ethnic cleansing," which

106. Robert Pape, *When Duty Calls: A Pragmatic Standard for Humanitarian Intervention*, 37 INT'L SECURITY 41, 43 (2012).

107. *Id.* at 53.

108. *Id.* at 80.

109. KIMBERLY A. HUDSON, JUSTICE, INTERVENTION, AND FORCE IN INTERNATIONAL RELATIONS 59 (2009).

110. *Id.* at 2 ("The first objective of this book is to show that Walzer's formulation of just cause is too restrictive and to work out a new formulation that is more stable.").

111. *Id.* at 5.

112. *See id.* at 53–88.

113. *Id.* at 59–60.

114. Pape, *supra* note 106, at 53.

can involve removing a group of people from an area without any loss of life.[115] May and others add torture,[116] a norm that has been subject to significant debate in light of the United States' adoption of what the Bush Administration controversially called "enhanced interrogation techniques."[117] Pattison adds rape and assault,[118] two violations that are excluded from the ICISS just cause threshold — even when committed in large numbers — unless they amount to crimes against humanity or ethnic cleansing. Hudson agrees with the Outcome Document's implication that all international crimes are qualitatively grave enough to constitute just cause. [119] Finally, Altman and Wellman would allow armed intervention to prevent a wide range of human rights violations.[120]

With regard to the quantity of harm required, virtually all authorities assert that it must be "significant" or "large-scale," but few identify a particular number of victims required. Pape's argument that there should be several thousand dead and tens of thousands more threatened with death in the near future seems to set the bar higher than at least some other commentators would deem necessary. Altman and Wellman would clearly disagree, as would Pattison, at least for situations where the intervention is not likely to cause significant harm.[121] Moreover, at least one of the humanitarian interventions that the Security Council has authorized did not meet this threshold.[122]

B. The Uncertain Gravity of International Crimes

In light of the broad consensus that just cause for humanitarian intervention requires harm that is both quantitatively and qualitatively grave, international crimes as a category can only serve as an appropriate threshold if they uniformly meet these gravity criteria. It is difficult to

115. ICISS Report, *supra* note 6, ¶ 4.19.

116. May, *supra* note 86, at 188.

117. *See, e.g.*, Ruth Blakeley, *Dirty Hands, Clean Conscience? The CIA Inspector General's Investigation of "Enhanced Interrogation Techniques" in the War on Terror and the Torture Debate*, 10 J. HUM. RTS. 544, 546–47 (2011) (concluding that recently declassified reports of the Central Intelligence Agency's Inspector General reveal that "enhanced interrogation" amounted to torture as defined by the Convention Against Torture).

118. *See supra* note 96 and accompanying text.

119. *See supra* notes 109–13 and accompanying text.

120. ALTMAN & WELLMAN, *supra* note 92, at 9.

121. *See* PATTISON, *supra* note 68, at 24.

122. When the Security Council granted such authorization with respect to Libya in 2011, approximately 233 had been killed. *See Libya: Governments Should Demand End to Unlawful Killings*, HUM. RTS. WATCH (Feb. 20, 2011), http://www.hrw.org/news/2011/02/20/libya-governments-should-demand-end-unlawful-killings; *Up to 15,000 Killed in Libya War: U.N. Rights Expert*, REUTERS, June 9, 2011, *available at* http://www.reuters.com/article/2011/06/09/us-libya-un-deaths-idUSTRE7584UY20110609. The authorization with respect to Côte d'Ivoire occurred after approximately 3,000 had been killed. *Côte d'Ivoire: 2 Years in, Uneven Progress*, HUM. RTS. WATCH (May 21, 2013), http://www.hrw.org/news/2013/05/21/cote-d-ivoire-2-years-uneven-progress.

assess whether this is the case because, as discussed above, the theories lack uniformity and precision as to what the criteria require, and because the gravity of many international crimes is unclear.

International crimes are certainly grave in some qualitative sense. Indeed, the Rome Statute of the ICC proclaims them "the most serious crimes of concern to the international community as a whole" and asserts that they "shock the conscience of humanity."[123] However, there are various theories about what qualities render each of them grave,[124] none of which supplies sufficient justification for intervention absent a notion of scale. Moreover, despite common assertions that international crimes cause large-scale harm,[125] such harm is not clearly required by the law or theory of international crimes. As such, an examination of the gravity elements of each of the crimes suggests that, at least some of the time, they will not be sufficiently "conscience shocking" to warrant humanitarian intervention.

The legal elements of "war crimes" cover an especially broad range of harms. Such crimes aim to regulate armed conflict in various ways rather than to identify particularly atrocious conduct.[126] The scale of harm war crimes inflict can be quite limited, involving, for instance, the killing or rape of one person.[127] The quality of the harm can also be reasonably minor, such as the harm associated with damaged property.[128]

That war crimes encompass harms of widely varying degrees of gravity is illustrated by the controversy surrounding their inclusion in the ICC's Rome Statute. In negotiating the statute, some states expressed the view that only war crimes committed on a large scale, or as part of a plan or policy, were sufficiently serious to be included in the Court's jurisdiction.[129]

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123. Rome Statute, *supra* note 11, pmbl.

124. *Compare* Robert D. Sloane, *The Expressive Capacity of International Punishment: The Limits of the National Law Analogy and the Potential of International Criminal Law*, 43 STAN. J. INT'L L. 39, 53 (2007) (arguing that international crimes threaten "certain paramount values of mankind (a concept redolent of natural law and identified with the modern international human rights movement)"), *with* International Military Tribunal, *Judgment*, *in* 1 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL: NUREMBERG, 14 NOVEMBER 1945 – 1 OCTOBER 1946, 171, 186 (1947) (noting that aggression is "the supreme international crime" because it "affect[s] the whole world").

125. *See, e.g.*, BEATRICE I. BONAFÈ, THE RELATIONSHIP BETWEEN STATE AND INDIVIDUAL RESPONSIBILITY FOR INTERNATIONAL CRIMES 71 (2009) ("International crimes are offences which require [sic] to be carried out on such a large scale that the participation or at least the support of the state apparatus has often been present.").

126. *See* Rome Statute, *supra* note 11, art. 8.

127. *See, e.g.*, Int'l Criminal Court [ICC], *Elements of Crimes* art 8(2)(a)(i), ICC-ASP/1/3 (Sept. 9, 2002) (establishing as an element of war crimes that "[t]he perpetrator killed one or more persons").

128. *See* Rome Statute, *supra* note 11, art. 8(2)(e)(xii) (prohibiting destruction of property not required by military necessity).

129. *See* Herman von Hebel & Darryl Robinson, *Crimes Within the Jurisdiction of the Court*, *in* THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE 79, 107–08 (Roy S. Lee ed., 1999) (discussing the debate between countries over the inclusion of a threshold clause).

Other states felt the Court's jurisdiction over war crimes should be broader.[130] The compromise reached is that the Court has jurisdiction over war crimes "in particular" when such crimes are "committed as part of a plan or policy or as part of a large-scale commission of such crimes."[131]

In light of the broad scope of harms that war crimes cover, theories about what makes these crimes serious enough to be of "concern to the international community"[132] generally look not to their scale but to their association with armed conflict. The existence of an armed conflict supplies the international interest in war crimes because such conflict breaches or at least threatens international peace and security.[133] However, threats to international peace and security can exist in varying degrees, not all of which necessarily reach the just cause threshold for intervention.

The gravity of "ethnic cleansing" is even more difficult to ascertain, since no legal definition exists. Although David Scheffer asserts that "ethnic cleansing has a clear identity as an atrocity crime warranting implementation of [RtoP],"[134] most authors, including Scheffer, agree that ethnic cleansing is a non-legal term that can include various other international crimes.[135] Given the ambiguity around what constitutes "ethnic cleansing," it is hard to agree with Scheffer that this category of crimes is necessarily grave enough to serve as a "powerful justification for [RtoP]."[136]

Even genocide, which is often labeled the "crime of crimes,"[137] does not clearly meet the just cause threshold for humanitarian intervention in all instances. Although genocide is widely associated with large-scale harm, the definition of genocide does not include a requirement of scale.[138] While some commentators assert that large-scale harm — or at least a policy to commit such harm — is implicit in the definition,[139] international courts have not uniformly followed this approach. The International

130. *Id.*

131. Rome Statute, *supra* note 11, art. 8.

132. *Id.* pmbl.

133. *See* LARRY MAY, WAR CRIMES AND JUST WAR 41–42 (2007).

134. David Scheffer, *Atrocity Crimes Framing the Responsibility to Protect*, 40 CASE W. RES. J. INT'L L. 111, 131 (2007–2008).

135. *Id.* at 128–29.

136. *Id.* at 131.

137. *See, e.g.*, Prosecutor v. Musema, Case No. ICTR-96-13-A, Judgment and Sentence, ¶ 981 (Jan. 27, 2000), http://www.unictr.org/Portals/0/Case%5CEnglish%5CMusema%5Cjudgement%5C000127.pdf ("The Chamber is thus of the opinion that genocide constitutes the 'crime of crimes', [which] must be taken into account in deciding the sentence.").

138. *See* Convention on the Prevention and Punishment of the Crime of Genocide art. II, Dec. 9, 1948, S. EXEC. DOC. O, 81-1 (1949), 77 U.N.T.S. 278, 280 [hereinafter Genocide Convention]; Rome Statute, *supra* note 11, art. 6.

139. *See* WILLIAM A. SCHABAS, GENOCIDE IN INTERNATIONAL LAW: THE CRIME OF CRIMES 10–11 (2000).

Criminal Tribunal for the former Yugoslavia (ICTY), in particular, has held that genocide includes very small-scale killings by a single person who intends to contribute to the destruction of a group, no matter how unrealistic that intention.[140] Genocide theorists also disagree about whether the gravity of genocide stems purely from the evil inherent in the intent to destroy a group, or requires some realistic prospect of such destruction.[141]

Unlike the other crimes, the legal elements of crimes against humanity aim explicitly to capture a certain level of quantitative gravity. Crimes against humanity are committed as part of a widespread or systematic attack on a civilian population, and, in the Rome Statute at least, the attack must be part of a state or organizational policy to commit the attack.[142] "Widespread" obviously connotes scale and the idea of systematicity, and state policy can also be read as requiring at least the threat of large-scale harm.

However, theories of crimes against humanity differ as to the importance of scale in defining these crimes, with at least some theorists arguing that a single inhumane act should be sufficient to qualify.[143] Courts adjudicating crimes against humanity have also read these requirements expansively.[144] For instance, a former ICTY judge notes that crimes committed in a single prison camp have been found to be "widespread" for purposes of crimes against humanity.[145]

In sum, there is substantial variation and disagreement concerning the gravity elements of war crimes, ethnic cleansing, genocide, and crimes against humanity. Therefore, while international crimes are sometimes sufficiently "conscience shocking" to satisfy the just cause threshold for

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140. Prosecutor v. Jelisic, Case No. IT-95-10-T, Judgment, ¶ 66 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 14, 1999), http://www.icty.org/x/cases/jelisic/tjug/en/jel-tj991214e.pdf.

141. *Compare* SCHABAS, *supra* note 139, at 10–12 (arguing that genocide can only be committed as part of a state or organizational policy), *with* Paola Gaeta, *On What Conditions Can a State Be Responsible for Genocide?*, 18 EUR. J. INT'L L. 631, 642–43 (2007) (arguing that individual liability for genocide does not require a state plan or policy), *and* David L. Nersessian, *Comparative Approaches to Punishing Hate: The Intersection of Genocide and Crimes Against Humanity*, 43 STAN. J. INT'L L. 221, 254 (2007) ("Although most genocides probably are so organized in practice, 'policy' is not a constituent element of genocide.").

142. Rome Statute, *supra* note 11, art. 7.

143. *See, e.g.*, Simon Chesterman, *An Altogether Different Order: Defining the Elements of Crimes Against Humanity*, 10 DUKE J. COMP. & INT'L L. 307, 315 (expressing skepticism about the "gruesome calculus of establishing a minimum number of victims necessary to make an attack 'widespread'"); David Luban, *A Theory of Crimes Against Humanity*, 29 YALE J. INT'L L. 85, 108 (2004) (arguing that any requirement for a "body count" to determine whether a potential crime against humanity is widespread or systematic risks "charnel house casuistry" (internal quotation marks omitted)).

144. Patricia Wald, *Genocide and Crimes against Humanity*, 6 WASH. U. GLOBAL STUD. L. REV. 621, 631 (2007).

145. Former ICTY judge Patricia Wald has noted that "[i]n practice . . . the 'systematic or widespread' chapeau of crimes against humanity presents no great obstacle to prosecution." *Id.* at 629–30 (citing GERHARD WERLE, PRINCIPLES OF INTERNATIONAL CRIMINAL LAW 671 (2005)).

humanitarian intervention, that is not always true. As such, the Outcome Document's reference to such crimes does not provide an appropriate threshold for military intervention.

C. Relabelling International Crimes "Atrocities" Does Not Adequately Clarify the Threshold

While many of those who write about RtoP assume that the international crimes in the Outcome Document constitute a high just cause threshold,[146] some advocates of RtoP recognize that such crimes are not uniformly exceptionally serious. As a result, many supporters of RtoP have begun using the term "atrocity crimes" to denote the circumstances warranting intervention.[147] By qualifying the relevant crimes as "atrocities," supporters imply that the crimes must cause a quantitatively, and perhaps qualitatively, high level of harm, but they generally provide no specifics about what this means.

One exception is David Scheffer, who initiated the move to reframe the crimes in the Outcome Document as "atrocity crimes" in an article entitled, *Atrocity Crimes: Framing the Responsibility to Protect*.[148] Scheffer begins by asserting that genocide, war crimes, ethnic cleansing, and crimes against humanity are "atrocity crimes," which he defines by reference to several criteria, including a "substantiality test":

> The crime must be of significant magnitude, meaning that its commission is widespread or systematic or occurs as part of a large-scale commission of such crimes. The crime must involve a relatively large number of victims (e.g., a fairly significant number of deaths or wounded casualties), or impose other very severe injury upon noncombatant populations (e.g., massive destruction of private or cultural property), or subject a large number of combatants or prisoners of war to violations of the laws and customs of war.[149]

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146. *See supra* note 68 and accompanying text.

147. *See, e.g.*, THE WHITE HOUSE, NATIONAL SECURITY STRATEGY 48 (2010), *available at* http://www.whitehouse.gov/sites/default/files/rss_viewer/national_security_strategy.pdf (stating that international community has a responsibility "to prevent mass atrocities and genocide"); Contarino & Lucent, *supra* note 66, at 563; Scheffer, *supra* note 134, at 111; Paul R. Williams et al., *Preventing Mass Atrocity Crimes: The Responsibility to Protect and the Syria Crisis*, 45 CASE W. RES. J. INT'L L. 473, 484, 486 (2012).

148. Scheffer, *supra* note 134, at 111.

149. *Id.* at 118. His definition of "atrocity crimes" includes four other factors of less relevance to the present analysis: "[t]he crime may occur in time of war, or in time of peace, or in time of violent societal upheaval"; "[t]he crime must be identifiable in conventional international criminal law as" one of the core crimes; "[t]he crime must have been led . . . by a . . . powerful elite in society"; and the crime must give rise to individual criminal responsibility. *Id.* at 118–19.

Surprisingly, having defined "atrocity crimes" in part by reference to this "substantiality test," Scheffer goes on to state that not all atrocity crimes are subject to the substantiality test. He notes that "war crimes often are not subject to a substantiality test,"[150] and that, at least in domestic courts, genocide could include acts committed with intent "to exterminate one or a very small number of individuals."[151] Elsewhere in the article Scheffer asserts that crimes against humanity are only substantial enough to justify intervention when they involve acts of a certain "magnitude, continuous commission, planning, and leadership."[152] The reader is thus left uncertain about the relationship between the category "atrocity crimes" and the criterion of "substantiality."

Scheffer's efforts to "draw[ ] the line" between atrocity crimes that justify military intervention under RtoP and those that do not fail to clarify the matter.[153] Indeed, the idea that such a line must be drawn seems to conflict with other statements in the article, including the title, that imply that the purpose of defining a category of "atrocity crimes" is precisely to explain when intervention is justified. Moreover, Scheffer's explanations for which crimes meet the threshold are confusing. For instance, he asserts both that war crimes are "often . . . not subject to a substantiality test," and that "there is a substantiality test for war crimes that normally applies before individual culpability is established."[154] This apparent conflict stems from the fact that Scheffer uses the term "substantiality test" in two ways. While his "substantiality test" for defining atrocity crimes focuses on quantitative gravity, here he is describing qualitative gravity — the requirement that war crimes must involve "grave consequences for the victim."[155] He concludes by reverting to the quantitative understanding of "substantiality" when he states that "[a] credibly high substantiality test, one requiring a significant number of war crimes which affects a reasonably large number of victims or potential victims, would be central to whether the war crimes in question are indeed atrocity crimes and thus whether [RtoP] is relevant to responding to the situation."[156]

In sum, Scheffer's article raises as many questions as it answers regarding the justifications for humanitarian intervention. To be fair, however, the same is true of many of the efforts to explain the just cause threshold. Moreover, Scheffer intended his article as a "preliminary

150. *Id.* at 131.
151. *Id.* at 120–21.
152. *Id.* at 125.
153. *See id.* at 111–12.
154. *Id.* at 131–32.
155. *Id.* at 132 (quoting Prosectuor v. Rutaganda, Case No. ICTR-96-3-T, Judgment, ¶ 105 (Dec. 6, 1999); Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, ¶ 616 (Sept. 2, 1998)) (internal quotation marks omitted).
156. *Id.* at 133.

rationale" for a threshold for military action under RtoP, presumably hoping it would stimulate further discussion of the issue.[157] Instead, while RtoP advocates have heeded Scheffer's plea to use "the unifying term of 'atrocity crimes' to describe [the] four categories of crimes,"[158] they have not further developed the content of the term. Indeed, the use of the term seems to have suppressed further elaboration of the just cause threshold. This may be because the rhetoric of "atrocities" issues an emotional appeal — who can deny that we all have responsibilities to prevent "atrocities"? — which makes it harder to suggest that some harms may fall below the threshold.

The post-Outcome Document reports of the Secretary-General illustrate how the term "atrocity crimes" has replaced other efforts to describe the threshold. The 2009 report, *Implementing the Responsibility to Protect*, differentiates between the gravity required for military and nonmilitary forms of intervention. The report sets forth a three-pillared approach to RtoP: Pillar One involves the internal responsibilities of states; Pillar Two concerns the responsibilities of states to assist one another in meeting their internal responsibilities; and Pillar Three addresses the responsibilities of states to act collectively, including by force, when a state is manifestly failing to meet its internal responsibilities.[159] The report applies the first two pillars to all "crimes relating to the responsibility to protect";[160] however, when the report discusses military intervention, the terminology changes to "*egregious* crimes and violations relating to the responsibility to protect"[161] and "*large-scale* crimes and violations related to the responsibility to protect."[162] This implies that military intervention pursuant to RtoP is subject to a higher gravity threshold than other forms of intervention.[163]

Beginning in 2011, however, the Secretary-General's reports use the terms "atrocity crimes" and "mass atrocity crimes" with respect to all aspects of RtoP, not merely military intervention.[164] The addition of

157. *Id.* at 112.

158. *Id.* at 134.

159. U.N. Secretary-General, *Implementing the Responsibility to Protect: Rep. of the Secretary-General*, ¶¶ 49–50, U.N. Doc. A/63/677 (Jan. 12, 2009) [hereinafter U.N. Secretary-General, *Implementing RtoP*].

160. *See id.* ¶¶ 17, 39, 44, 47.

161. *Id.* ¶ 56 (emphasis added).

162. *Id.* ¶ 58 (emphasis added).

163. Although the report uses the terms "atrocity crimes" and "mass atrocities" in several places, *see, e.g.*, *id.* ¶ 68, it does not fully embrace that characterization.

164. U.N. Secretary-General, *Responsibility to Protect: State Responsibility and Prevention: Rep. of the Secretary-General*, ¶ 2, U.N. Doc. A/67/929–S/2013/399 (July 9, 2013) [hereinafter U.N. Secretary-General, *State Responsibility and Prevention*]; *see also* U.N. Secretary-General, *Responsibility to Protect: Timely and Decisive Response: Rep. of the Secretary-General*, U.N. Doc. A/66/874–S/2012/578 (July 25, 2012) [hereinafter U.N. Secretary-General, *Timely and Decisive Response*].

"mass" emphasizes the quantitative gravity dimension, but the reports make no effort to explain what "mass" means in this context, and indeed they use the terms interchangeably. What little effort is made to define "atrocity crimes" does not attempt to draw a line relevant to military intervention.[165] This shift toward the rhetoric of "atrocity crime" in the Secretary General's reports is mirrored in much of the literature regarding RtoP.[166] As explained above, this trend to replace the reference to the crimes in the Outcome Documents with the term "atrocity crimes" fails adequately to clarify the just cause threshold for humanitarian intervention, and may even stifle discussion of the issue.

D. Just Cause Does Not Require Criminal Intent

In addition to including harms that are insufficiently grave to merit humanitarian intervention, using international crimes as the just cause threshold excludes situations that likely warrant such intervention as a moral matter. As demonstrated above, the moral norms undergirding the gravity threshold for humanitarian intervention remain underdeveloped. Nonetheless, a strong argument can be made that such norms are not coextensive with the moral norms that inform criminal responsibility.

In particular, criminal liability for serious crimes usually requires an evil intent, but such intent is unnecessary to justify humanitarian intervention. Criminal law is about punishment, and even utilitarian moral philosophers often accept the baseline retributive premise that the innocent should not be punished regardless of the good that such punishment may generate.[167] In contrast, fault is not required for military intervention to be morally legitimate. Rather, as already discussed, such legitimacy depends significantly on the seriousness of the harm occurring or threatened. Culpability is irrelevant because the purpose of humanitarian intervention

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165. For instance, the 2013 report asserts that "[w]hat distinguishes atrocity crimes is the deliberate targeting of specific groups, communities or populations." U.N. Secretary-General, *State Responsibility and Prevention*, *supra* note 164, ¶ 12. This can be read as a qualitative gravity requirement — assuming there is some particular evil in targeting groups rather than individuals — or a quantitative gravity requirement if the groups must be of a certain size.

166. When attempts are made to define "atrocity crimes," they often simply refer to the four crimes, and sometimes they add the qualifier "large-scale." *See, e.g.*, GARETH EVANS, THE RESPONSIBILITY TO PROTECT: ENDING MASS ATROCITY CRIMES ONCE AND FOR ALL 12 (2008) [hereinafter EVANS, THE RESPONSIBILITY TO PROTECT].

167. *See* Guyora Binder & Nicholas J. Smith, *Framed: Utilitarianism and Punishment of the Innocent*, 32 RUTGERS L.J. 115, 127–39 (2000) (noting that many modern utilitarians have argued that utilitarianism does not justify punishing the innocent, and describing how utilitarian doctrine is interpreted to avoid this consequence); John Rawls, *Two Concepts of Rules*, 64 PHIL. REV. 3, 3–4 (1955) (arguing that utilitarianism and negative retributivism are reconcilable if one notices the "distinction between justifying a practice and justifying a particular action falling under it"); THOM BROOKS, PUNISHMENT 98 (2012) (describing negative retribution as a form of rule utilitarianism).

is to prevent, not to punish.[168] As many of the theories discussed above suggest, humanitarian intervention is morally legitimate when the nature and scale of harm occurring is such an affront to our common humanity that we cannot tolerate inaction.[169] What that means requires further elaboration, but there is no compelling reason to limit it to harm that has been caused intentionally.

The arguments that have been advanced in favor of an intent requirement for the just cause threshold are unconvincing. Eric Heinze proposes two moral grounds for limiting humanitarian intervention to intentionally caused harm. First, an intent requirement would limit humanitarian intervention to "situations where there is an identifiable agent who is responsible for the abuses and against whom the use of force would be directed."[170] The problem with this argument is that there is no moral basis to require that humanitarian intervention be "directed against" anyone. Since the goal is to protect people in danger of harm, not to punish, the force must be "directed against" the harm. Thus, in a failed state situation, for instance, forcible delivery of aid may be necessary because armed groups are competing for control over the relevant territory. But the use of force would not be "directed against" those groups; it would be directed toward helping those in harm's way.

Heinze's second argument is that permitting humanitarian intervention in situations of unintentional harm "would permit an intervener to engage in horrendous crimes, so long as doing so would maximize aggregate human security."[171] The legal norms governing the use of force already address this concern by prohibiting certain kinds of conduct irrespective of the reasons for the use of force.[172] It is therefore unnecessary to limit military intervention to the prevention of crimes on this basis.

Although evil intent is not required for humanitarian intervention to be legitimate, it is sometimes relevant to determinations of legitimacy because

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168. Carsten Stahn recently made this point in response to the Obama Administration's use of punitive language in attempting to justify a potential intervention in Syria after that government used chemical weapons. *See* Carsten Stahn, *Syria and the Semantics of Intervention, Aggression, and Punishment*: *On 'Red Lines' and 'Blurred Lines'*, 11 J. INT'L CRIM. JUST. 955, 959–60 (2013) [hereinafter Stahn, *Semantics of Intervention*]. *See also* Evans, *From Humanitarian Intervention*, *supra* note 1, at 717 ("The rationale for coercive humanitarian intervention is not punishment for past sins . . . ."); David Luban, *War as Punishment*, 39 PHIL. & PUB. AFF. 299, 304 ("[W]e shall have to accept the possibility of wrongdoing without vindication.").

169. Evans, *From Humanitarian Intervention*, *supra* note 1, at 704–12.

170. ERIC A. HEINZE, WAGING HUMANITARIAN WAR: THE ETHICS, LAW, AND POLITICS OF HUMANITARIAN INTERVENTION 46 (2009).

171. *Id.* at 50.

172. *See* Robert D. Sloane, *The Cost of Conflation: Preserving the Dualism of* Jus ad Bellum *and* Jus in Bello *in the Contemporary Law of War*, 34 YALE J. INT'L L. 47, 52 (2009) (explaining that the "dualistic axiom" of *jus ad bellum* and *jus in bello* "insists that *in bello* constraints . . . . do not vary based on . . . one side's asserted *casus belli*").

it predicts the likelihood of future harm. The fact that harms were committed intentionally, especially by people in positions of social power, such as government actors, makes it more likely that additional harms will be inflicted in the future.[173] The likelihood of future harm may, in turn, warrant a determination that the situation is sufficiently grave to justify military intervention even if the harm already inflicted has not met the just cause threshold. However, when the suffering already occurring meets the gravity threshold, or when there are reasons other than intent to believe that sufficient additional preventable suffering is imminent, humanitarian intervention may be morally justified in the absence of intent.

The pre-Outcome Document formulations of RtoP reflect these moral norms. The ICISS Report's "just cause threshold" allowed for military intervention not only in cases of state action — that is, intentional conduct — but also of state inaction, neglect, or collapse.[174] Situations of state inaction or neglect sometimes involve intent — such as when a state has a policy of failing to protect a population — but inaction can also be the result of misguided resource allocation or incompetence. Likewise, state collapse means that no state exists to protect a population, making it particularly important and appropriate for the international community to do so. By requiring intent, the restriction to international crimes precludes military intervention in these cases.

The debate surrounding the applicability of RtoP to the situation in Burma after cyclone Nargis aptly illustrates the poor fit between RtoP and international crimes. In May 2008, Nargis killed between 100,000 and 200,000 people and caused many more to suffer other serious harms.[175] The government of Burma, unable to quickly assist the victims, nonetheless initially refused outside assistance.[176] French Foreign Minister Bernard Kouchner invoked RtoP, urging the Security Council to authorize military intervention to deliver aid.[177] This suggestion immediately met with strong criticism, including from RtoP's most ardent supporters, even

173. *See, e.g.*, Tim Bakken, *Nations' Use of Force Outside Self-Defense*, 8 GEORGETOWN J.L. & PUB. POL'Y 451, 470 (2010) (discussing international military action against a state that has committed grave crimes in the past in order to prevent future harm because "prior acts probably do aid in predicting future behavior").

174. ICISS Report, *supra* note 6, ¶ 4.19.

175. Cristina G. Badescu & Thomas G. Weiss, *Misrepresenting R2P and Advancing Norms: An Alternative Spiral?*, 11 INT'L STUD. PERSP. 354, 362 (2010); Louis Charbonneau, *UN Says 1.5 Million People Affected by Myanmar Storm*, REUTERS, May 8, 2008, *available at* http://uk.reuters.com/article/2008/05/08/idUKSP48798._CH_.242020080508.

176. Ian MacKinnon, *Burmese Regime Blocked International Aid to Cyclone Victims, Report Says*, GUARDIAN, Feb. 27, 2009, http://www.theguardian.com/world/2009/feb/27/regime-blocked-aid-to-burma-cyclone-victims.

177. Badescu & Weiss, *supra* note 175, at 362.

though the ICISS Report's just cause threshold included "environmental catastrophes."[178]

Most of the arguments that supporters advance against applying RtoP to natural disasters are not based on moral norms but rather on alleged pragmatism: RtoP supporters simply assert that it is not feasible to extend the norm beyond what states accepted in 2005.[179] Despite having coauthored the ICISS Report, Evans asserts that "we need to be very careful, indeed, about even floating the idea of extending the reach of the 'responsibility to protect' norm to environmental emergencies."[180] According to Evans, "these cases are clearly not intended to be subsumed under the various descriptions of mass atrocity crimes that appear in the World Summit outcome document and the relevant lead-up reports."[181]

Evans also argues that including natural disasters would render RtoP less operationally effective. According to Evans, going beyond international crimes would diminish RtoP's ability to "generat[e] an effective, consensual response to extreme, conscience-shocking cases."[182] He does not explain why the failure to help hundreds of thousands of injured and homeless people is not an "extreme, conscience-shocking case." While Evans notes that RtoP could apply if it were shown that the government actors had the intent to commit crimes against humanity,[183] he does not explain why such intent should be relevant, apart from the Outcome Document's restriction to international crimes.

Cristina Badescu and Thomas Weiss likewise argue that despite the inclusion of natural disasters in the ICISS Report, UN officials, including the Special Adviser on RtoP, Edward Luck, were right to conclude that "Burma was not an [RtoP] situation."[184] They reach this conclusion "despite the gravity of the crisis," and like Evans, rest it on a purported practical need to restrict the norm according to the Outcome Document.[185]

These discussions of RtoP's applicability to the cyclone in Burma highlight the absence of a normative foundation for the limitation to international crimes, as well as the need to better define the just cause threshold for humanitarian intervention. Perhaps the reluctance to

178. ICISS Report, *supra* note 6, ¶ 4.20. A few scholars support expanding RtoP to cover these kinds of situations. *See, e.g.*, Lloyd Axworthy & Allan Rock, *R2P: A New and Unfinished Agenda*, 1 GLOBAL RESP. TO PROTECT 54, 56 (2009).

179. *See, e.g.*, Gareth Evans, *The Responsibility to Protect in Environmental Emergencies*, 103 AM. SOC'Y INT'L L. PROC. 27, 29 (2009) [hereinafter Evans, *Environmental Emergencies*].

180. *Id.*

181. *Id.*

182. *Id.*

183. *Id.* at 30–31.

184. Badescu & Weiss, *supra* note 175, at 363.

185. *Id.*

intervene militarily to force the delivery of aid in Burma was not based on the inapplicability of the norm but on the perception that the situation was not grave enough. Perhaps it did not sufficiently "shock the conscience of humanity," in Walzer's words, or was not adequately "barbaric," in Luban's. Would the world have reacted differently if the cyclone had left a million or two million in danger of imminent death? What if the state had collapsed and intervention would therefore have met with little resistance? Should RtoP still not apply because no one committed an international crime? No moral norms have been advanced to support such a conclusion. Although RtoP is not a legal norm, it may eventually become one, and, in the meantime, it will likely continue to help frame discussions about the legitimacy of such intervention. It is therefore important that RtoP discourse include situations where intervention would be morally legitimate.

As a legal norm governing humanitarian intervention develops, it may be advisable to limit the norm based on practical considerations. But the practical considerations RtoP's advocates cite for maintaining the restriction to international crimes are based on the fallacy that such crimes provide a high threshold for intervention. Once this fallacy is unveiled, the value of the limitation is greatly reduced. Moreover, its costs include not only excluding from RtoP discourse situations that may warrant intervention as a moral matter, but also, as explained below, possibly impeding nonmilitary forms of intervention and adversely affecting the development of international criminal law.

III. BEYOND HUMANITARIAN INTERVENTION: THE OTHER COSTS OF LIMITING RTOP TO INTERNATIONAL CRIMES

The decision at the World Summit to limit RtoP to international crimes, and subsequent endorsements of that decision, have important unappreciated consequences both for RtoP's effectiveness and for that of the international criminal law regime. As this Part details, the restriction limits RtoP's effectiveness as a tool of prevention by requiring a determination that international crimes are threatened for RtoP to apply. Moreover, the restriction encourages people to think of international crimes exclusively as "atrocities" that require a very large scale of harm. Such a quantitative gravity threshold for all international crimes would limit the ability of international criminal law to serve as a preventive tool. Finally, by obscuring the just cause threshold for humanitarian intervention, the restriction to international crimes complicates the task of determining when intervention amounts to the crime of aggression.

A. Impeding Prevention

Many advocates of RtoP agree that its focus should be less on military intervention than on preventing people from being harmed by encouraging states to (1) fulfill their internal protection responsibilities, (2) assist one another in this regard, and (3) intervene when necessary, preferably through sanctions and other nonmilitary means.[186] The ICISS Report asserts that "[p]revention is the single most important dimension of the responsibility to protect."[187] A critical distinction between RtoP and the doctrine of humanitarian intervention is that the latter concerns only military intervention, while the former is much more focused on these other goals.[188]

To enable RtoP to serve this broad preventive function, its supporters portray RtoP as encompassing pre-existing legal and moral norms related to human rights and human security. For instance, in his post-Outcome Document reports on RtoP, Secretary-General Ban Ki-moon takes the position that RtoP includes responsibilities related to the whole gamut of human rights and human security norms.[189]

In limiting all aspects of RtoP to international crimes, the Outcome Document formulation makes it more difficult for RtoP to serve this preventive purpose. The Secretary-General justifies the breadth of RtoP by asserting that failing to respect human rights and human security norms makes international crimes more likely.[190] While this is no doubt true, an increased likelihood of international crimes, presumably compared to situations where such crimes are highly unlikely, surely does not justify application of RtoP. If RtoP is limited to situations involving international crimes, such crimes must at least be threatened; that is, there must be some significant chance of such crimes occurring.

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186. *See, e.g.*, Press Release, Secretary-General, 'Responsibility to Protect' Came of Age in 2011, Secretary-General Tells Conference, Stressing Need to Prevent Conflict Before It Breaks out, U.N. Press Release SG/SM/14068 (Jan. 18, 2012) (advocating for prevention and cooperation); *cf.* ANNE ORFORD, INTERNATIONAL AUTHORITY AND THE RESPONSIBILITY TO PROTECT 103 (2011) (arguing that RtoP "has strengthened the idea that the UN has the responsibility and the capacity . . . to coordinate international functions of law-making, discipline and security").

187. ICISS Report, *supra* note 6, at XI.

188. *See, e.g.*, Evans, *From Humanitarian Intervention*, *supra* note 1, at 709 (explaining that RtoP is "more than [military] intervention" and "extends to a whole continuum of obligations"). One author has even argued that the central purpose of RtoP is to build democratically legitimate states. Touko Piiparinen, *Sovereignty-Building: Three Images of Positive Sovereignty Projected Through Responsibility to Protect*, 24 GLOBAL CHANGE, PEACE & SECURITY 405, 410 (2012) ("The actual implementation of RtoP necessarily involves structural transformations in seemingly 'irresponsible' states to generate a particular kind of sovereignty . . . .").

189. *See, e.g.*, U.N. Secretary-General, *State Responsibility and Prevention*, *supra* note 164, ¶ 6; U.N. Secretary-General, *Human Security: Rep. of the Secretary-General*, ¶¶ 23–24, U.N. Doc. A/64/701 (Mar. 8, 2010).

190. *See* U.N. Secretary-General, *Implementing RtoP*, *supra* note 159, ¶¶ 43–44; U.N. Secretary-General, *Timely and Decisive Response*, *supra* note 164, ¶ 6.

Determining when a threat of international crimes exists is a difficult task. Although substantial governmental and nongovernmental resources are being expended on efforts to predict the likelihood of future international crimes,[191] no one claims to be able to do it accurately.[192] Moreover, determining whether particular elements of international crimes are met — such as, for instance, the intent to destroy a group as an element of genocide — is a complicated endeavor that can take time and resources.[193] The effort required to make such determinations may delay applying the label "RtoP situation," thereby undermining RtoP's usefulness as a tool of prevention. When states are considering taking collective prevention action pursuant to RtoP, the problem of delay is particularly acute because of the added requirement of reaching a consensus that RtoP applies.

Additionally, limiting the preventive components of RtoP to international crimes encourages a focus on events in the Global South, where most of the crimes being prosecuted internationally have taken place. Focusing RtoP discourse on events in the Global South is likely to generate the same sorts of criticisms that the ICC has incurred for prosecuting exclusively cases in Africa.[194] That is, some state leaders will portray RtoP as a vehicle for oppression.[195] If, on the other hand, the

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191. *See, e.g.*, Press Release, Office of the Press Sec'y, White House, Fact Sheet: A Comprehensive Strategy and New Tools to Prevent and Respond to Atrocities (Apr. 23, 2012), *available at* http://www.whitehouse.gov/the-press-office/2012/04/23/fact-sheet-comprehensive-strategy-and-new-tools-prevent-and-respond-atro (summarizing the Obama Administration's forthcoming Atrocities Prevention Board established to prevent mass atrocities and genocide); *see also* Stephen Pomper, *Update on Atrocity Prevention Strategy Implementation*, WHITE HOUSE BLOG (May 1, 2013, 2:01 PM), http://www.whitehouse.gov/blog/2013/05/01/update-atrocity-prevention-strategy-implementation.

192. For instance, the Arab Spring, which involved large-scale war crimes as well as crimes against humanity, came as a surprise to virtually the entire world. *See* JOHN G. HEIDENRICH, HOW TO PREVENT GENOCIDE: A GUIDE FOR POLICYMAKERS, SCHOLARS, AND THE CONCERNED CITIZEN 85 (2001) ("Trying to guess the specific day a genocide may begin can be extremely difficult, but for even this goal there are some forecasting models."); Susan Benesch, *Vile Crime or Inalienable Right: Defining Incitement to Genocide*, 48 VA. J. INT'L L. 485, 519 (2008) (positing a "reasonably possible consequences test" to gauge when there is a "possibility that a particular speech will lead to genocide").

193. *See* Beth Van Schaack, *Darfur and the Rhetoric of Genocide*, 26 WHITTIER L. REV. 1101 (2005) (focusing on an assessment provides delay tactics for reluctant states).

194. *See, e.g.*, Charles C. Jalloh, *Regionalizing International Criminal Law?*, 9 INT'L CRIM. L. REV. 445, 462–65 (2009) (quoting African leaders who consider the ICC to be like colonialism); Abdul Tejan-Cole, *Is Africa on Trial?*, BBC NEWS AFR. (Mar. 27, 2012), http://www.bbc.com/news/world-africa-17513065 (citing accusations of bias because the only people charged and convicted in the ICC are from Africa); AFRICAN NETWORK ON INT'L CRIMINAL JUSTICE, REFLECTIONS ON THE AFRICAN UNION ICC RELATIONSHIP (2014), *available at* http://www.iccnow.org/documents/CivSocdocreAUsummit.pdf.

195. Jonah Eaton, Note, *An Emerging Norm? Determining the Meaning and Legal Status of the Responsibility to Protect*, 32 MICH. J. INT'L L. 765, 792–93 (2009) (discussing the concerns of "a similar, but smaller group of states than in 2005," who feared that RtoP would be used as pretext in the context of the debate surrounding the Secretary-General's 2009 report).

preventive aspects of RtoP also extend to the responsibility of the United States not to engage in systematic torture, and of Russia and China not to imprison large numbers of political dissidents, it will be seen as a more equitable tool of prevention.

B. Undermining the International Criminal Law Regime

Making RtoP contingent on the commission of international crimes threatens to undermine the international criminal law regime in several ways. First, as shown above, it encourages people to frame international crimes as "atrocity crimes," a term that implies a high degree of quantitative and qualitative gravity. Yet it is not clear that such a high gravity threshold is appropriate for international crimes as a general matter. The primary purpose of international criminal law is to prevent crimes that concern the international community through the expressive and deterrent effects of punishment. International punishment is sometimes appropriate even for crimes that do not affect massive numbers of people. For instance, the ICC is adjudicating a case involving the killing of twelve peacekeepers.[196] While the number of victims may not render this an "atrocity" in some peoples' minds, international prosecution is at least arguably appropriate on the grounds that it will help to prevent such actions in the future. Likewise, the ICC prosecutor is considering prosecuting a coup d'état in Honduras that caused six deaths and two instances of sexual violence.[197] Although this is hard to label a "mass" atrocity of the kind that would trigger RtoP, it is arguably an appropriate subject of international prosecution, since all states share an interest in preventing coups d'état.

Furthermore, the threat of ICC adjudication of smaller-scale crimes is necessary if the Court is to serve as a deterrent to the commission of further crimes in a given situation. It may be appropriate to desist from military intervention until a certain quantity of harm has occurred, but the same threshold should not apply to mere prosecution or threat of prosecution of perpetrators. If the ICC must wait until crimes turn into "mass atrocities" to initiate prosecutions, its preventive capacity will be seriously undermined. By encouraging people to think of international crimes as "atrocities," therefore, RtoP may undermine the ability of the

196. Prosecutor v. Abdallah Banda Abakaer Nourain & Saleh Mohammed Jerbo Jamus, Case No. ICC-02/05-03/09, Corrigendum of the "Decision on the Confirmation of Charges," 4 (Mar. 7, 2011), http://www.icc-cpi.int/iccdocs/doc/doc1036947.pdf (charging Banda with "attack[ing] the MGS Haskanita and kill[ing] twelve (12) AMIS peacekeeping personnel and attempt[ing] to kill eight (8) [African Union Mission in Sudan] peacekeeping personnel").

197. HUMAN RIGHTS WATCH, AFTER THE COUP: ONGOING VIOLENCE, INTIMIDATION, AND IMPUNITY IN HONDURAS 12–16 (2010), *available at* http://www.hrw.org/sites/default/files/reports/honduras1210webwcover_0.pdf.

international criminal law regime to achieve both its expressive and deterrent functions.[198]

Linking intervention to international crimes may also restrict the willingness of states to identify conduct as international crimes, thereby impeding the progressive development of international criminal law. This effect has been seen most clearly in the case of genocide, which entails a treaty-based responsibility to prevent.[199] States have resisted claims that genocide is occurring or threatened for fear that such a conclusion would trigger responsibilities under the Genocide Convention.[200] Likewise, in some cases, states have been reluctant at first to conclude that war crimes and crimes against humanity are taking place, for fear this conclusion would trigger responsibilities.[201] In light of the importance of state consent to international law, such state resistance can constrain the developing definitions of international crimes.

Finally, by obscuring the just cause threshold through the implication that all international crimes are atrocities warranting humanitarian intervention, RtoP complicates the task of determining when the crime of aggression has been committed. In 2010, the state parties to the ICC Statute adopted a definition of aggression that will become prosecutable at

198. On a related note, the tendency to label international crimes "atrocities" may curtail the developing norms of state responsibility with respect to such crimes.

199. *See* Genocide Convention, *supra* note 138; *see also* Application of Convention on Prevention and Punishment of Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), 2007 I.C.J. 43, 102–05 (Feb. 26).

200. *See, e.g.*, Keith A. Petty, *Humanity and National Security: The Law of Mass Atrocity Response Operations*, 34 MICH. J. INT'L L. 745, 807 (2013) ("[M]any states downplayed the level of violence in Rwanda, so as not to invoke the obligations in the Genocide Convention."); Gregory H. Stanton, *The Rwandan Genocide: Why Early Warning Failed*, 1 J. AFR. CONFLICTS & PEACE STUD. 6, 12 (2009) (noting that political leaders "resisted the 'cognitive dissonance' of reports of impending genocide in Rwanda, which might have created at least a moral duty to intervene"); Scott Straus, *Darfur and the Genocide Debate*, 84 FOREIGN AFF. 123, 123 (2005) (noting how the public debate on the Darfur crisis "has focused not on how to stop the crisis, but on whether or not it should be called a 'genocide'" which "would inevitably trigger an international response" as such); George Pumphrey, *"The Srebrenica Massacre": Analysis of the History and the Legend*, GLOBAL RES. (Mar. 12, 2010), http://www.globalresearch.ca/the-srebrenica-massacre-analysis-of-the-history-and-the-legend (stating that Serbian and foreign intellectuals appealed to President Boris Tadic to reconsider a parliamentary action which could be interpreted as Serbia's acceptance of responsibility for a "genocide").

201. Anne-Diandra Louarn, *West 'Reluctant' to Confirm Chemical Weapons in Syria*, FRANCE 24, http://www.france24.com/en/20130822-west-reluctant-confirm-chemical-weapon-use-syria-assad (last updated Aug. 22, 2013) (interview with Frédéric Pichon) ("Western powers are reluctant [to confirm chemical weapons in Syria], because if they all unanimously confirm that chemical weapons have been used in Syria, they have to intervene . . . ."); Samantha Power, *Never Again: The World's Most Unfulfilled Promise*, FRONTLINE, http://www.pbs.org/wgbh/pages/frontline/shows/karadzic/genocide/neveragain.html (last accessed Oct. 19, 2014) ("[W]hen it came to atrocities in Cambodia, Iraq and Rwanda, the United States also refrained from condemning the crimes or imposing economic sanctions; and, again in Rwanda, the United States refused to authorize the deployment of a multinational [UN] force . . . .").

the ICC once certain conditions are met.[202] Despite the efforts of some states to include in the definition a specific exemption for humanitarian intervention,[203] the crime of aggression is simply defined as "an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations."[204]

The ICC may thus be required to determine whether an act of intervention that a state claims was humanitarian was instead an act of aggression. Assuming the ICC rejects the view that all military intervention not authorized by the Security Council constitutes aggression,[205] the Court will have to resolve the difference between aggression and humanitarian intervention in part by applying the criteria of "character, gravity and scale."[206] In so doing, the ICC will need to know what constitutes just cause for humanitarian intervention. By hindering the development of a normatively sound threshold, current RtoP discourse makes it difficult for the ICC to determine whether the leaders of an intervening state are criminals or heroes.

IV. WHAT TO DO ABOUT RTOP?

The critique above suggests that RtoP should be restructured to (1) remove the restriction to international crimes, and (2) better define the circumstances in which humanitarian intervention is legitimate. Many RtoP supporters will strongly resist these changes on the grounds that the consensus reached in the Outcome Document should not be disturbed. This Part first describes the outlines of a more normatively sound RtoP

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202. The amendments to the Rome Statute adopting a definition of the crime of aggression provide that the ICC will not be permitted to exercise its jurisdiction over the crime until after January, 1, 2017, and after a sufficient number of states have ratified the amendments. Amendments to the Rome Statute of the International Criminal Court, June 11, 2010, C.N.651.2010 TREATIES-8 (Depositary Notification) [hereinafter Amendments to the Rome Statute], *available at* https://treaties.un.org/doc/Treaties/2010/06/20100611%2005-56%20PM/CN.651.2010.pdf.

203. *See* Beth Van Schaack, *The Crime of Aggression and Humanitarian Intervention on Behalf of Women*, 11 INT'L CRIM. L. REV. 477, 484 (2011); *see also* Beth Van Schaack, *Negotiating at the Interface of Power and Law: The Crime of Aggression*, 49 COLUM. J. TRANSNAT'L L. 505, 565 (2011) (arguing that "[p]reserving a determinative role for the [UN Security] Council in aggression prosecutions" could help "insulate from prosecution" legitimate humanitarian interventions).

204. Amendments to the Rome Statute, *supra* note 202, art. 8 *bis*.

205. Many international lawyers hold the view that any intervention not authorized by the Security Council is illegal. This view is reflected, for instance, in the conclusion of the Independent International Commission on Kosovo that NATO intervention there was "illegal but legitimate." THE KOSOVO REPORT, *supra* note 18.

206. *See* Keith A. Petty, *Criminalizing Force: Resolving the Threshold Question for the Crime of Aggression in the Context of Modern Conflict*, 33 SEATTLE U. L. REV. 105, 107 (2009) ("Ultimately, the question is whether specific instances of armed force rise to the level of criminal aggression. The issue is framed in terms of the gravity of the State conduct. When alleged acts of unlawful force reach a certain level of severity, they cross the threshold of criminal aggression.").

before addressing the concern that reopening the definition in the Outcome Document would be a mistake.

A. Rethinking Just Cause

As other commentators have argued, in order to be an effective guide to decisions about humanitarian intervention, RtoP must be reformed to something more akin to the ICISS formulation.[207] This means both broadening the just cause threshold beyond international crimes and elaborating other criteria for intervention such as right intention, proportionality, last resort, and reasonable prospects. The Outcome Document leaves open the possibility that such criteria will be considered when it states that decisions about intervention will be made "on a case-by-case basis."[208] For RtoP to lend legitimacy to intervention, however, it must be rooted in accepted norms that are applied consistently.

In developing the just cause threshold for humanitarian intervention, states should seek to clarify both the quality and quantity of harm required for such intervention to be justified. This Article does not purport to provide specific answers to those questions. As the theoretical overview above shows, these are complex issues about which there is little consensus. Rather, this Article's message is that masking complexity and conflict by referencing international crimes, or even "atrocity crimes," is not the solution.

Instead, the international community should grapple with the value choices at stake. In terms of quality of harm, the international community must consider whether force should be used to protect people from crimes like rape and torture, institutionalized human rights violations spread over a long time span, damage to homes or other property, or starvation and disease. It must also evaluate when force is appropriate on the grounds that a state's neglect or "failure" is causing extreme suffering. And, as uncomfortable as the task may be, the international community must examine the problem of quantity: How many people must be suffering badly before force can be used legitimately to stop their suffering? If little harm has occurred but great harm is threatened, how certain must the international community be of that threat before engaging in humanitarian intervention?

I do not mean to suggest that any of these questions are susceptible to clear or definitive answers. Ultimately, the just cause threshold will have to be decided according to the multiplicity of considerations presented in each situation. Nonetheless, it is essential for the international community to continue to debate these questions rather than simply relying on

207. *See, e.g.*, Bellamy, *supra* note 24, at 168–69.
208. *See* Outcome Document, *supra* note 8, ¶ 139.

international crimes to supply the just cause threshold. The more the international community is able to clarify these issues, the closer it will be to elaborating a useful norm of humanitarian intervention.

Rethinking RtoP's reliance on international crimes as a just cause threshold for humanitarian intervention would also clarify that the vast majority of state responsibilities under RtoP are not appropriately limited to international crimes. States are not just responsible for the human rights and human security of their populations because ignoring these responsibilities might lead to international crimes. Nor are the responsibilities of states to assist one another or to intervene in nonforcible ways necessarily associated with the possibility of international crimes. States are responsible for protecting people inside their borders because that is the central function of government.[209] They are responsible for helping to protect those outside their borders because globalization increasingly undermines the relevance of borders to human security,[210] and because our common humanity requires that we help one another.[211] To be effective, the discourse surrounding RtoP must reflect these realities.

Whatever the just cause threshold for humanitarian intervention, therefore, it should not apply to the other forms of intervention under RtoP. With respect to nonmilitary intervention, RtoP should encompass the entire range of human rights and human security norms. Its application should be subject only to the dictates of proportionality.

B. How Important Is the Outcome Document Consensus?

Many RtoP supporters assert that the consensus reached in the Outcome Document should not be disturbed. That consensus may not be perfect, the reasoning goes, but states agreed to it and any effort to change it would undermine state support and thus RtoP's effectiveness. For instance, in his 2009 report, Secretary-General Ban Ki-moon asserts that:

> The responsibility to protect applies, until Member States decide otherwise, only to the four specified crimes and violations: genocide, war crimes, ethnic cleansing and crimes against humanity. To try to extend [RtoP] to cover other calamities, such as

209. *See, e.g.*, JOHN LOCKE, *The Second Treatise*, *in* TWO TREATISES OF GOVERNMENT §§ 123–24 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690).

210. *See* Benvenisti, *supra* note 64, at 312 (asserting that globalism increases the likelihood that state actions have impacts beyond their borders and that states therefore have a moral responsibility to take into account the interests of persons potentially affected by their actions wherever they may be found).

211. The idea that we have a duty to assist others in need has deep historical roots. Cicero, for instance, asserted that "the man who does not defend someone, or obstruct the injustice when he can, is at fault just as if he had abandoned his parents or his friends or his country." CICERO, ON DUTIES bk. I § 23 (M. T. Griffin & E. M. Atkins eds., Cambridge Univ. Press 1991) (44 BC).

> HIV/AIDS, climate change or the response to natural disasters, would undermine the 2005 consensus and stretch the concept beyond recognition or operational utility . . . .[212]

The Secretary-General does not explain why a broader norm would be less recognizable or useful, but his reference to states possibly deciding otherwise implies that his concern is based largely on state consent.[213] Similarly, Scheffer argues that "a broader mandate for [RtoP] in the years ahead may burden it with so much political controversy and dissent among international lawyers that it will collapse as a declared commitment, even with respect to atrocity crimes, before it has an opportunity to be fully tested."[214]

Arguments such as these rest on the assumptions that RtoP as currently formulated enjoys substantial support and, relatedly, that it has considerable "operational utility," in the Secretary-General's words. These are empirical claims that are not borne out by the evidence.

First, the debates around actual and potential humanitarian interventions since the 2005 World Summit do not support the claim that RtoP has become an important consideration. RtoP has been credited with promoting interventions in Libya and Côte D'Ivoire.[215] However, both of those interventions were relatively uncontroversial — at least initially — because the governments in question were very weak internally and enjoyed little external support, including in relevant regional organizations.[216] It is thus unclear how important RtoP was to the decisions to intervene militarily in those cases.[217]

When the world considered military intervention in Syria, on the other hand, it was dealing with a stronger government with Russian support. In that context, RtoP seems to have had little influence on discussions about possible humanitarian intervention. Although Prime Minister David Cameron mentioned RtoP in arguing for the legality of the intervention,[218]

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212. U.N. Secretary-General, *Implementing RtoP*, *supra* note 159, ¶ 10(b).

213. *See id.*; *see also* STANLEY FOUND., ACTUALIZING THE RESPONSIBILITY TO PROTECT: 43RD CONFERENCE ON THE UNITED NATIONS OF THE NEXT DECADE 4 (2008), *available at* http://www.stanleyfoundation.org/publications/report/unnd808.pdf ("Activist efforts to expand the scope of [RtoP] beyond the four crimes listed in paragraphs 138–139 are an obstacle to building sustainable global consensus around [RtoP].").

214. Scheffer, *supra* note 134, at 115.

215. *See, e.g.*, 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, 833, 839 (2011) (pointing out that RtoP was highlighted in the lead-up to resolutions authorizing UN intervention in both Côte d'Ivoire and Libya).

216. *Id.* at 825.

217. *See* Mohamed, *supra* note 15 ("The decision of the United States to support intervention in Libya, however, should be recognized for what it was: a decision defended primarily by the national interest and only secondarily by a sense of responsibility.").

218. James Kirkup, *David Cameron: World Setting a 'Dangerous' Precedent Not Intervening in Syria*,

the United Kingdom's official statements generally relied on the broader doctrine of humanitarian intervention.[219] The U.S. government's justifications for intervention omitted mention of RtoP and appealed mainly to a common morality and notions of self-interest. President Obama stated, for instance, that "when, with modest effort and risk, we can stop children from being gassed to death and thereby make our own children safer over the long run, I believe we should act."[220] Indeed, to the extent the United States tried to argue intervention was justified based on criminal conduct — the use of chemical weapons — other states and many commentators were unconvinced.[221]

UN Secretary-General Ban Ki-moon asserts that RtoP played an important role in encouraging nonmilitary intervention in Kenya after ethnic violence killed approximately 1,000 people following the 2007 elections.[222] He does not claim, however, that the willingness of states to assist Kenya or its willingness to accept assistance hinged in any way on the idea that international crimes were occurring or threatened. Indeed, although the ICC is prosecuting senior Kenyan leaders in connection with the violence, one ICC Appeals Chamber judge argued in a dissenting opinion that the crimes committed do not amount to international crimes.[223] Moreover, Kenya objects to the prosecutions and is even considering withdrawing from the ICC.[224] Any link between the

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TELEGRAPH, Sept. 6, 2013, http://www.telegraph.co.uk/news/worldnews/middleeast/syria/10291207/David-Cameron-world-setting-a-dangerous-precedent-not-intervening-in-Syria.html.

219. *E.g.*, PRIME MINISTER'S OFFICE, CHEMICAL WEAPON USE BY SYRIA REGIME: UK GOVERNMENT LEGAL POSITION, 2013, *available at* https://www.gov.uk/government/publications/chemical-weapon-use-by-syrian-regime-uk-government-legal-position/chemical-weapon-use-by-syrian-regime-uk-government-legal-position-html-version (positing that even if the Security Council is blocked, the United Kingdom would still be permitted by international law to take measures under the doctrine of humanitarian intervention).

220. President Barack Obama, Address to the Nation on Syria (Sept. 10, 2013) (transcript available at http://www.npr.org/2013/09/10/221186456/transcript-president-obamas-address-to-the-nation-on-syria).

221. *See, e.g.*, Stahn, *Semantics of Intervention*, *supra* note 168, at 976 (arguing that "[t]he use of chemical weapons on 21 August 2013 represents only a small fraction of the violence committed in the Syrian conflict. . . . Focusing accountability on incidents relating to the use of chemical weapons blurs the vision of the conflict.").

222. U.N. Secretary-General, *Implementing RtoP*, *supra* note 159, ¶¶ 11(c), 51.

223. Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey & Joshua Arap Sang, Case No. ICC-01/09-01/11, Dissenting Opinion by Judge Hans-Peter Kaul to Pre-Trial Chamber II's "Decision on the Prosecutor's Application for Summons to Appear for William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang," ¶ 4 (Mar. 15, 2011), http://www.icc-cpi.int/iccdocs/doc/doc1039488.pdf.

224. *See* Prosecutor v. Francis Kirimi Muthaura, Uruhu Muigai Kenyatta, & Mohammed Hussein Ali, Case No. ICC-01/09-02/11, Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute (May 30, 2011), http://www.icc-cpi.int/iccdocs/doc/doc1078823.pdf; Natalia Ojewska, *Uhuru Kenyatta's Trial: A Case Study in What's Wrong with the ICC*, GLOBALPOST (Feb. 6, 2014),

intervention and claims concerning international crimes would therefore likely have been counterproductive. In sum, the evidence does not support the conclusion that RtoP currently plays an important role in decisions about humanitarian intervention or that its influence with regard to other forms of intervention is contingent on its connection to international crimes.

Furthermore, the positions states have taken on RtoP since 2005 indicate that support for the norm in its current form is mixed.[225] According to one author, there has been a "revolt" against RtoP in some quarters, particularly since the intervention in Libya and subsequent nonintervention in Syria.[226] Indeed, since the World Summit, some states have even taken the position that they did not intend the Outcome Document as an endorsement of RtoP at all.[227]

To the extent states support RtoP, it is not clear that their views are strongly contingent on the restriction to international crimes. As already noted, the restriction was important to achieving unanimous support for the inclusion of RtoP in the Outcome Document, and some states continue to consider the restriction important.[228] Others, however, espouse a broader norm.[229] For instance, the U.K. government takes the position that military intervention in the absence of Security Council authorization is permissible when "there is convincing evidence, generally accepted by the international community as a whole, *of extreme humanitarian distress on a*

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http://www.globalpost.com/dispatch/news/regions/africa/kenya/140206/uhuru-kenyattas-trial-case-study-whats-wrong-the-icc ("Kenyan members of parliament approved a motion to withdraw from the Rome Statute that established the ICC.").

225. *See* Silva D. Kantareva, *The Responsibility to Protect: Issues of Legal Formulation and Practical Application*, 6 INTERDISC. J. HUM. RTS. L. 1, 13 (2011) (stating that RtoP has gained little traction in terms of general state practice).

226. YANG RAZALI KASSIM, THE GEOPOLITICS OF INTERVENTION: ASIA AND THE RESPONSIBILITY TO PROTECT 12 (2014).

227. Gareth Evans, *The Responsibility to Protect: An Idea Whose Time Has Come . . . and Gone?*, 22 INT'L REL. 283, 288 (2008).

228. *See, e.g.*, Ambassador Abdullah Hussain Haroon, Permanent Representative of Pak., Statement at the Thematic Debate on Responsibility to Protect Populations from Genocide, War Crimes, Ethnic Cleansing, and Crimes Against Humanity (2009), *available at* http://www.pakun.org/press-releases/2009/07272009-01.php ("[I]t must be clear that the scope of the concept of [RtoP] is restricted to 'responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity[.]' [A]nything beyond this should not be considered."); Liu Zhenmin, Statement to the Security Council Chamber from the Second Open Debate on the Protection of Civilians in Armed Conflict (Dec. 4, 2006), *available at* http://www.responsibilitytoprotect.org/files/Excerpted%20statements%20on%20the%202nd%20Open%20Debate.pdf ("As many Member States have expressed their concern and misgivings [over the World Summit Outcome], we believe that it is not appropriate to expand, willfully interpret or even abuse this concept.").

229. For statements of state representatives regarding RtoP, see *Government Statements*, INT'L COAL. FOR THE RESPONSIBILITY TO PROTECT, http://www.responsibilitytoprotect.org/index.php/document-archive/government?view=frelated&id=2409 (last visited Oct. 22, 2014).

large scale, requiring immediate and urgent relief."[230] For the United Kingdom, therefore, the threshold for humanitarian intervention is one of large-scale harm, not necessarily the commission of international crimes.

Even assuming some number of the states that support RtoP would object to any definition that is not restricted to international crimes, it is not clear that their support is critical to the long-term viability of RtoP. Indeed, a norm can become customary international law despite the objections of some states.[231] It is thus impossible to know the effect of removing the restriction on state support without greater clarity about which states would object and how many.

Furthermore, to the extent that objections rest on the inaccurate perception that the restriction entails a high gravity threshold, such objections could presumably be overcome if the issue is clarified. If such clarification does not take place, the support of such states may evaporate in any event, as the likely expansion of international criminal law makes the poor fit between international crimes and RtoP increasingly evident. As states see international courts adjudicating cases involving relatively low gravity in terms of quantity or quality of harm, they may become less convinced of the appropriateness of linking RtoP to international crimes.

Finally, the biggest concern supporters voice about expanding RtoP beyond international crimes is that it would exacerbate fears among some states in the Global South that RtoP, like the "right" to humanitarian intervention, is simply a tool with which powerful states can oppress weaker states.[232] This Article's proposal addresses such concerns in two ways. First, it demonstrates that the limitation to international crimes does not obviate the problem of pretextual intervention, since international crimes are not uniformly exceptionally grave. Second, this Article proposes not only to delink RtoP from international crimes, but also to reopen discussions about the appropriate just cause threshold for humanitarian intervention. Clarifying the just cause threshold, along with the other criteria for intervention, should help to assuage concerns about pretextual intervention.

Once RtoP as a whole is dissociated from international crimes, it should be fairly uncontroversial to expand the discourse concerning the components of RtoP unrelated to military intervention. With regard to states' internal responsibilities, their responsibilities to assist one another, and their responsibilities to intervene nonmilitarily, the broader norms of human rights law and human security already apply. Setting aside the just

230. *See* Letter from Robertson, *supra* note 14 (emphasis added).

231. *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) cmt. b (1986) ("A practice can be general even if it is not universally followed . . . .").

232. *See* Evans, *Environmental Emergencies*, *supra* note 179, at 29.

cause threshold for humanitarian intervention, RtoP is largely, in the words of one commentator, "old wine in new bottles."[233]

CONCLUSION

Developing a viable norm of humanitarian intervention is one of the international community's most pressing tasks. Recent debates about humanitarian intervention in Libya and Syria, as well as Russia's invocation of humanitarian intervention to justify aggression in Georgia and Ukraine,[234] testify to the weakness of existing norms. Although RtoP has successfully reoriented discussions about intervention,[235] its limitation to international crimes at the 2005 World Summit was a mistake. By making RtoP contingent on the commission of international crimes, states crafted a discourse that excludes situations of unintentional yet catastrophic harm, threatens to impede efforts to prevent harm by requiring findings of actual or potential criminal wrongdoing, and may undermine the international criminal law regime by encouraging "atrocity" rhetoric and obscuring the difference between humanitarian intervention and aggression.

To ensure that RtoP does not promote — rather than prevent —harm, it must be reformulated. The restriction to international crimes should be removed so that most aspects of RtoP apply to the entire gamut of state responsibilities regarding human rights and human security. At the same time, the just cause threshold and other criteria for humanitarian intervention should be clarified so that RtoP can begin to serve the purpose for which it was conceived: encouraging states to engage in intervention, including by force, when necessary to protect people from serious harm.

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233. Carsten Stahn, *Responsibility to Protect: Political Rhetoric or Emerging Legal Norm?*, 101 AM. J. INT'L L. 99, 111 (2007) (internal quotation marks omitted).

234. *See* Quentin Peel, *Russia's Reversal: Where Next for Humanitarian Intervention?*, FIN. TIMES, Aug. 22, 2008, http://www.ft.com/intl/cms/s/0/e06e25fc-7076-11dd-b514-0000779fd18c.html#axzz2wmOnzUo (citing Russian foreign minister as justifying attack on Georgia as necessary to protect Russian citizens from genocide and ethnic cleansing); *Putin: Intervention in Ukraine Would Be "Humanitarian"*, B92, Mar. 4, 2014, http://www.b92.net/eng/news/world.php?yyyy=2014&mm=03&dd=04&nav_id=89510 (citing Russian president as stating that use of force in Ukraine would constitute a "humanitarian action").

235. ORFORD, *supra* note 186, at 22 ("In making the argument that this embrace of the [RtoP] concept is an important normative development, I depart from the consensus position that is developing in academic literature about the *insignificance* of the [RtoP] concept.").