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HUMANITARIAN INTERVENTION IN SYRIA: THE LEGAL BASIS

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Humanitarian Intervention in Syria: The Legal Basis

Executive Summary

This memorandum sets forth the legal basis for the use of military force to prevent ongoing atrocity crimes in Syria. This memorandum does not take a position on whether force should be used in Syria, which is a question for policymakers alone.

Since protests began in March 2011, Syrian security forces have reportedly killed at least 15,000 civilians, including nearly 2000 in July 2012 alone. According to a February 2012 report commissioned by the United Nations Human Rights Council (the “UN Report”), Syrian security forces have engaged in widespread and systematic attacks against civilians, firing artillery into densely populated areas, deploying snipers and helicopter gunships against unarmed demonstrators, and torturing hospitalized protesters. In the Houla region, Syrian government militias, known as *shabiha*, executed over one hundred people—including 49 children—leading a number of states to expel Syrian diplomats in protest. Major news organizations have reported that Syrian security forces have tortured children and used them as human shields. Tens of thousands of refugees have fled Syria into Jordan, Lebanon, Turkey, and Iraq. In Turkey alone, more than 35,000 Syrians have sought refuge in camps along the Turkish-Syrian border.

Under President Bashar al-Assad, the Syrian government has repeatedly violated its promises to stop the killing and abide by a peace agreement brokered by the UN and the Arab League. Meanwhile, measures taken by the international community, including Syria’s suspension from the Arab League, extensive economic sanctions, and threats of more drastic action, have failed to stop the Assad regime from using deadly force against unarmed civilians and members of the political opposition.

These actions, as characterized by the UN Report, respected news organizations, and other commentators, constitute a *prima facie* case (a rebuttable presumption of truth) that the Syrian government has committed atrocity crimes. Under international law, atrocity crimes, such as war crimes and crimes against humanity, are crimes so extreme that their prohibition is *jus cogens*, *i.e.*, fundamental to the international legal order. In Syria, mass atrocity crimes are being committed on a scale not seen since Kosovo, Rwanda, and Darfur.

This memorandum analyzes the Syria crisis through the lens of the Responsibility to Protect, a rapidly evolving doctrine that codifies customary international law on the use of force to prevent atrocity crimes. The Responsibility to Protect was born out of the humanitarian catastrophes of the 1990s. At that time, state sovereignty remained inviolate in international relations. Lacking a clear legal mechanism to intervene in Rwanda and Kosovo, the international community failed to act quickly enough to prevent mass atrocity crimes.

As a result of these tragedies, a consensus emerged in the early 2000s that sovereignty must also entail the responsibility to protect one's own citizens from atrocity crimes. Consequently, when atrocity crimes are occurring in a state, and the state is unable or unwilling to protect its own people, the international community can legally intervene using force as a last resort. This doctrine became known as the Responsibility to Protect, or R2P. As a legal doctrine, R2P incorporates the general prohibition on the use of force, respect for state sovereignty, and the widespread consensus that atrocity crimes threaten the international system such that they cannot go unchecked. The doctrine also codifies prior state practice on the use of force to prevent atrocity crimes.

R2P has three main components. First, states have an affirmative obligation to protect their populations, whether nationals or not, from genocide, war crimes, ethnic cleansing, and crimes against humanity, and from their incitement. At the same time, the international community has an obligation to help states prevent atrocity crimes within their borders. Second, when there is convincing evidence that atrocity crimes are occurring, and a state is unable—or, as in the case of Syria, unwilling—to stop them, the international community should exhaust peaceful means, such as diplomacy and targeted sanctions. If peaceful means prove insufficient to stop the atrocity crimes, however, the third component of R2P holds that the international community may use military force as a last resort.

Optimally, military intervention pursuant to R2P will be authorized by the Security Council, which under international law is the primary arbiter regarding the legitimate use of force. Given the scale of the violence within Syria and its destabilizing effect on the Middle East, the Security Council could authorize the use of force in Syria pursuant to its Chapter VII powers. Sometimes, however, as in Kosovo, the Security Council will be unable to act, even in the face of clear evidence of ongoing atrocity crimes. The Syria crisis, where Russian and Chinese opposition has prevented the Security Council from acting even as atrocity crimes have intensified, presents a similar situation.

In these situations, R2P provides a legal framework for the international community to use military force as a last resort. Unlike previous theories of humanitarian intervention, R2P incorporates a number of procedural and operational safeguards. The *prima facie* case requirement, which demands clear, widely substantiated evidence of ongoing atrocity crimes, ensures that a humanitarian rationale for intervention exists. The requirement that peaceful measures have been exhausted ensures that force is being used as a last resort. In addition, R2P incorporates criteria for legitimate humanitarian intervention, developed by the UN High Level Panel on Threats, Challenges, and Change, to ensure that force is limited and narrowly tailored to stopping atrocity crimes and protecting civilians. As R2P currently stands, an intervention that satisfied all of these requirements and criteria would be legal.

Based on the available evidence, a *prima facie* case exists that the Syrian government is committing atrocity crimes on a scale not seen since Kosovo, Rwanda, and Darfur. Although the international community has attempted to use peaceful measures to stop the Syrian government's attacks, multiple rounds of sanctions and a variety of diplomatic overtures have been unsuccessful. While the Security Council could authorize an intervention under its Chapter VII powers, it remains deadlocked due to opposition from Russia and China, which have vetoed three resolutions aimed at forcing Syria to stop its attacks on civilians. Therefore, as a last resort, the international community—either through a regional coalition or a coalition of the willing—has a right under customary international law to use force in Syria for the limited purpose of stopping atrocity crimes, provided that the force is narrowly tailored to accomplishing this humanitarian goal.

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HUMANITARIAN INTERVENTION IN SYRIA: THE LEGAL BASIS

Statement of Purpose

This memorandum sets forth the legal basis for the use of military force to prevent ongoing atrocity crimes in Syria.¹ This memorandum does not take a position on whether force should be used in Syria, which is a question for policymakers alone.

Introduction

Customary international law and the UN Charter generally prohibit the use of force in international relations. Although the UN Charter gives the Security Council the primary authority to authorize the use of force to deal with threats to, or breaches of, the peace, its veto system can lead to deadlock. At the same time, certain crimes, such as genocide, war crimes, and crimes against humanity, are deemed under international law to be so extreme that their prohibition is fundamental to the international order. Historically, states have sometimes used force without Security Council authorization to prevent atrocity crimes, most notably the North Atlantic Treaty Organization (“NATO”) intervention in Kosovo, which many commentators deemed to be illegal but legitimate. In Rwanda, however, the international community failed to act in part because the atrocity crimes were occurring within the borders of a sovereign state. In the wake of these humanitarian tragedies, the international community wrestled with the question of when force can legally and legitimately be used to stop atrocity crimes within a sovereign state.

The emergence of the Responsibility to Protect (“R2P”) doctrine gives the international community the legal right to use force to stop ongoing atrocity crimes. This right is only triggered when (1) a *prima facie* case of ongoing atrocity crimes exists; and (2) peaceful measures to stop these crimes have been exhausted. In such a situation, the Security Council could authorize the use of force pursuant to its Chapter VII powers. If the Security Council is deadlocked, however, as it

¹ This paper has been prepared by lawyers qualified in the United States, France, and United Kingdom. All contributors have extensive experience in public international law, having worked at leading international law firms, the U.S. Department of State, or as public international law academics. The Public International Law & Policy Group, a 2005 Nobel Peace Prize nominee, is a non-profit organization, which operates as a global pro bono law firm providing free legal assistance to states and governments involved in peace negotiations, drafting post-conflict constitutions, and prosecuting war criminals. To facilitate the utilization of this legal assistance, PILPG also provides policy formulation advice and training on matters related to conflict resolution.

was in Kosovo, R2P provides a framework for the international community to legally intervene without Security Council authorization.

This memorandum proceeds by evaluating the Syria crisis through the lens of R2P. First, the factual background to the Syria crisis and the international community's response to date is discussed. Second, the evolution of the R2P doctrine in customary international law is traced, in particular its basis in state practice of military intervention to stop atrocity crimes with and without Security Council authorization. Finally, the R2P doctrine is applied to the Syria crisis.

Based on the available evidence, a *prima facie* case exists that the Syrian government is committing atrocity crimes on a scale not seen since Kosovo, Rwanda, and Darfur. Although the international community has attempted to use peaceful measures to stop the Syrian government's attacks, multiple rounds of sanctions and a variety of diplomatic initiatives have been unsuccessful. While the Security Council could authorize an intervention under its Chapter VII powers, it remains deadlocked due to opposition from Russia and China, which have vetoed three resolutions aimed at forcing Syria to stop its attacks on civilians. Therefore, as a last resort, the international community—either through a regional coalition or a coalition of the willing—has a right under customary international law to use force in Syria for the limited purpose of stopping atrocity crimes, provided that the force is narrowly tailored to accomplishing this humanitarian goal.

Factual Background

Since the Syria crisis first began in March 2011, attacks by Syrian government forces and militias have killed at least 15,000 civilians, and tens of thousands of refugees have fled into neighboring countries. The international community has endeavored to resolve the crisis through diplomatic overtures and sanctions, but its attempts have been unsuccessful.

The Syria Crisis, March 2011 to Present

In March 2011, in the wake of political uprisings in Tunisia, Yemen, and elsewhere in the Middle East, the arrest of 15 minors for anti-regime graffiti in Dara'a sparked widespread protests across Syria.² While these protests initially called for political reforms, they intensified when Assad failed to institute any

² Rania Abouzeid, *Syria's Revolt: How Graffiti Stirred an Uprising*, TIME, March 22, 2011, available at <http://www.time.com/time/world/article/0,8599,2060788,00.html>.

meaningful changes. The Syrian security forces responded by attacking unarmed protesters with military-grade weapons, including tanks, artillery, and helicopter gunships. These attacks marked the beginning of the intensifying crisis.³

Since the protests began, Syrian security forces have reportedly killed at least 15,000 civilians.⁴ These attacks appear to be intensifying. The UK-based Syrian Observatory for Human Rights estimates that over 13,000 civilians have been killed since May 2012,⁵ including nearly 2000 in July alone.⁶ These attacks have created a humanitarian crisis in Syria. Tens of thousands of refugees have fled Syria into Jordan, Lebanon, Turkey, and Iraq,⁷ and more than 35,000 Syrians have sought refuge along the Turkish-Syrian border.⁸ Most recently, one news organization reported that from July 19th to July 20th, 2012, approximately 30,000 Syrians crossed the border into Lebanon.⁹

According to a February 2012 report commissioned by the United Nations Human Rights Council (the “UN Report”), Assad’s security forces have committed “widespread, systematic, and gross human rights violations”¹⁰ by indiscriminately using heavy weapons, including tanks, artillery, and helicopter gunships, against civilians.¹¹ Additionally, the UN Report found that Syrian forces had deliberately

³ Christopher Phillips, *Syria’s Bloody Arab Spring*, LONDON SCHOOL OF ECONOMICS AND POLITICAL SCIENCE, 37 (2012), available at <http://eprints.lse.ac.uk/43464/>.

⁴ Due to the security situation, it is difficult to establish precisely how many civilians have been killed, but most organizations estimate the figure at over 10,000. These estimates do not include Syrian government or Free Syria Army casualties. See, e.g., *Syria Crisis: Counting the victims*, BBC, May 29, 2012, available at <http://www.bbc.co.uk/news/world-middle-east-18093967>.

⁵ *Syria Crisis: Fresh clashes rock Damascus and Aleppo*, BBC, July 23, 2012, available at <http://www.bbc.co.uk/news/world-middle-east-18943316>. See also *Syria Crisis: Counting the victims*, BBC, May 29, 2012, available at <http://www.bbc.co.uk/news/world-middle-east-18093967>.

⁶ *Syrian death toll tops 19,000, say activists*, THE GUARDIAN, July 22, 2012, available at <http://www.guardian.co.uk/world/2012/jul/22/syria-death-toll-tops-19000?newsfeed=true>.

⁷ *Helping to Ease the Strain*, Office of the United Nations High Commissioner for Refugees, available at <http://www.unhcr.org/pages/4f86c2426.html>.

⁸ *Turkish firefighters battle blazes ‘intentionally started’ on Syria border*, THE ASSOCIATED PRESS, July 4, 2012, available at <http://www.guardian.co.uk/world/2012/jul/04/turkish-firefighters-blazes-syria-border>.

⁹ *Syrian death toll tops 19,000, say activists*, THE GUARDIAN, July 22, 2012, available at <http://www.guardian.co.uk/world/2012/jul/22/syria-death-toll-tops-19000?newsfeed=true>.

¹⁰ Independent International Commission of Inquiry, *Report of the Independent International Commission of Inquiry on the Syrian Arab Republic*, para. 2., delivered to the General Assembly Human Rights Council, U.N. Doc. A/HCR/19/69 (Feb. 22, 2012), available at http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session19/A-HRC-19-69_en.pdf.

¹¹ Independent International Commission of Inquiry, *Report of the Independent International Commission of Inquiry on the Syrian Arab Republic*, paras. 39-46, delivered to the Human Rights Council, U.N. Doc. A/HCR/19/69 (Feb. 22, 2012), available at http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session19/A-HRC-19-69_en.pdf.

shot civilians, shelled residential areas, and tortured hospitalized protesters.¹² The UN Report concluded that Syria has “manifestly failed” to protect its own people.¹³

The majority of these attacks have been directed against unarmed civilians. In one such incident described in the UN Report, on December 21, 2011 Syrian forces “attacked a group of activists who had sought refuge in the village mosque...after the forces withdrew, 60 bodies were discovered...the victims appeared to have been tortured before their execution.”¹⁴ Since the UN Report was released, new atrocities have been reported on an almost daily basis. In the Houla region, Syrian militias, known as *shabiha*, executed over one hundred people—including 49 children—leading a number of western states to expel Syrian diplomats in protest.¹⁵

In response to the widespread international condemnation over Houla,¹⁶ the Syrian government claimed that it was legitimately targeting “terrorists,” who were themselves responsible for the mass killings.¹⁷ Yet even when Syrian forces have attacked armed opposition forces, such as fighters from the Free Syria Army (“FSA”), they have done so in a way that also deliberately targets civilians in violation of international law. In December 2011, during a Syrian military operation in Bab Amr, Homs against the FSA, the UN Report found that “residential buildings...were shelled by tanks and anti-aircraft guns,” and “state snipers also shot at and killed unarmed men, women, and children.”¹⁸ The UN

¹² Independent International Commission of Inquiry, *Report of the Independent International Commission of Inquiry on the Syrian Arab Republic*, paras. 39-46, delivered to the Human Rights Council, U.N. Doc. A/HCR/19/69 (Feb. 22, 2012), available at http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session19/A-HRC-19-69_en.pdf.

¹³ Independent International Commission of Inquiry, *Report of the Independent International Commission of Inquiry on the Syrian Arab Republic*, Summary, delivered to the Human Rights Council, U.N. Doc. A/HCR/19/69 (Feb. 22, 2012), available at http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session19/A-HRC-19-69_en.pdf.

¹⁴ Independent International Commission of Inquiry, *Report of the Independent International Commission of Inquiry on the Syrian Arab Republic*, para. 42, delivered to the Human Rights Council, U.N. Doc. A/HCR/19/69 (Feb. 22, 2012), available at http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session19/A-HRC-19-69_en.pdf.

¹⁵ *Houla: How a massacre unfolded*, BBC, June 8, 2012, available at <http://www.bbc.co.uk/news/world-middle-east-18233934>. See also Martin Chulov, *Houla massacre: UN resolution condemns Syria*, The Guardian, June 1, 2012, available at <http://www.guardian.co.uk/world/2012/jun/01/syria-houla-massacre-un-resolution>.

¹⁶ See, e.g., Philip Gourevich, *What has the Houla Massacre changed?*, THE NEW YORKER, May 29, 2012, available at <http://www.newyorker.com/online/blogs/newsdesk/2012/05/what-has-the-houla-massacre-changed.html>.

¹⁷ *Security Council debates response to Houla*, ALJAZEERA, May 27, 2012, available at <http://www.aljazeera.com/news/middleeast/2012/05/2012527171046463842.html>.

¹⁸ Independent International Commission of Inquiry, *Report of the Independent International Commission of Inquiry on the Syrian Arab Republic*, para. 42, delivered to the Human Rights Council, U.N. Doc. A/HCR/19/69 (Feb. 22, 2012), available at http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session19/A-HRC-19-69_en.pdf.

Report also found that defectors from the Syrian forces have been “summarily executed.”¹⁹

The Syria crisis has threatened to destabilize the Middle East. In two separate incidents on April 9, 2012, Syrian security forces fired across the Turkish border, killing two people at a border crossing and wounding three people in a refugee camp.²⁰ In the aftermath of these attacks, Turkish Prime Minister Recep Tayyip Erdogan said that he would consider invoking NATO’s collective security provision if the Syrian violence continued to threaten Turkish national security.²¹ In June 2012, Syria shot down a Turkish military aircraft flying over the Mediterranean, claiming that it had entered Syrian airspace.²² Turkey has also alleged that Syria intentionally started fires on Turkey’s border to prevent refugees and members of the Syrian opposition from seeking shelter there.²³ UN Special Advisers to the Secretary-General on the Prevention of Genocide and on the Responsibility to Protect on the situation in Syria²⁴ have expressed concern at the mass killings of civilians, echoing the UN Report’s conclusion that the Syrian government has manifestly failed to protect its population.²⁵

The International Community’s Response

There have been a number of attempts by the international community to resolve the Syria crisis peacefully. These efforts have been unsuccessful. The United States, European Union, and Arab League imposed extensive sanctions that restrict the travel and freeze the assets of Syrian officials,²⁶ block the purchase of

¹⁹ Independent International Commission of Inquiry, *Report of the Independent International Commission of Inquiry on the Syrian Arab Republic*, para. 2. delivered to the General Assembly Human Rights Council, U.N. Doc. A/HCR/19/69 (Feb. 22, 2012), available at

http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session19/A-HRC-19-69_en.pdf.

²⁰ *Turkey protests as Syrians open fire at border*, BBC, April 9, 2012, available at <http://www.bbc.co.uk/news/world-middle-east-17656657>.

²¹ Ekrem Dumanli, *PM: Turkey May Invoke NATO’s Article 5 Over Syrian Border Fire*, TODAY’S ZAMAN, April 11, 2012, available at <http://www.todayzaman.com/news-277185-.html>.

²² *Turkish firefighters battle blazes ‘intentionally started’ on Syria border*, ASSOCIATED PRESS, July 4, 2012., available at <http://www.guardian.co.uk/world/2012/jul/04/turkish-firefighters-blazes-syria-border>.

²³ *Turkish firefighters battle blazes ‘intentionally started’ on Syria border*, ASSOCIATED PRESS, July 4, 2012, available at <http://www.guardian.co.uk/world/2012/jul/04/turkish-firefighters-blazes-syria-border..>

²⁴ *Statement of the Special Advisers of the Secretary-General on the Prevention of Genocide and on the Responsibility to Protect on the situation in Syria*, UNITED NATIONS PRESS RELEASE, June 14 2012, available at <http://www.un.org/en/preventgenocide/adviser/pdf/14%20June%20Statement%20-%20English.pdf>

²⁵ *Statement of the Special Advisers of the Secretary-General on the Prevention of Genocide and on the Responsibility to Protect on the situation in Syria*, UNITED NATIONS PRESS RELEASE, June 14 2012, available at <http://www.un.org/en/preventgenocide/adviser/pdf/14%20June%20Statement%20-%20English.pdf>

²⁶ Katherine Marsh, *Syria Sanctions Declared as Violent Crackdown Continues*, THE GUARDIAN, May 6, 2011, available at <http://www.guardian.co.uk/world/2011/may/06/syria-sanctions-crackdown-eu>.

Syrian oil,²⁷ and target Syrian information technology.²⁸ The EU has also imposed seventeen round of sanctions, targeting luxury items as well as goods and technologies that can be used for internal suppression.²⁹

A series of international peace plans have also failed to stop the atrocities. In December 2011, the Syrian government signed a peace plan sponsored by the Arab League,³⁰ agreeing to form a national unity government, hold elections,³¹ and allow Arab League monitors to enter the country. In the three weeks following the monitors' arrival, however, more than 400 people died, prompting the League to suspend its mission on January 28, 2012.³² The following month, the Arab League temporarily halted cooperation with the Syrian government after the government rejected an Arab League resolution calling for a joint Arab League-UN peacekeeping mission.³³ On February 16, 2012, the UN General Assembly condemned "widespread and systematic violations of human rights and fundamental freedoms by the Syrian authorities," calling upon the government to implement the Arab League's peace plans.³⁴

In March 2012, the Arab League and the UN renewed their efforts by jointly appointing Kofi Annan as the UN-Arab League Special Envoy to Syria. Annan produced a Six Point Plan for ending the conflict, supported by all members of the Security Council.³⁵ Assad agreed to the Annan Plan, which required Syrian forces to withdraw from populated areas and imposed a ceasefire.³⁶ On April 14, 2012,

²⁷ Independent International Commission of Inquiry, *Report of the Independent International Commission of Inquiry on the Syrian Arab Republic*, para. 2. delivered to the General Assembly Human Rights Council, U.N. Doc. A/HCR/19/69 (Feb. 22, 2012), available at

http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session19/A-HRC-19-69_en.pdf.

²⁸ U.S. Treasury Department Office of Public Affairs, *Fact Sheet: New Executive Order Targeting Human Rights Abuses via Information Technology*, April 23, 2012, available at http://www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/Documents/ghravity_eo_fact_sheet.pdf.

²⁹ Stephen Castle, *European Union Tightens Sanctions*, THE NEW YORK TIMES, July 23, 2012, available at <http://www.nytimes.com/2012/07/24/world/europe/european-union-tightens-sanctions-on-syria.html>.

³⁰ *Syrian Uprising: A Year in Turmoil*, THE WASHINGTON POST, March 14, 2012, available at <http://www.washingtonpost.com/wp-srv/special/world/syrian-uprising-one-year-of-bloodshed/index.html>.

³¹ Kareem Faheem, *Arab League Floats Ambitious New Peace Plan for Syria*, NEW YORK TIMES, Jan. 22, 2012, available at <http://www.nytimes.com/2012/01/23/world/middleeast/arab-league-floats-new-peace-plan-for-syria.html>.

³² *Syrian Uprising: A Year in Turmoil*, THE WASHINGTON POST, March 14, 2012, available at <http://www.washingtonpost.com/wp-srv/special/world/syrian-uprising-one-year-of-bloodshed/index.html>.

³³ *Syria Rejects New Arab League Peace Mission Proposal*, BBC, Feb. 13, 2012, available at <http://www.bbc.co.uk/news/world-middle-east-17008597>.

³⁴ General Assembly resolution 66/253, paras. 2, 6, U.N. Doc. A/Res/66/253 (Feb. 21, 2012).

³⁵ *Syrian Uprising: A Year in Turmoil*, THE WASHINGTON POST, March 14, 2012, available at <http://www.washingtonpost.com/wp-srv/special/world/syrian-uprising-one-year-of-bloodshed/index.html>.

³⁶ *Syrian Uprising: A Year in Turmoil*, THE WASHINGTON POST, March 14, 2012, available at <http://www.washingtonpost.com/wp-srv/special/world/syrian-uprising-one-year-of-bloodshed/index.html>.

the Security Council subsequently adopted resolution 2042, supporting the ceasefire and authorizing 30 unarmed observers to monitor implementation of the Annan Plan. A week later, the Security Council passed resolution 2043, which established the UN Supervision Mission in Syria (“UNSMIS”), a 90-day deployment of up to 300 additional unarmed military observers.³⁷

Despite the efforts of the international community, the Security Council has failed to pass three strongly-worded resolutions authorizing peaceful measures to end the conflict in Syria due to Russian and Chinese opposition. In October 2011, the first resolution threatened sanctions if the Syrian government did not immediately end violence against civilians.³⁸ In February 2012, the second resolution did not threaten sanctions but called on Assad to leave office and supported the Arab League’s peace plan.³⁹ In July 2012, Russia and China vetoed a British-drafted resolution sponsored by the U.S., France, and Germany that threatened sanctions unless the Syrian government withdrew heavy weapons from populated areas within ten days.⁴⁰

The Evolution of the Responsibility to Protect Doctrine

The Responsibility to Protect is a customary international law doctrine that codifies (1) the *jus cogens*, or fundamental, nature of the prohibition against atrocity crimes; (2) historical state practice regarding humanitarian intervention; and (3) *opinio juris*, or state belief, that when atrocity crimes are unchecked within a state, the threat to international stability is so great that states can justifiably use force for the limited purpose of stopping these crimes.

The R2P doctrine advances international law regarding the use of force for humanitarian purposes in two important ways. First, it codifies the consensus within the international community, which emerged after the humanitarian tragedies in Kosovo and Rwanda, that mass atrocities committed within a state’s borders pose a threat to international peace and security.⁴¹ From the perspective of

³⁷ Security Council resolution 2042, para. 5, U.N. Doc. S/RES/2043 (April 21, 2012).

³⁸ *Russia and China veto UN resolution against Syrian regime*, THE GUARDIAN, October 4, 2011, available at <http://www.guardian.co.uk/world/2011/oct/05/russia-china-veto-syria-resolution>.

³⁹ Paul Harris, Martin Chulov, David Batty, and Damien Pearse, *Syrian Resolution Vetoed by Russia and China at United Nations*, THE GUARDIAN, February 4, 2012, available at <http://www.guardian.co.uk/world/2012/feb/04/assad-obama-resign-un-resolution>.

⁴⁰ *Russia, China Veto Syria Resolution at U.N.*, THE WALL STREET JOURNAL, July 19, 2012, available at <http://www.bbc.co.uk/news/world-middle-east-18233934>.

⁴¹ See Global Center for the Responsibility to Protect, *Implementing the Responsibility to Protect: The 2009 General Assembly Debate: An Assessment 5* (August 2009), available at http://globalr2p.org/media/pdf/GCR2P_General_Assembly_Debate_Assessment.pdf.

international law, atrocity crimes are so extreme that their prohibition is fundamental to the international legal order.⁴² Atrocity crimes have this special status because of their scale and their destabilizing effect on the international system. Sovereign states, therefore, have an affirmative duty to protect their citizens from them.

Second, R2P provides a framework for ensuring that any response to atrocity crimes is limited to protecting civilians, and force is used only as a last resort. Consequently, if a *prima facie* case of atrocity crimes exists, and peaceful measures have been exhausted, the international community can legitimately use force to stop atrocity crimes. When the Security Council is deadlocked, states can use force without Security Council authorization if the intervention complies with UN-endorsed criteria for legitimacy.

An Overview of the Responsibility to Protect

Prior to the codification of R2P, states sometimes used military force to halt atrocity crimes, acting on the basis of (1) self-defense (Tanzania's intervention against Idi Amin in Uganda); (2) implied Security Council authorization (the 1991 intervention by a coalition of western states on behalf of the Kurds in Iraq); or (3) without such authorization under the concept of humanitarian intervention (NATO's 1999 intervention on behalf of the Albanian minority in Kosovo). This state practice reflected the notion that the prohibition of atrocity crimes is *jus cogens*, *i.e.*, these crimes are so extreme that they threaten international peace and stability, and must never be permitted.⁴³

Due to the general prohibition on the use of force, the lack of explicit Security Council approval, and concerns about state sovereignty, these interventions were often deemed to be technically illegal. At the same time, because atrocity crimes threaten international peace and security, these interventions were also thought to be legitimate. Lacking a clear legal mechanism to intervene in Rwanda and Kosovo, the international community failed to act quickly enough to prevent genocide and other crimes against humanity.⁴⁴ As a result of these tragedies, a consensus emerged in the early 2000s that the concept

⁴² M. Cherif Bassiouni, 59 *LAW & CONTEMPORARY PROBLEMS* 9, 17 (1996) (collecting sources). According to *Vienna Convention on the Law of Treaties* Article 53, a norm of *jus cogens* is one "accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."

⁴³ M. Cherif Bassiouni, 59 *LAW & CONTEMPORARY PROBLEMS* 9, 17 (1996) (collecting sources).

⁴⁴ Christopher C. Joyner, "*The Responsibility to Protect*": *Humanitarian Concern and the Lawfulness of Armed Intervention*, 47 *VIRGINIA JOURNAL OF INTERNATIONAL LAW* 695, 694, 698-700, 704 (2007).

of state sovereignty must also entail the responsibility to protect one's own citizens from atrocity crimes. This concept became known as the responsibility to protect, or R2P.

Following the 2004 UN High Level Panel on Threats, Challenges, and Change (the "UN High Level Panel"), which recognized R2P as an "emerging norm" of international law,⁴⁵ the UN General Assembly endorsed the concept in its 2005 World Summit Outcome Document ("WSOD").⁴⁶ The WSOD provided that states have the responsibility to protect civilian populations from genocide, war crimes, ethnic cleansing, and crimes against humanity. Accordingly, when a state "manifestly fails" in its protection responsibilities, the international community may take stronger measures, up to and including collective use of force.⁴⁷ The Security Council subsequently endorsed the WSOD's definition of R2P.⁴⁸

In 2009, UN Secretary-General Ban Ki-moon presented a report clarifying R2P so that states could implement it in a "fully faithful and consistent manner."⁴⁹ This formulation of R2P, which has been explicitly endorsed by more than 50 states,⁵⁰ has three components.⁵¹ First, each state has the responsibility to provide security for their populations and protect them from genocide, war crimes, and

⁴⁵ *The Secretary-General's High-level Panel on Threats, Challenges, and Change, A More Secure World: Our Shared Responsibility*, U.N. Doc. A/59/565, Dec. 2004, at para. 203 (describing the Responsibility to Protect as an "emerging norm"). See also Security Council Resolution 1674, U.N. Doc. S/RES/1674 (Apr. 28, 2006) ("[R]eaffirm[ing] the provisions of paragraphs 138 and 139 of the 2005 World Summit Outcome Document regarding the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity"). Notably, this resolution was ultimately supported by Russia and China, each of whom had initially expressed reservations about the implications of R2P for state sovereignty.

⁴⁶ *2005 World Summit Outcome Document*, General Assembly Resolution 60/1, paras. 138-9, U.N. Doc. A/RES/60/1 (Oct. 24, 2005).

⁴⁷ General Assembly Resolution 60/1, paras. 138-39, U.N. Doc. A/RES/60/1, 24 Oct. 2005, available at <http://unpan1.un.org/intradoc/groups/public/documents/un/unpan021752.pdf>. As the General Assembly was addressing the question of R2P within the confines of the UN system, it naturally conditioned the use of force on Security Council approval under Chapter VII.

⁴⁸ See Security Council Resolution 1674, U.N. Doc. S/RES/1674, 28 Apr. 26, 2006 ("[R]eaffirm[ing] the provisions of paragraphs 138 and 139 of the 2005 World Summit Outcome Document regarding the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity."), available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N06/331/99/PDF/N0633199.pdf?OpenElement>.

⁴⁹ Secretary-General, *Implementing the Responsibility to Protect*, para. 2, delivered to the General Assembly, U.N. Doc. A/63/677 (Jan. 12, 2009). At the subsequent General Assembly debate, over fifty states explicitly endorsed the Secretary General's three-pillar formulation.

⁵⁰ See Global Center for the Responsibility to Protect, *Implementing the Responsibility to Protect: The 2009 General Assembly Debate: An Assessment 5* (August 2009), available at http://globalr2p.org/media/pdf/GCR2P_General_Assembly_Debate_Assessment.pdf.

⁵¹ Secretary-General, *Implementing the Responsibility to Protect*, para. 11, delivered to the General Assembly, U.N. Doc. A/63/677 (Jan. 12, 2009).

crimes against humanity.⁵² Second, when a state lacks the capacity to protect its own civilians from these crimes, the international community has the responsibility to provide assistance.⁵³ Third, if there is convincing evidence, *i.e.*, a *prima facie* case, that a state has failed to protect its civilians from atrocity crimes—or is perpetrating them, as is the case in Syria—then the international community may respond “in a timely and decisive manner, by taking a range of peaceful, coercive, or forceful measures.”⁵⁴

The Use of Force to Prevent Atrocity Crimes Prior to the Codification of R2P

Whether justifying their actions on the basis of self-defense or humanitarian intervention, states have historically used military force to halt atrocity crimes, even without Security Council authorization. These instances provide important evidence that atrocity crimes were seen as a threat to the international system, and states were willing to act on this belief.

Early Instances of States Using Military Force to Prevent Atrocity Crimes

State practice to prevent atrocity crimes is first found in India’s intervention in Bangladesh to end repression and support self-determination.⁵⁵ Further instances include Tanzania’s intervention to overthrow Idi Amin in Uganda and Vietnam’s use of force to end the rule of Pol Pot in Cambodia.⁵⁶ These states justified their interventions on the basis of self-defense,⁵⁷ not a right to protect populations.⁵⁸ Despite this, Sir Christopher Greenwood, Judge of the International Court of Justice (“ICJ”), argues that these actions were, in reality, a form of humanitarian intervention.⁵⁹ In Uganda, for instance, Tanzania did not merely

⁵² Secretary-General, *Implementing the Responsibility to Protect*, para. 11, delivered to the General Assembly, U.N. Doc. A/63/677 (Jan. 12, 2009).

⁵³ Secretary-General, *Implementing the Responsibility to Protect*, para. 11, delivered to the General Assembly, U.N. Doc. A/63/677 (Jan. 12, 2009).

⁵⁴ Secretary-General, *Implementing the Responsibility to Protect*, para. 11, delivered to the General Assembly, U.N. Doc. A/63/677 (Jan. 12, 2009).

⁵⁵ Sir Christopher Greenwood, *Humanitarian Intervention: the Case of Kosovo*, FINNISH YEARBOOK OF INTERNATIONAL LAW 141, 163 (2002).

⁵⁶ For further details, see Malcolm Evans, INTERNATIONAL LAW 621 (2010).

⁵⁷ Malcolm Evans, INTERNATIONAL LAW 622 (2010).

⁵⁸ *North Sea Continental Shelf (Federal Republic of Germany v Denmark)*, (1968) I.C.J., 44 (April 26 1968) (“Not only must the acts concerned amount to settled practice, but they must also be such or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, *i.e.* the subjective element, is implicit in the very notion of *opinio juris*.”)

⁵⁹ Sir Christopher Greenwood, *Humanitarian Intervention: the Case of Kosovo*, FINNISH YEARBOOK OF INTERNATIONAL LAW 141, 163 (2002).

repel attacks, but overthrew a particularly repressive regime.⁶⁰ In consequence, these early instances of state practice form the foundation of R2P, demonstrating that states recognized the importance of protecting civilians from atrocity crimes.

Iraq

In 1991, Saddam Hussein's regime threatened military retaliation on the Kurdish population in northern Iraq.⁶¹ In resolution 688, the Security Council called the Kurdish situation a "threat to international peace and security"⁶² and adopted a number of provisional measures, including a demand that the Iraqi regime end its repression of the Kurdish population and allow international humanitarian aid.⁶³ Without express authorization from the Security Council, but in continuance of their activities under resolution 688, a coalition of US, French, and British forces established a no-fly zone to protect Kurdish refugees and humanitarian efforts in the region.⁶⁴ The coalition justified its actions on the implied authorization that it derived from the terms of resolution 688.⁶⁵ Again, Iraq is an example of the movement towards the modern day conception of R2P. States recognized the importance of protecting populations from atrocity crimes, using force as a last resort.

Kosovo

In 1998, Yugoslav President Slobodan Milosevic launched attacks on ethnic Albanian civilians in Kosovo as part of a campaign against the Kosovo Liberation Army ("KLA").⁶⁶ In resolution 1199,⁶⁷ the Security Council labeled the situation in Kosovo a threat to "peace and security" and adopted provisional measures, including a demand for the parties to cease hostilities and take steps towards a

⁶⁰ Sir Christopher Greenwood, *Humanitarian Intervention: the Case of Kosovo*, FINNISH YEARBOOK OF INTERNATIONAL LAW 141, 163 (2002).

⁶¹ Global Security, *Operation Provide Comfort* (2011), available at http://www.globalsecurity.org/military/ops/provide_comfort.htm.

⁶² Security Council resolution 688, U.N. Doc. S/RES/688 art. 1 (Apr. 5, 1991), available at <http://www.fas.org/news/un/iraq/sres/sres0688.htm>.

⁶³ Security Council resolution 688, U.N. Doc. S/RES/688 (Apr. 5, 1991), available at <http://www.fas.org/news/un/iraq/sres/sres0688.htm>.

⁶⁴ Global Security, *Operation Provide Comfort* (2011), available at http://www.globalsecurity.org/military/ops/provide_comfort.htm.

⁶⁵ Capt. Michael E. Harrington, *Operation Provide Comfort: A Perspective in International Law*, 8 CONNECTICUT JOURNAL OF INTERNATIONAL LAW 635, 645 (1993).

⁶⁶ Independent International Commission on Kosovo, KOSOVO REPORT (2000), available at <http://reliefweb.int/sites/reliefweb.int/files/resources/F62789D9FCC56FB3C1256C1700303E3B-thekosovoreport.htm>

⁶⁷ Security Council resolution 1199, U.N. Doc. S/RES/1199 (Sep. 23, 1998), available at <http://www.un.org/peace/kosovo/98sc1199.htm>.

conciliatory dialogue.⁶⁸ Despite resolution 1199, Milosevic continued to order attacks on civilians and civilian-populated areas.⁶⁹ In March 1999, after numerous diplomatic efforts by NATO, the UN, and the Organization for Security and Cooperation in Europe (“OSCE”), NATO conducted Operation: Allied Force, a 77-day campaign of air strikes that ended the conflict in Kosovo.⁷⁰ The mission’s aim was to destroy Milosevic’s military capacity to attack Kosovar Albanians.⁷¹ The operation included contributions from all 19 NATO member states and ended with the surrender of Milosevic.⁷²

In support of their actions in Kosovo, states advanced a number of legal justifications. The United Kingdom relied on a doctrine of humanitarian intervention, claiming that an exception to the UN Charter’s prohibition on the use of force had emerged. Under this doctrine, states may legally intervene without Security Council authorization when (a) convincing evidence of extreme humanitarian distress on a large scale that requires immediate urgent relief can be shown; (b) it was objectively clear that there is no practicable alternative to the use of force if lives are to be saved; and (c) the proposed use of force is necessary and proportionate to the aim of humanitarian intervention.⁷³ For their part, France and Germany stressed the unique nature of the NATO operation, with most other states arguing that their actions were justified on the basis of the international community’s right to humanitarian intervention and implied Security Council authorization.⁷⁴

Although there were questions surrounding the legality of the right to use military action without Security Council authorization at the time of Kosovo, the

⁶⁸ Security Council resolution 1199, U.N. Doc. S/RES/1199 (Sep. 23, 1998), *available at* <http://www.un.org/peace/kosovo/98sc1199.htm>.

⁶⁹ Independent International Commission on Kosovo, *KOSOVO REPORT* (2000), *available at* <http://reliefweb.int/sites/reliefweb.int/files/resources/F62789D9FCC56FB3C1256C1700303E3B-thekosovoreport.htm>

⁷⁰ U.S. Department of State, *Background Note: Kosovo* (Nov. 16, 2011); North Atlantic Treaty Organization, *NATO's Role in Relation to the Conflict in Kosovo*.

⁷¹ U.S. Department of Defense, *Operation Allied Force* (June 21, 1999), *available at* <http://www.defense.gov/specials/kosovo/>.

⁷² U.S. Department of Defense, *Operation Allied Force* (June 21, 1999); Rand Corporation, *Operation Allied Force: Lessons for Future Coalition Operations* (2001), *available at* http://www.rand.org/pubs/research_briefs/RB72/index1.html; U.S. Department of State, *Background Note: Kosovo* (Nov. 16, 2011).

⁷³ For a summary of the United Kingdom’s legal argument, *see*, Sir Christopher Greenwood, *Humanitarian Intervention: the Case of Kosovo*, *FINNISH YEARBOOK OF INTERNATIONAL LAW* 141, 157 (2002).

⁷⁴ Malcolm Evans, *INTERNATIONAL LAW* 622 (2010).

legitimacy of the intervention was acknowledged.⁷⁵ Judge Greenwood of the ICJ later opined, however, that “modern customary international law recognizes a right of military intervention on humanitarian grounds by states, or an organization like NATO,” although such a right is a “matter of last resort and confin[ed]...to extreme cases.”⁷⁶ Reflecting a similar sentiment, when the Economic Community of West African States (“ECOWAS”) intervened on a humanitarian basis in Liberia⁷⁷ in 1992 and in Sierra Leone⁷⁸ in 1998 without prior Security Council authorization, the Security Council later approved of these interventions.

The Codification of the R2P Doctrine post-2001

After 2001, the international community began to regularize how it responds to atrocity crimes. This period marked the first use of the term “responsibility to protect.” In addition, several high-level commissions and panels were convened to codify criteria for the legitimate use of force for humanitarian purposes. In the later part of the decade, R2P gained widespread support among the international community. Notably, the UN General Assembly and the Security Council endorsed R2P, invoking the doctrine in response to the 2006 Darfur crisis and the 2011 Libyan conflict.

Criteria for the Legitimate Use of Force for Humanitarian Purposes

Over the past decade, a consensus has emerged regarding the criteria for legitimate humanitarian action, based largely on the doctrine articulated by the United Kingdom. In 2001, the International Commission on Intervention and State Sovereignty (“ICISS”), evaluating customary international law at the time, proposed a six-part test for humanitarian action involving the use of force: (1) just

⁷⁵ See, e.g., Independent International Commission on Kosovo, KOSOVO REPORT (2000), available at <http://reliefweb.int/sites/reliefweb.int/files/resources/F62789D9FCC56FB3C1256C1700303E3B-thekosovoreport.htm>.

⁷⁶ Sir Christopher Greenwood, *Humanitarian Intervention: the Case of Kosovo*, FINNISH YEARBOOK OF INTERNATIONAL LAW 141, 170, 171 (2002).

⁷⁷ See Security Council resolution 788, para. 1, U.N. Doc. S/RES/788, (Nov. 19, 1992), available at [http://www.undemocracy.com/S-RES-788\(1992\).pdf](http://www.undemocracy.com/S-RES-788(1992).pdf) (citing Chapter VIII of the Charter and “commend[ing] ECOWAS for its efforts to restore peace, security, and stability in Liberia”).

⁷⁸ The 1997 ECOWAS intervention to restore democracy in Sierra Leone was undertaken without explicit Security Council approval. Following a *coup d'état* by the Revolutionary United Front, Security Council resolution 1132 authorized ECOWAS to enforce a maritime embargo against the junta and provide humanitarian assistance, but didn't explicitly authorize use of force. See Security Council resolution 1132, U.N. Doc. S/RES/1132 (Oct. 1997), available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N97/267/13/PDF/N9726713.pdf>. Direct military action by ECOMOG led to the junta's collapse in early 1998. A subsequent statement by the Security Council president “welcomed the fact that the military junta has been brought to an end” and encouraged ECOMOG to “proceed with its efforts ... in accordance with the relevant provisions of the Charter of the United Nations.” See Statement by the President of the Security Council, *The Situation in Sierra Leone*, U.N. Doc. S/PRST/1998/5 (Feb. 26, 1998) available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N98/046/90/PDF/N9804690.pdf?OpenElement>.

cause must exist; (2) the assistance must be provided as a last resort; (3) the acting States must have rightful intentions; (4) the action must be proportional to the humanitarian crisis; (5) the action must have a reasonable chance of success; and (6) the action must be authorized by a legitimate authority.⁷⁹ Regarding what constitutes a “legitimate authority,” the ICISS also endorsed regional or sub-regional organizations pursuing collective action within their boundaries, on the basis that member states to those organizations are more familiar with local political actors and are more likely to feel the impact of the human catastrophe.⁸⁰ In 2004, the UN High Level Panel embraced a nearly identical test for legitimate humanitarian action involving the use of force.⁸¹

R2P Endorsement by the United Nations

The General Assembly and the Security Council have endorsed the R2P doctrine. Following the UN High Level Panel’s recognition of the Responsibility to Protect as an “emerging norm,” the General Assembly endorsed the principle in its 2005 World Summit Outcome Document.⁸² The Security Council affirmed R2P in its landmark resolution 1674 on the Protection of Civilians in Armed Conflict,⁸³ and again in resolution 1706, which affirmed the principle in the context of the Darfur crisis.⁸⁴

⁷⁹ *The Responsibility to Protect*, INTERNATIONAL COMMISSION ON INTERVENTION AND STATE SOVEREIGNTY, Dec. 2001, at xii (applying the principles to “military interventions”).

⁸⁰ *The Responsibility to Protect*, INTERNATIONAL COMMISSION ON INTERVENTION AND STATE SOVEREIGNTY, Dec. 2001, at paras. 6.31-35.

⁸¹ *The Secretary-General’s High-level Panel on Threats, Challenges, and Change, A More Secure World: Our Shared Responsibility*, para. 207, U.N. Doc. A/59/565, (Dec. 2, 2004). The High-Level Panel defined the proper criteria for humanitarian intervention under the Responsibility to Protect as 1) seriousness of threat, 2) proper purpose, 3) last resort, 4) proportional means, and 5) balance of consequences (chance of success and consequences of action vs. inaction). The Panel’s test omits the sixth “legitimate authority” criteria because they were talking specifically about Security Council approved interventions, which are by definition legitimate.

⁸² General Assembly resolution 60/1, paras. 138-39, U.N. Doc. A/RES/60/1 (Oct. 24, 2005), *available at* <http://unpan1.un.org/intradoc/groups/public/documents/un/unpan021752.pdf>. The participants affirmed the core elements of Responsibility to Protect, including: (1) each State’s responsibility to protect its populations “from genocide, war crimes, ethnic cleansing and crimes against humanity”; (2) the international community’s corresponding duty to encourage State compliance with the Responsibility to Protect; and (3) the responsibility of the international community, through the United Nations, to use all peaceful means to protect populations such that when a State “manifestly fails” in its protection responsibilities, the international community has the right to take stronger measures, up to and including collective use-of-force authorized by the Security Council under Chapter VII.

⁸³ See Security Council resolution 1674, U.N. Doc. S/RES/1674 (Apr. 28, 2006) (“[R]eaffirm[ing] the provisions of paragraphs 138 and 139 of the 2005 World Summit Outcome Document regarding the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity.”), *available at* <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N06/331/99/PDF/N0633199.pdf>. Notably, the resolution was ultimately supported by Russia and China, each of whom had initially expressed reservations about the implications of Responsibility to Protect for state sovereignty.

⁸⁴ See Security Council resolution 1706, U.N. Doc. S/RES/1706 (Aug. 31, 2006), *available at* <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N06/484/64/PDF/N0648464.pdf>.

R2P was also most recently invoked by the Security Council in response to the 2011 conflict in Libya. When authorizing the use of force in Libya, the Security Council stated that it was authorizing all necessary measures to protect civilians and civilian-populated areas under attack. The Security Council first passed resolution 1970, which referred the Libyan situation to the International Criminal Court and imposed an arms embargo, travel ban, and asset freeze on Libya, or on a number of specified individuals. When these measures failed to stop the Libyan government from attacking its own people, resolution 1973 explicitly invoked Libya's failure to uphold its responsibility to protect its population as justification for Chapter VII intervention.⁸⁵ In addition to systemic violations of human rights by the government and widespread attacks against the civilian population, the resolution cited concern "at the plight of refugees and foreign workers forced to flee" Libya and "for the safety of foreign nationals and their rights" in Libya.⁸⁶

Applying the R2P Doctrine to the Syria Crisis

R2P provides a legal framework for the international community respond to atrocity crimes. The concept first encourages the international community to assist states to prevent atrocity crimes occurring within their jurisdiction. When this is not possible, the international community should attempt to prevent the atrocity crimes through peaceful means. When peaceful measures are not sufficient to prevent, or halt the atrocity crimes, the international community may authorize the use of force as a last resort.

R2P Intervention with Security Council Authorization

One option for legitimate military intervention in Syria is through the Security Council. Chapter VII of the UN Charter empowers the Security Council to take action with respect to threats to peace and international security.⁸⁷ First, the Security Council must determine the existence of a "threat to the peace, breach of peace, or act of aggression."⁸⁸ The Security Council may call on the parties concerned to comply with provisional measures, such as a cessation of hostilities, a withdrawal of armed forces, allowing observers, or cooperation with the delivery

⁸⁵ Security Council resolution 1973, preamble, U.N. DOC S/RES/1973 (March 17, 2011).

⁸⁶ Security Council resolution 1973, preamble, U.N. DOC S/RES/1973 (March 17, 2011).

⁸⁷ *Charter of the United Nations*, arts. 39- 51 (1945), available at <http://www.un.org/en/documents/charter/chapter1.shtml>.

⁸⁸ *Charter of the United Nations*, art. 39 (1945), available at <http://www.un.org/en/documents/charter/chapter1.shtml>.

of humanitarian assistance.⁸⁹ The Council may consider the failure to comply with these measures in its decisions for further action.⁹⁰ Under Article 41, the Security Council may impose non-military measures including diplomatic and economic sanctions.⁹¹ If Article 41 measures are “inadequate or have proved to be inadequate,” the Security Council can “take such action by air, sea, or land as may be necessary to restore international peace and security” under Article 42 of the UN Charter.⁹²

While the Security Council could authorize the use of military force in Syria pursuant to its Chapter VII powers, it is deadlocked. To date, Russia and China have vetoed three resolutions authorizing peaceful measures to end the conflict in Syria.⁹³

Requirements for R2P Intervention Without Security Council Authorization

When the Security Council is deadlocked, as it is regarding the Syria crisis, R2P provides a legal framework for the international community to use military force as a last resort. Unlike previous theories of humanitarian intervention, R2P incorporates a number of procedural and operational safeguards to prevent states from abusing the doctrine. The *prima facie* case requirement, which demands clear, widely substantiated evidence of ongoing atrocity crimes, ensures that a humanitarian rationale for intervention exists. The requirement that peaceful measures have been exhausted ensures that force is being used as a last resort. In addition, R2P incorporates criteria for legitimate humanitarian intervention, developed by the UN High Level Panel on Threats, Challenges, and Change, to ensure that force is limited and narrowly tailored to stopping atrocity crimes and

⁸⁹ *Charter of the United Nations*, art. 40 (1945), available at <http://www.un.org/en/documents/charter/chapter1.shtml>; See also, United Nations, *Repertoire of the Practice of the Security Council: Actions with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression*, B (2011), available at <http://www.un.org/en/sc/repertoire/actions.shtml#rel2>.

⁹⁰ *Charter of the United Nations*, art. 40 (1945), available at <http://www.un.org/en/documents/charter/chapter1.shtml>.

⁹¹ *Charter of the United Nations*, art. 41 (1945), available at <http://www.un.org/en/documents/charter/chapter1.shtml>.

⁹² *Charter of the United Nations*, art. 42 (1945), available at <http://www.un.org/en/documents/charter/chapter1.shtml>.

⁹³ *Russia and China veto UN resolution against Syrian regime*, THE GUARDIAN, October 4, 2011, available at <http://www.guardian.co.uk/world/2011/oct/05/russia-china-veto-syria-resolution>; Paul Harris, Martin Chulov, David Batty, and Damien Pearse, *Syrian Resolution Vetoed by Russia and China at United Nations*, THE GUARDIAN, February 4, 2012, available at <http://www.guardian.co.uk/world/2012/feb/04/assad-obama-resign-un-resolution>; *Russia, China Veto Syria Resolution at U.N.*, THE WALL STREET JOURNAL, July 19, 2012, available at <http://www.bbc.co.uk/news/world-middle-east-18233934>.

protecting civilians. An intervention that satisfied all of these requirements and criteria would be legal.

A Prima Facie Case that the Syrian Government is Committing Atrocity Crimes

To trigger the international community's right under R2P to use force without Security Council authorization, a *prima facie* case⁹⁴ that atrocity crimes are being committed must be established.⁹⁵ It is a foundational principle of international law that the use of force should be avoided wherever possible. Any use of force, especially without Security Council authorization, also raises considerations concerning infringements on sovereignty, and the risk that force may be used to advance an individual state's interests at the expense of the international community. R2P's *prima facie* case requirement mitigates these concerns by placing the burden on the international community to show that there is credible evidence of ongoing atrocity crimes.⁹⁶

Atrocity Crimes Generally

Crimes against humanity may be committed during times of peace or during an armed conflict. According to the Rome Statute of the International Criminal Court, crimes against humanity occur whenever one of the enumerated acts in Article 7 (1) of the Rome Statute is committed in a widespread or systematic manner, against a civilian population, and with knowledge of the attack. The specific acts that may support a charge of crimes against humanity, and are relevant to the factual situation in Syria, include: (1) murder;⁹⁷ (2) imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;⁹⁸ (3) torture;⁹⁹ (4) persecution against any identifiable group or

⁹⁴ *Prima facie* here is used in the strong sense of the common law concept. As described by the U.S. Supreme Court, a *prima facie* case constitutes evidence sufficient to create a "legally mandatory, rebuttable presumption" on the part of the opposing party. *See Tex. Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981) (emphasis added). In the case of Syria, a *prima facie* case would consist of clear, and well-documented, evidence from multiple reputable sources that the regime had intentionally committed atrocity crimes.

⁹⁵ This view is supported by recent Security Council practice and academic opinion. When authorizing Chapter VII powers in UN Security Resolution 1973 (2011), war crimes had not been proven, therefore supporting the requirement of *prima facie* case only. For detailed academic discussion on the evidentiary standards required for R2P, see Stuart Ford, *Is the Failure to Respond Appropriately to a Natural Disaster a Crime against Humanity? The Responsibility to Protect and Individual Criminal Responsibility in the Aftermath of Cyclone Nagris*, 38 DENVER JOURNAL OF INTERNATIONAL LAW & POLICY 227, 240 (2010).

⁹⁶ For an explanation of the different evidentiary standards used in international criminal law, see Stuart Ford, *Is the Failure to Respond Appropriately to a Natural Disaster a Crime Against Humanity? The Responsibility to Protect and Individual Criminal Responsibility in the Aftermath of Cyclone Nagris*, 38 DENVER JOURNAL OF INTERNATIONAL LAW & POLICY 227, 240 (2010).

⁹⁷ *Statute of the ICC* Article 7 (1) (a) (1998), available at <http://untreaty.un.org/cod/icc/statute/romefra.htm>.

⁹⁸ *Statute of the ICC* Article 7 (1) (e) (1998), available at <http://untreaty.un.org/cod/icc/statute/romefra.htm>.

⁹⁹ *Statute of the ICC* Article 7 (1) (f) (1998), available at <http://untreaty.un.org/cod/icc/statute/romefra.htm>.

collectivity on political grounds;¹⁰⁰ and (5) other inhuman acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.¹⁰¹

Crimes against humanity encompass what is commonly referred to as the conduct element of the offense,¹⁰² as well as the presence of what is often referred to as the contextual and mental elements of the crime.¹⁰³ In the simplest possible terms, the contextual element of the crime requires “widespread” or “systematic” attack against a civilian population, and the mental element requires both intent for the underlying crime and also knowledge of the broader context in which the crimes are committed.¹⁰⁴ The International Criminal Tribunal for the Former Yugoslavia (“ICTY”) has defined “widespread and systematic” as effectively equating to a plain and natural interpretation;¹⁰⁵ similarly, “attack directed against any civilian population” is defined by Article 7 (2) of the ICC Statute,¹⁰⁶ but again, a plain and natural interpretation applies.

Unlike crimes against humanity, war crimes only occur in times of armed conflict.¹⁰⁷ According to Article 8 of the Rome Statute, acts comprising war crimes will differ depending upon whether the armed conflict is international or non-international.¹⁰⁸ In July 2012, the International Committee of the Red Cross (“ICRC”) determined that the fighting in Syria amounts to a civil war, *i.e.*, a non-international armed conflict.¹⁰⁹ The result is that the Syrian officials can be held accountable for war crimes.¹¹⁰

¹⁰⁰ *Statute of the ICC* Article 7 (1) (h) (1998), available at <http://untreaty.un.org/cod/icc/statute/rome fra.htm>.

¹⁰¹ *Statute of the ICC* Article 7 (1) (k) (1998), available at <http://untreaty.un.org/cod/icc/statute/rome fra.htm>.

¹⁰² Malcolm Evans, *INTERNATIONAL LAW* 759 (2010).

¹⁰³ Malcolm Evans, *INTERNATIONAL LAW* 759 (2010).

¹⁰⁴ Malcolm Evans, *INTERNATIONAL LAW* 761 (2010).

¹⁰⁵ *Prosecutor v Kunarac, Kovac and Vukovic*, Case No IT-96-23/1-A, Judgment, para. 94 (Jun. 12, 2002).

¹⁰⁶ For detailed discussion of the meaning of “civilian population,” see *Prosecutor v Kunarac, Kovac and Vukovic*, Case No IT-96-23/1-A, Judgment, para. 90 (Jun. 12, 2002).

¹⁰⁷ *Statute of the ICC* Art. 8 (1998), available at <http://untreaty.un.org/cod/icc/statute/rome fra.htm>. 8. An armed conflict is defined as protracted violence.

¹⁰⁸ A non-international armed conflict is one that is confined to the national territory of a state and involves only state actors. When an armed conflict crosses state boundaries or involves multiple state parties it is generally considered an international armed conflict.

¹⁰⁹ *Syria in Civil War Red Cross says*, BBC, Jul. 15, 2012, available at <http://www.bbc.co.uk/news/world-middle-east-18849362>

¹¹⁰ *Syria in Civil War Red Cross says*, BBC, Jul. 15, 2012, available at <http://www.bbc.co.uk/news/world-middle-east-18849362>

War crimes are deemed to have been committed in Syria if there have been violations of common Article 3 to the Geneva Conventions;¹¹¹ or violations of a closed list of 12 customary war crimes outlined in Article 8(2)(e) of the Rome Statute.¹¹² There is an inevitable degree of overlap between acts categorized as crimes against humanity and those categorized as war crimes.¹¹³ Even so, the ability to categorize events as either crimes against humanity or war crimes adds weight to any assertion that there is *prima facie* case that the Syrian government is committing atrocity crimes.

Ongoing Atrocity Crimes in Syria

The killings, tortures, and other abuses against Syrian civilians have been described by academics, practitioners, independent organizations, and respected news agencies as rising to the level of a *prima facie* case that the Syrian government is committing atrocity crimes. Professor David Crane, former Chief Prosecutor to the Special Court of Sierra Leone, has led a team in writing a detailed report documenting the atrocities that have occurred in Syria since March 2011.¹¹⁴ Professor Crane's report considers and analyzes reports from news agencies and NGOs, concluding that there is evidence to support an allegation that 40 individuals within the Assad regime have committed crimes against humanity.¹¹⁵ In addition, the UN Report on Syria found that Assad's security forces "continue to commit widespread, systematic, and gross human rights violations"¹¹⁶ by indiscriminately using heavy weapons—including tanks, artillery, and helicopter gunships—against civilians.¹¹⁷ The same Commission has also found that Assad's security forces had summarily executed unarmed protesters, targeted women and children with snipers, attacked residential areas with indiscriminate weapons like mortars, and tortured hospitalized protesters.¹¹⁸ A Human Rights Watch report documenting human rights abuses in Syria further

¹¹¹ *Third Geneva Convention Relative to the Treatment of Prisoners of War*, Art. 3 (Aug. 12, 1949), available at <http://www.icrc.org/ihl.nsf/WebART/375-590006>.

¹¹² *Statute of the ICC* Art. 8(2)(e) (1998), available at <http://untreaty.un.org/cod/icc/statute/romeofra.htm>.

¹¹³ Tarun Chhabra and Jeremy B. Zucker, *Defining the Crimes*, in *THE RESPONSIBILITY TO PROTECT* 37, 48 (Jared Genser and Irwin Cotler, eds., 2012).

¹¹⁴ Syracuse University College of Law, *Report on the Syrian Crisis: Mapping Atrocity in Syria*.

¹¹⁵ Syracuse University College of Law, *Report on the Syrian Crisis: Mapping Atrocity in Syria*, 70.

¹¹⁶ Independent International Commission of Inquiry, *Report of the Independent International Commission of Inquiry on the Syrian Arab Republic*, para. 2, delivered to the Human Rights Council, U.N. Doc. A/HCR/19/69 (Feb. 22, 2012), available at http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session19/A-HRC-19-69_en.pdf.

¹¹⁷ Independent International Commission of Inquiry, *Report of the Independent International Commission of Inquiry on the Syrian Arab Republic*, paras. 39-46, delivered to the Human Rights Council, U.N. Doc. A/HCR/19/69 (Feb. 22, 2012).

¹¹⁸ Independent International Commission of Inquiry, *Report of the Independent International Commission of Inquiry on the Syrian Arab Republic*, paras. 39-46, delivered to the Human Rights Council, U.N. Doc. A/HCR/19/69 (Feb. 22, 2012).

suggests that war crimes have been committed.¹¹⁹ Estimates that thousands of civilians have been killed and displaced during this crisis provides further evidence that the Syrian government's attacks rise to the level of atrocity crimes.

Because the evidence that the Syrian government is committing atrocity crimes is substantial, well-documented, and corroborated by multiple sources in the media, human rights organizations, and government agencies, it satisfies R2P's *prima facie* case requirement.

The Requirement that Peaceful Measures Have Been Exhausted

The R2P framework first encourages the international community to assist states prevent atrocity crimes occurring within their jurisdiction. When this is not possible, the international community should attempt to prevent the atrocity crimes through peaceful means. Only where peaceful measures are not sufficient to prevent or halt the atrocity crimes, may the international community authorize the use of force as a last resort.

In the context of Syria, it is not possible for the international community to assist Syria in preventing atrocity crimes that are occurring within its jurisdiction because the Syrian government itself is perpetrating them. The international community has also exhausted peaceful means, as a series of peace plans and diplomatic efforts have failed to halt the killing. Consequently, under R2P the international community can now use force to stop ongoing atrocity crimes, provided that this intervention is legitimate.

R2P Criteria for the Use of Force for Humanitarian Purposes in Syria

As previously discussed, the International Commission on Intervention and State Sovereignty and the UN High Level Panel endorsed a set of criteria to test the legitimacy of humanitarian action involving the use of force: (1) just cause must exist; (2) the assistance must be provided as a last resort; (3) the acting States must have rightful intentions; (4) the action must be proportional to the humanitarian crisis; and (5) the action must have a reasonable chance of success.¹²⁰

Applying the conditions, first, Syria presents a "just cause" for intervention because the Syrian government's attacks, which show no sign of abating, have

¹¹⁹ Human Rights Watch, *They Burned My Heart* (May. 3, 2012), available at <http://www.hrw.org/sites/default/files/reports/syria0512WebVersionReduced.pdf>.

¹²⁰ *The Responsibility to Protect*, INTERNATIONAL COMMISSION ON INTERVENTION AND STATE SOVEREIGNTY, Dec. 2001, at xii (applying the principles to "military interventions"). Although these criteria were initially designed to test the legitimacy of the use of force with Security Council authorization, they can also be applied to the use of force without Security Council authorization.

already killed over 15,000 civilians and displaced tens of thousands, including 35,000 refugees in Turkey alone.¹²¹ As discussed above, these attacks constitute atrocity crimes because of their widespread and systematic nature. Second, intervention in Syria would be a last resort as a succession of peace plans, ceasefires, and economic sanctions have not stopped the killing.

The remaining criteria address how the intervention is carried out, and must be satisfied if intervention in Syria is to be deemed legitimate. Under the third criterion, acting states must have “rightful intentions.” This requirement is satisfied when the intervention is motivated by a desire to save civilian lives rather than self interest.¹²²

The fourth criterion demands that action must be proportional to the humanitarian crisis, and the limited application of military force may only be used. For example, measures such as air strikes to protect civilians in a “safe haven,” securing a humanitarian corridor, or enforcement of a no-fly zone, are first-stage, proportional responses, rather than a full-scale ground invasion to overthrow a government.¹²³

The fifth criterion requires that the action must have a reasonable chance of success.¹²⁴ This criterion is more likely to be satisfied when the intervention is carried out by a broad international coalition.

In accordance with earlier instances of intervention without Security Council authorization,¹²⁵ the legitimacy of an intervention will also be greater where

¹²¹ *Helping to Ease the Strain*, United Nations High Commissioner for Refugees, available at <http://www.unhcr.org/pages/4f86c2426.html>.

¹²² Christopher C. Joyner, “*The Responsibility to Protect*”: *Humanitarian Concern and the Lawfulness of Armed Intervention*, 47 VIRGINIA JOURNAL OF INTERNATIONAL LAW 695, 712 (2007). It is important that the intervening state/states not be perceived as acting primarily with an ulterior motive, using humanitarian interventions as a pretext for less legitimate motives such as revenge, power or land grabs, or strategic interests. See, e.g., *The Responsibility to Protect: Research, Bibliography, Background*, INTERNATIONAL COMMISSION ON INTERVENTION AND STATE SOVEREIGNTY (Dec. 2001) at 54-5, available at <http://www.idrc.ca/EN/Resources/Publications/Pages/IDRCBookDetails.aspx?PublicationID=242> (discussing how India’s 1971 intervention in Pakistan was ill-received by the international community because India did not even claim humanitarian reasons as the primary justification for its intervention).

¹²³ This phenomenon was most evident in the recent U.S.-led war in Iraq. There, although the U.S. and its allies found wide support for no-fly zones to protect the Kurds, the eventual invasion of Iraq to overthrow Saddam Hussein met with considerable resistance from the international community. See, e.g., *Iraq War Legitimacy “Questionable,” Says ex-Diplomat*, BBC, Nov. 29, 2009, available at <http://news.bbc.co.uk/2/hi/8382194.stm>.

¹²⁴ See, e.g., *The Responsibility to Protect*, INTERNATIONAL COMMISSION ON INTERVENTION AND STATE SOVEREIGNTY (Dec. 2001) at xii, available at <http://www.idrc.ca/EN/Resources/Publications/Pages/IDRCBookDetails.aspx?PublicationID=242>.

¹²⁵ The military intervention in Kosovo was led by NATO.

military action is undertaken by a regional security organization, a coalition of the willing,¹²⁶ or some form of multilateral operations.¹²⁷ Like the ICISS report, the UN High Level Panel approved of the trend towards using regional coalitions to stop atrocity crimes.¹²⁸

The legitimacy of an intervention will also be increased where it is taken pursuant to specific requests from opposition leaders. This condition is again derived from earlier instances of intervention without Security Council authorization, as in northern Iraq, where leaders of the Kurdish community appealed to France, the UK, and the US to protect the Kurds from Saddam Hussein.¹²⁹ The KLA also requested help from the international community on numerous occasions during the Kosovo crisis.¹³⁰ In Syria, a legitimate request for intervention could come from a number of sources, including the Syrian National Council, Local Coordinating Committees, Revolutionary Council, Free Syrian Army, or other leading opposition groups.

Conclusion

International law regarding the use of force for humanitarian purposes is still evolving. Even so, the R2P doctrine now reflects an international consensus on several issues: (1) the concept of sovereignty must include an inherent responsibility to protect civilians from atrocity crimes, the prohibition of which is fundamental to the international system; and (2) when a state is unwilling or unable to prevent atrocity crimes from occurring, and peaceful measures have been exhausted, the international community may use force to prevent the atrocity crimes. When there is a *prima facie* case of ongoing atrocity crimes, peaceful

¹²⁶ For example, unilateral intervention by Vietnam in Cambodia in 1975 was widely condemned because of the global distrust of communist governments at that time. See Sean D. Murphy, HUMANITARIAN INTERVENTION: THE UNITED NATIONS IN AN EVOLVING WORLD ORDER 104 (1996).

¹²⁷ Christoph Mikulaschek, *Report from the 39th International Peace Institute Vienna Seminar on Peacemaking and Peacekeeping*, in THE UN SECURITY COUNCIL AND THE RESPONSIBILITY TO PROTECT 20, 24 (2010), available at http://www.ipacademy.org/media/pdf/publications/favorita_paper_2010.pdf; Saban Kardas, *Humanitarian Intervention: The Evolution of the Idea and Practice*, 6 PERCEPTIONS: JOURNAL OF INTERNATIONAL AFFAIRS 5 (Jul. 2001), available at <http://www.sam.gov.tr/perceptions/Volume6/June-July2001/kardas09.PDF>.

¹²⁸ *The Secretary-General's High-level Panel on Threats, Challenges, and Change, A More Secure World: Our Shared Responsibility*, para. 272, U.N. Doc. A/59/565 (Dec. 2, 2004) (“Recent experience has demonstrated that regional organizations can be a vital part of the multilateral system ... [t]he key is to organize regional action within the Charter and the purposes of the United Nations ...”)

¹²⁹ Peter Malanczuk, *The Kurdish Crisis and Allied Intervention in the Aftermath of the Second Gulf War*, 2 EUROPEAN JOURNAL OF INTERNATIONAL LAW 114, 121 (1991).

¹³⁰ Carlotta Gall, *Conflict in the Balkans: Top Ethnic Albanian Rebel Asks NATO to Start Strikes*, NEW YORK TIMES, March 23, 1999, available at <http://www.nytimes.com/1999/03/23/world/conflict-balkans-kosovo-top-ethnic-albanian-rebel-asks-nato-start-strikes.html?pagewanted=all&src=pm>.

measures have been exhausted, and Security Council is deadlocked, R2P gives the international community the legal right to use force without its prior approval, as long as the intervention complies with UN-endorsed criteria for legitimacy.

In the case of Syria, substantial and well-documented evidence from multiple sources indicates that the government is committing atrocity crimes. These crimes are widespread and systematic. They include deliberate and indiscriminate attacks with heavy weapons against protesters and other unarmed civilians; mass executions; and the torture of children and injured persons. Peaceful measures, such as sanctions, diplomacy, and tough rhetoric have not deterred them or stopped the killings.

The Security Council may authorize the use of force to prevent Syria's continuing atrocity crimes, either acting pursuant to R2P doctrine or on the basis that Syria represents a threat to the peace and security of the region. There is a significant probability, however, that the Security Council will be unable to take forceful measures against Syria because of Russian and Chinese opposition.

In this eventuality, the international community, or a regional coalition of states, could invoke R2P, giving it the legal authority to use force in Syria for the limited purpose of preventing the atrocity crimes. This authority would be temporary, and the use of force must be narrowly tailored to humanitarian goals. Importantly, the right to use force without Security Council authorization may only be invoked to prevent ongoing atrocity crimes, the prohibition of which is fundamental to the international legal order. The international community's limited authority to intervene would also be subject to a number of procedural and operational safeguards, which constrain how much military force can be employed and under which circumstances.

Ultimately, the decision whether to use force in Syria, subject as it is to political and pragmatic considerations, is one for policymakers, and policymakers alone. From the perspective of international law, however, because Syria presents a *prima facie* case where atrocity crimes are occurring and peaceful measures have been exhausted, states have the limited authority to use force, even without Security Council authorization, should they deem it necessary.