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# COMMENTS

## EXPANDING THE RESPONSIBILITY TO PROTECT: SAVING POPULATIONS FROM HIV/AIDS\*

### I. INTRODUCTION

South African President Thabo Mbeki's denial of AIDS and rejection of lifesaving treatment for his people were directly responsible for the avoidable deaths of more than 330,000 people from 2000–2005.<sup>1</sup> South Africa is one of the countries most severely affected by HIV/AIDS. During Mbeki's rule, prevalence of HIV/AIDS in the adult population was 18.8%.<sup>2</sup> An estimated nine hundred South Africans died every day.<sup>3</sup> Yet Mbeki and his government turned their backs on scientific consensus, argued that HIV was not the cause of AIDS and that antiretroviral drugs were not useful for patients, and rejected international aid for the epidemic.<sup>4</sup> As a result, the Anglican Church and others condemned the government's inaction as a crime against humanity.<sup>5</sup>

Although it is not certain that Mbeki's actions rose to the level of crimes against humanity,<sup>6</sup> it is certain that as a result of his AIDS policies hundreds of thousands of people were denied the right to treatment, which implicates the right to life<sup>7</sup>—a

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1. Sarah Boseley, *Mbeki Aids Denial 'Caused 300,000 Deaths': South African President's Refusal to Accept Medical Evidence of Virus Was Major Obstacle to Providing Medicine, say Harvard Researchers*, GUARDIAN, Nov. 26, 2008, <http://www.guardian.co.uk/world/2008/nov/26/aids-south-africa>; Celia W. Dugger, *Study Cites Toll of AIDS Policy in South Africa*, N.Y. TIMES, Nov. 26, 2008, at A1; see also Pride Chigwedere et al., *Estimating the Lost Benefits of Antiretroviral Drug Use in South Africa*, 49 J. ACQUIRED IMMUNE DEFICIENCY SYNDROMES 410, 411 (2008) (describing Harvard study quantifying deaths resulting from Mbeki's policies).

2. UNAIDS, 2006 REPORT ON THE GLOBAL AIDS EPIDEMIC 506–10 (2006).

3. *Id.*

4. Boseley, *supra* note 1.

5. Laurie Nathan, *Consistency and Inconsistencies in South African Foreign Policy*, 81 INT'L AFF. 361, 369 (2005); *Church Enters SA Row*, BBC NEWS (Sept. 20, 2000), <http://news.bbc.co.uk/2/hi/africa/933631.stm>.

6. Crimes against humanity are defined in the Rome Statute of the International Criminal Court as acts committed "as part of a widespread or systematic attack directed against a civilian population, with knowledge of the attack." Rome Statute of the International Criminal Court, art. 7, July 17, 1998, 2187 UNT.S. 90 [hereinafter Rome Statute].

7. Noah Novogrodsky, *The Duty of Treatment: Human Rights and the HIV/AIDS Pandemic*, 12 YALE HUM. RTS. & DEV. L.J. 1, 17 (2009); see also Alicia Ely Yamin, *Not Just a Tragedy: Access to Medications as a Right Under International Law*, 21 B.U. INT'L L.J. 325, 332–36 (2003) (discussing regional human rights

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universally recognized and nonderogable human right under international law.<sup>8</sup> Whether Mbeki's actions amounted to crimes against humanity, however, is a critical question. Under the Responsibility to Protect (RtoP), a relatively new international norm, if Mbeki's government denied the South African people access to lifesaving treatment as part of a widespread or systematic policy (constituting a crime against humanity) rather than a bald unwillingness to do so, the international community would have had a responsibility to intervene. There is no doubt that from the perspective of the thousands of people who died from AIDS during Mbeki's rule, this distinction is arbitrary and meaningless.

Although it is widely recognized that HIV/AIDS and the armed conflicts of 1990s have been the greatest assaults to humanity in the last thirty years, RtoP applies only to mass atrocity crimes. Under current RtoP doctrine, the international community has a responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity—when their own states are unwilling or unable—but not from thoughtless and unjustified denial of lifesaving HIV/AIDS medications.

This Comment will argue that RtoP should be expanded beyond the limited cases of genocide, war crimes, ethnic cleansing, and crimes against humanity to include the protection of populations in peril from HIV/AIDS. Section II provides an overview of RtoP and the HIV/AIDS crises. Part II.A discusses the development of RtoP. Part II.A.1 discusses the global political climate that served as the impetus for RtoP's creation. Part II.A.2 examines the conceptual documents that have shaped RtoP's development. Part II.A.3 explores the foundations of RtoP, namely a new definition of sovereignty as responsibility, international human rights law, and human security. Part II.A.4 discusses how the doctrine has been operationalized, highlighting its application in specific crisis situations and its shift toward prevention.

Part II.B discusses the global HIV/AIDS crisis. Part II.B.1 provides an overview of the devastating impact of the pandemic. Part II.B.2 discusses HIV/AIDS as a significant threat to international security. Part II.B.3 examines how HIV/AIDS implicates international human rights law, paying particular attention to the right to treatment—a component of the right to life and the right to health.

Section III offers an argument for expanding RtoP to include HIV/AIDS. Part III.A explains that the current version of RtoP was a political compromise and suggests that that as international concerns evolve, and the acceptance of RtoP broadens, so too should its application. Part III.B demonstrates that broader application would be consistent with RtoP's increasing focus on prevention to apply the doctrine to HIV/AIDS crises. Finally, Part III.C argues that applying RtoP in the HIV/AIDS context is consistent with the foundations of the norm: the protection of human rights and human security.

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instruments and state court decisions which have interpreted the right to life broadly in the context of denial of access to medicines).

8. Novogrodsky, *supra* note 7, at 17.

## II. OVERVIEW

### A. *The Development of a Responsibility to Protect (RtoP)*

#### 1. The Global Politics Surrounding the Development of a Responsibility to Protect

From its inception, RtoP has been shaped by global politics.<sup>9</sup> In the 1990s, the inadequate response of the international community to a series of violent internal conflicts led to a feeling that the principles designed to guide the action of the United Nations (UN) and the international community in the protection of citizens from mass atrocities were flawed.<sup>10</sup> In the face of violence and great humanitarian disaster—in Somalia in 1993, Rwanda in 1994, and Srebrenica in 1995—the international community failed to take action to save lives.<sup>11</sup> On the other hand, The North Atlantic Treaty Organization’s (NATO) intervention in Kosovo in 1999, without the authorization of the UN Security Council, drew significant criticism.<sup>12</sup> The tension between the moral imperative to act when citizens’ human rights are grossly violated and the longstanding principles of nonintervention in the domestic affairs of states<sup>13</sup> paralyzed the international community.<sup>14</sup>

Recognizing the need to move forward, UN Secretary-General Kofi Annan challenged the international community to find a consensus on principles that would enable the prevention of future atrocities while ensuring respect for state sovereignty: “[I]f 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?”<sup>15</sup> Canada responded

9. Naomi Kikoler, Keynote Paper, International Conference: Protecting People in Conflict and Crisis: Responding to the Challenges of a Changing World, Global Ctr. for the Responsibility to Protect 4 (Sept. 2009).

10. INT’L COMM’N ON INTERVENTION & STATE SOVEREIGNTY, THE RESPONSIBILITY TO PROTECT 1 (2001) [hereinafter ICISS REPORT].

11. *Id.*; Gareth Evans & Mohamed Sahnoun, *The Responsibility to Protect*, 81 FOREIGN AFF. 99, 100–01 (2002).

12. ICISS REPORT, *supra* note 10, at 1. While many states did not recognize the legality of intervention in Kosovo, they did recognize that action was a moral imperative. Antonio Cassese, *A Follow-Up: Forcible Humanitarian Countermeasures and Opinio Necessitatis*, 10 EUR. J. INT’L L. 791, 792–93 (1999); *see also* Richard A. Falk, *Kosovo, World Order, and the Future of International Law*, 93 AM. J. INT’L L. 847, 852 (1999) (stating that intervention was “necessary to prevent a humanitarian catastrophe in the form of ethnic cleansing,” but “[i]t was impossible because of the political unavailability of an appropriate means”). The Independent International Commission on Kosovo, appointed to evaluate NATO’s action there, eventually concluded that the bombing campaign was “illegal but legitimate.” INDEP. INT’L COMM’N ON KOSOVO, THE KOSOVO REPORT: CONFLICT, INTERNATIONAL RESPONSE, LESSONS LEARNED 4 (2000).

13. The principle of nonintervention is enshrined in Article 2(7) of the UN Charter, which states “[n]othing . . . shall authorize the United Nations to intervene in matters which are essentially within the jurisdiction of any State.” UN Charter art. 2, para. 7.

14. Kikoler, *supra* note 9, at 4.

15. KOFI ANNAN, “WE THE PEOPLES”: THE ROLE OF THE UNITED NATIONS IN THE 21ST CENTURY 34 (2000); ICISS REPORT, *supra* note 10, at VII; Evans & Sahnoun, *supra* note 11, at 100.

to this challenge in 2000 by appointing the Independent International Commission on Intervention and State Sovereignty (ICISS) to try to develop international political consensus on how to move from paralysis towards collective action, particularly through the United Nations.<sup>16</sup> It was the report of the ICISS, issued a year later, which coined the phrase “responsibility to protect.”<sup>17</sup>

## 2. Core RtoP Documents

The doctrine of RtoP developed conceptually through four core documents: (1) the report of the International Commission on Intervention and State Sovereignty, *The Responsibility to Protect*; (2) the 2004 report of the High-Level Panel on Threats, Challenges and Change; (3) *In Larger Freedom*, a pre-World Summit report by UN Secretary-General Kofi Annan; and (4) the 2005 World Summit Outcome Document.<sup>18</sup> A 2009 Report, *Implementing the Responsibility to Protect*, by Secretary-General Ban Ki-Moon sought to clarify the commitments set forth in the World Summit Outcome Document and define the policy agenda for RtoP moving forward.<sup>19</sup> This Part will discuss these documents.

### a. *The Responsibility to Protect*, Report of the International Commission on Intervention and State Sovereignty

The central premise of the ICISS report was that “sovereign states have a responsibility to protect their own citizens from avoidable catastrophe—from mass murder and rape, from starvation—but that when they are unwilling or unable to do so, that responsibility must be borne by the broader community of states.”<sup>20</sup> The report highlighted the critical gap between the growing emphasis on human rights and human security and the legal principles and mechanisms available for their protection.<sup>21</sup>

The ICISS panel perceived RtoP as an outgrowth of changing conceptions about the relationship between states and citizens in a globalized world.<sup>22</sup> In this way, “ICISS registered and dramatized a norm shift that was already underway”—that based on the evolving practice of states and the Security Council, emerging and established norms, and customary international law, the prohibition of intervention is not absolute.<sup>23</sup>

The solution envisioned by the ICISS was comprised of three substantive components, which represent a graduated approach to protection: (1) the responsibility of the state and the international community to *prevent* “deadly conflict and other forms of man-made catastrophe,” through “ensur[ing] accountability and good

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16. ICISS REPORT, *supra* note 10, at 2.

17. *Id.* at 8.

18. Carsten Stahn, *Responsibility to Protect: Political Rhetoric or Emerging Legal Norm?*, 101 AM. J. INT’L L. 99, 102 (2007).

19. *See generally* BAN KI-MOON, IMPLEMENTING THE RESPONSIBILITY TO PROTECT (2009).

20. ICISS REPORT, *supra* note 10, at VIII.

21. *See id.* at 3 (stating that the capacity and norms of international institutions have not kept pace with modern needs and expectations, including international intervention for human protection purposes).

22. THOMAS GEORGE WEISS & RAMESH CHANDRA THAKUR, GLOBAL GOVERNANCE AND THE UN: AN UNFINISHED JOURNEY 338 (2010).

23. *Id.* at 312, 338.

governance, protect[ing] human rights, promot[ing] social and economic development and ensur[ing] a fair distribution of resources;<sup>24</sup> (2) the responsibility to *react* to “situations of compelling need for human protection” when preventative measures fail;<sup>25</sup> and (3) the responsibility to *rebuild* by “helping to build a durable peace, and promoting good governance and sustainable development” in an effort to ensure that the conditions that prompted the intervention do not recur.<sup>26</sup>

Prevention is the most important dimension of the ICISS framework.<sup>27</sup> The report calls on the international community—including regional and nongovernmental organizations—to act in collaboration with states to tackle the root causes of conflict through measures including international development assistance, support for local initiatives that enhance human rights and the rule of law, and mediation efforts.<sup>28</sup> It also places an emphasis on direct prevention efforts, which may come in the form of political, diplomatic, economic, legal and military inducements.<sup>29</sup>

When prevention fails to resolve or contain a humanitarian crisis and the state involved is unable or unwilling to protect its people, then intervention by the broader international community may be required.<sup>30</sup> Intervention may take the form of economic, political, or diplomatic coercion, or military intervention as a last resort.<sup>31</sup> As conceived by the ICISS, the use of force for human protection purposes is justified 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.”<sup>32</sup> This includes cases of overwhelming natural or environmental catastrophes, where there is a significant threat to life and the state is either unwilling or unable to protect its populations.<sup>33</sup> Thus, the Commission did not distinguish between situations in which harm is caused by state action and situations in which it is not.

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24. ICISS REPORT, *supra* note 10, at 19.

25. *Id.* at 29.

26. *Id.* at 39.

27. *Id.* at XI. *But see id.* at 29 (“The ‘responsibility to protect’ implies above all else a responsibility to react to situations of compelling need for human protection.”).

28. *Id.* at 19, 22–23.

29. *Id.* at 23.

30. *Id.* at 29. The primary authority for authorizing intervention under the ICISS framework is the UN Security Council. *See id.* at 49 (“It is the Security Council which should be making the hard decisions in the hard cases about overriding state sovereignty. And it is the Security Council which should be making the often even harder decisions to mobilize effective resources, including military resources, to rescue populations at risk when there is no serious opposition on sovereignty grounds.”). Still, the ICISS left open the possibility that the UN General Assembly and regional organizations could assume the responsibility to react if the Security Council failed to appropriately respond to a compelling proposal for intervention. Stahn, *supra* note 18, at 104; *see also* ICISS REPORT, *supra* note 10, at 53 (noting that if the Security Council either rejects a proposal for intervention where significant human rights issues are at stake or fails to address such a proposal within a reasonable time, alternative options include action within area of jurisdiction by regional or subregional organizations under Chapter VIII of the UN Charter or consideration of the matter by the General Assembly).

31. ICISS REPORT, *supra* note 10, at 29–30.

32. *Id.* at 32.

33. *Id.* at 33.

The responsibility to *prevent*, in particular, and the responsibility to *react* would be implicated if RtoP was applied in the context of HIV/AIDS. Therefore, these are the components of RtoP that will be discussed throughout this Comment.

*b. 2004 Report of the High-Level Panel on Threats, Challenges, and Change*

The first demonstration of UN support for RtoP came as part of the 2004 report of the High-Level Panel on Threats, Challenges and Change, which was commissioned by Kofi Annan to examine the UN's role in addressing collective security concerns.<sup>34</sup> The panel "endorse[d] the emerging norm that there is a collective international responsibility to protect," the idea that the international community has a right and an obligation to intervene when states are unable or unwilling to protect the welfare of their people.<sup>35</sup> It envisioned this duty to encompass a wide range of intervention measures, from prevention to military force to reconstruction.<sup>36</sup> The panel focused on RtoP in the context of "avoidable catastrophe—mass murder and rape, ethnic cleansing by forcible expulsion and terror, and deliberate starvation and exposure to disease."<sup>37</sup>

This Comment will argue that, consistent with the recommendation of the High-Level Panel, RtoP should apply to exposure to disease, particularly HIV/AIDS.

*c. In Larger Freedom, Report of the Secretary-General*

UN Secretary-General Kofi Annan largely embraced the recommendations of the High-Level Panel regarding RtoP in his 2005 report, *In Larger Freedom*. This report highlighted the relationship between security, development and human rights and expressed the need for collective action.<sup>38</sup> Describing RtoP as an "emerging norm," Annan emphasized that "*we must embrace the responsibility to protect, and, when necessary, we must act on it.*"<sup>39</sup>

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34. The mission of the High-Level Panel was to translate ideas, including those put forth by the ICISS, into policy proposals that could later be adopted by the General Assembly. Alex Bellamy, *Conflict Prevention and the Responsibility to Protect*, 14 GLOBAL GOVERNANCE 135, 139 (2008) [hereinafter Bellamy, *Conflict Prevention and RtoP*]; Alex Bellamy, *Whither the Responsibility to Protect? Humanitarian Intervention and the 2005 World Summit*, 20 ETHICS & INT'L AFF. 143, 155–56 (2006) [hereinafter Bellamy, *Whither the Responsibility to Protect?*].

35. KOFI ANNAN, A MORE SECURE WORLD: OUR SHARED RESPONSIBILITY 56–57 (2004).

36. *Id.*; Anne-Marie Slaughter, *Security, Solidarity and Sovereignty: The Grand Themes of UN Reform*, 99 AM. J. INT'L L. 619, 621 (2005).

37. ANNAN, *supra* note 35, at 56.

38. *See* KOFI ANNAN, IN LARGER FREEDOM: TOWARDS DEVELOPMENT, SECURITY AND HUMAN RIGHTS FOR ALL: REP. OF THE SECRETARY-GENERAL 6–7 (2005) (discussing the imperative of collective action); Stahn, *supra* note 18, at 104 (stating that the report fostered the idea that state security and human security are indivisible and that threats must be resolved through collective action).

39. ANNAN, *supra* note 38, at 35. The Secretary-General's report suggested that intervention by the international community is appropriate only when authorized by the Security Council under the UN Charter. *See id.* (stating that when diplomatic, humanitarian and other methods to protect the human rights and well-being of civilian populations are insufficient, the Security Council may take action consistent with the UN Charter).

*d. 2005 World Summit Outcome Document*

At the 2005 United Nations World Summit member states unanimously agreed to adopt the concept of RtoP, solidifying the scope of the principle and the framework through which RtoP can be implemented.<sup>40</sup> Paragraphs 138 and 139 of the Summit Outcome Document declare:

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

139. The international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the Charter, to help 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 manifestly fail to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity. We stress the need for the General Assembly to continue consideration of the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity and its implications, bearing in mind the principles of the Charter and international law. We also intend to commit ourselves, as necessary and appropriate, to helping States build capacity to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity and to assisting those which are under stress before crises and conflicts break out.<sup>41</sup>

Thus, as adopted by the UN General Assembly,<sup>42</sup> RtoP is limited to four crimes:

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40. 2005 World Summit Outcome, G.A. Res. 60/1, ¶¶ 138–39, UN Doc. A/RES/60/1 (Sept. 15, 2005). In 2006, the UN Security Council unanimously reaffirmed RtoP as outlined in the World Summit Outcome Document in Resolutions 1674 and 1894 on the protection of civilians in armed conflict. *See* S.C. Res. 1674, ¶ 4, UN 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”); S.C. Res. 1894, ¶ 7, UN Doc. S/RES/1894 (Nov. 11, 2009) (“Reaffirming the relevant provisions of the 2005 World Summit Outcome Document regarding the protection of civilians in armed conflict, including paragraphs 138 and 139 thereof regarding the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity.”).

41. 2005 World Summit Outcome, *supra* note 40, at ¶¶ 138–39. The Summit Outcome Document suggests that the Security Council is the sole authority on matters of intervention, but does not prohibit intervention by other actors. Alex J. Bellamy, *The Responsibility to Protect—Five Years On*, 24 ETHICS & INT’L AFF. 143, 143 (2010).

42. The principle document for understanding the nature of the crimes to which RtoP applies is the Rome Statute of the International Criminal Court. *See generally* Rome Statute, *supra* note 6.

genocide,<sup>43</sup> war crimes,<sup>44</sup> ethnic cleansing,<sup>45</sup> and crimes against humanity.<sup>46</sup> The version of RtoP adopted at the World Summit represents a more narrow conception than the reports of the ICISS and the High-Level Panel. This was a critical compromise.<sup>47</sup> Limiting RtoP to the four specified crimes—which were already reasonably well defined under international humanitarian law—was essential to gaining consensus support for adoption in a contentious political environment.<sup>48</sup>

*e. Implementing the Responsibility to Protect, Report of the Secretary-General*

In 2009, new UN Secretary-General Ban Ki-moon issued a report titled *Implementing the Responsibility to Protect*, which was the first comprehensive

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43. Genocide is defined as “any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such.” *Id.* art. 6. The definition is followed by a series of acts representing serious violations of the right to life and physical and mental integrity, including killing members of the group, causing serious bodily or mental harm to members of the group, and imposing measures intended to prevent births within the group. *Id.* It is the specific intention to destroy an identified group either “in whole or in part” that distinguishes the crime of genocide from a crime against humanity.

44. War crimes refer to a broad category of acts prohibited during armed conflict that have come to be recognized as crimes under international law. *See id.* art. 8, ¶ 2 (outlining acts that constitute “war crimes”). These include willful killing; torture or inhumane treatment; willfully causing great suffering, or serious injury to body or health; and intentionally directing attacks against the civilian population. *Id.*

45. There is no formally accepted legal definition of ethnic cleansing, although it has been understood to be “a purposeful policy designed by one ethnic or religious group to remove by violent and terror-inspiring means the civilian population of another ethnic or religious group from certain geographic areas.” Rep. of the Comm’n of Experts Established Pursuant to S.C. Res. 780 (1992), ¶ 130, UN Doc. S/1994/674 (May 27, 1994). Ethnic cleansing differs from genocide in that the intent of the perpetrator may not be to destroy a group, but instead to create an ethnically homogenous territory. *Id.*

46. Crimes against humanity encompass acts such as murder, extermination, rape, persecution, and “[o]ther inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health” committed “as part of a widespread or systematic attack directed against a civilian population, with knowledge of the attack.” Rome Statute, *supra* note 6, art. 7. An attack directed against a civilian population means “a course of conduct involving the multiple commission of acts . . . against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack.” *Id.* art. 7, ¶ 2(a). Crimes against humanity differ from genocide in that they do not require the intent to destroy a group and they differ from war crimes in that they may be committed outside of armed conflicts. The Rome Statute significantly broadened the scope of crimes against humanity from its original definition in the 1945 Charter of the International Military Tribunal, which provided that only acts committed during wartime could qualify as crimes against humanity and be prosecuted. Charter of the International Military Tribunal art. 6(c), 59 Stat. 1544, 82 UNT.S. 279 (Aug. 8, 1945).

47. *Cf.* Stahn, *supra* note 18, at 108 (“States avoided reducing the idea of responsibility to protect to a purely moral concept. However, paragraphs 138 and 139 of the Outcome Document represent a rather curious mixture of political and legal considerations, which reflects the continuing division and confusion about the meaning of the concept.”).

48. Edward C. Luck, *Sovereignty, Choice, and the Responsibility to Protect*, 1 GLOBAL RESP. TO PROTECT 10, 13 (2009); *see also* Stahn, *supra* note 18, at 108 (describing the debate surrounding the adoption of RtoP at the World Summit). Jean Ping, President of the General Assembly during the World Summit negotiations, cited the suggestion for linking RtoP to specific, well-defined crimes in international criminal law as a breakthrough in the debate over RtoP. Jean Ping, Chairman, Afr. Union Comm’n, *The Responsibility to Protect in Africa*, Keynote Address to Round-Table High-Level Meeting of Experts (October 23, 2008), *in* THE RESPONSIBILITY TO PROTECT (RTO P) AND GENOCIDE PREVENTION IN AFRICA 11, 12 (Int’l Peace Inst. ed. 2009).



document from the UN Secretariat since the adoption of RtoP in 2005.<sup>49</sup> Its goal was to clarify the commitments set forth in paragraphs 138 and 139 of the World Summit Outcome Document for a fragmented UN membership in order to turn RtoP into a workable norm.<sup>50</sup> In an attempt to provide more content and context for the Summit Outcome language, the report largely drew on the previously discussed core documents that stretch back to the ICISS report.<sup>51</sup>

The Secretary-General's report reframes RtoP as a three-pillar spectrum of responsibility for advancing the mandate of the World Summit Outcome Document: (1) the responsibility of states to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity, (2) the responsibility of the international community to assist states in meeting their protection obligations, and (3) the responsibility of the international community to take timely and decisive collective action, consistent with the UN Charter, when states have failed to protect their populations.<sup>52</sup>

The report affirms that RtoP does not create new legal obligations. Rather, "the provisions of paragraphs 138 and 139 of the Summit Outcome are firmly anchored in well-established principles of international law."<sup>53</sup> In this respect, RtoP simply reinforces the preexisting obligations of states.<sup>54</sup>

If states are unable to protect their populations and therefore fail to fulfill their responsibilities under pillar one, because of weak political leadership or a deficit in effective prevention capacity, the international community should assist them in exercising their protection responsibilities (pillar two).<sup>55</sup> The report highlights a number of established international, regional, and subregional entities that are poised to contribute to these efforts.<sup>56</sup> It emphasizes the value of prevention, claiming that building the capacity to prevent atrocity crimes from occurring is what is most needed

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49. BAN, *supra* note 19.

50. See Edward C. Luck, *The Responsible Sovereign and the Responsibility to Protect*, in ANNUAL REVIEW OF UNITED NATIONS AFFAIRS 2006/2007, at xxxiii, xxxv (Joachim W. Müller & Karl P. Sauvant eds., 2007) (stating that the report sought to distinguish what was agreed to in the World Summit Outcome Document and alternate conceptualizations of RtoP that had emerged); Monica Serrano, *The Responsibility to Protect—True Consensus, False Controversy*, 55 DEV. DIALOGUE 101, 106 (2011) (stating that the Secretary-General's report reaffirmed the narrow understanding of RtoP as applied to the four specified crimes and contributed significantly to the RtoP narrative).

51. BAN, *supra* note 19, at 7.

52. *Id.* at 8–9.

53. *Id.* at 5. See also *id.* at 12 (stating that the responsibility of states to protect their populations is "firmly embedded in pre-existing, treaty-based and customary international law").

54. Commentators have suggested that the real value of RtoP is as a political tool because of its ability to generate the will and consensus to respond in exceptional situations. See GARETH EVANS, *THE RESPONSIBILITY TO PROTECT: ENDING MASS ATROCITY CRIMES ONCE AND FOR ALL* 65 (2008) ("The whole point of embracing the new language of 'the responsibility to protect' is that it is capable of generating an effective, consensual response in extreme, conscience-shocking cases."); Sheri P. Rosenberg, *Responsibility to Protect: A Framework for Prevention*, 1 GLOBAL RESP. TO PROTECT 442, 448 (2009) ("While R2P in some aspects may reinforce or reiterate existing law, its strength lies in the framework it establishes—unearthing, interpreting, and crystallising the obligation to act in the face of mass atrocity crimes.").

55. See BAN, *supra* note 19, at 15. (describing conditions and initial steps for international community to aid in protection responsibilities).

56. *Id.*

from the perspective of RtoP.<sup>57</sup>

Pillar three focuses on the responsibility of the international community to take “timely and decisive” action to save lives when states are “manifestly failing” to protect their populations.<sup>58</sup> A timely and decisive response may involve diplomatic and humanitarian measures under Chapter VI of the UN Charter, collaboration with regional, subregional, and national organizations under Chapter VIII, or Security Council-authorized coercive measures under Chapter VII.<sup>59</sup>

The report confirms that RtoP applies, until member states decide otherwise, only to the four crimes and violations specified in the World Summit Outcome Document: genocide, war crimes, ethnic cleansing, and crimes against humanity.<sup>60</sup> It states, “[t]o try to extend it to cover other calamities, such as HIV/AIDS, climate change, or the response to natural disasters, would undermine the 2005 consensus and stretch the concept beyond recognition or operational utility.”<sup>61</sup>

Despite the bright line that Secretary-General Ban Ki-moon drew in 2009, RtoP has been and continues to be an evolving doctrine. This Comment will argue that as the understanding and support of RtoP evolves, so too should its application.

### 3. Foundations of RtoP

RtoP attempts to fill the gap between the traditional state-centric global regime codified in the UN Charter and the protection of individuals from threats to their welfare. As stated in the ICISS report, “[w]hat is at stake [in the enactment of RtoP] is not making the world safe for big powers, or trampling over the sovereign rights of small ones, but delivering practical protection for ordinary people, at risk of their lives, because their states are unwilling or unable to protect them.”<sup>62</sup> The articulation of a “responsibility to protect” represents a conceptual effort to reconcile state sovereignty with an expanding network of human rights obligations and a broadened interpretation of threats to international peace and security.<sup>63</sup> As such, RtoP is rooted in a new definition of sovereignty as responsibility, international human rights law, and the

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57. *Id.* at 20. See *infra* notes 154–58 and accompanying text for a more in-depth discussion of the prevention component of RtoP as set out in the Secretary-General’s report.

58. BAN, *supra* note 19, at 9.

59. *Id.* Chapter VI of the UN Charter deals with pacific settlement of disputes and requires countries to first attempt to resolve conflict through peaceful methods such as “negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.” UN Charter ch. VI, art. 33, para. 1. Chapter VIII concerns regional arrangements, and requires members who are a part of regional security agencies to “make every effort to achieve pacific settlement of local disputes through such regional arrangements or by such regional agencies before referring them to the Security Council.” UN Charter ch. VIII, art. 52, para. 2. Chapter VII authorizes the Security Council to “determine the existence of any threat to the peace, breach of the peace, or act of aggression” and to take such action “as may be necessary to maintain or restore international peace and security.” UN Charter, ch. VII, art. 39, 42.

60. *Id.* ¶ 10(b).

61. *Id.*

62. ICISS REPORT, *supra* note 10, at 11.

63. Gareth Evans, *From Humanitarian Intervention to the Responsibility to Protect*, 24 WIS. INT’L L.J. 703, 708–09 (2006).

concept of human security.<sup>64</sup> This Part will briefly describe each of these foundations.

*a. Sovereignty as Responsibility*

RtoP relies on a new and evolving conception of “sovereignty as responsibility,” under which states are defined by their obligations rather than their borders.<sup>65</sup> Characterizing sovereignty as responsibility implies that states have a duty to protect the welfare of their people and that they are accountable both to their populations internally and externally to the international community.<sup>66</sup>

This definition of sovereignty is in tension with the long-held tenets of the Westphalian system of international relations, which emphasized that borders are sacrosanct and that states have exclusive control over the people and resources within their territories.<sup>67</sup> The principles of nonintervention and sovereign impunity are deeply embedded in international legal order.<sup>68</sup> Article 2(7) of the UN Charter grants states the sole capacity to make decisions regarding the affairs within their borders.<sup>69</sup> And article 2(4) prohibits member nations from using force against the “territorial integrity or political independence of any state.”<sup>70</sup>

Respect for absolute sovereignty and noninterference began to erode, however, with the proliferation of post–World War II human rights conventions and a broadened understanding of human security.<sup>71</sup> It became untenable that the notion of inviolable state sovereignty effectively permitted states to abuse the rights of their citizens in

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64. See ICISS REPORT, *supra* note 10, at XI (stating that the foundations of RtoP lie in the obligations of sovereignty; the responsibility of the Security Council under Article 24 of the UN Charter to protect international peace and security; international human rights law; and the practice of states, regional organizations, and the Security Council).

65. *Id.* at 13 (stating that RtoP relies on a recharacterization from *sovereignty as control* to *sovereignty as responsibility* in regard to both internal functions and external duties). *But see* Luke Glanville, *The Antecedents of ‘Sovereignty as Responsibility’*, 17 EUR. J. INT’L RELATIONS 233, 249 (2011) (arguing that the notion of sovereignty as responsibility has deep historical roots and cautioning against a belief that it is an “abstract and late-arriving challenge to concrete and timeless sovereign rights of internal control and non-interference”); Stahn, *supra* note 18, at 111 (“The shift from sovereignty as control to sovereignty as responsibility appears to be less radical than suggested by its history.”).

66. See ICISS REPORT, *supra* note 10, at 13 (describing the significance and implications of thinking of sovereignty as responsibility).

67. Evans & Sahnoun, *supra* note 11, at 101–02. For an overview of Westphalian sovereignty, see DAVID LUBAN ET AL., INTERNATIONAL & TRANSNATIONAL CRIMINAL LAW 29–30 (2009).

68. See UN Charter art. 2, para. 1 (stating that the foundation of international order is the sovereign equality of all states); INT’L COMM’N ON INTERVENTION & STATE SOVEREIGNTY, THE RESPONSIBILITY TO PROTECT: RESEARCH, BIBLIOGRAPHY, BACKGROUND 6 (2001) [hereinafter ICISS SUPPLEMENT] (stating that the post–World War II system of international order enshrined in the UN Charter is based on the Westphalian model of sovereignty).

69. See UN Charter art. 2, para. 7 (“Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state.”).

70. UN Charter art. 2, para. 4.

71. ICISS REPORT, *supra* note 10, at 13; Evans & Sahnoun, *supra* note 11, at 102; *see also* ICISS SUPPLEMENT, *supra* note 68, at 7–9 (describing the limits of and contemporary challenges to the notion of state sovereignty, including an expanding network of human rights obligations and the broadening interpretation of threats to international peace and security).

violation of international legal obligations.<sup>72</sup> The humanitarian disasters of the 1990s only contributed to the prevailing feeling that the current system was inadequate.<sup>73</sup>

The pressure on the international community to reconcile the humanitarian imperative of saving lives with respect for state sovereignty led to a reframing of “sovereignty as responsibility.”<sup>74</sup> According to this conception, sovereignty demands responsibility both to a state’s population and to the broader community of states in the form of compliance with international obligations and protection of fundamental human rights.<sup>75</sup> As the High-Level Panel recognized, “[w]hatever perceptions may have prevailed when the Westphalian system first gave rise to the notion of State sovereignty, today it clearly carries with it the obligation of a State to protect the welfare of its own peoples and meet its obligations to the wider international community.”<sup>76</sup> The state is the principal guardian of its people, however it forfeits its sovereignty in cases where it is unwilling or unable to perform this role.<sup>77</sup> Sovereignty, therefore, is conditioned upon the fulfillment of certain core responsibilities.

This recharacterization of sovereignty forms the basis of RtoP. Under the concept of sovereignty as responsibility, situations threatening the lives of citizens are no longer subject solely to the discretion of the state; instead they are perceived as issues of concern to the international community.<sup>78</sup> The following Parts will describe how the proliferation of human rights treaties and a broadened understanding of human security developed in concert with the progressive understanding of sovereignty and collectively form the foundations of RtoP.

*b. Human Rights*

RtoP emerged in the context of a broad movement toward international standards

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72. See ROBERTA COHEN & FRANCIS M. DENG, BROOKINGS INSTITUTION, *MASSSES IN FLIGHT: THE GLOBAL CRISIS OF INTERNAL DISPLACEMENT 1* (1998) (“We are clearly witnessing what is probably an irresistible shift in public attitudes towards the belief that the defense of the oppressed in the name of morality should prevail over frontiers and legal documents.” (quoting former UN Secretary-General Javier Perez de Cuellar)); Evans & Sahnoun, *supra* note 11, at 102 (stating that today even the strongest supporters of traditional sovereignty would not claim that a state has unlimited power to do what it wants to its people).

73. See Gareth Evans, *From Principle To Practice—Implementing The Responsibility To Protect*, Keynote Address to Egmont (Royal Institute of International Affairs) Conference and Expert Seminar (Apr. 26, 2007) (describing how the traditional assumption of non-intervention came “under challenge, as never before” in the 1990s due to the inadequate response of the international community to civil wars and situations of massive internal violence). See *supra* notes 10–14 and accompanying text for a brief overview of the humanitarian disasters of the 1990s.

74. The concept of sovereignty as responsibility originated from the work of Francis Deng, a UN Representative on Internally Displaced Persons in the 1990s. See generally FRANCIS M. DENG ET AL., *SOVEREIGNTY AS RESPONSIBILITY: CONFLICT MANAGEMENT IN AFRICA* (1996). In this role, Deng argued that sovereignty was derived from responsibility, both internally to a state’s populations and externally to the broader international community. *Id.* If a state was unable or unwilling to fulfill its responsibilities, sovereignty could no longer be invoked as a protection against international interference. *Id.*

75. ICISS REPORT, *supra* note 10, at 13; Evans & Sahnoun, *supra* note 11, at 102; Slaughter, *supra* note 36, at 620.

76. ANNAN, *supra* note 35, at 21.

77. Stahn, *supra* note 18, at 114.

78. *Id.* at 101.

for the protection of human rights.<sup>79</sup> In the aftermath of the atrocities perpetrated by the Nazi regime, the idea that individuals possessed certain rights independent of their own states and that these rights should be protected by international law gained traction.<sup>80</sup> The result was a proliferation of international human rights treaties.<sup>81</sup> States were no longer considered the sole actors in international law; individuals increasingly became the subject of and participants in the world regime.<sup>82</sup>

The 1945 UN Charter committed the UN and its members to “promoting and encouraging respect for human rights and for fundamental freedoms.”<sup>83</sup> While the Charter itself does not contain a bill of rights, the 1948 Universal Declaration of Human Rights enumerated the fundamental rights of individuals in order to give effect to the Charter’s many human rights references.<sup>84</sup> The International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, both adopted in 1966, affirm the role of human rights as fundamental to international relations and bolster and expand the commitments in the Universal Declaration.<sup>85</sup> Together, these three instruments “mapped out the international human rights agenda, established the benchmark for state conduct, inspired provisions in many national laws and international conventions, and led to the creation of long-term national infrastructures for the protection and promotion of human rights.”<sup>86</sup> They protect a wide array of individual rights, including the right to life, the right to health, and the right to enjoy the benefits of scientific progress.<sup>87</sup>

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79. ICISS REPORT, *supra* note 10, at 6; *see id.* at 14 (claiming state adoption of standards for the protection and advancement of international human rights as one of the great achievements of the post–World War II era).

80. *See* LUBAN ET AL., *supra* note 67, at 33 (stating that World War II “sounded an alarm throughout the world” that protection for individual human rights and human dignity was necessary).

81. *See* ICISS SUPPLEMENT, *supra* note 68, at 8 (stating that since the signing of the UN Charter in 1945, states have subscribed to an expanding network of human rights obligations); Sheila McLean, *The Right to Reproduce*, in HUMAN RIGHTS: FROM RHETORIC TO REALITY 99, 111 (Tom Campbell et al. eds., 1986) (stating that in response to the atrocities of World War II, the UN promulgated a number of international agreements protecting the rights and welfare of the individual).

82. Traditional international law primarily concerned the mutual relations of states. With the emergence of international human rights law, it is now recognized that how a state treats its citizens is also a legitimate focus. *See generally* CARL A. NØRGAARD, *THE POSITION OF THE INDIVIDUAL IN INTERNATIONAL LAW* (1962); Alexander Orakhelashvili, *The Position of the Individual in International Law*, 31 CAL. W. INT’L L.J. 241 (2001).

83. UN Charter art. 1, para. 3.

84. The Universal Declaration of Human Rights, G.A. Res. 217A, UN GAOR, 3d Sess., UN Doc. A/810 (Dec. 10, 1948) [hereinafter UDHR]; *see also* ICISS REPORT, *supra* note 10, at 14 (“The Universal Declaration of Human Rights (1948) embodies the moral code, political consensus and legal synthesis of human rights.”). The UN Charter contains several references to human rights without defining them. For example, the Preamble states the commitment of signatories to “reaffirm faith in fundamental human rights, in the dignity and worth of the human person.” UN Charter Preamble. Article 55 commits the UN to promote “universal respect for, and observance of, human rights and fundamental freedoms for all.” *Id.* art. 55. Article 56 commits members to “take joint and separate action . . . for the achievement of [universal respect for human rights].” *Id.* art. 56. And article 68 calls for the creation of a commission for the promotion of human rights. *Id.* art. 68.

85. ICISS REPORT, *supra* note 10, at 14.

86. *Id.* at 14.

87. *See* UDHR, *supra* note 84, art. 3 (recognizing the right to life); International Covenant on Civil and Political Rights, art. 6, ¶ 1, Dec. 19, 1966, 999 UNT.S. 171 [hereinafter ICCPR] (protecting the right to life);

A concern for human rights is at the heart of RtoP.<sup>88</sup> In fact, RtoP has been hailed as a “milestone in the relationship between sovereignty and human rights.”<sup>89</sup> Indeed, the concept of RtoP was developed as a means to justify international intervention to protect individuals from gross human rights abuses.<sup>90</sup> Even the term “responsibility to protect” implies that situations should be evaluated from the perspective of those needing support.<sup>91</sup>

*c. Human Security*

The increasing importance of human security has also played a critical role in the development of RtoP.<sup>92</sup> Since the United Nations Development Programme (UNDP) first introduced the concept in 1994, human security has become a central principal of international law and international relations.<sup>93</sup> As Canadian Foreign Minister Lloyd Axelworthy recognized, “[a]t the start of this new century, the protection of peoples is among the most important issues before us.”<sup>94</sup> As such, human security has been identified as a bedrock of the UN.<sup>95</sup> According to former UN Secretary-General Annan, “[e]nsuring human security is, in the broadest sense, the United Nations’ cardinal mission.”<sup>96</sup>

Human security is based on the premise that national and international peace and security are possible only if they are derived from the security of people.<sup>97</sup> Rather than focusing exclusively on the security of states, human security focuses on the protection of individuals against threats to their dignity and welfare posed by either external or

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UDHR, *supra* note 84, art. 25 (recognizing a right to health); International Covenant on Economic, Social and Cultural Rights, art. 12, Dec. 16, 1966, 993 UNT.S. 4 [hereinafter ICESCR] (guaranteeing the “right of everyone to the enjoyment of the highest attainable standard of health”); *id.* art. 15, ¶ 1(c) (recognizing the right to enjoy the benefits of scientific progress).

88. See Roberta Cohen, Address at Harvard Human Rights Journal Annual Symposium (Feb. 20, 2009), available at [http://www.brookings.edu/speeches/2009/0220\\_responsibility\\_to\\_protect\\_cohen.aspx](http://www.brookings.edu/speeches/2009/0220_responsibility_to_protect_cohen.aspx) (explaining that “[e]veryone would agree that international human rights standards are the foundation of R2P”).

89. Bellamy, *Whither the Responsibility to Protect?*, *supra* note 34, at Abstract.

90. Stahn, *supra* note 18, at 102.

91. Evans & Sahnoun, *supra* note 11, at 101.

92. All of the foundational documents of RtoP—the report of the ICISS, the 2004 report of the High-Level Panel on Threats, Challenges and Change, the 2005 report of the UN Secretary-General, and the 2005 World Summit Outcome Document—emphasize the fundamental importance of human security. ICISS REPORT, *supra* note 10, at 15; ANNAN, *supra* note 35, at 11–14; ANNAN, *supra* note 38, at 35; 2005 World Summit Outcome, *supra* note 40, at ¶ 143.

93. ICISS REPORT, *supra* note 10, at 6; S. NEIL MACFARLANE & YUEN FOONG KHONG, HUMAN SECURITY AND THE UNITED NATIONS 2 (2006); *Background*, COMM’N ON HUMAN SEC., <http://ochaonline.un.org/humansecurity> (last visited Oct. 26, 2013).

94. MACFARLANE & KHONG, *supra* note 93, at x. That human security has significantly influenced global politics, institutions and governance is evidenced by the emergence of a number of international, regional and nongovernmental organizations dedicated to advancing the concept of human security. See Gerd Oberleitner, *Human Security: A Challenge to International Law?*, 11 GLOBAL GOVERNANCE 185, 185–86 (2005) (listing governmental, UN, and academic human security initiatives).

95. Oberleitner, *supra* note 94, at 188.

96. MACFARLANE & KHONG, *supra* note 93, at 152.

97. *Id.* at 2.

internal actors and forces.<sup>98</sup> The notion of human security gained currency with an increased focus on the individual in international law because:

[t]he traditional, narrow perception of security leaves out the most elementary and legitimate concerns of ordinary people regarding security in their daily lives. It also diverts enormous amounts of national wealth and human resources into armaments and armed forces, while countries fail to protect their citizens from chronic insecurities of hunger, disease, inadequate shelter, crime, unemployment, social conflict and environmental hazard.<sup>99</sup>

From a human security perspective, “death, whether it be from violence or disease, is equally to be feared. The principal difference is that death from disease is much more likely for the vast majority of the world’s population.”<sup>100</sup>

The UN’s heightened attention to human security parallels the Security Council’s broadened interpretation of what constitutes a threat to international peace and security, from conflicts among states to crises within states.<sup>101</sup> Since the 1990s, the Security Council has demonstrated a greater willingness to recognize that internal wars, genocide, and other extreme violations of human rights can be treated as threats to international peace and security. For example, the Security Council condemned attacks on civilians in Bosnia and Herzegovina, Kosovo and Sierra Leone as grave breaches of international law.<sup>102</sup> Resolution 1820 identifies sexual violence against women as a tactic of war and a threat to international peace and security.<sup>103</sup> And in 2001, the Security Council for the first time discussed a health issue when it adopted Resolution 1308 affirming that HIV/AIDS constitutes a threat to international peace and security and consequently falls within its mandate.<sup>104</sup>

International scholar Anne-Marie Slaughter has argued that the promotion of human security as the centerpiece of the UN’s agenda for the twenty-first century represents a “blueprint for profound change, through nothing less than a reconception

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98. ICISS REPORT, *supra* note 10, at 15; *id.* at 11. There is no universally accepted definition of human security. As defined by UNDP in its 1994 Human Development Report, human security “means, first, safety from such chronic threats as hunger, disease and repression. And second, it means protection from sudden and hurtful disruptions in the patterns of daily life—whether in homes, in jobs or in communities.” UNITED NATIONS DEV. PROGRAMME, HUMAN DEVELOPMENT REPORT 1994, at 22 (1994). The ICISS report defines human security as “the security of people—their physical safety, their economic and social well-being, respect for their dignity and worth as human beings, and the protection of their human rights and fundamental freedoms.” ICISS REPORT, *supra* note 10, at 15.

99. ICISS REPORT, *supra* note 10, at 15. The notion of human security increases the scope of security concerns beyond the protection of borders and other national interests to encompass a broad range of domestic, environmental, economic and health issues. MACFARLANE & KHONG, *supra* note 93, at xii; *see also* ICISS REPORT, *supra* note 10, at 6 (stating that the concept of human security includes human rights concerns, but is even broader in its scope).

100. Slaughter, *supra* note 36, at 619.

101. Oberleitner, *supra* note 94, at 190. This broadened interpretation of threats to international peace and security has significant consequences for state sovereignty, because under Chapter VII of the UN Charter, sovereignty yields to measures taken by the Security Council in response to a threat or breach of the peace. UN Charter ch. VII.

102. ICISS SUPPLEMENT, *supra* note 68, at 9.

103. S.C. Res. 1820, ¶ 1, UN Doc S/RES/1820 (June 19, 2008).

104. S.C. Res. 1308, UN Doc S/RES/1308 (July 17, 2000).

of security, solidarity, and even sovereignty.”<sup>105</sup> According to Slaughter, the protection of individuals against all threats to their dignity and welfare—including internal threats—necessitates the subordination of state security to human security.<sup>106</sup> Accepting this subordination requires a rethinking of sovereignty.<sup>107</sup> Therefore

membership in the United Nations is no longer a validation of sovereign status and a shield against unwanted meddling in a state’s domestic jurisdiction. It is rather the right and capacity to participate in the United Nations itself, working in concert with other nations to sit in judgment of and take action against threats to human security whenever and wherever they arise.<sup>108</sup>

#### 4. Operationalizing RtoP

It is widely recognized that the acceptance of RtoP at the 2005 World Summit was a remarkable achievement that represents the increasing importance of human rights and human security in international affairs.<sup>109</sup> Secretary-General Kofi Annan claimed that “[s]tate sovereignty, in its most basic sense, is being redefined—not least by the forces of globalisation and international co-operation. States are now widely understood to be instruments at the service of their peoples, and not vice versa.”<sup>110</sup> RtoP has “become part of the diplomatic language of humanitarian emergencies, used by governments, international organizations, NGOs, and independent commissions to justify behavior, cajole compliance, and demand international action.”<sup>111</sup> Still, there remains significant disagreement and uncertainty about the application, legality, and scope of RtoP.<sup>112</sup> This is in part due to the fact that the version of RtoP adopted in the World Summit Outcome Document was a compromise solution representing a mixture of political and legal principles.<sup>113</sup>

This Part will first discuss the application of RtoP to crises in Myanmar and

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105. Slaughter, *supra* note 36, at 619.

106. *Id.*

107. *Id.* at 620.

108. *Id.*

109. See Stahn, *supra* note 18, at 100–01 (stating that the inclusion of RtoP in the 2005 World Summit Outcome Document was one of most important results of the World Summit, and claiming that it represents a “broader systemic shift in international law, namely, a growing tendency to recognize that the principle of state sovereignty finds its limits in the protection of ‘human security’”); Ramesh Thakur & Thomas Weiss, *R2P: From Idea to Norm—And Action?*, 1 GLOBAL RESP. TO PROTECT 22, 23 (2009) (“[N]o idea has moved faster in the international normative arena than the ‘responsibility to protect.’”); Ramesh Thakur, *The Responsibility to Protect—and Prosecute?* HINDU, Jul. 10, 2007, <http://www.hindu.com/2007/07/10/stories/2007071053730800.htm> (stating that the UN’s adoption of the responsibility to protect was one of its “most significant normative advances since 1945”).

110. Kofi Annan, *Two Concepts of Sovereignty*, ECONOMIST, Sept. 16, 1999, <http://www.economist.com/node/324795>.

111. ALEX J. BELLAMY & SARA E. DAVIES, GLOBAL POLITICS AND THE RESPONSIBILITY TO PROTECT: FROM WORDS TO DEEDS 26 (2011); see also Rosenberg, *supra* note 54, at 444 (noting that the RtoP framework is invoked in most policy discussions surrounding humanitarian crises).

112. Stahn, *supra* note 18, at 108.

113. *Id.* See *supra* notes 47–48 and accompanying text for a description of the debate and disagreement surrounding RtoP at the World Summit.



Kenya in order to demonstrate when and how the doctrine has been invoked and in what situations it has found success. It will then discuss the increasing emphasis on RtoP's prevention component.

*a. RtoP Applied in Crises Situations*

RtoP has been referenced in thirteen crisis situations by the UN, civil society, and other actors since its adoption at the World Summit in 2005.<sup>114</sup> However the Security Council, the body charged with taking action under RtoP, has displayed a disinclination to invoke RtoP, referring to the norm only four times in relation to specific crises: Resolution 1706 on the situation in Darfur,<sup>115</sup> Resolutions 1970 and 1973 on the situation in Libya,<sup>116</sup> and Resolution 1975 on the situation in Côte d'Ivoire.<sup>117</sup>

The uncertainty over whether to invoke RtoP is perhaps best exemplified by highlighting the 2008 situations in Myanmar and Kenya. In the former, the application of RtoP to natural disasters was fiercely debated and eventually rejected. In the latter, the application of RtoP—through preventive, diplomatic engagement to stop the spread of post-election violence—was widely hailed as an RtoP success.

A cyclone hit Myanmar in May 2008, devastating the Irrawaddy Delta region.<sup>118</sup> The cyclone affected an estimated 2.4 million people and 140,000 people were killed or left missing.<sup>119</sup> It was the worst natural disaster in Myanmar history, and the most devastating cyclone to strike Asia since 1991.<sup>120</sup> The international community quickly mobilized a substantial relief operation, however much of the aid was rejected or strictly limited by Myanmar's military regime.<sup>121</sup> For the first three weeks after the cyclone, all foreigners, including aid workers, were banned from entering the Irrawaddy Delta, and at one point the military leaders seized a shipment of food aid from the UN

114. *Crises*, ICRTOP, <http://www.responsibilitytoprotect.org/index.php/crises> (last visited Oct. 26, 2013) (listing the situations as Darfur, Sudan, Burma, Zimbabwe, The Democratic Republic of Congo, Sri Lanka, Kenya, Guinea, Nigeria, Kyrgyzstan, Cote d'Ivoire, Libya, and Syria). Libya was the only case in which the Security Council referenced RtoP in a Chapter VII resolution. BAN KI-MOON, THE ROLE OF REGIONAL AND SUB-REGIONAL ARRANGEMENTS IN IMPLEMENTING THE RESPONSIBILITY TO PROTECT 10 (2011).

115. S.C. Res. 1706, Preamble, UN Doc. S/RES/1706 (Aug. 31, 2006) (recalling and referring to paragraphs 138 and 139 of the 2005 World Summit Outcome Document).

116. S.C. Res. 1970, Preamble, UN Doc. S/RES/1970 (Feb. 26, 2011) (recalling "the Libyan authorities' responsibility to protect its population"); S.C. Res. 1973, Preamble, UN Doc. S/RES/1973 (Mar. 17, 2011) ("Reiterating the responsibility of the Libyan authorities to protect the Libyan population and reaffirming that parties to armed conflicts bear the primary responsibility to take all feasible steps to ensure the protection of civilians.").

117. S.C. Res. 1975, Preamble, UN Doc. S/RES/1975 (Mar. 30, 2011) (reaffirming "the primary responsibility of each State to protect civilians" and "[r]eaffirming that it is the responsibility of Côte d'Ivoire to promote and protect all human rights and fundamental freedoms").

118. TRIPARTITE CORE GRP., POST-NARGIS JOINT ASSESSMENT I (2008).

119. UN OFFICE FOR THE COORDINATION OF HUMANITARIAN AFF., MYANMAR CYCLONE NARGIS: OHCA SITUATION REPORT NO. 46, at 1 (2008).

120. TRIPARTITE CORE GRP., *supra* note 118, at 1.

121. Seth Mydans, *Myanmar Rulers Still Impede Access, Relief Groups Say*, N.Y. TIMES, June 3, 2008, at A8; Seth Mydans & Helene Cooper, *Aid for Myanmar Mobilizes, Mixed with Criticism*, N.Y. TIMES, May 7, 2008, at A1.

World Food Program.<sup>122</sup> The apparent disregard for the welfare of the Myanmar people led to calls for RtoP to be invoked.<sup>123</sup> French Foreign Minister Bernard Kouchner argued that the denial of humanitarian assistance constituted a crime against humanity and that the UN Security Council should invoke RtoP to authorize the delivery of aid without Myanmar's consent.<sup>124</sup> This led to a vigorous debate about the proper role of RtoP. China and ASEAN rejected the proposal on the ground that RtoP does not apply to natural disasters.<sup>125</sup> Gareth Evans, cochair of the ICISS, argued that application of RtoP deserved consideration because "there [was] at least a prima facie case to answer for [the government of Myanmar's] intransigence being a crime against humanity of a kind which would attract the responsibility to protect principle."<sup>126</sup> In contrast, special advisor to the UN Secretary-General Edward Luck stated it would be a misapplication of responsibility to protect principles to apply them to the tragedy in Myanmar.<sup>127</sup> No action was taken under RtoP, however commentators have claimed that its invocation increased the political pressure on Myanmar's government to become more responsive to international concerns, leading to a loosening of restrictions.<sup>128</sup>

In contrast, applicability of RtoP to postelection violence in Kenya was widely agreed upon and is now hailed as the best example of RtoP in action.<sup>129</sup> In early 2008, a wave of ethnic violence erupted in Kenya following a disputed presidential

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122. 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 Nargis*, 38 DENV. J. INT'L L. & POL'Y 227, 231 (2009); Seth Mydans, *Myanmar Seizes UN Food for Cyclone Victims and Blocks Foreign Experts*, N.Y. TIMES, May 10, 2008, at A10.

123. Joanna Harrington, *R2P and Natural Disasters*, in ROUTLEDGE HANDBOOK OF THE RESPONSIBILITY TO PROTECT 141, 143 (Andy Knight & Frazer Egerton eds., 2011).

124. ASIA-PACIFIC CTR. FOR THE RESPONSIBILITY TO PROTECT, CYCLONE NARGIS AND THE RESPONSIBILITY TO PROTECT: MYANMAR/BURMA BRIEFING NO. 2, at 4 (2008); Ford, *supra*, note 122, at 233. British Foreign Secretary, David Miliband, also claimed RtoP could apply to the situation in Myanmar. *The UN and Humanitarian Intervention: To Protect Sovereignty, or to Protect Lives?*, ECONOMIST, May 17, 2008, at 50.

125. Bellamy, *supra* note 41, at 152.

126. Gareth Evans, *Facing Up to Our Responsibilities*, GUARDIAN (May 12, 2008, 5:30 AM), <http://www.guardian.co.uk/commentisfree/2008/may/12/facinguptoourresponsibilities>.

127. Edward Luck, Special Advisor to the UN Secretary-General, Statement to the U.S. Senate Foreign Relations Committee (June 17, 2008); ASIA-PACIFIC CTR. FOR THE RESPONSIBILITY TO PROTECT, *supra* note 124, at 8.

128. Jürgen Haacke, *Myanmar, the Responsibility to Protect, and the Need for Practical Assistance*, 1 GLOBAL RESP. TO PROTECT 156, 169 (2009).

129. Bellamy, *supra* note 41, at 154; see also Desmond Tutu, *Taking the Responsibility to Protect*, N.Y. TIMES, Nov. 9, 2008, <http://www.nytimes.com/2008/02/19/opinion/19iht-edtutu.1.10186157.html> (touting effective collective action of the international community under RtoP and stressing that "[t]he place to start is with prevention: through measures aimed in particular at building state capacity, remedying grievances, and ensuring the rule of law"). Human Rights Watch called the collective international response a "a model of diplomatic action under the Responsibility to Protect." HUMAN RIGHTS WATCH, *BALLOTS TO BULLETS: ORGANIZED POLITICAL VIOLENCE AND KENYA'S CRISIS OF GOVERNANCE* 67 (2008). *But see* Donald Steinberg, Crisis Group Deputy President, *Responsibility to Protect in the Real World: From Rwanda to Darfur to Kenya*, Address to Cardozo Law School at Yeshiva University (Mar. 10, 2008) (highlighting that the crisis was only labeled an RtoP situation retrospectively, although "the motivation, the early response, and the outcome are all straight from the R2P playbook").

election.<sup>130</sup> It is estimated that more than 1,100 Kenyans were murdered and more than 300,000 were forcibly driven from their homes, with victims often targeted on the basis of their ethnicity.<sup>131</sup> A coordinated diplomatic effort mandated by the African Union, spearheaded by former UN Secretary-General Kofi Annan, and supported by the UN, Kenya's neighbors, key donors, and civil society, led to a power-sharing agreement and an end to the violence that many feared would escalate into a worse campaign of mass atrocities.<sup>132</sup> Annan later stated that he "saw the crisis in the [RtoP] prism with a Kenyan government unable to contain the situation or protect its people."<sup>133</sup> Secretary-General Ban Ki-moon also characterized the situation as relevant to RtoP, stating that the Kenyan leaders had "the responsibility to do everything possible to resolve the sources of the crisis peacefully."<sup>134</sup> Commentators have claimed that the successful use in Kenya of mediation, a noncoercive preventive tool, demonstrates how RtoP can effectively save lives if understood as a larger concept embracing more than just military intervention.<sup>135</sup>

*b. The Shift to a Responsibility to Prevent*

Although the responsibility to prevent was identified as the most important aspect of RtoP in the 2001 ICISS report and the 2005 World Summit Outcome Document, the debate surrounding the content and application of the doctrine has been dominated by the responsibility to react and military intervention. RtoP's preventative dimension has been largely disregarded.

In the last few years, however, the Secretary-General's efforts to strengthen the responsibility to prevent as an operational, not just conceptual component of RtoP, have begun to shift the focus of RtoP away from reaction and toward prevention.

"[P]revention is the single most important dimension" of the RtoP framework as articulated by the report of the ICISS.<sup>136</sup> The report stressed the need for the international community to act in collaboration with states to tackle the root causes of conflict through measures such as international development assistance, support for

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130. GLOBAL CTR. FOR THE RESP. TO PROTECT, *THE RESPONSIBILITY TO PROTECT AND KENYA: PAST SUCCESSSES AND CURRENT CHALLENGES 1* (2010); Marlise Simons, *4 Kenyans to Stand Trial at Hague Court in 2008 Election Violence*, N.Y. TIMES, Jan. 23, 2012, at A9.

131. Simons, *supra* note 130.

132. Bellamy, *supra* note 41, at 154; GLOBAL CTR. FOR THE RESP. TO PROTECT, *supra* note 130, at 1.

133. Bellamy, *supra* note 41, at 154 (quoting Kofi Annan, UN Secretary General).

134. Ban Ki-moon, UN Secretary-General, Address to the Summit of the African Union (Jan. 31, 2008).

135. *E.g.*, GLOBAL CTR. FOR THE RESP. TO PROTECT, *supra* note 130, at 2.

136. ICISS REPORT, *supra* note 10, at XI. The ICISS's focus on a responsibility to prevent was an attempt to address the "gap between rhetoric and financial and political support for prevention." *Id.* at 20; Bellamy, *Conflict Prevention and RtoP*, *supra* note 34, at 137. It also reflected the UN's increasing emphasis on preventive efforts. Bellamy, *Conflict Prevention and RtoP*, *supra* note 34, at 137. For example, in 2000 the UN General Assembly and the Security Council both adopted resolutions pledging to bolster the effectiveness of the UN in conflict prevention. ICISS REPORT, *supra* note 10, at 19. Secretary-General Kofi Annan's 2002 report, *Prevention of Armed Conflict*, argued that the UN system should move from a "culture of reaction to a culture of prevention," and charged that each branch of the UN integrate prevention strategies into its work. *Prevention of Armed Conflict: Views of Organs, Organizations and Bodies of the United Nations System: Rep. of the Secretary-General*, ¶ 8, UN Doc. A/57/588-S/2002/1269 (Nov. 5, 2002).

local initiatives that enhance human rights and the rule of law, and mediation efforts.<sup>137</sup> It also placed an emphasis on centralizing early warning and analysis mechanisms<sup>138</sup> and enhancing direct prevention efforts, which may come in the form of political, diplomatic, economic, legal and military inducements.<sup>139</sup> Effective prevention, according to the ICISS, ultimately “depends on disparate actors working together,” including “[s]tates, the UN and its specialized agencies, the international financial institutions, regional organizations, NGO’s, religious groups, the business community, the media, and scientific, professional and educational communities.”<sup>140</sup>

The version of RtoP adopted in paragraphs 138 and 139 of the 2005 World Summit Outcome Document similarly stressed the importance of prevention.<sup>141</sup> States committed to helping each other “build capacity to protect their populations” and “assist[] those which are under stress before crises and conflicts break out.”<sup>142</sup> The Outcome Document prioritizes prevention by treating intervention as a measure of last resort;<sup>143</sup> the Security Council should always pursue peaceful measures under Chapters VI of the UN Charter and collaborative measures with regional and subregional organizations under Chapter VIII before authorizing coercive action under Chapter VII.<sup>144</sup>

Despite this stated emphasis on prevention, academic and policy debate surrounding RtoP has focused on the responsibility to react and the relationship between RtoP and military intervention.<sup>145</sup> Alex Bellamy, Director of the Asia Pacific Centre for the Responsibility to Protect, has argued that at least three factors have contributed to the neglect of RtoP’s prevention component: (1) the difficulty in comprehensively and effectively addressing the “bewildering range of structural and direct causes” of conflict, which would demand significant resources and political commitment;<sup>146</sup> (2) the adoption of a doctrine of preemption by the United States and

137. ICISS REPORT, *supra* note 10, at 19, 22–23.

138. *Id.* at 21–22.

139. *Id.* at 23.

140. *Id.* at 25–26.

141. See 2005 World Summit Outcome, *supra* note 40, at ¶ 138 (stating that RtoP “entails the prevention of [genocide, war crimes, ethnic cleansing and crimes against humanity], including their incitement, through appropriate and necessary means”).

142. *Id.* at ¶ 139. For a discussion of the controversy regarding the UN’s role in conflict prevention from the time of the ICISS report until the 2005 World Summit, see Bellamy, *Conflict Prevention and RtoP*, *supra* note 34, at 140–42.

143. ELI STAMNES, NOR. INST. OF INT’L AFFAIRS, THE RESPONSIBILITY TO PROTECT AND ‘ROOT CAUSE’ PREVENTION 7 (2010).

144. 2005 World Summit Outcome, *supra* note 40, at ¶ 139.

145. E.g., Alex Bellamy, *Responsibility to Protect or Trojan Horse? The Crisis in Darfur and Humanitarian Intervention After Iraq*, 19 ETHICS & INT’L AFF. 31, 42–50 (2005). See generally Ramesh Thakur, *Intervention, Sovereignty and the Responsibility to Protect: Experiences from ICISS*, 33 SEC. DIALOGUE 323 (2002); Thomas G. Weiss, *The Sunset of Humanitarian Intervention? The Responsibility to Protect in a Unipolar Era*, 35 SEC. DIALOGUE 135 (2004).

146. Bellamy, *Conflict Prevention and RtoP*, *supra* note 34, at 143–44. This “dilemma of comprehensiveness” implicates two problems. First, it is difficult to generate the political will necessary for a serious commitment to prevention because it requires governments and other organizations to commit resources prior to the outbreak of conflict. *Id.* at 143. Second, prevention measures are seemingly limitless; structural prevention to address root causes of conflict may encompass broad-based economic, social, cultural,

its allies in the war on terrorism, which has made other states hesitant to endorse measures that would make it easier for powerful states to engage in a preventive war,<sup>147</sup> (3) practical concerns about where the responsibility to prevent lies if the host state is unwilling or unable to act.<sup>148</sup>

There has, however, been a marked change in attitude regarding the prevention component of RtoP. Scholarly and political attention has begun to shift away from reaction and toward prevention, due largely to Secretary-General Ban Ki-Moon's efforts to clarify the purpose of RtoP and strengthen its utility as an operational doctrine.<sup>149</sup> As part of these efforts, Ban has consistently and frequently emphasized the importance of prevention in the RtoP framework.

The Secretary-General's first comprehensive report about RtoP in 2009 reaffirmed that prevention is the "key ingredient" for successful implementation.<sup>150</sup> The report stated "[w]hat is most needed, from the perspective of the responsibility to protect, are assistance programmes that are carefully targeted to build specific capacities within societies that would make them less likely to travel the path to crimes relating to the responsibility to protect."<sup>151</sup> This approach recognizes the value of long-term "upstream" prevention through helping states develop the institutional capacity, policies, and values that would make the commission of RtoP crimes unacceptable in their societies.<sup>152</sup> The goal is for states to internalize RtoP principles into their conceptions of the state and its responsibility to the peoples within its borders.<sup>153</sup>

A subsequent report of the Secretary General focused on the critical role of regional and subregional organizations in implementing prevention mechanisms.<sup>154</sup> The report stressed that the core function of these organizations is to reinforce the sovereign responsibility of the state to protect its own populations,<sup>155</sup> through action such as encouraging governments to fulfill treaty obligations, and establishing regional norms

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humanitarian and legal reform, and states are concerned that "prevention" could be used as a pretext for intervention. *Id.* at 144; *see also* EVANS, *supra* note 54, at 103–04 (stating that identifying the potential causes of mass atrocities, which is necessary for effective prevention, is difficult because of the vast number of contributive factors).

147. Bellamy, *Conflict Prevention and RtoP*, *supra* note 34, at 145–46.

148. *Id.* at 147. For example, efforts to prevent further atrocities in Darfur were hindered by confusion over whether the responsibility to act fell on the host government, the African Union, or the UN Security Council. *Id.*

149. *See, e.g.*, Bellamy, *Conflict Prevention and RtoP*, *supra* note 34 (examining attitudes regarding the responsibility to prevent and identifying principles that may help advance the prevention component of RtoP).

150. *Id.* at 9.

151. *Id.* at 20. *See also* ASIA-PACIFIC CTR. FOR THE RESPONSIBILITY TO PROTECT, PREVENTING GENOCIDE AND MASS ATROCITIES: CAUSES AND PATHS OF ESCALATION 5 (2009), *available at* <http://www.r2pasiapacific.org/docs/R2P%20Reports/Causes%20and%20Paths%20of%20Escalation%20Report%20June%202009.pdf> ("[I]t is principally through building the capacity for prevention that the R2P contributes to strengthening state sovereignty and assists states to establish and maintain domestic stability.").

152. Bellamy, *supra* note 41, at 158; Edward C. Luck, *The Responsibility to Protect: Growing Pains or Early Promise?*, 24 ETHICS & INT'L AFF. 349, 352 (2010).

153. Luck, *supra* note 152, at 352.

154. *See generally* BAN, *supra* note 114.

155. *Id.* at 4; *see also id.* at 5 (stating that collaborative learning processes "complement the responsibility to protect's emphasis on prevention and on helping the State to succeed, not just reacting once it has failed to protect").

and standards to protect human rights.<sup>156</sup> If a state is unable or unwilling to exercise its responsibility to protect, however, regional and subregional organizations must take more direct, capacity-building action to help the state prevent or stem RtoP crimes.<sup>157</sup> The report makes clear that “improving operational prevention and collaboration with our regional and sub-regional partners is [the UN’s] most urgent priority.”<sup>158</sup>

Furthermore, in a January 2012 address, Secretary-General Ban Ki-Moon pledged to make 2012 the “Year of Prevention” for RtoP.<sup>159</sup> Ban stated that “[p]revention does not mean looking the other way in times of crisis, vainly hoping that things will get better . . . . Prevention means proactive, decisive and early action.”<sup>160</sup> In part to deliver on RtoP, he committed the UN to redouble its efforts during his second term as Secretary-General, in training, education, and capacity building in terms of human rights, humanitarian law, and democratic values.<sup>161</sup>

As the UN has clarified the value of prevention in the RtoP framework, member states have confirmed their widespread support for the responsibility to prevent mass atrocity crimes,<sup>162</sup> and scholars have begun to focus their attention on the once-neglected aspect of the doctrine.<sup>163</sup> There is an increasing recognition that the best way to protect populations is to prevent mass atrocities from occurring in the first place.

#### B. *AIDS and International Law*

In an effort to elucidate whether RtoP can and will evolve to include crises outside of the four limited international crimes, it is important to understand the nature of these crises. This Comment does so through an examination of HIV/AIDS and its impact on international security and human rights.

##### 1. The Global Impact of HIV/AIDS

The global impact of HIV/AIDS has been cataclysmic. Since the beginning of the pandemic three decades ago, 35 million people have already been killed by AIDS.<sup>164</sup>

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156. *Id.* at 5–6.

157. *Id.* at 7.

158. *Id.* The report highlights the importance of both operational and structural prevention. Operational prevention involves strategies and tactics undertaken when violence appears imminent. Structural prevention, on the other hand, “seeks to change the context” of a society from one that is prone to conflict to one that is less so. *Id.*

159. Ban Ki-Moon, UN Secretary-General, Address to Stanley Foundation Conference on the Responsibility to Protect (Jan. 18, 2012).

160. *Id.*

161. *Id.*

162. See GLOBAL CTR. FOR THE RESPONSIBILITY TO PROTECT, IMPLEMENTING THE RESPONSIBILITY TO PROTECT THE 2009 GENERAL ASSEMBLY DEBATE: AN ASSESSMENT 2, 6 (2009) (stating that the fundamental obligation to prevent mass atrocity crimes was unanimously endorsed by UN member states at the General Assembly’s first debate on RtoP in July 2009).

163. E.g., BELLAMY & DAVIES, *supra* note 111, at 5; Bellamy, *Conflict Prevention and RtoP*, *supra* note 34, at 137; Rosenberg, *supra* note 54, at 443–44.

164. *Global Health Observatory: HIV/AIDS*, WORLD HEALTH ORG., <http://www.who.int/gho/hiv/en/index.html> (last visited Oct. 26, 2013).

Another 34 million are living with HIV/AIDS worldwide.<sup>165</sup> Each day, the disease causes more than 7,000 new infections<sup>166</sup> and 4,900 deaths.<sup>167</sup> In sub-Saharan Africa, and parts of Asia, Central America, and the Caribbean, HIV/AIDS has become a generalized epidemic.<sup>168</sup>

The impact of the disease has been most devastating in sub-Saharan Africa, which is home to more than two-thirds of the world's infected persons and is responsible for ninety-one percent of all new infections among children.<sup>169</sup> In nine countries in sub-Saharan Africa, the prevalence rate is greater than ten percent, reaching more than twenty percent in Botswana, Lesotho and Swaziland.<sup>170</sup> With an estimated twenty-six percent of the adult population infected in 2009, Swaziland has the highest adult HIV/AIDS prevalence in the world. In many of these high-prevalence countries, HIV/AIDS has reversed decades of advances in adult survival;<sup>171</sup> the disease has caused current life expectancy to decrease up to twenty years.<sup>172</sup>

HIV/AIDS is unique from other diseases because of the population it targets.<sup>173</sup> AIDS kills people in their most economically productive years; people typically contract HIV when they are sexually active, during adolescence and middle age.<sup>174</sup> In Zambia, for example, HIV/AIDS has caused the mortality rate for people aged fifteen to forty-nine to quadruple—in 2004, seventy-eight percent of deaths in this group were

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165. UNAIDS, REPORT ON THE GLOBAL AIDS EPIDEMIC 2010, at 7 (2010); *see also* BAN KI-MOON, UNITING FOR UNIVERSAL ACCESS: TOWARDS ZERO NEW HIV INFECTIONS, ZERO DISCRIMINATION AND ZERO AIDS-RELATED DEATHS 1 (2011) (noting that no country has been immune to the devastation of this global pandemic).

166. BAN, *supra* note 165, at 1.

167. UNAIDS, *supra* note 165, at 19.

168. *Children and HIV and AIDS: How widespread is the AIDS Epidemic?*, UNICEF, [http://www.unicef.org/aids/index\\_epidemic.html](http://www.unicef.org/aids/index_epidemic.html) (last visited Oct. 26, 2013). UNAIDS considers HIV/AIDS “generalized” where adult HIV prevalence exceeds 1% and transmission is mostly heterosexual. *Understanding the Latest Estimates of the 2006 Report on the Global AIDS Epidemic*, UNAIDS, [http://data.unaids.org/pub/GlobalReport/2006/2006\\_Epi\\_backgroundunder\\_on\\_methodology\\_en.pdf](http://data.unaids.org/pub/GlobalReport/2006/2006_Epi_backgroundunder_on_methodology_en.pdf) (last visited Oct. 26, 2013).

169. UNAIDS, *supra* note 165, at 25.

170. *Id.* at 181 (estimates for 2009: Swaziland: 25.9%; Botswana: 24.8%; Lesotho: 23.6%; South Africa: 17.8%; Zimbabwe: 14.3%; Zambia: 13.5%; Namibia: 13.1%; Mozambique: 11.5%; Malawi: 11%).

171. *See* WORLD HEALTH ORG., THE WORLD HEALTH REPORT 2003: SHAPING THE FUTURE, at xii (2003), (noting that although global life expectancy has increased by almost twenty years since the 1950s, this progress has been erased in countries most heavily impacted by HIV).

172. *See id.* (stating that in Botswana, Lesotho, Swaziland, and Zimbabwe, HIV/AIDS has reduced life expectancies by more than twenty years); UNITED NATIONS DEP'T OF SOC. & ECON. AFF., THE WORLD'S WOMEN 2010: TRENDS AND STATISTICS 21 (2010) (noting that life expectancy in Southern Africa—South Africa, Namibia, Botswana, Swaziland, and Lesotho—was sixty-four years for women and fifty-nine years for men from 1990–1995, but only five years later it had fallen to fifty-one for women and forty-nine for men as a consequence of the HIV/AIDS pandemic); COMM'N ON HIV/AIDS AND GOVERNANCE IN AFRICA, AFRICA: THE SOCIO-ECONOMIC IMPACT OF HIV/AIDS 3, *available at* [http://www.uneca.org/chga/doc/SOCIO\\_ECO\\_IMPACT.pdf](http://www.uneca.org/chga/doc/SOCIO_ECO_IMPACT.pdf) (reporting that life expectancy in Sub-Saharan Africa dropped to levels not seen since the 1960s).

173. *See* Novogrodsky, *supra* note 7, at 10 (noting that while tuberculosis and malaria kill millions of people every year, their victims are the very young and old).

174. COMM'N ON HIV/AIDS AND GOVERNANCE IN AFRICA, *supra* note 172, at 6.

from HIV/AIDS-related causes.<sup>175</sup> The demographics of the disease have had a devastating effect. In countries most affected by the pandemic, HIV/AIDS increases poverty, impairs access to education, depletes workforces, destroys militaries, and exacerbates inequality and discrimination. That is why UN Secretary-General Kofi Annan, in his 2005 address to the General Assembly High-Level Meeting on HIV/AIDS, claimed, “the fight against AIDS may be the great challenge of our age and our generation. Only if we meet this challenge can we succeed in our other efforts to build a humane, healthy and equitable world.”<sup>176</sup>

HIV/AIDS impoverishes households and communities.<sup>177</sup> Families often sacrifice everything to care for members infected with HIV, who in many cases are the primary income-earning adults.<sup>178</sup> The financial burden to the household is a result of both the increased expenditure for medical care and the loss of productive workers.<sup>179</sup> When the breadwinner dies, survivors are left wanting for food,<sup>180</sup> widows are subjected to property grabbing and disinheritance, and children are left orphaned.<sup>181</sup>

The costs of HIV/AIDS stretch far beyond the household. Human capital is eroded through the loss of productive and reproductive labor and through the fracturing of knowledge transfer between generations.<sup>182</sup> The loss of experienced workers and skilled professionals drains production in key sectors.<sup>183</sup> In recognition of this

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175. Markus Haacker, *HIV/AIDS: The Impact on the Social Fabric and the Economy*, in INT’L MONETARY FUND, *THE MACROECONOMICS OF HIV/AIDS* 41, 43–44 (Markus Haacker ed., 2004).

176. *Annan Calls for Collective Action, Strong Leadership, To Turn Back HIV/AIDS Epidemic*, UN NEWS CENTRE (June 2, 2005), <http://www.un.org/apps/news/story.asp?NewsID=14469&Cr=HIV&Cr1=AIDS>; *UN Calls for Action to Halt AIDS*, BBC NEWS (June 3, 2005, 2:54 AM), <http://news.bbc.co.uk/2/hi/americas/4605413.stm>.

177. See WORLD BANK, *OUR COMMITMENT: THE WORLD BANK’S AFRICA REGION HIV/AIDS AGENDA FOR ACTION 2007–2011*, at 14 (2008) (“The epidemic depletes savings, reduces labor supply, increases households’ vulnerabilities to shocks, reduces productivity in the private and public sectors and negatively affects public finances.”). See generally Tony Barnett & Alan Whiteside, *Poverty and HIV/AIDS: Impact, Coping and Mitigation Policy*, in UNICEF, *AIDS, PUBLIC POLICY AND CHILD WELL-BEING 209* (Giovanni Andrea Cornia ed., 2007).

178. Novogrodsky, *supra* note 7, at 8.

179. See Robert Greener, *The Impact of HIV/AIDS on Poverty and Inequality*, in *THE MACROECONOMICS OF HIV/AIDS* 167, 171 (Markus Haacker ed., 2004) (describing how HIV/AIDS impacts a household’s income).

180. See generally STUART GILLESPIE & SUNEETHA KADIYALA, *HIV/AIDS AND FOOD AND NUTRITION SECURITY: FROM EVIDENCE TO ACTION* (2005).

181. See UNAIDS, *supra* note 165, at 112 (reporting that 16.6 million children were orphaned by AIDS in 2009). When parents die, orphans face financial distress and a lack of care, leading to reductions in school attendance and increases in the incidence of child labor. WORLD BANK, *supra* note 177, at 16.

182. GILLESPIE & KADIYALA, *supra* note 180, at 16.

183. Agriculture, which is the main source of livelihood for the majority of people affected by HIV/AIDS and the largest sector in many developing economies, has been particularly hard hit. See POPULATION DIVISION, UN DEP’T OF ECON. & SOC. AFF., *THE IMPACT OF AIDS* 61 (2004), available at <http://www.un.org/esa/population/publications/AIDSimpact/AIDSWebAnnounce.htm> (stating that farming and other rural occupations provide a livelihood for more than seventy percent of the population in many African countries). The UN Food and Agriculture Organization estimates that twenty-five percent of the agricultural labor force in Sub-Saharan Africa could be lost by 2020. *AIDS a Threat to Rural Africa*, UN FOOD AND AGRIC. ORG., <http://www.fao.org/FOCUS/E/aids/aids1-e.htm> (last visited Oct. 26, 2013).



economic devastation, the Executive Director of UNAIDS<sup>184</sup> declared, “AIDS has emerged as the single greatest threat to development.”<sup>185</sup> The World Bank predicted that HIV/AIDS could depress GDP in South Africa by as much as seventeen percent in just one decade.<sup>186</sup>

The vast majority of HIV/AIDS deaths are now preventable due to the development of effective drugs and treatment. Antiretroviral therapy has dramatically reduced the rates of AIDS morbidity and mortality and increased the life span of those infected by decades.<sup>187</sup> For people living with HIV who have access to treatment, the disease has effectively become a manageable chronic condition instead of a death sentence.<sup>188</sup> Since 1996, about 14.4 million life-years have been gained due to the provision of antiretroviral therapy.<sup>189</sup> Expanding access to treatment has contributed to a nineteen percent decline in deaths among HIV-infected persons between 2004 and 2009.<sup>190</sup> The impact has been particularly remarkable in places where treatment is readily available; AIDS-related deaths have declined by seventy percent in affluent countries since the introduction of antiretroviral therapy.<sup>191</sup> The provision of antiretrovirals also has significant prevention effects. The drugs inhibit the transmission of HIV/AIDS, both from mother to child and from infected persons to their sexual partners, by reducing the viral load of the human immunodeficiency virus.<sup>192</sup>

A precipitous decrease in the price of first-line AIDS drugs has made them widely available in low- and middle-income countries. Cocktails of drugs that once cost \$12,000 or more per patient per year are now available in generic form in poor countries for less than \$200 per year.<sup>193</sup> At the end of 2009 more than 5.2 million

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184. The Joint United Nations Programme on HIV/AIDS (UNAIDS) was created in 1996 to coordinate and bolster the UN’s response to the pandemic. ANNAN, *supra* note 35, at 26. UNAIDS works with civil society, national governments, and international organizations on policy initiatives, and UNAIDS is a primary source of HIV/AIDS data. *About UNAIDS*, UNAIDS, <http://www.unaids.org/en/aboutunaids/> (last visited Oct. 26, 2013).

185. *HIV Hits 50 Million*, BBC NEWS: WORLD EDITION, <http://news.bbc.co.uk/2/hi/health/533475.stm> (last visited Oct. 26, 2013). The Human Development Index—a composite measure of well-being, taking into account life expectancy, literacy, education, and standards of living—was lower in 2008 than 1990 in eighteen countries as a result of HIV/AIDS. UNITED NATIONS DEV. PROGRAMME, HUMAN DEVELOPMENT REPORT 2007/2008, at 265 (2008).

186. Channing Arndt & Jeffrey Lewis, *The Macro Implications of HIV/AIDS in South Africa: A Preliminary Assessment*, 68 S. AFR. J. OF ECON. 380, 386 (2000). Another World Bank report predicted that the South African economy could shrink to half its current size in about four generations in the absence of intervention. Clive Bell et al., *The Long-Run Economic Costs of AIDS: A Model with an Application to South Africa*, 20 WORLD BANK ECON. REV. 55, 55 (2006).

187. UNAIDS, ACCESS TO TREATMENT IN THE PRIVATE SECTOR WORKPLACE: THE PROVISION OF ANTIRETROVIRAL THERAPY BY THREE COUNTRIES IN SOUTH AFRICA 5 (2005).

188. *Id.*; WORLD HEALTH ORGANIZATION, HIV/AIDS IN EUROPE: MOVING FROM DEATH SENTENCE TO CHRONIC DISEASE MANAGEMENT 8 (Srdan Matic et al. eds., 2006).

189. UNAIDS, *supra* note 165, at 107.

190. *Id.* at 8.

191. UNAIDS, *supra* note 187, at 5.

192. Kevin M. De Cock et al., *Preventing HIV Transmission with Antiretrovirals*, 87 BULLETIN WORLD HEALTH ORG. 485, 488 (2009).

193. Donald G. McNeil, *AIDS: A Price Break for Antiretroviral Drugs in 70 of the World’s Poorest Countries*, N.Y. TIMES, May 24, 2011, at D6.

people in low- and middle-income countries were receiving antiretroviral therapy.<sup>194</sup> This figure represents a thirty percent increase over the number of people receiving treatment just twelve months earlier.<sup>195</sup>

Even given these price reductions, the international response to HIV/AIDS is “shamefully ill-resourced,” and access to life-saving treatment remains elusive for a large majority of people living with HIV.<sup>196</sup> Only one-third of the fifteen million people who need treatment in low- and middle-income countries are receiving it.<sup>197</sup>

## 2. HIV/AIDS and the Threat to Security

HIV/AIDS “destroys the very fibre of what constitutes a nation: individuals, families and communities; economic and political institutions; military and police forces.”<sup>198</sup> The impact of HIV/AIDS is so pervasive that the disease has been declared a threat to security by countless international organizations and world leaders.<sup>199</sup> Speaking before the UN Security Council, World Bank President James Wolfensohn declared, “[m]any of us used to think of AIDS as a health issue. We were wrong. AIDS can no longer be confined to the health or social sector portfolio. . . . We face a major development crisis and, more than that, a security crisis.”<sup>200</sup> In 2000, UN Secretary-General Kofi Annan stated:

The impact of AIDS in [Southern and Eastern Africa] is no less destructive than that of warfare itself. Indeed, by some measures it is far worse. Last year, AIDS killed about ten times more people in Africa than did armed conflict. . . . AIDS is causing social and economic crises which in turn threaten political stability.<sup>201</sup>

A 2000 United States Central Intelligence Agency report classified HIV/AIDS and other infectious diseases as a rising global health threat that would complicate national and global security over the next twenty years.<sup>202</sup> The report was the first United States document to recognize the linkage between HIV/AIDS and security.<sup>203</sup>

Most significantly, the UN Security Council has met twice to discuss the security

194. UNAIDS, *GETTING TO ZERO: 2011–2015 STRATEGY* 15 (2010).

195. UNAIDS, *supra* note 165, at 96.

196. ANNAN, *supra* note 35, at 26.

197. UNAIDS, *supra* note 165, at 95.

198. INT’L CRISIS GRP., *HIV/AIDS AS A SECURITY ISSUE* 1 (2001).

199. For an overview of how HIV/AIDS is now treated as a security issue, see Pieter Fourie & Martin Schönsteich, *Africa’s New Security Threat: HIV/AIDS and Human Security in Southern Africa*, 10 AFR. SEC. REV. 29 (2001), Gwyn Prins, *AIDS and Global Security*, 80 INT’L AFF. 931 (2004), and P.W. Singer, *AIDS and International Security*, 44 SURVIVAL 145 (2002).

200. WORLD BANK, *VOICE FOR THE WORLD’S POOR: SELECTED SPEECHES AND WRITINGS OF WORLD BANK PRESIDENT JAMES D. WOLFENSOHN, 1995–2005*, at 195–96 (2005).

201. Press Release, United Nations, In Address to Security Council, Secretary-General Says Fight Against AIDS in Africa Immediate Priority in Global Effort Against Disease (January 6, 2000).

202. NAT’L INTELLIGENCE COUNCIL, *THE GLOBAL INFECTIOUS DISEASE THREAT AND ITS IMPLICATIONS FOR THE UNITED STATES* 5 (2000), available at <http://www.dtic.mil/cgi-bin/GetTRDoc?AD=ADA502015&Location=U2&doc=GetTRDoc.pdf>.

203. ELKE KRAHMANN, *NEW THREATS AND NEW ACTORS IN INTERNATIONAL SECURITY* 133 (2005).

implications of HIV/AIDS.<sup>204</sup> These are the only times the Security Council has convened to consider a health issue. The first meeting in July 2000 led the Security Council to unanimously adopt Resolution 1308, which recognizes that the HIV/AIDS pandemic poses a risk to security and stability.<sup>205</sup> The Resolution “[r]ecogniz[ed] that the spread of HIV/AIDS can have a uniquely devastating impact on all sectors and levels of society,” and “[r]eaffirm[ed] the importance of a coordinated international response . . . given its possible growing impact on social instability and emergency situations.”<sup>206</sup> In June 2011 the UN Security Council reaffirmed its commitment to address the impact of AIDS on peace and security by unanimously adopting Resolution 1983.<sup>207</sup> Building on its first resolution on HIV/AIDS, Resolution 1983 “[r]ecogniz[ed] that HIV poses one of the most formidable challenges to the development, progress and stability of societies and requires an exceptional and comprehensive global response.”<sup>208</sup>

Proponents of treating the AIDS epidemic as a threat to security claim that it has had the effect of increasing the profile of the disease as an international political issue, building a sense of emergency surrounding the epidemic, and encouraging donors and governments to do more.<sup>209</sup> Some scholars have argued, however, that although security rhetoric is present in discourse surrounding the disease, this approach has been less successful than is often assumed and has done less to influence global governance of HIV/AIDS than alternate frameworks, such as human rights law.<sup>210</sup>

### 3. AIDS and International Human Rights Law

The right to treatment for HIV/AIDS is a human right, derived from a broad framework of international human rights instruments and decisions of national tribunals. This right to access medicine is a component of a number of globally recognized human rights including the right to life and the right to health.<sup>211</sup> This Part will describe those rights.

#### *a. The Right to Life*

The right to life is the most fundamental human right.<sup>212</sup> As such, the right to life is found in virtually every international and regional human rights instrument and state

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204. By the time the Security Council first recognized HIV/AIDS as a threat to international peace and security in 2000, the number of deaths per year from HIV/AIDS in Africa was greater than the number of battle deaths in all of the civil wars of the 1990s. ANNAN, *supra* note 35, at 26.

205. S.C. Res. 1308, UN Doc. S/RES/1308 (July 17, 2000).

206. *Id.*

207. S.C. Res. 1983, UN Doc. S/RES/1983 (June 7, 2011).

208. *Id.*

209. *E.g.*, Simon Rushton, *AIDS and International Security in the United Nations System*, 25 HEALTH POLICY & PLANNING 495, 501 (2010).

210. *Id.*

211. Novogrodsky, *supra* note 7, at 17; Yamin, *supra* note 7, at 330.

212. *See* Novogrodsky, *supra* note 7, at 17 (noting that the right to life has attained *jus cogens* status under international law). *Jus cogens* refers to a principle that it is recognized and accepted by the international community as a peremptory norm from which no derogation is permitted. Vienna Convention on the Law of Treaties, art. 53, May 23, 1969, 1155 UNT.S. 331.

constitution.<sup>213</sup> Under Article 3 of the Universal Declaration of Human Rights, “[e]veryone has the right to life, liberty and security of person.”<sup>214</sup> Similarly, Article 6 of the International Covenant on Civil and Political Rights (ICCPR) states “[e]very human being has the inherent right to life. This right shall be protected by law.”<sup>215</sup> The UN Human Rights Committee, which monitors the implementation of the ICCPR, has interpreted the right to life broadly to require states to not only refrain from action that directly threatens the lives of their citizens, but to adopt positive measures to “reduce infant mortality and to increase life expectancy, *especially in adopting measures to eliminate . . . epidemics.*”<sup>216</sup> Because antiretroviral treatment has the power to save and prolong the lives of people with HIV, regional and national interpretive bodies and tribunals have also interpreted the right to life broadly and are increasingly finding that the denial of access to medication violates this right.<sup>217</sup>

*b. The Right to Health*

The right to access medical treatment is most logically placed within the right to health. The right to health is deeply ingrained in the international human rights framework and recognized in national constitutions.<sup>218</sup> The World Health Organization declared the right to health in 1948, stating in its constitution, “[t]he enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being.”<sup>219</sup> Subsequently, the Universal Declaration of Human Rights,<sup>220</sup> the International Covenant on Economic and Social Rights (ICESCR),<sup>221</sup> and several other international human rights instruments codified this right.<sup>222</sup> The ICESCR, which

213. See Yamin, *supra* note 7, at 330–36 (discussing the recognition and interpretation of the right to life in international, state, and regional tribunals and institutions).

214. UDHR, *supra* note 84, art. 3.

215. ICCPR, *supra* note 87, art. 6, ¶ 1.

216. UN Human Rights Comm., General Comment No. 6: The Right to Life, art. 6, ¶ 5 (Apr. 30, 1982) (emphasis added).

217. Novogrodsky, *supra* note 7, at 17; see Yamin, *supra* note 7, at 332–36 (discussing regional human rights instruments and recent decisions of state courts which have interpreted the right to life broadly in the context of denial of access to antiretrovirals). For example, the Supreme Court of Venezuela has found that the failure of the social security institute to provide regular antiretroviral treatment constitutes a violation of the right to life. *López v. Instituto Venezolano de los Seguros Sociales*, Sala Constitucional, Tribunal Supremo de Justicia, Expediente Numero: 1,343 (2001) (Venez.). A similar decision was reached by the Columbian Constitutional Court. See *Corte Constitucional [C.C.] [Constitutional Court]*, Julio 3, 1998, M.P.: F. Diaz-Moron, Sentencia T-328/98, Gaceta de la Corte Constitucional [G.C.C.] (Colum.) (holding that denial of antiretrovirals prescribed under social security system violated the constitutional right to life).

218. See Yamin, *supra* note 7, at 339 (stating that the right to health or health care is enshrined in more than sixty national constitutions).

219. WORLD HEALTH ORGANIZATION CONST. pmbl.

220. UDHR, *supra* note 84, art. 25, ¶ 1 (stating that “[e]veryone has the right to a standard of living adequate for the health and well-being of himself and of his family, including . . . medical care.”).

221. ICESCR, *supra* note 87, art. 12.

222. *E.g.*, Convention on the Rights of the Child, art. 24, Nov. 20, 1989, 1577 UNT.S. 3; Convention on the Elimination of All Forms of Discrimination Against Women, art. 11, ¶ 1(f), Dec. 18, 1979, 1249 UNT.S. 13; International Convention on the Elimination of All Forms of Racial Discrimination, art. 5(e)(iv), March 7, 1965, 660 UNT.S. 195.

provides the most comprehensive provision on the right to health,<sup>223</sup> obligates state parties to “recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health,”<sup>224</sup> to prevent, treat and control epidemics,<sup>225</sup> and to create “conditions which would assure to all medical service and medical attention in the event of sickness.”<sup>226</sup> The right to access HIV/AIDS drugs is a critical component of prevention of the epidemic as much as it is treatment for infected persons. State parties that are too poor to provide treatment directly are obligated under the ICESCR “to take steps, individually and through international assistance and cooperation, especially economic and technical” to achieve the realization of the right to health.<sup>227</sup>

The UN committee that tracks compliance with the ICESCR and assists states in implementation has interpreted the right to health to include access to medical treatment and the provision of essential drugs.<sup>228</sup> In its General Comment 14 on the *Right to the Highest Attainable Standard of Health*, the Economic, Social and Cultural Rights Committee declared that state parties must provide access to all WHO-defined essential drugs as part of their nonderogable, minimum core obligations under the ICESCR.<sup>229</sup> Antiretrovirals are part of the WHO Model List of Essential Medicines.<sup>230</sup>

Additionally, in 2001 the United Nations Commission on Human Rights,<sup>231</sup> which coordinates human rights activities throughout the UN system, declared that access to treatment in cases of pandemics such as HIV/AIDS is a basic human right.<sup>232</sup> Resolution 2001/33 stated that access to antiretroviral treatment is “one fundamental element for achieving progressively the full realization of the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.”<sup>233</sup> A 2011 General Assembly resolution similarly “[r]ecognize[d] that access to safe, effective, affordable, good quality medicines and commodities in the context of epidemics such as HIV is fundamental to the full realization of the right of everyone to enjoy the highest attainable standard of physical and mental health.”<sup>234</sup>

While the right to health is a basic human right, there have been significant

223. UN Comm. on Econ., Soc., and Cultural Rights, General Comment No. 14: The Right to the Highest Attainable Standard of Health, ¶ 2, UN Doc. E/C.12/2000/4 (Aug. 11, 2000) [hereinafter General Comment 14].

224. ICESCR, *supra* note 87, art. 12, ¶ 1.

225. *Id.* art. 12, ¶ 2(c).

226. *Id.* art. 12, ¶ 2(d).

227. *Id.* art. 2, ¶ 1.

228. General Comment 14, *supra* note 223, ¶ 43(d).

229. *Id.*; *see also* Yamin, *supra* note 7, at 337 (noting that a state must satisfy its core obligations under the ICESCR regardless of its development level).

230. WORLD HEALTH ORG., MODEL LIST OF ESSENTIAL MEDICINES 6.4.2 (17th ed. 2011). The list is comprised of the “minimum medicine needs for a basic health care system, listing the most efficacious, safe and cost effective medicines for priority conditions.” *Id.*

231. The Commission on Human Rights was replaced by the Human Rights Council in 2006. G.A. Res. 60/251, UN Doc. A/RES/60/251 (Mar. 15, 2006).

232. Comm’n Hum. Rts. Res. 2001/33, ¶ 1, UN Doc. E/CN.4/2001/167 (Apr. 23, 2001).

233. *Id.*

234. Political Declaration on HIV and AIDS: Intensifying our Efforts to Eliminate HIV and AIDS, G.A. Res. 65/277, ¶ 32, UN Doc. A/65/277 (June 10, 2011).

hurdles to its enforcement. First, rights to health are generally considered second-generation rights because they require positive government action to ensure their realization.<sup>235</sup> Additionally, the right to health under the ICESCR is progressive; state obligations are conditioned on the availability of resources<sup>236</sup> and therefore the ICESCR lacks a universal implementation standard.<sup>237</sup> The effect of these characteristics has been to permit states to renege on their duties to fulfill the right to health knowing they will likely face no meaningful sanctions for noncompliance.<sup>238</sup>

Despite these challenges, the right to treatment has undergone profound normative development in recent years.<sup>239</sup> This has been driven by regional and national right-to-treatment cases, the vast majority of which have centered on access to HIV/AIDS drugs.<sup>240</sup> As Noah Novogrodsky, a prominent HIV/AIDS and international justice scholar, observed in his article on the duty of treatment: “it is striking that almost every treatment case has centered on first-line therapies for AIDS, not heart disease, cancer, or any of the other infectious diseases that plague the developing world.”<sup>241</sup> In these cases courts and interpretive bodies have found that people living with HIV have a justiciable right to treatment, which is grounded in international treaty provisions and domestic laws concerning the right to health and the right to life.<sup>242</sup> Novogrodsky argues that because the right to health has traditionally been considered an unenforceable second-generation right, the recognized justiciability of the right to treatment for HIV is remarkable and demonstrates the exceptionalism of the disease.<sup>243</sup>

### III. DISCUSSION

RtoP should be expanded beyond the limited cases of genocide, war crimes, ethnic cleansing, and crimes against humanity to include the protection of populations in peril from HIV/AIDS.

Part III.A begins this Discussion by explaining that the version of RtoP adopted at the 2005 World Summit was a political compromise that represents a more limited conception of RtoP than was sketched out in the documents that shaped its development. It finds that as a doctrine still in its infancy, RtoP is not set in stone. Therefore, as international concerns evolve, and the acceptance and understanding of

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235. Philip Alston & Gerard Quinn, *The Nature and Scope of States Parties' Obligations Under the International Covenant on Economic, Social and Cultural Rights*, 9 HUMAN RTS. Q. 156, 159 (1987); Novogrodsky, *supra* note 7, at 19.

236. ICESCR, *supra* note 87, art. 2, ¶ 1.

237. Novogrodsky, *supra* note 7, at 25.

238. *Id.*

239. Yamin, *supra* note 7, at 336.

240. Novogrodsky, *supra* note 7, at 24–25.

241. *Id.* at 25.

242. *Id.* at 25–32 (describing the right to treatment jurisprudence in national and supranational tribunals, predominantly in Latin America); Yamin, *supra* note 7, at 340 (noting that national courts in Costa Rica, India, Venezuela, Columbia, Argentina, and South Africa have found that the state has an affirmative obligation to provide medicine to HIV/AIDS patients). National courts have been more apt to find justiciable dimensions to the right to health in AIDS treatment cases because of the connection to the right to life. Yamin, *supra* note 7, at 341.

243. Novogrodsky, *supra* note 7, at 25, 30.

RtoP broadens, so too should its application.

Next, Part III.B demonstrates that the framework for responding to the HIV/AIDS crisis mirrors the framework for preventing RtoP crimes. Therefore it is consistent with RtoP's increasing focus on prevention to apply the doctrine to HIV/AIDS crises. Further, because the global AIDS-governance framework is well established, applying RtoP in the context of HIV/AIDS would utilize and strengthen mechanisms already in place. This Part also explains the insufficiency of the current international response to the pandemic.

Finally, Part III.C of this Discussion argues that applying RtoP in the HIV/AIDS context is consistent with the foundations of the norm: the protection of human rights and human security. Part III.C.1 describes that in situations of HIV/AIDS crisis, the right to treatment is frequently violated because states are often unable to provide treatment for those in need. The right to treatment implicates the right to life, the most fundamental human right, and the right RtoP seeks to safeguard. This Part determines that because the deprivation of AIDS treatment results in so many more deaths than mass atrocity crimes, it is incongruous for RtoP to apply in one case and not the other. It then concludes by examining why a human rights framework is inadequate to protect populations threatened by HIV/AIDS from mass violations of their human rights. Part III.C.2. highlights the grave threat to human security posed by HIV/AIDS, which is often compared to the threat caused by armed conflict. It concludes that if human security, the cardinal mission of the UN, is now a principle advanced by RtoP, the doctrine should apply to the most significant global security concerns.

*A. RtoP is an Evolving Concept; As the Doctrine Evolves, So Too Should its Application*

RtoP is largely a political concept.<sup>244</sup> The impetus for its creation was outrage over the failure of the international community to respond effectively to civil wars of the 1990s.<sup>245</sup> It was conceived as part of an UN-wide effort to keep the organization relevant and bolster the ability of the international community to respond to new threats facing the globalized world in the twenty-first century.<sup>246</sup>

With such an ambitious agenda, there was little agreement about both the correct role of RtoP and the best way to achieve these goals. The varying perspectives are reflected in the iterations of the doctrine found in the conceptual documents that shaped the development of RtoP.<sup>247</sup> The ICISS report envisioned the scope and reach of RtoP

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244. Kikoler, *supra* note 9, at 4.

245. See *supra* Part II.A.1 for a discussion of the global politics surrounding the development of RtoP.

246. See ANNAN, *supra* note 35, at 11–14 (“[T]he biggest security threats we face now, and in the decades ahead, go far beyond States waging aggressive war. They extend to poverty, infectious disease and environmental degradation; war and violence within States; the spread and possible use of nuclear, radiological, chemical and biological weapons; terrorism; and transnational organized crime. . . . The central challenge for the twenty-first century is to fashion a new and broader understanding . . . of what collective security means—and of all the responsibilities, commitments, strategies and institutions that come with it . . .”).

247. See *supra* Part II.A.2 for a discussion of the core documents that shaped the RtoP doctrine.

to be broad, encompassing wide range of “avoidable catastrophe[s],”<sup>248</sup> including cases of natural or environmental catastrophe.<sup>249</sup> The HIV/AIDS pandemic, which kills 4,900 people every day, fits this definition.<sup>250</sup> The High-Level Panel also focused on RtoP in the context of “avoidable catastrophe” and specifically stated that RtoP would apply in situations of “exposure to disease.”<sup>251</sup> Again, HIV/AIDS, which causes more than 7,000 infections each day,<sup>252</sup> is a prime example of an avoidable catastrophe. The eventual limitation of RtoP in the World Summit Outcome Document, to four well-defined and understood offenses in international humanitarian law, was a compromise that enabled the political consensus necessary for RtoP’s adoption.<sup>253</sup>

Therefore, the current version of RtoP is a reflection of the fragile political consensus that existed in regard to the norm in 2005 and represents a departure from the versions of RtoP set forth in the documents that shaped its development. Even the Secretary-General’s seemingly definitive assertion in his 2009 report that RtoP applies only to the four crimes specified in the World Summit Outcome Document, and not to “other calamities, such as HIV/AIDS, climate change or the response to natural disasters,” was made with a consideration of the political compromise that enabled RtoP’s adoption.<sup>254</sup> The report itself states that the current limitations on RtoP exist only “until Member States decide otherwise,” implying that they are not inherent in or essential to the doctrine itself.<sup>255</sup> In recognition of the divisive nature of the document, the Secretary-General recently stated that RtoP “can be a minefield of nuance, political calculation and competing national interests.”<sup>256</sup>

Some prominent officials have claimed that the limitation of RtoP to genocide and mass atrocity crimes is a departure from the framework originally conceived by a number of international actors.<sup>257</sup> Former Canadian Foreign Minister Lloyd Axworthy, who initiated the ICISS and chaired its advisory board, has criticized the narrowing of the RtoP framework: “What is the moral distinction between closing the door of rescuing people from death by machete and closing the door of life-saving aid?”<sup>258</sup>

Of course there is no distinction; any difference is purely political. Individuals are unreservedly entitled to a right to life and a protection of that right, whether it is

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248. ICISS REPORT, *supra* note 10, at VIII. See *supra* Part II.A.2.a for a discussion of the scope and application of RtoP according to the ICISS report.

249. ICISS REPORT, *supra* note 10, at 33.

250. UNAIDS, *supra* note 165, at 19.

251. ANNAN, *supra* note 35, at 56. See *supra* Part II.A.2.b for a discussion of RtoP according to the High-Level Panel.

252. BAN, *supra* note 165, at 1.

253. See *supra* notes 47–48 and accompanying text for a description of the debate surrounding RtoP at the World Summit.

254. See BAN, *supra* note 19, at 8 (stating that to extend RtoP at this time would undermine the 2005 consensus).

255. *Id.*

256. Ban, *supra* note 159.

257. See Lloyd Axworthy & Allan Rock, *Responsibility to Protect? Yes*, GLOBE & MAIL, May 9, 2008, <http://www.theglobeandmail.com/commentary/letters/responsibility-to-protect-yes/article672098> (stating the mandate of the ICISS was not intended to be exclusive to a specific kind of threat because human security applies to a broader range of situations than conflict, such as natural disasters and pandemics).

258. *Id.*



threatened by armed conflict or by AIDS.<sup>259</sup> The international community's commitment to protect individuals from mass atrocity crimes has betrayed its broader commitment to universality and the promotion of a robust international human rights regime.

It is important to remember that RtoP doctrine is still in its infancy and not yet fixed.<sup>260</sup> As political exigencies and international concerns evolve, the conception of sovereignty as responsibility becomes more established,<sup>261</sup> and the acceptance of RtoP broadens, so too should the application of the doctrine. The understanding of RtoP has already changed significantly in the six years since its inception. While academic and policy discourse surrounding RtoP initially focused on the responsibility to react and RtoP as a justification for military intervention, it is now recognized that prevention is the core of the RtoP framework. The focus on prevention is especially applicable to HIV/AIDS interventions.

*B. Applying RtoP to HIV/AIDS Crises Would be Consistent with the Doctrine's Increasing Focus on Prevention*

RtoP doctrine has already evolved from the concept that was envisaged at the time of its adoption. Emphasis has increasingly been placed on the responsibility to prevent and how it can be operationalized.<sup>262</sup> The mechanisms and strategies for preventing RtoP crises—identified in core RtoP documents and enumerated in subsequent reports and statements of the Secretary-General<sup>263</sup>—are the same strategies needed to effectively combat the HIV/AIDS epidemic. It therefore is consistent with the trajectory of RtoP to apply the norm to the HIV/AIDS crisis.

Strategies for fulfilling the responsibility to prevent encompass efforts to both address the root causes of conflict as well as efforts to stem crises and prevent loss of life once they are imminent. The Secretary-General has classified these strategies in terms of structural prevention, which “seeks to change the context [of a society] from one that is more prone to [conflict] to one that is less so,” and operational prevention, which “addresses societies on the edge.”<sup>264</sup> In either case, “for prevention to succeed, strong support from the international community is often needed, and in many cases may be indispensable.”<sup>265</sup>

The UN's existing strategies for combating the HIV/AIDS pandemic fall into these same categories.<sup>266</sup> They are both structural—aimed at reducing the vulnerability

259. See *supra* notes 212–15 and accompanying text for an explanation of the right to life as the most fundamental human right, from which no derogation is permitted.

260. JAMES PATTISON, HUMANITARIAN INTERVENTION AND THE RESPONSIBILITY TO PROTECT: WHO SHOULD INTERVENE? 13 (2010).

261. See *supra* Part II.A.3.a for a discussion of sovereignty as responsibility.

262. See *supra* Part II.A.4.b for a discussion of the shift in emphasis to the prevention aspects of the RtoP framework.

263. See *supra* notes 159–61 and accompanying text for a discussion of Secretary-General Ban Ki-moon's efforts to promote and clarify the prevention aspect of RtoP.

264. BAN, *supra* note 114, at 7.

265. ICISS REPORT, *supra* note 10, at 19. See *supra* note 158 for a definition of structural and operational prevention.

266. See generally UNAIDS, *supra* note 194 (explaining the UNAIDS 2011–2015 AIDS strategy).

of individuals and communities to HIV/AIDS—and operational—aimed at alleviating the impact of the epidemic through providing treatment.<sup>267</sup> Prevention is the “cornerstone of national, regional and international responses to the HIV epidemic.”<sup>268</sup>

RtoP documents have enumerated a multiplicity of mechanisms and approaches for prevention that necessitate the involvement of a wide array of actors—from individual states, the UN, and regional organizations, to civil society, international donors, and the business and scientific communities.<sup>269</sup> These strategies are largely focused on “helping States build capacity to protect their populations.”<sup>270</sup> They include enacting measures to “ensure accountability and good governance, protect human rights, promote social and economic development and ensure a fair distribution of resources,”<sup>271</sup> “encourag[ing] governments to recognize their obligations under relevant international conventions,”<sup>272</sup> and facilitating the flow of “information, ideas, and insights between stakeholders at the local and national levels and those at the global level.”<sup>273</sup>

These encompass the kinds of collective measures employed to protect populations in peril from HIV/AIDS. In a recent political declaration on HIV/AIDS, the UN General Assembly stressed the importance of international cooperation in mounting an effective response to the AIDS pandemic, and recognized the shared responsibilities of state governments, donor countries, civil society, and the private sector.<sup>274</sup> UNAIDS’ *2011–2015 HIV/AIDS Strategy* calls on these diverse actors to work with local governments and civil society to build lasting national and regional institutional capacity,<sup>275</sup> foster political incentives for commitment,<sup>276</sup> increase knowledge translation and generation,<sup>277</sup> encourage the realization and protection HIV-related human rights,<sup>278</sup> and ensure equitable access to HIV programs and treatment.<sup>279</sup>

Thus, the framework for responding to the HIV/AIDS crisis mirrors the framework for preventing RtoP crimes. Applying RtoP in the HIV/AIDS context—to situations where the states most severely impacted by HIV/AIDS are either unwilling or unable to protect their populations from the disease—would rely on existing efforts outlined above and strengthen the mechanisms, institutional structures, and strategies

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267. *Id.*

268. Political Declaration on HIV and AIDS: Intensifying our Efforts to Eliminate HIV and AIDS, *supra* note 234, at ¶ 58.

269. *E.g.*, ICISS REPORT, *supra* note 10, at 25–26.

270. ICISS REPORT, *supra* note 10, at 23; 2005 World Summit Outcome, *supra* note 40, at ¶ 139; BAN, *supra* note 19, at 9; BAN, *supra* note 114, at 7.

271. ICISS REPORT, *supra* note 10, at 19.

272. BAN, *supra* note 114, at 5–6.

273. *Id.* at 7–8.

274. Political Declaration on HIV and AIDS: Intensifying our Efforts to Eliminate HIV and AIDS, *supra* note 234, at ¶ 15.

275. UNAIDS, *supra* note 187, at 54.

276. *Id.* at 7.

277. *Id.* at 54.

278. *Id.* at 7.

279. *Id.* at 7.

already in place.<sup>280</sup>

Additionally, the measures mentioned above to protect populations from HIV/AIDS are preventive, which is consistent with RtoP's focus on prevention, rather than military force. It is important to note that although RtoP doctrine provides a range of progressive measures for protection, from prevention to coercion and chapter VII military force,<sup>281</sup> this Comment does not claim that a state's failure to protect its population from HIV/AIDS would warrant military intervention. In fact, to do so would likely undermine the legitimacy of RtoP. However the possibility the RtoP framework provides for coercive action, if other measures prove inadequate and the state is "manifestly failing" to protect its populations, lends legitimacy to RtoP obligations.<sup>282</sup> And in rare cases, such as in South Africa where hundreds of thousands of people with AIDS died because President Mbeki deliberately denied them access to life-saving drugs,<sup>283</sup> coercive measures not involving military force under chapter VII may be appropriate.<sup>284</sup>

Finally, while the global response to HIV/AIDS has been robust and substantial progress has been made,<sup>285</sup> these advances are fragile and insufficient.<sup>286</sup> The General Assembly's 2011 *Political Declaration on HIV/AIDS* recognized, "the HIV epidemic remains an unprecedented human catastrophe inflicting immense suffering on countries, communities and families throughout the world."<sup>287</sup> As part of the Millennium Development Goals, the UN and member states pledged to achieve, by 2010, universal access to treatment for HIV/AIDS for those in need.<sup>288</sup> The international community failed to reach this goal; only one-third of the fifteen million people who need treatment in low- and middle-income countries are receiving it.<sup>289</sup> For

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280. A discussion of which actors should implement RtoP—who specifically should step in when states cannot fulfill their protection role and responsibility transfers to the international community—is beyond the scope of this Comment. See PATTISON, *supra* note 260, for a thorough analysis of this topic.

281. See *supra* notes 52 and accompanying text for a description of the progressive range of measures states and the international community are required to take under RtoP.

282. 2005 World Summit Outcome, *supra* note 40, at ¶ 139.

283. See *supra* Section I for an overview of the HIV/AIDS crisis in South Africa under President Mbeki.

284. The UN Charter provides:

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

UN Charter art. 41.

285. See *supra* notes 187–95 and accompanying text for a description of the impact of increased access to HIV/AIDS medicines in reducing deaths as well as preventing new infections.

286. See BAN, *supra* note 165, at 3 (stating that "governance achievements, although heartening, are exceedingly fragile"). See *supra* notes 199–200 and accompanying text for a description of the shortfalls of the current international response to HIV/AIDS.

287. Political Declaration on HIV and AIDS: Intensifying our Efforts to Eliminate HIV and AIDS, *supra* note 234, at ¶ 8.

288. United Nations Millennium Declaration, G.A. Res. 55/2, UN Doc. A/RES/55/2 (Sept. 18, 2000). The Millennium Development Goals are eight international development goals that all 193 U.N member states have agreed to achieve by 2015. Goal Six is to halt and reverse the spread of HIV/AIDS by 2015. *Id.* ¶ 19.

289. UNAIDS, *supra* note 165, at 95.

each person who starts antiretroviral treatment, two people become newly infected with HIV.<sup>290</sup> Every day, 7,000 people are newly infected, including 1,000 children.<sup>291</sup> Further, global AIDS resources have flatlined due to aid fatigue and the economic downturn, threatening support for essential initiatives.<sup>292</sup> One of RtoP's most important functions is as a "label that can be attached to particular crises in order to generate the will and consensus necessary to mobilize a decisive international response."<sup>293</sup> The AIDS pandemic, which profoundly threatens human rights and global security, is a crisis that warrants such a response.

C. *Applying RtoP to HIV/AIDS Crises Would be Consistent With the Human Rights and Human Security Foundations of the Doctrine*

RtoP was born out of a recognition that international institutions did not have the mandate or capacity to meet modern threats and expectations.<sup>294</sup> Traditional notions of state sovereignty inhibited the international community from safeguarding individuals from threats to their welfare. The formulation of RtoP was an attempt to reconcile state sovereignty with an international regime increasingly focused on protecting human rights and human security. This Part discusses the human rights and human security foundations of RtoP in the context of HIV/AIDS.

1. Populations Face Widespread Violations of Human Rights in Societies Most Impacted by HIV/AIDS

Millions of people in need are being denied access to life-saving treatment for HIV/AIDS, in violation of their human rights.<sup>295</sup> If the ultimate purpose of RtoP is to "save lives by preventing the most egregious mass violations of human rights,"<sup>296</sup> RtoP should be expanded to include the protection of populations in peril from HIV/AIDS.

RtoP is focused on preventing and stemming mass violations of the right to life,<sup>297</sup> the most fundamental and revered human right and a right that has achieved *jus cogens* status in international law.<sup>298</sup> It is obvious that genocide and other mass atrocity crimes implicate this right. Yet, so does HIV/AIDS. Because AIDS causes death, and treatment forestalls death and grave morbidity, the right to treatment for HIV/AIDS is encompassed as part of the right to life or the right to health in a number of major international human rights instruments.<sup>299</sup> Still, this right is routinely violated by governments that are either unwilling or unable to provide access to treatment for

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290. BAN, *supra* note 165, at 6.

291. *Id.* at 1.

292. *Id.* at 1, 3.

293. Bellamy, *supra* note 41, at 159. See *supra* note 55 for an explanation that a function of RtoP is to generate political will to act in certain situation.

294. ICISS REPORT, *supra* note 10, at 3.

295. UNAIDS, *supra* note 165, at 95.

296. BAN, *supra* note 19, at 28.

297. Rosenberg, *supra* note 54, at 455.

298. See *supra* note 212 and accompanying text for a discussion of the important role of the right to life in international law.

299. See *supra* Part II.B.3 for a discussion of the right to treatment in international human rights law.

populations in need. Two-thirds of the fifteen million people who require treatment in low- and middle-income countries are denied their right to receive it.<sup>300</sup> As a result of the denial of treatment and other factors, HIV/AIDS annually kills ten times more people than armed conflict.<sup>301</sup>

It is incongruous for the international community to protect the right to life for individuals living in societies undergoing civil war and genocide, but not to protect the right to life in societies where even more people die because they cannot access HIV/AIDS medicines. All individuals are unconditionally promised the right to life under international human rights law. And RtoP is premised on the idea that situations violating the right to life are no longer subject solely to the discretion of the state; they are issues of concern to the broader international community.<sup>302</sup>

Some would argue that protection of the right to life, through the right to treatment, is best located under the current human rights framework. That 1.8 million people needlessly die from AIDS each year suggests otherwise.<sup>303</sup> A human rights framework is inadequate because some states are simply unable or unwilling to protect their populations from HIV/AIDS despite their existing human rights commitments to do so. Applying RtoP to HIV/AIDS crises would obligate the international community to step in under these circumstances.

The right to treatment, like all human rights, imposes on states the obligations to respect, protect, and fulfill.<sup>304</sup> The obligation to *respect* means that states must refrain from interfering with or curtailing the realization and enjoyment of the right to treatment.<sup>305</sup> This encompasses the negative commitments not to create conditions of scarcity that deprive people in need of treatment, and not to discriminate.<sup>306</sup> The obligation to *protect* requires states to protect individuals and groups against the deprivation of this right. If the right to treatment is located under the right to health, this may include regulating the market for AIDS medicines, and ensuring that third parties do not limit people's access to HIV/AIDS services.<sup>307</sup> The obligation to *fulfill* means that states must take positive action to provide treatment.<sup>308</sup>

Pillar one of RtoP—the responsibility of states to protect their populations<sup>309</sup>—simply internalizes and reinforces these preexisting obligations.<sup>310</sup> Thus, states have the same duties to safeguard their citizens under both international human rights law and RtoP. The international community, however, does not. The obligations on states under human rights law (to protect, respect and fulfill the rights of their people) impose no

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300. UNAIDS, *supra* note 165, at 95.

301. Press Release, *supra* note 201.

302. Stahn, *supra* note 18, at 114.

303. UNAIDS, *supra* note 165, at 19.

304. General Comment 14, *supra* note 223, at ¶ 13; Novogrodsky, *supra* note 7, at 21.

305. Novogrodsky, *supra* note 7, at 21.

306. *Id.* at 22.

307. *Id.*

308. *Id.* at 23.

309. See *supra* note 53–54 for a discussion of states' duties to protect their populations under RtoP, rooted in existing legal obligations.

310. BAN, *supra* note 19, at 12 (stating that the responsibility of states to protect their populations is “firmly embedded in pre-existing, treaty-based and customary international law”).

corresponding duty on the international community. Under pillar two of RtoP, however, the international community has a collective obligation to take coordinated action to “encourage and help” states in protecting individuals from mass atrocity crimes and consequent violations of their human rights.<sup>311</sup> This is the novelty and necessity of RtoP; it provides a framework for international action when the underlying human rights framework proves inadequate.<sup>312</sup>

Under an international human rights framework, when states are unable to protect the right to treatment by providing AIDS medications to populations in need, fulfillment of this right is dependent on voluntary aid from other actors such as other states, regional organizations, other states, and NGOs. As was previously stated, current global AIDS resources and commitments are fragile and insufficient,<sup>313</sup> and as a result the right to treatment is illusory for millions of people living with the disease. Therefore, there is a significant disconnect between the rights to life, health, and treatment promised to individuals under internationally recognized human rights covenants<sup>314</sup> and the rights that are actually protected. This disconnect is exacerbated by fact that individuals have limited recourse to enforce these rights. People whose rights are violated generally must rely on their own state to remedy the wrong, even when it is the state that is committing the violation.<sup>315</sup>

This Comment previously discussed that the right to treatment for HIV/AIDS is increasingly justiciable; in a range of regional and national cases, tribunals have declared that states must provide treatment for people living with HIV/AIDS as part of their obligations to fulfill rights to life and health.<sup>316</sup> While this “enforcement revolution”<sup>317</sup> demonstrates the exceptionalism of HIV/AIDS as a threat to human rights and human security, it does not change the fact that the willingness to adjudicate claims is dependent on the whim and capacity of individual states. There is a wide variation among countries as to the status of international law in domestic legal systems and the extent to which national courts are willing to cite international rights as a basis for their decisions.<sup>318</sup> Further, most of the legal advances associated with the right to treatment have occurred in Latin America,<sup>319</sup> not in sub-Saharan Africa, which is home

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311. 2005 World Summit Outcome, *supra* note 40, at ¶ 138. See *supra* notes 55–57 and corresponding text for a discussion of the responsibilities of the international community under pillar two of RtoP.

312. See Bellamy, *supra* note 41, at 143 (stating that RtoP introduced the novel idea that the international community should assist states in protecting their populations); Rosenberg, *supra* note 54, at 471 (stating that “[RtoP] innovates when it makes the link between a state’s obligation to protect its populations and the responsibility of states to assist other states with their obligations”); Stahn, *supra* note 18, at 115 (stating that the vision of a collective responsibility to act in the face of gross human rights violations is novel).

313. See *supra* notes 286–93 and accompanying text for a discussion of the shortcomings of the current international response to HIV/AIDS.

314. See *supra* Part II.B.3 for a discussion of the right to treatment in international human rights law.

315. Mark Gibney et al., *Transnational State Responsibility for Violations of Human Rights*, 12 HARV. HUM. RTS. J. 267, 267 (1999).

316. See *supra* notes 242–43 and accompanying text for a discussion of the justiciability of the right to treatment.

317. Novogrodsky, *supra* note 7, at 1.

318. Yamin, *supra* note 7, at 340.

319. See Novogrodsky, *supra* note 7, at 25–33 (chronicling right to treatment cases in national and supranational courts, predominantly in Latin America).

to more than two-thirds of the world's infected persons<sup>320</sup> and where treatment coverage is only thirty-seven percent.<sup>321</sup> It is clear that the human rights framework is inadequate to protect populations from mass violations of their right to life due to their state's inability to protect them from HIV/AIDS. If the primary focus of RtoP is truly to prevent and stem mass violations of human rights,<sup>322</sup> the norm must include protection of populations that are ravaged by HIV/AIDS as well as atrocity crimes.

However, even if we concede that the violation of the right to life due to atrocity crimes is fundamentally different than the violation of the right to life due to the denial of AIDS medication, HIV/AIDS represents a security threat of such magnitude that it should still be protected under RtoP. The next Part elaborates on this argument.

## 2. HIV/AIDS Poses a Significant Threat to Human Security

Reflecting the notion that ensuring human security is the cardinal mission of the UN,<sup>323</sup> RtoP requires that states and international actors have a collective responsibility to act in certain situations that threaten security: cases of genocide, war crimes, ethnic cleansing, and crimes against humanity.<sup>324</sup> While there is no doubt that these crises represent grave assaults to human security, so does HIV/AIDS.<sup>325</sup> If human security is an international interest framed and advanced via RtoP, then the doctrine should reflect the most significant global security concerns. HIV/AIDS is undoubtedly one of these concerns.

The security threat posed by HIV/AIDS has repeatedly been compared to that caused by armed conflict.<sup>326</sup> In terms of fatalities, its impact has been even more destructive than warfare; the pandemic kills far more people in Africa than does armed conflict.<sup>327</sup> HIV/AIDS has also had a devastating social and economic impact,<sup>328</sup> making it a considerable security problem at the domestic, regional and continental levels. In some countries HIV/AIDS has caused life expectancy to decrease up to twenty years.<sup>329</sup> The epidemic has destroyed families and communities.<sup>330</sup> The loss of experienced workers and skilled professionals has drained production in key sectors, stifling development and depressing GDP.<sup>331</sup> Countless major world leaders and organizations have declared HIV/AIDS a threat to security, including the World Bank,

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320. UNAIDS, *supra* note 165, at 25.

321. *Id.* at 96.

322. Rosenberg, *supra* note 54, at 455.

323. MACFARLANE & KHONG, *supra* note 93, at 152. See *supra* Part II.A.3.c for a discussion of the emergence of human security as a central principal of international law.

324. Stahn, *supra* note 18, at 114.

325. See *supra* Part II.B.2 for a discussion of HIV/AIDS and the threat to human security.

326. *E.g.*, Press Release, *supra* note 201.

327. *Id.*

328. See *supra* Part II.B.2 for a general discussion of the devastating global impact of HIV/AIDS.

329. See *supra* notes 174–75 and accompanying text for a description of how in some high-prevalence countries HIV/AIDS has reversed decades of advances in life expectancy.

330. See *supra* notes 177–81 and accompanying text for a discussion of the impact of HIV/AIDS on households and communities.

331. See *supra* notes 182–86 and accompanying text for a discussion of the social and economic impact of HIV/AIDS.

the UN, and the United States Central Intelligence Agency.<sup>332</sup>

The UN Security Council—the body tasked with maintaining international peace and security—has met twice to discuss the security implications of HIV/AIDS, most recently declaring, “HIV poses one of the most formidable challenges to the development, progress and stability of societies and requires an exceptional and comprehensive global response.”<sup>333</sup> RtoP is the response needed.

#### IV. CONCLUSION

This Comment has attempted to demonstrate the importance of expanding RtoP to include HIV/AIDS crises. In other words, the international community would have an obligation to help states protect their populations from HIV/AIDS when they are unable or unwilling to do so on their own. This protection obligation would include efforts to uphold the human right to treatment for people living with the disease in order to prevent needless loss of life.

RtoP was born out of a recognition that international institutions did not have the mandate or capacity to meet modern threats and expectations. Traditional notions of state sovereignty inhibited the international community from safeguarding individuals from threats to their welfare.<sup>334</sup> The formulation of RtoP was an attempt to reconcile state sovereignty with an international regime increasingly focused on protecting human rights and human security.<sup>335</sup>

The current version of RtoP, however, falls short in achieving this goal. Limiting RtoP’s application to four—although admittedly egregious—international crimes, leaves the world community impotent with respect to protecting other human rights and human security crises. This interpretation is inconsistent with the expectations created by numerous human rights conventions and the necessity to protect against threats to international peace and security, including human security. This Comment does not argue that RtoP is “about protecting everybody from everything.”<sup>336</sup> RtoP should, however, be about protecting populations from mass loss of life due to HIV/AIDS.

As previously discussed, the expansion of RtoP to include HIV/AIDS crises is consistent with the documents that articulated the RtoP concept and preceded the version of the doctrine adopted at the 2005 World Summit,<sup>337</sup> RtoP’s increasing emphasis on prevention,<sup>338</sup> and the human rights and human security foundations of the

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332. See *supra* notes 199–201 and accompanying text for an overview of the statements of world leaders about the threat HIV/AIDS poses to human security.

333. S.C. Res. 1983, UN Doc. S/RES/1983 (June 7, 2011).

334. See *supra* Part II.A.1 for an overview of the humanitarian crises that led to RtoP’s conception.

335. See *supra* Part II.A.3 for a discussion of the foundations of RtoP.

336. Cf. EVANS, *supra* note 54, at 65 (arguing that the RtoP concept should not be expanded beyond the four crimes agreed upon at the 2005 World Summit because it would stretch the doctrine beyond practical utility).

337. See *supra* Part III.A for a discussion of the varying versions of RtoP found in the conceptual documents that shaped its development.

338. See *supra* Part III.B for a discussion of how the framework for combating HIV/AIDS is consistent with RtoP’s increasing focus on prevention.



doctrine.<sup>339</sup> That is why the international community should expand RtoP to include HIV/AIDS.

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339. See *supra* Part III.C for a discussion of how applying RtoP to HIV/AIDS is consistent with the human rights and human security foundations of the doctrine.

