

THE LEGALITY OF ‘INTERVENTION BY INVITATION’ IN SITUATIONS OF R2P VIOLATIONS

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The shift towards sovereignty as responsibility forms the basis for the Responsibility to Protect (R2P) concept, in which the failure of a state to protect its population from the commission of core international crimes—specifically genocide, crimes against humanity, war crimes, and ethnic cleaning—results in a potential circumscribing of its sovereignty to the point where a U.N. Security Council-authorized military intervention is permitted. The wider implications of this change in sovereignty have not been fully considered. This article examines one particular aspect of this alteration in sovereign power, namely the impact upon the legality of a state involved in the commission of R2P crimes inviting an external military force onto its territory. Utilizing a concept referred to as protection legitimacy, this article argues that a government that is committing or complicit in the commission of R2P crimes should lose the right to invite intervention where the presence of such forces is designed to aid the repression of the state’s population. Under this approach, following a declaration by the U.N. General Assembly affirming the factual commission of R2P crimes in a state and recognizing the consequent loss of that state’s protection legitimacy, the state in question would be prohibited from inviting external intervention onto its territory. Additionally, a state that intervenes by invitation in a situation where the host state has lost its protection legitimacy would be in violation of international law, a violation that may amount to complicity in the R2P crimes in question. The article discusses recent interventions in the Syrian Civil War and their legal implications to illustrate the proposed prohibition.

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I. INTRODUCTION

In international law, a government's power to govern the domestic territory under its control and act as the external representative of a state on the international plane derives from the sovereignty of that state. While statehood has long involved the duty to ensure the safety and welfare of the population within a territory, the international community has increasingly considered the international rights derived from state sovereignty as contingent upon the government protecting its population from the commission of large scale crimes such as genocide, crimes against humanity, war crimes, and ethnic cleansing. This notion of *sovereignty as responsibility*, crystallized in the norm of the Responsibility to Protect (R2P), provides that sovereignty may be qualified as a result of the commission of certain crimes against its population to the extent that the state no longer enjoys total freedom in its internal affairs.

This article argues that the contingent nature of sovereignty under the R2P framework operates through a property referred to as the *protection legitimacy* of the government in question. Where the government is either participating or complicit in the commission of R2P crimes, its *protection legiti-*

macy is lost, resulting in the diminution of its right to access the bundle of powers that derive from sovereignty. The most serious potential consequence is military intervention by the international community into the state to end R2P crimes. Utilizing this *protection legitimacy* concept, this article argues that the state should be prohibited from inviting external military intervention into a situation involving R2P crimes if the inviting state is committing or is complicit in the commission of the crimes. This article also proposes that, for the prohibition of intervention by invitation to function, there must be a declaration from the U.N. General Assembly that a state has lost its *protection legitimacy* in order to ensure the enduring legitimacy of the R2P concept.

The article begins with a detailed overview of the concept of intervention by invitation in international law and its parameters, followed by a discussion of the shift in sovereignty towards responsibility, the impact of the shift upon the theoretical foundations of international law, and the consequential reframing of the intervention by invitation question. Next, the notion of *protection legitimacy* is introduced, alongside an outlining of the proposed mechanism for its operation, with a particular focus on the role of the General Assembly. Third, the article discusses the possible legal consequences for a state that accepts an invitation to intervene in a prohibited situation—examining both the range of potential violations of international law and the permissible countermeasures. The article finishes with a consideration of some contemporary practical examples of state interventions and their legal status under the proposed prohibition, specifically those undertaken in the context of the ongoing Syrian Civil War.

II. THE DOCTRINE OF INTERVENTION BY INVITATION

States have long accepted intervention by invitation in international relations¹ and the doctrine appears uncontroversial in theory. State sovereignty entitles a government exercising legal authority to defend themselves against armed opposi-

1. Gerhard Hafner, *Present Problems of the Use of Force in International Law*, 2009 INST. DE DROIT INT'L Y.B. 299, 302; Louise Doswald-Beck, *The Legal Validity of Military Intervention by Invitation of the Government*, 1986 BRIT. Y.B. INT'L L. 189, 189.

tion within their territory.² The consent of the inviting state justifies action that would, in the absence thereof, amount to a prohibited use of force by one state in the territory of another.³ Unless a question of coercion arises, the introduction of foreign troops does not damage the recipient state's sovereignty.⁴ However, in practice, the parameters of intervention at the request of a government remain highly disputed, and international law does not provide clear rules governing such activities.⁵ This section first addresses the legal basis for the notion of intervention by invitation and subsequently outlines the main limitations of the concept.

A. *The Legal Basis for Intervention by Invitation*

Article 2(4) of the U.N. Charter prohibits states from intervening militarily in the territory of other states.⁶ There are limited exceptions to this rule of customary international law⁷ expressly provided for in the Charter, namely, individual or collective self-defence under Article 51, and intervention sanctioned by the Security Council under Chapter VII.⁸ Intervention by invitation is not an exception to the prohibition on the use of force as the prohibition specifically covers the use of

2. Hafner, *supra* note 1, at 302.

3. Christopher J. Le Mon, *Unilateral Intervention by Invitation in Civil Wars: The Effective Control Test Tested*, 35 N.Y.U. J. INT'L. L. & POL. 741, 742 (2003).

4. *Id.* at 743.

5. See Hafner, *supra* note 1, at 304, 308 (stating that the while intervention by invitation is lawful, "What remains disputed and intensively discussed is the question of the type and author of the invitation (request) and the limits of such activities under international law").

6. See also G.A. Res. 2625 (XXV), Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations, pmbl. (Oct. 24, 1970) ("No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. Consequently, armed intervention and all other forms of interference or attempted threats against the personality of the State or against its political, economic and cultural elements, are in violation of international law.").

7. See *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, Judgment, 1986 I.C.J. Rep. 14, ¶¶ 191-93 (June 27).

8. U.N. Charter arts. 42, 51.

force *without* consent.⁹ By virtue of consent, the use of force by an invited military is not at odds with the host state's territorial integrity and is not, therefore, an infringement of Article 2(4).¹⁰

Two principal sources confirm the existence of the doctrine of intervention by invitation: U.N. resolutions and jurisprudence of the International Court of Justice (ICJ). These sources are best viewed on a continuum of time and understood in the context of developments precipitated by the Cold War. First, resolutions passed by U.N. organs indicate a noticeable shift, from reluctance to acknowledge the legality of intervention to explicitly doing so. General Assembly Resolution 2131 (XX) of 1965 declared that “*no State shall organize, assist, foment, finance, incite or tolerate subversive, terrorist or armed activities directed towards the violent overthrow of the regime of another State, or interfere in civil strife in another State.*”¹¹ General Assembly Resolution 2625 of 1970, otherwise known as the Declaration on Friendly Relations, repeated the same terminology verbatim.¹² While precluding coercive interference in civil war situations, these resolutions left open the question of the lawfulness of assisting a government during a civil war.¹³ However, General Assembly Resolution 3314 (XXIX) of 1974 resolved the issue by providing the seminal definition of aggression in international law. Article 3(e) of the Resolution recognized the validity of intervention by invitation, albeit negatively, by describing as an act of aggression: “[t]he use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory

9. Jean d’Aspremont, *Mapping the Concepts Behind the Contemporary Liberalization of the Use of Force in International Law*, 31 U. PA. J. INT’L L. 1089, 1131 (2010).

10. Albrecht Randelzhofer & Oliver Dörr, *Article 2(4)*, in 1 THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 200, ¶ 34, at 215 (Bruno Simma et al. eds., 3d ed. 2012) (“As the prohibition of the threat or use of force is limited to the international relations between States, it does not apply to military acts of protection by a State within its own territory against intruding persons, ships, or aircraft. Thus, the enforcement of a State’s own territorial jurisdiction by means of armed force does not fall under Art. 2(4).”).

11. G.A. Res. 2131 (XX), ¶ 2 (Dec. 21, 1965) (emphasis added).

12. G.A. Res. 2625 (XXV), *supra* note 6.

13. Doswald-Beck, *supra* note 1, at 208–12.

beyond the termination of the agreement.”¹⁴ More explicitly, in 1976 the Security Council condemned South Africa’s aggression against the People’s Republic of Angola in a resolution which recalled, in the preamble, “the inherent and lawful right of every State, in the exercise of its sovereignty, to request assistance from any other State or group of States.”¹⁵ Likewise, the General Assembly’s 1981 Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of States notes “[t]he duty of a State to refrain from any economic, political or military activity in the territory of another State *without its consent*.”¹⁶

The ICJ clarified any lingering doubt as to the existence of a permissive rule in its 1986 *Nicaragua* judgment.¹⁷ In a cursory statement, the ICJ found that the international legal principle of non-intervention would be callow “if intervention, *which is already allowable at the request of the government of a State*, were also to be allowed at the request of the opposition.”¹⁸ With this, the Court treated the legality of a government inviting outside intervention as axiomatic—without reference to doctrine or further elucidation. The holding also represented a sound dismissal of the law of belligerency, whereby aid to forces opposing the incumbent government was permissible only once the conflict reached a certain threshold.¹⁹ Most strikingly, the Court suggested no limitations to the asserted right of a government to invite intervention.²⁰ The Court thereby apparently “enunciated a clear rule of nonintervention except by invitation of the legally-recognized government.”²¹ The ICJ’s subsequent *Congo v Uganda* judgment, which reaffirmed *Nicaragua* while focusing its discussion solely on the circumstances in which the consent of a government to outside intervention could be withdrawn, repeated the Court’s

14. G.A. Res. 3314 (XXIX), annex, art. 3(e) (Dec. 14, 1974).

15. S.C. Res. 387, pmb. (Mar. 31, 1976).

16. G.A. Res. 36/103, annex, § 2(o) (Dec. 9, 1981) (emphasis added).

17. *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), Judgment, 1986 I.C.J. Rep. 14 (June 27).

18. *Id.* ¶ 246 (emphasis added).

19. *Le Mon*, *supra* note 3, at 749–50; *see also* *Nicar. v. U.S.*, 1986 I.C.J. ¶¶ 207, 209 (where the Court found that there was “no such general right of intervention, in support of an opposition within another State, [. . .] in international law”).

20. Hafner, *supra* note 1, at 306.

21. *Le Mon*, *supra* note 3, at 751.

former lack of scrutiny as to parameters of the right to invite intervention.²²

In addition to these main sources, the International Law Commission (ILC) affirmed, in the context of its development of the law of state responsibility, that military activities by an external state on another state's territory are not limited by the principle of non-intervention if performed upon request.²³ The argument that consent cannot legitimize an act violating a peremptory norm, which includes use of force, does not engage in situations of intervention by invitation. "Since a valid consent by the State whose territory is affected excludes the application of the prohibition of force altogether, the peremptory character of the prohibition cannot affect the validity of the consent."²⁴ Most significantly, state practice demonstrates the acceptance of the validity of consent to external military intervention.²⁵ The existence of a right for an incumbent government to invite external military forces is clearly established under international law. Identifiable parameters for this right are, however, less clearly defined. These parameters are addressed in the following section.

B. *The Preconditions and Limitations for Intervention by Invitation*

The government seeking assistance must consent to the action to validate the doctrine of intervention. In order for state consent to have a legalizing effect on an intervention, scholars suggest that the consenting government should be (i) legitimate; (ii) effective; and, (iii) that the intervention consented to must not violate the right of self-determination.²⁶

While these factors are necessarily interlinked, external legitimacy is both the common thread and the key determinant

22. *Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda)*, Judgment, 2005 I.C.J. Rep. 168, ¶¶ 42–54, 196–99 (Dec. 19); Randelzhofer & Dörr, *supra* note 10, ¶ 33, at 214.

23. See *Report of the Commission to the General Assembly on the Work of its Fifty-Third Session*, [2001] 2 Y.B. Int'l L. Comm'n, U.N. Doc. A/CN.4/SER.A/2001/Add.1. See also Hafner, *supra* note 1, at 307.

24. Randelzhofer & Dörr, *supra* note 10, ¶ 33, at 215.

25. See Sandra Szurek, *Circumstances Precluding Wrongfulness in the ILC Articles on State Responsibility: Consent*, in *THE LAW OF INTERNATIONAL RESPONSIBILITY* 439, 439–47 (James Crawford et al. eds., 2010).

26. See Randelzhofer & Dörr, *supra* note 10, ¶ 33, at 215.

of legality of intervention by invitation.²⁷ Only when the inviting party is recognized externally as the legitimate government—i.e. expressing the state’s authority²⁸—is intervention by invitation considered a lawful interaction between sovereign states.²⁹ The question of legitimacy inherently relies on rules governing the recognition of a state.³⁰ As noted by Doswald-Beck, “representation of a regime on behalf of a state” at the U.N. confers legitimacy “which mere individual State recognition would not”.³¹ Significantly for the purposes of the doctrine of intervention by invitation, “recognition will rarely be withdrawn from an established regime, even once it has lost control, if there is no new single regime in control to take its place.”³²

Traditionally, a government’s legitimacy as representative of a state was determined by reference to its “de facto control over the state’s territory”.³³ A government with effective control over its territory was thereby entitled to invite outside assistance—irrespective of how the government came to power, wielded its authority, or the makeup of the opposition.³⁴ Greater regard for human rights in recent decades precipitated the rise of the theory of democratic legitimacy, raising questions as to whether illiberal democracies should be empowered to request intervention by third states.³⁵ The decreasingly determinative role of the notion of effective control over territory since the end of the Cold War, with increased consid-

27. Le Mon, *supra* note 3, at 742, 754.

28. See Roger Bond Choquette, Note, *A Rebuttable Presumption Against Consensual Nondemocratic Intervention*, 55 COLUM. J. TRANSNAT’L L. 138, 146 (2016) (explaining that a state must have the proper authority to legally consent to a foreign intervention of its territory).

29. Le Mon, *supra* note 3, at 791; see also Gregory H. Fox, *Intervention by Invitation*, in THE OXFORD HANDBOOK OF THE USE OF FORCE IN INTERNATIONAL LAW 816, 829–30 (Marc Weller ed., 2015) (noting that “[t]he rules on procedural aspects of state consent are regulated by firmly established norms of international law.”) (citations omitted).

30. Le Mon, *supra* note 3, at 742.

31. Doswald-Beck, *supra* note 1, at 199.

32. *Id.*

33. See Le Mon, *supra* note 3, at 745; Fox, *supra* note 29, at 817.

34. See Le Mon, *supra* note 3, at 745 (“The effective control test involves no legal inquiry into how the putative government gained control; if it can fulfill the functions of the state, it will be considered the legal government.”); Fox, *supra* note 29, at 817.

35. Fox, *supra* note 29, at 834–37.

eration of the democratic legitimacy of a government³⁶ and particularly the existence of free and fair elections, arguably supports the theory of limiting the right to request intervention.

Examples of intervention requested by governments with debatable foundations are far from conclusive. Governments led by Jean-Bertrand Aristide in Haiti in 1991, Ahmad Tejan Kabbah in Sierra Leone in 1997, and Alassane Ouattara in Côte d'Ivoire in 2010—each of which had internationally verified electoral mandates but held no actual power or territory—requested external assistance and were restored to power.³⁷ However, each instance could equally be explained through the lens of specific geopolitical considerations.³⁸ More recently, northern Mali was under the control of anti-government forces prior to French intervention at the request of the central government in 2013.³⁹ Territorial control is not, therefore, dispositive of a government's ability to invite outside intervention.⁴⁰ Some may perceive a government's democratic legitimacy as theoretically capable of offsetting a lack of effectivity in certain circumstances,⁴¹ but as a concept, even democratically elected government systems remain open to potential abuse and may cause division where, for example, electoral mandates are secured by a very small margin or in controversial circumstances.

The question of governmental legitimacy is particularly acute in times of civil war due to the nature of what such internal conflict implies, namely a challenge to the domestic order

36. *Id.* at 817.

37. *See* S.C. Res. 940 (July 31, 1994) (reaffirming the commitment of the international community to restore Jean-Bertrand Aristide to his leadership position in Haiti); S.C. Pres. Statement 1998/5 (Feb. 26, 1998); S.C. Res. 1980 (Apr. 28, 2011).

38. Fox, *supra* note 29, at 837.

39. *See, e.g.*, U.N. SCOR, 68th Sess., 6905th mtg. at 5–6, U.N. Doc S/PV.6905 (Jan. 22, 2013) (recounting the occupation of northern Mali by armed extremists and terrorist groups in 2012).

40. Doswald-Beck, *supra* note 1, at 200; *see also* YORAM DINSTEIN, WAR, AGGRESSION AND SELF-DEFENCE 119 (2011) (explaining that traditional international law and state practice indicate that it is permissible to extend military assistance to a state that is embroiled in civil war).

41. d'Aspremont, *supra* note 9, at 1132; *see also* Doswald-Beck, *supra* note 1, at 198 (noting that ONUC and the United Nations have obliged the requests of unseated governments for military assistance in several cases).

and the embodiment of the legitimate representative of the people. It follows that the most controversial aspect of intervention by invitation is its permissibility in times of civil war.⁴² The ICJ's dismissal of standards of belligerency and the lack of apparent restraints on the right to invite intervention in the *Nicaragua* and *Uganda* cases suggest that the Court considered intervention at the request of a government during a civil war to be lawful—though the question of whether any limitations must exist in practice continues to be raised by scholars.⁴³

The operative rationale is that where a society is divided as to its political future, an incumbent government cannot claim to represent the population of the state. Accordingly, external intervention at the invitation of this unrepresentative government would interfere with the people's right to self-determination.⁴⁴ The Institut de Droit International argued as much in 1975, issuing a resolution declaring that “[t]hird States shall refrain from giving assistance to parties to a civil war which is being fought in the territory of another State,” in particular refraining from “sending armed forces or military volunteers, instructors or technicians to any party to a civil war, or allowing them to be sent”⁴⁵ The British government took a similar position in a 1984 Foreign Office document stating that “any form of interference or assistance is prohibited

42. See Le Mon, *supra* note 3, at 754-791 (discussing in detail six historical case studies of interventions in civil wars).

43. See, e.g., Doswald-Beck, *supra* note 1, at 196-97 (arguing that there is, at the least, a very serious doubt as to whether a State may validly aid another government to suppress a rebellion, particularly if the rebellion is widespread and seriously aimed at overthrowing the regime requesting assistance).

44. See Karine Bannelier & Theodore Christakis, *Under the UN Security Council's Watchful Eyes: Military Intervention by Invitation in the Malian Conflict*, 26 LEIDEN J. INT'L L. 855, 860 (2013) (discussing the validity of the intervention by invitation in Mali following a military coup in 2012).

45. Inst. de Droit Int'l, *The Principle of Non-Intervention in Civil Wars*, art. 2(1)-(2) (a) (1975). The main concern of the Institute appears to have been escalation of a civil war into an international conflict as a result of external intervention. See *id.* pmb. (“Considering that any civil war may affect the interests of other States and may therefore result in an international conflict if no provision is made for very stringent obligations of non-intervention; Considering in particular that the violation of the principle of non-intervention for the benefit of a party to a civil war often leads in practice to interference for the benefit of the opposite party”). Though the subject has been revisited more broadly, the position of the Institut remains the same.

(except possibly of a humanitarian kind) when a civil war is taking place and control of the state's territory is divided between warring parties."⁴⁶

Two points require further attention. First, it is important to look at the parameters of the right to self-determination. International law places greater stress "on the unity and independence of the State, rather than on the free aspirations of the people."⁴⁷ It follows that, unless a particular group "has been recognized by the international community as entitled to self-determination", an incumbent government requesting external aid to suppress insurrection would not necessarily breach the principle of self-determination.⁴⁸ Provided a government is made up of persons from the group perceived as entitled to self-determination, no deprivation of self-determination is generally deemed to have occurred.⁴⁹

Second, as a practical matter, the fact that an armed group has sufficient military means to engage governmental forces in a civil war does not necessarily indicate they have a claim to represent a people for the purposes of the principle of self-determination.⁵⁰ Additionally, it is logically incoherent that an incumbent government can invite external intervention up to the time where the level of violence reaches the threshold of civil war, but not after that point.⁵¹ A blanket prohibition of the right to invite intervention in times of civil war would also effectively prohibit states from seeking assistance against, for example, warring terrorist non-state actors.⁵² State practice also rebuffs the suggested view that intervention by invitation is prohibited in times of civil war.⁵³ A recent exam-

46. *United Kingdom Materials on International Law 1986*, 1986 BRIT. Y.B. INT'L L. 487, 616.

47. Doswald-Beck, *supra* note 1, at 202.

48. *Id.*

49. *Id.* at 203, 207.

50. Dapo Akande & Zachary Vermeer, *The Airstrikes Against Islamic State in Iraq and the Alleged Prohibition on Military Assistance to Governments in Civil Wars*, EJIL: TALK! (Feb. 2, 2015), <https://www.ejiltalk.org/the-airstrikes-against-islamic-state-in-iraq-and-the-alleged-prohibition-on-military-assistance-to-governments-in-civil-wars/#more-13000>.

51. *Id.*

52. Choquette, *supra* note 28, at 156.

53. Randelzhofer & Dörr, *supra* note 10, ¶ 33, at 214; Fox, *supra* note 29, at 827–29; *see also* Le Mon, *supra* note 3, at 755–92 (examining intervention efforts in six different civil wars from 1958–1997).

ple of this is states' positions on airstrikes against ISIS targets in Iraq.⁵⁴ Further, scholars challenge this interpretation.⁵⁵

This is not to say that no consideration will be given to the question of self-determination in situations where a civil war is occurring. Today, democratic legitimacy—in the sense of a government's "legitimacy of origin"⁵⁶—is increasingly seen by states as a makeweight against territorial control in terms of governmental legitimacy. In the future, this may be similarly true where a government arbitrarily exercises its power, leading to revolt—otherwise referred to as the government's "legitimacy of exercise."⁵⁷ Presently, however, there is no clear rule prohibiting intervention by invitation on behalf of an incumbent government engaged in a civil war.⁵⁸

The next section discusses how the traditional precepts of sovereignty and its role as the foundational norm of the international legal system frames the current debate on intervention by invitation. As the normative basis of sovereignty shifts from *control* to *responsibility*, the issue of governmental legitimacy becomes much more central to the question of intervention by invitation. To illustrate this, the following section deconstructs the classical Westphalian structure of sovereignty and examines the systemic impacts of a shift away from this

54. Akande & Vermeer, *supra* note 50.

55. See Randelzhofer & Dörr, *supra* note 10, ¶ 33, at 214 (arguing that sovereign states are legally free to consent to interventions by other States forces in times of civil war).

56. See Jean d'Aspremont, *Legitimacy of Governments in the Age of Democracy*, 38 N.Y.U. J. INT'L L. & POL. 877, 894–917 (2006) (described as "the procedural elements of democracy that insure that [governmental] authority originates in popular sovereignty through free and fair elections").

57. See *id.* (defined as "the substantive elements of democracy" such as basic political freedoms, civil rights, and respect for the rule of law).

58. See Fox, *supra* note 29, at 837–39 (noting that, during the uprising against the Gaddafi regime in Libya, several states recognized the Libyan Council as the legitimate representative of the Libyan people. Similar statements have been made with regard to groups opposed to the Assad regime in Syria being considered as the legitimate representatives of the Syrian people. Given the apparent break that such statements would represent from the abiding international law, it is suggested that these statements had rhetorical political significance rather than legal implications. That said, given the link between state recognition and external legitimacy, the crux of any assessment of the legality of an invited intervention, the rules relating to intervention in civil wars may yet change. Were they to become the norm, the warning set out in the *Nicaragua* case would have come to pass.).

traditional template towards what is known as *sovereignty as responsibility* in contemporary international law.

III. INTERVENTION BY INVITATION – THE SOVEREIGNTY QUESTION

A. *The Westphalian Prism*

The legality of intervention by invitation, and the parameters of the scholarly debate concerning this issue, are ultimately a function of the normative construction of the principle of state sovereignty. From at least the League of Nations era onwards, the dominant variant of sovereignty in international law has been the so-called Westphalian model. This framework emphasizes the equality of all states as participants in the international legal system, the necessity of consent—both express and implied—for the application of the law upon a state, and the exclusion of external actors from the state’s “domestic jurisdiction.”⁵⁹ In practical terms, Westphalian sovereignty is little more than a mythical notion, both in terms of its ostensible origin at the Peace of Westphalia⁶⁰ and the absolutism of its protection of domestic jurisdictions from external interference.⁶¹ Nevertheless, it is difficult to dispute that it forms the normative base of the law as theoretically constituted.⁶²

From the perspective of the intervention by invitation debate, the key conceptual move undertaken by the Westphalian model is the conflation of *state sovereignty* with what might be referred to as *governmental sovereignty*—the right of the governing power to enjoy the international privileges deriving

59. U.N. Charter art. 2(7).

60. See Andreas Osiander, *Sovereignty, International Relations, and the Westphalian Myth*, 55 INT’L ORG. 251 (2001) (arguing that the peace at Westphalia was not the catalyst of the modern sovereignty-based international system).

61. See LUKE GLANVILLE, *SOVEREIGNTY AND THE RESPONSIBILITY TO PROTECT: A NEW HISTORY* (2013) (arguing that the centrality of the principle of non-intervention to the construction of sovereignty was a fleeting development that peaked in the second half of the twentieth century).

62. See the dominating role played by Westphalian norms in the landmark cases in the field, such as the primacy of state consent in *S.S. Lotus* (Fr. v. Tur.), 1927 P.C.I.J. (ser. A) No. 10, and the principle of non-interference in *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), Judgment, 1986 I.C.J. Rep. 14 (June 27).

from sovereignty.⁶³ In essence, Westphalian sovereignty fails to distinguish between the state and the government, understanding the latter as the sole legitimate representative of the former, thereby permitting government exercise of the entirety of the state's sovereign functions at the international level.⁶⁴ Through the norm of state consent, and the principle of non-intervention from which it derives, the government thus becomes the sole gatekeeper between the international and domestic spheres in the Westphalian model.⁶⁵

Provided this state-government conflation is maintainable—i.e. where there is no challenge to a government's claim as the legitimate representative of the state in question—the legality of intervention by invitation is a logical corollary to the primacy of state consent in the Westphalian model. In civil war contexts, however, the notions of state and government are decoupled. Consequently, it is unclear whether the principle of non-intervention or state consent should be supreme when considering the propriety of intervention by invitation.

As the previous section demonstrates, a debate emerges between two possible approaches to resolving the question of normative hierarchy: either the absence of a legitimate government to waive the prohibition on intervention means no external involvement is permitted, or additional criteria are deployed to recognize a claimant as the legitimate government with the sole power to invite external intervention. Considering the latter, the Westphalian model favors facts over norma-

63. Sean Butler, *Self-Determination and Sovereignty as Responsibility: A Symbiotic Relationship*, in ARE WE "MANIFESTLY FAILING" R2P? 19–21 (Vasilka Sancin ed., 2017).

64. See J.H.H. Weiler, *The Geology of International Law – Governance, Democracy and Legitimacy*, 64 ZAÖRV 547, 558 (2004) (explaining the consequences of this conflation, particularly regarding the empowerment it provides to the executive branch over the other organs of government).

65. See Bardo Fassbender, *Sovereignty and Constitutionalism in International Law*, in SOVEREIGNTY IN TRANSITION 116–120 (Neil Walker ed., 2003) (discussing the historical origins of how sovereignty came to be interpreted such that states "protected a domestic legal order like a shield through which international law could not pass"); ISRAEL DE JESÚS BUTLER, UNRAVELLING SOVEREIGNTY: HUMAN RIGHTS ACTORS AND THE STRUCTURE OF INTERNATIONAL LAW 22–23 (2007) (writing on the means by which the precepts of Westphalian sovereignty generate this gatekeeper structure).

tive criteria⁶⁶ on account of the agnosticism held towards “matters which are essentially within the domestic jurisdiction” of states.⁶⁷ Two methods of ranking claimants to legitimate government emerged in the Cold War era: either the incumbent government was supported regardless of the strength of opposition claims to territory or popular support,⁶⁸ or, as discussed above, the doctrine of effective control was utilized by states or the international community to recognize the strongest party as the legitimate government.⁶⁹

The intervention by invitation debate is firmly ensconced within the logic of Westphalian sovereignty. The predominance of the Westphalian prism persists despite the challenge posed to the continuing relevance of this model of sovereignty by the evolution of the international legal system in the U.N. era.⁷⁰ This evolution is visible, for example, through the proliferation of multilateral institutions in both number and power, and the growing centrality of universalist concepts such as human rights within such institutions.⁷¹ While the frequency of the application of normative criteria such as self-determination and democratic legitimacy to questions concerning governmental status in the post-Cold War era generally has increased, this trend has not been matched by a similar development as regards intervention by invitation. The request of the Malian government for intervention in 2013 provides the only prominent, but imperfect,⁷² example of a

66. See Montevideo Convention on the Rights and Duties of States art. 1, Dec. 26, 1933, 165 L.N.T.S. 19 [hereinafter Montevideo Convention] (including the archetypal example of characteristics that describe a state in Article 1).

67. U.N. Charter art. 2(7).

68. See, e.g., Trevor Findlay, *THE USE OF FORCE IN UN PEACE OPERATIONS* 71-81 (2002) (discussing how the mandate of the U.N. Operation in the Congo peacekeeping force, in which it was tasked with preventing civil war during the 1960 Congo crisis, was ultimately interpreted by key U.N. diplomats to mean support for the Congolese central government at the expense of the secessionist claims of the Katangan region).

69. See *supra* notes 33-41 and accompanying text.

70. See e.g. *supra* note 62 (on the role of the Westphalian prism in the *Nicaragua* case)

71. U.N. Charter art. 1(3), 55, 62 and 76.

72. The Malian government’s invitation was only one of three justifications offered by France for its intervention, alongside the implementation of U.N. Security Council Resolution 2085 and self-defence enacted under Article 51 of the U.N. Charter. Theodore Christakis & Karine Bannelier, *French*

move away from the Westphalian template in this area. The endurance of the Westphalian prism is evident in the academic discourse concerning Russia's ongoing intervention in the Syrian Civil War. There, the primary point of contestation among scholars is the right of the Assad government to extend an invitation in the midst of a civil war, rather than how the actions of the regime would affect its status as the legitimate government.⁷³

Each of the three Westphalian approaches to the question of intervention by invitation in civil war contexts—strict non-intervention, supporting the incumbent government, or deploying the effective control doctrine—arguably amounts to little more in practice than support, whether tacit⁷⁴ or actual, of the political status quo and the existing power configuration in the state in question. The approaches do not consider the interests, wishes, or welfare of the populations involved. As the international politico-legal system shifts away from the government-centric focus of the Westphalian model towards a more humanity-based understanding of sovereignty, the needs of populations increasingly arise in considerations concerning the creation and application of international law.⁷⁵ In order to incorporate this focus into the intervention by invitation debate, replacing the Westphalian prism with an alternative nor-

Military Intervention in Mali: It's Legal But. . . Why? Part I, EJIL: TALK! (Jan. 24, 2013), <https://www.ejiltalk.org/french-military-intervention-in-mali-its-legal-but-why-part-i/>.

73. See, e.g., Laura Visser, *Russia's Intervention in Syria*, EJIL: TALK! (Nov. 25, 2015), <https://www.ejiltalk.org/russias-intervention-in-syria/> (discussing the existing literature on the legitimacy of the Russian intervention in Syria, and whether the Assad government remains the "correct issuing authority.").

74. On so-called neutral approaches often amounting to tacit support for the status quo, see Fox, *supra* note 29, at 829; see also Dominick Donald, *Neutral is Not Impartial: The Confusing Legacy of Traditional Peace Operations Thinking*, 29 ARMED FORCES & SOC'Y 415 (2003) (discussing the impossibility of impartial neutrality as an approach to conflict situations, and the practical implications of this fact for peacekeeping operations operating under a mandate of neutrality).

75. See Anne Peters, *Humanity as the A and O of Sovereignty*, 20 EUR. J. INT'L L. 513, 543–44 (2009) ("The old concept of sovereignty has been thoroughly transformed by the much more recent concept of human rights."); Eyal Benvenisti, *Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders*, 107 AM. J. INT'L L. 295, 301–13 (2013); Louis Henkin, Lecture: That "S" Word: Sovereignty, Globalization, and Human Rights Et Cetera, in 68 FORDHAM L. REV. 1, 12–14 (1999).

mative conception of sovereignty, one that better reflects the need to safeguard those groups in vulnerable and powerless positions, is necessary. The most promising alternative conception of sovereignty in this regard is the notion of sovereignty as responsibility (SAR).

B. *Sovereignty as Responsibility*

Francis Deng and others first advocated SAR in 1996 as part of an approach to effective conflict management in Africa.⁷⁶ Deng argued that for sovereignty to be legitimate, it should ensure “a certain level of protection for and providing of the basic needs of the people” as part of “reaffirming the responsibility of sovereignty and accountability to the domestic and external constituencies as interconnected principles of the international order.”⁷⁷ Under this reconceptualization, a government would be faced with “discharge[ing] its responsibilities or otherwise risk forfeiting its sovereignty,” with international action taken to protect populations thereby operating as a “complement” or “fulfillment” of sovereignty rather than a “violation” as under the Westphalian model.⁷⁸

The SAR concept forms the normative core of the R2P doctrine as formulated by the Independent Commission on Intervention and State Sovereignty (ICISS) in 2001.⁷⁹ Under R2P, states have primary responsibility in protecting their populations from genocide, crimes against humanity, war crimes, and ethnic cleansing. The international community holds a secondary responsibility that is activated when the aforementioned state fails to discharge its primary responsibility—potentially leading to external military intervention as a last resort.⁸⁰ Gareth Evans, a creator of R2P, characterized the normative underpinning of R2P as being a shift in the basis of sovereignty from the “control” of the Westphalian model to

76. See FRANCIS M. DENG ET AL., *SOVEREIGNTY AS RESPONSIBILITY: CONFLICT MANAGEMENT IN AFRICA* (1996) (presenting a framework to guide national governments and the international community as they fulfil their responsibility to protect their citizens from conflict).

77. *Id.* at 27.

78. *Id.* at 28.

79. INDEP. COMM'N ON INTERVENTION & STATE SOVEREIGNTY, *THE RESPONSIBILITY TO PROTECT* (2001) [hereinafter ICISS REPORT].

80. *Id.* ¶ 4.37-4.38.

“responsibility,”⁸¹ with the privileges of sovereignty—such as the right to freedom from external intervention—emerging from what Anne Peters refers to as “a kind of social contract between the state and the international community as a whole.”⁸² In a modified form discussed below, the U.N. General Assembly in the 2005 World Summit Outcome Document (WSOD)⁸³ and the Security Council in Resolution 1674 of 2006 endorsed R2P.⁸⁴

As opposed to their conflation in the Westphalian model,⁸⁵ *state sovereignty* and *governmental sovereignty* are decoupled under SAR, with the international community consequently requiring government adherence to normative criteria in order to retain the enduring privileges of sovereignty.⁸⁶ SAR consequently introduces a theoretical basis for governmental legitimacy within the international legal framework, in contrast to the formal ambivalence concerning this notion under the Westphalian model.⁸⁷ This conception of sovereignty also provides stronger theoretical support than the Westphalian conception for a number of recent developments in the international politico-legal sphere, such as the incorporation of human rights standards into analyses of self-determination,⁸⁸ the practice of African states to refuse recognition to governments which obtain power through unconstitutional means,⁸⁹ and the refusal of any state to recognize the Islamic

81. GARETH EVANS, *THE RESPONSIBILITY TO PROTECT: ENDING MASS ATROCITIES ONCE AND FOR ALL* 42 (2008).

82. ANNE PETERS, *Membership in the Global Constitutional Community*, in JAN KLABBERS, ANNE PETERS & GEIR ULFSTEIN, *THE CONSTITUTIONALIZATION OF INTERNATIONAL LAW* 153, 187 (2009).

83. G.A. Res. 60/1, 2005 World Summit Outcome ¶¶ 138–39 (Sept. 16, 2005).

84. S.C. Res. 1674, ¶ 4 (Apr. 28, 2006).

85. See *supra* 62 note and accompanying text.

86. DENG, *supra* note 76, at 27.

87. See, e.g., David Wippman, *Pro-Democratic Intervention*, in *THE OXFORD HANDBOOK ON THE USE OF FORCE* 797, 800–02 (Marc Weller ed., 2015) (detailing the evolving attitudes towards governmental legitimacy in international law).

88. See, e.g., Alain Pellet, *The Opinions of the Badinter Arbitration Committee: A Second Breath for the Self-Determination of Peoples*, 3 *EUR. J. INT’L L.* 178 (1992) (explaining the work of the Badinter Commission concerning the break-up of Yugoslavia).

89. Constitutive Act of the African Union art. 4, July 11, 2000, 2158 *U.N.T.S.* 3.

State (IS) group in the wake of its emergence in 2014, despite the group arguably meeting the Montevideo criteria for statehood.⁹⁰

Before turning to how SAR provides a useful lens for analysing the intervention by invitation question, it is necessary to note that SAR has failed to gain universal acceptance as the dominant normative conception of sovereignty. Some developing states are more reticent about its wholesale adoption compared to the primarily Western states that have already embraced the norm. Of particular interest here are the foreign policy approaches of China and Russia, both of which present visions of a world order deeply rooted in the Westphalian model. A 2014 government document entitled “China, A Staunch Defender and Builder of the International Rule of Law” presents China’s approach to international politics as one that emphasizes sovereignty, the peaceful settlement of disputes, and non-interference in the internal affairs of others as component parts of “the foundation stones upon which modern international law and conduct of international relations are built.”⁹¹ In relation to SAR and R2P, Charles Ziegler argues that “Beijing views the 2005 Summit outcome document as more the expression of an ideal than a firm contribu-

90. See Montevideo Convention, *supra* note 66, art. 1 (listing the criteria for statehood, including: a permanent population; a defined territory; a government; and the capacity to enter into relations with other states). During the period in which it controlled parts of Iraq and Syria, Islamic State governed territory in which a permanent population resided, operated a hierarchical administrative structure akin to a government—one that collected taxes, offered limited services and provided paid employment to its officials—and engaged in international oil trade that demonstrated its capacity to enter into relations with other states. Yuval Shany et al, *ISIS: is the Islamic State Really a State?*, THE ISRAEL DEMOCRACY INSTITUTE (Sep. 14, 2014), <https://en.idi.org.il/articles/5219>.

91. *Full Text of Chinese FM’s Signed Article on Int’l Rule of Law*, PEOPLE’S DAILY (Oct. 24, 2014), <http://en.people.cn/n/2014/1024/c90883-8799769.html>. The document traces China’s historical affinity for the principle of sovereignty to the semi-colonial treatment it suffered in the “century of humiliation” that followed the Opium Wars, and emphasizes the focus on sovereignty in China’s major contributions to international politics in the U.N. era, such as their involvement in the creation of the “Five Principles of Peaceful Co-Existence” that formed the guiding principles of the Non-Aligned Movement.

tion to the evolution of international law.”⁹² Russian foreign policy is guided by the doctrine of multipolarity, “an alternative vision of the world order that contests the imposition of liberal values” in which powerful states act as regional poles to maintain the balance of power.⁹³ Sovereignty, in the Russian mould, is thus perceived as “the cornerstone of the international system and attempts to undermine it as disruptive of global order.”⁹⁴

This opposition to the SAR concept manifests itself in state practice regarding R2P. The U.N. version of the doctrine agreed to in the WSOD is a more restrictive iteration than the original ICISS version—with international coercive action that would breach sovereignty under the Westphalian model only appropriate on a case-by-case basis when “national authorities are manifestly failing to protect their populations.”⁹⁵ The Security Council debates concerning the 2011 Libyan Revolution, as a result of which the Council authorized military action under R2P for the first time,⁹⁶ featured heavily polarized

92. Charles E. Ziegler, *Contesting the Responsibility to Protect*, 17 INT’L STUD. PERSP. 75, 90 (2016). In this regard, it is noteworthy that Chinese delegates at a 2001 ICISS roundtable in Beijing argued that “the assertion of ‘human rights transcending sovereignty’ has serious fallacies in theory.” Mohammed Ayoob, *Third World Perspectives on Humanitarian Intervention and International Administration*, 10 GLOBAL GOVERNANCE 99, 108 (2004).

93. Xymena Kurowska, *Multipolarity as Resistance to Liberal Norms: Russia’s Position on the Responsibility to Protect*, 14 CONFLICT, SECURITY & DEV. 489, 489 (2014).

94. *Id.* at 495. Multipolarity is an offshoot of the concept of “sovereign democracy” created by Vladislav Surkov, which emphasizes the particularism of democratic forms to each state over the universalism of liberal democracy: it is “a mode of the political life of society in which the state authorities, their bodies and actions are elected, formed, and directed exclusively by the Russian nation in all its unity and diversity . . . rooted in the conception of a just world order as a community of free communities (sovereign democracies) that cooperate and compete on the basis of rational rules.” V.Iu. Surkov, *Nationalization of the Future: Paragraphs pro Sovereign Democracy*, 47 RUSS. STUD. PHIL. 8, 9 (2009).

95. G.A. Res. 60/1, *supra* note 83, ¶ 139.

96. *See* S.C. Res. 1973, ¶ 4 (Mar. 17, 2011) (authorizing a military intervention under R2P to protect the Libyan population from attack by the regime led by Colonel Muammar Gaddafi. Res. 1973 was implemented by a NATO-led coalition, which interpreted its mandate to permit an offensive campaign against the command and control infrastructure of the regime, leading ultimately to the overthrow of the government and the death of Gaddafi). For a discussion of the controversy surrounding NATO’s actions, see

rhetoric in which Western states made frequent reference to the Gaddafi regime's loss of legitimacy whereas China and Russia, in co-ordination with the other BRICS states,⁹⁷ prioritized the defence of Libyan sovereignty from excessive external interference.⁹⁸ U.N. practice concerning R2P, particularly in the aftermath of NATO's controversial campaign in Libya, tends to favor the non-coercive "Pillar One"⁹⁹ and "Pillar Two"¹⁰⁰ aspects of the R2P doctrine over the coercive "Pillar Three" option,¹⁰¹ an approach that offers little to confront Westphalian sovereignty.

Consequently, while the normative criteria used by the international community under SAR can derive from a wide spectrum of possibilities—ranging from the minimal protection offered by R2P, namely protection from atrocity crimes, to an expansive position akin to a right to democratic governance¹⁰²—the contested nature of the concept suggests the ne-

Alex J. Bellamy & Paul D. Williams, *The New Politics of Protection? Côte d'Ivoire, Libya and the Responsibility to Protect*, 87 INT'L AFF. 825, 838–46 (2011).

97. Namely Brazil, India and South Africa.

98. Sean Butler, *Separating Protection from Politics: The UN Security Council, the 2011 Ivorian Political Crisis and the Legality of Regime Change*, 20 J. CONFLICT & SECURITY L. 251, 273–75 (2015).

99. The "three pillar" approach to implementing R2P in the U.N. system was introduced by Secretary-General Ban in his 2009 report on R2P to the General Assembly. Pillar One refers to the state's primary responsibility to protect its population. U.N. Secretary-General, *Implementing the Responsibility to Protect*, ¶ 11(a), U.N. Doc. A/63/677 (Jan. 12, 2009) [hereinafter *Implementing R2P*].

100. Pillar Two refers to "assistance and capacity-building" provided by the international community to assist the state to realize its responsibility. *Id.* ¶ 11(b).

101. Pillar Three refers to the international community's responsibility to respond when a state manifestly fails to provide protection. *Id.* ¶ 11(c). See, e.g., *Implementing R2P*, *supra* note 99 ¶ 6–10 (documenting Secretary-General Ban's conceptual approach to R2P, emphasising the importance of prevention to realising the responsibilities of states and the international community over the "false choice" offered by the humanitarian intervention paradigm). The intention of the new Secretary-General, Antonio Guterres, to continue this policy is evident in his 2017 report on R2P. U.N. Secretary-General, *Implementing the Responsibility to Protect: Accountability for Prevention*, U.N. Doc. A/71/1016 (Aug. 10, 2017).

102. See, e.g., Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 AM. J. INT'L L. 46 (1992) (espousing the right to democratic governance as a global entitlement that should be promoted and protected by the international community).

cessity of a restrictive application of SAR to the intervention by invitation question. Consequently, the focus of the proposal in this article centers on intervention by invitation in situations involving commission of R2P crimes.

IV. R2P AS A PROHIBITION ON INTERVENTION BY INVITATION

A. *State Sovereignty and the State's Protection Legitimacy*

The R2P concept, as enumerated in paragraphs 138–139 of the WSOD, has been characterized by scholars as lacking in substantive details and questioned in terms of whether it encompasses anything new in practice.¹⁰³ While R2P may not impose any new legal obligations upon states, two important points should be highlighted for the present purposes.

First, R2P reoriented the conception of state sovereignty and emphasized the state's basic obligations vis-à-vis the population under its jurisdiction.¹⁰⁴ The legal validity of this protection principle is well accepted in international law. Second, and subsequently, R2P conceives that the international community may intervene, when necessary, to protect populations where the territorial state fails to do so. While not a legally operative obligation on the part of the international community,¹⁰⁵ this portion of the R2P concept nonetheless involves an express acknowledgment that sovereignty may be limited or restricted in situations involving R2P crimes.¹⁰⁶ As bluntly stated by Secretary General Kofi Annan, sovereignty cannot

103. See, e.g., Carsten Stahn, Note, *Responsibility to Protect: Political Rhetoric or Emerging Legal Norm?*, 101 AM. J. INT'L L. 99 (2007) (submitting that R2P “should be understood partly as a political catchword that gained quick acceptance because it could be interpreted by different actors in different ways, and partly as ‘old wine in new bottles.’”).

104. See Bardo Fassbender, *Article 2(1)*, in 1 THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 133, 155–56 (Bruno Simma et al. eds., 3d ed. 2012) (“Accordingly, sovereignty can no longer be referred to by governments as ‘a shield behind which mass violence could be inflicted on populations with impunity.’ Today, sovereignty of a State entails its obligation to protect human rights and, especially, to meet its core protection responsibilities. In that sense, we have witnessed the ‘humanization of sovereignty.’”).

105. Gareth Evans & Ramesh Thakur, Correspondence, *Humanitarian Intervention and the Responsibility to Protect*, 37 INT'L SECURITY 199, 205 (2013).

106. See, e.g., *Implementing R2P*, *supra* note 99, ¶ 11(c) (describing the responsibility of states to respond collectively in a timely and decisive manner when a state is manifestly failing to protect its people, including through “coercive [measures] under Chapter VII [of the U.N. Charter].”).

shield international crimes.¹⁰⁷ Again, this builds upon existing accepted notions.¹⁰⁸

The principle of non-intervention in domestic affairs as a corollary of state sovereignty is not absolute.¹⁰⁹ Though Article 2(7) establishes the principle of non-intervention, the Charter makes clear that the principle gives way in certain circumstances¹¹⁰—notably, where situations are deemed a threat to international peace and security by the Security Council. Large-scale human rights violations are accepted as capable of endangering international peace and security.¹¹¹ This mirrors the evolution noted above in relation to the greater focus paid to human rights considerations when evaluating state sovereignty.¹¹² The fact that the commission of certain interna-

107. U.N. Secretary-General, *We the Peoples: The Role of the United Nations in the Twenty-First Century*, ¶ 219, U.N. Doc. A/54/2000 (Mar. 27, 2000) (“no legal principle—not even sovereignty—can ever shield crimes against humanity.”). See also *Implementing R2P*, *supra* note 99, ¶ 5 (noting the various horrors which marred the twentieth century and demonstrated the failure of individual states to live up to their most basic responsibilities, while querying whether “sovereignty, the essential building block of the nation-State era” could “be misused as a shield behind which mass violence could be inflicted on populations with impunity.”).

108. See, e.g., U.N. Secretary-General, *An Agenda for Peace*, ¶ 5, U.N. Doc A/47/277 (June 17, 1992) (“The time of absolute and exclusive sovereignty, however, has passed; its theory was never matched by reality.”); Nationality Decrees Issued in Tunis and Morocco, 1923 P.C.I.J. (ser. B) No. 4, at 24 (Feb. 7).

109. See Peters, *supra* note 75, at 543–44 (insisting that sovereignty is derived from “the protection of basic human rights, needs, interests and security,” and that the Security Council may have the duty to authorize humanitarian action if certain very narrow conditions, such as a grave breach of human rights, are met).

110. See *id.* at 538 (“UN Member States have renounced any right to invoke protection from intervention with regard to threats to the peace (Article 2(7) of the UN Charter). The Security Council may also authorize preventive coercive action in order to forestall imminent human rights violations.”).

111. See S.C. Res. 688 (Apr. 5, 1991) (relating to the repression of the Iraqi civilian population); S.C. Res. 794 (Dec. 3, 1992) (relating to “the human tragedy” caused by conflict in Somalia and exacerbated by obstacles to distributing humanitarian assistance); S.C. Pres. Statement 1992/28, at 819 (Jan. 31, 1992) (stating that “non-military sources of instability in the economic, social, humanitarian and ecological fields have become threats to [international] peace and security”).

112. See Fassbender, *supra* note 104, at 155 (“An equally important limitation of traditional state sovereignty advanced by the UN Charter is the obli-

tional crimes are not, and cannot be, considered matters purely within the internal domestic affairs of a state is central to this shift.¹¹³ R2P serves as confirmation that the sovereignty of a state is tied to its responsibility for protecting human rights within its territory.¹¹⁴

This article asserts that, given the intrinsic link between a state's sovereignty and its role in safeguarding the human rights of its inhabitants, state sovereignty is contingent on the *protection legitimacy* of the state, namely the state protecting its population from the commission of atrocities. Within the context of R2P, a state committing or complicit in the commission of R2P crimes loses its *protection legitimacy* vis-à-vis its population for as long as such crimes continue. Where *protection legitimacy* is lost, there is a consequential impact on that state's sovereignty. The most serious potential diminution of sovereignty resulting from this loss is explicitly provided for in the R2P context: external military intervention into the state in certain very narrow circumstances involving the commission of R2P crimes.¹¹⁵ As is clear from the WSOD, such intervention is a measure of last resort when all non-peaceable measures have proved futile.¹¹⁶ Additionally, the WSOD refers generally, in

gation of any state not to interfere with, and to protect, the fundamental human rights and freedoms of all persons under its jurisdiction. By establishing that obligation, international law departed from the traditional view, still prevalent in the era between the two World Wars, that 'the relationship between a state and its citizens was a matter of domestic law, not to be interfered with from outside, neither by third states nor by institutions of the international community.'").

113. See Georg Nolte, *Article 2(7)*, in 1 THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 280, 297 (Bruno Simma et al. eds., 3d ed. 2012) (noting that it has been widely recognized since the 1960s "that problems relating to human rights are of interest to all nations."); Peters, *supra* note 75, at 526.

114. See Fassbender, *supra* note 104, at 156 ("[S]overeignty can no longer be referred to by governments as 'a shield behind which mass violence could be inflicted on populations with impunity'. Today, sovereignty of a State entails its obligation to protect human rights and, especially, to meet its core protection responsibilities.").

115. ICISS REPORT, *supra* note 79, ¶ 4.13; see Peters, *supra* note 75, at 535–40 (discussing how the ICISS report requires a state's sovereignty to be suspended or diminished if the state does not fulfil its obligation to protect against mass atrocities, allowing the international community and the Security Council to intervene).

116. G.A. Res. 60/1, *supra* note 83, ¶ 139.

paragraph 139, to “other peaceful means” which may be taken by the international community to protect populations from R2P crimes.¹¹⁷ As R2P crimes may result in the most substantive possible limitation of a state’s sovereignty, the concept must encompass more limited forms of restrictions upon sovereignty in order to bring R2P crimes to an end. This is the logical implication of the non-forcible measures which the international community may take under paragraph 139 of the WSOD to help protect populations from R2P crimes.

Building thereon, this article proposes that in situations of lost *protection legitimacy*, the state committing or complicit in the commission of R2P crimes should have its sovereignty restricted such that it no longer has the authority to invite outside intervention,¹¹⁸ as any such intervention will result in exacerbation of the commission of the R2P crimes. The loss of the state’s *protection legitimacy* by dint of its violation of international law through the commission or complicity in the commission of R2P crimes means that the state’s effort to get external military support for its illegal action should be impermissible. Any such request for external intervention is legally invalid because the state does not have the sovereign authority necessary for requesting assistance for its illegal actions in committing or being complicit in R2P crimes. Furthermore, any third state which accepts the request will also be violating international law.

B. *Assessing the Loss of a State’s Protection Legitimacy*

U.N. Secretary General Ban Ki-Moon has stated that “[n]o government questions the principle” of R2P.¹¹⁹ However, as noted above, states have clearly expressed their concern regarding its implementation in practice, specifically the possibility that it may be used as a pretext for “unjustified forceful

117. *Id.*

118. See ELIAV LIEBLICH, INTERNATIONAL LAW AND CIVIL WARS: INTERVENTION AND CONSENT 346-347 (2013) (arguing that a lack of effective protection by a government results in the negation of that government’s power to consent to intervention as well as to withdraw any previous consent to an intervention).

119. U.N. Secretary-General, Remarks at Breakfast Roundtable with Foreign Ministers: The Responsibility to Protect: Responding to Imminent Threats of Mass Atrocities (Sept. 23, 2011).

interventions.”¹²⁰ Thus, the determination that there has been a loss of *protection legitimacy* by a state resulting in a diminution of sovereignty necessitates a fact-based assessment and need always be judged on the circumstances of a given situation.¹²¹ The sovereignty limitation suggested herein is, in accordance with the R2P concept, a narrow formulation. It is not engaged for all human security issues, but is confined to the commission of R2P crimes.¹²² While a resolute prohibition on interference in internal affairs is indispensable in preventing abusive interventionism,¹²³ the international community also shares the understanding that R2P crimes must be stopped.¹²⁴

As limiting the sovereignty of a state is a serious deprivation of its rights and is likely to incur opposition from states on the basis of encroachment in sovereign internal affairs, a determination that a state has lost its *protection legitimacy* would need to emanate from Paragraph 139 of the WSOD. That paragraph refers to the U.N.’s “responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the Charter” in order “to help to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity.” However, the U.N.’s responsibility in the realm of non-forceful R2P measures is not precisely defined. That peaceful actions may be taken to address R2P crimes is clear.¹²⁵ Given that the Security Council veto poses a practical threat to the implementation of action under R2P, the General Assembly is the most apt and realistic locus for determining that a state has lost its *protection legitimacy*. It is also the most appropriate body for deciding that the commission of R2P crimes means that the matter is no longer within the realm of Article 2(7) of the U.N. Charter. With such

120. See Mindia Vashakmadze, *Responsibility to Protect*, in 1 THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 1201, 1230 (Bruno Simma et al. eds., 3d ed. 2012) (explaining that several states voiced concerns in the General Assembly debate on R2P regarding the possibility of the misuse of the concept for unjustified uses of force).

121. *Id.* at 1230.

122. See Peters, *supra* note 75, at 523 (“Properly understood, R2P does not cover all human security issues, but its application is limited to extreme, conscience-shocking cases of mass atrocities.”).

123. See *id.* at 533 (“Some form of external state sovereignty is indispensable to prevent self-interested, partial, and even abusive interventionism.”).

124. Vashakmadze, *supra* note 120, at 1222.

125. G.A. Res. 60/1, *supra* note 83, ¶ 139.

a determination from the General Assembly, the state in question would be unable to invite external military assistance into a situation in which that state is committing or is complicit in the commission of R2P crimes against its population.

As a practical matter, the General Assembly has both the power and authority to declare that R2P crimes are being committed and that a state has consequently lost its *protection legitimacy* and is prohibited from inviting external military assistance.¹²⁶ Such a determination entails two components: (i) assessment of the commission of R2P crimes and the state's involvement therein; and (ii) a consequential declaration that the state has lost its *protection legitimacy* and no longer has authority to seek outside military help. With regard to the first element, this calculus would necessarily involve a fact-based determination of whether there is sufficient available evidence that R2P crimes are being committed. Additionally, the decision would necessarily consider the territorial state's involvement—by virtue of commission, complicity or inability to prevent—in the crimes. U.N. bodies such as the Human Rights Committee, High Commissioner for Human Rights, and special procedures of the Human Rights Council have frequently made statements alleging the commission of international crimes such as war crimes and crimes against humanity; and the General Assembly has recognized and acknowledged such statements as constituting reasonable grounds for belief that such crimes have been committed.¹²⁷

In relation to the second aspect, we advance that the General Assembly has the authority and, arguably, the responsibility, under the Charter and the WSOD, to declare that as a consequence of the commission of R2P crimes and state involve-

126. See Cóman Kenny, *Responsibility to Recommend: The Role of the UN General Assembly in the Maintenance of International Peace and Security* 3 J. USE FORCE & INT'L L. 3, 23–29 (2016) (explaining the role and powers inherent in the U.N. General Assembly under the U.N. Charter and the Uniting for Peace Resolution in relation to the maintenance of international peace and security and how the R2P concept fits within the Assembly's sphere of competence).

127. See, e.g., G.A. Res. 71/248, ¶¶ 1–2 (Jan. 11, 2017); G.A. Res. 69/188, ¶ 7 (Jan. 21, 2015) (taking note of the findings of various U.N. entities as demonstrating the likelihood of the commission of war crimes and crimes against humanity in Syria, and crimes against humanity in the Democratic People's Republic of Korea).

ment therein the state has lost its *protection legitimacy*. Such loss results in proscription of that state's invitation of external military intervention. Paragraph 139 of the WSOD "stress[es] 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." Proceeding in the manner suggested herein would constitute a development of the General Assembly's role within the R2P doctrine and mark a substantive contribution to the viability of R2P.

More broadly, the General Assembly's power to make a declaration as proposed above accords with its Charter-mandated responsibilities in the maintenance of international peace and security. Article 11 grants the General Assembly the power to "discuss any questions relating to the maintenance of international peace and security." Simultaneously, as noted by the ICJ, Article 14 of the Charter vests in the General Assembly "the power, *inter alia*, [. . .] to 'recommend measures for the peaceful adjustment' of various situations."¹²⁸ The sole limitation placed upon the, albeit non-binding, power¹²⁹ of the General Assembly in matters of international peace and security is contained in Article 12, "namely, that the Assembly should not recommend measures while the Security Council is dealing with the same matter unless the Council requests it to do so."¹³⁰ However, the ICJ has held that the prohibition of simul-

128. *Id.* ¶ 26. It is suggested that recommendations adopted by the Assembly on any such matter should necessarily cover the same area as the more defined recommendatory powers of the Council under Chapters VI and VII. See NIGEL D. WHITE & NICHOLAS TSAGOURIAS, *COLLECTIVE SECURITY: THEORY, LAW AND PRACTICE* 102 (2013).

129. With regard to Article 11(2) of the Charter, which states that Assembly discussion relating to the maintenance of international peace and security for which action is ultimately necessary must be referred to the Council, it has been noted that this refers to the taking of enforcement action, in the sense of binding action, rather than the recommendation thereof and, thus, that it is inapplicable to an Assembly recommendation proposing the use of force under the U4P resolution. See Andrew J. Carswell, *Unblocking the UN Security Council: The Uniting for Peace Resolution*, 18 J. CONFLICT & SECURITY L. 453, 473–74 (2013).

130. *Certain Expenses of the United Nations, Advisory Opinion*, 1962 I.C.J. Rep 151, 163 (July 20).

taneous action by the General Assembly and the Security Council has been superseded by practice.¹³¹

Additionally, the Charter provides that the General Assembly may address recommendations to both singular and multiple states. In practice, the General Assembly has directed recommendations to, *inter alia*, “member states,” “specific member states,” “all states,” and “governments”.¹³² In sum, the General Assembly has express authorization to make recommendations aimed at maintaining international peace and security, including recommendations to peaceably resolve ongoing threats, directed both to a state and the international community as a whole. Applied to the circumstances of R2P and the role envisaged within the doctrine for General Assembly actions under the Charter as protection for populations at risk from R2P crimes—the Assembly has the power to declare that a state has lost its *protection legitimacy* and consequently may not request external military assistance where the state is committing or complicit in international crimes.

Such a General Assembly declaration would not—given the lack of legal effect of Assembly resolutions—have binding effect.¹³³ However, a determination of this kind would constitute recognition of an existing violation of international law. Accordingly, the declaration’s lack of legal effect would not alter the effect of a declaration that the state committing or complicit in the commission of R2P crimes has lost its *protection legitimacy* and may not invite external military forces into a situation of R2P crimes. Instead, such a declaration would simply amount to an acknowledgment by the U.N. of an ongoing situation. In other words, the General Assembly’s declaration, which merely recognizes an existing set of circumstances, does not need to be binding in order to be effective. It merely recognizes the occurrence of a violation of international law—the commission of R2P crimes. It also acknowledges that certain consequences result from the violation, namely the loss of a state’s *protection legitimacy*.

131. *Id.*

132. Eckart Klein & Stefanie Schmahl, *Article 11*, in *THE CHARTER OF THE UNITED NATIONS: A COMMENTARY* 491, 501 (Bruno Simma et al. eds., 3d ed. 2012).

133. *South West Africa Cases (Eth. v. S. Afr.; Liber. v. S. Afr.)*, Judgment, 1966 I.C.J. Rep. 6, ¶ 98 (July 18).

The non-binding legal status of any such declaration is important for two reasons. First, practice shows that a U.N. statement need not be legally binding in order to legally characterize the actions of states or non-state actors in a particular manner.¹³⁴ This is significant as the WSOD creates no requirement for the U.N. to formally declare that R2P crimes have been committed in order to act. However, in the case of the most significant reaction of the international community—external intervention under the banner of a Security Council Resolution—a declaration of the commission of R2P crimes would necessarily be included in any resolution determining the need for an international mission. Second, while not creating legal effects, a General Assembly declaration is indispensable in terms of the legitimacy of R2P. Although in the situation presented in this article, the legal violation has occurred by the time the General Assembly recognizes it as such, unilateral declarations of R2P violations and resulting actions by individual states against the offending state on a unilateral basis would likely lead to destabilisation of international relations and completely undermine the R2P doctrine. The necessity of a General Assembly resolution therefore originates not in its effects but in its source: that it is a U.N. declaration recognizing the commission of R2P crimes by a majority of member states imbues the pronouncement with a legitimacy that unilateral decisions do not have.

Importantly, this proposal of limiting the sovereign right of a state to invite external military intervention applies only when the state is committing or complicit in the commission of R2P crimes. Paragraphs 138–139 of the WSOD, and the ICISS Report upon which they are built, make no distinction between direct state involvement or complicity in the commission of crimes and the state's inability to prevent such crimes as a basis for external intervention.¹³⁵ However, under the *protection legitimacy* rubric, a differentiation should be made between situations in which the state is either (i) directly committing or complicit in the commission of R2P crimes, or (ii) unable to prevent the commission of R2P crimes. Where a state loses its *protection legitimacy* by virtue of being unable—for

134. See, e.g., G.A. Res. 498 (V), ¶ 1 (Feb. 1, 1951) (declaring Chinese acts of aggression against Korea).

135. ICISS REPORT, *supra* note 79, ¶ 4.22.

example, due to weak state institutions or a militarily powerful non-state actor—to halt the commission of R2P crimes, the prohibition on inviting external forces should not apply, as an external invitation could arguably assist in bringing the commission of R2P crimes to an end. On the other hand, where a state is actively facilitating the commission of R2P crimes by supporting the group(s) responsible, then it is unlikely in practice that the state will seek external support to quell what they themselves are supporting. This highlights the need to prevent invited external military interventions which effectively worsen the commission of R2P crimes.

V. LEGAL EFFECTS OF AN INTERVENTION BY INVITATION IN AN R2P SITUATION

In a situation in which R2P crimes are being committed and the General Assembly consequently declares that the state has lost its *protection legitimacy*, a question arises as to the legal impact of the loss of *protection legitimacy* on the part of the government committing or complicit in R2P crimes as it relates to the other actors in the international system. Two specific inquiries are of interest here: first, how the loss of *protection legitimacy* impacts the legality of the actions of the intervening state, and where specific legal liabilities accrue therein; and second, how the international community may respond, in terms of sanctions and other countermeasures, to the above violations of the law.

A. *Legal Impact upon the Intervening State*

While it is clear that the host government, through the commission or involvement in the commission of R2P crimes, has performed an illegal act to which external actors may respond with legal countermeasures—it is not immediately obvious what the precise nature of the illegal act committed by the intervening state is. Consequently, it is unclear what the appropriate response from the international community should be. As an illustration, consider the question of external sanctions upon the intervening state: is imposition of sanctions for the simple act of accepting an invitation to intervene in an R2P situation legitimate? Or would such sanctions only become legitimate should the intervening state refuse a demand to withdraw from the U.N. Security Council or General Assembly? Al-

ternatively, would there be a requirement for a material act in support of the commission of R2P crimes before sanctions against an intervening state could be legitimate?

In order to address this issue, this article examines the specific legal violations involved in an intervention in R2P situations. There are three potential types of violation: (1) breaches of the principle of non-intervention and the right to self-determination; (2) complicity by the intervening state in the R2P crimes committed by the host government, which constitutes a violation of Article 16 of the ILC's Draft Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA);¹³⁶ and (3) breaches of Article 41 of ARSIWA concerning third-party actions with regards to breaches of *jus cogens* norms.¹³⁷

1. *Violation of the Principle of Non-Intervention and the Right to Self-Determination*

The core argument of this article is that the government's forfeiting of its *protection legitimacy* through the commission of R2P crimes results in the loss of the legal power to consent to an external intervention. As this consent functionally overrules the principle of non-intervention, the obvious result of the forfeiting of this power is that prohibited interventions violate the rule. Such interventions should consequently be considered no different than a non-consensual breach of the sovereignty of the state in question. As this breach occurs at the moment of intervention, imposition of sanctions and other countermeasures would be permissible from the commencement of the act—without needing to wait for a demand to withdraw to be issued and refused. Providing that the General Assembly has officially recognized the situation as falling under the R2P rubric, the invited state ought to be aware of its obligation not to accept an invitation to intervene.

A prohibited intervention may also be a violation of the population in question's right to self-determination. From the very origins of international legal philosophy in the work of

136. Int'l Law Comm'n, Draft Articles on Responsibility of States for Internationally Wrongful Acts, art. 16, U.N. Doc. A/56/10 (Nov. 6, 2001) [hereinafter ILC Draft Articles].

137. *Id.* art. 41.

Emer de Vattel,¹³⁸ the defence of sovereignty as a foundational norm of the international legal system has been premised on sovereignty operating as the external manifestation of a people's right to self-determine.¹³⁹ In this regard, the legitimate government of a state acts as the gatekeeper between the international and domestic spheres, with an invitation to intervene understood as issuing from the population through the government acting as its representative. The invitation operates as a form of permission for the intervening state to become involved in the host state's process of internal self-determination within established parameters. As the loss of *protection legitimacy* removes the right of the host government to act as guardian of the population, the prohibited intervention becomes a violation of their self-determination.

As with the breach of the non-intervention principle, this violation of self-determination occurs at the moment of intervention.¹⁴⁰ For both of these breaches, the violation continues for the length of the intervention,¹⁴¹ ceasing only when the intervening state withdraws. In the unlikely scenario that a new government, who would benefit from a renewed *protection legitimacy* insofar as it does not continue the previous government's policy of committing R2P crimes, consents to the intervener's continuing presence, the violation ends upon the issuing of this consent.

2. *Complicity in the R2P Crimes*

While the breaches of non-intervention and self-determination constitute the primary violations of international law resulting from a prohibited intervention, two other potential breaches are of interest. However, these breaches may be subject to more interpretational contestation than the primary breaches above. This section discusses the question of complicity in the R2P crimes first, followed by a brief discussion of the

138. EMER DE VATTEL, *THE LAW OF NATIONS* 94–96 (Liberty Fund 2008) (1758). See generally INTERNATIONAL RELATIONS IN POLITICAL THOUGHT 311–25 (Chris Brown et al. eds. 2002) (discussing the role of Vattel in the emergence of international law as an autonomous branch of legal theory).

139. See, e.g., Butler, *supra* note 63 (discussing the relationship between sovereignty as responsibility and self-determination).

140. ILC Draft Articles, *supra* note 136, art. 14.

141. *Id.*

potential applicability of ARSIWA Article 41 to the situation under consideration.

As regards complicity in international law, the most authoritative statement on the subject is Article 16 of ARSIWA, which states that:

A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if:

(a) that State does so with knowledge of the circumstances of the internationally wrongful act; and

(b) the act would be internationally wrongful if committed by that State.¹⁴²

While the provision of material support by the intervening state to the commission of R2P crimes would be an obvious act of complicity, it is additionally possible that the test established by Article 16 could be interpreted such that a state undertaking a prohibited intervention would be complicit in the crimes by the very act of intervening. There are two aspects to the complicity test key to this discussion: the necessary extent of state involvement in the crime, and the requirement that the state have knowledge of the circumstances of the crime.

First, the ILC commentary on ARSIWA declares that “the assisting State will only be responsible to the extent that its own conduct has caused or contributed to the internationally wrongful act,” with “no requirement that the aid or assistance should have been essential to the performance of the internationally wrongful act; it is sufficient if it contributed significantly to that act.”¹⁴³ In the 2007 *Genocide* case, the ICJ defined the standard for state complicity in the crime of genocide as “the provision of means to enable or facilitate the commission of the crime.”¹⁴⁴ This standard is arguably equally applicable to the remaining R2P crimes on account of their similar nature and common grouping in other international legal instruments, most notably in the Rome Statute of the International

142. *Id.* art. 16.

143. *Report of the Commission to the General Assembly on the Work of its Fifty-Third Session*, *supra* note 23, at 66.

144. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), Judgment, 2007 I.C.J. Rep. 43, ¶ 419 (Feb. 26) [hereinafter *Genocide*].

Criminal Court.¹⁴⁵ It is not difficult to envisage how an intervention on the invitation of a state committing R2P crimes could enable or facilitate the commission of said crimes—either through direct involvement in or support of the acts as they occur, or indirectly through supplying military assistance that enables the host state to divert its attention and resources towards increasing its capacity for atrocity commission.

The more complicated aspect of the Article 16 criteria is the so-called *knowledge of the circumstances* test. In its commentary, the ILC took a strict approach to the test, requiring that the intervening state “knowingly [provide] an essential facility” in order to be considered complicit.¹⁴⁶ Such an interpretation makes it difficult for a prohibited intervention to automatically trigger the requirement. However, there is some evidence in support of an alternate, liberal interpretation of what constitutes knowledge in this situation. In the *Genocide* case, the ICJ found that an awareness of the *dolus specialis* (specific intent) of the principal perpetrator was sufficient for the provision of assistance to the commission of genocide to constitute an illegal act.¹⁴⁷ Vaughan Lowe argues that this knowledge is inferable from behavior, in that “states must be supposed to intend the foreseeable consequences of their acts.”¹⁴⁸ Additionally, the ICJ applied an effective *known or should have known* test in the *Corfu Channel* case when establishing Albanian responsibility for mines in its territorial waters.¹⁴⁹ Given that the proposed prohibition would require a declaration from the General Assembly concerning R2P crimes, an illegally intervening state claiming lack of knowledge about the foreseeable consequences of its actions would face extreme difficulty.

Consequently, undertaking a prohibited intervention would in itself constitute sufficient action for the intervening state to be complicit in the R2P crimes. Such an interpretation

145. Rome Statute of the International Criminal Court art. 6–8, July 17, 1998, 2187 U.N.T.S. 3.

146. ILC Draft Articles, *supra* note 136, art. 16(1).

147. *Genocide*, 2007 I.C.J. Rep. at 218, ¶ 421.

148. Vaughan Lowe, *Responsibility for the Conduct of Other States*, 101(1) J. INT’L L. & DIPL. 1, 8 (2002). See MILES JACKSON, *COMPLICITY IN INTERNATIONAL LAW* (2015) (for a comprehensive discussion of the principle of complicity in international law).

149. *Corfu Channel Case* (U.K. v. Alb.), Judgment, 1949 I.C.J. Rep. 4, 22–23 (Apr. 9).

would, however, be open to challenge from those who favor a more conservative approach to the test established in Article 16 ARSIWA.

3. *Breach of Article 41 ARSIWA*

The final potential violation considered is a breach of Article 41 ARSIWA. This article declares that states may not recognize as lawful any situation created by a serious breach of *jus cogens* norms, and prohibiting rendering of any aid or assistance in maintaining that situation.¹⁵⁰ The four categories of R2P crimes as outlined in the WSOD are widely regarded to have achieved *jus cogens* status.¹⁵¹ Accordingly, Article 41 prohibits states from recognizing the legality of the commission of R2P crimes or from taking any action that may indicate such legality. Undertaking an invited intervention in this specific context of R2P crimes would constitute an implicit claim that the situation was not subject to the proposed prohibition—effectively denying the illegality of those crimes and implying the situation is lawful. This would constitute a breach of Article 41. As a prohibited intervention would likely be undertaken with the intent of assisting the host government in obtaining or maintaining military superiority in a situation, it would thus additionally breach Article 41 by assisting in the maintenance of a situation violating *jus cogens* norms.

B. *Legal Parameters of the Response of the International Community*

With regards to any of the aforementioned breaches, the violation would commence at the initiation of the intervention and continue until the illegality of the intervention ended either through withdrawal or issuance of legitimate consent. In

150. See ILC Draft Articles, *supra* note 136, art. 41(2).

151. See M. Cherif Bassiouni, *International Crimes: Jus Cogens and Obligatio Erga Omnes*, 59 L. & CONTEMP. PROBS. 63, 68 (1996); *Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Rwanda)*, 2006 I.C.J. 219, ¶ 64 (Feb. 3); *Jurisdictional Immunities of the State (Ger. v. It.)*, Judgment, 2012 I.C.J. 99, ¶ 93 (Feb. 3). While ethnic cleansing does not exist as a separately defined crime in the core texts of international criminal law, such as the Rome Statute, it is accepted that most of the acts which comprise ethnic cleansing would fall under the definitions of genocide or crimes against humanity. WILLIAM A. SCHABAS, *AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT* 106, 115 (4th ed. 2014).

response to such an illegal intervention, the international community or members thereof could undertake countermeasures against the intervening state; the legal parameters regarding the type and scale of these countermeasures would be dependent upon the source of their authorisation.

It is important to note first that, as a consequence of the U.N. Charter's rules on the use of force, the only entity with the legal power to undertake or authorize countermeasures involving the use of military force—including counter-interventions to protect a population under threat from the combination of a host government and an intervening state—is the U.N. Security Council.¹⁵² Given the potential problem of the veto, discussed above, it is likely that situations will arise in which a deadlock in the Council renders forceful countermeasures legally impermissible, making it necessary for the international community to turn to non-forceful reprisal measures, such as the imposition of sanctions.

Any multilateral institution with the necessary legal power, such as a regional organisation,¹⁵³ or even a single state,¹⁵⁴ may undertake non-forceful countermeasures. As outlined in Articles 49–54 of ARSIWA, countermeasures should be reversible¹⁵⁵ and proportionate,¹⁵⁶ should uphold obligations under human rights law¹⁵⁷ and *jus cogens* norms,¹⁵⁸ and should be terminated as soon as the illegal action ends.¹⁵⁹ While this article proposes that the General Assembly should be responsible for the recognition of R2P situations that would trigger the prohibition on intervention, it should be noted that the General Assembly has no legal power to impose sanctions or other countermeasures on account of the non-binding

152. U.N. Charter arts. 2(4), 39–51. The specific illegality of forceful countermeasures outside of Security Council authorisation is recognized in Article 50(1)(a) of ARSIWA. ILC Draft Articles, *supra* note 136, art. 50(1)(a).

153. For an explanation of the legal basis upon which such sanctions are based as regards the European Union, see *Sanctions or Restrictive Measures* (2008), http://eeas.europa.eu/archives/docs/cfsp/sanctions/docs/index_en.pdf.

154. United Nations Legislative Series, BOOK 25: MATERIALS ON THE RESPONSIBILITY OF STATES FOR INTERNATIONALLY WRONGFUL ACTS (2012), 304.

155. ILC Draft Articles, *supra* note 136, art. 49(3).

156. *Id.* art. 51.

157. *Id.* art. 50(1)(b).

158. *Id.* art. 50(1)(d).

159. *Id.* art. 53.

nature of its resolutions.¹⁶⁰ It can, however, *recommend* the imposition of sanctions, which states or other international actors may impose voluntarily.¹⁶¹

As an illustration of the proposed prohibition on intervention by invitation in an R2P situation, the theoretical framework outlined above is applied to a contemporary example where a state has intervened militarily upon request into a situation in which R2P crimes are being committed below. Specifically, the next section discusses recent interventions in Syria and Iraq.

VI. INTERVENTION BY INVITATION IN SITUATIONS OF R2P CRIMES: SYRIA AND IRAQ

Beginning in mid-March 2011, state security forces met widespread, initially peaceful, demonstrations of the Syrian people with brutal violence.¹⁶² The situation rapidly “degenerated from legitimate popular aspirations into a conflagration of an unparalleled scale and magnitude.”¹⁶³ In the years since, international actors have investigated and publicized war crimes and crimes against humanity, primarily against Syrian civilians.¹⁶⁴ U.N. reports from 2011 onwards, emanating from the High Commissioner for Human Rights,¹⁶⁵ the Human Rights Council,¹⁶⁶ and the Committee Against Torture,¹⁶⁷ af-

160. The General Assembly does have the power to suspend “the exercise of the rights and privileges of [UN] membership” or expel a state from the UN, but can only do so under “the recommendation of the Security Council.” U.N. Charter arts. 5–6.

161. *See, e.g.*, G.A. Res. 1899 (XVIII), at 46 (Nov. 13, 1963) (explaining the petroleum embargo on South Africa recommended by the General Assembly in response to the actions of that state in Namibia).

162. Human Rights Council, Rep. of the Indep. Int’l Comm’n of Inquiry on the Syrian Arab Republic, ¶ 8, U.N. Doc. A/HRC/28/69 (Feb. 5, 2015) [hereinafter H.R.C. February 2015 Report]; Katherine Marsh, *Syrian Regime Launches Crackdown by Shooting 15 Activists Dead*, GUARDIAN (Mar. 24, 2011), www.theguardian.com/world/2011/mar/24/syria-crackdown-shooting.

163. H.R.C. February 2015 Report, *supra* note 162, ¶ 134.

164. *See, e.g., id.* ¶ 135 (noting the rise in “war crimes, crimes against humanity and human rights violations” in Syria during its civil war).

165. Human Rights Council, Rep. of the United Nations High Comm’r for Human Rights on the Situation of Human Rights in the Syrian Arab Republic, U.N. Doc. A/HRC/18/53 (Sept. 15, 2011).

166. Human Rights Council, Rep. of the Indep. Int’l Comm’n of Inquiry on the Syrian Arab Republic, U.N. Doc. A/HRC/S-17/2/Add.1 (Nov. 23,

firmed allegations that government and rebel forces committed crimes against humanity, and that the Syrian government was aware and potentially complicit in the widespread and systematic commission of human rights violations.

Additionally, the U.N.-created Independent International Commission of Inquiry on the Syrian Arab Republic has released periodic reports detailing the types of actions taken by the Syrian authorities against civilians, including a “surrender or starve” siege strategy against opposition controlled areas, indiscriminate shelling, and aerial bombardment using a variety of weaponry—including cluster munitions, thermobaric bombs, and barrel bombs—some containing chemical agents.¹⁶⁸ The Independent Commission of Inquiry concluded, in clear R2P terminology, that “[t]he Syrian State has manifestly failed to protect its citizens from mass atrocities. War crimes and crimes against humanity have been committed on a massive scale.”¹⁶⁹

Despite the well documented nature of such information,¹⁷⁰ and the seemingly clear need for an R2P-type response, the Security Council has been unable to pass a number of draft Chapter VII resolutions due to the use of the veto

2011); Human Rights Council, Rep. of the Indep. Int’l Comm’n of Inquiry on the Syrian Arab Republic, U.N. Doc. A/HRC/19/69 (Feb. 22, 2012).

167. *UN Committee Against Torture Concerned About Gross and Widespread Rights Violations*, RELIEFWEB (Nov. 25, 2011), <https://reliefweb.int/report/syrian-arab-republic/un-committee-against-torture-concerned-about-gross-and-widespread-righ-0>.

168. H.R.C. February 2015 Report, *supra* note 162, ¶¶ 10–15.

169. *Id.* ¶ 47.

170. *See, e.g.*, Human Rights Council, Rep. of the Indep. Int’l Comm’n of Inquiry on the Syrian Arab Republic, U.N. Doc. A/HRC/34/64 (Feb. 2, 2017); Human Rights Council, Rep. of the Indep. Int’l Comm’n of Inquiry on the Syrian Arab Republic, U.N. Doc. A/HRC/31/68 (Feb. 11, 2016); Human Rights Council, Rep. of the Indep. Int’l Comm’n of Inquiry on the Syrian Arab Republic, U.N. Doc. A/HRC/30/48 (Aug. 13, 2015); H.R.C. February 2015 Report, *supra* note 162; Human Rights Council, Rep. of the Indep. Int’l Comm’n of Inquiry on the Syrian Arab Republic, U.N. Doc. A/HRC/27/60 (Aug. 13, 2014); Human Rights Council, Rep. of the Indep. Int’l Comm’n of Inquiry on the Syrian Arab Republic, U.N. Doc. A/HRC/24/46 (Aug. 16, 2013); Human Rights Council, Rep. of the Indep. Int’l Comm’n of Inquiry on the Syrian Arab Republic, U.N. Doc. A/HRC/21/50 (Aug. 16, 2012); Human Rights Council, Rep. of the Indep. Int’l Comm’n of Inquiry on the Syrian Arab Republic, U.N. Doc. A/HRC/S-17/2/Add.1 (Nov. 23, 2011).

power by China and Russia.¹⁷¹ Such efforts to block meaningful U.N. action stand in contrast to the presidents of Russia and China publicly calling for an end to the hostilities in Syria.¹⁷² The Russian and Chinese use of the veto, which is itself a legitimate power provided for under the Charter,¹⁷³ arises from opposition to what the Russian and Chinese allege is a violation of non-interference in domestic affairs and the illicit use of interventionist measures to effect regime change.¹⁷⁴

Against this background, the Russian parliament approved a request from President Putin, on September 30, 2015, to use Russian military forces in Syria pursuant to a request from Syrian President Bashar Assad.¹⁷⁵ According to the Kremlin: “[t]he operation’s military goal is exclusively air support of the Syrian armed forces in their fight against the [Islamic] State.”¹⁷⁶ They continued by stating that such use of Russian forces was “based on the generally recognised international law norms and principles.”¹⁷⁷ Shortly thereafter, on October 2, 2015, the governments of France, Germany, Qatar,

171. See, e.g., S.C. Draft Res. 2011/612 (Oct. 4, 2011) (joint draft resolution of France, Germany, Portugal, and the United Kingdom calling for Syrian authorities to cease the use of force against civilians and stop human rights violations); S.C. Draft Res. 2012/77 (Feb. 4, 2012); S.C. Draft Res. 2014/348 (May 22, 2014) (French draft resolution referring Syria to the ICC, co-sponsored by 65 member states); S.C. Draft Res. 2012/538 (July 19, 2012) (joint draft resolution of France, Germany, Portugal, the United Kingdom, and the United States demanding the implementation of a six-point proposal to bring an end to violence and human rights violations, secure humanitarian access, and facilitate a Syrian-led political transition).

172. Wu Jiao et al., *China, Russia Call for End of Violence in Syria*, CHINA DAILY (Mar. 29, 2012), www.chinadaily.com.cn/china/2012HuAsiaTour/2012-03/29/content_14937237.htm.

173. U.N. Charter art. 27(3). See also, Andreas Zimmermann, *Voting: Article 27*, in 1 THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 871, 927–28 (Bruno Simma et al. eds., 3d ed. 2012) (discussing U.N. Security Council members’ use of their veto power including, abuse of the veto power and double vetoes).

174. Louis Charbonneau, *Russia U.N. Veto on Syria Aimed at Crushing West’s Crusade*, REUTERS, Feb. 8, 2012, www.reuters.com/article/us-un-russia-idUSTRE8170BK20120208#B9tfIvUSqB0sUQgC.97.

175. *Lawmakers Authorize Use of Russian Military Force for Anti-IS Airstrikes in Syria*, RUSSIAN NEWS AGENCY (Sept. 30, 2015), <http://tass.com/politics/824795>.

176. *Id.*

177. *Id.*

Saudi Arabia, Turkey, the UK, and the United States issued a joint declaration expressing concern that Russian actions in areas of Syria such as Homs were not targeting the IS but were, in fact, attacks on Syrian opposition that led to civilian casualties.¹⁷⁸ NATO released a similar statement days later.¹⁷⁹

Irrespective of whether Russian military support was used directly against opposition forces or was indeed used against IS—thus allowing the Syrian government to potentially divert its own forces and focus on attacking opposition fighters—Russian intervention by invitation in Syria is a violation of international law under the rubric set out above. Syria has unquestionably lost its *protection legitimacy* as a result of its direct involvement in, and tolerance of, the commission of R2P crimes against its own population. The invitation issued by Syria for Russian intervention was therefore devoid of legal authority. Russia's acceptance of that invitation, with full awareness of the ongoing R2P crimes against the Syrian population, consequently amounts to a breach of international law. Though the Russian government has protested against measures proposed by the Security Council on the basis that the proposals amounted to unlawful intervention, Russia's sending forces to Syria is itself a proscribed intervention—as the basis claimed for its legality was vitiated by Syria's commission of R2P crimes against its population.

The illegality of the Russian intervention in Syria stands in contrast with the intervention undertaken by a coalition led by the United States against the operation of the IS group in Iraq beginning in August 2014.¹⁸⁰ As with the Russian actions in Syria, these actions lacked Security Council authorization. The United States, instead, undertook the action “in coordination

178. Press Release, Foreign & Commonwealth Office, Joint Declaration on Recent Military Actions of the Russian Federation in Syria (Oct. 2, 2015), <https://www.gov.uk/government/news/joint-declaration-on-recent-military-actions-of-the-russian-federation-in-syria>.

179. Press Release, N. Atl. Treaty Org. Statement by the North Atlantic Council on Incursions into Turkey's Airspace by Russian Aircraft (Oct. 5, 2015), https://www.nato.int/cps/en/natohq/news_123392.htm.

180. Dan Roberts & Spencer Ackerman, *US Begins Air Strikes Against ISIS Targets in Iraq, Pentagon Says*, GUARDIAN (Aug. 8, 2014), www.theguardian.com/world/2014/aug/08/us-begins-air-strikes-iraq-isis.

with and at the request of the Government of Iraq¹⁸¹—i.e., the posited legality of the operations arose from the consent of the host state.¹⁸² While the putative source of legality for the intervention—host state consent—and ostensible target, IS, are the same in both cases, they are distinguishable situations due to the Syrian government’s loss of *protection legitimacy*. The loss subsequently proscribed government invitation of interventions, in contrast to the Iraqi government’s retention of this power due to its clean hands in relation to the commission of R2P crimes. Indeed, the Iraqi situation provides a useful exemplar of the previously discussed distinction between states that commit or facilitate R2P crimes, who ought to lose their *protection legitimacy*, and those that are unable to prevent non-state actors from engaging in such crimes on their territory,¹⁸³ who should retain their power to invite intervention so that they may permit military operations within their territory by a more powerful state in an effort to halt or prevent the crimes in question.

181. Press Release, White House, Letter from the President—War Powers Resolution Regarding Iraq (Sept. 23, 2014), <https://obamawhitehouse.archives.gov/the-press-office/2014/09/23/letter-president-war-powers-resolution-regarding-iraq>.

182. It should be noted that, in addition to the activities against IS in Iraq, the U.S.-led coalition’s operations against the group included actions taken within the territory of Syria, for which the coalition received no formal consent from the Assad government. Some scholars have argued that the legality of the actions in Syria can be based instead upon the Syrian government being “unable or unwilling” to prevent IS from attacking Iraq from inside Syrian territory. See, e.g., Kate Martin, *UK’s Legal Rationale for Drone Strikes Differs Fundamentally from US Rationale*, JUST SECURITY (Sept. 25, 2015), www.justsecurity.org/26343/uk-rationale-drone-strikes-differs/ (noting that states have a right to use military force to address “imminent” threats to their security emanating from terrorist or other armed groups in countries that are unwilling or unable to stop such actors). This argument is both hotly contested in academic commentary and deficient in support from state practice. See, e.g., Kevin Jon Heller, *That “Broad Consensus” for Unwilling/Unable Just Got Less Broad*, OPINIO JURIS (Sept. 28, 2015), <http://opiniojuris.org/2015/09/28/that-broad-consensus-for-unwillingunable-just-got-less-broad/> (pointing out that the “broad consensus that there is a right to use military force in self-defense when the host country is unable or unwilling to stop the attack” is supported by only four of the world’s 194 states).

183. See, e.g., Human Rights Council, “They Came to Destroy”: ISIS Crimes Against the Yazidis, U.N. Doc. A/HRC/32/CRP.2 (June 15, 2016) (outlining the allegations of genocide, crimes against humanity and war crimes committed by IS against the Yazidi population in Iraq and Syria).

VII. CONCLUSION

The international community accepts, with varying degrees of support, the basic premise that the sovereignty which accords the rights and privileges of statehood is not absolute. Sovereignty may be circumscribed where the population of that state falls victim to genocide, crimes against humanity, war crimes, or ethnic cleansing. Within this conception of sovereignty, there is a basis for what is described above as *protection legitimacy*, wherein a state that is committing or complicit in the commission of R2P crimes has failed to protect its people and has consequently lost a number of rights deriving from sovereignty. R2P provides that in certain contexts, state sovereignty may be limited in the most fundamental way—namely, that the international community could intervene militarily within the state. What is argued for here is that within the same conception of sovereignty as responsibility, lies a prohibition on a state that is committing or complicit in the commission of R2P crimes from inviting external military assistance—a right which would otherwise accrue by dint of state sovereignty.

Due to the significance of any limitation on state sovereignty, such a declaration of lost *protection legitimacy* would necessarily have to emanate from the U.N. for legitimacy purposes. Given the difficulties faced by the Security Council in its attempts to reach sufficient consensus for consistent action under the R2P framework, this article suggests that the General Assembly is the most suitable organ for declaring when a state has lost its *protection legitimacy*. Though non-binding, a General Assembly resolution acknowledging the commission of R2P crimes and the involvement of a government therein would serve as a basis for preventing the government in question from exacerbating the commission of crimes by inviting military assistance from third states. The consequences for any state accepting an invitation to intervene in a situation involving the commission of R2P crimes would be a violation of international law with the attendant possibility of facing countermeasures under the law of state responsibility. Applied in practice, the notion of *protection legitimacy* would have prohibited the Russian intervention that occurred in the Syrian conflict—recognized by various international bodies as amounting to

state involvement in R2P crimes—at the request of the Syrian government.

R2P is designed to ensure that a state protects its population from the gravest crimes known to humanity. Tying the concept of protection to state sovereignty was a means of making the commission of R2P crimes impactful for states, such that they could lose some of the rights and privileges afforded by that sovereignty. In line with this, and as proposed here, states should not—by mere fact of being in power—enjoy the sovereign right to invite external military assistance where that state is committing or complicit in R2P crimes, regardless of the pretext or claims the intervenor or requestor may make about the specific and narrow reasons for seeking such assistance. The simple fact is that military assistance to a state committing or complicit in the commission of R2P crimes only serves to assist, directly or indirectly, its repressive acts against its population. A state targeting its people in such a manner should not be permitted to seek help in its violation of international law. Any state which does accept an invitation to intervene militarily in a situation involving R2P crimes should face consequences for its actions. R2P embodies an evolution in our conception of sovereignty, conditioning the power on protection of populations such that the commission of atrocity crimes has real consequences for states. Allowing abuse of that same veil of sovereignty to assist a state targeting its population would grossly violate the underlying and foundational spirit of R2P.