*Review of International Studies (2010), 36, 25–46* doi:10.1017/S0260210511000106
© 2010 British International Studies Association

# Responsibility and obligation in the 'Responsibility to Protect'

WILLIAM BAIN*

Abstract. This article takes up Louise Arbour's claim that the doctrine of the 'Responsibility to Protect' is grounded in existing obligations of international law, specifically those pertaining to the prevention and punishment of genocide. In doing so, it argues that the aspirations of the R2P project cannot be sustained by the idea of 'responsibility' alone. The article proceeds in arguing that the coherence of R2P depends on an unacknowledged and unarticulated theory of obligation that connects notions of culpability, blame, and accountability with the kind of preventive, punitive, and restorative action that Arbour and others advocate. Two theories of obligation are then offered, one natural the other conventional, which make this connection explicit. But the ensuing clarity comes at a cost: the naturalist account escapes the 'real' world to redeem the intrinsic dignity of all men and women, while the conventionalist account remains firmly tethered to the 'real' world in redeeming whatever dignity can be had by way of an agreement. The article concludes by arguing that the advocate of the responsibility to protect can have one or the other, but not both.

**William Bain** is Senior Lecturer in International Political Theory in the Department of International Politics, Aberystwyth University. He is the author of *Between Anarchy and Society: Trusteeship and the Obligations of Power* (Oxford University Press, 2003) as well as several articles that explore the politics and ethics of trusteeship, international administration, and post-conflict reconstruction. At present, he is working on a book that is provisionally entitled *The Political Theory of World Order: God, Man, and the Common Good*.

In her 2008 article in the *Review*, Louise Arbour has provided a fascinating defence of the responsibility to protect norm as being securely grounded in existing international law. From this specifically legal foundation she works-out an 'internationalised form of duty of care' that narrows the gulf between the demands of international legal obligations and the willingness of individual states and the international community to act with resolute purpose in preventing genocide, crimes against humanity, and ethnic cleansing. There is no doubt that Arbour's argument deserves to be read for what it says. More interesting, however, is what it does not say; and for that it deserves a response. The project Arbour wants to defend discloses a kind of incoherence which, contrary to her own assertion, clouds the 'intellectual clarity' of the responsibility to protect and, consequently, devalues

* The author would like to thank all who offered comments and questions at various stages of this work. In particular, I want to thank Kirsten Ainley, Chris Brown, Molly Cochran, Alexandra Gheciu, Ian Hall, Andrew Linklater, Nicholas Rengger, and Jennifer Welsh.



https://doi.org/10.1017/S0260210511000106 Published online by Cambridge University Press

its 'political usefulness' as a guide to action. In short, the ostensible innovation of shifting the terms of debate from a *right* of intervention to a *responsibility* to prevent, protect, and rebuild, falls well short of the mark insofar as the idea of 'responsibility' does not of itself sustain the kind of action that the responsibility to protect norm demands. In other words, the idea of 'responsibility' tells us who might be held accountable for the commission of mass atrocities or the failure to prevent them; it does not, however, tell us who should act to remedy these actions or punish those who are to blame.

The principal argument of this article is that the coherence of the responsibility to protect depends on an unacknowledged and unarticulated theory of obligation that connects notions of culpability, blame, and accountability with the kind of preventive, punitive, and restorative action that Arbour and others advocate. Indeed, Arbour's frequent and perplexing shifts between the language of 'responsibility' and the language of 'obligation' highlights the limitations of what can be placed on the back of 'responsibility'; and it underscores the need to bring a degree of clarity to the responsibility to protect that it presently lacks. Therefore, I shall proceed by making three principal claims: (1) Arbour's argument and the larger project of which it is a part cannot be sustained by 'responsibility' alone; (2) a theory of obligation – natural or conventional – is required to connect the 'sovereign as responsibility' principle with the 'international responsibility to protect' principle; and (3) the ensuing clarity comes at a cost, as is illustrated in the context of the responsibility to rebuild, which is denominated in the metaphysical Truth of the naturalist account or the contingent truth of the conventionalist account. In other words, the naturalist account escapes the 'real' world to redeem the intrinsic dignity that is the birthright of all men and women, and the conventionalist account remains firmly tethered to the 'real' world to redeem whatever dignity that can be created and had in an agreement. The advocate of the responsibility to protect can have one or the other, but not both.

## The imperative of action

The notion of a 'responsibility to protect' finds its origin in the peculiarities of the changing nature of conflict, particularly in post-colonial Africa. The incidence of conflict between states, the 'scourge' from which the UN system was founded to save 'succeeding generations', has steadily declined over the past several decades. But in its place a new kind of conflict, one that exacts a disproportionate toll on civilian populations, has emerged to challenge the cardinal principles upon which UN system was also founded: sovereign equality, non-interference, and territorial integrity. Indeed, the characteristic brutality of intra-state conflict has proved to be deeply corrosive of these principles, continued respect for which ends up sustaining what are otherwise unviable states.[1] It is against this backdrop that the 'sovereignty as responsibility' principle gained traction. No longer was it possible, so the argument goes, to act with impunity. Sovereignty issues no license. Instead,

[1] See Robert Jackson, *Quasi-States: Sovereignty, International Relations, and the Third World* (Cambridge: Cambridge University Press, 1990).

https://doi.org/10.1017/S0260210511000106 Published online by Cambridge University Press

sovereignty is justified in terms effectiveness, understood as the provision of a system of law and order which attends to the provision of basic needs and to the development of human dignity. Where these core responsibilities are not fulfilled the legitimacy of a government is called into question, thereby inviting remedial action, including, in the worst cases, armed intervention carried out by the international community. Thus, any tension that might arise between state sovereignty and the imperative of action is resolved in favour of the international community, because 'living up to the responsibilities of sovereignty' implies the existence of a higher authority capable of holding the supposed sovereign accountable. Some form of international system has always existed to ensure that states conform to accepted norms or face consequences, in the form of unilateral, multilateral, or collective action.[2]

This line of argument is picked-up and extended in the report of the International Commission on Intervention and State Sovereignty (ICISS): *The Responsibility to Protect*. The report has been praised on a number counts, not the least of which is its measured tone, which has saved it from a long but undistinguished fate as an over-sized coffee cup coaster in many national capitols. It has been more successful than other reports of its kind, with the Secretary-General of the UN, Ban Ki Moon, taking special interest in the report's focus on protecting civilians from genocide and other atrocities. Members of the General Assembly endorsed the 'sovereignty as responsibility' principle in the 2005 World Summit outcome document, which declares: '[w]e accept that responsibility and will act in accordance with it.'[3] The Security Council too has given its approval, having recalled and reaffirmed this commitment on at least two occasions, including one which deals specifically with the situation in Darfur.[4] The report has also elicited a substantial scholarly response, focusing mainly on issues of institutional reform, capacity building, mobilising political will, and instances of failure to protect. Of course, some of these responses tack to a sober conclusion, arguing, for example, that the World Summit decision is likely to contribute 'very little' to ensuring that 'never again' really means 'never again'; others strike a more optimistic chord in seeing the responsibility to protect as a 'central conceptual reference point' in contemporary international relations.[5]

Louise Arbour, the UN High Commissioner for Human Rights, is the latest in a long succession of distinguished figures to advance the responsibility to protect framework as a way of redressing gross human rights abuses. Like others, she embraces the idea of responsibility to escape the problems of grounding 'intervention for human protection purposes' – to use the infelicitous phraseology of the report – in the language of rights. Rights are by definition discretionary in

[2] Francis Deng et al., *Sovereignty as Responsibility: Conflict Management in Africa* (Washington, DC: Brookings Institute, 1996), chap. 1.

[3] UN General Assembly, World Summit Outcome Document, 15 September 2005, A/60/L.1, paras 138–9.

[4] See Security Council Resolution 1674 (2006), Adopted by the Security Council as its 5430th Meetings, 28 April 2006, S/RES/1674 (2006); and Security Council Resolution 1706 (2006), Adopted by the Security Council as its 5519th Meetings, 31 August 2006, S/RES/1706 (2006).

[5] See Gareth Evans, 'The Responsibility to Protect: Meeting the Challenges', Lecture to the 10th Asia-Pacific Programme for Senior Military Officers, S. Rajaratnam School of International Studies, Singapore (5 August 2008), available at: {www.crisisgroup.org}; and Alex Bellamy, 'Whither the Responsibility to Protect? Humanitarian Intervention and the 2005 World Summit', *Ethics and International Affairs*, 20:2 (2006), pp. 143–69.

https://doi.org/10.1017/S0260210511000106 Published online by Cambridge University Press

character; they inhere in a putative intervener. As such, rights prefigure a permissive mode of action, mediated by contingent motives and interests, which does not always make contact with victims who are in need of rescue. Rights are also susceptible to abuse; hence questions inevitably arise about 'purity of intent', especially in parts of the world where memories of colonial domination are still fresh.[6] This particular concern stems from a deep-rooted belief that honesty and interest do not always coincide, which is to say that too often the discourse of armed humanitarianism is invoked to disguise what are in fact less salubrious motives. Better, then, Arbour argues, to seek refuge in the idea of responsibility, which is anchored in the victim's point of view and interests as against a notoriously suspect axis of state motives and interests. Indeed, once stripped of a discretionary right of intervention states find themselves burdened with a responsibility to take action to prevent genocide, crimes against humanity, and war crimes, in what Arbour describes as a 'permanent duty to protect individuals against abusive behaviour'.[7]

There is thus far little to distinguish Arbour's position from other sympathetic accounts of the responsibility to protect. More interesting, however, is her suggestion that the intelligibility of the responsibility to protect begs no 'leap into wishful thinking' for the simple reason that the 'doctrine rests upon an undisputed obligation of international law: the prevention and punishment of genocide'.[8] An uncharitable response might interpret this claim as casting a long shadow over enthusiastic pronouncements heralding a new norm that marks a definite and long overdue break with the past. If taken seriously, a response of this sort ends up reducing the responsibility to protect to a cleverly thought-out marketing campaign aimed at getting states to fulfil already existing obligations, some of which are sixty years old. But there is something genuinely interesting in the argument from existing law, namely it holds potential interveners to a rather more exacting standard of accountability than if responsibility were construed as merely a political or moral consideration. For Arbour, the legal basis of the responsibility to protect imposes on would-be interveners a test of 'due diligence', the burden of which is evaluated in respect of influence, proximity, and knowledge, in what amounts to an 'internationalised form of duty of care'.[9] In elaborating this argument she pushes beyond the decision of International Court of Justice, which found Serbia in breach of its obligation to prevent genocide in Bosnia in Herzegovina, due to unusually close links with the perpetrators of genocide, to pose a rather more searching question: might logic of this 'duty of care' be applied to the wider international community?[10]

In attempting to answer this question Arbour lays out far-reaching consequences as to what this duty of care might entail for right conduct among states. For example, the doctrine of great power responsibility is taken in a new direction in the suggestion that the preponderant responsibility that falls on the permanent members of the Security Council extends, paradoxically, so far as to restrict the

[6] Louise Arbour, 'The responsibility to protect in international law', *Review of International Studies*, 34:3 (2008), p. 447.
[7] Arbour, 'The responsibility to protect', p. 448.
[8] Ibid., pp. 448, 450.
[9] Ibid., pp. 451–5.
[10] Ibid., p. 453.

https://doi.org/10.1017/S0260210511000106 Published online by Cambridge University Press

threat or use of the veto in certain circumstances.[11] Arbour rehearses the standard doctrine in saying that, owing to their 'global reach', these powers bear a 'heavier responsibility' in matters of grave humanitarian concern. But the privilege that goes with preponderant power is immediately qualified by the duty of care, which asks veto-wielding great powers to 'cease inhibiting other States from discharging their duty to protect when those States are willing and able to discharge their obligations'.[12] The insulation afforded by great distance is also whittled away as the requirements of due diligence fall equally on all states, irrespective of location. Nor can inaction be excused on grounds of ignorance or the incredulity that often greets reports of heinous crimes. The question, Arbour contends, does not turn on the availability of information; it turns on the kind of action that available information prompts. The crucial point, then, is failure in respect of any of these elements of responsibility – influence, proximity, and knowledge – may incur legal as opposed to merely moral or political culpability for failing to prevent 'conscience shocking' crimes. It is then possible to argue, for example, that exercising the veto in a way that frustrates intervention for 'human protection purposes' may well 'constitute a violation of the vetoing States' obligations under the Genocide Convention'.[13]

## The limits of responsibility

There is no doubt that 'the responsibility to protect' has left a definite imprint on the way in which human protection activities are conceived, and to that extent it offers a potent normative language with which to frame and to evaluate a broad range of issues that fall under the rubric of human security. And Arbour's intervention in the conversation is sure to bolster the currency of this language. But set aside a fondness for policy cheerleading, if only for a moment, to pull at the threads of the 'inherent soundness and justice'[14] of the responsibility to protect and we shall find a lack of conceptual clarity which leaves the entire project vulnerable to criticism, especially from those who would see the responsibility to protect as yet another manifestation of dominant power. In short, the shift from a *right* of intervention to a *responsibility* to protect does not sustain the kind of action envisioned by Arbour and other advocates of the cause. Consider the ICISS report's operative principles: (1) sovereignty entails responsibility for the security and well-being of a state's citizens; and (2) the international community assumes this responsibility when a state is either unable or unwilling to discharge is responsibilities.[15] The problem is that that principle (2) does not follow logically or morally from principle (1). In other words, sovereignty may well entail responsibility but saying so identifies only the person – natural or legal – to whom certain

[11] The 'capricious' threat or use of the veto was a central concern for the ICISS, which recommended the adoption of a code of conduct as to its use. Note, however, that Arbour's legal argument goes well beyond the political solution advocated by the Commission. See ICISS, *The Responsibility to Protect* (Ottawa: International Development Research Centre, 2001), pp. 51, 75.
[12] Arbour, 'The responsibility to protect', p. 453.
[13] Ibid., pp. 451–4.
[14] Ibid., p. 448.
[15] ICISS, *The Responsibility to Protect*, pp. 11–16.

https://doi.org/10.1017/S0260210511000106 Published online by Cambridge University Press

actions of omission or commission are attributable; or, to push the concept further, it identifies the person who may be held accountable for these actions.[16]

It is this latter conception of responsibility, that is, responsibility understood in terms of accountability, which is particularly relevant to the responsibility to protect. The idea of responsibility is, of course, a central part of a shared normative vocabulary that is used to describe and to evaluate the character of human conduct. It is with reference to responsibility that expressions of praise and blame are communicated; and to that extent the idea of responsibility and the related concept of accountability are deeply entangled with judgements that interrogate conduct in light of expectations presupposed in shared normative standards.[17] Thus, the idea of responsibility discloses a forward-looking or 'prospective' face, which is to say, as Arbour suggests, that states are responsible prospectively for faithfully adhering to obligations laid out in the Genocide Convention. Crucially, prospective responsibility does not require the actual commission of harm for evaluative statements to make sense: the expectation that states *ought* to conduct themselves in this manner leaves them liable to blame when they fail to prevent harm. The idea of responsibility also discloses a backward-looking or 'retrospective' face, whereby praise or blame is apportioned in relation to an evaluation of specific actions and the consequences in which they result. Thus, a state is said to be retrospectively responsible for causing harm, resulting from conduct in breach of the Genocide Convention, which may merit blame and whatever punishment or reparations might be due.[18]

If the argument from responsibility is taken further we are able to describe the kind of agent to which it pertains as well as the conditions in which talk of responsibility is appropriate. The idea of responsibility conceived in terms of accountability is very closely connected to that of human freedom and the notion of voluntary action. For it makes little sense to blame a man for failing to prevent an earthquake or to praise a woman for desiring food for no other reason than to satiate her hunger. But considerations of blame and praise do arise when an earthquake results in the collapse of substandard construction, killing or injuring innocent persons as happened in China's Sichuan province; and they arise as well when a desire for food is motivated by a determination to deny it to others for political reasons, thereby threatening their well-being. Likewise, it is nonsensical to blame the government of Myanmar for the mere fact of cyclone Nargis and the destruction it wrought; but expressions of blame, imputing responsibility, do gain traction when projected against a backdrop of the government's tardy, if not negligent, response in assisting the victims of the disaster. In thinking through such questions it may matter that the person in question is mentally ill or below the age

[16] On the distinction between 'attributability' and 'accountability' see Gary Watson, 'Two Face of Responsibility', *Agency and Answerability* (Oxford: Oxford University Press, 2004), pp. 260–88. The ICISS report confirms this much in noting that agents of states 'are responsible for their actions; that is to say, they are accountable for their acts of commissions and omission'. See ICISS, *The Responsibility to Protect*, p. 13.

[17] See Lawrence Stern, 'Freedom, Blame, and the Moral Community', *The Journal of Philosophy*, 71:3 (1974), p. 84; and Peter Strawson, 'Freedom and Resentment', *Proceedings of the British Academy*, 48 (1962), pp. 1–25.

[18] On 'prospective' and 'retrospective' responsibility see Toni Erskine, 'Introduction: Making Sense of "Responsibility" in International Relations – Key Questions and Concepts', *Can Institutions Have Responsibilities?* (Basingstoke: Palgrave, 2003), p. 8.

https://doi.org/10.1017/S0260210511000106 Published online by Cambridge University Press

of majority, in which case he or she may be absolved of responsibility altogether. These considerations might also diminish responsibility, as might extreme duress or genuine ignorance of cogent facts. Whichever the case, however, the idea of responsibility generally involves an agent who enjoys at least an element of freedom, discloses the capacity for deliberation and decision, possesses at least some knowledge of circumstances and foresight of likely consequences, and, therefore, may be held liable for the consequences of his or her actions.[19]

But we cannot glean what a third-party should do from the mere fact that someone is said to be responsible. In other words, the 'sovereignty as responsibility' principle does not of itself say anything about who should act to remedy atrocities or punish those who are to blame. The sanction for irresponsibility may be a feeling of inward distress, the torment of conscience, or alienation from one's self; it might also result in approbation that leads to social marginalisation or perhaps forfeiture of membership in a particular association. But Arbour and other advocates of the responsibility to protect have something more demanding in mind, namely a spectrum of action that includes a coercive sanction – including the use of force – which finds its imprimatur in international law. Thus, it might be argued, as does Arbour, that the responsibility to protect rests on already existing law, namely obligations pertaining to the prevention and punishment of genocide.[20] Unlike the idea of responsibility, which designates a locus of accountability, the idea of obligation does enjoin action; it is a way saying that something must be done independently of what considerations of interest or advantage might recommend. Indeed, the demand that states act to prevent genocide emanates from the fact that they have voluntarily assumed an obligation to do so. Only then does the language of responsibility become audible in any intelligible way. For it is in light this 'undisputed obligation' that states are (prospectively) responsible for conducting themselves in a manner that is consistent with the Genocide Convention; and it is in light of the same obligation that states are (retrospectively) responsible for harm caused by negligent or malicious conduct.

It is knowledge of this coordinated relation of obligation and responsibility that invests the responsibility to protect with the conceptual clarity which it presently lacks. Unfortunately, obtaining clear sight of this relation is frustrated by Arbour's frequent and bewildering oscillation between the language of obligation and the language of responsibility, obfuscating their different characters along the way. Indeed, it is 'obligation', rather than 'responsibility', which affords a 'comparative advantage' over a discretionary right of intervention. Arbour seems to concede that much as she shifts effortlessly from 'responsibility' to 'obligation' (and 'duty') to argue that it is the duty of all states to protect their citizens against abusive behaviour, to which she adds: '[a]bsent that State's ability or willingness to discharge such obligations, the onus of protection falls by default upon the broader international community.'[21] Similarly, the bedrock of her argument, the responsibility of third-parties to prevent genocide, is sustained by obligations enshrined in

[19] See generally Jonathan Glover, *Responsibility* (London: Routledge & Kegan Paul, 1970); Joel Feinberg, *Doing and Deserving: Essays in the Theory of Responsibility* (Princeton: Princeton University Press, 1970); and H. L. A. Hart, *Punishment and Responsibility: Essays in the Philosophy of Law* (Oxford: Clarendon Press, 1968).
[20] Arbour, 'The responsibility to protect', p. 450.
[21] Ibid., p. 449.

https://doi.org/10.1017/S0260210511000106 Published online by Cambridge University Press

international law.[22] Thus, in making explicit what is now only implicit in Arbour's argument it is possible to make sense of the responsibility to protect as a doctrine founded on a coordinated relationship, whereby states are burdened with obligations for which they may be held responsible in instances of failure. It is also possible to give a coherent account of the ICISS report's operative principles without having to confront the vexed question of ascribing agency to an elusive and under-theorised international community. In other words, the residual responsibility that is said to reside in the international community as such is better understood in the context of an obligation, voluntarily assumed, which demands that (contracting) states act in a particular manner.

Curiously, Arbour and other advocates of the responsibility to protect have little, if anything, to say about the place or character of obligation in their thinking, although the language of obligation tends to run throughout their arguments, both explicitly and implicitly. Nevertheless, the 'sovereignty as responsibility' formula does provide a useful starting point for thinking about obligation insofar as it suggests the character that states should disclose and the kind of normative order of which they should be a part. It surely rules out the idea of the state as being nothing more than a coercive order – that is, an arrangement of force. This view of the state emphasises the ability to issue and enforce commands; it is a superior force that imposes itself on the individual will, the effectiveness of which provides evidence that the state does in fact exist.[23] However, reducing the relation of state and individual to one of force runs up against the objection that force ought not be arbitrary in a way that leaves the individual vulnerable to the capricious will of the magistrate. Making the state an order or laws, whereby power is subject to recognised rules, does provide a defence against the arbitrary exercise of power; unfortunately, it provides no defence against arbitrary laws, such as those which the Nazis enacted in the 1930s to strip Jews of their civil rights.[24] Thus, the ICISS report takes an additional step, thereby remedying this problem, in seeing the state as a superior force, subject to law, which is also legitimate – that is, a state in which power should be accepted and in which law should be obeyed.

This conception of the state immediately begs an age old question of political thought: why, after having identified an office of authority, should anyone be obliged to obey? It must be stressed that the capacity of the state to compel obedience has nothing to do with answering this question. To have power but not authority is to be a tyrant.[25] Moreover, it has nothing to do, contra to a common but nonetheless mistaken view among scholars of International Relations, with an assessment of what in fact a state does or does not do. Indeed, whatever answer might be furnished is firmly located in the domain of (objective) right, understood as the thing or state of affairs which is just, which, as Michael Oakeshott argues, is to leave behind the world of fact for an inquiry into its underlying justification.[26]

[22] Ibid., p. 450.
[23] A. P. d'Entreves, *The Notion of the State* (Oxford: Clarendon Press, 1967), pp. 1–3.
[24] d'Entreves, *The Notion of the State*, pp. 2–3.
[25] Michael Oakeshott, 'The Authority of Governments and the Obligations of Subjects (1)', in Terry Nardin and Luke O'Sullivan (eds) *Lecture in the History of Political Thought* (Exeter: Imprint Academic, 2006), pp. 428–9.
[26] See Oakeshott, 'The Authority of Governments', pp. 427–30. On the distinction between objective and subject right see Brian Tierney, *The Idea of Natural Rights: Studies in Natural Rights, Natural Law, and Church Law, 1150–1625* (Grand Rapids, MI: William B. Eerdmans Publishing, 1997); and

https://doi.org/10.1017/S0260210511000106 Published online by Cambridge University Press

Of course, there are several possible answers that are intelligible historically, including wisdom, divine right, prescription, blood, and virtue; but in a world that tends to fetishise democracy as a universal elixir of whatever might ail the world, the answer from consent is surely the most powerful and recognisable. Hanna Pitkin explains consent as defining the limits of obligation as well as the person – again, natural or legal – to whom obedience is owed: '[l]egitimate authority is distinguished from mere coercive power precisely by the consent of those subject to it. And the justification for your obligation to obey is your own consent to it; because you have agreed, it is right for you to have an obligation.'[27] This answer, in turn, structures the direction of scholarly inquiry in a way that privileges certain fundamental (and familiar) subsidiary questions, such as 'whose consent is required?' and 'how is consent to be ascertained?'

But there are definite limits as to what consent can tell us, the most obvious being the reasons why any obligation underwritten by consent should be regarded as obligatory. H. L. A. Hart explains the significance of this problem when he says that the validity of obligations assumed in acts of consent depends on pre-existing rules that authoritatively establish that promises must be kept prior to entering into such an agreement. It follows, then, he continues, that 'such rules presupposed in the very notion of a self-imposed obligation obviously cannot derive *their* obligatory status from a self-imposed obligation to obey them'.[28] Some, such as Carol Pateman, dismiss this concern as a 'psuedo-problem', arising from an assumed nexus between the liberal state and abstract individualism, which 'dissolves' when self-imposed obligations are conceived as the product of inter-subjective 'social practice'.[29] But this rejoinder evades rather than dissolves the problem by substituting prescription for consent; it is a way of saying that self-imposed obligations are obligatory because that is the way it has been done for a long time. The limits of consent are also evident insofar as it tells us that (political) obligation is legitimate precisely because we have given our consent; it must remain silent, however, on the substantive content of obligation as well as the desirability, that is, the good, of any particular obligation or the political life to which it is ordered. In other words, argument from consent seeks 'to ground the obligation of the subject or citizen in the realm not of final but of efficient causes, not in the ends government exist to promote but in the source from which they derive their powers.'[30]

Even a cursory read of *The Responsibility to Protect* will confirm that the 'sovereignty as responsibility' principle is justified in terms of final causes – that is, the ultimate justification of state sovereignty is not found in the efficient cause of how it is legitimised, namely consent, but in the ends for the sake of which it is instituted. At the international level the same set of issues present themselves. The

Annabel Brett, *Liberty, Right and Nature: Individual Rights in Later Scholastic Thought* (Cambridge: Cambridge University Press, 2003).

[27] Hanna Pitkin, 'Obligation and Consent – I', *The American Political Science Review*, 59:4 (1965), p. 993.

[28] H. L. A. Hart, *The Concept of Law*, (Oxford: Clarendon Press, 1961), pp. 219–20.

[29] Carole Pateman, *The Problem of Political Obligation: A Critical Analysis of Liberal Theory* (New York: John Wiley & Sons, 1979), pp. 24–30.

[30] See Francis Oakley, 'Legitimation by Consent: The Question of the Medieval Roots', *Politics and Eternity* (Leiden: Brill, 1999), pp. 98–100. On the difference between 'final' and 'efficient' causes see R. W. Dyson, *Natural Law and Political Realism in the History of Political Thought*, vol. 1 (New York: Peter Lang, 2005), pp. 68–9; and Milja Kurki, *Causation in International Relations: Reclaiming Causal Analysis* (Cambridge: Cambridge University Press, 2008), pp. 218–22.

https://doi.org/10.1017/S0260210511000106 Published online by Cambridge University Press

ICISS report notes that '[t]he Charter of the UN is itself an example of an international obligation voluntarily accepted by member states.'[31] However, the authority of this obligation depends, as is the case with domestic obligation, on a non-consensual rule found in extra-legal experience that grounds the binding force of consent; for in the absence of such a rule, the law, and the obligations that pertain thereto, are whatever states will them it to be at any given moment in time.[32] At this point we are left to confront anew the problem posed by medieval nominalism, whereby God can will that what is good today is evil tomorrow. To conceive the modern sovereign in similar terms is to reject the intelligibility of final causes and the 'sovereignty as responsibility' principle along with it.[33] Indeed, the justification of the obligations that ground Arbour's argument must at some point leave consent for the world of extra-legal experience, which is to say, as A. P d'Entreves explains, that the ultimate 'validity of laws does not depend on their "positiveness", and that it is the duty of the individual to pass judgment on laws before he obeys them.'[34]

## Nature

To admit this much is to open the door to a natural law approach to obligation. Of course, the mere mention of natural law is often all it takes to provoke sneers of derision. Nineteenth century legal theorists were particularly fond of dismissing natural law as little more than woolly aspiration: it could not be properly specified, it could not be adequately enforced, and therefore it did not deserve to be called law. But the high tide of legal positivism has since receded and with it natural law has experienced something of a revival, impelled in no small part by the crimes Holocaust and the ensuing trials at Nuremburg. For it was Nuremburg that restored the bridge between law and morality, hence acting in accordance with properly enacted and promulgated law was not enough to absolve persons charged with crimes against the peace and crimes against humanity. It is in this sense that some crimes, such as genocide, slavery, and apartheid, are widely regarded as being categorically wrong, irrespective of the fact that there is an instrument of (positive) international law that proscribes them. So in the event that a persistent objector enslaved a portion of his (or her) population, it would matter not a jot if the perpetrator were not a party to the relevant instruments of international law: the plea 'I am not bound because I have not consented' would be no plea at all. And it is in this context that James Leslie Brierly gets it right in pointing to both the difficulty and necessity of natural law: '[i]t may not always be easy to feel intellectually assured that such a belief is founded in reality, but it is a belief upon which even the most sceptical acts every minute of his life.'[35]

[31] ICISS, *The Responsibility to Protect*, p. 13.
[32] See Martii Koskenniemi, *From Apology to Utopia* (Cambridge: Cambridge University Press, 2005), pp. 309–12.
[33] Michael Allen Gillespie, *The Theological Origins of Modernity* (Chicago: University of Chicago Press, 2008), pp. 22–9.
[34] A. P. d'Entreves, *Natural Law: An Introduction to Legal Philosophy* (London: Hutchinson University Library, 1952), p. 107.
[35] James Leslie Brierly, 'The Basis of Obligation in International Law', in Hersch Lauterpacht (ed.), *The Basis of Obligation in International Law and Other Papers* (Oxford: Clarendon Press, 1958), p. 67.

https://doi.org/10.1017/S0260210511000106 Published online by Cambridge University Press

It is in view of this tension between intellectual uneasiness and practical necessity a puzzle arises: few people will declare themselves as fully signed-up advocates of natural law but the language of natural law is an omnipresent feature of contemporary political life, domestic and international. The justification of NATO's intervention in Kosovo, the event which in so many ways breathed life into the responsibility to protect, is a case in point. Vaclav Havel defended the intervention by appealing to a higher law, arguing that it 'acted out of respect for the law, for the law that ranks higher than the protection of the sovereignty of states. It has acted out of respect for the rights of humanity, as they are articulated by our conscience as well as by other instruments of international law.'[36] And it is this idea of a higher law articulated by our conscience, which, as Havel puts it, 'identifies justice with moral standards that are independent of the practices of actual communities', that grounds the common conclusion that intervention in Kosovo was illegal but morally justified.[37] The language of natural law is also intelligible in the Universal Declaration of Human Rights, Article 1 of which amounts to a classic statement of natural law: '[a]ll human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.'[38] It should come as no surprise, then, that tucked away in the ICISS report is the admission that the responsibility to protect is supported by a wide array of legal sources, including 'fundamental natural law principles'.[39]

The character and content of these principles are not explained, nor is their origin, but a glimpse might be had in earlier explications of the 'sovereignty as responsibility' principle. Here again Nuremburg cast a long shadow as Francis Deng, the person credited with initially outlining the 'sovereignty as responsibility' principle, sees the trials as auguring a fundamental reinterpretation of state sovereignty. From then on the order of laws that is the state and the authority that enacts those laws are justified for the sake of a particular end, a final cause, namely the development of human dignity. Indeed, he suggests that '[i]n the search for normative principles it should be safe to reaffirm human dignity as an overarching goal to which all peoples and societies aspire and are committed, whatever the variations of their cultural perspectives on the details of the concept.'[40] The pre-eminence of this goal qualifies the relation of law and obligation in a crucial way: law that is inimical to the flourishing of human dignity exacts no obedience because it is not law properly so-called. Of course, argument of this sort has obvious appeal for advocates of the responsibility to protect, who proceed in the conviction that principles of sovereign equality and non-interference do not license abuse, just as they are not meant to shield tyrants from being held accountable internationally. They are quick to point to a growing consensus among states as tangible evidence of an emerging norm; but it is equally clear that the rightness of

[36] Vaclav Havel, Address of His Excellency Vaclav Havel, President of the Czech Republic to both Houses of Parliament in the House of Commons Chamber, Ottawa, on Thursday, 29 April 1999, Government of Canada, Department of Foreign Affairs and International Trade (11 August 1999), p. 4.
[37] Havel, Address of His Excellency, p. 5.
[38] Ian Brownlie, (ed.), 'Universal Declaration of Human Rights', *Basic Documents on Human Rights*, 3rd edition (Oxford: Oxford University Press, 1992), p. 22.
[39] ICISS, *The Responsibility to Protect*, p. 16.
[40] Deng, *Sovereignty as Responsibility*, p. 19.

https://doi.org/10.1017/S0260210511000106 Published online by Cambridge University Press

this norm and the obligations it entails does not depend ultimately on any kind of consensus, no matter how broad it might be. Consensus plays a supporting role to the lead, that is, a determination of right, which is established in advance of whatever consensus might achieve.

But what is often asserted as self-evident fact, the value of human dignity as the goal of all societies, is unavoidably an evaluative concept that speaks to a specific conception of right relation among human beings. For the claim of human dignity, something which is not only independent of the will of the state but is the rule and measure of the whatever the state wills, is nothing less than the evaluative criterion of natural law, if not in name then at least in spirit and function. It is a mistake, however, to imagine a single tradition of natural law. Pre-modern theories of natural law are deeply tied-up in the idea of community, especially as it relates to human interdependence and perfection though social and political experience. Here, 'natural' names an end-point to be achieved; it is an ethical ideal or *telos* at which things should aim. This approach places special emphasis on the 'common good', although it never eclipses entirely the good of the individual.[41] In contrast, modern theories of natural law give priority to the individual as against the community in deference to the value of negative liberty: the freedom to act without interference. Thus, 'natural' is not an end to be achieved; it is a starting point from which to erect civil association and to work out a moral and legal order that stresses the importance of consent and the preservation of individual liberty.[42] Despite obvious differences, both approaches take as their point of departure a distinctive natural law problematic: human flourishing, however it might be conceived, cannot be achieved without the help of others. Natural law offers an answer to this problem while taking human beings as they are: self-aware, capable of moral discernment, free to act on those judgments, and manifestly flawed.

But difficulty arises to the extent which the answer to this problematic depends on the command of a superior in order to invest it with coherence, and in one way or another that superior has taken the form of God. Of course, the theologians and canonists of medieval Christendom made no attempt to separate natural law from God. Their disagreements concerned the difference between intellectualist and voluntarist approaches to natural law, which is expressed in the difference between the statement 'something is good, therefore God wills it' and the statement 'something is good because God wills it'.[43] When we look to the modern world we find that someone like Grotius too relies on God to give his theory of natural law coherence, although a persistent misreading of his words about God's existence – the infamous *etiamsi daremus* passage – is often said to be the watershed of a secular theory of natural law. But a Whiggish over-modernisation of Grotius' thought fails to comprehend that he was also addressing the intellectualist-voluntarist distinction in arguing against Ockhamist nominalism: hence God cannot make two and two equal five any more than he can make that which is intrinsically evil, good.[44]

[41] R. W. Dyson, *Natural Law and Political Realism in the History of Political Thought*, vol. 2 (New York: Peter Lang, 2007), pp. x–xi.
[42] Dyson, *Natural Law*, vol. 2, p. x.
[43] See J. B. Schneewind, *The Invention of Autonomy: A History of Modern Moral Philosophy* (Cambridge: Cambridge University Press, 1998), pp. 22–5.
[44] See D'Entreves, *Natural Law*, p. 56; Schneewind, *The Invention of Autonomy*, pp. 18–36, 69–76; and Oliver O'Donovan and Joan Lockwood O'Donovan (eds), *From Irenaeus to Grotius: A Sourcebook in Christian Political Thought* (Cambridge: William B. Eerdman's Publishing, 1999), pp. 787–92.

https://doi.org/10.1017/S0260210511000106 Published online by Cambridge University Press

Moreover, the binding character of Grotian natural law also depends on God, so that the laws of nature are not obligatory, as his eighteenth century translator Jean Barbeyrac explains, until 'Reason has discovered the Author of the Existence and Nature of Things, whose Will gives those Maxims the Force of a Law.'[45]

That natural law accounts of obligation should rely on God is what Elizabeth Anscombe describes as the consequence of a distinctively Christian approach to ethics, whereby notions of licit and illicit and that of being bound follow from their correspondence with law. Thus, the idea of obligation specifies actions which in a moral sense must be done; and the good man (or the bad man) and good actions (or bad actions) are identified insofar as they correspond with relevant precepts of law. In other words, it is in respect of law instituted (for an intellectualist) or commanded (for a voluntarist) by God that the notion of 'ought' obtains its special moral sense, so that it is possible to say we ought to assist our fellow human beings in realising their goals as opposed to saying we ought to service the car regularly to ensure it is reliable through the winter. Unfortunately, the so-called 'new natural law', which seeks to escape the problem posed by God by taking refuge in underived, logically demonstrated self-evident values, provides little relief from this predicament because these values are pre-moral or outside the category of morality and, therefore, do not tell us very much about the man who faithfully subscribes to them. He is neither good nor bad.[46] There is, then, for Anscombe, little reason to retain the moral sense of 'ought' and the idea of moral obligation to which it is attached because, considered apart from a law-based conception of ethics, 'they are survivals, or derivatives of survivals, from an earlier conceptions of ethics which no longer generally survives, and are only harmful without it'.[47]

## Convention

Difficulties with this approach to obligation lead us to a different mode of thought, one which sets history before reason and therefore convention before nature. It was David Hume's devastating assault on reason that did so much to destroy the foundations of natural law. Hume denied reason a necessary connection to morality as in naturalist thought: it tells us nothing about what is good and it cannot move us to action even if we know what is good. Reason is also shorn of its epistemological role in discovering and justifying moral claims on the back of the well known fallacy of deriving an *ought* from an *is*.[48] Instead, reason is limited to telling us what is available and how we might get what we want, which is to reduce reason to an instrumental faculty disconnected from considerations of morality.[49] In place of the rationalism of natural law theories Hume stressed the

[45] See Barbeyrac's commentary on Hugo Grotius, *The Rights of War and Peace*, vol. I, trans. Jean Barbeyrac, ed. Richard Tuck (Indianapolis: Liberty Fund, 2005), pp. 151–3.
[46] Dyson, *Natural Law*, vol. 2, p. 212. For a summary of the 'new natural law' and its critics see Howard Kainz, *Natural Law: An Introduction and Re-examination* (Chicago: Open Court, 2004).
[47] G. E. M. Anscombe, 'Modern Moral Philosophy', in Mary Geach and Luke Gormally (eds), *Human Life, Action and Ethics* (Exeter: Imprint, 2005), pp. 169–82.
[48] For an analysis of this distinction in the context of natural law see Dyson, *Natural Law*, vol. 2, pp. 200–3, 222–4.
[49] Schneewind, *The Invention of Autonomy*, pp. 357–9.

https://doi.org/10.1017/S0260210511000106 Published online by Cambridge University Press

importance of virtue, natural and artificial, in explaining how human beings create principles of justice by their own effort. That we owe justice to our acquaintances and strangers alike, not to mention our enemies and those we might hate, leads Hume to deny that benevolence or love of humanity moves us to be just. On this point he is clear: 'there is no such passion in human minds as the love of mankind, merely as such, independent of personal qualities, of services, or of relation to ourself.'[50] Rather justice emerges slowly as individuals become aware that stability of possession – property being at the core of justice – would be beneficial to them all. Thus, justice arises as a matter of convention, the motive of which is self-interest rather than an imperative formulated as an obligation; and justice is said to be of moral value only when, through sympathy, we recognise these benefits accrue to all who participate in the convention. It is at this point that obligation comes into view, albeit not as a command tied to law, but as a motive that moves us to action.[51]

The importance of Hume's account of the artificial virtues has a crucial historical bearing on how we understand the notion of society. Artificial virtues like justice are those which are required for the existence of any complex society to exist, much less to function well. So whereas a society can exist in which a natural virtue like charity or benevolence is largely absent, it cannot exist without rules of justice, particularly those pertaining to man's peaceable enjoyment of his external goods. Indeed, Hume goes so far as to say that '[n]o one can doubt that the convention for the distinction of property, and for the stability of possession, is of all circumstances the most necessary to the establishment of human society.'[52] As it happens, it is precisely this notion of convention that informs Hedley Bull's notion of the elementary goals of international society: limitations on the use of force, the keeping of promises, and stability of possession.[53] Hume also showed how justice can arise and continue to exist without the help of a sovereign, for in arising spontaneously it is neither created nor maintained by the will of a sovereign, either in terms of command or law.[54] And because justice does not depend on a sovereign, matters such as the distribution of goods can be accomplished impersonally through the operation of the market. Indeed, the artificial origin of justice is an important part of what is perhaps the most influential alternative to natural law accounts of society and social change: the idea that societies undergo a process of historical development such as that exemplified by Adam Smith's 'four stage's theory', the pinnacle of which is commercial society.[55]

Argument from convention solves problem of securing obligation in God for the unbeliever and for the sceptic, but seeing the moral world as nothing but a human construction comes at a cost. A conventionalist approach such as Hume's reduces law to an inferior status, at least when compared to that which it enjoys

[50] See David Hume, in Stuart Warner and Donald Livingston (eds), *Political Writings* (Indianapolis: Hackett Publishing, 1994), pp. 4–7.
[51] Hume, *Political Writings*, pp. 11–12, Schneewind, *The Invention of Autonomy*, pp. 367–9.
[52] Hume, *Political Writings*, p. 12.
[53] Bull makes specific reference to Hume in elaborating this argument. See *The Anarchical Society* (New York: Columbia University Press, 1977), pp. 4–5.
[54] Schneewind, *The Invention of Autonomy*, pp. 370–1.
[55] See generally Christopher Berry, *Social Theory of the Scottish Enlightenment* (Edinburgh: Edinburgh University Press, 1997), chap. 6.

https://doi.org/10.1017/S0260210511000106 Published online by Cambridge University Press

in natural law theory. Law is no longer the embodiment of justice; nor is it the first defence against odious custom such as female genital mutilation, honour killing, or the stoning to death of adulterers. Law is simply a codification, that is, an affirmation and clarification, of what convention is in a given state of society. Similarly, all societies might require certain arrangements of justice to secure the institution of property, stability of possession and promise keeping being the most obvious, but there is little scope for adjudicating these virtues as themselves just or unjust. To do so would require a moral point of reference that is external to the convention itself. For these virtues imply no more than society depends on the security of property and its orderly transfer; and whatever consideration of the value of these arrangements is related, not to the existence of these virtues, but to the results that come with exercising them. In other words, it is a sense of common interest, mutually expressed, which 'produces a suitable resolution and behaviour', and therefore determines the value of convention.[56] The consequence, then, is a world truly of our making, for it admits, as J. B. Schneewind puts it, 'Beyond that, all is local convention. And one convention is good as another, if both do the job.'[57]

It is at this point that convention shows its ugly face only to receive an ugly glare in return, for a world that begins and ends with convention leaves a precariously narrow ground on which to protest. All that is left to resolve disputes is argument by assertion or, failing that, the application of force, the latter being the preferred method of Charles Napier's attempt to suppress the practice of *sati* in 19th century British India:

> This burning of widows is your custom. Prepare the funeral pile. But my nation has also a custom. When men burn women alive, we hang them and confiscate all their property. My carpenters shall therefore erect gibbets on which to hang all concerned when the widow is consumed. Let us all act according to national customs.[58]

Argument from convention also presents something of a conundrum for some widely held accounts of universal human rights. For example, the rights declared in the Universal Declaration of Human Rights (UDHR) depend on first principles that suppose the inherent dignity of the human person, the equal worth of all persons, and their membership in human family. One might look to something like a Rawlsian 'overlapping consensus' in order to vindicate these principles in a common community of value; look hard enough, however, and we shall find lurking in the background an unacknowledged *naturalis ratio* that argument from convention does not allow.[59] Indeed, the intrinsic human value presupposed by the UDHR would appear to founder on a tautological stipulation; for in lieu of an *a priori* and prescriptive account of human nature, reason cannot establish by itself the *moral* value of these first principles, which leaves us to wonder why human life should be regarded as intrinsically valuable at all. In other words, the intrinsic value that attaches to human life is not what follows from a human essence that

[56] Hume, *Political Writings*, p. 11.
[57] Schneewind, *The Invention of Autonomy*, pp. 366, 373.
[58] Quoted in A. P. Thornton, *Doctrines of Imperialism* (New York: John Wiley & Sons, 1965), p. 170.
[59] As Dyson argues, 'meaningful moral discourse depends not simply upon rationality, but upon the existence of shared values'. It is in respect of (unacknowledged) values or first premises that Rawls, like some modern natural law theorists, arrives at such a consensus. See *Natural Law*, vol. 2, pp. 100–6, 221.

https://doi.org/10.1017/S0260210511000106 Published online by Cambridge University Press

transcends and therefore joins individual human beings in a universal moral relationship; it might be the case that '[w]e find ethical value in human nature in the way that the conjurer finds a rabbit in a top hat: only because we put it there ourselves.'[60]

## The implications of obligation

Both the naturalist and conventionalist accounts of obligation connect the 'sovereignty entails responsibility' principle with the principle of an 'international responsibility to protect'; and in doing so they invest a degree of coherence in Arbour's argument – and the ICISS project generally – which it presently lacks. But the purchase of coherence comes at a cost as both accounts also give occasion to controversy which, from the academic's standpoint, invites further reflection, and from the practitioner's standpoint, may well frustrate the realisation of goals that justify the responsibility to protect project. Indeed, the stakes come into view in consideration of one aspect of the ICISS report: the responsibility to rebuild. Here again the limitations of responsibility are on full display. The report provides little insight as to what links the responsibility to rebuild to substantive action, apart from a seemingly unproblematic assertion that it follows as a logical consequence of the responsibility to protect. It does say that in the aftermath of military intervention there should a 'genuine commitment' on the part of the international community to help build a durable peace and to promote good governance and sustainable development, which involves, as any number of recent post-conflict missions attest, ensuring respect for human rights and the promotion of democratic institutions and free market economy.[61] But ask why any of these things should be done and the answer seems to be a prudential desire to avoid a return to conflict. In short, then, we are left with a calculation of contingent interest that counsels: '[t]here is no substitute for a clear and effective post-intervention strategy.'[62]

Missing in this counsel of prudence is an explication of the normative linkages which, elsewhere in the report, are said to run through the assistance, intervention and reconstruction spectrum. Indeed, a counsel of prudence will not do as a normative grounding of the responsibility to rebuild, not the least because it falls back on the same discretionary consideration of (contingent) state interest that the language of 'responsibility' is meant to circumvent. A theory of obligation does provide such a grounding, albeit in different ways and with different consequences. There should be no doubt that the pronounced and repeated emphasis that the ICISS report places on the dignity of the human person cleaves to natural law argument. It is to this kind of argument that Gareth Evans – a fervent champion of the ICISS project – appeals when he says 'the case for R2P rests simply on our

[60] Dyson, *Natural Law*, vol. 2, pp. 212–21.
[61] See ICISS, *The Responsibility to Protect*, p. 39; William Bain, *Between Anarchy and Society: Trusteeship and the Obligations of Power* (Oxford: Oxford University Press, 2003); and Dominik Zaum, *The Sovereignty Paradox: The Norms and Politics of International Statebuilding* (Oxford: Oxford University Press, 2007).
[62] ICISS, *The Responsibility to Protect*, pp. 17, 40.

https://doi.org/10.1017/S0260210511000106 Published online by Cambridge University Press

common humanity'.[63] The notion of 'common humanity' usually refers to universal principles that are true for all men and woman for no other reason than they are human, which is to say they are neither willed nor enacted by any person or any legislature. And it is in virtue of these principles that all human beings are, by definition, subjects of equal moral concern. In other words, they provide a prescriptive benchmark in specifying how human beings should treat one another and they provide a standard against which to evaluate conventional arrangements, such as those relating to government, property, and positive law.[64]

Of course, the metaphysical vagaries of natural law are often all its takes to elicit fits of exasperation when it becomes apparent that these principles cannot be demonstrated in any empirical way. But insofar as their content is concerned we need not look any further than international human rights law and especially the UDHR, which after all is a pronouncement, indeed, a clarification, of principles that exist prior to their 'declaration'. Eleanor Roosevelt conveyed the underlying purpose of the UDHR, in an address before the General Assembly in 1948, as a 'common standard of achievement for all peoples of all nations', to which she added: '[t]his declaration is based upon the spiritual fact that man must have freedom in which to development [sic] his full stature and, through common effort, to raise the level of human dignity.'[65] The common standards to which she refers speak to conditions of life that are thought to be appropriate for all human beings; and because they are so appropriate there is a positive obligation to assist others in achieving them, which enhances respect for, and development of, the intrinsic worth and indestructible value of the human person. The natural law approach to obligation provides a way of saying that these things must be done irrespective of what the shifting sands of state interest might recommend.

When it comes to the responsibility to rebuild this approach to obligation does not disallow considerations of interest, nor does it discount the ways of power or the fact that interests, especially those of the great powers, are always at work. But it does require that rebuilding activities correspond with the demands of human dignity. Indeed, this requirement is hardly out of line with the declared aims of contemporary post-conflict reconstruction missions, which all converge on the view that the interests of states are as a matter of right leavened by the claims of individuals. Thus, the advantages of a natural law approach to obligation are obvious enough, for it makes not only sovereignty, but the state, the society of states, and international law, the servant of human flourishing, just as the ICISS report contemplates. It is an approach that requires rather than counsels a cooperative ethic of mutual assistance, according to which we should help our neighbours in realising their goals and protect them when they are in danger, even if they are distant strangers. Moreover, it is an approach that provides a standard against which to evaluate attempts at rebuilding war-torn territories, thereby linking human rights, democracy, and free market economy to the kind of life that is appropriate for all human beings; and it is for the sake of these things that states

[63] Gareth Evans, 'The Responsibility to Protect: An Idea Whose Time Has Come. . .and Gone?', Annual Lecture of the David Davies Memorial Institute, Aberystwyth University (23 April 2008), available at: {www.crisisgroup.org}.
[64] See Dyson, *Natural Law*, vol. 1, pp. xii.
[65] General Assembly, Third Session, Verbatim Record of the 180th Meeting, Held at the Palais de Chaillot, Paris (9 December 1948), A/PV 180, 62–3.

https://doi.org/10.1017/S0260210511000106 Published online by Cambridge University Press

are required to act in respect of international legal obligations and for which they may be held responsible if they should fall short of the mark.

If we dig deep enough we shall find more than a faint residue of this kind of thinking in the ICISS report and in the writings of its most enthusiastic advocates. Indeed, the underlying rationale of the responsibility to protect, protecting people from war crimes, genocide, and crimes against humanity, is largely unintelligible without the help of natural law concepts and categories. The problem is that the appeal of natural law argument is not persuasive to a great many who hear it. Natural law has been criticised for a number of reasons, including a problematic relation between rationality and morality, doubts about the moral certainty of universal principles, and, for those who would set themselves up as the spokesmen for all humanity, an essentialist conception of human nature.[66] So if we dig deeper still we might find that that intrinsic value and inherent dignity of the human being is rather like an onion: 'peel away layer after layer and you are left, not with the "essential" or "natural" onion, but with nothing at all'.[67] It is at this point that we are left with little alternative than argument from convention, a version of which holds out the advantage of recognising the moral significance of difference while leaving open the possibility of agreement on moral action. The value of difference is preserved because there is no pre-existing moral law, expressing a common humanity, with which difference must conform in order to be valuable. In this way convention furnishes a response to the reality that we must cooperate with others to satisfy our wants and desires, albeit in a world that is home to many interests, some of which overlap while others conflict.

Unlike natural law, which is intelligible in terms of pre-existing or objective moral precepts, convention appeals to will and interest, which is to say it is created rather than discovered. In an important sense convention is arbitrary, although, as Leslie Green explains, the arbitrariness of convention should not be taken to mean that it is without purpose and, therefore, value.[68] That Americans drive on the right side of the road and Britons on the left is an arbitrary decision; but the purpose and the value of these arbitrary conventions is to promote the public interest of helping motorists arrive safely at their destinations. Thus, convention finds its footing in the world of common interest and its value is measured by the principle of utility – that is, the extent to which it is beneficial to the parties that participate in convention. In other words, the normative force of convention derives, not from its content, which is determined arbitrarily, but from satisfaction of relevant interests.[69] Of course, argument from convention holds out its own distinctive advantages, especially in a world that lacks a sovereign to enforce agreements. The authenticity of convention does not depend on effective enforcement, so that it is possible to speak of the declaratory (as opposed to legal) rights contained in the UDHR as part of a conventional (global) culture of human rights. Likewise, a convention might serve common interests but it does not (necessarily) entail an equal distribution of benefits, just as the institution of great power responsibility involves recognition of differences in power and differences in privilege so that all states might secure their (common) interest in peace and

[66] See Dyson, *Natural Law*, vol. 2, chap. 8.
[67] R. W. Dyson, 'Natural Law as a Problem in Moral Philosophy', Unpublished Paper (2005).
[68] Leslie Green, *The Authority of the State* (Oxford: Clarendon Press, 1988), pp. 89–90.
[69] Ibid., p. 93.

https://doi.org/10.1017/S0260210511000106 Published online by Cambridge University Press

security. Indeed, convention provides an empirically ascertainable statement of common interest, rather than a metaphysical statement of universal right, which is both concrete social fact and concrete framework of action.[70]

Attractive though such an approach might appear, especially when scepticism undermines belief in a (metaphysical) universal moral law, argument from convention might not be strong enough to sustain the aspirations of the ICISS project. For the platform of interest and utility on which convention is founded also presupposes the fact that conformity with convention is fundamentally conditional.[71] Convention is a source of stability insofar as it cultivates regularity in expectation and action; and justice arises, not in compliance with law, but in recognition of the advantages that might be had by participating in convention. Thus, self-interest is the mother of justice, which is transformed into mutual interest once we realise that satisfaction of our interest entails satisfying the interests of others. And in recognition of this state of affairs a sense of obligation arises, albeit in a much weaker version than in natural law thinking, for the obligation to comply with rules of justice is tied to the satisfaction of these interests rather than the moral necessity of law.[72] Crucially, then, there is no existential good prior to convention because conforming with convention, such as keeping promises, produces whatever good might be had. Indeed, that good is the consequence of convention places emphasis on maintaining the convention before the exigencies of particular circumstances, hence Hume's suggestion that 'however single acts of justice may be contrary, either to public or private interest, it is certain that the whole plan or scheme is highly conducive, or indeed absolutely requisite, both to the support of society, and the well-being of every individual'.[73] There are times, then, to take his argument further, when injustice should be tolerated for the sake of the whole, such as injustice that arises in respect of sovereignty and non-intervention, because 'this momentary ill is amply compensated by the steady prosecution of the rule'.[74]

This voice too is plainly audible in contemporary world affairs, although it presents problems for the responsibility to rebuild that are no less daunting than those posed by a natural law approach. The emphasis on interests as the bedrock of convention, which, in turn, transform obligation into a motive of action, throws the door open to a kind of diversity that is at odds with the ICISS report. For once the notion of 'good' is relegated to a consequence of convention, and it is no longer something which activates or guides moral sentiment, there is no reason to privilege human rights, democracy, and free market economy as necessary goals of post-conflict reconstruction. There is no intrinsic human dignity to develop in respect of these goals. Indeed, there is little scope for evaluating the justice of convention, provided they offer a serviceable way of doing things, which is to admit decidedly illiberal customs and illiberal societies to the fold. And it is at this point that an ordinary Afghan's defence of the Taliban must be taken seriously: '[w]e have no TV. We can't listen to music. We don't have parties [. . .] But at least

[70] Ibid., pp. 93–4, 118.
[71] Ibid., p. 121.
[72] Hume, *Political Writings*, pp. 7–20.
[73] Hume, *Political Writings*, p. 17; and Schneewind, *The Invention of Autonomy*, pp. 368–73.
[74] Hume, *Political Writings*, p. 17.

https://doi.org/10.1017/S0260210511000106 Published online by Cambridge University Press

we have security and justice.'[75] For the *modus vivendi* that is the achievement of convention begins to show its weakness once recognition of common interest begins to fray, perhaps to the delight of the persistent objector, at which point force assumes a place of especial importance in prolonging the life of convention. The problem, then, is that convention offers a kind of (contingent) truth, born of social fact, in place of metaphysical Truth, but its greatest advantage – facilitating cooperation in a condition of difference – is also its greatest weakness. For an agreement fashioned out of contingent interest is also vulnerable to the contingency of interest; and nowhere is this vulnerability more acute than when people require protection from egregious abuse. Convention offers a conditional answer when, more often than not, the seriousness of the situation demands one that is unconditional.

## The wages of thought

An objection might be lodged at this point on grounds that the concerns raised in this article are those of an academic, and to that extent they have little relevance to real-life situations that call-out for urgent attention. Indeed, these concerns are likely to strike advocates of the responsibility to protect as trivial, even jejune, when placed alongside the immediacy of wanton massacre and ethnic cleansing. But responding in such a way is to indulge a version of the error committed by those who parry criticism of the responsibility to protect as *prima facie* evidence of bad faith or other less honourable motives. It is an error nonetheless. That the satisfaction of practical concerns should be made the test of worthwhile scholarship is a most unfortunate prejudice that misunderstands both the nature of theoretical reflection and the bearing that 'thinking' or 'thought' has on human conduct and how it is interpreted. It supposes that ideas, beliefs, and arguments are somehow separated from real-life experience, thereby severing any meaningful relation between abstract concepts and the goings-on of the 'real world'. For it fails to understand that after acknowledging the 'gap between thinking and experience', as J. G. A. Pocock describes it, the task of the theorist becomes one of inhabiting the gap with a view to understanding the immanent coherence of various ideas, beliefs, and arguments, and how they are employed in the context of action in particular situations. In other words, the gap between theoretical reflection and the desire to solve practical problems is not as great as it is sometimes thought: '[t]o solve a theoretical problem may have practical implications and, conversely, to state and solve a practical problem may raise new problems of wider generality.'[76]

It is a failure to appreciate the relation between 'thought' and 'experience' that leads Arbour (and others) to overstep the mark in confusing 'political usefulness' and 'intellectual clarity'.[77] Thus, in reflecting on 'the way forward' the authors of

[75] Anand Gopal, 'Some Afghans Live Under Taliban Rule – and Prefer It' (15 October 2008), available at: {www.csmonitor.com}.
[76] J. G. A. Pocock, 'The History of Political Thought: A Methodological Inquiry (1962)', *Political Thought and History: Essays on Theory and Method* (Cambridge: Cambridge University Press, 2009), pp. 5, 12–3, 17.
[77] Arbour, 'The responsibility to protect', pp. 457–8.

https://doi.org/10.1017/S0260210511000106 Published online by Cambridge University Press

*The Responsibility to Protect* address the moral appeal of the argument, observing that '[g]etting the moral motive to bite means [. . .] being able to convey a sense of urgency and reality about the threat to human life in a particular situation.'[78] This is a most puzzling assessment of what is required to communicate the appeal of the argument, moral or otherwise. It is not a matter of effective marketing: publicising heart-wrenching images of rape camps, mass graves, and distended bellies of starving children. Nor is it matter of disseminating disclaimers as part of a public education programme, such as 'sovereignty may be hazardous to your health', in much the same way that cigarette packets carry warnings about the risks of smoking, often with the help of graphic images to drive home the point. The moral appeal of the responsibility to protect rests on the extent to which it is persuasive to those who hear it, which is to reduce the scope of the problem to a rather simple proposition, the satisfaction of which is infinitely demanding. The difficulty, then, is not found in the challenge of connecting the urgency and reality of particular situations with an appropriate (moral) motive; it is found in an over-emphasis on 'responsibility' which, for all its attractiveness, cannot bear the weight placed on it.

At this point experience must give way to thought. The burden of persuasion must shift from the invocation of symbols and images to an engagement that is the vocation of the theorist: an exploration of the rational coherence of ideas and arguments.[79] So we might all agree that the responsibility to protect finds support in existing international law, as Arbour argues; and we might also agree that this legal basis is buttressed by the declarations of the General Assembly and the decisions of the Security Council. But it is also true that legal realities are often confounded by philosophical problems. And if the responsibility to protect is to command widespread assent, as its authors hope, then these philosophical problems must be addressed in order to persuade those who hear but are not yet persuaded. For concern with practical problems, such as protecting civilians from state-sponsored slaughter, must at some point involve theoretical reflection on the ends of life as well as the prudential considerations that go with realising them. Otherwise we shall be left with an irresolvable shouting match between the 'righteous', who possess an all too sure sense of what morality requires, and the 'sceptical', who see morality as an charade or an inconvenience that stands before what they want.

In the end, the world must be made safe from both of these views by investing in the responsibility to protect a coherence that it presently lacks. I have attempted to interrogate two contrasting but pervasive accounts of obligation in order to clarify the 'sovereignty as responsibility' principle and how it might be connected to 'international responsibility to protect' principle. The argument from nature soars among the most ambitious aspirations of the ICISS project, an integral part of which is the development of human dignity by helping others build societies that respect human rights, adopt democratic values, and embrace free markets – all being parts of a life that is appropriate for all human beings. In contrast, the argument from convention remains securely tethered to the sensible world of social fact in seeking agreement in common, empirically ascertainable, subjective interests. Here, human rights, democracy and free market economy might be the ends

[78] ICISS, *The Responsibility to Protect*, p. 71.
[79] This thought is derived from Pocock, 'The History of Political Thought', p. 18.

https://doi.org/10.1017/S0260210511000106 Published online by Cambridge University Press

for which societies aspire, but not necessarily so. The point of engaging these accounts of obligation should not be seen as the penultimate step before taking up a position in one camp or the other, thereby anointing a winner; it is, rather, to recognise that we are heirs to both approaches and to their peculiar advantages and disadvantages. For there is surely a compelling urge to seek security of belief in the demonstrable world of agreement, which provides proof of the world as it 'really' is; and yet what is often expressed in terms of interest and agreement finds its bearing from a presumed universal moral unity that is perhaps so obvious and so fundamental that most people do not think to call into question. In that, James Brierly was no doubt right; and yet we are still left to wonder if it is something in which we can really believe.

https://doi.org/10.1017/S0260210511000106 Published online by Cambridge University Press