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Reinventing Humanitarian Intervention: Two Cheers for the Responsibility to Protect?

In 2005, world leaders endorsed a new doctrine called the 'Responsibility to Protect' which is designed to provide a moral and legal framework for the international community to respond to mass atrocities. This means that if a state defaults on its responsibility to protect its citizens the international community would assume this responsibility collectively.

The notion that the international community has a 'Responsibility to Protect' entails three distinct yet related commitments: a responsibility to prevent, to react and to re-build. By far the most controversial element of the responsibility to protect doctrine is the idea that military force should, on occasion, be used to protect civilians. This amounts to a new take on a very old and divisive issue - humanitarian intervention.

This paper outlines the changing parameters of state sovereignty since 1945 before tracing the development of the Responsibility to Protect doctrine from its genesis in the *International Commission on Intervention and State Sovereignty* to its international endorsement in 2005. It then examines the parameters of the concept, its political and legal status and highlights the key challenges, both normative and practical, in its implementation.

Adèle Brown

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Summary of main points

The Responsibility to Protect is an emerging doctrine designed to provide an international framework of protection for civilians facing mass atrocities. It was developed initially by an independent panel of experts named the International Commission on Intervention and State Sovereignty in 2001 and later endorsed by world leaders at a UN Summit in 2005

The Responsibility to Protect is a three-fold duty: to prevent, to react and to rebuild.

This three-fold duty falls by default to the state concerned but should be assumed by the international community whenever there is a "manifest failure" of the state to discharge its responsibilities to its citizens

The most controversial element of the doctrine is the idea that the international community, authorised by the UN Security Council, could mount a military intervention in order to stop mass atrocities.

It remains unclear whether in the event of Security Council paralysis, a unilateral intervention would prove legitimate or legal.

There is considerable debate over the status and scope of the Responsibility to Protect. On balance, most observers and states believe that it remains a political commitment and has not yet acquired legal force.

Implementation of the Responsibility to Protect has proved difficult due to a range of challenges both conceptual and practical.

Many non-Western countries harbour fears about abuse of the Responsibility to Protect.

The doctrine is supported by all of the major political parties in the UK and the British Government has been at the forefront of efforts to secure support for the principle in international fora.

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I Chronology of Key Developments

1999	Then UN Secretary General Kofi Annan publishes 'Two concepts of sovereignty' in the *Economist* arguing that the concept of absolute state sovereignty is changing
2000	International Independent Commission on the Balkans judges the war in Kosovo to be "illegal but legitimate"
2000	African Union Constitutive Act recognizes the AU's responsibility to intervene in the internal affairs of member states in order to protect citizens in humanitarian crises.
2001	"The Responsibility to Protect" (2001), the report of the International Commission on Intervention and State Sovereignty is published
2003	Invasion of Iraq.
2003	Situation in Darfur deteriorates badly
2004	Publication of "A More Secure World: Our Shared Responsibility" by the United Nations High-Level Panel on Threats, Challenges and Change. The Panel recommends acceptance of R2P as an "emerging norm"
2004	Secretary-General appoints Juan Méndez of Argentina as his Special Adviser on the Prevention of Genocide
2005	"In Larger Freedom", the Report of the UN Secretary-General, is submitted to heads of state and government attending the 2005 World Summit session of the UN General Assembly. It recommends endorsement of the R2P principle
2005	The UN World Summit Outcome Document includes an endorsement of Responsibility to Protect
2006	The Peacebuilding Commission, which was created in 2005, becomes operational.
2006	UN Secretary-General appoints an Advisory Committee on Genocide Prevention to provide guidance and support to the work of the Special Adviser
2006	UN Security Council makes first references to R2P in Resolution 1674 (28 April 2006), a thematic resolution on the protection of civilians in armed conflict and in UN Security Council Resolution 1706 (31 August 2006).
2007	Francis Deng of Sudan succeeds Juan Méndez as Special Adviser on the Prevention of Genocide
2007	New post of Special Adviser on the Responsibility to Protect sanctioned by the Security Council on advice from the Secretary General. Post holder is Edward Luck
2008	Global Centre for the Responsibility to Protect established

II Introduction

In 1994, while the international community fiddled, Rwanda burned. To the enduring shame of many, the world's most powerful states stood back and watched as genocide was perpetrated against over 800,000 people. Furthermore, the international community's record of failure was not confined to Rwanda. During the 1990s, Somalia, Srebrenica and East Timor, to name but a handful of human catastrophes, became watchwords for international inertia, inaction and incompetence.

Although the refrain of 'never again' rumbled round the UN's corridors of power and in member states' capitals, it was not until 2000 that politicians, diplomats, policy makers, the media and civil society gathered together with a view to finding moral and legal bases to compel the international community to act to protect people from harm when their own states are unwilling or unable to do so.

The forum for these discussions was the so-called International Commission on Intervention and State Sovereignty (ICISS). Over a twelve month period, the Commission developed a doctrine which has now become known as the 'Responsibility to Protect'. At the most general level R2P – the routinely used acronym - encapsulates the idea that respect for the inviolability of state sovereignty, the keystone of modern international relations and law, is not absolute and that sovereignty entails responsibility. In practice this means that if a state defaults on its responsibility to protect its citizens, the international community must then assume this responsibility itself. This notion, that the international community has a 'Responsibility to Protect', entails three distinct yet related commitments: a responsibility to prevent, to react and to re-build.

In broad terms, none of these three elements, either singularly or as a whole, is an entirely new concept: the first and third elements, namely conflict prevention and state building, have been subject to extensive academic and political examination and both are now considered to be mainstream discourses and indeed industries in their own right. Although debates may continue over, for instance, the most appropriate means to prevent conflict and state failure, and the best methods to re-build post-conflict societies, there is general agreement that preventing state failure and re-building post-conflict societies are desirable goals.

However, far more controversial and indeed much less scrutinised is the second element of the 'responsibility to protect' doctrine, which argues that the international community has a 'responsibility to react' and that this new 'duty' may include using military force to protect civilians. Essentially, this is a new take on a very old and divisive concept – the right to humanitarian intervention. The 'responsibility to react' may be less linguistically confrontational than 'humanitarian intervention', and the moral and legal bases may have been overhauled to accord with 21st century sensitivities and changes in international relations, but the idea, that there is responsibility to react using armed force to protect civilians in desperate peril, remains as hotly contested as its predecessor.

Although this paper will touch on all three elements of the responsibility to protect, the main focus will lie on its most controversial element: that of the responsibility to react with armed force. The paper starts by briefly outlining the changing parameters of state sovereignty since the adoption of the UN Charter in 1945 before tracing the development

of the Responsibility to Protect doctrine from its genesis in the International Commission on Intervention and State Sovereignty to its international endorsement by the World Summit in 2005. Subsequent sections examine the parameters of the concept and its political and legal status as well as the key challenges, both normative and practical, in implementing the R2P principle. The final section looks at ways ahead and next steps.

III The Evolution of Sovereignty and Non-intervention

The notion that the international community has a responsibility to protect those whose governments are either unwilling or unable to protect them is far from new; indeed Just War theories advocating intervention in limited circumstances are as old as international legal discourse itself. More recently in 1948, states ratified the *Convention on the Prevention and Punishment of the Crime of Genocide*[1] (commonly referred to as the Genocide Convention). It remains one of relatively few instances prior to the adoption of the Responsibility to Protect doctrine where the international community has placed formal limits on state sovereignty. The Convention itself reaffirms the long-standing belief that genocide, whether committed in war or peace, is an international crime and asserts that states have a dual duty under international law: to prevent it taking place and to punish those who perpetrate it.[2] The crime of genocide has since been adopted by the international criminal tribunals for the former Yugoslavia and Rwanda and the Rome Statute of the International Criminal Court, making it an undeniable part of contemporary international law.

The 2007 judgment of the International Court of Justice in *Bosnia and Herzegovina v Serbia and Montenegro*[3] confirmed that state sovereignty had its limits when it held that the prevention of genocide is a legal obligation that one State owes to the citizens of another. The Court stressed that the scope of the responsibility to prevent is one of conduct and not one of result, essentially declaring that states should employ all reasonable means to prevent genocide. The Court went on to state that when considering whether a state had discharged this obligation it would take account of the State's capacity to influence effectively the persons likely to commit, or committing genocide. Capacity, in turn, was held to depend on a range of factors including geographical proximity and the extent of political influence. It also found that the obligation to prevent genocide arose at the instant that the state learns of, or should normally have learned of, the existence of a serious risk that genocide will be committed.

The Genocide Convention is, however, the exception to the norm. The general trend towards the centrality of state sovereignty in international relations which started with the Peace of Westphalia in 1648 was codified in the UN Charter in 1945. Key to this was Article 2(7) of the Charter which declares that "[n]othing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state…" This is bolstered by other provisions, notably Article 2(4) which prohibits the use of force against the "territorial integrity or political

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1 General Assembly Resolution 260 A (III), 9 December 1948

2 Article 1 Genocide Convention

3 Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro) [2007] ICJ Rep.

independence" of any state. As a result, on the face of it at least, the Charter's thrust is clear: non-intervention and respect for state sovereignty are paramount.

In the early post war years however, theory and practice were often out of synch. In reality, adherence to the principle of non-intervention after 1945 was inconsistent at best. Before long interventions were taking place. Where this involved military action, states often claimed to be exercising a legal and moral right to humanitarian intervention. Some tried to claim this was permissible under customary international law, others cited exceptions to Article 2(7), and a great number of states did not attempt to justify their actions at all. Very few operations were what would be popularly understood to be a 'humanitarian intervention'. Most of these operations, particularly during the Cold War, were not remotely concerned with helping people in crisis. They were, more often than not, Trojan horses in superpower wars-by-proxy or a means to confer legitimacy on otherwise illegal uses of force.

Although breaches of the non-intervention norm were frequent, generally speaking the norm itself was never called into question. Indeed, the emergence of a host of new states during the 1960s as part of the decolonisation process helped to strengthen and clarify the limits of permissible intervention. With the Security Council paralysed by Cold War posturing, newly independent states, fiercely protective of their sovereignty, seized the opportunity to mould the rules on intervention. A series of declarations reinforced the centrality of state sovereignty and non-intervention to international relations. The 1965 UN General Assembly Declaration on the 'Inadmissibility of Intervention' asserted

> No state has the right to intervene, directly, or indirectly, for any reason, whatsoever, 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 condemned.[4]

This was supplemented by the 1970 UN General Assembly 'Friendly Relations Declaration' which prohibited any interference by a state against the political, economic, social and cultural elements of another state. It also referred to intervention in the instance of a civil war, stating,

> …every state has a duty to refrain from organising, instigating, assisting or participating in acts of civil strife or terrorist acts in another State, or acquiescing in organised activities within its territory which directed towards the commission of such acts gave support or sustenance to such civil conflict.[5]

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4 UN General Assembly Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty, A/RES/20/2131 (XX), 21 December 1965

5 UN General Assembly Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, A/RES/25/2625, 24 October 1970

Over time, these declarations became authoritative interpretations of international law with case law confirming that the principle of non-intervention is part of customary international law despite the fact that breaches of this rule may be frequent.[6]

However, the mood had begun to shift in other areas of international law. The rapid rise of the international human rights movement and the conclusion of multilateral human rights treaties[7] gave rise to emerging claims that state sovereignty involved rights, as well as responsibilities.

In the 1990s, with the end of the Cold War, the vogue for intra-state peacebuilding took hold. The number of interventions authorised by a newly invigorated UN Security Council increased dramatically. The decision of the Security Council to depart from previous practice - by declaring that civil wars and internal strife could be regarded as threats to international peace and security - had a major impact on what situations might justify a response in the form of a legitimate intervention. Once a situation was deemed by the Security Council to be a threat to international peace and security, it could use its powers to order "enforcement action", which includes armed interventions, under Chapter VII of the Charter. As more and more interventions were ordered, it became clear that state sovereignty and non-intervention were far from inviolable, irrespective of what the Charter's formal terms stated.

Inevitably, this new 'interventionism' on the part of the UN and international community spawned a corresponding debate on the changing limits of state sovereignty and non-intervention. Writing in 1992 the then UN Secretary General, Boutros Boutros-Ghali, wrote, "[t]he time of absolute and exclusive sovereignty…has passed; its theory was never matched by reality."[8]

At the time, Boutros-Ghali's sentiments were indicative of guarded but widespread optimism that respect for state sovereignty would no longer be used as a cloak for states to hide behind while they abused their citizens. Indeed, many believed that the apparently increasing willingness of the Security Council to authorise interventions to deal with internal humanitarian crises was a harbinger of a new dawn in multilateral protection.

The reality, as is now well documented, was far different. In 1993 Operation Restore Hope, a UN peacekeeping mission designed to restore order in Somalia, went tragically awry, leading to the deaths of both US soldiers and Somali citizens. Less than a year later when genocidal violence exploded in Rwanda, the US and other major military powers showed a determined resistance to intervene. Still stinging from the debacle in Somalia, there was no desire amongst the Permanent Five (P5) members of the Security Council to repeat previous failures and endure the domestic opprobrium which went with

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[6] See Military and Paramilitary Activities in and against Nicaragua (Nicaragua v The United States) Case (Merits) ICJ Nicaragua v USA , [1986] ICJ Rep.

[7] For example the *International Covenant on Civil and Political Rights* and the *International Covenant on Social, Economic and Cultural Rights* both of which were concluded in 1966

[8] Boutros Boutros-Ghali, *An Agenda for Peace: Preventive Diplomacy, Peacemaking and Peace-keeping* A/47/277 - S/24111, 17 June 1992, para 17

it. So, in spite of global recognition that genocide was being perpetrated, Rwanda was largely left on its own.

Not so with Kosovo. On 24 March 1999 NATO forces began a bombing campaign designed to end Serbian attacks on Kosovo.[9] Crucially, none of the Security Council Resolutions on Kosovo that were passed in 1998 authorised NATO's use of force.[10] Some states argued that authorisation could be implied from the 1998 resolutions. Others, including the UK, claimed that the campaign was designed to avert a humanitarian catastrophe and could therefore be justified under customary international law.

Political and legal divisions ensued. While few observers questioned the moral case for action, there was little agreement over the legal basis for the campaign. The *Independent International Commission on Kosovo,* which reported in 2000, encapsulated the dilemma when it stated that the intervention was "illegal but legitimate."[11]

Kosovo in many respects was a defining moment in the debate over how, when and even if the international community should protect people facing humanitarian crises within a sovereign state. Coming as it did after Somalia and Rwanda and a number of other interventions of questionable success and legality, it became clear that the international community's response to such situations was not only frequently inconsistent but also often half-hearted, sometimes incompetent and on occasion illegal. Louise Arbour, the UN High Commissioner for Human Rights, has highlighted some of the conceptual problems with humanitarian intervention,

> To begin with, the 'right' to intervene is by definition discretionary. It is the prerogative of the intervener and has always been exercised as such, thereby creating a hierarchy among those who received protection and those whom the potential intervener could afford to ignore. The invocation of such right has also, not surprisingly, unleashed criticism from the many who question the interveners' purity of intent and who denounced, plausibly or not, the self-serving agendas that they believed were hidden behind the pretence of humanitarianism.[12]

Yet, for all the drawbacks with humanitarian intervention, the 1990s in particular highlighted that occasions would arise when intervention may be necessary. The challenge was to develop a conceptual and practical framework which avoided the inherent problems associated with humanitarian intervention.

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9 For background on the Kosovo conflict see the following Library Research Papers: Kosovo: KFOR and Reconstruction, 99/66, 18/06/1999; Kosovo: operation Allied Force, 99/48, 29/04/1999; Kosovo: NATO and Military Action, 99/34, 24/03/1999; Kosovo: The Diplomatic and Military Options, 98/93, 27/10/1998; Kosovo, 98/73, 07/07/1998

10 Security Council Resolution 1160, 31 March 1998, Security Council Resolution 1199, 23 September 1998 and Security Council Resolution 1203, 24 October 1998

11 Independent International Commission on Kosovo, *The Kosovo Report,* 2000

12 Louise Arbour, "The Responsibility to Protect as a Duty of Care in International Law and Practice", Speech to Trinity College, Dublin, 23 November 2007

IV Developing the R2P Doctrine: Key Milestones

A. The International Commission on Intervention and State Sovereignty

An attempt to tackle the challenge of when and how to intervene came in 2000 in the form of an international panel of experts, sponsored by the Canadian Government in direct response to former UN Secretary General Kofi Annan's challenge to Member States to address dilemmas posed by humanitarian crises where intervention to protect human lives and the sanctity of state sovereignty clashed. It was called the *International Commission on Intervention and State Sovereignty* (ICISS).[13]

The ICISS members were chosen to reflect a range of geographical, political and professional backgrounds.[14] Over the period of a year, the Commission held a series of regional meetings and roundtables in a bid to hear and reflect different streams of international opinion on the subject. In the words of Ramesh Thakur, one of the ICISS Commissioners, the resulting report was "a genuine effort to incorporate many of the views that were expressed in Cairo, New Delhi and Santiago as well as Beijing, London, Paris and Washington".[15]

The ICISS was not the first panel of experts to look at the issue of humanitarian intervention and the question of state sovereignty. Over the years, a vast literature on these subjects had developed.[16] The challenge for the ICISS was how best to move debate forward on an issue which had so clearly polarised opinion.

1. The Idea of 'Sovereignty as Responsibility'

Prior to the establishment of ICISS, academics, lawyers and policymakers had focused clearly on whether it was ever legitimate to intervene in another state's affairs. ICISS chose to take a different approach. Instead of looking at the longstanding, circular and hotly contested debate over whether a 'right to intervene' existed, the Commission tried to find a new way of talking about protection against grave atrocities. Gareth Evans, President of the *International Crisis Group*, and co-chair of the Commission explained the approach as follows:

> We sought to turn the whole weary debate about the right to intervene on its head, and to re-characterise it not as an argument about the 'right' of state to anything, but rather about their 'responsibility' – one to protect people at grave risk: the relevant perspective we argued, was not that of prospective interveners but those needing support. The searchlight was swung back where it always

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[13] International Commission on Intervention and State Sovereignty, *The Responsibility to Protect*, 2001

[14] The Commission was led by Co-Chairs Gareth Evans, former Foreign Affairs Minister of Australia, and Mohamed Sahnoun of Algeria, Special Advisor to the UN Secretary-General. The ten other ICISS Commissioners were Gisèle Côté-Harper, Lee Hamilton, Michael Ignatieff, Vladimir Lukin, Klaus Naumann, Cyril Ramaphosa, Fidel Ramos, Cornelio Sommaruga, Eduardo Stein and Ramesh Thakur

[15] Ramesh Thakur, *The United Nations, Peace and Security*, 2007, p248

[16] See, for example, the extensive and comprehensive bibliography produced by the ICISS which runs to approximately one hundred pages

> should be: the need to protect communities from mass killing and ethnic cleansing, women from systematic rape and children from starvation.[17]

In the eyes of the ICISS, the idea that sovereignty entailed not just rights but also responsibilities was essential to providing a moral basis for action.[18] Ramesh Thakur, noted:

> The international order is based on a system of sovereign states because this is seen as the most efficient means of organising the world in order to discharge the responsibility to people of protecting their lives and livelihoods and promoting their well-being and freedoms. If sovereignty becomes an obstacle to the realisation of freedom, then it can, should and must be discarded. In today's seamless world, political frontiers have become less salient both for international organisations, whose rights and duties can extend beyond borders, and for member states, whose responsibilities within borders can be held to international scrutiny. The steady erosion of the once sacrosanct principle of national sovereignty is rooted in the reality of global interdependence: no country is an island unto itself anymore…
>
> We found it useful to re-conceptualise sovereignty, viewing it not as an absolute term of authority but as a kind of responsibility. In part this expressed what we heard from a cross-section of African interlocutors. State authorities are responsible for the functions of protecting the safety and lives of citizens and accountable for their acts of commission and omission in international as well as national forums. [19]

As the report itself states, "[…] the responsibility to protect is more of a linking concept that bridges the divide between intervention and sovereignty; the language of the 'right or duty to intervene' is intrinsically more confrontational."[20]

2. Prevent, React, and Rebuild

Having argued that state sovereignty entailed responsibility, the Commission then sought to tackle the issue of where this responsibility lay. It concluded that the 'responsibility to protect' lies first and foremost with the state whose population is at risk, both because this reflects existing international law and also because it accords with reality. However, where the state in question is unwilling or unable to act, and the population faces serious harm as a result of internal war, insurgency, repression or state failure, the ICISS argued this responsibility should transfer to the international level. One of the ICISS's most important contributions was its assertion that if international intervention was to be effective in responding to mass atrocities, the parameters of the concept would have to

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[17] Gareth Evans, "The International Responsibility to Protect: the Tasks Ahead", Address to Seminar on Africa's Responsibility to Protect, The Centre for Conflict Resolution, Cape Town, 23 April 2007

[18] The development of the notion that sovereignty implies responsibility is commonly attributed to academic Francis Deng. See for example his book, *Sovereignty as Responsibility: Conflict Management in Africa*, 1996

[19] Ramesh Thakur, *The United Nations, Peace and Security*, 2007, p255

[20] International Commission on Intervention and State Sovereignty, *The Responsibility to Protect*, 2001, para 2.29

include action to prevent conflict as well help rebuild after the event. Thus, according to ICISS, the international community's 'responsibility to protect' is three fold:

> A. **The responsibility to *prevent***: to address both the root causes and direct causes of internal conflict and other man-made crises putting populations at risk.
>
> B. **The responsibility to *react***: to respond to situations of compelling human need with appropriate measures, which may include coercive measures like sanctions and international prosecution, and in extreme cases military intervention.
>
> C. **The responsibility to *rebuild***: to provide, particularly after a military intervention, full assistance with recovery, reconstruction and reconciliation, addressing the causes of the harm the intervention was designed to halt or avert.[21]

a. R2P - a Three Dimensional Duty

The Commission was at pains to stress that the R2P was a three dimensional duty in a bid to drive debate forward from the idea that humanitarian intervention only involves the use of armed force. Indeed, the ICISS stated that this type of action should only be considered in "extreme and exceptional cases" which it defined as "cases of violence which…genuinely shock the conscience of mankind or which present a clear and present danger to international security."[22] The ICISS approach is based on the belief that co-operation is more likely to lead to effective action than confrontation. Lee Feinstein has commented

> The advantage of a cooperative approach is that it sends a clear message to the state of concern by setting an expectation of proper behaviour. A state's response to offers of assistance would give a clearer indication of state complicity and, if necessary, build a case for more robust international action later. Offers of assistance open doors to states and to the international community to act within states.
>
> […] In truth, options that fall well short of force are almost always preferable. They are politically easier to initiate and sustain, they avoid the inherent risks of war, and they can often be more effective, especially if pursued early and shrewdly.[23]

However, should preventive measures fail to induce an improvement to the situation, the ICISS report encourages states to react. As noted above, the duty to 'react' by taking coercive measures is not limited to armed force. The ICISS specifically made reference to a range of alternative methods of coercion that included targeted political, diplomatic, and economic sanctions. From a military perspective, action could include ending military cooperation or training; arms embargoes on weapons, ammunition, or spare parts; military co-operation with regional organisations, preventive military deployments,

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21 Ibid, xi

22 Ibid, p31

23 Lee Feinstein, *Darfur and Beyond: What is Needed to Prevent Mass Atrocities*, *Council of Foreign Relations*, No 22, January 2007, p17

enforcement of no-fly zones and naval blockades.[24] There is an obvious role here too, for promoting the use of international justice, for example through the use of the International Criminal Court.

However, the thorniest issue discussed by the Commission related to the responsibility to react involving military intervention in response to a hostile situation. In particular the ICISS looked at when this should be used and what situations this should apply to as well as what safeguards should exist against abuse and who should authorise action. This is discussed in the following section.

3. Guidelines on Military Intervention

Rather than trying to anticipate every contingency and provide a uniform checklist for intervention, the ICISS argued that the decision on intervention would have to be a matter of careful judgement on a case-by-case basis.[25] To assist in this process, the Commission espoused a series of principles which it stated should determine when and how military force was used.[26]

The first of these was that there must be 'Just Cause'. In order for this threshold to be satisfied there would have to be a large scale loss of life or ethnic cleansing, either actual or imminent. Even when the just cause threshold had been crossed by 'conscience-shocking' acts, intervention was to be guided by four cautionary standards: right intention, last resort, proportional means and reasonable prospects.

Ramesh Thakur has summarised the rationale behind this approach.

> Right intention is better assured with multilateral operations, clearly supported by regional opinion and the victims concerned. Military intervention can only be justified when every non-military option for the prevention or peaceful resolution of the crisis has been explored, with reasonable grounds for believing that lesser measures would not have succeeded. The scale, duration and intensity of the planned military intervention should be the minimum necessary to secure the defined human protection objective. And there must be a reasonable chance of success in halting or averting the suffering which has justified the intervention, with the consequences of action not likely to be worse than the consequences of inaction.[27]

Next, the Commission addressed the issue of which body should be charged with authorising interventions. The Commission came down firmly in favour of the UN, more particularly the Security Council. It concluded:

> There is no better or more appropriate body than the United Nations Security Council to authorise military intervention for human protection purposes. The task is not to find alternatives to the Security Council as a source of authority, but to make the Security Council work better than it has.

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[24] Ibid, p18

[25] Ramesh Thakur, *The United Nations, Peace and Security*, 2007, p258

[26] The full text of the proposals can be found in Appendix A of this paper

[27] Ramesh Thakur, *The United Nations, Peace and Security*, 2007, p258

> Security Council authorisation should in all cases be sought prior to any military intervention action being carried out. Those calling for an intervention should formally request such authorisation, or have the Council raise the matter on its own initiative, or have the Secretary-General raise it under Article 99 of the UN Charter.[28]

Recognising the potential for interventions to be blocked by permanent members with a right to a veto, the Commission called upon P5 members to refrain from using it "in matters where their vital state interests are not involved."[29] If agreement on this could not be garnered the ICISS recommended that the fall-back position be as follows

> I. consideration of the matter by the General Assembly in Emergency Special Session under the "Uniting for Peace" procedure[30]; and
>
> II. action within area of jurisdiction by regional or sub-regional organisations under Chapter VIII of the Charter, subject to their seeking subsequent authorisation from the Security Council.[31]

Finally, the Commission listed a number of operational principles to be followed. These included the need for clear objectives, a common military approach among partners, and an acceptance of limitations and rules of engagement which fit the situation.[32]

By rooting the R2P in existing UN structures and by making reference to principles such as proportionality, necessity and last resort, the Commission attempted to place R2P squarely inside familiar and accepted legal doctrines.

4. Commentary

Given the amount of work which had previously been undertaken on the subject of humanitarian intervention, ICISS set itself the task of moving the debate forward. For Co-Chair Gareth Evans, ICISS's contribution was fourfold. Firstl he argues that the new language used was helpful in "taking a good deal of the heat and emotion out of the policy debate, requiring the actors to change their lines and think afresh about what the real issues are."[33] Secondly, he points to the Commission's insistence on re-thinking sovereignty to see it not as control, but as responsibility. Thirdly, he refers to the Commission's desire to ensure that the R2P amounts to more than just a military response – prevention and rebuilding are integral to the concept. And finally, Evans alludes to the adoption of guidelines for when military action is appropriate in a bid to ensure both legality and legitimacy. He notes:

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[28] International Commission on Intervention and State Sovereignty, *The Responsibility to Protect*, 2001, xii

[29] International Commission on Intervention and State Sovereignty, *The Responsibility to Protect*, 2001, xiii

[30] The 'Uniting for Peace' procedure is found in General Assembly Resolution 377 which was adopted on 3 November 1950. It provides that in the event that the Security Council cannot maintain international peace and security because of a lack of unanimity among the P5, the General Assembly shall consider the matter immediately.

[31] International Commission on Intervention and State Sovereignty, *The Responsibility to Protect*, 2001, xiii

[32] International Commission on Intervention and State Sovereignty, *The Responsibility to Protect*, 2001, xiii

[33] Gareth Evans, "From Humanitarian Intervention to R2P", *Wisconsin International Law Journal*, Vol 24, No 3, 2006, p706

> The effectiveness of the global collective security system, as with any other legal order, depends ultimately not only on the legality of decisions but also on the common perception of their legitimacy—their being made on solid evidentiary grounds and for the right reasons, morally as well as legally.
>
> As to legitimacy, we identified five criteria that we argued should be applied by the Security Council—and be used by the world at large—to test the validity of any case made for a coercive humanitarian intervention. All five have an explicit pedigree in Christian just war theory, but their themes resonate equally with other major world religions and intellectual traditions.[34]

There were however, a number of crucial issues that ICISS did not address, not least the issue of whether an intervention which was not authorised by the Security Council could ever be regarded as legal. Avoiding this controversial issue may have helped to ensure broad support for the report but it left open an issue that continues to raise questions. It is also somewhat ironic that in trying to use language to take heat out of the policy debate, R2P has become an amorphous concept meaning vastly different things to different people. As will be discussed later, this brings with it many challenges.

Although NGOs and civil society enthusiastically embraced the work and conclusions of ICISS, the timing of its publication could scarcely have been worse for those who had hoped it would punch high onto the international political agenda. Coming only months after the events of 11 September 2001, it was quickly overshadowed by the new global focus on counter-terrorism and it began to look distinctly possible that R2P might not be picked up at all by the international community. But this changed with the 2003 invasion of Iraq, a development which affected the R2P's standing on the political agenda in a number of ways.

The 'Iraq effect' was two-fold. Firstly, references to R2P terminology started to be used by those seeking to justify action in Iraq, particularly when arguments about weapons of mass destruction began to be discredited. The idea that the Iraq invasion was based on protecting Iraqis against the tyranny of Saddam Hussein has been described as "devastating to the responsibility-to-protect agenda"[35] because it served to increase concerns that R2P would be used to further erode the sovereignty of smaller, developing countries. Notwithstanding these concerns, it nevertheless gave R2P the international political exposure that it had lacked up until that point.

Secondly, the disputes and divisions within the UN prior to the invasion seriously damaged the UN's credibility as a forum for dealing with peace and security. The failure to respond effectively to the Iraq situation compounded existing concerns about the UN's capabilities which had been graphically illustrated years earlier in Bosnia and Rwanda, and served to bolster calls for wide-ranging and far-reaching debate on UN reform. Fortunately for proponents of R2P, they were able to make it part of this larger debate

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[34] Ibid, p710

[35] William Pace and Nicole Deller, "Preventing Future Genocides: An International Responsibility to Protect", *World Order*, 2005, Vol 36, No 4, p18

that had begun to gather pace ahead of a planned meeting of global leaders at the UN's World Summit in 2005.

Other factors conspired to push R2P up the political agenda. By 2004 the situation in Darfur had deteriorated rapidly. As the humanitarian crisis deepened, NGOs such as Human Rights Watch, the International Crisis Group and the Aegis Trust turned to the R2P framework as a basis to call for further international action on Darfur, using the UN reform process as a means to promote further discussion of its value.[36] As a consequence the R2P was picked up in two key reports that were to inform negotiations ahead of the 2005 UN World Summit.

B. The UN High Level Panel Report on Threats, Challenge and Change

As part of the preparation for the 2005 World Summit the UN Secretary General appointed a sixteen member High Level Panel (HLP) to recommend clear and practical measures for ensuring effective collective action, including a review of the principal organs of the United Nations. The panel's findings were published in December 2004 as the *Report of the High-Level Panel on Threats, Challenges and Change*.

The report examined the possible root causes of conflict, discussed current threats such as terrorism, proliferation of weapons of mass destruction and organised crime, examined the use of force and the role of collective security mechanisms and identified limitations on the existing capacity for peacekeeping and peace enforcement. The High Level Panel commented

> In signing the Charter of the United Nations, States not only benefit from the privileges of sovereignty but also accept its responsibilities. Whatever perceptions may have prevailed when the Westphalian system first gave rise to the notion of State sovereignty, today it clearly carries with it the obligation of a State to protect the welfare of its own peoples and meet its obligations to the wider international community.
>
> But history teaches us all too clearly that it cannot be assumed that every State will always be able, or willing, to meet its responsibilities to protect its own people and avoid harming its neighbours. And in those circumstances, the principles of collective security mean that some portion of those responsibilities should be taken up by the international community, acting in accordance with the Charter of the United Nations and the Universal Declaration of Human Rights, to help build the necessary capacity or supply the necessary protection, as the case may be.[37]

Amongst the report's many recommendations aimed at strengthening the international security framework was an endorsement of the international responsibility to protect. The report stated

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[36] Ibid, p22

[37] Report of the High-level Panel on Threats, Challenges and Change, *A More Secure World: our Shared Responsibility*, 2004, para 29

> We endorse the emerging norm that there is a collective international responsibility to protect, exercisable by the Security Council authorizing military intervention as a last resort, in the event of genocide and other large-scale killing, ethnic cleansing or serious violations of international humanitarian law which sovereign Governments have proved powerless or unwilling to prevent.[38]

In general terms, the recommendations of the HLP largely reflected those of the ICISS. For instance the Panel endorsed the idea that R2P was an emerging norm and recommended that P5 members voluntarily refrain from using their veto and instigate a system of indicative voting. As the Panel explained:

> Under this indicative vote, "no" votes would not have a veto effect, nor would the final tally of the vote have any legal force. The second formal vote on any resolution would take place under the current procedures of the Council. This would, we believe, increase the accountability of the veto function."[39]

There were, however, a number of changes. These included the HLP's addition of 'serious violations of humanitarian law' to the list of actions that may give ''just cause' for action, which would have served to widen the international community's responsibilities. Some of the 'precautionary principles' alluded to by the ICISS were renamed. Thus, 'right intention' became 'proper purpose' and 'balance of consequences' became 'likelihood of success'. The general substance and thrust of these conditions however, remained the same. In addition,

> The High-level Panel also effectively endorsed the criteria of legitimacy which the ICISS had insisted must be a basis for any resort to military action. The only difference was that the panel recommended that these criteria be applied by the Security Council when considering whether to use military force in any context whatsoever, not only in internal humanitarian intervention situations.[40]

C. The UN Secretary General's Response to the High Level Panel Report

Kofi Annan's response to the Panel's report entitled *'In Larger Freedom: Towards Development, Security and Human Rights for All*[41] was published in March 2005 shortly ahead of the World Summit. Commenting on the issue of R2P, he stated,

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[38] Ibid, para 203

[39] Ibid, para 257. Alex Bellamy has questioned the value of the indicative voting approach arguing that is based on an "unproven assumption that external pressure can persuade states to act in humanitarian crises. He adds, "there is little evidence to suggest that states intervene in foreign emergencies because they are in some sense morally shamed into doing so by either domestic or global public opinion." See Alex Bellamy, "Whither the Responsibility to Protect? Humanitarian Intervention and the 2005 World Summit", *Ethics & International Affairs*, pp149-151

[40] Gareth Evans, "From Humanitarian Intervention to R2P", *Wisconsin International Law Journal*, Vol 24, No 3, 2006, p713

[41] Kofi Annan, *In Larger Freedom: towards Development, Security and Human Rights for All*, A/59/2005 21 March 2005

> While I am well aware of the sensitivities involved in this issue, I strongly agree with this approach. I believe that we must embrace the responsibility to protect, and, when necessary, we must act on it. This responsibility lies, first and foremost, with each individual State, whose primary raison d'être and duty is to protect its population. But if national authorities are unable or unwilling to protect their citizens, then the responsibility shifts to the international community to use diplomatic, humanitarian and other methods to help protect the human rights and well-being of civilian populations. When such methods appear insufficient, the Security Council may out of necessity decide to take action under the Charter of the United Nations, including enforcement action, if so required. In this case, as in others, it should follow the principles set out in section III above.[42]

The Secretary General then called upon Governments to

> …embrace the "responsibility to protect" as a basis for collective action against genocide, ethnic cleansing and crimes against humanity, and agree to act on this responsibility, recognizing that this responsibility lies first and foremost with each individual State, whose duty it is to protect its population, but that if national authorities are unwilling or unable to protect their citizens, then the responsibility shifts to the international community to use diplomatic, humanitarian and other methods to help protect civilian populations, and that if such methods appear insufficient the Security Council may out of necessity decide to take action under the Charter, including enforcement action, if so required[…][43]

Interestingly, the criteria which had been developed to guide the use of military force were not included alongside Annan's comments on the R2P. Although many NGOs had embraced the R2P notion, in other quarters opposition to the concept - most notably from the P5 - began to gain momentum. Annan tried to ward off further controversy and division by de-coupling the guidelines on the use of military force from the doctrine on the R2P. Thus the substance of his comments remained largely similar to the ICISS and the HLP but, from a presentational perspective, he attempted to make it easier for anti-interventionists to swallow by placing the guidelines on military intervention in the section of the report dealing with the use of force. Such was the strength of feeling on this matter that without this change it is doubtful whether subsequent agreement amongst Member States could have been achieved.

As a result, the guidelines were placed within the report's section on the Use of the Force with Annan recommending that the Security Council

> …should come to a common view on how to weigh the seriousness of the threat; the proper purpose of the proposed military action; whether means short of the use of force might plausibly succeed in stopping the threat; whether the military option is proportional to the threat at hand; and whether there is a reasonable chance of success. By undertaking to make the case for military action in this way, the Council would add transparency to its deliberations and make its decisions more likely to be respected, by both Governments and world public opinion. I therefore recommend that the Security Council adopt a resolution

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[42] Ibid, para 135

[43] Ibid, Annex, Section III, 7(b)

> setting out these principles and expressing its intention to be guided by them when deciding whether to authorize or mandate the use of force.[44]

As the resultant negotiations ahead of the 2005 Summit highlighted, Annan's attempt was to meet with only limited success.

D. The 2005 World Summit and Outcome Document

1. Pre-Summit Negotiations and Key Positions

Negotiations for the World Summit, at which it was hoped that a global endorsement of R2P would take place, came less than two years after the UN had failed to stem US action against Iraq. The bitterness that this had engendered was not just confined to wrangles between the US and UN. Widespread concern about the UN's future role and the limits of permissible intervention had followed the launch of Operation Iraqi Freedom. There was little doubt that it was hardly the most auspicious moment to try and rally consensus around such a highly controversial proposal.

With such extensive division apparent, the early signs that a deal could be brokered were less than promising. Although the early response from civil society to the R2P had been largely positive, resistance from key states had been mounting since the ICISS published in its report in 2001. Disquiet amongst the P5 was already apparent as early as May 2002, when the Security Council had discussed the idea at its annual retreat. Alex Bellamy has noted,

> With the partial exception of the U.K., the P-5 was sceptical from the outset…The United States rejected the idea of criteria on the grounds that it could not offer pre-commitments to engage its military forces where it had no national interests, and that it would not bind itself to criteria that would constrain its right to decide when and where to use force…The Chinese government had opposed The Responsibility to Protect throughout the ICISS process and insisted that all questions relating to the use of force defer to the Security Council. In its position paper on UN reform, however, China accepted that "massive humanitarian" crises were "the legitimate concern of the international community." While Russia supported the rhetoric of the responsibility to protect, it shared China's belief that no action should be taken without Security Council approval, argued that the UN was already equipped to deal with humanitarian crises, and suggested that, by countenancing unauthorized intervention, The Responsibility to Protect risked undermining the Charter.
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> While the U.K. and France were undoubtedly the leading advocates of The Responsibility to Protect among the P-5, and (along with the United States) flatly rejected the Russian and Chinese view that unauthorized intervention be prohibited in all circumstances, they too expressed concerns. In particular, they worried that agreement on criteria would not necessarily produce the political will and consensus required to respond effectively to humanitarian crises.

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[44] Ibid, p33

> Opinion outside the Security Council was similarly divided. The Non-Aligned Movement (NAM) rejected the concept. India, for example, argued that the council was already sufficiently empowered to act in humanitarian emergencies and observed that the failure to act in the past was caused by a lack of political will, not a lack of authority. Speaking on behalf of the NAM, the Malaysian government argued that The Responsibility to Protect potentially represented a reincarnation of humanitarian intervention for which there was no basis in international law.
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> The Group of 77 was more equivocal. Offering no joint position on the concept, it nevertheless suggested that the report ought to be revised to emphasize the principles of territorial integrity and sovereignty.[45]

As the Summit grew closer nearly all the negotiation on the Outcome Document took place in what Gareth Evans has described as "the notoriously difficult environment of the UN diplomatic corps rather than at a political leadership level in nations' capitals." [46] He goes on to describe the last minute negotiations, stating

> a fierce rearguard action was fought almost to the last by a small group of developing countries joined by Russia that basically refused to concede any kind of limitation on the full and untrammelled exercise of state sovereignty, however irresponsible that exercise might be. What carried the day in the end was not so much the consistent support from the United States and EU countries, which was not particularly helpful in the prevailing post-Iraq environment in meeting these familiar sovereignty concerns. Rather, it was the persistent advocacy by sub-Saharan African countries led by South Africa; the clear—and historically quite significant—embrace of limited-sovereignty principles by key Latin American countries; and some very effective last minute personal diplomacy with major wavering-country leaders by Canadian Prime Minister Paul Martin.[47]

2. Attaining Consensus: The Final Text

Ultimately - but far from inevitably - world leaders endorsed the Responsibility to Protect in the Summit's 'Outcome Document', helped in no small measure by co-operation between the most unlikely of partners, the US and the Non-Aligned Movement.[48]

On the face of it, the text agreed at the World Summit largely mirrored that developed by the ICISS, the HLP and the UN Secretary General: there is a recognition that each state has a responsibility to protect its citizens and that when that responsibility is not, or cannot, be discharged the international community has a responsibility to protect people

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[45] Alex Bellamy, "Whither the Responsibility to Protect? Humanitarian Intervention and the 2005 World Summit", *Ethics & International Affairs*, Vol 20 No 2, June 2006, pp151-152

[46] Gareth Evans, "From Humanitarian Intervention to R2P", *Wisconsin International Law Journal*, Vol 24 No 3, 2006, p714

[47] Ibid

[48] The Non-Aligned Movement consists of 118 countries and was established in 1961 "through the efforts of Tito, Nasser and Nehru who were determined to find a way of promoting the political and economic interests of the weaker countries at the global level. It works closely with the G-77. It meets at Head of State level every three years." (Foreign and Commonwealth Office, *Major UN Groups and Major Groupings Relating to the UN System Research Paper,* February 2008)

against genocide and other 'conscience-shocking' acts by taking both peaceful and, if necessary, military action.

Yet, for all the similarities, the process of diplomatic negotiation inevitably led to concessions and compromise which in turn resulted in both obvious and subtle differences between the Outcome Document and previous attempts to fashion an R2P norm. Perhaps most notable is the complete absence of any mention of the list of precautionary principles to guide military interventions. Gareth Evans has commented:

> Although the five criteria of legitimacy originally spelt out by the ICISS had managed to survive all the way through the earlier debate, they fell at the last hurdle: caught, in effect, in a pincer movement between, on the one hand, the hostility of the United States, which very definitely did not want any guidelines adopted that could limit in any way the Security Council's - and by extension, its own - complete freedom to make judgments on a case-by-case basis, and on the other, the hostility of a number of developing countries who argued, with more passion than intelligibility, that to have a set of principles purporting to limit the use of force to exceptional, highly defensible cases was somehow to encourage it.[49]

Gone too, was any reference to the possibility that the P5 should exercise restraint in their use of the veto when an R2P issue came before them. At the insistence of Russia and China the idea that action could be taken in response to an imminent disaster was shelved. Also absent from the document were any suggestions as to what should happen in the event that the Security Council failed to act.

Less obvious, but no less important, were a number of other changes which could have both symbolic and substantive impact. For instance, the original ICISS phraseology was altered to ensure that the host state's responsibility was strengthened by changing the text to read that "each individual state has the responsibility to protect". Further attempts to raise the threshold for international action can also be seen in the change to the ICISS proclamation that the international R2P should commence when a state is "unable or unwilling" to halt or avert serious harm to people. Negotiators dropped this idea, preferring instead to utilise the idea of 'manifest failure'.

With negotiations complete, the final text was placed within a section headed 'Responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity' and consists of the following key paragraphs:

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

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[49] Gareth Evans, "From Humanitarian Intervention to R2P", *Wisconsin International Law Journal*, Vol 24 No 3, 2006, p716

> 139. The international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the Charter, to help to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. In this context, we are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity. We stress the need for the General Assembly to continue consideration of the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity and its implications, bearing in mind the principles of the Charter and international law. We also intend to commit ourselves, as necessary and appropriate, to helping States build capacity to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity and to assisting those which are under stress before crises and conflicts break out.
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> 140. We fully support the mission of the Special Adviser of the Secretary-General on the Prevention of Genocide.[50]

V From Idea to Implementation

A. Assessing the Outcome Document

Gaining consensus on such a divisive subject, not least in a forum still echoing with post-Iraq recriminations, was nothing short of a diplomatic triumph. Thomas Weiss notes that, "with the possible exception of the prevention of genocide after World War II, no idea has moved faster or farther in the international normative arena than The Responsibility to Protect (R2P)…[51] For Lee Feinstein "the significance for preventing mass atrocities is clear. …the United Nations has skirted Talmudic debates about whether an atrocity is genocide by concluding that international action is warranted for a range of actions even if they do not meet a formal definition of genocide."[52] Others have noted, "[t]hat military force for human protection remains a policy option at all represents new and crucial middle ground in international relations."[53] Still others have contended that the inclusion of R2P in the Outcome Document,

> …is testimony to a broader systemic shift in international law, namely a growing tendency to recognise that the principle of state sovereignty finds its limits in the protection of human security…This development is part and parcel of a growing

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[50] United Nations General Assembly, 2005 World Summit Outcome Document, 15 September 2005, A/RES/60/1

[51] Thomas Weiss, "R2P After 9/11 and the World Summit", *Wisconsin International Law Journal*, Vol 24 No 3, 2006, p741

[52] Lee Feinstein, Darfur and Beyond: What is Needed to Prevent Mass Atrocities, *Council of Foreign Relations*, No 22, January 2007, p10

[53] Thomas Weiss, "R2P After 9/11 and the World Summit", *Wisconsin International Law Journal*, Vol 24 No 3, 2006, p746

> transformation of international law from a state and governing elite based system of rules into a normative framework to protect certain human and community interests."[54]

However, as with any diplomatic compromise, there is always the danger that important details are lost in the bargaining process. Alex Bellamy maintains that, "[i]n their bid to sell the responsibility to protect in the wake of the deeply divisive debate on Iraq, both the Canadian Government and Ramesh Thakur watered down the concept in crucial areas."[55] He goes on to argue that the absence of the just cause thresholds and precautionary principles, which would have constituted an important barrier to abuse, is a great loss. For others, ascertaining whether or not the Outcome Document amounts to "R2P-lite", as Thomas Weiss describes it, will only be known when a situation arises where R2P could help.[56]

On balance, there is little doubt that securing international agreement on a text has contributed significantly to the normative development of the Responsibility to Protect, albeit a diluted version of that developed by the ICISS. Whilst that has value in itself, significant questions remain as to both its legal and practical significance.

1. Legal Significance

Assessing the legal significance of R2P depends on a number of factors, not least whether states understand it to be a legal obligation and whether it adds to, or reinforces, existing duties under international law.

Indications thus far seem to suggest that many states believe the Responsibility to Protect has moral but not legal force. Both the British and US Governments have indicated that they regard the R2P as a political commitment and not a legal one. In a written answer from June 2007, the British Government stated, "Responsibility to Protect remains a political commitment rather than a legal obligation, but it is in the UK's interest to make sure that this commitment holds."[57]

The US position was spelled out in a letter from the former US Ambassador to the UN, John Bolton. It states that in a "general and moral sense" the international community has a responsibility to act when the host state allows atrocities. But it goes on to clarify that the "responsibility of the other countries in the international community is not of the same character as the responsibility of the host".[58] In a later paragraph, the letter makes it clear that the US does not believe the UN as a whole, or the Security Council, or

[54] Carsten Stahn, "Responsibility to Protect: Political Rhetoric or Emerging Legal Norm", *The American Journal of International Law,* Vol 101 No 1, January 2007, pp100-101

[55] Alex Bellamy, "Whither the Responsibility to Protect? Humanitarian Intervention and the 2005 World Summit", *Ethics & International Affairs*, Vol 20 No 2, June 2006 p147

[56] Thomas Weiss, "R2P After 9/11 and the World Summit", *Wisconsin International Law Journal*, Vol 24 No 3, 2006, p751

[57] HC Deb 461, c253-4W, 4 June 2007

[58] Letter from Ambassador John Bolton on the Responsibility to Protect, 30 August 2005, accessible via the *Responsibility to Protect* website, www.responsibilitytoprotect.org

individual states, have an obligation to intervene under international law.[59] These statements from key P5 members are important because the development of international law is, in part, influenced by reference to States' actions and legal intent.

Academics too, question whether the Responsibility to Protect is a legal requirement. Carsten Stahn is one of the few scholars to have addressed this in detail. He poses the question, "how can a concept that is labelled as a new approach and a re-characterisation of sovereignty in 2001 turn into an emerging legal norm within the course of four years and into an organizing principle for peace and security in the UN system one year later?"[60] Stahn goes on to explain that none of the four main documents in which R2P has been considered would be considered to be binding legal sources.[61] He states:

> Even a broader conception of the law which takes account of GA Resolutions and reports of the Secretary General…fails to offer conclusive guidance in this regard. A closer study of the relevant reports and documents reveals considerable divergences of opinion. Different bodies have employed the same notion to describe partly different paradigms. The text of the Outcome Document of the World Summit, which is arguably the most authoritative of the four documents in terms of its legal value leaves considerable doubt concerning whether and to what extent states intended to create a legal norm.[62]

Although the R2P doctrine may not yet be legally binding, there are areas where R2P could nevertheless be of legal importance. It has been argued that it serves as an international endorsement, reiteration and indeed reinforcement of existing international legal obligations, namely the duty to prevent and punish genocide, as reflected in the Genocide Convention and more recent case law.[63]

Secondly, the UN High Commissioner for Human Rights, Louise Arbour has argued that by adopting the R2P text states have "willingly acquired…a responsibility for a failure to act, a failure for which, I suggest, they could be held accountable."[64] She goes on to consider the extent to which this accountability would be of a legal nature and upon whom this responsibility would lie:

> I posit that because of the power they wield and due to their global reach, the members of the Security Council, particularly the Permanent Five Members (P5) hold an even heavier responsibility than other States to ensure the protection of civilians everywhere. If their responsibility were to be measured in accordance

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59 Ibid

60 Carsten Stahn, "Responsibility to Protect: Political Rhetoric or Emerging Legal Norm", *The American Journal of International Law,* Vol 101 No 1, January 2007, pp100-101

61 The main sources of international law are listed in Article 38(1) of the Statute of the International Court of Justice and can be broadly categorised as: international conventions; international custom; the general principles of law recognized by civilized nations; and judicial decisions and the teachings of the most highly qualified scholars.

62 Carsten Stahn, "Responsibility to Protect: Political Rhetoric or Emerging Legal Norm", *The American Journal of International Law,* Vol 101 No 1, January 2007, pp100-101

63 Notably the Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro) [2007] ICJ Rep.

64 Louise Arbour, "The Responsibility to Protect as a Duty of Care in International Law and Practice", Speech to Trinity College, Dublin, 23 November 2007

> with the International Court of Justice's analysis [in Bosnia v Serbia], it would seem logical to assume that a failure to act could carry legal consequences and even more so when the exercise or threat of a veto would block action that is deemed necessary by other members to avert genocide, or crimes against humanity.[…]
>
> The responsibility to protect doctrine may force a reassessment of the consequences of the use of the veto power specifically, as well as the perils of inaction more generally. In this sense, one might speak of an emerging notion of "international public interest." To serve such an international public interest, States should not only take all reasonable steps to prevent heinous crimes, but should also cease inhibiting other States from discharging their duty to protect when those States are willing and able to discharge their obligations.
>
> In that context and keeping in mind the analysis on the International Court of Justice, one has to wonder why the exercise of a veto blocking an initiative designed to reduce the risk of, or put an end to, genocide would not constitute a violation of the vetoing States' obligations under the Genocide Convention.[65]

She also discussed what she believes are the serious implications for the country intervening

> No longer holders of a discretionary right to intervene, all States are now burdened with the responsibility to take action under the doctrine of responsibility to protect. Arguably, this changes very little with respect to the offending or defaulting State (the recipient of international attention and action) and its political or military leaders. At the very least, under the Genocide Convention and its norms, which have been incorporated into international customary law, States have a duty to prevent genocide. Moreover, under the expanding reach of international criminal law, robust remedies have been fashioned—although not fully implemented—to enforce the prohibition against genocide, war crimes and crimes against humanity.
>
> To date, however, outside the Genocide Convention, no firmly established doctrine has been formulated regarding the responsibility of third-party States in failing to prevent war crimes and crimes against humanity, let alone ethnic cleansing—which, it should be remembered, is not as such a legal term of art.[66]

Louise Arbour’s comments highlight some of the potentially controversial and far reaching consequences of a legally enforceable version of the R2P. In a similar vein, the President of the *American Society of International Law*, José Alvarez, has posed a series of questions which warrant further consideration if and when R2P moves from being a political to a legal norm. While Arbour’s argument focuses on the possibility of holding individual states - in particular P5 members - liable for failing to act, Alvarez points to the possibility that the R2P doctrine could entail the legal liability of the UN as a whole or even regional organisations, in the event that they fail to react to an international atrocity. His overall assessment strikes a cautionary note,

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[65] Ibid
[66] Ibid

> …However laudable this effort, such a duty is absurdly premature and not likely to be affirmed by state practice.
>
> There are innumerable, obvious difficulties when we try to affirm R2P as a legal proposition in this fashion. We are not sure what is meant by finding the "UN" legally responsible in such a case: do we mean the organization as a whole, such that all dues paying members owe Rwanda compensation for the organization's failure to protect? Or do we mean only members of the Security Council? Or only the P-5 whose votes were absolutely essential to the outcome? Or those states able but unwilling to contribute armed members to protect Rwandans? Or the Secretary- General who failed to act quickly? Further, should we care whether those who created institutions such as the UN intended to impose such liability on their organization? Does the proposition that the UN committed a wrongful abdication of its responsibility to protect mean that others (including members) are entitled to impose counter-measures on it by, for example, failing to pay their UN dues? Does it matter if the UN's internal rules – such as the requirement that Council action draw the votes of 9 members including the affirmative votes of the P-5 – anticipate selective interventions by the Council? Or is it viable to suggest, as the ILC's current draft articles of IO responsibility provide, that an organization's internal rules (like those of a state) provide no excuse from the duty to protect? …
>
> Further, if we treat R2P seriously as imposing "legal responsibility" on the UN, how does that idea comport with the legal responsibility of states? International lawyers would appear to be caught in a dilemma. On the one hand, we are reluctant to say that states should be absolved from their responsibilities merely when they act in unison. States should not be enabled to abuse the law by acting collectively, like so many teenagers on a rampage. On the other hand, failing to uphold the accountability of states' international organizations fails to respect the distinct legal personhood of those organizations -- much less the reality that in cases such as the genocide in Rwanda, the organization -- and distinct actors within it such as the Secretary-General – were capable of and failed to take certain autonomous action within their institutional competence. We are, I would submit, far from resolving such difficult doctrinal matters as a matter of real world practice, and the concept of R2P cannot plausibly short-circuit the difficult political negotiations that would be necessary to overcome such difficulties.[67]

When confronted with such a spectrum of potential legal consequences, it is understandable why many states continue to argue that R2P is a political rather than legal commitment.

2. Practical Significance

In the short term, the success of the Outcome Document can also be measured against the extent to which it makes a difference to the lives of people under threat from their own governments. Darfur was, and is, the obvious case in point, and in the immediate months following the World Summit there was qualified optimism that the Responsibility

[67] José E. Alvarez, "The Schizophrenias of R2P", Panel Presentation at the 2007 Hague Joint Conference on Contemporary Issues of International Law: Criminal Jurisdiction 100 Years After the 1907 Hague Peace Conference, The Hague, The Netherlands, 30 June 2007

to Protect might be deployed as a basis for concerted international action in response to the worsening humanitarian situation in Darfur. In the event, although a number of Security Council Resolutions on Sudan have referred to the Responsibility to Protect, there is now a general acceptance that it has failed to make a tangible impact upon the power politics being played out in the Security Council.

As discussed above, many states are unconvinced than the R2P is a legal obligation. It will only be through state practice that the legal parameters and practical consequences will become clearer, and even then, this is likely to take considerable time and depends largely on the Security Council's reaction to a relevant humanitarian crisis. Thus far, the Security Council has only made select references to the 'Responsibility to Protect'. The first, which was secured with considerable support from the UK, was in Security Council Resolution 1674 on the Protection of Civilians in Armed Conflict, which was unanimously adopted on 28 April 2006, and "reaffirms the provisions of paragraphs 138 and 139 of the World Summit Outcome Document regarding the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity." Subsequent resolutions on Sudan[68] have also mentioned the R2P. In contrast, attempts to secure a reference to the responsibility to protect in the aftermath of the Burmese cyclone in May 2008 were stymied by anti-interventionists in the P5.[69]

The ability of the international community to use the Responsibility to Protect to positive effect in the event of another 'Darfur' will depend largely on the willingness of states to address a range of conceptual and practical concerns about the R2P which were left unanswered - deliberately in some instances to ensure a consensus would hold - at the World Summit. These issues are considered in the following sections.

VI Implementation Issues

A. Conceptual Issues

1. Clarifying the Parameters of R2P

At present RTP's parameters are distinctly ambiguous. There is, for instance, a lack of clarity about which situations the R2P should apply to, when the responsibility should begin and upon whose shoulders the responsibility should lie. While some commentators have disputed this and argue that recent case law on the Genocide Convention offers sound guidance on the scope of the responsibility to prevent genocide, there are obvious limitations to this approach, notably that the guidance primarily applies to genocide and not to crimes against humanity or war crimes, both of which the international community has pledged to offer protection against. Understandably, too, recent international criminal law judgments have focused on defining these categories of crimes and not on what duty of prevention the international community owes in similar situations. As a result, there is less clarity on the scope and nature of the international community's responsibility to prevent or react to war crimes or crimes against humanity. In practice, other problems

68 Notably Security Council Resolutions 1706 and 1755

69 This issue is examined in more detail in Section VII.C

have emerged. For instance in May 2008, the Responsibility to Protect was invoked in the Security Council by the French Foreign Minister Bernard Kouchner in response to the humanitarian catastrophe that followed Cyclone Nargis in Burma. Without a clear idea of the parameters of the R2P, disputes immediately arose as to whether the consequences of a natural disaster fell within the scope of the R2P as agreed in 2005.

While fluidity in the early stages of norm development is important to ensure consensus building, there is a danger it can begin to mean very different things to different people, in the process undermining the very consensus that it desperately relies upon for legitimacy. In an article in *Foreign Affairs* in 2004 Anne-Marie Slaughter and Lee Feinstein argued that the 'duty to prevent' could include action to stop nuclear-non-proliferation.[70] In response, Gareth Evans claimed this was an example of how R2P could be used as a "springboard for other forms of adventurism." Commenting further, he notes:

> There was much to admire in Slaughter and Feinstein's enthusiasm for better preventive strategies for inhibiting nuclear proliferation but much to be alarmed about in their argument that ultimately military force could be used preventively (not just pre-emptively when attack was imminent) and not solely when the Security Council endorsed it against regimes whose "absolute power… past behavior, and…expressed intentions," as they put it, seemed to justify this course.
>
> When one is trying to carefully build an international consensus where none has previously existed, of a kind which will actually mobilize real-time action to prevent real-time genocide and other atrocity crimes, it is not an enormous help to be told that preventive strikes against putative nuclear weapons states are a natural corollary of the R2P principle.[71]

There is another very real concern amongst non-western states that until the parameters of the R2P are clarified Western states will have ample scope to intervene in situations where there is no real humanitarian crisis. The President of the *American Society of International Law* José Alverez for instance has commented, "[n]otice…how readily the core concept of the R2P leads down the slippery slope to the Bush Administration's controversial notions of the pre-emptive use of force."[72]

A related issue is that of expectation management. One of the problems with many of the interventions that took place in the 1990s was that of unrealistic expectations. Benjamin Valentino has pointed out, "the argument that low-risk, small-scale military operations could effectively prevent atrocities was forwarded by advocates of intervention in virtually every major episode of human rights abuse in the nineties."[73] The reality, of course, was often quite different. Many humanitarian interventions were ill-equipped, militarily, and

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[70] Lee Feinstein and Anne-Marie Slaughter, "A Duty to Prevent", *Foreign Affairs*, January/February 2004

[71] Gareth Evans, "From Humanitarian Intervention to R2P", *Wisconsin International Law Journal*, Vol 24 No 3, 2006, p718

[72] 'The Schizophrenias of R2P', *Panel Presentation at the 2007 Hague Joint Conference on Contemporary Issues of International Law: Criminal Jurisdiction 100 Years After the 1907 Hague Peace Conference*, José E. Alvarez The Hague, The Netherlands, 30 June 2007,

[73] Benjamin Valentino, "The Perils of Limited Humanitarian Intervention: Lessons from the 1990s", *Wisconsin International Law Journal*, Vol 24 No 3, 2006, p727

financially, and lacked appropriate mandates or sufficient political support. Clarification of the parameters of R2P are necessary if it is to avoid becoming promoted, erroneously, as a panacea for widely divergent human security situations in the same way that humanitarian intervention was in the 1990s.

Part of this task will fall to the UN's new Special Adviser on the Responsibility to Protect who was appointed in August 2007.[74] The Special Adviser will work closely with the Special Representative on Preventing Genocide and Mass Atrocities, Francis Deng.[75] In so doing, it is hoped that he will contribute to the conceptual development of R2P and take on a role in consensus building.[76] On 9 October 2007 the Special Adviser presented a paper recommending eight initial steps towards realising his side of the mandate to the Policy Committee, the equivalent of the UN Secretary General's cabinet. These were readily adopted and the Special Adviser embarked on a series of meetings and roundtables around the world to attain further input.[77] The creation of the post and the relatively high official grade assigned to it is perhaps also indicative of Secretary General Ban Ki Moon's commitment to the Responsibility to Protect.

2. The Issue of Unilateral Interventions

There is another important legal and conceptual issue that has not yet been clarified, namely whether individual States may, in the absence of Security Council authorisation, intervene militarily to protect populations at risk. The idea of humanitarian intervention without Security Council approval is legally and politically controversial as the 1999 military operation in Kosovo so clearly demonstrated.

Paragraph 139 of the Outcome Document fails to shed much light on this subject and it remains unclear whether the United Nations is the only actor that can exercise the R2P or whether it is merely the preferred actor. Inevitably, this uncertainty will lead to differing interpretations about the scope of the R2P and its applicability. Writing in the *Yale Law Journal*, Alicia Bannon notes:

> The Summit's failure to consider unilateralism is not surprising. The agreement articulates a clear responsibility for the United Nations to act. The need for unilateral or regional action would therefore become an issue only if the United

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[74] The post holder is Edward Luck, an academic who has specialised in UN issues.

[75] The Office of the Special Adviser for the Prevention of Genocide was established in 2004, ten years after the genocide in Rwanda. Its mandate includes collating information, promoting co-ordination within the UN, providing early warning and making recommendations to the Security Council. However, as Lee Feinstein notes political sensitivities make the role a particularly difficult one: "In October 2005, the Special Adviser's request to brief the Security Council about his trip to Darfur was blocked by the US, China, Algeria and Russia, despite requests from Annan and the eleven other members of the Security Council to allow it." Lee Feinstein, *Darfur and Beyond: What is Needed to Prevent Mass Atrocities*, *Council of Foreign Relations*, No 22, January 2007

[76] Letter dated 31 August 2007 from the Secretary–General addressed to the President of the Security Council, S/2007/721

[77] Centre for Conflict Resolution, International Peace Academy and the Office of the UN Special Representative for the Prevention of Genocide and Mass Atrocities, *Prevention of Genocide and Mass Atrocities and the Responsibility to Protect: Challenges for the United Nations and the International Community in the 21st Century*, December 2007

> Nations failed to fulfil its duties, something that the drafters may have preferred not to countenance…[78]

One idea which has received increasing exposure in recent months is a proposal for a League of Democracies which, it is argued, could be used to legitimise action taken by coalitions of the willing in the event that the Security Council was paralysed. The idea has been most closely associated with US Republican Presidential Candidate John McCain but as his adviser, foreign policy analyst Robert Kagan, points out it has already garnered support amongst American Democrats too. In an article written for the *Financial Times*, Kagan outlines the case for a League as follows,

> American liberal internationalists like the idea because its purpose is to promote liberal internationalism. Mr Ikenberry believes a concert of democracies can help re-anchor the US in an internationalist framework. Mr Daalder believes it will enhance the influence that America's democratic allies wield in Washington. So does Mr McCain, who in a recent speech talked about the need for the US not only to listen to its allies but to be willing to be persuaded by them.
>
> A league of democracies would also promote liberal ideals in international relations. The democratic community supports the evolving legal principle known as "the responsibility to protect", which holds leaders to account for the treatment of their people. Bernard Kouchner, the French foreign minister, has suggested it could be applied to Burma if the generals persist in refusing international aid to their dying people. That idea was summarily rejected at the United Nations, where other humanitarian interventions - in Darfur today or in Kosovo a few years ago - have also met resistance.
>
> So would a concert of democracies supplant the UN? Of course not, any more than the Group of Eight leading industrialised nations or any number of other international organisations supplant it. But the world's democracies could make common cause to act in humanitarian crises when the UN Security Council cannot reach unanimity. If people find that prospect unsettling, then they should seek the disbandment of NATO and the European Union and other regional organisations which not only can but, in the case of Kosovo, have taken collective action in crises when the Security Council was deadlocked. The difference is that the league of democracies would not be limited to Europeans and Americans but would include the world's other great democracies, such as India, Brazil, Japan and Australia, and would have even greater legitimacy. […][79]

The idea has, however, met with considerable resistance. Echoing the concerns of many observers, Sir David Hannay, the former UK Ambassador to the UN and now Executive Director of the United Nations Association, points out that it would have no claim to international legitimacy or legality and could reinforce existing global divisions between Russia, China, Vietnam and many of the countries of the Middle East, on the one hand, and the league of democracies on the other. Sir David also notes

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[78] Alicia Bannon, "The Responsibility to Protect: the UN World Summit and the Question of Unilateralism'" , *Yale Law Journal*, 2006, p1157

[79] Robert Kagan, "The Case for a League of Democracies", *Financial Times,* 14 May 2008, p11

> …surely the real conversation-stopper, which none of the proponents of the league seems to have addressed, is the improbability that the great democracies of the developing world (India, Brazil, South Africa, and so on) would be prepared to sign up for the journey.
>
> A brief survey of the United Nations voting records of the three developing countries I have mentioned would reveal that they are among the most anti-interventionist of all UN members and the most hesitant about authorising the use of force. Have any of the champions of a league of democracies thought to ask the Indians or Brazilians what they think about the idea?[80]

B. Implementation: Practical Challenges

1. The Current Security Council Set-up

Throughout the process of developing the R2P norm, it has been widely argued that the most appropriate body to authorise interventions is the Security Council. The rationale, in theory, is clear: the Charter tasks the Security Council with maintaining international peace and security. Others go even further by arguing that under Article 24 of the Charter the Security Council not only has the right, but a developing legal responsibility, to act.[81] This latter point remains open to debate but what is clear is that Members of the Council should execute their mandate consistent with the principles and objectives of the UN.[82]

Previous experience, however, indicates that power politics often dictate motives which are not always consistent with those enshrined in the UN Charter. Moreover, the Security Council is often criticised for being unrepresentative with no permanent members from Africa, Latin America or the Indian sub-continent. In a lengthy paper for the Institute for Public Policy Research (IPPR), David Mepham and Alexander Ramsbotham highlight the poor democratic credentials of some Security Council members, and question whether the legitimacy of military interventions should be dependent on the votes of countries like China, that deny democratic elections to their own people. They also query whether action to prevent large-scale killing in an African country should fall to a Security Council that has no permanent African membership.[83]

It is also telling that anti-interventionists pushed heavily for the Security Council to be the authorising body for R2P interventions, given the ability of any of the P5 members to veto an intervention. The ICISS's suggestion that P5 members should voluntarily refrain from using the veto on matters that did not compromise their national interests was a

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80 David Hannay, "League idea will not stir support", *Financial Times*, 19 May 2008, p12

81 For a discussion of this issue see Hitoshi Nasu, "The Responsibility to React? Lessons from the Security Council's Response to the Southern Lebanon Crisis of 2006", *International Peacekeeping*, 14:3, 2007, pp339-352

82 International Commission on Intervention and State Sovereignty, *Supplementary Volume to The Responsibility to Protect: Research, Bibliography, Background*, *2001,* p158

83 David Mepham and Alexander Ramsbotham, *Safeguarding Civilians: Delivering on the Responsibility to Protect in Africa*, Institute of Public Policy Research, May 2007, p63. They do, however, also acknowledge that Africa's weak response to Darfur suggests that a stronger African voice on the UNSC would not automatically ensure more decisive action.

noble but ultimately vain attempt to encourage a modicum of altruism. By the time the proposal had reached the Secretary General it was dropped because it was considered to be far too controversial. The High Level Panel's recommendation that a system of indicative voting be used met with an equally equivocal response. Bannon has noted,

> "…The World Summit failed to agree to measures that would reduce the likelihood of strategic behaviour among Security Council members to undercut action. Due in large part to UK pressure, the final Summit agreement removed proposed language that called on permanent Security Council members "to refrain from using the veto in cases of genocide, war crimes, ethnic cleansing and crimes against humanity". This gap leaves permanent members with a powerful negotiating tool, permitting bad faith vetoes in the face of clear atrocities. The agreement's limitation of coercive measures to a case by case basis further encourages such bad faith actions."[84]

Certainly, if the Security Council's previous record is anything to go by, it will prove difficult to implement the R2P. Atrocity prevention has frequently been seen as a lesser priority when pitched against competing security goals. Even when humanitarian issues succeed in making it on to the Security Council's crowded agenda, poor early warning facilities mean that Council is often left trying to play 'catch up' with complex situations on the ground, thereby reducing its available responses and ultimately its effectiveness in preventing future crises. Thus the ICISS's refrain that "the task is not to find alternatives to the Security Council as a source of authority, but to make the Security Council work better than it has" is one which will need to be addressed if the R2P is to become a practical and realistic option in the future.

2. Overcoming Fears about Abuse of R2P

Developing countries have been at the forefront of efforts to ensure R2P does not become a charter for hegemonic intervention by large states. The long history of Western colonialism and imperialism driven by commerce, geopolitics, wealth and high moral purpose has left deep scars, and many governments remain suspicious of interference in their domestic affairs by the international community. More recently, the 'Iraq effect' has re-ignited concerns about the potential for abusing R2P. Lord Ashdown has noted,

> Unilateral declarations by superpowers that they have the right to intervene in the affairs of other states for the general peace tend to raise hackles across the international community as the 2003 intervention in Iraq clearly demonstrated. States, especially, those which are less powerful, are predictably uneasy about the precedent that say intervening to install democracy would set, and the extent to which such a provision would invite abuse by the powerful.[85]

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[84] Alicia Bannon, "The Responsibility to Protect: the UN World Summit and the Question of Unilateralism"' , *Yale Law Journal*, 2006, p1160

[85] Paddy Ashdown, *Swords and Ploughshares, Bringing Peace to the 21st Century*, 2007, p58

Overcoming these deep seated fears has proved difficult, as the ICISS discovered in a series of regional roundtables.[86] For instance, the Beijing Roundtable concluded that

> In practice, legalization of humanitarian intervention is counterproductive to halting massive killings in targeted countries, for it can facilitate interventionists exploiting the legality for their own purposes and encourage warring parties inside a country to take an irresponsible stand in mediation processes.

ICISS Roundtables in other regions highlighted a variety of concerns. In the Middle East for example, some felt that the results of Western intervention had not always been beneficial and had instead sometimes aggravated the crises and created fresh problems.[87] In Asia and Latin America it was noted that the trigger for intervention is more likely to be alleged human rights violations and on this there is considerable international disagreement.[88] The African situation is somewhat different according to Thakur. He points to a number of possible explanations for the greater willingness of Africans to accept intervention.

> Their greatest fear is state failure leading to humanitarian crises, where the sensitivity to intervention is less….Sovereignty is elusive in the African context of tensions and polarisation between state and society…Also, many weak African states lack empirical sovereignty, being subject instead to warlords, robber barons, gun and drug runners etc. The greater African openness to interventions many be explained by recent African history. Far too many regimes – Haile Mariam Mengistu in Ethiopia, Idi Amin and Milton Obote in Uganda – had used the shield of sovereignty for their abusive records, treating people, African people as objects rather than actors. But African civil society representatives were just as uncomfortable with the association of the term humanitarian with war…[89]

While the exact reasons for mistrusting the responsibility to protect varied across continents and regions in light of historic factors and individual experiences of humanitarian intervention, the common thread that emerged was an enduring mistrust of what is generally perceived to be a Western imposed doctrine.

3. Political Will and the Strategic Security Environment

Assuming that the Security Council can overcome the not insignificant problems outlined above, other related challenges loom large, not least that of securing political will. The strategic shift away from humanitarian intervention that started with the botched operations of the 1990s was completed at a stroke on 11 September 2001. Political will for humanitarianism evaporated, and was quickly replaced by a new Western pre-occupation and strategic focus on combating terrorism. The intervention in Iraq completed what 9/11 started as far as diminishing political support for intervention is concerned. Weiss observes,

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[86] Roundtables were considered to be an integral part of the deliberations by the ICISS and consisted of 11 regional roundtables in: Ottawa; Geneva; London; Maputo, Washington, Santiago, Chile, Cairo, Paris, New Delhi, Beijing and St Petersburg.

[87] Ramesh Thakur, *The United Nations, Peace and Security*, 2007, p271

[88] Ibid, p272

[89] Ibid

> The wars in Iraq and on terror have had three stifling effects on [the] normative conversation […] Iraq is a conversation stopper for many critics when discussing any possible loosening of criteria for intervention or setting aside the principle of non-intervention. Second, glib rhetoric about the wars on Iraq and terrorism suggests a heightened necessity for more clear-headed analysis. There is a danger of contaminating the legitimate idea of humanitarian intervention by association, especially with George W. Bush's and Tony Blair's spurious and ex post facto "humanitarian" justifications for invading Iraq.[90]

He goes on to discuss the effect that the Bush doctrine of pre-emption has had of reinforcing fears of US dominance and as a precedent for other would-be interventionists,

> One probable result of the enunciation of interventionist doctrines by the USA will be to make states even more circumspect than before about accepting any doctrine, including on humanitarian intervention or on the responsibility to protect, that could be seen as opening the door to a general pattern of interventionism.[91]

The UK is one of the few countries which continues to make the case for intervention more generally. Speaking on 12 February 2008, the British Foreign Secretary David Miliband accepted that "discussion about the Iraq war has clouded the debate about promoting democracy around the world" but went on to argue that, even so, leading powers should not shy away from liberal interventionism in the pursuit of democracy.[92] Yet, in believing that there is a need to make the case for intervention he is arguably acknowledging, albeit implicitly, that support for this form of action has already collapsed. Indeed, the fact that objections during the process to develop R2P came from countries such as Argentina, Chile and Germany, which earlier would have been considered to be friends of R2P, is indicative of the nature and extent of the 'Iraq effect'.

Iraq has had an equally injurious effect on the campaign to encourage developing countries to overcome their suspicions about R2P. Weiss argues that the "sloppy and disingenuous use of "the h word" by Washington and London has played into the hands of those Third World countries that wish to slow or reverse normative progress."[93] He goes on to state,

> For them, humanitarian intervention is a convenient sleight of hand to conceal hidden—and in the case of Iraq, not so hidden—Western agendas. Their worst fears about Trojan horses have hardly been assuaged by mainstream American academics—false friends of R2P who have pointed to the ethical underpinnings of pre-emptive and even preventive war. […] According to Ivo Daalder and James Steinberg, the conditional terms of sovereignty include preventing genocide,

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90 Thomas Weiss, "R2P After 9/11 and the World Summit", *Wisconsin International Law Journal*, Vol 24 No 3, 2006, p749

91 Ibid, p750

92 David Miliband, "The Democratic Imperative", Aung San Suu Kyi Lecture, Oxford University, 12 February 2008

93 Thomas Weiss, "R2P After 9/11 and the World Summit", *Wisconsin International Law Journal*, Vol 24 No 3, 2006, p758

> terrorism, the spread of WMDs, diseases, and by extension environmental collapse. […]
>
> In spite of incantations from the ICISS, the High-level Panel, Kofi Annan, and the World Summit, humanitarian intervention is an even harder sell these days than a few years back for fear that the Bush administration could manipulate any imprimatur.[94]

4. Limitations within the UN

As Martha Finnemore has noted, "[t]o be legitimate in contemporary politics, humanitarian intervention must be multilateral."[95] It would therefore make sense, in theory at least, to discharge the 'responsibility to react' through the United Nations. In theory this would also place the largest burden of responsibility on the states most capable of exercising it, as the UN High Commissioner for Human Rights argues:

> By applying the same logic that places a special responsibility on those countries that, due to their pre-eminence and special rights in the Security Council, are able to wield more influence, I would further argue that being better positioned to avert and respond to atrocities may have as much to do with the capacity to project power and mobilize resources beyond national and regional borders as with physical proximity. In this respect, too, powerful States may be reasonably expected to play a leading role in bolstering appropriate measures of prevention, dissuasion and remedy across a geographic spectrum commensurate with their weight, wealth, reach, and advanced capabilities.…Chapter VII of the UN Charter which allows the Security Council to authorise enforcement action in respect of threats to international peace and security could be used as a legal basis for action. [96]

There would be other advantages to using the UN for this purpose, notably the existence of a unified civil and military command structure, the fact that it provides the best context for the widest possible burden sharing and the comparatively low cost involved when it comes to deploying troops.[97] These advantages, however, must be weighed against a range of fundamental shortcomings, as Lord Ashdown explains:

> Wars are best fought by organizations designed to fight wars – and the UN isn't one of them. Bosnia and East Timor proved that…This is not the UN's fault. Originally, the UN's role in peacemaking was conceived as one which included a war-fighting capacity and it was equipped with the means to do this in its first intervention in the Congo. But since then the UN members, and especially the permanent five, have declined to give New York the things a war-fighting organization needs. The UN has no fixed military common structure, no standing general staff, no standing army, no intelligence, no logistics, no battlefield communications, quite often no soldiers of the right quality and almost no clear-

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[94] Ibid, p751

[95] Martha Finnemore, "The Purpose of Intervention, Changing Beliefs about the Use of Force", 2003, p78

[96] Louise Arbour, "The Responsibility to Protect as a Duty of Care in International Law and Practice", Speech to Trinity College, Dublin, 23 November 2007

[97] Paddy Ashdown, *Swords and Ploughshares, Bringing Peace to the 21st Century*, 2007, p160

> cut rules of engagement that make sense on the battlefield – in short nothing that is required to successfully prosecute a military action in which live bullets are likely to be used and young men and women run the risk of being killed. To reinforce the point, since the Congo, the UN's member states have never so far allowed the UN to carry out a Chapter VIII (humanitarian) intervention (which tend to be opposed) and only ever allowed them to carry out Chapter VI (peacekeeping) tasks which tend to be permissive.[98]

The very nature of R2P situations suggests that it is highly unlikely that the situation on the ground will be permissive and thus it is questionable whether the UN has the institutional capabilities to deal with these situations. The unprecedented global surge in UN peacekeeping operations has left it overstretched and unable to cope without serious reform. As Lord Ashdown concludes, "…The UN will always remain weak in comparison to the professional armies of its most powerful member states or military alliances like NATO, when it comes to either an opposed intervention or an in-conflict reconstruction in the face of continuing insurgency."[99] This was graphically illustrated during the 1990s in Somalia and the former Yugoslavia. In both cases, UN-led peacekeeping forces were inserted into societies where there was no peace to keep and ultimately, UN forces had to be replaced by larger, more robust American-led peace enforcement missions.[100]

Alicia Bannon also highlights a series of related shortcomings,

> First the structure of the United Nations does not foster quick and decisive responses. Vetoes by the permanent members of the Security Council – or even threats of vetoes – can undermine effective international action. Bureaucratic hurdles and diplomatic negotiations can be time-consuming, making it difficult to respond to rapidly unfolding events. More generally, any form of international coercion is usually diplomatically and politically costly, creating a strong incentive for international actors to avoid difficult measures. The international response to the crisis in Darfur is illustrative. China, which has ties to the Sudanese government and enjoys a permanent seat on the Security Council, was reported to have opposed coercive measures like sanctions…[101]

Institutional shortcomings have in the past been compounded by operational limitations and weaknesses. As Rebecca Hamilton notes, "there is an ever-present danger that focusing on the operational challenges for the military will let the political decision-makers off the hook, [but] there are nevertheless some very real practical difficulties ahead."[102] It is certainly accurate to state that a number of UN interventions have suffered because of an absence of clear instructions from the Security Council as well as national conceptions of command and control at the operational and tactical levels. These repeated failings, combined with the often cautious approach of contingents deployed in the first crucial months of intervention, damaged the credibility and future of UN

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[98] Ibid, p159

[99] Ibid, p196

[100] RAND, *The UN's Role in Nation-Building: From the Congo to Iraq*, 2005, xviii

[101] Alicia Bannon, "The Responsibility to Protect: the UN World Summit and the Question of Unilateralism'" , *Yale Law Journal*, 2006, p1157

[102] Rebecca Hamilton, "The Responsibility to Protect: From Document to Doctrine – But What of Implementation?" *Harvard Human Rights Journal*, Vol 19, 2006, p289

operations.[103] The UN military interventions in Sierra Leone and the Democratic Republic of Congo, both deployed in 1999, illustrate some of the challenges facing UN peace operations in Africa when it comes to the protection of civilians, and as the ICISS noted:

> Shortcomings in strategy and objectives are even more apparent when it comes to coercive protection. Consider, for example, the creation of the safe areas in Bosnia in April 1992. While these authorizations indicate that intervening forces have the right to use force to protect civilians, it is also clear that they are under no obligation to do so. And although broadening mandates and developing more robust ROEs have been welcomed in many quarters, some have argued that asking more of troops already under equipped for their existing tasks is a recipe for disaster."[104]

The UN has not been entirely blind to its own limitations and over the years there has been increasing recognition from within its own ranks that it must play to its strengths rather than trying to take responsibility for robust military operations that are beyond its capabilities.[105]

More recently, the drive for UN reform has led to renewed attempts to rectify continuing institutional shortcomings. For instance, the Department of Peacekeeping Operations (DPKO) has been bolstered by the addition of new staff in its headquarters, taking its total personnel strength to approximately 600 people. However, in relation to DPKO re-structuring, the Secretary General's proposals say nothing about enhancing the capacity of UN peace operations to promote civilian protection, which in the opinion of Mepham and Ramsbotham amounts to "a serious oversight given the increasing emphasis placed on civilian protection in UN mandates."[106]

Lord Ashdown is one of many who have argued that there is a strong case for further strengthening the UN DPKO's capacity to provide a proper headquarters capable of providing better management of operations in the field which are permissive in nature.[107] The creation of a new Peacebuilding Commission (PBC) in December 2005, which is designed to plug an institutional gap and help to stop countries sliding back into conflict, is also a potentially important structural innovation. Louise Arbour argues that the PBC is ideally suited to identify the institutional reconstruction and economic development aspects of the responsibility to protect norm in the longer term.[108] As with many structural innovations, however, it is questionable whether it will be able to garner sufficient political will and resources to allow it to capitalise upon its potential. Similar comments can be made about the newly created Human Rights Council. As Arbour points out, "…since impending genocide is almost invariably preceded by patterns of gross and systematic human rights violations, the Human Rights Council is – or should be – the pre-eminent

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[103] International Commission on Intervention and State Sovereignty*,* *Supplementary Volume to The Responsibility to Protect: Research, Bibliography, Background, 2001,* p184

[104] Ibid, p185

[105] See for example the report of the Panel on United Nations Peace Operations (the Brahimi Report), 2000, A/55/305 - S/2000/809

[106] David Mepham and Alexander Ramsbotham, *Safeguarding Civilians: Delivering on the Responsibility to Protect in Africa,* Institute of Public Policy Research, May 2007, p54

[107] Paddy Ashdown, *Swords and Ploughshares, Bringing Peace to the 21st Century*, 2007, p196

[108] Louise Arbour, "The Responsibility to Protect as a Duty of Care in International Law and Practice", Speech to Trinity College, Dublin, 23 November 2007

forum for early warning and prevention."[109] Crucial too is ongoing work to improve the UN's early warning capacity.

If the UN's current institutional shortcomings effectively preclude it from discharging the military enforcement element of R2P, what body should be charged with enforcing the responsibility to react? The Security's Council's solution to the UN-led debacles in Somalia and Yugoslavia during the 1990s was to delegate some of the more complex enforcement actions to member state-led coalitions and regional bodies. The fact that the 2005 Outcome Document made reference to regional bodies suggests that Member States believe that delegating to regional bodies may, in some instances, be the best and indeed the only option.

5. A Role for Regional Organisations?

The fact that the Outcome Document makes reference to regional organisations (ROs) is an important recognition that centralised UN enforcement missions may not always be plausible, or even desirable. Those advocating the use of regional bodies for R2P enforcement action propose a variety of arguments to support their position. These tend to be based on a belief that regional bodies will have a deeper interest in restoring peace and stability to the region and that they will display greater cultural sensitivity because they have a more homogenous membership. These factors, it is argued, will help to bring greater legitimacy to operations, not to mention that ROs are often in closer proximity to conflict zones, which in turn assists with early warning and improves efficiency. There is also case law to suggest that regional organisations may, by the very nature of their proximity and influence, have a duty to take action to prevent genocide within their sphere of influence.[110]

The legal basis for Security Council delegation to regional bodies can be found in Article 53 of the UN Charter, which allows the Security Council to use 'regional arrangements or agencies' for enforcement action. In the past this option has generated controversy not least because under Article 53 regional bodies are supposed to secure Security Council authorisation before taking delegated action. In the case of Kosovo, none of the Security Council Resolutions passed in 1998 expressly authorised states or NATO to use force, yet this did not stop military force from being used. While some states claimed that relevant Security Council Resolutions provided implied authorisation, others, including the UK claimed that it was an internationally legal response designed to avert a humanitarian catastrophe and was therefore justified under customary international law. As the Kosovo Commission pointed out, this approach not only led to questions about the legality of the operation, it also had an adverse effect on its legitimacy.

The idea that Security Council authorisation might be implied, or even that it can retrospectively authorise interventions, as it arguably did with the 1992 Economic Community of West African States (ECOWAS) operations in Liberia (1990-1992) and

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[109] Ibid

[110] Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro) [2007] ICJ Rep

action in Sierra Leone (1997-1998), prompts mixed reactions. While some argue that the use of regional bodies in this way could help to ensure that R2P becomes operational, it does nothing to assuage the fears of those who believe that this leaves the international law open to abuse and inconsistency, which is neither good for the development of the law or the people who seek international protection. Indeed the UN World Summit rejected demands by a number of African states that the African Union should be able to act before gaining UN authorisation.[111] As the ICISS noted,

> …the loose connection between UN authorization and member-state enforcement is not without its problems. In particular, the delegation of authority – or "subcontracting" to coalitions of the willing and able or to regional arrangements or agencies – has raised concerns about the use of Security Council authority to give legitimacy to the foreign policy objectives of powerful states."[112]

There are other potential practical problems with delegating R2P interventions to regional organisations. As the One World Trust notes, regional organisations and individual powers have a mixed record of effective deployment in peacekeeping operations, particularly when compared over time to UN operations. They point to problems such as uneven resources among regional organisations combined with a lack of institutional knowledge regarding peacekeeping, which make regional operations poor substitutes for UN missions. They also point to problems such as lack of impartiality and the potentially destabilising presence of a regionally dominating power which could hamper the legitimacy and operational ability of regional operations.[113]

A Wilton Park Conference Report on this subject noted

> "….Some argue the time has arrived for formalising relations with all ROs to bring greater clarity: for the perception of respective roles; for recognition of Chapter VIII organisations through a procedural mechanism involving formal application, clear criteria and transparent decision-making; and for according delegated responsibility, with ultimate recourse to the UNSC when necessary. Others, including several ROs, prefer a more pragmatic approach, concentrating on needs and effectiveness. ROs have diverse working methods and very different capacities. The comparative advantages of ROs are seen as: their ability to intervene when the UN faces political constraints; their speed of response; their flexibility or improvisation; and their familiarity with issues on the ground. Some fear this 'added value' of ROs may be compromised through instituting a formal working relationship with the UN. Instead, the answer lies in eschewing a generic approach; those ROs which have the capacity and are willing to work with the UN could choose to do so through formalised MoUs or other legal agreements.[114]

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[111] David Mepham and Alexander Ramsbotham, *Safeguarding Civilians: Delivering on the Responsibility to Protect in Africa*, Institute of Public Policy Research, May 2007, p63

[112] International Commission on Intervention and State Sovereignty, *Supplementary Volume to The Responsibility to Protect: Research, Bibliography, Background, 2001,* p120

[113] Maeve Bateman and Michael Hammer, "Don't call me, I'll call you", *One World Trust*, Briefing Paper 107, October 2007, p2

[114] "The UN's relationship with regional organisations in crisis management and peacekeeping: how should it be developed to mutual advantage?", *Wilton Park Conference Report*, 21-23 April 2005

The relative merits and shortcomings of a selection of regional bodies most likely to be involved in R2P enforcement actions are outlined below.

a. The African Union

The African continent's experience of state collapse and numerous humanitarian tragedies as well as lack of capacity and its heavy reliance on Western donor funds, combined with repeated Western indifference, have significantly impacted on African regional policy.

In 2000, the African Union's Constitutive Act recognised the responsibility of the AU to intervene in the internal affairs of member states in order to protect citizens in humanitarian crises.[115] This was a major departure from the position adopted by the AU's predecessor, the Organisation for Africa Unity, which had advocated a policy of non-interference. Like the ICISS, military action under the AU is to be regarded as a last resort and is seen as part of a longer continuum that starts with prevention and ends with re-construction.

Although the 'responsibility to protect' is not explicitly included in any of the AU's founding documents, the 15 member Peace and Security Council (PSC) created for the prevention, management and resolution of conflicts in 2004, provides a source of authority for intervention on the basis of civilian protection. It has also been noted that the establishment of the PSC and its subsidiary bodies – the Continental Early Warning System, the Panel of the Wise and Africa's Standby Force to be established in 2010 based on five sub-regional brigades – as well as the adoption of the AU policy on Post-Conflict Reconstruction and Development - could provide a foundation for implementing the three dimensions of the responsibility to protect principle in Africa.[116]

In practice, the AU's response to the situation in Darfur – which is commonly regarded as being a classic example of a R2P-type situation - has been patchy.[117] There have been many accusations of incompetence, inconsistency and insufficient political support. At the most basic level, the AU also suffers from a range of structural problems which hinder the effective discharge of its intervention mechanism, as Alex Bellamy explains,

> First, procedurally, there remains confusion about both which body would actually invoke intervention and the legal relationship between the AU and the Security Council. Under the act, the fifteen-member Peace and Security Council would recommend action to the AU Assembly. In turn, the Assembly is authorized to defer its responsibility in a particular case to the peace and Security Council. The problem here is that the Assembly meets only once a year and takes decisions on the basis of consensus or, failing that, a two-thirds majority. The process of

[115] Article 4(h) of the Constitutive Act of the African Union, adopted in Lome on 11 July 2000, explicitly spells out the principle of intervention: the 'right of the Union to intervene in a Member State' with respect to the commission of 'war crimes, genocide, and crimes against humanity'

[116] Centre for Conflict Resolution, *Africa's Responsibility to Protect*, April 2007, p20

[117] The African Union's response to, and involvement in, the humanitarian disaster in Darfur is scrutinised in a number of Library Research Papers and Standard Notes and will not be re-examined here. See for example, House of Commons Library Research Paper *Sudan: the Elusive Quest for Peace*, 06/08, 08/02/2006

> activating Article 49h) against the will of the relevant member state would therefore be time consuming. Moreover, given the continent's traditional reluctance to endorse interventionism and fractious sub-regional alignments, the possibility of securing a two-thirds majority in the face of a hostile host must be thought unlikely at best. In practice the two AU missions in Burundi and Darfur have been conducted with host consent.

He also points to the thorny relationship between AU initiatives and the Security Council:

> The Constitutive Act strongly implies that the AU, not the UN Security Council, may assume primary responsibility in the face of humanitarian emergencies. On other matters, however, African states have a track record of denouncing regional initiatives involving the use of force and insisting upon the primacy of the Security Council. In 1999, Namibia voted with Russia and China in condemning NATO's intervention in Kosovo, a position publicly shared by both South Africa and Nigeria. The question, then, is, does the AU require Security Council authorization in order to launch a forced intervention? Technically, the answer is no because through binding themselves to the Constitutive Act, members have consented to making themselves subject to intervention should the AU Assembly see fit. The AU's institutions are themselves constrained however. The AU protocol setting outs its Peace and Security Council's terms of reference insists that he body must fully cooperate and maintain close and continued cooperation with the Security Council. Furthermore, the protocol formally recognizes the primary role of the Security Council in the maintenance of international peace and security. At the same time, the protocol did not insist that the AU was obliged to seek UN authorization for collective enforcement action…
>
> … As the Darfur case demonstrates, there is a distinct possibility that the AU and UN may have different ideas about the gravity of a particular situation. In that case, AU members not only reflected the US view that the Sudanese government was guilty of genocide, but also disputed the UN's findings that senior government officials were implicated in widespread and systemic war crimes and crimes against humanity. They also argued in the Security Council throughout 2005 that the humanitarian situation in Darfur was improving, despite widespread reports from the UN and elsewhere to the contrary.
>
> The second problems associated with Africa's regional initiative is that is could theoretically be used to block Security Council action. On the one hand, it risks undermining the prescriptive component of the R2P by permitting the P5 to defer to the AU in cases where they lack the political will to act, regardless of the latter's capacity to act effectively. On the other it may legitimize anti-interventionist arguments by lending credence to the idea that the Security Council should avoid imposing its will on Africans. Both of these trends were evident in the Darfur Crisis.[118]

Thus, although substantial efforts have been made by the AU in a bid to create a culture of protection within its institutions, the perennial problem of a lack of political will has undoubtedly hindered the implementation of national, regional and international standards. It is not surprising, therefore, that South Africa's *Centre for Conflict Resolution*

[118] Alex Bellamy, "Whither the Responsibility to Protect? Humanitarian Intervention and the 2005 World Summit", *Ethics & International Affairs*, Vol 20 No 2, June 2006, p159

has concluded that, "there remains an urgent need for the AU to address the reality of responses on the ground, and the experience of the current AU mission in Darfur is an example of the problems of lack of military capacity in a difficult intervention situation.[119]

b. The European Union and NATO

The EU's security and defence capabilities are still very much under development.[120] As part of this, in 2003 the EU agreed to create European Union Battlegroups (EU BGs) which became fully operational on 1 January 2007. Each of the fifteen Battlegroups is made up of 1500 troops under EU control. The aim was for the EU to be able to deploy an autonomous operation within 15 days in response to a crisis. The forces are to have the capacity to operate under a Chapter VII mandate[121] and could be deployed in response to a UN request to stabilise a situation or otherwise meet a short-term need until peacekeepers from the United Nations, or regional organisation acting under a UN mandate, could arrive or be reinforced.[122]

There is also NATO's Response Force (NRF), which is described as "a high readiness force of ships, aircraft and ground troops capable of responding to a range of crisis situations at very short notice as decided by the North Atlantic Council (NAC)."[123] In practical terms this means that some 25,000 troops are available for rapid deployment around the world for a variety of mission types ranging from crisis management to 'an initial entry force' for larger, follow-on operations.[124] Like the EU Battlegroups, the NRF has the capacity to begin deploying after five days' notice and to sustain itself for 30 days or longer with reinforcements.

In their paper on *Safeguarding Civilians*, which focuses on the implementation of R2P in an African context, David Mepham and Alexander Ramsbotham argue that the EU's Battlegroups "appear to be highly relevant to rapid military interventions for humanitarian protection purposes in Africa," and point to the fact that the December 2005 EU Strategy for Africa pledged to deploy operations involving EU Battlegroups to promote African peace and security. However, they go on to urge a note of caution, pointing out that "Battlegroups have not been configured for the specific tasks of civilian protection, and no framework nations or multinational coalition members have made clear commitments to deploy them to crises in Africa." [125] The failure to deploy troops to Darfur seems indicative of this very sentiment. As far as the NRF is concerned, the *Safeguarding Civilians* report is broadly supportive, stating that the "NRF appears exceptionally well placed to respond to a fast-moving war crimes or genocide-type situation like Rwanda in 1994."

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[119] Centre for Conflict Resolution, *Africa's Responsibility to Protect*, April 2007, p8

[120] For background on this subject see, House of Commons Library Research Paper, *European Security and Defence Policy: Developments Since 2003*, 06/32, 08/06/2006

[121] Under Chapter VII of the UN Charter the Security Council can authorise enforcement action in respect of threats to international peace and security.

[122] Franco-British Summit, *Declaration on Strengthening European Co-operation in Security and Defence,* 24 November 2003

[123] NATO, "The NATO Response Force, At the centre of NATO transformation"

[124] David Mepham and Alexander Ramsbotham, *Safeguarding Civilians: Delivering on the Responsibility to Protect in Africa,* Institute of Public Policy Research, May 2007, p58

[125] Ibid, pp57-59

However, as with the EU Battlegroups it is questionable to what extent NATO will be prepared to deploy the NRF to support military interventions in Africa. The report notes that up until now,

> NATO's operational activities in Africa have been restricted to providing logistic support to AMIS in Darfur, and some minor training and capacity-building assistance. With NATO assets already severely stretched in Afghanistan and Kosovo, and with the UK and the US still heavily committed in Iraq, there seems little immediate prospect of that changing. The international political fallout from the Afghanistan and Iraq interventions raises further questions about the willingness of NATO to support military intervention in Africa.[126]

Other potential problems are appearing on the radar. Daniel Korski highlights the fact that the US military's plans for a new Africa based combatant command may marginalise both NATO and the EU as security players in Africa for years to come.[127] He continues:

> Perhaps most urgently of all, both organizations are struggling with the twin challenges of integrating civilian and military assets on the one hand, and integrating NATO and EU assets in post-conflict operations on the other. They are sometimes, but not always the same issue. A formal NATO-EU Capability Group has sought to address the latter, but so far with little success.[128]

There is also potential for political fallout over the potentially overlapping mandates of the Battlegroups and the NRF and a range of operational issues arising from the fact that national troops are 'double-hatted', essentially meaning that the same troops are assigned for the use of both NATO and the EU. Although there is broad political agreement that the NRF will take the lead on missions in less permissive environments, there are no guarantees that this will not lead to major disagreements. A number of other potential challenges can be identified:

> …the armed forces of most EU Member States are widely regarded to be either under-funded, overstretched, or both. Most EU countries are members of NATO and have troops and assets deployed in Afghanistan, Iraq and elsewhere, while only 9 out of 25 countries allocate 2% or more of GDP to their defence budgets. Consequently, delivering on commitments under the Battlegroup concept is widely considered to be a challenge for the future.[129]

Although the Battlegroups only became fully functional in 2007, operational challenges emerged quickly and by October 2007 a decision was taken to scale back the number of number of forces on permanent stand-by.[130] Jim Dorschner notes:

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[126] Ibid, p59

[127] Daniel Korski, "A Checklist for enhanced EU-NATO Cooperation", in *Security & Defence Agenda Discussion Paper*, March 2008, p8

[128] Ibid

[129] House of Commons Library Research Paper, *European Security and Defence Policy: Developments Since 2003*, 06/32, 08/06/2006, p38

[130] "NATO scales down plans for rapid reaction force", *Reuters*, 25 October 2007

> Problems emerging with the planned deployment of 4000 EU peacekeepers to Chad and the Central African Republic underline the challenges of creating an independent European military capability. These include lack of logistical support, tactical and strategic airlift and battlefield helicopters. The latter are considered essential for effective operations in undeveloped regions like Africa where they may be the only reliable mans to deploy rapid-reaction forces, evacuate casualties, transport essential supplies and provide close air support.[131]
>
> Consensus in decision making has also been highlighted as potentially problematic for the success of this initiative. Although the EU's commitment to support the African Union in Darfur has not involved the deployment of a Battlegroup, the internal disagreements as to whether the operation should have been EU or NATO-led has been regarded as indicative of future challenges given the existence of the NATO Response Force for precisely the same type of operations. Similarly the EU's commitment to support the UN force (MONUC) in the Democratic Republic of Congo (DRC) ahead of the July 2006 elections has not involved the deployment of an EU Battlegroup, despite the perceived suitability of the operation.[132]

6. The need for US Support

A number of commentators argue that, without military and operational support from the US, many potential R2P missions would simply be untenable. Thomas Weiss, for instance, argues that US air-lift capacity, military muscle, and technology are required for larger and longer-duration deployments, such as would be required in the Sudan or the Democratic Republic of Congo. He states, "For better or worse, the United States in the Security Council is what Secretary of State Dean Rusk called the fat boy in the canoe: 'When we roll, everyone rolls with us'. With Washington's focus elsewhere, the danger is not too much but rather too little humanitarian intervention."[133] He goes on to state:

> The political will as well as operational capacity for humanitarian intervention has evaporated because the United States, as the preponderant power, is unable to commit significant political and military resources for human protection. Meanwhile, other states complain but do little because their own militaries are too feeble for the task. […]
>
> Moreover, downsizing of the armed forces over the last fifteen years means an insufficient supply of equipment and manpower to meet the demands for humanitarian intervention. There are bottlenecks in the U.S. logistics chain—especially in airlift capacity—that make improbable a rapid international response to a fast-moving, Rwanda-like genocide. With half of the U.S. Army tied down in Iraq and a quarter of its reserves overseas, questions are being raised even about the capacity to respond to a serious national security threat or a natural

[131] *Janes' Defence Weekly,* "Difficult Start for EU Battlegroups", 12 December 2007, p19

[132] The prospects for the EU Battlegroups concept are also discussed in an October 2005 report from the *Center for Strategic and International Studies* entitled *European Defense Integration.*

[133] Thomas Weiss, "R2P After 9/11 and the World Summit", *Wisconsin International Law Journal*, Vol 24 No 3, 2006, p756

> disaster like Hurricane Katrina let alone minor "distractions" like Haiti or major ones like the DRC. [134]

As Alex Bellamy has noted, the problem is that the responsibility to protect places great emphasis on the factual elements of each case, but such assessments are rarely political neutral. He comments:

> This means that it is more likely that the criteria would be regarded as satisfied when the United States wished to act militarily than when others wished to do the same. It is certainly the case that state that are out of favour in the West would have a much more difficult time persuading the most powerful member of international society of their cause than would the United States and its allies[135]

VII Debate in the UK

A. Context

The UK's support for intervention in Kosovo in 1999 set the broad course for the Labour Government's foreign policy. Speaking in 1999 in Chicago, Tony Blair argued strongly in favour of intervention for the purposes of humanitarian protection. Outlining the challenges of this approach he stated:

> The most pressing foreign policy problem we face is to identify the circumstances in which we should get actively involved in other people's conflicts. Non - interference has long been considered an important principle of international order. And it is not one we would want to jettison too readily. One state should not feel it has the right to change the political system of another or ferment subversion or seize pieces of territory to which it feels it should have some claim. But the principle of non-interference must be qualified in important respects. Acts of genocide can never be a purely internal matter. When oppression produces massive flows of refugees which unsettle neighbouring countries then they can properly be described as "threats to international peace and security". When regimes are based on minority rule they lose legitimacy - look at South Africa.
>
> Looking around the world there are many regimes that are undemocratic and engaged in barbarous acts. If we wanted to right every wrong that we see in the modern world then we would do little else than intervene in the affairs of other countries. We would not be able to cope.
>
> So how do we decide when and whether to intervene. I think we need to bear in mind five major considerations
>
> First, are we sure of our case? War is an imperfect instrument for righting humanitarian distress; but armed force is sometimes the only means of dealing

[134] Ibid, p747

[135] Alex Bellamy, "Whither the Responsibility to Protect? Humanitarian Intervention and the 2005 World Summit", *Ethics & International Affairs*, p159

> with dictators. Second, have we exhausted all diplomatic options? We should always give peace every chance, as we have in the case of Kosovo. Third, on the basis of a practical assessment of the situation, are there military operations we can sensibly and prudently undertake? Fourth, are we prepared for the long term? In the past we talked too much of exit strategies. But having made a commitment we cannot simply walk away once the fight is over; better to stay with moderate numbers of troops than return for repeat performances with large numbers. And finally, do we have national interests involved? The mass expulsion of ethnic Albanians from Kosovo demanded the notice of the rest of the world. But it does make a difference that this is taking place in such a combustible part of Europe.
>
> I am not suggesting that these are absolute tests. But they are the kind of issues we need to think about in deciding in the future when and whether we will intervene. [136]

Blair's philosophy, which has often been tagged 'liberal interventionism', has since been broadly adopted by Gordon Brown although there has arguably been a degree of recalibration.[137]. In his first major foreign policy speech as Prime Minister in November 2007, Brown acknowledged, like his predecessor some eight years earlier, that there is "still a gaping hole in our ability to address the illegitimate threats and use of force against innocent peoples."[138] He also noted that:

> "[I]t is to the shame of the whole world that the international community failed to act to prevent genocide in Rwanda. We now rightly recognise our responsibility to protect behind borders where there are crimes against humanity."

The Prime Minister went on to argue that honouring this commitment would only be possible with the development of a new framework to assist reconstruction, the systematic use of earlier Security Council action, proper funding of peacekeepers, targeted sanctions, the real threat of international criminal court actions and better international and regional co-ordination of traditional emergency aid and peacekeeping with stabilisation, reconstruction and development.[139]

The notion that sovereignty entails responsibility has also been promoted by the Foreign Secretary David Miliband. In a speech to Peking University he argued that "[s]ometimes, responsible sovereign nations must be prepared to intervene together where they see a risk to regional stability and where a state is unable or unwilling to address the problem itself."[140]

In practice, the UK has been a strong supporter of the Responsibility to Protect within the UN, spearheading efforts to secure a reference to the R2P in a Security Council resolution on the protection of civilians in April 2006. Official statements contain an

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[136] Tony Blair, "Doctrine of the International community", Speech at the Economic Club, Chicago, 24 April 1999

[137] For a full discussion of this issue see the House of Commons Library Research Paper entitled, *British Foreign Policy since 1997*, June 2008

[138] Gordon Brown, "Lord Mayor's Banquet Speech", London, 12 November 2007

[139] Ibid

[140] David Miliband, "Responsible Sovereignty", Speech at Peking University, Beijing, 29 February 2008

acknowledgment that the main challenge now is ensuring that the concept becomes operational.[141] This, the Prime Minister has argued, could be advanced by ensuring that

> Security Council peacekeeping resolutions and UN Envoys make stabilisation, reconstruction and development an equal priority; that the international community should be ready to act with a standby civilian force including police and judiciary who can be deployed to rebuild civic societies; and that to repair damaged economies we sponsor local economic development agencies… in each area the international community able to offer a practical route map from failure to stability.[142]

The Government's recent stance has prompted many observers, including Seamus Milne writing for the *Guardian*, to claim that intervention is making a political comeback:

> The interventionists, it seems, are back in business. …now Kosovo's declaration of independence has given them a banner to rally the disillusioned to a cause that gripped the imagination of many western liberals in the 90s. John Williams, the foreign office spin doctor who drafted the infamous Iraq war dossier in 2002, wrote last week that the Kosovo war had convinced him to follow Tony Blair over Iraq - and it would be a "tragedy" if Iraq made future Kosovos impossible. The Independent on Sunday went further, calling Kosovo's new status a "triumph of liberal interventionism".[143]

B. Positions of the Major Opposition Parties

Support for the Government's general approach on the Responsibility to Protect has been forthcoming from both of the main opposition parties. In a speech to RUSI in 2007, the Shadow Secretary of State for International Development Andrew Mitchell argued strongly in favour of the R2P and urged the Government to use its influence on the Security Council to ensure that peacekeeping missions were approved with mandates and rules of engagement that were specifically designed to protect civilians from grave harm. Mr Mitchell went on to argue

> Membership on the Security Council involves a set of obligations: there must be consequences for states that decline to take seriously their international responsibilities to promote peace and security. At the very least, Council members with a clear conflict of interest should agree to withhold their veto in situations of grave humanitarian need. Let them publicly explain why their national interests put them on the side of genocidal regimes.[144]

The Conservatives have called on the British Government to join efforts such as the US Global Peace operations initiative to strengthen the infrastructures needed quickly to dispatch peacekeepers to known trouble spots. Andrew Mitchell notes: "We must also call on the DPKO to develop new plans with contributing member states to ensure the

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141 HC Deb 469 13 December 2007 c829W

142 Gordon Brown, "Lord Mayor's Banquet Speech", London, 12 November 2007

143 Seumas Milne, "A System to Enforce Imperial Power will only be Resisted", *The Guardian*, 28 February 2008

144 Andrew Mitchell MP, "UN Peacekeeping and the Failure to Protect", Speech to the Royal United Services Institute for Defence and Security Studies, 18 June 2007

rapid deployment of boots on the ground, trained specifically to protect civilians caught up in regional or intra-state violence."[145]

The Liberal Democrats have endorsed a more general review of voting procedures and would like to see an overarching requirement on the P5 to set out publicly their reasons for using the veto.[146] They have also addressed the issue of what should happen when the Security Council fails to act. Their policy paper entitled 'International Law - Britain's Global Responsibilities' argues:

> ... [t]he UN Security Council […] has primary responsibility in this area. But if it fails to act in exceptional cases, such as with Kosovo, where there is an overwhelming, widely supported and demonstrably legitimate case for intervention, states may be entitled to take proportionate measures to protect fundamental human rights.[147]

The Liberal Democrats also believe that the Security Council and General Assembly should "by declaratory resolutions, adopt criteria governing the use of force in these limited circumstances", a position which largely mirrors those developed by the ICISS and the HLP.

C. Case Study: Burma and the Responsibility to Protect

Discussion of the Responsibility to Protect within Parliament has, until recently, been relatively limited. However, the suggestion of Bernard Kouchner, the French Foreign Minister (and founder of medical aid agency Médecins Sans Frontières) that the international community had a 'responsibility to protect' those affected by cyclone Nargis, which hit Burma in May 2008, has prompted considerable debate within the UK. Although Kouchner's suggestion that the Security Council should use R2P as the basis for a Resolution to impose the delivery of aid on the Burmese government was rejected in Security Council discussions (primarily due to objections from China and Russia), it continued to gain momentum in the British media as a possible policy option.

It was argued that although the situation in Burma started off as a natural disaster, it was subsequently exacerbated by the Burmese authorities manifestly failing to protect the population from the subsequent effects of the cyclone. Some argued that, in theory, the intentional denial of humanitarian assistance by the Burmese authorities could amount to a crime against humanity[148] and as such could trigger the 'responsibility to protect'. In practice, and from a legal perspective, there would be significant issues in determining how to measure 'intent' in these circumstances.

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145 Ibid

146 *Liberal Democrat Policy Paper,* Britain's Global Responsibilities: the International Rule of Law, No *74*, 10 August 2006

147 Ibid

148 Observers appear to have based their argument on Article 8(2)(b)(xv) of the Statute of the International Criminal Court which defines war crimes. The provision in question states, "Intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies as provided for under the Geneva Conventions."

On 12 May 2008, in an interview on BBC Radio Four's *World Tonight* Programme on 12 May 2008 the Foreign Secretary responded to the question, "Could it [the responsibility to protect] not also apply to cases of natural disaster?" David Miliband answered, "…it certainly could…" Later he stated: "…the original deaths are the result of the cyclone, but the subsequent deaths are the result of what I have called the malign neglect of a regime that fears help from the outside world."[149]

On 14 May 2008, speaking about Burma during Prime Minister's Questions, Conservative leader David Cameron asked Gordon Brown to clarify the Government's position on the responsibility to protect. The exchange was as follows:

> Mr. Cameron: …Can the Prime Minister clarify an aspect of the responsibility to protect? The British ambassador to the UN has said that the UK's responsibility to protect does not apply to natural disasters, but yesterday the Foreign Secretary said that it certainly could. Will the Prime Minister make it absolutely clear that, in our view, the responsibility to protect should be extended to Burma and to Burmese people at this time?
>
> The Prime Minister: There are two ways of proceeding. There is the responsibility to protect and there is the right to humanitarian intervention, which was invoked in 1999. We are leaving all the options open...[150]

During the earlier *World Tonight* interview the Foreign Secretary also seemed to suggest that the 'responsibility to protect' and to take action was a "legal requirement".[151] This appears to contrast with a written answer from June 2007, in which the British Government stated that, the "Responsibility to Protect remains a political commitment rather than a legal obligation, but it is in the UK's interest to make sure that this commitment holds."[152] It is unclear how these two positions can be reconciled.

The ambiguous nature of the concept of the Responsibility to Protect was also clear in a subsequent Opposition Day Debate. There was considerable discussion and indeed, at points, some apparent misunderstanding about the parameters of the R2P and whether it could and should be used as a basis for humanitarian action in Burma.

In line with previous comments made by the Foreign Secretary, the Government argued that it would "retain the option of invoking the responsibility to protect'[153] in the case of

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[149] Extracts from transcript of BBC Radio 4's *The World Tonight* programme, 13 May 2008

[150] HC Deb 14 May 2008 c1376

[151] Extracts from transcript of BBC Radio 4's *The World Tonight* programme', 13 May 2008, The Foreign Secretary stated, "The particular issue with the phrase that you quoted, the responsibility to protect, which was a landmark decision of the whole of the UN in 2005, did refer, as you implied, to questions of genocide, but it was interesting to hear Gareth Evans, who was then the Australian Foreign Minister, I think, or a former Australian Foreign Minister, who played a leading role in creating this responsibility to protect. He was on the radio this morning talking about how, in circumstances where government was foisting disaster on its people by refusing aid, that would come into the category of responsibility to protect. The issue that gives us an extra wrinkle, though, is that is a legal requirement, the responsibility to protect. It's obviously a political issue, but it's legal and well, and so there are legal questions, but I think politically all instruments, UN or others, should be used, and we've been arguing for that in New York."

[152] HC Deb 14 May 2008 c1437-1438

[153] HC Deb 14 May 2008 c1432

Burma on the basis of "malign neglect" of citizens by the Burmese government. The Government however, made no further mention of whether it deemed the R2P to be a legal requirement. The Government's acceptance that the situation in Burma could warrant the application of the R2P was welcomed by Members from both the Conservative and Liberal Democrat benches.

For the Conservatives, Andrew Mitchell noted,

> Lawyers might say that the situation in Burma does not currently fit the technical definition that triggers the responsibility to protect. Conservative Members say that it should and we say further that the international community, through the UN, must revisit this failure to protect as part of the reform of the international architecture so that regimes cannot obstruct and frustrate with impunity the common humanitarian responsibility of the international community. For now, there is one thing and one thing only that matters – the saving of lives, which will surely be list in their thousands unless international aid reaches those in such peril in Burma tonight.[154]

The Liberal Democrat Shadow Secretary for State for International Development, Michael Moore, noted:

> We are arguing over how formal that responsibility is and what it has meant in the past few years, but surely that fancy new phrase simply formalises the basic humanitarian instincts that we all have and to which we respond on occasions such as this, when we expect Governments, as a basic part of their duty, to protect the people who live in their countries. The responsibility to protect, as formalised and debated in recent years, has been clearly based around the ideas of the responsibility to prevent, the responsibility to react and the responsibility to rebuild. On all those grounds, the Burmese regime has failed, not just in the past 10 days, but over many years…
>
> …[W]e cannot pretend that this is not a legitimate area for debate, and we must be clear that in our deliberations we are examining where we can go using that new authority. […]
>
> We must not assume in this debate that that responsibility means an automatic rush to have military action, or military or another assertive form of intervention. Military action is an option, but it must only be a last resort and it is not what is contemplated in this situation…Inevitably, military assets and military assistance will be necessary and useful in making the humanitarian intervention more effective, so we must be prepared to argue the case in not only this Chamber but the broader international community.[155]

However, a note of caution was sounded by Mike Gapes, the Chairman of the Foreign Affairs Committee, who alluded to the fact that "actions have consequences, so the term responsibility to protect needs to be clearly defined." Mr Gapes went on to say:

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[154] HC Dec 14 May 2008 c1411
[155] HC Deb 14 May 2008, c1422

> Gareth Evans, the former Foreign Minister of Australia, who heads the International Crisis Group and who chaired the UN Panel, is right to say that there are dangers in eroding the definition of what we mean. However, as opposition Front benchers pointed out, he also said that there might be circumstances in which such action was necessary. That is similar to the call of the French Foreign Minister Bernard Kouchner, for the international community to act…[L]anguage such as "responsibility to protect" needs greater clarity. Otherwise, we may undermine an important principle of dealing with humanitarian issues such as war crimes, stopping ethnic cleansing and other matters to which the UN resolution refers.[156]

VIII Next Steps

Progress on the development of the R2P norm thus far has been remarkable considering the lingering and pervasive mood of inter-state bitterness within the UN that was spawned by the Iraq invasion in 2003. While its global endorsement in 2005 was a major political achievement, its legacy remains uncertain. The commitment of the international community to put pen to paper at the World Summit in 2005 has contributed significantly to R2P's normative status but, crucially, in the three years since its adoption, the doctrine's ability to make an impact on the lives of civilians in peril remains untested. There are a range of reasons for this, the most nebulous and thorny of which is a clear lack of political will to make the doctrine a reality. This has been compounded by the inadequacy of institutional structures, notably in the UN Security Council, as well as a strategic security environment in which human security situations are considered less important than existing military commitments. The question remains, therefore, whether the laudable efforts of world leaders in 2005 to forge consensus on the R2P will ever be translated into a workable reality.

In the short term it appears highly unlikely; there are too many unanswered questions, conceptual ambiguities and institutional and operational shortcomings for R2P to be implemented in any meaningful way, particularly given the patchy political support it commands. Alex Bellamy poses a similar question:

> To what extent, then, will the outcome document help prevent future Rwandas and Kosovos?...Powerful states are no more likely to feel obliged to act to save distant strangers, and there is no more likelihood of agreement about what to do in particular cases. When confronting a humanitarian emergency, supporters and opponents of intervention alike can use the language of the responsibility to protect to support their claims. Perhaps the most worrying development is that in attempting to forge a consensus, the ICISS and its supporters sacrificed most of the key elements of their twin strategies. It is imperative that states now return to some of the fundamental questions the ICISS raised: who precisely, has a responsibility to protect? When is that responsibility acquired? What does the responsibility to protect entail? And how do we know when the responsibility to protect has been divested? If they do not, there is a real danger that states of all

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[156] HC Deb 14 May 2008 c1437-1438

> stripes will co-opt the language of the responsibility to protect to legitimate inaction and irresponsibility.[157]

Bellamy's questions can be supplemented with others, for instance: do some states have greater responsibilities than others by virtue of their political power, regional status, historical ties or economic force? What are the consequences, both political and legal, of inaction? Is it possible to make progress on the less controversial aspects, for instance on the non-military aspects of the R2P, by temporarily setting aside the issue of armed intervention, in a bid to solidify the development of the norm, or would this risk undermining the concept as a whole? On a practical level, how can advocates of R2P stop countries back-sliding on existing commitments? Should R2P be used as a basis for military intervention to protect civilians in peril? These conceptual and practical questions go the heart of the current debate over the value of the R2P.

On the crucial matter of political will, it looks unlikely that there will be major changes in the short term. Within the UN, the political group positions remain unchanged. The Non-Aligned Movement (NAM), which will prove key to the success or otherwise of the R2P, looks likely to continue to reject the right of humanitarian intervention in whatever form it is packaged, "in spite of the support for and even bullishness about intervention in Africa, the African Union's constitution, and Latin America's dramatic change in attitude toward accepting intervention."[158] Crucially, the United States will continue to refuse to commit military forces. In contrast to these positions, support for the R2P and the idea of 'responsible sovereignty' is forthcoming from the British Government, which is seeking to move beyond Iraq and Afghanistan by re-legitimising liberal interventionism as a credible foreign policy objective. The UK, however, is in a minority, and along with other proponents of the R2P it must in the short and medium term find a way of addressing the legitimate concerns of a large constituency which believes that R2P is simply a new form of Western interference driven by a mistaken sense of 'lofty purpose' which will merely serve to reinforce a 'might is right' approach. There can be little doubt that Western imperialism has left deep scars and engendered a legacy of hearty cynicism amongst states that have direct experience of this type of interventionism. There are other reasons for objections, as Gareth Evans has noted

> There are players out there actively seeking to deflate or undermine the concept, sometimes because they understand it all too well and want to limit its effective application to their own behaviour, but I suspect more often – as I have already said – because they have simply misunderstood what the concept is actually about and fear its misapplication and overreach.[159]

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[157] Alex Bellamy, "Whither the Responsibility to Protect? Humanitarian Intervention and the 2005 World Summit", *Ethics & International Affairs*, p169

[158] Thomas Weiss, "R2P After 9/11 and the World Summit", *Wisconsin International Law Journal*, Vol 24 No 3, 2006, p745

[159] Gareth Evans, "Delivering on the Responsibility to Protect: Four Misunderstandings, Three Challenges and How To Overcome Them" , Address to SEF Symposium 2007, The Responsibility to Protect (R2P): Progress, Empty Promise or a License for 'Humanitarian Intervention', Bonn, 30 November 2007

He suggests that in both cases what is required is not "passive acceptance of a tide of hostility, but active, ongoing diplomatic and other advocacy efforts to explain and defend the concept."[160]

However, as Evans admits, this approach is difficult in the post-Iraq environment. Rightly or wrongly, US and UK action in Iraq has tainted the R2P debate and as a result it is now considerably more difficult to sell the R2P to already sceptical audiences who are fearful of accepting an idea that may open the door to a more general pattern of interventionism, particularly when it is unclear when and where R2P will be used. Without political support from this key audience, R2P faces a bleak future.

At the other end of the spectrum, it will be necessary in the short term to manage unrealistic expectations that R2P is a fully developed legal norm which can and should be used as a basis for intervention. Darfur is the case in point as far as this issue is concerned. On first inspection Darfur seems to be exactly the type of situation that R2P was developed to deal with. References by the Security Council to R2P in the context of Sudan appear to corroborate this view. However, as the situation on the ground shows, putting R2P into practice in the face of existing institutional and operational shortcomings and the immensely complex political and security situation in Sudan has proved impossible.

There are very real concerns that well-intentioned advocacy will create unrealistic expectations that R2P can make an immediate operational impact in situations such as Darfur, when the reality is wholly different. In the process this could create short-term disappointment which in turn would give way to longer-term disillusionment. There is apprehension too, in advocating a doctrine that hints at unauthorised military intervention, particularly if it could then be used as a retrospective justification for the use of force in Iraq. Either or both potential outcomes could seriously damage the normative development and value of R2P.

What becomes apparent from this situation is that there is an urgent need to bring clarity to the R2P concept if it is to avoid being stretched, distorted, abused, or regarded as a panacea. This practical work will partly fall into the lap of NGOs such as the newly created *Centre for the Responsibility to Protect* and partly to Governments who support the general concept. Within the UN, the Office of Special Adviser on the Responsibility to Protect will also have the arduous task of preventing 'backsliding' on political commitments that have already been made. As alluded to earlier, there are also sound legal reasons for clarifying the parameters of R2P, not least in situations where states wish to act when the Security Council is paralysed by the veto. Work of this type will not be concluded quickly. This applies equally to the need to develop institutional and operational capacity at both international and regional levels.

The future of R2P is inextricably linked to a broader debate on international institutional reform. As outlined previously, without the necessary institutional security mechanisms R2P is unlikely ever to become a workable reality. Although this paper has concentrated on the most controversial aspect of the R2P – the military element – in order to improve

[160] Ibid

the delivery of the other key elements (prevention and re-building) institutional reform is also required. The scale of this challenge is truly immense. As has been noted, the debate on UN reform and its role in international security situations is well underway. The development of the Peacebuilding Commission, the creation of the Human Rights Council, further work on early warning systems and re-structuring of the Department of Peacekeeping are positive developments. Transparency measures in the Security Council that have been instigated are a step forward but they will do nothing to address the underlying problems of unequal representation or the veto power. Crucially, too, the prospect of a UN rapid reaction force capable of dealing with non-permissive situations continues to look like a highly improbable option. Much will depend upon the US's approach to the United Nations. Both Presidential candidates for the White House are calling for wide-ranging UN reform. What is not yet clear is how this will impact upon the Responsibility to Protect.

For R2P to move forward in the UN there is a need for political recognition of the relative strengths and weaknesses of the United Nations across the spectrum of R2P activities. The UN must be able to play to its strengths and concentrate on undertaking tasks which can command political and financial support. This would tend to suggest that it should limit its focus to the preventative and re-building elements of the Responsibility to Protect where it has enjoyed successes in the past. Depending on the overall success of the UN reform programme and its ability to re-engage with key states, the UN may also find that its most important role may be as the 'legitimiser' for multilateral R2P operations.

This however, leaves open the question of which bodies should be used to take military action in non-permissive situations. There are strong arguments in favour of bolstering the already embryonic capabilities of regional organisations to tackle civilian crises, based on the provisions contained in Chapter VIII of the UN Charter. For this to be successful, work must be undertaken on strengthening the relationship between the UN and regional organisations on crisis management and peacekeeping. Yet, how this should be achieved is in itself a contested issue. Operational capabilities within regional organisations would also have to be strengthened and measures put in place to ensure that accountability to the Security Council remained intact.

With such broad challenges to broach, will R2P ever be more than an aspiration? David Miliband has asked, "in a world where so many states remain wedded to the principle of non-interference and the primacy of sovereignty, how do we make the responsibility to protect a reality, not a slogan?..."[161] Alex de Waal's riposte was, "RIP R2P[…] what Darfur needs is old-fashioned peace and peacekeeping and state of the art humanitarian technology."[162]

While de Waal's comments may be sound in the context of Darfur, they perhaps highlight the need to control expectations about the short-term potential impact of the R2P. In 1945 the UN Charter provisions contained a collective security apparatus that was visionary for its age and yet, six decades on, this is nowhere near being fully implemented. This, in itself, does not negate the case for a collective security system but

[161] David Miliband, Speech at the FCO Leadership Conference, London, 4 March 2008
[162] Alex de Waal, "Why Darfur intervention is a mistake", *BBC News Online*, 21 May 2008

simply underlines the fact that States currently do not wish to make this a reality. When viewed in this context, expecting R2P to be implemented and operational within three years of its global endorsement is unrealistic. ICISS Commissioner Ramesh Thakur summed up this situation when he noted that R2P may be an idea before its time. Equally apt is José Alvarez's observation that R2P is as much a victim as a product of its time.[163]

Most commentators appear to agree that even though R2P face substantial problems, it is here to stay. The main challenge now lies in ensuring its conceptual integrity is maintained for long enough to tackle the hurdles that currently prevent its implementation. Given the extent of the challenges outlined above and if Thomas Weiss is correct in his assertion that "changing the language to R2P from humanitarian intervention has not changed the underlying political dynamics,"[164] it is perhaps worth questioning whether R2P *should* be and indeed is the most appropriate means to assist failing states and protect civilians in the future. Certainly there are a number of underlying problems that, at present, appear to elude convincing responses.

[163] José E. Alvarez, "The Schizophrenias of R2P", Panel Presentation at the 2007 Hague Joint Conference on Contemporary Issues of International Law: Criminal Jurisdiction 100 Years After the 1907 Hague Peace Conference, The Hague, The Netherlands, 30 June 2007

[164] Thomas Weiss, "R2P After 9/11 and the World Summit", *Wisconsin International Law Journal*, Vol 24 No 3, 2006, p758

IX Appendices

A. Extracts from the International Commission on Intervention and State Sovereignty

The Responsibility to Protect: Principles for Military Intervention

(1) The Just Cause Threshold
Military intervention for human protection purposes is an exceptional and extraordinary measure. To be warranted, there must be serious and irreparable harm occurring to human beings, or imminently likely to occur, of the following kind:
a. large scale loss of life, actual or apprehended, with genocidal intent or not, which is the product either of deliberate state action, or state neglect or inability to act, or a failed state situation; or
b. large scale "ethnic cleansing", actual or apprehended, whether carried out by killing, forced expulsion, acts of terror or rape.

(2) The Precautionary Principles
A. Right intention: The primary purpose of the intervention, whatever other motives intervening states may have, must be to halt or avert human suffering. Right intention is better assured with multilateral operations, clearly supported by regional opinion and the victims concerned.
B. Last resort: Military intervention can only be justified when every non-military option for the prevention or peaceful resolution of the crisis has been explored, with reasonable grounds for believing lesser measures would not have succeeded.
C. Proportional means: The scale, duration and intensity of the planned military intervention should be the minimum necessary to secure the defined human protection objective.
D. Reasonable prospects: There must be a reasonable chance of success in halting or averting the suffering which has justified the intervention, with the consequences of action not likely to be worse than the consequences of inaction.

(3) Right Authority
A. There is no better or more appropriate body than the United Nations Security Council to authorise military intervention for human protection purposes. The task is not to find alternatives to the Security Council as a source of authority, but to make the Security Council work better than it has.
B. Security Council authorisation should in all cases be sought prior to any military intervention action being carried out. Those calling for an intervention should formally request such authorisation, or have the Council raise the matter on its own initiative, or have the Secretary-General raise it under Article 99 of the UN Charter.
C. The Security Council should deal promptly with any request for authority to intervene where there are allegations of large-scale loss of human life or ethnic cleansing. It should in this context seek adequate verification of facts or conditions on the ground that might support a military intervention.
D. The Permanent Five members of the Security Council should agree not to apply their veto power, in matters where their vital state interests are not involved,

to obstruct the passage of resolutions authorising military intervention for human protection purposes for which there is otherwise majority support.
E. If the Security Council rejects a proposal or fails to deal with it in a reasonable time, alternative options are:
I. consideration of the matter by the General Assembly in Emergency Special Session under the "Uniting for Peace" procedure; and
II. action within area of jurisdiction by regional or sub-regional organisations under Chapter VIII of the Charter, subject to their seeking subsequent authorisation from the Security Council.
F. The Security Council should take into account in all its deliberations that, if it fails to discharge its responsibility to protect in conscience-shocking situations crying out for action, concerned states may not rule out other means to meet the gravity and urgency of that situation — and that the stature and credibility of the United Nations may suffer thereby.

(4) Operational Principles
A. Clear objectives; clear and unambiguous mandate at all times; and resources to match.
B. Common military approach among involved partners; unity of command; clear and unequivocal communications and chain of command.
C. Acceptance of limitations, incrementalism and gradualism in the application of force, the objective being protection of a population, not defeat of a state.
D. Rules of engagement which fit the operational concept; are precise; reflect the principle of proportionality; and involve total adherence to international humanitarian law.
E. Acceptance that force protection cannot become the principal objective.
F. Maximum possible coordination with humanitarian organisations. [165]

[165] International Commission on Intervention and State Sovereignty, *The Responsibility to Protect*, 2001

B. From ICISS to the Outcome Document: Key Changes

CONTENTIOUS ELEMENT	ICISS	HIGH LEVEL PANEL REPORT	RESPONSE OF THE SECRETARY GENERAL	2005 OUTCOME DOCUMENT
Extent to which R2P lies with the host state	The state has "primary responsibility"	"…lies first and foremost with each individual state…"	"…lies first and foremost with each individual state…"	"Each individual state has the responsibility to protect…"
Stage at which R2P transfers to international level	When the state is "unable or unwilling" to halt or avert serious harm to people	Where "…sovereign Governments have proved powerless or unwilling to protect…"	"if national governments are unwilling or unable…"	Where there is "a manifest failure"
Thresholds for 'just cause'	Actual or imminent large scale loss of life, ethnic cleansing including but not limited to genocide	Genocide, large scale killing, ethnic cleansing or serious violations of international humanitarian law ..."whether actual or imminently apprehended."	"…against genocide, ethnic cleansing and crimes against humanity…"	Genocide, war crimes, ethnic cleansing and crimes against humanity
Inclusion of 'Precautionary Principles for military interventions	Principles listed as: right intention, last resort, proportional means and reasonable prospect of success	Principles renamed as follows: proper purpose (right intention), last resort, proportional means and balance of consequences (likelihood of success)	Should be a "common view" on seriousness of the threat; proper purpose proportionality, reasonable chance of success.	No mention
The body which should authorise military intervention	Security Council. Secondary sources of authority General Assembly acting under the Uniting for Peace resolution or regional bodies	Security Council	Security Council	Security Council and regional organisations, as appropriate
Use of Security Council veto	Voluntary restraint – "The P5 should agree not to apply their veto power, in matters where their vital state interests are not involved…"	Voluntary restraint and indicative voting P5 should pledge to "refrain from the use of the veto in cases of genocide and large-scale human rights abuses."	No mention	No mention
Alternative action in the event the SC fails to act	General Assembly could authorise under Uniting for Peace Declaration or regional collective action under Chapter VIII	No mention	"…task is not to find alternatives to the Security Council as a source of authority but to make it work better."	No mention
Extent of Obligation to take action	"… a residual responsibility also lies with the broader community of states."	"…there is a collective international responsibility to protect…"	"The Security Council may out of necessity decide to take action…"	"…we are prepared to take collective action…"