FROM HUMANITARIAN INTERVENTION TO THE RESPONSIBILITY TO PROTECT

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What should be the response of the international community when faced with situations of catastrophic human rights violations within states, where the state in question claims immunity from intervention based on longstanding principles of national sovereignty? When, if ever, it is right for states to take coercive action, in particular military action, against another state for the purpose of protecting people at risk within it?

These issues, the centerpiece of international debate for most of the 1990s, have not gone away, despite current preoccupations with a new post-9/11 slate of concerns: global terrorism, externally directed Islamist extremism, energy security, nuclear proliferation, and resurgent nationalism. They are intellectually right at the intersection point of international relations, law, policy, ethics, human rights, and human security. And in practice they keep coming to haunt us: most obviously, currently, in Darfur, where over the last three years at least two hundred thousand people have died, over two million have been displaced, and five thousand more are dying each month from war-related disease and malnutrition as well as from continuing outright violence; and where international peacekeeping efforts have been manifestly inadequate, political settlement talks have been floundering, humanitarian relief is faltering, and the overall situation is again deteriorating.[1]

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[1] *See* INT'L CRISIS GROUP, TO SAVE DARFUR, AFRICA REPORT 105, 1-4, n.9 (2006), *available at* http://www.crisisgroup.org/library/documents/africa/horn_of_africa/105_to_save_darfur.pdf.

The good news is that the international community is much closer to consensus now than it ever has been on the proper conceptual response to the questions in issue. What we have seen over the last five years is the emergence, almost in real time, of a new international norm, one that may ultimately become a new rule of customary international law with really quite fundamental ethical importance and novelty in the international system. The evolution away from the discourse of *humanitarian intervention*, which had been so divisive, and toward the embrace of the new concept of *the responsibility to protect* has been a fascinating piece of intellectual history in its own right.

The less good news is that the story is incomplete. With the forces of resistance to the idea of the responsibility to protect still quite strong in the international community, for a variety of reasons, which are understandable if not acceptable, there is a critical need to maintain the momentum of this conceptual evolution. And there is an even more critical need to translate such theoretical consensus as does now exist around this principle into effective practical action whenever cases arise that cry out for its application.

I. THE BIRTH OF A DOCTRINE

In understanding how far we have come, but have yet to go, the best place to begin is with the UN Charter of 1945. The UN founders were overwhelmingly preoccupied with the problem of states waging war against each other, and the charter produced a really quite stunning innovation to the extent that it outlawed, across the board, the use of force, the only exceptions being self-defense in confronting an attack[2] and authorization by the Security Council,[3] a new international institution given unprecedented authority to act in cases of threats to international peace and security. On the question, however, of external force being applied in response to an internal catastrophe, the charter language, if anything, pointed the other way with a clear statement of the principle of non-interference in Article 2(7): "Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state."[4]

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[2]   U.N. Charter art. 51.
[3]   *Id.* arts. 39-51.
[4]   *Id.* art. 2, para. 7.

The inclination to read the charter as very limited in its reach was reinforced not only by the Cold War, which commenced almost immediately after the UN began, but also by the large increase in UN membership during the decolonization era. States, all newly proud of their identity and conscious in many cases of their fragility, saw the non-intervention norm as one of their few defenses against threats and pressures from more powerful international actors seeking to promote their own economic and political interests. This was extremely inhibiting to the development of any sense of obligation to respond in an effective way to situations of catastrophic internal human rights violations.

One big agreed exception to the non-intervention principle was the Genocide Convention of 1948.[5] But it was almost as if, with the signing of this convention, the task was seen as complete. Nothing much was done throughout the Cold War years to give practical force and effect to the plain terms of the Genocide Convention itself, even in situations where legal arguments about lack of provable intent and so on were simply not in issue. The starkest case was Cambodia under Pol Pot in the mid-1970s. Although there were, even here, technical problems in applying the convention (in this case because the people being massacred and starved were overwhelmingly of the same nationality, ethnicity, race, and religion as those doing the killing), the world did come to accept this as a catastrophic genocidal situation. But far from being praised after crossing the border to displace the Khmer Rouge, Vietnam received widespread international condemnation. While Hanoi's motives may have been neither pure nor humanitarian, its intervention did stop the génocidaires in their tracks. Nonetheless, all the international pressure was on the interveners rather than those perpetrating the horror to begin with.

Other relevant instruments emerged during the Cold War period, including the Universal Declaration of Human Rights[6] and the 1966 conventions on civil and political rights as well as economic, social, and cultural rights.[7]   But in terms of practical implementation and

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5   Convention on the Prevention and Punishment of the Crime of Genocide, G.A. Res. 260A(III), U.N. GAOR, 3d Sess., 179th plen. mtg., U.N. Doc. A/810 (1948), *entered into force* Jan. 12, 1951, *available at* http://www.unhchr.ch/html/menu3/b/p_genoci.htm.

6   Universal Declaration of Human Rights, G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc A/810 (Dec. 12, 1948).

7   International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, 7th Sess., U.N. Doc. A/6316 (1966), *entered into force* Mar. 23, 1976, *available at* http://www.ohchr.org/english/law/ccpr.htm; International Covenant on Economic,

commitment, the world remained at the level of grandiloquent rhetoric, and non-interference in domestic affairs still led the list of unbreakable commandments so far as international discourse was concerned.

With the arrival of the 1990s, the end of the Cold War, and the new era of apparent cooperation between formerly warring parties, it seemed there was new hope for a newly active and effective international security system. The international defense of Kuwait against Iraq's invasion in 1991 was a classic example of the international system working as it was intended to in response to acts of interstate aggression. But the euphoria about a rules-based system emerging, or re-emerging, did not last long.

The quintessential problem of the 1990s became that of intrastate conflict, civil war, and internal violence perpetrated on a massive scale. With the break-up of various Cold War state structures, most obviously in Yugoslavia, and the removal of some superpower constraints, conscience-shocking situations repeatedly arose, but old habits of non-intervention died very hard. Even when situations cried out for some kind of response and the international community did react through the UN, it was too often erratic, incomplete, or counterproductive. So we had the debacle of the intervention in Somalia in 1993, the pathetically inadequate response to the genocide in Rwanda in 1994, the lamentable failure to prevent murderous ethnic cleansing in the Balkans, in particular in Srebrenica, in 1995, and also the Kosovo situation in 1999 when the international community did in fact intervene, as it probably should have, but did so without the authority of the Security Council in the face of a threatened veto by Russia.

All this generated very fierce debate about what came to be called humanitarian intervention.[8] On the one hand, there were those who argued fiercely for "the right to intervene"—the *droit d'ingérence* for which Bernard Kouchner of Médecins Sans Frontières made the battle cry;[9] on the other hand, equally strong claims were made about the primacy and continued resonance of the concept of *national sovereignty*, seen as a complete inhibitor to any such coercive intervention. The

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Social and Cultural Rights, G.A. Res. 2200A, 21 U.N. GOAR Supp. (No. 16) at 49, 7th Sess., U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, *entered into force* Jan. 3, 1976, *available at* http://www.ohchr.org/english/law/ccpr.htm.

[8] However, this terminology continues to be strongly resisted by humanitarian relief organizations, starting with the Red Cross, that have always hated the idea of juxtaposing or identifying the concept of humanitarianism with that of military force in any circumstances.

[9] *See, e.g.*, Bernard Kouchner, *Establish a Right to Intervene Against War, Oppression*, Los Angeles Times, Oct. 18, 1999, at B7.

debate was a fierce one and, throughout the 1990s, utterly unresolved in the UN or anywhere else. Battle lines were drawn and trenches were dug.

This led UN Secretary-General Kofi Annan to make his agitated plea to the General Assembly in 2000, bringing the issue to a very public head, which continues to resonate to this day: "[I]f humanitarian intervention is, indeed, an unacceptable assault on sovereignty, how should we respond to a Rwanda, to a Srebrenica—to gross and systematic violations of human rights?"[10] Secretary-General Annan's own initial solution to this problem was to say that in these situations national sovereignty had to be weighed and balanced against individual sovereignty.[11] But this formulation, in truth, did little more than restate the basic dilemma: When exactly *did* individual sovereignty claims take primacy over state sovereignty? How does one identify the point at which the former should override the latter?

That same capacity to state a core issue elegantly but not resolve it in any very compelling way characterized the influential report in 2000 of the Independent International Commission on Kosovo, chaired by Richard Goldstone and Carl Tham.[12] Wrestling with the problem of the NATO intervention in 1999 that had not been authorized by the Security Council, the report described the intervention as "unavoidable" because "diplomatic options had been exhausted, and two sides were bent on a conflict which threatened to wreak humanitarian catastrophe."[13] The commission concluded that "the intervention was legitimate, but not legal."[14] They recognized the need "to close the gap between legality and legitimacy" and recommended that the General Assembly adopt a "principled framework for humanitarian intervention which could be used to guide future responses to imminent humanitarian catastrophes."[15]

The task of drafting such a framework—and meeting the challenge laid down by Annan—fell to the Canadian government-sponsored International Commission on Intervention and State Sovereignty (ICISS). The ICISS, which I had the privilege of co-

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[10] The Secretary-General, *Millennium Report of the Secretary-General of the United Nations*, *We the People: The Role of the United Nations in the 21st Century*, at 48, U.N. Doc A/54/20 (2000), *available at* http://www.un.org/millennium/sg/report/ch3.pdf.

[11] *See* Kofi Annan, *Two Concepts of Sovereignty*, ECONOMIST, Sept. 18, 1999, at 49.

[12] INDEP. INT'L COMM'N ON KOSOVO, THE KOSOVO REPORT: CONFLICT, INTERNATIONAL RESPONSE, LESSONS LEARNED (2000).

[13] *Id*. at 289.

[14] *Id*.

[15] *Id*. at 10.

chairing with the Algerian diplomat Mohamed Sahnoun, presented its report, entitled *The Responsibility to Protect,* to the UN Secretary-General at the end of 2001.[16] The report made four main contributions to the international policy debate, which, it seems fair to say, have been resonating ever since.

The first, and perhaps ultimately the most politically useful, was to invent a new way of talking about humanitarian intervention. We sought to turn the whole weary debate about the right to intervene on its head and to re-characterize it not as an argument about any *right* at all but rather about a *responsibility*[17]—one to protect people at grave risk—with the relevant perspective being not that of the prospective interveners but, more appropriately, of those needing support.[18] This new language clearly has been 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. The commission's hope—and so far, broadly what our experience has been—was that entrenched opponents would find new ground on which to more constructively engage, just as relations between developers and environmentalists improved after the Brundtland Commission introduced the concept of *sustainable development*.[19]

The second contribution of the commission, and perhaps the most conceptually significant, was to insist upon a new way of talking about sovereignty: we argued, influenced in particular by the work of Francis Deng,[20] that its essence should now be seen not as *control* but as *responsibility*. The UN Charter's explicit language emphasizes the respect owed to state sovereignty in the traditional Westphalian sense, but actual state practice has evolved in the six decades since the charter

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[16] INT'L COMM'N ON INTERVENTION AND STATE SOVEREIGNTY, THE RESPONSIBILITY TO PROTECT (2001), *available at* http://www.iciss.ca/report-en.asp (follow "View Document (PDF)" hyperlink) (last visited Nov. 25, 2006).

[17] *Id.* ¶ 2.4.

[18] *Id.* ch. 2.

[19] World Comm'n on Env't & Dev. [WCED], *Our Common Future*, ch. 2, U.N. Doc. A/42/427 (Aug. 4, 1987). The World Commission on Environment and Development is also known as the Brundtland Commission, named after its Chair, Gro Harlem Brundtland. The commission was convened by the United Nations in response to the 1983 General Assembly Resolution A/38/1961 and produced the report, *Our Common Future*, in 1987. *Id.*

[20] *See*, *e.g.*, FRANCIS M. DENG ET AL., SOVEREIGNTY AS RESPONSIBILITY: CONFLICT MANAGEMENT IN AFRICA (1996); *see also* INT'L COMM'N ON INTERVENTION AND STATE SOVEREIGNTY, *supra* note 16.

was signed, with a new focus on human rights and, more recently, on human security, emphasizing the *limits* of sovereignty.[21]

We spelt out the implications of that change by arguing that sovereignty implies responsibilities as well as rights: to be sovereign means both to be responsible to one's own citizens and to the wider international community.[22]   The starting point is that any state has a primary responsibility to protect the individuals within it.[23]   But that is not the finishing point: where the state fails in that responsibility, through either incapacity or ill will, a secondary responsibility to protect falls on the international community, acting primarily through the UN.

The third contribution of the commission was to make it clear that the responsibility to protect was about much more than intervention and, in particular, military intervention. It extends to a whole continuum of obligations:

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;[24]

The responsibility to *react*: to respond to situations of compelling human need with appropriate measures, which may include coercive measures like sanctions, international prosecution, and, in extreme cases, military intervention;[25] and

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.[26]

Of these three dimensions to the responsibility to protect, the commission made very clear its view that prevention was the single most important.[27]   But, that said, the question of military action remains, for better or worse, the most prominent and controversial one in the debate. Whatever else it encompasses, the responsibility to protect implies above all else a responsibility to react—where necessary, coercively, and in extreme cases, with military coercion—to situations of compelling need for human protection.

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[21]   INT'L COMM'N ON INTERVENTION AND STATE SOVEREIGNTY, *supra* note 16, ¶ 2.7.

[22]   *Id.* ¶ 2.27.

[23]   *Id.* ¶ 2.8.

[24]   *Id.* ch. 3.

[25]   *Id.* ch. 4.

[26]   *Id.* ch. 5.

[27]   *Id.* ¶ 7.15.

The fourth contribution of the commission was to come up with guidelines for when military action is appropriate—going both to its legality and legitimacy, in terms of the language of the Kosovo Report.[28] 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. They are as follows:

(1) Just Cause: Is there "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, 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."[29]

The bar for military intervention here has been set deliberately high and tight and excludes many kinds of unconscionable behavior (e.g., imprisonment and torture of political opponents or overthrow of a democratically elected government) that would certainly justify other forms of coercive response (e.g., targeted sanctions).

(2) Right Intention: Is the primary purpose of the proposed military action to halt or avert human suffering, whatever other motives may be in play?[30]

(3) Last Resort: Has every non-military option for the prevention or peaceful resolution of the crisis been explored, and are there reasonable grounds for believing lesser measures will not succeed?[31]

This guideline was not intended to mean that every non-military option must literally have been tried and failed. Given that there will often be simply no time for that process to work itself out, what is

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[28]   *Id.* at XII-XIII.
[29]   *Id.* at XII.
[30]   *Id.*
[31]   *Id.*

necessary is that there be reasonable grounds for believing, in all the circumstances, that these other measures would not have worked.

(4) Proportional Means: Is the scale, duration, and intensity of the planned military action the minimum necessary to secure the defined human protection objective?[32]

(5) Reasonable Prospects: Is there a reasonable chance of the military action being successful in meeting the threat in question, and are the consequences of action not likely to be worse than the consequences of inaction?[33]

This last balance-of-consequences test is, and should be, a very important constraint. Apart from anything else, it effectively rules out military action against any one of the five permanent members of the Security Council—e.g., against Russia over Chechnya or against China over some imaginable course of events in Xinjiang—even if all other conditions for intervention were to be met. The same is true for other major powers—which is why Indonesia's permission was required for the East Timor intervention. That permission was given only very reluctantly and under much international pressure, but it *was* given; the case was, accordingly, not one of coercive humanitarian intervention at all. All this raises the familiar question of double standards to which the only answer can be this: the reality that interventions may not be able to be mounted in every case where there is justification for doing so is no reason for them not to be mounted in any case.

The ICISS was not naïve about these criteria of legitimacy. We recognized that there was no push-button inevitability about their application and that for the Security Council to adopt them could not guarantee that the objectively best outcome would always prevail. But we argued that the existence of agreed criteria would change the nature of Security Council debate: Maximize the possibility of achieving council consensus around when it is appropriate or not to go to war; maximize international support for whatever it decides; and minimize the possibility of individual member states bypassing or ignoring it.[34]

There remained to address the problem of legality. What if, taking into account all five criteria of legitimacy, a very clear case could be made for coercive intervention, but the Security Council—under the UN Charter the *only* source of authority for the use of military force except in cases of legitimate self-defense—simply would not vote to

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[32] *Id.*

[33] *Id.*

[34] *Id.* ¶ 4.14.

authorize it? This was exactly the issue that had to be confronted with Kosovo in 1999 when all the elements of a horrific new ethnic cleansing operation were falling into place, but Russia made clear it would veto any military intervention.[35]

In these cases a very real dilemma arises as to which of two evils is the worse: the damage to international order if the Security Council is bypassed or the damage to that order if human beings are slaughtered while the Security Council stands by. The commission's response to this dilemma was not to try and establish some alternative basis for the legality of interventions in these situations.[36] We saw the need as not to find alternatives to the Security Council as a source of authority but to make it work better. We opted for a clear political message: if an individual state or ad hoc coalition steps in, fully observes and respects all the necessary criteria of legitimacy, intervenes successfully, and is seen to have done so by world public opinion, then this is likely to have enduringly serious consequences for the stature and credibility of the UN itself.[37] That is essentially what happened with the United States and NATO intervention in Kosovo, and the UN cannot afford to drop the ball too many times on that scale.

II. THE EVOLUTION OF A DOCTRINE

It is one thing to develop a concept of this kind but quite another to get any policy maker to take any notice of it. Everyone's bookshelves are full of barely opened reports by blue ribbon commissions and panels. The most interesting thing about the *Responsibility to Protect* report is the way its central theme has continued to gain traction internationally, even though it was almost suffocated at birth by being published in December 2001, in the immediate aftermath of 9/11, and by the subsequent massive international preoccupation with terrorism rather than internal human rights catastrophes.

For a start, the responsibility to protect concept was embraced enthusiastically by Secretary-General Annan, who acknowledged, very graciously, that it had rather more potential to bridge the sovereignty versus intervention divide than his own earlier attempt to find consensus around the idea of balancing state sovereignty against individual

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[35]   *See, e.g.*, *id.* ¶ 1.2.

[36]   *Id.* ¶ 8.4.

[37]   *Id.* ¶ 6.4.

sovereignty. It began to be embraced, importantly, in the doctrine of the newly emerging African Union. And over the next two to three years, it won quite a constituency among academic commentators and international lawyers, a number of whom were prepared to accept, to a greater or lesser extent, the commission's own rather heroic assessment of the responsibility to protect as an emerging international norm that might, in due course, become accepted as customary international law. The responsibility to protect during this period even acquired that ultimate measure of recognition and acceptance, a now almost universally used acronymic abbreviation, *R2P*.

In international law, being the rather odd beast that it is, capable of evolving through practice and commentary as well as through formal treaty instruments, these embraces and acknowledgments are to some extent self-fulfilling. But that is only the case if the momentum is maintained. If the R2P concept was to really catch hold and become the primary frame of reference within which catastrophic human rights violations were assessed and responded to in the future, its acceptance had to become considerably more visible and universal.

A great deal of effort has been going into maintaining that momentum, and several big milestones have now been passed. First, the High-level Panel on Threats, Challenges and Change, whose report *A More Secure World: Our Shared Responsibility* was submitted to the Secretary-General in December 2004, squarely adopted the whole concept in these words:

> 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 or other large-scale killing, ethnic cleansing or serious violations of international humanitarian law which sovereign Governments have proved powerless or unwilling to prevent.[38]

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.

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[38] The Secretary-General, *Report of the High-level Panel on Threats, Challenges and Change, A More Secure World: Our Shared Responsibility*, ¶ 203, *delivered to the General Assembly*, U.N. Doc. A/59/565 (Dec. 2, 2004), *available at* http://www.un.org.secureworld/report2.pdf.

The second milestone passed was the embrace of these recommendations by the Secretary-General himself in his own proposals for reform published in March 2005 as *In Larger Freedom: Towards Development, Security and Human Rights for All,* the basic working document for the World Summit scheduled in September last year in the context of the UN's sixtieth anniversary.[39] After repeating, in effect, the language of the High-level Panel, he went on to say: "While I am well aware of the sensitivities involved in this issue, I strongly agree with this approach. I believe we must embrace the responsibility to protect, and, when necessary, we must act on it."[40]

The third milestone passed, and by far the biggest, was the unanimous embrace of the responsibility to protect principle by the General Assembly, meeting as the World Summit itself.[41] The Summit outcomes overall were, from a UN reform perspective, deeply disappointing, certainly when measured against the breadth of the Secretary-General's *In Larger Freedom* proposals, which reached across the whole spectrum of development, security, human rights, and management issues, and against some of the hopes and expectations that had been generated by the preceding debate.[42] The endorsement of R2P, in this context, was a very major achievement and one of only a small handful of real achievements from the whole occasion (along with the creation of the Peacebuilding Commission and the agreement to replace the dysfunctional Commission on Human Rights with a new Human Rights Council).

That this endorsement happened was anything but inevitable. Nearly all the negotiation on the Summit Outcome Document took place in the notoriously difficult environment of the UN diplomatic corps rather than at a political leadership level in nations' capitals. 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 untrammeled 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

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[39] The Secretary-General, Report of the Secretary General, In Larger Freedom: Towards Development, Security and Human Rights for All, delivered to the General Assembly, U.N. Doc. A/59/2005 (Mar. 21, 2005) [hereinafter In Larger Freedom], *available at* http://www.un.org/largerfreedom/contents.htm (follow "Report" hyperlink; then follow "Full Report" hyperlink).

[40] *Id.* ¶ 135.

[41] G.A. Res. 60/1, U.N. Doc. A/RES/60/1 (Oct. 24, 2005).

[42] In Larger Freedom, *supra* note 39.

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.

The language of the summit outcome document was quite strong, including these critical passages:

> 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, 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.[43]

Bearing in mind the almost pitched battles fought in the General Assembly not very long before on the intervention-sovereignty issue, to get such language endorsed unanimously by the whole international community, in that same global forum, was a considerable achievement. From any view, the evolution in just five years of the responsibility to protect concept from a gleam in a commission's eye to what now might be described as a broadly accepted international norm, creating in the process the context for a far more effective response to conscience-shocking situations than the international community has managed in the past, is an extremely encouraging story.

But it's not the whole story.   The recognition of the responsibility to protect as a principle is one thing—its practical implementation, quite another. There are quite a number of problems

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[43]   G.A. Res. 60/1, *supra* note 41, ¶¶ 138-39.

that remain to be overcome in this respect, and I shall briefly describe them in turn as the problems of buy-in by the Security Council, false friends, capacity, and will.

III. THE IMPLEMENTATION OF A DOCTRINE

A. THE PROBLEM OF SECURITY COUNCIL BUY-IN

A General Assembly resolution is helpful in identifying relevant principles, but the Security Council is the institution that matters most when it comes to executive action. And here a problem has already become apparent, even just at the level of generalities rather than specifics, in the context of an attempt after the World Summit to get the council itself to endorse the R2P language of the General Assembly's resolution. Debate on a thematic resolution on the protection of civilians in armed conflict, which incorporates this language, has been dragging on inconclusively since it was introduced by the United Kingdom presidency in December 2005, with Russia and China arguing, in their usual studied gravity, that the whole issue should first be addressed in more detail by the General Assembly. The cause is by no means lost, but the exercise has been instructive for anyone who would too readily assume that a new spirit of responsibility is abroad.[44]

The Security Council problem has been compounded by the unwillingness of almost anybody to buy into what was—for the ICISS, the High-level Panel, and the Secretary-General in his own report—an integral part of the R2P package, viz. the set of criteria addressing the legitimacy of using military force. The General Assembly resolution itself, quite apart from any Security Council follow up, omitted any language on these principles, whether in a specific R2P context or more generally.[45] 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,

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[44] Since this was written the Security Council has specifically endorsed the responsibility to protect principle in Resolution 1674, and subsequently incorporated it by reference in Resolution 1706 on Darfur. *See* S.C. Res. 1674, U.N. Doc. S/RES/1674 (Apr. 24, 2006); S.C. Res. 1706, U.N. Doc. S/RES/1706 (Aug. 31, 2006). But effective operational implementation of the principle still remains some distance away.

[45] *Id.*

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.

B. The Problem of False Friends

The biggest inhibitor of all to the ready acceptance of R2P as an operating principle has been the misuse of that principle in the context of the war on Iraq. The initial rationales for military intervention in Iraq were cast not at all in R2P terms: the issue was Iraq's presumed possession of weapons of mass destruction, or at least the capacity to make them, and its perceived dissimulation in that respect to the international community, supplemented by the less plausible suggestion that Saddam Hussein was hand-in-glove with international terrorists. But as these rationales fell away, the argument came to be cast ever more specifically, particularly by the United Kingdom, but with Washington not far in the rear, in terms of Saddam's tyranny—the human rights violations he had perpetrated on his own people and the need to protect them from further abuse. The genocidal massacres of the Kurds using chemical weapons in the 1980s and of the Shiites in the early 1990s—to both of which the West had turned a blind eye at the time, but no matter—were surely proof, it was suggested, that this was a suitable case for R2P treatment and of the most coercive kind.

But of course, it was nothing of the kind. The rationale for coercive humanitarian intervention is not punishment for past sins, however grotesque, but to avert, here and now, threats to large numbers of people which are actually occurring or imminently about to occur. It is not to allow a regime with a bloody past to be attacked by others at a time of their choosing: as Ken Roth of Human Rights Watch has put it, "'Better late than never' is not a justification for humanitarian intervention."[46] And even if a prima facie case could be made for going to war on this threshold issue of the seriousness of the security threat to

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[46] Ken Roth, *War in Iraq: Not a Humanitarian Intervention*, *in* Human Rights Watch World Report, 2004: Human Rights and Armed Conflict 13, 22 (2004), *available at* http://www.hrw.org/wr2k4/download/wr2k4.pdf.

Iraq's own people, the case for actually doing so depends on multiple other criteria being satisfied, not least that the results of military action will not be worse than taking no action. There are not too many people outside the inner core of the Bush administration who would confidently have made that judgment at the time, and no one, I suspect, who would make it now.

The key issue here (not only for developing-country-sovereignty addicts but also for writers like David Rieff) is that the ideals of liberal interventionism captured in the R2P principle—which should have been carried through in Rwanda and Srbrenica but weren't, and were carried through but with incomplete authority in Kosovo—are all too easily capable of misapplication by neo-conservatives and others to justify unjustifiable military adventures such as Iraq.

This false friends problem is compounded when absolutely genuine, principled supporters of R2P decide to use it as a springboard for other forms of adventurism. Anne-Marie Slaughter and Lee Feinstein embarked on this path when in a *Foreign Affairs* article in 2004 they sought to build upon the foundations of R2P (to which they paid gracious homage) a new edifice, which they called "a duty to prevent."[47] This concept is currently getting a new lease of life, although I am not sure this is to both authors' present taste, in the current debate about Iran's nuclear ambitions, not least with the just-released new 2006 National Security Strategy restating this administration's determination to "if necessary, act preemptively in exercising our inherent right of self-defense."[48]

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.[49] When one is trying to carefully build an international consensus where none has previously existed, of a kind which will

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[47] Lee Feinstein & Anne-Marie Slaughter, *A Duty to Protect*, 83 FOREIGN AFF. 136, 137 (2004).

[48] THE WHITE HOUSE, THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 18 (2006), *available at* http://www.whitehouse.gov/nsc (follow "National Security Strategy of the United States of America 2006" hyperlink; then follow "Full PDF Document" hyperlink) (last visited Nov. 25, 2006).

[49] Feinstein & Slaughter, *supra* note 47, at 139 (addressing Saddam Hussein's Iraq).

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.

C. THE PROBLEM OF CAPACITY

This is a further real-world problem of grave dimensions, which arises most acutely in the context of the use of military force. Even with complete agreement, in some last resort situation, about the legality and legitimacy of military intervention and the best will in the world to deploy military force, there may just not be the capacity to do so or at least a capacity to deploy force of the kind required.

The problems here are all very familiar ones. Those countries with apparently massive capacity—in terms of both personnel numbers and equipment—are often preoccupied with battles and deployments elsewhere or have the wrong kind of troop configurations and equipment to do the fast and flexible jobs most often required. Throughout Europe in particular, in country after country, the number of troops operationally deployable at any given time is a tiny percentage of the men and women in uniform. Elsewhere in the world, there may be no apparent shortage of boots able to go on the ground, but there will be issues of training, command, control and communications capability, transportability, and general logistic support. And for any proposed multinational deployment, there will be issues of planning, mission control, and field command—who is responsible for what and interoperability.

The present situation in Darfur is a classic demonstration of the problem of military implementation of the international responsibility to protect. This is not a case where I would argue that external military forces should fight their way in whatever the resistance of the national government: if nothing else, the fifth criterion of legitimacy, the balance of consequences, would argue against that. But it is obviously a case for a major international protective response in which resources are committed to the resolution of an internal man-made catastrophe and on a scale that really will make a difference. At least twelve thousand fully mandated troops—desirably many more, but this number at a minimum—are, in the International Crisis Group's judgment, needed on the ground right *now* to protect villages against further attack or destruction, protect the displaced against forced repatriation and

intimidation, protect women from systematic rape outside IDP camps, provide security for humanitarian operations, and neutralize the government-supported militias who continue to prey on civilians.[50]

At present, under the current African Union Mission in Sudan (AMIS), there are only some seven thousand inadequately mandated, insufficiently mobile, and otherwise militarily incapable personnel on the ground. And there are no firm plans to increase this number, although there is now some acceptance of the desirability of the UN taking over the operation in six months' time. The extra five thousand troops that are needed, at a minimum, are presently nowhere to be seen: no individual African country has that number available, and none are being volunteered by the European countries or NATO countries or other developed countries which could, on the face of it, make a difference. They are presently very comfortable sheltering behind the African Union's unwillingness to accept outsiders, particularly non-Islamic northerners, into the fray, but the truth of the matter is that they are neither able nor willing to provide the necessary resources. What they are best configured to supply, and most comfortable negotiating, as Kofi Annan has been heard to ruefully say, is some quick in-and-out heavy lift or other logistical support, a handshake, and a photo opportunity.

D. THE PROBLEM OF POLITICAL WILL

Even if the capacity to react in the way required is there for the taking, there will always be a problem in R2P situations of mobilizing the necessary political will. This is true not only of the most extreme form of coercive reaction, the use of military force, but also of non-military coercive action, like the application of sanctions or the bringing of atrocity crime suspects before international criminal courts. (There has been some good recent news in that respect with the final establishment of the International Criminal Court—and less unyielding opposition to it by the United States, at least in the context of Sudan—and also with the bringing to justice of Charles Taylor before the UN Special Court for Sierra Leone; but the problem of absent political will remains starkly apparent with the continued failure of Serbia to cooperate in bringing the indictees Radovan Karadzic and Ratko Mladic before the International Criminal Tribunal for the former Yugoslavia.) The need

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[50]   *See* INT'L CRISIS GROUP, *supra* note 1.

for political will is also there even with the use of utterly non-coercive preventive action, which may nonetheless involve expensive resources and the commitment to apply them effectively.

The problem of finding the necessary political will to do anything hard or expensive or politically sensitive is just a given in public affairs. The evident absence of such will should not be a matter for lamentation or despair but mobilization—even in a current environment where, as Philip Stephens put it recently in the *Financial Times*, "on both sides of the Atlantic, the impulse to engage is giving way to an inclination to retreat."[51] For every Indian Ocean tsunami that generates a massively sympathetic international human response and an outpouring of material support, there is a Pakistani earthquake, just about as horrendous in its human consequences, that does not. We have to live with these vagaries in the human psyche and our various body politics and work on ways of overcoming them.

The ICISS made the point that mobilizing political will is not only a matter of intelligently using the institutional instruments at hand—everything from CNN's cameras to the power of the "[UN] Secretary-General under Article 99 of the UN Charter to 'bring to the attention of the Security Council any matter that in his opinion may threaten the maintenance of international peace and security.'"[52] It is also a matter of intelligently and energetically advancing good *arguments*, which may not be a sufficient condition but are always necessary for taking difficult political action.

> Those arguments may be *party interest* arguments designed to consolidate a government's vocal domestic base (always an important element in the Bush Administration's interest in Sudan); *national interest* arguments (much easier to make now in relation to "quarrels in far away countries between people of whom we know nothing," in Chamberlain's terms, because of what we do know now about the capacity of failed states, in this globalised world, to be a source of havoc for others); or *financial* arguments (in terms of a million dollars worth of preventive action now saving a billion dollars worth of military intervention later). And if all else fails, they can even be *moral* arguments (given that however base politicians' real motives may be, they always like to be seen as acting from higher ones).[53]

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[51] Philip Stephens, *No Retreat From the Global Community*, FIN. TIMES (London), Mar. 18, 2006, at 19.

[52] INT'L COMM'N ON INTERVENTION AND STATE SOVEREIGNTY, *supra* note 16, ¶ 3.14.

[53] Gareth Evans, President, Int'l Crisis Group, Keynote Address at Channels of Influence in a Crisis Situation Seminar in Helsinki, Finland: Conflict Prevention and Development Cooperation (May 9, 2006), *available at* http://www.crisisgroup.org/home/index.cfm (follow "President"

There are, in short, many problems that remain if the principle of the responsibility to protect is to be consolidated, further refined and developed, and above all practically implemented. But for all the problems that remain, some extraordinary progress has been made and within a remarkably short time period given the normal pace at which international norms and patterns of behavior change. We really are now well on the way toward building an international legal order that, despite all the challenges which continue to buffet it, will give us some grounds for optimism that we are not forever condemned to repeat the mistakes of the past. And that means not only the mistake of going to war when we should not, but also what can sometimes be the even bigger mistake of *not* going to war to protect our fellow human beings from catastrophe when we *should*.

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hyperlink; then follow "Speeches" hyperlink; then follow "Conflict Prevention and Development Cooperation" hyperlink).