R2P AFTER 9/11 AND THE WORLD SUMMIT

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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), the title for the 2001 report from the International Commission on Intervention and State Sovereignty (ICISS).[1] The September 2005 World Summit, for example, provided the latest and perhaps most significant endorsement.[2] It was not so long ago, in 1995 for example, that the Commission on Global Governance proposed amending the UN Charter to explicitly permit Chapter VII military action with a humanitarian justification.[3] The recommendation was moot, however, after the host of interventions in the 1990s for which the Security Council recognized massive suffering

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1. Int'l Comm'n on Intervention and State Sovereignty [ICISS], *The Responsibility to Protect* (Dec. 2001), *available at* http://www.iciss.ca/pdf/Commission-Report.pdf. *See also* ICISS, *The Responsibility to Protect: Research, Bibliography, Background* (Dec. 2001) (*prepared by* Thomas G. Weiss & Don Hubert), *available at* http://www.iciss.ca/pdf/Supplementary-Volume.pdf.
2. 2005 World Summit Outcome, G.A. Res. 60/1, ¶¶ 138-9, U.N. Doc. A/RES/60/1 (Oct. 24, 2005).
3. COMM'N ON GLOBAL GOVERNANCE, OUR GLOBAL NEIGHBORHOOD 90 (1995).

as a sufficient enough threat to international peace and security to justify forceful action. José Alvarez observes the acceleration in the usual pace for normative development: "[T]raditional descriptions of the requisites of custom—the need for the passage of a considerable period of time and the accumulation of evidence of the diplomatic practices between sets of states reacting to one another's acts—appear increasingly passé."[4]

At the same time, the Security Council's painful dithering since early 2003 over large-scale murder and massive displacement in Darfur also demonstrates, at the very least, the dramatic disconnect between multilateral rhetoric and reality.[5]   As Roméo Dallaire, the Canadian general in charge of the feeble UN force during the 1994 slaughter in Rwanda, lamented, "[h]aving called what is happening in Darfur genocide and having vowed to stop it, it is time for the West to keep its word."[6]

Normative developments and political reality are rarely in synch, however.   Sometimes norm entrepreneurs scramble to keep up with events, and sometimes they are ahead of them.[7]   In this case, the humanitarian interventions in northern Iraq in 1991 and Somalia in 1992 were agreed to by the UN before there was any significant discussion of conditioning state sovereignty on human rights. Plotting the growing consensus about R2P on a graph would thus reflect a steady growth since the early 1990s whereas the operational capacity and political will to engage in humanitarian intervention—like the transformed humanitarian system[8]—would seem to be on a roller coaster. Hence, while the 2005 World Summit marked the zenith of international normative consensus about R2P, the blow-back from 9/11 and the war in Iraq along with the absence of military capacity besides the American one, which is tied down, explains the current nadir in actual humanitarian intervention—the

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[4]   JOSÉ E. ALVAREZ, INTERNATIONAL ORGANIZATIONS AS LAW-MAKERS 591 (2005).

[5]   *See* Hugo Slim, *Dithering over Darfur? A Preliminary Review of the International Response*, 80 INT'L AFF. 811 (2004). *See also* CHERYL O. IGIRI & PRINCETON N. LYMAN, GIVING MEANING TO "NEVER AGAIN": SEEKING AN EFFECTIVE RESPONSE TO THE CRISIS IN DARFUR AND BEYOND (Council on Foreign Rel., Sp. Rep. 5, Sept. 2004), *available at* http://www.cfr.org/content/ publications/attachments/NeverAgainSudanCSR.pdf.

[6]   *See* Roméo Dallaire, *Looking at Darfur, Seeing Rwanda*, N.Y. TIMES, Oct. 4, 2004, at A25. *See also* ROMÉO DALLAIRE WITH BRENT BEARDSLEY, SHAKE HANDS WITH THE DEVIL: THE FAILURE OF HUMANITY IN RWANDA (2003) for a description of the lack of support from western countries for the UN intervention in Rwanda.

[7]   *See generally* Martha Finnemore & Kathryn Sikkink, *International Norm Dynamics and Political Change*, 52 INT'L ORG. 887 (1998).

[8]   *See generally* Michael Barnett, *Humanitarianism Transformed*, 3 PERSP. ON POL. 723 (2005).

contemporary manifestation of what I earlier called "collective spinelessness" in the Balkans.[9]

We are at the dawn of a new normative era but in the dusk of the bullish days of humanitarian intervention. As in other arenas, action speaks louder than words.

I. R2P: THE BASICS

The essential idea behind the R2P doctrine is that human beings sometimes trump sovereignty as it is enshrined in UN Charter Article 2(7) with its emphasis on nonintervention in the domestic jurisdiction of member states. As suggested by the 2005 World Summit, future policy debates and actions will be framed by the responsibility to protect, which, since its publication in December 2001, has been greeted by largely positive reactions, including academic reviews.[10] Within an ever changing system of world politics and humanitarianism, former *New York Times* columnist Anthony Lewis described it as "the international state of mind,"[11] and even one of its harshest opponents, Mohammed Ayoob, admits its "considerable moral force."[12] R2P certainly qualifies as emerging customary law.

The ICISS identified two threshold cases: large-scale loss of life and ethnic cleansing, underway or anticipated. Humanitarian intervention also should be subject to four precautionary conditions: right intention, last resort, proportional means, and reasonable prospects of success. And finally, the Security Council is the preferred decision-maker.

The ICISS pushed the normative envelope in two ways. The first is in the report's opening sentences insisting that sovereignty also encompasses a state's responsibility to protect populations within its borders. Even committed advocates of human rights and robust intervention now see state authority as elementary to enduring peace and reconciliation and recommend fortifying failed or fragile states. This

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[9] Thomas G. Weiss, *Collective Spinelessness: U.N. Actions in the Former Yugoslavia*, *in* THE WORLD AND YUGOSLAVIA'S WARS 59 (Richard H. Ullman ed., 1996).

[10] For a review of the reviews, *see* S. Neil MacFarlane et al., *The Responsibility to Protect: Is Anyone Interested in Humanitarian Intervention?*, 25 THIRD WORLD Q. 977 (2004).

[11] Anthony Lewis, *The Challenge of Global Justice Now*, DÆDALUS, Winter 2003, at 5, 8.

[12] Mohammed Ayoob, *Humanitarian Intervention and State Sovereignty*, 6 INT'L J. HUM. RTS. 81, 84 (2002). For the context that drives Ayoob's skepticism, *see generally* MAKING STATES WORK: STATE FAILURE AND THE CRISIS OF GOVERNMENT (Simon Chesterman et al. eds., 2005).

realization does not reflect nostalgia for any national-security state of the past but a realistic appraisal of a new bottom line.

The second ICISS contribution consists of moving away from the rights of outsiders to intervene toward a framing that spotlights those suffering from war and violence. Abandoning the picturesque vocabulary of the French Doctors Movement[13] shifts the fulcrum away from the rights of interveners and toward the rights of affected populations and the responsibilities (if not legal obligations) of outsiders to protect them. The new perspective thus prioritizes the rights of those suffering from starvation or systematic rape and the duty of states and international institutions to respond.[14] Rather than looking for a legalistic trigger to authorize states to intervene, R2P specifies that it is shameful to do nothing when conscience-shocking events cry out for action.

To repeat, the historical trajectory, as captured in paragraphs 138 and 139 of the World Summit's outcome,[15] has been extremely fast—moving from, starting in the early 1990s, Frances M. Deng and Roberta Cohen's work on internally displaced persons and their concept of "sovereignty as responsibility"[16] to UN Secretary-General Kofi Annan's "two sovereignties"[17] to the ICISS itself.[18] As a result, the four characteristics of a sovereign state—territory, authority, population, and independence—spelled out in the 1934 Montevideo Convention on the Rights and Duties of States have been complemented by another, a modicum of respect for human rights. State sovereignty seems less sacrosanct today than in 1945. Richard Haass proposes a bumper sticker, "abuse it and loose it."[19]

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[13] LE DEVOIR D'INGÉRENCE: PEUT-ON LES LAISSER MOURIR? [The Duty to Interfere: Can We Let Them Die?] (Mario Bettati & Bernard Kouchner eds., 1987); MARIO BETTATI, LE DROIT D'INGÉRENCE: MUTATION DE L'ORDRE INTERNATIONAL [The Right to Interfere: Transformation of the International Order] (1987).

[14] *See* Gareth Evans, *When Is It Right to Fight?*, SURVIVAL, Autumn 2004, at 69-71.

[15] 2005 World Summit Outcome, *supra* note 2, ¶¶ 138-9.

[16] FRANCES M. DENG ET AL., SOVEREIGNTY AS RESPONSIBILITY: CONFLICT MANAGEMENT IN AFRICA (1996). *See also* ROBERTA COHEN & FRANCIS M. DENG, MASSES IN FLIGHT: THE GLOBAL CRISIS OF INTERNAL DISPLACEMENT (1998); THE FORSAKEN PEOPLE: CASE STUDIES OF THE INTERNALLY DISPLACED (Roberta Cohen and Francis M. Deng eds., 1998); Francis M. Deng, *Frontiers of Sovereignty: A Framework of Protection, Assistance, and Development for the Internally Displaced*, 8 LEIDEN J. OF INT'L L. 249 (1995).

[17] Kofi A. Annan, Two Concepts of Sovereignty, *in* THE QUESTION OF INTERVENTION: STATEMENTS BY THE SECRETARY-GENERAL (U.N. 1999).

[18] This story is told in THOMAS G. WEISS & DAVID A. KORN, INTERNAL DISPLACEMENT: CONCEPTUALIZATION AND ITS CONSEQUENCES (2006).

[19] RICHARD N. HAASS, THE OPPORTUNITY: AMERICA'S MOMENT TO ALTER HISTORY'S COURSE 41 (2005).

Amidst, at most, extremely modest achievements,[20] the World Summit's treatment of R2P—which the former Guatemalan ambassador and UN Economic and Social Council President Gert Rosenthal called "the only unequivocal success in September 2005"—suggests that consensus-building can sometimes occur around even the most controversial issues and with opposition from the strangest of bedfellows—in this case, John Bolton, the permanent representative of the United States, and the Non-Aligned Movement (NAM). The summit's final text reaffirms the primary roles of states in protecting their own citizens and encourages international assistance to weak states to exercise this responsibility. At the same time, it makes clear the need for international intervention when countries fail to shield their citizens from or, more likely, actively sponsor genocide or war crimes.

NAM will continue to reiterate its rejection of the so-called right of humanitarian intervention—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. The United States will continue to refuse to commit military forces. Despite these two political realities, the proverbial bottom line is clear: when a state is incapable or unwilling to safeguard its own citizens and peaceful means fail, the resort to military force (with Security Council approval) remains a possibility. In short, there is an acceptance by most governments of the collective responsibility to protect. Nonetheless, political will remains problematic, and the threshold for military humanitarian intervention, extremely high—requiring not merely the existence of substantial human rights abuses but what Tom Farer calls "spikes"[21] in such massive and conscience-shocking events as genocide, war crimes, crimes against humanity, and ethnic cleansing.

While purists may be disenchanted—especially by the summit's insistence on Security Council approval instead of the ICISS approach that treated it as a strong preference—Karl Popper's plea in 1945 for "piecemeal engineering" has resonance. He urged the pursuit of "the method of searching for, and fighting against, the greatest and most urgent evils of society, rather than searching for, and fighting for, its

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[20] *See* Thomas G. Weiss and Barbara Crossette, *The United Nations: Post-Summit Outlook*, *in* FOREIGN POLICY ASS'N, GREAT DECISIONS 2006 9, 16-17 (2006).

[21] Tom J. Farer with Daneile Archibugi, Chris Brown, Neta C. Crawford, Thomas G. Weiss & Nicholas J. Wheeler, *Roundtable: Humanitarian Intervention after 9/11*, 19 INT'L REL. 211, 216, 220-250 (2005).

greatest ultimate good."[22]   That military force for human protection remains a policy option at all represents new and crucial middle ground in international relations.

Consensus-building around R2P should also be seen in context. Two years earlier, the UN was sidelined in the war against Iraq. And everyone was unhappy—the UN could not impede U.S. hegemony, and it could not approve requisite action against Saddam Hussein. Kofi Annan thus asked sixteen former senior government officials—the High-level Panel on Threats, Challenges and Change (HLP)—to describe what ailed the UN and propose a way forward. The blue-ribbon panel's December 2004 report, *A More Secure World,* contains a laundry list of recommendations—unkindly described as the "101 Dalmatians" for its number of proposals.[23] In March 2005 the HLP's propositions, including its enthusiastic support for R2P and rules for the use of force, were endorsed in Kofi Annan's *In Larger Freedom.*[24]

Once seen as a window of opportunity to revisit the United Nations in light of changes in world politics since 1945, summit negotiations exposed the debilitating political and bureaucratic conflicts that regularly paralyze the organization. "A once-in-a-generation opportunity to reform and revive the United Nations has been squandered,"[25] said the lead editorial from the *New York Times*. Partisans of R2P were relieved even if the overall results constituted considerably less than Annan's prior plea that "the UN must undergo the most sweeping overhaul of its 60-year history."[26]

Where does that leave us? David Kennedy worries about the unacknowledged and unanticipated costs of humanitarian action, or "the dark sides of virtue."[27] David Rieff wonders whether the revolution of moral concern "has actually kept a single jackboot out of a single human face."[28] My own somber lament is in-humanitarian nonintervention. Appallingly sparse responsibility to protect those suffering from

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[22] KARL POPPER, THE OPEN SOCIETY AND ITS ENEMIES 171 (2002).

[23] U.N. High-level Panel on Threats, Challenges and Change, *A More Secured World: Our Shared Responsibility*, U.N. Doc. A/59/565 (Dec. 2, 2004).

[24] The Secretary-General, *In Larger Freedom: Towards Development, Security and Human Rights for All*, *delivered to the General Assembly*, ¶ 4, U.N. Doc. A/59/2005 (Mar. 21, 2005).

[25] Editorial, *The Lost U.N. Summit Meeting*, N.Y. TIMES, Sept. 14, 2005, at A28.

[26] Kofi A. Annan, *In Larger Freedom: Decision Time at the UN*, FOREIGN AFFAIRS, May/June 2005, at 63, 66.

[27] DAVID KENNEDY, THE DARK SIDES OF VIRTUE: REASSESSING INTERNATIONAL HUMANITARIANISM (2004).

[28] DAVID RIEFF, A BED FOR THE NIGHT: HUMANITARIANISM IN CRISIS 15 (2002).

atrocities that shock the human conscience represents as great a threat to international society and global justice as pre-emptive or preventive war.

Overzealous military action for insufficient humanitarian reasons certainly is no danger. Rather, the real threat to international society comes from doing nothing while observing Sudan's slow-motion genocide (some two to three hundred thousand dead black Africans and as many as three million forcibly displaced) and condoning massive suffering in the Democratic Republic of the Congo (DRC) (an estimated four million people, or four Rwandas, have died since 1998 largely from the famine and disease accompanying armed conflict).[29] If Darfur and the DRC are occasionally discussed but overlooked, the situation in northern Uganda amounts to a "secret genocide," according to Olara Otunnu, the former UN under-secretary-general and special representative for children and armed conflict,[30] because the decade-long effort to subjugate some two million people (from the Acholi, Lango, and Teso regions) in two hundred refugee camps is a hidden side of Yoweri Museveni's "success."

Why exactly does the humanitarian intervention fashion of the 1990s now seem like ancient history? There are two main reasons. First, critics have more important preoccupations in the aftermath of 9/11. It is not so much that date but the expansion of the war on terror to Iraq that has tainted the terms of the debate. For example, it has become harder to dismiss out-of-hand the rear-guard reactions by many developing countries to put the brakes on R2P because it could be a veiled pretext for imperialism. Second, the notion that human beings matter more than sovereignty radiated, albeit briefly, across the international political horizon until the United States tied down its military in Afghanistan and Iraq.[31] 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

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[29] Int'l Rescue Comm., *The IRC in Sudan*, http://www.theirc.org/where/the_irc_in_sudan.html (last visited Oct. 7, 2006); Int'l Rescue Comm., *The IRC in Democratic Republic of Congo*, http://www.theirc.org/where/the_irc_in_democratic_republic_of_congo.html (last visited Oct. 7, 2006).

[30] Olara A. Otunnu, *The Secret Genocide*, FOREIGN POLICY, July/Aug. 2006, at 45.

[31] *See* TERRORISM AND THE UN: BEFORE AND AFTER SEPTEMBER 11 (Jane Boulden & Thomas G. Weiss eds., 2004); WARS ON TERRORISM AND IRAQ: HUMAN RIGHTS, UNILATERALISM, AND U.S. FOREIGN POLICY (Thomas G. Weiss, Margaret E. Crahan & John Goering eds., 2004).

complain but do little because their own militaries are too feeble for the task.[32]

II. A TAINTED DEBATE

It is not so much 9/11 per se but the way that Washington has pursued the war on terrorism, and especially in waging war against Iraq, that has made many observers uncomfortable—or shall we say even more uncomfortable—with the notion of any responsibility to protect. Those espousing the use of military force for human protection purposes are no longer on the side of the angels because of how the concept could apparently be manipulated by the George W. Bush administration.

In addition to the inability to react to Rwanda's genocide, the other trigger for the ICISS was the decision by the North Atlantic Treaty Organization (NATO) to use force in Kosovo without a Security Council mandate. For many developing countries, this intervention raised hackles similar to those following 9/11's expanded war on terrorism. Notwithstanding legal arguments in a highly political forum[33] and the opinion of an independent commission of human rights specialists that it was "legitimate" even if "illegal,"[34] Kosovo provided additional evidence of the council's inconsistency that can be elided into a condemnation of Iraq. This earlier unilateral—meaning, in international legal terms, outside of the UN Charter—intervention was yet another indication that the world's most powerful states can break the rules with impunity.

It is no secret that many skeptics, especially in the Third World, have always been uneasy with intervention, for humanitarian or any other purpose. The reservations were captured by Algerian President Abdelaziz Bouteflika's remarks during the UN's 1999 general debate after Annan's justification of "two concepts of sovereignty" that opened the General Assembly: "We do not deny that the United Nations has the right and the duty to help suffering humanity, but we remain extremely sensitive to any undermining of our sovereignty, not only because sovereignty is our last defense against the rules of an unequal world, but

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[32] *See* Thomas G. Weiss, *The Sunset of Humanitarian Intervention: The Responsibility to Protect in a Unipolar Era*, 35 SECURITY DIALOGUE 135, 141 (2004).

[33] Ian Johnstone, *Security Council Deliberations: The Power of the Better Argument*, 14 EUR. J. OF INT'L L. 437 (2003).

[34] INDEP. INT'L COMM'N ON KOSOVO, KOSOVO REPORT: CONFLICT, INTERNATIONAL RESPONSE, LESSONS LEARNED 4 (2000).

because we are not taking part in the decision-making process of the Security Council."[35]

There is no need to rehash these arguments further. Suffice it to say that history counsels caution to anyone even vaguely familiar with the so-called humanitarian interventions of the colonial period—or more recently of Washington's on behalf of the contras in Nicaragua or Moscow's on behalf of comrades in Budapest and Prague.[36] Concerns about the degradation of sovereignty often come from developing countries whose borders have been breached by countries that now champion protecting human beings and ignoring borders. At the same time, repressive regimes hiding behind the shield of sovereignty should also be obvious to any student of history.

Hence, we require an honest debate about motivations and likely costs and benefits rather than visceral accolades or rejections because of a qualifying adjective. The beginning of such a debate was started by the ICISS but cut short in the aftermath of 9/11—indeed, the report was finalized only a few weeks before the attacks on U.S. territory. Such a discussion has become even more relevant, albeit more complex, because outside assistance can do more harm than good or can become entangled in a local political economy that favors war.[37]

The wars in Iraq and on terror have had three stifling effects on that necessary normative conversation. First, the selective use of the Security Council has been compounded by Washington's and London's decisions to go to war against Iraq in March 2003 without a Security Council blessing. The use of the council à la carte creates problems for states seeking more consistency in the application of international norms. Indeed, Iraq is a conversation stopper for many critics when discussing any possible loosening of criteria for intervention or setting aside the principle of nonintervention.

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

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[35] *Quoted in* INTERNAL DISPLACEMENT UNIT OF THE OFF. FOR THE COORD. OF HUMANITARIAN AFF., NO REFUGE: THE CHALLENGE OF INTERNAL DISPLACEMENT, at 37, U.N. Sales No. E.03.III.M.1 (2003).

[36] Weiss, *supra* note 32, at 142.

[37] *See, e.g.*, MARY B. ANDERSON, DO NO HARM: HOW AID CAN SUPPORT PEACE—OR WAR (1999); MARK DUFFIELD, GLOBAL GOVERNANCE AND THE NEW WARS: THE MERGING OF DEVELOPMENT AND SECURITY (2001); PETER J. HOFFMAN AND THOMAS G. WEISS, SWORD & SALVE: CONFRONTING NEW WARS AND HUMANITARIAN CRISES (2006).

Blair's spurious and ex post facto "humanitarian" justifications for invading Iraq. I usually concur with Fernando Tesón's judgments about the use of force for humanitarian purposes, but I disagree totally with his implausible efforts to rationalize the end of Saddam Hussein's tyranny in Baghdad as a "humanitarian intervention."[38] Terry Nardin's characterization is on target when he writes that Tesón's "rationales strain the traditional understanding."[39]

As a result, it is harder today than in 2001 to gainsay those who are reluctant to codify norms about using military force for human protection purposes. Many regard the new Bush and Blair doctrine as such a powerful threat as to require renewing the principle of nonintervention rather than downgrading sovereign prerogatives, even with a humanitarian rationale.

The *National Security Strategy of the United States of America*,[40] unveiled in September 2002, circumscribes future discussions about using force for human protection. The Bush doctrine "has had the effect of reinforcing fears both of U.S. dominance and of the chaos that could ensue if what is sauce for the U.S. goose were to become sauce for many other would-be interventionist ganders," according to the picturesque image of Adam Roberts.[41] "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."[42]

Third, and in a related way, the possibility to move in the General Assembly toward a consensus resolution on criteria has also stalled. The World Summit approved "R2P-lite"—that is, without specifying the criteria governing the use of force and insisting upon Security Council approval. In evidence was Washington's refusal to establish a doctrine that might function either as an automatic trigger or as a drag on the American use of force—that is, the R2P's thresholds and precautionary principles could limit Washington's flexibility in determining when and where to deploy military force. ICISS

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[38] Fernando R. Tesón, *Ending Tyranny in Iraq*, 19 ETHICS & INT'L AFF. 1, 1 (2005).

[39] Terry Nardin, *Humanitarian Imperialism: Response to "Ending Tyranny in Iraq"*, 19 ETHICS & INT'L AFF. 21, 21 (2005).

[40] National Security Council, *The National Security Strategy of the United States of America* (Sept. 2002), *available at* http://www.whitehouse.gov/nsc/nss.pdf.

[41] Adam Roberts, *The United Nations and Humanitarian Intervention*, *in* HUMANITARIAN INTERVENTION AND INTERNATIONAL RELATIONS 90 (Jennifer Walsh ed., 2004).

[42] *Id.*

Commissioner Ramesh Thakur has argued persuasively that a consensus resolution about R2P criteria would make it more difficult for states to wrap themselves disingenuously in a humanitarian blanket for purely self-interested interventions.[43] Thakur's suggestion is intriguing but currently beside the point because politics in the General Assembly have postponed the discussion *sine die.*

The concerns about the wars on terrorism and Iraq have on occasion skewed the debate. For instance, a special section of *The Nation* in July 2003, "Humanitarian Intervention: A Forum," had virtually nothing to do with the announced topic.[44] The preoccupation was the increasingly steep slippery slope facilitating actions by the Bush administration, or in Richard Falk's opening salvo: "After September 11, the American approach to humanitarian intervention morphed into post hoc rationalizations for uses of force otherwise difficult to reconcile with international law."[45]

U.S. military action in Afghanistan was based on self-defense and approved by the Security Council and had beneficial humanitarian consequences even if humanitarian justifications were not part of the original authorization. The war in Iraq, however, was without council approval and has not improved the overall humanitarian situation on the ground. Indeed, the country is on the brink of civil war.

Hostility thus has resulted not only from the usual suspects but also from countries that earlier would have supported the R2P concept. Moreover, "the Iraq war has undermined the standing of the United States and the U.K. as norm carriers . . . [and] the process of normative change is likely to be slowed or reversed."[46] One specific illustration took place immediately after the so-called victory in the Iraq war at the July 13-14, 2003, Progressive Governance Summit of left-of-center government leaders when Canadian Prime Minister Jean Chrétien and British Prime Minister Tony Blair were unsuccessful in inserting the basic principles from the ICISS report in the final communiqué. When

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[43] *See* Ramesh Thakur, *Iraq and the Responsibility to Protect*, 62 BEHIND THE HEADLINES 1 (2004); Ramesh Thakur, *A Shared Responsibility for a More Secure World*, 11 GLOBAL GOVERNANCE 281 (2005). *See also* RAMESH THAKUR, THE UNITED NATIONS, PEACE AND SECURITY: FROM COLLECTIVE SECURITY TO THE RESPONSIBILITY TO PROTECT (2006).

[44] Richard Falk et al., *Humanitarian Intervention: A Forum*, THE NATION, July 14, 2003, at 11, 12.

[45] *Id.* Richard Falk was joined by Mary Kaldor, Carl Tham, Samantha Power, Mahmood Mamdani, David Rieff, Eric Rouleau, Zia Mian, Ronald Steel, Stephen Holmes, Ramesh Thakur, and Stephen Zunes.

[46] Alex J. Bellamy, *Responsibility to Protect or Trojan Horse? The Crisis in Darfur and Humanitarian Intervention in Iraq*, ETHICS & INT'L AFF., Oct. 2005, at 31, 32-33.

Argentina, Chile, and Germany in particular strongly objected to such a suggestion, a supportive passage was removed.

This reluctance among countries that earlier might have been counted among R2P's friends seems to be growing in UN corridors. The world's worst apprehensions regarding U.S. military activism were rekindled by the Iraq crisis and confirmed by Blair's and Bush's various attempts to twist the concept of the responsibility to protect. Is it wise for even enthusiasts to push forward any doctrine that hints at unauthorized humanitarian intervention, which could then provide a justification after the fact for the use of force in Iraq? And hostility was even more obvious among diplomats of developing countries who started out with deep suspicions. 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. Based on the logic of extending R2P to prevention, Lee Feinstein and Anne-Marie Slaughter argue for a new "duty to prevent" while Allan Buchanan and Robert Keohane call for the "cosmopolitan" use of preventive military force.[47] The inevitable extension of the link between R2P and prevention was made crystal clear by the Naval War College's Thomas Nichols: "The Westphalian notion of sovereignty has already been breached by the necessity for humanitarian intervention, and now the international community must take the next step and legitimize action not only to prevent terrible regimes from annihilating their own people but also to coordinate preventive action against such regimes when they seek to undermine international order."[48] According to Ivo Daalder and James Steinberg, the conditional terms of sovereignty include preventing genocide, terrorism, the spread of WMDs, diseases, and by extension environmental collapse.[49] "It would be unfortunate," they conclude, "if

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[47] Lee Feinstein & Anne-Marie Slaughter, *A Duty to Prevent*, FOREIGN AFF., Jan. 2004, at 136; Allen Buchanan & Robert O. Keohane, *The Preventive Use of Force: A Cosmopolitan Institutional Proposal*, ETHICS & INT'L AFF., Apr. 2004, at 1.

[48] Thomas M. Nichols, *Anarchy, Order, and the New Age of Prevention*, WORLD POL'Y J., Fall 2005, at 1, 20.

[49] Ivo Daalder & James Steinberg, Editorial, *Preventive War, A Useful Tool*, L.A. TIMES, Dec. 4, 2005, at M3.

President Bush's doctrine of preemption were a casualty of the Iraq war."[50]

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. As mentioned earlier, a rigorous application of R2P would not lend itself to be a veiled pretext to intervene for pre-emptive purposes, especially if the Security Council's authorization were a sine qua non for an authorization.[51] But this is scarce consolation to those who see Washington's and London's loose application of humanitarian rhetoric to Iraq ex post facto. While analysts have the leisure to parse carefully the ICISS's criteria, it is impossible to dismiss out-of-hand the fiercest claims that R2P conceals an imperial agenda.

III. A Distracted *Hyper-Puissance*

Conventional wisdom now holds that terrorism and 9/11 altered international relations. The crossroad is not born solely of terrorism, however; it is multi-sourced and of long gestation. It accentuates the implications of the post-Cold War trend toward a UN system based on one superpower. The preponderance of the United States—militarily, economically, and culturally—is ever more striking. What kind of collective security organization is possible when Washington's gear, according to former European Union Commissioner of External Relations Chris Patten, is "unilateralist overdrive"?[52]

While the ICISS met with him during a preliminary consultation, they failed to integrate adequately the implications of what French Foreign Minister Hubert Védrine dubbed the *hyper-puissance*. Bipolarity had given way to what was supposed to be U.S. primacy, but the military prowess in Afghanistan and Iraq makes "primacy" an

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[50] *Id. See also* Ivo Daalder & James Steinberg, Editorial, *The Future of Pre-emption*, L.A. TIMES, Dec. 4, 2005, at M3.

[51] *See*, *e.g.*, Gareth Evans, Co-Chairman, Int'l Comm'n on Intervention and State Sovereignty, Commentary at the American Society of International Law Conference: Uneasy Bedfellows: "The Responsibility to Protect" and Feinstein-Slaughter's "Duty to Prevent" (Apr. 1, 2004), http://www.crisisweb.org/home/index.cfm?id=2560&1=1.

[52] Chris Patten, Com't & Anal., *Jaw-Jaw, Not War-War: Military Success in Afghanistan Has Encouraged the US to Ignore European Doubts About Confronting the 'Axis of Evil'*, FIN. TIMES (London), Feb. 15, 2002, at 16.

understatement. Scholars speculate about the nuances of economic and cultural leverage in the international system resulting from U.S. soft power,[53] but the hard currency of international politics undoubtedly remains military might. Before the war on Iraq, the "hyper-power" was already spending more on its military than the next fifteen to twenty-five countries (depending on who was counting); with additional appropriations for Afghanistan and Iraq, Washington now spends more than the rest of the world's militaries combined.[54]

Security Council efforts to control U.S. actions increasingly resemble the Roman Senate's attempts to control the emperor. UN diplomats almost unanimously describe the debate surrounding Iraq as "a referendum not on the means of disarming Iraq but on the American use of power."[55] Today, there are two world "organizations," the United Nations (global in membership) and the United States (global in reach). Critics of U.S. hegemony, and several members of the ICISS are among them, argue that enforcement decisions should be based on UN authority instead of U.S. capacity. But the two are inseparable.

I have my doubts about the imminent approach of "the twilight of the unilateral world"[56]; what Charles Krauthammer identified in 1990 as the unilateral "moment" is likely to continue for some time.[57] The stark reality of U.S. military hegemony in the contemporary international system will put a damper on humanitarian intervention unless Europeans invest more in an independent military capacity. To date, neither populations nor parliaments on the continent have demonstrated any willingness to contribute a fair share of the Western defense burden or to reconfigure their forces to make them useful for humanitarian intervention.[58] Europe's continued free-riding and failure to develop a truly independent capacity—indeed, its military capabilities continue to decline vis-à-vis those of the United States—constrains bullish notions about humanitarian intervention.

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[53] *See* JOSEPH E. NYE JR., THE PARADOX OF AMERICAN POWER: WHY THE WORLD'S ONLY SUPERPOWER CAN'T GO IT ALONE (2002).

[54] Center for Defense Info., *U.S. Military Spending, Fiscal Years 1945-2008*, http://www.cdi.org/news/mrp/us-military-spending.pdf.

[55] James Traub, *The Next Resolution*, N.Y. TIMES, Apr. 13, 2003, § 6 (Magazine), at 50, 51.

[56] Cora Bell, *The Twilight of the Unipolar World*, AM. INTEREST, Winter 2005, at 18.

[57] Charles Krauthammer, *The Unipolar Moment*, FOREIGN AFF., 1990-91, at 23; Charles Krauthammer, *The Unipolar Moment Revisited*, NAT'L INTEREST, Winter 2002-03, at 5.

[58] Andrew Moravcsik argues for a division of labor between American enforcement and European peacekeeping in *Striking a New Transatlantic Bargain*, FOREIGN AFF., July/Aug. 2003, at 74.

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

Mass starvation, rape, and suffering will continue to reappear in a post-9/11 world, and we will know about them rapidly. For at least some conscience-shocking cases of mass suffering, there simply will be no viable alternative to military coercion for human protection purposes.

There is some flexibility for action in minor crises. For instance, the prediction that major powers other than the United States would not respond at all with military force to a new humanitarian emergency after September 11 proved somewhat too pessimistic. France's leading of an EU force into Ituri in summer 2003 halted an upsurge of ethnic violence and perhaps demonstrated to Washington that the EU could act outside of the continent, independently of NATO. This possibility was perhaps strengthened by Europe's take-over from NATO of the Bosnia operation in December 2004 and sending of troops to the DRC for elections in July 2006.

These efforts provide some faint hope that an EU security identity could underpin a more operational responsibility to protect in modest crises. *A Secure Europe in a Better World*[60] lacks the crispness of its American counterpart. While spending on hardware falls considerably short of targets, the number of European troops deployed abroad has doubled over the last decade and approaches the so-called Headline Goals, which set targets for the European Union in terms of military and civilian crisis management. As two Europeans have noted, "This incremental approach may move some way further yet, but it will come up against budgetary ceilings, against the unwillingness of some

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[59] *See* ALAN J. KUPERMAN, THE LIMITS OF HUMANITARIAN INTERVENTION: GENOCIDE IN RWANDA (2001).

[60] Eur. Council, *A Secure Europe in a Better World: European Security Strategy* (Dec. 12, 2003) (drafted by Javier Solana, EU High Representative), *available at* http://ue.eu.int/uedocs/cmsUpload/78367.pdf.

governments to invest in the weapon and support systems needed, and against the resistance of uninformed national publics."[61]

There is little doubt, however, that U.S. 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 DRC. 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."[62] With Washington's focus elsewhere, the danger is not too much but rather too little humanitarian intervention.

IV. CONCLUSION

The ICISS was originally established because of the Security Council's failure to address dire humanitarian crises in Rwanda and Kosovo. In 1994 intervention was too little and too late to halt or even slow the murder of what may have been as many as eight hundred thousand people in the Great Lakes region of Africa. In 1999 the North Atlantic Treaty Organization finessed the council and waged its first war in Kosovo. But many observers saw the seventy-eight-day bombing effort as being too much and too early. In any event, the Security Council's inability to authorize the use of deadly force to protect vulnerable populations linked the two cases.

However, the absence of meaningful military might in Rwanda—like the do-nothing approach in Darfur and the DRC—represents a more serious threat to international order and justice than the council's paralysis in Kosovo. Not all claims to justice are equally valid, and NATO's was greater than Serbia's or Russia's. At least in the Balkans, a regional organization took a unanimous decision to enable human protection. Justified criticism arose about timidity: Washington's domestic politics meant that military action remained at an altitude of fifteen thousand feet when ground troops would have prevented the initial mass exodus. Nonetheless, past or potential victims undoubtedly would support NATO's decision. An early survey of affected populations in several war zones reports that fully two-thirds of civilians under siege who were interviewed in twelve war-torn societies by the

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[61] Bastian Giegerich & William Wallace, *No Such a Soft Power: The External Deployment of European Forces*, SURVIVAL, Summer 2004, at 163, 178-79.

[62] *Quoted in* LINCOLN PALMER BLOOMFIELD, ACCIDENTAL ENCOUNTERS WITH HISTORY (AND SOME LESSONS LEARNED) 14 (2005).

International Committee of the Red Cross wanted more intervention, and only 10 percent wanted none.[63]

It is soothing for those who are preoccupied with positive normative developments to point proudly to paragraphs 138 and 139[64] about R2P as a success story—along with the new Peacebuilding Commission and the Human Rights Council—in the World Summit Outcome Document. As compelling as cosmopolitanism may be normatively, R2P is an important step "to promote a society-of-states morality, given the fact that sovereignty is one of the few principles that has universal appeal among national elites and mass publics."[65] However, the summit did nothing to change the geopolitical reality that "never again" is an inaccurate description of the actual impact of the 1948 Genocide Convention—"here we go again" would be more like it. There are clear limits to analysis and advocacy with neither the political will nor the operational capacity among major powers to act on new norms. Stephen Krasner reminds us that sovereignty has always involved hypocrisy, but, even more importantly, Simon Chesterman notes that it is political desires and means, and not sovereignty considerations, that determine whether states intervene to save strangers as Nicholas Wheeler urges.[66]

In fact, in my more somber moments, I am afraid that the collective yawn since early 2003 in the face of slow-motion genocide in Darfur could be more destructive of the fabric of international law than the eight hundred thousand deaths in Rwanda. At least in 1994, there was an attempt to maintain the fiction that no such horror was under way. Samantha Power argues that the Clinton administration, for instance, dared not use "the *g* word", which apparently would have implied the necessity to act.[67] But after 9/11, Scott Straus seems closer to the mark. "Darfur has shown that the energy spent fighting over whether to call the events there 'genocide' was misplaced," he writes. "[It] is not a magic

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[63] INT'L COMM. OF THE RED CROSS, THE PEOPLE ON WAR REPORT: ICRC WORLDWIDE CONSULTATION ON THE RULES OF WAR iii-vi, xvi (Oct. 1999).

[64] 2005 World Summit Outcome, *supra* note 2, ¶¶ 138-9.

[65] J. MARTIN ROCHESTER, BETWEEN PERIL AND PROMISE: THE POLITICS OF INTERNATIONAL LAW 95 (2006). *See also* ROBERT JACKSON, THE GLOBAL COVENANT: HUMAN CONDUCT IN A WORLD OF STATES (2000).

[66] STEPHEN D. KRASNER, SOVEREIGNTY: ORGANIZED HYPOCRISY (1999); SIMON CHESTERMAN, JUST WAR OR JUST PEACE?: HUMANITARIAN INTERVENTION AND INTERNATIONAL LAW (2001); NICOLAS J. WHEELER, SAVING STRANGERS: HUMANITARIAN INTERVENTION IN INTERNATIONAL SOCIETY (2000).

[67] SAMANTHA POWER, "A PROBLEM FROM HELL": AMERICA AND THE AGE OF GENOCIDE 329-90 (2002).

word that triggers intervention."[68] We cannot put that genie back in the bottle. The 1948 Convention on the Prevention and Punishment of the Crime of Genocide literally appears to be not worth the paper on which it is reproduced.

This time the facts are not disputed. As *New York Times* columnist Nicholas Kristof lamented, "The publishing industry manages to respond more quickly to genocide than the UN and world leaders do."[69] The U.S. Congress condemned Darfur unanimously, voting 422-0 in July 2004 that Khartoum was committing "genocide"[70] while Secretary of State Colin Powell actually used the dreaded term in a speech in September of that year, [71] which coincided with views from such private groups as Physicians for Human Rights.[72] In September European Union parliamentarians urged Sudan to end actions that could be "construed as tantamount to genocide."[73]

Changing the language to R2P from humanitarian intervention has not changed the underlying political dynamics. Military overstretch and the prioritization of strategic concerns to the virtual exclusion of humanitarian ones is the sad reality of a post-9/11 world. Shortly after the so-called victory in the war in Iraq, I argued that the sun had set on humanitarian intervention because the obsessions with Afghanistan, Iraq, and terrorism meant that strategic considerations would trump humanitarian concerns for the foreseeable future. Subsequently, 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.

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[68] Scott Straus, *Darfur and the Genocide Debate*, FOREIGN AFF., Jan./Feb. 2005, at 123, 124, 131.

[69] Nicholas D. Kristof, *Genocide in Slow Motion*, N.Y. REVIEW OF BOOKS, Feb. 9, 2006, at 14 (reviewing JULIE FLINT & ALEX DE WAAL, DARFUR: A SHORT HISTORY OF A LONG WAR (2005); GERARD PRUNIER, DARFUR: THE AMBIGUOUS GENOCIDE (2005)), *available at* http://www.nybooks.com/articles/18674. *See generally* FLINT & DE WAAL, *supra*; PRUNIER, *supra*.

[70] United Nations Office for the Coordination of Humanitarian Affairs, *Sudan: U.S. Congress Unanimously Defines Darfur Violence as "Genocide"*, IRINNEWS.ORG, July 23, 2004, http://www.globalsecurity.org/military/library/news/2004/07/mil-040723-irin03.htm.

[71] Colin L. Powell, U.S. Sec'y of State, Written Remarks Before the Senate Foreign Relations Committee: The Crisis in Darfur (Sept. 9, 2004), http://www.state.gov/secretary/former/powell/remarks/36032.htm.

[72] *See* Physicians for Hum. Rts., *PHR Calls for Intervention to Save Lives in Sudan: Field Team Compiles Indicators of Genocide* 1, 2, 11 (June 23, 2004), *available at* http://www.phrusa.org/research/sudan/pdf/sudan_genocide_report.pdf.

[73] *E.U. Lawmakers Call Darfur Crisis "Genocide"*, MIDDLE EAST ONLINE, Sept. 16, 2004, http://www.middle-east-online.com/english/sudan/?id=11287.

I regret that I was correct, and Darfur truly substantiates my argument. Rather than military action to halt the killing and displacement, the reinforced Third World apprehension about any Western pressure on the hapless Sudan led to the deployment of seven thousand largely ineffective African Union (AU) soldiers[74] and additional international inquiry. It began with Security Council Resolution 1564[75] establishing the International Commission of Inquiry on Darfur, which concluded that "the Government of Sudan has not pursued a policy of genocide." But it also continued to split genocidal hairs by recognizing that "in some instances individuals, including Government officials, may commit acts with genocidal intent."[76] The commission identified perpetrators and asked the International Criminal Court to prosecute the unnamed Sudanese war criminals. The chasm between the magnitude of the suffering and the international response could hardly have been greater.

In February 2006 with the United States in the chair, the Security Council decided to start planning to absorb the AU troops in a UN force that could number between twelve thousand and twenty thousand when and if it was deployed in early 2007. The council was seemingly not in a hurry to put boots on the ground; four years after the killing and displacement began, it remained unclear which countries (other than the United States, which had already said "no") would put their troops in harm's way.

Khartoum linked even feeble Western activism in Darfur to U.S. and UK action in Iraq—a different kind of conversation stopper. As David Rieff writes, "In Europe or the U.S., sending NATO forces to Darfur may seem like fulfilling the global moral responsibility to protect. But in much of the Muslim world, it is far likelier to be experienced as one more incursion of a Christian army into an Islamic land."[77]

But there is more possible bad news. The repeated failure to come to the rescue mocks the value of the emerging R2P norm and

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[74] *See* WILLIAM G. O'NEILL & VIOLETTE CASSIS, BROOKINGS INST.-U. OF BERN PROJ. ON INT. DISPM'T., PROTECTING TWO MILLION INTERNALLY DISPLACED: THE SUCCESSES AND SHORTCOMINGS OF THE AFRICAN UNION IN DARFUR 67-69 (2005), *available at* http://www.brookings.edu/fp/projects/idp/200511_au_darfur.pdf.

[75] S.C. Res. 1564, U.N. Doc. S/RES/1564 (Sept. 18, 2004).

[76] Int. Comm'n of Inquiry on Darfur, *Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General*, Jan. 25, 2005, at 4, *available at* http://www.un.org/News/dh/sudan/com_inq_darfur.pdf.

[77] David Rieff, *A Nation of Pre-emptors?*, N.Y. TIMES, Jan. 15, 2006, § 6 (Magazine), at 11.

ultimately may further erode public support for the United Nations in spite of the sixtieth anniversary celebrations.