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Operationalising the Responsibility to Protect

**The Continuing Debate over where Authority
should be Located for the Use of Force**

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R2P



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The Continuing Debate over where Authority should be Located for the Use of Force

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Executive Summary

This report focuses on the question of where authority should be located for the use of force. This question has been a matter of considerable controversy since NATO unilaterally employed force to protect the Kosovars in March 1999. At the heart of this debate has been the question of whether the UN Security Council should be the only body that can authorise the use of force for humanitarian purposes. Or alternatively, are there substitutes for Security Council authority that can and should be invoked – both legally and morally – in cases where the Council is either unable (because of the power of the veto) or unwilling (because of the lack of majority support in the Council) to act to prevent or end mass atrocities.

Restricting itself to a focus on the military dimension of R2P, this report identifies seven models of authority which span the boundary from consent to non-consensual action. These are: (1) consent freely given; (2) coerced and induced consent; (3) Security Council authorisation; (4) the Security Council as a global jury; (5) General Assembly authorisation; (6) Regional arrangements; and (7) coalitions of the willing. The level of controversy regarding the legitimacy and legality of using force for protection purposes increases as intervention moves into the non-consensual realm. Even if governments disagree about the efficacy of using force, it is recognised that sovereign states have the right to request such assistance. Indeed, the UN Secretary-General and his advisors have identified assisting (the military component is only one dimension here) states in fulfilling their responsibilities for protection as a key goal in operationalising the 2005 Outcome Document. However, as my report argues, the boundary between consent and non-consent is an imprecise one, and it is necessary to recognise that consent for military deployments is often secured through the threat of coercive pressures (as with the case of East Timor in September 1999) as well as inducements in the form of rewards.

From the seven models of authority identified, five are ones that might be employed by governments in cases where a target state is ‘manifestly failing’ to protect its population from genocide, war crimes, ethnic cleansing and crimes against humanity’ (as set out in paragraph 139 of the Outcome Document). The least controversial here is *Security Council authorisation*, but the proclivity of the Council to interpret Article 39 of Chapter VII as permitting such uses of force is a recent normative development, and one that should not be underestimated when set against the Security Council’s narrow statist interpretation of

Article 2 (7) during the Cold War. Nevertheless, the report points out that whilst the new norm of Security Council authorised protection has enabled interventions that were previously unthinkable, this has not ensured that action has been taken when it was most desperately needed such as in Rwanda, and more controversially in Darfur. There is also the possibility that future cases might see the Council reversing this expansive interpretation of Chapter VII, and many governments in the Non-Aligned Movement remain sensitive about the Council expanding its competence into matters that were previously covered by Article 2 (7) of the Charter.

The report explores the potential of *General Assembly authorisation* when the Security Council is deadlocked (as could have happened if Western governments had sought a mandate for intervention in Darfur). However, this poses a host of problems that will caution governments, especially those with a vested interest in maintaining the authority of the veto from pressing their claims in this body. The legitimacy that would flow from an affirmative vote in the General Assembly is the strongest argument here, but critics of the Assembly who favour vesting authority in a 'concert of democracies' would reply that decisions on whether to save endangered peoples should not rest with an Assembly that is comprised of a large number of governments that do not have good human rights credentials in their own jurisdictions.

The above criticism opens up the much larger question of UN reform but advocates of R2P have not been afraid to enter this terrain. The International Commission on Intervention and State Sovereignty argued in 2001 that the five permanent members of the Security Council (P5) should limit the exercise of the veto in cases where there was majority support for a resolution authorising intervention for human protection (unless vital interests were at stake). However, such a proposal would not resolve divisions between the P5 such as those that arose over Kosovo because what was at stake in the latter case was not a capricious Russian and Chinese threat to veto NATO's action but genuine differences of opinion over whether the use of force was warranted. Moreover, what made the Kosovo case such a difficult one for the Council was that NATO was seeking a mandate (though it never tabled a formal resolution) to use force to prevent what it argued was an impending humanitarian catastrophe. Justifying preventive or anticipatory intervention for protection purposes is extraordinary difficult because action will always lack the legitimacy that comes from media reports of mass atrocities. This seems an inescapable problem and certainly one that will not be resolved by any of the proposed reforms to the Security Council's working methods or practices.

Consequently, we are left with the prospect of future Kosovo-type situations where the permanent members (perhaps expanded beyond the P5) are divided on the merits of military action. Yet the Security Council's handling of the Kosovo case might also offer the best precedent for how the international community should cope with future cases of this kind. The lesson of Kosovo, and especially the abject defeat of the Russian draft resolution condemning the bombing, is that Council members are not ready to legally sanction armed intervention for humanitarian purposes that lacks express Council authorisation. But neither will they always condemn it. A majority of Council members were persuaded that NATO's breach of the strict procedural rules of the UN Charter should be excused and in this sense it operated an international equivalent to mitigation in domestic law.

By contrast with those liberal interventionists who wish to establish the principle that *coalitions of the willing* have the authority to consider using force in cases where the Security Council is paralysed from acting, the Kosovo model of the *Security Council as a global jury* has the virtue of not directly challenging the Council's authority whilst also preserving an emergency exit when it is 'manifestly failing' to protect populations from genocide and mass killing.

Operationalising the Responsibility to Protect

The Continuing Debate over where Authority should be Located for the Use of Force¹

This report seeks to contribute to the debate over operationalising the responsibility to protect (R2P) as agreed by the heads of state and governments in paragraphs 138 and 139 of the Outcome Document from the 2005 World Summit. Specifically, it seeks to focus on the challenges that face the UN – crucially the Security Council – in developing ‘timely and decisive’ responses to mass atrocities. To this end, the paper identifies different models of military intervention that span the continuum from state based consent to situations where UN bodies act without consent. These models open up the question of how governments should proceed in cases where the Security Council is unable to agree on timely and decisive action, and where particular states use force to prevent or stop a humanitarian emergency. The question of what to do in a future Kosovo-like situation, one where the permanent members are divided over the merits of using force, has divided the international community since NATO’s unilateral action over Kosovo. Paragraph 139 of the Outcome Document requires that any collective action in support of R2P must be ‘in accordance with the Charter, including Chapter VII’. This has led some commentators to argue that the 2005 Outcome Document closes the door on unilate-

¹ The ideas in this paper were presented to a workshop on ‘Operationalising the Responsibility to Protect’ which was organised by NUPI and held on 29-30 October at Holmen Fjordhotel outside Oslo. I would like to thank all the participants at the workshop for their contributions. I am grateful to Alex Bellamy, Frazer Egerton, Kristin Marie Haugevik, and Eli Stamnes for their comments on earlier drafts of this report. I would also like to thank Frazer, Vincent Keating, and Rachel Owen for the excellent research assistance they provided during the preparation of this report. The report develops themes from the following publications: Nicholas J. Wheeler ‘A Victory for Common Humanity? The Responsibility to Protect after the 2005 World Summit’, *Journal of International Law and International Relations*, 2 (1) (Winter 2005), pp. 95-105; Nicholas J. Wheeler and Justin Morris, ‘Justifying Iraq as a humanitarian war: the cure is worse than the disease’, in W.P.S. Sidhu and Ramesh Thakur (eds.), *The Iraq Crisis and World Order: Structural and Normative Challenges* (Tokyo: United Nations University Press, 2007), pp. 444-64; Nicholas J. Wheeler and Frazer Egerton, ‘The Responsibility to Protect: a “precious commitment or a promise unfulfilled?”’, *Global Responsibility to Protect*, 1 (2009), 1-19.

ral and regional action without prior Security Council authorisation.² But others have argued that the language in the Outcome Document cannot be the last word on military intervention to end genocide and mass killing, and that there is a legal and moral justification for using force, even if this lacks express Security Council authorisation.³

The report identifies varying models of armed intervention that span the consent/coercion boundary. I have divided these into two broad categories, each of which has a series of sub-categories. These can be thought of as steps through which the intervention process can proceed. The first category is that of *consent-based models of intervention*. This can be sub-divided into the following two types: (1) *consent freely given* by a government and/or armed factions fighting within a territory and (2) *coerced and induced consent* where a government and/or armed factions are persuaded to accept an intervention force through the use of positive rewards and/or the threat or use of coercive but non-forcible measures. The second category focuses on how the UN should proceed in cases where consent is not forthcoming. The report divides these up into the following five types: (1) *Security Council authorisation*; (2) *the Security Council as a global jury*; (3) *General Assembly authorisation*; (4) *regional arrangements*; and (5) *coalitions of the willing*.⁴

Consent-Based Models of Intervention

Paragraph 138 of the Outcome Document calls upon all states to help governments meet their responsibilities for protection. Far from weakening sovereignty, the wording in paragraph 138 is aimed at helping governments exercise sovereignty responsibly by strengthening their capacities to protect populations from ‘genocide, war crimes, ethnic cleansing, and crimes against humanity’ (the four mass atrocity crimes covered by Paragraph 138).

² See Thomas G. Weiss, *Humanitarian Intervention* (Cambridge: Polity Press, 2007), p. 117; Alex J Bellamy ‘The Responsibility to Protect and the problem of military intervention’, *International Affairs*, 84 (4), 2008, p. 623.

³ See G. John Ikenberry and Anne-Marie Slaughter, *Forging a World of Liberty Under Law: US National Security in the 21st Century: Final Report of the Princeton Project on National Security* (Princeton: Princeton Project for National Security, 2006), pp. 7-8; Susan E. Rice and Andrew J. Loomis, ‘The Evolution of Humanitarian Intervention and the Responsibility to Protect’, in Ivo H. Daalder (ed.), *Beyond Preemption: Force and Legitimacy in a Changing World* (Washington D.C.: The Brookings Institution, 2007), pp. 59-95.

⁴ I am grateful to Alex Bellamy for suggesting these categories. I have also benefited from the conceptual framework developed in Oliver Ramsbotham and Tom Woodhouse, *Humanitarian Intervention in Contemporary Conflict* (Cambridge: Polity Press, 1996).

Consent freely given

In terms of the question of the legal/legitimate basis for authorisation of armed intervention, the least problematic cases arise in situations where the host state and/or armed factions within the state welcome outside support and assistance (including armed intervention) to help them protect endangered civilians. Ideally this will take the form of early preventive action, but cases have arisen, and can be expected to arise again, where prevention fails and decisive action is required to protect civilians from mass atrocities.

A text-book case of this kind was the UK's intervention in Sierra Leone in May 2000. The context for this military action was the collapse of the 1999 Lomé Accord. This agreement had initially ended the conflict between the Government of President Kabbah and the forces of the Revolutionary United Front (RUF). The latter refused to disarm as had been agreed and showed their contempt of the UN by seizing 500 of its peacekeepers (UNAMSIL) as hostages and by marching on the capital. Once again UN peacekeepers found themselves drifting into that most dangerous of situations where there was insufficient consent for peacekeeping but not enough combat capability for peace enforcement. The Blair Government decided to intervene to stabilise the situation but not as part of UNAMSIL. The British mission prevented the fall of the capital to the RUF and rescued the peace process. What is significant about this case is that the British Government deployed forces with the consent of the host government, though not with the consent of the RUF. This case is an important one because it shows that where the political will exists, foreign governments can respond in a timely and decisive manner to assist a state which is 'failing' to provide protection to its citizens.

This type of intervention raises the question of what happens if the consent is subsequently withdrawn. An example of this is the implementation of the 1991 Paris Peace Agreement which established the United Nations Transitional Authority in Cambodia (UNTAC). The mission was at the time 'the largest and most expensive peacekeeping operation of its kind – the most expensive at US\$2.8 billion; the largest at 22,000 strong.'⁵ The intervention was plagued by questions of consent, originally provided and subsequently withdrawn by the two main protagonists. The Party of Democratic Kampuchea (PDK), formerly the Khmer Rouge, was suspicious and resistant to the agreement from the outset. The Hun Sen Government was a little more welcoming of the intervention, but it too threatened to retract its consent. Whilst the PDK saw the UN troops as supporting the Hun Sen Gov-

⁵ David Roberts, 'More honoured in the breach: Consent and impartiality in the Cambodian peacekeeping operation', *International Peacekeeping*, 4(1), 1997, p.3.

ernment, Hun Sen considered that the UN would oppose his government staying in power because it was supported by Communist Vietnam. Ultimately, this withdrawal of consent undermined the ability of the UN forces to implement the Paris Agreement.⁶ In this case and future situations of its kind, the question facing the UN is whether to enforce peace agreements on parties that backslide on their commitments.

Coerced and induced consent

If the target state is opposed to military intervention on its soil, then the necessary consent for such deployments to prevent or end mass atrocities might be secured through positive inducements. But if this fails to secure the consent for an intervention to protect endangered populations, consideration might be given to what I have elsewhere called 'coerced consent.'⁷ The latter arises in cases where military forces are inserted into a situation requiring protection with the consent of the target state and/or armed factions inside the country, but this consent has only been secured through the threat or use of coercive (though non-forcible) measures.

A good example of the direct application of coercive measures to secure consent is Indonesia's reluctant decision on 12 September 1999 to permit an Australian-led international force to enter the territory of East Timor which Indonesia claimed sovereignty over. The context for this was the violence that had immediately erupted on the island following the result of the referendum in which 75% of the 98.6% of registered voters had chosen independence. The Habibie Government had stubbornly refused to consent to an international force to restore security despite the fact that a 1,000 people had been killed and up to a quarter of the population had been driven from their homes by pro-Indonesian militias who were opposed to independence.

The coercive pressure to make Indonesia comply took the form of withdrawing IMF and World Bank loans and ending military assistance, and the role of the United States was decisive here.⁸ In a speech on 9 September, President Clinton raised the spectre of the US acting to prevent Indonesia obtaining much needed IMF and World Bank

⁶ Raoul M. Jennar, 'UNTAC: "International Triumph" in Cambodia?', *Security Dialogue*, 25 (2), 1994, pp. 145-56.

⁷ Nicholas J. Wheeler and Tim Dunne, 'East-Timor and the New Humanitarian Interventionism', *International Affairs*, 77 (4), 2001, pp. 805-29.

⁸ See Statement by the President on East Timor, 9 September 1999, 3, www.usinfo.state.gov/regional/ea/timor, visited on 6 July 2001; Mark Suzman and Sander Thoenes, 'US halts military links in move on E. Timor violence', *The Financial Times*, 10 September 1999.

loans. He stated that his ‘own willingness to support future assistance will depend very strongly on the way Indonesia handles this situation.’ The President wanted to send a clear signal to political and military leaders in Indonesia that if the violence continued, ‘there will be overwhelming public sentiment to stop the international economic cooperation...nobody is going to want to continue to invest there if they are allowing this sort of travesty to go on.’⁹

The economic threat posed to Indonesia’s recovery after the Asian financial crisis by the loss of IMF and World Bank finance was compounded by the fact that this would send a clear signal to investors that Indonesia was a bad risk, leading to greater pressure on the stability of the currency and the economy in general. In addition to these economic considerations, the growing realisation that the crisis in East Timor was worsening was a key factor in Habibie’s decision on 12 September to agree to the deployment of a multinational force.¹⁰

The pressure applied against Jakarta was not just economic. It was also diplomatic, and this took three forms. First, it was highly fortuitous that the Asia Pacific Economic Cooperation (APEC) forum was meeting at heads of government level in Auckland at the same time as the crisis in East Timor was taking place. President Clinton and other world leaders were able to use the summit to pressurise Indonesian leaders into agreeing to the deployment of an international force to the island. The second factor was the mission sent by the Security Council to East Timor. The importance of this was that it demonstrated the strength of feeling in the Council on the question of Indonesia’s responsibility for the violence in East Timor to the Indonesian leadership. The third factor in the shaming of Indonesia was the strong consensus at the UN, best reflected in the open Security Council debate on 11 September, where the vast majority of the fifty or so governments present agreed that if Indonesia was unable or unwilling to restore security in East Timor then it should accept the offer of an international peacekeeping force.¹¹

The case of East Timor predates the development and adoption of R2P. However, it is an important case of how R2P might be operation-

⁹ Statement by the President on East Timor, 9 September 1999, 3, 7.

¹⁰ According to Stephen Fidler and Gwen Robinson, this pressure ‘was instrumental in persuading Indonesia to accept an international peacekeeping force’ (‘IMF and World Bank played role in climbdown: East Timor lobbying effort exposes divisions over wisdom of sanctions’, *The Financial Times*, 13 September 1999).

¹¹ For a full transcript of the speeches, see 4043rd meeting of the Security Council held on Saturday 11 September, S/PV.4043, www.un.org/peace/etimor/docs, visited on 7 July 2001.

alised in future situations of this kind. Had R2P existed in 1999, it is evident that the killings and ethnic cleansing that were committed in the aftermath of the referendum would have led to R2P being invoked, and a consensus quickly established that Indonesia was failing to live up to its responsibilities under paragraph 138 of the Outcome Document. East Timor is a good precedent because the Security Council was united that Indonesia was in breach of its legal and moral obligations to provide security for the East Timorese, and equally united in the pressures that were being applied to Jakarta. At the same time, there was no appetite in the Council for any armed intervention that lacked Indonesia's consent, and Australia was emphatic that it would only intervene with a Chapter VII mandate which Canberra knew would only be forthcoming if Indonesia gave its consent. It was accepted as a given of the discourse that unilateral action on the model of NATO's intervention in Kosovo was unacceptable.

Can the lessons of the East Timor case be applied to contemporary cases where mass atrocities have been and are taking place such as Zimbabwe and the Sudan? Indonesia in 1999 was particularly vulnerable to the financial pressures that were applied against it, coming as they did in the wake of the Asian financial crisis. Is Harare or Khartoum vulnerable to such pressures? As the East Timor case shows, the role of the United States is likely to be essential to the success of any future strategy of coerced consent. In this context, it has been argued that Washington could have played a key role in coercing the Sudanese Government to comply with UN resolutions over Darfur and to end its complicity in the violence there.

Susan Rice (former Assistant Secretary of State for African Affairs in the Clinton Administration and President elect Obama's nominee for US Ambassador to the UN) called in a speech in February 2007 for stronger coercive pressures to be employed against Khartoum. Her focus was the latter's refusal to allow into Darfur the UN peacekeeping force that had been given a Chapter VII mandate of civilian protection in Security Council Resolution 1706. She argued that the Bush Administration should impose crippling financial sanctions (going well beyond the asset freeze agreed to by the Security Council in 2005) against the Sudanese Government and that these should not be lifted until the peacekeeping force had fully deployed and Khartoum had permanently and verifiably stopped all air and ground attacks in Darfur.¹² Gareth Evans in discussing Darfur has argued that it 'remains, on any view, an "R2P situation"', and he agreed with Rice that tougher measures should have been employed against Khartoum. At the same time, Evans has not been persuaded that Darfur satisfies the

¹² Susan E. Rice, "The Escalating Crisis in Darfur", Speech before the Spring Africa Speaker Series, SAIS, Johns Hopkins University, February 21, 2007.

relevant precautionary criteria that should be applied when considering the use of force for protection purposes (crucially on the question of whether force would do more good than harm). Consequently, he has looked to the international community to adopt other measures to coerce Khartoum into meeting its responsibilities for protection. But it is here that he has been disappointed considering that the international community has failed to apply the ‘sustained diplomatic, economic, and legal pressure to change the cost-benefit balance of the regime’s calculations.’¹³

A key factor that has militated against coercive non-forcible – as well as forcible – action in the case of Darfur has been the divisions in the Council over whether the Sudanese Government has abdicated its sovereign responsibilities for protection. Those states on the Security Council which opposed applying stronger coercive measures against Khartoum anticipated the language in paragraphs 138 and 139 of the Outcome Document by arguing in 2002–2003 that the crisis in Darfur had not yet reached the point where it was reasonable to argue that Sudan was failing in its responsibilities.¹⁴ This raises the question of what should happen if the Security Council is divided on the question of whether a government – to use the language in paragraph 139 of the Outcome Document – is ‘manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity’. It is to the role of the Security Council in authorising non-consensual intervention that I now turn.

UN and Non-UN Models of Forcible Non-Consensual Intervention

The rest of this report focuses on situations where consent for military intervention has not been secured – willingly or unwillingly – from the target state. Starting with the least controversial model where the Security Council authorises Member States and/or regional organisations to use force for protection purposes under Chapter VII of the UN Charter, the report goes on to identify four alternative models that have been proposed as a way of securing legitimacy for military intervention in cases where the Security Council fails to act in a timely and decisive manner to prevent or end mass atrocities.

¹³ Gareth Evans, *The Responsibility to Protect: Ending Mass Atrocity Crimes Once and For All*, (Washington DC: The Brookings Institution, 2008), p. 61.

¹⁴ This problem is explored in Alex Bellamy, ‘The Responsibility to Protect and Darfur’, *Ethics and International Affairs*, 19 (2), 2006, pp. 31-54.

Security Council Authorisation

Governments and heads of state agreed in Paragraph 139 of the 2005 Outcome Document that to protect populations from ‘genocide, war crimes, ethnic cleansing and crimes against humanity’ they were ‘prepared to take collective action, in a timely and decisive manner’, through the Security Council, in accordance with the Charter, including Chapter VII’. Such an agreement was a momentous one when it is considered how resistant Member States were during the Cold War to exercising Chapter VII in this way. During this period, the Security Council interpreted what counted as a threat to ‘international peace and security’ very narrowly, restricting it to cross-border aggression. This interpretation was inimical to the protection of basic humanitarian values.¹⁵

Today, it is becoming less and less conceivable that the Security Council would oppose a state or group of states seeking a mandate to end genocide, mass killing and large-scale ethnic cleansing on the grounds that this violated a state’s sovereign rights. It is this normative transformation that is registered in the 2005 agreement by governments and heads of state to paragraph 139 of the Outcome Document. Without underestimating the significance of the 2005 agreement, it is important to understand that this was a codification of the Security Council’s practice in the 1990s. What changed in the first decade after the end of the Cold War was the Security Council’s expansion of the boundaries of legitimate intervention by defining humanitarian emergencies inside a state’s borders as a threat to ‘international peace and security’. The importance of this normative development was that it made possible UN enforcement action under Chapter VII of the Charter.¹⁶

However, there are three caveats that have to be borne in mind when claiming, as Kofi Annan did when UN Secretary-General, that there is a ‘developing international norm’¹⁷ forcibly to protect endangered populations. The first is that governments remain extremely sensitive about trespassing on the sovereignty of other states. Member states are

¹⁵ Nicholas J. Wheeler, *Saving Strangers: Humanitarian Intervention in International Society*, (Oxford: Oxford University Press, 2000).

¹⁶ It would be wrong to give the impression that this pushing out of the boundaries of legitimate intervention was uncontested. Rather, as the deliberations over intervention in northern Iraq in 1991 and in Somalia in 1992 demonstrated, there was resistance from those states that worried about setting precedents that might erode the principle of non-intervention (see Wheeler, *Saving Strangers*, pp. 139-207).

¹⁷ Kofi A. Annan, “Two Concepts of Sovereignty”, Address to the 54th Session of the General Assembly, 20 September 1999, reprinted in Kofi A. Annan, *The Question of Intervention: Statements by the Secretary General*, New York: United Nations, 1999, p. 44.

cognizant that the United Nations was created to prevent wars, not to become an instrument for their propagation. Consequently, in the absence of target state consent, the Security Council is only going to authorize armed action to protect fellow humans in exceptional circumstances and where it is believed that the costs of military action are massively outweighed by the moral consequences of inaction. The bar, then, for UN-authorized humanitarian intervention is very high, and most states will support such action only in cases of genocide and mass killing and where it does not impinge upon important interests.

Secondly, the much-vaunted claim that there is a ‘developing international norm’ to protect civilians appears very hollow when viewed from the perspective of the millions who have perished in the past ten years from genocide and war in Rwanda, Sudan, and the Democratic Republic of the Congo (DRC). In the case of NATO’s intervention in Kosovo, the major Western states were prepared to employ force for a complex mix of humanitarian and security reasons. But the emergent norm of civilian protection was insufficient to motivate these same governments to put their troops in harm’s way to save Rwandans from genocide in 1994. Though the norm enables new possibilities of intervention, it does not ensure that such actions will take place when they are morally required. The moral limitations of the project of humanitarian intervention in the 1990s can be seen in the fact that in no case have states intervened when there were no vital interests at stake and/or where there were perceived to be significant risks to the lives of the intervening forces. This produces a pattern of intervention that is highly selective, frequently driven by considerations of national self-interest rather than humanitarian need.¹⁸ It also ensures that, when intervention does take place, it is widely viewed as morally hypocritical, a rhetorical instrument that rationalizes the projection of force by the powerful. The US-led war against Iraq in 2003 is only the latest intervention where this long-standing critique can be strongly heard.

The third point to realize about the developing norm of UN authorised humanitarian intervention is that the consensus over armed intervention does not extend to unilateral action (defined as an intervention not authorized by the Security Council). It is evident from the position taken by the vast majority of states in debates in the General Assemb-

¹⁸ In some cases military intervention is rightly ruled out on the grounds that armed action would do more harm than good (Chechnya and Tibet are obvious examples here). As Michael Ignatieff notes, ‘perfect consistency is a test of legitimacy that political action can never meet, and hence the prerequisite of consistency serves (even if it does not intend to do so) either as a justification for doing nothing or as a condemnation of any intervention actually undertaken’ (Michael Ignatieff, ‘Human Rights, Power and the State’, in Simon Chesterman, Michael Ignatieff, and Ramesh Thakur, (eds), *Making States Work*, Tokyo: United Nations University Press, 2005, p. 60).

ly that there is no support for a legal right of unilateral humanitarian intervention. Many Southern states remain worried that such a right would become a weapon that the strong would use against the weak. This normative position is codified in the language in paragraph 139 of the Outcome Document which explicitly states that any military action to protect endangered populations can only be taken through the existing collective security provisions in the UN Charter.

However, not all governments have been or are prepared to accept such a restriction on the use of force. This raises the vexed question of how the international community should proceed if Security Council members – especially the permanent members – are divided over whether a particular case warrants armed intervention? If the Security Council is paralysed from acting because of the power of the veto, how should the international community judge a state or group of states that justify the use of force as preventing or ending mass atrocities? This is the moral and legal conundrum that was posed by NATO's action in Kosovo.

The Security Council as a global jury

It is clear from the Security Council's response to NATO's use of force against Yugoslavia that ringing statements of principle about the illegality of unilateral action are not necessarily a reliable guide to how states will react in specific cases where they have to balance conflicting legal and moral concerns. The 2001 report by the International Commission for Intervention and State Sovereignty (ICISS) had suggested that the prospect of future unilateral actions could be helpful in sending a clear message to the Security Council that it would undermine its authority if it failed to exercise what the ICISS viewed as 'its responsibility to protect, in a conscience-shocking situation crying out for action.'¹⁹ If this was a veiled reference to Kosovo, then it overlooked the fact that the Council was divided on what constituted the proper exercise of its 'responsibility' in this case.

One key theme that underlies some of the statements in the Council during the Kosovo crisis was that Russia and China had behaved irresponsibly by threatening to veto a draft resolution authorising NATO's use of force.²⁰ Such an interpretation of the case led the ICISS to recommend that 'The Permanent Five members of the Security Council should agree not to apply their veto power, in matters where their vital interests are not involved, to obstruct the passage of resolutions authorizing military intervention for human protection pur-

¹⁹ *The Responsibility to Protect*, Report of the International Commission on Intervention and State Sovereignty, Ottawa, Canada, 2001, p. 55.

²⁰ S/PV.3988, 24 March, 1999, pp. 6-7.

poses for which there is otherwise majority support.²¹ The problem with this proposal as a way of preventing a future Kosovo-type situation where one or more veto-bearing permanent members oppose the majority will of the Council is that it ignores how far Russia and China might have had genuine misgivings about whether the use of force was justified to end the humanitarian crisis, absent whatever instrumental reasons they may also have had to oppose NATO's armed intervention.

The conundrum that faced Security Council members over Kosovo was that whilst NATO's intervention was a clear breach of specific provisions of the Charter, the illegality of its action had to be weighed against the moral imperative to rescue the Kosovars. The result was that the majority of non-Western states on the Council operated an international equivalent to mitigation in domestic law systems. The best evidence for this is the defeat by twelve votes to three (Russia, China and Namibia) of the Russian draft resolution demanding a halt to the bombing. Five states on the Council were members of NATO, but the other seven votes were cast by Slovenia (a friend of the West and strongly opposed to the Milošević regime), Argentina, Brazil, Bahrain, Malaysia, Gabon, and Gambia. These Council members rejected the Russian resolution because they accepted that NATO's action was justifiable on humanitarian grounds. Having witnessed the horrific consequences of Serb ethnic cleansing in Bosnia and fearful that this was about to be repeated in Kosovo, they were persuaded that such atrocities could not be tolerated again.

Thomas Franck argued that 'the essence of mitigation is that the law recognises the continuing force of the rule in general, while also accepting that in extraordinary circumstances, condoning a carefully calibrated and justifiable violation may do more to rescue the law's legitimacy than would its rigorous implementation.'²² Supporting this legal interpretation of the case, NATO did not rely on an explicit legal rationale, and its claim to be acting to prevent a humanitarian emergency could be interpreted as a plea in mitigation. Franck argued that when faced with such pleas, the role of the UN's political organs – crucially the Council – is to act as 'a global jury'²³ in which the text of the Charter is balanced against the moral necessities of the case.

The moral and legal responsibility that falls on those who intervene without Council authority is to persuade the Council – and wider glo-

²¹ *The Responsibility to Protect*, xiii.

²² Thomas Franck, *Recourse to Force: State Action Against Threats and Armed Attacks*, (Cambridge: Cambridge University Press, 2002), p. 185.

²³ Franck, *Recourse to Force*, p. 186.

bal opinion – that its action should be excused or tolerated on humanitarian grounds. And if states are not condemned by the Security Council for breaking the law in such cases, or only pay a minor penalty for such infractions, it seems reasonable to conclude that the Security Council would be operating a principle of mitigation as it did over Kosovo.

General Assembly Authorisation

According to paragraph 139 of the Outcome Document, collective action in support of R2P must be ‘in accordance with the Charter, including Chapter VII.’ If the Security Council fails to take action to prevent or end mass atrocities because of the threat or use of the veto, then there is the alternative of seeking General Assembly approval for military intervention. The General Assembly has competence under the Charter to recommend (but not authorise) military measures when the Security Council is unable to exercise its ‘primary responsibility for maintaining international peace and security’. Although the ICISS report argued that the task was to make the Security Council work better, it did recommend that recourse might be made to the General Assembly if the threat or use of the veto was blocking an intervention for protection purposes that had majority support. The Commission argued that states should always request Council authorisation before having recourse to this alternative UN route (NATO failed this test over Kosovo), and that if the veto was exercised in such circumstances, consideration should be given to convening a special session of the General Assembly under the 1950 ‘Uniting for Peace’ Resolution.²⁴ Adopted at the height of the Cold War, this Resolution was a way of bypassing the Soviet veto in the Security Council. However, it is important to realise that there is no constitutional basis in the UN Charter for the General Assembly to override the right of veto granted to permanent members of the Security Council in Article 27 (3).

The advantages of using the General Assembly to legitimise (but not legalise) military intervention for protection purposes are two-fold: first, in negating the veto power of the P5 in circumstances where they are unwilling to act in the face of the most severe humanitarian crises, it nevertheless keeps collective action within the bounds of the UN system (as required by paragraph 139 of the Outcome Document). Second, if a two-thirds majority for military action could be secured in the General Assembly, then this would give a significant measure of international legitimacy to an intervention. As Evans wrote, ‘if a decision were supported by an overwhelming majority of member states, it would provide a high degree of legitimacy for a military intervention (and had the procedure been tested in the cases of

²⁴ *The Responsibility to Protect*, p. 53.

Rwanda and Kosovo, it is conceivable that there would have been such support).²⁵

It is a fascinating counterfactual as to whether NATO would have secured majority support in the Council had it followed these procedures over Kosovo, and whether in the event of a Russian or Chinese veto, a resolution supporting military action prior to the commencement of hostilities would have elicited the necessary two-thirds majority in the General Assembly. Some NATO governments (notably Canada)²⁶ suggested this course of action over Kosovo, but it was the negative consideration of pursuing this option that weighed heavier with NATO member-states, especially the United Kingdom and the United States. London publicly claimed that it did not go down the 'Uniting for Peace' road over Kosovo because the General Assembly lacked the legal competence to determine enforcement action of this kind.²⁷ However, this legal argument belied the fact that the United Kingdom was nervous that the Alliance would secure a two thirds majority in the Assembly recommending military action. There were two further political factors that militated against using the Assembly at the time and which remain pertinent today.

The first was that had the vote been close, or even lost, then this would have damaged NATO's claims to be acting on behalf of the moral purposes of wider international society as embodied in the three Chapter VII resolutions demanding that the Federal Republic of Yugoslavia end its large-scale ethnic cleansing. Second, some NATO governments were very conscious that giving the Assembly this degree of legitimacy would erode the power of the veto in the Council. The United Kingdom and the United States felt it was necessary to bypass the veto in this particular case, but they did not want to issue a direct challenge to the legitimacy of the veto. One of the concerns here was that such a precedent might embolden the Non-Aligned Movement (NAM) to use the Assembly to adopt a resolution recommending military action against Israel.

Given these political considerations, the three Western permanent members of the Council firmly opposed proposals that would have enhanced the role of the General Assembly vis-à-vis the Council. Moreover, this position was supported by Russia and China who were determined to maintain the primacy of the Council since it is the one body where they continue to have major influence in the global arena.

²⁵ Evans, *The Responsibility to Protect*, p. 136.

²⁶ Author's interviews with Canadian officials in 2001-2002.

²⁷ See the testimony of Mr Emyr Jones Parry, Political Director of the Foreign Office, to the House of Commons Foreign Affairs Committee, Fourth Report, 'Kosovo', 18 November, 2000, p. 67.

Regional Arrangements

Chapter VIII of the UN Charter recognises an explicit role for regional organisations in the promotion of international peace and security. However, Chapter VIII also states that ‘no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council.’ Consequently, it is important to distinguish between regional organisations that act as sub-contractors of the UN as against regional actors that act independently without prior UN authorisation.²⁸

There have been cases of military intervention by regional bodies that have not had prior UN authorisation. For example, the Economic Community of West African States (ECOWAS) monitoring group’s (ECOMOG) interventions in Liberia in 1992 and Sierra Leone in 1997.²⁹ However, in both these cases, the Security Council provided an important measure of what the ICISS called ‘*ex post facto* authorization’ in resolutions adopted after the interventions had taken place.³⁰ These precedents led the ICISS to propose that where the Security Council was unable or unwilling to act, recourse might be made to regional arrangements and organisations. This position finds support in Susan Rice and Andrew Loomis’s 2007 recommendation that ‘Decisions to support intervention by relevant or concerned regional bodies should be deemed sufficient to legitimize action by their members when Security Council authorisation is sought but not forthcoming’.³¹ NATO’s unilateral (defined as non-Security Council authorised) intervention in Kosovo is the most dramatic example of regional action of this kind, though it would fail Rice and Loomis’s test because NATO did not formally table a resolution seeking Security Council authorisation.

Building on the precedents of Liberia and Sierra Leone, African states, have shown an increasing willingness to develop both the capacity and legal framework to conduct armed interventions for protection purposes. Within a short period after the ICISS published its report, the

²⁸ I am grateful to Kristin Marie Haugevik for this distinction. See her report ‘Regionalizing the Responsibility to Protect: Possibilities, Capabilities and Actualities’, *NUPI Report Responsibility to Protect*, No. 2, 2008. for a fuller discussion of the role of regional organisations in operationalising R2P.

²⁹ Jeremy Levitt, ‘Humanitarian Intervention by Regional Actors in Internal Conflicts: The Cases of ECOWAS in Liberia and Sierra Leone’, *Temple International and Comparative Law Journal*, 12 (2) 1998, pp. 333-75.

³⁰ *The Responsibility to Protect*, Report of the International Commission on Intervention and State Sovereignty, Ottawa, Canada, 2001, p. 54. See also Donald Sylvan, *International Intervention: Sovereignty versus Responsibility* (London: Routledge, 2002), p. 107.

³¹ Rice and Loomis, ‘The Evolution of Humanitarian Intervention and the Responsibility to Protect’, p. 91.

African Union (AU) which was the successor to the Organisation of African Unity (OAU) produced a new charter that mandated intervention in certain circumstances, even without Security Council authorisation. Article 4(h) of The Constitutive Act of the AU establishes ‘the right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity’.

However, translating the AU’s humanitarian commitments into effective civilian protection remains a daunting task as its role in Darfur has shown. Despite Article 4(h), the AU has been reluctant to act without Khartoum’s consent which has claimed that it is capable of protecting its own citizens. Nevertheless, as Rice and Loomis have argued, the AU was ‘the only international actor willing to face bullets to save civilians in Darfur.’³² It deployed a 7,000 strong force with a mandate of humanitarian protection and assisting in the process of confidence-building between the warring parties. But it has been severely hampered in these efforts by inadequate resources and logistic support, despite contributions from Western governments. Nick Grono has argued that in practice the AU force ‘is largely an observer mission. It does not have a mandate to go out and proactively protect civilians. In fact, it can only protect civilians when they are being attacked in its presence, and only then if it feels it has enough troops to intervene — and too often it does not.’³³ In 2006 the AU recognised the limitations of its efforts at civilian protection and called for a larger UN force to replace it. In response the Security Council adopted under Chapter VII Resolution 1706 which called for a force of 22,000 to provide protection of civilians in Darfur.

There have been some discussions as to whether the AU could intervene to end the human rights violations in Zimbabwe. Prime Minister Raila Odinga of Kenya called in December 2008 for the African Union to oust Zimbabwean President Robert Mugabe. However, his plea has fallen on deaf ears and it is highly unlikely that the AU will forcibly intervene in Zimbabwe unless the oppression and killings reach genocidal levels. Even then, there are severe limits on the political, financial, and military capacities of the AU as an intervention force. As Wafula Okumu has pointed out, ‘In view of the stark realities facing the AU – particularly its convoluted decision-making pro-

³² Rice and Loomis, ‘The Evolution of Humanitarian Intervention and the Responsibility to Protect’, p. 81.

³³ Nick Grono, ‘Briefing-Darfur: The International Community’s Failure to Protect’, *African Affairs*, 105 (421), 2006, p. 626.

cess, lack of resources, and lack of political will – it is not likely that it will intervene to protect the livelihoods of Zimbabweans.³⁴

Capacity building is clearly a key challenge facing the AU and this underlines the urgency of realising the G-8 commitment to train and equip five inter-operable brigades in Africa. However, even if the AU develops the capacity to act in a timely and decisive manner in the face of mass atrocities, there will remain the question as to whether African governments have sufficient solidarity and interests with their neighbours to place their forces in harm's way to save African civilians. In addition, there is the question as to whether future interventions aimed at protecting civilians that lack the consent of the target states should be expressly authorised by the Security Council, given the language in Paragraph 139 of the 2005 World Summit.

Coalitions of the Willing

As I noted earlier, the ICISS report had suggested that the prospect of unilateral action could be helpful in sending a clear message to the Security Council that it would undermine its authority if it failed to effectively respond to conscience-shocking atrocities. There is no case where a coalition of states have formally requested Council authorisation for an intervention to prevent or end mass atrocities and this has been rejected on grounds that such an action would breach a state's sovereignty. As we have seen, the ICISS report opened the door to the possibility in such cases of states circumventing Council authority by having recourse to the General Assembly and/or regional organisations. However, what is often overlooked is that the ICISS report was emphatic that recourse to these bodies would only become possible if a majority of council members supported an armed intervention and this majority will was then frustrated by the exercise of the veto. It followed that if majority support was lacking in the Council, then this effectively closed the door on states utilising these other alternatives to the Council. The careful wording in the report reflected the need to balance the different views within the Commission as to how far ICISS should advocate bypassing the strict procedural rules of the UN Charter.

The attempt by ICISS to legitimate an exit from the strict Charter framework has been rejected by those who see it as too permissive in permitting non-UN authorised intervention as well as by those who see it as too constraining of such interventions. With regard to the former, the agreement in paragraph 139 of the Outcome Document that

³⁴ Wafula Okumu, 'As the world fudges, Zimbabweans should act to end their nightmare', *Daily Nation*, 8 December 2008, <http://www.nation.co.ke/News/africa/-/1066/499836/-/view/printVersion/-/2adspvz/-/index.html>, accessed 10 December 2008.

any action to protect populations must be taken through the existing collective security machinery of the Charter can be seen as an attempt to firmly bolt the door that ICISS had tried to push open a little. For those who viewed the ICISS recommendation as too constraining in requiring states to table a resolution seeking approval for military action that secures at least nine votes, paragraph 139 cannot be the last word on the legitimacy of intervention.

Supporters of this view recognise that governments which act without Council authorisation take on in former US legal advisor Abraham Sofaer's words 'the burden of persuading governments, courts, and the public of the propriety of [their] actions.'³⁵ Rice and Loomis, for example, argued that in seeking post-hoc legitimation for their actions, a 'coalition of the compassionate' should be ready to defend their actions in the following terms:

When all else fails, a member state or coalition of members may intervene to save lives at their own risk and expense and seek retroactive UN or regional support. In this instance the gravity of the humanitarian crisis, the purity of humanitarian motives, and the efficacy and proportionality of the military action should be critical considerations in the achievement of ex post facto legitimization. Member states that take such action should be prepared to have their intervention formally condemned and penalties assessed if it fails to meet the above criteria.³⁶

Rice and Loomis were making a number of assumptions here that should be questioned. First, there is no agreement on the criteria that should be employed to judge the legitimacy of an intervention of this kind, and little or no likelihood of any such consensus being reached at the UN in the near to medium term. Second, even if it is possible in the future to reach an agreement on criteria, it is mistaken to think that this will resolve the disagreements that have paralysed Security Council action in cases like Kosovo and Darfur. The problem is that governments might agree on the relevant criteria to be applied, but disagree over their application in specific cases. This difficulty can be seen in the debate over whether force should have been used to end the human suffering in Darfur. Rice, Loomis, and Evans all agree that Darfur is a case where R2P should be applied, but the latter disagrees

³⁵ Abraham Sofaer, 'International Law and Kosovo', *Stanford Journal of International Law*, 36 (1), 2000, p. 16.

³⁶ Rice and Loomis, 'The Evolution of Humanitarian Intervention and the Responsibility to Protect', p. 91.

with Rice and Loomis on the question as to whether the use of violent means can promote humanitarian ends in this case.³⁷

Resolving substantive disagreements over the efficacy of military action to end mass atrocities requires an agreed procedural mechanism that everyone accepts as authoritative. But as this report has shown, there is no consensus on where ultimate authority should be located for the use of force in contemporary international society.

Conclusion

The 2005 Outcome Document omitted any discussion of the limited alternatives to Security Council authorisation that had been proposed in the ICISS report, and had such issues been seriously pressed, they would have derailed any agreement on R2P. In seeking to bolt the door firmly against interventions that lacked express Security Council authorisation, the Outcome Document retreated from the important attempt in the ICISS report to provide a humanitarian emergency exit from the strict procedural rules of the UN Charter. The result is that it is not evident that the UN is any better placed today to cope with a future Kosovo than it was in 1999 when the Security Council was divided over the merits of preventive armed intervention.

Such a situation could have arisen in the case of Darfur had the United States, United Kingdom, and other Western states, perhaps with the support of some African governments, sought a mandate from the Security Council for a non-consensual armed intervention in Darfur. Perhaps in such a situation, members of the Security Council, including crucially Russia and China, would have felt compelled to grant a UN mandate in the face of claims that such an action was the only means to end the humanitarian catastrophe. But if these members of the P5 had continued to oppose the use of force, would those Western states that felt morally compelled to act once again have broken with the principle of UN authority?

NATO's unilateralism over Kosovo demonstrates that Western governments are not always prepared to wait for Council authorization when they believe that the preventive use of force is necessary to protect endangered peoples. In such situations, the real question is: who is acting irresponsibly, those who seek to end the killings in the absence of a clear UN mandate or those who argue that such actions break international law and hence undermine the rules restricting the use of

³⁷ Compare Evans, *The Responsibility to Protect*, p. 145 with Rice and Loomis, 'The Evolution of Humanitarian Intervention and the Responsibility to Protect', pp. 91-2. See also Bellamy 'The Responsibility to Protect and the problem of military intervention', p. 627.

force? How the moral imperative to save endangered peoples can be satisfied in cases where the Security Council is unwilling or unable to act without this generating the negative political repercussions that inevitably accompany unilateral action remains a challenge that advocates of R2P continue to wrestle with.

The best defence of NATO's action in Kosovo is that it was an anticipatory intervention aimed at preventing a humanitarian catastrophe. But interventions of this kind are always going to be the most difficult to legitimate, especially to governments that are nervous about any erosion of the principles of sovereignty and non-intervention. It becomes much easier to justify using violent means when the target state has committed mass atrocities that have been widely reported in the media. However, any armed rescue that then takes place will come too late for many. This assessment also applies to the mobilisation of non-forcible coercive pressures as in the case of East-Timor. It would not have been possible to mobilise the economic and political pressures on Jakarta to secure its consent to an international force in the absence of the rising levels of violence in East Timor.

The case of Rwanda offers a further illustration of how outside intervention only becomes possible once the killings and violence have been reported. It is the case that the barrier to intervention, once the genocide had started in 1994, was not the lack of UN authority but the absence of political will. It is inconceivable that the Security Council would have blocked a non-consensual forcible intervention on the grounds that this violated Rwanda's sovereignty. However, if the clock is turned back to January 1994 when the UN force commander was seeking a change of mandate to permit peace enforcement operations against the government-sponsored Hutu militias who would spearhead the genocide, it is by no means evident that the Security Council would have authorised an armed intervention. Yet we now know that such action was desperately needed and might have prevented the subsequent genocide. Without the benefit of hindsight, Council members – perhaps a majority – would have worried in the months preceding the genocide that a non-consensual intervention of this kind posed too great a challenge to the principles of sovereignty and non-intervention upon which interstate order is founded. Prevention might be the most important dimension of operationalising R2P, but more consideration needs to be given to how far prevention requires a coercive military element (as in Rwanda and East Timor), and how anticipatory actions of this kind can be legitimated to wider international and domestic publics.