

## SELECTED ARTICLE ON INTERNATIONAL HUMANITARIAN LAW

# Military intervention for humanitarian purposes: does the Responsibility to Protect doctrine advance the legality of the use of force for humanitarian ends?

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### **Abstract**

*The Responsibility to Protect is being touted as a new approach to protecting populations from mass atrocities. Certainly it would be encouraging to believe that an end to genocides, large scale ethnic cleansing and large scale loss of life were within humanity's reach. However, whilst the holistic approach of the doctrine is to be commended, the legality of the proposal requires further analysis. This paper specifically addresses the evolution of the legality of humanitarian intervention and looks at whether the Responsibility to Protect doctrine advances the legality of the use of force for humanitarian ends.*



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Military intervention for humanitarian purposes has a controversial past. As the International Commission on Intervention and State Sovereignty report recognizes, this is the case ‘both when it has happened – as in Somalia, Bosnia and Kosovo – and when it has failed to happen, as in Rwanda’.<sup>1</sup> Since the then United Nations Secretary-General Kofi Annan posed his much cited question at the United Nations Millennium Summit,

‘(...) if humanitarian intervention is, indeed, an unacceptable assault on sovereignty, how should we respond to a Rwanda, to a Srebrenica – to gross and systematic violations of human rights that affect every precept of our common humanity?’<sup>2</sup>

many have sought to discuss and debate humanitarian intervention and the emerging Responsibility to Protect (R2P) doctrine. Unfortunately, now is not the time to stop the debate. Mass atrocities are not confined to the past. The importance of finding international agreement on the legality of humanitarian intervention has never been more apparent. The recent tragedy that is Darfur bears this out.

The R2P is being touted as a new approach to protecting populations from mass atrocities. This developing doctrine, reference to which was included in the 2005 United Nations World Summit Outcome Document, dictates that when a state is unwilling or unable to protect its citizens from actual or apprehended large scale loss of life (with or without genocidal intent) or large scale ‘ethnic cleansing’, the principle of non-intervention in the internal affairs of other states yields to the international responsibility to protect.<sup>3</sup> This responsibility includes three elements: the responsibility to prevent, the responsibility to react and the responsibility to rebuild. Military intervention for humanitarian purposes is a crucial part (although last resort measure) of the responsibility to react. The R2P is premised on the understanding that international order is best maintained by non-intervention in the internal affairs of other states. However, it also challenges this principle in so far as it recognizes that ‘to respect sovereignty all the time is to risk being complicit in humanitarian tragedies sometimes’.<sup>4</sup> That is, the R2P adopts a view of sovereignty which emphasizes as its defining characteristic the capacity to provide protection, rather than territorial control.<sup>5</sup> Weiss describes the R2P as adding a fourth characteristic, namely ‘respect for human rights’, to the three Peace of Westphalia

1 International Commission on Intervention and State Sovereignty (ICISS), *The Responsibility to Protect*, International Development Research Centre, Ottawa, 2001, p. VII, available at <http://www.iciss.ca/pdf/Commission-Report.pdf> (last visited 1 December 2009).

2 *Ibid.*, p. VII.

3 *Ibid.*, pp. XI, XII.

4 Ramesh Thakur, ‘Outlook: Intervention, Sovereignty and the Responsibility to Protect: Experiences from ICISS’, *Security Dialogue*, Vol. 33, No. 3, 2002, pp. 323–340, at p. 324, available at <http://sdi.sagepub.com/cgi/content/abstract/33/3/323> (last visited 15 March 2008).

5 See further Anne Orford, ‘Jurisdiction Without Territory: From the Holy Roman Empire to the Responsibility to Protect’, *Michigan Journal of International Law*, Vol. 30, No. 3, 2009, pp. 984–1015, at p. 990.

characteristics of a sovereign state – territory, authority and population.<sup>6</sup> Unsurprisingly, this creates tensions between what Chesterman labels ‘the belief in the justice of a war waged against an immoral enemy and the emerging principle of non-intervention as the corollary of state sovereignty’.<sup>7</sup> It is this tension that makes analysis of the R2P both intellectually interesting and practically necessary.

Today, this tension is well illustrated by the contrast between the pre- and post-September 11 worlds. International relations in the 1990s – featuring the proliferation of failed states, terrorism, the targeting of civilians in conflict and the ‘CNN effect’ – were said to have created a ‘climate of heightened expectations for action’<sup>8</sup> and less tolerance for the principle of non-intervention. Yet as Michael Ignatieff writes:

‘When [R2P] appeared in late September, 2001, as the ruins of the World Trade Center were still smoldering, it was already irrelevant to American and European policymakers. Their overriding concern had shifted from protecting other country’s civilians to protecting their own.’<sup>9</sup>

Indeed, the increased allocation of military resources to the ‘War on Terror’ and the *ex post facto* ‘humanitarian’ arguments for the war in Iraq have arguably undermined the notion of humanitarian intervention.<sup>10</sup> Despite this, the R2P continues to be discussed at the United Nations as well as in academic literature. MacFarlane, Thielking and Weiss divide the ‘humanitarian intervention’ debate into ‘three distinct clusters of opinion’. The *opponents* are those who view the idea as a return to semi-colonial practices dividing the world into the civilized and the uncivilized. The *agnostics* and *sceptics* do not see the debate resolving the ‘fundamental problems of insufficient political will’. The *optimists* view the R2P as ‘a realistic and substantial step’ towards a ‘workable consensus’.<sup>11</sup> Many are hopeful that the R2P is indeed a new solution. The R2P effectively makes a promise to the world’s most vulnerable people: a promise that when their own governments fail them, the international community will intervene to protect them. The question that therefore needs answering is whether the R2P can deliver on this promise.

This is not the first attempt to articulate how the R2P distinguishes itself. However, such discussions have tended to focus on the holistic approach that the

6 Thomas G. Weiss, ‘The Sunset of Humanitarian Intervention? The Responsibility to Protect in a Unipolar Era’, *Security Dialogue*, Vol. 35, No. 2, 2004, pp. 135–153, at p. 138, available at <http://sdi.sagepub.com/cgi/content/abstract/32/2/135> (last visited 15 December 2008).

7 Simon Chesterman, *Just War or Just Peace?*, Oxford University Press, Oxford, 2001, p. 7.

8 Jennifer Welsh, Carolin Thielking and S. Neil MacFarlane, ‘The Responsibility to Protect: Assessing the report of the International Commission on Intervention and State Sovereignty’, *International Law Journal*, 2001–2002, p. 490.

9 Michael Ignatieff, ‘Whatever happened to “responsibility to protect”?’, *National Post*, 10 December 2008, <http://www.nationalpost.com/story.html?id=1054758> (last visited 12 December 2008).

10 S. Neil MacFarlane, Carolin J. Thielking and Thomas G. Weiss, ‘The Responsibility to Protect: is anyone interested in humanitarian intervention?’, *Third World Quarterly*, Vol. 25, 2004, pp. 977–992.

11 *Ibid.*, pp. 979–981.

R2P takes by asserting a responsibility to prevent mass atrocities.<sup>12</sup> This paper specifically addresses the evolution of the legality of military intervention for humanitarian purposes in the expectation of forming conclusions regarding legality of the R2P's 'responsibility to react'. The paper discusses the various schools of thought in the history of humanitarian intervention and various views regarding the legality of humanitarian intervention. It also contains an assessment of how the R2P differs from or remains similar to previous approaches, and finally an analysis of whether the R2P advances the legality of the use of force for humanitarian ends. The aim is to establish whether the R2P is a distinct and innovative approach to the problem of mass atrocities or whether it merely rephrases a concept that has failed on many occasions.

## The Responsibility to Protect

### Background

The International Commission on Intervention and State Sovereignty (hereinafter the Commission) was established by the Government of Canada, in September 2000, in the wake of the controversy surrounding the North Atlantic Treaty Organisation's bombing campaign in Kosovo. The catalyst was Kofi Annan's question asking how the international community should respond to 'gross and systematic violations of human rights that affect every precept of our common humanity'.<sup>13</sup> Specifically the Commission described their mandate as being:

'generally to build a broader understanding of the problem of reconciling intervention for human protection purposes and sovereignty; more specifically, it was to try to develop a global political consensus on how to move from polemics – and often paralysis – towards action within the international system, particularly through the United Nations'.<sup>14</sup>

In December 2001, the Commission produced a report of their consultations and findings. They called for the acceptance of a responsibility by the international community to protect populations experiencing large scale loss of life and ethnic cleansing. The Commission consisted of twelve members. It was chaired by Former Australian Foreign Minister and Chief Executive of the International Crisis Group, Gareth Evans, and Algerian diplomat and Special Advisor to the United Nations Secretary-General, Mahoamed Sahnoun. The Commissioners were drawn from a number of disciplines (including the military, law, academia, politics, governance, business and development) and countries (Russia, Germany,

12 See for example Gareth Evans, *The Responsibility to Protect: Ending Mass Atrocity Crimes Once and for All*, Brookings Institution Press, 2008, pp. 44 and 56, and R. Thakur, above note 4, p. 324.

13 ICISS, above note 1, p. VII.

14 *Ibid.*, p. 2.

Canada, South Africa, America, Switzerland and Guatemala).<sup>15</sup> The Commissioners, who met five times and attended national and regional roundtable consultations, had their work supported by an international research team led by Thomas Weiss, an American Professor, and Stanlake Samkange, a Zimbabwean lawyer.<sup>16</sup>

## The responsibilities to prevent, react and rebuild

The R2P seeks to bring an end to gross and systematic violations of human rights. It proposes the authorization of ‘action taken against a state or its leaders, without its or their consent, for purposes which are claimed to be humanitarian or protective’.<sup>17</sup> The R2P embraces three specific responsibilities: the responsibility to prevent, the responsibility to react and the responsibility to rebuild. It is said that ‘[p]revention is the single most important dimension of the responsibility to protect’.<sup>18</sup> The Commission considers that effective conflict prevention requires ‘knowledge of the fragility of the situation and the risks associated with it’, ‘understanding of the policy measures available that are capable of making a difference’ and ‘willingness to apply those measures’. More succinctly it labels these three criteria ‘early warning’, ‘preventive toolbox’ and ‘political will’.<sup>19</sup> Although the report stresses prevention as the most important priority, it is perhaps not surprising that some argue this is ‘preposterous’<sup>20</sup> or at the least a smokescreen for the reality that the controversial aspect of the doctrine is the responsibility to react. Significant attention is devoted in the report to setting out the criteria for military intervention. The Commission utilizes six headings of ‘decision making criteria’ for military intervention. The Commission is not of the view that there can or should be a universally accepted list of criteria for intervention, but rather that their six proposed criteria may go some way to bridging the gap between the ‘rhetoric and the reality’<sup>21</sup> when it comes to the responsibility to react.

The first of the criteria is referred to as the ‘threshold criteria: just cause’. The R2P dictates that military intervention must be limited to situations of:

- ‘A. large scale loss of life, actual or apprehended, with genocidal intent or not, which is the product either of deliberate state action, or state neglect or inability to act, or a failed state situation; or
- B. large scale “ethnic cleansing”, actual or apprehended, whether carried out by killing, forced expulsion, acts of terror or rape’.

15 *Ibid.*, Appendix A.

16 *Ibid.*, p. 84.

17 *Ibid.*, p. 8.

18 *Ibid.*, p. XI.

19 *Ibid.*, p. 20.

20 Thomas G. Weiss, *Military–Civilian Interactions: Humanitarian Crises and the Responsibility to Protect*, Rowman and Littlefield Publishers Inc., USA, 2005, p. 199.

21 ICISS, above note 1, p. 32.

The second criterion is ‘right authority’. This refers to the question of who should be the body to authorize any such intervention. The Commission devotes an entire chapter to this controversial and crucial criterion. In sum, three ‘right authorities’ are suggested: the Security Council, the General Assembly and Regional Organizations. The Commission notes that the Security Council should be the ‘first point of call’. However, in view of the Council’s past inability or unwillingness to fulfil the role expected of it, military intervention authorized by the General Assembly or Regional Organizations would have a ‘high degree of legitimacy’.<sup>22</sup>

The third criterion is ‘right intention’. This means that the ‘primary purpose of the intervention must be to halt or avert human suffering and that regime overthrow is not a legitimate reason for invoking the doctrine.’<sup>23</sup>

The fourth criterion is ‘last resort’: meaning that resort to force should only be used when ‘every diplomatic and non-military avenue for the prevention or peaceful resolution of the humanitarian crises’ has been explored. This is further qualified by the statement that this does not mean that the international community must have first tried every single possible option, but rather ‘that there must be reasonable grounds for believing that, in all the circumstances, if the measure had been attempted it would not have succeeded’.<sup>24</sup>

The fifth criterion is ‘proportional means’. Proportionality is a fundamental principle of *jus ad bellum*; its inclusion in the list is uncontroversial.

The last criterion is ‘reasonable prospects’. This dictates that military action can only be justified if it stands a reasonable chance of success. The Commission notes ‘military intervention is not justified if actual protection cannot be achieved or if the consequences of embarking upon the intervention are likely to be worse than if there is no action at all’.<sup>25</sup>

The final responsibility of R2P is the responsibility to rebuild. A post-intervention strategy is regarded as being of ‘paramount importance’.

## Subsequent developments

In international law terms, the R2P has had what could be described as a meteoric rise to mainstream debate.<sup>26</sup> In 2003, the United Nations High-level Panel on Threats, Challenges and Change was created by Kofi Annan to ‘generate new ideas about the kinds of policies and institutions required for the United Nations to be

22 *Ibid.*, pp. 53–54.

23 *Ibid.*, p. 35.

24 *Ibid.*, p. 36.

25 *Ibid.*, p. 37.

26 To give some perspective, the International Criminal Court was established in 1998 after the concept had first been proposed over 120 years earlier – see Christopher Keith Hall, ‘The first proposal for a permanent international criminal court’, *International Review of the Red Cross*, No. 322, 1998, pp. 57–74.

effective in the 21st century'.<sup>27</sup> This report made reference to the R2P by stating 'we endorse the emerging norm that there is a collective international responsibility to protect, exercisable by the Security Council authorizing military intervention as a last resort'.<sup>28</sup> Significantly, the High-level Panel's report stated that:

'[t]here is a growing recognition that the issue is not the "right to intervene" of any State, but the "responsibility to protect" of every State when it comes to people suffering from avoidable catastrophe – mass murder and rape, ethnic cleansing by forcible expulsion and terror, and deliberate starvation and exposure to disease'.

Kofi Annan's 2005 report 'In Larger Freedom: Towards Development, Security and Human Rights for All', also endorsed the R2P.<sup>29</sup> The idea was then taken up by the wider international community. The General Assembly, in the 2005 World Summit Outcome Document<sup>30</sup>, stated:

'138. Each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity (...) The international community should, as appropriate, encourage and help States to exercise this responsibility and support the United Nations in establishing an early warning capability.

139. The international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the Charter, (...) *we are prepared to take collective action, in a timely and decisive manner, through the Security Council*, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in co-operation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity (...) [emphasis added]

On 28 April 2006, the Security Council unanimously adopted Resolution 1674 on the Protection of Civilians in Armed Conflict. Resolution 1674 contains the first official Security Council reference to the R2P. The resolution reaffirms the provisions of paragraphs 138 and 139 of the World Summit Outcome Document and notes the Security Council's readiness to address gross violations of human rights, 'as genocide and mass crimes against humanity may constitute threats to

27 Report of the High-Level Panel on Threats, Challenges and Change, *A more secure world: our shared responsibility*, UN Doc. A/59/565, 2 December 2004, available at <http://www.un.org/secureworld/report.pdf> (last visited 12 December 2009).

28 *Ibid.*, para. 203.

29 Report of the United Nations Secretary-General, *In Larger Freedom: Towards Development, Security and Human Rights for All*, UN Doc. A/59/2005, 21 March 2005, para. 135, available at <http://www.un.org/largerfreedom/contents.htm> (last visited 19 December 2009).

30 United Nations General Assembly, *2005 World Summit Outcome*, UN Doc. A/RES/60, 15 September 2005, available at <http://daccessdds.un.org/doc/UNDOC/GEN/N05/487/60/PDF/N0548760.pdf?OpenElement> (last visited 12 December 2009).

international peace and security'.<sup>31</sup> In February 2008, the United Nations Secretary-General appointed a Special Adviser to focus on the R2P.<sup>32</sup> In January 2009, Secretary-General Ban Ki Moon released a report entitled 'Implementing the Responsibility to Protect'.<sup>33</sup> This report seeks to articulate ways we can better prevent and protect people against atrocities (but does not add to the discussion about the international acceptance of the doctrine).

Bellamy argues that there has been a 'watering down' of the 2001 doctrine in its 2005 World Summit Outcome Document articulation.<sup>34</sup> Optimists, however, point to these endorsements by the international community as giving the doctrine increasing legitimacy. As we will see, both assessments have some degree of merit.

## A short history of military intervention for humanitarian purposes

### Before the United Nations Charter

The principles that underpin humanitarian intervention and the R2P have origins in 15th century religious and 'just-war' theories, although the term itself was not used. Vitoria (1492–1546) viewed it as the duty of 'civilised' states to intervene in 'backward' states to end inhuman practices such as cannibalism and human sacrifice, and to spread Christianity.<sup>35</sup> Grotius (1583–1645) added to these criteria the suppression of idolatry, atheism and sexual immorality.<sup>36</sup> More generalized sentiments of this nature can be traced even further back to the work of Aristotle. *Politics* 'posit[ed] that war was a means to defend "the good life" and to help others "to share in the good life"'.<sup>37</sup> Similarly the principle of non-intervention, which underpins our current system of international order, is rooted in history. Since the 1648 Peace of Westphalia ended thirty years of brutal war in Europe, the notion of the nation state and the inviolability of its territory has been on the rise.<sup>38</sup> The underlying premise being that international order is best maintained by respect for non-intervention in the internal affairs of other states. Some authors have

31 SC Res. 1674, 28 April 2006, UN Doc. S/RES/1674.

32 United Nations, *Secretary-General Appoints Edward C. Luck of United States Special Adviser*, Press Release, February 2008, <http://www.un.org/News/Press/docs/2008/sga1120.doc.htm> (last visited 5 December 2009).

33 United Nations General Assembly, *Implementing the Responsibility to Protect*, 12 January 2009, UN Doc. A/63/677, available at <http://daccessdds.un.org/doc/UNDOC/GEN/N05/487/60/PDF/N0548760.pdf?OpenElement> (last visited 3 March 2009).

34 Alex J. Bellamy, 'Whither the Responsibility to Protect? Humanitarian Intervention and the 2005 World Summit', *Ethics and International Affairs*, Vol. 20, No. 2, 2006, pp. 143–169.

35 Bhikhu Parekh, 'Rethinking Humanitarian Intervention', *International Political Science Review*, 1997, pp. 50–51.

36 *Ibid.*, p. 51.

37 Sean D. Murphy, *Humanitarian Intervention*, University of Pennsylvania Press, Philadelphia, 1996, p. 37. Murphy also notes that the Jewish, Greek and Roman natural law traditions from which the Christian just war doctrine emerged contain ideas relating to the justice of using force against others: p. 62.

38 See Antonio Cassese, *International Law*, 2nd edn, Oxford University Press, Oxford, 2005, pp. 22–25.



described the two concepts, respect for the basis principles of humanity and sovereignty, as incompatible, noting that regard for humanitarian principles is 'subversive' and 'destined to foster tension and conflict among States'.<sup>39</sup> Although many theorists do recognize that sovereignty and respect for humanity are two sides of the same coin, the tension between the two is evident in both the work of theorists and the practice of states since the 15th century. Murphy articulates this well when he says:

'the earliest writers on international law (...) observed how states reacted to the anarchy (...) by building an international system [where] (...) the necessity of obedience of persons to their sovereign was firmly stated, but so was the right of a sovereign to intervene to protect the subjects of another sovereign from harsh treatment'.<sup>40</sup>

Literature referring to what we would today understand as humanitarian intervention dates from around 1840.<sup>41</sup> Brownlie asserts that by the end of the nineteenth century the majority of scholars had accepted the existence of a *right* of humanitarian intervention but goes on to note that the doctrine was 'inherently vague' and 'open to abuse by powerful states'<sup>42</sup>. There are various examples of interventions to suggest that European powers thought likewise.<sup>43</sup> In 1921, humanitarian intervention was described by Stowell as being:

'the reliance upon force for the justifiable purpose of protecting the inhabitants of another state from the treatment which is so arbitrarily and persistently abusive as to exceed the limits of that authority within which the sovereign is presumed to act with reason and justice'.<sup>44</sup>

A mixture of moral and legal arguments was put forward for the existence of such right. Some early 20th century writers even sought to argue that intervention could be justified as a 'quasi-judicial police measure'.<sup>45</sup> However, Chesterman notes that the examples used by those seeking to assert the existence of the right of humanitarian intervention really had very little in the way of state practice to rely on.<sup>46</sup> Furthermore, although in the inter-war period, the international community through the League of Nations provided an international force in the Saar plebiscite in 1934–35,<sup>47</sup> the Covenant of the League of Nations and the 1928 Kellogg-Briand Pact did not comment on humanitarian intervention, and the latter expressly prohibited war. Similarly the Kellogg-Briand's Latin American

39 *Ibid.*, p. 375.

40 S.D. Murphy, above note 37, pp. 62–63.

41 T.G. Weiss, above note 20, p. 8.

42 Ian Brownlie, *International Law and the Use of Force by States*, Oxford University Press, Oxford, 1963, p. 338.

43 For a discussion of these, see S.D. Murphy, above note 37, ch. 2.

44 T.G. Weiss, above note 20, p. 8.

45 S. Chesterman, above note 7, pp. 36–37.

46 *Ibid.*, p. 25.

47 Stephen C. Neff, *War and the Law of Nations*, Cambridge University Press, Cambridge, 2005, p. 297.

counterpart, the Saavedra-Lamas Treaty of 1933, expressly prohibited ‘intervention’ both armed and diplomatic.<sup>48</sup>

## The United Nations Charter and the Cold War years

The United Nations Charter established as a universal legal norm the doctrine of non-intervention. Article 2(1) states that the United Nations is based on the principle of the sovereign equality of all its members. Article 2(4) prohibits the threat or use of force against the territorial integrity or political independence of any state. Article 2(7) notes that nothing contained in the Charter authorizes the United Nations to intervene in matters which are essentially within the domestic jurisdiction of a state.<sup>49</sup> Articles 42 (collective security authorized by the United Nations Security Council) and 51 (the inherent right of self defence) articulate the two sole exceptions to article 2(4)’s prohibition on the use of force.<sup>50</sup> While this seems to paint a fairly clear picture of the prohibition on the use of force, the charter also affirms ‘faith in fundamental human rights’ in its preamble. In this regard the Charter has ensured that the dilemma, posed by the debates and tensions between sovereignty and assisting the oppressed, survives its operation. However, although some arguments are put forward to the contrary, it is fair to say that the predominant view has always been that the Charter did not intend to permit the use of force for the protection of populations from humanitarian crisis by states acting at their own discretion.<sup>51</sup> Furthermore, during this period the use of force for the protection of populations from humanitarian crisis by the international community did not gain any widely accepted legal precedent. In particular, the International Court of Justice rejected the possibility that a right of intervention by force could be consistent with international law. The Court stated that ‘whatever be the present defects in international organisation’ the right of intervention by force cannot find a place in international law.<sup>52</sup> (The International Court of Justice has also asserted that the use of force is not the appropriate method to monitor or ensure respect for human rights.)<sup>53</sup> Further, there was no mention by the Security Council of any issue of humanitarian concern during the period from 1945 until the Six Day War of 1967.<sup>54</sup> Indeed, intervention during the Cold War era has been described as being ‘undertaken unabashedly to promote

48 *Ibid.*, p. 296.

49 Charter of the United Nations, *Statute and rules of court and other documents*, International Court of Justice, The Hague, 1978.

50 *Ibid.*

51 Jeffrey L. Holzgrefe and Robert O. Keohane (eds), *Humanitarian Intervention Ethical, Legal and Political Dilemmas*, Cambridge University Press, Cambridge, 2003, p. 216.

52 International Court of Justice (ICJ), *Corfu Channel (United Kingdom of Great Britain and Northern Ireland-Albania)*, Judgement, *ICJ Reports 1949*, para. 29; S. Chesterman, above note 7, p. 54.

53 ICJ, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Judgement, *ICJ Reports 1986*, para. 268.

54 T.G. Weiss, above note 6, p. 136.

strategic ends' as opposed to humanitarian ones.<sup>55</sup> The analysis of ten prominent interventions in the period between 1945 and 1990 by the researchers for the Commission concludes that 'humanitarian justifications were most robust in cases where purely humanitarian motives were weakest'.<sup>56</sup> The Cold War period therefore did little to advance the legality of humanitarian intervention. The concept of humanitarian intervention received little attention. Although some military interventions occurred in failing states this was more the result of an extension of the Cold War than it was humanitarian in nature.<sup>57</sup> Humanitarian intervention went from being an inherently vague *right* which arguably existed in the pre-war years to a non-entity in the post-war years.

### From the first Gulf War to the Responsibility to Protect

Bellamy dates the origins of the emergence of the current notion of a 'humanitarian exception to the principle of non-intervention' to the 'invasions' in northern and southern Iraq in the 1990s.<sup>58</sup> Bellamy attributes the lack of public criticism of those interventions, from those nations that did not support them, as setting some form of precedent for future humanitarian interventions.<sup>59</sup> Western powers publicly justified their actions in humanitarian terms and the other nations 'were prepared tacitly to legitimate Western action'.<sup>60</sup> Further, Teson's analysis shows that in the years since the Gulf War the Security Council has passed a number of resolutions which indicate that the Security Council views the failure to protect human rights or prevent abuse as coming within the 'threats to peace and security' mandate.<sup>61</sup> These observations are certainly supported by the prominence of a number of humanitarian intervention theories in the 1990s. The phrase 'right to intervene' was coined by the cofounders of *Médecins Sans Frontières*, Dr Bernard Kouchner, and Professor of Law Mario Bettati. Francis Deng's work as Special Representative of the Secretary-General on Internally Displaced Persons developed the idea of 'sovereignty as responsibility'.<sup>62</sup> Kofi Annan sought to redefine the concept of state sovereignty by articulating it as being 'weighed and balanced against individual sovereignty, as recognized in the international human rights

55 Mohammed Ayoob, 'Humanitarian Intervention and State Sovereignty', *International Journal of Human Rights*, Vol. 6, No. 1, 2002, pp. 81–102.

56 ICISS, 'The Responsibility to Protect: Supplementary Volume', International Development Research Centre, Canada, December 2001, p. 67.

57 Paul Collier, *The Bottom Billion: Why the Poorest Countries Are Failing and What Can Be Done About It*, Oxford University Press, Oxford, 2008, p. 124.

58 Alex J. Bellamy, 'Motives, outcomes, intent and the legitimacy of humanitarian intervention', *Journal of Military Ethics*, Vol. 3, No. 3, 2004, pp. 216–232, at p. 218.

59 *Ibid.*, p. 218; Nicholas J Wheeler, *Saving Strangers: Humanitarian Intervention in International Society*, Oxford University Press, Oxford, 2000, p. 154.

60 N.J. Wheeler, above note 59, p. 154.

61 Fernando R. Teson, 'Collective Humanitarian Intervention', *Michigan Journal of International Law*, Vol. 17, 1995–1996, pp. 323–370.

62 T.G. Weiss, above note 6, p. 139.

instruments'.<sup>63</sup> The 'doctrine of the international community' was the then British Prime Minister Tony Blair's contribution to the discourse to justify what Russia, China and India saw 'as an illegitimate attempt to force Serbians and Kosovars to change their government and their political system'.<sup>64</sup> Orford calls the result of all of these theories gaining prominence a move from reliance on the Security Council to a 'more amorphous international community' as the 'guarantor' of human rights.<sup>65</sup> These ideas have also some found acceptance in regional law and politics. Significantly article 4(h) of the Constitutive Act of the African Union provides:

'The Union shall function in accordance with the following principles:

....

h. 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'.<sup>66</sup>

This provision has not been invoked to date and it remains to be seen if and when it is what the response of the Security Council and the rest of the international community will be. Use of this provision could be contrary to the United Nations Charter, as it seems to suggest that the African Union could take a decision to authorize intervention without resort being had to the Security Council.

As Welsh and Teson, among others, observe, by the end of the 1990s there existed state practice which evidenced, if not support, at least 'toleration', for United Nations authorized actions with an 'expressly humanitarian purpose'.<sup>67</sup> That said, however, there was no evidence of any international consensus on the *legality* of humanitarian intervention. Indeed, Teson is perhaps the strongest advocate of a right of humanitarian intervention<sup>68</sup> and even he makes the argument in support of such a right on the basis of morality not law.<sup>69</sup> It is fair to assert that the majority of international lawyers continue to express views that are in line with the International Court of Justice's interpretation in the *Corfu Channel Case* and its more recent decision in the *Nicaragua Case*.<sup>70</sup> However, many of the ideas prominent in the 1990s debates have been taken up by the Commission. It is against this background that we can now assess whether the R2P's articulation of the use of force for humanitarian ends differs such as to provide an advance on the 1990s

63 G. Evans, above note 12, p. 37.

64 J. Welsh *et al.*, above note 8, p. 492.

65 Anne Orford, 'Muscular Humanitarianism: Reading the narratives of the new interventionism', *European Journal of International Law*, Vol. 10, No. 4, 1999, pp. 679–711, at p. 680.

66 Constitutive Act of the African Union, adopted 11 July 2000, available at: [http://www.africa-union.org/root/au/AboutAu/Constitutive\\_Act\\_en.htm](http://www.africa-union.org/root/au/AboutAu/Constitutive_Act_en.htm) (last visited 14 May 2009).

67 Jennifer M. Welsh, *Humanitarian Intervention and International Relations*, Oxford University Press, Oxford, 2006, ch 4; see also F.R. Teson, above note 61.

68 Rein Mullerson, *Human Rights Diplomacy*, Routledge, London, 1997, p. 150.

69 F.R. Teson, above note 61.

70 R. Mullerson, above note 68, p. 150.

proposition that, although the resort to armed force may sometimes be ethically justified, it remains contrary to international law.<sup>71</sup>

## The Responsibility to Protect in light of previous articulations of humanitarian intervention

Gareth Evans, as co-chair of the Commission, is not surprisingly very quick to defend against any suggestion that the 'R2P is just another name for humanitarian intervention'.<sup>72</sup> Evans' assertion, that the R2P is designed to be about more than just coercive military intervention for humanitarian purposes, is clearly evidenced by the R2P's focus on prevention, non-military forms of intervention and post-conflict rebuilding, in addition to military intervention. In this regard, there is no doubt that the R2P provides a more holistic and integrated approach to conflict prevention, and the avoidance of human rights abuses and mass atrocities, than previous articulations of humanitarian intervention. However, notwithstanding the R2P's inclusion of responsibilities to prevent and rebuild, it is clear that the crux of the doctrine remains devoted to the question of military intervention. Indeed, the text of the Commission's report devotes by far the most paper to the responsibility to react. As such, after briefly making some general observations about the distinguishing features of the R2P's approach, the paper now turns to consider how different the 'responsibility to react' component of the R2P actually is compared with previous articulations of military intervention for humanitarian purposes.

### Responsibility *versus* right and protection *versus* intervention

The shift in language under the R2P, away from the ideas of a 'right to intervene' and 'humanitarian intervention', is of some significance. The Commission took the approach that the language of the debate was very important for three key reasons. First, there was a need to focus attention on the beneficiaries of the doctrine rather than the rights of the intervening states. Second, there was a need to incorporate the often neglected elements of preventative effort and post-conflict assistance. Third, the use of the word 'right' was problematic in that it 'load[ed] the dice in favour of intervention before the argument ha[d] even begun'.<sup>73</sup> Bellamy goes so far as to say that the use of language, to prevent abuse of the doctrine by those wishing to use humanitarian arguments to justify interventions that are anything but, is 'one of the two key strategies' adopted by the R2P 'for preventing future Rwandas and Kosovos'.<sup>74</sup> The meaning of 'humanitarian' is open to interpretation. Vitoria and Grotius had different ideas to that of the Commission; China and Russia often have different ideas to Britain and the United States. Further, the use of the word

71 Imer Berisha, *Humanitarian Intervention The Case of Kosova*, Kosovo Law Centre, Pristina, 2002, p. 29.

72 G. Evans, above note 12, p. 56.

73 ICISS, above note 1, pp. 16, 17.

74 A.J. Bellamy, above note 34, pp. 143–169.

‘humanitarian’ for military action has always been of concern to humanitarian actors. The International Committee of the Red Cross (ICRC), as well as some non-governmental organizations working in this field, stress the importance of neutrality and impartiality in their work: the argument being that, whilst the military can do good deeds (and certainly are often the organization with the best logistics chain to effectively support the civilian population), there is always an underlying political agenda to their actions. The military can never be acting in a truly humanitarian manner.<sup>75</sup> This is the case even when military engineers are, for example, constructing water-sanitation facilities for civilian use. As such, disposing of the term ‘humanitarian’ when discussing military intervention will certainly be welcome in some circles.

However, while the Commission’s reasoning behind the change in the language makes sense and is in keeping with the general approach of the R2P towards a more holistic, victim-focused approach, it should be understood that the phrase ‘responsibility to protect’ creates expectations. Terry warns against the use of the phrase, in particular by humanitarian organizations without the resources or mandate to actually provide protection.<sup>76</sup> Further, the word ‘protect’ is a very powerful one. There is a difference between intervention and protection:

‘It is one thing to intervene because the country in question is unstable and unable to provide protection to its citizens. It is quite another thing to enforce stability and provide protection for the citizens of that country, having once intervened’.<sup>77</sup>

That said, there seems to be consensus that speaking in terms of a responsibility to protect rather than a right to intervene provides a very significant departure from 1990s articulations of humanitarian intervention. Indeed, this language shift is seen by many as being very powerful.

Of course the terminology itself is not going to save lives. However, what it can do is go some way to making the military intervention aspect of the R2P appear different to previous articulations of humanitarian intervention. This may have the effect of invoking more widespread support for it. Certainly the R2P’s adoption (in part) by the World Summit Outcome Document goes some way to evidencing this. What may, however, be of more significance is what Weiss calls the ‘continuum of responsibility’ at the heart of the R2P, which he asserts is of ‘indisputable’ ‘utility’.<sup>78</sup> Welsh, Thielking and MacFarlane use the phrase ‘Spectrum of Responsibilities’.<sup>79</sup> Bellamy focuses on the ‘parameters of responsibility’:

‘[B]y defining the circumstances in which international society should assume responsibility for preventing, halting, and rebuilding after a humanitarian

75 Fiona Terry, ‘Humanitarian Protection Conference’, seminar delivered at Melbourne University, 22 February 2006.

76 *Ibid.*

77 Satvinder Juss, *International Migration and Global Justice*, Ashgate, England, 2006, p. 112.

78 T.G. Weiss, above note 20, p. 199.

79 J. Welsh *et al.*, above note 8, p. 494.

emergency and placing limits on the use of the veto, the commission aimed to make it more difficult for Security Council members to shirk their responsibilities'.<sup>80</sup>

Although *Agenda for Peace*, the work of former Secretary-General Boutros Boutros-Ghali, adopted a tripartite vision of peacemaking stressing the need for focus on both prevention and 'post-conflict peacebuilding',<sup>81</sup> this idea of a continuum of responsibility had not previously been picked up with such rigour as it has been in the wake of the R2P.

Added to the terminology change and focus on a continuum of responsibility is the idea of the authority and responsibility of states being subject to their capacity. Orford places great significance on this. She notes that while humanitarian intervention of the 1990s provided an exceptional and temporary measure in emergencies whereby authority and responsibility remained with the state, under the R2P authority and responsibility shift in cases of state failure. Orford stresses that the R2P grounds the authority and responsibility on the capacity to provide protection.<sup>82</sup> That is, the legitimacy of authority is based on protection. In this sense the R2P cannot be said to be altogether innovative. Deng gave considerable attention to the idea of 'sovereignty as responsibility'<sup>83</sup> and indeed, 'sovereignty as responsibility' itself is regarded as having earlier origins in the 'standard of civilization argument'.<sup>84</sup> Further, as Stahn recognizes, sovereignty has never been understood without reference to corresponding duties – at least *vis a vis* other states.<sup>85</sup> This is acknowledged by the International Court of Justice, which gave recognition to the concept obligations *erga omnes* (obligations owed to the international community by States) in the *Barcelona Traction Case*.<sup>86</sup> However, the R2P's refocusing of the discussion on the limits of sovereignty, in cases of large scale loss of life or ethnic cleansing, is certainly a positive development.

## The criteria for military intervention

### *Justa causa – genocide and large scale ethnic cleansing*

The idea of requiring a set *justa causa* for humanitarian intervention is clearly not new. For example, Thomas Aquinas articulated that the target entity of the intervention must have had some form of guilt.<sup>87</sup> Indeed, it has been suggested that the Commission's criteria are a reformulation of Augustine's doctrine of just war.<sup>88</sup>

80 A.J. Bellamy, above note 34, pp. 143–169.

81 Carsten Stahn, 'Responsibility to protect: political rhetoric or emerging legal norm?', *American Journal of International Law*, Vol. 101, No. 1, 2007, pp. 99–120, at p. 114.

82 A. Orford, above note 5.

83 T.G. Weiss, above note 6, p. 139.

84 M. Ayoob, above note 55, p. 84.

85 C. Stahn, above note 81, p. 112.

86 *Ibid.*, p. 112.

87 S.D. Murphy, above note 37, pp. 40–41.

88 S.N. MacFarlane *et al.*, above note 10, p. 980.

That said, the *justa causa* of the R2P is novel in so far as its subject matter – large scale loss of life and ethnic cleansing – is a reflection of the key humanitarian concerns of the late 1990s. Vittoria's concept of intervention sought to prevent cannibalism,<sup>89</sup> while today it seems the international community is more concerned with genocide. The longevity of this as mankind's prevailing concern remains to be seen. Some African states had favoured the inclusion of the overthrow of democratically elected regimes as part of the doctrine;<sup>90</sup> this was (and still is) also supported by some academics.<sup>91</sup> In 1945 France unsuccessfully proposed that the United Nations Charter be drafted so as to allow intervention in situations where 'the clear violation of essential liberties and of human rights constitutes a threat capable of compromising peace'.<sup>92</sup> Others have more recently suggested that the irradiation of weapons of mass destruction<sup>93</sup> and terrorism<sup>94</sup> should also invoke a responsibility to protect. However, the fact that the Commission has chosen to limit the R2P to apprehend large scale loss of life (with or without genocidal intent) or large scale 'ethnic cleansing' means that the R2P is not at risk of lacking cultural legitimacy or consensus, as may have been the case if concepts of democracy or certain aspects of human rights had been brought into play.<sup>95</sup> The universal condemnation of the large scale taking of life, and in particular genocide, gives the R2P universal credibility.

### *Right authority*

The R2P outlines that the Security Council should always be the first point of call on matters relating to military intervention. The Security Council should be the body that authorizes any intervention.<sup>96</sup> The United Nations Charter clearly provides for the use of force necessary to 'maintain or restore international peace and security' when authorized by the Security Council.<sup>97</sup> The idea of collective security dates at least to the Peace of Westphalia, which included a collective security mechanism (although this was never utilized),<sup>98</sup> and is not of itself controversial. However, as the High-level Panel notes '[t]he Security Council so far has been

89 See further B. Parekh, above note 35.

90 T.G. Weiss, above note 20, p. 201; see also F.R. Teson, above note 61, p. 333.

91 E.g. Paul Collier, *War, guns and votes: democracy in dangerous places*, Oxford University Press, Oxford, 2009.

92 J.L. Holzgrefe and R.O. Keohane, above note 51, p. 207.

93 S.N. MacFarlane *et al.*, above note 10, p. 989.

94 George R. Lucas, 'The Role of the International Community in Just War Tradition – Confronting the Challenges of Humanitarian Intervention and Preemptive War', *Journal of Military Ethics*, Vol. 2, No. 2, 2003, pp. 122–144.

95 Abdullahi Ahmed An-Na'im, 'Problems of Universal Cultural Legitimacy for Human Rights', in An-Na'im and Dend (eds), *Human Rights in Africa: Cross Cultural Perspectives*, The Brookings Institution, Washington DC, 1990, pp. 331–367; Inque Tatsuo, 'Liberal Democracy and Asian Orientalism', in J. Bauer and D.A. Bell (eds), *The East Asian Challenge for Human Rights*, Cambridge University Press, New York, 1999, pp. 27–59.

96 ICISS, above note 1, p. 53.

97 United Nations Charter, art. 42.

98 A. Cassese, above note 38, pp. 24–25.



neither very consistent nor very effective in dealing with these cases, very often acting too late, too hesitantly or not at all'.<sup>99</sup> Differing geo-political interests and agendas has meant that unanimous consensus of the permanent five members of the Security Council has rarely been achieved in respect of determinations of breaches of the peace, condemnations of acts of aggression or authorizations of the use of military force.<sup>100</sup> This lack of agreement leads to one of two consequences: inactivity and cries of Rwanda being repeated (the cases like Darfur and Zimbabwe) on the one hand and arguably morally legitimate, but illegal military interventions in for example Yugoslavia (by the North Atlantic Treaty Organisation), Liberia, and Sierra Leone (by the Economic Community of West African States) on the other.

The Commission's 'solution' to this problem is to discuss the potential roles of the General Assembly and Regional Organizations in authorizing military intervention. Of General Assembly authorization, the R2P says 'if supported by an overwhelming majority of member states, [it] would provide a high degree of *legitimacy* for an intervention'.<sup>101</sup> Specifically the R2P proposes the use of Emergency Special Sessions of the General Assembly established under the 1950s 'Uniting for Peace' procedures (which were designed to specifically address cases where the Security Council failed to maintain international peace and security) to authorize the use of force (by a two-thirds majority).<sup>102</sup> Of Regional Organizations' authorization, the comment that is made is that there is 'certain leeway for future action in this regard'.<sup>103</sup> While these ideas are of course very controversial they are not without significant academic and political precedent (if not any legal precedent). That intervention without Security Council authorization should be part of international law is not an idea confined to the post-Rwandan genocide world.<sup>104</sup> The Uniting for Peace resolution,<sup>105</sup> although of questionable legality, also evidences previous attempts to resolve Security Council deadlocks. Further, according to Dinstein, the legislative background materials to article 51 of the Charter note that the reference to collective self defence was intended to confirm the legitimacy of regional security arrangements.<sup>106</sup> The many proponents of the North Atlantic Treaty Organisation intervention in Kosovo have also raised various arguments to justify intervention without Security Council authorization.<sup>107</sup> More recently regional security organizations have looked to engage in military

99 Report of the High-Level Panel on Threats, Challenges and Change, above note 27, para. 202.

100 S. Chesterman, above note 7, pp. 114–115.

101 ICISS, above note 1, p. 53.

102 *Ibid.*, p. 53.

103 *Ibid.*, p. 54.

104 N.J. Wheeler, above note 59, p. 45.

105 UN General Assembly Resolution 377(V) A, 3 November 1950.

106 Yoram Dinstein, *War Aggression and Self Defence*, 3rd edn, Cambridge University Press, Cambridge, 2001, p.161, quoting Goodrick, Hambro and Simons, *Charter of the United Nations* (3rd edn, 1969), pp. 342–44.

107 See A. Cassese, above note 38; I. Berisha, above note 71.

interventions without any recourse being had to the Security Council.<sup>108</sup> Certainly all these arguments could help rebut the assertion that moves to legitimize collective security without Security Council authorization are against the spirit of the United Nations Charter. However, such arguments are not widely supported.

In sum, despite discussing the options at length, chapter six of the Commission report does not go so far as to permit bodies other than the Security Council to authorize the use of force to protect populations. Further, the paragraphs of World Summit Outcome Document that seek to embrace the R2P are entirely limited to those aspects which speak to collective action *through the Security Council*. Thus in this respect, it can be argued that even in theory, the R2P does not envisage a reassessment of international law so as to alter the ‘right authority’.

### *Right intention*

The primary purpose of an intervention must be to halt or avert human suffering.<sup>109</sup> That there are some criteria by which the ‘goodness’ of any use of force is judged is certainly not a new idea. Thomas Aquinas’s theory of just war required there to be an intention to promote good not evil.<sup>110</sup> There are, however, two aspects of this criterion that warrant further analysis in terms of the question of whether the R2P differs from previous articulations of humanitarian intervention. The first is the term ‘intention’. The second is the term ‘primary purpose’.

The Commission’s use of the word ‘intention’ rather than ‘motives’ or ‘purpose’ is potentially significant. In order to distinguish between these concepts, it is helpful to adopt an example Bellamy uses: a country could intervene with the intention of halting injustice but still be motivated by, for example, a desire to secure its borders.<sup>111</sup> Bellamy argues that looking at the intention of the intervener as opposed to its motives is significant because intentions are much easier to judge than motives,<sup>112</sup> seeing that they can be inferred from acts.<sup>113</sup>

The use of the term ‘primary purpose’ arguably presents a significant and positive departure from ‘classical’ humanitarian intervention (of which some would argue has never actually taken place) where the ‘threat or use of force (...) for the *sole* purpose of preventing (...) serious violation of human rights’<sup>114</sup> was

108 For example, the Economic Community of West African States (ECOWAS) intervention in Sierra Leone. ECOWAS and the Organisation of African Unity both included provisions in their respective charters which suggest that they are prepared to bypass the Security Council and engage in regional military action without seeking Security Council authorization.

109 ICISS, above note 1, p. 35.

110 S.D. Murphy, above note 37, pp. 40–41.

111 A.J. Bellamy, above note 58, p. 229.

112 *Ibid.*, pp. 227–229.

113 Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations*, Basic Books, New York, 1977, pp. 155–56; A.J. Bellamy, above note 58, p. 226.

114 Wil Verwey, *Het gebruik van geweld voor humanitaire doeleinden – Dwangmaatregelen voor humanitaire doeleinden en humanitaire interventie*, Advies Nummer 15, 18 June 1992, quoted in A.J. Bellamy, above note 58, p. 221.

required. The reference to 'primary purpose' may be viewed as a concession, but can perhaps be best viewed as a concession to reality. Humanitarian intervention critic Mohammed Ayoob argues that it is 'impossible to prevent considerations of national interest from intruding upon decisions' regarding humanitarian intervention.<sup>115</sup> This is a common (and valid) criticism of any attempt at military intervention. To have adopted a *sole* purpose criteria would, for this reason, undoubtedly result in the R2P never gaining momentum.

### *Last resort*

The 'last resort' criterion is criticized by some who warn that the time taken to exhaust other measures before using force is often the time in which the deaths of those most in need of protection occur. Furthermore, it has been argued that delays in invoking military intervention can result in any such intervention being 'politically less likely and practically more lethal'.<sup>116</sup> However, the inclusion of this criterion is unsurprising given the international community's Charter-based ideal to exhaust all peaceful means of dispute settlement before resorting to the use of military force.<sup>117</sup> As such there is nothing in this criterion to distinguish it much from previous articulations of humanitarian intervention. Furthermore, 'last resort' refers as much to the fact that any form of military intervention should be invoked in rare and extreme cases<sup>118</sup> as much as it does to the timing of the intervention itself.

### *Proportional means*

The Commission defines proportionality as meaning 'the scale, duration and intensity of the planned military intervention should be the minimum necessary to secure the humanitarian objective in question'.<sup>119</sup> Proportionality is a fundamental principle of *jus ad bellum*; its inclusion as a criterion for intervention is therefore necessary and uncontroversial. However, that is not to say that such importance has always been attributed to clearly articulating this requirement in previous situations of humanitarian intervention. Chesterman notes that 'it is curious that more writers did not comment on the modality of humanitarian intervention, given the amount of ink spilt on the question of its legitimacy'.<sup>120</sup> As such perhaps the main significance here, in contrast to previous articulations of humanitarian intervention, is that proportionality is clearly spelt out as a requirement.

115 M. Ayoob, above note 55, p. 85.

116 T.G. Weiss, above note 20, pp. 200–201.

117 United Nations Charter, Article 2(3).

118 S. Chesterman, above note 7, p. 40.

119 ICISS, above note 1, p. 37.

120 S. Chesterman, above note 7, p. 41.

### *Reasonable prospects*

The Commission notes that ‘military intervention is not justified if actual protection cannot be achieved or if the consequences of embarking upon the intervention are likely to be worse than if there is no action at all’.<sup>121</sup> That this criterion is so overt in the R2P is significant. Michael Ignatieff has made the comment:

‘It is not merely that no one wants to go in anymore. It is also that no one believes that, once you do, you can succeed and then come home. Fixing broken states once looked possible. In Afghanistan and Iraq, everyone has learned how difficult it is to stay this course.’<sup>122</sup>

The interventions in Afghanistan and Iraq might, as Ignatieff argues, put the world off invoking any form of military intervention for some time; however, if and when it does intervene it is vitally important that this criterion has been given explicit acknowledgement. Its importance in intervention decision making should never be overlooked. Doing so could and has led to disastrous consequences. That said, it is not clear how one might objectively and correctly evaluate if a proposed action ‘stands a reasonable chance of success’. Military strategists can certainly be relied on to some extent to undertake this analysis, but even the world’s military super powers can get this drastically wrong. Perhaps this is one area where much more work needs to be done: to create sub-criteria for evaluating whether there are ‘reasonable prospects for success’.

## **A practical reassessment of military intervention for humanitarian purposes**

International law, by its very consensus nature, will always be the result of a series of compromises. The R2P itself is the product of compromises. The Commission’s report acknowledges that some commissioners would have preferred a wider range of threshold criteria.<sup>123</sup> The issue therefore is whether this compromise leads to advancement on previous articulations of humanitarian intervention; or are we now just grappling with a new name for an old ‘inherently vague’ doctrine that has been unable to effectively protect a number of populations from mass atrocities? The R2P clearly seeks to distinguish itself from previous articulations of humanitarian intervention. That it theoretically does so in a number of ways is clear from aspects of the six criteria for military intervention, the shift in terminology from ‘right to intervene’ to ‘responsibility to protect’ and the focus on a continuum of responsibility. To conclude the evaluation, it is necessary to consider whether, in practical terms, the R2P overcomes many of the arguments against military

121 ICISS, above note 1.

122 M. Ignatieff, above note 9.

123 ICISS, above note 1, p. VIII.

intervention, so as to challenge the *opponents*, inspire the *agnostics* and *sceptics* and prove the *optimists* right. The problems posed by military intervention have been the subject of extensive academic discussion. The arguments seem to fit quite neatly into five categories: the rule of law, political will, consistency, perceptions of imperialism and feasibility. This is of course not the first discussion of this type.<sup>124</sup> It is hoped, however, that the distinguishing feature of this analysis will be its consideration of the R2P's ability (or inability) to overcome these five practical impediments to military intervention.

## The rule of law

The underlying dilemmas posed by humanitarian intervention are nicely put by the Commission when it states:

'For some the new activism has been a long overdue internationalization of the human conscience; for others it has been an alarming breach of an international state order dependent on the sovereignty of states and the inviolability of their territory. For some, again, the only real issue is ensuring that coercive interventions are effective; for others, questions about legality, process and the possible misuse of precedent loom much larger.'<sup>125</sup>

From a legal perspective two key issues arise in relation to humanitarian intervention. The first concerns the legality of the use of force. The second concerns the authorization of the use of force. Turning first to the issue of the legality of the use of force for humanitarian ends. Article 2(7) notes that nothing contained in the Charter authorizes the United Nations to intervene in matters that are essentially within the domestic jurisdiction of a state.<sup>126</sup> Chapter VII of the Charter, however, dictates that force (other than in cases of self defence) can only be utilized in situations which constitute a 'threat to peace'. Although the idea of using force for humanitarian ends had entered academic debate, and some incidents of state practice<sup>127</sup> evidence willingness on the part of the international community to try and protect vulnerable populations in this way, the idea remained subject to considerable controversy at the end of the 1990s. However, the adoption by the World Summit Outcome Document of paragraphs 138 and 139 of the R2P may signify the crystallization of customary international law, as evidenced by state practice and *opinio juris* in respect of the interpretation of 'threat to peace' in chapter VII of the United Nations Charter. That is, in the wake of 1990s developments such as the Security Council's determination on more than one occasion, that serious or systematic, widespread and flagrant violations of international humanitarian law

124 See for example, Thakur's 2002 article which addressed the question of the 'added value' of the R2P. This discussion framed the benefits of R2P as being 'balance, outreach, independence, comprehensiveness, innovativeness and political realism': R. Thakur, above note 4, pp. 325–27.

125 ICISS, above note 1, p. VII.

126 United Nations Charter, above note 49.

127 See particularly F.R. Teson, above note 61, on Somalia, Iraq, Kosovo and Rwanda.

may contribute to a threat to international peace and security,<sup>128</sup> as well as action taken outside the Security Council in Kosovo, the General Assembly has seen fit to acquiesce to such an interpretation. As such, genocide, war crimes, ethnic cleansing and crimes against humanity, can now surely be said to constitute ‘threats to peace’ pursuant to the United Nations Charter. This is the most significant legal advance provided by the R2P, and in effect its crowning glory. However, as we will see, despite this significant legal advancement, it seems little will change in respect of humanitarian intervention. This is because of the requirements in the Charter surrounding the authorization of the use of force.

The debates centre around two clauses of the United Nations Charter: article 2(4) (the prohibition on the use of force) and article 39 (which states that the ‘Security Council shall determine the existence of any threat to the peace and decide upon subsequent measures’). Many arguments have been put forward (in various combinations) to justify humanitarian intervention without Security Council authorization.

There are those that assert that the language of the Charter (specifically in that it prohibits the use of force ‘against the territorial integrity or political independence of any state’) does not exclude the use of force to ensure that other Charter values – such as human rights – are able to be enjoyed.<sup>129</sup> There are also those that rely on the International Court of Justice’s statement that the Charter does not cover the whole area of the regulation of the use of force<sup>130</sup> and that therefore humanitarian uses of force can operate outside the Charter. The argument is also made that since the Charter’s adoption, customary international law has developed to allow for humanitarian intervention and the Charter must accordingly be interpreted in light of the new customary norms. Humanitarian intervention is seen by some as a form of self-help that survived the adoption of the Charter.<sup>131</sup> There is also the view that intervention is lawful in cases of failed states because there is no state sovereignty to breach.<sup>132</sup> Another argument put forward is that the failure of the Charter’s collective security mechanisms means that the right of individual states to intervene is retained.<sup>133</sup> Finally, there are also those who maintain the argument that the resort to armed force can be ethically justified, although it is contrary to international law.<sup>134</sup>

These arguments may have some limited legal and academic merit. However, as we saw in chapter three, even in theory, the R2P does not seek to permit the use of force other than in self-defence without the authorization of the Security Council. ‘[W]e are prepared to take collective action, in a timely and

128 See for example SC Res 808 (1993), SC Res 827 (1993), and SC Res 955 (1994) establishing the International Criminal Tribunals for Rwanda and the former Yugoslavia.

129 ICJ, *Nicaragua*, above note 53, para. 176. See also J.M. Welsh, above note 67, p. 55.

130 ICJ, *Nicaragua*, above note 53, para. 176.

131 S. Chesterman, above note 7, pp. 52–53.

132 David Luban, ‘Just War and Human Rights’, in *Philosophy and Public Affairs*, Vol. 9, No. 2, 1980, pp. 160–181, at p. 169.

133 F.R. Teson, above note 61, S. Chesterman, above note 7, p. 57.

134 I. Berisha, above note 71, p. 29.

decisive manner, *through the Security Council*' (emphasis added) is the only operative military intervention component of the World Summit Outcome Document's 'endorsement'. As such, until such time as reform changes the international order, and the underlying premise of the United Nations Charter, the legal doctrine of non-intervention will remain a fundamental principle of the international legal system. Any use of force that is not sanctioned by the United Nations Security Council will undermine this.

Thus from a legal perspective, whilst the R2P can certainly be held up as confirming an international acceptance of the right of the United Nations Security Council to find a 'threat to peace' in cases of genocide, war crimes, ethnic cleansing and crimes against humanity, it does not change the fact that the use of force, other than in self defence, without United Nations Security Council authorization remains contrary to international law. I conclude therefore that, whilst somewhat momentous in a legal sense, the practical effect of the responsibility to react aspect of R2P is of little significance. It does not advance the legality of the use of force for humanitarian ends. Indeed the R2P effectively concedes that morally legitimate but illegal military interventions will continue to take place in order to protect populations due to inactivity by the Security Council.

## Political will

The discourse on humanitarian intervention is necessarily multidisciplinary, as the law does not operate in a vacuum. The question of whether there is political will for the R2P to deliver on its promise to the vulnerable must be added to any discussion of the legality of such a promise. Political will in this regard involves two aspects: the political will to embrace the R2P and the political will to provide appropriately resourced military forces with the legal mandate to enable them to protect.

Evans is critical of 1990s articulations of humanitarian intervention such as the 'right to intervene' and the 'doctrine of the international community' on the basis that these doctrines, while they 'rallied' the North, failed to engage the South.<sup>135</sup> Evans points to the adoption of the R2P by the African Union as evidence of the R2P's ability to bridge the North–South divide.<sup>136</sup> While the West are joined by some of sub-Saharan Africa and Latin America in supporting the R2P, the East Asian approach is much more 'cautious', Russia is 'lukewarm' and China disapproving.<sup>137</sup> As we have seen, United Nations papers subsequent to the R2P have adopted the idea that states should commit to 'helping States build capacity to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity' and 'to assisting those which are under stress before crises and conflicts break out' and to supporting 'collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter'.<sup>138</sup>

135 G. Evans, above note 12, p. 34.

136 *Ibid.*

137 S.N. MacFarlane *et al.*, above note 10, p. 982.

138 United Nations General Assembly, *2005 World Summit Outcome*, above note 30, para. 139.

However, the political will just does not exist to embrace the R2P's suggestion that when the Security Council fails, the right authority would be the General Assembly or Regional Organization. The author is perhaps not as inspired as Thakur was when he concluded of the Commission's report:

'the fact that a dozen people of diverse backgrounds and varied starting positions were able to agree on a challenging, substantial and wide-ranging report encourages us to believe that an international consensus can indeed be forged around the ideas and principles it contains'.<sup>139</sup>

As we have seen, in both Srebrenica and in Rwanda, a lack of resources and a lack of a mandate to actually provide protection is just as harmful (or perhaps more so) to humanitarian intervention efforts as a lack of will to intervene in the first place.<sup>140</sup> Indeed the willingness to put resources on the line is often a more pressing concern than respect for state sovereignty.<sup>141</sup> As Ayoob frames it 'even if they commit themselves to intervene for altruistic and humanitarian reasons (...) they will normally not be in a position to sustain such a commitment when faced by human and material costs'.<sup>142</sup> With the American military engaged in Afghanistan (and to some extent in Iraq still) for the foreseeable future, their support for any proposed operation is unlikely to be forthcoming. There is also a lack of interest in Europe – as Weiss notes, both by politicians and by populations – to spending money on defence such as to give Europe a military capacity independent to the United States.<sup>143</sup> Fatigue by those who have the resources to intervene (given the number of instances which would warrant such intervention) is a reality.

The six criteria of military interventions under the R2P and the notion of 'responsibility' seek to eliminate the question of political will. Strictly applied this doctrine would say that there is no question of political will. Rather, if the six criteria are met, the intervention takes place. Stahn notes that if this is the case then the doctrine is significant because it creates a positive duty. There are only very limited positive duties in international law and very little by way of implications for failing to comply with these duties.<sup>144</sup> Unfortunately, however, although the Commission has tried to be politically realistic and forward thinking, it has not been able to inspire the international community to agree to any positive duty. Ignatieff may be right in his assertions that the War on Terror and the war in Iraq have disengaged political will for humanitarian intervention. However, irrespective

139 R. Thakur, above note 4, p. 337.

140 See for example Fiona Terry, *The Paradox of Humanitarian Action: Condemned to Repeat*, Cornell University Press, New York, 2002; Mary Ellen O'Connell, 'The Responsibility to Protect (R2P): A way forward – or rather part of the problem?', *Foreign Voices*, Vol. 1, 2008, available at [http://www.humansecuritygateway.info/documents/FV\\_R2Pwayforwardorproblem.pdf](http://www.humansecuritygateway.info/documents/FV_R2Pwayforwardorproblem.pdf) (last visited 16 December 2009).

141 N.J. Wheeler, above note 59, p. 300.

142 M. Ayoob, above note 55, p. 85.

143 T.G. Weiss, above note 6, p. 141.

144 C. Stahn, above note 81, pp. 115–118.



of these recent events, national self-interest considerations still come first. The notion that the vulnerable are ‘merely strangers’<sup>145</sup> continues to resonate despite the Commission’s aspirations and solid humanitarian reasoning. Thus although the R2P is innovative and a progressive development of the law if understood in the sense of a positive duty,<sup>146</sup> there is no evidence of any political will to accept such a duty.

## Consistency

By the end of the nineteenth century the majority of scholars had accepted the existence of a right of humanitarian intervention. However, as Brownlie notes such doctrine was ‘inherently vague’ and open to abuse by powerful states.<sup>147</sup> Chesterman is among those who argue that a lack of consistency undermines the United Nations as a whole and is to be avoided.<sup>148</sup> On the other hand, however, there is a growing consensus that the inability to intervene in some cases of need should not prevent intervention were possible and necessary.<sup>149</sup> Fearing that the shortcomings of Operation Iraqi Freedom will leave the world shying away from military intervention and lead to ‘another Rwanda’ (which he describes as the aftermath of the failed intervention in Somalia) Collier argues in support of military intervention ‘but not necessarily everywhere’.<sup>150</sup> Others also accept the political reality of this approach. Ayoob and Weiss, who offer opposing views on many aspects of humanitarian intervention, both concede that ‘states will pick and choose’ and ‘selectivity (...) seems to be inevitable’.<sup>151</sup> In this sense the R2P has made a very practical contribution to the humanitarian intervention discourse. It has dismissed the lack of consistency arguments by asserting that just because interventions cannot be mounted in every case where they should be is no reason for not mounting them in any case.<sup>152</sup> It has significantly moved the debate on in this sense. Furthermore, without setting out a ‘shopping list’ as such for humanitarian interventions it has again articulated that criteria are a necessary aspect of reaching international agreement and come to some agreement as to their required content.

## Perceptions of imperialism

Humanitarian intervention always has the ‘potential of becoming a tool for the interference by the strong in the affairs of the weak, with humanitarian considerations providing a veneer to justify such intervention’.<sup>153</sup> The legitimization of the use of unauthorized force on ‘humanitarian’ grounds by way of camouflaging

145 N.J. Wheeler, above note 59.

146 C. Stahn, above note 81, p. 115.

147 I. Brownlie, above note 42, p. 338.

148 S. Chesterman, above note 7, p. 161.

149 G. Evans, above note 12.

150 P. Collier, above note 57, p. 128.

151 M. Ayoob, above note 55, p. 86.

152 ICISS, above note 1, p. 37.

153 M. Ayoob, above note 55, p. 92.

the interventionist policies of the West is a well-acknowledged concern of the South.<sup>154</sup> Further, humanitarian intervention presupposes that some societies know better than others<sup>155</sup> and that there is universal cultural legitimacy for a certain interpretation of human rights.<sup>156</sup> Reading the R2P report, it is evident that the Commission was keen to dispel any potential allegation that the R2P is a tool of imperialism. Indeed, proponents of human rights and humanitarian intervention alike argue that the Commission was quite timid in setting the bar for humanitarian intervention so high. The overthrow of democratically elected regimes and mass abuses of human rights could well have been included. Both situations have often been cited as creating conditions for humanitarian intervention. Certainly precedent, in the form of the Security Council-approved intervention in Haiti in 1994 to restore the elected government, as well as the *ex post facto* sanction by the Security Council of the Nigerian-led Economic Community of West African States mission to overthrow the government in Sierra Leone in 1997, can be found to support the former as valid humanitarian interventions.<sup>157</sup>

Specifically excluding these two situations marks perhaps the most significant way in which military intervention under the R2P is different from previous articulations of humanitarian intervention. Humanitarian intervention was predominantly seen as a human rights issue,<sup>158</sup> while the just cause criterion that the R2P adopts is focused on the most serious international crimes.

The argument made by some is that, by setting the bar high with regard to the gravity of the crimes required, the Commission has aimed low; but in aiming low there is more scope for saving lives, because the perception of imperialism and the ongoing debates about the universality of human rights are avoided. Weiss makes a valid point when he says that the R2P criteria for military intervention means that R2P cannot be a ‘smokescreen for bullies’ (he argues rather that the pressing concern in this respect is not humanitarian intervention at all, but rather the United States pre-emptive doctrine of self defence).<sup>159</sup> No doubt many governments will happily label the R2P as imperialism, but an objective observer must note its limited scope, which addresses only universally acknowledged crimes of the most serious nature.

## Feasibility

‘Inherent in the idea of humanitarian intervention is the contradiction that it is acceptable to kill and injure some, even wholly innocent people, to preserve human rights of others.’<sup>160</sup>

154 Thelma Ekiyor, ‘The Responsibility to Protect (R2P): A way forward – or rather part of the problem?’, *Foreign Voices*, vol. 1, 2008, available at [http://www.humansecuritygateway.info/documents/FV\\_R2Pwayforwardorproblem.pdf](http://www.humansecuritygateway.info/documents/FV_R2Pwayforwardorproblem.pdf) (last visited 18 December 2008).

155 D. Luban, above note 132.

156 A.A. An-Na’im, above note 95; I. Tatsuo, above note 95.

157 T.G. Weiss, above note 6, p. 139.

158 See for example M. Ayoob, above note 55, p. 81.

159 T.G. Weiss, above note 6, p. 142.

160 M.E. O’Connell, above note 140.

Of the 'humanitarian' interventions in East Pakistan in 1971, Idi Amin's Uganda in the 1970s and Pol Pot's Cambodia in the late 1970s the Commission's supplementary volume notes Kofi Annan's statement that 'few would now deny that in those cases intervention was a lesser evil than allowing the massacres to continue'.<sup>161</sup> These cold war interventions which are sometimes *ex post facto* cited as being examples of legitimate and worthwhile humanitarian interventions, were, at the time, the subject of declarations by intervening states about invoking the right of self-defence. Similarly Wheeler argues that in all three of these cases 'the use of force was the only means of ending atrocities on a massive scale'.<sup>162</sup> Similarly, Collier for example, makes the case for humanitarian intervention by holding up the British intervention in Sierra Leone in 2000 as being a model for military intervention, describing it as 'cheap, confident and sustained'.<sup>163</sup> However, as the government of Sierra Leone invited the intervention this cannot be said to be humanitarian intervention in the strict sense.

However, the question that really remains is: can lasting peace be brought by external intervention? As Kennedy notes:

'how easily ethical denunciation and outrage can get us into things on which we are not able to follow through – triggering intervention in Kosova, Afghanistan and even Iraq, with humanitarian promises on which we cannot deliver'.<sup>164</sup>

This is of course a question for which an answer is well beyond the scope of this paper. An analysis of all instances of external intervention (in which consideration is given to the whole multitude of additional factors that may have influenced peace or its opposing state – whatever that may be described as) is needed. Pickering and Kisangani have conducted some empirical studies around the consequences of intervention but conclude that significantly more work needs to be done in this area.<sup>165</sup> Furthermore, this issue is not addressed directly by the Commission. However, by including a specific responsibility to rebuild, the R2P goes some way to address the feasibility concerns associated with uninvited foreign military intervention.

## Conclusion

There are undoubtedly a plethora of unanswered questions in the development of the R2P, yet it is still a significant step forward for the international community in so far as it clearly articulates a holistic and integrated approach to protecting

161 ICISS, above note 56, pp. 67–68.

162 N.J. Wheeler, above note 59, p. 295.

163 P. Collier, above note 57, p. 128.

164 David Kennedy, *Of Law and War*, Princetown University Press, Princetown, 2006, p. 108.

165 Jeffrey Pickering and Emizet F Kisangani, 'Political, Economic and Social Consequences of Foreign Military Intervention', *Political Research Quarterly*, Vol. 59, No. 3, 2006, pp. 363–376.

populations from mass atrocities. It resoundingly supports the adoption of measures short of the use of military force that can save lives. Furthermore, military intervention under the R2P differs from previous articulations of humanitarian intervention in that it:

1. clearly articulates humanitarian intervention decision making criteria. These criteria reflect the views of various practitioners and academics in this field as set out in the literature to date as well as aspects of state practice;
2. asserts that an inability to intervene in one situation should not be used as a justification for not intervening in another;
3. limits the use of force by way of humanitarian intervention to situations of actual or apprehended large scale loss of life. It is not therefore intended to be a human rights advocacy tool but rather a protection against the most serious breaches of international humanitarian law. As such, it gains legitimacy rather than contributing to perceptions of imperialism; and
4. most significantly, its acceptance by United Nations confirms the legality of declarations by the Security Council in which they find genocide, war crimes, ethnic cleansing or crimes against humanity within the borders of one state constitute a threat to peace.

In sum, it is fair to say that the R2P builds in a positive way on the existing literature on humanitarian intervention. In particular it provides greater specificity to criteria for intervention that had begun to crystallize as a result of usage in both academic circles and state practice. The opponents therefore, who view the idea of humanitarian intervention as a return to semi-colonial practices dividing the world into the civilized (democratic and human rights observing) and the uncivilized (undemocratic and human rights abusing), do not give the doctrine its due. The R2P evidences a universal (rather than purely Western) acceptance that certain aspects of un-civilization can constitute a threat to peace.

However, the *optimists*, who view the R2P as a realistic and substantial step forward, are deceiving themselves. The R2P claims to novelty are exaggerated. It does not provide a real reassessment of humanitarian intervention such as to change the prospects of the world's most vulnerable. The R2P does not overcome the issue of a deadlocked Security Council and a lack of political will to actually protect vulnerable populations. The R2P's assertion that the world is moving towards a new regime in international law, whereby the authority of the United Nations Security Council is not always required for intervention in cases of 'serious and irreparable harm occurring to human beings',<sup>166</sup> is too far in the camp of the optimists and not grounded in political reality. As such it is the agnostics and sceptics, who see merit in many of the R2P's ideas but concede its lack of ability to resolve the fundamental problems of the operation of the United Nations Security Council, who are unfortunately proved most right: '[t]he history of efforts to make the Security Council more reflective of growing UN membership of a changing

166 ICISS, above note 1, p. XII.

world politics suggests slim prospects for change'.<sup>167</sup> Although the R2P's acceptance makes limited forms of humanitarian intervention legal, the R2P does not make military intervention without Security Council authorization any more legal than it was in the 1990s. Similarly, the R2P's acceptance does not make military intervention without Security Council authorization any more palatable to those who have always opposed it. Indeed, in the context of the post-Iraq War world, humanitarian intervention is arguably no longer on the agenda of many of those who once supported it.

The word promise is used only once in the R2P report. Nonetheless, the R2P is a promise, by the international community, to the world's most vulnerable. It promises that they will be protected from actual or apprehended large scale loss of life (with or without genocidal intent) or large scale 'ethnic cleansing'. I fear this is to be a promise cruelly betrayed by the current world order. Despite the efforts of the International Commission on Intervention and State Sovereignty, and the best intentions of those who seek to prevent another Rwanda, a solution is not forthcoming. It has been some 150 years since Mill stated '[t]here assuredly are cases in which it is allowable to go to war, without having ourselves been attacked (...); and it is very important that nations should make up there mind in time, as to what there cases are'.<sup>168</sup> Mill would therefore be disappointed at having to acknowledge the strength of Chesterman's point when he says '[t]he failure to reconcile the relevant Charter provisions with (...) customary international law analysis is indicative of how little has changed in the tenor of debate on humanitarian intervention over the last hundred or so years'.<sup>169</sup> Even if you argue that the United Nations Charter legally supports a wider use of force for humanitarian ends than this paper acknowledges, the reality is that, only when and where it meets the self-interest criteria of those nations with the capacity to protect vulnerable populations will such populations be protected.

167 T.G. Weiss, above note 6, p. 145.

168 John Stuart Mill, 'A Few Words on Non-intervention' in *Dissertations and Discussions*, Longmans, Green, Reader and Dyer, London, 1867, Vol. III.

169 S. Chesterman, above note 7, p. 45.