

The International Law and Policy regarding the Use of Force, Humanitarian Intervention, and the Responsibility to Protect¹

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Our first task is to properly define the concept being addressed. “Humanitarian intervention” as defined for purposes of the conference that gave rise to this book² clearly does not include such actions as the drone attacks that have been increasing in Pakistan and elsewhere under the rubric of what has been called the US “Global War Against Terror (ism/ists).” More broadly, the concept is distinguishable from counterterrorism actions aimed at protecting a state’s own nationals. And of course any doctrine of humanitarian intervention, properly speaking, should not include military actions taken under the pretext of humanitarian intervention but actually undertaken mainly for other reasons.

It is common to limit the concept of humanitarian intervention solely to military or, at least, coercive³ intervention; but while our main focus remains the use of force it is worth recognizing that it is often helpful to conceive creatively of an entire spectrum of actions available to be taken for humanitarian purposes, ranging from fact-finding to financial, economic, legal, diplomatic/political and policing as well as military means.⁴ Military actions, as always, should be undertaken only as a last resort after all other approaches have been tried, since military actions inevitably involve unintended consequences often including significant loss of life as well as other human rights violations.

While humanitarian intervention and the Responsibility to Protect doctrine relate to trends involving recognition of non-state actors and the protection of civilians, including responsibilities for multinational corporations,⁵ it is thus also improper to narrowly circumscribe the concept of humanitarian intervention by saying that it refers only or mainly to those situations where non-state actor armed groups and rebels are “asserting identity” against the “processes of

globalization,” a position ascribed to ICRC president Cornelio Sommaruga in our conference concept paper. Such a situation may have characterized, say, Kosovo, but it hardly seems to capture the essence or even accurately describe the main aspects of other situations where humanitarian intervention has been called for or invoked in recent years, such as those of the Sudan, the most recent war in Iraq, or even more recently the intervention in Libya (or the general non-intervention, as of the date of writing, in Syria).

Calls for humanitarian intervention are not limited to any particular politics or ideology (except perhaps human rights); both previously and currently in the US, for example, neoconservatives like William Kristol, Paul Wolfowitz, and Robert Kagan have often joined liberal hawks in making such calls (as happened in the case of Libya with respect to Hilary Clinton, Samantha Powers, and Susan Rice of the Obama administration).⁶ And it bears recalling that strong policy reasons may support humanitarian intervention, including “general considerations of humanity, and possibly even the deterrence of acts of internal aggression and repression.”⁷

The reality is that motivations for humanitarian intervention are rarely pure or simple. Even if authentic humanitarian motivations are part of the mix, strategic considerations of national interest are inevitably involved as well.

Contrary to conventional wisdom, humanitarian intervention as we have defined it is, broadly speaking, neither particularly new nor newly controversial.⁸ Precedents go back centuries, and existing international customary and treaty law have long entitled states to intervene for humanitarian reasons, under certain conditions. For many decades now, moreover, states have been obligated in various ways to prevent and punish what we now call genocide, war crimes, and crimes against humanity.

What appears most novel is the attempt under some versions of the new “Responsibility to Protect” (“R2P” doctrine) to expand traditional notions of humanitarian intervention beyond established international law to embrace actions by individual states or collective or regional action outside of or even in opposition to legal authorities including, today, the will of the UN Security

Council.⁹

Whether that is wise policy¹⁰ or advisable in the future remains debatable, but such a broad doctrine cannot be said to be required or even allowed as a general matter by current international law.

The Legal History Regarding the Use of Force

The legality of humanitarian intervention falls within the legal rules pertaining to recourse to war or armed force (*jus ad bellum*), as opposed to the rules governing the conduct of war (*jus in bello*). Legal rules governing recourse to war go back at least as far as Thucydides, whose *History of the Peloponnesian War* recounts debates on the subject.¹¹ Natural law conceptions from Aristotle and the Greek Stoics influenced law relating to war and force between princes and what we would call today “non-state actors” such as armed peasants or groups, just as natural law conceptions influenced other realms of law. Chinese and Islamic scholars developed rules governing constraints on war,¹² and Christian Scholastics such as St. Augustine¹³ and St. Thomas Aquinas took the lead in constructing “just war” theory, which as we will see continues to influence today’s global legal rules. This allowed war to be waged so long as it was, *inter alia*, for a “just cause,” with “right intent” (to do good and avoid evil), and with “right authority.”¹⁴

As the new Westphalian system of sovereign states was coming together in the early seventeenth century, the Dutch jurist Hugo Grotius¹⁵ wove together these separate strands of natural law and just war theory in his treatise *On the Law of War and Peace* (1625). Humanitarian intervention had been recognized before Grotius in the writings of the Scholastics, Suarez and Gentili,¹⁶ and among the just causes Grotius included for states going to war under the law of nations was to protect innocents against the domestic violation by a state of the laws of nature. Grotius dismissed the counterargument that this could serve as a pretext for war undertaken for other purposes, arguing that “a right does not at once cease to exist in case it is to some extent abused by evil men.” Recent invocations of R2P by Zimbabwe’s Robert Mugabe and by the Foreign Minister of Syria show the ongoing potential for such abuse.¹⁷

This early rationale for humanitarian intervention well-served the imperial interests of the Netherlands, with whom Grotius was trying to ingratiate himself. It is also worth noting that the influential conceptions of Grotius – pro-sovereignty but leaving room for humanitarian intervention – occurred at roughly the same time as the Westphalian settlement which nominally solidified the norms of sovereignty and non-intervention in the years leading up to 1648. And so the link between humanitarian intervention and imperialistic rationalizations has a venerable pedigree which continued to assert itself for centuries¹⁸ and still gives ammunition to critics¹⁹ today.

The following century, the Swiss jurist Vattel was more skeptical of but still allowed room for humanitarian intervention, being more concerned about the risk of pretextual interventions.²⁰ Vattel's ambivalent recognition reflected the longstanding debate that has characterized this subject. After Jeremy Bentham coined the term “international law”²¹ and his positivist disciple John Austin further narrowed its scope and ability to constrain nation states, international law became even more utilitarian and rationalist²² in the eighteenth century – increasingly divorced from even the idea of limits on force that were present in its natural law, “just war,” and Grotian foundations.

By the nineteenth century, as Von Clausewitz put it, war became merely policy pursued by other means,²³ as international law and imperialist practice allowed broad room for the use of force. Most international legal publicists accepted that a right of humanitarian intervention existed, although they differed about the circumstances in which it applied.²⁴ The growing prevalence of war and availability of bloody new technologies such as the machine gun and steamships, however, led to a call for renewed limits at the end of the nineteenth century. The weak limits of the 1899 and 1907 Hague Conventions resulted. The horrors of World War I prompted the resurgence of “just war” concepts,²⁵ as modified by a shift toward more institutionalized collective security (as opposed to unilateral security), with the 1919 establishment of the League of Nations including its arbitral and cooling-off periods, and then the 1928 Kellogg-Briand Pact (which among the 40 initial contracting states attempted to ban recourse to war except, implicitly, in self-defense).

The atrocities of World War II finally resulted in the creation of the United Nations in 1945. The UN Charter's Article 2 (4) requires all Members to "refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations."²⁶ The UN's purposes include maintaining the peace (by collective security if necessary) as well as promoting human rights.²⁷ The only exceptions to the bar against the use of force are (i) forceful collective security measures approved by the Security Council under UN Charter Article 42, to preserve the peace or human rights, and (ii) self-defense against an armed attack as provided for in Article 51. The reference to "threat or use of force" and the authorities in the UN Charter clearly encompass actions taken under the rubric of "humanitarian intervention," which are thus illegal without but legal with Security Council approval.

While Article 2 (7) provides that "[n]othing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state," it also provides explicitly that "this principle shall not prejudice the application of enforcement measures under Chapter VII." So the UN Charter endorses sovereignty, but sovereignty as including responsibility (a concept not only going back to Locke and the social contract theorists of the Enlightenment, but partaking of Confucian and other traditions of the duties of rulers and even the right to revolt against tyrants). From the outset, therefore, the sovereign equality on which the United Nations was founded was made subject to Security Council authority in fulfillment of the UN's purposes. Sovereignty today no longer connotes impunity for atrocities.

More like the Grotian than the Von Clausewitz approach, the bias of the UN Charter is thus both anti-war and tolerant of certain defensive and protective uses of force. The UN charter could even be said to embody core elements of just war theory ("just cause," "right intent," and "right authority"), since the Security Council authorizes the use of force only upon a determination that there has been a threat to or breach of international peace, akin to the Grotian notion of states acting to enforce the natural order of peace when that order is threatened by another state.²⁸

The overarching importance of human rights to maintaining peace (and as grounds for collective security action when rights are grossly abused) received a boost with the enactment of the Universal Declaration of Human Rights (UDHR) and the associated treaty network (including treaties such as the Genocide Convention). The UDHR is widely considered an authoritative interpretation of the human rights provisions of the UN Charter,²⁹ and many parts of it are recognized as customary international law.³⁰ Not only customary but also treaty law³¹ has long obligated states to punish genocide, war crimes, and crimes against humanity (which crimes may also encompass the atrocity of ethnic cleansing, which although not usually considered a crime in its own right under international law can constitute one of the other crimes³² and is another gross human rights violation typically included in R2P). Rape and sexual violence can also amount to war crimes, crimes against humanity or constitutive acts with respect to genocide, as the Security Council,³³ various tribunals, treaty bodies, and regional mechanisms have noted. The protection responsibilities of states thus derive “from the pre-existing and continuing legal obligations of States, not just from the relatively recent enunciation and acceptance of the Responsibility to Protect.”³⁴ Upon its enactment, the UN Charter reflected this customary and conventional law in its provision for collective security as authorized by the Security Council (which can include coordination with regional organizations like NATO).

Creative efforts in the wake of the NATO bombing in Kosovo to assert as legal a broader right of humanitarian intervention even absent Security Council authorization,³⁵ including under the rubric of an expansive version of the “R2P” doctrine allegedly allowing this, have not succeeded to date (as discussed in more detail below). Several of the leading NATO nations participating took pains to stress the Kosovo operation’s exceptional nature and limited precedential value in law.³⁶ In fact, unilateral military action risks being considered the crime of aggression.³⁷

The upshot of all this is that under established international law, military action is not legal unless it is either self-defense against armed attack (as contemplated by article 51 of the UN charter) or collective action approved by the Security Council. This approach leaves room for humanitarian intervention

approved by the Security Council, but it does not leave room at least in international law for humanitarian intervention that does not receive Security Council approval.³⁸

Review and Analysis of Recent Legal Developments, especially the “Responsibility to Protect”

The genocides of the 20th century occurring all over the world -- ranging from Armenia, to the Holocaust in Europe, to Cambodia, to the former Yugoslavia, to Rwanda, to Darfur -- have been a major impetus to calls for more effective legal and non-legal mechanisms to prevent and/or halt atrocities through various forms of humanitarian intervention, including military and non-military.³⁹ This is important to stop the immediate atrocities⁴⁰ occurring, but also to prevent the ongoing and systemic consequences from failing to prevent such atrocities (such as those still apparent in the DRC stemming from the failure to intervene to prevent the Rwandan genocide). Like the International Criminal Court and the special tribunals established in the wake of the Rwanda, Cambodia, Sierra Leone, and the former Yugoslavia therefore, humanitarian intervention is considered by many to be a way to uphold the rule of law globally and make a major contribution to addressing the enforceability gap that has long plagued international law.

The Late 20th Century Context and the Role of MSF

The doctrine of humanitarian intervention was given a boost when the nongovernmental organization Médecins sans Frontières (“Doctors without Borders” or MSF), led by co-founder and later French Foreign Minister Dr. Bernard Kouchner, advocated during the 1980s for a right and duty to intervene, regardless of sovereignty, to stop atrocities such as those that occurred during the war for Biafran secession in the late 60s.⁴¹ The French government under President François Mitterrand included the notion in several UN resolutions,⁴² but the concept was neither fully developed nor supported and obviously failed to be deployed to prevent atrocities in Somalia, the Balkans, or Rwanda.

The Role of Kosovo and the Independent International Commission on Kosovo

When the UN Security Council failed to approve the use of force to protect the Kosovar Albanians against Serbian atrocities, NATO intervened in 1999 without Security Council authorization, expressly invoking a humanitarian rationale⁴³ although NATO certainly had mixed motives for the intervention.⁴⁴ The Independent International Commission on Kosovo⁴⁵ established in August 1999 by the Prime Minister of Sweden and including Justice Richard Goldstone of South Africa, famously labeled the intervention “illegal but legitimate.” Then-UN Secretary-General Kofi Annan responded to the resulting controversy at the time of the UN General Assembly in September 1999 by issuing calls in several different fora (ranging from his millennium report *We, the Peoples*, to *The Economist* magazine)⁴⁶ for the international community to address the dilemmas highlighted by Kosovo regarding how to protect human rights while respecting sovereignty.

*The Role of the International Commission on Intervention and State Sovereignty (ICISS)*⁴⁷

The International Commission on Intervention and State Sovereignty (ICISS) was another ad hoc commission, created in September 2000 in part to help resolve this challenge. The government of Canada was a prime mover behind the ICISS and the UK government strongly supported the effort as well.

The nearly all-male ICISS, co-chaired by former Australian Foreign Minister Gareth Evans and former Algerian diplomat Mohamed Sahnoun, presented its report, *The Responsibility to Protect*,⁴⁸ about a year later -- in December 2001. The report reiterated the tension between what it called the “internationalization of the human conscience” and what others viewed as an alarming breach of the established order of state sovereignty on which international peace and stability depended. The report defines the R2P as “the idea that sovereign states have a Responsibility to Protect their own citizens from avoidable catastrophe – from mass murder and rape, from starvation – but that when they are unwilling or unable to do so, that responsibility must be

borne by the broader community of states.”⁴⁹

The report was careful to distinguish R2P from counterterrorism actions, although it problematically and uncritically assumed that *military* responses to terrorism were fully justified under the article 51 right to collective or individual self-defense in the UN Charter.⁵⁰

The ICISS Report’s Articulation of a Responsibility to Protect

The R2P identified by the ICISS is very broad indeed: it applies to supersede the principle of non-intervention whenever “a population is suffering serious harm, as a result of internal war, insurgency, repression or state failure, and the state in question is unwilling or unable to halt or avert it.” The contents of the duty is said to include three “elements” or “sub-duties”: (i) a prior responsibility to “prevent” that supposedly obligates the international community to address “both the root causes and direct causes of internal conflict and other man-made crises putting populations at risk,” (ii) a subsequent responsibility to “react” that may include coercive measures like sanctions, arms embargoes, international prosecution or “in extreme cases military intervention,” and (iii) a responsibility to “rebuild” that envisions “full assistance with recovery, reconstruction, and reconciliation, addressing the causes of the harm the intervention was designed to halt or avert.”

By putting the bookends of prevention and rebuilding around a more broadly defined central obligation to react, the ICISS usefully called attention to the fact that these decisions are not and should not be made in a vacuum, but are both temporally and substantively connected in a continuum of obligations. It would clearly be a major advance, and exponentially less costly in terms of lives saved as well as monetary expenditures, if the UN and the international community could more effectively and proactively prevent atrocities before they occur, instead of merely reacting to them afterwards. And that should be possible, as violence on this scale typically is accompanied by planning, preparation, and warning signs that could be the basis for greater awareness and preventive action.

Yet what the ICISS “giveth,” the ICISS can “taketh away.” After asserting a staggeringly broad right to intervene even militarily, the ICISS drew implicitly on “just war” theory as complemented by common sense and a dash of realism in an attempt to place boundaries around the greatly liberalized authority to use military force that it urged. How successful they were in influencing real-world practice remains very open to question.

The “Just Cause” Threshold and Four Precautionary Principles

The ICISS description of R2P very helpfully set forth a number of threshold and precautionary “core principles.” As an initial matter, the military intervention must meet a “just cause threshold” of “serious or irreparable harm” occurring “or imminently likely to occur” to human beings, that involves:

- 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.

These sound reasonable enough; putting aside the fact that from the individual perspective a violation of that individual’s rights is what matters, it makes sense to have at least some rough quantitative as well as qualitative thresholds as prerequisites to intervention, and a requirement that the harm be serious and “large-scale” is as good as most, although the fact that they can be “apprehended” as well as actual – while understandable and important -- raises obvious potential for abuse.

The same may be said for the other “precautionary principles.” While the “right intention” of halting or averting human suffering supposedly must be the “primary purpose” of the operation, said to be “better assured with multilateral operations, clearly supported by regional opinion and the victims concerned,” motives are obviously difficult to prove and the question of motives has often been proven to be quite capable of manipulation historically. Thus, humanitarian motives were invoked in connection with the Japanese occupation

of Manchuria, Mussolini's invasion of Ethiopia, and Hitler's invasions of Austria and Czechoslovakia.⁵¹

At least the ICISS version of R2P points to the possible supporting evidence of humanitarian motive to be found in "multilateral operations, clearly supported by regional opinion and the victims concerned": but is this evidence reliable? After all, multilateral operations as well as unilateral can be undertaken for cold-hearted reasons of national interest as well as humanitarianism, "regional opinion" is not always "clear," and aren't there usually contesting allegations regarding who the real "victims" are in such situations? Such difficulties have led some scholars to largely cast aside considerations of motive, focusing instead on the evidence emerging afterward, especially whether the operations focused on humanitarian goals, ended afterwards, and did not extend for example to improper resource appropriation or control.⁵² While relevant, post-hoc analysis fails to provide adequate guidance in advance of a given operation, meaning that some analysis of motive is likely to remain relevant at least to determine whether an operation passes some minimal "smell test," so long as the usual existence of non-humanitarian motives in addition to humanitarian motives does not preclude an action otherwise passing muster.

After "right intention," the second "precautionary principle" is the classic one that military intervention is justified only as a "last resort"—to be used only after "every non-military option for the prevention or peaceful resolution of the crisis has been explored, with reasonable grounds for believing lesser measures would not have succeeded." While this principle is just as crucial as the requirement for the "right intention" of an authentic and primary humanitarian purpose, it too has all-too-often been more honored in the breach, historically, than in the observance.

The third "precautionary principle" is another classic one from the law of armed conflict/law of war (which is often oxymoronically called humanitarian law): proportionality. This requires that "[t]he scale, duration and intensity of the planned military intervention should be the minimum necessary to secure the defined human protection objective." This principle remains an important

and laudatory attempt to restrain the excesses of war, and the fact that it, too, is often subject to the vagaries of debate and interpretation in no way makes it any less welcome in the humanitarian intervention context.

The fourth and final “precautionary principle” also derives from “just war” theory: reasonable prospects of success in halting or averting the suffering which has justified the intervention, with the consequences of action not likely to be worse than the consequences of inaction (thus overlapping with the proportionality principle to some extent in contemplating that more good than harm be done). Again, this is a vital and laudable limiting principle, but one similarly subject to human biases, cognitive errors, and flawed assumptions of success that have plagued military actions throughout history including, notoriously, the recent operations in Afghanistan, Iraq, and arguably perhaps Libya today. In short, this one is also “easier said than done.”

“Right Authority” and Sound Operations

The law of armed conflict/law of war also influences two other requirements: right authority, and sound operations. In terms of “right authority,” even the ICISS version of R2P generally maintains the primacy of the UN Security Council, which is charged with seeking “adequate verification of facts or conditions on the ground that might support a military intervention” and acting “promptly” when there are allegations of large scale loss of human life or ethnic cleansing. The Permanent Five members of the Security Council are urged not to exercise their veto power when a majority of the Security Council agrees, unless their “vital state interests” are involved, according to a new “Code of Conduct” the ICISS recommends.⁵³ If the Security Council rejects or fails to act, the ICISS contemplates that there could still be authorization by the UN General Assembly (acting under the “Uniting for Peace” procedure),⁵⁴ or by a UN Charter chapter VIII regional organization like NATO. The ICISS seems to take a quite aggressive interpretation of the Uniting for Peace authority of the General Assembly, which by its terms is limited to making legally non-binding “recommendations” as opposed to authorizations regarding military force⁵⁵ (although the General Assembly can investigate and has roles in mediation and peacekeeping as well). Moreover, the ICISS contemplates that action in the

regional organization case, putatively unlike the General Assembly alternative, would still be subject to “seeking subsequent authorization” from the Security Council – although the time frame for this is undefined and, especially if the Security Council previously rejected the action, this would seem to be a modification of current law and one that could open the door to significant erosion of Security Council authority as well as various unintended consequences and risks. The ICISS *Responsibility to Protect* report also opens the door to military intervention unapproved by the Security Council by reminding the Security Council that [it]:

. . . should take into account in all its deliberations that, if it fails to discharge its responsibility to protect in conscience-shocking situations crying out for action, concerned states may not rule out other means to meet the gravity and urgency of that situation – and that the stature and credibility of the United Nations may suffer thereby.

The remaining operational considerations are mainly reminders of key lessons learned from recent problematic interventions, including: the need for a clear objective and resources, incrementalism in deploying force, remembering that the objective is protection of the population and not defeat of a state (i.e. regime change), and maximum possible coordination with humanitarian organizations.

These criteria identified by the ICISS report, drawing on long-standing just war traditions and international law, represent a very concise and useful reminder of crucial considerations before the use of force could be considered legitimate.

Still, problems remain with the R2P doctrine as proposed by ICISS. For example, the legal foundations of the new doctrine are said to include Security Council authorization to keep the peace; but this new humanitarian intervention doctrine points to supposedly “developing” state practice as a way to potentially circumvent Security Council approval in situations where the Security Council is unable or unwilling to act. The extent and legality of that state practice remained ill defined, and the idea of a regional organization’s acting against the

express decision of the Security Council is especially problematic in both law and policy. To take another example: “prevention” options are distinguished from intervention, and are highlighted as the “single most important dimension of the responsibility to protect.” Yet while they are supposed to be prioritized and “exhausted” before intervention is even “contemplated,” there are obvious risks that these prevention options will not be given the weight in practice that they should be given in theory, and the ICISS report identifies few means in practice to change this persistent reality.

The Secretary General’s High-Level Panel on Threats, Challenges, and Change

A version of the R2P was also endorsed by a High-Level Panel of eminent persons constituted by Secretary-General Kofi Annan early last decade. The High-Level Panel’s report recommended in slightly different language criteria very similar to that identified by the ICISS before any Security Council authorization to use military force would be legitimate, including “seriousness of threat, proper purpose, last resort, proportional means and balance of consequences.”⁵⁶ But notably, the panel retreated to the traditional idea that the *Security Council* must authorize such actions.⁵⁷ This occurred despite the fact that the High-Level Panel included Gareth Evans (Co-Chair of the ICISS, closely associated with the more expansive version of the R2P) and several ICISS members.

The UN General Assembly’s 2005 Endorsement of the Responsibility to Protect

The UN General Assembly’s 2005 endorsement of a version of the R2P⁵⁸ occurred after detailed negotiations at one of the largest gatherings of governments and heads of state in history. The endorsement was contained as part of the World Summit Outcome, contained in a much broader, comprehensive resolution addressing many other subjects. The endorsement remains at a fairly general level and represents a much more limited statement than that of the ICISS, which is probably why it makes no attempt to preserve the careful legitimacy criteria present in the prior ICISS and High Level Panel

elaborations:

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

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

Several things are noteworthy about this official discussion by the General Assembly of a very different and less-developed “R2P.” First, unlike the ICISS and High Level Panel versions, the emphasis at the outset remains on the

responsibility of individual sovereign states to protect their populations from atrocities. Second, the emphasis then turns to prevention (as opposed to military intervention) and the desirability of the international community helping states to exercise that obligation “as appropriate.” Third, this version encourages states to support the United Nations in establishing an early warning capability. Fourth, the General Assembly resolution then emphasizes the obligation to use peaceful, diplomatic, humanitarian, and other non-violent, non-coercive means to protect populations from atrocities (including those under Chapters VI and VIII of the UN Charter, as opposed to the more coercive and violent measures available under Chapter VII). Fifth, then and only then, “should peaceful means be inadequate and national authorities [be] manifestly failing to protect their populations” from the four categories of atrocities, do the nations of the General Assembly say that they are prepared to take collective Security Council action possibly including military action under Chapter VII. Although the “international community” is said to have the obligation referenced in paragraph 139, note that this is “through the United Nations” and (in the next sentence) “through the Security Council, in accordance with the Charter.”⁵⁹ Sixth, the R2P doctrine and associated implementation mechanisms are confirmed as still somewhat inchoate and developing, with the General Assembly enjoined to “continue consideration of the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity and its implications, bearing in mind the principles of the Charter and international law” (which would presumably include not only human rights but sovereignty). Finally, the General Assembly resolution returns to its original emphasis on the responsibility of individual states to prevent atrocities, referring to the need to build capacity for proactive prevention and protection “before crises and conflicts break out.”

Unlike the ICISS report, and notwithstanding the widespread discussions and assumptions to the contrary, the General Assembly’s version is thus more a restatement of existing law than any radical new doctrine. The biggest obstacles to more frequent use of existing legal authorities to stop atrocities stem more from elusive political will and perceived clashes with the national interests of the Permanent Five members of the Security Council than any other factors. Notwithstanding these practical difficulties, strong policy considerations

reinforce the longstanding legal approach, including what would be a risky precedent allowing humanitarian intervention outside of the context of Security Council approval. If it is allowed for one state or group of states, it can easily be allowed for another state or another group, which could risk quickly devolving into a war of all against all.

In reaching its conclusion, the General Assembly had before it not only the ICISS report, but also the report of the High-Level Panel and the Secretary-General's report from earlier that year, *In Larger Freedom*. While *In Larger Freedom* rightly stated that "no legal principle -- not even sovereignty -- should ever be allowed to shield genocide, crimes against humanity and mass human suffering," it too mentions only the Security Council when discussing the ultimate decision to use military force in connection with such humanitarian intervention/R2P.⁶⁰

Those who prefer to see more than that might argue that the General Assembly resolution reflects or even incorporates by reference the content of the prior, unofficial ICISS effort. But that would be patently untrue and misleading. The most one can argue about the ICISS report is that it forms a useful part of the relevant background context that was available to the General Assembly at the time, was considered along with the other documents but not fully embraced, and remains available to inform discussions regarding existing law including the "soft law"⁶¹ resulting from the official General Assembly resolution. But the different and more conservative emphasis of the subsequent official General Assembly resolution, having taken the prior, unofficial ICISS report into account in deliberations and negotiations, clearly takes precedence as a matter of legal authority. Indeed, that there was any General Assembly reference at all using any language regarding a responsibility to protect is actually quite remarkable in light of the massive questions ongoing at the time regarding the relatively unilateral US intervention in Iraq.

So we are left with a reaffirmation of individual state sovereignty *and* a "weak" version of R2P, with theoretical recourse to military action authorized by the UN Security Council (perhaps cooperating with regional organizations) in the event that peaceful means such as mediation or preliminary coercive means

such as threatened international prosecution are inadequate. There is no reference to or toleration of any unilateral action by any state or regional organization or even the General Assembly itself, as envisioned by the ICISS report. The reason that the explicit international legal constraints and criteria previously emphasized (in the ICISS report, the High-Level Panel's report, and the Secretary General's *In Larger Freedom* report) were dropped in the General Assembly resolution may be because they were deemed unnecessary. After all, the General Assembly World Summit Outcome resolution basically restated existing law and policy which include such prudential considerations at least implicitly and in theory; the prudential "just war" criteria are even included explicitly to some extent, for example, in the references to the various provisions of the UN Charter and the need to first try peaceful means before resorting to force.

Reaffirming the usual reliance on the Security Council similarly should also have the benefit (via checks and balances) of validating, at least to some extent, the traditional "right intent" element, and mandating caution in the use of force (with the Security Council continuing to be a safeguard against overuse of such an intervention doctrine), while leaving the door open to military intervention in extreme situations. The attention to R2P does highlight the need for action regarding atrocities. But it also leaves intact the dilemmas which have driven discontent regarding current law, including the perceived and actual difficulties of relying so heavily on the Security Council with all its baggage of being subject to political and other perceived interests of members including the Permanent Five.

Operationalizing the Responsibility to Protect

In January 2009, the UN Secretary-General reported on ways to "operationalize" the R2P.⁶² An explicit aim of the report was to "discourage States or groups of States from misusing the responsibility to protect for inappropriate purposes" by more fully developing "the United Nations strategy, standards, processes, tools and practices for the responsibility to protect."

The Secretary-General sets forth three pillars to guide action: (i) the

protection responsibilities of the state (involving the reminder that sovereignty entails duties and not just privileges), (ii) international assistance and capacity building, including greater development assistance to poor countries (which would reduce but not eliminate the risks of violent competition for resources),⁶³ and (iii) timely and decisive response from among the many options available including but not limited to military force.

Notably, the Secretary-General takes the opportunity to reiterate that “[i]n accordance with the Charter, measures under Chapter VII must be authorized by the Security Council” (although he also recognizes, in a more accurate and constrained way than the ICISS report, that if the Security Council is unable to act, the General Assembly may make legally non-binding recommendations⁶⁴ e.g. under the Uniting for Peace resolution⁶⁵).

Security Council Action

By paragraph 4 in its resolution 1674 in 2006 (on the protection of civilians in armed conflict),⁶⁶ which it has recalled in subsequent resolutions such as resolution 1706 in 2006 on Darfur,⁶⁷ the UN Security Council reaffirmed the more general, limited, and traditional version of R2P contained in the two paragraphs of the 2005 General Assembly resolution discussed above.⁶⁸ The Security Council’s recent authorization of military force to protect civilians in Libya is further affirmation of that version of the doctrine. Since the Security Council is the highest legal authority in the global order, at least in terms of maintaining international peace and security,⁶⁹ this definitively settles the question at least for now⁷⁰ and confirms that the more expansive version of R2P advocated by the ICISS report has not yet been accepted into law.⁷¹ As the Secretary-General has noted, “the responsibility to protect does not alter, indeed it reinforces, the legal obligations of Member States to refrain from the use of force except in conformity with the Charter.”⁷²

Recent Cases, Especially Libya

The conventional wisdom regarding Kosovo – that the 1999 NATO intervention was, in the words of the Independent International Commission on

Kosovo, “illegal but legitimate” – has come under attack from a variety of quarters, including those who question not only the operation’s legality but also its legitimacy and effectiveness in light of atrocities on the Kosovan side (the Kosovo Liberation Army) as well as the Serbian side, and supposed new evidence including from the trial at the International Criminal Tribunal for the Former Yugoslavia of former Serbian President Slobodan Milošević, which indicated that the atrocities did not diminish but escalated after the NATO bombing started⁷³ (although this might have been an escalation of pre-existing ethnic cleansing plans). In the case of Kosovo, the centrifugal forces unleashed by NATO’s intervention ultimately resulted in Kosovo’s declaration of independence; but military intervention can also reinforce state authority, e.g. by being deployed on behalf of a state against armed groups which commit atrocities.⁷⁴

In general, consent-based prevention, protection, peacekeeping, and disarmament by the UN, regional, or subregional organizations has a better track record than more coercive military intervention, which the Secretary General has acknowledged has occurred “less frequently and with more mixed results.”⁷⁵ But consent is not required for an operation to be legal under Chapter VII Security Council authority.

The UN Security Council authorized humanitarian force on an exceptional basis in Haiti both in 1994 and again in 2004 (without express reference to the R2P concept but including some of its substantive concerns) in order to address a perceived threat to peace and security and protect democracy and human rights.⁷⁶

As noted above, a limited version of R2P was referenced in connection with Security Council resolutions regarding Darfur, Sudan beginning in 2004 and especially in 2006.⁷⁷ There have been no meaningful R2P Security Council actions regarding Somalia or Sri Lanka despite the serious human rights violations, atrocities, internally displaced people and refugees associated with those conflicts.

China and Russia vetoed a draft resolution in 2007 on Burma/Myanmar, on

the ground that the military attacks against minorities there were the internal affairs of a sovereign state as opposed to a situation that threatened international or regional security or a breach of the peace. The perceived short-term national security interests of two Permanent Five Security Council members clearly took precedence in this instance.

There were also calls from France and other quarters to invoke R2P in dealing with natural disasters such as Cyclone Nargis in Burma/Myanmar, but these too have been strongly resisted by powerful nations such as China⁷⁸ and have not gained much traction.

As noted previously, Russia's attempt in 2008 to invoke R2P regarding its invasion of South Ossetia, Georgia was quite evidently pretextual; such unilateral action by a state to putatively protect its citizens would not be legal under the proper R2P doctrine, which again requires Security Council authorization.

While the R2P was invoked by some (e.g. UN Special Rapporteur on the Occupied Palestinian Territories, Richard Falk) in connection with the 2008-9 incursion by Israel into Gaza,⁷⁹ the Security Council took no action.

The Security Council has also referenced R2P both directly and more indirectly in its resolutions on Côte d'Ivoire,⁸⁰ and even more indirectly in its resolution authorizing the Hybrid AU/UN (UNAMID) force for Darfur in 2007.⁸¹ (A resolution merely referring to the obligation of the state to protect civilians, then authorizing a force, is a more indirect reference than one that also speaks explicitly of the responsibility to protect, and/or references the obligation of the international community to step in should the state fail in its responsibility.)

Interestingly, the language of the Security Council resolution 1973 authorizing military force in Libya emphasizes the responsibility of "the Libyan authorities" to protect the population. Although R2P proponents properly point to the recent Libyan case as an instance of R2P implementation,⁸² it is noteworthy that the Libyan case involved Security Council authorization and wasn't the unilateral action previously advocated part of the core R2P concept

e.g. in the ICISS report. The fact that the Security Council's more recent resolutions (such as that regarding force in Libya) no longer say "exceptional" as they did in the 90's (e.g. re Haiti) reflects the fact that the legal authority of the Security Council to act in such situations is now more accepted.

More importantly, although the Security Council is undoubtedly the "right authority" under global law to take actions against such threats or breaches to the peace, increasing questions arose as the Libyan operation proceeded regarding whether the Security Council gave adequate consideration to the full panoply of legitimacy factors and precautionary principles counseled by just war theory, the ICISS report, the High-Level Panel reports, and the key UN Secretary General reports on the subject.

On the question of whether there was "just cause," Col. Gaddafi and members of his family indeed made very disturbing threats of a "bloodbath" that would show "no mercy" to the rebels in the city of Benghazi. He even referred to the rebels for example as "cockroaches" – recalling the dehumanizing rhetoric that preceded e.g. the Holocaust, the Cambodian, and Rwandan genocides. These are indeed very serious early warning indicators for possible extreme violence (even though such extreme rhetoric was the Libyan regime's modus operandi for decades), and so should be taken seriously. But whether the remarks themselves are sufficient to amount to "just cause" for a military intervention is another matter entirely.

In the case of Libya, as in so many other cases, the assertion of "just cause" amounts in practice to an assertion that one side in a civil war – a small and disorganized band of weak rebels, in this case – is the side that truly carries the banner of justice and law. That has become increasingly problematic as more has been learned about the mixed nature of the rebels, some of whom were perhaps associated with al Qaeda, and others of whom seemed to be acting more out of self-interest than anything else. But the NATO forces rapidly evolved from the neutral posture associated with impartially defending civilians to being very clearly associated with the rebel side in the conflict – a factor which caused significant buyer's remorse among some Security Council members who had supported the action (especially Russia and China). Even if the rebels were

uniformly attractive and their cause was just, the other criteria may call into question whether military intervention makes sense.

For decades, Col. Gaddafi ruled his people in a despotic fashion and been despised for it -- especially in the West. But after years of nurturing dependent subjects, dispensing patronage, and cultivating an image as a pan-Arabist, he had supporters both at home and abroad, and even nations in the West have vacillated at various times between condemning and tolerating (and to some extent even embracing) him. Moreover, the assertions that the risks to lives in Bahrain, Yemen, and Syria were “smaller scale”⁸³ hardly appear true today, when it is clear that Gaddafi refrained from large scale massacres but the regimes in those other nations have murdered more of their own peaceful dissidents.

Ultimately, the claimed “just cause” in Libya must forever remain somewhat speculative, as it was based mainly on Gaddafi’s rhetoric and threats regarding what he might do in Benghazi (again, in contrast to situations in Syria, Saudi Arabia, Yemen, and Bahrain – and earlier in Egypt and Tunisia – where the rulers were actively engaged in murdering their people). In such a situation, the nations who took the lead on the forceful intervention in Libya cannot avoid being accused by some of being inconsistent hypocrites, with the banner they carry appearing to be a double standard. In the case of Syria, it is true that Russia and China have been obstacles to military intervention authorized by the Security Council – but it is often overlooked that the US and other Western powers have their own complex reasons for not invoking R2P there. Reluctance to intervene with respect to the other Arab states – nominal allies of the US and the West in the so-called US “Global War Against Terror(ism/ists)” – is even easier to explain in terms of realpolitik interests. They are suppliers of energy (Saudi Arabia) or other perceived strategic goods (Bahrain as base for the US Fifth Fleet, the other states as supposed sources of regional stability). A broader and longer-term conception of such interests, however, might note that the longer-than-expected conflict in Libya, like the currently ongoing conflict in Syria, has led to significant increases in refugee flows, opportunities for greater infiltration by al Qaeda (e.g. al Qaeda in the Islamic Maghreb increasing its presence in Libya), and instability that threatens

regional security, oil supplies, inflation, and represents a negative factor in the global economy.⁸⁴

Regarding whether there was “right intent,” protecting Libyan civilians was undoubtedly one possible motive, but other likely motives might have included avoiding mass refugee flows to Europe and ensuring more reliable, long-term access to Libya’s significant oil reserves. After all, relations with Gaddafi had been improving and, as is so often the case, little or no action was taken to protect civilians from torture, abuse, and other rights violations when the relationship with the ruler was better (and profitable for the interests represented by those countries which have now taken military action against his regime). As always, it is difficult to determine which motives predominate, but R2P advocate Gareth Evans admitted that “had oil or regime change been the primary motivation, the Arab League and the Security Council would never have endorsed military intervention.”⁸⁵

Whether the (potential) victims themselves called for military intervention (as some did) would be a positive factor favoring such intervention, as noted in the ICISS report, but after the military action began it became clear that Gaddafi had more support (not all of it contrived) than early simplistic analyses suggested. Much was also made of the Arab League’s request for a no-fly zone on March 13, 2011 (which would be evidence of the “regional opinion” in the terms of the ICISS report), but members of the Arab League, Russia, China,⁸⁶ and various commentators noted and objected to the rapid escalation of the intervention (arguably beyond the limited civilian protection directive of the Security Council resolution). The more aggressive targeting, in their eyes, seemed aimed at the more dubious and legally problematic regime change that the US, French, and UK leaders explicitly advocated⁸⁷ than the limited civilian protection authorized by the UN Security Council. This mission creep from civilian protection into regime change not only went beyond the Security Council authorization,⁸⁸ but went beyond even the more expansive version of the R2P conceived in the ICISS report.

Moving on to whether the military action was truly a “last resort,” the R2P was referenced in the initial Security Council resolution 1970 passed on

February 26, 2011, imposing sanctions and an arms embargo, and referring the case to the International Criminal Court.⁸⁹ But these efforts were not really given any significant time to work before the second Security Council resolution 1973 was adopted a matter of weeks later, on March 17, 2011, authorizing “all necessary measures to enforce compliance” with the no-fly zone imposed in Libya in order to protect civilians. As has happened in other cases,⁹⁰ it is hard to say that every non-military option was exhausted prior to the use of force; indeed, it was reportedly only after the launch of force that the search began in earnest for negotiated exit options for Col. Gaddafi.

Were the measures “proportionate” in terms of the military action, and calculated to produce more good than harm, without excessive means endangering civilians? Even if the initial “no fly zone” was, can the same be said about the various escalating measures evident as the civil war progressed? The escalation included assistance of various sorts to the rebels, various on-the-ground advisors (despite the language in resolution 1973 “excluding a foreign occupation force of any form on any part of Libyan territory”), unmanned aerial drones, attacks on civilian infrastructure, bombing (which inevitably took innocent civilian lives),⁹¹ and even reported targeted killing of members of Gaddafi’s family and attempts to target Col. Gaddafi himself for death. The allied governments moved toward officially recognizing the rebels (what Canada’s *Globe and Mail* newspaper called the “fractious and murky umbrella organization for the opposition”), clearly taking sides in the civil war and unabashedly seeking regime change.⁹² It strains credulity to argue that the escalation and increasingly clear regime change mission remained within the legal authority granted. On the contrary, those changes entailed corresponding costs to the credibility of the effort (and not only this attempt at enforcing R2P, but perhaps future potential R2P efforts as well).⁹³ This is quite evident in the case of Syria, where Russia and China have blocked a Security Council mandate⁹⁴ for more aggressive intervention in part on grounds (also of concern to the Arab League) that they were misled by the overreach in the Libyan case.

What about “prospects for success”? It is difficult under the best of circumstances to predict the future; it is especially difficult in the context of war, given the truism that “no battle plan ever survives contact with the enemy.” In

thinking that they could predict the future, the US and NATO might be said to have been afflicted by the same sort of hubris chronicled by historians such as Barbara Tuchman (in *The March of Folly*) and reflected in comments such as that of then Secretary of State Madeleine Albright, who famously stated “If we have to use force, it is because we are America. We are the indispensable nation. We stand tall, and we see further than other countries into the future.” President Obama has later echoed this “indispensable nation” sentiment.⁹⁵ To this one might perhaps add President Obama’s promise that the heavy US role in the Libyan operation would take “days, not weeks.”⁹⁶ The significant US commitment actually took many months in the combat phase of the battle, and continues in other ways to date. Given the tens of thousands of deaths which have occurred, the persistent violence, continuing instability, and the ongoing “string of assassinations” in Libya (including the September 11, 2012 killing of US Ambassador Christopher Stevens),⁹⁷ the outcome still remains uncertain in many respects.

In any event, the “prospects for success” criterion for humanitarian intervention would remain, if applied honestly, perhaps the highest hurdle to legitimacy of many military interventions (especially given the long string of hubristic failures history presents). Despite the overthrow and death of Col. Gaddafi, both during and after the combat phase of the operation civilians died in huge numbers.⁹⁸ One suspects that similar concerns about overall, long-term consequences and prospects for success in the more recent case of Syria have been a factor in the international community’s unwillingness thus far to intervene in that situation of elevated and more complex strategic interests. Among other challenges to intervention, the presence of al Qaeda among the rebel groups resisting the Assad regime leads to an understandable fear that assistance now could result in blowback harm later (as happened in the case of Afghanistan during the Reagan era).⁹⁹

No ground is gained, therefore, in the reformulation of this criterion as a “balance of consequences” test (which asks whether the affected population will be better or worse off, as required by the High-Level Panel report discussed above): there are now a number of long-term studies which point to the increased risk of civil war resulting from foreign imposed regime change,¹⁰⁰ and

the longer such conflicts persist, the more civilian lives are at risk. According to the International Crisis Group, “Although the declared rationale of this intervention was to protect civilians, civilians are figuring in large numbers as victims of the war, both as casualties and refugees.”¹⁰¹ Suggestions to the contrary notwithstanding,¹⁰² the viciousness of the violence in humanitarian interventions often escalates over time. Such realities bring us back to the question of whether the cause is “just” in the broadest sense of the term: if the foreseeable likely result of arming a band of weak, disorganized, heterogeneous rebels is to extend an already lengthy civil war in which many civilians are dying, *how is that consistent with a humanitarian purpose of protecting civilians?*

This aspect of course stands out when one recalls the recent and ongoing case of Iraq. There, after the failures to find weapons of mass destruction and to persuasively link secular Baathist Saddam Hussein to Al Qaeda, the Bush administration tried to construct a humanitarian rationale for intervention. This was never very compelling, since Saddam’s massacres of Kurds occurred years before when he was a US ally and depended in part on supplies and targeting information from NATO allies. But the civilian protection rationale takes on truly ludicrous dimensions when one looks at the bloodbath of conflict, insurgency, suicide bombings, and rape unleashed by the Iraq invasion that has taken (depending on which estimates you believe) somewhere between approximately 110,000¹⁰³ and over 1,000,000¹⁰⁴ lives, resulted in more than 2,000,000 refugees who have left Iraq, and another 2,000,000 internally displaced Iraqis, and cost the US over three trillion dollars (according to Nobel Laureate Joseph Stiglitz and his coauthor Linda Bilmes).¹⁰⁵ Iraq thus takes its place in the pantheon of imperialistic invasions cloaked in the garb of humanitarian intervention at tremendous cost to the invading nation as well as the civilians the invasion was supposed to protect.

Col. Gaddafi was long the object of fairly unique opprobrium, at least in the West. When combined with the constellation of mixed motives (humanitarian and realpolitik) presenting themselves in February 2011, including the desire to seize the opportunity to shore up the R2P doctrine and make up for the notorious and acknowledged failures of the United Nations and the West, for

example in connection with Srebrenica and Rwanda, one understands how the Libyan operation came about.

Instead of reinforcing the R2P doctrine, however, the Libyan operation – at least at this point – tends to counsel caution in humanitarian intervention even when the target seems as attractive as a Gaddafi.

Like all wars, humanitarian invasions are a risky and uncertain venture even in the best of circumstances -- those very rare instances where “right intention” predominates and the other legitimacy criteria are met. So they are even more suspect in the usual cases where the legitimacy criteria are strained or seem to be afterthoughts or pretexts.¹⁰⁶ This is especially the case when human fallibility meets human cupidity, as clearly happened on so many levels in the Iraq (which strategically benefited Iran, contrary to US goals).¹⁰⁷ But it happens in all wars, as vested interests including from the military-industrial complex¹⁰⁸ exert influence toward the continuation of the war.

Conclusion and Recommendations

The metaphors and frames we use determine the methods we adopt and our notions of what can be tolerated:¹⁰⁹ “war” and “force” lead to collateral damage being tolerated, and military force traditionally has been more threatening than protective of civilians historically – which counsels the need to take much more seriously, invest in, and prioritize to a much greater extent prevention and civilian rather than military methods as default modes of protecting civilians.

There is little doubt about the good faith and good intentions of many of the interventionists.¹¹⁰ But as is said, war is hell -- and the road to hell is paved with good intentions. International law must constrain the frequent temptation of nations to resort to unilateral military force, while simultaneously leaving room for collective responses to mass atrocities. This is why “the consensus of opinion among governments and jurists favors requiring Security Council approval for humanitarian intervention.”¹¹¹

Like some other observers, both from the nongovernmental realm as well as

the military, the longer I have observed efforts at humanitarian intervention, the more cautious I have been in my assessment of whether a change in the basic international law is necessary or advisable. As much as we sorely need more effective means of intervening to prevent atrocities, we just as surely need better means to more accurately gauge as well as deeply and comprehensively understand the true costs of military intervention as well as the potential benefits of greater non-military prevention and protective instruments and interventions of various kinds. The long-standing and somewhat irrational but deeply engrained human impulse to quickly identify the so-called “good guys and bad guys” and then resort to war as a means of conflict resolution (even in the absence of reliable factual information) must be counterbalanced by more reliable mechanisms of gathering the facts, measuring and choosing in calibrated fashion among the full range of potential responses, creatively addressing the problems, and avoiding the unintended consequences that inevitably arise along with escalation, misinformation, miscommunication, and all of the other characteristics of the Fog of War.¹¹² Reinforcing peaceful solutions as opposed to the sadly prevailing inclinations toward violent response also has a systemic value, as it forms a critical means of discouraging conflicts from arising in the first place.

Again, none of this is to contest the dire need for more effective solutions to protect human rights either in general, or in situations of mass atrocity; but it is to remind us of the serious complexities and difficulties involved and the very real risks of counterproductive consequences that may be worse for human rights whenever resort is had to war. Although an important place exists in international law for a version of the R2P doctrine, it is crucial that it be properly founded by clear threshold criteria in order to assure legality and legitimacy and avoid pretextual or ill-considered actions.

Some of the tentative conclusions and recommendations that thus come to mind are:

1. All regions of the world should understand that current international law pertaining to military aspects of humanitarian intervention and the R2P remains centered on the UN Charter’s provisions pertaining to the

use of force and, in particular, action within the province of the UN Security Council. To that end:

- a. Conferences such as the one we have held on humanitarian intervention should be replicated in other regions and the insights derived therefrom should be broadly disseminated and made available to public and private sector educational institutions, conflict resolution bodies, women's groups, businesses, peace groups, international relations and global affairs groups, legal groups, UN associations, and other fora, courses, and curricula, to help global civil society continue to play an even more vital role in research, education, training, monitoring, early warning, and advocacy for peace;
 - b. International law publicists, political science, international relations, jurists and scholars should make the current governing law more known;
 - c. There should be an effort to reach out to and engage relevant media so that they play a more constructive role than they have in past and present conflicts;¹¹³
 - d. Relevant UN officials and agencies, such as the Secretary General, the High Commissioner for Human Rights, other officials and their staff, should take the opportunity to clarify the law and policy where possible, including especially to members of the general public and opinion leaders (e.g. by means of international media, social media, blogging, and other avenues), since the political will to sustainably support legal and needed interventions will depend on such public support.
2. The error that humanitarian intervention and the R2P are only about military intervention should be strongly highlighted and refuted. International law publicists, other scholars, and UN officials and agencies should take care to emphasize the full range of actions (including non-military coercive and non-coercive measures, ranging from sanctions,¹¹⁴ arms embargoes, and international prosecution, to diplomacy, mediation, public-private partnerships with business and civil society, and technical assistance) available to the international community to assist. Greater development assistance would also have an

undoubted positive effect, although it must carefully be given in ways that don't exacerbate conflict (a topic for which greater field research remains needed).¹¹⁵

3. More bottom-up engagement of populations within nations and international networks between and among nations and others, especially on the practical conflict-preventive value of human rights, frameworks for diversity, and concepts, institutions, and mechanisms to proactively promote peace, education, tolerance, and mutual understanding as opposed to ethnic, religious, or other conflict or tension, can and should receive much more official attention, resources, and action – both directly and via collaboration with other stakeholders – and can be facilitated by new technologies and communication and networking platforms.
4. The limits as well as the powers implied in humanitarian intervention and under the R2P doctrine should also be more broadly understood, especially that:
 - a. R2P is not a recipe for unilateral intervention; it would not “legalize” interventions such as that which occurred in Kosovo, although it could help clear the path for legal collective security action through the Security Council.
 - b. R2P is currently limited to the four atrocity categories of genocide, crimes against humanity, war crimes, and ethnic cleansing – a default focus which amounts to a further de facto “precautionary principle” by establishing what amounts to high threshold of qualitative and quantitative seriousness before an equally serious resort to force.
 - c. Extending R2P to other man-made or natural disasters such as HIV/AIDS, climate change, tsunamis, or earthquakes (as some have proposed) would, in the words of the Secretary-General, “undermine the 2005 consensus and stretch the concept beyond recognition or operational utility.”¹¹⁶
 - d. R2P is properly subject to crucial legitimacy criteria and precautionary principles discussed in detail above (and referenced again in summary fashion immediately below).
5. The criteria for legitimacy and the precautionary principles deriving

from longstanding “just war” theory and international law should be even more clearly understood, firmly enshrined in UN and Security Council law, and more carefully implemented in practice.¹¹⁷ Again, these include such considerations as:

- a. “just cause” including large-scale actual or threatened loss of life or ethnic cleansing;
 - b. “right authority” – i.e. the Security Council, in the case of humanitarian intervention;
 - c. “right intent” -- a primary purpose of the intervention to prevent or halt suffering;
 - d. “last resort”: military force only as a last resort;
 - e. “proportionality”: overall good exceeding harm, and means proportionate to and limited by the ends; and
 - f. “reasonable prospects for success” or the related test of a “balance of consequences” (which asks whether, on the facts as known including the challenges apparent, civilian lives are likely to ultimately be better or worse off from the intervention).
6. The UN and the international community should continue to enhance the capabilities and effectiveness of early warning and assessment systems to identify and allow reaction to atrocities or potential atrocities. Some of the “liberation technologies”¹¹⁸ deployed in connection with the violence accompanying the disputed elections in Kenya and Côte d’Ivoire as well for example in the “Arab Spring” give indications of some of the people-centered possibilities that could be taken to broader scale, ranging from solutions that shine the light of transparency on what is occurring to those that inform the populace of information vital to maintaining their security.

Notes

- 1 This paper is based on the author's presentation at the Kyoto Conference on Humanitarian Intervention organized by the editors.
- 2 A "form of coercive action, undertaken by one or more states, involving the use of armed forces in another state without the consent of its authorities and with the purpose of stopping and preventing widespread suffering or death among its inhabitants" (Adam Roberts).
- 3 Coercive measures short of military intervention are broadly acknowledged to include, e.g., international prosecution and sanctions.
- 4 Examples given by the Global Centre for the Responsibility to Protect include "strengthening state capacity through economic assistance, rule-of-law reform, the building of political institutions, and the like; or, when violence has begun or seems imminent, through direct acts of mediation." See *The Responsibility to Protect: A Primer*, at 1 (available at <http://globalr2p.org/pdf/primer.pdf>). The UN Secretary General has highlighted possibilities for encouraging and building capacity for states to comply with their Responsibility to Protect including "dialogue, education and training," and "confidential or public suasion, education, training and/or assistance" by UN Member states, development agencies, the Bretton Woods institutions, regional and subregional mechanisms, UN officials and agencies such as the High Commissioners for Human Rights and for Refugees, the Emergency Relief Coordinator, the Special Adviser on the Prevention of Genocide, and other advisors, officials, representatives, and envoys. Report of the Secretary General, Implementing the Responsibility to Protect, A/63/677 (Jan. 12, 2009), at paras. 30, 33, and 37.
- 5 E.g. Catherine Powell, "Libya: A Multilateral Constitutional Moment?," 106 A.J.I.L. 298, 301 (Apr. 2012).
- 6 Helene Cooper and Steven Lee Myers, "Shift by Clinton Helped Persuade President to Take a Harder Line," *New York Times* (Mar. 19, 2011).
- 7 Dino Kritsiotis, "Reappraising Policy Objections to Humanitarian Intervention," 19 Mich. J. Int'l L. 1005, 1016 n.32 (1998) (citations omitted).
- 8 Gary J. Bass, *Freedoms Battle: the Origins of Humanitarian Intervention* (New York: Knopf, 2008); Stephen P. Marks and Nicholas Cooper, "Human Rights: Law, Policy, and Implementation: The Responsibility to Protect: Watershed or Old Wine in a New Bottle?," 2 *Jindal Global L. Rev.* 86, 93 (2010), *citing* Geliijn Molier, "Humanitarian Intervention and The Responsibility To Protect After 9/11," 53 *Netherlands Int'l L. Rev.* 1, 47 (2006).
- 9 Distinguished scholars frequently limit the definition of humanitarian intervention to the field of actions not authorized by the UN Security Council, arguing that the existence of such authorization amounts merely to an exercise of the Security Council's enforcement powers as opposed to humanitarian intervention as traditionally understood. See, e.g., Dino Kritsiotis, "Reappraising Policy Objections to Humanitarian Intervention," 19 Mich. J. Int'l L. 1005, 1014 n.26 (1998) (*citing* A.C. Arend & R.J. Beck, *International Law and the Use of Force: Beyond the U.N. Charter Paradigm* 113 (1993)). For purposes of the present discussion, however, this article adopts the broader conference definition of the phrase, which has room to embrace UN-authorized interventions.
- 10 For an inventory and analysis of key objections to humanitarian intervention (made before the various recent framings of the issues under the rubric of the "Responsibility to Protect"), see Dino Kritsiotis, "Reappraising Policy Objections to Humanitarian Intervention," 19 Mich. J. Int'l L. 1005 (1998).
- 11 E.g. Thucydides, *History of the Peloponnesian War* 53-62 (Rex Warner trans., rev. ed. 1972).

- 12 Stephen Neff, *War and the Law of Nations: A General History* 39-45 (2005); see also Jerome Alan Cohen, *China and Intervention: Theory and Practice*, 121 U. Pa. L. Rev. 471, 474 (1973), citing Te-hsu Ch'eng, *International Law in Early China (1122-249 BC)*, 11 Chinese Soc. & Pol. Sci. Rev. 44, 44-46 (1927) who noted that the general rule of non-intervention among pre-imperial Chinese feudal states was nevertheless subject to frequent invocation of an "exception [that] permitted intervention against a ruler who oppressed his own people."
- 13 E.g. St. Augustine of Hippo, *Against Faustus the Manichaeon* XXII. 73-79, in *Augustine: Political Writings* 222 (Michael W. Tkacz & Douglas Kries, trans., Ernest L. Fortin & Douglas Kries, eds., 1994) (on "right authority"); St. Thomas Aquinas, "The Just War," in *The Summa Theologica*, Great Books of the Western World vol. 20 (Chicago, Illinois: Encyclopedia Britannica, Inc., 1952), excerpt available at: <http://www.catholiceducation.org/articles/politics/pg0029.html>.
- 14 Cf. discussion of criteria in ICISS Report, below (which also reference as criteria that the use of force should be "last resort," with "proportional means," and "reasonable prospects" for success).
- 15 Following other Renaissance jurists such as Francisco de Vitoria (c. 1492 – c. 1546) and Francisco Suárez (1548 – 1617).
- 16 See e.g. Theodor Meron, *Common Rights of Mankind in Gentili, Grotius and Suarez*, 85 Am. J. Int'l L. 110 (1991), and Anne Orford, *International Authority and the Responsibility to Protect* (New York, NY: Cambridge University Press, 2011).
- 17 Speech by Zimbabwean President Robert Mugabe to 66th UN General Assembly (2011), available at <http://www.newzimbabwe.com/opinion-6117-Full+text+Mugabes+speech+to+66th+UNGA/opinion.aspx>; "Syria Exercising its Responsibility to Protect Citizens," Speech by Syrian Foreign Minister Walid al-Moallem to the 66th UN General Assembly (2011), available at: <https://syrianleaks.wordpress.com/2011/09/27/syria-exercising-its-responsibility-to-protect-citizens/>
- 18 See Mark Mazower, *Governing the World: The History of An Idea* (2012), at 8, 167, and 380-81 (tracing the idea of intervention through the Concert of Europe to later 19th and 20th century justifications for the supposedly pure "civilizing mission" intentions of the colonial powers with respect to the world's "lower races," imperial echoes of which he finds in R2P today).
- 19 Such as e.g. Noam Chomsky, *A New Generation Draws the Line: Kosovo, East Timor, and the "Responsibility to Protect" Today* (2011 Expanded Edition); see also Noam Chomsky, *Statement by Professor Noam Chomsky to the United Nations General Assembly Thematic Dialogue on the Responsibility to Protect* (July 23, 2009), available at <https://www.un.org/ga/president/63/interactive/protect/noam.pdf>
- 20 Emerich de Vattel, *The Law of Nations*, bk. II, ch. i, § 7 (Joseph Chitty trans., 1879) (1758).
- 21 Reportedly suggested by the use of the phrase *jus inter gentes* (rather than the phrase *jus gentium*) by 17th century Oxford jurist Richard Zouche (according to Thomas Erskine Holland in the *Dictionary of National Biography*, (London: Smith, Elder & Co. 1885–1900)).
- 22 Neff, at 161.
- 23 Carl Von Clausewitz, *On War* 87 (1832) (Michael Howard & Peter Paret eds., trans., 1976).
- 24 Ian Brownlie, *Principles of Public International Law* (6th ed), at 710; this would be consistent with the idea of war being a customary norm arising from the accoutrements of sovereignty. For a more qualified view, see e.g. Simon Chesterman, *Just War or Just Peace?: Humanitarian Intervention and International Law* (2003), at 43-44 ("More than anything, humanitarian intervention appears to occupy a lacuna in the primitive international legal regime of the time.").
- 25 See, e.g. Antoine Rougier, *La Theorie De l'intervention D'humanite*, 17 Rev. Gen. Dr. Int'l Publ. 468-526 (1910) (describing criteria for humanitarian intervention in just war terms).
- 26 UN Charter, art. 2, para. 4.

- 27 See UN Charter, arts. 1, 3, and 55.
- 28 See UN Charter, arts. 39, 42 and 43.
- 29 R. Cassin, 'La déclaration universelle et la mise en oeuvre des droits de l'homme', in 79 *Recueil des Cours de l'Académie de droit international* (1951-II) 237-367, at 290-296; Louis Sohn, *The New International Law: Protection of the Rights of Individuals Rather Than States*, 32 *AM. U. L. REV.* 1, 17 (1982).
- 30 Myres S. McDougal, Harold Lasswell, & Lung-Chu Chen, *Human Rights and World Public Order* 266, 273-74, 325-27 (1980); Hurst Hannum, *The Status of The Universal Declaration of Human Rights in National and International Law*, 25 *GA. J. INT'L & COMP. L.* 287, 334 (Fall 1995-Winter 1996); Cf. *Filartiga v. Pena-Irala*, 630 F.2d 876, 882 (2d Cir. 1980) (anti-torture provisions as customary international law).
- 31 E.g. the Constitutive Act of the African Union (2000) provides, in article 4 (h), for "the right of the Union [note: as opposed to other Member States] to intervene in a Member State pursuant to a decision of the Assembly in respect to grave circumstances, namely: war crimes, genocide, and crimes against humanity." The Convention on the Prevention and Punishment of the Crime of Genocide similarly imposes a responsibility "to act." And of course the Rome Statute for the International Criminal Court and the various special international criminal tribunals reflect the obligations to punish these crimes.
- 32 E.g. Report of the Secretary General, *Implementing the Responsibility to Protect*, A/63/677 (Jan. 12, 2009), at para. 3.
- 33 See, e.g., Resolutions 1612 (2005) and 1820 (2008).
- 34 Report of the Secretary General, *Implementing the Responsibility to Protect*, A/63/677 (Jan. 12, 2009), at para. 11 (a).
- 35 E.g. Christopher Greenwood, *Humanitarian Intervention: The Case of Kosovo*, 1999 *Finnish Y.B. Int'l L.* 141.
- 36 U.S. Secretary of State Madeleine Albright, Press Conference with Russian Foreign Minister Igor Ivanov, Singapore, 26 July 1999 available at <http://secretary.state.gov/www/statements/1999/990726b.html>; Bruno Simma, "NATO, the UN and the Use of Force: Legal Aspects", *European Journal of International Law*, 10, 22 (1999).
- 37 See UN Charter Chapter VII and Art. 39 ("Action With Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression"); GA Res. 3314 (XXIX) (Dec. 14, 1974) (Definition of Aggression); and cf. outcome of the 2010 Review Conference of the Rome Statute held in Kampala, Uganda, where consensus was reached on amendments adding the crime of aggression to the Rome Statute for the ICC, but with entry into force depending on states parties activating the jurisdiction after Jan. 1, 2017: see e.g. <http://www.iccnw.org/?mod=aggression>. While the Kosovo intervention was challenged by Yugoslavia before the International Court of Justice, the case was dismissed on technical grounds. See *Legality of Use of Force Case (Provisional Measures)* (ICJ, 1999).
- 38 See also *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, 1986 ICJ REP. 14, para. 268 (June 27) (rejecting US position that its unilateral conduct was justified by customary international law allowing the protection of human rights in Nicaragua).
- 39 See e.g. Alex J. Bellamy, *Responsibility to Protect or Trojan Horse? The Crisis in Darfur and Humanitarian Intervention after Iraq*, 19 *Ethics & Int'l Aff.* 31 (2005); Nigel S. Rodley & Basak Cali, *Kosovo Revisited: Humanitarian Intervention on the Fault Lines of International Law*, 7 *Hum. Rts. L. Rev.* 275 (2007).
- 40 The most significant and gross violations of international human rights widely recognized to

raise issues of humanitarian intervention and R2P – genocide, war crimes, crimes against humanity, and ethnic cleansing – are often referred to herein as “atrocities.”

- 41 Mario Bettati & Bernard Kouchner, *Le Devoir D' Ingerence: Peut On Les Laisser Mourir?* (1987).
- 42 E.g. G.A. Res. 43/131 U.N. Doc. G/RES/43/131 (1988).
- 43 See e.g. Press Conference with NATO Secretary General Javier Solana and SACEUR Gen. Wesley Clark (Mar. 25, 1999), available at <http://www.nato.int/kosovo/press/p990325a.htm>.
- 44 As noted e.g. by Ian Brownlie, *Principles of Public International Law* 742-43 (7th ed. 2008). Note that mixed motives, always inevitable, do not necessarily delegitimize an intervention.
- 45 Independent International Commission on Kosovo, *The Kosovo Report: Conflict, International Response, Lessons Learned* (2000).
- 46 Kofi Annan, “Two Concepts of Sovereignty,” *The Economist* (Sept. 18, 1999).
- 47 <http://www.iciss.ca/menu-en.asp>
- 48 <http://www.iciss.ca/pdf/Commission-Report.pdf>
- 49 *Id.*, at VIII.
- 50 *Id.*, at VIII (citing Security Council resolutions 1368 and 1373 passed in the immediate aftermath of the 9/11 attacks).
- 51 See e.g. Gary J. Bass, *Freedoms Battle: the Origins of Humanitarian Intervention* (New York: Knopf, 2008) (chapter 1, esp. 5-19); Amos Yoder, *World Politics and the Causes of War Since 1914*, at 58 (1986). More recent examples include Russia’s attempt to invoke R2P when invading Georgia in 2008.
- 52 E.g., Dino Kritsiotis, “Reappraising Policy Objections to Humanitarian Intervention,” 19 *Mich. J. Int’l L.* 1005, 1039 (1998).
- 53 ICISS Report, at XIII. This “Code of Conduct” mechanism would thus attempt to acknowledge the realities of continued P5 resistance when vital interests are involved, but would allow broader scope for collective action in the most serious atrocity cases when there is agreement for action on the part of a majority of the Security Council (including the non-P5 members). No such Code has been enacted yet.
- 54 G.A. Res. 377 (V), U.N. DOC. A/RES/377(V) (Nov. 3, 1950).
- 55 In this more hortatory sense, there may thus still be a role for the General Assembly in urging Security Council action when the Security Council seems unable to act. See also Report of the Secretary General, *Implementing the Responsibility to Protect*, A/63/677 (Jan. 12, 2009), para. 63.
- 56 High-level Panel on Threats, Challenges and Change, A/59/565 (Dec. 2, 2004), at p. 53; for detail see paragraphs 204-209.
- 57 “We endorse the emerging norm that there is a collective international Responsibility to Protect, exercisable by the Security Council authorizing military intervention as a last resort, in the event of genocide and other largescale killing, ethnic cleansing or serious violations of international humanitarian law which sovereign Governments have proved powerless or unwilling to prevent.” High-level Panel on Threats, Challenges and Change, A/59/565 (Dec. 2, 2004), at para. 203.
- 58 G.A. Res. 60/1, UN DOC. A/RES/60/1 (Oct. 24, 2005) (World Summit Outcome), available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N05/487/60/PDF/N0548760.pdf?OpenElement>
- 59 While this construction leaves room for regional organizational involvement under Chapter VIII (Regional Arrangements), Article 53 is clear that this may only occur with the prior authorization of the Security Council. See e.g. <http://www.un.org/en/documents/charter/chapter8.shtml> (UN Charter Chapter VIII, Article 53 expressly provides that – with exceptions pertaining to World

- War II no longer relevant – “no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council”).
- 60 Report of the Secretary General, *In Larger Freedom: Towards Development, Security and Human Rights for All* (Mar. 21, 2005), at para. 135.
- 61 Possessing authority but formally non-binding.
- 62 Report of the Secretary General, *Implementing the Responsibility to Protect*, A/63/677 (Jan. 12, 2009).
- 63 Report of the Secretary General, *Implementing the Responsibility to Protect*, A/63/677 (Jan. 12, 2009), at para. 43.
- 64 See e.g. *Certain Expenses of the United Nations*, Advisory Opinion, 1962 I.C.J. 151, 168 (July 20) (ICJ finding that coercive peace enforcement is solely within the authority of the Security Council, although e.g. consensual peacekeeping is not).
- 65 G.A. Res. 377 (V), U.N. DOC. A/RES/377 (V) (Nov. 3, 1950).
- 66 S.C. Res. 1674, UN DOC. S/RES/1674 (Apr. 28, 2006) (Protection of Civilians in Armed Conflict).
- 67 S.C. Res. 1706, UN DOC. S/RES/1706 (Aug. 31, 2006) (Sudan).
- 68 See also S.C. Res. 1894 (2009), pmb.
- 69 UN Charter, art. 24.
- 70 Thus, the Secretary General has said: “Based on existing international law, agreed at the highest level and endorsed by both the General Assembly and the Security Council, the provisions of paragraphs 138 and 139 of the Summit Outcome define the authoritative framework within which Member States, regional arrangements and the United Nations system and its partners can seek to give a doctrinal, policy and institutional life to the Responsibility to Protect (widely referred to as “RtoP” or “R2P” in English). The task ahead is not to reinterpret or renegotiate the conclusions of the World Summit but to find ways of implementing its decisions in a fully faithful and consistent manner.” Report of the Secretary General, *Implementing the Responsibility to Protect*, A/63/677 (Jan. 12, 2009), at para. 2; see also para. 67.
- 71 *Accord*, Catherine Powell, “Libya: A Multilateral Constitutional Moment?,” 106 A.J.I.L. 298, 300 (Apr. 2012) (“Whereas the first prong restates the affirmative obligations of individual states that are now well established under human rights and humanitarian law, consensus on the second (what I will call collective assistance) and third (what I will call collective action) prongs has not gelled; they do not represent established law.”) (footnotes omitted).
- 72 Report of the Secretary General, *Implementing the Responsibility to Protect*, A/63/677 (Jan. 12, 2009), at para. 3.
- 73 E.g. David N. Gibbs, *First Do No Harm: Humanitarian Intervention and the Destruction of Yugoslavia* (2009).
- 74 Report of the Secretary General, *Implementing the Responsibility to Protect*, A/63/677 (Jan. 12, 2009), at para. 29.
- 75 Report of the Secretary General, *Implementing the Responsibility to Protect*, A/63/677 (Jan. 12, 2009), at para. 40.
- 76 S.C. Res. 940, UN DOC. S/RES/940 (1994) (Haiti); S.C. Res. 1529, UN DOC. S/RES/1529 (2004) (Haiti); S.C. Res. 1542, UN DOC. S/RES/1542 (2004) (Haiti).
- 77 See e.g. S.C. Res. 1564 (2004), pmb. (referencing the responsibility of regional governments to “protect their populations”); see also S.C. Res. 1653 (2006) (Great Lakes Region), at para. 10; and S.C. Res. 1706, UN DOC. S/RES/1706 (Aug. 31, 2006) (Sudan).
- 78 See Asia-Pacific Centre for the Responsibility to Protect, *Cyclone Nargis and the Responsibility to Protect: Myanmar/Burma Briefing No. 2*, at 2-3 (May 2008), available at <http://www.>

r2pasiapacific.org/documents/Burma_Brief2.pdf.

- 79 See “The Crisis in Gaza: An RtoP Situation?,” (Dec. 2008-Jan. 2009), *available at* <http://www.responsibilitytoprotect.org/index.php/crises/178-other-rtop-concerns/2750-the-crisis-in-gaza>
- 80 See e.g. S.C. Res. 1933, UN DOC. S/RES/1933 (2010) (Côte d’Ivoire) (stating in reference to UNOIC mandate that the protection of civilians is “without prejudice to the primary responsibility of the Ivorian authorities”); and S.C. Res. 1975, UN DOC. S/RES/1975 (2011), pmb. (reaffirming in the preamble “the primary responsibility of each State to protect civilians” and “[r]eaffirming that it is the responsibility of Côte d’Ivoire to promote and protect all human rights and fundamental freedoms”).
- 81 See S.C. Res. 1769, UN DOC. S/RES/1769 (2007) (Darfur, Sudan) (referencing UNAMID’s mandate to “protect civilians, without prejudice to the responsibility of the Government of Sudan”).
- 82 E.g. Ramesh Thakur, “UN Breathes Life Into Responsibility to Protect,” *The Star* (Mar. 13, 2011), *available at* <http://www.thestar.com/opinion/editorialopinion/article/957664--un-breathes-life-into-responsibility-to-protect>.
- 83 Gareth Evans, “Hypocrisy and War,” *EuropeanVoice.com* (June 2, 2011), *available at* <http://www.europeanvoice.com/article/2011/june/hypocrisy-and-war/71261.aspx?LG=1>
- 84 Cf. International Crisis Group, *Popular Protest in North Africa and the Middle East (V): Making Sense of Libya* (June 6, 2011) (“to insist that he must go now, as the precondition for any negotiation, including that of a ceasefire, is to render a ceasefire all but impossible and so to maximise the prospect of continued armed conflict.”), *available at* <http://www.crisisgroup.org/~media/Files/Middle%20East%20North%20Africa/North%20Africa/107%20Popular%20Protest%20in%20North%20Africa%20and%20the%20Middle%20East%20V%20-%20Making%20Sense%20of%20Libya.ashx>.
- 85 *Id.*
- 86 E.g. Statement by H. E. Ambassador Li Baodong, Permanent Representative of China to the United Nations, at the Security Council Open Debate on the Protection of Civilians in Armed Conflict (May 10, 2011), *available at*: <http://www.china-un.org/eng/hyyfy/t823976.htm>. China voted for S.C. Res. 1970 on Libya (imposing arms embargo and sanctions) but abstained from S.C. Res. 1973 (authorizing “all necessary measures” i.e. military force, to protect Libyan civilians).
- 87 [insert instances from Obama, Sarkozy, and Cameron]
- 88 In contrast, for example, to the first Gulf War in Iraq, where troops stopped short of Baghdad because they were not authorized to go further and implement regime change.
- 89 S.C. Res. 1970 U.N. Doc. S/RES/1970 (Feb. 26, 2011), pmb. (recalling Libya’s Responsibility to Protect).
- 90 For example, in the case of Afghanistan in 2001, revisionist historians have promulgated the myth that the Taliban refused to negotiate, or to consider turning over Osama bin Laden. E.g. Alex J. Bellamy, *Just Wars: From Cicero to Iraq 171* (2006) (the US attacked “only when it became clear that the Taliban would not cooperate”). The facts, however, showed that President George W. Bush made demands that were expressly *not* “open to negotiation,” showing that “the United States government was not acting consistently with the last resort principle.” Stephen R. Shalom, “Far from Infinite Justice: Just War Theory and Operating Enduring Freedom,” 26 *Ariz. J. Int’l & Comp. Law* 623, 627 (Fall 2009), citing Address Before a Joint Session of the Congress of the United States: Response to the Terrorist Attacks of September 11, 2 *PUB. PAPERS* 1140, 1141 (Sept. 20, 2001).

- 91 To the extent that this and similar violence was directed at civilian non-combatants as opposed to combatants (e.g. either by intentionally bombing civilian targets, as happened for example in World War II and in the first and second wars in Iraq, or by bombing civilian areas bereft of military targets), it would be in violation of the *jus in bello* principle requiring “distinction.” Cf. Barton Gellman, “Allied Air War Struck Broadly in Iraq; Officials Acknowledge Strategy Went Beyond Purely Military Targets,” *Wash. Post* (June 23, 1991), at A1; Thomas J. Nagy, “The Secret Behind the Sanctions: How the U.S. Intentionally Destroyed Iraq’s Water Supply,” *Progressive* (Sept. 2001), at 22.
- 92 E.g. Campbell Clark, “Ottawa backs rebel council, pledges humanitarian aid,” (June 14, 2011), available at: <http://www.theglobeandmail.com/news/politics/canada-recognizes-libyas-rebel-council-as-legitimate-voice/article2060025/>
- 93 See e.g. Dr. Kwame Akanor, “African Union’s Mistake of Policy and Principle,” (June 14, 2011) (“R2P remains controversial and the Libyan events exacerbates (rather than eases) our understanding of its application. For instance, are armed rebels trying to overthrow that government civilians or combatants? Does the claim of civilian protection justify attacking pro-regime forces? Further, does the call for regime change by the sponsors of the resolution, and the wanton civilian deaths that have occurred as a result of the intervention, not dilute the case for R2P?”); Editorial, *The Washington Times* (June 15, 2011) (“ This was the first and probably last invocation of the Responsibility to Protect (R2P) doctrine.”); Q & A with Ambassador Daniel Kurtzer, *The Star-Ledger* (New Jersey), (June 12, 2011) (“There are still significant holes in the analysis and policy underpinning what we’re doing in Libya. We intervened there on the basis of a vague notion, an international law called the Responsibility to Protect. But it’s very unclear what that means in practical terms. In Libya, we’re using it as a cover to support the rebels and oppose the regime, and in some ways, we’re using it for regime change -- which is not actually what it’s supposed to represent.”); David Swanson, “Is That Even Legal,” (June 5, 2011) (“The resolution was for a humanitarian intervention, a no fly zone, a cease fire, an arms embargo, and a ban on foreign ground troops. It was immediately used to bomb civilians, introduce arms, and employ foreign ground troops, not to mention drone bombings and an apparent assassination attempt -- both practices of highly dubious legality.”); Jeffrey Laurenti, *The Trenton Times* (June 11, 2011) (“The fragile new doctrine of an international “responsibility to protect” cannot survive its misappropriation by the West for regime change.”).
- 94 E.g. UN Department of Public Information, Press Release, “Security Council Fails to Adopt Draft Resolution Condemning Syria’s Crackdown on Anti-Government Protestors, Owing to Veto by Russian Federation, China” (Press Release SC/10403, Oct. 4, 2011), available at <https://www.un.org/News/Press/docs/2011/sc10403.doc.htm>.
- 95 “American remains the one indispensable nation, says President Obama,” *Examiner.com* (Oct. 23, 2012), available at <http://www.examiner.com/article/american-remains-the-one-indispensable-nation-says-president-obama>.
- 96 E.g. “Obama to Members of Congress: Action Versus Libya to Last ‘Days not Weeks,’” (Mar. 18, 2011), available at: <http://blogs.abcnews.com/politicalpunch/2011/03/obama-to-members-of-congress-action-versus-libya-in-days-not-weeks.html>
- 97 David D. Kirkpatrick and Steven Lee Myers, “Libya Attack Brings Challenges for US,” *The New York Times* (Sept. 12, 2012) (the assault was “spearheaded by an Islamist brigade formed during last year’s uprising against Col. Muammar el-Qaddafi”), available at https://www.nytimes.com/2012/09/13/world/middleeast/us-envoy-to-libya-is-reported-killed.html?_r=1&pagewanted=all

- 98 A bipartisan group of US Congressmen filed a lawsuit arguing that the Libyan war is illegal and unconstitutional under domestic US law, failing to comply with the War Powers Act; the Obama administration argued in response that the hostilities and the limited supporting role of the US don't trigger the law. See e.g. Scott Wilson, "Obama Insists Role in Libya Follows Law," *Washington Post* (June 15, 2011), available at: http://www.boston.com/news/nation/washington/articles/2011/06/16/obama_insists_role_in_libya_follows_law/
- 99 Chalmers A. Johnson, *Blowback: The Costs and Consequences of American Empire* (2nd ed. 2004).
- 100 See e.g. Alexander B. Downes, "Catastrophic Success: Foreign-Imposed Regime Change and Civil War" (July, 2010), available at http://www.duke.edu/~downes/documents/DOWNES_CATASTROPHICSUCCESS_JULY2010.pdf.
- 101 <http://www.crisisgroup.org/en/regions/middle-east-north-africa/north-africa/libya/107-popular-protest-in-north-africa-and-the-middle-east-v-making-sense-of-libya.aspx>
- 102 E.g. Ryan Goodman, *Humanitarian Intervention and Pretexts for War*, 100 *Am. J. Int'l. L.* 107, 116 (2006).
- 103 <http://www.iraqbodycount.org/>
- 104 http://www.alternet.org/story/148622/wikileaks_docs_underestimate_iraqi_dead?page=entire
- 105 Joseph Stiglitz and Linda Bilmes, *The Three Trillion Dollar War: The True Cost of the Iraq Conflict* (New York: Norton 2008).
- 106 Although Professor Ryan Goodman has argued that relaxing the standard so as to legalize unilateral humanitarian intervention might decrease the tendency of states to use humanitarian intervention as a pretext for wars undertaken for other motives, this remains a highly contestable proposition. See e.g. Ryan Goodman, *Humanitarian Intervention and Pretexts for War*, 100 *Am. J. Int'l. L.* 107, 116 (2006) (arguing that legalizing unilateral humanitarian intervention and "encouraging aggressively minded states to justify force as an exercise of humanitarian intervention can facilitate conditions for peace" including because humanitarian force is supposedly less prone to escalation and more prone to face-saving, negotiated settlements). The argument reminds me not so much of the position that legalizing drugs will reduce their use as the National Rifle Association's much more empirically suspect argument that proliferating small arms will help prevent genocides.
- 107 See e.g. Thomas Rich, *Fiasco: The American Military Adventure in Iraq* (New York: Penguin, 2006).
- 108 See Farewell Address of President Dwight D. Eisenhower (Jan. 17, 1961), available at <http://www.americanrhetoric.com/speeches/dwightdeisenhowerfarewell.html> ("[W]e must guard against the acquisition of unwarranted influence, whether sought or unsought, by the military-industrial complex.")
- 109 See e.g. Joe W. (Chip) Pitts, "The Limits of the Military Metaphor," *The American Prospect* (Sept. 2011), available at http://prospect.org/cs/articles?article=limits_of_the_military_metaphor.
- 110 See e.g. the impressive list of NGO's working with the governments in the International Coalition for the Responsibility to Protect, available at: <http://www.responsibilitytoprotect.org/index.php/about-coalition/current-members> -- but note the interpretation focused on Security Council authorization as opposed to unilateral action, and the cautions (i) that R2P is restricted to the four categories commonly referenced, (ii) that it should "not be interpreted as a new version of military humanitarian intervention," and (iii) that the coalition members agree to "guard against abuse of the norm by governments, regional organizations or international organizations." <http://www.responsibilitytoprotect.org/index.php/about-coalition/our->

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- 111 Ryan Goodman, *Humanitarian Intervention and Pretexts for War*, 100 *Am. J. Int'l. L.* 107, 108 (2006).
- 112 As merely one example of possibly counterproductive, unintended consequences from the use of military force, a “fateful” US missile strike in Afghanistan in 1998 apparently healed a breach that had been emerging between Osama bin Laden and Mullah Omar of the Taliban, leading Mullah Omar to refrain from turning bin Laden over to the Saudis as he had previously planned. See Alan Cullison & Andrew Higgins, “Strained Alliance: Al Qaeda’s Sour Days in Afghanistan--Fighters Mocked the Place; Taliban, in Turn, Nearly Booted Out bin Laden--A Fateful U.S. Missile Strike,” *Wall St. J.* (Aug 2, 2002), at A1.
- 113 See, e.g. Greg Mitchell, *So Wrong for So Long: How the Press, the Pundits – and the President – Failed on Iraq* (New York: Union Square Press, 2008); Howard Friel and Richard Falk, *The Record of the Paper: How the New York Times Misreports US Foreign Policy* (New York: Verso, 2004).
- 114 E.g. on travel, financial transfers, luxury goods.
- 115 Cf. Report of the Secretary General, *Implementing the Responsibility to Protect*, A/63/677 (Jan. 12, 2009), at paras. 43-45.
- 116 Report of the Secretary General, *Implementing the Responsibility to Protect*, A/63/677 (Jan. 12, 2009), at para. 10 (b).
- 117 As also urged by the Secretary General, *Implementing the Responsibility to Protect*, A/63/677 (Jan. 12, 2009), at para. 62.
- 118 See e.g. Program on Liberation Technology, Stanford University, available at <http://liberationtechnology.stanford.edu/>; Berkeley Law School Conference, “Early Warning Systems,” (Apr. 27, 2011), available at <http://www.law.berkeley.edu/HRCweb/events/TechConference2011/livestream/warning.html>; Patrick Meier, “The Role of Ushahidi as a Liberation Technology,” Stanford event, available at <http://cddl.stanford.edu/events/6426>; “Early Warning for Protection: Technologies and practice for the prevention of mass atrocity crimes,” <http://www.oxfam.org.au/act/events/early-warning-for-protection>

