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Global Ethics
after the Responsibility to Protect
Challenges and Dilemmas

Hirotsugu Ohba, Masatsugu Chijiiwa, and Josuke Ikeda

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Preface

This working paper aims to engage in a critical scrutiny into the ethics of humanitarianism in the post 9.11 world, with particular emphasis on the 'Responsibility to Protect (R2P)', a major international standard providing conditions for 'just' intervention.

First Proposed in 2001 by the International Commission on Intervention and State Sovereignty, R2P is now obtaining the status of a global moral principle, with numerous discussions being conducted about its effective implementation. However, some of the recent attention focused on R2P also highlights various unresolved problems related to 'political will' or 'available resources', and more importantly, to moral dilemmas.

In particular, the gap between the principles of R2P and its practical application, or simply the inapplicability of R2P to various actual contexts has gradually become apparent. Moreover, an increasing number of political uses of the term 'R2P' may at times impede its original intent and legitimacy. What these challenges and dilemmas present are various situations which do not permit a straightforward affirmation of R2P. Hedley Bull described the world as an 'anarchical society', by which he does not mean chaos but the sharing of common norms even where no government exists, but today international society has become even more complex and requires a more complex structure of global governance. R2P is rapidly becoming embedded in this global structure. It would seem necessary therefore to engage in an intensive and critical moral consideration of R2P.

In this working paper, we present some of the challenges and agendas that international society has faced since the formulation of R2P. First, Jousuke Ikeda provides an overall treatment from a global ethics perspective, arguing that the development of R2P was the decisive point in completing the transformation of the idea of protection, moving away from the traditional method of 'asylum' to a more proactive approach of 'intervention'. Hirotsugu Ohba argues that R2P's

emergence was due more to chance than to the outcome of some inevitable process, while Masatsugu Chijiiwa argues that, in order for the United Nations Security Council to act as a rightful authority in relation to human protection, its decisions in the implementation of R2P must be based on a reconciliation of national interest and international legitimacy. What is common to these papers is that R2P still has, despite its global popularity, unresolved moral problems which need to be faced squarely. Through three critical comments, the authors aim to reveal the hidden problematic aspects of R2P and offer fresh issues for serious consideration in the second decade of R2P.

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From Asylum to Intervention: Transforming the Ethics of Global Rescue *

Josuke IKEDA

Abstract

One major aspect of the Responsibility to Protect (R2P) is that it presents global criteria for just intervention; however, R2P is so characterized by the fact that it represents the completion of the transformation of the ethics of global rescue from a traditional asylum style to a more proactive intervention style. The purpose of this paper is to focus on this shift by presenting critical insights demonstrating that the development of R2P was a decisive point in this transformation.

The provision of asylum has long been considered the primary method of 'saving strangers'. It is differentiated from intervention by virtue of the fact that asylum is based on the ethics of 'welcoming' others, while intervention is characterised by active engagement. This paper attempts to describe the parallel development of both styles of protection while examining their interrelatedness and tension throughout history.

Having clarified the relationship between these two approaches, this paper then argues that a transformation has occurred with respect to the ethics of global rescue, from asylum to intervention. It hypothesises that this transformation involved a retreat from asylum and an integration of it with intervention, and that events occurring during the 1980s and 1990s created a path to R2P. Here, a comparative analysis can be made between two specific examples: the UN Convention on Territorial Asylum (1977) and the Establishment of the UN Guiding Principles on Internal

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Displacement (1998). This paper points out that the former is an example that highlights the failure of asylum-led transformation, while the latter is an example of the success of an intervention-led one; it also discusses how this 20-year-old transformation laid the foundation for R2P.

Introduction

The globalised world has witnessed an increase in the rescue of casualties of civil conflicts, humanitarian catastrophes, and disasters by the international community. As long as activities directly relate to life-or-death matters, they necessarily involve strong ethical dimensions. Nonetheless, discussions of global rescue efforts immediately raise some degree of controversy. In a traditional sense, such efforts have been discussed in terms of the tension between sovereignty and human rights, and in modern and post-modern senses, they also involve a worldwide reconfiguration of power relationships. The main point is that the problems inherent in global rescues derive from a single source: a fundamental split, even if there is some overlap, between being a citizen and being a human. Currently, there is also another split and overlap between particular communities and the whole of the world. The influence of this duality and inconsistency is not limited to the issue of global rescue; it also involves the whole issue of global ethics.

The purpose of this paper is to consider these issues through a particular phenomenon—forced displacement. Usually epitomised by refugees and Internally Displaced Persons (hereafter, IDPs), forced displacement is considered a core issue of so-called complex humanitarian emergencies (Väyrynen 2000). There are now approximately 40 million victims of this phenomenon worldwide, and they are found on almost every continent. Upon examining this issue, we find that there are two points deserving attention. Firstly, we can see a clear discrepancy between the number of refugees and the number of IDPs. While the number of the former have shown steady decreases (recent numbers indicate approximately 10–15 million), the number of IDPs remains high (some 25 million). Secondly, there seems to be a paradox in terms of how victims of forced displacement are treated worldwide: whilst more international institutions

and treaties have been developed to address the needs of these victims, the world is far from having established a 'durable solution'. One possible cause of this paradox is the emergence of 'New Wars' (Kaldor 2001) and the radical transformation of violence; however, it is also arguable that the world has, whether deliberately or not, undergone a structural change whereby the goal has become to provide protection within the country of origin of the displaced persons, rather than outside that country. This has sometimes been criticised as 'containment' (Dubernet 2001). Two concepts correspond to these trends—namely, asylum and intervention. This paper will focus on both concepts. What should be avoided, however, is a straightforward, post-modern judgement that the global treatment of forcibly displaced people is symptomatic of a 'global apartheid' or 'anarchical governance' (Tosa 2003; 2009) in which a liberal global power dominates under the banner of cosmopolitanism. Rather, this paper will argue that, despite the recognition of post-modern criticism, the current situation of global displacement has long historical roots that can be traced back to the fundamental dichotomy between citizens and humans, or the community and the world. This paper will also argue that the historical development of this citizen–human duality has created something new in the contemporary context: the dominance of the ethics of intervention over those of asylum, and even the absorption of the latter into the former.

Sections two and three examine the conceptual and ethical aspects of the ideas of asylum and intervention, respectively. Section four is devoted to further examination of the integration of the ethics of asylum and those of intervention. The *Responsibility to Protect* (hereafter, R2P) is considered an especially important point, as it embodies a result of this integration. By bringing together historical analysis and post-modern observation, this paper aims at presenting a comprehensive picture of the ethics of present-day global rescue.

Ethics of Asylum

Asylum constitutes one of the main dimensions of global rescue—namely that of sanctuary granted by a foreign power. As a concept, it has been investigated

in several studies (Grahl-Madsen 1980, Price 2009, etc.) that may suffice to demonstrate some points as to its essence. First, as its etymology suggests (i.e., *asylia*/*asylon* in Greek and asylum in Latin), '*asylum*' does *not directly* refer to protection; rather, it points to the inviolability of a particular authority and/or the venue where it is located. In a Western context, there seems to have been a gradual shift of authority from ancient kingship to secular sovereign states via Christianity; nonetheless, what deserves attention is that they all share the idea of asylum as a function of authority. It is precisely at this point that asylum came to be considered a right of the authority and not of its beneficiary, though the recent shift that has occurred has been from the former's to the latter's. In addition, it may be useful to understand asylum in conjunction with the idea of amnesty, as they are both functions of a certain authority.

Another point to note is that the granting of asylum has generally been an exception, rather than the rule. Its main function is to provide immunity from competing authorities. In this sense, asylum has a strong but negative association with existing judgements. There are two especially noteworthy aspects. Domestically, asylum works not only as a negation of but also as a *complement* to justice, both criminal and civil. In such cases, the main purpose of asylum has been more about clarifying cases in which the individual had originally been innocent but was wrongfully processed. The story is different in the international realm, where immunity refers to the exclusion of the original judgement and the authorities that made it, both of which exclusions easily become a matter of debate. Facing such potential or apparent conflict, three types of resolution have been developed. One is treaty-making *vis-à-vis* extradition among polities. These treaties constitute a formal aspect of the development that aims to clarify which types of acts and groups of people can or cannot benefit from asylum[1]. In these treaties, the criteria for asylum have been assigned on a country-by-country basis and are usually bilateral. Nonetheless, one needs to note that the world has made considerable efforts to turn the worldwide web of treaties into a global asylum

1 Historical examples include treaties of extradition between England and Denmark (1661), England and Holland (1662), Denmark and Brunswick (1732) and France and Switzerland (1777). There were also treaties of non-extradition between Prussia and Belgium (1836), with France (1845) and Holland (1850).

system, complete with multilateral legal instruments and administrative devices.

The second type of resolution is the development of common understandings regarding international asylum, regardless of the existence of treaties. Perhaps one crucial point to highlight here is the principle of non-hostility—that the seeking of asylum does not constitute an act that impairs the relationship between the asylum-seeker and his or her state of origin. Another point is that certain groups of people, such as pirates and traitors, have been recognised as being consistently excluded from the asylum system. Both of these points remain crucial pillars of the international system of asylum, and they have been maintained by the principle of reciprocity.

Finally, asylum always presupposes prosecution and/or persecution. Historical examples involve various reasons for flight from prosecution/persecution—reasons ranging from purely punitive to religious or political. Sometimes it includes forced marriage (as experienced by the daughters of Daneous in Aeschylus' play *The Suppliants*) or serious ethnic oppression (as recorded in the Biblical account of the Exodus). When considering the ethics of asylum, the existence of prosecution/persecution is vital since it presents asylum as an act of *acceptance*—a function of a particular authority that allows asylum-seekers to stay within its sphere of influence. Thus, the moral question here is how many people should be accepted and on what basis. Existing studies show two positions, 'partialist' and 'impartialist' (Gibney 2004), which roughly reflect communitarian or cosmopolitan ethics, respectively. Whilst partialists tend to restrict asylum, impartialists support open borders and more acceptance. It may also be that partialists are inclined to rely upon utilitarian criteria, whilst impartialists may invoke a deontological approach. Practical suggestions seem to take the middle ground by proposing acceptance 'quotas' based on human rights theory (Grahl-Madsen 1980). As will be discussed later, however, one should be careful in making any direct connection between asylum and human rights: such a connection is a rather modern product, wrought by shifting the source of the 'inviolable' from kingship or religious authority to the individual human being.

Ethics of Intervention

Intervention has been another pillar in global rescue. As implementations of intervention have increased, scholarship has also given it intensive coverage as a topic of global ethics (Brown 2003; Chaterjee and Scheld 2003; Lu 2006; Brock 2009; Hutchings 2010). Nonetheless, it is crucial first to acknowledge that the act of intervention in international life remains 'convention-breaking' (Rosenau 1969:163) and 'hostile' (Wight 1977: 111). This very essence of hostility has become a crucial part of the basic character of intervention, connoting an *active engagement* in the affairs of other countries. The action itself may breach the principle of sovereignty. Therefore, ethically speaking, the ethics of intervention necessarily entails *justification* as to why such a deed should be permitted.

On this point, there seem to be three types of reasoning. The first is the transplantation of a 'just war' tradition, which R2P apparently presents. However, the theories of just war and of just intervention are similar only in the style of reasoning therein; their backgrounds of justification are qualitatively different. Whilst the just war tradition starts with the question of reconciling Christian pacifism and actual war engagement, just intervention theory offers a rationale as to why and under what conditions sovereignty should be overruled. They are similar in that both provide reasoning for the original 'rule-breaking' activities (i.e., breaching pacifism in the former case and non-interference in the latter). Recent development has shown, nevertheless, the synchronicity of these two theories, under the common headings of *jus ad bellum*, *in bello* and *post bellum* (Hatchings 2010).

The second line of reasoning is paternalistic and involves the idea of trusteeship. According to this reasoning, intervention takes place on behalf of the people living in the state that is subjected to intervention. The growth of international paternalism has occurred in tandem with the idea of international trusteeship, which can be traced back to Aristotle via Locke (Bain 2002). Obviously, one point to bear in mind is the conscious and structured asymmetry between the 'beneficiary' and the 'benefactor', which has often served as convenient logic justifying acts of aggression. This asymmetry is conscious

and structured because, contrary to the formal equality among sovereign states, there remain obvious differences in their political, economic, social and military capabilities.

Third, there is a deontological or prescriptive approach to intervention. As Tesón (2005) points out, Kantian logic often provides a strong basis for the active rescue of strangers. Of course, Tesón's argument is only one, albeit persuasive, account; there remain others, contrasting types of normative ethics, such as utilitarianism (cf. Goodin 1985). However, the point here is not that Kantian logic contrasts with other competitive options, but that it is a standpoint that converts moral reasoning from mere justification to prescription. Intervention here is not only justified but also required, regardless of the positions of normative ethics. In this sense, the third type of reasoning can have the most direct link to Hare's (1981) prescriptivity and universalism. Another point of note is that whilst this prescriptive approach serves as a moral reasoning for intervention, it also creates further ethical problems inherent in situations involving bystanders and selective action. Such inquiries, of course, are not new, but one needs to tackle them squarely, so long as one maintains a prescriptive attitude *vis-à-vis* intervention: it is no longer a matter of supererogation.

As mentioned, recent trends indicate a convergence of these approaches, and the appearance of R2P is the clearest evidence of above. Perhaps one of the most important aspects of R2P is its transformation of ethics within the context of intervention. Previously understood as 'rule-breaking'—and therefore prompting a justification to nullify moral condemnation—intervention is now considered necessary. The restraints have been loosened or changed with a new understanding of state sovereignty. It is debatable whether such a transformation is having a positive impact on world politics and global ethics; one can approach this question by narrowing the focus down to the context of forced displacement and the traditional ethics of asylum.

From Asylum to Intervention

It is here hypothesised that, in the context of forced displacement, a transformation

has occurred within the ethics of global rescue. There has been a shift in the core activities and in the accompanying ethics—from those denoting asylum to those denoting intervention. In other words, there has been a retreat from asylum, and elements thereof have come to be integrated with the ethics of intervention. This process has not resulted in the outright 'extinction' of asylum *per se*, but the retreat has indeed been silent, steady and certain. This section examines how such a transformation has been taking place, and the impact it has made on global ethics and politics.

(1) Three Stages of Development: A Historical Review

The whole transformation process can be divided into four stages: the expansion of asylum, the development of intervention, the rise of mass displacement and the integration of asylum and intervention.

1) The expansion of asylum

As long as asylum reflects the functions of specific authorities, it is subject to changes within those authorities themselves. Historical studies tell us that in general these authorities have shifted from ancient kingships to sovereign states (Price 2009; Shimada 1985). Keeping this in mind, however, it is a good idea to ask how the role of natural law ethics has also changed, since it constitutes a core principle of the citizen–human duality that transcends the various authorities involved. As Lauterpacht points out, natural law claims essential equality between slaves and the free (1950/1968: 83–84). Indeed, slaves comprised the first group to be granted asylum, apart from those originally covered (i.e., criminals and debtors). He further argues that the natural law tradition later became the foundation of individual human rights (ibid., chap. 5). His assertion deserves attention, for it hints that asylum may already be connected to human rights, or that asylum may involve human rights.

Together with the role of natural law ethics, it is also useful to consider the influence of Christianity in the expansion of asylum. Basically, the expansion of asylum seems to have occurred in tandem with its secularisation, but in

earlier stages, the emergence of Christianity had had considerable impact on the process. First of all, Christian churches were provided as places of refuge. This is worth noting, because a church was a place separate from secular authorities, which constituted both the ancient and modern realms of 'territorial asylum'. For Christians, the site for asylum belongs to the Christian world, which is not the case in the 'ordinary' human sphere. Second, as Price correctly points out, the auspices of Christian authority change the criteria for 'causes of prosecution' (Price 2009). The idea of sin, as per Christianity, reformulated the notion of crime; this development, in turn, redrew the line demarcating who could and could not be considered an *asylee*. Thirdly, Christianity introduced a prototype of rescue beyond asylum, as presented in the story of the 'good Samaritan'. This is important, because Jesus actually ordered people to 'go and do as he [i.e., the good Samaritan] did' (Luke 10:37), instead of merely welcoming those who are in need. What is common to these three factors is that they all presuppose different notions of authority and territory—two concepts which, from the Christian mindset, potentially transcend and supersede any secular notions. It is arguable that such potential universality helped foster the expansion of asylum in the modern period.

An expansion of asylum accompanied, obviously, the increasing number of people meeting eligibility criteria. This is a simple fact, but the implications thereof are enormously important; that is because, historically speaking, protection itself had been quite exceptional for ordinary victims of displacement. For instance, following the breakup of talks between Athens and Melos, most men were killed and women and children enslaved. Killing and plundering were also allowed when Rome fell in 410 AD. What these cases tell us is that it had been very difficult, if not impossible, for ordinary people to escape the catastrophe and obtain protection as refugees. The historical expansion of asylum thus features the gradual and steady inclusion of those who had previously not qualified, such as slaves, pagans, and ordinary criminals. Again, in this development, one can see the influence of natural law ethics and in particular the idea of human rights.

2) The development of intervention

While the use of asylum expanded, another process appeared—intervention. Despite its expansion, asylum still bore the problem of offering limited eligibility. Thus, it was almost natural that a question would arise as to whether or not the previously unqualified should still be protected—and if they were, by what means. Natural law and the Roman Empire had chosen the expansion of asylum by including slaves, whilst the Christian world took a different tack. One of the earliest forms of intervention was the saving of fellow Christians undergoing persecution; in this sense, Moses was a role model: he himself can be regarded as an agent of intervention, leading two million people from Egypt to Israel. In the early middle ages, it was Augustine of Hippo and Thomas Aquinas who developed accounts supporting the just use of force. Again, Christianity can be seen as having a potentially global reach in terms of its authority, and so territory seems to be a crucial consideration.

In any examination of the development of intervention, it is crucial to mention the role of Grotius. On one hand, Grotius recognised asylum as a potential cause of war, because it may breach the authority of the asylum-seeker's country of origin; on the other hand, however, he denied local residents the right to rise up against own tyranny, as doing so can impede the stability of a nation. In such circumstances, he says, the legitimate 'way out' was the taking up of war for the sake of the oppressed (Grotius 2005: Book II, 1161–2). It is also worth recalling that Grotius' criteria for intervention are linked with the idea of trusteeship (Grotius 2005: Book II, 1162). Certainly, Grotius was not the first person to justify intervention for the sake of the oppressed, but his formulation of the 'war undertaken for others' marks a crucial watershed moment that created the possibility to expand the act of rescue with fewer limitations.

On this issue, Grotius' introduction of intervention is supplemented by the work of Samuel Pufendorf. Pufendorf's achievement was to (re)introduce the idea of 'hospitality' into the Law of Nations (Pufendorf 1934: 363)—an act that, Price (2009: 39) argues, happened in tandem with the collapse of asylum and the interpretation of asylum as the general duty of 'accepting strangers'. However, this seems to be a slight exaggeration, as these events do not change the very

basic framework of asylum—that is, its 'welcoming' nature. Rather, it was the philosophy of Kant that changed this character, as Kant defines 'hospitality' as 'the *right* of the stranger not to be treated with hostility when he arrives on someone else's territory' (Kant 1970/1991: 105; emphasis added). Kant's formulation of hospitality is interesting, since it is ascribed to the principle of commonly sharing the world (Kant 1970/1991: 106). Pufendorf and Kant agree upon one point: hospitality should be circumscribed as welcoming, and one should allow a foreigner to stay, as long as doing so does not incur any harmful results. Therefore, hospitality is always conditional and holds a caveat on one crucial point; the conditional nature of 'hospitality' also leads to calculations *vis-à-vis* the interests of receiving states versus those of the displaced persons.

3) The rise of mass displacement

Thus far, we have examined the expansion of asylum and the development of intervention. These events suggest the limits of the initial asylum system, but it can reasonably be said that until the 19th century, there had been a measure of balance between the two activities. Such balance obviously embraces the citizen–human duality, and it also responds to questions of how to strike a balance between the preservation of certain communities or states and the protection of other people, based on their being fellow human beings.

However, such a balance began to dissolve as the modern world faced mass numbers of displaced persons. Of course, this development was not driven solely by forced migration; voluntary international migration itself had become global (Goodwin-Gill 1978; Hathaway 1991). Although large-scale displacement is not unique to modern times, some instances of late-modern displacement have borne certain characteristics. First, they tend be related to the nationalisation of warfare. The development of total war involved entire nationalities and it drastically increased the number of casualties thereof, including the number of those displaced. Second, forced migrants were more 'politicised' than had previously been the case. As noted, providing asylum had long been regarded as not being an act of hostility among states. However, following the Russian Revolution, Cold War refugees were considered political defectors of certain regimes. In

such circumstances, the granting of asylum was tantamount to the provision of security and freedom from political opponents, and thus it was encouraged, especially in the American block. Third, late-modern mass displacement also brought with it the concept of 'repatriation'. This is important, because the idea of repatriation suggests a rejection of traditional means of problem solving: unlike the conventional sense of asylum, repatriation presumes that forced displacement will be resolved when displaced persons *go back* to their own countries. Thus, repatriation makes the asylum seeker's country of origin the site of problem solving, rather than wherever the asylum-seeker chooses to go. Under such circumstances, asylum is considered temporary and complementary—a proverbial 'stop-gap measure' in the process of securing solutions. Although asylum in this context is different from 'resettlement', international society prioritises the notion of repatriation, both explicitly and implicitly.

Finally, the introduction and development of human rights significantly influenced mass displacement. In a sense, mass displacement itself requires the insertion of human rights, given its sheer scale. What should be noted is that it is not merely the *idea* of human rights that was linked with displacement; it also brought with it some related conceptions and practices that greatly complicated the whole picture.

One typical example is the idea of intervention. As has been mentioned, intervention for humanitarian purposes was justified by Grotius, but the insertion of non-intervention and the rise of legal positivism had long prevented the occurrence of certain acts of intervention. It was not until the late 19th century that one saw the revival of intervention, and some publicists began to justify it in terms of humanitarian aims.

Another example is the idea of self-determination. As typically expressed in Woodrow Wilson's Fourteen Points, self-determination became a specific human right, and expressed the collective will for self-governance. Nonetheless, together with the rise of nationalist sentiment, self-determination rather *created* displacement.

(2) The Integration Process of Asylum and Intervention after 1945

It can be said that, following the three aforementioned stages of transformation, the integration of asylum and intervention would be inevitable. The twentieth century world needed effective measures that met certain needs *vis-à-vis* the stability of sovereignty and the protection of human rights. Indeed, the institutionalisation of these at the international level during and after WWI highlights the League of Nations' efforts to reconcile different requirements. Aside from its original definition, the requesting and granting of asylum are now considered matters of human rights. The Universal Declaration of Human Rights mentions asylum as a right of the individual (article 14); the Convention on Refugees provides various rights for refugees, none of which appeared systematically in the texts of conventions that occurred during the inter-war period. If such integration *per se* were inevitable, it is the process of integration that should be more closely scrutinised. How did this integration take place?

Originally, the ethics of asylum led the entire integration process. Although the initial meaning of 'asylum' as a function of a particular authority (i.e., sovereign states) was changed by inserting the notion of human rights, it was never rejected. The act of intervention was restricted under the principles of sovereign equality and non-intervention, both of which had been constitutional pillars of modern international society (Bull 1977). The issue of asylum had therefore been *primarily* a matter of sovereignty.

Extending this basic chain of events, the post-WWII world sought further internationalisation of the asylum system. One clear effort in this direction was the development of the UN Declaration of Territorial Asylum, adopted in 1969. Two concepts were newly introduced at this time: 'international solidarity' (article 2-2) and 'mass influx' (article 3-2). The first, 'international solidarity', implies two related things: the global need for cooperation and the need for burden-sharing (cf. Goodwin-Gill 1996: 176). Such solidarity was reinforced by the recognition that asylum granting was not only 'peaceful' but also 'humanitarian' (article 2-2). The second concept, 'mass influx', was used as an exception to the non-*refoulement* principle that prioritises 'national security' over protection of the displaced. Although the declaration was 'mindful' that asylum touches

upon human rights, the introduction of the new concepts still indicates that the declaration's standpoint was based on sovereign stability.

Three years after the adoption of the UN Declaration of Territorial Asylum, a privately organised committee completed a first draft, in an attempt to elevate it to an international convention. The idea of 'international solidarity' and 'mass influx' were bundled together, and one separate article (i.e., article 5) was provided under the heading of 'international cooperation'. It was further reviewed by the UN Group of Experts in 1975, and other versions of draft articles commonly mentioned the need for international cooperation. Nevertheless, the final conference draft submitted in 1977 deleted all such expressions, and the conference itself ended in complete failure. One of the main drafters of the convention, Grahl-Madsen (1980: 62) admits that the draft itself 'definitely needed refinement'. Further attempts to revise the draft were never completed.

The failures of the convention and of attempts to revise it suggest there are limits to integration, at least in terms of extending the ethics of asylum. Instead, what started to appear was a different route: integration led by the ethics of intervention. Importantly, it went hand-in-hand with attempts to make the sovereignty of states less absolute. Within the context of forced displacement, such change was apparent in the drafting process of the Declaration against Unacknowledged Detention. Later known as 'forced disappearance', unacknowledged detention refers to a situation in which a particular group of people suddenly disappears; the phenomenon has been observed mainly in Latin American states since the 1970s. The issue of unacknowledged detention has little connection to asylum, and the declaration itself was unsuccessful, at least in the early 1980s. However, there are still two noteworthy points. In the first place, with regard to its form, there was no drive to legalise the detention declaration; in other words, it was institutionalised as a 'soft law'. The asylum declaration was indeed a soft law too, but there is a considerable difference between these two texts—the soft-law quality of the asylum declaration resulted from a compromise that had diverted it from becoming a legal convention, while the detention declaration had sought soft-law status from the outset. Second, from the viewpoint of substance, the issue touched the internal structure of

particular states. This had a considerable impact, since it expressed the view that the primary agent of protection is not the recipient state, as seen in asylum issues, but the one in which displacement is actually going on. In the 1990s, these two declarations were further implemented and developed in a more sophisticated manner.

The year 1992 is, in two senses, significant in the history of forced displacement: in that year, a second trial to develop a declaration against forced disappearances was successful, and similar attempts were initiated with respect to IDPs. The sharp rise in the number of IDPs worldwide became a grave concern in international society, and the United Nations High Commissioner for Refugees actually broke the tradition of restricting coverage with respect to refugees to those who crossed borders. In 1992, the first comprehensive report on IDPs was published by Secretary-General Butros Butros-Ghali[2]; thereafter, a specialised post was dedicated to the issue. Newly appointed Special Representative Francis M. Deng initiated a multi-year study of the rights of IDPs[3], and he finally completed a draft of the Guiding Principles on Internal Displacement (hereafter, the Guiding Principles)[4] and the Framework for National Responsibility (hereafter, the Framework) [5].

The development of the Guiding Principles and the Framework happened more quickly than that of other, similar attempts, and it inherited from some practices, including the intentional avoidance of codification (Deng 2007: 153). Indeed, both documents were just noted 'with appreciation', and therefore never formerly adopted[6]. Nonetheless, there followed an incredible spread of their tenets to member states, and in cases such as Colombia and Georgia, they even affected national legislation. More striking were their substantial aspects. The Guiding Principles stated some principles that had already appeared in the drafts of the Declaration of Unacknowledged Detention or the Declaration against Forced Disappearance. Those principles were not merely reiterated;

2 UN Doc., E/CN.4/1992/73 (14 February 1992).
3 UN Doc., E/CN.4/1996/52/Add.2 (5 December 1995); E/CN.4/1998/53/Add.1 (11 February, 1998).
4 UN Doc., E/CN.4/1998/53/Add.2 (11 February 1998).
5 UN Doc., E/CN.4/2006/71 (23 December 2005).
6 UN Commission on Human Rights, Resolution 1998/50, E/CN.4/RES/1998/50 (17 April 1998).

they were also reinforced. One of them touched on international responsibilities with regards to IDP-producing countries. Before the Guiding Principles had been 'taken notes', Deng (1993) personally proposed the idea of 'sovereignty as responsibility' and argued that responsibility primarily rests on the IDPs' country of origin. His proposition is reflected in Principles 3-1, 7-2, 9 and 25-1, and is further reflected in the Framework [7]. Furthermore, conditioned sovereignty may be 'forfeited' (Deng 1993: 13) if the state is not able to discharge its own responsibilities in preventing displacement or in offering adequate protection if displacement does occur. The residual responsibilities, to be fulfilled by international society, were introduced at this stage.

It is surprising that the language and logic of the Guiding Principles is very similar—indeed, almost identical—to those presented in R2P reports. Both sources emphasise the significance of prevention, state that IDP-producing states are the primary agents of responsibility, hint at the possibility of the forfeiture of sovereignty when those states perform poorly, express an expectation that international society follow up on the primary responsibilities of those states, and refuse to reject interventions on humanitarian grounds. In fact, Deng's proposal for 'sovereignty as responsibility' was invoked in the background research (ICISS 2001b: 11) and officially used as a notion that counters the traditional understanding of 'sovereignty as control' (ICISS 2001a: para. 2.14). Moreover, Deng himself mentions R2P in consolidating his own argument[8]. What can be seen here is a mutual reference between the Guiding Principles and R2P; one can see an even more widespread use of the principle in a more general context[9].

Having reviewed developments occurring in the latter half of the 20th century, it may be helpful to summarise the whole of the integration process into a few points. First of all, the transformation of rescue ethics took the form of an integration of the ethics of asylum and intervention. Second, a review of history tells us that both sets of ethics allowed for the transformation that took place. Third, the rise of mass displacement brought about radical changes in the

7 UN Doc., E/CN.4/2006/71/Add.1 (23 December 2005).

8 UN Doc., E.CN.4/2003/86, note 3 in p. 24.

9 For instance, see the UN Secretary-General's report In Larger Freedom (UN Doc., A/59/2005), para. 7(b), 132 and 135.

environment of rescue, creating conditions that were more in line with the ethics of intervention—in spite of which there remained an enduring balance between the two sets of ethics. Fourth, in the late 20th century, the integration process accelerated. It was the ethics of asylum that first led the process, but the failure of the Asylum Convention became a decisive turning point. Fifth, after 1977, the process was instead led by the ethics of intervention. Through the success seen in developing the Declaration against Forced Disappearance and the Guiding Principles for IDPs, the prevalence of intervention ethics became very apparent. Finally, there seems to be close connections between the Guiding Principles and R2P.

The final point to consider is what can be inferred from the aforementioned historical experiences. On the one hand, the integration of the two sets of ethics tackles today's pressing need to respond to humanitarian emergencies. In the context of forced displacement, the development of the Guiding Principles and the Framework provided useful guidance. More generally, the intervention ethics presented in these documents eventually constituted the prototype of the ethics of humanitarian response, which R2P embodies. In any case, the integration process has broken the balance between the two and driven the whole of the forced displacement issue into the realm of human rights. This is problematic, because the issue of displacement contains aspects that cannot be reduced to human rights—namely, sovereignty, authority, and asylum. Again, what we are witnessing is the transformation of asylum from a function of authority to an issue of human rights. What may result is an incomplete transformation. As long as displacement itself entails two possible solutions, that is, protecting the displaced, on the one hand, at the initial site of displacement or, on the other hand, at the location where the displacement ends, there will also be two routes of moral conduct along which each solution could be executed. It is, therefore, imperative that a balance be struck between the two responses, rather than proceeding to complete integration, and in particular to the absorption of the ethics asylum by the ethics of intervention.

Conclusion

One question remains—Is (or has) the integration process (been) meaningless, amounting to nothing? One may even ask the question of whether that process has even been harmful. There are no easy answers to these questions, especially as contemporary displacement becomes increasingly complex. It is, after all, not merely the problem of people moving from one place to another. Forced displacement has 'root' causes, inflicts global burdens, and involves the protection of human lives. These characteristics are part and parcel of the citizen–human duality. In many respects, one can be both citizen and human, but not all aspects thereof can be easily integrated. Although some attempts have been made to 'reconcile' these two sets of ethics (Linklater 2007; Erskine 2008; Miller 2009), there remains a fundamental gulf between them. It was Arendt (1951) who once pointed out their inconsistencies, the limits of human rights, and the limits of asylum. On the other hand, at the core of the ethics of global rescue there is the concept of human rights. In a contemporary context, it is impossible to nullify the role of human rights and the ethics of intervention. It is also difficult to deny Arendt's warning. All of these points serve to remind us of the necessity to consider carefully the ethics of global rescue at multiple levels.

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Dicey Ethics:
The Limitations of R2P as a Norm

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Abstract

In this paper, I argue that the very success of an implementation of R2P can undermine the moral justification of that implementation—or at least the perception of that justification.

'Srebrenica' has been spoken of as a 'shock to the conscience of mankind'. It was in response to this shock that R2P came to be advocated on the grounds that the 'use of force' is necessary to halt mass atrocities. However, a successful implementation of R2P through the 'use of force' may have some ethical pitfalls. Three significant ethical issues are the following: (1) even a successful implementation of R2P will cause civilian casualties and the deaths of soldiers; (2) when R2P is implemented in order to prevent a slaughter and succeeds in that prevention, the very non-occurrence of the slaughter would then remove the ethical grounds for the implementation of R2P; (3) the action taken to implement R2P may well be in violation of existing norms.

1. Introduction

Genocide and ethnic cleansing are among the most controversial topics in international relations at present. Although there have been occurrences of these since ancient times, Rwanda and Srebrenica came as a shock to people who believed themselves to be living in a modern world that had transcended such brutality. In Rwanda, in the year 1994, about 800,000 people were killed, many

with machetes, and in Srebrenica, in 1995, about 7,500 Muslims were killed by the Bosnian-Serbian army [BSA] despite the 'safe area' protection of the UN force, the Dutch Battalion [Dutchbat].

These tragedies have stirred up several debates over so-called humanitarian intervention, particularly in regard to the tension between the 'right to intervene' and 'state sovereignty'. In order to find a basis for moving beyond the impasse created by the inconclusiveness of this debate, Kofi Annan, the then-UN Secretary-General, began speaking of the incidents of 'Rwanda' and 'Srebrenica' as a 'shock to the conscience of mankind'. Annan's view on this can be seen in the following quotation:

> I recognize both the force and the importance of these arguments. I also accept that the principles of sovereignty and non-interference offer vital protection to small and weak states. But to the critics I would pose this question: if humanitarian intervention is, indeed, an unacceptable assault on sovereignty, how should we respond to a Rwanda, to a Srebrenica—to gross and systematic violations of human rights that offend every precept of our common humanity? [Annan 2000, p.48]

R2P is one answer to Annan's question. The ICISS (International Commission on Intervention and State Sovereignty) was founded with the support of the Canadian government, and in December 2001, it submitted a report on the 'Responsibility to Protect'. This report was presented as a synthesis of the debates regarding 'state responsibility' vs. 'the right to intervene'. The ICISS advocated the adoption of the principle that sovereignty entails not only rights but also responsibilities.

The R2P report stated the following:

> A. State sovereignty implies responsibility, and the primary responsibility for the protection of its people lies with the state itself.
> B. Where 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 principle of non-intervention yields to the international responsibility to protect. [ICISS 2001, p. XI]

R2P is not just a proposal in a report but is emerging as a new norm. It has been referred to and supported in UN-related documents such as '*In Larger Freedom*' and '*A More Secure World*'. Further, at the 2005 World Summit of the United Nations General Assembly, member states embraced R2P. Although there are many challenges and problems associated with it, R2P has been accepted as a new 'manifesto' of the international community.

Critical points in regard to R2P include not only utilization of the term 'responsibility' but also—a most controversial point—permission for the 'use of force' for humanitarian purposes beyond self-defence. However, the 'use of force' has been a 'double-edged sword' from ancient days. My concern and intent with this article is to inquire into the conditions necessary to ensure that R2P is ethical. Of course, some can point out simply that R2P is not ethical because of the 'use of force' clause, while others can insist that R2P is ethical because there is no other means to rescue those individuals who suffer from tragedies.

This paper is written from a standpoint supporting the concept of R2P. However, while it recognizes that military intervention is sometimes necessary to protect people from genocide and ethnic cleansing, it also recognizes that R2P does have limitations in its practice of civilian protection, as do other concepts and moral principles relating to the same issue.

In addition to this, I want to point out that R2P is not just an academic question but is a norm that decides the destiny of many, including the suffering, the soldiers involved, etc. In order to make an implementation ethically viable, it must be shown that a concrete process and result can resolve the problems inherent in R2P. Therefore, the awareness of concrete examples of the problems and limitations of R2P can help in a practitioner's decision-making.

In this paper, I want to clarify that R2P has emerged more out of chance than as the outcome of some inevitable process. Moreover, it must be stressed that the success of an R2P operation would mean not only that genocide or ethnic cleansing would be prevented from occurring, but that because of this non-occurrence, it may happen that

the intervention can no longer be shown conclusively to have been necessary.

2. The Ethical Basis of R2P

In this section, I will discuss R2P in light of two factors that that are considered to provide an ethical basis for it, namely that it is carried out a) when there is mass killing going on, and b) when there is reasonable hope of success.

The Core concept of R2P: Military Intervention and the Responsibility to React

Although R2P is comprised of three responsibilities, its core concept is military intervention.

R2P consists of the following three responsibilities [ICISS, p. XI]:

> A. The responsibility to prevent: to address both the root causes and direct causes of internal conflict and other man-made crises putting populations at risk.
> B. The responsibility to react: to respond to situations of compelling human need with appropriate measures, which may include coercive measures like sanctions and international prosecution, and in extreme cases military intervention.
> C. The responsibility to rebuild: to provide, particularly after a military intervention, full assistance with recovery, reconstruction and reconciliation, addressing the causes of the harm the intervention was designed to halt or avert.

Although ostensibly R2P seems to be focused on non-military measures, in fact, virtually 'the commission's main focus was on intervention'. [Bellamy 2008, p.621]. Prevention and rebuilding do not make R2P controversial. Thus, it is the second responsibility, the 'responsibility to react,' and particularly 'military intervention,' that is at the centre of debate.

Principles of Military Intervention

In short, the criteria that are considered to give military interventions associated

with R2P their ethical justification include the fact of mass killing and the probability of success.

R2P does not give a carte blanche for 'military intervention' unconditionally, but provides 'principles for military intervention'. These are 'the just cause threshold', 'the precautionary principle', 'right authority', and 'operational principles'. Although I will not take up these 'principles for military intervention' in detail, the inclusion of these principles makes it clear that R2P is intended to 'be humanitarian both at the level of *Jus ad Bellum*, and also *Jus in Bello*. In other words, R2P is intended to 'be ethical' both in concept and in practice. It is inevitable that improper motives or practices will spoil the legitimacy of intervention, which is why ICISS has created complex principles to guide it. Most particularly, the reality of a large-scale 'tragedy' and the probability of success are the conditions that guarantee the ethical and moral nature of R2P.

This now raises the question of the concrete actions that are indicated by R2P. Historically, the military's purpose is to gain victory, not to be humanitarian. If humanitarianism prevailed around the world, the military would not have existed in the first place. Therefore, the military in general, is not designed for such things as 'humanitarian operations'. Now, however, it is undertaking such tasks. Therefore, we have to determine what concrete actions are indicated by R2P. Most importantly, we have to be able to recognize concrete situations in which an implementation of R2P might be called for.

Concrete situations can be found in the R2P report. R2P arose from the situations that occurred in Rwanda and Srebrenica. It was devised to rescue people from tragedies like those that took place in these two locations. Therefore, we need to explore the kinds of action expected in a situation like that of Rwanda and Srebrenica.

We will discuss the Srebrenica massacre in the following section because this case is more useful in examining the practice of R2P than is the Rwandan case. While Rwanda was abandoned in the first place, Srebrenica was designated as a 'Safe Area' by the UN and was protected by a UN force, the Dutch battalion [Dutchbat].

3. The Case of Srebrenica

It is argued that in Srebrenica, Dutchbat should have counterattacked the Bosnian Serb Army (BSA). In this section, I will consider this in terms of both factual and counterfactual thinking.

The Story of Srebrenica

'Srebrenica' is a name that has come to mean tragedy and shame for many people. The oft-told story about this tragedy is as follows:

> In July 1995, the world's first UN Safe Area became the site of Europe's worst massacre since World War II. That month, the Bosnian Serb army staged a brutal takeover of the village of Srebrenica and its surrounding regions, while a Dutch peacekeeping battalion of the UN forces helplessly looked on. In the course of the destruction, Bosnian Serb soldiers separated Muslim families and systematically slaughtered more than 7,000 Muslim men in the fields and factories around the town. [PBS program]

What was the reason behind such a tragedy? The UN report, *The Fall of Srebrenica*, is an answer to that question and concludes with the following critical lesson.

> The cardinal lesson of Srebrenica is that a deliberate and systematic attempt to terrorize, expel or murder an entire people must be met decisively with all necessary means, and with the political will to carry the policy through to its logical conclusion. …it required the use of force to bring a halt to the planned and systematic killing and expulsion of civilians. [A/54/549, para.502]

In short, the report concluded that the 'use of force' is necessary when confronting 'conscience-shocking' tragedies.

Counterfactual Thinking of Srebrenica

Srebrenica was a case of failure. How does the memory of this failure influence the concept of R2P? Our memories indulge in not only factual but also counterfactual thinking—thinking of what would have been the consequences if a different course of action had been taken.

We can easily detect an example of counterfactual thinking about the Srebrenica case in the following quote.

> It is true that the UNPROFOR troops in Srebrenica never fired at the attacking Serbs. They fired warning shots over the Serbs' heads and their mortars fired flares, but they never fired directly on any Serb units. Had they engaged the attacking Serbs directly, it is possible that events would have unfolded differently. [A/54/549, para.472]

The above passage implies that if Dutchbat had counter-attacked the BSA, the outcome for 'Srebrenica' would be quite different from what we now know it to have been.

This view is common among academicians. On the basis of this, Dutchbat has been harshly criticised by many. For example, Abram de Swaan, a professor of sociology at Amsterdam University said that the 'Dutch commanders and their troops were cowards'; De Swaan's view is still shared by many Dutch people [Daruvalla, 2002]. Many believe that Dutchbat should have counter-attacked.

Scholars of ethics also evaluated the Dutchbat's inaction as a 'moral failure'. For example, Paolo Tripodi, Professor of Ethics at the Marine Corps University of the U.S., argued the following.

> When the Dutch peacekeepers deployed in and around Srebrenica decided that resisting the Bosnian Serb soldiers' attack was not a viable option, they were fully aware that such a course of action would result in some sort of harm to the Muslims under their protection. [Tripodi 2008, pp.7-8]

In his view, peacekeepers in Srebrenica 'decided to allow the killings of many thousand refugees' [Tripodi 2008, p.15]. He concluded that the peacekeepers had

a moral responsibility, despite the fact that there might not have been any legal responsibility. He had also argued in a previous article for this kind of moral responsibility on the part of the peacekeepers in Srebrenica [Tripodi 2006].

We can also find influences of this same thinking in the R2P report. This report stressed the need for acceptance of the idea that 'force protection cannot become the principal objective'. [ICISS p. XIII]

Furthermore, the duties of soldiers involved in implementing R2P are spelled out in the Brahimi report, 'Report of the Panel on United Nations Peace Operations'. The Brahimi report also pointed out that 'peacekeepers—troops or police—who witness violence against civilians should be presumed to be authorized to stop it' [A/55/305-S/2000/809, para.62].

As far as the purpose of this paper is concerned, it is not necessary to discuss Dutchbat's decision-making in detail. However, there are a number of points that need to be made. First, before the Srebrenica massacre, Srebrenica was virtually the front-line base of the Bosnian Muslims Army, despite being a 'Safe Area' labelled as neutral. Second, the BSA had attacked the Muslim Army directly, but not the Dutchbat. Third, BSA commander Gen. Mladić had repeatedly made direct promises to both the Commanding Officer of Dutchbat and the refugees themselves that he would protect refugees.

Despite the complicated circumstances in Srebrenica just described, counterfactual thinking involving the notion that Dutchbat should have counterattacked the BSA for the protection of refugees had a powerful influence over UN officials, academicians and other people including the ICISS.

People who believe in counterfactual thinking assume that the prevention, and therefore the non-occurrence of a particular tragedy, would indicate that the actions taken to prevent that tragedy had indeed been ethical. We will discuss the validity of this 'counterfactual thinking' in the next section.

4. Limitations of Counterfactual thinking

In this section, my questions are as follows. Is 'counterfactual thinking' appropriate? If the Dutchbat had counterattacked and beaten back the BSA, could

such actions be evaluated as ethical?

This brings us to the crux of the matter. I will consider whether the case of Srebrenica indicates that a counter-attack would be ethical. I will address three kinds of counterattacks: (1) a counterattack that causes civilian casualties and the death of soldiers; (2) a counterattack that seeks to prevent a slaughter, the non-occurrence of which would then eliminate the ethical grounds for the military action; and (3) a counterattack that is in violation of existing norms.

A Counterattack Causing Civilian Casualties and Deaths of Soldiers

Military actions always cause civilian casualties, even if the purpose of such action is civilian protection. This means that if the course of action recommended by the counterfactual thinking regarding Srebrenica had in fact been carried out, this too would have caused civilian casualties.

Let us examine the situation of Srebrenica at the time in more detail. Around 4,000 to 5,000 refugees entered the Dutchbat compound while 15,000 to 20,000 stayed outside. If Dutchbat had counterattacked the BSA, the BSA would have attacked more aggressively, including a direct attack on the Observation Post and the compound of Dutchbat. This also would have meant a massacre.

Lt Col Karremans, the commanding officer of Dutchbat at the time, reported the following: 'there are now more than 15,000 people within one square kilometre, including the battalion, in an extremely vulnerable position: the sitting duck position, not able to defend these people at all'. [A/54/549, para.315]

In addition to that, Rob Franken also said the following.

> Could the Dutch have resisted or at least defended the refugees until help arrived? Major Rob Franken, the Dutch second in command, was in charge of the troops on the ground. He says no: 'If we would have started the firing there would be a massacre. I was absolutely convinced of that'. [CBS News 2002]

It seems true that 'the massacre' that the commanders imagined at that time could have taken place, depending on the timing of the counterattack. Civilian casualties would have been inevitable.

'Inevitable casualties' itself is not the point in question. What is important is whether the kind of counter-attack envisaged here can justify these casualties or not.

The Non-occurrence of a Slaughter as Eliminating the Ethical Grounds for Military Action

It was pointed out in the previous section that R2P was influenced by the 'memory of Srebrenica', and that much of this memory was based on counterfactual thinking. That 'memory' insists that the massacre could have been prevented. That 'memory' is premised on the fact that the massacre did in fact take place. However, is this enough to justify military action?

Lt Col P.J. de Vin, an officer of the Royal Netherlands Marine Corps, criticized the above premise in the following quote.

> Although my conclusion is that Karremans did not take the correct moral and ethical approach when he decided not to defend the enclave, I want to emphasize that in hindsight, Karremans' position was typical of a moral dilemma. Had he fought and lost a hypothetical twenty soldiers, he might have prevented the mass murder of 7,500 Muslim men. For this prevention of a mass murder he would not have received much credit however. Nobody would have known what he prevented. On the other hand he then probably would have been prosecuted for disobeying a direct order to abandon the OPs and consequently would have been held responsible for the death of his soldiers. [de Vin, p.33]

This clearly shows that a military officer who adopt this kind of counter-attack as being ethical, faces the dilemma that a successful prevention of a massacre may eliminate any evidence of the ethical grounds of the military action.

'Use of Force' as a Violation of Norms

Even in R2P, the 'use of force' is obviously the last resort because this military measure is a 'double-edged sword'. This is why the R2P report includes complex criteria. However, if prevention is successful and the massacre does not occur,

will the 'premise' that coercive military action was necessary still be regarded as ethical?

Even if we accept R2P as an ethical norm, R2P is merely one of many ethical norms. As I have just discussed, the non-occurrence of the massacre may remove any evidence of ethical grounds for the military action of commanders of a Peace-Keeping Operation [PKO] in the field, which means that the successful 'use of force' would eliminate the possibility of demonstrating of that very use.

Recall, at the time of the Srebrenica massacre, that the most powerful norm of conduct in peacekeeping was the 'non-use of force' supported by 'neutrality'. This can be seen in the quotation below.

> Peace-keeping and the use of force (other than in self-defence) should be seen as alternative techniques and not as adjacent points on a continuum, permitting easy transition from one to the other. [A/50/60- S/1995/1, para.36]

This document, published by the UN before and after the Srebrenica massacre in 1995, clearly proves that the 'use of force' is contrary to the norm of 'neutrality'. In addition to that, although it is true that Dutchbat's mission included 'protecting civilian populations in designated safe areas', it did not directly imply protection through the 'use of force'.

This example shows that the practice of R2P creates conflicts between R2P and other norms.

I will now return to our main concern. The question we have to ask here is whether one can justify the 'use of force' for the protection of civilians despite there being the possibility that, on the one hand, many civilian casualties may occur as a result of that use of force, and on the other hand, a successful intervention resulting in the non-occurrence of the possibility of demonstrating massacre may undermine the ethical nature of the intervention.

The conclusion of this section, then, is that counterfactual thinking regarding Srebrenica is rather inadequate in practice. It might be well to note the possibility that what has come to be known as the 'Srebrenica Massacre' could, as the result

of a successful intervention using force, have come to be known as 'the Failure of Srebrenica', and R2P might have never emerged.

5. Conclusion

In this article, the most important conclusion is that the success of an operation R2P does not guarantee its ethical success. Ethics depends on the outcome. Therefore, in order to maintain R2P as an ongoing and reliable norm, care must be taken in its implementation.

'Civilian casualties' are inevitable, even if the execution of R2P will prevent genocide and ethnic cleansing; no weapon can distinguish innocent civilians from slaughterers.

My argument points out the limitations of counterfactual thinking about the Srebrenica massacre. Some people may counter my argument that, from the perspective of utilitarianism, we can justify the 'use of force' even if civilian casualties do occur.

However, I cannot accept such a contradiction because the practitioner cannot justify the 'use of force'. In other words, the practitioner cannot ask some innocent people to die for the prevention of genocide.

This moral problem will remain a risk in the field as an aporia. We must never forget the risks involved in the practice of R2P. Before taking any action, we have to consider the possibilities and limitations of practising R2P seriously in order to prevent a tragedy.

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What Constitutes the 'Rightful Authority' and on What Grounds?: The United Nations Security Council versus a Concert of Democracies

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Abstract

This paper seeks to illustrate the legitimacy issues associated with the concept of rightful authority in relation to the 'Responsibility to Protect (R2P)'. More specifically, it focuses on the authority that must either embark itself on or authorise other actors to embark on military interventions for human protection (i.e., humanitarian interventions). The first section of this paper explains the critical importance of rightful authority in relation to humanitarian interventions. The following two sections examine the United Nations Security Council (UNSC) and a Concert of Democracies respectively as possible candidates to be the rightful authority. In the final part, I conclude that the UNSC, though deficient in procedures and effectiveness, still serves as a more legitimate authority than does an exclusive club of democracies. Nevertheless, in order for the UNSC to be perceived as more legitimate in relation to R2P, it has to reconcile two frequently competing demands: international legitimacy based on intergovernmental consensus on the one hand and cosmopolitan legitimacy derived from assessment of those who require rescue and are affected by interventions on the other. This challenge is not new, but it will be even more acute after the current international society embraces R2P.

1. Introduction

Reflecting on the cases of international response to internal conflicts and humanitarian emergencies in the 1990s, the International Commission on

Intervention and State Sovereignty (ICISS) articulated a new idea known as the Responsibility to Protect (R2P) in 2001. Since then, there have been ongoing efforts, mainly in the UN, to build consensus around the principle of R2P. The 2005 World Summit Outcome adopted unanimously by over 170 heads of state in the UN General Assembly, was a watershed document in that it provided the basis for debate and clarification of R2P in the international society of states. It embraced the core tenets of R2P, affirming that 'each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity'; should diplomatic, humanitarian and other peaceful means prove inadequate and the state manifestly fail to protect their populations from these four atrocious acts, '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' (A/60/L.1, paras 138–139). This was followed and confirmed by the UN Secretary General's report, 'Implementing the Responsibility to Protect' (A/63/677 12, January 2009). This document represents a process aimed at building international consensus on the norms for R2P.

At the same time, international society encountered disagreements over the actual interpretation and application of R2P on several occasions, including the genocide in Darfur (2003–), the Russian intervention in Georgia (2008), and the devastation wrought by Cyclone Nargis in Burma (2008), to cite just a few (Bellamy 2010). Despite broad agreement that the armed conflict in Darfur led to mass atrocities or genocide, which should have triggered an outside coercive intervention, the reaction of international society was too slow and too little. In July 2004, the African Union (AU) dispatched a small-scale peacekeeping mission (AMIS) to Darfur. The AMIS force was gradually increased from 150 to 7000 soldiers, but it finally proved ineffective in monitoring the ceasefire and protecting the inhabitants. Since December 2007, an AU/UN hybrid operation (UNAMID) has been underway, but so far it has failed to afford adequate protection to civilians, due to lack of resources and capacity (Badescu and Bergholm 2009). In this case, neither the UNSC nor an individual state or a group of states was willing to apply R2P norms.

In contrast, in August 2008, the Russian foreign minister invoked R2P to justify his country's military intervention against Georgia. However, at that moment, Georgian actions against South Ossetian populations did not appear to constitute a situation that legitimized the use of force on behalf of R2P (Evans 2009). Moreover, the Russian justification did not garner international support. This case demonstrated the danger in unilateral application of the R2P norm by major powers.

These two episodes showed that, at the very same time as there is consensus-building in progress at the UN, there is also a dissonance of opinions among states about the way to put R2P into practice. The underlying problem is that:

> Even if the rule is agreed and even if the background criteria for evaluation agreed, all rules have to be interpreted and applied to the circumstances of a particular case. It is therefore impossible to avoid the fundamental political issues: what is the body that has the authority to interpret and to apply the rule? (Hurrell 2005, p.30)

It is precisely this inescapable question that this paper will address by illustrating the legitimacy issues associated with the concept of rightful authority in relation to R2P. The paper begins by locating the importance of authority in military interventions for human protection by presenting an overview of the R2P report. This will be followed by two sections that examine the UNSC and the idea of a Concert of Democracies respectively, as two possible candidates for the rightful authority to judge the requirements of applying the R2P principle to a situation and to sanction military intervention. The final section summarises the arguments and suggests that for the UNSC to be recognised as the rightful authority, it must reconcile competing conceptions of legitimacy.

2. Concept of rightful authority revisited

Expounded originally by the ICISS in 2001, the idea of the Responsibility to Protect is very different from the dominant discourses on humanitarian interventions involving the 'right to intervene'. As one of two co-chairs of the ICISS, Gareth Evans emphasises, 'the responsibility to protect is about much more than that' (Evans 2008,

p.56). Indeed, according to the R2P report, 'the substance of the responsibility to protect is the provision of life-supporting protection and assistance to populations at risk', and it 'has three integral and essential components': the responsibility to prevent an actual or potential internal conflict or humanitarian tragedy, the responsibility to react to these situations and the responsibility to rebuild devastated societies towards a lasting peace. It is apparent that of the three elements, prevention is the most important, because it addresses the root and direct cause of internal conflicts and other circumstances which threaten the life of populations, eliminating the need to resort to the use of deadly force in the first place. However, there is no doubt that at the heart of the matter lies the need to define justifiable conditions for military interventions (i.e., humanitarian interventions) to stop mass atrocities or genocide as part of the responsibility to react.

Drawing upon the just war tradition, the R2P report listed six conditions for legitimate humanitarian interventions, which are the equivalent of *jus ad bellum*: just cause, right intention, last resort, proportional means, reasonable prospects of success and rightful authority. In addition, the report set out operational principles, some of which are considered to fall under *jus in bello*. For the present purpose, it is sufficient to enunciate two of the principles listed above—just cause and rightful authority.

The basic assumption of ICISS is that 'military intervention for human protection purposes must be regarded as an exceptional and extraordinary measure, and for it to be warranted, there must be serious and irreparable harm occurring to human beings, or imminently likely to occur'. Therefore 'just cause' as the threshold principle for military intervention establishes highly limited exceptions to the fundamental rule of non-intervention: genocide, ethnic cleansing, crimes against humanity, violations of laws of war and other dire situations involving massive loss of human life (ICISS 2001, pp.32–33).

Moreover, legitimate interventions for human protection should be duly authorised by a 'rightful authority'. The ICISS report devoted a whole chapter to the question of authority (ICISS 2000, chapter 6), which implies that the concept of authority is central to the legitimacy of military interventions. Therefore, the question is, who holds such authority on behalf of international society? On this

point, the ICISS is abundantly clear:

> There is no better or more appropriate body than the Security Council to deal with military intervention issues for human protection purposes… If international consensus is ever to be reached about when, where, how and by whom military intervention should happen, it is very clear that central role of the Security Council will have to be at the heart of that consensus. The task is not to find alternatives to the Security Council as a source of authority, but to make the Security Council work much better than it has. (ICISS 2001, p.49)

The ICISS went on to add that it would be impossible to come to an international consensus on the legitimacy of unilateral military interventions that were not approved by the UNSC or the General Assembly[1].

For the moment, two or three points need to be mentioned to underline the critical importance of the question 'Who will authorise the use of force in the practice of R2P?' First of all, as is well known, it was Thomas Aquinas who originally introduced the notion of rightful authority to just war theory in the Middle Ages. For mediaeval theorists, including Aquinas, roughly speaking, two key issues were at stake. The first one was a legitimate monopoly of the use of force by a sovereign authority, coupled with the proscribing of wars of private individuals. In a contemporary context, the sovereign state has limited authority only in self-defence, individual or collective (Article 51 of the UN Charter). The right to use force for other purposes such as maintenance of international peace and security and protection of civilians is centralised in the UNSC under Chapter 7 of the UN Charter.

Second, 'the concept of authority to use force implies the responsibility to use it as necessary in the service of order and justice and for the punishment of evil' (Johnson 1999, p.31. See also, pp.46–48). Based on these observations, the rightful authority in regard to R2P, having a monopoly on the use of force in international society, must embark on or authorise other actors to initiate military interventions for human protection in the case of a humanitarian catastrophe. If

1 As one possible alternative, the R2P report touched on 'uniting for peace' procedures in the General Assembly (ICISS 2001, p.53).

the rightful authority neglects its responsibility, its legitimacy is undermined.

The last point to be mentioned concerning the importance of rightful authority in regard to R2P is that the authority will make a judgment involving a temporary suspension of the sovereignty of delinquent states that are unable or unwilling to discharge their primary responsibility to protect populations within their territory. This is very consequential to international society, because, as R.J. Vincent aptly put it:

> So long as international society is primarily composed of sovereign states, observance of a general rule of nonintervention can be regarded as a minimum condition for their orderly coexistence. (Vincent 1974, p.331)

Martha Finnemore also pointed out, 'restraint in intervention politics is what makes a world of sovereign states possible and separates our world from Hobbesian anarchy' (Finnemore 2003, p.vii). Therefore, the political judgment of rightful authority will affect the security of ordinary people at risk, as well as the shape of international order. In what follows, this paper first inquires into the existing rightful authority, the UNSC.

3. Legitimacy of the United Nations Security Council

Fundamentally, the UNSC is understood to be a formal legal authority in the Weberian sense, because it is grounded on the legal instrument of the UN Charter with the consent of member states. In the view of Gerry Simpson, the UNSC is one of the manifestations of legalised hierarchy, the historical precedent of which can be traced back to the Concert of Europe system in 19th century Vienna (Simpson 2004). As an international authority, the UNSC is entrusted with great powers and responsibilities for the maintenance of international order as one of the common interests of the society of states, mainly under Chapters 5–7 of the UN Charter. Martin Wight summarises well the nature of the UNSC envisioned by the founders of the United Nations:

> The Smutsian pretence in the preamble, of 'we the peoples', we human individuals being party to the contract is dropped as the Charter trundles on to Article 24, where sovereign states, who alone are international persons and can make an international contract, perform this solemn transaction: they 'confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council act on their behalf'. In the very next article they pledge themselves 'to accept and carry out the decisions of the Security Council in accordance with the present Charter' (Article 25); and in Article 48 they authorize the Security Council to determine what action they themselves are to take, to carry out the Security Council's decisions. In fact, they set up for themselves a Hobbesian sovereign, not 'we the peoples', but states, members of the United Nations. The Security Council is the Hobbesian sovereign of the United Nations. (Wight 1996, p.34)

The presumption underlying the UN collective security system centred on the Leviathan-like UNSC is to cope with threats arising from international anarchy, i.e., to prevent and suppress interstate conflicts through the united powers of member states. In pursuit of international peace and security, Chapter 7 of the UN Charter lays down a set of rules for enforcement action, including military action, launched by the UNSC.

But as is generally known, the UNSC receded into the background during the Cold War, when the world was divided between the West and the East and between the North and the South. As a result, the UN did not undertake enforcement actions in many situations because the permanent members in the UNSC exercised their veto power. There were few exceptions: UN forces in the Korean War, economic sanctions against the white-dominated racist government of Southern Rhodesia and an arms embargo against the apartheid government in South Africa, etc. (Byers 2005, pp.16–19)

The end of the Cold War allowed the permanent members of the UNSC to share common interests and perhaps common values, opening the room for enforcement measures under Chapter 7. The US-led Multi-National Force in the Gulf war of 1990–1991 spearheaded the subsequent military enforcement actions

actually implemented by a single state or a group of states acting collectively with authorisation from the UNSC. But since then the 'threats to peace' with which the UNSC has been dealing emanate not from international anarchy among states but from tyranny such as systematic violations of human rights by repressive governments and internal anarchy exemplified by internal conflicts and collapsed states. With this expansion of the notion of a 'threat to peace', the UNSC, acting under Chapter 7 of the UN Charter, has increasingly authorised member states to engage in enforcement actions in difficult situations involving internal conflicts and serious humanitarian crises such as those in Somalia, Bosnia, Rwanda, East Timor, Haiti, Albania, Afghanistan, etc. (Chesterman 2001; Welsh 2008; Roberts and Zaum 2008) In addition, a UN peacekeeping operation was given the mandate of peace enforcement in Somalia (UNOSOM II) and Bosnia (UNPROFOR), although both cases marked failed UN efforts in the 1990s (Berdal 2008). Furthermore, most of the peacekeeping operations (PKO) that the UNSC set up during this past decade fall under the category of so-called 'robust peacekeeping' operations. This type of PKO was deployed in Sierra Leone (UNAMSIL), the Democratic Republic of Congo (MONUC), East Timor (UNTAET), Cote d'Ivoire (UNOCI), Sudan (UNMIS), Haiti (MINUSTAH) and other conflict-ridden areas, with the mandate to use force 'within its capabilities and areas of deployment' in order to protect civilians, to prevent spoilers from disrupting the political process, and to assist the national authorities in maintaining law and order (Johnstone 2009). In a nutshell, the UNSC has come to play a larger role in protection of civilians, restoration of law and order and reconstruction of war-torn societies. This amounts to a de facto transformation of the international authority of the UNSC, while the letter of the UN Charter remains intact.

Accompanying these expanding roles and responsibilities, there is a growing awareness of legitimacy issues inherent in the UNSC. First, it is in essence an intergovernmental organisation which prioritises adjustment of the interests and values of member states over those who require international rescue in a humanitarian crisis. Generally speaking, decisions of the UNSC strongly depend on accommodation among the five permanent members. Thus, unity among the

great powers enabled the United Nations to intervene in Somalia and East Timor. On the other hand, hesitancy to grapple with genocide in Rwanda and, again, in Darfur has exhibited a lack of political will and agreement on the part of the UNSC members, especially the five great powers. Thus the arbitrary exercise of the power of the UNSC is built into the UN Charter, which is characterised as a 'selective security system' (Roberts and Zaum 2008).

The second legitimacy problem associated with the UNSC, derived from the first one, is a lack of responsibility and accountability to populations at risk who require UN intervention and assistance. The UNSC is, in fact, sometimes condemned for both its action and its inaction, but responsibility for the consequences of its failures in making decisions and taking actions, which people involved in armed conflicts or humanitarian tragedy normally have to accept, is not imputed to it. In conclusion, despite the strong support that the ICISS concentrates on the UNSC as the rightful authority presiding over R2P, it is confronted with legitimacy problems that need to be overcome.

Having examined the record of the UNSC's failure to achieve unity in response to humanitarian crises such as those in Rwanda, Kosovo and Darfur, it is arguable that regional or sub-regional organisations should act as a substitute authority and launch interventions by utilising Articles 52 and 53 of the UN Charter, which stipulate the roles for 'regional arrangements or agencies' in maintaining international peace and security[2]. In fact, the R2P report leaves room for collective interventions by relevant regional organisations within the defined region prior to UN authorisation, with the condition that the organisations should pursue ex-post facto approval. By way of example, interventions by the Economic Community of West African States (ECOWAS) in Liberia and Sierra Leone were referred to in the report (ICISS 2001, pp.53–54).

What this paper aims to examine below is a more controversial alternative than regional organisations.

2 Strictly speaking, as Article 53 (1) of the UN Charter states, 'No enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council'. Hence, regional organisations are required to seek prior authorisation from the UNSC before embarking on armed interventions.

4. Legitimacy of a Concert of Democracies

There are some proposals, primarily from international relations scholars as well as statesmen and their policy advisers in the United States, that in the case of paralysis of the UNSC, a group of democratic states should have the authority to use armed force for the purpose of dealing with contemporary threats such as genocide and mass atrocities, transnational terrorist networks and proliferation of weapons of mass destruction. Those recommendations, though varied, are summarised under the heading of 'a Concert of Democracies' or 'a League of Democracies'.[3] It should be noted at the outset that the case for a Concert of Democracies was made in order to reach bipartisan agreement (between Democrats and Republicans, between liberal institutionalists and neo-conservatives) on a grand strategy for the national security and foreign policy of the United States. The focus of this proposal is on rectifying the unilateralism of US foreign policy, especially under the Bush administration, at the climax of which the invasion against Iraq was carried out without the necessary UN resolutions and in disregard for European allies. This aim is most explicitly stated in the Princeton Project on National Security report, 'Forging a World of Liberty Under Law: U.S. National Security in the 21st Century' (Ikenberry and Slaughter 2006).

In essence, the main objective of the Concert of Democracies is to build a liberal international order led by the United States. More specifically, the concert would help democratic states confront their common security threats, stimulate economic growth and development and promote democracy and human rights throughout the world (Daalder and Lindsay 2007; Lindsay 2009, p.10). The Responsibility to Protect is one of the challenges that the concert is intended to address. The norm of R2P is enshrined in Article 4 of The Charter for a Concert of Democracies, drafted by the Princeton Project:

3 According to Charles A. Kupchan, Democrats prefer to use the label 'concert', while Republicans tend to use the term 'league' (Kupchan 2009, pp.97–98). Although I recognize that there are not only overlaps but also differences between the proposals from both parties, I will use 'concert' and 'league' interchangeably throughout this paper.

> The Parties recognize that sovereign states have a responsibility to protect their own citizens from avoidable catastrophe—mass murder and rape, ethnic cleansing by forcible expulsion and terror, and deliberate starvation and exposure to disease—but that when they are unwilling or unable to do so, that responsibility must be borne by the international community. (Ikenberry and Slaughter 2006, Appendix A, p.61)

For proponents of a concert or league of democracies in pursuing this liberal order, one of the critical issues is to reformulate the relationship with the United Nations. In certain respects, advocates of the concert or the league share a sceptical attitude towards the UNSC, while trying to promote its reform. They appear to have a distaste for the conception of legitimacy of the UN based on its existing procedures and universalism. Daalder and Lindsay argued as follows:

> But should international legitimacy rest on universalism, or at least on the widespread support by the international community as a whole? This notion reduces the criterion of legitimacy to a procedural question… So when it comes to determining international legitimacy, why should states with no legitimacy at home have an equal say as states with such legitimacy? Real legitimacy, like real sovereignty, resides in the people rather than in the state… (Daalder and Lindsay 2007)

The idea of a concert or league of democracies therefore rests on the assumption that the main reason for the UNSC's inability to act in a timely and decisive manner is the refusal to cooperate by certain of its member states, namely undemocratic states including China and Russia. On this point, the case for the concert involves a proposal to reform the UNSC, for example, abolishing the veto power of the permanent members. But if future UNSC reform as proposed in the Princeton Project fails, the following amendments should come into effect in The Charter for a Concert of Democracies:

> 7. Action pursuant to article four and consistent with the purposes of the United Nations, including the use of military force, may be approved by a

two-thirds majority of the parties.

8. Action to enforce the purposes of the United Nations in the wake of a threat to the peace, breach of the peace, or act of aggression, may be approved by a two-thirds majority of the parties. (Ikenberry and Slaughter 2006, Appendix A, p.61)

One might consider that the Concert of Democracies is no more than a proposed concept, having no basis in the actual practice of international relations. Moreover, some may argue that the concert is nothing but 'an American idea, which has been developed to deal primarily with the future of US international hegemony from an American standpoint' (Alessandri 2008, p.83). To this point, it should be added that the concert has a precedent. NATO military intervention in the Kosovo conflict in 1999 is a case in point. As Solana, Javier, the Secretary-General of NATO at the time boasted, 'it was the unique allied cohesion of 19 democracies, including NATO's three new members, that was crucial in establishing consensus on the legal basis and legitimacy of NATO's actions.' (Solana 1999, p.118). Furthermore, Fernando Tesón also defended NATO intervention without UN approval by arguing that

> I disagree with the view that U.N. Security Council approval was necessary to legitimize NATO's actions. While I concur that it is preferable to have the Security Council (or anyone else, for that matter) on the side of freedom, I believe that NATO had a stronger claim to legitimacy in authorizing humanitarian intervention in Kosovo than the Security Council. This is because NATO is the community of nations committed to the values of human rights and democracy. (Tesón 2005a, p.388)

Elsewhere, by attributing the UNSC's deficit of legitimacy to the arbitrary nature of the veto and to inaction promoted by the right of veto and the existence of undemocratic states in the UNSC, Tesón claimed, 'The UN Security Council is inadequate as the guardian of human life and freedom' (Tesón 2005b, p.17) and then concluded, 'Humanitarian intervention, therefore, should in principle be approved or supported by a democratic alliance or coalition' (ibid., p.18).

Such a line of argument is tantamount to saying that because of their

commitments to human rights and democratic governance, the Concert of Democracies is more legitimate than the UNSC and that the former should supplant rather than simply supplement the latter. But is the concept of a concert or league so appealing in relation to R2P? If it intends to act as the rightful authority presiding over R2P, the concert must face some legitimacy deficits. First, unlike the UNSC, the Concert of Democracies is not founded on a legal instrument with a universal character. Moreover, an institution for the Concert of Democracies, if established, would not rest on the consent of a wide variety of states, including non-democratic ones, some of which could be subject to humanitarian intervention. In the same way, a league of democratic states is neither more nor less than an exclusive club of like-minded states. In this club, non-democratic states which cannot meet the requirements of membership are not allowed to have a say and a vote in the decision-making process. It makes no sense at all that non-democracies would accept the existence of such a privileged class in international society.

Second, just like the UNSC, the League of Democracies would be a selective security system. While NATO violated the UN Charter and intervened militarily in Kosovo, it hesitated to send troops to Darfur to stop massacre. Therefore, whether a concert is willing to act or not will depend on accommodation to the national interests of each member state, as well as on common values of democracy and human rights. There is no guarantee that the concert will always act as rightful authority in the face of genocide or mass atrocities.

Therefore, in common with the UNSC, a Concert of Democracies will not be ultimately responsible for or accountable to those who require rescue. In the final analysis, the case for a concert or league of democracies is not as promising as its advocates would have us believe.

Conclusion

In this paper, for the purpose of considering the rightful authority that would preside over the interpretation and application of R2P norms, I have compared the UNSC and a Concert of Democracies. My conclusion is that, judging from

universal membership and its current universally-agreed UN Charter as an expression of basic principles of the international order, the UNSC remains a more legitimate authority than a Concert of Democracies. At the same time, however, it must be borne in mind that advocates of a concert have criticised deficiencies in the UNSC procedures and effectiveness. Therefore, for the UNSC to be perceived as more legitimate in relation to R2P, it has to reconcile two frequently competing demands: the demands for international legitimacy based on intergovernmental consensus on the one hand and cosmopolitan legitimacy derived from assessment of those who require rescue and are affected by interventions on the other. The comments of Ramesh Thakur are indicative in this respect:

> If the UN is in crisis, it is a crisis of contradictory expectations. Its Charter begins with the grand words 'We the peoples of the world'. The reality is that it functions as an organisation of, by and for member states.…The UN needs to achieve a better balance between the wish of the peoples and the will of governments; between the aspirations for a better world and its performance in the real world; between the enduring political reality enveloping and at times threatening to suffocate it and the vision of an uplifting world that has inspired generations of dreamers and idealists to work for the betterment of humanity across cultural, religious and political borders. (Thakur 2006, p.344)

The legitimacy of the UNSC as rightful authority hinges on a daunting task: it must now address the security of populations under threat more than ever before, without jeopardising international order. This challenge is not so new, but it will be even more acute after the current international society embraces R2P.

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