

military force) and *ius in bello* (the law regulating the conduct of hostilities once military force has begun). In his contribution to this chapter, Rogier Bartels examines the interaction between *ius ad bellum* and *ius in bello* in the context of humanitarian intervention. For example, he asks whether *ius ad bellum* rules require that intervening states be subject to more relaxed international humanitarian law rules, given the just cause of the military action in which they are engaging. Ultimately, Bartels argues to the contrary: that intervening states should accept a *stricter* application of international humanitarian law principles. In the context of humanitarian intervention, Bartels concludes, ‘the laws “inspired by respect for human dignity” and designed to limit human suffering ... [should] be more strictly applied in pursuit of true humanitarianism.’

While the legal foundations of humanitarian intervention remain in flux, geopolitical realities continue to limit the practical use of the doctrine. In his contribution to this chapter, Paul Williams highlights a number of geopolitical factors that militate against any significant role for humanitarian interventions in the coming decades. First, and perhaps most importantly, lingering questions remain regarding the effectiveness of humanitarian intervention. Recent interventions have presented vexing problems in terms of military capacity and high costs in human lives. Moreover, U.S. military actions in Afghanistan and Iraq have highlighted the inherent tension between humanitarianism and military action – and in particular, have raised concerns that humanitarian interventions might be used as a pretext for ‘preemptive’ military action. Finally, the advent of justice and accountability mechanisms (like the International Criminal Court) may have chilled the willingness of some states (the United States, for example) to engage in humanitarian intervention.

The chapter concludes with an account of the panel discussion that took place at the Hague Conference. At the panel discussion, contributors to this chapter were joined by Anne Cubilie of the United Nations Office for the Coordination of Humanitarian Affairs. As the panel discussion makes clear, the need for humanitarian interventions will certainly continue – and indeed, is likely to increase – in the coming decades. But the lack of a clear, agreed-upon legal framework will continue to hamper humanitarian efforts to engage in humanitarian intervention. Thus while some progress has been made in defining the contours of the debate over humanitarian intervention, that debate remains as robust and complex as ever.

THE SCHIZOPHRENIAS OF R2P

by José E. Alvarez*

I congratulate the organizers of The Hague Joint Conference on having the good sense to indicate that what we will be addressing on this panel is ‘humanitarian intervention’ and not the alternative term that is all the rage in UN circles, namely the ‘responsibility to protect’ (or ‘R2P,’ for those in the know). In my brief presentation I want to warn against turning R2P from political rhetoric to legal norm. An alternative, more positive title for my talk would be ‘two cheers for humanitarian intervention.’

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The responsibility to protect concept was borne out of frustration with the international community's repeated failures to intervene in cases of on-going mass atrocity, in particular in Rwanda and Kosovo. The concept sought to deflect attention from the controverted 'right' of some states to intervene, to the duties of all states to protect their own citizens from avoidable catastrophes and for third parties to come to the rescue. The idea was born and given its most detailed treatment in the 2001 Report of the International Commission on Intervention and State Sovereignty, sponsored by the Canadian government.¹ As that Commission conceived it, the virtue of R2P was that it would entice states to engage in humanitarian relief by shifting the emphasis from the politically unattractive right of state interveners to the less threatening idea of 'responsibility.' R2P put the focus on the peoples at grave risk of harm rather than on the rights of states. It also stressed that responsibility was shared – as between the primary duty of states to protect their own populations and the secondary duty of the wider community.

R2P avoided the delimited connotations of 'intervention' to emphasize duties to prevent, to react, and to rebuild. As the Commission defined the term, R2P applied when there was 'serious and irreparable harm occurring to human beings, or imminently likely to occur' involving the large-scale loss of life, actual or apprehended, with genocidal intent or not, produced by either deliberate state action or state neglect, inability to act, or in a failed state situation.² R2P triggered the residual responsibility of the broader community (1) when a particular state was either unwilling or unable to fulfill its primary R2P, (2) when a particular state was itself the perpetrator of the crimes or atrocities, or (3) when 'people living outside a particular state are directly threatened by actions taking place there.'³ On the crucial question of who is authorized to take military action in response, the Commission indicated that the Security Council was the first port of call but it did not categorically exclude the possibility that R2P could ultimately be exercised by the General Assembly, regional organizations, or even coalitions of the willing. But the Commission stipulated that legitimate interventions would require 'just cause,' right intention, last resort, proportionality of means, and reasonable prospects of success.

The Commission's concept soon became part of ambitious proposals for UN reform in the December 2004 Report by the High-Level Panel on Threats, Challenges and Change.⁴ It was then embraced by the UN Secretary-General's March 2005 Report 'In Larger Freedom.'⁵ It was subsequently adopted by the General Assembly in Resolution 60/1, the 2005 World Summit Outcome and has since been cited by the Security Council in Resolution 1674 (of April 2006) where the Council 'reaffirmed' states' 'responsibility to protect populations from genocide, war crimes, ethnic cleansing, and crimes against humanity.'⁶ Each of these iterations of R2P put a somewhat different spin on it. The High Level panel report did not envisage anyone other than the Security Council exercising the collective's right, but the Outcome document, reflecting the sensitivities of the United States in particular, suggests that there is no systematic mandatory duty on the Council to act in all cases and leaves it open for states to intervene in humanitarian catastrophes where they have a legitimate basis to act in self-defense.⁷ For its part, the Secretary-General's report removed the concept from the section on use of force and put it in a wider context: the freedom to live in dignity.⁸

The Canadian diplomats and intellectuals behind this concept, such as Gareth Evans, can be very proud. Few 'norm entrepreneurs' have been able to see one of their ideas, created out of whole cloth, be 'reaffirmed' – as if it was a long-standing principle – by no less a body than the Security Council within a span of five years. R2P was widely

considered the only 'unequivocal success' of the World Summit of September 2005, where it was endorsed by both John Bolton, then US Ambassador to the UN, and the Non-Aligned Movement.⁹

Instinct should warn us there must be something wrong as well as right with an idea that can be endorsed by such strange bedfellows, and there is. R2P's normative 'legs' result from its various, not always consistent iterations as well as from the lack of clarity as to whether it is a legal or merely political concept. It means too many things to too many different people.¹⁰

If we examine how R2P has now been cited and by whom, it is clear that many invocations, whether in good faith or not, are at a considerable distance from what I suspect was the original Canadian core concept: creating an exemption (as in some countries' tort law) from liability for the good Samaritan who acts to save lives. We now find that R2P has been cited:

- (1) by scholars and others as entailing a duty to protect national artifacts, a duty that the United States allegedly violated by failing to protect the Iraqi National Museum after its Operation Iraqi Freedom;¹¹
- (2) by policymakers (such as UK Foreign Secretary Jack Straw or President Bush) and scholars (such as Fernando Teson) to justify the 2003 invasion of Iraq – either as part of duty to protect people from tyrannical rule or to punish a regime for prior mass atrocities;¹²
- (3) by policymakers (such as US Attorney General Alberto Gonzalez) and scholars who suggest that states have a duty to protect their peoples from terrorist acts and that this includes a duty to implement the dozen or so counter-terrorism, multilateral treaties that now exist as well as the Security Council's various counter-terrorist injunctions under Chapter VII;¹³
- (4) by policymakers (such as the authors of the United States' National Security Strategy) and scholars (such as Anne Marie Slaughter and Lee Feinstein) who contend that there is a duty to prevent states and non-state actors, including through the use of force, from acquiring WMDs;¹⁴
- (5) by other 'liberal' scholars (such as Allan Buchanan and Robert Keohane) who argue for the 'cosmopolitan' use of military force to promote democracies and the rule of law;¹⁵
- (6) by Canadian liberals who assert that Canada failed in its duty to protect its citizens from the excesses of the US's war on terror when it did not protect Canadian nationals who were allegedly transferred by the US government into the hands of those who would torture them.¹⁶

Many defenders of R2P are horrified by these suggestions. They contend that all of these are erroneous or opportunistic applications of R2P by its 'false friends.' In a recent article, Gareth Evans argues, for example, that R2P *properly understood* could never justify Operation Iraqi Freedom because its use is restricted to on-going threats to human life, not a regime's past atrocities or its current disrespect for democracy. As he and Ken Roth of Human Rights Watch (properly) point out, 'better late than never' has never been a justification for humanitarian intervention and it should not be for R2P.¹⁷

But in the few minutes that I have, I want to suggest that these expansive citations of R2P are built into its very soul. We should not blame a few bad apples for R2P's current

all-purpose misuse – any more than the United States can continue to suggest that a few ‘bad apples’ were responsible for the human rights horrors committed by US agents in its war on terror. I will focus on just four core concepts of R2P, most of which were built into the original Commission conception of the term, to suggest some of the risks R2P poses if treated seriously as a legal concept.

THE REDEFINITION OF SOVEREIGNTY

The essence of R2P is that sovereignty implies responsibility. As Gareth Evans himself has suggested, the point of R2P was to change how we talk about sovereignty. The driving force was to reorient the interpretation of the UN Charter’s concept of sacrosanct domestic jurisdiction and territorial integrity to reflect ‘contemporary’ values of human rights and human security. While the creators of R2P may not like what Slaughter does with this idea, when she argues, as she has on the pages of the *American Journal of International Law* (AJIL) in 2005, that UN members now retain only ‘conditional sovereignty’ – and that they retain their ordinary rights under the Charter only so long as they fulfill their minimum human rights obligations and their international legal obligations toward fellow states – she is being faithful to their core concept.¹⁸ When Richard Haas, then director of policy planning at the US State Department, reduces R2P to the bumper sticker ‘abuse it and lose it’¹⁹ – R2P supporters may object to his lack of nuance, but they can hardly claim his bumper sticker violates the core idea that, as Slaughter puts it, statehood has only an ‘instrumental’ rather than an ‘intrinsic’ value.²⁰

R2P reflects a pre-9/11 (but post-Cold War) view of sovereignty. It treats sovereignty as more of a hindrance than protection; the UN Charter (and the Security Council) less as sovereignty’s guarantor than the guarantor of the rights of individuals. Now, I do not deny that under the UN Charter or the Friendly Relations Declaration a state’s rights may be infringed if it violates the self defense rights of others, fails to respect the self-determination of its (or other) peoples, or engages in certain crimes (from genocide to apartheid), but at a time when the largest military and economic power seems all too ready to deploy the ‘preventive’ use of force anywhere and everywhere, when the Security Council itself seems all too ready to impose legal obligations on all sovereigns with respect to counter-terrorism and WMDs, and when the United States at least appears to see the greatest threat to its own nationals and to others as stemming from the acts of non-state terrorists, old-fashioned notions of un-impeachable sovereignty and non-intervention against overweening power retain their traditional appeal. Holding the line on expanding the categories of actions (or inactions) upon which sovereignty is ostensibly ‘conditioned’ and being particularly clear on when the interference with sovereignty includes resorting to the unilateral use of force appears, to me at least, to be a singularly important project.

None of this means that it is not worth re-examining more specific questions such as, for example, what states owe one another under the Genocide Convention, particularly in light of the International Court of Justice’s recent clarification of that treaty. One look at Darfur and the world’s inaction tells us as much. Perhaps it is time, in light of the ICJ’s Bosnia decision, for a protocol to the Genocide Convention indicating much more clearly what its signatories have a right to do in the face of on-going genocide in another signatory state. But that question is far more targeted in nature than a principle like R2P, which *by its nature* is grounded in a more ‘flexible’ or permeable view of the legal rights of

sovereigns (including their rights to territorial integrity). Now is not the time for such a fundamental reinterpretation of the UN Charter or other fundamental norms of international law.

THE EXPANSION OF WHAT IT MEANS TO 'PROTECT'

Notice, too, how readily the core concept of R2P leads down the slippery slope to the Bush Administration's controversial notions of the preemptive use of force. The Canadian Commission's original use of R2P emphasized the need to act to prevent imminent threats to the lives of others. It stressed the need for, first, the state where atrocities are likely, and thereafter third parties to act in response not only to on-going harms but to 'direct threats.' It envisioned action, including the use of force where necessary, when the target state was unwilling, incapable of action, including where states have 'failed.' Unlike later iterations of R2P, which attempted to confine its militaristic deployment to the Security Council, the Commission left open the possibility that others could resort to R2P should the Council fail to act. This was consistent, after all, with the fundamental reorientation of the international system suggested by the very concept of R2P, since it elevated the lives of people over those of abstractions, namely governments or states. While the Canadian Commission imposed conditions on the use of force that is justified under R2P, only some of these inherently vague conditions (such as 'proportionality' and perhaps 'last resort' if seen as a version of necessity) are terms of art under international law. I find it difficult to believe that the same international community that has so far failed to agree on a comprehensive definition of what 'terrorism' is will be any more able to define such elastic (and politically loaded) terms as 'just cause,' 'right intention' or 'reasonable prospects of success.' That such conditions are not necessarily at odds with the United States' National Security Strategy and its invocation of a doctrine of preemptive force suggests why the Canadian government's reliance on such conditions does not provide me with much reassurance.

More disturbing still is the fact that the Canadian Commission's allusion to 'just cause' harkens back to the pre-Charter 'just war' doctrine – just as the US doctrine of preemptive force does.²¹ At the heart of both R2P and the ostensible doctrine of preemptive force is the bizarre (but, history tells us, sadly irresistible) idea that waging war, including 'preventive' war, is sometimes necessary to protect the 'dignity, justice, worth and safety' of individuals.²² R2P is based on the proposition that while going to war is a mistake, it may be, as Gareth Evans himself argues, an 'even bigger mistake' not to go to war 'to protect fellow human beings from catastrophe when we should.'²³

THE EXPANSION OF SECURITY

Nor should it surprise anyone that R2P should now be used to justify counter-terrorist action. Although the Security Council has suggested that R2P was limited to action directed against the commission of recognized international crimes, R2P was originally conceived to enable reactions against 'serious and irreparable harm . . . involving the large-scale loss of life,' however this occurs, including as a result of a state's failure to act. The Canadian Commission wrote of the need to engage R2P when 'people living outside a particular state are directly threatened by actions taking place there.' Those who focused

on the need to avert large scale loss of life can hardly complain if the hegemon argues that such threats emerge as much from terrorists' actions, including in Afghanistan or Iraq. A concept born from the need to protect people at grave risk seems readily adaptable to the considerable (and just as real) risks posed by terrorists armed with WMDs.

Witness the surface plausibility of the words of Anne Marie Slaughter:

'... the drafters of the Charter would have identified only scourges such as poverty and disease as threats to the extent that they directly threatened territorial integrity or political independence of individual states in a system of states. Today we understand that to the extent that poverty and disease contribute to state collapse, that collapse can threaten not only that state's neighbors but also states halfway across the world by providing a haven for terrorists and other criminals. So to that extent we can directly link state security and human security.'²⁴

But for those of us who have long been critical of the concept of a 'failed' or 'collapsed' state and the uses to which that determination (and indeed the very definition of 'sovereignty') has been put over the course of history,²⁵ linking a state's right to enjoy its existing security to a highly malleable determination of whether that state respects 'human security' is not a positive or necessarily 'progressive' development of the law.

THE INVOCATION OF LEGAL RESPONSIBILITY

R2P poses less serious but other troubling problems if taken seriously as legal principle. For international lawyers who worship at the shrine of the Articles of State Responsibility, all international legal persons are legally liable when they either take wrongful action or fail to act when action is demanded by international law. If there is such a thing as a responsibility to protect, the legal mind naturally assumes that a failure to exercise such responsibility is an internationally wrongful act entailing the usual panoply of potential remedies, including the legal liability of the wrongful actor and the potential for counter-measures against that actor by others. Not surprisingly, R2P has now helped to inspire the experts on the International Law Commission engaged in drafting provisions that would impose legal responsibility on those international organizations – such as the UN or even regional organizations – who fail to act in the face of international atrocity. The ILC's current draft articles of responsibility of international organizations (along with its proposed commentaries by its special rapporteur) suggest, for example, that the UN should have been legally liable for failing to act in the face of the Rwandan genocide.²⁶ However laudable this effort, such a duty is absurdly premature and not likely to be affirmed by state practice.

There are innumerable, obvious difficulties when we try to affirm R2P as a legal proposition in this fashion. We are not sure what is meant by finding the 'UN' legally responsible in such a case: do we mean the organization as a whole, such that all dues paying members owe Rwanda compensation for the organization's failure to protect? Or do we mean only members of the Security Council? Or only the P-5 whose votes were absolutely essential to the outcome? Or those states able but unwilling to contribute armed members to protect Rwandans? Or the Secretary-General who failed to act quickly? Further, should we care whether those who created institutions such as the UN intended to impose such liability on their organization? Does the proposition that the UN committed a wrongful abdication of its responsibility to protect mean that others (including members) are

entitled to impose countermeasures on it by, for example, failing to pay their UN dues? Does it matter if the UN's internal rules – such as the requirement that Council action draw the votes of 9 members including the affirmative votes of the P-5 – anticipate selective interventions by the Council? Or is it viable to suggest, as the ILC's current draft articles of IO responsibility provide, that an organization's internal rules (like those of a state) provide no excuse from the duty to protect? But surely there is a distinction here between the internal rules of a state and the internal rules of the UN. The latter, such as its voting rules, are, unlike the laws of states, both 'internal' and rules of international law.²⁷

Further, if we treat R2P seriously as imposing 'legal responsibility' on the UN, how does that idea comport with the legal responsibility of states? International lawyers would appear to be caught in a dilemma. On the one hand, we are reluctant to say that states should be absolved from their responsibilities merely when they act in unison. States should not be enabled to abuse the law by acting collectively, like so many teenagers on a rampage. On the other hand, failing to uphold the accountability of states' international organizations fails to respect the distinct legal personhood of those organizations – much less the reality that in cases such as the genocide in Rwanda, the organization – and distinct actors within it such as the Secretary-General – were capable of and failed to take certain autonomous action within their institutional competence. We are, I would submit, far from resolving such difficult doctrinal matters as a matter of real world practice, and the concept of R2P cannot plausibly short-circuit the difficult political negotiations that would be necessary to overcome such difficulties.

CONCLUSION: TWO CHEERS FOR HUMANITARIAN INTERVENTION

All of this leads me to suggest that for all its uncertainties, the concept of humanitarian intervention retains admirable qualities. My own preference would be for international lawyers to continue to work on elaborating the contours of that principle, which at least has been venerated by usage, rather than turning to the far more slippery (and dangerous) concept of R2P. Unlike R2P, the emphasis on 'humanitarian' suggests that anything justified by this doctrine requires attention to on-going 'humanitarian' needs. This would include on-going grave international crimes and perhaps crises stemming from natural disasters, but 'humanitarian' concerns probably do not embrace past crimes, undemocratic regimes, or threatened terrorist acts. In addition, the reference to 'intervention' emphasizes its opposite: the ordinary rule of non-intervention.

Humanitarian intervention, as advocates of R2P have rightly pointed out, does little to threaten the traditional rights of sovereigns. It does not suggest that by merely ratifying the UN Charter states sign away their sovereignty – subject to the vote of 9 members of the Council or, worse still, whenever a ragtag 'coalition of the willing' decides to act preventively because they believe another has violated the Charter (or the R2P). Humanitarian intervention, however ambiguous its scope, was never conceived as anything but an add-on to the existing rules of international law, including the rules of self-defense. Unlike R2P, humanitarian intervention did not aspire to fundamentally re-orient a state-centric system of rules away from its state-centricity.

Finally, humanitarian intervention, when legitimately invoked as a legal excuse by an intervening state, prevents a charge of unlawful action against the intervener. When invoked by lawyers, it seeks to protect the intervener from liability. It works like national

rules precluding liability for good Samaritans. Unlike R2P it does not try to go farther: to *require* good Samaritans to act lest they be held legally 'responsible.' To the extent R2P tries to achieve that, this is likely to prove to be a step too far internationally (if not nationally).

Those of us who grew up in Samantha Power's 20th century,²⁸ where states repeatedly failed to act in the face of genocide, hated all of these limits on humanitarian intervention. But in the midst of the 21st century's 'war' on terror, many of us are coming to appreciate them.

The Canadian Commission that first elaborated R2P completed its work on September 10, 2001. Their members woke up to a changed world within the next 24 hours. The rest of us are learning that their idea, however politically attractive and motivated by the best of intentions, may have become a victim and not merely a product of its time.

HUMANITARIAN INTERVENTION AFTER 9/11 : THE LINK BETWEEN *IUS AD BELLUM* AND *IUS IN BELLO*

by Rogier Bartels*

'[T]he provisions of the Geneva Conventions [...] [and Additional] Protocol [I] must be fully applied in all circumstances to all persons who are protected by those instruments, without any adverse distinction based on the nature or origin of the armed conflict or on the causes espoused by or attributed to the parties to the conflict.'

Preamble to the Protocol Additional (I) to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Conflicts, June 8, 1977

Michael Walzer wrote in 1977 that 'lawyers have constructed a paper world, which fails at crucial points to correspond to the world the rest of us still live in.'²⁹ If there is one topic in international affairs to which Walzer's comment aptly applies, it is that of humanitarian intervention and in particular, to the way that its modern version of a 'just war', is carried out. The debate about humanitarian intervention has revealed in public opinion a real connection between *ius ad bellum* and *ius in bello*.³⁰

Indeed, few topics in international affairs have fascinated so many authors, who discuss thoroughly in legal writings the issue of humanitarian intervention.³¹ The connection between the right to intervene and the way the intervention then takes place has also constituted part of the academic debate.

It has recently been argued that *ius ad bellum* should be influenced by the rules of *ius in bello*, including, for example, rules related to target selection and to proportionality. In humanitarian intervention, it is also argued that the law regulating the conduct of

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