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TOWARDS A NEW TRANSATLANTIC CONSENSUS ON THE 'COLLECTIVE
RESPONSIBILITY TO PROTECT'¹

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A key challenge facing the international community in 2005 is whether it can give real substance to the idea of the 'collective responsibility to protect'.² The limited international response to the humanitarian emergency in Darfur in 2004-2005 suggests that rhetorical commitments to this principle are not backed up by the political will to save strangers in peril. Recognising the limits of the existing UN machinery to extend protection, and guided by two reports that he had commissioned, Kofi Annan produced in March his own report '*In larger freedom*' which sets out a detailed blueprint for UN reform. The basic theme running through this document is the indivisibility of human and global security, and the need for the UN to establish a holistic concept of collective security that can address the myriad of interdependent threats facing humanity in the 21st century.³ Conflict prevention is given a high priority in the report, but the Secretary General recognises that in some cases, there is no alternative to the use of force in upholding international peace and security.

It was disagreements over the use of force against Iraq which plunged transatlantic relations into a major crisis in 2003, and a central issue at stake in this dispute was where authority should be located for the use of force. France and Germany led those European states which, on this occasion, championed the view that the Security Council was the body that was responsible for making such decisions. Set against this, the Bush Administration maintained that whilst Council authority was desirable, it was not essential, and that faced with the existential threat posed by the potential

coupling of terrorism and WMD, America reserved the right to take all necessary measures in its self-defence. Britain tried to resolve these competing positions by securing a new resolution authorising the use of force, but when this proved unobtainable, it argued that recourse to force was legal based on existing Chapter VII resolutions demanding Iraq's disarmament.⁴

Four years earlier, the Atlantic Alliance had chosen to bypass the Council over Kosovo. This action was taken because NATO members on the Council believed that two of the permanent members were failing to live up to their responsibilities to protect global humanitarian norms. In so doing, they accepted that there were cases when exceptions had to be made to the rule of Council authorisation. In *'In larger freedom'*, Annan considers that the task is not to seek alternatives to the Council, but to make it work better. To this end, he proposes that the Council unite around a new set of principles that should determine when force is used. This suggestion was first advanced by the International Commission on Intervention and State Sovereignty (ICISS) in its 2001 report *The Responsibility to Protect*, and was endorsed in the December 2004 'Report of the Secretary General's High-Level Panel on Threats, Challenges and Change'. However, as I argue below, it has to be questioned whether this recommendation would prevent future differences arising in the Council over the use of force, especially if this concerned preventive military action. Consequently, it is necessary to address the question of what should happen if the Council is unable or unwilling to act to prevent and end massive humanitarian crises. The paper proceeds in three stages: first, I set out how the concept of the 'responsibility to protect' was developed through the work of ICISS; second, I consider how far implementation of the recommendations proposed by Kofi Annan in his *'In Larger Freedom'* would have changed the actions of the Security Council in the cases of Rwanda and Kosovo; and finally, I examine some of the suggestions that have been advanced for moving forward when the Council is blocked, and consider how far these might lead to a new consensus on this question between America and Europe.

ICISS and the 'Responsibility to Protect'

The idea of the 'responsibility to protect' was first explicitly articulated in the report produced by the ICISS. Set up at Lloyd Axworthy's initiative, the Commission sought to develop a new normative framework that would ensure that there were no more Rwandas and no more Kosovos. Here, it was responding to Kofi Annan's plea that the UN avoid future situations where the Security Council was united but ineffective as over Rwanda, and divided as over Kosovo with particular states using force without express Council authorisation. The report argued that the debate over sovereignty versus intervention should be re-framed in terms of the responsibility to protect. States are entrusted with the primary responsibility to protect the security of their citizens. However, should they fail to exercise this responsibility, then 'the principle of non-intervention yields to the

international responsibility to protect'.⁵ The report declared that, '[t]he most compelling task now is to work to ensure that when the call goes out to the community of states for action, that call will be answered. There must never again be mass killing or ethnic cleansing'.⁶ The Commission viewed its report as:

- Contributing to the generation of the political will necessary to avoid future Rwandas.
- Bridging the divide between West and South in relation to contending claims of human rights versus sovereign rights by moving debate away from the legal right of states to intervene and towards the international responsibility to protect the victims of humanitarian crises.
- Establishing threshold principles – large scale killing and ethnic cleansing – and precautionary ones (right intention, last resort, proportional means and reasonable prospect of success) to govern when intervention was permissible.

The general response to the ICISS report from governments was positive at the declaratory level, but no substantive progress has been made on implementing its key recommendation that the General Assembly and Security Council endorse the idea of the responsibility to protect and adopt the threshold and precautionary principles in the report. Supporters of *The Responsibility to Protect* blame the attempts to justify the Iraq war in humanitarian terms as responsible for the limited progress that has been made. For example, Gareth Evans co-chair of the Commission – and an influential member of the High-Level Panel - argued that the 'poorly and inconsistently' argued humanitarian justification for the war has 'almost choked at birth what many were hoping was an emerging new norm justifying intervention on the basis of the principle of the "responsibility to protect"'.⁷ The worry is that what is seen as the misuse of humanitarian arguments by America, and especially the UK, will reinforce long-standing suspicions on the part of many Southern states that a doctrine of humanitarian intervention would be a weapon used by the strong against the weak.⁸

Towards 'In Larger Freedom'.

One important consequence of the divisions in the Council over Iraq was Annan's setting up of the 'High-Level Panel on Threats, Challenges and Change' which was charged with examining how the UN could be reformed to meet the new security challenges of the 21st century. Its report '*A more secure world: our shared responsibility*' takes as its point of departure the core assumption in the ICISS report that state and human security are indivisible, and that it is to collective action by states that we have to look to address the myriad of threats facing humanity. In March 2005, the Secretary General produced his response to the High-Level Panel's recommendations in his submission to the

General Assembly which also drew on the findings of the Millennium Project which investigated how to achieve the Millennium development goals by 2015. The aspect of Annan's report that I want to focus on concerns its recommendations regarding the use of force.

Principles for the Use of Force

On page 33 of *'In larger freedom'*, the Secretary General sets out his view that the Council has the authority – and indeed the *responsibility* – to use force preventively to uphold international peace and security. Moreover, he clearly includes prevention of genocide and ethnic cleansing in his definition of what counts as a threat to international security.⁹ Following the High-Level Panel which in turn drew on the ICISS report, Annan suggests that the following principles should guide the Council in its deliberations on the use of force, and he calls upon the Council to adopt a resolution setting this out. The five principles are:

- *Seriousness of Threat*
- *Proper Purpose*
- *Last Resort*
- *Proportional Means*
- *Reasonable Chance of Success*

The Secretary General considers that '[b]y undertaking to make the case for military action in this way, the Council would add transparency to its deliberations and makes its decisions more likely to be respected, by both governments and world public opinion'.¹⁰ Implicit in this contention is the assumption that if the Council agreed to criteria, this would enable it to reach agreement in future cases where the issue of intervention was contested. However, this is a deeply problematic assumption. A good way of showing this is to consider whether things would have been different had the Council been guided by these principles in the cases of Rwanda and Kosovo.

Taking Rwanda first, it is highly dubious that agreed principles would have changed the Council's actions in abandoning Rwandans to their fate. The fundamental barrier to intervention in Rwanda, as Kofi Annan acknowledged in a 1999 report, concerned lack of political will.¹¹ No state opposed intervention in Rwanda on grounds of sovereignty, and had any state, or group of states, sought a mandate to use force in April and May 1994, it is virtually inconceivable that this would have been opposed. The reason for inaction over Rwanda, as has been the case with Darfur, is the reluctance of the most powerful states on the Council to incur the costs of armed intervention when they have no compelling security interests at stake. Thus, the real test of the guidelines proposed by the Secretary General - as with the High-Level Panel and the ICISS - is whether they would

increase the likelihood of the Council mustering the political will to act to prevent and halt future humanitarian crises.

It is equally problematic to maintain that criteria would have generated a consensus in the Council over Kosovo. The problem is that states can sign up to criteria but disagree over their application in particular cases. Moreover, the Secretary General's report fails to appreciate that securing authorisation for the preventive use of force is likely to be most divisive in terms of Council deliberations as both Kosovo and Iraq illustrate. With regard to the former, the Council was divided in the face of NATO's request for a UN mandate to intervene to end the ethnic cleansing of Kosovo Albanians. A majority of states on the Council accepted that the humanitarian necessities of the situation justified the use of force, and were satisfied that the criteria listed above were clearly met in this case. However, China, and especially Russia, threatened to veto any resolution sanctioning military action. They argued in March 1999 that all diplomatic means of resolving the conflict had not been exhausted, and that recourse to force would escalate the violence and complicate the chances of securing a settlement. In short, they were simply not persuaded that the criteria of 'seriousness of threat', 'last resort' and 'proportional means' were satisfied in this case. In the case of Russia, these normative objections coincided with important geopolitical interests, and both factors were at work in shaping its response to NATO's action.¹²

In making these points, I am not arguing that we should not strive to achieve a consensus on principles. I agree with the argument that criteria are important in promoting transparency in Council debates, and in forcing governments to articulate their positions in terms of shared norms. As such, criteria have a role to play in constraining unjustified interventions masquerading as humanitarian, but equally they have a role to play in forcing those who oppose intervention to justify their position. In this regard, even if consensus cannot be reached in the Council on criteria, America and Europe should try and reach agreement on these principles. The benefit of this would be that in a future case where the permanent members were divided on the merits of humanitarian intervention, and Western governments decided to act to end the atrocities, they could appeal to these principles as legitimating grounds for action. The ICISS report suggested that the prospect of future unilateral actions could be helpful in sending a clear message to the Council that it would undermine its authority if it failed 'to discharge its responsibility in conscience-shocking situations crying out for action'.¹³ This was a veiled reference to Kosovo but it overlooked the fact that the Council was divided in that case on what constituted the proper exercise of its 'responsibility'. In such situations, the real question is: who is acting irresponsibly, those who seek to end the killings in the absence of a clear UN mandate or those who block the granting of such authorisation on the grounds that the use of force will lead to even greater harm.

Given the different interpretations that governments place on shared norms, there is no guarantee that adoption of these principles by the Council would always lead to consensus. In this respect, a striking omission from *'In larger freedom'* (and from the High-Level Panel) concerns what should happen if the Council cannot reach agreement on the use of force in a situation where a request has been made for UN authorisation. For example, the implication is that if a majority of the Council supported a request for authorisation from a coalition of Western and African states seeking to end atrocities in Darfur, and this was opposed by one or more permanent members, then this would be the end of the matter. Few will be satisfied with this outcome, since each of us can imagine circumstances in which we would support moral imperatives trumping the legal prerogatives of the UN Charter.

The Problem of Authority

To its credit, the ICISS report recognised that this question could not be ducked, and it suggested the following procedural mechanisms be employed: states must always request Council authorisation before acting (NATO failed this test over Kosovo); the P-5 should agree not to exercise the veto (unless vital interests were threatened) in cases where a resolution supporting military intervention to end a humanitarian crisis has majority support (this was not specified but it was understood that this meant securing at least 9 votes); and if the veto is exercised in such cases, recourse might be made to the General Assembly under the 'Uniting for Peace' resolution and/or to regional bodies. It is a fascinating counterfactual question as to whether NATO would have secured majority support in the Council had it followed these procedures over Kosovo, and whether in the event of a Russian or Chinese veto, a resolution supporting military action prior to the commencement of hostilities would have elicited a two-thirds majority in the General Assembly.

During the run-up to the Iraq war, and when it was increasingly doubtful that a 'second' resolution authorising the use of force would be adopted, Tony Blair suggested that the use of force would be legitimate even if a resolution was vetoed provided it secured majority support in the Council – the infamous 'unreasonable veto' argument. As we now know from the Attorney-General's note to the Prime Minister on 7 March 2003, Lord Goldsmith considered that there were no legal grounds to support such a view. For a member of the P-5 to suggest such an argument was very risky since it opened the door for others to discredit vetoes in the future by recourse to similar reasoning. Faced with Britain's inability to bend the Security Council to its will over Iraq, and frustrated by legal advice at home which ruled out justifying the use of force on grounds of regime change, Blair suggested in the aftermath of the war that international law be changed to permit states to remove tyrannical regimes.

In a landmark speech on 5 March 2004 in his home constituency of Sedgefield, Blair declared that ‘we surely have a responsibility to act when a nation’s people are subjected to a regime such as Saddam’s’.¹⁴ He admitted that there was no existing legal basis for intervention of this kind, but maintained that there should be. Here, we see the difficulties of agreeing on what constitutes ‘seriousness of threat’ in particular cases. Blair was arguing that the level of human rights abuses inside Iraq satisfies the threshold that should legally justify armed intervention, but this claim sits uneasily with both the ICISS and High-Level Panel’s discussion of threshold principles which are defined in terms of genocide, large-scale killing and ethnic cleansing. Blair suggested in his Sedgefield speech that the Security Council should unite around legitimating humanitarian intervention in cases like Iraq.

However, there is no likelihood of the Council agreeing to such a significant erosion of the principle of non-intervention, with China and Russia likely to lead the opposition, drawing considerable support from the non-aligned grouping at the UN. These states have long worried that the major Western powers, and especially the US, might employ human rights justifications as a pretext to legitimate military intervention. Such suspicions have been seen as being confirmed by the action in Iraq. In this regard, any future expansion of the Council – a key part of both the recommendations of the High-Level Panel and ‘*In larger freedom*’ - designed to ensure greater Southern representation is likely to prove deleterious from the liberal interventionist standpoint represented by Blair. Exactly how Council reform would factor into the further development of the norm of humanitarian intervention remains a matter of conjecture, but it is unlikely that increasing representation from Africa, Asia and Latin America will result in a Council more inclined to support forcible humanitarian intervention.

There are two compelling reasons why the threshold justifying humanitarian intervention should remain high: the first is that resort to armed action as a means of halting or stopping slaughter must always be a last resort, and it should be taken in the full knowledge that using force inevitably imposes harm on the civilian population whom the intervention is aimed at rescuing. Such interventions should only be launched where policy makers are confident that the moral costs of inaction far outweigh the moral consequences of using force, and this inevitably means restricting military intervention to extreme cases of humanitarian emergency. This position was one of the key planks in Human Rights Watch’s rejection of the argument that the war in Iraq was justifiable on humanitarian grounds. In his 2004 article, Executive Director Kenneth Roth argued that humanitarian intervention, without the consent of the target state, could only be justified ‘in the face of on-going or imminent genocide, or comparable mass slaughter or loss of life...Other forms of tyranny are deplorable...but they do not in our view rise to the level that would justify the extraordinary response of military force’.¹⁵ Roth’s credentials are strong ones since his organisation

has campaigned tirelessly to persuade the world to do more to end Saddam's gross human rights abuses. In this context, he did accept that military intervention would have been justifiable to save lives in Iraq on two previous occasions – the 1988 'genocide' against the Kurds and the immediate aftermath of the 1991 Gulf War when Saddam's forces brutally suppressed uprisings by Kurds and Shiites in the North and South of the country. He recognised that Saddam had killed perhaps as many as a quarter of a million Iraqis over the twenty-five years of his rule, but there was no evidence of mass killing - actual or imminent – that justified military intervention in March 2003.¹⁶

The second objection to lowering the threshold is that this opens the door to a range of interventions that can claim, with varying degrees of plausibility, to be humanitarian. Evans encapsulated the reasoning that led ICISS to establish deliberately narrow threshold principles in its report. 'The argument', he recalled, 'was that unless the bar is set very high and tight, excluding less than catastrophic forms of human rights abuse, *prima facie* cases for the use of military force could be made across half the world'. Awful though they were, the level of chronic human rights abuses inside Iraq could not justify recourse to force because Saddam's 'behaviour was not much worse than a score or two of others'.¹⁷ On the other hand, he did agree with Roth and many others that Iraq would have been a legitimate target for military intervention in the late 1980s and early 1990s.¹⁸

In arguing that the threshold should be kept high, it is important that any future consensus on principles should recognise the legitimacy of using force, preventively. The problem of Council unity is unlikely to arise in cases where there is clear-cut evidence of genocide and mass killing (unless one of the P-5 has a vital interest at stake), but if military intervention occurs at this point, it will come far too late for many. But securing a consensus that force should be used to prevent such a catastrophe from occurring is fraught with difficulty. The fundamental dilemma in using force in response to warning indicators of an impending disaster is that it can never be known whether intervention is justified; we can never have access to the counter-factual of what would happen if the intervention does not take place. Robert Legvold captures the dilemma of legitimating anticipatory humanitarian intervention: 'To wait until massive numbers of lives have been lost before acting will...compound the tragedy...Yet, to reach agreement on forceful action in response to warning signs before tragedy strikes promises to be difficult in the extreme, if the evidence is ambiguous, as it is likely to be, and if a sizable number of states, including major powers like Russia, China and India, start from a strong bias against intervention'.¹⁹

The only case to date of this kind was Kosovo, and the reason why it was such a difficult one for the Council was because there were genuine differences of opinion among the P-5 over whether force was the right means to end the crisis. NATO claimed that it had credible evidence that the Milosevic government was planning to forcibly expel the Kosovars, but others, including

Russia and China, argued that diplomacy should have been given more time. Had the humanitarian crisis in Kosovo worsened along the lines predicted by NATO, Russia's position might have changed in the Council. It accepted that the Yugoslav Government was committing gross abuses of international humanitarian law, and had voted in support of Resolution 1199 and abstained on Resolution 1203. The difficulty with this line of argument is how many Kosovars had to be killed - or be expelled - before Russia and China would have sanctioned military action. The burden of justification, then, that falls on states launching anticipatory interventions is far greater than would be the case if the humanitarian catastrophe had already happened, since the risks of abuse are greatest in relation to such preventive actions.

Conclusion

The question as to whether agreement on principles determining the use of force would generate Council unity in future cases is probably a moot one since it is highly unlikely that the Council will take this part of the reform package forward.

Even without the political fall-out from Iraq, there was little enthusiasm in the Council for new guidelines on intervention. The British attempt, led by the then Foreign Secretary Robin Cook, to press this issue in the aftermath of Kosovo failed to gain significant support. The US strongly opposed such efforts, concerned that guidelines might either restrict its freedom of manoeuvre or push it into actions that it was reluctant to undertake. China was equally opposed worrying that guidelines might open the door to greater UN interventionism in the internal affairs of Member States.²⁰ There is no reason to think that these basic positions have changed, and if anything, they have hardened: for states like China, India and Russia, all too conscious of the massive disequilibrium in global power, it is vital that nothing be done that further restrict the UN Charter's restraints on the use of force. Yet the opposite view is taken by many in the Bush administration who draw the lesson from Iraq that the UN failed (again) to live up to its responsibilities, and this means that the UN cannot be relied upon to act as the key legitimising agent of global security. For as long as the non-Western permanent members of the Council act to frustrate collective action, it is beholden upon the US and its Western allies to serve as the indispensable protector of global security.

An important objective behind the Secretary General's setting up of the High-Level Panel was that it might offer a means of healing the bitter divisions that opened up over Iraq. Certainly, Annan hopes the High-Level Panel's endorsement of preventive military action against non-imminent threats as a legitimate exercise of the Council's authority under Chapter VII of the Charter - a proposal carried forward in *'In Larger Freedom'* - will reassure the Bush Administration that the existing Charter framework can protect America in a post 9/11 world. The

problem is that no procedural mechanism can ever satisfy the interests and values of every state. Thus, a consensus might settle on the legitimacy of military action when there is majority support in the Council, but given the importance of the issues at hand, can Western states always be expected to accept that legitimacy is conditional upon securing a majority among a random group of states with variable values, interests and democratic credentials? And in relation to proposals to refer contested issues to the General Assembly, the latter is likely to offer no more acceptable a solution given that its universality of membership brings together all the tyrants of the world.

Consequently, unless Western states are prepared to limit their freedom of action in cases where the procedural rules lead to decisions that deny them a mandate, the prospect will always exist of powerful states which lose out resorting to unilateral action. Kosovo demonstrates that Western governments are not prepared to be so constrained when they believe that the preventive use of force is necessary to protect endangered peoples. The favourable balance of power means they can act without risking major conflicts with the other great powers, though as Iraq shows, there are political costs to such actions, especially if they split the Western camp itself. But the disequilibrium will almost certainly prove impermanent, and so the question for the future is whether European and American interests would be better served by constraining their actions in order to entrench the legitimacy of the procedural mechanism of UN authorisation.

¹ I would like to thank Alex Bellamy, Jean-Marc Coicaud, Gerry Simpson and especially Justin Morris for their comments on earlier versions of this paper.

² This term was employed in the Report of the Secretary General's High Level Panel on Threats, Challenges and Change.

³ 'In larger freedom: towards development, security and human rights for all', Report of the Secretary General, A/59/2005, 21 March 2005.

⁴ The US employed the same reasoning in defending its action as lawful, though it is evident from the British Attorney General's opinion of 7 March 2003 that the UK and US have a different view as to where authority rests in deciding whether a state is in non-compliance with existing resolutions. See 'Note to the PM from the Attorney General', 7 March 2003, released on Downing Street web site on 28 April 2005, <http://www.number-10.gov.uk/output/Page7443.asp>, accessed 28 April 2005.

⁵ *The Responsibility to Protect*, p.xi., Report of the International Commission on Intervention and State Sovereignty, December 2001.

⁶ *Responsibility to Protect*, p.70.

⁷ Gareth Evans, 'When is it Right to Fight? Legality, Legitimacy and the Use of Military Force, 2004 Cyril Foster Lecture, Oxford University, 10 May 2004.

⁸ For a fuller discussion of this argument see Nicholas J. Wheeler and Justin Morris, 'Justifying Iraq as a humanitarian intervention: the cure is worse than the disease', in W.P.S. Sidhu and Ramesh Thakur (eds.), *The Iraq Crisis and World Order: Structural and Normative Challenges* (Tokyo: United Nations University Press, forthcoming 2006).

⁹ 'In larger freedom', p.33.

¹⁰ 'In larger freedom', p.33.

¹¹ Kofi A. Annan, *Preventing War and Disaster: A Growing Global Challenge* (New York: United Nations Department of Public Information), p.21.

¹² For a detailed discussion of the Council debates over Kosovo, see Nicholas J. Wheeler, 'The Humanitarian Responsibilities of Sovereignty', in Jennifer Welsh (ed.), *Humanitarian Intervention and International Relations* (Oxford: Oxford University Press, 2004), pp.41-48.

¹³ *The Responsibility to Protect*, p.55.

¹⁴ Prime Minister Tony Blair, speech on Iraq and the threat of international terrorism, Sedgefield, 6 March, <http://politics.guardian.co.uk/speeches/story/0,11126,1162992,00.html>, accessed 7 July 2004.

¹⁵ Kenneth Roth, 'War in Iraq: Not a Humanitarian Intervention', *Human Rights Watch Report 2004*, <http://hrw.org/wr2k4/3.htm>, accessed 15 June 2004, pp.3-4.

¹⁶ Roth, 'War in Iraq', pp.3-4.

¹⁷ Gareth Evans, 'When is it Right to Fight?'

¹⁸ Evans, 'When is it Right to Fight?'

¹⁹ Robert Legvold, 'Foreword' to the Como Workshop, *Pugwash Occasional Papers*, September 2000, p.10.

²⁰ These competing positions are discussed in Nicholas J. Wheeler, 'Legitimizing Humanitarian Intervention: Principles and Procedures', *Melbourne Journal of International Law*, 2/2, (2001), pp.550-568.