'Beseeching Dominance':* Critical Thoughts on the 'Responsibility to Protect' Doctrine

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> [At] its heart the Rwandan story is the failure of humanity to heed a call for help from an endangered people. While most nations agreed something should be done, they all had an excuse why they should not be the ones to do it. As a result the UN was denied the political will and material means to prevent the tragedy.
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> *Lt General Roméo Dallaire, Force Commander, UN Assistance Mission to Rwanda*[2]

> What difference does it make to the dead, the orphans and the homeless, whether the mad destruction is wrought under the name of totalitarianism or the holy name of liberty and democracy? ... liberty and democracy become unholy when their hands are dyed red with innocent blood.
>
> *M K Gandhi*[3]

1. Introduction

Would more law have saved the victims of Rwanda? From the discourse that emerged from the September 2005 United Nations World Summit,[4] an observer would be forgiven for thinking it was the absence of international legal norms which permits

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* Anne Orford, 'Locating the International: Military and Monetary Interventions after the Cold War' (1997) 38 *Harvard International Law Journal* at 483 quoted in Shelly Wright, *International Human Rights, Decolonisation and Globalisation: Becoming Human* (2004) at 166–167.

1 LLB (Hons) (Melb), BA (Hons) (Melb).

2 Roméo Dallaire, *Shake Hands with the Devil: The Failure of Humanity in Rwanda* (2004) at 516.

3 Quoted in Michael Byers & Simon Chesterman, '"You the People": Pro-democratic Intervention in International Law' in Gregory Fox & Brad Roth (eds), *Democratic Governance and International Law* (2000) at 259.

4 The World Summit brought together 170 Government representatives and Heads of State to discuss the proposals in the UN Secretary-General's Report, *In Larger Freedom: Towards Development, Security and Human Rights for All, Report of the Secretary-General*, UN Doc A/59/2005, 21 March 2005, UNGA 59th session (*'In Larger Freedom'*) at [125]–[126] covering issues including development, security, human rights and UN reform <http://www.un.org/ga/59/hl60_plenarymeeting.html> accessed 1 October 2007.

mass atrocity to occur. The World Summit's endorsement of the 'Responsibility to Protect' doctrine[5] is not to be dismissed lightly. The emerging norm suggests that the Security Council now has a duty to intervene, including militarily, in States that cannot or will not protect their populations from genocide, war crimes and crimes against humanity.[6] At the level of rhetoric at least, it represents a shift in notions of State sovereignty from entitlement to responsibility; 'a collective security system based on a positive pledge of assistance rather than a negative commitment to refrain from the use of force'.[7] However, the development of norms *per se* should not be the cause of triumphant celebration. Law of itself cannot replace the political will to act nor can it redeem a failure to prevent atrocity. There is a danger in elevating new legal concepts or seeing them as panaceas for the complex ills which plague dictatorships or States with poor human rights records.[8] Moreover, too often international lawyers and activists mistake the development of doctrinal vocabulary for practical results.[9] The work of the international law-making bureaucracy becomes valued as a good in itself, regardless of its impact.

Responsibility to Protect also raises concerns for some developing countries, which perceive it as an attempt to legitimise intervention in their sovereign affairs by more powerful States.

This article will attempt to locate the Responsibility to Protect narrative on the use of force within a framework of critical and Third World Approaches to International Law (TWAIL) with a view to assessing the validity of some of their claims. To complement this discussion, David Kennedy's critique of humanitarianism in *The Dark Sides of Virtue*[10] will also be examined.

Part Two outlines the nature and evolution of Responsibility to Protect, with a particular focus on military intervention for 'human protection purposes' as contained in the Report of the International Commission on State Sovereignty.[11] Part Three will examine the distinct characteristics of TWAIL generally and its approaches to notions of military intervention in particular. Part Four will apply some of these critiques to Responsibility to Protect and discuss the emergence of this norm as a justification for intervention by powerful States, and as a discourse of utopian ideals. In conclusion it will be asserted that critical approaches offer important cautions about military intervention but few practical solutions and that Responsibility to Protect offers the potential for improved transparency in Security Council deliberations on the use of force where atrocities are involved.

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5 The draft resolution referred to the High-level Plenary Meeting of the General Assembly at its 59th Session, *2005 World Summit Outcome*, UN Doc A/60/150, 15 September 2005 at [138]–[139].

6 Ibid.

7 Anne Marie Slaughter, 'Security, Solidarity and Sovereignty: The Grand Themes of UN Reform' (2005) 99 *American Journal of International Law* 619 at 625.

8 Thomas Carothers discusses these concepts in *Critical Mission: Essays in Democracy Promotion* (2004) at 121–122.

9 These ideas are built on David Kennedy's critiques in his *The Dark Side of Virtue: Reassessing International Humanitarianism* (2004).

10 Ibid.

11 International Commission on State Sovereignty, *The Responsibility to Protect: Report of ICSS* (December 2001) <http://www.responsibilitytoprotect.org> ('ICSS Report') accessed 1 October 2007.

2. Background to the Responsibility to Protect Doctrine

To the surprise of many diplomats attending the 2005 UN World Summit in New York and to the joy of human rights activists,[12] the Final Outcomes Document[13] endorsed the Responsibility to Protect doctrine,[14] despite strong opposition from some States. The Outcomes Document was later endorsed in a Resolution of the UN General Assembly at its 60th Session.[15] The pledge made by governments comprised two limbs. First, it asserted the primacy of a State's responsibility to protect its own population from genocide, war crimes, ethnic cleansing and crimes against humanity.[16] Second, where States manifestly failed to protect their populations from such violations, it established a responsibility on the Security Council to take 'timely action' where 'peaceful means proved inadequate'.[17] The controversial nature of the doctrine was illustrated by the fact that the text stressed the 'need for the General Assembly to continue consideration of the Responsibility to Protect … bearing in mind the principles of the United Nations Charter and international law.'[18]

Responsibility to Protect developed against a backdrop of international failures to prevent large scale human rights violations in the 1990s, and the challenges to the international collective security system presented by the use of unilateral force by some States.[19] Intensive debate has occurred on the role of the United Nations and the nature and limits of State sovereignty.[20] Major disagreement persists between governments, academics and activists on whether there is an obligation to intervene and if so, by whose authority and how and when such intervention should occur.[21]

The iconic failures of the Member States of the United Nations to prevent large-scale killings are Rwanda in 1994 and Srebrenica in 1995. In the case of Rwanda, despite repeated requests from the UN Commander of the Assistance Mission in Rwanda, the Security Council refused to send additional UN troops to prevent or halt the genocide which resulted in the deaths of 800,000 Tutsi and moderate Hutus over 90 days.[22] In Srebrenica, the absence of a ceasefire, and a weak peacekeeping mandate

12 An Australian representative expressed amazement that the Responsibility to Protect reference survived inclusion in the Outcome document given the amount of controversy it had generated in the debates: author's discussion with Australian Department of Foreign Affairs representative, October 2005.

13 Above n5.

14 Id at [138]–[139].

15 Later adopted by the 60th Session of the UN General Assembly, *2005 World Summit Outcome*, UNGA Res 60/1 (UN Doc A/RES/60/1), 24 October 2005.

16 Above n15 at [138].

17 Id at [139].

18 Ibid.

19 The earliest proponents of the idea were Gareth Evans & Mohamed Sahnoun, 'The Responsibility to Protect' (1998) 81 *Foreign Affairs* 99. See also Gareth Evans, 'The Responsibility to Protect: Rethinking the Humanitarian Challenge' (2004) 98 *American Society of International Law Proceedings* 78.

20 For example see, Jennifer Czernecki, 'The United Nations' Paradox: The Battle between Humanitarian Intervention and State Sovereignty' (20–03) 41 *Duquesne Law Review* 391 and Amir Nakhjavani, 'To What Extent Does a Norm of Humanitarian Intervention Undermine the Theoretical Foundations Upon Which the International Order was Built?' (2004) 17 *Windsor Review of Legal and Social Issues* 35.

21 Evans (2004), above n 19 at 79.

combined with inadequate resources and bureaucratic incompetence allowed the Bosnian Serb forces to overrun the UN 'safe haven' and kill more than 7,000 Muslim civilian men and boys under UN watch.[23]

As well as these failures to protect, the Responsibility to Protect debate was shaped by cases of unilateral military intervention that raised questions about the appropriate legal process for intervention. In 1999, NATO conducted military operations in Kosovo without Security Council authorisation.[24] NATO justified the intervention on the basis of concerns about the widespread and escalating persecution of the non-Serb population in that region.[25] The military action spurred prolific debate about the morality and legality of the action, the impact on the international rule of law[26] and whether the action in fact worsened the human rights situation by facilitating the movement of Albanian Kosovars from the area.[27] Following Kosovo, the US-led invasion of Iraq in 2003 raised additional debate, particularly in light of the changing justifications presented for military action. Initially the stated military objective was to remove weapons of mass destruction in accordance with UN Security Council Resolution 1441. When such weapons were not found, justifications moved to broader political objectives such as nation-building to secure a stable democracy, and ensuring that human rights and the rule of law were established.[28] Together these cases presented a major challenge to the collective security system envisaged in the United Nations Charter.[29]

In 1999, the UN Secretary-General, Kofi Annan, reflected on the failures of the UN and (albeit in veiled language) warned against the dangers to multilateralism posed by continued inaction by the Security Council:

> If the collective conscience of humanity … cannot find the United Nations its greatest tribune, there is a grave danger that it will look elsewhere for peace and justice.[30]

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22 Dallaire, above n 2.

23 The Dutch United Nations Protection Force (UNPROFOR) battalion based in Srebrenica failed to take the military action necessary to save the town. Robust NATO air strikes that could have stopped the Serb onslaught were never authorised, despite repeated requests from Dutch peacekeepers on the ground. Requests for NATO air support to protect the safe haven from Serb shelling were refused, in one instance because a commander 'filled in the wrong' request form for the UN Department of Peacekeeping. Human Rights Watch, Report, *Bosnia-Hercegovina: The Fall of Srebrenica and the Failure of UN Peacekeeping* (1995) <http://www.hrw.org> accessed 1 October 2007.

24 See Ruth Wedgwood, 'NATO's Campaign in Yugoslavia' (1999) 93 *American Journal of International Law* 828; Thomas Franck, 'Lessons of Kosovo' (1999) 93 *American Journal of International Law* 857.

25 Michael Byers & Simon Chesterman, 'Changing the Rules about Rules? Unilateral Humanitarian Intervention and the Future of International Law' in Jeff Holzgrefe & Robert O' Keohane (eds), *Humanitarian Intervention* (2003) at 177.

26 Fernando Teson, *Humanitarian Intervention: An Inquiry into Law and Morality* (2nd ed, 1997) and Byers & Chesterman, ibid.

27 Abdullah An-Na'im, 'NATO on Kosovo is Bad for Human Rights' (1999) 17 *Netherlands Quarterly Human Rights Report* 229; Henry Steiner & Philip Alston (eds), *International Human Rights in Context: Law, Politics and Morals* (2nd ed, 2003) at 655–56.

28 'President Bush Outlines Iraqi Threat', Cincinnati Museum Centre, 7 October 2002 <http://www.whitehouse.gov/news/releases/2002/10/print/20021007-8.html>.

29 Nakhjavani, above n 20; Czernecki, above n 20.

30 ICSS Report, above n 11 at 2.

Again, in 2000 the Secretary-General challenged Member States in the General Assembly to find a solution to systematic violations of human rights in light of the seemingly intractable problem of non-intervention on the basis of State sovereignty.[31] In response, in September 2000, Canada established the Independent International Commission on Intervention and State Sovereignty (ICSS). The ICSS mandate was to develop consensus on how to reconcile intervention for human protection purposes with the pre-existing paradigm of State sovereignty.[32] Over 12 months, the ICSS conducted wide ranging international consultations with members of the Security Council, NGOs, academics, and community organisations. A thorough examination of the ICSS Report is beyond the scope of This article. The discussion will concentrate on the core principles in the Responsibility to Protect doctrine with an emphasis on the principles for military intervention.

A. The Core Principles of the Responsibility to Protect

The ICSS Report outlines three specific responsibilities for States individually and collectively and four principles for military intervention for human protection purposes. To address the problems of intervention in State sovereignty, the ICSS engaged in what Slaughter terms 'a tectonic shift'; it redefined sovereignty as control to sovereignty as responsibility.[33] Thus the core principles provide that whilst States have the primary sovereign responsibility for the safety and welfare of their people, the principle of non-intervention will yield to the international Responsibility to Protect where States are unable or unwilling to protect their population from serious harm.[34] In this sense, the privileges of sovereignty (namely, the exclusivity of a State's domestic jurisdiction and control) have been made conditional upon the State being able to fulfil its fundamental human rights obligations to its citizens.[35]

B. Specific Responsibilities of Governments and the International Community

The ICSS Report outlines three specific responsibilities for both governments separately and collectively in the Responsibility to Protect. These are the responsibility to *prevent* the root causes of conflict; the responsibility to *react* to situations of compelling need including, where appropriate, with military force; and the responsibility to *rebuild* to assist with recovery, reconstruction and reconciliation, particularly following military intervention.[36] The core principles emphasise that prevention is the 'single most important' dimension of the Responsibility to Protect

31 *In Larger Freedom*, above n4 at [125]–[126].

32 ICSS Report, above n 11 at 2.

33 Id at 13; Slaughter, above n 7 at 626.

34 ICSS Report, above n 11 at xi and 17–18.

35 Slaughter, above n 7 at 631 observes that 'To move from a rights based conception of sovereignty to a responsibility based conception, from a perception of UN membership as validation of sovereign status to viewing signature as acceptance of conditional sovereignty … is bold indeed'.

36 ICSS Report, above n 11 at xi, 19–44.

and that coercive intervention is a matter of last resort, based on exhaustion of preventive options and a graduated use of force.[37]

C. *Principles for Legitimate Military Intervention*

The ICSS Report outlines four principles for legitimate military intervention for humanitarian purposes. These principles identify the threshold of harm required for intervention to occur ('Just Cause Threshold'), limits on the means of military intervention ('Precautionary Principles'), how force should be authorised ('Right Authority') and finally, a number of military operational requirements to address shortcomings of previous peacekeeping operations.[38]

(i) Just Cause Threshold

The threshold identified for the use of force is a high one intended only for extreme situations.[39] Resort to military intervention is identified as an 'exceptional and extraordinary measure'[40] warranted only in cases of actual or apprehended large scale loss of life, or 'ethnic cleansing' such as killing, forced expulsion, acts of terror or rape.[41] The intention of the State in which protection is required is not relevant for the purposes of establishing Just Cause; rather, the threat can be the result of deliberate State action, neglect, or the inability to act.[42] Accordingly, conditions such as State collapse resulting in mass starvation civil war, and natural or environmental catastrophes where the State is unable to cope are also envisaged in the conditions justifying intervention.[43] The reference to 'apprehended' harm indicates that military action can be legitimate as an anticipatory measure in response to clear evidence of likely large scale killing.[44]

(ii) Precautionary Principles

The report outlines four additional Precautionary Principles or conditions that have to be met for military intervention to be justified: Right Intention, Last Resort, Proportional Means and Reasonable Prospects of Success.[45]

The primary purpose of the intervention must be to halt or avert human suffering. This 'Right Intention' is best assured, the Report asserts, through the use of multilateral operations supported by regional opinion and the victims concerned.[46] However, the Report is silent on how to ascertain the views of the victims.

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37 Ibid.

38 For an example of some of these see the *Report of the Panel on United Nations Peace Keeping Operations*, 12 August 2000, UN Doc A55/305/S/2000/809 ('Brahimi Report').

39 ICSS Report, above n 11 at [4.10]–[4.13].

40 Id at xii [1] Just Cause Threshold.

41 Ibid.

42 ICSS Report, above n 11 at [A]. The intention of the intervening States is dealt with in the Right Intention test; see below.

43 Id at [4.20].

44 Id at [4.21].

45 Id at xii.

46 Id at xii [2.A], [4.33]–[4.36].

The Last Resort principle requires that all peaceful methods of resolving the crisis have been explored prior to the use of military intervention. Additionally, the Proportional Means principle requires that the military means used need to be proportionate in scale, duration and intensity to the human protection objective.[47] These two principles bring together normative discourse from both the standards of international humanitarian law[48] and the international guidelines on the use of force and firearms.[49]

The Reasonable Prospects test requires the planned military operation to have a reasonable chance of success. Success is measured in terms of halting or averting human suffering.[50] Military intervention will not be justified where the consequences of action are worse than the consequences of inaction, for example, where the military action triggers a larger conflict, or a conflagration involving major military powers.[51] In effect, this means that the doctrine will operate in extremely limited circumstances and preclude military action against any one of the five Permanent Members of the Security Council, or indeed other major powers.[52]

(iii) Right Authority Principle

The Right Authority principle is a re-assertion of the supremacy of the Security Council as the authoriser of military force within the international collective security system.[53] Under the principle, any military action for human protection purposes requires Security Council authorisation prior to being carried out. More controversially, the principles states that the five Permanent Members of the Security Council agree not to apply their veto power in matters where their vital State interests are not involved.[54] Unsurprisingly, a similar provision was deleted from previous drafts of the World Summit Outcome document.[55] This principle distinguishes Responsibility to Protect from 'Humanitarian Intervention' and the possibility of unilateral or regional intervention without Security Council authorisation.

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47 Id at xii [2.B & C], [4.37]–[4.40].

48 The principle of proportionality is fundamental to international humanitarian law. Combatants can only use such force as is reasonably necessary to achieve a legitimate military objective. Indiscriminate attacks expected to cause incidental loss of civilian life disproportionate to the direct military advantage anticipated are prohibited: see arts 51(5)(b) and 52 of *Protocol II Additional to the Geneva Conventions of August 12 1949 and relating to the Protection of Victims of Non-International Armed Conflicts*, opened for signature 8 June 1977, 16 ILM 1442 (entry into force 7 December 1978).

49 The principles of force as a method of last resort and proportionality reflect the *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials*, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990 <http://www.unhchr.ch/html/menu3/b/h_comp43.htm> accessed 1 October 2007.

50 ICSS Report, above n 11 at 37–38.

51 Ibid.

52 Id at [4.42].

53 Id at xii.

54 Ibid.

55 The '2nd Revised Draft Outcome Document' of 5 August 2005 provided at para [119]: 'We invite the permanent members of the Security Council to refrain from using the veto in cases of genocide, war crimes, ethnic cleansing and crimes against humanity': See *State by State Positions on the Responsibility to Protect*, R2P <http://www.responsibilitytoprotect.org> accessed 1 October 2007.

(iv) Operational Principles

Six operational principles for military intervention are outlined to address past deficiencies highlighted in UN military operations. These include a requirement for a clear mandate and resources to match; interoperability issues such as ensuring common military approach and clear chain of command; rules of engagement that involve adherence to international humanitarian law; and acceptance that force protection cannot become the principle objective.[56]

Many of the principles of the Responsibility to Protect in the ICSS Report have been adopted by subsequent key UN reports. In 2004, the Secretary-General's High Level Panel on Threats, Challenges and Change endorsed the 'emerging norm' of the Responsibility to Protect and five basic criteria of legitimacy mirroring the Just Cause threshold and the Precautionary Principles outlined above.[57] *A Secure World* recommended that guidelines authorising the use of force by the Security Council be embodied in resolutions of both the Council and the General Assembly.[58] In 2005, the Secretary-General's report *In Larger Freedom*[59] adopted the recommendations of *A More Secure World* in this regard, and urged governments to 'embrace' the Responsibility to Protect as the basis for collective action against genocide, ethnic cleansing and crimes against humanity.[60] The Security Council is currently negotiating a draft resolution on the protection of civilians from armed conflict which contains a reference to the Responsibility to Protect.[61] Disagreement between Member States about inclusion of the reference prevented the Resolution being passed in December 2005.[62] Governments who are opposed to Responsibility to Protect include members of the G77 and Non-Aligned Movement plus China, including Russia, Algeria, Syria, Cuba, Venezuela, Iran, India, Indonesia and Pakistan.[63]

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56 ICSS Report, above n 11 at xiii.

57 *A More Secure World: Our Shared Responsibility, Report of the Secretary–General's High Level Panel on Threats, Challenges and Change*, UN Doc A/59/565, 2 December 2004 at [199]–[207] ('*A More Secure World*').

58 Id at [208].

59 *In Larger Freedom*, above n 34.

60 *In Larger Freedom*, above n 34 at 58, 59.

61 Draft Security Council Resolution, Protection of Civilians in Armed Conflict, 21 November 2005. Operative paragraph 6 '*Recalls* the World Summit Outcome Document and *underlines* the importance of its provisions regarding the Responsibility to Protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity, including in this regard the responsibilities of individual Member States as well as the international community acting through the United Nations including the Security Council.' (emphasis original) <http://www.r2p.org> accessed 1 October 2007.

62 On 9 December 2005, 21 governments spoke in favour of the reference to the World Summit commitment in the draft Security Council Resolution. Other governments are against either the Responsibility to Protect in its entirety or the Security Council taking on the issue prior to it being reviewed by the General Assembly: see 'What Civil Society is Saying' <http://www.r2p.org>.

63 The G77 is a group of 132 loosely affiliated developing countries whose goal is to advance the economic well being of the Third World. The NAM has a membership of 113 which overlaps with the G77. Government positions on R2P <http://www.r2p.org>.

3. Third World and Other Critical Approaches to Responsibility to Protect

A. Third World Approaches to International Law (TWAIL)

Third World Approaches to International Law (TWAIL) seek to highlight the historical continuity between colonialism and contemporary international law and relations.[64] Makau Matua has observed that, in so far as European hegemony is concerned, there is a continuum between the colonial administrator, the Christian missionary, the exporter of democracy and now the human rights crusader.[65] In this way, the exploitative economic and political relations established by the colonial encounter are enduring values and assumptions which can be traced to the current norms and institutions of the international system.[66]

The term 'Third World' is not intended to be monolithic.[67] It is generally accepted that the Third World does not imply an homogeneous entity but rather a 'chorus of voices' 'occupying a historically constituted, alternative and oppositional stance within the international system.'[68] Mohammed Ayoob characterizes Third World States as 'postcolonial' on the basis of their inherent political and economic characteristics; namely their economic dependence and lack of social cohesion which makes them vulnerable to internal dissension and external interference.[69]

Matua argues that whilst TWAIL represent a diverse range of interests, cultures and approaches, the subordinate position non-European States occupy in the international system has given rise to a distinct form of intellectual and political consciousness; a form of broad united opposition to the unjust nature of the global order.[70] TWAIL is said to share four general characteristics. First, they are anti-hierarchical, that is, they reject the complexes of superiority inherent in European approaches to international law. Second, they are counter-hegemonic and urge the inclusion of Third World countries in the processes and institutions of the international political and economic order. Third, TWAIL are suspicious of universal creeds whose construction has not been inclusive of Third World voices. Finally, TWAIL are made up of coalitions of actors who are seeking to highlight the current injustices perpetrated under the broad banner of globalisation.[71]

According to TWAIL, the system of international law is said to be Eurocentric, that is, derivative of European values, culture and economic imperatives.[72] Embedded

64 Karen Michelson, 'Rhetoric and Rage: Third World Voices in International Legal Discourse' (1998) 16 *Wisconsin International Law Journal* 353 at 408–9; Antony Anghie, 'Colonialism and the Birth of International Institutions: Sovereignty, Economy and the Mandate System of the League of Nations' (2002) 34 *New York Journal of International Law and Politics* 513.

65 Makau Matua, 'What is TWAIL?' (2000) *American Society of International Law Proceedings* 31 at 36.

66 Ibid; Michelson, above n 64 at 406.

67 Balakrishnan Rajagopal, 'Locating the Third World in Cultural Geography' (1999) *Third World Legal Studies* 1.

68 Michelson, above n 64 at 360.

69 Mohammed Ayoob, 'Third World Perspectives on Humanitarian Intervention and International Administration' (2004) 10 *Global Governance* 99 at 100.

70 Matua, above n 65 at 35–36.

71 Id at 36–39.

in this Eurocentricity are notions of cultural difference that have been constructed into what Matua terms 'racialised hierarchies'.[73] These hierarchies place European values and culture as superior to that of non-Europeans, and legitimise the conquest and domination of 'uncivilized' peoples.[74] According to Mutua, a key objective of TWAIL is to examine how contemporary international law perpetuates and legitimises the subordinate relationships between Europeans and non-Europeans.[75]

Second, the economic exploitation which formed the basis of the colonial encounter was not simply an aberration that was remedied by decolonisation.[76] Instead, TWAIL argue that the subordinate economic relationship inherited by non-European States at the time of their creation as 'sovereign equals' has rendered their political independence largely illusory.[77] Thus, despite the change of international rhetoric to 'self determination,' the colonial power structures remained in place, changing 'the form of European hegemony but not its substance.'[78] TWAIL are therefore interested in exploring how the law and its institutions function as tools of power and exclusion in practice, despite claims of universality. They expose notions of equality to reveal the manner in which more powerful economic States exert their dominance and control through international economic and development institutions.

B. Other Critical Approaches

Although David Kennedy is not a TWAIL scholar, he utilises similar themes in his work on the limitations of humanitarianism. These critiques may have relevance for an assessment of the Responsibility to Protect and will also be discussed below. Like TWAIL, Kennedy is interested in how actors within 'humanitarianism' (by which he means lawyers, doctors, activists and other professionals engaged in the human rights movement) fail to recognize their own power and the impact this has on their accountability for risks and the long-term consequences of their actions.[79] The international human rights movement dangerously assumes it can 'do no wrong'[80] and this, Kennedy argues, leads to unforeseen consequences by sustaining the biases and blind spots that cloud policy judgment.[81] Thus, whilst TWAIL are focused on the ideology of power, Kennedy has more a pragmatic focus and urges humanitarian actors to engage in greater 'cost-benefit analysis' of their actions.[82]

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72 Id at 34.
73 Id at 31.
74 Id at 34; Anghie, above n 64 at 607.
75 Matua, above n 65 at 31.
76 Anghie, above n 64 at 608.
77 Matua, above n 65 at 35.
78 Id at 34–35.
79 For an overview see E L Gaston, 'The Dark Sides of Virtue: Reassessing International Humanitarianism' (2005) 46 *Harvard International Law Journal* 547 at 552.
80 Kennedy, above n 9 at xviii, 119–125.
81 Id at xvii.
82 Id at xviii.

4. Applying Critical Approaches to the Responsibility to Protect

Colonial history has left an understandable historical suspicion in Third World States regarding all forms of foreign intervention. According to TWAIL, military intervention, regardless of its benevolent motive, cannot be separated from the international power relations that construct it. Nor can it be separated from the history of colonialism and the enduring structures of economic inequality it established. In this manner, the colonial encounter is *constitutive* of international law generally and of influential concepts such as 'human rights', 'sovereignty' or 'legitimacy' in particular. From a TWAIL perspective, such terms as currently defined are inherently suspicious for their role in legitimizing power imbalances between States.[83] The critique does not deny the importance of preventing atrocity, but argues against the interpretation and use of military intervention in terms that benefit those in a position to define such intervention.[84] The debate is about *who* gets to decide which cases are appropriate for intervention and by what *process*.

A. TWAIL Critiques of the Responsibility to Protect

TWAIL approaches highlight two main interlinked concerns with the Responsibility to Protect. Firstly, the Responsibility to Protect legitimises and reinforces existing international power structures by allowing interference in weaker States by superpowers and their allies. Secondly, the Responsibility to Rebuild and the development theories which underpin it license powerful States to rebuild in their own political and economic image. This process evokes the 'civilising mission' used historically by colonial powers as a pretext subjugating Third World States.[85]

(i) Reinforcing Existing Unequal International Power Relations

> … let's us not allow a handful of countries to try and reinterpret with impunity the principles of international law to give way to doctrines like "Pre-emptive War"… and now the so-called Responsibility to Protect, but we have to ask ourselves who is going to protect us? How are they going to protect us?
>
> *Venezuela President Hugo Chavez Frías, World Summit address*[86]

The main criticism from States that oppose the Responsibility to Protect, such as Venezuela and Cuba, is that the doctrine will only serve the interests of the superpowers and their allies.[87] Some countries view the Responsibility to Protect as simply synonymous with 'humanitarian intervention'. For example, Zimbabwe argues

83 James Gathii, 'Rejoinder: Twailing International Law' (2000) 98 *Michigan Law Review* 2066 at 2070.

84 Dennis Ignatius (High Commissioner of Malaysia), 'The Responsibility to Protect – A Third World Perspective', *Embassy* (24 August 2005) <http://www.embassymag.ca/html/index.php?display=story&full_path=/2005/august/24/r2p/>.

85 Ayoob, above n 69 at 101.

86 *2005 World Summit Excerpts, Responsibility to Protect* <http://www.responsibility toprotect.org> accessed 1 October 2007.

87 Ibid.

that '[C]oncepts such as humanitarian intervention and Responsibility to Protect need careful scrutiny in order to test the motives of their proponents.'[88]

A further critique is that intervention will only ever be selectively and inconsistently applied by those with sufficient military might to do so.[89] In this regard, commentators argue that powerful States apply double-standards in their selection of cases for humanitarian style interventions which reflect their strategic and economic interests rather than any genuine humanitarian impulse.[90] The most commonly cited example is the failure of the Security Council (in particular the United States) to intervene against the Israeli occupation of Palestine.[91] Furthermore, it is unlikely that Third World States will ever be permitted to utilise the Responsibility to Protect to intervene in developed States.[92]

The Reasonable Prospects test lends support to claims that the Responsibility to Protect only reinforces existing unequal power relations. The test insists that military action will only be justified if it stands a reasonable chance of success, does not result in consequences worse than if there was no action at all or was likely to trigger a larger conflict.[93] Apart from the extreme difficulty of objectively assessing these criteria, the test precludes consistent rules for all countries. The ICSS Report acknowledges the application of this principle 'would on purely utilitarian grounds' preclude military action against any one of the five Permanent Members of the Security Council.[94] While this fact is dismissed as a simple matter of realpolitik by the ICSS Report ('the reality is that interventions may not be able to be mounted in every case where there is justification for doing so'),[95] TWAIL would view such selectivity as confirming the doctrine as a vehicle for the interests of the powerful.

It is unsurprising that Third World States attach considerable importance to the international legal protections against the use of force.[96] Given the memory of colonialism, their relatively recent entrance into nationhood, and relatively limited military power, it would be expected that they would be nervous of international activism which could threaten their newly acquired sovereign status.[97]

(ii) Rebuilding in the Image of More Powerful States

TWAIL scholars such as Anghie and Ayoob view the issue of military intervention for protection purposes as inextricably linked to the problems associated with international administrations in developing States and the subsequent imposition of neo-capitalist economic policies.[98] The Responsibility to Protect attempts to address concerns about improper motives of intervention for protection purposes through

88 *2005 World Summit Excerpts*, above n 86.
89 Ayoob, above n 69 at 110–111.
90 Ibid.
91 Ibid.
92 David Rieff, *A Bed for the Night: Humanitarianism in Crisis* (2003) at 268.
93 ICSS Report, above n 11 at [4.42].
94 Ibid.
95 Id at [4.43]–[4.43].
96 Byers & Chesterman, above n 25 at 194.
97 Ayoob, above n 69 at 100.
98 Ibid.

the Right Intention test, which limits intervention to the objective of halting or averting human suffering.[99] However, this objective is not a simple matter. Halting human rights violations in the short term is different from preventing them from reoccurring in the longer term. One objective involves a rapid emergency intervention and the latter a commitment to addressing the root causes of violence in a State. This is recognised by the Responsibility to Rebuild principle and the post-intervention obligations it prescribes. Whilst the ICSS Report rejected 'regime change and occupation' as illegitimate objectives, it acknowledged that in practice 'disabling a regime's capacity to harm its people may be essential to discharging the mandate of protection.'[100] The consequences of intervention thus leave the doctrine open to claims that powerful States are seeking to rebuild States in their own political and economic image.

For TWAIL, concerns about the improper motives of intervening States are grounded in the continuing relevance of the colonial legacy. A common critique against formalising intervention for human protection purposes is that it represents a reinvigoration of the 'civilising mission' used by colonial powers as a pretext to subjugate Third World States during the 19th century.[101] Orford, for example, has suggested that nostalgia for the colonial mission of salvation is behind much Euro-American commentary on the use of human rights abuse as a justification for the use of force. She observes: '[j]ustifications for military and monetary intervention draw strongly upon … stories of those who cannot govern themselves, who beseech dominance.'[102]

TWAIL scholars such as Anghie are interested in examining how international law concepts function to separate the 'civilised' and the 'uncivilised' for the purpose of creating hierarchies among States.[103] According to Anghie, the civilising mission has taken on different forms during different phases of international law's development.[104] During the nineteenth century, positivism functioned to exclude non-European peoples from exercising sovereignty and the rights that accompanied it.[105] Such exclusion functioned to legitimise colonial domination of non-European land. The racism did not stop, however, when non-European peoples were finally able to exercise sovereignty. Anghie argues that sovereignty as experienced by the non-European world was of a fundamentally different character to that experienced by the Europeans.[106] For non-Europeans, sovereignty consisted of alienation and subordination, rather than empowerment.[107] This is because the transfer of formal sovereignty occurred at the same time that real economic power was withdrawn and transferred to external forces.[108]

99 ICSS Report, above n 11 at [4.33].
100 Id at [4.33]–[4.36].
101 Ayoob, above n 69 at 101.
102 Orford, quoted in Shelly Wright, above n *.
103 Anghie, above n 64 at 518.
104 Id at 518–519; Anthony Anghie, 'Finding the Peripheries: Sovereignty and Colonialism in Nineteenth Century International Law' (1999) *Harvard International Law Journal* 1 at 5.
105 Anghie, above n 64 at 24.
106 Id at 20.
107 Id at 70–71.

Applying these critiques to the Responsibility to Protect, it is arguable that the attribution of pejorative labels such as 'human rights abuser' and 'authoritarian regime' serves to delineate States for the purposes of intervention in the same manner that 'civilised' and 'uncivilised' did historically. The establishment of concepts such as 'human rights', 'the rule of law', and 'good governance' and their imposition on developing States are being used to justify intervention as 'civilisation' was used in the nineteenth century.[109]

A further concern is the terms on which States are rebuilt following intervention. The ICSS Report states that following military intervention there 'should be a genuine commitment to helping build a durable peace, good governance and sustainable development'.[110] TWAIL and critical legal theory have highlighted how norms of democratic governance can operate as ideology to secure systematic inequalities within and between States.[111] Gathii for example, argues that policies based on good governance, democracy or development can operate as 'structures of power' by maintaining or failing to ameliorate economic and political inequality.[112] In his view, democratization within the current good governance agenda is inherently linked with neo-liberal economic policies that are based on a number of questionable assumptions that may be inimical to economic and social rights.[113] Similarly, Koskenniemi has observed how democratic norms can 'too easily be used against revolutionary politics that aim at the roots of the existing distributionary system'.[114] The Responsibility to Rebuild principle draws on external international standards that are largely non-negotiable in the post-conflict setting. In this way, the State reconstruction project is ironic for it seeks to impose international standards for the purpose of promoting self-determination and sustainable development.[115] As Gregorian has observed, a benevolent autocracy is, after all, still an autocracy.[116]

B. Responses to TWAIL

The Responsibility to Protect doctrine has anticipated a number of the critiques discussed above. There are also a number of limitations to the arguments made by TWAIL which will be discussed in the next section.

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108 Id at 609.

109 Rieff, above n 92 at 60.

110 ICSS Report, above n11 at [5.1].

111 Susan Marks, 'International Law and the Project of Cosmopolitan Democracy' in Susan Marks, *The Riddle of All Constitutions* (2000) at 101.

112 James Gathii, 'Good Governance as a Counter-Insurgency Agenda to Oppositional and Transformative Social Projects in International Law' (1999) *Buffalo Human Rights Law Review* 107 at 170.

113 Id at 108 and also James Gathii, 'A Critical Appraisal of the NEPAD Agenda in Light of Africa's Place in the World Trade Regime in an Era of Market-Centred Development' (2003) 13 *Transnational Law and Contemporary Problems* 179.

114 Quoted in Marks, above n 111 at 101.

115 Gaston, above n 79 at 599.

116 This point is observed by Vartan Gregorian in the foreword of Simon Chesterman, *You, The People: The United Nations, Transitional Administration, and State Building* (2004) at vii.

(i) The Responsibility to Protect Limits Grounds for Intervention

Aware of the concerns raised above, the ICSS Report is at pains to insist that '[i]ntervening to protect human beings must not be tainted by any suspicion that it is a form of neo-colonial imperialism'.[117] By asserting the primacy of prevention, the use of force as a means of last resort and legitimacy through multilateralism and Security Council endorsement, the ICSS has sought to limit opportunities for imperial adventurism and Western 'vigilante justice'.[118] Additionally a distinction should be made between interventions for the purpose of halting human rights abuses and interventions for the purpose of regime change. Professor An-Na'im has observed in relation to intervention for humanitarian purposes that '[w]ithout the consistent application of clear principles, the actions of Western Governments will remain highly suspect and ultimately ineffective.'[119] While the problem of consistency remains, the Responsibility to Protect's articulation of detailed principles may bring a greater degree of transparency to the deliberations of the Security Council.

(ii) Intervention is not Simply a Vehicle for Colonial Power

Intervention for human protection purposes may not always be simply a vehicle for colonial power. The idea that the motives of powerful States in intervening for human protection purposes will *always* be suspect is an oversimplification. Rather, States act on a complex push and pull of motives, some idealistic, some selfish. The reasons how and why countries intervene militarily have also shifted over time. Martha Finnemore has conducted an extensive review of the role of humanitarian norms in shaping patterns of military intervention over 180 years.[120] She argues that since the Cold War, many military interventions have occurred, for example in Somalia, Cambodia, Kosovo and Bosnia, where States were of negligible geo-strategic or economic importance to their intervenors.[121] This is in contrast to the nineteenth century up to 1945 in which interventions occurred mostly for strategic reasons based on 'shared fears and perceived threats'.[122] Additionally, the recent growth of multilateralism cannot simply be explained as a matter of efficacy or the self-interest of powerful States. To the contrary, as recent UN-led military operations have shown, multilateral interventions can have significant costs, including large coordination and cooperation problems. The choice of the type of intervention is thus influenced by perceptions of political acceptability and the political costs of different options, which in turn is influenced by the normative context.[123] According to Finnemore, these shifts are attributable to three factors: first, changing notions of who is 'human' and can claim humanitarian protection; second, changing notions of legitimacy which now require the *method* of intervention to be multilateral; and third, changing notions of military

117 ICSS Report, above n 11 at [5.31].
118 Abdullah An-Na'im, above n 27.
119 Id at 656.
120 Martha Finnemore, *The Purpose of Intervention: Changing Beliefs about the Use of Force* (2003).
121 Id at 52.
122 Id at 80.
123 Id at 74–75.

'success', that it is no longer acceptable to simply install governments but rather to introduce a *process* such as elections.[124]

If the Responsibility to Protect is a neo-colonial imposition, it is not one that States are rushing to implement. As Byers and Chesterman observe, 'States are not champing at the bit to intervene in support of human rights … prevented only by an intransigent Security Council and the absence of clear criteria to intervene without its authority.'[125] Rather the real issue is the absence of political will. Developed States do not always view it in their national interest to fund costly military interventions and must often be pressured by a domestic constituency before doing so. Indeed, one of the biggest concerns for African States identified during the ICSS consultations was that the international community *would fail to intervene* in crisis situations because of the lack of economic and strategic interests there.[126] In this regard, TWAIL underplays the differences *between* Third World States' views on intervention. Ayoob has mapped how African, Asian and Latin American perspectives differ from each other (and within these continents themselves) in regard to external intervention.[127] Differences in perspective depend on the problems facing each country, their relative international and regional power, and their shared affinities with people affected by State repression or State failure.[128]

The fact that Responsibility to Protect can only be applied selectively in very few cases because of the preconditions that must be satisfied is also a protection against TWAIL's fear of unlimited or rogue interventionism.

(iii) TWAIL Marginalises Voices of People Within Third World States

TWAIL occupy an ambiguous relationship to the notion of sovereignty. They reject the authenticity of political sovereignty (because it coincided with new forms of economic dependency), whilst simultaneously privileging the concept as providing protection from outside interference. In doing so, TWAIL pay more attention to the colonial legacy between States than to the power imbalances within them. Indeed, TWAIL fail to distinguish more broadly between Third World governments and their citizens. This dilemma results in the adoption of narrow definitions of State-based sovereignty similar to those TWAIL are seeking to critique.

This approach may function to marginalise voices within Third World countries, such as victims and survivors of human rights abuses calling for international protection from their governments. For example, in Darfur in February 2006, several hundred internally displaced women marched on the African Mission in Sudan (AMIS) Compound demanding that UN troops be immediately deployed to protect civilians from armed attack as the African Union AU was failing to do so.[129] This act of defiance stood in contrast to the position of the Sudanese Government which has vehemently rejected a UN mission in Darfur as a breach of its sovereignty.[130]

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124 Id at 53.

125 Byers & Chesterman, above n 25 at 202.

126 Ayoob, above n 69 at 106–107.

127 Id at 105–106.

128 Id at 105.

129 Confidential report on file with the author, UNMIS Sudan, February 2006.

The failure of TWAIL to examine the power imbalances within Third World States may also have other unforeseen consequences. The powerful anti-colonial polemic can be utilised by leaders to deflect criticism from their own domestic human rights record. For example, the Sudanese Government, arguing against a UN-led military operation in Darfur to protect civilians there, insisted that 'Sudan is too strong to bow its head to such pressure and [the UN Mission in Sudan] must realise that Africans are capable of resolving their own problems. Gone is the time when Africans were exploited under the pretence of a foreign mandate.'[131] Other government commentators have evoked images of an invidious imperialist 'invisible hand' at work in Sudan, posing intervention in Darfur as means to dismantle the country for economic gain.[132]

The critique of post-intervention rebuilding as simply mirroring past patterns of colonial domination also denigrates the historical achievements of domestic human rights struggles. Local activists within States can use concepts such as democracy and human rights for leverage for reform in their own countries. Susan Marks argues that despite the 'pacifying potentials' of the norm of democratic governance, it is possible for the project to be redirected to emancipatory ends.[133] She urges international lawyers to 'recapture the initiative in favour of revolutionary politics that aims at the roots of the existing distributionary system, [to] re-deploy an alliance between international law and democracy against neo-colonialism.'[134]

The refashioning of sovereignty undertaken by the Responsibility to Protect addresses some of TWAIL's limitations outlined above. Placing the emphasis on 'sovereignty as responsibility' makes it more difficult for governments to insist on the inviolability of intervention in the face of atrocity. In the first instance, governments are given the opportunity to fulfil the obligations of sovereignty by meeting their fundamental human rights obligations to their citizens. It is only where they are unable or unwilling to fulfil their responsibility that they forfeit the exclusivity of their domestic jurisdiction. Even then, military intervention must come as a last resort where other less intrusive and extreme methods have been exhausted or would arguably be futile. Additionally, shifting the terms of the intervention debate away from the right to intervene to the Responsibility to Protect is a more victim-centred approach. As the ICSS Report persuasively argues, emphasising 'responsibility' places more focus on the urgent needs of beneficiaries of the intervention than 'rights' which focus prerogatives of intervening States.[135] It is these victims' voices that are in danger of being lost in some of the TWAIL narratives.

130 'Taha Affirms Sudan's Rejection of Replacement of AU Forces', *Sudan Vision* (21 February 2006) at 1; 'Parliament Unanimously Rejects Replacement of AU forces by International Ones', *Sudan Vision* (23 February 2006) at 1.

131 The statement appeared in the editorial of the government newspaper, 'Editorial' *Sudan Vision* (17 January 2006) at 4.

132 Mohamed Elfatih Zeyada, 'The Invisible Hand', *Sudan Vision* (25 February 2006) at 3.

133 Marks, above n 111 at 102–103.

134 Ibid.

135 ICSS Report, above n 11 at [2.28].

C. *Utopian Ideals in the Responsibility to Protect*

Another critique of the Responsibility to Protect is that the legitimacy of the narrative depends on a number of utopian ideals. One is the existence of a benevolent 'international community'. As outlined above, critical approaches view notions of community with scepticism and instead focus on the underlying inequalities of economic power between Member States of the UN.[136] For example, David Rieff argues that an 'international community' of shared values does not exist, but rather, 'there is an international order, dominated by the United States and there are international institutions like the UN, the World Trade Organisation and the World Bank.'[137] Such rhetoric can also raise unrealistic expectations. Kennedy insists that the utopia of community as propagated by the international human rights movement gives rise to the false expectation of a 'foreign emancipatory friend who does not materialize'.[138]

In reality, as intervention requires Security Council endorsement, the so-called 'community' is reflected in the will of the Council's five Permanent Members. Further, TWAIL would argue the legacy of colonialism is reflected in the very establishment of international institutions such as the UN and this erodes the legitimacy of their decision making processes.[139] TWAIL argue that the Security Council is an imperfect forum for decision making for several reasons. First, power is concentrated in the hands of the major powers through the use of the veto and decisions reflect their respective strategic and economic interests. Second, the Security Council does not constitute the 'international community' because of its unrepresentative character.[140]

Unsurprisingly, TWAIL reserve their greatest critiques for unilateral humanitarian interventions such as Kosovo and Iraq, where intervention is determined solely by military might without the pretence of Security Council pre-approval.[141] In this regard, the Responsibility to Protect with its focus on the Right Authority of the Security Council as the sole authoriser of military intervention for human protection purposes is preferable to unilateral action.[142] Nevertheless, due to the concerns identified by TWAIL above, the Security Council remains a flawed and undemocratic body. The reluctance of the Council to make progress on reform issues such as membership and veto power only serves to highlight the entrenched interests it represents.[143]

The reverence for concepts such as good governance and rule of law in the Responsibility to Rebuild and their promises of moving countries towards

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136 Gathii, above n 83 at 2068.

137 Rieff, above n 92 at 8–9.

138 Kennedy, above n 9 at 22–23.

139 Stephen C Schlesinger, *Act of Creation: The Founding of the United Nations* (2003).

140 Ayoob, above n 69 at 102.

141 The statements of the G77 are reproduced in Byers & Chesterman, above n 25 at footnote 25 and 192–193.

142 Ayoob, above n 69 at 102–103. The Right Authority principle provides that: 'There is no better or more appropriate body than the United Nations Security Council to authorise military intervention for humanitarian purposes. The task is not to find alternatives to the Security Council as a source of authority, but to make the Security Council work better than it has:' ICSS Report, above n 11 at xii.

rehabilitation and reconstruction may also be overly idealistic.[144] Scholars such as Carothers have challenged prevailing assumptions by democracy activists about the neat 'transition paradigm'; that States move in a sequence of linear stages to democratisation. Rather, he argues that most new third wave democracies occupy a 'gray [*sic*] zone' of superficial democratic features, rather than embodying genuine liberalism.[145]

Undue faith in a 'tick the box' approach to democracy may result in failed attempts by intervening countries to fulfil their Responsibility to Rebuild. Kennedy argues that hubristic conceptions of humanitarian policy (democracy, governance, rule of law and so on) can operate as professional bias and 'blindspots' that result in unforeseen distributional and unintended longterm consequences.[146] Such blindspots prevent humanitarians from considering the pragmatic costs of their actions. For example, the infatuation with concepts such as the rule of law as a development strategy has become 'an unfortunate substitute for engagement with the politics and economics of development policy making.'[147] Similarly, Kennedy argues that an over-zealous confidence in prescriptive market deregulation as a development strategy led to difficult transitions in Central and Eastern Europe. A better approach, he maintains, would have involved a more gradual transition such as occurred in the Greek and Spanish transition models into Europe.[148]

The narratives of the Responsibility to Protect also raise important questions about how language may be used to cloak power differentials between States and mask the horror of military operations. The text adopted at the World Summit authorises 'collective action' where national authorities fail to protect their populations from war crimes, ethnic cleansing and crimes against humanity. The narrative sanitises what is actually being spoken about in a way which disguises its inherently bloody nature. What evil regimes do is violent and criminal, but what the 'international community' does in the name of 'protection' or 'humanitarianism' is 'collective action' despite the fact that such operations invariably result in the deaths of civilians. Intervention is posited as a form of concern or caring. However, as Rieff observes, '[h]umanitarian war should be seen as a contradiction in terms'[149] and 'inevitably it is the logic of war not the logic of humanitarianism that prevails.'[150] This is also Gandhi's point reflected at the beginning of this article. There is an irony involved in pursuing 'human protection' with a means which is inherently violent; one is essentially stopping bloodshed by engaging in bloodshed.

Conflating the language of force with humanitarianism (with its focus on protection of innocent civilians) can also perform a sanctifying function, removing it

143 Reform of the Security Council has been debated at the UN for the last decade without much progress. At the heart of the stalemate lies a conflict over claims to new permanent Council seats. For an overview see Global Policy Forum, *Security Council Reform* <http://www.globalpolicy.org/security/reform/index.htm> accessed 1 October 2007.

144 Carothers, above n 8 at 167–168.

145 Id at 176–178.

146 Kennedy, above n 9 at 149–167.

147 Id at 167.

148 Id at 192–198.

149 Rieff, above n 92 at 258.

150 Id at 284–5.

from the realm of critique or excluding consideration of other useful vocabularies or possibilities. Kennedy has argued that the vocabulary of human rights promises Western constituencies a neutral and universalist mode of emancipatory intervention. This, he argues, leads these constituencies to 'unwarranted innocence' in their interventions and 'unwarranted faith in the benign nature of a human rights presence.'[151]

(i) Responses to Accusations of Utopianism

Whilst it is true that narratives of a benevolent international community exist in the Responsibility to Protect, the ICSS Report attempts to strike a balance between idealism and pragmatism. The Right Authority principle acknowledges the power relations in the Security Council by requiring that the five Permanent Members 'agree' not to use their veto power in matters where their vital State interests are not involved.[152] As the World Summit demonstrated, however, any attempt to curtail the entrenched interests of the P5 is likely to meet intractable opposition.

The Responsibility to Rebuild discussion of the ICSS Report recognises the problems associated with the limits of occupation.[153] The discussion places considerable emphasis on the need to achieve local ownership and avoid dependency on international administration.[154] However, how this is to occur in practice remains the challenge.[155]

The drafters of the Responsibility to Protect were keenly attuned to the nuances of language. The decision to reject the term 'humanitarian intervention' is a conscious attempt to de-link humanitarianism from militarisation.[156] The ICSS also recognised the potency of apparently neutral terminology; that 'an inherently approving word like "humanitarian" tends to prejudge … whether the intervention is in fact defensible.[157]

The claim that the Responsibility to Protect minimises the horror of war is partly addressed by the limitations set by the Just Cause Threshold and the Precautionary Principles. These conditions mean in practice that resort to war will only occur on an extremely selective basis. Additionally, the specific requirement to observe total adherence to international humanitarian law in the Operational Principles is designed to minimise the suffering caused by military operations.

151 Kennedy, above n 9 at 23.

152 ICSS Report, above n 11 at xiii.

153 Id at 44–45.

154 Id at [5.27]–[5.31].

155 For a discussion of the ways in which the humanitarian sector in Rwanda interacted with the processes that led to the genocide in Rwanda, see Peter Uvin, *Aiding Violence: The Development Enterprise in Rwanda* (1998).

156 ICSS Report, above n 11 at [1.39]–[1.41].

157 Id at [1.40].

D. *Law Cannot Replace Political Will and Process Does Not Equal Results*

One risk posed by the development of the Responsibility to Protect is that norm generation will be mistaken for 'success' in itself, regardless of its implementation or the results it achieves. In fact, the very need to articulate the Responsibility to Protect principles represents a failure of Member States to stop atrocities and mitigate suffering.[158]

Kennedy argues that humanitarians too easily overstate the potential of international policy making. It is assumed that humanitarian policy will have humanitarian effects and that more international law is necessarily a good thing:[159]

> Like activists, policy makers can mistake their good intentions for humanitarian results or enchant their tools — using a humanitarian vocabulary can itself seem like a humanitarian strategy.[160]

Examples of Kennedy's concerns can be seen in the UN and NGO literature. In a speech one month after the World Summit, Kofi Annan announced in enthusiastic tones:

> Consider that thought. Human life, human dignity, human rights raised above even the entrenched concept of State sovereignty. Global recognition that sovereignty in the twenty-first century entails the Responsibility to Protect people from fear and want. A global declaration that reinforces the primacy of the rule of law.[161]

Similarly, one international NGO indicated in a press release that the Responsibility to Protect meant that:

> … people who live under threat of genocide from their own governments, state-sponsored actors or other non-state actors now have a new tool to battle the often deadly indifference and paralysis of the international community. This declaration ensures that governments will be held accountable for their actions, and inaction, both at home and abroad in the face of genocide and other grave crises.[162]

The assumption these statements contain is that legal normative development in and of itself is a reason for optimism and self congratulation. Unfortunately, however, there is a significant gap between norms and the realities faced by oppressed people on the ground. Words on paper rarely do anything to 'battle the often deadly indifference and paralysis of the international community'. Thus, the moral tone of much of the commentary from the World Summit's narrative is misplaced. The law will always fail in a redemptive function. It cannot replace the political decision to *act* to prevent crimes against humanity. Norms in other words, are not a substitute for political will. Rwanda is a case in point. The existence of customary international law

158 Rieff, above n 92 at 100.

159 Kennedy, above n 9 at 111–113.

160 Id at 112.

161 Kofi Annan, Address to Universidade Nova de Lisboa, M2 Presswire, 13 October, 2005, Media Quotes on the Responsibility to Protect and the UN Summit Outcome <http://www.r2p.org>.

162 Responsibility to Protect NGO, Press Release, *Despite Shortcomings Summit Declaration Offers Genuine Step Forward on Preventing and Ending Genocide* <http://www.r2p.org>.

and treaty obligations to prevent and punish genocide had little impact on the decision of Member States' whether to intervene or not.[163] Indeed, the US initially rejected the term 'genocide' in relation to Rwanda to avoid its pre-existing legal obligations.

(i) Responses

The major weakness in Kennedy's discussion is that no practical solutions are provided to the problems he is raising, apart from a general exhortation to greater cost-benefit analysis of humanitarian actions.[164]

A number of Kennedy's critiques are persuasive in relation to the commentary emerging on the Responsibility to Protect from the World Summit. However, a distinction should be drawn between the commentaries on the Summit and the ICSS Report. The ICSS Report is a deeply pragmatic document and because of this it is one of which Kennedy would likely approve. The Responsibility to Protect prescribes both a *process* for legitimacy combined with an *assessment of the costs* and benefits of military action through the Reasonable Prospects principle. Indeed it brings together the three discourses of human rights (State sovereignty as responsibility & Just Cause Threshold), international humanitarian law (Precautionary Principles) and general humanitarian protection concerns (Responsibility to Rebuild). In doing so it does not 'enchant' or privilege any one discourse but rather seeks to integrate them and may avoid the 'blindspots' against which Kennedy warns. The Responsibility to Protect principles reflect the same 'strategic pragmatism' that Kennedy praises concerning US Navy targeting procedures; a realisation that military actions have deadly consequences but these can be minimised given the level of force necessary to achieve their goals.[165] The Operational Principles also indicate a pragmatic approach. By recognising that tragedies such as Srebrenica occurred in the context of by applying existing UN military operations, the principles seek to remedy ambiguous mandates only and inadequate resources and to ensure rules of engagement which comply with international humanitarian law.

The humanitarians and human rights activists Kennedy describes are also doing more than simply focusing on normative development of the Responsibility to Protect. It is an over-generalisation to suggest activists are not interested in outcomes. Several NGOs are advocating the doctrine, and monitoring its implementation.[166] Like other international law it cannot replace political will, but it may function as an additional shaming mechanism at the international level to influence State behaviour. For example, at a recent press conference in Washington, the Secretary-General stated that Darfur was considered as 'one of the first tests' of Responsibility to Protect that was agreed by Member States at the World Summit.[167] Finnemore argues that

163 The fact that States attempted to avoid the word 'genocide' in relation to Rwanda indicates they understood an obligation to intervene does exist. Finnemore, above n 120 at 80 argues that the response to Rwanda was significant because (despite the failure to act) States were recognising an obligation to intervene that did not exist in the nineteenth century or during most of the Cold War.

164 Gaston, above n 79 at 556; Hilary Charlesworth, 'Author! Author! A Response to David Kennedy' (2002) 15 *Harvard Human Rights Journal* 127 at 130–131.

165 Kennedy, above n 9 at 293–295.

166 See <http://www.ResponsibilitytoProtect.org> accessed 1 October 2007.

patterns of military intervention cannot be understood apart from the changing normative context in which they occur. Normative context thus cannot simply be dismissed because it is norms that 'shape conceptions of interest and give purpose and meaning to action.'[168]

5. Conclusion

TWAIL challenge seemingly neutral and altruistic concepts by revealing the material and economic inequalities that underpin relations between States. The most persuasive critiques apply to the area of post-conflict rebuilding and the risks posed by international benevolent occupations. Kennedy highlights how the choice of a sanctified vocabulary can channel attention to a limited range of questions and hence possible solutions to different humanitarian problems. Perhaps the greatest weakness of these critiques is the absence of concrete solutions they proffer to the problems they highlight. However, this may not be their function. These critical discourses do not necessarily seek to provide practical solutions to the Secretary-General's question: 'how do we respond to a Rwanda, to a Srebrenica … that offend every precept of our common humanity?' Rather, they provide a range of claims counselling caution. They attempt to demonstrate how international norms may function as ideology and benefit existing political and economic power structures. They counsel against 'enchanting' our tools of international law, whether dressed in the garb of 'protection', 'democracy' or 'human rights'. The warning against self congratulatory posturing by international lawyers and activists is important. After all, the very need for a Responsibility to Protect doctrine represents moral and political *failure*; the failure of UN Member States to prevent and halt atrocity in the first place. In the case of Rwanda, this failure occurred with the legal obligations of the *Genocide Convention* already in place.

To its credit, the ICSS Report anticipated many of the possible critiques raised TWAIL and Kennedy. By asserting the primacy of prevention, the use of force as a means of last resort and legitimacy through multilateralism and Security Council endorsement, it has addressed some key concerns about imperial adventurism and Western 'vigilante justice'. The Precautionary Principles, in particular the 'reasonable prospects' of success test, is an example of the practical cost-benefit analysis that Kennedy advocates.

The Responsibility to Protect doctrine is the most thorough attempt to date to enunciate clear principles on possible military action to halt atrocities. Given the realities of international relations, however, the application of such principles to any situation will depend on the complex mix of national interests, media coverage of atrocity and various domestic and international political pressures being brought to bear on Permanent Members of the Security Council. By identifying practical criteria for establishing the legitimacy of military intervention, the Responsibility to Protect doctrine may allow greater transparency of reasoning by the Security Council — or simply more terminology over which to prevaricate.

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167 Media transcript, 'Secretary-General Annan, White House Stake Out', 13 February 2006, copy on file with the author.

168 Finnemore, above n 120 at 53.