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## FOREIGN POLICY AND HUMAN RIGHTS

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# PRESENTATION



## Foreign Policy and Human Rights

The fields of human rights and foreign policy have coincided with increasing frequency in recent years. The convergence of these areas, however, has not been widely explored in academic circles of the Global South, and is often considered secondary by activists working at the national level. This issue of SUR, prepared in partnership with **Asian Forum for Human Rights and Development**, **CIVICUS: Worldwide Alliance for Citizen Participation** and **Commonwealth Human Rights Initiative**, proposes, on the one hand, to raise awareness about the different interfaces and interactions between the international activities of countries and the national *protection* of human rights, and, on the other, to examine contemporary international dynamics such as the emergence of a multipolar world and its impact on the global protection of human rights.

The thematic group of articles addresses the changes in the international system – primarily the more prominent role played by so-called emerging powers (Brazil, South Africa, India and China, among others) – and their impact on the global protection of human rights.

Reviewing the foreign policy of these countries and their impact on human rights includes, for example, analyzing their increased commitment to and engagement with regional and international human rights protection mechanisms. With respect to this point, the potential role of emerging powers in the field of human rights is examined by David Petrasek in **New Powers, New Approaches? Human Rights Diplomacy in the 21<sup>st</sup> Century**. In his article, Petrasek argues that, despite the reluctance of these new powers to adopt “traditional” tactics such as naming and shaming and the imposition of conditionalities in their bilateral relations, these countries play an important role in the international protection of human rights through standard-setting on specific human rights issues in multilateral forums.

In **Foreign Policy and Human Rights in Emerging Countries: Insights Based on the Work of an Organization from the Global South**, Camila Asano, coordinator of Foreign Policy and Human Rights at Conectas, examines the role of emerging countries,

with a focus on Brazil, in international and multi-lateral bodies. Based on the experience of Conectas, the article provides insights for other civil society organizations wishing to engage with the formulators and implementers of foreign policy to promote policies that are more respectful of human rights. SUR 19 also features a joint interview with Maja Daruwala, of the **Commonwealth Human Rights Initiative (India)**, and Susan Wilding, of **CIVICUS World Alliance for Citizen Participation (South Africa)**, two additional organizations that monitor how their countries’ activities abroad are affecting human rights. Both for Asano and for Daruwala and Wilding, the international performance of their countries leaves a lot to be desired in terms of consistency.

A subgroup of articles analyzes, more specifically, two topics of Brazilian foreign policy: health and international development cooperation. In **Public Health and Brazilian Foreign Policy**, Deisy Ventura addresses Brazilian diplomacy in the field of health – at a regional and international level – and analyzes how the human rights topic has been included in this agenda. In the article, Ventura demonstrates the solidarity that underpins Brazilian health diplomacy, but also warns of the proliferation of cross-cutting contradictions – both internal and external – that weaken, in the current context, the prevalence of human rights and the very effectiveness of Brazilian health cooperation. In **Brazil’s Development Cooperation with Africa: What Role for Democracy and Human Rights?**, Adriana Erthal Abdenur and Danilo Marcondes de Souza Neto revisit the role and presence of Brazil on the African continent, analyzing how and to what extent the “Brazilian model” of cooperation directly and indirectly impacts the dimensions of democracy and human rights on the African continent. The authors identify, despite the non-interventionist rhetoric of Brazilian foreign policy, a positive – albeit cautious – role of the country in its relationship with African nations. They point out, however, that Brazil could be a more active and decisive partner in the promotion of democracy and human rights on the continent.

This group also includes two articles on the national implementation of international norms, decisions and recommendations. These articles were

included with the aim of countering the normative analysis that usually underlies studies on this topic by including the political dimension that permeates the domestic incorporation of international instruments, given that, in the same one country, we find cases of active engagement, limited respect and even defiance of international norms. These dynamics interest us, since they have a considerable impact on the scope that victim protection systems will have in each specific context.

In this context, in **Incorporating International Human Rights Standards in the Wake of the 2011 Reform of the Mexican Constitution: Progress and Limitations**, Carlos Cerda Dueñas examines how the 2011 constitutional reform in Mexico established respect for human rights as a guiding principle of the country's foreign policy and what the impact of this has been on the incorporation of international norms by the country. Elisa Mara Coimbra, meanwhile, discusses the relationship between Brazil and the Inter-American System of Human Rights. In **Inter-American System of Human Rights: Challenges to Compliance with the Court's Decisions in Brazil**, the author comments on the implementation status of the decisions in five cases in which Brazil was condemned by the regional system.

Despite the variety of issues present in this edition, we should briefly mention the major research topics and agendas that emerged during the conception and production of this issue of SUR and that, for practical reasons, have not been fully addressed here. Prominent among them are, for example, the dynamics of transparency, accountability and citizen participation in foreign policy, and comparative studies of foreign policies of two or more countries from the Global South. As expected, and fortunately, the debate does not end with this issue, and SUR remains committed to continuing this dialogue.

## **Non-thematic articles**

This issue of SUR includes four articles in addition to the dossier. The first, **Finding Freedom in China: Human Rights in the Political Economy**, written by David Kinley, addresses human rights in China from an economic policy perspective, proposing new ways of viewing the relationship between the Chinese

economic model and the realization of fundamental freedoms in the country.

Laura Betancur Restrepo, in **The Promotion and Protection of Human Rights through Legal Clinics and their Relationships with Social Movements: Achievements and Challenges in the Case of Conscientious Objection to Compulsory Military Service in Colombia**, presents an analysis of the work of the Constitutional Court of Colombia on the subject of conscientious objection in the specific case of mandatory military service. Based on discourse analysis, the author attempts to comprehend the legal translation of social demands and its direct and indirect impacts for social movements.

Finally, the issue contains two articles that tackle the issue of sexual and reproductive rights. The first, **Modern-day inquisition: A Report on Criminal Persecution, Exposure of Intimacy and Violation of Rights**, written by Alexandra Lopes da Costa, discusses the implications of the ban on abortion in Brazil, in a quasi-journalistic account of a case that occurred in the state of Mato Grosso do Sul.

The second, **Case Study on Colombia: Judicial Standards on Abortion to Advance the Agenda of the Cairo Programme of Action**, by Ana Cristina González Vélez and Viviana Bohórquez Monsalve, examines how Colombia and, more broadly, Latin America, have advanced in the implementation of the Cairo Programme of Action, which addresses access to abortion and the protection of other reproductive rights.

Finally, we would like to emphasize that this issue of the Sur Journal was made possible by the support of the Carlos Chagas Foundation (FCC). Conectas Human Rights is grateful for the collaboration of the partner organizations throughout the production of the thematic section of this issue. We also thank Amado Luiz Cervo, Bridget Conley-Zilkic, Celia Almeida, Daniela Riva Knauth, Deisy Ventura, Eduardo Pannunzio, Eloisa Machado de Almeida, Fernando Sciré, Gabriela Costa Chaves, Gilberto Marcos Antonio Rodrigues, Gonzalo Berrón, Guilherme Stolle Paixão e Casarões, Katia Taela, Jefferson Nascimento, Louis N. Brickford, Márcia Nina Bernardes, Renan Honório Quinalha, Renata Avelar Giannini, Salvador Tinajero Esquivel and Thomas Kellogg for reviewing the articles published in this issue.



CONOR FOLEY

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## ABSTRACT

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Debates about humanitarian action in complex emergencies raise fundamental problems about the protection of human rights under international law. As UN peacekeeping missions become increasingly more complex and multifaceted, for example, they face accountability deficits. Many of the largest UN missions have authority under Chapter VII of the UN Charter to use force to protect civilians under imminent threat of physical violence. This raises a number of issues related to the UN's negative and positive obligations under international law. The UN Charter itself contains no express basis for peacekeeping, which has developed in an *ad hoc* manner in response to different crises. Some States have also acted outside the framework of the UN Charter justifying military action in the name of 'humanitarian intervention'. This paper explores some of the principled and practical dilemmas related to the extraterritorial protection of civilians through both unilateral and multilateral action within the framework of international law.

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## KEYWORDS

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## THE EVOLVING LEGITIMACY OF HUMANITARIAN INTERVENTIONS

Conor Foley

When can armed soldiers from one country lawfully enter into the territory of another country in order to protect the citizens of that State from grave violations of international human rights or International Humanitarian Law (IHL)? Article 2 of the UN Charter prohibits the use of force and interference in States' internal affairs, even by the UN itself. According to the Charter, there are only two permissible bases for the use of force: the inherent right of self-defence or authorisation by the UN Security Council, acting under its Chapter VII powers, in response to a threat to international peace and security.

Some scholars argue that a third basis may be emerging in customary international law, the right to 'humanitarian intervention', although there is little State practice to justify this claim. In the aftermath of NATO's intervention in Kosovo, carried out without UN Security Council authority, an International Commission on Intervention and State Sovereignty (ICISS) was established, which published a report, "The Responsibility to Protect", in 2001. Initially heralded as 'an emerging international norm', some language associated with R2P was included in the UN World Summit Outcome document, but the attempts to reach this consensus largely gutted the concept of its normative content. In the aftermath of the invasion of Iraq few were prepared to allow individual powerful States to take upon themselves the role of judge, jury and executioner in deciding when such interventions could take place.

Recent years have, however, seen the deployment of increasing numbers of soldiers in UN peacekeeping missions, authorised under Chapter VII mandate to use force to protect civilians under imminent threat of physical violence. There are currently well over 100,000 troops deployed on missions in various parts of the world. Given that Chapter VII contains no references to human rights, IHL or the protection of civilians, and that the UN Charter itself provides no basis for peacekeeping, this is a significant development in international law and international relations.

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*Notes to this text start on page 92.*

There appear to be three possible arguments which could be used to justify this practice. The first is that there is a necessary causal connection between grave violations of human rights and IHL and threats to international peace and security – through, for example, the spill-over effects of a conflict or cross border flows of refugees. The second is that powers of the Security Council are so unbound that there is nothing to prevent it declaring any situation to be a ‘threat to international peace and security’, thus allowing it to invoke Chapter VII in order to circumvent article 2 of the Charter. The third, which this author favours, is that there is an emerging international agreement that the UN, by virtue of its certain legal personality, increasingly regards itself as subject to the positive and negative obligations of international law. Accepting this argument fully, however, will require some hard thinking about the hierarchy of international legal norms in relation to Security Council decisions and the immunities with which the UN has used until now to shield its peacekeeping missions.

## 1 An Experience from Sri Lanka

In the spring of 2009, while I was conducting an evaluation for a humanitarian agency in Sri Lanka, government forces stormed the final hold-out of the Liberation Tigers of Tamil Eelam (LTTE or Tamil Tigers) in the north of the country.<sup>1</sup> The LTTE forces had compelled civilians to accompany them as they retreated into an ever smaller area of territory, often shooting those that tried to escape (UNITED NATIONS, 2011). Between January and May of that year, around 300,000 civilians, along with the remnants of the LTTE’s forces, were blockaded into an area around the size of New York City’s Central Park, where up to 40,000 of them may have been killed (INTERNATIONAL CRISIS GROUP, 2010). The so-called ‘no fire zone’, area was shelled incessantly by government forces, and hospitals and food-distribution points appear to have been deliberately targeted (STEIN, 2010). Many more people died from starvation and disease, because the government blocked humanitarian access and consistently under-estimated the number of civilians in the area. Others were summarily, either executed during the final assault or after they had been identified as LTTE members during the screening process (THE TIMES, 2009). Videos have since emerged of bound prisoners being shot in the head and the corpses of naked women who appear to have been sexually assaulted.<sup>2</sup>

Aid organizations attempting to help the affected population were systematically harassed and intimidated (FOLEY, 2009a). National staff members were arrested on trumped-up charges. The pro-government media repeatedly accused these organizations of giving support to the LTTE (DAILY MIRROR, 2009), and similar accusations were made against the United Nations mission in the country (ECONOMIST, 2010). Most international humanitarian agencies did not speak out publicly about the massacres that their staff members were witnessing. Some also agreed to help in the construction of what were de facto internment camps into which survivors of the massacre were herded for screening and detention. International aid workers who did speak out were expelled when their visas ran out and agencies that remained argued that it was better to retain a presence in the



country than to abandon it. A similar argument was made to justify involvement in the construction of the camps (FOLEY, 2009c).

After the conflict ended the government blocked all calls for an independent inquiry and mounted a campaign of overt physical intimidation of the United Nations (UN) mission in the country (ECONOMIST, 2010). Yet, although the available evidence suggests that the Sri Lankan government may be guilty of a far larger crime than the massacre at Srebrenica in 1995, it has faced little of the international opprobrium that attached itself to the Bosnian Serbs in the 1990s (FOLEY, 2009b). In May 2009, the UN Human Rights Council adopted a resolution praising its victory and humanitarian assistance efforts. Brazil joined China, Cuba, Egypt and Pakistan in voting down calls for an international investigation into possible war crimes.

Thirteen years before this massacre, in 1996, the BBC foreign correspondent, Fergal Keane, recorded a letter to his new-born son, Daniel, which became the most requested broadcast in the corporation's history. He told him that:

*I am pained, perhaps haunted is a better word, by the memory, suddenly so vivid now, of each suffering child I have come across on my journeys. To tell you the truth, it's nearly too much to bear at this moment to even think of children being hurt and abused and killed. And yet looking at you, the images come flooding back [...] There is one last memory. Of Rwanda, and the churchyard of the parish of Nyarabuye where, in a ransacked classroom, I found a mother and her three young children huddled together where they'd been beaten to death. The children had died holding onto their mother, that instinct we all learn from birth and in one way or another cling to until we die.*

(BRITISH BROADCASTING CORPORATION, 1996).

I remember listening to the broadcast at the time and thinking about it again when I was in Sri Lanka because my own wife was pregnant at the time, and we subsequently named our son Daniel. The genocides of Rwanda and Srebrenica had shaped the attitudes of my generation. Civilians had been massacred while UN peacekeepers looked on and aid workers proved powerless to help since, as an advertisement by *Medicins sans Frontieres* (MSF) put it pithily, 'one cannot stop genocide with doctors' (CROSSLINES GLOBAL REPORT. 1994).

## 2 The Birth of the Responsibility to Protect

At the end of the 1990s, the North Atlantic Treaty Organization (NATO) took direct military action against Serbian forces in Kosovo, an Australian-led force intervened in East Timor and British paratroopers helped to beat back a rebel advance in Sierra Leone. While the latter two interventions had UN approval, the one in Kosovo did not. A subsequent report by the International Commission on Intervention and State Sovereignty (ICISS) argued that international human rights and humanitarian law created positive obligations on States to intervene when the rights that these protected were being violated in a large-scale or systematic

way (INTERNATIONAL COMMISSION ON INTERVENTION AND STATE SOVEREIGNTY, 2001). The UN itself was bound by some of these obligations, the report's authors argued, and if the Security Council failed to fulfil its 'Responsibility to Protect' (R2P), these obligations could pass on to others. The concept of R2P was embraced in influential UN reports (UNITED NATIONS, 2004 and 2005b) and a reference to it was incorporated into the outcome document of the high-level meeting of the General Assembly in September 2005 (UNITED NATIONS, 2005a).

However, a closer look at the wording of this document shows that the claims of those who argue that R2P is an emerging international legal norm, sometimes described as a 're-characterization of sovereignty', are somewhat overblown.<sup>3</sup> The actual text adopted says little more than that States have a responsibility to protect their own citizens and that the UN Security Council should support them in these efforts. The furthest it goes on the subject of direct interventions in other countries is in a rather convoluted commitment 'to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter (UNITED NATIONS, 1945), including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities manifestly fail to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity (UNITED NATIONS, 2005a, para. 139). As one observer has noted, this amounts to saying little more than that the Security Council should continue authorizing, on an *ad hoc* basis, the type of interventions that it has been authorizing for many years (CHESTERMAN, 2011).

Bellamy has described the agreed wording as 'R2P lite' arguing that it differed from the proposals brought forward by the ICISS 'by (among other things) emphasizing international assistance to States (pillar two), downplaying the role of armed intervention, and rejecting criteria to guide decision-making on the use of force and the prospect of intervention not authorized by the UN Security Council' (BELLAMY, 2006b). This has been rejected by others such as Evans, a co-chair of the ICISS, who argues that 'the agreed text differs little from all the previous formulations in the ICISS, High Level Panel and secretary general's reports' (EVANS, 2008a, p. 47).<sup>4</sup> Weiss, who served as Research Director of the ICISS, also rejects Bellamy's description, although his view of what was in fact endorsed is revealing:

*the proverbial new bottom-line is clear: when a State is unable or unwilling to safeguard its own citizens and peaceful means fail, the resort to outside intervention, including military force (preferably with Security Council approval) remains a distinct possibility.*

(WEISS, 2008, p. 142).

In a highly critical account of R2Ps significance, Orford argues that the 'responsibility to protect concept can best be understood as offering a normative grounding to the practices of international executive action that were initiated in the era of decolonisation and that have been gradually expanding ever since' (ORFORD, 2011, p. 10).

Plainly, two years after the invasion of Iraq, however, the majority of the UN's members were not prepared to allow powerful States to brush away the constraints of international law as it currently stands. But the fudge also represented a deeper clash over the recent history of what are commonly referred to as humanitarian interventions.

### 3 From humanitarian access to humanitarian interventions

To paraphrase a Balkan's dictum about Kosovo, it all started in Iraq and perhaps it finished in Iraq as well. At the end of the first Gulf War, in 1991, over two million Kurds fled their homes after their uprising against Saddam Hussein collapsed when the Western backing that they were expecting failed to materialise. Fearing another chemical weapons attack, like the one at Halabja in 1988, they headed for the Turkish border, but found it sealed off by the Turkish government.<sup>5</sup> By April 1991, up to 1,000 people were starving or freezing to death every day (FREEDMAN; BOREN, 1992, p. 48). The world had just seen United States (US) airpower annihilate the Iraqi armed forces, and Western public opinion refused to accept that nothing could be done to save the Kurds from another act of genocide. When the UN Security Council passed Security Council Resolution 688 (1991), calling for 'humanitarian access', Britain, France and the US deployed ground troops to turn back the Iraqi army and persuade the refugees that it was safe to come down from the mountains.<sup>6</sup>

Several thousand ground troops were deployed and a 'no-fly zone' was subsequently declared over northern Iraq, in what became known as 'Operation Provide Comfort'. Apart from the military forces used, 30 other countries contributed relief supplies and some 50 humanitarian non-governmental organisations (NGOs) either offered assistance or participated in this operation (TESON, 1996). The humanitarians attended regular military briefings and had access to military telecommunications and transportation, while heavily armed troops rode with the trucks on which displaced people were returning (COOK, 1995, p. 42), setting controversial precedents for future cooperation.<sup>7</sup>

The history of what happened next largely depends on who is telling it. Two broad narratives have emerged, which, while they converge around the same events, do so from diametrically opposed perspectives. What is not disputed is that Operation Provide Comfort was the first of a series of interventions in which international armed soldiers and civilian aid workers were deployed in what are commonly referred to as 'complex emergencies', with the aim of 'protecting' threatened populations.<sup>8</sup> The best known of these were in: Somalia, Haiti, Bosnia-Herzegovina, Rwanda, Sierra Leone, Kosovo, East Timor, Liberia, the Democratic Republic of Congo, Côte d'Ivoire, Darfur and South Sudan. About the only other thing on which everyone can agree is that their results can best be described as 'mixed'.

For some, these 'humanitarian interventions' have happened in a period of misguided folly that has seen the weakening of both national sovereignty and international law. The interventions have gone far beyond the 'traditional principles'

of UN peacekeeping – deployment with the consent of the parties, on the basis of strict impartiality and limited use of force – and the neutral model of delivering humanitarian aid pioneered by the International Committee of the Red Cross (ICRC). By undermining these principles, many argue, the interventions have needlessly politicised the humanitarian field and provided cover for regime-change invasions and counter-insurgency strategies.<sup>9</sup>

For others, they simply exposed that the traditional model itself was long-broken, based on an outdated ‘Westphalian’ deference to inviolable national sovereignty. These argue that the humanitarian crises of the 1990s showed that the UN-based system of collective security had become an excuse for indifference to and inertia in the face of mass global suffering and crimes against humanity.<sup>10</sup> The principle of ‘non-interference’ in a State’s domestic affairs, enshrined in article 2 of the UN Charter and ‘humanitarian neutrality’, contained in the ICRC’s statute, need to be reconceptualised in the light of the development of international human rights law, which provide a concrete point of reference against which to judge state conduct (INTERNATIONAL COMMISSION ON INTERVENTION AND STATE SOVEREIGNTY, 2001, para. 2.15). Preserving neutrality in the face of mass atrocities was tantamount to ‘complicity with evil’.<sup>11</sup>

During the 1990s these arguments were mainly confined to discussions amongst human rights and humanitarian practitioners, but they spilled dramatically into mainstream debate during the arguments surrounding the invasion of Iraq in 2003. Britain’s then prime minister, Tony Blair, explicitly placed his actions within the context of R2P when he argued that it was international law which was at fault in not permitting such invasions because:

*a regime can systematically brutalise and oppress its people and there is nothing anyone can do, when dialogue, diplomacy and even sanctions fail, unless it comes within the definition of a humanitarian catastrophe (though the 300,000 remains in mass graves already found in Iraq might be thought by some to be something of a catastrophe). This may be the law, but should it be?*

(BLAIR, 2004).

In arguing for an expansion the ‘right’ to military intervention during an emergency humanitarian crisis to non-emergency contexts, Blair was using a double sleight-of-hand. Although some States have occasionally asserted they are legally justified in taking such actions – including Britain in relation to Operation Provide Comfort in Northern Iraq and NATO’s actions during the Kosovo crisis – there is little State practice to show its emergence as a customary rule of international law (GRAY, 2008; DUFFY, 2006). As a Foreign Office policy paper has put it ‘the best case that can be made in support of humanitarian intervention is that it cannot be said to be unambiguously illegal [...] But the overwhelming majority of contemporary legal opinion comes down against [it]’ (UK Foreign Office Policy Document, No. 148, quoted in HARRIS, 1998, p. 918).

The UN Charter (1945) contains no such ‘humanitarian’ exception to its explicit prohibition on the use of force save in self-defence or with the authorisation

of the Security Council acting under Chapter VII. Blair's Attorney General had also explicitly advised him that there was no basis for using the right to humanitarian intervention as a basis for the invasion and that the best argument that could be made was around the 'revival' of claims that Iraq was still in breach of its cease-fire obligations from the first Gulf War.<sup>12</sup>

Membership of the UN is open to all 'peace-loving nations' irrespective of the nature of their government providing that they accept the obligations of the Charter. The primary purpose of the UN is to 'maintain international peace and security'.<sup>13</sup> Its other purposes include: developing friendly relations amongst nations based on respect for the principle of equal rights and self-determination of peoples, promoting economic, social, cultural and humanitarian cooperation, and respect for human rights.<sup>14</sup> The respective weight of these objectives have been the subject of much international jurisprudence and legal debate and it is now widely accepted that by virtue of their membership of the UN, States are bound by some restrictions on their actions and how they treat their own people.

Certain crimes, such as genocide, war crimes, and crimes against humanity are now recognised as being so serious that they can be prosecuted regardless of who committed them or where they took place and international criminal tribunals have been established to bring the perpetrators to justice. Former heads of State have been arrested and charged notwithstanding their claims to state or diplomatic immunity. It is also now widely accepted that some of the most basic human rights have attained the status of *jus cogens*, which is a 'peremptory norm' (UNITED NATIONS, 1969, art. 53) of general international law that can only be overridden by another peremptory norm (HUMAN RIGHTS COMMITTEE, 1994, para. 10).<sup>15</sup> However, the extent to which these rights impose positive and negative extraterritorial obligations remains disputed and there is no general acceptance that States can resort to unilateral force to protect them in other States. Indeed such an action would also be a clear violation of the most basic norms of international law and could amount to a crime of aggression.

Advocates of 'humanitarian intervention' have long protested at the association of their cause with operations such as the invasion of Iraq. During discussions on Darfur in 2007, the International Crisis Group (ICG) dubbed Blair a 'false friend' of the R2P doctrine (EVANS, 2007) for his attempts to re-package the invasion of Iraq as a humanitarian intervention (BLAIR, 2003a, 2003b, 2004). Yet this is the logic of allowing powerful States discretion to decide unilaterally when and where to take military action in defence of human rights. Shortly after R2P's 'adoption' by the UN General Assembly Russia's foreign minister cited it in justification of military action in South Ossetia,<sup>16</sup> France did so in relation to a proposed forcible intervention to deliver food aid in Myanmar (FRANCE, 2008). Britain's minister of defence even reached for the concept when arguing for a weakening of the protections of the Geneva Conventions for the inmates in Guantanamo Bay (REID, 2006a).<sup>17</sup> Given that Britain, France and Russia are all permanent members of the Security Council, such assertions can be rejected as opportunistic, but they cannot be dismissed as irrelevant.

Some international non-governmental organizations (INGO) have lobbied for military intervention in certain circumstances. As discussed above, MSF did

so during the conflict in Rwanda in 1994. CARE called for military intervention in Somalia in 1991. Oxfam supported these calls and also called for military intervention in eastern Zaire in 1996, and Sierra Leone in 2000. In 1998, it called on the British Government to make a 'credible threat of force' against the Serbs in Kosovo, although once the intervention started it decided not to take a position and resisted calls from its Belgrade office to condemn attacks on civilian targets by NATO, arguing that as an organization whose international headquarters was in one of the countries doing the bombing, this was too controversial a position to take (VAUX, 2001, p. 21).

By the time I reached Sri Lanka in 2009, however, most had backed away from such liberal muscularity. The humanitarian narrative, epitomised by the powerful imagery in Keane's Letter to Daniel, had been largely eclipsed by another set of images associated with the US military presence in Afghanistan and Iraq: the phosphorous attacks in Fallujah, torture in Abu Ghraib and the spiralling number of children killed by drone strikes. My own views on the subject had changed considerably and the massacres in Sri Lanka brought them close to full circle.

#### 4 Protection of civilians

I had first gone to Northern Iraq as a journalist in 1994. I joined the staff of Amnesty International UK shortly afterwards and had responsibility in the Section for our work on impunity during the Pinochet case. I delivered some training to refugees in Kosovo during the war in 1999 and was subsequently seconded there as a Protection Officer for the UN High Commissioner for Refugees (UNHCR). I spent a year and half in Afghanistan, managing a legal aid project helping returning Afghan refugees. After Afghanistan, I took a series of shorter posts in other field missions until my wife found out that she was pregnant.

Sri Lanka was, therefore, my last field mission and I came home exhausted, burnt-out and ready to put both humanitarian aid and the debates about it behind me for some time. For the next couple of years I worked as a home-based consultant, carrying out research, doing evaluations and delivering training, while learning the far more challenging skills of fatherhood. Towards the end of 2010 I was hired by the UN Department of Peacekeeping Operations (DPKO) to write a scenario-based training course on the protection of civilians (POC). Although I had been involved in debates about 'protection' for many years, the concept was new to me, which possibly reflects its emerging status in international law. In February 1999 the UN Security Council had requested that the Secretary General submit 'a report with recommendations on how it could act to improve both the physical and legal protection of civilians in situations of armed conflict' (UNITED NATIONS, 1999d). The report was published in September 1999 and contained a series of recommendations on how the Security Council could 'compel parties to conflict to respect the rights guaranteed to civilians by international law and convention' (UNITED NATIONS, 1999c). The following month the Security Council authorized a peacekeeping operation in Sierra Leone, UN Mission in Sierra Leone - UNAMSIL, which specifically stated that:

*Acting under Chapter VII of the Charter of the United Nations, decides that in the discharge of its mandate UNAMSIL may take the necessary action to ensure the security and freedom of movement of its personnel and, within its capabilities and areas of deployment, to afford protection to civilians under imminent threat of physical violence taking into account the responsibilities of the Government of Sierra Leone.*

(UNITED NATIONS, 1999e, para. 14).

The wording is a model of legal caution but it goes far beyond that contained in the Summit Outcome document on R2P. Most importantly, it gives a Chapter VII mandate to missions so that they can use force to carry out 'protection' tasks. The following year the UN published its Report of the Panel on United Nations Peace Operations (the Brahimi Report), which explicitly stated that UN peacekeepers:

*must be able to carry out their mandate professionally and successfully. This means that United Nations military units must be capable of defending themselves, other mission components and the mission's mandate. Rules of engagement should not limit contingents to stroke-for-stroke responses but should allow ripostes sufficient to silence a source of deadly fire that is directed at United Nations troops or at the people they are charged to protect.*

(UNITED NATIONS, 2000, para. 49).

Similar language to the UNAMSIL resolution has since appeared in the mandates of other UN peacekeeping missions and there are now over 100,000 soldiers deployed in the field in POC-mandated missions. POC is also now debated at an open bi-annual session of the Security Council and this has resulted in a steady stream of statements, resolutions and reports (HOLT; TAYLOR, 2009; DEPARTMENT OF PEACEKEEPING OPERATIONS/DEPARTMENT OF FIELD SUPPORT, 2010a, 2010b; 2010c; 2010d, 2010e). When the Security Council revised the mandate of the UN mission to the Democratic Republic of Congo (DRC) in 2007 it stated that 'the protection of civilians must be given a priority in decisions about the use of available capacity and resources' (UNITED NATIONS, 2007, para. 5). Security Council mandates have become increasingly detailed in spelling out the tasks of UN peacekeeping missions, yet most have continued to use a similar set of formulations and language regarding the POC-related tasks.

We presented the first draft of the training package to all the African field missions at a seminar in the UN base in Entebbe in March 2011. This coincided with the Security Council decision to invoke POC as justification for authorizing military intervention in Libya, and was just before the UN mission in Côte d'Ivoire took military action to protect civilians against the forces of the incumbent President. The following year I was re-hired by DPKO to work on some mission-specific training using a similar model. A whistle-stop tour brought me to Goma in the Democratic Republic of Congo, shortly before rebels of the M23 movement invaded the town, out to the border between Liberia and Côte d'Ivoire a few weeks after a group of UN peacekeepers had been killed in a rebel ambush and then to newly-independent South Sudan.

POC is quite distinct from the R2P doctrine. As the UN Secretary General's report *Responsibility to protect: timely and decisive response*, of July 2012 noted, 'While the work of peacekeepers may contribute to the achievement of R2P goals, the two concepts of the responsibility to protect and the protection of civilians have separate and distinct prerequisites and objectives' (INTERNATIONAL COMMISSION ON INTERVENTION AND STATE SOVEREIGNTY, 2001, para. 16). A briefing from the Global Centre for the Responsibility to Protect, in 2009, also explained:

*Open debates on POC have indeed been the only occasions within the formal [Security] Council agenda to reflect on the development of the R2P norm and its practice. Yet the sensitivities around the inclusion of R2P within the protection of civilians' agenda have increased in recent months. There are concerns that the POC agenda is being needlessly politicized by the introduction of R2P into the Council's work and resolutions on the protection of civilians, as those who seek to roll back the 2005 endorsement of R2P raise questions about the protection of civilians in the attempt to challenge hard-won consensus reached on both issues.*

(GLOBAL CENTRE FOR THE RESPONSIBILITY TO PROTECT, 2009).

The main textual differences between POC and R2P are that the latter appears to be only intended to protect people against certain specified 'mass crimes' and when the State in which they are taking place is 'manifestly failing' to do so (GLOBAL CENTRE FOR THE RESPONSIBILITY TO PROTECT, 2009). This makes it considerably narrower in scope than a POC mandate, which provides protection to all 'civilians under imminent threat of physical violence', subject to the conditions discussed above. However, R2P also remains associated in many minds both with the non-UN Security Council sanctioned military action undertaken by NATO during the Kosovo crisis and previous debates surrounding the legality of 'humanitarian interventions'.<sup>18</sup>

POC changes the debate about the UN's responsibilities to protect people in complex emergencies in a number of ways. Most obviously, the implementation of a POC mandate will require missions to reassess the rules of engagement that they give to their soldiers and the powers of arrest and detention of the international military and police deployments.

## 5 Conclusion

Peacekeeping soldiers have often been criticised for their reluctance to open fire when civilians around them are being threatened, but clearly such life and death decisions cannot be taken lightly or in the absence of a clear legal regime. What exactly constitutes an 'imminent threat' and should this be based on the rules of international human rights law or the, more permissive, laws of armed conflict? Most mission mandates clearly state the primary of the host State government responsibility to protect its own people, but what happens when it is these forces that constitute the most serious threat to them? What is the status of the peacekeepers themselves? How can UN commanders exercise effective control over their own forces given that disciplinary issues are the exclusive



preserve of troop contributing countries and these often also impose national caveats over where, when and how their soldiers can be deployed? How should UN peacekeepers deal with people who have been indicted by the International Criminal Court?

The answers to these questions are not obvious and confronting them takes UN missions into new and uncertain areas. Unlike R2P, it does not start from a position that the UN is 'obliged' to intervene in humanitarian crises. Indeed the Brahimi Report quite explicitly states that: 'There are many tasks which United Nations peacekeeping forces should not be asked to undertake and many places they should not go' (UNITED NATIONS, 2000, para. 1). However, the notion that the UN can use Chapter VII mandates to protect individuals in purely internal conflicts involves a significant reappraisal of its powers under international law.

As well as prohibiting the unilateral use of force; article 2 of the Charter also specifically prohibits intervention by the UN in 'matters which are essentially within the domestic jurisdiction of any State' (UNITED NATIONS, 1945, art. 2) but 'this principle shall not prejudice the application of enforcement measures under Chapter VII' (UNITED NATIONS, 1945, principle 7). This Chapter contains no reference to human rights or humanitarian law, or indeed the protection of civilians, and is specifically related to the preservation of international peace and security. While the UN has occasionally used its Chapter VII powers to authorise interventions in internal conflicts involving widespread violations of human rights and humanitarian law, previous mandates all grounded themselves on threats to international peace and security, if only through the potentially destabilizing impact of a refugee crisis on the wider region.

One could argue that there is nothing in the Charter to prevent the Security Council declaring any situation a threat to international peace and security, which, therefore unlocks its Chapter VII powers. This has already happened in relation to international terrorism, allowing the Security Council to make extradition demands, impose travel bans and seize the assets of named individuals. However, given the primacy of the UN Charter over other international treaties, including human rights conventions, this has worrying implications.

The blanket legal immunities with which UN missions cover themselves has also prevented courts from allowing the people that these have been sent to serve holding them accountable for the most basic human rights issues. The European Court of Human Rights has declared alleged violations of the right to life and freedom from arbitrary detention by the UN mission in Kosovo inadmissible, while the UN mission in Haiti stated that a compensation claim brought on behalf of victims of a cholera outbreak in Haiti was 'not receivable' (UNITED NATIONS, 2013), despite the fact that its own Special Envoy to Haiti had already publicly admitted that peacekeepers were the likely cause of the disease, which has so far claimed more than 7,000 lives (DOYLE, 2012).

For all the drawbacks in allowing individual States to act as judge, jury and executioner, in carrying out 'humanitarian interventions', most of these at least have clear lines of legal and political accountability by which their actions can be challenged. UN missions by contrast are often responding to the problems they encounter through improvisation in the field, limited resources and in areas of opaque and still largely unexplored law.

The oft-asserted, but empirically unsupported, truism, that the main reason for a failure to end mass atrocities has been a ‘lack of political will’ is sometimes relied upon by advocates of ‘humanitarian intervention’ to argue that the UN Security Council should not have the last word on authorising such actions. Its critics point that the body is neither democratic nor representative and argue that its vetoes – and potential vetoes – may have prevented interventions which could have saved lives. While the former claim strengthens long-standing arguments for UN reform, the latter belongs to the ‘what if’ school of history. Powerful members of the UN, or those will powerful friends, will continue to get away with murder because that is the reality of the world balance of power. This should not stop human rights organisations from documenting and denouncing violations wherever they occur or humanitarian organisations attempting to get access to areas where they can alleviate the suffering.

Where new thinking is required is not whether international law should be ‘reformed’, to make it easier for States to invade one another, but on how we apply existing principles for a world in which States increasingly act extraterritorially and through transnational actors. No one who has seen a massacre up close would argue with the proposition of international intervention to save lives. But we still need to discuss how we can tame the Leviathan that we wish to create.

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## NOTES

1. The following paragraphs are based on media reports, interviews and first hand observations.

2. BBC News UK presses Sri Lanka over Channel 4's 'war crimes' film 15 June 2011

3. For accounts of the negotiations that led to the wording adopted at the summit see Bellamy, 2009, p. 66-97; Evans, 2008b, p. 288; and Bellamy, 2006.

4. For similar views see also Thakur, 2011 and 2006; Weiss and Thakur, 2010; Evans, 2006/07 and 2008.

5. Turkey had ratified the 1951 Convention Relating to the Status of Refugees, but not the 1967 Protocol which extends the scope of the Convention beyond Europe.

6. For details see Cooke, 1995.

7. Weiss and Collins, 2000, p. 79 note that the humanitarians 'perceived the international military as an ally in their efforts to assist a persecuted minority group'. See also Randel, 1994, p. 336; Barry with Jefferys, 2002; Stoddard, Harmer and Di Domenico, 2008.

8. Complex humanitarian emergencies are generally defined by: the deterioration or collapse of central government authority; conflict and widespread human rights abuses; food insecurity; macroeconomic collapse; and mass forced displacement of people. See Natsios, 1996, p. 67.

9. See Hehir, 1998, p. 29-53; see also Abiew, 1999; Chandler, 2002; Orford, 2011.

10. Evans and Sahnoun (Co-Chairs), 2001, p. 11-18 for an overview of the debate. See also Simma, 1999; Lillich, 1969, p. 210; Lillich, 1974, p. 240; Lillich, 1973 and Fonteyne, 1974, p. 203.

11. See United Nations, 1999a; 1999b.

12. Opinion of the Attorney General, "Iraq", 7 March 2003.

13. United Nations, 1945, article 1(1) 'To maintain international peace and security, and to that end: to take effective collective measures for the prevention and

removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace'.

14. United Nations, 1945, article 1(2): 'To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace; (3) To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion.'

15. The Committee on the Elimination of Racial Discrimination, in its Statement on racial discrimination and measures to combat terrorism, has confirmed that the prohibition of racial discrimination is a norm of jus cogens (UNITED NATIONS, 2002, chap. XI, sect. C, para. 4). See also, International Criminal Tribunal for the former Yugoslavia, *Prosecutor v. Delalic and Others*, 1998a, paras 452, 454; *Prosecutor v. Furundzija*, 1998b, paras. 139 and 143; *Prosecutor v. Kunarac and Others*, 1988c para. 466.

16. Interview by Min. of Foreign Affairs of the Russian Federation Sergey Lavrov to BBC, Moscow, August 9, 2008.

17. See also Reid, 2006b.

18. See Beyerlin, 1995, p. 926, Tsagourias, 2000, p. 5-41, Murphy, 1996, p. 7-20. The traditional meaning of the term 'humanitarian intervention' focuses on the use or threat of military force by a state or group of states against another State for humanitarian purposes, a 'right to humanitarian assistance' implies that there is a legal basis to provide emergency relief across borders, even when this is carried out without the authority, or against the wishes, of the central government of the State concerned.



## RESUMO

Debates sobre ação humanitária em emergências complexas levantam questões fundamentais sobre a proteção de direitos humanos no âmbito do direito internacional. Como as missões de paz da ONU têm se tornado cada vez mais complexas e multifacetadas, por exemplo, elas enfrentam déficits no que diz respeito à prestação de contas. Muitas das maiores missões da ONU têm autoridade nos termos do Capítulo VII da Carta da ONU para fazer uso da força para proteger civis de ameaça iminente de violência física. Isto levanta uma série de questões relacionadas a obrigações negativas e positivas da ONU perante o direito internacional. A Carta das Nações Unidas não prevê expressamente operações de manutenção da paz, que se desenvolveram de forma *ad hoc* como reação a diferentes crises. Alguns Estados também têm agido fora do escopo da Carta das Nações Unidas, justificando ação militar em nome da “intervenção humanitária”. Este artigo explora alguns dos dilemas em termos de princípios e práticas relativos à proteção extraterritorial de civis, tanto por meio de ação unilateral, quanto multilateral no âmbito do direito internacional.

## PALAVRAS-CHAVE

Proteção – Intervenção humanitária – R2P – Carta da ONU – Emergências complexas

## RESUMEN

Los debates sobre la acción humanitaria en situaciones de emergencia complejas plantean problemas fundamentales acerca de la protección de los derechos humanos con arreglo al derecho internacional. Así, por ejemplo, a medida que las misiones de mantenimiento de la paz de la ONU se vuelven más complejas y heterogéneas, se enfrentan a déficits en materia de rendición de cuentas. Esto plantea una serie de cuestiones relacionadas con las obligaciones positivas y negativas de las Naciones Unidas en virtud del derecho internacional. La Carta de las Naciones Unidas no contiene ningún fundamento expreso para el mantenimiento de la paz, que se ha desarrollado de manera *ad hoc* en respuesta a las diferentes crisis. Algunos Estados también han actuado fuera del marco de la Carta de las Naciones Unidas para justificar una acción militar en nombre de una “intervención humanitaria”. Este artículo explora algunos de los dilemas prácticos y de principios correspondientes a la protección extraterritorial de la población civil tanto a través de la acción unilateral como multilateral en el marco del derecho internacional.

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