Responsibility to Protect and the Coercive Enforcement of Human Rights

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I. Introduction

The issue of human rights has moved to the forefront of UN activities. Since the mid-1990s, within a broader spectrum of UN reform, increasing emphasis has been placed on human rights as an operational priority (the so-called mainstreaming of human rights) throughout UN structures. The UN itself has grown both in size and ambition, notably through the expansion of different local human rights mechanisms and specialized agencies, in conjunction with a rapid growth in human rights NGOs worldwide. The 1990s saw a dramatic opening for human rights as the UN assumed a prominent peace-building role, building human rights protection into its operations as a guiding principle. The limitations of the UN in solving violent conflicts and ensuring human rights protection have been well documented, most demonstrably in the major human rights catastrophes of Rwanda and the Balkans in the 1990s. It is against this backdrop of UN failure to act that efforts to "mainstream" human rights has have taken on new momentum at the turn of the Century.

In particular, the more overtly coercive dimensions of human rights enforcement have emerged front and center in contemporary debates on the appropriate response of the international community to massive human rights violations. Movement towards politically legitimating humanitarian intervention based on collective action – including the use of force – is embodied in the principle of "Responsibility to Protect" or RtoP, and associated efforts to redefine threats to international peace and security that have pushed human rights compliance onto the agenda of the UN Security Council (UNSC). This development reflects three broad trends that inform and, in turn, are informed by RtoP: (1) the broadening of interpretations of threats to international peace and security, including mass atrocities; (2) the reality of constant renegotiations of state sovereignty in matters of human rights, and the legitimate form and scope of international intervention in the domestic affairs of sovereign countries; and (3) the increased acceptability of the use of force for a broad range of policy objectives and associated beliefs in the utility of coercive/military power.

RtoP has rapidly emerged as a notably powerful norm in world politics, notwithstanding its relatively brief lifespan.[1] Elaborated in paragraphs 138 and 139 of the 2005 World Summit Outcome document adopted by the United Nations General Assembly (UNGA) in October 2005, RtoP establishes that individual States have a responsibility to protect their populations from the four major international crimes, genocide, war crimes, ethnic cleansing and crimes against humanity.[2] Most significantly, manifest failure to exercise this responsibility constitutes grounds for UN intervention, including the deployment of military forces as a last resort and in accordance with the principles of the UN Charter and international law.[3] This "securitization of human rights violations" challenges norms of non-interference in the internal affairs of sovereign states.[4] Notably, the UNSC has endorsed the principle of RtoP,[5] recognizing a link between systematic breaches of International Humanitarian Law and threats to international peace and security.[6] Nevertheless, RtoP remains a highly controversial doctrine for many Member States in a post-9/11 (and more acutely post-Iraq war) world – especially with regard to the responsibility to "respond in a timely and decisive manner" as elaborated in paragraph 139.

This paper examines some of the key underlying norms that inform contemporary debate on RtoP. In the process, it also highlights some of the broader implications of a trend towards securitizing human rights. It begins by historically tracing the role of the UN Security Council (UNSC) and General Assembly (UNGA) in situating human rights within the framework of threats to international peace and security. It offers a historically rich assessment of the linkages between responses to massive human rights violations and international security within the UN. Much of the existing literature focuses almost exclusively on mapping such developments within the Security Council in the post-Cold War era. Notwithstanding the primary responsibility of the Council in matters of international peace and security, this paper is intended to act as a corrective to a discussion which, with some notable exceptions,[7] often underspecifies or neglects altogether the role of the UNGA in this arena.

Secondly, despite precedent within UN structures for framing massive violations of human rights as a threat to international peace and security, the more coercive dimensions of human rights enforcement has prompted significant pushback by certain groups of states previously willing to endorse the 2005 World Summit Outcome document. The paper proceeds to unpack some of these contentious dynamics by focusing on first order principles of legitimacy and jurisdiction within and outside UN structures. The question of legitimate authority in sanctioning the use of force is a key point of contention for critics of recent interventions conducted outside the UN Charter in Kosovo and Iraq, as well as for those advocates of reform within the UN. In

[1] Thomas Weiss notes that "[w]ith the possible exception of the prevention of genocide after World War II, no idea has moved faster or farther in the international normative arena than the Responsibility to Protect." Thomas Weiss, "R2P after 9/11 and the World Summit," *Wisconsin International Law Journal* 24 (2006), 741.
[2] 2005 World Summit Outcome, UN Doc. A/60/1, 15 September 2005.
[3] G.A., Sixtieth Session, 8th plen. mtg., UN Doc. A/RES/60/1, paras. 138 and 139, 24 October 2005.
[4] See P. G. Danchin and H. Fischer, *United Nations Reform and the New Collective Security* (Cambridge: Cambridge University Press, 2010).
[5] S. Res. 1674, 28 April 2006 (protection of civilians in armed conflict); *and* S. Res. 1706, 31 August 2006 (Darfur conflict).
[6] See also S. Res. 1265, 17 September 1999 (protection of civilians in armed conflict); S. Res. 1296, 19 April 2000 (protection of civilians during armed conflict); and S. Res. 1325 (respect women's rights during armed conflict).
[7] T. M. Franck, *Recourse to Force: Threats and Armed Attacks* (New York: Cambridge University Press, 2002).

particular, many States are highly critical of delegating the authority to override State sovereignty to the UNSC, a body they view as unrepresentative and monopolized by traditionally dominant States.

Thirdly, current debate surrounding implementation has increasingly focused on RtoP as a doctrine of prevention as much as enforcement under the rubric of the 'Three Pillar System' devised by the UN Secretary General in his 2009 report to the UNGA: (1) the protection responsibilities of the State; (2) international assistance and capacity-building; and (3) timely and decisive response.[8] This has raised questions regarding the relative emphasis between the pillars, particularly concerning the specific responsibilities that may be entailed for prevention and enforcement. This debate is being conducted in the context of contemporary developments that are testing the relevance of RtoP to diverse situational crises and the notable reluctance of the Security Council to apply RtoP to ongoing crisis situations.[9] Observers, such as Nicholas Wheeler, criticized the 2005 World Summit Outcome document for failing to address two fundamental questions: what should happen if the UNSC is unable or unwilling to authorize the use of force to prevent or end a humanitarian tragedy? And second, how could better implementation of this norm save strangers in the future?[10] Issues of legitimacy, authority, and implementation raised by these questions and explored in this paper remain of central concern. The UNSC and UNGA historical record of activity in the area of human rights enforcement provides valuable historical context to a fuller understanding of the contours of this contemporary debate.

II. Violations of human rights and threats to international peace and security

This section of the paper addresses the role of the UNSC and the UNGA in the elaboration of RtoP and, more broadly, their contribution to underlying historical precedents that inform the securitization of human rights within UN structures. José Alvarez's contention that RtoP "reflects a pre-9/11 (but post-Cold War) view of sovereignty" may be accurate.[11] However, the basic idea that in the event of gross and systematic violations of human rights by a State, that State forfeits its claim to non-interference has historical precedent within the normative confines of the UNGA that goes back decades. The Assembly has played a significant part in the gradual inclusion of human rights within the classical frame of threats to international peace and security, a historical role which is often underspecified or neglected in scholarly and policy accounts of human rights enforcement focused on the executive arm of the UN, the UNSC. The historical record of the UNGA in the slow progression towards securitization of human rights nevertheless has an important bearing on current debates on RtoP, offering a distinct angle of vision on key areas of contention.

[8] S.G. Report to the UN G.A., "Implementing the Responsibility to Protect", pp. 8-9
[9] Alex J. Bellamy, "The Responsibility to Protect – Five Years On," *Ethics & International Affairs* 24 (2010), 145
[10] See Nicholas Wheeler, "A Victory for Common Humanity? The Responsibility to Protect after the 2005 World Summit," *Journal of International Law & Relations* 2 (2006), 95.
[11] José E. Alvarez, "The Schizophrenias of R2P," 2007 Hague Joint Conference on Contemporary Issues of International Law: Criminal Jurisdiction 100 Years After the 1907 Hague Peace Conference, The Hague, The Netherlands, June 30, 2007.

2.1. Developments within the UN Security Council

There has been a dramatic expansion of UNSC activities since the end of the 1980s. Throughout the Cold War the UNSC adopted, on average, 15 resolutions each year. Between 1990 and 2008 the average number of resolutions increased significantly to more than 60 each year. The range of activities the UNSC became involved in also expanded. There has been a significant shift in peacekeeping doctrine in particular. While traditionally based on principles of consent, neutrality and the limited use of force, the UNSC mandated "peace building" missions over the course of the last two decades have included election observation, provisional administration, as well as coercive rules of military engagement. Most significant, however, in tracing the UNSC's increasing willingness to accept a human rights protection mandate is the Council's record of engagement with the practice of humanitarian intervention over the course of the 1990s.

The response to the humanitarian crisis in the aftermath of the Gulf War in 1991 set a precedent for the UNSC's human rights protection mandate. In the aftermath of the Gulf War Kurds in the North and Shia and marsh Arabs in the South of Iraq revolted against the regime of Saddam Hussein. The revolt was violently suppressed with Western military forces remaining passive bystanders. The UNSC was eventually pushed into taking humanitarian action with Turkey and France bringing the situation of refugees to the attention of the UNSC. France and the UK maintained that human rights violations constituted threat to international peace and security, and the US argued that the refugee flows constituted a threat to international borders. Hence, many of the states that supported the resolution did so because of the transboundary implications (refugee flows) of the internal Iraqi situation. This suggests that if the situation had in fact been purely internal, there would not have been support for intervention.

In the end, UNSC Resolution 688 was adopted, but with China threatening to use its veto, the resolution was not adopted under Chapter VII and did not authorise the use of force.[12] It merely recognised that repression of Iraqi civilian population threatened international peace and security. It demanded that the Iraqi government ceases its repression, but did not specify consequences of failing to do so. There was resistance by some countries (Yemen, Zimbabwe, and Cuba) who argued that the UNSC had no mandate to intervene in a country's internal affairs, and that the matter should be referred to other UN organs such as ECOSOC or the UNGA. Although Resolution 688 did not explicitly authorise the use of force, the phrase "threat to international peace and security" opened the door for the claim that force could be used to protect lives in this situation. Yet, the concern of the UNSC with the internal human rights situation did signal a gradual shift with past practice. In terms of implementation of the resolution, US, UK and France established no-fly zones and safe havens in northern Iraq, justifying Operation Provide Comfort with reference to Resolution 688. Resolution 688 constitutes the first occasion whereupon the UNSC recognized that internal human rights violations could have international implications. It was also the first time that a group of states had publicly justified the use of force on human rights grounds.

The intervention in Somalia in 1992 was the first time that the UNSC authorized military intervention under Chapter VII on the "sole" grounds of a humanitarian emergency. It also demonstrated the UNSC's willingness to mandate much more coercive peacekeeping operations

[12] Kuwait UN Doc. S/Res/688, 5 April 1991.

for humanitarian purposes. In January 1992, the UNSC declared that the internal conflict in Somalia constituted a treat to international peace and security (UNSC Resolution 733), but did not go beyond authorizing an arms embargo. But following intense lobbying on behalf of UN Secretary General Boutros-Ghali and widespread media attention, the UNSC adopted Resolution 794 authorizing "the use of all necessary means," justifying its decision on the grounds that the "magnitude of the human tragedy" in Somalia constituted a threat to international peace and security.[13]

There was no significant concern over spillover transboundary implications as the crisis in Somalia remained mainly internal. Nonetheless, the resolution was approved unanimously with no dispute over the legal competence of the UNSC to intervene in the domestic affairs of a state (as in the case of Resolution 688). The UK and France, in particular, supported military intervention. China and India supported the UNSC resolution but demanded that the UNSC recognized the "unique character of the present situation in Somalia;" hence seeking to avoid setting a precedent. For these countries the situation was seen as exceptional because of the lack of sovereign authority in Somalia. The US, in contrast, stated that Resolution 794 did constitute a precedent. Yet, the move from peacekeeping towards more coercive and interventionist activities such as forcible disarmament of factions, was not matched by a political will to bear the human costs, nor to provide adequate resources for such tasks. The subsequent withdrawal of US troops from Somalia muted the enthusiasm for humanitarian intervention and would have far-reaching consequences in the next humanitarian crisis confronting the UNSC.

The UNSC's hesitant response to the unfolding Rwandan genocide is widely documented. Negotiations between the Habyarimana government and the Rwandan Patriotic Front culminated in the Arusha Accords in August 1993. UNSC Resolution 872 established UNAMIR to monitor the implementation of a ceasefire and the creation of a transitional government. However, following the outbreak of large-scale violence at the beginning of April 1994 it took the UNSC until late June 1994 to adopt Resolution 929 authorizing the use of force under Chapter VII to end gross human rights violations in Rwanda. The permanent members of the UNSC or "P5" acted in the "shadow of Somalia" and were not interested in another potentially costly military commitment. Also, the majority of ten supporting votes and five abstentions reflected unease at the French offer to provide troops in what was perceived as French support for the incumbent Rwandan regime. The UNSC resisted calls to send more troops to support UNAMIR and opposed a declaration of an ongoing genocide in order to avoid the obligation to act.

In contrast, the UNSC's engagement with the conflict in Bosnia reflected its increasing willingness – albeit hesitant and uneven – to adopt a human rights protection mandate. The initial response of the UNSC to the outbreak of armed conflict in the former Yugoslavia (1991-1999) consisted of an arms embargo imposed by UNSC Resolution 713. From 1991 to 1995 the UNSC adopted 55 resolutions related to the crisis in Bosnia-Herzegovina. A traditional peacekeeping mission was authorized in February 1992 (UNPROFOR). In response to media coverage of Serb detention camps that revived images of the Holocaust in Europe the UNSC adopted Resolution 770, which mandated under Chapter VII powers all Member States "to take nationally or through regional arrangements all measures necessary to facilitate in co-ordination with the United Nations the delivery […] of humanitarian assistance" (12-0-3 with China, India

[13] Somalia UN Doc. S/Res/794, 3 December 1992

and Zimbabwe abstaining). The UK and France were determined to avoid committing ground troops but had to be seen to be doing something. As a result, the UNSC was willing to authorize member states and regional organizations to use all necessary means, but not UNPROFOR whose mandate was limited to conventional and limited peacekeeping rules of engagement.

In April 1993 UNSC established safe havens in Srebrenica, Sarajevo and other Bosnian cities (UNSC Resolutions 819 and 824). Resolution 836 authorized the use of all necessary means to protect the safe havens from attack and to secure humanitarian aid deliveries. Member states were authorized to support UNPROFOR through air strikes. Hence, the only politically feasible military option available to the UN was NATO air strikes, which generated mixed results. On the one hand they degraded Serb military capacity, but on the other, they did little to save civilians trapped inside "safe" areas (Zeha, Bihac, Srebrenica fell in 1995). Notwithstanding the uneven and hesitant approach in practice to the Bosnian conflict, the responsibilities of the UNSC to address gross human rights violations gradually consolidated in response to the conflict.

In sum, the UNSC's response to conflicts and humanitarian emergencies in the 1990s established a significant, yet fragile, protection norm. The UNSC no longer rejected responsibility for situations of gross human rights violations. Nevertheless, any development has been very far from linear with UNSC responses to humanitarian crises shaped as much by resistance on the part of member states to act according to this emerging protection norm. UNSC members still enjoy significant flexibility in their interpretation of what ought to be done in response to humanitarian emergencies with significant implications for the UNSC's legitimacy as a venue for the authorization of force as developed in the following section.

2.2. Developments within the UN General Assembly

The gradual consolidation of a human rights protection mandate within the UNSC over the course of the 1990s has been extensively covered in the literature.[14] However, the UNGA has also played a significant part in the gradual inclusion of human rights within the classical frame of threats to international peace and security. Indeed, the General Assembly has been a key player in the emergence of RtoP as a norm. The Assembly as the principle forum for the elaboration of norms and also as the most representative body within UN structures is a principal source of political legitimacy. Kofi Annan used his address on the eve of the General Assembly's 54th session in 1999 to issue a challenge to the international community in the wake of UN inaction in Rwanda, Kosovo and East Timor, calling for humanitarian intervention as a last resort "in the face of massive and ongoing abuses."[15] The General Assembly has remained a focal point for deliberation on RtoP, with successive reports by the Secretary General and government-sponsored bodies paving the way for the responsibility to protect to be unanimously endorsed in the landmark Outcome Document of the 2005 World Summit.[16]

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[14] References

[15] S.G. Report to S.C., UN Doc. S/1999/957, 8 September 1999, p. 22.

[16] See in particular International Commission on Intervention and State Sovereignty, *The Responsibility to Protect* (Ottawa: International Development Research Centre, 2001); *Also* S.G. report to G.A., "Millennium Report," UN Doc. A/54/2000; High-level Panel on Threats, Challenges and Change, "A More Secure World: Our Shared Responsibility" (G.A. Doc. A/59/565, 2 December 2004); S.G. Report to G.A., *In larger freedom*.

A strict interpretation of the principle of non-interference in the internal affairs of sovereign states characterized UN proceedings throughout the Cold War, reflective of the aversion of former colonies to external intervention, as well as politically convenient for the many authoritarian political regimes that populated the UN and who were themselves "low-intensity" violators of human rights. Nevertheless, rare instances of General Assembly criticism of individual States human rights records can be found in resolutions on Bulgaria and Hungary in 1949.[17] It is important to place such criticism of Soviet satellite states in the context of super power sparring between the US and the Soviet Union. For much of the Cold War, Article 2(7) was rigidly adhered to with States rarely subject to criticism for human rights violations by their peers. Indeed, state sovereignty was arguably further entrenched by the General Assembly in the 1966 Covenants on Civil and Political Rights and Economic, Social and Cultural Rights.[18]

Guest suggests that 1976 found the UN human rights machinery "at a turning point" no longer able to ignore reports of egregious human rights crimes.[19] Nevertheless, progress was piecemeal with responses to alleged violations considered on a "case-by-case" basis. Allegations against the Argentinean government began circulating within UN structures in 1975 in the context of the General Assembly's recently approved Declaration against Torture.[20] However, it was not until 1978 that the General Assembly finally passed a resolution expressing deep concern over the "disappearance of persons as a result of excesses of law enforcement and security authorities."[21] Despite such concrete progress, much to the frustration of human rights NGOs the General Assembly refused to mention Argentina by name.[22] Such developments did have a cumulative impact. In the early 1980s, notwithstanding US obstructionism,[23] the General Assembly passed a series of resolutions condemning human rights violations in Chile, El Salvador and Guatemala and calling upon these governments to ensure full respect for human rights.[24]

The General Assembly has also contributed to the framing of human rights crimes as a threat to international peace and security, as such warranting collective action on the part of the UN. As early as 1950, the General Assembly argued that international security is not a matter of military inter-state conflict only.[25] The General Assembly was an early vocal critic of the white minority regime of South Africa, significantly branding apartheid policies as contrary to the UN Charter

[17] G.A. Res. 272(III), 30 April 1949.
[18] Article 1 of both Covenants asserts that: "Each state has the right freely to choose and develop its political, social, economic and cultural systems." See Juergen Moosleitner, "Collective Security and Human Rights: How the United Nations' Institutional Design Corrupted Complementary Purposes," *Global Society* 23 (2009), 35.
[19] Iain Guest, Behind the Disappearances: Argentina's Dirty War Against Human Rights and the United Nations (Penn.: Univ. of Penn. Press, 1990), p. 96.
[20] G.A. Res. 3452, Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 9 December 1975.
[21] G.A. Res. 33/173, 20 December 1978. This Resolution would spur the Commission for Human Rights on to establish The Working Group on Enforced or Involuntary Disappearances in 1980, the first United Nations human rights thematic mechanism to be established with a universal mandate. CHR Res. 20 (XXXVI), 29 February 1980.
[22] Guest, Behind the Disappearances, p. 473.
[23] Under the guise of protesting against UN "selectivity" the US delegation to the UN abstained or voted against a succession of resolutions on human rights violating governments in Latin America throughout the early 1980s. Guest, *Behind the Disappearances*, p. 314.
[24] G.A. Res. 35/192, 15 December 1980.
[25] G.A. Res. 45/80, 12 December 1950 (highlights the connection between international security and development).

and a serious threat to international peace and security.[26] Similar resolutions were issued concerning Namibia and Rhodesia.[27] Concern for human rights violations and the preservation of international peace led the General Assembly to set up a special committee in 1967 to monitor Israeli practices in the occupied territories.[28] This action precipitated mission creep within other UN bodies. For instance, the Economic and Social Council (ECOSOC) approved Resolution 1235 in 1967 allowing for review not only of apartheid in South Africa, but situations which appeared to reveal a "consistent pattern of gross violations similar to apartheid" including Gaza, Namibia and Chile.[29]

Under Article 10 of the Charter the General Assembly may advise and make recommendations to the Security Council concerning any dispute or situation, with the proviso that the matter is not currently under consideration by the Council (Article 12). The interplay of jurisdictions is apparent. A Security Council resolution on Namibia in 1969 made explicit mention of Assembly resolutions in declaring the continued presence of South Africa in Namibia as illegal.[30] In turn, a Council resolution calling on the government of Israel to ensure the safety and welfare of the inhabitants of the occupied territories following the Six-Day War was followed by action by the Assembly to monitor the situation.[31] In a direct appeal to the Council in 1965, the Assembly argued "that action under Chapter VII of the Charter is essential in order to solve the problem of apartheid and that universally applied economic sanctions are the only means of achieving a peaceful solution."[32] Despite resolutions by the Security Council condemning apartheid policies in the 1960s,[33] the Council did not impose a mandatory Chapter VII arms embargo on South Africa until 1977.[34] Economic sanctions were never imposed by the Council, with the US and UK blocking such a proposal in 1981.

III. Legitimate authority and the use of force

There are then, historical precedents of the UNGA appealing to the UNSC for the adoption of coercive enforcement measures. However, under the UN Charter primary responsibility to react to mass atrocities falls to the UNSC. The tensions within the UN Charter are well known. With regards to the use of force, Article 2(4) establishes prohibitions on the threat or use of force, against territorial integrity or political independence of any state, or in any manner inconsistent with the purposes of the UN. The only exceptions to these prohibitions are self-defense (Article 51) and when authorized by the UNSC in order to maintain international peace and security (Chapter VII). The UN Charter also prohibits intervention in "matters which are essentially within the domestic jurisdiction of any state" (Article 2.7), while Article 1(3) promotes human rights and fundamental freedoms for all.

[26] See G.A. Res. 1761 (XX), 6 November 1962 (South Africa).
[27] See G.A. Res. 2145 (XXI), 27 October 1966 (Namibia); and G.A. Res. 2652 (XXV), 3 December 1970 (Rhodesia).
[28] G.A. Res. 2443 (XXIII), 19 December 1968.
[29] ECOSOC Res. 1235 (XLII), 6 June 1967.
[30] S. Res. 264, 20 March 1969.
[31] S. Res. 237, 14 June 1967.
[32] G.A. Res. 2054 (XXI), 15 December 1965.
[33] S. Res. 191 (1964), 18 June 1964.
[34] S. Res. 418, 4 November 1977.

This section of the paper explores the singular legitimacy of the UNSC as a venue for the legitimate authorization of force in response to massive human rights violations. It places this discussion in the context of alternative venues for authorization, including unilateral intervention by States operating outside the UN Charter as witnessed in the cases of Kosovo and Iraq. It also highlights the secondary role of the UNGA in responding to threats against international peace and security and critically engages with the question of the UNGA's latent legitimacy and jurisdiction in the area of human rights enforcement.

3.1. The UNSC and authorization of the use of force for humanitarian purposes

The inherent tensions in the UN Charter were visibly exposed in the international response to the Kosovo conflict. After a period of intensification of the conflict in Kosovo, the UNSC adopted Resolution 1160 in March 1998 authorizing the use of force. Resolution 1160 reflected broad agreement that the situation constituted a threat to international peace and security (China abstained on the basis of the argument that the situation should be treated as an internal affair of the Former Republic of Yugoslavia (FRY)). UNSC Resolutions 1199 and 1203 reaffirmed the threat to international peace and security that the Kosovo conflict posed. The US and UK favored a more robust resolution but Russia strongly opposed military action against the Serbian government, and both Russia and China threatened to use their vetoes. As a result, no further UNSC resolution specifically authorizing use of force was adopted. Instead, NATO threatened to authorize air strikes against the FRY if it did not comply with UNSC resolutions. Although the threat of the use of force appeared to have some impact on FRY,[35] the failed negotiations at Rambouillet in February 1999 prompted the start of NATO air strikes in March 1999. In response, Russia proposed a UNSC resolution condemning the use of force. The resolution was opposed by twelve UNSC members and supported by Russia, China and Namibia. It is important to note that those opposing intervention did not oppose the idea that human rights violations did not fall under the responsibility of the UNSC. Instead, they opposed the use of force.

The controversial NATO intervention in Kosovo constitutes a significant shift in the politics of humanitarian intervention in the post-Cold War period. NATO's actions marked a decisive break from the previous pattern of UNSC authorization of the use of force for humanitarian purposes,[36] and heightened the debates surrounding the legitimacy and legality of the use of force and humanitarian intervention. There are contrasting views on the legality of NATO's unauthorized (unilateral) humanitarian intervention: (1) it was legal because it was implicitly authorized by Resolutions 1160 and 1199; (2) it was illegal because use of force, other than in self-defense, requires explicit authorization by the UNSC; and (3) it was illegal but legitimate, in other words it was a just action that outweighed the costs of lacking proper authorization.[37]

[35] Agreement of OSCE verification mission and a NATO air verification mission monitoring compliance with UNSC resolutions 1160 and 1199, endorsed by UNSC in Resolution 1203.
[36] Although note ECOWAS in Liberia in 1990, and Sierra Leone in 1997, which may be most accurately describe as "intervention by invitation."
[37] The International Independent Commission on Kosovo (IICK) published its report in 2001 and referred to the intervention as "illegal but legitimate."

The Kosovo intervention provided the impetus for the creation of the International Commission on Intervention and State Sovereignty (ICISS). Its report, 'The Responsibility to Protect', sought to establish a normative basis for the consistent application of the use of force for humanitarian purposes. According to the RtoP framework, states would have primary responsibility for the protection of their citizens. But in the event of their inability or unwillingness to exercise this duty, the responsibility to protect would fall upon the international community, with the option of the use of force as a last resort.

The ICISS report reaffirmed the centrality of the UNSC in matters related to the authorization of the use of force. Yet, the authority of the UNSC was once again challenged by the unilateral decision to invade Iraq in 2003. For some observers, however, the Iraq invasion increased the likelihood of future intervention. According to this view, the Iraq invasion demonstrated increasing convergence of security interests and values pushed by powerful states (e.g. "failed" states perceived to present grave humanitarian crises but also sites for the incubation of terrorism), as well as the impact of the "Bush doctrine" on reducing the normative significance of sovereignty. For others however, the Iraq invasion has decreased the likelihood of future interventions. They note that the US and UK are militarily overstretched (in Afghanistan and Iraq) as well as the ascendance of strategic considerations related to the "war on terror" that are likely to trump humanitarian concerns. Nevertheless, crucially, the Iraq intervention in 2003 was widely perceived as an abuse of humanitarian justification for war. Bellamy, for example, argues that the Iraq war did not undermine support for the norm of humanitarian intervention, but rather the credibility or legitimacy of the US and UK to act as norm carriers.[38]

The difficulties in reaching a consensus on the use of force in a post-Iraq era can be seen in the case of Darfur. In July 2004, the UNSC adopted Resolution 1556 that held that the situation constituted a threat to international peace and security under Chapter VII. During UNSC deliberations the RtoP framework and references to the protection norm provided a discursive framework for justifications of further activities by the UNSC. Resolution 1556 of July 2004 exposed a divided UNSC with the Philippines stating that Sudan had failed in its responsibility to protect; China, Pakistan, Sudan rejected this claim, as did Brazil and Russia. In contrast, the US, UK, Germany, Chile, and Spain invoked RtoP without suggesting that responsibility should pass from Sudan to the UNSC. This group of States referred to the African Union (AU) as bearing primary responsibility for action, should Sudan fail. In September 2004, the US circulated a draft resolution finding Sudan to be in material breach of Resolution 1556, called for an expanded AU force, international overflights to monitor the situation, prosecution of those responsible for genocide, a no-fly zone for Sudanese military aircraft, and targeted sanctions.

Resolution 1564 also established an International Commission of Inquiry on Darfur mandated to evaluate the scale of human rights violations. The report, published in January 2005, did not refer to genocide. Resolution 1564 extended cooperation with the African Union Mission in Darfur (AMIS). The situation continued to deteriorate following Resolution 1564 and by early 2005 the envoy of the UN Secretary General tacitly recognized the AU's inability to protect civilians and called for other agencies to be deployed.[39] The situation was further complicated by two additional issues: first, the referral to the International Criminal Court (ICC) which was

[38] Alex Bellamy, "
[39] Reference

eventually pushed through by the EU in the face of US opposition (US, Algeria, Brazil and China abstained); and second, the fact that the UN was already entrenched in policing a peace agreement in Southern Sudan with heated debate surrounding whether to extend the mandate to Darfur. The UNSC decided in Resolution 1706 to merge the UN mission in Sudan (UNMIS) and AMIS into a joint mission: the UN-AU Mission (UNAMID), which was authorized in August 2006 to use all necessary means (Russia, China and Qatar abstaining). UNMIS was eventually given a Chapter VII mandate for southern Sudan but avoided pronouncing on whether UNMIS would be deployed to Darfur.

A key question that emerges from this analysis is why the UNSC and supporters of RtoP did not take measures to either coerce Sudanese government to comply or improve effectiveness of AMIS? In part, the answer lies with the principled and self-interested objections of anti-interventionists including Russia and China. Among the pro-interventionists, some lacked the incentives to maintain robust support for such action (Romania, Philippines), while others such as the US – despite declaring the situation in Darfur a genocide – failed to adopt the sort of activist line witnessed in the case of Kosovo and Iraq. This reticence can be attributed to a number of factors, including military overstretch, the tarnished image of the US in the Muslim world and its diminished status as a norm carrier. For these reasons, the US was compelled to pursue a less than satisfactory consensus within the UNSC. Nevertheless, the response to the situation in Sudan and Darfur illustrate that the sun has not set on intervention. There was widespread political support for AMIS intervention.

3.2. The UNGA and authorization of the use of force for humanitarian purposes

In the event that the Security Council fails to discharge its responsibility in the face of human rights crimes, is it ever legitimate for another actor to step into the breach? This is a question that continues to exercise much General Assembly debate in the context of RtoP. The ICISS report of 2001 suggested that in the event of the Council failing to act, alternative venues may be considered, including the General Assembly under Articles 10 and 11 and regional or sub-regional organizations under Chapter VIII.[40] However, it expressly avoided dealing with the legality of such contingency options.[41] Ambiguity persists as to whether Security Council authorization is a necessary condition for intervention. The 2005 World Summit Outcome document, while attributing primary responsibility in the maintenance of international peace and security to the UNSC, also notes "the role of the General Assembly relating to the maintenance of international peace and security in accordance with the relevant provisions of the Charter."[42] Articles 10 and 11 give the Assembly broad jurisdiction over UN authority, including the maintenance of peace and security, albeit with its powers limited to issuing recommendations, not binding decisions. The most recent Secretary-General Report on RtoP to the General Assembly states "[d]ecisions about collective action…should ultimately be made by the Security Council or, less frequently, by the General Assembly."[43]

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[40] International Commission on Intervention and State Sovereignty, *The Responsibility to Protect* (Ottawa: International Development Research Centre, 2001), p. 53.
[41] Ibid., p. 54.
[42] 2005 World Summit Outcome, UN Doc. A/60/1, 15 September 2005, para. 80.
[43] S.G. Report to the G.A., "Early warning, assessment and the responsibility to protect," UN Doc. A/64/864, 14 July 2010, para. 5.

It is important to place this discussion within the broader context of calls for Security Council reform including restrictions on the use of the veto and diluting the power of the P5 or permanent members (China, France, Russia, UK and US).[44] During the 2009 General Assembly informal dialogue on RtoP, 35 Member States, including Chile, Singapore, and New Zealand, called for restricting the use of the veto in cases of genocide, war crimes, crimes against humanity and ethnic cleansing.[45] Debate has also centered on enhancing the role of the Assembly in implementing RtoP. Proposals have included the UNSC being subject to guidance from the UNGA in the event of action under Chapter VII (CARICOM10); periodic review by the UNGA (Indonesia and South Korea); the creation of a Committee on RtoP mandated to make recommendations to the UNSC (Gambia); and placing the early warning unit under the UNGA (Egypt).[46] Other delegations hostile to RtoP have effectively advocated contravening the Charter in asserting the primacy of the UNGA over the use of force (Venezuela, Sudan) and proposing binding powers for Assembly resolutions concerning situations of mass atrocities (Non-Aligned Movement).[47]

Leaving aside the political and practical implications of individual proposals, the role of the General Assembly in the implementation of RtoP raises important questions of jurisdiction and, ultimately, the legitimacy of intervention. The idea of General Assembly authorization of force in the event of Security Council paralysis was contemplated by the ICISS suggesting that "intervention which took place with the backing of a two-thirds vote in the General Assembly would clearly have powerful moral and political support."[48] This is not a hypothetical proposition. Indeed, there is historical precedent for seeking support for military action from the General Assembly under the "Uniting for Peace" procedures.

The "Uniting for Peace" procedure has its genesis in the Cold War politics of North Korean aggression in 1950. Faced with a Soviet Union veto at the Security Council, the US turned to the General Assembly as an alternative venue for the authorization of force to maintain international peace and security. The resulting "Uniting for Peace" Resolution 377(v) states that in the event of Security Council inaction, the General Assembly may convene an emergency session with a view to recommending collective action, including the use of force.[49] Activated in 1956 to address the Suez crisis, the deployment of an emergency peace-keeping force was authorized by majority vote in the General Assembly.[50] Four years later, amid deadlock in the Council, the Assembly once again invoked the United for Peace procedure to continue ONUC peace enforcement operations in the Congo.[51] Significantly, the International Court of Justice (ICJ) was

[44] See *The Economist*, "Thinking the UNthinkable," 11 November 2010.
[45] ICRtoP, "Report on the General Assembly Plenary Debate on the Responsibility to Protect," 15 September 2009, p. 6.
[46] Ibid. *And* Global Centre for the Responsibility to Protect (GCR2P) Report, "Early Warning, Assessment, and the Responsibility to Protect": Informal Interactive Dialogue of the General Assembly held on 9 August 2010, September 2010.
[47] Ibid.
[48] International Commission on Intervention and State Sovereignty, *The Responsibility to Protect* (Ottawa: International Development Research Centre, 2001), p. 48.
[49] G.A. Res. 377(V). G.A.O.R. 5th Sess. 302nd Plen. Meeting, 3 November 1950.
[50] G.A. Res. 1000, 5 November 1956. Adopted by 57-0 with 19 abstentions.
[51] G.A. Res. 1474, 20 September 1960. Adopted by 70-0 with 11 abstentions.

requested to rule on the legality of this action by the UNGA. In an affirmative ruling, the ICJ determined that the Charter in giving the Security Council primary responsibility implied a secondary responsibility to be exercised by the General Assembly in the event of an impasse within the Security Council.[52]

The United for Peace procedure has been used on 10 occasions, the most recent emergency special session concerning the Israeli occupation of Palestinian territory was convened in 1997 (and is yet to conclude).[53] Some observers claim that Resolution 377(V) effectively nullifies the Security Council's veto power. This interpretation contends that should the Council fail to fulfill its "primary responsibility" to maintain international peace and security the General Assembly then must exercise "final responsibility."[54] Echoes of this position can be found in the above contentions by Member States that the Council should not exercise its veto in matters concerning the four major human rights crimes against peace. However, the legal authority of the General Assembly to authorize the use of force remains in dispute with Article 11(2) of the Charter stating "[a]ny such question on which action is necessary shall be referred to the Security Council by the General Assembly." In turn, the empirical record paints a different picture. To date, the United for Peace procedure has resulted in the authorization of force on only one occasion at the behest of the dominant Western power, the US (Korea in 1951).[55]

In recent times, the UNGA has also failed to exercise this prerogative. In relation to Kosovo, the UK government is reported to have considered invoking the procedure but rejected the option because it was uncertain that the required majority of two thirds could be achieved.[56] Mobilization by Member States and NGOs opposed to the Iraq war for a possible United for Peace resolution was mooted, but came to nothing. The threat was serious enough for the US to send instructions to its embassies on how to effectively resist such a move within the General Assembly.[57] In brief, such experiences suggest a number of conclusions when evaluating the UNGA as a legitimate venue for the authorization of force. Firstly, a two third majority sets a high bar for achieving consensus within the UNGA for collective action, especially action involving the use of force. Secondly, such action is unlikely to meet success without the support of a (majority of) Security Council permanent member(s). As such, a scenario whereby the UNGA assumed responsibility for the maintenance of peace of security in accordance with the Charter is not inconceivable but is a very remote prospect. This reality underscores the Secretary-General's claim that, in any case, "the task is not to find alternatives to the Security Council as a source of authority but to make it work better."[58]

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[52] Certain Expenses of the United Nations, Advisory opinion of 20 July 1962, 1962 I.C.J. 163 at 164. In an Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory issued in 2004, the ICJ has opined that the prohibition of simultaneous action by the Council and Assembly has been superseded by practice (I.C.J. Reports 2004, p. 136, at paras. 27-28).

[53] G.A. Doc. A/ES-10/PV.1, 24 April 1997.

[54] Cameron Hunt, "The Veto Charade," 7 November 2006.

[55] G.A. Res. 498 (V), 1 February 1951.

[56] Heike Krieger, *The Kosovo conflict and international law: an analytical documentation 1974-1999* (New York: Cambridge University Press), p. xxxvii.

[57] Kamrul Hossain, "The Complementary Role of the United Nations General Assembly in Peace Management," *Review of International Law & Politics* 77 (2008), 77-93.

[58] S.G. Report to G.A., *In larger freedom: towards development, security and human rights for all*, UN Doc. A/59/2005, 21 March 2005, para. 126.

IV. Implications for current debates on RtoP

This paper has pursued a number of avenues of inquiry to offer a distinct angle of vision on the development of human rights securitization within UN structures. Section one engaged in a historical tracing of human rights within the frame of threats to international peace and security within the UNSC and UNGA. It documented a gradual advance towards the strengthening of linkages between human rights violations and international security concerns. However, this development has not followed a linear path. It has been uneven, inconsistent as well as prone to stagnation and even reversal. Section two examined the question of legitimate authority for the use of force for humanitarian purposes. The UNSC retains its legal standing as the primary authority responsible for the maintenance of international peace and security. Notwithstanding its singular legal authority, in practice intervention by the UNSC has been fundamentally shaped by the political interests of its members. However, the paper also documents the secondary responsibility of the UNGA – in both law and practice – in the event of the UNSC failing to exercise its responsibility to protect. This discussion raises a number of significant implications for contemporary debate on RtoP which we include below in summary form:

First, RtoP highlights the reality of constant renegotiations of state sovereignty in matters of human rights, and the legitimate form and scope of international interventions in the domestic affairs of sovereign countries. It has shifted understandings of what sovereignty entails towards a less absolutist understanding of sovereignty over the course of the last decades. Growing receptivity to non-traditional threats in the post-Cold War era has led to a reevaluation of sovereignty in the face of human rights and humanitarian threats to the collective security system. This push towards expanding notions of RtoP applicable situations can be seen, for example, in debates surrounding the protection of civilians from natural or environmental catastrophes (Burma/Myanmar). These trends also invoke understandings of sovereignty not as entitlement but as status, understandings of what it means to be a legitimate member an international society, and the capacity to engage in increasingly complex transactions with other members of the system. As Annan argued in 1998, "sovereignty implies responsibility, not just power."[59] Contemporary deliberations in the UNGA on RtoP indicate that this is a position widely endorsed by a diverse group of member states.[60]

However, if you accept that understandings of sovereignty are prone to change, there will also be the potential for pushback, reversal and stagnation. As Welsh observes, "[e]fforts to implement norms open up new areas of contestation for those skeptical of the norm's provisions, and can lead to either backsliding or differential interpretations of the norm's meaning."[61] What does this mean for RtoP? There may be recognition of certain fundamental principles enshrined in RtoP. But debate within the UNGA on RtoP suggests that some states remain to be convinced that human rights crimes constitute a threat to their own or the collective's security. Criticism from rising powers, such as Brazil, India and China, suggests that these States are not yet willing to

[59] Kofi Annan, "Intervention," Ditchley Foundation Lecture XXXV, 1998, p. 2.
[60] Members of the European Union, Benin, Costa Rica, Lesotho, Qatar, and Timor-Leste agreed that mass atrocities within states could constitute grounds for collective action in the 2009 General Assembly informal dialogue on RtoP.
[61] Welsh 2010, 426

fully accept the compatibility between the principle of non-interference and RtoP.[62] Resistance to broadening grounds for intervention confront growing recognition that massive violations of human rights also presents a threat to international peace and security. Yet, certain Member States continue to claim that such a position infringes Article 2(7) of the Charter and "that beyond the abhorrence of mass atrocity crimes, and State responsibility to protect civilians, there [is] no consensus."[63]

More generally, resistance to RtoP needs to be seen in the context of an uncertain future for the global human rights regime in light of the wider implications of the rise of non-Western states and shifting global power balances. As power shifts globally, competing understandings of sovereignty that emphasize sovereign equality may reassert themselves challenging the demands and expectations of RtoP advocates. For example, current debate within the UNSC reflect an enduring and deep disquiet towards the violation of State sovereignty, with Russia and China continuing to argue that the RtoP lies with the national government, not the international community. Similarly, despite the 2005 agreement building upon precedent within UN structures for framing massive violations of human rights as a threat to international peace and security, the more coercive dimensions of human rights enforcement has prompted significant pushback by certain groups of states within the General Assembly. The 2005 document stressed "the need for the General Assembly to continue consideration of the responsibility to protect" and this has been undertaken in a succession of informal dialogues guided by the publication of two Secretary-General Reports on RtoP.[64] For RtoP advocates, this has provided a platform to build further political consensus around a norm that for some Member States was insufficiently considered by the Assembly in 2005.[65] RtoP detractors, on other hand, have argued that the norm lacks legal basis, infringes Article 2.7 of the Charter (the principle of non-interference) and called for an additional General Assembly resolution.[66]

The strength of resistance should, however, not be exaggerated and claims that the conceptual foundations of RtoP may be subject to renegotiation have thus far proven premature.[67] Indeed, with the exception of a hard core of RtoP detractors,[68] support for the concept appears to be

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[62] Note, however, precedent for such an arrangement can be found in the Constitutive Act of the African Union. See Article 4(h), Constitutive Act of the African Union, 11 July 2000. Also see *International Service for Human Rights*, "Responsibility to protect: support grows in the GA but detractors remain implacable," 24 August 2010.

[63] This group include Cuba, Iran, Pakistan, Nicaragua, Sudan, Venezuela. See *International Service for Human Rights*, "Responsibility to protect: support grows in the GA but detractors remain implacable," 24 August 2010.

[64] S.G. Report to the UN G.A., "Implementing the responsibility to protect: Report of the Secretary-General," 12 January 2009, UN Doc. A/63/677; *and* S.G. Report to UN G.A., "Early warning, assessment and the responsibility to protect," UN Doc. A/64/864, 14 July 2010. See also Ban Ki-moon, ''On Responsible Sovereignty: International Cooperation for a Changed World,'' Berlin, SG/SM11701, 15 July 2008.

[65] Pace et al. observe that "negotiations were not conducted through an extensive and transparent preparatory process. This process…extended over only a few months and was largely conducted behind closed doors by a few key member states…" See William Pace et al., "Realizing the Responsibility to Protect in Emerging and Acute Crises: A Civil Society Proposal for the United Nations," in *Responsibility to Protect: The Global Moral Compact for the 21st Century* (New York: Palgrave MacMillan, 2009), p. 226.

[66] See *International Service for Human Rights*, "Responsibility to protect: support grows in the GA but detractors remain implacable," 24 August 2010.

[67] *The Economist*, "An Idea Whose Time Has Come – And Gone?" 27 July 2009.

[68] These include Cuba, Iran, Pakistan, Nicaragua, Sudan, and Venezuela.

holding steady, or even growing, within the Assembly.[69] A Special Advisor to the Secretary-General on RtoP was appointed in February 2008 with the express mandate to develop the concept as well as assist the General Assembly in building a consensus on RtoP.[70] Also, the passing of a first procedural resolution on RtoP by the Assembly in September 2009 was hailed by RtoP supporters as an important step.[71]

Second, RtoP raises the question of which organization or actor holds the responsibility to respond in a timely and decisive manner? This highlights the issue of authorization. Who authorizes and what is the appropriate role of the UN? The Charter stipulates that the UN would have a monopoly over the use of force in international relations. Originally, the expectation was that member states would contribute troops on a standing basis with command and control exercised by a military staff committee composed of chiefs of staff from the P5 or their representatives. However, permanent troop contributions were never made and the UN Military Staff Committee has remained dormant. Rather, the model that has developed is one where the UN has a monopoly over the authorization of the use of force. But the use of force would be delegated to others (individual states, coalitions of the willing, regional organizations). This has been the practice for much of the post-Cold War period. In the cases of Kosovo and Iraq, the monopoly of the UN over the authorization of the use of force was fundamentally challenged. Nevertheless, the UN continued to play a significant role in both scenarios.

Considerable doubts within the UNSC surround which organization – be it the UN or regional organizations such as the AU – should bear the responsibility for RtoP and ultimately the use of force. Those in favor of regional organizations and powers taking the lead on RtoP argue that such actors are more likely to have an interest in the situation and to be seized of matter; to have longer experience of working together and to be better coordinated with more knowledge of local situations. Opposing this position, others argue that regional action reinforces local spheres of influence and may be counterproductive to collective security. In turn, regional organizations are unlikely to have global response capabilities. Even in the case of NATO, an organization with significant logistical capabilities, its capacity to operate beyond Europe is limited. As such, reliance on regional organizations as the enforcers of RtoP confronts the issue of what to do about poorer regions lacking in the organizations and resources required to effectively address humanitarian crises.

Third, the language of RtoP can operate as both an enabler for those that favor intervention as well as a constraint. Indeed, RtoP language has been used to support as well as counter intervention. For example, Thakur seeks to reassure developing countries that RtoP contains "all the safeguards they [developing countries] need and all that they are going to get with respect to threshold causes, precautionary principles, lawful authorizations, and operational doctrine."[72] Moreover, opponents of RtoP appear to have shed the largely discredited language of absolute sovereignty, focusing instead on the issue of who has responsibility (and at what threshold

[69] *International Service for Human Rights*, "Responsibility to protect: support grows in the GA but detractors remain implacable," 24 August 2010.
[70] UN S.G., "The Secretary-General Appoints Edward Luck of the United States as Special Advisor," 21 February 2008. UN Doc. SG/A/1120.
[71] G.A. Res. A/RES/63/308, 14 September 2009.
[72] Thakur, 205.

should responsibility pass from one actor to another). Although there may be broad-based recognition at the UNSC of a protection norm, Russia and China continue to argue that RtoP lies with national governments (for example, in the case of Sudan/Darfur), not the international community. Hence, RtoP provides language that can be used to both promote and oppose legitimate intervention.

Fourth, RtoP is not intended to supplant but rather work in accordance with the principles of the UN Charter, particularly as they relate to the legitimate authority to use force. There may be a broad consensus that military action is a legitimate addition to the RtoP toolbox. But debate persists as to which actor is the legitimate wielder of such authority. Some states contend that the role of the UNGA should go further given its status as the most representative body within UN structures. From this perspective, the UNGA also holds a strong claim to legitimacy as a source of authority in the use of force under Pillar 3 of RtoP with the UNSC viewed as the implementing body. This argument is based not only on the historical precedent of the United for Peace procedure but also criticism of the UNSC's handling of situations of mass atrocities.[73]

Fifth, RtoP is intimately linked to the development of conceptions of "human security" that underwrote practices of humanitarian intervention following the end of the Cold War. Securitization is a tactical move giving hitherto neglected human rights issues a new centrality by positing them as existential threats to valued referent objects (such as the state, humanity). The gradual securitization of human rights, therefore, reflects efforts to emphasize existential threats and distinguish "security" threats from the merely "political;" to emphasize emergency and immediacy; and to legitimize extraordinary measures. The securitization of human rights lies in the processes of constructing a shared understanding of what is to be considered and collectively responded to as a threat.

As has been widely commented upon, linking human rights with the high politics of international security has a number of problematic implications. First, there is a danger that newly securitized issues will be dealt with in ways appropriate to old security issues, hence privileging coercive force over political responses. Indeed, de Waal for instance, has argued that the RtoP framework has encouraged external actors to pay undue attention to military responses to mass atrocities rather than political solutions to the conflict in Darfur.[74] Second, processes of securitization tend to privilege certain types of harms at the expense of others. The scope of just cause within the framework of RtoP is limited to only grave human rights crimes at the expense of other forms of human suffering.

And finally, current debates surrounding the implementation of RtoP raises a whole range of issues regarding the extent to which the RtoP norm generates compliance. Notwithstanding the lack of "hard" law status of General Assembly resolutions, Assembly activity on human rights securitization is not solely an academic exercise. Resolutions may attain legal weight to the extent that such documents enter the canon of "soft law" and encourage the emergence of an *opinio iuris*. RtoP detractors claim that the concept's lack of legal status – not having been codified in a declaration, convention or other form of international customary law – leaves open

[73] The Stanley Foundation, "Actualizing the Responsibility to Protect," Report from 43rd Conference on the UN of the Next Decade, Portugal, 20-25 June 2008, pp. 44-5.
[74] De Waal reference

the question of its compatibility with the UN Charter. RtoP advocates, for their part, have responded that RtoP is not a novel legal doctrine but rather a political framework based on legal obligations already set forth in the Charter, in relevant human rights conventions, international humanitarian law and other instruments.[75] State responsibility to protect civilians and minority groups during armed conflict is well established in a growing body of law and practice.[76] Humanitarian intervention based on collective action, however, is not. The specific responsibilities of the international community in cases where prevention fails remain largely unspecified and politically contentious.

Debate within the Assembly can be cast in light of this distinction. The UN Secretary General has stated that the strong commitment to RtoP made in 2005 is based on three pillars: (1) the protection responsibilities of the State; (2) international assistance and capacity-building; and (3) timely and decisive response.[77] Discussion on Pillars one and two has largely focused on a "responsibility to prevent" escalation towards a full scale atrocity-producing situation. As Edward C. Luck, the Special Adviser to the Secretary-General on RtoP, has stated, "early and constructive international engagement may make early warning unnecessary…Under pillars one and two the name of the game should be "prevention, prevention, prevention."[78] Effective Pillar Two action might include the deployment of UN observers, fact-finding missions as well as political, legal and economic measures including sanctions and suspension of privileges within the UN system. Since 2009, much constructive deliberation has centered on RtoP as a doctrine for prevention. The Secretary-General's emphasis in his 2010 report on early-warning mechanisms and increasing emphasis on local RtoP infrastructure at the regional and national level speak to this agenda.[79]

The Secretary-General's 2009 report on RtoP states that it is imperative that the three pillars are considered of equal length, strength and viability. In relation to Pillar three – the duty to take collective action in a timely and decisive manner – the report contends that this responsibility is generally understood too narrowly.[80] According to this line of reasoning, collective action under Paragraph 139 of the 2005 World Outcome Document is not necessarily to be construed as the authorization of force but rather the strategic mobilization of an array of peaceful and non-peaceful RtoP policy options. As such, collective action is to be tailored to the situation at hand on a "case-by-case" basis drawing on intervention prerogatives found within Chapters VI (pacific measures), VII (coercive measures) and VIII of the UN Charter (regional and subregional arrangements). This conception of Pillar three is also compatible with General Assembly prerogatives under Articles 10 to 14, as well as the Uniting for Peace procedure discussed above.

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[75] *Global Centre for the Responsibility to Protect* (GCR2P) Report, "Early Warning, Assessment, and the Responsibility to Protect": Informal Interactive Dialogue of the General Assembly held on 9 August 2010.
[76] See also S. Res. 1265, 17 September 1999 (protection of civilians in armed conflict); S. Res. 1296, 19 April 2000 (protection of civilians during armed conflict); and S. Res. 1325 (respect women's rights during armed conflict).
[77] S.G. Report to the UN G.A., "Implementing the Responsibility to Protect", p. 8-9
[78] *Global Centre for the Responsibility to Protect* (GCR2P) Report, "Early Warning, Assessment, and the Responsibility to Protect": Informal Interactive Dialogue of the General Assembly held on 9 August 2010.
[79] S.G. Report to UN G.A., "Early warning, assessment and the responsibility to protect," UN Doc. A/64/864, 14 July 2010.
[80] S.G. Report to the UN G.A., "Implementing the Responsibility to Protect", p. 9.

Nevertheless, operational questions of RtoP implementation have inevitably given rise to discussion of triggering events and the applicable scope of the norm. There has been a diversity of opinion expressed within the General Assembly on threshold and precautionary criteria for coercive intervention as well as the scope of RtoP application to crisis situations that may or may not fall within the set of established international crimes. As Stephen Toopes contends, "[t]he fact that the [2005 World Summit] Outcome tied the responsibility to protect to a set of established international crimes speaks to a number of the legality requirements…linking of the responsibility to existing legal categories significantly enhances the clarity of the triggering events and scope of the norm."[81]

The expansion of pillar three authority beyond the use of coercive measures to emphasize political mediation has been advanced with reference to practice, such as the bilateral, regional and global efforts mobilized to diffuse escalation of human rights crimes in Kenya following the disputed election in 2008. Broadening the scope of Pillar three action to include such pacific measures is not necessarily controversial in itself. However, it does raise the question of whether this development serves to move forward, or rather evade, the controversial debate surrounding the use of force on humanitarian grounds. This issue informed much of the 2009 General Assembly informal dialogue on RtoP with Member States, such as the Philippines, Rwanda, South Korea and Serbia, constructively highlighting the need to establish criteria for the use of force to protect populations from the four major crimes.[82] In contrast, such discussion was conspicuously absent from the 2010 informal dialogue with most delegations restricting their interventions to the contents of the Secretary-General's report on early warning, assessment and RtoP.

[81] Toope 2010

[82] See ICRtoP, *Report on the 2009 General Assembly Plenary Debate on the Responsibility to Protect*, 15 September 2009.