


2010

In Search of an “Action Principle”

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Recommended Citation

Glen, Patrick J. (2010) "In Search of an “Action Principle”," *Human Rights & Human Welfare*: Vol. 10: Iss. 1, Article 39.

Available at: <https://digitalcommons.du.edu/hrhw/vol10/iss1/39>



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In Search of an “Action Principle”

Abstract

In his seminal work on the history of scientific development, Thomas Kuhn described the structure of that development as revolutionary in nature, occurring at that point in time “in which an older paradigm is replaced in whole or in part by an incompatible one.” The impetus for this paradigm shift is malfunction—“scientific revolutions are inaugurated by a growing sense ... that an existing paradigm has ceased to function adequately in the exploration of an aspect of nature to which that paradigm itself had previously led the way... [T]he sense of malfunction that can lead to crisis is prerequisite to revolution.” Kuhn himself analogized his conception of the theory and operation of scientific revolutions to political revolutions, drawing out parallels in genesis, form and function between the two.

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Keywords

Political revolution, Responsibility to protect, Humanitarian intervention, International justice, International human rights, International criminal law

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working paper no. 61

In Search of an “Action Principle”

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Posted on 1 December 2010

<http://www.du.edu/korbel/hrhw/working/2010/61-glen-2010.pdf>

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IN SEARCH OF AN “ACTION PRINCIPLE”

INTRODUCTION

In his seminal work on the history of scientific development, Thomas Kuhn described the structure of that development as revolutionary in nature, occurring at that point in time “in which an older paradigm is replaced in whole or in part by an incompatible one.”¹ The impetus for this paradigm shift is malfunction—“scientific revolutions are inaugurated by a growing sense ... that an existing paradigm has ceased to function adequately in the exploration of an aspect of nature to which that paradigm itself had previously led the way.... [T]he sense of malfunction that can lead to crisis is prerequisite to revolution.”² Kuhn himself analogized his conception of the theory and operation of scientific revolutions to political revolutions, drawing out parallels in genesis, form and function between the two. The notion of revolutionary change, or paradigm shifts, itself provides a useful framework to judge the evolution, current state, and potential future of international human rights and criminal law. Although the analogy must necessarily be incomplete, as is the analogy between scientific and political revolutions, it does go a long way in explaining how the current system of international justice has reached its present state, and what may need to occur before that system can develop further.

The central focus of the instant article is on the emerging principle of the “responsibility to protect,” a principle still in its infancy almost ten years after its initial iteration. That principle itself is built of discrete smaller principles, which together build the overarching notion of a “responsibility to protect,” but for present purposes, this article is concerned only with the potential recourse to military or other definitive action in the face of a state’s failure to safeguard

¹ THOMAS S. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* 92 (Chicago: University of Chicago Press, 1996) (1962).

² *Id.*

its citizens.³ Using Kuhn as the backdrop, this article argues that the international justice system finds itself again at the threshold of a paradigm shift, one which, whether the community makes the shift or fails to make the shift, will have far-reaching consequences for international law and policy in the twenty-first century. In essence, the international community, confronted with continuing instances of genocide, crimes against humanity, and mass atrocities committed by states against their own populaces, finds itself desperately in need of an "action principle," a principle that can motivate and sanction actions by states in the interest of populations generally.

Despite much political rhetoric and posturing on the international stage, such a principle still escapes policy-makers and those with the will to act. This is not surprising considering the myriad interests that are often in play when members of the international community sit down and attempt to address specific and concrete realities and situations. Further, it should be noted at the outset that there may never come a time when a true action principle is embraced and utilized by members of the international community. Nonetheless, to cease striving for such a principle would be an abdication of responsibility by those who have the power to act. As Gareth Evans has written, "[i]t can only be a matter of time before reports emerge again, from Central Africa, Central or South Asia, the Balkans, or somewhere else, of massacres or mass starvation, rape or ethnic cleansing, occurring or apprehended."⁴ It would be nice if, for once, the international community actually had a plan and a course of action prepared for such occurrences that could be implemented and undertaken in time to halt the commission of crimes, rather than to simply wait and dispense post hoc "justice" after the fact. It is to this aim that the instant article is dedicated.

³ The "responsibility to protect" comprises three distinct responsibilities: the responsibility to react, with which this article is concerned, and the responsibilities to prevent and rebuild, each vitally important in their own right.

⁴ Gareth Evans, *The Responsibility to Protect: Rethinking Humanitarian Intervention*, 98 AM. SOC'Y INT'L L. PROC. 78, 80 (2004).

I. REVOLUTIONS IN INTERNATIONAL JUSTICE

Since the Treaty of Westphalia established the framework of the modern international order, there have been two major shifts in the world of international justice that could be construed, in the Kuhnian sense, as revolutions. The first occurred in the wake of World War Two with the trials of former political and military leaders of the defeated German and Japanese sides. The Nuremburg tribunal explicitly disallowed any defense based on sovereign immunity, *i.e.*, the position prevailing under the Westphalian conception of the state that a country's leaders would be immune to prosecution by other states.⁵ Although not entirely without precedent, and there are few innovations in international law and policy that are truly *sui generis*, Nuremburg represented a partial replacement of the Westphalian paradigm with a new paradigm in which state actors could be held accountable for certain crimes against their populaces. Returning to Kuhn, the paradigm shift itself is clear, and the fact that the Nuremburg principles only partially unraveled the sovereignty contemplated by the Treaty of Westphalia does not discount the revolutionary nature of this moment. Moreover, the malfunction-as-impetus is also apparent, although the shift is made *post hoc*—it is not a systemic malfunction that necessarily led to the shift away from Westphalia, but that shift occurred because, had the international community failed to make the shift, the malfunction would have been manifest. Those who committed the crimes of Nazi Germany could have been freed, and a dangerous precedent regarding international accountability would have been set.

The basic principle of Nuremburg, that a state's leaders will be held accountable for atrocities committed against its citizens, remained in the consciousness of international law, despite several years of somnolence, and returned with vigor in the last years of the Twentieth

⁵ See Geoffrey Robertson QC, *Ending Impunity: How International Criminal Law Can Put Tyrants on Trial*, 38 CORNELL INT'L L.J. 649, 650-56 (2005).

Century. In response to the atrocities committed during the disintegration of Yugoslavia and in Rwanda, the United Nations established ad hoc tribunals for the trial of those responsible. More recently, hybrid tribunals have been established in Cambodia and Sierra Leone. Yet despite the continuing vibrance of the Nuremburg principle, the international community's application of that principle was obviously and decidedly ad hoc—although perpetrators would be brought to justice, such justice remained dependent on the establishment of a specific forum for a specific situation.

Thus, the second revolutionary moment occurred at the point when international justice became institutionalized in the body of the International Criminal Court. This moment fits more neatly into the Kuhn analogy, as a "malfunction" was at least implicitly present—the cost and time involved with establishing a tribunal anew for each situation warranting justice—and the paradigm shift towards an institutionalized forum for administering international criminal justice at least partially replaced the prior system of ad hoc and national justice. National jurisdictions will continue to have a significant role to play in the system via the principle of complementarity, and nothing in the Rome Statute itself bars recourse to hybrid or other forms of ad hoc tribunals, yet insofar as it does present an entirely new and permanent forum for the administration of international criminal justice, the ICC is truly revolutionary in the Kuhnian sense. From its establishment on, and to the extent that crimes are committed within its temporal and substantive jurisdiction, it will be charged with the role of investigating violations of international criminal and humanitarian law, bringing appropriate charges, and trying the violators. And it will do all this from a permanent seat, with a full complement of judges, prosecutors, and staff, whose full time job will be international criminal law.

These first two moments have built off of each other, as the establishment of the ICC is a direct result of the continuing vitality of the Nuremburg principles and the international community's desire to see justice done when the worst atrocities are committed by state political and military leaders. So, to, have the cumulative "effects" of these preceding moments given rise to the current point of crisis in international criminal and human rights law, where, for the first time, the international community has begun to question to what extent the atrocities themselves may be halted prior to or during their commission, rather than simply punished post factum. To ultimately answer this question, however, means that one must return to the surviving aspects of Westphalia and rationalize one state's "meddling" into the sovereign domain of another state, a course of action effectively rendered impermissible by the founding document of the current international order, the United Nations Charter: "Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state[.]"⁶

The "malfunction" here is clear—a state's sovereignty, as traditionally conceived under the international system, in essence means that certain ongoing acts will be isolated from review by the international community, even if, under prevailing norms of international law, the perpetrators may ultimately be held to account for those atrocities. This dilemma was noted by former Secretary-General Kofi Annan over the course of several high-profile appearances and speeches from 1999 through 2001. In his speech to the Fifty-Fourth Session of the U.N. General Assembly, Annan stated that "[s]urely no legal principle—even sovereignty—can ever shield crimes against humanity."⁷ In his millennium report issued the following year, the dilemma was posed in more existential terms: "If humanitarian intervention is, indeed, an unacceptable assault

⁶ Charter of the United Nations, June 26, 1945, 3 Bevans 1153, article 2.7.

⁷ SECRETARY-GENERAL PRESENTS HIS ANNUAL REPORT TO GENERAL ASSEMBLY, U.N. Doc. SG/SM/7136 and GA/9596 (Sept. 20, 1999).

on sovereignty, how should we respond to a Rwanda, to a Srebrenica—to gross and systematic violations of human rights that affect every precept of our common humanity?”⁸ This course of thought culminated at the very moment that the new principle of a “responsibility to protect” became manifest. At his Nobel lecture in 2001, Annan stated emphatically that the “sovereignty of states must no longer be used as a shield for gross violations of human rights.”⁹ That same year, the International Commission on Intervention and State Sovereignty issued a report designed to meet the inherent tension between state sovereignty and the state’s continuing proclivity to commit atrocities against its own citizens. In the words of one prominent member, to meet these difficulties, the international community had “to rethink sovereignty in terms of its essence being not so much control as *responsibility*.”¹⁰ Thus, we find ourselves in the midst of the third (potentially) great, although currently incomplete, revolution in international criminal and human rights law.

II. THE RESPONSIBILITY TO PROTECT: FROM 2001 THROUGH THE PRESENT

The “responsibility to protect” was the result of the International Commission on Intervention and State Sovereignty’s 2001 report, *The Responsibility to Protect*.¹¹ This report, in the course of rethinking sovereignty-as-responsibility, premised the resulting conception of sovereignty on two basic principles: “a primary responsibility to protect lies with the state and a secondary or surrogate responsibility to protect falls to the international community when the state is unable or unwilling to halt or avert a population suffering serious harm, whether resulting

⁸ KOFI A. ANNAN, WE THE PEOPLES: THE ROLE OF THE UNITED NATIONS IN THE 21ST CENTURY 48 (2000), G.A. Resolution 2000, U.N. GAOR, 54th Sess., U.N. Doc. a/54/2000 (2000), available at <http://www.un.org/millennium>.

⁹ Kofi Annan, *Nobel Lecture* (Dec. 10, 2001).

¹⁰ Evans, *supra* note 4, at 82.

¹¹ INTERNATIONAL COMMISSION ON INTERVENTION AND STATE SOVEREIGNTY, THE RESPONSIBILITY TO PROTECT (2001).

from internal war, insurgency, repression or state failure.”¹² This conception of state sovereignty envisions a two-fold conception of state responsibility: a state is internally responsible to its citizens for the welfare of those citizens, and externally responsible to the international community for its internal actions.¹³ In essence, then, the Commission contemplated a “residual responsibility” on the part of the international community, to be activated: 1) when a particular state is clearly either unwilling or unable to fulfill its responsibility to protect; 2) when a particular state ... is itself the actual perpetrator of crimes or atrocities; or 3) where people living outside a particular state are directly threatened by actions taking place there.¹⁴

When this residual responsibility is activated, states in the international community may take coercive measures as against the offending state, which “may include political, economic, or judicial measures, and in extreme—but only in extreme—cases, they may also include military action.”¹⁵ The possibility of military action is central to the instant article, but as Evans noted, that possibility is accompanied by a number of difficult questions: “[W]hat is an extreme case? Where should we draw the line in determining when military intervention is *prima facie* defensible? What other conditions or restraints, if any, should apply in determining whether and how intervention should proceed? Most difficult of all, who makes all these decisions? Who should have the ultimate authority to determine whether an intrusion into a sovereign state, involving the use of deadly force on a potentially massive scale, should actually go ahead?”¹⁶ The Commission established six basic criteria that should govern the question of military intervention:

¹² Emma McClean, *The Responsibility to Protect: The Role of International Human Rights Law*, 13 J. CONFLICT & SECURITY L. 123, 127 (2008).

¹³ *Id.* at 128; Carsten Stahn, *Responsibility to Protect: Political Rhetoric or Emerging Legal Norm?*, 101 AM. J. INT’L L. 99, 104 (2007).

¹⁴ Stahn, *supra* note 13, at 104 (citing THE RESPONSIBILITY TO PROTECT 17).

¹⁵ Evans, *supra* note 4, at 84.

¹⁶ *Id.*

1. Just cause (the threshold for action)—military intervention should not be countenanced unless two potential situations are present: “large-scale loss of life, actual or apprehended, with or without genocidal intent, that is the product either of deliberate state action, state neglect or inability to act, or a failed state situation; or large-scale ‘ethnic-cleansing,’ actual or apprehended, whether carried out by killing, forced expulsion, acts of terror, or rape.”¹⁷ The Commission also noted that situations of natural disasters or catastrophes could also provide the catalyst for military intervention, “when the state concerned is unwilling or unable to cope or call for assistance, and significant loss of life is occurring or threatened.”¹⁸

2. Right intention—“The primary purpose of the intervention, whatever other motives the intervening states may have, must be to halt or avert human suffering.”¹⁹

3. Last resort—military intervention must always be an option of last resort: “Every diplomatic and nonmilitary avenue for the prevention or peaceful resolution of the humanitarian crisis must have been explored.”²⁰ The Commission hedged against the interminable delay a strict application of a “last resort” principle could lead to, noting that the requirement that military intervention must be a recourse of last resort “does not necessarily mean that every such option must literally have been tried and failed; often there will simply not be the time for that process to work itself out. What it does mean is that there must be reasonable grounds for believing that, in all circumstances, if the measure had been attempted it would not have succeeded.”²¹

¹⁷ *Id.* at 85.

¹⁸ *Id.*

¹⁹ *Id.* at 85-86.

²⁰ *Id.* at 86.

²¹ *Id.*

4. Proportionality—“The scale, duration, and intensity of the planned military intervention should be the minimum necessary to secure the humanitarian objectives in question.”²²

5. Reasonable prospects—“Military action can only be justified if it stands a reasonable chance of successfully halting or averting the atrocities or suffering that triggered the intervention.”²³

6. Right authority—the military intervention must derive its invocation from an international actor with the legal authority to authorize military interventions into a sovereign state.²⁴

The question of right authority is central to whether the “responsibility to protect” will ever become an efficacious principle of action. As Gareth Evans noted in the wake of the Commission’s report, “[w]hen it comes to authorizing military intervention for human protection purposes, the argument is compelling that the United Nations, in particular the Security Council, should be the first port of call. The difficult question—starkly raised by Kosovo—is whether it should be the last.”²⁵ Thus, although the Commission’s report made clear that the United Nations should be the first stop in obtaining authorization to intervene for protection purposes, it did not foreclose the option that states unilaterally, in coalitions, or under the auspices of regional organizations, could intervene if the United Nations failed to take appropriate action.²⁶

The issue of right authority was next taken up by the United Nations’ High-Level Panel on Threats, Challenges and Change, whose mandate encompassed issues mainly pertaining to

²² *Id.*

²³ *Id.*

²⁴ *Id.* at 86-88.

²⁵ *Id.* at 86-87.

²⁶ THE RESPONSIBILITY TO PROTECT 54-55; see Stahn, *supra* note 13, at 104; Rebecca J. Hamilton, *The Responsibility to Protect: From Document to Doctrine—But What of Implementation?*, 19 HARV. HUM. RTS. J. 289, 291 (2006).

institutional reform at the U.N. Unsurprisingly, then, the focus of the eventually issued report centered on the primacy of U.N. authorization, specifically via the Security Council.²⁷ “Unlike the Commission [], the panel did not envisage that an international responsibility to protect could be invoked by coalitions of the able or willing or regional organizations in the absence of Security Council authorization. The report stressed that the ‘emerging norm’ of a ‘collective international responsibility to protect’ was only ‘exercisable by the Security Council’ and only if military intervention was at stake.”²⁸ Again unsurprisingly, this same tact was presented in Secretary-General Annan’s 2005 report, *In Larger Freedom: Towards Development, Security and Human Rights for All*.²⁹ In this report, the “[u]se of force was described as an *ultima ratio* measure that, if taken, ought to be carried out by the Security Council. The notion of responsibility to protect was used to constrain, rather than to enable, the use of force.”³⁰ As Carsten Stahn noted, “the general focus of the report on the [Security] Council and the silence of the secretary-general on alternative means of carrying out interventions for purposes of human protection indicated a general reluctance to accept military action without the Security Council’s authorization.”³¹

Nonetheless, despite the United Nations own attempts to maintain not only a focus on the Security Council, but a monopoly of decision, gray area was restored to the “right authority” debate via the 2005 World Summit Outcome Document, the product of the High-Level Plenary Meeting of the 60th Session of the General Assembly.³² The relevant provisions of that

²⁷ See HIGH-LEVEL PANEL ON THREATS, CHALLENGES AND CHANGE, A MORE SECURE WORLD: OUR SHARED RESPONSIBILITY (2004).

²⁸ Stahn, *supra* note 13, at 106.

²⁹ See REPORT OF THE SECRETARY GENERAL, IN LARGER FREEDOM: TOWARDS DEVELOPMENT, SECURITY AND HUMAN RIGHTS FOR ALL (2005).

³⁰ Stahn, *supra* note 13, at 107.

³¹ *Id.* at 107-08.

³² G.A. Res. 60/1 (Oct. 24, 2005).

document are paragraphs 138 and 139, which embody the responsibility to protect and contemplate the circumstances when the residual responsibility of the international community may be activated. Paragraph 138 recognizes that “Each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity. This responsibility entails the prevention of such crimes, including their incitement, through appropriate and necessary means.” Turning from the state’s internal responsibilities, paragraph 139 addresses the external dimension of the state’s responsibility: “The international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapter VI and VIII of the Charter, to help to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity.” When that responsibility comes into play, the international community should be “prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, 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 are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity.”³³

The Outcome Document does not, contrary to the previous iterations by Annan and the High-Level Panel on Threats, Challenges, and Change, “firmly state that UN collective security action constitutes the only option for responding to mass atrocities through the use of force.... It leaves the door open to unilateral response through its ‘case-by-case’ vision of collective security and qualified commitment to act in cooperation with regional organizations (‘as appropriate’).”³⁴ Another commentator has posited that unilateral intervention may be contemplated upon the

³³ *Id.* at para. 139.

³⁴ Stahn, *supra* note 13, at 109.

satisfaction of three conditions: 1) one of a narrow set of "extreme human rights abuses" is present; 2) a course of international action has been exhausted or is infeasible ("the agreement implies a hierarchy of actors and of interventions: Good faith U.N. action is privileged over unilateralism and peaceful action is privileged over violent means."); and 3) the intervention is undertaken solely for purposes of protection.³⁵

Although the circumstances that may warrant a military intervention in the face of a state's failure to protect its own citizens are more or less clear, the course of conduct contemplated once those circumstances become apparent is less so. The four documents explored above diverge in this regard, with some contemplating potential unilateral or multilateral action outside the confines of the U.N. system if that system itself is unable to take the appropriate steps, while others view the U.N. as the sole permissible step on the enforcement side of the responsibility to protect. Unfortunately, until this dilemma is resolved, there is little reason to believe that the responsibility to protect, no matter how beautifully theorized, will have any relevance in practice.

III. THE RESPONSIBILITY TO PROTECT: AN EARLY FAILURE

Whether in the Congo, Sudan, Burma, or any of a range of other states, the responsibility to protect has failed as a principle in motivating a response to a state's clear abdication of its internal responsibility to protect its citizens. This failure can be attributed to a number of causes, including a lack of clear support for the principle in practice, *i.e.*, a lack of political will for broad implementation, an incompletely and potentially incorrectly theorized view of the "responsibility," and the pervasiveness at the United Nations and in foreign delegations of a paper culture antithetical to definitive action.

³⁵ See Alicia L. Bannon, *The Responsibility to Protect: The U.N. World Summit and the Question of Unilateralism*, 115 YALE L.J. 1157, 1158 (2006).

First, it is far from clear that there is currently, or ever will be, sufficient political will to make the responsibility to protect a political reality in those situations where its invocation would be needed. This is a distinct issue from those circumstances which present a need for invocation of the principle, but where action may be impossible from a logistical or operational perspective. The failure here is starker, as the international community *could* do something, but for failure to adequately mobilize political resources does not. The situation in Darfur is often viewed through this prism, as operational capacity has never been a real concern in planning on the ground aid and action. Rather, one of the many lessons of Darfur is that “even if operational targets can be met, they will not be met without political commitment.”³⁶ This situation, a failure of political will despite the capacity to act, is not particular to Darfur, but will infect every circumstance where the responsibility to protect is invoked, and this is true for a range of reasons, from individual apathy in the populations of other states to self-interest on the part of governments and international actors.³⁷ A failure of political commitment is fatal in these situations, as there is nothing outside the very imperative to action that these situations cry out for that can compel action on the part of states or international bodies. Yet unless this situation can be remedied, the enunciation of the “responsibility to protect” may well “merely mark the turn of another century of inaction in the face of mass human suffering.”³⁸

Second, it is also not clear that the principle has achieved any sort of real consensus regarding its scope and implementation in theory, making any practical application that much more difficult. Emma McLean has noted that “the change in language advocated by the ICISS report has done little to forge consensus or overcome the struggle between sovereignty and

³⁶ Hamilton, *supra* note 26, at 294.

³⁷ See Gareth Evans, *From Humanitarian Intervention to the Responsibility to Protect*, 24 WIS. INT’L L.J. 703, 720 (2006).

³⁸ Hamilton, *supra* note 26, at 297.

human rights.”³⁹ Despite paying lip-service to the responsibility to protect, many states still wish to maintain rigidly classic definitions of sovereignty, whether so they can keep a tight grasp on regions seeking independence, or because they simply want outside eyes averted from domestic issues. This inevitably means that the responsibility to protect cannot gain hard legal traction, as it remains simply a principle, or a soft law ideal, yet to coalesce around a definitive consensus of when and how sovereignty can be “side-stepped” in favor of international action.⁴⁰ Although the responsibility to protect itself should probably never become such a hard principle of law, as that would implicate the (unwise) establishment of a coercive regime for incidences of non-action,⁴¹ the foundations of the responsibility *must* rest on such hard legal “facts.” Such legal facts must include the extent of a state’s sovereignty and when sovereignty can cease to act as a cover for a state’s treatment of its own citizens, the circumstances when militarily coercive action can be resorted to, and what the nature of the military response could be, *i.e.*, international, unilateral, multilateral, regional. Until these definitional and legal issues are sorted out, the responsibility to protect will remain not only a point of soft law, but, for all intents and purposes, simple and superfluous verbiage.

Finally, despite any number of hortatory declarations of support, implementation of the principle is inevitably compromised by the fact that its implementation rests with an organization that largely finds written reports, reprimands, and censures sufficient to discharge its responsibility without getting its hands dirty with real action. The United Nations and any

³⁹ McLean, *supra* note 12, at 134 (internal quotation marks and citation omitted).

⁴⁰ *See, e.g., id.* at 135 (“At this juncture it is pertinent to recall that the responsibility to protect is not a legal principle. It is a policy option which the ICISS grounds on four pillars to support the position that a norm of intervention for human protection purposes in extreme cases of major harm to civilians is emerging.”); Stahn, *supra* note 13, at 120 (“Responsibility to protect is [] in many ways still a political catchword rather than a legal norm.”).

⁴¹ *See* Stahn, *supra* note 13, at 117 (“If the responsibility to protect were indeed a primary legal norm of international law, it would be logical to assume that such violations should entail some form of legal sanction in case of noncompliance. But it is uncertain on what basis and under which rules such violations could be remedied.”).

number of foreign ministries, including the United States Department of State, are paper cultures intricably bound to notions of bureaucracy and the interminable delay inherent therein. Thus, while many trumpet the idea of a responsibility to protect, there is little reason to believe that this responsibility will ever be put into action, as the individuals with the responsibility to act must go through any number of paper exchanges and reports before action could actually be countenanced. Indicative of this mindset are two recently issued reports, one by the United Nations, the other by the International Human Rights Clinic of Harvard Law School. The Harvard report dealt with the issue of international crimes being committed in Burma, and was overseen by veritable international jurists, among them, Richard Goldstone, Patricia Wald, and Sir Geoffrey Nice.⁴² The report noted the consistent course of grave violations of human rights law undertaken by Burma's military junta, and the fact that such violations had been extensively documented by the United Nations over the preceding decades in a range of reports and resolutions.⁴³ Noting these reports, however, the report did not question the efficacy of the United Nations, or advocate for actual action. Rather, it recommended recourse through the United Nations Security Council; specifically, that the U.N. should pass resolutions condemning the situation, the Security Council should establish a Commission of Inquiry to verify the violations, and then the Security Council should establish a judicial mechanism or refer the case to the International Criminal Court to address the violations.⁴⁴ It seems an odd conclusion to recommend further reports as the definitive action, when that very conclusion was derived from decades of reports that have obviously not impacted the situation in Burma at all.

⁴² See INTERNATIONAL HUMAN RIGHTS CLINIC, HARVARD LAW SCHOOL, CRIMES IN BURMA (May 2009).

⁴³ See *id.* at 3-4, 37-76.

⁴⁴ *Id.* at 77, 86-90.

This same flawed logic and lack of self-awareness is even more present in the Secretary-General's report on "implementing" the responsibility to protect.⁴⁵ The Secretary-General correctly noted, regarding genocide, that "[t]oo often, the international response has been inadequate. Far from being consigned to history, genocide remains a serious threat. Not just vigilance but a will to act are as important today as ever."⁴⁶ Nonetheless, any directive to act is almost immediately undermined in the same paragraph: "To this effect, my Special Advisor and his office continue to pursue a strategy of enhancing the United Nations' understanding of genocide and its precursors, of strengthening the ways in which existing international law can be used to prevent genocide and, above all, of monitoring and analyzing ongoing situations of concern and advising me and Member States as needed."⁴⁷ This inaction is manifest even in the monitoring of actual, rather than apprehended, incidents. Regarding the breakdown in the Congo, "[t]hroughout 2008, my Special Advisor on the Prevention of Genocide *has followed* the situation in the eastern DRC ... with considerable concern.... *From his meetings and observations*, my Special Advisor concluded *that there is cause for deep concern regarding the grave human rights and humanitarian situation in North Kivu, including the risk of genocidal violence[.]*"⁴⁸ The basic thrust of this report is the establishment of a framework of analysis "to determine whether there may be a risk of genocide in a certain situation."⁴⁹

The framework uses eight questions to prompt information collection and analysis of key areas: 1) the existence and vulnerability of national, ethnic, racial or religious group(s); 2) human rights violations committed against the group(s); 3) domestic capacity to prevent genocide; 4) the existence of armed opposition actors; 5) the existence of any significant political or economic motivation encouraging political leads to stroke divisions between groups; 6) whether

⁴⁵ *Implementing the Responsibility to Protect—Report of the Secretary-General, A/63/677, January 2009*, 21 INT'L J. REFUGEE L. 519 (2009).

⁴⁶ *Id.* at 536.

⁴⁷ *Id.*

⁴⁸ *Id.* at 531.

⁴⁹ *Id.* at 519-20.

elements of the crime of genocide are already occurring; 7) whether there are moments of particular vulnerability approaching; and 8) whether there is a discernible intent to commit to destroy a national, ethnic, racial or religious population group.⁵⁰

One can imagine a genocide being completed in the time that the United Nations will take to answer these questions which, it bears mentioning, will only “prompt information collection and analysis” even if a risk of genocide is apprehended! The kind of analysis and assessment noted by the United Nations, and undertaken by the Harvard clinic, are important and have a place within the international justice framework. At some point, however, the proliferation of reports cannot help but have a deleterious impact on the will to act, as seems clearly the case at this stage in the development of the responsibility to protect. Too many actors and policy makers seem content on writing about why and in what situations the responsibility should be engaged, rather than in undertaking the necessary steps to ensure implementation on the ground. Yet, as is obvious, no matter how beautiful the language or theory of the responsibility is, if it cannot *protect* in practice, it is not worth the paper these reports are written on. As Gareth Evans has written, “[w]e cannot be content with reports and declaration. We must, as an international community, be prepared to act. We will not be able to live with ourselves if we do not.”⁵¹

IV. TOWARDS A PRINCIPLE OF ACTION

If the responsibility to protect, as currently conceived and implemented, is flawed and incapable of realizing its inherent promise, how can the international community proceed towards a principle of action that can provide the requisite impetus in a Darfur or Burma? In order to realize such a principle of action, the responsibility to protect simply has to be more tightly and coherently theorized, specifically in relation to the types of overtly coercive responses

⁵⁰ *Id.* at 520, 522-24.

⁵¹ Evans, *supra* note 4, at 89.

it will countenance under its name, *i.e.*, how military action may be undertaken. This may be the most important aspect regarding moving forward, but all the hard legal "facts" noted in the preceding section must be dealt with explicitly and comprehensively, which has only occurred to a limited degree thus far. Specifically, the limitations on a state's sovereignty must be addressed, the circumstances warranting an overt and physical response must be categorized, and the permissible nature of that response must be delineated.

As an initial matter, however, the "theory" of the international community's residual responsibility must be more fully developed. The "responsibility to protect" asserts that a state has an internal responsibility to protect its citizens, and an external responsibility to the international community to assure that it does fulfill its domestic responsibilities.⁵² Only when the state shirks the internal dimension of its responsibility may the international community's responsibility be engaged. Rather than view the international community's "residual" responsibility as derivative of the state's internal responsibility, that responsibility should derive directly from the corpus of international human rights and criminal law, *i.e.*, the international community has a responsibility to enforce a state's compliance with its obligations under international law, and when a state fails to fulfill those mandates, coercive action by the international community is permissible. Although a state does have an external responsibility to the international community to ensure its own compliance with its international obligations, this responsibility is not one which implicates the domestic populace or should engage any international responsibility. It is a traditional state-to-state conception of responsibility, and recourse for violations in that sense should be confined to traditional avenues of international dispute settlement. Any responsibility undergirding the international community's call to action

⁵² See McClean, *supra* note 13, at 128; Stahn, *supra* note 14, at 104.

in “responsibility to protect” situations should be based not on this external dimension of the state’s responsibility, but on the international community’s duty to ensure compliance with international law.

Regarding limitations on a state’s sovereignty, it is still accepted that so long as a state complies with its obligations to its citizens, its internal actions will avoid external scrutiny. There is a growing consensus, however, that when this responsibility is neglected, any defense to external scrutiny based on sovereignty is weak, at best. This fact is derived from the legal obligations undertaken by the state on behalf of its citizens, and the understanding that a state may not commit atrocities against its subject populace: “If nations have no sovereign right to commit or passively permit atrocities against their own populations, then they cannot object on sovereignty grounds to coercive actions halting the commission of those atrocities.”⁵³ Thus, the issue of sovereignty need not be dealt with in a necessarily expansive manner. It is sufficient, for purposes of discerning when action is warranted, to address solely those grave circumstances where the state is actively committing atrocities against its populace. In those circumstances, a state simply does not have any cognizable defense to intervention, as it is itself committing crimes under international law which the intervention is designed to stop. Accordingly, this provides the first legal peg of support for a principle of action: action can proceed against a state that is committing crimes against its population in violation of international law, because that state lacks any colorable sovereignty defense.

But what crimes will trigger this “abrogation” of sovereignty?

Any inclination towards adventurism on the part of the members of the international community can be tempered by making clear that a military intervention will only be triggered

⁵³ Bannon, *supra* note 35, at 1162.

by the worst abuses of a state. Election fraud or electoral corruption would be an insufficient basis to justify a military response, making action unjustified based on the recent elections in Iran and the previous disputed elections in Kenya and Zimbabwe. Violations of other human rights, *i.e.*, religious freedom, rights of association, freedoms of speech and the press, are also not actions that should trigger an overt military response. This is not to say that these rights are not extraordinarily important or that some other form of coercive response should not be contemplated and implemented—it is solely to recognize that not every violation of a right cognizable under international law can give rise to the most extreme response. Rather, the ICISS report has basically gotten it right in categorizing those circumstances where a state's actions against its citizens will give rise to colorable grounds for military intervention: where there is "large-scale loss of life, actual or apprehended, with or without genocidal intent, that is the product either of deliberate state action, state neglect or inability to act, or a failed state situation; or large-scale 'ethnic-cleansing,' actual or apprehended, whether carried out by killing, forced expulsion, acts of terror, or rape."⁵⁴ Additionally, intervention will be countenanced when a state is unwilling or unable to take necessary steps to protect its populace in the wake of a natural disaster or catastrophe.⁵⁵ Burma's inexcusable delay and ultimately ineffectual response to Cyclone Nargis is just such an example.

To this list should be added a state's commission of crimes against humanity, as defined by the Rome Statute. This would include as a trigger for a military response a state's commission of enslavement, deportation or forcible transfers of segments of the population, torture, persecution, state-sponsored disappearances, and other inhumane acts of a similar

⁵⁴ Evans, *supra* note 4, at 85.

⁵⁵ *Id.*

character.⁵⁶ Although these acts are justifiably seen as reprehensible, the criticism may be leveled that to include crimes against humanity as a trigger for military action increases exponentially those circumstances where such action could be justified. The line between persecution and deprivation of religious freedoms, for instance, may be gray, and there are no good reasons for including crimes against humanity on the one hand, while excluding similarly egregious violations of human rights on the other. In practice, and in correctly applying the definition of crimes against humanity, including this class should not unduly expand the range of circumstances where a military action may be countenanced, mainly on account of the inherent jurisdictional limitation of “crimes against humanity.” The acts noted above are not crimes against humanity when viewed in isolation, or necessarily even when viewed in the aggregate: rather, to constitute crimes against humanity, a state must be committing the listed acts, and the state’s commission of those acts must be widespread or systematic, and the attacks must be directed at a civilian population.⁵⁷ Considering the prevailing international law definitions of “widespread” and “systematic,” it is unlikely that including crimes against humanity as a trigger to action would lead to action in any but the most egregious circumstances.⁵⁸ Thus, once a state’s sovereignty has been pierced by its commission of atrocities against its citizens, military action can be countenanced if those atrocities constitute genocide or mass killings, or crimes against humanity, or if the state fails to take reasonable responsive action in the face of a natural disaster or catastrophe to the significant detriment of its population. This is the second legal peg on which any claim of military action must be hung.

⁵⁶ Rome Statute of the International Criminal Court, art. 5(1)(b), U.N. Doc. 1998, A/CONF. 183/9 (July 1, 2002).

⁵⁷ *Id.* at art. 7(1).

⁵⁸ *See, e.g.*, Prosecutor v. Rutaganda, Case No. ICTR-96-3-T, Judgment, ¶ 69 (Dec. 6, 1999) (“‘widespread,’ as an element of crimes against humanity, was defined in the Akayesu Judgment, as massive, frequent, large scale action, carried out collectively with considerable seriousness and directed against a multiplicity of victims, whilst ‘systematic’ was defined as thoroughly organised action, following a regular pattern on the basis of a common policy and involving substantial public or private resources.”).

This leaves, of course, perhaps the most contentious aspect of any principle of action—when can action be resorted to and who is charged with the responsibility of acting?

Much of the debate over the “responsibility to protect” has taken place within the context of “growing concern as to the effectiveness of the [United Nations], in particular the Security Council, to respond to genocide, ethnic cleansing and other mass human rights violations.”⁵⁹ The United Nations generally, and the Security Council specifically, proved ineffectual in the face of genocide in Rwanda and ethnic cleansing and forced displacements of persons in Kosovo, and has thus far failed to act with any sort of efficacy in Sudan, Burma or Congo. Yet the fact remains that the United Nations and the Security Council are the preeminent legal-political institutions under international law, for better or for worse, and thus, there is a compelling argument that before any military action can be undertaken, the Security Council must be consulted.⁶⁰ Nonetheless, there are also compelling reasons for not consulting the Security Council. Its members vested interests may often block definitive action in a state where action is sorely needed, such as in Darfur, where China has substantial oil interests in Sudan and is loathe to risk those interests on humanitarian grounds. Self-interest leads to two distinct problems. First, self-interest, if it proceeds through incrementalism, may delay any action by the Security Council until far past the time when action could have been efficacious in halting the commission of atrocities. Second, if self-interest leads to a more definitive refusal of action, say through an explicit veto of a contemplated course of action, the Security Council’s refusal to act will inevitably call into question any actions that are ultimately contemplated or undertaken by a state singularly or in a coalition of other like-minded actors in the wake of the United Nations’ failure to act. Thus, a pall may be cast over any eventual action. Of course, delay may become

⁵⁹ McLean, *supra* note 13, at 124.

⁶⁰ See Evans, *supra* note 4, at 86-87.

manifest even if no self-interest problems are present. As noted previously, the United Nations is largely a paper culture, and so even if the Security Council may be inclined towards action, no action will be implemented until a significant number of rounds of investigation, reporting, and debate have taken place. As with the “analysis of genocide” proposed by the Secretary-General in his report on implementing the responsibility to protect, one can very well image the completion of genocide or crimes against humanity in the time it may take the Security Council to act.

This article is not the place to argue for comprehensive United Nations’ reform or for a position that would blatantly ignore that body’s prerogatives regarding international law and intervention. Nonetheless, it is clear that some mechanism must be put into place that will assure at least the possibility of a course of action in the face of United Nations inaction. Thus, recourse to unilateralism and multilateralism *must* be countenanced by a fully theorized responsibility to protect. The main question that needs to be answered in that context, then, is when can such action be resorted to?

Assuming for purposes of this article that the Security Council, or, more generally, the United Nations, should be the first step in seeking sanction for the use of military action against a state that has failed in its responsibility to protect, alternative courses of action should be permitted when it becomes apparent that the Security Council is either unable or unwilling to act. Thus, there needs to be a requirement of exhausting available U.N. remedies prior to undertaking a unilateral or multilateral response, but the exhaustion requirement has to be read in a pragmatic, not formal sense. In line with Gareth Evans, it is not necessary that every potential remedial course via the Security Council be attempted and fail prior to undertaking alternative courses of action—a state ready to take action need only be certain that all international courses

have been explored and have either failed or further attempts would be futile.⁶¹ This is a necessarily subjective test—when further courses of action will be deemed futile will obviously depend on the perspective of the state seeking sanction for action, and there is, unfortunately, no bright-line rule for when, in any given situation, the Security Council has become “irrelevant.” To require some level of exhaustion, however, assures that the United Nations will be the first stop in seeking sanction to any military action, which should, in turn, assure that body a place in the debate about whether coercive military action is justified and provide it with an opportunity to undertake *its* obligation to protect subjugated populaces.

If, however, it fails in this obligation, as seems increasingly likely given its track record over the preceding decades, the responsibility to protect must be theorized in such a way as to provide explicit legal cover for action on the part of single states, multilateral coalitions, or regional actors. In most circumstances, these types of responses will be all that is available, either because of self-interest on the part of Security Council members or the general apathy at the United Nations towards action. The failure of the United Nations to act, however, should not be an obstacle in the road to others exercising their responsibility to protect. Nor are there any fatal criticisms to allowing unilateral or multilateral action in these circumstances. Unilateralism is almost a non-starter, as there are few, if any countries, with the ability to intervene unilaterally in the circumstances contemplated by the responsibility to protect. The United States, perhaps the only country with both the resources and will to undertake such interventions, is reeling from two current wars and is unlikely to undertake, unilaterally, any new obligations. In any event, any eventual action is still constricted by threshold requirements that would have to be met, even if unilateral or multilateral action is taken outside the confines of Security Council sanction.

⁶¹ *Id.* at 86.

Permitting such action does not create a “wild west” type of atmosphere where any gunslinger-country can ride to the rescue of an afflicted population. Such intervention can only occur once a state has failed in its own duty to protect its citizens, and the actions being undertaken in that state rise to the requisite level of severity to warrant forcible intervention. In short, the responsibility does not grant a *carte blanche* to willing states. Additionally, so long as the responsibility is grounded on the legal pegs noted above, no claim can be made that the intervention itself, even if it does occur through a “coalition of the willing” rather than under the auspices of the U.N. blue hats, is impermissible. Any intervention will occur only under the legal principles that sovereignty is limited, and that the offending state’s sovereignty has been pierced by its active commission of heinous crimes against its own population. Finally, and also unfortunately, self-interest, when present, will likely act *against* the principle of intervention, not in favor of action.

The Bush administration’s invasion of Iraq has done much to temper the international community’s desire to intervene in humanitarian situations. This is unfortunate, not least so because any humanitarian justification for that invasion was decidedly *post hoc* and not relevant to the initial decision to invade.⁶² Those with the power to act now cannot be lead astray by the hang-over of that “misadventure.” Action outside the Security Council in responsibility to protect situations must be sanctioned, as in the bulk of such situations, that will be the only true action that is likely to occur. This is embarrassingly apparent from shots of U.N. “peacekeepers” standing by in the midst of the Rwandan genocide, to NATO’s lead role in Kosovo after the Security Council’s inexcusable abdication of responsibility, and to the lead role of African states and regional organizations in Congo and Darfur. If the responsibility to protect is to attain the

⁶² Paul Wolfowitz, *Realism*, FOREIGN POL’Y, Sept.-Oct. 2009, 66-72.

status of an action principle, then U.N.-fetishism must be jettisoned in favor of a more pragmatic outlook on international law and policy. Sanctioning the types of alternative action contemplated by this article, and in those circumstances where such action is warranted, would go a long way in making such an action principle a reality.

CONCLUSION

There is a serious malfunction in the current operation of international human rights and criminal law, as states continue to commit mass atrocities against their own populations. Although the "responsibility to protect" does represent a partial shift away from the prevailing paradigm, whereby a state is largely unaccountable during the commission of such acts, it has thus far been ineffectual in marshaling action against offending states. This is so for a number of reasons, but most importantly because implementation of a plan of action is too dependent on the United Nations and the Security Council. If a true "action principle" is to be realized in the near future, unilateral and multilateral action in the face of United Nations inaction must be sanctioned by the international community. The fears surrounding such a move are largely unfounded and, in any event, the potential gains to be realized far outweigh any of the associated costs. Although some have sought a balancing in these situations, weighing the harm to the Security Council if action is undertaken outside its purview against the harm to populations in the face of non-action, there is another dimension to this analysis, namely the harm to the international system when states are permitted to flaunt international law with impunity in the commission of crimes against their populations. Darfur, Burma, and North Korea, to name a few, are horrendous situations not only for the human cost associated with the regimes' misdeeds, but also because the very existence of these regimes seems a repudiation of those human rights that have grounded the international order since the birth of the United Nations.

Now is finally the time for action and the time to cease hiding behind reports and other instruments of interminable delay. For if we fail to act now, in light of decades of accumulated knowledge, “we will not be able to live with ourselves.”⁶³

⁶³ Evans, *supra* note 4, at 89.