Whither the Responsibility to Protect? Humanitarian Intervention and the 2005 World Summit

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In the months immediately following NATO’s contentious intervention in Kosovo, Kofi Annan reflected on the dilemma of humanitarian intervention. “On the one hand,” he asked, “is it legitimate for a regional organization to use force without a UN mandate? On the other, is it permissible to let gross and systematic violations of human rights, with grave humanitarian consequences, continue unchecked?” Annan challenged international society to avoid “future Kosovos” (cases where the Security Council considers action but is deadlocked about whether to intervene to prevent humanitarian crises from worsening) and “future Rwandas” (cases where the Security Council fails even to consider taking decisive action in the face of genocide, mass murder, and/or ethnic cleansing). The challenge was taken up by scholars and political leaders, most notably by the International Commission on Intervention and State Sovereignty (ICISS), an independent panel partly funded by the Canadian government. In its report, The Responsibility to Protect, the ICISS insisted that the primary responsibility for protecting civilians lay with the host state and that outside intervention could only be contemplated if the host proved either unwilling or unable to fulfill its responsibilities.

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* I would like to thank Paige Arthur, Luke Glanville, Justin Morris, Paul D. Williams, Nicholas J. Wheeler, the three anonymous reviewers for Ethics & International Affairs, and especially Sara E. Davies for their help and advice in preparing this article.


2 Nicholas J. Wheeler, “A Victory for Common Humanity? The Responsibility to Protect after the 2005 World Summit” (paper presented to a conference on “The UN at Sixty: Celebration or Wake?” Faculty of Law, University of Toronto, October 6–7, 2005), p. 1.

After the publication of *The Responsibility to Protect*, the ICISS’s commissioners and supporters lobbied hard to persuade states to endorse the concept and to adopt it at the 2005 World Summit. They appeared to succeed. Paragraphs 138 and 139 of the summit’s outcome document stated:

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. We accept that responsibility and will act in accordance with it. The international community should, as appropriate, encourage and help States to exercise this responsibility and support the United Nations in establishing an early warning capability.

The international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the Charter of the United Nations, to help protect populations from war crimes, ethnic cleansing and crimes against humanity. In this context, we are 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. The clause received a mixed reception among commentators. Some, such as Todd Lindberg, viewed it as a “revolution in consciousness in international affairs,” a departure in the relationship between sovereignty and human rights. According to Lindberg, the declaration replaced the state with human individuals as the primary focus of security and deterritorialized protection by giving all states a responsibility to uphold and protect basic human rights regardless of where they were violated. Others were more equivocal. Michael Byers, for instance, argued that the World Summit watered down the concept of the responsibility to protect to such an extent that it would not, in practice, afford protection to threatened populations and might even limit the

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4 Throughout this article, “the responsibility to protect” refers to the concept and *The Responsibility to Protect* to the ICISS report.


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Security Council’s ability to respond decisively to man-made humanitarian disasters.\(^7\)

This article evaluates these two positions by asking whether the incorporation of the responsibility to protect clause into the outcome document of the 2005 World Summit indicates a meaningful change in the norm of humanitarian intervention in both a prescriptive and permissive sense.\(^8\) The former (prescriptive) refers to the need to prevent future Rwandas by persuading states—particularly those with the capacity to act—to assume responsibility for the protection of imperiled peoples. After all, as Simon Chesterman pointed out, it is political will, not sovereignty considerations, that ultimately determines whether or not states intervene.\(^9\) Humanitarian intervention is therefore only likely when states feel obliged to act, be it for humanitarian or self-interested reasons.\(^10\) The latter (permissive) refers to the political costs associated with intervention. If, as constructivists argue,\(^11\) rule breaking attracts political costs, a permissive norm of intervention that may, for instance, tolerate intervention in clear cases of extreme human suffering with only the implied authorization of the Security Council\(^12\) would minimize those costs, enabling intervention and avoiding the fractious debates that accompanied NATO’s intervention in Kosovo.

The article proceeds in three parts. The first identifies the two strategies developed by the ICISS to achieve the goal of preventing future Rwandas and Kosovos and notes problems inherent in those strategies. The second part identifies four processes that played a pivotal role in getting the responsibility to protect clause into the outcome document. The third part of the article returns to the outcome document to detail some of the critical changes to the responsibility to protect. In concluding, I argue that the responsibility to protect statement in the outcome document has done little to increase the likelihood of preventing future


\(^8\) The idea of distinguishing between the prescriptive and permissive elements of the humanitarian intervention norm was suggested to the author by Luke Glanville.


Rwandas and Kosovos. Perhaps more worrying is that in order to secure consensus, the concept’s advocates have abandoned many of its central tenets, significantly reducing the likelihood of progress in the near future.

RESPONSIBILITY TO PROTECT: TWO STRATEGIES

The Responsibility to Protect adopted two strategies for preventing future Rwandas and Kosovos. Both attempted to encourage and enable intervention in genuine humanitarian emergencies—while also constraining the use of humanitarian arguments to justify other types of force—by changing the terms of the debate. Indeed, the importance of language in shaping the way the world responds to humanitarian crises was acknowledged by three of its key progenitors.\(^{13}\) The first strategy was to set down the parameters of responsibility—that is, by defining the circumstances in which international society should assume responsibility for preventing, halting, and rebuilding after a humanitarian emergency and placing limits on the use of the veto, the commission aimed to make it more difficult for Security Council members to shirk their responsibilities.\(^ {14}\)

The ICISS proposed two just cause thresholds (mass killing and ethnic cleansing), and insisted that when the host state was either unwilling or unable to prevent or halt these wrongs, the responsibility for doing so would fall on international society generally and the Security Council in particular. The council’s permanent five members (P-5) would be invited to commit themselves to not casting their veto in such cases unless their vital national interests were at stake, and, by shifting the presumption away from sovereignty and toward responsibility, Security Council members would be obliged to publicly justify their positions.\(^ {15}\) On the one hand, by creating common benchmarks, these measures would empower UN members and domestic publics and enable them to insist that Security Council members assume their responsibilities and take action in humanitarian crises. On the other hand, by forcing states to publicly defend their

\(^{13}\) Lloyd Axworthy, Gareth Evans, and Ramesh Thakur. See “Responsibility to Protect: Redefining Sovereignty,” MacArthur Newsletter (Summer 2005), p. 9. I am grateful to one of the anonymous reviewers for bringing this to my attention.

\(^{14}\) The importance of generating political will was understood at the outset by the ICISS commissioners. See Gareth Evans and Mohamed Sahnoun, “The Responsibility to Protect,” Foreign Affairs 81, no. 6 (2002), pp. 99–110.

\(^{15}\) ICISS, The Responsibility to Protect, paras. 6.19–6.21. ICISS (para. 6.21) reported that this proposal was presented to the Commission “in an exploratory way by a senior representative of one of the Permanent Five Countries.”

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positions by reference to the just cause thresholds and precautionary principles (right intention, last resort, proportional means, reasonable prospects), the ICISS’s proposals would constrain states that may wish to oppose intervention for selfish reasons. The ICISS insisted that states wishing to pursue intervention on humanitarian grounds present their case to the council and force those reluctant to endorse action to vote against it and publicly defend their positions. Confronted with a genuine humanitarian emergency and unable to justify opposition on humanitarian grounds, the thinking went, anti-interventionist states would be reluctant to block collective action.

The second strategy, closely allied to the first, was to use language to guard against potential abuse. As Thomas M. Franck and Nigel S. Rodley first noted, abuse refers to the use of humanitarian arguments to justify interventions that are anything but, and it was a recurrent feature of state practice prior to 1945. The principal objections to The Responsibility to Protect immediately after it was published came from states and commentators worried about the widened potential for abuse that may accompany any relaxing of the general prohibition on force contained in Article 2(4) of the Charter. David Chandler, for instance, described the report as an argument for lawmaking by the Western elite. Among states, this view was most clearly expressed by Venezuela, which argued that the responsibility to protect would merely serve the interests of the powerful by granting them more freedom to intervene in the affairs of the weak without necessarily increasing global cooperation in response to humanitarian emergencies.

According to the ICISS commissioners, the just cause thresholds and precautionary principles constituted an important barrier to abuse. By establishing a common framework that interveners would use to justify acting and that others would use to evaluate and judge those claims, the responsibility to protect would make it harder for states to abuse humanitarian claims.

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The Responsibility to Protect aimed to inhibit the abuse of humanitarian justifications by insisting that intervention was legitimate only in response to mass murder and ethnic cleansing and where the four precautionary principles were satisfied.

The ICISS intended this dual strategy to help avoid future Rwandas by making it harder for the world’s powerful states to avoid assuming responsibility in the face of a supreme humanitarian emergency and to prevent future Kosovos by encouraging potential interveners to justify their actions by reference to the just cause thresholds and precautionary principles, while constraining the ability of opponents to cast what Tony Blair described as “unreasonable” vetoes.

Although the use of the enabling and constraining functions of argument to encourage states to act on the responsibility to protect was an innovative attempt to move humanitarian intervention beyond the divisive and irresolvable struggle between defenders of human rights and advocates of sovereign inviolability, there are at least three inherent problems with this approach. The first is the problem of indeterminacy. Once criteria have been propagated and established as a norm, the propagators of the norm cannot control its application. As Nicholas Wheeler has pointed out, there is no guarantee that when confronting a humanitarian emergency, states would agree that the just cause threshold had been crossed, or the precautionary principles satisfied. Moreover, there is an inherent tension between The Responsibility to Protect’s two strategies: one aimed at enabling “genuine” humanitarian interventions, the other at preventing “abuse.” The problem of indeterminacy means that there is nothing to prevent states from using the latter mechanism to prevent action in supreme humanitarian emergencies by, for example, arguing that the just cause threshold had not been crossed or that the host state rather than the Security Council should take measures to remedy the problem. This is precisely

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21 This is Wheeler’s term. See Wheeler, Saving Strangers, p. 34.
22 For a discussion of the unreasonable veto argument, see Nicholas J. Wheeler and Tim Dunne, “Moral Britannia: Evaluating the Ethical Dimension in Britain’s Foreign Policy,” Foreign Policy Centre, April 26, 2004, pp. 28–32; available at fpc.org.uk/fsblob/233.pdf.

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how several Security Council members used responsibility to protect language in 2004-5 to oppose intervention or sanctions against Sudan for its complicity in the humanitarian catastrophe in Darfur.25

The second problem is that, in adding further ambiguity to the application of the right of humanitarian intervention by attempting to legislate for unauthorized intervention in cases where the Security Council is deadlocked, *The Responsibility to Protect* places great emphasis on the factual elements of each case. Assessments of factual evidence are never politically neutral, however, and the emphasis on “facts” gives the powerful an opportunity to sway others by bringing financial, military, and political pressure to bear.26 As Byers argues in relation to preemption, this means that it is more likely that the criteria would be regarded as satisfied “when the United States wished to act militarily than when others wished to do the same.”27 It is certainly the case that states that are out of favor in the West would have a much more difficult time persuading the most powerful members of international society of their cause than would the United States and its allies. That is not to say that the West’s claims would always be generally accepted, as both Iraq and Kosovo demonstrate to differing degrees. It does mean, however, that absent support in the West, humanitarian intervention by non-Western states is much less likely to be legitimated, regardless of the nature of the humanitarian criteria.

The third problem with the twin strategies developed by the ICISS is that the prescriptive component relies on the idea that governments can be persuaded to act in humanitarian crises by the force of international and domestic opinion. Put simply, the basic proposition is that if the Security Council were to commit to *The Responsibility to Protect*, its members could be held to account by their fellow states, world society, and domestic electorates. This, the argument follows, would significantly strengthen the moral authority of those states lobbying for action in cases that clearly crossed the just cause threshold. Had *The Responsibility to Protect* been in place in 1994, activist Security Council members such as New Zealand and the Czech Republic, the international media, and domestic publics might have shamed powerful states into action by

25 Alex J. Bellamy, “Responsibility to Protect or Trojan Horse? The Crisis in Darfur and Humanitarian Intervention after Iraq,” *Ethics & International Affairs* 19, no. 2 (2005), pp. 31–54.


prohibiting them from plausibly justifying inaction by reference to the responsibility to protect norm. 28

This view not only overlooks the problem of indeterminacy, however, but is also based on an unproven assumption that external pressure can persuade states to act in humanitarian crises. There are, at best, two cases that seem to support this assumption: the American decision to intervene in Somalia in 1992 and the Australian decision to intervene in East Timor seven years later. Although humanitarian concern played a significant role in the Somalia case, insiders report that the administration and Congress responded directly to images of humanitarian disaster in a context where the Pentagon was advising that armed intervention would be relatively risk-free. There is no evidence that the United States was pressured into acting by external forces. Indeed, as Susan L. Carruthers pointed out, intense media interest in Somalia came only after the administration announced its intention to assist. 29 In the case of East Timor, Australian public opinion played a vital role in changing the government’s policy, but there were significant limits on how far Australia was prepared to go. While policy insiders commented that “no Australian government could have survived if it stood by and did nothing” 30 in response to the militia violence that accompanied East Timor’s vote for independence, Australia insisted that it would intervene only if the mission was authorized by the Security Council and approved by the government of Indonesia. The delays this caused meant that although Australia did intervene, intervention came only after the worst of the violence was over. 31 In other cases, such as Kosovo, governments led the public in creating the perceived necessity of intervention, and in still others, most notably Bosnia, Rwanda, and Darfur, governments proved impervious to external pressure in the face of a supreme humanitarian emergency and public pressure. The point here is that there is little evidence to suggest that states intervene in foreign

28 The problem for activist nonpermanent members was exacerbated by the lack of quality information provided by the UN secretariat. After briefings by NGOs that confirmed that genocide was under way in Rwanda, the activist states were resolutely blocked by three permanent members (the United States, China, and the U.K.) and found it difficult to mobilize the nonaligned members to bring pressure to bear on the permanent members. See Colin Keating, “Rwanda: An Insider’s Account,” in David M. Malone, The UN Security Council: From the Cold War to the 21st Century (Boulder, Colo.: Lynne Rienner, 2004), pp. 500–11.


30 Quoted by Peter Chalk, Australian Foreign and Defence Policy in the Wake of the 1999/2000 East Timor Intervention (Santa Monica, Calif.: RAND Corporation, 2001), p. 42.

31 See Michael G. Smith, Peacekeeping in East Timor: The Path to Independence (Boulder, Colo.: Lynne Rienner, 2003).
emergencies because they are in some sense morally shamed into doing so by either domestic or global public opinion.

SELLING THE RESPONSIBILITY TO PROTECT

The Responsibility to Protect was received most favorably by such states as Canada, Germany, and the U.K., which had, since the 1999 Kosovo intervention, been exploring the potential for developing criteria to guide global decision-making about humanitarian intervention.\(^{32}\) Other advocates included Argentina, Australia, Colombia, Croatia, Ireland, South Korea, New Zealand, Norway, Peru, Rwanda, Sweden, and Tanzania, though South Korea, for example, argued that the UN should create clear mechanisms and modalities to limit the extent to which the responsibility could be invoked to override sovereignty.\(^{33}\)

With the partial exception of the U.K., the P-5 was skeptical from the outset. When the Security Council discussed the report at its annual retreat in May 2002, the permanent members expressed disquiet. The United States rejected the idea of criteria on the grounds that it could not offer precommitments to engage its military forces where it had no national interests, and that it would not bind itself to criteria that would constrain its right to decide when and where to use force.\(^{34}\) Thus, in late 2004, three prominent observers predicted, “The Bush administration does not and will not accept the substance of the report or support any formal declaration or resolution about it.”\(^{35}\) The Chinese government had opposed The Responsibility to Protect throughout the ICISS process and insisted that all questions relating to the use of force defer to the Security Council. In its position paper on UN reform, however, China accepted that “massive humanitarian” crises were “the legitimate concern of the international community.”\(^{36}\) While Russia supported the rhetoric of the responsibility to protect, it shared China’s belief that no action should be taken without Security Council approval.

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argued that the UN was already equipped to deal with humanitarian crises, and suggested that, by countenancing unauthorized intervention, The Responsibility to Protect risked undermining the Charter.\textsuperscript{37} While the U.K. and France were undoubtedly the leading advocates of The Responsibility to Protect among the P-5, and (along with the United States) flatly rejected the Russian and Chinese view that unauthorized intervention be prohibited in all circumstances, they too expressed concerns. In particular, they worried that agreement on criteria would not necessarily produce the political will and consensus required to respond effectively to humanitarian crises.\textsuperscript{38}

Opinion outside the Security Council was similarly divided. The Non-Aligned Movement (NAM) rejected the concept. India, for example, argued that the council was already sufficiently empowered to act in humanitarian emergencies and observed that the failure to act in the past was caused by a lack of political will, not a lack of authority.\textsuperscript{39} Speaking on behalf of the NAM, the Malaysian government argued that The Responsibility to Protect potentially represented a reincarnation of humanitarian intervention for which there was no basis in international law.\textsuperscript{40} The Group of 77 was more equivocal. Offering no joint position on the concept, it nevertheless suggested that the report ought to be revised to emphasize the principles of territorial integrity and sovereignty.\textsuperscript{41}

Although Western civil society groups were generally supportive, a series of workshops organized by the World Federalist Movement and the Institute for Global Policy highlighted several key concerns. In particular, it was noted that The Responsibility to Protect remained vague on what should happen if the Security Council failed to act. These groups were also deeply concerned about


\textsuperscript{38} Welsh, “Conclusion,” p. 204, n. 4.

\textsuperscript{39} Though India proposed that the P-5 commit themselves to not vetoing “responsibility to protect” measures, a proposal rejected by the P-5. See Anita Inder Singh, “UN at Sixty: New Strategies a Must for Effectiveness,” Tribune: On-Line Edition (Chandigarh, India), September 30, 2005; available at www.tribunindia.com/2005/20050930/edit.htm#4.


\textsuperscript{41} Statement by Stafford Neil, Permanent Representative of Jamaica to the United Nations and Chairman of the Group of 77, on the Report of the Secretary-General entitled “In Larger Freedom,” April 6, 2005; available at www.g77.org/Speeches/040605.htm.
the emphasis placed on the primacy afforded to the responsibility of the host state and questioned how failed states or rebel leaders would be held to account.\footnote{World Federalist Movement—Institute for Global Policy, \textit{Civil Society Perspectives on the Responsibility to Protect: Final Report} (New York: World Federalist Movement, April 2003), pp. 12–14.}

The report’s supporters aimed to accomplish one or both of two things at the 2005 World Summit. First, they wanted to persuade the General Assembly to make a commitment to the responsibility to protect in the summit’s outcome document. Second, they wanted to convince the Security Council to adopt a resolution that would commit it to act whenever the just cause thresholds were crossed, to submit its decisions to public deliberation about the use of force based on the precautionary principles, and to withhold the use or threat of the veto in humanitarian emergencies other than in cases where a permanent member’s \textit{vital} interests were at stake. To accomplish these aims, advocates had to address the two quite distinct sets of concerns outlined above: first, the P-5’s concern that the criteria would constrain the freedom for maneuver that they deemed essential for the maintenance of international order;\footnote{I owe this point to Justin Morris.} and second, the concern, among African and Asian states in particular, that the criteria would be abused by the powerful to justify armed interventions against the weak. These concerns were only sharpened by the 2003 invasion of Iraq.

Given the depth of these disagreements and the divisiveness of the debate about the Iraq war, it is remarkable that a consensus was produced at the 2005 World Summit. This consensus was a product of four intersecting factors: the approach taken by the Canadian government and the ICISS commissioners to selling the concept; its adoption by the High-Level Panel on Threats, Challenges and Change (HLP), and, subsequently, Kofi Annan in his program for renewing the UN; the emergence of an African consensus on the principle of the responsibility to protect; and the advocacy of a high-profile U.S. report on UN reform written by George Mitchell and Newt Gingrich. In the sections that follow I briefly outline each of the four processes that helped to produce this consensus.

\textit{Canada and the ICISS Commissioners}

As noted above, the job of building a global consensus on the responsibility to protect was made more difficult by the use of humanitarian arguments by the United States and the U.K. to justify the war in Iraq.\footnote{I have explored this point more thoroughly in Bellamy, “Responsibility to Protect or Trojan Horse?” esp. pp. 37–40.} In the face of this
increased skepticism about the political uses of *The Responsibility to Protect*, the report’s main sponsor—the Canadian government—and high-profile commissioners chose to emphasize the aspects of the report that would constrain recourse to force. In particular, the Canadian government insisted that intervention should be authorized by the Security Council, brushing aside the question of the unreasonable veto by downplaying the ICISS’s suggestion that the P-5 commit themselves to limiting use of the veto, and stressed that the threshold for action should be set high—higher, in fact, than the actual practice of the Security Council in the 1990s.45 In his 2004 address to the General Assembly, Canadian prime minister Paul Martin argued that *The Responsibility to Protect* “is not a license for intervention; it is an international guarantor of international accountability.”46 In short, Martin argued that though a commitment to the responsibility to protect would add a prescriptive component to the humanitarian intervention norm, the Security Council should only license interventionism when the just cause thresholds were satisfied, and that the problem of unauthorized intervention should be bypassed.

The Canadian government’s position was stated more clearly in the “nonpaper,” the unofficial policy presentation it submitted to the HLP. The non-paper reiterated the centrality of sovereignty, going as far as to articulate the pluralist view that if humanitarianism can only be “undertaken at the cost of undermining the stability of the state-based international order,” then sovereignty should trump humanitarian action. The responsibility to protect, the non-paper argued, should be grounded in the UN Charter’s insistence that the principle of sovereignty yields to the demands of international peace and security and, as such, the UN membership should resolve or declare that “while the primary responsibility to protect rests with individual states, there is a corollary responsibility on the part of the international community to act in extreme cases.” The threshold for intervention, Canada argued, should be set high and the Security Council should carefully assess the modalities of action before authorizing intervention.47

45 Byers, “High Ground Lost.”

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Conspicuous by their absence from the non-paper were constraints on the use of the veto and discussion of unauthorized intervention.

Ramesh Thakur, an ICISS commissioner, adopted a similar tone. Thakur argued that the just cause thresholds and precautionary principles ought to be viewed as constraints that would limit states' ability to abuse humanitarian justifications. According to Thakur, the criteria would “make it more difficult for coalitions of the willing to appropriate the language of humanitarianism for geopolitical and unilateral interventions,” while making the Security Council's deliberations more transparent. Prophetically, Thakur argued that a post-Iraq consensus could be forged if these constraining elements of The Responsibility to Protect were emphasized.

In their bid to sell the responsibility to protect in the wake of the deeply divisive debate on Iraq, both the Canadian government and Ramesh Thakur watered down the concept in crucial areas. First, the question of unauthorized intervention (“future Kosovos”) was sidestepped in favor of a concept wedded to Security Council authorization. Second, having placed the authorization of intervention squarely under the rubric of the Security Council, they added further constraints by emphasizing that the just cause threshold and precautionary principles limited the scope of Security Council activism. As Michael Byers pointed out, this was effectively a backward step, since the council had shown itself willing to authorize intervention in cases that fell short of the just cause threshold in the 1990s. Third, in order to win over the reluctant P-5 (especially the United States, Russia, and China), the idea that the use of the veto be limited was quietly dropped.

The HLP and “In Larger Freedom”
According to Wheeler, it was the adoption of The Responsibility to Protect by the UN’s High-Level Panel and its subsequent place in Kofi Annan’s agenda for renewing the UN (“In Larger Freedom”) that “significantly changed the normative context,” paving the way for consensus at the World Summit. Kofi Annan commissioned the HLP in September 2003 and gave it the task of examining the challenges to international peace and security and the contribution that

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50 Byers, “High Ground Lost.”
the UN could make to address those challenges more effectively. In its report, issued in December 2004, the HLP endorsed the “emerging norm that there is a responsibility to protect” and confirmed the developing consensus that this norm was “exercisable by the Security Council.” The task, the panel argued, was not to confront the dilemma of how to proceed when the council is deadlocked in response to a humanitarian emergency by identifying alternative sources of authority, but to make the council itself work better, as if the division and inaction of the past were a product of problematic procedures, not deep political disagreement.

In order to make the council “work better,” the panel endorsed The Responsibility to Protect’s just cause thresholds and precautionary principles with minor revisions. The panel subtly broadened the just cause thresholds by adding “serious violations of humanitarian law” to the list of genocide, mass murder, and ethnic cleansing. Just as significantly, the panel added a preventive component to the just cause criteria, insisting that the criteria would be satisfied if the threat was actual or “imminently apprehended.” The panel then identified four further criteria that should guide decision-making in the Security Council, reiterating though renaming the ICISS’s four precautionary principles: proper purpose (right intention), last resort, proportional means, and balance of consequences (likelihood of success). As with the Canadian non-paper, the question of limiting recourse to the veto was dropped from the section on the responsibility to protect, but the HLP proposed its own constraint on the use of the veto in its section on Security Council reform: a system of indicative voting whereby council members could call for states to publicly declare and justify their positions prior to an actual vote. Predicated on logic similar to the prescriptive component of The Responsibility to Protect, the HLP assumed that members would be reluctant to publicly state their opposition to collective action in cases where the just cause thresholds had been crossed, and would therefore desist from blocking such action.

Since setting the challenge for international society to think carefully about how to prevent “future Rwandas and Kosovos,” the secretary-general has been a fervent supporter of criteria to guide decisions about the use of force. Moreover,

53 Ibid., para. 198.
54 Ibid., paras. 203, 207, and 257.
since 1999, Annan has recognized that it may sometimes be necessary and legitimate for states to act outside the council.\(^{55}\) Faced with a growing consensus that the responsibility to protect should be embedded within the Security Council, however, Annan accepted the HLP’s recommendations.\(^{56}\) In a seemingly minor amendment that had important consequences (see below), Annan separated the commitment to the concept from the criteria governing the use of force, placing the former in a section on human rights and the latter in the section on force.

**Africa and the Ezulwini Consensus**

In 2003, the African Union (AU), created by the Constitutive Act of 2002, formally replaced the Organization for African Unity (OAU). Although the change was motivated by several key concerns, primary among them was the belief that international society had generally neglected African problems and that the continent must take its own measures.\(^{57}\) As the Declaration of African Heads of State that accompanied the Constitutive Act put it, “The international community has not always accorded due attention to conflict management in Africa, as it has consistently done in other regions, and . . . the efforts exerted by Africans themselves in the area of peacekeeping . . . are not given adequate financial and logistical support.”\(^{58}\)

Under the Constitutive Act, African leaders awarded the AU a right of humanitarian intervention. They then mitigated it, however, by reaffirming the principle of noninterference. Article 4(h) of the act established “the right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely war crimes, genocide and crimes against humanity.” The article was amended in 2003 to cover other “serious threats to legitimate order,” and an additional paragraph (Article 4 (j)) formalizing a state’s right to request intervention was added. The seemingly contradictory Article 4(g) insisted that the member states refrain from interfering in the domestic affairs of other members. Together, these articles reject unilateral intervention in favor of collective action. Their significance lies in the assertion that the AU need not defer to the UN Security Council in humanitarian emergencies.


As Ben Kioko, a senior legal advisor to the AU, explained: “Article 4(h) was adopted with the sole purpose of enabling the African Union to resolve conflicts more effectively on the continent.” Through Article 4, therefore, the AU created an institutional mechanism that permits the regional arrangements foreseen by The Responsibility to Protect.

There are at least two problems, however, with the way in which the AU’s intervention mechanism has developed in practice, which suggest that it may not be wholly compatible with the initial aims of the ICISS. First, procedurally, there remains confusion about both which body would actually invoke intervention and the legal relationship between the AU and the Security Council. Under the act, the fifteen-member Peace and Security Council would recommend action to the AU Assembly. In turn, the Assembly is authorized to defer its responsibility in a particular case to the Peace and Security Council. The problem here is that the Assembly meets only once a year and takes decisions on the basis of consensus or, failing that, a two-thirds majority. The process of activating Article 4(h) against the will of the relevant member state would therefore be time-consuming. Moreover, given the continent’s traditional reluctance to endorse interventionism and fractious subregional alignments, the possibility of securing a two-thirds majority in the face of a hostile host must be thought unlikely at best. In practice, the two AU peace missions in Burundi and Darfur have been conducted with host state consent.

The relationship between AU initiatives and the Security Council is just as thorny. The Constitutive Act strongly implies that the AU, not the UN Security Council, may assume primary responsibility in the face of humanitarian emergencies. On other matters, however, African states have a track record of denouncing regional initiatives involving the use of force and insisting upon the primacy of the Security Council. In 1999, Namibia voted with Russia and China in condemning NATO’s intervention in Kosovo, a position publicly shared by both South Africa and Nigeria. The question, then, is, does the AU require

Security Council authorization in order to launch a forced intervention? Technically, the answer is “no,” because through binding themselves to the Constitutive Act, members have consented to making themselves subject to intervention should the AU Assembly see fit. The AU’s institutions are themselves constrained, however. The AU protocol setting out its Peace and Security Council’s terms of reference insists that the body must “fully cooperate” and “maintain close and continued cooperation” with the Security Council. Furthermore, the protocol formally recognizes the “primary role” of the Security Council in the maintenance of international peace and security. At the same time, the protocol did not insist that the AU was obliged to seek UN authorization for collective enforcement action.

Substantively, although the Constitutive Act’s original just cause thresholds directly mirrored those of *The Responsibility to Protect*, the AU has not yet agreed on its definitions of “war crimes,” “crimes against humanity,” and “genocide.” As the Darfur case demonstrates, there is a distinct possibility that the AU and UN may have different ideas about the gravity of a particular situation. In that case, AU members not only rejected the U.S. view that the Sudanese government was guilty of genocide, but also disputed the UN’s findings that senior government officials were implicated in widespread and systematic war crimes and crimes against humanity. They also argued in the Security Council throughout 2005 that the humanitarian situation in Darfur was improving, despite widespread reports from the UN and elsewhere to the contrary.\(^{62}\) Finally, the amendment of Article 4(h) to include “serious threats to legitimate order” may be understood as re-prioritizing regime security over human security. At least two commentators, therefore, understood the amendment as a backward step.\(^{63}\)

The second problem associated with Africa’s regional initiative is that it could theoretically be used to block Security Council action. On the one hand, it risks undermining the prescriptive component of *The Responsibility to Protect* by permitting the P-5 to defer to the AU in cases where they lack the political will to act, regardless of the latter’s capacity to act effectively. On the

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\(^{62}\) For details on successive UN reports on the deteriorating situation in Darfur in 2005, see Bellamy, “Responsibility to Protect,” pp. 40–50. On the African position, see Williams, “Military Responses to Mass Killing.”

other, it may legitimize anti-interventionist arguments by lending credence to
the idea that the Security Council should avoid imposing its will on Africans.

Both of these trends were evident in the Security Council debate about
how best to respond to the Darfur crisis. In one of the earliest Security
Council deliberations, in July 2004, the United States, the U.K., Germany,
Chile, and Spain (those states generally most supportive of action against
the Sudanese government) all argued that the Sudanese government had
failed in its responsibility to protect, but refrained from claiming that re-
ponsibility for the council. Instead, they referred to the AU as bearing
primary responsibility should the government of Sudan continue to fail.64
This position was endorsed by Francis Deng—the secretary-general’s represen-
tative on internally displaced persons and the author of the “sovereignty as re-
ponsibility” idea that preceded the responsibility to protect. Deng argued that
because the Sudanese government had declared its hostility to UN intervention,
the best way forward was to encourage the AU to establish and increase its pres-
ence in Darfur, in collaboration with the Sudanese government.65 This view was
supported by some African states, who were primarily concerned with averting
international intervention. Algeria, a nonpermanent member of the Security
Council, used the existence of regional initiatives to justify rejecting measures
the United States proposed, including overflights to verify a cease-fire, that it
deemed “unacceptable assaults on Sudan’s sovereignty.”66 Likewise, an “African
mini-summit” on Darfur led by Libya and Egypt reaffirmed a commitment to
preserve Sudanese sovereignty and expressly rejected “any foreign [that is, UN
or “Western”] intervention by any country whatsoever in this pure African
issue,” insisting that regional solutions should take primacy over globally or-
chestrated action.67

What all this meant for Africa’s position on The Responsibility to Protect
became clear when the AU’s executive council met to develop a common posi-
tion on UN reform in March 2005. The so-called Ezulwini consensus went some
way to resolving the problems outlined above. The consensus endorsed the
HLP’s criteria (the just cause threshold and precautionary principles) for guiding
the Security Council, but, at the insistence of South Africa—the most persistent

64 UNSC 5035th meeting, S/PV.5015, July 30, 2004, especially pp. 10–12.
advocate of *The Responsibility to Protect* in Africa—observed that these guidelines “should not undermine the responsibility of the international community to protect.” On the relationship between the AU and the Security Council, it endorsed the idea—discussed above—that while the AU was the primary instrument of peace and security in Africa, its interventions should be approved by the Security Council, though “in certain circumstances, such approval could be given ‘after the fact,’” a tacit nod to ECOWAS’ 1992 intervention in Liberia, which the Security Council endorsed only retroactively.

These two paragraphs endorsing *The Responsibility to Protect* within the framework of the Security Council, albeit marginally broader than the HLP and Canadian government in granting slightly more leeway to regional organizations, were mitigated by two subsequent paragraphs that, if not actually undermining the thrust of the earlier paragraphs, certainly contributed to the concept’s watering down. First, the AU insisted that the responsibility to protect not be used “as a pretext to undermine the sovereignty, independence, and territorial integrity of states.” Second, in a strangely worded paragraph (B(ii)) on the legality of force, the AU insisted that the use of force comply scrupulously with Article 51 of the UN Charter (self-defense) and Article 4(h) of the AU’s Constitutive Act. Any use of force outside these two mechanisms “should be prohibited.” It is too early to tell how these clauses will shape practice. This paragraph, however, clearly contradicts the insistence that criteria not undermine the responsibility of the international community by suggesting that, on matters of humanitarian intervention in Africa, the Security Council may act only alongside the AU. Paragraph B(ii) implies that the council’s right to authorize armed intervention in Africa should be circumscribed, an argument that, I noted earlier, has been articulated to oppose intervention in Darfur.

The development of a regional peace and security mechanism in Africa and its incorporation of a regional “right to intervene” in cases where *The Responsibility to Protect*...
to Protect’s just cause thresholds are satisfied certainly implies support for the ICISS concept.\textsuperscript{73} At the 2005 World Summit, however, only two African states publicly endorsed the concept as proposed by the ICISS: South Africa and Tanzania. The majority of African states chose not to offer individual comment, but some, such as Algeria and Egypt, directly opposed the concept. Given this, the Ezulwini consensus should not be understood as an endorsement of The Responsibility to Protect as outlined by either the ICISS or the HLP, but as an insistence that while regional bodies \textit{may} decide to intervene, such decisions must be subject to sovereignty considerations and must take precedence over the global level. In relation to how the Security Council operates, despite South Africa’s insistence on a prescriptive component to encourage the great powers to assume responsibility for Africa’s problems, the predominant concern was to limit council activism.

\textit{Gingrich/Mitchell and the Bolton Factor}

The fourth component of the consensus was a change in the American position. As I noted earlier, the United States was concerned with two issues: that publicly committing to a responsibility to protect might compel it to deploy its forces in ways that were inimical to its perceived national interests; and that the just cause thresholds and precautionary principles would limit its flexibility in deciding when and where to use force to protect the common good. It is worth noting, however, that the Bush administration’s three tests for a “rogue state” include support for terrorism, the proliferation of weapons of mass destruction, and regimes that “brutalize their own people and squander their natural resources for the personal gain of their rulers.”\textsuperscript{74}

In 2004, a high-profile task force organized by the U.S. Institute of Peace and chaired by George Mitchell and Newt Gingrich investigated the relationship between U.S. interests and Annan’s UN reform agenda, setting out a number of proposals for America’s position on the question. The task force argued that in cases where a government fails to protect its citizens, “the collective responsibility of nations to take action cannot be denied.” Disputing the emerging consensus that humanitarian action be authorized by the Security Council, the task


force argued that the failure of the Security Council to act “must not be used as an excuse by concerned members to avoid protective measures.”75 In other words, echoing the ICISS, the task force argued that it was legitimate for states to act outside the UN framework when the scale of the humanitarian catastrophe warranted immediate intervention. Furthermore, it insisted that the United States should compel states opposed to intervention to publicly justify their positions. In practice, the task force suggested that the United States should adopt a four-stage approach to dealing with genocidal regimes:

- The government implicated in genocide, mass killing, or massive violations of human rights should be warned that it has a responsibility to protect.
- If it fails to act, the government should have its financial assets frozen and “targeted sanctions” should be imposed on specific individuals.
- If these measures fail, the Security Council should consider military intervention. But, “in the event that the Security Council is derelict or untimely in its response, states—individually or collectively—would retain the ability to act.”76
- Individuals guilty of mass murder should be identified and held accountable.

The Mitchell-Gingrich report laid the groundwork for a renewed U.S. engagement with *The Responsibility to Protect*. The task force spoke directly to the administration’s two principal concerns: the decoupling of criteria and emphasis on the host’s responsibility to protect weakened the prescriptive component of *The Responsibility to Protect*, while the discussion of unauthorized intervention promised to permit the United States a degree of flexibility in deciding when and where to use force.

By the time the draft outcome document reached the incoming U.S. ambassador to the UN, John Bolton, the criteria guiding decisions to use force had been decoupled from the commitment to the responsibility to protect, as advised by Annan (see above). Nevertheless, Bolton argued that it was necessary to redraft the responsibility to protect statement to take account of two important considerations. First, Bolton argued that while the United States accepted that host states had the primary responsibility to protect and that the international

76 Ibid., p. 32.
community had a responsibility to act when the host state permitted atrocities, it was important to recognize that “the responsibility of the other countries in the international community is not of the same character as the responsibility of the host, and we thus want to avoid formulations that suggest that the other countries are inheriting the same responsibility as the host state has.” He argued that the Security Council was not legally obliged to protect endangered civilians, whereas host states were. Bolton also argued that the Security Council must have the freedom to decide upon the most appropriate course of action on a case-by-case basis and that the language of obligation should be toned down accordingly. Second, Bolton shared the U.K.’s view that the commitment to the responsibility to protect “should not preclude the possibility of action absent authorization by the Security Council,” suggesting that there may be cases of humanitarian catastrophe where the intervener chooses to act in self-defense—a clear reference to the U.S. intervention in Afghanistan.

TOWARD CONSENSUS

From this brief discussion, it is clear the responsibility to protect paragraphs in the World Summit outcome document represent the emergence of a consensus. There was broad support for setting a high just cause threshold, for the idea that the host state had the primary responsibility to protect, and against the idea that the P-5 should voluntarily limit their use of the veto.

Disagreement remained on two pivotal issues, however. First, there was the question of whether the Security Council alone had the authority to authorize armed intervention. Although the United States and the U.K. continued to argue that the need to prevent “future Rwandas” meant that unauthorized intervention could not be expressly ruled out, the majority of states shared the view that if the responsibility to protect was to constrain Western interventionism—a core component of the argument in favor of the concept—then the absolute primacy of the Security Council had to be reaffirmed. Second, there was strong disagreement about the place of criteria to guide decisions about the use of force. Whereas

77 Letter from John R. Bolton, Representative of the United States of America to the United Nations to President Ping, President of the UN General Assembly, August 30, 2005; available at www.un.int/usa/reform-un-jrb-ltr-protect-8-05.pdf. I am very grateful to Paul D. Williams for providing me with a copy of this letter and attachments.

78 Ibid. The United States did not seek UN Security Council authorization for its intervention in Afghanistan, arguing that it was an act of self-defense under Article 51 of the Charter. The Security Council nevertheless passed a resolution welcoming the intervention.

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several African states, as well as the HLP and Annan, argued that criteria were an essential component of making the Security Council’s decisions more transparent, the United States, China, and Russia all opposed criteria, though for very different reasons: the United States because it believed that criteria would limit its freedom of action and might reinforce the concept’s prescriptive component, and the others because they feared that criteria might be abused. There also remained many significant points of ambiguity, not least the question of the point at which the responsibility to protect transferred from the host state to international society; the level, locale, and nature of international society’s obligation in such cases; and the relationship between the UN and regional organizations. I will briefly outline how these issues were resolved in the outcome document.

The key points of agreement on the just cause threshold and the host state’s responsibility provided the backbone of the outcome document’s statement on the responsibility to protect. On the former, the wording of the original draft, which was based on Annan’s “In Larger Freedom,” was altered to strengthen the host state’s responsibility.79 On the just cause thresholds, the suggestion that massive human rights violations be included was overlooked in favor of genocide, ethnic cleansing, war crimes, and crimes against humanity. Importantly, the HLP’s suggestion that the Security Council be empowered to act in anticipation of a humanitarian crisis was rejected at the insistence of Russia and China.80

In relation to the questions of the point at which the responsibility to protect was transferred from the host state to international society, and the nature of the concept’s prescriptive element, the General Assembly hardened the test for the former and weakened the nature of the international responsibility, in line with the United States’ argument. Thus, the idea that the responsibility to protect would transfer if the host state proved itself “unable or unwilling” to protect its population, as both the ICISS and the HLP insisted, was replaced by the idea of “manifest failure,” significantly raising the threshold. On the prescriptive component, the United States won support for watering down this element. Thus, Annan’s proposal that the international community had an “obligation” to take

79 The original draft read that the responsibility to protect “lies first and foremost” with the host state, whereas the revised draft stated that “each individual state has the responsibility to protect.” These comparisons are based on the Revised Draft Outcome Document of the High-Level Plenary Meeting of the General Assembly Submitted by the President of the General Assembly, A/59/HLPM/CRP.1/Rev. 2, August 10, 2005, and the 2005 World Summit outcome document, A/60/L.1, September 15, 2005, paras. 137 and 138, unless otherwise stated.

80 As noted earlier, both China and Russia rejected any modification of the rules governing recourse to force.
measures when the threshold was crossed was rewritten as a “responsibility” to do so.

On the question of authority, the differences between the United States, the U.K., and France on the one hand and Russia, China, India, and Africa on the other appeared irreconcilable. In order to satisfy the anti-interventionists, the draft outcome document placed the responsibility to protect squarely in the domain of the Security Council. The precise wording of the relevant sentence, however, leaves open the possibility of unauthorized intervention. It reads, “we are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter” should peaceful means fail. The key phrase in this sentence is “we are prepared.” The original text began with “we recognize our shared responsibility,” while Bolton’s proposed change used the wording “stand ready.” In all three forms, the wording falls short of insisting upon council authorization and could be read as suggesting that concerned states may work under the council’s rubric but may also choose to work through alternative arrangements. The subtle wording both reduces the sense of obligation and opens a window for lawyers to defend unauthorized intervention by reference to the outcome document.

This small window of opportunity was reinforced by the outcome document’s brief section on the use of force. According to Wheeler, the document’s drafters separated the sections on the use of force and the responsibility to protect (they were conjoined in “In Larger Freedom”) in order to reassure China and India. Between “In Larger Freedom” and the first drafts of the outcome document, the commitment to criteria was reduced to a commitment to continue discussing criteria. Then, in the final version, even this commitment was removed. To all intents and purposes, this appears to have been a major diplomatic victory for the anti-interventionists (especially China and Russia), who had opposed criteria from the outset, believing that they opened up the possibility for abuse.

It is important to remember, however, that the United States also opposed criteria, though for very different reasons—it feared constraints being placed on its action. On closer inspection, paragraphs 77–80 of the outcome document leave open the possibility of unauthorized intervention. The paragraphs reiterate the obligation of states to refrain from the threat or use of force in any manner.

81 “2005 World Summit Outcome,” A/60/L.1, September 15, 2005, para. 139.
inconsistent with the UN Charter, insist that states “strictly abide” by the Charter, reaffirm the Security Council’s authority to mandate coercive action, and assert its “primary responsibility” for international peace and security. By forbidding the use of force in a manner inconsistent with the Charter, the paragraphs leave open the possibility of unauthorized intervention aimed at either upholding the UN’s humanitarian principles outlined in Article 1 of the Charter or acting on the “implied authorization” of past Security Council resolutions, as NATO suggested it was doing in intervening in Kosovo.83

PREVENTING FUTURE RWANDAS AND KOSOVOS

Ultimately, the incorporation of the responsibility to protect into the outcome document of the 2005 World Summit has done little to resolve the challenge of preventing future Rwandas and Kosovos. The 2005 consensus was produced not by the power of humanitarian argument but by bargaining away key tenets of the ICISS’s recommendations. In order to prevent future Rwandas, the ICISS had proposed a series of measures that would make it more difficult for the great powers to avoid their responsibilities. The Security Council would publicly acknowledge its responsibilities, would commit itself to criteria governing recourse to force, would consider restricting the use of the veto, and its members would be encouraged to declare and justify their positions publicly. Anti-interventionists and some interventionists opposed these measures. The United States, supported in this endeavor by China and Russia, successfully whittled away the council’s responsibility from an obligation to act to a commitment to “stand ready” to act should the prevailing circumstances permit. Arguably the most important component of the prescriptive element, the ICISS’s recommendation that the P-5 consider limiting their use of the veto, was omitted almost from the outset. For the P-5, this measure constituted an unacceptable constraint, and for many other states it threatened to remove an important barrier to abuse. Although the HLP made a similar recommendation (indicative voting), this was placed in its ill-fated package of proposed Security Council reform. Given the inherent difficulties with the prescriptive component described in the first part of this article, the weakening of the responsibility from an (albeit rhetorical) “obligation” to simple “preparedness” will make it all too easy for the great powers to avoid acting to prevent future Rwandas.

83 See Byers, War Law, pp. 40–50.
The main challenges for avoiding future Kosovos were, first, to encourage traditional anti-interventionists not to block collective action, and, second, to enable “genuine” humanitarian interventions and constrain abuse by framing international debate around criteria. As noted earlier, the proposal to limit the use of the veto was ruled out almost immediately. The place of criteria (just cause thresholds and precautionary principles), however, was widely seen as pivotal and was strongly endorsed by advocates of the ICISS, Annan, the HLP, and the AU. From the outset, however, criteria were opposed by the United States, who saw them as overly prescriptive and restrictive, and Russia and China, who saw them as too enabling. To secure consensus, the drafters of the outcome document removed the criteria and then removed a paragraph calling for discussion about criteria, a cornerstone of *The Responsibility to Protect*. The final element of preventing future Kosovos was the need to think more seriously about how to proceed in cases where the Security Council is deadlocked. As Wheeler points out, it was the divisiveness of the debate over Kosovo that had prompted both Annan’s challenge to international society and the Canadian government to commission the ICISS in the first place.\(^8^4\) *The Responsibility to Protect* set out a hierarchy of authority, permitting the General Assembly and regional organizations to act in cases where the council was deadlocked. This hierarchy secured little support: in the wake of Iraq, neither the Canadian government nor the ICISS commissioners felt able to press the case for unauthorized intervention, and a majority of states argued that intervention must be authorized by the Security Council. Most interestingly, several African states argued that the AU did not require UN authorization to intervene in African crises, but this proposal was eventually dropped in favor of an insistence upon authorization, though the AU put forward a broad interpretation to include after-the-fact resolutions.

Critics of the outcome document are correct to argue that it does not advance the question of how to deal with unauthorized intervention, but it is important to recognize that it does not set it back either. Although the responsibility to protect paragraphs speak of the Security Council standing ready to act, it does not preclude the possibility of action outside the council. Moreover, the paragraph on the use of force only prohibits force used in “a manner inconsistent with the UN Charter.” Advocates of the unauthorized interventions in Kosovo and Iraq argued, not wholly implausibly, that the use of force in these cases was

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not inconsistent with the Charter because the interventions aimed to enforce Chapter VII Security Council resolutions.

To what extent, then, will the outcome document help prevent future Rwandas and Kosovos? From the preceding discussion the answer is “very little.” Powerful states are no more likely to feel obliged to act to save distant strangers, and there is no more likelihood of agreement about what to do in particular cases. When confronting a humanitarian emergency, supporters and opponents of intervention alike can use the language of the responsibility to protect to support their claims. Perhaps the most worrying development is that in attempting to forge a consensus, the ICISS and its supporters sacrificed almost all of the key elements of their twin strategies. It is imperative that states now return to some of the fundamental questions the ICISS raised: Who, precisely, has a responsibility to protect? When is that responsibility acquired? What does the responsibility to protect entail? And how do we know when the responsibility to protect has been divested? If they do not, there is a real danger that states of all stripes will co-opt the language of the responsibility to protect to legitimate inaction and irresponsibility.