

# To Save Succeeding Generations: UN Security Council Reform and the Protection of Civilians

**BRAZIL  
IN THE  
WORLD**

Conor Foley



## Executive Summary

There is now widespread agreement that the UN Security Council must change. The power structure established at the end of the Second World War no longer reflects the realities of world politics and international relations. This makes the veto powers of the Security Council's five permanent members (P5), Britain, China, France, Russia and the United States, increasingly anachronistic.

A deadlock remains, however, as to how such change should take place. One of the strongest arguments for reform is that since the primary purpose of the Security Council is the maintenance of international peace and security, and most of the threats to this take place in what is often termed the 'global south', it is absurd that the mandates for peacekeeping missions are being written by a body which excludes the vast majority of both troop-contributing and mission-hosting states from its permanent membership.

This Strategic Paper was written as a contribution to the debate about UN reform with specific reference to the protection of civilians by peacekeeping missions under international law. It argues that the opportunity for reform should include clarification of the UN's own responsibilities under international human rights and humanitarian law (IHL). It is the first in a series of papers being produced by the Igarapé Institute and CEBRI on Brazil's role in the world.

The number of UN peacekeeping missions has increased significantly in recent years and these are becoming increasingly multi-dimensional. There are now well over 100,000 UN troops deployed around the world on missions which have Chapter VII authority to use force to protect civilians. Armed soldiers are being given lawful authority to enter into the territory of other countries in order to protect the people in that state from grave violations of international human rights or IHL. Given that Article 2 of the UN Charter prohibits the use of force and interference in states' internal affairs, even by the UN itself, except when it is acting under its Chapter VII powers, and given that this Chapter contains no references to human rights, IHL or the protection of civilians, what is the legal basis for the Security Council to act in this way?

The UN Charter contains no express basis for peacekeeping, which has developed in an ad hoc manner in response to different crises. As these operations have become more complex, their encroachment into the domestic jurisdiction of the mission-hosting states is creating an accountability deficit. The Charter specifies that its provisions take precedence over all other international treaties and this, together with the legal immunities that cover UN missions, makes it extremely difficult to scrutinise their human rights records. However, individual states may, in certain circumstances, be challenged for the actions of their personnel and this could impact on their willingness to contribute personnel to peacekeeping missions in the future.

There are various models for how such scrutiny could be achieved. A greater use of advisory opinions by the International Court of Justice is one option. The establishment of a body similar to the Ombudsperson Office that assists the UN Sanctions Committee is another. The purpose of this Strategic Paper is to stimulate debate rather than provide a blueprint for reform.

In 2011 the Brazilian government published a paper on Responsibility while Protecting (RwP), which argued for greater control of Chapter VII authorized operations by the Security Council and that these should be carried out 'in strict conformity with international law, in particular international humanitarian law and the international law of armed conflict.' The recognition that operations authorized by the Security Council must themselves be subject to international legal regulation provides a welcome opportunity to address this normative gap.

## Sumário Executivo

Existe hoje um consenso geral de que o Conselho de Segurança da ONU deve mudar. A estrutura de poder acertada ao final da Segunda Guerra Mundial não mais reflete as realidades da política mundial e das relações internacionais. Isso faz com que seja cada vez mais anacrônico o poder de veto dos cinco membros permanentes (P-5) – China, Estados Unidos, França, Reino Unido e Rússia.

Há, porém, um impasse sobre como tal mudança deve ocorrer. Um dos argumentos mais fortes em favor da reforma é o seguinte: já que o principal objetivo do Conselho de Segurança é a manutenção da paz e da segurança internacional, e que a maioria das ameaças ocorre no chamado “sul global”, é um absurdo que os mandatos para as missões de manutenção da paz sejam elaborados por um órgão que exclui, como membros, a grande maioria dos países contribuintes de tropa e dos países que recebem as missões.

Este Artigo Estratégico foi preparado para ser uma contribuição para o debate sobre a reforma da ONU, com referência específica à proteção de civis por missões de manutenção da paz sob o direito internacional. Argumenta-se que a oportunidade para a reforma deve incluir alguns esclarecimentos sobre as responsabilidades da própria ONU em relação a direitos humanos internacionais e ao direito internacional humanitário (DIH).

O número de missões de manutenção da paz da ONU aumentou de maneira significativa nos últimos anos e tais missões são cada vez mais multidimensionais. Há, hoje, mais de 100 mil tropas da ONU desdobradas pelo mundo, trabalhando em missões que têm a autoridade do Capítulo VII para usar a força para proteger civis. Militares armados recebem autoridade legal para ingressar no território de outros países com o objetivo de proteger as pessoas daquele Estado de grandes violações de direitos humanos internacionais ou do DIH. Considerando que o Artigo 2º da Carta das Nações Unidas proíbe o uso da força e a interferência nos afazeres domésticos de outros Estados, mesmo quando feito pela própria ONU, exceto quando atua sob os poderes do Capítulo VII, e considerando que este Capítulo não faz qualquer referência a direitos humanos, DIH ou proteção de civis, qual seria a base legal para o Conselho de Segurança agir desta maneira?

A Carta da ONU não contém base expressa para as missões de paz – isto se desenvolveu de maneira ad hoc como resposta a diferentes crises. À medida que essas operações se tornam mais complexas, sua intromissão na jurisdição doméstica dos Estados que recebem as missões acaba criando um déficit em relação à prestação de contas. A Carta especifica que suas normas devem ter precedência sobre todos os tratados internacionais e isso, junto com as imunidades legais que amparam as missões da ONU, faz com que seja extremamente difícil investigar seu histórico de direitos humanos. No entanto, em alguns casos, Estados podem ser individualmente desafiados pelas ações de seu pessoal, o que pode ter um impacto em sua disposição de contribuir com pessoal para futuras missões de paz. Há vários modelos sobre como realizar exames detalhados de algumas ações. Uma opção é fazer melhor uso das opiniões consultivas da Corte Internacional de Justiça. Outra forma é criar um órgão semelhante a um escritório de ombudsman, que daria assistência ao Comitê de Sanções da ONU. O objetivo deste artigo é apenas estimular o debate e não oferecer um plano para a reforma.

Em 2011, o governo brasileiro lançou uma nota sobre a “Responsabilidade ao Proteger” (RwP), argumentando por maior controle das operações autorizadas pelo Conselho de Segurança sob o mandato do Capítulo VII e propondo que tais operações fossem implementadas em “estrita conformidade com o direito internacional, particularmente com o direito internacional humanitário e o direito internacional dos conflitos armados”. O reconhecimento de que as operações autorizadas pelo Conselho de Segurança devem se sujeitar a regulamentações legais internacionais se apresenta como uma bem-vinda oportunidade de lidar com esta lacuna normativa.

# Preface

*Antonio de Aguiar Patriota, Foreign Minister of Brazil*

The profound nature of the changes through which the world order is undergoing in the past decades is a novelty to no one.

The work of the Security Council is one area in which these changes are particularly evident. From a body which faced enormous difficulties to act in the fulfillment of its mandate, until the beginning of the 1990s, it became ever more present and active in the determination of actions taken (and to be taken) by the international community. As a matter of comparison, suffice it to say that since 1990 the Council has adopted annually more Chapter VII resolutions (those involving the enforcement powers of the Council) than the total number adopted during the history of the Council until then.

This transformation is, naturally, a consequence of the changes taking place in the real world, outside the Council, which led to the obsolescence of the East-West Cold War confrontation climate that prevailed until then.

But it is also more than that. It is the result of a process in which the Council took to itself, and was also entrusted with new responsibilities and tasks which go clearly beyond the scope imagined when the UN Charter was adopted almost 70 years ago.

A notable case in point is the question of the protection of civilians, which has become one of the mainstays of the current discussions held and decisions taken at that body. The issue is the subject of Conor Foley's deep and insightful study in his text *To Save Succeeding Generations: UN Security Council Reform and the Protection of Civilians*.

In a thorough yet concise analysis, he explains the evolution of the concepts that have led to the adoption of a more proactive approach by the Council in this area, and also presents and discusses actions taken on the basis of the premises established by this conceptual background.

Through the discussion of cases in which the Council adopted resolutions relating to the protection of civilians, he demonstrates how the decisions and practices approved -- from the creation of the concept of peacekeeping operations to the current discussions regarding the use of force in the protection of civilians in situations not necessarily involving international conflict -- have departed from the original text of the UN Charter.

He presents a compelling case on the need for the Council to redress its credentials, in particular those related to the representativeness and the legitimacy of its decisions, and also stresses the need for the establishment of a clearer understanding among the international community as a whole as to the practices and prerogatives of the Council, lest its efficiency and effectiveness become compromised.

In this regard, analyzing the proposal put forward by Brazil of *Responsibility while Protecting (RwP)*, he offers a valuable contribution to the efforts made with the intention of consolidating a common understanding as to the responsibilities compelling the Security Council to act in the protection of civilians, and the need for mechanisms of accountability regarding actions taken under these responsibilities.

The text invites us to a sorely needed reflection on the urgency of reestablishing the very foundations of the international system of collective security, not only in regard to its structure, but also on the basis of building common views as to the conceptual framework for its actions.

# To Save Succeeding Generations: UN Security Council Reform and the Protection of Civilians<sup>1</sup>

Conor Foley

## A Death in Baghdad

On 19 August 2003 a bomb attack on the United Nations compound in Baghdad killed 22 UN staff members, including the head of the mission, Sergio Vieira de Mello. The anniversary of the bombing has since been designated as World Humanitarian Day, during which aid workers honour the memory of our colleagues who have lost their lives in the cause of humanity. Vieira de Mello had served in the world's worst conflict zones, and he was responsible for making decisions during some of the UN's most controversial and difficult missions, from Bosnia-Herzegovina to Rwanda. The Brazilian had joined the office of the UN High Commissioner for Refugees (UNHCR) at the age of 21, its youngest staff member at the time, and rose quickly through its ranks. He headed the UN missions to both Kosovo and Timor-Leste. At the time of his death he combined his role in Iraq with heading the UN Office for High Commissioner of Human Rights (OHCHR) and was spoken of as a future UN Secretary General.

<sup>1</sup> The author is grateful to the following people for their comments on the manuscript and background papers and discussions on which it was based: Noam Lubell, Leonardo Paz Neves, Scott Sheeran, Ilona Szabo de Carvalho and Polly Truscott. Particular thanks are due to Eduarda Passarelli Hamann and Robert Muggah for editing the draft. All opinions expressed remain the sole responsibility of the author.



*A partial view of the exterior of the United Nations headquarters in Baghdad that was destroyed by a truck bomb on 19 August 2003*

*UN Photo/Timothy Sopp*

In the final weeks before his death Vieira de Mello had become openly critical of the high-handed arrogance of the US administration in Iraq and the behaviour of its occupation forces. He visited Abu Ghraib prison in early August and warned that there were not enough safeguards in place to protect detainees against abuse. He also spoke out against the killing of journalists and civilians by US soldiers. In his last recorded interview, published the day before he died, he told a Brazilian journalist that the US was trampling on Iraq's dignity and wounding its national pride. 'Who would like to see his country occupied?' he asked. 'I would not like to see foreign tanks in Copacabana.'<sup>2</sup> Yet for all these reservations, Vieira de Mello believed that once the invasion had happened, the UN needed to work with the US administration to achieve the best possible outcome that it could get for the Iraqi people. He was prepared to 'wrap the blue flag' around the occupation because he could not see any alternative. The decision was ultimately to cost him his life.

The invasion of Iraq brought a new urgency to the debate about international law and the use of force. It had been carried out without UN approval, and most international experts, including Kofi Annan, the former UN Secretary General, have since declared that it was illegal.<sup>3</sup> Four years before this invasion NATO had carried out a bombing campaign during the Kosovo crisis, also without UN approval. This had led to considerable discussion about the circumstances in which it was legitimate for states to use force to protect human rights in other countries. A report published in the wake of the Kosovo crisis coined the term 'responsibility to protect' (R2P) and its arguments and legal significance will be discussed later in this Strategic Paper.

In March 2011 NATO started another bombing campaign, this time over Libya, with the professed aim of protecting civilians at risk of attack during an uprising against President Muammar Gaddafi. This campaign did have the authorization of the UN Security Council, although some of its members believe that NATO went beyond the mandate of the initial resolution and it effectively became a regime-change intervention. Five members of the Security Council – Brazil, Germany, India, Russia and China – abstained on the resolution authorizing the use of force and Brazil subsequently published a paper, *Responsibility while Protecting (RwP)* calling for greater control and accountability over such missions.

Between these two events, in 2004, Brazil led the UN peacekeeping mission to Haiti (MINUSTAH), which is charged amongst other things with the protection of civilians (POC). In May 2013, the Brazilian General Carlos Alberto dos Santos Cruz, this mission's previous Force Commander, was appointed Force Commander of MONUSCO, the UN mission in the Democratic Republic of Congo. This mission will include a new Intervention Brigade, with Security Council authorization to conduct combat operations against rebel groups in the east of the country. Although still part of a peacekeeping force, their Rules of Engagement (RoEs) will reflect the laws of armed conflict and international humanitarian law (IHL).

Meanwhile discussions to create a larger and more representative Security Council are tortuously progressing from a UN Working Group to Intergovernmental Negotiations, with little prospect of any immediate substantive breakthrough.<sup>4</sup> There is now a general agreement that the Security Council must change. The power structure agreed

2 *O Estado de São Paulo*, 'Ocupação é humilhante diz Vieira de Mello', 18 August 2003.

3 *BBC News*, 'Iraq war illegal says Annan', 16 September 2004.

4 For a detailed account see Lydia Stewart, 'Reform of the Security Council, September 2007- May 2013', Center for UN Reform Education, <http://www.centerforunreform.org/node/499>, accessed 29 May 2013.

at the end of the Second World War no longer reflects the realities of world politics and international relations. This makes the veto powers of its five permanent members (P5) Britain, France, Russia, the United States and China, increasingly anachronistic. A deadlock remains, however, as to how such change should take place.

Brazil, Germany, India and Japan (the G4) have proposed an enlargement of the Council's permanent membership, but without the new members having a veto, which could be a first step to getting rid of the veto altogether. The African group of countries has proposed that they should be allocated two permanent seats with full veto powers. In April 2012 Jordan, Liechtenstein, Costa Rica, Singapore and Switzerland (the S5) put forward a draft resolution for 'Improving the working methods of the Security Council', to increase its transparency and accountability.<sup>5</sup> This included proposals for strengthening the relationship between the Security Council, the General Assembly and other principal organs, informing member states more fully about peacekeeping operations and enhancing the participation of troop- and police-contributing countries in the discussion of their mandates. It also urged the P5 not to use their vetoes to block Council action aimed at preventing or ending genocide, war crimes and crimes against humanity. However, the resolution was withdrawn due to the opposition of the P5 in May 2012.<sup>6</sup>

One of the strongest arguments for reform is that since the primary purpose of the Security Council is the maintenance of international peace and security, and most of the threats to this take place in what is often termed the 'global south', it is absurd that the mandates for peacekeeping missions are being written by a body which excludes the vast majority of both troop-contributing and mission-hosting states from its permanent membership.

This Strategic Paper was prepared as a contribution to the debate about UN reform with specific reference to the protection of civilians by peacekeeping missions under international law. It is in favour of the G4 and S5 positions, but also argues that the opportunity for reform should include clarification of the UN's own responsibilities under international human rights and IHL. Much of the debate on this topic in recent years has focussed on two main issues: the failure of the UN Security Council to authorize interventions in circumstances where these arguably could have helped to prevent grave violations of international human rights and IHL and a failure to provide peacekeeping missions with sufficiently robust mandates, supported by sufficient equipment and personnel to provide protection to civilians where the deployments did take place. A third, and more recent, criticism is that as UN peacekeeping operations have become involved in ever wider and further-reaching tasks, their encroachment into the domestic jurisdiction of the mission-hosting states is creating an accountability deficit, best be summed up by the expression *Quis custodiet ipsos custodes?*<sup>7</sup> (who will guard the guardians?).

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5 UNGA Doc A/66/L.42/Rev.215, May 2012.

6 *International Service of the Swiss Broadcasting Corporation*, 'Swiss withdraw UN draft resolution', 18 May 2012.

7 Juvenalis, Decimus Junius (Juvenal), *The Satires*, Rome: (publisher unknown), late first/early second century AD, lines 347–8, 'Who will guard the guards themselves?'

## The Protection of Civilians

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On 12 February 1999 the UN Security Council held an open meeting to discuss the protection of civilians in armed conflict.<sup>8</sup> The Council noted with concern that civilians and humanitarian aid workers ‘continued to be targeted in instances of armed conflict, in flagrant violation of international humanitarian and human rights law’ and requested that the Secretary General submit ‘a report with recommendations on how it could act to improve both the physical and legal protection of civilians in situations of armed conflict.’

The report was published in September 1999 and contained a series of recommendations on how the Security Council could ‘compel parties to conflict to respect the rights guaranteed to civilians by international law and convention.’<sup>9</sup> In welcoming its publication, the Security Council adopted the first in a series of resolutions on the Protection of Civilians in Armed Conflict.<sup>10</sup> Resolution 1265 noted, in its preamble, the ‘primary responsibility under the Charter of the United Nations for the maintenance of international peace and security’, the ‘importance of taking measures aimed at conflict prevention and resolution’ and the ‘need to address the causes of armed conflict in a comprehensive manner in order to enhance the protection of civilians on a long-term basis, including by promoting economic growth, poverty eradication, sustainable development, national reconciliation, good governance, democracy, the rule of law and respect for and protection of human rights’.

More specifically the resolution also expressed its ‘willingness to consider how peacekeeping mandates might better address the negative impact of armed conflict on civilians’ and requested the Secretary General ‘to ensure that United Nations personnel involved in peacemaking, peacekeeping and peace-building activities have appropriate training in international humanitarian, human rights and refugee law.’ The following month a Security Council Resolution authorizing a peacekeeping operation in Sierra Leone (UNAMSIL) specifically stated that:

Acting under Chapter VII of the Charter of the United Nations, decides that in the discharge of its mandate UNAMSIL may take the necessary action to ensure the security and freedom of movement of its personnel and, within its capabilities and areas of deployment, to afford protection to civilians under imminent threat of physical violence taking into account the responsibilities of the Government of Sierra Leone.<sup>11</sup>

In the same year the UN published two reports on the failure of its missions to prevent genocide in Rwanda and Srebrenica.<sup>12</sup> In August 2000 it published the *Report of the Panel on United Nations Peace Operations* (the Brahimi Report), which acknowledged that over the previous decade the organisations had ‘repeatedly failed to meet the challenge’ of saving ‘generations from the scourge of war’.<sup>13</sup> The Brahimi Report contained a series of

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8 Statement by the President of the Security Council, S/PRST/1999/6, 12 February 1999.

9 *Report of the Secretary-General to the Security Council on the Protection of Civilians in Armed Conflict*, S/1999/957, 8 September 1999.

10 UNSCR S/RES/1265 (1999), 17 September 1999.

11 UNSC S/RES/1270 of 22 October 1999, para. 14.

12 *Report of the Independent Inquiry into the actions of the United Nations during the 1994 Genocide in Rwanda*, S/1999/1257, 16 December 1999 and *Report of the Secretary-General pursuant to General Assembly resolution 53/35, The fall of Srebrenica*, A/54/549, 15 November 1999.

13 *Report of the Panel on United Nations Peace Operations*, A/55/305–S/2000/809, 21 August 2000.





*Two Pakistani peacekeepers with the United Nations Organization Mission in the Democratic Republic of the Congo (MONUC) arriving in Ituri Province to secure the area following brutal massacres of the local population by local militia (30 January 2005)*

*UN Photo/Christophe Boulierac*

recommendations designed to remedy problems that the UN had encountered in the deployment of its peacekeeping forces focused on strategic direction, decision-making, rapid deployment, operational planning and support. It also stated that UN peacekeepers ‘who witness violence against civilians should be presumed to be authorized to stop it, within their means, in support of basic United Nations principles. However, operations given a broad and explicit mandate for civilian protection must be given the specific resources needed to carry out that mandate.’

The report listed the logistical and resources-based challenges that the UN faced in deploying peace-keeping troops in sufficient time and number and argued that ‘the Secretariat must tell the Security Council what it needs to know, not what it wants to hear, when formulating or changing mission mandates.’ It also noted that there ‘are hundreds of thousands of civilians in current United Nations mission areas who are exposed to potential risk of violence, and United Nations forces currently deployed could not protect more than a small fraction of them even if directed to do so.’ Nevertheless, it argued that, ‘Once deployed, United Nations peacekeepers must be able to carry out their mandate professionally and successfully. This means that United Nations military units must be capable of defending themselves, other mission components and the mission’s mandate. Rules of engagement should not limit contingents to stroke-for-stroke responses but should allow ripostes sufficient to silence a source of deadly fire that is directed at United Nations troops or at the people they are charged to protect.’ The report also stated that:

There are many tasks which United Nations peacekeeping forces should not be asked to undertake and many places they should not go. But when the United Nations does send its forces to uphold the peace, they must be prepared to confront the lingering forces of war and violence, with the ability and determination to defeat them.

Since the publication of the Brahimi Report the number of UN peacekeeping missions has increased significantly and these are becoming increasingly multi-dimensional. There are now well over 100,000 UN troops deployed around the world on missions which have Chapter VII authority to use force to protect civilians. POC is also debated at an open bi-annual session of the Security Council and this has resulted in a steady stream of statements, resolutions and reports on how it could be strengthened. When the Security Council revised the mandate of the UN mission to the Democratic Republic of Congo in 2007 it stated that ‘the protection of civilians must be given a priority in decisions about the use of available capacity and resources’.<sup>14</sup>

The cautious language of the UNAMSIL resolution has been repeated many times since and this may be one of the reasons why there has been so little discussion on the far-reaching implications that POC has for the future of UN peacekeeping. POC has also partly been overshadowed by the debate about R2P, which, in its original formulation, contained a section discussing ‘circumstances when the Security Council *fails to discharge what this Commission would regard as its responsibility to protect*, in a conscience-shocking situation crying out for action’ [emphasis added].<sup>15</sup> The implication of this was that the ‘responsibility to protect’ through the use of physical force might pass to other bodies to act without the Security Council’s authority, as had happened during the Kosovo crisis. This alarmed many countries, particularly after the British Prime Minister, Tony Blair, used similar language to justify the invasion of Iraq.<sup>16</sup>

Two paragraphs related to R2P were inserted into the concept in the Outcomes Document that was finally adopted at the UN World Summit in 2005. However, the process of compromises which led to their inclusion resulted in a considerable watering down of the text.<sup>17</sup> The convoluted commitment eventually adopted was ‘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 manifestly fail to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity.’<sup>18</sup> As one observer has noted this amounts to saying little more than that the Security Council should continue authorizing, on an *ad hoc* basis, the type of interventions that it has been authorizing for many years.<sup>19</sup>

In fact by limiting interventions to four specific situations and stipulating that the national authorities concerned must be *manifestly* failing to protect their own populations the language of the text considerably raises the threshold

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14 UNSCR S/RES/1794 of 21 December 2007, para 5.

15 Gareth Evans and Mohamed Sahnoun (Co-Chairs), *Responsibility to Protect*, International Commission on Intervention and State Sovereignty (ICISS), December 2001, para 6.37.

16 Text of speech delivered by the Prime Minister of Britain, Sedgefield, 5 March 2004.

17 Thomas Weiss, *What’s wrong with the United Nations and how to fix it*, London: Polity, 2008, p.142 rejects the argument that the Summit Outcome Document merely contains a commitment to ‘R2P lite’, yet his description of what was in fact endorsed is revealing: ‘the proverbial new bottom-line is clear: when a state is unable or unwilling to safeguard its own citizens and peaceful means fail, the resort to outside intervention, including military force (preferably with Security Council approval) remains a distinct possibility.’ Weiss is a prominent scholar of international relations and was Research Director of the International Commission on Intervention and State Sovereignty.

18 World Summit Outcome document, para 139.

19 Simon Chesterman, ‘*Leading from Behind*’: *The Responsibility to Protect, the Obama Doctrine, and Humanitarian Intervention After Libya*, New York University School of Law, Public law & legal theory research paper series, Working paper no. 11-35, June 2011.

needed to get agreement about an intervention adopted by the Security Council. A minority of its members could, for example, quite plausibly block an intervention by claiming that a generalised situation of violence in which civilians are clearly at threat, did not fit into one of these four categories specified, or that insufficient evidence had been presented to prove that the authorities genuinely lacked the capacity or will to contain the situation themselves. By failing to tackle the issue of membership of the Security Council or the veto powers of its permanent members, the summit also missed an opportunity for a far more important reform.

Of perhaps more significance is the fact that it has now become an accepted practice for the Security Council to authorize such interventions and that POC makes explicit that they are expected to do far more than the tasks associated with 'traditional peacekeeping'. Simply put, armed soldiers are being given lawful authority to enter into the territory of another country in order to protect the people in that state from grave violations of international human rights or IHL. Given that Article 2 of the UN Charter prohibits the use of force and interference in states' internal affairs, even by the UN itself, except when it is acting under its Chapter VII powers, and given that this Chapter contains no references to human rights, IHL or the protection of civilians, what is the legal basis for the Security Council to act in this way?

There appear to be three possible answers to this question. The first is that there is a necessary causal connection between grave violations of human rights and IHL and threats to international peace and security – through, for example, the spill-over effects of a conflict or cross border flows of refugees. The second is that the powers of the Security Council are so 'unbound' that there is nothing to prevent it declaring any situation to be a 'threat to international peace and security', thus allowing it to invoke Chapter VII in order to circumvent Article 2. The third is that there is an emerging international agreement that the UN, by virtue of its 'certain legal personality', is increasingly subject to the positive and negative 'protection' obligations of international law.

If the last of these arguments is accepted, its implications for international law and international relations are significant. UN-authorized interventions in the Balkans, East Timor, Haiti and large parts of Africa have dramatically altered the debate about national sovereignty, human rights and international law over the last two decades. UN missions have moved from peace-keeping to peace enforcement, and sometimes taken on governance functions over entire territories. International criminal tribunals have stripped away state immunity and indicted former and serving government ministers. In 2012 the former President of Liberia, Charles Taylor, was sentenced to 50 years imprisonment for war crimes by the Special Court of Sierra Leone. The former President of Yugoslavia, Slobodan Milosevic died in custody while on trial before the International Criminal Tribunal for Yugoslavia in 2006. The current President of Sudan, Omar al-Bashir was indicted for genocide by the International Criminal Court in 2008.

As will be discussed further in the next section, international courts have accepted that states may have extra-territorial obligations under human rights law and IHL in certain circumstances. At least one domestic court has ruled that these include a positive obligation to defend the lives of those that their soldiers have been sent to protect. However, because the UN Charter takes precedence over other international legal obligations, domestic and international courts have been extremely reluctant to hold the UN to account. The fact that UN missions are also covered from many legal actions by immunities also makes it extremely difficult to scrutinize their human rights records.

International law is evolving rapidly in this area and the case-law that is emerging is complex, controversial and sometimes contradictory. The UN Charter itself contains no express basis for peacekeeping, which has developed in an *ad hoc* manner in response to different crises. Humanitarianism is also a new, and comparatively under-studied, area of work. Although its influence on international relations is clearly growing, it has been subject to very little academic scrutiny and remains surrounded by many myths and misconceptions. Much that has been written on this topic is largely polemical based on an ideological division between ‘liberal interventionists’ on the one hand and ‘anti-imperialists’ on the other. While this debate has generated significant heat, it has thrown rather less light on the real-world dilemmas that policy-makers and practitioners face. The debate has also largely taken place in the ‘global north’, although its subject matter is of far more direct concern to the global south.

As discussed above, while the mandates for peacekeeping missions continue to be written by a Security Council dominated by its five permanent members, the vast majority of troop-contributing countries and mission-hosting states are from the global south. As UN peacekeeping missions grapple with the legal and practical dilemmas that implementing their mandates pose, it is becoming increasingly clear that the existing legal framework provides insufficient guidance and regulation.<sup>20</sup> The following section will provide a brief outline of how the UN Charter has provided legal authority for the expansion of peacekeeping operations. The next section will look at the legal constraints governing the UN itself.

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<sup>20</sup> Scott Sheeran, *Contemporary issues in UN peacekeeping and international law*, Institute for Democracy and Conflict Resolution – Briefing Paper, 2011 provides a summary overview of the issues.

## The UN Charter and peacekeeping operations

The primary purpose of the UN is to ‘maintain international peace and security’. Its other purposes include: developing friendly relations amongst nations based on respect for the principle of equal rights and self-determination of peoples, promoting economic, social, cultural and humanitarian cooperation, and respect for human rights. Its members have formally committed themselves to abiding by principles which include respect for the sovereign equality of nations, a prohibition on the unilateral use of force and an obligation to act in good faith. The prohibition on the use of force is set out in Article 2(4):

All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.

Article 2(7) of the Charter states that ‘Nothing...shall authorize the UN to intervene in matters which are essentially within the domestic jurisdiction of any state ... But this principle shall not prejudice the application of enforcement measures under Chapter VII’. Membership of the UN is open to all ‘peace-loving nations’ irrespective of the nature of their government, providing that they accept the obligations of the Charter. Chapter VII contains no references to human rights, IHL or the protection of civilians and the UN is not party to treaties which provide such protection.

Under Chapter VII the Security Council may ‘determine the existence of any threat to the peace, breach of the peace, or act of aggression’ and ‘make recommendations, or decide what measures shall be taken’ in response. It may ‘call upon the parties concerned to comply with such provisional measures as it deems necessary or desirable’, and ‘take account of failure to comply’ with these. It may also impose ‘complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations. If these measures prove insufficient the Security Council ‘may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.’<sup>21</sup>

The UN Charter is often compared to a Constitution as it sets out the legal powers roles and inter-relationships of its constituent components, and provides the legal framework that governs their activities. The Charter can also be seen as a ‘living’ document, which allows for ‘constitutional development.’ It was adopted before the proclamation of the Universal Declaration of Human Rights and some argue that the references to human rights in the Charter should be read in the light of their subsequent codification in treaties and case-law.<sup>22</sup> However, the Charter does not incorporate the ‘checks and balances’ that are often associated with constitutional theory, and nor does it does it provide for a clear separation of powers within the Organization.<sup>23</sup> In the absence of judicial review it is,

<sup>21</sup> UN Charter, Articles 39, 40, 41 and 42.

<sup>22</sup> White, Nigel and Klaasen, Dirk, *The UN, human rights and post-conflict situations*, Manchester University Press, 2005, p.7; Nigel White *The United Nations System: toward international justice*, Boulder, Col.: Lynne Rienner, 2002, pp.14-17. Others, such Peter Malanczuk, *Akehurst’s Modern Introduction to International Law*, 7th Edition, Routledge, 1997, p.212, argue that the wording adopted by the drafters indicates they were always intended to be merely aspirational.

<sup>23</sup> Thomas Franck, ‘The Powers of Appreciation: Who is the ultimate guardian of the powers of UN legality?’ *American Journal of International Law*, 1992, pp. 519-23.



*A Brazilian United Nations Military Liaison Officer speaks with a Timorese family about the security situation in Covalima district (Timor-Leste 20 June 2007)*

*UN Photo/Martine Perret*

therefore, difficult to determine authoritatively what positive and negative obligations bind the Security Council and its subsidiary organs.

Under Article 25 all members of the UN 'agree to accept and carry out the decisions of the Security Council in accordance with the present Charter' while Article 103 specifies that: 'In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.' The Vienna Convention on the Law of Treaties recognizes the absolute priority of Article 103 over other treaty obligations.<sup>24</sup> It has been noted that the wording of the UN Charter is so 'open textured and discretionary' as to make the powers of the Security Council practically unchallengeable<sup>25</sup> and that, as a consequence, 'a threat to peace . . . seems to be whatever the Security Council says is a threat to peace'.<sup>26</sup> The UN and its various organs have reinterpreted their own competencies in ways that, at times, plainly departed from the original text of the Charter and the intent of its drafters. However, this has been as much to compensate for their practical weaknesses as to expand their theoretical powers.<sup>27</sup>

The drafters of the Charter originally envisaged an extremely comprehensive system of collective security. The Security Council was to have considerable land, sea and air forces permanently at its disposal under agreements

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24 Vienna Convention on the Law of Treaties, Article 30.

25 S Lamb, 'Legal limits to UN Security Council Powers', in Guy Goodwin-Gill and Stefan Talmon (eds) *The Reality of International Law: essays in honour of Ian Brownlie*, Oxford: Oxford University Press, 1999, p.361.

26 Peter Malanczuk, *Akehurst's Modern Introduction to International Law*, 7th Edition, Routledge, 1997, p.426.

27 Niels Blokker, 'Is the Authorization Authorized? Powers and Practice of the UN Security Council to Authorize Use of Force by Coalitions of the Able and Willing', *European Journal of International Law*, 11, (2000) p.541-568.

to be negotiated, in accordance with Article 43. In the initial discussions the Soviet Union contemplated a force of 'about 12 ground divisions (say 125,000 men) 600 bombers, 300 fighters, 5-6 cruisers, 24 destroyers and 12 submarines. The United States wanted 20 ground divisions (say 300,00 men), 1,250 bombers, 2,250 fighters, 3 battleships, 6 aircraft carriers, 15 cruisers, 84 destroyers and frigates and 90 submarines.'<sup>28</sup> However, the Security Council's work soon became paralyzed by its permanent members' vetoes with the onset of the Cold War. No Article 43 agreements were ever concluded and the meetings of the Military Staff Committee, envisaged by Article 47, became an empty formality.<sup>29</sup>

The lack of agreements under Article 43 has often left the Security Council with 'no choice but to rely on member states willing to act on its behalf'.<sup>30</sup> This method of 'delegated enforcement action' is not explicitly mentioned in the Charter, as its drafters envisaged that, with the exception of Chapter VIII operations, the UN would be deploying its own forces made available by member states. Although it is now widely accepted that the Security Council can delegate this power to states, it may create ambiguity about whether they are permissively 'authorized' or 'obliged' by a Security Council resolution to take certain actions.<sup>31</sup> As is discussed in the next section, this has caused controversy over the use of detention powers in Kosovo and Iraq.

Calls for the creation of a UN standing military force have resurfaced periodically and variations of the proposal regularly feature in discussions on UN reform.<sup>32</sup> Some progress has been made in the development of stand-by preparedness, but the rapid deployment of properly equipped troops has been a recurring problem in UN peacekeeping missions. This is largely due to an underlying reluctance on the part of all states to see a major transfer to the UN of their power to use military force and reflects a broader tension between the real balance of power between national and international organizations. As the Appeals Chamber of International Criminal Tribunal for Yugoslavia has noted:

[t]he international community lacks any central government with the attendant separation of powers and checks and balances. In particular, international courts, including the International Tribunal, do not make up a judicial branch of a central government. The international community primarily consists of sovereign States; each jealous of its own sovereign attributes and prerogatives, each insisting on its right to equality and demanding full respect, by all other States, for its domestic jurisdiction . . . international courts do not necessarily possess, *vis-à-vis* organs of sovereign States, the same powers which accrue to national courts in respect of the administrative, legislative and political organs of the State. Hence, the transposition onto the international community of legal institutions,

28 Colonel D.W. Bowett, *United Nations Forces: A legal study*, New York: Frederick A Praeger, 1964, p.15.

29 Alex Bellamy and Paul Williams, *Understanding Peacekeeping*, Second Edition, Polity Press, 2011, pp.81-91; Christine Gray, *Use of Force in International Law*, Third Edition, Oxford: Oxford University Press, 2008, pp.255-264.

30 Bruno Simma, *The Charter of the United Nations A Commentary Second Edition*, Oxford: Oxford University Press, 2002, p.729.

31 See, for example, Rosalind Higgins, *Problems and Processes: international law and how we use it*, Oxford: Oxford University Press, 1994, p.266; and Dan Sarooshi *The United Nations and the Development of Collective Security*, Oxford: Oxford University Press, 1999, p.153; Natalino Ronzitti, 'Lessons of International Law from NATO's Armed Intervention Against the Federal Republic of Yugoslavia', *The International Spectator* Volume XXXIV, No. 3, July - September 1999.

32 Adam Roberts, 'Proposals for UN Standing Forces: history, tasks and obstacles', in Vaughan Lowe Adam Roberts and Jennifer Welsh (eds), *The United Nations Security Council and War*, Oxford: Oxford University Press, 2008, pp.99-130.

constructs or approaches prevailing in national law may be a source of great confusion and misapprehension.<sup>33</sup>

The most obvious restraints on the Security Council are political. Decisions require an affirmative vote of nine members and each of the five permanent members of the Security Council has a veto on 'substantive' resolutions. In *Agenda for Peace*, published in 1992, Boutros Boutros-Ghali, the newly-appointed Secretary General, commented that: 'Since the creation of the United Nations in 1945, over 100 major conflicts around the world have left some 20 million dead. The United Nations was rendered powerless to deal with many of these crises because of the vetoes - 279 of them - cast in the Security Council, which were a vivid expression of the divisions of that period. With the end of the cold war there have been no such vetoes since 31 May 1990, and demands on the United Nations have surged. Its security arm, once disabled by circumstances it was not created or equipped to control, has emerged as a central instrument for the prevention and resolution of conflicts and for the preservation of peace.'<sup>34</sup>

The year before the publication of *Agenda for Peace*, at the end of the first Gulf War in 1991, the Security Council passed Resolution 688, which demanded 'humanitarian access' to the Kurds, whose abortive rising against Saddam Hussein's regime had just collapsed. Fearing another chemical weapons attack, like the one at Halabja in 1988, two million people fled towards the Turkish border, but arrived to find it sealed off by the Turkish government. The world had just witnessed US air power annihilate the Iraqi armed forces and western public opinion refused to accept that nothing could be done to prevent another act of genocide. Britain, France, and the United States deployed ground troops to turn back the Iraqi army and persuade the refugees that it was safe to come down from the mountains.

Several thousand ground troops were deployed and a 'no-fly zone' was subsequently declared over northern Iraq, in what became known as 'Operation Provide Comfort'. This was the first of a series of interventions in which international armed soldiers and civilian aid workers were deployed in what are commonly referred to as 'complex emergencies'.<sup>35</sup> The best known of these were in: Somalia, Haiti, Bosnia-Herzegovina, Rwanda, Sierra Leone, Kosovo, Timor-Leste, Liberia, the Democratic Republic of Congo, Côte d'Ivoire, Darfur and South Sudan. About the only thing on which everyone can agree is that their results can best be described as 'mixed'. A botched intervention in Somalia in 1993 led the US government refusing to deploy its own troops on future missions and insisting that the UN force deployed to Rwanda in 1994 be scaled-back in size. UN forces were unable to prevent genocide in both Rwanda and Bosnia-Herzegovina.

Resolution 688 had described the situation in Iraq as a 'threat to international peace and security', but had not been adopted under Chapter VII of the UN Charter and so did not provide legal authorization for the use of force. The British government was subsequently to claim that Operation Provide Comfort, while 'not specifically mandated' by the

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33 *Blaskic Case, Judgement on the request of the Republic of Croatia for review of the decision of Trial Chamber II of 18 July 1997*, Judgment of 29 October 1997, para 40.

34 Boutros Boutros-Ghali, *Report of the Secretary-General An Agenda for Peace: Preventive Diplomacy, Peacemaking and Peacekeeping* UN Doc. A/47/277 - S/24111, 17 June 1992.

35 See Andrew Natsios 'NGOs and the UN system in complex humanitarian emergencies: conflict or cooperation', Thomas Weiss and Leon Gordenker (Eds) *NGOs, the UN & Global Governance*, Lynne Rienner Publishers, Boulder, 1996, p.67. These are generally defined by: the deterioration or collapse of central government authority; conflict and widespread human rights abuses; food insecurity; macroeconomic collapse; and mass forced displacement of people.





*Darfuri students outside the Oumoul Mouminina School in West Darfur waiting for the arrival of the head of the African Union and United Nations Hybrid Operation in Darfur - UNAMID (Sudan, 24 January 2011)*

*UN Photo/Albert Gonzalez Farran*

Security Council had been taken by states 'in exercise of the customary international law principle of humanitarian intervention'.<sup>36</sup> Belgium advanced a similar argument to justify its participation in NATO's bombing campaign during the Kosovo crisis.<sup>37</sup> However, most legal scholars agree that there are far too few examples of state practice to support the claim that 'humanitarian interventions' can be justified under customary international law. As a British Foreign Office briefing, published in 1986, had previously stated:

The state practice to which advocates of the right of humanitarian intervention have appealed provides an uncertain basis on which to rest such a right. Not least this is because history has shown that humanitarian ends are almost always mixed with less laudable motives . . . . the best case that can be made in support of humanitarian intervention is that it cannot be said to be unambiguously illegal. To make that case, it is necessary to demonstrate, in particular by reference to Article 1(3) of the UN Charter, which includes the promotion and encouragement of respect for human rights as one of the Purposes of the United Nations, that paragraphs 7 and 4 of Article 2 do not apply in cases of flagrant violations of human rights. But the overwhelming majority of contemporary legal opinion comes down against . . . [it] for three main reasons: first, the UN Charter and the corpus of modern international law do not seem specifically to incorporate such a right; secondly, state practice in the past two centuries, and especially since 1945, at best provides only a handful of genuine cases of humanitarian intervention, and, on most assessments, none

<sup>36</sup> The expanding role of the United Nations and its implications for UK policy: minutes of evidence, hearing of the Foreign Affairs Committee of the House of Commons, 2 December 1992, at 84. Statement of Tony Aust, Foreign and Commonwealth Office Legal Counsellor.

<sup>37</sup> See *Legality of the Use of Force (Provisional Measures)* ICJ Reports, 1999.

at all; and finally, on prudential grounds, that the scope for abusing such a right argues strongly against its creation. . . . the case against making humanitarian intervention an exception to the principle of non-intervention is that its doubtful benefits would be outweighed by its costs in terms of respect for international law.<sup>38</sup>

Supporters of the invasion of Iraq in 2003 cited the discussions taking place about R2P as an opportunity to address this issue. As discussed previously, the summit Outcome Document did contain two paragraphs of language that bear some similarities to the original R2P concept report, but, the compromises necessary to achieve this largely stripped the doctrine of its normative content. One prominent supporter of R2P has claimed that it was ‘the spectacular misuse of R2P principles by the US-led coalition, supported particularly in this respect by the UK, in the case of the 2003 invasion of Iraq’ that caused many states to conclude ‘that R2P will be just another excuse for neo-colonialist and neo-imperialist interventions.’<sup>39</sup>

R2P also suffered from its close association of with NATO’s actions in Kosovo. Although the final death toll from this crisis has never been definitively established, it is clear that it was far lower than was claimed by supporters of intervention at the time.<sup>40</sup> The vast majority of the killings also occurred after the start of NATO’s bombing campaign and so cannot credibly be used as retrospective justification for it.<sup>41</sup> NATO’s reliance on a high aerial bombing campaign, while keeping the losses of western troops to zero, failed to provide protection to threatened civilians and significantly increased the risk of targeting mistakes. Around 500 civilians were killed by NATO bombs and missiles, which was probably around 10 per cent of the total fatalities.<sup>42</sup> Up to 800,000 Kosovan ethnic Albanians fled their homes during the conflict, as Serbian security forces and paramilitaries carried out a campaign of terror against the civilian population. Around 150,000 Serbs and Roma fled in its aftermath fearing attacks by Albanian extremists. Human Rights Watch estimates that up to one thousand Serbs and Roma may have been murdered in this period.<sup>43</sup> The attacks continued in the years that followed after Kosovo had been placed under UN administration and the failure of the international community to protect minority communities undermined many of the original humanitarian arguments for the intervention.<sup>44</sup>

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38 *UK Foreign Office Policy Document, No. 148*, British Yearbook of International Law, 1986.

39 Gareth Evans, *Hypocrisy, Democracy, War and Peace*, International Crisis Group, 16 June 2007.

40 *CNN News*, ‘Transcript: Clinton addresses the nation on Yugoslavia strike’, 24 March 1999, in which he compared the situation to the Holocaust. See also *Washington Post*, ‘NATO continues attacks on Kosovo’, 17 May 1999, quotes US Defence Secretary William Cohen as claiming that ‘up to 100,000 ethnic Albanian men of fighting age have vanished and may have been killed.’ *BBC News*, ‘Serbs accused of clearing mass graves’ 18 May 1999’, quotes David Scheffer, the US ambassador at large for war crimes, as saying that ‘the number of Kosovar men unaccounted for in the province had now reached 225,000.’ However, by July 2001, the ICTY had exhumed approximately 4,300 bodies, which it noted was far less than the 11,334 bodies it had initially reported. According to the International Committee of the Red Cross, as of April 2001, 3,525 people remained missing. Since many of those missing were eventually found it seems credible to assume that the total death toll was between 5,000 and 7,000 people.

41 In October 1998 an Amnesty International report estimated that ‘several hundred ethnic Albanians and a smaller number of Serbs have been killed since the conflict began in February 1998.’ NATO claims that this figure had risen to 1,500 by March 1999. Other reports claim higher or lower figures, which mainly correlate with whether their authors opposed or supported the intervention.

42 *Under Orders: War Crimes in Kosovo*, Human Rights Watch, October 2001.

43 *Ibid.*

44 Conor Foley, *The Thin Blue Line: how humanitarianism went to war*, Verso Press, 2010.

But while there is clearly no enthusiasm for allowing individual states to act as judge, jury and executioner on the question of 'humanitarian interventions', the Security Council is now regularly authorizing missions which take on tasks that go far beyond 'traditional peacekeeping'. Missions are carrying out functions such as justice and security sector reform, disarmament of militia forces, and capacity-building of the police and military to improve the 'protective environment'. They are also organising and supervising elections and promoting economic, social and political reform. The annual reports of the UN Special Committee for Peacekeeping Operations (C34) repeatedly reaffirm that peacekeeping is based on three fundamental principles: consent of the parties, impartiality and non-use of force except in self-defence or defence of the mandate. Nevertheless UN missions from Haiti, to the Democratic Republic of Congo and Côte d'Ivoire have repeatedly been involved in large-scale armed actions, often directed against particular parties that have been identified as a threat to civilians.<sup>45</sup>

In 2011, for example, the UN mission in Côte d'Ivoire (UNOCI) took military action against the forces of the incumbent President who had refused to vacate office after losing an election, which the UN had certified as fair. UNOCI was authorized to 'use all necessary means' to prevent the President's forces from using heavy weapons in the country's biggest city, after they had mounted attacks on civilians.<sup>46</sup> In the same year the Security Council used its Chapter VII powers to authorize military action in Libya to protect civilians at risk of attack during an uprising against President Muammar Gaddafi.<sup>47</sup>

In March 2013 the UN Security Council authorised the creation of its first-ever 'offensive' combat force to support MONUSCO in Eastern DRC.<sup>48</sup> This followed criticism of the mission's failure to prevent the town of Goma from briefly falling into the hands of a rebel group the previous year. The Force Intervention Brigade has a mandate to 'neutralize and disarm' Congolese rebels and foreign armed groups and will consist of 3,000 troops trained for combat operations. MONUSCO has also been providing logistical support to the Congolese armed forces in their counter-insurgency campaigns against rebel and militia forces in recent years and, since 2009, has developed a Human Rights Due Diligence Policy (HRDDP), which requires active monitoring of the behavior of national armed forces and prohibits direct support to particular military personnel or units that have committed human rights violations.

Leaving aside the rights and wrongs of these specific actions, it is clear that they involve life-and-death decisions and have considerable implications for the UN's responsibilities under international human rights law and IHL. Given the lack of checks and balances on the powers of the Security Council in the UN Charter or possibilities for judicially reviewing its actions, how, in practical terms can the UN itself be held to account for them?

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45 For a good overview of four missions see Victoria Holt and Glyn Taylor, *Protecting civilians in the context of UN peacekeeping operations*, New York: United Nations, 2009.

46 *UN News Centre*, 'UN forces begin operation in Ivorian city in response to attack by pro-Gbagbo forces', 10 April 2011.

47 UN Security Council Resolution 1973, adopted by 10 votes in favour with five abstentions 17 March 2011

48 Resolution 2098, adopted unanimously, 28 March 2013.

## The powers and limitations of the UN Security Council

In 2007 the European Court of Human Rights ruled in two separate cases that France, Germany and Norway could not be held responsible for the actions or inactions of their forces in Kosovo (KFOR) because these fell within the mandate of the UN mission (UNMIK), which ‘was a subsidiary organ of the UN created under Chapter VII of the Charter’.<sup>49</sup> One complaint was brought by the father of a boy killed by an exploding shell dropped by NATO during its air campaign, which, it was alleged, French KFOR soldiers had failed in their positive obligation to mark or clear. The second was brought by an alleged Albanian militia leader who was detained before trial in military custody for several months in 2001 and 2002. The Court noted that the UN is ‘not a Contracting Party to the [European] Convention’ and concluded that:

[i]t is evident from the Preamble, Articles 1, 2 and 24 as well as Chapter VII of the Charter that the primary objective of the UN is the maintenance of international peace and security. While it is equally clear that ensuring respect for human rights represents an important contribution to achieving international peace (see the Preamble to the Convention), the fact remains that the UNSC [Security Council] has primary responsibility, as well as extensive means under Chapter VII, to fulfil this objective, notably through the use of coercive measures. The responsibility of the UNSC in this respect is unique and has evolved as a counterpart to the prohibition, now customary international law, on the unilateral use of force . . . operations established by UNSC Resolutions under Chapter VII of the UN Charter are fundamental to the mission of the UN to secure international peace and security and since they rely for their effectiveness on support from member states, the Convention cannot be interpreted in a manner which would subject the acts and omissions of Contracting Parties which are covered by UNSC Resolutions . . . to the scrutiny of the Court.

The Court has reached similar decisions in a number of other cases and the reasoning has also been used in domestic courts to find that British soldiers can detain people without trial in Iraq by virtue of a Security Council Chapter VII resolution.<sup>50</sup> In July 2008 the District Court of The Hague similarly ruled that it had no jurisdiction to hear the *Mothers of Srebrenica* case,<sup>51</sup> concerning the 1995 genocidal massacre in an area declared by the UN to be ‘safe’ during the conflict in Bosnia-Herzegovina. This decision was upheld by the Court of Appeal and the Dutch Supreme Court in 2012.<sup>52</sup> The previous year a court ruled that the Dutch Battalion based in Srebrenica as part of the UN peacekeeping mission could be held responsible for the deaths of three Bosnians who were effectively handed

49 *ECtHR Behrami and Behrami v. France* (Appl. No. 71412/01) 31 May 2007 (Grand Chamber admissibility decision) and *Saramati v. France, Germany and Norway* (Appl. No. 78166/01), Decision on admissibility, 2 May 2007.

50 Hilal Abdul-Razzaq Ali Al-Jedda, an Iraqi national, who had also been granted British citizenship, was arrested in Baghdad in 10 October 2004 and detained without trial in a detention centre run by British forces in Basra until 30 December 2007. The European Court of Human Rights subsequently found a violation of the right to liberty in this case on the grounds that the detention could not be attributable to the UN. *Al-Jedda v. the United Kingdom* Appl. No. 27021/08, Judgment of 7 July 2011 (Grand Chamber).

51 *Mothers of Srebrenica/Netherlands and United Nations*, District Court of the Hague, July 10, 2008, De Rechtspraak BD6795 (Neth.).

52 Judgment of the Supreme Court of the Netherlands, in the case of the *Mothers of Srebrenica*, First Division 10/04437, EV/AS, 13 April 2012.



*Children stand near a water point at Zam Zam camp for internally displaced near El Fasher in North Darfur, Sudan (25 June 2012)*

*UN Photo/Sojoud Elgarrai*

over to the Bosnian Serb forces as they over-ran the town, rejecting the argument that these acts were solely attributable to the UN.<sup>53</sup>

There have also been a series of cases in which people have had their assets frozen or been subject to travel bans due to rulings by the UN sanctions committee regarding their suspected links with Al Qaeda or the Taliban.<sup>54</sup> Governments have argued that domestic and international courts have no jurisdiction to hear such cases because the committee was established by the UN using its Chapter VII powers. While a number of lower courts have accepted this argument, the European Court of Justice, the European Court of Human Rights and the UN Human Rights Committee have found that measures taken by states to implement Security Council resolutions at the national or regional level should not be considered the same as those directly attributable to the UN itself and have questioned the lack of procedural safeguards surrounding these infringements of rights.<sup>55</sup> In his concurring opinion in one case Human Rights Committee member, Nigel Rodley, stated that the wording of the UN Charter strongly suggests that there should be a ‘presumption that the Security Council did not intend

that actions taken pursuant to its resolutions should violate human rights’, which would apply to *jus cogens* and non-derogable rights and that ‘even in respect of rights that may be derogated from during a public emergency, any departures would be conditioned by the principles of necessity and proportionality.’<sup>56</sup>

In 2009 the Security Council adopted a new resolution to establish an Office of the Ombudsperson to assist the Sanctions Committee in its consideration of delisting requests.<sup>57</sup> The mandate of this office was subsequently

<sup>53</sup> *Judgment in the case of Mustafić, Court of Appeal in the Hague, Civil Law Section*, Case number: 200.020.173/01, Case-/cause-list number District Court : 265618/ HA ZA 06-1672, Ruling of 5 July 2011; *Judgment in the case of Nuhanović, Court of Appeal in the Hague, Civil Law Section*, Case number : 200.020.174/01 Case-/cause-list number District Court : 265618/ HA ZA 06-1672, Ruling of 5 July 2011.

<sup>54</sup> Established pursuant to UN Security Council resolutions 1267 (1999), 1333 (2000) and 1390 (2002).

<sup>55</sup> See, for example, *Kadi v. the European Commission*, Judgement of the General Court, Case T-85/09, 30 September 2010; *Nada v. Switzerland*, Judgement of the Grand Chamber, Appl. No. 10593/08, 12 September 2012; and *Sayadi and Vinck v. Belgium*, CCPR/C/94/D/1472/2006, Communication No. 1472/2006, Views adopted on 22 October 2008.

<sup>56</sup> *Nabil Sayadi and Patricia Vinck v. Belgium*, Appendix B, Individual opinion of Committee member Sir Nigel Rodley (concurring).

<sup>57</sup> UN Security Council Resolution 1904, adopted 17 December 2009.

expanded in 2011.<sup>58</sup> Although it falls short of providing a formal judicial review of the committee's decisions and the international minimum standards of due process in human rights law,<sup>59</sup> it has been argued that the authority ceded to the Ombudsperson is 'unprecedented and extraordinary'.<sup>60</sup>

In two land-mark cases in the early 1990s, the International Court of Justice was confronted with the dilemma of how to deal with situations in which UN Chapter VII Security Council Resolutions appeared to be in conflict with human rights norms. In the *Libya* case of 1992,<sup>61</sup> it was claimed that the Security Council was over-riding elements of procedural justice and the right to a fair trial, while in the *Bosnia genocide provisional measures* case of 1993 one judge suggested that an arms embargo imposed by the UN had led to the 'exposure of the Muslim population of Bosnia to genocidal activity at the hands of the Serbs'.<sup>62</sup> Neither case was resolved definitively at the time, but both expose a fundamental problem with the international regulatory framework surrounding Chapter VII decisions of the Security Council which has an obvious relevance to peacekeeping operations.

There is a growing jurisprudence which holds that the UN is bound by at least some of the positive and negative legal 'protection' obligations in international law. Courts have, in particular, stated that the Security Council is bound by *jus cogens*, which is a 'peremptory norm' of general international law that can only be over ridden by another peremptory norm.<sup>63</sup> It is now widely accepted that some of the most basic human rights and rules of IHL have attained *jus cogens* status and that these would probably include: the prohibitions on aggression, genocide, slavery, systematic racial discrimination, crimes against humanity, torture and apartheid as well as the right to self-determination.<sup>64</sup> The obligation on states to protect and promote these most basic human rights is the concern of all states, that is they are owed *erga omnes*, and a material breach of them allows all states to consider themselves 'legally injured' and resort to counter-measures so long as these do not involve the use or threat of force.<sup>65</sup> UN Security Council resolutions also often include references to IHL, human rights and refugee law in mission mandates, however, the lack of effective accountability mechanisms makes it difficult to determine exactly what negative and positive legal obligations these frameworks of law place on the missions at the strategic, operational and tactical level.

In 1999 the Secretary-General's Bulletin on Observance of International Humanitarian Law stated that: 'The fundamental principles of international humanitarian law are applicable to UN forces when in situations of armed

58 UN Security Council Resolution 1989, adopted 17 June 2011.

59 *Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism*, UN Doc. A/67/396, 26 September 2012.

60 Sue E. Eckert and Thomas J. Biersteker, *Due Process and Targeted Sanctions An Update of the "Watson Report"*, Watson Institute for International Studies, Brown University, Rhode Island, December 2012.

61 *Case concerning questions of interpretation and application of the Montreal Convention arising out of the Aerial incident at Lockerbie (provisional measures) Libya v UK*, ICJ Reports 1992.

62 Further Requests for the Indication of Provisional Measures, Order of 13 September 1993, Separate Opinion of Judge Lauterpacht paras 89 – 95.

63 Vienna Convention on the Law of Treaties, 1969, Article 53.

64 See ILC Commentaries to Articles on State Responsibility, Introductory Commentary to Part Two, ch. III; Human Rights Committee, General Comment 24 (52), General comment on issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant, UN Doc. CCPR/C/21/Rev.1/Add.6 (1994), para 10.

65 For discussion see Bruno Simma, 'NATO, the UN and the Use of Force: Legal Aspects', *European Journal of International Law*, 10, 1999.

conflict they are actively engaged therein as combatants, to the extent and for the duration of their engagement. They are accordingly applicable in enforcement actions or in peacekeeping operations when the use of force is permitted in self-defence.<sup>66</sup> This was confirmed by the United Nations Peacekeeping Operations: Principles and Guidelines (the Capstone Doctrine) in 2008, which stated that UN peacekeepers ‘must have a clear understanding of the principles and rules of international humanitarian law and observe them in situations where they apply.’<sup>67</sup> The UN Safety Convention of 1994,<sup>68</sup> which makes it a crime under international law to attack UN staff and associated personnel, specifies that this is in all cases except when they are ‘are engaged as combatants against organized armed forces and to which the law of international armed conflict applies’.<sup>69</sup>

However, the extent to which the UN considers its operations to be bound by human rights remains less clear.<sup>70</sup> On the two occasions in which the UN established administrations with executive powers over their respective territories,<sup>71</sup> the regulations establishing the applicable law explicitly included international human rights treaties.<sup>72</sup> The Security Council resolution creating the UN mission in Kosovo (UNMIK) specified that its responsibilities would include ‘protecting and promoting human rights’,<sup>73</sup> while one of the earliest regulations of the UN mission to East Timor (UNTAET) stated that ‘all persons undertaking public duties or holding public office in East Timor shall observe internationally recognized human rights standards’.<sup>74</sup> However, the experiences of both missions show that the formal declarations of support for international human rights standards mean little unless mechanisms can be established to hold its forces and personnel to account when these are violated. This creates a potential conflict with the established practice of granting sweeping legal immunities to UN missions.

Article 105 of the UN Charter provides that the UN and its representatives ‘shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfilment of its purposes’.<sup>75</sup> This Article also provided for the drafting of the Convention on Privileges and Immunities of the United Nations of 1946,<sup>76</sup> which

66 UN Secretary General, *UN Secretary General’s Bulletin, Observance by UN Forces of International Humanitarian Law*, 6 August 1999, (ST/SGB/1999/13).

67 UN Department of Peacekeeping Operations and UN Department of Field Support, *United Nations Peacekeeping Operations: Principles and Guidelines* (Capstone Doctrine), 2008, p. 15.

68 Convention on the Safety of UN and Associated Personnel, New York, 9 December 1994.

69 *Ibid.*, Article 2 The Rome Statute of the International Criminal Court also lists attacks on UN peacekeepers as a crime under its jurisdiction in Article 8.

70 Frederic Megret & Florian Hoffman, ‘The UN as a Human Rights Violator? Some Reflections on the UN’s Changing Human Rights Responsibilities’ (2003) 25(2) *Human Rights Quarterly* pp. 314–334.

71 the UN mission in Kosovo (UNMIK) and the UN Transitional Administration in East Timor (UNTAET).

72 UNMIK Regulation No. 1999/24 on the Law Applicable in Kosovo (Dec. 12, 1999) UNTAET Regulation No. 1999/1, 27 December 1999, on the Authority of the Transitional Administration in East Timor, 9 November 2010.

73 UN Security Council Resolution 1244, 10 June 1999, Article 11 (j).

74 UNTAET Regulation No. 1999/1.

75 ‘(1) The Organization shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfillment of its purposes. (2) Representatives of the Members of the United Nations and officials of the Organization shall similarly enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connection with the Organization. (3) The General Assembly may make recommendations with a view to determining the details of the application of paragraphs 1 and 2 of this Article or may propose conventions to the Members of the United Nations for this purpose.’

76 Convention on Privileges and Immunities of the United Nations 1946, Adopted by the General Assembly of the United Nations on 13 February 1946, United Nations — Treaty Series 1946-1947.

contains detailed provisions of the ‘functional’ privileges and immunities enjoyed by UN officials and member state representatives.<sup>77</sup> The Convention protects the UN’s ‘property and assets wherever located and by whomsoever held. . . . from every form of legal process except insofar as in any particular case it has expressly waived its immunity.’<sup>78</sup> It also states that the ‘premises of the United Nations shall be inviolable’ and ‘immune from search, requisition, confiscation, expropriation and any other form of interference, whether by executive, administrative, judicial or legislative action.’<sup>79</sup>

The Convention provides legal immunity for its own officials, representatives of member states while participating in its activities and experts on mission to the UN in respect of all acts performed by them in their official capacities. These privileges and immunities ‘are granted to officials in the interests of the United Nations and not for the personal benefit of the individuals themselves’ and the UN Secretary-General ‘shall have the right and the duty to waive the immunity of any official in any case where, in his opinion, the immunity would impede the course of justice’. There will clearly be circumstance in which shield of immunity is necessary for the UN to carry out its operational activities, but as these operations have grown more complex, the lack of effective accountability mechanisms raises increasing questions about what normative constraints really govern the behaviour of its missions. This has most clearly been the case on the two occasions in which the UN established administrations with executive powers in Kosovo and Timor-Leste.<sup>80</sup>

Serious concerns have been raised about the human rights records of both of these administrations. For example, an Amnesty International report published in 2006 claimed that both the UNMIK and Kosovo police contravened international standards on the use of force and firearms by beating and tear-gassing peaceful demonstrators, and shooting people dead in circumstances that were not properly investigated.<sup>81</sup> Both KFOR and UNMIK police failed to protect minority communities and the Kosovo national police may have actually participated in violent attacks. Concern about the lack of accountability, particularly in the wake of widespread violence in Kosovo in 2004, eventually led to the establishment of the Kosovo Human Rights Advisory Panel in 2006 to investigate individual complaints of alleged human rights violations committed by or attributable to UNMIK.<sup>82</sup>

An Amnesty International report on Timor-Leste published in 2001 noted that: ‘Detainees have gone for weeks or even months before having access to legal counsel. It is still not uncommon for individuals to be detained beyond the expiry of their detention orders. . . . . At the same time, the UN Civilian police (Civpol), currently responsible for law enforcement in East Timor [sic], have not always responded effectively where civil disturbances have occurred

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77 For details see, August Reinich, ‘Convention on Privileges and Immunities of the United Nations, New York, 13 February 1946, Convention on Privileges and Immunities of the Specialized Agencies, New York, 21 November 1947, *United Nations Library of International Law*,’ <http://untreaty.un.org/cod/avl/ha/cpiun-cpisa/cpiun-cpisa.html>, accessed 7 March 2013. Staff disputes within the United Nations are settled by an internal mechanism in the form of the United Nations Administrative Tribunal, established by General Assembly resolution 351 A (IV) of 9 December 1949.

78 Convention on Privileges and Immunities Article II, Section 2.

79 Ibid., Article II, Section 3.

80 The UN mission in Kosovo (UNMIK) was established by UN Security Council Resolution 1244 of 10 June 1999; the UN Transitional Administration in East Timor (UNTAET), established by Security Council resolution 1272 (1999) of 25 October 1999.

81 Amnesty International, *The UN in Kosovo: A legacy of impunity*, AI Index: EUR 70/015/2006; Amnesty International, *Kosovo: KFOR and UNMIK fail to uphold human rights standards in Mitrovica*, AI Index: EUR 70/14/00.

82 *The Kosovo Human Rights Advisory Panel, International Law Meeting Summary*, Chatham House, 26 January 2012.



and in some cases its members have committed violations themselves in their efforts to prevent such disturbances . . . . Acts such as illegal detention and torture by unofficial security groups, often with links to political groups or Falintil [the dominant political party], have not been effectively addressed.<sup>83</sup> Many observers believe the lack of accountability of UNTAET during the transition period exacerbated the problems that the country has experienced since independence.

Most UN peacekeeping missions do not have executive power and so their responsibilities are more limited. Nevertheless, they are increasingly confronted with situations which may involve decisions related to the use of force, arrest and detention.<sup>84</sup> Missions with protection of civilians (POC) mandates clearly have both positive and negative obligations under international human rights law and IHL. Some argue that, in some situations, international forces with a UN mandate are performing functions analogous to those of an Occupying Power.<sup>85</sup> This would mean that they have a duty to ‘protect the inhabitants of the occupied territory against acts of violence and not to tolerate any such violence by third parties’.<sup>86</sup> In 2005 the ICJ found, in a case brought by the Democratic Republic of Congo against Uganda, that as the occupying power, ‘Uganda’s responsibility is engaged both for any acts of its military that violated its international obligations and for any lack of vigilance in preventing violations of human rights and international humanitarian law by other actors present in the occupied territory, including rebel groups acting on their own account.’<sup>87</sup>

The UN has generally sought to develop mechanisms to address its most egregious failures in the field as a result of political pressure from both inside and outside the organization. The UN Secretariat also regularly carries out its own reviews and ‘lessons learned’ exercises. The problem remains, however, of a more general crisis of legitimacy, which needs to be addressed through leadership reform. While the UN Security Council may be able to shield itself and its subordinate organs from direct legal challenges, the number of cases taken against states implementing its resolutions is likely to grow and this will have a direct impact on the willingness of member states to contribute personnel to its missions. There is a real danger that, if current trends continue, the only countries that may be prepared to contribute troops and police will be those whose jurisdictions lack mechanisms for establishing effective accountability over their own states’ human rights records.

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83 Amnesty International, *East Timor: Justice past, present and future*, AI Index: ASA 57/001/2001.

84 See, for example, *Copenhagen Process on the Handling of Detainees in International Military Operations*, <http://um.dk/en/politics-and-diplomacy/copenhagen-process-on-the-handling-of-detainees-in-international-military-operations/>, accessed 2 March 2013.

85 Siobhan Wills, *Protecting civilians: the obligations of peacekeepers*, Oxford: Oxford University Press, 2009, pp.111-245.

86 Regulations Concerning the Laws and Customs of War on Land (Hague Regulations), Articles 42 and 43; Fourth Geneva Convention, Articles 4, 27, 41, 42, 43, 64 and 78.

87 In *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, I.C.J. Reports 2005, p. 168, para 179; ‘See also *On the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ Advisory Opinion, ICJ Reports 9 July 2004, paras 102 - 113; *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons*, ICJ Reports 8 July 1996, para 24 *Case Concerning Military and Paramilitary Activities in and against Nicaragua*, Judgment, of 27 June 1986, ICJ Rep. 1986, para 178.

## Responsibility while Protecting

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On 26 February 2011 the UN Security Council adopted a Resolution expressing grave concern at the situation in the Libya, deploring the gross and systematic violation of human rights, including the repression of peaceful demonstrators, and rejecting unequivocally the incitement to hostility and violence against the civilian population made from the highest level of the Libyan government.<sup>88</sup> The resolution noted that the widespread and systematic attacks taking place in the Libya may amount to crimes against humanity, expressed its concern at the plight of refugees and also the shortages of medical supplies to treat the wounded.

The Resolution recalled that it was ‘the Libyan authorities’ responsibility to protect its population’ and reaffirmed its ‘strong commitment to the sovereignty, independence, territorial integrity and national unity’ of the country. Nevertheless, the Security Council, acting under Chapter VII of the UN Charter, demanded an immediate end to the violence, urged Libya to ‘respect human rights and international humanitarian law, and allow immediate access for international human rights monitors’ as well as ensuring ‘the safe passage of humanitarian and medical supplies, and humanitarian agencies and workers, into the country.’ An arms embargo was imposed on the country and key members of the Libyan government were subjected to a travel ban and an asset freeze. The situation was also referred to the International Criminal Court for further investigation.

On 17 March the Security Council adopted another Resolution, which expressed its ‘grave concern at the deteriorating situation’ and deplored ‘the failure of the Libyan authorities to comply’ with its previous Resolution.<sup>89</sup> The Council reiterated ‘the responsibility of the Libyan authorities to protect the Libyan population and reaffirm[ed] that parties to armed conflicts bear the primary responsibility to take all feasible steps to ensure the protection of civilians.’ However, it again invoked Chapter VII to authorize: ‘Member States that have notified the Secretary-General, acting nationally or through regional organizations or arrangements, and acting in cooperation with the Secretary-General, to take all necessary measures . . . to protect civilians and civilian populated areas under threat of attack . . . while excluding a foreign occupation force of any form on any part of Libyan territory.’<sup>90</sup> The Resolution also ‘demanded that Libyan authorities comply with their obligations under international law and take all measures to protect civilians and meet their basic needs and to ensure the rapid and unimpeded passage of humanitarian assistance.’

Two days later NATO began a massive bombardment of Libyan air defenses and military hardware, with a focus just outside the rebel-held town of Benghazi, which was besieged by government forces. NATO’s campaign was to continue until the end of October when Gaddafi was captured, tortured and killed by rebels after losing control of the capital Tripoli. A convoy in which he had been travelling was hit by a United States’ Predator Missile, which was followed by a French air strike on a road about 3 kilometers west of Sirt, his hometown where he had been sheltering, killing dozens of loyalist fighters.<sup>91</sup> NATO insists that they were unaware of Gaddafi’s presence in the convoy and

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88 Security Council Resolution 1970, adopted on 26 February 2011.

89 Security Council Resolution 1973, adopted on 17 March 2011.

90 Ibid., para 4.

91 Conor Foley, *Humanitarian Action in Complex Emergencies: Managing linkages with security agendas*, Advanced Training Program on Humanitarian Action, March 2013.



*Children languishing in Zam Zam IDP camp in Darfur, Sudan (1 July 2004)*

*UN Photo/Eskinder Debe*

Britain's Prime Minister, David Cameron, had earlier stated that their understanding of the UN resolution was that it was 'limited in its scope. It explicitly does not provide legal authority for action to bring about Gaddafi's removal from power by military means.'<sup>92</sup>

NATO's senior military planners have subsequently stated that their rules of engagement throughout the campaign were only to hit military targets and only if these had been identified as a specific threat to civilians at the time.<sup>93</sup> In marked contrast to the air campaign during the Kosovo crisis, NATO did not attack civilian infrastructure or telecommunications targets and the total death toll from air strikes in Libya is estimated as being a few dozen.

Nevertheless, the fact that the campaign continued until Gaddafi had been militarily deposed and the refusal of NATO to consider a ceasefire or facilitate negotiations which could conceivably have led to a peaceful power change of power led many to argue that it had gone beyond the terms of the original Security Council Resolution. They pointed out that the original Resolution had been explicitly concerned with the protection of civilians in the threatened town

of Benghazi, that it had imposed an arms embargo on the entire territory and that it had ruled out putting foreign troops on the ground. It is widely believed that the three permanent members of the Security Council – Britain, France and the US – who had pushed hardest for this Resolution deployed Special Forces inside Libya during the campaign, had also provided covert military support to the rebels. Numerous atrocities committed by rebel forces, who were operating under NATO's air protection, and the fact that the final death toll for the conflict, around 25 – 30,000 people, vastly exceeded the numbers killed before NATO's intervention, added to these concerns.<sup>94</sup>

<sup>92</sup> BBC News, 'Libya: Removing Gaddafi not allowed says Cameron', 21 March 2011.

<sup>93</sup> Presentation by Major General Robert Weighill, Director of Operations for Operation Unified Protector, Escola Superior da Guerra, Rio de Janeiro, August 2012.

<sup>94</sup> For a broadly sympathetic account of the intervention which contains these criticisms see Simon Adams, *Libya and the Responsibility to Protect*, The Global Centre for the Responsibility to Protect, 2012.

In her opening speech to the UN General Assembly, in September 2011, while the conflict was still taking place, President Dilma Rousseff reiterated Brazil's condemnation of the brutal repression of civilian populations by the Libyan authorities, but stressed that the use of force should be a last resort and that the Security Council should take steps to ensure that any military action remained within the terms of its original mandate.<sup>95</sup> In November 2011 the Brazilian government published a paper entitled 'Responsibility while protecting: elements for the development and promotion of a concept' known as RWP, which gave more substance to this critique.<sup>96</sup>

The UN Security Council Resolution authorizing military intervention in Libya did not refer to R2P, apart from its brief nod towards respect for Libya's national sovereignty when it noted that it was the responsibility of the authorities to protect their own people. Nevertheless, both supporters and opponents of the Libyan intervention have largely viewed it through the R2P paradigm. The RWP concept paper noted that the concept of the 'responsibility to protect' had been incorporated into two paragraphs of the 2005 World Summit Outcome document 'in terms and using parameters that were the result of long and intense negotiations':

In addition to recognizing that each individual state has the primary responsibility for protecting its own population, the 2005 World Summit Outcome placed limitations on the use of force by the international community in the exercise of its responsibility to protect:

- material (genocide, war crimes, ethnic cleansing and crimes against humanity);
- temporal (upon the manifest failure of the individual state to exercise its responsibility to protect and upon the exhaustion of all peaceful means); and
- formal (through the Security Council, in accordance with Chapters VI and VII of the Charter and on the basis of a case-by-case evaluation).

The paper stated that there must be a 'strict line of political subordination and chronological sequencing' between the measures taken by a state to protect its own population and measures taken by the international community to assist this process by 'providing cooperation and assistance to allow States to develop local capacities that will enable them to discharge that responsibility'. It was only in 'exceptional circumstances' when both of these measures have 'manifestly failed', that the Security Council could authorize further action in the name of collective security. It further stated that: 'Going beyond the exercise of collective responsibility and resorting to mechanisms in the domain of collective security implies that a specific situation of violence or threat of violence against civilians should be characterized as a threat to international peace and security.'<sup>97</sup>

The paper noted that: 'The 1990s left us with a bitter reminder of the tragic human and political cost of the international community's failure to act in a timely manner to prevent violence on the scale of that observed in Rwanda. There may be situations in which the international community might contemplate military action to prevent humanitarian catastrophes. Yet attention must also be paid to the fact that the world today suffers the painful consequences of

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95 General Assembly of the United Nations, *General Debate of the 67th Session*, 21 September 2011.

96 Letter dated 9 November 2011 from the Permanent Representative of Brazil to the United Nations addressed to the Secretary-General, 11 November 2011, UN Doc. A/66/551-S/2011/701.

97 UN Doc. A/66/551-S/2011/701, paras 5 and 6.

interventions that have aggravated existing conflicts, allowed terrorism to penetrate into places where it previously did not exist, given rise to new cycles of violence and increased the vulnerability of civilian populations. There is a growing perception that the concept of the responsibility to protect might be misused for purposes other than protecting civilians, such as regime change. This perception may make it even more difficult to attain the protection objectives pursued by the international community.<sup>98</sup>

The RWP paper therefore stressed that: ‘The authorization for the use of force must be limited in its legal, operational and temporal elements and the scope of military action must abide by the letter and the spirit of the mandate conferred by the Security Council or the General Assembly, and be carried out in strict conformity with international law, in particular international humanitarian law and the international law of armed conflict.’<sup>99</sup> Further, ‘the Security Council must ensure the accountability of those to whom authority is granted to resort to force.’<sup>100</sup>

The publication of the RWP concept paper provoked some realignment in the debate about R2P. One critic concluded that Brazil’s main motivation for proposing the concept was that its officials had felt ‘personally humiliated’ by their treatment on the Security Council by the US, Britain and France during the Libya crisis.<sup>101</sup> He argued that ‘giving the UNSC operational control over a military intervention would place troops at great risk and make failure more likely’ and charged that ‘RWP would undermine R2P, not strengthen it; that it would meet with considerable opposition in the West; that in practice RWP could result in greater harm to civilians because it incentivizes such behavior by the adversary; and that it does not offer answers to the very real dilemmas of R2P operations or explain what other alternatives might have been possible in R2P cases.’<sup>102</sup> Others, however, see the two concepts as complementary and have criticised the ‘sneering’ reaction of some western leaders towards RWP.<sup>103</sup> Some of Brazil’s traditional allies, such as South Africa and India, have reacted lukewarmly towards RWP, which they see as making too many concessions to the original R2P concept.

R2P and RWP are sometimes referred to as ‘emerging norms’ in international relations. However, this terminology is confusing, as the usual meaning of the word is, a collective understanding of the proper behavior of actors. Clearly there are considerably different interpretations of what both concepts mean in practice. R2P was originally promoted by supporters of NATO’s intervention in Kosovo, which took place without UN Security Council approval. RWP was formulated in response to concerns that NATO’s intervention in Libya had gone beyond the terms of its UN Security Council authorization. Both papers are better conceived of as advocacy positions, couched in the language of diplomatic compromise, but coming from quite different starting points. If they have normative content it is around where their interpretation of existing international law shows convergence.

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98 UN Doc. A/66/551–S/2011/701, paras 8 – 10.

99 UN Doc. A/66/551–S/2011/701, para 11 (d).

100 UN Doc. A/66/551–S/2011/701, para 11 (i).

101 Thomas Wright, ‘Brazil hosts workshop on “responsibility while protecting”’ *Foreign Policy*, 29 August 2012.

102 See also *the Economist*, ‘Our friends in the south’, 7 April 2012, which stated that ‘Mr Obama will surely want to know, too, what exactly Brazil means by its big new foreign-policy idea. That is to complement the UN’s justification for intervention in another country’s affairs under the rubric “Responsibility to Protect” with “Responsibility while Protecting” after it has gone in. Since Brazil tends not to support going in in the first place, when would it want to see this new responsibility kick in? Even some experienced and sympathetic diplomatic observers in Brasilia say they have no idea what concrete difference this would make on the ground.’

103 Gareth Evans, ‘Responsibility while protecting’, *Project Syndicate*, 27 January 2012.



*The Security Council approves Resolution 1973 (2011), which authorizes the use of military force, including a no-fly zone, in Libya. Five Members - China, Brazil, Germany, India and the Russian Federation - indicate their abstentions (17 March 2011)*

*UN Photo/Paulo Filgueiras*

Both papers stress that the Security Council has a role in preventing large-scale violence against civilians and that this may justify military action to prevent humanitarian catastrophes. Both seem to imply that a ‘failure’ to act may mean that the Security Council is under some type of obligation to protect people in certain circumstances. *RwP* specifically forbids armed interventions if they are not authorized by the Security Council. It also underlines that the UN Charter requires the Council to find a link between violations of human rights and IHL and a specific ‘threat to international peace and security’ if it wishes to exercise its Chapter VII powers. While these are generally accepted principles of current international law, *RwP* goes further when it suggests that ‘the Security Council must ensure the accountability of those to whom authority is granted to resort to force’ and that these operations must ‘be carried out in strict conformity with international law, in particular international humanitarian law and the international law of armed conflict.’

Both human rights law and IHL contain positive as well as negative obligations. Common Article 1 of the Geneva Conventions contains an obligation to ‘respect and ensure respect for’ IHL, which, as discussed above, includes protecting civilians against violence by third parties. Although it is generally agreed that this applies to the conduct of hostilities rather than a decision about whether or not to initiate military action,<sup>104</sup> the suggestion that the Security Council has an obligation to ensure that operations which it authorizes are carried out in conformity with other treaty obligations is a significant legal innovation. *RwP*, therefore, strengthens the commitments to POC discussed in the first section of this Strategic Paper and also addresses the accountability deficit discussed in previous sections.

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<sup>104</sup> See, for example, Anne Ryniker, ‘The ICRC’s position on Humanitarian Intervention’, *International Review of the Red Cross*, Vol 83, No. 482, 30 June 2001, pp.527-32. This states that ‘International humanitarian law cannot serve as a basis for armed intervention in response to grave violations of its provisions; the use of force is governed by the United Nations Charter’.

This would not involve giving the Security Council ‘operational control’ over the conduct of delegated actions, but it does address the very real problem of open-ended Chapter VII authorizations.<sup>105</sup>

In July 2012 the UN Secretary General published his fourth paper on the progress made since the 2005 World Summit in implementing the responsibility to protect.<sup>106</sup> This noted that ‘in recent years the responsibility to protect has been invoked in more situations than ever before. Not surprisingly, there have been some challenges with its implementation. With expanded use has come a deeper and wider conversation about how to “operationalize” the responsibility to protect in a manner that is responsible, sustainable and effective. In that context, the initiative on “responsibility while protecting” that was introduced by the President of Brazil during the general debate in September 2011 is welcome. The government of Brazil has since facilitated broad and constructive discussion of the initiative among member states. The initiative has received considerable attention from member states, as the international community has sought to refine and apply the concept first elaborated at the 2005 World Summit against the context of recent action authorized by the Security Council, particularly in Libya.’<sup>107</sup>

The report reviewed the debate about the intervention in Libya without offering any conclusions beyond observing that ‘decisions to use force or apply other coercive measure are never to be taken lightly’ and may involve ‘difficult choices’.<sup>108</sup> It concluded that there was a need for greater dialogue on this issue with the General Assembly since while there was wide acceptance that the ‘fundamental principles of international law’ should be drawn upon to prevent and respond to genocide, war crimes, ethnic cleansing and crimes against humanity, controversy still persisted on ‘aspects of implementation, in particular with respect to the use of coercive measures to protect populations. . . . There is no template for responding to these grave crimes and violations that can be applied to all cases.’<sup>109</sup> While this brings little clarity to the debate about the specific circumstances in which the Security Council should use its powers to authorize such interventions, it does highlight the anomalous nature of the discretion which the Council has in exercising them.

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105 Since Security Council Resolutions require majority votes in favour and may be vetoed by a single Permanent Member of the Council, it can prove difficult to terminate an open-ended Chapter VII operation unless the original Resolution is time-bound.

106 Report of the Secretary-General, Responsibility to protect: timely and decisive response, UN Doc. A/66/874–S/2012/578.

107 Ibid., paras 49-50.

108 Ibid., paras 57-8.

109 Ibid., para 61.

## Another world is possible

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Reform has been an almost constant item on the agenda of the General Assembly and Security Council since the UN was created. Hundreds, even thousands, of books, articles and speeches have addressed the theme. There also numerous research institutions and think-tanks devoted to generating ideas for how its various defects should be remedied. Much, in fact, has been accomplished in recent decades. Peacekeeping, which was not even mentioned in the UN Charter, has become a central part of the UN's work. A major re-structuring in the early 1990s saw the creation of three new UN Departments: the Department of Peacekeeping Operations (DPKO), the Department for Political Affairs (DPA) and the Department for Humanitarian Affairs (later to become the Office for the Coordination of Humanitarian Affairs – OCHA). UN agencies such as the UN High Commissioner for Refugees (UNHCR) and the World Food Programme (WFP) also significantly expanded their field presences and a new agency, the Office for the High Commissioner for Human Rights (OHCHR) was established at around the same time.

Amongst the concrete achievements of the UN World Summit of 2005 was the creation of a Peace-Building Commission. A Central Emergency Response Fund (CERF) was created at the same time and both are intended to help the UN respond more rapidly and effectively to the challenges of conflicts and natural disasters. The humanitarian reform process has been taken forward through the establishment of a 'cluster' system, while POC strategies are being increasingly integrated into mission planning processes and training programmes. These developments have been largely driven forward by the UN Secretariat itself, which has always been one of the strongest advocates for change, but strongly supported by a succession of UN General Assembly and Security Council resolutions. Reports from the Secretariat, such as Agenda for Peace, have contained many specific recommendations, which if implemented in full would have undoubtedly created a more effective organisation.

There are, however, two underlying tensions which are always likely to inhibit more far-reaching reform. The first is that the so-called 'international community' actually consists of nation states that will defend their sovereign attributes and prerogatives and insist on respect for their sovereign equality with others. While some may seek to wish this away with dreams of global federalism, it is a reality that cannot be ignored. The second, and related, issue is that the world that we live in is unequal, with an enormous balance of wealth and power concentrated in the global 'north', while the global 'south' remains largely marginalised and excluded. The structure of the UN was explicitly designed to reflect this balance with the victors of the Second World War granting themselves permanent seats and veto powers on the Security Council.

The global balance of power has visibly shifted in recent years, and part of the logic to reform of the Security Council is to reflect these new realities. But it is not surprising that states view each reform proposal through a lens of self-interest and form alliances to block or promote change accordingly. While the debates remain confined to the worlds of academia and inter-governmental diplomacy, this stasis will continue to preserve the privileges of the status quo.

Recent years, however, have shown that public opinion can be mobilised on global governance issues. International treaties have been drawn up on land mines, the arms trade and an international criminal court, even when these have been vigorously opposed by some of the world's most powerful states. Despite the complexity of the issues being negotiated, campaign organisations have found ways of translating their underlying themes into simple concepts that they were able to communicate to their supporters, who mobilised in their hundreds of thousands.





*Regional staff of the Electoral Assistance Office of the United Nations Mission in Nepal (UNMIN) walk on a bridge as they deploy to the remote district of Okhaldunga, 200km east of Kathmandu (7 March 2008)*

*UN Photo/Agnieszka Mikulska*

The development of international human rights law shows a similar process. Prior to the Second World War international law generally regarded individuals as objects, rather than subjects, according them virtually no rights or responsibilities. It took the horrors of the Holocaust to persuade the world that the way in which a government treated its own people could not be regarded as a sole prerogative of national sovereignty.

The Universal Declaration of Human Rights was proclaimed at the UN on 8 December 1948, laying the framework, for the development of subsequent human rights treaties. The first of these, the Genocide Convention, was adopted by the UN General Assembly the following day. There are a number of other universal and regional treaties, protecting a broad range of human rights. Courts and monitoring bodies have also been created to oversee how these are being respected in practice. Some of these allow individuals to directly petition or complain of violations and courts may issue rulings that states accept as binding. Years of patient litigation at both the national

and international level have extended the protection provisions of human rights law to vulnerable groups. They have also established a considerable case-load of legal precedence on issues such as how long people can be legitimately held in custody before they are charged; what safeguards must be put in place to protect them from mistreatment; what type of investigations must be mounted when it is alleged that this has occurred; in what circumstances can lethal force be used against terrorist suspects; and what type of investigations are necessary when actions by the security forces result in a death.

Certain crimes, such as genocide, war crimes, and crimes against humanity are now recognized as being so serious that they should be prosecuted regardless of who committed them or where they took place. International criminal tribunals have been established to bring the perpetrators to justice. Courts are also accepting that in certain circumstances states may be held accountable for actions that their forces or agents have carried out in other countries, although the scope of these obligations remains unclear.<sup>110</sup>

The human rights movement has also shown how organizations can work together with states to achieve progressive change. Amnesty International started off in the 1960s as a small organization in London urging its members to write letters on behalf of 'prisoners of conscience'. After the military *coup d'état* in Chile it ran its first campaign against torture which resulted in the UN adopting a Declaration against Torture in 1974. This became a Convention

<sup>110</sup> Compare and contrast ECtHR *Bankovic v Belgium and 16 Other Contracting States*, Appl. No. 52207/99, (Grand Chamber), Decision on Admissibility, 19 December 2001 with *Issa and others v. Turkey* Appl. No. 31821/96, Admissibility Decision of 20 May 2000.

10 years later. Amnesty then mobilised its international sections to urge their countries to ratify the Convention, which was to eventually provide the legal basis for the arrest of Augusto Pinochet, Chile's former dictator, when he visited Britain in 1998. In the same year agreement was reached in Rome on the statute for an International Criminal Court, which includes torture, when committed as a war crime or a crime against humanity, within its jurisdiction.

Many of these developments have taken place under UN auspices although, as previously discussed, the extent to which the UN Security Council, and its subsidiary bodies, can be held to account for their own human rights records remains unclear. UN human rights monitoring bodies are increasingly requesting information from states about the activities of their police and soldiers serving in UN missions and the missions themselves show a growing recognition that their human rights obligations are not beyond scrutiny. The UN mission to the Democratic Republic of Congo (MONUSCO) recently introduced a Human Rights Due Diligence Policy (HRDDP) after units of the Congolese army, which it had been providing logistical support to during an operation, were implicated in serious violations including murder and rape.<sup>111</sup> Both the Human Rights Advisory Panel established in Kosovo and the Office of the Ombudsperson to assist the Sanctions Committee provide possible models that could be adapted for wider application.

Establishing greater accountability over the UN for its own human rights record will not, however, be straight forward. Critics have argued that subjecting the Security Council's decision to any form of judicial review would hamper its ability to take 'prompt and effective action' for the maintenance of international peace and security.<sup>112</sup> UN missions probably could not function in many places without immunity from criminal prosecution by their host states and troop contributing countries remain reluctant to devolve disciplinary powers to the UN. Some argue that states may also be more prone to refuse to contribute police and soldiers to missions if this will make them liable to the scrutiny of human rights monitoring bodies, although the logic of that argument is difficult to accept if taken to its most obvious extreme cases. Nevertheless there are good arguments for treating these objections seriously. The purpose of this Strategic Paper is not to provide a blue-print for reform, but to link together two arguments which up until now have largely been conducted separately.

As UN peacekeeping operations take on wider and more far-reaching tasks, their negative and positive obligations under international law are increasing. This will almost inevitably lead to more international legal challenges brought by those who will claim that their rights have been violated. If mechanisms are not established to ensure that the UN system as a whole can deal with these in an equitable and transparent manner, then those member states with the strongest national and regional human rights monitoring mechanisms are likely to become even more reluctant to commit their soldiers, police and other personnel to missions, which will deepen the crisis of legitimacy facing UN peacekeeping.

In her speech to the UN General Assembly in September 2011 President Rouseff stressed the Security Council's role in the preservation of international peace and security. She also argued that 'the more legitimate that body's decisions, the better it would be able to play its role'. An expanded and more representative Security Council could address this part of this problem, but reforming the Council without addressing the issue of system-wide accountability would miss the opportunity for a far deeper reform.

111 News Release, UN Office of the High Commissioner of Human Rights, *Possible War Crimes in the DRC*, 9 September 2009.

112 Michael Wood, 'The UN Security Council and International Law'. Second lecture: 'The UN Security Council and International Law', *Hersch Lauterpacht Memorial Lectures*, Lauterpacht Centre for International Law, University of Cambridge, 7 November 2006.



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