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"A Regional Responsibility to Protect"

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It is time to redraw the terms of the intervention debate. The editors of this volume describe that debate in terms of three principal dimensions: legality, feasibility, and legitimacy. Interventions of certain kinds will become far more feasible and far more legitimate in the future. But unless the world can summon the will to revise a charter designed only to prevent inter-state war in a world in which far more violence, destruction, and human misery are created by intra- and extra-state war, such interventions are likely to remain illegal. The best hope lies with a collective reinterpretation of the U.N. Charter to give regional organizations the primary responsibility for authorizing military interventions subject to subsequent approval or disapproval by the Security Council.

In the fifteen years since the fall of the Berlin Wall, the world has witnessed mass murder and atrocities perpetrated by governments on their own citizens, ethnic cleansing, refugees, and the leveling of cities and scorching of countryside on a scale to rival the great wars of the 20th century, in percentage and even absolute terms. The overthrow of the Somali government in 1991 and the subsequent in-fighting among rival groups gave rise to an anarchist dystopia, including a horrific famine, that continues in large parts of the country today. The genocide in Rwanda not only killed hundreds of thousands of Rwandans but destabilized the entire Great Lakes region of Africa, another conflict that continues and that has claimed over 2 million lives.

The dissolution of the former Yugoslavia, in Croatia, Bosnia, and finally Kosovo shattered a country and reintroduced concentration camps, ethnic cleansing, and attempted genocide to Europe. The Russian suppression of Chechen separatists left a landscape so barren and brutalized that nothing human is likely to grow for a long time. The ongoing civil war in Syria has displaced over a third of the country's 22 million population, a percentage equivalent to 100 million Americans; killed an estimated 150,000 people, although the true numbers are likely to be far higher; destroyed one of the cradles of civilization; and seeded at least a generation of hatred and revenge.

This tide of horror follows on tens of millions of deaths in Armenia, the Holocaust, Stalin's Russia, China and Cambodia over the course of the 20th century, none of which fall within the ambit of Article 2(4) of the U.N. Charter, which addresses only inter-state war. That limitation does not negate the value of Article 2(4); although inter-state war has certainly continued since 1945, it is much reduced since before 1945, particularly given the tripling of the number of states in the world and hence the far greater number of possible inter-state conflicts.

At some point in human history, however, the violent killing of large numbers of non-combatants by a government becomes a matter of international concern, regardless of whether that government is foreign or the victims' own. The original reason to outlaw war, first in 1928 with the Kellogg-Briand pact and then with the U.N. Charter in 1945, may have been the desire to protect states from each other's aggression. But the purpose of a state, even on the most

minimalist Hobbesian account, is to protect the lives of its citizens. The doctrine of Responsibility to Protect (R2P), as spelled out first by Francis Deng and then adapted to the U.N. context by the International Commission on Intervention and State Sovereignty under the rubric of sovereignty as responsibility, simply extends the logic of this basic insight. It is an effort to answer the question posed by Kofi Annan in his Millennium Report of 2000:
"if humanitarian intervention is, indeed, an unacceptable assault on sovereignty, how should we respond to a Rwanda, to a Srebrenica—to gross and systematic violations of human rights that offend every precept of our common humanity?"

Here, then, is a definition of legitimacy. An intervention is legitimate when it responds to a "gross and systematic violation of human rights that offends our common humanity." The insistence on sovereignty embedded in the U.N. Charter is a bulwark against inter-state aggression that historically resulted in precisely such gross and systematic violations of human rights—through the extermination and subjugation of peoples in the victim state. But to insist on legality when the result is to allow such gross and systematic violations of human rights is to make a travesty of the law. Legitimacy, in this context, carries out the spirit of the law when its letter is blocked.

In the words of the Kosovo Commission, the NATO military intervention against Serbia was "illegal but legitimate." Illegal, "because it did not receive prior approval from the United Nations Security Council." But "justified because all diplomatic avenues had been exhausted and because the intervention had the effect of liberating the majority population of Kosovo from a long period of oppression under Serbian rule."

The rub, of course, is determining exactly when a gross and systematic violation of human rights sufficient to offend our common humanity has occurred. The U.N. Charter consigns such definitional determinations to a collective process. Only the Security Council can decide when a "breach of the peace, threat to the peace, or act of aggression has occurred." Similarly, when the U.N. adopted the R2P resolution in 2005, it was up to the Security Council to determine when a state "is manifestly failing to protect its populations" from "genocide, war crimes, crimes against humanity, and ethnic cleansing," such that collective action by the international community" is required.

Without this collective process, the fear of aggression masquerading as humanitarian intervention returns, with very good reason. The U.S. originally justified its invasion of Iraq on grounds of preventing nuclear proliferation, a justification that at least fell into line with many Security Council resolutions seeking to prohibit Iraq from acquiring nuclear weapons. But when no weapons were found, the Bush Administration shifted to a humanitarian justification, arguing that the Iraqi people had been oppressed by Saddam Hussein in the same way that the Kosovars had been oppressed by Serbia. Russia used a very similar justification when it sent troops into Crimea in 2014 to surround and disarm Ukrainian soldiers while staging a highly choreographed referendum intended to approve secession from Ukraine and absorption into Russia. The Russian government argued that it was protecting Russian-speaking Ukrainians from Ukrainian nationalists. The United States points out, rightly, that its aim in Iraq was never to conquer and annex territory, but rather to return Iraq to its people. Still, Russia could make a credible argument that a majority of Crimeans wanted to be part of Russia.

Thus “legality” requires a collective determination; “legitimacy” is invoked by powers that act without that collective determination but with an overwhelming sense that the actions taking place within a particular country are so grave as to shock the conscience of the world. I, for one, would have supported an intervention in Rwanda wholeheartedly, as I would in Syria today.

“Feasibility” complicates the matter still further, as military interventions, to be limited, are the most feasible early on in a conflict when a little force has the chance of going the longest way. The archetypal example is in Rwanda, where a force of even a couple of hundred well-armed soldiers in the early days of the genocide could have cleared hundreds of thousands of machete wielding Tutsi mobs off the streets and out of the houses of their victims. In Syria, an early intervention punishing the Syrian government for deliberately targeting civilians in horrific ways would likely have changed the political calculus of the government and created much better conditions for a negotiated peace.

Early on in a crisis, however, the political will to act is typically most lacking. Those are the days in which the many reasons for not acting seem far more compelling than the reasons for taking the inevitably fraught decision to use force. As the crisis wears on, however, and the political, economic, and security case for action becomes stronger, the situation on the ground inevitably becomes much more complicated, making intervention less feasible in terms of accomplishing the central goal of stopping the killing.

This tension between military and political feasibility exists within individual governments. It is magnified ten or a hundred fold when the only way to legalize an intervention is to reach agreement with 14 other governments, each of which has their own political, military, and humanitarian calculations. When the collective decision-making body is far from the actual crisis unfolding and involves many countries that are not directly affected by spill-over violence, refugee flows, and economic and political destabilization, paralysis is all the more likely to ensure.

So what is to be done? We must spell out the global conditions for legitimacy over legality, on the assumption that the law will catch up with the reality of state practice. With nearly two hundred nations in the United Nations and without the prospect, we hope, of the kind of cataclysmic global event that led first to the League of Nations Covenant and then to the United Nations Charter, the only way to amend the substantive terms, or at least the interpretation of the Charter, is through concerted practice.

To protect against aggression masquerading as humanitarian intervention, it is necessary to keep the requirement of collective authorization. Requiring multiple nations—large and small, with different histories and perspectives—to approve the use of military force is a strong safeguard to ensure that any intervention meets the test of legitimacy: “gross and systematic violations of human rights that offend every precept of our common humanity.” Allowing that collective check to be exercised by regional organizations that would then have to seek the post-hoc approval of the Security Council, as in the Kosovo case, would, over time, result in effectively amending Article 53 of the Charter.

Article 53 provides: The Security Council shall, where appropriate, utilize such regional arrangements or agencies for enforcement action under its authority. But no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council. . . . Article 54 then requires that the Security Council be kept "fully informed of activities undertaken or in contemplation under regional arrangements or by regional agencies for the maintenance of international peace and security." If regional organizations were consistently to approve an intervention only among their members before the intervention and then come to the Security Council for approval after the fact, it is possible to imagine a customary law amendment to Article 53 that essentially says "no enforcement action shall be taken" by regional organizations without "the authorization or subsequent approval by the Security Council."

Devolving responsibility for determining the legitimacy of humanitarian interventions within the R2P framework to regional organizations—particularly regional organizations of a size large enough to ensure a diverse array of interests and views—would help ensure that action would be taken while it is still feasible. Over time, authorization of intervention by regional organizations followed by a subsequent up or down vote by the Security Council would become a rule of customary international law sufficient to amend the Charter, thereby turning legitimate into legal.

Such an evolution could only take place, however, if states and regional organizations were explicit about the actions they were taking and why they were taking them, including formal statements on the record about the inadequacy of the current Charter framework to champion and protect our common humanity. That additional requirement of reason-giving would provide a further check on hasty and self-interested action. But to fulfill that requirement, governments would have to confront precisely the issues this volume addresses: how does the world respond when action that is legitimate, in the sense that inaction is manifestly immoral, is illegal? When a failure to act now means that comparable action is likely to be infeasible later? When the law is an ass, but it is still the law?

The answers to these questions are not easy. But they must be found.