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978-0-521-19999-5 - International Authority and the Responsibility to Protect

Anne Orford

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## 1

## Protection in the Shadow of Empire

Since the late 1950s, the United Nations (UN) and other international actors have developed and systematised a body of practices aimed at ‘the maintenance of order’ and ‘the protection of life’ in the decolonised world.<sup>1</sup> These practices range from fact-finding and the provision of humanitarian assistance to peacekeeping, the management of refugee camps and territorial administration. As the UN and humanitarian organisations expanded and consolidated those practices, a new form of authority began to emerge. This book is an exploration of the ways in which those practices of governing and that form of authority have been represented. It focuses in particular upon a new basis for justifying and rationalising international rule that emerged at the beginning of the twenty-first century. The international authority to undertake executive action for protective ends was given a detailed normative articulation in the form of a 2001 report by the International Commission on Intervention and State Sovereignty (ICISS) entitled ‘The Responsibility to Protect’.<sup>2</sup> ICISS was an initiative, sponsored by the Canadian government, undertaken in response to serious concerns about the legality and legitimacy of the 1999 North Atlantic Treaty Organization (NATO) action in Kosovo. The responsibility to protect concept is premised upon the notion, to quote former UN Secretary-General Kofi Annan, that ‘the primary *raison d’être* and duty’ of every state is to protect its population.<sup>3</sup> If a state ‘manifestly’ fails to protect its population, the responsibility to do so shifts to the international community.

The idea that states and the international community have a fundamental responsibility to protect populations has rapidly colonised

<sup>1</sup> UN SCOR, 15th Sess., 873rd Mtg., UN Doc. S/PV.873, 13–14 July 1960, para. 19.

<sup>2</sup> International Commission on Intervention and State Sovereignty, ‘The Responsibility to Protect’ (Ottawa: International Development Research Centre, 2001).

<sup>3</sup> UN Secretary-General, ‘In Larger Freedom: Towards Development, Security and Human Rights for All’, UN GAOR, 59th Sess., Agenda Items 45 and 55, UN Doc. A/59/2005, 21 March 2005, para. 135.

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internationalist debates about conflict prevention, humanitarian action, peacekeeping and territorial administration, and has garnered the support of a strikingly diverse range of states, international and regional organisations and civil society groups since 2001. The responsibility to protect concept came of age with its unanimous adoption by the General Assembly in the World Summit Outcome of 2005.<sup>4</sup> The General Assembly there endorsed the notion that both the state and the international community have a responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. Although the General Assembly confined the situations in which the international community might intervene militarily to those in which a state was 'manifestly failing' to protect its population, it endorsed a broad range of preventive, early warning and capacity-building actions to assist states 'before crises and conflicts break out'.<sup>5</sup> The UN is now committed to the project of 'implementing the responsibility to protect'.<sup>6</sup> The description of that project by UN officials makes clear that the aim is not to develop new actions or operations in order to implement the abstract ideal of protection. Instead, the implementation of the responsibility to protect concept can be seen as an attempt to integrate pre-existing but dispersed practices of protection into a coherent account of international authority.

According to UN Secretary-General Ban Ki-moon, the challenge now facing those who support the responsibility to protect concept is to transform the concept from 'promise to practice' or from 'words into deeds'.<sup>7</sup> In contrast, this book will argue that the significance of the responsibility to protect concept lies not in its capacity to transform promise into practice, but rather in its capacity to transform practice into promise, or deeds into words. The project of developing and seeking to implement the responsibility to protect concept engages with the way in

<sup>4</sup> 2005 World Summit Outcome, GA Res. 60/1, UN GAOR, 60th Sess., Provisional Agenda Items 46 and 120, Supp. No. 49, UN Doc. A/RES/60/1, 24 October 2005, paras. 138–9.

<sup>5</sup> *Ibid.*

<sup>6</sup> UN Secretary-General, 'Implementing the Responsibility to Protect: Report of the Secretary-General', UN GAOR, 63rd Sess., Agenda Items 44 and 107, UN Doc. A/63/677, 12 January 2009, p. 7.

<sup>7</sup> On the need to move from 'promise to practice', see UN Secretary-General, 'Implementing the Responsibility to Protect'. On the need to move from 'words to deeds', see UN Secretary-General, 'Remarks at a Stanley Foundation Conference on "Implementing the Responsibility to Protect"', Tarrytown, 15 January 2010, [www.stanleyfoundation.org/publications/policy\\_memo/SGresptoprotect15jan2010.pdf](http://www.stanleyfoundation.org/publications/policy_memo/SGresptoprotect15jan2010.pdf).

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which the UN thinks.<sup>8</sup> The implementation of the responsibility to protect concept is designed to produce an ‘international reflex’ action directed to protecting populations at risk whenever decisions about those populations are made.<sup>9</sup> Yet unlike earlier periods in which the scope of international executive action has been justified, redefined or expanded, the articulation of the responsibility to protect concept does not simply offer a reflection upon past practice or an attempt to produce modest lessons learned from previous experience. Instead, it develops an ambitious conceptual framework aimed at systematising and giving formal expression to the protective authority exercised by international actors in the decolonised world since 1960.

### The role of the UN in the decolonised world

The idea that the UN has a responsibility to maintain order and protect life in the decolonised world began to take shape with the creation of the United Nations Emergency Force (UNEF) in response to the Suez crisis of 1956 and the UN offer of military assistance to the Government of the Republic of the Congo in 1960. When the UN was requested to intervene in Egypt and the Congo, both the requesting governments and the Secretary-General believed that the UN could operate as a neutral force to protect the interests of newly independent states and prevent the expansion of Cold War conflicts. That Secretary-General was Dag Hammarskjöld. Hammarskjöld is considered by many to have been the most important Secretary-General of the UN to date. His significance lies in the fact that he successfully transformed the office of the UN Secretary-General and championed the expansion of ‘dynamic executive action’ to fill the power vacuums created by the ‘liquidation of the colonial system’.<sup>10</sup>

<sup>8</sup> See generally Mary Douglas, *How Institutions Think* (Syracuse: Syracuse University Press, 1996), p. 126 (arguing that if we want to change human action in the modern world ‘[o]nly changing institutions can help’, and that the only way to change institutions is to understand how they think).

<sup>9</sup> Gareth Evans, *The Responsibility to Protect: Ending Mass Atrocity Crimes Once and For All* (Washington DC: Brookings Institution Press, 2008), pp. 54, 235 (suggesting that the aim is for the responsibility to protect concept ‘to become the accepted international reflex in principle’ and that achieving that aim requires ‘institutional processes capable of translating knowledge, concern, and confident belief in the utility of action into actual action’).

<sup>10</sup> UN Secretary-General, ‘Introduction to the Annual Report of the Secretary-General on the Work of the Organization’, UN GAOR, 16th Sess., Supp. No. 1A, UN Doc. A/4800/Add.1, 1961, p. 7.

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When Hammarskjöld took office, the Secretary-General was still largely regarded in the terms set out in Article 97 of the UN Charter as ‘the chief administrative officer of the Organization’. In the words of his colleague Brian Urquhart: ‘It was Hammarskjöld’s development – perhaps creation is not too strong a word – of the political role of the Secretary-General that is his most lasting practical legacy.’<sup>11</sup> In a sense, Hammarskjöld did not so much create the political role of the Secretary-General as re-imagine the role of ‘chief administrative officer’ in political terms. He was thus a man for his time. Administration was to become the principal means of governing, both in terms of the administrative rule that has come to dominate the governance of industrialised states and in the form of managerial rule by international actors over the people and territories of the decolonised world.

On 8 September 1961, five days before he left for the Congo and ten days before he was killed in a plane crash there, Hammarskjöld addressed his staff for the last time, and said:

If the Secretariat is regarded as truly international, and its individual members as owing no allegiance to any national government, then the Secretariat may develop as an instrument for the preservation of peace and security of increasing significance and responsibilities.<sup>12</sup>

As Hammarskjöld foresaw, the UN has since developed as an instrument for the preservation of peace and security, and its significance and responsibilities have increased dramatically as a result. International intervention in the decolonised world from Congo onwards has been represented as necessary to preserve international peace and security, to prevent a political vacuum being filled by imperialist states and to protect order and maintain life. The UN understands itself as neutral and impartial – a mediator between factions (an expansive term that can encompass elected governments, insurgents, revolutionaries and *génocidaires*) unable to reach consensus. The effect has been to create a long-term policing and managerial role for the UN in the decolonised world.

<sup>11</sup> Sir Brian Urquhart, ‘The Secretary-General – Why Dag Hammarskjöld?’ in Sten Ask and Anna Mark-Jungkqvist (eds.), *The Adventure of Peace: Dag Hammarskjöld and the Future of the UN* (New York: Palgrave Macmillan, 2005), p. 14 at pp. 19–20.

<sup>12</sup> Dag Hammarskjöld, ‘Last Word to the Staff’ in Wilder Foote (ed.), *The Servant of Peace: A Selection of the Speeches and Statements of Dag Hammarskjöld* (London: The Bodley Head, 1962), p. 329.

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That form of executive rule gradually expanded, until by the 1990s much of the decolonised world was subject to some form of international administration. Despite the scope and complexity of the forms of executive action undertaken by international actors in the decolonised world, the nature of the authority to undertake such action received very little attention for much of the twentieth century. The expansion of executive rule has not been the subject matter of Charter amendments, new treaties or doctrinal elaboration. Instead, the practices of executive rule have been transmitted through operationally oriented documents such as Security Council mandates, rules of engagement, instruction manuals, reports and studies outlining lessons learned from previous experiences. In the words of Hammarskjöld, these documents have functioned as digests of experience, blueprints for action and 'master texts' of the kind needed to guide future operations.<sup>13</sup> To the extent that such master texts have sought to justify the authority to undertake executive rule in the decolonised world, they have done so from the beginning on functional grounds.

According to Hammarskjöld, the development of executive rule was necessary for the performance of the UN's duty to maintain peace and security. Decolonisation had given rise to new conflicts, made more threatening by the possibility that Africa in particular might become a new theatre for the Cold War. Decolonisation had expanded the membership of the UN and made conferencing too slow and cumbersome. The UN could not perform its key functions of guaranteeing peace and protecting independent states if it were understood only as conference machinery. The challenges to peace and security posed by decolonisation made it necessary to abandon the static 'conference approach' to international relations and focus instead upon dynamic 'executive action'.<sup>14</sup> In order to do so, the UN had to ensure that peace operations conformed to certain principles distilled from previous actions. The UN must act independently of the ideologies and interests of specific governments, remain impartial as between warring parties, ensure that

<sup>13</sup> See Dag Hammarskjöld, 'The Uses of Private Diplomacy' in Wilder Foote (ed.), *The Servant of Peace: A Selection of the Speeches and Statements of Dag Hammarskjöld* (London: The Bodley Head, 1962), p. 170 at p. 173 (discussing the study of the UN operation in the Suez that he had initiated in the Secretariat as an attempt to 'digest our experiences, work out some kind of blueprint, master texts of the kind needed for this kind of operation').

<sup>14</sup> UN Secretary-General, 'Introduction to the Annual Report of the Secretary-General', p. 1.

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the parties involved consented to the UN's operations and only take actions necessary to achieve the mandate.

### From deeds into words: systematising peace and protection

Executive rule thus developed through the systematisation of practice rather than through the development of detailed doctrines or norms. Perhaps it would be more precise to say that UN culture 'transcended the conventional split between norms and actions by elevating the actions themselves to norms'.<sup>15</sup> To the generations of international civil servants who came after him, Hammarskjöld did not bequeath norms or 'lifeless ideas ... whose believers might or might not ever translate them into deeds'.<sup>16</sup> Instead, Hammarskjöld and his colleagues bequeathed deeds – deeds that were then systematically rationalised and translated into programmes for further dynamic executive action. The result has been the gradual consolidation of an impressive apparatus of international rule accompanied by a minimalist articulation of the nature and form of international authority.

The terms in which the practices of international rule were rationalised remained remarkably stable for almost forty years. The UN and other humanitarian internationalists understood themselves to be impartial and neutral actors, intervening to maintain peace and protect life with the consent of those they governed. For Hammarskjöld, the commitment to impartiality meant that 'UN personnel cannot be permitted in any sense to be a party to internal conflicts'.<sup>17</sup> The commitment to neutrality meant more broadly 'that the international civil servant, also in executive tasks with political implications, must remain wholly uninfluenced by national or group interests or ideologies'.<sup>18</sup> The Secretary-General in particular has a duty 'to carry out his tasks in controversial political situations with full regard to his exclusively

<sup>15</sup> Isabel V. Hull, *Absolute Destruction: Military Culture and the Practices of War in Imperial Germany* (Cornell: Cornell University Press, 2005), p. 333. Hull explores the way in which imperial German military culture worked to elevate actions to norms by transmitting 'habits of action' or practices, rather than 'lifeless ideas'.

<sup>16</sup> *Ibid.*

<sup>17</sup> UN Secretary-General, 'Summary Study of the Experience Derived from the Establishment and Operation of the Force: Report of the Secretary-General', UN GAOR, 13th Sess., Agenda Item 65, UN Doc. A/3943, 9 October 1958, annex, para. 166.

<sup>18</sup> Dag Hammarskjöld, 'The International Civil Servant in Law and in Fact' in Wilder Foote (ed.), *The Servant of Peace: A Selection of the Speeches and Statements of Dag Hammarskjöld* (London: The Bodley Head, 1962), p. 329 at p. 338.

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international obligation under the Charter and without subservience to a particular national or ideological character'.<sup>19</sup> Even as early as the Congo operation, the capacity of the UN to act as an impartial and independent guarantor of international peace and security was questioned, but the Secretary-General was able successfully to dismiss such criticisms as mistaken or made in bad faith. The idea that the UN in particular, and international humanitarians more generally, could intervene as neutral actors to alleviate suffering without becoming party to internal conflicts persisted throughout the Cold War.

With the ending of the Cold War, international executive action expanded. During the 1990s, humanitarian missions, peace operations and territorial administration became more frequent and more ambitious. As a result, the stakes of the conceptualisation of international authority became apparent and the inadequacy of existing accounts of international rule could no longer be ignored. With the expansion in the scope and complexity of international operations, it became clear that existing political and legal concepts could not adequately grasp the nature of this form of rule or address the problems and contests to which it gave rise. Both the achievements and the failures of UN operations placed the legitimacy of international executive action on the table. In Kosovo and East Timor, for example, local actors challenged the legitimacy of the authority exercised by international administrators. In Rwanda and Srebrenica, critics argued that the commitment of the UN to protecting its own personnel and to complying with principles of impartiality and neutrality meant that UN peacekeepers failed to protect civilian populations from genocide. As the ambition and complexity of peacekeeping, humanitarian and administration operations grew, so too did the difficulties faced by international actors in determining the proper limits of their responsibility and authority. These difficulties found expression in the many auditing and other reports produced by the UN and humanitarian actors seeking to rationalise their processes or reflect upon lessons learned from past practice, as well as in external critiques of the failures of intervention. While the practices of international rule introduced under Hammarskjöld were characterised in terms of technical expertise and political impartiality, by the end of the 1990s that framework for understanding international practice was increasingly unable to address pressing questions about the legitimacy, authority and credibility of international action.

<sup>19</sup> *Ibid.*



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Many of the issues raised by humanitarian practice were most clearly exemplified by the disastrous effect of attempts to create 'safe havens' or humanitarian spaces in which the UN and humanitarian non-governmental organisations could alleviate the suffering and protect the lives of civilians in situations of civil war or genocide. Critics of the UN argued that its reliance upon principles of impartiality and the use of force only in self-defence had led to its complicity in allowing genocide to unfold in Rwanda in 1994 and again in the UN-protected safe haven of Srebrenica in 1995. The humanitarian principles of impartiality and neutrality came under sustained challenge, with Western journalists and activists arguing that 'impartial peacekeeping between two unequal sides was its own form of side-taking'.<sup>20</sup> Within the UN, official reports questioned the viability of the long-standing commitment to impartiality and neutrality on the part of UN peacekeepers and humanitarian agencies when confronted with situations of war or genocide.<sup>21</sup> In the words of a major UN report on the future of UN peace operations, although impartiality should remain one of the 'bedrock principles' of peacekeeping, there are cases where 'local parties consist not of moral equals but of obvious aggressors and victims'.<sup>22</sup> In such situations, 'continued equal treatment of all parties by the United Nations can in the best case result in ineffectiveness and in the worst may amount to complicity with evil'.<sup>23</sup> The report called on world leaders 'to strengthen the capacity of the United Nations to fully accomplish the mission which is, indeed, its very *raison d'être*: to help communities engaged in strife and to maintain or restore peace'.<sup>24</sup> The massacre of civilians who had relied on the UN for protection in Srebrenica and Rwanda had shown 'how easy it was to declare land "safe", yet how difficult it was to persuade the major powers in fact to secure civilians'.<sup>25</sup>

<sup>20</sup> Samantha Power, *Chasing the Flame: Sergio Vieira de Mello and the Fight to Save the World* (New York: Penguin Books, 2008), p. 179.

<sup>21</sup> UN Secretary-General, 'Report of the Secretary-General pursuant to General Assembly Resolution 53/35: The Fall of Srebrenica', UN GAOR, 54th Sess., Agenda Item 42, UN Doc. A/54/549, 15 November 1999; 'Report of the Independent Inquiry into the Actions of the United Nations during the 1994 Genocide in Rwanda', UN SCOR, 54th Sess., UN Doc. S/1999/1257, 16 December 1999, annex.

<sup>22</sup> Panel on UN Peace Operations, 'Report to the Secretary-General', UN GAOR, 55th Sess., Provisional Agenda Item 87, UN Doc. A/55/305-S/2000/809, 21 August 2000, pp. ix, 9.

<sup>23</sup> Panel on UN Peace Operations, 'Report to the Secretary General', p. ix.

<sup>24</sup> Panel on UN Peace Operations, 'Report to the Secretary General', p. xv.

<sup>25</sup> Power, *Chasing the Flame*, p. 206.



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During the 1990s, international humanitarians who had been involved in development, refugee, famine assistance and emergency relief work began to publish subtle analyses of the problems that their increased operations had faced, particularly in Africa. These analyses were also framed in terms of responsibility and protection. They explored the difficult issues raised by the involvement of the development enterprise in contributing to conditions leading to genocide,<sup>26</sup> the responsibility of protection agencies in situations where humanitarian spaces and refugee camps were providing safe havens for belligerents,<sup>27</sup> and the effects of the over-inflated claims that humanitarians made in representing their capacity to offer protection to people at risk.<sup>28</sup> This literature began to ask questions about the lawfulness or ethics of humanitarian internationalists, both in terms of how they represented their presence and how they understood their responsibility for the effects of their actions and decisions. It also addressed issues of effectiveness, asking whether humanitarian protection was in fact assisting populations at risk, and whether humanitarian actors were fulfilling their responsibilities to those people they claimed to be assisting. Academic commentators in turn suggested that representatives of the international humanitarian community were involved in governing, and that the responsibility of these actors may be better addressed if international presence were recognised as an ongoing factor shaping the dynamics of conflict in the decolonised world rather than characterised as a series of temporary interventions.<sup>29</sup>

The increased scope and ambition of international executive rule in the post-Cold War period thus gave rise to two sets of questions about authority. The first set of questions related to the legitimacy and the effectiveness of international authority. Why should the international executive, and particularly executive organs of the UN, have the power to govern in the decolonised world, rather than domestic authorities, other international institutions claiming functional authority or even

<sup>26</sup> Peter Uvin, *Aiding Violence: The Development Enterprise in Rwanda* (Connecticut: Kumarian Press, 1998).

<sup>27</sup> Fiona Terry, *Condemned to Repeat?: The Paradox of Humanitarian Action* (New York: Cornell University Press, 2002).

<sup>28</sup> Alex de Waal, *Famine Crimes: Politics and the Disaster Relief Industry in Africa* (International African Institute, Bloomington: Oxford and Indiana University Press, 1997).

<sup>29</sup> Anne Orford, *Reading Humanitarian Intervention: Human Rights and the Use of Force in International Law* (Cambridge: Cambridge University Press, 2003); David Kennedy, *The Dark Sides of Virtue: Reassessing International Humanitarianism* (Princeton: Princeton University Press, 2004).

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coalitions of willing states? Is the international executive in fact able to govern effectively? Should the UN or other international actors have the right to judge the legitimacy of rulers or governments? The second set of questions referred to the relation between international rulers and local claimants to authority. Why do international administrators recognise and liaise with particular local claimants to authority? Upon what grounds is the choice made to recognise one actor rather than another as the legitimate authority or the appropriate collaborator in a territory? Can international humanitarians really act impartially in making such choices? What effects does the choice to collaborate with one group or leader rather than another have in situations of civil war or protracted conflict? Because international actors were operating in the decolonised world without an adequate characterisation of their political and legal role, they had no coherent answer to questions about the political choices they were inevitably making by treating *génocidaires* in the same way as insurgents, or by liaising with warlords as well as parliamentarians. While this problem was already apparent as early as the Congo action, it became unavoidable in the aftermath of situations such as Rwanda and Srebrenica. During the 1990s, it appeared increasingly necessary for representatives of international authority to find a more coherent account of the power they exercised and the political choices they made. The responsibility to protect concept is a response to that need.

### The powers of the international executive under the UN Charter

The responsibility to protect concept can best be understood as offering a normative grounding to the practices of international executive action that were initiated in the era of decolonisation and that have been gradually expanding ever since. To the extent that there existed an explicit legal basis for that form of executive rule, it can be found in the provisions of the UN Charter that define the authority of the Secretariat and the Secretary-General. Article 97 of the Charter describing the Secretary-General as the 'chief administrative officer of the Organization', together with Article 100 providing that the Secretary-General and the staff of the Secretariat 'shall not seek or receive instructions from any government or from any other authority external to the Organization' and Article 101 providing that Secretariat staff are to be appointed by the Secretary-General rather than by Members, established the character of the executive. According to Hammarskjöld, those provisions were of 'fundamental importance' for the status of the