Intervening Interests: Humanitarian and Pro-Democratic Intervention in the Asia-Pacific

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Abstract

Whilst the Asia-Pacific has been the arena of two significant military operations since 1999, the academic discussion surrounding humanitarian and pro-democratic intervention has tended to focus on the paradigm cases in Africa and Europe. Focusing particularly on the concept of the Responsibility to Protect ('R2P'), as well as the criteria elaborated by the International Commission on Intervention and State Sovereignty (ICISS), this article seeks to illuminate the debate in the Asia-Pacific regional context. Concentrating on the interventions in East Timor and Solomon Islands, it examines the Howard Government's approach to legal and procedural questions of intervention, with a view to determining the impact on the evolving normative framework for intervention. Specifically, it will highlight the way in which consent has emerged as a fundamental prerequisite to intervention, a requirement that can easily come to undermine effective international responses and foment prevarication as humanitarian disasters unfold. The Rudd Government appears more committed to the emerging R2P doctrine, but the question remains whether the international community is committed to the full practical implications of the R2P — under what circumstances it will, in practice, be willing to respond militarily to a humanitarian crisis without the consent of the State concerned.

Introduction

In September 1999, images were broadcast from Dili of East Timorese children being thrown over the barbed wire fence into the relative safety of the United Nations ('UN') compound.[1] It was a rude awakening for the international community generally and the Australian public in particular — whatever the cause of the conflict, there was an abiding sense of responsibility for its disastrous human consequences. It is this kind of tragedy that inspires the traditional debate over humanitarian intervention — is there such a legal doctrine and, if so, what are its governing principles? It has long been the subject of discussion among philosophical schools, stretching back before Grotius' 1636 seminal contribution.[2] The signing of the *Charter of the United Nations* ('*UN Charter*') settled certain questions, but the theoretical and practical debate remains very much alive. Even since Tesón traced his liberal interpretation on the use of force for humanitarian intervention in

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1 ABC Television, 'Evacuees Carry Burden of Guilt over Those Left Behind', *The 7.30 Report*, 8 September 1999.

2 Ian Brownlie, *International Law and the Use of Force by States* (1963) 13.

1988,[3] there has been considerable evolution in the area amid a rapidly developing global environment.

The literature on intervention has tended to focus on Africa and Europe, each of which bears unique characteristics that affect the way in which the intervention debate is framed and the factors that are taken into account in determining whether intervention is appropriate.[4] Taking the interventions in Solomon Islands and East Timor as background, as well as the pervasive and ongoing instability in the region, this article will focus on the Asia-Pacific, with a view to determining the way in which the peculiarities of the region determine approaches and attitudes to intervention.

The first section will lay the foundations of the debate, examining the legal rules governing the use of force and the historical development of a purported right of humanitarian intervention at international law. Some of the principal examples in the Cold War era will be explored, before tracing the significant developments of the 1990s through the crises in Somalia, Haiti, Rwanda and Kosovo, leading to the 2001 Report of the International Commission on Intervention and State Sovereignty ('ICISS').

The second section turns to the Asia-Pacific to identify the unique conditions that influence the debate in the region. The attempts to articulate more clearly the universal norms on humanitarian intervention are examined in order to determine their applicability and relevance in the regional context. With a view to elucidating the particularities of the Asia-Pacific, a more detailed analysis follows of the rationale — legal, moral and political — behind the Australian-led interventions in East Timor and Solomon Islands.

Finally, the third section consolidates the regional state practice and *opinio juris*, particularly from Australia, in order to gauge the normative direction of the region and the extent to which regional intervention action sits comfortably with the broader international rules regulating the use of force. The section will focus particularly on the primacy that has increasingly been accorded to the requirement of consent, and will ask whether the overall framework that thereby evolves is preferable to the ICISS framework for the use of force. The discussion will conclude with an eye to the future, surveying some of the principle areas of instability, underlining the need for greater determinacy in the norms on intervention, as well as a greater consistency in their application. It is the central thesis of this article that a threshold requirement has developed in the region which requires that intervention only take place with the express consent of the relevant government authority. This consent criterion is not, per se, properly situated within a rigorously developed and consistently adhered to normative framework, has undermined effective responses to humanitarian crises and fostered an undesirable sense of indeterminacy in both the legal and normative discourses.

The article notes that Australia has played a determining role in the regional intervention debate and will, therefore, focus much of its attention on Australian governmental attitudes and responses. In view of this, it is important to note that the change in Federal Government from the Liberal-National Coalition to the Australian

[3] Fernando Tesón, *Humanitarian Intervention – An Inquiry into Law and Morality* (1988).

[4] See, eg, Michael Byers and Simon Chesterman, 'Changing the Rules about Rules?' in J L Holzgrefe and Robert Keohane (eds), *Humanitarian Intervention – Ethical, Legal, and Political Dilemmas* (2003) 177, 190–2.

Labor Party, in November 2007, has perhaps signalled a new direction in foreign policy. The indications are that the new (Rudd) Government's policy has greater faith in multilateralism generally and the UN specifically, and it has emphatically endorsed the Responsibility to Protect ('R2P'),[5] including A$4.5 million in funding to support the concept.[6] The experience during the prime ministership of John Howard (1996–2007) is nonetheless instructive as to the perils of unilaterally developed and inconsistently implemented foreign policy goals, as well as important in order to evaluate the normative environment inherited by the Rudd Government.

1. The legal principles governing intervention

A. The UN Charter framework for the use of force

The rules and guiding principles governing the use of force that are enunciated in the *UN Charter* remain hard law, subject though they are to interpretation and the influence of customary international law.[7] Intervention is clearly characterised within the Charter framework as an exception to the general prohibition on the use of force in article 2(4).[8] The norm is firmly grounded in the Westphalian paradigm that elevates state sovereignty to an almost unimpeachable status, and the prohibition is reinforced by the broader principle of non-intervention,[9] which has developed over time into a norm of *jus cogens*.[10] This preoccupation of international law with relations between States endured largely unchallenged through to the end of the Cold War era, with only a handful of conflicts casting the notion of intra-State conflict into the international consciousness in the years preceding 1990. The Charter framework for the use of force, thus, bears the indelible marks of a drafting process born of inter-State conflict, and the customary law on use of force in the first four decades after the World War II upheld the principle of non-intervention.[11]

The Charter does, nonetheless, permit exceptions to the general rule. These are to be found in chapters VII and VIII. The former governs the circumstances under which the UN Security Council, mandated with the 'primary responsibility for international peace and

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[5] Stephen Smith, 'Statement by Australia to the Human Rights Council: Seventh Session, 5 March 2008', <http://www.foreignminister.gov.au/releases/2008/fa-s046_08.html>; Stephen Smith, 'United Nations Association of Australia' (Speech delivered to the Annual United Nations Day Dinner, 23 October 2008).

[6] Stephen Smith, 'Supporting the Responsibility to Protect (R2P) principle' (Press Release, 15 September 2008); Stephen Smith, 'Australia supports Responsibility to Protect' (Press Release, 21 July 2009).

[7] See generally, Mark Villiger, *Customary International Law and Treaties* (2nd ed, 1997).

[8] In relation to humanitarian intervention, see J L Holzgrefe, 'The Humanitarian Intervention Debate' in J L Holzgrefe and Robert Keohane (eds), *Humanitarian Intervention – Ethical, Legal, and Political Dilemmas* (2003) 15, 37f. See generally Brownlie, above n 2, 83–96; Yoram Dinstein, *War, Aggression and Self-Defence* (4th ed, 2004) 83–96; Christine Gray, *International Law and the Use of Force* (2nd ed, 2004) ch 2.

[9] *UN Charter* art 2(7); *Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States*, GA Res 2625, UN GAOR, 25th sess, 1883rd plen mtg, UN Doc A/8082 (1970); *Corfu Channel Case (Merits)* [1949] ICJ Rep 4, 29; *Nicaragua (Merits)* [1986] ICJ Rep 14, 106–7. On the historical development to 1945, see Brownlie, above n 2, chs 1–5.

[10] *Nicaragua (Merits)* [1986] ICJ Rep 14, [190]; Gray, above n 8, 29; Dinstein, above n 8, 99–102.

[11] *Nicaragua (Merits)* [1986] ICJ Rep 14, [202]; Simon Chesterman, *Just War or Just Peace?* (2001) 114–21.

security',[12] may resolve to intervene. The threshold question in this context is the 'existence of any threat to the peace, breach of the peace, or act of aggression'[13] that allows the Council, as a last resort, to 'take such action … as may be necessary to restore international peace and security'.[14] Chapter VII also authorises the use of force for the purpose of individual or collective self-defence; action that may only continue until the Council has taken measures to restore international peace and security.[15] Chapter VIII then deals with the handling of disputes through the apparatus of regional arrangements or agencies, although without specifically defining either term.[16] However, article 53 underlines the point that no enforcement action, irrespective of which State or grouping of States undertakes the action, may be taken without UN Security Council authorisation.[17]

Bearing in mind the requirement for unanimity among the five permanent members of the UN Security Council, it is not surprising that there was a general hiatus in the use of force until the end of the Cold War. Those interventions that did occur were either the product of rare periods of détente or simply an illegal derogation from the provisions of the Charter.[18] Some were justified on existing exceptions to the prohibition, most regularly self-defence,[19] but broader, self-interested political objectives were involved in each case — and crystallisation of any norm conferring a right to intervene is hindered by the obfuscation of motivations that drive unilateral intervention.[20] In the specific context of humanitarian concerns, inconsistent international responses to humanitarian crises and the array of factual matrices in crisis situations further muddy the normative waters.[21]

B. The internationalisation of human rights

The Preamble of the Charter declares a determination 'to reaffirm faith in fundamental human rights, in the dignity and worth of the human person'.[22] Moreover, the purposes of the UN include achieving 'international cooperation in solving international problems … of a humanitarian character, and in promoting and encouraging respect for human

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[12] *UN Charter* art 24(1).
[13] Ibid art 39.
[14] Ibid art 42.
[15] Ibid art 51.
[16] Rosemary Durward, 'Security Council Authorisation for Regional Peace Operations: A Critical Analysis' (2006) 13(3) *International Peacekeeping* 350, 352; Tom Farer, 'Humanitarian Intervention Before and After 9/11' in J L Holzgrefe and Robert Keohane (eds), *Humanitarian Intervention – Ethical, Legal, and Political Dilemmas* (2003) 53, 73.
[17] Chesterman, above n 11, 47–87. See also the *Declaration on the Enhancement of Cooperation between the United Nations and Regional Agencies in the Maintenance of International Peace and Security*, GA Res 49/57, UN GAOR, 48th sess, 84th plen mtg, Annex, UN Doc A/Res/49/57 (1994). Contra Michael Reisman, 'Unilateral Action and the Transformation of the World Constitutive Process: the Special Problem of Humanitarian Intervention' (2000) 11 *European Journal of International Law* 1; *Uniting for Peace Resolution*, GA Res 377, UN GAOR, 5th sess, 302nd plen mtg, UN Doc A/Res/377 (V) (1950).
[18] Holzgrefe, above n 8, 46–7. On 'exceptional illegality', see Chesterman, above n 11, 39f; Thomas Franck, 'Interpretation and Change in the Law of Humanitarian Intervention' in J L Holzgrefe and Robert Keohane (eds), *Humanitarian Intervention – Ethical, Legal, and Political Dilemmas* (2003) 204, 212f.
[19] Eg, East Pakistan (1971), Grenada (1983) and Panama (1989). See Gray, above n 8, 126–9; Dinstein, above n 8, 231–4; Farer, above n 16, 60.
[20] Kelly Pease and David Forsythe, 'Human Rights, Humanitarian Intervention, and World Politics' (1993) 15 *Human Rights Quarterly* 290, 300; Franck, above n16, 216f.
[21] Farer, above n 16, 68f; Chesterman, above n 11, 161.
[22] *UN Charter* Preamble.

rights'.[23] In the context of use of force, the question of legality turns on the relationship between these nebulous phrases and the notion of 'international peace and security'. Importantly, the UN Security Council, in carrying out its decisions, 'shall act in accordance with the purposes and principles of the United Nations',[24] as articulated in articles 1 and 2. There is, therefore, an explicit foundation for the consideration of humanitarian concerns when the Council formulates its decisions, but it remains unclear whether this extends to authorising intervention on that basis.

Adherence to international human rights instruments has grown steadily since 1945,[25] even if the level of protection afforded domestically varies considerably from State to State.[26] The articulation of clear rules, the institution of systems for their adjudication,[27] and their characterisation as obligations owed *erga omnes,*[28] point to an internationalisation of human rights that, to varying degrees, encroaches on sovereignty.[29] Nonetheless, the coercive power of the Human Rights Council and the human rights treaty bodies is limited.[30] As noted above, in order for intervention to be justified, it is also necessary that violations be determined a 'threat to international peace and security'. The UN Security Council has, on occasions, specifically characterised situations of human tragedy as such.[31] However, it must be recognised that the decisions of the UN Security Council, although not without normative significance,[32] are primarily political in character. In any event, according to the vagaries of enthusiasm or apathy at work within the UN Security Council, such determination of a threat to international peace and security has not always been readily forthcoming.[33] It is also important to note the extent to which votes in the UN Security Council may be cast according to inducements or interests that bear little, if any, relation to the substance of the proposed text.[34] What emerges is a profound inconsistency in the use of force whereby, even as an increasingly desperate humanitarian crisis, induced

[23] Ibid art 1(3).

[24] Ibid art 24(2).

[25] For a full list see Office of the High Commissioner for Human Rights ('OHCHR') <http://www.ohchr.org/english/law/index.htm>. Unlike Europe, Africa and the Americas, the Asia-Pacific does not have a regional human rights instrument, arguably limiting the protection afforded. See Bruce Pruitt-Hamm, 'Humanitarian Intervention in Southeast Asia in the Post-Cold War World: Dilemmas in the Definition and Design of International Law' (1993–95) 3 *Pacific Rim Law and Policy Journal* 183, 184.

[26] Holzgrefe, above n 8, 44.

[27] See generally Henry Steiner, Philip Alston and Ryan Goodman, *International Human Rights in Context* (3rd ed, 2008).

[28] *Barcelona Traction (Merits),* ICJ Rep 3 [1970], 33; *General Comment No 31*, Human Rights Committee, 80th sess, 2187th mtg, [2], CCPR/C/21/Rev.1/Add.13 (2004).

[29] Pease and Forsythe, above n 20, 295.

[30] See generally Steiner, Alston and Goodman, above n 27, chs 9–10.

[31] SC Res 794 [Somalia], UN SCOR, 3145th meeting, UN Doc S/RES/794 (1992); SC Res 929 [Rwanda], UN SCOR, 3392nd mtg, UN Doc S/Res/929 (1994); SC Res 1078 [Great Lakes], UN SCOR, 3710th mtg, UN Doc S/Res/1078 (1996).

[32] See Section 4 in this article.

[33] Jane Stromseth, David Wippman and Rosa Brooks, *Can Might Make Rights? Building the Rule of Law After Military Interventions* (2006) 32–3; Robert Lillich, 'The Role of the UN Security Council in Protecting Human Rights in Crisis Situations: UN Humanitarian Intervention in the Post-Cold War World' (1995) 3 *Tulane Journal of International and Comparative Law* 2, 4.

[34] Chesterman, above n 11, 181–2.

and perpetuated by internal conflict, unfolded in Sudan,[35] a 'Coalition of the Willing' deployed to Iraq without express UN Security Council authorisation.[36] There is no easily identifiable trend of either state practice or *opinio juris*.

C. The first purported humanitarian interventions

The Charter does not explicitly provide either for 'humanitarian' or 'pro-democratic' intervention, leading in some cases to a high degree of interpretative liberalism in order to establish that a given situation represents a threat to international peace and security.[37] The moment serious human concerns become incorporated into a case for intervention, the lines of both legitimacy and legality in any enforcement action can be obfuscated amid the more emotive appeal to the need for an end to human suffering. In the first decades following the World War II, there was significant blurring of these lines in virtually every purported case of humanitarian intervention.[38]

In East Pakistan in 1971 there was a clear humanitarian crisis, with the death of over a million people and the displacement of up to 10 million.[39] India's Representative to the UN Security Council declared that 'we have on this occasion absolutely nothing but the purest of motives and the purest of intentions: to rescue the people of East Bengal from what they are suffering'.[40] Notwithstanding this sense of altruism, India also justified their intervention on the basis of self-defence[41] and the enforcement action was, moreover, roundly condemned by the UN at the time.[42] Similarly, in Tanzania in 1979 and Cambodia in 1978, the enormity of the suffering was stark.[43] In the former case, intervention was tacitly approved by the international community,[44] whereas in the latter, Vietnam's flagrant disregard for the principle of proportionality earned broad condemnation.[45] Arguably even more tenuous in their links to serious human rights violations were the United States (US)

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[35] OHCHR, *Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General* (2005) 3–4. Note, however, the International Crisis Group position in 2006 that not all criteria for intervention were met: International Crisis Group, 'Getting the UN into Darfur', Africa Briefing No 43 (12 October 2006), 15–17.

[36] The ICISS criteria would not have permitted intervention on humanitarian grounds in Iraq. See Gareth Evans, 'From Humanitarian Intervention to the Responsibility to Protect' (2006) 24 *Wisconsin International Law Journal* 703, 717–18.

[37] Michael Reisman, 'The Constitutional Crisis in the United Nations' (1993) 87 *American Journal of International Law* 83, 93. For a historical survey of the pre-Charter doctrine, see Jean-Pierre L Fonteyene, 'The Customary International Law Doctrine of Humanitarian Intervention: its Current Validity Under the UN Charter' (1973–4) 4 *Californian Western International Law Journal* 203.

[38] See Chesterman, above n 11, 63–87.

[39] See generally the International Commission of Jurists, *The Events in East Pakistan 1971* (1972).

[40] UN Doc S/PV.1606 (1971), [186]. Tesón describes the Indian action as 'an almost perfect example' of humanitarian intervention. Tesón, above n 3, 185.

[41] UN SCOR, UN Doc S/PV.1606 (1971), [151]: cited in Chesterman, above n 11, 73.

[42] Douglas Eisner, 'Humanitarian Intervention in the Post-Cold War Era' (1993) 11 *Boston University International Law Journal* 195, 203; Thomas Franck, *Recourse to Force* (2002), 140–2; Chesterman, above n 11, 73.

[43] See Chesterman, above n 11, 77–81.

[44] Eisner, above n 42, 204; Chesterman, above n 11, 78; Franck, above n 42, 145.

[45] Eisner, above n 42, 205; Franck, above n 42, 150.

led invasions of Grenada in 1983 and Panama in 1989, both of which were also condemned by the UN General Assembly.[46]

The Cold War experience of intervention is mixed. There was an effort to elevate humanitarian considerations to a new status — at the very least, as a legitimating factor in intervention; at best, capable of conferring legality on enforcement action. But it is questionable whether humanitarian grounds were relied upon by States themselves.[47] In 1990, therefore, the examples of state practice and *opinio juris* were clearly insufficient for the articulation of a new norm — intervention was still treated by the international community as an impermissible breach of the principle of non-intervention and the sanctity of state sovereignty. There were, nonetheless, the first indications that in the most serious cases, involving human suffering on a scale to 'shock the conscience of mankind',[48] intervention might become more plausible from a legal perspective. Indeed, the International Court of Justice (ICJ), although forming the view in its *Nicaragua* judgment that human rights considerations did not justify the use of force,[49] arguably phrased their objection so as not to rule out humanitarian intervention.[50]

The absence of a clearly articulated, rigorous, consistently applied, rule-based and substantive framework for the authorisation of humanitarian or pro-democratic intervention inevitably continues to breed intervention sceptics within the international community — particularly, and understandably, among States that are more susceptible to intervention action.[51] The Nigerian representative was particularly pointed on this question during debate in July 1994 on the intervention in Haiti: '[t]he adoption of the draft resolution should … not be seen as a global license for external interventions through the use of force or any other means in the internal affairs of member states'.[52]

D. Post-Cold War development of the norms

The end of the Cold War created a new atmosphere in the UN Security Council where meaningful legal action suddenly became possible.[53] In addition, the collapse of the Soviet Union, in and of itself, created newly volatile conditions in the former Soviet Republics, with internal divisions spawning new humanitarian crises.[54] These ongoing conflicts and other flashpoints across the globe brought the question of intervention to the forefront of the international legal and political consciousness. The result was an evolution of the

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[46] GA Res 38/7 [Grenada], UN GAOR, 38th sess, 43rd plen mtg, UN Doc A/Res/38/7 (1983), [1]; GA Res 44/240 [Panama], UN GAOR, 44th sess, 88th plen mtg, UN Doc A/Res/44/240 (1989), [1].

[47] There is a tendency of some academic writing to advance 'legal arguments to justify actions that the governments themselves have not articulated'. Byers and Chesterman, above n 4, 195; Gray, above n 8, 31–2.

[48] ICISS, *The Responsibility to Protect* (2001), [4.13]; Robert Jennings and Arthur Watts (eds), *Oppenheim's International Law* (9th ed, 2007) 442.

[49] *Nicaragua (Merits)* [1986] ICJ Rep 14, [268].

[50] Pease and Forsythe, above n 20, 311; Tesón, above n 3, 243–4. *Contra* Chesterman, above n 11, 62.

[51] Olivier Corten, 'La résolution 940 du Conseil de sécurité autorisant une intervention militaire en Haïti' (1995) 6 *European Journal of International Law* 116, 132. See also Ryan Goodman, 'Humanitarian Intervention and Pretexts for War' (2006) 100 *American Journal of International Law* 107.

[52] UN SCOR, 49th sess, 3413th mtg, UN Doc S/PV.3413 (1994), [11].

[53] Stromseth, Wippman and Brooks, above n 33, 29.

[54] Lillich, above n 33, 3.

international legal system, inspired by the increasingly internal nature of conflicts and the evolving attitude of many Western States in their response.[55]

Humanitarian concerns rarely drew a definitive multilateral response before the end of the Cold War.[56] By contrast, in the globalising world of the 1990s, influenced by the ever-proliferating 'CNN effect',[57] States increasingly considered enforcement action necessary and legitimate, even if not strictly legal, in order to stem the human disaster precipitated by conflicts.[58] The international response to these humanitarian crises in the 1990s was inconsistent, with the pendulum swinging to both extremes. The overall trajectory, however, was towards the evolution of a legal norm permitting enforcement action in the face of gross and ongoing human rights violations. There were four principle flashpoints that marked the development in this humanitarian stream of the intervention discourse.

The first was the 1992 UN Security Council-authorised intervention in Somalia.[59] Whilst the conflict had wider implications (for example, as a result of the refugee flow), the UN Security Council based its decision on the *internal* situation; most specifically, the need for the delivery of humanitarian assistance.[60] The mission certainly saved lives, but the UN ultimately drew deep criticism for its handling of the situation — an 'inordinately expensive, poorly led and coordinated, and incredibly cumbersome UN operation'.[61]

Secondly, in 1994, in response to the illegal seizure of power by a Haitian military junta, the UN Security Council again authorised enforcement action based on the systematic and ongoing violation of human rights.[62] Significantly, this also represented a determination that the absence of democratic governance constitutes a threat to international peace and security.[63] These examples 'underscore the proposition that when there is political will, the UN possesses all the authority it needs to protect human rights in crisis situations'.[64]

Thirdly, by way of contrast, and no doubt influenced heavily by the Somali experience, the UN Security Council was effectively inert in 1994 as hundreds of thousands of

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[55] Deborah Weissman, 'The Human Rights Dilemma: Rethinking the Humanitarian Project' (2003–04) 35 *Colombia Human Rights Law Review* 259, 259.

[56] Pease and Forsythe, above n 20, 309.

[57] '[T]he idea that real-time communications technology could provoke major responses from domestic audiences and political elites to global events': Piers Robinson, 'The CNN Effect: Can the News Media Drive Foreign Policy' (1999) 25 *Review of International Studies* 301, 301.

[58] Farer, above n 16, 59.

[59] SC Res 794 [Somalia], UN SCOR, 3145th mtg, UN Doc S/RES/794 (1992).

[60] Ibid; Lillich, above n 33, 7–8.

[61] Ioan Lewis and James Mayall, 'Somalia' in Mats Berdal and Spyros Economides (eds), *United Nations Interventionism, 1991-2004* (2007) 108, 136. See also Walter Clarke and Jeffrey Herbst, 'Somalia and the Future of Humanitarian Intervention' (1996) 75 *Foreign Affairs* 70; Mohamed Sahnoun, *Somalia: the Missed Opportunities* (1994).

[62] SC Res 940 [Haiti], UN SCOR, 3413th mtg, UN Doc S/RES/940 (1994), [1].

[63] Douglas Donoho, 'Evolution or Expediency: the United Nations Response to the Disruption of Democracy' (1996) 29 *Cornell International Law Journal* 329, 364–5.

[64] Lillich, above n 33, 11; UN, Report of the Secretary-General's High-Level Panel on Threats, Challenges and Change, *A More Secure World: Our Shared Responsibility* (2004) [202].

Rwandans were killed, leaving UN troops on the ground in Rwanda with no power to intervene decisively.[65]

Fourth was the international response in Kosovo. Rwanda represented a mistake that many States did not wish to see repeated, and this is one reason the pendulum swung back in 1997, as reticence turned to readiness with the unequivocal response of the North Atlantic Treaty Organization ('NATO') to the conflict in the Serbian territory.[66] This readiness was, however, largely confined to NATO Member States, was not justified on legal grounds by most,[67] and did not meet with the approval of the international community[68] — as Cassese observes: 'from an *ethical* viewpoint, resort to armed force was justified. Nevertheless, as a legal scholar I cannot avoid observing in the same breath that this moral action is *contrary to current international law*'.[69]

The doctrine surrounding pro-democratic intervention has progressively evolved parallel to, and at times intersecting with, the debate over pure humanitarian intervention. Writing in 1992, Thomas Franck conducted a thorough theoretical analysis of the idea, concluding that there were clear indications of an emergent right to democratic governance.[70] In his eyes, the one limitation to its full fruition was the 'incoherence' of the concept — that is, the extent to which it conflicts, prima facie, with other precepts of international law; specifically, non-intervention.[71] Even in the case of the Haitian intervention, there was at least tacit consent from the de jure government (noted in the authorising resolution) and the UN Security Council was, moreover, at pains to emphasise the exceptional nature of the crisis.[72] Those considerations notwithstanding, it was a significant development to see the international community intervening to restore democracy.[73] It was also noteworthy in that the United States sought recourse through the UN framework,[74] not unilaterally, as had been its habit. It is, however, generally accepted that international law does not consider uninvited and unilateral pro-democratic intervention as a legitimate exception to the prohibition on the use of force.[75]

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[65] 'Our readiness and capacity for action has been demonstrated to be inadequate at best, deplorable at worst, owing to the absence of the collective political will', UN Secretary-General, *Report of the Secretary-General on the Situation in Rwanda*, UN Doc S/1994/640 (1994), [43].

[66] North Atlantic Council, 'The Situation in and around Kosovo' (Press Release, 12 April 1999).

[67] Chesterman, above n 11, 46.

[68] Byers and Chesterman, above n 4, 178, 184.

[69] Antonio Cassese, 'Ex iniuria ius oritur: Are We Moving Towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?' (1999) 10(1) *European Journal of International Law* 23, 25 (emphasis in original). See also Independent International Commission on Kosovo, *Kosovo Report: Conflict, International Response, Lessons Learned* (2000).

[70] Thomas Franck, 'The Emerging Right to Democratic Governance' (1992) 86 *American Journal of International Law* 46.

[71] Ibid 77–8.

[72] SC Res 940 [Haiti], UN SCOR, 3413th mtg, UN Doc S/RES/940 (1994), [2]. See also Lillich, above n 33, 10.

[73] Corten, above n 51, 125.

[74] Chesterman, above n 11, 151–2.

[75] Gray, above n 8, 49–52; Chesterman, above n 11, 109–11; Oscar Schachter, 'The Legality of Pro-Democratic Invasion' (1984) 78 *American Journal of International Law* 645, 648; ICISS, above n 48, [4.25]. *Contra* Michael Reisman, 'Sovereignty and Human Rights in Contemporary International Law' (1990) 84 *Amercian Journal of International Law* 866.

E. The ICISS Report and the emerging 'responsibility to protect'

It seems, therefore, to have been largely accepted for some years that in the case of egregious and ongoing human rights violations, whether or not they manifest themselves in the context of an international or internal conflict, direct military intervention with the authorisation of the UN Security Council will be legal — and, arguably, in certain situations will not meet with particularly vehement resistance even if UN Security Council authorisation is not secured.[76] Oscar Schachter argues against formulating strict rules governing future interventions, highlighting the distinct character of each factual matrix.[77] Yet, whilst it can be dangerous to over-generalise the debate, there is considerable merit in Franck's contention that 'to legitimate a rule, the underlying principles must be enunciated in a way that makes their content determinate'.[78]

Recognising this need for determinacy and coherence, ICISS was charged with the task of developing a test as to when, if ever, military action is appropriate on humanitarian grounds.[79] Its conceptual framework covered the 'responsibility to prevent', the 'responsibility to react', and 'the responsibility to rebuild', all of which are interlinked, but this article is primarily concerned with conditions that may give rise to use of force in the context of the 'responsibility to react'. In its final report, ICISS elaborates six criteria for military intervention, which are largely a consolidation of the existing legal framework and longstanding principles of just war, as well as the accumulated legal scholarship on the question:[80] just cause, right authority, right intention, last resort, proportional means and reasonable prospects. It restricts legitimate intervention to exceptional situations involving the most serious human rights violations, and, in this context, pro-democratic intervention is specifically ruled out.[81] Notwithstanding the philosophical grievances borne against the UN Security Council, as well as its proven imperfections with regard to the execution of its role, the Commission notes that the UN Security Council must remain the fundamental arbiter of military intervention.[82] It does, however, moot the possibility of action through the apparatus of regional arrangements, with a view to obtaining ex post facto approval.[83]

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[76] See, eg, Jeremy Levitt, 'Humanitarian Intervention by Regional Actors in Internal Conflicts: the Cases of ECOWAS in Liberia and Sierra Leone' (1998) 12 *Temple International and Comparative Law Journal* 333; Franck, above n 18, 219.

[77] Oscar Schachter, 'Commentary' (1992) 86 *American Society of International Law Proceeding* 320.

[78] Franck, above n 70, 55.

[79] ICISS, above n 48, vii. For earlier suggestions of tests see, eg, Cassese, above n 69, 27; Tom Farer, 'A Paradigm of Legitimate Intervention' in Lori Damrosch (ed), *Enforcing Restraint – Collective Intervention in Internal Conflicts* (1993) 316, 324; Nicholas Wheeler, 'Legitimating Humanitarian Intervention' (2001) 2 *Melbourne Journal of International Law* 550, 554–60.

[80] See generally Michael Walzer, *Just and Unjust Wars: a Moral Argument with Historical Illustrations* (1977). See also Tom Farer, with Daniele Archibugi et al, 'Roundtable: humanitarian intervention after 9/11' (2005) 19(2) *International Relations* 211; Nicholas Wheeler, *Saving strangers: humanitarian intervention in international society* (2000); Antonio Cassese, 'Ex iniuria ius oritur: Are We Moving Towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?' (1999) 10(1) *European Journal of International Law* 23; Stanley Hoffman, *Duties beyond borders: on the limits and possibilities of ethical international politics* (1981); C A J Coady, *Morality and Political Violence* (2007).

[81] ICISS, above n 48, [4.25].

[82] Ibid [6.1–6.40]. Note that the Report moots the possibility of action through the General Assembly in the case of Security Council inaction.

[83] Ibid [6.35]; Jeremy Levitt, above n 76.

The report is particularly significant in that it shifts the phraseology from the 'right to intervene' to the 'responsibility to protect', with a view to eliminating the perceived irreconcilable tension between sovereignty and the concept of intervention for humanitarian purposes.[84] The reformulation casts '*sovereignty as responsibility*', rather than '*sovereignty as control*',[85] and characterises the R2P as 'the linking concept that bridges the divide between sovereignty and responsibility'.[86] The responsibility to intervene only exists, therefore, where the sovereign responsibility of a State has not been and will not be discharged, whether owing to unwillingness or incapacity.[87]

With this much clearer enunciation of a framework, the norms surrounding humanitarian intervention have a greater degree of determinacy. The R2P has been unanimously endorsed by the General Assembly in the 2005 *World Summit Outcome*;[88] affirmed by the Secretary-General's High Level Panel on Threats, Challenges and Change;[89] elaborated by the Secretary-General in his report on implementing the R2P;[90] 'reaffirmed' by the UN Security Council;[91] and specifically emphasised by a number of States. The 'Responsibility to Protect – Engaging Civil Society Project' has compiled an inventory of official documents that record discussion of the principle, including endorsing statements from a broad cross section of countries, the African Union, the European Union, and the Commonwealth Heads of Government.[92] Among these is the debate launched by the French Government, invoking the R2P, which explored the possibility of action *without* the consent of the Burmese authorities to deliver aid directly to cyclone-ravaged regions of Myanmar in 2008.[93] Indeed, the ICISS report specifically raises this possibility in its elucidation of the just cause criterion: intervention may be possible in cases of 'overwhelming natural or environmental catastrophes, where the State concerned is either unwilling or unable to cope, or call for assistance, and significant loss of life is occurring or threatened'.[94] It should, furthermore, be noted that the R2P principle is already enshrined in art 4(h) of the *Constitutive Act of the African Union*, according to which

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[84] ICISS, above n 48, [2.12].
[85] Ibid [2.14] (emphasis in original).
[86] Ibid [2.29] (emphasis in original).
[87] Ibid. For a discussion of the ICISS drafting process and reactions to it, see Alex Bellamy, *Responsibility to Protect* (2009), ch 2.
[88] *2005 World Summit Outcome*, GA Res 60/1, UN GAOR, 60th sess, 8th plen mtg, UN Doc A/Res/60/1 (2005), [138–40]. For analysis of negotiations on the final wording, see Bellamy, above n 87, ch 3.
[89] UN, above n 64, [201–7].
[90] Secretary-General, Implementing the Responsibility to Protect – Report of the Secretary General, 63rd sess, UN Doc A/63/677 (2009).
[91] SC Res 1674 [on the protection of civilians in armed conflict], UN SCOR, 5430th mtg, UN Doc S/Res/1674 (2006), [4].
[92] Responsibility to Protect – Engaging Civil Society Project, *What the Governments are Saying* (2007) <http://www.responsibilitytoprotect.org/index.php/government_statements/>.
[93] Reuters, 'France Suggests Helping Myanmar without Government Backing', 7 May 2008, <http://www.responsibilitytoprotect.org/index.php/government_statements/1627?theme=alt1>. See further discussion below in the Conclusion of this article.
[94] ICISS, above n 48, [4.20].

the Union is empowered to intervene 'in respect of grave circumstances; namely war crimes, genocide and crimes against humanity'.[95]

Neither the R2P generally, nor the ICISS criteria specifically, may be considered hard law. There is extensive debate surrounding both the criteria and broad conceptual framework, with some fearing that they are too permissive and dangerously encroach on state sovereignty and the principle of non-intervention.[96] Others argue that the test is too tightly constricted by the requirement for UN Security Council authorisation[97] and others still argue that the very idea of R2P gives States a cloak to hide behind, given that the concept recognises that the first duty to protect lies with the sovereign state.[98] This article, however, is concerned with the reality of international decision-making. Assuming, then, that the doctrine enjoys universal support, at least in principle, the regional enquiry should focus on the extent to which regional practice supports the R2P as a rule *de lege ferenda*, or whether it is repudiating it. Whilst endorsement of the general doctrine does not necessarily imply agreement on the specific ICISS criteria, the analysis cannot take place in a vacuum. The World Summit Outcome is arguably the most helpful reflection of *opinio juris* on the question, but it only addresses, and in a fairly limited way, criteria of just cause and right authority. In the interests of more detailed analysis against a more comprehensive test, this article prefers to evaluate the regional situation through the prism of the ICISS criteria.

2. The particularities of the Asia-Pacific

A. The ICISS criteria and the Asia-Pacific dynamic

The work of ICISS was inspired by the experience of the 1990s and the failure to respond effectively where the just cause threshold was met — particularly in Bosnia, Somalia, Rwanda and Kosovo.[99] The ICISS report seeks to extrapolate general principles from these experiences, providing a framework that is better able to ensure effective and consistent international responses to actual or threatened humanitarian crises. However, the Asia-Pacific experience in recent years presents a dynamic *apparently* less susceptible to analysis along the lines the ICISS criteria. In this regard, the central feature of the Asia-Pacific security structure is that, at present, Australia is apparently the only country in the region that has shown both the capacity *and* inclination to be proactive in bringing military pressure to bear where there is arguably just cause.[100] This section will present and explain the disconnect between the ICISS criteria and the recent experiences in the Asia-Pacific — is it because the Commission's conclusions are not universally apt or is it

[95] *Constitutive Act of the African Union*, art 4(h). Bellamy notes potential practical obstacles to application of the principle in the African Union context: Bellamy, above n 87, 78–9.

[96] Max Matthews, 'Tracking the emergence of a new international norm: the responsibility to protect and the crisis in Darfur' (2008) 31 *Boston College International and Comparative Law Review* 137, 146.

[97] See generally Fernando Tesón, 'Of tyrants and empires' (2005) 19(2) *Ethics and International Affairs* 27; Tesón, *Humanitarian Intervention: an inquiry into law and morality* (1988); Michael Walzer, *Just and unjust wars: a moral argument with historical illustrations* (1977).

[98] Alex Bellamy, 'Responsibility to protect or Trojan horse' (2005) 19(2) *Ethics and International Affairs* 31, 49.

[99] ICISS, above n 48, 1.

[100] See James Cotton, 'Against the Grain – the East Timor Intervention' (2001) 43(1) *Survival* 127, 133–4.

simply because regional actors are undermining the progressive development and strengthening of the doctrine of R2P?

Considering the requirement that intervention has reasonable prospects of success, the power differential in the Asia-Pacific limits the possible sphere of intervention considerably. In terms of defence capability, Australia's capacity is dwarfed by almost all the East Asian States.[101] Should, for example, human rights violations in a State such as Myanmar (375 000 active personnel, strongly allied to China, with 2 255 000; compared to Australia's 51 610)[102] escalate to the ICISS threshold point, Australia would be in no position to act alone. It would require significant substantive support among the other military powers in the region, as well as acquiescence from those unwilling to participate substantively.[103] Moreover, Australia's calculus of decision-making is bound to take into account the interests of its relationship with the US, its most important ally, including specific US interests and the need for at least in-principle (if not material) support for any military intervention. This is the geopolitical reality of the region.

Limitations notwithstanding, the missions to East Timor and Solomon Islands have proven that Australia is prepared to take the initiative in securing peace and stability in the region. The former marked a rapid about-turn in Australian foreign and defence policy, which to that point had been strictly pro-Indonesian and non-interventionist.[104] The policy transformation was not, however, in the philosophy, but in its manifestation. Australia remains very much guided by the national interest.[105] Moreover, notwithstanding the aberrant foray into non-consensual intervention through the US-led coalition in Iraq, remains committed to the principle of sovereignty.[106] Whilst the new formula no doubt allows some evolution towards the principles articulated in the ICISS report, at one level Australia's mentality rests closer to a traditional interpretation of sovereignty.

The practical effect of this is that, whilst Australia's new interventionism may be perceived by some in the region as neo-colonial belligerence, official policy has been categorical in asserting Australia's commitment to cooperative arrangements to deal with threats to peace and security in the region.[107] This was reinforced at the Pacific Islands Forum (PIF) in 2000 with the signing of the *Biketawa Declaration*.[108] The Forum leaders, 'while respecting the principle of non-interference in the domestic affairs of another member state', created a framework for providing assistance to Member States. Intervention, in the form of 'targeted measures', is envisaged to be pursued according to certain requirements: 'discussion' (with the State concerned), 'credibility', 'coherence and consistency', 'staying the course', 'cooperation', 'consensus', and all in a 'cost-effective' way.[109] The Declaration brings the Forum towards status as a regional organisation under

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[101] International Institute for Strategic Studies, 'East Asia and Australasia' (2007) 107(1) *The Military Balance* 331, 342f.
[102] Ibid. On the determining significance of raw personnel numbers, see Yaacov Vertzberger, *Risk Taking and Decisionmaking – Foreign Military Intervention Decisions* (1998) 116–7.
[103] See generally Vertzberger, above n 102, ch 5.
[104] Richard Leaver, 'Introduction: Australia, East Timor and Indonesia' (2001) 14(1) *The Pacific Review* 1, 4.
[105] Commonwealth of Australia, *Advancing the National Interest: Australia's Foreign and Trade Policy* (2000).
[106] Commonwealth of Australia, *Defence 2000 – Our Future Defence Force* (2000) 48–9.
[107] See generally ibid; Commonwealth of Australia, above n 106.
[108] PIF, *Biketawa Declaration*, opened for signature 24 July 2003, [2003] ATS 17 (entered into force 24 July 2003).
[109] Ibid annex A.

chapter VIII of the *UN Charter*,[110] and, indeed, it has been suggested that, were a standing regional peacekeeping force to be created, it would most appropriately be established under the aegis of the PIF.[111] In the context of the 2003 Solomon Islands intervention, the Declaration was invoked repeatedly by Foreign Minister Alexander Downer.[112] In this respect, Australia has evinced a certain degree of respect for multilateralism, but this has not been unequivocal, as we shall see. More general attention is being given to human rights considerations at the PIF level, through the Pacific Plan,[113] re-emphasised as a priority in the 2006 Forum Communiqué.[114]

With respect to the other most relevant regional forum, the Association of Southeast Asian Nations (ASEAN), of which Australia is not a member, there is little apparent enthusiasm for any doctrine of non-consensual humanitarian intervention. In its statement of principles, the *ASEAN Charter* emphasises in four separate paragraphs the principle of non-interference,[115] somewhat overwhelming the single explicit reference to 'the promotion and protection of human rights'.[116] The Charter does, however, provide for the establishment of a human rights body,[117] and a working group has been formed to this end, but there are no indications as yet that this will either explicitly or implicitly entertain the prospect of military intervention by a regional force. The contrasting approaches of ASEAN and the PIF to the situations in Myanmar and Fiji, respectively, are arguably an indication of their relative determination for results on human rights questions. We will return to these examples in the final section of this article.

In order to understand the normative development through Australia's role in the Asia-Pacific, it is instructive to consider in more detail the two Australian-led interventions of the last decade, in East Timor and Solomon Islands.

B. East Timor: Consent and the 'reasonable prospects of success'

In 1975, Indonesia occupied the territory of what is now Timor-Leste and remained in uninterrupted effective control until the arrival of the International Force in East Timor (INTERFET) in 1999. Whilst initially joining the UN condemnation of the Indonesian occupation and affirming the right of the East Timorese to self-determination,[118] the Australian Government ultimately conferred de facto recognition of Indonesian sovereignty under the Fraser Government as early as October 1976, and then de jure

[110] Fergus Hanson, 'Promoting a Pacific Pacific: a Functional Proposal for Regional Security in the Pacific Islands' (2003) 4 *Melbourne Journal of International Law* 254, 279.
[111] Ibid 279.
[112] See, eg, Commonwealth of Australia, *Questions Without Notice*, House of Representatives, 20 October 2000 (Alexander Downer).
[113] PIF Secretariat, *The Pacific Plan – for strengthening regional cooperation and integration* (2007), 8, 19.
[114] PIF, *Forum Communiqué* (37th PIF, Nadi, 24–25 October 2006), 9.
[115] *ASEAN Charter* art 2(a),(e),(f),(k).
[116] *ASEAN Charter* art 2(i).
[117] *ASEAN Charter* art 14.
[118] GA Res 3485 [East Timor], UN GAOR, 30th sess, 2439th mtg, UN Doc A/RES/3485 (1975).

recognition on 14 February 1979,[119] the beginning of negotiations over maritime boundaries.

In the wake of the East Asian financial crisis and President Suharto's demise, and in view of increasing international public sympathy for the East Timorese independence cause,[120] the question of self-determination in East Timor returned to the fore.[121] Under significant diplomatic pressure from the international community, particularly Australia,[122] Indonesia agreed on 5 May 1999 to the deployment of the United Nations Mission in East Timor (UNAMET) to monitor a popular consultation on the question of independence,[123] subject to Indonesian control over security.[124] In response to an overwhelming pro-independence vote,[125] the withdrawing Indonesian forces (TNI) and pro-Indonesian militia instigated a campaign of violence, terror and destruction.[126] The UN Security Council Mission to the territory was largely unequivocal in its conclusion that grave breaches of international humanitarian law were being perpetrated[127] and these claims were borne out by the subsequent UN Report.[128] Australia informed the Secretary-General that it would be prepared to lead an international coalition to restore order and, with the consent of Indonesian President Habibie, UN Security Council approval was secured.[129] INTERFET was deployed on 20 September 1999 and quickly established control over this scorched territory, where between 60 and 80 per cent of infrastructure was destroyed.[130] In the UN's most comprehensive intervention mission to date, the newly independent territory came under UN control through the subsequent UN Transitional Authority in East Timor (UNTAET).[131]

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[119] Christine Chinkin, 'Australia and East Timor in International Law' in CIIR/IPJET, *International Law and the Question of East Timor* (1995) 276–7.

[120] James Cotton, *East Timor, Australia and Regional Order: Intervention and its Aftermath in Southeast Asia* (2004) 100; Mark Quarterman, 'UN Leverage in East Timor: Inducing Indonesian Compliance through International Law' in Jean Krasno et al (eds), *Leveraging for success in United Nations peace operations* (2003) 141, 156–7.

[121] The ICJ took the view that the East Timorese clearly enjoyed a right to self determination. See *Case Concerning East Timor (Portugal v Australia) (Merits)* [1995] ICJ Rep 90, [31].

[122] See Vertzberger, above n 102, 9.

[123] *Agreement between the Republic of Indonesia and the Portuguese Republic on the Question of East Timor*, 5 May 1999, 2062 UNTS 8 (entered into force 5 May 1999); SC Res 1246 [East Timor], UN SCOR, 4013th mtg, UN Doc S/RES/1246 (1999).

[124] *Agreement Regarding the Modalities for the Popular Consultation of the East Timorese through a Direct Ballot*, 5 May 1999, 2062 UNTS 40 (entered into force 5 May 1999), [G].

[125] 21.5% for special autonomy, 78.5% against. See UN, 'People of East Timor Reject Proposed Special Autonomy, Express Wish To Begin Transition to Independence, Secretary-General Informs Security Council' (Press Release, 3 September 1999).

[126] Hansjorg Strohmeyer, 'Collapse and Reconstruction of a Judicial System: The United Nations Missions in Kosovo and East Timor' 95 *American Journal of International Law* 46, 50f.

[127] UN Security Council, Report of the Security Council Mission to Jakarta and Dili, 8 to 12 September, 1999, UN Doc S/1999/976 (1999), Annex.

[128] International Commission of Inquiry on East Timor, *Report of the International Commission of Inquiry on East Timor*, UN GAOR, 54th sess, UN Doc A/54/726, S/2000/59 (1999), [123–142].

[129] SC Res 1264 [East Timor], UN SCOR, 4045th mtg, UN Doc S/RES/1264 (1999).

[130] Strohmeyer, above n 126, 57.

[131] SC Res 1272 [East Timor], UN SCOR, 4057th mtg, UN Doc S/Res/1272 (1999).

The Australian Government was aware the intervention would affect the bilateral relationship with Indonesia and yet was not dissuaded,[132] the Prime Minister asserting that Australia's objective should not be 'to maintain a good relationship with Indonesia at all costs or at the expense of doing the right thing according to our own values'.[133] Australia did insist, however, that there would be no intervention in the absence of Indonesian consent for the deployment; and this notwithstanding the ever-diminishing legitimacy of Indonesian sovereignty over the territory.[134] It seems the Australian position was ultimately determined not by reference to the objective status of the territory, nor the objective legitimacy of intervention, but by the anticipated Indonesian response to an uninvited intervention — the risk of full-scale armed conflict. Indeed, ICISS noted that '[i]t will be the case that some human beings simply cannot be rescued at unacceptable cost — perhaps of a larger regional conflagration, involving major military powers'.[135]

The ICISS report is concerned with 'action taken against a state or its leaders, without its or their consent, for purposes that are claimed to be humanitarian or protective'.[136] It is arguable that the just cause threshold, as well as the requirements for right intention, last resort and proportional means, would have been satisfied in the wake of the East Timorese independence vote, even in the absence of an invitation from the Indonesian authorities.[137] But Australia felt the prospects of success would have been undermined by a non-consensual intervention and this, in turn, delayed the fulfilment of the 'right authority' criterion whereby UN Security Council authorisation became dependent on Indonesia's consent. Yet, the rapidly deteriorating security situation was arguably exacerbated by the delay that resulted from the insistence on Indonesian consent for the operation,[138] consent that had no bearing on legitimacy[139] except insofar as it impacted on the putative prospects of success, and no bearing on legality except insofar as it impacted on right authority (through the UN Security Council), given that Russia and China would not acquiesce in the absence of consent. Hence, something of a vicious circle emerges.

This decision-making process that led to the East Timor intervention highlights what is arguably a deficiency of the ICISS criteria when applied to cases in the Asia-Pacific. The geopolitical dynamic of the region will, in many cases, not be susceptible to analysis along similar lines to the paradigm candidates for humanitarian intervention — Rwanda and Kosovo, for example. In each of these cases: (a) there was a breakdown of the structures of State within the territory concerned; and/or (b) the forces that might resist a non-consensual intervention were surmountable by an international coalition. It is

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[132] See Richard Leaver, 'The Meanings, Origins and Implications of "the Howard Doctrine"' (2001) 14(1) *The Pacific Review* 15, 16.

[133] Commonwealth of Australia, *Parliamentary Debates*, House of Representatives, 21 September 1999, 10030 (John Howard, Prime Minister).

[134] See generally Chinkin, above n 119.

[135] ICISS, above n 48, [4.41].

[136] Ibid [1.38].

[137] Simon Chesterman, 'East Timor' in Mats Berdal and Spyros Economides (eds), *United Nations Interventionism, 1991-2004* (2007) 192, 196.

[138] Editorial Comments, 'NATO's Kosovo Intervention' (1999) 93(4) *American Journal of International Law* 824, 847 [Christine Chinkin].

[139] See generally Chinkin, above n 119.

axiomatic that the reasonable prospects of success for a mission are a decisive factor in determining the legitimacy of an intervention, for '[o]f all things, at once the most unjustifiable and the most impolitic is an unsuccessful intervention'.[140] But in the paradigm cases, this has not been a determining factor — potential military superiority has been overwhelming. Even in the case of Kosovo, where the sovereign Serbian State retained effective control, the NATO forces were vastly superior. In the event of a threshold case in the heart of Asia, by contrast, it seems difficult to imagine the requisite confluence of interests such that: (a) *all* the significant military powers in the region would be united behind an intervening coalition; or (b) there would be sufficient will outside the region (that is, from the US or UK, probably both) to join a coalition that would risk severe casualties[141] in order to avert a humanitarian catastrophe.

The international community has reached the stage where 'the next Rwanda cable'[142] would probably be answered militarily, but not if Hutu rebels were backed by an African equivalent of Indonesia, China, Myanmar, or Malaysia. The strategic environment in Asia means that the reasonable prospects criterion takes on greater significance. Further attention must, therefore, be devoted to the way in which this obstacle to peace and security can be addressed. However, these concerns should not lead to premature conclusions in a given situation that strategic imbalances automatically preclude military intervention. Specifically, in the case of East Timor, for example, it should not be assumed that, had intervention occurred without the consent of the Indonesian authorities, it would have precipitated full scale inter-State conflict. Otherwise put, it should not be assumed that the only way to address the difficulties of the reasonable prospects criterion is to require consent. The two criteria have become conflated, whereas they ought to remain distinct.

C. Pro-democratic intervention in Solomon Islands

From 1998 onwards, economic and human security in Solomon Islands was steadily deteriorating amid violent conflict focused on the two most populous islands of Guadalcanal and Malaita. Whilst regularly characterised as an ethnic conflict, the root of the tension is more accurately attributed to disputes over land rights flowing from the significant population movement from Malaita to Guadalcanal;[143] the local Guale people felt disempowered and dispossessed by the relative prosperity of the Malaitan immigrants. The tension increasingly tended towards violent confrontation, in its organised form principally between the Guale resistance; the Guadalcanal Revolutionary Army (GRA), later the Isatabu Freedom Movement (IFM); and the Malaitan Eagle Force (MEF). Despite the Australia-brokered Townsville Peace Agreement in 2000, a response to the MEF coup

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[140] William Vernon Harcourt, *Letters by Historicus on Some Question of International Law: Reprinted from 'The Times' with Considerable Additions* (1863) 41, cited in Chesterman, above n 11, 42. See also ICISS, above n 48, [4.41–4.43].

[141] In Kosovo, notwithstanding NATO's military superiority, destructive aerial bombardment was preferred over ground forces in order to minimise NATO casualties.

[142] Bruce D Jones, 'Rwanda' in Mats Berdal and Spyros Economides (eds), *United Nations Interventionism, 1991-2004* (2007) 139, 162.

[143] Clive Moore, 'The Solomon Islands Beyond RAMSI' in M Anne Brown, *Security and Development in the Pacific Islands – Social Resilience in Emerging States* (2007) 171–3. See generally Jon Fraenkel, *The Manipulation of Custom – From Uprising to Intervention in the Solomon Islands* (2004).

that deposed Prime Minister Bartholomew Ulufa'alu and his government, the descent into chaos continued.

By 2003, the assessment was bleak, as the apparatus of State seemed almost entirely defunct — Solomon Islands was now described as a 'failing state'.[144] It was only at this point, some three years after the first official request for foreign intervention[145] and having ruled out the possibility only months earlier,[146] that Australia established the Regional Assistance Mission to Solomon Islands (RAMSI), unanimously endorsed by the Solomon Islands Parliament,[147] to restore law and order in the country.

In the case of Solomon Islands, the invitation was forthcoming and so the ICISS criteria were broadly academic, the consent of a State being generally accepted as precluding wrongfulness at international law.[148] It is interesting in this context to note that, had the invitation not been forthcoming, there was arguably a case for intervention according to the ICISS criteria. This is important in the sense that ICISS shifted the phraseology from the purported 'right of humanitarian intervention', which implies a discretion, to a 'responsibility to protect', which implies an obligation. Noting also the *erga omnes* character of human rights obligations, one may expect that the aggregate has some normative significance. Moreover, the broader geopolitical considerations and implications in the Solomon Islands context seemed comparatively minimal. But in the face of an Australian Government initially loath to become involved in any protracted peacemaking, peacekeeping, or administrative operation in the Pacific, there was no suggestion from the international community (at a State level) that any obligation to intervene existed. This suggests that the international community was yet to embrace the R2P with substantive enthusiasm.

Such was the perceived disinterest at an international level that the Australian Foreign Minister actively bypassed the UN framework on the basis that it 'would be just too difficult to get the UN to solve this problem. We'll have to do it ourselves, with a coalition of other countries'.[149] In justification, the Minister cited the egregiously inadequate responses to Rwanda and Kosovo,[150] reasoning that may be questionable in view of UN reform processes in response to those failures.[151] The Minister's comments are purely speculative as to the capacity of the UN, but are nonetheless indicative of continuing

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[144] Australian Strategic Policy Institute (ASPI), *Our Failing Neighbour – Australia and the Future of Solomon Islands* (2003), 6. See also Amnesty International, 'Guns and Greed in the Solomon Islands', *The Wire* (Amnesty International's monthly magazine online), March 2003, <http://web.amnesty.org/wire/March2003/Solomon_Islands>.

[145] Moore, above n 143, 171.

[146] Alexander Downer, 'Neighbours Cannot be Recolonised', *The Australian* (Sydney), 8 January 2003, 11; Commonwealth of Australia, *Australia's National Security – A Defence Update* (2003) 21.

[147] *The Facilitation of International Assistance Act 2003* (Solomon Islands).

[148] International Law Commission, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries' in *Report of the International Commission on the work of its Fifty-third session*, GAOR, 56th sess, Supp No 10 (A/5610, chap.IV.E.2), art 20.

[149] ABC Radio, 'Interview with Alexander Downer', *World Today*, 27 June 2003. Note that Australia did inform the UN Secretary-General of the action to be taken, pursuant to article 54 of the *UN Charter*. The UN Security Council gave ex post facto approval. See Fayssal Mekdad, 'Press Statement on Solomon Islands by Security Council President' (Press Release, 26 August 2003).

[150] Alexander Downer, 'Security in an Unstable World' (Speech delivered at the National Press Club, Canberra, 26 June 2003).

[151] See generally Lakhdar Brahimi et al, *Report of the Panel on United Nations Peace Operations*, UN Doc A/55/305-S/2000/809 (2000).

perceptions that the procedural requirements for the legal use of force, subject as they are to the vagaries of national interest at work within the UN Security Council, foster prevarication and create the circumstances in which impending humanitarian disasters are allowed to become reality.[152]

This attitude can be traced back to the events of 11 September 2001, which spawned an era of preoccupation with transnational crime, in response to which Australia's foreign and defence policy took new bearings, particularly in the context of the Pacific. The prevailing policy wisdom previously sought to delve as little as possible into the domestic affairs of Australia's Pacific neighbours, but increasingly it became clear that the problems in the region — part of the so-called 'arc of instability'[153] — were 'not simply transitional, but systemic'.[154] It is through this prism of a renewed alertness to the spectre of international terrorism that the intervention in Solomon Islands is best understood.[155] In deciding to intervene, the Australian Government specifically highlighted the potential threat to international peace and security posed by failed States, deriving the imperative from 'a national interest and an international expectation'.[156] As Farer points out:

> '[w]hat Osama bin Laden and his friends may have inadvertently accomplished is to stiffen humanitarianism with the iron of national security and thus make it interesting to the parochial, narrowly compassionate figures who predominate the councils of the leading states'.[157]

D. Identifying emerging themes of intervention in the Asia-Pacific

The Solomon Islands intervention reinforces the observation distilled from the East Timor experience — that the ICISS criteria have held little practical sway in the Asia-Pacific context, insofar as state practice in the region has required consent before any intervention will be legitimised. RAMSI also marked an evolution in that, perhaps emboldened by its leadership role within INTERFET, Australia was increasingly encouraging regional responses to regional problems, no longer committed to involving the UN in the process. It remains for us to determine from a regional perspective, therefore, the normative effect of Australian intervention policy during the period of the Howard Government.

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[152] Downer's New Zealand counterpart recognised the same shortcomings, but endorsed multilateralism through the UN framework. Phil Goff, 'The United Nations: Our Hope for the Future' (Speech delivered at the UN Association of New Zealand Forum, Wellington, 26 March 2003).

[153] Dennis Rumley, 'Emergence of Australia's Arc of Instability' in Dennis Rumley et al (eds), *Australia's Arc of Instability – The Political and Cultural Dynamics of Regional Security* (2006) 11, 16–18.

[154] ASPI, above n 144, 8.

[155] See Farer, above n 16, 85.

[156] John Howard, 'Ministerial Statement to Parliament on the Regional Assistance Mission to Solomon Islands' (Speech delivered to Parliament of Australia, Canberra, 12 August 2003); ASPI, above n 144, 24.

[157] Farer, above n 16, 89.

3. Evaluating the normative direction of the region

A. Mixed messages on the importance of multilateralism

Chesterman argues persuasively that the dichotomy between just war and just peace is a misleading one, as 'it suggests that normative constraints currently prevent States from intervening on humanitarian grounds. Not only is there no evidence of such reluctance, precisely the contrary is true'.[158] The decisions to intervene in East Timor and Solomon Islands seem to support this proposition. In the former case, Indonesian 'sovereignty' was not an issue from a legal perspective, but weighed significantly in the political and military equation. Australia's circumvention of the UN Security Council in the Solomon Islands intervention has been noted in the previous section. Its attitude in that case was symptomatic of an ambivalence towards multilateralism and strict legalism that merits further consideration in this section, in which it will be argued that it is the previous Government's attitude that has undermined the integrity of decision-making on intervention in the region and that the requirement of 'consent' is superfluous. It was unnecessarily and unhelpfully incorporated into the Howard Government's calculus of intervention, and the ICISS criteria are, in fact, a sufficient and superior set of criteria, notwithstanding the geopolitical particularities of the region.

Foreign Minister Downer faulted the UN over its failure to respond in Kosovo in 1999, and yet neglected to mention the relatively successful East Timorese intervention the same year,[159] conducted under the aegis of the UN. He unambiguously asserted his perception of the UN role — 'our support for multilateral institutions like the UN is based on the belief that multilateralism, where it's useful, is a means to an end, not an end in itself'.[160] The previous day the Minister was more blunt — 'increasingly, multilateralism is a synonym for an ineffective and unfocused policy involving internationalism of the lowest common denominator'.[161] So Australia, at this point, did not see the UN so much through a legal prism as a practical one. It is a logic according to which the normative conditions justifying intervention occupy a space in international law largely separate from the framework of the UN. This is the result of a system where legality can often seem to be determined by reference to procedural, as opposed to substantive, requirements for the use of force.[162]

The characterisation of the UN Security Council as a body obsessed with procedure is, however, misguided. The failure to intervene in Rwanda, to which Downer specifically referred, was not an indication that the international community opposed intervention either in principle or in law, but rather a reflection of the reality that no State was itself willing to intervene. Inherent in the procedural requirement for the use of force (other than for self-defence) is a substantive evaluation. It has already been noted that this

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[158] Chesterman, above n 11, 236. Cf Ramesh Thakur, *The United Nations, Peace and Security* (2006) 254.

[159] Downer earlier praised the UN role in East Timor. Alexander Downer, 'Making a Difference – What the United Nations Can and Should Deliver' (Speech delivered to the UN General Assembly, New York, 13 September 2002).

[160] ASPI, above n 144.

[161] Downer, above n 146.

[162] Chesterman, above n 11, 218.

determination of a 'threat to international peace and security' is at least in part a political one, not necessarily consistently made, and quite clearly open to some justifiable criticism.[163] Subject to those qualifications, however, it is important to observe that when humanitarian concerns are at stake, the veto is unlikely to be exercised out of obstinacy.[164]

For example, Downer rebuked the Australian Labor Party for their policy position on Iraq:

> The Labor Party's opposition was not based on outcomes or results – it was based on process. That is, the Labor Party hid behind the French threat to veto any United Nations UN Security Council resolution – although it would abide by whatever policy decision the UN Security Council delivered with French acquiescence.[165]

This analysis is flawed. It draws a false dichotomy between process and outcomes, assuming that the former has no bearing on the latter. Specifically, it assumes in this case that the French decision could not, per se, be attributed with some normative significance.[166] Even in the case of Kosovo, where the just cause threshold was probably met, NATO's prosecution of the intervention highlights the dangers of acting outside the UN legal framework, even if the initial justification is *morally* sound.[167] Should the intervention be characterised as morally right, it should at the same time be characterised as illegal,[168] and the failure of the UN Security Council to legalise the process in that instance should not be seen as a fundamental indictment of the whole system.[169] Ultimately, process and legality are inextricably linked.

Amid Downer's apathy for multilateralism is an enthusiasm for the PIF and the *Biketawa Declaration*.[170] Having declared emphatically that '[s]overeignty in our view is not absolute' and that '[a]cting for the benefit of humanity is more important',[171] the Australian Government was nonetheless adamant that no intervention would occur without consent — nothing short of an Act of the Solomon Islands Parliament authorising the deployment and guaranteeing the protection of Australian troops.[172] This indicates a prima facie respect for sovereignty, but the requirement is curious in the context of a 'failed state', where the idea of legislative endorsement for intervention seems to lack both practical and normative significance.[173] The Solomon Islands 'state' was clearly in no position either to enforce the protection of international peacekeepers or to oppose them, should they choose to

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[163] See pp 105–6 in this article.
[164] Chesterman, above n 11, 221.
[165] Commonwealth of Australia, above n 106.
[166] For the French rationale, see Patrick Poivre D'Arvor (TF1) and David Pujadas (France 2), Televised interview with Jacques Chirac (Palais de l'Élysée, 10 March 2003).
[167] Editorial Comments, above n 138, 846–7 [Christine Chinkin], 856–7 [Richard Falk], 862 [Thomas Franck].
[168] Ibid, 824 [Louis Henkin]; Gray, above n 8, 45–9; Dinstein, above n 8, 315; Franck, above n 42, 191.
[169] Ian Brownlie 'Thoughts on Kind-Hearted Gunmen' in Richard Lillich (ed), *Humanitarian Intervention and the United Nations* (1973) 139, 145–6.
[170] Commonwealth of Australia, above n 106.
[171] Downer, above n 146.
[172] Alexander Downer, 'Solomon Islands Parliament Supports Australia's Offer' (Press Release, 11 July 2003).
[173] David Wippman, 'Pro-democratic Intervention by Invitation' in Gregory Fox and Brad Roth (eds), *Democratic Governance and International Law* (2000) 293, 298–9; Oscar Schachter, 'The Right of States to Use Armed Force' (1983–4) 82 *Michigan Law Review* 1620, 1641f; Michael Walzer, above n 80, 96–7.

intervene uninvited. Furthermore, the notion that the Solomon Islands Parliament represented the 'sovereignty' of the State is highly dubious in view of the internal chaos.[174] In giving primacy to the question of 'consent' over UN Security Council authorisation, the Howard Government demonstrated misplaced priorities. Close inspection of the source of the consent suggests that the UN will remain a surer, albeit still imperfect, determinant of legality *and* often also legitimacy.[175]

It may well be that, in this case, the intervention was justified and that regional leaders were genuinely supportive of RAMSI.[176] However, despite the invitation and despite the approval of the PIF, it remains a legitimate concern that, absent prospective UN Security Council authorisation, regional organisations 'are less intermediary structures in the UN's collective security system than local agents of the regional hegemon in question'.[177] The risk is all the more acute where one of the principal actors sends conflicting messages concerning its attitudes towards sovereignty, the notion of consent and the importance of multilateralism. Operating through a genuinely multinational framework does not guarantee success and cooperation, but experience suggests that it will encourage it far more than even quite genuine unilateral endeavour.

Setting aside the ambiguity in Australian foreign policy, it is important to note the way in which States attribute the notion of consent with an unwarranted normative value derived from incorrect assumptions. This is tied to the study of operational factors, which in turn impact upon the reasonable prospects of success. The approach adopted in the Solomon Islands mission was designed to minimise uncertainty and risk, but unilateral risk assessment is, in many respects, as concerning as unilateral intervention itself and yet another reason why the whole process should be subjected to multilateral deliberation. In the case of East Timor, the Australian Government considered the assurances of the Indonesian President to be a sufficient guarantee of security for the popular consultation,[178] a policy position that overemphasised the internal stability and lines of authority within the Indonesian military structure[179] and failed to appreciate that 'in order to prevail in strategy, it is imperative to reconcile the need for action with the precaution dictated by uncertainty'.[180] The lesson of this experience is that the consent or cooperation of a State does not necessarily imply operational certainty and, moreover, can create a false sense of security that ultimately exacerbates the situation on the ground. Failures in this regard can have consequences that are felt long into the State-building enterprise. Jarat Chopra, erstwhile Head of the Office of District Administration for UNTAET, made the damning assessment that '[i]n statistical terms, UNTAET had given birth to a failed

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[174] ASPI, above n 144, 23–5.

[175] Farer, above n 16, 75.

[176] PIF Secretariat, *Forum Communiqué* (34th PIF, Auckland, 14–16 August 2003), [13].

[177] Alex Bellamy and Paul Williams, 'Conclusion: What Future for Peace Operations? Brahimi and Beyond' (2004) 11(1) *International Peacekeeping* 183, 194; Thakur, above n 158, 269; Brownlie, above n 169, 147–8.

[178] For a detailed critique of the Government's preparedness, see Commonwealth of Australia, *Parliamentary Debates*, House of Representatives, 21 September 1999, 10034f (Kim Beazley).

[179] Vertzberger, above n 102, 134–5. See also Stephan Frühling, 'Uncertainty, Forecasting and the Difficulty of Strategy' (2006) 25 *Comparative Strategy* 19, 20f.

[180] Frühling, above n 179, 28. See also Michael Fitzsimmons, 'The Problem of Uncertainty in Strategic Planning' (2006) 48(4) *Survival* 131, 143; Cotton, above n 120, 98–99.

state'.[181] This must, at least in part, be attributed to the wholesale destruction that attended the perilously inadequate supervision of the East Timorese independence poll.

B. Looking ahead: Responding to current and future regional instability

Looking forward in the regional intervention debate, it is instructive to consider a few possible flashpoints in order to emphasise that the issue remains a live one. There may well be future situations that present a compelling case for intervention, if the R2P is to be taken seriously. In some cases, owing to no reasonable prospects of success, serious humanitarian calls may go unanswered, and intervention would be imprudent at best, suicidal at worst — this is why ICISS included reasonable prospects of success as one of the criteria. However, there may be cases where the reasonable prospects criterion presents no legitimate obstacle, and at that point Australian and other governments should not hide behind the spurious criterion of consent in order to avoid or delay intervention where the situation, and the R2P, demands it.

In Myanmar, the regime has a record of flagrant and brutal suppression of fundamental civil and political rights.[182] Demonstrations in 2007, which included thousands of monks,[183] returned to the international spotlight a situation that many argue merits some degree of international pressure.[184] The international response at a State level, although initially limited, was nonetheless almost universal, including condemnation from both ASEAN and the UN.[185] Australia made clear that it was China, as Myanmar's closest ally, which bore the diplomatic responsibility for making representations to the Burmese authorities.[186] For its part, China conceded there were 'problems', but argued in Charter legalese that they did not pose 'a threat to international and regional peace',[187] and Russia agreed.[188] Nonetheless, both the UN Security Council and the Human Rights Council condemned the suppression and called for the return to Myanmar of UN Special Envoy Ibrahim Gambari.[189] As noted above, uninvited foreign military intervention in Myanmar to address the political situation, without at least the acquiescence of China and India, would be inconceivable in the present geopolitical climate. In terms of the impact this has on approaches elsewhere, the ICISS philosophy bears emphasis — 'the reality that

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[181] Jarat Chopra, 'Building State Failure in East Timor' (2002) 33(5) *Development and Change* 979, 999.

[182] Channel 4, 'New Evidence of Burmese Violence', *Channel 4 News*, 3 October 2007; Evan Williams, 'Courage Against the Junta', *The Australian* (Sydney), 29–30 September 2007, 29.

[183] On the significance of the monks' role see ABC Television, 'Brutal Crackdown continues in Burma', *The 7.30 Report*, 27 September 2007.

[184] Sanctions are now being imposed. 'Bush Ramps up Sanctions on Burma', *BBC News*, 19 October 2007 <http://news.bbc.co.uk/2/hi/asia-pacific/7053000.stm>.

[185] ABC Radio, 'World Urges China to Pressure Burma on Crackdowns', *Lateline*, 28 September 2007.

[186] Ibid. See also Ken Roth (Executive Director of Human Rights Watch), *Letter to President Hu Jintao on Burma*, 17 October 2007.

[187] ABC Television, 'Military Crackdown Continues in Burma', *Lateline*, 29 September 2007. At the ICISS Round Table Consultation in Beijing, 14 June 2001, the Chinese opined that 'humanitarian intervention' is 'tantamount to marrying evil to good': cited in Thakur, above n 158, 268.

[188] 'Burma Troops Open Fire as Monks Return', *The Australian* (Sydney), 27 September 2007.

[189] *Statement by the President of the Security Council on the Situation in Myanmar*, UN SCOR, 5757th mtg, UN Doc S/PRST/2007/37 (2007); Human Rights Council, Resolution on the Situation of Human Rights in Myanmar, Res S-5/1, 5th Special Sess, 2nd mtg, 2 October 2007.

interventions may not be able to be mounted in every case where there is justification for doing so, is no reason for them not to be mounted in any case'.[190] Similar points may be made in relation to ongoing unrest in the Chinese province of Tibet.

However, notwithstanding these realities, the devastating result of Cyclone Nargis in 2008 yet again raised the question of the doctrine. The cyclone killed at least 78 000 people and left over 2 million in immediate need of aid assistance.[191] US, British and French ships, laden with humanitarian supplies, were denied entry into port by the ruling junta, despite the local authorities having failed to reach hundreds of thousands of Burmese.[192] The proposal launched by the French Government, noted above,[193] sparked a vigorous debate, with strong resistance from many quarters to the idea of direct intervention, and often based on compelling arguments. In particular, it was argued that direct action would undermine any cooperation efforts with the Burmese authorities and that aid drops without any on-the-ground mechanism for effective organisation and distribution would be counterproductive.[194] Indeed, the Secretary-General has insisted on a narrow construction of just cause, and specifically ruled out natural disasters as a trigger, arguing it would 'stretch the concept beyond recognition or operational utility'.[195] But, as noted by Gareth Evans (ICISS co-chair) in an opinion piece for *The Guardian,* whilst the focus of the R2P, at least as far as the use of force is concerned, should remain on cases of 'genocide, war crimes, ethnic cleansing and crimes against humanity' — this is the formulation that finds expression in the 2005 World Summit Document[196] — there arguably comes a point when failure to act in a situation such as Myanmar faces can duly be characterised as a crime against humanity.[197] This is a debate beyond the confines of this article, but suffice to say for present purposes that the decision not to force action in Myanmar was a reminder of the reluctance within the international community, whether rightly or wrongly, to intervene non-consensually to alleviate the immediate consequences of a humanitarian disaster.

Turning now to other situations in the region where the R2P may yet become a live issue. While East Timor, the world's newest State, struggles with its first steps in statehood, Indonesia's other provincial difficulties remain unresolved. West Papua may not pose an

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[190] ICISS, above n 48, [4.42].

[191] 'Burma asks for $11bn to rebuild', *The Australian* (Sydney), 26 May 2008 <http://www.theaustralian.news.com.au/story/0,25197,23756159-25837,00.html>.

[192] Jonathan Head, 'Will Burma keep its word on aid?' *BBC News online*, 23 May 2008 <http://news.bbc.co.uk/2/hi/asia-pacific/7417203.stm>.

[193] See above n 93; interestingly, former Australian Foreign Minister Alexander Downer also supported the forcible delivery of aid – ABC Television, 'Downer discusses tension in Liberal leadership', *Lateline,* 19 May 2008 <http://www.abc.net.au/lateline/content/2007/s2248940.htm>.

[194] Gareth Evans, 'Facing up to our responsibilities' *The Guardian* (UK), 12 May 2008, <http://commentisfree.guardian.co.uk/gareth_evans/2008/05/facing_up_to_our_responsbilities.html>; Reuters, 'China, Indonesia, reject France's Myanmar push' 8 May 2008, <http://www.reuters.com/article/asiaCrisis/idUSN08518240>; Responsibility to Protect – Engaging Civil Society, 'R2PCS reflects on Burma cyclone disaster' 9 May 2008 <http://www.responsibilitytoprotect.org/index.php/civil_society_statements/?theme=alt5>.

[195] *Implementing the Responsibility to Protect – Report of the Secretary General*, 63rd sess, UN Doc A/63/677 (2009), [10(b)].

[196] *2005 World Summit Outcome*, GA Res 60/1, UN GAOR, 60th Sess, 8th plen mtg, UN Doc A/Res/60/1 (2005), [138–40].

[197] Evans, above n 194.

immediate problem,[198] but internal conflict continues, accompanied by allegations of serious human rights violations,[199] and as long as the underlying causes of conflict remain unresolved there is always a danger that the simmering conflict may once again boil over.[200] Whilst, from a legal viewpoint, the territory may have been incorrectly placed under Indonesian control,[201] any attempt now to institute fuller autonomy, let alone independence, faces difficulties deriving principally from the demographic shifts that have occurred since Indonesia gained control in the 1960s.[202] It is likely in this respect that the East Timorese experience will be of considerable discouragement to the international community. There, where the population remained largely homogenous and overwhelmingly supportive of independence, the international community failed in its attempt to oversee a peaceful transition. In 2006, Australia and Indonesia signed the vaguely drafted *Lombok Treaty*, which commits Australia to opposing secession in West Papua.[203] Australia has reversed longstanding policy once already and, should the human security situation deteriorate to a level similar to that seen in East Timor, Australia may again be required to make a decision regarding intervention.[204]

Beyond the difficulties still facing Solomon Islands, more pervasive governance issues in the Pacific Islands represent an ongoing threat to regional security. The situations in Vanuatu, Tonga, Nauru, New Caledonia, Fiji and Papua New Guinea show signs of strain, and all these States have considerable progress ahead of them in order to consolidate their statehood.[205] It is worth mentioning more specifically the situation in Fiji, where the environment is delicately balanced. It remains effectively under military leadership in the wake of the 2006 coup, with Commodore Frank Bainimarama now restored once again as Interim Prime Minister. He initially signalled democratic elections at the beginning of 2009 and cooperated with the PIF in the articulation of a seven-point plan for the country.[206] However, Fiji was suspended from the PIF on 2 May 2009, having failed to adhere to this timetable and to respond satisfactorily to the Port Moresby Leaders' Retreat decisions in January 2009, and in view of the 'disturbing deterioration of the political, legal and human

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[198] Jason MacLeod, 'Self-Determination and Autonomy: the Meanings of Freedom in West Papua' in M Anne Brown (ed), *Security and Development in the Pacific Islands – Social Resilience in Emerging States* (2007) 139, 147.

[199] John Wing and Peter King, *Genocide in West Papua? The Role of the Indonesian State Apparatus and a Current Needs Assessment of the Papuan People* (2005) 19–22.

[200] Benjamin Reilly, 'Internal Conflict and Regional Security in Asia and the Pacific' (2002) 14(1) *Global Change, Peace and Security* 7, 15; Allan Gyngell, 'Balancing Australia's Security Interests', (Paper presented at the Global Forces 2006 ASPI Conference, Canberra, 26 September 2006) 60.

[201] MacLeod, above n 198, 141.

[202] 'The non-indigenous population has increased from 4% in 1971 to nearly 51% at the current time': Jim Elmslie, Peter King and Jake Lynch, *Blundering in? The Australia-Indonesia Security Treaty and the Humanitarian Crisis in West Papua* (2007) 7. MacLeod, above n 198, 153–4.

[203] *Agreement Between the Republic of Indonesia and Australia on the Framework for Security Cooperation*, opened for signature 13 November 2006, [2006] ATNIF 25 (not yet in force) ('*Lombok Treaty*'), art 2.3. The *Lombok Treaty* is subject to widely divergent interpretations. See Elmslie, King and Lynch, above n 202, 23–6.

[204] For a critique of foreign support for secessionist movements, see Tom Farer, 'The Ethics of Intervention in Self-Determination Struggles' (2003) 25 *Human Rights Quarterly* 393.

[205] See generally Dennis Rumley et al (eds), *Australia's Arc of Instability – the Political and Cultural Dynamics of Regional Security* (2006).

[206] PIF Secretariat, above n 176, [15].

rights situation'.[207] On 1 September 2009, the Commonwealth followed suit.[208] The PIF itself has continued to express concern over the situation,[209] and Human Rights Watch alleges ongoing serious human rights abuses.[210] Considering, moreover, the Secretary-General's emphasis on 'timely and decisive' responses to threshold cases,[211] it remains possible that the PIF will at some point be faced with a decision on intervention.[212]

The future of regional security is uncertain, but it is hard to envisage a situation arising where Australia's R2P would require direct military intervention on purely humanitarian grounds, unless as part of a larger coalition led by a militarily much stronger State. In the current geostrategic climate, the clearest possible candidates for such intervention are beyond the reach of Australia's military capacity. However, governance issues will continue to affect security in the Pacific Islands. Any response to 'failing states' and internal conflict should be measured, bringing the lessons of previous interventions to future action and grounding those responses firmly and expressly within the existing international legal framework.

The ICISS criteria, including the requirement for authorisation by the UN Security Council, should be adhered to, and consent should not be gratuitously incorporated into criteria of intervention — ultimately, after all, once consent is obtained it is no longer technically an intervention.[213] It should be recognised that prevarication in East Timor led to preventable destruction, as the international community sought the consent of Indonesia. As noted above, the proposition that non-consensual intervention in East Timor would have spawned a full-scale inter-State war, or a 'regional conflagration',[214] is not certain. For the purpose of this article, however, it is sufficient to note that neither according to the ICISS criteria, nor the *text* of chapter VII of the *UN Charter*, was consent required — indeed the purpose of chapter VII is to provide the framework for non-consensual intervention. It must be recognised, therefore, that any consent requirement imposed by one of the five permanent members of the UN Security Council, or anyone else for that matter, is a policy consideration. According to the circumstances, it *may* find legitimation in the reasonable prospects criterion. However, not being grounded in legality, it can very easily become a smokescreen to indifference and inaction. In Solomon Islands, had consent not been obtained, it has to be assumed that there would have been no intervention — the international community must ask itself whether such a position would be consistent with the universally endorsed R2P. For, if consent is allowed

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[207] PIF Secretariat, 'Statement by Forum Chair on suspension of the Fiji military regime from the Pacific Islands Forum' (Press Release, 2 May 2009).

[208] Commonwealth Secretariat, 'Fiji suspended from Commonwealth' (Press Release, 1 September 2009).

[209] PIF Secretariat, *Forum Communiqué*, (40th PIF, Cairns, 5–6 August 2009), [44–51].

[210] Human Rights Watch, 'Letter to Pacific Islands Forum Leaders' (1 August 2009).

[211] *Implementing the Responsibility to Protect – Report of the Secretary General,* 63rd sess, [part IV] UN Doc A/63/677 (2009); *2005 World Summit Outcome*, GA Res 60/1, UN GAOR, 60th sess, 8th plen mtg, UN Doc A/Res/60/1 (2005), [139].

[212] Christopher Griffin, 'Unity, Identity, Nation Building: Challenges to Fijian Leadership' in Dennis Rumley et al (eds), *Australia's Arc of Instability – The Political and Cultural Dynamics of Regional Security* (2006) 247, 269. Note that ICISS rejected, with qualifications, the idea that the responsibility to intervene could be activated by a military overthrow. ICISS, above n 48, [4.26].

[213] As much is implicit from the language of the *UN Charter*, art 2(7).

[214] ICISS, above n 48, [4.41].

to remain the *sine qua non* of intervention in the region, then the R2P will remain pie in the sky and the spectre of humanitarian disaster looms large.

Conclusion

It is now axiomatic that foreign military intervention is legitimate in the face of gross, systematic and ongoing violations of human rights. The UN allows such action when authorised by the UN Security Council and even in the absence of authorization; the international community has shown that in the most serious cases it may acquiesce to intervention. Yet legitimacy and legality notwithstanding, in all situations a willing leader of enforcement action is a prerequisite — 'the United Nations itself can no more conduct large-scale military operations than a trade association of hospitals can conduct heart surgery'.[215] In recent years in the Asia-Pacific, Australia has been the State to drive intervention, albeit as the leader of international coalitions. Highlighting the disconnect between the articulation of the ICISS criteria and their implementation in the region, this article has raised concerns over the manner in which Australia has approached intervention and the unwelcome ambiguity this engenders in the normative framework.

It appears that in the context of the Asia-Pacific, irrespective of the strict legal requirements and further to the need for political will, there is a regional requirement for consent, although it is unclear whether this is required from the de jure or the de facto authority. Whilst genuine consent can confer legality on an intervention, the rationale for the requirement in the Asia-Pacific appears to be based in pragmatism and realism as opposed to legalism. This limited influence of strict international rules in the calculus of intervention raises two concerns for the future of security in the region. Firstly, there is instability inherent in attitudes to international relations that are guided by reference to subjective judgments of national and international interest, to the exclusion of international law. Secondly, there is a concomitant danger that ill-conceived and poorly executed interventions, particularly in the rebuilding phase, will be ineffective in achieving their long-term goals. It is important also to note that all military action, consensual and non-consensual, is fraught. It behoves States to pursue holistic measures covering the full ambit of the R2P — to prevent, to react, to rebuild — such that the international community can avoid the demand for ad hoc choices between doing nothing and using force. Such choices do not arise spontaneously, but are invariably the consequence of inadequate policy positions in the years preceding a crisis point.[216]

Although it is difficult to distil a coherent foundation to Australia's foreign policy in this regard during the period of the Howard Government, the general trend was a growing ambivalence towards international law. Australia's approach to regional intervention may be consistent with the basic normative framework described in the first section of this article, but only because it has increasingly situated itself outside that framework. Downer's position effectively militated for a global security system based on regional organisations, a

[215] Michael Mandelbaum, 'The Reluctance to Intevene' (1994) 95 *Foreign Policy* 3, 11, cited in Chesterman, above n 11, 180.

[216] Bellamy, above n 87, 198–9.

proposal explicitly rejected by the drafters of the *UN Charter*.[217] Notwithstanding the legality, *in casu*, of the missions in East Timor and Solomon Islands, and the gravity of the situations they were seeking to address, there are more long-term considerations that have a bearing on the wisdom of the initial intervention.

For the time being, it appears that Australia is performing its role in the region with relatively benign intent. However, as interventions increasingly situate themselves outside the UN framework on the central legal questions, stability and order in the international system are sacrificed in the name of 'outcomes'. The result is a system where legitimacy of action, even when legal, can more easily be disputed by opposing States. More disturbingly, the vague articulation of norms, encouraged by only selective adherence to existing rules, facilitates a security environment increasingly susceptible to abuse by a regional hegemon. The international law governing the question still remains and the ICISS standards should be embraced as far as they go. There is, however, the danger of a gap emerging where, amid the greater immediacy of flagrant humanitarian abuses in countries such as Myanmar, less emphasis is placed on the importance of adhering strictly to the rules surrounding pro-democratic intervention.

This article has centred its attention on the *jus ad bellum,* arguing the R2P has been poorly discharged in the Asia-Pacific region, largely due to an often unnecessary and misguided requirement for consent. This is just one step in the calculus of intervention, and further consideration of both the preceding and subsequent stages should be a pressing concern for the academic community. The weight of history suggests that, much as we might wish it otherwise, externally imposed solutions and frameworks for reconstruction are unlikely to create a viable State in the long-term.[218] Ultimately, without a clearer articulation of the *jus post bellum*, there is a missing piece in the theory of just war.[219] If the 'responsibility to protect' necessarily implies a 'responsibility to rebuild'[220], the next task of the international community is to address the difficulty of satisfying the 'reasonable prospects' criterion — to develop a clearly articulated legal framework for peace-building activities, recognising the particularities and nuances of each situation, but situating each and every one in an overriding legal structure that fosters stability and collective accountability in the international system. Failure to avoid further ad hoc, poorly planned interventions will perpetuate the current paradigm of intractable conflict, where a *capacity* to protect is rarely demonstrated in the long term.

The discourse on intervention and the use of force has unfolded for centuries, and it is worth reflecting on the fairly modest normative evolution that has been the product of that extensive debate. Ultimately, whilst there are compelling and sometimes irresistible demands on the collective conscience, there is an existing framework through which the moral conviction can be satisfied, and with the clear articulation of the R2P, there is potential for much greater determinacy in the norms that govern intervention. The UN is

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[217] Bellamy and Williams, above n 177, 194–6.

[218] Simon Chesterman, Michael Ignatieff and Ramesh Thakur, *Making States Work – From State Failure to State Building* (2004) 17.

[219] See Carsten Stahn, *'Jus ad bellum', 'jus in bello'… 'jus post bellum*'? – Rethinking the Conception of the Law of Armed Force' (2006) 17(5) *European Journal of International Law* 921, 922–3.

[220] ICISS, above n 48, [2.29].

an imperfect system for an imperfect world, but those who would see greater stability and security through unilateral determinations of the common good are misguided. This is not to suggest that the international community should resign itself to the limitations of the legal status quo, for there is an ever-pressing need to re-evaluate practice and outcomes and advocate vigorously for truly genuine cooperation in the task of peace-building.[221] Nor is it to suggest that regional frameworks do not have a crucial role to play in the management of conflict. Rather, it is to reassert the primacy of international law over ad hoc unilateralism. It is to affirm that multilateralism is indispensable. It is also to recognise that the further we distance ourselves from the rigours of process and accountability, the further we remove ourselves from the realisation of otherwise admirable aims.

[221] *2005 World Summit Outcome*, GA Res 60/1, UN GAOR, 60th Sess, 8th plen mtg, UN Doc A/Res/60/1 (2005), [146–8]; Thakur, above n 158, 284–5.