

# Precommitment Regimes for Intervention: Supplementing the Security Council

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As global governance institutions proliferate and become more powerful, their legitimacy is subject to ever sharper scrutiny. Yet what legitimacy means in this context and how it is to be ascertained are often unclear. In a previous paper in this journal, we offered a general account of the legitimacy of such institutions and a set of standards for determining when they are legitimate.<sup>1</sup> In this paper we focus on the legitimacy of the UN Security Council as an institution for making decisions concerning the use of military force across state borders. The context for this topic has changed over the last decade as a result of the ongoing development of the responsibility to protect (RtoP) doctrine and extensive discussions about it in the United Nations. Yet the mostly widely accepted proposals for RtoP still require Security Council authorization for forceful intervention, and strictly limit the conditions under which such intervention may take place.

The world currently lacks reliable multilateral arrangements both to prevent humanitarian disasters and to protect fragile democratic governments against coups and other violent attempts to overthrow them. We are particularly interested in the protection of fragile democracies. It is a valid question whether democratic publics should rely on the Security Council, with its particular composition and permanent member veto, to serve as their principal external guarantor. We argue that the Security Council is a legitimate institution for making these decisions, but that it does not possess unconditional *exclusive* legitimacy. That is, under some conditions, multilateral coercive intervention to resolve a

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humanitarian crisis or to counter the use of violence against democratic governance could be legitimately authorized through other means. Nevertheless, the dangers of unilateral intervention, or intervention by a relatively small set of powerful states, are sufficiently great that these other options should be quite carefully restricted. In the final section of this paper we evaluate proposals for institutions other than the Security Council to authorize the multilateral use of force. We are skeptical about the authorization of force by a democratic coalition, but we look with more sympathy on the idea of establishing “precommitment regimes.” Such regimes would enable states to preselect groups of other states to intervene legally, without Security Council authorization, in cases of well-defined contingencies involving threats to struggling democracies or major violations of human rights.

To begin, we set out a conceptual framework for assessing the legitimacy of the Security Council. We distinguish between normative and sociological legitimacy and between justice and legitimacy, and we explain the distinctive practical function and value of legitimacy assessments. We then proceed to discuss the legitimacy of Security Council action, concluding that, despite some serious flaws, the Security Council is arguably a legitimate institution for making decisions regarding the use of force across borders.

Next we focus on the problem of Security Council *inaction*. This problem became salient in the 1990s in the context of such humanitarian emergencies as those in Somalia, Bosnia, and Rwanda. These concerns led to a now famous report, *The Responsibility to Protect*,<sup>2</sup> and to almost a decade of discussions in the United Nations about the principle of the responsibility to protect and how it should be implemented. These discussions culminated in a three-day debate in the UN General Assembly in July 2009, which has provided a clear indication of the support of most UN members for the principle of RtoP as interpreted by Secretary-General Ban Ki-moon, as well as the range of concerns and objections to its institutionalization. RtoP may ultimately lead to broader international agreement on the conditions under which humanitarian intervention is justified, but it does not resolve a crucial issue: whether, if the Security Council refuses to act due to the exercise of a Great Power veto, other means may legitimately be used to authorize the use of armed force.

As mentioned above, in the final section we consider possible reforms that would help to make RtoP more meaningful, including reforms circumventing a Security Council veto. In our view, desirable reforms must meet three criteria: (1) they must facilitate prompt action that promises to be effective and not to

worsen the situation; (2) they must not undermine the near consensus formed, in the discussion of RtoP, on the principle that under some conditions coercive multilateral intervention is justifiable; and (3) they must not overlook the crucial significance of building state capacity to prevent avoidable humanitarian crises.

## A CONCEPTUAL FRAMEWORK

### *Normative and Sociological Senses of “Legitimacy”*

It is important at the outset to distinguish between the normative and sociological sense of “legitimacy.” An institution is legitimate in the normative sense if and only if it has *the right to rule*, broadly described. A legitimate institution is justified in issuing rules and seeking to gain compliance with them by attaching costs and benefits, and if those to whom it directs its rules have content-independent reasons to comply. In other words, the fact that the institution issues the rules itself counts as a reason for compliance, irrespective of the substance of the rule.<sup>3</sup> In addition, legitimate institutions are presumptively entitled to noninterference with their proper activities.<sup>4</sup> Generally speaking, the proper response to the defects of a legitimate institution is to try to reform it, rather than to overthrow it.

Legitimacy in the normative sense is not to be confused with legality. Agreement that the Security Council has exclusive legal authority under international law does not settle whether it has exclusive legitimacy; indeed, having legal authority may even be compatible with its lacking legitimacy *tout court*. Similarly, whether the NATO intervention in Kosovo was illegal is one question, and whether it was legitimate is another, as the Goldstone report noted.<sup>5</sup>

In contrast to the normative conception, to say that an institution is legitimate in the sociological sense is merely to say that it is generally *believed* to have the right to rule. An institution might be legitimate in the normative sense even if it was not legitimate in the sociological sense—if, for example, there were a widespread erroneous adverse belief about how it came to be or how it was currently operating. Conversely, an institution might be widely believed to be legitimate but lack legitimacy in the normative sense, if, for example, it succeeded in hiding certain damaging information about itself. Whether an institution is legitimate in the sociological sense can be determined by surveys of opinion and observation of the behavior of agents subject to its authority. Whether it is legitimate in the normative sense is a moral question that can only be answered on the basis of a

defensible account of what characteristics an institution must have in order to have the right to rule.

There is an important connection between the two senses of legitimacy. To function effectively, an international institution usually needs to be widely regarded as legitimate. This is particularly true of international institutions that are not simple bargains for mutual advantage and where free riding cannot be avoided by tit-for-tat strategies. An institution that is not regarded as legitimate is more likely, other things being equal, to provoke a backlash that may have serious consequences. So designers of institutions should not simply aim for ideally best arrangements, but must consider trade-offs between moral desiderata and sociological legitimacy. In the remainder of this essay we will first focus on normative legitimacy, but then go on to consider its relationship to sociological legitimacy in our assessment of proposals for alternatives to the Security Council.

#### *A Standard of Legitimacy for Global Governance Institutions*

Legitimacy is not the same as justice. An institution can fall short of being fully just and yet be legitimate (although it is true that severe injustices can rob it of legitimacy). When there is pervasive disagreement and uncertainty about what justice requires, the concept of legitimacy can play a uniquely valuable role by making possible support for the institution that is based on moral reasons, not merely on self-interest or the fear of coercion. People who disagree about what justice requires may be able to agree in their judgments of legitimacy. If there is considerable agreement on a standard of legitimacy, or at least on some basic necessary conditions for legitimacy, then legitimacy judgments can identify an effective normative coordination point in the absence of agreement on justice.

There are two weighty reasons not to insist that global governance institutions must be just if they are to be recognized as having the right to rule. First, there is sufficient disagreement and uncertainty about what global justice requires that demanding such a high and ambiguous standard for legitimacy would frustrate the reasonable goal of securing coordinated support for valuable institutions on the basis of moral reasons. Second, even if there were much less disagreement and uncertainty, withholding support from a valuable institution because it fails to meet standards of justice would undermine progress toward justice, which requires effective institutions. The concept of legitimacy, then, can be seen as an expression of a realistic normative stance: it reflects both an awareness that

some institutions, though morally flawed, are so beneficial that we need them despite their imperfections, and a commitment to holding institutions to a higher standard than their mere benefit relative to the non-institutional status quo.

In our view, the legitimacy of global governance institutions, including the Security Council, should be assessed according to what we call the Complex Standard.<sup>6</sup> We advance the Complex Standard as a proposal for criteria that individuals and groups can use to determine whether particular global governance institutions ought to be regarded as authoritative in their domains of operation. That is, should those to whom they address their rules and policies work on the presumption that they should be obeyed, or at most reformed, and that they should not be interfered with or overthrown? The Complex Standard is not offered as a discovery of the necessary and sufficient conditions for the legitimacy of global governance institutions, but rather as a reasonable basis for a valuable practice. It has three substantive criteria and three epistemic criteria.

The first substantive criterion is *minimal moral acceptability*. Global governance institutions, like other institutions, must not persist in perpetrating serious injustices that involve violations of basic human rights. This requirement seems especially appropriate for the Security Council, since in recent times it has increasingly portrayed the protection of basic human rights as one of its major tasks.

The second substantive criterion is *institutional integrity*. If there is a gross disparity between an institution's performance and its self-proclaimed goals or procedures, its legitimacy is seriously called into question. Similarly, it undermines an institution's legitimacy if its constitution predictably thwarts the pursuit of the very goals on which it bases its claims of authority.

The third substantive criterion, *comparative benefit*, is more complex, but intuitive nonetheless. Because the chief justification for having global governance institutions is that they supply important goods that cannot be achieved without them, failure to supply these benefits calls the legitimacy of these institutions into question. Unless they do a reasonably good job of supplying the benefits invoked to justify their creation, the constraints on sovereignty they impose and the removal of decision-making to bodies remote from democratic citizens would be unacceptable. Achieving the comparative benefit criterion requires providing net benefits exceeding those that would be possible without the institution in question. However, if an institution provides only marginally better benefits than would be available in its absence, and if there is good reason to believe that it should

be able to provide much more substantial benefits but persists in failing to do so, its legitimacy will be questionable.

This is *not* to say that an institution loses legitimacy whenever there is a feasible alternative that could be marginally more efficient at delivering the benefits in question. Such a criterion for legitimacy would be too demanding and would foster excessive instability, defeating the practice's goal of achieving moral reason-based coordinated support for valuable institutions. Yet if an institution persists in seriously suboptimal performance, with little prospect for improvement, *and* there is a morally acceptable alternative institution that would do a significantly better job of securing the benefits in question and that could be created without excessive transition costs, the institution's legitimacy would be called into question.

The three substantive criteria are best conceived as what John Rawls calls counting principles: the more of them an institution satisfies and the higher the degree to which it satisfies them, the stronger its claim to legitimacy.<sup>7</sup> In addition to the three substantive criteria, there are three epistemic virtues that are critical for the legitimacy of global governance institutions.

First, because their chief function is to achieve coordinated action among states and other actors, institutions ought to generate reliable information about coordination points and make it available to relevant actors; otherwise they will not satisfy the criterion of comparative benefit. Second, a degree of transparency concerning the institution's operations is necessary in order to achieve satisfactory terms of accountability. By "terms of accountability" we mean the specification of who the accountability holders are and of the standards to which they are to hold the institution's operations. For the terms of accountability to be met, the operations of the institution must be reasonably transparent to the accountability holders and other relevant stakeholders. Third, institutions must have the capacity to revise their goals and processes over time as circumstances dictate, and this in turn requires the capacity to revise the terms of accountability through a process of principled deliberation.

Because there is considerable disagreement and uncertainty as to what global justice requires and about the proper division of labor between international and national institutions for achieving it, there is continuing controversy about the appropriate terms of accountability for global governance institutions. Epistemic virtues are therefore of crucial importance. Institutions should facilitate principled, factually informed deliberations about these matters and should help ensure that they utilize input from all who properly have a stake in the outcomes.

## ASSESSING THE LEGITIMACY OF SECURITY COUNCIL ACTION

In assessing the performance of the Security Council, we begin with our three epistemic criteria.

On the criterion of transparency, the Security Council gets low marks. Its most important negotiations take place in secret.<sup>8</sup> Despite talk of transparency, the effectiveness of the Council, as essentially a Great Power club, actually depends on its *lack* of transparency. It can therefore be argued that to achieve the objectives of international peace and security, the Security Council must be non-transparent: that is, a transparent Security Council would fail on the criterion of comparative benefit since it would simply become a forum for appealing to outside audiences rather than reaching Great Power agreement to take effective action. We do not dispute this argument, but note that non-transparency can affect the sociological legitimacy of the Security Council with states other than Great Powers, and with the publics of democratic Great Powers.

From the standpoint of accountability, the Security Council also falls short, in two respects. First, the UN Charter provides no checks on the Security Council: there are no constitutional constraints on what it can do. Indeed, when the Security Council acts, with the approval of all Great Powers and sufficient other support, its legal powers are essentially unlimited, and there is no provision for judicial review of its decisions by the International Court of Justice or any other judicial body.<sup>9</sup> Second, there is little in the way of incentives for responsible use of the veto by the five permanent members. The permanent members most likely to use the veto against humanitarian intervention are extremely powerful and not likely to suffer severe political or economic consequences for using it to thwart such interventions.

The Security Council scores better on our third epistemic criterion—the capacity of an institution to revise its goals in light of experience and changing values. The institutional goals of the Security Council have changed somewhat over time, with the protection of basic human rights coming to occupy a larger place in the institution's mission. On the other hand, the permanent member veto seems firmly entrenched, despite the lack of a compelling moral justification for it.

We now turn to our three substantive criteria. When taking measures under its own control, the Security Council has generally met the minimal moral acceptability requirement. And although there have been occasional reports of rape and

killing by UN forces, forces under UN command do not seem to exhibit a systematic pattern of serious human rights violations. They have not, however, always been effective. For example, as an international commission reported, “poorly armed and ill-disciplined UN troops were an inadequate response in the face of atrocities in Sierra Leone.”<sup>10</sup> There have recently been much more serious problems with operations carried out by forces nominally under state control, working in cooperation with UN peacekeeping forces. A recent report by Human Rights Watch has documented mass rapes and murders by Congolese forces supported logistically by the United Nations Peacekeeping Department.<sup>11</sup>

The Council’s record is mixed and ambiguous on the criterion of institutional integrity. Integrity requires a lack of “egregious disparity” between the goals of an institution and its actual practices.<sup>12</sup> Every complex organization engages in some form of “organized hypocrisy,” and the UN is no exception.<sup>13</sup> The “Oil-for-Food” program, which was marred by corruption, is a case in point. So weaknesses can be identified on this standard. But unlike many national-level and local institutions in a variety of countries, the Security Council does not seem to be consistently corrupt. On the other hand, the failure to take serious steps toward stopping the massive killing and other human rights abuses in Bosnia, Rwanda, Darfur, and Congo, and perhaps somewhat more controversially in Kosovo, reveals a marked discrepancy between the professed goals and the behavior of the Security Council.

Finally, assessing how well the Security Council fares according to the criterion of comparative benefit is probably most difficult because it requires the assessment of a counterfactual—that is, what would have been the case in the absence of the Security Council. It should not be taken for granted, as if it were self-evident, that the use of force across borders would be more common and more often wrongful if the Council did not exist. Few informed observers would give the Council major credit for the reduction in the scale and destructiveness of warfare in the second, as compared to the first, half of the twentieth century, since factors other than the existence of the Security Council (such as the possession by states of nuclear weapons and changing views of the acceptability of war as a means of national policy) could account for the improvement. By all accounts, UN peacekeeping operations and Security Council–authorized interventions have had much more modest effects. Nevertheless, the most systematic recent studies of peacekeeping conclude, after careful analysis that takes account of these inferential difficulties, that the net effects are positive: “peacekeeping works.”<sup>14</sup>



Based on these empirical findings, we believe that the Security Council provides significant benefits from the standpoint of international security and the protection against human rights abuses relative to the status quo ante, the condition in which there was no supranational institution capable of exercising significant constraint on the use of force. We conclude that the Security Council sufficiently realizes the substantive criteria of the Complex Standard to be considered legitimate (in the normative sense), although its performance is in many respects highly flawed.

## ASSESSING THE LEGITIMACY OF SECURITY COUNCIL INACTION: THE RESPONSIBILITY TO PROTECT

During the 1990s the Security Council's failure to act effectively, for years in the former Yugoslavia, and with devastating consequences in Rwanda, drew much more criticism than its authorization of peacekeeping actions in troubled societies ranging from Angola and Mozambique to Guatemala. Responding to this concern, in 2001 the International Commission on Intervention and State Sovereignty (ICISS), initiated by the government of Canada, issued a report, *The Responsibility to Protect*, which has resonated in the United Nations system ever since.<sup>15</sup> As co-chair of the commission, Gareth Evans—the former foreign minister of Australia—has played an active role in explaining and promoting the concept of the “responsibility to protect,” and the World Summit of 2005 endorsed the report's recommendation in the following terms:

The international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian, and other peaceful means, in accordance with Chapters VI and VIII of the Charter, to help to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. In this context, we are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity.<sup>16</sup>

Building on this resolution, in January 2009 Secretary-General Ban Ki-moon articulated three “pillars” of the responsibility to protect: (1) state responsibility; (2) international assistance and capacity building; and (3) timely and decisive response “when a State is manifestly failing to provide such protection.”<sup>17</sup> The

secretary-general emphasized that all three pillars had to be strong. A subsequent General Assembly debate in July 2009 revealed some dissent to the principle, but also an increasing convergence of views among many countries. There was support for the secretary-general's view that RtoP was not open for renegotiation, but needed to be implemented; for his articulation of the three pillars strategy; and for his view that the scope of RtoP should be narrowly confined to four crimes: genocide, war crimes, ethnic cleansing, and crimes against humanity. Notably, it should *not* extend to inadequate responses to natural disasters or civil war. The Nicaraguan president of the General Assembly, joined by Cuba, Venezuela, Sudan, and on some issues other delegations, tried to cast doubt on the legitimacy of RtoP by linking it to unilateral intervention, but without much success. In contrast, India, Indonesia, Japan, Brazil, and South Africa came to its defense.

The secretary-general's report, and the subsequent debate, did reveal some ambivalence about the role of the Security Council in implementing the RtoP agenda. The secretary-general urged the five permanent members "to refrain from employing or threatening to employ the veto in situations of manifest failure to meet obligations relating to the responsibility to protect."<sup>18</sup> To our mind, this statement can be interpreted as an attempt to cast doubt on the legitimacy of such a veto. In the General Assembly the caution about RtoP expressed by many developing countries suggested that there would be little support in that body for more expansive authorization for humanitarian intervention. As noted above, a radical minority saw RtoP as a license for unilateral intervention, but there was more general caution about intervention without the consent of the state involved, expressed by China, Pakistan, and Sri Lanka. On the other hand, thirty-five states supported the secretary-general's recommendation that the five permanent members refrain from employing the veto in situations covered by RtoP. And, not surprisingly, a number of delegations expressed (in varying degrees) skepticism about the Security Council's ability to discharge its responsibilities and declared the need for General Assembly oversight.<sup>19</sup>

#### *Exclusive Versus Nonexclusive Legitimacy*

We have argued that the Security Council is a legitimate institution and that this implies that its actions are presumptively legitimate. Nevertheless, as noted, in recent years the Council has been criticized more severely for *inaction* than for action. Although no interventions by the Security Council have led to large-scale

human rights abuses, its inaction in Rwanda in 1994 contributed to a death toll estimated at between 500,000 and 800,000.<sup>20</sup> The central problem with the Security Council is, therefore, not what it does, but what it fails to do. So the most serious questions about Security Council legitimacy are not those of non-exclusive but of exclusive legitimacy.

An institution has exclusive (normative) legitimacy with regard to a domain of action if and only if it is legitimate with regard to that domain *and it is impermissible for any other agent to attempt to act in that domain* (without its authorization). Thus, if the Security Council had exclusive legitimacy with regard to intervention decisions, every other agent would be under a moral obligation not to make such decisions. We argue that the Security Council does not have exclusive legitimacy. It would be permissible, we argue—and in fact would be highly desirable—to develop a superior (on the basis of the Complex Standard) institution for the making of intervention decisions when the Security Council fails to make them.

The core of our argument that the Security Council does not possess exclusive legitimacy can be outlined as follows, in the form of four premises and a conclusion.

*Premise One:* The Security Council has sometimes failed to authorize justified humanitarian interventions against genocide, war crimes, crimes against humanity, and ethnic cleansing; and there is no evidence that this disposition toward inaction has been rectified. By claiming exclusive authority, the Security Council not only fails to discharge its avowed function of protecting basic human rights but also poses a serious obstacle to states fulfilling the responsibility to protect. Furthermore, there is no prospect of the Security Council reliably protecting weak democratic governments from violent overthrow.

*Premise Two:* Because it lacks systematic procedures for accountability and is recalcitrant to reform the permanent member veto, the Security Council has little prospect for substantial improvement. If the permanent members were to accept the secretary-general's advice not to use the veto in situations covered by RtoP—and were somehow to institutionalize this promise—this premise could be rendered invalid; but such self-abnegation is highly unlikely.

*Premise Three:* If an institution repeatedly fails to discharge one of its primary justifying functions (in this case, the protection of basic human rights), acts as an obstacle to other parties fulfilling that function, and has little prospect for substantial improvement in these regards, then it is permissible to try to develop a

superior alternative, if there is a reasonable probability that the alternative can be successfully created and sustained and the risk that the attempt to create the alternative will have negative unintended consequences is acceptably low.

*Premise Four:* There is a reasonable probability that at least one alternative institution for making humanitarian intervention decisions and decisions concerning the restoration of legitimate government that would be superior to the Security Council could be created and sustained, and the risk that the attempt will have bad unintended consequences is acceptably low.

*Conclusion:* Therefore, the Security Council does not possess exclusive legitimacy with regard to humanitarian intervention decisions, and it is permissible to try to develop a superior institutional alternative.

The first three of these premises enjoy considerable intuitive plausibility, given our analysis of legitimacy and our account of the distinctive function and practical value of legitimacy assessment. Premise Four, however, requires more support, since we have not discussed alternative institutions. Therefore, we will next explore two candidates for alternative institutions that could perhaps be superior, on the basis of the Complex Standard, to the status quo: a democratic coalition and a pre-commitment regime.

## ALTERNATIVES TO THE SECURITY COUNCIL

### *A Democratic Coalition*

The first alternative that we consider is a coalition of democratic states. “Democratic” here means liberal constitutional democracies: states with constitutions that embed majoritarian voting processes in a system of entrenched civil and political rights and that have an independent judiciary. In addition, such states have strong civil societies, with a variety of organizations, institutions, and practices that provide sources of information that are relatively independent of the state, that help create a political culture that is willing to question the state’s policies, and that exert significant influence on state action. One prominent example of the idea of a democratic coalition is the proposal for a “concert of democracies” advanced by John Ikenberry and others.<sup>21</sup>

The key idea of this proposal is that democratic states are *relatively reliable decision-makers* when it comes to decisions concerning humanitarian intervention. Their relative reliability has two main sources. First, if the coalition’s membership is restricted to well-established liberal constitutional democracies, the

shared commitment to human rights and to democratic government will be relatively strong—entrenched in political cultures and empowered by constitutional orders. Second, liberal democracies are epistemically superior in ways that are relevant to making good decisions. They feature free media, traditions of organized political activism, access to accurate information, and powerful channels of accountability that constrain state action.

The most plausible proposals for a democratic coalition to authorize intervention share three features.<sup>22</sup> First, the coalition could begin its formal deliberations only after a failure by the Security Council to authorize an intervention and could act only after advising the Security Council that it is about to do so, in order to give that body a chance to reconsider its own inaction. Second, the coalition's deliberations would be guided by a relatively uncontroversial set of substantive criteria for intervention that set a high threshold for what counts as a socially created humanitarian emergency—namely, massive violation of the most basic human rights, genocide being the clearest example. Third, the democratic coalition would include provisions for *ex ante* and *ex post* accountability. *Ex ante* accountability requires that all of the issues and options (including nonmilitary options) be discussed, and that states that question the necessity of the intervention have the opportunity to interrogate those who support it. Provisions for *ex post* accountability are also necessary. The intervenors must publicly commit in advance to allowing an independent body to have free access to the state into which the intervention is to occur and to facilitate the generation and publicizing of the best available information about (1) the actual effects of the intervention and (2) whether the pre-intervention assessment of the humanitarian emergency on the basis of which the case for intervention was made was credible. The independent body's *ex post* evaluation of the intervention would focus on whether the behavior of intervening states was consistent with the statements they made in the *ex ante* accountability process.

There are two quite different types of objections to the democratic coalition proposal. The first is that its combination of membership criteria and substantive criteria is not adequate to ensure responsible decisions. Although it is true that well-established democratic states have a stronger commitment to human rights and democracy than other states, this commitment is not a guarantee against flawed decision-making in the case of humanitarian interventions. For example, the democratic states willing to participate in an intervention coalition may use such an opportunity to pursue their own geopolitical interests under the guise

of humanitarian concern, either in a calculated fashion or through self-deceiving rationalizations. Also, the channels of accountability provided by democratic political processes are designed to make leaders accountable to their own fellow citizens, not to foreigners. This implies a risk that when democratic states deliberate about intervention, they may seriously underestimate or unduly discount the costs of an intervention to the intended beneficiaries or other “outsiders.” Taken together, these objections imply that a democratic coalition may lack adequate provisions for responsible decision-making: the combination of membership criteria and substantive criteria is insufficient, so additional provisions for accountability are needed. The inclusion of *ex ante* and *ex post* accountability provisions to simple democratic coalition proposals is designed to address this first type of objection.

The second type of objection is from the standpoint of sociological legitimacy, and it remains even if *ex ante* and *ex post* accountability provisions are included. Unless the criteria for membership are so undemanding as to undercut the claim that democracies are relatively reliable decision-makers, many states, including some powerful ones, such as China and Russia, will be excluded from participating. Nondemocratic states tend to be especially adamant about the inviolability of sovereignty, and may regard a democratic coalition as a military alliance against them. Specifically, Russia and China are likely to find the idea of such a coalition especially repugnant, because it repudiates the exclusive legitimacy of the Security Council, in which they both hold veto power. Indeed, the Chinese reaction to the idea of a democratic intervention coalition has been extremely negative.<sup>23</sup> A new institution for intervention that is greeted with hostility by two or more major powers as well as by a number of less powerful nondemocratic states would be lacking in sociological legitimacy. The proposal for a “concert of democracies” by Ikenberry and others is perhaps especially unlikely to enjoy broad sociological legitimacy because of a provision of its draft enabling treaty, whereby members of the coalition are obligated not to use force against each other. Thus, the proposal for democracies to use force against states controlled by nondemocratic governments at the same time exempts the intervenors from possible intervention.<sup>24</sup>

The lack of sociological legitimacy is a serious matter for three reasons. First, it may hamper the effectiveness of the coalition. States that regard the coalition as illegitimate will not cooperate (by not granting rights to traverse airspace, and so forth), and may exert pressure on their allies and clients to refrain from cooperating as well. Second, there is the risk of an adverse defensive reaction: the

perceived threat of a democratic coalition could strengthen militant nationalism in powerful nondemocratic countries, and might even lead to the forging of new alliances among them. Third, the institutionalization of a democratic coalition could inhibit cooperation between democratic and autocratic states on important issues other than humanitarian intervention—such as global economic stability, orderly international trade, and effective actions to limit climate change. The protection of human rights through intervention is an important objective for policy, but does not necessarily trump effective cooperation on other issues that affect billions of people and, indeed, prospects for a healthy atmosphere for human life. In brief, where sociological legitimacy is lacking, institutionalizing a democratic coalition could have bad consequences. On balance, the expected gain in the quality of decisions relative to the Security Council does not seem great enough to justify the risk that the lack of sociological legitimacy will undercut the effectiveness of the coalition, provoke an unacceptable backlash, and disrupt cooperation on other important issues.

#### *A Precommitment Regime for Democracy-protecting Intervention*

A precommitment regime is designed to achieve greater sociological legitimacy than the democratic coalition proposal by explicitly respecting state sovereignty while facilitating intervention when necessary to protect democracy against violent overthrow. It is not designed in the least to expand democracy to societies that have not experienced it—certainly not by force—but only to help maintain it where the people of a country have already managed to institute it themselves. It is our hope that this respect for democratic sovereignty would enable such a regime to go beyond the present RtoP mandate to respond to sustained and widespread violence against civilians, as in cases of genocide or ethnic cleansing, to achieve a further desirable objective: helping to protect nascent democracies against violent overthrow.

Under a precommitment regime for democracy protection, a set of democratic states could enter into a contract by which a democratic government would authorize intervention in its own territory in response to violence that the government was unable to control, either due to incapacity or to having been dislodged from power by force. Conceptually, we think of this contract as between the guarantor states, on the one hand, and the people, or *demos*, of the vulnerable state, on the other. The existing democratic government would be regarded as the agent of the *demos*.<sup>25</sup> Some would argue that in existing international law states cannot

consent to the use of armed force against themselves; but the fact that this contract is with the *demos* gets around that objection: armed force would not be used against the *demos* but only against a regime that had violated democratic processes and disempowered the public.

If the Security Council failed to authorize an intervention in response to a grave humanitarian crisis involving massive violations of human rights, as a result of a loss of effective control by the elected government, its partners in the precommitment regime could intervene. If the contract so provided, a precommitment regime could also be designed for less extreme situations: for example, when the elected government is violently overthrown in a military coup, or when a violent revolution (with the violence not forced on the revolutionaries by state repression) takes place, with or without aid from abroad. But precommitment regimes could not be activated in the absence of violent actions or threats. Claims of “creeping authoritarianism” on the part of an elected government could not trigger intervention, since in such circumstances the criteria for judgment on whether such actions should be regarded as antidemocratic or as an implementation of democracy are too unclear.

It is important to emphasize that pre-authorization for intervention would be available only to democratically elected governments that at the time of the precommitment contract held power through means consistent with democratic legality. Authorization for intervention would not be extended to situations in which a popular movement had arisen to contest state power. The reason for these conditions is to ensure that a precommitment regime did not become a means for autocratic regimes to maintain themselves in power in spite of popular opposition. We are not proposing a return to Count Metternich’s version of the Concert of Europe.

Furthermore, precommitment contracts would have to include provisions to strengthen the capacity of those democratic states that are to be protected to maintain order within their territories. Such provisions would be in the interest of the potential intervenors by reducing the likelihood that they would have to act, as well as in the interests of the governments arranging to be protected. Such provisions would also be sovereignty-reinforcing, and therefore consistent with the emphasis that we observed in the RtoP debates on maintaining state sovereignty and building state capacity.

Since we are not international legal specialists, we can only sketch the legal arrangements we envisage, hoping that if international lawyers find these ideas



worthwhile, they could devise appropriate modalities. As we envision, precommitment contracts would be reported to the Security Council under Article 51 of the UN Charter and registered with the Secretariat of the United Nations under Article 102. Each precommitment regime would have a provision for designating which of its guarantor members would undertake the intervention, should the triggering conditions be fulfilled. And any valid precommitment contract would have to incorporate *ex ante* and *ex post* accountability mechanisms, as sketched above. Such precommitment regimes could be justified as easily as defensive alliances, such as NATO. Article 51 of the Charter says that “nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.”

Any contract would also have to include provisions for revoking the authorization. Precommitment contracts should be revocable at will by legitimate governments, since any other provision would be likely to be seen by most states as inconsistent with an appropriate understanding of sovereignty. However, if a precommitment regime had specified as a triggering condition the violent overthrow of the democratically elected government, then clearly an attempt to revoke the authorization for intervention by those who had unlawfully seized control could not be regarded as legitimate.

The Security Council could invalidate the precommitment agreement through a procedural vote, requiring nine of the fifteen Council members, with the veto not applying (Article 27.2). This provision is designed to ensure that precommitment agreements regarded by the Security Council as inconsistent with international peace and security would not be valid. An agreement could be invalidated if in the judgment of the Security Council the incumbent government did not permit fair contestation for public office through free and fair elections, or if it systematically repressed the ability of those outside the government to speak, write, and organize politically. The Security Council could, in making these judgments, rely on impartial measures of democracy, such as those used by scholars.<sup>26</sup> The Security Council could take such action at any time, taking into account the possibility that signatory governments, even if democratic when the original contract was concluded, could become nondemocratic over time.

There are at least four situations in which a state might find a precommitment regime an attractive option: (1) a new democracy that had not gained control of its

own military could select a precommitment regime as a way of deterring a military coup and, if unsuccessful at deterrence, responding to it; (2) a state that had just made the transition from authoritarian rule to democracy could opt for the precommitment contract as an insurance policy against authoritarian counterrevolutionaries forcing it back into its previous condition;<sup>27</sup> (3) a state that has either recently emerged from a period of violent ethnic conflict or has good reason to believe that it is likely to suffer this great harm could engage in measures designed to prevent it by signing the precommitment contract; (4) any state whose leaders thought that it was likely to be a target of uninvited intervention in the future could, by signing the precommitment contract, at least control who the intervenors would be. This latter measure might be critical in a situation in which there was reason to fear that a neighboring state might be poised to invade one's country (to secure resources or annex part of its territory, perhaps) under the pretext of a humanitarian intervention or an intervention to restore democracy. In the 1990s, for example, interventions in West Africa by the Economic Community of West African States (ECOWAS) in Sierra Leone and Liberia were both ineffective in dealing with resource-fueled civil wars, and provided the opportunity for pillage by some ECOWAS units.<sup>28</sup> The civil war in Rwanda spilled over into the Congo in 1994, and by 1998 several African countries had intervened, resulting in massive human rights abuses.<sup>29</sup>

In certain situations, the incentives for opting for precommitment could be increased by the actions of other states. For example, in cases of new states emerging through secession from or dissolution of existing states, where the risk of humanitarian crises or authoritarian takeovers was high, other states could make the signing of a precommitment contract a condition of recognition of the new state or of its membership in valuable trade regimes or military alliances.

A precommitment regime would not require prior authorization of the Security Council and would therefore sidestep the veto. But by providing that the Council could invalidate agreements, this institutional innovation—unlike a democratic coalition—would not directly challenge the authority of the Council. Furthermore, it would be consistent with a strong interpretation of the notion of sovereignty, because it would not authorize intervention without prior state consent. To put the same point differently, whereas the democratic coalition is in direct competition with the Security Council in cases in which the Council fails to authorize an intervention, the precommitment regime would operate in a complementary way, without repudiating the Security Council's decisions.

Note that the Security Council could always preempt action by the precommitment regime if it decided to take action itself.

Such a precommitment regime does carry the potential danger that it would become an oppressive alliance, enabling a protected state more readily to repress domestic opposition or to threaten its neighbors. Domestic repression would contradict the democracy-enhancing purpose of a precommitment regime, and threats to neighbors could generate protective reactions leading to a spiral of conflict. Precommitment contracts would therefore remain valid only as long as their beneficiaries continued to adhere to democratic standards, including an absence of systematic bias against any internal ethnic group; and as long as they maintained nonaggressive and nonexpansionary foreign policies, firmly eschewing alliances that could be threatening to their neighbors. Great care would have to be taken that pre-authorization arrangements, within the spheres of military capacity of major states, were clearly not threatening to those states, since such measures would be a recipe for multilateral warfare rather than peacekeeping or peacemaking. The provision that the Security Council could void a dangerous contract is designed to mitigate the risk that states protected by precommitment contracts could become internally repressive or externally aggressive.<sup>30</sup>

We do not propose a precommitment regime as a panacea, since the creation of this institutional option would not necessarily change state behavior. Established democracies with the capacity to intervene on behalf of threatened democracies are not always inclined to do so. Indeed, there could be a problem of time inconsistency: even states that had taken on the role of guarantor under a precommitment arrangement might renege when the time came to fulfill their commitments. Shifts in international alignments or domestic opinion could undermine even genuine intentions to become engaged.<sup>31</sup> In response, we do not argue that legal obligation automatically transfers into political action. But a precommitment regime would remove one constraint, by providing a clearly institutionalized path for pro-democratic intervention without formal action by the Security Council. Furthermore, having joined a precommitment regime as a guarantor, a state would have some reputational stake in fulfilling its commitment. This consideration would not necessarily be decisive, but it would generate an additional reason to act. In view of the time inconsistency problem, however, it would be important for the criteria for intervention to be very clear, so that reputational costs of renegeing would be higher and so that democratic leaders

in vulnerable states would not place confidence in arrangements that turned out to be ephemeral. Indeed, one of the advantages of a precommitment regime would be to enhance clarity about whether, and under what conditions, democratic regimes could expect external protection against threats of force against them.

On the side of vulnerable countries, there could also be reservations: governments could be reluctant to signal weakness, or seem to reduce their own sovereignty, by entering into precommitment contracts. Yet if faced with real dangers from potential coups, they would have the incentive to seek some guarantees, however uncertain, of protection. Reluctance on the part of vulnerable countries (as well as other countries) could be reduced, furthermore, by placing part of a package of capacity-building measures under the responsibility to protect.<sup>32</sup> The package as a whole would provide opportunities for states to fulfill their responsibility to protect in a rule-governed, responsible manner, taking sovereign consent very seriously, without being hamstrung by the veto.

At present, precommitment regimes are likely to be most valuable in Africa, a region far from the borders of any permanent member of the Security Council, and in which democracy is fragile. Between 1960 and 2005 there were sixty-seven *constitutional* changes of leadership in Africa, of which 21–31 percent were followed within four years by attempted military coups. Furthermore, the proportion of constitutional changes of leadership that are followed by military coups seems to be fairly steady over time.<sup>33</sup> This reality suggests that there is a major problem to which an international solution could be appropriate. To some extent, coups have been inhibited by continuing ties with the prior colonial powers; but a precommitment regime would regularize and institutionalize such inhibitions, increasing accountability for such protective actions through publicity and through the operation of the Security Council.

In general, the incrementalist option of precommitment regimes is likely to enjoy more sociological legitimacy than the status quo because it makes it possible to fulfill better the responsibility to protect. It is more a supplement than an alternative to existing arrangements for joint military action. In addition, the precommitment proposal should be less threatening to nondemocratic states, such as Russia and China, because, unlike the democratic coalition proposal, it does not provide a special exemption for democratic states to act contrary to existing UN Charter-based international law. The execution of precommitment contracts, as we have argued, is permissible under existing law.

### *The Risk of Unintended Consequences*

Those who assume that the Security Council is not only legitimate but also has exclusive legitimacy regarding humanitarian intervention typically claim that any attempt to create an alternative institution for these decisions would be too risky. Three different risks need to be distinguished: (1) the risk that the new institution would make bad decisions concerning intervention; (2) the risk that the existence of the new institution would erode the sociological legitimacy of the Security Council; and (3) the risk of other unintended consequences, such as undermining efforts to institutionalize RtoP. Although one can never provide guarantees against human error and self-interest, the specifications that beneficiary governments must be democratic, and that the Security Council can void such agreements, are designed to reduce the first sort of risk. Compared to a veto-ridden Security Council, unjustifiable *inaction* would be less likely.

With respect to the second issue, we have already noted that because of provisions for Security Council preemption, arrangements for precommitment regimes would not be likely to erode the Council's perceived legitimacy. Indeed, they might reduce justifiable criticism of the Council that results from its frequent inaction in the face of humanitarian crises and the internal use of force. Finally, the risk that a precommitment regime would generate other bad consequences is potentially the most serious; and in comparing the proposal for a democratic coalition with that of a precommitment regime, we have tried to take this into account by specifying limiting conditions—in particular, that the regime being protected must be democratic to prevent the bad consequence of keeping authoritarian regimes in power, and that the Security Council can void precommitment regimes by a procedural majority of nine states. By contrast, the much more open-ended proposal for a democratic coalition could provoke a serious backlash from a coalition of post-imperialist countries and autocracies that would wave the “anti-imperialist” banner to defeat its efforts.

Nonetheless, we acknowledge that our preferred alternative might have deleterious consequences that we have not anticipated. We hope, by offering this paper, to elicit criticisms and suggestions to improve the formulation presented here.

#### NOTES

<sup>1</sup> Allen Buchanan and Robert O. Keohane, “The Legitimacy of Global Governance Institutions,” *Ethics & International Affairs* 20, no. 4 (2006), pp. 405–38.

<sup>2</sup> International Commission on Intervention and State Sovereignty (hereafter ICISS), *The Responsibility to Protect* (Ottawa: International Development Research Center, 2001).

- <sup>3</sup> This claim that legitimate institutions are generally authoritative—that is, that those to whom they direct their rules have content-independent reasons to comply with *all* of their rules or policies—requires qualification. For it can be argued that if an institution issued a policy that directly and unambiguously was at odds with the very functions that are used to justify its existence or that clearly violated the most basic human rights, then there would not even be a *prima facie* duty to comply. In other words, in such extreme cases the content of a policy could undercut authoritativeness. For example, if we suppose that the European Court of Human Rights satisfies all reasonable criteria for being a legitimate institution, and if we further suppose that it has issued a ruling declaring that EU states may deprive their Roma citizens of all civil and political rights, there would be no content-independent reason for anyone to comply with this ruling. It would be a mistake to say that in this case there was a content-independent reason to comply but that it was *outweighed* by considerations of content. Instead, the content of the policy is so unacceptable that it *negates* any content-independent reasons for complying. We rely here in part on an unpublished paper by Bas Van der Vossen on legitimacy.
- <sup>4</sup> This analysis of normative legitimacy as the right to rule is elaborated and defended in Buchanan and Keohane, “Legitimacy.”
- <sup>5</sup> Independent International Commission on Kosovo, *The Kosovo Report* (New York: Oxford University Press, 2000).
- <sup>6</sup> Buchanan and Keohane, “Legitimacy.”
- <sup>7</sup> John Rawls, *A Theory of Justice* (Cambridge, Mass.: Harvard University Press, 1971).
- <sup>8</sup> For a recent comprehensive review of Security Council action on issues of war and peace, see Vaughan Lowe et al., *The United Nations Security Council and War: The Evolution of Thought and Practice Since 1945* (Oxford: Oxford University Press, 2008). In almost all important situations, the most critical negotiations took place privately rather than publicly.
- <sup>9</sup> We are not suggesting that such a provision would be a good idea, since the International Court of Justice (ICJ) is too weakly institutionalized to take on such a burden; if it had this authority, it would surely become even more politicized than it is, and there is little reason to believe that the ICJ would dare to overrule a united Security Council or that such an adverse ICJ decision would be heeded by the Great Powers.
- <sup>10</sup> ICISS, *The Responsibility to Protect: Research, Bibliography, Background* (Ottawa: International Development Research Center, 2001), p. 109.
- <sup>11</sup> See Human Rights Watch, “Eastern DR Congo: Surge in Army Atrocities,” November 2, 2009; available at [www.hrw.org/en/news/2009/11/02/eastern-dr-congo-surge-army-atrocities](http://www.hrw.org/en/news/2009/11/02/eastern-dr-congo-surge-army-atrocities). See also Jeffrey Gettleman, “U.N. Told Not to Join Congo Army in Operation,” *New York Times*, December 10, 2009. The moral status of Security Council inaction is more questionable, as we will see, than that of Security Council action.
- <sup>12</sup> Buchanan and Keohane, “Legitimacy,” p. 422.
- <sup>13</sup> Stephen D. Krasner, *Sovereignty: Organized Hypocrisy* (Princeton: Princeton University Press, 1999).
- <sup>14</sup> Virginia Page Fortna, *Does Peacekeeping Work? Shaping Belligerents’ Choices after Civil War* (Princeton: Princeton University Press, 2008); and Michael W. Doyle and Nicholas Sambanis, *Making War and Building Peace* (Princeton: Princeton University Press, 2006). Both of these studies are impressive pieces of scholarship. It is important to note, however, that efficacy at peacekeeping does not imply overall effectiveness, particularly if an institution often fails to act when human rights are at stake.
- <sup>15</sup> ICISS, *The Responsibility to Protect*, n3.
- <sup>16</sup> UN General Assembly, Sixtieth Session, “2005 World Summit Outcome,” A/RES/60/1, October 24, 2005, para. 139.
- <sup>17</sup> UN General Assembly, Sixty-third Session, “Implementing the Responsibility to Protect: Report of the Secretary-General,” A/63/677, January 12, 2009, p. 9.
- <sup>18</sup> *Ibid.*, para. 61.
- <sup>19</sup> We rely here on two valuable reports on the General Assembly debate: Global Centre for the Responsibility to Protect, “Implementing the Responsibility to Protect—The 2009 General Assembly Debate: An Assessment” (August 2009); and International Coalition for the Responsibility to Protect, “Report on the General Assembly Plenary Debate on the Responsibility to Protect” (September 15, 2009).
- <sup>20</sup> For a gripping account by an academic who was at the United Nations during these crucial times, see Michael Barnett, *Eyewitness to a Genocide: The United Nations and Rwanda* (Ithaca: Cornell University Press, 2002).
- <sup>21</sup> G. John Ikenberry, Anne-Marie Slaughter, et al., “Forging a World of Liberty Under Law: U.S. National Security in the 21st Century,” Final Report of the Princeton Project on National Security (Princeton: Woodrow Wilson School of Public and International Affairs, September 27, 2006).

- <sup>22</sup> In our view the proposal for a concert of democracies by Ikenberry et al. does not include sufficient provisions for accountability. The provisions outlined here are drawn from Allen Buchanan and Robert O. Keohane, "The Preventive Use of Force: A Cosmopolitan Institutional Proposal," *Ethics & International Affairs* 18, no. 1 (2004), pp. 1–22.
- <sup>23</sup> One of the authors was present in Shanghai and Beijing in January 2007, when the Princeton Project report was discussed in meetings involving American and Chinese participants. The Chinese participants were vociferous and sustained in their criticisms of the idea of a democratic coalition that could authorize intervention. It was clear that they viewed this proposal as entirely unacceptable.
- <sup>24</sup> Ikenberry et al., "Forging a World of Liberty Under Law," Appendix A, note 7.
- <sup>25</sup> We thank an anonymous referee for raising the question of with whom the contract should be made.
- <sup>26</sup> The most common such measure is the Polity IV measure. See "Polity IV Project: Political Regime Characteristics and Transitions, 1800–2009"; available at [www.systemicpeace.org/polity/polity4.htm](http://www.systemicpeace.org/polity/polity4.htm).
- <sup>27</sup> Andrew Moravcsik has made a similar argument about human rights regimes: that "governments delegate self-interestedly to combat future threats to domestic democratic governance." See Andrew Moravcsik, "The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe," *International Organization* 54, no. 2 (Spring 2000), pp. 217–53. The quote is from the abstract, which appears in the unpaginated front material of the journal.
- <sup>28</sup> See Adekeye Adebajo, *Building Peace in West Africa: Liberia, Sierra Leone, and Guinea-Bissau* (Boulder, Colo.: Lynne Rienner Publishers, 2002).
- <sup>29</sup> Joe Bavier, "Congo War-Driven Crisis Kills 45,000 a Month: Study," Reuters, January 22, 2008; available at [www.reuters.com/article/idUSL2280201220080122](http://www.reuters.com/article/idUSL2280201220080122) (accessed July 7, 2010).
- <sup>30</sup> See Inis L. Claude, *Power and International Relations* (New York: Random House, 1962), esp. chap. 5, "A Critique of Collective Security."
- <sup>31</sup> We are grateful to three anonymous referees for emphasizing this point in their comments on a draft of this paper.
- <sup>32</sup> We are indebted to Laurence Helfer of Duke Law School for this suggestion.
- <sup>33</sup> Kristen A. Harkness, "Dangers to Democratization: Military Responses to Constitutional Changes of Leadership in Africa" (paper presented at the Midwest Political Science Association conference, Chicago, April 2010), esp. Table 2, p. 12.