

The Legal Character of R2P and the UN Charter

Written by Brad Halt

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BRAD HALT, AUG 8 2012

The Responsibility to Protect (R2P) has developed out of the need for a clear and coherent framework to respond to intrastate mass atrocity crimes. The inconsistent and uncoordinated manner in which the UN and international community have exercised the contestable right of humanitarian intervention has led to failed, apathetic, or incompetent responses to humanitarian catastrophes in Somalia in 1993, Rwanda in 1994, and Srebrenica in 1995.[1] The inability of the international community to reach consensus on the appropriate response to humanitarian crises before the loss of an enormous amount of life has highlighted the need for a well defined, internationally accepted, and coherent set of parameters to guide the effective international response to imminent or occurring mass atrocity crimes. R2P has functioned as a valuable starting point, shifting the emphasis from the 'right to intervene', which inevitably generates considerable backlash, to the notion of 'responsibility.' [2] It has also unveiled a willingness among states to negotiate a compromise between responding to events "that affect every precept of our common humanity," with the established principles of sovereignty and non-intervention.[3]

Those who critique the character of R2P as serving to undermine the legality of the UN Charter generally take the view that the doctrine strives for "nothing short of democracy and justice, imposed by military intervention." [4] Contrary to this notion, R2P sets out the broader responsibilities that states have towards their own citizens, the responsibilities states have as members of the international community, and the responsibilities that institutions such as the Security Council have in preventing, responding to, and rebuilding after mass atrocity crimes. That the *prevention* [5] of mass atrocity crimes is the most important aspect of R2P does not make any easier the reconciliation of tensions between the preeminent legal principles of sovereignty and non-intervention, with the emerging responsibility of the international community to prevent and respond to mass atrocity crimes that offend an increasingly globalized human conscience.[6]

This paper seeks to critically reflect on the *third pillar* of R2P, regarding the timely and decisive response of the international community to mass atrocity crimes.[7] R2P's legal dimension has been subject to intense scrutiny, and most supporters regard R2P as a legal norm *de lege ferenda*, or an emerging norm of customary law.[8] This notion will be challenged and the doctrine of R2P will be placed within the existing parameters of international law and, more specifically, those principles established by the UN Charter. The misconception of R2P as a customary legal norm, or narrow principle in itself, has been at the root of those accounts that suggest R2P is a more sophisticated means of justifying unilateral humanitarian intervention.[9] Next, the legal framework of the UN Charter that has influenced the development of R2P, namely the cornerstone principles of sovereignty and non-intervention, will be examined. It is then worth tracing the development of R2P from its initial, far-reaching introduction in the International Commission on Intervention and State Sovereignty report, to its universal endorsement at the 2005 World Summit. Finally, it will be argued that R2P has helped to delegate appropriate responses from state and institutional actors to mass atrocities crimes, through the clarification and development of legal commitments already established by the UN Charter.

The legal status of R2P

R2P is often misrepresented as an emerging legal norm, structured to legitimize humanitarian intervention and excuse forms of military recklessness.[10] Critics tend to oversimplify the tenets of R2P as boiling down to represent one mandate, that being legitimate unilateral humanitarian intervention.[11] These same critics willingly overlook the broader goals of the doctrine, most notably the first pillar of state responsibility and the second pillar establishing the

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duty of the international community to assist states to fulfill this responsibility. While some of those in the activist camp may find attractive the construal of R2P as a legal norm in itself, the consequence of doing so involves “redefining sovereignty, enabling self-interested coercive intervention, and expanding the scope for potential intervention,” none of which are tenable options to a majority of states.[12] More than an emerging legal norm, R2P “is constructed as a comprehensive framework for the prevention and containment of massive human rights violations.”[13]

The architects of the doctrine incorporated political, legal and moral language into the 2001 Commission document, which established the R2P, in order to define a vast and persuasive set of responsibilities to appeal to all levels of the international community. This far-reaching framework cannot be said to accurately constitute a norm of international law, not only because it developed outside of a normative vacuum, but also *within* an existing and comprehensive legal framework comprised of the UN Charter and customary legal documents such as the Genocide Convention, the Geneva Conventions and the Statute of the International Criminal Court.[14] R2P can neither be considered a source of binding international law, as none of the relevant R2P documents conform to those sources of international law identified in Article 38 of the International Court of Justice.[15] Finally, to be considered customary law, the tenets of R2P would require the repeated conduct of states, and a corresponding belief that such conduct is an *opinio juris* principle of international law.[16] If this were the case, the obligations of states and institutions articulated in the R2P documents would lack the contention they have received, and this analysis would be meaningless.

However, R2P is not devoid of legal character, and is perhaps best articulated as a political commitment towards existing but contested legal responsibilities, best articulated in its current form as soft law. The UN Charter, more than any other document, encapsulates the agreed upon consensus of the international community on the prevailing customary norms of international law, but is not devoid of conflicting principles, notably those of non-intervention articulated in Articles 2(4) and 2(7), and the powers vested in the Security Council regarding the authorization of force under Chapter VII.[17] Soft laws generally interact in complex ways with hard laws, and act as precursors to future legal development or the formation of binding treaties.[18] They may also take on the character of *opinio juris* inherent to customary law, and “help shape legal interpretation of existing rules by emphasizing particular normative understandings and rules of international conduct.”[19] Soft law is characteristically found in the resolutions of high-level panels, which lack binding legal status but offer ‘anticipatory’ documents informing judicial decision-making and legal interpretation.[20] Article 138 and 139 of the 2005 World Summit Outcome Document are thought to embody soft law most accurately, given their “open-ended, malleable language and the fact that their implications have engendered considerable controversy.”[21]

Thus, R2P is best understood as a form of soft law, defined and influenced by existing international legal principles.[22] While the initial interpretation of R2P in the report of the Commission did pose a potential normative threat to the legality of the UN Charter, R2P has undergone a transformation in succeeding reports and can now be accurately said to constitute a comprehensive restatement of how existing legal commitments ought to be interpreted and applied in the future.[23]

The Legal Framework

If we are to take the view that the purpose of R2P is not to create new law, but to aid in the clarity and implementation of existing legal principles, it is of value to outline the relevant legal framework and some of the contemporary interpretations of the commitments that derive from such provisions. The cornerstone principle of the international system of states is UN Charter Article 2(4), which provides a general prohibition on the interstate use of force.[24] Article 2(4) is bolstered by Article 2(7)[25], which similarly prohibits intervention by the UN in interstate affairs.

This basic proscription on the use of force is subject to two explicit exceptions, the first of which entails force utilized in self-defense as authorized under Article 51, and force authorized by the Security Council “to maintain international peace and security” under provisions in Chapter VII. In order to authorize force under Chapter VII, the Security Council must determine that massive violations of human rights are occurring, or are about to occur, that the violations constitute a threat to international peace, and that the authorization of enforcement action to prevent or end those violations is necessary.[26] While the former prescription makes clear the legitimate course of action for conflict

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between states, the latter is “conspicuously silent” on the issue of justification for military intervention in intrastate conflicts that threaten or materialize into massive humanitarian crises.[27] Article 24(1) vests primary responsibility for the maintenance of peace and security in the Security Council, backed up by Article 39, which grants the Security Council the right to “determine the existence of any threat to the peace, breach of the peace, or act of aggression and...make recommendations, or decide what measures shall be taken...to maintain and restore international peace and security.”

The doctrine of R2P requires the relevant actors to adopt a limited scope to Article 2(4), a consensus that has yet to have been reached, effectively enlarging the number of exceptions to the prohibition on the use of force.[28] While the Commission report does emphasize the norm of nonintervention as the bedrock principle of international law,[29] it assumes a limited view on the scope of the principle, arguing that:

Where a population is suffering serious harm, as a result of internal war, insurgency, repression or state failure, and the state in question is unwilling or unable to halt or avert it, the principle of non-intervention yields to the international responsibility to protect.[30]

The scope of R2P requires the Security Council to assume an extensive reading of Article 39, incorporating human rights violations into the broader interpretation of “threats to the peace.”[31] A convincing case can be made for the extensive reading of such open-textured language, and the willingness of the Security Council throughout the 1990s to sanction military intervention under Chapter VII in response to intra-state crises reflects this rendering.[32] While the Security Council’s response to intrastate crises has been sporadic and grounded within questionable humanitarian motives, such actions raise the dilemma of whether or not the content of the principle of non-intervention has changed, and if so, how this new understanding is to be put into practice in future humanitarian crises.[33]

R2P’s initial rendition began with a limited interpretation of the scope of the non-intervention principle, a position that has evolved over the last decade. The next section will be devoted to understanding the R2P’s earliest understanding of non-intervention, and how it has fit within the legal framework of the UN Charter.

The International Commission on Intervention and State Sovereignty

The R2P doctrine contains two sets of legal responsibilities, the first being the responsibility of states toward their own population, followed by the responsibility of states owed to populations in other states.[34] The first set of legal responsibilities, referred to as sovereignty as responsibility, constitutes the first pillar of the R2P and rests on “long standing obligations under international law.”[35] The relative state ‘baggage’ associated with this responsibility involves embedding the notion of human rights into the idea of sovereignty.[36] Such a notion has been articulated as early as the 17th century, when Hobbes forwarded the notion that the sovereign’s authority “was based on an unwritten contract between the state and the individual” and was “voided if the sovereign posed an existential threat to the individual or failed to provide for the individual’s security.”[37] In more recent times, the Genocide Convention, the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights have enshrined the *jus cogens* responsibility that states have towards their citizens.[38] It is widely understood that sovereignty encompasses legal obligations; paragraph 138 of the World Summit Outcome Document makes this responsibility unequivocally clear.[39] However, when a state is “unable or unwilling to fulfill this responsibility, or is itself the perpetrator...it becomes the responsibility of the international community to act in its place.”[40] It is the Gordian knot between a sovereign’s right to non-interference under Articles 2(4) and 2(7) and the international community’s responsibility under R2P to which the next section is devoted.

Saving Strangers[41]

The scope of R2P throughout the last decade has been “in one important respect narrowed, and in another major respect presentationally refined.”[42] This evolution is important, as it has changed the manner in which R2P clarifies a number of international legal commitments.[43] R2P’s most contested aspects have been the third pillar’s recommendations regarding military intervention as a means of protecting vulnerable populations from mass

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atrocities, and how this force is to be legitimated and legalized within existing international law. The Commission report emphasizes that upholding the basic human rights of citizens “lies first and foremost with the sovereign state, secondly with domestic authorities acting in partnership with external actors, and only thirdly with international organizations.”[44] In the event that massive humanitarian crises necessitate the involvement of international organizations, the Commission advocates for coercive measures such as diplomatic, economic and military sanctions, arms embargoes and financial restrictions and, as a last resort, military intervention.[45] The Commission justified the resort to force through the fulfillment of ‘Six Principles for Military Intervention’ – a set of criteria to be met in order for an intervention to be legitimate – namely, right authority, just cause, right intention, last resort, proportional means and reasonable prospects.[46] It has been argued extensively that, if these principles were observed, they would be exceptionally difficult to satisfy in non-genuine humanitarian emergencies, a predominant concern among states skeptical of any perceived challenge to their sovereign inviolability.[47]

The Report goes on to emphasize “that there is no better or more appropriate body than the Security Council to deal with military intervention issues for human protection purposes” and that the “task is not to find alternatives to the Security Council as a source of authority, but to make the Security Council work much better than it has.”[48] To this end, the Report recommends the permanent five Security Council members agree to withhold the use of their veto in the event of a significant humanitarian crisis to which their vital national interests are not at stake.[49] The discourse set out by the Commission “made abundantly clear our view that the Security Council should be the first port of call on any matter relating to military intervention for protection purposes,”[50] willingly accommodating the democracy deficit inherent to the Security Council and steering clear of advocating the need for Security Council reform. Yet the ultimate demise of R2P, as conceptualized by the Commission report, stems from the fact that the Report *does* fail to deem interventions absent Security Council authorization illegal, and points to the General Assembly’s ‘Uniting for Peace Resolution’,[51] as well as the actions of regional organizations,[52] as alternative means of legitimizing the use of force in humanitarian catastrophes. The Commission did not seek “consensus...around any set of proposals for military intervention which acknowledged the validity of any intervention not authorized by the Security Council or General Assembly,”[53] yet the breadth of the Commission’s view on the potential use of force undermined its overall mandate. The timing of the Commission report following the invasion of Iraq, and the general rhetoric of the Bush administration fostered an “unwillingness on the part of many states to support anything that appeared to diminish sovereign inviolability” or the Security Council as the primary guarantor of such inviolability.[54]

The Commission placed an emphasis on the moral duty to protect civilians from atrocity crimes over the mandatory observation of the legal framework of the UN Charter. However justifiable this bias may be on the surface, several states took objection to the notion “that humanitarian intervention requires a departure from UN procedure” because the unwieldy burden of the veto “slows down and occasionally blocks the swift action that is sometimes needed.”[55] To support the use of force as authorized by any organization or body outside of the Council on account of its perceived moral and political clout is to misconceive the fundamental difference between legality and legitimacy.[56] The preceding 2005 World Summit sought to address this dilemma and bring R2P firmly within the legal parameters set by the UN Charter.

The 2005 World Summit

The World Summit represents the greatest multilateral commitment to the doctrine of R2P to date, with over 170 states having agreed to the wording of the 2005 Outcome Document.[57] Whereas the 2009 General Assembly Debate highlighted the ongoing difficulty of implementing R2P, the World Summit attained an important measure of consensus,[58] ascertaining that “‘collective action’ could be taken using ‘Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations...should peaceful means be inadequate and national authorities are manifestly failing to protect populations.’”[59]

One of the functional strengths of the World Summit’s definition is the limitation of the scope of R2P to a set of crimes that place default responsibility to act on the international community– those being the crimes of genocide, war crimes, ethnic cleansing and crimes against humanity.[60] This set of crimes derives strength and legitimacy from their precise legal meaning and their established illegality in the existing customary legal regime.[61] The exclusion of the conditional endorsement of unilateral intervention as articulated by the Commission, and the reassertion of the

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Security Council as the sole legitimate authority empowered to authorize intervention, is the most important measure taken for the legality of R2P. With this renewed emphasis on Security Council primacy, R2P was brought safely within the parameters of legality set by the UN Charter.[62]

Conclusion

The World Summit Outcome Document encompasses a number of significant setbacks to the overall R2P mandate. Criticisms have ranged from assertions that the legitimacy of humanitarian intervention pre-2001 has been eroded through the endorsement of R2P at the World Summit,[63] to notions that R2P is hollow and absent of any substance or prescriptive value.[64] Both arguments have merit, namely when the ambiguity of the language employed in Paragraph 139 of the Outcome Document is taken into account. The language of the Document asserts the relative 'preparedness'[65] of states to take action, implying a voluntary over mandatory commitment to react in event of genocide, war crimes, ethnic cleansing or crimes against humanity.[66]

Taking into account the ambiguity of the language, the strongest arguments against the World Summit Outcome Document are nonetheless most often misplaced. Advancing the legitimacy of R2P cannot be accomplished through the assertion that the primary motivation of the doctrine is the establishment of a legitimate form of intervention beyond Security Council authorization.[67] Such a position, once again, obscures the line between legality and legitimacy, and undermines the need to ensure that "when protective action is taken...it is undertaken in a way that reinforces the collective responsibility of the international community to address such issues rather than allowing opportunities and excuses for unilateral action." [68] Such a mandate is similarly counterproductive in that it neglects the dual importance of legality and legitimacy to achieving consensus on R2P.

It may be true that R2P does little to add anything "substantially new" to the competences of the Security Council under Article 39 and Chapter VII.[69] R2P has the capacity to act as a "powerful political call for all States to abide by legal obligations already set forth in the Charter, in relevant human rights conventions, and international humanitarian law." [70] The endorsement of R2P by the global community has functioned to entrench the power of the Security Council to take humanitarian action consistently, with a higher degree of legitimacy, and with confidence that the processes established by R2P are firmly rooted in pre-existing, treaty-based and customary international law.[71] The remaining arguments surrounding R2P no longer pertain to the legality of the doctrine within the UN Charter framework, but how to effectively apply it.[72]

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[3] International Commission on Intervention and State Sovereignty, *The Responsibility to Protect* (Ottawa: International Development Research Centre, 2001), p. vii.

[4] Alex De Waal. "How to End Mass Atrocities." *New York Times*, 9 March 2012, <http://www.nytimes.com/2012/03/10/opinion/how-to-end-mass-atrocities.html?pagewanted=all> (accessed 31 May 2012).

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[6] Ramesh Thakur, *United Nations Peace and Security*, (Melbourne: Cambridge University Press, 2006): 244.

[7] Ban Ki-moon, 'Implementing the Responsibility to Protect: Report of the Secretary General', A/63/677, 12 January 2009, p. 22.

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[14] Ibid., 485. Also, ICISS, *The Responsibility to Protect*, p. 50.

[15] Office of the President of the General Assembly, 'Concept note on the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity', 17 July 2009, p. 1 (available online at <http://www.un.org/ga/president/63/interactive/protect/conceptnote.pdf>).

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[20] Malanczuk, *Akehurst's Modern Introduction to International Law*, p. 55.

[21] Welsh and Maria, "International Law and the Responsibility to Protect," p. 230.

[22] Payandeh, "With Great Powers Comes Great Responsibility?" p. 471.

[23] Aidan Hehir, "The Responsibility to Protect: 'Sound and Fury Signifying Nothing'?" *International Relations* 24 no. 2 (2010): 230.

[24] Article 2(4) "All Members [of the United Nations] shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any manner inconsistent with the purposes of the United Nations."

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[25] Article 2(7): “Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.”

[26] Joyner, “The Responsibility to Protect,” p. 702.

[27] *Ibid.*, 700.

[28] Payandeh, “With Great Powers Comes Great Responsibility?” p. 506.

[29] ICISS, *The Responsibility to Protect*, 12.

[30] ICISS, *The Responsibility to Protect*, XI.

[31] Payandeh, “With Great Powers Comes Great Responsibility?” p. 495.

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[35] Ban Ki-moon, ‘Implementing the Responsibility to Protect’, p. 10.

[36] Payandeh, “With Great Powers Comes Great Responsibility?” p. 471.

[37] Thomas Hobbes, *Leviathan* (Oxford: Oxford University Press, 1996).

[38] Hehir, “The Responsibility to Protect: ‘Sound and Fury Signifying Nothing’?” p. 230.

[39] 2005 World Summit, Sept. 14-16, 2005, *2005 World Summit Outcome*, U.N. Doc. A/60/L.1 (Sept. 20, 2005), p. 31. Paragraph 138 states: ‘Each individual State has the Responsibility to Protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity. This responsibility entails the prevention of such crimes, including their incitement, through appropriate and necessary means. We accept that responsibility and will act in accordance with it.’

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[44] ICISS, *The Responsibility to Protect*, p. 49.

[45] *Ibid.*, p. 29.

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[46] Ibid., p. 32.

[47] Bellamy, "The Responsibility to Protect and the problem of military intervention," p. 621.

[48] ICISS, *The Responsibility to Protect*, p. 49.

[49] Ibid., p. 51.

[50] Ibid., p. 53.

[51] Ibid.

[52] Ibid.

[53] Ibid., p. 54.

[54] Hehir, "The Responsibility to Protect: 'Sound and Fury Signifying Nothing'?" p. 221.

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[57] *2005 World Summit Outcome*, U.N. Doc. A/60/L.1: p. 31.

[58] Ban Ki-moon, 'Implementing the Responsibility to Protect', p. 17.

[59] *2005 World Summit Outcome*, U.N. Doc. A/60/L.1: p. 31.

[60] Ibid.

[61] Bellamy, "The Responsibility to Protect and the problem of military intervention," p. 621.

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[66] Office of the President of the General Assembly, p. 1.

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