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## R2P and the Normative Accountability of the UN Security Council

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The 'Responsibility to Protect' (R2P) doctrine has emerged in response to global challenges in protecting civilians from atrocities. According to the UN Secretary General's (UNSG) latest report on R2P in 2015, the doctrine is organised under three pillars: (1) the general protection responsibilities of states; (2) international assistance and capacity building; and (3) timely and decisive response. The practical application of the third pillar of R2P has been largely conditioned by decisions of the five Permanent Members (P5) of the UN Security Council (UNSC). This geopolitical reality has weakened the normative legitimacy of R2P. On the one hand, military interventions have been authorised without real compliance with the normative requirements of R2P. On the other, the prerogative of the P5 to deny authorisation for military interventions has been exercised without regard for normative criteria.

This article focuses specifically on military intervention by third party states, and the legal and normative discourse around such intervention. The article is presented in three sections. The first discusses the international legal framework pertaining to military intervention and inquires into whether intervention outside the sanction of the UNSC is conceivable under international law. The second examines the inherent challenges within this framework—particularly the challenge concerning the selective and political use of intervention by the P5. The concluding section identifies as a critical lacuna the absence of a clear normative framework that governs UNSC decision-making. It examines past efforts such as the Uniting for Peace Resolution 377 of 1950, and suggests a fresh approach to dealing with this lacuna.

### 2. The Limits of the Law

#### 2.1 *Interpreting International Law on R2P*

The law on military intervention to protect civilians has become a subject of considerable debate. According to the International Commission on Intervention and State Sovereignty (ICISS), third party intervention is justified where a host state is either 'unwilling' or 'unable' to protect its population from certain atrocities (ICISS, 2001: 17). In its 2001 report, ICISS states that military intervention is appropriate as an 'exceptional and extraordinary measure' provided it is guided by certain precautionary principles (ICISS: XII). The first such principle stipulates that the primary purpose of the military intervention must be to 'halt or avert human suffering'. Second, the intervention must be a last resort i.e. where every non-military option is exhausted. Third, the intervention must be proportionate to 'secure the defined human protection objective'. Finally, there must be a reasonable chance of success in halting or averting the atrocity through the intervention.

Some scholars have adopted an expansive view on the legal implications of R2P. Luke Glanville contends that, in certain instances, states have a legal obligation to intervene. Relying on the reasoning in the judgement of the International Court of Justice in the *Bosnia v. Serbia* case (2007), he suggests that states have an obligation to prevent grave crimes that are universally prohibited (Glanville, 2012: 15-28). Glanville further argues that states are obliged to employ all means reasonably available to them where they have the capacity to effectively influence the actors committing the crimes. He also suggests that this obligation arises 'as soon as there is a known serious risk that the crime will be committed' (p.25). Meanwhile, other scholars such as Anne Peters argue that R2P imposes a

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specific legal obligation on the UNSC to intervene for humanitarian purposes (Peters, 2009: 540).

The UN's official position on R2P is much more conservative. Glanville explains that this 'restrained' approach is largely due to the concern expressed by some states that endorsement of R2P would 'facilitate self-interested interference by powerful states in the domestic affairs of the weak' (p.11). Moreover, states have raised doubts as to whether the 'interventionist positions' of R2P are incompatible with international law (p.11-12). Thus the UN has tied intervention to the specific authority of the UNSC. According to the 2005 World Summit Outcome Document, states are 'prepared to take collective action', including military intervention, 'through the Security Council' to protect civilians from atrocities. Two important legal principles emerge in this respect. The first is that the sanction of the UNSC is a prerequisite to any military intervention. The second legal principle is that states are not obliged to intervene even if the UNSC authorises intervention. In fact, Jose Alvarez describes as 'absurdly premature' the claim that such an obligation exists in international law (Alvarez, 2008: 282). Thus it would appear that no international treaty establishes a legal right to intervene outside the UNSC's sanction or the general right to self-defence as provided for in Article 51 of the UN Charter.

## 2.2 A Customary International Norm on R2P?

An alternative means of establishing an international legal norm on 'humanitarian intervention' has been suggested by some scholars. Bartram Brown for instance claims that an independent right of military intervention for the purpose of 'protect[ing] individuals from continuing grave violations of fundamental human rights' has evolved through customary international law (Brown, 2000: 1686-1687). Similarly, Glanville argues that 'at least some aspects of [R2P] beyond borders can be rightly understood to rest' on customary law (p.31).

Other scholars contend that there is no established principle under customary international law that provides a legal alternative to UNSC-sanctioned military intervention. Kenneth Anderson for instance argues that the 'cabining of a gradual, cautious evolution toward R2P strictly within the UNSC was a deliberate move by states' following the 1999 Kosovo intervention (Anderson, 2013: 2). He accordingly casts doubts over the legality of unilateral intervention to protect civilians from chemical attacks in Syria. Daniel Joyner also disputes the existence of a customary international law justification for humanitarian intervention outside the ambit of the UN Charter. He contends that the idea that such a norm was created through state practice 'fades significantly' in light of numerous examples of military intervention including Belgian action in the Congo in 1960, U.S. intervention in Grenada in 1983 and the 1999 Kosovo intervention (Joyner, 2002: 602). He and others such as Dapo Akande (2013) accordingly argue that there is no real evidence of a customary international law norm that justifies unilateral military intervention on humanitarian grounds.

The views of Anderson, Joyner and Akande closely match those of the UN member states and specifically the position adopted in the 2005 World Summit Document. Thus the claim that there is a growing customary international legal norm on humanitarian intervention appears, at best, to be strained.

In this context, the UNSC-sanctioned interventions in Libya and Cote d'Ivoire are recent examples of 'legal' military intervention to protect civilians. These interventions are discussed in the next section of this article.

## 3. Law Without Norms

The current international law on military intervention produces two normative concerns worth discussing. First, meeting the 'legal' prerequisites to military intervention—essentially, obtaining the UNSC's sanction to intervene—does not guarantee any real compliance with the normative requirements of R2P. Second, the prerogative of the P5 to deny authorisation for military intervention is not grounded in any normative criteria.

### 3.1 The Absence of Normative Prerequisites to Intervention

As discussed in the preceding section of this article, there are certain normative prerequisites that ought to be met before invoking R2P. These prerequisites flow from what the ICISS terms 'precautionary principles'. Therefore, at the

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centre of the type of military intervention contemplated by R2P is the object of protecting civilians. Yet recent UNSC-sanctioned interventions have been criticised for switching objectives from civilian protection to regime change.

Foluke Ipinyomi critiques the intervention in Cote d'Ivoire as being animated by the international community's ambition to ensure the removal of Laurent Gbagbo and the institution of Alassane Ouattara as president (Ipinyomi, 2012: 173). David Rieff (2011) also cautions against the conversion of R2P into a means of effecting regime change. He suggests that intervention to protect the people of Benghazi in Libya made 'moral sense'. Yet he criticises the subsequent UNSC-sanctioned bombing campaign ostensibly aimed at ousting Muammar Qaddafi. Christian Henderson (2011) further scrutinises the UNSC resolutions pertaining to Libya and Cote d'Ivoire. UNSC Resolution 1973 authorised states to use 'all necessary measures...to protect civilians and civilian populated areas under threat of attack' in Libya, and particularly Benghazi. Meanwhile, UNSC Resolution 1975 authorised the UN Operation in Côte d'Ivoire 'to use all necessary means to carry out its mandate to protect civilians under imminent threat of physical violence...' Yet both Resolutions were ultimately used to effect regime change (Henderson: 772-773). One might argue that the Libyan intervention became illegal, as regime change was technically outside the scope of UNSC authorisation. Yet, according to Henderson, regime change was the 'overall stated aim' of the Cote d'Ivoire resolution (p.772). In both cases, the 'legal' requirement of UNSC sanction prior to intervention did not prevent states from operating well beyond the aims of civilian protection.

These same challenges are likely to be confronted in the context of the UNSC's most recent authorisation of military intervention—in territories controlled by the Islamic State in Iraq and the Levant (ISIL). UNSC Resolution 2249 authorises 'all necessary measures' to 'prevent and suppress terrorist acts'. The terms 'all necessary measures' no doubt include military intervention, and have been interpreted to justify airstrikes in Syria and Iraq. Such intervention is justified on the basis that ISIL and other such groups pose a 'threat to international peace and security'. The existence of such a threat is determined through an evaluation of factual circumstances, and is not governed by any normative test. In its preamble, Resolution 2249 mentions the fact that the Islamic State has perpetrated 'gross systematic and widespread attacks...against civilians'. Yet it does not base the need for intervention on the objective of protecting civilians. To the contrary, civilians in Syria and Iraq have been directly harmed by such intervention in the past, and are likely to be harmed in the future.

Thus the absence of any normative criteria to govern UNSC-sanctioned military intervention has enabled states to pursue ends outside civilian protection. It has in fact enabled states to carry out operations that have directly harmed civilians.

### *3.2 The Absence of Normative Checks on Inaction*

Under article 42 of the UN Charter, the UNSC is empowered to authorise military intervention 'to maintain or restore international peace and security'. However, such authorisation will be impossible should any of the P5 choose to exercise its veto. The veto effectively trumps all normative criteria pertaining to R2P. Even if a factual situation arises where the international community reaches consensus that military intervention is justified, the matter is foreclosed if any permanent member subjectively decides otherwise.

The first normative lacuna—i.e. the absence of normative criteria to govern military intervention—may contribute in some ways to the second. Anderson alludes to this interplay when he observes: 'the view...that NATO took a distinctly limited license by the Security Council for humanitarian intervention in Libya and turned it into an unlimited license for regime change has almost certainly altered the willingness of Russia and China to grant any formal authority through Security Council authorisation' (p.3). The fact that UNSC-sanctioned interventions are not normatively constrained has permitted overreaching incursions into state sovereignty. Such overreaching has perhaps produced a chilling effect on the motivation of the P5 (particularly Russia and China) to authorise military interventions to prevent atrocities. This was clearly seen in the case of Russia's and China's decisions to veto UNSC resolutions on Syria in 2012 and 2014. In both cases, Russia and China cited Syrian state sovereignty as a reason for rejecting the UNSC proposals to take action against the Syrian regime. Even though the failed resolutions themselves did not call for military intervention—the first called for the Syrian President to step down and the second sought to refer Syria to the International Criminal Court—the vetoing states characterised the resolutions as pretexts

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to intervention. The peculiar contradictions of UNSC decision-making are thus most evident in the case of Syria. On the one hand, even when civilian lives were at stake in the wake of chemical attacks, the UNSC was unable to even sanction non-military intervention. Yet the same body later sanctioned airstrikes in Syria that put civilians directly at risk on the pretext of preventing and suppressing terrorist attacks.

Therefore, the power to block military intervention—a power reserved for the P5—is also not constrained in normative terms. In 2015, the UNSG explicitly acknowledged this predicament, commenting that the UNSC ‘has too often failed to live up to its global responsibility, allowing narrower strategic interests to impede consensus and preclude a robust collective response’.

### **4. Conclusion: A Return to Norms**

The ‘legality’ of a particular military intervention to protect civilians ultimately depends on whether the UNSC sanctions it under Chapter VII of the UN Charter. Yet, as explained in the preceding section, there is no normative framework that governs the UNSC’s decision-making in this regard. On the one hand, UNSC-sanctioned interventions can be exploited to effect regime change or to directly harm civilians under the guise of suppressing terrorism. On the other, the subjective political will of a single permanent member could lead to ‘policy paralysis’ (Luck, 2010: 355). The current legal framework simply has no way of dealing with situations where the UNSC itself is ‘unwilling’ or ‘unable’ to protect civilians from atrocities.

Amending the UN Charter to check the discretionary power of the P5 is unrealistic given the fact that any amendment must be sanctioned by the P5 (Joyner: 613). However, a two-pronged reform strategy that seeks to operate within the framework of international law (as it currently stands) could still be considered. This approach is meant to challenge—at least to some extent—the current lack of accountability on the part of the P5. As discussed later in this section, such a challenge is not without precedent. The UNGA (United Nations General Assembly) has in the past pushed back on the UNSC through the process that emerged from the Uniting for Peace Resolution 377 in 1950.

Under this two-pronged strategy, the UNGA should first agree upon and adopt clear normative criteria for military intervention to protect civilians from genocide, war crimes, crimes against humanity and ethnic cleansing. As explained below, these criteria could be used to pressure non-cooperating P5 members to at least provide reasons for their decisions. The current framework offered by the 2005 World Summit Document should be expanded upon to include such normative criteria. The ‘just cause threshold’ and the precautionary principles offered by ICISS are helpful in this regard. According to the UNSG’s High Level Panel Report in 2004, justification for intervention is triggered by actual or ‘imminently apprehended’ atrocities that a host state is unable or unwilling to avert. The actual intervention could then be guided by principles of right intention (i.e. protecting civilians), exhaustion of peaceful remedies, proportionality and reasonable prospects of success (ICISS: XII).

Second, when faced with a stalemate among the P5, a more radical version of Joyner’s ‘diplomatic approach’ to convincing reluctant permanent members to ‘acquiesce’ to intervention may be considered (Joyner: 615). Joyner proposes that permanent members such as Russia and China could be diplomatically convinced that their abstention from voting (in effect, refraining from using the veto) for an intervention would not create any precedent of consent. Such an approach aims to allay their fears that any perceived consent ‘may contribute to subsequent legal justification for future international involvement in their own domestic affairs’ (Joyner: 615). Yet, even under Joyner’s approach, actual intervention would become illegal if a permanent member chooses to veto a proposal to intervene. Thus the UNGA may need to go one step further in the case of a stalemate. If the UNGA reaches a consensus on the normative appropriateness of the proposed intervention, it could formally call upon the non-cooperating permanent member to provide reasons for its decision to veto the proposal. By doing so, the UNGA could potentially contribute towards developing an international practice of providing reasons for the use of the veto—at least where civilian lives are at stake.

The Uniting for Peace Resolution 377 remains a useful example of the UNGA pushing back on the UNSC in the event of a stalemate among the P5. The resolution was applied on at least twelve occasions to respond to situations where the UNSC, ‘because of lack of unanimity of the permanent members, fail[ed] to exercise its primary

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responsibility for the maintenance of international peace and security'. The Resolution has not been used since 1997. Yet it demonstrates the potential for holding the P5 to account on some normative basis. It is certainly both desirable and possible to adopt a similar resolution on R2P to deal with situations where the UNSC is unable or unwilling to protect civilians from atrocities owing to a stalemate among the P5.

The foregoing reform strategy does not offer an alternative legal justification for military intervention to protect civilians. But it may prompt a fresh normative discourse around R2P that achieves two important aims. On the one hand, it may provide a normative check on 'legal' interventions that have ulterior motives beyond civilian protection. On the other, it may compel non-cooperating permanent members of the UNSC to provide reasons for their actions or inaction vis-à-vis the normative criteria on R2P when a legitimate case for intervention to protect civilians arises. This approach could revitalise R2P and contribute towards greater alignment between the law on military intervention and the norms on protecting civilians.

## References

### *Books, Articles and Reports*

Akande D, 'The Legality of Military Action in Syria: Humanitarian Intervention and the Responsibility to Protect', EJIL Talk!, 28 August 2013

Alvarez J, 'The Schizophrenias of R2P', in Alston and Macdonald (eds.), *Human Rights, Intervention, and the Use of Force* (2008), 275

Anderson K, 'Legality of Intervention in Syria in Response to Chemical Weapon Attacks' (30 August 2013) 17(21) *American Society of International Law Insights*

Brown B.S, 'Humanitarian Intervention at a Crossroads' (2000) 41 *William and Mary Law Review* 1683

Glanville L, 'The Responsibility to Protect Beyond Borders' (2012) 12(1) *Human Rights Law Review* 1

Henderson C, 'International Measures for the Protection of Civilians in Libya and Cote d'Ivoire' (2011) 60 *International and Comparative Law Quarterly* 767

International Commission on Intervention and State Sovereignty (ICISS), *The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty* (2001)

Ipinoyomi F, 'Is Côte d'Ivoire a Test Case for R2P? Democratization as Fulfillment of the International Community's Responsibility to Prevent' (2012) 56(2) *Journal of African Law* 151

Joyner D.H, 'The Kosovo intervention: legal analysis and a more persuasive paradigm' (2002) 113 *European Journal of International Law* 597

Luck E.C, 'The Responsibility to Protect: Growing Pains or Early Promise?' (2010) 24(4) *Ethics and International Affairs* 349

Peters A, 'Humanity as the A and Ω of Sovereignty' (2009) 20 *European Journal of International Law* 513

Rieff D, 'The Road to Hell: Have Liberal Intellectuals Learned Nothing From Iraq?' *The New Republic* (23 March 2011)

### *Cases*

International Court of Justice, *Application: Instituting Proceedings, Legality of Use of Force (Yugoslavia v. United*

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Kingdom of Great Britain and Northern Ireland) 1999 General List No. 113

Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro) ICJ Reports 2007 43

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