The Third Pillar: The Vulnerable Component of the 'Responsibility to Protect'

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In 2005, Kofi Annan declared that the International Community (IC) had agreed on a clear and unambiguous mechanism able to protect populations from the four crimes (Welsh, 2008). Yet, with the case of Darfur in mind the very same year, it is legitimate to question the R2P viability in answering humanitarian crises. This essay argues that the doctrine cannot be considered as a viable mechanism to answer humanitarian crises, more specifically because of its Third Pillar.

Equal sovereignty and non-interference – indexed in Article 2 of the United Nations (UN) Charter – are the most prominent concepts in International Law (Thakur, 2008). Yet, the end of the cold war brought to light the evolution of a new paradigm that has been latent for two decades (Fassin and Pandolfi, 2013). Indeed, if from 1945 to the 1990s, maintaining peace and state sovereignty prevailed over humanitarian considerations, the post-cold war period saw the proliferation of humanitarian interventions in response to complex emergencies creating a gap between the UN fundamental principle of non-interference and state practice (Thakur, 2008). The United Nations Security Council (UNSC) even started to mandate interventions (e.g. Somalia) (Brauman and Meyran, 2018). Yet, the IC failed to avoid disastrous humanitarian crises in Bosnia and Rwanda. Consequently, Annan suggested the establishment of a new consensus meant to reconcile sovereignty, human security and the primary mandate of the UNSC to maintain International Peace and Security (Thakur, 2008). This led to the publication of the International Commission on Intervention and State Sovereignty (ICISS) report on the R2P in 2001 which redefined sovereignty in terms of responsibility, and subsequently to the consensual adoption of the 2005 World Summit Outcome Document (WSOD), recognizing R2P as a practice (Welsh, 2008). The R2P lies on Three Pillars. The primary responsibility for people protection belongs to the sovereign state (i.e. Pillar one) but the IC shares the responsibility to offer their financial or technical assistance if needed (i.e. Pillar two) (Paris, 2014). The Third Pillar involves coercive measures: if a state "manifestly fails" to protect its population, the IC has the responsibility to take actions through peaceful means or military intervention. This last Pillar appears to be "the most controversial" one (Fiott, 2015), undermining the operational viability of the doctrine.

First, I argue that the R2P Third Pillar does not make consensus in the IC, preventing its establishment as a global norm. Then, I explain that this lack of consensus results not only into a lack of accountability of the IC but also into the ambiguity of R2P's framework. Finally, I advocate the Third Pillar risks to remain controversial due to its own logic.

Lack of consensus

It is wrong to claim that the R2P is an International Customary Norm as the doctrine does not make consensus (Nash, 2010). Indeed, the WSOD was negotiated by a restricted amount of states; the document was a watered-down consensus, and those who did not agree on the whole principle chose to remain silent. France and the United Kingdom (UK) were in favor of the doctrine and so were the United States (US) though under some conditions (i.e. No code of conduct). Similarly – with the exception of South Africa and Tanzania – the African Union, with the Rwandan genocide in mind, expressed support for the R2P and even institutionalized the doctrine in Article 4(h) of their Charter, demonstrating a normative shift with the Organization of African Unity reluctance to interfere in states internal affairs (Warner, 2017).

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This institutionalization did not take place in Southeast Asia where the norm of non-interference still prevails over the urge to take military action to protect suffering populations (Capie, 2012). As highlighted by the report of a Singaporean advocacy group, if the first and the second pillars do not bring division, the military aspect of the third pillar is rejected. Even the Philippines and Indonesia, strong supporters of the R2P in 2005, did not endorse a role of a localizing agent in the region. Some even talk about the adoption of an 'R2P-Plus': a revised version of the doctrine with no coercive tools.

Likewise, Russia and China "see themselves as guardians of the Westphalian world order" (Kuhrt, 2015, p.107). To them, the traditional definition of sovereignty is the guarantee of a stable world order. As such, they criticize the West for their abusive use of coercive forces in the name of human security and repeatedly vetoed interventions without state consent. In the case of Darfur for instance, the non-consent of the Sudanese government has led to the Russian intervention blockage at the UNSC even after the word 'genocide' appeared (Welsh, 2008).

Therefore, if we take Finnemore and Sikkink's norm-life cycle, the R2P fails to reach the 'norm internalization' stage (Butler, 2016). To gain the status of ICL, the doctrine should be extensively accepted in order to transform state behaviours. This lack of consensus has a strong implication on the operationality of the R2P. The next part of the paper will show how much it sapped the IC accountability and the clarity of the R2P framework.

Impacts on its operationality

The lack of the IC accountability

According to Berrang (n.d.), the "inconsistency and selectivity" (p.2) of the UNSC in decision-making has remained pervasive after the introduction of the R2P. This is symptomatic of the R2P not being a norm (Bazirake and Bukuluki, 2015): the IC does not have a legal obligation to react.

What is more, some states explicitly rejected any kind of legal responsibility (Teimouri, 2015). In 2002, the US made clear they would disagree with a 'code of conduct' limiting either the use of their veto or the resort to the use of force (Butler, 2016). Instead of a legally binding responsibility, they suggested a moral one which reminds us of the Kosovo intervention when NATO justified their action on moral grounds (Teimouri, 2015). Consequently, the WSDO was deprived of any guiding principle.

Furthermore, the President of the UN General Assembly declared that "none of the 5 main documents articulating, developing, endorsing and outlining implementation plans for R2P can be considered a source of binding international law in accordance with those listed in Article 38 of the Statute of the International Court of Justice" (Butler, 2016, p.15). As such, the R2P is more a political than a legal instrument.

Consequently, as a veto or complete denial cannot be considered as illegal, the doctrine does not solve the problem of political will. This weakness can create Rwanda-like situations where actors decide not to act in the absence of interests. This is arguably the case in Syria with Moscow being a supporter of Assad (Paris, 2014). More generally, R2P is trapped into a selective logic. Moreover, in the case no military intervention takes place, neither the hold state nor the IC is held accountable (Teimouri, 2015).

An ambiguous R2P framework

On the other hand, the terminology of paragraph 139 of the WSDO appears to be very ambiguous (Bazirake and Bukuluki, 2015). The IC is supposed to resort to collective action in case "national authorities manifestly fail to protect their population" (p.1021) from the four crimes. The expression 'manifestly fail' replaces 'unable or unwilling' – judged to be too subjective – in the WSOD (Gallagher, 2014). To the Global Center for the Responsibility to Protect, the modification was aimed at raising the threshold as this new terminology would provide a "more evidence-based standard" (p.4). Yet, the 'manifestly fail' criteria remains very unclear. This is evidenced by the Australian government decision, in 2008, to financially support fourteen R2P research projects meant to shed light on the "unresolved issues surrounding the identification of a manifest failing" (p.5). Defining better the threshold is essential

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for the R2P to be fully viable. As a matter of fact, the ambiguity of the threshold could be used by intervening states to delay or speed up humanitarian actions depending on their own interests (Bazirake and Bukuluki, 2015). In other words, 'manifestly fail' is a threat to another requirement of Paragraph 139 which is "to take collective action, in a timely and decisive manner" (p.1019).

What is more, in practice, the US and the UK keep using the 'unable or unwilling' terminology instead of the new one. Different interpretation to this deviation has been proposed: it was an unconscious mistake, the UK and the US are manipulating the ambiguity at their advantage, the use of the old or the new threshold does not make any difference because the argument of one being more objective than another is not persuasive. But to Gallagher (2014), no matter where this inconsistency lies, it is without any doubt fueling the fear of R2P detractors that Western powers might misinterpret the mechanism to satisfy national-oriented motives. The NATO-led operation in Libya for instance raised criticism regarding the misuse of the UNSC Resolution 1973. As Marcel Boisard – the former Assistant Secretary-General of the UN – puts it, the intervening states did not try to negotiate a ceasefire but merely took the protection of civilians as a pretext to satisfy their own interest, namely the regime change (Pommier, 2011). In Boisard's words: "The principle of 'responsibility to protect' died in Libya, just as 'humanitarian intervention' died in Somalia in 1992" (p.1079)

R2P has little hope to be viable one day

To Paris (2014), the R2P is meant to remain weak and disputed due to five 'structural problems' inked into military interventions.

Firstly, according to the problem of the mixed motive, the belief that an operation could only rely on altruistic aims is a myth as no operation can occur without the presence of national-interested objectives – for matters of national accountability. But these necessary goals tend to delegitimize the operations. In Libya for instance, the sheer desire of France, the UK and the US to overthrow Gaddafi casts doubt on their primary motives.

Secondly, the counterfactual problem makes the effectiveness of an intervention difficult to assess as the benefits of non-intervention cannot be evidenced. Therefore, the debate about whether Operation Unified Protector avoided a bloodbath or not remains unanswered.

Thirdly, the conspicuous harm problem renders the collateral damages of the intervention highly visible and the benefits hidden. As such, even though the human cost of the NATO-led operation in Libya was low, the uncensored media coverage did not serve the cause of the interveners who appeared as atrocities accomplices.

Fourthly, the end-state problem enhances the dilemma between an early withdrawal without solving the deep causes of the crisis and the criticisms associated with a semi-permanent protective presence, the negotiation of a settlement or the facilitation of a regime change. Again, this problem is noticeable in the case of Libya where both regime change and troop withdrawal have been challenged.

Finally, the inconsistency problem emphasizes a paradox. Both the decision to intervene or not will undisputedly lead to criticism. If the intervention in Libya damaged NATO's credibility, the situation would have been the same in the case of non-intervention (e.g. Syria). In sum, the military component of R2P seems to be trapped in its own logic.

Conclusion

Contrary to what Annan declared in 2005, the R2P Third Pillar lacks consensus. This has strong repercussions on its operationalization that strengthen division even more. On the one hand, the IC is not legally accountable but simply morally responsible to act in case of a humanitarian crisis. On the other hand, the ambiguity and inconsistency of paragraphs 138 and 139 are likely to lead to R2P misuses. Therefore, the introduction of the R2P in 2005 did not solve the politicization and efficiency problem linked with military intervention on humanitarian ground. Moreover, the Third Pillar appears to be irremediably trapped in its own logic (Paris, 2014) which limits its "normative potential" (Swaren-Sanchez, p.19) hindering the doctrine to "transcend politics and power structures" (p.11). As such, the

Third Pillar cannot be considered as viable. Moreover, as Ban Ki-moon specified in 2012, "Like any other edifice, the structure of the responsibility to protect relies on the equal size, strength and viability of each of its supporting pillars" (Capie, 2012, p.78). Therefore, the very fact that the Third Pillar cannot be assessed viable makes the whole doctrine deficient (Butler, 2016).

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