

**AFTER LIBYA AND SYRIA: R2P'S NORMATIVE UTILITY AND FUTURE APPLICATION**

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**BACHELOR OF LAW/BACHELOR OF ARTS GRADUATE 2014**

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**SUBJECT: UNDERGRADUATE DISSERTATION SUBMITTED FOR CREDIT, SEMESTER ONE, 2014**

## AFTER LIBYA AND SYRIA: R2P'S NORMATIVE UTILITY AND FUTURE APPLICATION

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*The international community has characterised the Responsibility to Protect (“R2P”) both as a transformative success for international law and as a failure for civilians relying upon the concept to shelter them from mass atrocity crimes committed by their state. Crises in Libya and Syria both necessitated the international community to engage with R2P, yet despite geographical, political and cultural similarities, that engagement produced significantly different outcomes. This paper contends that R2P’s greatest utility is not in providing the international community with another avenue to pursue the use of force, but in its normative power to cultivate an environment wherein sovereignty is equated with protecting populations.*

### I. OVERVIEW

The Responsibility to Protect (“R2P”) represents the international community’s primary weapon in the prevention of mass atrocity crimes. It provides an alternative conception of sovereignty in the twenty first century, placing the emphasis on protecting populations rather than maintaining territorial control. In this sense, R2P marks a dramatic departure from traditional Westphalian ideas of state sovereignty.<sup>1</sup> The concept is comprised of three equally weighted pillars as stipulated in paragraphs 138 and 139 of the *Outcome Document of the 2005 United Nations World Summit* (“Outcome Document”) and formulated by Secretary-General Ban Ki-moon in his 2009 Report on Implementing the Responsibility to Protect.<sup>2</sup>

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<sup>1</sup>Rosa Brooks, ‘Lessons for International Law from the Arab Spring’ (2013) 28 *American University International Law Review* 101, 106.

<sup>2</sup> 2005 *World Summit Outcome*, UN GAOR, 60<sup>th</sup> Sess [138]-[139], UN Doc A/Res/60/1 (2005).

“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. The international community should, as appropriate, encourage and help States to exercise this responsibility and support the United Nations in establishing an early warning capability.”

“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 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 manifestly fail to protect their populations from genocide, war crimes, ethnic cleansing and crimes against

Pillars One and Two respectively affirm that the primary responsibility to protect a population resides with its State, and the international community's role in assisting states fulfil these obligations. Pillar Three acknowledges the need to employ coercive measures in accordance with the United Nations Charter ("the Charter").<sup>3</sup> The contentious issue is which particular cases warrant the use of military force.

Secretary-General Ki-moon identified the application of R2P as a cardinal challenge of our time.<sup>4</sup> In part, this reflects the international community's reluctance to engage with the policy. Largely, this is a consequence of the discretionary powers reserved for the Security Council when implementing the Third Pillar. Limited test cases, a by-product of the concept's infancy, coupled with its ad hoc application have contributed to this disengagement.

Libya and Syria, conflicts which erupted within months of each other, drew the international community's attention to R2P. Both instances were characterised by the failure of the states in protecting their own populations from mass atrocities.<sup>5</sup> The International Criminal Court's then chief prosecutor, Luis Moreno-Ocampo, stated that investigators had 'strong evidence' of Libyan leader Muammar Gaddafi's forces shooting at unarmed civilians, conducting mass arrests and instigating torture.<sup>6</sup> Similarly, a United Nations Commission of Inquiry on Syria ("the Commission") identified seventeen incidents of intentional mass killing perpetrated by

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humanity. We stress the need for the General Assembly to continue consideration of the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity and its implications, bearing in mind the principles of the Charter and international law. We also intend to commit ourselves, as necessary and appropriate, to helping States build capacity to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity and to assisting those which are under stress before crises and conflicts break out."

<sup>3</sup> *Charter of the United Nations* art 42.

<sup>4</sup> *Implementing the Responsibility to Protect: Report of the Secretary General*, UN GAOR, 63<sup>rd</sup> sess, UN Doc A/63/677 (12 January 2009) ('*Implementing R2P*'), 2.

<sup>5</sup> Francis Grimal, *International Law and Strategy* (Routledge, 2013) 114-116.

<sup>6</sup> Luis Moreno-Ocampo, 'Statement to the United Nations Security Council on the situation in Libya pursuant to UNSCR 1970 (2011) (Speech delivered in New York, 2 November 2011).

government forces, including the use of chemical weapons.<sup>7</sup> As a result of these troubling findings, the international community considered R2P and the circumstances triggering its application. The Security Council on 17 March 2011 adopted Resolution 1973 authorising “all necessary measures” to protect Libya’s civilians.<sup>8</sup> This included a coalition of NATO allies enforcing a no-fly zone over Libya, and an arms embargo. But the Security Council remains deadlocked on Syria, with Russia and China exercising their veto on resolutions supporting the Arab League’s peace plan for the state and sending the crisis to the International Criminal Court.<sup>9</sup>

In Libya’s aftermath, some States now allege that R2P was a ‘smokescreen’ for regime change, and voiced discomfort with the Security Council’s selective application of the concept when ‘politically expedient’ for powerful states, undermining its force in international law.<sup>10</sup> Soon, R2P’s first two pillars lay forgotten and the entire framework was becoming a euphemism for one possible outcome of the third pillar. Although this paper recognises the entirety of the R2P framework, its scope is specifically military intervention under the third pillar. The variant of R2P referred to throughout the paper is outlined in paragraphs 138 and 139 of the Outcome Document, as endorsed in 2005 and reaffirmed by the General Assembly in 2009.<sup>11</sup> Ultimately, this paper questions the utility of R2P’s Third Pillar and its capacity to become a rule or an enforceable norm. It maintains that R2P, despite its conformity to the United Nations Charter, offers something new. The concept innovatively uses pre-existing legal principles as building blocks for a new edifice and reinforces the

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<sup>7</sup> *Report of the Independent International Commission of Inquiry on the Syrian Arab Republic*, UN HRCOR, 25<sup>th</sup> sess, UN Doc A/HRC/25/65 (12 February 2014) (*‘HRC Commission Report on Syria’*).

<sup>8</sup> *Establishment of a Ban Flights in the Libyan Jamahiriya Airspace*, SC Res 1973, UN SCOR, 66<sup>th</sup> sess, 6498<sup>th</sup> mtg, UN Doc S/RES/1973 (17 March 2011) (*‘Resolution 1973’*), 1.

<sup>9</sup> UN SCOR, 66<sup>th</sup> sess, 6627<sup>th</sup> mtg, UN Doc S/PV.6627 (4 October 2011), 3-5.

<sup>10</sup> Alex J. Bellamy, *The Responsibility to Protect and the Problem of Regime Change* (27 September 2011) E-International Relations <<http://www.e-ir.info/2011/09/27/the-responsibility-to-protect-and-the-problem-of-regime-change/>>

<sup>11</sup> *The Responsibility to Protect*, GA Res 63/308, UN GAOR, 63<sup>rd</sup> sess, 105<sup>th</sup> plen mtg, Agenda Item 44 and 107, UN Doc A/RES/63/308 (11 February 2010).

normative power of those principles.<sup>12</sup> It remains unclear which body is appropriate to determine whether a particular conflict is suitable for preventive or reactive intervention, and so this paper concludes by considering Brazil's complementary framework, Responsibility While Protecting ("RWP") to determine this main question. Brazil's concept note provides specific criteria that the Security Council must consider prior to authorising the use of force, including proportionality and the limitation that use of force must not cause 'more harm than authorised to prevent.'<sup>13</sup> It also emphasises increased monitoring and review of the process once it has been invoked.

This paper draws upon a pragmatic approach to international law, articulated by Kenneth Anderson, Professor of Law at American University. Anderson states that international law is 'necessarily and inevitably' intertwined with politics, policy, diplomacy and the real world consequences of action.<sup>14</sup> An absolutist approach to international law requires the international community to accept civilian slaughter, or to break the law.<sup>15</sup> Conversely, a pragmatic approach views these other factors as *part of* international law itself. It emphasises 'reasonableness' – concerned with legal formalism but not confined to it.<sup>16</sup> In this tradition, this paper will have regard for geopolitical considerations and for the international community's wariness of R2P's misuse post-Libya. It will consider how these factors

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<sup>12</sup> Anne Peters, 'The Security Council's Responsibility to Protect' (2011) 8 *International Organisation Law Review* 1, 9.

<sup>13</sup> *Brazil's Concept Note on RWP*, UN Doc A/66/551 and S/2011/701, para 11.

<sup>14</sup> Kenneth Anderson, *Five Fundamental International Law Approaches to the Legality of a Syria Intervention* (5 September 2013) Lawfare <<http://www.lawfareblog.com/2013/09/five-fundamental-international-law-approaches-to-the-legality-of-a-syria-intervention/>>; Kenneth Anderson, *Legality of Intervention in Syria in Response to Chemical Weapon Attacks* (30 August 2013) American Society of International Law <<http://www.asil.org/insights/volume/17/issue/21/legality-intervention-syria-response-chemical-weapon-attacks>>. See also generally Martti Koskeniemi, 'The Place of Law in Collective Security' (1996) 17 *Michigan Journal of International Law* 456 and Ian Johnstone, 'Security Council Deliberations: The Power of the Better Argument' (2003) 14(3) *European Journal of International Law*, 437.

<sup>15</sup> *Ibid.*

<sup>16</sup> *Ibid.*

informed the Security Council's decision to intervene in Libya but not in Syria, pursuant to its powers outlined in Chapter VII of the Charter.

## II. R2P IN LIBYA AND IN SYRIA: ITS CONCEPTUAL SUCCESS

Reactions to the intervention in Libya have been mixed. Former United Nations Assistant Secretary-General Ramesh Thakur, described Libya as the 'first road test' of R2P's third pillar. Gareth Evans, somewhat more enthusiastically, also celebrated Libya as an example of R2P working 'exactly as it should.'<sup>17</sup> It was the first military intervention whose purpose was protecting a nation's population against egregious human rights abuses committed by the government. Yet, mere months later, the international community declined to do the same for the people of Syria. Did the Security Council's failure to invoke R2P in Syria therefore undermine the concept's credibility and derail its application in future conflicts?

Syria's escalating violence, the unquestionable commission of mass atrocity crimes by both government forces and the rebels, as well as the Security Council's deadlock, are factors which can easily point towards R2P's failure. Similarly, R2P's success in Libya can be attributed to the 'unique constellation of unrelated, temporal factors' rather than a collective desire to abide by R2P's principles. Here, R2P is seen as a 'tool' for national political agendas first, and civilian protection second.<sup>18</sup> President Obama's justification for the United States intervening in Libya in the national interest best demonstrates this. He cited the

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<sup>17</sup> Ramesh Thakur, 'R2P After Libya and Syria: Engaging Emerging Powers' (2013) 36 *The Washington Quarterly* 61, 61.

<sup>18</sup> Minerva Nasser-Eddine, 'How R2P Failed Syria' (2012) 28 *Flinders Journal of History and Politics* 16, 17; Miguel D'Escoto Brockmann, 'At the Opening of the Thematic Dialogue of the General Assembly on the Responsibility to Protect (United Nations General Assembly, New York, 23 July 2009).

responsibility to act is triggered when American interests and values are ‘at stake.’<sup>19</sup> The President canvassed this point stating the United States has ‘strategic interests’ in preventing violence in Libya to prevent refugee flows into neighbouring countries, and destabilising the region.<sup>20</sup> The United States’ presidential election in 2016 will change the leadership and with this, its views on R2P will also likely change. Consequently, if the rationale for involvement is an vaguely defined ‘national interest’, R2P’s long term implications will be limited.

R2P’s Third Pillar is grounded in existing obligations arising from international law and supposedly adds nothing “new” to the discourse. Yet Article 2(4) of the Charter prohibits the use of force and Article 51 does not recognise the concept as an exception. It is a dangerous misstatement that the Third Pillar permits states to intervene during humanitarian disasters without Security Council authorisation. Dr Aidan Hehir, Director of the Security and International Relations at the University of Westminster, explains that the issues considered prior to *Resolution 1973* were, for all intents and purposes, of the same nature as those made prior to the emergence of R2P.<sup>21</sup> These criticisms, however, fundamentally misunderstand R2P’s function. The concept does not purport to create any additional legal duties for states or international bodies. Rather, R2P is a tool of political rhetoric and framing to articulate the collective social and moral position of the international community. It does not represent an attempt to articulate “new” law.

Through this lens, Libya and Syria both represent R2P’s conceptual success. Should the international community decide to employ coercive measures, its mandate is not

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<sup>19</sup>Amos Guiora, ‘Intervention in Libya, Yes; Intervention in Syria, No: Deciphering the Obama Administration’ (2011) 44 *Case Western Reserve University’s Journal of International Law* 251, 265.

<sup>20</sup> Ibid.

<sup>21</sup>Aidan Hehir, ‘The Responsibility to Protect: Sound and Fury Signifying Nothing’ (2010) *International Relations* 218, 228.

unconditional. Paragraph 139 imposes three limitations on the use of force by the international community in exercising R2P:<sup>22</sup>

1. *Material* – R2P is applicable only to the four crimes agreed upon by the member states being genocide, war crimes, ethnic cleansing and crimes against humanity; and
2. *Temporal* – The use of force is contingent upon states manifestly failing to exercise their responsibility to protect and upon first exhausting all peaceful means available; and
3. *Formal* – coercive measures are only available through the Security Council’s authorisation, pursuant to Chapters VI and VII of the Charter on the basis of a ‘case-by-case’ evaluation.

The International Community’s recourse to R2P’s Third Pillar is contingent upon satisfying these requirements. Paragraph 139 also confirms the Security Council’s discretionary authority through inclusion of the phrase, ‘case by case basis.’<sup>23</sup> When generating a response to mass atrocities pursuant to Chapter VII, this framework invites the Council to consider region specific variables. In Syria, these included the likelihood that authorising the use of coercive force would result in greater civilian casualties. Evidently, an unfavourable outcome for the Syrian people does not automatically imply R2P has failed and is inapplicable to future conflicts. It more so indicts the institution that failed to meaningfully engage with R2P and unite behind non-coercive military intervention.

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<sup>22</sup> Ban Ki-moon, ‘Address on Responsible Sovereignty: International Cooperation For a Changed World’ (Speech delivered at the event on Responsible Sovereignty: International Cooperation for a Changed World, Berlin, 15 July 2008).

<sup>23</sup> Andrew Garwood-Gowers, ‘The Responsibility to Protect and the Arab Spring: Libya as the Exception, Syria as the Norm?’ (2013) 36(2) *University of New South Wales Law Journal* 594, 600.

### III. THE UNITED NATIONS SECURITY COUNCIL AND R2P'S INSTITUTIONAL FAILURE

R2P critics maintain that the concept provides no satisfactory answer to the seminal question of who defines whether a particular situation is a suitable candidate for preventative or reactive intervention. This indeterminacy enables the Security Council's permanent five ("P5") members to block interventions, claiming the 'thresholds' to authorise coercive force have not been breached. The international community's response to alleged or clear occurrences of mass atrocity crimes is contingent upon the Security Council's will, which is heavily informed by political exigencies. Geostrategic rivalries, for instance, continue to paralyse the Council's attempt to respond to Syria, rendering it incapable of making the decisions expected of it in circumstances that call for its decisive action. Russia and China undoubtedly exercised their veto for reasons of national interest, however, they are not unique in doing so. The United States has exercised its veto more often than all other members of the Council combined, and remains the only member who does not recognise the ICC's jurisdiction.<sup>24</sup> This was noted by Russia when it vetoed a resolution in early 2014 referring the Syrian conflict to the ICC.<sup>25</sup>

Unquestionably, the Security Council maintains a monopoly on the legitimate use of force, and in the event that a crisis reaches a particular point, the discretion in determining what response (if any) is exercised by the P5. The potential for robust responses to humanitarian crises, authorised by the Council, is therefore largely frustrated by political divisions. It has been suggested in the absence of the Council's authorisation to employ coercive measures, the power be deferred to regional organisations.<sup>26</sup> The Arab League's position in Syria, however, is far from principled and is largely motivated by the individual interests of

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<sup>24</sup> Sean D. Murphy, *United States Practice in International Law* (Cambridge University Press, 2005) 307.

<sup>25</sup> UN SCOR, 69<sup>th</sup> sess, 7180<sup>th</sup> mtg, UN Doc S/PV.7180 (22 May 2014) page 12.

<sup>26</sup> *Brazil's Concept Note on RWP*, UN Doc A/66/551 and S/2011/701, para

members.<sup>27</sup> There also remains little evidence it was itself motivated by R2P to advocate robust measures against Libya. Politics appears to be the ‘driving force’ when generating responses to conflicts, irrespective of which body authorises it. In this context, R2P’s utility will be predicated on its normative power to mobilise this political will and to exact pressure on the Security Council to sanction action. The concept’s significance is not derived from its capacity to create a legal duty to act, but rather, to generate a ‘shift in expectations’ of what the Council *ought* to do.<sup>28</sup>

Further, the Council is not an arbitrary body capable of exercising absolute power, unchecked and unrestrained. It has an obligation to cooperate in bringing an end to the commission of mass atrocity crimes and is bound minimally by the “Purposes and Principles” of the Charter.<sup>29</sup> Arguably, this obligation assumes the form of voting positively on a resolution authorising a robust intervention if this is the *only* means in bringing an end to the violations R2P seeks to confront. The Security Council is an organ with restricted membership. *Ergo*, members do not only stand in a special legal relationship with the United Nations but also, with the remaining members who are not represented on the Council.<sup>30</sup> One commentator likens them to “trustees” of the international community.<sup>31</sup> Orford corroborates this viewpoint stating the veto power is “justified” given the military and economic capabilities of the P5.<sup>32</sup>

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<sup>27</sup> International Commission on Intervention and State Sovereignty, *Responsibility to Protect* (2001), XII.

<sup>28</sup> Hehir, above n 24, 1341.

<sup>29</sup> *Charter of the United Nations* art 1(1), “To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace.”

Art 24(2), “In discharging these duties the Security Council shall act in accordance with the Purposes and Principles of the United Nations. The specific powers granted to the Security Council for the discharge of these duties are laid down in Chapters VI, VII, VIII, and XII.”

<sup>30</sup> Anne Peters, ‘The Security Council’s Responsibility to Protect’ (2011) 8 *International Organisation Law Review* 1, 24.

<sup>31</sup> Anne Orford, *International Authority and the Responsibility to Protect* (Cambridge University Press, 2011), 24-26.

<sup>32</sup> *Ibid.*

Thus, it is “intrinsically correlated” with a special responsibility.<sup>33</sup> In this context, R2P develops the idea that whilst states are responsible for their citizens, the Security Council is responsible for the international community as a whole.

Acknowledging the merits of the criticisms directed towards the Council’s decision making process in authorising coercive force, R2P should not, as a consequence, be condemned to a premature death. This paper has restricted its discussion to the invocation of R2P’s Third Pillar. It is, however, an erroneous perception that the concept *requires* military intervention or is, in and of itself, a “licence” to intervene.<sup>34</sup> R2P contemplates a diverse range of preventative and peaceful measures intended to forestall the need for coercive force. Military intervention is merely one conventional aspect in the way coercive force is utilised in current security matters. This in turn formulates one pillar of the concept. In 2009, Secretary-General Ki-moon explicitly rejected the notion that one aspect of R2P could be favoured over any other, let alone that it could exist *a la carte*.<sup>35</sup> Orford further argues the preoccupation with R2P’s military aspects threatens to derail the concept’s normative force it has accrued over the last two decades.<sup>36</sup>

#### IV. R2P AS AN INTERNATIONAL NORM

Norms are commonly recognised as legitimate modes of behaviour, incorporated into the decision making calculus of states and manifested in the policies they pursue.<sup>37</sup> Indicators that this process of ‘norm internalisation’ has occurred include states treating the rule in

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<sup>33</sup> Ibid.

<sup>34</sup> Alex J. Bellamy, *Responsibility to Protect* (Polity Press, 2009) 73.

<sup>35</sup> *Implementing R2P*, UN Doc A/63/677, page 2.

<sup>36</sup> Anne Orford, ‘From Humanitarian Intervention to Responsibility to Protect’ (Speech delivered at the 2013 James Crawford Lecture on International Law, The University of Adelaide, 21 October 2013).

<sup>37</sup> H Aidan Hehir, ‘The Responsibility to Protect in International Political Discourse: Encouraging Statement of Intent or Illusory Platitudes’ (2010) 15 *The International Journal of Human Rights* 1331, 1332. 1350.

question as a necessary part of the strategic landscape for decision making and ceasing to make cost-benefit calculations about the effects of breaking the rule as they consider future behaviours.<sup>38</sup> The Security Council has yet to meaningfully engage with R2P on this level and has by-passed opportunities to invoke R2P in Sri Lanka, Zimbabwe and Myanmar. Special Rapporteur on R2P Jennifer Welsh explains, however, that the acceptance of norms is not a ‘linear process.’<sup>39</sup> R2P has the potential to become an international norm because it creates a sense of moral obligation amongst states, through a repeated process of interaction and interpretation.<sup>40</sup>

International law rarely relies on coercive measures for its enforcement, preferring the collective power of the international community to deprive states of the benefits of membership in a system of states.<sup>41</sup> R2P’s potential lies in making it harder for states to violate the law, or do nothing at all. It injects considerations of morality or conscience into the States decision making process. Peters characterises R2P as pulling pre-existing norms together and placing them in a novel framework.<sup>42</sup> This is not legally superfluous and through systemisation, the normative power of those principles is reinforced. The whole is greater than the sum of the parts. R2P also provides the international community with a new vocabulary to discuss sovereignty. References to the concept in Council Resolutions and debates coupled with how leaders publically discuss the responsibility of States to protect their population facilitate the process of “norm internalisation” amongst the international community. Of notable importance are the Security Council’s references to R2P, including

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<sup>38</sup> Ibid.

<sup>39</sup> Adam Lupel, Interview with Jennifer Welsh (Recording for *Global Observatory*, 11 December 2013).

<sup>40</sup> Aidan Hehir, ‘The Responsibility to Protect as the Apotheosis of Liberal Technology’ in Aidan Hehir and Robert Murray (eds), *Libya: The Responsibility to Protect and the Future of Humanitarian Intervention* (Palgrave Macmillan, 2013) 34, 49.

<sup>41</sup> Oona A. Hathaway and Scott J Shapiro, *On Syria, U.N Vote is Not an Option* (3 September 2013) *The New York Times* < <http://www.nytimes.com/2013/09/04/opinion/on-syria-a-un-vote-isnt-optional.html>>

<sup>42</sup> Peters, above n 32, 9.

*Resolution 1973*, as their resolutions are binding and could potentially express an *opinio juris*.<sup>43</sup> These factors demonstrate that R2P is meaningful in its utility, rather than in strict legality.

## V. RESPONSIBILITY WHILE PROTECTING

Despite the international community's disillusionment with how the Council continues to engage with Syria, there has been no demand to 'rescind' R2P, *per se*. There has been a demonstrated interest to further clarify the concept and 'tighten' operational safeguards to prevent misuse, for instance, through the Brazilian proposal of Responsibility While Protecting ("RWP"). The concept note, circulated to the General Assembly in 2011, suggested the use of force may be authorised by the GA in "exceptional circumstances" in accordance with *Resolution 377(V)*, the "Uniting for Peace" Resolution.<sup>44</sup> It remains unclear what constitutes "exceptional", replicating the problems currently experienced by R2P's Third Pillar. One academic queried whether international law should permit states to intervene militarily to stop mass atrocities absent Security Council authorisation.<sup>45</sup> Bypassing the Council would undermine its authority and consequently the United Nations as a whole, which relies upon the support and adherence of the law from the international community.<sup>46</sup> Brazil's concept emphasises strict regulation of R2P and preventive diplomacy to reduce the risk of armed conflict and the human costs associated with it. It *supplements* the concept by adding new principles and procedures. Significantly, RWP responds to thematic critiques

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<sup>43</sup> Carsten Stahn, 'Responsibility to Protect: Political Rhetoric or Emerging Legal Norm?' (2007) *American Journal of International Law* 99, 115-116.

<sup>44</sup> *Uniting for Peace*, GA Res 377(V) UN GAOR, UN Doc A/RES/377(V) (3 November 1950).

<sup>45</sup> Guiora, above n 22, 271.

<sup>46</sup> Jonah Eaton, 'An Emerging Norm? Determining The Meaning and Legal Status of the Responsibility to Protect' (2011) 32 *Michigan Journal of International Law* 766, 794-800.

common to all R2P rejectionist states since the concept's inception in 2005, including fears of Western imperialism, neo-colonialism, resolution abuse and regime change.

RWP suggests specific criteria which the Security Council must consider before authorising the use of force. Drawing upon older conceptions of the Law of Armed Conflict (Just War Theory), the measure must be of last resort and satisfy the test of proportionality and must not cause more harm than it was authorised to prevent.<sup>47</sup> The proposal directly engages with the charge against NATO exceeding its mandate, stating that in event the use of force is contemplated, the actions taken must be limited to the objectives established by the Security Council.<sup>48</sup> Brazil's representative noted RWP could contribute meaningfully to the debate as it provides guidelines for the Security Council to consider prior to authorising coercive measures, along with an enhanced monitoring and review process to assess the interpretation and implementation of their mandates.<sup>49</sup> This is to ensure accountability of those to whom authority is granted to employ force. Evans predicts the P5 are likely to greet this requirement with hostility on the grounds there must be flexibility when implementing any military mandate.<sup>50</sup> Developing some form of oversight, however, of Security Council authorised military interventions may reduce the potential for R2P to be used as a pre-text for the pursuit of other strategic objectives. RWP is gaining traction amongst the two veto-wielding members of the BRICS. China and Russia supported the principle with "confidence", contrasting starkly with their cautious approach to R2P.<sup>51</sup> Although it remains uncertain whether they will move to endorse the idea of RWP in a more formal capacity, it is generally understood as a positive development. The proposal has attracted the support of Secretary-

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<sup>47</sup> *Brazil's Concept Note on RWP*, UN Doc A/66/551 and S/2011/701, para 11(e).

<sup>48</sup> *Brazil's Concept Note on RWP*, UN Doc A/66/551 and S/2011/701, para 11(g).

<sup>49</sup> *Brazil's Concept Note on RWP*, UN Doc A/66/551 and S/2011/701, para 11(h).

<sup>50</sup> Gareth Evans, 'R2P and R2P After Libya and Syria' (Speech delivered to the GCR2P/FGV/Stanley Foundation Workshop, Rio de Janeiro, 23 August 2012).

<sup>51</sup> Thorsten Benner, 'Brazil as a Norm Entrepreneur: the Responsibility While Protecting' Initiative (Working Paper, Global Public Policy Institute, March 2013), 8.

General Ki-moon, Dr Francis Deng, former Special Adviser for Prevention of Genocide and Dr Edward C. Luck, former Special Adviser for the Responsibility to Protect.<sup>52</sup> RWP alone will not end the Council's stalemate on Syria but it does present one avenue to neutralise dissenting rhetoric and rescue R2P's normative development from contamination.

## VI. CONCLUSION

Libya and Syria demonstrate R2P's normative force in international law. Its potential is anchored in making it 'harder' for states to violate the law or to do nothing at all, and although the concept's application presents challenges, it continues to develop its normative status. Through Council Resolutions, including *Resolution 1973*, subsequent debates and world leaders referring the responsibility of Gaddafi and Assad to protect their populations, R2P is undergoing the process of norm internalisation. Significantly, the question is no longer under what circumstances R2P applies. It is now evident every state has an inherent responsibility to protect. Yet this was not always so when one year before R2P's endorsement at the World Summit in 2005, one hundred thousand people were massacred in Darfur and two million people were forcibly removed from their homes. Today, the Russian Government will not dispute the fact the Syrian Government has a responsibility to protect its population and should not be using force to target civilians. Thus, the question the international community now grapples with has moved towards how best to achieve R2P's goals in different circumstances. Although political interests are likely to obstruct R2P's Third Pillar invocation, they are not enough to invalidate the concept, nor what it has achieved.

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<sup>52</sup> *Report of the Secretary General on the Responsibility to Protect: Timely and Decisive Response*, UN GAOR, 66th sess, UN Docs A/66/874 and S/2012/578 (25 July 2012); Noel M. Morada, 'Ensuring Responsibility while Implementing under Article 4(h) Intervention' in Dan Kuwali and Frans Viljoen (eds) *Africa and the Responsibility to Protect: Article 4(h) of the African Union Constitution Act* (Routledge, 2014) 312, 314-315.

RWP represents the international community's desire to further clarify R2P and "tighten" the operational safeguards to prevent misuse. The proposal is similarly couched in existing principles of international law and suggests that prior to employing force as a last resort, it must meet the test of proportionality and must not cause more harm than it was authorised to prevent. The concept's greatest strength is arguably its advancement of enhanced monitoring and review procedures to ensure the Council Resolutions are interpreted and implemented accordingly. RWP has received overwhelming support from the international community, most notably Russia and China. It provides hope of reviving R2P's legitimacy in future Council debates, which has been somewhat influenced by the delayed response to Syria's crisis.

Crucially, it also serves as a timely reminder to the international community of its progress in this area. The characteristic stalemate of the Security Council can be, in part, attributed to Russia and China continuing to espouse traditional understandings of territorial sovereignty and non-interference. R2P's greatest challenge will be cultivating an environment whereby sovereignty as conceived by the concept is respected and implemented. If this is achieved, the necessity for Pillar Three interventions lessens as States accept their responsibility. RWP attempts to facilitate this shift. Irrespective of the troubling outcomes unfolding in Syria, R2P continues to exact pressure on States, the Security Council and the international community to uphold their responsibility to protect civilian populations, to respond to the commission of mass atrocity crimes and ultimately, prevent their future occurrence.

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