

# **The Responsibility to Protect and the Use of Force: Remaking the Procrustean Bed?**

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## **Abstract**

The emergence of the Responsibility to Protect (R2P) owed much to the need to enhance the UN's ability to act forcibly in the face of the most extreme cases of gross human suffering. Too often in the past such responses were emasculated or thwarted by the necessity to successfully navigate the UN Charter's prescriptions over the use of force, by the unwillingness of member states to provide military forces, or by a combination of the two. In accepting that certain types of inhuman activity can lead to the legitimate use of force within the UN Charter framework, the adoption of R2P appeared to resolve at least some of these problems, and as such it offered hope to those wishing to see the UN adopt a more assertive response to the grossest of human rights abuses. But, using stalemate over Syria as its backdrop, this article demonstrates the dubiousness of the claim that such a normative development can ever trump the hard edged political and strategic factors which determine when states will accept and/or participate in the use of force, and it suggests a radical solution to the dangers inherent in R2P's intimate association with military intervention.

## **Keywords**

Security Council, norms, Responsibility to Protect, Syria, military intervention

## **Introduction**

Amidst the burst of interventionary action which characterised the United Nations Security Council's (UNSC) activities in the 1990s, Adam Roberts observed the 'pushing and shoving' which the Council had to undertake in order to 'make the awkward facts of a crisis fit the procrustean bed of the UN Charter' (1993: 440) and the tension between state sovereignty and human rights which the Charter embodies. On first acquaintance with the now voluminous body of literature on the Responsibility to Protect (R2P), one could easily be drawn to the conclusion that, in its formulation and subsequent adoption, the concept marked a damascene moment for international society which enabled it to escape this normative straightjacket. Further examination, however, demands greater circumspection; in the

context of the long and often inglorious history of the UN's attempts to satisfactorily marry its obligations to state sovereignty and human rights, what impact has the adoption of R2P really had in terms of the UN's use of force?

This article seeks to contribute to the debate over the significance of R2P. It will show that, whilst R2P constitutes an important move in international society's attempt to determine how best to address gross human suffering in a world of sovereign states, it is ultimately on this broader objective, rather than on R2P itself, that we should focus our analysis. R2P provides us with an understanding of sovereignty and from this it presents a set of broad-based policy options which enable us better to pursue the greater goal. But it is transmutable, at least with regard to the policy options to which it gives rise, as the stark differences between its 2001 and 2005 incarnations clearly demonstrate.

In this vein this article advocates and explores the possible implications of a specific change to the R2P as currently conceived, namely the excision of its non-consensual, coercive military aspects. It argues that three benefits would follow from this. Firstly, whilst such a move would not deprive the UNSC of the opportunity to resort to force outside the R2P mechanism – since the Council has such power by virtue of the UN Charter, not R2P – it would remove any notion of automaticity and significantly reduce ambiguity regarding the initiation of R2P-justified moves leading eventually to coercive military action. As such, the proposed amendment would reassure those states which harbour genuine concerns over the association of R2P with forcible intervention. Secondly, it will deprive those who cite such fears as a cloak for ulterior reasons for wanting to prevent intervention of a means of rationalising and justifying their stance. Finally, at a time when power is shifting in favour of those who have traditionally been most protective of sovereign prerogatives and most doubtful about recourse to force, there is much to be said for acting to preserve and cement

those aspects of the R2P which enjoy more widespread support and to avoid cross-contamination through arguments over force and regime change.

The article proceeds in three parts. The first sets R2P in historical context by examining post-1945 state practice, showing how, through an often slow and inconsistent process characterised as much by cajoling and acquiescence as by enthusiasm, the UN membership has come to adopt a more expansive, human-focused view of state sovereignty, culminating in acceptance of the R2P. Part two examines the concept's often uncomfortable relationship with the use of force, before part three sets out the case for extracting the non-consensual, coercive use of force from the R2P remit and examines the implications of doing so.

### **From non-intervention to the 'Responsibility to Protect'**

In his 2011 report on R2P, the UN Secretary General (UNSG) Ban Ki-Moon argued that the notion that '[s]overeignty endows the State with international and domestic responsibilities, including for the protection of populations on its territory ... is not a new or radical idea.' He continued:

In 1945, the drafting committee in San Francisco, referring to the domestic jurisdiction clause of Article 2(7), declared that if fundamental freedoms and rights are 'grievously outraged so as to create conditions which threaten peace or to obstruct the application of the provisions of the Charter, then they cease to be the sole concern of each State.' (Ban, 2011)

This quote is often cited (Strombeth et al, 2006: 24; Sills, 2004: 62) to support the point which the UNSG seeks to make here, and it is correct that at the San Francisco Conference where the Charter was drawn up the assembled states displayed a degree of sensitivity to the

notion that states must respect the human rights of their citizens. In the immediate aftermath of the atrocities of the Second World War it would have been remarkable had it been otherwise. But closer examination of the historical record shows that such concern was closely circumscribed. When the committee to which the drafting committee reported came to consider the above quoted observation (which in fact related to Article 1(3), not Article 2(7) as the Secretary General suggested) it was the need to guard against the impression that ‘the Organization should actively impose human rights and freedoms within individual countries’ that won the committee’s strongest endorsement (UNCIO, 1945: Vol. 6, 325). The balance between state and individual rights that delegates agreed at San Francisco was struck firmly in favour of the sovereignty of the former (Morris and Wheeler, 2012).

This desire to avoid the establishment of an overly interventionary organisation is most clearly evidenced by the manner in which the Conference dealt with the Charter’s non-intervention principle, found in Article 2(7), which disbars UN intervention ‘in matters which are essentially within the domestic jurisdiction of any state’. Initially intended to apply only to the UNSC pursuant to its powers regarding pacific settlement of disputes, this principle’s scope was dramatically widened by a proposal from the Four Sponsoring Governments (i.e. the USA, USSR, UK and China) that it encompass all aspects of UN activity, though with the explicit and crucial exception that the principle would not apply to UNSC enforcement action under Chapter VII of the Charter. Such an amendment was necessitated, it was explained by the US delegate, by the ‘broadening of the scope of the Organization’ to include social, economic and humanitarian issues. This expansion, he proclaimed, constituted ‘a great advance’, but it had nevertheless to be made clear that ‘the Organization would deal with the governments of member states [and would neither] penetrate directly into the[ir] domestic life ... [nor] go behind the[m] ... in order to impose its desires’ (UNCIO, 1998: Vol. 6, 508-509). On the basis of this rationale the change was overwhelmingly approved. It was this same line

of reasoning which led to the Charter prohibiting states from using force in their *international* relations while leaving open to them the option of ‘using force within ... metropolitan area[s] to put down a revolution or other disturbance’ (Goodrich and Hambro, 1949: 103), and to the Council being granted authority to act in order ‘to maintain or restore *international* peace and security’ (Art 39) once it had determined that peace was in jeopardy.

Reflecting on these aspects of the Charter, Ian Hurd has recently mused over the fact that ‘there is no international legal category of a “threat to domestic peace and security” which might serve as the counterpart to the idea of a “threat to international peace and security”’ and to consider how the ‘Security Council has over its history employed a series of devices to overcome this limitation’ (2012: 36). The process of circumvention to which Hurd refers began early in UN history when, in 1946, the UNSC pronounced that the nature of Spain’s fascist Franco regime constituted a matter of ‘international concern’ which was not ‘essentially within [Spain’s] domestic jurisdiction’ (Higgins, 1963: 78). Such a finding could have amounted to a major erosion of the Charter’s non-intervention principle, but the rapidity with which the Council took this first step proved a very poor indicator of the path that it would subsequently tread; as intra-state conflicts claimed the lives of thousands (and sometimes millions) of people throughout the Cold War (Harff and Gurr, 1988), the Council stood largely idle. Such inertia stemmed from a complex and varied combination of factors. It was, in part, a consequence of the all-consuming geostrategic logic of the day, as well as of narrower national interests, including at times the desire to avoid pro-interventionary precedents. That such concerns could be presented in the legitimising cloak offered by the principle of non-intervention was for some a mere convenience, but for many of those with recent experience of colonialism the principle was a genuinely valued safeguard of state independence (Jackson, 1993: 23-4). Meanwhile for all states the recognition that, in a world of superpower distrust and hostility, conflict almost anywhere had the potential to lead to

superpower conflagration with repercussions everywhere, served as a cautionary brake on intervention (Bull, 1977; Wheeler, 2000).

The end of the Cold War lifted the shadow of great power conflict, significantly reduced geostrategic rationales for supporting human rights violating regimes, and heralded a period of preponderance for western powers and the liberal values which they espoused. It was in this more propitious context of the 1990s that the UNSC was called upon to consider intervening in a series of cases involving humanitarian emergencies arising from the actual or anticipated mass killing of innocent civilians and/or the breakdown of state authority. The Council approached these with varying degrees of enthusiasm, and where mandates for action were issued they too varied in terms of their palliative impact on the suffering. Nevertheless, practice during this period undoubtedly signalled a greater disposition on the part of the UNSC to determine that intra-state humanitarian emergencies fell within its legitimate purview and consequently, as the twentieth century drew to a close, UNSG Kofi Annan suggested that there was evidence of a ‘developing international norm in favour of intervention to protect civilians from wholesale slaughter’ (United Nations, 1999). The following year the UNSG conceded that his suggestion had generated considerable controversy, with critics condemning “‘humanitarian intervention’ [as] cover for gratuitous interference in the internal affairs of sovereign states’ and bemoaning a pattern of inconsistent action the only common feature of which was that ‘weak states [were] far more likely to be subjected to it than strong ones’ (Annan, 2000: 48-49). Conscious of these concerns as he was, Annan nevertheless called upon UN members to address what he termed the ‘dilemma of intervention’: if ‘both the defence of humanity and the defence of sovereignty are principles that must be supported ... which principle should prevail when they are in conflict’ (ibid.)?

The response to the UNSG's clarion-call is now well documented, but a very brief résumé of events is required here in order to illustrate how, even over its as yet short life, R2P has morphed over time. The concept first came to prominence as the centre-piece of the report of the Canadian sponsored International Commission on Intervention and State Sovereignty (ICISS). The Commission argued that the key to resolving Annan's dilemma lay in a two-fold proposition: firstly 'State sovereignty implies responsibility, and the primary responsibility for the protection of its people lies with the state itself'; and secondly that '[w]here 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' which entails the responsibilities to 'prevent', 'react' and 'rebuild' (ICISS, 2001: XI).

These core tenets of ICISS's espousal of the R2P secured approval at the UN's 2005 World Summit, although much of the content of the ICISS report fell victim to the diplomatic machinations required to secure global consensus (Bellamy, 2009; Hehir, 2012). The R2P was eventually enshrined in paragraphs 138-39 of the Summit's Final Outcome Document, subsequently endorsed by the UNSC in April 2006 (United Nations 2005; United Nations 2006), and with a view to 'turn[ing] promise into practice, words into deeds' (Ban 2008) UNSG Ban Ki-moon set about developing an implementation framework for R2P, culminating in his report on 'Implementing the Responsibility to Protect' (Ban 2009; also Bellamy 2010). Reflecting closely the Summit Outcome Document, the Secretary General laid out a 'three pillar' approach in which 'Pillar one [relates to] the enduring responsibility of the State to protect its populations ... Pillar two is the commitment of the international community to assist States in meeting those obligations, [and] Pillar three is the responsibility of Member States to respond collectively in a timely and decisive manner when a State is manifestly failing to provide such protection'. The Report makes clear the UNSG's view that

it should not be ‘assumed that one [Pillar] is more important than another’, but today the interplay between the three pillars remains a matter of heated contestation.

### **The Responsibility to Protect and the Use of Force**

In R2P’s antecedents, conception, gestation, articulation and ultimate adoption, the question of when and under what circumstances it might be deemed legitimate to resort to coercive military action has been a central bone of contention. For the majority of the UN’s existence there has been little appetite for the employment of force by external actors to address human rights violations within states. The end of the Cold War did herald a notable change in this position, but even here a number of caveats must be attached to any assertion that the Council had at this stage resolved what Kofi Annan was later to term the dilemma of intervention. Firstly, the breadth and depth of support for Council intervention was limited, both within and especially outside the chamber; even when calls for action were channelled through the UNSC many states remained highly sceptical, often inclined to acquiesce to intervention rather than actively support it. Notable amongst such sceptics were key regional players such as India and Brazil, and even more importantly two of the Council’s permanent, veto-bearing members, China and Russia.

Ever sensitive about sovereign infringement and cognizant that the UN was created to prevent rather than propagate wars, intervention sceptics premised whatever limited support they gave to Council intervention on the caveats that it should only authorize armed action to protect fellow humans in exceptional circumstances such as genocide and mass killing and where the costs of military action are massively outweighed by the moral consequences of inaction (Wheeler and Morris, 2006). But unease over the interplay between interests and the selectivity of action as much as normative disputes over sovereignty coloured the intervention



debate during this period. Western championing of the interventionary agenda centred on advocacy of a *right* rather than a *duty* to act and did not extend to cases where the taking of action might impinge upon important strategic or economic interests, or the costs – be they material or political – appeared to be too high (Ignatieff, 2005). Consequently, when key members were insufficiently interested to act - as was most notoriously the case in Rwanda - the Council remained effectively inert whilst millions fell victim to conflict, and when the interests of veto-bearing members clashed – as over Kosovo – it succumbed to veto- (or veto threatened) paralysis.

It was, as noted above, the desire to address and remedy these various issues that gave rise to the R2P and consequently the concept is intimately bound up with questions of when and how to employ force for humanitarian purposes. The acuteness of diplomatic sensitivities over the matter was apparent to the ICISS from the outset. Steps such as the dropping of the term ‘humanitarian intervention’ from the Commission’s title (Bellamy, 2009: 36) and the report’s headline assertion that ‘prevention is the single most important dimension of the responsibility to protect’ (ICISS, 2001: XI) were amongst the measures taken to reorient the concept, designed to present it as something more than a legitimisation of old-style forcible humanitarian intervention. Yet the picture was far from clear: the vagueness of the report’s prevention and rebuilding provisions gave them the appearance of being something of a ‘tacked on’ diversionary element (Bellamy. 2009: 62); they were contradicted by declarations such as that the R2P ‘implies above all else a responsibility to react to situations of compelling need for human protection’ (ICISS, 2001: 29. See also Hehir, 2012: 41); and they contrasted in terms of specificity with the report’s discussion of ‘threshold criteria’ for forcible intervention and - even more controversially – with its discussion of sources of authority for intervention beyond the UNSC.

In conjunction these factors resulted in significant levels of scepticism amongst many states; the all too apparent diplomatic reality was that a conception of R2P which appeared to privilege coercive military force was unacceptable to too many UN members for it to form the basis of an international consensus. The version of the R2P which eventually emerged from the 2005 World Summit reflected these tensions, most particularly through the removal of references to criteria for intervention and potential authorisation outside of the UNSC. For many the result was so dilute an incarnation of the original ICISS concept as to be little more than ‘a political catchword that gained quick acceptance because it could be interpreted by different actors in different ways’ (Stahn, 2007: 102). But as Michael Byers (2004) has pointed out, ambiguity is intrinsically symptomatic of the negotiating process and where issues are as contentious as the use of force is, its intentional inclusion may be the only means by which consensus can be achieved. Hence whilst ‘indeterminacy’ may have been a ‘problem’ for some (Bellamy, 2010: 161), for those who were more cautious about the liberal agenda it constituted a positive move away from the more specific force-related elements of the ICISS report and a *sine qua non* for agreement.

In light of such manoeuvrings it is perhaps hardly surprising that, in terms of state practice relating to the most contentious cases, R2P’s post-2005 history is somewhat chequered, especially if judged against the great expectations engendered by the ICISS report and, even more so, by much of the scholarly comment on the topic (Hehir, 2012: 4-5). Indeed, when it comes to authorising non-consensual, coercive military force, with one possible exception, R2P has failed to provide the panacea which Kofi Annan sought back in 1999. The possible exception is the UNSC-mandated, NATO-led intervention in Libya where it was widely (Bellamy, 2011; Dunne and Gelber, 2014; Thakur 2011), though not unanimously (Hehir, 2013; Morris, 2013) argued that the concept played a pivotal role in shaping the international response. Whatever the merits of this particular argument, what

does appear clear from the breadth of negative responses to NATO action (ICRtoP, 2012) is that the manner in which the alliance interpreted and implemented its mandate in Libya did much to confirm the worst fears of those who had long maintained a significant degree of scepticism over the use of force to address gross human suffering (Newman, 2013).

Reflecting on the Libya-Syria nexus even R2P champions such as Gareth Evans have conceded that, post-Libya, ‘consensus has simply evaporated in a welter of recrimination’ (2012), and whilst it cannot be doubted that non-R2P factors also played a significant part in motivating some of the opposition to Council action over Syria (Buckley, 2012) - and some even refute the impact ascribed to the Libyan case (Bellamy, 2014 and Gifkins in this issue) - there is good reason to connect inaction in Syria with action in Libya. Crucially much of the evidence relates to Russia and China, the two non-western, veto bearing members of the Council. Indeed when Syria was first discussed in the Council, Russia asserted that the ‘international community [was] alarmed’ by the prospect that Libya might become ‘a model for future actions of NATO in implementing the responsibility to protect’ (United Nations, 2011a), whilst in similar vein China later stated its opposition to ‘military intervention under the pretext of humanitarianism’ and ‘externally imposed solution[s] aimed at forcing regime change’ (United Nations 2012a). With Russia’s determination, expressed by its Foreign Minister Sergei Lavrov ‘not [to] allow the Libyan experience to be reproduced in Syria’ (RIA Novosti, 2012. See also Kurowska, 2014) and similar sentiments echoing in Chinese diplomatic quarters (Liu and Zhang, 2014) it is hard to dissent from Jennifer Welsh’s view that ‘[i]t is difficult to fully explain this showdown in the council without understanding the impact of the council’s *second* resolution with respect to Libya, Resolution 1973’ (2012. Original emphasis).

Welsh’s emphasis on Resolution 1973, the resolution which authorised the use of force in Libya, highlights a central problem for R2P, namely the fact that whilst, in extremis,

forcible intervention may offer the only chance to alleviate gross violations of human rights, it nevertheless remains apparent that for a large proportion of international society support for the concept is inversely proportionate to the probability that its invocation will result in recourse to such force. The root cause of such anxiety is complex and multifaceted. As previously noted, throughout much of the UN's history questions have been begged over whether, through military means or others, it is constitutionally appropriate for states to intervene in the so-called domestic affairs of their sovereign equals, whilst those (invariably powerful) states which answer this question in the affirmative have often been suspected of harbouring ulterior motives. Constitutional and motivational anxieties are compounded by concerns that military endeavours are *in practice* an ill-suited means of addressing humanitarian crises, destined to fall victim, as Roland Paris argues, to the 'deep tensions inherent in the strategic logic of preventive humanitarian intervention' (2014: 570).

These concerns underpin the treacherous terrain of interventionary politics. They have long retarded the UN's attempts to fit the round peg of human rights into the square hole of state sovereignty, and they lay at the heart of the malady which the R2P was designed to cure. In this it has not been without success, heralding a hitherto hard to imagine coalescence of global opinion over the proposition that, in principle, the grossest of state violations of human rights fall unequivocally within the Council's remit. Yet even here the situation is not wholly clear, since insofar as they might militate in favour of the use of force, the chamber's R2P-based responsibilities may conflict with its ultimate *raison d'être*, namely minimising inter-state conflict and maintaining international order. When our concentration is focused on human rights abuses *by* states *against* their citizens it is all too easy to overlook the intrinsic merits of such order for both states and individuals (Bull, 1977: 93-8), but it is important to recognise the potential within R2P to generate contradictory obligations for the UNSC (Morris, forthcoming 2015). How, when faced with the actual or potential gross

violation of human rights, is the Council to react if such reaction necessitates taking military action which may simultaneously threaten international order and yet prove ineffective in alleviating suffering?

Yet rather than seeing R2P as a source of obligatory contention within the Council, its advocates, as Chris Brown has argued, perceived it as an ‘inherently anti-political’ means by which to ‘to avoid ... the toxic politics of previous approaches to interstate intervention’ (Brown, 2013: 425). But this was, as Brown observes, ‘a very bad idea’ since any form of intervention is ‘inherently a political act’ (ibid.); intervention imperils the compact of coexistence on which international society is premised and as the nature of the incursion becomes less supportive of the state authorities and more coercive the more apparent this becomes. As Edward Newman has noted, the ‘controversies which exist [over R2P] are a reflection of the broader fault lines in international order’ (2013: 239) and interventions involving the deployment of non-consensual, coercive military force prise such fault lines open like no others (Rotmann et al, 2014). The desire to maintain a sense of the political does much to explain the dilution to which R2P was subjected at the 2005 World Summit, particularly with regard to the removal of references to criteria for action. It also evidences the unfeasible nature of any attempt ‘to produce some kind of algorithm that will give a general answer to the question of what is right and what is wrong’ and highlights the need for ‘the exercise of judgement ... that takes into account the totality of the circumstances’ (Brown, 2003: 42-43). In a world of limited resources, competing obligations and interests, and considerable uncertainty, states must seek to balance a plethora of demands whilst simultaneously attempting to fathom the likely moral, legal, political and strategic implications of their acts and omissions and the actions and reactions to which they might lead (Gallagher, 2012, Hehir, 2012). This is the essence of politics and it cannot be circumvented by R2P or similar normative constructs.

## **Extracting Non-consensual, Military Coercion from the R2P**

The preceding analysis suggests that whilst it might be premature to bid RIP to R2P as a whole (Rieff, 2011), its non-consensual, coercive military aspect is in far from robust health. Fallout from intervention in Libya and stalemate over Syria are the most telling *symptoms* of this affliction, but discord over the issue of non-consensual, military action as a response to gross violations of human rights is rooted far more deeply in international politics and hence in the history of the UN and debates over the appropriate balancing of human and state rights. For some the most appropriate remedy lies in fundamental changes to the institutional apparatus within which R2P is grounded and upon which it depends for its implementation (Hehir, 2012; Pattison, 2010). But such proposals face an array of political and practical hurdles and even their advocates accept that they are only achievable in the long term (Pattison, 2010: 219).

Significant, if less radical supplements to or reinterpretations of the R2P have been offered in the form of the Brazilian government's 'Responsibility while Protecting' (RwP) (United Nations 2011b; Prawde, 2014) and Ruan Zongze's (2012) notion of 'Responsible Protection'. RwP seeks to emphasise the preventive aspects of the R2P, but in the immediate context of this discussion its greatest import lies in its call for appropriate analysis, against prudential criteria, of action or inaction in advance of any resort to force, and its insistence that, once action is undertaken, the Council adopt more robust monitoring and review processes. In part building on the RwP initiative, Zongze's proposal additionally emphasises the need for would-be interveners to focus exclusively on humanitarian purposes, and to accept responsibility for post-intervention reconstruction, but it expresses profound scepticism over the ability of military means to deliver humanitarian outcomes. There is considerable merit in elements of both of these proposals, but for different reasons neither

adequately addresses the problem which the UNSC is now facing with respect to the R2P. The notion of Responsible Protection is too heavily imbued with anti-Western rhetoric to form the basis for Council-wide agreement, whilst the impact of RWP's criteria for action is likely to become apparent too late in the Council's deliberative processes to fully assuage deep-seated fears over the eventual use of force and, moreover, its monitoring aspects necessitate a level of Council micro-management over operational decisions which is unfeasible once military action has commenced. We must, therefore, look for an alternative remedy and it is in this vein that the proposal that R2P be amended to exclude recourse to non-consensual, coercive military action is made (Morris, 2013).

It must be conceded at the outset that the excision advocated here runs contrary to the spirit of the initial challenge which Annan set states in 1999 when he posed his dilemma of intervention. Similarly, it would be problematic in terms of Ban's 2009 R2P-implementation framework which, according to the UNSG, depended on having three pillars of equal length otherwise 'the edifice ... could become unstable' and of sufficient strength to ensure that it does not 'implode and collapse' (Ban, 2009). But the preceding analysis suggests that such instability is already evident and implosion and collapse are far from unforeseeable. This claim should not be overstated for, as Alex Bellamy has shown, post-Libya the UNSC has continued to invoke R2P language and logic in a number of cases (2014: 37-40. Also Gifkins in this issue.). But as Aidan Hehir shows in his contribution to this special issue, in its deliberations over R2P the UNSC's attention has remained tightly focused on host state rather than international responsibilities, and where it has chosen to mandate the deployment of UN personnel it has done so only with the consent of the authorities of the target states in question. Hence however commonplace citation of R2P may have become, we can still conclude that the concept currently shows no signs of facilitating intervention involving, or potentially involving, use of non-consensual, coercive military force. The proposition offered

here is that removal of the most coercive element of pillar three from the R2P repertoire will safeguard the concept's consensus-based preventive, capacity-building and assistive elements, ensuring that future Libyas cannot occur under the R2P banner. Hence it will inoculate such activities against the toxicity and potential normative contamination of debate over the non-consensual deployment of military forces. At the same time it will only deprive the Council of that which, at present, it is incapable of utilising.

It should also be borne in mind that the proposal made here is not for the wholesale discarding of Pillar Three's Chapter VII aspects. Indeed, R2P-recourse to some elements of Chapter VII must be maintained, since paragraph 139 of the 2005 outcome document makes explicit reference to it, and the UNGA has shown itself to be very largely opposed to revisiting its 2005 decision (Bellamy, 2010). But a tailored approach to the amendment of Pillar Three is not only necessary, it is for two reasons also desirable. Firstly, it quite obviously preserves R2P recourse to key Council powers, including that under Article 40 which enables the chamber to 'call upon the parties ... to comply with ... provisional measures' such as a cessation of hostilities or withdrawal of armed forces and, even more significantly, its ability under Article 41 to impose sanctions not including the use of force. But beyond this it also enhances the possibility that the Council will actually utilise such powers, for whilst the notion of a truncated yet enhanced Pillar Three may at first glance seem oxymoronic, careful consideration of the UN's historical record in addressing the issue of gross human rights violations suggests otherwise.

This assertion is premised on two related arguments. Firstly, excision will remove any notion of automaticity and significantly reduce any ambiguity regarding the initiation of R2P-justified non-military sanctions leading eventually to the use of coercive military action. The value of the former is recognised even by some of R2P's strongest advocates, as Gareth Evans' concession that, post-Libya, there is a need 'to avoid the "slippery slide" argument



which ... mak[es] some countries unwilling to even foreshadow non-military measures ... because of their concern that military coercion would be the inevitable next step if lesser measures fail ...' (2012) shows. The excision of non-consensual, military coercion addresses this 'slippery slide' argument by removing the process end-point which lies at the heart of states' fears. But beyond this it will also remove any ambiguity from the R2P, precluding claims that resolutions passed pursuant to it somehow implied that the use of force was also authorised even where this was not made explicit. Interventions in Kosovo and Iraq stand as (admittedly pre-R2P) examples of such assertions (Byers, 2004). Indeed, excision may actually enhance the willingness of Council members to formulate and sign up to resolutions which make explicit the fact that they are acting pursuant to the international community's residual R2P (something they failed to do even over Libya (Morris, 2013)) if they can do so safe in the knowledge that R2P cannot ultimately lead to a use of force of which they do not approve.

Secondly, in addition to placating genuine concerns of the types articulated above, excision will deprive those who cite such fears as a cloak for ulterior reasons for wanting to prevent intervention of a means of rationalising and justifying their stance. Suspicion over such behaviour is a perennial feature of the intervention debate and certainly permeated the diplomatic thoughts of many, for example, over Russia's opposition to UNSC action over Syria. Accordingly, France spoke for many when it accused Russia of 'merely want[ing] to win time for the Syrian regime [which Russia supported] to crush the opposition' (United Nations, 2012b). The disentangling of genuine and ulterior motives for citing such fears is inherently problematic, but by addressing both aspects of the problem the amendment suggested here avoids the need, at least in this context, to even attempt such interpretational divination.

In addition to the fact that the Council will maintain, within its R2P remit, many potentially significant Chapter VII powers, it is crucial to understand that nothing in the proposal made here will deprive the chamber of its ability to authorise force to address humanitarian crises outside of the R2P should its powers within the concept prove inadequate. The Council's power to authorise the use of force stems, one must remember, not from the R2P, but from the Charter itself. In such circumstances Council members will be required, just as they are when contemplating authorising the use of force in other situations, to balance the pros and cons of such action and to exercise the political judgement which, as discussed above, R2P misguidedly sought to eliminate from such decision making.

Moreover, excision would not constitute a mere return to the status quo ante-R2P. Instead it would offer a more propitious environment for the Council to authorise the use of force outside of the R2P framework than that experienced prior to concept's adoption. There are two reasons for suggestion this. Firstly, pre-R2P, the Council often embroiled itself in debates over whether domestic violations of human rights, no matter how gross, fell within its authority. The UN's endorsement of R2P provides an unequivocal affirmative answer to this question; however one amends the third pillar of the R2P, this constitutional genie is now out of the bottle. Secondly, where, pre-R2P, Council members were persuaded that it was appropriate to intervene to address gross human rights violations, they were obliged by the Charter to determine the existence of a threat to international peace and security in order to conform to the edicts of the Charter's Article 2(7), the very 'pushing and shoving' to which Roberts was referring back in 1993. But R2P removed this necessity by establishing the principle that the Council may legitimately resort to force to address gross violations of human rights irrespective of the presence of such a threat. This principle would endure even if the extraction recommended here is performed; outside the R2P it would still be *technically* necessary to determine a threat to the peace, but as past Council practice has often shown, in

the political confines of the UNSC members have proven hugely adept at attaching the broadest of interpretations to such determinations (Morris, 1995). With the principle established and no restraining Charter definition of what constitutes a threat to the peace, the Article 2(7) exception now offers an even freer licence to the Council to authorise force for humanitarian purposes where its members consider it appropriate to do so.

Just how significant the proposed limitation of R2P could prove to be in the future depends on three inter-related questions: firstly, what is the nature of the current disagreement over R2P; secondly, how fixed are attitudes to R2P; and finally, how might the power and influence of key actors in the debate change over time? With regard to the first of these questions, there seems strong ground for suggesting that there is relatively little opposition to the notion that sovereignty denotes a responsibility on the part of states to their citizens. But this still leaves open at least two understandings of the current normative stand-off. The first interpretation of the clash, evidenced in much of the post-Libya practice and commentary referred to above, is that there is almost unanimous support for the central tenets of R2P, but disagreement emerges once the operationalisation of this notion passes from the consensual to the coercive, and most acutely where coercive action is military in nature. If this is the case then, in the manner already described, the amendment proposed here is likely to prove significant. But as Newman argues, there is an alternative reading of the situation in which widespread acceptance of the notion that sovereignty entails state responsibility to domestic populations remains married in the eyes of many states to a conviction that individual states rather than international society collectively remain ‘the legitimate agent to resolve problems within their borders’ (2013: 243). If this is correct then the implications for R2P’s third pillar may be too pervasive for the proposal made in this paper to address; the removal of coercive military action would palliate some of the concerns to which such

thinking gives rise, but it would still remain the case that the P5-agreement on which the remainder of pillar three activity would depend would be limited, if not altogether absent.

Whichever of the above depictions best captures the current R2P predicament, there remains the possibility that views currently held by states may change. Crucial amongst the states to consider in this regard is China, a long-time champion of traditional understandings of sovereignty and opponent of intervention, yet a state which, over more recent years, has shown a far greater willingness to countenance the key tenets which underpin the R2P (Alden and Large, 2010). This may have more to do with a reassessment of national interests than with an embrace of R2P-style ‘missionary humanitarianism’ (Verhoeven, 2014: 67) and reservations over the use of force, exacerbated by NATO intervention in Libya, remain acute. But analysis suggests that China does, nevertheless, now accept ‘the value of peaceful measures on the spectrum of R2P implementation’ (Liu and Zhang, 2014: 422). In Beijing’s eyes, it is likely that an R2P framework shorn of its coercive military elements would be welcome, leading to a greater inclination to support the newly formulated concept.

Of course China is just one player in a multi-state environment, but given its predicted material trajectory over coming decades its stance is likely to be the most significant amongst those who have traditionally cast doubt on the veracity of intervention. Hence, consideration of China brings us to the third question: how might changes in the global distribution of power affect the debate? For some, such as Jennifer Welsh, a global power shift may augur badly for those who support the concept of the R2P. Such concern stems from the fact that, as Welsh has observed:

RtoP was born in an era when assertive liberalism was at its height, and sovereign equality looked and smelled reactionary. But as the liberal moment recedes, and the distribution of power shifts globally, the principle of sovereign equality may enjoy a comeback (2010: 428).

Yet the preceding discussion suggests that for many states, including China and other rising powers such as India and Brazil (Rotmann et al, 2014), the principal objection is to the use of force for humanitarian purposes rather than to the other aspects of R2P. It follows that any normative assault which a redistribution of power might instigate could be deflected, if not wholly counteracted, by the removal from R2P of this primary point of contention.

Deliberating over questions such as these presents a number of possible R2P-related scenarios. It is not possible to map these with any degree of certainty, but the prospect of increasing dissent over R2P looks far from remote. If this is correct then removing its most contentious element, the non-consensual use of coercive military force, is likely to prove a price worth paying for the protection it will afford the preventive, capacity-building and supportive elements of the concept and the enhancement it may bring to the use of its less coercive Chapter VII aspects. In an imperfect world – and in the absence of (extremely unlikely) fundamental Charter reform – this is as close to a remaking of the procrustean bed as we are likely to get.

## **Conclusion**

The central contention of this article, namely that R2P should be amended through the removal of its non-consensual, coercive military aspects, may at first glance appear to constitute a retrograde step, a betrayal of the concept's original *raison d'être*, and a capitulation to the forces of illiberalism. But this would be wrong for a number of reasons. Firstly, even devoid of its non-consensual, coercive military aspects, R2P will constitute yet another step in international society's journey towards ensuring that state sovereignty does not act as a veil behind which the grossest of mass human rights violations can be committed

with impunity. A shared understanding of sovereignty as responsibility will remain at its heart, its preventive, capacity-building and assistive elements will be preserved - and, in all likelihood strengthened - and ultimately, albeit outside the R2P framework, the UNSC will maintain its ability to authorise coercive military action for humanitarian purposes where it sees fit.

Secondly, R2P and the wider humanitarian agenda of which it is part must be judged against the appropriate historical benchmarks. It would, for example, be highly misleading to suggest that the version of R2P advocated here is unacceptable because it falls short of the standard set by ICISS, for as the 2005 World Summit demonstrated, the majority of international society was unwilling to endorse much of what the Commission proposed. We must look, therefore, at the bigger picture. In doing so we see that, contrary to Ban Ki-moon's claim, R2P involves a fundamental normative shift from the position taken in 1945, and this would remain the case even if it is stripped of its most coercive aspect. Similarly, if we compare the situation with that which prevailed during the Cold War, the level of progress is abundantly obvious. Moving forward the comparative terrain becomes more opaque, but assessment remains positive. Post-Cold War the UNSC showed itself prepared to authorise a number of interventions, but it was able to do so largely because of the material and normative dominance of the western powers which characterised the chamber at the time, and its actions invoked as much disaffection as support amongst the UN's wider membership. Given the rarity of such ascendance in the UN era, this period is likely to prove a poor comparator, but it is still notable that whilst a reconfigured conceptualisation of R2P might lack the coercive edge which characterised the interventions of this period, its support will be far more extensive and its effectiveness probably little reduced. So it is only against the outcome of the 2005 World Summit that accusations of back-tracking have any real leverage and even here the picture is mixed. R2P-2005 accepted the possibility of coercive military

action, but it did so only on a case-by-case basis and it made such action dependent on Council authorisation. On paper what is proposed here could be seen as a retreat from this stance, but for the reasons given above, in reality this assessment is likely to prove hollow. Indeed, given the initially shaky foundations on which the 2005 consensus was built and the subsequent erosion resulting from intervention in Libya, the proposal offers the prospect of shoring-up the wider R2P-2005 construct.

Finally we must make comparative assessments in light of what is achievable and sustainable rather than merely desirable. We might sympathise with Navi Pillay, former UN Commissioner for Human Rights, when she lambasted UN members for allowing ‘short-term geopolitical considerations and national interests ... [to] repeatedly take ... precedence over intolerable human suffering’ (United Nations, 2014), but any sense that they will behave otherwise is surely held more in hope than expectation. As Chris Brown has pithily commented, ‘states do not simply clear their in-trays and abandon all other considerations when faced with gross violations of human rights’ (2013: 440). We might wish that it were otherwise, but since it is not we would do well to heed E. H. Carr’s warning over the perils of adopting an approach in which ‘wishing prevails over thinking’ (1946: 8). R2P constitutes a significant step in international society’s ongoing journey towards a fully symbiotic relationship between state and human rights, but it is only one in a series. If one consequence of living in a world of legitimately differing views about world order is the need to shorten the concept’s normative stride so as to garner greater support and enhance sustainability, then we should acknowledge this and act accordingly.

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