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Disputed Norms in International Security and the Changing Notion of Sovereignty:

R2P and the Dilemma of Military Interventions

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Dear Editor,

The Responsibility to Protect, or R2P, is a disputed norm in international security, mainly due to the changing notion of sovereignty and the dilemma surrounding the legality of military interventions on humanitarian grounds. In the aftermath of ethnic-based mass violence in Rwanda, Somalia and Kosovo, R2P, which is based on a three pillar mechanism, was unanimously adopted through the United Nations (UN) General Assembly (GA) resolution A/RES/60/1, with the aim of preventing 'genocide, war crimes, ethnic cleansing and crimes against humanity.'[1] Under R2P, the international community is collectively responsible for militarily intervening in imminent situations of mass atrocities (Pillar III of R2P), after peaceful measures of prevention such as assistance, diplomatic relations, sanctions or arms embargoes under Pillar I and II are inefficient.

R2P was enshrined in Chapter VII (Art 39-51) of the UN Charter, which normatively rests on the *jus ad bellum* principle, the right to conduct war. This principle was established by the just war theory (*jus bellum iustum*) of Roman jurisprudence.[2] While opponents of the just war tradition argue that war is essentially unjustifiable, adepts of *jus ad bellum* claim that the violation of the non-interference principle by the aggressor generates the right to self-defence and defensive retaliation, cited from Art 51 of the UN Charter.[3] R2P extended this provision to domestic contexts of breaches of peace, setting thus international military interventions under the UN mandate as a mechanism to protect domestic populations from mass atrocities or aggression, as

[1] UNGA Res 60/1 (adopted 24 October 2005) UN Doc A/RES/60/1.
[2] Benedict Kingsbury and Benjamin Straumann, *The Roman Foundations of the Law of Nations: Alberico Gentili and the Justice of Empire* (Oxford University Press 2010).
[3] *Jus ad bellum* principle of the just war tradition is activated by six principles; just cause, legitimate authority, reasonable prospects of success, proportionality, last resort and aim of achieving peace.

was the case in Darfur and Libya. [4] Authorisation from a legitimate body, ie the UN, to conduct war is assumed to differentiate international military interventions from a criminal act.

R2P involves an ontological change in the understanding of sovereignty, from 'sovereignty as authority', as interpreted under the Treaty of Westphalia, to 'sovereignty as responsibility' under R2P, in which the 'sovereign' is understood as 'the one who protects'. This shift implies a transfer of sovereignty from the national state to the international community, in which the latter takes the responsibility to protect when the former fails to do so.[5]

Post-Westphalian Sovereignty and Sources of *Opinio Non Juris* Related to R2P

Values of responsibility to protect civilians and human security began to prevail in the 90s, particularly in the aftermath of the Rwandan genocide. An international commitment to preventing genocides and mass losses of lives yielded a change from the concept of fixed, 'absolute and exclusive' sovereignty established by the Treaty of Westphalia to a Post-Westphalian understanding of 'shifting' or 'floating' sovereignty which can be attributed to different actors depending on circumstances. In the new interpretation, the notion of sovereignty is contingent on state's performance to protect its constituents and failure to do so signalises the *Leviathan*'s failure to fulfil the social contract – an (informal) agreement through which citizens transfer their natural individual sovereignty to the *Leviathan*, ie the state, in return for protection and defence 'from the invasion of foreigners, and the injuries of one another'.[6] The state's failure to provide protection generates a vacuum of responsibility, which is temporarily filled by the international community. R2P was adopted with the aim of providing a legal ground for a shift of authority and sovereignty from national states to the international community. The transfer of individual state sovereignty to the international community is assumed.

This shift of responsibility (and implicitly, sovereignty) under R2P, most particularly under Pillar III – military action – is still disputed, despite a series of initiatives at academic, legal and policy

[4] Jess Gifkins, 'R2P in the UN Security Council: Darfur, Libya and beyond' [2016] 51(2) Cooperation and Conflict 148.
[5] International Commission on Intervention and State Sovereignty, *Responsibility to Protect* (2001).
[6] Thomas Hobbes, *Leviathan: or the Matter, Forme and Power of a Commonwealth Ecclesiastical and Civill* (The University of Adelaide, 2016) Chapter XVII.

levels to clarify the status of R2P in international law.[7] The *opinio non juris* related to R2P arises in several forms. Firstly, its adoption as UNGA resolution, which has a non-binding character in international law, sets the implementation of R2P mainly *ad hoc*, with decisions (for intervention or not) being taken by the Security Council on a case-specific basis. Secondly, R2P's position at the intersection of two norms of same rank; the prohibition of use of force on grounds of breaches of territorial integrity of states, enshrined in Article 2(4) of UN Charter and the responsibility to intervene on humanitarian grounds under Art 39-51 of the UN Charter.[8] I argue that R2P can be seen as a mechanism to mediate between these two apparently conflicting or even zero-sum provisions of the UN Charter. Military intervention under R2P can be understood as an exception to the principle of non-interference, by ranking humanitarian principles higher than territorial sovereignty.

A second source of controversy regarding R2P arose from its application outside the UN Charter such as the NATO intervention in Kosovo and recently, US strikes in Syria, which unlocked a significant potential to weaken the credibility and legitimacy of R2P as well as its uniform application.[9] Further analysis is needed to assess whether these actions might be justified by the *ad hoc* character of R2P, given that collective action under Chapter VII of UN Charter is often impeded by veto or threats of veto from permanent members of the Security Council, as in the case of Syria.

Thirdly, military intervention under R2P is legally justifiable only when it is anticipated to improve the humanitarian situation, which is difficult to estimate due to the counterfactual type

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[7] Numerous initiatives at academic and practitioner level – such as Global Centre for the Responsibility to Protect (GCRtoP), International Coalition for the Responsibility to Protect, Global R2P Journal, just to mention a few – aim to advance understanding and operationalisation practices as well as to strengthen normative consensus around R2P. Publications and reports are issued regularly and provide well documented analyses and recommendations on ongoing security crisis. At policy level, the UN Office on the Genocide Prevention and the Responsibility to Protect (UNOPRP) operates mainly on early warning activities and initiating resolutions under Pillars I and II.

[8] The principle of non-interference is also articulated in the Kellogg-Briand Pact (1929) on the renunciation of war, which prohibits war, particularly in the sense of conquest, as an instrument of foreign policy.

[9] Simma Bruno, 'NATO, The UN and the Use of Force: Legal Aspects' (1999) 10 European Journal of Internal Law < http://www.ejil.org/pdfs/10/1/567.pdf> accessed 02 October 2017 and Jordan Paust, 'US Use of Limited Force in Syria Can Be Lawful Under the UN Charter' (*Jurist*, 10 September 2013) <http://www.jurist.org/forum/2013/09/jordan-paust-force-syria.php> accessed 02 October 2017.

of analysis required for this assessment. In other words, it involves arguing for the prevention of a 'non-event', which has not happened yet. [10]

Fourthly, R2P's disputed legal status is related to its imprecise and ambiguous operationalisation. The threshold of transition from Pillars I and II (assistance to nation-states to protect its constituencies, in form of incentives and sanctions) to Pillar III ('timely and decisive' collective [military] response) is set at 'large scale loss of life (…) with genocidal intent or not'.[11] While the threshold to Pillar III should be at a higher level than transition from Pillar I to Pillar II, the question remains, how high and how should 'large scale loss of life (…) with genocidal intent or not' be operationalised.

Argument and Conclusion: Strengthen Legal-Normative Consensus Around R2P

I argue that even if power relations and geostrategic calculations will continue to be dominant in the current international order, particularly in the domain of security and foreign policy, provisions of public international law still matter and can make a difference. Decisions in international relations and global politics are often taken on the account of the logic of consequentialism and to a lesser extent on the altruistic basis of humanitarian intervention, which R2P is embracing. A series of reforms and efforts need to be adopted in order to strengthen R2P and consolidate legal-normative consensus regarding its operationalisation and application, in particular the provisions under Pillar III. Firstly, research and legal outputs generated by the numerous research and policy institutions working on R2P need to be centralised. Secondly, reports and recommendations of the United Nations Office on Genocide Prevention and Responsibility to Protect (UNOGPRP), Global Centre on the Responsibility to Protect and similar forums need to be complemented by follow-up mechanisms to ensure the sustainable implementation of their recommendations and measures adopted under the first two pillars. Thirdly, a stronger role for the International Court of Justice and International Criminal Court could be envisaged, given their role in settling or prosecuting acts of aggression determined under Chapter VII. Fourthly, under Art 64 of the Vienna Convention on the Law of Treaties, it is

[10] Roland Paris, 'Is it possible to meet the 'Responsibility to Protect'?' *The Washington Post* (Washington, 9 December 2014). Guglielmo Verdirame, 'The Law and Strategy of Humanitarian Intervention' (*EJIL:Talk!*, 30 August 2013) <https://www.ejiltalk.org/the-law-and-strategy-of-humanitarian-intervention/> accessed 03 October 2017.

[11] UN Secretary-General Report 'Implementing the responsibility to protect' (adopted 12 January 2009) UN Doc A/63/677.

necessary to clarify whether R2P has the character of a peremptory norm, considering R2P's rapid development from an 'emerging; norm in 2005 to a principle with potential of getting status of customary law through its repeated application. In fact, over 60 UNSC resolutions were adopted under R2P between 2006-2014.[12] Further, mechanisms need to be put in place in order to clarify the relationship between the principle of non-interference and the right to self-defence and humanitarian intervention, and consequently arbitrate in the case of conflicting norms or provisions.

Last but not the least, a concept addressing the dilemma of use of force needs to be developed with the aim of preventing situations in which retaliation of violent actions causing mass losses of lives might be impeded by the decision-making procedure in the UNSC, whose reform is currently illusory.[13] A second Rwanda would put enormous pressure on the international collective security as well as on institutions which are mandated to implement it, such as the United Nations.

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[12] 64 UNSC resolutions have been adopted between 2007 and 2017 under R2P, most of them under the first two pillars. See 'R2P Resolutions' (*Global Centre for the Responsibility to Protect*, 14 September 2017) < http://www.globalr2p.org/resources/335 > accessed 03 November 2017.

[13] Thomas G. Weiss, 'The Illusion of UN Security Council Reform' (2003) 26(4) The Washington Quarterly 147.