

The Responsibility to Protect in International Law

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A Critical Analysis of the Status and Implementation of the Responsibility to Protect in International Law

Background

The 1990s saw levels of human cruelty and violence comparable to that seen during World War II. In Rwanda 800,000 were slaughtered in 100 days, 'a faster rate of killing than the Holocaust',^[1] despite there being 'ample forewarning' of the impending genocide.^[2] Once this 'indifference and callousness' of the international community^[3] had become apparent it led to a 'deep sense of shame',^[4] which was a factor behind the intervention in Kosovo aimed at protecting the ethnic Albanian population. This intervention was not authorised by the UN Security Council (UNSC), leading many to vociferously challenge its legality under the UN Charter, concerned that humanitarian arguments would be abused to justify military interventions to achieve ulterior motives which would infringe state sovereignty.^[5]

What emerged was a conflict between the need to intervene in Rwanda type situations and the need to respect state sovereignty and international law. Reacting to this, UN Secretary-General Kofi Annan challenged the international community to reconcile the two important concepts of the inviolability of state sovereignty and the need to respond to 'to gross and systematic violations of human rights that offend every precept of our common humanity'.^[6]

The Canadian Government established the International Commission on Intervention and State Sovereignty (ICISS), which published its highly influential report in 2001 putting forward for the first time the concept of Responsibility to Protect (R2P) in response to Annan's challenge.^[7] This led to a supportive report from the High-Level Panel on Threats, Challenges and Change,^[8] and most significantly world leaders agreeing to the essence of R2P at the 2005 World Summit.^[9]

Each of these expressions of support characterise R2P differently, but the essence of the concept is fixed. The clearest formulation comes from Secretary-General Ban Ki-moon's 2009 report characterising R2P as comprising of three pillars.^[10] Pillar one asserts that state sovereignty includes a responsibility to protect their population from atrocities. Building on this, pillar two affirms that the international community has a role to play in supporting states in fulfilling this responsibility. Finally the third pillar suggests that if a state does not comply with its responsibility then the international community may take action, through peaceful means at first, but with potentially more coercive measures if necessary.

Introduction

This essay will argue that R2P is not a legal concept; it creates no legal change as it is embedded within the existing international law order. R2P is 'best understood as a reaffirmation and codification of already existing norms'^[11] and as a political concept having political effects. This is not criticism of R2P, but is instead its greatest strength. It allows R2P to command wider support from the international community, especially from states suspicious of changes to the fundamentals of international law.

R2P has 'significantly changed the grammar of political discourse with regard to the prevention and reaction to

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human rights violations' shifting political discourse away from justifying interventions to stop atrocities, to questioning why there has been no intervention. This gives legitimacy to intervention for humanitarian purposes through the UN and making it harder for UNSC members to justify veto use.[12]

However, R2P currently faces serious challenges to its political influence, which it must overcome. First is the perception that it does entail changes to international law, particularly regarding the prohibition of the use of force found in Article 2(4) of the UN Charter. This essay will demonstrate clearly that these fears are unfounded. Second is the damage that failures in the application of R2P have done to the concept, focusing on lack of action in Darfur and Syria, and R2P's use in Libya.

The essay will end with suggestions on how R2P should overcome these issues. It should not advocate and push for military action outside of the UN framework; this would be unrealistic and fatally damage R2P. Instead there must be a focus on developing R2P further, reacting and responding to the lessons of Libya and Syria in order that it can realise its full potential.

Responsibility to Protect

R2P has experienced a rapid growth, moving from mere 'passionate prose' in the ICISS report in 2001 to quickly becoming a 'mainstay of international public policy debates'. [13] This support has shown resilience in the face of a backtracking from influential states a few months after the World Summit, [14] as well as an attempt from avowed opponents of the concept to destroy it. [15] As well as the significant support shown by states, the response from civil society has been encouraging and instrumental to this success; NGOs from all over the world have joined together to support and develop R2P, creating the influential International Coalition for the Responsibility to Protect. [16] Due to these factors R2P can be seen as one of the most 'most dramatic' developments in international affairs [17] and consequently there are 'not many ideas that have the potential to matter more for good, not only in theory but in practice'. [18]

The reason for R2P's rapid adoption is that it provides a satisfying response to Annan's challenge to reconcile sovereignty and the need for action to prevent atrocities. Overall it achieves this by moving away from the language of a right to humanitarian intervention which dominated the debates surrounding the Kosovo intervention [19] to focus on the 'perspective of the victims of human rights violations'. [20]

R2P expresses a responsibility to protect populations from atrocities as an inherent part of state sovereignty. [21] Building on this the Canadian Permanent Representative at the World Summit persuasively argued that R2P strengthens, not weakens, state sovereignty. This is because outside non-military intervention will help states to discharge the responsibilities which sovereignty entail. [22] From this, a state's failure to prevent atrocities does not fall under the 'domaine réservé that excludes interferences from outside'; [23] should a state fail to exercise their sovereignty in this way the responsibility falls to the rest of the international community. This aspect is clearly influenced by the failure over Rwanda.

The international community's responsibility to protect is to be achieved through primarily non-military means, such as developing a better 'early warning capacity', [24] using 'appropriate diplomatic, humanitarian and other peaceful means' to protect populations with a focus on vulnerable states 'which are under stress' to prevent crises from breaking out and to help them 'build capacity to protect their populations'. [25] This approach is more effective than military methods; they are 'easier to initiate and sustain' and avoid the huge risks, costs, and destruction which military action brings. [26] This effectiveness was demonstrated in the response to post-election violence in Kenya. Diplomatic efforts helped prevent the violence from escalating, [27] described by Annan as 'a successful example of R2P at work', notwithstanding the lack of military intervention. [28]

Furthermore this focus fits in with the Third World Approach to International Law, described by Anghie and Chimni, which looks at international law from the perspective of those in the Third World, aiming to develop it 'from a language of oppression to a language of emancipation'. [29] R2P achieves this by focusing on the plight of those suffering and entails 'taking Third World development seriously', potentially leading to significant transfers of 'wealth,

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expertise and opportunity' from affluent to developing nations in order to build their preventative capacity.[30]

If R2P were too heavily linked with military intervention it would be a 'clear barrier to consensus' due to fears that humanitarian justifications would be abused by large and powerful nations, as was the concern with Kosovo[31]. There is less concern of this happening theoretically with R2P's primary focus being on non-military preventative measures; military intervention is a complete last resort. Furthermore a well understood focus on non-military methods should avoid the complicated and controversial questions about the legality of the use of force, which will be analysed in detail below. All this together renders R2P more acceptable to the wider international community, and is the reason why R2P has been heralded as causing a 'significant conceptual shift'.[32]

Legal Status

Due to this conceptual shift R2P is seen by some as resulting in a change to international law. Feinstein argues that R2P 'redefines sovereignty' from being inviolable and absolute as it was for 350 years, to entail 'rights as well as responsibilities'.[33] Thus R2P is characterised as an 'emerging norm'[34] of customary international law, which with acceptance is changing the international legal order.

This is not the case. Bellamy draws on Hobbes to show that this conception of sovereignty is not novel; Hobbes asserted that if the state could no longer perform the function it was given power to do, then it does not qualify as sovereign and is not owed obedience.[35] This is remarkably similar to the idea that failure to protect a population is a failure in the exercise of sovereignty. Furthermore this conception of limited sovereignty is seen throughout international law. In the Island of Palmas case it was noted that 'territorial sovereignty... has a corollary duty' which was to respect the sovereignty of other states.[36] Even the largely permissive 'Lotus Principle' makes it clear that sovereignty is not absolute; states have the right to only do anything which is not prohibited by international law.[37]

Sovereignty's duties were extended towards the protection of populations in the UN Charter with Articles 1(3) and 55 including important statements regarding human rights protections, which Annan argues shows that the Charter was not 'a licence for governments to trample on human rights and human dignity'.[38] Moreover, R2P as expressed at the World Summit applies to genocide, ethnic cleansing, war crimes and crimes against humanity,[39] all of which are prohibited by international law and are *ius cogens* norms[40] from which no derogation is permitted.[41] Therefore it is possible to say that states have the existing duty and responsibility to respect them, regardless of R2P.

Some writers contend that R2P creates a new legal duty on the wider international community to respond to atrocities. Thus Peters writes that R2P has contributed to the evolution of a 'legal obligation' on the UNSC to intervene for humanitarian purposes,[42] and Bannon writes that a 'clearly acknowledged duty' to protect foreign populations was expressed at the World Summit.[43]

This is a misunderstanding and misrepresentation of what was decided at the World Summit. Firstly with regards to military intervention should peaceful means fail, states merely proclaimed that they are 'prepared' to take action on a 'case-by-case' basis.[44] This tentative language points towards 'a voluntary, rather than a mandatory engagement'.[45] This analysis is supported by the fact that the draft wording for this section stating 'we recognise our shared responsibility to take collective action' was rejected, showing that states wanted to avoid assuming an obligation.[46]

Secondly even the vocabulary of a responsibility lacks the 'specific normative content'[47] that would entail that R2P is an obligation; a mere responsibility does not legally create a corresponding duty.[48] Furthermore, as Stahn points out, if R2P were an obligation adopted by states at the World Summit, surely there would be corresponding legal sanctions for noncompliance, yet there are none.[49]

Thus it can be clearly seen that R2P is not a legal concept which creates corresponding legal duties. R2P's formulations of sovereignty and responsibility expressed are a 'rhetorical trick' used cleverly to shift emphasis away from the intervention of the international community, to the plight of those suffering.[50] This way R2P is far more acceptable to a diverse and divided international community, with smaller states concerned about abusive

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interventions, and with larger states concerned that an obligation to intervene would remove discretion from decision making.

The Prohibition of the Use of Force

However there is another, more controversial element of R2P which has an alleged impact on international law. Orford, while agreeing that R2P does not impose any new obligations upon states, contends that it changes international law to confer legal authority on actors to use force in the application of R2P.[51]

The use of force is prohibited in international law by Article 2(4) of the UN Charter and is referred to as being of 'fundamental or cardinal importance'[52] and at the 'cornerstone' of the UN Charter.[53] Given the ostensible strength of the prohibition, Zifcak states that 'it is apparent that the express terms of the Charter do not readily embrace humanitarian intervention'.[54] There two exceptions to this prohibition in the Charter. Article 51 permits force used in self-defence under certain conditions, and most significantly for R2P, Chapter VII allows the UNSC to authorise force in response to a threat to the peace. This is where R2P fits in; it was made clear at the World Summit that under R2P authorisation for the use of force will be made 'through the Security Council, in accordance with the Charter, including Chapter VII'.[55]

Contrary to Orford's assertion, there is ample existing legal authority under Chapter VII for the UNSC to authorise the use of force in response to an atrocity, by classifying it as a threat to the peace. Some, like Damrosch, contend that no authority can be found in the UN Charter to authorise the use of force as a response to internal conflict and atrocities which do not pose a 'transboundary threat to peace and security'.[56] However this is inaccurate; what constitutes a threat to the peace was 'designed to be subjectively determined' by the UNSC for it is an 'open textured' concept.[57] Records from both the Dumbarton Oaks and San Francisco conferences corroborate with this analysis.[58]

Therefore one cannot say that there is no authority for a particular definition of peace and security used by the UNSC; quite simply threats to the peace 'are what the UNSC says they are'.[59] Furthermore in many situations the UNSC has deemed an internal conflict a threat to the peace under Chapter VII before the development of R2P, such as in Somalia[60], Rwanda[61], Haiti[62] and East Timor.[63] Therefore use of force as envisaged under R2P 'would fit securely under Article 42'[64] and consequently R2P does not do anything to change these existing competencies of the UNSC under Chapter VII.[65]

The Security Council and the Use of Force

Overall then, R2P does 'not entail revolutionary changes within the existing legal framework' of international law.[66] This is seen by some as a R2P's major flaw. Being part of the existing international legal framework means that any authorisation of coercive military and non-military measures under Chapter VII of the UN Charter, and so the most drastic tools in the R2P armoury, are subject to the veto power of the permanent five UNSC members.

There were suggestions in the ICISS Report and High-Level Panel Report that the permanent five should refrain from using the veto in face of a large scale atrocity, but this was not taken up at the world summit.[67] Consequently the continuing threat of the veto means that the UNSC risks 'policy paralysis' due to the risk of the veto being misused for ulterior political purposes, leading to a highly selective application of R2P[68] which ultimately discredits its utility.

This sadly has been the case with both Darfur and Syria. In 2003 fighting broke out in Darfur between anti-government groups and the Sudanese government, which reacted by using local militias (known as the Janjaweed) and large scale aerial bombings of the area; both sides committed atrocities against civilians. The result has been over 200,000 deaths and the displacement of some 2 million people, around one third of the Sudanese population.[69]

The response of the international community is widely held to have been a 'conspicuous' and 'abject' failure.[70] Although the crisis broke out before the 2005 World Summit, and the UNSC had taken measures from 2005 onwards

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such as targeted sanctions and an ICC referral, these measures were 'slowly implemented and have proven insufficient to protect vulnerable populations'.^[71] It was not until 2007, with the consent of Sudan, that a major UN peacekeeping force was implemented.^[72] This slowness and ineffectiveness was caused by the SC members' 'geopolitical concerns',^[73] such as China's investments in Sudanese oil, the USA's counter terrorism assistance from Sudan and Russia's lucrative arms contracts. These factors prevented these states from pushing for and allowing swift and meaningful action.^[74]

The UNSC's response to the violence in Syria has been even more disappointing. Syrian civilians 'have borne the brunt' of this violence with allegations of targeting aerial bombings and artillery attacks on civilian areas, bringing 'immeasurable destruction and human suffering',^[75] leading to an estimated death toll of 60,000, with a further 4 million 'in desperate need'.^[76] Despite the clear need for the application of R2P in this situation China and Russia have exercised their veto over three separate resolutions designed to address the crisis. These vetoes are suspected again to be fuelled by geopolitical concerns, such as Russian arms interests and the strategic Tartus naval base.^[77] This situation is made more complicated by Russia and China's reluctance to consent to coercive action after the Libyan intervention, which they feel was taken too far by NATO. This will be discussed below.

These case studies show that R2P 'cannot guarantee' action,^[78] states can still perpetrate atrocities with impunity. Therefore the placement of R2P's reliance on the existing legal framework including Chapter VII could be a fatal flaw. Although its legal status is uncontroversial for it requires no change in international law, it will not achieve its goal of protecting civilians from atrocities if it fails in its practical application.

For this reason some advocate the use of force outside of the auspices of the UNSC. Bannon argues that R2P as expressed at the World Summit actually 'strengthens the legal justification' for this type of unilateral and regional action should the UNSC fail to act.^[79] This assertion is baseless; it was made clear at the World Summit that R2P will operate within the existing framework of Chapter VII for the most coercive actions.^[80] To hold otherwise is a rewriting of what was actually decided and the intentions of those states.

Williams et al make a more sensitive suggestion; while accepting that R2P at present does not advocate the use of force outside of the UNSC, they submit that it is a 'crucial component' which R2P should incorporate.^[81] In their view this is the 'most appropriate way to develop' R2P in order to ensure that failures such as Darfur and Syria are not repeated. This will be achieved through a tightly prescribed use of force outside the UNSC should it fail to act; for example it would have to be low intensity force, authorised by a regional organisation at the request of opposition groups.^[82]

Legal change of this sort may be possible, despite the prohibition of the use of force in Article 2(4). One method is through a wider interpretation of this Article. Reisman argues that the precise wording of Article 2(4) allows for the use of force so long as it does not violate 'the territorial integrity or political independence of any state' and is consistent with the purposes of the UN.^[83] In his view 'humanitarian intervention seeks neither a territorial change nor a challenge to the political independence of the state involved' and is fully consistent with the most fundamental purposes of the UN.^[84] He summarises by stating that it is a 'distortion' to argue that Article 2(4) precludes humanitarian uses of force.

Schachter dismisses this argument as it 'demands an Orwellian construction' of the terms political independence and territorial integrity.^[85] This appears to be backed up by the ICJ in the Corfu Channel Case.^[86] The United Kingdom argued that its minesweeping in Albanian waters 'threatened neither the territorial integrity nor the political independence of Albania';^[87] however the Court held that this violated Albanian sovereignty. Later the ICJ in Nicaragua construed this as a blanket rejection of intervention.^[88] If a mere minesweeping mission violates sovereignty in this way so surely must humanitarian intervention.

Most significantly, a look at the UN Charter's travaux préparatoires shows this particular interpretation is inaccurate. The phrase 'against the territorial integrity or political independence of any state' was added at the request of smaller states to emphasise protection from the use of force, not to create an exception.^[89] From this the words 'in any other manner inconsistent with the Purposes of the United Nations' are supplementary to the prohibition of the use of force

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to give it a holistic coverage.[90]

However, it is possible that this interpretation of Article 2(4) could change in the future. Legal realists argue that the drafters' intentions have no inherent authority; 'legal status depends... on the attitude of the contemporary international community towards it'.^[91] This is very similar to, and will be considered with, the idea that customary international law can modify a treaty's provisions. Chesterman points to one example where the UN Charter has been modified by subsequent practice and interpretation.^[92] Article 27(3) states that UNSC decisions must receive 'the concurring votes of the permanent members'. However it has become practice to consider a measure passed without all votes concurring should permanent members abstain. This interpretation or change to Article 27(3) was affirmed by the ICJ in the Namibia advisory opinion;^[93] however it remains unclear whether this was a modification by customary international law, or a new interpretation.

Both lead to the same outcome, thus Williams et al's preferred form of R2P incorporating the use of force outside the UNSC to protect populations could develop by either reinterpreting Article 2(4), or through customary international law. For a practice to become customary international law two criteria must be fulfilled; the actions concerned must 'amount to a settled practice', and 'the states concerned must... feel that they are conforming to what amounts to a legal obligation'.^[94] This is a high threshold to reach, which would be very difficult and consequently unrealistic to achieve, for 'the threshold of requisite practice' would be high to modify Article 2(4) in this way, especially given its fundamental importance. Thus it would 'require overwhelming support by the international community' to bring about any customary change to the use of force.^[95]

These same problems exist for the possibility of custom allowing humanitarian intervention outside of the UNSC to exist side by side with Article 2(4), which is possible.^[96] There is nowhere near the requisite level of consensus for this in the international community. Previous attempts to develop a less stringent application of Article 2(4) have been vociferously rejected; the reaction to NATO's unauthorised intervention in Kosovo demonstrates this perfectly. NATO and its members relied on a mixture of the legal arguments explained above and moral arguments relating to the human rights abuses in Kosovo to justify their intervention.^[97] Others, however, saw it as a 'gross violation of the Charter'.^[98]

Shortly after the intervention supporting states distanced themselves from its potential legal implications. The USA and Germany claimed that Kosovo was not to be viewed as a precedent for future intervention,^[99] and Slovenia and Canada welcomed the UNSC resuming its legitimate role over the situation after passing Resolution 1244.^[100] Most opposition to such a customary rule comes from the small and medium sized states which are crucial to R2P's global acceptance, concerned that it 'would be bound to be abused, especially by the big and strong, and to pose a threat, especially to the small and weak'.^[101]

Thus the force unauthorised by the UNSC is an incredibly divisive and controversial issue, which has little chance of acquiring the required support to become custom. If R2P were to incorporate Williams et al's suggestion of force outside of the UNSC it would damage R2P's credibility and acceptance for states would associate R2P with the Kosovo intervention and the legitimate concerns they had over the potential abuse of such an ability.

With these concerns in mind the ICISS' task when developing R2P 'was not to find alternatives to the Security Council, but to make the Security Council work better'.^[102] This is a key part to its promising international support which is crucial to its effectiveness as a political concept; the more support it has the greater its political influence. This political influence manifests itself practically by generating 'compliance pull', which 'pulls actors toward larger and more effective commitments to protecting civilians',^[103] and by creating greater political legitimacy (not legal authority) for R2P influenced measures under Chapter VII.^[104] These practical effects will be lost if R2P loses its global support base. R2P must be pragmatic in what it can achieve, while maintaining the necessary support for it to have a practical effect lest it becomes nothing more than an idealistic theory.

This might lead to a slow and incremental development of R2P which may seem disappointing given the need for urgent action in Syria. However, the steady development of human rights norms since World War II, which now 'play a transformative role in international policy', shows how powerful this incremental process can be.^[105] For this

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reason Luck writes that these experiences of the past 'remain relevant, reminding us of the value of both optimism and patience.'^[106]

Libya, Syria and the Future

This process of incremental development is at risk due to R2P's application in Libya, and lack thereof for Syria. When the UNSC, in the spirit of R2P, authorised states to take 'all necessary measures' to protect civilians in Libya, ^[107] it was not a unique legal development, the authority for the UNSC to use force for civilian protection under Chapter VII is well established as shown above. It was however a significant political development, as it was achieved due to R2P's influence.^[108] It also appeared to mark a departure from the apathy and inaction which characterised the responses to Rwanda and Darfur. This is even more significant as parallels can be seen between Libya and Rwanda; Gaddafi urged his supporters to attack the opposition 'cockroaches',^[109] a very similar incitement to violence to that seen in Rwanda.

These positives were short lived due to NATO's implementation of the resolution. Force under the resolution was only authorised for the purposes of protecting civilians; NATO acted ultra vires as their actions were 'less about protecting the population and more about regime change'. ^[110] NATO deliberately sided with the Libyan rebels and TNC, using its airpower to overthrow Gaddafi. This was despite the resolution reaffirming Libya's 'sovereignty, independence, territorial integrity and national unity' and the 5 abstaining states voicing their concern that military force of this kind could be abused for ulterior purposes.^[111]

This perceived abuse of the UNSC resolution in Libya led to a strong backlash from China, South Africa and Brazil, all of whose support is crucial to R2P's legitimacy.^[112] South Africa's representative explained that NATO's actions 'will undermine the gains made in [R2P]'.^[113] This prediction was accurate. When the Syria crisis broke out the UNSC failed to act decisively as it did for Libya, NATO's abuse of the Libya resolution made Russia and China, as well as the Arab league and other prominent emerging states sceptical about any further action under R2P, despite the violence being perhaps worse.^[114]

R2P is facing two significant problems at present which affect both sceptical and enthusiastic supporters, hampering its continued support and development. Important emerging states are concerned that R2P, even if authorised through the UNSC, will be used for ulterior purposes. At the same time, due to the UNSC's failure to act in Syria R2P could be viewed as having no practical utility, leading to the paradoxical situation where R2P is simultaneously attacked for going both too far and not far enough.

Even though R2P is not to blame for NATO's abuse of the resolution, R2P needs to develop in light of these criticisms in order to continue its growing political influence. This can be best achieved, not by advocating a controversial legal change such as in Williams et al's proposal, but with a more modest political suggestion. R2P should incorporate threshold criteria to guide the use of force as in the ICISS^[115] and High Level Panel Reports;^[116] seriousness of threat, proper purpose, last resort, proportionality and balance of consequences. While R2P's primary focus should be on preventative and capacity building mechanisms, not using military force, it must respond to the international community's concerns which revolve around the use of force.

These criteria would benefit both enthusiastic and cautious supporters of R2P, addressing both the problems emerging from the Libya and Syria experiences. They will focus and guide the UNSC's decision making; making it 'more responsive to the security needs of civilians'^[117] and giving less influence to geopolitical concerns, thereby maximising the possibility of UNSC consensus.^[118] Criteria will also make it harder for R2P to be abused, for any decision made by the UNSC will have a significantly higher legitimacy in the eyes of the international community, having been made according to transparent and relevant guidelines.^[119] This is not a perfect suggestion; the UNSC could still fail to act since these are only political criteria to guide the UNSC's assessment of a crisis. However it is a pragmatic solution to ensure R2P continues to grow and have a political influence.

Conclusion

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Responsibility to protect is an attempt to ensure that the international community never again fails to prevent an atrocity as was the case in Rwanda. Initial indications are promising; R2P has great potential as shown by its rapid growth in support and influence. However its potential is being impeded by continuing debate and concern over its legal status, and most significantly its effect on international law regarding the use of force. These debates and concerns are misguided; R2P is firmly embedded within the existing international legal order, and consequently presents no legal change. Nor should it be modified to push for such change in the face of a potentially ineffective UNSC. R2P's strength comes from its status as a political concept, not a legal one. Once this is accepted and made clear the focus can and should be on developing R2P to increase its support and effectiveness through its political influence in order to generate a stronger 'compliance pull'. This is especially important following the controversies of R2P's role in the Libya intervention, and the lack of Syrian intervention. R2P needs to react and learn from the failures of these situations to ensure that it realises its potential, not by stretching international law to provide the ability to use force outside of the UNSC framework, but by incorporating threshold criteria for the use of force to help guide UNSC decision making.

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