

The Case for Criteria: Moving R2P Forward after the Arab Spring

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JAMES PATTISON, JAN 29 2014

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In this paper, I want to revisit the issue of criteria and guidelines for humanitarian intervention, which was frequently discussed in the 1990s and early 2000s. After a brief account of the current state of the debate on the issue of criteria for intervention in the Responsibility to Protect (R2P) doctrine, I will suggest that, contra the prevailing view, there are *already* criteria for intervention in R2P. I will then go on to argue that (i) a more explicit acceptance of the existence of criteria and (ii) an interpretation of them that is most morally judicious should be key elements of moving R2P forward after Libya and Syria.

The Current State of the Debate

In the 1990s and early 2000s (largely before R2P was developed and gathered apace), there was a lively discussion about whether there should be developed criteria for intervention to govern instances, such as the crisis in Kosovo in 1999, where the Security Council is deadlocked, but humanitarian intervention would seem to be required to tackle mass atrocities.[1] The discussions of such criteria tended to focus on the possibility of developing formal criteria for military intervention that would enable the possibility of intervention without the need for UN Security Council authorisation. Yet, getting states to agree to the development of formal criteria outside of the UN Security Council was always going to be extremely tough, as it so proved, despite various proposals by states and civil society.[2]

By contrast, the 2001 ICISS report on R2P includes criteria for military intervention (its accounts of just cause, legitimate authority, and four "precautionary principles"), primarily to govern UN Security Council-authorized interventions.[3] However, the explicit inclusion of formal criteria within the R2P doctrine was rejected by states in the discussions in the build-up to the 2005 World Summit.[4] As a result, the prevailing view is that there are *not* criteria for humanitarian intervention under R2P.

There are two schools of thought surrounding the case for criteria, both of which largely endorse the prevailing view. On the one hand, there is a more sceptical school of thought (which includes one of the world's most distinguished R2P scholars, Alex Bellamy) that worries that formal criteria for military intervention are unlikely to be developed and would add little to resolve current issues.[5] It is, therefore, not worth investing political capital in developing criteria; this effort would be better spent elsewhere. On the other hand, there is a more optimistic school of thought (which includes perhaps the most eminent R2P advocate, Gareth Evans) that proposes that guidelines on intervention could do much to take R2P forward.[6] This includes tackling the deadlock surrounding R2P post-Libya and Syria, improving decision-making on the use of force, and ultimately leading to more interventions when required. In a somewhat similar vein, Brazil and China have developed the "responsibility while protecting" (RwP) and "responsible protection" (RP) notions, respectively.[7] Both of these proposals make the case for guidelines for intervention in order to improve the justifiability of interventions, largely in response to the NATO intervention in Libya, which (amongst other things) was alleged to have gone beyond the mandate given to it by UN Security Council Resolution 1973.

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It should be noted that the two schools of thought are not necessarily inconsistent; there are differences in what is being considered. Whereas the former, more sceptical view tends to focus on the development of *formal* criteria, such as in the form of a new treaty, perhaps outside of auspices of the UN Security Council, the latter, more optimistic view tends to focus on the case for the development of less formal *guidelines* to govern UN Security Council-authorized interventions in R2P cases. One could accept that it may be difficult to develop formal criteria, but still accept the case for the development of informal guidelines.

Notwithstanding, both schools of thought tend to assume that there do not already exist guidelines for military intervention under R2P.[8] As I will argue in the next section, this assumption is mistaken.

The R2P Already Has Criteria

I will now suggest that there already exist criteria for the R2P. More precisely, I will argue that there already exist some informal guidelines on R2P. These guidelines are very similar (in subject matter) to the standard accounts of the principles that govern the resort of force in Just War Theory (the principles of *jus ad bellum*) and the guidelines in the ICISS report, which, to a certain extent, draw on Just War considerations.[9] To see this, let us consider the main *jus ad bellum* conditions and how they already exist in the R2P. As far as I am aware, the existence of R2P guidelines has not been explicitly acknowledged in the literature on R2P.

1. An account of just cause was clearly endorsed by states at the 2005 UN World Summit.[10] Intervention is permissible only when states are manifestly failing to protect their populations from the four R2P crimes: genocide, war crimes, ethnic cleansing, and crimes against humanity.
2. In terms of legitimate authority, almost all accounts of the R2P require that any military intervention be authorised by the UN Security Council.
3. In terms of last resort, the 2005 World Summit makes it clear that force may be used only “should peaceful means be inadequate” and emphasises the need for the pursuit of non-forcible options, as well as prevention. This is very similar to recent accounts of the principle of last resort in Just War Theory, which tend to move away from a literal understanding of this principle.[11]
4. In a similar manner to right intention, those authorised to undertake humanitarian intervention are already required to be consistent with the intent of the authorisers (i.e. the UN Security Council) by sticking to their mandate and reporting to the UN Security Council when requested.
5. In regard to the likely fidelity to the principles of *jus in bello* (which can be framed as *ad bellum* condition by looking to likely compliance),[12] any intervener is already bound by international humanitarian law (IHL).
6. The principle of proportionality in the resort of force (i.e. as an *ad bellum* matter) is a central principle of international law and would apply to intervention under R2P. It requires that the policy adopted must be proportionate to the original provocation and/or the intervention must be expected to do more good than harm. (Also note that the latter is very similar to the Just War requirement of a reasonable prospect of success).

It seems, therefore, that there are already conditions governing military intervention under R2P.

These principles have a quasi-legal status. Some are legally binding, most notably the principles of legitimate authority, fidelity to the principles of *jus in bello*, and proportionality *ad bellum*. Others have a more moot legal status, largely dependent on whether one holds that the 2005 World Summit is legally binding. Regardless, all seem to be norms: they dictate generally expected standards of behaviour and are widely endorsed.

It may be objected that such guidelines are legally irrelevant because the UN Security Council is the ultimate authority on matters of international peace and security. As such, its decisions cannot be subject to external legal constraints. This seems mistaken. First, the primary subject of the guidelines is that which they authorise—the intervener—and this is clearly subject to external legal constraints. The Security Council is not the agent that will undertake the intervention, but rather the authority to authorise intervention under R2P. Second, even though the Security Council can determine matters of peace and security, it is still subject to various external constraints, such as those of the UN Charter. Indeed, although the primary subject of the guidelines is the intervener, they may also

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apply to the Security Council, in that the Security Council *should* authorise interventions that meet these conditions.

As already noted, these principles reflect the broad categories of Just War Theory. As such, we should not be surprised that there are already existing guidelines on humanitarian intervention under R2P. Just War Theory is not best seen as an arcane political theory with little policy relevance. Rather, the broad framework of Just War Theory is widely accepted and often frames political discussions about the resort of force, as well as international law.[13] My point, then, it is that if we accept that the principles of Just War Theory are politically important and widely endorsed, and that they often affect decisions about the resort to force, including military intervention, it seems far less of a jump to accept that there are already principles that are politically important and widely endorsed, and that govern intervention under R2P.

Of course, there is significant disagreement surrounding the exact formulation of the relevant principles of Just War Theory, both in academia and beyond. For instance, in light of the War on Terror and War in Iraq, there has been a vibrant debate about whether preemptive and/or preventative self-defence is a just cause for resort to force. Accordingly, even though there is broad agreement on the *main categories*, there is still substantial disagreement on their *details*. It is a similar story for R2P.

Moving R2P Forward

Although there is broad agreement on the six conditions for military intervention under R2P, the interpretation of some of them is still contested. This seems to be particularly the case for proportionality and last resort. For instance, in its early accounts of RWP, Brazil proposed an account of last resort (“chronological sequencing”) that was very restrictive and, if implemented, could potentially lead to far fewer humanitarian interventions.[14]

To take R2P forward, there are two steps that can be beneficial in regard to criteria. The first is to have a more *explicit* acceptance of the fact that there are conditions governing military intervention under R2P. This should help to improve the openness of the decision-making on the use of force and the influence of the current guidelines, as well as help to develop more settled guidelines, so that problematic interpretations are more clearly delegitimised. In addition, a more explicit acceptance that there are guidelines for intervention under R2P may be necessary if one wants to hold that there is a legal duty to intervene (which is argued by certain R2P advocates and international lawyers).[15] The difficulty with the case for a legal duty to intervene is that it would seem mistaken to argue that there is a duty to intervene (or to authorise intervention) in cases when intervention would not be morally permissible, such as in Syria in 2012 and 2013, arguably. Accordingly, a more explicit acceptance that there are guidelines for intervention under R2P should help make clearer the specific cases where there is, in fact, a legal duty to intervene, and not acting would be illegal.

The second step is to develop an interpretation of the current guidelines that is most morally desirable, within current political constraints. The accounts of the criteria in the later versions of RWP and in the ICISS are, I think, generally judicious and should be used as the basis for the interpretations of the particular guidelines.[16] The worry is that there will develop an account of the guidelines, in general, or of a particular guideline that is morally problematic, such as by unduly enabling or restricting humanitarian intervention (e.g. chronological sequencing in early accounts of RWP).

There seems to be momentum developing around the first step. Influential R2P advocates, such as Gareth Evans and Ramesh Thakur, and some of the BRICS states, such as China and Brazil, have recently endorsed the case for guidelines for intervention under R2P. But more needs to be done on the second step. If there are to be guidelines on intervention under R2P, we need to ensure that they are appropriate ones. To that end, it may be up to civil society and R2P advocate states to develop morally judicious accounts of the guidelines to help to frame the call for—and perhaps more explicit acceptance of—guidelines for intervention.

[1] *Earlier versions of this article were presented at “Responsibility to Protect and the Crises in Libya and Syria,”

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ESRC Seminar Series, University of Westminster, December 2013, and “The Responsibility to Protect and Humanity: A Study on the Idea of Human Interconnectedness,” White Rose Conference, University of Leeds, December 2013. I would like to thank the participants for their helpful feedback and comments. The paper draws on themes discussed at greater length in the context of the Brazil’s responsibility while protecting doctrine in James Pattison, “The Ethics of Responsibility While Protecting: Just War Theory, the Responsibility to Protect, and Guidelines for Humanitarian Intervention,” *Human Rights & Human Welfare*, working paper no. 71 (1 April 2013). Accessed at www.du.edu/korbel/hrhw/workingpapers/2013/71-pattison-2013.pdf (Jan. 14, 2014). See, for instance, the various contributions in J. L. Holzgrefe and Robert O. Keohane (eds.), *Humanitarian Intervention: Ethical, Legal and Political Dilemmas* (Cambridge: Cambridge University Press, 2003), and the special edition of *International Relations* 19/2 (2005), as well as Danish Institute of International Affairs, *Humanitarian Intervention: Legal and Political Aspects* (Copenhagen: The Danish Institute of International Affairs, 1999).

[2] See, for instance, the Dutch proposal: Advisory Council on International Affairs and Advisory Committee on Issues of Public International Law, *Advisory Report 13: Humanitarian Intervention*, (2000). Accessed at http://cms.web-beat.nl/ContentSuite/upload/aiv/doc/AIV_13_Eng.pdf (Jan. 14, 2014). Perhaps more famous is the “Doctrine of the International Community” speech by Tony Blair to the Chicago Economic Club, which outlines five criteria (April 22, 1999). Accessed at http://www.pbs.org/newshour/bb/international/jan-june99/blair_doctrine4-23.html (Jan. 14, 2014).

[3] The ICISS does leave room for intervention to be authorised by the General Assembly under the Uniting for Peace procedure; presumably, the criteria would also apply to such interventions. ICISS, *The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty* (Ottawa: International Development Research Centre, 2001).

[4] See Alex J. Bellamy, *Global Politics and the Responsibility to Protect* (London: Routledge, 2011), 164-9.

[5] *Ibid.*

[6] See, for instance, Gareth Evans, “R2P and RwP after Libya and Syria,” keynote address to GCR2P/FGV/Stanley Foundation Workshop, Responsibility While Protecting: What’s Next? Rio de Janeiro (23 August 2012).

[7] Brazil, “Responsibility while Protecting: Elements for the Development and Promotion of a Concept,” A/66/551-S/2011/701 (11 November 2011). Ruan Zongze, “Responsible Protection: Building a Safer World,” China Institute of International Studies (Jun 15, 2012). Accessed at http://www.ciis.org.cn/english/2012-06/15/content_5090912.htm (Jan. 14, 2014).

[8] This is not quite true of Bellamy. Most notably, in response to the case for formal criteria, he notes that R2P already informally implies (in effect) just cause in the 2005 World Summit agreement. Alex J. Bellamy, *Global Politics and the Responsibility to Protect*, (London: Routledge, 2011) 166. However, as far as I am aware, he does not note (in his impressive body of work) that a longer list of informal guidelines for intervention under R2P *already* exists.

[9] ICISS, *The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty* (Ottawa: International Development Research Centre, 2001).

[10] United Nations, “2005 World Summit Outcome,” A/RES/60/1 (14-16 September 2005). Accessed at http://www.un.org/ga/59/hl60_plenarymeeting.html (Jan. 14, 2014).

[11] See, for instance, Simon Caney, *Justice Beyond Borders: A Global Political Theory* (Oxford: Oxford University Press, 2005), 249-50; and John Lango, “The Just War Principle of Last Resort: The Question of Reasonableness Standards,” *Asteriskos: Journal of International and Peace Studies* 1/1-2 (2007), 7-23.

[12] See James Pattison, “Humanitarian Intervention, the Responsibility to Protect and *jus in bello*,” *Global*

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Responsibility to Protect 1/3 (2009), 364-91; and James Pattison, *Humanitarian Intervention and the Responsibility to Protect: Who Should Intervene?* (Oxford: Oxford University Press, 2010), 99-127.

[13] The matter is, of course, complicated by the fact that accounts of Just War Theory often draw on international law. On the political import of Just War, see Daniel Brunstetter, "Trends in Just War Thinking during the U.S. Presidential Debates 2000-12: Genocide Prevention and the Renewed Salience of Last Resort," *Review of International Studies* (forthcoming).

[14] Brazil, "Responsibility while Protecting: Elements for the Development and Promotion of a Concept," A/66/551-S/2011/701 (11 November 2011).

[15] See, for instance, Luke Glanville's excellent piece, "The Responsibility to Protect Beyond Borders," *Human Rights Law Review* 12/1 (2012), 1-32.

[16] Brazil, "Statement by H.E. Ambassador Maria Luiza Ribeiro Viotti, Permanent Representative of Brazil to the United Nations," General Assembly Interactive Dialogue on "Responsibility to Protect: Timely and Decisive Response" (5 September 2012). ICISS, *The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty* (Ottawa: International Development Research Centre, 2001).

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