
International law and the responsibility to protect

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Introduction

‘[W]e surely have a responsibility to act when a nation’s people are subjected to a regime such as Saddam’s.’¹ During its short life, the ‘responsibility to protect’ (R2P) has experienced gains and setbacks, with the greatest setback coming in March 2004 when Tony Blair invoked the concept in an attempt to justify the previous year’s invasion of Iraq.

R2P is of interest to international lawyers and international relations scholars alike. It is a result of ‘norm entrepreneurship’.² It achieved prominence quickly, with only four years separating its birth in 2001 from its inclusion in the United Nations World Summit Outcome Document in 2005. But with success came controversy and compromise. On the key issue of the use of military force, R2P has – by widespread agreement – been confined to the context of UN Security Council decision-making, where it remains non-binding.

This chapter examines the interaction between R2P, the prohibition on the use of force set out in the UN Charter, and the discretionary power of the Security Council to determine the existence of a ‘threat to the peace’ and authorise military action.³ It asks: to what degree, if any, has R2P

¹ Tony Blair, ‘The Global Threat of Terrorism’, speech, Sedgefield, 5 March 2004, BBC News, full text available at <http://news.bbc.co.uk/2/hi/3536131.stm>.

² On norm entrepreneurs, see Martha Finnemore and Kathryn Sikkink, ‘International Norm Dynamics and Political Change’, *International Organization*, 52 (1998), 887; Margaret Keck and Kathryn Sikkink, *Activists Beyond Borders: Advocacy Networks in International Politics* (Ithaca: Cornell University Press, 1998); Ian Johnstone, ‘The Secretary-General as Norm Entrepreneur’ in Simon Chesterman (ed.), *Secretary or General?: The UN Secretary-General in World Politics* (Cambridge University Press, 2007), 123.

³ The broader aspects of R2P are well-documented elsewhere. See e.g. Gareth Evans, *The Responsibility to Protect: Ending Mass Atrocity Crimes Once and For All* (Washington, DC: Brookings Institution, 2008); Ramesh Thakur, *The Responsibility to Protect: Norms, Laws, and the Use of Force in International Politics* (London: Routledge, 2011).

become part of contemporary international law concerning the use of force? And what does the history of R2P tell us, more generally, about 'norm entrepreneurship' and processes of legal change?

The chapter concludes that R2P has neither acquired legal status as a new exception to the prohibition on the use of force, nor exerted much influence on the rest of the international legal system. At the same time, the concept may – on an *ad hoc* basis – be influencing how States respond when another State violates the law while seeking to prevent atrocities. If so, the principal legal effect of R2P might concern mitigation of the consequences of rule-breaking, rather than any changes to the rules themselves.

Development of R2P

The central obligation of the UN Charter is set out in Article 2(4):

All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.⁴

According to the international rules on treaty interpretation, a treaty 'shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose'.⁵ The ordinary meaning of Article 2(4) is clear: the use of force across borders is prohibited. This meaning is supported by the context of the terms and the object and purpose of the treaty, with the Charter's preamble affirming the determination of its members 'to ensure by the acceptance of principles and the institution of methods, that armed force shall not be used, save in the common interest'.⁶ The Charter allows only two exceptions to the prohibition: Security Council authorisation and the right of self-defence. Only the first of these exceptions is of much relevance to R2P.

Under Chapter VII of the UN Charter, the Security Council has wide powers to 'determine the existence of any threat to the peace, breach of the

⁴ Art. 2(4), UN Charter (San Francisco, adopted 26 June 1945, entered into force 24 October 1945), 1 UNTS XVI.

⁵ Art. 31, Vienna Convention on the Law of Treaties (Vienna, adopted 22 May 1969, entered into force 27 January 1980), 1155 UNTS 331. The Vienna Convention codified the customary international law of treaty interpretation, as to which see Lord McNair, *The Law of Treaties* (Oxford University Press, 1961), 366–82.

⁶ UN Charter.

peace, or act of aggression' and authorise military action. These powers went unexercised during the Cold War, apart from a possible authorisation in Korea in 1950 and a clear but tightly constrained authorisation concerning Southern Rhodesia in 1966. In the latter situation, the Security Council took a significant step in determining that human rights violations – in this case the racist policies of a white minority government – constituted a threat to the peace. It imposed a wide-reaching embargo and, in Resolution 221, called upon the United Kingdom 'to prevent, by the use of force if necessary, the arrival of vessels reasonably believed to be carrying oil destined for Southern Rhodesia'.⁷

Somalia (1992–3)

After the Cold War, the Security Council used Chapter VII in a number of human rights or humanitarian crises. In January 1992, the Council determined that civil strife and famine in Somalia constituted a threat to the peace and imposed an arms embargo.⁸ Later that year, the Council authorised a UN-led peacekeeping force⁹ as well as a second, US-led, force with a broad mandate to 'use all necessary means to establish as soon as possible a secure environment for humanitarian relief operations'.¹⁰

One year later, the killing of eighteen US Army Rangers in Mogadishu prompted a public outcry in the United States that led to the collapse of both the US- and UN-led operations. But Somalia nevertheless represented an important step for the Security Council, which for the first time in the post-Cold War era had authorised the use of force for humanitarian ends.

Bosnia (1992–5)

The post-Cold War break-up of Yugoslavia resulted in bloody cleavages between ethnic groups. In 1992, the Security Council used Chapter VII to establish the United Nations Protection Force (UNPROFOR) to provide basic peacekeeping.¹¹ The next year, it extended UNPROFOR's mandate to include the creation and protection of so-called 'safe havens' for Bosnian civilians.¹² Later in 1993, Security Council Resolution 836 authorised NATO aircraft to bomb Serbian weapons and supply lines, but only

⁷ SC Res. 221, 9 April 1966.

⁸ SC Res. 733, 23 January 1992.

⁹ SC Res. 755, 28 August 1992.

¹⁰ SC Res. 794, 3 December 1992.

¹¹ SC Res. 743, 21 February 1992.

¹² SC Res. 819, 16 April 1993.

after specific targeting decisions were co-ordinated and approved by both NATO and the UN Secretary-General.¹³ As with the Somalia resolutions, Resolution 836 was significant in authorising force for humanitarian ends. But the complex mandate proved ineffective and, in 1995, more than 7,000 men and boys were slaughtered in Srebrenica as UN peacekeepers stood by, their pleas for NATO air support unanswered.

Rwanda (1994)

As the Rwandan genocide began in April 1994, the commander of a small UN peacekeeping operation desperately requested more troops. The Security Council responded by reducing his force from 2,500 to 270 peacekeepers. The withdrawal cannot be attributed to any lack of knowledge on the part of Security Council members. On 23 April, a classified document prepared for senior US officials spoke matter-of-factly about 'the genocide, which relief workers say is spreading south'.¹⁴ Six days later, during a Security Council meeting, the British ambassador reportedly cautioned against designating the massacre as 'genocide' because doing so might compel a response.¹⁵ As in Bosnia, where inadequate and complex mandates hindered action, the problem was a lack of political will. And yet the failure to act in Rwanda might subsequently have shamed some countries into action in Kosovo.

Kosovo (1999)

In 1999, NATO countries launched an air campaign to protect the Albanian population of Kosovo from Serbian forces. The intervention took place without Security Council authorisation and over the strong objections of Russia, China and numerous developing countries. Although the United Kingdom claimed a right of 'unilateral' (i.e. not Security Council-authorised) humanitarian intervention,¹⁶ the United States was more circumspect, referring repeatedly to 'humanitarian concerns' but

¹³ SC Res. 836, 4 June 1993.

¹⁴ Central Intelligence Agency, 'National Intelligence Daily', 23 April 2004, available at www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB117/Rw34.pdf.

¹⁵ Linda Melvern, *A People Betrayed: The Role of the West in Rwanda's Genocide* (London: Zed Books, 2000), 180.

¹⁶ See Sir Jeremy Greenstock, UK Permanent Representative to the UN, statement to the Security Council on 24 March 1999, UN Doc. S/PV.3988, 11–12, reproduced in *British Yearbook of International Law*, 70 (1999), 580–1. See also 'Fourth Report of the House of Commons Foreign Affairs Committee', (2000) HC-28-I, which points out that the

never explicitly claiming a third exception to the prohibition on the use of force.¹⁷ Germany supported the NATO action but insisted it ‘must not be allowed to become a precedent’.¹⁸

The Kosovo War put proponents of human rights and humanitarian assistance in a difficult position. UN Secretary-General Kofi Annan’s initial reaction was to say: ‘Emerging slowly, but I believe surely, is an international norm against the violent repression of minorities that will and must take precedent over concerns of State sovereignty.’¹⁹ Following the war, the United Kingdom proposed a framework for a limited right of unilateral humanitarian intervention. According to the British criteria, armed force should only be used as a last resort, in the face of ‘an overwhelming humanitarian catastrophe, which the government has shown it is unwilling or unable to prevent or is actively promoting’. The force ‘should be proportionate to achieving the humanitarian purpose’, carried out ‘in accordance with international law’, and ‘collective’.²⁰ But the Kosovo War did nothing to alleviate concerns about powerful states abusing any new right to intervene. In 1999 and 2000, the 133 developing states of the Group of 77 twice adopted declarations that unequivocally affirmed the illegality of humanitarian interventions not specifically authorised by the Security Council.²¹

UK government justified humanitarian intervention only ‘as an exceptional measure in support of purposes laid down by the UN Security Council... where that is the only means to avert an immediate and overwhelming humanitarian catastrophe’.

¹⁷ See e.g. ‘In the President’s Words: “We Act to Prevent a Wider War”’, *New York Times*, 25 March 1999, A15. After the war, Secretary of State Madeleine Albright stressed that Kosovo was ‘a unique situation *sui generis* in the region of the Balkans’ and that it was important ‘not to overdraw the various lessons that come out of it’. Press conference with Russian Foreign Minister Igor Ivanov, Singapore, 26 July 1999, cited in vol. II of the ICISS report, ‘The Responsibility to Protect’ (Ottawa: International Development Research Centre, 2002), 128.

¹⁸ Foreign Minister Klaus Kinkel said: ‘With their decision, NATO states did not intend to create any new legal instrument that could ground a general power of authority of NATO for intervention. The NATO decision must not be allowed to become a precedent. We must not enter onto a slippery slope with respect to the Security Council’s monopoly on the use of force.’ Deutscher Bundestag, Plenarprotokoll 13/248, 16 October 1998, 23129 (author’s translation). German original available at <http://dip21.bundestag.de/dip21/btp/13/13248.asc>.

¹⁹ Kofi Annan, ‘No Government Has the Right to Hide Behind National Sovereignty in Order to Violate Human Rights’, *The Guardian*, 7 April 1999, available at www.guardian.co.uk/world/1999/apr/07/balkans.unitednations.

²⁰ Foreign Secretary Robin Cook, ‘Speech to the American Bar Association, 19 July 2000’, *British Yearbook of International Law*, 71 (2000), 646.

²¹ See Ministerial Declaration, 23rd Annual Meeting of the Ministers for Foreign Affairs of the Group of 77, 24 September 1999, para. 69, available at www.g77.org/doc/Decl1999.

This negative reaction was likely what caused Annan, later in 1999, to acknowledge that any norm of unilateral humanitarian intervention had not yet achieved legal status and could have undesirable consequences for the international order: 'What is clear is that enforcement action without Security Council authorisation threatens the very core of the international security system founded on the Charter of the UN. Only the Charter provides a universally accepted legal basis for the use of force.'²²

*International Commission on Intervention
and State Sovereignty (2001)*

After the Kosovo War, the Canadian government established the International Commission on Intervention and State Sovereignty (ICISS) and charged it with finding 'some new common ground'.²³ However, a careful reading of the ICISS report, released in December 2001 and entitled 'The Responsibility to Protect', shows the commissioners failing to agree on the central issue of the use of force. Some passages seem to favour a right of humanitarian intervention in the absence of Security Council authorisation:

Based on our reading of state practice, Security Council precedent, established norms, emerging guiding principles, and evolving customary international law, the Commission believes that the Charter's strong bias against military intervention is not to be regarded as absolute when decisive action is required on human protection grounds.²⁴

Other passages lean the other way, albeit with a nod to the 'Uniting for Peace' Resolution adopted by the General Assembly in 1950:

As a matter of political reality, it would be impossible to find consensus . . . around any set of proposals for military intervention which acknowledge the validity of any intervention not authorized by the Security Council or General Assembly.²⁵

html; Declaration of the Group of 77 South Summit, Havana, Cuba, 10–14 April 2000, para. 54, available at www.g77.org/doc/docs/summitfinaldocs.english.pdf.

²² Kofi Annan, 'Preventing War and Disaster' (United Nations: Annual report on the work of the Organization, 1999), 8, para. 66, UN Doc. A/54/1.

²³ ICISS, 'The Responsibility to Protect', I, vii. ²⁴ *Ibid.*, 16, para. 2.27.

²⁵ *Ibid.*, 54–5, para. 6.36. On 'Uniting for Peace' see UNGA Res. A-RES-377(V) (3 November 1950); and Dominik Zaum, 'The Security Council, the General Assembly and War: The Uniting for Peace Resolution' in Vaughan Lowe *et al.* (eds.), *The United Nations Security*

In addition to coining the term ‘responsibility to protect’, the ICISS usefully expanded the focus of attention to include preventive and post-crisis measures. But it did little to resolve the controversy over unilateral humanitarian intervention, leaving that for states to decide.

Constitutive Act of the African Union (2002)

In 2002, the Organisation of African Unity renamed and reconstituted itself through the Constitutive Act of the African Union.²⁶ Part of the reconstitution was a provision described by Dan Kuwali as ‘by and large, on all fours with the notion of R2P’.²⁷ Article 4(h) asserts the ‘right of the Union to intervene in a Member State pursuant to a decision of the Assembly [of Heads of State and Government] in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity’.²⁸ Article 4(h) also implies that African Union member states do not consider themselves bound to obtain UN Security Council authorisation when using force collectively in response to such atrocities.²⁹

Despite having faced some major human rights and humanitarian crises, the African Union has yet to invoke Article 4(h). Paul Williams has identified three possible reasons for this: ‘first, the strength of the host state; second, the residual power of the principles of non-interference and anti-imperialism within the African society of states; and third, the AU’s lack of practical military capacity for humanitarian intervention’.³⁰ A fourth and equally important reason may be that, whenever the African

Council and War: The Evolution of Thought and Practice since 1945 (Oxford University Press, 2008), 154.

²⁶ Constitutive Act of the African Union, 11 July 2002, OAU Doc. CAB/LEG/23.15.

²⁷ Dan Kuwali, ‘The End of Humanitarian Intervention: Evaluation of the African Union’s Right of Intervention’, *African Journal on Conflict Resolution*, 9 (2009), 48.

²⁸ In 2003, the adoption of a ‘Protocol Relating to the Establishment of the Peace and Security Council of the African Union’ provided an implementing mechanism for decisions to intervene taken by the Assembly. Available at: www.africa-union.org/root/au/organs/psc/Protocol_peace%20and%20security.pdf.

²⁹ Art. 17(1) of the Protocol (*ibid.*) reads: ‘In the fulfillment of its mandate in the promotion and maintenance of peace, security and stability in Africa, the Peace and Security Council shall cooperate and work closely with the United Nations Security Council, which has the primary responsibility for the maintenance of international peace and security.’ Nothing in the words ‘cooperate and work closely with’ or ‘primary responsibility’ implies a relationship of legal dependence.

³⁰ Paul D. Williams, ‘The African Union’s Conflict Management Capabilities’, Council on Foreign Relations, October 2011, 5, available at www.cfr.org/content/publications/attachments/IIGG_WorkingPaper7.pdf.

Union has wished to intervene in a human rights or humanitarian crisis, the UN Security Council has provided a Chapter VII resolution.

There may well be a causal connection between the 2001 ICISS report and the Constitutive Act of the African Union, since the former preceded the latter by just six months. At the same time, the right asserted in Article 4(h) is entirely consistent with established international law because the member states of the African Union, when ratifying the Constitutive Act, consented to the new power.³¹ Article 4(h) is analogous to Chapter VII, where the powers of the Security Council are derived from the consent expressed by member states when ratifying the UN Charter. For this reason, Article 4(h) is not a precedent for unilateral humanitarian intervention, even if it does create a new, strictly regional, treaty-based exception to the prohibition on the use of force.

Iraq War (2003)

Again, Tony Blair has provided a worrisome example of how R2P could be abused. One year after the Iraq War, the British prime minister implied that a right of unilateral humanitarian intervention already existed in situations of ‘humanitarian catastrophe’:

It may well be that under international law as presently constituted, a regime can systematically brutalise and oppress its people and there is nothing anyone can do, when dialogue, diplomacy and even sanctions fail, *unless* it comes within the definition of a humanitarian catastrophe . . .³²

He then invoked R2P in support of a right to intervene in less severe circumstances:

The essence of a community is common rights and responsibilities. We have obligations in relation to each other . . . [W]e do not accept in a community that others have a right to oppress and brutalise their people. We value the freedom and dignity of the human race and each individual in it. Emphatically I am not saying that every situation leads to military action. But . . . we surely have a responsibility to act when a nation’s people are subjected to a regime such as Saddam’s.³³

Thus, a war that Blair had previously sought to justify with contested readings of Security Council resolutions was suddenly being rationalised with a concept that, as a possible legal basis for force, had already been

³¹ See similarly Kuwali, ‘The End of Humanitarian Intervention’, 45–6.

³² Blair, ‘The Global Threat of Terrorism’ (emphasis added). ³³ *Ibid.*

widely rejected by most governments.³⁴ This development was of pivotal importance for the future direction of R2P.

High-level Panel on Threats, Challenges and Change (2004)

After Blair's invocation of R2P, many proponents of the concept refocused their efforts on addressing the problem of political will within the context of existing legal constraints. This adjustment was visible in a speech given to the UN General Assembly by Canadian Prime Minister Paul Martin in September 2004.³⁵ Martin stressed that the 'responsibility to protect is not a licence for intervention; it is an international guarantor of political accountability'. Although 'customary international law is evolving to provide a solid basis in the building of a normative framework for collective humanitarian intervention', this basis was not yet complete. Martin called for the Security Council to 'establish new thresholds for when the international community judges that civilian populations face extreme threats'.

In December 2004, the UN Secretary-General's High-level Panel on Threats, Challenges and Change reported that 'the Council and the wider international community have come to accept that, under Chapter VII . . . it can always authorize military action to redress catastrophic internal wrongs if it is prepared to declare that the situation is a "threat to international peace and security", not especially difficult when breaches of international law are involved'.³⁶ With respect to R2P specifically, the Panel wrote:

There is a growing recognition that the issue is not the 'right to intervene' of any State, but the 'responsibility to protect' of *every* State when it comes to people suffering from avoidable catastrophe – mass murder and rape, ethnic cleansing by forcible expulsion and terror, and deliberate starvation and exposure to disease.³⁷

³⁴ Russian Foreign Minister Sergey Lavrov likewise invoked the term 'responsibility to protect' to justify the invasion of Georgia in 2008, but it is clear that he was referring to a principle in Russian *domestic* law concerning the duty of the Russian government to protect its citizens. See 'Interview by Minister of Foreign Affairs of the Russian Federation Sergey Lavrov to BBC', Moscow, 9 August 2008, available at www.un.int/russia/new/MainRoot/docs/off_news/090808/newen2.htm.

³⁵ 'Address by Prime Minister Paul Martin at the United Nations', 21 September 2004, available at <http://news.gc.ca/web/article>.

³⁶ 'A More Secure World: Our Shared Responsibility', Report of the High-level Panel on Threats, Challenges and Change, 2 December 2004, UN Doc. A/59/565, 57, para. 202.

³⁷ *Ibid.*, 56–7, para. 201.

The Panel stressed that this ‘emerging norm’ was – in terms of military intervention – only ‘exercisable by the Security Council’.³⁸ It proposed ‘criteria of legitimacy’ for when force should be used: seriousness of intent, proper purpose, last resort, proportional means and balance of consequences.³⁹ It recommended that these criteria be embodied in declaratory resolutions of the Security Council and General Assembly.⁴⁰

Secretary-General’s Report and World Summit Outcome Document (2005)

In March 2005, Kofi Annan issued a report entitled ‘In Larger Freedom’ in which he endorsed R2P while affirming the Security Council’s monopoly on the use of force:

[I]f national authorities are unable or unwilling to protect their citizens, then the responsibility shifts to the international community to use diplomatic, humanitarian and other methods to help protect the human rights and well-being of civilian populations. When such methods appear insufficient, the Security Council may out of necessity decide to take action under the Charter of the United Nations, including enforcement action, if so required.⁴¹

Six months later, at the conclusion of the UN World Summit, the member states not only endorsed R2P; they declared themselves ‘prepared to take collective action . . . in a timely and decisive manner’.⁴² However, they also specified that any such action would take place ‘through the Security Council, in accordance with the Charter, including Chapter VII’, that it would only be ‘on a case-by-case basis’ and only ‘should peaceful means be inadequate and national authorities are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity’.

The inclusion of R2P in the World Summit Outcome Document was a significant development. At the same time, the role of the concept was deliberately limited by: (1) the reaffirmation of the exclusivity of

³⁸ *Ibid.*, 57, para. 203. ³⁹ *Ibid.*, 57–8, para. 207. ⁴⁰ *Ibid.*, 58, para. 208.

⁴¹ ‘In Larger Freedom: Towards Development, Security and Human Rights for All’, Report of the Secretary-General, 21 March 2005, UN Doc. A/59/2005, paras. 132 and 135.

⁴² ‘World Summit Outcome Document’, 15 September 2005, paras. 138 and 139, available at www.un.org/summit2005/documents.html.

Security Council decision-making;⁴³ (2) the use of non-committal language such as ‘prepared’ and ‘on a case-by-case basis’; and (3) the raising of the ICISS threshold of ‘population suffering serious harm’ to ‘genocide, war crimes, ethnic cleansing, and crimes against humanity’. Moreover, the World Summit Outcome Document did not create any new rights, obligations or limitations for the Security Council, since the Council already had the discretionary power to authorise the use of force for the full range of human rights and humanitarian concerns. At most, the World Summit Outcome Document created a new point of *political* leverage, since proponents of action can now point to this collective statement of intent.

Security Council Resolution 1674 (2006)

In April 2006, the Security Council followed the recommendation of the High-level Panel by adopting a declaratory resolution. Resolution 1674 addresses numerous aspects of the ‘protection of civilians in armed conflict’, including R2P. Paragraph 4 ‘[r]eaffirms the provisions of paragraphs 138 and 139 of the World Summit Outcome Document regarding the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity’.⁴⁴ It thus confirms the Council’s post-Cold War practice of including human rights and humanitarian crises within the scope of possible determinations of ‘threats to the peace’. However, it does not signal or contribute to any change in international law, because the scope of the Council’s discretionary power is so very wide that, from a legal perspective, it might only be limited by *jus cogens* rules.⁴⁵

⁴³ That said, Carsten Stahn has argued that ‘states did not categorically reject the option of (individual or collective) unilateral action in the Outcome Document. This discrepancy leaves some leeway to argue that the concept of responsibility to protect is not meant to rule out such action in the future.’ Carsten Stahn, ‘Responsibility to Protect: Political Rhetoric or Emerging Legal Norm?’, *American Journal of International Law*, 101 (2007), 120. However, as a general principle of interpretation, a text’s silence on any particular issue does not imply a gap.

⁴⁴ SC Res. 1674, 28 April 2006.

⁴⁵ See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Order of 13 September 1993, 440, para. 100 (Separate Opinion of Judge ad hoc Elihu Lauterpacht). In the *Tadić* case, the International Criminal Tribunal for the Former Yugoslavia wrote: ‘the determination that there exists such a threat [to the peace] is not a totally unfettered discretion, as it has to remain, at the very least, within the limits of the Purposes and Principles of the Charter’. However, the tribunal went on to note that ‘the practice of the Security Council is rich

The adoption of Resolution 1674 might increase the likelihood of the Security Council acting in situations of ‘genocide, war crimes, ethnic cleansing and crimes against humanity’, but only because its references to R2P and the World Summit Outcome Document give proponents of military action an additional point of political leverage. It is important to note that the Resolution does not include any criteria such as those recommended by the High-level Panel.⁴⁶ Nor did the Council follow the lead of the General Assembly and declare it was ‘prepared to take collective action . . . in a timely and decisive manner’.⁴⁷

The greatest challenge with respect to humanitarian and human rights crises remains generating the political will to act, which in the context of the Security Council means both adopting *and* implementing a resolution. That political will is required over both stages was demonstrated with respect to Darfur. In August 2006, after more than two years of atrocities, the Security Council finally used its Chapter VII powers to authorise the deployment of a UN peacekeeping force with a robust mandate to protect civilians.⁴⁸ Resolution 1706 made an indirect reference to R2P by noting that Resolution 1674 ‘reaffirms inter alia the provisions of paragraphs 138 and 139 of the 2005 United Nations World Summit outcome document’.⁴⁹ But most governments, instead of rushing to participate in this new and legally robust mission, either ignored the authorisation or cited commitments elsewhere.⁵⁰

Security Council Resolution 1973 (Libya, 2011)

In March 2011, Libyan dictator Muammar Gaddafi used deadly force against peaceful protesters and threatened to show no mercy to the

with cases of civil war or internal strife which it classified as a “threat to the peace” and dealt with under Chapter VII, with the encouragement or even at the behest of the General Assembly’. *Prosecutor v. Duško Tadić* (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction), Case No. IT-94-1, ICTY Appeals Chamber, Judgment, 2 October 1995.

⁴⁶ See discussion, n. 39. ⁴⁷ ‘World Summit Outcome Document’.

⁴⁸ In para. 12 of Resolution 1706, adopted on 31 August 2006, the Security Council, ‘Acting under Chapter VII of the Charter of the United Nations: (a) *Decides* that UNMIS is authorized to use all necessary means, in the areas of deployment of its forces and as it deems within its capabilities . . . to protect civilians under threat of physical violence . . .’

⁴⁹ *Ibid.*

⁵⁰ See e.g. ‘UN Force for Darfur Takes Shape’, *New York Times*, 1 August 2007, available at www.nytimes.com/2007/08/01/world/africa/01iht-darfur.4.6942617.html?_r=0.

residents of rebel-held cities.⁵¹ The Security Council responded by adopting Resolution 1973 which provided two parallel authorisations to use force, the first of which was much broader than the second.⁵²

In paragraph 4, the Council: ‘*Authorizes* Member States . . . to take all necessary measures . . . to protect civilians and civilian populated areas under threat of attack in the Libyan Arab Jamahiriya, including Benghazi, while excluding a foreign occupation force of any form on any part of Libyan territory’.

This first authorisation would cover a great deal of military activity, because ‘all necessary measures’ is the language normally used by the Council to grant full powers to intervening countries.⁵³ Even the exclusion of a ‘foreign occupation force’ does not preclude the use of some ground forces, since ‘occupation’ is a technical term of international humanitarian law defined in the 1907 Hague Regulations: ‘Territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised.’⁵⁴

The second authorisation that deals with airspace is arguably redundant, because it concerns a measure that could also fall within the scope of ‘all necessary measures . . . to protect civilians and civilian populated areas’. It appears in paragraph 6 where the Council ‘*Decides* to establish a ban on all flights in the airspace of the Libyan Arab Jamahiriya in order to help protect civilians’, and in paragraph 8 where the Council ‘*Authorizes* Member States . . . to take all necessary measures to enforce compliance with the ban on flights imposed by paragraph 6 above, as necessary’.

Resolution 1973 does not endorse an expansive conception of R2P, with just one paragraph in the preamble making reference to it: ‘*Reiterating* the responsibility of the Libyan authorities to protect the Libyan population

⁵¹ In one TV broadcast, Gaddafi told the residents of Benghazi to lay down their arms; otherwise, he warned, his troops would come that night and ‘find you in your closets; we will have no mercy and no pity’. Dan Bilefsky and Mark Landler, ‘As U.N. Backs Military Action in Libya, U.S. Role Is Unclear’, *New York Times*, 17 March 2011, available at www.nytimes.com/2011/03/18/world/africa/18nations.html.

⁵² SC Res. 1973, 17 March 2011.

⁵³ Of course, all military actions remain subject to the rules of international humanitarian law, including those set out in the 1949 Geneva Conventions and 1977 Additional Protocols.

⁵⁴ Art. 42, Hague Regulations concerning the Laws and Customs of War on Land, as annexed to the 1907 Convention (IV) respecting the Laws and Customs of War on Land (The Hague, adopted 18 October 1907, entered into force 26 January 2010), 205 CTS 277.

and *reaffirming* that parties to armed conflicts bear the primary responsibility to take all feasible steps to ensure the protection of civilians.⁵⁵ Apart from the word ‘primary’, there is nothing in the paragraph that suggests a responsibility to protect on the part of outside countries.

Nor does Resolution 1973 declare that any of the crimes identified by the World Summit Outcome Document as falling within the ambit of R2P are occurring. Although the resolution condemns ‘the gross and systematic violation of human rights, including arbitrary detentions, enforced disappearances, torture and summary executions’, it adopts a decidedly cautious stance as to these actually being crimes against humanity, ‘*considering* that the widespread and systematic attacks currently taking place in the Libyan Arab Jamahiriya against the civilian population may amount to crimes against humanity’.

Resolution 1973 is consistent with R2P insofar as it authorises the use of force for human rights purposes.⁵⁶ But in terms of the development of R2P, Resolution 1973 proves only that the concept has become part of the context of Security Council deliberations. Of course, in some situations that role as context may still be significant.

Post-Libya consequences for R2P

There are those who believe that the evolution of R2P was set back by the controversy over NATO’s campaign in Libya, and that this reversal is evident in the lack of a meaningful response by the Security Council to the Syrian civil war.⁵⁷ As Vitaly Churkin, Russia’s ambassador to the United Nations, has said:

⁵⁵ Similar references appear in the preambles of SC Res. 1975, 30 March 2011 (Côte d’Ivoire), SC Res. 1996, 8 July 2011 (South Sudan) and SC Res. 2014, 21 October 2011 (Yemen).

⁵⁶ That human rights were the principal motivating factor behind Resolution 1973 is supported by the fact that, at the time of the intervention, the Libyan regime posed no threat to other countries. Gaddafi forswore his nuclear and chemical weapons programmes in 2003 and was removed from the US list of state sponsors of terror in 2006.

⁵⁷ See e.g. Gareth Evans, Ramesh Thakur and Robert A. Pape, ‘Humanitarian Intervention and the Responsibility to Protect (R2P)’, *International Security*, 37 (2013), 206 ([T]he R2P consensus underpinning Resolution 1973 fell apart over the course of 2011, damaged by gaps in expectation, communication, and accountability between those who mandated the operation and those who executed it.); Spencer Zifcak, ‘The Responsibility to Protect after Libya and Syria’, *Melbourne Journal of International Law*, 13 (2012), 1; Noele Crossley, ‘The Responsibility to Protect in 2012: R2P Fails in Syria, Brazil’s “RWP” Emerges’, *Global Policy Journal* blog, 28 December 2012, available at www.globalpolicyjournal.com/blog/28/12/2012/.

The situation in Syria cannot be considered in the Council separately from the Libyan experience. The international community is alarmed by statements that compliance with Security Council resolutions on Libya in the NATO interpretation is a model for the future actions of NATO in implementing the responsibility to protect . . .⁵⁸

However, the authorisations in Resolution 1973 gave space for different public positions concerning the permissible extent of force.⁵⁹ This would not be the first time the Security Council has crafted a resolution with a view to providing room for divergent interpretations.⁶⁰ The result is an intermediate zone on the legal–illegal spectrum of military action: between the legal and the illegal, there is now the deliberately arguable. One benefit of this grey zone is that it provides space for states to disagree in public while ‘agreeing to disagree’ in private. Another benefit may be that it creates a form of temporary, conditional permission that can harden into legality or illegality, depending on how contested facts are subsequently clarified – for instance, by the presence or absence of weapons of mass destruction, or the actual existence and scale of atrocities.

It is also significant that Resolution 1973 had the support of the Arab League. Indeed, the resolution refers explicitly to ‘the decision of the Council of the League of Arab States of 12 March 2011 to call for the imposition of a no-fly zone on Libyan military aviation, and to establish safe areas in places exposed to shelling as a precautionary measure that allows the protection of the Libyan people and foreign nationals residing in the Libyan Arab Jamahiriya’. The involvement of the Arab League made it politically difficult for China and Russia to cast their vetoes, and thus increased the incentive to agree on language that enabled the resolution to be interpreted in different ways.

The Arab League has also been active with respect to the Syrian crisis: suspending Syria’s membership of the League, imposing economic sanctions, pushing for a Security Council resolution that would have called on President Bashar al-Assad to step aside and proposing a UN-authorised

⁵⁸ UN SCOR, 66th Session, 6627th Meeting, UN Doc. S/PV.6627 (4 October 2011), 4.

⁵⁹ As Hugh Roberts writes, ‘Those who subsequently said that they did not know that regime change had been authorised either did not understand the logic of events or were pretending to misunderstand in order to excuse their failure to oppose it.’ Hugh Roberts, ‘Who Said Gaddafi Had to Go?’, 33, *London Review of Books*, 17 November 2011.

⁶⁰ Michael Byers, ‘Agreeing to Disagree: Security Council Resolution 1441 and Intentional Ambiguity’, *Global Governance*, 10 (2004), 165.

peacekeeping mission.⁶¹ However, there are many factors associated with Security Council decision-making. In the case of Syria, complicating factors include its geographic location, the presence of Russian electronic intelligence-gathering and naval facilities and advanced air defences which would likely cause the loss of aircraft and pilots if any attempt was made to impose a no-fly zone.⁶²

After a chemical-weapons attack in Damascus in August 2013, the United Kingdom, United States and France prepared for air strikes against the Syrian regime. Significantly, the term ‘responsibility to protect’ was largely absent from official statements concerning the legal basis for military action. The British government released a document setting out its legal position that stated, in part:

If action in the Security Council is blocked, the UK would still be permitted under international law to take exceptional measures in order to alleviate the scale of the overwhelming humanitarian catastrophe in Syria by deterring and disrupting the further use of chemical weapons by the Syrian regime. Such a legal basis is available, under the doctrine of humanitarian intervention, provided three conditions are met:

- (i) there is convincing evidence, generally accepted by the international community as a whole, of extreme humanitarian distress on a large scale, requiring immediate and urgent relief;
- (ii) it must be objectively clear that there is no practicable alternative to the use of force if lives are to be saved; and
- (iii) the proposed use of force must be necessary and proportionate to the aim of relief of humanitarian need and must be strictly limited in time and scope to this aim (i.e. the minimum necessary to achieve that end and for no other purpose).⁶³

The British government’s position was similar to the framework it had proposed after the Kosovo War, without the requirements that the intervention be carried out ‘in accordance with international law’ and

⁶¹ ‘The League and Syria’ in ‘Times Topics: Arab League’, *New York Times* website, available at http://topics.nytimes.com/topics/reference/timestopics/organizations/a/arab_league/index.html.

⁶² Julian Borger, ‘Russian Military Presence in Syria Poses Challenge to US-led Intervention’, *The Guardian*, 23 December 2012, available at www.guardian.co.uk/world/2012/dec/23/syria-crisis-russian-military-presence.

⁶³ ‘Chemical Weapon Use by Syrian Regime – UK Government Legal Position’, 29 August 2013, available at www.gov.uk/government/uploads/system/uploads/attachment_data/file/235098/.

'collective'.⁶⁴ For the purposes of this chapter, its relevance lies in the lack of any reference to R2P despite the emergence of that concept over the previous decade. It is also significant that the House of Commons rejected Prime Minister David Cameron's call for military action, thus preventing any State practice from accompanying the *opinio juris* of the legal position.⁶⁵

The US government also avoided any reference to R2P, focusing instead on the use of chemical weapons, which killed at most several thousand people, as compared to the 100,000 or more deaths caused in Syria by conventional arms. Secretary of State John Kerry stated that any military action would be 'a limited and tailored response to ensure that a despot's brutal and flagrant use of chemical weapons is held accountable.'⁶⁶

Only French President François Hollande referred explicitly to R2P, saying that '[International law] is the best way of ensuring borders are respected, disputes are settled and collective security prevails. But international law must evolve with the times. It cannot be a pretext for allowing large-scale massacres to be perpetrated. This is why I recognise the principle of "the responsibility to protect" civilians, which the United Nations General Assembly voted for in 2005.'⁶⁷ However, earlier in the same speech, Hollande made clear that the catalyst for any French military action was the use of chemical weapons, rather than the broader humanitarian crisis: 'The international community cannot fail to react to the use of chemical weapons. France stands ready to punish those who took the appalling decision to gas innocent people.'⁶⁸

These controversies over the implementation of Resolution 1973 in Libya and the legal bases for using force in Syria will eventually subside, for there is more pragmatism in international relations than the public statements of governments might indicate. The concept of R2P will

⁶⁴ Foreign Secretary Robin Cook, 'Speech to the American Bar Association, 19 July 2000'.

⁶⁵ Andrew Grice, 'David Cameron's Plans for Military Action in Syria Shot Down in Dramatic Commons Vote', *The Independent*, 30 August 2013, available at www.independent.co.uk/news/uk/politics/david-camerons-plans-for-military-action-in-syria-shot-down-in-dramatic-commons-vote-8788612.html.

⁶⁶ Secretary of State John Kerry, 'Statement on Syria', 30 August 2013, available at www.state.gov/secretary/remarks/2013/08/213668.htm.

⁶⁷ '21st Ambassadors' Conference – Speech by François Hollande', 27 August 2013, available at www.diplomatie.gouv.fr/en/the-ministry-158/events-5815/article/21st-ambassadors-conference-speech.

⁶⁸ *Ibid.*

survive, and have influence politically, even if it never changes the core legal prohibition on the use of force.

Legal status of R2P

Prior to Blair's 2004 speech, much of the literature on R2P either continued the debate that had previously been framed as 'unilateral humanitarian intervention', or discussed the concept in the post-9/11 context of self-defence and preventive military action.⁶⁹ But even before Blair's demonstration of the potential for the abuse of R2P by powerful states, it was already apparent that the threshold for changing the prohibition on the use of force was unachievable. Both the widespread opposition of developing States and the *jus cogens* character of the prohibition rendered the idea of an R2P exception a non-starter in a legal system where rules are changed through the actions and opinions of nearly 200 states, and where a small number of rules are more deeply entrenched than the others.⁷⁰ Gareth Evans, one of the 'norm entrepreneurs' behind R2P, has summarised the new consensus: 'The 2005 General Assembly position was very clear that, when any country seeks to apply forceful means to address an R2P situation, it must do so through the Security Council . . . Vigilante justice is always dangerous.'⁷¹

This chapter could end here: with the conclusion that R2P, insofar as it concerns the use of force, is now limited to being part of the content of Security Council decision-making. However, it may prove useful to extend the analysis one step further, by examining whether R2P is having any influence on the margins of the prohibition on the use of force, and specifically on the rules proscribing the provision of aid, assistance, training, equipment and arms to rebels.⁷²

⁶⁹ See, perhaps most problematically, Lee Feinstein and Anne-Marie Slaughter, 'A Duty to Prevent', *Foreign Affairs*, 83 (2004), 136.

⁷⁰ See Michael Byers and Simon Chesterman, 'Changing the Rules about Rules? Unilateral Humanitarian Intervention and the Future of International Law' in J. L. Holzgrefe and Robert O. Keohane (eds.), *Humanitarian Intervention: Ethical, Legal and Political Dilemmas* (Cambridge University Press, 2003), 183–4.

⁷¹ Gareth Evans, 'Russia and the 'Responsibility to Protect'', *Los Angeles Times*, 31 August 2008, available at <http://www.latimes.com/la-oe-evans31-2008aug31-story.html>.

⁷² As the International Court of Justice explained in the *Nicaragua* case, it is sometimes necessary 'to distinguish the most grave forms of the use of force (those constituting an armed attack) from other less grave forms'. *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. US)*, Judgment, 27 June 1986, ICJ Reports (1986), 101, para. 191.

Support for rebels

The prohibition on the use of force has long been understood to encompass the provision of aid, assistance, training, equipment and arms to rebels.⁷³ In 1970, the UN General Assembly adopted the ‘Friendly Relations Resolution’ that encapsulated the rule in two paragraphs:

Every State has the duty to refrain from organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts, when the acts referred to in the present paragraph involve a threat or use of force . . .

Also, no State shall organize, assist, foment, finance, incite or tolerate subversive, terrorist or armed activities directed towards the violent overthrow of the régime of another State, or interfere in civil strife in another State.⁷⁴

Although the rule was often violated during the Cold War, as the two superpowers engaged in ‘proxy wars’, it was not altered by that contrary practice. One explanation for the lack of change is that support for rebels was usually provided covertly, and only overt actions can contribute to changing international law.⁷⁵

The rule was affirmed in the 1986 *Nicaragua* case where the International Court of Justice found that the United States had illegally trained and equipped rebels.⁷⁶ The Court addressed the possibility that the law might be different when rebels have a ‘particularly worthy’ cause:

[The Court] has to consider whether there might be indications of a practice illustrative of belief in a kind of general right for States to intervene, directly or indirectly, with or without armed force, in support of an internal

⁷³ See Ian Brownlie, *International Law and the Use of Force by States* (Oxford University Press, 1963), 70–1. The only possible and controversial exception to this ban has concerned the provision of support to groups engaged in wars of ‘national liberation’. For example, in 1981 the UN General Assembly appealed ‘to all States to provide all necessary humanitarian, educational, financial and other necessary assistance to the oppressed people of South Africa and their national liberation movement in their legitimate struggle’. GA Res. 36/172 (1981), para. 16.

⁷⁴ Declaration on Principles of International Law concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, GA Res. 2625 (XXV) (1970).

⁷⁵ See Anthony D’Amato, *The Concept of Custom in International Law* (Ithaca: Cornell University Press, 1971), 469, where the author writes, with respect to the widespread use of torture by states, that the ‘objective evidence shows hiding, cover-up, minimization, and non-justification – all the things that betoken a violation of the law’.

⁷⁶ *Nicaragua* case.

opposition in another State, whose cause appeared particularly worthy by reason of the political and moral values with which it was identified. For such a general right to come into existence would involve a fundamental modification of the customary law principle of non-intervention.⁷⁷

The Court went on to emphasise that, 'for a new customary rule to be formed, not only must the acts concerned "amount to a settled practice", but they must be accompanied by the *opinio juris sive necessitatis*'. In short, '[r]eliance by a State on a novel right or an unprecedented exception to the principle might, if shared in principle by other States, tend towards a modification of customary international law', but only if States 'justified their conduct by reference to a new right of intervention or a new exception to the principle of its prohibition'.⁷⁸ The Court in the *Nicaragua* case found neither a settled practice nor evidence of *opinio juris*.

The end of the Cold War brought three developments that might have affected the rule. First, there was an increase in the practice of selling weapons to rebel groups, as arms producers, squeezed by a reduction in military spending by NATO and former Warsaw Pact countries, became less scrupulous about their buyers.⁷⁹ Secondly, and as explained above, the Security Council expanded its conception of 'threat to the peace' to include human rights and humanitarian crises. Thirdly, a difficult debate about unilateral humanitarian intervention took place, which ultimately led to the ICISS reframing the issue as 'responsibility to protect'.

The debate about unilateral humanitarian intervention has also spilled over into an academic debate over the permissibility of supplying weapons to rebels who are fighting to prevent atrocities.⁸⁰ There are authors who support arms transfers based on an inherent right to self-defence against genocide,⁸¹ and those who accept the 'normative legitimacy' of such transfers but insist on the continued requirement of 'some form of approval within the UN system'.⁸² But there has been little movement with respect to State practice and *opinio juris*, as an examination of some recent developments demonstrates.

⁷⁷ *Ibid.*, 108, para. 206. ⁷⁸ *Ibid.*, 108–9, para. 206.

⁷⁹ See Joanna Spear, 'Arms Limitations, Confidence-building Measures, and Internal Conflict' in Michael Edward Brown (ed.), *The International Dimensions of Internal Conflict* (Cambridge, MA: Center for Science and International Affairs, 1996), 383.

⁸⁰ See Frederic Mégret, 'Beyond the "Salvation" Paradigm: Responsibility to Protect (Others) vs the Power of Protecting Oneself', *Security Dialogue*, 40 (2009), 575.

⁸¹ Daniel D. Polsky and Don B. Kates, 'Of Holocausts and Gun Control', *Washington University Law Quarterly*, 75 (1997), 1237.

⁸² Kenneth D. Heath, 'Could We Have Armed the Kosovo Liberation Army: The New Norms Governing Intervention in Civil War', *UCLA Journal of International Law and Foreign Affairs*, 4 (1999–2000), 259.

Bosnia-Herzegovina

Bosnia-Herzegovina was recognised as an independent State before Iran began shipping weapons in 1994, in an effort to help the Bosnian government counter well-armed Serbian paramilitaries who were committing atrocities against civilians. As a result, the legal controversy that ensued was not over any possible infraction of the rule prohibiting arms shipments to rebels, but rather of the apparent violation of a UN arms embargo that had been imposed on both sides.

Nevertheless, the situation cast some light on whether – and how – the justness of a cause might matter to the legality of weapons shipments. When the *Los Angeles Times* reported that the United States had known about the Iranian shipments and failed to discourage them,⁸³ the White House responded that it had ‘upheld the letter of the law and the requirements of the UN Security Council resolution’ imposing the embargo.⁸⁴ But another newspaper reported an anonymous US official as saying: ‘Were we in a position to stop them? Not really. And was there sympathy for Bosnia here? The answer is, yes.’⁸⁵

Libya

In February 2011, the Security Council imposed an arms embargo on Libya by way of paragraph 9 of Resolution 1970.⁸⁶ One month later it adopted Resolution 1973, which authorised ‘all necessary measures, *notwithstanding paragraph 9 of resolution 1970 (2011)*, to protect civilians and civilian populated areas.’⁸⁷ This language can easily be interpreted as authorising the supply of weapons to the rebels, and arguably reflects something of a change in the international community’s attitude to providing such support. However, the ‘notwithstanding paragraph 9’ language in no way contributed to a change in the general rule because the authorisation was provided by the Security Council. The question, as to

⁸³ James Risen and Doyle McManus, ‘U.S. OKd Iranian Arms for Bosnia, Officials Say’, *Los Angeles Times*, 5 April 1996, available at http://articles.latimes.com/1996-04-05/news/mn-55275_1_iranian-arms-shipments.

⁸⁴ James Risen, ‘Administration Defends its OK of Bosnia Arms’, *Los Angeles Times*, 6 April 1996, available at http://articles.latimes.com/1996-04-06/news/mn-55492_1_arms-embargo.

⁸⁵ Rupert Cornwell, ‘US “Secretly Agreed Iran Arms for Bosnia”’, *The Independent*, 6 April 1996, available at www.independent.co.uk/news/world/us-secretly-agreed-iran-arms-for-bosnia-1303474.html.

⁸⁶ SC Res. 1970, 26 February 2011. ⁸⁷ SC Res. 1973, para. 4 (emphasis added).

whether there has been any change in the rule *outside* of Chapter VII, remained unanswered.

Syria

In 2011–13, Syria was not subject to a UN arms embargo because Russia and China were opposed to such a measure. Syria thus provides an opportunity to examine whether the prohibition on providing aid, assistance, training, equipment and arms to rebels has been relaxed in parallel with (and perhaps as a consequence of) the development of international human rights and R2P. As we will see, a number of governments have been willing to openly provide aid, assistance and ‘non-lethal’ equipment to the Syrian rebels. But some of those governments have stopped short of providing arms, while others have only done so covertly.

In July 2012, Switzerland suspended arms exports to the United Arab Emirates after a Swiss-made hand grenade originally shipped to that country was found in Syria.⁸⁸ The next month, *Reuters* reported that US President Barack Obama had ‘signed a secret order authorizing U.S. support for rebels seeking to depose Syrian President Bashar al-Assad and his government’ but that the United States was ‘stopping short of giving the rebels lethal weapons’.⁸⁹ France also indicated that it would provide ‘non-lethal elements’ to the rebels, including ‘means of communication and protection’.⁹⁰ And when British Foreign Secretary William Hague announced that his government would provide £5 million in non-lethal equipment to the Syrian opposition, he emphasised that the funding would go to ‘unarmed opposition groups, human rights activists and civilians’.⁹¹ In January 2013, when Hague announced that the United Kingdom was seeking modifications to EU sanctions on Syria ‘so that the

⁸⁸ ‘Switzerland Halts Arms Exports to UAE, as Report says Swiss Arms Used by Syria Rebels’, *Haaretz and Reuters*, 5 July 2012, available at www.haaretz.com/news/middle-east/switzerland-halts-arms-exports-to-u-a-e-as-report-says-swiss-arms-used-by-syria-rebels-1.449022.

⁸⁹ Mark Hosenball, ‘Exclusive: Obama Authorizes Secret U.S. Support for Syrian Rebels’, *Reuters*, 1 August 2012, available at www.reuters.com/article/2012/08/01/us-usa-syria-obama-order-idUSBRE8701OK20120801.

⁹⁰ ‘France Gives Non-lethal Military Aid to Syrian Opposition: PM’, *Al Arabiya News*, 22 August 2012, available at: <http://english.alarabiya.net/articles/2012/08/22/233570.html>.

⁹¹ ‘Syria Conflict: UK to Give Extra £5m to Opposition Groups’, *BBC News*, 10 August 2012, available at www.bbc.co.uk/news/uk-19205204.

possibility of additional assistance [to the rebels] is not closed off,⁹² he indicated any military equipment provided would still be of a non-lethal character, such as body armour.⁹³

This differentiation between the provision of aid, assistance, training and non-lethal equipment on the one hand, and weapons on the other, was consistent with another recent development in international politics. For it has become widely accepted that curtailing arms transfers to non-State groups is one of the most effective means of reducing long-term risks to civilians. This new acceptance has led to an Arms Trade Treaty that was adopted by the United Nations in April 2013.⁹⁴ The treaty makes no exception for the provision of arms to rebels, not even those fighting to prevent atrocities, and ratifications of the treaty are now contributing important State practice to the prohibition against such transfers.⁹⁵

Of course, weapons still find their way into rebel hands. In June 2012, the *New York Times* reported that CIA operatives in southern Turkey were helping to direct arms – paid for by Turkey, Saudi Arabia and Qatar – to Syrian opposition fighters.⁹⁶ In January 2013, *The Guardian* reported that: ‘Along with Qatar, Turkey and the UAE, the Saudis are believed to be the rebels’ principal suppliers and financiers.’⁹⁷ However, the latter report also observed that ‘public discussion of the issue is extremely rare and the demarcation between government and private initiatives is blurred’.

In other words, although there is State practice in support of providing arms to rebels, it is not accompanied by the *opinio juris* necessary to change a rule of customary international law, and certainly not one of *jus cogens* status that is set out in a foundational treaty such as the UN Charter.

⁹² ‘Hague: “Options Open” on Military Support for Syrian Rebels’, *BBC News*, 10 January 2013, available at www.bbc.co.uk/news/uk-politics-20969386.

⁹³ *Ibid.* ⁹⁴ Arms Trade Treaty (New York, adopted 2 April 2013, not yet in force).

⁹⁵ On the role of treaties as state practice, see Richard Baxter, ‘Treaties and Custom’, *Recueil des Cours*, 129 (1970-I), 25; D’Amato, *The Concept of Custom in International Law*, 89–90 and 160; Mark Villiger, *Customary International Law and Treaties* (Dordrecht: Martinus Nijhoff, 1985).

⁹⁶ Eric Schmitt, ‘C.I.A. Said to Aid in Steering Arms to Syrian Opposition’, *New York Times*, 21 June 2012, available at www.nytimes.com/2012/06/21/world/middleeast/cia-said-to-aid-in-steering-arms-to-syrian-rebels.html.

⁹⁷ Ian Black, ‘Arm Syrian Rebels to Contain Jihadis, says Saudi Royal’, *The Guardian*, 25 January 2013, available at www.guardian.co.uk/world/2013/jan/25/arm-syrian-rebels-jihadis-saudi.

Even the United States' June 2013 decision to supply some of the Syria rebels with weapons is clouded with regards to its legal relevance. The decision was announced by a spokesman and not by the president or a cabinet member. Weapons were not specifically mentioned; instead, the spokesman simply said that the military aid would be 'different in scope and scale to what we have provided before'. Moreover, the decision was explicitly linked to the Syria government's use of chemical weapons, rather than the human suffering caused.⁹⁸ As a result, the United States did not contribute substantially to the State practice and *opinio juris* in favour of relaxing the more general rule against providing arms to rebels. And of course the United States cannot change international law on its own; what matters, more than its actions, is how other countries respond.

For the moment, the situation has not changed from that described by former US State Department Legal Adviser John B. Bellinger III in January 2013:

The U.N. Charter prohibits member states from using force against or intervening in the internal affairs of other states unless authorized by the U.N. Security Council or justified by self-defense. These rules make it unlawful for any country to use direct military force against the Assad regime, including establishing 'no-fly zones' or providing arms to the Syrian opposition without Security Council approval.⁹⁹

However, states are increasingly behaving as if the same general prohibition on the use of force no longer precludes the provision of aid, assistance, training and 'non-lethal' equipment to rebels – at least in cases where the rebels are fighting to prevent atrocities. States could also, in future, behave as if the general prohibition on the use of force no longer precludes the supply of arms to rebels who are fighting against a regime that uses chemical weapons. And to the degree these changes occur, they do so in parallel with, and perhaps partly as a result of, developments concerning international human rights that include the Security Council taking a broader approach to 'threat to the peace', as well as the emergence of R2P.

⁹⁸ Mark Mazzetti, Michael R. Gordon and Mark Landler, 'U.S. Is Said to Plan to Send Weapons to Syrian Rebels', *New York Times*, 13 June 2013, available at www.nytimes.com/2013/06/14/world/middleeast/syria-chemical-weapons.html.

⁹⁹ John B. Bellinger III, 'U.N. Rules and Syrian Intervention', *Washington Post*, 17 January 2013, available at http://articles.washingtonpost.com/2013-01-17/opinions/36410395_1_syrian-opposition-assad-regime-intervention.

Role of R2P in contributing to mitigation

When a State feels compelled by humanitarian concerns to violate the prohibition on the use of force, the circumstances might be taken into account in mitigation. Mitigation is a concept familiar to international law. In the 1949 *Corfu Channel* case, when Albania took the United Kingdom to the International Court of Justice in circumstances where both countries had acted illegally, the Court held that a declaration of illegality was a sufficient remedy for the British violation.¹⁰⁰ In 1960, after Israel abducted Adolf Eichmann from Argentina to face criminal charges, Argentina lodged a complaint with the Security Council, which passed a resolution stating that the sovereignty of Argentina had been infringed and requesting Israel to make ‘appropriate reparation’.¹⁰¹ However the Council, ‘mindful’ of ‘the concern of people in all countries that Eichmann be brought to justice’, made no indication that Eichmann should be returned to Argentina.¹⁰²

Shortly after the Kosovo War, Simon Chesterman and I wrote:

In accordance with such an approach, the human rights violations that prompted a unilateral humanitarian intervention would have to be considered, and to some degree weighed against the actions of the intervening state, in any determination as to whether compensation for violating the rules concerning the use of force is required. Given the fundamental character of the rights violated when mass atrocities occur . . . the intervening state might fare quite well in any such after-the-fact balancing of relative violations.¹⁰³

Since then, the development of R2P has introduced criteria that might guide the Security Council and individual states on the appropriateness and degree of mitigation. Resolution 1674 identified that ‘genocide, war crimes, ethnic cleansing and crimes against humanity’ are of particular concern to the Council, and therefore most likely to trigger an authorised intervention.¹⁰⁴ The paragraphs on R2P in the World Summit Outcome Document, which were ‘reaffirmed’ in Resolution 1674, specified that an intervention may only be contemplated ‘should peaceful means be inadequate and national authorities are manifestly failing to protect their

¹⁰⁰ *Corfu Channel (United Kingdom v. Albania)*, Judgment, 9 April 1949, ICJ Reports (1949), 4, 36.

¹⁰¹ SC Res. 138, 23 June 1960. ¹⁰² *Ibid.*

¹⁰³ Byers and Chesterman, ‘Changing the Rules about Rules?’, 200–1.

¹⁰⁴ See discussion, nn. 44–5.

populations'.¹⁰⁵ And while the report of the High-level Panel on Threats, Challenges and Change was not explicitly endorsed by the Security Council or General Assembly, its 'criteria of legitimacy' – seriousness of intent, proper purpose, last resort, proportional means and balance of consequences – might be considered by the Council and individual states as they decide how to respond to another State's violation of the prohibition on force.¹⁰⁶

Mitigation itself could come in the form of *ex post facto* authorisation from the Security Council, and it is instructive that such authorisation was granted with respect to the ECOWAS interventions in Liberia and Sierra Leone but not the US-led interventions in Kosovo or Iraq.¹⁰⁷ It could also come in the form of a waiver or reduction of reparations owed, a possibility foreseen in Article 39 of the International Law Commission's Articles on State Responsibility: 'In the determination of reparation, account shall be taken of the contribution to the injury by wilful or negligent action or omission of the injured State or any person or entity in relation to whom reparation is sought.'¹⁰⁸

Mitigation may already be happening with respect to transfers of weapons to rebels. As was explained above, such transfers are generally covert, and covert actions cannot make or change international law.¹⁰⁹ However, to the degree such transfers are known to be happening, as in Syria, they now attract little reprobation from other states – if and when they are directed at rebels who are fighting to prevent atrocities. One can therefore speculate that, instead of changing the rule to accommodate the exception, the international community is simply choosing to ignore or at least downplay particular violations.

Implications for the international legal system

The on-going development of R2P offers a number of insights into the international legal system. First, 'norm entrepreneurs' who act strategically and persistently can have a significant influence on the framing of debates concerning specific issues of international law.

¹⁰⁵ See discussion, nn. 42–3. ¹⁰⁶ See discussion, nn. 36–9.

¹⁰⁷ See SC Res. 788 and 866, 19 November 1992 and 22 September 1993 (Liberia) and 1181, 13 July 1998 (Sierra Leone).

¹⁰⁸ James Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (Cambridge University Press, 2002).

¹⁰⁹ See discussion, nn. 75–8.

Secondly, such efforts can be interrupted by unanticipated events, including attempts to distort or hijack the norm by other actors.

Thirdly, unanticipated events can necessitate compromise and redirection, which in the case of R2P has involved the limitation of the concept, insofar as it concerns the use of force, to being part of the context of Security Council decision-making.

Fourthly, compromise and redirection may also result when 'norm entrepreneurs' realise that some aspects of the international legal system, such as the prohibition on the use of force, are deeply imbedded and therefore highly resistant to change. This is not to say that ICISS members were naïve about the existence of *jus cogens* rules or the necessity for widespread support from the developing world for any change. Strategically, it is sometimes useful to set one's public goals higher than the results one realistically hopes to achieve. For this reason, acceptance of R2P as relevant context for Security Council decision-making has to be considered a victory, even if some proponents of the concept remain dissatisfied.¹¹⁰

Fifthly, the failure of 'norm entrepreneurs' to change a rule does not necessarily mean that they have failed to influence associated or derivative aspects of the legal system. In the case of R2P and the prohibition on the use of force, the failure to change the rule concerning military interventions has not precluded a possible change to the same rule as it applies to the provision of aid, assistance, training and non-lethal equipment to rebels fighting to prevent atrocities, and perhaps even of weapons. Practitioners and scholars of international law would be wise to pay attention, not just to the central aspect of any rule, but also to its often-more-mutable margins.

Finally, the effects of 'norm entrepreneurship' can include changes that are additional or alternative to changes to rules. In the case of R2P, both as it concerns unilateral humanitarian intervention and the provision of arms to rebels, it is important to consider whether the development of the concept will lead to increased mitigation of the consequences – for States

¹¹⁰ See e.g. the International Coalition for the Responsibility to Protect, a coalition of forty-nine NGOs which includes the following 'essential element' in its 'common understanding' of R2P: 'when a state "manifestly fails" in its protection responsibilities, and peaceful means are inadequate, the international community *must* take stronger measures including Chapter VII measures under the UN Charter, including but *not limited to the collective use of force authorized by the Security Council*. Available at www.responsibilitytoprotect.org/index.php/about-coalition/our-understanding-of-rtop (emphasis added).

whose moral compulsion to violate international law is both genuinely felt and well-founded.

In the future, R2P may lead to more changes in the international legal system. But instead of beginning at the core of the prohibition on the use of force, the changes will most likely commence at the margins. International law is often like that, moving forward sideways.