

Dangerous Liaisons: The Responsibility to Protect and a Reform of the U.N. Security Council

NADIA BANTEKA*

This Article responds to current literature, which unitarily advocates for a United Nations Security Council (UNSC) reform solution to the Responsibility to Protect (R2P) deadlock, particularly in the context of the situation in Syria. This Article argues, contra the consensus, that a reformed UNSC would hinder the crystallization of R2P as a customary norm and its application to humanitarian crises. Part I of this Article argues that the interaction between R2P and the newly advanced concept of Responsibility Not to Veto (RN2V) can be examined under two hypotheses: one substantive and one procedural. The substantive hypothesis treats RN2V as a corollary obligation to R2P, explicating that the concept of R2P necessitates two separate state obligations: (1) the obligation to respond to grave violations of human rights; and (2) the obligation to, at a minimum, refrain from obstructing other states' efforts to employ R2P. I argue that the substantive hypothesis, though not necessarily conceptually problematic, does not offer the same practical and pragmatic value that the procedural hypothesis does. By viewing RN2V as a procedural mechanism to facilitate R2P's invocation, R2P has a higher likelihood of being crystallized into a rule of customary international law. Part II of this Article analyzes empirical data to show that the often-proposed UNSC re-

* Lecturer in International Law, The Hague University of Applied Sciences; S.J.D. (Cand.) University of Pennsylvania Law School; Visiting Scholar, Columbia Law School. Thank you to William Burke-White, Shannon Noelle Doherty, and the participants of the 2015 Penn Law Global Forum for their insightful comments on earlier drafts of this paper. Thank you also to Svetlana Atanasova and Olivia Flasch for their excellent research assistance. Finally, thank you to the editors of the *Columbia Journal of Transnational Law* for their constructive suggestions and edits. All remaining errors are my own.

form measure would be ineffective. I utilize the proposed models of UNSC expansion, advanced by the current academic literature, to examine the past and current practices of potential new permanent members toward the concepts of RN2V and R2P. By comparing this practice to that of the current permanent UNSC members, I conclude that the resulting UNSC composition would, in the aggregate, include more states that are not traditionally in favor of R2P. Despite hopes of a UNSC reform making the Council more effective in governing the use of force, this Article argues that in cases of R2P, a reformed UNSC is likely to face greater difficulty in reaching a consensus. Instead, the most effective way to promote the development of the R2P norm is through acknowledging RN2V's procedural role, and the assertion that RN2V functionally implements, or particularizes, R2P.

INTRODUCTION	383
I. RESPONSIBILITY TO PROTECT & RESPONSIBILITY NOT TO VETO	386
A. Preliminary Terminological Observations.....	386
B. Responsibility to Protect as a Substantive Norm.....	388
C. RN2V & R2P: A Tale of Two Concepts	391
D. R2P & UNSC Past Politics	393
E. Which R2P?	396
II. U.N. SECURITY COUNCIL REFORM	399
A. Preliminary Discussions	399
B. Composition of an Expanded UNSC	402
C. Politics in UNSC v. RN2V	408
D. Politics in Reformed UNSC v. R2P.....	413
CONCLUSION	423

INTRODUCTION

The legal regime surrounding the use of force changed substantially and hardened normatively in the wake of World War II

(WWII).¹ The emergence of the Bretton Woods system² and the United Nations Charter (UNC)³ in particular drastically limited the cross-border use of force in situations involving self-defense and in actions authorized by the United Nations Security Council (UNSC or Council). The aftermath of WWII also witnessed the renewed appeal of the relatively archaic but consistently relevant notion of state sovereignty. Article 2(7) of the UNC reflects the hard shell of state sovereignty, which forbids any interference with a state's domestic affairs.⁴ As a field of inquiry in *statu nascendi* in 1945, human rights were clearly subordinate to the imperative goal of peace preservation that formed the cornerstone of the UNC.⁵ Although the protection and promotion of human rights were featured among the principal purposes of the United Nations (UN),⁶ the UNC set a general prohibition on the use of force in Article 2(4),⁷ save for measures authorized

1. Compare League of Nations Covenant art. 11 (“[W]ar or threat of war . . . is hereby declared a matter of concern to the whole League . . .”), with U.N. Charter art. 2, ¶ 4 (“All Members shall refrain . . . from the threat or use of force . . .”) (emphasis added).

2. See generally Articles of Agreement of the International Bank for Reconstruction and Development art. 1, Dec. 27, 1945, 60 Stat. 1440, 2 U.N.T.S. 134; Articles of Agreement of the IMF art. 1, July 22, 1944, 60 Stat. 1401, 2 U.N.T.S. 39 (describing the peaceful, collaborative, and reconstructive purposes of the Bretton Woods institutions).

3. U.N. Charter art. 39 (“The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with art. 41 and art. 42, to maintain or restore international peace and security.”) (emphasis added); U.N. Charter art. 51 (“Nothing in the present Charter shall impair the *inherent right of individual or collective self defense if an armed attack occurs* against a Member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security.”) (emphasis added).

4. U.N. Charter art. 2, ¶ 7 (“Nothing contained in the present Charter shall authorize the United Nations to *intervene in matters which are essentially within the domestic jurisdiction* of any state or shall require the Members to submit such matters to settlement under the present Charter; but *this principle shall not prejudice the application of enforcement measures under Chapter VII.*”) (emphasis added).

5. See SIMON CHESTERMAN, JUST WAR OR JUST PEACE?: HUMANITARIAN INTERVENTION AND INTERNATIONAL LAW 45 (2001) (arguing that the UNC “clearly privileges peace over dignity” in its substantive provisions).

6. U.N. Charter art. 1, ¶ 3 (“To achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and *in promoting and encouraging respect for human rights* and for fundamental freedoms for all without discrimination as to race, sex, language, or religion.”) (emphasis added).

7. U.N. Charter art. 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.”).

by the UNSC under its Chapter VII powers,⁸ or through state action taken in individual or collective self-defense.⁹

The UNC use-of-force regime has not, however, enjoyed blanket observance throughout time. In the years that followed, the human-rights regime gradually gained more influence by slowly contesting the stale ideas of sovereignty and incorporating the interests of individuals as obligations owed by states.¹⁰ Arguments for an international right or obligation of forcible intervention have been voiced continuously,¹¹ without the establishment of a clear legal doctrine. Instead, the norms of human rights, state sovereignty, and peace preservation have been constructed and deconstructed, balanced and rebalanced over time in order to reach the desired normative threshold. These norms have generated doctrines that carry theoretical and legal implications, the most prominent and recent among these being the Responsibility to Protect (R2P).¹²

Part I of this Article introduces the concept of R2P alongside the newly developed concept of Responsibility Not to Veto (RN2V). After analyzing both R2P and RN2V and reviewing their interaction in UNSC politics through the case studies of Rwanda, Kosovo, Sudan, Libya, and Syria, this Article examines their relationship under two hypotheses. The first hypothesis holds that the emerging norm

8. U.N. Charter art. 39 (“The Security Council *shall determine* the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or *decide what measures shall be taken* in accordance with Articles 41 and 42, to maintain or restore international peace and security.”) (emphasis added).

9. U.N. Charter art. 51 (“Nothing in the present Charter shall impair the *inherent right of individual or collective self defense* if an armed attack occurs against a Member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security.”) (emphasis added).

10. See, e.g., Hague Convention (II) with Respect to the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land, July 29, 1899, 32 Stat. 1803; Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135. For this period of international law, diverging from state sovereignty and honoring human rights meant to a great degree protecting civilians from violence by constraining the behavior of states and their official actors in their battlefield behavior.

11. See Gareth Evans, *The Responsibility to Protect: An Idea Whose Time Has Come . . . and Gone?*, 22 INT’L REL. 283, 284–98 (2008); Ryan Goodman, *Humanitarian Intervention and Pretexts for War*, 100 AM. J. INT’L L. 107, 141 (2006); Ian Hurd, *Is Humanitarian Intervention Legal? The Rule of Law in an Incoherent World*, 25 ETHICS & INT’L AFF. 293, 293–313 (2011).

12. See Miles Kahler, *Legitimacy, Humanitarian Intervention, and International Institutions*, 10 POL. PHIL. & ECON. 20, 21 (2010).

of R2P encompasses the corollary obligation of RN2V. I argue that this hypothesis is the more difficult path for R2P to follow as it presupposes that R2P incorporates RN2V in its development, thus requiring both obligations be met in order for R2P to achieve the adherence needed to harden into an accepted international law norm.

Instead, I offer an alternative hypothesis that more accurately reflects the relationship between R2P and RN2V. This hypothesis frames RN2V as a procedural mechanism the UNSC can adopt in a context where R2P has not yet crystallized under customary international law. Having examined the relationship between these two notions, I then address the arguments concerning the UNSC's ineffectiveness in R2P situations, and its disengagement with RN2V due to its current composition. Part II of this Article evaluates the common argument that R2P requires a reformed UNSC to operate better. I examine the three proposed UNSC reform models to argue that prior state practice and behavior by both permanent members of the UNSC Permanent Five (P5)¹³ and also by states likely to be added to a reformed UNSC suggest that a reformed UNSC will likely be less favorable toward the notion of R2P than the current UNSC. I perform this analysis in two steps: first I analyze the possibility of a reformed UNSC engaging positively with RN2V. Second, I examine the likelihood of this reformed UNSC engaging positively with R2P. In this light, I conclude that despite hopes of UNSC reform making the Council more effective in governing the use of force, in cases of R2P a reformed UNSC is likely to face greater difficulty in reaching agreement, which consequently may hinder the development of the R2P emerging norm.

I. RESPONSIBILITY TO PROTECT & RESPONSIBILITY NOT TO VETO

A. Preliminary Terminological Observations

One constant has surfaced throughout the debates over the changing normative content of the use of force regime *vis-à-vis* external intervention: deference to UNSC is understood as a key legitimizing step.¹⁴ The very notion of R2P has become a contested do-

13. The permanent members of the UNSC, also known as the Permanent Five, or P5, comprise the following five governments: China, France, Russia, the United Kingdom, and the United States. U.N. Charter art. 23, ¶ 1. These members represent the five great powers that emerged as victors of World War II. Each of the permanent members has power to veto UNSC Resolutions. U.N. Charter art. 27, ¶ 3.

14. The ICISS Report, see *infra* notes 19–22 and accompanying text, was ambiguous in this regard. The later documents seem to foreclose interventions not authorized by the

main in international law and politics with actors employing the idea in a variety of differing ways. After reviewing the notion of R2P as a whole, this Article restricts its scope of R2P to the use of coercive measures and possible military action against egregious human rights violations—what is often referred to as R2P’s “third pillar.”¹⁵ This Article also relies on the understanding that R2P is a powerful emerging norm with significant normative leverage, but one that has yet to crystallize into binding customary international law.¹⁶

UNSC as a lawful option. See High-Level Panel on Threats, Challenges and Change, *A More Secure World: Our Shared Responsibility*, ¶ 201, U.N. Doc. A/59/565 (Dec. 2, 2004); *id.* ¶ 203 (“We endorse . . . exercisable by the Security Council authorizing military intervention as a last resort, in the event of genocide”); U.N. Secretary-General, *In Larger Freedom: Towards Development, Security and Human Rights for All*, ¶ 135, U.N. Doc. A/59/2005 (Mar. 21, 2005) (“This responsibility lies first and foremost with each individual State [T]he Security Council may out of necessity decide to take action under the Charter of the United Nations”); see also G.A. Res. 60/1, ¶¶ 138–39, 2005 World Summit Outcome (Oct. 24, 2005). On this subjective definition of legitimacy, see IAN HURD, *AFTER ANARCHY: LEGITIMACY AND POWER IN THE UNITED NATIONS SECURITY COUNCIL* 7–12 (2007).

15. The first pillar is the primary responsibility of the state to protect its populations from genocide, war crimes, ethnic cleansing, and crimes against humanity, and from their incitement. The second pillar is the commitment of the international community to assist states in meeting those obligations by means of inter-state cooperation, regional arrangements, civil society, the private sector, and through the institutions of the United Nations. The third pillar is the responsibility of states to collectively respond in a timely and decisive manner when a state is manifestly failing to protect its populations. See U.N. Secretary-General, *Implementing the Responsibility to Protect*, ¶¶ 2, 11, U.N. Doc. A/63/677 (Jan. 12, 2009).

16. See High-Level Panel on Threats, Challenges and Change, *supra* note 14, ¶ 203 (describing the Responsibility to Protect as an “emerging norm”); William W. Burke-White, *Adoption of the Responsibility to Protect* 1 (U. Pa. L. Sch. Public Law and Legal Theory Research Paper Series, Research Paper No. 11-40, 2011); see also Sandra Szurek, *La responsabilité de protéger, nature de l’obligation et responsabilité internationale*, in COLLOQUE DE NANTERRE, *LA RESPONSABILITE DE PROTEGER* 91, 93 Cf (Société française ed., 2008). It still remains controversial whether R2P is a legal obligation, only a political concept, soft law, or an emerging legal norm. Proponents of a legal obligation argue that R2P is rooted in pre-existing treaty obligations such as Common Article 1 of the 1949 Geneva Conventions, the Genocide Convention, and the human rights Covenants, which embody positive obligations for states. See Edward C. Luck, Special Adviser to the U.N. Secretary-General, Remarks to the General Assembly on the Responsibility to Protect 3 (July 23, 2009), <http://www.un.org/en/preventgenocide/adviser/pdf/EL%20GA%20remarks%202009.pdf> (“[I]t is a political, not legal, concept based on well-established international law and the provisions of the UN Charter.”); Louise Arbour, *The Responsibility to Protect As a Duty of Care in International Law and Practice*, 34 REV. INT’L STUD. 445, 447–48, 450 (2008) (“[R2P is] anchored in existing law . . . [and] rests upon an undisputed obligation . . . [of] the prevention and punishment of genocide.”); see also L. Boisson de Chazournes & Laurence Condorelli, *De la “responsabilité de protéger” ou d’une nouvelle parure pour une notion déjà bien établie*, 110 REVUE GENERAL DE DROIT INTERNATIONAL 11–18 (2006)

B. Responsibility to Protect as a Substantive Norm

The modern history of R2P can be traced to then-U.N. Secretary-General Kofi Annan's 1998–1999 speeches, where he argued that sovereignty should no longer shield governments that violate the basic human rights of their people.¹⁷ It is against this backdrop that R2P rose to articulate the rationale by which the international community should intervene to protect those exposed to atrocities.¹⁸ For

(arguing that R2P does not go beyond the obligation to respect and to ensure respect under international humanitarian law (Common Article 1 of the Geneva Conventions) and is therefore nothing new); Andrew Clapham, *Responsibility to Protect—Some Sort of Commitment*, in CONFLICTS, SÉCURITÉ ET COOPÉRATION—LIBER AMICORUM VICTOR-YVES GHEBALI 169, 191 (Vincent Chetail ed., 2007) (discussing R2P being a political concept); Jennifer M. Welsh & Maria Banda, *International Law and the Responsibility to Protect: Clarifying or Expanding States' Responsibilities?*, 2 GLOBAL RESP. TO PROTECT 213, 230 (2010) (discussing R2P as soft law).

17. See, e.g., Kofi A. Annan, Two Concepts of Sovereignty, Address to the 54th Session of the General Assembly (Sept. 20, 1999), in KOFI A. ANNAN, THE QUESTION OF INTERVENTION: STATEMENTS BY THE SECRETARY GENERAL 44 (1999). See also the statement of the Secretary-General in U.N. GAOR, 54th Sess., 4th plen. mtg. at 1–2, U.N. Doc. A/54/PV.4 (Sept. 20, 1999) (“The sovereign state, in its most basic sense, is being redefined by the forces of globalization and international cooperation. The state is now widely understood to be the servant of its people, and not vice versa. At the same time, individual sovereignty—and by this I mean the human rights and fundamental freedoms of each and every individual, as enshrined in our Charter—has been enhanced by a renewed consciousness of the right of every individual to control his or her own destiny. These parallel developments—remarkable and in many ways welcome—do not lend themselves to easy interpretations or simple conclusions. They do, however, demand of us a willingness to think anew about how the United Nations responds to the political, human rights and humanitarian crises affecting so much of the world; about the means employed by the international community in situations of need; and about our willingness to act in some areas of conflict while limiting ourselves to humanitarian palliatives in many other crises whose daily toll of death and suffering ought to shame us into action.”).

18. Historically, R2P had been invented to replace the highly controversial concept of humanitarian intervention by shifting the terms of the debate from sovereignty as control to sovereignty as responsibility and from a right to intervene to a responsibility to protect. See INT’L COMM’N ON INTERVENTION & STATE SOVEREIGNTY, THE RESPONSIBILITY TO PROTECT: THE REPORT OF THE INTERNATIONAL COMMISSION ON INTERVENTION AND STATE SOVEREIGNTY ¶¶ 1.39–1.41, 2.14, 2.28–2.29 (2001) [hereinafter ICISS REPORT]. See generally FRANCIS M. DENG, PROTECTING THE DISPOSSESSED: A CHALLENGE FOR THE INTERNATIONAL COMMUNITY (1993); FRANCIS M. DENG ET AL., SOVEREIGNTY AS RESPONSIBILITY: CONFLICT MANAGEMENT IN AFRICA (1996). For a first assessment of this paradigm shift, see Anne Peters, *Le droit d’ingérence et le devoir d’ingérence: vers une responsabilité de protéger*, 79 REVUE DE DROIT INTERNATIONAL ET DE DROIT COMPARÉ 290, 290–308 (2002). See, critically, José Alvarez, *The Schizophrenias of R2P*, in HUMAN RIGHTS, INTERVENTION, AND THE USE OF FORCE 275–84 (Philip Alston & Euan Macdonald eds., 2007).

this reason, states convened the International Commission on Intervention and State Sovereignty (ICISS), which subsequently produced its 2001 Report for R2P. The ICISS Report¹⁹ argued that the debate between sovereignty and intervention should be reframed to encompass R2P instead of a unilateral right of states to use force against gross human rights violations.²⁰ The ICISS Report's main contribution was its rejection of the idea of substituting the UNSC with other forms of authority,²¹ thereby fundamentally distinguishing R2P from the older notion of humanitarian intervention.²² According to a liberal analysis of humanitarian intervention, the protection and enforcement of human rights is the "ultimate justification of the existence of states."²³ Consequently, in cases where a state is a perpetual violator of substantial human rights or fails to protect its people from such violations, the protection offered by state sovereignty from external intervention is suspended. Therefore, states that are committed to human rights and democracy bear a legitimate right to unilateral or collective intervention without the need for UNSC authorization.²⁴ States have been particularly reluctant in endorsing such an expansive rights-based justification for humanitarian intervention. In fact, only three early episodes of forceful, unilateral intervention have been labelled strictly "humanitarian" in their pursuit: the interven-

19. See ICISS REPORT, *supra* note 18, at xii; see also RAMESH THAKUR, THE UNITED NATIONS, PEACE AND SECURITY: FROM COLLECTIVE SECURITY TO THE RESPONSIBILITY TO PROTECT 257–63 (2006).

20. PROTECTING THE DISPOSSESSED, *supra* note 18; SOVEREIGNTY AS RESPONSIBILITY, *supra* note 18, at 11–18.

21. ICISS REPORT, *supra* note 18, ¶ 6.14.

22. The ICISS Report distinguished the idea of R2P from humanitarian intervention in three ways. See *id.* ¶ 2.29. First, the Report stressed that R2P views intervention from the side of those who need assistance, such as communities facing gross human rights violations in the vein of genocide, ethnic cleansing, or mass murder, rather than from the interests of the intervening states. *Id.* Second, the Report introduced a complementary concept of responsibility that recognized that the primary R2P lies with the state whose people are being affected, and "that it is only if the state is unable or unwilling to fulfill this responsibility, or is itself the perpetrator, that it becomes the responsibility of the international community to act in its place." *Id.* Third, the Report expanded the parameters of intervention, calling for ongoing engagement to prevent further conflict and rebuild the society after the initial intervention on the part of the intervening state(s). *Id.* In practice this principle "means that if military intervention action is taken—because of a breakdown or abdication of a state's own capacity and authority in discharging its 'responsibility to protect'—there should be a genuine commitment to helping to build a durable peace, and promoting good governance and sustainable development." *Id.* ¶ 5.1.

23. FERNANDO TESON, HUMANITARIAN INTERVENTION: AN INQUIRY INTO LAW AND MORALITY 15–16 (3d ed. 2005).

24. *Id.* at 388–89.

tion of India in East Pakistan (1971), of Tanzania in Uganda (1978), and of Vietnam in Kampuchea (1978).²⁵ The Cold War-divided UNSC never authorized any of these interventions²⁶ and was quick to condemn them with the exception of the invasion in Uganda—a testament to the normative assumptions of the time.²⁷

Later in 2004, the idea of R2P was taken up in the context of the U.N. reform debate with the High-Level Panel on Threats, Challenges and Change (HLP),²⁸ and R2P was adopted by the U.N. Gen-

25. For a discussion of early military humanitarian intervention and the rationale of intervening, see Thomas M. Franck, *Interpretation and Change in the Law of Humanitarian Intervention*, in HUMANITARIAN INTERVENTION: ETHICAL, LEGAL AND POLITICAL DILEMMAS 204, 204–31 (J. L. Holzgrefe & Robert O. Keohane eds., 2003). For the ethical and legal implications of the norm, see TESON, *supra* note 23, at 388–89.

26. Franck, *supra* note 25, at 216–19. Before 1990, the UNSC adopted only twenty-two resolutions under Chapter VII, most of which authorized sanctions rather than uses of force. The two most notable exceptions to this were the Congo peacekeeping force and the Korean War. In the case of the Korean War, authorization was possible only because of the temporary absence of the USSR in order to protest the exclusion of the People's Republic of China from the Council. In anticipation of deadlock upon the USSR's return, the UNSC adopted the 1950 "Uniting for Peace Resolution," allowing the U.N. General Assembly to take responsibility in issues of international peace and security in cases where the UNSC is unable to act. G.A. Res. 377 (V), Uniting for Peace (Nov. 3, 1950).

27. At about this time, a justification for intervention based on the defense of human rights was reflected in the debates between Michael Walzer and his critics. See, e.g., MICHAEL WALZER, JUST AND UNJUST WARS: A MORAL ARGUMENT WITH HISTORICAL ILLUSTRATIONS 100–09 (1977).

28. High-Level Panel on Threats, Challenges and Change, *supra* note 14, ¶ 201. The High Level Panel explicitly recognized that any use of force for R2P purposes would have to be authorized by the Council under its Chapter VII provisions. It was this criterion that China and especially Russia had insisted on including in the United Kingdom and Lebanon's draft paper in 1999–2000. Additionally, the issue of the UNSC adopting a set of pre-established criteria for the authorization of an R2P intervention was heavily debated. The principal argument against the Council adopting criteria is that it will enable powerful states to circumvent Council authority. However, this proposition is open to the powerful rebuttal that agreement on thresholds would actually constrain the use of force. Nicholas J. Wheeler argued not that "establishing criteria would eliminate the risk of abuse, but [that] agreement on the principles set out in both the High-level Panel report and [Kofi Annan's report] *In Larger Freedom* would set a clear benchmark against which to judge the humanitarian claims of states." Nicholas J. Wheeler, *A Victory for Common Humanity? The Responsibility to Protect After the 2005 World Summit*, 2 J. INT'L L. & INT'L REL. 95, 101 (2005). For this debate, see Gareth Evans, Address to Australian Fabian Society: The United Nations: Vision, Reality and Reform 5 (Sept. 28, 2005); see also THAKUR, *supra* note 19, at 257–63; Alex J. Bellamy, *Whither the Responsibility to Protect? Humanitarian Intervention and the 2005 World Summit*, 20 ETHICS & INT'L AFF. 143, 146–47 (2006). See generally Thomas G. Weiss, *The Sunset of Humanitarian Intervention? The Responsibility to Protect in a Unipolar Era*, 35 SECURITY DIALOGUE 144 (2004); Ian Johnstone, *Discursive Power in the UN Security Council*, 2 J. INT'L LAW & INT'L REL. 73 (2005).

eral Assembly (UNGA) in its Outcome Document. The Outcome Document helped recognize the responsibility to protect populations from genocide, war crimes, ethnic cleansing, and crimes against humanity, and placed primary responsibility on individual states and corresponding responsibility on the international community.²⁹ The Outcome Document's approach was further endorsed by the UNSC in Resolution 1674 on the protection of civilians in armed conflict, giving it stronger normative bite.³⁰ Finally, in 2009, the U.N. Secretary-General Ban Ki-moon presented a report clarifying R2P so that states could implement it in a "fully faithful and consistent manner."³¹ According to the Secretary-General's Report, R2P should be understood as comprising three conceptual pillars.³² First, there is the responsibility of all states to protect their own populations from genocide, war crimes, and crimes against humanity.³³ Second, in cases where the territorial state is unable or unwilling to protect its populations from these crimes, the international community bears the responsibility to intervene in a non-military manner in assisting these states to meet their obligations under the first pillar.³⁴ Third, if a state "manifestly fail[s]" in its responsibilities, the international community ought to respond in a "timely and decisive manner," by taking a range of peaceful, coercive, or forceful measures in accordance with the UNC.³⁵ Measures taken pursuant to the Secretary-General's Report to protect populations may only be authorized through Chapter VII of the UNC.³⁶

C. RN2V & R2P: A Tale of Two Concepts

The ICISS Report placed high importance on the challenge of increasing the effectiveness of the UNSC for the purposes of R2P.³⁷

29. G.A. Res. 60/1, ¶¶ 138–39 (Oct. 24, 2005).

30. S.C. Res. 1674, ¶ 4 (Apr. 28, 2006).

31. *Implementing the Responsibility to Protect*, *supra* note 15. At the subsequent UNGA debate, over fifty states explicitly endorsed UNSG's three-pillar formulation. See GLOB. CTR. FOR THE RESPONSIBILITY TO PROTECT, IMPLEMENTING THE RESPONSIBILITY TO PROTECT: THE 2009 GENERAL ASSEMBLY DEBATE: AN ASSESSMENT 5–6 (2009), http://www.globalr2p.org/media/files/gcr2p_-general-assembly-debate-assessment.pdf.

32. *Implementing the Responsibility to Protect*, *supra* note 15, ¶ 11.

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.* ¶¶ 49–50.

37. See THOMAS G. WEISS & DON HUBERT, THE RESPONSIBILITY TO PROTECT: RESEARCH, BIBLIOGRAPHY, BACKGROUND 379 (2001).

To this end, it proposed that the P5 agree not to exercise their veto power in cases of resolutions authorizing the use of force to prevent or end a humanitarian catastrophe,³⁸ when their vital national interests were not involved.³⁹ Most governments initially responded positively at the declaratory level to the Report's recommendations. Nonetheless, there was no support from the P5 for agreed limits on the veto. While some developing states welcomed a greater role for the UNGA in such occasions, there was no question of the veto-bearing members of the Council formally and officially agreeing to limit their veto.

The more modest approach of RN2V to R2P's third pillar is arguably the most likely prospective mechanism to allow for the development of R2P within the purposes and context of UNSC Chapter VII action.⁴⁰ While the prospect of a UNC amendment formally adopting RN2V remains unlikely, the P5 could adopt this process as a "formal, mutually agreed practice."⁴¹ Relatedly, the HLP called for the P5 "in their individual capacities, to pledge themselves to refrain from the use of the veto in cases of genocide and large-scale human rights abuses."⁴² An earlier draft of the World Summit Outcome Document "invite[d] the permanent members of the Security Council to refrain from using the veto in cases of genocide, war crimes, ethnic cleansing and crimes against humanity."⁴³ Notwithstanding these developments, RN2V was not included in the 2005 Outcome Document mostly due to P5 pressure. One year later, Costa Rica, Jordan, Liechtenstein, Singapore, and Switzerland put forward the S5 plan, which included a call for P5 members to voluntarily abstain from using the veto in matters of "genocide, crimes against humanity and serious violations of international humanitarian law."⁴⁴ Despite the omission of RN2V in the Outcome Document, the idea resurfaced in the Secretary-General's 2009 Report urging the P5 to reach "a mutual

38. See ICISS REPORT, *supra* note 18, ¶¶ 6.19–6.21.

39. *Id.*; see also WEISS & HUBERT, *supra* note 37, at 379.

40. See Gareth Evans & Mohamed Sahnoun, *The Responsibility to Protect*, 81 FOREIGN AFF. 99, 106–07 (2002).

41. ICISS REPORT, *supra* note 18, ¶ 6.21.

42. High-Level Panel on Threats, Challenges and Change, *supra* note 14, ¶ 256.

43. U.N. President of the G.A., Revised Draft Outcome Document of the High-Level Plenary Meeting of the General Assembly of September 2005 Submitted by the President of the General Assembly, ¶ 119, U.N. Doc. A/59/HLPM/CRP.1/Rev.2 (Aug. 5, 2005).

44. Costa Rica, Jordan, Liechtenstein, Singapore and Switzerland, Draft Resolution on Improving the Working Methods of the Security Council, annex ¶ 14, U.N. Doc. A/60/L.49 (Mar. 17, 2006).

understanding” to the effect of RN2V.⁴⁵ Finally, and most recently, France with the support of several states⁴⁶ has spearheaded and advocated for the P5 members to voluntarily and collectively regulate their right to exercise the veto⁴⁷ by suspending this right when mass atrocities are under consideration.⁴⁸ As such, RN2V represents a proposal *de lege ferenda* in relation to the third pillar of R2P.

D. R2P & UNSC Past Politics

RN2V is little more than a by-product of the UNSC’s inaction and deadlocks when faced with humanitarian emergencies. The UNSC carries a rather tough past against such humanitarian calls. For instance, the full-blown horror of the Rwandan genocide was not enough for UNSC members to transcend political considerations and take action.⁴⁹ Many have argued that had R2P been in place in 1994,

45. *Implementing the Responsibility to Protect*, *supra* note 15, ¶ 61 (“Within the Security Council, the five permanent members bear particular responsibility because of the privileges of tenure and the veto power they have been granted under the Charter. I would urge them to refrain from employing or threatening to employ the veto in situations of manifest failure to meet obligations relating to the responsibility to protect, as defined in paragraph 139 of the Summit Outcome, and to reach a mutual understanding to that effect.”).

46. See U.N. GAOR, 68th Sess., 46th plen. mtg. at 14, U.N. Doc. A/68/PV.46 (Nov. 7, 2013) (Most notably Belgium and the Netherlands, stating that “Other ideas and proposals are more recent but deserve our careful attention. In particular, support of the French proposal of a code of conduct for the voluntary limitation of the use of the veto right in case of mass atrocities comes to mind. It is both ambitious and heartening. We encourage the other permanent members of the Council to consider it with an open mind.”); *id.* at 17–18 (Kuwait stating that “[w]ith regard to improving the working methods of the Council, including calls for rationalizing the veto, we welcome French President Hollande’s proposal whereby the five permanent members would voluntarily abstain from using the veto in cases of crimes against humanity.”); *id.* at 20 (“[The United Kingdom] note[d] the French proposal on the use of the veto and agree[d] that it is essential that the Security Council act to stop mass atrocities and crimes against humanity. For our part, the United Kingdom cannot envisage circumstances where we would use our veto to block action to avert a mass atrocity or to stop crimes against humanity.”).

47. Laurent Fabius, *A Call for Self-Restraint at the U.N.*, N.Y. TIMES (Oct. 4, 2013), <http://www.nytimes.com/2013/10/04/opinion/a-call-for-self-restraint-at-the-un.html>.

48. U.N. Doc. A/68/PV.46, *supra* note 46, at 28 (France stating that “Our Minister for Foreign Affairs, Mr. Laurent Fabius, has also spoken on the subject. The limitation of the exercise of the veto would involve the five permanent members of the Security Council voluntarily and collectively suspending their right to exercise the veto when mass atrocities are under consideration. It would thus be a voluntary process—a code of conduct—which would therefore not require a revision of the Charter. It would not in fact be a reform of the Security Council.”).

49. See generally FERGAL KEANE, SEASON OF BLOOD: A RWANDAN JOURNEY (1995).

the international community may have averted the Rwandan genocide. Nonetheless, the fundamental barrier to intervention in Rwanda was not impermeable sovereignty but lack of political will for action; no P5 member threatened to veto proposed intervention in Rwanda. However, P5 members exerted their influence to prevent deployment of an enhanced peacekeeping operation. This demonstrates the power P5 members can exert over the UNSC's response to humanitarian emergencies.⁵⁰

Kosovo stands as perhaps the most notable example of P5 influence over the UNSC's response to humanitarian crises. There UNSC members were sharply divided due to the genuine divergence in preferences and interests of the P5 regarding the deployment of force in bringing the crisis to an end.⁵¹ At first, the UNSC responded to the human rights violations with Resolution 1199, which labeled the situation a "threat to peace and security."⁵² In the months that followed, and as it became apparent that stronger measures would be required to end the mass atrocities, the UNSC faced a deadlock. The Kosovo paradigm was one of a threat of veto power. NATO member states in the UNSC tried to informally secure a Chapter VII Resolution authorizing the use of force to prevent Serb forces from conducting ethnic cleansing in Kosovo.⁵³ Russia and China, however, made it equally clear that they viewed the Kosovo crisis as the internal concern of a sovereign state (in this case, the Federal Republic of Yugoslavia), and thus stated they would veto any potential resolution authorizing the use of force in the area.⁵⁴

50. See, e.g., U.N. SCOR, 49th Sess., 3368th mtg. at 7, U.N. Doc. S/PV.3368 (Apr. 21, 1994); see also U.N. SCOR, 49th Sess., 3377th mtg. at 9–12, U.N. Doc. S/PV.3377 (May 16, 1994).

51. See, e.g., Press Release, Security Council Rejects Demand for Cessation of Use of Force Against Federal Republic of Yugoslavia, U.N. Press Release SC/6659 (Mar. 26, 1999).

52. S.C. Res. 1199, at 2 (Sept. 23, 1998).

53. U.N. SCOR, 53d Sess., 3930th mtg. at 4–5, U.N. Doc. S/PV.3930 (Sept. 23, 1998); U.N. SCOR, 53d Sess., 3937th mtg. at 15–16, U.N. Doc. S/PV.3937 (Oct. 24, 1998); U.N. SCOR, 54th Sess., 3982d mtg. at 5, U.N. Doc. S/PV.3982 (Feb. 25, 1999).

54. See U.N. SCOR, 53d Sess., 3930th mtg. at 2–4, U.N. Doc. S/PV.3930 (Sept. 23, 1998); U.N. SCOR, 53d Sess., 3937th mtg. at 11–12, 14, U.N. Doc. S/PV.3937 (Oct. 24, 1998); U.N. SCOR, 54th Sess., 3982d mtg. at 4–5, U.N. Doc. S/PV.3982 (Feb. 25, 1999); see also Christopher Greenwood, *Humanitarian Intervention: The Case of Kosovo*, in FINNISH YEARBOOK OF INTERNATIONAL LAW 141, 157 (Matti Koskenniemi ed., 2002) (“[I]t was clear . . . from other signs (such as China’s action in blocking the renewal of the mandate for the United Nations force in Macedonia in February 1999) that any draft resolution to provide such authorization [for an intervention in Kosovo] would be vetoed by Russia and China. The legal justification for NATO intervention in Kosovo accordingly had

Even after the official endorsement of R2P by the United Nations, the dithering and ineffective response to the situation in Darfur⁵⁵ further illustrated the failure of R2P to emerge as a functional norm beyond a diplomat's cocktail-party pastime. The ongoing failure to respond to the Sudan crisis signaled that the commitments made in the Outcome Document⁵⁶ were not supported by the necessary political will to prevent large-scale human suffering. This time, China and Russia leveled informal threats that they would veto any UNSC resolution authorizing the use of military force or even serious economic sanctions against the Sudanese Government.⁵⁷

A few years later, just as UNSC action in Libya lit sparks of hope for a paradigm shift, the Chinese-Russian veto of the R2P Resolutions over Syria blew them away.⁵⁸ In Libya's case, the UNSC successfully passed Resolution 1973, forming the legal basis for military intervention explicitly based on R2P, demanding an immediate ceasefire, and authorizing the establishment of a no-fly zone by the international community.⁵⁹ Resolution 1973 authorized the use of force in Libya by invoking Libya's failure to uphold its responsibility to protect its population as justification for Chapter VII intervention.⁶⁰ Of all the situations before the UNSC, Libya fits the R2P/RN2V scenario most closely, as reflected in the abstentions of Russia and China to Resolution 1973.⁶¹

In a similar vein, UNSC debate over Syria revolved around R2P-based military intervention to protect the Syrian population from the gross human rights violations committed by the Assad regime.⁶²

to be sought elsewhere.”).

55. While condemning the violence in Darfur, the statements, resolutions, and records of meetings held after September 2005 addressing the matter failed to issue or mention any active measures to resolve the humanitarian crisis. *See, e.g.*, S.C. Pres. Statement 2005/48, U.N. Doc. S/PRST/2005/48 (Oct. 13, 2005); U.N. SCOR, 60th Sess., 5277th mtg., U.N. Doc. S/PV.5277 (Oct. 13, 2005); S.C. Res. 1651 (Dec. 21, 2005); U.N. SCOR, 60th Sess., 5342d mtg., U.N. Doc. S/PV.5342 (Dec. 21, 2005).

56. 2005 World Summit Outcome, *supra* note 14.

57. *See, e.g.*, U.N. SCOR, 61st Sess., 5423d mtg. at 2–3, U.N. Doc. S/PV.5423 (Apr. 25, 2006).

58. Gareth Evans, *The Consequences of Syria: Does the Responsibility to Protect Have a Future?*, E-INT'L REL. (Jan. 27, 2014), <http://www.e-ir.info/2014/01/27/the-consequences-of-non-intervention-in-syria-does-the-responsibility-to-protect-have-a-future/>.

59. S.C. Res. 1973, ¶¶ 1, 6 (Mar. 17, 2011).

60. *Id.* at 1.

61. U.N. SCOR, 66th Sess., 6498th mtg. at 3, U.N. Doc. S/PV.6498 (Mar. 17, 2011).

62. *See generally* U.N. SCOR, 67th Sess., 6810th mtg., U.N. Doc. S/PV.6810 (July 19, 2012), and more recently U.N. SCOR, 69th Sess., 7116th mtg. at 9–10, 14, U.N. Doc.

Unlike Libya, however, Russia and China actively vetoed sanctions against Syria.⁶³ Despite the fact that the U.N. Human Rights Council had concluded that Syria's humanitarian crisis is driven by a "state policy" of deliberate attacks against civilians,⁶⁴ the UNSC has not been able to agree on an intervention. Even though Syria represents a *prima facie* case for UNSC action based on R2P under its Chapter VII powers, Russia and China have vetoed three separate resolutions aimed at taking action to protect the Syrian population.⁶⁵ Despite claims from Russia and China that their opposition stems from concerns of possible future abuse of the R2P norm, strategic geopolitical interests and a desire to maintain the status quo have all played a part in the decision-making.⁶⁶ Lack of political will from Russia and China to sanction Syria on R2P grounds—coupled with the active use of their veto—signals: first, that R2P has not yet crystallized into a customary international norm; and second, that it has not garnered the crucial political support and legal acceptance within the UNSC that is needed to respond to mass atrocities.

E. Which R2P?

Looking at R2P in light of recent UNSC politics and action, RN2V best fits calls for change in UNSC proceedings. If we understand R2P's third pillar as a response to states' breach of their obligation to protect their populations, the UNSC can only guarantee action by detaching, as much as possible, individual state interests from the decision-making process. This creates an intricate relationship between R2P and RN2V in pursuing this aim. In an effort to unpack this relationship, I offer two alternative hypotheses: one substantive and one procedural.

First, RN2V can be understood as a corollary obligation to R2P. Therefore, the R2P emerging norm is understood to encompass

S/PV.7116 (Feb. 22, 2014).

63. U.N. SCOR, 67th Sess., 6810th mtg. at 2, U.N. Doc. S/PV.6810 (July 19, 2012).

64. See U.N. Human Rights Council, Rep. of the Indep. Int'l Comm'n of Inquiry on the Syrian Arab Republic, U.N. Doc. A/HRC/21/50, at 75 (Aug. 16, 2012).

65. See U.N. SCOR, 66th Sess., 6627th mtg. at 2, U.N. Doc. S/PV.6627 (Oct. 4, 2011); U.N. SCOR, 67th Sess., 6711th mtg. at 2, 9, U.N. Doc. S/PV.6711 (Feb. 4, 2012); France, Germany, Portugal, United Kingdom of Great Britain and Northern Ireland and United States of America: Draft Resolution, U.N. Doc S/2012/538 (July 19, 2012).

66. See, e.g., Christopher Harmer, *Russian Naval Base Tartus*, INST. FOR STUDY WAR (July 31, 2012), http://www.understandingwar.org/sites/default/files/Backgrounder_Russian_NavalBaseTartus.pdf (demonstrating the strategic importance of the naval base Russia holds at Tartus).

two cumulative components: the obligation of states to respond to grave human rights violations in third states and, in that context, the obligation of the veto-bearing UNSC members to abide by it—or at least not obstruct third states in the performance of their obligation. More specifically, regarding the third pillar, for R2P to take full effect RN2V would have to be triggered such that the veto-bearing states cumulatively waive their veto right and through abstaining revert to regular UNSC voting procedure.⁶⁷ This still allows each state to determine whether it wishes to vote in favor of a resolution or abstain without bearing the risk of states individually blocking resolutions otherwise agreed upon by a clear majority. In this scenario, and in accordance with Article 27(3) of the UNC, the nine affirmative votes within the current UNSC composition would still be necessary to pass a Chapter VII Resolution. Therefore, RN2V would not at all times equal guaranteed action in spite of state considerations and preferences. Should opposition remain firm against potential action, the voting process may well yield insufficient affirmative votes to adopt a resolution calling for action if more than six states abstain.⁶⁸

RN2V therefore captures an effort to shift the decision-making process on intervention from the idiosyncratic preferences of the veto-bearing states to a broader majority consensus within the UNSC.⁶⁹ However, this hypothesis presupposes that R2P develops by incorporating RN2V, with both of these corollary obligations consistently observed. Within that framework, R2P must achieve a certain threshold of adherence in order to evolve into an accepted international law norm. As such, it would then enjoy the necessary normative pull required for its invocation and application as a rule of customary international law. This is arguably the more difficult path for R2P to pave, as it would require consistent state practice and *opinio juris* both on R2P's pillars and on RN2V in order for it to take full effect under international law.

Under an alternative hypothesis, R2P is substantively distinguished from RN2V. RN2V would serve as a facilitator for R2P in

67. U.N. Charter art. 27, ¶ 3 (“Decisions of the Security Council on all other matters [i.e., non-procedural matters] shall be made by an affirmative vote of seven members including the concurring votes of the permanent members . . .”).

68. This stands under the current form and composition of the UNSC with fifteen members *vis-à-vis* the requirement of Article 27(3) of the UNC for a minimum of nine affirmative votes for the adoption of a Chapter VII Resolution. Such could change in the event of a reform of the number of UNSC seats and would have to be adjusted according to the amendment of U.N. Charter art. 17, ¶ 3.

69. Phrasing borrowed from Daniel H. Levine, *Some Concerns About “The Responsibility Not to Veto,”* 3 GLOBAL RESP. TO PROTECT 323, 341 (2011).

the context of R2P's current status as non-binding international law.⁷⁰ As is the case for all emerging norms of international law, ongoing state practices continue to shape and reshape R2P's exact content and application. For as long as R2P remains an emerging norm, it requires RN2V as a procedural mechanism for invocation. Without RN2V, the invocation of R2P in instances of third-pillar intervention remains entirely subject to the interests of individual veto-bearing states that can arbitrarily bar otherwise supermajority-backed resolutions.

While this aligns with UNSC structures and procedures as they were originally set in place,⁷¹ recent changes in the field of human rights, human security, and the conception of state sovereignty have given rise to developments of norms, the application of which directly collides with such fundamental processes. R2P is the perennial emerging norm, which requires for its application a lower threshold of state sovereignty and a broad acceptance of human rights ideals. Such norms could only develop hand in hand with ad hoc exceptional "codes of conduct" that would allow them to escape the barriers of traditional, more backward-looking UNSC proceedings and politics. Without arrangements like RN2V, R2P would arguably never have the opportunity to develop into anything more substantive than a theoretical doctrine, invoked to serve particular state preferences and interests. It would thus bear the risk of following a similar fate as humanitarian intervention.

In this spirit, I argue that R2P combined with the procedural mechanism of RN2V presents the only viable way to provide the R2P emerging norm the opportunity to stand the test of either crystallizing into a customary law norm or dropping from our lexicon. The Libya paradigm, as the first R2P invocation, was framed under this very notion. Despite the break in practice in Syria's case, the international community's consequent response to the UNSC deadlock signals a strong conviction in favor of taking action under R2P within the procedural code of RN2V.⁷² In this context, it has been argued that UNSC's lack of effectiveness toward R2P could be alleviated

70. See High-Level Panel on Threats, Challenges and Change, *supra* note 14, ¶ 82.

71. BARDO FASSBENDER, UN SECURITY COUNCIL REFORM AND THE RIGHT OF VETO: A CONSTITUTIONAL PERSPECTIVE 277 (1998) ("Seen against the background of the history of international law and organization, the veto can, *first*, be described as a last residue of the notion of (external) sovereignty which had been established in the nineteenth century.").

72. See, e.g., U.N. SCOR, 67th Sess., 6816th mtg. at 12, 15, 24–25, 35, U.N. Doc. S/PV.6816 (July 25, 2012) (expressing grave concerns about the situation in Syria due to the Russian-Chinese veto).

through UNSC reform.⁷³ As UNGA's then-president underlined in his R2P concept note, "It is the veto and the lack of UNSC reform rather than the absence of a responsibility to protect legal norm that are the real obstacles to effective action."⁷⁴ The UNSC may thus present the only forum that could authorize action under R2P's third pillar and determine both the application of RN2V and the potential development or disappearance of R2P. In light of the UNSC's inability to effectively address the Syria crisis, it has been argued that R2P proponents should either "mobilize a coalition of the willing" to intervene in Syria or "let R2P . . . rest in peace."⁷⁵ More constructively, others have called for reform of the UNSC structure and proceedings to remedy its ineffectiveness in situations involving mass atrocities.⁷⁶ Under the pressure of these ongoing calls for reform, the question of whether the emerging R2P and RN2V norms will gain from a reformed UNSC membership becomes especially salient.

II. U.N. SECURITY COUNCIL REFORM

A. Preliminary Discussions

The UNC provides that "in order to ensure prompt and effective action by the UN, its Members confer on the UNSC primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the UNSC acts on their behalf."⁷⁷ The UNSC regime contains two main enforcement regimes: the pacific dispute resolution and socioeco-

73. See MICHAEL BYERS, *WAR LAW: UNDERSTANDING INTERNATIONAL LAW AND ARMED CONFLICT* 110–11 (2005) ("In a world where the use of force remains governed by the UN Charter and most countries still believe that the Security Council is functioning appropriately, conflict prevention is the only area where the responsibility to protect could add something new and useful Proponents of the responsibility to protect who focus on military intervention are participating in a terrible charade.").

74. U.N. President of the G.A., *Concept Note on the Responsibility to Protect Populations from Genocide, War Crimes, Ethnic Cleansing and Crimes Against Humanity*, U.N. Doc. A/63/958 (Sept. 9, 2009).

75. Stewart M. Patrick, *RIP for R2P? Syria and the Dilemmas of Humanitarian Intervention*, COUNCIL ON FOREIGN REL.: INTERNATIONALIST (June 12, 2012), <http://blogs.cfr.org/patrick/2012/06/12/rip-for-r2p-syria-and-the-dilemmas-of-humanitarian-intervention>.

76. See, e.g., Ben Sharples, *New Zealand Wants Security Council Veto Change Amid Syria Crisis*, BLOOMBERG BUS. (Sept. 30, 2012), <http://www.bloomberg.com/news/articles/2012-09-30/new-zealand-wants-security-council-veto-change-amid-syria-crisis>.

77. U.N. Charter art. 24, ¶ 1.

conomic cooperation contained in Chapters VI and X⁷⁸ and the coercive powers conferred to the UNSC under Chapter VII.⁷⁹ The UNSC therefore has the unique authority within the United Nations to authorize the use of force⁸⁰ and is the only U.N. organ that creates legally binding obligations upon all Member States.⁸¹

The UNSC currently consists of fifteen member states: five permanent members (P5) being China, France, Russia, the United Kingdom, and the United States, and ten non-permanent members that serve two-year terms.⁸² While membership in the UNSC is, in principle, equal to the states present, the P5 enjoy the power to veto proposed resolutions.⁸³ This arrangement was put in place due to the integral part P5 states played during the negotiations and drafting of the UNC. It was also an eventual compromise reached in light of the argument raised by the P5 that they would not participate in the United Nations without an agreement to include the veto power.⁸⁴ The last time the UNSC underwent a reform that reshaped it to what it is today was in 1963 through a UNGA Resolution that expanded the number of non-permanent members from six to ten.⁸⁵ Since then, and more emphatically in the last two decades, significant arguments have been raised and attempts made for new reforms, with no tangible results materializing.⁸⁶

While an extensive analysis and evaluation of the arguments for UNSC reform falls beyond the scope of this Article, it is important to place the debate in context. In its post-Cold War era record, the UNSC has been repeatedly criticized, *inter alia*, over double standards in choice of action, lack of effectiveness in making decisions, and lack of representativeness.⁸⁷ This has created a climate

78. U.N. Charter art. 33, ¶¶ 1–2, arts. 62–63, 67.

79. ROBERT KOLB, *IUS CONTRA BELLUM: LE DROIT INTERNATIONAL RELATIF AU MAINTIEN DE LA PAIX* 51 (2003).

80. U.N. Charter art. 42.

81. U.N. Charter art. 25.

82. U.N. Charter art. 23, ¶ 1.

83. U.N. Charter art. 27, ¶ 3 (“Decisions of the Security Council on all other matters [i.e., non-procedural matters] shall be made by an affirmative vote of seven members including the concurring votes of the permanent members . . .”).

84. HURD, *supra* note 14, at 89–90.

85. G.A. Res. 1991 (XVIII) (Dec. 17, 1963).

86. See, for example, U.N. GAOR, 68th Sess., 46th plen. mtg., U.N. Doc. A/68/PV.46 (Nov. 7, 2013); U.N. GAOR, 68th Sess., 47th plen. mtg., U.N. Doc. A/68/PV.47 (Nov. 7, 2013).

87. THE UNITED NATIONS SECURITY COUNCIL AND WAR: THE EVOLUTION OF THOUGHT AND PRACTICE SINCE 1945, at 31 (Vaughan Lowe et al. eds., 2008).

where the authority and legitimacy of the UNSC are challenged⁸⁸ by voices accusing it of being dominated by the unfairly superior P5, who either overstretch their functions or ensure the UNSC does too little too late according to their interests.⁸⁹ More specifically, the argument holds that the UNSC, being the sole organ fully responsible for the maintenance of international peace and security, ought to be attuned to the contemporary geopolitical balance and distribution of power. Even though the P5 continue to hold significant political, economic, and military power in the global sphere, new powers are emerging, resulting in renewed dynamics and power shifts that challenge the inclusiveness of the UNSC.

For these reasons, the HLP Report envisioned UNSC reform under a set of specific goals.⁹⁰ First, reform should ensure the expansion of participation in the UNSC better includes members that contribute the most financially, militarily, or diplomatically.⁹¹ Second, the reform must not compromise the effectiveness of the organ and must aspire to make it more democratic.⁹² Despite the arguments that

88. See generally David D. Caron, *The Legitimacy of the Collective Authority of the Security Council*, 87 AM. J. INT'L L. 552 (1993).

89. Matilde Pérez Herranz, *The Security Council and the Legitimacy of the Use of Force: Legal, Normative and Social Aspects* 22 (Institut Català Internacional per la Pau, Working Paper No. 9, 2010).

90. See High-Level Panel on Threats, Challenges and Change, *supra* note 14, ¶¶ 248–49.

91. *Id.* ¶ 249; see also Maria Mikhailitchenko, *Reform of the Security Council and Its Implications for Global Peace and Security*, 7 J. MIL. & STRATEGIC STUD. 1, 9 (2004) (“The criteria [that members of the Non-Aligned Movement] outlined [for choosing new Permanent Members of the Security Council] are ‘consistency in support for, and participation in, and financial contribution to, UN activities in the field of international peace and security, regional geographical representation, [and] economic potential for regional roles are the most important criteria in judging the suitability of states that have applied for permanent membership.’ Even if we take this relatively simple set of criteria as a starting point, we may still find the choice problematic. For instance, the monetary contribution of Japan constituted 19.63% of the UN budget in 2001. At the same time India is one of the UN’s largest contributors of peacekeeping troops.”) (internal citations omitted). Determining which state is more appropriate to take a permanent seat in the UNSC can easily become a very tricky endeavor. For more comparisons, see United Nations Peacekeeping, *Troop and Police Contributors Archive (1990–2014)*, UNITED NATIONS, http://www.un.org/en/peacekeeping/resources/statistics/contributors_archive.shtml (last visited Jan. 13, 2016); United Nations Committee on Contributions, *Assessment of Member States’ Contributions to the UN Regular Budget and Working Capital Fund*, UNITED NATIONS, <http://www.un.org/en/ga/contributions/budget.shtml> (last visited Jan. 13, 2016).

92. High-Level Panel on Threats, Challenges and Change, *supra* note 14, ¶ 249; see also Mikhailitchenko, *supra* note 91, at 10 (noting that democratization is another problematic aspect) (“Democratization [of the UNSC] would dictate that all permanent members are democratic states and that work of the Security Council is transparent at all its

can be made in favor of or against the language of the HLP Report, there seems to be a general consensus⁹³ that the UNSC needs to be reformed to increase its representativeness as it is perceived to be “out of date.”⁹⁴ This consensus does not come without caveats. Most accounts recognize the need for reform but share the fear that UNSC enlargement might impact the overall effectiveness of the Council.⁹⁵ In light of this, I will use the proposed expansion models to argue that, unlike what has been advocated, a reformed Council is not likely to be more favorable toward the notion of R2P than the current UNSC composition.

B. Composition of an Expanded UNSC

In response to Secretary-General Kofi Annan’s call for UNSC reform in 2003,⁹⁶ the UNGA issued a UNSC-reform report that included a proposal to increase the UNSC representation of states that contribute significantly to U.N. coffers financially, militarily, and diplomatically.⁹⁷ Renewed interest in potential UNSC reform triggered member states to assemble into three main blocks that each proposed their own reform plans.

The first plan was originally developed by the G4 group (Brazil, Germany, India, and Japan),⁹⁸ and subsequently gained the back-

stages. Neither of these conditions is satisfied at the present time. China is a non-democratic permanent member with the right of veto and Article 30 of the UN Charter gives the Council the right to determine its own work procedures.”)

93. Mikhailitchenko, *supra* note 91, at 4; cf. Thomas G. Weiss, *The Illusion of UN Security Council Reform*, 26 WASH. Q. 147, 147–48 (2003).

94. Warren Hoge, *U.N. Tackles Issue of Imbalance of Power*, N.Y. TIMES (Nov. 28, 2004), <http://www.nytimes.com/2004/11/28/politics/un-tackles-issue-of-imbalance-of-power.html>.

95. See, e.g., Weiss, *supra* note 93, at 151; Yehuda Z. Blum, *Proposals for UN Security Council Reform*, 99 AM. J. INT’L L. 632, 640–44 (2005); Caron, *supra* note 88, at 573–74; W. Michael Reisman, *The Constitutional Crisis in the United Nations*, 87 AM. J. INT’L L. 83, 96 (1993).

96. Ranjan Roy, *Annan Seeks Expanded UN Security Council*, GLOBAL POL’Y F. (Sept. 23, 2003), <http://www.globalpolicy.org/security/reform/cluster1/2003/0923expanded.htm>. For an overview of the history of the reform debate, see Wolfram Karl, Bernd Mützelburg & Georg Witschel, *Article 108*, in 2 THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 1341, 1361–63 (Bruno Simma et al. eds., 2d ed. 2002).

97. High-Level Panel on Threats, Challenges and Change, *supra* note 14, ¶249.

98. Brazil, Germany, India & Japan, Draft Resolution on Security Council Reform, (May 13, 2005), <https://www.globalpolicy.org/images/pdfs/g4resolution.pdf>. A similar Draft Resolution had also been advanced by the L.69 Group, which was more general but in the same line of increased expansion in the permanent and non-permanent seats with a focus

ing of twenty-seven states.⁹⁹ The plan advocated the addition of six

on greater representation of developing states including island and small states. Barbados, Benin, Bhutan, Brazil, Burundi, Cape Verde, Fiji, Grenada, Guyana, Haiti, India, Jamaica, Liberia, Mauritius, Nauru, Nigeria, Palau, Papua New Guinea, Rwanda, Saint Vincent and the Grenadines, Seychelles, Solomon Islands, South Africa, Tuvalu & Vanuatu, Draft Resolution on Security Council Reform Process, U.N. Doc. A/61/L.69/Rev.1 (Sept. 14, 2007). Due to the more general nature of this plan and to the similar rationale it bears with that of the G4, it is not further addressed. However, states that initially backed it have continued to do so, combined with backing the G4 plan, the Ezulwini Consensus, or a combination of the two. More specifically, in the latest UNSC reform discussion in the 46th and 47th Plenary Meetings of the UNGA, Saint Kitts and Nevis, speaking on behalf of the L.69 Group, submitted:

Our group is bound by the firm conviction that expansion in both the permanent and non-permanent categories of membership of the Security Council is imperative to better reflect contemporary world realities and achieve a more accountable, representative, transparent and, more importantly, relevant Security Council. . . . Let me reiterate that the L.69 acknowledges and supports the African shared position as enunciated in the Ezulwini Consensus.

U.N. GAOR, 68th Sess., 46th plen. mtg. at 11–12, U.N. Doc. A/68/PV.46 (Nov. 7, 2013). Nicaragua expressed its “support for the statement made by the representative of Saint Kitts and Nevis, Ambassador Delano Frank Bart, on behalf of the L.69 Group, the most representative, diverse and numerous group involved in these negotiations.” U.N. GAOR, 68th Sess., 47th plen. mtg. at 4, U.N. Doc. A/68/PV.47 (Nov. 7, 2013). Brazil “aligns itself with the statements delivered at the 46th meeting by Ambassador Motohide Yoshikawa, Permanent Representative of Japan, on behalf of the Group of Four, and by Ambassador Delano Frank Bart, Permanent Representative of Saint Kitts and Nevis, on behalf of the L.69 Group.” *Id.* at 10.

99. Afghanistan, Belgium, Bhutan, Brazil, Czech Republic, Denmark, Fiji, France, Georgia, Germany, Greece, Haiti, Honduras, Iceland, India, Japan, Kiribati, Latvia, Maldives, Nauru, Palau, Paraguay, Poland, Portugal, Solomon Islands, Tuvalu & Ukraine, Draft Resolution on Security Council Reform, U.N. Doc. A/59/L.64 (July 6, 2005) [hereinafter L.64 Draft Resolution]. States have continued to back this plan throughout the reform discussions up to the latest UNSC reform discussion in the 46th and 47th Plenary Meetings of the UNGA. For instance, Japan, speaking on behalf of Japan, Brazil, Germany and India, declared:

As recently as 26 September, the G-4 Foreign Ministers reiterated their common vision of a reformed Security Council. We took into consideration the contributions made by countries to the maintenance of international peace and security and other purposes of the Organization, as well as the need for the increased representation of developing countries, especially African, in both categories of membership in an enlarged Council.

U.N. GAOR, 68th Sess., 46th plen. mtg. at 8, U.N. Doc. A/68/PV.46 (Nov. 7, 2013). Denmark submitted that it “remains committed to an enlargement of the Council in both the permanent and non-permanent categories of membership, including both developing and developed countries as new permanent members. The goal is to enhance the legitimacy, credibility and effectiveness of the Council.” U.N. GAOR, 68th Sess., 47th plen. mtg. at 9, U.N. Doc. A/68/PV.47 (Nov. 7, 2013). Greece has also favored “expanding the Council in both existing categories of membership, permanent and non-permanent, and . . . improving its working methods.” *Id.* at 17.

permanent and four non-permanent members to the UNSC.¹⁰⁰ Under this plan, the six new permanent seats would include two members from African states, two from Asian states, one from Latin American and Caribbean states, and one from Western European and other states.¹⁰¹ The four new non-permanent members would be elected under the following pattern: one from African States, one from Asian States, one from Eastern European states, and one from Latin American and Caribbean states.¹⁰²

The second proposed plan came from the Uniting for Consensus group, which put forward the suggestion of adding five non-permanent seats to the UNSC and also adding restrictions on veto powers.¹⁰³ The envisioned seat distribution would include six seats

100. L.64 Draft Resolution, *supra* note 99, ¶ 1(a).

101. *Id.* ¶ 1(b).

102. *Id.* ¶ 1(c).

103. Argentina, Canada, Colombia, Costa Rica, Italy, Malta, Mexico, Pakistan, Republic of Korea, San Marino, Spain & Turkey, Draft Resolution on Reform of the Security Council at 1, ¶¶ 1, 7(a), U.N. Doc. A/59/L.68 (July 21, 2005) [hereinafter L.68 Draft Resolution]. States have continued to back this plan throughout the reform discussions up to the latest UNSC reform discussion in the 46th and 47th Plenary Meetings of the UNGA. For instance, Italy, speaking on behalf of the Uniting for Consensus group, has stated:

We remain absolutely convinced that the creation of new permanent individual members would be a mistake. . . . In our view, that approach would not be in line with the interests of the vast majority of Member States from all regional groups. It would in fact benefit only a handful of the 193 Member States, and it would not be a step towards a more democratic Security Council. . . . The Security Council, in line with decision 62/557, needs comprehensive reform based on all five interrelated clusters: categories of membership, the veto, size and working methods, regional representation, and the relationship between the Security Council and the General Assembly. Nobody would benefit from a piecemeal approach or rushed solutions motivated mainly by the desire to increase the number of seats in the Security Council.

U.N. GAOR, 68th Sess., 46th plen. mtg. at 13, U.N. Doc. A/68/PV.46 (Nov. 7, 2013). Pakistan submitted that it “fully associates itself with the statement made by the representative of Italy on behalf of the Uniting for Consensus group. . . . We oppose in principle the notion of new, individual permanent members because it runs counter to the avowed objectives of transparency, democratization and inclusive decision-making.” *Id.* at 24. Argentina, in a similar vein, declared:

The delegation of Argentina associates itself with the statement made by the representative of Italy on behalf of the Uniting for Consensus [g]roup. . . . Argentina does not favour increasing the number of permanent members of the Council, since we believe that that would not ensure greater participation by those not represented in it today. My country believes that a comprehensive reform of the Council should eliminate privileges for a few and ensure equal rights for all.

U.N. GAOR, 68th Sess., 47th plen. mtg. at 12–13, U.N. Doc. A/68/PV.47 (Nov. 7, 2013). Spain “fully endorse[d] the statement made by the representative of Italy on behalf of the Uniting for Consensus [g]roup.” *Id.* at 17. Turkey affirmed:

from African states, five from Asian states, four from Latin American and Caribbean states, three from Western European and other states, and two from Eastern European states.¹⁰⁴

Finally, the third UNSC reform proposal (known as the Ezulwini Consensus) was brought forward primarily by African states envisioning an enlargement of the UNSC, both in permanent and non-permanent membership, bringing the number of seats to twenty-six.¹⁰⁵ More specifically, it called for granting two permanent

[A]dditional permanent seats would not be in keeping with the idea of an accountable and transparent Council. Moreover, the Uniting for Consensus position, through its proposal to allocate a non-permanent seat for small and medium-sized States, most of which have never been elected to the Council, provides the most democratic option for a sustainable outcome.

Id. at 26.

104. L.68 Draft Resolution, *supra* note 103, ¶ 4.

105. African Union Executive Council, *The Common African Position on the Proposed Reform of the United Nations: "The Ezulwini Consensus,"* § C(e), Seventh Extraordinary Session, Ext./EX.CL/2 (VII) (Mar. 8, 2005); Algeria, Angola, Botswana, Burkina Faso, Cameroon, Cape Verde, Chad, Congo, Côte d'Ivoire, Djibouti, Egypt, Equatorial Guinea, Ethiopia, Gabon, Gambia, Ghana, Guinea, Guinea-Bissau, Kenya, Liberia, Libyan Arab Jamahiriya, Madagascar, Malawi, Mali, Mauritania, Mauritius, Mozambique, Namibia, Niger, Nigeria, Rwanda, São Tomé and Príncipe, Senegal, Seychelles, Sierra Leone, Somalia, South Africa, Sudan, Tunisia, Uganda, United Republic of Tanzania, Zambia & Zimbabwe, Draft Resolution on Reform of the Security Council, ¶ (c), U.N. Doc. A/59/L.67 (July 18, 2005) [hereinafter L.67 Draft Resolution]. States have continued to back this plan throughout the reform discussions up to the latest UNSC reform discussion in the 46th and 47th Plenary Meetings of the UNGA. For instance, Sierra Leone argued:

Full representation of Africa in the Council . . . should be according to the Ezulwini Consensus and the Sirte Declaration. That, in brief, means no less than two permanent seats with all the prerogatives and privileges of permanent membership, including the right of veto, if it continues to exist, and also two additional non-permanent seats.

U.N. GAOR, 68th Sess., 46th plen. mtg. at 5, U.N. Doc. A/68/PV.46 (Nov. 7, 2013). Egypt submitted:

The African common position reflected in the Ezulwini Consensus and the Sirte Declaration aims at achieving the legitimate aspirations of a whole continent, comprising 54 countries. Its objective is to rectify the historical injustice to Africa regarding its representation in the Security Council. It does not seek to achieve narrow national political interests.

Id. at 7. Guyana, speaking on behalf of the fourteen member states of the Caribbean Community, aligned itself "with the statement delivered earlier by the representative of Egypt on behalf of the Non-Aligned Movement, and with the statement that will be delivered on behalf of the L.69 Group." *Id.* at 9. Tunisia similarly stated:

[Tunisia] associates itself . . . with the statements made by the representatives of Sierra Leone, on behalf of the African Group, and of Egypt, on behalf of the Non-Aligned Movement. . . . We believe that the ultimate aim of any Security Council reform must be to strengthen equitable representation within that body.

Id. at 19–20. Libya, *id.* at 27, Zambia, U.N. GAOR, 68th Sess., 47th plen. mtg. at 6, U.N. Doc. A/68/PV.47 (Nov. 7, 2013), Venezuela, *id.* at 7–8, Lesotho, *id.* at 20, Malaysia, *id.* at

and two additional non-permanent seats to African states, two additional permanent seats and one additional non-permanent seat to Asian states, one non-permanent seat to Eastern European states, one permanent and one additional non-permanent seat to Latin American and Caribbean States, and one additional permanent seat to European and other states.¹⁰⁶

The members whose behavior can be measured and examined in the new proposed plans are the permanent members, including the proposed additions under the G4 and the Ezulwini Consensus plans, and the permanent members together with those members holding renewable seats under the Uniting for Consensus group plan. While it remains a closely contested issue driven by regional politics, the “usual suspects” to be added in this reformed UNSC can be foreseen by virtue of their contribution to the United Nations,¹⁰⁷ their economic¹⁰⁸ and military power,¹⁰⁹ as well as their political influence. For Africa, the choice is split among South Africa, Nigeria, and perhaps

20–22, The Philippines, *id.* at 24, and Ecuador, *id.* at 26, also directly aligned themselves with this proposal.

106. African Union Executive Council, *supra* note 105; L.67 Draft Resolution, *supra* note 105.

107. See, e.g., U.N. Secretary-General, *Implementation of General Assembly Resolutions 55/235 and 55/236*, U.N. Doc. A/67/224/Add.1, annex (Dec. 27, 2012) (showing that Japan (10.83%) and Germany (7.14%) were the second- and fourth-highest providers, respectively, of assessed contributions to the U.N. Peacekeeping operations in 2013).

108. See, e.g., *World Economic Outlook Database*, IMF (Oct. 2013), <https://www.imf.org/external/pubs/ft/weo/2013/02/weodata/index.aspx> (follow “By Countries (country-level data)” hyperlink; then follow “All countries” hyperlink; then select Brazil, Egypt, Germany, India, Japan, Nigeria, and South Africa; then select “Gross domestic product, constant prices: National currency”; then select “Prepare Report”) (estimating the following constant-prices GDP in the nation’s currency for 2014 in billions: Brazil (1,210.845), Egypt (625.118), Germany (2,520.079), India (63,449.267), Japan (536,062.801), Nigeria (14,430.863), South Africa (2,051.832)).

109. See, e.g., *SIPRI Military Expenditure Database*, STOCKHOLM INT’L PEACE RESEARCH INST., http://www.sipri.org/research/armaments/milex/milex_database (last updated Nov. 3, 2015) (select “Download data for all countries from 1988–2014 as an Excel Spreadsheet”) (outlining the latest reliable data (from 2012) on military expenditure (% GDP) per country: Brazil: 1.5%, Egypt: 1.8%, Germany: 1.4%, India: 2.5%, Japan: 1.0%, Nigeria: 0.5%, South Africa: 1.2%); see also *Contributors to the United Nations Peacekeeping Operations: Monthly Summary of Contributions (Police, UN Military Experts on Mission and Troops)*, UNITED NATIONS (Feb. 28, 2014), http://www.un.org/en/peacekeeping/contributors/2014/feb14_1.pdf (outlining the amount of troops each country contributes to U.N. Peacekeeping operations: India is the second greatest contributor with 6,798 troops, Nigeria is the sixth greatest contributor with 4,128 troops, Egypt is the ninth greatest contributor with 2,240 troops, South Africa is the twelfth greatest contributor with 2,105 troops, and finally Brazil is the sixteenth greatest contributor with 1,716 troops; Japan contributes 271 troops and Germany contributes 228 troops).

Egypt,¹¹⁰ in Asia, Japan¹¹¹ and India¹¹² have been in the lead for some time now; in Europe, Germany¹¹³ appears as the only viable candidate, and, in the Americas, Brazil¹¹⁴ stands at the top of the list.¹¹⁵

110. Albert Venter, *Reform of the United Nations Security Council: A Comment on the South African Position*, 20 INT'L J. WORLD PEACE 29, 37 (2003).

111. See, e.g., François Hollande, President, Republic of Fr., Debat d'ouverture de la 67eme session de l'Assemblée generale, Intervention de M. François Hollande President de la République [Opening Statement at the General Debate of the 67th Session of the General Assembly by President François Hollande] 1 (Sept. 25, 2012), http://gadebate.un.org/sites/default/files/gastatements/67/FR_fr.pdf [hereinafter France's Statement] ("Le Conseil de sécurité doit mieux refléter la réalité du monde d'aujourd'hui. C'est pourquoi je rappelle une fois encore que la France soutient la demande d'élargissement formulée par l'Allemagne, le Japon, l'Inde et le Brésil. Elle est également favorable à une présence accrue de l'Afrique, y compris parmi les membres permanents."); U.N. GAOR, 67th Sess., 9th plen. mtg. at 43–47, U.N. Doc. A/67/PV.9 (Sept. 26, 2012) (Japan's statement).

112. See, e.g., France's Statement, *supra* note 111, at 1; U.N. GAOR, 67th Sess., 15th plen. mtg. at 15–17, U.N. Doc. A/67/PV.15 (Sept. 28, 2012) [hereinafter Germany's Statement]; U.N. GAOR, 67th Sess., 19th plen. mtg. at 11–13, U.N. Doc. A/67/PV.19 (Oct. 1, 2012) (India's statement).

113. Germany's Statement, *supra* note 112, at 16–17 ("We will weaken the Security Council if we fail to adapt it to today's world. Together with our partners in the G-4 group, India, Brazil and Japan, Germany is prepared to assume greater responsibility. It cannot be that Latin America and Africa have no permanent seats on the Security Council or that dynamic Asia has only one seat. That does not reflect the realities of today's world, and it definitely does not reflect the realities of tomorrow.").

114. See, e.g., France's Statement, *supra* note 111, at 1; U.N. GAOR, 67th Sess., 6th plen. mtg. at 7–10, U.N. Doc. A/67/PV.6 (Sept. 25, 2012) (Brazil's statement); Germany's Statement, *supra* note 112, at 16–17.

115. The addition of Brazil, Germany, India, and Japan has been advocated by the United Kingdom and France. U.N. GAOR, 68th Sess., 46th plen. mtg. at 20, 28, U.N. Doc. A/68/PV.46 (Nov. 7, 2013) ("The United Kingdom supports broadening Council membership to include permanent seats for Brazil, Germany, India and Japan France supports . . . in particular the candidacy of Germany, Brazil, India and Japan as permanent members of the Security Council"); see also Ananth Krishnan, *China Ready to Support Indian Bid for UNSC*, HINDU (July 16, 2011), <http://www.thehindu.com/news/international/article2233806.ece> (providing that China has also voiced support for the addition of India to the UNSC). Moreover, the international community has long advocated for African representation in the UNSC. See, e.g., U.N. GAOR, 68th Sess., 46th plen. mtg. at 20, 28, U.N. Doc. A/68/PV.46 (Nov. 7, 2013) (advocating for permanent African representation on the UNSC by the United Kingdom and France); U.N. GAOR, 68th Sess., 48th plen. mtg. at 1, 2–3, 8, 10, 13, 15–16, 18, 22, 28–29, U.N. Doc. A/68/PV.48 (Nov. 8, 2013) (advocating for permanent African representation by Botswana, Rwanda, Equatorial Guinea, Algeria, Trinidad and Tobago, Mexico, Portugal, Ireland, South Africa, Australia, Mauritius, Finland, and Jamaica); U.N. GAOR, 68th Sess., 49th plen. mtg. at 4, 8–9, U.N. Doc. A/68/PV.49 (Nov. 8, 2013) (advocating for permanent African representation on the UNSC by Montenegro, El Salvador, and Sudan). Ever since the Ezulwini Consensus was issued and

Understanding the future of the emerging R2P norm as path-dependent,¹¹⁶ a closer examination of the past and current behavior of the potential new member states to this reformed UNSC helps predict future state behavior and its effect on R2P. As R2P is an emerging norm, it has not yet shaped itself to the decisions of the current UNSC and U.N. Member States.¹¹⁷ As such, while the notion of R2P might have begun to gain some normative pull, it is still not strong enough to transcend the UNSC *realpolitik*. For this reason, it will be the state practice and *opinio juris*—as reflected in UNSC and possible UNGA decision-making regarding R2P—that will determine the future development of the norm. Therefore, an analysis of the prior and current behavior of the states most likely to become part of a reformed UNSC will help test whether a more representative UNSC could possibly promote, undermine, or leave untouched the emerging norm of R2P. This analysis will take place in two steps: first, the likelihood of a reformed UNSC engaging positively with RN2V will be addressed. Second, *arguendo*, this Article shall assess the likelihood of this reformed UNSC engaging positively with R2P.

C. *Politics in UNSC v. RN2V*

Even before RN2V appeared on the U.N. agenda, there had been a fair number of instances where states, including the P5, had considered the use of veto within the UNSC to be problematic. The first such claim, though effectively outside the walls of the UNSC, came with the “Uniting for Peace” resolutions. Resolution 377 on Korea was the first to declare that in cases of a UNSC deadlock, where there appears to be a threat to the peace, breach of the peace,

the African Union suggested that it should determine which two African states should represent Africa in the UNSC, Egypt, Nigeria, and South Africa have generally been considered the three most likely African candidates due to their international influence and economic and military power. See, e.g., Konye Obaji Ori, *UN Permanent Seat: Nigeria Taunts South Africa, Egypt*, AFRIK-NEWS (Mar. 7, 2009), <http://www.afrik-news.com/article15393.html>; John Campbell, *Debate Continues Over a Permanent African Seat on the UN Security Council*, COUNCIL ON FOREIGN REL.: AFR. IN TRANSITION (Oct. 1, 2012), <http://blogs.cfr.org/campbell/2012/10/01/debate-continues-over-a-permanent-african-seat-on-the-un-security-council>.

116. See generally Ian Greener, *The Potential of Path Dependence in Political Studies*, 25 POLITICS 62 (2005); Paul Pierson, *Increasing Returns, Path Dependence, and the Study of Politics*, 94 AM. POL. SCI. REV. 251 (2000).

117. The Resolutions discussed in the UNSC during the 1990s and 2000s regarding humanitarian purposes were: S.C. Res. 1244 (June 10, 1999); S.C. Res. 1264 (Sept. 15, 1999); S.C. Res. 1497 (Aug. 1, 2003); S.C. Res. 1973 (Mar. 17, 2011). In the situations of Sudan and Syria, there are no Resolutions as there was either a threat or use of veto power.

or act of aggression, the UNGA is to consider the matter and to make recommendations for collective measures including the use of armed force when necessary to maintain international peace and security.¹¹⁸ The second set of claims that were also confined to the UNSC includes, most notoriously, the “reverse veto” and the “unreasonable veto.” In the aftermath of the Gulf War, the United States and the United Kingdom used the reverse veto to maintain sanctions on Iraq. Here, the reverse veto was the result of an original resolution calling for sanctions which was drafted using language requiring an affirmative vote to lift said sanctions. The unreasonable veto was used in the context of the UNSC debates over intervention in Iraq that preceded the U.S.-led intervention in 2003. In response to France’s declaration that it would veto any UNSC draft resolution that would allow for intervention in Iraq, the United Kingdom labeled such a potential veto “unreasonable” in light of its disregard of potential evidence that could prove a material breach of Resolution 1441,¹¹⁹ and would as such present substantial grounds for UNSC action.¹²⁰

However, these instances are not only case-specific and particular but also lack—perhaps with the exception of “Uniting for Peace” Resolutions—the authoritative support to frame a debate regarding veto waiving. Only the U.N. Secretary-General’s Implementing R2P Report officially calling for a reform of the P5 veto

118. G.A. Res. 377 (V), at A(A)(1) (Nov. 3, 1950) (“[I]f the Security Council, because of lack of unanimity of the permanent members, fails to exercise its primary responsibility for the maintenance of international peace and security in any case where there appears to be a threat to the peace, breach of the peace, or act of aggression, the General Assembly shall consider the matter immediately with a view to making appropriate recommendations to Members for collective measures, including in the case of a breach of the peace or act of aggression the use of armed force when necessary, to maintain or restore international peace and security. If not in session at the time, the General Assembly may meet in emergency special session within twenty-four hours of the request therefor. Such emergency special session shall be called if requested by the Security Council on the vote of any seven members [*nine since 1965*], or by a majority of the Members of the United Nations.”).

119. See Warren Hoge, *Blaming France, Blair Says Passage of Iraq Resolution Unlikely*, N.Y. TIMES (Mar. 13, 2003), <http://www.nytimes.com/2003/03/13/international/europe/13CND-BRIT.html>; *Full Text: Iraq Legal Advice (Part Two)*, GUARDIAN (Apr. 28, 2005), <http://www.theguardian.com/politics/2005/apr/28/election2005.uk1>; S.C. Res. 1441, ¶ 2 (Nov. 8, 2002) (offering Iraq under Saddam Hussein “a final opportunity to comply with its disarmament obligations” set out in several previous resolutions: S.C. Res. 660 (Aug. 2, 1990); S.C. Res. 661 (Aug. 6, 1990); S.C. Res. 678 (Nov. 29, 1990); S.C. Res. 686 (Mar. 2, 1991); S.C. Res. 687 (Apr. 3, 1991); S.C. Res. 688 (Apr. 5, 1991); S.C. Res. 707 (Aug. 15, 1991); S.C. Res. 715 (Oct. 11, 1991); S.C. Res. 986 (Apr. 14, 1995); and S.C. Res. 1284 (Dec. 17, 1999)).

120. For a more nuanced analysis, see Ariela Blätter & Paul D. Williams, *The Responsibility Not To Veto*, 3 GLOBAL RESP. TO PROTECT 301, 308 (2011).

power sparked UNGA debate on the issue a year later.¹²¹ The potential for RN2V to arise as an unofficial code of conduct within the UNSC arguably presents the only plausible benchmark to lay the groundwork for a sustained development of R2P. Nonetheless, states—particularly the P5—have been reluctant to publicly raise and discuss limits to the veto power in RN2V occasions.

On May 2, 2013, “a group of just over 20 UN member states [under the acronym ACT] launched a new initiative to improve the working methods of the UN Security Council.”¹²² The group is currently composed of twenty-two members from various regions: Austria, Chile, Costa Rica, Estonia, Finland, Gabon, Hungary, Ireland, Jordan, Liechtenstein, Maldives, New Zealand, Norway, Papua New Guinea, Peru, Portugal, Saudi Arabia, Slovenia, Sweden, Switzerland, Tanzania (as an observer), and Uruguay.¹²³ It is interesting to note that none of the P5 or the potential new UNSC members in the event of a reform is part of this initiative. Though states have been reluctant to raise the issue of RN2V in the past, 2013 and 2014 in particular witnessed increased attention toward the issue, sparked in part by the inability of the UNSC to respond to the humanitarian crisis in Syria. The European Parliament adopted a resolution in support of the R2P principle and proposed that the P5 adopt a voluntary code of conduct limiting the right to use the veto in cases of genocide, war crimes, crimes against humanity, and ethnic cleansing.¹²⁴ Most recently, Jordan made a statement as President of the UNSC expressing its support for reform to end the use of the veto in situations of genocide, crimes against humanity, and war crimes.¹²⁵

Among the P5, France has been the most vocal toward RN2V, which is ironic given the fact that the idea itself originated from the

121. U.N. Secretary-General, *Implementing the Responsibility to Protect*, ¶ 61, U.N. Doc. A/63/677 (Jan. 12, 2009) (“I would urge [the P5] to refrain from employing or threatening to employ the veto in situations of manifest failure to meet obligations relating to the responsibility to protect . . .”).

122. Volker Lehmann, *Reforming the Working Methods of the UN Security Council: The Next ACT*, FRIEDRICH-EBERT-STIFTUNG (Aug. 2013), <http://library.fes.de/pdf-files/iez/global/10180.pdf>.

123. *Id.*

124. Recommendation to the Council of 18 April 2013 on the UN Principle of the “Responsibility to Protect” (“R2P”), EUR. PARL. DOC. P7_TA(2013)0180 (Apr. 18, 2013), 8–9, <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+TA+P7-TA-2013-0180+0+DOC+PDF+V0//EN>.

125. U.N. ASS’N-U.K., UN SECURITY COUNCIL AND THE RESPONSIBILITY TO PROTECT: VOLUNTARY RESTRAINT OF THE VETO IN SITUATIONS OF MASS ATROCITY (Oct. 2015), http://www.una.org.uk/sites/default/files/Veto%20R2P%20code%20of%20conduct%20briefing%20October%202015%20update_0.pdf.

former French Foreign Minister Hubert Védrine.¹²⁶ Since then, France has openly and strongly requested that the “permanent members of the Security Council define a code of conduct,”¹²⁷ like RN2V, and most recently raised these concerns in light of the situation in Syria.¹²⁸ The United States has never directly addressed RN2V. However, it has advocated for a more active UNSC role in the most recent situations of Libya and Syria,¹²⁹ and also stated: “the Security Council the world needs to deal with this urgent crisis [in Syria] is not the Security Council we have.”¹³⁰ The United Kingdom has recently broken its silence by suggesting that it will not use its veto in situations of mass atrocity.¹³¹ Russia, on the other hand, has been adamantly opposed to any dilution of its veto power,¹³² while China

126. On May 23, 2001, a roundtable discussion with French Government officials and Parliamentary officials was held at the Canadian Cultural Centre in Paris. This was one of many consultations the ICISS held at venues all over the world. INT’L COMM’N ON INTERVENTION AND STATE SOVEREIGNTY, THE RESPONSIBILITY TO PROTECT: RESEARCH, BIBLIOGRAPHY, BACKGROUND 378–93 (2001), <http://www.idrc.ca/EN/Resources/Publications/Pages/IDRCBookDetails.aspx?PublicationID=242>.

127. U.N. GAOR, 68th Sess., 5th plen. mtg. at 34, U.N. Doc. A/68/PV.5 (Sept. 24, 2013) (quoting French President Hollande stating, “[a]nd the United Nations bears the responsibility to act. Each time the Organization appears powerless, peace is the first victim. That is why I am proposing that the permanent members of the Security Council define a code of conduct such that in cases of mass crimes, they may collectively decide to renounce the right of veto.”).

128. U.N. SCOR, 68th Sess., 7052d mtg. at 13, U.N. Doc. S/PV.7052 (Oct. 29, 2013) (“The Syrian crisis has highlighted the impasse that the Security Council has come up against in dealing with the use of the right of veto. A few weeks ago, the President of France spoke in the General Assembly on the importance of creating a code of conduct for the permanent members that would establish guidelines for the use of the right of veto. The Minister for Foreign Affairs also spoke on the subject. What would be involved would be for the five permanent members of the Security Council to collectively and voluntarily suspend their right of veto when a situation involving crime on a massive scale is considered to have occurred.”).

129. See, e.g., U.N. SCOR, 67th Sess., 6810th mtg. at 11, U.N. Doc. S/PV.6810 (July 19, 2012) (“One can only hope that one day, before too many thousands more die, Russia and China . . . will stop protecting Al-Assad and allow the Council to play its proper role at the centre of the international response to the crisis in Syria.”); Remarks by Ambassador Susan E. Rice, U.S. Permanent Rep. to the United Nations, at the Security Council Stakeout on Libya (Mar. 16, 2011), <http://usun.state.gov/remarks/4995>.

130. Samantha Power, U.S. Permanent Rep. to the U.N., Amb. Power on Syria at Center for American Progress (Sept. 6, 2013), <http://iipdigital.usembassy.gov/st/english/texttrans/2013/09/20130906282382.html#axzz3qYs6hOt9>.

131. *Elders Propose Veto Reform in Cases of Atrocities*, INT’L PEACE INST. (Sept. 26, 2015), <http://www.ipinst.org/2015/09/preventing-mass-atrocities#2>.

132. Statement by Russia at the Framing the Veto in the Event of Mass Atrocities—Unofficial Transcription from UN Webcast (Sept. 25, 2014), <http://www.globalr2p.org>

has indirectly referred to its “benchmarks” regarding the use of the veto.¹³³

Of the potential new members of a reformed UNSC a few have, either directly or indirectly, referred to RN2V. South Africa has openly embraced the need “to develop guidelines for response, including the curtailment of the veto, when considering issues relating to these four crimes and enhancing the capacity of the UN to respond decisively and timeously.”¹³⁴ Egypt has explicitly referred to the “role of the [U.N.] General Assembly in the maintenance of international peace and security” and “further emphasized that in such instances where the Security Council has not fulfilled its primary responsibility for the maintenance of international peace and security, the General Assembly should take appropriate measures in accordance with the Charter to address the issue.”¹³⁵ Germany has indirectly supported RN2V in the latest Syria debates, arguing, “To this very day, the Security Council has failed to live up to its responsibility for the people in Syria. . . . The deadlock in the Security Council must not continue.”¹³⁶ Nigeria, Japan, India, and Brazil have all been silent toward RN2V.

It is clear that no concrete conclusion regarding RN2V may be drawn at this point. It is likely, due to the support it has received from states in the UNGA, that RN2V will continue to advance at the U.N. level through like-minded states that favor R2P and strive to ensure swift responses in cases of mass atrocity. Though RN2V may not have been on the agenda of many key U.N. players, France’s leadership on the issue, coupled with Jordan’s advocacy as President of the UNSC, could seize the momentum and further advance the debate.

/media/files/russia-transcribed.pdf.

133. Statement by China at Framing the Veto in the Event of Mass Atrocities—Unofficial Transcription from UN Webcast (Sept. 25, 2014), <http://www.globalr2p.org/media/files/china-transcribed.pdf>.

134. U.N. GAOR, 63d Sess., 98th plen. mtg. at 17, U.N. Doc. A/63/PV.98 (July 24, 2009) (quoting Mr. Sangqu of South Africa as stating, “That is why our delegation agrees with the Secretary-General that the General Assembly needs to develop guidelines for response, including the curtailment of the veto, when considering issues related to these four crimes and needs to enhance the capacity of the United Nations to respond decisively and timeously”).

135. U.N. GAOR, 63d Sess., 97th plen. mtg. at 6, U.N. Doc. A/63/PV.97 (July 23, 2009).

136. U.N. GAOR, 67th Sess., 15th plen. mtg. at 15, U.N. Doc. A/67/PV.15 (Sept. 28, 2012).

D. Politics in Reformed UNSC v. R2P

One of the most critical issues R2P faces is the backsliding of Member States. Indeed, Gareth Evans considers backsliding as a problem of the highest priority and distinguishes two forms of it. The first form is the self-interested cynicism of certain states, and the second form is reflected in the less crudely self-interested and more ideologically minded states retaining an aversion to anything that may be conceived as neo-imperialism.¹³⁷

Under the current UNSC standing, Russia and China are considered to belong in this backsliding group of states. Despite China's initial signing of the Outcome Document, its commitment to R2P can be described as tepid at best. Until the Libyan crisis, China had never openly mentioned R2P in any of its UNGA addresses¹³⁸ and was instead very cautious about crossing the lines of sovereignty by arguing that "it is inadvisable to make hasty judgment [sic] that the State concerned is unable or unwilling to protect its own citizens and rush to intervene."¹³⁹ Since then, China has approached R2P cautiously¹⁴⁰

137. Gareth Evans, President, Int'l Crisis Group, Co-Chair, Int'l Comm'n on Intervention and State Sovereignty, *The International Responsibility to Protect: The Tasks Ahead*, Address to The Centre for Conflict Resolution's Seminar Africa's Responsibility to Protect (Apr. 23, 2007), <http://www.crisisgroup.org/en/publication-type/speeches/2007/evans-the-international-responsibility-to-protect-the-tasks-ahead.aspx>.

138. See, e.g., *What the World Is Saying about Darfur: Almost Nothing*, HUM. RTS FIRST, <http://www.humanrightsfirst.org/wp-content/uploads/pdf/06927-ij-ga-country-pres.pdf> (last visited Feb. 23, 2016).

139. Statement by Ambassador Wang Guangya on the Report of the High-Level Panel, Permanent Mission of the People's Republic of China to the U.N. (Jan. 27, 2005), <http://www.china-un.org/eng/hyyfy/t181639.htm>; see also World Federalist Movement, *State-by-State Positions on the Responsibility to Protect*, http://www.responsibilitytoprotect.org/files/Chart_R2P_11August.pdf; Permanent Mission of the People's Republic of China to the U.N., *Position Paper of the People's Republic of China on the United Nations Reforms* (June 7, 2005), http://www.fmprc.gov.cn/mfa_eng/wjb_663304/zzjg_663340/gjs_665170/gjzzyhy_665174/2594_665176/2602_665192/t199084.shtml ("Each state shoulders the primary responsibility to protect its own population. However, internal unrest in a country is often caused by complex factors. Prudence is called for in judging a government's ability and will to protect its citizens. No reckless intervention should be allowed. . . . Wherever it involves enforcement actions, there should be more prudence in the consideration of each case.").

140. Gov't of China, Statement Delivered on Behalf of the Permanent Mission of China to the U.N. in the General Assembly Informal Interactive Dialogue on the Responsibility to Protect (Sept. 5, 2012), <http://www.globalr2p.org/media/files/china-statement-2012-transcribed.pdf> ("R2P is a complicated issue, its applicability and the real implementation is still a controversial issue. China favors further discussion in the GA on this matter. Before a consensus is reached among the member states the UN should be very careful and prudent in the promotion and the real implementation of R2P.").

by reiterating the primary responsibility of territorial states and emphasizing the mere “constructive assistance” the international community may provide in “strict adherence to the principles of objectivity and neutrality to the purposes and the principles of the UN Charter and in full respect of national sovereignty, independence, unity and territorial integrity of the state concerned.”¹⁴¹

Similarly, Russia is generally seen as equivocating on R2P implementation. Both China and Russia, judging by their voting precedent on humanitarian interventions, appear to be fairly interest-driven.¹⁴² Russia has kept a similar rhetoric in assigning primary responsibility with the territorial state and considers military intervention a strict exception.¹⁴³ The role of the international community then is limited to providing the necessary assistance to states to pro-

141. Gov’t of China, Statement by China at the U.N. General Assembly Informal Interactive Dialogue on the Responsibility to Protect (July 12, 2011), <http://www.globalr2p.org/media/files/china1.pdf>.

142. China and Russia used their “informal veto” to block action authorizing a UNSC Kosovo intervention. See INDEP. INT’L COMM’N ON KOSOVO, THE KOSOVO REPORT: CONFLICT, INTERNATIONAL RESPONSE, LESSONS LEARNED 142 (2000); Gareth Evans, President, Int’l Crisis Group, Co-Chair, Int’l Comm’n on Intervention and State Sovereignty, Address at U.C. Berkeley Int’l Conf. on the Responsibility to Protect: Stopping Mass Atrocities (Mar. 14, 2007), <http://www.crisisgroup.org/en/publication-type/speeches/2007/evans-the-responsibility-to-protect-the-power-of-an-idea.aspx>. Similarly, they blocked humanitarian action in Sudan and most recently vetoed R2P action in Syria. See James Traub, *The World According to China*, N.Y. TIMES MAG. (Sept. 3, 2006), <http://www.nytimes.com/2006/09/03/magazine/03ambassador.html>; Press Release, Security Council Fails to Adopt Draft Resolution on Syria that Would Have Threatened Sanctions, Due to Negative Votes of China, Russian Federation, U.N. Press Release SC/10714 (July 19, 2012), <http://www.un.org/press/en/2012/sc10714.doc.htm>. Both China and Russia share economic and geopolitical interests in the said states. See Neil MacFarquhar, *With Rare Double U.N. Veto on Syria, Russia and China Try To Shield Friend*, N.Y. TIMES (Oct. 5, 2011), <http://www.nytimes.com/2011/10/06/world/middleeast/with-united-nations-veto-russia-and-china-help-syria.html>; Michelle Nichols, *Russia, China Veto U.N. Security Council Resolution on Syria*, REUTERS (July 19, 2012), <http://www.reuters.com/article/us-syria-crisis-un-idUSBRE86I0UD20120720>. On the contrary, they decided to abstain in Resolution 1973 authorizing R2P in Libya where they arguably bear less economic interest. See, e.g., S.C. Res. 1973 (Mar. 17, 2011); DIRECTORATE-GENERAL FOR EXTERNAL POLICIES, POLICY DEP’T, THE POSITIONS OF RUSSIA AND CHINA AT THE UN SECURITY COUNCIL IN THE LIGHT OF RECENT CRISES 17 (Mar. 2013), [http://www.europarl.europa.eu/RegData/etudes/note/join/2013/433800/EXPO-SEDE_NT\(2013\)433800_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/note/join/2013/433800/EXPO-SEDE_NT(2013)433800_EN.pdf).

143. Gov’t of Russia, Statement by Russian Fed’n to the U.N. General Assembly Informal Interactive Dialogue on the Responsibility to Protect (July 12, 2011), <http://www.globalr2p.org/media/files/russia2.pdf> (“We believe that the premier responsibility for preventing genocide and ethnic cleansing belongs to states. It is the states that primarily have responsibility for strengthening these preventative mechanisms. . . . Military intervention must be the exception and in strict accordance with international law primarily the Charter of the UN.”).

tect their own populations.¹⁴⁴ Additionally, Russia has often accused R2P of being open to state manipulation for “distorted goals” (citing mainly the example of Libya),¹⁴⁵ and of enjoying insufficiently widespread recognition to form an international legal obligation.¹⁴⁶

In the camp of the potential new UNSC members, India too had never mentioned R2P in its UNGA addresses up until the situation in Libya. India was also one of the states that attempted to block R2P during the 2005 World Summit.¹⁴⁷ Indian officials have continuously suggested that the role of the international community is limited to merely encouraging states to use peaceful means of dispute

144. Gov't of Russia, Statement by Russia During the U.N. General Assembly Informal Interactive Dialogue on the Responsibility to Protect: Timely and Decisive Action (Sept. 5, 2012), http://responsibilitytoprotect.org/Russia%20Statement%20_Transcribed.pdf (“It is our belief that the paramount obligation for protecting the responsibility of one’s own population lies with the state. The role of the international community amounts, first and foremost, to providing the necessary assistance to the state in implementing this duty. Using coercive measures is an extreme measure which should be implemented in strict compliance with the UN Charter, in so doing the main aim of such coercion should be to prompt the responsible state for implementing its obligations and not supplanting its role in so doing.”).

145. *Id.* (“The third pillar of R2P, especially with respect to the use of armed force, is the most contradictory. Examples from practice confirm how likely the use or the application of R2P may be for distorted goals. And in this context with this in mind the Libyan issue not only didn’t reinforce faith in R2P but also harmed the image of this concept around the world. Once again we appeal for there to be an extremely cautious approach to implementing R2P. If there is interference, negative consequences may eviscerate the chances of a positive effect.”).

146. *Id.* (“The question remains open of whether the proposed strategy for applying R2P actually enjoys widespread recognition among states. Has the concept achieved the level of maturity in general which would allow one without any doubt to put it into practice? Have the mechanisms been created which limit the possibilities of abuse? We do not have the confidence that in the world a consensus has been achieved on these issues. And only such a consensus, in our opinion, would create a sound basis for further steps in this area.”); Mission of the Russian Fed’n to the U.N., Statement Delivered During the General Assembly Informal Interactive Dialogue on the Responsibility to Protect: State Responsibility and Prevention (Sept. 11, 2013), <http://www.globalr2p.org/media/files/russia-transcription.pdf> (where in a similar vein, more recently for the case of Syria, and without making explicit mention to R2P but instead to “humanitarian intervention,” Russia held that “We cannot agree with attempts to base military action against Syria on narrow concepts of so-called ‘humanitarian intervention,’ which have no basis in international law, and are not generally recognized and they go against the letter and spirit of the Charter and we are convinced that the Syrian conflict can be resolved only through discussion and good faith work to end the suffering of the Syrian people.”).

147. Press Release, Human Rights Watch, Small Number of Countries Holding UN World Summit Hostage on Human Rights, Security, Poverty (Sept. 5, 2005), <https://www.hrw.org/news/2005/09/05/small-number-countries-holding-un-world-summit-hostage-human-rights-security-poverty>.

resolution.¹⁴⁸ With respect to Resolution 1973 and R2P in Libya, India has openly stated that it considered the norm's objective in that instance to be regime change,¹⁴⁹ describing R2P as a legitimizing tool for "big power intervention."¹⁵⁰ Similarly, Egypt is among those countries that attempted to block R2P during the World Summit.¹⁵¹ Egypt does not share the view of R2P as an emerging legal norm or concept and instead contends that R2P must continue to be measured up against sovereignty.¹⁵² For this reason, it considers R2P to be a "back door for disguised military intervention"¹⁵³ and an opening for pursuing regime change.¹⁵⁴

148. World Federalist Movement, *supra* note 139. It is noteworthy that India decided to abstain in Resolution 1973 authorizing action in Libya by virtue of R2P. U.N. SCOR, 66th Sess., 6498th mtg. at 3, U.N. Doc. S/PV6498 (Mar. 17, 2011).

149. Hardeep Singh Puri, Permanent Rep. of India to the U.N., Statement Delivered During an Informal Interactive Dialogue on The Report of the Sec'y Gen. on the Responsibility to Protect: Timely and Decisive Action (Sept. 5, 2012), <http://responsibilitytoprotect.org/India.pdf> ("It merits repetition that almost all aspects of resolution 1973, namely the pursuit of ceasefire, arms embargo, and no-fly zone, were violated not to protect civilians because the regime had long back lost its fighting capability but to change the regime. It is the pursuit of the objective of regime change that generated a great deal of unease among a number of us who support action by the international community, anchored in the United Nations, to implement the provisions contained in paragraphs 138 and 139 of the World Summit Outcome Document.").

150. *Id.* ("R2P cannot turn out to be a tool legitimizing big power intervention on the pretext of protecting populations from the violations of human rights and humanitarian law. It cannot be seen as codifying a system of coercion, providing a tool in the hands of powerful governments to judge weaker states, and encourage regime change primarily on political considerations.").

151. Press Release, *supra* note 147.

152. World Federalist Movement, *supra* note 139.

153. Egyptian Delegation to the U.N., Egypt's Statement at the Informal Interactive Dialogue of the General Assembly on the Responsibility to Protect (Sept. 11, 2013), http://www.globalr2p.org/media/files/egypt_en.pdf ("The R2P needs to be thoroughly discussed in the General Assembly. R2P is still a political term. And there are valid concerns about using it as a back door for disguised military intervention. There is a lot of work ahead of us to clarify this important concept, and to bring it in conformity with the UN charter and relevant principles of international law.").

154. Egyptian Delegation to the U.N., Statement Delivered on Behalf of the Permanent Mission of Egypt to the United Nations, General Assembly Informal Interactive Dialogue on "The Responsibility to Protect: Timely and Decisive Action" (Sept. 5, 2012), http://responsibilitytoprotect.org/Egypt_Transcribed.pdf ("Second, the military approach should be considered as a last resort and after all other measures under the three pillars have failed. Such an approach must be applied responsibly and must not be misused as a tool for intervention or regime change. This requires developing parameters for our collective responsibility while protecting populations against the four major crimes defined in the 2005 document.").

South Africa's record on R2P has been mixed. Despite its proactive role in favor of R2P in the 2005 Summit, it maintains an inconsistent voting record while serving its UNSC term.¹⁵⁵ For example, South Africa initially voted in favor of Resolution 1973 on Libya, but subsequently voiced concerns about R2P being abused¹⁵⁶ as a "pretext for other motives including regime change"¹⁵⁷ and has emphasized that the role of the international community must "remain that of assisting affected States at their request."¹⁵⁸ In other words, South Africa seems to favor the idea of R2P but is hesitant in its implementation, especially as regards the third pillar.

Brazil's position is also unclear, though it leans pragmatically against R2P. Brazil abstained from Resolution 1973,¹⁵⁹ and has also

155. See, e.g., U.N. SCOR, 62d Sess., 5619th mtg. at 6, U.N. Doc. S/PV.5619 (Jan. 12, 2007) (South Africa voting against Draft Resolution S/2007/14 favoring R2P in Burma); U.N. SCOR, 66th Sess., 6498th mtg. at 3, U.N. Doc. S/PV.6498 (Mar. 17, 2011) (South Africa voting in favor of Resolution 1973 for Libya).

156. S. Afr. Delegation to the U.N., Statement by South Africa to the U.N. at the General Assembly Informal Interactive Dialogue on "The Responsibility to Protect: State Responsibility and Prevention" (Sept. 11, 2013), <http://www.globalr2p.org/media/files/south-africa-transcription-1.pdf> ("Abuse of R2P for political reasons is a major concern. We hear of calls and agitations for humanitarian intervention in Syria, as well as for R2P there. Based on our own experience of previous Security Council authorizations of the use of force, we caution against the possibility of pushbacks of some of the gains that have been made in the past few years in relation to the concept of Responsibility to Protect.").

157. S. Afr. Delegation to the U.N., Statement Delivered on Behalf of the Permanent Mission of South Africa to the United Nations General Assembly Informal Interactive Dialogue on "The Responsibility to Protect: Timely and Decisive Action" (Sept. 5, 2012), <http://responsibilitytoprotect.org/South%20Africa.pdf> ("Responsibility to Protect response must be fully respected and implemented in the later and in the spirit of its provision rather than using the mandate as a pretext for other motives including regime change. Put plainly, Mr. President, the primary objective of Responsibility to Protect is not regime change. The third pillar is by far the most challenging.").

158. S. Afr. Delegation to the U.N., *supra* note 156 ("It is important therefore that this consensus [on R2P] is borne out of sufficient checks and balances, namely qualifications to avoid abuses for political agendas, that government bare the primary Responsibility to Protect its population, that the building of capacity of States to prevent the four listed crimes, and the use of force being considered a matter of last resort, should not be compromised. We believe that the role of the international community must remain that of assisting affected States at their request, be it in the context of prevention of conflicts or atrocity crimes.").

159. U.N. SCOR, 66th Sess., 6498th mtg. at 3, U.N. Doc. S/PV.6498 (Mar. 17, 2011) (Brazil abstaining from voting on Resolution 1973 for Libya); see also Maria Luiza Ribeiro Viotti, Permanent Representative of Braz. to the U.N., Responsibility to Protect: SG Report on "The Role of Regional and Sub-Regional Arrangements in Implementing the Responsibility to Protect," at 4 (July 12, 2011), <http://www.globalr2p.org/media/files/brazil->

called for attention to the “painful consequences of interventions that have aggravated existing conflicts.”¹⁶⁰ Brazil, just like the rest of this group of prominent nations, has also voiced concerns over misuse of R2P for regime change.¹⁶¹

On the opposite bank lay the current UNSC members, France and the United Kingdom, that have both consistently and vocally supported R2P. France understands R2P to be an action-based principle¹⁶² that involves all three pillars equally, and therefore does not shy away from the possibility of action involving the use of force.¹⁶³ Similarly, the United Kingdom has argued that R2P’s importance lies in the fact that it may allow the international community to escape

stmt.pdf (“On the third pillar, which deals with ‘timely and decisive response’ and the use of force, the report mentions the case of Libya, in which the Security Council cited the Libyan authorities’ responsibility to protect its population. In light of the gravity of the situation in Libya and taking into account the views of the League of Arab States, the African Union and the Permanent Mission of Libya to the UN, Brazil voted in favor of Resolution 1970 (2011). With regard to Resolution 1973, Brazil had serious doubts on whether the use of force, to the extent provided for by the Resolution, would lead to the realization of our common objectives, that is, the immediate end of violence and the protection of civilians.”).

160. Permanent Representative of Brazil to the U.N., Letter dated Nov. 9, 2011 from the Permanent Rep. of Brazil to the United Nations addressed to the Secretary-General, at 3, U.N. Doc. A/66/551-S/2011/701 (Nov. 11, 2011) (“Yet attention must also be paid to the fact that the world today suffers the painful consequences of interventions that have aggravated existing conflicts . . .”).

161. *Id.* (“There may be situations in which the international community might contemplate military action to prevent humanitarian catastrophes. Yet attention must also be paid to the fact that the world today suffers the painful consequences of interventions that have aggravated existing conflicts, allowed terrorism to penetrate into places where it previously did not exist, given rise to new cycles of violence and increased the vulnerability of civilian populations. There is a growing perception that the concept of the responsibility to protect might be misused for purposes other than protecting civilians, such as regime change.”).

162. Fr. Delegation to the U.N., General Assembly Informal Interactive Dialogue on The Responsibility to Protect (Sept. 5, 2012), [http://responsibilitytoprotect.org/France\(5\).pdf](http://responsibilitytoprotect.org/France(5).pdf) (translation in English available at <http://www.globalr2p.org/media/files/france-statement-2012-transcribed.pdf> (“The Responsibility to Protect is a concept to which France is very much attached. It reflects the preeminent place of human rights in international law. It is a concept that is based on action, it is a concept which enables us to save lives.”)).

163. Gérard Araud, Permanent Rep. of Fr. to the U.N., General Assembly Informal Interactive Dialogue on The Responsibility to Protect (Sept. 11, 2013), http://www.globalr2p.org/media/files/france_en_official.pdf (“But we shouldn’t forget that prevention may involve the use of force. Prevention is not just the first pillar. It’s not just a matter of taking measures for the sake of it, without any regard for the suffering of others. It’s a commitment—made in 2005—to implement a series of measures to prevent future atrocities, including through the international criminal justice system, including through coercive military initiatives when decisive action is required.”).

past accusations of doing “too little too late.”¹⁶⁴ Having voted just like France in favor of both Resolution 1973 on Libya and all draft resolutions involving Syria, the United Kingdom views R2P as an opportunity for the UNSC to “shoulder their responsibility in taking decisive action” against grave human rights violations.¹⁶⁵ The United States, albeit more reluctant to the potential development of R2P as a “legal obligation,” is also in favor of its principles, has applauded its development,¹⁶⁶ and has committed itself as a strong supporter in its advancement.¹⁶⁷ As one of the key proponents for action in Libya

164. Gov’t of the U.K., General Assembly Debate Statement: United Kingdom (July 12, 2011), <http://www.globalr2p.org/media/files/uk.pdf> (“The UK, I think goes without saying, strongly supports the continued efforts to refine and to implement the principle of responsibility to protect and the principle of responsible sovereignty which is the corollary of the principle of the responsibility to protect. As a number of speakers have said, pillar 3 is of course the last resort but as the Secretary General said earlier the problem that we have had most often in recent years is not that we have been too bold but that we have done too little and too late and it will be no surprise to colleagues that we disagree with the characterization that one or two speakers have made of action in relation to Libya over the last two or three months.”).

165. Michael Tatham, Ambassador & Political Coordinator, U.K. Mission to the U.N., General Assembly Informal Interactive Dialogue on “The Responsibility to Protect: Timely and Decisive Action”: The UK is Fully Committed to Implementing the Responsibility to Protect (Sept. 5, 2012), <http://responsibilitytoprotect.org/United%20Kingdom.pdf> (“As outlined in the Secretary-General’s report, collective response under pillar three includes a broad range of non-coercive and coercive measures that actors at national, regional, and international levels can use—from mediation to sanctions. The international community has said ‘never again’ and we have said ‘we must learn the lessons of Rwanda and Srebrenica.’ But this has sometimes proved harder than it might sound. . . . On Libya, we believe the UN Security Council-mandated action taken by NATO was necessary, legal and morally right. By taking prompt action, the UN Security Council and NATO saved tens of thousands of people from becoming victims of crimes against humanity and war crimes. . . . On Syria, the overwhelming majority vote in favour of the UN General Assembly Resolution on Syria on 3 August sent a clear message that the world condemns escalating violence and human rights violations by the Syrian regime. But the collective response by the international community to the situation in Syria has been thwarted by a lack of consensus in the United Nations Security Council. We reiterate the call for all members of the Security Council to shoulder their responsibility in taking the decisive action required to compel the Assad regime to cease the violence and engage in a political process.”).

166. Rick Barton, U.S. Rep. to the Econ. & Soc. Council of the U.N., Remarks at the General Assembly Informal Interactive Dialogue on Responsibility to Protect (July 12, 2011), <http://responsibilitytoprotect.org/United%20States.pdf>.

167. Elizabeth Cousens, U.S. Rep. on the U.N. Econ. & Soc. Council & Alt. Rep. to the U.N. Gen. Assembly, Remarks at the UNGA Interactive Dialogue on the Responsibility to Protect (Sept. 5, 2012), <http://www.responsibilitytoprotect.org/USA%203rd%20Pillar.pdf> (“Seven years ago, all member states of the United Nations came together to endorse and accept a shared responsibility to protect populations from genocide, ethnic cleansing, crimes against humanity, and war crimes. The United States remains a strong supporter of the

and Syria, the United States understands both countries as depictions of an international obligation under R2P.¹⁶⁸ Finally, it has called for increased efforts to make the framework of the Outcome Document less of an aspiration and more a reflection of reality.¹⁶⁹

Out of the potential new member states of the UNSC, Japan and Nigeria seem to be the only countries with clear positions in favor of R2P. Japan has continuously stressed the principles of R2P in its public statements at the UNGA, including calls for forcible intervention in humanitarian situations where all other alternatives have failed.¹⁷⁰ Japan has also specifically addressed and regretted the lack of action in Syria, stressing the responsibility to protect of the international community through the UNSC to take action¹⁷¹ against “tragedies, which desperately require the response of the international community.”¹⁷² Nigeria has expressed its continued support to-

Responsibility to Protect and is committed to working with international partners to advance this concept and put it into practice.”).

168. Barton, *supra* note 166 (“The Security Council’s decisive action in Libya shows the progress we have made in learning from our past failures to prevent mass atrocity crimes and in living up to the aspirations we set for ourselves under Responsibility to Protect.”).

169. Samantha Power, U.S. Permanent Rep. to the U.N., Statement at an Informal Interactive Dialogue on the Responsibility to Protect (Sept. 11, 2013), <http://www.globalr2p.org/media/files/us-statement-at-the-2013-interactive-dialogue.pdf> (“The important framework that the Outcome Document created in 2005 remains more aspirational than it is real. Eight years and countless innocent lives later, we are the ones who have a responsibility to make it real.”).

170. See Kinichi Komano, Ambassador Extraordinary & Plenipotentiary of Japan in Charge of Human Sec., Statement at the Seventh Ministerial Meeting of the Human Security Network (May 20, 2005) (“We do not deny that there could be some extremely catastrophic cases such as genocide, mass killing or ethnic cleansing. If all the non-military efforts do not produce any good outcome, we understand that the responsibility to protect these suffering people should fall upon the international community, which may have recourse to military intervention, or ‘humanitarian intervention,’ as a last resort.”); see also U.N. SCOR, 61st Sess., 5577th mtg. at 15–17, U.N. Doc. S/PV.5577 (Dec. 4, 2006); Kenzo Oshima, Permanent Representative of Japan to the U.N., Statement on Protection of Civilians in Armed Conflict (June 22, 2007).

171. Tsuneo Nishida, Ambassador Extraordinary & Plenipotentiary, Permanent Rep. of Japan to the U.N., Remarks on the Occasion of an Informal Interactive Dialogue on the Responsibility to Protect, at 1 (Sept. 5, 2012), <http://responsibilitytoprotect.org/Japan.pdf> (“Japan deeply regrets that the Security Council has been unable to take unified action on this issue [in Syria]. The UN, including the Security Council, should seriously consider and agree on appropriate measures to address the ongoing situation, bearing in mind the importance of RtoP . . .”).

172. Kazuyoshi Umemoto, Ambassador Extraordinary & Plenipotentiary, Interim Permanent Rep. of Japan to the U.N., Remarks on the Occasion of an Informal Interactive Dialogue on the Responsibility to Protect (Sept. 11, 2013), http://www.globalr2p.org/media/files/japan_en.pdf (“[W]e hope that the Security-Council will play the role which it

ward R2P¹⁷³ and understands its three pillars to be in line with international humanitarian and human rights law, as well as representing an important shift toward human security.¹⁷⁴

Finally, Germany, once expected to align with its traditional post-WWII UNSC allies on R2P, muddied the waters with its most recent abstention from Resolution 1973, a stance that went against its prior commitment to R2P¹⁷⁵ as an emerging legal norm. Germany has expressed concern about a “prevailing narrow focus” on R2P’s third pillar,¹⁷⁶ and considers the failure to prevent mass atrocities in Syria as an individual and collective failure of the international

should play with respect to the Syria situation. . . . We should not forget that we are witnessing tragedies which desperately require the response of the international community.”).

173. Gov’t of Nigeria, Statement Delivered by the Government of Nigeria During the September 2012 United Nations General Assembly Interactive Dialogue on the Responsibility to Protect, at 3 (Sept. 5, 2012), [http://responsibilitytoprotect.org/Nigeria\(1\).pdf](http://responsibilitytoprotect.org/Nigeria(1).pdf) (“Today’s debate therefore, should aim at strengthening global commitment towards an effective implementation of the R2P.”); Gov’t of Nigeria, Statement at the Global Centre for R2P and the Permanent Mission of Rwanda to the UN Event: Genocide: A Preventable Crime (Jan. 15, 2014), <http://www.globalr2p.org/media/files/statement-by-nigeria.pdf> (“Therefore we request member-states to continue to support the R2P process because we believe that greater development and adoption of the process will provide a framework to mobilise political will to prevent and protect populations from mass atrocity crimes like the 1994 genocide in Rwanda.”).

174. Usman Sarki, Ambassador & Deputy Permanent Rep. of Nigeria to the U.N., Statement at the Fifth Annual Informal Interactive Dialogue on the Report of the Secretary-General on the Responsibility to Protect: State Responsibility and Prevention, at 2 (Sept. 11, 2013), <http://www.globalr2p.org/media/files/nigeria.pdf> (“R2P and its three pillars, not only derives its global legitimacy on international humanitarian and human rights law, but also represents a global conceptual and policy shift in the notion of sovereignty and security, with new emphatic ascendancy on human security rather than on state security.”).

175. Christoph Retzlaff, Councillor, Permanent Mission of Ger. to the U.N., Statement on the “Responsibility to Protect” in the General Assembly (July 12, 2011), <http://www.globalr2p.org/media/files/germany.pdf> (“The progress we have seen in implementing RtoP in the last years is indeed encouraging. We have applied this principle in a number of specific situations. This is a decisive step that clearly demonstrates that RtoP has become a broadly accepted concept and an emerging norm of international law.”).

176. Miguel Berger, Deputy Permanent Rep. of Ger. to the U.N., Statement at the 4th Informal Interactive Dialogue on the Responsibility to Protect (Sept. 5, 2012), [http://responsibilitytoprotect.org/Germany\(1\).pdf](http://responsibilitytoprotect.org/Germany(1).pdf) (“As to the public perception of R2P, Germany remains concerned about the prevailing narrow focus on the third pillar. The discussion of NATO’s military action in implementation of Security Council resolution 1973 has unnecessarily further contributed to a reduced awareness of pillars one and two. Let me therefore again stress that we remain committed to the application of R2P as a holistic concept that merges prevention and response.”).

community and not of the notion of R2P.¹⁷⁷ Germany's position therefore remains unclear and its vote could arguably swing either way in the course of time.

In sheer numbers, there seems to be a relative advantage of states opposing R2P in a reformed UNSC. States likely to favor action under R2P's third pillar are France, the United Kingdom, the United States, Japan, and Nigeria while states likely to oppose it are Russia, China, India, South Africa, Brazil, and Egypt. A possible swing state that may favor or oppose R2P on a more ad hoc basis is Germany. This set is substantially different from the current dynamic of the UNSC, which in its permanent seating is dominated by states favorable to R2P. The key changing players in this equation are mostly the potential new permanent states.

The potential new UNSC members all play a substantial role in regional politics, which would consequently alter the dynamics and politics of a reformed UNSC. More specifically, a reformed UNSC operating under RN2V would affect the lobbying of states, particularly the permanent members, to vote in favor or against a resolution. Since passing a resolution would now entail majority voting, the stakes of non-permanent members would rise. States lobbying for a resolution are likely to devote more resources to getting non-permanent members on board by offering more incentives. After all, the higher representation of all regions in the reformed UNSC would inherently create the potential for more incentive-driven lobbying toward non-permanent members due to the presence, in the permanent seating, of key regional actors. Therefore, for the purposes of majority voting under RN2V in a reformed UNSC, the weight is more likely to fall on regional politics and political influence exerted by the new permanent members over the occasional non-permanent ones. A reformed UNSC would arguably become more fluid and less favorable to the development of R2P than the UNSC in its current composition. As such, situations that would otherwise call for R2P action are likely to suffer from more deadlocks, ineffectiveness, and inertia in a reformed UNSC, potentially leading to more skepticism and cynicism toward the emerging R2P norm. In this light and in response to the voices calling for a UNSC reform hoping for more ef-

177. Christophe Eick, Minister Plenipotentiary, Permanent Mission of Ger. to the U.N., Statement on the Responsibility to Protect (Sept. 11, 2013), <http://www.globalr2p.org/media/files/germany-2013-dialogue-statement.pdf> ("Germany remains a strong advocate of the Responsibility to Protect. Some have said that the concept of the Responsibility to Protect has failed to prevent mass atrocities, in Syria and elsewhere. But as the Secretary-General has stated this morning, it is not the concept of R2P that is to blame. We should rather look at our individual and collective failure, as States and the international community, when we ask 'what went wrong.'").

fective action under R2P, the situation appears counterintuitively bleaker than expected.

CONCLUSION

This Article, though limited in scope, has sought to identify the potential effect UNSC reform may have on the development of the emerging norm of R2P. It set out to substantiate three primary claims. First, the most viable way for R2P to develop is hand in hand with the procedural mechanism of RN2V. It is through an agreement by the veto-bearing UNSC members to waive their veto right in cases of humanitarian catastrophe that R2P's third pillar may be given its full effect. Second, while UNSC reform has been viewed as a panacea to the ineffectiveness of the Council in humanitarian emergencies, UNSC expansion would in fact add mostly members whose prior practice and behavior have been unfavorable toward R2P. A reformed UNSC, even operating under RN2V with clear majority voting, is likely to oppose R2P and thus hinder its development, rather than contribute to its normative crystallization. Finally, potential UNSC reform is likely to give space to more political and regional power play than before. This too would further decrease the capacity of the UNSC to invoke R2P and potentially impede its development and crystallization as a legal norm.