
RECENT DRAFT RESOLUTION

INTERNATIONAL LAW — THE RESPONSIBILITY TO PROTECT — DRAFT SECURITY COUNCIL RESOLUTION REFERRING SYRIAN CONFLICT TO THE INTERNATIONAL CRIMINAL COURT VETOED BY RUSSIA AND CHINA (13 IN FAVOR, 2 AGAINST). — U.N. SCOR, 69th Sess., 7180th mtg. at 4, U.N. Doc. S/PV.7180 (May 22, 2014).

The Responsibility to Protect (R2P) is an emerging international norm that imposes a responsibility on states — and where they fail, on the international community — to protect individuals within their borders. Today, perhaps nowhere is protection more needed than in Syria. Since Bashar al-Assad's regime met initially peaceful Syrian protests with military force in March of 2011, a raging civil war between the Assad regime and a number of rebel groups has claimed more than 191,000 lives¹ and resulted in numerous horrific human rights violations.² Nonetheless, on May 22, 2014, at the 7180th meeting of the U.N. Security Council,³ a draft resolution referring the ever-worsening situation in Syria to the International Criminal Court (ICC) for investigation fell to a double veto by Russia and China.⁴ The failure of this resolution marks the fourth time that Russia and China have used their vetoes to block a Security Council resolution condemning the violence in Syria and pressuring the Assad regime to seek a peaceful settlement.⁵ This pattern highlights the tension between the purpose of R2P and the structure of the U.N. Security Council and strengthens the argument that R2P will prove unable to fulfill its larger purpose of elevating concern for individuals over national interests in deliberations on international crisis response.

The Syrian Civil War began as a series of protests inspired by demonstrations in North Africa and in other parts of the Middle East.

¹ Pillay Castigates "Paralysis" on Syria, as New UN Study Indicates over 191,000 People Killed, OFF. OF THE HIGH COMMISSIONER FOR HUM. RTS. (Aug. 22, 2014), <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=14959&LangID=E> [<http://perma.cc/JW2Q-F6YG>].

² See, e.g., U.N. Secretary-General, *Situation of Human Rights in the Syrian Arab Republic: Implementation of Human Rights Council Resolution 19/22*, ¶¶ 22, 23, 26, U.N. Doc. A/HRC/21/32 (Sept. 25, 2013).

³ The Council consists of ten members elected every two years and five members (China, France, Russia, the United Kingdom, and the United States — the P5) who hold permanent seats and the veto power. U.N. Charter arts. 23, 27. The Council determines threats to international peace and security and adopts recommendations or Chapter VII coercive measures (ICC referral, sanctions, and military intervention) to resolve them. *Id.* arts. 33–34, 36, 39–42.

⁴ U.N. SCOR, 69th Sess., 7180th mtg. at 4, U.N. Doc. S/PV.7180 (May 22, 2014).

⁵ See U.N. SCOR, 67th Sess., 6810th mtg. at 2, U.N. Doc. S/PV.6810 (July 19, 2012); U.N. SCOR, 67th Sess., 6711th mtg. at 2, U.N. Doc. S/PV.6711 (Feb. 4, 2012); U.N. SCOR, 66th Sess., 6627th mtg. at 2, U.N. Doc. S/PV.6627 (Oct. 4, 2011).

Although protests initially inspired some minor changes in governance,⁶ the violence escalated as security forces opened fire on protesters in March and April of 2011, deployed troops with tanks to select cities, imposed a communications blackout, and unleashed an artillery assault on the city of Homs.⁷ As a militarized opposition coalesced, both the Arab League's and the U.N.'s efforts to negotiate a peaceful outcome consistently failed.⁸ Since then, bombardments by government forces and armed opposition, extremist, and terrorist groups have killed hundreds of civilians,⁹ and all sides have targeted vital services, such as safe drinking water, electricity, and medical facilities.¹⁰ Neither women nor children have been spared from abuse,¹¹ and systematic torture by security forces is widespread.¹² The capacity of U.N. agencies to meet humanitarian needs is stretched thin — António Guterres, U.N. High Commissioner for Refugees, has called the conflict “the most dramatic humanitarian crisis that we have ever faced.”¹³

The Security Council sought to respond by condemning the violence and pressuring the Syrian Government to seek a political settlement.¹⁴ But since 2011 the Council has failed four times to invoke its authority to address the crisis.¹⁵ In October 2011, a resolution was ve-

⁶ For example, the government repealed the forty-eight-year state of emergency. *Syrian Civil War*, BRITANNICA, <http://www.britannica.com/EBchecked/topic/1781371/Syrian-Civil-War> (last visited Nov. 23, 2014) [<http://perma.cc/C2AB-X4HK>].

⁷ *See id.*

⁸ The Arab League sponsored a peace plan calling for the cessation of violence against protesters. The Syrian Government agreed and then violated it. *See id.* Even Kofi Annan, acting as Joint Special Envoy for the U.N. and the Arab League to negotiate a compromise, grew pessimistic about the prospect of negotiations and resigned, as did his replacement, Lakhdar Brahimi. *Id.*

⁹ *See* U.N. Secretary-General, *Implementation of Security Council Resolution 2139 (2014) and 2165 (2014): Rep. of the Secretary-General*, ¶ 4, U.N. Doc. S/2014/611 (Aug. 21, 2014).

¹⁰ *Id.* ¶ 7.

¹¹ *See id.* ¶¶ 14–16. Violations against children include “the killing and maiming of children, child recruitment and . . . arbitrary detention and abduction,” *id.* ¶ 14, and there are reports of insurgent groups stoning women for alleged adultery, *id.* ¶ 16.

¹² U.N. Human Rights Council, *Report of the Independent International Commission of Inquiry on the Syrian Arab Republic*, ¶¶ 62, 79, U.N. Doc. A/HRC/19/69 (Feb. 22, 2012).

¹³ Martin Chulov, *Half of Syrian Population ‘Will Need Aid by End of Year,’* THE GUARDIAN (Apr. 19, 2013, 8:43 PM), <http://www.theguardian.com/world/2013/apr/19/half-syrian-population-aid-year> [<http://perma.cc/J9GD-WYM3>].

¹⁴ First, the Council issued a Presidential Statement calling for humanitarian access and emphasizing the importance of a Syrian-led political settlement. *See* Saira Mohamed, *The U.N. Security Council and the Crisis in Syria*, AM. SOC’Y INT’L L., <http://www.asil.org/insights/volume/16/issue/11/un-security-council-and-crisis-syria> (last visited Nov. 23, 2014) [<http://perma.cc/A7VP-KE7N>]; *see also* U.N. SCOR, 66th Sess., 6598th mtg. at 2, U.N. Doc. S/PV.6598 (Aug. 3, 2011).

¹⁵ But note the Council’s unanimous passage of resolutions establishing a framework to eradicate chemical weapons in Syria, *see* S.C. Res. 2118, U.N. Doc. S/RES/2118 (Sept. 27, 2013), and requiring Syria to open access to humanitarian aid, *see* S.C. Res. 2165, U.N. Doc. S/RES/2165 (July 14, 2014).

toed by Russia and China¹⁶ even though the originally intended sanctions were reduced to a mere warning.¹⁷ In February 2012, thirteen of the Council's fifteen members supported a draft resolution expressly condemning violence on both sides.¹⁸ But Russia and China remained steadfastly defiant, decrying the resolution as unbalanced since it did not *equally* condemn violence by armed opposition groups and the Syrian government¹⁹ and suggesting that it was part of an approach likely to undermine the potential for political settlement and to lead to regime change.²⁰ In July 2012, Russia and China vetoed a *third* resolution, this one invoking the Council's coercive powers under Chapter VII of the Charter to support compliance with then-Special Envoy Kofi Annan's peace plan.²¹ Russia painted the resolution as an attempt by the West to impose its will on a sovereign state,²² while China found it "unbalanced," likely to "derail the matter from the political track,"²³ and perhaps inconsistent with sovereignty.²⁴

A fourth resolution, explicitly endorsed by sixty-five countries, came up for a vote on May 22, 2014. This resolution would have referred the situation in Syria to the ICC, required the Assad regime to cooperate in the ICC investigation, and demanded cooperation from the opposition.²⁵ Two statements preceded the vote: The first was by Deputy Secretary-General Jan Eliasson, who urged on behalf of the Secretary-General that the Council pass the resolution, reminding

¹⁶ U.N. SCOR, 66th Session, 6627th mtg., *supra* note 5, at 2–3. As for motive, Russia and China emphasized sovereignty and nonintervention. *Id.*

¹⁷ Mohamed, *supra* note 14; *see* France et al.: Draft Resolution, U.N. Doc. S/2011/612 (Oct. 4, 2011).

¹⁸ U.N. SCOR, 67th Session, 6711th mtg., *supra* note 5, at 1. The draft supported the Arab League peace plan. *See* Bahrain et al.: Draft Resolution, U.N. Doc. S/2012/77 (Feb. 4, 2012).

¹⁹ *See* U.N. SCOR, 67th Session, 6711th mtg., *supra* note 5, at 9 (statement of Russian Federation) (calling draft "biased" due to its failure to adequately condemn actions of opposition groups); *see also* Spencer Zifcak, *The Responsibility to Protect After Libya and Syria*, 13 MELB. J. INT'L L. 59, 83 (2012) (reviewing statements after failure of February 2012 draft).

²⁰ *See* U.N. SCOR, 67th Session, 6711th mtg., *supra* note 5, at 9 (statement of Russian Federation) ("[F]rom the very beginning of the . . . crisis some . . . members of the international community . . . have undermined any possibility of a political settlement, calling for regime change, [and] encouraging the opposition towards power . . .").

²¹ *See* France et al.: Draft Resolution, U.N. Doc. S/2012/538 (July 19, 2012); *see also* U.N. SCOR, 67th Sess., 6810th mtg., *supra* note 5, at 2 (statement of United Kingdom) (explaining the draft's purpose — "to use the . . . weight of the Council to . . . support . . . the Joint Special Envoy of the United Nations and the League of Arab States").

²² U.N. SCOR, 67th Sess., 6810th mtg., *supra* note 5, at 8 (statement of Russian Federation) ("[Western members'] calculations to use the Security Council . . . to further their plans of imposing their own designs on sovereign States will not prevail.").

²³ *Id.* at 13 (statement of China).

²⁴ *See id.*

²⁵ Albania et al.: Draft Resolution, U.N. Doc. S/2014/348 (May 22, 2014). It also exempted the nationals, officials, and personnel of any state not party to the Rome Statute, like the United States, from prosecution. *Id.*

members of their “responsibility . . . to end the bloodshed and to ensure justice for the victims of unspeakable crimes” and warning that a failure to agree would harm “the credibility of [the Council] and of the entire Organization.”²⁶ Second, the French representative, Ambassador Araud, also spoke, pointing out that the resolution affirmed Syria’s territorial integrity and noting that as there was no credible peace process underway in Syria at the time of the vote, the involvement of international justice could hardly undermine such a process.²⁷ France concluded that a veto of the draft resolution would qualify as a “veto against justice.”²⁸

The draft resolution was defeated 13 to 2, owing (again) to Russian and Chinese vetoes.²⁹ This result was denounced by the vast majority of Council members. The United States representative proclaimed that “history books may well depict photographs . . . of emaciated, acid-scarred corpses juxtaposed with a photo of the two members of the Council that prevented justice for the victims.”³⁰ The United Kingdom found it “disgraceful that [Russia and China] ha[d] yet again vetoed the Security Council’s efforts to take action in response to the appalling human rights violations being committed every day in Syria.”³¹ For its part, Russia defended its veto by claiming that the draft resolution “reveal[ed] an attempt to use the ICC to further inflame political passions and lay the ultimate groundwork for . . . outside military intervention.”³² China expressed its general discomfort with referring domestic issues to the ICC and suggested that referral was anathema to a political settlement.³³ Rwanda, Jordan, Luxembourg, Chile, and Australia each expressed support for a French measure to restrain the veto,³⁴ and Australia and Rwanda explicitly juxtaposed criticisms of the veto power with the international community’s obligations under R2P, thereby clearly highlighting the tension between the two.³⁵

²⁶ U.N. SCOR, 69th Sess., 7180th mtg., *supra* note 4, at 2 (statement of the Deputy Secretary-General).

²⁷ *Id.* at 3 (statement of France).

²⁸ *Id.* at 4.

²⁹ *Id.*

³⁰ *Id.* at 5 (statement of United States).

³¹ *Id.* at 7 (statement of United Kingdom).

³² *Id.* at 13 (statement of Russian Federation).

³³ *Id.* (statement of China).

³⁴ *Id.* at 6 (statement of Rwanda); *id.* at 7 (statement of Jordan); *id.* at 8 (statement of Luxembourg); *id.* (statement of Chile); *id.* (statement of Australia).

³⁵ *Id.* at 9 (statement of Australia) (stating that “[t]he Security Council has a responsibility to protect,” that “accountability is central to protection,” and that using the veto to block accountability for mass atrocities “underlines the importance of . . . restrain[ing] . . . use of the veto”); *id.* at 6 (statement of Rwanda) (urging the P5 “[a]s co-chair of the Group of Friends on the Responsibility to Protect” and in light of “[Rwanda’s] history of genocide” to consider a “code of conduct” to restrain the veto during mass atrocities).

R2P's central purpose is to overcome inconsistency in the international community's willingness to be responsible for and respond to unfolding humanitarian crises. It aims to reduce the influence of national considerations, relative to a broader commitment to protecting individuals' human rights, in deliberations over international response. But the veto power sometimes frustrates R2P's purpose by magnifying the effect of those considerations, turning the national interests of a tiny minority of nations into insuperable roadblocks to *international* response. This dynamic explains the 2014 veto, and its occurrence despite stunning evidence of the crisis's gravity and of pervasive criminality bolsters the argument that post-R2P the international community still faces what R2P was meant to end — national interest-driven inconsistency in crisis response.

R2P was born out of the perceived failures of the international community to respond to post-Cold War crises effectively and consistently.³⁶ Pre-R2P, the question was how to integrate a concern for the welfare of individuals *within* states into an international system premised on the idea of sovereignty and the corresponding duty of sovereigns not to intervene in one another's internal affairs.³⁷ In 2001, the International Commission on Intervention and State Sovereignty (ICISS) proposed R2P, an international norm that answered this question by recasting sovereignty as a *responsibility*.³⁸ The doctrine is not consistently defined,³⁹ but the basic agreed-upon principles are: (1) a state has the primary responsibility to protect the individuals within it;⁴⁰ (2) if the state is unable or unwilling to do so, the international community has a secondary responsibility to protect, acting primarily through the U.N.;⁴¹ and (3) the norm's foundational purpose — to bring to life “the notion that regardless of states' singular interest or lack of interest in intervention, individuals should never be allowed to suffer at the hands of their governments.”⁴² R2P received its first true test during the Libyan Crisis of 2011. There the Council cited R2P in

³⁶ See, e.g., Gareth Evans, *From Humanitarian Intervention to the Responsibility to Protect*, 24 WIS. INT'L L.J. 703, 706 (2006) (describing international crisis responses during the 1990s as “erratic, incomplete, or counterproductive”); see also Saira Mohamed, *Syria, the United Nations, and the Responsibility to Protect*, 106 AM. SOC'Y INT'L L. PROC. 223, 225 (2012).

³⁷ See INT'L COMM'N ON INTERVENTION & STATE SOVEREIGNTY, THE RESPONSIBILITY TO PROTECT, ¶¶ 2.7–2.13 (2001), <http://responsibilitytoprotect.org/ICISS%20Report.pdf> [<http://perma.cc/C8KR-5MXY>].

³⁸ *Id.* ¶¶ 2.14–15.

³⁹ See, e.g., Saira Mohamed, *Taking Stock of the Responsibility to Protect*, 48 STAN. J. INT'L L. 319, 327 (2012) (showing that the United Nations' adoption of the principle at the world summit appears to temper the “responsibility” to react coercively as needed to “preparedness” to do so in the case of four specific crimes).

⁴⁰ Evans, *supra* note 36, at 709.

⁴¹ *Id.*

⁴² Mohamed, *supra* note 39, at 321.

passing two resolutions: Resolution 1970, which imposed sanctions and referred the situation to the ICC, and later Resolution 1973, which authorized the use of force to protect civilians in the form of a western-backed no-fly zone that ended Colonel Gaddafi's rule.⁴³ After Libya, some scholars and commentators, though mindful of R2P's still precarious status, displayed a cautious optimism about R2P's influence in determining responses to crises.⁴⁴

But others have questioned R2P's ability to achieve its aims. For example, Professor Aidan Hehir argues that the ability of R2P to drive Security Council decisionmaking is questionable.⁴⁵ This is because R2P does not alter the structure of the Security Council itself; it does not place any new binding rule on the Council's decisionmaking and does not restrain the P5 veto power, which means that "Chapter 7 is, in effect, a matter for the P5 to interpret" and that "R2P is . . . ultimately dependent on whether the members of the P5 have a collective interest in — or are at least not opposed to — halting a particular looming or actual mass atrocity."⁴⁶ For Hehir, whether states' national interests are aligned, and not any broad commitment to human rights, ultimately determines whether states will intervene.⁴⁷ The details of the May 2014 vote support Hehir's thesis for two reasons.

First, the vote shows that the influence of R2P and its concern for individuals do not ensure an international response adequate to truly protect civilians. While the Council has passed resolutions dealing with aspects of the crisis, none of them invoke the Council's Chapter VII authority to push the Syrian Government to seek a political settlement.⁴⁸ They do not address the *source* of the ongoing humanitarian crisis, and insofar as Syrian civilians continue to suffer at the hands of their government and others, the international community's R2P obligations are not discharged. Furthermore, noncoercive measures are inapt in this situation: the Syrian Government has reneged on all peace agreements, and negotiation appears futile. In Syria, true protection demands coercion. If in situations like Syria — where the possibility of consensual settlement seems beyond remote, where consent-

⁴³ See Zifcak, *supra* note 19, at 63–69, 86.

⁴⁴ See, e.g., Alex J. Bellamy & Paul D. Williams, *The New Politics of Protection? Côte d'Ivoire, Libya and the Responsibility to Protect*, 87 INT'L AFF. 825 (2011).

⁴⁵ See Aidan Hehir, *The Permanence of Inconsistency: Libya, the Security Council, and the Responsibility to Protect*, 38 INT'L SECURITY, Summer 2013, at 137, 137–38.

⁴⁶ *Id.* at 152.

⁴⁷ See *id.* at 153–57.

⁴⁸ This goal was key to the 2014 resolution — the theory is that accountability incentivizes parties to halt their crimes and reconsider their positions. See, e.g., U.N. SCOR, 69th Sess., 7180th mtg., *supra* note 4, at 7–8 (statement of Luxembourg) (“[A]bsolute impunity is one of the reasons that the parties . . . continue to engage in a bloodbath To fight against impunity is to fight against precisely the elements that fuel war and violence.”).

based peace agreements are ignored, and where evidence of abuses is so clear — the international community *still* cannot respond to the violence with any Chapter VII coercive measure (for example, collective sanctions, ICC referral, or military action) or with the credible threat of one, then R2P's commitment to the protection of individuals is not so influential that those under attack can rely on an appropriately calibrated international response.

Second, it is likely that R2P's insufficiency to ensure a coercive response in Syria is due to the ability of national interests, when combined with the veto power, to override R2P in determining international crisis response. Russia's and China's actions are not completely explained by their asserted reasons. There are other Council members who, like Russia and China, seek to protect sovereignty and are wary of Council action under R2P after its association with regime change in Libya — which many felt went beyond the Council's authorization. But the record of the 2014 veto shows that unlike with Russia and China, these concerns have not led others to obstruct *nonviolent* coercive measures. So there is likely more behind the constancy of Russian and Chinese opposition than is stated. In fact, that opposition is widely suspected to be national interest-based.⁴⁹ Syria is the location of Russia's last military base outside of the former Soviet Union and is a key Russian arms purchaser.⁵⁰ In 2011 "Russia sent almost \$1 billion in arms to Syria's troops."⁵¹ CNN reports that China was Syria's third-largest importer in 2010, and speculates that China's emphasis on nonintervention may be driven by "its own . . . international controversies over its policies with Tibet as well as allegations of human rights violations."⁵² But the mere presence of national interests is not decisive — it is through the veto power that these interests rule. In a worst-case scenario, the veto power allows *one* state's national interests to frustrate the will of nearly the *entire* international community. In other words, it magnifies the influence of national interests in deliberations on responses to crisis. This is likely what the world saw when Russia and China vetoed the draft resolution in May 2014.

⁴⁹ This observation does not imply that all supporters of the 2014 resolution were motivated primarily by the commitments inherent in R2P and not their national interests. Russia and China are the obstacles *here*, but elsewhere, any P5 state's national interests could be the culprit.

⁵⁰ Anna Borshchevskaya, *Russia's Many Interests in Syria*, WASH. INST. FOR NEAR E. POL'Y (Jan. 24, 2013), <http://www.washingtoninstitute.org/policy-analysis/view/russias-many-interests-in-syria> [http://perma.cc/Y5LU-XGFF].

⁵¹ Thomas Grove, *Insight: Syria Pays for Russian Weapons to Boost Ties with Moscow*, REUTERS (Aug. 29, 2013, 12:45 PM), <http://www.reuters.com/article/2013/08/29/us-syria-crisis-russia-arms-insight-idUSBRE97SoWW20130829> [http://perma.cc/V8L6-LKAY].

⁵² Holly Yan, *Syria Allies: Why Russia, Iran and China Are Standing by the Regime*, CNN WORLD (Aug. 29, 2013, 9:01 PM), <http://www.cnn.com/2013/08/29/world/meast/syria-iran-china-russia-supporters> [http://perma.cc/R5R8-FYD4].

Unfortunately for advocates of R2P, this issue defies simple resolution. Two tactics present themselves. One is to expand R2P to permit the limited use of force by one state or a regional alliance to protect civilians in situations of mass atrocities.⁵³ But while this might help facilitate a protective response during Council deadlock, one might worry that allowing single nations or regional alliances to use force in the absence of explicit Security Council authorization could undermine the legitimacy and credibility of the Charter — the linchpin of international peace. Another tactic is to restrain the veto power. While this has been discussed for decades,⁵⁴ France recently offered a modern twist: a P5 agreement to *voluntarily* refrain from vetoing resolutions relating to mass atrocities. Under the proposal, if the Secretary-General decides that a situation qualifies as a mass atrocity, the agreement suspends the right of veto for any resolutions addressing it.⁵⁵ Although securing buy-in would be difficult, such an agreement might help reduce the influence of national interests in deliberations. However the proposal permits an exception when “vital national interests” are at stake,⁵⁶ as determined by the “restrained” states. Thus, the proposal seems to have the possibility of national interest–based paralysis built in, and contains no other procedures to ensure an international response should the agreement be circumvented. These deficiencies mean that, at best, the proposal could only be an *initial* step toward a framework to regulate the veto. Eliminating R2P’s inconsistency will likely require more.

R2P’s principal purpose is to create consistency in international crisis response by elevating the concept that individuals should not be subject to violence perpetrated by their own governments over the influence of national interests. The 2014 veto suggests that this purpose is unlikely to be achieved if the synergism between the veto power and national interests can magnify the influence of the latter. This leaves R2P in a precarious position, without a simple path forward. Certainly R2P’s role in Syria has been complicated by the rise of the Islamic State as an enemy of most involved. What is clear now is that the world should choose its next step carefully, in Syria and in general — for that step may decide the fates of hundreds of thousands of people.

⁵³ The idea is to allow states or regional bodies to carry out low-intensity military operations to protect civilians if credible opposition groups approve and if there is a record of Security Council attempts and failures to respond. See Paul R. Williams et al., *Preventing Mass Atrocity Crimes: The Responsibility to Protect and the Syria Crisis*, 45 CASE W. RES. J. INT’L L. 473, 490–502 (2012).

⁵⁴ See Ariel Blatter & Paul D. Williams, *The Responsibility Not to Veto*, 3 GLOBAL RESP. PROTECT 301, 306–09 (2011) (describing the rationale behind the veto power, the history of its usage, and the history of reform proposals).

⁵⁵ Laurent Fabius, Op-Ed., *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?_r=0.

⁵⁶ *Id.*