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Libya and Syria: Responsibility to Protect at a Crossroads

by Rafał Tarnogórski

The Arab Spring, especially the developments in Libya and Syria, revealed the persistent problem of a lack of appropriate and legally acceptable measures the international community could use to intervene in specific countries where people die because of violent acts by the authorities there. Although Responsibility to Protect (R2P) is seen as a new idea, it can be regarded as a manifestation of a trend that has already begun to affect the present but will have a major impact in the future. When the intervention in Libya started, it seemed that the importance of R2P would grow and exert increasing influence on international relations. The real significance of the UN response to the Libyan crisis was that for the first time the implementation and representation in practice of the R2P concept became real.¹ However, it is quite clear now that the current Syrian crisis can serve as a catalyst for discussion on the necessary conditions for a military intervention, thus either strengthening the underlying trend of R2P or blocking it for years.

For R2P to take effect consensus is needed, but there is no indication that an understanding has been reached among the key players as to what to do with Syria. The meeting of nine nations in Geneva in July 2012 aimed at finding a solution to end the bloodshed in Syria ended with Russia and China blocking the rest from calling for Syrian leader Bashar al-Assad's ouster. This was the coalition of the uncooperative, the disabled and the unwilling.² The first UN mediator, Kofi Annan, the former UN Secretary General, who convened the so called Action Group, formulated a plan that calls for the formation of a Syrian national unity government that would draft a new constitution and prepare for elections.³ But the plan appeared to lack support from either side in the conflict, and Annan resigned from his post and chastised the UNSC for not taking action while the bloodshed continued.⁴ The second UN mediator, Lakhdar Brahimi, a former Algerian foreign minister and a U.N. envoy in Afghanistan and Iraq, made numerous trips to Damascus but was unable to halt the violence.⁵

The recourse to R2P appeared at the beginning of the conflict in Syria, but it soon was clear that there would be no repeat of the Libyan scenario. Even worse, the bloodshed in Libya and Syria could be a death knell for the whole R2P concept.

¹ D.R. Rothwell, H. Nasu, "UN Security Council resolutions on Libya and the significance of 'R2P'", <http://www.eastasiaforum.org/2011/04/08/un-security-council-resolutions-on-libya-and-the-significance-of-r2p/>. However, the very first application of the R2P norm came in Guinea-Bissau in 2010. The SC directly stated (UNSCR 1949), that the government of Guinea-Bissau bears primary responsibility for "the protection of its civilian population".

² N. Cumming-Bruce, R. Nordland, Talks Come Up With Plan for Syria, but Not for Assad's Exit, 30 June 2012, http://www.nytimes.com/2012/07/01/world/middleeast/future-of-syria-on-agenda-as-countries-gather-in-geneva.html?pagewanted=1&_r=2&nl=todaysheadlines&emc=edit_th_20120701.

³ Action Group for Syria Final Communique from 30 June 2012, <http://www.un.org/News/dh/infocus/Syria/FinalCommuniqueActionGroupforSyria.pdf>.

⁴ R. Gladstone, Resigning as Envoy to Syria, Annan Casts Wide Blame, 2 August 2012, <http://www.nytimes.com/2012/08/03/world/middleeast/annan-resigns-as-syria-peace-envoy.html?pagewanted=all>.

⁵ Syrian president tells envoy that support of 'terrorists' must stop, 22 October 2012, <http://www.cnn.com/2012/10/21/world/meast/syria-brahimi-assad-meeting/index.html>.

What is R2P?

The R2P doctrine does not have the status of a norm of international law. However, it is close to it (the rule of law *in statu nascendi*) because it concerns matters that are defined by legal categories and are well-within in the existing norms. One should mention such important issues as the relationship between human rights and the principle of sovereignty, the principle of self-determination and territorial integrity, the need to respond to crises (the responsibility of individual countries and the international community) and the principle of non-interference in internal affairs.

The R2P concept is based on the recognition that sovereignty is not only the expressed and institutionally recognised right to exercise control over a territory without being subordinate to any foreign sovereign state but also a responsibility. Thus, although sovereignty is the most important fundamental right of a state (sovereign entity), it is not unlimited.⁶ Responsibility rests with each sovereign state, and if the state fails in its exercise of duty, the responsibility passes to the international community. Intervention should be seen as a last resort (Responsibility to React), it must be preceded by prevention (Responsibility to Prevent) and after intervention, an international assistance should be provided (Responsibility to Rebuild).

The idea of R2P originally was inspired by the Canadian government. It created the International Commission on Intervention and State Sovereignty (ICISS), consisting of members of the UN General Assembly and initiated by Lloyd Axworthy, then-Canadian Minister of Foreign Affairs. It was the ICISS Report issued in 2001 that set and named the concept of "Responsibility to Protect". The fundamental principles set out in the report were:

- State sovereignty implies responsibility, and the primary responsibility for the protection of its people lies with the state itself;
- Where a population is suffering serious harm, as a result of internal war, insurgency, repression or state failure, and the state in question is unwilling or unable to halt or avert it, the principle of non-intervention yields to the international responsibility to protect the population.

The ICISS also advocated that any form of military intervention initiated under the R2P premise must fulfil the following six criteria in order to be justified as an extraordinary measure of intervention:

1. Just Cause (expressed as a large-scale loss of life or large-scale ethnic cleansing);
2. Right Intention (the primary purpose being to halt or avert human suffering);
3. Last Resort (only when every non-military option for the prevention or peaceful resolution of the crisis has been explored);
4. Proportional Means (the minimum necessary means should be used to achieve the objective of human protection);
5. Reasonable Prospects (reasonable chance of halting or averting the suffering, with the consequences of inaction likely to be worse than those of action);
6. Proper Authority (the United Nations Security Council).⁷

Thanks in large part to Canadian efforts, the concept was adopted on 16 September 2005 by the Heads of State and Governments Summit Final Outcome (A/RES/60/1). It recognises that states are responsible for ensuring the protection of their citizens, and in the case that a state has failed that duty, the responsibility passes to the international community, which may take the appropriate action described in Chapter VII of the UN Charter.

The foundations of the present shape of R2P were put in Ban Ki-Moon's report of 12 January 2009 (A/63/677), "Implementing the Responsibility to Protect", which defined the scope of the future legal norm as:

- 1) the enduring responsibility of a state to protect its population, whether nationals or not, from genocide, war crimes, ethnic cleansing and crimes against humanity, or from their incitement;

⁶ *The Responsibility to Protect. Report of the International Commission on Intervention and State Sovereignty*, International Development Research Centre, Ottawa 2001, <http://www.iciss.ca/pdf/Commission-Report.pdf>.

⁷ *Ibidem*; see also M.H. Findlay, "Can R2P survive Libya and Syria", *The Strategic Studies Working Group Papers*, November 2011, <http://www.opencanada.org/wp-content/uploads/2011/11/SSWG-Paper-Martha-Hall-Findlay-November-2011.pdf>.

2) to meet the commitment of the international community to assist states in meeting these obligations, UN members are obligated to render necessary assistance;

3) the responsibility of the UN member states to respond collectively in a timely and decisive manner when a State is manifestly failing to provide protection. A reasoned, calibrated and timely response could involve any of the broad range of tools available to the United Nations.

These three points are referred to often as the “three pillars” of R2P. An important addendum was made in September 2011 when Brazilian President Dilma Roussef articulated that alongside the “Responsibility to Protect” doctrine, it is important to exercise “Responsibility while Protecting” (RwP). The idea of RwP seeks to address concerns regarding the implementation of military measures under the R2P framework, emphasising that prevention is the “best policy” and that the use of force in particular must be monitored and assessed.⁸ The concept was welcomed by UN members as providing an opportunity for constructive discussion on the implementation of the whole R2P norm; however, monitoring and limiting the use of force should not establish barriers to action in responding to the threat of mass atrocities.

On 5 September 2012, the UNSG presented his last report on the topic. The paper “The responsibility to protect: timely and decisive response” examines the range of tools available under the third pillar of R2P, partners available for implementation and the close connection between prevention and response.⁹

How to Use R2P?

In accordance with the previously stated principles, serious violations of human rights as crimes under international law should be treated as international security issues. In light of discussions on the content of the principle of sovereignty and its limitations and the argument that when a source of danger to the safety of a population is the state itself, the maintenance of international peace and security should not be treated as an obstacle to the international community’s desire to take effective remedial action. The international protection of human rights and the fact that some of these rights are norms *jus cogens* support the conclusion that the international community has a duty to maintain international peace and has an obligation to take effective measures against states that threaten security, even if only internally.

The most important is a recognition that the international community not only has a possibility, but a legal duty to act when it comes to crimes under international law and should not hide behind the shield of sovereignty. The same philosophy was behind the establishment of the International Criminal Court—an international permanent tribunal to prosecute individuals for genocide, crimes against humanity, war crimes and the crime of aggression (Article 5 of the Rome Statute). The preamble to the Rome Statute explicitly expressed that it is the duty of every “State Party” to the statute to investigate and prosecute those responsible for international crimes within the jurisdiction of the court.

In the context of R2P, the issue of humanitarian intervention is often discussed. It is a concept that permits military intervention on humanitarian grounds to defend a population suffering serious harm as a result of an internal war, insurgency, repression or state failure. Although this is similar to the concept of Responsibility to Protect, the two institutions should not be confused.¹⁰ With humanitarian intervention at the forefront, the use of force may be an element of pressure on a state, and such action could be taken without the authorization of the Security Council, though such unilateral military action cannot be considered to comply with international law.¹¹

In R2P, military intervention is considered a measure of last resort and only used when every non-military option for the prevention or peaceful resolution of the crisis has been explored. R2P does not prescribe a particular course of action. In particular, it does not aim at authorising military intervention. Rather, it commits states to take consecutive, measurable steps to mitigate the risk of

⁸ Letter dated 9 November 2011 from the Permanent Representative of Brazil to the United Nations addressed to the Secretary-General: “Responsibility while protecting: elements for the development and promotion of a concept”, A/66/551-S/2011/701, <http://www.un.int/brazil/speech/Concept-Paper-%20RwP.pdf>.

⁹ Document no. A/66/874-S/2012/578, 25 July 2012, http://www.un.org/ga/search/view_doc.asp?symbol=A/66/874.

¹⁰ G. Evans, *Responsibility to Protect. Ending Mass Atrocity Crimes Once and For All*, Brookings Institution Press, Washington 2008, p. 56–59.

¹¹ J.L. Holzgrefe, R.O. Keohane, *Humanitarian Intervention. Ethical, Legal, and Political Dilemmas*, Cambridge University Press, Cambridge 2003.

mass atrocities, based on existing legal obligations.¹² Thus, the discussion about the Brazilian proposition for the principle of RWP was welcomed as means to enhance R2P implementation concerning the application of use of force.

Two Ways to Responsibility ...

So, what happened in Libya that R2P is now questioned? Figuratively speaking, by using the wrong tool for the job, the tool was damaged. R2P is not suitable for overthrowing governments. It was never planned for such a use, and in its very essence is the need for consensus among members of the international community. R2P was directly cited in the preamble of UN Security Council Resolution 1970,¹³ the consequences of which extended to UNSC Resolution 1973.¹⁴ This was a major step to obtain the status of a norm under international law. And it seemed that the concept would be developed extensively, not limiting it only to the framework proposed by the report by the UN Secretary General, but with the intent to extend protection to other fundamental human rights.¹⁵ The action taken against the then-leader of Libya Muammar Qaddafi could be perceived in that sense, however, it was less about protecting the population and more about regime change. And it happened despite the fact that UNSC Resolution 1973 was passed with 10 in favour and none against, but with five abstentions, by Brazil, China, Germany, India, and the Russian Federation. The countries that did not vote clearly revealed their concerns about the measure. No UNSC permanent member used its veto, but the commentary surrounding the resolution's enactment suggests there is significant worry about the potential abuse of military force for just that kind of greater political purpose.

The reasons are certainly understandable. The UN's inability in the past to respond in an effective manner, e.g., to the situations in both Rwanda and Srebrenica, led some states to take military action through NATO. This raised serious questions about the concept of sovereignty of states. This concept of non-interference has been key to the evolution of international law and fundamental to the creation of the United Nations. International intervention would sometimes be needed for humanitarian reasons, but it was also clear that there is a need for a non-ideological process that would be internationally accepted. Currently, such confidence at the international multilateral level is only via a mandate from the UN. For Libya, this mandate was not used properly. It should be noted, however, that the International Commission of Inquiry on Libya found that NATO had "conducted a highly precise campaign with a demonstrable determination to avoid civilian casualties".

In referring to the R2P criteria, to be justified as an extraordinary measure of intervention in the case of Libya, "Proper Authority" had been preserved but "Proportional Means" was exceeded during the action and "Right Intention" was abused. This so called Libyan model or "the Libyan experience" makes some powers (especially Russia and China) very reluctant to condone any actions in Syria that may be taken under the aegis of R2P, even if the all main actors, including China, Russia, the U.S. and the EU have similar goals—to stop the bloodshed and restore stability.¹⁶

The violence committed against the Syrian people by their government has been as bad, if not worse, than what Qaddafi was doing before UNSCR 1973 was adopted. The same world powers that were so insistent that something must be done in Libya are not now going to support military action against Syria. The violence in Syria has met with universal condemnation, but no world power is willing to apply R2P. In the case of Syria, there is the lack of the "Proper Authority" criterion, which is needed to use the machinery of R2P. The current situation in Syria has reached the level of a non-international armed conflict, at least in certain areas, and the acts of violence against civilians should be treated as war crimes. The humanitarian situation is of great concern, and the continuing violence should lead to the conclusion that this is a real test of R2P. It is obvious that at this stage of the

¹² E. Strauss, "From idea to experience—Syria and the Responsibility to Protect", *Opinion*, 28 February 2012, <http://www.iss.europa.eu/fr/publications/detail-page/article/from-idea-to-experience-syria-and-the-responsibility-to-protect/>

¹³ "Recalling the Libyan authorities responsibility to protect its population";

¹⁴ "... authorized Member States, acting nationally or through regional organizations or arrangements, to take all necessary measures to protect civilians under threat of attack in the country (...) while excluding a foreign occupation force of any form on any part of Libyan territory".

¹⁵ W. Magnuson, "The Responsibility to Protect and the Decline of Sovereignty: Free Speech Protection Under International Law", *Vanderbilt Journal of Transnational Law*, no. 2 (43) 2010, p. 255–312.

¹⁶ J. Szczudlik-Tatar, "China's Position During the Crisis in Syria", *PISM Bulletin*, No. 76 (409), August 8, 2012.

conflict it is too late for prevention, and the moral and political responsibility of the Security Council to take collective action in a timely and decisive manner is an integral part of the doctrine of R2P.¹⁷

It is a truism to say that Syria is not Libya, but the difference is not only on geographical or political grounds. After the intervention in Libya, R2P has been mistakenly equated solely with military action, but within the scope of the concept of R2P is space for other activities. The best solution, of course, is a political process leading to a transition without further bloodshed and violence. But in the meantime, a jointly agreed way to protect the Syrian population is needed, through the creation of an exchange of information on the humanitarian situation and local humanitarian coordination committees or by taking measures against sectarian violence and the establishment of neutral humanitarian safe havens. This is also the basis of recent proposals made by China.¹⁸

... Which Leads Us Back to the UN

R2P can be introduced into international law only through the UN, first by constant practice by the UN General Assembly (through resolutions) and the Security Council, then probably by the so called Declaration of Principles, a document that has a detailed description of action directives or standards. There is only one threat to this concept but it is a serious one: the identification of R2P as a cover for *casus belli*. In such a case, R2P would share the fate of its predecessor—humanitarian intervention. The route to international recognition of R2P goes only through the United Nations as it requires a Security Council sanction, which means the need for unanimity of the SC Permanent Members. Using the experience of Libya, Syria and other similar cases, there is a need for a clarification of what kind of situations call for R2P and which do not. The rhetoric of “democracy” versus “dictators” seems not to be sufficient.¹⁹

Over the past year and a half at the UN, R2P had been the main issue, with Security Council and General Assembly resolutions addressing events in Libya, Yemen and Syria. A recent informal interactive dialogue (held on 5 September 2012) at the General Assembly focused on understanding the idea of a “timely and decisive response” in the case a state fails to protect its citizens. During the discussion, five components were identified to define the current state of affairs relating to R2P:

1. Each situation in which R2P can be used is distinct;
2. Such distinctions may lead to charges of double standards and selectivity;
3. None of the three pillars of R2P is likely to be effective by itself;
4. An effective and integrated response should involve elements of both prevention and response;
5. Effective prevention and response requires cooperation between the United Nations and its regional partners.

In general, the concept of R2P (and the related concept of human security) would have a huge positive impact on the interpretation of the UN Charter and could even serve as a catalyst for accelerating UN reform. But R2P must be handled carefully. The unfortunate case of Libya should not be used for tipping the balance against R2P. It is a tool that can be useful, and it seems there is an awareness of that fact among the international community and members of the UNSC. Therefore, in the case of Syria it would be better to refrain from using a now-damaged tool to facilitate action there in order for R2P to be used properly in the future.

Currently, the most important need is to stop the bloody civil war in Syria. This means a proposal should be put forward for a transition of power in a peaceful manner, ensuring the interests of the government and the opposition, respectively, and within a reasonable timeframe. Such a solution may make reference to the Polish “Round Table” talks of the 1980s and the peaceful transition there from totalitarian regime to democracy. The whole effort of international diplomacy should be turned to achieve this goal in Syria. Given the different interests of the permanent members

¹⁷ U.N. Legal Counsel Patricia O'Brien's keynote address to the American Society of International Law Midyear Meeting, University of Georgia School of Law in Athens, 20 October 2012.

¹⁸ China urges cease-fire, negotiations on political transition to end bloodshed in Syria, 1 November 2012, <http://www.foxnews.com/world/2012/11/01/china-urges-ceasefire-negotiations-on-political-transition-to-end-bloodshed-in>.

¹⁹ M.H. Findlay, “Can R2P survive Libya and Syria”, *The Strategic Studies Working Group Papers*, November 2011, p. 7.

of the Security Council and the inability to decide serious matters, the only way to end the conflict is a large compromise at the UN level that translates into a calming of the situation inside the country. Political compromise between the belligerents in Syria is probably not possible without international support. A continuing civil war makes the future of the country uncertain. But from the point of view of the application of R2P—the key is to stop the violence.