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CEBRI-Clingendael Conference in Brasilia on 29 May 2012, challenges in implementing the Responsibility to Protect: Undertaking coercive and non-coercive action

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Introduction

'Libya can be considered as the most straightforward case for 'R2P' action that's come along in years, maybe decades. '(...) The Libyan case was, at least at the outset, a textbook case of the R2P norm working exactly as it was supposed to, with nothing else in issue but stopping continuing and imminent mass atrocity crimes' according to Gareth Evans, one of the chief architects of this Responsibility principle.[2] However, later on there has also been a great deal of criticism on the implementation of this 'military intervention' in Libya, which has led to the Brazilian proposal for the 'Responsibility while Protecting'.

This article will first of all go into the history of the R2P doctrine, followedby its application in the Libyan conflict. Then some critical observations, whichhave been made on the application of the R2P norm in the Libyan conflict will bementioned. This will be followed by the Brazilian proposal for 'Responsibility while Protecting' and the discussion of this idea. At the end, some final remarks will be made.

The Responsibility to Protect (R2P)

In his address to the General Assembly in 1999 and 2000, the then UN Secretary General Kofi Annan challenged Member States to resolve the conflict between the principles of non-interference regarding state sovereignty and the responsibility facing the international community to respond to massive human rights violations and ethnic cleansing.

As a follow-up, the 2001 International Commission on Intervention and State Sovereignty, sponsored by the Canadian Government, called on the international community to recognise its 'international responsibility to protect'. This important new concept reflected the idea that: 'Sovereign states have a responsibility to protect their own citizens from avoidable catastrophe - from mass murder and rape, from starvation - but that when they are unwilling or unable to do so that responsibility must be borne by the broader community of states'.[3] The principle of non-intervention accordingly yields to an 'international responsibility to protect'.[4] Sovereignty brings with it not just rights but also responsibilities.

UN Summit

These conclusions were echoed in the December 2004 report by the UN Secretary-General's High Level Panel and the Secretary-General's In Larger Freedom Report of 2005.[5] Most importantly, the responsibility of a state to protect its own people and, if it fails to do so, for the international community to act was subsequently endorsed by Heads of State and Government at the UN Summit, convened by Kofi Annan, on 14-16 September 2005.[6]

The outcome document includes paragraphs 138 and 139 on R2P:

2 Former Foreign Minister Gareth Evans: 'Responsibility to Protect', YALEGLOBAL ONUNE, 15 April 2011 (http:yaleglobal.yale.edu/print/7095).

3 The Responsibility to Protec/, International Commission on Intervention and State Sovereignty, Ottawa, International Development Research Centre, December 2001, p. VIII.

4 Ibid, p. XI.

5 The Secretary-General's High-level Panel Report on Threats, Challenges and Change, A more secure world: our shared responsibility, New York, United Nations, December 2004; and In larger freedom: towards development, security and human rights for all, Report of the Secretary-General, New York, United Nations, 21 March 2005.

6 UN General Assembly 2005, World Summit Outcome, 15 September 2005, paras. 138-139.

'138. Each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity. This responsibility entails the prevention of such crimes, including their incitement, through appropriate and necessary means. We accept that responsibility and will act in accordance with it. The international community should, as appropriate, encourage and help States to exercise this responsibility and support the United Nations in establishing an early warning capability.

139. The international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the Charter, to help protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. In this context, we are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities manifestly fail to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity. We stress the need for the General Assembly to continue consideration of the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity and its implications, bearing in mind the principles of the Charter and international law. We also intend to commit ourselves, as necessary and appropriate, to helping States build capacity to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity and to assisting thosewhich are under stress before crises and conflicts break out.'

Caveats

So now it looked as if the debate about humanitarian intervention had finally been won by the interventionists. Humanitarian intervention had at last been sanctioned by the international community. Or had it?

The language of the Summit declaration, on closer inspection, is more limited by caveats than that of the preceding high level reports. The occasions for action are no longer 'large-scale killings, actual or apprehended' or 'large-scale ethnic cleansing' but the more circumscribed 'genocide, war crimes, ethnic cleansing and crimes against humanity'. Moreover, responsibility devolves to the international community to act not when states are 'unable or unwilling' to protect their populations from such atrocities, but when they 'manifestly fail' to do so. Also the 'precautionary principles', based on the just war criteria right authority, just cause, right intention, last resort, proportional means and reasonable prospects, that were included in both the preceding high level international reports designed to guide when and how interventions may take place, are not mentioned in the Summit declaration.[7] The inclusion of the criteria was opposed by, on the one hand, the US fearing that it would constrain its freedom of action and, on the other, by Russia and China which were fearful it might encourage action which bypasses the Security Council.[8]

More importantly, whatever nice words remained in the Summit declaration, the international community subsequently showed little appetite for humanitarian intervention.

7 Note III, pp. 32-37 and note V, pp. 57-8.

8 The US and Russian/Chinese motives in opposing the inclusion of criteria in the Summit declaration are noted in Alex J. Bellamy, 'The Responsibility to Protect and the Problem of Military Intervention', International Affairs, vol. 84, no.4, 2008, p. 625.

Uprising in Libya[9]

But then, in the early months of 2011, came the Arab Spring. However, in Libya it seemed that the determination of one dictator to use force to hold onto power would succeed in suppressing the popular uprising. After some initial protests in mid-January, demonstrations quickly turned violent. Initially the rebels enjoyed rapid successes.[10] However, by mid-March 2011 Gaddafi's forces had regained control of most of the areas occupied by the rebels and were about to attack the main rebel stronghold of Benghazi. Gaddafi threatened to clear this city of a million people 'house by house.'

Resolution 1970

After earlier consultations, the Security Council had already unanimously passed Resolution 1970 on 26 February. Among other issues, it condemned 'the widespread and systematic attacks' against civilians, which it noted 'may amount to crimes against humanity'. It also underlined the Libyan government's responsibility to protect its people. Acting under Chapter VII of the UN Charter, the Council demanded an immediate end to the violence and urged Gaddafi's government to ensure safe passage for humanitarian and medical supplies. It also referred the situation in Libya since 15 February to the Prosecutor of the International Criminal Court, and it established an arms embargo on the country.

Resolution 1970 proved relatively uncontroversial, although several Council members indicated in the informal consultations that they were not prepared to endorse more coercive measures. In response, on 2 March, Gaddafi's regime wrote to the UN Security Council, declaring that its condemnation of Libya was premature and requesting that Resolution 1970 be suspended until theallegations against Libya were confirmed.

Resolution 1973

Contrary to the expectation of many experts, the international community decided to act with coercive measures. On 17 March 2011, following an earlier plea for help from the Arab League, the UN Security Council passed resolution 1973, calling for a no-fly zone as well as a ceasefire. The comprehensive resolution also included provisions for a more robust arms embargo and called for travel bans and asset freezes against additional Libyan individuals, companies and other entities.

Resolution 1973 authorized UN members 'to take all the necessary measures to protect civilians and civilian-populated areas under threat of attack in the Libyan Arab Jamahiriya, including Benghazi, while excluding a foreign occupation force of any form on any part of Libyan territory.'[11] US, UK and French air forces shortly thereafter commenced operations to implement the UNSecurity Council resolution, with other countries subsequently joining the operation, including, importantly, the Arab state, Qatar. NATO subsequently took over military command.

Criticism

During the NATO-led implementation of the Council's Libya mandate 'to protect civilians and civilian-

9 See Alex J. Bellamy and Paul D. Williams, 'The new politics of protection? Cote d'Ivoir, Libya and the responsibility to protect', International Affairs, vol. 87, no. 4, 2011, pp. 838- 847.

10 Defiant Gadaffi issues chilling call, ABC (Australia), 23 February 2011.

11 www.un.org/News/Press/docs/20l l/scl0200.doc.htm. For an assessment of the morality of the Libyan intervention against the just war criteria see David Fisher, 'A debate on the Iraq war and reflections on Libya', International Affairs, Vol. 87, no. 3, May 2011, pp. 701-4.

populated areas under threat of attack' there was a great deal of criticism by the 'BRICS' countries (Brazil, Russia, India, China, and South Africa). They did not complain about the initial military response - destroying the Libyan air force's infrastructure, and air attacks against ground forces advancing on Benghazi. Rather they objected to what came afterwards, when it rapidly became apparent that mission creep had become a part of the operation. The US, UK, and French leaders - Obama, Cameron and Sarkozy - put in writing in The New York Times on 14 April that they could not envisage a future Libya in which Gaddafi (or members of his family) played a role, which was considered by critical observers to amount to a regime change.[12] However, this prospective slide towards a forced regime change was not contemplated by UNSCR 1973, and it was not supported by the BRICs, the African Union and countries other than the United States, the EU member states, and a handful of their partners, such as Qatar and the United Arab Emirates. Mission creep has become a well-known phenomenon in peace-enforcing operations nowadays. It is the shifting of the mission's objectives due to practical difficulties and ambiguities on the ground.

Concerns were also raised that the interveners had rejected ceasefire offers that may have been serious, had carried out airstrikes against fleeing personnel who posed no immediate risk to civilians, and had attacked locations that had noobvious military significance, like the compound in which Gaddafi's relatives were killed. More generally, the Western powers, along with Arab states like Qatar, comprehensively supported the rebel side in what rapidly became a civil

war. They also ignored an explicit arms embargo in the process. Britain, France,and Italy (with US support) put special forces advisers on the ground, provided equipment, established tactical communications and intelligence cooperation with the rebel forces, and coordinated NATO air attacks with rebel advances.

The United States, the United Kingdom and France took the position that protecting civilians in areas like Tripoli, that were under Gaddafi's direct control, required overturning his regime. As a consequence NATO did not participate in the search for a negotiated solution and supported, at least indirectly, the uncompromising position of the Transitional Council.[13] The Western permanent members of the Security Council argued that if one side was supported in a civil war, it was because a regime's one-sided killing sometimes leads civilians to take up arms to fight back and to recruit army defectors. Moreover, military operations cannot be micromanaged with a '1,000-mile screwdriver', as Gareth Evans states. He thinks that 'a more limited 'monitor and swoop' concept of operations would probably have led to a longer and messier conflict in Libya, which would have been politically impossible to sustain in the us and Europe, and would likely have produced many more civilian casualties'.[14]

Although all these arguments may have some validity, the United States, the United Kingdom, and France resisted debating them in the Security Council. Other Council members were never given sufficient information to enable them to be evaluated. The Western permanent powers' dismissiveness during the Libyan campaign did provoke the other Council members. A healing process is needed before any

12 Barack Obama, David Cameron, Nicolas Sarkozy, 'Libya's Pathway to Peace', The New York Times, 14 April 2011.

13 Matthias Dembinski and Theresa Reinold, Libya and the Future of the Responsibility to Protect - African and European Perspectives, Peace Institute Frankfurt (PRIF), Frankfurt am Main, 2011, p. 25.

14 Note XI.

consensus can be expected on tough responses to such situations in the future.

Nevertheless, under those bleak circumstances, it was Brazil which took the initiative to propose new mechanisms for the implementation of R2P.

The Responsibility while Protecting

During her first address to the UN General Assembly on 21 September 2011, Brazil's President Dilma Rousseff acknowledged the concept of the 'responsibility to protect', but she conditioned her support by suggesting a complementary norm which involves establishing basic criteria to assure that interventions by force always do the slightest damage possible.[15] She emphasized that prevention is the 'best policy' and that the use of force in particular must be monitored and assessed.

Brazil's Permanent Representative to the United Nations, Maria Luiza Ribeiro Viottii, presented a paper on 9 November 2011 with a new set of principles and procedures on the theme of 'responsibility while protecting'.[16] Its two proposals are, firstly, a set of criteria (including last resort, proportionality, and a balance of consequences) to be taken into account before the Security Council mandates any use of military force. It is important that they should be adopted, at least informally, as guidelines for decision-making. Secondly, Brazilproposes a monitoring-and-review mechanism to ensure that such mandates' implementation is seriously debated. This oversight mechanism would allow the Security Council in its entirety to oversee the implementation of protective mandates.

The Brazilian paper initiated a broad discussion in academic circles and the Permanent Mission of Brazil organized an informal discussion in New York on 21 February this year. Twenty-two Member States, the European Union, the Special Adviser on the Prevention of Genocide and three civil society organisations made statements at this meeting.[17]

The discussion does not call into question the idea of protecting civilians,but rather voices legitimate concerns on the application of the use of force; concerns 'of an operative, rather than conceptual nature'. The discussion on RwP was mainly welcomed as a forum to enhance the norm's implementation.

Discussion

Now, some of the issues will be highlighted which have been raised in theongoing discussion on the Responsibility while Protecting.

The Brazilian concept note states that 'As a measure of last resort by the international community in the exercise of its responsibility to protect, the use of force must then be preceded by comprehensive and judicious analysis of the possible consequences of military action on a case-by-case basis'. One of the biggest challenges is how to strike a balance between analyzing and discussing various policy options and 'timely and decisive action'. While some have feared that the criteria of last resort, proportionality and balance of consequences might be used to institutionalize inaction, that should not be the case if they are properly

15 Oliver Stuenkel, Why the BRICS should embrace the 'Responsibility while Protecting', Like 22 Retweet 16, 1 March 2012.

16 letter dated 9 November 20/ I from the Permanent Representative of Brazil to the UnitedNations addressed to the Secretary-General, New York, 11 November 2011.

17 United Nations Informal Discussion on 'Responsibility While Protecting', 21 February 2012.

understood. In particular the criterion 'last resort' should not mean waiting interminably while lesser options are tried and fail. It means making a reasonable judgment based on all available evidence that no lesser measures could succeed in halting or averting the threat of mass atrocities. As the UN's Secretary-General mentions in his report on the implementation of R2P: 'In a rapidly unfolding emergency situation, the United Nations, regional, sub regional and national decision makers must remain focused on saving lives through 'timely and decisive' action (para. 139 of the Summit Outcome), not on following arbitrary, sequential or graduated policy ladders that prize procedure over substance and process over results'.[18]

One should also keep in mind the German General Von Moltke, saying: 'no military plan survives first contact with the enemy'.[19] Even the most comprehensive analysis will not change this. But when thousands of lives are at stake, what is needed is 'timely and decisive action (...) not philosophical debate', Edward Luck says.[20]

This should not prevent a discussion of the various consequences of forceful action, as it is crucial that any such reaction is be practically workable, recognizing legitimate military needs and realities, and the limits of micro management. It has been suggested to involve the Department of Peacekeeping Operations with support from military experts in an advisory role in the decisionmaking by the Security Council on protection operations. Those military expertsshould in my opinion especially advise on operational principles as clear objectives, a common military approach, the acceptance of limitations, rules of engagement, and maximum coordination with humanitarian organizations. It would also be useful to articulate more clearly how R2P will impact military doctrine and strategic concepts.

But still, we have to realize as Von Clausewitz noted: 'Everything in war is very simple, but the simplest thing is difficult'.[21] 'In war more than anywhere else things do not turn out as we expect. Nearby they do not appear as they did from a distance'.[22] Moreover, '...every fault and exaggeration of a theory is instantly exposed in war.'

Other raised concerns in the informal discussion in New York concern the distinction made in the concept note on 'collective responsibility', which can be fully exercised through non-coercive measures, and 'collective security', involving a case-by-case assessment by the Security Council as to whether to characterize a situation as a threat to international peace and security. The Mission of the Netherlands reiterated that 'this distinction is not made in the Outcome Document, which in paragraph 139 expressly refers to Chapter VII when timely and decisive action in the exercise of R2P needs to be taken.[23] In prepared remarks, the International Coalition for the Responsibility to Protect declared that 'genocide, war crimes, crimes against humanity and ethnic cleansing are by definition and under international law threats to international peace and security, thus requiring Member States and the UN to take preventive and reactive measures when faced

18 Implementing the responsibility to protect, Report of the Secretary-General, General Assembly, 12 January 2009, pp. 22-23.

19 See, Hajo Holbom, 'Moltke and Schlieffen: The Prussian-German School', in: Edward Mead Earle (ed.), Makers of Modern Strategy - Military Thought from Machiavelli to Hitler, Princeton University Press, Princeton, New Jersey, 1961, pp. 174-187.

20 Opening Statement of Edward C. Luck, on the Responsibility to Protect Informal Discussion on the 'Responsibility While Protecting' Initiative Organized by the PermanentMission of Brazil, New York, 21 February 2012.

21 Carl von Clausewitz, On War, Princeton University Press, Princeton, New Jersey, 1976, p. 119.

22 Ibid, p. 193.

23 Statement by Herman Schaper, Permanent Representative, Permanent Mission of the Kingdom of the Netherlands to the United Nations in New York, Informal debate on Brazilian concept note on 'Responsibility while Protecting', 21 February 2012.

with the threat of these crimes'.[24]

A US intervention in this discussion considered it a grave error to equate 'manifest failure' with a strict chronological sequence.[25] Appropriate decision making in this area requires not just 'temporal' considerations but a comprehensive assessment of risks and costs and the balance of consequences, as the paper calls for elsewhere. It also regretted any implication that in those circumstances where collective action is necessary, diplomacy should be considered 'exhausted'. 'We should not eliminate the possible role of diplomacy, even - perhaps especially - in situations where forceful action is required'.

Concluding remarks

While the discussion on the Responsibility while Protecting will continue, it should be emphasized that, for the first time, the international community recognized in 2005 both the rights of citizens and a specific relationship between the government and its citizens, namely a relationship of protection. R2P is here to stay. There is, in principle, universal support for the basic elements of R2P: the four crimes (genocide, war crimes, ethnic cleansing and crimes against humanity), and the three pillars (the protection responsibilities of the State; international assistance and capacity-building; and a timely and decisive response).

The nature of sovereignty itself is thus changed: legitimate governments are defined not only by their control of a territory and a population but also by how they exercise that control. If they fail in that obligation, the international community has the responsibility to protect those citizens.

The most urgent reason for the doctrine of non-intervention was that it protected weaker states from stronger states, on the assumption that the worst thing that could happen to a state and its population was invasion or some other use of force by another state. That made sense in the 19th century and much of the 20th century. But the words of Thucydides have not made sense for many centuries, when he wrote that 'The strong do as they wish, while the weak suffer as they must'? However, in the 21st century populations are often at equal or greater risk from their own governments as they are from other states. In a world of governments and societies, the responsibility to protect is the foundation of a new way to think about them both and the relationship between them.

24 Note XVI.

25 Remarks by the United States at an Informal Discussion on 'Responsibility while Protecting', http://usun.state.gov/brieting/statements/184487.htm.

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