

## IMPLEMENTING R2P IN LIBYA – HOW TO OVERCOME THE INACTION OF THE UN SECURITY COUNCIL

Kevin Frayer/AP/SIPA



Smoke rises following air strikes outside the town of Bin Jawad, eastern Libya, 6 March 2011.

The UN Security Council Resolution 1970 on the situation in Libya does not provide a satisfactory answer to the question of how the international community should intervene to prevent the massacre of civilians that is allegedly currently taking place in that country. This means that an alternative approach must be considered. If the body whose primary responsibility it is to preserve international peace and security does not provide a timely – i.e. immediate – response to a ‘gross and systematic violation of human rights’ characterised by attacks on the civilian population which ‘may amount to crimes against humanity’, as the Resolution acknowledges, other actors in the international community are entitled to take the lead under international law and implement the Principle of the Responsibility to Protect (R2P), provided certain legal conditions are met.

The Resolution contains a fundamental contradiction. On the one hand, it explicitly mentions the fact that the Council acts under Art. 41 of the UN Charter, which refers to ‘measures not involving the use of armed force’ for giving effect to decisions of the Council in cases of breach of the peace or a threat to international peace and security; on the other hand, the Council ‘calls upon all Member States, working together and acting in cooperation with the Secretary General, to facilitate and support the return of humanitarian agencies and make available humanitarian and related assistance in the Libyan Arab *Jamahiriyah*’ (par. 26). This was considered a sufficient justification for enforcing a no-fly zone in the North and subsequently the South of Iraq, in order to protect Kurdish and Shi’ite populations from persecution by their own government, back in 1991. At the time there was certainly no further reaction of the Security Council upon the UK, France and the US establishing a no-fly zone and enforcing it with military means, acting upon a paragraph of Resolution 688 (1991) which is practically identical to the last paragraph of Resolution 1970 quoted above. But the implicit veto of Russia and China against the use of force in Libya to enforce the decision has led in this case to the Security Council referring to Art. 41

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instead of making a general reference to Chapter VII of the UN Charter.<sup>1</sup>

The international community, and in particular states willing to protect the victims of the massacres, is thus confronted with what must qualify as the most unrealistic and absurd decision that the Council has yet made. In the present circumstances, there is absolutely no chance of enabling the Secretary General to make humanitarian assistance available throughout Libya, as requested by the Council, without using military force, which has formally been ruled out by the Council. Ironically, the Resolution also requests Member States willing to help the UNSG in providing victims with humanitarian assistance to keep the Council regularly informed on the 'progress of actions undertaken'. Since the use of force in order to create a no-fly zone and protect humanitarian agencies is excluded, UN Member States can perhaps make a direct appeal to Gaddafi, whom the same Council Resolution stops short of considering as a perpetrator of crimes against humanity, asking him to provide humanitarian assistance to the people he is slaughtering.

## The shortcomings of the definition of R2P in the 2005 Outcome Document

It is obvious that the sovereign territorial state bears primary responsibility for protecting its own population, particularly from mass violations of human rights. But it is equally obvious that in cases where such a state initiates a massacre against its own people, the international community needs a mechanism by which R2P is shifted from the state to the international community as represented by a coalition of states or by a peace-enforcing operation. It is thus all very well for the Security Council to remind Gaddafi that he bears international responsibility regarding crimes against humanity, in the hope that relevant norms and principles will lead to an international trial and his subsequent punishment. But since R2P concerns not the future criminal responsibility of individuals but the actual protection of victims, the UNSC's reminder to Libya that it bears a responsibility to protect the victims of its own armed action is simply absurd. It is indeed possible that it amounts to a strategy of the Council not to

discharge its own responsibilities under international law.

The Report inspiring R2P was submitted to the UN General Assembly shortly after 11 September 2001 by the International Commission on Intervention and State Sovereignty, an international expert group who undertook an exhaustive examination of international law under the auspices of the Canadian government. According to this Commission, although they should always be an exceptional measure, armed interventions to protect populations suffering mass violations of human rights are legitimate, even in cases where the Security Council fails to provide the adequate authorisation, when there is 'serious and irreparable harm occurring to human beings, or imminently likely to occur, of the following kind: (a) large-scale loss of life, *with genocidal intent or not*, which is the product either of deliberate state action, or state neglect or inability to act, or a failed state situation; or (b) large-scale ethnic cleansing'.<sup>2</sup>

The fact that R2P was endorsed by all UN member states on the occasion of the 2005 World Summit was widely celebrated as a success, although it clearly represented an attempt to empty the concept of any content by subsuming it under Chapter VII of the UN Charter while leaving untouched the discretionary powers of the Security Council, as the case of Libya illustrates. Certainly, the World Summit Outcome Document endorsed by world leaders apparently embraced R2P as regards cases of genocide, war crimes, ethnic cleansing and crimes against humanity. All states thus codified within a multilateral framework their willingness to take measures which would be non-coercive in the first instance but when necessary coercive, specifically mentioning Chapter VII, in cases where national authorities show signs of their inability or unwillingness to protect the population on their territory.<sup>3</sup>

Leaving aside all accompanying references to prevention, cooperation and solidarity, as well as to the comprehensive action of the UN system, including all its agencies, and regional organisations and NGOs that were incorporated in the subsequent Report of the Secretary General of January 2009 as regards

1. Although some commentators considered at the time that the authorisation to use force in Iraq, as formulated in the previous Resolution 678 demanding that Iraq withdraw its troops from Kuwait, constituted a valid justification for the use of force in order to implement Resolution 688, this interpretation is clearly *ultra vires*: the use of force can only be authorised under the Charter in order to give effect to a specific decision of the Council, not as a general measure against one state.

2. 'The Responsibility to Protect: Principles for Military Intervention', in *The Responsibility to Protect. Report of the International Commission on Intervention and State Sovereignty*, available at: <http://www.dfaic-maeci.gc.ca/iciss-ciise/report2-en.asp#synopsis>.

3. Paragraphs 138 and 139. In this context, the States show their support for the mandate of the Special Advisor of the Secretary-General on the Prevention of Genocide (par. 140).

non-coercive measures,<sup>4</sup> the fact is that according to the Outcome Document only the Security Council can, on a case-by-case basis, exercise R2P when a massacre is ongoing and only military action can put an end to it. Thus the formulation of the principle emerging from the World Summit serves precisely the opposite purpose of the formulation in the Report of the International Commission on Intervention and State Sovereignty that had identified it as a fundamental principle of international law.

As Lampedusa's Prince of Salina so memorably put it, 'everything must change if we want everything to remain the same'. But an alternative line of reasoning applies, indeed must always apply, under international law, especially when a fundamental principle is at risk of being pre-empted. Considering that the 2005 Outcome Document leads to the conclusion that the Security Council bears responsibility on a case-by-case basis for protecting populations from the very moment the territorial state shows its unwillingness or inability to do so – in particular by initiating a massacre amounting to a crime against humanity – two questions emerge that need to be addressed:

1. Can the Council not only decide not to discharge its own responsibility but even prevent other members of the international community from discharging theirs by merely citing Art. 41 of the Charter? In other words, can the UN system, including by consensus of member states under the UN framework, limit the exercise of rights and faculties that are conferred to sovereign states under international law beyond the UN Charter?
2. What are the options under the present international order in cases where the Council is either unwilling to act efficiently or lacks the necessary capacity to take on the responsibility for protecting victims of a massacre? Is there a codified practice that would allow for action in spite of it not being authorised by the SC?

## Consequences of inaction of the Security Council in R2P cases

Given that the Council can authorise the use of force in order to give effect to its decisions to prevent or put an end to massacres, and that the territorial sovereign state can always use force in order to prevent or put an end to massacres, R2P is necessarily redundant and nonsensical when predicated on either the Council or

of the territorial state. The principle becomes meaningful only when neither the territorial state nor the UNSC have discharged their respective and successively applicable responsibilities. If R2P represents an attempt to avoid the territorial state using the shield of sovereignty in order to legally massacre its citizens, it is equally unacceptable that the UNSC uses the shield of its discretionary powers in order to prevent international action being deployed to protect the victims. Endorsing a legal principle in order to prevent its application is indeed contrary to international law, which is ultimately interpreted by sovereign states, in particular when the UNSC fails to apply principles that have been endorsed by them.

In this particular field of resorting to intervention to protect the victims of massacres, the fatal problem is that international law has been disregarded and manipulated for too long as a consequence of Washington's embrace of unilateralism in the aftermath of the al-Qaeda attacks of 11 September 2001. As the then UNSG Kofi Annan put it in early 2004, the terrorist attacks in the United States and the war in Iraq succeeded in breaking the consensus on what constitutes a threat to peace.<sup>5</sup> Even in the case of Afghanistan, where formal legal basis for the intervention was admittedly provided by the Security Council (*ius ad bellum*), flagrant and still ongoing violations of international humanitarian law (*ius in bello*), subsequently extended to Pakistan, render this consensus on threats to peace and how to respond to them elusive and even futile. A consensus on the scope and extent of the legal order can only be based on full compliance with basic legal principles.

If R2P represents such a basic consensus, then member states and the Security Council must be held accountable either for breaching the principle or for not implementing it. The alternative would be that neither member states nor the Security Council can be held accountable under international law, or that the Security Council is in fact the sole interpreter of international law. As stated by Jean Combacau in 1974, a threat to peace according to the meaning of Article 39 of the Charter is defined in terms of a situation concerning which the competent organ determines that it does in fact constitute a threat to peace.<sup>6</sup> But, if that is the case, it is absolutely unrealistic to expect states to respect decisions of the Security Council. The crucial question may therefore not be that the

4. See full text of the Report in <http://globalr2p.org/pdf/SGR2PEng.pdf>.

5. 'Words of welcome by the UN Secretary-General during the meeting with NATO parliamentarians', New York, 8 March 2004 (see complete text at [www.un.org/apps/sgstats.asp?nid=808](http://www.un.org/apps/sgstats.asp?nid=808)). His concern led to the forming of the High-level Panel on Threats, Challenges and Change, whose mandate consisted of re-establishing that consensus in order to overcome divisions in the world and to propose lines of action to reform the UN on the occasion of its 60<sup>th</sup> anniversary.

6. Jean Combacau, *Le pouvoir de sanction de l'ONU. Etude théorique de la coercition non-militaire* (Paris: Pedone, 1974), p. 100.

organ is not sufficiently representative, as frequently stated these days – particularly by those states who want to become permanent members of the Security Council – but that its discretionary powers may trump compliance with basic principles of international law. In other words, expanding UNSC membership will not help forge a new international consensus on threats to peace unless the organ becomes more accountable – and not less active – as regards discharging its responsibilities.

But the Council is bound to act in strictly legal terms. According to Article 39 of the UN Charter, it ‘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 [author’s emphasis] maintain or restore international peace and security’. The key here lies in the fact that the identification by the Council of the existence of a threat to peace, as in the case of Libya, obliges it to act – either by recommending or deciding what to do – so that peace is maintained or restored, for which it needs to either provide or else authorise others to provide the necessary means of action. What the Council cannot do under the Charter is to identify a threat without providing or asking others to provide an answer commensurate to the threat. Responsibilities are not dispensable but must be discharged.

The consensus expressed in the Charter and in the Outcome Document that the Council bears responsibility to act when the territorial state initiates a massacre no longer stands in the event that the Council fails to discharge such responsibility by providing an adequate and effective answer. Third states willing to protect victims of massacres perpetrated by their own governments whose plight was not acted upon by the Council are thus entitled to do so, including by using force in as much as they fully respect all relevant international principles. Third states do not bear a particular responsibility or obligation under international law, but their right to act cannot be pre-empted by those who have failed to discharge their responsibilities.

## Framework for implementing R2P without authorisation of the UNSC

There is a common belief that the principle of R2P is grounded in international human rights law, but this is only one of the possible interpretations. As Robert Yewdall Jennings stated in 1939, well before international human rights law was enacted, persecutions

are of international concern for reasons exclusively pertaining to sovereign rights of third countries: ‘the wilful flooding of other states with refugees constitutes not merely an inequitable act, but an actual illegality, and *a fortiori* where the refugees are compelled to enter the country of refuge in a destitute condition.’<sup>7</sup> In this perspective, invoking the sovereignty of neighbouring states is in itself sufficient justification for an intervention to protect victims in Libya, their potential exodus constituting a threat to peace and security, which reflects the concerns of interior ministers of EU countries bordering the Mediterranean (Italy, Malta, Cyprus, Greece, France and Spain) in a declaration they made at a meeting held in Rome on 23 February. In an unprecedented joint statement, they urge the EU to establish a ‘common and sustainable asylum system’ that includes relocating migrants within the EU by the end of 2012 and a solidarity fund to help the Mediterranean countries that initially receive them, while warning of the danger of ‘uncontrolled flows of illegal immigrants and asylum seekers into Europe, with serious consequences and potential risks to EU internal security.’<sup>8</sup>

In the event that the UNSC is not prepared to implement the principle, this and other similar lines of reasoning should allow for action taken by a coalition of the willing. But, more fundamentally, the practice of the Council subsequent to its Resolution 688 (1991) provides a clear understanding of the content of international law in this respect, even if the pre-eminence attached by the body to counter-terrorism during the last decade has only introduced confusion in international law and deviation from its core principles. Certainly, as a consequence of the end of the Cold War, the Security Council adopted a series of decisions which responded to common parameters of interpreting international law in R2P cases. The armed interventions of limited scope that took place, with unequal results, in Iraqi Kurdistan, the former Yugoslavia, Somalia, Rwanda and Albania as well as some decisions such as those concerning Abkhazia and Zaire (today the DRC), have allowed for the establishment of a new *category* of threats to international peace and security that is not solely or even predominantly based on international human rights law. In 1997, the President of the Council identified what doubtless could be considered the predominant rationale underpinning its

7. ‘Some International Law Aspects of the Refugee Question’, *British Yearbook of International Law*, vol. XX, 1939, pp.111-2.

8. For details, see: <http://www.news1130.com/news/world/article/187844--mediterranean-countries-ask-eu-to-share-refugees-amid-migrant-waves-from-north-african-unrest?ref=topic&name=Storm-Centre&title=> (accessed 7 March 2011). The question is whether they are aware of existing adequate legislation at the EU level, which however entails that they need to create a category of protected persons coming from Libya in accordance with prevailing principles of international law (see my note *Mass Exodus and the Responsibility to Protect under European and International law. The case of Libya* at [http://www.iss.europa.eu/uploads/media/Mass\\_exodus.pdf](http://www.iss.europa.eu/uploads/media/Mass_exodus.pdf)).

decisions: ‘the massive displacement of civil population in conflict situations can result in a serious risk for international peace and security.’<sup>9</sup>

Even if human rights considerations also played an important role, the Council’s willingness to protect civil populations caught up in conflicts during the 1990s can only be explained as a result of the determination to find a legitimate way of avoiding a massive exodus of refugees. The legitimate method found was the protection of humanitarian aid, which led to the implicit conclusion that protecting basic States’ interests entailed greater efforts to provide assistance to civil populations trapped in conflict. During these years, it was confirmed that humanitarian assistance, protected if necessary by peacekeepers or coalition forces, was the most efficient strategy – taking into account economic cost and the benefits in terms of interstate security – for dealing with armed conflicts. For this reason, and not for any other, the Council has been and still is perhaps the major promoter and protector of the humanitarian work of NGOs.

In an attempt to fully describe and clarify this evolution in the practice of peacekeeping, in 2000 the Council adopted Resolution 1296, by means of which it tried to *codify* explicit threats to international peace and security; threats which the collective security system, on a case-by-case basis, needed to be ready to address at the turn of the twenty-first century. These ‘new threats’ included, or were directly related to, deliberate attacks against the civil population or any other type of protected persons in situations of armed conflict; the perpetration of systematic massive violations of international humanitarian law and international law concerning human rights in situations of armed conflict; denying free unhindered access to personnel who carry out assistance or humanitarian tasks to civil populations in situations of armed conflict; and the vulnerability of refugees and displaced persons in camps which could give rise to abuse or aggression, as well as the risk of armed elements infiltrating the camps.<sup>10</sup>

The Council has not honoured its own definition of categories which call for its immediate action in the case of Libya. Thus, to the extent that Resolution 1296 cod-

9. Declaration by the President of the Security Council on the protection of humanitarian assistance to refugees and others in conflict situations, made in the name of the Council, 19 June 1997.

10. It should be pointed out, however, that all these categories of threats constitute or may constitute immediate causes of forced mass exodus. Resolution 1296 is generally a well-conceived codification of the collective security system practice during the last decade of the twentieth century. But the Council of course insisted on the need to make decisions ‘case by case, and taking into account the circumstances’ of each situation (par. 1). The circular definition of threat to peace that Combacau proposed in 1971 is still fundamentally valid.

ifies pre-existing practice, all states of the international community are entitled to initiate action on the basis of international norms and principles as expressed in a Resolution of the Council that the Council itself is unwilling to apply. The remaining question is, though, *how* to implement R2P without further violating the international order.

Lack of proportionality in the use of force and the existence of goals other than that of protecting civilians have characterised most of the self-proclaimed *humanitarian* interventions throughout history. Abuse on the part of the intervening states frequently delegitimised their action in spite of their official declarations. More recently, the cases of Afghanistan and Iraq show that the failure to respect international humanitarian law also results in a complete disconnection between proclaimed goals and results. Emphasis should thus be placed on means of action rather than on the declared goals of the intervention. A precedent can again be found in the interventions carried out during the 1990s, but also including cases such as Sierra Leone in this century, upon decisions of the Security Council intended to guarantee that humanitarian assistance was effectively delivered. In order to prevent abuses in the use of force, these decisions in fact subordinated all military actions to the needs expressed by UN civilian agencies which hold international mandates of action for protecting categories of vulnerable people, such as refugees, displaced persons and children, or for providing basic services such as health, food and education.

The Council authorised the use of force in as much as it was needed by humanitarian actors to perform their tasks. From a practical point of view, it was not the military who dictated the strategy in the field, but UN civilian agencies who specifically asked them to escort their convoys or protect their facilities. Even if local populations were not directly protected by the blue berets or the coalitions of the willing supporting their task of protecting humanitarian assets, abuses of the intervening armies were in this way minimised or even precluded. The emerging criteria for a legitimate use of force is that of respecting protection requirements of UN civilian agencies, as confirmed by the creation of temporary UN civil administrations in East Timor and Kosovo in 1999. The use of armed force was authorised only to the extent that it creates conditions in which international public civil action could take place. Any other use of force, particularly direct fire which is not justified under the principle of self-defence of soldiers as extended to humanitarian workers, would have been deemed unlawful.

Rather than the end goal of the intervention as devised by strategists, the subordination of military force to international civilian authorities and actors provided legitimacy under international law to interventions authorised by the Security Council in situations similar to that currently prevailing in Libya. Also, considering that such practice has been codified by the Council particularly in its Resolution 1296, the inaction of the Council, even its attempt to pre-empt R2P by mentioning Art. 41 of the Charter, may not be an obstacle to legitimate military intervention that is limited to guaranteeing the delivery of humanitarian aid to the victims of Gaddafi. Such intervention should start with the establishment of a no-fly zone allowing for the return of aid

agencies to Libya and may be followed, if necessary, with the granting of escort and protection to humanitarian action on the ground. The most basic principles of international law as endorsed and consistently applied by the international community under the aegis of the Security Council may not be violated by intervening states, as we have witnessed in recent years, nor can they be pre-empted by a Security Council that seems unable or unwilling to discharge its responsibility under international law. Although the Council has expressed its readiness to take additional measures if humanitarian aid is not guaranteed in Libya, the principle of R2P does not allow for delays or hesitation once a massacre is actually happening.