THE RESPONSIBILITY TO PROTECT AFTER LIBYA AND SYRIA

Address by Professor the Hon Gareth Evans AC QC, Co-Chair, Global Centre for the Responsibility to Protect, to Annual Castan Centre for Human Rights Law Conference, Melbourne, 20 July 2012

Of all the human rights issues that shock our conscience at home and abroad, I think we would agree that the ones that most offend, and challenge, every precept of our common humanity are the mass atrocity crimes: genocide, ethnic cleansing, crimes against humanity and large-scale war crimes – those catastrophic human rights violations where men, women and children are murdered, tortured, raped, starved or forcibly expelled for no other reason than their race, ethnicity, religion, nationality, caste, class or ideology.

The extraordinary thing is how long it has taken for any kind of genuine international consensus to develop as to how to respond to these catastrophic crimes. Even after the horrors of the Holocaust and all the many developments in international human rights law and international humanitarian law that followed World War II, when it came to reacting to reacting to cases like Cambodia, East Pakistan, and Uganda in the 1970s and '80s, and Rwanda, Bosnia and Kosovo in the '90s, the world was in almost total disarray.

There was at least real debate about these issues in the '90s, but it was only about 'humanitarian intervention': the so-called 'right to intervene' militarily. Hardly anyone talked about prevention or less extreme forms of engagement and intervention. The options were 'Send in the Marines' or do nothing. The global North often rallied to the 'right to intervene' cry, but the global South was understandably deeply reluctant – after all its unhappy historical experience – to accept the idea that big guys had the right to throw their weight around in this way. So we had all the division and inaction and despair that most of us here will remember all too vividly: saying each time 'never again', but then having to look back over again, and again, with a mixture of anger, incomprehension and shame, asking ourselves how it could possibly have happened again.

It was to find a way through this agonizing lack of consensus – this consensus-free zone – that the concept of the responsibility to protect ('R2P') was born: initiated in the 2001 report of the International Commission on Intervention and State Sovereignty (ICISS), sponsored by the Canadian government which I co-chaired with the African diplomat Mohammed Sahnoun, and then, after a long, complicated and often cantankerous diplomatic process, endorsed unanimously by the UN General Assembly sitting at head of state and government level at the 2005 World Summit, in what has been described by the British political and Holocaust historian Martin Gilbert as 'the most significant adjustment to national sovereignty in 360 years.'

There were, and remain, crucial differences between R2P and the 'right of humanitarian intervention', and it is a fundamental mistake to maintain, as some still do, that R2P is no more than old humanitarian intervention wine in a new bottle. In the first place, R2P is primarily about prevention, whereas humanitarian intervention is only about reaction. Secondly, R2P is about a whole continuum of reactive responses – from diplomatic persuasion, to pressure, to non-military measures like sanctions and International Criminal Court process, and only in extreme, exceptional and last resort cases military action,

whereas humanitarian intervention is only about military reaction. And thirdly, R2P is about a wide range of actors, whereas humanitarian intervention focuses only on the role of those capable of applying coercive military force.

More specifically, R2P involves three distinct levels of responsibility. The primary responsibility is that of the sovereign state itself to its own people – one that is absolute, unconditional, and continuing – not to perpetrate or allow atrocity crimes on its territory (the so-called 'Pillar I'). The second responsibility is that of others in the international community – including other states and intergovernmental organizations – to assist states to discharge that primary responsibility, if they are willing to be so assisted ('Pillar II'). The third responsibility is that of others – if prevention fails, and a state is manifestly failing to protect its own people – to then provide that protection by every means prescribed, and circumscribed, by the United Nations Charter ('Pillar III').

Since 2005, there has been a long period of international discussion and argument about the meaning, scope and limits of R2P, in a variety of contexts. But what we can now say, following the major debates in the UN General Assembly in 2009, 2010 and 2011 is that – even after the controversy about Libya which I will come to in a moment – it has won a remarkable degree of acceptance in principle. Secretary General Ban Ki-Moon was not exaggerating when he said in September last year, 'Our debates are about how, not whether to implement the Responsibility to Protect. No government questions the principle'.

But, and it's a very big 'but' indeed, we have to acknowledge that a good deal of the debate about how to implement R2P in practice, at least at the sharp end – when prevention has manifestly failed and violence is actually occurring – is still very fierce and very divisive. From the high point we reached in the Security Council in February and March last year – when there *was* real consensus both about the steps that had to be taken to stop atrocity crimes that were happening in Libya and feared likely to happen on an even bigger scale – we have now, in relation to the even worse human rights situation in Syria, reached the low point of paralysis in the Council, even on adopting non-military measures like targeted sanctions, an arms embargo, or reference to the International Criminal Court (ICC).

So why did consensus fell away, and what can be done to re-establish it?

Sixteen months ago, in March 2011, the United Nations Security Council, with no dissenting voices, and expressly invoking the principle of the responsibility to protect, authorized the use of 'all necessary measures' to protect civilians at imminent risk of massacre in Benghazi and elsewhere in Gaddafi's Libya. A NATO-led airborne military operation immediately followed, and those thousands of lives at imminent risk were unquestionably saved.

The March resolution followed a unanimous one three weeks earlier, also invoking R2P, which condemned Gaddafi's violence against unarmed citizens, demanded that it stop, and sought to concentrate his mind by applying targeted sanctions, an arms embargo and the threat of ICC prosecution. Only when that was ignored was the military intervention authorized.

I and many others hailed these resolutions as the coming of age of R2P, a textbook example of the doctrine working as it was supposed to, saving lives imminently at risk, and at last decisively cutting across centuries of state practice treating sovereignty almost as a license

to kill. If the Council had acted as decisively and robustly in the 1990s as it did in Libya, the lives of 8,000 others would have been saved in Srbrenica and 800,000 in Rwanda.

But now, over Syria, despite a rapidly climbing death toll of as many as 17,000 or more, the Security Council remains, as it has been for over a year, almost completely paralysed, barely able to agree on condemnation of the violence and a diplomatic mission to address it, let alone more robust measures.

Part of the reason for hesitation – and certainly the unwillingness to even *begin* to think about coercive military intervention – is that the geopolitics of the Syrian crisis are very different: complex internal sectarian divisions with potentially explosive regional implications, anxiety about the democratic credentials of many of those in opposition, no Arab League unanimity in favour of tough action, a long Russian commitment to the Assad regime, and a strong Syrian army meaning that any conceivable intervention would be difficult and bloody.

But there's more to it than that. We have to explain why it is that it took until February this year for the Security Council to even formally condemn the violence, and why there has been no consensus whatever even about non-military coercive measures like targeted sanctions of the kind that which were unanimously agreed for Libya at a stage when the Gaddafi regime's violence was much less than Assad's. Consensus *has* simply evaporated in a welter of recrimination about how the NATO-led implementation of the Council's Libya mandate "to protect civilians and civilian populated areas under threat of attack" was actually carried out. We have to frankly recognize that there has been some infection of the whole R2P concept by the perception, accurate or otherwise, that the civilian protection mandate granted by the Council was manifestly exceeded by that military operation.

Leading the critical charge have been the 'BRICS' (Brazil, Russia, India, China and South Africa), all of whom were sitting on the Security Council last year – in an interesting foretaste of the kind of Security Council membership more representative of current world power balances that many of us have been arguing for. Their complaints have been not about the initial military response – destroying Libyan air force infrastructure, and air attacks on the ground forces advancing on Benghazi – but what came after, when it became rapidly apparent that the three permanent member states driving the intervention (the US, UK and France, or 'P3') would settle for nothing less than regime change, and do whatever it took to achieve that.

Particular concerns are that the interveners rejected ceasefire offers that may have been serious, struck fleeing personnel that posed no immediate risk to civilians and locations that had no obvious military significance (like the compound in which Gaddafi relatives were killed) and, more generally, comprehensively supported the rebel side in what rapidly became a civil war, ignoring the very explicit arms embargo in the process.

The P3 is not without some answers. If civilians were to be protected house-to-house in areas like Tripoli under Gaddafi's direct control, they say, that could only be by overturning his whole regime. If one side was taken in a civil war, it was because one-sided regime killing sometimes leads (as now in Syria) to civilians acquiring arms to fight back and recruiting army defectors. Military operations cannot micromanaged with a '1,000 mile screwdriver'. And a more limited 'monitor and swoop' concept of operations would

have led to longer and messier conflict, politically impossible to sustain in the US and Europe, and likely to have produced many more civilian casualties.

And yet. These arguments all have force, but the P3 resisted debate on them at any stage in the Security Council itself, and other Council members were never given sufficient information to enable them to be evaluated. Maybe not all the BRICS are to be believed when they say that, had better process been followed, more common ground could have been achieved. But they can be when they say they feel bruised by the P3's dismissiveness during the Libyan campaign -- and that those bruises will have to heal before any consensus can be expected on tough responses to such situations in the future.

The better news is that a way forward has opened up. Brazil has been arguing for some months that the R2P concept, as it has evolved so far, needs not overthrowing but rather *supplementing* by a complementary set of principles and procedures which it has labeled 'responsibility while protecting' ('RWP'). Its two key proposals are for a set of criteria to be fully debated and taken into account before the Security Council mandates any use of military force, and for some kind of enhanced monitoring and review processes which would enable such mandates to be seriously debated by all Council members during their implementation phase.

One way of approaching the criteria issue – which I certainly favour, and about which I will be speaking to the Brazilian Foreign Minister in Rio next month – would be return directly to the so far unimplemented recommendations of my ICISS Commission (and reports which followed it, including from Secretary-General Kofi Annan himself) that the Security Council apply specific prudential guidelines whenever considering any authorization of coercive military action under Chapter VII of the Charter.

Five such guidelines have been proposed. First, seriousness of risk: is the threatened harm of such a kind and scale as to justify prima facie the use of force? Second, primary purpose: is the use of force primarily to halt or avert the threat in question, whatever secondary motives might be in play for different states? Third, last resort: has every non-military option been fully explored and the judgment reasonably made that nothing less than military force could halt or avert the harm in question? Fourth, proportionality: are the scale, duration, and intensity of the proposed military action the minimum necessary to meet the threat? And fifth, what will often be the hardest legitimacy test to satisfy, balance of consequences: will those at risk ultimately be better or worse off, and the scale of suffering greater or less?

The adoption, formally or informally, of such criteria could clearly not guarantee consensus in any particular case, but by requiring systematic attention to all the relevant issues – which simply does not happen at the moment – would hopefully make the achievement of consensus much more likely. One of the further virtues of this approach would be to make it abundantly clear from the outset just how different coercive military action is to other response mechanisms, and how many hurdles should have to be jumped before ever authorizing it: that it is something that should not be contemplated as a routine escalation, but only in the most extreme and exceptional circumstances.

 If such criteria were able to be agreed, and applied with some rigour and consistency to new situations as they arise, it should be a lot easier to avoid the "slippery slide" argument which has contributed to the Security Council paralysis on Syria, making some countries

unwilling to even foreshadow non-military measures like targeted sanctions or ICC investigation because of their concern that military coercion would be the inevitable next step if lesser measures failed.

The initial reaction to the Brazilian RWP proposal by the P3 powers was dismissive -- 'these countries would want all those delaying and spoiling options, wouldn't they' – but has begun to soften, as it must. If an un-vetoed majority vote is ever going to be secured again for tough action in a hard mass atrocity case, even action falling considerably short of military action, the issues at the heart of the backlash that has accompanied the implementation of the Libyan mandate, and the concerns of the BRICS states in particular – voicing as they do the concerns of a much wider swathe of the developing world – simply have to be taken seriously.

The completely effective implementation of R2P is going to be work in progress for some time yet. Renewed consensus on how to implement it in the hardest of cases in future is going to be hard to achieve, and will take time to achieve: it will certainly come too late to be very helpful in solving the present crisis in Syria, for which the only alternative to a strongly Russian-supported diplomatic solution – still some distance away, and maybe completely unachievable – appears to be, unhappily, a full scale civil war bloodbath.

But I don't think there is any policymaker in the world who fails to understand that if the Security Council does *not* find a way of genuinely cooperating to resolve these cases, working within the nuanced and multidimensional framework of the R2P principle, the alternative is a return to the bad old days of Rwanda, Srebrenica and Kosovo.

That means either total, disastrous, inaction in the face of mass atrocity crimes, or action being taken to stop them without authorization by the Security Council, in defiance of the UN Charter and every principle of a rule based international order. After all that has been achieved over the last decade, that would be heartbreaking. And, congenital optimist as I am, I believe it won't happen.

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