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Responsibility to Protect: Why Libya and not Syria?

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While the intervention in Libya saved relatively many lives, there is hesitation to intervene in Syria due to geopolitics, despite the threshold for intervention having been reached. However, by endorsing the notion of responsibility to protect, UN Member States, including the Security Council, agreed to act collectively to save humanity from atrocities. Therefore, the international community should support the Arab League to constructively engage the warring factions to find a peaceful solution to the crisis and persuade them to avoid committing atrocities against civilians. The Syrian government should uphold its primary responsibility to protect its population and the belligerents should provide access for humanitarian assistance; those at fault should be held accountable by the international criminal court.

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Smoke rises from the Bab Sabaa neighbourhood of Homs, Syria on 19 March 2012

Introduction

In 2005, world leaders translated the slogan 'never again' into a political commitment of 'responsibility to protect' (R2P), which outlines the state and international responsibilities to protect populations from genocide, war crimes and crimes against humanity including 'ethnic

cleansing'.² R2P entails that if a state is manifestly unable or unwilling to protect its populations from mass atrocity crimes, the international community has the responsibility to act – by persuasion, if possible, and by coercion, if necessary.³ The slogan 'never again' abhors inaction by the international

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community in the face of an imminent threat of mass violence made by a government against its own people. The notion of R2P may be rendered a paper tiger in view of the Syrian army's indiscriminate assault on the very people it ought to protect. The Syrian military and security forces have launched massive campaigns of arrest, arbitrarily detaining thousands of protestors, activists and others suspected of anti-government sentiments or activities including forced disappearances.⁴

Both Russia and China vetoed a UN Security Council draft resolution that would have demanded that all parties in Syria – both government forces and armed opposition groups – stop all violence and reprisals.⁵ This is in contrast to the resolve reflected in UN Security Council Resolution 1973, where the Security Council authorised the use of “all necessary measures” to protect civilians at imminent risk of massacre in Libya. The hand wringing by the international community to intervene in Syria has eclipsed the political commitment of R2P manifested by the speed with which the international community intervened to protect Libyans from atrocities committed by their own government. Although the humanitarian crises in both Libya and Syria have similar patterns and warrant international intervention, there has not been international consensus to act decisively in Syria. That inaction comes despite a death toll of thousands of civilians, including hundreds of children, and still counting.⁶

The slogan ‘never again’ abhors inaction by the international community in the face of an imminent threat of mass violence made by a government against its own people. The notion of R2P may be rendered a paper tiger in view of the Syrian army’s indiscriminate assault on the very people it ought to protect

The notion of R2P also lends legal force from Common Article I to the four Geneva Conventions, which recognises states’ collective responsibility to ensure the protection of civilians in armed conflict. According to the Geneva Conventions, this responsibility entails a set of measures to prevent, mitigate, and prohibit grave breaches of International Humanitarian Law, also known as war crimes, which are part of the crimes that trigger R2P.⁷ Common Article I of the Geneva Conventions, which is applicable at all times,

is regarded as customary international law which binds all states (*erga omnes*) regardless of whether they are parties to the Conventions or not.⁸ Therefore, the issue is how to build consensus to act?

Whose responsibility? – How to build consensus to act

On the one hand, it was easier to garner international consensus on Libya because of factors such as Colonel Muammar el Qaddafi’s previous reputation of being a pariah, the timing of the intervention and the threat of refugee flows into Europe.⁹ Although the African Union (AU) has a right to intervene in circumstances like the Libyan crisis pursuant to Article 4(h) of the AU Constitutive Act, such right was not invoked. However, the AU High-Level *ad hoc* Committee devised a Roadmap for the peaceful resolution of the Libyan crisis. The Roadmap was duly endorsed by the AU Assembly of Heads of State and Government.¹⁰ On the other hand, different factors – including geopolitics and regional interests – can be attributed to the hesitation to act in Syria.¹¹ Such factors include the potentially explosive regional sectarian divisions; the absence of unanimity in the Arab League to take a decisive action to halt the atrocities; a longstanding commitment by Russia to the Assad regime; and a strong Syrian army, which would make any conceivable military intervention difficult and bloody.¹²

The other reason seems to be that a weakened Syria may tilt the balance of power in the region and create a vacuum for states such as Iran to become stronger and more predominant in the Middle East. The hesitation is also partly influenced by the way the Resolution 1973 mandate was executed. While the mandate was clearly “to protect civilians and civilian populated areas under threat of attack,” critics have argued that the NATO-led force stretched its protection mandate by directly supporting rebel factions and seeking regime change rather than political settlement, contrary to the parameters of the initial international consensus.¹³

Although there have been similar atrocities in Bahrain and Yemen, *inter alia*, it is clear that the humanitarian crisis in Syria has reached the threshold warranting the implementation of R2P.¹⁴ The Syrian situation tests the international community’s ability and willingness to operationalise R2P consistently. The need for immediate action becomes increasingly pressing as the crisis in Syria degenerates to a breaking point. There are running battles in the country that are not sparing civilians

and the violence shows no sign of abating. The risk of further mass atrocity crimes is significant as security forces continue to pound protesters with mortar and sniper fire.¹⁵ The Security Council is paralysed over Syria, unable to agree not only on the last resort of military intervention, but even on lesser coercive measures such as targeted sanctions, an arms embargo, or a referral of the situation to the International Criminal Court (ICC). The lack of consensus to act decisively in the Syrian crisis may require UN Member States to seek alternative means to exercise their responsibility to protect the population in Syria.

Therefore, in order to garner consensus to respond to the crisis in Syria, there is need to underscore the essence of R2P, which is to save lives. As unanimously endorsed by the World Summit Outcome, implementation of R2P should focus on saving lives from mass atrocity crimes. R2P neither justifies forced regime change nor calls for bringing about democracy and enforcing human rights by the use of armed interventions.¹⁶ Stretching the concept or abusing it to disguise regime change would result in withering international consensus. Implementing R2P demands responsibility while protecting.¹⁷ What this means in terms of implementing R2P in Syria is that the international actors should not overstep but rather implement any given mandate according to the letter and spirit of the relevant UN Security Council resolution.¹⁸

To avoid paralysis of the Security Council in authorising action in Syria, Security Council members ought to have acted in dubio pro humanitate (in favour of humanity). Then, the question would have been: how to intervene?

Although China and Russia dutifully explained their vetoes – and convincingly so – in the present international climate, ‘constructive abstention’ would probably have been more appropriate than obstructing the passage of what would otherwise be a majority resolution.¹⁹ It should be remembered that the Security Council is legally obligated under Article 39 of the UN Charter to examine in good faith any situations coming to its attention that could potentially be considered a threat to or breach of the peace such as the Syrian crisis. Therefore, the members of the Security Council have a particular responsibility to act (or to authorise action)

on behalf of the international community in the face of mass atrocity crimes.²⁰ As a matter of treaty law, members of the Security Council are severally and jointly under an obligation to promote and protect human rights and humanitarian norms under the relevant treaties they are party to.²¹ Thus, if the Security Council does not authorise a convincing R2P intervention, then it may be failing to discharge its legal responsibility under the UN Charter. As such, individual Member States of the UN Security Council may be in contravention of their international legal obligations under the UN Charter. This is particularly so when the Security Council members allow non-legal factors to inhibit them from carrying out their responsibility to protect populations against mass atrocity crimes.²² To avoid paralysis of the Security Council in authorising action in Syria, Security Council members ought to have acted *in dubio pro humanitate* (in favour of humanity).²³ Then, the question would have been: how to intervene?

How to Protect?

It is no longer contentious whether individual governments and the international community are responsible for protecting populations from mass atrocity violence. The question is rather how that responsibility should be exercised. To be sure, R2P encompasses a continuum of prevention, reaction and rebuilding, with measures ranging from early warning mechanisms to diplomatic pressure, coercive measures, holding perpetrators accountable and international assistance.²⁴ It should be noted that since R2P relates to a continuum, military resources can also be deployed during the preventive phase without necessarily leading to the use of force.²⁵ Such military deployment may constitute, for example, the creation of buffer zones and humanitarian corridors. As can be noted, there are responses that are intended to immediate effects (such as preventive diplomacy and the use or threat of sanctions and international criminal prosecution) and responses that aim to achieve long-term effects (such as promoting economic development, human rights and good governance).²⁶

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While conflict prevention is central to avert mass atrocities, halting atrocities in an on-going conflict like the Syrian crisis requires tailored engagement directed at conflict resolution

as well as atrocity prevention.²⁷ Although peaceful proactive global engagement has been successful in crises such as in Kenya, Guinea, Kyrgyzstan, and South Sudan, among other places, it is naïve to say that perpetrators of atrocities in an on-going conflict can be stopped by peaceful means alone. However, the dynamics and geopolitics of the Syrian situation inform that military intervention may not be a viable solution yet it may be necessary to halt the perpetrators of mass atrocities against civilians. Others also foresee that endorsement of the Arab League plan would lead to civil war.²⁸ Military action can only be justified if it holds reasonable prospects for success in halting or averting humanitarian suffering, with consequences of action not likely to be worse than the consequences of inaction. Military action must not risk triggering a greater conflagration.

Unless military resources are tactfully deployed to display a credible potential to use force – show of force in military parlance – without leading to actual use of force, it is probable that military intervention could degenerate into a proxy war between factions that support President Bashar al-Assad's regime and those that oppose it. Such military intervention could be protracted and convoluted thereby exacerbating the already grave human rights situation. This 'show of force' would thus be utilised as a preventive form of intervention that is limited to protection of civilians through buffer zones and humanitarian corridors. Arab troops would have to take the lead in creating zones to protect civilians, backed by logistics and intelligence support by any possible coalition of the willing, if necessary.²⁹

The behaviour of the warring factions can be influenced by persuasion to comply, backed by credible threats that perpetrators of atrocities against civilians shall be held individually responsible, with information that such crimes are subject to universal jurisdiction and are not subject to any statute of limitation or amnesty

Recommendations

In light of the gridlock of the UN Security Council to decide, and given the scruple and diffidence of the international community to act on Syria, there is need for human rights and humanitarian agencies to lead the way in seeking alternatives to address

the prevailing humanitarian crisis in Syria. As a way forward, therefore, the following steps may need to be considered.

- **The warring parties** should declare a daily ceasefire or temporary truce to allow independent and unimpeded access for international humanitarian agencies to reach the most affected areas and to provide escape routes for civilians. Another alternative is to create “safe areas” or “no-kill zones”, which should provide safe haven for civilians not involved in the fighting.³⁰ Furthermore, the belligerents should also cooperate fully with the Office of the High Commissioner for Human Rights in this regard.
- **The Syrian government** should uphold its primary responsibility to halt and avert the commission of atrocities in Syria – an obligation that it is currently failing to fulfil. In this way the government should ensure that security forces stop targeting unarmed civilians and act in accordance with their obligations under international law, particularly human rights and humanitarian law.
- **The UN Security Council** should not only demand that the Syrian government must immediately cease attacks on unarmed civilians protesting peacefully but also threaten – in a clear and unambiguous manner – that perpetrators of atrocities shall be held individually responsible and liable for prosecution. The UN Security Council should also impose an arms embargo and targeted sanctions against members of the Syrian government who have command responsibility for the security forces. Furthermore, the Security Council should establish an independent, transparent and full investigation into the killings with those responsible to be held accountable.³¹ Lastly, the Security Council should refer to the ICC for investigation and indictment of those individuals found responsible for war crimes and crimes against humanity.³²
- **The Arab League** should continue its efforts to find a political settlement to the crisis. Due to greater proximity to the area, the Arab League may be more acceptable by the international community as well as the warring factions in Syria as an organisation that can diligently seek a solution to the Syrian crisis than distant countries and coalitions that may seem to advance an imperialist agenda. The more Syria spins out of control, the more destabilised the region will be because of the threat of terrorism, refugee flows and proliferation of arms, among other factors. Therefore, the Arab League should facilitate an all-inclusive political dialogue with the Assad regime, including

the military and the opposition as well as members of the Syrian business community and various minorities, to find a solution that is derived from Syrian citizens.³³ By way of monitoring and evaluating progress of the process, the Arab League, in collaboration with the UN Security Council, should establish clear and measurable benchmarks for improvement in the Syrian situation such as a ceasefire and the release of political prisoners, and respond accordingly.³⁴

- **Dr Kofi Annan**, as the UN/Arab League Envoy, should take cognisance of the positions of the parties in the Syrian crisis. The government's position is that "no political dialogue or political activity can succeed while there are armed terrorist groups operating and spreading chaos and instability," whereas the opposition is arguing that "negotiations can never take place between the victim and torturer: Assad and his entourage must step down as a condition before starting any serious negotiations."³⁵ On that basis, Dr Annan should persuade the warring factions to take advantage of the window of opportunity created by the Assad regime on the reforms taken so far, such as the enactment of new legislation to allow multiparty politics in Syria and the constitutional referendum, and call upon the opposition in Syria to protest peacefully and to participate fully in the reforms. The behaviour of the warring factions can be influenced by persuasion to comply, backed by credible threats that perpetrators of atrocities against civilians shall be held individually responsible, with information that such crimes are subject to universal jurisdiction and are not subject to any statute of limitation or amnesty.

While it is imperative for Assad to step down, the pressing issues seem to be stopping the violence between security forces and the opposition, access for humanitarian agencies and the release of detainees in order to start off political dialogue and negotiate a transitional period

- **The ICC Chief Prosecutor** should send a strong signal, in a clear but calculated manner, that perpetrators of mass atrocity crimes in Syria will be held accountable in order to dissuade and deter them from committing further atrocities.³⁶ Mass atrocity crimes occur where perpetrators can commit such atrocities with impunity.

Therefore, deterrence is key to preventing such atrocities. If potential perpetrators genuinely believe that they are likely to be prosecuted for committing atrocities, this may provide a strong disincentive for such conduct. It is for this reason that the framers of the Rome Statute of the ICC set out in its preamble their determination "to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes."³⁷ Deterrence and prevention of mass atrocity crimes of the magnitude in Syria can thus be a force for peace.³⁸

Conclusion

Implementation of R2P in Libya pursuant to Resolution 1973 has shown that the abuse of a Security Council mandate can erode consensus. While the Security Council's decisive and unified action in Libya saved many lives, the NATO intervention in Libya has also exposed the political unwillingness of the AU to implement Article 4(h) of the AU Constitutive Act.³⁹ The Syrian crisis is another test for the international community's resolve to halt mass atrocities that trigger R2P. The geopolitics associated with the Syrian crisis and the manner the Security Council mandate was stretched in Libya have stifled the international community's consensus to act in Syria. To build consensus to implement R2P in the Syrian situation requires focusing on saving lives. While it is a reality that national interests play a role in deciding to intervene, it is also true that by endorsing the notion of R2P, members of the UN Security Council agreed to act (or authorised action) *in dubio pro humanitate* in the face of R2P cases.⁴⁰ Therefore, the Security Council should act decisively and demand that the Syrian government should immediately cease attacks on civilians and uphold its responsibility to protect its people.

The Security Council should also issue a stern warning that perpetrators of mass atrocities shall be held individually responsible and liable for prosecution at the ICC. This view lends credence to the "Friends of Syria" group where delegates from 70 countries issued a declaration calling on Assad's regime to end violence immediately, allow humanitarian access, and permit the delivery of relief supplies.⁴¹ The opposition, too, should be urged to protest peacefully as armed opposition is given as the ostensible reason for attacks by the government security forces. Further, the opposition should be encouraged to participate fully the reforms if they are to shape the process. While it is imperative for Assad to step down, the pressing issues seem to be stopping the violence between security

forces and the opposition, access for humanitarian agencies and the release of detainees in order to start off political dialogue and negotiate a transitional period.

On its part, the Arab League-led Roadmap can instil a stronger sense of ownership and, therefore, be more acceptable to the parties in the Syrian crisis.⁴² For purposes of international accountability, the UN should support the Arab League to make sustained constructive engagement in finding a concrete political solution to the Syrian crisis. In this sense, the Arab League should convene a meeting of concerned regional states as well as the Syrian government and the opposition, to discuss a means of resolving the crisis peacefully.⁴³ As the UN Secretary-General has said, “the legitimate aspirations of the Syrian people must be addressed through an inclusive Syrian-led political process that guarantees fundamental freedoms and rights for all.”⁴⁴ It appears that the Security Council’s failure to agree on firm collective action has emboldened the Syrian government to launch an all-out assault to crush dissent with overwhelming force.⁴⁵ The longer the international community fails to take action, the more the civilian population will suffer and be massacred in Syria, defeating the adage of ‘never again.’ Therefore, states must act now to protect the population in Syria.⁴⁶ Timely, decisive and effective action today will save lives, prevent the situation in Syria from spinning out of control, and send a strong message to others contemplating mass atrocities against their own citizens.

Endnotes

- 1 The Author is grateful to the Malawi Defence Force, particularly the Commander, General Henry Odillo, for granting him study leave to pursue the post-doctoral fellowship. The Author is also indebted to his mentor, Professor Frans Viljoen, for the research fellowship grant and Professor Gudmundur Alfredsson and Professor Michelo Hansungule for the tireless support and tutelage.
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 - 11 Williams, supra note 9.
 - 12 Evans, supra note 3.
 - 13 Decision on the peaceful resolution of the Libyan crisis, supra note 10. Also note that Russia and China have justified their veto of 4th February 2012 on the above grounds as well as a concern that UN actions such as endorsement of the Arab League plan would lead to civil war. Further, both countries prefer a political solution as opposed to international intervention, while both also feel that UN efforts so far have been biased towards the armed opposition movement. See Williams, supra note 9.
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- 37 See the fifth recital of the preamble of Rome Statute of the International Criminal Court, available at: <<http://untreaty.un.org/cod/icc/statute/romefra.htm>> (accessed on 23 February 2012).
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