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## R2P and RWP After Libya and Syria

*Keynote Address by Professor the Hon Gareth Evans, Co-Chair, Global Centre for the Responsibility to Protect, to GCR2P/FGV/Stanley Foundation Workshop, Responsibility While Protecting: What's Next?, Rio de Janeiro, 23 August 2012*

We have to acknowledge that the UN Security Council paralysis over Syria, and at least some of the circumstances which have brought that about, have regenerated some serious international scepticism about the whole Responsibility to Protect (R2P) project. For example, I was asked this week by Chatham House to respond to the question 'Surely the Libya backlash is so powerful it has set your agenda back to 2001?!' Issues have been raised which do have to be addressed. The Brazilian 'Responsibility While Protecting' (RWP) proposal has made an important contribution to doing just that, and today's discussion – designed to help further refine and develop the RWP concept, especially in the context of next month's UNGA debate on R2P – could not be more timely.

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But before we plunge into the detail of where we are now, and where we go next, it's worth reminding ourselves – and the sceptics – where we have come from. Does anyone, anywhere, really want to go back to where we were a decade and more ago? It wasn't a good place:

- 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, catastrophic mass atrocity crimes were a regular occurrence behind sovereign state walls, with men, women and children being murdered, tortured, raped, starved or forcibly expelled for no other reason than their race, ethnicity, religion, nationality, caste, class or ideology.
- 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, there were no commonly accepted principles at all as to how the international community should react. By the '90s there was at least a debate about the issues but the appropriate policy response was a consensus-free zone.
- The only debate was 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 powers had the right to throw their weight around in this way. And so we had all the division or inaction, or both, in the face of catastrophe that we can all remember.

It was to find a way through this agonizing lack of consensus – this consensus-free zone – that the concept of the responsibility to protect was born: initiated in the 2001 report of the International Commission on Intervention and State Sovereignty (ICISS): 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.

Does anyone really want to throw away what was achieved in 2005, and has been further achieved since? In my judgement that has been three big things – at the conceptual level, the institutional level, and the political level – and again I think we should remind ourselves, and the sceptics, what those have been.

*Conceptually*, the big breakthrough was to replace the impossibly divisive language of 'humanitarian intervention' (HI) with the inherently non-confrontational language of 'responsibility to protect', and recast the content of the debate accordingly.

There are 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:

- First, R2P is primarily about prevention, whereas humanitarian intervention is only about reaction.
- Second, 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 third, R2P is about a wide range of actors, [1] starting very much with the sovereign state itself where the problem exists, and others in the international community able and willing to assist that state prevent mass atrocities, whereas humanitarian intervention focuses only on the role of those able and willing to apply coercive military force.

For supporters of R2P to continue to use 'humanitarian intervention' language, even just to describe the really sharp end of the R2P response continuum, is to blur these critical distinctions between HI and R2P.

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, and without going into detail here, I think it is fair to say that as a result of those many debates – about Darfur, the Congo, Georgia, Myanmar, Sri Lanka, Kenya, Guinea and others as well – there is a lot more understanding of what R2P is and isn't about than there was at the outset.

*Institutionally*, we've come a long way, with the UN Joint Office of the Special Advisers on Genocide and the Responsibility to Protect up and running and making its voice increasingly heard (a trend which I hope will continue under the Office's new leadership); the steady development of other 'focal points' within key governments and regional organizations – officials

whose day job it is to worry about early warning and effective response to new situations as they arise; the continuing effort to professionalise mediation resources; the gradual consolidation of the new international criminal justice system around the ICC, not associated with R2P as such, but an important element in the R2P response toolbox; and the attention that is going into ensuring that militaries have the proper force configurations, doctrine, rules of engagement and training to assist with mass atrocity response operations should they be invited by a host government or mandated by the Security Council to do so.

*Politically*, I think it is fair to say that – even taking into account the controversy about Libya and the paralysis on Syria which I will come to in a moment – the story since 2005 has been one of steady progress. When one looks closely at the contributions to the major debates in the UN General Assembly in 2009 and 2010 – and even in 2011 when anxiety about the conduct of the Libyan intervention was alive and well – it is impossible to deny that there is now a remarkable degree of acceptance of the basic principles of R2P, a steady increase in the number of instances in which those principles have been explicitly invoked, and now practically no voices at all challenging its foundations.

Secretary General Ban Ki-Moon may have been gilding the lily a little in September last year when he said that ‘No government questions the principle’, but he was not exaggerating at all when he said that now ‘Our debates are about how, not whether to implement the Responsibility to Protect.’

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But, and it’s a very big ‘but’ indeed – to come now directly to the subject of today’s discussion – 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 of consensus and cooperation we reached in the Security Council in February and March last year, we have now plunged to a very low point indeed. I and many others hailed the Council resolutions on Cote d’Ivoire, and especially Libya, as the coming of age of R2P, a textbook example of the doctrine working as it was supposed to when prevention failed, 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 Srebrenica and 800,000 in Rwanda.

But then, over Syria, despite a rapidly climbing death toll and a situation – even before the present descent into full scale civil war – manifestly worse than that which had prompted the military intervention in Libya, the Security Council found itself almost completely paralysed, barely able to agree even on a condemnation of the violence and a diplomatic mission to address it, and totally unable to agree on any more robust response, even non-military measures like targeted sanctions, an arms embargo, or reference to the International Criminal Court (ICC) which had been the first line of response in Libya.

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

Part of the reason for hesitation in Syria – and certainly the unwillingness of anyone in the Council to *begin* to argue for direct 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 resolve to condemn the violence, and why there has been no consensus whatever even about non-military coercive measures. The truth of the matter is that consensus *has* simply evaporated in a welter of recrimination about how the NATO-led implementation of the Council’s Libya mandate in UNSCR 1973 “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, with no dissenting voices, was manifestly exceeded by that military operation.

Leading the critical charge over the last year has not just been Russia – about whose motivations some cynicism is possible, because of its close economic and military connections with the Syrian governing regime – and China, which has always been highly sensitive on the sovereignty/intervention issue, but of course the whole ‘BRICS’ group (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.

I have not understood the BRICS complaints as being about the initial military response – attacking from the air Libyan air force infrastructure, and the ground forces advancing on Benghazi. Although there were some grumbles about the West ignoring a last-minute ceasefire offer from Gaddafi, the more general view was that he had by his conduct and language over preceding days demonstrated his total unreliability, and that a show of actual force was necessary to stop an imminent massacre and demonstrate the international community’s resolve. Certainly I understand that neither Russia nor China, who did not veto the Libyan ‘all necessary measures’ resolution 1973, nor the other BRICS who abstained on this vote, were under any illusions about the nature of the action which would follow in those first few days.

The real complaints related to the days, weeks and months which came after the initial attacks, 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 have been that the interveners rejected later ceasefire offers that may have been serious, and which certainly should at least have been explored; struck fleeing personnel that posed no immediate risk to civilians; struck 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 does have some strong answers to these criticisms. 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 be 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 my understanding is that 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.

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It is directly to address these concerns that Brazil has advanced its 'Responsibility While Protecting' idea. I have seen this as involving – when stripped down to its bare essentials – three core propositions:

- R2P, as endorsed in 2005 and as refined since, remains a valuable normative advance, not least in its strong focus on prevention of, as well as reaction to mass atrocity crimes, and whatever the issues involved in some aspects of its practical implementation, the baby should not be thrown out with the bathwater: RWP is designed to complement R2P, not replace it;
- Before acting under Pillar III of R2P, and under Chapter VII of the UN Charter, to endorse any use of coercive military force, more formal and systematic attention needs to be paid by the Security Council to relevant prudential criteria or guidelines; and
- After such action has been taken, there should be enhanced UN Security Council procedures to monitor and assess the manner in which such mandates are interpreted and implemented.

In the form in which RWP was originally floated by the Brazilian President in the UNGA general debate last September, and more particularly in the subsequent 'Elements' note circulated by Brazil in November (which still remains the only formal expression of the concept) these basic propositions became a little lost sight of, with a lot of immediate attention – and criticism – focusing on two specific themes (which I notice the Stanley program note for today's workshop continues to describe as 'major issues' in the RWP proposal):

- the proposition that the three R2P pillars were temporally *sequential* in their operation, which suggests that Pillar III is only about more forceful measures and that the state's own responsibility ceases to be central once the wider international community becomes engaged; and
- the proposition that there was a need to exhaust all peaceful means before considering the use of force, which could be read as institutionalizing inaction, by requiring interminable waiting for lesser measures like sanctions to be tried and fail.

But my understanding is that, in the various forums in which RWP has been discussed this year the debate has moved on, with the view being accepted that:

- as clearly spelt out in the latest SG's report, the three R2P pillars should not be viewed as sequential: rather all remain equally applicable, albeit with different emphases reflecting changing circumstances; and
- on the 'last resort' question, it is not a matter of waiting for sanctions or whatever to fail, but rather making a reasonable judgement based on all available evidence that no lesser measures could succeed in halting or averting the threat of atrocity crimes.

So let me focus my remaining remarks on what I would regard as the two major substantive new elements in the RWP proposal, and the two big themes on which I think we should concentrate in our discussion today – viz. first, a set of criteria or guidelines to be fully debated and taken into account before the Security Council mandates any use of military force; and secondly, 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.

*Criteria.* One way of approaching the criteria issue, which I certainly favour, would be not just to single out, as the November 2011 Brazilian Elements note does, two or three criteria, but to return directly and deliberately to the so-far-unimplemented recommendations of my ICISS Commission and the reports which followed it, from the High Level Panel on Threats Challenges and Change, and from Secretary-General Kofi Annan himself, which are that the Security Council apply *five specific prudential guidelines* whenever considering *any* authorization of coercive military action (not just in R2P cases) under Chapter VII of the Charter:

- First, seriousness of risk: is the harm occurring or being threatened of such a kind and scale as to justify *prima facie* the use of force?
- Second, primary purpose: is the use of force primarily intended 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, balance of consequences: will those at risk ultimately be better or worse off, and the scale of suffering greater or less? Will more good than harm be done?

I think it's important to note at the outset that while the immediately recognisable pedigree of these criteria is to be found in Christian 'just war' theory going back to the early Middle Ages, these themes do resonate equally with other major world religious and intellectual traditions, including Islam, Judaism, Buddhism and Hinduism and Sikkism, and there is a whole body of literature describing this.[2]

For all the universal values which such benchmarks clearly seem to embody, talk of adopting them as any kind of a basis for Security Council decision making tends to generate an immediate backlash, with states saying 'rigid criteria' would be impossible to apply given all the variability and fluidity of real world situations, and that (and this language is in the latest SG's report) 'templates' are to be avoided. But these objections in my view greatly overstate the case, and sometimes simply conceal a preference for behaving in a completely ad hoc fashion, in accordance with perceptions of immediate national interest involved rather than the real objective needs of the situation on the ground.

I would envisage the criteria I have listed being described simply as 'guidelines' to which 'the Security Council should have regard' in making decisions under Chapter VII authorising the coercive use of military force. If the Security Council were able to reach an informal understanding among its members to so act case by case, this would be almost as useful as embodying such guidelines in a formal Security Council or General Assembly resolution, and would avoid what could possibly be a painful and protracted debate about abstractions.

What would actually be achieved by the Security Council 'having regard' to these guidelines? Clearly they could 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 – they would hopefully make the achievement of consensus much more likely. Would anyone really want to argue that any one of these guidelines are irrelevant or wrong-headed, and should be ignored or overridden – that military force should be used although it *wasn't* demonstrably necessary to halt or avert the harm in question, that *disproportionate* force should be used, or that military force should be used though it would do more *harm* than good?

It is not a matter of satisfying a court of *law* about any of these guidelines -- last resort, proportionality, the balance of consequences and so on. The courts in question are of rationality, public opinion, and peer group understanding – and if a strong, credible and articulate case cannot be publicly made and defended under all five of the headings I have mentioned, then scepticism and cynicism about the proposed use of force in any particular case is likely to be justified.

There is one further virtue in spelling out these guideline. It would 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.

*Process.* I will be much briefer about the issue of an appropriate process for monitoring and reviewing use of force mandates once granted, although this is an issue which again tends to generate more heat than light.

To the extent that an R2P issue arises in the context of a Protection of Civilians (POC) situation, as it occasionally will – as with Cote d'Ivoire last year, where what was involved was adding extra dimensions of force authorisation to an already mandated UN mission – then the issue of monitoring and reviewing the mandate in question is unlikely to be problematic: the performance of the mission is already regularly scrutinised under existing Security Council procedures.

The trickier situation is when an explicit R2P mandate like that in Libya under UNSCR 1973 is given, which leaves the responsibility to implement it to member states acting otherwise than through a specifically endorsed and DPKO-organised mission. The member states in question will almost by definition be large and powerful, and may be unlikely – as was the P3 with Libya – to welcome regular close scrutiny of what they are doing. But they should be prepared to accept, at least informally, the obligation to report back to the Council at regular intervals, describing fully how the mandate in question is being interpreted and applied, and the progress of the situation on the ground, allowing full debate in the process on whether the continuance of the mandate in its present form is justified, and whether its terms require modification in some way.

Again it is not so much a matter of holding member states in some way legally to account: it's a matter of recognising that unless the courts of rationality, public opinion and peer group understanding can be broadly satisfied, then destructive cynicism and scepticism about these interventions is bound to grow. And the prospect of being able to repeat them in future, with the support and authority of the Security Council, which is what a rule based international order requires, will be negligible.

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. They have begun to realize, as they must, that 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.

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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.

But I think it can be achieved, with the RWP proposal, further refined and developed, playing a critical role as a circuit-breaker. 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, congenial optimist as I am, I believe it won't happen.

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[1] More specifically, R2P involves three distinct 'pillars' of responsibility, as articulated in the SG's report of 2009. 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').

[2] Summarised in footnote 26 to page 140 of my book *The Responsibility to Protect* (Brookings, 2009)