

R2P and its Application to the Crisis in Mali

Written by James P. Rudolph

This PDF is auto-generated for reference only. As such, it may contain some conversion errors and/or missing information. For all formal use please refer to the official version on the website, as linked below.

R2P and its Application to the Crisis in Mali

<https://www.e-ir.info/2013/04/16/r2p-and-its-application-to-the-crisis-in-mali/>

JAMES P. RUDOLPH, APR 16 2013

Islamists guided by a strict interpretation of the Koran. The imposition of Shariah law. Stonings to death for adultery. Amateur amputations for petty theft. Kidnappings. Ransoms. Public executions. Outright bans on Western music. Public floggings for smoking. Cultural treasures demolished. No, this is not Afghanistan. Welcome to northern Mali, where an amalgam of jihadists and Al-Qaeda affiliates (most notably, Al Qaeda in the Islamic Maghreb) now control a territory the size of France. How did this come to pass and what, if anything, can the international community do about it?

This article will attempt to sketch the recent history of Mali and the role, if any, of the norm known as Responsibility to Protect (R2P). It will lay out the trajectory of R2P, from its early days as nothing more than an aspiration to its current status as an emerging (some might say binding) norm of international law. Included in this section will be the elements that make up R2P and its firm grounding in just war theory. We will then turn to the gravamen of the text – whether R2P applies to the situation in Mali and, if so, how that application might look in practice. Following this discussion, we will explore how the United Nations Security Council (UNSC) might rely on R2P – explicitly or not – to justify its recent resolution permitting the use of force in Mali. Finally, this article will end with a discussion of “jus post bello,” another emerging norm which holds that the international community has, as a corollary to its responsibility to protect, a responsibility to rebuild. That is, after hostilities have ended, are those responsible for the military intervention duty-bound to remain until they have stabilized the situation and laid the groundwork for a functioning government? Moreover, and more fundamentally, should R2P be admitted at all to the so-called canon of international human rights?

It is hoped that by the end of this article the reader will have a more sophisticated understanding of what is unfolding in Mali; what legal justifications exist for the use of force; whether those justifications exist; and what role the UNSC and the international community can and should play in preventing future human rights abuses in Mali.

The Responsibility to Protect is not, strictly speaking, legally binding under international law. It is, at most, an emerging norm, which means that it might one day be classified as customary international law. Customary international law develops, for the most part, rather glacially, after states have followed a certain precept/norm out of a sense of obligation.[1] That is, internally/psychologically speaking, states (governed by individuals) feel compelled to continue a certain practice. After an indeterminate amount of time, the embryonic, inchoate norm graduates and becomes binding on states. For R2P advocates, there is a strong sense that the path already traveled by the norm indicates that R2P will one day soon become binding international law. Others of a more skeptical bent, however, maintain that the R2P concept will remain just that – a concept to be used when convenient and discarded when not. With the above legal context in mind, it is now appropriate to dilate on the recent (albeit short) history of R2P.

Part One: Precis of R2P's History

According to Gareth Evans, the “breakthrough” in the history of R2P came in 2001 with the work of the International Commission on Intervention and State Sovereignty (ICISS), a committee created in 2001 under the auspices of the Canadian government but involving other members of the UN General Assembly.[2] This is no doubt true, but it would be misleading to suggest that the ICISS report (to which we will turn in the section *infra*) was somehow *sui*

R2P and its Application to the Crisis in Mali

Written by James P. Rudolph

generis. Individuals before the ICISS report, in other words, had struggled in their attempts to reconcile the tension between sovereignty, on the one hand, and intervention on behalf of human rights on the other. If a state enjoys sovereignty, the reasoning goes, it follows that whatever happens within its borders is ipso facto impervious to external oversight. Those espousing this line of thought invariably point to Article 2(7) of the U.N. Charter to bolster their position.[3] Following this argument to its logical conclusion, however, leads one to a troubling proposition: human rights abusers can act with impunity, as there is nothing to gainsay their course of action. The result is that those on the ground – those experiencing hardship, deprivation, violence – have no recourse to international justice, nor can they reasonably entertain expectations of outside help. If anything, they can turn to their own government for relief. Of course, this state of affairs was wholly unsatisfactory to those committed to the idea of human rights – that is, humans, by virtue of being human, have inherent dignity and are inviolable. Thus, early advocates, mindful that the conception of sovereignty described above had been predominant for hundreds of years, had to find an accommodation. They did so not by turning international law on its head but rather by redefining sovereignty to include the element of responsibility. That is, sovereignty still involves exclusive control and supremacy over a defined territory, but it now included (according to these early advocates) the primary responsibility of the state to protect its own citizens from so-called mass atrocity crimes. This shift in thinking was not seamless, as one would expect. Reprising the brief history of this evolution, as recounted by Gareth Evans in *The Responsibility to Protect*, will therefore contextualize the fact that R2P is of recent vintage and thus still a work in progress.

1. Francis Deng – Although others have been credited with initiating the movement away from a traditional, conventional conception of sovereignty (notably Bernard Kouchner and Tony Blair), most people would agree that it was Francis Deng who meaningfully and lastingly inserted the idea of responsibility into the debate about the contours and limits of sovereignty. Deng was from 1992 to 2004 the Representative of the UN Secretary-General on Internally Displaced Persons (IDP). In this capacity, Deng confronted head-on the clash between sovereignty and human rights. He concluded that states do indeed have “positive responsibilities for their own citizens’ welfare.”[4] It was this exciting reconfiguration of sovereignty (though admittedly Deng was not the only one to conceptualize it this way) that provided, according to Gareth Evans, the “central conceptual underpinning of the responsibility to protect norm as it finally emerged.”[5] It was left to UN Secretary-General Kofi Annan and the ICISS to flesh things out.

2. Kofi Annan – Kofi Annan became the seventh UN Secretary-General in 1997. Thus, he preceded by about four years the work of the ICISS. We will therefore briefly outline his role in the development of R2P as a norm, then move on to the more detailed work of ICISS. The inherent tension referred to above (between sovereignty and human rights) is handily encapsulated by the use of a term: the “sovereignty-intervention debate.” R2P, of course, is not always about intervention (this is something to which Gareth Evans and others constantly aver), but this term helps in focusing on the crux of the dilemma. If one intervenes, one is clearly violating another’s sovereignty. Yet, having said that, if one does not intervene, one is allowing fundamental human rights to be violated with impunity, thus exposing the whole international human rights regime to the charge that there is no real bite or enforcement. In this spirit, Annan published an article in *The Economist* in 1999 in which he said: “When we read the [UN] Charter today, we are more than ever conscious that its aim is to protect individual human beings, not to protect those who abuse them.”[6] In other words, Annan implied that national sovereignty, on the one hand, had to be balanced against individual sovereignty on the other. It seems natural today, but at the time it was anything but an accepted premise. Nevertheless, Annan can rightfully take credit for at least shaking people out of their complacency regarding the sovereignty-intervention debate. It was left to the ICISS and others to pick up where Annan left off.

3. ICISS – As any proud and informed Canadian will tell you, several prominent Canadians – Foreign Minister Lloyd Axworthy, Michael Ignatieff, Gisele Cote-Harper – prompted and prodded the Canadian government into more forceful and dynamic action regarding the concept of R2P. As a result, a commission was created to explore alternatives to the standard sovereignty-intervention debate and to offer possible solutions. The ensuing report, *Report of the International Commission on Intervention and State Sovereignty*, listed core principles and foundations as a way of moving the debate into new territory. First and foremost, the commission sought to move the discussion away from any talk of a right to intervene and instead stressed the idea that states had a responsibility to protect at-risk citizens. Moreover, the term “humanitarian intervention” was jettisoned because it came to imply military force alone. One of the overriding objectives of the commission was to reframe the debate, thus allowing individuals to see that R2P also included prevention measures short of war.[7] The second principle was again linked to the idea of

R2P and its Application to the Crisis in Mali

Written by James P. Rudolph

responsibility, but this time the term was employed in its dual use – that is, states have a responsibility, as described supra, but when they are either unable or unwilling to protect their citizens from mass atrocity crimes, the international community assumes the role that the state has forfeited. Third, ICISS laid out a “continuum of obligations,” including the responsibility to prevent, react and rebuild. At each stage, the “tools” available to the international community range from diplomatic, economic, legal and security-sector measures. The point, however, was to prevent people from conflating humanitarian intervention with R2P, which, as is clear from the so-called toolkit, means much more than military intervention. To be sure, the use of force is an arrow in the R2P quiver, but it stresses time and again that prevention takes primacy. That said, when force is used – and this is the fourth contribution of the ICISS – it must be legal *and* legitimate. We will turn to these two considerations infra, but at this point it suffices to say that legality means UNSC approval while legitimacy refers to criteria grounded in just war theory.

This article, it should be stressed, is not about the history of R2P, but it is hoped that this background is constructive in giving the reader a sense of how any of this might apply in Mali – i.e., how the UN General Assembly or UN Security Council might consider it right and proper to invoke an idea to justify the use of force. And any introduction to the life of R2P would, of course, be inadequate without at least covering its application by the UN General Assembly and UNSC. We will thus very briefly touch on some of this history, after which we will delve into the elements that make up a R2P claim.

“The really big step forward in terms of formal acceptance of R2P,” Gareth Evans recounted, “came with the UN Sixtieth Anniversary World Summit in September 2005.”[8] This is so because a UN panel – the UN Secretary-General’s High-Level Panel on Threats, Challenges, and Change – essentially endorsed the core idea of the ICISS report, stating: “The Panel endorses the emerging norm that there is a collective international responsibility to protect, exercisable by the Security Council authorizing military intervention as a last resort, in the event of genocide and other large-scale killing, ethnic cleansing or serious violations of humanitarian law which sovereign governments have proved powerless or unwilling to prevent.”[9] Of course, this report would have been a dead letter without the Secretary-General actually invoking it in his report to the World Summit meeting. Kofi Annan took up the cause by issuing a report, *In Larger Freedom: Towards Development, Security and Human Rights for All*, which specifically mentioned R2P. “I believe,” Annan said, “that we must embrace the responsibility to protect, and, when necessary, we must act on it.”[10] All of this culminated in the UN General Assembly World Summit Outcome Document, in which paragraphs 138 and 139 reiterated that (1) states have a responsibility to protect against mass atrocity crimes and (2) that the international community assumes this responsibility when “authorities are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing, and crimes against humanity.”[11] Besides this imprimatur of legitimacy and acceptance, the UN Security Council also has relied on the Outcome Document, citing it at least twice.[12] Having said that, we cannot dilate further on this fascinating history. Suffice it to say that the UNSC has invoked and relied on R2P, thus bestowing even more authority and credibility on a concept that, in its incunabulum just 12 years ago, was nothing more than an amorphous aspiration. With this history and context in mind, we can now turn to the heart of the discussion – what the elements of R2P are and how any of this may or may not apply to the humanitarian crisis unfurling in Mali.

Part Two: R2P Elements and Applicability to Mali

As alluded to supra, humanitarian intervention, with its exclusive focus on the use of force to end mass atrocity crimes,[13] was seen as too limiting and too controversial to ever gain acceptance as a universally workable doctrine.[14] To be sure, R2P does not claim to possess such status, but the so-called Global South countries were – and for the most part remain – skeptical of any doctrine attempting to justify intervention into ostensibly internal matters. For many of them, humanitarian intervention simply represents another attempt by the West to package imperialistic impulses in the mantle of human rights.[15] As a result of this resistance, those involved in the ICISS report were acutely aware of the need to place more emphasis on preventive measures. Thus was born the idea that R2P’s overarching leitmotif was the early and active engagement of the international community to prevent mass atrocity crimes from occurring in the first place. As one can imagine, humanitarian intervention (like criminal law) is triggered only after human rights have been violated. The need, then, was to have an early warning system in place to alert and empower the international community. As such, it is a bit of a misnomer to speak of the “responsibility to

R2P and its Application to the Crisis in Mali

Written by James P. Rudolph

protect” when in reality it refers principally to the “responsibility to prevent.” This emphasis on prevention was intended to allay some of the above-noted concerns regarding humanitarian intervention and the misuse of “noble” motives. With these historical antecedents in mind, we can now more fully appreciate the elements or factors of R2P

As noted, R2P was bifurcated into a legal category and a legitimacy category. With respect to the legal category, this means above all else that the United Nations – especially the UN Security Council – is to be involved. The authors of the ICISS report were not looking for an end-run around the UN; rather, they were hoping to make the process smoother so as to increase reliance on the only institution capable of bequeathing maximum legitimacy. In short, then, legality with regard to R2P means that any proposed course of action must receive a stamp of approval from the UN. Having established this, however, it is interesting to note that the ICISS authors took it a step further by insisting on a category of legitimacy. By and large, these criteria are derived from a long and proud tradition: just war theory. In order for a proposed or actual action to be considered “legitimate,” the following five criteria must be consulted: the seriousness of the harm – i.e., large-scale loss of life or ethnic cleansing; the primary purpose of the proposed action; whether there are peaceful alternatives available; the proportionality of the response; and, finally, the balance of consequences – that is, whether more good than harm will result from the intervention.

In the case of Mali, the seriousness of the harm is debatable. To be sure, serious human rights violations are occurring, and priceless World Heritage sites (especially in Timbuktu) are being wiped out.[16] But some still wonder whether these depredations rise to the level of seriousness required by R2P. As noted in the introduction, amputations, stonings, floggings and other denials of justice are now commonplace.[17] No one denies that what is happening is dreadfully unfortunate and shocking. Yet whether this kind of violence should trigger the international community’s residual responsibility to protect – and with it, non-consensual military force – is contested. Nevertheless, the point is probably moot, as the UN already has authorized military force to retake lost territory and put an end to the human rights violations. (France’s recent intervention, while significant, was at the request of Mali’s interim president, and therefore would not truly fit into the R2P rubric. It will, however, be discussed in the final section of this article. Moreover, France has independent reasons for intervening: upwards of 6,000 French citizens live in Mali and half a dozen are being held hostage by Islamists.[18])

The primary purpose of the authorization is, of course, to re-establish Mali’s territorial integrity and eradicate al-Qaeda-affiliated terrorists. As the reader doubtless has inferred, this element was designed to address the criticism that R2P was just a wolf in sheep’s clothing – i.e., that it meant aggression or neocolonialism. Thus, if some ulterior motive were unearthed (like a desire for territory), the whole operation would be seen as devoid of legitimacy. Here, the United Nations has authorized a multinational African force called the International Support Mission for Mali, but it has done so through the Economic Community of West African States (ECOWAS) and the African Union (AU). In addition, the troops preparing to retake the north, many of whom have been trained under a US-led program called the Trans-Sahara Counter Terrorism Partnership, come from Mali itself.[19] In other words, legitimacy is very much a concern for this African-led force.[20]

Peaceful alternatives must be explored before non-consensual coercive military force can be authorized. The humanitarian situation in Mali started unraveling in 2012 when the democratically elected president, Amadou Toumani Toure (“ATT”), was toppled in a coup d’état. Since then, three main Islamist groups – Al Qaeda in the Islamic Maghreb, Ansar Dine and the Movement for Unity and Jihad in West Africa – have engaged in kidnappings, forced marriages, drug trafficking and the destruction of “blasphemous” Sufi shrines. They were able to achieve such wide-ranging, carte blanche authority by driving the Malian military out of the area after a coup in Bamako, the capital, toppled the democratically elected government. (The initial collaboration with the secularist National Movement for the Unity of Azawad also helped, but deep ideological differences – Azawad advocated for a secular state while the Islamists insisted on a government based on Shariah – have since undermined any cooperation.) Peaceful measures for solving the crisis have been attempted, but to date nothing has really worked. Indeed, many, if not all, of the Islamists in northern Mali seem to relish the thought of engaging in jihad against the West.[21] Peace negotiations sponsored by Burkina Faso remain in place, but given France’s recent military intervention and the collapse of the December 2012 cease-fire, hopes seem dim at this point for a truly peaceful solution. The stage, in other words, seems set for more aggressive military force by outside forces. Nevertheless, UN Security Council Resolution 2085 (which authorizes the intervention) envisages a two-step process, with support for a political

R2P and its Application to the Crisis in Mali

Written by James P. Rudolph

dialogue between the Malian authorities and the Islamists as a condition precedent to the use of force.[22]

The military intervention in northern Mali has been authorized but not yet implemented. Thus, any discussion of the last two elements – proportionality and balance of consequences – would be mere conjecture. Nonetheless, it is interesting to note that the force that has been authorized, at 3,300 troops, is probably insufficient to dislodge well-armed and well-financed Islamists and other rebels in a territory the size of France.[23] Moreover, this desert terrain is, by most accounts, punishingly inhospitable,[24] and the Islamists seem entrenched and ready to fight to the death. In other words, proportionality is probably not an issue at this point (if anything, the force is not yet robust enough), and the international community will have to decide in the coming months if this proposed action will indeed result in a more stable, peaceful and open society for Mali.

Now that we have covered the legitimacy issue, it is safe to turn to the specifics of what the international community might actually do vis-à-vis Mali. Interestingly, R2P entails more than the responsibility to protect. In fact, the concept has built within it three responsibilities: the responsibility to prevent, the responsibility to react and the responsibility to rebuild. As the situation in Mali seems already to have passed the point where prevention would be effective, the real focus must now be on the responsibility to react. Notwithstanding this conclusion, and to ward off any confusion concerning the use of force, the responsibility to react also has preventive steps to take before coercive, non-consensual force is used. Thus, the focus must first be on the other options within the reaction “toolbox,” and only if these fail can we seriously consider the use of force. These other steps include political and/or diplomatic responses; constitutional and/or legal responses; economic and social responses; and security-sector measures. We will take these in turn.

Political and diplomatic responses are actually divided into political incentives and political sanctions. Incentives include things like diplomatic recognition, membership in international organizations, cancellation of debt, etc. In the case of Mali, we are dealing with a bifurcated country (with two-thirds of the country controlled by Islamists), so these incentives are unlikely to work, because the real issue is how to get the government in Bamako back in control of the north. Likewise, political sanctions (things like withdrawal of diplomatic recognition, expulsion from international organizations, travel bans) are, like political incentives, of dubious utility.

The next option, therefore, is the constitutional/legal option, but to be precise, the constitutional option is really about long-term, structural changes tailored to prevent atrocities in the first place, so the focus here is on legal options. In short, this means criminal prosecution. First and foremost, national governments continue to play the primary role in enforcing international law, and this includes prosecution for crimes subject to universal jurisdiction like piracy, genocide, torture, crimes against humanity, etc. It is only when the state is unable or unwilling to prosecute (other than referrals by the Security Council) that institutions like the International Criminal Court (ICC) get involved. Unfortunately, the government in Bamako, which lost control of two-thirds of the country, seems unable to mount an effective prosecution of the crimes being committed in the north. Indeed, Mali is seeking international help by, among other things, asking the ICC to launch an investigation into possible war crimes, signaling its intent to rely on outside help.[25] But launching an investigation and actually apprehending suspects are two different things, as the case of Omar al-Bashir in Sudan so tristfully reminds us.

The application of economic and social measures – the next analytical step in the process – is related to political and diplomatic incentives/sanctions, and they are, for the same reasons cited above, suspect. Thus, we are left with the final step in the analysis – security measures and, possibly, the use of force. Security measures include peacekeeping under Chapter VI of the UN Charter (dubbed Chapter Six and a Half by Dag Hammarskjöld because the term “peacekeeping” is not found in the Charter[26]). Peacekeeping forces are primarily engaged in monitoring, supervision and verification of cease-fires and peace agreements, so this option, at least in the case of Mali, is premature, as the threat of instability and destabilization from the north has not yet been neutralized.

This brings Chapter VII, Article 42 of the United Nations Charter into play: “Should the Security Council consider that measures provided for in Article 41 [measures not involving the use of force] would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security.” Violations of human rights can constitute threats to the peace, so the triggering

R2P and its Application to the Crisis in Mali

Written by James P. Rudolph

mechanism for UN action in Mali seems already to be in place. Indeed, UN Human Rights Commissioner Navi Pillay has already expressed concern about the human rights violations occurring in Mali. “According to credible reports that my office has received,” Pillay said in a report to the Human Rights Council, “the various armed groups currently occupying northern Mali have been committing serious human rights violations and possibly war crimes.”[27] Pillay listed “amputations, the stoning to death of an unmarried couple, summary executions, recruitment of child soldiers, as well as violations of women’s rights, children’s rights, freedom of expression, the rights to food, health, education, to freedom of religion and belief, and cultural rights.”[28]

The question, though, relates to specifics: What, exactly, would the use of force in Mali look like? The latest United Nations estimates suggest as many as 500,000 people have fled the brutality and bloodshed in the north,[29] so – at a minimum – it could involve the establishment of safe havens in Mali and in the neighboring countries to which they are fleeing. Arms embargoes and jamming of radio frequencies could also interfere with the Islamists’ ability to communicate with one another. Many of the insurgents/Islamists in northern Mali came from Libya after the fall of Gaddafi or from an Islamist group (Boko Haram) in Nigeria. In other words, communication between and among these disparate and scattered groups will be vitally important, so interfering with that ability could prove debilitating. But all of these suffer from one fundamental weakness: they are unlikely to extirpate the fundamentalists in the north of the country. Thus, it appears as though direct military action is the only alternative if eliminating the extremists is indeed the objective. For this, the UNSC would have to authorize the use of force. Conveniently for us, the UN has authorized the use of force, so we are in the unique position of being able to comment on it herein as it unfolds and develops. Yet interestingly, the UNSC acted pursuant to its authority under Chapter VIII of the UN Charter, which involves regional agencies.

Chapter VIII of the UN Charter acknowledges the important role played by regional organizations, but there is a catch: “No enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council...” In other words, ECOWAS, having received the blessing of the UN, has the necessary mandate to proceed with the deployment of troops in Mali. But to reiterate, there are serious misgivings about the force and its ability to carry out its mission – i.e., remove the Islamists, restore law and order and reestablish Mali’s territorial integrity. In fact, Mali’s army failed its most recent test in the town of Konna, when Islamists overran “a long-held defensive position in the center of the country...dealing a significant blow to the Malian Army in its efforts to contain the militants who have seized the nation’s north.”[30] General Carter F. Ham, the commander of the Pentagon’s Africa Command, acknowledged that such a development represented a “significant change” to the equation.[31] Furthermore, the regional powerhouse and leader of the multinational force, Nigeria, is dealing with its own Islamist insurgency,[32] so the prospect of an effective regional alliance to oust the Islamists is, at the moment at least, distant. This is because regional solutions bring into play regional rivalries. Algeria is not keen on having troops from ECOWAS on its border, and “the Malian army itself has been lukewarm about being on the receiving end of support from its African neighbours, given the involvement of ECOWAS troops in human-rights abuses in previous missions in Liberia and Sierra Leone.”[33] These factors, Welsh concludes, “illustrate that while regional organizations are often touted as the legitimate and preferred actors in crises such as Mali, they cannot always fulfil their mandate. Capacity and politics can get in the way.”[34] Perhaps in a concession to this reality, Gen. Ham has noted that the U.S. has begun *unarmed, remotely piloted aircraft operations from Niger in support of intelligence-gathering efforts in the region.*

Hence, R2P provides us with a framework for thinking about how best to respond to the crisis in Mali. There are available to the international community several options short of coercive, non-consensual force, and these measures must be given serious and sustained attention. That said, some of them (like ICC prosecution) remain Pollyannaish in the absence of international cooperation and coordination. And, to be fair, some skeptics will question whether R2P has a role to play at all, noting that it applies only to large-scale loss of life and conscience-shocking atrocities. They may be right, but at this stage, given reports of war crimes and other human rights violations occurring in Timbuktu and other northern cities, it is probably best not to prematurely exclude R2P from the equation.

Part Three: An Emerging Norm?

R2P and its Application to the Crisis in Mali

Written by James P. Rudolph

Now that we have completed our tour of the history of R2P and how it might actually be applied in Mali, it is time to transition to two fundamentally important – and concluding – topics: whether R2P, as an emerging norm, should even be admitted to the so-called canon of human rights and, if so, whether the norm also includes the above-noted responsibility to remain and rebuild – i.e., *jus post bello*. In other words, yes, there is a formal debate – and a formal process – for whether emerging norms really should count as internationally recognized human rights.

The debate to which we referred *supra* deals with the expansion of international human rights: should there be limits within which new rights develop? In 1986, the UN General Assembly (GA) adopted a resolution titled “Setting International Standards in the Field of Human Rights,” in which the GA set forth five criteria to consider when considering admitting emergent rights into the “canon.” The criteria are: (1) are the proposed international rights consistent with the existing body of international human rights law?; (2) are the proposed rights of fundamental character and do they derive from the inherent dignity and worth of the human person?; (3) are the proposed rights sufficiently precise to give rise to identifiable and practicable rights and obligations?; (4) are the proposed rights protected by, where appropriate, realistic and effective implementation machinery, including reporting systems?; and (5) do the proposed rights enjoy broad international support?[35]

First and foremost, is R2P consistent with the existing body of international human rights law? With all the talk of military intervention, it is easy to forget that, at heart, R2P is about protecting human beings. It is about bolstering prevention efforts to nip potential human rights abuses in the bud; it is about offering assistance to countries with limited capacity; it is about employing diplomacy, economic sanctions and international prosecution; and it is, finally, about the use of force as a last resort. All of these measures are meant to prevent and remedy mass atrocity crimes. In other words, international human rights law, with its concern for human equality and dignity, would be bolstered, not weakened, by the admission of R2P as a fully-fledged right. Notwithstanding the criticism of R2P as dressed up colonialism, this author feels strongly that R2P is consistent with the existing body of human rights and therefore concludes that the first element has been satisfied.

Second, is R2P of fundamental character and does it derive from the inherent dignity and worth of the human person? Again, R2P is concerned, above all else, with the prevention of mass atrocity crimes. The shift away from humanitarian intervention happened because many in the human rights field concluded that more needed to be done to prevent abuses from happening in the first place. This is why there are options to choose from when one is looking for alternatives short of force. Yet at the same time R2P had to include as an option the use of force to stop violations of internationally recognized human rights. Critics would contend that the primary purpose of R2P is something less noble, but the history and the documents suggest another story. They evince a desire, based on the idea that humans have inherent dignity and worth, that leaders have a grave responsibility to protect those within their borders from gross and systematic abuses. It seems evident, in other words, that R2P is indeed in keeping with the inherent dignity and worth of the human.

Third, is R2P precise enough to give rise to easily identifiable and practical obligations? The premise of R2P is clear and forceful: States have the primary responsibility to protect their citizens from mass atrocity crimes and, when they are either unable or unwilling to accomplish this, the international community assumes this role. And the whole point of the R2P “toolbox” was to lay out a useful and practicable set of alternatives to effectuate the R2P premise. Thus, although more remains to be done, it seems clear at this point that there are easily identifiable rights and obligations attached to R2P.

Fourth, is there a realistic and effective implementation machinery in place? Like most human rights, implementation and enforcement are always concerns. A legal right includes, by definition, a remedy. Oftentimes in the field of human rights, the remedy depends in large part on political will. That is, are states cooperating with their reporting obligations and are they offering assistance and support? The difference with R2P is that it is meant to protect and enforce already established human rights norms, so when the international community receives information regarding abuses, R2P is triggered. In other words, R2P depends to a large extent on the implementation machinery that already exists. To be sure, when military force is used pursuant to R2P, political will is needed from troop-contributing states, but the information on which they are acting comes from the extant human rights armamentarium. Therefore, even though the enforcement mechanism of R2P is derivative, it is there and available.

R2P and its Application to the Crisis in Mali

Written by James P. Rudolph

Finally, does R2P enjoy broad international support? Based on the history provided above, it seems clear that there is widespread support for the concept and its implementation. After all, R2P was endorsed by the General Assembly and has been invoked by the UN Security Council, most recently in the case of Libya. To be sure, some states – notably Russia and China – remain leery of R2P's full implications. Nonetheless, worldwide support for R2P seems genuine and lasting. In sum, then, R2P has broad and lasting support, and should be admitted forthwith to the canon of international human rights.

Jus post bello and Conclusion

The concluding section explores the idea that there is a corollary to R2P known as *jus post bello*, or the responsibility to rebuild. In other words, after hostilities have ended, does the intervening state (or group of states) have a duty to stabilize the country before departing? In the case of Mali, the question is whether the UNSC resolution also envisions some kind of post-conflict arrangement whereby forces transition from military objectives to peacekeeping functions. Stated differently, Mali is effectively two countries at the moment, so when (if) the two halves are united, will the victorious forces be asked to engage in the reconstruction of Mali's battered political institutions? Before the coup, Mali enjoyed a reputation as a stable and functioning democracy, so it should not be exceedingly difficult to recapture some of that spirit. But complicating matters is the ethnic strife that is present in the north. The Tuaregs who teamed up with the Islamists were eventually sidelined, so at present the Islamists are dominated by ethnic Arabs who consider themselves "white" while those in the south are considered inferior blacks. Added to this mix is the long and bitter history of the Tuareg (Berber) nomads, who for years have attempted to carve out some kind of autonomy in the north. Thus, if there is a post-conflict solution to be had, it will have to wrestle with – and hammer out – these seemingly intractable divisions.[36]

Given these factors, any peacekeeping force would probably be involved in monitoring a cease-fire or observing elections – what those in the field call "protecting the population and creating space for a political solution." [37] What we are concerned with, however, is whether the force itself would gain added strength by pointing to R2P as a source of legitimacy. As noted, the concept of *jus post bello* is newer than R2P, so it remains an emerging norm. This norm, if it is to be accepted as a fully mature right, would be put through the same process that was described above to analyze R2P as a human right. It is true that UN General Assembly resolutions are not binding, but over time they can ripen into customary international law. We will not repeat the step-by-step process here, but suffice it to say that *jus post bello* will likely gain more and more acceptance as a logical and necessary corollary to R2P.

R2P's history is short but jam-packed with fascinating and fast-moving international law, diplomacy and, yes, fortuitous timing. In just 12 short years it went from being an inchoate aspiration to something that in 2011 was explicitly invoked by the UN Security Council vis-à-vis Libya. The details and elements of R2P have herein been applied to the situation in Mali, and this author has concluded not only that it has a positive role to play in responding to the human rights violations occurring there, but that it also is ripening into a fully-fledged member of the human rights canon. Humanitarian intervention is still viable, but it, unlike R2P, is not as flexible or focused on prevention. R2P thus offers itself as an attractive, all-encompassing alternative to those who want more emphasis on measures short of war.

Whatever happens, we must keep in mind that this is not just about arcane references to the UN Charter and the justifications for when force can be used, though these are important considerations. There are other, more humane reasons, for why we should all be engaged and concerned. These have to do with the destruction of priceless world heritage sites, the existence of thousands of refugees, the exploitation of women and the denial of the right to self-determination. In other words, things that have to do with the common heritage of humankind and our ability to develop politically, culturally, economically and socially without fear and abuse. This, more than anything else, is why the crisis in Mali deserves more attention.

—

James P. Rudolph is an attorney in California and Washington, D.C. with an LL.M in international law. He worked

R2P and its Application to the Crisis in Mali

Written by James P. Rudolph

for the U.S. Agency for International Development (USAID) during the Clinton administration.

- [1] See Restatement of the Law (Third), the Foreign Relations of the United States, section 102(2): “Customary international law results from a general and consistent practice of states followed by them from a sense of legal obligation.”
- [2] Gareth Evans, *The Responsibility to Protect* (Washington, DC: The Brookings Institution, 2008), p. 31.
- [3] “Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state...”
- [4] Francis Deng, *Sovereignty as Responsibility: Conflict Management in Africa* (Washington, DC: The Brookings Institution, 1996).
- [5] Evans, *The Responsibility to Protect* (Washington, DC: The Brookings Institution, 2008).
- [6] Kofi Annan, “Two Concepts of Sovereignty,” *The Economist*, September 18, 1999.
- [7] Gareth Evans, *The Responsibility to Protect* (Washington, DC: The Brookings Institution, 2008), pp. 41-42.
- [8] *Ibid.* at 44.
- [9] High-Level Panel on Threats, Challenges, and Change, *A More Secure World*, annex 1, recommendation 55, p. 106.
- [10] Kofi Annan, *In Larger Freedom: Toward Development, Security and Human Rights for All*, A/59/2005 (United Nations, 2005), paragraph 135; available at www.un.org/largerfreedom.
- [11] UN General Assembly, “World Summit Outcome 2005,” Resolution A/RES/60/1 (October 24, 2005); available at www.un.org/summit2005/documents.html.
- [12] Resolution 1674 of April 28, 2006, operative paragraph 4, which reads: “Reaffirms the provisions of paragraphs 138 and 139 of the 2005 World Summit Outcome Document regarding the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity”; available at www.un.org/News/Press/docs/2006/sc8710.doc.htm.
- [13] Alton Frye, *Humanitarian Intervention: Crafting a Workable Doctrine* (Council on Foreign Relations Press, 2000).
- [14] Humanitarian intervention is defined as “the threat or use of force by a state, group of states, or international organization primarily for the purpose of protecting the nationals of the target state from widespread deprivations of internationally recognized human rights.” Sean D. Murphy, *Humanitarian Intervention: The United Nations in an Evolving World Order* 11-12 (1996).
- [15] Bartram S. Brown, *Humanitarian Intervention at a Crossroads*, 41 *Wm. & Mary L. Rev.* 1683, 1727 (2000) (“Perhaps the most compelling argument against recognizing a right of humanitarian intervention is that it might be used as a pretext for military intervention actually motivated by other, less noble, objectives.”). See also Louis Henkin, *How Nations Behave: Law and Foreign Policy* 144-145 (2nd Ed. 1979) (“Humanitarian intervention can too readily be used as the occasion or pretext for aggression.”).
- [16] Karima Bennouna, “The Taliban of Timbuktu,” *The New York Times*, January 23, 2013 (“Even holy places are not safe. These self-styled ‘defenders of the faith’ demolished the tombs of local Sufi saints in the fabled city of Timbuktu.”). Such actions have led people to refer to Mali as a potential Afghanistan-in-the-Sahara.

R2P and its Application to the Crisis in Mali

Written by James P. Rudolph

- [17] Adam Nossiter, "Islamists' Harsh Justice Is on the Rise in North Mali," *The New York Times*, December 27, 2012.
- [18] Steven Erlanger, Adam Nossiter and Alan Cowell, "Malian Town Falls to Islamist Rebels, France Says," *The New York Times*, January 14, 2013 ("France now has more than 400 troops in Bamako, mainly to ensure the safety of French citizens and to send a signal to the Islamists...").
- [19] John Campbell, "French Enter Mali But How Will it End?," *Council on Foreign Relations*, January 14, 2013.
- [20] Edward Cody, "French action in Mali exposes absence of African neighbors, Western allies," *The Washington Post*, January 15, 2013 ("In addition to Nigeria, Togo has pledged 500 soldiers, Benin 300, Niger 600 and Burkina Faso 500").
- [21] Ibid., "Islamists' Harsh Justice In on the Rise in North Mali," *The New York Times* ("...the Islamists, undeterred by international threats against them, warned reporters that eight others [thieves] 'will soon share the same fate [amputation].'").
- [22] Tobias Koepf and Jon Temin, "How Will France's Surprise Intervention in Mali Affect a Longer-Term Solution?," *United States Institute of Peace*, January 17, 2013 ("The resolution included support for a political dialogue between the Malian authorities, Ansar Dine...and the Tuareg rebel group MNLA.").
- [23] Colum Lynch, "U.S.- and European-backed force will try to rebuild Mali's military," *The Washington Post*, December 20, 2012 ("The Obama administration has harbored deep misgivings about the ability of a Malian-led force to prevail in combat with Islamic radicals in the region..."). See also Will Ross, "West Africa prepares to take on Mali's Islamists," *BBC News*, November 20, 2012 ("The Malian army is split, demoralised...").
- [24] "A look at why quick intervention happened in Central African Republic rebellion but not Mali's," *Associated Press*, January 4, 2013.
- [25] Emily Alpert, "International court launches investigation of Mali abuses," *The Los Angeles Times*, January 16, 2013 ("As aid groups bemoan the suffering of people in embattled Mali, the International Criminal Court said it launched an investigation Wednesday of alleged crimes against humanity committed by armed groups in the country."). This investigation will also include allegations regarding the use of child soldiers.
- [26] Erik K. Rundquist, "Peacekeeping," *Oxford Bibliographies*; available at www.oxfordbibliographies.com.
- [27] "Top UN official condemns amputations, human rights violations in northern Mali," *UN News Centre*, September 17, 2012.
- [28] Ibid.
- [29] Alice Thomas, "Hidden Victims: Mali's Internally Displaced People," *Think Africa Press*, November 14, 2012 ("To date, over 400,000 Malians...have fled the north, with about half seeking refuge in neighboring countries."). See also Mark Doyle, "Mali Intervention by Ecowas: refugee fears," *BBC News Africa*, December 14, 2012. Doyle's numbers come from a United Nations aid coordination body called the Inter-Agency Standing Committee.
- [30] Adam Nossiter, "Mali Government Is Left Reeling After Islamists Take Village Long Held by Army," *The New York Times*, January 11, 2013. See also "Mali Islamists 'enter' Konna after clashes with army," *BBC News Africa*, January 10, 2013 ("...at present Nigeria's military is overstretched. There are troops on active duty in thirty-three of the thirty-six Nigerian states and the army, in effect, has the lead in responding to the Boko Haram insurgency in the north.").
- [31] Adam Nossiter, "Mali Government is Left Reeling After Islamists Take Village Long Held by Army," *The New*

R2P and its Application to the Crisis in Mali

Written by James P. Rudolph

York Times, January 11, 2013 (“If true, this is a significant change in the situation.”).

[32] John Campbell, “Nigeria’s role in the Mali intervention,” *Council on Foreign Relations*, January 15, 2013.

[33] Jennifer Welsh, “Sending soldiers to Mali may be the only solution,” *The Globe and Mail*, January 14, 2013.

[34] *Ibid.*

[35] UN General Assembly, Resolution A/RES/41/120.

[36] Scott Straus and Leif Brottem, *The New York Times*, January 18, 2013 (“The jihadis are successful today in part because of the perennial weakness of the Malian state, a failed political process in Mali, and deep multifaceted dissatisfaction among Malians with regard to how politics have been practiced and resources allocated. Long-term success will turn on rebuilding the political process in Mali.”). Straus and Brottem go on to list the three things that must happen if Mali is to reemerge as a peaceful and stable democracy: First, the democratic process must be reinvigorated; second, the military must not meddle in politics; and third, a durable solution for northern Mali is required.

[37] Max Fisher, “Is Mali another loss for counterintelligence?,” *The Washington Post*, January 15, 2013.

About the author:

James P. Rudolph is an attorney in California and Washington, D.C. with an LL.M in international law. He worked for the U.S. Agency for International Development (USAID) during the Clinton administration.