

# Libya: a Turning Point for the Responsibility to Protect Doctrine?

Written by Carlo Focarelli

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CARLO FOCARELLI, APR 6 2011

The Libyan Crisis is in some respects a turning point in the 'history' of the responsibility to protect doctrine (RtoP).

First, the UN Security Council has *clearly* embraced RtoP. This is apparent from a number of provisions found in Resolution 1973 (2011), to be combined with those contained in Resolution 1970 (2011). Some of these provisions are far reaching and unprecedented. Resolution 1973 (2011) is very broad in authorizing the use of force. It goes far beyond the 'no fly zone' to authorize every military action necessary for the protection of the civilian population, expressly excepting only 'a foreign occupation force of any form on any part of Libyan territory.' The decision to adopt Resolution 1973 (2011) was extremely timely; only a few hours before, Gaddafi announced that his troops would commit a massacre in Benghazi. Also the preconditions for intervention are rather unusual, in particular the support for sanctions by the Libyan representative at the UN Security Council (UN Doc S/PV.6491, at 7-8), together with the insurrection unfolding on the Libyan territory.

The Russian Federation and China have been seen to accept RtoP, at least in this case, by abstaining in the Security Council's voting of Resolution 1973 (2011), although the Russian Federation soon critiqued the bombing of Libya by the Coalition and China grounded its abstention in the great importance it attaches to the requests of the Arab League and the African Union. Importantly, the Russian Federation and China voted in favour of Resolution 1970 (2011) referring the Libyan situation to the International Criminal Court (ICC) to investigate crimes against humanity committed from 15 February 2011 onwards, that is, from just a few days before adopting the resolution. The United States, the Russian Federation, and China seem now prepared to 'use' the ICC, and hence in some sense to recognize it.

The Libyan case is different from all other previous major conflicts after the end of the Cold War. The bombing of Serbia (FRY) in 1999, which claimed to be a humanitarian intervention by a number of intervening states, was not authorized by the UN Security Council. Russia, China, India, and the NAM strongly condemned the bombing. The notion that NATO was operating 'on behalf of the international community' was simply false. Nor was there any authorization from the Security Council in the 2001 Afghanistan War or in the 2003 Iraq War. In the Libyan case, indeed, there is an authorization and it seems that no serious protests have been raised thus far. The UN Security Council is not, and should not, be a global sheriff, but when its action enjoys wide support, then states acting under its authorization are to be taken as acting on behalf of the international community as a whole.

Second, RtoP has *not* been endorsed *in its entirety* by Resolution 1973 (2011). This resolution states that it is for the Libyan authorities to protect the Libyan people and, taking note that these authorities have failed to do so, authorizes the use of force for the protection of the victims of Gaddafi's brutal repression. It assumes that it is up to the international community to react. Resolution 1973 says nothing about what will happen next, in particular about the 'responsibility to rebuild', one of the three pillars of RtoP in the 2001 ICISS' Report. This has invited questions about the 'objective' of the intervention, especially from strategic analysts. Resolution 1973 (2011) states that the objective is to protect the civilian population. It may be questioned what this exactly means (e.g. whether the authorization covers the overthrow of Gaddafi) and the range of possible meanings is wide, but certainly not unlimited. What can be proved not to be aimed at the protection of civilians goes beyond the authorization.

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Third, the partial endorsement of the doctrine by the Security Council does not mean that this latter will necessarily follow its own example in future cases, even less that it will do so on the basis of 'egalitarian' and 'just' global policy considerations. The doctrine remains grounded in a case-by-case assessment by the Council and dependent on the majorities of the day. It also, quite inevitably, will depend on a great many other factors such as urgency, prospects of success, military costs, possible benefits, foreseeable reaction, new alliances, risks of escalation, surrounding local environment, likelihood that military operations will end as early as possible, local political destabilization, cross-border spill-over effects, outflows of refugees, state-building prospects, and so forth.

Interventions will continue to be selective and hypocritical, although one cannot but start somewhere. Major powers will remain reluctant to intervene when there is no gain in sight. Weaker states will remain sceptical and suspicious towards a doctrine that is destined to work one way, that is, from Western countries (or Western-led countries) towards the others, never the other way round. The UN General Assembly is unlikely to use its 1950 'Uniting for Peace' resolution, as suggested by the 2001 ICISS' Report, to take enforcement measures in cases where the Security Council is stuck because of the veto of its permanent members. The Assembly has failed to use this resolution in recent years when the Security Council has refrained from endorsing RtoP. The Libyan case shows that, unlike in the past, regional organizations, such as NATO, are not prepared to intervene without the green light of the UN Security Council. Unilateral humanitarian intervention is confirmed as internationally unlawful. No one was actually prepared to intervene without an authorization of the Security Council, not even within coalitions of the willing, let alone unilaterally.

There has never been an international law norm (nor an 'emerging norm', as the ICISS's Report in 2001 suggested) allowing RtoP in the specific sense of justifying otherwise unlawful unilateral measures taken by individual states. It is one thing to understand RtoP as a guide for political mediation, it is quite another to use it as a justification for otherwise internationally unlawful acts, especially military intervention. While the first aspect is straightforward, the second is highly questionable and heatedly debated. Nor is there a norm, as noted earlier, that obliges the UN Security Council to apply RtoP.

Fourth, military operations inevitably cause casualties and kill innocents. The intervening states are operating under the 'authorization' of the Security Council. There is no obligation to intervene. Once a state has made the decision to take part in the military operation, then its recourse to force is lawful within the terms of the authorization, but the whole range of operations are conducted by the intervening states and are legally attributable to them. It is hoped that enquiries will be made, and cases will be brought to international and domestic courts if need be, to find whether violations of international law, in particular of international humanitarian law, have been committed by the Coalition and NATO-led intervening states. This holds true for any police action within states, and there is no reason why it cannot also apply to military interventions at global level. The intervening states should be prepared to account for possible violations of the law and abuse of power.

Fifth, IR realists contend that wars are always dictated by the same basic motives, although each has its own particularities. Realists do not believe in 'moralized' international relations and hardly believe that the Libyan conflict will inject more 'morality' into inter-state relations. They may be right. But the jurist has no need to determine whether there is, or there will be, more 'morality' in international relations. The point is that a certain military action is under way, it is unfolding on the basis of a certain legal act issued by a certain authority called the Security Council, this act might well have been not adopted for lack of the majority required, no state was apparently ready to intervene (despite its presumable interest in doing so) without such legal act. This makes a difference. It may well not be 'morality', but still it is something. History changes day by day, and does not change from 'cynical' to 'moral' overnight. Fortunately so, perhaps.

Finally, as St Augustine memorably affirmed when he asked, 'justice being taken away then, what are kingdoms but great robberies?', the good news is that political leaders who use the state for personal gain and to accumulate power to oppress other human beings may be *personally* targeted by the Security Council's worldwide enforceable sanctions, authorized military intervention, and ICC investigation for possible commission of international crimes—certainly a prospect that (although susceptible of elusion) they would do without if they could. The process towards more justice in defence of the most vulnerable will be long and will probably fail. But people are called upon

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to realize that political leaders of *every* country (including *Western* countries) are responsible for what they do and must account for their misdeeds. Rulers who conquer or purchase statehood to gain impunity cannot be tolerated. Violence is to be banned, but there is also a time when violence is necessary for the protection of the most vulnerable. The international community is mobilizing and the Libyan case may hopefully be a good beginning.

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