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## RESPONSIBILITY TO PROTECT (R2P) AND THE SYRIAN REFUGEE CRISIS: A MISSED OPPORTUNITY?<sup>1</sup>

### A RESPONSABILIDADE DE PROTEGER (R2P) E A CRISE SÍRIA DOS REFUGIADOS: UMA OPORTUNIDADE PERDIDA?

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**Abstract:** The paper debates the concept of Responsibility to Protect (R2P) and its applicability to the recent humanitarian Syrian crisis. By providing an insight on the conflict, it applies the general requisites of the doctrine to the situation at hand, providing different approaches to it. The general view of R2P as an emerging norm of customary international law is then challenged in the light of the conflict, assessing the reasons why it was considered not applicable under the mass atrocities perpetrated in Syria since 2011, asserting that there is nothing normatively new about the doctrine. The paper suggests instead that R2P's strongest argument is on its didactic and conceptual simplicity, which can be used to provide a better enforcement of already existing norms, proving its applicability as such.

**Síntese:** O presente trabalho elabora acerca do conceito de Responsabilidade de Proteger (R2P) e a sua aplicabilidade na recente crise humanitária Síria. Através de uma análise do conflito, são postos em prática os requisitos teóricos da doutrina, indagando da sua existência como norma emergente de direito costumeiro internacional. É elaborada uma crítica à doutrina em face das razões que impediram que fosse usada na crise dos refugiados da guerra civil Síria, defendendo que não existe nada de normativamente novo na sua génese, antes resultando de normas já existentes no Direito Internacional. Argumenta-se antes que o verdadeiro ponto forte da teoria se encontra no seu carácter didático/pedagógico e na sua simplicidade conceptual, que pode ser usada como garantia de uma maior coercibilidade de normas já existentes.

**Keywords:** Responsibility to Protect; Humanitarian Intervention; Refugees; Syria; International Law.

**Palavras-Chave:** Responsabilidade de Proteger; Intervenção Humanitária; Refugiados; Síria; Direito Internacional.

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**Introduction;** *Section I - The Responsibility to Protect and the dawn of a new era for International Law; Section II – R2P and the Syrian Refugee Crisis ; Section III – A truly new doctrine?*

## INTRODUCTION

The world faces today one of the largest humanitarian crises since the forced migrations that were imposed by the Second World War, with the astonishing number of 59.5 million displaced persons in 2014<sup>3</sup>. Since 2001, and with the advent of a growing awareness towards national and regional atrocities, following the crimes committed in Somalia, Bosnia and Herzegovina, Kosovo and Rwanda, the international community decided to act and to reaffirm its power as a united force towards peace. The doctrine of Responsibility to Protect, regarding sovereignty as Responsibility, was held as the great new step towards the accountability of States for actions taken against their people, transforming the concept of sovereignty into a duty rather than a right. The *El Dorado* of International Law was rising: an international community together, if necessary acting against states, to reaffirm the values of peace and respect for human rights, ensuring that the atrocities that were seen in the past XX century would never again take place. Echoes of «Never Again» filled the international law doctrine as bells of good news.

This was the international mood in the first decade of 2000, with promising goals and objectives for the millennium to come.

It is in this context that the doctrine of Responsibility to Protect should be understood and critically analyzed.

This paper intends to bring a more realistic perspective over the latest developments of the doctrine of R2P when faced with the recent Syrian refugee crisis, debating whether it should be seen as a “missed opportunity” to prove its applicability. For this purpose the subject will be divided into three main sections: Section I provides a short insight over the developing process of R2P from its creation to where it stands now; Section II applies the criteria set forth in Section I, trying to understand whether the doctrine could be applicable to the recent Syrian crisis, while Section III offers a critical analysis of the reasons that lead the international community to remain idle in not applying the doctrine that it has been defending for the past 15 years, arguing for the need of a distinct view on the topic.

### Section I: The Responsibility to Protect and the dawn of a new era for International Law

The doctrine of Responsibility to Protect (R2P) derives from one of the most fundamental questions of international law: Are there limits to internal sovereignty? And if so, when breached, do they justify an intervention (whatever

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3. <http://www.unhcr.org/news/latest/2015/6/558193896/worldwide-displacement-hits-alal-time-high-war-persecution-increase.html>. With respect to the latest decade, the numbers have risen from 37.5 million in 2005, to 43.7 million in 2010 and finally 59.5 in 2014. These numbers do not take into account the last two years, where the Syrian refugee crisis hit its highest point.

shape it might take) on the part of the international community?

R2P contends therefore with the oldest obstacle on the implementation of a true global legal system, having pretensions of shifting its concept from the classical Jean Bodin's formulation of «*La souveraineté est la puissance absolue et perpétuelle d'une République.*»<sup>4</sup> to sovereignty as a duty to protect, as prerogative allowed by the international community insofar as it is executed according to its values. It is, therefore, as CRANSTOM puts it, "a 'revolution of Sovereignty'<sup>5</sup>, where States are regarded as institutions abiding to a higher set of values, paying due respect to them, and acting internally accordingly.

This so called revolution has been growing since the beginning of the 2000's and it is there where we can trace its origins.

One can sum up its recent legal evolution in the following moments:

- The International Commission on Intervention and State Sovereignty (ICSS) Report of 2001, entitled *Responsibility to Protect*;
- The 2004 UN High-Level Panel on Threats, Challenges and Changes Report: *A More Secure World: Our shared responsibility*;
- The World Summit Outcome Document had also a reference to the doctrine, defining the crimes, which would be unanimously approved as triggering R2P;
- The two distinct reports of both Kofi Annan<sup>6</sup>, in 2005, and Ban Ki-moon<sup>7</sup> in 2009;
- The several recent resolutions on the topic, such as the recent UNGA

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4. On the beginning of chapter III of his *Les six livres de la République*, Jean Bodin argues that, regardless of the classical formulation above, the idea of sovereignty was not off an unlimited power, as the private sphere was always to be safeguarded. BODIN, Jean, *Les six livres de la République*, Chapter III, Livre Poche, 1993. Available digitally at: [http://classiques.uqac.ca/classiques/bodin\\_jean/six\\_livres\\_republique/bodin\\_six\\_livres\\_republique.pdf](http://classiques.uqac.ca/classiques/bodin_jean/six_livres_republique/bodin_six_livres_republique.pdf)

5. ALAN CRANSTOM, *the Sovereignty Revolution*, Stanford Law and Politics, Stanford University Press, California, 2004, p. 9. The author begins immediately by eroding the concept of Sovereignty by stating that "It is sovereignty widely and unwisely thought in our time to mean only national sovereignty with every nation supposedly supreme inside its own borders and acknowledging no master outside them, restrained but not necessarily much by international laws, treaties, and codes of civilized behavior; all of which are breakable and none of which are enforceable in the reasonably reliable and just way that laws are enforced in free and orderly nations."

6. Report of the Secretary-General KOFI ANNAN, *In larger freedom: towards development, security and human rights for all*, adopted in the fifty-ninth session of the General Assembly of the UN, from 21th March 2005. Available at: [http://www.un.org/en/ga/search/view\\_doc.asp?symbol=A/59/2005](http://www.un.org/en/ga/search/view_doc.asp?symbol=A/59/2005)

7. Report of the Secretary-General BAN KI-MOON, *Implementing the responsibility to protect*, adopted in the sixty-third session of the General Assembly of the UN, from 12th January 2009. Available at: <http://responsibilitytoprotect.org/Implementing%20the%20top.pdf>

resolution 2150, from 14<sup>th</sup> April 2014<sup>8</sup>.

We believe that it all began with the works done by the ICISS, in 2001, with the report entitled “The Responsibility to Protect” where the major guidelines from the doctrine were to be established. Although it is true that the notion of sovereignty as a duty can be traced way before the year 2000<sup>9</sup>, the truth is that the specific way in which R2P is now idealized, was established on the basis of a new three pillar system consisting of:<sup>10</sup>

- The Responsibility to Prevent;<sup>11</sup>
- The Responsibility to React<sup>12</sup>;
- The Responsibility to Rebuild.<sup>13</sup>

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8. UN Security Council, Security Council resolution 2150 (2014) [on prevention and fight against genocide and other serious crimes under international law], 16 April 2014, S/RES/2150 (2014), available at: <http://www.refworld.org/docid/537c70b54.html> [accessed 6 September 2016].

9. JEREMY SARKIN traces back the origin of R2P to the very foundations of International Law, being present in the Marten’s Clause and the Hague Conventions. For further developments vide JEREMY SARKIN, *The Historical Origins, Convergence and Interrelationship of International Human Rights Law, International Humanitarian Law, International Criminal Law and International Law: Their Application from at least the Nineteenth Century*, Human Rights and International Legal Discourse, vol. 1, 2007, p.125.

10. International Commission on Intervention and State Sovereignty, *The Responsibility to Protect*, 2001, available online at <http://responsibilitytoprotect.org/ICISS%20Report.pdf>

11. With regard to this first pillar, the Commission stated three cumulative criteria for an effective prevention: *For the effective prevention of conflict, and the related sources of human misery with which this report is concerned, three essential conditions have to be met. First, there has to be knowledge of the fragility of the situation and the risks associated with it – so called “early warning.” Second, there has to be understanding of the policy measures available that are capable of making a difference – the so-called “preventive toolbox.” And third, there has to be, as always, the willingness to apply those measures – the issue of “political will.”* in International Commission on Intervention and State Sovereignty, *The Responsibility to Protect*, 2001, p. 19, paragraph 3.9. Available at <http://responsibilitytoprotect.org/ICISS%20Report.pdf>

12. With respect to this pillar is very interesting the position that the Commission takes: It acknowledges the need for some coercive action, once prevention measures have failed, but it ensures that military remedies are used as a last resort, only in extreme cases: *The “responsibility to protect” implies above all else a responsibility to react to situations of compelling need for human protection. When preventive measures fail to resolve or contain the situation and when a state is unable or unwilling to redress the situation, then interventionary measures by other members of the broader community of states may be required. These coercive measures may include political, economic or judicial measures, and in extreme cases – but only extreme cases – they may also include military action,* in International Commission on Intervention and State Sovereignty, *The Responsibility to Protect*, p. 29, paragraph 4.1.

13. Responsibility to rebuild is seen in the report as an important step to maintenance of peace in a post intervention scenario. Reconciliation mechanisms such as Truth Commissions, mixed tribunals, and other peace building interventions are seen as a crucial action to stabilize the country after intervention. The Commission said about this pillar: *The responsibility to protect implies the responsibility not just to prevent and react, but to follow through and rebuild. This means that if military intervention action is taken – because of a breakdown or abdication of a state’s own capacity and authority in discharging its “responsibility to protect” – there should be a genuine commitment to helping to build a durable peace, and promoting good*

The Commission advocated that the doctrine of R2P had to be very carefully balanced with other principles of International Law, *maxime* the principle of non-intervention or of *domain réservée*.<sup>14</sup> In fact, to accept the existence of a duty of the international community that could overcome the traditional sovereign right to the protection of State's affairs, was to claim the reformulation of the Westphalian concept of State, something that required a strong basis. By applying a threefold test to the intervention, deeming it as a procedure, it made possible to raise awareness of the international community on a prevention basis. Through concerted preventive action on the part of all states, by exercising pressure through the threat of use of force, and ensuring safety on a peace aftermath, the responsibility was therefore seen as a process: a duty to prevent severe breaches from happening, through constant surveillance over the community; a duty to intervene to restore the respect of the values; a duty to repair and rebuild to ensure the return to normality and respect for human rights.

The ICSS Report of 2001 was, however, elusive to what situations should trigger the application of this duty:

*Where a population is suffering serious harm, as a result of internal war, insurgency, repression or state failure, and the state in question is unwilling or unable to halt or avert it, the principle of non-intervention yields to the international responsibility to protect.*

Alongside this report, the UNSC issued several resolutions<sup>15</sup> along the years, following the several devastating conflicts that took place in the first decade and half of 2000. From the Libyan crisis in 2011, to the South Sudan peacekeeping operations or the Central African Republic in 2013, with the still ongoing conflict in Syria, there were several opportunities for the UN to declare its support for the emerging doctrine.

But even in 2001, before the afore mentioned conflicts, there was always a striking question to be addressed: if R2P only applies when gross violations of international law are taking place, or are about to take place, which violations reach the threshold to trigger the duty?

In some simpler words, what were the crimes that would justify the threefold intervention?

This first question, as simple as it might seem, divided the doctrine and was the first step towards the erosion of the concept. If no exact consensus could be

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*governance and sustainable development, in Intervention and State Sovereignty, The Responsibility to Protect*, p. 39, paragraph 5.1.

14. Paragraph 2.7 of the Report.

15. Security Council of the UN (SC) Resolution 1674, from 28<sup>th</sup> April 2006; SC Resolution 1755, from 30<sup>th</sup> April 2007. SC Resolution 1828, from 31<sup>st</sup> July 2008 and then in the cases of Libya (SC Resolution 1970, from 26<sup>th</sup> February 2011 and 1773, 17 March 2011), Côte de Ivoire (SC Resolution 1975, 30 March 2011), South Sudan, (1996, 8 July 2011) among others. Most recently the UNSC has approved SC Resolution 2150, 16 April 2014, reaffirming the commitment on fighting the genocide and other war crimes.

reached to which violations would entail the responsibility, then the first great obstacle of R2P was on its practical application rather than in its theoretical basis. Some said that, in a more cautious approach or “R2P lite”<sup>16</sup>, the doctrine should only be applied when severe crimes such as genocide or other war crimes were perpetrated, because only in these cases would the powerful states still maintain domain over when and where should the interventions take place. If any general violation of human rights would automatically trigger the duty to protect, then the obligation to act would automatically be imposed on some states, restricting their freedom to choose the actual conflicts. Some other authors refused this approach, deeming it as a too narrow view<sup>17</sup>, and argued for a compromise solution, that could result of a delicate political compromise between the need to protect the different endangered peoples and the freedom to choose when and where to intervene.

The need for a deeper understanding of the doctrine was then evident. And in 2004 and 2005 the UN High-Level Panel on Threats, Challenges and Changes published a report entitled *A More Secure World: Our shared responsibility*,<sup>18</sup> repeating a narrower idea of R2P, claiming that “ *The principle of non-intervention in internal affairs cannot be used to protect genocidal acts or other atrocities, such as large-scale violations of international humanitarian law or large-scale ethnic cleansing, which can properly be considered a threat to international security and as such provoke action by the Security Council.*”<sup>19</sup>, but then accepting other forms of violation that could trigger the doctrine *There is a growing recognition that the issue is not the “right to intervene” of any State, but the “responsibility to protect” of every State when it comes to people suffering from avoidable catastrophe - mass murder and rape, ethnic cleansing by forcible expulsion and terror, and deliberate starvation and exposure to*

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16. WEISS is clear when he states that: *The World Summit approved “R2P-lite”—that is, without specifying the criteria governing the use of force and insisting upon Security Council approval. In evidence was Washington’s refusal to establish a doctrine that might function either as an automatic trigger or as a drag on the American use of force—that is, the R2P’s thresholds and precautionary principles could limit Washington’s flexibility in determining when and where to deploy military force,* in THOMAS G. WEISS, *r2p after 9/11 and the world summit*, Wisconsin International Law Journal, vol. 24, 3, available at: <http://hosted.law.wisc.edu/wordpress/wilj/files/2012/02/weiss.pdf>

17. SARKIN presents a different view on the matter, claiming that a lite version of R2P was only possible because of a political compromise between the ideal theoretical idea of the doctrine and its practical applicability: *RtoP has therefore been diluted by ostensible pragmatism. Some of those who have supported and believed in RtoP felt that they had to make a choice. They assumed achieving consensus on RtoP would require agreeing on a lesser version of the concept. As a result, questions such as when RtoP applies, when RtoP begins, who has the responsibility to protect, and who should exercise it, all remain clouded in controversy and ambiguity* in JEREMY SARKIN, *Is the Responsibility to Protect an Accepted Norm of International Law in the post-Libya Era? How is the Third Pillar Ought to be Applied*, Groningen Journal of International Law, Vol. 1, p. 18.

18. Report of the UN’s Secretary-General High level Panel on Threats, Challenges and Change, *A More Secure World: Our shared responsibility*, 2004. Available at: [http://www.un.org/en/peacebuilding/pdf/historical/hlp\\_more\\_secure\\_world.pdf](http://www.un.org/en/peacebuilding/pdf/historical/hlp_more_secure_world.pdf)

19. Report of the UN’s Secretary-General High level Panel on Threats, Challenges and Change, p. 65.



disease. The focus was however the same, seeing R2P as a true responsibility<sup>20</sup> of the international community, rather than just a duty to intervene.

In 2005, the World Summit Outcome Document also made a reference to the doctrine, where States unanimously approved the need to act when gross violations of human rights were taking place. It was then proclaimed:

*Each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity. This responsibility entails the prevention of such crimes, including their incitement, through appropriate and necessary means. We accept that responsibility and will act in accordance with it. The international community should, as appropriate, encourage and help States to exercise this responsibility and support the United Nations in establishing an early warning capability.*<sup>21</sup>

The Summit reaffirmed to a great extent what had been said in 2004, but restricting the doctrine of R2P to those crimes of a graver nature, such as genocide, war crimes, ethnic cleansing and crimes against humanity.

Following the Summit, and with the Millennium Goals in sight, the then Secretary-General of the UN, Kofi Annan, showed his full support of the doctrine, through a Report entitled *In larger freedom: towards development, security and human rights for all*<sup>22</sup>, deeming it as the only acceptable way of protecting human rights. The path was then to make states realize that it was first and foremost their own responsibility, but that in case of failure the international community would not remain idle. R2P would have to be a responsibility that states accepted by the mere fact of their being part of a globalized, multi-cultural world, where respect for minorities and the values of peace were to be respected, or otherwise enforced.

Kofi Annan argues in that Report:

*The International Commission on Intervention and State Sovereignty and more recently the High-level Panel on Threats, Challenges and Change, with its 16 members from all around the world, endorsed what they described as an “emerging norm that there is a collective responsibility to protect”<sup>23</sup> (see A/59/565, para. 203). While I am well aware of the sensitivities involved in this issue, I strongly agree with this approach. I believe that we must embrace the*

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20. Further ahead it is argued that the concept of responsibility is not used in its strict and correct legal use. *Vide* Section II.

21. United Nations General Assembly (UNGA) Resolution 60/1, *World Summit Outcome*, 2005, paragraph 138. Available in <http://www.un.org/womenwatch/ods/A-RES-60-1-E.pdf>

22. Report of the Secretary-General KOFI ANNAN, *In larger freedom: towards development, security and human rights for all*, adopted in the fifty-ninth session of the General Assembly of the UN, from 21th March 2005, paragraph 135. Available at: [http://www.un.org/en/ga/search/view\\_doc.asp?symbol=A/59/2005](http://www.un.org/en/ga/search/view_doc.asp?symbol=A/59/2005)

23. We will also criticize this approach of an alleged upcoming norm of customary international law in section II.

***responsibility to protect, and, when necessary, we must act on it.*<sup>24</sup>**

However, the Secretary-General made very clear that any intervention would always have to respect the UN Charter, which would require the action of the UNSC under chapter VII. And at the same time noted that the subject was of a high sensitivity, with different states claiming different approaches and responsibilities.

*This responsibility lies, first and foremost, with each individual State, whose primary raison d'être and duty is to protect its population. But if national authorities are unable or unwilling to protect their citizens, then the responsibility shifts to the international community to use diplomatic, humanitarian and other methods to help protect the human rights and well-being of civilian populations. When such methods appear insufficient, the Security Council may out of necessity decide to take action under the Charter of the United Nations, including enforcement action, if so required.*<sup>25</sup>

To this moment, the year of 2005, it was clear that R2P should respect three major directives:

- To follow a three-pillar approach, in a process of preventing, intervening and restoring;
- That it would be triggered by gross violations of international law, namely genocide, war crimes, ethnic cleansing or crimes against humanity; and
- In the event of an intervention, the UN Charter ought to be respected, meaning the need for the intervention of the UNSC.

Following this basis, in 2009, R2P suffers its first great reformulation, through another report of the new UN Secretary-General, Ban Ki-moon<sup>26</sup>, redirecting attentions to the topic.

In the light of the Millennium Goals, Ban Ki-moon proposes a different approach<sup>27</sup> to the three pillars, reformulating them as:

- The protection responsibilities of the State;
- International assistance and capacity-building;
- Timely and decisive response.

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24. Report of the Secretary-General KOFI ANNAN, paragraph 135.

25. *Ibidem*, paragraph 135.

26. Report of the Secretary-General BAN KI-MOON, *Implementing the responsibility to protect*, adopted in the sixty-third session of the General Assembly of the UN, from 12<sup>th</sup> January 2009. Available at: <http://responsibilitytoprotect.org/Implementing%20the%20top.pdf>

27. Ban Ki-moon's report develops on the crimes that should actually entail such duty to protect, reaffirming what had been a continuous attempt to stabilize the types of crimes. Following Summit's visions, the crimes that would justify the intervention of the international community would be four: genocide, war crimes, ethnic cleansing and crimes against humanity.

Concerning the first pillar, Ban Ki-moon proposed several measures that could bring prevention as a true responsibility of the sovereign states, repeating the idea of sovereignty as a duty, but providing actual objective ideas on how to achieve that goal. In his view, R2P's first pillar should be made of the strength of democratic institutions and the internal management of conflict situations through the creation of new organs or institutions. It also recalled the work that could be done between states and the UNHRC, exchanging experiences and creative ways on prevention of conflicts.

*Responsible sovereignty is based on the politics of inclusion, not exclusion. This entails the building of institutions, capacities and practices for the constructive management of the tensions so often associated with the uneven growth or rapidly changing circumstances that appear to benefit some groups more than others.*<sup>28</sup>

Prevention was then seen as a true responsibility of the state, that ought to create institutions that would ensure the respect for human rights, but also to cooperate in greater ways with the international community, namely through accepting relevant treaties and conventions on the protection of human rights. The UN Secretary-General stressed especially the role that the International Criminal Court could play in these matters, by advising all states to join the Statute and put in practice its principles.

An interesting aspect that the report also refers to, is the responsibility that states have to recognize those persons who, under very difficult situations of genocide or other war crimes, stood against a regime and tried to protect human rights. It was not only to punish those who have perpetrated unlawful actions, in the UN Secretary-General's view, but foremost reward and acknowledge those who had fought to maintain the international values of peace and humanity intact.<sup>29</sup>

Concerning the second pillar, Ban Ki-moon's report seems to go further away from military intervention (reallocating its analysis on the third pillar), rather focusing on the settlement and peaceful resolution of disputes. It underlines the crucial role that the UNHRC has had in the past years in shaping educational methods on several countries, which have contributed to drastically reduce the motives of future conflicts, reaffirming the power that non-military solutions might have before drastic measures are to be taken:

*Encouragement can also be expressed through dialogue, education and training on human rights and humanitarian standards and norms. For example, an innovative framework established by the Security Council in the context of its resolution 1612 (2005) has permitted high-level dialogue by the Special*

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28. *Ibidem*, paragraph 14.

29. s it is stated in the Report, in paragraph 27: *Similarly, one of the keys to preventing small crimes from becoming large ones, as well as to ending such affronts to human dignity altogether, is to foster individual responsibility. Even in the worst genocide, there are ordinary people who refuse to be complicit in the collective evil, who display the values, the independence and the will to say no to those who would plunge their societies into cauldrons of cruelty, injustice, hatred and violence. We need to do more to recognize their courage and to learn from their actions.*

*Representative of the Secretary-General for Children and Armed Conflict and UNICEF on child protection issues*<sup>30</sup>.

It seems that Ban Ki-moon wants to establish a firm hierarchy on the measures to be taken in this pillar, therefore setting, with respect to the UN Charter, a need to exhaust all peaceful measures, before undertaking any military action. And even in the event of an open conflict, the report mentions the possibility of “preventive deployment”<sup>31</sup>, deploying UN or regional military and civilians forces to establish order in the area, as it was done in Burundi in 2003<sup>32</sup>.

But even under the third pillar, in what is called a *Timely and decisive response*, Ban Ki-moon’s approach is always of an extreme caution: the same hierarchy is to be imposed under chapters VI and VII of the UN Charter.

*The United Nations has a strong preference for dialogue and peaceful persuasion. Therefore, pillar three encompasses, in addition to more robust steps, a wide range of non-coercive and non-violent response measures under Chapters VI and VIII of the Charter. Under the Charter, many of these can be undertaken by the Secretary-General or by regional or subregional arrangements, without the explicit authorization of the Security Council. This was the case in Kenya in early 2008, when for the first time both regional actors and the United Nations viewed the crisis in part from the perspective of the responsibility to protect.*<sup>33</sup>

Military action, or a true humanitarian intervention, must be used only in extreme cases and under last resort. And it must respect the procedural requisites of the Charter, which means, among so many others, the requirement of an authorization by the UNSC:

*Paragraph 139 of the Summit Outcome reflects the hard truth that no strategy for fulfilling the responsibility to protect would be complete without the possibility of collective enforcement measures, including through sanctions or coercive military action in extreme cases. When a State refuses to accept international prevention and protection assistance, commits egregious crimes and violations relating to the responsibility to protect and fails to respond to less coercive measures, it is, in effect, challenging the international community to live up to its own responsibilities under paragraph 139 of the Summit Outcome. Such collective measures could be authorized by the Security Council under Articles 41 or 42 of the Charter, by the General Assembly under the “Uniting for peace” procedure (see para. 63 below) or by regional or subregional arrangements under Article 53, with the prior authorization of the Security Council*<sup>34</sup>.

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30. *Ibidem* paragraph 33.

31. Report of the Secretary-General pursuant to the statement adopted by the Summit Meeting of the Security Council on 31 January 1992: *An agenda for peace: preventive diplomacy, peacemaking and peacekeeping*, available at: <http://www.un-documents.net/a47-277.htm>

32. On the topic Burundi: HENRI BOSHOF, *The African Union’s First Mission, in African Security Analysis Programme Situation Report*, from 10th June 2003. Available at: <https://www.issafrica.org/uploads/BURUNDIJUN03.PDF>

33. *Ibidem* paragraph 51.

34. *Ibidem* paragraph 57.

The recent resolution 2150, from 16<sup>th</sup> April 2014,<sup>35</sup> reaffirms the same line of thought by stating the classic four crimes of genocide, war crimes, ethnic cleansing and crimes against humanity, imposing on the states the duty to combat all forms of genocide and other ethnicity-based atrocities:

*Calls upon States to recommit to prevent and fight against genocide, and other serious crimes under international law, reaffirms paragraphs 138 and 139 of the 2005 World Summit Outcome Document (A/60/L.1) on the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity, and underscores the importance of taking into account lessons learned from the 1994 Genocide against the Tutsi in Rwanda, during which Hutu and others who opposed the genocide were also killed.*<sup>36</sup>

The way in which these several developments were applied to the recent Syrian crisis will be the subject of the next Section.

## **Section II – R2P and the Syrian Refugee Crisis**

Having understood the historical development of the doctrine, one can now explore the potential application of such theory on the complex Syrian conflict and the refugee crisis that came with it.

The fact is that, since March 2011, Syria has been involved in a civil war which has been ongoing since the first riots began five years ago. The number of refugees emerging from this crisis has now risen to an estimated 4.8 million, spreading across Turkey, Lebanon, Jordan, Egypt and Iraq, and some 6.6 million internally displaced persons within Syria itself, according to the United Nations High Commissioner for Refugees.

The protests started in March 2011 in the southern city of Deraa caused by the arrest and subsequent torture of some youngsters who had allegedly painted revolutionary slogans on a school wall. Between March and July 2011, Syria, and Damascus and Aleppo above all, was flooded with demonstrations of the people demanding President Bashar Al-Assad's resignation. The reaction was of an extreme violence: by mid-May 2011 there were above 1,000 registered kills perpetrated by the regime under a new Emergency Law. Unlike other leaders on the so-called "Arab Spring", Assad's response to claims of democracy had always been of strong intolerance and repression towards protesters, ignoring and aggressively tackling any kind of movement that could target the regime.

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35. UN Security Council, Security Council resolution 2150 (2014) [on prevention and fight against genocide and other serious crimes under international law], 16 April 2014, S/RES/2150 (2014), available at: <http://www.refworld.org/docid/537c70b54.html> [accessed 6 September 2016]

36. UN Security Council, Security Council resolution 2150 (2014) [on prevention and fight against genocide and other serious crimes under international law], 16 April 2014, S/RES/2150 (2014), available at: <http://www.refworld.org/docid/537c70b54.html> [accessed 6 September 2016], paragraph 1.

This repression would eventually degenerate in a civil war that lasts until today. By the end of 2012 more than 60,000 have been killed in the war, which finally impelled the UN to finally send a special envoy, Mr. Lakhdar Brahimi, to negotiate a cease fire, which proved to be a failure disrespected by both parties. The war continued to rage on, and by the end of 2015, 90,000 persons, including countless civilians, had been killed as result of the conflict. Recent numbers suggest at least 250,000 persons dead due to the conflict.

In the light of these events, and since the beginning of the conflict, the UN created a commission to investigate any possible violations of human rights, as well as war crimes, crimes against humanity and genocide. The Independent International Commission of Inquiry on the Syrian Arab Republic was then established on the 22<sup>nd</sup> of August 2011, by the Human Rights Council, through resolution S-17/1<sup>37</sup> adopted at its 17<sup>th</sup> special session with a mandate to investigate all alleged violations of international human rights law. In this document it was very clear that war crimes have been committed by both parties of the conflict<sup>38</sup>:

In its first paragraph it reads:

(...)

*1. Strongly condemns the continued grave and systematic human rights violations by the Syrian authorities, such as arbitrary executions, excessive use of force and the killing and persecution of protesters and human rights defenders, arbitrary detention, enforced disappearances, torture and ill-treatment of detainees, including of children;*

Then stating that:

*4. Calls upon the Syrian authorities to immediately put an end to all human rights violations, to protect the population and to fully comply with their obligations under international human rights law, and calls for an immediate end to all violence in the Syrian Arab Republic;*

Since that resolution, dating back to 2011, at least 15 others have been passed by the UN, all of them constantly denouncing the atrocities that both parties of the conflict have been carrying out, demanding a cease fire and an immediate halt of the violations of human rights that were being witnessed. In June 2015, with the resolution entitled «The grave and deteriorating human rights and humanitarian situation in the Syrian Arab Republic»<sup>39</sup>, the UNHRC admitted and

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37. UN Office of the High Commissioner for Human Rights (OHCHR), *Independent International Commission of Inquiry on the Syrian Arab Republic established pursuant to United Nations Human Rights Council*, Resolutions S-17/1, 19/22 and 21/26, 20 December 2012, available at: <http://www.refworld.org/docid/50d2e6bf2.html> [accessed 15 August 2016].

38. The political analysis of the Syrian conflict is not the subject of this paper. However it is safe to say that there were many more that just two parties of the conflict by the year 2013: the war had summoned not only regime's militaries, but also members of Hezbollah, as well as ISIS members and Kurdish fighters.

39. UN Human Rights Council, *The grave and deteriorating human rights and humanita-*

condemned the continuous existence of war and sexual crimes, and the actual use of chemical weapons, along with the deepest concerns for the growing number of both refugees and IDPs.<sup>4041</sup>

On the 2<sup>nd</sup> of December 2013, the UN's Human Rights Commissioner, Navi Pillay, reported that the UN inquiry had found "massive evidence... [of] very serious crimes, war crimes, crimes against humanity" which were authorized "at the highest level of government, including the head of state".<sup>42</sup>

The several UNSC resolutions followed the same path: Resolutions 2139, from 22<sup>nd</sup> February 2014, and 2165, from the 14<sup>th</sup> of July 2014, clearly expressed that such atrocities were taking place and that they ought to cease immediately. The existence of war crimes was acknowledged by the Security Council when it states, in Resolution 2139:

*Demands that all parties immediately put an end to all forms of violence, irrespective of where it comes from, cease and desist from all violations of international humanitarian law and violations and abuses of human rights, and reaffirm their obligations under international humanitarian law and international human rights law, and stresses that some of these violations may amount to war crimes and crimes against humanity.*<sup>43</sup>

While Resolution 2165 reaffirmed the duty to protect that the Syrian Government had upon its people:

*Reaffirming the primary responsibility of the Syrian authorities to protect the population in Syria and reiterating that parties to armed conflict bear the primary responsibility to take all feasible steps to ensure the protection of civilians, and recalling in this regard its demand that all parties to armed conflict comply fully with the obligations applicable to them under international law related to the protection of civilians in armed conflict, including journalists, media professionals and associated personnel*<sup>44</sup>

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*rian situation in the Syrian Arab Republic*: resolution adopted by the Human Rights Council, 13 October 2015, A/HRC/RES/30/10, available at: <http://www.refworld.org/docid/56b1c8554.html> [accessed 15 August 2016].

40. *Vide* paragraphs 5, 6 and 14.

41. It is extremely interesting the fact that the UNHRC acknowledges the impact that such mass movement of people will have in Syria's neighboring countries:

"Expresses deep concern at the growing number of refugees and internally displaced persons fleeing the violence, welcomes the efforts by neighboring countries to host Syrian refugees, and acknowledges the socioeconomic consequences of the presence of large-scale refugee populations in those countries;"

42. The news were advanced by several media. For example BBC: <http://www.bbc.com/news/world-middle-east-25189834>

43. UN Security Council, Security Council resolution 2139 (2014), 22 February 2014, S/RES/2139 (2014), available at: <http://www.refworld.org/docid/530c948e4.html> [accessed 1 September 2016] paragraph 2.

44. UN Security Council, Security Council resolution 2165 (2014) [on the humanitarian situation in the Syrian Arab Republic and the establishment of a monitoring mechanism], 14 July 2014, S/RES/2165(2014), available at: <http://www.refworld.org/docid/53c66b974.html> [accessed 1 September 2016], recital number 13.



So both the UNHRC and the UNSC reaffirmed, several times, the existence of war crimes and crimes against humanity in Syria, as well as the growing humanitarian crisis that had led to millions of refugees and IDP's, and yet there was not a single time where responsibility to protect was mentioned as such.

Why? Why was the doctrine of Responsibility to Protect not an option?

The reasons are twofold: on one hand, one must prove that the general requisites of the doctrine of R2P were in fact met in the light of the Syrian conflict, according to what was explained in Section I; on the other hand, being these requisites actually met, one should search for a different approach to the doctrine, understanding it under principles beyond the strict legal ones.

We have seen in Section I that the general criteria for the application of the doctrine of R2P were not absolutely stabilized, especially in its objective scope of application (which crimes?). However, having a broader or narrower concept of R2P, it seems safe to say that three criteria must be fulfilled in order to have a justified intervention:

- That there must have been, or about to be, a severe violation of human rights, typically genocide, war crimes, ethnic cleansing and crimes against humanity but also, we claim, all crimes that achieve the threshold of severe infringement of international law;
- That the conduct is attributable to the state, either by its direct intervention on the conflict or by its incapacity to control or prevent it; and
- That there is the permission, granted by the international community, to carry out such an action, according to the process and principles laid out by the UN Charter<sup>45</sup>.

One can then affirm that there is one substantive criterion, the type of crime at hand, and two procedural requisites, the attribution of the conduct, either by action or omission, and the consent of the Security Council to act. It is of course especially on the third pillar, according to the latest formulation of the doctrine,

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45. This need was exceptionally important in the Libyan case, where NATO acted according and with respect to UNSC resolution 1973 from 2011. The Resolution reads:

*Authorizes Member States that have notified the Secretary-General, acting nationally or through regional organizations or arrangements, and acting in cooperation with the Secretary-General, to take all necessary measures, notwithstanding paragraph 9 of resolution 1970 (2011), to protect civilians and civilian populated areas under threat of attack in the Libyan Arab Jamahiriya, including Benghazi, while excluding a foreign occupation force of any form on any part of Libyan territory, and requests the Member States concerned to inform the Secretary-General immediately of the measures they take pursuant to the authorization conferred by this paragraph which shall be immediately reported to the Security Council;*

UN Security Council, Security Council resolution 1973 (2011), *on the situation in the Libyan Arab Jamahiriya*, 17 March 2011, S/RES/1973(2011), available at: <http://www.refworld.org/docid/4d885fc42.html> [accessed 1 September 2016]



to the timely and decisive response, that R2P faces its most controversial ground.

When facing those requisites the question seems of an extreme, almost naïve, simplicity.

Were there war crimes, crimes against humanity or other barbaric acts being perpetrated in the Syrian conflict?

Both the UNSC, as well as the UNHRC, affirmed so in several resolutions stated above, which were then confirmed various times by the reports of the Independent International Commission of Inquiry on the Syrian Arab Republic. They all affirmed that murder, rape, ethnic cleansing and use of international forbidden weaponry counted among the many crimes committed by both parties of the conflict. The amount of refugees and IDP's caused by the war are evidences that reinforce the proof. There was, beyond any doubt, a confirmation of the substantive criteria to act. A timely and decisive response seemed to be the only answer.

Were these conducts attributable to the Syrian State?

The Syrian conflict began and grew under the spectrum of a civil war, forced by Assad's regime through repression of public opinion and the internal military intervention against its people. In fact, the Syrian state was an active part of the conflict, accused of the use of chemical weapons on civilians and partisans. Not only was Assad's regime infringing its duty to protect its population, by ensuring the safeguard of fundamental freedoms of its people, as it was one of the primary sources of the conflict, going directly against the Syrian people. Using any method of causal link, either by criminal standards or by the works of the ILC through the Draft Articles on the Responsibility of the State for Internationally Wrongful Acts<sup>46</sup>, the criminal conduct was attributable to the state, justifying once again a breach of its sovereign rights.

Was there permission to act? Did the UNSC issue a somewhat similar resolution to the UNSC 1973, of 2011, concerning Libya?

In fact, when Syrian people needed the support of the international community, the UNSC remained idle. And so did R2P.

If one briefly analyzes the content of UNSC resolutions on Syria, it is clear to say that intervention was never deemed to be a true viable solution, which is rather clear on the latest resolution dated February 2016<sup>47</sup>. All resolutions depart from the essential premise of diplomacy and peaceful settlement of the conflict, pursuant to the vision adopted during the five years of conflict.

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46. International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, November 2001, Supplement No. 10 (A/56/10), chp.IV.E.1, available at: <http://www.refworld.org/docid/3ddb8f804.html> [accessed 4 September 2016]

47. UN Security Council, Security Council resolution 2268 (2016) , 26 February 2016, S/RES/2268 (2016), available at: <http://www.refworld.org/docid/56d696694.html> [accessed 4 September 2016]

It reads:

*Reaffirms its support for a Syrian-led political process facilitated by the United Nations, requests the Secretary-General, through his good offices and the efforts of his Special Envoy for Syria, to resume the formal negotiations between the representatives of the Syrian government and the opposition, under the auspices of the United Nations, as soon as possible, and urges the representatives of the Syrian government and the Syrian opposition to engage in good faith in these negotiations*<sup>48</sup>

Although references to Syria's duty to protect its people can be found in almost every UNSC resolution, which would reaffirm the strength of the doctrine, the fact is then that there was never any concrete action concerning its third and most relevant pillar.

Why is that then? Why was there no repetition of the Libyan Resolution, allowing international coalitions to take action?<sup>49</sup> Does this mean the Responsibility to Protect is subject to political decision, and therefore dependent on the type of conflict at hand?

To answer these questions one should look at some of the major set of criticism that R2P has been facing since its creation.

### Section III – A truly new doctrine?

One way to look at the problem is to deny it and affirm that R2P is not more than a general set of already existing norms of international law, recently reunited under a certain new labelling. In fact, as Payandeh<sup>50</sup> puts it, the concept of Responsibility to Protect is itself a very ambiguous concept, whose normative character lacks both jurisprudential evidences and *opinio iuris*. The single concept of responsibility is used in a distinct way of what is the traditional normative responsibility in international law. If one distinguished the duty from the effectiveness of the consequence (the responsibility itself), it is easy to understand that the «Responsibility» is itself the duty, a duty to protect, and not the normative consequence of the breach of that duty. This means that under the same word two absolutely divergent concepts emerge: responsibility as a duty and responsibility as a consequence of the breach of a duty. This is one of the fundamental reasons for the non-application of the doctrine in conditions where there is not an absolute certainty on the types of crimes committed (not

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48. *Ibidem* paragraph 7.

49. All the attempts to do so were clearly vetoed by China and Russia which affirmed that a peaceful settlement, mainly through sanctions, would suffice. On the matter: <http://yaleglobal.yale.edu/content/applying-responsibility-protect-syria>

50. MEHRDAD PAYANDEH, *With Great Power Comes Great Responsibility? The Concept of the Responsibility To Protect Within the Process of International Lawmaking*, Yale Journal of International Law [Vol. 35], pp. 470-514, available at: <https://yalejournalofintl.law.files.wordpress.com/2016/02/35-2-payandeh-great-responsibility.pdf>

the case in Syria where proofs are evident). Because the duty is not so much the «responsibility» itself, but the duty not to perpetrate crimes against humanity, war crimes genocide or others, one can easily wonder what is there to add to the existing duty.<sup>51</sup> In Payandeh's opinion, this is the first step towards a loss of the normative concept of the doctrine, regarding responsibility as a distinct concept of the one used, for example, in the Draft Articles on State's Responsibility for Internationally Wrongful Acts<sup>52</sup>, having the consequence of bringing it more to the moral or generic axiological fields.

This is one way of explaining R2P's failure on Syria. The fact is that R2P faces the same contingencies seen in every action in international law: the constant political approach, the blockage of the UNSC, and the unequal treatment of some situations with regard to others. It was just a theoretical creation made to ensure that the already existing duties were not forgotten by the international community, and that actual norms of customary international law such as the prohibition of the use of chemical weapons or the prohibition of the perpetration of war crimes would be increasingly supervised by the international community. Once R2P was perceived as a different kind of responsibility, that derived not only from legal but also from moral values, it lost its absolute sphere of legality and emerged, once again, into the hands of politics. The lack of jurisprudence concerning R2P is indeed a sign of this: the ICJ never stated the use of such doctrine as a norm of customary international law. In fact, the mere interpretation of several resolutions, in almost all cases of violations of human rights, as proving state's practice of an emerging customary international law norm, has contributed to the loss of R2P's normative content. If any resolution that affirms the duty of a country to protect its people is deemed as state's practice of the upcoming norm, then it means that the exact content and requisites of the application of such norm are still uncertain or, and more likely, result of the application of already existing norms.

This absence of normative character, or the sole repetition of other duties, does not mean, *per se*, that the doctrine is of no use. It just imposes the search for different perspectives on its application.

One very interesting, although critical, approach was the one assumed by Beham and Janik<sup>53</sup>, which criticized R2P's hidden tendency to democratize. One possible explanation for the failure of the application of R2P in the recent Syrian conflict can be found in assuming that the doctrine intends more than to provide humanitarian intervention, imposing on states a legal duty to prevent atrocities.

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51. *Ibidem*, as stated in p. 483.

52. International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, November 2001, Supplement No. 10 (A/56/10), chp.IV.E.1, available at: <http://www.refworld.org/docid/3ddb8f804.html> [accessed 4 September 2016]

53. MARKUS P. BEHAM AND RALPH R. A. JANIK, *A 'Responsibility to Democratise'? The 'Responsibility to Protect' in Light of Regime Change and the 'Pro-Democratic' Intervention Discourse*, in R.A. Barnes, V.P. Tzevelekos (eds.), *Beyond Responsibility to Protect: Generating Change in International Law* (Cambridge et al.: Intersentia, 2016, pp. 53-70. Available at: [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2817363](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2817363)

In the author's opinion there is in fact a subliminal intention of regime change and the imposition of a certain Western idea of democracy. This would easily explain why Libya's intervention was acclaimed as the greatest step to R2P, by deposing a dictator unprotected by any world potency, and the lack of will to provide such transition in Syria, with Russia's and China's constant blockage. And this is to be explained under Syria's internal problems, that go beyond the actual civil war, for example with the Kurdish minorities, and that are hardly compatible with a consistent and safe regime change towards democracy. Moreover, it is of no interest to Russia or China that such a change towards democracy actually takes place in Syria, or that true stability rises in that area, therefore having no intentions of applying the newly created doctrine of R2P. Syria is after all both a great commercial partner, in the standard markets and weaponry imports, as well as a strong opponent of the so called "Arab Spring" seen as a subliminal "westernization" of some Arab speaking countries. As Beham and Janik pose it, there is no room for a «Responsibility to Democratize»<sup>54</sup>, simply because there is no interest on such democratization.

This amounts to a second role of criticism beyond the simple conceptualization and lack of jurisprudence that strikes upon the legitimacy of R2P. In fact R2P, concerning the latest refugee and humanitarian crisis in Syria, can be subject to political and ideological winds, that assert the interventions when it is advantageous, and blocks and prevents reaction when world potencies' interests are at stake. Moreover, it can be used as an instrument, as Beham and Janik assume, of a certain imposition of values upon sovereign states, in a constant and extremely delicate struggle between the principle of intervention (the duty to do so in extreme circumstances, derived from the exceptions of the UN Charter) and the principle of non-intervention of article 2 (7) of the UN Charter.

Does this mean, therefore, that this missed opportunity is the beginning of the end to the doctrine of Responsibility to Protect?

There may be another way looking at it<sup>55</sup>. A more constructive perspective.

One alternative way of looking at the concept is to regard it as something new, even if based upon already existing norms. Although it seems, at first glance, paradoxical, the fact is that there are advantages through the greater conceptualization of the doctrine of R2P. And that major advantage is of a pedagogical and systematical nature.

It is very difficult to argue that, where we stand today, there is already an existing norm of customary international law, called R2P, which provides a normative duty to protect people from atrocities. Because the fact is that there are already several norms that provide such protection. There is nothing new in claiming that genocide, war crimes or other atrocities are to be stopped, prevented and

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54. *Ibidem*, p. 9.

55. On a different perspective, and relating R2P and global governance, *vide* ALISE COEN, *R2P, Global Governance, and the Syrian Refugee Crisis*, in *The International Journal of Human Rights*, vol. 19, issue 8, 2015.

repressed by States: internal sovereignty must come with limits that derive of the mere existence of an international community. There is nothing truly new about this. What R2P brought, and can be of an extreme usefulness, is a new didactic approach to the understanding of such norms. This is where its true value lies: on organizing a series of diverse and widespread duties and deriving them from a single source.

This approach immediately overcomes the criticism exposed before. The limits on the use of R2P are the limits that international norms suffer, by arguable efficient decision mechanisms, such as the UNSC's voting, or by political and intergovernmental aspects of international relations. This does not mean that there is no advantage in the development of such a doctrine, as an umbrella concept, which would allow the international community to further develop its normative content, through actual norms of customary international law or other sources.

The humanitarian crisis, and especially the grave refugee crisis at hand, are not an immediate proof of the failure of R2P as a doctrine by the simple fact that it was never meant to be a true norm of customary international law. What in fact failed, by not tackling the problem earlier, was the general enforcement of international law norms because of a constant institutional blockage created after 1945. This is not new and is among the greatest problems of modern International Law. R2P rather allows researchers to pursue increasingly simpler lines of thought, deriving several prohibitions of violations of human rights from the very basic foundations of the responsibility of being sovereign. This simplicity might play a part on the solution to the Syrian or any crisis where crimes against people are committed, by allowing a simpler and more direct discourse towards decision making organs. Instead of reaffirming the several dispersed norms, most of them of a customary nature, the duty is presented as one single, but complex, concept: a "Responsibility" that derives from the essence of being sovereign. And the reassurance that, if the sovereign inherent duty to protect one's people is breached, the international community will act.

So, if one wonders whether the recent Syrian refugee and humanitarian crisis was in fact a missed opportunity for R2P, we argue that it played its part, but that it is upon the basis of international law that the international community should improve, using conceptualization as a means of organizing and explaining states and populations the duties to which they are already bound.

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