The world’s failure to respond effectively to ongoing atrocities in Syria may mean Responsibility to Protect (R2P) is down, but it’s not out. R2P still offers a principled approach to react to a chemical weapons atrocity in the face of likely Security Council vetoes.

The lack of consensus in the UN Security Council as to how to react to mass atrocity crimes in Syria, including now the horrific use of chemical weapons on the outskirts of Damascus last month, has raised obvious questions about the current vitality and utility of the Responsibility to Protect (R2P) doctrine, which was unanimously embraced with so much hope and fanfare by heads of state and government at the World Summit in 2005.

But while R2P may be down, it’s not out, for four reasons I will spell out in turn. First, there is effectively universal consensus now about its basic principles. Second, those principles have shown their worth in real-world cases, and the Security Council has continued to invoke them, even after it divided over Libya and became paralysed on Syria. Third, there is a principled way through the dilemma now facing policymakers as to how to react to the chemical weapons atrocity in the face of likely Council vetoes. And fourth, it is possible to see how the consensus that matters most—in the Security Council, on the hardest of cases—could be re-created in the future.

As to R2P’s general acceptance, the best evidence for R2P lies in the statements made in successive annual General Assembly debates on the subject since 2009. No state now disagrees that every sovereign state has the responsibility, to the best of its ability, to protect its own peoples from genocide, ethnic cleansing, and other major crimes against humanity and war-crimes. No state disagrees that others have the responsibility, to the best of their own ability, to assist it to do so. And no state seriously continues to challenge the principle that the wider international community should respond with timely and decisive collective action when a state is manifestly failing to meet its responsibility to protect its own people. Certainly there is less general comfort with this last pillar than the first two, and there will always be argument about what precise form action should take in a particular case, but the basic principles are not under challenge.

As to the real-world worth of these principles, there is plenty of evidence that R2P means more than just words. Most notably, there have been the cases of Kenya in 2008, when diplomatic action was quick and effective, and of Cote d’Ivoire and
Libya in 2011, when the Security Council authorized the use of military force. If the international community had acted as decisively and robustly in the 1990s as it did in response to the threatened massacre in Benghazi, the 8,000 men and boys murdered in Srebrenica and the 800,000 men, women and children slaughtered in Rwanda might still be alive today. And, whatever its subsequent divisions over Libya and Syria, since 2011 the Council has continued to invoke R2P language in appropriate resolutions (for example, those on Yemen, South Sudan and Mali).

The disagreement now evident in the UN Security Council is really only about how the R2P norm is to be applied in the hardest cases, the sharp-end cases, those where prevention has manifestly failed, and where the harm to civilians being experienced or feared is so great that the issue of military force has to be given at least some *prima facie* consideration. But of course these *are* the talismanic cases, and if consensus has broken down at the highest political level on how they should be handled, there is a danger of flow-on risk to the credibility of the whole R2P enterprise. So how can that consensus begin to be restored? The immediate need is to navigate a way through the current chemical weapons dilemma in Syria in a way that does not make it even harder to find consensus in the future. And the longer-term need is to address the underlying problem itself, viz. the breakdown of trust that occurred during the implementation of the mandate to intervene in Libya.

As to the immediate issue, there is a principled way through the dilemma. It involves establishing whether any form of military action against the Syrian regime in response to last month’s horrific chemical weapons attack would be legitimate and wise, and then—if such a case can be made—having a credible answer to the question of whether such action could still be justified in the absence of Security Council endorsement.

The legitimacy and wisdom issue depends essentially on satisfying the five familiar criteria spelled out by the International Commission on Intervention and State Sovereignty in 2001, and which have since become the currency of this debate (although not yet formally adopted by the UN General Assembly or Security Council).

The first such criterion is whether the *seriousness of the harm* in question is such as to *prima facie* justify coercive military action. Satisfying that means producing unassailable evidence—more than the US has put on the table so far—that the hundreds of deaths in Ghoula were indeed caused by chemical weapons (CW), and that the Assad regime was responsible. No one can afford another debacle like Iraq in 2003.

It also means answering the question as to why the death of hundreds from CW should be seen as a red line, when the deaths until then of scores of thousands by
other means (including many civilians, and in many cases also involving war crimes or crimes against humanity) has previously not been. The short answer is that use of CW, like biological or nuclear weapons, is inherently indiscriminate: conventional weapons can at least notionally be targeted to avoid collateral civilian casualties in a way that is just about impossible for weapons-of-mass-destruction use, certainly in urban warfare as distinct from an isolated battlefield context.

The second criterion is that the motive of any such action be civilian protection (i.e. stopping any repetition of this harm from a totally unconscionable weapon) and have no other agenda. That means, in particular, that there must be no hint of a suggestion here that the military action is really about securing regime change.

The third criterion is last resort, that no lesser measure—including diplomacy, or reference to the International Criminal Court (which would need to be by the Security Council)—is available or likely to be effective in meeting the civilian protection objective. With a US response now put on hold until Congress can debate it, there is time to further explore and evaluate this issue. Even if a military strike does take place, diplomatic efforts must never be abandoned: it is only through a negotiated political transition that the whole Syrian conflict is ever likely to be settled.

The fourth criterion is that any military response be proportional to the scale of the threat: doing that which is necessary, and no more than that, to deter any future use of chemical weapons. It does not mean full-scale war designed to achieve regime change.

The final criterion of legitimacy, or prudence, is the balance of consequences: that any military response not put those meant to be protected in even greater peril. Concerns on this front—that any major intervention would simply further inflame the war, causing even greater overall suffering—until now have been a key reason for the lack of wide international support for any such action. Certainly any proposed action would need to be very precisely calibrated, with a full understanding of its likely wider impact; not an impossible task, but a very difficult one.

The moral and prudential case for military action depends on every one of these criteria being satisfied, and being seen to be so by the broad international community. The legal case, by contrast, depends under the UN Charter (in the absence of self-defence being involved here) on whether the Security Council has endorsed it. The unanimous language of the 2005 UN resolution was crystal clear that any non-peaceful enforcement of R2P had to be under Chapter VII of the Charter. The heroic efforts by UK (and some US) government lawyers to argue that customary international law allows action outside it—in the case of exceptional measures taken to alleviate overwhelming humanitarian catastrophe—are quite
unpersuasive. There may be some logic in the proposition that the very nature of customary international law—dependent as it is on accepted custom and practice—means that you have to break it to make it. But Kosovo in 1999 is insufficient precedent, or evidence of contemporary practice, to claim that any new law has been made.

What the Kosovo precedent does do is suggest a credible answer as to how a military strike against Syria could possibly still be justified in the court of global opinion, if not of law, should an actual or threatened Russian veto mean the absence of Security Council legal authority. In the Kosovo case, the great weight of world opinion supported the view that NATO’s proposed intervention to stop Milosevic’s genocidal attacks might not be legal, but was morally legitimate. And it might well do so again here, provided the kind of criteria described above are again seen to be broadly satisfied.

The most credible way of overcoming the lack of formal legal authority is to offer the equivalent of a domestic court plea in mitigation: “We may have breached the letter of the law, but don’t challenge its applicability and won’t make a habit of it—it’s just that in the very particular circumstances of this case there was an overwhelming moral imperative to act as we did, and any censure should reflect that.” Much better, in trying to rebuild longer-term consensus in these hard cases, to put the argument in such popularly understandable terms, placing particular emphasis here on the horrifying, morally game-changing use of CW. To invent a legal justification when there isn’t one, as the UK in particular tried to do in Iraq in 2003 and is doing now, is to put at risk the credibility of the whole humanitarian enterprise aimed at civilian protection.

So, finally, how can the longer-term objective be met of recreating in the Security Council the kind of consensus on dealing with the most extreme cases that existed when the Cote d’Ivoire and Libya mandates were granted in 2011? The key to the future is recognizing what went wrong in the past. With Libya there was no problem at the outset. But a major one did arise when it became rapidly apparent that the three permanent Council-member states driving the intervention (the US, UK and France, or “P3”) would settle for nothing less than regime change, and do whatever it took to achieve that. The BRICS countries—Brazil, Russia, India, China and South Africa, all then represented on the Council—argued fiercely that a narrow civilian protection mandate was being exceeded (in particular when the P3 dismissed without serious exploration various Gaddafi peace overtures). And they had a strong case.

Some of the counter-arguments have force of their own – in particular that if civilians were to be protected house-to-house in areas like Tripoli under Gaddafi’s direct control, this could only be achieved by defeating him outright. However, the
P3 resisted debate on them at any stage in the Security Council itself, and other Council members were never given sufficient information to enable them to be evaluated. Maybe not all the BRICS are to be believed when they say that had better process been followed, more common ground could have been achieved. But they can be when they say they feel bruised by the P3’s dismissiveness during the Libyan campaign—and that those bruises will have to heal before any consensus can be expected on tough responses to such situations in the future.

One constructive proposal which offers some real hope of longer term reconciliation on the Council was initiated by Brazil at the end of 2011. It proposed supplementing R2P, not replacing it, with a complementary set of principles and procedures which it has labelled “responsibility while protecting” or “RWP”. As it has evolved in subsequent discussion, RWP has just two major substantive elements. One is that agreed prudential criteria of the kind discussed above (including in particular “last resort”, “proportionality” and “balance of consequences”) should be fully debated and taken into account before the Security Council mandates any use of military force. The other is that there should be some kind of enhanced monitoring and review processes which would enable such mandates to be seriously debated by all Council members during their implementation phase, with a view to ensuring so far as possible that consensus is maintained throughout the course of an operation.

The initial reaction by the P3 powers to the Brazilian RWP proposal when it was first articulated was very sceptical—“these countries would want all those delaying and spoiling options, wouldn’t they”—but their Syrian experience has begun to compel some rethinking. The reality is that if an un-vetoed majority vote is ever going to be secured again for tough action in a hard mass atrocity case—even action falling considerably short of military action—then the issues at the heart of the backlash that has accompanied the implementation of the Libyan mandate, and the concerns of the BRICS states in particular, simply have to be taken seriously. Those issues and concerns reflect the views of a much wider swathe of the developing world.

No one really wants to see a return to the bad old days when appalling crimes against humanity committed behind sovereign state walls were seen by almost everyone as nobody else’s business, or to the totally consensus-free-zone of the 1990s. It will take time (and almost certainly come too late to be of any utility in Syria), but recreating the kind of consensus that has been already achieved, albeit fleetingly, in the high-water-mark hard cases of 2011 is ultimately achievable.
