THE RESPONSIBILITY TO PROTECT AND THE RESPONSIBILITY WHILE PROTECTING: AN ANALYSIS OF HUMANITARIAN INTERVENTION AND THE DEVELOPING WORLD

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INTRODUCTION

Since the International Committee on Intervention and State Sovereignty (ICISS) introduced the concept of the responsibility to protect in 2001 the term has gone a long way from document to doctrine and practice. Yet a decade later there are still numerous unresolved matters concerning the prevention of atrocities and the legitimacy of military intervention for humanitarian purposes. The disagreements on the international arena may be linked to divergent points of view between Western and emerging powers. Whilst there is still some resistance to the idea of a responsibility to protect, especially in the global south, the main debates on the existence and justification of a responsibility to protect are mostly over.¹ The central question has now become how to implement this responsibility, or how to transform words into deeds.²

This second generation debate on the responsibility protect has gained ground since the successful deployment of the concept during the intervention in Libya. Yet despite the overall positive evaluation of the intervention, emerging powers were quick to perceive the blurring of the line between protecting civilians and regime change. They also raised eyebrows to the expansive interpretation of Security Council resolutions and to the lack of accountability mechanisms for the use of force in implementation of the mandate. As a response to these shortcomings and in an effort to bring new light to the debate on the responsibility to protect, in late 2011 Brazil proposed the complementary concept of a ‘responsibility while protecting’.

In this paper we will look at how this new notion may play a bridging role between Western and emerging countries, rebalancing the concept of the responsibility to protect and strengthening its role in international politics. On the other hand, a critical approach to both the responsibility to protect and the responsibility while protecting will be presented in an effort to show how their discourse still contains blind spots and biases that have not been taken into account by the institutionalised debate. The ultimate goal of this essay is therefore to provide a

² Alex J Bellamy, Global Politics and the Responsibility to Protect: from words to deeds (Routledge 2010).
broad look at the development of the responsibility to protect, highlighting the challenges and difficulties it faces. In doing so, it hopes to suggest how the idea may continue to advance and shape the way we think about humanitarian intervention.

The first chapter will provide an account of the context that steered the formulation of the notion of a responsibility to protect and will detail the initial proposal of the ICISS. Subsequently, the second chapter will narrate the important moments in the development of the concept, such as the war in Iraq in 2003 and the World Summit in 2005. The following part will continue this narrative, with a focus on the recent conflict in Libya as the catalyst to the Brazilian suggestion of a responsibility while protecting. After detailing this new concept, we will examine how the responsibility to protect may be enriched by its complementary notion. The penultimate chapter will therefore explore the potential for bridging the divide between Western and emerging powers on humanitarian intervention. Notwithstanding this potential, the final chapter will end this paper by stressing the limited nature of the institutional debate so far. This input of critical analysis is intended to foster new enquiries on the parallel development of the responsibility to protect and the responsibility while protecting.
CHAPTER ONE
THE CONCEPTION OF THE RESPONSIBILITY TO PROTECT

The importance and actuality of the difficulties revolving around humanitarian intervention is a direct result of the changes the international community has gone through in the past decades. Most significantly, the changing face of conflict has brought to light the new challenges posed by intrastate conflicts, migration, climate change, terrorism, the proliferation of non-state armed groups, cyber warfare and new robotic technologies. In fact, war between states has dramatically declined – they now represent less than five per cent of all conflicts. At the same time, despite the end of the era of colonialism and the end of the Cold War, intrastate conflicts and ethnic violence persisted throughout the world, becoming problems of crucial importance to international law and politics.

In the field of international law, the political dilemmas concerning humanitarian intervention are crystallised in the tension between the traditional concept of sovereignty and the progressing demand for respect to human rights. That is why it has been stated that ‘the vital debate on the foundations and frontiers of humanitarian intervention is perhaps the greatest political question of our time’. In this context, the concept of the responsibility to protect was born out of the debates that occurred throughout the 1990s over humanitarian intervention. The failures of the international community in Bosnia and in Rwanda prompted Kofi Annan, the former Secretary-General of the United Nations, to question: ‘if humanitarian intervention is, indeed, an unacceptable assault on sovereignty, how should we respond to a Rwanda,

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to a Srebrenica – to gross and systematic violations of human rights that affect every precept of our common humanity?"  

The International Commission on Intervention and State Sovereignty (ICISS), funded by the Canadian government, set out to propose solutions to the question posed by Annan. It published in 2001 a report entitled ‘The Responsibility to Protect’. Its main accomplishment was to reconceptualise sovereignty as implying responsibility. Sovereignty was recharacterised from ‘sovereignty as control’ to ‘sovereignty as responsibility’ with regard to both a state’s internal functions and external duties. The report affirmed that state authorities have the primary responsibility to protect the safety and lives of citizens and to promote their wellbeing. Secondly, it declared that government officials are responsible internally to their citizens and externally to the international community through the United Nations.  

An important feature of the Commission’s report was the effort to change the terms of the debate that since the 1980s was framed in the language of intervention: the traditional language referring to a ‘right to intervene’ (droit d’ingérence) should be replaced by a focus on the ‘responsibility to protect’. The intention of this change of terms was to foster a change in perspective, avoiding privileging claims of the potentially intervening states over focusing on the point of view of those seeking support. Accordingly, it escaped the traditional focus on the act of intervention, providing good support for the need of preventive effort or subsequent follow-up assistance. In fact, the responsibility to protect encompasses not only the responsibility to react, but most importantly the responsibility to prevent and the responsibility to rebuild. Finally, the responsibility to protect language acknowledges that the primary responsibility towards the welfare of citizens lies with the state concerned, and ‘that it is only if the state is unable or unwilling to fulfil this

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7 ibid 13.
8 ibid.
9 ibid 16-18.
10 ibid.
11 ibid xi.
responsibility, or is itself the perpetrator, that it becomes the responsibility of the international community to act in its place’.  

When it comes to defining parameters for military intervention, the report states that the responsibility to intervene and stop human suffering will fall upon the ‘international community’. The difficulties that arise in this situation are as follows: if military intervention becomes inevitable, who has the right to authorise it? Furthermore, who can legitimately act in the name of a responsibility to protect? In answer to these questions, the ICISS came up with six criteria for military intervention, those being right authority, just cause, right intention, last resort, proportional means and reasonable prospects.  

The just cause criterion states that military intervention can only be justified in order to halt or avert large-scale loss of life or large-scale ethnic cleansing, actual or apprehended. Right intention means that the primary objective of the intervention must be to halt or avert human suffering. The last resort principle compels governments to pursue all reasonable peaceful means available before considering military intervention. Proportional means refers to the scale, duration and intensity of the force to be used, which should be the minimum necessary to secure the humanitarian objective in question. Furthermore, reasonable prospects intends to avoid interventions that do not have a practical chance of success, or that might cause worse consequences than if there was no intervention at all.  

The last criterion is perhaps the most important and controversial one: right authority. The Commission’s report clearly favours action taken by the UN Security Council, concluding that ‘the task is not to find alternatives to the Security Council as a source of authority, but to make the Security Council work much better than it has’. But what if the Security Council fails to act? Should it be the only and last resort of authority for humanitarian intervention?

12 ibid 17.
13 ibid 32.
14 For a detailed description of each criterion see: The ICISS Report (n 6) 32-37.
16 The ICISS Report (n 6) 37.
17 ibid.
18 ibid 49.
The ICISS suggests some alternative courses when the Security Council is blocked by disagreement between its permanent members or when its decisions are clearly ineffective. The first choice is the ‘Uniting for Peace’ procedure under General Assembly Resolution 377(V) of 1950, according to which the General Assembly may recommend enforcement action in the event of a deadlock in the Security Council. According to the ICISS, ‘although the General Assembly lacks the power to direct that action be taken, a decision by the General Assembly in favour of action, if supported by an overwhelming majority of member states, would provide a high degree of legitimacy for an intervention which subsequently took place, and encourage the Security Council to rethink its position’.\(^{19}\) The Commission does not, however, precise what it regards as ‘an overwhelming majority’ nor as a ‘high degree of legitimacy’, bearing in mind that the latter does not necessarily coincide with legality. Another recommended option would be recourse to regional organizations acting under Chapter VIII of the United Nations Charter. In this case, prior authorisation from the Security Council would still be needed. However, the report notes that ‘there are recent cases when approval has been sought \textit{ex post facto}, or after the event (Liberia and Sierra Leone), and there may be certain leeway for future action in this regard’.\(^{20}\)

Nonetheless, a crucial dilemma still remains. As the ICISS described it, ‘it is a real question in these circumstances where lies the most harm: in the damage to the international order if the Security Council is bypassed or in the damage to that order if human beings are slaughtered while the Security Council stands by’.\(^{21}\) The report does not give a clear and definitive answer to this question; it simply argues that concerned states are unlikely to rule out other means and forms of action to respond to critical and urgent situations. Moreover, it warns us of the hazards to the international community that could follow from either unauthorised intervention or from inaction.

\(^{19}\) ibid 53.
\(^{20}\) ibid 54.
\(^{21}\) ibid 55.
CHAPTER TWO

THE RESPONSIBILITY TO PROTECT: FROM DOCUMENT TO DOCTRINE

The decade that followed the report proved that the document had gained widespread attention. It is now possible to affirm that the responsibility to protect is past its ‘post-ontological era’. 22 Accordingly, the debates concerning its existence and its justification are assumed by some authors to be all but over. 23 A second generation of scholarship has thus recently emerged, whose focus is more on its implementation than on its origins. 24 But before we explore this recent scholarship and the latest developments in the concept it is necessary to briefly review the important occurrences since the publication of the ICISS report.

The invasion of Iraq in 2003 by a coalition of States led by the United States and the United Kingdom had an enormously negative impact on the recently born doctrine. In Gareth Evans’ analysis the new norm was practically ‘choked at birth’. 25 For many critics of humanitarian intervention, the war in Iraq was a conversation stopper when discussing setting aside the principle of non-intervention. 26 In fact, the invasion of Iraq was taken by some authors as a patent example of the problem of ‘false friends’ or that of ‘Trojan horses’. These expressions refer to the distortion of the concept of the responsibility to protect and its use to achieve illegitimate goals. In this sense, George W Bush’s and Tony Blair’s spurious and ex post facto ‘humanitarian’ justifications for the war in Iraq were a clear sign of the dangers of contamination to the idea of a responsibility to protect. 27 Another good illustration of

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22 The parallel made here refers to Thomas Franck’s declaration that international law had entered its post-ontological era. See: Thomas M Franck, Fairness in International Law and Institutions (Oxford University Press 1995) 6.
23 Orchard (n 1) 378.
24 ibid.
27 ibid.
the concept’s interpretive openness was the attempt to associate it with doctrines of preventive war.28

Besides the problem of false friends, the invasion of Iraq seriously undermined the potential the responsibility to protect had to foster action when it was truly needed. In other words, ‘to the extent the Iraq war is perceived to indicate the potential for misuse of the R2P doctrine, it will be more difficult next time for us to call on military action when we need it to save potentially hundreds of thousands of lives’.29 This is precisely what happened in the humanitarian crisis in Darfur, where the international community’s slow and ineffective response evidenced that the responsibility to protect still had a long way to becoming an operational principle.30 The situation in Darfur revealed that the war in Iraq undermined the standing of the United States and the United Kingdom as the responsibility to protect norm carriers.31 The states most associated with the new norm lost credibility due to abuse of the doctrine or use of it in self-serving purposes. The crisis in Darfur also demonstrated that changing the language from humanitarian intervention to responsibility to protect did not genuinely affect the underlying political dynamics. According to Thomas Weiss, ‘military overstretch and the prioritization of strategic concerns to the virtual exclusion of humanitarian ones is the sad reality of a post 9/11 world’.32 Moreover, the responsibility to protect language was adopted by both those who defended and those who opposed humanitarian intervention: ‘it allowed traditional opponents of intervention to replace largely discredited ‘sovereignty-as-absolute’-type arguments against intervention in supreme humanitarian emergencies with arguments about who had the primary responsibility to protect Darfur’s civilians’.33

Despite all these difficulties, the responsibility to protect did in fact achieve some success in the years that followed the ICISS report. When lessons from Iraq were sinking in, the concept resurfaced and achieved widespread recognition in the

31 Alex J Bellamy, ‘Responsibility to Protect or Trojan Horse? The Crisis in Darfur and Humanitarian Intervention after Iraq’ (2005) 19(2) Ethics & International Affairs 32.
32 Weiss (n 26) 758.
33 Bellamy (n 31) 52.
United Nations 2005 World Summit. In that occasion, world leaders endorsed the responsibility to protect in a unanimous statement.  

This was a crucial step for the emerging norm as just when it had finally attained worldwide recognition it was transformed in what has been called ‘R2P-lite’. This new version of the responsibility to protect did not specify the criteria governing the use of force and insisted upon Security Council authorisation for humanitarian interventions. Firstly, the responsibility to protect material field of application was linked to ‘genocide, war crimes, ethnic cleansing and crimes against humanity’. In second place, there was an appeal to the international community to help states exercise their responsibility and to develop early warning capabilities. Finally, the document declared that the international community was prepared to take collective action, through the Security Council, ‘should peaceful means be inadequate and national authorities […] manifestly [fail] to protect their populations’.

This clearly shows that the responsibility to protect as adopted by the international community in the World Summit is different than the initial concept proposed by the ICISS. The responsibility to protect no longer contains criteria to guide the decision about when to intervene and it does not open any possibilities for military action other than those approved by the Security Council. Its scope of application is clearly defined: it applies to genocide, war crimes, ethnic cleansing and crimes against humanity, all of which have reasonably precise meanings in international law. Although some authors criticised the outcome of the 2005 World Summit as a step backward for the responsibility to protect, mainly because the criteria on the use of force were left out and unilateral humanitarian intervention was completely ruled off, one should not underestimate the value of the consensus achieved in the Summit. The endorsement of the principle by the General Assembly and subsequently by the Security Council expresses a broad commitment of the international community towards protecting populations from grave harm. One might consider that this new version of the responsibility to protect has better chances of being implemented than its predecessor.

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36 2005 World Summit Outcome (n 31) paras 138-139.
37 ibid.
38 ibid para 139.
40 Weiss (n 35) 117.
add, furthermore, that the criteria that were left out of the responsibility to protect concept had a very limited prospect of application as they were ‘unlikely to foster consensus on how to act, deter the use of vetoes, provide anything other than a self-serving pathway to the legitimisation of intervention not authorised by the Security Council, or add anything to the Council’s mechanism for preventing abuse’. 42

The years that followed the 2005 consensus did not fundamentally alter the framework accorded to in the World Summit. The responsibility to protect came up in debates in 2008 about international action to help civilians affected by the deadly cyclone Nargis. Myanmar’s military junta had refused early offers by Western powers to provide humanitarian relief with the use of military forces in nearby areas. In response, the then French Foreign Minister Bernard Kouchner called for the application of the responsibility to protect to justify action to help victims of the cyclone. In fact, the original ICISS report did include ‘overwhelming natural or environmental catastrophes’ causing significant loss of human life as a possible trigger for the responsibility to protect. 43 Nonetheless, this possibility was erased in 2005, when the responsibility to protect was materially limited to war crimes, crimes against humanity, genocide and ethnic cleansing. 44 In this context, the calls for applying the responsibility to protect in Myanmar were mostly rejected as ‘incendiary’ and ‘unnecessarily confrontational’. 45

The concept also came up incidentally in discussions concerning the Russian-Georgian conflict over South Ossetia in 2009; the Gaza operation of 2008-9; and the Sri Lanka civil war in 2009 against the Tamil Tigers. Yet in these three occasions it was never a prominent part of the political debate and the responsibility to protect did not find in them suitable test cases. The next important step was in fact the 2009 General Assembly debate on the responsibility to protect. This debate was informed by a report by the Secretary-General entitled ‘Implementing the Responsibility to Protect’. 46 A three-pillar approach was presented: pillar one concerns the protection

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42 Bellamy (n 39) 630.
43 The ICISS Report (n 6) 33.
44 Note that ‘ethnic cleansing’ is considered a crime against humanity in international criminal law. There is hence some tautology in this definition.
responsibilities of the state; pillar two is about international assistance and capacity building; pillar three talks about timely and decisive response in a rapidly unfolding emergency situation. Overall, most countries reaffirmed the 2005 consensus and expressed opposition to reopening the definition of the responsibility to protect and its material limitations. The debate was proclaimed by some authors as ‘anything other than a resounding success for the R2P principle, and for advocates and victims working to prevent atrocity crimes’. By 2009 there was enough consensus and reasonable clarity surrounding the responsibility to protect. All that was missing was a successful application of the concept in practice. This opportunity materialised in 2011 with the ‘Arab Spring’ and the revolution in Libya.

47 ibid.
49 Thakur (n 45) 157.
CHAPTER THREE

LIBYA AND THE RESPONSIBILITY WHILE PROTECTING

The fight against the Gaddafi regime in Libya during the Arab Spring was perhaps the first and only successful case of application of the responsibility to protect. By the time the conflict had evolved into a protracted civil war, it was clear that the regime had no intention to protect its population; Gaddafi had gone to national television to announce that ‘officers have been deployed in all tribes and regions so that they can purify all decisions from these cockroaches’ and that ‘any Libyan who takes arms against Libya will be executed’. Fortunately, the widespread enmity to the Gaddafi regime from fellow African and Arab states proved decisive in harnessing legitimacy for intervention. The Gulf Cooperation Council (GCC) soon urged the Security Council to ‘take all necessary measures to protect civilians, including enforcing a no-fly zone over Libya’, and condemned ‘crimes committed against civilians, the use of heavy arms and the recruitment of mercenaries’ by the Libyan regime. This declaration was closely followed by the decisive action of the League of Arab States (LAS), an unusual supporter of military interventions. The League called on the Security Council ‘to impose immediately a no-fly zone on Libyan military aviation, and to establish safe areas […] that allows the protection of the Libyan people and foreign nationals residing in Libya, while respecting the sovereignty and territorial integrity of neighbouring States’. Similar support was given by the Organisation of the Islamic Conference.

Despite the rapidly deteriorating situation on the ground in Libya and the increasing support for military intervention, some states remained sceptical about the prospects of intervention. China’s long established opposition to military interference

50 ‘Defiant Gaddafi issues chilling call’, ABC Australia (23 February 2011).
52 Council of the League of Arab States, Resolution n 7360 (12 March 2011) paras 1-2.
stood in the way, as did Russia’s hesitance to abet in the eventual use of force.\textsuperscript{54} Likewise, non-permanent members of the Security Council such as Brazil, India and Germany demonstrated apprehensiveness about the possible consequences of a military intervention. They worried that interference might have prolonged the conflict and aggravated the situation of civilians.

Yet when the fall of Benghazi was imminent and massacre looming, the Security Council managed to approve Resolution 1973 (2011), which under Chapter VII of the United Nations Charter authorised the use of ‘all necessary measures… to protect civilians and civilian populated areas under the threat of attack’ and established ‘a ban on all flights in the airspace of the Libyan Arab Jamahiriya in order to protect civilians’.\textsuperscript{55} China, Russia, Brazil, Germany and India abstained. The Resolution recalled the responsibility to protect the population and reaffirmed the application of the principle previously enunciated in Resolution 1970 (2011). It is noteworthy that this was truly the first time that the Security Council managed to invoke the responsibility to protect to authorise the use of military force in a non-consenting state. Resolution 1973 thus broke through ‘the final constraint of principle on humanitarian intervention – the nominal consent of the host state’.\textsuperscript{56}

With the advantage of hindsight – even if a very short-term one – one can say that the intervention in Libya was overall a success.\textsuperscript{57} It immediately averted Gaddafi’s assault on Benghazi and in the long run provided the Libyan rebels with enough support for them to overthrow the former regime. The fact that the United States left France and the United Kingdom at the vanguard of military operations also contributed to a sense of cooperation and multilateralism, downplaying suspicions of ‘American exceptionalism’. Nonetheless, the intervention also raised serious concerns about the future of the responsibility to protect. Differences soon emerged about how to interpret the mandate conferred by the Security Council. Russia was unsettled about the sudden bombing campaign sparked by the Resolution. It noted that ‘bombing had caused civilian casualties and emphasised that any use of force by the

\textsuperscript{54} Bellamy and Williams (n 51) 843.
\textsuperscript{56} Bellamy and Williams (n 51) 847.
\textsuperscript{57} The Guardian, ‘Libyan intervention was a success, despite the aftermath’s atrocities’ (28 October 2011).
coalition in Libya should be carried out in strict compliance with Resolution 1973’.\(^{58}\) China defended an immediate ceasefire and scoffed at what it considered arbitrary interpretations of the Council’s resolutions. South Africa, initially a supporter of the Resolution, later affirmed that actions committed in the implementation of the Resolution should also be examined by the International Criminal Court (ICC).\(^{59}\) For its part, Brazil reserved that its vote ‘should in no way be interpreted as condoning the behaviour of the Libyan authorities or as disregard for the need to protect civilians and respect their rights’,\(^{60}\) and yet it doubted whether the use of force would lead to the immediate protection of civilians and the end of violence. Moreover, as the intervention in Libya became protracted and assistance to the rebels persisted until the eventual fall of Gaddafi, the line between protecting civilians and regime change was increasingly blurred.

In this context, the experience in Libya was a turning point for the responsibility to protect. Primarily, it was an important victory for supporters of the concept. On the other hand, Libya revealed that disagreement on its implementation was still pervasive and that there were still many unresolved questions. The split between Western powers and the emerging powers was clearer than ever. Taking stock of the experience, Brazil came up with the idea of a ‘responsibility while protecting’ in an attempt to reframe the debate and rebuild consensus.

During a debate in the Security Council on the protection of civilians in armed conflict in November 2011, Brazil introduced a concept paper baptised ‘The responsibility while protecting: elements for the development and promotion of a concept’.\(^{61}\) The central idea behind the proposal was that ‘the international community, as it exercises its responsibility to protect, must demonstrate a high level responsibility while protecting’.\(^{62}\) This new development indicates a pragmatic shift in the way that some developing countries approach the responsibility to protect and

\(^{58}\) S/PV.6528 (4 May 2011) in Bellamy and Williams (n 51) 845.

\(^{59}\) ibid.

\(^{60}\) Bellamy and Williams (n 51) 844.


\(^{62}\) ibid 1.
the debate on humanitarian intervention in general.\textsuperscript{63} Brazil’s proposal was promptly endorsed by India and South Africa in 2011 during the India-Brazil-South Africa (IBSA) Summit.\textsuperscript{64} The agreement between these emerging democracies is significant as it demonstrates a willingness to assume a more proactive role in international security while simultaneously endeavouring to mediate between the West (United States and Europe) and reluctant powers such as China and Russia.\textsuperscript{65}

The document that introduces the concept of the ‘responsibility while protecting’ reinforces the consensus achieved at the 2005 World Summit and recalls the three pillars approach developed by the Secretary-General.\textsuperscript{66} It defends that the three pillars ‘must follow a strict line of political subordination and chronological sequencing’.\textsuperscript{67} Subsequently, the document distinguishes the collective responsibility to prevent atrocities from the mechanisms of collective security, which only come into place as a last resort, when there is a threat to international peace and security. In such circumstances, the responsibility while protecting stresses that even when military intervention is legitimate, legal and just, there are nonetheless inevitably high human and material costs.\textsuperscript{68} This is the first main apprehension brought forward by the document: the fact that military interventions, like any other acts of warfare, are inherently violent. As a warning, the document reminds us that some of the past interventions have ‘aggravated existing conflicts, allowed terrorism to penetrate into places where it previously did not exist, given rise to new cycles of violence and increased the vulnerability of civilian populations’.\textsuperscript{69} The second key concern that the responsibility while protecting points out is the old problematic of ‘false friends’ or ‘Trojan horses’. Echoing the opinions of many developing countries, the document notes a ‘growing perception that the concept of the responsibility to protect might be misused for purposes other than protecting civilians, such as regime change’.\textsuperscript{70} This is

\textsuperscript{64} IBSA Dialogue Forum Fifth Summit of Heads of State and Government Tshwane Declaration. Available at: http://www.ibsa-trilateral.org (accessed on 19 August 2012).
\textsuperscript{65} The Hindu, Op-ed ‘BRICS and the ‘responsibility while protecting’ concept’ (12 March 2012).
\textsuperscript{66} Responsibility While Protecting concept paper (n 61) 2.
\textsuperscript{67} ibid.
\textsuperscript{68} ibid.
\textsuperscript{69} ibid.
\textsuperscript{70} ibid.
a direct consequence of the recent employment of the responsibility to protect in the war in Libya.

As a conclusion, the Brazilian proposal encourages the development of the concept of the responsibility while protecting in tandem with the responsibility to protect.\textsuperscript{71} The former is in fact complementary to the latter. Their evolution should thus occur jointly, ‘based on an agreed set of fundamental principles, parameters and procedures’.\textsuperscript{72} Nine points are thenceforth proposed as initial assumptions for the elaboration of shared principles and parameters. Succinctly, these are: (a) emphasis on prevention and especially on preventive diplomacy; (b) rigorousness in efforts to exhaust all peaceful means available before contemplating other solutions; (c) when the use of force becomes a necessity, it is subject to authorisation by the Security Council, in accordance with Chapter VII of the Charter, or in exceptional circumstances by the General Assembly acting under Resolution 377(V); (d) authorisations to use force must be ‘limited in its legal, operational and temporal elements and the scope of military action must abide by the letter and spirit of the mandate conferred by the Security Council or the General Assembly’;\textsuperscript{73} (e) the use of force must be the minimal possible and must not cause more harm than that which it seeks to avert; (f) the use of force must be judicious and proportionate, and must always be linked to the objectives established by the Security Council; (g) the aforementioned points must be observed throughout the whole duration of the authorisation to use force; (h) there is a need for enhanced Security Council procedures to monitor and assess the implementation of its resolutions, hence assuring there will be responsibility while protecting; and finally (i) ‘the Security Council must ensure the accountability of those to whom authority is granted to resort to force’.\textsuperscript{74}

Whilst many of the principles proposed by Brazil were already present in previous clarifications of the concept of the responsibility to protect, the shift in emphasis to accountability and rigorousness when deploying military force is the main thrust behind the responsibility while protecting. For this reason, the new notion did not receive a warm welcome from the powers most likely to use force in future interventions, notably the United States, France and the United Kingdom. During an

\textsuperscript{71} Responsibility While Protecting concept paper (n 61) 3.
\textsuperscript{72} ibid.
\textsuperscript{73} ibid.
\textsuperscript{74} ibid 4.
informal General Assembly discussion on the responsibility while protecting, the United States expressed concern with some of the points related to the concept.\textsuperscript{75} It criticised what it regarded as higher thresholds for the legitimacy of military intervention, such as the requirement that the three pillars follow a strict line of political subordination and chronological sequencing.\textsuperscript{76} Furthermore, the United States claimed that they could not ‘bind [themselves] to inaction based on an unrealistic prerequisite of assured success’.\textsuperscript{77} Despite there being no mention in the concept paper on the responsibility while protecting of anything like an ‘assured success’ when intervening, the United States’ response highlights the persistent disagreements between North and South on the topic. It is a tension between a potentially intervening North, who wants to assure flexibility and discretion on its use of force, and a peripheral South who is to be the object of such interventions.\textsuperscript{78} The South thus responds through different strategies: it either rejects any notion related to intervention, forever opposing the responsibility to protect, or it seeks to frame the debate and shift its focus towards its apprehensions.

\textsuperscript{75} Remarks by the United States at an Informal Discussion on ‘Responsibility while Protecting’ (21 February 2012). Available at: http://usun.state.gov/briefing/statements/184487.htm (accessed on 20 August 2012).

\textsuperscript{76} ibid.

\textsuperscript{77} ibid.

\textsuperscript{78} On the possibility to generalise a North-South divide on the issue of humanitarian intervention and the responsibility to protect see: Thakur (n 45) 144-160.
CHAPTER FOUR
FORGING CONSENSUS: BRIDGING THE NORTH-SOUTH DIVIDE

If the past decade has proved fruitful for the concept of the responsibility to protect, it may be less because of its practical application and more due to its creation of ‘a collection of shared expectations’. In this sense, the main thrust of the idea has been to allocate authority in international politics, strengthening the United Nations as the legitimate forum for decisions on humanitarian intervention. As Anne Orford explains, the influence of the responsibility to protect ‘lies not in its capacity to transform promise into practice, but rather in its capacity to transform practice into promise, or deeds into words’. In order to continue this path of forging consensus and allocating authority, the North-South divide will have to be shortened.

With the changing balance of power in world politics, emerging powers are abandoning the position of ringside observers to the development of the responsibility to protect to assume roles as project designers – if not yet members of the implementation team. This is where the responsibility while protecting comes in as a useful mode of reframing the debate and encouraging the developing world to take part in it. Thakur calls upon these countries to ‘master the so-called New-Diplomacy and become norm entrepreneurs’ instead of ‘forever opposing, complaining and finding themselves on the losing side anyway’. A lot has already been achieved in defining the responsibility to protect in a way that dismisses early attempts to use it as a justification for unilateral intervention. Yet there is still some way to go towards guaranteeing the responsibility to protect will provide a rules-based system and minimal consensual procedures on humanitarian intervention.

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79 Bellamy (n 2) 84.
80 Anne Orford, International Authority and the Responsibility to Protect (Cambridge University Press 2011) 2.
81 Thakur (n 45) 158. Note, for instance, the conception of the concept by an institution funded by the Canadian government and how the concept changed once the debate moved to the General Assembly.
82 ibid.
As recent publications have shown, the responsibility to protect has not encompassed the whole of the debate on military interventions. James Pattison has recently argued that humanitarian intervention is a different concept than the responsibility to protect.\textsuperscript{84} The former is supposedly broader than the latter and according to Pattison it can ‘be undertaken in response to a variety of humanitarian crises and does not require Security Council authorisation’.\textsuperscript{85} His argument is that the responsibility to protect ‘fails to identify’ who has the responsibility to intervene and that its ‘provision of legality to an intervention is not necessary’.\textsuperscript{86} Instead, he proposes that effectiveness and legitimacy should be two guiding properties to identify would-be interveners.\textsuperscript{87} Nevertheless, in his scheme effectiveness takes a central role, being the ‘primary, necessary and sometimes sufficient determinant of legitimacy’.\textsuperscript{88} In subsuming legitimacy in an account of effectiveness and discarding legality, Pattison’s work is a suitable illustration of a discourse that goes far beyond the responsibility to protect in justifying military interventions.

Between a North that desires to retain leeway for the deployment of its military forces and a South that is still inclined to frown upon interventionist discourses, the coupling of the responsibility to protect to the responsibility while protecting offers a midway path that ‘navigates the treacherous shoals between the Scylla of callous indifference to the plight of victims and the Charybdis of self-righteous interference in others’ internal affairs’.\textsuperscript{89} The shift in focus to accountability is a much-needed counterweight to a wider acceptance by developing countries of humanitarian interventions. It is also a necessary development for the rising role of the United Nations as a centre of authority that will be increasingly unable to maintain its neutrality around questions of protection and intervention.\textsuperscript{90} This breakdown of neutrality will have to be accompanied by accountability if it is to be accepted by developing states. Thus the responsibility while protecting may provide the missing link for recasting the notion of the responsibility to protect and its application in a multipolar world.

\textsuperscript{84} James Pattison, \textit{Humanitarian Intervention and the Responsibility to Protect: Who Should Intervene?} (Oxford University Press 2010).
\textsuperscript{85} ibid 13.
\textsuperscript{86} Orchard (n 1) 381 and Pattison (n 84) 64.
\textsuperscript{87} Pattison (n 84) 72.
\textsuperscript{88} ibid 74.
\textsuperscript{89} Thakur (n 45) 160.
\textsuperscript{90} Orford (n 80) 192.
CHAPTER FIVE
RETURN TO SENDER: A CRITIQUE OF THE RESPONSIBILITY TO PROTECT AND WHILE PROTECTING

So far this essay has taken a pragmatic view on the problematic of humanitarian intervention and the responsibility to protect. To end it, however, it is worthwhile to take a brief look at critical international law scholarship in order to expose the limits of the discussion that has hitherto been surveyed. Accordingly, our aim is to demonstrate how the concept of the responsibility while protecting can be seen not only as a development but also as a prolongation of the same discourse that sustains the responsibility to protect.

A critical look at the topic may start with the realisation that the era of humanitarian intervention may coincide with the end of human rights. This means that the responsibility to protect underwrites a shift in human rights as a discourse of rebellion and dissent to one of state legitimacy. This is a significant realisation not only for developing countries fighting for international justice, but especially for third world peoples and social movements. It means that to accept a responsibility to protect – even if coupled with a responsibility while protecting – is to condone a narrative that ‘relies upon colonial stereotypes of suffering natives or human rights victims as the pivot for establishing the identity of the heroic international community’. 

The human rights discourse upon which these responsibilities are based has its own limitations and political agenda. In the first place, the shift to accountability and rigorousness in the Brazilian proposal conserves a failure to explore and expand other forms of responsibility. Consequently, the relationship between economic globalisation and insecurity remains on the background while the ability to save human beings through military interventions positions the international community in the role of saviour. The responsibility for the violence produced by the current

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92 ibid 7.
94 ibid 188.
system is neutralised and normalised in the process. In fact, there is no talk of responsibility for the emergence of insecurity or the causes of extreme poverty.\textsuperscript{95} A second way in which the current debate fails to provide appropriate answers to global insecurity is due to the limitations of human rights to convey the demands of the oppressed in the third world who are excluded from the legal-statist framework of rights. Rajagopal thus draws attention to the challenge of including social movements and resistance to globalisation in the narrative of international law.\textsuperscript{96} It is in this context that we should see Douzinas’ suggestion that the radical and revolutionary potential of human rights is ‘radically circumscribed when rights become an apology for state violence’.\textsuperscript{97}

The philosopher Jacques Rancière summarises the aforementioned critical approach by describing the right of humanitarian intervention as ‘a sort of return to sender: the disused rights that had been sent to the rightless are sent back to the senders’.\textsuperscript{98} This movement is founded on a discourse of absolute victims – object of an absolute evil (genocide, crimes against humanity, war crimes) – and of an avenger, the bringer of infinite justice.\textsuperscript{99} It contributes to the coupling of consensual policy and humanitarian police,\textsuperscript{100} stifling debate on global justice, inequality and social exclusion. If the responsibility while protecting is a pragmatic approach to ensure the continuous development of the responsibility protect, it is still part of its same discourse. It may help overcome the illusion of humanitarian interventions as ‘virtual wars’, where violence is clean and surgical – what some have termed ‘technological utopianism’.\textsuperscript{101} Yet its potential for developing states is limited as far as it is embryonically attached to a responsibility to protect based on a discourse of human rights and humanitarianism which is itself narrow in scope.

\textsuperscript{97} Orford (n 93) 187.
\textsuperscript{98} Jacques Rancière, ‘Who is the Subject of the Rights of Man?’ (2004) 103 South Atlantic Quarterly 297.
\textsuperscript{99} ibid.
\textsuperscript{100} ibid.
\textsuperscript{101} Orford (n 93) 191.
CONCLUSION

The concept of the responsibility to protect has flourished since its conception. Nonetheless, as it enters its ‘adolescence’ it will inevitably undergo changes and face numerous obstacles. We have traced how the idea has so far managed to overcome its early crisis and has established itself as a central notion in debates on humanitarian intervention. Initially we recalled the move from a document composed by the ICISS to a doctrine endorsed by the international community in the 2005 World Summit. Subsequently, we outlined the major advances in the years leading to the concept’s effective application in Libya. The Libyan intervention, however successful, exposed the responsibility to protect to new difficulties concerning accountability and the extent of the mandate imposed by the Security Council. In this context, we reviewed the proposal of Brazil to supplement the responsibility to protect with a responsibility while protecting.

Once the main points brought up by the responsibility while protecting were presented, we argued that this notion may help bridge the North-South divide when it comes to humanitarian intervention. It may therefore be seen as an exercise in pro-active diplomacy by emerging powers that have signalled abandoning former strict opposition to intervention to assume an inclusive role in shaping debate and becoming norm entrepreneurs. While that may hold true for Brazil, India and South Africa, there is still opposition from China and Russia, reflected in the failure to include the responsibility while protecting in the last summit of the BRICS. The ongoing conflict in Syria has added to the lack of consensus and the distancing of China and Russia not only from Western powers but also from other emerging nations.102

Finally, a brief look at what critical international legal scholarship has to say about the responsibility to protect disclosed the limits of the current debate and of the proposal of a responsibility while protecting. We highlighted that other forms of responsibility – for global inequality or for the causes of insecurity and poverty – were being sidelined by a discourse reminiscent of colonial times, based on stereotypes of victims and saviours. Furthermore, we questioned if the era of

102 Note that China and Russia were the only BRICS members to reject the General Assembly Resolution 66/253B, which directly criticizes Russia and China by ‘deploring the Security Council failure’ to act.
humanitarian intervention could mean the end of human rights as an emancipatory and revolutionary discourse.

In a final analysis, the debate that was initiated on the responsibility while protecting is first and foremost a confirmation of the triumph of the responsibility to protect. Accordingly, if the responsibility to protect is ‘our normative instrument of choice to convert a shocked international conscience into timely and decisive collective action’,\textsuperscript{103} it should not only be complemented by a responsibility while protecting, but also by a broader examination of responsibility for global injustice and insecurity.

\textsuperscript{103} Thakur (n 45) 160.
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