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Mitigating the Gap: the Responsibility to Protect as a Soft Law Mechanism

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Professor Juergen Dedring

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1. Introduction

Today major civilian casualties and gross human rights violations are not the result of interstate wars, but of what traditionally has been seen as intrastate conflicts. In principle, because of being internal, these conflicts have been considered outside of the valid course of action of the international community. The United Nations Charter is clear. "[A] sovereign state is empowered by international law to exercise exclusive and total jurisdiction within its territorial borders, and the other states have the corresponding duty not to intervene in its internal affairs."¹

Yet, haven't states also agreed on setting global standards of behavior concerning human rights, such as the Universal Declaration of Human Rights, the Convention on the Prevention and Punishment of the Crime of Genocide, and the Geneva Conventions, that should specifically address these situations?

Commenting on this legal imbalance, Diehl et al. tell us that although one might think that international law functions resembling Hart's classification of primary norms and secondary rules, in which secondary rules serve to solve problems such as inefficiency or uncertainty of primary norms, the conceptualization and functioning of the international legal system is somehow different.

As the authors explain, it is easier to understand international law "as a dual system for regulating interactions both generally and within specific areas,"² or a system that provides for both an operating and a normative system in ordering international relations. As a normative system, international law guides international behavior by identifying specific goals and values to be promoted and protected. As an operating

¹ Evans et al. 2002, p. 102.

² Diehl et al. 2009, p. 1.

system, international law provides a supportive structure through which new norms and rules are created, parameters for interaction established, and procedures and institutions to solve potential conflicts determined.

In order to comprehend how international law functions, it is basic to keep in mind that while through the years the tendency has been towards expansion in both of its dimensions,^{3 4} it is precisely because of its Westphalian legacy - in which international law is basically conceived as regulating interactions among, but not above, or within states - that the operating system is not only more elaborated than the normative system, but also, that some of its elements limit the progress of elements of its normative counterpart.

Accordingly, the existence of imbalances between normative developments, and the capacity of the international legal system to support the implementation of norms, are not uncommon. The problem presents itself not only when new norms are created, but lack "the appropriate processes and structures... to give [them full] effect",⁵ but also when effective implementation appears to be 'incompatible' with previous norms or institutions - a persistent setback.

As explained by Diehl et al., while existing imbalances can remain unresolved, political shocks⁶ may facilitate operating system changes. However, in the absence of international consensus, or when necessary operational changes run counter to the

³ In its operating dimension by increasing "the number of actors[,] forms of decision-making[, as well as] forums and modes of implementation."

Ibid, p. 6.

⁴ In its normative dimension by increasing its depth and scope, especially in issue specific areas such as human rights, where international law regulates behavior within states.

⁵ Diehl et al. 2009, p. 164.

⁶ According to Diehl et al. "political shocks can be discrete events, such as world wars, acts of terrorism, or horrific human rights abuses [that] represent dramatic changes in the international political environment." Diehl et al. 2003, p.57.

interests of powerful states, political shocks can also give rise to extra-systemic adaptation processes, such as soft law mechanisms.

Defined as "those that do not involve a formal legal obligation or legal processes, but nevertheless represent a shared understanding or consensus about procedure or behavior among the parties",⁷ soft law mechanisms are usually created to "provide for both norms and their implementation when formal agreements are not possible or involve issues that are heretofore considered domestic concerns."^{8 9}

As pointed by Abbot et al., one of the main advantages of softer types of legislation is to provide states with the opportunity to learn about emerging international challenges and possible avenues for cooperation, thereby providing the international community with a mechanism that can help to develop further consensus and compromise among states. In this view, although soft law adaptations "do not ensure a fully functioning legal system,¹⁰ they are in some cases superior to operating system components designed to fulfill the same functions."¹¹

As we will see through this thesis, emergence of the Responsibility to Protect constituted a direct reaction to mass atrocities and evidence of the dynamic nature of the international legal system, which, through the ongoing process of evolution of the human rights regime, directly centers individuals and their inalienable rights as the main subjects for protection at the national and international levels.

As a soft law mechanism based on strong normative foundations, and the

⁷ Diehl et al. 2009, p. 177.

⁸ Ibid.

⁹ Elaborating on this point Abbott et al. tell us that it is precisely because of the high sovereignty costs of formal arrangements as well as the uncertain consequences that can derive from their application, that states choose to cooperate through these types of legislation.

¹⁰ Since there may be some operating system gaps that are not address in their totality.

¹¹ Diehl et al. 2009, p. 9.

adaptation or re-conceptualization of Sovereignty as Responsibility, the Responsibility to Protect provides a comprehensible response to a substantive question: how to reconcile the institution of state sovereignty,¹² fundamental for orderly relations among nations, with agreed upon standards of behavior and humanitarian precepts, such as the prohibition of genocide, which have reached the status of *jus cogens* norms.¹³

In this view, the Responsibility to Protect - or the primary responsibility of states to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity, and the complementary responsibility of the international community to assist states in fulfilling their responsibility, and to react by diplomatic and other peaceful means, and only if necessary, through the use of force in accordance with the United Nations Charter - represents not an idealistic solution, but a serious effort to construct a coherent and realistic framework to better coordinate international institutions and norms that initially appear as irreconcilable.

¹² And its related principles such as non-interference.

¹³ Citing the International Court of Justice 1986 Nicaragua decision, Shelton tells us that *jus cogens* norms are those "rules of international humanitarian law so fundamental to respect for the human person and 'elementary considerations of humanity' that 'they constitute intransgressible principles of international customary law'." Shelton 2009, p. 86.

2. Research Design

2.1 Hypothesis

Motivated by the divided positions that followed from the Security Council's adoption of Resolution 1973,¹⁴ and its implementation by NATO, as well as by the expanding debate on the role and utility of the Responsibility to Protect when considering the international community's differing treatment of events currently unfolding in countries like Syria and in Bahrain, the object of this thesis is to better understand what is the Responsibility to Protect, what is the relationship between the developing framework and greater compliance with international law, and what are its main contributions, pending challenges and limitations.

I will argue that although the Responsibility to Protect has commonly been defined as a norm or an emerging norm, such an understanding can lead to inaccurate interpretations of what should be expected from the developing framework. Instead, I will argue that it is better to understand the Responsibility to Protect as a soft law mechanism aimed at facilitating compliance with previously agreed-to standards of behavior. As I will seek to demonstrate, this interpretation is not only more realistic, when considering that due to the high sovereignty costs involved in the framework¹⁵ it is probable that the Responsibility to Protect will never reach full legalization, but is also more coherent, when realizing that the most important contribution of the framework is not really legal but political.

¹⁴ Concerning the situation of Libya.

¹⁵ Both of decision-making sovereignty in the case of powerful states and of territorial sovereignty in the case of weaker ones
See Luck 2010, p. 362.

2. 2 Methodology

This thesis will adopt a qualitative approach to analysis based on the use of case studies, and the review of relevant literature, official documents such as United Nations General Assembly declarations, Security Council resolutions and Secretary General reports, as well as statements by member states representatives and UN officials.

Following Diehl et al.'s conceptualization of soft law mechanisms, the first part of this thesis will revisit the political shocks that led to the emergence of the Responsibility to Protect. After reviewing the international response to humanitarian crises in Somalia, Rwanda, Bosnia and Kosovo during the nineteen nineties, I will explore the theoretical foundations of the Responsibility to Protect: the re-conceptualization of Sovereignty as Responsibility, developed by Francis Deng during the mid-nineties, and the Responsibility to Protect as conceived and presented to the world in 2001 by the International Commission on Intervention and State Sovereignty.

Next, I will review the political efforts aimed at creating and advancing international consensus on the framework, the negotiation process undertaken by states within the United Nations system, and the language in which the Responsibility to Protect was publicly acclaimed by world leaders at the World Summit in 2005. Over this basis I will explore the steps that have been taken at the United Nations in order to implement the Responsibility to Protect as an organizing framework for political action at the international, regional and national levels. My thesis will conclude by identifying the main contributions, pending challenges and the limitations of the Responsibility to Protect.

3. Political Shocks

Understanding the circumstances that led to the emergence of the Responsibility to Protect takes us back to the early nineties, a time that seemed like a historic moment for the United Nations. The end of the Cold War allowed the organization to immerse itself in vast regions of the world through diplomacy, mediation, and peace operations. In addition, in 1991, the United Nations had coordinated an exemplary response to Iraq's invasion of Kuwait.

Yet, despite talk of a 'new world order', images of peacekeepers as 'freedom warriors', and the declaration by members of the Security Council in 1992 that social, economic and even ecological crises could constitute threats falling within their purview,¹⁶ events to happen in Somalia, Rwanda and the former Yugoslavia would soon shake the organization.

As explained by Traub, in the excitement of the moment it had been easy to overlook crucial facts. First, the dynamics and challenges of conflict prone areas were changing dramatically in the context of the post-Cold War era. Second, the United Nations "had no previous experience with the boiling madness of civil war."¹⁷ Third, "Council members had made no serious effort to match the size and capacity"¹⁸ of authorized operations to the environment in which peacekeepers were going to be deployed. Fourth, "the United States had attained such global dominance with the collapse of the Soviet empire that it could afford to act on its own, even if it preferred not to."¹⁹

¹⁶ Chesterman 2002, p. 300.

¹⁷ Traub 2006, p. 60.

¹⁸ Ibid. p. 36.

¹⁹ Ibid, p. 25.

3. 1 Somalia 1993

The United Nations presence in Somalia in 1992 constituted a direct application of the Security Council's new approach to global security. In practice, although intolerable in humanitarian terms, the Somali crisis did not present any type of threat to international peace and security per se, but a threat to Somalis themselves. In addition, UNOSOMs²⁰ initial contingent numbered five hundred Pakistani peacekeepers, who as pointed out by Traub, were being deployed in the middle of a 'madhouse' run by contending factions.

After the totality of UNOSOMs personnel were held down at Mogadishu's airport by forces loyal to the chief warlord Mohammed Aideed, former Secretary General Boutros Boutros Ghali asked the United States government for needed support in order to carry out the operation. Amazingly, "[h]aving already lost his re-election bid"²¹ President George H. Bush authorized the unthinkable, and "[a]n astonishing thirty-seven thousand troops, twenty-eight thousand of them American, [took] over the job from the five hundred Pakistanis."²²

Yet, even with this reinforcement, UNOSOMs mission would prove unsustainable. The operation had been conceived as a patchy response to the Somali crisis, and its mandate only encompassed the distribution of humanitarian aid to civilians by keeping contending factions at bay. With no American national interests involved, and the mission's goals seemingly accomplished, the Clinton administration was eager to pull out American troops. Re-considering these issues, the Security Council authorized a new operation in March, 1993.

²⁰ United Nations Operation in Somalia.

²¹ Traub 2006, p. 37.

²² Ibid.

Ironic, when thinking that the contingent that was going to replace American troops was worse trained and armed than its predecessor, the mission's mandate was broadened. This time the operation's goals aimed not only at ensuring the flow of humanitarian aid to civilians, but also at disarming contending factions, and at starting to rebuild the Somali State.

Not surprisingly, in June 1993, once ten thousand US Marines had left, "Aideed's troops ambushed two Pakistani units, killing twenty-six" peacekeepers.²³ The next day, responding to what seemed like an attack on the United Nations, the Security Council authorized "all necessary precautions against all those responsible for armed attacks".²⁴ The consequences of this authorization would prove disastrous.

Acting outside of the mission's mandate, eighteen US Army Rangers died while trying to capture Aideed's closest men. This signified high costs for the Clinton administration since the operation had been orchestrated by the United States Special Operations Command in Florida, not the United Nations. For Somalis, the operation meant the deaths of thousands of civilians, thus ending all support from the local population. For the United Nations, "Somalia was a profound shock to the system:"²⁵ the whole Mogadishu experience had demonstrated that the organization was both unprepared, and unable to operate in a coherent way in the context of a failed state.

3. 2 Rwanda 1994

The United Nations presence in Rwanda started as a part of a wider effort in the Central African region aimed at persuading rival groups to lay down arms, and to manage

²³ Ibid, p. 38.

²⁴ Ibid.

²⁵ Ibid, p. 39.

internal conflict by accepting "systems of power sharing."²⁶

By August, 1993, the Arusha Accords had been signed by President Habyarimana, representing the Hutu government, and by the RPF,²⁷ a Tutsi rebel group that had accumulated considerable military gains in the northern part of the country since the beginning of the Rwandan Civil War in 1990. The parties had agreed to start working on their differences, and to a ceasefire line to be monitored by the United Nations.

Yet unfortunate dynamics were already developing. First, Security Council members again were underestimating the size of the contingent that was required to accomplish the mission's goals. Although the United Nations Department of Peacekeeping had initially estimated that UNAMIR²⁸ would require the presence of twelve hundred men, pressed by the increasing costs of peace operations, the Security Council authorized the deployment of a force of only eight hundred. Second and more importantly, the real risk in Rwanda, the Interahamwe, a militia group composed mainly of Hutu radicals who felt President Habyarimana was compromising too much just by negotiating with Tutsis, had not been a party to the peace agreement, and because of that, they were considered out of the mandate or scope of action of UNAMIR. Third, because of Somalia, the institution and its members, specially the United States, were in denial.

Neither detailed information coming from UNAMIR's Commander, Romeo Dallaire, in January 1994 on the emerging dynamics on the ground and on the atrocities that were about to happen, nor that the extermination of Tutsis and of moderate Hutus since the beginning of April was becoming systematic, was able to modify the organization's passive approach to the conflict or its humanitarian consequences. Instead,

²⁶ Ibid, p. 51.

²⁷ Rwandan Patriotic Front.

²⁸ United Nations Assistance Mission for Rwanda.

the Peacekeeping Department 'explained' to Dallaire that the overriding consideration of peacekeeping missions was to avoid the use of force. He was explicitly reminded that the scope of UNAMIR's mandate did not contemplate actions such as seizing illegal arms from the Interahamwe, or providing protection to civilians!

On April 6th, facilitated by the lack of any type of coherent action by the United Nations, and after a missile had blown up President Habyarimana's plane, "the killing began within hours."²⁹ In a desperate effort on April 7th, Dallaire contacted the Peacekeeping Department with a last minute plan to persuade moderate Hutus to organize against the Interahamwe. Sadly, he was again told that it was imperative, in light of the disaster that had just occurred in Somalia, that UNAMIR did not take sides.

From that point on, events in Rwanda followed exactly the path that had been delineated a couple of months earlier in Dallaire's cable to the Secretariat. On April 10th, a group of ten Belgian peacekeepers was killed by the Interahamwe. Reacting to the episode, Belgians and Americans began advocating for withdrawal of the operation. With the situation rapidly deteriorating Boutros Boutros Ghali implored Council members to stop the violence by authorizing the use of force on April 19th. Yet facilitated by a lack of international consensus on how to proceed, and if to proceed,³⁰ the Secretary General's plea was highly questioned.

Even by the last days of April, when estimates of victims were close to five hundred thousand, "and the newspapers and airwaves were filled with accounts of

²⁹ Traub 2006, p. 55.

³⁰ As Traub tells us, member states seemed to be divided into several groups. The first was formed by many developing countries that had been persuaded by the Rwandan representative to the UN that the RPF was to be blamed for increasing levels of violence in his country. A second group of states was inclined to believe that Rwandans' lack of cooperation with UNAMIR justified the closing of the mission. Finally, countries that had contributed troops to the mission expressed deep concerns for the security of their nationals.

unspeakable savagery[,] the UN continued to behave as if Rwanda represented a conventional problem of political reconciliation."³¹ It was not until May that the Secretary General was clear enough and used the term genocide. Shamefully, "the Clinton administration was by then twisting itself into rhetorical knots" to avoid using the term for fear that this somehow would imply the automatic implementation of "provisions of the UN Convention on the Prevention and Punishment of the Crime of Genocide, which requires signatories to 'prevent and punish' such crimes."³²

Finally, by the beginning of May, the Security Council had agreed to task the United Nations Secretariat with the development of an unofficial plan to reinforce the mission. Inside of Rwanda, Dallaire proposed an additional contingent of fifty-five hundred men to be deployed in areas where Tutsis had concentrated. His plan was clear, and from the ground it made perfect sense. Contrary to the situation in Somalia where the danger was coming from well armed factions, in Rwanda, it was "a bunch of thugs armed with machetes"³³ that was slaughtering masses.

Yet, invoking the disaster in Somalia, the United States opposed Dallaire's plan. Instead, the Clinton administration proposed logistic support to implement a different operation. As United States' officials explained to the Peacekeeping Department, Rwandans at risk had already left the country and they could be protected in refugee camps outside of Rwanda. But the strategy made no sense since Dallaire was describing how thousands were being massacred per day. By May 17th, the United States finally agreed on a resolution, and the Security Council authorized the deployment of only eight hundred men.

³¹ Traub 2006, p. 57.

³² Ibid.

³³ Ibid, p. 58.

At this point, as Traub explains, not even this weak gesture mattered "since neither Rwanda's neighbors nor any of the usual peacekeeping sources were willing to send soldiers into the Central African cauldron".³⁴ Fortunately, on May 19th, the RPF, led by Paul Kagame, was able to take the capital, Kigali, and declared a ceasefire. Ironically, a month later, when a new government had already been established, the Peacekeeping Department received "the first pledge of troops"³⁵ from a couple of states.

In the end, the 'ugly truth' was that members of the international community had "little responsibility to protect the lives of the victims of an ongoing genocide."³⁶ As for the United Nations, the operation in Rwanda constituted the worst failure in the whole history of the organization.³⁷ Although in Somalia, decisions taken had gone extremely wrong, in Rwanda, "where 800,000 people were slaughtered in one hundred days,"³⁸ the United Nations had been unable in effect to intervene at all.

3. 3 Bosnia 1992-1995

Calls for United Nations presence in the ethnically diverse Socialist Federal Republic of Yugoslavia had started in November, 1991, when "army troops had massacred civilians in the Croatian town of Vukorvar."³⁹ Croatia's Parliament had declared independence in June of that year, and Yugoslavia's Serb President, Slobodan

³⁴ Ibid.

³⁵ Ibid. p. 59.

³⁶ Ibid.

³⁷ Revisiting the events in Rwanda, an independent inquiry observed: "While UNAMIR [had been] established to monitor a peace agreement, 'the onslaught of the genocide should have led decision-makers in the United Nations [...] to realize that the original mandate, and indeed the neutral mediating role of the United Nations, was no longer adequate and required a different, more assertive response, combined with the means necessary to take such action'."

Ibid.

³⁸ Ibid, pp. 50-51.

³⁹ Ibid, p. 42.

Milosevic, had launched a military campaign supposedly aimed at ensuring the unity of the Federation. By December, a small group of United Nations unarmed military observers had been deployed to monitor a ceasefire line that had been negotiated by the European Union.

Yet, even before authorizing any type of armed operation, Secretary General Boutros Boutros Ghali expressed his discomfort with the idea of the organization's presence in the Balkans. In his view, not only were there so many other, more terrible conflicts around the world, but this was "a white man's war",⁴⁰ thus a European problem. In turn, although Lord Carrington⁴¹ had commented that "the hour of Europe [had] come",⁴² it seemed like Europeans were only willing to be the protagonists of the diplomatic effort. It was clear from French and British statements that support from the ground was to be assumed by the United Nations.

Calls for the deployment of peacekeepers to Bosnia started in April, 1992, when the Yugoslav Army and Serbian paramilitary forces surrounded Sarajevo. After dispatching an envoy to the area, the Secretary General informed the Security Council that since there was no peace to keep, conditions were not ripe for sending in peacekeepers. Nevertheless, in June UNPROFOR⁴³ was enlarged to include infantry. As stated by the Council, in resolution 761, the mission's goals would be "to ensure the security and functioning of Sarajevo's airport and the delivery of humanitarian assistance"⁴⁴ to civilians.

After the shelling of Srebrenica's market, Council members agreed on the

⁴⁰ Ibid, p. 43.

⁴¹ Chief negotiator for the European Union in the Balkans.

⁴² Traub 2006, p. 42.

⁴³ United Nations Protection Force

⁴⁴ S/RES/761, June 29, 1992.

establishment of a safe area around the town, to be protected by peacekeepers.

Considering increasing levels of ethnic violence, the idea of safe havens was later extended to incorporate four towns with predominately Muslim populations.

Since this task was unprecedented for peacekeepers, UNPROFOR officials began questioning the implementation of the policy. As seen by the mission's commander, the idea of safe areas implied that peacekeepers had to side openly with one of the parties to the conflict. Nevertheless, in order to follow the Council's orders, he requested an additional seventy thousand troops. Boutros Boutros Ghali then presented two plans to the Council. The first one was constructed in terms of UNPROFORs request, the second, to deploy a small number of peacekeepers, and to back them with the threat of air strikes. The Council adopted the second approach and authorized an additional contingent of seventy-six hundred men. The decision proved catastrophic.

In effect, although the protection of endangered populations within safe areas had been conceived as a 'temporary' option, which meant "until the Serbs accepted the so-called Vance-Owen peace plan",⁴⁵ when the plan failed, ethnic violence rose, but air strikes did not follow, the policy became counterproductive. Not only were Serbs getting the message that the United Nations was bluffing, but with lightly armed peacekeepers, Bosnian Muslims had become easy targets!

Moreover, increasing violence was facilitated, in practice, by a mute Secretariat, and divided Council members. As early as 1994, protected towns such as Srebrenica, Gorazde, and Bihac were becoming outright 'killing zones', yet neither the Secretary General nor the Security Council would do anything about it until mid-1995.

Serb forces launched the final assault on Srebrenica on July 6, 1995. The town fell

⁴⁵ Traub 2006, p. 45.

on July 11th after desperate calls from Dutch peacekeepers for air support were ignored.

Traub described the scene:

[I]t was clear that something terrible [happened] to the town's Muslim population: the Serbs had deported women, children and the elderly. [Initially] '4000 draft-aged males' could not be accounted for[...] In the end, the Bosnian Serbs killed about seventy-four hundred men and boys - by far the greatest atrocity in Europe since World War II.⁴⁶

Shamefully, only after Milosevic's forces had crossed the last possible line by successfully implementing his ethnic-cleansing policy, did Security Council members concur on how to proceed. In an emergency meeting on July 21st, allied leaders agreed that NATO "would no longer give the UN a veto over bombing decisions."⁴⁷ Soon after Serbian militias encircled the rest of the protected areas, the Clinton administration communicated its intention to start the air campaign with, or without European support. On August 30th, two days after a Serb explosive killed thirty-seven more people in Sarajevo, NATO strikes began. Operation Deliberate Force would continue "until the Bosnian Serb leadership... signed a draft of a peace agreement two weeks later."⁴⁸

3. 4 Kosovo 1999

Calls for the United Nations to be a presence in the Federal Republic of Yugoslavia started in 1998. Yet, Kosovo was not going to become a United Nations issue.⁴⁹

⁴⁶ Ibid, p. 49.

⁴⁷ Ibid.

⁴⁸ Ibid.

⁴⁹ At least initially.

Since the beginning of the year, facilitated by an increasing number of weapons flowing from Albania, Kosovars were moving from peaceful resistance to Milosevic's rule, to a more militarized stance towards the Yugoslav government. At the same time, Serb forces were moving from retaliating against KLA⁵⁰ leaders and their families, to collective punishments towards predominately Albanian and Muslim populations.

Despite an active Secretariat⁵¹ that started calling attention to the escalating conflict as early as May, Russia, a historical Serb ally, which at the time was facing similar problems in Chechnya, was determined to protect Milosevic's rule over the Serb Province.

Indeed, the Russians were very clear. In September, when the Security Council was able to pass a resolution declaring that increasing levels of ethnic violence constituted a threat to international peace and security, "demanding that Serb forces be confined to their garrison, and [calling on the parties to seek] a negotiated solution to Kosovo's bid for secession[, t]he Russian ambassador insisted that the resolution did not authorize force should Serbs fail to comply."⁵²

In October, pressed by threats of NATO's air strikes, Milosevic declared he would cooperate with the Council's resolution by allowing observers. Yet, "the Serbs were not about to be deterred by unarmed monitors [and t]he violence, the bouts of ethnic cleansing, grew more brutal."⁵³ This time however, Milosevic was seriously miscalculating the limits of the Clinton administration's patience.

⁵⁰ Kosovo Liberation Army.

⁵¹ Kofi Annan was elected Secretary General of the United Nations in December, 1996. Previously he had served as head of the Department of Peacekeeping Operations since 1993. That experience had greatly molded his position on the issue.

⁵² Traub 2006, p. 94.

⁵³ Ibid, p. 95.

By mid January, having no intention on waiting until the Council's paralysis would diffuse, as in Bosnia, and responding to the assassination of forty-five Kosovars in the town of Racak, "NATO began to prepare its war machinery, while the Bosnia Contact Group[,]⁵⁴ which had been coordinating diplomatic efforts, called for a last-ditch attempt at negotiations."⁵⁵

Once diplomacy at Rambouillet failed, Paul Heinbecker, Canadian Ambassador to the United Nations and then President of the Security Council, tried for the last time to persuade Council members to authorize a collective enforcement operation. Determined to stop Milosevic, and conscious of Russia's intention to continue to exercise its veto, NATO launched its seventy-two day long bombing campaign on March 24, 1999.

⁵⁴ Composed of the United States, the United Kingdom, Germany, France, Italy and Russia.

⁵⁵ Traub 2006, p. 95.

4. Trying to Start the Debate

In the aftermath of Kosovo, with the world divided between those who felt that NATO's unauthorized intervention to save Kosovar Albanians had been legitimate, and the majority of states who thought of it as having disastrous consequences for the international order that the United Nations had helped to build since 1945,⁵⁶ former Secretary General Kofi Annan decided to make human security and intervention the themes of his next report to the General Assembly in September of 1999.

[In his speech,] Annan argued that the State was the servant of the people and that the 'sovereignty of the individual' was enhanced by a growing respect of human rights. State sovereignty therefore implied a responsibility to protect individual sovereigns. The role of the UN was to assist states in their fulfillment of their responsibilities and achievement of their sovereignty. This much was clearly set out in the UN Charter, Annan reiterated. The question however, was one of how to determine the 'common interest' in particular cases. In a case such as that of Kosovo, did sovereignty as responsibility require intervention, and, if so, who was entitled to take this decision? Answering his own questions, Annan [focused on three critical points.] First, a principle of intervention should be 'fairly and consistently applied'. Second, it should embrace a 'more broadly defined, more widely conceived definition of national interest'. In other words[,] decision-makers should make decisions on the basis of the common good not on the basis of national interests. Third, the proper authority was the Security Council, but the Council should accept its responsibilities and make a commitment to respond to humanitarian emergencies.⁵⁷

⁵⁶ Article 2 section (4) of the United Nations Charter establishes that [a]ll Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations. The only exceptions to this rule are self-defense, or Security Council authorization in accordance with Chapter VII of the United Nations Charter.

⁵⁷ Bellamy 2009, pp. 31-32.

Not surprisingly, Annan's approach was not only questioned⁵⁸ but formally repudiated. As stated by the G77, "the doctrine of humanitarian intervention [was] an unacceptable violation of state sovereignty."⁵⁹

Yet, Annan's initial failure was the beginning of a bigger effort.⁶⁰ A year later, the Secretary General reiterated his message in his 2000 Millennium Summit Report, and "[a]t the 2000 convening of the General Assembly, Canadian Prime Minister Jean Chretien announced that he would impanel a commission to study the issues that Annan had raised."⁶¹

This commission, that became known as the International Commission on Intervention and State Sovereignty (ICISS) would be responsible for reframing the terms of the debate by developing the concept of the Responsibility to Protect. However, because the Responsibility to Protect is built over the re-conceptualization of Sovereignty as Responsibility, the next section will first explore Deng's work.

⁵⁸ For instance by the President of Algeria who declared that his country was specially sensitive to any revision of the institution of state sovereignty in favor of intervention, since most of the world had no "active part in the decision-making process in the Security Council nor in monitoring the implementation of decisions."

Ibid.

⁵⁹ Traub 2006, p. 101.

⁶⁰ As Bellamy tells us, Canadian officials had begun advocating in early 2000 for the necessity to form a commission to deal with the issue of humanitarian intervention. Recognizing that such a commission required 'serious political sponsorship', Canada's Foreign Minister, Lloyd Axworthy, approached Kofi Annan to ask for his endorsement of the commission and its report. Annan declined. Nevertheless, he recommended the Canadian government sponsor the new commission at the gathering of the General Assembly in September of that year.

As pointed out by Bellamy, in his report, Annan "set the scene for the proposed commission" by pointing to three critical concerns that had been raised by member States since his 1999 speech. First, some states saw humanitarian intervention as a tool that powerful states could abuse. Second, some felt that the acceptance of the principle could encourage increasing violence from secessionist movements in order to provoke international action. Third, some feared that the principle could be applied in a selective manner.

Bellamy, 2009, p. 35.

⁶¹ Traub, 2006, p. 102.

5. Re-conceptualizing Sovereignty

Through the nineteen nineties, the realization that the end of the Cold War revealed a vacuum of responsibility for the management of internal conflicts and their humanitarian consequences, and that the United Nations was failing to adapt to the emerging challenges and dynamics of conflict prone areas, confronted the international community with a substantive dilemma - how to bridge the gap between international ideals, such as the protection of basic rights, and on-the-ground realities in sovereign countries such as Somalia, the former Yugoslavia, and Rwanda, where internal conflicts and gross human rights violations had been fueled by state failure or partisan authorities' unwillingness to protect segments of the population.

Because, in principle, providing local solutions to local problems counts for a high degree of legitimacy, and because, in practice, external assistance to safeguard effectively populations in need of protection is greatly facilitated by governments' cooperation, the challenge "is one of how to negotiate sovereignty, how to engage governments in a constructive dialogue that would bridge sovereignty and responsibility, that would turn sovereignty from being a barricade against the outside world, into a positive challenge of a state's responsibility for its people,"⁶² and to do it within a framework able to unite state responsibility and accountability into a principle for political action, at both the national and international levels.

5.1 From Sovereignty as Control to Sovereignty as Responsibility

To explain the basis for conceptualizing Sovereignty as Responsibility, Deng et al. start from the premise that the institution of state sovereignty is to be understood in its

⁶² Deng 2011, p. 92.

historical context. Indeed, although established in the post-Thirty Years War in Europe through the Peace of Westphalia in 1648, sovereignty has advanced through at least four overlapping phases.

Sovereignty "was initially conceived as an instrument of authoritative control by the monarch over feudal princes in the construction of modern territorial states."⁶³ Accordingly, the basic premise of this period was that the primary goal of the state ⁶⁴ was to "maintain order through an effective exercise of sovereignty."⁶⁵ Utilized in this context, sovereignty was understood by legal scholars like Austin, as an attribute of power, which placed authority above the law, law being a reflection of the sovereign's will. In other words, sovereign rule was absolute and not to be constrained, and although restrictions to authority were possible, they would result from acts or discretion of the sovereign.

The second phase in the development of sovereignty can be dated to 1945. "[T]he Nuremberg trials and the mounting humanitarian and human rights movement following World War II represent a clear demarcation line for the erosion of sovereignty."⁶⁶ The legal dispute in 1945 and 1946 was not if Nazi atrocities committed during war time constituted crimes against humanity, but if it was necessary or not to pass new legislation to declare Nazi law illegal retroactively. As posited by those such as Hart, retroactive legislation was necessary. Contrariwise, basing his views on the intrinsic ethics of law, Fuller contended that Nazi "laws had so violated the fundamental principles of morality

⁶³ Deng et al. 1996, p. 2.

⁶⁴ This premise applied to any type of government holding power, such as monarchies, autocracies or democracies.

⁶⁵ Deng et al. 1996, p. 3.

⁶⁶ Ibid, p. 4.

and human dignity as to have ceased to be law."⁶⁷

Prompted by the level of destruction, as well as by the humanitarian costs resulting from the war, the United Nations was created not only as an organization to promote friendly relations among nations, and to enforce the prohibition of the use of force in international relations, but also to promote human rights standards, their protection, and to facilitate human rights law codification. As posited by Buergenthal, despite the vagueness of the human rights provisions set forth in the United Nations Charter, articles 1(3), 55 and 56 proved to have important effects.⁶⁸ "In time, the membership of the United Nations came to accept the proposition that the Charter had internationalized the concept of human rights."⁶⁹

Explaining this process, Deng et al. tell us that although not fully elaborated, basic human rights norms were adopted by member states around the United Nations system via the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights. This corpus of law provides the basis for the essential premise of human rights law. In simple terms, "to qualify for the name of government, a government now has to meet certain standards, all of which involve restraints in the use of power: no torture, no

⁶⁷ Ibid.

⁶⁸ Article 3 establishes that the purposes of the United Nations are (3) to achieve international co-operation in solving international problems of an economic, social, cultural or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion.

Article 55 establishes that with a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote (a) higher standards of living, full employment, and conditions of economic and social progress and development; (b) solutions of international economic, social, health, and related problems; and international cultural and educational co-operation; and (c) universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

Article 56 establishes that all Members pledge themselves to take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in article 55.

⁶⁹ Buergenthal 2009, p. 292.

brutalization... no state terror... no discrimination... and so on."⁷⁰ In other words, these agreed-to responsibilities by sovereign states imply acknowledging "[h]umanity [as] the *raison d'etre* of any legal system",⁷¹ recognizing that many states were failing in fulfilling their "primary function, namely the protection and development of the human dignity of the individual,"⁷² and accepting that "the normative principles of governance should emphasize state protection for the individual [both through] the provision of the essential requirements of life,"⁷³ and through the protection of basic human rights.

These premises not only "impose on the international community a correlative responsibility for their enforcement,"⁷⁴ but constituted the basis for operation of the right of self-determination during the decolonization process. As Deng et al. tell us, sanctions against apartheid practices in South Africa were an effective measure to expand sovereignty as responsibility, a process which has been reinforced in time, by increasing waves of democratization, as well as by the increasing codification of international law instruments within the United Nations system.

In effect, sovereignty finds limits, and at the same time expands in specific areas, through ratification of international agreements such as the Convention on the Prevention and Punishment of the Crime of Genocide, the Geneva Conventions and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. These treaties are legally binding and provide a valid and legitimate base for United Nations practices such as "on-site monitoring and visits, criticism, condemnations, sanctions and

⁷⁰ Deng et al. 1996, p. 4.

⁷¹ Ibid.

⁷² Ibid.

⁷³ Ibid, pp. 4-5.

⁷⁴ Ibid, p.5.

even armed intervention."⁷⁵

As demonstrated by post-Cold War dynamics, the advancement and expansion of the human rights regime have been impressive. When compared to the Cold War era, the nineteen nineties had been characterized by an explosion of humanitarian assistance missions, and peacekeeping operations authorized by the United Nations Security Council.

However, precisely because the issue of humanitarian intervention represents the greatest erosion to the traditional conceptualization of sovereignty, is that the third phase of its evolution "emerged as a reactive assertion of sovereignty by governments whose domestic performance renders them vulnerable to international scrutiny."⁷⁶ Still, even supporters of a more liberal conceptualization of sovereignty admitted the existing tension between the expansion of sovereignty as responsibility, and the erosion of state sovereignty as a fundamental institution to facilitate peaceful relations among nations.⁷⁷ As questioned by former Secretary General Perez de Cuellar in 1991, after affirming the irreversible expansion of humanitarian and human rights standards: "[D]on't these premises call into question one of the cardinal principles of international law, one diametrically opposed to it, namely, the obligation of non-interference in the internal affairs of States?"^{78 79}

⁷⁵ Ibid, p. 8.

⁷⁶ Ibid, p. 2.

⁷⁷ Article 2 of the United Nations Charter establishes that the Organization and its Members, in pursuit of the Purposes stated in Article 1, shall act in accordance with the following Principles (1) the Organization is based on the principle of the sovereign equality of all its Members

⁷⁸ Deng et al. 1996, p. 13.

⁷⁹ Article 2 of the United Nations Charter establishes that the Organization and its Members, in pursuit of the Purposes stated in Article 1, shall act in accordance with the following Principles (7) Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to

Answering this question a few years later, former Secretary General Boutros Boutros Ghali argued for the need to balance the international community's concerns with the need of good governance at the level of states. In this view, at the same time that fulfillment of sovereign responsibilities had become the best way to protect national sovereignty, broader cooperation was still necessary.^{80 81}

This perspective takes us to the current period in the development of sovereignty - a period characterized by a pragmatic effort to reaffirm the centrality of the institution as well as to clarify its parameters.

5. 2 Sovereignty as Responsibility as an Individual and Collective Framework

[In simple terms, conceptualizing Sovereignty as Responsibility, means] to recognize internal conflicts and their consequences as falling within the domestic jurisdiction and therefore national sovereignty of the country concerned. However, it is also recognized, that sovereignty carries with it certain responsibilities for which governments must be held accountable. And that they are accountable not only to their national constituencies but ultimately to the international community. In other words, by effectively discharging its responsibilities for good governance, a state can legitimately claim protection for its national sovereignty.⁸²

Sovereignty as Responsibility as a standard for government behavior is especially

settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.

⁸⁰ This last point implied recognizing that although during the nineteen nineties the international community was becoming more assertive, failures to adapt and react to the dynamics of conflict prone areas, demonstrated that prevention and regional involvement were essential.

⁸¹ To reinforce this message, Boutros Boutros Ghali challenged the former Organization for African Unity to take the lead on this issue, by stipulating "principles or norms for conflict prevention that would promote democracy, fundamental human rights, and good governance."

Deng et al. 1996, p. 15.

⁸² Ibid, p. 1.

relevant in the context of conflict prone areas in Africa, where, as Deng et al. tell us, the absence of adequate institutions to manage diversity during the post-independence period made "conflict over power wealth, and development"⁸³ unavoidable.

As the authors explain, misunderstood post-colonial objectives⁸⁴ resulted in policies that essentially led to pervasive patterns characterized by "gross violations of human rights, denial of civil liberties, disruption of economic and social life, and consequent frustration of development."⁸⁵

The case of Rwanda, where Hutus are the majority of the population, provides a good example to illustrate this point. After independence in 1962, Tutsi domination, that had been reinforced by brutal colonial administrations, was simply replaced by Hutu repression. After all, the RPF was composed basically of Tutsi refugees who, since independence, had been escaping from Hutu government persecution and suppressive practices.

[Learning the lessons from Rwanda suggests that] it is not the differences in identity, whether real or perceived, that generate conflict, but rather the implications of those differences in terms of equitable access to power and resources, social services, development opportunities and the enjoyment of fundamental rights and freedoms.

Seen in this light, early prevention becomes a challenge of good governance and equitable management of diversity. That means eliminating gross inequalities, discrimination and promoting a

⁸³ Ibid, p. 21.

⁸⁴ Such as national unity which had been misinterpreted by nationalists after independence "as uniformity and homogenization rather than acceptance of diversity," in ethnically, culturally and religiously diverse nations.

Ibid, p. 25.

⁸⁵ Ibid, p. 21.

common sense of belonging, a responsibility that all states... have towards their people.⁸⁶

It is precisely because of this responsibility of governments, that sovereignty "becomes a pooled function to be protected when exercised responsibly, and to be shared when help is needed."⁸⁷ In other words, Sovereignty as Responsibility conceptualizes a framework based on cooperation, in which members of the international community exercise responsibilities in the form of increasing 'layers of assistance', in the event of incapacity or reluctance of national authorities to govern.

Precisely because many internal conflicts are embedded in regional ones, and because domestic instability has the potential of spreading to one's neighborhood, is that regional and sub-regional organizations, as well as neighbors, are the first called to share responsibility by constructively guiding members, or neighbors, by assisting them in fulfilling their responsibilities, and by responding in the most appropriate manner when required.

Ultimately, because it is a stated mission of the United Nations to create the "conditions of stability and well-being which are necessary for peaceful and friendly relations among nations",⁸⁸ and because one of its stated purposes is to achieve international cooperation in solving international problems of a humanitarian character by promoting and encouraging respect for human rights,⁸⁹ the United Nations is called upon to actively advance and support sovereignty as shared responsibility as a framework for political action at the national and international levels.

⁸⁶ Statement by Francis Deng at the 16th Commemorative Event of the Rwandan Genocide. New York, April 7, 2010.

⁸⁷ Deng et al. 1996, p. 21.

⁸⁸ Article 55 (c) of the United Nations Charter.

⁸⁹ See article 1 (3) of the United Nations Charter.

In this respect, considering that the goal is to create a coherent and effective system able to assist states and to protect populations, sharing responsibility requires the United Nations to take the lead in at least four specific areas.

First, considering that there is still debate "whether or not existing law provides adequate basis for a comprehensive system of international protection and assistance"⁹⁰ for endangered populations, it is crucial to restate existing obligations contained in agreed-to international instruments in order "to clarify the legal bases and introduce any reforms."⁹¹

Second, considering that the political will of international actors is essential to provide protection and assistance for populations in need, "the formulation of guiding principles may be as important, if not more so, as the promulgation of legally binding standards."⁹²

Third, considering that interventions in the name of humanitarian purposes were abused by powerful nations in the past, the United Nations should state coherent principles for the use of force when the goal is to protect populations, and should have the main "responsibility for determining the existence of humanitarian crises that threatened international peace and security or otherwise justify international action."⁹³

Fourth, and perhaps the most important, considering that Western engagement in ongoing crisis is frequently prompted by "the gravity of the tragedies involved",⁹⁴ direct preventive efforts, as well as structural prevention measures, need to be stressed and further developed.

⁹⁰ Deng et al. 1996, p. 28.

⁹¹ Ibid.

⁹² Ibid, p. 29.

⁹³ Ibid.

⁹⁴ Ibid.

Finally, the United Nations is called upon to play an active role in the areas of conflict prevention and conflict resolution by utilizing all tools at its disposal. As Deng et al. tell us, such a quest had already been outlined by Boutros Boutros Ghali. In his view, the goals of the United Nations should be considered with a broad perspective including: to identify conflict prone situations at their earliest possible stages, and to intervene by utilizing diplomatic tools; to engage in peacemaking when conflict initially erupted; to preserve peace through peacekeeping operations, and to provide assistance to parties to implement agreed-to peace frameworks; and to assist in peace-building initiatives, in the form of institutional reform, infrastructure recovery, or national reconciliation measures.

As explained by Deng et al., what "is envisaged can be conceptualized as a three-phase strategy that would include monitoring the development to draw early attention to impending crises, interceding in time to avert the crises through diplomatic initiatives, and mobilizing international action when necessary."⁹⁵

⁹⁵ Ibid, pp. 31-32.

6. Reframing the Terms of the Debate

Aiming to achieve consensus on a legitimate and comprehensive strategy through which the international community could reconcile the so called 'sovereignty-intervention' dilemma, Canada's Prime Minister announced the creation of the ICISS in September, 2000. As noted by Canada's Foreign Minister, Lloyd Axworthy, "[t]he ICISS was to outline appropriate and politically feasible international responses to massive human rights violations and to set ways of preventing such violations."⁹⁶

Precisely because what was needed was the strongest possible consensus, commissioners were selected from all regions. The ICISS was chaired by Gareth Evans⁹⁷ and Mohamed Sahnoun,⁹⁸ from Australia and Algeria respectively. Of the other ten commissioners, five represented Western countries,⁹⁹ and five represented the far flung South Africa, Guatemala, the Philippines, India and Russia. To promote further international participation, the ICISS "organized a series of 11 roundtables and national consultations attended by the commissioners and participants from the academy, governments and non-governmental sector."¹⁰⁰ Furthermore, in order to take advantage of similar efforts, the commission also engaged with parallel working groups such as the Rio Group and the Pugwash Study Group.

As pointed out by Bellamy, although positions previously taken in the Pugwash Group's workshops of late 1999 and September, 2000 by delegates of countries such as China, "painted a gloomy picture for the ICISS,"¹⁰¹ they were also indicative that even

⁹⁶ Bellamy 2009, p. 36.

⁹⁷ Former Australian Foreign Minister.

⁹⁸ Former Algerian diplomat who had served the UN as a special adviser on the Horn of Africa and special representative in Somalia and the Great Lakes of Africa.

⁹⁹ Bellamy 2009, p. 37.

¹⁰⁰ Ibid, p. 38.

¹⁰¹ Ibid, p. 40.

the strongest adversaries of humanitarian intervention were not opposed to it in all cases. In this respect, the challenge was to agree on which situations triggered the necessity of international reaction, as well as to clarify the procedure, and to identify the right authority to make those decisions. The delegates of the Pugwash Study Group had also deemed crucial that to effectively respond to emerging challenges, timely reaction was just one of the capacities that needed to be further developed and perfected. In the delegates' views, 'intervention' should be understood "as one stage in a continuum of international support for efforts to prevent and limit human suffering."¹⁰²

Accordingly, much of the focus of the ICISS centered on what the Pugwash and Rio Groups identified as most relevant: "criteria for intervention, institutions/authority and modalities."¹⁰³

6. 1 The Road to the ICISS Report

The ICISS met for the first time in Ottawa on January 15, 2001. Considering the terms of the post-Kosovo debate, and the nature of the issues at stake, Evans and Sahnoun announced that, following the example of the Brundtland Commission - which during the late eighties had coined the term 'sustainable development' - the goal of the ICISS was to develop a framework able to transcend the negative perceptions of intervention, when the intent or purpose was to assist and protect endangered populations. Humanitarian intervention as an expression needed to be replaced for at least for two reasons. First, humanitarian agencies insisted that the term 'humanitarian' should not be used to refer to any type of action that implied acts of war. Second, commissioners such

¹⁰² Ibid.

¹⁰³ Ibid, p. 41.

as Ramesh Thakur from India, rightly argued that the term itself had negative historical connotations.

During the Ottawa meeting, commissioners also expressed their views on the utility of establishing criteria for the use of force, as well as on the modalities for preventing and responding to mass atrocities. On the first point, some commissioners argued that the development of guiding principles for decision-makers could be helpful, but others were skeptical. On the issue of modalities, the commissioners agreed on the necessity of coordination among "civilian and military agencies in developing long-term strategies to prevent massive human suffering."¹⁰⁴

Before the beginning of the commission's second meeting, to be held in Geneva, Evans "came up with the idea of reframing the debate in terms of a 'responsibility to protect'."¹⁰⁵ As it was presented by Evans, the idea was able to clarify and resolve four issues that had been raised previously:

First, the almost exclusive focus on military intervention was misplaced. If the aim was to strengthen international protection for basic human rights, it was necessary to consider a much wider continuum of activities. Second, resistance to humanitarian intervention was grounded in legitimate historical sensitivities about colonialism and self-determination. Third, the search for new legal rules to govern intervention was not a promising avenue of enquiry. Not only was the possibility of consensus slim, but new legal rules would not guarantee the protection of endangered peoples. Finally, more attention should be given to the responsibilities of different actors.¹⁰⁶

In Geneva, the commissioners again focused on the issues of criteria and

¹⁰⁴ Ibid, p. 43.

¹⁰⁵ Ibid.

¹⁰⁶ Ibid.

modalities. Perhaps the most important contribution of the gathering was the participants' agreement that not only the prevention of mass atrocities was crucial but, if military intervention for human protection was to take place, "long-term plans for rebuilding after conflict"¹⁰⁷ were necessary. Yet, concerned that the responsibility to rebuild could be seen as a form of neo-colonialism by intervention opponents, the commissioners stressed that "rebuilding around local empowerment"¹⁰⁸ provided the right answer.

After the conclusion of the Geneva meeting, the issue of the utility of criteria on the use of force in the event of military intervention began to create divisions among the commissioners. Representing views from the developing world, Thakur argued that the existence of guiding principles was necessary not to legitimize intervene actions, but to "actually restrain intervention."¹⁰⁹ Taking the argument further, participants at the New Delhi roundtable not only reiterated the necessity of guiding criteria, but for their application only "by a legitimate and representative body [adding] that a reformed Security Council was the best candidate for this role."¹¹⁰

Yet the West remained skeptical. As noted by some during the London roundtable, the existence of criteria would play no significant role in shaping the political behavior of Security Council members. Others rejected altogether the idea of establishing criteria for intervention on the basis of this being an intrinsically divisive matter. Also, as pointed out by French officials during the Paris roundtable, the existence of criteria could be counterproductive, as it could encourage groups to increase existent levels of violence in order to capture international attention.

¹⁰⁷ Ibid, p. 44.

¹⁰⁸ Ibid.

¹⁰⁹ Ibid, p. 45.

¹¹⁰ Ibid, p. 46.

Commissioners and roundtables participants also expressed differing views on "which institutions had the authority to sanction the use of force or other coercive measures."¹¹¹ Although everybody agreed that the Security Council had the main responsibility to authorize enforcement operations, some participants at the Maputo roundtable expressed reservations about the idea that the Council be the only source of authority, pointing to cases in which regional organizations had acted in the absence of Council authorization such as ECOWAS intervention in Liberia, which had been ratified a posteriori by the Council. "Regional measures also prompted the delegates at St. Petersburg to refrain from denouncing all non-UN sanctioned interventions, primarily because Russia had itself intervened in several conflicts in the former Soviet space through the Commonwealth of Independent States."¹¹²

Only during the Washington roundtable did some participants argue that Security Council authorization was not necessary, but preferable. Defenders of this view posited that in cases of unauthorized intervention, the operation could be legitimized if the guiding criteria on the use of force had been met.

During the Paris roundtable, Hubert Vedrine posited that while unauthorized intervention might be the only option in some cases, the real challenge was not one of how to legitimize interventions outside of the United Nations, but of how to make the Security Council work better. In his view, the establishment of a code of conduct for the Security Council could help. "The code would contain clear thresholds for what counted as a humanitarian crisis requiring a Security Council response and an agreement of the P5 not to cast their veto in cases where [the majority of the Council favored intervention,

¹¹¹ Ibid.

¹¹² Ibid, p. 47.

unless] national security interests were at risk."¹¹³ The position was welcomed by the commissioners for two reasons. First, considering concerns that had been raised, Vedrine's idea provided a way to advance the complex debate. Second, the formula "provided a neat link between the [Responsibility to Protect and criteria]: the Security Council should be encumbered with a responsibility to protect and empowered to make effective and timely decisions in the discharge of its responsibilities."¹¹⁴

Finally, broad consensus around three issues had emerged among commissioners concerning the modalities of the Responsibility to Protect. First, the Responsibility to Protect should encompass not only timely reaction, but also prevention strategies and rebuilding efforts. Second, the Responsibility to Protect should ultimately focus on the empowerment of local populations. Third, there was need for the creation of an "early warning and response mechanism to alert the world to potential crises and to coordinate responses."¹¹⁵

Once agreement on the basics of the concept was built among the commissioners, the Beijing roundtable¹¹⁶ represented the last critical step in the potential development of international consensus on the notion of the Responsibility to Protect. The challenge? Chinese delegates focused on the issues at stake almost exclusively from a 'humanitarian intervention' perspective.

The meeting opened with a paper which argued that humanitarian intervention was 'a total fallacy' because it had no basis in law, being derived from a fallacious view of human rights as 'transcending' sovereignty, and that its Western advocates had not seriously pursued a policy of protecting human rights.

¹¹³ Ibid, p. 48.

¹¹⁴ Ibid.

¹¹⁵ Ibid, p. 49.

¹¹⁶ Which took place in June 14, 2001.

[Yet, as pointed out by Bellamy, all] was not lost[.] The Chinese went on to argue that, whilst humanitarian intervention was fallacious, humanitarianism was not. In fact, humanitarianism was a 'lofty virtue' which could be pursued through the Security Council.¹¹⁷

This last point was crucial. The commissioners could hope for gradual Chinese support for the concept so long as the military dimension of the Responsibility to Protect operated under Security Council approval.

6. 2 The Report's Contribution

The ICISS report entitled *The Responsibility to Protect* was presented to the world on December 18, 2001. At its release, Paul Heinbecker "declared his confidence that 'the thoughtfulness of this report, with its clear political and practical focus, provides a solid basis for advancing this issue within the UN system'. "¹¹⁸

Based on the re-conceptualization of Sovereignty as Responsibility, as previously developed by Francis Deng, the report stresses that states have the primary responsibility to protect their populations from mass atrocities, and that in cases where states are unable or unwilling to fulfill their responsibilities, the responsibility to protect is transferred to the international community.

As emphasized by the ICISS co-chairs, reframing the debate in these terms offers three specific advantages to solve the so called sovereignty-intervention dilemma. First, this approach benefits those who need protection the most - the victims whose rights are grossly violated in the context of internal conflicts, or who are being persecuted or massacred by radical groups or state agents. Second, the concept is one that stresses

¹¹⁷ Bellamy 2009, pp. 49 -50.

¹¹⁸ Ibid, p. 51.

national accountability. The primary responsibility lays with states "and the communities and institutions within them."¹¹⁹ Only when states are unable or unwilling to protect their populations, does the international community have a residual responsibility to intervene to protect human beings, and to take measures to ameliorate the effects of potential crises. Third, the concept of the Responsibility to Protect differs from that of humanitarian intervention in the sense that it is not an open door for military action, but is broader, and does not necessarily imply coercion.

As defined by the ICISS, the Responsibility to Protect comprises three responsibilities: to prevent, to react, and to rebuild.¹²⁰ Moreover, because preventing the conditions that may lead to the commission of mass atrocities constitutes the most effective strategy to avoid them in the first place, the ICISS report emphasizes that the responsibility to prevent is "the single most important dimension"¹²¹ of the Responsibility to Protect.

Yet, since the report focused most of its recommendations on the reactive component of the framework,¹²² it "made it difficult for advocates to build international support for"¹²³ the final work of the ICISS. Nevertheless, the commissioner's work did make a crucial contribution: its work resulted in reframing the debate in a way that

¹¹⁹ ICISS report, p. 19

¹²⁰ As stated on the ICISS report, "The responsibility to protect embraces three specific responsibilities: A. **The responsibility to prevent:** to address both the root causes and direct causes of international conflict and other man-made crises putting populations at risk.

B. **The responsibility to react:** to respond to situations of compelling human need with appropriate measures, which may include coercive measures like sanctions and international prosecution, and in extreme cases military intervention.

C. **The responsibility to rebuild:** to provide, particularly after a military intervention, full assistance with recovery, reconstruction and reconciliation, addressing the causes of the harm the intervention was designed to halt or avert."

Ibid, p. xi

¹²¹ Ibid, p. xi.

¹²² See Box 1.

ICISS, pp. xii-xiii.

¹²³ Bellamy 2009, p. 65.

potentially could generate broader international consensus. As Bellamy observes:

[The] deep-seated skepticism towards intervention did not necessarily translate into a rejection of the underlying purpose of [the Responsibility to Protect] - the prevention and amelioration of genocide and mass atrocities. Indeed in the commission's own consultations, there was a clear consensus on the importance of shifting away from the non-consensual use of force to protect civilians, within a broader continuum of measures, including prevention. The commission's adoption of a language focusing on the rights of endangered civilians rather than on the rights of potential interveners helped to illuminate a broad constituency of states and civil society actors prepared to acknowledge that sovereignty entailed responsibilities and the legitimacy of international involvement in protecting people from genocide and mass atrocities.¹²⁴

As a consequence, as an expression, the Responsibility to Protect would survive. However as we will see, its core principles, particularly those concerning the use of force, would require important revisions.

¹²⁴ Ibid.

Box 1

THE RESPONSIBILITY TO PROTECT:
PRINCIPLES FOR MILITARY INTERVENTION

(1) THE JUST CAUSE THRESHOLD

Military intervention for human protection purposes is an exceptional and extraordinary measure. To be warranted, there must be a serious harm occurring to human beings, or imminently likely to occur, of the following kind:

A. large scale loss of life, actual or apprehended, with genocidal intent or not, which is the product either of deliberate state action, or state neglect or inability to act, or a failed state situation; or

B. large scale 'ethnic cleansing', actual or apprehended, whether carried out by killing, forced expulsion, acts of terror or rape.

(2) THE PRECAUTIONARY PRINCIPLES

A. Right intention: The primary purpose of the intervention, whatever other motives intervening states may have, must be to halt or avert human suffering. Right intention is better assured with multilateral operations, clearly supported by regional opinion and the victims concerned.

B. Last resort: Military intervention can only be justified when every non-military option for the prevention or peaceful resolution of the crisis has been explored, with reasonable grounds for believing lesser measures would not have succeeded.

C. Proportional means: The scale, duration and intensity of the planned military intervention should be the minimum necessary to secure the defined human protection objective.

D. Reasonable prospects: There must be a reasonable chance of success in halting or averting the suffering which has justified the intervention, with the consequences of action not likely to be worse than the consequences of inaction.

(3) RIGHT AUTHORITY

A. There is no better or more appropriate body than the United Nations Security Council to authorize military intervention for human protection purposes. The task is not to find alternatives to the Security Council as a source of authority, but to make the Security Council work better than it has.

B. Security Council authorization should in all cases be sought prior to any military intervention action being carried out. Those calling for an intervention should formally request such authorization, or have the Council raise the matter on its own initiative, or have the Secretary-General raise it under Article 99 of the UN Charter.

C. The Security Council should deal promptly with any request for authority to intervene where there are allegations of large scale loss of human life or ethnic cleansing. It should in this context seek adequate verification of facts on conditions on the ground that might support a military intervention.

D. The Permanent Five members of the Security Council should agree not to apply their veto power, in matters where their vital state interests are not involved, to obstruct the passage of resolutions authorizing military intervention for human protection purposes for which there is otherwise majority support.

E. If the Security Council rejects a proposal or fails to deal with it in a reasonable time, alternative options are:

I. consideration of the matter by the General Assembly in Emergency Special Session under the 'Uniting for Peace' procedure; and

II. action within area of jurisdiction by regional or sub-regional organizations under Chapter VIII of the Charter, subject to their seeking subsequent authorization from the Security Council.

F. The Security Council should take into account in all its deliberations that, if it fails to discharge its responsibility to protect in conscience-shocking situations crying out for action, concerned states may not rule out other means to meet the gravity and urgency of that situation - and that the stature and credibility of the United Nations may suffer thereby.

(4) OPERATIONAL PRINCIPLES

A. Clear objectives; clear and unambiguous mandate at all times; and resources to match.

B. Common military approach among involved partners, unity of command; clear and unequivocal communications and chain of command.

C. Acceptance of limitations, incrementalism and gradualism in the application of force, the objective being protection of a population, not defeat of a state.

D. Rules of engagement which fit the operational concept; are precise; reflect the principle of proportionality; and involve total adherence to international humanitarian law.

E. Acceptance that force protection cannot become the principal objective.

F. Maximum possible coordination with humanitarian organizations.

7. A Persistent but Flexible Effort

As soon as the ICISS released its report in late 2001, Canadian officials actively began pursuing a double strategy aimed "to mobilize civil society to act both as advocate and as agents of implementation, while at the same time leading an inter-governmental process to gauge support for the [Responsibility to Protect], to identify political obstacles and to build a group of 'like-minded' 'friends'."¹²⁵ As seen by Canada, active engagement in these areas provided the possibility to sell the emerging framework in two manners: first, through a 'norm building approach', in which states could be persuaded to utilize Responsibility to Protect language in declarations and resolutions; second, through an 'operationalisation approach', which implied to focus "on practical initiatives towards increasing the physical protection of civilians."¹²⁶

Responding to Canada's call, non-governmental organizations generated important insights on best ways of advancing the framework.¹²⁷ As seen by these actors, it was crucial to stress the preventive dimension of the Responsibility to Protect. As important, when considering that "operationalisation was likely to deliver more consensus and actual protection,"¹²⁸ it was imperative to advocate "for the commitment of resources for conflict prevention and support for the development of international

¹²⁵ Bellamy 2009, p. 71.

¹²⁶ Ibid.

¹²⁷ Through the organization of seminars, global consultations and various roundtables, the World Federalist Movement-Institute for Global Policy (WFM-IGP) was able to identify three key areas to be further pursued by civil society actors. First, to increasingly embed Responsibility to Protect language in government officials' discourse and to persuade them of the moral imperative to respond to potential humanitarian crises. Second, to support the creation of political will to act when required, by gathering and disseminating relevant information, by monitoring Security Council actions in relevant cases, by lobbying for the inclusion of potential humanitarian crises on the Council's agenda, and by advocating for the incorporation of the Responsibility to Protect language and objectives in mandates of authorized operations. Finally, to focus on operational matters while advocating for the necessity to strengthen capacities of international organizations.

¹²⁸ Bellamy 2009, p. 71.

policing capacity and the mandates of UN representatives and advisers on protection issues such as IDPs and the prevention of genocide."¹²⁹

The second part of the Canadian strategy, aimed at direct engagement with government officials, helped the Canadian government and other Responsibility to Protect supporters to realize that although a majority of governments could be persuaded to accept that states had the responsibility to protect their populations from mass atrocities, it was necessary still to address governments' concerns on the potential implications of the ICISS framework.

Security Council permanent members had expressed their concerns during the Council's annual retreat in May, 2002. Uncertainty on the criteria to guide the use of force was the main problem for the United States. As seen by the Bush administration, American sovereign decisions on matters such as when and where to intervene could end up being constrained. In turn, France and the United Kingdom expressed concerns about the ability of criteria to generate political will on the part of Security Council members to intervene when required. For this reason, as the ICISS's report, they argued that the use of force in the absence of Security Council approval should not be condemned in all cases. China expressed concerns in the opposite direction, stating that commitment to the letter of the United Nations Charter was not negotiable: any question related to the use of force was to be deferred to the Security Council only. Russia, as well as China, also stressed the position that "the UN was already equipped to deal with humanitarian crisis."¹³⁰

As for the G77, the group was also divided and "suggested that the report should

¹²⁹ Ibid, p. 72.

¹³⁰ Ibid, p. 67.

be revised so as to emphasize the principles of territorial integrity and sovereignty."¹³¹ Finally, "[t]he Non Aligned Movement (NAM) flatly rejected"¹³² the Responsibility to Protect. In the eyes of one its leading members, India, the problem at the Security Council level during humanitarian emergencies was not a lack of authority to act, but a lack of political will to act when necessary. As seen by Nirupam Sen:¹³³

[The Responsibility to Protect] 'should be addressed with necessary caution and responsibility', since 'we do not believe that discussions on the question should be used as a cover for conferring any legitimacy on the so-called "right of humanitarian intervention" or making it the ideology of some kind of "military humanism"'.¹³⁴

To make matters worse, the US-led invasion of Iraq in 2003 exacerbated negative perceptions on the potential implications of the emerging framework. As pointed out by Weiss, although humanitarian motives could "have been invoked [as a potential justification for intervention] in March, 1988 - when Saddam used chemical weapons against the Kurdish city of Halabja in northern Iraq, instantly killing 5,000 civilians - or on numerous other occasions in the 1990s," that was clearly not the case in 2003. In effect, only when the existence of weapons of mass destruction inside of Iraq proved unsustainable, was the operation justified in humanitarian terms.¹³⁵

As posited by Bellamy, although it is impossible to judge the impact that the event had on opponents of the framework, the incident did limit the terms of what supporters of the Responsibility to Protect were prepared to advocate for. This was

¹³¹ Ibid, p. 68.

¹³² Ibid.

¹³³ India's Ambassador at the United Nations

¹³⁴ Bellamy 2009, p. 68.

¹³⁵ Weiss 2007, p. 126.

demonstrated "during a forum of social democratic political leaders" held on July 14, 2003, in which Argentina, Chile and Germany, "rejected sections of a draft communiqué proposed by Tony Blair and Jean Chrétien [which contained] language clearly reminiscent of"¹³⁶ the Responsibility to Protect.¹³⁷ Representatives from the three countries opposed the draft's "wording, reportedly 'believing it could be used to justify the military campaign in Iraq'."¹³⁸

Nevertheless, the event led supporting governments to emphasize the necessity of truly multilateral responses to potential humanitarian crises. For instance, in 2004, Chancellor Gerhard Schroeder declared the commitment of the German government to protecting endangered populations, stating that:

[W]hilst 'prevention does not rule out timely military intervention... this must be based on criteria that are in keeping with our values and basic political convictions'. [No country can guarantee security, peace, and prosperity for itself and deal with the new challenges that face us by acting alone [...] German security policy is based on the primacy of international law and the strengthening of the United Nations.]¹³⁹

Considering these developments, NGO's suggestions, and the two failed attempts to have the General Assembly discuss the work of the ICISS,¹⁴⁰ Canadians began promoting three major changes to the commission's framework: first, that approval of non-consensual measures constituted a prerogative of the Security Council only; second, "that the 'just cause' thresholds and precautionary principles should be viewed as

¹³⁶ Bellamy 2009, p. 69.

¹³⁷ The draft read: '[W]here 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'.

Ibid.

¹³⁸ Ibid.

¹³⁹ Ibid.

¹⁴⁰ Which were blocked by the NAM in late 2002.

constraints limiting governments' ability to 'abuse' humanitarian justifications[;]"¹⁴¹ ¹⁴²
third, and considering concerns of Council members, that it was necessary to stop
pushing for some of the measures that had being designed to make the Council work
better.¹⁴³

By late 2004, "not even ardent supporters [of the framework] were advocating the
wholesale adoption of the commission's recommendations."¹⁴⁴ Instead, key advocates
seemed determined to forge international consensus by "watering down the concept and
offering the world a new understanding of the [Responsibility to Protect]."¹⁴⁵

¹⁴¹ This point had been stressed by Ramesh Thakur in the aftermath of the US-led invasion of Iraq.

¹⁴² Bellamy 2009, p. 74.

¹⁴³ Such as the P5 code of conduct.

¹⁴⁴ Bellamy 2009, p. 75.

¹⁴⁵ Ibid, p. 74.

8. The Role of Kofi Annan, the High Level Panel and International Practice

Although negative dynamics between the United States and the United Nations went back to 1994, when Republicans reached a majority in both houses of Congress, the fact that the organization had been sidelined by Americans in 2003 not only had the effect of questioning the relevance of the United Nations, but also of damaging further an already tense relationship between Kofi Annan and the Bush administration. In an interview given to BBC in September of that year, the Secretary General declared that in the absence of Security Council approval, Iraq's invasion had been technically 'illegal'. In turn, American officials, such as Randy Scheunemann,¹⁴⁶ declared that the Secretary General's behavior was outrageous. In his view, Annan "who ultimately [worked] for the member states, [was trying to] supplant his judgment for the judgment of the members [of the United Nations]."¹⁴⁷

Annan shared his concerns in his address to the General Assembly on September 23, 2003. After reminding member states about the shared vision "of global solidarity and collective security" that was agreed to in the Millennium Declaration of 2000, and about the rules of the collective security system as established in the United Nations Charter, the Secretary General told his audience:

Now we must decide whether it is possible to continue on the basis agreed [in 1945], or whether radical changes are needed. And we must not shy away from questions about the adequacy, and effectiveness, of the rules and instruments at our disposal. Among those instruments, none is more important than the Security Council itself[.] The Council needs to consider how it will deal with the possibility that individual States may use force 'pre-emptively' against perceived threats [and] need to begin

¹⁴⁶ Former advisor of the Defense Secretary Donald Rumsfeld,

¹⁴⁷ BBC News, "Iraq Was Illegal, Says Annan."

a discussion on the criteria for an early authorization of coercive measures to address certain types of threats.¹⁴⁸ [Also crucial, Council members] still need to engage in serious discussions of the best way to respond to threats of genocide or other comparable massive violations of human rights[.] Once again this year, our collective response to events of this type - in the Democratic Republic of Congo, and in Liberia - has been hesitant and tardy.¹⁴⁹

As pointed out by Annan, in order to confront collective challenges, not only the Security Council but many bodies of the United Nations needed to be revised and possibly reformed.¹⁵⁰ To this aim, the Secretary General informed member states of his intention of establishing a High Level Panel (HLP) of experts which would focus on four tasks:

First, to examine the current challenges to peace and security[.] Second, to consider the contribution which collective action can make in addressing these challenges[.] Third, to review the functioning of the major organs of the United Nations and the relationship within them[.] Fourth, to recommend ways of strengthening the United Nations, through reform of its institutions and processes.¹⁵¹

Among many relevant recommendations, the Report of the HLP on Threats, Challenges and Change, entitled *A More Secured World: Our Shared Responsibility*,¹⁵² both "endorsed the 'emerging norm that there is a responsibility to protect', and confirmed the developing consensus that this norm was 'exercisable by the Security Council'."¹⁵³

In order to improve the performance of the Security Council, the HLP reiterated

¹⁴⁸ Such as terrorist groups armed with weapons of mass destruction.

¹⁴⁹ The Secretary-General Address to the General Assembly. New York, 23 September 2003.

¹⁵⁰ Such as the Secretariat, the General Assembly and the Economic and Social Council among others.

¹⁵¹ The Secretary-General Address to the General Assembly. New York, 23 September 2003.

¹⁵² The report was released in December, 2004.

¹⁵³ Bellamy 2009, p. 75.

two ICISS recommendations - the just cause thresholds, and the precautionary principles. Yet, the HLP clarified possible causes that could trigger international reaction in two ways. First, by adding 'serious violations to international humanitarian law' to the list that already contained crimes such as genocide, large scale killing and ethnic cleansing. Second, by "insisting that the criteria would be satisfied if the threat was actual or 'imminently apprehended' - as opposed to simply 'apprehended', as the ICISS had proposed."¹⁵⁴ In addition, the HLP renamed the precautionary principles and advised Council members to adopt them as 'guidelines for the use of force' through a declaratory resolution. Finally, as had been advocated by other supporters, the HLP dropped the P5 code of conduct. Instead, it recommended the adoption of an indicative voting system, in which Security Council members "could call for states to declare themselves publicly and to justify their positions prior to an actual vote."¹⁵⁵

Kofi Annan endorsed most of the HLP recommendations in his own report for United Nations reform. *In Larger Freedom*¹⁵⁶ reiterated the idea that states had the primary responsibility to protect their populations, and that only in cases where states proved unable or unwilling to fulfill their obligations, the Security Council had the authority to approve enforcement operations. Perhaps the most important contribution of Annan's proposal was to place his recommendations in the section on the rule of law, while leaving the HLP guidelines for Security Council action in the section related to the use of force.¹⁵⁷ As seen by the Secretary General, the move was justified because it highlighted the preventive facet of the emerging framework, thus distancing the

¹⁵⁴ Ibid.

¹⁵⁵ Ibid. p. 76.

¹⁵⁶ Released in late-May, 2005.

¹⁵⁷ The HLP had placed all its recommendations on the Responsibility to Protect in the Chapter related to collective security.

Responsibility to Protect from the idea of military intervention.

Although the endorsement by the HLP and the Secretary General were crucial for introducing the Responsibility to Protect to the General Assembly agenda, existing international practice - which involved the gradual operationalisation of Responsibility to Protect related principles - was also determinant for facilitating international consensus on the revised framework. In effect, since 1998 Security Council members had been working on how to incorporate the protection of civilians during armed conflicts in peacekeeping mandates. As a consequence, by 2005, when the United Nations reform package was being negotiated by member states, "[n]ot only the UN had established itself [at the center of civilian protection efforts], but some of those states most skeptical about the [Responsibility to Protect,]¹⁵⁸ had made a physical contribution to protection through their involvement in UN peace operations."¹⁵⁹

¹⁵⁸ Such as Brazil, China, India, Jordan and Pakistan.

¹⁵⁹ Bellamy 2009, p. 77.

9. Making it to the International Agenda

Considering that on September of 2005 world leaders would gather at the United Nations to express their positions on the issues that Annan's reform package had raised, Jean Ping, Foreign Minister of Gabon, and then President of the General Assembly, began inquiring about countries postures on the Secretary General's proposals in late 2004. In general, when consulted on the point of the Responsibility to Protect, permanent delegations had expressed support for a declaration that would recognize that states had the primary responsibility to protect their populations from mass atrocities. Yet, there were also various concerns and opposing positions.

Security Council members had expressed opposition to a code of conduct to be followed by the P5, as it had been recommended by the ICISS. On the issue of the right authority, contrary to the Chinese delegation's argument that Security Council authorization was an imperative, the United States and the United Kingdom held that if operations were based on legitimate purposes, they should not be ruled out by member states. On the proposed guidelines for decision-making, '[w]hereas several African states, the [HLP] and Annan endorsed criteria as essential to making the Security Council's decisions more transparent, accountable (to the wider membership) and hence legitimate, the US, China and Russia opposed them.'¹⁶⁰ Lastly, a small group of states led by India argued that accepting the Responsibility to Protect implied the risk of legitimizing an 'intervener's charter'.

As Bellamy tells us, although careful negotiation with delegations had led to significant improvements in the draft document by early August, the appointment of John

¹⁶⁰ Bellamy 2011, p. 22.

Bolton,¹⁶¹ as the United States Permanent Representative to the United Nations, with only three weeks to go until the Summit proved quasi-disastrous.

Despite the fact that Bolton's observations on the Responsibility to Protect could have been accommodated in Pings draft,¹⁶² his call for a complete revision of the document, and for the removal of "all references to the Millennium Development Goals (MDGs), the 'right to development' and the goal of the debt reduction[.]"¹⁶³ had the effect of destabilizing the emerging consensus. In effect, the episode not only had the effect of shaking the position of some G77 countries - since the block had negotiated incorporating Responsibility to Protect language into Ping's draft so long as Western nations agreed to commit themselves to development related matters - but also, of sparking negative reactions from China and Russia, which began reversing to previous positions by stating that the United Nations was already prepared to deal with humanitarian crises.

Yet, four factors were determinative for reversing the dynamics. First, advocacy efforts by key African and Latin American countries were persistent and demonstrated that support for the Responsibility to Protect did not come only from Western nations. Second, "last minute personal diplomacy [efforts] with major wavering-country leaders by Canadian Prime Minister Paul Martin"¹⁶⁴ were successful. Third, despite Bolton's position, Ping and members of the Secretariat had continued to work on the draft proposal which they distributed to permanent delegations three days ahead of the

¹⁶¹ Described both by Bellamy and Traub as an anti-UN hawk.

¹⁶² As Bellamy tells us, Bolton expressed three main objections to the Responsibility to Protect paragraphs. As argued by the United States representative, the text needed to "be redrafted to recognize that: the responsibility of the other countries in the international community [was] not of the same character as the responsibility of the host [state]; that the Security Council was not *legally* obliged to protect endangered civilians; and that the commitment to the [Responsibility to Protect] 'should not preclude the possibility of action absent authorization by the Security Council'."

Bellamy 2011, p. 22.

¹⁶³ Ibid.

¹⁶⁴ Evans 2006, p. 715.

Summit. Finally, United Nations complaints about the position of the American delegation were heard by Secretary of State Rice, who reversed Bolton's stance and declared the United States delegation's support for the final draft.

In the end, persistent efforts and careful diplomacy proved successful, since on September 16, 2005, while gathered in New York to celebrate the 60th anniversary of the United Nations, world leaders unanimously endorsed paragraphs 138 and 139 of the World Summit Outcome Document. As agreed by member states:

138. 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 early warning capability.

139. The international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the Charter, to help protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. In this context, we are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities manifestly fail to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity. We stress the need for the General Assembly to continue consideration of the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity and its implications, bearing in mind the principles of the Charter and international law. We also intend to commit ourselves, as necessary and appropriate, to helping States build capacity to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity and to assisting those which are under stress before crises and conflict break out.

Although non-binding in nature, the declaration is remarkable, not only because it is extremely clear both when it reaffirms the fact that state authorities have the primary responsibility to protect their populations from mass atrocity crimes and, when it validates the authority of the Security Council to authorize operations for human protection purposes, so long as peaceful means prove inadequate, and national authorities manifestly fail to protect their populations, but also, because it stresses prevention and recognizes the legitimate role of the United Nations to assist states in meeting their obligations. Crucially, "paragraphs 138 and 139, [began] to point to the kind of tools, actors and procedures that could form the basis for operationalizing [Responsibility to Protect] principles."¹⁶⁵

Yet, as demonstrated by initial 'revolts' against the implementation of the concept during the 2006-2007 period by China, at the Security Council level, and by Sudan, both concerning the Darfur crisis,¹⁶⁶ one thing was to proclaim the Responsibility to Protect as a universal principle, and something very different was to agree on how to translate the noble declaration into international practice. Fortunately, "[p]romising signs began to emerge [...] with the election of South Korean foreign minister, Ban Ki-moon as UN Secretary General in October 2006[,]"¹⁶⁷ and with the appointment of Edward Luck, in February of 2008, as Ban's Special Adviser on the Responsibility to Protect.

¹⁶⁵ Luck 2008, p. 3.

¹⁶⁶ For more information on these incidents see Bellamy 2011, pp. 28-31.

¹⁶⁷ Bellamy 2011, p. 31.

10. Clarifying the Concept

Secretary General Ban Ki-moon proposed the creation of the position of the Special Adviser on the Responsibility to Protect on December of 2007. As explained to member states, initially, the new adviser was "to provide recommendations about implementing the 2005 World Summit Agreement."¹⁶⁸ Yet, in the long term, his work was to complement the work of Francis Deng as his Special Adviser on the Prevention of Genocide, as "Deng [would focus] on responding to emerging crises and [the Special Adviser on the Responsibility to Protect] on addressing longer term policy and reform challenges."¹⁶⁹ To facilitate the process, Ban also proposed the "establishment of a joint office for the Responsibility to Protect and for the Prevention of Genocide."

Although the Secretary General's suggestions initially were rejected by the General Assembly indirectly, when its Fifth Committee "adopted a resolution on the 2007/8 budget without funding for Ban's proposal[,]"¹⁷⁰ the appointment of Edward Luck as his Special Adviser on the Responsibility to Protect, in early 2008,¹⁷¹ and his adoption of a consultative approach towards member states "based on a detailed dissection of the 2005 agreement,"¹⁷² represented an important turning point for the negative perceptions on the potential implications of the emerging framework that had been building up since 2005.

In effect, constructive engagement with delegations resulted in developing important conceptual clarifications. Among others, that the Responsibility to Protect, as conceived by member states, comprised three non-sequential but equally important

¹⁶⁸ Ibid, p. 32.

¹⁶⁹ Ibid, p. 118.

¹⁷⁰ Ibid, p. 32.

¹⁷¹ In virtue of the right of the Secretary General to designate advisers.

¹⁷² Bellamy 2011, p. 33.

pillars. Also, that although the object of the Responsibility to Protect was 'narrow' - thus applicable only to the ongoing obligations of states to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity - a comprehensive approach to potential and ongoing crises by the international community needed to be 'deep' - thus including "the whole prevention and protection toolkit available to the United Nations system, regional arrangements, states, and civil society."¹⁷³

Despite the fact that the Secretary General's approach was criticized by commentators like Ramesh Thakur because it stress "prevention, capacity-building, and the primary responsibility of states rather than the dilemmas associated with humanitarian intervention,"¹⁷⁴ Ban and his team insisted that in order to secure international support for the Responsibility to Protect, the role of the General Assembly in advancing the framework was crucial.

In their view, "all member states [needed to have] the opportunity to examine the principle and comment on its implementation. What might be lost in terms of momentum, they rationalized, would be more than compensated for in terms of legitimacy if the principle was moved forward on the basis of consensus."¹⁷⁵ On this basis, the 2009 Secretary General's Report to the General Assembly, entitled *Implementing the Responsibility to Protect*,¹⁷⁶ began by clarifying the nature and scope of the emerging framework, to later identify possible avenues that could help implementing the 2005 agreement.

After demonstrating that, as conceived by member states, the responsibility of

¹⁷³ Ibid.

¹⁷⁴ Ibid.

¹⁷⁵ Ibid.

¹⁷⁶ Which was released on January 30th, 2009.

states to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity constituted a reaffirmation of existing legal obligations, and that the various ways of implementing the framework that could be identified in the 2005 agreement were concordant with the principles and procedures set up in the United Nations Charter, the 2009 report went ahead and analyzed in detail the Responsibility to Protect as conceived by member states.

Crucial "in terms of the principle's conceptual development, [were] the idea[s] that the [Responsibility to Protect] comprises three pillars"¹⁷⁷ - state responsibility, international assistance and timely response - and that Responsibility to Protect principles were not aimed at destroying sovereignty as an institution, but at reinforcing its content. Such an understanding, concordant with the re-conceptualization of 'sovereignty as individual and shared responsibility' developed by Deng during the mid-nineties, not only explains why the emerging framework defines the responsibility of states to protect their populations from mass atrocity crimes and their incitement, as the 'bedrock' of the Responsibility to Protect, but also why the framework "focuses on helping states succeed (pillar two), [and] not just on reacting when states fail (pillar three)."¹⁷⁸ Once these points were made, the 2009 report continued by identifying different avenues that could facilitate the implementation of the framework, both in the short and the long term.

Analyzing the first pillar of the Responsibility to Protect - or the primary responsibility of states to protect their populations from mass atrocities and their incitement, as proclaimed in paragraph 138 of the World Summit Outcome Document¹⁷⁹ -

¹⁷⁷ Bellamy 2011, p. 33.

¹⁷⁸ Ibid, p. 36.

¹⁷⁹ Paragraph 138 of the Summit Outcome asserts that "[e]ach individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity. This

the 2009 report of the Secretary General explains that although states could approach the task of protecting populations in diverse manners, existent research pointed to the promotion and protection of basic rights, and the existence of mechanisms to facilitate the management of diversity, as crucial factors to facilitate effective protection of populations.

Accordingly, in addition to calling for needed research and analysis on pressing issues, such as "why one society plunges into mass violence while its neighbors remain relatively stable, and on why it has been so difficult to stem widespread and systematic sexual violence in some places[,]"¹⁸⁰ the 2009 Report recommends to member states to consider various initiatives that could facilitate the development of a culture of prevention at the level of individual states. Among others:

- The UN Human Rights Council could be used to encourage states to meet their [Responsibility to Protect] obligations and the Council's Universal Peer Review (UPR) mechanism could be utilized to monitor their performance.
- States should become parties to the relevant instruments of human rights law, as well as to the Rome Statute of the International Criminal Court (ICC). They should also incorporate this law into domestic jurisdiction and implement it faithfully.
- In addition to acceding to the Rome Statute, states should also do more to assist the ICC and other international tribunals by, for example, locating and apprehending indictees.
- [Responsibility to Protect] principles should be localized into each culture and society so that they are owned and acted upon by communities and not seen as external impositions.
- States, even stable ones, should ensure that they have mechanisms in place to deal with bigotry,

responsibility entails the prevention of such crimes, including their incitement, through appropriate and necessary means. We accept that responsibility and will act in accordance to it."

¹⁸⁰ A/63/677, pp. 10-11.

intolerance, racism and exclusion.¹⁸¹

Analyzing the second pillar of the Responsibility to Protect, the 2009 report of the Secretary General argues that as proclaimed in paragraphs 138 and 139 of the World Summit Outcome Document¹⁸² "the commitment of the international community to assist states in meeting [their] obligations"¹⁸³ could be exercised in four distinct manners: by encouraging states to meet their responsibilities; by helping states in exercising their responsibilities; by helping states in building needed protection capacities; and by assisting states "under stress before the conflicts break out."¹⁸⁴

After explaining that a pre-condition for exercising pillar two measures is "the consent and cooperation of the host state,"¹⁸⁵ and reminding member states that in cases where national authorities are determined to commit or facilitate the commission of mass atrocities, there is little that pillar two measures can accomplish, the 2009 report recommends specific measures on each of the second pillar's facets:

- *Encouraging states to meet their pillar one responsibilities:*
 - Those inciting or planning to commit the four crimes need to be made aware that they will be held to account.
 - Incentives should be offered to encourage parties towards reconciliation.
- *Helping them to exercise this responsibility:*

¹⁸¹ Bellamy 2011, p. 37.

¹⁸² "Paragraph 138 of the Summit Outcome asserts that 'the international community should, as appropriate, encourage and help States to exercise [their] responsibility'. Paragraph 139 asserts that 'we also intend to commit ourselves, as necessary and appropriate, to helping States build capacity to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity and to assisting those which are under stress before crises and conflicts break out'.

A/63/677, p. 15.

¹⁸³ Luck 2008, p .1.

¹⁸⁴ Paragraph 139 World Summit Outcome Document.

¹⁸⁵ Bellamy 2011, p. 37.

- Security sector reform aimed at building and sustaining legitimate and effective security forces makes an important contribution to maintaining stability and provides states with the capacity to respond quickly and legitimately to emerging problems.

- *Helping them to build their capacity to protect:*

- Targeted economic development assistance would assist in preventing the four crimes by reducing inequalities, improving education, giving the poor a stronger voice, and increasing political participation.

- International assistance should help states and societies to build the specific capacities they need [to] prevent genocide and mass atrocities.

- *Assisting states 'under stress before crises and conflicts break out:*

- The UN and regional and subregional organizations could build rapidly deployable civilian and police capacities to help countries under stress.

- Where the four crimes are committed by non-state actors, international military assistance to the state may be the most effective form of assistance.¹⁸⁶

Analyzing the third pillar of the Responsibility to Protect - or the responsibility of the international community to respond in a timely and decisive manner when states are manifestly failing to protect their populations - the 2009 report of the Secretary General explains that in terms of strategy, as stated in paragraph 139 of the Summit Outcome Document, "pillar three comprises two steps. [First,] the international community, through the United Nations[,], has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance of Chapter VI and VIII of the Charter, to help protect populations"¹⁸⁷ from mass atrocity crimes. Second, and so long as peaceful means prove inadequate, and "national authorities are manifestly failing to protect their populations[, the international community has the responsibility to take

¹⁸⁶ Ibid.

¹⁸⁷ Ibid, p. 38.

collective] action, through the Security Council, including enforcement measures under Chapter VII of the Charter."¹⁸⁸

Stressing the fact that military operations for protection purposes constitute only one of the measures that could be authorized by Council members, the 2009 report points to several ways in which the international community could exercise the last pillar of the Responsibility to Protect:

- The Security Council might use targeted sanctions on travel, financial transfers, and luxury goods, and arms embargos. In such cases, it is incumbent on the Security Council, relevant regional organizations and individual states to develop the expertise, capacity and political will necessary to properly implement these regimes.
- The permanent members of the Security Council should refrain from using their veto in situations of manifest failure and should act in good faith to reach a consensus on exercising the Council's responsibility in such cases.
- Member states may want to consider developing principles, rules and doctrine to guide the use of force for humanitarian purposes.
- The UN should strengthen its capacities for the rapid deployment of military personnel, including by developing doctrine and training and resolving command and control issues.
- The UN should strengthen its partnerships with regional organizations to facilitate rapid cooperation.¹⁸⁹

Lastly, the report also reminded member states of the fact that "the 2005 agreement contained a specific commitment to strengthen UN's capacity for early

¹⁸⁸ Ibid, pp. 38-39.

¹⁸⁹ Ibid, p. 39.

warning"¹⁹⁰ and reiterated Ban's "call for the establishment of a Joint Office for the Prevention of Genocide and [the Responsibility to Protect]."¹⁹¹

¹⁹⁰ Ibid., p. 36.

¹⁹¹ Ibid, p. 39.

11. A Productive Debate

The first formal consideration of the Responsibility to Protect at the General Assembly level began on July 21, 2009, when Secretary General Ban Ki-moon presented *Implementing the Responsibility to Protect* to the wide membership of the United Nations. Although the move was criticized by some Responsibility to Protect supporters who feared "that a General Assembly debate could 'provide the opportunity for skeptical governments to renegotiate' [the 2005 Agreement,]"¹⁹² Ban's team remained cautious yet optimistic, since careful analysis of countries' positions showed, that "governments in the Asia-Pacific region, long thought the region most resistant to [the Responsibility to Protect], were quite open to the principle and endorsed the Secretary-General's approach[.]"¹⁹³

Tensions raised when Miguel d'Escoto, Nicaraguan Ambassador to the United Nations and then President of the General Assembly, did his best to influence his peers against Ban's proposed framework for better understanding and implementing the 2005 agreement. Not only did he withhold the Responsibility to Protect as much as he could from the General Assembly's agenda, he was uncooperative with the Secretariat on establishing a date for the debate that would be compatible with Ban's schedule, but he also arranged for "an 'Interactive Informal Dialogue on the Responsibility to Protect' on the morning of [July 23,] immediately prior to the GA debate."¹⁹⁴ For the event, d' Escoto invited four panelists, two of them outright critics of the Responsibility to Protect, and distributed a 'concept note' which argued against the framework and posited that 'colonialism and interventionism used responsibility to protect arguments'. Lastly,

¹⁹² Ibid, p. 43.

¹⁹³ Ibid, pp. 42-43.

¹⁹⁴ GCR2P 2009, p. 3.

d'Escoto appointed Nerupem Sen, former Indian Ambassador to the United Nations and a manifest detractor of the framework, "as his special adviser on [the Responsibility to Protect]."¹⁹⁵

Fortunately, the "efforts [of the President of the General Assembly] failed and the 2009 General Assembly debate vindicated [Ban and his advisers'] cautious,"¹⁹⁶ but optimistic stance, since 90 of the 94 speakers who took the floor on the occasion - representing as many as 180 countries and two observer missions - welcomed the Responsibility to Protect as interpreted by the 2009 report. This was an impressive accomplishment considering that only four countries - Cuba, Nicaragua, Venezuela and Sudan - expressed their support for a revision of the 2005 agreement.

Perhaps one of the most significant part of the debate was the identification by member states of "key measures that [could] be taken to prevent mass atrocity crimes."¹⁹⁷ In effect, based on the premise that state responsibility constitutes the 'bedrock' of the Responsibility to Protect, countries such as Austria, Colombia and Japan "stressed the importance of good governance, the rule of law [...] and a functioning law-enforcement and justice system," as well as the necessity of states becoming parties to relevant human rights and humanitarian conventions and treaties, including the Rome Statute. In turn, South Korea stressed the crucial value of conflict management mechanisms at the domestic level, and the importance of promoting national dialogue as well as periodic country risk assessments. "The Holy See argued for national policies that fostered greater protection of religious, racial and ethnic minorities." Countries such as Bolivia and

¹⁹⁵ Bellamy 2011, p. 43.

¹⁹⁶ Ibid, p. 43.

¹⁹⁷ GCR2P 2009, p. 8.

Azerbaijan, also stressed the importance of measures aimed to end impunity, such as prosecution for those responsible for mass atrocity crimes.

Commenting on the need for strengthening early warning capacities, the United States and Azerbaijan underscored the importance of further analysis on the factors that can lead to the commission of mass atrocities. Complementing the position, Armenia, Chile and Israel stressed the need for governments themselves, as well as for the international community, to pay attention to warning signs. In turn, the United States pointed to the need for "effective UN human rights machinery, including 'more credible action from the Human Rights Council and timely information on unfolding and potential calamities from the Office of the High Commissioner for Human Rights and the network for Independent UN Rapporteurs and Experts'."¹⁹⁸ Countries such as Armenia, Canada, Chile, Croatia, Leichtenstein, Slovenia and South Korea also stressed the crucial role to be played by the Special Adviser on the Prevention of Genocide. Some of these countries also underscored the need for strengthening the position of the Special Adviser on the Responsibility to Protect.

Many states¹⁹⁹ also stressed the importance of improving existing mediation capacities and called for a bigger allocation of resources to the area. The European Union underscored the relevance of developing mediation capacities at the local level. Illustrating the utility of these types of measures, Timor-Leste shared its experience as a recipient of "valuable assistance [...] in building local mediation and conflict resolution capacities."²⁰⁰ For its part, the United States called for the need of further strengthening

¹⁹⁸ Ibid, p. 9.

¹⁹⁹ Such as Mexico, South Africa, Vietnam, Ireland, South Korea, Luxembourg, Norway and Hungary.

²⁰⁰ GCR2P 2009, p. 9.

United Nations mediation standby teams, and publicly recognized their invaluable contributions.

Approximately 60 states underscored the importance of regional organizations in supporting the emerging framework. Countries such as Sierra Leone, South Africa and Ghana called for greater cooperation and support from the United Nations with African organizations such as the African Union (AU) and the Economic Community of West African States (ECOWAS). In turn, Sierra Leone pointed to institutional and operational advances such as "Africa's Continental and Early Warning Systems, the AU Panel of the Wise, and the building of a 15-20,000 strong African Standby Force (ASF) as the most effective ways of enhancing the continent's capacity to address African problems at the sub-regional level."²⁰¹ The European Union also underscored the importance of regional organizations' various instruments to assist states in building capacities "in areas of conflict prevention, development and human rights, good governance, rule of law and judicial and security sector reform."²⁰² The Philippines called for greater support from the United Nations in helping build civilian capacities at the regional and sub-regional level and pointed to "the potential value of region-to-region learning processes and their adaptation to local conditions and cultures."²⁰³ Lastly, South Korea stressed the urgency of incorporating Responsibility to Protect related criteria into peer review mechanisms at the regional level.

Countries such as Uruguay, Luxembourg and the Solomon Islands also highlighted the possibility of a stronger role to be played by the Peacebuilding Commission (PBC). In turn, "Nigeria noted the role of the African Union Framework for

²⁰¹ Ibid.

²⁰² Ibid.

²⁰³ Ibid.

Post-Conflict Reconstruction and Development as a complement of the PBC."²⁰⁴ Lastly, Jordan argued that the General Assembly should contribute in strengthening the Responsibility to Protect by focusing not only on the potential role to be played by the PBC, but also by the Economic and Social Council and the Human Rights Council.

In the end, although the debate clearly identified that there are still areas of concern for some states, such as the issue of selectivity and double standards, the need for a more representative and effective Security Council, and the potential for the Responsibility to Protect to be abused by powerful states, it also revealed a deepening consensus or common understanding on six points:

*First, the [Responsibility to Protect] is a universal principle [to be applied at all times and all places.] Second, the [Responsibility to Protect] lies first and foremost with the state[.] Third, the [Responsibility to Protect] applies only to the four crimes and their prevention. Fourth, the [Responsibility to Protect] must be implemented and exercised in a manner consistent with international law and the UN Charter[.] Fifth, measures related to the [Responsibility to Protect] third pillar include more than simply coercion or the use of force[.] Finally, prevention is the most important element of the [Responsibility to Protect].*²⁰⁵

²⁰⁴ Ibid, pp. 9-10.

²⁰⁵ Bellamy 2011, p. 44.

12. Contributions, Pending Challenges and Limitations of the Responsibility to Protect

In "The Responsibility to Protect - Five Years On," Bellamy provides us with an assessment of the effectiveness of the Responsibility to Protect during the 2005-2010 period. After analyzing a series of cases "in which he believes [that the Responsibility to Protect] was either used too little (Somalia), used ineffectively (Darfur) or employed effectively (Kenya),"²⁰⁶ and accepting that it is perhaps too early to tell, Bellamy demonstrates that, to-date, the ability of the framework to provide effective results on the ground is at best mixed. In the article, Bellamy also elaborates on various issues which seem specially relevant for my argument in this section, since they refer to the relationship between the Responsibility to Protect and greater compliance with international law.

In building his argument, Bellamy tells us that the Responsibility to Protect "is commonly conceptualized as fulfilling two functions, but that the two are not complementary."²⁰⁷ The author argues that one cannot sustain that the Responsibility to Protect represents at the same time a "political commitment to prevent and halt genocide and mass atrocities accompanied by a policy agenda in need of implementation,"^{208 209} and "a speech act and catalyst for action,"^{210 211} because the Responsibility to Protect represents a universal principle, applicable at all times, and in all places, and not "a label that can be attached to particular crises."²¹²

²⁰⁶ Luck 2010, p. 349.

²⁰⁷ Bellamy 2010, p. 158.

²⁰⁸ Ibid.

²⁰⁹ As it has been explained by the 2009 report of the Secretary General.

²¹⁰ Bellamy 2010, p. 160.

²¹¹ As stressed by some ICISS commissioners like Gareth Evans.

²¹² Bellamy 2010, p. 159.

Bellamy also tells us that although there seems to be consensus in conceptualizing the Responsibility to Protect as a norm,²¹³ there is less clarity "on what sort of norm it is."²¹⁴ According to the author, although it is clear that the Responsibility to Protect's first pillar²¹⁵ is to be understood as a reaffirmation of existing legal obligations, the normative status of pillars two and three²¹⁶ are somehow questionable, since these dimensions "are weakened by the problem of indeterminacy."²¹⁷

Bellamy then reminds us of the varied but ineffective and weak responses of the international community to humanitarian crises which occurred between 2005 and 2010 in countries like Sudan and Somalia, and advances the argument that while during the 2005 World Summit states may have agreed that something is to be done in this type of cases, the fact that the international community has a "relatively free hand to *what* [is to be done,] severely restricts [the Responsibility to Protect's] compliance-pull, and hence its ability to encourage states to find consensus and commit additional resources to the protection of civilians."²¹⁸ Explaining the situation, Bellamy affirms that "the more precise a norm indicates the behavior it expects in a given situation, the stronger its compliance pull."

Finally, commenting on the contributions of the framework, Bellamy goes back to the first 'function' of the Responsibility to Protect. After reminding us that "[t]he further upstream we go in terms of structural prevention, the more difficult it is to demonstrate

²¹³ As Luck tells us, for his analysis, Bellamy adopts Finnemore and Sicking's conceptualization of norms that defines them as "shared expectations of appropriate behavior for actors with a given identity." Luck 2010, p. 359.

²¹⁴ Bellamy 2010, p. 160.

²¹⁵ State responsibility.

²¹⁶ International assistance and timely and decisive response.

²¹⁷ Bellamy 2010, 161.

²¹⁸ Ibid, p.162.

[the Responsibility to Protect's] impact[,]"²¹⁹ and of pointing to cases²²⁰ where "a combination of international observation and engagement"²²¹ seemed to have a positive effect on the behavior of relevant actors, since mass atrocities did not follow from national confrontations, Bellamy concludes:

Given that indeterminacy makes it unlikely that [the Responsibility to Protect] will act in the near future as a catalyst for international action in response to genocide and mass atrocities, it seems reasonable to argue that the most prudent path is to view the principle as a policy agenda in need of implementation rather than as a 'red flag' to galvanize the world into action. This view would certainly be consistent with the evidence thus far that [the Responsibility to Protect] is best employed as a diplomatic tool, or prism, to guide efforts to stem the tide of mass atrocities, and that it has little utility in terms of generating additional international political will in response to such episodes.²²²

Yet, Bellamy's line of reasoning seems problematic not only because "on an operational plane [the two functions of the Responsibility to Protect]"²²³ need not to be incompatible, if pursued in reasonable proportions and if it is understood that a call to action does not necessarily refer to military and coercive action,"²²⁴ but because it also ignores cases such as Kenya, where structural prevention failed,²²⁵ yet where international action through mediation, was successful in reversing the situation.

²¹⁹ Ibid, p. 164

²²⁰ "[I]ncluding among others, Chad, Mali, Pakistan, Guinea-Bissau, Cote d'Ivoire, and Timor Leste."

Ibid.

²²¹ Ibid.

²²² Ibid, p. 166-167.

²²³ As identified by Bellamy.

²²⁴ Luck 2010, p. 357.

²²⁵ As demonstrated by "the ethnic violence that erupted in the in the aftermath of the disputed December 2007 elections" causing the death of 1,500 people and the displacement of 300,000. Bellamy 2010, p. 154.

Furthermore, because Bellamy bases his line of reasoning on an erroneous understanding not only of what is the Responsibility to Protect but also of the way international law functions, his whole analysis concerning what should be expected from the developing framework seems flawed. In effect, as it has been stressed by the current Secretary General and his advisers, the Responsibility to Protect "does not seek to add new norms or standards"²²⁶ to the ones contained in existing international agreements,²²⁷ but instead, to provide individual states and the international community with a comprehensive strategy able to integrate a "coherent set of ideas for implementing" foundational norms and related principles²²⁸ of the Responsibility to Protect within the terms of the 2005 World Summit Outcome document.

Moreover, in understanding the commitment of the international community to assist and support states in fulfilling their obligations, and under certain circumstances to act collectively, it is basic to keep in mind two facts that are crucial in terms of what should be expected from the Responsibility to Protect. First, that as agreed by member states, timely and decisive action is to be decided by the Secretary General, if measures are pacific, or through processes at the regional and global levels that take place on political bodies such as the African Union Peace and Security Council²²⁹ and the United Nations Security Council "where there is no automaticity or rigid template demanding a particular course of action."²³⁰ Second, that international assistance and response "cannot

²²⁶ Luck 2010, p. 360.

²²⁷ Such as the Convention on the Prevention and Punishment of the Crime of Genocide, and the Geneva Conventions.

²²⁸ Such as the protection of civilians during armed conflicts.

²²⁹ Article 4(h) of the Constitutive Act of the African Union establishes the right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity.

²³⁰ Luck 2010, p. 360.

require a successful outcome [since] there is no certain way of knowing beforehand which course of action will make the most positive difference."²³¹

Furthermore, concerning the compliance-pull that the framework can generate when utilized as a speech act, it is clear that the issue is not if "the invocation of [the Responsibility to Protect] exerts no pull"^{232 233} but if this is sufficient. This point brings us back to what should be expected from international law, since "[i]f we expect norms, standards and principles to be respected and implemented all the time[,] then we would not have any." In addition, as correctly posited by Luck, "compliance tends to deepen over time [as standards of behavior which are characterized by] important aspirational qualities, [are] emulated and attained over time."²³⁴

So, if the Responsibility to Protect is not a norm, what is it, and what are its contributions, pending challenges and limitations? Considering its non-binding nature, and the fact that the Responsibility to Protect "represents a shared understanding or consensus about procedure among"²³⁵ member states - in the sense that there is "[a]greement that something ought to be done when an important international standard has been breached in unacceptable ways"²³⁶ - it seems fair to conceptualize the framework as a soft law mechanism aimed at facilitating compliance with previously agreed-to standards of behavior. In other words, what the Responsibility to Protect "brings to existing norms on genocide prevention, war crimes, ethnic cleansing, and crimes against humanity, in fact, is the nucleus of a multilateral compliance

²³¹ Ibid, p. 361.

²³² "As the very political opposition (as well as enthusiasm) the concept generates speaks to the widespread perception of its potency as a political rallying cry."

Ibid, p. 359.

²³³ Ibid, p. 358.

²³⁴ Luck 2010, p. 359.

²³⁵ Diehl et al. 2009, p. 177.

²³⁶ Luck 2010, p. 362.

mechanism."²³⁷ Seen in this light, it is easier to understand why it is that the main contribution of the framework is not really legal, but political, since what the 2005 agreement actually does is add "a universal and high-level political dimension that the struggle against genocide has sorely lacked over the past six decades."²³⁸

[Yet it is basic to keep in mind that the] status quo gives way slowly, sometimes painfully slowly, at the United Nations. But it does give way with time and sustained effort[.] No doubt the first two pillars - the preventive or upstream end of [the Responsibility to Protect] will become standard operating procedure for the UN system and its partners well before the third pillar. The first two pillars, with their stress on prevention, capacity-building and rebuilding, early warning and global regional collaboration, face little political opposition. Here the challenge is more institutional and intellectual - figuring out what needs to be done, how to do it, and who should do it - than political. The implementation of the third pillar, mounting a 'timely and decisive' response when a state is 'manifestly failing to protect its population, will come more slowly and unevenly.²³⁹

This last point takes us to the limitations not only of the Responsibility to Protect but of international law in general. In this point it is useful to go back to Diehl et al. who explain that:

The tenuous relationship between international law and international politics has created a barrier to understanding the conditions that make international law effective. As a factor in ordering international relations, international law manages the challenges of global governance generated by power, politics, and natural phenomena through system-wide change and adaptation. To perform effectively, international law requires that three elements be in alignment:

²³⁷ Ibid.

²³⁸ Ibid, p. 356.

²³⁹ Luck 2008, p. 9

- the existence of a legal concept that is sufficiently developed to be communicated clearly;
- the availability of a structure or framework that can support the operation of the law;
- the political consensus and will of the system's members to use the law.²⁴⁰

In effect, not only is the Responsibility to Protect part of a bigger process, but "ultimately[,] it is all about political will,"²⁴¹ and this is not only from the perspective of government authorities who are supposed to protect their populations from mass atrocities and their incitement, but from neighbors, sub-regional and regional organizations, as well as from relevant bodies of the United Nations. Yet it is important to keep in mind that the framework is still developing and, as it was stated earlier, that its most important contribution is its political dimension. In other words, although the possibility of breaking the law, or the P5 using their veto power is a reality, they may become "an increasingly unattractive recourse"²⁴² as the legitimacy of the framework, derived both from increasing global consensus, and from the gradual operationalisation of its related principles and components, are "likely to raise political costs"²⁴³ of violations, and of blocking timely and decisive action, when states manifestly fail to protect their populations.

²⁴⁰ Diehl et al. 2003, p. 43.

²⁴¹ Luck, 2010, p. 363.

²⁴² Luck 2008, p. 9

²⁴³ Ibid.

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