The Responsibility to Protect (R2P) and the Responsibility while Protecting (RwP): Friends or Foes?

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Abstract

Since its endorsement at the 2005 World Summit of the United Nations, the "responsibility to protect" ("R2P") has become a key concept on the prevention of atrocity crimes. It rests on three pillars: the protection responsibilities of the individual states, international assistance as well as timely and decisive collective action. Parts of the concept have remained controversial, in particular the third pillar which comprises military force as the means of last resort. In late 2011, the notion of the "responsibility while protecting" ("RwP") was introduced by Brazil. A Brazilian concept paper on the responsibility while protecting indicates a series of principles, parameters and procedures, most of which constrain recourse to the use of force and partly even to pillar three action more generally.

On September 5, 2012, the General Assembly is scheduled to hold its informal interactive dialogue on the report that has recently been submitted by Secretary-General Ban Ki-moon on the third pillar of the responsibility to protect. In the run-up to this debate, the Global Governance Institute takes a look at the impact which the initiative on the responsibility while protecting may have, or has already had, on the concept of the responsibility to protect and its implementation. It identifies overlaps and complementarities, but also tensions between the two notions. In a first informal exchange of views on the RwP initiative, member states reaffirmed their commitment to R2P in the form that had been agreed at the 2005 World Summit. They expressed support for some of the guidelines on the use of force which RwP proposes and which had also been part of the original R2P concept. By contrast, they predominantly rejected or modified those other elements of RwP which could invite a revision of the existing consensus on R2P and impede timely and decisive collective action. The upcoming General Assembly dialogue is now likely to be a crossroads for the future direction of this debate.

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Introduction[1]

Since 2001, and especially since its endorsement by the heads of state and government at the United Nations (UN) World Summit in 2005, the "responsibility to protect" ("R2P") has become a key concept on the prevention of atrocity crimes. Still, parts of the concept have remained controversial, first amongst them the possibility that military action may be taken in the name of protecting populations from grave human rights abuses. Apprehensions that R2P may serve to legitimate the use of force were heightened by the international intervention in Libya in 2011. Some UN member states, including members of the Security Council, subsequently criticized as excessive the way in which the North Atlantic Treaty Organization (NATO) had interpreted and implemented the mandate under Security Council Resolution 1973 (2011). South Africa, one of the non-permanent members of the Council in 2011 that had voted in favour of Resolution 1973, openly labelled NATO actions a "flagrant abuse" of the resolution (South Africa 2012).

Against this backdrop, the new notion of the "responsibility while protecting" ("RwP") was introduced by Brazil, one of the five members of the Security Council that had abstained in

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the vote on Resolution 1973.[2] In opening the general debate of the UN General Assembly's sixty-sixth session, on September 21, 2011, Brazilian President Dilma Rousseff warned that interventions in the past had resulted in painful consequences that continued to haunt the world. Accordingly, she demanded that, alongside the responsibility to protect, further discussion was necessary on the "responsibility in protecting" (Brazil 2011a). The matter was subsequently taken up by Brazil's Permanent Representative during the Security Council open debate on the protection of civilians in armed conflict on November 9, 2011, in a statement delivered on behalf of the Brazilian Minister for External Relations (Brazil 2011b), as well as in a concept paper entitled "Responsibility while protecting: elements for the development and promotion of a concept" (Brazil 2011c).

The objective of this analysis paper is to assess the impact, positive as well as negative, which the new notion of the responsibility while protecting may have on the evolution and implementation of the responsibility to protect. For this purpose, it proceeds in four steps: a brief sketch of the "responsibility to protect" framework (1.), a summary of the "responsibility while protecting" initiative (2.), an analysis of potential tensions, complementarities and overlaps between the two approaches (3.), and, finally, a first assessment of the echo which the RwP proposal has caused in the international community (4.). The analysis will reveal that the Brazilian initiative comprises a number of principles, some of which refine the responsibility to protect whereas others would amount to a partial but significant revision of the existing consensus if they were pursued in their intitial form.

1. The Concept of the Responsibility to Protect (R2P)

The pivotal document on the responsibility to protect is General Assembly Resolution 60/1, which incorporates the outcome of the 2005 UN World Summit, including three paragraphs on the "Responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity" (UN General Assembly 2005: paras. 138-140). From the international law perspective, the World Summit Outcome document as a resolution of the General Assembly has only the character of a legally non-binding recommendation (Article 10 of the Charter of the United Nations). Having been agreed at the highest level of international diplomacy, by the assembled heads of state and government of the United Nations, and having been adopted unanimously by the General Assembly, however, it sends a strong political message and may contribute to the evolution of customary international law. The 2005 World Summit agreement has hence become the point of reference for subsequent debates on the responsibility to protect and the basis for its implementation.

1.1 Historical Context: Humanitarian Intervention and a New Approach

To properly understand what the World Summit agreement says and notably also what it does not say on the responsibility to protect, it is important to recall the history of the concept and the contents which it was originally proposed to have. The impetus that eventually led to the birth of the notion of a responsibility to protect came from the debate over the highly controversial idea of a right of humanitarian intervention. In its classical, narrow sense, humanitarian intervention refers to military action in a third state without its consent and with the purpose of protecting its inhabitants from wide-spread suffering or death (Roberts 2000: 5). The legitimacy and the lawfulness of such intervention was hotly debated, especially in light of the general prohibition of the use of force in Article 2(4) of the UN Charter, which

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[2] The other four abstaining members were China, Germany, India and the Russian Federation, see UN Doc. S/PV.6498 at 3.

acknowledges only two explicit exceptions: the use of force in self-defense (Article 51 UN Charter) and action authorized by the Security Council under Chapter VII of the UN Charter. For Chapter VII to be applicable, Article 39 of the UN Charter requires the determination by the Security Council of an act of aggression or of a threat to or a breach of international peace.

In the 1990s, the world witnessed man-made humanitarian disasters to which the Security Council either failed to react timely or decisively, namely during the genocides in Rwanda in 1994 and Srebrenica in 1995, or was sidelined by disagreement amongst its permanent members that led to unilateral intervention, i.e. to intervention without authorization by the Security Council,[3] in the case of Kosovo. Noting opposition to the idea of a humanitarian intervention, UN Secretary-General Kofi Annan squarely raised the question of how the international community should respond to situations such as those in Rwanda and Srebrenica, to "gross and systematic violations of human rights that offend every precept of our common humanity" (Annan 2000: para. 217). Heeding Annan's call, Canada established the International Commission on Intervention and State Sovereignty (ICISS), which published, in late 2001, its report on "The Responsibility to Protect" (ICISS 2001a) and thereby coined the notion that would come to be of major influence in the international discourse on the prevention of mass atrocities.

According to the framework proposed by the ICISS, the responsibility to protect people within its borders lies primarily with the sovereign state itself (ICISS 2001a: XI). This primary responsibility of the host state is complemented however with a responsibility of the community of states. The responsibility to protect comprises a continuum of responsibilities, from preventing man-made crises before they put populations at risk via reaction to "situations of compelling human need" to a responsibility to rebuild (ibid.). The ICISS is very clear in its assessment that prevention is the most important dimension of this framework and that less intrusive measures must always be considered before more coercive ones are applied. Still it also envisages the possibility that military intervention may be necessary as part of the international response to an imminent crisis which the host state is unable or unwilling to halt or avert (ibid.).

To constrain military intervention for protection purposes, the ICISS report proposes a number of criteria: a just cause threshold, limiting cases for military response to situations of actual or impending large scale loss of life or of large scale ethnic cleansing; precautionary principles, requiring that interveners are primarily motivated by the purpose of halting or averting human suffering ("right intention") and that military intervention is a last resort, a proportional means and has reasonable chances of success; and, finally, authorization by the right authority, that is in principle by the Security Council, although the General Assembly and regional or sub-regional organizations are at least mentioned as alternative options (ICISS 2001a: XII-XIII, 31-37; 47-55).

1.2 The 2005 World Summit and the Three Pillars of the Responsibility to Protect

At the 2005 UN World Summit, the notion of a "responsibility to protect" was, at least in principle, endorsed by the assembled heads of state and government (UN General Assembly

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[3] For the term "unilateral humanitarian intervention" see e.g. Vaughan Lowe and Antonios Tzanakopoulos, "Humanitarian Intervention", in Rüdiger Wolfrum, *The Max Planck Encyclopedia of Public International Law* (Oxford: Oxford University Press, 2012), at para. 8; for outlines of the crises in the former Yugoslavia, Rwanda and Kosovo and the respective international response see International Commission on Intervention and State Sovereignty (ICISS), *The Responsibility to Protect: Research, Bibliography, Background: Supplementary Volume to the Report of the International Commission on Intervention and State Sovereignty* (Ottawa: International Development Research Centre, 2001) at 89-94, 97-102, 109-114.

2005: paras. 138-140). As regards the precise contents of the concept, the following compromise solution was adopted:

"Responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity

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 an 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 to 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 are manifestly failing 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 conflicts break out.

140. We fully support the mission of the Special Adviser of the Secretary-General on the Prevention of Genocide."

Paragraphs 138 and 139 of the outcome document incorporate several elements of the ICISS report but omit others, such as the precautionary principles on the use of force. In addition, nuances of wording display varying levels of commitment to different aspects of the "responsibility to protect" idea. On the one hand, the member states accept their individual "responsibility" to extend protection to their own populations as well as a collective "responsibility" of the "international community, through the United Nations" to use peaceful means. On the other hand, they express a mere preparedness, "on a case-by-case basis" and subject to the additional conditions stipulated in paragraph 139 clause 2, to take collective action under Chapter VII.

In his report on "Implementing the responsibility to protect", Secretary-General Ban summarized R2P, as agreed at the World Summit, as resting on three pillars: the protection responsibilities of states for their own population (Pillar I), the commitment of the international community to assist states in meeting these obligations (Pillar II), and the responsibility of UN member states "to respond collectively in a timely and decisive manner when a State is manifestly failing to provide such protection" (Pillar III) (Ban 2009: para. 11). This third pillar was the most controversial in subsequent debates on the responsibility to protect.[4] For a significant number of member states, pillar three and especially the avenue which it provides for military intervention is prone to misapplication and abuse.[5]

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[4] Cf. the reports prepared by the International Coalition for the Responsibility to Protect (ICRtoP) on the General Assembly's plenary debate on R2P in 2009 as well as its 2011 interactive dialogue on the role of regional and sub-regional arrangements in implementing R2P, International Coalition for the Responsibility to Protect, *Report on the General Assembly Plenary Debate on the Responsibility to Protect (15 September 2009)*, online: ICRtoP <http://www.responsibilitytoprotect.org/ICRtoP%20Report-General_Assembly_Debate_on_the_Responsibility_to_Protect%20FINAL%209_22_09.pdf> and *Interactive dialogue of the UN General Assembly on the role of regional and sub-regional arrangements in implementing*

Such apprehensions were heightened by the Libyan air campaign which was conducted by a coalition of willing states, for most part under NATO control and supervision, on the basis of Resolution 1973 (2011). In that resolution, the Security Council had, acting under Chapter VII of the UN Charter, authorized the use of "all necessary measures" for the protection of civilians and civilian populated areas that were under threat of attack.[6] At the same time, like in the preceding Resolution 1970 (2011), the Security Council had also explicitly referred to the "responsibility to protect", although it should be noted that this express reference was limited to the first pillar of the concept, reiterating the protection responsibilities of the Libyan authorities.[7] The mandate to use force for the protection of civilians was eventually terminated by Resolution 2016 of 27 October 2011,[8] three days after the incumbent leader Muammar al-Qadhafi had been killed by rebel forces and national liberation been declared by the opposition National Transitional Council. Members of the Security Council subsequently criticized that the authorization to use force under Resolution 1973 (2011) had in effect been used to topple the Libyan regime. It is against this backdrop that the Brazilian initiative on the "responsibility while protecting" must be understood.

2. The Initiative on the Responsibility while Protecting (RwP)

The distinction made at the 2005 World Summit between the three different pillars as well as between different forms of third pillar action lies at the basis of the Brazilian concept of the responsibility while protecting. Characteristic for the Brazilian initiative is its attempt to constrain the more coercive means of third pillar action and in particular recourse to military intervention.

The statement that was submitted by Brazil's Permanent Representative to the UN, Ambassador Maria Luiza Ribeiro Viotti, on behalf of the Brazilian Minister for External Relations, Ambassador Antonio de Aguiar Patriota, during the open debate of the Security Council on the protection of civilians on November 9, 2011, stressed that the collective international responsibility to protect had to be exercised primarily by diplomatic, humanitarian and other peaceful means, whereas coercive measures should be considered only in cases were such peaceful means proved to be inadequate (Brazil 2011b: 16). Noting the "painful consequences of military interventions", Brazil alluded to the possibility that the use of force, even if authorized by the United Nations and for the noble aim of protecting civilians could cause more harm than it prevented (ibid.). In exercising its responsibility to protect, Brazil suggested, the international community therefore had to demonstrate a higher level of responsibility while protecting (ibid.).

In the last part of the statement and in more detail in the concept paper circulated shortly thereafter, Brazil gives content to this idea of a responsibility while protecting in the form of a number of fundamental principles, parameters and procedures (Brazil 2011b: 16-17; Brazil 2011c). Most basically, it stresses that "prevention is always the best policy", i.e. emphasis

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the Responsibility to Protect: ICRtoP Report, online: ICRtoP <http://www.responsibilitytoprotect.org/ICRtoP%20Report%20on%20RIGO%20GA%20dialogue%20on%20RtoP%20FINAL%281%29.pdf>.

[5] Cf. International Coalition for the Responsibility to Protect, *Interactive dialogue of the UN General Assembly on the role of regional and sub-regional arrangements in implementing the Responsibility to Protect: ICRtoP Report*, online: ICRtoP <http://www.responsibilitytoprotect.org/ICRtoP%20Report%20on%20RIGO%20GA%20dialogue%20on%20RtoP%20FINAL%281%29.pdf> at 6-7.

[6] See UN Security Council, Resolution 1973 (2011), 17 March 2011, UN Doc. S/RES/1973 (2011) at op. para. 4.

[7] See UN Security Council, Resolution 1973 (2011), 17 March 2011, UN Doc. S/RES/1973 (2011), preamble at para. 4 ("Reiterating the responsibility of the Libyan authorities to protect the Libyan population [...]"); Resolution 1970 (2011), 26 February 2011, UN Doc. S/RES/1970 (2011), preamble at para. 9 ("Recalling the Libyan authorities' responsibility to protect its population").

[8] See UN Security Council, Resolution 2016 (2011), 27 October 2011, UN Doc. S/RES/2016 (2011), op. para. 5.

should be on preventive diplomacy as a means of reducing the risk of armed conflict in the first place (Brazil 2011b: 16; Brazil 2011c: para. 11(a)).

With a view to situations in which the international community must react to the threat of violence against civilians, Brazil elaborates several parameters that constrain avenues to the use of force. In particular, the concept of the responsibility while protecting places high emphasis on the nature of military action as a means of last resort. Thus, it calls for rigorous efforts of the international community to exhaust all available peaceful means of protection in line with the UN Charter and the World Summit Outcome document (Brazil 2011b: 16; Brazil 2011c: para. 11(a)). The Brazilian concept paper further elaborates on this principle in a series of paragraphs, stressing that all diplomatic solutions must always be valued, pursued and exhausted, and that force may only be used following "a comprehensive and judicious analysis of the possible consequences of military action on a case-by-case basis" (Brazil 2011c: para. 7). Most crucial is the strict temporal limitation for the use of force which the concept paper reads into the World Summit agreement on the responsibility to protect. According to this understanding, the international community may only resort to force when the individual state manifestly fails to exercise its responsibility to protect and notably "upon the exhaustion of all peaceful means" (ibid.: para. 5). The three pillars of R2P, it suggests, "must follow a strict line of political subordination and chronological sequencing" (ibid.: para. 6).

To avoid "the precipitous use of force", Brazil moreover draws a line between the collective responsibility to protect on the one hand and collective security mechanisms on the other (Brazil 2011c: para. 6). According to this distinction, the collective responsibility to protect "can be fully exercised through non-coercive measures", whereas coercive action comes within the ambit of collective security and may be taken only in situations that qualify as threats to international peace and security (ibid.).

Alongside these temporal limitations, Brazil identifies a material and a formal prerequisite for the use of force in the responsibility to protect concept: the violence to be prevented by the international community must amount to genocide, war crimes, ethnic cleansing or crimes against humanity, and the intervention must be authorized by the Security Council pursuant to Chapters VI and VII of the Charter on the basis of a case-by-case evaluation (Brazil 2011c: para. 5). It is noteworthy that, according to the RwP concept paper, not only the Security Council acting under Chapter VII may authorize the use of force, but in exceptional circumstances also the General Assembly pursuant to the "Uniting for peace" resolution 377 (V) (ibid.: para. 11(c)).

The RwP concept paper stipulates additional parameters for the authorization of the use of force and the implementation of any such mandate (Brazil 2011c: para. 11 (d)-(g)). Amongst these parameters is the proportionality of the intervention and the demand that the use of force "must produce as little violence and instability as possible and under no circumstance [...] more harm than it was authorized to prevent" (Brazil 2011b: 16-17; Brazil 2011c: para. 11(d)-(e)). Also, it must be "limited to the objectives established by the Security Council" (Brazil 2011c: para. 11(f)). Moreover, "the scope of military action must abide by the letter and the spirit of the mandate conferred by the Security Council or the General Assembly, and be carried out in strict conformity with international law, in particular international humanitarian law and the international law of armed conflict" (ibid.: para. 11(d)).

The final paragraphs of the concept paper relate to the continuing role of the Security Council in overseeing the implementation of use of force mandates. They call for Security Council procedures to monitor and assess the way in which resolutions authorizing the use of force are

interpreted and implemented and request the Council to ensure the accountability of those who use force on its behalf (Brazil 2011c: para. 11(h)-(i)).

3. Overlaps, Complementarities and Tensions Between R2P and RwP

In its statement delivered during the open debate on the protection of civilians, Brazil was very clear in that it had no intention to challenge the responsibility to protect as such. Rather, it commended the recognition of this principle at the World Summit as a "milestone" and proposed the responsibility while protecting as a constructive contribution that built upon the existing conceptual framework and was to evolve together with the responsibility to protect (Brazil 2011b: 15-16). During an informal debate on the responsibility while protecting, which took place on February 21, 2012, at UN headquarters in New York, a number of speakers equally expressed their understanding that the Brazilian initiative was aimed at promoting or clarifying, but not at detracting from, changing or substituting R2P (cf. Deng 2012; Luck 2012; Costa Rica 2012; Ghana 2012; Guatemala 2012; Portugal 2012). Yet the fact that so many participants, and especially supporters of the responsibility to protect such as the Special Advisers on the Prevention of Genocide and on the Responsibility to Protect stressed this point calls for some pause for thought.

Indeed, at a closer look, the RwP initiative has the potential not only to contribute to R2P in a positive way, to facilitate its refinement, further consolidation and implementation. Instead, it could also catalyze misgivings about the responsibility to protect and its implementation into a significant revision of the concept. As will be discussed in more detail in the following paragraphs, the concept paper on the responsibility while protecting takes up some elements that were part of the responsibility to protect as agreed at the UN World Summit or at least in the ICISS report, but it also suggests additions or interpretations that conflict with the existing consensus and may turn into obstacles to timely and decisive protection.

3.1 Spotlight on the Military Component of R2P

On a general level, the RwP concept paper chooses a focus and overall adopts a tone that may increase the divisiveness in the discussion around R2P. Addressing specifically the avenues that it opens for recourse to the use of force, the Brazilian concept paper spotlights the one aspect of the responsibility to protect that is most controversial and accounts for much of the opposition to the concept. In the very first paragraphs, it very clearly alludes to the historical origin of the responsibility to protect in the humanitarian intervention discourse. At the outset, Brazil notes that "[s]ince the adoption of the Charter of the United Nations, in 1945, the thinking on the relationship between the maintenance of international peace and security and the protection of civilians, as well as on corresponding action by the international community, has gone through many stages" – of which it then specifically mentions two, namely the idea of humanitarian intervention, or a *droit d'ingérence*, and the responsibility to protect (Brazil 2011c: paras. 1-3).

The concept paper leaves no doubt as to the scepticism which Brazil entertains regarding military action as a means of protecting civilians. While acknowledging, with reference to the case of Rwanda, that there may be situations in which a failure of the international community to act timely could lead to humanitarian catastrophes and in which the international community might therefore contemplate military action (Brazil 2011c: para. 8), the very next paragraph draws attention to "the fact that the world today suffers the painful consequences of interventions that have aggravated existing conflicts, allowed terrorism to penetrate into places where it previously did not exist, given rise to new cycles of violence and increased the vulnerability of civilian populations" (ibid.: para. 9). Moreover, it warns against the

"precipitous use of force" (ibid.: para. 6) and notes the "high human and material costs" that military action will cause even when it is just, legal and legitimate (ibid.: para. 7). In addition, Brazil points to "the growing perception that the concept of the responsibility to protect might be misused for purposes other than protecting civilians, such as regime change", a perception that "may make it even more difficult to attain the protection objectives pursued by the international community" (ibid.: para. 10).

By recalling the one conceptual predecessor of the responsibility to protect which used to be most divisive, the Brazilian initiative could be a challenge to the further consolidation of R2P. The more prominence the military component of R2P gains in the discourse, the more unlikely are large parts of UN membership to further endorse the concept, including in resolutions of the Security Council. By referring explicitly to the *droit d'ingérence* or humanitarian intervention doctrine, Brazil reaffirms the link between R2P and the notion which had traditionally met with stark opposition especially in the Non-Aligned Movement (NAM) and which had already presented an obstacle to the endorsement of R2P during the drafting of the World Summit Outcome document.[9]

As pointed out above, there is no denying that the "responsibility to protect" emerged from the discourse on humanitarian intervention. Also, the concept does indeed envisage the option of military intervention (ICISS 2001a: XII-XIII; 29-37). Yet the concept of R2P presents in several respects a far more comprehensive and balanced approach to tackling the problem of mass atrocities than the doctrine of humanitarian intervention. R2P considers military action only as one means, and as the very last resort, in a broad framework that prioritizes prevention and sets forth manifold other tools to be used by the international community, including a variety of military, economic and political sanctions (ibid.: XI-XII; 19-31). Moreover, it places a different emphasis and calls for a different attitude on the part of potential interveners as it perceives intervention not as a right to be used at their own discretion but rather as one part of a continuum of responsibilities, from prevention via the various reactive means to the rebuilding of the society in peril (Evans 2006: 708; cf. also Welsh 2007: 366). The "responsibility to protect" is hence much more than a reformulation of the right of humanitarian intervention. Significantly, it also draws on other conceptual predecessors, including Francis M. Deng's work on "sovereignty as responsibility" (Deng et al. 1996; ICISS 2001a: 13). It would thus not do justice to the concept and indeed roll back on the important contribution that it has made to the international outlook on the issue of atrocity crime prevention if R2P was merely or primarily seen through the lens of RwP.

Then again the Brazilian initiative only reflects the growing wariness of R2P following the NATO intervention in Libya and highlights an aspect of the broader R2P framework that may still need further development and consensus-building. As long as the debate is entertained in a constructive tone, it may thereby present an opportunity for R2P, even more so since in this respect, i.e. on guidelines on the use of force, the agreement at the World Summit has lagged behind the original R2P concept as proposed by the ICISS. The crucial question is however to what extent the principles and parameters of the RwP concept paper can be aligned with the existing consensus around the responsibility to protect without impeding the effectiveness of the responsibility to protect.

3.2 The Primacy of Prevention: Reaffirmation of a Central R2P Principle
To begin with the explicit reference in the concept paper to prevention being the best policy against mass atrocities, very similar and necessarily general considerations apply. The

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[9] NAM's rejection of a right of humanitarian intervention was reiterated notably in a statement submitted on behalf of the movement by Malaysia in the drafting process of the World Summit Outcome document, which noted at the same time similarities between this concept and R2P, see NAM 2005.

primacy of prevention over reaction as such is a theme that has been integral to R2P from the outset (ICISS 2001a: XI: "Prevention is the single most important dimension of the responsibility to protect: prevention options should always be exhausted before intervention is contemplated, and more commitment and resources must be devoted to it."). It also clearly resonates with the World Summit Outcome document (cf. UN General Assembly 2005: para. 138). As such, RwP reaffirms an important conceptual leap that has been made by the authors of R2P, for whom the responsibility to protect comprised a continuum of obligations, first amongst which was the responsibility to prevent (ICISS 2001a: XI; Evans 2006: 708).

The concept note on the responsibility while protecting complements this general commitment to preventive policies with guidelines that specifically constrain recourse to military action. As so often, the devil is in the detail, as the parameters which Brazil elaborates around these principles are in part firmly grounded in the R2P concept as agreed at the World Summit or at least as proposed by the ICISS, but in part also go against its very grain. The Brazilian initiative thus has the potential to advance or to stall the debate, depending on whether it is understood as an invitation to renew attention to those important elements that failed to reach consensus at the World Summit or to reopen the agreement that had been reached at the time.

3.3 Collective Responsibility vs. Collective Security: A Distinction without Basis in R2P or Contemporary Readings of the UN Charter

When the concept paper juxtaposes the collective responsibility to protect on the one hand with collective security on the other, it proposes a distinction that finds no basis in either the R2P concept as it has been agreed at the World Summit or in the UN Charter as it has come to be interpreted and applied by the Security Council.

In its paragraph on collective international responsibility, the World Summit Outcome document explicitly includes action under Chapter VII, which permits coercive measures short of force according to Article 41 of the UN Charter and the use of military means pursuant to Article 42 UN Charter (cf. UN General Assembly 2005: para. 139 cl. 2). The heads of state and government thereby confirmed an evolution which the understanding of the scope for Chapter VII action had undergone since the adoption of the UN Charter, and especially following the end of the Cold War. Originally, the notions of a breach of or a threat to the peace in Article 39 of the UN Charter may have been designed primarily with a view to inter-state situations (Frowein and Krisch 2002a: para. 7). In the practice of the Security Council, however, the notion of threats to the peace in Article 39 of the UN Charter has been broadened to include internal armed conflicts (ICTY 2005: para. 30) or even more generally "catastrophic internal wrongs" (HLP 2004: para. 202), which may include massive violations of international human rights law (see generally Frowein and Krisch 2002a: paras. 7, 18-21).

There is hence no dichotomy between collective responsibility on the one hand and collective security mechanisms on the other. Rather, there is an overlap as situations which may trigger the former may also justify action under the latter. As far as the responsibility while protecting demands that coercive measures are only taken in situations that qualify at least as a threat to international peace and security, it only restates the threshold for Chapter VII action established by Article 39 of the UN Charter.

3.4 A Revival of Precautionary Principles on the Use of Force

A different, more nuanced and partly also more positive appraisal is in order as regards the emphasis which the RwP concept paper places on the last resort character of military action, the need for a balancing of consequences and the proportionality of the intervention. In principle, these criteria had not only been proposed by the ICISS, but were also endorsed in

the run-up to the World Summit by the Secretary-General's High-level Panel on Threats, Challenges and Change (HLP) as well as by Secretary-General Kofi Annan himself (ICISS 2001a: XII, 32-37; HLP 2004: para. 207; Annan 2005: para. 126). The World Summit document, by contrast, contained no express reference to any principles on the use of force. The last resort principle was at least implicitly built into the World Summit Outcome Document, which envisages Chapter VII action only "should peaceful means be inadequate" (UN General Assembly 2005: para. 139 cl. 2). As regards the other precautionary principles, the RwP concept paper takes up recommendations by the ICISS, the HLP and Secretary-General Annan, even though only in a cursory fashion, when it demands that military intervention must be proportional, cause no more harm than it is meant to prevent, and must remain within the objectives defined by the Security Council.

As a general matter, the appropriateness of laying down more specific criteria on the use of force might be doubted especially if one places special emphasis on the need for flexibility of the Security Council in dealing with Chapter VII situations. The principles to which the RwP alludes could constrain recourse to force even in cases where the threshold of actual or apprehended genocide, crimes against humanity, war crimes or ethnic cleansing is met. In the worst case, they could lay the ground for prolonged quarrels amongst the members of the Security Council over whether or not the conditions are ripe for outside intervention. Yet it is not the existence and due application of appropriate precautionary principles, defining only the necessary limits for military intervention, but only their misapplication that would impede effective international action where needed. Again, much depends on the details of the conceptualization and the implementation of such criteria. In the form proposed by the ICISS, the precautionary principles could arguably present a major conceptual achievement, allowing for a more transparent discussion on the use of force without being unduly restrictive to the detriment of effective protection.

Here, the RwP initiative could indeed make a constructive contribution in that it invites further reflection and clarification on the principles of proportionality, reasonable prospects and right intention. As regards the last resort principle, however, it proposes further refinements which would in fact amount to a revision of the R2P concept as it has emerged from the World Summit and could impede an effective collective response to ongoing or impending mass atrocities in the future.

3.5 Chronological Sequencing of the Three Pillars: An Overly Rigid Condition

Especially critical are the temporal sequences which the Brazilian concept paper reads into the three pillars of the responsibility to protect framework and which deviate from the framework that had been agreed at the World Summit. To begin with, its outline of the three pillars downgrades action under pillar three to a subordinate role. It provides for collective action under the third pillar only in "exceptional circumstances and when measures provided for in the first and second pillars have manifestly failed" (Brazil 2011c: para. 4). Moreover, according to the original Brazilian concept, "[t]he three pillars must follow a strict line of political subordination and chronological sequencing" (ibid.: para. 6). Finally it stipulates as a temporal limitation on the use of force the "exhaustion of all peaceful means" (ibid.: para. 5).

Such sequencing finds no basis in the concept agreed by the heads of state and government in the World Summit Outcome document. For collective action, including under Chapter VII of the UN Charter, the outcome document only requires a manifest failure of the national authorities as regards the protection of their populations and the inadequacy of peaceful means (UN General Assembly 2005: para. 139 cl. 2). Nowhere does it state, however, that peaceful means must have been tried and failed before the international community can move on to Chapter VII measures. For the original R2P concept, the ICISS had been clear that there

was no need for all peaceful means to have been taken in vain before military means could be legitimate (ICISS 2001a: para. 4.37). A rigid strategy of chronological sequencing could moreover conflict with the preparedness of the members states to take collective action "in a timely and decisive manner" (UN General Assembly 2005: para. 139 cl. 2).

Chronological sequencing of the three pillars would also be in open conflict with Secretary-General Ban's model of the R2P concept. According to the Secretary-General, all three pillars are of equal length, "must be ready to be utilized at any point, as there is no set sequence for moving from one to another, especially in a strategy of early and flexible response" (Ban 2009: para. 12). The Secretary-General was very clear in his report on the implementation of R2P that "[i]n dealing with the diverse circumstances in which crimes and violations relating to the responsibility to protect are planned, incited and/or committed, there is no room for a rigidly sequenced strategy" (ibid.: para. 50). As Ban stressed, "[i]n a rapidly unfolding emergency situation, the United Nations, regional, subregional and national decision makers must remain focused on saving lives through 'timely and decisive' action (para. 139 of the Summit Outcome), not on following arbitrary, sequential or graduated policy ladders that prize procedure over substance and process over results" (ibid.).

Importantly, the strict chronological sequencing that was proposed in the RwP concept paper also finds no basis in Chapter VII of the UN Charter. Rather, Article 42 UN Charter permits military action not only where coercive measures short of the use of force under Article 41 have already proved inadequate, but also where the Security Council considers that they would. As a general rule, Chapter VII thus envisages no strict chronological sequencing in the sense that all non-military means would have to be exhausted before military intervention may be ordered. Rather, the Security Council may immediately opt for military action pursuant to Article 42 of the UN Charter, based on the prognosis that measures under Article 41 of the UN Charter would be ineffective (Frowein and Krisch 2002b: para. 7). There is no reason why stricter requirements should then be applied to military operations for the prevention of mass atrocities, once it is recognized that they fall within the scope of Chapter VII (see on this above, at 3.3). A similar point has been made during the informal debate on RwP by the UN Secretary-General's then Special Adviser on the Responsibility to Protect, Edward C. Luck, who opposed any "double standards" in the sense of more restrictive conditions on the use of force in R2P situations than in other situations (Luck 2012).

To conclude, the chronological sequencing as originally suggested would be an inaccurate description of the R2P concept as agreed at the World Summit and effectively revise the commitment to the responsibility to protect as it had been negotiated in 2005. Moreover, a rigid strategy of chronological sequencing could in practice delay necessary action in crises which have already aggravated to such a degree that other forms of international action, including coercive means short of force, will fail to halt the commission of mass atrocities. More recent trends seem to accommodate these concerns, as the idea of a sequencing between the three pillars of R2P has been rejected or rephrased by other states (see below, 4.2.3), and Brazil itself appears willing to understand the proposed sequence in moving from one pillar to the other as a "logical" rather than a "chronological" process.

3.6 The Proposed Distinction between Protection of Civilians and Regime Change

By juxtaposing the protection of civilians on the one hand and regime change on the other, RwP is clearly conceived against the backdrop of the intervention in Libya and seeks to establish an outer limit to military operations based on R2P. Neither the ICISS concept nor the World Summit agreement on the responsibility to protect explicitly preclude that collective action for the prevention of mass atrocities may result in ousting the incumbent regime.

A general rule in the sense that the incumbent regime must be kept in place would in fact appear to be counterintuitive, given the circumstances in which military intervention may only be contemplated. According to the World Summit agreement, national authorities must be "manifestly failing to protect populations" from one of the threshold crimes of genocide, war crimes, crimes against humanity or ethnic cleansing (UN General Assembly 2005: para. 139 cl. 2). Such a manifest failure may not only be due to the inability, but importantly also to an unwillingness on the part of the state authorities to afford the required protection. In the worst case, as the ICISS had acknowledged, the government may itself be involved in the commission of atrocities (cf. ICISS 2001a: XII, 33).

According to the original R2P concept, an absolute limitation to this effect might indeed neither have been necessary. Rather, the precautionary principles proposed by the ICISS could have had struck the necessary balance, insofar as they require that the primary motive must always be the protection of people in peril ("right motivation") and that the scale, duration and intensity of the operation must be limited to the minimum necessary to achieve this purpose ("proportionality") (ICISS 2001a: XII). A strict application of these principles, which are absent from the World Summit outcome like the other criteria for military intervention, could ensure that R2P interventions are not abused for ulterior purposes and that regimes are toppled only where this is unavoidable to protect their population from genocide, crimes against humanity, war crimes or ethnic cleansing.

3.7 Right Authority: A Revival of General Assembly Authorization

The Brazilian concept paper goes beyond the current consensus on the responsibility to protect in that it recognizes, "in exceptional circumstances", the General Assembly as right authority to decide on military action (Brazil 2011c: para. 11(c)). In the World Summit agreement, the only procedure that is envisaged for the use of force is Security Council action under Chapter VII (UN General Assembly 2005: para. 139 cl. 2). The ICISS, by contrast, had mentioned "consideration of the matter by the General Assembly in Emergency Special Session under the 'Uniting for Peace' procedure" as an alternative option if the Security Council failed to take timely action (ICISS 2001a: XIII, 53). Brazil now revives this option, thereby in fact acknowledging an additional constellation in which military intervention would be legitimate. From the point of view of international law, it reaffirms the reading of the UN Charter that underlies General Assembly Resolution 377 (V) of 3 November 1950 ("Uniting for Peace"), according to which the General Assembly may recommend enforcement action, including the use of force, if the Security Council fails to deal with a threat to the peace, breach of the peace or act of aggression due to a lack of unanimity of its permanent members.[10]

3.8 Procedures to Ensure Security Council Supervision and Control

When RwP stipulates that military force must only be used in strict compliance with international law, in particular with international humanitarian law, and in accordance with the letter and spirit of the Security Council resolution by which it is authorized, it merely reaffirms existing limitations under international law. In particular, while the Security Council has the power to authorize military action, thereby granting a *jus ad bellum* in deviation from the general prohibition of the use of force according to Article 2(4) UN Charter, forces acting under such a mandate are not exempt from international humanitarian law, the *jus in bello* (cf. Greenwood 2008: para. 101).

By calling for "enhanced Security Council procedures [...] to monitor and assess the manner in which resolutions are interpreted and implemented" (Brazil 2011c: para. 11(h)), the

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[10] See UN General Assembly, *Uniting for Peace*, GA Res. 377(V), UN GAOR, 5th Sess., 302nd Plen. Mtg. (3 November 1950), A(A) at op. para. 1; see also Hailbronner and Klein 2002, paras. 24-36.

Brazilian concept paper then aims at strengthening the role of the Security Council once it has adopted a resolution authorizing the use of force. This procedural aspect of RwP addresses an issue that arises generally in the context of the Security Council's practice of decentralized implementation of Article 42 of the UN Charter. In the absence of forces at its own disposal as had been envisaged, but were never created, pursuant to Article 43 of the UN Charter, the Security Council has resorted to authorizing member states, acting individually or in "coalitions of the willing", as well as international organisations to use force on its behalf. (see on the whole Frowein and Krisch 2002b: paras. 17-27).

While this delegation of Chapter VII powers was sometimes controversial, it has, in principle, been accepted both in political practice and in legal commentary (Frowein and Krisch 2002b: paras. 20-24). From the point of view of international law, it has been made contingent on a sufficiently precise definition of the scope of the mandate and the delegated powers as well as on effective supervision and control by the Security Council as the delegating body (ibid.: para. 25). The actual practice of the Security Council in this regard has been inconsistent, with broad authorization formulae being used especially at the beginning of the 1990s, but more recently tends to more precise delimitations of the mandate and to stricter reporting duties (ibid.: para. 26).

The Brazilian call for enhanced Security Council monitoring may hence serve as a useful reminder of the need to keep the Security Council updated on the measures taken in exercising its authorization for the use of force, also in R2P constellations. It remains unspecific, however, as regards concrete needs as well as ways for improvement in this regard.

3.9 Evaluation: Overlaps, Complementarities and Tensions

Altogether, the Brazilian initiative on the responsibility while protecting brings up a painful subject for supporters of the responsibility to protect concept. It provides a frame of reference for the many misgivings that exist concerning the avenue which R2P envisages for military action. Yet there is no denying that RwP thereby raises a critical issue that will continue to be of concern to the international community.

RwP partly reaffirms the existing consensus, namely as far as it stresses the primacy of prevention and the four core crimes that trigger the responsibility to protect. In some respects, it challenges the responsibility to protect concept in a constructive way, for instance to the extent that it recalls the precautionary principles that had been proposed by the ICISS but have failed to obtain the express support of the community of states thus far.

Other aspects of the original RwP initiative as outlined in the Brazilian concept paper call for an approach to the three pillars of R2P, specifically to pillar three, which would be incompatible with the prevailing understandings of R2P and even of the UN Charter. Amongst these elements is namely the juxtaposition of collective responsibility and collective security and the suggested chronological sequencing of reactive means.

In sum, RwP as proposed by the Brazilian government has the potential to leave an imprint on the responsibility to protect, for better or for worse. It could prompt further elaboration on some parts of the responsibility to protect that indeed require further thought, but it could also undermine the progress that has been achieved so far in conceptualizing R2P. Much depends therefore on the degree and the form in which it is endorsed by the international community. The Brazilian government itself has demonstrated its commitment to further dialogue on the topic, in line with the idea that its initiative would start off a process in which RwP would evolve together with R2P (cf. Brazil 2011c: para. 11). In particular, it organized an informal debate on the RwP initiative on February 21, 2012, at UN headquarters, co-chaired by its

Minister of External Relations, Ambassador Antonio de Aguiar Patriota, and the then UN Special Adviser for the Responsibility to Protect, Edward C. Luck.

4. Response of the International Community to the "Responsibility while Protecting"

Both at the informal debate in February 2012 and beyond, RwP has generated a lively response and received significant support namely from UN Secretary-General Ban Ki-moon. In the exchange of views amongst UN member states in February and in the latest report by the Secretary-General on the third pillar of the responsibility to protect, it became also clear, however, that support for the RwP initiative as such and for certain of its substantive provisions is greater than for other components of the original concept.

4.1 Reactions to the Brazilian Initiative within the United Nations

Within the United Nations, the Brazilian initiative appears to have pushed at open doors notably as far as the organisation's top official is concerned. The reactions by his two then Special Advisers on the Prevention of Genocide, Francis M. Deng, and on the Responsibility to Protect, Edward C. Luck, were more cautious as was the section on the responsibility while protecting in the Secretary-General's recent report on R2P.

4.1.1 Initial Reactions to RwP by the Secretary-General and his Special Advisers

At the informal discussion in February 2012, Edward C. Luck noted that the Secretary-General had expressed "deep appreciation" for the "constructive initiative" (Luck 2012). In his latest report on the protection of civilians in armed conflict in June 2012, the Secretary-General again took up the proposal for a responsibility while protecting, noting specifically the idea that "any military action authorized by the Security Council abide by the letter and the spirit of the resolution and be implemented in strict conformity with international humanitarian law (Ban 2012a: para. 20). In this context, the Secretary-General recalled his own recommendation, made in his 2007 report on the protection of civilians, that the Security Council should systematically call upon the missions authorized to use force to comply with international humanitarian law and to report regularly on action taken to spare civilians from the effects of the hostilities (Ban 2012a: para. 20; Ban 2007: paras. 66 (a)-(b)). He underscored that such an approach was particularly important in cases in which the use of force was authorized specifically as a means of protecting civilians (Ban 2012a: para. 20). The positive tone of the Secretary-General's statement on the responsibility while protecting is particularly worthy of note when compared with his cautious remarks on the responsibility to protect: expressing concern about "the continuing and inaccurate conflation of the concepts of the protection of civilians and the responsibility to protect", Ban urged the Security Council and the member states to be mindful of the distinctions between the two concepts (ibid.: para. 21). Moreover, the Secretary-General squarely reduced R2P to a political rather than legal concept, which may be justified for some parts of R2P but less so for others (cf. Stahn 2007: 109, 115-118, 120; Bellamy 2006: 165-166; Kolb 2011).

The Secretary-General's Special Advisers on the Responsibility to Protect and on the Prevention of Genocide exhibited a remarkably more cautious attitude to the Brazilian initiative. Having noted the Secretary-General's deep appreciation for the concept, Edward C. Luck, for his part, welcomed "this ongoing dialogue, because the maturing principle of the Responsibility to Protect can only be strengthened through open and interactive discussion with Member States, independent experts, and civil society" (Luck 2012). In his eight observations that followed, however, he clearly rejected those proposals, such as namely the

idea of strictly chronological sequencing, that would have been incompatible with the 2005 World Summit consensus and that could impede timely and decisive action (Luck 2012). Then Special Adviser on the Prevention of Genocide, Francis M. Deng, noted the risk that RwP, if considered as a new concept, could detract from R2P. Yet the notion of the "responsibility while protecting" could in his view make an important contribution as a strategy of implementing R2P (Deng 2012).

4.1.2 RwP in the Secretary-General's Report on the Third Pillar of RwP
In his fourth report on the responsibility to protect, which was released on July 25, 2012, under the title "Responsibility to protect: timely and decisive response" and focused on the third pillar, Secretary-General Ban devoted a separate section to the responsibility while protecting (Ban 2012b: paras. 49-58). While this fact alone maysuggest a gradual consolidation of the notion within the R2P context, the contents of the ten paragraphs of this section as well as statements made elsewhere in the report also exhibit a very differentiated approach to individual parts of the RwP initiative.

The Secretary-General's R2P report welcomes the Brazilian initiative, noting furthermore the "broad and constructive discussion" which it has prompted and the "considerable attention" that it has received from member states (Ban 2012b: para. 50). As a matter of substance, however, the section on the responsibility while protecting also deviates in important aspects from the Brazilian concept note. For the Secretary-General, "[t]he essence of 'responsibility while protecting' is doing the right thing, in the right place, at the right time and for the right reasons" (ibid.: para. 53). This broad statement, which is in this generality hardly of a nature to give rise to protest, is fleshed out in a number of more specific propositions which have often little in common with those that had been put forward by Brazil in late 2011. In fact, Ban partly charges the responsibility while protecting with contents that had previously been attributed to the responsibility to protect such as early warning, which had already been the topic of the Secretary-General's second report on R2P (ibid.: paras. 52-53; Ban 2010).

Also striking is the frequency and consistency with which the Secretary-General refers, in varying terms, to the need for "timely and decisive response" of the international community throughout the entire section on the responsibility while protecting. While this is the leitmotif of the report, it is precisely the timeliness and decisiveness of the international reaction to unfolding crises which could suffer if all the principles and procedures proposed in the Brazilian concept paper were applied strictly according to their letter. The Secretary-General is merely being consistent then when he explicitly and repeatedly rejects the one element of the original RwP initiative that would be most prone to having this effect, namely the proposition that the three pillars of R2P were sequential (Ban 2012b: 2, 13). While reiterating that coercive measures are not the preferred tools of international reaction, the Secretary-General also makes clear that, as evidenced by Article 42 of the UN Charter, they must not be left until all other means have been tested and found to be inadequate (ibid.: para. 56). Rather he reaffirms his commitment to early and flexible response that contemplates all tools provided for under Chapters VI, VII and VIII of the UN Charter, as the situation may require (ibid.).

Aside from this unambiguous rejection of the idea of strict chronological sequencing, the Secretary-General's report also shows a reluctance to adopt specific guidelines on the use of force. While he makes reference to the proportionality of action under pillar three (Ban 2012b: paras. 17, 31) and to the last resort character of the use of force (ibid.: para. 60), other paragraphs indicate opposition to any constraints on the Security Council's flexibility. Thus, the report notes the wide latitude which the Security Council enjoys under the UN Charter to decide on the most appropriate course of action and suggests that the Council should continue

to respond flexibly (ibid.: para. 54). Accordingly, In the Secretary-General's view, there should be no template for decision-making (ibid.: para. 57). Moreover, assessment should be performed in a way so as to facilitate, not to inhibit effective response (ibid.). Finally, the Secretary-General also resists the proposition that the General Assembly could be an alternative authority to legitimize military action when he reaffirms that only the Security Council can authorize the use of force (ibid.: para. 32).

Leaving aside the substantive components of the responsibility while protecting, the overall tone in which the Secretary-General addresses the issue of military intervention is strikingly different from that of the Brazilian concept paper. To begin with, in outlining the history of the RwP initiative, the Secretary-General underlines that discussion on RwP had served to reaffirm the commitment of UN member states to the responsibility to protect principles as well as their determination to implement them in accordance with the 2005 World Summit agreement (Ban 2012b: para. 50). Subsequently, the report notably refers to the risk not only of overreaction but also of under-reaction (ibid.: para. 51). Moreover, it singles out military action only to the necessary degree, addressing it generally within a broader context of considerations pertaining to early warning and assessment and the whole range of tools under Chapters VI, VII and VIII (ibid.: paras. 52. 54-56). Ban recalls the tragic events in Rwanda and Srebrenica as historical evidence that Chapter VII intervention may be the appropriate course of action in certain circumstances (ibid.: para. 60). As regards the Libyan context, the Secretary-General merely notes the different views that have been expressed, including the criticism that "those charged with implementing Council resolution 1973 (2011) exceeded the mandate that they were given by the Council", but renounces any comment on the merits of these views (ibid.: para 54). Rather, he only calls upon the international community to learn from the Libyan experience and to take into account the concerns of the member states in the future (ibid.). In a balanced paragraph, Ban notes the findings of the International Commission of Inquiry on Libya, according to which the NATO air campaign had been "highly precise [...] with a demonstrable determination to avoid civilian casualties", acknowledging nonetheless that civilian lives had still been lost during the operation and calling on military actors to take all possible precautions in order to avoid situation in which civilians are placed at risk, in accordance with international humanitarian law (ibid.: para. 55). In the end, the section on the "responsibility while protecting" concludes by treating the initiative as an avenue for further discussion on the strategies for timely and decisive response, noting existing controversies over the implementation of R2P, but notably none concerning the concept as such (ibid.: paras. 58-59).

In sum, the Secretary-General's report on the third pillar welcomes the Brazilian initiative in principle, but also suggests significant modifications as compared with the RwP concept paper. In particular, it is marked by efforts to mold RwP in a way in which it presents no obstacle to effective third pillar action including, as the case may be, military means.

4.2 Member State Dialogue on the Responsibility While Protecting

Most important is the echo which the RwP proposal has caused amongst the member states, who ultimately decide on the direction of global politics and who have, in terms of international law, the power to authoritatively interpret their agreements and to develop customary law. The statements submitted at the informal debate on February 21, 2012, as far as they have been recorded and made publicly available,[11] show strong support for the R2P, coupled with mixed reactions to the RwP initiative.

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[11] See the statements collected by the Global Centre for the Responsibility to Protect at http://www.globalr2p.org/resources/RwP.php.

4.2.1 Unwavering Support in Principle for R2P as Agreed at the World Summit

Most importantly, the participants in the debate were almost unanimous in their commitment to the responsibility to protect in the form that had been agreed at the World Summit in 2005 (see especially Australia 2012, Denmark 2012, Germany 2012, Guatemala 2012, Netherlands 2012, Portugal 2012 and United States 2012; cf. also Ghana 2012, reiterating its commitment to R2P and referring to all three pillars). Even those states that were harshly critical of past practice in implementing the responsibility to protect reaffirmed the World Summit consensus as such. South Africa, for instance, condemned the NATO operations in Libya in the strongest terms ("elimination and destruction", "flagrant abuse of resolution 1973") and fully associated itself with the Brazilian concept paper, but also made clear that going back on the undertaking made by state leaders at the World Summit was no option (South Africa 2012). Even Kenya, which presented R2P as a doctrine of which many governments still had "grave misgivings and negative perceptions", and which adopted in part almost verbatim the Brazilian objections to military interventions, referred to the World Summit Outcome alongside the UN Charter (Kenya 2012).

The only state that openly attempted to renegotiate the concept of the responsibility to protect was the Bolivarian Republic of Venezuela. The Venezuelan representative placed special emphasis on the view that "until today, there is no consensus on the scope and nature of the responsibility to protect". After depicting R2P as a concept that was only designed to invade developing countries, Venezuela pointed to the one sentence in the World Summit agreement that provided for further examination of the issue in the General Assembly as the mandate that had supposedly emerged as far as R2P is concerned (Venezuela 2012). This statement, however, cannot blur the overall impression that the vast majority of UN members stand, at least in principle, by their commitment to the responsibility to protect.

4.2.2 Different Approaches to the Relationship between RwP and R2P

Amongst those states whose remarks attest to a firm commitment to the responsibility to protect in principle, some differences are discernible as regards their attitude towards the Brazilian initiative and the role that the RwP concept may play in the context of the responsibility to protect. A number of states displayed a very guarded approach to the responsibility while protecting. Some made very clear that the responsibility to protect was and remained the conceptual framework of the discussion whereas the responsibility while protecting only provided input as regards its implementation (see e.g. Germany 2012 and Netherlands 2012). Others found a more affirmative tone to describe the constructive impact that the RwP initiative could have, yet refrained from questioning that the agreed R2P framework remained the basis from which to proceed (see e.g. Ghana 2012, suggesting that R2P needs an "in-built mechanism of RwP" to be effective and sustainable; Guatemala 2012, considering that RwP builds on R2P but takes on board legitimate apprehensions generated by some of its aspects). An exception was Kenya which appeared to treat the two notions as concepts of equal status (see Kenya 2012: "the two concepts of R2P and RwP should move in tandem").

Apart from any agreement or disagreement on the different substantive propositions that had been put forward by Brazil, a number of states demonstrated a clear discomfort with the limited subject-matter and with the tone of the initiative. Several participants criticized the exclusive focus on the third pillar or even more narrowly on military action (see Australia 2012, Denmark 2012, Germany 2012, the United States 2012). The Brazilian approach met with opposition as it was perceived to overemphasize the risks of intervention and to unjustifiably narrow the issue down to constraining the use of force. Denmark and the Netherlands stressed that the risk of inaction in the face of mass atrocities was presumably still greater than that of military action going too far (Denmark 2012, Netherlands 2012). In a

similar vein, Costa Rica quoted the High-level Panel Report of 2004 for the proposition that the principle of non-intervention must not be used as a shield behind which genocidal acts and other atrocities may be committed (Costa Rica 2012). The highly critical tone of the Brazilian initiative as regards the use of force was echoed however in the South African statement and even more clearly in the Venezuelan and the Kenyan intervention.

4.2.3 Points of Agreement or Disagreement with the RwP Concept Paper

As regards the substantive components of the Brazilian concept paper, the echo which they received during the informal debate was multifaceted. General agreement reigned only on the proposition that prevention was the best policy (see e.g. Australia 2012, Costa Rica 2012, Netherlands 2012 and United States 2012).

Much support can also be found for the proposed set of principles on the use of force, at least on a general level. South Africa, one of the strongest proponents of the RwP approach, specifically demanded that the international community conform to "a set of agreed guidelines" when it resorts to the use of force (South Africa 2012). Australia noted that the proposed guidelines bore similarities with the precautionary principles of the ICISS report and could be "a useful policy tool to frame Security Council discussions" and to enhance the transparency of the reasoning behind its decisions (Australia 2012). For Germany, paragraph 11 of the Brazilian concept paper, which inter alia sets out the criteria for military intervention, added nothing to the existing legal framework but was useful in that it recalled some of the relevant principles (Germany 2012). No participant voiced opposition to the proposed principles on the use of force as such, although doubts were expressed by Denmark whether the elaboration of criteria under pillar three was the right focus at this time (Denmark 2012). On a somewhat related note, the Dutch representative objected to the Brazilian call for a "comprehensive and judicious analysis of the possible consequences of military action on a case-by-case basis", noting that such discussion must not lead to "the institutionalization of 'inaction'". Rather, a balance had to be struck between analysis and discussion and the need for timely and decisive action (Netherlands 2012).

Beyond this broader debate on the need for a set of guidelines in principle, some of the proposed guidelines were specifically endorsed, namely the balancing of consequences of an intervention, reminiscent of the ICISS principle of reasonable chances of success (Costa Rica 2012, United States 2012), the principle of proportionality (Costa Rica 2012, Germany 2012, Kenya 2012), and, in particular, the principle of last resort (Costa Rica 2012, Guatemala 2012, Kenya 2012, South Africa 2012, United States 2012). Yet when it comes to the specific criteria in the concept paper that would give precise meaning to the last resort principle, the Brazilian initiative received little unconditional support. Rather, it either met with outright opposition or was restated in a way more in line with the World Summit agreement.

A central matter of debate and at the same time a major point of disagreement with the Brazilian proposal at the time was the suggested chronological sequencing of the three pillars of the R2P model as well as of the different means of international reaction under pillar three. The South African statement would seem to have been the most affirmative one on this issue, as it not only fully endorsed the concept paper as such but also plainly demanded that "all diplomatic means must be exhausted before the use of force is adopted" (South Africa 2012). Various other delegations were very clear however that a rigid strategy of sequencing had no place in the agreed R2P framework (Australia 2012, Costa Rica 2012, Germany 2012, United States 2012). Australia reiterated that "the focus should be on early and flexible response tailored to each situation and aimed to save lives" (Australia 2012). In a similar vein, Germany reaffirmed its commitment to the flexible three pillar model of the World Summit Outcome document, noting that the proposed "responsibility while protecting", by contrast,

endorsed a much more limited approach when it prescribed a "strict chronological sequencing" and a "mandatory exhaustion of all peaceful means" (Germany 2012). Costa Rica stressed that chronological sequencing could be derived neither from the World Summit Outcome document nor from preceding reports or the UN Charter and would compromise the effectiveness of protection efforts (Costa Rice 2012). From a different angle, the United States also criticized the implication that in situations where military action had become necessary, the avenues for diplomatic means were exhausted (United States 2012).

Most telling are however the efforts made by some states that declared themselves sympathetic to the Brazilian initiative to phrase, or in fact rephrase, the "responsibility while protecting" in such a manner that it was compatible with the "responsibility to protect". Ghana, for instance, understood the call for a sequencing of pillars one to three as a way of laying emphasis on capacities under the first two pillars, which could, however, continue to be applied even during and after action under pillar three (Ghana 2012). While the Ghanaian intervention primarily softens the supposedly strict sequencing of the different pillars with a view to continued use of pillar one and two measures after the beginning of a military operation, thereby countering the US critique, Guatemala even went further. According to the Guatemalan view, "the main contribution of the Brazilian initiative is to nuance the borders between the three pillars, underlining that they do not necessarily represent sequential steps, and exploring with greater depth the ample range of options to make pillar three more operational" (Guatemala 2012). In the following, Guatemala praised the Brazilian initiative moreover for not discarding the military option where all other means failed (Guatemala 2012). Interpreted this way, the responsibility while protecting falls short of strict chronological sequencing but allows for the necessary flexibility as envisaged by the responsibility to protect. Overall, the February 2012 debate on the responsibility while protecting exhibited hence overwhelming opposition to the perception that pillar three action, or even military intervention, strictly required that all other means had previously been tested and failed.

Other components of the Brazilian concept paper caused a far less audible echo, if any. The proposed distinction between collective responsibility and collective security received little attention except by the Netherlands, whose representative rightly objected that no such distinction had been made in the World Summit document (Netherlands 2012). South Africa specifically addressed the issue of regime change, which it expressly ruled out, though notably only as the "primary objective" of implementing the responsibility to protect (South Africa 2012). Kenya took on and even carried one step further the proposition that military intervention with the approval of the General Assembly could be legitimate. According to the Kenyan view, the only way to have a responsible application of the responsibility to protect concept would be to establish a UN standing force, to be deployed by the General Assembly only (Kenya 2012). Leaving aside the question of how realistic the prospects of such a standing force capability are, this proposal clearly conflicts with what Special Adviser Luck called the "time-tested provisions [of the UN Charter] on the competences of each principal organ" (Luck 2012). Somewhat mixed were finally the reactions of UN member states to the proposed closer monitoring of military operations by the Security Council. The Netherlands rejected any micro-management by the Council, warning that this could result in "decreased appetite to implement SC-mandates" (Netherlands 2012). Australia equally rejected involvement of the Security Council in the micro-management of military operations, but acknowledged that additional military briefings could strengthen the existing reporting mechanisms (Australia 2012). Similarly, South Africa called for regular updates of the Security Council in order to enable it to exercise oversight of the implementation of its use of force mandates (South Africa 2012).

5. Conclusion and Outlook: RwP – Threat or Constructive Contribution to R2P?

At this moment, it is still too early to predict whether RwP will become a friend or a foe to R2P. In its original form, RwP is partly incompatible with R2P both as it had been drafted by the ICISS and as it has been agreed at the World Summit, whereas other parts revive the original R2P concept. It is to be expected that RwP, if it remains on the stage, will also undergo some changes. In fact, it may even be too early to say whether RwP will take hold in the international discourse on the prevention of atrocity crime prevention. Despite initial support from UN Secretary-General Ban Ki-moon, the reactions of UN member states have overall been rather cautious. Many of those states which commended the initiative as such and shared its underlying perception that the framework for the use of force had to be further elaborated distanced themselves from those parts of RwP which could undermine the responsibility to protect. The recent report by the Secretary-General on the third pillar of R2P points into the same direction.

Much will therefore depend on the future evolution of the RwP notion. The informal debate on the Brazilian initiative in February 2012 has sent strong signals that a vast majority of states is unwilling to reopen the consensus that has been formed at the World Summit. So far the debate following the introduction of the RwP notion has rather reaffirmed the responsibility to protect. Still, RwP mirrors concerns that are shared by large parts of UN membership, including by states that are sympathetic in principle to R2P. Especially in light of the controversies following the intervention in Libya, the way forward might indeed be to seek agreement on criteria that indicate whether a military operation is legitimate or not. By agreeing to precautionary principles such as were originally suggested by the ICISS, friends of R2P might accommodate to a large extent the fears of those sceptics who are still willing to accept R2P as such. There is no room in R2P however for rigid chronological sequencing, but this has been broadly recognized already during the informal debate on RwP.

The upcoming informal debate on the third pillar of the responsibility to protect will provide the forum for continued discussion of the responsibility while protecting. Given the present state of the debate, and the different directions in which it could evolve, the expected exchange of views may become a crossroads for the RwP and its relationship with R2P.

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