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From Non-indifference to Responsibility while Protecting: Brazil's Diplomacy and the Search for Global Norms

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ABSTRACT

Brazil has traditionally based its foreign policy on the principle of non-intervention in the affairs of other states. With the goal of attaining a permanent seat on the Security Council – a constant aspiration of former president Lula’s government – the country has demonstrated its effective engagement in peace operations. As a result of this new approach Brazilian diplomatic discourse has also changed. The principle of non-intervention has given way to two new principles. The first is that of ‘non-indifference’. Brazilian diplomacy now affirms the non-indifference of the country with respect to situations that pose a threat to international peace and security. This posture could be construed as a midway point between non-intervention and RtoP. A second major change in diplomatic stance stems from Brazil’s proposal of the novel concept of ‘Responsibility while Protecting’ (RwP); in essence a new twist on the original concept of RtoP. While this initiative demonstrates the country’s intention to participate actively in the UN debate, it is important to examine whether or not RwP represents a real innovation, or whether it tends merely to replicate the established principle of RtoP as initially envisaged in 2001. Should RwP be considered only a repackaged version of RtoP, or does it represent an important step forward in adumbrating RtoP? This article aims to analyze the evolution of Brazil’s diplomacy before the UN and the search for global norms regarding RtoP.

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ABBREVIATIONS AND ACRONYMS

BRICS	Brazil, Russia, India, China and South Africa
DPKO	UN Department of Peacekeeping Operations
IBSA	India, Brazil, and South Africa
ICC	International Criminal Court
ICISS	International Commission on Intervention and State Sovereignty
ICJ	International Court of Justice
Minustah	UN Stabilisation Mission in Haiti
OAS	Organisation of American States
P5	Permanent members of the UN Security Council
PDN	National Defence Policy (Política de Defesa Nacional)
RtoP	Responsibility to Protect
RwP	Responsibility while Protecting

INTRODUCTION

Brazil has traditionally based its foreign policy on the principle of non-intervention in the affairs of other states. In this it resembles that of other Latin American states: their history has made them resistant to any kind of external interference. Instead, they have hewed to the principles of national sovereignty, non-intervention and peaceful settlement of disputes that are deeply ingrained in their political and juridical cultures.¹ These principles were recognised in the agreements that established the Organisation of American States (OAS) in 1948² and have also been codified in the OAS Charter.³

This reluctance to accept intervention by outside parties had its origins in the Latin American experience of European colonisation and subsequent, repeated US interference in their own domestic affairs. Resistance to intervention remained almost intact even after 1980, when many Latin American states experienced a process of democratisation after having put an end to a series of military regimes.⁴ Non-intervention is also strongly rooted in the region's diplomatic and legal cultures, as well as in public opinion generally.⁵ Indeed the principle is enshrined in many Latin American constitutions, including that of Brazil (Article 4), and appeared in the Brazilian government's first National Defence Policy (PDN) strategy document in 1996, which stipulates that Brazil's actions in the international community must respect the constitutional principles of self-determination, non-intervention, and equality among states.

THE ORIGINS OF RESPONSIBILITY WHILE PROTECTING

The humanitarian disasters that emerged in the 1990s in Rwanda and in the Balkans, however, represented a major challenge to the principle of non-intervention. Many nations determined that they could no longer stand by in the event of grave abuses of human rights committed by other sovereign states against their own citizens; hence the gradual acceptance by the international community of the principle of Responsibility to Protect (RtoP). This principle, first articulated in a report of the International Commission on Intervention and State Sovereignty (ICISS) published under the auspices of the Canadian government in December 2001, was based on the precept that sovereignty confers responsibility.⁶

The RtoP principle was further promoted by UN Secretary-General Kofi Annan in September 2003 and included in the report, *A More Secure World: Our Shared Responsibility*, submitted in December 2004 by the UN High-level Panel on Threats, Challenges and Change⁷. This document served as a basis for the Secretary-General's own report, *In Larger Freedom: Towards Development, Security and Human Rights for All*, which stressed the responsibility of individual governments to protect their own people; a responsibility assumed by the international community only when a state is unable or unwilling to meet this obligation. The use of force is the last resort.

The most significant commitment under UN protocols, however, came in September 2005 with the adoption of the World Summit Outcome document issued following a UN plenary meeting in New York, which stated (paragraphs 138–139) that:

- each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity.
- 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.
- the international community is prepared to take collective action, through the Security Council, in accordance with Chapters VI and VII of the Charter, on a case-by-case basis and in co-operation 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.

RtoP thus replaced the highly controversial concept of ‘humanitarian intervention’ by shifting the terms of the debate from ‘sovereignty as control’ to ‘sovereignty as responsibility’.⁸ Brazil, however, still feared that major powers might use RtoP as an excuse to intervene, at their own discretion, to impose their will on weaker countries⁹. Brazil reconsidered the question of pre-eminence of human rights over the principles of national sovereignty and non-intervention only after it recognised that if it did not, it would run the risk of isolation from the international community. This conclusion was reached in the context of international debates related to RtoP; and also in the light of Brazil’s objective of acquiring a greater role in international decision-making; and of its long-term aim of attaining a permanent seat on the UN Security Council (a constant objective of the government of former president Luiz Inácio [‘Lula’] da Silva in particular). Effective engagement in international peace operations is a consequence of these determinations.

‘Non-indifference’ and ‘Responsibility to Protect’

As a result of this new approach Brazilian diplomatic discourse has also changed. The principle of non-intervention has given way to two new principles. The first is that of ‘non-indifference’. Brazilian diplomacy now affirms the non-indifference of the country with respect to situations that pose a threat to international peace and security. This posture could be construed as a midway point between non-intervention and RtoP, enabling Brazil to assuage its doubts about the latter policy by avoiding an open declaration of support for it. A second major change in diplomatic stance stems from Brazil’s proposal of the novel concept of ‘Responsibility while Protecting’ (RwP) in essence a new twist on the original concept of RtoP.

Against the background of a renewed commitment by the current government under President Dilma Rousseff to participate more actively in Security Council decisions, the Brazilian initiative found coincidental fertile ground in the events of the so-called Arab Spring of 2011. Indeed, the new strategy was developed in part as a response to alleged excesses committed during the implementation of UN Security Council Resolution 1973 that authorised military intervention in Libya against the government of Libyan

president Muammar Gaddafi;¹⁰ Brazil reacted strongly to what it considered an abuse of the Resolution and has since proposed a new approach to the established principle of RtoP: the principle of 'non-indifference'.

Non-indifference: the halfway house

Although almost a decade after its adoption by the African Union¹¹ the principle of 'non-indifference' as it applies to Brazil came out of Lula's foreign policy. This was guided by three diplomatic objectives: first, obtaining a permanent seat on the UN Security Council through reform of that organisation's charter;¹² secondly, strengthening and enlarging the Southern Common Market/ Mercosur; and thirdly, concluding the trade negotiations started in 2001 within the World Trade Organisation (the 'Doha Round'), as well as those conducted under the auspices of the Free Trade Area of the Americas.¹³ The military guidelines contained in the 1996 PDN reinforced the country's aim to participate actively both in international decision-making processes and in international peacekeeping operations, in accordance with its national interests.¹⁴ These twin goals go hand-in-hand: the desire to play a prominent role on the international stage has motivated engagement in peacekeeping operations under UN authority.¹⁵

Clearly it was necessary to reconcile the contradictions between Brazil's constitutional principle of non-intervention and the priorities of Lula's foreign policy. The Ministry of Foreign Affairs therefore needed a compromise to avoid the apparent dissonance in official discourse, which it found by simultaneously reinforcing the importance of non-intervention and seeking to demonstrate the need to intervene according to 'active international solidarity'.

It was this ambiguous strategy that resulted in the formulation of the principle of non-indifference: that Brazil cannot remain indifferent to the suffering of people who request its intervention. According to this reading, the country has an obligation to intervene, in the name of solidarity, in order to protect those who suffer from serious violations of human rights. Through this affirmation Brazil demonstrated its intent to play a more active role in the international arena, even though official discourse barely made reference to the more generally accepted idea of RtoP.¹⁶ On the one hand, the government appears to have accepted and complied with the principles that underlie RtoP, but its official stance has sometimes demonstrated the opposite case, with no indication that those principles have been institutionalised.¹⁷

Minustah: the non-indifference principle in practice

The opportunity to demonstrate its new-found intent to participate more energetically in UN peacekeeping operations – a more important role in international affairs – first arose through Brazil's decision to assume command of the UN Stabilisation Mission in Haiti (Minustah). The decision to command a UN peacekeeping force required the government to justify its engagement in the face of domestic critics, who immediately caught on to the contradiction between the constitutional principle of non-intervention and the official diplomatic discourse. Apparently, the government's objective was not to uphold intervention as a general doctrine, but to justify Brazilian participation in peacekeeping operations, particularly in Haiti. Brazil participated in Minustah from its inception

through Security Council Resolution 1542 in June 2004.¹⁸ According to the government this commitment followed an official invitation from the interim president of Haiti, as well as indications of support from other Security Council member states.¹⁹

Although it was not the first time that Brazil had taken part in a peacekeeping operation,²⁰ several particular factors explain the rationale for the more emphatic involvement in Minustah. First, the Brazilian contingent was substantial – in fact one of the largest it had ever sent for peacekeeping operations under the UN. Secondly, for the first time, most members of a peace-keeping force were from South American countries. Thirdly, also for the first time, Brazil was given command of an international peacekeeping operation.²¹ Finally, participation went beyond simply restoring security because the mission also aimed to ensure the freedom of the Haitian people to elect their own leaders.²²

Brazil, in accordance with Chapter VII of the UN Charter, had traditionally avoided the use of force and indeed had declined to take part in the Multinational Interim Force mission to Haiti created by Resolution 1529, following the 2004 coup d'état that deposed President Aristide.²³ Its motives for engagement in Minustah therefore raised questions. Resolution 1542, establishing Minustah, makes specific reference to Chapter VII of the Charter, authorising the use of force only with respect to Section I, which covers the mandate of the operation, in particular the objective of ensuring a 'secure and stable environment'. Under that Resolution, however, the definition of 'authorised actions' to ensure such an environment is broad enough to make it feasible to implement such a mission based entirely on Chapter VII.²⁴ In that case the Brazilian government would have to justify to a domestic constituency its participation in peace operations under this Chapter, even though it had always advocated a principle of non-intervention. The debate therefore seems to have much more to do with aligning Brazilian official discourse with its own laws and traditions than with actual legal authorisation for the operation.²⁵

Non-indifference as principle

On 25 May 2004, less than a month after the adoption of Resolution 1542, President Lula gave a speech to a conference at the University of Beijing in which he claimed that the Brazilian government was 'oriented [*sic*] by the principle of non-intervention, but also by an attitude of "non-indifference"'.²⁶ From that point on, the idea of non-indifference became a beacon throughout diplomatic discourse. Lula stated before the UN General Assembly in September 2004 that 'we do not believe in interfering in the internal affairs of other countries and we do not hide by [absenting] ourselves or by being indifferent to the problems that affect our neighbours'.²⁷ According to diplomatic convention the principle of non-indifference was justified under a foreign policy 'focused on the sovereign [intervention] of [a] country, both universal and humanistic'.²⁸ The posture of non-indifference stems from an 'active solidarity' in crisis situations, whenever a country's action is requested and whenever it can play a positive role.²⁹

Non-indifference was specifically related to the intervention in Haiti only after September 2005, when it was elevated to a principle.³⁰ Analysis of official discourse, however, shows that all references to non-indifference, whether as a policy or as a principle,³¹ are followed by the notion of non-intervention: this appears nothing short of contradictory.³² Several official statements have attempted to contrive a relationship

between the two concepts, while always avoiding open mention of the principle of RtoP. It appears, therefore, that non-indifference lies somewhere between non-intervention and RtoP.³³ Brazilian leaders have, however, broadened the possibilities of intervention based on the principle of non-indifference, even beyond RtoP.³⁴ To this end Brazil's permanent representative to the UN, Maria Luisa Ribeiro Viotti, has argued that the concept of non-indifference was aimed at strengthening the responsibility of the international community when faced with disasters and humanitarian crises, including those resulting from famine, poverty, and epidemics.³⁵

As an idea that remains undefined and ambiguous, non-indifference could be applied to a wide variety of situations in a discretionary and flexible way, in order to justify intervention in any country (although preferably after a request for assistance from the country concerned).³⁶ On the face of it all these manifestations of non-indifference in public debate serve only to justify a policy that has already been put into practice, while trying to reconcile it with the constitutional principle of non-intervention. In other words, in this case diplomatic discourse aims to fill the gaps in an existing practice, the basis of which does not appear fully legitimate when assessed against Brazilian diplomatic principles. Thus the ambiguity of the concept of non-indifference, the difficulty of translating it into tangible actions capable of guiding foreign policy, and the desire for a more active role in decision-making processes under the UN, together led Brazil to create what appears to be a new label for an already well-established idea: as one French observer notes, '*une nouvelle parure pour une notion déjà bien établie*'.³⁷ This 'new' notion is 'Responsibility with Protection' (RwP).

RWP IN THE UN DIALOGUE

It is important to examine whether or not RwP represents a real innovation, or whether it tends merely to replicate the established principle of RtoP as initially envisaged in 2001. Should RwP be considered only a repackaged version of RtoP, or does it represent an important step forward in adumbrating RtoP?

While Brazil was apparently reluctant to recognise the principle of RtoP, instead opting for the concept of non-indifference, its position has softened since 2010 in statements by Ms Viotti at the UN. Indeed, Brazil has taken part in many informal dialogues on RtoP chaired by the General Assembly subsequent to reports presented by the Secretary-General.³⁸ These colloquies have allowed Brazil to speak about RtoP in more concrete terms. It has emphasised that RtoP is not a principle, much less a novel legal prescription, but simply 'a powerful political call' for states to abide by legal obligations derived first from the UN Charter and secondly from relevant human rights conventions, international humanitarian law, and other instruments.³⁹

RtoP is based on three 'pillars'. Pillar one stresses that states have the primary responsibility to protect their populations from genocide, war crimes, ethnic cleansing, and crimes against humanity. Pillar two addresses the commitment of the international community to provide assistance to states in building capacity to meet this protective obligation and to assisting those under stress before crises and conflicts break out. The third pillar concerns the responsibility of the international community to take timely and decisive action when a state is manifestly failing to protect its population. Brazilian

discourse has always focused on the second pillar as a means of avoiding debate with regard to the third (and most controversial) issue, the responsibility of the international community to take timely and decisive action in humanitarian affairs.⁴⁰

The Libyan intervention

Brazil maintained the same official position until 2011, when the legitimacy of actions taken by states involved in the Libyan intervention came under question. Although Brazil had voted in favour of Resolution 1970, which imposed a range of international sanctions on Libya,⁴¹ it reacted strongly against what it considered misuse of the authorisation for the use of force prescribed in the subsequent Resolution 1973, which permits 'all necessary measures' to protect civilians and civilian populated areas under threat of attack, while excluding a foreign occupation force of any form on any part of Libyan territory.⁴² In its statement on Resolution 1970 Brazil condemned acts of violence in Libya and called on the Libyan authorities to ensure the people's right to freedom of expression. Nevertheless, as a supporter of the integrity and universal application of the Statute of Rome, which established the International Criminal Court (ICC), Brazil also criticised the clause in the Resolution that exempts from ICC jurisdiction nationals of countries not party to the Statute. This exemption represents a clear violation of the Statute and demonstrates the contradiction inherent in the position of the three permanent members of the Security Council (China, Russia and the US) that are not parties to it.

Brazil further expressed strong reservations on the operative paragraph 6 of Resolution 1970 (which is similar to Resolution 1593 of 2005 that referred the situation in Sudan to the ICC)⁴³ and reiterated its firm conviction that initiatives aimed at establishing those exemptions are not helpful in advancing the cause of justice and accountability.⁴⁴ It is worth mentioning that Paragraph 6 was included at the request of the US, in the light of its opposition to the extra-territorial jurisdiction of the ICC.⁴⁵ As Condorrelli and Ciampi have pointed out,

'since the entry into force of the Rome Statute, the US contribution to operations either established or authorised by the Security Council in countries party to the Rome Statute, or in connection with a situation referred to the ICC by the Security Council, is dependent upon the condition that a SC [sic] resolution ... provide protection from investigation or prosecution by the ICC for US nationals and members of the armed forces of other non-States Parties'⁴⁶.

If the fulfilment of this condition is a price of UN operations, it can hardly be reconciled with the Rome Statute or with international law in general.⁴⁷ In the event, Brazil abstained from voting on Resolution 1973, which was adopted by 10 votes in favour, none against and five abstentions.⁴⁸

Brazil's abstention may be explained by its objections to the ambiguity of the text, which leaves wide discretion to states, and by the disregard expressed through the text for the concerns of the League of Arab States in stopping the violence in Libya.⁴⁹ Ms Viotti pointed out that 'we are not convinced that the use of force as provided for in paragraph 4 of the present Resolution will lead to the realisation of our common objective – the immediate end of violence and the protection of civilians'. Indeed, Brazil questioned what effect any

external military action might have on the grand political narrative behind the Libyan uprising, given that it could exacerbate current tensions on the ground and harm those it sought to protect. It could also 'change the home-grown nature of the rebellion narrative and thus endanger the chances of a stable resolution of the conflict in the longer term'.⁵⁰

At an informal dialogue held at the General Assembly on 12 July 2011, following the presentation of a third report by the Secretary-General on 'The Role of Regional and Sub-regional Arrangements in Implementing Responsibility to Protect', Brazil criticised the way the Resolution was implemented.⁵¹ It argued that the implementation of the third pillar of RtoP – timely and decisive reaction – must be carried out carefully and in moderation, and cannot be used as an excuse for regime change or to allow interference in the internal affairs of another country.⁵² It went on to reiterate the importance of preventive measures and actions taken under the auspices of the second pillar, and the political subordination and chronological sequence between the three pillars of RtoP. It is interesting to note that Brazil continually insisted that RtoP should be understood only as a political call for the observance of principles and norms enshrined in the UN Charter. This call, according to Brazil, should be directed at intervening states in order for them to exercise proper responsibility as they protect.

UN mandates and the move to RWP

These criticisms have paved the way towards the development of a new strategy for Brazilian foreign policy, in the process overturning its previous position, which had left much room for ambiguity. Insofar as this new strategy can be considered a direct outcome of alleged excesses committed during the implementation of Resolution 1973, it is an indirect consequence of Brazil's eagerness to obtain a permanent seat on the Security Council, as its mandate as a non-permanent member was to end on 31 December 2011.⁵³ According to Brazil, the text of the Resolution had given a 'blank cheque' to the mandated states, without any control over the actions to be taken or the authorities deemed competent to act. This blank cheque therefore could easily be used to justify the NATO-led bombing operation against the Gaddafi regime; this was also the reason Brazil abstained (along with India, Lebanon, and South Africa) from voting for a Security Council resolution on 4 October 2011 condemning the violence in Syria.⁵⁴

The South African statement on that resolution emphatically posited the risk of going far beyond mandates when implementing Security Council resolutions, citing the possibility of supporting regime change as part of a hidden agenda. Indeed, NATO intervention in Libya raised concerns about the connection between regime change on the one hand and the use of protective force on the other, as well as about the double standard operative in referrals to the ICC given that (as noted above) three of the five permanent members of the Security Council have not ratified the Rome Statute.⁵⁵

Conflict in Syria and international divisions

Brazil and its fellow-members of the BRICS group (which comprises Brazil, Russia, India, China and South Africa) were widely criticised for not using their global influence to stop bloodshed in Syria following the insurgency that began there in March 2011.⁵⁶ Indeed, the Security Council vote exposed a clear division within the international community. The

US declared that it was ‘not encouraged’ by the performance of India, Brazil, and South Africa (the IBSA group) during their temporary tenure on the UN Security Council,⁵⁷ threatening to block their acquisition of a permanent seat on the Security Council⁵⁸ (all three IBSA countries are willing to demonstrate their capacity to serve as permanent members of a reformed and expanded Security Council).⁵⁹ US ambassador to the UN Susan Rice went so far as to say that the IBSA countries had taken positions ‘that one might not have anticipated, given that each of them come[s] out of strong and proud democratic traditions’.⁶⁰

The position taken by these countries as a group, however, served to demonstrate that concerns expressed by other, ‘junior’ UN member states are to be taken into account in future, in order to build a consensus regarding the use of force in RtoP situations and thus avoid the slippery slope to military intervention. Brazil seems now to be more proactive in shaping the rules governing humanitarian intervention and is no longer detached from discussions relevant to the matter.

Brazil has also become more closely committed to the debate through its suggestion of RwP as a new formula for RtoP. As a principle, RwP was put forward by President Rousseff in a statement at the opening of the 66th Session of the General Assembly in September 2011.⁶¹ Brazil’s minister of foreign affairs, Antonio de Aguiar Patriota, reinforced the proposal in a statement on 9 November 2011 which advanced the arguments propounded earlier in a letter to the Secretary-General from Ms Viotti.⁶² The annex to that letter is entitled ‘Responsibility while Protecting: elements for the development and promotion of a concept’.

RwP: core elements and problematic issues

The concept paper concerning the Brazilian version of RtoP that circulated for discussion at the Security Council emphasised the politically subordinate nature and strict chronological order of the three pillars of RtoP. This interpretation, however, appears contrary to the intention of the Secretary-General Kofi Annan, as expressed in his report of 12 January 2009⁶³ to the General Assembly on implementation of the RtoP; it has also been widely criticised⁶⁴ because it could lead to inaction or delay, which would be irresponsible.⁶⁵ The Brazilian position is that the use of force should not take place without a case-by-case analysis of the consequences of military action. This ensures that intervention does not exacerbate existing conflicts, putting the civilian population at risk. Brazil stressed – while bearing in mind the Libyan situation – that RtoP could be used for a purpose unrelated to the protection of civilians, such as enforcing regime change.

In order to avoid this risk, Brazilian diplomats considered it necessary to take an additional conceptual step in dealing with RtoP, by offering a new perspective on the matter. Mr Patriota stressed that under no circumstances should the use of force cause greater harm to civilians than it was authorised to prevent.⁶⁶ Accordingly the concept of RtoP should evolve alongside that of RwP, based on the following set of fundamental principles, parameters, and procedures.

- Just as in the medical sciences, prevention is always the best policy; it is the emphasis on preventive diplomacy that reduces the risk of armed conflict and the human costs associated with it;

- The international community must be rigorous in its efforts to exhaust all peaceful means available in the protection of civilians under threat of violence, in line with the principles and purposes of the Charter and as embodied in the 2005 World Summit Outcome.
- The use of force, including in the exercise of the responsibility to protect, must always be authorised by the Security Council, in accordance with Chapter VII of the Charter, or, in exceptional circumstances, by the General Assembly, in line with its resolution 377 (V).
- Authorisation for the use of force must be limited in its legal, operational and temporal elements and 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.
- The use of force must produce as little violence and instability as possible and under no circumstance can it generate more harm than it was authorised to prevent.
- In the event that the use of force is contemplated, action must be judicious, proportionate and limited to the objectives established by the Security Council.
- These guidelines must be observed throughout the entire length of the authorisation, from the adoption of the resolution to the suspension of the authorisation by a new resolution.
- Enhanced Security Council procedures are needed to monitor and assess the manner in which resolutions are interpreted and implemented to ensure responsibility while protecting.
- The Security Council must ensure the accountability of those to whom authority is granted to resort to force.⁶⁷

The first of these principles and parameters focuses on prevention, in the light of the declaration by UN Secretary-General Ban Ki-Moon of 2012 as the 'year of prevention'. The restatement of this principle in the Brazilian proposal does not seem to make any significant contribution to the debate; it merely reiterates arguments already put forward in discussions on the RtoP from 2001⁶⁸ and does not result in any concrete proposals.⁶⁹ In other words, Brazil presented no suggestions on how to strengthen either the state, or UN capacities, in preventing the four RtoP crimes and violations defined by the UN (ie genocide, war crimes, ethnic cleansing and crimes against humanity).

It is undeniable that building the capacity of national governments to protect their population is an essential component in the implementation of the three-pillar RtoP framework. For this reason one might expect Brazil to move on from debating the importance of preventive measures, to taking concrete steps to implement RtoP at national level. Indeed, UN member states must be prepared to act in a preventive capacity, based on Chapters VI and VIII of the UN Charter. Brazil should also take steps to embrace the 'Focal Points' initiative, launched in September 2010 by the New York-based Global Centre for the Responsibility to Protect, in association with the governments of Denmark and Ghana. This initiative aims to promote international co-operation through the creation of a formal RtoP network.⁷⁰

Apart from the prevention debate, the Brazilian proposal could be codified around three main concerns: first, the adoption of criteria to guide the process of decision-making

on the use of force within the Security Council's deliberations; secondly, the adoption of criteria to guide the implementation of resolutions authorising the use of force by mandated states; and finally, the creation of a monitoring and review mechanism for the implementation of Security Council resolutions by member states, in order to ensure that its mandate is duly respected.⁷¹ Brazil appears willing to accept such a political responsibility but recognises its lack of material capacity to project military force under the auspices of peacekeeping operations. Hence the country's discourse might focus on the importance of non-material values, such as multilateralism and peaceful means of dispute resolution.⁷²

THE CRITERIA QUESTION

In regard to the adoption of criteria to guide the decision-making process at the Security Council, Brazil has highlighted the particular importance of a legal, operational and temporal limitation for the Security Council to authorise the use of force, in order to avoid actions *ultra vires*.⁷³ The importance of the Security Council's considering criteria or guidelines prior to authorising the use of force was reiterated by Ms Viotti before the General Assembly on 5 September 2012, following a presentation of the July 2012 'Report of the Secretary-General on the Responsibility to Protect: Timely and Decisive Response'.

These criteria, however, are not new. They are the outcome of the 2001 report on RtoP prepared by the ICISS⁷⁴ and a report by the UN Secretary-General ('In Larger Freedom') in 2005.⁷⁵ The ICISS report listed the following six criteria to be met prior to the use of force: right authority, just cause, right intention, last resort, proportional means, and reasonable prospects. Those proposed criteria derive from an interpretation of the UN Charter, notably articles 40–42, which indicate that the Security Council should be guided by the principle of proportionality (based on article 42, military action is only to be taken if the Council considers that measures adopted under article 41 are inadequate). Still, the Charter confers great discretion on the Council with regard to the proportionality of its measures for the aims pursued.⁷⁶ As far as can be seen, this is a debate that pre-dates RtoP and has always come to the fore in cases involving authorisation of the use of force.⁷⁷

Unfortunately, the five permanent members of the Security Council (the P5) have deferred every attempt to discuss questions related to the Council's working methods, on the grounds that this debate is part of UN reform in general and therefore should be an integral part of intergovernmental negotiations.⁷⁸ In order to avoid any kind of interference from the wider membership, permanent members usually insist that the Security Council be the master of its own procedures and working methods.⁷⁹ Even if the P5 continue to avoid further discussion, however, this dormant debate on adopting criteria or guidelines for decision-making should be revived (as has already been recommended by the ICISS).⁸⁰ Should the proposed criteria be subject to a binding resolution of the Security Council or a non-binding resolution of the General Assembly? Or could criteria take the form of informal guidelines that the Security Council should take into consideration when making decisions to authorise the coercive use of military force under Chapter VII?

It is highly unlikely that either the Security Council or the General Assembly would accept any proposal for such rigid criteria. There are two reasons for this. One is that official discourse on such restrictions states that real situations requiring the use of force

differ widely and require flexibility in approach; the second has to do with the general and historic origins of the Security Council, which was designed by the UN Charter to have very broad powers and to be subject to very few express limitations.⁸¹ Such a proposal could therefore lead to political deadlock in the Council (as was suggested by the Secretary-General in January 2012). Moreover, a non-binding approach would hardly be effective in limiting the Security Council when acting on the basis of Chapter VII.

The absence of criteria for decision-making and for drafting Security Council resolutions and their lack of precision renders them open to different interpretations. Furthermore, the absence of a standard procedure to ensure that Security Council resolutions are legally well-drafted has a direct impact on the interpretation process,⁸² which is why the use of ambiguous terms should be avoided, even if the ambiguity is intentional and designed to maintain flexibility and allow for discretion in formulating the response of particular member states.⁸³ An example of this is the use of the term 'all necessary means' when drafting resolutions, which makes for even more difficulty in interpretation and in the control of any actions taken *ultra vires*. This discussion surfaced in the aftermath of US intervention in Iraq in 2003, when the Security Council authorised the 'use of all necessary means to uphold and implement Resolution No. 660 (1990) and all subsequent relevant resolutions and to restore international peace and security in the area'.⁸⁴ In order to avoid ambiguity of this kind the Security Council could impose so-called 'sunset clauses' (ie time-limited mandates requiring constant renewal of authorisation for the use of force) and/or substantial limitations specified in the resolution authorising the use of force, in order to clarify its mandates and prevent any abuse in the implementation of its resolutions.

In addition, Brazil proposes that the UN should respect 'a strict line of political subordination and chronological sequencing when adopting measures based on RtoP'.⁸⁵ This has been widely criticised by several delegations on the grounds that it contradicts Secretary-General Kofi Annan's report, and because it carries the risk of inaction or delay. These criticisms led Brazilian representatives to be more careful with their words during later meetings in 2012. Indeed, in order not to compromise the proposal and to avoid side-tracking from the essential elements of the debate, Ms Viotti stated before the General Assembly on 5 September 2012 that the three pillars of RtoP must follow a logical, not a chronological, sequence based on political prudence and not arbitrary checklists.

In relation to the adoption of criteria to avoid any transgression of the limits granted through a resolution authorising the use of force by mandated states, Brazil asserted that the use of military action must be limited according to the letter and spirit of the mandate given by the Security Council or the General Assembly, and in accordance with international law. In addition, the use of force must be judicious, proportionate⁸⁶ and limited to the objectives established by the Council. Debates about implementation are as old as the UN itself but the key Brazilian proposal concerns the creation of a monitoring and review mechanism for the implementation of Security Council resolutions by member states. This measure would ensure the legitimacy of any action authorised by the Council, by enabling the wider membership to be properly informed on, and maintain scrutiny of, the manner in which its mandates are implemented.⁸⁷ It is very important that such a mechanism exists and is effective, while at the same time recognising the limits and dangers of micro-management.⁸⁸

RtoP and constraints on action

One may well wonder how to control state actions under Chapter VII of the UN Charter when acting on the basis of RtoP, without creating double standards – in other words, creating more restrictive standards for using force in RtoP circumstances than in other situations.⁸⁹ Brazil's proposal is vague in this sense: the responsibility is borne by the Security Council, which must enhance its procedures for monitoring and assessing the manner in which resolutions are interpreted and implemented, in order to ensure the proper exercise of RWP.⁹⁰ Mr Patriota stated only that the UN has an obligation to develop an awareness of the dangers involved in the use of force in cases of RtoP, and to set up mechanisms capable of providing an objective and detailed assessment of these dangers.⁹¹

In order to evaluate possible excesses committed by member states mandated by the Security Council, one must first analyse the terms of the resolution in question. An authentic interpretation is one by the Security Council or by an organ authorised by it.⁹² The International Court of Justice (ICJ), as the main judicial organ of the UN, can only perform this task indirectly or incidentally, because the UN Charter does not allow for automatic review of any Security Council decision.⁹³ Attempts to identify the rules applicable to the interpretation of Security Council resolutions go back some time. An ICJ Advisory Opinion of 21 June 1971 concerning the presence of South Africa in Namibia stressed four points of reference to be taken into account in the interpretative process.⁹⁴ The doctrine then assessed the applicability and relevance to actions taken by the Security Council of criteria established by articles 31 and 32 of the Vienna Convention on the Law of Treaties.⁹⁵

In any event, Chapter VII resolutions should, in general, be narrowly interpreted⁹⁶ and they must include the establishment of a monitoring and review mechanism capable of evaluating any action *ultra vires* on the ground. Some proposals regarding the establishment of such a mechanism were made during the discussions on RWP in 2012: existing mechanisms within the Security Council could be strengthened to provide detailed information about military action taken in the field by authorised states or during multinational operations. More specifically, the Security Council could issue an express reporting demand on those states or regional organisations seeking to implement its Chapter VII mandates in RtoP situations.⁹⁷ The Australian government, for instance, considers that existing reporting mechanisms within the Security Council could be strengthened to provide detailed operational briefing to member states on military actions in the field.⁹⁸ Moreover, co-operating with military experts would be a constructive step towards controlling the implementation of Security Council mandates.⁹⁹ Indeed, the Netherlands ambassador to the UN has suggested that the UN Department of Peacekeeping Operations (DPKO) 'could play an advisory role with support from military experts'.¹⁰⁰

It is important, however, that such a mechanism would not be used to discourage states from implementing Security Council mandates on the basis of RtoP. Secondly, double standards should be avoided: there should not be more restrictive rules for the use of force in RtoP situations than in other circumstances requiring the use of force in general. Finally, any attempt to control implementation of Security Council mandates by other organisations, or coalitions of the willing, will be difficult for the reasons already keenly debated.¹⁰¹ The original idea of the UN Charter assumed that military action taken under

Article 42 would be carried out by armed forces placed under the exclusive command of the Security Council. The entire action would be centralised. Article 42, however, has never been operational¹⁰² because states did not place military contingents at the disposal of the Security Council. The UN did not of itself have the capacity to exercise the coercive military action provided under Article 42; hence during the 1990s interpretations of the article led to a system of substitution through which the Security Council began to authorise action by those states willing to implement its mandates through military force. The fact that these actions were thus decentralised left the UN exposed to pressure from national interests and agendas.

This experience indicates that in practice, expectations of monitoring decentralised actions by member states should be limited. If there are general limitations on the delegation of Chapter VII powers, including a precise definition of the scope of the delegated powers and effective supervision of their implementation by a delegating body¹⁰³ these limitations may not apply in practice to operations authorised by the Security Council¹⁰⁴ The Council tends to exercise effective control over peace-keeping operations deployed under the auspices of the DPKO by establishing time limits and requiring periodical reports. In other authorised operations led by states or regional organisations willing to implement its mandates, the Council has sometimes limited itself to authorising the use of force in broad and imprecise terms, as became apparent in the aftermath of the Second Gulf War.¹⁰⁵ Only recently has it opted for more precise definitions of the aims of the operations, establishing time limits and reporting requirements.¹⁰⁶

In such circumstances, as stated by the former UN Under-Secretary General Sir Brian Urquhart and recognised by Secretary-General Ban Ki-moon in his report in 2009, 'only a professional, specially trained, standing UN force at the full disposal of the Security Council can be absolutely relied on to respond with the necessary speed in such situations'.¹⁰⁷ Indeed, such a strategy would obviate the need for time-consuming negotiations whenever a peace-keeping operation was called for.¹⁰⁸ For that reason, debates concerning the United Nations Emergency Peace Service are still relevant and should be revived.¹⁰⁹ This would mean putting into practice one of the more important innovations in the UN Charter when compared with the somewhat toothless Covenant of the League of Nations. Consideration should be given, however, to whether any such function eventually exercised might not have the indirect effect of discouraging member states from implementing mandates conferred by the Council on the basis of RtoP.¹¹⁰ Brazil must offer clarification on how such mechanisms would be developed, as well as what their practical implications might be.

CONCLUSION

It follows from the foregoing that Brazilian foreign policy has developed three fundamental props since 2004. First, it holds to the constitutional principle of opposing intervention of any kind, based on Chapter VII of the UN Charter; secondly, it has reinterpreted that non-intervention into a position of non-indifference, in order to justify the assumption of command of the UN peacekeeping operation in Haiti; and finally, it has propagated the concept of RtoP, put forward by President Rouseff subsequent to alleged excesses attending the Libyan intervention authorised by Security Council Resolution 1973.

Brazil's more general diplomatic position in the international arena – deployment of peacekeeping missions and engagement in broader issues that have brought to the fore socio-economic demands from the nations of the South – clearly demonstrates an intention to participate actively in actions taken within the UN and, in particular, to obtain a permanent seat on the Security Council.¹¹¹ Taken together, these objectives go far to explain the direction Brazilian diplomacy has taken in recent years.¹¹²

President Rousseff's proposal on RwP has already aroused much debate at the UN. Brazil has continued to seize on opportunities to promote what has been widely considered as its major contribution to debates within the UN.¹¹³ The US and some European countries, however, have given RwP a somewhat negative reception, insisting that the Libyan intervention was successful and dismissing the Brazilian initiative as an attempt to delay or block interventions that were necessary to prevent mass atrocities.¹¹⁴ Rousseff was not able to achieve alliances with other BRICS countries in pursuit of Brazil's interest in promoting its RwP agenda. China,¹¹⁵ Russia and India¹¹⁶ did not back the Brazilian proposal, although all three have shown themselves less reluctant than Brazil to intervene in the affairs of a foreign state under the auspices of the Security Council.¹¹⁷ The principle of RwP, however, resonated well with countries from Southeast Asia and Africa¹¹⁸.

It is important that Brazil gains international support for its approach by working to convince other countries of its merits.¹¹⁹ For this reason the RwP proposal should be openly debated and discussed at the General Assembly and in forums such as BRICS and IBSA, in order to clarify what practical mechanisms need to be put in place,¹²⁰ especially given the lack of detail from Brazilian authorities as to what RwP entails in practice. According to *The Economist* it has already been suggested that Brazilian diplomats have no idea of what real difference RwP would make on the ground¹²¹ and it is true that some fundamental questions remain unanswered. How, for example, can criteria be established for limiting action by the Security Council without a mechanism to control the legality of its resolutions?¹²² How would it be possible to control the use of force by states authorised under Security Council resolutions? Which competent authority would monitor mandated states and how would it be composed? Furthermore, the question remains as to how effective decisions would be, given that even if existing monitoring mechanisms were expanded, they would still be subject to the good offices of the Security Council.

Answers to these questions are far from simple and the way forward is uncertain. Addressing a round table discussion in August 2012 at the Getúlio Vargas Foundation in Rio de Janeiro, the Minister of Foreign Affairs stated that Brazilian diplomats do not intend to further develop the idea of RwP in order to clarify it to the international community. He stressed that Brazil does not seek to impose a solution but rather to garner the opinions of other countries with respect to its proposal, and to rebuild consensus around situations involving RtoP. Brazilian diplomats were pleased to see RwP included in the July 2012 report of the Secretary-General. In that way the Brazilian initiative was introduced into the UN agenda; it was welcomed by the broader international community, in contrast to the grudging *a priori* reactions of some member states.

In discussing whether RwP should take the place of RtoP in debate, it should be borne in mind that Brazilian RwP is a way only of refining, not revisiting, RtoP.¹²³ The intent is not to renegotiate or reformulate a concept already agreed upon at the 2005 World Summit; according to Patriota it should be seen rather as an invitation to a collective debate on how to ensure that the use of force, when duly authorised by the Security

Council, is responsible and legitimate. The focus is on the manner of response in implementing RtoP, not on the concept itself. A good deal of confusion arose from putting forward the idea of a new label for RtoP without changing its essential nature. Had Brazil kept working through the accepted, consensual RtoP formula its intentions would have been more clearly understood.

All this may be thought to be much ado about nothing, but as has been highlighted by UN Special Adviser for the Prevention of Genocide, Francis Deng, looking at RwP only as a strategy to implement measures based on RtoP will itself sharpen discussions on how best to respond to RtoP situations. It will not detract from the main debate.

ENDNOTES

- 1 Serbin A & GMA Rodrigues, 'The Relevance of the Responsibility to Protect for Latin America and the Caribbean Region: Prevention and The Role of Civil Society', *Global Responsibility to Protect*, 3, 2011, pp. 266–285.
- 2 The Seventh International Conference of American States, held in 1933 in Montevideo, adopted the Convention on the Rights and Duties of States, which reaffirmed the principle that no state has the right to intervene in the internal or external affairs of another (Article 8), and underscored the obligation of all states to settle any differences that might arise between them through recognised peaceful methods (Article 10).
- 3 Article 2 of the UN Charter proclaims the promotion and consolidation of representative democracy, with due respect for the principle of non-intervention as one of the essential purposes of the organisation. The principle of non-intervention is reiterated in Article 3, which states that every state has the duty to abstain from intervening in the affairs of another state and by Article 19, establishing the fundamental rights and duties of states ('No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State').
- 4 Spektor M, 'Humanitarian Interventionism Brazilian Style?', *Americas Quarterly*, <http://www.americasquarterly.org/spektor>.
- 5 Serbin A & GMA Rodrigues, *op. cit.*, p. 272.
- 6 *The Responsibility to Protect*, Report of the International Commission on Intervention and State Sovereignty. Ottawa: International Development Research Centre, 2001, <http://www.iciss.ca/menu-en-asp>.
- 7 *A More Secure World: Our Shared Responsibility*, Report of the UN High-level Panel on Threats, Challenges and Change. New York, 2004, <http://www.un.org/secureworld/report3.pdf>.
- 8 Annan K, 'Two concepts of sovereignty', *The Economist*, 18 September 1999; see also Peters A, 'Le droit d'ingérence et le devoir d'ingérence: vers une responsabilité de protéger', *Revue de Droit International et de Droit Comparé*, 79, pp. 290–308; see also 'The Security Council's Responsibility to Protect', *International Organisations Law Review*, 8, 2011, p. 5.
- 9 Spektor M, 'The Arab Spring, Seen From Brazil', *The New York Times*, 23 December 2011.
- 10 The origins of the 1973 resolution lie in events across the Middle East and North Africa in the preceding months. The so-called Arab Spring began in Tunis on 3 January 2010 and spread across the region. See also Williams PD, 'The Road to Humanitarian War in Libya', *Global Responsibility to Protect*, 3, 2011, p. 250.

- 11 Information note, Informal Interactive Dialogue on The Role of Regional and Sub-regional Arrangements in 'Implementing the Responsibility to Protect', UN General Assembly, 12 July 2011. See also Williams PD, 'From non-intervention to non-indifference: the origins and development of the African Union's security culture', *African Affairs*, 2007.
- 12 Amorim C, 'Política externa do governo Lula: os dois primeiros anos', *Análise de conjuntura – Observatório Político Sul-Americano*, 4, March 2005, p. 14 *et seq.*
- 13 Almeida PR, 'A diplomacia da era Lula: balanço e avaliação', *Política Externa*, 20, 3, 2011–2012, pp. 95–114.
- 14 National Defence Policy 1996, point 5, 'b' and 'e'. See Hertz M, 'A reforma da Organização das Nações Unidas', in Pinheiro Guimarães S (ed.), *Desafios – Reino Unido e Brasil*, Brasília, IPRI (Instituto de Pesquisa de Relações Internacionais) and Funag (Fundação Alexandre de Gusmão), 1997.
- 15 The National Defence Policy document of 2005 reinforces this assertion by affirming that Brazil must 'have a capability to project its power in order to participate in peace operations established or authorised by the UN Security Council', Brazil, Ministry of Defence, *National Defence Policy*, 2005, Point 7.1, XXIII. See also Kenkel KM, "Global player" ou espectador nas margens? A "Responsabilidade de proteger": definição e implicações para o Brasil', *Revista da Escola de Guerra Naval (Rio de Janeiro)* 12, 2008, p. 46.
- 16 See 'Cluster III: Freedom to Live in Dignity', statement by Ambassador Ronaldo Sardenberg, Permanent Representative of Brazil, to the UN General Assembly, New York, 19–20 April 2005; and statement by Ambassador Celso Amorim prior to 60th session of the UN General Assembly, New York, 17 September 2005.
- 17 See statement by Celso Amorim, <http://www.itamaraty.gov.br/sala-de-imprensa/discursos-artigos-entrevistas-e-outras-comunicacoes/ministro-estado-relacoes-exteriores/artigo-do-senhor-ministro-de-estado-apresentado-no>. See also Kenkel KM, *op. cit.*, p. 44.
- 18 The UN Stabilisation Mission in Haiti (Minustah) established 1 June 2004 by Security Council Resolution 1542. The mission followed on a Multinational Interim Force (MIF) authorised by the Security Council in February 2004. See <http://www.un.org/en/peacekeeping/missions/minustah/>.
- 19 President Aristide had signed a letter relinquishing power and seeking the help of the UN, submitted to the Security Council 29 January 2004. The Council approved Resolution 1529 that night. For more details, see <http://www2.mre.gov.br/dcc/haiti.htm>. See also Pereira AHR, *Operação de Paz no Haiti*. Brasília: Gabinete de Segurança Institucional; Secretaria de Acompanhamento e Estudos Institucionais, 2005, p. 11.
- 20 Brazil has participated in more than 30 peacekeeping operations since 1948 but has provided troops and police officers for only five. See <http://www.itamaraty.gov.br/temas/temas-multilaterais/paz-e-seguranca-internacionais/nacoes-unidas>. See also Uziel E, *O Conselho de Segurança, as operações de manutenção da paz e a inserção do Brasil no mecanismo de segurança coletiva das Nações Unidas*, Funag, Brasília, 2010, p. 80; Seitenfus R, 'De Suez ao Haiti: a participação brasileira nas operações de paz', in *O Brasil e a Organização das Nações Unidas*. Brasília: Funag, 2008, pp. 2–7; Fontoura PRCT, *O Brasil e as operações de manutenção da paz das nações unidas*. Brasília: IBRI/Funag, 1999, p. 452; Cardoso AJS, *O Brasil nas Operações de Paz das Nações Unidas*. Brasília: Funag, 1998, p. 168.
- 21 See Pereira AHR, *Operação de Paz no Haiti*, Brazil, Gabinete de Segurança Institucional; Secretaria de Acompanhamento e Estudos Institucionais, Brasília, 2005, p. 38.

- 22 Seitenfus RAS, Zanella CK, & PM Marques, 'O direito internacional repensado em tempos de ausências e emergências: a busca de uma tradução para o princípio da não-indiferença', *Revista Brasileira de Política Internacional*, 50, 2, 2007, p. 16. Diniz E, 'O Brasil e as operações de paz', in Oliveira HA & AC Lessa (eds), *Relações Internacionais do Brasil: temas e agendas*, 2, 2006.
- 23 Uziel E, *op. cit.*, p. 80; Carvallho ASD & RM Rosa, 'O Brasil e a não-indiferença à crise haitiana: solidariedade ou retórica do discurso?', *Universitas Relações Internacionais*, Brasília, 9, 1, 2011, p. 496; Kenkel KM, *op. cit.*, p. 46; Diniz E, *op. cit.*, p. 92.
- 24 See section I of Security Council Resolution 1542.
- 25 See Kenkel KM, *op. cit.*, p. 46, for more detailed scrutiny of this assertion.
- 26 Statement by former president Lula at 'Foreign Policy in the XXI century and the role of the strategic partnership between China and Brazil', Conference, University of Beijing, 25 May 2004; see also Brazil, Ministry of Foreign Affairs, *Repertório de política externa: posições do Brasil*. Brasília: Funag, 2007, p. 19.
- 27 Statement by Lula to the UN General Assembly, New York, 21 September 2004, quoted in *Repertório de política externa: posições do Brasil*, *op. cit.*, p. 19.
- 28 Ministry of Foreign Affairs, *ibid.*, p. 20. See also lecture by Celso Amorim to seminar, 'A atualidade de San Tiago Dantas', Rio de Janeiro, 27 September 2004.
- 29 Statement by Celso Amorim at the 35th OAS General Assembly, Fort Lauderdale, 6 June 2005; Ministry of Foreign Affairs, *Repertório de política externa: posições do Brasil*, *op. cit.*, pp. 20–21.
- 30 Ministry of Foreign Affairs, *ibid.*, p. 583. See also statement by President Lula, Brasília, 1 September 2005, 'In a globalised and interdependent world, our contribution to peace and democracy is determined by the principle of "non-indifference". Therefore, we focus our efforts on stabilising Haiti. We accepted the challenge of assuming command of the peacekeeping mission in that country, as requested by the United Nations. While respecting the principle of non-intervention without arrogance, but also without indifference, we have contributed to solving crises in our countries of South America.'
- 31 See Seitenfus R *op. cit.*, p. 22. It has been argued that the principle of solidarity, considered the basis of the diplomatic policy of Lula's government, cannot of itself determine Brazil's participation in specific peacekeeping missions but can be used to show the country's interest in supporting a specific mission. This applies to the idea of non-indifference, defined either as attitude or as principle. Such an idea cannot guide specific choices, even if it can justify the country's support for UN peacekeeping operations. See Uziel E, *op. cit.*, p. 104.
- 32 For another example, see statement by Celso Amorim before the general debate at the UN General Assembly, New York, 17 September 2005.
- 33 See speech by Celso Amorim, 27 January 2010, to the Special Session of the Council of Human Rights regarding Haiti, 'Respecting self-determination in conjunction with the decision to help those who need it most is what we call 'non-indifference', a principle which does not affect non-intervention, but brings a fresh perspective ... [A]fter visiting Haiti nine times since 2004, I can guarantee: non-indifference has yielded results in terms of greater security, strengthening democratic governance, socio-economic progress, and greater self-confidence.'
- 34 The scope of RtoP, as suggested in the 2001 Report of the ICISS (International Commission on Intervention and State Sovereignty), has been narrowed to cover only core crimes as defined in Articles 6–8 of the Statute of the ICC (International Criminal Court). For debates about responsibility to protect populations against natural disasters, see workshop organised by the Société française pour le droit international, Atelier I, 'Responsabilité de protéger et catastrophes naturelles: l'émergence d'un régime?', in Société française pour le droit

- international, *Colloque de Nanterre, La responsabilité de protéger*. Paris: A Pedone, pp. 149–185.
- 35 Statement by Ambassador Maria Luisa Ribeiro Viotti to Informal Interactive Dialogue on ‘Responsibility to Protect’, New York, 23 July 2010.
- 36 Celso Amorim affirmed that humanitarian assistance should preferably be provided with the consent of the host state; <http://www.itamaraty.gov.br/sala-de-imprensa/discursos-artigos-entrevistas-e-outras-comunicacoes/ministro-estado-relacoes-exterores/artigo-do-senhor-ministro-de-estado-apresentado-no>.
- 37 Boisson de Chazournes L & L Condorelli, ‘De la “responsabilité de protéger”, ou d’une nouvelle parure pour une notion déjà bien établie?’, *Revue générale de droit international public*, 110, 1, pp. 11–18.
- 38 The competence of the General Assembly to continue consideration of RtoP according to the principles of the Charter and of international law is well established through Paragraph 139 of the outcome document of the UN Summit of 2005. In 2009, the Secretary-General presented to the General Assembly a report on Implementation of the Responsibility to Protect (A/63/677). This report was discussed by the General Assembly, 23–28 July 2009. The Secretary-General prepared a second report on Early Warning, Assessment and Responsibility to Protect (A/64/864), followed by an Informal Interactive Dialogue at the General Assembly, 9 August, 2010. Finally, in 2011, the Secretary-General reported on ‘the role of regional and sub-regional arrangements in the implementation of the Responsibility to Protect’ (A/65/877). A new Informal Interactive Dialogue was held 12 July 2011, <http://www.un.org/fr/preventgenocide/adviser/responsibility.shtml>.
- 39 See statement by Ambassador Maria Luiza Ribeiro Viotti, Permanent Representative of Brazil to the United Nations General Assembly, Informal Interactive Dialogue on ‘Responsibility to Protect’, New York, 23 July 2010.
- 40 Statement by Ribeiro Viotti, New York, 12 August 2010. The three pillars of RtoP were established in the report of the Secretary-General (*Implementing the Responsibility to Protect*) in January 2009, which proposed a terminological framework for understanding RtoP and outlined the measures and actors involved.
- 41 Resolution 1970 (2011) adopted by the Security Council 26 February 2011, S/RES/1970 (2011). Resolution 1970 first called upon Libya’s ‘responsibility to protect’ by referring the situation to the ICC and imposing financial sanctions and an arms embargo.
- 42 Security Council Resolution 1973 (2011) adopted 17 March 2011, S/RES/1973. This resolution represented the first time the Security Council explicitly authorised military intervention against the will of a functioning government, for humanitarian purposes. Resolution 1973 approved a no-fly zone, called for an immediate cease-fire and tightened sanctions on the government of Libya. It also called for the enforcement of a no-fly zone and for ‘all necessary measures to protect civilians and civilian populated areas under threat or attack, while excluding a foreign occupation force of any form’. The resolution also condemned the Libyan government for failing to comply with international law and for allowing gross violations of human rights and attacks that may amount to crimes against humanity. Other resolutions of the Security Council made reference to RtoP: Resolutions 1674 and 1894 set the legal framework for the Security Council on protection of civilians in armed conflict; Resolution 1706 referred to Darfur and Resolution 1975 to the situation in Ivory Coast.
- 43 The operative paragraph (6) reads: ‘6. *Decides* that nationals, current or former officials or personnel from a State outside the Libyan Arab Jamahiriya which is not a party to the Rome Statute of the International Criminal Court shall be subject to the exclusive jurisdiction of that

State for all alleged acts or omissions arising out of or related to operations in the Libyan Arab Jamahiriya established or authorised by the Council, unless such exclusive jurisdiction has been expressly waived by the State’.

- 44 See, *Operationalizing the Responsibility to Prevent*, policy brief, Oxford: Oxford Institute for Ethics, Law and Armed Conflict, pp. 9–10.
- 45 According to article 12 of the Statute of Rome read with article 13, the ICC holds jurisdiction over crimes allegedly committed in the territory of a State Party or over situations referred to the Prosecutor by the Security Council.
- 46 Condorelli L & A Ciampi, ‘Comments on the Security Council Referral of the Situation in Darfur to the ICC’, *Journal of International Criminal Justice*, 3, 2005, p. 595.
- 47 According to Condorelli and Ciampi the principle of exclusive jurisdiction implies that not only the ICC, but any state other than the contributing state, is prevented from exercising its jurisdiction; also that the exercise of jurisdiction by the ICC as well as the courts of all other states is permanently barred. The bar on the exercise of jurisdiction runs counter to the principle of complementarity established in the Rome Statute and also the principle of universal jurisdiction, enabling states to exercise their jurisdiction in relation to the most serious crimes of concern to the international community. For more details, see Condorelli & Ciampi, *op. cit.*, pp. 594–597.
- 48 France, UK, US, Bosnia, Colombia, Gabon, Lebanon, Portugal, Nigeria, and South Africa voted in favour, none voted against, and China, Russia, India, Brazil, and Germany abstained.
- 49 AFP (Agence France Presse), ‘Arab League criticises Western strikes on Libya’, 20 March 2011.
- 50 Williams PD, ‘The Road to Humanitarian War in Libya’, *op. cit.*, p. 258.
- 51 Statement by Ambassador Maria Luiza Ribeiro Viotti, Permanent Representative of Brazil to the United Nations General Assembly, Informal Interactive Dialogue: “The Role of Regional and Sub-regional Arrangements in Implementing the Responsibility to Protect”, New York, 12 July 2011.
- 52 On five potential checks to guard against the problem of regime change see Bellamy A, ‘Stopping genocide and mass atrocities – the problem of regime change’, *Protection Gateway*, 6 July 2012.
- 53 Corrêa A, ‘De olho em vaga na ONU, Brasil apresenta ‘conceito’ para nortear intervenções’, *BBC Brasil em Washington*, 10 November 2011.
- 54 In its statement to the Security Council, Brazil insisted the Council should have made more effort to garner broader support before the text was tabled, in order to allow for differences to be bridged. See SC 10403, 6627th Meeting (night), <http://www.un.org/News/fr-press/docs/2011/CS10403.doc.htm>. For an analysis of the arguments, see Evans G, ‘Responsibility While Protecting’, *Project Syndicate*, 27 January 2012. The draft resolution condemning all violence in Syria and demanding the Syrian government immediately cease all violations of human rights was again rejected 4 February 2012 through a double veto (Russia and China) in the Security Council.
- 55 See Outcome Document, Regional Capacity to Protect, Prevent and Response: UN-Asia Pacific Strategy and Coordination, Bangkok, 17–18 May 2012. <http://www.responsibilitytoprotect.org/index.php/component/content/article/35-r2pcs-topics/4196-asia-pacific-centre-for-the-responsibility-to-protect-conference-outcome-document-regional-capacity-to-protect-prevent-and-response-un-asia-pacific-strategy-and-coordination>. See also remarks by Arbour L, ‘For justice and civilians, don’t rule out regime change’, *The Globe and Mail* (Toronto), 26 June 2012.

- 56 For some criticism of the IBSA (India, Brazil, and South Africa) abstention, see Solana J, 'Failing the Syria Test', *Project Syndicate*, 10 October 2011; Human Rights Watch, 'IBSA: Push Syria to End Bloodshed', 15 October 2011; Spektor M, 'The Arab Spring, Seen From Brazil', *op. cit.*; and Goldberg ML, 'How Libya's Success Became Syria's Failure', *UN Dispatch*, 19 January 2012.
- 57 The three IBSA countries were sitting on the UN Security Council when the crises in Syria and Libya arose.
- 58 Gaouette N, 'US "Not Encouraged" by India, South Africa, Brazil at the UN', *Bloomberg News*, 13 September 2011.
- 59 Adams S, 'Emergent Powers: India, Brazil, South Africa and the Responsibility to Protect', *Huffington Post*, 20 September 2012.
- 60 Spektor M, 'The Arab Spring, Seen From Brazil', *op. cit.*
- 61 Statement by HE Dilma Rousseff at the opening of the general debate of the 66th Session of the UN General Assembly, New York.
- 62 Statement by Antonio de Aguiar Patriota to the Security Council, 9 November 2011; letter dated 9 November 2011 from the Permanent Representative of Brazil to the United Nations addressed to the Secretary-General, General Assembly, paragraphs 14 and 117 of the agenda, A/66/551-S/2011/701.
- 63 Report of the Secretary-General, *Implementing the Responsibility to Protect*, UN General Assembly agenda items 44 and 107, A/63/677, 12 January 2009. The Secretary-General stated that 'there is no set sequence to be followed from one pillar to another, nor is it assumed that one is more important than another. Like any other edifice, the structure of the responsibility to protect relies on the equal size, strength and viability of each of its supporting pillars (p. 2) and 'all three must be ready to be utilised at any point' (Item 12, p. 9).
- 64 Luck EC, 'R2P as a Tool – Identifying Past and Potential Added Value', and Evans G, 'The Responsibility to Protect (R2P) – From ICISS to today', papers delivered at Conference on R2P: the next decade, Muscatine (Iowa), 18 January 2012. See also statements at the UN by Megan Schmidt of the ICFRtoP (International Coalition for the Responsibility to Protect); Ambassador Carsten Staur, Permanent Representative of Denmark to the UN; Edward Luck, Special Adviser to the UN Secretary-General on the Responsibility to Protect; Gary Quinlan, Ambassador and Permanent Representative of Australia to the United Nations, and Eduardo Ulibarri, Permanent Representative of Costa Rica, all to the Informal Discussion at the UN on 'Responsibility while Protecting', New York, 21 February 2012.
- 65 Remarks by the US representative to Informal Discussion on 'Responsibility while Protecting', 21 February 2012. See also statements to the same forum by Quinlan G, Luck E and Ambassador Herman Schaper, Permanent Representative of the Kingdom of the Netherlands to the UN.
- 66 Statement by Antonio de Aguiar Patriota at UN Informal discussion at the UN on 'Responsibility while Protecting', New York, 21 February 2012.
- 67 Statement by HE Dilma Rousseff, Annex to letter dated 9 November 2011, *op. cit.*
- 68 The International Commission on Intervention and State Sovereignty had already stated that prevention is the most important dimension of RtoP and that the 'prevention option should always be exhausted before intervention is contemplated, and more commitment and resources must be devoted to it'. The report affirmed that the responsibility to prevent and react 'should always involve less intrusive and coercive measures being considered before more coercive and intrusive ones are applied'. According to the document, the precautionary principle entails the

- following measures: right intention, last resort, proportional means, and reasonable prospects (pp. XI and XII). See also statement by Schmidt M, 21 February 2012.
- 69 The Washington-based USIP (US Institute of Peace) held a session regarding 'Atrocity Prevention through Persuasion and Deterrence', 5 April 2012. The brief adopted by the institute analysed the utility of preventive deployments ('preventive contingency operations or military flexible deterrent options') and political missions ('multilateral teams of primarily civilian experts deployed by international or regional organisations') for the prevention of mass atrocities or RtoP crimes, notably their role as a tool within the third pillar of RtoP. The Brazilian proposal did not address such concerns.
- 70 This initiative aims to institutionalise RtoP at national level and to build a Focal Points network to facilitate coordination at international level. Governments were asked to designate a National Focal Point on RtoP and to support international co-operation on the issue through the creation of a formal network. More information available at <http://globalr2p.org/advocacy/FocalPoints.php>.
- 71 Evans G, 'Responsibility While Protecting', *op. cit.*
- 72 'The Responsibility to Protect, Views from South Africa, Brazil, India and Germany', event contribution, Konrad Adenauer-Stiftung, Pretoria, 21 June 2012.
- 73 Statement by HE Dilma Rousseff, Point 5 from annex to letter dated 9 November, *op. cit.*
- 74 For principles for military intervention, see the ICISS, *The Responsibility to Protect*, International Development Research Centre, Ottawa, December 2001.
- 75 See statement by Quinlan G, *op. cit.*
- 76 Krisch N, 'Introduction to Chapter VII' in Simma B (ed.), *The Charter of the United Nations: A Commentary* New York: Oxford University Press, 2nd edition, 2002, pp. 711–712.
- 77 Statement by Gareth Evans to Informal Discussion at the United Nations on 'Responsibility while protecting', New York, 21 February 2012.
- 78 The fact that the Security Council should be the master of its procedures and working methods was never questioned by Jordan, Liechtenstein, Costa Rica, Singapore, and Switzerland (the S5) in their draft resolution on the Improvement of the Working Methods of the Security Council presented 4 April 2012. It advocates improvement in the working methods of the Council to create a better understanding of its decisions and to ensure better interaction between the Council and other main bodies of the UN. This would result in 'better decisions and therefore in a more efficient and effective work of the Council. Its actions would be 'better prepared, better understood, politically better supported and thus better implemented', as pointed out by the Ambassador of Switzerland in his presentation of the draft resolution.
- 79 See Hansen M, 'The S5 presents draft resolution on the Improvement the Working Methods of the Security Council', New York: Centre for UN Reform Education, 10 April 2012.
- 80 See Evans G, '[C]lear criteria like "last resort", "proportionality", and "balance of consequences" would make it harder to use cynical diversionary tactics in the Security Council and elsewhere', in 'The Responsibility to Protect Comes of Age', *Project Syndicate*, 26 October 2011.
- 81 By virtue of Chapter VII and in reaction to the failure of the League of Nations sanctions system, the UN Charter confers on the Security Council very broad powers. After the failure of the League, states decided to create an organisation with strong coercive powers able immediately to counter threats of war. The central organ within the organisation would be empowered to reach the main goal of peace maintenance and should have broad freedom of action, as proposed in Dumbarton Oaks (see Krisch N, in Simma B (ed.), *op. cit.*, 'Article 43', pp. 702–703; and 'Introduction to Chapter VII', p. 705.

- 82 Wood, MC, *inter alia* 'legal input can be somewhat haphazard', in 'The Interpretation of Security Council Resolutions', *Max Planck Yearbook of United Nations Law* 11, 2007 Leyden: Martinus Nijhoff, p. 81.
- 83 *Ibid.*, pp. 80–81. The EU recognised that its legislation must be drafted in clear, unambiguous and coherent terms and uniform principles of drafting and layout must be applied. On 8 June 1993 the Council adopted a resolution on the quality of legislative drafting and in 1996 the European Commission adopted general guidelines for legislation.
- 84 Security Council Resolution 678. For scholarly comments, see De Leon PS, 'Titre et statut juridiques de la présence angloaméricaine en Irak à la lumière du droit international public', *Hague Yearbook of International Law*, 17. Leyden: Martinus Nijhoff, 2004, pp. 15–36; Bannelier K *et al.*, 'L'intervention en Irak et le droit international', *Cahiers internationaux*, 19, Centre d'étude et de recherche en droit international (Cerdin), Paris and International Law Centre, Brussels, Paris: A Pedone, 2004, p. 378.
- 85 Statement by HE Dilma Rousseff, Point 6 from annex to letter dated 9 November 2011, *op. cit.*
- 86 Although proportionality was included in the ICISS report there had been insufficient public discussion on its application, for fear of jeopardising the compromise on RtoP reached in 2001. According to Arbour, the Security Council is not the vehicle of choice for application of a very complex proportionality test, which is properly done in the courts over time. See Arbour L, 'R2P as a Tool – Identifying Past and Potential Added Value', and Evans G, 'The Responsibility to Protect (R2P) – From ICISS to today', in *Responsibility to Protect: the next decade*, The Stanley Foundation, *op. cit.*
- 87 Evans G, statement at Informal Discussion at the UN on 'Responsibility while Protecting', New York, 21 February 2012.
- 88 Statements by Quinlan, Evans and Ambassador Herman Schaper, at Informal Discussion at the UN on 'Responsibility while Protecting', New York, 21 February 2012.
- 89 Opening Statement by Edward Luck, at Informal Discussion at the UN on 'Responsibility while Protecting', New York, 21 February 2012.
- 90 'The establishment of these procedures should not be perceived as a means to prevent or unduly delay authorisation of military action in situations established in the 2005 Outcome Document'. Statement by Antonio de Aguiar Patriota during Informal Discussion at the UN on 'Responsibility while Protecting', New York, 21 February 2012.
- 91 Statement by Antonio de Aguiar Patriota, *op. cit.*
- 92 'It is an established principle that the right of giving an authoritative interpretation of a legal rule belongs solely to the person or body who has the power to modify or suppress it'. PCIJ (Permanent Court of International Justice), *Certain Expenses of the United Nations*, 1962, ICJ (International Court of Justice) Report, p. 297; PCIJ, *Jaworzina*, Advisory Opinion 6 December 1923, *PCIJ Series B*, No. 8.
- 93 The Security Council was not conceived of as *legibus solutus* (i.e. unbound by law), as held by the Appeals Chamber of the ICTY (International Criminal Tribunal for the former Yugoslavia) in *Prosecutor v. Tadić*, Case No. IT-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 20–22, 1 Oct 1995. See Alvarez JE, 'Judging the Security Council', *The American Journal of International Law*, 90, 1, January 1996, pp. 1–39; Cronin-Furman KR, 'The International Court of Justice and the United Nations Security Council: Rethinking a Complicated Relationship', *Columbia Law Review*, 106, 2, March 2006, pp. 435–463; Orakhelashvili A, 'The Acts of the Security Council: Meaning and Standards of Review', *Max Planck Yearbook of United Nations Law*, 11, 2007, pp. 143–192.

- 94 The ICJ stressed that one should consider 'the terms of the resolution to be interpreted, the discussions leading to it, the Charter provisions invoked and, in general, all circumstances that might assist in determining the legal consequences of the resolution of the Security Council', (ICJ, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding SC Resolution 276 (1970)*, 1971, ICJ Report, p. 53.
- 95 See Wood MC, *op. cit.*, 'Papastavridis E, 'Interpretation of Security Council Resolutions under Chapter VII in the Aftermath of the Iraqi Crisis', *International and Comparative Law Quarterly*, 56, January 2007, pp. 83–118.
- 96 Krisch N, 'Introduction to Chapter VII' in Simma B (ed.), *op. cit.*, p. 713; Papastavridis E, *op. cit.*, p. 107.
- 97 Proposal by Bellamy A, *op. cit.*
- 98 Statement by Quinlan at Informal Discussion, *op. cit.*
- 99 Statement by Ambassador Herman Schaper, 21 February 2012, *op. cit.* According to Luck E, 'if such a review is undertaken, the expert input of military officers who have planned and conducted such protection operations could be most helpful'.
- 100 Statement by Ambassador Herman Schaper, Permanent Representative of the Kingdom of the Netherlands to the United Nations in New York, *op. cit.*
- 101 'The choice between complete inaction and imperfect action was made', in Kolb R, *An Introduction to the Law of the United Nations*. Oxford: Hart Publishing, 2010, p. 86.
- 102 Kolb R, *op. cit.*, p. 85.
- 103 Krisch N, *op. cit.*, p. 713. '[F]urther limits on the delegation of powers are not expressly provided for in the Charter but can be deduced from general principles and from the object and purpose of the SC's delegation authority'. According to Article 53, the regional organisation authorised to use military force on behalf of the UN must submit full information to the Security Council. The obligation applies to states authorised to act individually or in coalition.
- 104 Krisch N, in Simma B (ed.), *op. cit.*, pp. 758–759.
- 105 See Security Council Resolution 678, 29 November 1990.
- 106 See, for example, Security Council Resolutions 1080, 1101 and 1244. For more detail, see Krisch N, *op. cit.*, p. 713.
- 107 Preface by Sir Brian Urquhart to Johansen R (ed.), *A United Nations Emergency Peace Service to Prevent Genocide and Crimes Against Humanity*. New York: Global Action to Prevent War, Nuclear Age Peace Foundation, World Federalist Movement, 2006, https://www.wagingpeace.org/articles/2005/03/00_uneps.pdf. See also Secretary-General, *Implementing the Responsibility to Protect*, *op. cit.*
- 108 Krisch N, 'Article 43' in Simma B (ed.), *op. cit.*, p. 743.
- 109 Johansen R, *op. cit.*, p. 12: '[T]o stop genocide and crimes against humanity, the next logical and essential step is the creation of a United Nations Emergency Peace Service (Uneps), a small, highly mobile standing United Nations rapid deployment capability that could be the first responder to potential cases of genocide and crimes against humanity'. See also Watt F, 'Implementing R2P: It doesn't get any easier', World Federalist Movement Canada, *Mondial*, June 2012.
- 110 Statement by Ambassador Herman Schaper, Permanent Representative of the Kingdom of the Netherlands to the United Nations in New York, *op. cit.*
- 111 Spektor M, 'Humanitarian Interventionism Brazilian Style?', *op. cit.*
- 112 Foley C, '[T]he Brazilian paper's real significance may be in showing how its own diplomacy

- is developing', in 'Welcome to Brazil's version of "responsibility to protect"', *The Guardian*, 10 April 2012.
- 113 Ribeiro Viotti ML, 'R2P in 2022', in *Responsibility to Protect: the next decade*, The Stanley Foundation, *op. cit.* Statement by Antonio de Aguiar Patriota, *op. cit.*; Evans G, Opening Presentation to Human Rights Council Side Event, *The Role of the Human Rights Council in Implementing the Responsibility to Protect*, Palais des Nations, Geneva, 19 June 2012.
- 114 Spektor M, 'Humanitarian Interventionism Brazilian Style?', *op. cit.* and Stuenkel O, 'BRICS and the "Responsibility while Protecting" concept', *The Hindu*, 12 March 2012.
- 115 Some reasons why the Libyan situation represented a challenge for China included 'demand at home for prompt action to ensure the safety of more than 35 000 Chinese working in the country'; widespread support among China-friendly Arab states for tough action against the Gaddafi regime; and 'economic interests in Libya that might be threatened by supporting the wrong side', 'The Libyan dilemma', *The Economist*, 10 September 2011.
- 116 India is increasingly willing to play a major role as a permanent member of the Security Council while also recognising the historic roots and deep imprints left on its foreign policy by the principles of sovereignty and non-interference, which are unlikely to change in the near future. See statements by Indian representative to The Responsibility to Protect, Views from South Africa, Brazil, India and Germany, Event Contribution, Konrad Adenauer-Stiftung, Pretoria, 21 June 2012.
- 117 For more detail about emerging powers and the RtoP, see Stuenkel O, 'Emerging Powers and the Responsibility to Protect', *Post-Western World* (Rio de Janeiro), 8 April 2012 and 'Emerging powers remain divided on R2P and RWP', *Post-Western World*, 8 July 2012.
- 118 Conference Outcome Document from the APC R2P (Asia Pacific Centre for the Responsibility to Protect), AusAID (Australian Agency for International Development) and Chulalongkorn University, *Regional Capacity to Protect, Prevent and Response: UN-Asia Pacific Strategy and Coordination*, Bangkok, Thailand, 17–18 May 2012.
- 119 Spektor M, 'Humanitarian Interventionism Brazilian Style?' *op. cit.* and 'The Arab Spring, Seen From Brazil', *op. cit.*
- 120 Conference Outcome Document from the APC R2P, *op. cit.*
- 121 'Our friends in the South', *The Economist*, 7 April 2012.
- 122 See Alvarez JE, *op. cit.*, pp. 1–39; Cronin-Furman KR, *op. cit.*, pp. 435–463; Orakhelashvili A, *op. cit.*, pp. 143–192.
- 123 Conference Outcome Document from the APC R2P, *op. cit.*

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