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The Ethics of 'Responsibility While Protecting': Brazil, the Responsibility to Protect, and Guidelines for Humanitarian Intervention

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Abstract

In the aftermath of the NATO intervention in Libya, the responsibility to protect (RtoP) doctrine has received considerable blowback. Various states, most notably some of the ‘BRICS’ states (Brazil, Russia, India, China, and South Africa), claimed that NATO exceeded its mandate given to it by United Nations Security Council (UNSC) Resolution 1973 (by allegedly focusing on regime change rather than on the protection of civilians), was inappropriate in its target selection, violated the arms embargo by transferring arms to rebels, and generally caused too much harm to civilians and civilian infrastructure.¹ It was also suggested that the UK, US, and France—the so-called ‘P3’—acted bombastically and arrogantly in UNSC, ignoring reasonable concerns (see Evans 2012). Regardless of the actual merits of these claims, the allegations have stuck to some extent and they have since framed some of the recent discussions about RtoP.

Keywords

Human rights, Brazil, Responsibility to protect, Humanitarian intervention, United Nations, Ethics

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THE ETHICS OF ‘RESPONSIBILITY WHILE PROTECTING’: BRAZIL, THE RESPONSIBILITY TO PROTECT, AND GUIDELINES FOR HUMANITARIAN INTERVENTION*

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I. Introduction

In the aftermath of the NATO intervention in Libya, the responsibility to protect (RtoP) doctrine has received considerable blowback. Various states, most notably some of the ‘BRICS’ states (Brazil, Russia, India, China, and South Africa), claimed that NATO exceeded its mandate given to it by United Nations Security Council (UNSC) Resolution 1973 (by allegedly focusing on regime change rather than on the protection of civilians), was inappropriate in its target selection, violated the arms embargo by transferring arms to rebels, and generally caused too much harm to civilians and civilian infrastructure.¹ It was also suggested that the UK, US, and France—the so-called ‘P3’—acted bombastically and arrogantly in UNSC, ignoring reasonable concerns (see Evans 2012). Regardless of the actual merits of these claims, the allegations have stuck to some extent and they have since framed some of the recent discussions about RtoP.

In this context, in 2011 Brazil presented the ‘responsibility while protecting’ (RwP) initiative. According to Brazil, this offers “an additional conceptual step” and “a new perspective” on RtoP and the protection of civilians more generally (2011*b*: 16). RwP highlights the need for those undertaking humanitarian intervention considering alternative measures first, to take extra care when using military force to protect civilians, and to report continually to the UNSC. It also brings back to the fore the issue of guidelines for humanitarian intervention (in this case, for the UNSC). Subsequently, RwP has been cited in various discussions on RtoP. For instance, it was subject to a section of the UN Secretary General’s (SG) recent report on pillar three of RtoP, *Responsibility to Protect: Timely and Decisive Response* (Ki-moon 2012: 13–15). In this report, Ban Ki-Moon argues that the initiative is “welcome” (2012: 13) and that it “provides a useful pathway for continuing dialogue about ways of bridging different perspectives and forging strategies for timely and decisive responses to crimes and violations relating to RtoP” (2012: 15).² In addition, there was an ‘Informal Discussion’ on RwP at the UN in February 2012. RwP was also frequently mentioned in the General Assembly (GA) debate on the report on pillar three of RtoP in September 2012.

On the one hand, Brazil’s RwP initiative has been seen as a vital addition to RtoP, strengthening it at a time when it was facing a difficult period and ameliorating the worries surrounding the intervention surrounding Libya. Some states claim that RwP is now central to RtoP.³ Similarly, Francis Deng, the then Special Advisor on the Prevention of Genocide, said that

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¹ Lehmann (2012) also advances some of these claims.

² To be sure, his report is also at times quite glib towards the concept, such as in response to its call for guidelines.

³ For instance, India sees RwP as key for RtoP: “if RtoP is to regain the respect of the international

“there is no doubt that the proposed RwP is an important contribution to the consideration of RtoP” (2012: 2). To that extent, Brazil’s RwP initiative might be seen as an important example of an emerging power appreciating that it needs to engage in norm entrepreneurship (or at least norm development) and, more generally, that it needs to act responsibly.

On the other hand, some have argued that RwP is morally problematic and “suggests additions or interpretations that conflict with the existing consensus [on RtoP] and may turn into obstacles to timely and decisive protection” (Kolb 2012: 9).⁴ For instance, the chronological sequencing proposed by RwP in the original concept note has been widely criticised as being too restrictive and potentially leading to nonintervention.⁵ Several Western states have also appeared to be opposed to the initiative, particularly when first proposed (although their position has softened) (Benner 2013). It has also been argued that RwP’s call for a “template for decision-making in such situations” is not desirable “as each situation is different” (Ki-moon 2012: 15), that, contra RwP, RtoP should not be subject to stricter requirements than other uses of force (e.g., Luck 2012: 1), and that, more generally, RwP adds “nothing new” (e.g., Fiott in ICRtoP 2012a: 12; Hamann 2012). So, it might be claimed that Brazil’s RwP initiative is morally problematic, fails to advance RtoP, and, on the contrary, potentially undermines it. So, on this view, RwP may be seen as a morally dubious attempt to block intervention and to reassert state sovereignty traditionally conceived, which ultimately undermines the emerging norm of RtoP. To that extent, it is very far from an encouraging example of an emerging power appreciating that it needs to engage in norm development and should act responsibly.

Much depends, then, on the normative worth of the Brazilian initiative. Should it be welcomed and does it bode well for the roles that emerging powers may play in the future? Or, does it face several moral problems that signify major worries about the roles that emerging powers such as Brazil will play in the promotion of RtoP and other similar norms? Consequently, the primary aim of this paper is to assess the normative worth of RwP. I will first outline the details of RwP and its development (Section II). I will then suggest that RwP adopts what I will call a ‘Restrictive Approach’ to the ethics of humanitarian intervention. I will argue that such an approach and RwP’s account of the guidelines governing humanitarian intervention are morally desirable. As already noted, one upshot of the development of RwP has been a renewed interest in the possibility of guidelines or criteria for humanitarian intervention. However, the utility of guidelines or criteria for humanitarian intervention has been subject to some scepticism (e.g., Bellamy 2011: 164–9; Brown 2005; Weiss 2005). A secondary aim of the paper—which I turn to in Section III—is to argue that the development of guidelines for humanitarian intervention under RtoP, as highlighted by RwP, would also be morally desirable. In fact, I will argue that guidelines for humanitarian intervention under RtoP *already* exist to some extent; what RwP adds is an interpretation of these guidelines in accordance with the Restrictive Approach to the permissibility and conduct of intervention. In the conclusion (Section IV), I will consider some of the political implications of RwP. Here my argument will be more tentative, but also generally optimistic.

Before beginning, some clarifications are necessary. First, the paper is focused on providing an ethical assessment of RwP. It is less concerned with providing an account of the reasons why

community, it has to be anchored in the concept of RwP” (2012).

⁴ It should be noted that Kolb’s paper was written before Brazil presented its comments on the report on pillar three in September 2012 (which addresses some of his concerns).

⁵ See, for instance, Ki-moon (2012: 4) and the various views of civil society (in ICRtoP 2012a) and states (in ICRtoP 2012b) in discussions on RwP. As I discuss below, Brazil has stepped back from the view of chronological sequencing, the most controversial part of the doctrine.

Brazil proposed RWP or more generally Brazil's engagement with RtoP and its general role in norm development beyond RWP.⁶

Second, it is worth briefly considering why we should care about assessing the moral credentials of RWP, in addition to the issue of what, if anything, it means for emerging powers' likely norm development and future behaviour. Most straightforwardly, we need to know whether RWP is a notion that should be supported. For instance, should RtoP advocates endorse RWP or reject it? Thorsten Benner (2013) suggests that Brazil has not more recently pushed the notion further forward, missing major opportunities to do so. Should other states and global civil society therefore take up the mantle (as Benner (2013: 9) proposes)? Moreover, considering the normative credentials of RWP brings to the fore some central moral issues for the ethics of humanitarian intervention, some of which have previously received relatively little attention, such as the accountability to authorising bodies. Related, it highlights the significant issue of guidelines for humanitarian intervention, which I shall consider in Section III. More generally, it raises the question of whether the Restrictive Approach to the ethics of humanitarian intervention should be favoured over a more permissive approach. Considering RWP therefore is not only important for assessing the potential for norm development by the BRICS, it prompts re-evaluation of central issues for humanitarian intervention and, in general, the RtoP doctrine.

Third, it is worth emphasising that, although not explicitly stated, RWP is focused particularly on humanitarian intervention. It is an account of the principles that should govern the use of military force under pillar three of RtoP. It is not primarily concerned with other sorts of action under pillar three, such as referrals to the International Criminal Court or economic sanctions, or actions under the other pillars, such as improving early-warning capabilities. In other words, it is essentially an add-on to RtoP for instances of humanitarian intervention. Hence, RWP is not an *alternative* to RtoP, but an *addition* or *clarification* of it for the issue of humanitarian intervention.

II. The RWP Initiative

I will start by providing an account of the RWP initiative. It should be noted that RWP has been subject to several slightly differing interpretations⁷, although there is general agreement about its main claims.

Rousseff's speech to the GA

RWP was first advanced by the Brazilian president, Dilma Rousseff, in her prestigious speech at the opening of the General Debate of the 66th Session of the GA in September 2011. Her account of RWP was limited to a few remarks, most notably that “[m]uch is said about the responsibility to protect; yet we hear little about responsibility in protecting. These are concepts that we must develop together” (Rousseff 2011). In doing so, she emphasised that force must be the last resort, the benefits of conflict prevention, the painful consequences of interventions, the import of the role of the UNSC, and the need for UNSC reform.

The concept note

⁶ See, instead, Benner (2013) and Kenkel (2012) for detailed accounts of these issues.

⁷ Perhaps the oddest is by the SG in his report on pillar three that it involves ‘doing the right thing, in the right place, at the right time and for the right reasons’ (Ki-moon 2012: 14). See Kolb (2012: 12–13) for a critique.

RwP was developed in more detail by Brazil in November 2011 in its 'concept note', *Responsibility While Protecting: Elements for the Development and Promotion of a Concept*. This concept note provides most of the substance of the initiative. Its central (if ambiguous) point is that "[a]s it exercises its responsibility to protect, the international community must show a great deal of responsibility while protecting" (Brazil 2011a: 3). But there are also some more substantive claims in the concept note.

The first concerns the sequencing of responses. It is suggested that the three pillars of RtoP must be followed in "a strict line of political subordination and chronological sequencing" (Brazil 2011a: 3). So, when responding to mass atrocities, it must be clear that the protection responsibilities of the state are not being met (pillar one) and international assistance and capacity-building must be tried and have failed (pillar two), and only then can there be a timely and decisive response (pillar three). Yet even then differentiation should be made between military and nonmilitary coercion, avoiding the "precipitous use of force" (Brazil 2011a: 2). This argument for sequencing has similarities to the Just War Theory (JWT) principle of last resort (when interpreted more literally). The suggestion is that it is necessary to "exhaust" all peaceful solutions, given the human and material costs of war (Brazil 2011a: 3). Similarly, on some accounts of last resort, all other options must be pursued before war can be permissible (see, further, Orend 2006: 57–8).⁸

The second concerns accountability and the authorisation of force. The use of force must be "judicious, proportionate and limited to the objectives established by the Security Council" (Brazil 2011a: 3). As noted above, it was perceived by some that NATO went beyond its mandate given to it in Resolution 1973. In this regard, the concept note states that "[t]here is a growing perception that the concept of the responsibility to protect might be misused for purposes other than protecting civilians, such as regime change. This perception may make it even more difficult to attain the protection objectives pursued by the international community" (Brazil 2011a: 3). In response to this worry, Brazil argues that humanitarian intervention should be authorised by the UNSC (Brazil 2011a: 3). In doing so, it affirms that humanitarian intervention must follow the "letter and spirit" of its UNSC mandate (Brazil 2011a: 3). It also argues that the UNSC must ensure the accountability of the interveners (Brazil 2011a: 4). To that end, it calls for "[e]nhanced Security Council procedures" in order to monitor the interpretation of resolutions (Brazil 2011a: 4). Moreover, it notes that, in exceptional circumstances, humanitarian intervention may be authorised by the GA under the 'Uniting for Peace' resolution (Brazil 2011a: 3).⁹

The third claim concerns the means used when engaged in humanitarian intervention and, related, the proportionality of the use of force. The concept note argues that humanitarian intervention must "be carried out in strict conformity with international law, in particular international humanitarian law and the international law of armed conflict" (Brazil 2011a: 3). It argues that "[t]he use of force must produce *as little violence and instability as possible* and under no circumstance can it generate more harm than it was authorized to prevent" (Brazil 2011a: 3; emphasis added).

Brazil's (2011b: 15–17) statement to the UNSC 'Open Debate' on the protection of civilians (PoC) in armed conflict, at which the concept note was presented, reinforced this point about means and proportionality:

⁸ Indeed, the last resort principle is invoked in the concept note (Brazil 2011a: 3).

⁹ The Uniting for Peace procedure permits the GA to recommend enforcement action when action has two-thirds majority backing and the UNSC is unable to decide (ICISS 2001b: 159). According to Benner (2013: 8), Brazil has stepped back this view somewhat and has reaffirmed that the UNSC is the sole legitimate authoriser of force.

Our collective point of departure should resemble the Hippocratic principle of *primum non nocere*—first, do no harm—with which doctors are so well acquainted. That must be the motto of those who are mandated to protect civilians. It would also be most unfortunate, ultimately unacceptable, if a United Nations mission established with the aim of protecting civilians were to cause greater harm than that it was enacted to prevent (Brazil 2011*b*: 16).

Hence, Brazil argues that “we must aim for a higher level of responsibility. One casualty is one too many, no matter how noble the intentions” and that as the international community exercises RtoP it must demonstrate a “high level of responsibility while protecting” (2011*b*: 16). In this statement on the debate on PoC, Brazil also envisages a new accountability mechanism to achieve this end. It argues that the UN “is under the obligation to fully develop an awareness of the dangers involved in such use and to set up mechanisms that can provide an objective and detailed assessment of such dangers, as well as ways and means of preventing harm to civilians” (2011*b*: 16).

Debates at the UN in 2012

In its statement on informal debate on RWP in February 2012 and its comments on the SG’s report on pillar three in September 2012, Brazil further clarified its RWP proposal. Most notably, it stepped back from the chronological sequencing proposed in the concept note, but still generally endorsed the last resort principle in its account of ‘prudential sequencing’. It argued that “[s]equencing between the three pillars of RtoP should be logical, based on political prudence. It does not mean the establishment of arbitrary check-lists” (Brazil 2012*b*). It emphasised that the procedures proposed “should not be perceived as a means to prevent or unduly delay authorization of military action in situations established in the 2005 Outcome Document” (Brazil 2012*a*: 5).

In regard to means and proportionality, it again emphasised the importance of care and caution when using military force. It argued that

[t]he use of force always brings with it the risk of causing unintended casualties and disseminating violence and instability. The fact that it is exercised with the aim of protecting civilians does not make the collateral damage or unintended destabilization less tragic. The use of force can make a political solution more difficult to achieve. This is why it must be utilized in the most judicious way (Brazil 2012*b*).

Guidelines

In its concept note, Brazil makes it clear that the constraints that it outlines are ‘guidelines’. These guidelines, it argues, “must be observed throughout the length of the authorization, from the adoption of the resolution to the suspension of the authorization by a new resolution” (Brazil 2011*a*: 4). Similarly, in its comments in 2012 it argued that RWP entails that there should be “more consistent and trustworthy guidelines and parameters for the accountable exercise of collective security by the Security Council” (Brazil 2012*b*). These guidelines can be summarised in the table below. Included in this list are requirements about just cause, which were agreed to at the 2005 UN World Summit and have since become the widely accepted definitive account of just cause for RtoP (they are also restated in the concept note (Brazil 2011*a*: 2)).

RWP GUIDELINES

1	Legitimate authority	The intervention should be authorised by the UNSC. GA authorisation is sufficient in exceptional circumstances under Uniting for Peace.
2	Right intention ¹⁰	The objectives of the intervention must be limited to those dictated by the UNSC mandate. This must be continually monitored by the UNSC.
3	Last resort	There should be sequencing of responses. Before military force is used, the measures under pillars one and two should be pursued first, and then the nonmilitary options under pillar three should be pursued next, unless political prudence dictates that such sequencing would unduly delay or prevent the use of force.
4	Means/ <i>jus in bello</i>	International humanitarian law (IHL) and the Laws of Armed Conflict (LOAC) should be adhered to. Interveners should adopt even greater restraint and potentially accept a greater proportion of the risks, rather than transferring these to civilians. ¹¹
5	Proportionality	Intervention must not do more harm than it is authorised to prevent.
6	Just cause	Intervention is permissible only when national authorities are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing, and crimes against humanity.

III. Assessing RWP: The Principles

Brazil's RWP initiative is an example of what can be called the 'Restrictive Approach' to the ethics of humanitarian intervention. On this approach, the rules governing the permissibility and conduct of intervention are (i) very limiting in the occasions when humanitarian intervention may be permissible and in how intervention may be carried out (e.g., incidental collateral harms may be prohibited). Advocates of this approach may also hold that the rules governing the permissibility and conduct of humanitarian intervention are (ii) more restrictive than those for other wars. For instance, Mary Kaldor (1999: 113–33) proposes that humanitarian intervention be conceived as 'cosmopolitan law-enforcement' rather than outright war-fighting. Similarly, George Lucas (2003) contends that there are greater restrictions on humanitarian intervention than those found in traditional accounts of *jus in bello* since humanitarian intervention is much closer to law-enforcement and peacekeeping.¹²

By contrast, the 'Permissive Approach' holds that the rules governing the permissibility and

¹⁰ I defend the view that right intention is implied by RWP's accountability proposals in section III (ii).

¹¹ I propose this interpretation in section III (iii).

¹² The ICISS (2001*a*) also takes this approach. Walzer's ([1977] 2006: 101–8) account of humanitarian intervention is also restrictive in terms of just cause, although this has been subject to some telling criticisms (e.g., Luban 1980) and he has since shifted his view (e.g., Walzer 2002). My own account of the ethics of intervention ('the Moderate Instrumentalist Approach' in Pattison 2010) is restrictive in that it holds that are several demanding principles that interveners should meet, some of which have been overlooked by standard accounts of the ethics of humanitarian intervention (although not all of these are always necessary conditions for permissible intervention).

conduct of humanitarian intervention are (i) not very limiting.¹³ Advocates of this approach may also deny that the rules governing the permissibility and conduct of humanitarian intervention are (ii) more restrictive than for other wars.¹⁴ They may hold that the rules governing the permissibility and conduct of humanitarian intervention are essentially the *same* as those governing other wars (and that these rules are not very limiting). They are simply the rules of *jus ad bellum* and *jus in bello* applied to the case of humanitarian intervention. In fact, it might be claimed by advocates of the Permissive Approach that the rules governing humanitarian intervention are more *permissive* than for other wars. For instance, Jeff McMahan (2010*a*; 2010*b*) and Gerhard Øverland (2011) have recently argued that since the rescued ‘benefit’ from humanitarian intervention, it is permissible to distribute to them much of the costs of intervention, rather than having these costs being borne by the rescuers or innocent bystanders.¹⁵

In what follows, I will argue generally in favour of the Restrictive Approach by claiming that the particular, restrictive guidelines endorsed by Brazil’s RWP initiative are morally desirable.

(i) Sequencing

Brazil’s more recent move away from chronological sequencing is clearly morally appropriate. As noted above, this view has similarities to the literal understanding of the JWT principle of last resort in that every option short of the use of force must be attempted first, regardless of its merit. The obvious and frequently noted problems with such an account are that, first, mass atrocities can continue to rage whilst all other options are pursued regardless of their feasibility and potential effectiveness and, second, the other options, such as economic sanctions, might cause more harm than intervention. The notion of prudential sequencing seems to acknowledge some of these worries. Although its requirements are fairly vague, a plausible interpretation of it is that there should be the sequencing of responses so that, before military intervention is used, the measures under pillars one and two are pursued first, then the nonmilitary options under pillar three, unless political prudence dictates that such sequencing would unduly delay or prevent the use of force. To that extent, it is similar to the JWT accounts of last resort that take last resort not to be literal, but rather to require the pursuit of feasible and potentially effective alternatives first (e.g., Caney 2005: 249–50).¹⁶

However, recently there has been a tendency to downplay the import of last resort in discussions about the ethics of humanitarian intervention and JWT. First, it is sometimes overlooked in various accounts of the conditions that should govern the resort to force, at least as a separate principle. Second, and related, its value is reduced to that of proportionality—that is, to comparing

¹³ Examples include Altman and Wellman (2008), Pape (2012), and Tesón (2005*b*).

¹⁴ As indicated above, in his comments in the informal discussion on RWP of February 2012, the then Special Adviser on RtoP, Edward Luck (although clearly not a strong advocate of the Permissive Approach), argued that although “we must take care to do no harm in the name of doing good”, we should avoid double standards whereby there are more restrictive standards “for using force in Responsibility to Protect situations than in other situations” (2012: 1).

¹⁵ They present noninstrumental and instrumental reasons for this view (see Pattison *forthcoming* for a rejection of their arguments). It should be noted that McMahan does accept that there are some counter-veiling considerations related to the difference between doing and allowing and role-based duties which, he thinks, counter-balances at least the noninstrumental considerations. It should also be noted that McMahan’s body of work generally presents a restrictive view of JWT.

¹⁶ It is also similar to the ICISS’s (2001*a*: 36) principle of last resort.

whether the use of force will do more harm than good (e.g., Lee 2012: 93–7).¹⁷ Its value is also sometimes reduced to that of necessity (when necessity is not included under the account of proportionality), which requires that the use of force be necessary and that alternatives could not better achieve the same aims (e.g., Fisher 2011: 73; Frowe 2011: 62). As standardly conceived, the principles of proportionality and necessity involve the consequentialist weighing of the costs and benefits of military action.

To be sure, such calculations are *an* important part of why last resort is morally important—it is obviously morally important to do more good than harm and to pursue the option that will do the most good and least harm. Last resort also seems to matter for epistemic reasons, which are often implied in discussions of the principle. The likely effects of war and intervention may be very uncertain and the alternative options may be more predictable. However, there is more to the last resort principle than consequentialist and epistemic concerns. That is to say, the use of force may be morally wrong even when it may do more good than harm overall and even when there is not much epistemic uncertainty. There should be a presumption against using military force because of the harm that it can cause, even if it will lead to greater benefits. This is not captured by the integration of last resort into the principles of proportionality or necessity (or by epistemic concerns).

Why is this the case? There is an additional, nonconsequentialist import of last resort, which stems from the difference between 'doing' and 'allowing' in moral philosophy and which is often overlooked in accounts of last resort.¹⁸ That is, it is sometimes important that one avoids *doing* harm, even if this will *allow* for an even greater harm. The worry with military intervention is that, in almost all feasible cases, it will lead to the intervener *doing* harm itself (often unintended harm) to those who are morally innocent, such as certain civilians.

It is important to note here that this does not mean the difference between doing and allowing is not of *absolute* moral significance (if one were to hold this, intervention may be impermissible because it typically involves *doing* harm). Rather, it may *sometimes* be acceptable to do harm in order to promote a *much greater good*, such as when using military force may lead to the foreseeable harm by the intervener of a small number of civilians, but would prevent the deaths of thousands. Rather, the noninstrumental difference between doing and allowing matters *to a certain degree*: in less extreme and more marginal cases, one should avoid doing harm, even if this will allow for a greater harm. This difference should be incorporated into the decisions about the use of military force and the last resort principle.

To see this, suppose that France is considering intervening in response to (hypothetical) mass atrocities in Guinea. France knows that, for various reasons, its intervention (i) would *do* much harm, such as cause the unintended death of thousands of innocent civilians in Guinea. Other options, such as diplomatic pressure, would lead to France doing less harm, but would be less effective overall than military intervention—it would *allow* for more harm (i.e., even despite the unintended death of thousands of civilians, military intervention would protect more lives). It matters that France would be doing harm. It would be better, *to a certain degree*, if France were to allow harm, and would not intervene and pursue alternative, less effective but less harmful measures,

¹⁷ Lee (2012: 96) does note that it may be helpful to list the principle separately, but does not say why.

¹⁸ This is difference sometimes framed in terms of the difference between 'killing' and 'letting die'. For accounts of the moral import of the difference between doing and allowing, see Quinn (1989) and Scheffler (2004). It should be noted that one account of last resort (Lango 2007) does include the noninstrumental value of the difference between doing and allowing.

than if it were to intervene and do harm itself.

Now, RwP's account of prudential sequencing allows scope for this consideration. In effect, it is an account of the last resort principle that, on the one hand, avoids the problems of the literal account of last resort by accepting that force may be required early on and that the alternatives may be worse. On the other hand, it offers more than simply consequentialist or epistemic reasons to be cautious in the use of force. It also seems to be based on a noninstrumentalist call for caution and care, in similar vein to the difference between doing and allowing in moral philosophy. So, it seems that prudential sequencing gets things about right, at least as a practical principle.

(ii) Accountability

Let us now consider RwP's accountability requirements. These concern, more clearly, (1) following the mandates of the UNSC closely and, less clearly, (2) 'Enhanced Security Council procedures'. These procedures are not fleshed out in any detail in the various RwP statements by Brazil. It is unclear whether it is simply a matter of changing *emphasis* without any real reform, a matter of *improving* current UNSC practices (as indicated in the open debate on the Working Methods of the UNSC (Brazil 2012c: 22)), or a matter of developing a *new* institution (as indicated in Brazil's statement to the debate on PoC—see above). For instance, the UNSC can already provide a specific mandate to an intervener and require additional periodic reporting by it in its authorising resolution—these points could simply be re-emphasised.¹⁹ Or, there could be more open decision-making in the UNSC, more engagement with the GA, and more refrain in the use of the veto, along the lines suggested in the proposal by the 'small five' states.²⁰ Alternatively, there could be a new institution to ensure that interveners follow their mandates.

Let us consider the first, more straightforward part of the proposal—that interveners follow their mandates very closely. On the one hand, there seem to be several potential reasons why this suggestion might be rejected. First, the moral legitimacy of the UNSC might be doubted. It may be argued that there is little moral merit in the dictates of the Council. This is because of the often-stated arguments about its unrepresentative make-up (e.g., with no permanent members from the Global South) and morally problematic decision-making procedures (e.g., with a veto for the P-5). After all, Brazil's original account of RwP also called for UNSC reform (highlighting that it is ready to play the role of a permanent member) (Rousseff 2011).

Second, requiring interveners to stick to their mandates may be viewed as morally problematic because of the problems with the mandates frequently given by the UNSC. The objection here runs that they have been inflexible, poorly conceived, and based on a poor appreciation of the situation on the ground (for instance, the UNSC does not make efficient use of the Military Staff Committee). Requiring that interveners stick to these mandates therefore may reduce their ability to tackle mass atrocities. Interveners need to be able to react to the situation on the ground as they find it, which may require a generous interpretation of the mandate given to them.

Third, and related, when on the ground there may be such humanitarian necessity that it is

¹⁹ Similarly, Bellamy (2012: 24–5) notes that the UNSC can (and does) already include sunset clauses, specific reporting requirements, forbid certain actions, and send fact-finding missions.

²⁰ The small five states are Costa Rica, Jordan, Liechtenstein, Singapore, and Switzerland (2012), which, amongst other things, proposed that the UNSC allow for greater participation by other UN members and limit the use of the veto. However, their proposal was withdrawn after significant opposition from Council members.

necessary for force commanders to not simply adopt a *generous interpretation* of their mandate, but to go *beyond it* in order to achieve the overarching goals of the tackling of mass atrocities. For instance, in 2000 the British force commander in Sierra Leone, David Richards, was originally provided with a mandate from the UK government (not the UNSC directly in this case) only to evacuate British civilians (see BBC 2010). However, once his force had intervened, he ordered it to protect Sierra Leonean citizens and to assist the government forces as well. Only later did he receive post facto authorisation from the Blair government.

Although valid, these concerns do not repudiate the general case for interveners following their mandates closely. On the contrary, despite potential cases of inflexible mandates and of exceptional humanitarian need, I will now argue that interveners should generally follow closely the mandate given to them by the UNSC. This is because the UNSC is currently the most appropriate authority on the use of force. To explain further, I will draw on Joseph Raz's (1986) 'service conception of authority', which is widely recognised as the most nuanced, developed, and convincing of all instrumentalist accounts of legitimate authority, and perhaps of all accounts of legitimate authority in general. For Raz, those subject to an agent's legitimate authority should treat the agent's commands as 'content-independent', meaning that its commands should be obeyed simply because it commands them. The judgments of those subject to the authority should be pre-empted since, first, a legitimate authority acts on the basis of its subjects' 'dependent reasons' (which concern both prudential and moral considerations), thereby removing the need for them to act on the basis of these reasons. Importantly for Raz, a legitimate authority is more likely to secure compliance with one's dependent reasons, compared to not letting it pre-empt judgment. In other words, a legitimate authority can be expected to increase compliance with the reasons which apply to you in the long-run, compared to relying on your own judgement. To a certain extent, this is regardless of the democratic make-up of the authority or whether it has been consented to. However, this does not mean that in *every single command* a legitimate authority will do better in its judgment than an individual actor; it means that *overall* a legitimate authority will increase compliance with the actor's dependent reasons if it pre-empts the judgment over a number of different issues for a period of time.

Now, despite the occasional case for interveners abandoning their UNSC mandates, general compliance with the UNSC in general and its mandates in particular will increase states' compliance with their dependent reasons, most notably their interest in international stability and reasons to tackle humanitarian crises. Maintaining the UNSC as the central body with the power to authorise force (apart from certain exceptions) reduces the number of possible actors in the international system that can authorise force. A system whereby there are more actors that can authorise force and intervention would potentially be more unstable (see Pattison *under contract*). This may become more likely if states are often willing to depart from their mandates. It is important, then, for states and other actors to follow generally the dictates of the UNSC.

In addition, although the UNSC has arguably often previously failed to authorise interventions that it should have, it is not as bad as sometimes depicted (e.g., Tesón 2005a). It has authorised numerous military interventions under Chapter VII and, more recently, has often been engaged in the tackling of mass atrocities, rather than ignoring them altogether (although, of course, there are some notable exceptions, such as Darfur, Sri Lanka, and Syria). It has become more realistic in what it can achieve, become more deeply engaged in responding to conflicts, there has been less confrontation in its discussions, and the UNSC has been much more willing to authorise peace operations to protect threatened populations, reducing the need for action outside of the UNSC (Bellamy 2011: 170–1). The quality of its mandates has also improved from those given in the 1990s with the 'coercive protection' of civilians often being required (although, again, there is still potential scope for improvement) (see Bellamy 2011: 190–1; Kolb 2012: 15). My point, then, is

that the UNSC does often address humanitarian crises and endorse appropriate action. This means that, for the specific issue of addressing mass atrocities, the UNSC generally *does* act upon our dependent reasons to tackle such crises—and probably does a better job than individual states would do acting alone—and so there is, in general, reason to comply with its mandates, rather than departing from them.

Hence, interveners should generally follow closely the mandate given to them by the UNSC, despite occasional potential cases of humanitarian need to depart from mandates. This is because doing so limits international instability and the UNSC does often act in response to mass atrocities and offer appropriate mandates.

So, I have suggested that there are reasons to follow closely UNSC mandates. But why is there a need for constant re-evaluation of missions? After all, on traditional accounts of JWT, a sharp distinction is made between *jus ad bellum* and *jus in bello*. On such accounts, once an intervener meets the requisite conditions for *jus ad bellum*, which may require legitimate authority (e.g., a UNSC mandate), its resort to force is permissible. The during war period, which would be the subject of such re-evaluations, is covered only by the principles of *jus in bello*, such as discrimination and proportionality, which concern the means used. There is no requirement to reassess legitimate authority, just cause, right intention, and so on.

However, it seems mistaken to separate too strongly *jus ad bellum* from *jus in bello*. There should be constant re-evaluation of wars as they proceed. That is, the principles of *jus ad bellum* should be continuously applied throughout the war to ensure that the war continues to be morally permissible.²¹ Otherwise, an intervention that was originally morally permissible may be subject to changing circumstances (e.g., the intervention may no longer be likely to be successful). Or, the intervener may change its behaviour or its goals (e.g., become more interested in securing material interests than achieving humanitarian aims). In such cases, the intervention would no longer be morally permissible and, potentially, should cease (if doing so would be more morally justifiable than continuing to fight).²²

Thus far, the argument has been framed in terms of accountability to the UNSC. However, RwP's requirement of following the mandates given by the UNSC ultimately concerns another central principle of *jus ad bellum*: right intention. The accountability requirement to follow mandates seems to be largely in response to the worry that interveners (e.g., NATO in the case of Libya) may not in fact have the protection of civilians as their main purpose, despite being authorised to intervene for this purpose, but rather will be concerned with regime change. This worry, then, is about the *purposes* or *intentions* of those authorised to undertake force—both before and during the intervention—and whether it is consistent with the intent of what has been authorised.²³

But why does it matter that there is right intention? First, intentions may signify likely consequences. For instance, an intervener that intends to achieve the protection of civilians may be

²¹ See Pattison (2013; *under contract*). Also see McMahan (2004) and Toner (2010), who present similar claims about the reapplication of *jus ad bellum* principles.

²² A worry here might be that if interveners were required to seek continuous reauthorisation from the UNSC, this might not be forthcoming (e.g., for various political reasons), which could lead to morally problematic early withdrawals by the interveners. In reply, this worry could, I think, be ameliorated if interveners were authorised for a suitably long period of time (without the need for constant reauthorisation). There would still be increased monitoring by the UNSC to ensure that the ends of mission are being realised and the means used to achieve these ends are appropriate. In other words, what I am defending (like RwP) is increased monitoring, not additional authorisations.

²³ I consider this point in relation to NATO's intervention in Libya in Pattison (2011).

more likely to protect civilians than an intervener that intends regime change.²⁴ Second, intentions are usually held to be important for defining actions in the philosophy of action (e.g., whether an intervention can be defined as 'humanitarian intervention' depends on whether the intervener had a humanitarian intention). And, it seems that there is a good case for permitting certain sorts of war and intervention (e.g., defensive wars) and prohibiting others (e.g., wars of aggression), or for having stricter rules to govern certain sorts of war and intervention (e.g., preventative wars and regime change) than others (e.g., collective self-defence). This is because of the risks of mistake and abuse that come with wars and interventions of prevention, regime change, and so on. The risks may be lower with other types of war and intervention, such as defensive wars. Thus, the intentions of the intervener matter because they help to signify the permissibility of their action and the rules that govern it by determining what sort of practice the intervener is engaged in. In the case of humanitarian intervention, it signifies that the Restrictive Approach should apply.

Now, doing more to ensure that interveners follow closely their humanitarian mandates may be a central way to ensure that they have the appropriate intention. For example, they need to show continually that they are aiming to achieve the protection of civilians in their target selection and operations, rather than achieving alternative objectives such as regime change. Increased reporting and monitoring may allow less scope for interveners to adopt other intentions, since they potentially would be subject to opprobrium and lose their mandate. Hence, compliance with the mandate may be penalised. A stronger system of monitoring and oversight might then be able to ensure that interveners have humanitarian intentions (even if their underlying motives differ). To that extent, the condition of right intention can be seen to be implied by RWP's accountability guidelines. Indeed, the concept note states that "the use of force... must be limited to the objectives established by the Security Council... These guidelines must be observed throughout the entire length of the authorization" and monitored by the UNSC (Brazil 2011*a*: 3–4).

Consequently, there is a normative case for RWP's requirements for following closely the mandates of the UNSC and constant re-evaluation, based on the authority of the UNSC, the need for wars and interventions to be continually reassessed, and the import of right intention being secured. However, there is a limit to the amount of re-evaluation required by the UNSC. Too much re-evaluation could interfere with the intervener's ability to be flexible in response to the situations that they find and could lead to shifting mandates, with the result of a confused and ineffective mission. The UNSC may also become preoccupied with the intervention if the procedures require constant reassessment of the intervention, to the detriment of other potential humanitarian crises. For example, if there had have been significant reassessment during the intervention in Libya, the UNSC may have spent all of its time debating (and probably bickering) about whether the specific targets were beyond the mandate given to it by the UNSC, with partisanship most likely affecting the assessment, with no time left to debate the situations in Côte d'Ivoire, Somalia, the Democratic Republic of Congo, etc.

To overcome these worries and to allow for greater re-evaluation, the (2) 'Enhanced Security Council procedures' envisaged by RWP may need to be ambitious, going beyond changing emphasis or UNSC practices. It would be preferable, I think, to delegate this re-evaluation to another body (depending on its characteristics), such as a reinvigorated Military Staff Committee or a new subsidiary body of the UNSC. This could provide independent monitoring of the intervention to the UNSC, with a demanding reporting requirement on interveners, with any transgressions of the

²⁴ Note that intentions differ from motives. Motives concern underlying reasons (see Tesón 2005*a*) and have more obvious potential non-instrumental import (even if not of major weight), stemming from the Kantian notion that one ought to act for duty's sake.

mandate being reported to the UNSC. Space precludes considering this proposal in detail here; suffice it to say that such a body could potentially be a desirable implication of RwP's call for interveners to stick to their mandates and enhanced Security Council procedures.

(iii) Means

The account of the use of means presented in RwP goes beyond the requirements of the principle of proportionality in IHL. According to the ICRC, proportionality in IHL asserts that “[l]aunching an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated, is prohibited” (2013). By contrast, RwP asserts (as noted above) that actions must produce “as little violence and instability as possible”, the use of force be used judiciously to avoid as far as possible “collateral damage” and unintended destabilisation (Brazil 2011*a*: 3; Brazil 2012*b*). Hence, actions that lead to incidental civilian harm necessary to achieve the military objective (e.g., the protection of civilians) may be permitted under IHL, but probably would not be under RwP. Actions that harm civilians, *even unintentionally*, in the pursuit of protecting civilians would be ruled out *if it is possible to avoid them*. Under RwP, interveners should ‘do no harm’, avoiding casualties as far as feasible.

What are the implications of RwP's account of means? One potential implication could be that it would lead to contingent pacifism, if the Hippocratic principle were taken to be absolute. This is because it may be that any foreseeable military intervention will involve interveners doing at least *some* incidental harm to civilians. However, it is clear that Brazil still wants to endorse the actual permissibility of humanitarian interventions on occasion, so it seems that RwP does not take such a strong line (i.e., incidental harm is still permissible when it cannot be avoided). A more likely implication is for the issue of the distribution of costs between interveners and those whom they are trying to protect. That is, if interveners are to avoid harming civilians incidentally *as far as possible*, they may be required to take on greater risks in order to do so, rather than maintaining very high levels of force protection. For instance, this could require that interveners avoid bombing from altitude (which can be indiscriminate) and instead fly lower in order to increase precision (which can be much more risky for the intervening soldiers).

Would such a shift in the distribution of the risks of humanitarian intervention be morally justifiable? There are strong noninstrumental and instrumental reasons for holding this to be the case (see, further, Pattison *forthcoming*). First, I argued above that there is a difference between doing and allowing that provides a potential basis for the prudential sequencing proposed by Brazil as an *ad bellum* matter (in regard to the principle of last resort). The difference between doing and allowing also matters in terms of *in bello*. During the use of force interveners should avoid *doing* harm to innocents, even if this may *allow* for greater harm.

Second, interveners should take on greater risks when necessary to avoid harming civilians incidentally because several intervening soldiers have relevant role-based duties in this context. As part of their soldier-state contract when signing up, soldiers agree to fight in wars required of them and, in doing so, take on significant risks (perhaps in return for certain benefits, such as a generous post-service pension). If facing a situation where the choice is a use of force that risks harming (i) innocent civilians or (ii) intervening soldiers, the fact that the soldiers have agreed to take on greater risks means that the second option should be chosen.²⁵

²⁵ This argument does not apply when intervening soldiers, such as certain conscripts, have not agreed to take on greater risks.

Third, it matters that interveners avoid doing harm themselves because of the need to maintain the norm of humanitarian intervention. If humanitarian interveners cause significant harm *themselves* (even though they may prevent even greater harms), the humanitarian credentials of the intervention may be questioned in some quarters (as happened with the interventions with Kosovo and Libya). This could reduce support for future humanitarian interventions, as there would be a concern that interveners will cause significant harm, and support for the doctrine of humanitarian intervention will be reduced internationally. Therefore, it is important that interveners be seen to be acting with significant restraint in order to maintain international support for humanitarian intervention (when it meets the requisite conditions, such as having UNSC approval). This is important in turn for improving the chances that those who in the future could be subject to mass atrocities will be protected by the international community.

One potential response is that RWP's more restrictive account of *jus in bello* for humanitarian intervention might lead interveners to be reluctant to intervene and so should be rejected (e.g., see McMahan 2010*b*; Øverland 2011). But one need not accept this conclusion. If an intervener does not follow the strict account outlined above, their intervention may still be permissible because it will achieve extremely beneficial consequences. It may be better for it to intervene than not to, since the import of fidelity to the principles of *jus in bello* is not the only relevant moral consideration—there may be other, weightier instrumentalist ones. But one can accept this point and still hold that its intervention would be *more morally* justifiable if it follows the stricter principles.²⁶

This response also applies, I think, to the suggestion that RWP and the Restrictive Approach more generally will lead to too few instances of humanitarian intervention. On this view, the central problem is the lack of humanitarian interventions in responses to mass atrocities, not too many morally problematic humanitarian interventions, and the RWP and the Restrictive Approach will only exacerbate this problem by precluding further possible interventions.²⁷ Yet, the guidelines of the Restrictive Approach are not all strict criteria and, in certain cases—namely, when an intervener will be extremely effective at tackling mass atrocities—they might not all be necessary. For instance, suppose that intervention by an Australian-led force in response to (hypothetical) mass killing in Burma would not meet the prudential sequencing condition. It might still be permissible, all things considered, since the intervention would be extremely effective at tackling the crisis and, as such, the import of the differing between doing and allowing (which underlies some of the value of prudential sequencing) would be outweighed by beneficial consequences. This is not to deny the general moral case for the Restrictive Approach: interveners should live up to its requirements in *all cases* (the intervention will be *more* justifiable) and it may be only in a few instances when it can be permissible to intervene and not to meet all of these conditions (e.g., when the intervention will be likely to be extremely effective).²⁸

III. Assessing RWP: The Case for Guidelines

Having defended the Restrictive Approach to the ethics of humanitarian intervention by highlighting the moral desirability of the particular principles endorsed by Brazil's RWP initiative, let us now turn to consider the issue of guidelines for intervention.

In the evolution of RtoP, various accounts of guidelines had been proposed. The ICISS

²⁶ See Pattison (2010) for a detailed defence of this point.

²⁷ I would like to thank Chris Brown for pressing this objection.

²⁸ This point is developed in Pattison (2010).

(2001*a*) report proposes that interveners should meet the conditions of just cause and right authority, and meet the four additional ‘precautionary principles’ (right intention, last resort, proportional means, and reasonable prospects). The report argues that the guidelines outlined in their report should be embraced by the UNSC in its responses to the potential basis for humanitarian intervention (ICISS 2001*a*: 74). In a similar vein, Kofi Annan’s report, *In Larger Freedom*, suggests that the UNSC should adopt a resolution that sets out criteria and expresses its intention to be guided by these criteria when deciding whether to authorise humanitarian intervention (Annan 2005: 33). Likewise, *A More Secure World* (UN 2004: 57–8) proposes ‘five criteria of legitimacy’ (seriousness of threat, proper purpose, last resort, proportional means, and balance of consequences) that the UNSC should consider when deciding whether to authorise intervention, which should be embodied in declaratory resolutions of the UNSC and GA. However, a list of guidelines was not expressly included in the 2005 World Summit agreement. On the one hand, this is lamented by Gareth Evans as “[o]ne of the many disappointments of the World Summit” (2008: 60). On the other, Alex Bellamy (2008: 265–31; 2011: 164–9) presents a robust and thoughtful case against formal criteria. He argues that overall “there is little likelihood of international consensus on criteria, and its proponents overstate their practical and political utility” (2008: 618).²⁹

In what follows, I will argue that four major objections to guidelines or criteria for humanitarian intervention are generally unpersuasive or do not apply in the case of RWP. (They may also not apply to other proposals for guidelines, such as those in the ICISS report and *In Larger Freedom*; I simply focus here on Brazil’s RWP initiative).

Objections to guidelines and criteria

The first objection is the ‘More Intervention Objection’. The worry here is that, once guidelines or criteria are established to govern UNSC practice, they would be used by states to engage in abusive intervention. States that want to intervene but lacked UNSC approval could claim that they meet the other requisite conditions and engage in intervention to pursue their self-interest.³⁰

Conversely, the second objection is that guidelines or criteria may in fact lead to less humanitarian intervention since interventions that do not meet the criteria would not be approved. I will call this the ‘Less Intervention Objection’. The worry is greatest when the criteria or guidelines that would be agreed to would be unduly restrictive. Unduly restrictive criteria may develop because agreement may be reached on the criteria based only on the lowest common denominator, which will preclude intervention, given opposition to humanitarian intervention in general by some states (see Stromseth 2003: 260).

A third objection is that criteria on humanitarian intervention would be of little merit since they would leave unaddressed the issue of who decides whether the conditions have been met. I will call this the ‘Who Decides Objection’. In the case of RWP guidelines, a new independent body might be needed to hold the UNSC accountable for its decisions related to these guidelines, for otherwise

²⁹ It should be noted here that several of the arguments presented by Bellamy are seemingly concerned with proposals for more formal criteria; he may well accept the case for informal guidelines. Indeed, the force of his rejection of criteria depends on the point that RtoP already identifies just cause thresholds and so already creates expectations of response (Bellamy 2011: 166; 169).

³⁰ There is a fairly large literature that considers the broader argument which this objection draws on, that is, whether criteria and a legal right for humanitarian intervention would be abused. See, for instance, DUPI (1999: 97–129), Franck and Rodley (1973), and Tesón (2005*b*).

the UNSC would be left to judge its own record. But a new independent body that could effectively hold the UNSC to account seems very unlikely to be developed.

A fourth objection is that what I will call the 'Feasibility Objection'. The argument is that criteria or guidelines are highly unlikely to be endorsed by states and, in particular, the P-5. This is because of the political opposition to the development of criteria to govern humanitarian intervention, which became very apparent in the build-up to the 2005 World Summit (see Bellamy 2011: 164–5). In addition, it would be very difficult to develop a new treaty on humanitarian intervention or to amend existing treaties, such as the UN Charter (which would require two-thirds majority support in the GA and unanimous support amongst the permanent members of the UNSC, both of which seem unlikely in this context (Buchanan 2003: 138; Stromseth 2003: 259).

Replies to the objections

These objections (particularly the latter three) do seem to have some force against the case for new formal criteria for humanitarian intervention, codified in international law in the form of a new treaty, able to ensure always morally justifiable intervention. It does seem that it would be difficult to agree on a set of formal criteria, develop a new legally binding treaty that codifies the criteria, and set up a new body to judge and to ensure compliance with the criteria, without developing a set of criteria governing humanitarian intervention that would be unduly restrictive or inefficacious. However, these objections are far less persuasive against an alternative, less formal account of the guidelines that does *not* require a new treaty and/or a new body to judge and to ensure compliance. This less formal account is based much more on the *gradual emergence* of guidelines through debates, agreements, and practice on RtoP and humanitarian intervention. To that extent, it has much more in common with the development of customary international law.³¹

First, against the More Intervention Objection, RwP and RtoP more generally make it very clear that the UNSC *must* authorise force. There is very little appetite in the international community for accepting interventions not authorised by the UNSC. As such, it seems very unlikely that a potential intervener could present with any plausibility that it is engaged in humanitarian intervention under the RtoP umbrella without it having UNSC approval.

Second, against the Less Intervention Objection, it may become harder for members of the UNSC to wield the veto if humanitarian intervention were meet the guidelines. In general, guidelines or criteria may encourage interveners and the UNSC to act because they create an expectation that states should be acting when these guidelines are or will be met.³² UNSC members or interveners that block such interventions may be subject to opprobrium and the loss of international legitimacy. Hence, guidelines can create a legitimating framework that can be used to criticise actors' refusal to intervene. That said, states such as the P-5 may still sometimes look to their own narrow, material self-interest in making such decisions. For instance, Bellamy (2011: 166–7) argues that there is little evidence to show that guidelines or criteria would constrain the use of the veto (such as China's threat to wield the veto in Darfur).

Notwithstanding, it does seem that guidelines governing the use of force may still have *some*, if perhaps *limited*, effect in this regard. This is because the existence of guidelines would require a

³¹ Whether such guidelines are or will be sufficient to be deemed as customary international law depends on the guidelines in question (some have a clear legal basis already) and on how much one requires in terms of the degree of state practice and acceptance for new customary international laws.

³² Bellamy (2011: 166) notes that this may be the case already with the just cause thresholds of RtoP.

shift in the framing of responses, which would need to be more focused on the guidelines than a general view on humanitarian intervention. It would not be so easy for states that want to block intervention to offer a broad rejection of humanitarian intervention in a particular case—such a move would obviously be implausible once guidelines are accepted since humanitarian intervention that meets the guidelines will have been accepted in principle. Rather, they would need to offer a more detailed account of why there should not be intervention, with reference to the prevailing guidelines. When debates become framed in terms of specific guidelines, it will be easier to challenge mendacious, implausible rejections, since they may be empirical matters. That is to say, some of the questions of whether the guidelines are met will be technocratic issues, to be established by empirical evidence (e.g., whether there are, in fact, ongoing mass atrocities in the state in question). Although these issues may, of course, be subject to some contestation, they may be less subject to the same degree of contestation that general debates about the normative case for humanitarian intervention endure. So, my point is that (i), if we accept that perceived legitimacy matters, even for powerful states (something which I cannot establish in this paper)³³, then (ii) even powerful states will need to begin to present their reasons for opposing intervention in terms of the guidelines, and self-interested, mendacious rejections of intervention will be able to be more easily challenged.³⁴

Against the third objection, the Who Decides Objection, it is not necessary to have a formal body in charge of deciding whether the guidelines have been met. As outlined by Thomas Franck (2003; 2006), various actors can play a metaphoric ‘jurying’ function by considering the credentials of the intervention, without the need for a new independent body. In this case, they would assess whether the UNSC-authorized intervener meets the requisite guidelines. Such jurying can take place in the International Court of Justice, international political forums (e.g., the GA), and the ‘court of public opinion’, informed and guided by the global media and NGOs (Franck 2003: 228–9).³⁵

Fourth, the Feasibility Objection depends on the particular conception of the development of criteria, focused on new international agreements and treaty-based law. As noted above, guidelines may develop informally and gradually. In fact, it seems that some guidelines have been *already* developing gradually (as a mix of international law and RtoP norms and doctrine). To see this, let us consider each of the guidelines in turn. But before doing so, it is worth noting that the fact that there are already guidelines on RtoP has not, I think, been appreciated in the literature on RtoP, as far as I am aware. The prevailing view—which I will now challenge—is that the reticence shown by states at the 2005 UN World Summit towards formal criteria in effect means that there are not

³³ I mean here a state’s legitimacy perceived globally, not simply amongst its support base.

³⁴ I will argue shortly that there are already guidelines on humanitarian intervention. It follows from my argument in this section that states such as the P-5 are *already* required to explain their reasons for blocking intervention in terms of these guidelines. Similarly, Bellamy (2011: 168) argues that there is already quibbling over the particular issues highlighted by some of the guidelines, rather than on general debate on whether intervention should occur. He therefore questions what criteria would add. Perhaps more optimistically, I suggest below that a more explicit statement and acceptance of the guidelines could increase the focus further on specific issues and clarify the requirements of the guidelines.

³⁵ A similar response is made by Evans, who argues that “[i]t is not a matter of satisfying a court of *law* about any of these guidelines—last resort, proportionality, the balance of consequences and so on. The courts in question are of rationality, public opinion, and peer group understanding—and if a strong, credible and articulate case cannot be publicly made and defended... then scepticism and cynicism about the proposed use of force in any particular case is likely to be justified” (2012). Bellamy (2011: 168) also acknowledges that the international community can make such judgments.

guidelines for humanitarian intervention under RtoP.

To start with, the agreement at the 2005 UN World Summit and almost all subsequent discussions of RtoP by states have made it clear that UNSC authorisation is a requirement for humanitarian intervention under RtoP (guideline 1). Second, as noted above, interveners are already required to stick to their mandate and should report to the UNSC when requested by the UNSC (guideline 2).³⁶ Third, the 2005 World Summit agreement also emphasises the need for the pursuit of nonforcible options and prevention, and that force can be used only “*should peaceful means be inadequate*” (UN 2005: 30; emphasis added) (which is the thrust of guideline 3, which concerns last resort).³⁷ In regard to the means used, interveners are bound by IHL and the LOAC (guideline 4). Guideline 6 on just cause was clearly endorsed by states at the 2005 World Summit.

The principle of proportionality in resort to force (i.e., as an *ad bellum*, rather than *in bello*, principle) (guideline 5) is perhaps the least clearly stated. Yet, although it is subject to less attention than *in bello* proportionality, proportionality *ad bellum* is a central principle of international law as well. In this context, Judith Gardam (1993: 403) argues that it is uncontroversial that proportionality *ad bellum* is part of wars of self-defence.³⁸ But proportionality *ad bellum* is not simply required in wars of self-defence. Julian Lehmann (2012: 132–3) argues that proportionality *ad bellum* is implicit in UNSC Chapter VII resolutions. This is because the UN Charter requires that, if the UN is to take effective collective measures, it must do so “in conformity with the principles of justice and international law”, which would certainly comprise proportionality. He also notes that Article 42 of the UN Charter states that the UNSC “may take such action by air, sea, or land forces as may be *necessary* to maintain or restore international peace and security” and that necessity (as understood in international law in this context) requires proportionality (Lehmann 2012: 132–3).

Hence, the guidelines can be summarised in the following table.

	GUIDELINE	THE STATUS QUO	THE RWP
1	Legitimate authority	The intervention must be authorised by the UNSC. ³⁹	The intervention should be authorised by the UNSC. GA authorisation is sufficient in exceptional circumstances under Uniting for Peace.
2	Right intention	The objectives of the intervention must be limited to those dictated by the UNSC mandate.	The objectives of the intervention must be limited to those dictated by the UNSC mandate. This must be continually monitored by the UNSC.
3	Last resort	Prevention should be first pursued. Peaceful alternatives	There should be sequencing of responses. Before military force is used, the measures

³⁶ Also see Kolb (2012: 15), who makes a similar point.

³⁷ Again, see Kolb (2012: 12), who makes a similar point.

³⁸ To be sure, Kretzmer (*forthcoming*) notes that its meaning is uncertain since it is used in two different senses: ‘tit for tat’ proportionality, which means that the “response must be proportionate to the act that provoked it”, and ‘means-ends’ proportionality, which means that “harm must not be disproportionate to the expected benefits of achieving those ends”. There is also further disagreement over what is an appropriate end to be pursued, against which the proportionality of the means can be judged (Kretzmer *forthcoming*).

³⁹ I do not include here the possibility of GA authorisation of intervention under the Uniting for Peace procedure since its status under current international law is moot.

		to intervention must be inadequate.	under pillars one and two should be pursued first, and then the nonmilitary options under pillar three should be pursued next, unless political prudence dictates that such sequencing would unduly delay or prevent the use of force.
4	Means/ <i>jus bello</i>	IHL/LOAC should be adhered to.	IHL/LOAC should be adhered to. Interveners should adopt even greater restraint and potentially accept a greater proportion of the risks, rather than transferring these to civilians.
5	Proportionality	Intervention must be in proportion to the just cause and any harm it causes should not be disproportionate to the expected benefits.	Intervention must not do more harm than it is authorised to prevent.
6	Just cause	Intervention is permissible only when national authorities are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing, and crimes against humanity.	Intervention is permissible only when national authorities are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing, and crimes against humanity.

The claim that these guidelines already inform discussions on humanitarian intervention is not, in fact, particularly controversial. These guidelines stem from JWT conditions, which have often been held to inform and to affect political and legal debates and decision-making about the use of force.⁴⁰ The conditions governing humanitarian intervention and the use of force under RtoP are only one aspect of this.

However, the political utility of criteria and guidelines has been subject to some notable criticisms—this can be seen as a fifth objection. For instance, in response to an account of moral criteria to govern intervention by Tom Farer (2005), Chris Brown (2005: 228) argues that states do not make judgments based on such criteria and Thomas Weiss (2005: 234–5) claims that guidelines avoid the reality of politics since decisions are political and made on a case-by-case basis. In response, it seems that these are exactly the *sorts* of considerations that states do *broadly* consider when engaging in military action. For example, it seems unlikely that most states would wage war without considering whether there is in fact a good reason to do so (just cause), whether it would be in accordance with international law (in effect, legitimate authority), whether there are options that would not involve putting troops on the line because of the political, moral, and financial costs of doing so (last resort), and whether the use of force will do more good than harm (proportionality).⁴¹ That said, even though states may reflect on such considerations, they may *interpret* these considerations differently—e.g., very permissibly—to how they may be stated in the relevant international laws and prevailing accounts of JWT, as well as whether the prevailing circumstances

⁴⁰ See, for instance, Brunstetter (*forthcoming*) for an account of the roles that JWT played during US presidential debates.

⁴¹ A similar point is made by Evans (2012), although in the context of proposing guidelines, rather than asserting that they already exist.

do in fact meet these considerations. For example, the relevant goods and harms in their proportionality calculation may prioritise the supposed good of national security over the human rights of those beyond their borders. Nor do guidelines overlook the nature of political decision-making. On the contrary, they are necessary precisely because of the need to constrain politics. But they still often allow for some flexibility in response. After all, they are *guidelines*, which allow for application to various circumstances.

Arguments for RWP guidelines

I have argued that the less formal, emerging guidelines on humanitarian intervention under RtoP, clarified and highlighted by RWP, are not subject to the four leading objections to establish formal criteria for humanitarian intervention. I have also suggested that guidelines already exist to some extent. But if the guidelines governing the use of force are already endorsed, what does Brazil's initiative add in this context? I will now consider this question and, in doing so, some further arguments as to why guidelines should be welcomed.⁴²

First, guidelines can generally *improve* the justifiability of humanitarian interventions that do occur and not simply lead to *more* intervention. The point is that interveners are encouraged to live up to the requirements of the guidelines, which is likely to lead to intervention that is more morally justifiable. The point rests, again, on the claim that states' are concerned about their legitimacy which affects their behaviour, in this case encouraging them to live up to the guidelines. For its part, RWP offers a persuasive account of the guidelines in line with the Restrictive Approach. If RWP becomes more widely accepted and integrated into RtoP, it could amend the prevailing understanding of the particular conditions in favour of this approach and encourage interveners to live up to them.⁴³ RWP could also make it clearer that there *are* already guidelines for humanitarian intervention under RtoP and clarify these guidelines. This could improve further the existing debates about humanitarian intervention and the influence of the current guidelines.

Second, if publicly stated and acknowledged further still, as RWP implies, guidelines could help to improve the openness of decision-making about force. The reasons for states engaging (or not) in humanitarian intervention, and the UNSC's authorisation (or not) of it, may become clearer as the states refer to the requisite conditions to explain their position. Hence, in *In Larger Freedom*, Annan argues that "by undertaking to make the case of military action in this way, the Council would add transparency to its deliberations and make its decisions more likely to be respected, both by Governments and world public opinion" (2005: 33). Moreover, a clear statement or acceptance of guidelines on intervention may improve the quality of public and political debate surrounding it. The focus may be on whether the intervention meets the specific conditions, rather than the vague, normative discussions about the case for humanitarian intervention in general that often comprise much of the public debate when specific instances of humanitarian intervention are considered.

Third, clearer guidelines on humanitarian intervention (again, as called for by RWP) may be necessary in order for the UNSC to be legally obliged to act (which is desired by certain RtoP advocates and international lawyers).⁴⁴ As it stands, one problem with arguments for a legal duty to

⁴² Also see Evans (2008: 141–2), who (albeit very briefly) presents some similar claims.

⁴³ Similarly, Andreas Kolb argues that "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" (2012: 12).

⁴⁴ This may be a reason why the P-5 may attempt to reject more formal accounts of the guidelines (although they may still develop as customary international law).

intervene—or, more precisely, for the UNSC to be legally required to authorise intervention—is that there may be instances where there may be no right to intervene, such as arguably in Syria. In cases such as Syria, intervention would be morally impermissible (since it would, I think, do more harm than good), but a blanket legal duty to intervene would still require humanitarian intervention. A more open acceptance that there *are* guidelines for humanitarian intervention (as called for by RwP) is therefore necessary in order to make clear the specific cases when there is, in fact, a legal right and a potential legal duty to intervene, and a failure to intervene would be morally wrong and potentially illegal.

IV. Conclusion: The Political Implications of RwP

I have argued that Brazil's RwP initiative—and in particular proposals on sequencing, UNSC accountability, and means—is morally justifiable as a form of the Restrictive Approach to the ethics of humanitarian intervention. I have also argued that there is a strong case for guidelines on the use of force, as envisaged by RwP. RtoP already contains guidelines on humanitarian intervention; RwP clarifies and reinterprets them in a morally desirable manner. That is, it interprets the guidelines according to the Restrictive Approach to the rules governing the permissibility and conduct of humanitarian intervention, rather than the prevailing, more permissive status quo. It also makes it clearer that there *are* and *should be* guidelines on humanitarian intervention. If RwP becomes integrated into RtoP, these guidelines may become clearer still and RwP's interpretation of them become more favoured. To finish, I will present some more tentative remarks about the political implications of RwP.

First, Brazil's initiative has had a fairly favourable response. Although, as noted above, there was notable opposition to the proposal by certain Western states when it was first stated and by several actors to chronological sequencing, this softened once chronological sequencing was removed and once certain Western states began to see the value in the initiative, and there was support for RwP's call for guidelines in the UN debates on RwP and in discussions in civil society (Benner 2013; Kolb 2012: 20). What does this mean for RtoP? Although to suggest that RwP will save RtoP is far too strong⁴⁵ (after all, RwP and the recent criticism of RtoP really concern only humanitarian intervention—other aspects may be largely unaffected by the blowback after Libya), RwP is nevertheless important for advancing RtoP. This is not simply because of the need to ameliorate certain states' concerns about the conduct of humanitarian intervention in light of the campaign in Libya. It may also be a next step in the 'narrow but deep approach' to RtoP of the SG, which in effect delimits RtoP in order to establish greater consensus. Guidelines along the lines of RwP's Restrictive Approach would specify RtoP further and, potentially, deepen its support. It potentially offers much needed detail on one of the most controversial parts of RtoP—the use of force under pillar three. It will therefore help in further specifying the emerging norm of RtoP (or, more precisely, RtoP norms, some of which are emerging; others, such as those concerning pillar one, are well established in international law). RwP also maintains interest in RtoP. It engenders new debates and so will keep states and other actors in the international community talking about RtoP, which is important for maintaining interest in the doctrine and its continued progression. RtoP needs to be seen by states as important and as needing debate and, ultimately, as worth investing political capital in; if RtoP is ignored and overlooked, it will never be more than emerging.

Moreover, the Brazilian initiative of RwP provides RtoP with an additional author of (and stakeholder in) RtoP—importantly, one that is from the Global South (thereby ameliorating some of

⁴⁵ See, for instance, Quinton-Brown (2012).

the lingering worries that RtoP is Western imperialism). For those more optimistic, RwP shows that RtoP is no longer reliant on certain Western states for its development; emerging powers are willing to take up the mantle. On such a view, Brazil is realising that influence on the international stage can be gained by being seen as a responsible international power and good global citizen, and a norm entrepreneur, such as by advancing and defending the morally valuable RwP. For instance, Daniel Fiott from the Madariaga-College of Europe Foundation argues that

[a]s the world is undergoing some very important shifts in power and influence, and as emerging countries take on more global responsibility on a par with their political and economic standing, Brazil's RwP concept shows a willingness to engage with the RtoP norm.... If RwP is the spark which ignites greater responsibility then Brazil will deserve much gratitude (in ICRtoP 2012a: 11).

If the optimistic view of RwP is correct and symptomatic of the likely type of norm engagement and development by the emerging powers, there will be significant reason to be upbeat about the likely future shifts in global power for the prevention of mass atrocities and, perhaps more generally, global norm development. On the other hand, as noted above, it seems that Brazil has not continued to pursue the development of RwP, at least not vigorously, which perhaps bodes less well for how the emerging powers see their responsibilities. It may be up to global civil society and other states, then, to carry forward RwP. As I have argued in this paper, there is a strong moral case for doing so.

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