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International Protection and the Sovereign Decision

A Genealogy of the Responsibility to Protect

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Abstract

In the wake of the 2005 World Summit ratification of the responsibility to protect doctrine, the cases of Darfur and Syria have revealed the decisionary discretion of the collective international responsibility to protect inscribed within the doctrine. Through an engagement with the decisionist theory of Carl Schmitt and the work of Giorgio Agamben, this essay seeks to return the question of the decision regarding intervention under the responsibility to protect doctrine to its proper place as the functioning of power. Through the genealogical method of Michel Foucault, the diverse elements of the doctrine could be traced to show the decision as the articulation of a certain relation of power. Inscribed within the legal anomie where international humanitarian and human rights law no longer applies, the doctrine would prescribe a collective international responsibility to protect only in relation to a figure of *bare life*, such that the fate of the latter would remain subject to the decision of the Security Council. This decision can, as such, always take the form of an abstention on action, sustaining the legal anomie wherein sovereign power would exist without legal restrictions.

Key words: RtoP, responsibility to protect, decisionism, Schmitt, bare life
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1 Introduction

> We want no more Rwandas, and we believe that the adoption of the proposals in our report is the best way of ensuring that. (ICISS 2001 p. VIII)

This had then been the promise of the International Commission on Intervention and State Sovereignty (ICISS) in 2001 which had – from the notion of *sovereignty as responsibility* which preceded it – articulated the *responsibility to protect* doctrine. This was thought to vest the sovereign responsibility for the protection of the state's citizens from mass violations of human rights within an international system of responsibility, such that when a state would "prove either unwilling or unable to fulfil this duty, the responsibility to protect is transferred to the international community." (Bellamy 2011 p. 16). It would, the thinking was, inscribe a "permanent duty to protect individuals against abusive behaviour." (Arbour 2008 p. 448).

Yet despite these ambitions, and despite the invocations of the inviolability of human dignity and inalienable rights which accompanied the doctrine's emergence (cf. Bellamy 2009 p. 19; Deng et al 1996 p. xiii, 4; Annan 1999a p. 6; Annan 1999d p. 40; ICISS 2001 p. XI, 6; UN 2005 p. 35), the international community's inaction in the case of Darfur[1] led one commentator to suggest that the doctrine had failed its entry exam (see Bellamy 2009 p. 149). And after what was for the doctrine encouraging results of the international community's action in Libya (Zifcak 2012 p. 67, 71)[2], the current situation in Syria led one commentator to state:

> At the time of writing, incontrovertible evidence has emerged that crimes against humanity of a similar scale and intensity to that which preceded the intervention in Libya are daily occurring in Syria. Yet no internationally mandated coercive intervention of the Libyan kind seems to be in prospect. (Zifcak 2012 p. 61)

Against the 2005 World Summit's ratification of the doctrine, and against a subsequent UN resolution reaffirming it (cf. Bellamy & Reike 2011 p. 81;

[1] A case which the Human Rights Council's High-Level Mission to Sudan had nevertheless categorized as an activation of the international community's responsibility to protect in light of the Sudanese government's manifest failure to protect the population there (Bellamy 2009 p. 125f).
[2] See for instance Security Council resolutions 1970 (UN Security Council 2011a), 1973 (UN Security Council 2011b).

Bellamy 2009 p. 2), one was tempted to ask how this possibility could at all have remained. How, against the vestment of final responsibility in the international community (Bellamy 2009 p. 55), could the fate of the subject on whose protection the doctrine was premised, rest on a decision on whether to intervene or not? How was it that this very international community, at the point at which violations of human rights would reach its most extreme, was left to decide on the precarious existence of life devoid of all else but its human rights?

Yet despite the rather substantial discourse on the implementation of the doctrine (cf. Bellamy 2011; UN 2009; Luck 2012; Arbour 2008 p. 456f); and despite a critical literature which had sought to scrutinize the relations of power inscribed within it (Orford 2011; Cunliffe 2011; Chomsky 2011; Branch 2011; Duffield & Waddell 2006; Duffield 2007), these questions it seems have not been explicitly asked.

It is the purpose of this essay to ask, not whether intervention in Darfur or Syria should in fact have taken place, but how in the first place the decision on whether or not to do so could remain a possibility within the doctrine. In other words, to shift the discourse on the doctrine from that of its exceptions *to the rule itself*.

1.1 The Decision

The decision, understood as the exercise of power, received a politico-juridical explication through the works of German legal theorist Carl Schmitt in the early 1920s. Indeed, the decision received such prominence in Schmitt's thought, that it served to define the very nature of sovereign power, expressed through the by now famous statement opening his *Political Theology*: "Sovereign is he who decides on the exception." (Schmitt 2005 p. 5). Deciding on the suspension of the legal order in the state of exception, the sovereign – to whom alone this prerogative accrued – would remain irreducible to any positivist notion of the legal order providing an exhaustive definition of sovereign power (cf. Schmitt 2005 p. 18ff, 30f; Orford 2011 p. 129). As we shall later see, this was not an entirely new contention, and may be traced through some of the most important writings on Western political theory.

The intellectual force of Schmitt's notion of the decision as a mark of power has it seems unfortunately led a rather peripheral existence within contemporary political literature; and with only one notable exception (Orford 2011), appears largely absent within the literature on the responsibility to protect. This silence on Schmitt's work, perhaps in part due to his association with National Socialism, was however in a sense interrupted by the work of contemporary Italian

philosopher Giorgio Agamben. Entering Schmitt into dialogue with the perhaps most innovative thinker on power in modern thought, Michel Foucault, Agamben provided new impetus for thinking the decision.

Departing from this theoretical framework and discussing its relevance for the responsibility to protect doctrine, the purpose of this essay is thus to reintroduce the problem of the decision into the discussions on the origin of the responsibility to protect doctrine. To return the question of the decision on intervention to halt mass atrocities inscribed within the doctrine to its proper place as the functioning of power. From this the initial research question would be as follows: *as a decision on intervention grounded in international humanitarian and human rights law, what relations of power are inscribed within the responsibility to protect doctrine such that the decision would remain possible?*

1.2 Structure of the Essay

The second chapter of the essay will outline the decisionist theory of Carl Schmitt in relation to sovereign power and the state of exception. Through the works of Giorgio Agamben, we will expand the theorization of the decision with reference to Michel Foucault's writings on power, and outline the theoretical framework for the decision within the responsibility to protect.

The third chapter will present the methodological considerations of the essay and briefly sketch the archaeological and genealogical methods of Michel Foucault. The chapter will conclude by a description of the method of the essay, in which elements of these two methods will be employed and articulated in relation to the general purpose of the study.

Chapter four will present the genealogical analysis of the responsibility to protect. It will be structured according to the diverse genealogical elements of the doctrine and outline the decision as a structural relation of power.

The final chapter will summarize the main findings of the essay and relate them to the theoretical framework. A brief discussion and reflections on theory and methodology will also be included.

2 Theory

Both the terms “decision” and “power” have in the preceding been used in a rather undefined manner, and I shall in the following sketch Schmitt's notion of the decision and its relation to the distinction between power and law. I shall thereafter, drawing on the work of Foucault, expand the notion of power, to finally see how Agamben integrates these disparate strands of thought.

2.1 The Duality of the Sovereign

To understand why Schmitt would attribute such importance to the decision, and to clarify in what sense I am here attributing to it the status of power, we shall have to clarify in what sense the sovereign power marked out by the decision relates to the legally constituted power of sovereignty. Let us closer examine Schmitt's decisionist definition of the sovereign as “he who decides on the exception.” (Schmitt 2005 p. 5).

Schmitt was quite clear that the state of exception inaugurated by the sovereign decision did not entirely equate a situation characterizable as “anarchy or chaos” (Schmitt 2005 p. 12). Rather, within it “the state remains, whereas law recedes.” (ibid.). The force of law applies here without its substance and becomes, as Agamben denoted it, force-of-~~law~~ (Agamben 2005 p. 39). In this sense the sovereign, in deciding, must necessarily remain in a relation of exteriority *vis-à-vis* the legal order which this decision suspends (Schmitt 2005 p. 7). This undoubtedly constitutes a paradoxical relation, since the sovereign simultaneously belongs to and stands outside the normal legal order (Agamben 1998 p. 15).

As mentioned in the introduction, Schmitt was certainly not the first to remark on this paradoxical relation of the sovereign. Indeed, the relation between power and law in Hobbes famous *Leviathan* becomes on closer inspection more complex than, and in some sense irreducible to, the question of contractual rights. Hobbes, as Agamben notes (1998 p.106), was quite explicit about the fact that the sovereign's right to punish was not a right given to him by his subjects. This right, which has its origins in the right of everyone in the state of nature to use any means for their preservation, “subduing, hurting, or killing any man in order thereunto” (Hobbes 1996 p. 206), was merely left with the sovereign by the

subjects' laying down of theirs (Hobbes 1996 p. 206; Agamben 1998 p. 106). In this sense, the sovereign's paradoxical duality becomes explicit in Hobbes:

> It is important to note that in Hobbes the state of nature survives in the person of the sovereign, who is the only one to preserve its natural *ius contra omnes*. (Agamben 1998 p. 35)

We may indeed go a bit further and closer consider Machiavelli's recollection of the ancient Greek allegory, according to which "ancient princes were sent to Chiron the Centaur to be raised and tutored." (Machiavelli 2007 p. 68). The duality of beast and man – corresponding to the opposition between nature and society – represents for the prince "two ways of fighting: either with laws or with force." (ibid.).

> What this means is that the ancient princes, whose tutor was half man and half beast, learned to use both natures, neither of which can prevail without the other. (Machiavelli 2007 p. 68)

The distinction between force and law inherent in the notion of sovereignty in this sense has a long history within political thought, and in the thought of Schmitt, would reveal itself most clearly in the decision on the state of exception (cf. Agamben 2005 p. 38f; Schmitt 2005 p. 13). The paradox of sovereignty is that while distinct, force and law nevertheless coexists within the sovereign. The state of exception is neither "anarchy or chaos" (Schmitt 2005 p. 12), since the legal order is suspended only in order to create the conditions under which it can again apply (cf. Agamben 1998 p. 19; Schmitt 2005 p. 13).

Anne Orford, who to my knowledge is the only one to explicitly refer to Schmitt within the literature on the responsibility to protect, had situated the responsibility to protect doctrine within a tradition of United Nations "executive rule" (cf. Orford 2011 p. 103, 106). The decision on protection, vested by the doctrine within the international community rather than with the people of the state[3] (cf. Orford 2011 p. 138), would subsequently be understood in relation to this tradition, underpinned by a protective imperative which would "privilege de facto over de jure authority, or fact over right." (Orford 2011 p. 133, 136).

Yet the paradox of the state of exception is precisely that it "cannot be defined either as a situation of fact or as a situation of right" (Agamben 1998 p. 18). Furthermore, Orford's account risks glossing over the discontinuities in the discursive constitution of the subject in relation to which power and authority is articulated.

In the first volume of his *History of Sexuality*, Foucault spoke of a "threshold of modernity" (Foucault 1990 p. 143), a moment in history where for the first time

[3]Similar arguments have been made in regard to the lack of democratic accountability inherent in the doctrine of responsibility to protect. Shifting accountability to the international community rather than to the people renders the latter deprived of the possibility to hold its state accountable for its actions (cf. Cunliffe 2011 p. 52).

the population, understood not solely as a collection of legal subjects but as a biological phenomenon in its own right, became a political issue (Foucault 2003 p. 245). At this point, a new subject of power appeared, one whose biological existence had to be understood as part of a population and whose fertility, life expectancy, sickness, etc, became truly political issues, but did so "only at the mass level." (Foucault 2003 p. 246; cf. 243f; cf. Foucault 1990 p. 142ff, 139).

Situating the emergence of what Foucault called *biopolitics* historically, introduces a discontinuity which becomes difficult to square with Orford's account. As we shall see, the decision cannot be understood solely as the question of who has the authority to decide (cf. Orford 2011 p. 137f). The complex relation of right and fact marked out by the sovereign decision becomes fully understood only by invoking the field of discourse and power wherein the subject of life against which sovereign power is exercised becomes articulated.

2.2 Bare Life

> There is a limit-figure of life, a threshold in which life is both inside and outside the juridical order, and this threshold is the place of sovereignty. (Agamben 1998 p. 27)

In what sense does Agamben use the term "life" here? Most likely, it serves to distinguish it from the legal subject corresponding to the power of the law. Yet whereas this might immediately seem to connote Foucault's notion of biopolitics, Agamben explicitly posits this limit-figure of life at "the place of sovereignty" (Agamben 1998 p. 27). Foucault had remained careful to distinguish sovereign power from that of biopolitics, as the logic according to which they operated was – despite their superficial similarities – quite different (Foucault 2003 p. 239f, 247). Agamben instead directs his inquiry precisely into "this hidden point of intersection between the juridico-institutional and the biopolitical models of power." (Agamben 1998 p. 6). As the place of sovereignty here refers back to the paradoxical nature of the sovereign, so the notion of life both inside and outside the judicial order should absolutely be taken at its word. The limit-figure of life which finds itself in this place of sovereignty then refers neither to biological life, nor to the criminal or the enemy (the sovereign's prerogative it is to identify, and possibly kill (Schmitt 2007 p. 48)). It occupies rather the sphere of "the sovereign decision, which suspends law in the state of exception and thus implicates bare life within it." (Agamben 1998 p. 83).

There is then a paradoxical figure of *bare life* implicated by the sovereign decision, devoid of everything except its relation to a sovereign power. It as such refers to a subject position which individuals, themselves interchangeable, may

occupy in relation to the power marked out by the sovereign decision. It refers to no group in society, no form of life thought of as more elementary than others; it marks out only a process of subjectification by which life may be captured by an indeterminate sovereign power. Agamben provides the perhaps most startling example of this process of subjectification in his explication of the Nazi concentration camps. As he explains, once the Jews had been denationalized and entered the "permanent spatial arrangement" (Agamben 1998 p. 169) of the state of exception which the camps after all represented, the power of the sovereign decision over life and death knew no bounds (cf. Agamben 1998 p. 170f). To reiterate and perhaps clarify a point made earlier, it is this process which remains a blind-spot in Orford's argument. More importantly, this process, one should be clear, did not disappear with the concentration camps. The individuals who entered Guantanamo did so precisely because they were neither *criminals* nor *prisoners of war*, but because they had come to assume that indeterminate status of "detainees" (Agamben 2005 p. 3f).

Such may be the most extreme cases of these processes of subjectification. Yet the logic itself is far too ubiquitous to be easily dismissed. The apparently benign figure of the refugee should for the purposes of this essay assume a position of particular importance. It is again imperative to understand that the refugee represents not a natural phenomenon which occasionally emerges to disrupt the normal order of the relation between citizen and nation-state. Also here a process of subjectification is at work. Devoid of political status, this figure nevertheless enters into a relation with the sovereign power of the receiving state. If the state of exception could be characterized as a sphere of state without law, we should certainly see in the refugee a mirror-image of this power relation. What is so unsettling about the decisionist power to which the refugee is exposed is however not its murderousness, but rather that within those spaces within which it exists unperturbed (as in those contemporary equivalents to the camp which Agamben identifies in the *zones d'attente* in French airports[4] (Agamben 1998 p. 174)), the question of "whether or not atrocities are committed depends not on law but on the civility and ethical sense of the police who temporarily act as sovereign" (Agamben 1998 p. 174).

It may certainly be objected that the refugee does not constitute a subject devoid of political status, that this figure on the contrary would represent, in being devoid of all other rights, the paradigmatic bearer of *human* rights (cf. Agamben 1995 p. 116). Given the importance attributed to the notion of human rights within the discourse on the responsibility to protect, it will however be important to here carefully outline what subject position is actually articulated by it.

Let us turn first to Alex J. Bellamy's arguably authoritative account on the history of the responsibility to protect. Recounting Kofi Annan's early

[4]These are spaces where "foreigners asking for refugee status are detained" (Agamben 1998 p. 174).

formulations of sovereignty as responsibility, he notes that this re-articulation of the relation between sovereignty and responsibility implied legitimacy to be attributable only to those states that "protected the fundamental rights of their *citizens*" (Bellamy 2011 p. 10, my emphasis). Yet, the foundation for this redefinition of sovereignty he attributes to "the *inalienable* human rights of individuals." (Bellamy 2011 p. 10, italics in original). Unperturbed by the terminological slippage within his own account, Bellamy essentially reiterates a fiction which, according to Agamben, has its origins in the 1789 Declarations of the Rights of Man and Citizen[5]. The operative fiction here is that man and citizen are essentially the same, and that man as the supposed bearer of human rights is never revealed as such:

> Rights are attributed to man (or originate in him) solely to the extent that man is the immediately vanishing ground (who must never come to light as such) of the citizen. (Agamben 1998 p. 128)

If this fiction had been possible to maintain until the emergence of massive refugee flows during the nineteenth century had begun to separate man from citizen, and reveal the necessarily temporary and precarious bearer of nothing but human rights (Agamben 1998 p. 126, 131f; Agamben 1995 p. 116), the question now is if the responsibility to protect has not brought this fiction to its extreme point of tension.

> In fact, the Rights of Man represent above all the original figure of the inscription of bare natural life in the legal-political order of the nation-state. (Agamben 1995 p. 116)

Whenever the bearer of human rights reveals itself outside of any other politico-juridical status, it is thus as bare life, neither fully outside or inside the legal order, yet caught by sovereign power. The camp inhabitant – whether in its most paradigmatic or more conspicuous modern form in the refugee-camps – assumes such a place. As does indeed the detainee who is neither criminal nor prisoner of war.

It is not then enough to ask in relation to the responsibility to protect whether there is law. In the absence of a subject of life upon which a political existence would be attributable, such law may appear solely as its force. Agamben, in direct contrast to Schmitt, stated in words which should for us echo the problematic of

[5]It is indeed intriguing to note that Bellamy, whilst quoting Thomas Jefferson, does not remark on the fact that even here, the "inalienable Rights" with which every man is endowed, relies upon the creation of "Governments" (Jefferson, Thomas quoted in Bellamy 2009 p. 20). While Agamben does not mention Jefferson's declaration, his comment on the French Declaration of the Rights of Man from 1789 would certainly seem applicable also here: "it is not clear whether the two terms *homme* and *citoyen* name two autonomous beings or instead form a unitary system in which the first is always already included in the second." (Agamben 1998 p. 126f).

human rights, that "[t]he fundamental categorial pair of Western politics is not that of friend/enemy but that of bare life/political existence, *zoē*/*bios*, exclusion/inclusion." (Agamben 1998 p. 8). If the question of inclusion and exclusion, played out at the level of discourse and power, indeed marks out the relation of the sovereign decision, we have to ask what is politically at stake in the responsibility to protect doctrine's endeavour to "redefine and delimit domestic and international jurisdiction" (Orford 2011 p. 178). We have to ask whether these delineations indeed would signify the inscription of a relation within the responsibility to protect, such that the decision would remain an ever present possibility.

2.3 Bare Life, the Decision, and the Responsibility to Protect

The question of inclusion and exclusion has since the publication of Agamben's *Homo Sacer* been extended to the truly international and global practices of the contemporary world order. Applying the frameworks of Foucault and Agamben, Mark Duffield had situated the doctrines of *human security* and *responsibility to protect* within a redrawing of the "external sovereign frontiers" of the West (Duffield 2007 p. 80). The responsibility to protect was in this sense envisaged as a strategic function, through which one would be able to control the global circulation of security risks associated with failed or ineffective states (cf. Duffield & Waddell 2006 p. 10; Duffield 2007 p. 122). Drawing on the work of amongst others Duffield, De Larrinaga & Doucet noted in a similar vein:

> In rendering life bare and politically unqualified, human security enables a form of human subjectivity amenable to the sway of sovereign power exercised from the global realm. (De Larrinaga & Doucet 2008 p. 534)

While these accounts may afford important insights to the overarching structure within which the responsibility to protect functions, particularly the work of Duffield remains eclectic and subsumes under a more or less coherent strategic function a considerable array of heterogeneous elements. The concrete structure of the decision – with which the present essay is concerned – remains, despite these works, a theoretical lacuna.

This being said, the work of Duffield extends Agamben's theoretical framework in important ways. Whereas Agamben himself would sketch only the most disturbing outcomes facing those labelled bare life, it has been the work of Duffield to introduce the subtlety of the "petty sovereignty" of the humanitarian NGOs which may "decide between life to be valued or disallowed." (Duffield

2007 p. 51). Duffield would in this sense extend the question of inclusion and exclusion beyond the strict borders of the state (Duffield 2007 p. 78f). Furthermore, drawing from what had been in Foucault's terms a manifestation of the biopolitical form of power (Foucualt 1990 p. 138), the *disallowment* of life could now be understood as the manifestation of a relation of sovereign power exercisable through the decision (Duffield 2007 p. 51).

2.4 Conclusion

We are now in a position to return to the question which opened this essay. What intrigued me was the inscription of rights and responsibilities as the foundations of the doctrine, such that the decision to abstain from their enforcement – and as such the decision on the disallowment of life – could remain within it. It would in this sense be the inverse of Orford's question regarding "the legal limits to the actions that the international community might take in the name of protecting populations at risk." (Orford 2011 p. 137). To ask instead regarding the limits to *inaction* inherent in the notion of *protection*[6].

What I shall propose here, is a re-reading of the *failure* of the international community to take collective action "in a timely and decisive manner" (2005 World Summit Outcome p. 30), in decisionist terms. To treat the *exceptions* from the principles established within the responsibility to protect, not as mere failings or lacunas, but rather as *the possibility of a decision*. Certainly it may be argued that absence of a capacity to act does not constitute a decision, and that a lack of political will, for instance within the Security Council, does not equate a decision to disallow life in the strictest sense. Yet, while the question on the steps to be taken such that the doctrine may be finally realized in its intended scope and fashion remains open and subject to considerable debate (cf. UN 2009; Luck 2012; Bellamy 2011), it will be important not to loose sight of what was actually inscribed within it.

To the extent that we are interested in the exceptions from what the responsibility to protect prescribes, it will be in the sense of thinking the exception, as does Schmitt, in the Kierkegaardian sense: as that which "reveals everything more clearly than does the general." (Kierkegaard quoted in Schmitt 2005 p. 15). Confining ourselves to thinking the exceptions in terms of failures and lacunas will never enable us to think the general which allowed them.

We shall then have to turn to the doctrine itself. We shall have to describe the discourse which allowed it to emerge, and which articulated a specific subject

[6]Carsten Stahn is one of few who raises the question – yet without providing much of an answer to it – of what the possibility of inaction implies for the status of RtoP (Stahn 2007 p. 17f).

> within the complex sphere of fact and right. We shall have to describe how discourses, institutions and laws were taken up, redefined, modified or created in relation to it, articulated its delineation, and which would constitute the conditions of possibility under which the decision on timely and decisive action in cases of manifestly failing states could be made. Should one succeed in such a description, one may fill what at the present remains a theoretical lacuna within the academic discourse on the doctrine. One may substitute for the decision as the sign of something always external to the doctrine, such as the political will of the powerful, the careful description of what made it possible in the first place.

3 Method

Already from the preceding discussion, the influence of Foucault on Agamben's reformulation of Schmitt was shown to dictate certain methodological directions. The decision in this sense would have to be understood as a constitutive relation of power, whereby the elements of such a decision – including the subject of life caught within it – would have to be described in terms of this relation.

3.1 The Elements of the Decision

It seems to me firstly that such a description must resolutely avoid treating it as the double of some other relation of power – such as those of *neocolonialism* or *imperialism* (cf. Chomsky 2011; Branch 2011). One would not *a priori* situate this relationship within the field of *Realpolitik*. Similarly, the notion of the doctrine of *human security* as a global strategic functioning of power within which the responsibility to protect would be situated (cf. Duffield 2007 p. 114, 119; De Larrinaga & Doucet 2008 p. 534), must similarly be resisted. While many points of interaction may exist between the discourse on the responsibility to protect and that of human security, what concerns us here is the specific relation established by the former. Lastly, while many of the elements of such a relation may antedate it, such as the notion of humanitarian intervention as developed by Bernard Kouchner, human rights, the Security Council and the veto of the Permanent Five, it is the unique relation established by the responsibility to protect which is of concern here. In these points, one should be clear, no ontological claim is made, but rather a methodological statement. We will concern us here only with the unique relation established through the responsibility to protect doctrine between a series of diverse elements, and the nature of power inscribed within it.

Such an approach would in this sense mirror the general methodological project articulated by Michel Foucault in his studies of power (cf. Foucault 2003 p. 28ff):

> [...] rather than starting with the subject (or even subjects) and elements that exist prior to the relationship and that can be localized, we begin with the power relationship itself […] and see how the relationship itself determines the elements to which it is applied. (Foucault 2003 p. 45)

Applied to the description of the decision within the responsibility to protect doctrine, one would similarly substitute for the isolated description of the elements themselves, in the form in which they might have appeared external to all relations of power, the description of the relationship articulated between them. One would substitute for the notion of power as something which one may possess the description of the conditions according to which power is accorded certain elements and denied others (cf. Foucault 2003 p. 13, 30).

Such a methodological framework however entails a set of practical problems. One would have to describe a multiplicity of elements in reference only to the relation within which they are articulated. Let us consider first the subject of life inscribed within the responsibility to protect doctrine. One would have to describe it, not as a being external to the discourse which surrounded it and articulated it in relation to the responsibility to protect, but precisely at the level of this discourse. One would not substitute for this discursive subject some notion of a pure body which remains identical to itself as it enters relations of power (cf. Foucault 1977 p. 153). Certainly the notion of a subject as bearer of human rights antedates the responsibility to protect doctrine, but what interests us here is the specific subject articulated by the latter. One is here not merely dealing with a transposition of a subject from one field to another. Secondly, one would have to describe how this subject became articulated in relation to an institutional structure, and which relations of power were thereby prescribed between them. Again, one would describe not a mere transposition of elements from one field to another. That is, whatever powers afforded for instance the Security Council, the aim is to describe these as an expression of the relation established by the doctrine.

These then are the two lines which a description of the decision within the responsibility to protect doctrine must follow.

Through an engagement with Foucault's writings on methodology, I will show how Foucault's earlier archaeological method solved the problem of the description of discourse; how the later Nietzschean genealogical studies offered a way of situating discourse within wider relations of power. These methodological tools will be shown to be capable of describing the elements of the relation inscribed within the possibility of the decision. In the last section of this chapter, I shall articulate a cohesive method through which the decision within the responsibility to protect doctrine may be studied through the adoption of these tools. I will however begin by providing a brief overview of Foucault's writings on methodology.

3.2 Foucault's Machinery

Foucault's methodological machinery is often divided into two distinct forms: his earlier *archaeological* method, and his later, Nietzschean *genealogy* (cf. Howarth 2000 p. 49). The two works in which Foucault most explicitly discussed these methods were the meticulous *Archaeology of Knowledge* (1972) and the short essay entitled *Nietzsche, Genealogy, History* (1977) respectively.

In the following section, the main tenets of the *Archaeology of Knowledge* will be discussed, and I will try to show how it proposed to solve the problem of the study of discourse. The basic machinery of the archaeological method, later to be adapted to the description of the subject of the responsibility to protect, will be outlined with reference to this work and examples from Foucault's *oeuvre*.

Foucault's later genealogical framework will thereafter be briefly outlined. I will show how the archaeological machinery became an internal moment within its description of relations of power; how it would situate discourse within a wider field of elements. I will show how the genealogy proposed to describe relations of power as multiplicities of elements articulated within apparatuses (*dispositifs*) of knowledge/power.

3.2.1 Archaeological Description

The *Archaeology of Knowledge*, originally published in 1969, represented an attempt at methodologically describing the studies which Foucault in the preceding years had undertaken, and which had resulted in *Madness and Civilization* (1964) and *The Order of Things* (1966) amongst others (Foucault 1972 p. 14f).

The problem to which the *Archaeology of Knowledge* had been a response was the relation between discourse and *things* within historical research. Articulated in direct contrast to what Foucualt referred to as histories of the referent (Foucault 1972 p. 47), the archaeology was envisaged as a method which would avail itself from the pervasive weight of a referent either posited at some pre-discursive original experience or at the teleological present (ibid.). In its stead, archaeology would posit the rigorous descriptions of the discourses themselves.

Substituting for the referent as the *raison d'etre* and stability of discourse – as "madness" to the psychiatric discourse or "sexuality" to its repression – the archaeological description of discursive practices, the conditions of possibility of a particular discourse could thereby be described (cf. Foucault 1972 p. 48f). In the place of descriptions of referents, archaeological description would direct itself towards the practices by which a category of objects come to be taken up within a

given discourse and determined to relate to one another; the principles according to which they are classified, divided, subsumed under one another or some common heading; the authorities who, through tradition, law, or privileged institutional position, may legitimately make these classifications (Foucault 1972 p. 41-55). Through such a shift in the approach with which a historical material would be studied, one would describe not *things*, which discourse may more or less accurately represent, but the practices by which discourse itself is produced. One would substitute for the history of the referent the rigorous study of "things said, precisely as they were said." (ibid. p. 109).

This then becomes, in part, the direction which we must follow. We must substitute for a referent of the responsibility to protect – be it the eternal subject of a pure human being or the transcendental bearer of human rights – the archaeological description of the discursive practices by which the discourse of the responsibility to protect and the articulation of a subject of life within it could be produced.

While the archaeology would ultimately prove restrictive and later be replaced, at least in part, by the genealogical method (cf. Howarth 2000 p. 61, 71), the functioning of the meticulous machinery it articulated can be gleaned also from Foucault's later studies. We will turn now to closer examine the first volume of Foucault's *History of Sexuality*. In it, the archaeological machinery can be exemplified, as well as the wider genealogical techniques.

3.2.2 *The History of Sexuality*

While Foucault had moved on to his genealogical method by the time he wrote the first volume of the *History of Sexuality*, many of the salient features of the archaeological machinery are effectively highlighted through it.

The main focus of the first part of this book was directed against what Foucault referred to as the "repressive hypothesis" (Foucault 1990 p. 10), according to which Victorian times had seen a concerted effort to repress all discourse on sexuality (ibid. p. 3, 17). While Foucault did admit that "there was a policing of statements" (ibid. p. 18), he could simultaneously show that "[a]t the level of discourses and their domains, however, practically the opposite phenomenon occurred." (ibid. p. 18). Not that repression would here be contrasted with a freedom which the history books had forgotten about (ibid. p. 10f), but rather that repression could not be separated from the discourses which produced it (cf. Foucault 1990 p. 34f). In other words, that which is repressed must simultaneously be invoked, understood, categorized by a plethora of discursive practices; institutions structured to control and amend its deleterious tendencies.

So it was through the scientific discourse on sexuality, and the discursive practices of psychiatry for instance, in the nineteenth century that the act of

sodomy became homosexuality, and a new subject emerged – later to demand rights within the very discourse which had produced it and sought to control it (ibid. p. 43, 101). Indeed, for every mundane manifestation of sexuality deemed dangerous or corruptible, a will to know about it and institutional arrangements to amend it would correspond (cf. ibid. p. 27ff, 31, 65). In fact, rather than the mere deployment of repression, eighteenth century society saw the development of a veritable "incitement to talk about sex." (ibid. p. 23).

The archaeological machinery substitutes for the analysis of an eternal referent of sexuality the study of the discursive practices which produced a certain speech regarding it. Indeed, the sexual subject becomes here not a mere natural thing which must be guided or controlled, but a product of discursive practices and relations of power. However, it also becomes clear that Foucault here moves beyond the mere description of discourse to describe the exercise of power within the sphere of sexuality. The following section will further outline these aspects and provide an overview of the genealogical framework within which discourse would in Foucault's later works be situated.

3.2.3 Genealogy and the *Dispositif*

It was in many ways to the same methodological problems to which the archaeology had been a response that Foucault would later turn to Nietzsche and the genealogical concept of historical research.

> Why does Nietzsche challenge the pursuit of the origin (*Ursprung*), at least on those occasions when he is truly a genealogist? First, because it is an attempt to capture the exact essence of things, their purest possibilities, and their carefully protected identities, because this search assumes the existence of immobile forms that precede the external world of accident and succession. (Foucault 1977 p. 142)

Here however, the contrast was not solely that between referents and discourse, and the genealogical method would not be as manifestly linguistic in its resistance to essences as the archaeology had been (cf. Howarth 2000 p. 82). Against the archaeological description of discursive formations, Nietzschean genealogy would instead suggest an incessant historical tracing in which nothing would be stable or essential enough not to be capable of being broken down into a multiplicity of origins. A historical method where *things* were revealed to possess "no essence or that their essence was fabricated in a piecemeal fashion from alien forms." (Foucault 1977 p. 142).

As Foucault developed his genealogy, the archaeological machinery was however not completely abandoned. Rather, "the constitution of objects of analysis through archaeological 'bracketing' becomes an internal moment of his

overall genealogical approach" (Howarth 2000 p. 67). However, whereas the archaeology had focused on the description of discursive practices, the genealogy sought to expand the field by situating these within wider practices of power (Howarth 2000 p. 72).

Apart from the short *Nietzsche, Genealogy, History*, the genealogy was never as explicitly articulated as the archaeology in Foucault's writings. However, to the adoption of the genealogical framework corresponded a new concept in Foucault's later oeuvre, which, for the purposes of this essay, will serve to encapsulate its methodological principles: the *dispositif*[7].

Whereas Foucault provided little in the way of a clear definition of this concept, an explication of it is provided in a short essay by Agamben aptly entitled *What Is an Apparatus?* (Agamben 2009). Here however, the concept is quickly expanded to denote "literally anything that has in some way the capacity to capture, orient, determine, intercept, model, control, or secure the gestures, behaviors, opinions, or discourses of living beings." (ibid. p. 14). Despite this rather voluminous definition, Agamben does seem to arrive at the heart of Foucault's usage of this term. The description of *dispositifs*, whatever their concrete form, be it "prisons, madhouses, the panopticon, schools, confession, factories, disciplines, juridical measures, and so forth" (ibid. p. 14), is a description that situates discursive practices within relations of power.

To reconnect with the example from Foucault's *History of Sexuality* above, the discourse on children's sexuality was in Foucault's work shown to be intimately related to the architectural layout of the schools which sought to control it (cf. Foucault 1990 p. 27f). Similarly, Foucault's *Discipline and Punish* revealed the relationship between discourse and architecture within Bentham's panopticism and its application within a series of disciplinary institutions (including not only the prison, but also the schools, the factory, and the hospital) (Foucault 1991 p. 203). The *dispositif* then does not describe merely a prison, or a school, or say the Security Council, but the multiplicity of elements which, in a given configuration, define them. It describes the connections which exists at a given time and place between concrete elements, be it discursive practices, architectural forms, laws, and so forth (cf. Agamben 2009 p. 2f; Foucault 1980 p. 195).

The *dispositif* furthermore, becomes the site where living beings are subjectified; where, from the substance of the living being in its interaction with *dispositifs*, specific subjects emerge (Agamben 2009 p. 14). From the preceding discussion on Foucault's *History of Sexuality*, it should be absolutely clear that the judicial subject of the sodomite does not equate the medical subject of the homosexual (Foucault 1990 p. 43); between the two a whole new apparatus (*dispositif*) of knowledge/power enters the field of the government of sexuality. Similarly, between the petty thief and the criminal corresponds a profound change

[7]The English translation "*apparatus*" is widely used, but appears interchangeably with the original French word *dispositif*.

within the penal system, and the notion of the delinquent or the criminal must be understood to have emerged within an entire field of discursive practices, laws, and even prison architecture (cf. Foucault 1991 p. 272, 277f). To refer back to the previous chapter, it was shown that *bare life* was to be understood not as natural or original life but in relation to a sovereign power which may decide over it.

Lastly, the *dispositif* corresponds to "an *urgent need*" (Foucault 1980 p. 195. italics in original). That is, it corresponds to some problem or other which appears in society, be it certain deleterious sexual practices, madness, delinquency or the events in Rwanda or Srebrenica.

3.2.4 Responsibility to Protect and the *Dispositif*

Dispositifs then articulate the elements of a relation of power. What I spoke of in the beginning of this chapter was in this sense to methodologically consider the relation of power inscribed within the possibility of the decision in the responsibility to protect doctrine as a *dispositif* of knowledge/power. It would be to describe how concrete elements, such as the decision by the Security Council on a state's manifest failure to discharge its responsibilities, the veto of the Permanent Five, the apparatus of the State, the subject upon whose protection the doctrine was premised, were articulated within the unique relation of the decision regarding intervention in a sovereign state. One would describe the history of this decision as the tracing of a multiplicity of elements, finally to constitute a specific relation of power between an institutional framework and a subject of life. Archaeological description of the discursive practices through which the subject of life within the doctrine could be described, becomes here an internal moment of the genealogical tracing of elements within which this subject ultimately would be situated.

3.3 The Method

While the various methodological steps of the description are here treated as relatively distinct forms, it should by now be clear that no aspect can be studied in complete isolation from the other. What is presented below as distinct steps, are therefore not to be considered in any temporal or logical sense, but merely as a simplified schemata.

3.3.1 Archaeological Description

The initial step would correspond to the archaeological internal moment of the description of the responsibility to protect doctrine as a *dispositif*. If the first methodological problem here was to deny reference to a figure of pure humanity, I shall instead try to describe the subject to which the rights inscribed within the responsibility to protect doctrine was accrued. Adapted from Foucault's archaeological machinery, the following directions will be pursued.

First will be to describe the *surfaces* where this subject emerged in its disparate forms (cf. Foucault 1972 p. 41): for instance as victims of genocide, as civilians caught in increasingly savage civil wars, as victims of political repression, as victims of ethnic cleansing, as people caught in the throes of extreme poverty. I will try to describe the specific context against which these subjects could emerge and be presented as urgent problems. This will require extending the analysis from the immediate documents of the doctrine to contemporary United Nations documents on peace and security, but also to those documents which first planted the seeds of the responsibility to protect, such as the works of Francis Deng *et al* (1994), Deng & Cohen (1998) and speeches and articles by Kofi Annan from the late 1990s.

The second discursive practice would be the *grids of specification* (cf. Foucault 1972 p. 42) according to which these various subjects were separated, related, or subsumed under a common heading. I shall try to describe the principles of reasoning which brought some under the heading of the responsibility to protect, while others were not (cf. Chhabra & Zucker 2012 p. 40). I will similarly describe the codification of these within the framework of the four crimes of the 2005 World Summit Outcome: genocide, crimes against humanity, war crimes and ethnic cleansing (Axworthy 2012 p. 15).

3.3.2 Description of the *Dispositif*

From this point I will to some extent depart from the archaeological machinery to consider the wider context of elements which comprise the *dispositif* of the responsibility to protect. While these will necessarily vary from one *dispositif* to another, it would appear, not least from the preceding discussion, that within the context of the responsibility to protect doctrine the legal framework assumes particular importance. The UN Charter, various international human rights law including the Universal Declaration of Human Rights, the ICCPR, the ICESCR, the Convention on Genocide, the 1948 Geneva Conventions as well as the Rome Statute of the International Criminal Court pervade the secondary literature (cf. Gierycz 2011 p. 104f, 111; Bellamy & Reike 2011 p. 90f). The ICJ judgement in

the case of *Bosnia-Herzegovina v. Serbia* has similarly been referenced as providing legal precedent to the tenets of the doctrine (Arbour 2008 p. 451; Bellamy & Reike 2011 p. 97). As the reference of these laws within the documents pertaining to the discourse of the responsibility to protect are described, what is important is not the question of whether or not a principle or a concept is compatible with the immovable and unbending foundations of international treaties and conventions. Rather, I shall try to describe how discourse attributes a certain status to them; how their reference within the documents on responsibility to protect, peace and security, was used such that certain aspects would have to be respected whereas others could be changed. The following directions for the analysis will serve as a focal point: the weight of the Articles of the UN Charter to the responsibility to protect doctrine once the doctrine was brought under the auspices of the United Nations institutional framework; the existence of a certain legal framework such that the doctrine could be subsequently codified within the four crimes.

In studying the institutional framework one would describe how it was envisaged in the early texts by Francis Deng or Kofi Annan. One would further describe the wider discourse on conflict, intervention, peace-keeping and peace-building within the United Nations through the study of contemporary official UN speeches and reports regarding the work of the organization. In studying these documents, one would seek to describe how the work of the United Nation was envisaged, to what problems it corresponded within the area of security and peace. It will be to describe within what institutional framework the subject of the responsibility to protect doctrine entered as the UN became this doctrine's embodiment, and what unique relations of power were established thereby. What institutions were, by tradition or necessity, inscribed within the doctrine; which could, within limits, be re-imagined. The following directions would be those of particular importance: the inscription of the decision regarding a Member State's manifest failure to discharge its responsibilities, the decision on intervention, the relation thereby inscribed between State and the United Nations institutions, the veto of the Permanent Five members of the Security Council originally inscribed within the Charter and taken up within the responsibility to protect discourse.

If one were to succeed in following these steps, I believe one could describe the relation between the rules through which a particular subject of life appears, and the institutional framework thus afforded the power to decide regarding its fate. In short, one would be able to return the decision within the responsibility to protect doctrine to its proper place as the functioning of power.

3.4 Questions on Material

Foucault's methodological framework provide little in the way of guidance on the selection of materials upon which these methods are to be applied. The most one can ascertain is that selection is guided more by the relation established between statements than by any formal boundaries set by a certain corpus of documents, or the supposed coherence provided by the function of the author (cf. Foucault 1972 p. 95, 97f, 126).

A more extensive study than the present one might have pursued this issue in the strict genealogical manner. The time constraints together with the sheer volume of texts produced on the doctrine (official, international, national, academic, journalistic) and the intricacy with which they relate to one another, however renders such an approach impractical. In establishing a framework of temporal progression and relation between the constitutive texts I thus relied heavily on the secondary literature. This literature was abundant and, particularly in the case of Bellamy (2009), impressively meticulous.

The main texts of the doctrine were the ICISS report from 2001 and the 2005 World Summit Outcome. Beyond these, a number of documents were continuously referenced within the secondary literature, and was thus included. These were for instance *A More Secure World: Our Shared Responsibility – Report of the High-Level Panel on Threats, Challenges and Change* henceforth simply the High-Level Panel, various UN documents on peace and security, including *We the Peoples: The Role of the United Nations in the 21st Century*, *Report of the Panel on United Nations Peace Operations* henceforth the Brahimi-report, *Prevention of Armed Conflict – Report of the Secretary-General,* and *In Larger Freedom: Towards Development, Security and Human Rights for All – Report of the Secretary-General.* Security Council and General Assembly resolutions referenced within the secondary or primary literature or as exemplifications of concrete events were also included.

Within the secondary literature, it has become, it seems, common praxis to begin with the works of Francis Deng *et al* (1996) and Deng & Cohen (1998) (Bellamy 2009 p. 2; Luck 2012 p. 90; Arbour 2008 p. 447; Evans 2008 p. 35f; Axworthy 2012 p. 8). Similarly, addresses and speeches by Kofi Annan from the late 1990s are frequently referenced as particularly influential (Bellamy 2009 p. 2; Thakur 2006 p. 245). These documents here marks, with the exception of Boutros Boutros-Ghali's *An Agenda For Peace: Preventive Diplomacy, Peacemaking and Peace-Keeping*, the temporal beginning of my analysis.

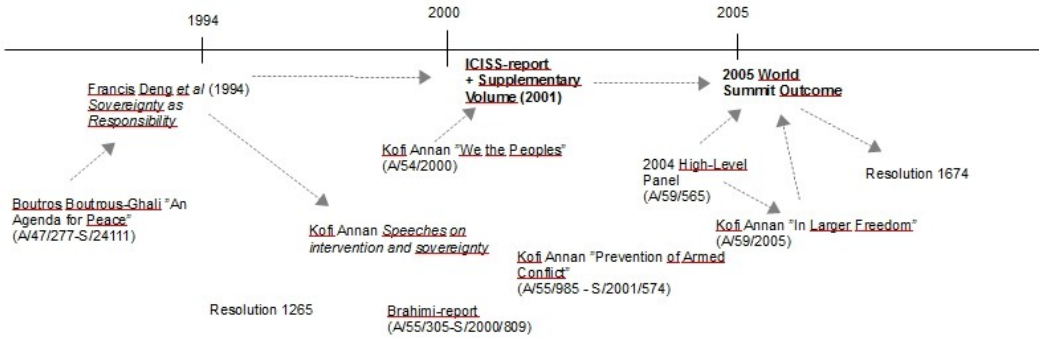
Certain legal documents referenced within the primary material were however also included; most notably the *United Nations Charter, 1948 Convention on the Prevention and Punishment of the Crime of Genocide, 1948 Universal*

Declaration of Human Rights, and the *1998 Rome statute of the International Criminal Court*. Others could however not be treated beyond their occasional appearance within the primary literature due to time constraints.

While the works of Bellamy and others was heavily relied upon in terms of orienting the study within the material, the methodological underpinnings of this essay meant detracting from them in some ways however. What interested me for instance was not the power struggles of the various states and their representatives. While R*ealpolitik* was arguably important in determining the final outcome of the doctrine (cf. Bellamy 2009), the emphasis on the discursive development meant that drafts, records of discussions, letters or later accounts by involved members of the process were only sparingly used.

Figure 1 sketches some of the main documents pertaining to the responsibility to protect doctrine and their immediate relations.

Figure 3.1. Timeline and immediate relations of main texts



Sources: Bellamy (2009); Axworthy (2012); Luck (2012); Deng *et al* (1996)

4 Analysis

In the following, I will try to trace the diverse threads that would eventually constitute the various elements of the responsibility to protect doctrine. While most of the documents discussed here directly or indirectly pertain to the responsibility to protect, the elements traced here does not necessarily follow the strict framework of the doctrine, but rather constitute the discursive and institutional field within which it was formulated. Similarly, while presented as analytically distinct, the emphasis here is on the mutually constitutive nature of the elements of the decision understood as a *dispositif*.

The first section will outline the archaeological description of the subject as it entered discourse. The conditions under which it could do so and the rules of formation that would mark out its extension will be the focus here. From the theoretical framework of the essay, the description of this discourse will particularly emphasize the relationship between these rules of formation and the language of rights.

In the archaeological description, and in the subsequent expansion of the analysis to the relation between the state and the subject of the doctrine, the interventionist aspect of the responsibility to protect will be the focus. Here, the relation between the subject and the collective international responsibility to protect will become the most visible and clearly articulated.

In the following part, the inscription of the collective international responsibility to protect under the auspices of the United Nations will be treated in detail, and the weight of the Charter of the United Nations more closely examined at the discursive and institutional level. I will try to emphasize the continuous discursive and institutional relations through which the disparate elements of the preceding description would inscribe the decision within the United Nations framework, and more specifically, the United Nations Security Council.

The concluding section will offer some brief comments on the legal status of the doctrine.

4.1 Archaeological Description of the Subject

Tracing the surfaces of emergence against which the subject first emerged within discourse, and the grids of specification according to which it would be categorized and its extension articulated, it may be possible to more clearly understand the relation of rights and responsibilities within which it was inscribed.

4.1.1 Surfaces of Emergence

Let us begin by trying to disentangle some of the surfaces against which the subject of the responsibility to protect first emerged. It has in this regard been noted that the events of the 1990s, which included those in Rwanda and former Yugoslavia, constituted the immediate context against which the question of intervention was taken up with renewed urgency towards the end of the century (Arbour 2008 p. 446). Within the speeches and addresses by Kofi Annan from the turn of the century, these events would indeed figure prominently, and invoked on the subject of humanitarian intervention (Annan 1999a p. 13f; Annan 1999b p. 23; Annan 1999d p. 38f; UN 2000a p. 34). Internal conflict had by this time began to appear within discourse as novel threat of the post cold war conflict order (UNDP 1994 p. 47; Deng *et al* 1996 p. xiii), and Annan would note in 1998 that ”[m]ost wars nowadays are civil wars.” (Annan 1999a p. 5). The ICISS-report, in which the term *responsibility to protect* was coined, argued that ”[t]he most marked security phenomenon since the end of the Cold War has been the proliferation of armed conflict within states.” (ICISS 2001 p. 4). In 2004, the High-Level Panel provided a comprehensive account of what had during the last decades of the twentieth century been a growing discrepancy in numbers between civil war and inter-state conflict in favour of the former (UN 2004 p. 17).

In addition to the noted pervasiveness of these conflict within the post cold war conflict order, *We the Peoples*, Annan's 2000 report to the General Assembly, had commented on the particularly brutal and pernicious character of the internal conflicts of the 1990s (UN 2000a p. 31). In a Security Council resolution from 1999, it was noted that civilians now constituted “the vast majority of casualties in armed conflicts” (UN Security Council 1999 p. 1).

What had emerged against the post cold war conflict order was thus a new subject of life: the civilian victim of internal conflict, ethnic cleansing, and genocide (cf. UN 2000a p. 6), whose precarious existence was played out behind the wall of sovereign inviolability[8]. The 1990s had thus seen the entry of a new

[8]The importance of Francis Deng's appointment as Special Representative on Internally Displaced People by Boutros Boutros-Ghali to the early formulations of sovereignty as responsibility followed a similar logic (cf.

problem into United Nations discourse and international security thinking more generally[9]. One which had brought to tension the entire United Nations institutional structure (UN 2000a p. 6).

It was against the entry of these novel set of problems into discourse that Kofi Annan famously asked:

> […] if humanitarian intervention is, indeed, an unacceptable assault on sovereignty, how *should* we respond to a Rwanda, to a Srebrenica – to gross and systematic violations of human rights that offend every precept of our common humanity? (UN 2000a p. 34, emphasis in original)

The notion of sovereignty as responsibility had been the response by Deng *et al* some years earlier to this question, and had posited that ”[t]he obligation of the state to preserve life-sustaining standards for its citizens must be recognized as a necessary condition of sovereignty.” (Deng et al 1996 p. xviii). Annan's redefinition of sovereignty clearly mirrored this contention (Annan 1999d p. 37f; Annan 1999e p. 49), and was later taken up as one of the fundamental principles of the responsibility to protect by the ICISS (2001 p. 13). According to it, the principle of non-intervention inscribed in the Charter would, under serious harm to a population which the state proves unable or unwilling to amend, yield to the international responsibility to protect (ICISS 2001 p. XI).

The roots of the responsibility to protect in this are to be found within the discourse which had first began to speak of the subject of life revealed by the proliferation of internal conflict and mass atrocities.

4.1.2 Grids of Specification

In the early formulations of sovereignty as responsibility by Deng *et al* (1996), this subject had a rather wide and imprecise extension, and few clear thresholds were established beyond which a state's sovereignty would be considered forfeited. Similarly, Kofi Annan, while contending that sovereignty would not constitute a pretext for non-intervention in cases of gross violations of human rights (Annan 1999b p. 24), articulated few thresholds beyond which intervention would be considered legitimate. At his address at the General Assembly's 54th session in 1999, Annan went so far as to state in relation to the Security Council that ”massive and systematic violations of human rights – wherever they may take place – should not be allowed to stand.” (Annan 1999d p. 39). Similarly, in *We the Peoples*, while commenting on the work of the United Nations widely (cf. UN

Bellamy 2009 p. 21; Bellamy & Reike 2011 p. 85). Unlike refugees, Deng & Cohen commented, IDP's would not fall under the protection of the United Nations (1998 p. 12f).

[9]This had already been remarked on in the 1994 *Human Development Report* (UNDP 1994 p. 47)

2000a p. 15-20), intervention was discussed mainly in relation to "organized mass murder and egregious violations of human rights" (UN 2000a p. 34).

One of the main features of the ICISS was the establishment of clear thresholds for intervention. These would include: genocide (as defined by the 1948 Genocide Convention), ethnic cleansing, crimes against humanity and war crimes, state collapse and resulting mass starvation and civil war, and overwhelming natural disasters where the state is unable or unwilling to handle the situation (ICISS 2001 p. 33). By the 2005 World Summit Outcome "mass starvation, civil war and natural disasters" (Chhabra & Zucker 2012 p. 40) had disappeared, and we shall later more closely look at the legal framework according to which these crimes legally codified this subject.

Most importantly however, the Commission contended that only in cases of "large scale" loss of life – a quantity deliberately left undefined – would international military intervention be warranted (ICISS 2001 p. 33).

> […] the Commission has resisted any temptation to identify as a ground for military intervention human rights violations falling short of outright killing or ethnic cleansing, for example systematic racial discrimination, or the systematic imprisonment or other repression of political opponents. (ICISS 2001 p. 34).

This however inscribed a subtle paradox within the doctrine. In the early formulations of sovereignty as responsibility by Deng *et al*, the responsibilities of the international community had been envisaged as rooted in the normative standards of human dignity, articulated in the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social, and Cultural Rights (Deng *et al* 1996 p. xiii). Similarly, the ICISS had envisaged as a foundation for the responsibility to protect "specific legal obligations under human rights and human protection declarations, covenants and treaties, international humanitarian law and national law" (ICISS 2001 p. XI). Yet whereas the United Nations mission for human rights, as Annan claimed, would begin and end with the "individual and his or her universal and inalienable rights" (Annan 1999b p. 20), only as a mass phenomenon did the subject of life to be protected by the responsibility to protect enter discourse[10]. While human rights in the legal sense were inscribed in the individual human person, the subject of the responsibility to protect would never appear as a singular body, but only as a multiplicity.

This was certainly not an imposition constructed by the ICISS. While the ICISS thresholds were a novel feature within the discourse, they followed almost directly from the surfaces of emergence against which the subject of the doctrine had first appeared. Indeed, formulations of "gross violations of human rights", which appears so frequently within the speeches and addresses through which

[10]Chhabra & Zucker (2012 p. 55) and Deller (2012 p. 69) made similar comments on the topic of the legal status of the doctrine. These will be treated in more detail under Chapter 4.4

Annan had raised the question of intervention, appears already in Deng *et al* (1996 p. xiii). The origins of the subject of the doctrine must thus be understood to lie in the discourse on security and international peace, rather than as a transposition of the legal subject of the Declaration of Human Rights. Within the articulation of the relation between fact and right of the doctrine, the "rights" of the victim of genocide or ethnic cleansing (cf. Bellamy 2009 p. 60), who could appear only as a multiplicity, would subsequently be attributable to no person.

4.2 The Subject and the Institutional Framework

Having now briefly outlined the subject of the doctrine as it emerged within discourse, we now turn to the immediate institutional framework within which this subject was inscribed through the doctrine.

4.2.1 Re-inscribing the State

In *An Agenda For Peace* from 1992, Boutros-Ghali had famously talked about the passing of absolute and exclusive sovereignty (UN 1992 p. 5), a contention taken up by Deng *et al* and the notion of sovereignty as responsibility (Deng *et al* 1996 p. 14). Duffield, by contrast, had situated the responsibility to protect as formulated by the ICISS within a general discursive field which had began to re-emphasize the state in relation to issues of security (Duffield 2007 p. 123). Paradoxically, the passing of absolute sovereignty, had also opened up for a strengthening of the state apparatus (Duffield 2007 p. 121f).

Indeed, the ICISS was quite clear in that it considered it one of its main objectives "to strengthen, not weaken, the sovereignty of states" (ICISS 2001 p. 75). And while much of the focus of the ICISS-report was on intervention, it is important to note that the responsibility to protect doctrine's most basic principle was the inscription of state responsibility:

> State sovereignty implies responsibility, and the primary responsibility for the protection of its people lies with the state itself. (ICISS 2001 p. XI)

This was further reiterated in paragraph 138 of the 2005 World Summit Outcome (p. 30). Certainly this contention had precedent. Already in the formulations of sovereignty as responsibility by Deng *et al* (1996) it was argued that "[u]ntil a replacement is found, the notion of sovereignty must be put to work and reaffirmed to meet the challenges of the times in accordance with accepted standards of human dignity." (Deng *et al* 1996 p. xi). Similarly, within United

Nations discourse, Boutros Boutros-Ghali pointed out in his *An Agenda For Peace* from 1992 that the foundation of peace promotion and conflict prevention would have to be the State (UN 1992 p. 5). Even as the changing conflict order was more explicitly reflected upon within United Nations discourse, Annan had stated that nothing would be less desirable than a world government, and that the main impediment to effective governance was the presence of weak states (UN 2000a p. 7).

To the importance which the discourse attributed the state certainly a plethora of historical reasons may be found; not least the weight of the Charter. Within the discursive field which concerns us here however, it is clear that human dignity and rights would find their embodiment, and even their prerequisite, in the institutional structure of the state apparatus (Deng *et al* 1996 p. 19; Paris Roundtable I 2001 p. 2; ICISS 2001 p. 14). As citizens, rather than as bearer of human rights, would the subject of the responsibility to protect be guaranteed of those "rights beyond borders" (Annan 1999d p. 40) of which Annan had spoken. The United Nations High-Level Panel on Threats, Challenges and Change, which in 2004 took up the ICISS's notion of responsibility to protect, explicitly stated that:

> What we seek to protect reflects what we value. The Charter of the United Nations seeks to protect all States, not because they are intrinsically good but because they are necessary to achieve the dignity, justice, worth and safety of their citizens. (UN 2004 p. 22)

Shortly thereafter, Kofi Annan expressed a similar sentiment in a United Nations report entitled *In Larger Freedom,* stating that "[i]f States are fragile, the peoples of the world will not enjoy the security, development and justice that are their right." (UN 2005 p. 6).

What then, would be implied by this notion of citizenship? Let us closer examine the so-called first pillar of the responsibility to protect, the state's responsibilities (see UN 2009 p. 8). A quick glance at the discourse through which this was formulated, the diverging formulations of how this responsibility was to be understood, and to what subject it corresponded, can be quickly gleaned. At times this responsibility was to be extended to the *citizens* of a state (Deng & Cohen 1998 p. 14; UN 2004 p. 56), at others, to the *populations* within the state's care (ICISS 2001 p. XI; 2005 World Summit Outcome p. 30; UN 2005 p. 35)[11]. The distinction is continuously glossed over, and the citizen and the bearer of human rights here enters a zone of indistinction[12] within the biopolitical care of

[11]Edward Luck had remarked on this distinction and personally favoured the more extensive 2005 World Summit extension of "population "(Luck 2012 p. 92).
[12]The term "zone of indistinction" is derived from Agamben and denotes there the indistinction of outside and inside in the state of exception (cf. 1998 p. 181)

the state[13]. No doubt could the distinction between population and citizen be rendered superfluous in this way, solely to the extent that the subject of the state would here be equated with the bearer of international humanitarian and human rights law. It would then be the latter which the doctrine would invoke, if only through re-inscribing the state.

While intervention, here understood as "action taken against a state or its leaders, without its or their consent" (ICISS 2001 p. 8), had been the focus of the ICISS-report, *prevention* of conflict and mass atrocities has been characterized as the central tenet of the responsibility to protect (ICISS 2001 p. XI; Thakur 2006 p. 257)[14]. Indeed, much resistance to military intervention was voiced both in the final report, which established very high thresholds for intervention, and in the roundtables leading up to the report (Paris Roundtable II 2001 p. 8; Geneva Roundtable I 2001 p. 2; Beijing Roundtable 2001 p. 1f). Already within the formulations of sovereignty as responsibility by Deng *et al*, and in the speeches by Kofi Annan from the late 1990s, had prevention been emphasized (Annan 1999a p. 8; Annan 1999d p. 41; Deng *et al* 1996 p. 26). Within United Nations discourse, the emphasis on prevention within the promotion of peace and security can be gleaned already from Boutros Boutros-Ghali's *An Agenda For Peace* from 1992 (UN 1992 p. 6f), and remains continuously emphasized (UNDP 1994 p. 38; UN 2000b p. 2, 5; UN 2000a p. 31). In 2001, Kofi Annan issued a report entitled *Prevention of Armed Conflict* (UN 2001), which was subsequently taken up in Security Council resolution 1366 from 2001 (UN Security Council 2001 p. 1). In it, the Council stressed "that the essential responsibility for conflict prevention rests with national Governments, and that the United Nations and the international community can play an important role in support of national efforts for conflict prevention and can assist in building national capacity in this field" (UN Security Council 2001 p. 3).

No doubt could conflict prevention receive the widespread support it did within the discourse through its emphasis on the state apparatus. Furthermore, conflict prevention, to a higher degree than intervention proper, could find support in the United Nations Charter (UN 2001 p. 9). However, while it was hoped that the re-inscription of the state and the global apparatuses of conflict prevention would obviate entirely the need for the decision on intervention (ICISS 2001 p. 19), and the subject of the responsibility to protect to subsequently remain hidden behind the citizen, the inscription of sovereign accountability to the international

[13]The biopolitical character of the doctrine's re-inscription of the state has been noted by both De Larrinaga & Doucet (2008 p. 531), Weber (2009 p. 583) and Duffield (2007 p. 121f). Cunliffe further noted that the responsibility to protect would inscribe state responsibility "*for* their people rather than *to* their people." (2011 p. 12, emphasis in original). Branch made a similar observation , noting that the responsibility to protect meant depriving the people themselves political agency (Branch 2011 p. 109)

[14]It has been argued that the 2005 World Summit Outcome represented a shift towards prevention from the ICISS, which arguably focused more on military intervention (Bellamy 2009 p. 4; Chandler 2011 p. 25f)

community necessarily meant that this subject would emerge at those times when the state would be as dissolved.

4.2.2 As Were the State Dissolved

As Agamben noted, the state of nature in Hobbes was considered in some sense internal to the state, revealed "at the moment in which the State is considered "as if it were dissolved" (*ut tanquam dissoluta consideretur* [Hobbes, *De cive*, pp. 79-80])." (Agamben 1998 p. 36). As we shall see, this formulation echoes many of the features of the institutional framework within which the subject of the responsibility to protect was inscribed.

Within the discourse here described, the state apparatus was not merely envisaged as the embodiment of an abstract and generalized notion of citizenship. Indeed, as we noted, within the responsibility to protect, the bearer of human rights and citizen here enters a zone of indistinction, and the former guaranteed only by seamlessly passing over into the latter. Only upon the interruption of this process at the mass level, would the collective international responsibility to protect be inscribed.

> […] the responsibility to protect acknowledges that the primary responsibility in this regard rests with the state concerned, and that it is *only* if the state is unable or unwilling to fulfill this responsibility, or is itself the perpetrator, that it becomes the responsibility of the international community to act in its place. (ICISS 2001 p. 17, my italics).

In the early formulations of sovereignty as responsibility by Deng *et al* (1996), it was explicitly argued that during internal conflict, "the affected population falls into a void of responsibility usually associated with sovereignty" (Deng *et al* 1996 p. 221). Within this void, where "death and suffering are being inflicted on large numbers of people, and when the state nominally in charge is unable or unwilling to stop it" (Annan 1999e p. 49), intervention would be inscribed. Within such an anomie, the subject of the doctrine would appear only temporarily; immediately to disappear within the citizen and enter the apparatus of the well-functioning state. Duffield had already remarked on the fact that the responsibility to protect as formulated by the ICISS would not constitute an apparatus of global citizenship, but would entail only "a short-term international substitution for a failed state until a local substitute can take over." (Duffield 2007 p. 123). Deng *et al*, on the subject of the institution of peace enforcement by the international community within a failed or collapsed state, explicitly saw the purpose of such actions as "to bring about a return to responsible sovereignty." (Deng *et al* 1996 p. 194). It was here emphasized that the responsibilities of conflict management and governance in these cases "may fall for a *limited time* on external agents." (Deng *et al* 1996 p.

207, my italics). As formulated by the ICISS-report, while intervention in accordance with the responsibility to protect would suspend the legal order of the sovereign state, "the suspension of the exercise of sovereignty is only *de facto* for the period of the intervention and follow-up, and not *de jure*." (ICISS 2001 p. 44). The subject of life which appears in relation to such measures by the collective international responsibility to protect, does so only within a legal anomie where the state remains in charge only nominally, and the rights of man accrue to no person[15].

While this relation becomes clear enough in relation to intervention proper, we saw that the preventive aspect of the responsibility to protect followed a similar logic. Here however, separating the disparate elements becomes problematic. Prevention, within the responsibility to protect and within the wider discursive field, had been articulated in relation to the deep structural causes of conflict (Annan 1999d p. 50f, 54; UN 1992 p. 6f; UN 2000a p. 31; UN Security Council 1999 p. 1; ICISS 2001 p. 21ff; UN Security Council 2001 p. 5; UN 2001 p. 7). As such, distinguishing between what would fall under conflict prevention proper, and what would fall under the general purview of the United Nations or "good governance" (cf. UN 2000 p. 15) in general becomes problematic. In the 2005 World Summit Outcome, it was explicitly stated that "development, peace, security and human rights are mutually reinforcing" (2005 World Summit Outcome p. 21). Indeed, within the discourse on prevention, economic development would become virtually inseparable from the prevention of mass atrocities and internal conflict (cf. Annan 1999d p. 52f; UN 2000a p. 33; UN Security Council 1999 p. 1). Similarly, many of the features of the work of the United Nations, including the issue of HIV/AIDS, were explicitly taken up as aspects of conflict-prevention (UN 2001 p. 28). In his 2001 report, *Prevention of Armed Conflict*, Annan however stated that:

> In this regard, I would like to draw a clear distinction between regular development and humanitarian assistance programmes, on the one hand, and those implemented as a preventive or peace-building response to problems that could lead to the outbreak or recurrence of violent conflict, on the other. (UN 2001 p. 7)

While this distinction becomes hard to make at the level of substance, already implied by the concept of conflict prevention is the potentiality of future conflict and state dissolution (cf. UN 2000b p. 2).

[15]No doubt Cunliffe referred to something similar in situating the responsibility to protect doctrine within what Slavoj Zizek had called an "ideology of victimization" (Cunliffe 2011p. 61). Similar observations have further been put forth by Branch (2011 p. 115). The curious notion of "rights of victims" (Bellamy 2009 p. 60) which Bellamy had talked about, here acquire an additional dimension. Indeed, the proximity between human rights and victimization within this discourse (cf. Annan 1999b p. 19), it seems, must be understood in relation to the legal anomie within which the former was inscribed.

To refer back to the quote by Hobbes which opened this section, we see that whether the preventive or the interventionist aspect of the responsibility to protect are discussed, the relationship between state and law is retained. Paradoxically, the international humanitarian and human rights law which the state was envisaged to uphold would be invoked precisely at the point at which it would no longer apply. While the doctrine was unique in challenging the exclusive coupling of state and responsibilities, what was envisaged was not a permanent substitute for the state, but a temporary and *de facto* assumption of the responsibilities normally associated with the state. The inclusion of life into the doctrine would at the outset be premised on its exclusion from the state apparatus and would, as the archaeological description showed, as such appear juridically indeterminate. Re-inscribing the principle of non-intervention as "the norm from which any departure has to be justified." (ICISS 2001 p. 31), such a justification would take on only the form of a decision within the legal indeterminacy of the international sphere[16].

4.2.3 The International Community and the Inscription of the United Nations

We shall now extend the analysis to the details of this decision, and a description of the institutional bodies upon whom it was invested. As we shall see, the inscription of the doctrine under the auspices of the United Nations institutional framework would be of particular importance.

It is important to note that the original formulation of sovereignty as responsibility by Deng *et al* (1996) was made outside the framework of the United Nations. Indeed, it was explicitly requested that the International Commission on Intervention and State Sovereignty (ICISS) would be held outside the purview of the United Nations (Axworthy 2012 p. 11). In this sense, one would pursue two convergent yet related lines: on the one hand the discursive origins of the responsibility to protect doctrine, and on the other the official discourse of the United Nations. As we shall see however, key to the genealogical analysis is the constant interaction of these two lines.

While Deng *et al* did not fully equate the international community with the United Nations institutional framework, it was clear that the latter would assume a particular status (Deng *et al* 1996 p. xxiii, 92), and was indeed explicitly encouraged to adopt the notion of sovereignty as responsibility (Deng & Cohen 1998 p. 15). Similarly, while the ICISS was ultimately hosted by the Canadian

[16]Orford in a similar vain seems to situate the decision within the doctrine at the point where civil war demands a protective authority vested at the international level (cf. Orford 2011 p. 137).

government rather than the United Nations, Lloyd Axworthy, who initiated the commission, would later state that:

> The ICISS proceeded on the assurances that the report of such a commission would be given serious acceptance at the highest levels of the UN. (Axworthy 2012 p. 11)

This said, neither the ICISS-report envisaged the international community as entirely exhausted by the United Nations framework, and the possibility was – however tentatively formulated – of unilateral action upon a failure to act by the UN (ICISS 2001 p. XIII, 53ff). As noted by Bellamy, the 2005 World Summit Outcome in contrast made no mention of coercive measures outside authorization by the Security Council (Bellamy 2009 p. 96).

Before more clearly outlining the United Nations institutional framework in relation to the responsibility to protect, it appears important to note the context of the United Nations in the post cold war order. In Boutros-Ghali's *An Agenda For Peace*, this event meant the opportunity to realize the Charter in its intended scope and fashion (UN 1992 p. 22). This was further reiterated in 2000 by Annan in his report *We The Peoples* (UN 2000a p. 31) and again taken up in the 2001 ICISS-report (ICISS 2001 p. 7). However, by the 2004 High-Level Panel, this optimism was no longer present:

> The moment was short-lived. It quickly became apparent that the United Nations had exchanged the shackles of the cold war for the straitjacket of Member State complacency and great Power indifference. (UN 2004 p. 18)

Acquiring political will on the part of Member States would indeed be an inherent aspect of the organization (cf. Annan 1999c p. 32). Already in Deng *et al* (1996), it was pointed out that the United Nations lacked the resources for effective implementation (Deng *et al* 1996 p. 190). In a speech at the Ditchley Foundation in 1998, Annan similarly pointed out that while legality could be provided by Security Council decision and resolution, the United Nations itself would not possess "the capacity for directing large-scale military enforcement operations." (Annan 1999a p. 12).

The post cold war context of internal conflict and mass atrocities introduced additional tension into the United Nations institutional framework, and Annan commented in *We the Peoples* from 2000 that "[w]e have not yet adapted our institutions to this new reality." (UN 2000a p. 6).

> If the international community were to create a new United Nations tomorrow, its make-up would surely be different from the one we have. (UN 2000a p. 52)

Paradoxically, as the doctrine was taken up by United Nations discourse through the High-Level Panel, *In Larger Freedom*, and the 2005 World Summit

Outcome, many features of the doctrine, it seems, were more closely bound to this very institutional framework. The structural weaknesses of the United Nations thus became in many respects those of the responsibility to protect. While this, as we shall see, was particularly the case in regard to the veto of the Security Council, the inscription of the doctrine within an inter-state institutional framework necessarily would entail a certain decisionary discretion and severe constrictions on implementation.

The latter, one should be clear, can be fully understood only in relation to a discursive structure which had at the outset refrained from inscribing international community responsibilities in relation to any legal subject. Indeed, as we shall see, measures under the international responsibility to protect were inscribed under international peace and security rather than human rights. To more fully outline these discursive developments, it will be necessary to describe how the Charter would figure within the discourse of the responsibility to protect.

4.2.4 The United Nations Charter

The convergence of the responsibility to protect doctrine and contemporary United Nations discourse may in many ways be characterized as the most decisive moment of the doctrine. Through it, the Charter would introduce novel tensions within the discourse, which we in the following we shall try to trace.

Already in the speeches on intervention by Kofi Annan from the late 1990s was the Charter established as the site of a considerable discursive struggle. In a 1998 speech at the Ditchley Foundation Kofi Annan noted that "Article 2.7 of the Charter protects national sovereignty even from intervention by the United Nations itself." (Annan 1999a p. 4). As strong as this prohibition was however, it had simultaneously been qualified by the possibility of enforcement measures under Chapter VII of the Charter in cases of threats to international peace and security (UN 1945 Chapter I Article 2.7 p. 3). As such, the Charter had left discursive room through which sovereignty as responsibility, and eventually the responsibility to protect, could be formulated in relation to it. As the 2004 High-Level Panel noted however, no provisions had been made in the Charter for the United Nations in terms of responding to internal conflict and state collapse (UN 2004 p. 69). International peace and security had traditionally been understood to refer to inter-state conflict, rather than to internal conflict and mass atrocities occurring within the borders of a sovereign state (cf. Annan 1999a p. 5; Deng *et al* 1996 p. 28; UNDP 1994 p. 3, 22). From the outset however, at the discursive level the direction favoured was extending the interpretation of "international peace and security", rather than amending or disregarding the Charter (cf. Annan 1999d p. 40). Annan took the stand that "[t]he Charter is a living document" (Annan 1999d p. 40), establishing the Charter as the site of a discursive struggle.

Subsequently, in 2000, he would state that ”[i]n the wake of these conflicts, a new understanding of the concept of security is evolving. (UN 2000a p. 31). Similarly, in his *Prevention of Armed Conflict* from 2001, it was argued that “with the end of the cold war, a new understanding of the concept of peace and security has emerged.” (UN 2001 p. 9). While the ICISS ultimately situated itself within this discourse (ICISS 2001 p. 50), much resistance existed and at the Beijing roundtable of the ICISS, the sentiment was that humanitarian intervention could receive no legal status from the Charter (Beijing Roundtable 2001 p. 1f). The issue was expressed succinctly at the London roundtable: “both supporters and opponents of humanitarian intervention make appeals to its norms.” (London Roundtable 2001 p. 1).

As has been noted (Thakur 2006 p. 250f), the ICISS was careful to distance its usage of the term ”intervention” from that of ”humanitarian”, so as to avoid ”militarization of the word” (ICISS 2001 p. 9). Indeed, despite employing a wide definition of intervention, military intervention would remain a logical possibility within the notion of an international responsibility to protect. While an option of last resort, as Annan put it, “in the face of mass murder it is an option that cannot be relinquished.” (UN 2000a p. 34). As such, the doctrine became bound to the provisions for the use of force under Article 42 Chapter VII of the Charter, and would be undermined by Article 2.7 without greatly extending the interpretation of “international peace and security”[17].

While the Charter would indeed become a living document, the discursive room inherent within it was not without bounds. While outright civil war and genocide might convincingly be argued to constitute threats to international peace and security, the ICISS exclusion of “human rights violations falling short of outright killing or ethnic cleansing” (ICISS 2001 p. 34) reflected the difficulties in extending this concept beyond its initial formation. Within the legal anomie where the international humanitarian and human rights law would no longer be upheld by the state as if dissolved, intervention as a measure of the international responsibility to protect would invoke the former solely as a threat to international peace and security.

4.3 The Decision

From the preceding description, it was noted how the collective international responsibility to protect would be inscribed within a legal anomie, and subsequently subject to a decision regarding the suspension of the non-

[17]The related discourse of human security, couched in the language of security rather than human rights, would follow a similar logic (see for instance UNDP 1994 p. 57)

intervention norm. As the doctrine would fall under the auspices of the United Nations, this collective responsibility to protect would be inscribed within the framework of the Charter, most notably intervention under Article 42 Chapter VII. The decision would in this sense accrue to the institutional framework of the United Nations, rather than the international community in any abstract sense. In the following, we shall try to outline this framework.

4.3.1 The Security Council

While the decision on the manifest failure of a state remained unqualified within the 2005 World Summit Outcome Document (Deller 2012 p. 82), the inscription of intervention under Article 42 Chapter VII of the Charter would by contrast attribute to such measures a clear deciding body.

Article 24 of the Charter attributed to the Security Council the ”primary responsibility for the maintenance of international peace and security” (UN 1945 Chapter V Article 24.1 p. 7). As already noted, it is perhaps one of the most notable and decisive events of the responsibility to protect that it was articulated within the area of peace and security rather than human rights. It was in fact with explicit reference to Article 24 of the Charter that the Security Council decision on military intervention was inscribed within the responsibility to protect doctrine through the ICISS (ICISS 2001 p. XI):

> There is no better or more appropriate body than the United Nations Security Council to authorize military intervention for human protection purposes. (ICISS 2001 p. XII).

Annan had noted in his *In Larger Freedom* from 2005 the increasing imbalance within the United Nations institutional structure as regards the Councils inscribed within the Charter (UN 2005 p. 41). At the expense of the others, the Security Council had since its inception, and particularly since the cold war, “asserted its authority “(UN 2005 p. 41). Upon Annan's recommendations in this report (UN 2005 p. 45), General Assembly resolution 60/251 established in 2006 the Human Rights Council to replace the Commission on Human Rights as a subsidiary organization to the General Assembly (UN General Assembly 2006 p. 2). It did not however possess any of the amount of power which the Security Council enjoyed. The unavoidable contingency of intervention within the responsibility to protect doctrine meant that the coercive means at the disposal of the international community would have to be inscribed under the mandate of the Security Council afforded it through the Charter, rather than the Human Rights Council which possessed no such authorities (UN General Assembly 2006).

As mentioned, Article 2.7 established the principle of United Nations non-intervention ”in matters which are essentially within the domestic jurisdiction of any state” (UN 1945 Chapter I Article 2.7. p. 3). It was here however simultaneously stated that “this principle shall not prejudice the application of enforcement measures under Chapter VII.” (UN 1945 Chapter I Article 2.7. p. 3). Article 39 of this Chapter gave the Security Council the authority to decide on threats to international peace and security and what actions should subsequently be taken (UN 1945 Chapter VII Article 39 p. 9). To this effect, Article 42 would authorize the Security Council to decide on military actions by the United Nations ”to maintain or restore international peace and security” (UN 1945 Chapter VII Article 42 p. 9). This was then the mandate of the Security Council.

In a speech at the Ditchley Foundation in 1999, Kofi Annan reflected on the ever present possibility of military intervention as a last resort of international community action in cases of “extreme violence” (Annan 1999a p. 10). The question then, at least rhetorically posed, was what body would assume the decision regarding such interventions. Referencing the Charter, Annan stated here unequivocally that:

> I would argue, therefore, that only the Council has the authority to decide that the internal situation in any State is so grave as to justify forceful intervention. (Annan 1999a p. 11)

While Article 42 was not yet explicitly discussed in relation to intervention in a sovereign state on protective grounds in *An Agenda For Peace* from 1992 (UN 1992 p. 12), *We The Peoples* from 2000 had more explicitly discussed the Security Council as the representative of the international community in the possibility of coercive intervention in cases of mass atrocities and egregious violations of human rights (UN 2000a p. 34). A similar sentiment had already been expressed by the Security Council itself in resolution 1265 from 1999 (Bellamy 2009 p. 61f). The Council had then expressed “its willingness to respond to situations of armed conflict where civilians are being targeted or humanitarian assistance to civilians is being deliberately obstructed, including through the consideration of appropriate measures at the Council's disposal in accordance with the Charter of the United Nations” (UN Security Council 1999 p. 3).

The ICISS inscription of the Security Council as the deciding body of the responsibility to protect thus situated itself within a discourse which had already extended the interpretation of the Security Council mandate (ICISS 2001 p. 50)[18]. As the responsibility to protect was taken up in the 2004 High-Level Panel, the Panel stated that:

[18]Indeed, on the subject of human security, the 1994 Human Development Report had already raised the possibility of extending the Security Council mandate to include as potential threats to peace ”economic and social crises.” (UNDP 1994 p. 84)

> […] step by step, the Council and the wider international community have come to accept that, under Chapter VII and in pursuit of the emerging norm of a collective international responsibility to protect, it can always authorize military action to redress catastrophic internal wrongs if it is prepared to declare that the situation is a "threat to international peace and security", not especially difficult when breaches of international law are involved. (UN 2004 p. 57)[19]

And as Annan endorsed the responsibility to protect in his 2005 report entitled *In Larger Freedom*, enforcement action by the international community was again inscribed with the Security Council (UN 2005 p. 33, 35). As the doctrine was affirmed by the international community at the 2005 World Summit Outcome, what had been at least a possible support for action outside the Security Council had disappeared (Bellamy 2009 p. 96; Chandler 2011 p. 22f). As Lloyd Axworthy would later put it: "Authority to decide was vested exclusively in the Security Council." (Axworthy 2012 p. 15)

Thus, by this time, the decision on intervention within the responsibility to protect doctrine was fully inscribed within the Security Council.

In the first formulation of the responsibility to protect by the ICISS, the decision on military intervention had been circumscribed by the establishment of a set of criteria. These included "*right authority, just cause, right intention, last resort, proportional means* and *reasonable prospects.*" (ICISS 2001 p. 32). While these were still present in the 2004 High-Level Panel (UN 2004 p. 58), they were absent in the 2005 World Summit Outcome (Bellamy 2009 p. 96). Whether Bellamy was correct in claiming that little difference would have been made by the presence of such criteria (Bellamy 2009 p. 3), it is clear that the 2005 World Summit Outcome emphasized the *case-by-case* character of the decision on intervention (2005 World Summit Outcome p. 30). As such, considerable decisionary discretion on the part of the Security Council was inscribed in the responsibility to protect[20]. The decision on the temporary and *de facto* suspension of the sovereignty of the "manifestly failing" state, would in this sense remain truly exceptional. In the absence of criteria, and in the absence of a judicially determinate subject, the responsibilities of the international community in relation to it would be subject entirely to the discretion of the Security Council.

[19]Security Council resolution 1973 which authorized actions under Chapter VII in Libya indeed determined the situation there to be a threat to international peace and security (UN Security Council 2011b p. 2f)

[20]In De Larrinaga & Doucet's account, this meant increased discretion on the part of the Security Council in distinguishing between biopolitically effective and ineffective states (De Larrinaga & Doucet 2008 p. 531; see also Duffield 2007 p. 122). Whether this contention is accurate, or the lack of criteria rather reflected a reluctance on the part of the international community to commit itself to undesired actions may be argued. The change of the threshold for intervention from "unable or unwilling" in the ICISS-report to "manifest failure" in the 2005 World Summit Outcome – a threshold Bellamy described as "significantly higher" (Bellamy 2009 p. 90) – would seem to point to the latter.

4.3.2 The Veto

This was further reaffirmed by the persistence of the veto power of the Permanent Five within the Security Council.

The question of the veto of the Permanent Five was, it seems, first raised within the discourse on the responsibility to protect in the ICISS-report. This introduced the notion of a *code-of-conduct* which would limit its use in matters which would not involve vital state interests of the Permanent Five (ICICC 2001 p. XIII, 51). However, it was simultaneously stated that:

> It is unrealistic to imagine any amendment of the Charter happening any time soon so far as the veto power and its distribution are concerned. (ICISS 2001 p. 51)

It is conceivable that as the responsibility to protect was taken up by the 2004 High-Level Panel, the subsequent entry of the doctrine into official United Nations discourse meant an increased reflection on the Charter in this regard. The report of the Panel thus stated matter-of-factly that:

> The United Nations was never intended to be a utopian exercise. […] The Charter of the United Nations provided the most powerful States with permanent membership in the Security Council and the veto. (UN 2004 p. 64).

Subsequently, as noted by Bellamy, the High-Level Panel had removed all reference to the *code-of-conduct* from the doctrine (Bellamy 2009 p. 75). And while the Panel urged the Permanent Five to ”pledge themselves to refrain from the use of the veto in cases of genocide and large-scale human rights abuses” (UN 2004 p. 68), it simultaneously acknowledged that it saw ”no practical way of changing the existing members’ veto powers.” (UN 2004 p. 68). Similarly, while discussing some of the suggestions of reform of the Security Council put forth in the High-Level Panel report, *In Larger Freedom* made no mention of the veto (cf. UN 2005 p. 42f). At the 2005 World Summit, scepticism was voiced by the Permanent Five on the subject of a *code-of-conduct* suggested by the ICISS (Bellamy 2009 p. 83), and in the paragraphs pertaining to the Security Council, no mention of it was made in the 2005 World Summit Outcome Document (2005 World Summit Outcome p. 32).

As should now be clear, the persistence of the veto power followed directly from the decision at the discursive level to situate intervention under the international responsibility to protect within international peace and security, in accordance with Article 42 of the Charter. As such, the decision would remain even more firmly embedded in *Realpolitik* and the power structure inherent therein. While Annan, in his 1999 article in the *Economist*, had urged the Security Council to “rise to the challenge” (Annan 1999e p. 50) of intervention in cases of

mass atrocities, the decision on whether it would do so was nevertheless left with it alone.

4.4 Legal Status

As the preceding analysis has shown, the decision was indeed inscribed within the doctrine. The question in this sense becomes what the nature of the collective international responsibility to protect was envisaged to be. The 2004 High-Level Panel had talked about the responsibility to protect as an:

> […] emerging norm that there is a collective international responsibility to protect, exercisable by the Security Council authorizing military intervention as a last resort, in the event of genocide and other large-scale killing, ethnic cleansing or serious violations of international humanitarian law which sovereign Governments have proved powerless or unwilling to prevent. (UN 2004 p. 57).

A frequent question within the secondary literature is to what extent this contention was accurate; whether such intervention really had or would aspire to the status of norm within international law (cf. Bellamy & Reike 2011 p. 82f; Stahn 2007 p. 101; Chhabra & Zucker 2012 p. 40; Orford 2011 p. 23).

4.4.1 Three Pillars and *Jus Cogens*

In his 2009 report entitled *Implementing the Responsibility to Protect*, Ban Ki-moon divided the doctrine into three pillars. The first pillar concerned the responsibilities of states towards their populations, the second to the assistance of the international community, and the third pillar to timely and decisive response in cases where the state had manifestly failed in its sovereign responsibilities (UN 2009 p. 8f). Following this division, the legal status of the constitutive aspects of the doctrine may be more easily ascertained (see Bellamy & Reike 2011 p. 88). On the subject of the first pillar, Bellamy & Reike stated that:

> These responsibilities are deeply embedded in existing international law, much of which is considered *jus cogens*. (Bellamy & Reike 2011 p. 83)

While the first pillar of the responsibility to protect could subsequently be considered *jus cogens*[21], much of the second, and particularly the third pillar, would instead be formulated in a *moral* language (cf. UN 2001 p. 35; UN 2000a p. 34; ICISS 2001 p. 33; Bellamy & Reike 2011 p. 83). Indeed, as secondary

[21]Refers to a peremptory norm within international law (Legal Information Institute)

literature has pointed out, while there exists now a legal framework for much of the crimes encompassed in the responsibility to protect doctrine, little refers to collective state responsibilities (cf. Chhabra & Zucker 2012 p. 54f; Bellamy & Reike 2011 p. 83, 87)[22]. Indeed, as Nicole Deller pointed out, the logic according to which the principle of responsibility to protect and that of international jurisdiction operates was envisaged as quite different (Deller 2012 p. 69).

The preceding description certainly mirrors several of these points. Discursively and institutionally, the direction favoured was to refrain from predicating the international responsibility to protect on any legal subject. Indeed, the temporary suspension of sovereignty in cases of gross violations of human rights would remain *de facto* rather than *de jure*, and subject to the *case-by-case* decision of the Security Council. The responsibilities of the international community would remain inscribed within a zone of indistinction between law and morality, or norm and "soft law", as Stahn denoted it (2007 p. 118). As we shall see, the codification of the four crimes by the 2005 World Summit did little to alter this state of affairs.

4.4.2 The Four Crimes

As already noted, the 2005 World Summit Outcome restricted the extension of the responsibility to protect to the four crimes: genocide, war crimes, crimes against humanity, and ethnic cleansing (2005 World Summit Outcome p. 30). As Ban Ki-moon famously state in his 2009 report *Implementing the Responsibility to Protect*:

> The responsibility to protect applies, until Member States decide otherwise, only to the four specified crimes and violations: genocide, war crimes, ethnic cleansing and crimes against humanity. To try to extend it to cover other calamities, such as HIV/AIDS, climate change or the response to natural disasters, would undermine the 2005 consensus and stretch the concept beyond recognition or operational utility; (UN 2009 p. 8)

While this certainly restricted the extension of the subject of the doctrine, it is arguable whether it did in fact impose new grids of specification on it. Whereas the adoption of the four crimes by the responsibility to protect doctrine may have mirrored those encompassed by the 1998 Rome statute of the ICC (Deller 2012 p. 69)[23], it also clear that the two were not coextensive. As Chhabra & Zucker pointed out:

[22]The ICJ judgment on Bosnia-Herzegovina v. Serbia did conclude that Serbia was guilty of not preventing atrocities in a neighboring country (Arbour 2008 p. 451).
[23]The exception here is "ethnic cleansing", which nevertheless to a large extent is assumed under the other three crimes of the Rome statute, and according to Deller was added to the responsibility to protect mainly for political purposes (Deller 2012 p.69)

> Whereas state responsibility typically requires ”systematic” and ”widespread” human rights violations, individual criminal liability can arise from a single incident. (Chhabra & Zucker 2012 p. 55)

Articles 6, 7 and 8 of the Rome statute wherein the crimes of genocide, crimes against humanity and war crimes are defined (ICC 1998 p. 3-9), are substantially wider than anything inscribed within the responsibility to protect discourse (cf. Deller 2012 p. 69). It is in this sense questionable whether the 2005 World Summit Outcome fundamentally redefined the subject of the responsibility to protect from its initial discursive formulation. While perhaps situated within the same discursive field, the Rome statute and the responsibility to protect doctrine would operate under distinct discursive rules of formation. The legal framework of the former would in this sense paradoxically be invoked without being attributable to any clearly defined legal subject.

5 Conclusion

The question which opened this essay was how the vestment of the final responsibility for the protection of human rights by the responsibility to protect doctrine, nevertheless meant that this responsibility – in cases where mass violations of human rights were indeed noted to occur – could remain subject to a decision. Through the genealogical tracing of the diverse strands of the doctrine, and through an engagement with the theoretical framework of Schmitt and Agamben, an answer to this question may now be articulated.

5.1 The Decision within the Responsibility to Protect

Through the works of Schmitt and Agamben, the decision as a mark of power was theorized as the ever present possibility of the force of law to transcend the legal order. In the decision, the force which supports law distinguishes itself from its substance, and applies without prescribing anything (cf. Agamben 2005 p. 38f). In the words which Schmitt used to denote the state of exception, "the state remains, whereas law recedes." (Schmitt 2005 p. 12). The decision in this sense signifies a particular relation of power wherein fact and law becomes indistinguishable.

Through the adoption of Foucault's archaeological machinery, the subject of life upon whom the responsibility to protect doctrine was premised was shown to have emerged against the pernicious internal conflicts of the post cold war order. A life devoid of those human rights for which the state was thought to find its *raison d'etre* (UN 2005 p. 35) now revealed itself as a mass phenomenon. In relation to it, the responsibility to protect would construct from an assemblage of heterogeneous elements the edifice which would capture this life. Within it, the threshold between state and international community, right and fact, between *de jure* and *de facto* authority, inclusion and exclusion, would be articulated, and signify the passage of citizen into the subject of the responsibility protect.

These thresholds, while marking a sphere of legal anomie associated with the dissolved state, would not however signify the absolute passage from right to fact. As Bellamy & Reike would put it, the collective international responsibility to protect would not be "entirely devoid of legal content." (Bellamy & Reike 2011 p. 100). The sphere within which the doctrine would inscribe the collective

international responsibility to protect would rather mirror that of the state of exception, in the sense in which Agamben understood it. In neither case represents such a state one of pure fact, "since it is only created through the suspension of the rule." (Agamben 1998 p. 18). The doctrine would articulate rather a relation of true exception. The legal framework of international humanitarian and human rights law would here be inscribed as the normal legal order of the state, and invoked by the responsibility to protect precisely within the void of responsibilities where the latter would no longer uphold it. The "rights" of the genocide victim or the victim of ethnic cleansing can here ascribe to no person, and life becomes captured by a *dispositif* of power where right and fact become truly indistinguishable.

As such, intervention as a measure of the responsibility to protect would here remain a *de facto* rather than a *de jure* assumption of the responsibilities normally associated with the state precisely *in the name of the law which it cannot truly uphold and must reinstate through the State*. Eschewing the notion of a world government, such measures would never be envisaged as anything beyond a temporary and *case-by-case* substitute for the state apparatus (cf. Duffield 2007 p. 123). The inscription of such measures under the mandate of the Security Council – for the maintenance and restoration of international peace and security – can be fully understood only in relation to this structure. Through it however, the decision would acquire a clear institutional embodiment and remain subject to the discretion of the Permanent Five.

While this description in part mirrors that of Orford's account of the decision, the latter may now be understood not merely as a question of authority, but as the inscription of a relation of power at the discursive and institutional level. Where non-intervention would remain "the norm from which any departure has to be justified" (ICISS 2001 p. 31), and where such a justification would be articulated in relation to the rights of an indeterminate multiplicity, only the force of the law would be inscribed beyond the frontiers of the state. Within the zone of indistinction between fact and law within which the responsibility to protect was inscribed, life truly becomes *bare*, and the decision of the Security Council would take on only the form of a decision on whether such a state of affairs would be sustained. Where it would be allowed to do so, if only by the veto of the Permanent Five, the sovereignty of whomever acts within it truly knows no bounds, and life may be disallowed to the point of death.

What has been described here would indeed reveal itself in the case of Syria. Two draft resolutions by the Security Council from 2011 and 2012 noting that gross and systematic human rights violations where currently occurring in Syria (UN Security Council 2011c p. 2; UN Security Council 2012a p. 2) were vetoed by China and Russia (UN Security Council 2011d; UN Security Council 2012b). A further draft resolution from 2012, characterizing the situation as a threat to international peace and security (UN Security Council 2012e p. 2), was again

vetoed by China and Russia (UN Security Council 2012f). While resolutions 2042 and 2043 where subsequently adopted, no mention was made to measures under Chapter VII, and only a small number of unarmed military observers would be deployed (UN Security Council 2012c; UN Security Council 2012d).

These events, rather than signifying temporary lacunas of the doctrine, must be understood in light of the findings of this essay to signify a general which had allowed them. Inscribed within a relation of exception, and in relation to a life as bare, the decision would remain an ever open possibility within the doctrine. The aspirations of the responsibility to protect would be violated only by this possibility, inscribed within the very doctrine which had formulated them.

5.2 Discussion

The essay will be conluded by offering some brief reflections on methodology and theory in light of the findings presented here. Some yet unresolved questions will be presented to which future studies on this issue may provide som answers.

5.2.1 Reflections on Methodology

The adoption of Foucault's overarching genealogical description of relations of power at the outset corresponded to a particular set of methodological problems. Through it, the diverse elements of the decision could be described in terms of a structural relation rather than as historicist essences. It allowed a description of a relation of power not immediately transposable to those of neocolonialism or *Realpolitik*. It allowed a description of examples such as those of Syria and Darfur not as signs of something always external to the doctrine, but rather of the internal structure which had allowed them. The question of implementation, bound to the structural weaknesses of the Security Council or Member State political will within the United Nations, could thus be supplemented by an account of the conditions of possibility which nevertheless allowed the inscription of these elements within the doctrine. Similarly, while the significance of the geographical dimensions of the surfaces of emergence through which the discourse on the responsibility to protect emerged remains an important question (cf. Branch 2011), and a post-colonial theoretical dimension on the genealogical history of the doctrine may have extended the present findings, it was possible to describe the decision as an unique mechanism of power, irrespective of its place within a wider field of power.

As was noted in the methodological discussions, the genealogical description would not concern itself *a priori* with the overarching strategic function of the specific relations constituting the decision. Mirroring the foucauldian description of power, the aim was to resist describing power in terms of intentions and strategies; to describe instead the very localized mechanisms through which it functions (cf. Foucault 2003 p. 28ff). It could subsequently be shown that the relation of power inscribed within the doctrine, in contrast to the sweeping accounts of Duffield and De Larrinaga & Doucet (cf. Duffield 2007 p. 122; De Larrinaga & Doucet 2008 p. 531, 534), were articulated through discursive struggle and piecemeal accumulation of heterogeneous elements. While the accounts of Duffield and others may afford important insights to the general field within which the doctrine figures, we saw the functioning of the decisionist power inscribed within it to not be merely a manifestation thereof. Whatever degree of truth should be attributed to the criticisms of neocolonialism or imperialism within the doctrine, the focus here was on the anonymous form of power inscribed within the decision; a form of power perhaps ultimately without design or intent on the part of the powerful.

Nevertheless, it may be necessary, in order to fully understand the implications hinted at in this essay, to direct ones attention also to the global order within which the doctrine is situated.

5.2.2 Reflections on Theory

The overarching question within which this essay was situated was that of the status of rights within the international sphere. While limited to the scope of the decision within the responsibility to protect, the genealogical methodology would continuously emphasize the discursive and institutional field within which it was inscribed. Whether the doctrine should be considered ultimately to have failed in being implemented beyond its discursive articulation thus was not the concern of this essay. What was of interest, as stated at the outset, was what conditions of possibility would allow it to articulate a certain relation of rights and power.

While, as was mentioned, theoretically and methodologically, the focus of the essay was on the interventionist aspect of the doctrine, a description of the intervention itself was excluded. That is to say, what concerned us was not those instances where the rights of man would settle on the ground with the presence of foreign troops. In part, this followed from the general silence on these issues within the discourse studied, in part, this question was beyond the scope of the purpose of this essay. The question of what relation to legality such a state of affairs would represents constitutes a particularly relevant question in light of the findings of this essay.

The theory of the state of exception from which this essay departed, envisaged the decision as the establishment of the order upon which law would apply (cf. Agamben 1998 p. 19). The question of the complex relation between the decision within the responsibility to protect as described here, and the notion of law within the international sphere, in this sense remains. Whether the decision of the responsibility to protect, inscribed as it was at the outset within the deprivation of a form of law which would apply only through the state apparatus, in any sense parallels that of the decision on the state of exception as articulated by Schmitt in this regard, similarly remains an open question. If such is the case, the question becomes what relation exists between the decision within the responsibility to protect, and a notion of order at the global or international level. No more does this question apply to the decision on intervention than the decision on non-intervention. While many similarities exists between the decision within the responsibility to protect, and the decision on the state of exception as articulated by Schmitt and Agamben, as this essay could show, the former would represent something quite different in being at the outset inscribed within a veritable state of exception yet invoking the legal framework of human rights.

The notion of rights within the international sphere has, its seems, yet to be fully understood. While a partial answer, this essay sought to show the precarious lineage of rights beyond borders within which the responsibility to protect was ultimately formulated. Morality and ethics, this essay has argued, may in the end provide little in the way of an equivalents to rights. Until such a time as a more fully articulated answer can be given to these questions, the notion of human rights may risk continuously re-inscribing its own failures.

6 Executive Summary

From the works of Francis Deng *et al* and Kofi Annan, the International Commission on Intervention and State Sovereignty (ICISS), hosted by the Canadian government in 2001, would take up the redefinition of sovereignty forwarded by these authors, and articulate from it what would become the responsibility to protect doctrine. As it would prescribe, the inability or unwillingness of a state to protect its population from mass violations of human rights associated with genocide, ethnic cleansing, crimes against humanity and war crimes, would signify the suspension of the norm of non-intervention, and the passing of the responsibilities normally associated with the state to the international community. Through it, so it was thought, human rights would find their permanent guarantor, irrespective of the borders of sovereign states.

As the doctrine was taken up and ratified at the 2005 World Summit Outcome, and subsequently reaffirmed by United Nations resolution 1674, inaction in Darfur and Syria would nevertheless reveal a decisionary discretion inscribed within it. Despite the invocations of the inviolability of human dignity and inalienable rights which accompanied the doctrine's emergence, the decision had remained and would here be exercised in relation to the rights of life itself.

Bracketing the question on the doctrine's implementation, the purpose of the present essay was to instead return the question on the decision on action by the international community to its proper place as the functioning of power. It was to query how such a possibility could have remained, and what it meant for the doctrine that it had done so. To ask, not whether intervention in Darfur or Syria should in fact have taken place, but how in the first place the decision on whether or not to do so could remain a possibility within the doctrine. Departing from the theory of the sovereign decision by Carl Schmitt, the research question was formulated: *as a decision on intervention grounded in international humanitarian and human rights law, what relations of power are inscribed within the responsibility to protect doctrine such that the decision would remain possible?*

The decision as a mark of power had received a juridico-political explication through Carl Schmitt's famous *Political Theology*. In it, the decision on the state of exception would signify a particular relation of power, here defined as sovereign. In such a relation, the force which upholds and supports the letter of the law separates itself from the latter, if only to bring about the state of affairs within which it can again apply. The decision in this sense, signifies an indeterminacy of law and non-law, fact and right, *de jure* and *de facto* authority.

Through the works of Giorgio Agamben, this relation was extended to incorporate the processes of subjectification whereby life becomes related to law. Revealing the figure of *bare life*, Agamben could show that in relation to a subject devoid of legal-political status, such an indeterminacy would characterize the sovereign power exercisable over it.

As the responsibility to protect had revealed a decisionary discretion in relation to the very form of life upon whose protection it was premised, the question was what it meant that the decision to abstain from action, such as in the cases of Syria and Darfur, could remain. What original inscription of life and rights had constituted the foundation of the doctrine, such that this possibility could have remained? In this sense, one would ask not regarding the failures or lacunas of the doctrine's implementation, but the original inscription of a relation of power between such a subject of life and a deciding body, such that this decision would remain a possibility, if only through the persistence of *Realpolitik* and the veto of the Security Council Permanent Five.

Mirroring the studies of power undertaken by Michel Foucault, a methodological framework was constructed, drawing on both Foucault's archaeological and genealogical machinery, whereby the relation of the decision inscribed within the responsibility to protect doctrine could be described. Adopting the foucauldian concept of the apparatus (*dispositif*) of knowledge/power, one would describe the relation of the decision as the articulation of discursive and institutional elements. One would through it describe a process of subjectification and the articulation of a relation of power between a subject of life and the decision on the suspension of the norm of non-intervention.

As the archaeological description could show, the subject of the responsibility to protect emerged against the discursive surfaces of internal conflicts, which had proliferated in relation to inter-state conflict during the last decades of the twentieth century. The grids of specification of this discourse categorized this subject at the outset as a mass phenomenon, and the ICISS establishment of thresholds beyond which the non-intervention norm would be suspended had been articulated exclusively as "large scale" killing. Expanding the genealogical description to the institutional framework of the doctrine, what was first noted was the re-inscription of the state. Through the apparatus of the state, international humanitarian and human rights law would find its institutional embodiment, and *only* upon the failure of the state to guarantee this legal framework, would the collective international responsibility to protect come into play. As the history of the doctrine would progress, its institutional make-up would become more closely bound to that of the United Nations, rendering the latter and the international community virtually synonymous terms.

The United Nations Charter would thus be established as the site of a discursive struggle upon which the institutional articulation of the doctrine would

depend. Inscribing the collective international responsibility to protect under coercive measures under Chapter VII of the Charter, the mandate of these measures would have to be expanded to encompass under the umbrella of "international peace and security" internal conflict and mass violations of human rights. While the Human Rights Council was established in 2006 to replace the Commission on Human Rights, it did not possess the authority to authorize coercive measures in the protection of human rights in a sovereign state. Such measures would instead remain under the mandate of the Security Council. This would become then the deciding body of the responsibility to protect. As ultimately codified by the 2005 World Summit Outcome Document, the decision on intervention by the international community would remain the exclusive prerogative of the Security Council, and contrary to the suggestions put forth by the ICISS, was to be made on a *case-by-case* basis, circumscribed neither by criteria nor restrictions on the veto of the Permanent Five.

The decision would then indeed prove to be inscribed within the doctrine itself. As a response to the emergence of a novel subject of the post cold war conflict order, the doctrine would construct from an assemblage of heterogeneous elements an edifice envisaged as a layered system of responsibilities. Within it, the threshold between state and international community, right and fact, between *de jure* and *de facto* authority, would be articulated. These would mark the passage of the citizen into the subject of the responsibility to protect, signified by the dissolution of the state apparatus and the substance of human rights law. At the outset, and following the re-inscription of the state, the relationship between the state and law would thus be retained. The responsibility to protect would from its inception be inscribed within the legal anomie where international humanitarian and human rights law would no longer be upheld by the state apparatus. Indeed, the *raison d'etre* of the doctrine would be the ever present possibility of the state faltering in its responsibilities.

What was envisaged was not however a collective international responsibility inscribed entirely in a relation of pure exteriority to law, for here law would be invoked by the doctrine precisely in its deprivation. Only as an exception would international humanitarian and human rights law appear, temporarily, outside the state, ascribing to a subject who would appear only as a multiplicity the "rights" of the victim of genocide or ethnic cleansing. Within such a relation of exception, intervention by the international community could take only the form of a *de facto* suspension of the sovereignty of the state, paradoxically doing so precisely in the name of the law which it cannot truly uphold. Here, law and fact become indistinguishable, and life becomes *bare*, subject to a decision of the Security Council. While never truly capable of upholding human rights beyond the temporary suspension of the sovereignty of the state in question, the decision of the Security Council would remain radically indeterminate. At its extreme, if only through the veto of the Permanent Five, it may sustain the legal anomie wherein it

was inscribed. In these instances, the sovereignty of whoever acts within it truly knows no bounds, and the decision may disallow the life upon whose protection the doctrine was premised, to the point of death.

The failures and lacunas in the implementation of the doctrine must thus be understood in relation to the general which had allowed them. This general, furthermore, must be understood within the wider context of rights beyond borders within which the doctrine of the responsibility to protect was formulated.

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