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R2P: Activating the International Community's Responsibility to Protect by Shifting Focus Away from Collective Action by the Security Council Towards Early Warning and Prevention

Monique Law

Abstract

The responsibility to protect (R2P) is an expression of policy which aims to prevent mass atrocities or stop them if they are underway. Consensus on the international aspect, which includes when states can or should intervene to protect citizens other than their own, remains elusive. An observer might well conclude that R2P is a noble idea which is short on effectiveness. This article will examine whether R2P can lift off and move from theory to practice. How R2P has developed to date will be considered first, then the obstacles that have hindered its progress and how these might be circumvented. The final focus will be on the elements which need to come together for R2P to be activated. The conclusion will be reached that R2P can only gain real traction by looking past the Security Council to other bodies, within and outside the UN, to work together at the early warning and prevention stage. Consensus on if and when states can intervene militarily to protect is as distant as ever. It will also be concluded that R2P remains a policy aspiration and will not crystallise into a legal norm in the foreseeable future.

Introduction

R2P was an idea born out of the worst of circumstances with the best of intentions. Its objective is to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. While it is generally recognised that prevention of these crimes, including their incitement, by each state within its own borders is the vital and central aim,¹ there has been disproportionate attention drawn to the international elements of the principle, in particular the scope for intervention into another state's affairs. Indeed, there has been a plethora of debate, UN policy documents and academic writing since R2P's first incarnation in 2001². However, fifteen years later, there is little and controversial state and Security Council (Council) practice. The response of the Council to the humanitarian crisis in Libya in 2011 has been used by proponents of R2P to advance their cause and simultaneously by detractors to support their view. The Council's approach in the face of 'massive evidence that war crimes and crimes against humanity had been committed'³ in Syria has exposed the limitations of the principle.

¹ cf Thomas Weiss: 'it is preposterous to argue that to prevent is *the* most important priority; the most urgent priority is to react better...ICISS's discourse about prevention is a helpful clarification, but it nonetheless obscures the essence of the most urgent part of the spectrum of responsibility: to protect those caught in the crosshairs of war.' *Humanitarian Intervention* (Polity Press, Cambridge 2012).

² *The Responsibility to Protect*, ICISS, (International Development Research Centre for ICISS, Ottawa 2001)

³ High Commissioner Navi Pillay informing the Council on 2 December 2013, *Syria Chronology of Events: Security Council Report* www.securitycouncilreport.org/chronology/syria.php accessed: 24.09.16.

The background and development of R2P, and what the principle means today, will be reviewed initially. A consideration of UN policy documents, Council practice and academic writing will show that while the primary responsibility of states to look after their own populations is undisputed, the international responsibility - both to help prevent and if it is too late for that, to intervene in a 'timely and decisive manner'⁴ - remains problematic. Where R2P sits within other UN protection mechanisms and initiatives will be considered, as these have the potential to be a positive or a negative influence by working in synergy with R2P or obstructing its implementation.

It will be seen that the UN Charter provisions on intervention and use of force act as a legal brake on unilateral action⁵ by states and that the right to veto restricts the Council. Without developments in either or both of these areas, the international element of the responsibility to protect appears inherently flawed in that it does not have the capacity to be fully realised in its current formulation. As amendments to the Charter and restraint on the exercise of the veto appear exceedingly unlikely, alternative ways in which R2P may progress will be assessed. These will be brought together in a final review of the key elements which need to align for R2P to be activated.

Where there has been manifest failure by a state to protect its population, R2P has not permeated Council thinking in any meaningful, positive way. There seems little likelihood it will do so while Council structure and *realpolitik* remain unchanged. The conclusion will be reached that R2P can only gain real traction by looking past the Council to other bodies, within and outside the UN, to work together at the early warning and prevention stage. It will also be concluded that state practice and *opinio juris* point firmly against crystallisation into a legal norm; instead, they point towards an understanding that R2P must be accepted as a policy aspiration that provides a moral, not a legal, impetus to act.

The birth of R2P

R2P emerged from an ongoing dialogue as to whether it was ever permissible for a state to intervene militarily into another state's territory to either prevent mass atrocities or stop those which were underway.⁶ Article 2(4) of the UN Charter prohibits the threat or use of force with only two exceptions: actions mandated by the Council under Chapter VII and states acting in individual or collective self-defence within the tight limitations of article 51. While claims have been made for a humanitarian exception, this is controversial and not the majority view.⁷ However, in circumstances where the Council determines that a situation constitutes a threat to the peace, action may be taken under Chapter VII to maintain or restore international peace

⁴ 2005 World Summit Outcome, (WSO), adopted by the Assembly on 24 October 2005, A/RES/60/1, para 139.

⁵ Including collective action.

⁶ ICISS (n2), Foreword.

⁷ Yoram Dinstein, *War, aggression, and self-defence* (5th ed Cambridge University Press, Cambridge, 2011) 73-75, paras 195 -198.

and security.⁸ This may allow for an intervention on protection grounds, as was the case in Libya in 2011.

Francis Deng, then Representative of the Secretary-General on Internally Displaced Persons, introduced the idea of a responsibility to protect in guidelines on Internal Displacement published in 1998.⁹ The first full conception was put forward by the International Commission on Intervention and State Sovereignty (ICISS) in 2001 in answer to a call by Secretary-General Kofi Annan to the international community. The 1990s had seen the failure of the UN to act against genocide in Rwanda in 1994 and at Srebrenica, in Bosnia and Herzegovina, in 1995. Reports highly critical of the UN in respect of Rwanda¹⁰ and Srebrenica¹¹, were published in 1999, the same year as NATO intervened in Kosovo without an explicit Council mandate. Against this backdrop, Annan hoped the international community could come to a consensus on how to reconcile the conflicting pulls of, on the one hand, intervention without consent¹² to protect people at risk of, or subject to, atrocities and, on the other, sovereignty which militates against intervention.¹³

What R2P means

R2P is an expression of policy, its scope set out in paragraphs 138 to 140 of the 2005 World Summit Outcome (WSO).¹⁴ Each state has the responsibility to protect its own population from genocide, crimes against humanity, war crimes and ethnic cleansing and if it manifestly fails to do so the international community has a subsidiary responsibility to protect.

The primary responsibility to protect is generally accepted by states.¹⁵ Reference to a state's responsibility to its *own* population does not represent any innovation in international law. However, although the description 'the emerging norm of a collective responsibility to protect' was used by the Secretary-General's High Level Panel as early as 2004, this was not

⁸ Charter of the United Nations 1945 (UN Charter), article 39.

⁹ Principle 3 'National authorities have the primary duty and responsibility to provide protection and humanitarian assistance to internally displaced persons within their jurisdiction' *Guiding Principles on Internal Displacement* (E/CN.4/1998/53/Add.2).

¹⁰ *Report of the Independent Inquiry into the actions of the United Nations during the 1994 Genocide in Rwanda*, S/1999/1257(1999).

¹¹ *Report of the Secretary-General pursuant to General Assembly Resolutions 53/35 The fall of Srebrenica* A/54/549(1999).

¹² Whether this is by enforcement action under Chapter VII, UN Charter or unilateral intervention by one or more states.

¹³ ICISS (n2), Foreword.

¹⁴ WSO (n4).

¹⁵ The Constitution of the Russian Federation, Article 2, 'Man, his rights and freedoms are the supreme value. The recognition, observance and protection of the rights and freedoms of man and citizen shall be the obligation of the State.' <http://www.constitution.ru/en/10003000-02.htm>, accessed:23.09.16; Constitution of the People's Republic of China, Article 4, '...The State protects the lawful rights and interests of the minority nationalities and upholds and develops a relationship of equality, unity and mutual assistance among all of China's nationalities.... and Article33,'The State respects and preserves human rights.' http://www.npc.gov.cn/englishnpc/Constitution/node_2825.htm, accessed:23.09.16. The Kingdom of Saudi Arabia, Article 10,'The State shall strive to...protect and take care of all its individuals...and Article 26,'The State will protect human rights according to the norms of the Islamic Shari'a.' (1993) 8 Arab L Q 258.

recognition of a new norm but rather an acknowledgement of what was already the status quo.¹⁶ If there are ‘catastrophic internal wrongs’ that constitute a threat to international peace and security, the Council can authorise military action under Chapter VII.¹⁷ The international aspect of R2P is not a legal norm; there is neither sufficient state practice nor *opinio juris* to support it as such.¹⁸

How R2P has developed

Secretary-General Ban Ki-moon’s 2009 report ‘Implementing the responsibility to protect’ (2009 Report) set out a three-pillar strategy for advancing the agenda set out at the World Summit.¹⁹ This expanded on the brief paragraphs in the WSO and envisaged a three-pronged approach towards a single objective of operationalizing the responsibility to protect. The three elements of the strategy were intended to be complementary, not sequential and of ‘equal size, strength and viability’.²⁰

Pillar one is the primary protection responsibility of each state:

The responsibility to protect, first and foremost, is a matter of state responsibility, because protection begins at home and the protection of populations is a defining attribute of sovereignty and statehood in the twenty-first century.²¹

Pillars two and three cover what is acknowledged as, at best, the supplemental role of the international community.²² Pillar two covers the international assistance²³ and capacity-building²⁴ elements and pillar three, ‘timely and decisive response’²⁵ by the international community when prevention falls short and there is manifest failure to protect.

The scope of what was described as Pillar three had been tightly delineated in paragraph 139 of the WSO as ‘the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the Charter’ along with readiness: to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with regional organizations as appropriate, should peaceful means be

¹⁶ *A more secure world: our shared responsibility*, Report of the Secretary-General’s High-Level Panel, A/59/565(2004), paras. 202&203.

¹⁷ UN Charter (n8).

¹⁸ Spencer Zifcak ‘The Responsibility to Protect’ in Malcolm D. Evans (ed) *International Law* (4th ed Oxford University Press, Oxford 2014) 510.

¹⁹ *Implementing the responsibility to protect*, Report of the Secretary-General, A/63/677, 2009.

²⁰ *Ibid* 2.

²¹ *Ibid* 10, para 14.

²² *Ibid*.

²³ WSO (n4) para 138 ‘The international community should (...) encourage and help’.

²⁴ *Ibid* para 139 ‘helping States build capacity to protect’.

²⁵ 2009 Report (n19) 2.

inadequate and national authorities manifestly fail to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity.²⁶

This emphasises that any action which would be a use of force under article 2(4) must be undertaken through the Council and not unilaterally (whether by individual states or collectively).

While the Council has this primary role, the General Assembly (Assembly) was tasked by the WSO with continuing consideration of the principle and its implications, and the extent to which it has done so will be considered further below.²⁷

In R2P's evolution from the ICISS conception in 2001 through to the text agreed by states at the World Summit in 2005, innovative elements were lost. ICISS saw the re-characterisation from a 'right to intervene' to a 'responsibility to protect'²⁸ evolving from the acknowledgement of an internal as well as an external aspect of sovereignty. States not only respect each other's sovereignty (external) but also 'the dignity and basic rights of all the people within the state' (internal), that is, 'sovereignty as responsibility'.²⁹

ICISS anticipated that a set of precautionary principles would be considered before a military intervention for human protection purposes was undertaken and hoped that the permanent five members of the Council would agree to temper their use of the veto. ICISS also envisaged that if the Council failed 'to discharge its responsibility to protect in conscience-shocking situations crying out for action' states may take matters into their own hands.³⁰

These elements did not survive; what is left is a policy statement grounded and delineated by international law. However, despite agreement by consensus in 2005, both the scope of the policy and its implementation continue to be discussed. The 2012 Report of the Secretary-General's Internal Review Panel on United Nations Action in Sri Lanka (Sri Lanka Report) noted that '[d]iffering perceptions among Member States and the Secretariat of the concept's meaning and use had become so contentious as to nullify its potential value' and that referring to it was more likely to weaken UN action than strengthen it.³¹

Looking at what the principle means today, a review of the statements of the thirty-nine states and groups of states which participated in the Thematic Panel Discussion on 26 February 2016,

²⁶ WSO (n4) para 139. The words echo 'manifestly failed' in para 430, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, Judgement, I C J Reports 2007 43, 220.

²⁷ WSO (n4) para 139.

²⁸ ICISS (n2), 11, para 2.4.

²⁹ *Ibid* 8, para 1.35.

³⁰ *Ibid* XII and XIII, 'Principles for Military Intervention'.

³¹ November 2012, 26, para 74, <http://www.un.org/News/dh/infocus/Sri Lanka/The Internal Review Panel report on Sri Lanka.pdf> accessed: 18.11.16. The Secretary-General appointed a Panel of Experts to advise him on accountability during the war in Sri Lanka's final stages and its memorandum, which "described the failure to act by Member States as a low mark for the UN", prompted the establishment by the Secretary-General of the Internal Review Panel. (4, paras 1 and 2).

to mark the tenth anniversary of the adoption of R2P at the World Summit, shows that criticisms articulated during the principle's conception still linger.

The scope for intervention is a key concern: '[the international community] cannot violate respect for sovereignty by providing interference in internal affairs' (China)³² and:

[W]e still, and as much as many other countries, have legitimate concerns that the notion of Responsibility to Protect may be manipulated for political objectives aimed at intervening in the internal affairs of some member states. (Egypt).³³

There are also questions over how R2P interacts with existing mechanisms:

[W]e would like to ask why the international community shouldn't rely on existing mechanisms such as the annual periodic reviews in the UNHCR to serve as the international community's early warning and preventative systems against atrocity crimes (India)³⁴ and:

We would be interested to hear your thoughts on the operational interplay and synergies, both in New York and at the national level, between the implementation of the responsibility to protect and other similar concepts, for example Protection of Civilians, Early Warning, Atrocity Prevention, International Criminal Justice? (Nordic countries).³⁵

'International R2P': towards a legal norm?

Before moving to how the principle has been put into practice, its status – whether it has developed into more than simply a policy statement – will be briefly discussed.

Prima facie, it might seem that R2P would be strengthened if, through state practice and *opinio juris*, it developed into a legal norm and thereby had more than a moral imperative. Without crystallising into a legal norm, the fundamental notion of responsibility bringing with it obligations cannot come into play; there is then no accountability for failure to meet an international responsibility.

It is apparent that R2P is hardly off the starting blocks in this respect. States, principally but not exclusively China, consistently reaffirm the need for respect for a state's sovereignty, which blocks interventions without consent.³⁶

The ICJ noted, in the *Prevention and Punishment of Genocide* case, that 'the duty to prevent places states under positive obligations, to do their best to ensure that such acts do not occur'.³⁷

³² General Assembly, Seventieth Session, Thematic Panel, GA/11764, 26 February 2016 www.globalr2p.org/media/files/china-26-feb.pdf, accessed: 15.11.16.

³³ *Ibid* www.globalr2p.org/media/files/egypt-26-feb.pdf, accessed: 15.11.16.

³⁴ *Ibid* www.globalr2p.org/media/files/india-26-feb.pdf, accessed: 15.11.16.

³⁵ *Ibid* www.globalr2p.org/media/files/denmark-nordic-countries-26-feb-1.pdf, accessed: 15.11.16.

³⁶ S/PV.6498 (17.03.11) 10.

³⁷ Genocide case (n26) 223 (albeit that the Court confined itself to determining the specific scope of the duty to prevent in the *Genocide Convention*, 220, para 429).

There are then questions of where positive obligations lie – equally or dependent on geographical contiguity or resource levels? Is a legal determination (and by whom) required before acting? To whom, and how, would failures to fulfil an international R2P be identified, allocated, measured and assessed within the State Responsibility framework?³⁸ There is also the issue of whether international R2P has any real meaning for weak or under-resourced states, given that it can never be realised by such states. Furthermore, even if all these questions are answered to the satisfaction of the international community as a whole, as Merrills points out, state responsibility has not proved satisfactory in encouraging performance, which is R2P's crucial feature.³⁹

It thus seems extremely unlikely that R2P is near crystallisation as a legal norm. To suggest otherwise would be premature and constitute a distraction from areas where there could be progress.

When the Council acted: Libya

The intervention in Libya in 2011 is widely regarded as the first military intervention to protect a civilian population without the consent of the host state.⁴⁰ Earlier actions were not considered as such because of their particular characteristics. For example, in 1992, Somalia was a failed state with no capacity to give consent.⁴¹

Acting in Libya followed a situation in Darfur where the refusal of state consent to transition from an overstretched African Union Mission (AMIS) to a UN mission was an obstacle to progress for many months, until a hybrid UN- African Union force was accepted.⁴²

Supporters of R2P saw Libya as its first success; it demonstrated that the Council can and will intervene to protect populations from mass atrocities when the host state manifestly fails to protect its population or threatens to be the perpetrator.

Other commentators see Libya as not necessarily an 'R2P action'.⁴³ The key Council resolutions concerning Libya, Resolution 1970⁴⁴ and Resolution 1973⁴⁵, refer only to Libya's

³⁸ Carsten Stahn, 'Responsibility to Protect: Political rhetoric or emerging legal norm?' 101 *The American Journal of International Law* 99.

³⁹ J. G. Merrills, *International Dispute Settlement* (5th ed Cambridge University Press, Cambridge 2011) 79.

⁴⁰ Although measures under Chapter VII of the Charter do not require consent.

⁴¹ Zifcak notes that the 'UN Secretary-General later expressed his opinion that the Somalia operation constituted a new precedent for the Council. It had, for the first time, authorized a military intervention for purely humanitarian purposes' (n18) 512.

⁴² Alex de Waal, 'Darfur and the failure of the responsibility to protect' (2007) 83(6) *International Affairs* 1039, 1042.

⁴³ eg Robert Murray, 'Resolution 1973 was predicated on humanitarian protection, but vague references and hopeful connections are not enough to qualify the mission in Libya as an extension of the R2P doctrine.' Aidan Hehir, Robert Murray (eds) *Libya The Responsibility to Protect and the future of Humanitarian Intervention* (Palgrave Macmillan, Basingstoke 2013) 222.

⁴⁴ S/RES/1970(2011), passed unanimously.

⁴⁵ S/RES/1973(2011), 10 votes in favour, 5 abstentions including permanent members China and the Russian Federation.

responsibility to protect, not to any wider international responsibility. The ambiguity around what constitutes an international R2P action⁴⁶ weakens the principle, as assessing its success or otherwise remains handicapped by the lack of clarity as to what it actually is.

Whether or not Libya was evidence of R2P in action, the death of Muammar al-Gaddafi and the regime change which followed the intervention by the multi-state coalition served to stall R2P's development. Russian Federation representative, Mr Churkin, said in the debate on resolution 1973 that: 'Provisions were introduced into the text that could potentially open the door to large-scale military intervention'.⁴⁷ The abstentions of Russia and China which allowed the resolution to pass were the result of diplomatic compromise that limited the use of force to protection of civilians and civilian populated areas under threat of attack.⁴⁸ It was widely perceived that the mandate was subsequently manipulated to use force beyond that required for civilian protection - to facilitate regime change and breach the arms embargo to arm the opposition.⁴⁹

Controversy over the implementation of Resolution 1973, and the great difficulties in Libya five years on, restricts its use as a precedent for similar action by the Council. To the extent that R2P has been associated with Libya, it has been tainted; for its opponents, the link of R2P to intervention has been strengthened.⁵⁰

Commitment at domestic level

For R2P to truly blossom it must be grounded not only in oratory at international level, but in absorption into national policy and debate.⁵¹ The UK, in its 2015 National Security Strategy and Strategic Defence and Security Review states 'We will use UN mechanisms such as the

⁴⁶ ie within the meaning of para 139 of the WSO.

⁴⁷ S/PV.6498 (17.03.11) 8.

⁴⁸ (n45) and Philip Alston, Ryan Goodman (eds) *International Human Rights Texts and Materials* (Oxford University Press, Oxford 2013) 751-758.

⁴⁹ *Ibid* Alston/Goodman.

⁵⁰ eg Statement of Venezuela, 8th Informal Interactive Dialogue of the UN General Assembly on Responsibility to Protect, 6 September 2016, 'Security Council authorized intervention in Libya did not put an end to violence and had the unintended effect of exacerbating tensions on the ground and causing more harm than good to the very same civilians it was supposed to protect.' <http://www.responsibilitytoprotect.org/index.php/component/content/article/35-r2pcs-topics/6146-united-nations-general-assembly-holds-eighth-annual-informal-interactive-dialogue-on-the-responsibility-to-protect>, accessed:24.09.16.

⁵¹ *US National Security Strategy 2015*, 22, 'We affirm our support for the international consensus that governments have the responsibility to protect civilians from mass atrocities and that this responsibility passes to the broader international community when those governments manifestly fail to protect their populations.' https://www.whitehouse.gov/sites/default/files/docs/2015_national_security_strategy.pdf; *French White Paper Defence and National Security 2013*, 23-24, 'The consensus on the Responsibility to Protect, as expressed at the World Summit in 2005, remains fragile, but France intends to make consolidation of this principle a priority of its external action.' <http://www.rpfrance-otan.org/White-Paper-on-defence-and>, cf no mention of R2P: *China's military strategy 2015*, 'With the growth of national strength, China's armed forces will gradually intensify their participation in such operations as international peacekeeping and humanitarian assistance, and do their utmost to shoulder more international responsibilities and obligations...' http://www.chinadaily.com.cn/china/2015-05/26/content_20820628.htm, and *Russian National Security Strategy*, December 2015, <http://www.ieee.es/Galerias/fichero/OtrasPublicaciones/Internacional/2016/Russian-National-Security-Strategy-31Dec2015.pdf>; all accessed: 24.09.16

Responsibility to Protect, Rights Up Front [sic], the Human Rights Council, and the Children in Armed Conflict agenda to drive global change, in line with British values'.⁵² This affirms statements at the UN.⁵³ However, if R2P is not in reality any part of national vocabularies or, indeed worse, is seen as providing a tool for intervention⁵⁴ – then its progression towards acceptance throughout the international community is stymied.

A review of Hansard on 18 March 2011,⁵⁵ the day after Resolution 1973 was passed, and three days later, when in the main debate on Libya the Commons voted in overwhelming support of that Resolution,⁵⁶ shows that while there were references to R2P from the Opposition and from two backbench Liberal Democrats,⁵⁷ there were none from the Government itself. Although Prime Minister David Cameron, who opened the debate, talked repeatedly of the action as one to protect civilians and Foreign Secretary William Hague closing the debate echoed this, neither framed these references within R2P.

The September 2016 report of the UK House of Commons Foreign Affairs Committee, which examined the intervention in Libya and its aftermath, also makes no reference to R2P.⁵⁸

⁵² *National Security Strategy and Strategic Defence and Security Review 2015*, Cm 9161, 63, para 5.109, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/555607/2015_Strategic_Defence_and_Security_Review.pdf, accessed: 20.11.16.

⁵³ eg Statement of UK Permanent Representative to the UN, Ambassador Matthew Rycroft, 8th Informal Interactive Dialogue of the UN General Assembly on Responsibility to Protect <http://www.responsibilitytoprotect.org/index.php/component/content/article/35-r2pcs-topics/6146-united-nations-general-assembly-holds-eighth-annual-informal-interactive-dialogue-on-the-responsibility-to-protect>, accessed:24.09.16.

⁵⁴ eg 'The British government has said that any action in Syria will comply with international law, and the most likely way to achieve this might be to claim that military action is for humanitarian purposes, using the Responsibility to Protect doctrine. This remains controversial, however, without a United Nations Security Council resolution to authorise it.' *Iraq, Syria and ISIS - recent developments* SNIA/6977 25 September 2014, 32, House of Commons Library, Research briefing, <http://researchbriefings.parliament.uk/ResearchBriefing/Summary/SN06977#fullreport>, accessed: 21.09.16.

⁵⁵ *UN Security Council Resolution Debate*, Commons Chamber, 18 March 2011, Volume 525, Column 611. [https://hansard.parliament.uk/Commons/2011-03-18/debates/11031850000007/UNSecurityCouncilResolution\(Libya\)?highlight=Responsibility%20Protect%20Libya#contribution-11031850000195](https://hansard.parliament.uk/Commons/2011-03-18/debates/11031850000007/UNSecurityCouncilResolution(Libya)?highlight=Responsibility%20Protect%20Libya#contribution-11031850000195), accessed: 19.11.16.

⁵⁶ *United Nations Security Council Resolution 1973 Debate*, Commons Chamber, 21 March 2011, Volume 525, Column 700, (Vote-Ayes:557, Noes:13, Columns 803-806), <https://hansard.parliament.uk/Commons/2011-03-21/debates/11032190000001/UnitedNationsSecurityCouncilResolution1973?highlight=Responsibility%20Protect%20Libya#contribution-11032190000331>, accessed:19.11.16. Note that Ed Miliband, then Leader of the Opposition, discusses four cautionary tests of "right intention, last resort, proportionate means and reasonable prospects" (at Column 716) but these are taken from ICISS and are not part of the agreed WSO.

⁵⁷ The minority party in the Coalition Government.

⁵⁸ *Libya: Examination of intervention and collapse and the UK's future policy options*, House of Commons Foreign Affairs Committee, Third Report of Session 2016-17, HC119, 14 September 2016.

Looking at more recent Commons activity, in 2016, R2P was mentioned in debates on Libya,⁵⁹ the genocide of minorities by Daesh,⁶⁰ the Report of the Iraq Inquiry⁶¹ and Syria,⁶² principally by voices from the Opposition benches. Whether R2P is just ‘hot air’⁶³ and the need for a UN capable of giving effect to it were issues raised.⁶⁴ Commenting on the latter, Prime Minister David Cameron:

There is a question sometimes about how can something be morally right but legally wrong. We therefore need to make sure we keep looking at reforming the United Nations, so we can bring those two things together.⁶⁵

This review, albeit very limited, of Commons debates indicates that although the UK Government confirms its priority to prevent atrocities,⁶⁶ it does not do so by referring to R2P. The sensitivity of governments to avoiding trespass into another state’s sovereignty, along with other diplomatic and political considerations, also inhibits articulation of international R2P. This excerpt from an exchange in the House of Commons in 2016 is an illustration:

The tragic recent history of Kashmir arose from the partition of India, which was managed by Britain after world war two. Does not Britain therefore have a special responsibility to help to find a solution to Kashmir’s troubles and the suffering of the Kashmiri people? (Kelvin Hopkins, MP Luton North)

The UK of course has very good relations with both India and Pakistan, but our long-standing position, held by successive Governments of all hues, is that it is for India and Pakistan to find a lasting resolution to the situation, taking into account the wishes of

⁵⁹ *Libya Debate*, Commons Chamber, 19 April 2016, Volume 608, Column 793, <https://hansard.parliament.uk/Commons/2016-04-19/debates/16041932000001/Libya?highlight=Responsibility%20Protect#contribution-443B946C-7C46-4C03-AF73-A111178FB4D8>, accessed: 20.11.16.

⁶⁰ *Daesh: Genocide of Minorities Debate*, 20 April 2016, Volume 608, Column 994, <https://hansard.parliament.uk/Commons/2016-04-20/debates/16042036000001/DaeshGenocideOfMinorities?highlight=Responsibility%20Protect#contribution-26A57A41-A9BB-4671-A7A6-5129A163F748>, accessed: 20.11.16.

⁶¹ *Report of the Iraq Inquiry debates*, 6, 13 and 14 July 2016, Volume 612, Column 901, <https://hansard.parliament.uk/Commons/2016-07-06/debates/16070641000001/ReportOfTheIraqInquiry?highlight=Responsibility%20Protect#contribution-16070642000044>, Volume 613, Columns 336, 365, 379 & 450, <https://hansard.parliament.uk/Commons/2016-07-13/debates/16071333000001/ReportOfTheIraqInquiry?highlight=Responsibility%20Protect#contribution-16071344000034> & <https://hansard.parliament.uk/Commons/2016-07-14/debates/16071433000002/ReportOfTheIraqInquiry?highlight=Responsibility%20Protect#contribution-160714330000305>, accessed: 20.11.16.

⁶² *Syria* (application for emergency debate), 10 October 2016, Volume 615, Column 72, <https://hansard.parliament.uk/Commons/2016-10-10/debates/18BB30D7-E553-4135-B4D6-08BE90FBC873/Syria?highlight=Responsibility%20Protect#contribution-AE19EC9F-070F-4012-B6FB-3BF2DDD470F7>, & *Aleppo and Syria debate*, 11 October 2016, Volume 615, Columns 170, 172, 190 and 203, <https://hansard.parliament.uk/Commons/2016-10-11/debates/F9DCC666-4E96-4F13-A37A-8D51120B8594/AleppoAndSyria?highlight=Responsibility%20Protect#contribution-C6A530CD-A206-48C9-BD2E-616DF5CA2082>, accessed: 20.11.16. A contribution in the debate indicates a misconception of R2P’s scope: ‘The UN doctrine of the responsibility to protect allows military intervention to protect civilians from genocide and war crimes by their state and provides a valid legal basis for intervention’, Column 203.

⁶³ *Ibid* Column 172.

⁶⁴ 6 July debate (n61), Column 901.

⁶⁵ *Ibid*.

⁶⁶ eg in *Daesh debate* (n60), Column 996.

the Kashmiri people. It is not for the UK to prescribe a solution or act as mediator. (Alok Sharma, the Parliamentary Under-Secretary of State for Foreign and Commonwealth Affairs)⁶⁷

When actions fall short: Syria

In Libya, the Council did act. In Syria, its actions so far have been disastrously inadequate. Secretary-General Ban Ki-moon addressed the Council in September 2016:

The Syrian tragedy shames us all. The collective failure of the international community should haunt every member of the Security Council (...)

We are at a make-or-break moment. I challenge everyone to use their influence now to restore our cessation of hostilities, enable the delivery of humanitarian assistance everywhere it is needed, and support the United Nations in charting a political path for the Syrians to negotiate a way out of the hell in which they are trapped. In their service as members of the Security Council, those present have no higher responsibility now.⁶⁸

The situation in Syria was, and is, very different from that in Libya. The speed with which the Council acted in Libya had been notable. In Syria, although protests against the Bashar al-Assad regime began in January 2011 and quickly escalated, there has been a deep-set and bitter conflict between political approaches among the Council.⁶⁹ Progress has been made in respect of eliminating the use of chemical weapons and – at times - gaining access for aid delivery. Crucially, though, an unprecedented four double-vetoes have paralysed the Council's actions in critical areas and severely limited its responses to the continuing humanitarian crisis.⁷⁰ As Deputy-Secretary-General Jan Eliasson acknowledged: 'our collective response to the Syrian crisis has been a catastrophic failure'.⁷¹

It is very apparent that the Council response to the crisis in Libya, or more specifically, how that response was implemented in practice, influenced Russia and China in Council discussions regarding Syria. China continues to consistently and firmly assert the fundamental importance of sovereignty. In discussions on the first of the draft resolutions subject to a double veto in

⁶⁷ *Kashmir debate*, 18 October 2016, Volume 615, Columns 651-652, <https://hansard.parliament.uk/commons/2016-10-18/debates/7BE917AC-E09B-44C4-B796-5844AFC24BD9/Kashmir>, accessed: 20.11.16. The 2015 Report *Structures of Violence The Indian State in Jammu and Kashmir* issued by The International Peoples' Tribunal on Human Rights and Justice in Indian-Administered Kashmir and The Association of Parents of Disappeared Persons estimates 'the disappearance of 8000+ persons, 70,000+ deaths, 6000+ unknown, unmarked and mass graves, and countless cases of torture and sexual violence' and notes that: 'The cases documented in this report may constitute crimes of Genocide, Crimes against Humanity and War Crimes under International Law', 3, http://www.jkccs.net/wp-content/uploads/2015/09/Untitled_1.pdf, accessed: 20.11.16.

⁶⁸ S/PV.7774 Provisional 21.09.16.

⁶⁹ During the debate on the first resolution subject to a double veto, Mr Araud (France) 'This is not a matter of language, it is a political choice. It is a veto on principle...' and Mr Churkin (Russian Federation) 'It is clear that the result of today's vote reflects not so much a question of acceptability of wording as a conflict of political approaches.' S/PV.6627 4.10.11, 3.

⁷⁰ S/PV.6627 4.10.11, S/PV.6711 4.02.12, S/PV.6810 19.07.12 and S/PV.7180 22.05.14.

⁷¹ Thematic Panel (n32) <http://www.globalr2p.org/resources/961> <http://www.globalr2p.org/media/files/dsg-jan-eliasson-26-feb.pdf>, 2 accessed: 28.09.16.

October 2011, Mr Li Baodong notes: ‘The international community should (...) fully respect Syria’s sovereignty, independence and territorial integrity’.⁷² Mr Churkin commented, in the same debate:

The situation in Syria cannot be considered in the Council separately from the Libyan experience. The international community is alarmed by statements that compliance with Security Council resolutions in Libya in the NATO interpretation is a model for the future actions of NATO in implementing the responsibility to protect.⁷³

In the debate in February 2012 on the second double-veto draft resolution Mr Churkin said that he considered the possibility of a political settlement to be undermined by those ‘calling for regime change’.⁷⁴

Feelings have been as strong on the other side of the debate. For example, the French representative Mr Arraud stated in the same debate:

For the past 10 months, we have been accused of seeking regime change and preparing for military intervention. That is patently false. In this Chamber, three days ago, our Ministers confirmed that there was no question of imposing a political regime on Syria.⁷⁵

The deadlock in Council shows no sign of easing, on the contrary, Russia scheduled a vote on a draft resolution of its own to follow that of the draft resolution put forward by France and Spain in early October 2016.⁷⁶ Neither passed, Russia cast its fifth veto to defeat France and Spain’s draft and its own gained only four votes in favour.⁷⁷

The political stalemate on key aspects of Council deliberations on Syria shows that the tensions between sovereignty and intervention to protect endure; this is unsurprising given that there has been no fundamental change in the international law landscape or the political perspectives of Council permanent members. The scope for the international community to act in circumstances of manifest failure to protect, however, was framed firmly within the Charter and international law;⁷⁸ it is hard to see how these opposing tensions will ease.

The broader Council practice

The continuing debate over the interpretation of R2P has been touched on. Upon examining the Council’s resolutions, the limited extent to which the Council demonstrates it has R2P in mind in its decision making process can be seen. It is by no means clear that the international element of the R2P is in any way securely anchored in this process.

⁷² S/PV.6627 4.10.11, 5.

⁷³ *Ibid* 4.

⁷⁴ S/PV.6711 4.02.12, 9.

⁷⁵ *Ibid* 3.

⁷⁶ France and Spain draft, S/2016/846 and Russian Federation draft, S/2016/847, 8.10.16.

⁷⁷ UK, France and US voted against S/2016/847 but with insufficient votes in favour these are not considered vetoes, <http://www.securitycouncilreport.org/un-documents/--other/>, accessed: 19.11.16.

⁷⁸ WSO (n4).

The Global Centre for the Responsibility to Protect has identified fifty resolutions and fourteen Presidential Statements referencing R2P.⁷⁹ The majority of these – thirty-two (including resolutions on Libya and Syria) – and all but two of the Presidential Statements - refer only to the primary responsibility of the relevant state.

Of the seven resolutions⁸⁰ referencing the full R2P, five give little more than a cursory nod to paragraphs 138 and 139. The other two are more comprehensive, particularly Resolution 2150, unanimously adopted, which is a call to states to recommit to prevent and fight against the crime of genocide and other serious crimes under international law. It refers specifically to the principle as a whole and acknowledges the important role played by regional and sub regional arrangements and especially notes article 4(h) of the Constitutive Act of the African Union.

Six resolutions refer to states' primary responsibility to protect and also refer to the role of the international community to encourage and help states to exercise their responsibility.⁸¹ The remaining five reaffirm other resolutions with R2P content.⁸²

The overall impression is that Council attention is very much on the primary responsibility with, at most - and infrequently -, lip service paid to the wider principle. This again points back to the question of whether international R2P in its entirety can be fully realised.

That said, even primary R2P has recently come under pressure. In order for Council members to reach agreement to adopt the June 2016 Presidential Statement on Women and peace and security,⁸³ previously agreed language had to be diluted:

(...) any specific reference to resolution 2171, including language from that resolution recalling member states' primary responsibility to prevent conflict, protect civilians and respect the human rights of individuals within their territory and under their jurisdiction, was removed in order to reach consensus.⁸⁴

This suggests no loosening of the grip of sovereignty.⁸⁵ It is too early to see if it represents a 'blip' in Council practice or will be a precedent in future statements and resolutions.

⁷⁹ *R2P references in United Nations Security Council Resolutions and Presidential Statements*, <http://www.globalr2p.org/media/files/unsc-resolutions-and-statements-with-r2p-table-as-of-august-2016.pdf>, accessed: 24.09.16.

⁸⁰ S/RES/1706 (2006), S/RES/1674 (2006), S/RES/1894 (2009), S/RES/2117 (2013), S/RES/2150 (2014), S/RES/2171 (2014), S/RES/2220 (2015).

⁸¹ S/RES/1996 (2011), S/RES/2085 (2012), S/RES/2185 (2014), S/RES/2211 (2015), S/RES/2227 (2015), S/RES/2277 (2016).

⁸² S/RES/2187 (2014), S/RES/2206 (2015), S/RES/2217 (2015), S/RES/2223 (2015), S/RES/2241 (2015).

⁸³ S/PRST/2016/9 15.06.16.

⁸⁴ <http://www.whatsinblue.org/2016/06/adoption-of-a-presidential-statement-on-women-peace-and-security.php>, accessed: 23.09.16.

⁸⁵ *Ibid* 'China, Russia, and in some instances Egypt, resisted many elements that they interpreted as an expansion of the women, peace and security agenda or perceived as infringing on state sovereignty or the competencies of other parts of the UN system.'

Council reform: the way to unfetter R2P?

Over the years there have been calls for a reform of Council procedures, with no success. One of the most recent initiatives is a code of conduct within the framework of the Accountability, Coherence and Transparency Group, by which states pledge, in particular, not to ‘vote against a credible draft resolution before the Security Council on timely and decisive action to end the commission of genocide, crimes against humanity or war crimes, or to prevent such crimes’.⁸⁶ As of 14 December 2015, 107 have signed up; including two Council permanent members, France and the UK. All five would be needed for this initiative to succeed.

The Secretary-General in his 2009 Report clarified that the privileged status (‘tenure’ and ‘veto power’) of the five permanent members carried responsibility with it.⁸⁷ He urged them not to ‘employ or threaten to employ the veto in situations of manifest failure to meet obligations relating to the responsibility to protect’.⁸⁸ Without the agreement of all five permanent members to commit to reform, it seems unlikely there will be any changes in Council practice.

That being so, a look beyond the Council is needed to assess whether there are capabilities elsewhere to advance R2P.

The role of the Assembly in implementing R2P

The World Summit tasked the Assembly with the limited role of continued consideration of R2P and its implications. Since 2005, it has done this through activity in the Assembly itself and the Human Rights Council. Secretary-General Ban Ki-moon presented eight annual reports to the Assembly, from 2009 to 2016. These covered implementation,⁸⁹ early warning and assessment,⁹⁰ regional and sub-regional arrangements⁹¹, ‘timely and decisive response’⁹², state responsibility and prevention⁹³, international assistance⁹⁴, implementation (taking stock 10 years on)⁹⁵ and mobilising collective action.⁹⁶ However, while the Assembly has thus technically met its remit, the consensus Heads of state and government were able to reach back in 2005 did not set any measurable targets. It is not therefore unexpected that progress has not been commensurate with the level of paper and debate generated.

⁸⁶ A/70/621-S/2015/978, operative para 2. Also the joint France/Mexico initiative for the 5 permanent members to suspend use of the veto in mass atrocity situations, [http://www.responsibilitytoprotect.org/France%20\(transcription\).pdf](http://www.responsibilitytoprotect.org/France%20(transcription).pdf), accessed: 28.09.16.

⁸⁷ 2009 Report (n19), 26-27, para 61.

⁸⁸ *Ibid.*

⁸⁹ *Ibid.*

⁹⁰ A/64/864, 2010.

⁹¹ A/65/877, 2011.

⁹² A/65/874, 2012.

⁹³ A/67/929, 2013.

⁹⁴ A/68/947, 2014.

⁹⁵ A/69/981, 2015.

⁹⁶ A/70/999, 2016.

It is not even clear that the continued consideration by the Assembly has strengthened consensus on R2P. The Russian Federation, in its statement at the Informal Interactive Dialogue discussing the 2016 Report, with Libya in mind, concluded the contrary.⁹⁷

The 2016 report was Ban Ki-moon's last as Secretary-General, and in it he expressed his hope that his successor will accelerate implementation of R2P.⁹⁸ Recognising that this has drifted off-track and that all the barriers - political divisions, Council disunity, financial pressures and so on – remain, he sets core challenges on prevention and on timely and decisive response. He also highlights the importance of preventing recurrence and working towards reconciliation and transitional justice.

Harnessing the UN as a whole

The UN has been criticised for siloing and administrative inefficiencies.⁹⁹ Although R2P and the Human Rights Council's Universal Periodic Review Mechanism could operate together and both be strengthened, synergies will not be achieved unless there is a conscious effort by states, regional organisations and those within the UN to integrate R2P into their thinking.

To consider just three among the many UN mechanisms and initiatives, first, in late 2013, Ban Ki-moon introduced his own initiative, 'Human Rights up Front' (HRuF).¹⁰⁰ This aims to ensure that the UN system takes early, effective action to 'prevent or respond to large-scale violations of human rights or international humanitarian law' and to encourage UN staff 'to take a principled stance and to act with moral courage to prevent serious and large-scale violations'.¹⁰¹ It was introduced in a much more low-key way than the very high profile setting of the World Summit and is designed to be informal and light, to 'help the United Nations operate in a more cohesive, cross-cutting, horizontal manner'.¹⁰² If HRuF is effective in tackling lower level human rights violations than the mass atrocities R2P addresses, this could help cut mass atrocities off at the knees.

Secondly, the 'Framework of Analysis for Atrocity Crimes' (Framework) developed by the Secretary-General's Special Advisers on Genocide and on R2P in 2014 aims to be a practical

⁹⁷ (n50), [http://www.responsibilitytoprotect.org/Russia%20\(transcription\).pdf](http://www.responsibilitytoprotect.org/Russia%20(transcription).pdf), accessed: 25.11.16.

⁹⁸ (n96) 2 para 5.

⁹⁹ Gerrit Kurtz, 'Agency competition is inherent to the silo structure of UN entities and their overlapping mandates, and co-operation at the working level is not a given.' *With Courage and Coherence, The Human Rights up Front Initiative of the United Nations* Global Public Policy Institute, July 2015 Policy Paper, 27 http://www.gppi.net/fileadmin/user_upload/media/pub/2015/Kurtz_2015_Courage_and_Coherence_UN_Human_Rights.pdf accessed: 24.09.16.

¹⁰⁰ 'Human Rights up Front' Initiative, UN 2014 <https://www.un.org/sg/en/content/ban-ki-moon/human-rights-front-initiative> accessed: 18.11.16.

¹⁰¹ <https://undg.org/home/guidance-policies/country-programming-principles/human-rights/rights-up-front-initiative/>, accessed: 19.11.16.

¹⁰² Deputy Secretary-General, (remarks at interactive dialogue with General Assembly [as prepared for delivery], 27.01.16 www.un.org/sg/dsg/statements/index.asp?nid=697 accessed: 28.09.16.

tool to identify risk factors indicative of potential mass atrocities.¹⁰³ Again, if it is used and is effective, it should enhance prevention.

And thirdly, the 2009 Report identified the Universal Periodic Review (UPR) mechanism of the Human Rights Council as a potentially important instrument for indirectly advancing goals relating to R2P.¹⁰⁴ Its purpose is to allow for a review of the human rights records of all 193 member states of the UN, in turn, every five years and it is in its second cycle.

Its universal scope and co-operative approach (if used in good faith) are strengths but it seems the hoped-for potential for UPR must be realised at the early warning stage. The first review of Syria took place in October 2011 when the country was already in crisis.¹⁰⁵ The calls for an immediate end to the repression and violence against civilians were rejected by Syria and the US' condemnation of gross violations of human rights, its observation that 'mass arrests, arbitrary detentions, torture and targeted killings by the Government continued unabated' and its call for President Assad 'to step aside immediately'¹⁰⁶ were considered 'interference in the domestic affairs of Syria'.¹⁰⁷

The role of the Secretary General

The Secretary-General, supported by the Secretariat and Special Advisers on the Prevention of Genocide and on the Responsibility to Protect,¹⁰⁸ has been a driver of R2P and 2017 sees the new Secretary-General, António Guterres, take office. In his opening remarks in the informal dialogue before the Assembly in April 2016 he made clear the importance he places on prevention:

TV cameras are not there when a crisis is avoided and so it is natural that it is difficult for governments and for international organisations to have prevention as a priority, but I believe prevention must be not only a priority but *the* priority of everything we do. And that of course demands a huge cultural change and a true revolution in global advocacy.¹⁰⁹

In light of the international community's failures in conflict prevention and resolution and in thwarting global terrorism, and in circumstances where 'power relations are becoming less clear' and 'leadership is becoming also a more complex concept', Mr Guterres envisages an

¹⁰³ United Nations, 2014, http://www.un.org/en/preventgenocide/adviser/pdf/framework%20of%20analysis%20for%20atrocities%20crimes_en.pdf, accessed 25.09.16.

¹⁰⁴ 2009 Report (n19), 11, para 16.

¹⁰⁵ *Report of the Working Group on the Universal Periodic Review Syrian Arab Republic*, A/HRC/19/11, 24.01.12.

¹⁰⁶ *Ibid* 6-7, para 31.

¹⁰⁷ *Ibid* 8, para 40.

¹⁰⁸ Mr Ivan Šimonović succeeded Professor Jennifer Welsh as the Secretary-General's Special Adviser on the Responsibility to Protect on 1 October 2016. <http://www.un.org/press/en/2016/sga1667.doc.htm> accessed: 21.09.16.

¹⁰⁹ *Informal dialogue with António Guterres*, 12 April 2016, at 1:32, <http://www.un.org/pga/70/sg/antonio-guterres-at-informal-dialogues/>, accessed: 19.11.16, [author transcription].

expanded role for the Secretary-General,¹¹⁰ making more active use of the good offices function.¹¹¹ The extent to which he is allowed to do so will of course depend on member states.

Looking forward: the key elements to align in order to activate R2P

The fifteen years since the World Summit Outcome have shown that the Council does not recognise R2P as giving it any new grounds to act. The barriers to ‘humanitarian intervention’ still stand firm against military intervention for human protection purposes. Realisation of pillar three of R2P therefore remains exceedingly problematic and a severing of the link between R2P and intervention without consent seems a necessary first step to re-building consensus on R2P.

Acknowledging that R2P is not, and is unlikely to be, a legal norm, its status as a policy statement and moral imperative means it can nevertheless be influential. Organisations outside the UN, such as the Global Centre for the Responsibility to Protect and the International Coalition for the Responsibility to Protect have been active here and civil society and media pressure on governments can be a potent influence.

The Sri Lanka Report identified the ‘single most effective UN action to protect civilians from gross human rights violations’ as ‘early and robust political consensus among UN Member States in favour of protection’.¹¹² There is widespread acceptance of states’ primary responsibility to protect their own populations. There is also broad consensus on the importance of early warning and prevention in reducing not only the human cost of mass atrocities (of course the primary aim of R2P), but also the costs of re-building after such crimes have been committed. Although practical support from the international community at these early stages still requires the consent of the receiving state, this is likely to arise in situations that are not quite as highly charged. Nonetheless there still remain significant limitations even here: where a state is – or seems likely to be – the perpetrator, failed states, and non-state actors and organised armed groups who are not cognisant of international law or choose to operate outside it.

The key element, building on consensus, is putting protection into practice. The mechanisms to do so are already there. More effective and sensitive use of them is needed: the UN assimilating HRuF throughout its operations, regional organisations providing the impetus for neighbouring states to cooperate and support each other and states using tools and mechanisms like the Framework and the Universal Periodic Review, and demonstrating their commitment to R2P in their foreign policy discussions at the domestic level.

A shift of emphasis from international to regional support may be beneficial in potentially defusing some of the tensions that come with support offered from states which are judged to

¹¹⁰ *Ibid* at 4:03.

¹¹¹ UN Charter (n8), articles 98 & 99.

¹¹² (n31), 30, para 86.

have motives other than altruism. Engagement with R2P at international, regional and national level would strengthen consensus around the principle. However, this is a utopian ideal in a world where 65.3 million people were displaced at the end of 2015, up almost ten per cent from the previous year, and where the political mood in the developed world is tending towards introspection rather than global outreach.¹¹³

The level of commitment of the new Secretary-General to R2P, and his ability to extend the good offices role, may also be influential in keeping R2P front of mind but experience since 2005 has unfortunately demonstrated that without widespread state support this is not of itself enough.

The final important factor in activating R2P is efforts directed towards ending impunity and the powerful message of deterrence and dissuasion that could send to potential perpetrators. The 2009 Report identified the International Criminal Court (ICC) and UN-assisted tribunals as an essential tool for implementing R2P.¹¹⁴ However, support for the ICC, which has already weathered a difficult birth and gestation, is currently moving in the wrong direction with South Africa, Burundi and Gambia deciding to withdraw from the Rome Statute¹¹⁵ and the planned withdrawal of the signature of the Russian Federation (it did not ratify the Statute).¹¹⁶

Conclusion

R2P has been extremely fertile ground for debate since its genesis in 2001. However, the initial, ambitious scope envisaged by ICISS was significantly diluted en-route to the principle's agreement by Heads of state and government in 2005. Council practice to date confirms that although a state's primary responsibility to protect its population is accepted and has been regularly reaffirmed, a broader, international responsibility is not. There remains lack of clarity around what is and is not action taken on the basis of R2P, with Libya an example here.¹¹⁷ It has been hailed as a success for R2P while others argue that R2P was at most only a single factor in the decision of the Council to take action. Subsequent stretching of the mandate cast a shadow over R2P and confirmed to detractors – rightly or wrongly given that it is arguable whether Libya was an 'R2P action' - that it could be used as a tool to facilitate western hegemony.¹¹⁸ This perception of the misuse of R2P fed into Council response to the

¹¹³ *Global Trends Forced Displacement in 2014* UNHCR <http://www.unhcr.org/576408cd7.pdf>, accessed: 19.11.16.

¹¹⁴ (n19), 12, para 18.

¹¹⁵ See comments of the Prosecutor, Mrs. Fatou Bensouda, in her Address at the First Plenary, Fifteenth Session of the Assembly of States Parties, 16.11.16, 3, <https://www.icc-cpi.int/iccdocs/otp/161116-Proscutor%27s-remarks-at-the-Opening-of-the-15th-Session-of-the-ASP.pdf>, accessed: 19.11.16.

¹¹⁶ *The Telegraph*, 16.11.16, <http://www.telegraph.co.uk/news/2016/11/16/russia-withdraws-signature-from-iccs-founding-statute/>, accessed: 19.11.16.

¹¹⁷ Also, eg, Thematic Panel (n32) the Kyrgyz Republic delegation disputing events in 2010 in Kyrgyzstan as an R2P "success", <http://www.globalr2p.org/media/files/kyrgyzstan-26-feb.pdf>, accessed: 28.09.16.

¹¹⁸ *Ibid*, <http://www.globalr2p.org/media/files/sudan-26-feb.pdf>, <http://www.globalr2p.org/media/files/cuba-26-feb.pdf>, <http://www.globalr2p.org/media/files/nicaragua-26-feb.pdf>, <http://www.globalr2p.org/media/files/egypt-26-feb.pdf>, accessed: 20.11.16.

humanitarian crisis in Syria leading to widespread criticism of Council inaction while mass atrocities are perpetrated there.

It seems very clear that Libya did not represent a precedent for military intervention without consent to protect populations from genocide, war crimes, ethnic cleansing or crimes against humanity. States remain extremely reluctant to intervene. As Shaw notes '[p]erhaps the outstanding characteristic of a state is its independence or sovereignty'¹¹⁹ and this is defended fiercely. The provisions of article 2(4) and (7) along with the veto power continue to protect state sovereignty tightly. Their combined effectiveness suggests that the full scope of the international element of R2P is inherently flawed in that it does not have the capacity to be fully realised within the confines of international law and Council *realpolitik*. In addition, state practice and *opinio juris* give no indication that the international responsibility element of R2P will develop into a legal norm. Moral opprobrium remains the only basis on which the international community can be called to account for not meeting its responsibility to protect.

The answer to the humanitarian intervention dilemma which thus still remains – the 'bridging of the gap' 'between what is requisite in strict legality and what is generally regarded as just and moral'¹²⁰ – may well best lie, as Franck described:

Not as a new legal right (...) but as a mitigating circumstance that does not create law and which is recognised as purely circumstantial and discretionary relief, rather like the early uses of equity.¹²¹

As for R2P, a bleak outlook would see it lost among other competing initiatives, without a champion to continue to bring it forward. Although not short of supporters outside the UN, it may wither through inertia or lack of resources within. More optimistically, however, it has shown itself capable of evolving over its fifteen-year life and it may continue to do so. However, as the polarity within the Council seems to be hardening rather than easing, it seems inevitable – and indeed essential - that there must be 'exclusion of hard pillar 3 responses from the R2P repertoire'¹²² for true consensus to be arrived at and maintained.

R2P can act as a rallying call to enhance efforts to prevent mass atrocities and provide a framework for states to encourage, support and assist other states to meet their responsibilities to their own populations. However, in order for R2P to really make a difference, emphasis must now shift from talk to action with focus firmly on prevention and strengthening early warning capability through more effective and sensitive use of existing mechanisms and initiatives and a change of emphasis from international to regional assistance.

¹¹⁹ Malcolm N Shaw, *International Law* (7th ed Cambridge University Press, Cambridge 2014) 153.

¹²⁰ Thomas M Franck, *Recourse to Force State Action Against Threats and Armed Attacks* (Cambridge University Press, Cambridge 2002) 180.

¹²¹ *Ibid* 190.

¹²² Justin Morris 'Libya and Syria: R2P and the spectre of the swinging pendulum' (2013) 89(5) *International Affairs* 1282.

The Sri Lanka Report noted that R2P's greatest contribution in practice may be as a 'process to help facilitate the emergence among Member States of early consensus on human rights protection'.¹²³ Although this is a very long way from the ICISS conception, and would fall far short of those early hopes for the principle, it would be an achievement in itself.

¹²³ Sri Lanka Report (n31), para 86.