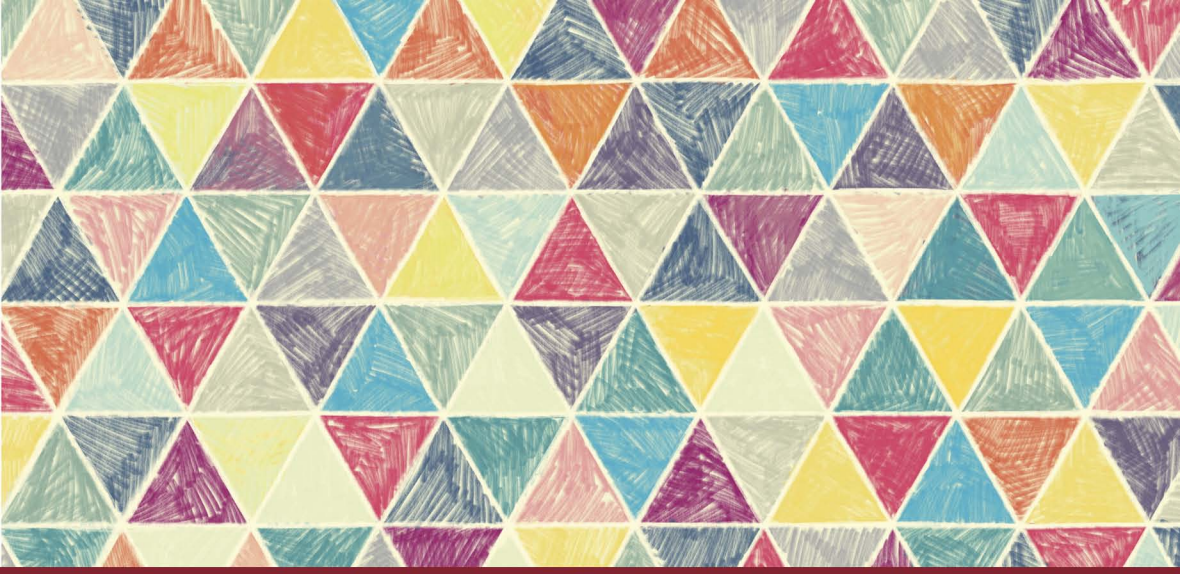

Global Politics and the Responsibility to Protect

CONSTRUCTING THE RESPONSIBILITY TO PROTECT

CONTESTATION AND CONSOLIDATION

Edited by
Charles T. Hunt and Phil Orchard

Constructing the Responsibility to Protect

This volume examines the ongoing construction of the Responsibility to Protect (R2P) doctrine, elaborating on areas of both consolidation and contestation.

The book focuses on how the R2P doctrine has been both consolidated and contested along three dimensions, regarding its meaning, status and application. The first focuses on how the R2P should be understood in a theoretical sense, exploring it through the lens of the International Relations constructivist approach and through different toolkits available to conventional and critical constructivists. The second focuses on how the R2P interacts with other normative frameworks, and how this interaction can lead to a range of effects from mutual reinforcement and co-evolution through to unanticipated feedback that can undermine consensus and flexibility. The third focuses on how key state actors – including the United States, China and Russia – understand, use and contest the R2P. Together, the book's chapters demonstrate that broad aspects of the R2P are consolidated in the sense that they are accepted by states even while other, specific aspects, remain subject to contestation in practice and in policy.

This book will be of much interest to students of the R2P, human rights, peace studies and international relations.

Charles T. Hunt is Vice-Chancellor's Senior Research Fellow and Australian Research Council DECRA Fellow at the Social & Global Studies Centre, RMIT University, Australia.

Phil Orchard is an Associate Professor of International Relations at the University of Wollongong, Australia.

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Constructing the Responsibility to Protect

Contestation and Consolidation

Edited by Charles T. Hunt and Phil Orchard

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Acknowledgments

The year 2020 marks 15 years since the Responsibility to Protect (R2P) doctrine was institutionalized at the international level through the World Summit Outcome Document (WSOD). Its evolution has been impressive. It reframed what had become an entrenched debate around the legality and legitimacy of humanitarian intervention. It has been operationalized within the UN through strong leadership by consecutive Secretaries-General, first under Kofi Annan, then under Ban Ki-moon, and now under António Guterres. It has been referenced in almost every major humanitarian crisis and has been used by the UN Security Council to authorize military action without the consent of the concerned state for the first time in Libya in 2011. Nonetheless, its rapid emergence has also been problematic. The failures of the UN Security Council to take effective action in Syria and issues with the outcome of the intervention in Libya have led to suggestions by commentators that the R2P doctrine may have suffered grave or even irreparable damage. Governments, too, have questioned how it should be applied, proposing new codes of conduct or challenging aspects of the doctrine such as its Pillar Three.

This book began with a common concern: that while alongside R2P's policy growth there has also been sustained academic interest, how the R2P doctrine has been understood in a theoretical sense has been less developed. While this may sound dry, we focus on this issue because these theoretical issues have direct, real world effects in two senses. Focused on the R2P doctrine itself, they can lead to conclusions we argue are incorrect that the R2P is indeterminate or too complex to be successful. Further, stand-alone accounts neglect how the R2P interacts and competes with a range of other normative agendas and practices at both the international and domestic levels. These are the issues we seek to address.

This book has had a long gestation, and we wish first to thank the contributors for their ongoing involvement. It began with an ISA sponsored Catalytic Workshop in 2015, which Phil Orchard convened along with Jason Ralph to examine the Responsibility to Protect at Ten. It then continued with a 2016 workshop at the Oceanic Conference on International Studies in which the authors presented their first drafts of papers and which was supported by the University of Queensland and the Asia Pacific Centre for the Responsibility to

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Melbourne and Wollongong

Introduction

Consolidation and contestation of the Responsibility to Protect

Charles T. Hunt and Phil Orchard

Introduction

This introduction proceeds in four parts. First, it provides a brief overview of the history and trajectory of the Responsibility to Protect (R2P). Second, it argues that while it is uncontroversial to say the R2P has normative properties, its normative status is much more disputed. That is to say, whether the R2P should be understood as a single coherent norm, a composite norm, an international regime or some other formation or structure operating in the international system is itself contested and one of the central arguments within the rest of the book. Third, the chapter engages with the intersection, interaction and interpenetration of the R2P doctrine with other normative agendas, principles and practices in the international peace, security and human protection realm. Finally, the chapter outlines and links together the chapters in the volume, presents the major themes and threads that run throughout the volume and identifies a series of potential research questions and agendas that flow from this set of engagements.

The Responsibility to Protect: realization or retreat?

In a remarkably short space of time, the R2P doctrine has become established within the international peace and security architecture and has significantly transformed practices at the international level. As of today, the R2P constitutes a framework for action in cases of mass atrocities based on the full array of measures prescribed and proscribed under the United Nations (UN) Charter – including the use of military force as a last resort. The possibility for and pathways to the non-consensual use of force remains the most controversial component of the R2P toolbox, yet it is deeply rooted in the evolution and development of the R2P.

The UN Charter establishes only two situations when the use of force is permitted. Under Article 51, it establishes that there is an inherent right of individual or collective self-defense if an armed attack occurs against a member state; while Article 42 within Chapter VII establishes that the UN Security Council may take any actions it considers necessary in order to maintain international peace

and security. Short of that, and as established in Article 2, all members are required to refrain from the threat or use of force against the territorial integrity or political independence of any state and nothing contained in the Charter allows for the UN to intervene in the domestic jurisdiction of any state. This required, however, that states would respect and protect their own populations. If a state failed or was unable to do so, there was no clear mechanisms by which the international community could take action. Even the Genocide Convention established that contracting parties who sought to prevent or suppress acts of genocide could only "call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate."[1]

Yet, beginning in the 1970s, individual states did undertake a series of interventions which, they argued, were for humanitarian reasons – India in East Pakistan, Vietnam in Cambodia, Tanzania in Uganda (Wheeler, 2000; Orchard, 2013). Then, with the end of the Cold War, we began to see a process of multilateral humanitarian intervention, bookmarked by the US, UK and France going into Northern Iraq in 1991 to protect the Iraqi Kurds; and by the NATO-led intervention in Kosovo in 1999 to protect the majority ethnic Albanian population. These actions, both designed to protect domestic populations under attack, did not fit into the bifold architecture the UN Charter had created. As the Independent International Commission on Kosovo famously noted, the NATO intervention there was "illegal but legitimate" (The Independent Commission on Kosovo, 2000). At the same time, the 1990s saw remarkable failures on the part of the international community – from the failure of the US-led peacekeeping mission in Somalia, to the fall of the Srebrenica safe area, to the Rwandan genocide, crises were occurring which required a response that was not forthcoming.

As UN Secretary-General, Kofi Annan made a provocative argument to the global community. In his 1999 speech to the General Assembly, he noted that in the wake of the Rwandan genocide and the Kosovo intervention, the inability of the international community to reconcile "two equally compelling interests – universal legitimacy and effectiveness in defence of human rights – can only be viewed as a tragedy" (Annan, 1999). Then, the following year, he argued: "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?" (Annan, 2000: 48). The first answer to that question was introduced the following year, when the International Commission on Intervention and State Sovereignty (ICISS) presented two basic principles:

> State sovereignty implies responsibility, and the primary responsibility for the protection of its people lies with the state itself. Where a population is suffering serious harm, as a result of internal war, insurgency, repression, or state failure, and the state in question is unwilling or unable to halt or avert it, the principle of non-intervention yields to the international responsibility to protect.
>
> (ICISS, 2001: xi)

As Thakur noted the following year, these two principles were deliberately designed to alter the debate around humanitarian intervention, moving it away from "the claims, rights and prerogatives of the potentially intervening states" toward the "urgent needs of the intended, putative beneficiaries of a given action." In so doing, the responsibility to protect acknowledged that "responsibility rests primarily with the state concerned" (Thakur, 2002: 327–328; Evans, 2008). This evolution in language from 'right' to 'responsibility' has been held as a central achievement of the ICISS, even if this shift echoed the ideas of 'responsible sovereignty' earlier introduced by Francis Deng (Deng, 1998; Welsh et al., 2002: 493).

And yet, while the ICISS introduced the language of the "responsibility to protect," retrospectively it had three main limitations. The first was that it framed its notion of serious harm around large-scale loss of life and ethnic cleansing brought about by deliberate state action or inability to act (ICISS, 2001: xii); yet it did not define a threshold or other criterion for 'large scale' and it failed to link these issues to established international human rights, humanitarian and criminal law. The second was that while it sought to create three 'responsibilities' – to prevent, react and rebuild – its focus was very much on the responsibility to react (Bellamy, 2011a). And, finally, the third was that as a Commission, the ICISS had little power itself. With the report being introduced in the wake of the September 11, 2001 attacks in the United States, even its proponents doubted how effective it would be, while the US invasion of Iraq in 2003 was used as justification to both critique the concept and question its applicability to situations such as Darfur (Weiss, 2004; Bellamy, 2005: 39).

Because of this, it was surprising when the R2P was taken up by the UN in its World Summit Outcome Document (WSOD) in 2005, (UN General Assembly, 2005). The WSOD endorsed the concept while modifying it significantly from its ICISS origins. In an expansion from the ICISS report, states accepted that they have a responsibility to protect their own populations from four identified mass atrocity crimes: genocide, war crimes, ethnic cleansing and crimes against humanity. Further, they have accepted responsibilities to help protect other populations from atrocity crimes and to take collective action when other national authorities are manifestly failing to protect their populations. As the WSOD noted, in Paragraphs 138–140:

> 138. Each individual state has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity. This responsibility entails the prevention of such crimes, including their incitement, through appropriate and necessary means. We accept that responsibility and will act in accordance with it. The international community should, as appropriate, encourage and help States to exercise this responsibility and support the United Nations in establishing an early warning capability.
>
> 139. The international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the Charter of the

> United Nations, to help protect populations from war crimes, ethnic cleansing and crimes against humanity. In this context, we are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities manifestly fail to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity. We stress the need for the General Assembly to continue consideration of the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity and its implications, bearing in mind the principles of the Charter and international law. We also intend to commit ourselves, as necessary and appropriate, to helping States build capacity to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity before crises and conflicts break out.
>
> 140. We fully support the mission of the Special Adviser of the Secretary-General on the Prevention of Genocide.
>
> (Ibid.)

Following the WSOD, in his 2009 Secretary-General's Report on the Responsibility to Protect, Ban Ki-moon offered a three-pillar formulation of the R2P as reflecting three distinct patterns of practice. The first pillar reflects "the enduring responsibility of the State to protect its populations, whether nationals or not, from genocide, war crimes, ethnic cleansing and crimes against humanity, and from their incitement" (UN General Assembly, 2009: 8). The second pillar reflects the "commitment of the international community to assist States in meeting those obligations" (ibid.: 9). Finally, the third pillar articulates "the responsibility of Member States to respond collectively in a timely and decisive manner when a State is manifestly failing to provide such protection" (ibid.).

Framing the R2P within these three pillars, Ed Luck, the former Special Adviser to the Secretary-General on R2P, has argued, allows "for an early and flexible response tailored to the circumstances of each situation." Its clear preference, he argues, "is for preventive action" (Luck, 2010b: 351–352). Indeed, prevention has become the focus of a great deal of R2P debate in the decade since 2009. For instance, some have argued that prevention should be the core business of R2P and point to cases such as Kenya, Guinea and Kyrgyzstan to evidence the value add of R2P providing an atrocity prevention lens (Sharma and Welsh, 2015; Davies and Teitt, 2012; Crossley, 2013; McLoughlin, 2014). Others, however, have pointed to the dilution of the intervention elements of the R2P and argue that this may constitute a paradox in the doctrine – stating but simultaneously reducing in significance the responsibility to react in timely and decisive ways (Chandler, 2015).

However, as Luck also noted, the need to respond effectively to the failure to prevent "is every bit as integral and essential …" (Luck, 2010b: 351–352). And

the third pillar, it is important to note, does not only reflect the use of force. Bellamy argues that it consists of two components:

> (a) a generic and ongoing responsibility to use lawful and peaceful measures, consistent with Chapter VI and VIII of the UN Charter, to protect populations from atrocity crimes and, (b) when these measures are judged inadequate, a commitment to take "timely and decisive action" through the UN Security Council.
>
> (Bellamy, 2015a: 4)

This version of the R2P appears to now be widely recognized within the UN and also, increasingly, in regional organizations (below, we suggest it has been institutionalized in the theoretical sense). This can be seen through several indicators. The first is that since 2009 there has been a formal pattern of behavior within the UN Secretariat, with annual Reports by the Secretary-General on the R2P and linked informal interactive dialogues of the General Assembly (Luck, 2018: 34). The ten Secretary-General's Reports issued over this time frame have each focused on different aspects of the R2P doctrine, including early warning (in 2010); on the involvement of regional and sub-regional organizations (in 2011); on the challenges of timely and decisive responses (in 2012); on state responsibility and prevention (in 2013), which led to the subsequent development of the UN Framework of Analysis for Atrocity Crimes; on international assistance (in 2014); on implementation (in 2015); on mobilizing collective action (in 2016); on improving accountability (in 2017); on linking early warning to early action (in 2018); and on prevention (in 2019). In 2018, the General Assembly also shifted to holding a formal plenary meeting on R2P at which 79 states and the European Union spoke (Global Centre for the Responsibility to Protect, 2018).

But, beyond this yearly process, UN bodies routinely invoke the R2P doctrine within resolutions. The UN Security Council, as of April 2019, had referred to the R2P in some 81 resolutions and presidential statements,[2] while the General Assembly has referenced the R2P 15 times in resolutions[3] and the Human Rights Council 42 times.[4] The language of R2P is routinely invoked in statements and speeches by both the Secretary-General and other key figures within the UN. Two roles – special advisers to the Secretary-General on R2P and on genocide prevention – have been created within the UN system (Thakur, 2016). And individual states have signaled a range of commitments. The Group of Friends of R2P includes 50 states and the European Union,[5] while 61 states as well as the European Union and Organization of American States have appointed their own national R2P focal points, a step taken by "governments with differing levels of capacity in mass atrocity prevention to demonstrate their commitment to R2P."[6] However, as Jacob (2018: 399) notes, "there is still a lack of consensus as to how the existing mechanisms could, or should, be mobilized to realize the preventive capacity of R2P…."

The doctrine also has deepening ties at the regional level, though here the record is more mixed. In the Asia Pacific, for example, intergovernmental bodies

such as the Association of Southeast Asian Nations (ASEAN) have begun to mainstream R2P considerations into their visions for a shared security community (Morada, 2018). Elsewhere, regional bodies have become key actors in particular cases such as the Arab League vis-à-vis Libya (Azzam and Hindawi, 2016), the Economic Community of West African States (ECOWAS) in relation to Mali, Guinea and the Gambia (Aning and Edu-Afful, 2016), or the Organization of Islamic Cooperation's efforts to refer Myanmar's human rights violations against the Rohingya to the International Court of Justice.[7] Among the more vocal proponents have been the European Union and the African Union. The EU and its member states "have been united in endorsing the norm…" though slower to implement it (De Franco et al., 2015: 996–996). In 2016 at the UN, the European Union noted it was "a strong supporter of the Responsibility to Protect and its three reinforcing pillars … we are committed to implement this important principle through better use of the full range of our diplomatic, political, development, human rights and humanitarian instruments and our partnerships across the globe."[8]

On the African continent, the R2P has had significant traction. In the March 2005 Ezulwini Consensus – a common position on UN reform – African states through the African Union (AU) voiced clear support for the formulation in the Secretary-General Report emerging from the High-level Panel on Threats, Challenges and Change. The statement outlined a willingness to take proactive regional action in line with the doctrine and opined that "authorization for the use of force by the Security Council should be in line with the conditions and criteria proposed by the Panel, but this condition should not undermine the responsibility of the international community to protect."[9] The R2P has also become increasingly embedded in the continent's institutional frameworks (Hunt, 2016a). For instance, the AU Constitutive Act specifically underlines in Article 4(h) "the right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity." The doctrine has also influenced the development of the AU's Peace and Security Architecture more generally including the operational concepts of the African Standby Force (Dersso, 2010; Hunt, 2013) This institutionalization at the continental level has been accompanied by significant resonance at the local level. Many have pointed to the communitarian and cosmopolitan ethics that undergird traditional forms of social and political order across Africa and the R2P (Murithi, 2008). While the African continent has also been a site of contestation for the R2P, it has found strong support at multiple levels (Hunt, 2018: 155).

Equally, the doctrine has found resonance in both civil society and academia, including through the Non-Governmental Organization (NGO) International Coalition for the Responsibility to Protect, the Global Centre for the Responsibility to Protect, and two regional focused Centers – the Asia Pacific Centre for the Responsibility to Protect and the European Centre for the Responsibility to Protect.

More generally, there appears to be positive advances associated with the R2P, most notably a decline in the past two decades with respect to the "overall number of civilians deliberately killed in any given year" (Bellamy, 2012: 8).

And the R2P doctrine has provided an important focus for how the international community should respond. Alex Bellamy argues that it has created "a collection of shared expectations" (Bellamy, 2011a: 84) while Jennifer Welsh suggests it has created a "duty of conduct" for members of the international community: "to identify when atrocity crimes are being committed (or when there is threat of commission) and to deliberate on how the three-pillar framework might apply" (Welsh, 2014: 136). By any measure the evolution of the R2P has been impressive. It has reframed what had become an entrenched debate around the legality and legitimacy of humanitarian intervention. As Thomas Weiss has argued, with the possible exception of post-Second World War genocide prevention, "no idea has moved faster or farther in the international normative arena than the Responsibility to Protect" (Weiss, 2011).

At the same time, how successful the R2P doctrine has been remains open to question along four dimensions. The first, most notably, has been its application or non-application in the cases of Libya and Syria. The Libyan intervention marked the first time the UN Security Council had authorized non-consensual military action for humanitarian reasons without the consent of the state. It followed the violent crackdown by the Qaddafi regime against protesters which had seen between 500 and 700 civilians killed, but also harsh rhetoric from Qaddafi – who described protesters as rats and cockroaches and pledged to "cleanse Libya house by house" (Adams, 2016: 707). In the debates around Libya, Dunne and Gelber argue that we can see the use of both explicit language reflecting the R2P, as well as implicit signifiers "such as the use of Charter VII authority, and the description of events as atrocities and international crimes" (Dunne and Gelber, 2014: 339). And yet, Libya was a somewhat unique case for a range of reasons. The initial consensus was "enabled by several exceptional factors, in particular a putative regional consensus and the poor international standing of Qaddafi's regime, as well as the clarity of the threat and short timeframe for action" (Bellamy and Williams, 2011: 825). Further, significant questions have been raised about how the Security Council resolution was implemented, reigniting questions about when intervention should occur (Kuperman, 2013), how the use of international military action should be used to avert atrocities (Paris, 2014), whether R2P is actually having an effect (Hehir, 2013) and even whether the Libyan intervention had "done grave, possibly even irreparable, damage to R2P's prospects of becoming a global norm" (Rieff, 2011).

In the case of Syria, the Security Council has failed to definitively halt mass atrocities during the long running civil war which has seen as many as 560,000 people killed.[10] And yet the UN Security Council did allow UN-based humanitarian assistance to enter the country with the notification only, and not the consent, of the government: "Clearly underpinning this shift was a view that the Syrian authorities were not fulfilling their responsibilities toward their own population …" (Orchard, 2017: 179). Some analysts have argued that these efforts in Syria should be understood as R2P in practice as efforts to prevent mass atrocities that are consistent with the goals of the R2P (Bellamy, 2016: 262). However, critics continue to see this as the archetypal example of the doctrine's failure and

ability to "legitimise inaction" rather than a case of partial success in extremely unfavorable political conditions in the Security Council (Hehir, 2016: 173).

Second, there have been renewed contestations over how the R2P should be applied, with governments proposing codes of conduct around so-called third pillar interventions such as the Brazilian government's "Responsibility While Protecting" – which sought to emphasize non-military means, limit the recourse to force and strengthen accountability to the Council (Welsh, 2014; McDougall, 2014) – and the Chinese government's semi-official "Responsible Protection" proposal (Li and Chen, 2013; Evans, 2014; Garwood-Gowers, 2016). But there have also been questions raised as to whether the Security Council is even the appropriate venue for considering R2P given the power dynamics within the Council. Moses, for example, has argued that because of this the R2P merely removes the "sovereign immunity" of weaker states, not the more powerful (Moses, 2013: 134).

Further, with the WSOD, any language with respect to a 'responsibility to rebuild' was removed. This became a critical issue with respect to the Libyan intervention, following which the main intervening states – the United States, the United Kingdom and France – did little to ensure a positive transition to a post-conflict state. This led to President Obama identifying the failure to plan for the aftermath of the intervention as the worst mistake of his presidency.[11] And, consequently, it has also led to academic arguments that a 'jus post bellum' – an international duty to rebuild – is needed as, otherwise, future interventions may have subsequent destabilizing effects even if successful in averting a mass atrocity (Paris, 2014: 577–577; Pattison, 2015; Doyle, 2016: 23).

Third, there have also been questions raised around how the UN Security Council actually uses R2P language. Gifkins, for example, suggests that R2P has been referenced by the Council more times since the Libya intervention than it was before it took place (Gifkins, 2016: 157–160). Accounts such as these (see also Bellamy, 2015b) hold that the focus on decision-making and implementation of military intervention masks the wide range of actions occurring under the holistic three-pillar conception of R2P. Other commentators temper that view – Hehir, for example, suggests that while eight resolutions dealing with the Arab Spring have mentioned R2P, each reference "is exclusively to Pillar I of R2P, relating to the host state's responsibility to protect its population. There is no mention in any of these resolutions of Pillar III or the international community's responsibility to protect" (Hehir, 2016: 170).

Notwithstanding its persistent appearance in UN Security Council resolutions, some of the momentum that Weiss speaks of has been lost in recent years. Advocates in civil society and among UN member states have struggled to leverage the R2P in established and emerging cases of mass atrocities – in part due to the perceived toxicity of the R2P after the Libya intervention. The UN, too, has had difficulties using R2P in specific situations. This includes places where the UN already has a strong presence and history of engagement (such as the Democratic Republic of Congo, South Sudan, the Central African Republic and Burundi) as well as places that have arrived on the Council's agenda more recently (such as Syria, Yemen, Myanmar and the Chad basin).