

Strong Brand, Weak Norm: The Responsibility to Protect in Practice

Jerry Fowler[†]

International inaction in response to genocide in Rwanda in 1994 and the NATO military intervention in Kosovo in 1999, undertaken without authorization by the U.N. Security Council, presented a challenge as the twenty-first century dawned: could the international community effectively respond to mass atrocities and do it in a way that accorded with international law? A key division in international politics was between states willing to contemplate and undertake humanitarian intervention in some circumstances and those that supported a view of state sovereignty that emphasized non-interference. A Canadian-sponsored panel of eminent persons, the International Commission on Intervention and State Sovereignty, sought to meet the challenge by articulating an innovative concept, the responsibility to protect (R2P). The Commission's strong form of R2P aimed to bridge the division among states by redefining sovereignty as responsibility and positing a complementary international responsibility to protect populations when states are unwilling or unable to do so. But the Commission's "strong-form R2P" did nothing to change the underlying politics of division and thus was not broadly acceptable to states. As a consequence, a significantly weaker version of R2P was incorporated into the World Summit Outcome Document, adopted by U.N. members in 2005. This weak-form R2P was based on traditional notions of sovereignty and deleted reference to an international responsibility to protect. Although R2P remains strong as a brand, its normative content has continued to erode since 2005. This Article charts the concept's normative decay and considers the prospects for strengthening it in the future. It concludes that the

[†] Assistant Professor of Law & Director, International Human Rights Clinic, University of Wyoming College of Law; Stanford University School of Law, J.D., with distinction, 1990; Princeton University, B.A., summa cum laude, 1983. The author is grateful for the valuable assistance provided by Debora Person, Director of the George Hopper Law Library at the University of Wyoming, and for comments and suggestions from Professor Noah Novogrodsky.

diffusion of global power as rising powers approach parity with the United States and other Western countries makes any enhancement of R2P unlikely. As it currently exists, weak-form R2P does not provide a normative response either to future Rwandas or to future Kosovos.

Introduction	80
I.1990s: “The Era of Humanitarian Intervention”	85
A. Somalia: Expansion of the Boundary of International Peace and Security	85
B. Rwanda: No Sense of Responsibility	87
C. Kosovo: NATO Intervention Without Security Council Authorization	90
D. No More Rwandas, No More Kosovos	93
II.Evolution of a Concept: From Strong-Form to Weak-Form R2P	95
A. ICISS and Strong-Form R2P	96
B. The 2005 World Summit and Weak-Form R2P ..	101
C. No More Rwandas, No More Kosovos?	111
III.Signs of Decay: Weak-Form R2P Since 2005	117
A. U.N. Resolutions	118
1. Security Council Resolutions	118
2. General Assembly Resolutions	120
B. General Assembly Annual Dialogues	121
C. Libya and R2P	126
1. Security Council Resolution and Debate	127
2. The U.S. Decision to Intervene	129
D. Syria in the Shadow of Libya	134
IV.R2P in the Age of Entropy	137
V.Conclusion	143

Introduction

Whether and how to respond to massive human rights abuses, including with the use of force, became a pressing issue on the international agenda in the 1990s with the end of the Cold War. The ostensible response was the incorporation of the “responsibility to protect”—or R2P—into the 2005 World Summit Outcome Document (Outcome Document).¹ For almost two decades since,

¹ G.A. Res. 60/1, 2005 World Summit Outcome, ¶¶ 138-139 (Sept. 16, 2005)

R2P has generated a remarkable amount of enthusiasm among its proponents. Its significance has been compared to Magna Carta² and it has been hailed as “the most significant adjustment to national sovereignty in 360 years.”³ It has spawned nongovernmental organizations⁴ and an academic journal.⁵ As one more skeptical scholar wryly noted, “[d]espite its newness, the concept of R2P looks back at a stellar career.”⁶

Although R2P proponents claim a nearly universal consensus in support of the concept,⁷ the true meaning of R2P continues to be so intensely debated that the issue has provided rich material for a burgeoning literature in the international relations field on how norms are formed and contested.⁸ On closer examination, R2P has

[hereinafter Outcome Document].

² Anne-Marie Slaughter, *A Day to Celebrate, but Hard Work Ahead*, FOREIGN POL’Y (Mar. 18, 2011), quoted in Jennifer M. Welsh, *Norm Contestation and the Responsibility to Protect*, 5 GLOB. RESP. TO PROTECT 365, 373 (2013).

³ Martin Gilbert, *The Terrible 20th Century*, GLOBE & MAIL (TORONTO) (Jan. 31, 2007), quoted in RAMESH THAKUR, THE UNITED NATIONS, PEACE AND SECURITY: FROM COLLECTIVE SECURITY TO THE RESPONSIBILITY TO PROTECT 302 (2d ed. 2017).

⁴ GLOB. CTR. ON THE RESP. TO PROTECT, <https://www.globalr2p.org/> [<https://perma.cc/MT6U-NT3P>] (last visited Nov. 27, 2022); INT’L COAL. FOR THE RESP. TO PROTECT, <https://www.globalr2p.org/international-coalition-for-the-responsibility-to-protect/> [<https://perma.cc/58U5-ZPVS>] (last visited Nov. 27, 2022); ASIA-PACIFIC CTR. ON THE RESP. TO PROTECT, <https://r2pasiapacific.org/> [<https://perma.cc/VD42-S45A>] (last visited Sept. 13, 2022).

⁵ GLOB. RESP. TO PROTECT, <https://brill.com/view/journals/gr2p/gr2p-overview.xml?language=en> [<https://perma.cc/BL7F-8FNF>] (last visited Nov. 27, 2022).

⁶ Teresa Reinold, *The Responsibility to Protect—Much Ado About Nothing?*, 36 REV. INT’L STUDS. 55, 55-56 (2010).

⁷ See, e.g., ALEX J. BELLAMY, THE RESPONSIBILITY TO PROTECT: A DEFENSE 1 (2015) (asserting that “R2P has achieved . . . genuine and resilient international consensus”); THAKUR, *supra* note 3, at 303 (“R2P is no longer seriously contested in the policy community as a principle.”).

⁸ See, e.g., Welsh, *supra* note 2; Amitav Acharya, *The R2P and Norm Diffusion: Towards a Framework of Norm Circulation*, 5 GLOB. RESP. TO PROTECT 466 (2013); Amitav Acharya, *Norm Subsidiarity and Regional Orders: Sovereignty, Regionalism and Rule Making in the Third World*, 55 INT’L STUDS. Q. 95 (2011); Nicole Dietelhoff & Lisbeth Zimmermann, *Things We Lost in the Fire: How Different Types of Contestation Affect the Robustness of International Norms*, 22 INT’L STUDS. REV. 51 (2020); Alan Bloomfield, *Resisting the Responsibility to Protect*, in NORM ANTIPRENEURS AND THE POLITICS OF RESISTANCE TO GLOBAL NORMATIVE CHANGE 20 (Alan Bloomfield & Shirley V. Scott eds., 2017); Andrew Garwood-Gowers, *R2P Ten Years After the World Summit: Explaining Ongoing Contestation over Pillar III*, 7 GLOB. RESP. TO PROTECT 300 (2015); AIDAN HEHIR, HOLLOW NORMS AND THE RESPONSIBILITY TO PROTECT (2019).

been quite successful as a brand, but it has much less substance than might first appear.⁹ A main source of confusion is that the substantive content of R2P changed significantly from its original articulation in 2001 by the Canadian-sponsored International Commission on Intervention and State Sovereignty (ICISS)¹⁰ to its incorporation into the Outcome Document adopted at a summit attended by most U.N. heads of state.¹¹ The distinctions between the two versions are such that various actors can express support for the “responsibility to protect” while meaning quite different things, particularly about the international role in responding to mass atrocities.¹² The 2005 version sometimes has been referred to as “R2P Lite.”¹³ But quite often, commentators make no distinction between the two versions. Some supporters note the creation of the R2P concept by ICISS in 2001, then assert that “[t]he principle . . . was unanimously adopted by the largest gathering of heads of state and government meeting at the UN summit” in 2005, without acknowledging the significant substantive difference between the two versions.¹⁴ To help clarify the differences and gain a greater sense of what enjoys broad support among states and what does not, this article proposes distinguishing between the “strong-form R2P” offered by ICISS in 2001 and the “weak-form R2P” incorporated into the Outcome Document in 2005.¹⁵ Focusing on the differences

⁹ Chris Brown, *The Antipolitical Theory of Responsibility to Protect*, 5 GLOB. RESP. TO PROTECT 423, 440 (2013) (noting that the R2P brand “has driven out other vocabularies for describing the appropriate ways of reacting to gross violations of human rights or mass atrocity crimes”).

¹⁰ See INT’L COMM’N ON INTERVENTION AND STATE SOVEREIGNTY, THE RESPONSIBILITY TO PROTECT XI (Dec. 2001), <https://idl-bnc-idrc.dspacedirect.org/bitstream/handle/10625/18432/IDL-18432.pdf> [<https://perma.cc/2D89-8T3D>] [hereinafter THE RESPONSIBILITY TO PROTECT].

¹¹ Outcome Document, *supra* note 1, ¶¶ 138-139.

¹² *Id.*; see also THE RESPONSIBILITY TO PROTECT, *supra* note 10.

¹³ E.g., Brown, *supra* note 9, at 434; Thomas G. Weiss, *R2P After 9/11 and the World Summit*, 24 WIS. INT’L L.J. 741, 750 (2006).

¹⁴ RAMESH THAKUR, THE RESPONSIBILITY TO PROTECT: NORMS, LAWS, AND THE USE OF FORCE IN INTERNATIONAL POLITICS 1-2 (2011); see also, e.g., Gareth Evans, *Foreword* to THAKUR, *supra* note 3, at xvi (implying that ICISS’s 2001 version of R2P received “unanimous endorsement” by the United Nations in 2005); but see Marc Pollentine, *Constructing the Responsibility to Protect* 293 (2012) (Ph.D. dissertation, Cardiff University) (expressing perplexity at “just how/why some states, and individual advocates from within public policy or academia, have managed to oversell the status and significance of the [2005] agreement in the way they have”).

¹⁵ See THE RESPONSIBILITY TO PROTECT, *supra* note 10, at XI; see also Outcome

in these two versions illuminates a crucial consequence of the substantive change. While strong-form R2P proposed an innovative concept of sovereignty—“sovereignty as responsibility”—weak-form R2P reinforced the view of sovereignty that has dominated the post–World War II era: a presumptive shield against external intervention.¹⁶ In particular, where strong-form R2P entailed an international *responsibility* to protect civilians under attack when their government was unwilling or unable to protect them, weak-form R2P eschewed any such responsibility.¹⁷ Instead, it substituted an *option* for the U.N. Security Council to act in highly constrained circumstances, if it chooses to do so and if no permanent member exercises its veto.¹⁸

Clarifying the distinction between the strong-form R2P articulated by ICISS (and preferred by many of R2P’s most vocal proponents) and the weak-form R2P agreed to in 2005 dispels the apparent paradox of simultaneous consensus and contestation of R2P.¹⁹ There is broad agreement on the weak form, but efforts to interpret it as something closer to the strong form engender vociferous debate.²⁰ Failure to distinguish between the two forms makes discussions of the concept seem like a veritable “Tower of Babel.”²¹

An unresolved issue is whether R2P over time will evolve toward a stronger form than that embodied in 2005.²² Weak-form

Document, *supra* note 1, ¶¶ 138, 139.

¹⁶ See THE RESPONSIBILITY TO PROTECT, *supra* note 10, at 8; see also Outcome Document, *supra* note 1, ¶ 135.

¹⁷ See THE RESPONSIBILITY TO PROTECT, *supra* note 10, at 17-18; see also Outcome Document, *supra* note 1, ¶ 139.

¹⁸ Outcome Document, *supra* note 1, ¶ 139.

¹⁹ See Pollentine, *supra* note 14, at 293 (noting that “how R2P was subsequently [i.e., after 2005] presented has added to the sense of confusion and misunderstanding”).

²⁰ See Garwood-Gowers, *supra* note 8, at 301 (noting “a growing body of literature now recognizes that behind states’ broad rhetorical support for R2P there are a range of different interpretations of the content, scope and function of the concept”).

²¹ Carsten Stahn, *Marital Stress or Grounds for Divorce? Re-Thinking the Relationship Between R2P and International Criminal Justice*, 26 CRIM. L.F. 13, 15 (2015) (attributing discord over R2P to “different understandings of the concept”); see also Pollentine, *supra* note 14, at 293 (noting that “how R2P was subsequently presented [by proponents] has added to the sense of confusion and misunderstanding”).

²² See Pollentine, *supra* note 14, at 303 (reporting that negotiators expressed hope that with all its limitations, “the [2005] R2P agreement would help make the atmosphere for dealing with such crimes more receptive than had often been the case”).

R2P reflected what the market would bear in 2005 in terms of redefining sovereignty, which was no change to the status quo.²³ But proponents of a stronger form could plausibly have hoped that the concept would attain through actual practice a “meaning-in-use” that approximated strong-form R2P.²⁴ This has not happened. If anything, R2P has been substantively weakened through practice, as references to R2P in U.N. resolutions almost exclusively focus on the role of the state without mentioning a complementary international responsibility or role.²⁵ And the prospects of future strengthening of R2P are dim. Broad adoption of a strong-form R2P was conceivable at the turn of the century because of the unipolar international order and the dominance of liberal Western states that are broadly supportive (at least in theory) of protecting populations under assault from their governments.²⁶ As unipolarity has faded and been replaced by a diffusion of power to many actors—the advent of what has been called the “age of entropy”²⁷—the chances of obtaining broad acceptance of a concept as deeply controversial as strong-form R2P have dissipated.

Part I of this article describes the context of R2P’s emergence. Part II then traces the evolution of R2P from the original strong-form to the weak-form version adopted in 2005. Part III discusses the development of R2P since 2005, demonstrating that even as the R2P brand has become more established, the substance has decayed further from the original strong form. Finally, Part IV looks forward and considers the possible trajectory of R2P in the age of entropy.

²³ See *infra* notes 193-94 and accompanying text.

²⁴ See Antje Weiner, *Enacting Meaning-in-Use: Qualitative Research on Norms and International Relations*, 35 REV. INT’L STUDS. 175, 179 (2009) (arguing that a norm’s literal expression “indicates no more than the formal validity of a norm, while its social recognition stands to be constructed by social interaction”).

²⁵ See *infra* notes 284-302 and accompanying text.

²⁶ See *infra* Part IV; see also Robert W. Murray & Tom Keating, *Responsibility to Protect, Polarity, and Society: R2P’s Political Realities in the International Order*, in CHALLENGES FOR HUMANITARIAN INTERVENTION: ETHICAL DEMAND AND POLITICAL REALITY 183, 184 (C.A.J. Coady et al. eds., 2018) (noting that “American unipolarity in the wake of the Cold War finally meant that the normative framework for international society could and would include human rights as a priority for all states”).

²⁷ See RANDALL SCHWELLER, *MAXWELL’S DEMON AND THE GOLDEN APPLE: GLOBAL DISCORD IN THE NEW MILLENNIUM* 1 (2014) (proclaiming the beginning of “the age of entropy, a chaotic period where most anything can happen and little can be predicted”).

I. 1990s: “The Era of Humanitarian Intervention”

Using military force for ostensibly humanitarian purposes was not an innovation of the 1990s.²⁸ But the end of the Cold War and the advent of a unipolar international environment dominated by the United States and its allies presented new possibilities, resulting in a decade that has been called “the era of humanitarian intervention.”²⁹ A succession of humanitarian crises, including the breakdown of order in Somalia, the disintegration of the former Yugoslavia, the genocide in Rwanda, and large-scale human rights abuses in Kosovo, made the difficult questions of whether and how to use force a recurring issue in international law and politics.³⁰

A. *Somalia: Expansion of the Boundary of International Peace and Security*

Beginning in 1991, Somalia imploded when its government collapsed and rival, clan-based militias began fighting each other for control of the country.³¹ As the specter of famine loomed, the militias impeded humanitarian relief and redirected food and medicine intended for the civilian population.³² In response, the U.N. Security Council adopted Resolution 794, in which it determined that “the magnitude of the human tragedy . . . constitute[d] a threat to international peace and security” and authorized a military intervention to ensure the delivery of

²⁸ See Harold Hongju Koh, *The War Powers and Humanitarian Intervention*, 53 HOUS. L. REV. 971, 976 (noting that humanitarian intervention is an “ancient concept . . . which has been with us at least since Grotius”); GARY J. BASS, *FREEDOM’S BATTLE: THE ORIGINS OF HUMANITARIAN INTERVENTION* 3 (2008) (“Over a century ago, it was a known principle that troops should sometimes be sent to prevent the slaughter of innocent foreigners.”); NICHOLAS J. WHEELER, *SAVING STRANGERS: HUMANITARIAN INTERVENTION IN INTERNATIONAL SOCIETY* 55-136 (2000) (discussing Cold War-era interventions by India in East Pakistan, Vietnam in Cambodia, and Tanzania in Uganda).

²⁹ Michael Ignatieff, *Is the Human Rights Era Ending?*, N.Y. TIMES (Feb. 5, 2002), <https://www.nytimes.com/2002/02/05/opinion/is-the-human-rights-era-ending.html> [<https://perma.cc/47BJ-ARFX>].

³⁰ See, e.g., WHEELER, *supra* note 28, at 285-310; SIMON CHESTERMAN, *JUST WAR OR JUST PEACE?: HUMANITARIAN INTERVENTION AND INTERNATIONAL LAW* 219-36 (2001).

³¹ See CHESTERMAN, *supra* note 30, at 140.

³² The extent to which aid was redirected was a matter of some debate. See ALEX DEWAAL, *FAMINE CRIMES: POLITICS AND THE DISASTER RELIEF INDUSTRY IN AFRICA* 183-84 (1997) (contrasting widely cited claims that 70-80% of aid was looted with reports from aid organizations that losses were as low as 15%).

humanitarian aid.³³

The U.N. Charter gives the Security Council “primary responsibility” to maintain international peace and security and to act if it determines that international peace and security are threatened or have been breached.³⁴ Under Chapter VII of the Charter, the Council’s authority to act includes the use of economic sanctions, arms embargoes, and military force.³⁵ Its invocation of this Chapter VII authority in Resolution 794 to authorize military intervention during an *internal* crisis, as opposed to a crisis involving more than one country, was an important development in the Council’s understanding of its own power.³⁶

The absence of a functioning government in Somalia facilitated the Council’s unanimous support for Resolution 794, as the issue of state consent to the intervention was moot.³⁷ China and India, both of whom traditionally emphasized the importance of obtaining such consent, noted this fact in explaining their support for the resolution.³⁸ The resolution included, at the behest of sovereignty-sensitive states,³⁹ language emphasizing the “unique character” of the crisis and how the Council’s action was “exceptional.”⁴⁰ But these considerations only spoke to whether and when the Security

³³ S.C. Res. 794 (Dec. 3, 1992).

³⁴ U.N. Charter arts. 24.1, 39. The General Assembly also has a role, albeit more limited, in maintaining international peace and security. U.N. Charter arts. 11-12; *see also* G.A. Res. 377A, Uniting for Peace (Nov. 3, 1950) (asserting UNGA ability to act if Security Council is deadlocked).

³⁵ U.N. Charter arts. 41-42.

³⁶ The Security Council in 1991 had declared Saddam Hussein’s attacks on the Kurds in northern Iraq a threat to international peace and security, although it tied the finding of a threat to international peace and security to the cross-border consequences of the abuses. S.C. Res. 688 (Apr. 5, 1991). That resolution also did not explicitly authorize any intervention or enforcement action. But when Western powers subsequently invoked it to justify the creation of a safe haven for Kurds, nobody on the Council objected. *See* WHEELER, *supra* note 28, at 152-55.

³⁷ *See* S.C. Res. 794 (Dec. 3, 1992).

³⁸ U.N. SCOR, 47th Sess., 3145th mtg. at 16, U.N. Doc S/PV.3145 (Dec. 3, 1992) (statement of China) (emphasizing “the long-term chaotic situation resulting from the present lack of a Government in Somalia”); *id.* at 49 (statement of India) (stressing the “unique challenge” of a “country without a government”).

³⁹ Nicholas J. Wheeler, *The Humanitarian Responsibilities of Sovereignty: Explaining the Development of a New Norm of Military Intervention for Humanitarian Purposes in International Society*, in HUMANITARIAN INTERVENTION AND INTERNATIONAL RELATIONS 29, 35-36 (Jennifer M. Welsh ed., 2004).

⁴⁰ S.C. Res. 794 (Dec. 3, 1992).

Council would exercise its power to intervene to protect international peace and security.⁴¹ They did not diminish the inherent existence of that power. The Security Council's response to Somalia significantly clarified the scope of its authority and established that it could respond to an internal humanitarian crisis with all the tools at its disposal, including military force.⁴²

If the Security Council's response in Somalia established that force could be used for humanitarian purposes, it also illustrated the limitations of force. The intervention undoubtedly saved lives.⁴³ But conflict with clan-based militias became intense. In June 1993, for example, twenty-four Pakistani troops were killed.⁴⁴ The intervention ultimately collapsed after the infamous "Black Hawk Down" incident in October 1993, where a failed raid to capture two militia leaders resulted in the deaths of eighteen American servicemembers and hundreds of Somalis.⁴⁵ The debacle led the United States to withdraw its forces in March 1994.⁴⁶

B. Rwanda: No Sense of Responsibility

The experience in Somalia also had a decisive effect on the Security Council's response when Hutu extremists launched a campaign of genocide in Rwanda in April 1994, resulting in the deaths of an estimated 500,000 members of the Tutsi minority.⁴⁷ The enormity of the violence and the abject failure of the Security

⁴¹ *Id.*

⁴² WHEELER, *supra* note 28, at 183.

⁴³ Mark Bowden, *The Legacy of Black Hawk Down*, SMITHSONIAN MAG. (Jan. 2019) (citing U.N. figure of more than 250,000), <https://www.smithsonianmag.com/history/legacy-black-hawk-down-180971000/> [<https://perma.cc/3AP7-3R6K>]; REFUGEE POL'Y GRP., LIVES LOST, LIVES SAVED: EXCESS MORTALITY AND THE IMPACT OF HEALTH INTERVENTIONS IN THE SOMALIA EMERGENCY 32 (Nov. 1994) (suggesting lives saved were at least 10,000); *but see* DEWAAL, *supra* note 32, at 179 (arguing that the famine was already receding before the intervention).

⁴⁴ WHEELER, *supra* note 28, at 194-95.

⁴⁵ Bowden, *supra* note 43, at 3.

⁴⁶ *See* Walter Clarke & Jeffrey Herbst, *Somalia and the Future of Humanitarian Intervention*, 75 FOREIGN AFFS. 70 (1996) (dissecting the factors that led to the mission's collapse); Chester A. Crocker, *The Lessons of Somalia: Not Everything Went Wrong*, 74 FOREIGN AFFS. 2, 5 (1995) (noting the mission's initial humanitarian achievements and attributing its ultimate failure to "strategic confusion followed by a collapse of political will when the confusion led to combat casualties").

⁴⁷ ALISON DES FORGES, HUM. RTS. WATCH, "LEAVE NONE TO TELL THE STORY": GENOCIDE IN RWANDA 15-16 (1999).

Council to act have been extensively documented.⁴⁸ A small U.N. peacekeeping force, the U.N. Assistance Mission in Rwanda (UNAMIR), was on the ground when the genocide began.⁴⁹ One of the genocidaires' first acts was to murder ten Belgian peacekeepers.⁵⁰ Although the Belgian government was initially willing to send reinforcements if other nations would join them and if the mission's mandate was bolstered, it withdrew its contingent after the United States, France, and the United Kingdom declined to commit forces.⁵¹ The Security Council then voted to withdraw most of the rest of UNAMIR, leaving only a token force.⁵²

Given the precedent of Somalia, there was no question that the Security Council had the authority under Chapter VII to act more aggressively if it chose to do so.⁵³ Rwanda's sovereignty did not provide a legal impediment to the Security Council's finding a threat to international peace and security and using its Chapter VII powers.⁵⁴ Early in the crisis, Nigeria circulated a draft Security Council resolution on behalf of the Non-Aligned Movement (NAM)—which consistently takes a strict view of sovereignty—that would have included a determination that the situation was a threat to international peace and security and expanded UNAMIR's mandate to include the restoration of public order.⁵⁵ In subsequent negotiations, the United States advocated for UNAMIR's total

⁴⁸ See, e.g., GERARD PRUNIER, *THE RWANDA CRISIS: HISTORY OF A GENOCIDE* 213-299 (1997); see DES FORGES, *supra* note 47, at 180-735 (1999); ORG. OF AFR. UNITY, *RWANDA: THE PREVENTABLE GENOCIDE*, chs. 14-16 (2000); U.N. Secretary-General, *Report of the Independent Inquiry into the Actions of the United Nations During the 1994 Genocide in Rwanda*, at 15-52, U.N. Doc. S/1999/1257 (Dec. 16, 1999). For a lengthier compilation of sources, see MICHAEL BARNETT, *EYEWITNESS TO A GENOCIDE: THE UNITED NATIONS AND RWANDA* 197 n.7 (2002).

⁴⁹ See DES FORGES, *supra* note 47, at 100.

⁵⁰ *Id.* at 5.

⁵¹ See BARNETT, *supra* note 48, at 101-05.

⁵² S.C. Res. 912 (Apr. 21, 1994).

⁵³ See BARNETT, *supra* note 48, at 99 (noting that the Security Council confronted “a choice between one of two broad options: the operation's withdrawal, or its reinforcement with a new mandate”).

⁵⁴ See S.C. Res. 929, ¶ 3 (June 22, 1994).

⁵⁵ Copies of the NAM draft can be found at Michael Dobbs ed., *Inside the UN Security Council: April-July 1994*, NAT'L SEC. ARCHIVE (June 2, 2014), <https://nsarchive2.gwu.edu/NSAEBB/NSAEBB472/#table> [<https://perma.cc/5P7L-UW6Z>].

withdrawal.⁵⁶ In other words, somewhat counterintuitively, NAM pushed for the Security Council to find that the situation inside Rwanda constituted a threat to international peace and security and expand UNAMIR's mandate, while the United States called for UNAMIR's evacuation.⁵⁷

When France ultimately decided it would send a heavily armed force of about 2,500 soldiers in the waning days of the genocide, the Security Council authorized the operation under Chapter VII using language virtually identical to that it had used in Somalia: "the magnitude of the humanitarian crisis in Rwanda constitutes a threat to peace and security in the region."⁵⁸ France's motivation for sending the force was unclear, and its deployment was controversial.⁵⁹ This intervention also came far too late to make much difference to the genocide's victims, the vast majority of whom already had perished.⁶⁰ Even so, the deployment was approved without opposition, although five countries abstained.⁶¹ There was no suggestion from any Security Council member that

⁵⁶ See BARNETT, *supra* note 48, at 100-01.

⁵⁷ Cable from Colin Keating, N.Z. Ambassador to the U.N., to Wellington, New Zealand (Apr. 15, 1994) (on file with the George Washington University National Security Archive); see also BARNETT, *supra* note 48, at 100-01 (describing the Security Council as split between "two camps regarding UNAMIR's future: those favoring intervention, guided by Nigeria, New Zealand, and the Czech Republic; and those insisting on withdrawal, led by the United States and the United Kingdom and joined by the muted voices of France, Russia, and China"). Although Nigeria and NAM favored intervention, that position is complicated by the fact that the Rwandan interim government, whose forces and allied militias were perpetrating the genocide, participated in the NAM caucus and actually was serving a term as a nonpermanent member of the Security Council. The interim government's support for U.N. intervention was probably due to a feeling that such an intervention would benefit it in its civil war against the insurgent Rwandese Patriotic Front, which had resumed simultaneously with the beginning of the genocide.

⁵⁸ S.C. Res. 929 (June 22, 1994). In drafting the resolution, France used Resolution 794 as its model. Letter from New Zealand Mission to the United Nations to Wellington, New Zealand (June 17, 1994), <https://nsarchive2.gwu.edu/NSAEBB/NSAEBB472/docs/Document%2017.pdf> [<https://perma.cc/N6UC-V78S>]. For a description of the force's composition, see PRUNIER, *supra* note 48, at 291.

⁵⁹ See PRUNIER, *supra* note 48, at 281-90; DES FORGES, *supra* note 47, at 415-16 (recounting evidence that the intervention was motivated by a desire to prevent a total Rwandese Patriotic Front victory).

⁶⁰ See DES FORGES, *supra* note 47, at 470 (noting French estimates that the intervention saved 15,000 to 17,000 lives out of the hundreds of thousands who died).

⁶¹ See BARNETT, *supra* note 48, at 149.

the Council lacked the power to authorize action.⁶² Brazil attributed its abstention from the vote in part to its policy preference that the Security Council avoid acting under Chapter VII, though it did not question the Council's clear authority to do so.⁶³ China also abstained purely for policy reasons, not because of doubts about the Council's power.⁶⁴

C. Kosovo: NATO Intervention Without Security Council Authorization

In the midst of addressing the genocide in Rwanda, the Security Council was also grappling with the consequences of the disintegration of the former Yugoslavia.⁶⁵ As the country broke into its constituent parts beginning in 1991,⁶⁶ ethnically based violence was particularly intense in the newly independent country of Bosnia-Herzegovina.⁶⁷ Bosnian Serbs opposed the new government, declaring their own Republika Srpska.⁶⁸ They laid siege to the capital, Sarajevo, and used violence to expel Bosnian Muslims from the territory they claimed.⁶⁹ The atrocities gave rise to a new euphemism: ethnic cleansing, defined by a U.N. Commission of Experts as "a purposeful policy designed by one ethnic or religious group to remove by violent and terror-inspiring means the civilian population of another ethnic or religious group from certain geographic areas."⁷⁰ Although ethnic cleansing is not technically a legal term, the acts that it describes can qualify,

⁶² See *id.* at 148-49 (noting "it was hardly imaginable that the Security Council would reject the first offer to provide humanitarian assistance").

⁶³ See U.N. SCOR, 49th Sess., 3392d mtg. at 3, U.N. Doc. S/PV.3392 (June 22, 1994) (statement of Brazil).

⁶⁴ *Id.* at 4.

⁶⁵ See generally Laura Silber & Allan Little, *Yugoslavia: Death of a Nation* (rev. ed. 1997); Tim Judah, *The Serbs: History, Myth and the Destruction of Yugoslavia* (3d ed. 2009); John R. Lampe, *Yugoslavia as History: Twice There Was a Country* 365-415 (2d ed. 2000).

⁶⁶ Yugoslavia was a federation of six republics: Serbia, Croatia, Bosnia-Herzegovina, Slovenia, Macedonia, and Montenegro. See LAMPE, *supra* note 65, at 233-64.

⁶⁷ See SILBER & LITTLE, *supra* note 65, at 218.

⁶⁸ See *id.*

⁶⁹ See JUDAH, *supra* note 65, at 228-30.

⁷⁰ See U.N. Secretary-General, *Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992)*, ¶ 130, U.N. Doc. S/1994/674 (May 27, 1994).

depending on specific circumstances, as war crimes, crimes against humanity, and genocide.⁷¹ The main benefactor of the Bosnian Serbs was Slobodan Milošević, the strongman who headed Serbia as Yugoslavia came apart and who built his career on Serbian nationalism.⁷²

Having deployed the U.N. Protection Force (UNPROFOR) in early 1992,⁷³ the Security Council struggled to deal with the conflict.⁷⁴ In the eighteen months from the beginning of the Bosnian war in April 1992 to October 1993, the Council adopted forty-seven resolutions and issued forty-two presidential statements, averaging almost five actions per month.⁷⁵ This flurry of activity belied an almost total lack of agreement as to what exactly should be done.⁷⁶ As one journalist noted, “the haphazard western response to the war helped to fuel it and prolong it.”⁷⁷

One approach involved identifying six “safe areas” for civilians in parts of Bosnia that the Serbs were trying to “cleanse” of Muslims.⁷⁸ This strategy had catastrophic consequences in July 1995 when Dutch UNPROFOR troops in Srebrenica, under pressure

⁷¹ *Id.* ¶ 129.

⁷² LOUIS SELL, SLOBODAN MILOŠEVIĆ AND THE DESTRUCTION OF YUGOSLAVIA 3-4 (2002) (describing Milošević’s transformation from a “Communist apparatchik” into a “charismatic nationalist”).

⁷³ S.C. Res. 743 (Feb. 21, 1992).

⁷⁴ See SILBER & LITTLE, *supra* note 65, at 265 (claiming that the conflict “humiliate[d] the U.N. Protection Force” and “fatally undermine[d] the credibility of the U.N. Security Council”).

⁷⁵ U.N. Secretary-General, *Report of the Secretary-General Pursuant to General Assembly Resolution 53/55: The Fall of Srebrenica*, ¶ 41, U.N. Doc. A/54/549 (Nov. 15, 1999) [hereinafter *The Fall of Srebrenica*]. “[R]esolutions are formal expressions of the opinion or will of” the Security Council. *Resolutions*, U.N. SEC. COUNCIL, <https://www.un.org/securitycouncil/content/resolutions> (last visited Nov. 27, 2022) [<https://perma.cc/HD87-57BS>]. “A presidential statement is a statement made by the President of the Security Council on behalf of the Council, adopted at a formal meeting of the Council and issued as an official document of the Council.” *Presidential Statements*, U.N. SEC. COUNCIL, <https://www.un.org/securitycouncil/content/presidential-statements> [<https://perma.cc/GW2F-KRUS>] (last visited Nov. 27, 2022).

⁷⁶ *Id.* ¶ 42.

⁷⁷ JUDAH, *supra* note 65, at 213.

⁷⁸ S.C. Res. 836 (June 4, 1993); see also *The Fall of Srebrenica*, *supra* note 75, ¶¶ 45-79 (discussing the evolution of the safe area concept). Among many flaws in the scheme, the Security Council did not explicitly mandate UNPROFOR to defend the safe areas and tied the authorization to use force to self-defense, not to the protection of civilians. *The Fall of Srebrenica*, *supra* note 75, ¶ 79.

from the Bosnian Serb army, handed over some 8,000 Muslim men and boys.⁷⁹ The Serbs murdered their prisoners, which the International Criminal Tribunal for the Former Yugoslavia (ICTY) later determined was genocide.⁸⁰ In all, as many as 20,000 civilians were killed in or near the safe areas.⁸¹ The conflict only came to an end after North Atlantic Treaty Organization (NATO) launched airstrikes in August 1995 in coordination with Bosnian and Croatian offensives,⁸² changing the balance of power and creating the conditions for a negotiated resolution. The war officially ended with the signing of the Dayton Agreement in December 1995, and an uneasy peace ensued.⁸³

The Dayton Agreement marked the end of the wars among Yugoslavia's successor republics,⁸⁴ but it was not the end of large-scale violence in the region.⁸⁵ Milošević's career as a proponent of Serbian nationalism in the late 1980s began in the province of Kosovo, an autonomous region that loomed large in Serbian history but by the end of the twentieth century had a population that was overwhelmingly Albanian Muslim.⁸⁶ Milošević's government ended Kosovo's autonomy in 1989.⁸⁷ Even as attention was focused on the break-up of Yugoslavia and the Bosnian war, conditions in Kosovo worsened.⁸⁸ Serbian oppression contributed to the emergence of a separatist insurgency, the Kosovo Liberation Army (KLA).⁸⁹ As abuse of Kosovar civilians intensified in 1998, the

⁷⁹ See *Prosecutor v. Krstić*, Case No. IT-98-33-A, Judgment, ¶ 2 (Int'l Crim. Trib. for the Former Yugoslavia Apr. 19, 2004).

⁸⁰ See *id.* ¶ 35; see also *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro)*, Judgment, 2007 I.C.J. 43, ¶ 297 (Feb. 26, 2007).

⁸¹ *The Fall of Srebrenica*, *supra* note 75, ¶ 3.

⁸² The Croatian army's offensive against Serbs in Croatia's Krajina region, Operation Storm, resulted in perhaps the largest ethnic cleansing of the Yugoslav wars with an exodus of some 170,000 people. JUDAH, *supra* note 65, at 2-4.

⁸³ SILBER & LITTLE, *supra* note 65, at 369-79.

⁸⁴ *Id.* at 382.

⁸⁵ See INDEP. INT'L COMM'N ON KOSOVO, *THE KOSOVO REPORT: CONFLICT, INTERNATIONAL RESPONSE, LESSONS LEARNED* at 67-83 (2000) [hereinafter *THE KOSOVO REPORT*] (describing the outbreak of civil war in Kosovo between February 1998 and March 1999).

⁸⁶ SELL, *supra* note 72, at 1-4.

⁸⁷ *THE KOSOVO REPORT*, *supra* note 85, at 41.

⁸⁸ *Id.* at 50-55.

⁸⁹ See *id.* at 51 (describing emergence of KLA).

United States and its NATO allies attempted to fashion a response that would dissuade Milošević.⁹⁰ NATO launched an air campaign without Security Council authorization, which in any event would have been stymied by Russia's use of its veto.⁹¹

Although the Security Council did not authorize the intervention, it decisively rejected a draft resolution tabled by Russia and India that would have condemned NATO's action as a violation of international law.⁹² After Serbia capitulated and the campaign ended, the Council provided a sort of *post hoc* ratification by authorizing a NATO-led security presence, the Kosovo Force (KFOR), and establishing a U.N. civil administration, the U.N. Mission in Kosovo (UNMIK).⁹³

Although using force for humanitarian purposes was not unprecedented, the Kosovo campaign marked the first time it had been done without Security Council authorization since the adoption of the U.N. Charter.⁹⁴ The action's legality was fiercely contested.⁹⁵ Although some NATO countries asserted that the intervention was legal, the United States declined to provide an explicit international legal rationale to justify the campaign.⁹⁶ An eminent persons panel that was convened to consider the operation's legality concluded that it was "illegal but legitimate."⁹⁷

D. No More Rwandas, No More Kosovos

For U.N. Secretary-General Kofi Annan, the inaction in Rwanda and unauthorized action in Kosovo presented a dilemma. It was unacceptable not to respond to a mass slaughter, but it also was unacceptable for the response to be outside the collective security

⁹⁰ See IVO H. DAALDER & MICHAEL E. O'HANLON, WINNING UGLY: NATO'S WAR TO SAVE KOSOVO, at 45-62 (2000) (describing diplomatic efforts to persuade Milošević to comply with U.N. demands).

⁹¹ See JAMES TRAUB, THE BEST INTENTIONS: KOFI ANNAN AND THE UN IN THE ERA OF AMERICAN WORLD POWER 96 (2006).

⁹² U.N. SCOR, 54th Sess., 3989th mtg. at 6, U.N. Doc. S/PV.3989 (Mar. 26, 1999). The vote was three for and twelve against, with only Namibia joining Russia and China. *Id.*

⁹³ S.C. Res. 1244 (June 10, 1999).

⁹⁴ WHEELER, *supra* note 28, at 242.

⁹⁵ See *id.* at 251; see also Koh, *supra* note 28, at 242.

⁹⁶ Koh, *supra* note 28, at 977 (expressing his opinion that it was "outrageous that the U.S. government would fail to state a legal rationale to justify its use of force").

⁹⁷ THE KOSOVO REPORT, *supra* note 85, at 4.

structure of the United Nations.⁹⁸ If Annan had to choose between the two, he would lean toward unauthorized action. But he preferred to resolve the dilemma by ensuring timely and decisive action under U.N. auspices.⁹⁹ He put this problem to the U.N. General Assembly when he addressed the issue of Kosovo in September 1999, saying the intervention

has cast in stark relief the dilemma of what has been called humanitarian intervention: on one side, the question of the legitimacy of an action taken by a regional organization without a United Nations mandate; on the other, the universally recognized imperative of effectively halting gross and systematic violations of human rights with grave humanitarian consequences. The inability of the international community in the case of Kosovo to reconcile these two equally compelling interests—universal legitimacy and effectiveness in defense of human rights—can only be viewed as a tragedy.¹⁰⁰

For Annan, the sense that Rwanda and Kosovo presented a dilemma sprang from his profound humanitarianism and his abiding commitment to the United Nations as an institution.¹⁰¹ Not all U.N. members felt as strongly on both points as he did—and thus the dilemma was not as acutely felt.¹⁰² The immediate reaction to his address from many developing countries was in fact quite hostile, because they felt that the much more serious issue was NATO's violation of Serbia's sovereignty.¹⁰³ And much of the leadership in

⁹⁸ Press Release, Secretary General, Secretary-General Presents His Annual Report to the General Assembly, U.N. Press Release SG/SM/7136 (Sept. 20, 1999), <https://www.un.org/press/en/1999/19990920.sgs7136.html> [<https://perma.cc/8MGT-TMJ9>] [hereinafter 1999 U.N. Press Release].

⁹⁹ TRAUB, *supra* note 91, at 96 (quoting Annan as saying that the “fact that the Council couldn't come together doesn't make [the use of force] not legitimate”).

¹⁰⁰ 1999 U.N. Press Release, *supra* note 98. A version of Annan's address was published for a broader audience as Kofi Annan, *Two Concepts of Sovereignty*, *ECONOMIST* (Sept. 16, 1999), <https://www.economist.com/international/1999/09/16/two-concepts-of-sovereignty> [<https://perma.cc/7Z8A-47QT>].

¹⁰¹ See TRAUB, *supra* note 91, at 145 (noting that Annan “believed devoutly in what he took to be the universal principles of human rights and humanitarianism and in the use of force against evil, so long as the force was mustered collectively and in conformity with international law”).

¹⁰² See Gareth Evans, *The Responsibility to Protect: Rethinking Humanitarian Intervention*, 98 *AM. SOC'Y INT'L L.* 78, 79 (2004) (noting the “cantankerous exchanges” between supporters and non-supporters of humanitarian intervention in the General Assembly).

¹⁰³ See THOMAS G. WEISS, *HUMANITARIAN INTERVENTION: IDEAS IN ACTION* 132 (3d

the U.N. Secretariat—that is, Annan’s most senior lieutenants—felt that unauthorized intervention was more problematic than unfettered atrocities.¹⁰⁴ For example, Ibrahim Gambari in the U.N. Department of Political Affairs fretted about “the consent of the host state. What should happen if this consent were not given?”¹⁰⁵ The United States, for its part, was not inclined to stay its hand over the absence of Security Council authorization if it was otherwise willing to act, as it had shown in Kosovo.¹⁰⁶ Put another way, there were many countries and other interested parties who felt one or the other horn of the dilemma was a bigger problem than the other.¹⁰⁷

II. Evolution of a Concept: From Strong-Form to Weak-Form R2P

Ahead of the U.N. Millennium Summit in September 2000, Annan reiterated the need to address the “dilemma of intervention.”¹⁰⁸ Acknowledging the importance of both “the defence of humanity” and “the defence of sovereignty,” he argued

ed. 2016) (“[R]eactions in the General Assembly Hall were raucous and predictable, from China, Russia, and especially much of the Third World.”); THAKUR, *supra* note 3, at 274-76 (noting the very negative reaction of NAM and G-77 countries to this Annan speech and others he made along the same lines); TRAUB, *supra* note 91, at 101 (recounting hostile responses from the president of Algeria and the Namibian president of the General Assembly, “the latter an astonishing breach of etiquette”).

¹⁰⁴ See TRAUB, *supra* note 91, at 101.

¹⁰⁵ *Id.* at 99. Gambari served as the U.N. representative for Nigeria’s military dictatorship from 1990 to 1999, in which capacity he had floated the NAM proposal for U.N. intervention in Rwanda, which enjoyed the consent of Rwanda’s genocidal interim government. See *supra* notes 54-56 and accompanying text. After Nigeria’s return to democracy, he held a succession of high-level U.N. posts, gaining notoriety as the UN’s “favorite dictator-whisperer” for his role as special envoy to authoritarian regimes in places like Myanmar, Zimbabwe, and Sudan. Colum Lynch, *The U.N.’s Dictator Envoy*, FOREIGN POL’Y (Feb. 11, 2010), <https://foreignpolicy.com/2010/02/11/the-u-n-s-dictator-envoy> [<https://perma.cc/4YJZ-NLNN>]; see also Seyward Darby, *Gullible Gambari*, NEW REPUBLIC (Jan. 10, 2010), <https://newrepublic.com/article/72367/gullible-gambari> [<https://perma.cc/RL3P-6PDD>].

¹⁰⁶ See TRAUB, *supra* note 91, at 94 (noting that in Kosovo, U.S. President Bill Clinton “was not about to let the UN serve as the arbiter of this grave moral responsibility”). When British Foreign Secretary Robin Cook told Secretary of State Madeleine Albright that his lawyers said a Security Council authorization was needed before intervening in Kosovo, she famously told him to “get himself new lawyers.” *Id.*

¹⁰⁷ The international political divisions over intervention are discussed more fully *infra* Part IV.

¹⁰⁸ U.N. Secretary-General, *We the Peoples: The Role of the United Nations in the Twenty-First Century*, ¶¶ 215-219, U.N. Doc. A/54/2000 (Mar. 27, 2000).

that “surely no legal principle—not even sovereignty—can ever shield crimes against humanity.”¹⁰⁹ Ultimately, when peaceful means fail to stop atrocities, “the Security Council has a moral duty to act on behalf of the international community.”¹¹⁰ To those who demurred that the principle of sovereignty should prevail, he asked, “if humanitarian intervention is, indeed, an unacceptable assault on sovereignty, how should we respond to a Rwanda, a Srebrenica—to gross and systematic violations of human rights that offend every precept of our common humanity?”¹¹¹

A. *ICISS and Strong-Form R2P*

The Canadian government took up Annan’s challenge to find a resolution to the dilemma and convened ICISS to answer the question he posed.¹¹² The Commission was co-chaired by former Australian foreign minister Gareth Evans and Algerian diplomat Mohamed Sahnoun and comprised a geographically diverse panel of eminent personalities.¹¹³ Throughout 2001, the Commission held consultations in every region of the world.¹¹⁴ These consultations revealed very little consensus—indeed, they were a “cacophony”—except that intervention could not be completely ruled out in every conceivable case.¹¹⁵ In December, the Commission published its report, “The Responsibility to Protect.”¹¹⁶

The dilemma identified by Annan was essentially a conflict (as suggested by the Commission’s very name) between traditional views of sovereignty (and the corollary principle of non-interference) and a purported right to humanitarian intervention.¹¹⁷ The Commission’s strategy to resolve the conflict involved reframing the debate by redefining “sovereignty” from a question of control to one of responsibility.¹¹⁸ By coming up with a new vocabulary centered on responsibility, it aimed to do away with the

¹⁰⁹ *Id.* ¶¶ 218-219.

¹¹⁰ *Id.* ¶ 219.

¹¹¹ *Id.* ¶ 217.

¹¹² THE RESPONSIBILITY TO PROTECT, *supra* note 10, at 81.

¹¹³ *Id.*

¹¹⁴ *Id.* at 83.

¹¹⁵ WEISS, *supra* note 103, at 137. Weiss was the Commission’s research director.

¹¹⁶ THE RESPONSIBILITY TO PROTECT, *supra* note 10, at 1.

¹¹⁷ *Id.* at 2.

¹¹⁸ *Id.* at 13.

contentious term “humanitarian intervention.”¹¹⁹

One key antecedent of the Commission’s R2P concept was the suggestion by Sudanese scholar Francis Deng and colleagues to view “sovereignty as responsibility.”¹²⁰ The idea was to “recast[] sovereignty . . . as an instrument for ensuring the protection and welfare of all those under a state’s jurisdiction.”¹²¹ This was a new way of talking about sovereignty in the post-1945 era, but the notion that sovereigns have a responsibility to the governed was not novel.¹²² And the development and broad acceptance by states of human rights norms in the years since the end of World War II, through such instruments as the Universal Declaration of Human Rights,¹²³ the Genocide Convention,¹²⁴ the Geneva Conventions,¹²⁵ the International Covenants on Civil and Political¹²⁶ and Economic, Social, and Cultural Rights,¹²⁷ and the Rome Statute of the International Criminal Court,¹²⁸ provided a strong foundation in international law for insisting that sovereignty entails

¹¹⁹ See WEISS, *supra* note 103, at 137 (“ICISS sought to drive a stake through the heart of the term ‘humanitarian intervention.’”); *but see* WILLIAM SHAKESPEARE, ROMEO AND JULIET, Act II, Sc. 2 (“What’s in a name? That which we call a rose / By any other name would smell as sweet.”). For a discussion of the bitter debate over the idea of humanitarian intervention, see *supra* notes 101-105 and accompanying text.

¹²⁰ See FRANCIS M. DENG ET AL., SOVEREIGNTY AS RESPONSIBILITY: CONFLICT MANAGEMENT IN AFRICA 1 (1996) (“[S]overeignty carries with it certain responsibilities for which governments must be held accountable.”); *id.* at 2-19 (charting the evolution of sovereignty from an emphasis on control to the idea of responsibility).

¹²¹ ROBERTA COHEN & FRANCIS M. DENG, MASSES IN FLIGHT: THE GLOBAL CRISIS OF DISPLACEMENT 275 (1998).

¹²² See LUKE GLANVILLE, SOVEREIGNTY AS RESPONSIBILITY: A NEW HISTORY 1 (2014) (contending that “the idea that sovereignty entails a ‘responsibility to protect’ has deep historical roots”); Welsh, *supra* note 2, at 391 (noting that the idea of a sovereign responsibility to protect the population stretches back to Bodin and Hobbes).

¹²³ G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948).

¹²⁴ G.A. Res. 260 (III) A, Convention on the Prevention and Punishment of the Crime of Genocide (Dec. 9, 1948).

¹²⁵ *E.g.*, Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 75 U.N.T.S. 973.

¹²⁶ G.A. Res. 2200 (XI) A, International Covenant on Civil and Political Rights (Dec. 16, 1966).

¹²⁷ G.A. Res. 2200 (XI) A, International Covenant on Economic, Social and Cultural Rights (Dec. 16, 1966).

¹²⁸ Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 38544.

responsibility.¹²⁹

But the Commission took the notion of responsibility one step further, and suggested that 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” those harms, then the responsibility for protecting the population passes to the international community.¹³⁰ Since the state has not fulfilled the essential aspect of sovereignty—the responsibility to protect the population—the corollary of sovereignty, the principle of non-interference, does not apply.¹³¹ Other attributes of state sovereignty, in other words, are conditional on the state’s meeting its responsibility to protect.¹³²

The Commission’s new vocabulary sought to focus on the rights of civilians not to be abused. With such a focus, the debate would then be over whose responsibility it is to protect those rights.¹³³ In a crisis, the relevant issue would be, “who is in a position to fulfill the responsibility to protect the population?” If the state cannot or will not, then the international community assumes the responsibility. But this would not actually lead to an abrogation of “sovereignty,” because sovereignty *is* responsibility.¹³⁴ Thus, redefining sovereignty as responsibility also allowed proponents of R2P to argue that the doctrine was in fact sovereignty-*enhancing*.¹³⁵

This is “strong-form” R2P—*twin* responsibilities: first the state’s responsibility, and second, if the state fails in fulfilling it, an international responsibility. Although the international responsibility is “residual” or complementary to the state responsibility, it is commensurate, equal in scope. The Commission was clear that this responsibility extended to the use of military force if absolutely necessary and appropriate to protect a population under attack.¹³⁶ These twin responsibilities provided the

¹²⁹ See THE RESPONSIBILITY TO PROTECT, *supra* note 10, at 14 (citing various international human rights and humanitarian law instruments).

¹³⁰ *Id.* at xi.

¹³¹ *See id.*

¹³² See WEISS, *supra* note 103, at 133 (R2P is premised on the idea that “sovereignty is not absolute, but contingent.”).

¹³³ THE RESPONSIBILITY TO PROTECT, *supra* note 10, at 16-18.

¹³⁴ *Id.* at 17.

¹³⁵ *See, e.g.,* THAKUR, *supra* note 3, at 289.

¹³⁶ THE RESPONSIBILITY TO PROTECT, *supra* note 10, at 31. The Commission

Commission's answer to the goal of no more Rwandas: if the state did not fulfill its primary responsibility to protect its population, there should be an explicit international responsibility to step in.

But what of the goal of no more Kosovos? The Commission's idea of an international responsibility to act, taken by itself, would provide a justification for interventions such as NATO's.¹³⁷ In fact, the obligation embedded in such a responsibility, if cited by intervening nations, could accelerate the development of a rule of customary international law in favor of such intervention.¹³⁸ Future Kosovos would not just be legitimate, the argument for their legality would also be enhanced.

The Commission addressed this issue by asserting that, first and foremost, it should be the Security Council that authorizes military action if necessary to protect a population under attack.¹³⁹ The Commission proposed that any planned intervention should first be brought to the Security Council and that the Security Council should act with dispatch in determining whether to approve it.¹⁴⁰

In the case of Kosovo, NATO declined to seek Security Council authorization, knowing that it would not be forthcoming because of a Russian veto.¹⁴¹ It is not entirely clear what purpose would have been served by requiring it to go through the motion of forcing that veto. In the specific case of Kosovo, a failed Security Council resolution on intervention—even one that garnered a majority but failed due to a veto—might have fractured consensus among NATO's members to undertake the intervention.¹⁴²

The Commission considered it “unconscionable” that the prospect of life-saving humanitarian action could be stymied by the

articulated strict criteria for the use of force based on just war principles. *Id.* at 32-37 (discussing the criteria of “just authority, just cause, right intention, last resort, proportional means and reasonable prospects [of success]”).

¹³⁷ *Id.* at 54-55 (discussing the possibility of military intervention without U.N. authorization).

¹³⁸ See Reinold, *supra* note 6, at 58 (discussing general view that customary international law arises from state practice undertaken with a sense of obligation).

¹³⁹ *Id.* at 49.

¹⁴⁰ *Id.* at 50.

¹⁴¹ WHEELER, *supra* note 28, at 261 (noting Russian threat in response to a U.K. draft to veto any resolution that would authorize the use of force in Kosovo).

¹⁴² See TRAUB, *supra* note 91, at 96 (citing Canadian ambassador's concern that some NATO members took “‘a connect-the-dots legal position’ that would have prohibited hostilities once a council resolution had been defeated”).

veto of a permanent member.¹⁴³ Its solution to this problem was a “code of conduct” under which permanent members would agree not to veto resolutions dealing with humanitarian crises if their “vital national interests were not claimed to be involved.”¹⁴⁴ Even if all the permanent members agree to such a code, it is not clear what difference it will make so long as they remain the judges of their own “vital national interests” (as well as judges of whether the relevant situation falls within whatever category is covered by the proposed code of conduct).¹⁴⁵

The Commission also included a warning to the Security Council that its failure to act on humanitarian crises may endanger its “significance, stature and authority.”¹⁴⁶ It is not clear how well-founded this concern is, especially compared with much more widely shared criticisms of the Council’s lack of representativeness.¹⁴⁷ Even so, protecting the Council’s reputation by acting effectively in humanitarian crises may be a form of collective action problem that evades solution. In any given situation the potential veto-wielder would have to forgo the immediate benefit it perceives in using the veto in exchange for the rather theoretical and highly attenuated benefit of protecting the Council’s collective “significance, stature and authority.”

Although it strongly preferred Security Council authorization, the Commission recognized that a code of conduct and imprecations to protect the Council’s reputation might not be enough to avoid Council inaction.¹⁴⁸ The Commission therefore felt compelled to consider alternative sources of legitimate authority.¹⁴⁹ The first it noted was the General Assembly acting under its “Uniting for Peace” procedure, which originated in the 1950s to address situations involving international peace and security where the

¹⁴³ THE RESPONSIBILITY TO PROTECT, *supra* note 10, at 51.

¹⁴⁴ *Id.*

¹⁴⁵ See Brown, *supra* note 9, at 430-31.

¹⁴⁶ THE RESPONSIBILITY TO PROTECT, *supra* note 10, at 51; see also *id.* at 55 (warning that a successful unilateral intervention after the Security Council failed to act “may have enduringly serious consequences for the stature and credibility of the UN itself”).

¹⁴⁷ See, e.g., Mohammed Ayoob, *Humanitarian Intervention and International Society*, 3 GLOB. GOVERNANCE 225, 225 (2001) (referring to the Security Council as “a cabal acting under the UN Charter’s veto provision and through a patently discriminatory process”).

¹⁴⁸ *Id.* at 53.

¹⁴⁹ *Id.* at 53-55.

Security Council is paralyzed.¹⁵⁰ The procedure requires a two-thirds' majority and, unlike the Security Council, cannot compel action.¹⁵¹ But if willing intervenors were prepared to act, General Assembly approval could provide a high degree of legitimacy grounded in the U.N. Charter.¹⁵²

A second alternative considered by the Commission involved interventions by regional or sub-regional organizations within their geographic areas.¹⁵³ The Commission noted without making a judgment that NATO, a regional organization, was criticized for acting outside its region in Kosovo, although the Commission also acknowledged the concern of NATO countries that the atrocities inside Kosovo would have tangible effects on them.¹⁵⁴ The U.N. Charter conditions enforcement action by regional organizations on authorization by the Security Council.¹⁵⁵ The Commission suggested that *post hoc* authorization might suffice.¹⁵⁶

The Commission recognized that interventions unsanctioned by the Security Council or the General Assembly would not be broadly considered legitimate.¹⁵⁷ But if such an intervention occurred "in a conscience-shocking situation," the Commission wondered, "where lies the most harm: in the damage to international order if the Security Council is bypassed or in the damage to that order if human beings are slaughtered while the Security Council stands by."¹⁵⁸

B. The 2005 World Summit and Weak-Form R2P

In articulating R2P, the Commission sought to establish a new norm, defined as "a standard of appropriate behavior for actors with a given identity."¹⁵⁹ As a general matter, a norm is less formal than

¹⁵⁰ THE RESPONSIBILITY TO PROTECT, *supra* note 10, at 53 (referring to G.A. Res. 377A, Uniting for Peace (Nov. 3, 1950)).

¹⁵¹ *Id.*

¹⁵² *Id.* at 53. Article 12 of the U.N. Charter gives the General Assembly residual responsibility in matters of international peace and security. U.N. Charter art 12.

¹⁵³ THE RESPONSIBILITY TO PROTECT, *supra* note 10, at 53.

¹⁵⁴ *Id.* at 54.

¹⁵⁵ U.N. Charter art. 53, ¶ 1.

¹⁵⁶ THE RESPONSIBILITY TO PROTECT, *supra* note 10, at 54. NATO effectively obtained *post hoc* authorization, or at least ratification, of its Kosovo intervention in S.C. Res. 1244 (June 10, 1999).

¹⁵⁷ *Id.* at 54-55.

¹⁵⁸ *Id.* at 55.

¹⁵⁹ Martha Finnemore & Kathryn Sikkink, *International Norm Dynamics and*

a legal rule. At some point, if the “appropriate behavior” is engaged in with a sufficient sense of legal obligation, a norm can ripen into customary international law.¹⁶⁰ The conventional model for the development and diffusion of new norms envisions a “life-cycle” of three stages.¹⁶¹ In the first stage, “norm entrepreneurs”—such as the Commission, its Canadian sponsors, and Secretary-General Kofi Annan—identify a problem and offer a new norm that would solve or at least ameliorate that problem.¹⁶² In the second stage, the norm entrepreneurs advocate for other influential actors to adopt the norm.¹⁶³ As more actors do so, the norm becomes institutionalized, leading to the third stage: a norm cascade during which the norm is broadly adopted and, eventually, achieves a “taken for granted” status in which most actors never even consider that they adhere to the norm because it is, well, taken for granted.¹⁶⁴

The Commission published its report calling for recognition of a new “responsibility to protect” norm in December 2001, releasing it into an international political landscape upended by the attacks on September 11 of that year.¹⁶⁵ This life-cycle model provided the playbook for R2P’s proponents as they sought to build a bandwagon of supporters, then seized on the opportunity to institutionalize the norm by having it endorsed at the 2005 World Summit.¹⁶⁶

For example, in 2003 Kofi Annan appointed a “High-Level Panel” to consider issues of U.N. reform.¹⁶⁷ One panel member was

Political Change, 52 INT’L ORG. 887, 891 (1998).

¹⁶⁰ See THAKUR, *supra* note 14, at 2-6; Reinold, *supra* note 6, at 58-60 (comparing development of norms and of rules of customary international law); *but see* Mehrdad Payandeh, *With Great Power Comes Great Responsibility? The Concept of the Responsibility to Protect Within the Process of International Lawmaking*, 35 YALE J. INT’L L. 469, 481 (2010) (arguing that R2P “cannot be understood as a norm or even as a potential norm under customary international law”).

¹⁶¹ This “life cycle” of norms is described in Finnemore & Sikkink, *supra* note 159, at 895. This somewhat static model has been supplemented by more dynamic models, some of which have been developed with reference to R2P. *See supra* note 8 and sources therein.

¹⁶² Finnemore & Sikkink, *supra* note 159, at 895.

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *See generally* THE RESPONSIBILITY TO PROTECT, *supra* note 10.

¹⁶⁶ *See generally* Outcome Document, *supra* note 1.

¹⁶⁷ Press Release, Secretary-General, Secretary-General Names High-Level Panel to Study Global Security Threats, and Recommend Necessary Changes, U.N. Press Release SG/A/857 (Nov. 4, 2003), <https://press.un.org/en/2003/sga857.doc.htm> [<https://perma.cc>

ICISS co-chair Gareth Evans, who worked to include R2P in the panel's final report.¹⁶⁸ Despite initial hesitation among some of its members, the panel ultimately did support R2P.¹⁶⁹ As one panel member claimed, this embrace of the idea “placed [it] fair and square in the centre of the negotiating arena” and teed it up “for decision.”¹⁷⁰ The significance of this unanimous endorsement of R2P was enhanced by the wide range of views represented on the panel, including (unlike the Commission) former high-ranking officials from China and Russia.¹⁷¹

The September 2005 summit, when U.N. members gathered for to consider a broad range of issues related to U.N. reform, presented an important opportunity to institutionalize R2P.¹⁷² Ahead of the summit, Annan issued a document to frame the issues to be considered and, building on the High-Level Panel's embrace of R2P, included the concept in his report.¹⁷³ Having R2P in both of these prefatory documents gave it a chance to be in the Outcome Document.¹⁷⁴

Many R2P proponents promote a narrative along the lines that the Commission proposed R2P, which was then “unanimously adopted” by U.N. members in the Outcome Document.¹⁷⁵ But this narrative elides both the circumstances in which the Outcome

/LN2J-YQXG].

¹⁶⁸ Welsh, *supra* note 2, at 372; *see also* DAVID HANNAY, *NEW WORLD DISORDER: THE UN AFTER THE COLD WAR: AN INSIDER'S VIEW* 213 (2008) (describing Evans as “the intellectual power-base of the Panel”).

¹⁶⁹ U.N. High-Level Panel on Threats, Challenges and Change, *A More Secure World: Our Shared Responsibility*, ¶¶ 29-30, 199-203, U.N. Doc. A/59/565 (Dec. 2, 2004).

¹⁷⁰ HANNAY, *supra* note 168, at 245.

¹⁷¹ The Chinese member was former foreign minister and vice-premier Qian Qichen while the Russian member was former foreign minister and prime minister Yevgeny Primakov. *Id.* at 211. Although the members were supposed to serve on the panel in their individual capacities, Qian and Primakov both seemed to be in close contact with their governments. *See id.* at 212.

¹⁷² U.N. Secretary-General, *In Larger Freedom: Towards Development, Security and Human Rights for All*, U.N. Doc. A/59/2005 (Mar. 21, 2005).

¹⁷³ *Id.* ¶¶ 7, 132, 125-126.

¹⁷⁴ *See* Pollentine, *supra* note 14, at 265 (quoting an interview with Gareth Evans about the importance of R2P being in both reports).

¹⁷⁵ *See, e.g.*, THAKUR, *supra* note 160, at 1-2 (describing the Commission's strong-form R2P, then asserting “[t]he principle, commonly referred to as R2P, was unanimously adopted by the largest gathering of heads of state and government meeting at the UN summit in October [sic] 2005”); Evans, *supra* note 14, at xvi.

Document was adopted and the significant substantive changes made to the R2P concept in that document's final version.¹⁷⁶

Negotiating a complex document that can garner the support of more than 190 countries would be difficult under any circumstances.¹⁷⁷ The level of difficulty in negotiating the Outcome Document soared with the arrival in August of the new U.S. ambassador, John Bolton. Scant weeks remained before the summit and many diplomats had left on vacation.¹⁷⁸ Bolton insisted that the existing draft needed to be rewritten from scratch.¹⁷⁹ In mid-August, the United States proposed hundreds of changes to the current draft.¹⁸⁰ But although Bolton certainly scrambled things, the process was not on a glide path toward consensus in any event.¹⁸¹

There was still no agreed-upon draft only days before the summit; the situation was "frantic."¹⁸² Kofi Annan's staff took charge of the process, which had been in the hands of member states for months, and produced a "take it or leave it" package calibrated to be acceptable enough that countries would not jeopardize the summit by rejecting it.¹⁸³ Out of 178 paragraphs, 2 dealt with the

¹⁷⁶ Strictly speaking, the Outcome Document was adopted by consensus, which is different from unanimity. Cuba and Venezuela made a point of expressing their reservations on a number of issues, including R2P. Pollentine, *supra* note 14, at 344 n.1407.

¹⁷⁷ See Pollentine, *supra* note 14, at 274-75 (noting that "the intense negotiations involved some 191 states, hundreds of individuals, at least 6 draft iterative outcome documents . . . with negotiations taking place across 4 key thematic clusters covering dozens of specific issues and individual proposals, all of which required *consensus* agreement").

¹⁷⁸ Press Release, The White House, President Appoints John Bolton as Ambassador to the United Nations (Aug. 1, 2005), <https://georgewbush-whitehouse.archives.gov/news/releases/2005/08/20050801.html> [<https://perma.cc/ABW8-PGS2>].

¹⁷⁹ See TRAUB, *supra* note 91, at 369 (quoting Bolton as telling the General Assembly president, "We're going to have to start from the beginning").

¹⁸⁰ Pollentine, *supra* note 14, at 275-76.

¹⁸¹ See *id.* at 279 (noting that "significant resentment towards the process was building prior to the arrival of Bolton," especially among the NAM and G-77 groups of developing countries); TRAUB, *supra* note 91, at 370 (suggesting that Western diplomats also were discontent with the process that Bolton disrupted).

¹⁸² HANNAY, *supra* note 168, at 272; see also Pollentine, *supra* note 14, at 335 (characterizing the last week of negotiations as "intense, complex, confused, procedurally unsatisfactory and a stark reminder of the limitations of multilateralism when faced with contentious issues").

¹⁸³ See Pollentine, *supra* note 14, at 342-43, 342 n.1404.

substance of R2P.¹⁸⁴ Everyone acquiesced to the package, including those most skeptical of R2P.¹⁸⁵ In effect, the goal of preventing the summit's collapse was a higher priority than quibbling over every issue touched on in the nonbinding Outcome Document.¹⁸⁶

In the aftermath, diplomats from a number of countries said that they agreed to the document's R2P language because of the pressure not to wreck the summit and disavowed any intent to adhere to the doctrine.¹⁸⁷ As the Dutch U.N. ambassador told one scholar, R2P "more or less slipped through in the shadow of bigger issues."¹⁸⁸ In this context—a complex "take it or leave it" package where there was powerful pressure to obtain consensus—claims that any particular issue in the document received "unanimous endorsement" are exaggerated.¹⁸⁹ The attitude of many countries seemed to be more "we can live with this language" than "yes, we endorse this big idea." China, to cite one important example, was focused more on other issues and was willing to accept R2P in the final document because of the sharply circumscribed nature of the final text.¹⁹⁰

Inclusion of R2P in the Outcome Document thus would have limited significance even if the substance of the concept were the same as that articulated by ICISS. In fact, the substance was not the same. Alterations in the language were significant enough that it is necessary to differentiate the Outcome Document's "weak-form" R2P from the Commission's "strong-form" R2P. Although R2P was tucked into a larger package, international politics still limited what could be included. The fact remained that its formulation had "to

¹⁸⁴ Outcome Document, *supra* note 1.

¹⁸⁵ The lone holdout was the Indian ambassador, who for domestic political reasons was able to pursue a quixotic personal campaign to omit any mention of R2P. See Madhan Mohan Jaganathan & Gerrit Kurtz, *Singing the Tune of Sovereignty? India and the Responsibility to Protect*, 14 CONFLICT, SEC. & DEV. 461, 470 (2014) (contending that the ambassador had a free hand on R2P because the governing coalition depended on left-wing parties supportive of his critical stance); see also Pollentine, *supra* note 14, at 341-42. He ultimately was overruled by the Indian prime minister after lobbying by the Canadian prime minister and Kofi Annan. TRAUB, *supra* note 91, at 385-86.

¹⁸⁶ See Welsh, *supra* note 2, at 373 (suggesting that R2P's acceptance was "largely a function of particular features of the negotiation process itself," including the presentation of the final document as a "take it or leave it" package).

¹⁸⁷ SPENCER ZIFCAK, UNITED NATIONS REFORM: HEADING NORTH OR SOUTH? 119-20 (2009).

¹⁸⁸ Pollentine, *supra* note 14, at 213.

¹⁸⁹ *Id.* at 214.

¹⁹⁰ See *id.* at 264.

win over a far larger group of skeptical, concerned, or less-enthusiastic states and to ensure clear red-lines of the Permanent Five and the U.N. membership in general were not crossed.”¹⁹¹ Skeptics included such influential states as China, Russia, India, Egypt, and Pakistan, and more generally the NAM of developing countries.¹⁹²

Paragraph 138 of the final document launches from a starting point similar to the Commission’s: “Each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity.”¹⁹³ The Commission also had started with the state’s responsibility, but envisioned a broader scope for that responsibility. It contended that there is a state responsibility to protect arising from the broad human rights and humanitarian legal architecture developed after World War II as well as the development of the concept of human security.¹⁹⁴ As former High Commissioner for Human Rights Louise Arbour observed in support of R2P, “under existing international law,” states have a responsibility to protect their populations “against genocide [as well] as against famine, disease, ignorance, deprivation of the basic necessities of life, discrimination and the lack of freedom.”¹⁹⁵ The Outcome Document’s narrower approach suggested less that sovereignty *is* responsibility than that some level of responsibility is an attribute of sovereignty, along with other attributes such as equality with other states and freedom from external interference.¹⁹⁶

The international role is addressed in paragraph 139 of the Outcome Document, which provides the most significant departure from the Commission’s R2P concept.¹⁹⁷ Again, the Outcome Document is narrower than the Commission’s formulation,

¹⁹¹ *Id.* at 281.

¹⁹² *See id.* at 286; *see also* ZIFCAK, *supra* note 187, at 115-16.

¹⁹³ Outcome Document, *supra* note 1, ¶ 138.

¹⁹⁴ THE RESPONSIBILITY TO PROTECT, *supra* note 10, at 14-15. The Commission defined human security as “the security of people against threats to life, health, livelihood, personal safety and human dignity.” *Id.* at 15.

¹⁹⁵ Louise Arbour, *The Responsibility to Protect as a Duty of Care in International Law and Practice*, 34 REV. INT’L STUDS. 445, 458 (2008).

¹⁹⁶ *See* Welsh, *supra* note 2, at 374 (characterizing paragraph 138 as “a ‘pro-sovereignty’ formulation that roots ownership and initial operationalization of R2P” in states).

¹⁹⁷ Outcome Document, *supra* note 1.

focusing only on the four atrocity crimes.¹⁹⁸ The Commission suggested that the international responsibility to protect attached when “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.”¹⁹⁹ Moreover, the Commission set the threshold at which failure to fulfill the responsibility could justify international military intervention at “large scale loss of life, actual or apprehended” or “large scale ‘ethnic cleansing,’ actual or apprehended.”²⁰⁰ Large scale loss of life certainly included genocide, (large scale) war crimes, and crimes against humanity.²⁰¹ But it also extended, according to the Commission, to “overwhelming natural or environmental catastrophes” if the state was unable or unwilling to protect.²⁰²

Paragraph 139 bifurcates the international role. It retains some language of responsibility, but that responsibility is restricted to using various peaceful means “through the United Nations . . . to help to protect populations” from the four atrocity crimes.²⁰³ In other words, the international community will help states to meet their responsibility if they request such help.²⁰⁴ This provision may make a difference if a state is unable to protect, but would not apply where a state is unwilling to protect.²⁰⁵

The heart of the difference between the Commission’s strong-form R2P and the Outcome Document’s weak-form version involves the issue of the international community’s role when a population is under attack from the state itself—that is, a situation similar to Rwanda or Kosovo. The Commission’s formulation of R2P had asserted commensurate responsibilities in such a case—first of the relevant state, then of the international community should the state be unwilling or unable to fulfill its responsibility to protect from serious harm.²⁰⁶ The Outcome Document was much

¹⁹⁸ *Id.*

¹⁹⁹ THE RESPONSIBILITY TO PROTECT, *supra* note 10, at xi.

²⁰⁰ *Id.* at xii, 32.

²⁰¹ *Id.*

²⁰² *Id.* at 33.

²⁰³ Outcome Document, *supra* note 1, ¶ 139.

²⁰⁴ U.N. Secretary-General, *Implementing the Responsibility to Protect*, ¶ 11(b), U.N. Doc. A/63/677 (Jan. 12, 2009) [hereinafter 2009 Report].

²⁰⁵ Outcome Document, *supra* note 1, ¶ 139.

²⁰⁶ *See supra* notes 136-138 and accompanying text.

different.

The distinction between strong-form R2P and weak-form R2P in this regard can be appreciated by charting the evolution of the relevant language from an August draft to the Outcome Document's final language.²⁰⁷ The draft circulated in early August by the General Assembly president echoed the Commission's strong-form language, as U.N. members would "recognize our *shared responsibility to take collective action*, in a timely and decisive manner, through the Security Council under Chapter VII of the UN Charter and in co-operation with relevant regional organizations, should peaceful means be inadequate and national authorities be unwilling or unable to protect their populations" from the four atrocity crimes.²⁰⁸ This language seems to have been a placeholder rather than reflecting any agreement among states.²⁰⁹ The United States, in particular, rejected this language precisely because it embodied an obligation to respond and articulated an international responsibility "of the same character as the responsibility" of the relevant state.²¹⁰ U.S. Ambassador John Bolton made clear that the United States wanted "to avoid formulations that suggest that the other countries are inheriting the same responsibility that the host state has."²¹¹

The United States thus recommended that the document be amended to say that U.N. members "stand ready" to act collectively if peaceful means fail.²¹² While falling short of accepting a responsibility, this language still implied a sense of urgency and

²⁰⁷ This discussion is necessarily abbreviated and focuses on the differences in language between the early August draft and the final document. For a more detailed account of the negotiations on R2P language from June to September, see Pollentine, *supra* note 14, at 313-43.

²⁰⁸ U.N. President of the G.A., Revised Draft Outcome Document of the High-level Plenary Meeting of the General Assembly of September 2005, ¶ 118, U.N. Doc. A/59/HLPM/CRP.1/Rev.2 (Aug. 5, 2005) (emphasis added).

²⁰⁹ Pollentine, *supra* note 14, at 276 (noting that "until mid-August the language of R2P was underdeveloped and over-optimistic in relation to what a majority of states were willing to accept"); *see also id.* at 281 (noting that the August 5 language "did not actually satisfactorily capture the language necessary" to obtain a consensus).

²¹⁰ Dear Colleague Letter from Ambassador John Bolton dated August 30, 2005, at 2. China and Russia likewise rejected any implication of obligation. Pollentine, *supra* note 14, at 287.

²¹¹ Dear Colleague Letter from Ambassador John Bolton, *supra* note 211, at 2.

²¹² *See id.* at 3.

perhaps a bias toward action.²¹³ The language ultimately incorporated into the Outcome Document retreats even more from a sense of international responsibility.²¹⁴ The final version says only that U.N. members are “prepared to take collective action . . . on a case-by-case basis.”²¹⁵ Far from accepting an obligation or responsibility to act, being “prepared to act” is consistent with being “prepared *not* to act” in any particular case.²¹⁶ The “case-by-case” language, insisted on by China, also was added specifically to underscore the absence of obligation.²¹⁷ The strong-form international *responsibility* to protect was replaced with the weak-form international *option* to protect.²¹⁸

The most that can be said is that being “prepared to act” implies a duty to *consider* whether to act.²¹⁹ But even that duty is sharply limited by the absence of any standard of care imposed on or accepted by the Security Council.²²⁰ The absence of any criteria guiding the case-by-case decisions in effect accords an “epistemological privilege” to each decision maker to act (or not act) on whatever basis they choose.²²¹

The threshold for international action incorporated into paragraph 139 further weakened the concept. In the Commission’s strong-form R2P, the international responsibility arose when the relevant state was “unwilling or unable” to protect the population from serious harm.²²² In the Outcome Document’s weak-form R2P,

²¹³ *Id.*

²¹⁴ Outcome Document, *supra* note 1.

²¹⁵ *Id.* ¶ 139.

²¹⁶ *See* Pollentine, *supra* note 14, at 333 (“Clearly, preparedness to act is a very different, greatly reduced statement compared to shared responsibility.”).

²¹⁷ *Id.* (noting that China was the strongest proponent of this language, “but [it] was also necessary for achieving acceptance from all sides of the spectrum for ensuring there were no built-in triggers or any obligation to act”).

²¹⁸ *See id.*

²¹⁹ Welsh, *supra* note 2, at 387 (“At a minimum, . . . what the second and third pillars of R2P demand is a ‘duty of conduct’ . . . to identify when atrocity crimes are being committed . . . and to deliberate on how the three-pillar framework might apply.”).

²²⁰ *See* William Joseph Buckley, *Not Losing Sight of Justice: A Response to Halperin’s Statement*, in *KOSOVO: CONTENDING VOICES ON BALKAN INTERVENTIONS* 231, 235 (William Joseph Buckley ed., 2000) (noting that a U.S. official’s use of “the moral language of cases” in the context of the Kosovo intervention means the basis for decision is “understandable only to the President”).

²²¹ *Id.*

²²² THE RESPONSIBILITY TO PROTECT, *supra* note 10, at viii.

the option for international action only becomes available if the state is “manifestly failing” to protect the population.²²³ A simple unwillingness or inability on the part of the state—or even simple failing—would not suffice. This higher threshold was more sovereignty-protective and would make Security Council action less likely.²²⁴

In sum, weak-form R2P: (1) places the emphasis on the role of the state while narrowing the scope of the state’s R2P to only the four atrocity crimes; (2) replaces the international responsibility to protect with a bifurcated international responsibility “to help” the state protect and an international option for the Security Council to act coercively; and (3) raises the threshold for coercive action to require that the state is “manifestly failing” to protect its population from the four atrocity crimes. The “progressive weakening” of strong-form R2P that ended with weak-form R2P was simply the only way that agreement could be reached in 2005.²²⁵ Table 1 provides a side-by-side comparison of the strong and weak forms of R2P. For clarity’s sake, the table incorporates the “three pillar” characterization offered by Secretary-General Ban Ki-Moon in 2009, which has become the common way to talk about weak-form R2P’s components.²²⁶

Relevant Actor	Strong-Form R2P (ICISS 2001)²²⁷	Weak-Form R2P (WSOD 2005)²²⁸
State	Responsibility to protect the human rights and human security of their populations	Responsibility to protect populations from genocide, ethnic cleansing, crimes against humanity, and war crimes (Pillar I)

²²³ Outcome Document, *supra* note 1, ¶ 139.

²²⁴ See Pollentine, *supra* note at 14, at 337 (noting that the insertion of a higher threshold “was symptomatic of concerns to limit R2P’s potential impact on sovereignty”).

²²⁵ Pollentine, *supra* note 14, at 284-85.

²²⁶ See 2009 Report, *supra* note 204, ¶ 11.

²²⁷ See THE RESPONSIBILITY TO PROTECT, *supra* note 10.

²²⁸ See Outcome Document, *supra* note 1.

International	Responsibility to protect populations from “serious harm, as a result of internal war, insurgency, repression or state failure [if] the state in question is unwilling or unable to halt or avert it”	Responsibility to help states protect through peaceful means (Pillar II)
		Option to act under Chapter VII through the U.N. Security Council if state is “manifestly failing” to protect population from the four atrocity crimes (Pillar III)

Table 1: A comparison of the strong and weak forms of R2P

C. No More Rwandas, No More Kosovos?

There is nothing in weak-form R2P that did not previously exist in international law and politics, except the R2P brand.²²⁹ The prohibitions on the four atrocity crimes were not new, and as pointed out *supra* Section II.A, states had already accepted much broader responsibilities to protect the human rights of their populations. The Security Council’s option to act also had been established as early as 1992, when it decided that an internal crisis could constitute a threat to international peace and security.²³⁰ As one scholar suggested, the weak-form R2P incorporated into the Outcome Document was substantively “old wine in new bottles” and rhetorically a slogan, the value of which was its ability to mean different things to different people.²³¹ Proponents of the ICISS version could say that the R2P had been unanimously endorsed by the UN, while skeptics could take comfort in the fact that it did not alter the status quo. And, of most immediate concern in September 2005, the World Summit could go forward without being derailed by disputes between the two camps.²³²

In a subtle but important way, however, weak-form R2P actually reinforced notions of sovereignty that emphasize the

²²⁹ See BELLAMY, *supra* note 7, at 14 (noting that “consensus on R2P [in 2005] was possible precisely because it did not change—or even seek to change—the basic international rules governing the use of force”).

²³⁰ See *supra* notes 32-41 and accompanying text.

²³¹ Carsten Stahn, *Responsibility to Protect: Political Rhetoric or Emerging Legal Norm?*, 101 AM. J. INT’L L. 99, 102 (2007).

²³² See *supra* notes 182-190 and accompanying text.

prerogatives of the state, including the right to non-interference.²³³ The core of strong-form R2P was the redefinition of “sovereignty as responsibility.”²³⁴ A key goal of this redefinition was to allow discussions about intervention to proceed from the question of who should fulfill this responsibility.²³⁵ The state is looked to first, but if it fails then the international community steps in. Necessary to the idea that sovereignty *is* responsibility—that protecting the population is a condition of enjoying the various attributes of sovereignty, such as the right of non-interference—is the existence of another actor with residual responsibility when the state fails.²³⁶ For that reason, the primary state responsibility and the residual international responsibility in strong-form R2P were—had to be—commensurate.²³⁷

By omitting an international responsibility to protect, on the other hand, weak-form R2P renders the question of who is going to fulfill the responsibility meaningless.²³⁸ The only actor with any responsibility to protect is the state, and that responsibility can hardly be said to be a condition of sovereignty if it belongs only to the (sovereign) state.²³⁹ Weak-form R2P was not just a watered-down version of strong form; it actually turned the concept on its head. Whereas strong form was intended to provide a way to transcend existing debates concerning intervention and state sovereignty by focusing on populations’ need for protection, weak-form R2P put the focus back on the state and tilted the balance in those debates to the primacy of state sovereignty.

Without a commensurate international responsibility, weak-form R2P merely added (or reaffirmed) a responsibility to protect populations from atrocity crimes as an attribute in every state’s basket of sovereignty. This attribute joins other attributes, such as

²³³ See Pollentine, *supra* note 14, at 311.

²³⁴ See THE RESPONSIBILITY TO PROTECT, *supra* note 10, at 13.

²³⁵ See *id.* at 16-18.

²³⁶ See Stahn, *supra* note 232, at 114 (noting that in ICISS’s conception of R2P “sovereignty exists essentially for the purpose of protecting people” and that “the state is conceived of as the principal guardian of the rights of its people; however, it loses this status of primacy in cases where it is unstable or unwilling to ensure this protection”).

²³⁷ See *id.* at 102.

²³⁸ *Id.* at 120 (questioning “to whom this responsibility shifts if a state fails to live up to its (primary) duty to protect citizens living on its territory”).

²³⁹ See *id.*

sovereign equality and the principle of non-interference.²⁴⁰ And the state's general entitlement to the attributes of sovereignty is presumed, even if the particular attribute of protection fails, unless the Security Council both determines that the state is manifestly failing and that it will act under Chapter VII. In other words, sovereignty is not contingent in weak-form R2P, but international action is. And when the Security Council gets to the "case-by-case" discussion of whether to act, the issues at stake, in addition to practical considerations, inevitably include the territorial integrity of the state in question and the norm of non-interference, which continues to exist.²⁴¹ When Security Council members are deciding whether and how to respond to a breach of a state's responsibility to protect, they are free to weigh it as they see fit and accord greater weight to other attributes, such as the presumption of non-interference.²⁴²

The importance of this particular attribute relative to other attributes could vary wildly depending on circumstances.²⁴³ Thus, the consequences of not fulfilling the responsibility to protect could be much more serious for a weak and friendless despot than for a great power or a state that enjoys the patronage of a great power. In the context of atrocity crimes, as in many other contexts, "sovereign status will mean something different to a state with substantial influence in international affairs than to a peer whose influence is of negligible account."²⁴⁴ Weak-form R2P not only does not alter that truth, it reinforces it.

R2P has been described as "a 'complex norm,' containing more than one prescription."²⁴⁵ The different elements of the complex norm are such that "the *breach* of one of the components of R2P (failure on the part of a national government to protect its population) is meant to act as a trigger for *fulfillment* of another

²⁴⁰ See MICHAEL ROSS FOWLER & JULIE MARIE BUNCK, LAW, POWER AND THE SOVEREIGN STATE: THE EVOLUTION AND APPLICATION OF THE CONCEPT OF STATE SOVEREIGNTY 70-80 (1995) (describing the "basket theory" that views sovereignty as a collection of attributes).

²⁴¹ See Outcome Document, *supra* note 1.

²⁴² *Id.*

²⁴³ FOWLER & BUNCK, *supra* note 241, at 70.

²⁴⁴ *Id.*

²⁴⁵ Welsh, *supra* note 2, at 384.

component (the international's remedial role in protecting)."²⁴⁶ This description would apply to strong-form R2P, but it does not accurately describe weak-form R2P. Weak-form provides a standard of appropriate behavior for states, but the international role in paragraph 139 is not framed in normative language; nothing in paragraph 139 tells members of the Security Council what behavior is appropriate.²⁴⁷ If they do consider action, they do so "case-by-case" without established criteria, leaving them free to make decisions for whatever reason of state they choose.²⁴⁸ In fact, the normative context for the Security Council is as it was before 2005: a strong presumption of non-interference and respect for the territorial integrity and political independence of states. That presumption is not ironclad, but nor has it ever been.²⁴⁹

For something characterized as a norm to guide actors' behavior, it must have "specificity, durability, and concordance."²⁵⁰ Paragraph 139 has none of those things. It lacks specificity as its language is vague and imprecise, entailing no commitment beyond being prepared to act or not to act.²⁵¹ Durability is a question of how strong the putative norm remains over time as it is challenged.²⁵² As explained *infra* Section III.A, although the content of paragraph 138—pertaining to the responsibility of states—has been repeatedly reaffirmed in U.N. resolutions, paragraph 139 has disappeared from such documents and has not been reaffirmed in years.²⁵³

Concordance refers to "the degree of intersubjective agreement" on the content of the putative norm.²⁵⁴ Paragraph 139 has not generated such agreement.²⁵⁵ When Secretary-General Ban Ki-Moon suggested in describing "pillar three" in 2009 that paragraph

²⁴⁶ *Id.*.

²⁴⁷ See Outcome Document, *supra* note 1, ¶ 139.

²⁴⁸ *Id.*

²⁴⁹ See STEPHEN D. KRASNER, SOVEREIGNTY: ORGANIZED HYPOCRISY 24 (1999) (noting that norms of non-intervention "have always been violated . . . [and] are best understood as examples of organized hypocrisy").

²⁵⁰ Jeffrey W. Legro, *Which Norms Matter? Revisiting the "Failure" of Internationalism*, 51 INT'L ORG. 31, 34 (1997).

²⁵¹ See Welsh, *supra* note 2, at 387 (acknowledging that the "less clearly defined nature" of pillar three weakens its "compliance pull").

²⁵² Legro, *supra* note 251, at 34.

²⁵³ See *infra* notes 284-302 and accompanying text.

²⁵⁴ Legro, *supra* note 251, at 35.

²⁵⁵ Outcome Document, *supra* note 1, ¶ 139.

139 in fact entailed a “responsibility” and was of equal length to the other pillars,²⁵⁶ the push back by many states was immediate and continuing.²⁵⁷ As India’s ambassador commented in 2018—thirteen years on from the World Summit and nine years after Ban suggested the pillar structure—pillar three is beset by “legally complex and politically challenging issues” and the idea of international action “is still riddled with serious gaps that must be reflected on.”²⁵⁸ It is not surprising, given paragraph 139’s indeterminate language, that disagreement about it is so widespread.

The original goal of ICISS and the formulation of strong-form R2P was to ensure no more Rwandas and no more Kosovos.²⁵⁹ Weak-form R2P does nothing to achieve that goal. The discretion accorded to the Security Council to act or not act is the same discretion that resulted in the non-response to Rwanda.

Although paragraph 139 spoke in terms of acting (or not) through the Security Council, it did not say that action without Security Council authorization was barred.²⁶⁰ In other words, it continued the unsettled state of affairs that existed when NATO intervened in Kosovo.²⁶¹ Indeed, when the United States, the United Kingdom, and France attacked Syria in 2018 without Security Council authorization in response to the Assad regime’s use of chemical weapons against civilians, the British government asserted that “[t]he legal basis for the use of force is humanitarian intervention.”²⁶² The United States was vaguer, as it had been in

²⁵⁶ 2009 Report, *supra* note 204, ¶¶ 11(c), 12.

²⁵⁷ *See, e.g.*, U.N. GAOR, 63d Sess., 98th plen. mtg. at 8, U.N. Doc. A/63/PV.98 (July 24, 2009) (statement of Singapore) (noting somewhat diplomatically “it is clear that there are some concerns over pillar three, and those will have to be discussed further”); *id.* at 4 (statement of Pakistan) (“Pillar three was introduced 10 or 15 years ago under another name—the right of intervention. It is that and remains that. The Assembly voted vehemently against it.”); U.N. GAOR, 63d sess., 97th plen. mtg. at 13, U.N. Doc. A/63/PV.97 (July 23, 2009) (statement of Brazil) (arguing contrary to the Secretary-General’s conception of equal pillars that “the third pillar is subsidiary to the first one and a truly exceptional course of action, a measure of last resort”).

²⁵⁸ U.N. GAOR, 72d sess., 99th plen. mtg. at 13, U.N. Doc. A/72/PV.99 (June 25, 2018) (statement of India).

²⁵⁹ *See supra* notes 108-112 and accompanying text.

²⁶⁰ Outcome Document, *supra* note 1, ¶ 139.

²⁶¹ *Id.*

²⁶² PRIME MINISTER’S OFF., SYRIA ACTION—UK GOVERNMENT LEGAL POSITION (Apr. 14, 2018), <https://www.gov.uk/government/publications/syria-action-uk-government-legal-position/syria-action-uk-government-legal-position> [https://perma.cc/YNH7-

Kosovo, asserting that the strikes “were justified, legitimate and proportionate.”²⁶³ In a further reprise of Kosovo, Russia tabled a draft resolution that “[c]ondemn[ed] the aggression against the Syrian Arab Republic by the US and its allies in violation of international law and the UN Charter.”²⁶⁴ The resolution obtained only three supporting votes.²⁶⁵ There is an argument that these strikes, the proffered justification, and the international response to them have created at least limited international legal support for humanitarian intervention without U.N. authorization.²⁶⁶

Weak-form R2P has some value. It “codified” the precedent that the Security Council can act to stop atrocity crimes within a country if it opts to.²⁶⁷ Furthermore, it clearly established that the range of atrocity crimes, and not just genocide, could trigger such action.²⁶⁸ Paragraph 138 also reaffirmed what was already true about state responsibility, and sometimes that can be valuable.²⁶⁹

Finally, even though weak-form R2P substantively differed from strong-form R2P, the weak version is not inconsistent with its strong-form predecessor.²⁷⁰ Its adoption created the possibility that the actual use of weak-form over time could make its practical

9A9Y]. The United Kingdom used the same language in defending the attack in the Security Council. *See* U.N. SCOR, 73d Sess., 8233d mtg. at 6-7, U.N. Doc. S/PV.8233 (Apr. 14, 2018) (statement of United Kingdom).

²⁶³ U.N. SCOR, 73d Sess., 8233d mtg. at 5, U.N. Doc. S/PV.8233 (Apr. 14, 2018) (statement of the United States).

²⁶⁴ U.N. Security Council, Russian Federation: Draft Resolution, ¶ 1, U.N. Doc. S/2018/355 (Apr. 14, 2018).

²⁶⁵ U.N. SCOR, 73d Sess., 8233d mtg. at 22-23, U.N. Doc. S/PV.8233 (Apr. 14, 2018). Bolivia joined Russia and China in supporting the resolution. *Id.*

²⁶⁶ *See* Michael P. Scharf, *Striking a Grotian Moment: How the Syria Airstrikes Changed International Law Relating to Humanitarian Intervention*, 19 CHI. J. INT'L L. 586, 614 (2019) (arguing that the strikes represented a “Grotian moment” that supports the legality at least of using force without Security Council authorization in “the context of responding to repeated use of chemical weapons against civilians”); *see also* Koh, *supra* note 28, at 1006 (arguing that “under certain highly constrained circumstances, a nation could lawfully use or threaten force for genuinely humanitarian purposes, even absent authorization by a U.N. Security Council resolution”).

²⁶⁷ Outcome Document, *supra* note 1, ¶ 139.

²⁶⁸ *See* Leila Nadya Sadat, *Little Progress in the Sixth Committee on Crimes Against Humanity*, 54 CASE W. RES. J. INT'L L. 89, 105 (2022) (noting “the notion that it is only genocides that deserve international sanction and attention”).

²⁶⁹ *See* Outcome Document, *supra* note 1, ¶ 138.

²⁷⁰ *E.g.*, THE RESPONSIBILITY TO PROTECT, *supra* note 10; *see generally* Outcome Document, *supra* note 1.

meaning closer to that of strong-form.²⁷¹ The international option to act in weak-form R2P could be converted in practice into something approaching an obligation by virtue of being implemented in that manner.²⁷² For example, if Security Council members were to invoke paragraph 139 while acting to respond to atrocity crimes, over time the option to act in paragraph 139 could be interpreted as a commitment to do so.²⁷³ In this sense, R2P could be viewed as a “work-in-progress,” gaining content as it is debated and applied to actual situations.²⁷⁴ But this dynamic view of norm creation also implies the opposite: practice could further weaken weak-form R2P.²⁷⁵ As the next section of the article shows, weak-form R2P in practice has decayed since 2005.

III. Signs of Decay: Weak-Form R2P Since 2005

R2P proponents often point to the incorporation of R2P into U.N. resolutions as evidence of the strong consensus in support of the concept.²⁷⁶ If those resolutions added to the substance incorporated into the Outcome Document, they could show a strengthening of R2P. This has not happened. If those resolutions consistently recited the substance incorporated in the Outcome Document, they would at least show that the agreement reflected there has continued and was not just a product of the pre-Summit pressures. In fact, General Assembly and Security Council resolutions have rarely reaffirmed (much less specifically restated) the content of the Outcome Document. Overwhelmingly, those resolutions have referred *only* to the *state* responsibility to protect and made no mention of any form of international responsibility or

²⁷¹ See Pollentine, *supra* note 14, at 303 (reporting that negotiators expressed hope that with all its limitations, “the [2005] R2P agreement would help make the atmosphere for dealing with such crimes more receptive than had often been the case”).

²⁷² See Weiner, *supra* note 24, at 179.

²⁷³ See Outcome Document, *supra* note 1, ¶ 139.

²⁷⁴ Mona Lena Krook & Jacqui True, *Rethinking the Life Cycles of International Norms: The United Nations and the Global Promotion of Gender Equality*, 18 EUR. J. INT’L RELS. 103, 104 (2010).

²⁷⁵ *Id.* (arguing that viewing norms as “processes . . . means, in turn, that co-optation, drift accretion and reversal of a norm . . . are constant possibilities”).

²⁷⁶ *E.g.*, *What is R2P?*, GLOB. CTR. FOR THE RESP. TO PROTECT, <https://www.globalr2p.org/what-is-r2p/> [<https://perma.cc/LU34-K8B4>] (last visited Nov. 27, 2022) (asserting that “R2P has been invoked in more than 80 UN Security Council Resolutions . . . more than 50 Human Rights Council resolutions and [31] General Assembly resolutions”).

even the option to act language of paragraph 139. Weak-form R2P, which has an already attenuated international role, is being converted in practice into what might be called “state-centric” R2P, which reiterates that the responsibility to protect is an attribute of sovereignty (as are political independence and territorial integrity). It has been years since there has been any reaffirmation in U.N. resolutions of even the limited international role in weak-form R2P.²⁷⁷

The General Assembly has also had a series of annual discussions of R2P, dating back to 2009.²⁷⁸ An analysis of those discussions shows that they have not contributed to any substantive advance. Key countries are saying the same things in recent debates as they did in the first discussions. The debates are essentially a form of “competency trap” that ensures there is not substantive progress.²⁷⁹

In the most significant instance since 2005 in which the Security Council acted under Chapter VII to respond to atrocity crimes—Libya—there is little evidence that R2P played a meaningful role in the decision.²⁸⁰ In particular, recently published memoirs by members of the Obama administration show that R2P did not figure in making U.S. policy. Indeed, Obama himself explicitly rejected R2P as a basis for action. Meanwhile, inaction has been the practice in other situations in which populations were being attacked by their governments.²⁸¹

A. *U.N. Resolutions*

1. *Security Council Resolutions*²⁸²

The Security Council on many occasions has stated that the state

²⁷⁷ See S.C. Res. 2171, ¶ 16 (Aug. 21, 2014).

²⁷⁸ *UN General Assembly and R2P*, GLOB. CTR. FOR THE RESP. TO PROTECT (June 28, 2022), <https://www.globalr2p.org/un-general-assembly-and-r2p/> [<https://perma.cc/KEA7-7YT5>].

²⁷⁹ See James G. March & Johan Olsen, *The Institutional Dynamics of International Political Orders*, 52 INT'L ORG. 943, 964-65 (1998) (defining a competency trap as “the tendency for a system to become firmly locked into a particular rule-based structure by virtue of developing familiarity with the rules and capabilities for using them”).

²⁸⁰ S.C. Res. 1970 (Feb. 26, 2011).

²⁸¹ See *infra* notes 387-412 and accompanying text.

²⁸² *UN Security Council Resolutions and Presidential Statements Referencing R2P*, GLOB. CTR. FOR THE RESP. TO PROTECT (June 2, 2022), <https://www.globalr2p.org>

has the primary responsibility to protect its population.²⁸³ It does not appear ever to have expressed in its own voice that it is prepared to act in a timely and decisive manner if a state manifestly fails to protect.²⁸⁴ On a handful of occasions, it “reaffirmed” paragraphs 138 and 139 in thematic resolutions, the first time being a 2006 resolution on the protection of civilians in armed conflict.²⁸⁵ It repeated this reaffirmation in a resolution on the same topic in 2009,²⁸⁶ but since then, resolutions on the theme of protecting civilians have only referred to state responsibility, with no mention of the Outcome Document or an international role relating to the responsibility to protect.²⁸⁷ The last time the Security Council appears to have explicitly reaffirmed paragraphs 138 and 139 was in a 2014 resolution on conflict prevention.²⁸⁸ Overwhelmingly, its references to responsibility address only state responsibility.²⁸⁹ Eighty-six percent of all Security Council resolutions that refer to R2P mention only state responsibility.²⁹⁰ That figure jumps to almost 92% for country-specific resolutions.²⁹¹ Moreover, the country-specific resolutions almost invariably reiterate respect for the sovereignty and territorial integrity of the state in question.²⁹²

The Council explicitly reaffirmed paragraphs 138 and 139 only once in a country-specific resolution—a 2006 resolution on

/resources/un-security-council-resolutions-and-presidential-statements-referencing-r2p/
[https://perma.cc/55R2-SCAJ] [hereinafter *R2P References*].

²⁸³ *See id.*

²⁸⁴ *See id.*

²⁸⁵ S.C. Res. 1674, ¶ 4 (Apr. 28, 2006) (“[r]eaffirm[ing] the provisions of paragraphs 138 and 139 of the 2005 World Summit Outcome Document regarding the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity”).

²⁸⁶ S.C. Res. 1894 (Nov. 11, 2009).

²⁸⁷ *E.g.*, S.C. Res. 2417 (May 24, 2018) (“[r]eaffirming the full respect for the sovereignty and territorial integrity of States” and “the primary responsibility of States to protect the population throughout their whole territory”).

²⁸⁸ S.C. Res. 2171, ¶ 16 (Aug. 21, 2014).

²⁸⁹ *See id.*

²⁹⁰ *See R2P References, supra* note 283.

²⁹¹ *Id.*

²⁹² *E.g.*, S.C. Res. 2612 (Dec. 20, 2021) (“[r]eaffirming [the Security Council’s] strong commitment to the sovereignty, independence, unity and territorial integrity of the DRC” and “[r]ecalling that the Government of the DRC bears the primary responsibility to protect civilians within its territory”).

Darfur.²⁹³ After that, the most it did in country-specific resolutions was refer to previous resolutions reaffirming paragraphs 138 and 139, and it does not appear to have done even that since 2015.²⁹⁴

This record suggests that the weak commitment made in 2005 to be prepared to act has faded.²⁹⁵ The collection of Security Council resolutions, as depicted in Figure 1,²⁹⁶ overwhelmingly focuses on the state's role. This deepens the state-centric nature of weak-form R2P.

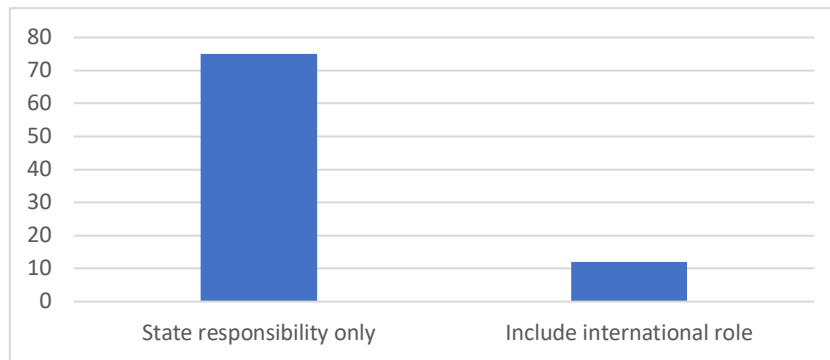


Figure 1: Security Council resolutions referring to R2P

2. *General Assembly Resolutions*²⁹⁷

The situation in the General Assembly is, if anything, starker. In September 2005, the General Assembly adopted the text of the Outcome Document, including paragraphs 138 and 139, as Resolution 60/1.²⁹⁸ In 2009, it adopted a very short resolution that “recall[ed]” (not reaffirmed) paragraphs 138 and 139 and took note of the report on R2P presented to it by the Secretary-General.²⁹⁹ Consensus on this resolution was possible only after the resolution

²⁹³ S.C. Res. 1706 (Aug. 31, 2006).

²⁹⁴ S.C. Res. 2241 (Oct. 9, 2015).

²⁹⁵ See R2P References, *supra* note 283.

²⁹⁶ For list of resolutions, see UN Security Council Resolutions and Presidential Statements Referencing R2P, GLOB. CTR. FOR THE RESP. TO PROTECT (June 2, 2022), <https://www.globalr2p.org/resources/un-security-council-resolutions-and-presidential-statements-referencing-r2p/> [<https://perma.cc/KJQ9-DMM8>].

²⁹⁷ See *id.*

²⁹⁸ Outcome Document, *supra* note 1.

²⁹⁹ G.A. Res. 62/308, ¶ 1 (Sept. 14, 2009).

was amended to remove the statement that the Assembly took note of the Secretary-General's report "with appreciation."³⁰⁰ Then in 2021, the General Assembly again "recall[ed]" paragraphs 138 and 139 in deciding, on a contested vote, to put the responsibility to protect on its annual agenda.³⁰¹ "Recalling" a past action is somewhat short of "reaffirming" it. Other than those three occasions, the General Assembly does not seem to ever have referred to paragraph 139 or to an international role in protecting populations while passing twenty-eight resolutions that mention a state responsibility.³⁰² Thus, 90% of General Assembly references to R2P have mentioned only the state's role. As with the Security Council, the General Assembly's practice has deepened the state-centric nature of weak-form R2P.³⁰³

B. General Assembly Annual Dialogues

Paragraph 139 of the Outcome Document "stress[ed] the need for the General Assembly to continue consideration of the responsibility to protect."³⁰⁴ One diplomat suggested after the 2005 World Summit that calling for more discussion in the General Assembly amounted to putting "the issue in the freezer."³⁰⁵ It took several years before the General Assembly made any move to discuss the issue, holding its first debate in 2009.³⁰⁶ From 2010 to 2017, it then held eight "informal interactive dialogues"—

³⁰⁰ See U.N. GAOR, 63d Sess., 105th plen. mtg. at 2, U.N. Doc. A/63/PV.105 (Sept. 14, 2009) ("With a view to ensuring that the draft resolution is adopted by consensus, the sponsors have asked me to introduce an oral revision, namely, that the expression 'with appreciation' be omitted from paragraph 1.").

³⁰¹ G.A. Res. 75/277 (May 18, 2021).

³⁰² See *UN General Assembly Resolutions Referencing R2P*, GLOB. CTR. FOR THE RESP. TO PROTECT (Apr. 18, 2022), <https://www.globalr2p.org/resources/un-general-assembly-resolutions-referencing-r2p-2/> [<https://perma.cc/TFN3-BP7H>].

³⁰³ The situation is similar with respect to the U.N. Human Rights Council. Sixty-three out of sixty-six resolutions (more than 95%) refer only to the state responsibility. The relevant text of UNHRC resolutions is available at *UN Human Rights Council Resolutions Referencing R2P*, GLOB. CTR. FOR THE RESP. TO PROTECT (Oct. 7, 2022), <https://www.globalr2p.org/resources/un-human-rights-council-resolutions-referencing-r2p/> [<https://perma.cc/4FKX-WBPM>].

³⁰⁴ Outcome Document, *supra* note 1, ¶ 139.

³⁰⁵ ZIFCAK, *supra* note 187, at 120 (quoting an unidentified African ambassador).

³⁰⁶ See U.N. GAOR, 63d Sess., 105th plen. mtg. at 2, U.N. Doc. A/63/PV.105 (Sept. 14, 2009).

something short of a formal debate.³⁰⁷ Starting in 2018, it held a formal debate every year except the pandemic-disrupted year of 2020.³⁰⁸ In 2021, the Assembly voted to place R2P on its annual agenda, rather than make a new decision every year to take up the matter.³⁰⁹

What is striking about well over a decade of dialogues and debates is that there does not appear to have been any substantive development of R2P, certainly none that has been embodied in a resolution or other formal action taken by the General Assembly. The two biggest steps have been to move from an informal dialogue to a formal debate, then from a debate decided on from year to year to one automatically included on the General Assembly's standing agenda.³¹⁰ Even that latter move failed to gain the support of a number of key countries, including China, Russia, India, Indonesia, Egypt, Pakistan, and Singapore.³¹¹ Only 116 countries supported the procedural step of putting the annual discussion on the agenda.³¹² That is a majority to be sure, but hardly an overwhelmingly one, much less anything approaching a consensus—just on the relatively simple question of whether the Assembly should commit to talking about it every year.

The Brazilian representative, who voted for the resolution and whose nation was one of its co-sponsors, urged his colleagues “to reflect on why a once-consensus notion now leads to heated debates on the mere possibility of its inclusion on the General Assembly's agenda.”³¹³ Malaysia, another supporter of the resolution, reflected on all the debate about R2P since 2005 and concluded that “opinions continue to diverge among Member States regarding the concept of R2P and its understanding and implementation, especially with

³⁰⁷ See *Summary of the 2021 UN General Assembly Plenary Meeting on the Responsibility to Protect*, GLOB. CTR. FOR THE RESP. TO PROTECT (June 8, 2021), <https://www.globalr2p.org/publications/summary-of-the-2021-un-general-assembly-plenary-meeting-on-the-responsibility-to-protect/> [<https://perma.cc/H8JT-SMD7>].

³⁰⁸ *Id.*

³⁰⁹ G.A. Res. 75/277 (May 18, 2021).

³¹⁰ See R2P References, *supra* note 283.

³¹¹ U.N. GAOR, 75th Sess, 66th plen. mtg. at 8, U.N. Doc. A/75/PV.66 (May 18, 2021). China, Egypt, Indonesia, and Russia voted no while the others abstained. *Id.*

³¹² *Id.*

³¹³ U.N. GAOR, 75th Sess., 64th plen. mtg. at 25, U.N. Doc. AV/75/PV.64 (May 17, 2021) (statement of Brazil).

regard to State sovereignty and the international mandate to act.”³¹⁴ Singapore, a long-time member of the Group of Friends of R2P, had alluded in 2009 to the divisions in the General Assembly over R2P and warned that “as long as the R2P concept remains hazy and undefined, it will remain up for grabs and open to manipulation.”³¹⁵ Twelve years later its representative observed, before abstaining on the agenda resolution, that “[t]here is no doubt that the concept of R2P continues to deeply divide Member States.”³¹⁶

Two crucial countries in determining the level of acceptance and future prospects of any concept like R2P are China, a permanent member of the Security Council, and India, an important regional power and an emerging global power.³¹⁷ The lack of substantive progress in these General Assembly debates can be illustrated by comparing the remarkable similarity in China’s interventions in 2009 and 2021:

³¹⁴ U.N. GAOR, 75th Sess., 65th plen. mtg. at 3, U.N. Doc. A/75/PV.65 (May 17, 2021) (statement of Malaysia).

³¹⁵ U.N. GAOR, 63d Sess., 98th plen. mtg. at 7-8, U.N. Doc. A/63/PV.98 (July 24, 2009) (statement of Singapore).

³¹⁶ U.N. GAOR, 75th Sess., 65th plen. mtg. at 6, U.N. Doc. A/75/PV.66 (May 18, 2021) (statement of Singapore).

³¹⁷ See NAT’L INTEL. COUNCIL, GLOBAL TRENDS 2040: A MORE CONTESTED WORLD 92-96 (Mar. 2021) (identifying the most influential actors in the coming two decades as the United States, China, the European Union, India, Japan, Russia, and the United Kingdom).

2009	2021
<p>“[E]xperience in the past few years shows that there is still controversy over the meaning and the implementation of the concept There must be no wavering with regard to the principles of respect for State sovereignty and non-interference in the internal affairs of States We note that Member States continue to have divergent views on the concept of the responsibility to protect; interpretations differ with regard to its many specific ramifications.”³¹⁸</p>	<p>It must be emphasized that Member States have not reached agreement on the definition and criteria of the responsibility to protect The international community should abide strictly by the purposes and principles of the Charter of the United Nations and fully respect the sovereignty and territorial integrity of the countries concerned, as well as the basic norms in international relations of non-interference, non-aggression and the peaceful settlement of disputes.”³¹⁹</p>

Table 2: Comparing Chinese interventions on R2P

In India’s case, the tone actually became more negative over time. In 2009, India’s representative spoke in more conciliatory terms than his unremittingly hostile predecessor, although the substance of India’s policy did not change much.³²⁰ He noted that the Outcome Document was a complicated attempt “to find common ground on a vast array of issues of global interest” and that R2P had received a “cautious go-ahead” in 2005.³²¹ He expressed concern about the “very general linguistic meaning” of the term R2P and its vulnerability to being manipulated.³²² He also observed that the best way to remedy the Security Council’s past failures was to

³¹⁸ U.N. GAOR, 63d Sess., 98th plen. mtg. at 23-24, U.N. Doc. A/63/PV.98 (July 24, 2009) (statement of China) (emphasis added).

³¹⁹ U.N. GAOR, 75th Sess., 65th plen. mtg. at 22, U.N. Doc. A/75/PV.65 (May 17, 2021) (statement of China) (emphasis added).

³²⁰ Jaganathan & Kurtz, *supra* note 185, at 473 (noting that a “comparison with India’s earlier policies demonstrates that the 2009 statement indicated a change in style and emphasis rather than in substance”).

³²¹ U.N. GAOR, 63d Sess., 99th plen. mtg. at 25, U.N. Doc. A/63/PV.99 (July 24, 2009) (statement of India).

³²² *Id.* at 25-26.

reform its structure.³²³

By 2018, the last time that India spoke in an R2P debate, the concern that R2P's vagueness would make it vulnerable to manipulation had hardened into regret that “[w]hile the responsibility to protect, at its core, has an appeal as a noble cause, it has been selectively used in the wider geostrategic balance of power among competing players or groups.”³²⁴ Like virtually every country, India embraced the notion that states have a responsibility to protect their own populations, connecting it to ancient Indian traditions.³²⁵ But any notion of international action is beset by “legally complex and politically challenging issues” and the international community’s “ability . . . to take appropriate collective action if a State manifestly fails to fulfill its responsibility to protect its population is still riddled with serious gaps that must be reflected on.”³²⁶ Indian Ambassador Syed Akbaruddin complained about the inevitability of “double standards, selectivity, arbitrariness and misuse for political gains” and concluded that “there remain huge and glaring gaps in building a common understanding on how or even whether to proceed with such a concept in the present system of global governance.”³²⁷ As noted above, three years later, India did not support putting R2P on the General Assembly’s annual agenda.

Perhaps the most poignant moment in the 2021 debate—and one that illustrates the ritualistic meaninglessness of the annual exercise—came with the intervention of the representative of Myanmar.³²⁸ The country’s democratically elected government had been overthrown by the military a few months before, but its representative continued to hold the seat.³²⁹ Noting that “the Myanmar military had been conducting a systematic and targeted campaign of attacks on our civilian population,” he begged the

³²³ *Id.* at 26.

³²⁴ U.N. GAOR, 72d Sess., 99th plen. mtg. at 14, U.N. Doc. A/72/PV.99 (June 25, 2018) (statement of India).

³²⁵ *Id.* at 13 (citing “a rock edict of Emperor Ashoka in the third century B.C.”).

³²⁶ *Id.*

³²⁷ *Id.* at 14.

³²⁸ U.N. GAOR, 75th Sess., 64th plen. mtg. at 21, U.N. Doc. AV/75/PV.64 (May 17, 2021) (statement of Myanmar).

³²⁹ *Id.*

United Nations to take “timely and decisive” action to respond.³³⁰ He listed nine action items “to protect the people of Myanmar from crimes against humanity committed by the military,” including a no-fly zone, targeted sanctions and an arms embargo.³³¹ Since the coup, he said, “through street art, protest placards, candlelit vigils and social media, the people of Myanmar have been calling for the responsibility to protect, saying ‘we need R2P.’”³³² The presiding officer thanked him for his “powerful remarks” and proceeded to the next speaker.³³³ Over the course of some three dozen ensuing interventions that day and the next, only one referred to or acknowledged the Myanmar representative’s plea.³³⁴

These annual discussions are a form of “competency trap,” a situation in which actors tend to do what is familiar to them rather than find new modalities that can effect change.³³⁵ The easiest and most natural path for the General Assembly to follow in dealing with a politically contentious issue is to have periodic discussions. They are not really designed to achieve consensus or resolve difference, so they do not. Procedural steps, like changing the label from dialogue to debate, substitute for substantive change.

C. *Libya and R2P*

The decision by the Security Council to authorize military intervention in Libya has been attributed by R2P proponents to R2P, which was described as a “game-changer” and “a powerful galvanizing norm.”³³⁶ Little evidence supports this claim other than the fact that R2P existed and the fact that the intervention occurred.

³³⁰ *Id.* at 22.

³³¹ *Id.*

³³² *Id.* at 23.

³³³ *Id.*

³³⁴ U.N. GAOR, 75th Sess., 64th plen. mtg. at 27, U.N. Doc. A/75/PV.64 (May 17, 2021) (statement of Luxembourg) (“The statement made a few minutes ago by my colleague from Myanmar unfortunately speaks for itself.”).

³³⁵ March & Olsen, *supra* note 280, at 964-65.

³³⁶ THAKUR, *supra* note 3, at 253; *see also* Simon Adams, *Libya and the Responsibility to Protect*, GLOB. CTR. FOR THE RESP. TO PROTECT (Oct. 5, 2012), <https://www.globalr2p.org/publications/libya-and-the-responsibility-to-protect/> [<https://perma.cc/97RQ-XFJZ>] (suggesting that in Libya R2P “was utilized to mobilize the Security Council to take coercive action against a UN member state”); WEISS, *supra* note 103, at 2 (“Security Council action to forestall atrocities in Libya in March 2011 represented a new upswing in the implementation of R2P.”).

But correlation is not necessarily causation. A far more robust explanation for the Security Council's response to Libya was not that members felt a responsibility to act; rather, in addition to the horrifying nature of Qaddafi's brutality, he was, as U.S. official Samantha Power observed, "unique in having virtually no friends who would stand up for him. Not China. Not Russia. Not his fellow autocrats in the Arab world."³³⁷

1. Security Council Resolution and Debate

Security Council Resolution 1973 authorized the use of "all necessary measures" to protect civilians in Libya.³³⁸ Not surprisingly, given the review above of Security Council resolutions, *supra* Section III.A.1, it only invoked Libya's responsibility to protect the population.³³⁹ It certainly did not suggest any international responsibility. Nor did it refer, directly or indirectly, to the weak-form option to act embodied in paragraph 139 of the Outcome Document.³⁴⁰

Resolution 1973 marked the first time that the Security Council had authorized the use of force without the consent of an ostensibly functioning government.³⁴¹ At the same time, Resolution 1973 was not that dramatic a further step given the extent to which the legitimacy of Qaddafi's regime had been called into question. The Arab League had suspended Libya's membership, recognized the rebel National Transitional Council (NTC) as the legitimate representatives of the Libyan people, and urged the Security Council to cooperate with it.³⁴² Moreover, the Libyan delegation in New York had broken with Qaddafi and the Libyan ambassador had

³³⁷ SAMANTHA POWER, *THE EDUCATION OF AN IDEALIST: A MEMOIR* 291-92 (2019).

³³⁸ S.C. Res. 1973, ¶ 4 (Mar. 17, 2011).

³³⁹ S.C. Res. 1973 (Mar. 17, 2011).

³⁴⁰ *Id.*

³⁴¹ Somalia did not have a government in 1992 and the genocidal interim government in Rwanda actually supported the French intervention in 1994. *See supra* notes 36-39, 56-60 and accompanying text.

³⁴² Permanent Observer of the League of Arab States to the U.N., Letter dated Mar. 14, 2011 from the Permanent Observer of the League of Arab States to the United Nations addressed to the President of the Security Council, U.N. Doc. S/2011/137 (Mar. 15, 2011) (transmitting League of Arab States Res. 7360 (Mar. 12, 2011)).

asked the Security Council to act.³⁴³

In explaining their votes on the resolution to authorize force, representatives from fourteen of the Council's fifteen members spoke.³⁴⁴ Not one of them made a reference to having acted, even in part, because of an international responsibility to protect.³⁴⁵ A number of speakers, on the other hand, took care to reaffirm the basic norm of sovereignty and speak of the need to preserve the unity, territorial integrity, and sovereignty of Libya.³⁴⁶ It is true that any decision of this sort will be the product of a number of considerations, and not all of those considerations will be explicitly cited.³⁴⁷ But if a new "norm" actually were a game changer or had a galvanizing effect, one would expect at least some reference to it. One explanation could be that states motivated by R2P refrained from invoking it because of its highly controversial nature.³⁴⁸ If that is true, it suggests that as strong as R2P's brand is in certain contexts, in others it has negative value.³⁴⁹ It also underscores R2P's lack of normative power, in that the concept obviously does not reflect a generally accepted "standard of behavior"³⁵⁰ for U.N. members if its name cannot even be uttered when decisions on how to act are being made.

The intervention of China, which abstained from the resolution, is particularly instructive. The Chinese ambassador referred to relevant norms, they just did not include any international

³⁴³ U.N. SCOR, 66th Sess., 6490th mtg. at 5, U.N. Doc. S/PV.6490 (Feb. 25, 2011) (statement of Libya) ("Please, United Nations, save Libya We want a swift, decisive and courageous resolution."); *see also* U.N. SCOR, 66th Sess., 6491st mtg. at 7, U.N. Doc. S/PV.6491 (Feb. 26, 2011) (statement of Libya) ("The Tripoli regime no longer has any legitimacy.").

³⁴⁴ U.N. SCOR, 66th Sess., 6498th mtg., U.N. Doc. S/PV.6498 (Mar. 17, 2011). Gabon's representative did not speak. *See id.*

³⁴⁵ *Id.*

³⁴⁶ *E.g.*, U.N. SCOR, 66th Sess., 6498th mtg. at 9, U.N. Doc. S/PV.6498 (Mar. 17, 2011) (statement of South Africa).

³⁴⁷ *See* BELLAMY, *supra* note 7, at 96 (explaining why the absence of R2P references in Security Council statements does not mean R2P was not instrumental).

³⁴⁸ *See* Justin Morris, *Libya and Syria: R2P and the Spectre of the Swinging Pendulum*, 89 INT'L AFFS. 1265, 1273 (2013) (noting that, if true, this explanation would indicate that R2P "remains controversial and contested, and subject to a far lesser level of norm-cascade than is often suggested in scholarly literature").

³⁴⁹ *Id.*

³⁵⁰ Finnemore & Sikkink, *supra* note 159, at 891.

responsibility to protect.³⁵¹ Rather, he noted that “China has always emphasized that . . . the Security Council should follow the U.N. Charter and the norms governing international law, respect the sovereignty, independence, unity and territorial integrity of Libya, and resolve the current crisis in Libya through peaceful means.”³⁵² To underscore that final point, he said that “China is always against the use of force in international relations.”³⁵³ China’s willingness to allow the resolution to be adopted was based on the “great importance” that China accorded the Arab League’s call for a no-fly zone as well as the support of African countries for the resolution.³⁵⁴ China generally takes regional views into account, especially in a situation where it has no pressing national interests.³⁵⁵ If one is looking for an explanation other than R2P to explain China’s abstention,³⁵⁶ it is simply that its baseline preference for opposing intervention and the use of force in this case was overridden by its lack of national interest in Libya and its policy, when other things are equal, of deferring to regional actors.³⁵⁷

2. *The U.S. Decision to Intervene*

The United States was central to the outcome in Libya because it was the Security Council member that first insisted on adopting a resolution authorizing the use of “all necessary measures.”³⁵⁸ What was previously on the table—a no-fly zone—would have done little

³⁵¹ The ambassador expressed “grave[] concern[]” about events in Libya. U.N. SCOR, 66th Sess., 6498th mtg. at 10, U.N. Doc. S/PV.6498 (Mar. 17, 2011) (statement of China). As should be obvious, one can be gravely concerned by a situation—or alarmed, appalled, or horrified—without accepting any responsibility to act. In this case, he did not even mention Libya’s responsibility to protect its population, although he could have done so without accepting or acknowledging any international responsibility.

³⁵² *Id.*

³⁵³ *Id.*

³⁵⁴ *Id.* Although the African Union did not support the use of force, the three African members of the Council voted for the resolution. *Id.* at 3.

³⁵⁵ See ROSEMARY FOOT, CHINA, THE UN, AND HUMAN PROTECTION: BELIEFS, POWER, IMAGE 147-48 (2020) (recounting influence of regional states on China’s position on Libya resolutions).

³⁵⁶ See BELLAMY, *supra* note 7, at 96 (arguing that “dismissing R2P’s influence [on Resolution 1973] would leave us bereft of plausible explanations as to why states voted the way they did”).

³⁵⁷ FOOT, *supra* note 356, at 145-146.

³⁵⁸ Sarah Brockmeier et al., *The Impact of the Libya Intervention Debates on Norms of Protection*, 30 GLOB. SOC’Y 113, 118-19 (2015).

to protect civilians who were being assaulted on the ground.³⁵⁹ Now that the key players in the Obama administration have written their accounts of the decision to intervene, it is quite clear that a putative international responsibility to protect, far from being a game changer, had little if anything to do with setting U.S. policy.³⁶⁰ First and foremost, with one negative example discussed below, none of the key players even mentioned the “responsibility to protect” or its relevance to U.S. policy decisions in their recollections of the policy discussions on Libya.³⁶¹

Obama’s national security officials were deeply split over whether to intervene in Libya.³⁶² His vice-president, secretary of defense, national security advisor, and chairman of the Joint Chiefs of Staff opposed intervention on the ground that the United States had no national interest in the country.³⁶³ The White House chief of staff was “incredulous” that the matter was even under discussion.³⁶⁴

Among those supporting intervention were Secretary of State Hillary Clinton, U.N. Ambassador Susan Rice, NSC officials

³⁵⁹ See BARACK OBAMA, *A PROMISED LAND* 655 (2020) (noting that “it wasn’t even clear that a no-fly zone would have any effect, since Gaddafi was using ground forces . . . to attack opposition strongholds”); Michael Knights, *Slippery Slope: Libya and the Lessons of Previous No-Fly Zones*, WASH. INST. (Feb. 25, 2011), <https://www.washingtoninstitute.org/policy-analysis/slippery-slope-libya-and-lessons-previous-no-fly-zones> [<https://perma.cc/CPR9-UDU7>] (giving an example of a no-fly zone in Iraq that “never truly protected civilians . . . because the regime’s ground forces were still capable of destroying communities with artillery and other means”).

³⁶⁰ Even based on the information that was available at the time of the intervention, “characterizing the U.S. decision to support intervention in Libya as a triumph of the responsibility to protect ignore[d] both disputes over the content of the concept and the motivations expressed by the United States for supporting the intervention.” Saira Mohamed, *Taking Stock of the Responsibility to Protect*, 48 *STAN. J. INT’L L.* 319, 320 (2012).

³⁶¹ See OBAMA, *supra* note 360, at 653-62; HILLARY RODHAM CLINTON, *HARD CHOICES* 363-77 (2014); SUSAN RICE, *TOUGH LOVE: MY STORY OF THE THINGS WORTH FIGHTING FOR* 278-87 (2019); POWER, *supra* note 338, at 289-307; BEN RHODES, *THE WORLD AS IT IS: A MEMOIR OF THE OBAMA WHITE HOUSE* 109-24 (2018); see ROBERT M. GATES, *DUTY: MEMOIRS OF A SECRETARY AT WAR* 510-13, 515-16, 517-23 (2014). Gates did dismissively refer to Power as a “strong advocate” of the responsibility to protect, but that was a general description of her policy preferences rather than a characterization of her position or arguments on Libya. *Id.* at 511.

³⁶² See GATES, *supra* note 362, at 511; RHODES, *supra* note 362, at 112-13.

³⁶³ GATES, *supra* note 362, at 511.

³⁶⁴ RHODES, *supra* note 362, at 113.

Samantha Power and Ben Rhodes, and some more junior staffers.³⁶⁵ There is no question that the proponents of intervention among Obama's advisors wanted to protect civilians.³⁶⁶ The flaw is in supposing that somehow that desire was a product of R2P. These players certainly were sympathetic to R2P, perhaps even a strong-form version of it. But it hardly galvanized them, because they had commitments on the issue of responding to atrocity crimes that pre-existed R2P.³⁶⁷

Susan Rice's support for intervention in an appropriate case extended back to her experience in government during the Rwandan genocide.³⁶⁸ Samantha Power's views were shaped by her experience as a journalist in Bosnia in the 1990s, and she famously embarked on writing an entire book about past failures to confront genocide well before ICISS coined the term "responsibility to protect."³⁶⁹ And it was Power's book, not R2P, that contributed to Rhodes's support for intervention.³⁷⁰ Hillary Clinton also was motivated by humanitarian considerations, but her focus was on practicalities, such as making sure that any intervention had sufficient international support, including from the Arab League.³⁷¹

³⁶⁵ See *id.* at 112-14.

³⁶⁶ See RICE, *supra* note 362, at 153; POWER, *supra* note 338.

³⁶⁷ See RICE, *supra* note 362, at 153; Samantha Power, *Bystanders to Genocide*, ATLANTIC (Sept. 2001), <https://www.theatlantic.com/magazine/archive/2001/09/bystanders-to-genocide/304571/> [https://perma.cc/2ZYU-SFJ2].

³⁶⁸ RICE, *supra* note 362, at 153 ("Of course, it was the human cost of the Rwandan genocide that has haunted me ever since. It left me determined to go down fighting, if ever I saw an instance where I believed U.S. military intervention could be at once feasible, effective, and make a critical difference in saving large numbers of human lives at an acceptable risk to U.S. interests."); see also Power, *supra* note 368, at 108-09 (quoting Rice as saying, "I swore to myself that if I ever faced such a crisis again, I would come down on the side of dramatic action, going down in flames if that was required").

³⁶⁹ See generally SAMANTHA POWER, *A PROBLEM FROM HELL: AMERICA AND THE AGE OF GENOCIDE* (2002); see also POWER, *supra* note 338, at 118-24 (describing the genesis of the book in the late 1990s).

³⁷⁰ RHODES, *supra* note 362, at 119 ("My own worldview had been shaped, in part, by reading books like Samantha's and watching liberals . . . promote movies like *Hotel Rwanda*.").

³⁷¹ See CLINTON, *supra* note 362, at 367 (recounting that after she initially opposed intervention, Arab League endorsement of a no-fly zone "began to change the calculus"). In an earlier address to the U.N. Human Rights Council, Clinton had said that the body "was founded because the international community has a responsibility to protect universal rights and to hold violators accountable." Hillary Clinton, U.S. Sec'y

She did not make a moral case for intervention to Obama.³⁷² Attributing the positions taken by these officials on the Libya intervention to R2P, in other words, is the equivalent of attributing the rising of the sun to the call of the rooster.

But none of these officials ultimately decided U.S. policy on Libya; President Obama did. Although scholars writing without the benefit of his personal account believed that “R2P gave him the necessary intellectual and normative tool to act,”³⁷³ it is now clear that is not the case. In fact, he explicitly declined to think in terms of R2P:

And yet, as much as I shared the impulse to save innocent people from tyrants, I was profoundly wary of ordering any kind of military action against Libya, for the same reason that I’d declined Samantha [Power]’s suggestion that my Nobel Prize address include an explicit argument for a global “responsibility to protect” civilians against their own governments. Where would the obligation to intervene end? And what were the parameters?³⁷⁴

Foremost in his mind was the possibility of another “Black Hawk Down” incident with U.S. casualties.³⁷⁵ He also did not feel

of State, Remarks at the Human Rights Council in Geneva (Feb. 28, 2011), <https://geneva.usmission.gov/2011/02/28/sec-clinton-hrc-geneva-2011> / [\[https://perma.cc/P7AY-4MGH\]](https://perma.cc/P7AY-4MGH).

³⁷² Jo Becker & Scott Shane, *Hillary Clinton, “Smart Power” and a Dictator’s Fall*, N.Y. TIMES (Feb. 27, 2016), <https://www.nytimes.com/2016/02/28/us/politics/hillary-clinton-libya.html> [<https://perma.cc/P7AY-4MGH>] (reporting that Clinton “did not directly push Mr. Obama to intervene . . . [n]or did she make an impassioned moral case, according to several people in the room”).

³⁷³ THAKUR, *supra* note 3, at 254; *see also* BELLAMY, *supra* note 7, at 98 (arguing that Obama “was persuaded by the normative argument for intervention” made by “long-standing R2P supporters” Power and Rice).

³⁷⁴ OBAMA, *supra* note 360, at 654-55. Power pushed to include an endorsement of R2P in the Nobel speech up until the morning it was given. When speechwriter Ben Rhodes brought the issue up with Obama in the final review of the text, “he looked at me with exasperation. ‘I’m on my way to deliver the speech,’ he said. ‘This isn’t the time to be making policy.’” RHODES, *supra* note 362, at 82. An R2P endorsement made its way into the National Security Strategy in 2010 and again in 2015, but Obama obviously was not sold on the idea. *See* THE WHITE HOUSE, NATIONAL SECURITY STRATEGY 48 (May 2010), https://obamawhitehouse.archives.gov/sites/default/files/rss_viewer/national_security_strategy.pdf [<https://perma.cc/8BD7-UH4D>]; THE WHITE HOUSE, NATIONAL SECURITY STRATEGY 22 (Feb. 2015), https://obamawhitehouse.archives.gov/sites/default/files/docs/2015_national_security_strategy_2.pdf [<https://perma.cc/AZ7G-L4LB>].

³⁷⁵ OBAMA, *supra* note 360, at 655.

there was any popular support in the United States for intervention; if things went wrong, he worried that his administration would pay a steep political price.³⁷⁶ He resented that French President Nicholas Sarkozy and U.K. Prime Minister David Cameron had backed him and the United States into a corner by announcing their intention to introduce a resolution in the Security Council to authorize a no-fly zone, which would require the United States to take a stand:

I was irritated that Sarkozy and Cameron had jammed me on the issue, in part to solve their domestic political problems, and I felt scornful of the Arab League's hypocrisy. I knew that Bill [Daley, his chief of staff] was right: that outside Washington, there wasn't a lot of support for what America was being asked to do, and that the minute anything about a U.S. military operation in Libya went south, my political problems would only worsen.³⁷⁷

He also believed that the no-fly zone proposed by the United Kingdom and France was worse than useless, because Qaddafi's air power was not the source of the threat to civilians.³⁷⁸ He resolved his dilemma by insisting that a resolution authorize "all means necessary" but that U.S. involvement in any subsequent military operation be limited.³⁷⁹ The United States would use its capabilities to suppress the Libyan air defense at the beginning of the operation, then hand it off to the European allies.³⁸⁰ Quite simply, Obama was trying to get out of a box he found himself in, not vindicate an international responsibility to protect. He later told Secretary of Defense Robert Gates that the decision had been a "51-49 call."³⁸¹

To the extent Obama had a doctrine guiding his decisions on humanitarian crises, it was something more pragmatic and limited than a strong-form R2P: "If it is possible to do good at a bearable cost, to save lives, we will do it."³⁸² This echoed how a senior State

³⁷⁶ *Id.* at 658.

³⁷⁷ *Id.*

³⁷⁸ OBAMA, *supra* note 360, at 656 (recounting that he complained to his staff that "we are being asked to participate in a no-fly zone that will make everyone look like they're doing something but that won't actually save Benghazi"). He considered the no-fly zone proposal a "turd sandwich." POWER, *supra* note 368, at 297 (quoting Obama).

³⁷⁹ *See* OBAMA, *supra* note 360, at 655.

³⁸⁰ *Id.* at 659.

³⁸¹ GATES, *supra* note 362, at 519.

³⁸² Jeffrey Goldberg, *The Obama Doctrine*, ATLANTIC (Apr. 2016), <https://www.theatlantic.com/magazine/archive/2016/04/the-obama-doctrine/471525/> [<https://perma.cc/Q5HX-QFCQ>].

Department official had characterized the policy behind the Kosovo intervention: “We will continue to act . . . where we can and where our interests are at stake to protect against and stop gross abuses.”³⁸³ Neither of these statements is inconsistent with the weak-form R2P and its option to act on a case-by-case basis. But the continuity of that view from the late 1990s to the 2010s suggests that R2P was not a “powerful galvanizing norm” for U.S. policy, because the policy stayed the same from before the concept existed to after its weak form was adopted.³⁸⁴

D. Syria in the Shadow of Libya

The use of “all means necessary” to protect civilians in Libya did not end until Qaddafi’s overthrow and murder by rebel forces.³⁸⁵ Russia, China, and others complained that the use of force in support of the rebels exceeded the mandate that had been given by the Security Council.³⁸⁶ It is not clear that an actual decision ever was made, at least in the U.S. government, to remove Qaddafi from

³⁸³ Morton H. Halperin, *Winning the Peace: America’s Goals in Kosovo*, in KOSOVO: CONTENTING VOICES ON BALKAN INTERVENTIONS 224, 230 (William Joseph Buckley ed., 2000).

³⁸⁴ U.K. Prime Minister David Cameron was an early proponent of intervention, but R2P does not seem to have been part of his motivation. In his memoir, he recalled that “it was Bosnia that was at the forefront of my mind as I discussed . . . how to respond to the crisis in Libya.” DAVID CAMERON, *FOR THE RECORD* 275 (2019); see also U.K. House of Commons, Foreign Affairs Committee, *Libya: Examination of Intervention and Collapse and the UK’s Future Policy Options* 16 (Sept. 14, 2016) (suggesting that “British politicians and policymakers may have attached undue weight to their individual and collective memories of the appalling events at Srebrenica” in deciding to intervene in Libya); Eric A. Heinze & Brent J. Steele, *The (D)evolution of a Norm: R2P, the Bosnian Generation and Humanitarian Intervention in Libya*, in LIBYA, THE RESPONSIBILITY TO PROTECT AND THE FUTURE OF HUMANITARIAN INTERVENTION 130, 132 (Aidan Hehir & Robert Murray eds., 2013) (arguing that decisions made about the Libya intervention could be attributed to the impact of the war in Bosnia on policymakers’ view of the world). R2P did not rate a mention in either Cameron’s account or the report of the parliamentary inquiry into the Libya intervention.

³⁸⁵ Mary Beth Sheridan, *Moammar Gaddafi Killed in Rebel Custody as Last Loyalist Holdout in Libya Falls*, WASH. POST (Oct. 20, 2011), https://www.washingtonpost.com/world/middle_east/gaddafis-home-town-overrun-conflicting-reports-on-his-fate/2011/10/20/gIQAMwTB0L_story.html [https://perma.cc/X7QV-75T5].

³⁸⁶ E.g., U.N. SCOR, 66th Sess., 6531st mtg. at 21, U.N. Doc. S/PV.6531 (May 10, 2011) (statement of China) (“The original intention of [the Libya resolutions] was to put an end to violence and to protect civilians. We are opposed to any attempt to willfully interpret the resolutions or to take actions that exceed those mandated by the resolutions.”).

power.³⁸⁷ One official described it as an example of “the fundamental pull of mission creep.”³⁸⁸ But the logic is not elusive. Virtually any military intervention to protect civilians is going to encounter an “end state problem.”³⁸⁹ In the context of Libya, the possible end states essentially were using just enough force indefinitely to perpetuate a stalemate between Qaddafi’s forces and the rebels; negotiating a durable political solution; or changing the regime.³⁹⁰ The first option was impractical and had the additional disadvantage of leaving a portion of Libya’s population under Qaddafi’s control.³⁹¹ The African Union favored the second option, but the rebels refused to negotiate with Qaddafi, and the fear that he would use a period of negotiations to regroup was not unreasonable.³⁹² Whether regime change was ever the point of the intervention, it became the only logical culmination.³⁹³

A narrative that attaches importance to the role of R2P in the Libya intervention naturally connects the outcome in Libya to subsequent actions regarding Syria.³⁹⁴ Indeed, the insistence of R2P proponents that Libya was “a textbook case of the [R2P] norm working exactly as it was supposed to” ensured that R2P would get the blame for Libya’s outcome even if it did not deserve the credit for the initial authorization of force.³⁹⁵ And there is little doubt that Libya hardened skepticism toward international action, whether under ostensible R2P auspices or not.³⁹⁶

³⁸⁷ See Becker & Shane, *supra* note 373 (quoting Gates as saying “I can’t recall any specific decision that said, ‘Well, let’s just take him out’”).

³⁸⁸ Dexter Filkins, *The Moral Logic of Humanitarian Intervention*, NEW YORKER (Sept. 9, 2019), <https://www.newyorker.com/magazine/2019/09/16/the-moral-logic-of-humanitarian-intervention> [<https://perma.cc/7C2P-M23M>] (quoting National Security Council official Derek Chollet).

³⁸⁹ Roland Paris, *The “Responsibility to Protect” and the Structural Problems of Humanitarian Intervention*, 21 INT’L PEACEKEEPING 569, 576-77 (2014).

³⁹⁰ *Id.*

³⁹¹ *Id.* at 582.

³⁹² *Id.* at 583.

³⁹³ *Id.* at 582-83 (discussing the end-state problem in Libya).

³⁹⁴ See Morris, *supra* note 349, at 1275.

³⁹⁵ Interview—Gareth Evans, E-INT’L RELS. (Sept. 2, 2011), <https://www.e-ir.info/2011/09/02/interview-the-rtop-balance-sheet-after-libya/> [<https://perma.cc/WL9X-67TD>]; see Morris, *supra* note 349, at 1277 (noting the “curious paradox” that “a policy which in Libya was rarely justified in terms of R2P has come, in the eyes of some, to demonstrate the dangers inherent in the concept”).

³⁹⁶ See, e.g., Jaganathan & Kurtz, *supra* note 185, at 475 (“In Libya, India witnessed

In casting the first of a series of vetoes of draft Syria resolutions in October 2011, the Russian ambassador said nothing about R2P but pointedly asserted that “the situation in Syria cannot be considered in the Council separately from the Libyan experience.”³⁹⁷ He accused NATO of turning Resolution 1973 “into its opposite.”³⁹⁸ China, which joined Russia in casting a veto on this occasion and a number of others, said nothing about Libya or R2P.³⁹⁹ But its representative emphasized that the international community “should fully respect Syria’s sovereignty, independence and territorial integrity” and that any international action should “compl[y] with the Charter of the United Nations and the principle of non-interference in the internal affairs of States.”⁴⁰⁰ He underscored that non-interference “has a bearing upon the security and survival of developing countries, in particular small and medium-sized countries, as well as on world peace and stability.”⁴⁰¹ Perhaps in a subtle show of regret for China’s abstention on Resolution 1973, he insisted that his government’s “position on those questions has been consistent and firm.”⁴⁰²

It is not surprising that Russia would make tactical use of criticisms of the denouement in Libya. But it is difficult to think that Libya had much bearing on its policy in Syria, where it had significant national interests.⁴⁰³ Likewise, China has fewer interests in Syria, but its ideological commitment to non-interference and a tendency to support a state faced with armed rebellion informed its vetoes.⁴⁰⁴ Dissatisfaction with the Libya intervention provided context for China’s reaffirmation of those policy preferences, but that dissatisfaction is not necessary to explain the underlying

what it had always dreaded seeing—the instrumentalisation of R2P to justify regime change.”).

³⁹⁷ U.N. SCOR, 66th Sess., 6627th mtg. at 4, U.N. Doc. S/PV.6627 (Oct. 4, 2011) (statement of Russia).

³⁹⁸ *Id.*

³⁹⁹ *See id.* at 5 (statement of China).

⁴⁰⁰ *Id.*

⁴⁰¹ *Id.*

⁴⁰² *Id.*

⁴⁰³ *See* Anna Borshchevskaya, *Russia’s Many Interests in Syria*, WASH. INST. (Jan. 24, 2013), <https://www.washingtoninstitute.org/policy-analysis/russias-many-interests-syria> [<https://perma.cc/2KN5-DTZ2>].

⁴⁰⁴ *See* U.N. SCOR, 66th Sess., 6627th mtg. at 5, U.N. Doc. S/PV.6627 (Oct. 4, 2011) (statement of China).

policy.⁴⁰⁵

The point is that there is no basis for thinking that weak-form R2P has had any role in shaping the policy preferences of either China or Russia when it comes to international action in atrocity situations. This point extends to emerging powers like India, Brazil, and South Africa, which have made political statements urging Syrian President Bashar Assad to step down, but have drawn the line at supporting intervention to bring about that result.⁴⁰⁶ A broader survey of statements by Security Council members in discussions of Syria found that there was little mention of Syria's state responsibility to protect and none of an international role in protecting the population.⁴⁰⁷ The same point could be extended to a number of other situations where weak-form R2P seems to have had little or no impact on key states' policy preferences, including Sudan,⁴⁰⁸ Sri Lanka,⁴⁰⁹ and Myanmar.⁴¹⁰ In other words, it is the inaction on Syria, not the action on Libya, that reflects common practice since 2005.

IV. R2P in the Age of Entropy

The prospects for halting weak-form R2P's decay and strengthening it are dim. The reason weak-form R2P has decayed is much the same as why the World Summit did not endorse strong-form R2P in the first place. Although ICISS sought to reframe the debate, it actually did nothing to change the underlying politics driving that debate.⁴¹¹ The fundamental political divide in international politics, including over the issue of humanitarian

⁴⁰⁵ See FOOT, *supra* note 356, at 176 (attributing China's Syria vetoes at least in part to its discontent with Libya and noting the various ways in which that was manifested).

⁴⁰⁶ Brown, *supra* note 9, at 441.

⁴⁰⁷ See Morris, *supra* note 349, at 1275 (finding that seven Council members mentioned Syria's responsibility to protect between October 2011 and April 2013).

⁴⁰⁸ See Alex DeWaal, *Darfur and the Failure of the Responsibility to Protect*, 83 INT'L AFFS. 1039 (2007).

⁴⁰⁹ See Damien Kingsbury, *Sri Lanka*, in *THE RESPONSIBILITY TO PROTECT: THE PROMISE OF STOPPING MASS ATROCITIES IN OUR TIME* 298, 301 (Jared Genser & Irwin Cotler eds., 2012).

⁴¹⁰ See Martin Mennecke & Ellen E. Stensrud, *The Failure of the International Community to Apply R2P and Atrocity Prevention in Myanmar*, 13 GLOB. RESP. TO PROTECT 111 (2021).

⁴¹¹ See Brown, *supra* note 9, at 432 (noting that ICISS tried unsuccessfully to "tak[e] the politics out of the question of responding to gross violations of human rights").

intervention, has been aptly summed up as one view that “emphasizes order among states and justice within them” and a contending view that “stresses order within states and justice among them.”⁴¹² This basic division has also been described as between a “solidarist” view of the world system, which assumes a universal standard of morality that can justify intervention when violated, and a “pluralist” view, which gives primacy to the co-existence of states with differing views on justice and how to attain it.⁴¹³ Both of these views accept that there are international laws and norms, but diverge sharply as to how extensive they are and can be.⁴¹⁴

The pluralist view assumes that different states can have varying views on justice and how to achieve it.⁴¹⁵ Some might stress the importance of economic rights, for example, while others give priority to political rights.⁴¹⁶ Underlying the pluralist view is the conviction that internal justice can best be achieved if there is sufficient internal order—that is, a functioning state that has monopoly over the use of force.⁴¹⁷ Thus, other things being equal,

⁴¹² Mohammed Ayoob, *Making Sense of Global Tensions: Dominant and Subaltern Conceptions of Order and Justice in the International System*, 47 INT'L STUDS. 129, 130 (2010).

⁴¹³ See Hedley Bull, *The Grotian Conception of International Society*, in DIPLOMATIC INVESTIGATIONS: ESSAYS IN THE THEORY OF INTERNATIONAL POLITICS 51, 52 (Herbert Butterfield & Martin Wight eds., 1968) (contrasting the view that there is “solidarity, or potential solidarity” among states “with respect to the enforcement of [international] law” with the pluralist view that states “are capable of agreeing only for certain minimum purposes which fall short of that of the enforcement of the law”); see also Edward Newman, *R2P: Implications for World Order* 5 GLOB. RESP. TO PROTECT 235, 240-41 (2013) (contrasting “solidarism [which] ‘defines international societies with a relatively high degree of shared norms, rules and institutions among states’” with “the pluralist world view [of] a stable international society . . . based upon certain norms of peaceful coexistence, and above all mutual recognition and respect for territorial integrity, and non-interference into the domestic affairs of other states”); Brown, *supra* note 9, at 427 (contrasting the view that states have “an ethic of coexistence that places a premium on the norm of non-intervention” with the view of “extensive mutual obligations such that to simply respond verbally to human rights violations would be wholly inadequate”).

⁴¹⁴ Bull, *supra* note 414, at 53.

⁴¹⁵ See Nicholas J. Wheeler, *Pluralist or Solidarist Conceptions of International Society: Bull and Vincent on Humanitarian Intervention*, 21 MILLENNIUM: J. INT'L STUDS. 463, 467 (1992).

⁴¹⁶ *Id.* at 476.

⁴¹⁷ See Ayoob, *supra* note 413, at 133-34 (arguing that “in the absence of even rudimentarily effective states to provide a minimum degree of political order . . . the concept of human rights remains nothing more than a pure abstraction”); see also FOOT, *supra* note 356, at 3 (describing China’s view of human protection as “connect[ing]

the existence of large-scale human rights abuses reflects a breakdown of order. The most logical approach to remedying the abuses, then, is the restoration of order. Except in the most extreme cases, that means support for the relevant state.⁴¹⁸ An intervention targeting the state, on the other hand, will only contribute to more disorder and thus continued human rights abuses, often at the hands of non-state actors.⁴¹⁹ The pluralist view is also based on the conviction that, in the absence of justice among states, intervention in countries with weak states are as apt to be in the service of the interests of strong states as in the interests of those suffering abuse.⁴²⁰ At the core of the pluralist view is an emphasis on respect for state sovereignty and adherence to the principle of non-interference.⁴²¹

The solidarist view, on the other hand, presupposes broad if not universal agreement on standards of justice and human rights.⁴²² Violations of those standards within a state's territory are an appropriate subject for international action.⁴²³ And if widespread abuses are attributable to the state, the state may well need to be

economic development, the strong state, and social stability on the understanding that having these three components in place better guarantees international peace and security and thus human protection"); COURTNEY J. FUNG, CHINA AND INTERVENTION AT THE U.N. SECURITY COUNCIL: RECONCILING STATUS 141 (2019) (describing China's vision of "developmental peace" as an alternative to liberal internationalism).

⁴¹⁸ See, e.g., Jaganathan & Kurtz, *supra* note 185, at 479 (describing India's "preoccupation with order[, which] translates into India's fixation with sovereignty and its corollary, the principle of non-intervention in the internal affairs of states").

⁴¹⁹ See Newman, *supra* note 414, at 243 (describing the "pluralist view [as being that] states are the legitimate agent to resolve problems within their borders, and to undermine this principle—even when terrible abuses are occurring—would be to set a very dangerous precedent").

⁴²⁰ See Ayoob, *supra* note 413, at 135 (arguing that under current conditions, international interventions for humanitarian purposes "whether authorized by the Security Council or not, readily come to be viewed as instruments of depredation by the strong against the weak").

⁴²¹ See Wheeler, *supra* note 416, at 467 (noting the centrality to a pluralist view of "reciprocal recognition of sovereignty, and its logical corollary, the norm of non-intervention").

⁴²² See Newman, *supra* note 414, at 240 (noting that solidarism assumes "a relatively high degree of shared norms, rules and institutions among states") (quoting BARRY BUZAN, FROM INTERNATIONAL TO WORLD SOCIETY? ENGLISH SCHOOL THEORY AND THE SOCIAL STRUCTURE OF GLOBALISATION xviii (2004)).

⁴²³ See *id.* at 244.

replaced.⁴²⁴ Put simply, shared values of justice and human rights give rise to “extensive cross-border moral obligations” to prevent and respond to large scale abuses.⁴²⁵ A key distinction between the two views is that pluralists tend to see the state as the main subject of international law, while solidarists see greater scope for individuals to be subjects of international law.⁴²⁶

The issue is not which view is more empirically or morally justified; rather, it is simply that the two views co-exist and each is held by a significant number of states.⁴²⁷ Strong-form R2P did not bridge the gap between them. In fact, ICISS’s view of “sovereignty as responsibility” focused on justice within states.⁴²⁸ The new conception of sovereignty through which ICISS intended to resolve the conflict between intervention and state sovereignty was in effect redefining sovereignty in solidarist terms.⁴²⁹ Little wonder that the states who were most resistant to strong-form R2P going into the World Summit—such as China, India, Pakistan, Russia, Egypt, and many members of the NAM—were those possessed of a pluralist perspective.⁴³⁰

The only way to obtain even limited consensus on R2P in the Outcome Document was to make the concept more reflective of pluralist values. Thus, primacy was given to the state’s role.⁴³¹ The issues of international concern were limited to the most serious categories of abuse, that is, the four atrocity crimes.⁴³² The phrase “responsibility to protect” was used only in conjunction with those

⁴²⁴ See Andrew Garwood-Gowers, *R2P Ten Years After the World Summit: Explaining Ongoing Contestation over Pillar III*, 7 GLOB. RESP. TO PROTECT 300, 315 (2015) (noting Syria as an example of an international intervention that could potentially lead to regime change).

⁴²⁵ Brown, *supra* note 9, at 427.

⁴²⁶ Wheeler, *supra* note 416, at 467-68.

⁴²⁷ See *id.* at 468; Garwood-Gowers, *supra* note 425, at 16; Newman, *supra* note 414, at 256.

⁴²⁸ See Newman, *supra* note 414, at 240-41.

⁴²⁹ See *id.* (referencing Anne-Marie Slaughter, *Security, Solidarity, and Sovereignty: The Grand Themes of UN Reform*, 99 AM. J. INT'L L. 619, 620 (2005)).

⁴³⁰ See *id.* at 244 (noting that ICISS’s idea of conditional sovereignty “has been widely internalized in liberal—mainly Western—circles . . . [but] is not universally accepted”).

⁴³¹ See *id.* at 235 (noting that the World Summit version of R2P “is ‘firmly anchored in well-established principles of international law,’ including the bedrock of state sovereignty and—except in the most exceptional circumstances—non-interference”).

⁴³² See Outcome Document, *supra* note 1, ¶ 138.

crimes and only in conjunction with the state, not in reference to the international community or the United Nations.⁴³³ Any idea of an *international* responsibility to protect was excised from the text, and emphasis was placed on assisting states.⁴³⁴ Even regarding the option for international intervention in paragraph 139, the issue is not whether *people* need protection, but whether the *state* is manifestly failing.⁴³⁵ The point of the Commission's strong-form R2P was to shift the focus of consideration from states to the people in need of protection—a solidarist perspective.⁴³⁶ The Outcome Document's weak-form R2P puts the focus back onto the state—a pluralist perspective. Even the curtailed international role in weak-form R2P makes pluralist states uneasy.⁴³⁷

Political scientist Mohammed Ayoob characterized the solidarist view as the “hegemonic” perspective, and the pluralist view as the “subaltern” perspective.⁴³⁸ That was an accurate description of the relative power of states holding those two views in the years immediately after the end of the Cold War when the United States and its Western allies were predominant and the world order essentially was unipolar.⁴³⁹ That predominance—along with the practical availability of unused military capacity⁴⁴⁰—facilitated the era of humanitarian intervention.

But even by 2005, the hegemony of the solidarist view was insufficient to obtain consensus on strong-form R2P.⁴⁴¹ Solidarist

⁴³³ See *id.*, ¶¶ 138-139.

⁴³⁴ See Newman, *supra* note 414, at 238.

⁴³⁵ See Outcome Document, *supra* note 1, ¶ 139.

⁴³⁶ See Newman, *supra* note 414, at 240.

⁴³⁷ See Garwood-Gowers, *supra* note 425, at 316 (discussing “pluralist misgivings” about pillar three).

⁴³⁸ Ayoob, *supra* note 413, at 129-30 (arguing that the positions of states are not “geographic or cultural,” but based on “the position of groups of states in the international hierarchy, thus pitting a globally subaltern vision . . . against a globally hegemonic or dominant one”); see also Newman, *supra* note 414, at 241 (noting that the divide is not “between a liberal west and a pluralist non-western world, and this is certainly not a simple north-south debate, but the pluralist reservations about R2P have more commonly been heard in non-Western capitals”).

⁴³⁹ See Richard N. Haass, *The Age of Nonpolarity: What Will Follow U.S. Dominance*, 87 FOREIGN AFFS. 44, 44 (2008).

⁴⁴⁰ See Ignatieff, *supra* note 29 (commenting that the interventions of the 1990s were “made possible because the Western militaries had spare capacity and time to do human rights work”).

⁴⁴¹ See Newman, *supra* note 414, at 239.

countries may still have been dominant, but there was a limit to their dominance.⁴⁴² In accepting the compromises necessary to get R2P into the Outcome Document, proponents could have reasonably thought that weak-form R2P was flexible enough to evolve through use into a de facto strong form.⁴⁴³ A prerequisite for that to happen, however, would be for more states to be socialized into the solidarist underpinnings of strong-form R2P.

In fact, practice has moved R2P in the opposite direction, as pillar three and the international role have become less and less evident and the number of R2P situations occurring without any effective international reaction have proliferated.⁴⁴⁴ That is because the gap in power and influence between solidarist states and pluralist states has narrowed considerably.⁴⁴⁵ If the solidarist view is still dominant, it is much less so now than in 2005. The narrowing of the gap is likely to continue, and as it does, the chances of normative enhancement of weak-form R2P will diminish.⁴⁴⁶

Unipolarity was fading even as the heads of state gathered in 2005, replaced by “a world dominated not by one or two or even several states but rather by dozens of actors possessing and exercising various kinds of power.”⁴⁴⁷ The world order supplanting unipolarity has been called “the age of entropy”⁴⁴⁸ and even “no one’s world.”⁴⁴⁹ Whatever label is applied, the reality is that power is diffusing.⁴⁵⁰ As power diffuses, the chances of normative change

⁴⁴² See *id.* at 242-43.

⁴⁴³ See Pollentine, *supra* note 14, at 303 (reporting that negotiators expressed hope that with all its limitations, “the [2005] R2P agreement would help make the atmosphere for dealing with such crimes more receptive than had often been the case”).

⁴⁴⁴ See *supra* notes 396-421 and accompanying text.

⁴⁴⁵ See Newman, *supra* note 414, at 257.

⁴⁴⁶ See Morris, *supra* note 349, at 1280 (noting that “any migration in the balance of global power towards [China and other rising powers] will enhance their ability to compete in the highly contested normative space of international politics”).

⁴⁴⁷ See Haass, *supra* note 440, at 44.

⁴⁴⁸ SCHWELLER, *supra* note 27, at 1.

⁴⁴⁹ CHARLES A. KUPCHAN, *NO ONE’S WORLD: THE WEST, THE RISING REST, AND THE COMING GLOBAL TURN 3* (2012) (“It is doubtful, however, that any country, region, or model will dominate the next world. The twenty-first century will not be America’s, China’s, Asia’s, or anyone else’s; it will belong to no one.”).

⁴⁵⁰ See SCHWELLER, *supra* note 27, at 26 (noting that “power is diffusing and dissipating at the same time: more actors have power but only enough to thwart the effective rule of others”).

on an issue as contested as sovereignty and intervention lessen.⁴⁵¹

The United States and the European Union will continue to have influence, but less than in the 1990s, while the relative influence of pluralist powers like China and India will increase.⁴⁵² A number of regional powers, many of whom also tend toward pluralism, also will gain in influence.⁴⁵³ These changes may not be enough to result in a new order, but will lead to the fracturing of the current one.⁴⁵⁴

The implication for R2P is that there is little chance it will develop in a solidarist direction. The increasingly influential pluralist powers will insist on their say in the normative arrangement of the world.⁴⁵⁵ Indeed, all of this has been happening already and explains the normative decay described *supra* Part III.⁴⁵⁶ The age of entropy will see more of the same.

V. Conclusion

The strong form of R2P articulated by ICISS represented a creative attempt to fashion a new norm that would prevent future Rwandas and Kosovos while bridging divisions among states over humanitarian intervention. It proposed redefining sovereignty as responsibility and recognizing a complementary international responsibility to protect populations from serious harm whenever a state is unable or unwilling to do so. The Commission aimed for its reframing of the discussion around the question of responsibility to generate broad agreement among states, but this reframing did

⁴⁵¹ See Diana Panke & Ulrich Petersohn, *Norm Challenges and Norm Death: The Inexplicable?*, 51 COOP. & CONFLICT 3, 5 (2016) (suggesting that the outcome of conflicts over norms turns on “the relative strength” of the contestants).

⁴⁵² See NAT’L INTEL. COUNCIL, *supra* note 318, at 94-96.

⁴⁵³ *Id.* at 97 (citing Australia, Brazil, Indonesia, Iran, Nigeria, Saudi Arabia, Turkey, and the United Arab Emirates as regional powers in the coming two decades).

⁴⁵⁴ See Randall Schweller, *Emerging Powers in an Age of Disorder*, 17 GLOB. GOVERNANCE 285, 287 (2011) (arguing that, “because there will be no locus of international authority to adjudicate among competing claims or to decide which rules, norms, and principles should predominate, international order will become increasingly scarce”).

⁴⁵⁵ NAT’L INTEL. COUNCIL, *supra* note 318, at 98 (predicting “more assertive challenges to the Western-led political order from China and Russia”); see also, e.g., U.N. SCOR, 66th Sess., 6627th mtg. at 5, U.N. Doc. S/PV.6627 (Oct. 4, 2011) (statement of China) (contending that any Security Council action on Syria should “compl[y] with the Charter of the United Nations and the principle of non-interference in the internal affairs of States”).

⁴⁵⁶ See *supra* Part III.

nothing to alter the underlying politics that caused the division. As a consequence, strong-form R2P was not broadly acceptable to the U.N. membership. Only a weak form of R2P could be agreed to for inclusion in the Outcome Document. This weak-form R2P emphasized the primacy of the state and deleted any reference to an international responsibility to protect populations, substituting an international option to act under highly constrained circumstances and if no permanent member of the Security Council exercises a veto.

In the years since 2005, the normative content of weak-form R2P has decayed further. U.N. resolutions only occasionally reaffirmed the 2005 decision and have not done so at all in recent years. Resolutions have reiterated the primacy of the state in protecting populations, as well as the importance of respecting states' territorial integrity and political independence. They have not articulated any form of international responsibility to protect and have stopped even referring back to the minimal international role in the Outcome Document. Weak-form R2P, in other words, has become more state-centric and consistent with traditional views of sovereignty since 2005.

Discussions in the U.N. General Assembly, which have occurred almost annually since 2009, have not resulted in any normative advance. Rather, states' positions on contentious issues remain largely unchanged. The discussions have been a form of competency trap, where actors follow established patterns and procedures rather than adopt new mechanisms that might effect change.

R2P proponents hailed the intervention in Libya, where the Security Council for the first time authorized intervention in a state with a functioning government without that government's consent, as a "textbook case of the RtoP norm working exactly as it was supposed to."⁴⁵⁷ But R2P had little demonstrable normative effect on key actors, particularly the United States. It was not even mentioned in the Security Council discussion of the decision to authorize the use of military force. Meanwhile, inaction has been the more common response to situations in which populations are under attack from their governments.

This trend of decay is likely to continue in the age of entropy,

⁴⁵⁷ See Interview with Gareth Evans, *supra* note 396.

as global power diffuses and the relative strength of solidarist and pluralist states equalizes. Weak-form R2P will persist as a brand even as it becomes more state-centric. It remains, as it was in 2005, broadly acceptable to countries across the spectrum, all the more so since the international role in pillar three has been effectively excised. With its focus on assisting states to build preventive capacity, it may actually have a positive effect in some states on the margin. But the policy challenge that led to the creation of ICISS—no more Rwandas, no more Kosovos—remains as daunting as it was before the creation of the R2P brand.

[This Page is Intentionally Left Blank]