Global Constitutionalism (2015), 4:3, 428–467 © *Cambridge University Press, 2015*
doi:10.1017/S2045381715000155

Global constitutionalism and the responsibility to protect

BLAGOVESTA TACHEVA and GARRETT WALLACE BROWN
Department of Politics, University of Sheffield, Northumberland Road, Sheffield, S10 2TU

Email: b.d.tacheva@sheffield.ac.uk; g.w.brown@sheffield.ac.uk

Abstract: There is recent scholarship suggesting that the *Responsibility to Protect* (R2P) has now emerged as a master concept in relation to responding to mass atrocity crimes and that the R2P can further be seen as representative of an emerging global constitutional norm. In critical response, this article provides the first attempt to systematically investigate R2P's relationship with global constitutionalisation as well as to explore its wider implication with regard to global constitutionalism. In doing so, the article examines existing discussions of R2P and global constitutionalism, tracks the normative evolution of R2P in order to determine its current 'stage' of *norm diffusion*, and further attempts to locate the extent to which the R2P can be perceived as also part of a process of global constitutionalisation. From this analysis the article concludes that although the R2P could be labelled as, at best, a weak emerging norm, it fails to meet the more demanding signifier of an emerging constitutional norm and that there is further evidence to suggest that the R2P might be better understood as a stalled or degenerating norm.

Keywords: degenerating norm; global constitutionalisation; global constitutionalism; norm diffusion; responsibility to protect

Introduction

There is a considerable amount of scholarship suggesting that the *Responsibility to Protect* (R2P) represents an answer to the failures of prior humanitarian intervention norms.[1] As is often argued, the architects of the R2P aspired to provide a resolution to two debates permeating the

[1] G Evans, *The Responsibility to Protect: Ending Mass Atrocity Crimes Once and For All* (Brookings Institute, Washington DC, 2008); A Cottey, 'Beyond Humanitarian Intervention: The New Politics of Peacekeeping and Intervention' (2008) 14 *Contemporary Politics* 437; T Dunne, 'R2P: Distributing Duties and Counting Costs' (2013) 5 *Global Responsibility to Protect* 443; M Doyle, *The Question of Intervention: John Stuart Mill and the Responsibility to Protect* (Yale University Press, New Haven, CT, 2015).

humanitarian intervention lexicon: To redefine sovereignty as responsibility and to change the discourse on intervention by substituting the contested concept of a 'right to intervene' with a more normative demand for a 'responsibility to intervene'.[2] As an example of R2P's perceived impact, Thakur and Weiss have suggested that the R2P represents the 'most dramatic development of our time', with Gilbert further claiming that it is the 'most significant change to national sovereignty in 360 years'.[3] In making similar claims, many scholars of International Relations have argued that the R2P better satisfies the moral imperatives underwriting the need for the international community to act in the face of humanitarian crises.[4]

As part of this R2P discourse many have argued that 'the R2P has snowballed to the point that it has become a "master concept" in relation to mass atrocity crimes such as genocide, war crimes, crimes against humanity, and ethnic cleansing'.[5] Bellamy further agrees that the R2P has become firmly entrenched, suggesting that 'the key debates now are ones about how best to implement R2P, not about whether to accept the principle'.[6] In this way, it is claimed that the R2P has surpassed its norm predecessor humanitarian intervention in terms of both normative advancement and influence. As part of these arguments, considerable effort has been made to provide conceptual clarity to the R2P, its implication on global order, as well as highlight its significance in international law. These efforts have been deemed necessary because it is generally recognised that

[2] J Pattison, *Humanitarian Intervention and the Responsibility to Protect: Who Should Intervene* (Oxford University Press, Oxford, 2010) 2.

[3] R Thakur and T Weiss, 'R2P: From Idea to Norm – and Action?' (2009) 1 *Global Responsibility to Protect* 23; M Gilbert, 'The Terrible 20th Century' (2007) *The Globe and Mail*, 31 January. Also see L Axworthy and A Rock, 'R2P: A New and Unfinished Agenda' (2009) 1 *Global Responsibility to Protect* 69.

[4] As a sample see F Teson, 'The Liberal Case for Humanitarian Intervention' in J Holzgrefe and R Keohane (eds), *Humanitarian Intervention: Ethical, Legal and Political Dilemmas* (Cambridge University Press, Cambridge, 2003); H Andrew, *Order and Justice in International Relations* (Oxford University Press, Oxford, 2003); N Wheeler, 'A Victory for Common Humanity? The Responsibility to Protect after the 2005 World Summit' (2005) 2 *Journal of International Law and International Relations* 95; K Booth, *Theory of World Security* (Cambridge University Press, Cambridge, 2005); Evans (n 1); Pattison (n 2); A Linklater, *The Problem of Harm in World Politics: Theoretical Investigations* (Cambridge University Press, Cambridge, 2011); Dunne (n 1); Doyle (n 1); L Glanville, *Sovereignty and the Responsibility to Protect: A New History* (University of Chicago Press, Chicago, IL, 2014); A Bellamy, 'The Responsibility to Protect Turns Ten' (2015) 29 *Ethics and International Affairs* 161.

[5] A Gallagher, *Genocide and Its Threat to Contemporary International Order* (Palgrave Macmillan, Basingstoke, 2013) 125.

[6] A Bellamy, *Responsibility to Protect: A Defense* (Oxford University Press, Oxford, 2015) 12.

conceptual distinctions and clarity are of fundamental importance to the R2P discourse, since pinning down R2P's 'norm status' is indispensable for determining the extent to which the R2P can influence state policy and practice, whether it can transform the dominant understanding of sovereignty, whether it can overcome the failures of past humanitarian intervention norms, and whether it has the potential to become part of customary international law.

Nevertheless, conceptual clarity and the diffused impact of the R2P on creating international legal norms remain difficult to pin down. Since the term 'responsibility to protect' was coined in 2001 by the International Commission on Intervention and State Sovereignty (ICISS), it has been dubbed as a 'concept',[7] a 'principle',[8] 'a principled norm',[9] a 'candidate norm',[10] an 'emerging norm',[11] a 'new international norm',[12] an 'evolving international norm',[13] 'soft law',[14] an 'internalised and complex norm',[15] a 'new norm to legalize humanitarian intervention',[16] 'on its way towards becoming a new rule of international customary law'[17] and even as having 'attained the status of customary international law'.[18] Relatedly, those

[7] EC Luck, 'A Response' (2010) 2 *Global Responsibility to Protect* 178.

[8] AJ Bellamy, *Responsibility to Protect: The Global Effort to End Mass Atrocities* (Polity Press, Cambridge, 2009).

[9] T Dunne and K Gelber, 'Arguing Matters: The Responsibility to Protect and the Case of Libya' (2014) 6 *Global Responsibility to Protect* 329. By employing the term 'principled norm' Dunne and Gelber aim to distinguish the R2P 'from the general class of "norms" that relate to behavioural regularities' in order to reflect the 'high moral purpose that is addressed by the R2P'.

[10] J Brunnée and SJ Toope, *Legality and Legitimacy in International Law* (Cambridge University Press, New York, NY, 2010) 324.

[11] United Nations, High-Level Panel on Threats, Challenges and Change, 'A More Secure World: Our Shared Responsibility' A/59/565 (2 December 2004).

[12] G Evans, 'The Responsibility to Protect: An Idea Whose Time Has Come... and Gone?' (2008) 22 *International Relations* 286.

[13] N Shawki, 'Responsibility to Protect: The Evolution of an International Norm' (2011) 3 *Global Responsibility to Protect* 173.

[14] JM Welsh and M Banda, 'International Law and the Responsibility to Protect: Clarifying or Expanding States' Responsibilities?' (2010) 2 *Global Responsibility to Protect* 213.

[15] JM Welsh, 'Norm Contestation and the Responsibility to Protect' (2013) 5 *Global Responsibility to Protect* 387.

[16] SJ Stedman, 'UN Transformation in an Era of Soft Balancing' (2007) 83 *International Affairs* 938.

[17] See (n 12); L Arbour, 'The Responsibility to Protect as a Duty of Care in International Law and Practice' (2008) 34 *Review of International Studies* 447–8. Similarly Thomas Weiss suggests that the R2P 'certainly qualifies as emerging customary law'. See TG Weiss, 'R2P after 9/11 and the World Summit' (2006) 24 *Wisconsin International Law Journal* 743.

[18] R Van Landingham, 'Politics or Law? The Dual Nature of the Responsibility to Protect' (2012) 41 *Denver Journal of International Law & Policy* 120.

who remain sceptical have unfavourably depicted the R2P as simply 'old wine in new bottles',[19] 'much ado about nothing',[20] 'part of the problem',[21] and recently, in the aftermath of the international community's idleness in the face of the Syrian crisis, as 'dead'.[22]

In the context of 'global constitutionalism', yet another description has been attached to the 'responsibility to protect'. Namely, its description as an 'emerging global constitutional norm'.[23] Although this additional understanding of the R2P is intriguing, labelling the R2P as part of an emerging global constitutionalism requires better justification, especially since, despite its far-reaching implications, attempts to understand R2P as a part of the process of global constitutionalism are scarce. Furthermore, when such explorations have been made in the past, they are far from systematic, comprehensive, or convincing. As a result, there is considerable room for scepticism about labelling the R2P as an emerging global constitutional norm and such a claim requires significant investigation before those of us more sympathetic to global constitutionalism should be overly enthusiastic.

With this in mind the purpose of this article is to provide the first attempt at systematically investigating R2P's relationship with global constitutionalisation as well as exploring its wider implication with regard to global constitutionalism. The overarching question we wish to explore is to what extent the R2P can be perceived as an emerging constitutional norm within larger constitutionalisation processes and what does this determination tell us about R2P's place within broader debates concerning global constitutionalism?

In response to this question the article progresses in four sections. Section I draws upon existing discussions of R2P and global constitutionalism to highlight existing lacunas as well as to provide some contextual background for analysis. Section II examines the normative evolution of R2P and determines its current 'stage' of *norm diffusion*, suggesting that the R2P

[19] C Stahn, 'Responsibility to Protect: Political Rhetoric or Emerging Legal Norm?' (2007) 101 *American Journal of International Law* 102.

[20] T Reinold, 'The Responsibility to Protect – Much Ado about Nothing?' (2010) 36 *Review of International Studies* 55.

[21] T Ekiyor and ME O'Connell, 'The Responsibility to Protect (R2P): A Way Forward – or Rather Part of the Problem?' (2008) 1 *Foreign Voices* 1.

[22] See M Nuruzzaman, 'The "Responsibility to Protect" Doctrine: Revived in Libya, Buried in Syria' (2013) 15 *Insight Turkey* 57. See also AJ Bellamy, 'R2P: Dead or Alive?' in M Brosig (ed), *The Responsibility to Protect – From Evasive to Reluctant Action? The Role of Global Middle Powers* (HSF, ISS, KAS & SAIIA, Johannesburg, 2012).

[23] A Peters, 'Membership in the Global Constitutional Community' in J Klabbers, A Peters and G Ulfstein (eds), *The Constitutionalization of International Law* (Oxford University Press, Oxford, 2009) 189.

should be considered, at best, a 'weak emerging norm' and that it features what Welsh describes as characteristics of a 'complex norm'. Given the 'complexities' associated with the R2P as detailed in Section II, Section III seeks to locate the extent to which the R2P can be further perceived as part of a process of constitutionalisation, arguing that there are varying degrees of 'fit' between the R2P and global constitutionalism, but that this 'fit' depends on how we wish to understand global constitutionalism writ large. From these determinations, the conclusion establishes whether the R2P lends itself to a global constitutionalism reading or whether the R2P norm suffers potential degeneration and stalled constitutionalisation, which has so far received limited critical attention, but which also greatly threatens the R2P's ability to be understood as part of a larger global constitutional interpretation. The article concludes that although the R2P might reasonably be labelled as a weak emerging norm in terms of basic norm diffusion models, it fails to meet the more demanding signifiers of an emerging constitutional norm and that there is further evidence to suggest that the R2P might be better understood as having the hallmarks of what might be labelled as a stalled or degenerating norm.

Nevertheless, before beginning it is important to set and justify the parameters limiting the scope of this article. First, this article remains focused on testing the relationship between the R2P and its saliency as a foundational component of global constitutionalism. The reason for this tight focus is twofold: 1) the R2P is often implied to be a 'game changer' within contemporary international relations and that it therefore has constitutional significance, whether as a piece of international customary law[24] or as a 'internalising' norm which significantly alters the way we think about international relations and the responsibilities of the 'international community';[25] 2) Yet the explicit and implicit references to the R2P as a potential emerging 'global constitutional norm' have not been supported or investigated thoroughly, suggesting that these intimations either represent an underdeveloped assumption about the R2P's existing norm status and/or symbolise a level of wishful thinking by global constitutionalists (and R2P scholars) who want to locate increasing political and legal order amongst continuing international contestation. Second, and relatedly, the aim of this article is not to sufficiently put the R2P 'norm status' question to bed, that is an investigation beyond the limits of any one article. The aim here is merely to suggest that remaining questions about the norm status of the R2P render it untenable as an emerging global constitutional norm.

[24] RJ Buchan, *International Law and the Construction of the Liberal Peace* (Hart Publishing, London, 2013).

[25] See (nn 1 and 4).

In this way, the argument is not to suggest that the R2P hasn't changed the way we might think about international relations now or in the future, but to simply suggest that the more generous treatments of the R2P as part and parcel of increasing constitutionalisation and global constitutionalism should be, at present, tempered. Third, by providing a more critical and thoroughgoing treatment of the R2P the article aims to provide additional criteria from which to better pinpoint investigations into the potential of the R2P and what iterations, reforms and institutionalisations will be required before it could be more confidently understood as representative of an emerging constitutional norm. Fourth, it should be noted that this article makes no moral or ethical judgement about the R2P, its relationship with humanitarian military intervention (which is a considerable aspect of Pillar III of the R2P), or about the merits/effectiveness/imperialism(s) involved with humanitarian intervention in its various forms.[26] In addition, we recognise that the R2P is not limited to humanitarian intervention in its militarised sense, since prevention and post-conflict commitments are present within the R2P lexicon (although they remain wanting). In this way the aim here is merely to test the R2P as a norm that challenges certain existing political and legal orthodoxies, which in turn may or may not epitomise a set of global constitutional properties. Lastly, due to space limitations, we recognise that other related and relevant R2P literatures will at times be under-represented or receive tailored treatment. Nevertheless, we also think that the arguments presented here are germane and critically applicable to many optimistic accounts of the R2P, which continue to portray the R2P as being 'the most dramatic development of our time' and thus normatively and legally constitutive of a new era in international politics.[27] As suggested above, this article will examine and question these more optimistic accounts of the R2P so as to better determine its constitutional significance.

I. Constitutionalisation and the R2P as an emerging global constitutional norm

The inaugural editorial to the journal *Global Constitutionalism* states that the debates surrounding the R2P, especially following the manifestation of the norm in Libya, have given rise to 'important questions about legality, legitimacy, and the constitutionality of issues emerging beyond

[26] For a good critical overview see A Hehir, *The Responsibility to Protect: Rhetoric, Reality, and the Future of Humanitarian Intervention* (Palgrave, Basingstoke, 2012).

[27] See (nn 1, 4, 5, 6 and 24).

the state'.[28] The editors underscored the need for serious multidisciplinary engagement to 'address the coming challenges to fundamental norms that are held as central constitutional principles in most contemporary societies around the globe'.[29] Nevertheless, despite the explicit identification of R2P as resting importantly within the global constitutionalism discourse, the norm has actually received very little attention in the relevant literature, with the only explicit attempt to locate the R2P within the global constitutionalism paradigm offered briefly by Peters.[30]

For Peters, the key to identifying R2P's contribution to processes of global constitutionalisation resides with how global constitutionalism understands sovereignty as 'the legal status of a state as defined [and thus subordinate to] (and not only protected) by international law'.[31] As Peters asserts, 'constitutionalists welcome the re-characterisation of sovereignty as implying a responsibility to protect', because: 1) similarly to the constitutionalist perspective postulating that 'the ultimate normative source of international law is […] humanity, not sovereignty', 'the concept of R2P takes human needs as the starting point and 2) shifts the focus from state right to state obligations (or responsibilities), which is a typical constitutionalist concern'.[32] To establish the relationship between the responsibility to protect and global constitutionalism, Peters underscores the International Commission on Intervention and State Sovereignty (ICISS) acknowledgement of the concept of sovereignty as entailing a 'dual responsibility: externally – to respect the sovereignty of other

[28] A Wiener, AF Lang Jr, J Tully, MP Maduro and M Kumm, 'Global Constitutionalism: Human Rights, Democracy and the Rule of Law' (2012) 1 *Global Constitutionalism* 2.

[29] Ibid.

[30] See (n 23). Although there are a significant number of scholars who have in different forms implied that the R2P represents a political and/or legal norm that alters the constitutional make-up of international relations (see nn 1, 3, 4, 6 and 24), we have chosen to largely focus on Peters' account for the following reasons. First, Peters is a leading scholar of global constitutionalism and therefore offers useful insights on the R2P's potential constitutionalisation and does so in more detail than most International Relations scholars. Second, there has been very little directly written on the R2P and its link to global constitutionalism, thus making Peters' more expansive account particularly useful in terms of setting the debate. Although reference is made to other R2P authors who broadly intersect with aspects of global constitutionalism, Peters' treatment is favoured, due to its direct engagement with the focus of this article.

[31] B Fassbender, 'Sovereignty and Constitutionalism in International Law' in N Walker (ed), *Sovereignty in Transition* (Hart Publishing, Oxford, 2003) 129. Under this understanding, the establishment and entrenchment of the international prohibition on the use of military force can be properly appreciated as a (re)legalisation of sovereignty and as a crucial step towards the constitutionalisation of the international legal system.

[32] See (n 23) 155, 185. Furthermore, as Peters underscores 'the ongoing process of rendering sovereigns responsible is a cornerstone of the current transformation of international law into a constitutionalized system'. See (n 23) 190.

states, and internally, to respect the dignity and basic rights of all the people within the state' and the concomitant dual accountability that flows from it – to a state's citizens on the one hand, and to the broader community of states on the other hand.[33]

In unpacking key elements of the R2P doctrine Peters identifies four concepts, borrowed from the constitutionalist arsenal, which she suggests provide the missing links within the logic of the ICISS. First, global constitutionalism provides a concept of international community and the related constitutionalist argument for the existence of international legal obligations that may fall upon and be owed to the broader community of states.[34] Second, the concept of multi-level governance, or the idea that governance activities are flexibly distributed to different levels (i.e. local, national, regional, supranational, global) offers an explanation as to why the responsibility to protect would logically fall to the international level in cases of failure at the lower domestic level.[35] Third, the existence of an internal responsibility of states towards its citizens can be explained through the constitutional idea of a social contract, according to which agents invest their state with sovereign powers in exchange for the protection of their rights, denoting that these powers can be revoked should the sovereign fail to fulfil its intrinsic duty to secure those rights.[36] The connection between the internal and external responsibility can also be conceived of as a vertical social contract between the broader community of states and the state, by which the global community is bound to respect a sovereign's authority, so long as it meets its fundamental commitment (or responsibility) to protect its populations.[37]

The connection between internal and external responsibility is reflected in the three-pillar structure of the R2P, where Pillar I, based on pre-existing legal obligations, is the responsibility of states to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity; Pillar II addresses the duty of the international community to assist states in building the requisite capacities to fulfil their responsibility to protect populations from the four crimes, and; Pillar III is the international

[33] *The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty* (International Development Research Centre, Ottawa, 2001) paras 1.35, 2.15.

[34] See (n 23) 187; for a detailed account of the emergence of the international community see (n 24) 31, 61.

[35] See (n 23) 189.

[36] See (n 23) 187. For instance, Peters associates the internal responsibility with Lockean liberal constitutionalism, with the only difference being that states have a responsibility to protect all individuals within their territory, whereas in the classic understanding of the social contract this duty is owed to the state's citizens. See also Buchan (n 24) 185–6.

[37] Peters (n 23) 187.

community's responsibility to act in a timely and decisive manner should states fail to discharge their primary responsibility.[38] By virtue of its three-pillar structure, Welsh refers to the R2P as a 'complex norm', containing various prescriptions that not only impose different obligations on different actors, but are characterised by varying degrees of specificity.[39] In this sense, Bellamy argues that the R2P is 'not a single norm but a principle that contains at least two sets of norms – one set concerned with how governments treat their own population and the other set concerned with how the international community as a whole should respond to mass atrocities'.[40] Whereas the former responsibility for states to protect their populations from mass atrocity crimes is a highly determinate norm entrenched in international human rights and humanitarian law,[41] the exact requirements that Pillar II and III impose on the international community are less specific, which in turn weakens their compliance pull and uptake.[42] The lack of definitional clarity surrounding the requirements of Pillars II and III and their context-dependency give rise to heated scholarly debates as to whether these elements of the R2P can be characterised as norms.[43] Hence, this article will focus on the most indeterminate and contentious aspect of the R2P – the third pillar.

Lastly, Peters refers to 'the emerging legal principle of solidarity' as strengthening the case for a duty to provide humanitarian assistance beyond borders, and as yet another 'conceptual source' for the subsidiary responsibility of the international community if a state fails in its own obligation.[44]

What becomes clear from Peters' discussion is that she relies on two conceptual functions common to global constitutionalism. The first relates to the concept of constitutionalisation as a descriptive method to explain legal phenomena relating to notions of international community, where the R2P is framed as an emerging norm of customary international law. This usage of global constitutionalisation is fitting with global constitutionalism writ large, since theories of constitutionalisation are used to describe

[38] United Nations, 'Implementing the Responsibility to Protect', Report of the UN Secretary-General, Ban Ki-moon, A/63/677 (12 January 2009) 2, 8–10.

[39] See (n 15) 384, 386–7.

[40] See (n 6) 62.

[41] Luke Glanville goes further to suggest that the idea of sovereignty has always included a corresponding responsibility to protect its own citizens as a condition of that sovereignty and therefore the R2P does nothing more than to explicitly articulate a notion that has always been coupled with legitimate sovereignty from its inception by Bodin and Hobbes. See L Glanville, *Sovereignty and the Responsibility to Protect: A New History* (University of Chicago Press, Chicago, IL, 2014).

[42] See (n 6) 63.

[43] See (n 15) 387.

[44] See (n 23) 187.

underlying legal or political processes of law creation at the global level, which are then interpreted as representative of a larger regime structure with constitution-like qualities.[45] Like Peters' usage in relation to the R2P, the descriptive quality of constitutionalisation generally takes on three basic characteristics: 1) The categorisation of formal legal and political processes as being part of a larger vertical or pluralistic 'constituting' global legal order that generates measurable and demonstrable compliance pull; 2) The explaining of empirical subjectification of various entities into an established overarching legal order and/or the legal codification and clarification of jurisdictional relationships and obligations between entities, and; 3) Descriptions of extra-legal processes of norm solidification and socialisation that represent international community building in a meaningful sense.[46]

The second function employed by Peters refers to normative constitutionalism as a heuristic device – a normative guideline for reading international law and moving the agenda for a more constitutionalised world order forward. In relation to the latter, Peters perceives the R2P as a constitutional concept in the sense that it espouses key normative tenets and thus challenges the saliency of state sovereignty by suggesting that in cases where laws protecting sovereignty and human rights clash, the latter trump the former by virtue of being more important in terms of normative substance. This again fits with the global constitutionalism approach writ large, where it is often claimed to represent 'a strand of thought (an outlook or perspective) and a political agenda which advocates the application of constitutional principles, such as the rule of law, checks and balances, human rights protection, and democracy, in the international legal sphere in order to improve the effectivity and the fairness of the international legal order'.[47]

Although Peters' use of the global constitutionalist approach does help to frame the R2P phenomena as a challenge to existing international norms, the claims that the R2P is also a corresponding 'emerging global constitutional norm' that has the potential to crystalise into 'hard international law'[48] require further investigation and justification. In other words, Peters'

[45] GW Brown, 'The Constitutionalization of What?' (2012) 1 *Global Constitutionalism* 203.

[46] Ibid 205, 206, 208.

[47] A Peters, 'Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures' (2006) 19 *Leiden Journal of International Law* 583. Klabbers *et al.* further characterise constitutionalism as an 'attitude, a frame of mind' and 'a philosophy'. See J Klabbers, A Peters and G Ulfstein, *The Constitutionalization of International Law* (Oxford University Press, Oxford, 2009) 10.

[48] See (n 23) 188.

attempt to characterise the R2P as a constitutional norm lacks the requisite specificity and depth to adequately gauge if it can be properly conceived as a process of global constitutionalisation. Although Peters vaguely identifies some ways in which R2P can be perceived as resonating with processes of global constitutionalisation, these conclusions are undermined by a tendency to overstate the norm's revolutionary transformative constitutional potential. The reason for this is that she seemingly conflates the *idea of R2P* with the *norm of R2P*. The main concern here is that her analysis relies solely on the original propositions of the ICISS report, which formed the basis of the R2P idea. However, as will be discussed later, the Commission's proposals were considerably watered down by the time of their adoption by the General Assembly in 2005, which arguably sheds important light on the level to which the R2P has/has not developed as an emerging constitutional norm. In addition, there have been a number of reiterations within the R2P discourse that suggest that there are ebbs and tides, contestations, reformulations and rejections within international discussions. In this regard, the lack of a precise conceptual distinction between the R2P as *normative idea* under debate (what Bellamy claims as a meta-theoretical agreement regarding basic principles) and the R2P as a *diffusing norm* (ongoing contestation regarding significance and application)[49] ultimately results in an overstatement of the norm's status as an emerging constitutional foundation.

II. Better understanding the norm status of the R2P

The key concern above relates to how far the R2P, as articulated in the ICISS report and beyond, has moved toward solidifying into an international norm.[50] The analysis presented here will embody a much-needed reappraisal of the R2P as an emerging norm, tracing out recent R2P-related developments in international relations. In doing so, this section will first offer a brief

[49] See Bellamy's quote (n 6).

[50] In its most basic generally agreed upon formulation, a norm is defined 'as a standard of appropriate behaviour for actors with a given identity', see M Finnemore and K Sikkink, 'International Norm Dynamics and Political Change' (1998) 52 *International Organization* 891. An important conceptual distinction underscored in the literature on norms is that between norms and principled ideas, which unlike norms ('collective expectations about proper behavior for a given identity') that can lead to a change in states' policy, merely express 'beliefs about right and wrong held by individuals', see R Jepperson, A Wendt and PJ Katzenstein, 'Norms, Identity, and Culture in National Security' in PJ Katzenstein (ed), *The Culture of National Security: Norms and Identity in World Politics* (Columbia University Press, New York, NY, 1996) 54. In other words, 'the prescriptive or evaluative quality of "oughtness"' is what distinguishes norms from other rules (see Finnemore and Sikkink (above) 891) and makes the study of the process through which ideas evolve into norms worthwhile.

chronological examination of the key steps in R2P's normative evolution. Second, it will determine R2P's status by assessing how the outlined developments fare against Finnemore and Sikkink's three-stage norm 'life-cycle' model as well as Risse and Sikkink's 'spiral' model of norm socialisation.[51] The rationale behind choosing these models is that they provide an outline of the criteria that can help pinpoint R2P's normative status, including *threshold criterion* which can help demark a line between an emergent norm and an accepted international norm.[52]

This more systematic evaluation of R2P's normative advancement is important, since locating the *norm status* of the R2P is a prerequisite for determining its potential to influence public policy, determining its solidification into binding law, potential to guide discourse, to alter state practice, to affect the protection of suffering populations and, most importantly, to determine whether the R2P has any true transformative constitutional potential. By better determining the norm status of the R2P, we provide analysis on the R2P that can locate foundations for our ensuing discussion of R2P's relationship with constitutionalisation and its potential stagnation or degeneration.

The R2P's normative trajectory

In December 2001 the ICISS reframed the humanitarian intervention debate as a *responsibility to protect* in response to the pressing need to forge a

[51] Norm socialisation is commonly conceptualised as the process by which principled ideas held by individuals become norms that can then influence a transformation of interests, identities and behaviours with the ultimate goal for states to internalise them, so as to guarantee compliance in the absence of external pressure, see T Risse and K Sikkink 'The Socialisation of International Human Rights Norms into Domestic Practices' in T Risse, K Sikkink and SC Ropp (eds), *The Power of Human Rights: International Norms and Domestic Change* (Cambridge University Press, Cambridge, 1999) 11. Others define socialisation as the 'induction of new members [...] into the ways of behaviour that are preferred in a society', see J Barnes, M Carter and M Skidmore, *The World of Politics* (St Martin's Press, New York, NY, 1980) 35. What makes this definition particularly relevant to the discussion of the R2P is that it presupposes the existence of a society. At the global level, this understanding of socialisation is intelligible within the confines of the international system described as a society of states, see H Bull, *The Anarchical Society: A Study of Order in World Politics* (Columbia University Press, New York, NY, 1977). In this sense, norm socialisation is the mechanism through which states become recognised as members of the society of states, see Risse and Sikkink (above) 11.

[52] AP Cortell and JW Davis, 'How Do International Institutions Matter? The Domestic Impact of International Rules and Norms' (1996) 40 *International Studies Quarterly* 451; NG Onuf, *World of Our Making: Rules and Rule in Social Theory and International Relations* (University of South Carolina Press, Columbia, SC, 1989); ME Keck and K Sikkink, *Activists beyond Borders: Advocacy Networks in International Politics* (Cornell University Press, Ithaca, NY, 1998); spirals: T Risse, 'Let's Argue! Communicative Action in World Politics' (2000) 54 *International Organization* 1; JT Checkel, 'Why Comply? Social Learning and European Identity Change' (2001) 55 *International Organization* 553.

new shared understanding for addressing grave human rights violations.[53] Under the Commission's understanding, sovereign states have a responsibility to protect their populations from serious harm such as 'slaughter, ethnic cleansing, starvation',[54] but also that when they are 'unwilling or unable'[55] to do so 'that responsibility must be borne by the broader community of states'.[56] In theory, the new idea resolves the sovereignty–intervention debate, for according to the report's reasoning, to the extent that a state fails to discharge its responsibility to protect, it revokes its sovereignty and hence its corollary right to be free from external intervention.[57] The report submits that the international community can legitimately intervene in another state's jurisdiction in 'extreme and exceptional cases' involving 'large-scale loss of life or large-scale ethnic cleansing'.[58] The ICISS further stipulates that once international responsibility is triggered, the UNSC has a residual responsibility to act on behalf of the international community, as the 'first port of call'.[59] As Buchan rightly suggests, under the Commission's understanding, the UNSC is under a *positive* duty to react, which is implicit in the wording 'the responsibility *must be borne* by the broader community of states' (his emphasis).[60] Significantly, the Commission tentatively points to two subsidiary sources of legitimate authority, should the UNSC relinquish its responsibility, namely the UN General Assembly engaging its powers to act under the 'Uniting for Peace Resolution' and international organisations acting under Chapter VII.[61] Lastly, the report calls on the P5 to commit to a 'code of conduct' to refrain from casting their veto in situations calling for action to halt grave humanitarian emergencies.[62] In this vein, the latter two proposals represent attempts to resolve issues of *legitimate authority*, by circumventing or directly addressing the problems stemming from the UNSC's political make-up that often stifles decision-making on the use of force. Yet, despite taking major steps towards overcoming the impasse

[53] See (n 33) para 2.4; K Annan, 'Two Concepts of Sovereignty' (18 September 1999) 353 *The Economist* 49–50.

[54] See (n 33) para 8.1.

[55] Ibid.

[56] Ibid VIII.

[57] Luban describes the principle of non-intervention ('each state has a duty of non-intervention into the affairs of other states') as the corollary of sovereignty. D Luban, 'Just War and Human Rights' (1980) 9 *Philosophy and Public Affairs* 164.

[58] See (n 33) paras 4.10, 4.19.

[59] Ibid para 6.28.

[60] See (n 24) 67.

[61] See (n 33) paras 6.29, 6.30.; T Bolaños, 'Military Intervention without Security Council's Authorisation as a Consequence of the "Responsibility to Protect"' in R Wolfrum and C Kojima (eds), *Solidarity: A Structural Principle of International Law* (Springer, Heidelberg, 2010) 164; UN General Assembly, Uniting for Peace Resolution, A/RES/377 A (V) (3 November 1950).

[62] See (n 33) XIII, 51.

related to humanitarian intervention, it is often argued that the ICISS report itself, when presented in 2001, was not much more than 'a politically astute and legally aware statement by a highly distinguished group of individuals' which does not give rise to corresponding binding legal and political obligations.[63]

The R2P Outcome Document

Although the doctrine saw tense negotiations in the run-up to the 2005 World Summit, by the time it was unanimously endorsed by more than a 150 heads of state in the Outcome Summit Document, the concept had undergone alterations and had been pruned-down to just two paragraphs.[64] Critically, the conceptual shifts that occurred in the 2005 Secretary-General Report were broadly adopted by the General Assembly in 2005.[65] The Outcome Document solidified R2P links with international crimes by specifically limiting the triggers for all R2P actions to four mass atrocity crimes 'genocide, war crimes, ethnic cleansing and crimes against humanity'.[66] Once again, the report definitively affirmed that the subsidiary responsibility to protect lies exclusively with the UNSC.[67] However, unlike the responsibility of states towards their citizens, this residual responsibility was not understood in the sense of a positive duty to intervene, which is implied in the wording 'we are *prepared* [(not responsible or obliged)] to take collective action [...] through the Security Council' (emphasis added).[68] Furthermore, in contrast to all previous iterations of the R2P, the Outcome Document submitted that decisions on the use of force are to be made 'on a case-by-case

[63] W Burke-White, 'Adoption of the Responsibility to Protect' in J Genser, I Cotler, D Tutu and V Have (eds), *The Responsibility to Protect* (Oxford University Press, Oxford, 2011) 18.

[64] UN General Assembly, World Summit Outcome, A/RES/60/1 (24 October 2006) paras 138, 139.

[65] Ibid.

[66] Ibid para 138.

[67] Ibid para 139; see (n 19) 99–120.

[68] See (n 64) para 139. A testimony that this is an accurate reading of the Outcome Document's provisions is the overlap with the position of UN Secretary-General Ban Ki-moon, asserting that 'The Charter gives the Security Council a *wide degree of latitude* to determine the most appropriate course of action. The council should continue to respond *flexibly* to the demands of protecting populations from crimes and violations relating to RtoP' (my emphasis): UN Secretary-General's Report, 'Responsibility to Protect: Timely and Decisive Response', UN Doc A/66/874-S/ 2012/ 5787 (25 July 2012). This position is advocated by Stahn who brings attention to a letter by the Secretary of State to Jon Bolton, released shortly after the Summit, elucidating that the United States would 'not accept that either the United Nations as a whole or the Security Council, or individual states, have an obligation to intervene under international law.': Quoted in (n 19) 108. The understanding that the UN merely possess a discretionary right to intervene is affirmed by Buchan, who refers to the Libyan crises to suggest that once the Libyan government violated its responsibility to protect, the UNSC did not see it as passing to itself.: See (n 24) 69.

basis [...] should peaceful means be inadequate and where national authorities are *manifestly failing* to protect their populations' from the four mass atrocity crimes.[69]

Although replacing the ICISS prerequisite for R2P action – 'unable and unwilling' with 'manifest failure' – was an attempt to make the formulation of the concept more specific, the lack of definitional clarity surrounding the latter requirement posits further hurdles to making decisions on the use of force.[70] In addition, as the diplomacy surrounding the Summit suggests, neither states, nor the Secretary-General, wanted to create additional legal obligations.[71] Hence, the R2P was intentionally confined to the parameters defined by the extant framework on the use of force, which are bound to the principles of sovereignty and non-intervention. This makes it perfectly clear that states want to preserve sovereign political discretion when it comes to matters of high politics, in particular the use of force.

To sum up, what emerged from the 2005 World Summit was not revolutionary with respect to international law. As mentioned above, under customary international law, 'states already have an obligation to: prevent and punish genocide, war crimes and crimes against humanity; assist states to fulfil their obligations under international humanitarian law (e.g. in Common Article 1 of the Geneva Conventions, 'the parties agree to "respect" and "ensure respect" for the Convention); and promote compliance with the law'.[72] Furthermore, the 2005 Outcome Document did not establish a new international authority, other than the UNSC, to act outside the Charter with respect to the use of force. Lastly, the Outcome Document remains largely a moral imperative and a political commitment intended to fortify existing legal commitments, as opposed to an attempt to transform international law or create new legal obligations.[73] In fact, as Bellamy states, 'consensus on R2P was possible precisely because it did not change or even seek to change the basic international rules governing the use of force',[74] particularly because a number of states were opposed to its crystallisation into a new legal obligation pertaining to the international community's responsibility to prevent and respond to mass atrocity crimes.[75]

[69] See (n 64) para 139. Emphasis added.

[70] The manifest state failure requirement effectively ruled out the possibility for preventative action by reaffirming that the UNSC can only sanction intervention to halt an enduring crisis. Unfavourably, this solidified R2P's link with 'military humanism'. See N Chomsky, *The New Military Humanism: Lessons from Kosovo* (Pluto Press, London, 1999).

[71] See (n 15) 375.

[72] See (n 6) 16.

[73] See (n 15) 374.

[74] See (n 6) 14.

[75] See also (n 15) 375–6.

Instead, as Welsh suggests, the Outcome Document 'represents a form of soft law [...] that helps to shape interpretation of existing rules by emphasizing particular normative understandings about domestic and international conduct'.[76] By virtue of the unanimous endorsement of Articles 138 and 139, they can be taken as 'an authoritative interpretation by states of key elements of the Charter's provisions on human rights and the use of force', and as an attempt to prompt states to act on their existing obligations to their own populations as part of international human rights law.[77] In this way, it could be argued that although not a new legal device, the WSOD does provide greater clarity to the R2P norm by helping to diminish definitional confusion and facilitate states' adherence by way of informing legal debate. As a result, the R2P has potential to inform and be referred to as a moral imperative within existing customary and codified international legal channels.

As Welsh and Banda suggest, 'consensus of the Assembly, as the world's most representative body, is a reasonable proxy for the existence of the international *opinio juris* on a given issue', which testifies to the existence of some shared understanding on the R2P.[78] Thus, despite not being legally binding, General Assembly (GA) resolutions can in this way generate international cooperation or articulate a level of meta-theoretical moral consensus.[79] However, the significance of the former function is in some sense devalued as a potential component of constitutionalisation by the fact that the GA decision would have been clearly transformative as a constitutional foundation had it been coupled to the UNSC in a way that created an obligation to intervene.[80] That said, despite its weak legal position, in 2006 the R2P concept did find endorsement by the UNSC in Resolution 1674 and was invoked in Resolution 1706 with regard to the conflict in Darfur,[81]

[76] Ibid 377.

[77] Ibid.

[78] See (n 14) 229.

[79] O Asamoah, 'The Legal Effect of Resolutions of the General Assembly' (1963) 3 *Columbia Journal of Transnational Law* 210. Law-declaring resolutions of the General Assembly, for example, may assist in the determination or interpretation of international law or even constitute evidence of international custom. Scholars differ, however, as to whether 'law-declaring resolutions' of the Assembly can create law beyond their contributory role in the formation of customary international law. For doubts, see H Hilgenberg, 'A Fresh Look at Soft Law' (1999) 10 *European Journal of International Law* 514.

[80] As Stahn suggests that the 2005 Summit formulation of the R2P is merely 'old wine in new bottles,' for it does not bind the UN with new obligations, but merely restates states' obligations to human rights that over time have already developed into positive duty through custom. See (n 19) 99–120, esp 102.

[81] UN Security Council Resolution 1674, 'Protection of civilians in armed conflict', S/RES/1674 (August 2006): 'reaffirms the provisions of paragraphs 138 and 139 of the World Summit Outcome Document regarding the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity'; UN Security Council Resolution 1706, 'Reports of the Secretary-General on the Sudan', S/RES/1706 (August 2006).

which unlike the concept's previous incarnations are significant in the sense that, in this 'case by case consideration', it was given legal force.

Anti-R2P sentiments gathering momentum

Notwithstanding these progressive developments, it became obvious not only that universal consensus over the R2P was lacking (particularly Pillar II and III obligations), but also that anti-R2P sentiments were bourgeoning across the UN. As Evans elucidates, in 2008 'Latin American, Arab, and African delegates to the UN's budget committee took to the floor [to declare…] that the "World Summit rejected the R2P in 2005"'.[82] Although the declaration that the GA did not endorse the R2P in 2005 was 'a straightforward denial of fact', it demonstrated that some states wished to separate themselves from their commitment and were attempting to contain and diminish the impact of R2P.[83] Although one should be cautious not to blow this professed hostility towards the norm out of proportion,[84] it does illustrate that a number of countries wish to distance themselves from the R2P. As a result, this should temper those who emphasise that the R2P presents a clear constitutionalising progression, since such a position understates the far more worrying fact that this emerging scepticism is spreading amongst some of the most ardent former R2P entrepreneurs. Whereas the majority of Non-Aligned Movement (NAM) countries have never been enthusiastic about the R2P, the support for conditional sovereignty championed by Latin American states was a major catalyst leading to the 2005 GA endorsement. This endorsement has now in many ways reversed.[85] Similarly, sub-Saharan countries led by South Africa, whose bold adoption of a pro-interventionist stance in the 2001 African Union Constitutive Act[86] and the 2005 Summit are now ostensibly much less fervent about intervention and the R2P. Therefore, the fact that the support of former promoters of R2P has considerably waned since 2008 should not be ignored when considering the R2P as an emerging global constitutional norm, especially since these retreats have featured prominently in the R2P chronicles of the past five years and have had an impact on the doctrine's ineffective operationalisation in Syria.

[82] See Evans (n 1) 52.

[83] Ibid 126.

[84] M Serrano, 'Responsibility to Protect – True Consensus, False Controversy' (2011) 55 *Development Dialogue* 105.

[85] For an outline of Latin American shifts in perspectives on R2P, most notably Brazil's, see D Lopes and P Vieira, 'Brazil's Rendition of the "Responsibility to Protect" Doctrine: Promising or Stillborn Diplomatic Proposal?' (2015) 3 *Brasiliana: Journal for Brazilian Studies* 32; O Stuenkel and M Tourinho, 'Regulating Intervention: Brazil and the Responsibility to Protect (2014) 14 *Conflict, Security & Development* 379.

[86] *Constitutive Act of the African Union*, Lomé Summit (7 November 2000).

Secretary General 2009 Report – Is there 'a change in the tide'?[87]

Significant steps in R2P's norm trajectory are represented by its inclusion in the top five priorities of Ban-Ki Moon's 2009 General Secretary report. The report reframed the commitments of the 2005 World Summit by delineating a 'three-pillar approach' towards R2P's operationalisation: 1) 'the protection responsibilities of the state'; 2) the international community's responsibility to assist states to fulfil their domestic (internal) obligations; and 3) the commitment to 'timely and decisive [collective] response'.[88] In order to appease vocal critiques and suspicions of previous R2P formulations, the prevailing focus of the consultations prior to the report's publication was on prevention and assistance. As Chandler rightly notes, the new interpretation proposed by the Secretary-General aimed to bolster sovereignty in order 'to avoid the need for military intervention [hence] distancing R2P from coercive intervention' in order to dispel suspicions of R2P as Western imperialism.[89] Although the report deliberately downplayed the possibility for military intervention, it did not rule it out[90] and even reiterated the ICISS proposition to encourage the P5 to abstain from casting their veto 'in situations of manifest failure to meet obligations relating to the responsibility to protect'.[91]

The report was almost unanimously endorsed in the first GA formal plenary debate on R2P, which reaffirmed the 2005 agreement as non-renegotiable, with only four (out of 118 states presenting their views) expressing strong objections to what was agreed in the 2005 Outcome Document – Venezuela, Sudan, Cuba and Nicaragua. Importantly, the remarks from India, South Africa, Brazil, Nigeria and Japan – key regional powers, who previously espoused a sceptical stance towards the R2P, approved that much of the content of the three-pillar strategy was a prudent characterisation of the R2P.

Although the constructive dialogue attested to widespread support for the 2009 Secretary General's report, it did not fulfil the hopes of R2P proponents to reflect support for the individual commitment of member states to R2P implementation and for the efforts of the UN to implement

[87] See (n 84).

[88] See (n 38) 2. The report envisions that each of R2P's three supporting pillars is equally important and that 'there is no set sequence to be followed from one pillar to another' when it comes to implementation: at 2.

[89] D Chandler, 'R2P or Not R2P? More Statebuilding, Less Responsibility' (2010) 2 *Global Responsibility to Protect* 161.

[90] See (n 38) 25.

[91] Ibid 27.

the R2P.[92] In other words, efforts were focused on solidifying meta-theoretical consensus about R2P and 'clarifying what R2P entailed and did not entail, as per paragraphs 138 and 139 of the 2005 Outcome Document, rather than on obtaining commitments to implement R2P'.[93] In this sense, as Badescu observes, 'since September 2005, R2P's momentum has stagnated'.[94] Importantly, despite her claim that 'significant objection to R2P has diminished post-2009',[95] the fact that one of the projected outcomes of the debates (namely states affirming their commitment to the R2P was never fulfilled) makes one question the meaningfulness of rhetorical consensus and thus still raises doubts as to whether R2P is substantive enough to compel states to halt mass atrocity crimes in extremis. In this light, although representing an emerging deliberative norm, it would be an overstatement to also suggest that it represents an emerging global constitutional norm, since, as we will illustrate in later sections of this article, the R2P does not currently meet basic constitutionalisation criteria as commonly understood, and in some ways shows significant signs of norm stagnation or degeneration.

R2P and a diminishing shared understanding

The reluctance to invoke the R2P in relation to the Syrian crises, which many have identified as the epitome of a 'manifest failure',[96] not only suggests that a shared understanding surrounding the R2P is thin, but also demonstrates that R2P is increasingly being perceived as 'toxic' by a number of 'critical states', some of which are also former proponents and key norm entrepreneurs of the doctrine. For instance, Canada, who led international efforts to forge the R2P and played a pivotal role in formulating and mobilising support prior to the 2005 Summit, has long abandoned the R2P.[97] This became evident in the Canadian debate over Libya in which the Conservative government defied its Liberal opposition by intentionally

[92] C Badescu, *Humanitarian Intervention and the Responsibility to Protect: Security and Human Rights* (Routledge, London, 2011) 113.

[93] Ibid 116.

[94] Ibid.

[95] Ibid 113. See (n 84).

[96] See A Gallagher, 'Syria and the Indicators of a "Manifest Failing"' (2014) 18 *International Journal of Human Rights* 1. See also MT Labonte, 'Whose Responsibility to Protect? The Implications of Double Manifest Failure for Civilian Protection' (2012) 16 *International Journal of Human Rights* 982.

[97] For a more detailed analysis on Canada's diminishing support for the R2P see K Matthews, 'Canada's Abandonment of the Responsibility to Protect' (20 September 2012) available at <http://cips.uottawa.ca/canadas-abandonment-of-the-responsibility-to-protect/>, accessed 14 August 2014. See also N Kikoler, 'Time for Canada to Recommit to R2P' (28 April 2014). available at <http://www.globalr2p.org/media/files/time-for-canada-to-recommit-to-r2p.pdf>, accessed 14 August 2014.

avoiding the language of R2P in its attempt to justify Canada's role in the Libyan operation. According to Nossal, the Conservative government's refusal to characterise Libya as a case of R2P constituted an effort to align with the position adopted by other Western governments who refrained from employing the R2P rhetoric. This wariness was also shared by other states in the international system, most notably China and Russia, who suggested that 'the R2P could be used as a cover for legitimising military intervention to achieve regime change'.[98] In this way, Nossal argues that by purposely avoiding the R2P language (while not explicitly dismissing it), Canada allowed others to link the R2P to the Libyan case. As Nossal argues, this had two consequences: 1) It contributed towards the affirmation of the now dominant view that 'the Libyan operation was associated with R2P', and; 2) In light of post-Libyan perceptions of it being an R2P failure, has now also 'contributed to the increasing marginalisation of R2P as a normative idea'.[99]

Following the Libyan fiasco another former key norm entrepreneur and major regional power South Africa withdrew its support, followed by Brazil and India, both prominent powers who readopted their sceptical stance. The aftermath of their withdrawal was profoundly felt in relation to Syria, where the abstention of South Africa, Brazil and India added political weight to the three consecutive UNSC resolution vetoes against action in Syria, which were cast by Russia and China.[100] As some have argued, with all of the BRICS countries now failing to provide support for the R2P, it also signals the end of the doctrine.[101]

Whereas calling the R2P 'dead' may be a step too far, what this level of dissent shows is that consensus surrounding the R2P norm is extremely frail, which effectively constitutes a major drawback from the widely

[98] KR Nossal, 'The Use—and Misuse—of R2P: The Case of Canada' in A Hehir and R Murray (eds), *Libya, The Responsibility to Protect and the Future of Humanitarian Intervention* (Palgrave Macmillan, London, 2013) 124.

[99] Ibid 125.

[100] See S Adams, 'Emergent Powers: India, Brazil, South Africa and the Responsibility to Protect' (14 September 2012) available at <http://www.globalr2p.org/media/files/adams-r2p-ibsa-1.pdf>, accessed 14 August 2014. For South Africa see F Aboagye, 'South Africa and the R2P: More State Sovereignty and Regime Security Than Human Security' in Brosig, *The Responsibility to Protect – From Evasive to Reluctant Action? The Role of Global Middle Powers* (n 22).

[101] Scholars such as Bellamy, Dunne, Glanville and Weiss have argued that although the BRICS may not be actively supporting the R2P, they have not formally rejected it either, which suggests that although weakened, the R2P is certainly not dead. For a critique and claim that this signals the death of the R2P, see C Keeler, 'The End of the Responsibility to Protect?' (12 October 2011) available at <http://www.foreignpolicyjournal.com/2011/10/12/the-end-of-the-responsibility-to-protect/>, accessed 14 August 2014.

shared understanding of the 2005 World Summit and the 2009 Secretary-General's report. In this sense, the invocation of the doctrine's language in Libya (although without making explicit reference to R2P as such) has marked a rather short-lived high watermark in R2P's normative trajectory.[102] What has followed is inadequate operationalisation that has seemingly reversed any progressive trend surrounding a shared understanding of the R2P.

On a more positive note, not long after the 2009 debates had concluded, on 14 September 2009 the GA adopted by consensus its first resolution on the R2P (i.e. UNGA Res 63/308), with the expressed support of states who have experienced mass atrocity traumas.[103] Subsequently, as with the 2009 formal plenary debate, the interactive dialogues following the release of the 2010 and 2011 Secretary-General reports on R2P,[104] reaffirmed that there is emerging meta-theoretical understanding of the norm, attested to by a near unanimity on the 2005 consensus around the four mass atrocity crimes, along with the three-pillar strategy delineated in the Secretary-General's report.[105] In general, all six of the Secretary-General reports have expanded the basis for broader and stronger shared understanding. However, as Serrano notes, 'none of these positive interpretations should blind us to the unsettled issues and the lingering concerns',[106] most prominently, the risk of misuse and selectivity, that were raised by a large number of delegations in the 2009 debate and the 2010 dialogue. These concerns continue to generate uneasiness among UN member states and have even led some to readopt a sceptical stance towards the doctrine more recently, thus shedding doubts on the claims that the 2009 report has clearly marked a 'change in the tide'.

[102] M Doyle, 'The Politics of Global Humanitarianism: The Responsibility to Protect before and after Libya' (2016 forthcoming) 53 *International Politics*.

[103] The statements of support of these states have been recognised as particularly meaningful by the Secretary General. See United Nations, 'Secretary-General Welcomes Adoption of Text on Responsibility to Protect', SG/SM/12452, GA/10855, Press Release, 14 September 2009. See UN Security Council Resolution 1894, S/RES/1894, November 2009, available at <http://unispal.un.org/UNISPAL.NSF/0/A4E2352BFDF75FF08525766C00588264>, accessed 11 May 2014.

[104] While Cuba, Venezuela and Pakistan continued to express strong objections to R2P, the majority of statements recognised that R2P had evolved from a controversial concept into a norm that had become an 'operational reality'. See <http://www.globalr2p.org/resources/341>, accessed 11 May 2014.

[105] Importantly, member states further agreed that the responsibility is rooted in international law, that the four mass atrocity crimes are the only triggers for R2P action and can be interpreted as 'threats to international peace and security' under Chapter VII, allowing for SC action; that the R2P supports sovereignty.

[106] See (n 84) 108.

Locating the norm stage of the R2P

As the brief historical analysis of the R2P above suggests, determining a clear R2P norm trajectory remains elusive. One popular model for understanding the level of norm diffusion is advanced by Finnemore and Sikkink, who suggest that 'norms evolve in a patterned *life cycle*',[107] comprising three key stages of norm influence and process: (i) *norm emergence*, characterised by the efforts of various norm entrepreneurs, including states, NGOs and individuals, to promote the new idea, followed by (ii) *norm cascade* (or broad acceptance) via norm socialisation, involving the persuasion of a critical mass of actors to endorse the new norm and the gradual accumulation of positive precedents (iii) *norm internalisation*, namely 'achiev[ing] "taken-for-granted" quality that makes conformance with the norm almost automatic' by virtue of a norm's extremely broad acceptance.[108] In an attempt to provide an answer to the pivotal question of what it takes for an idea to become a norm or, as they word it, 'the question of how many actors must share [a particular] assessment before we can call it a norm', Finnemore and Sikkink introduce threshold criteria, i.e. a 'tipping point', that draws the line between the first two stages. On their account, norm tipping occurs when 'a critical mass of relevant state actors adopt the norm', comprised of 'at least one-third of the total states in the system', including most significantly 'critical states without which the achievement of the substantive norm goal is compromised'.[109]

When attempting to interpret R2P's normative advancement through the lens of the life-cycle model, two observations become instantaneously obvious – 1) R2P's norm advancement substantiates (corresponds to) the key steps in the norm emergence stage and 2) the idea has come nowhere near attaining a 'taken-for-granted' status of the third stage. In her interpretation of norm criteria, in light of R2P's normative development up to 2009, Badescu has argued that the R2P has reached its 'tipping point' and has moved into the second 'cascading' stage of norm socialisation. She bases this claim on the fact that the most powerful states, which participated in the negotiations prior to the 2005 Summit, unanimously believed in the accuracy of the R2P principles and on the subsequent unanimous endorsement by the 192 GA member states. When analysed to 2009, a life-cycle account seemingly supports Badescu's observation that 'the tide has turned', but only if this means that formal acquiescence is neither the equivalent of enthusiastic endorsement, nor substantive

[107] See Finnemore and Sikkink (n 50) 888.
[108] Ibid 904.
[109] Ibid 890, 895.

consensus, nor a continuity in maintaining this shared understanding (as evidenced by increasing anti-R2P-sentiments, resulting in reluctance to invoke the norm when needed).

Similarly, Serrano and Weiss argue that the R2P norm is in the early stages of its life cycle. However, in contrast with Badescu, they adopt a more sceptical view by arguing that 'we are not quite there at the threshold of the so-called "tipping point"'.[110] According to Serrano and Weiss, despite the wide support that the norm has gained, 'norm cascade is a qualitatively different process from what has occurred so far', as the 'the existing international, regional, and national institutional developments are inadequate to generate a vigorous norm cascade'.[111] On the other hand, Welsh recently argued that the R2P norm has already emerged and entered the 'norm cascade' and 'diffusion' phase of the life-cycle model.[112] The divergence in the interpretations of prominent R2P scholars when assessing R2P's progress against the pattern of one of the most prominent models of norm diffusion suggests that it is difficult to draw definitive conclusions on the progress of the R2P norm. As Luck argues, since R2P 'is fundamentally a political enterprise that is unlikely to follow linear or predictable paths', it 'defies simple or conventional categorization'.[113]

Hence, although the life-cycle model can provide crude estimations, these remain overly simplistic and fail to capture the more nuanced ebbs and tides involved with norm diffusions. This is particularly the case in relation to the history of the R2P, since the model does not account well for large fluctuations, drawbacks and/or norm stagnation or degeneration. Similarly, the model does not specify in detail how progress towards legal codification and constitutional grounding is advancing via 'cascading' or can be determined to have advanced to a constitutionally 'taken for granted stage'. As a result, this makes the model better suited for normative transformations in areas where rapid norm diffusions can occur, but does not account well for developments in the highly complicated political realm associated with the R2P.

In an attempt to better capture the complex and dynamic forms of norm diffusion, Risse and Sikkink proposed an alternative 'spiral model' of norm socialisation, comprising of five distinct phases: 1) repression and

[110] M Serrano and TG Weiss, 'Introduction: Is R2P ''Cascading''?' in Serrano and Weiss (eds), *The International Politics of Human Rights: Rallying to the R2P Cause?* (Routledge, New York, NY, 2014) 14.

[111] Ibid 14, 17.

[112] See (n 15) 378–9.

[113] EC Luck, 'Foreword' in Serrano and Weiss, *The International Politics of Human Rights: Rallying to the R2P Cause?* (n 110) xiv.

activation of framework; 2) denial; 3) tactical concessions; 4) prescriptive status; and 5) rule-consistent behaviour.[114] As a more nuanced approach, this model claimed to 'identify the dominant mode of social interaction in each phase (adaptation, arguing, institutionalisation), and […] specif[y] the causal mechanisms by which international norms affect structural change'.[115]

In a further attempt to determine the status of the R2P norm, Badescu suggested that the key steps in R2P's norm trajectory substantiate not only the first two stages of the life-cycle model, but also met the types of social interactions Risse and Sikkink 'identified in their five-phase "spiral model" of norm diffusion as instrumental adaptation and argumentative discourse'.[116] Badescu claims that the momentum around the R2P in both academic and policy circles can all be brought under the umbrella of the dominant mode of social interaction in the second and third phases of the spiral model, namely 'adaptation' and 'arguing'.[117] She further argues that the efforts to advance the R2P in the period between the 2005 World Summit and the July 2009 General Assembly debate, during which the 2005 World Summit consensus was employed as a platform for the ensuing negotiations and compromises, fits very well within the description of the early phases of the spiral model of normative advancement, namely 'denial' and 'tactical concessions'.[118] Lastly, for Badescu, the July 2009 General Assembly debate on R2P further verifies that the R2P is going through the first two phases of the spiral model, as similarly to R2P developments prior to the debate, 'bargaining among proponents and opponents was prevalent'.[119]

Process-tracing of the R2P can also reveal the types of social interaction that Risse and Sikkink identified in their five-phase model of norm diffusion in terms of instrumental adaptation and argumentative discourse. In particular, R2P developments prior to the July 2009 General Assembly resonate with descriptions of early norm development, namely 'denial' and 'tactical concessions'. These two stages appear particularly relevant for potential misapplications of the norm as seen in the history of the R2P, since they include processes of adaptation, denial, dialogue, strategic bargaining, and moral conscious-raising. These stages are essential to contestation and its effects on norm development;

[114] See Risse and Sikkink (n 51) 21–31.

[115] Ibid 19.

[116] See (n 92) 114. See also C Badescu and T Weiss, 'Misrepresenting R2P and Advancing Norms: An Alternative Spiral?' (2010) 11 *International Studies Perspectives* 359.

[117] See (n 92) 110.

[118] Ibid 116. See also Badescu and Weiss (n 116) 355.

[119] See (n 92) 116.

and, in turn, they affect the course of moral persuasion, backlash, and widespread international protest.[120]

Nevertheless, like Peters, most analytical treatments of norm diffusion within the R2P literature remain underdeveloped and the causal relationship between norm production, cascade and internalisation is either assumed or receives lite-touch investigation by scholars. This is problematic, since under close inspection there arise a number of concerns with how these models conceptualise the process in which norms diffuse as well as their relationship with constitutionalisation processes. As often argued, a key concern with norm life-cycle models is that they assume that the 'norms retain their meaning throughout the diffusion process'.[121] As norm diffusion relates to the R2P, a differentiated and more nuanced understanding is therefore important, since understandings of the norm are amalgamated, hijacked, pruned-down, misappropriated and interpreted in uniquely idiosyncratic ways.

Furthermore, the R2P norm diffusion literature often assumes that there is what Betsill calls a 'normative fit' between the global norm and the institutional contexts in which these norms are to be diffused.[122] The concern here is that global norms are often seen as static entities that simply 'fit' into existing institutional peg-holes without considerable alteration or lack of compliance once 'adopted' on paper. Again, like above, the problem here is that the idea of the R2P is often argued as transformative once any iteration is meta-theoretically agreed and that the institutions that will receive the R2P norm are empty vessels ready for it to eventually slot into place. As Laffey and Weldes suggest, this is too simplistic, since 'the "fit" between various ideas and the plausibility, or not, of new ideas are actively constructed rather than simply "there" in the ideas themselves'.[123]

The limitations of the life-cycle and spiral models to capture a clear emergence level of the R2P are magnified in relation to the history outlined above. On one side, the R2P has been included in expert reports, the conclusive statement of the 2005 World Summit, six UN Secretary-General Reports, two GA Resolutions and within 26 UNSC Resolutions which

[120] See Badescu and Weiss (n 116) 359.

[121] H Stevenson, *Institutionalizing Unsustainability: The Paradox of Global Climate Change* (University of California Press, Berkeley, CA, 2013) 53.

[122] M Betsill, 'The United States and the Evolution of International Climate Change Norms' in P Harris (ed), *Climate Change and American Foreign Policy* (St. Martin's Press, New York, NY, 2000) 205.

[123] M Laffey and J Weldes, 'Beyond Belief: Ideas and Symbolic Technologies in the Study of International Relations' (1997) 3 *European Journal of International Relations* 225–6.

have been informed by the R2P.[124] On the other hand, the R2P has never been incorporated in a treaty and its credentials as a future or potential international law norm are incredibly weak, given that the GA resolution adopting the concept may inform legal and political debates, but does not create legally binding obligations by definition. Furthermore, the past 14 deliberative iterations associated with the R2P have significantly diluted the original concept, suggesting that norm diffusion is not straightforwardly linear and has resulted in a norm that does not effectively fulfil ICISS's original inspiration to overcome the failures of the humanitarian intervention norm as well as the failures associated with what was dubbed after the Rwanda genocide as an international *authority crisis*.

Lastly, given the above, there are further arguments that could be made to suggest that the R2P is in fact representative of a degenerative norm. According to Panke and Petersohn, 'norm degenerations require the presence of actors who challenge the norm and the absence of central enforcement authorities or individual states that are willing and capable of punishing norm violations'.[125] To support this claim, Panke and Petersohn present a systematic study demonstrating that: 1) norms are likely to be abolished swiftly if the environment is unstable and rapidly changing, and if the norms are highly precise, or; 2) incrementally degenerated if the environment is relatively stable and if norms are imprecise.[126]

In many ways the R2P substantiates the key elements in the general definition of norm degeneration provided above. First, the 'presence of actors who challenge the norm' have played a prominent role in R2P's normative evolution. Continuous attempts to limit the scope of the international community's protective authority can be attributed to state concerns regarding the prospective expansion of international jurisdiction that might stem from the adoption of the responsibility to protect norm. More importantly, a wave of scepticism surrounding the norm has been on the rise as a result of its contentious association in Libya, the effects of which surfaced recently in rejecting the norm in Syria. Second, as discussed further below, there is an absence of robust enforcement of R2P mechanisms and a concomitant lack of *willingness* on behalf of individual states to punish norm violations. In this regard, in terms of the general definition of degenerative elements, the history of the R2P shows correlative properties.

[124] For a table of the 26 UNSC Resolutions referencing R2P, including exact textual references and links to the resolutions see Global Centre for the Responsibility to Protect, UN Security Council Resolutions Referencing R2P, <http://www.globalr2p.org/resources/335>, accessed 11 September 2015.

[125] D Panke and U Petersohn, 'Why International Norms Disappear Sometimes' (2012) 18 *European Journal of International Relations* 719.

[126] Ibid.

This does not mean that the norm is in fact degenerating, since it is still far too early to tell. Nevertheless, it does suggest that the norm is not as entrenched as many scholars argue and it offers an alternative theoretical treatment that leads to alternative conclusions about the long-term significance of the R2P. Namely, there are theoretical and empirical reasons to suggest that the R2P may be a 'stalled norm' in that there is limited institutional capacity and/or normative willingness to promote it further; or that it might be degenerating, in that this inability/unwillingness to promote the norm essentially renders it increasingly inept and ignored by means of political and normative attrition.

In relation to the two potential degenerative mechanisms outlined above, the R2P meets the second categorisation by virtue of the fact that the environment in which the R2P has evolved is relatively stable. As a result, the R2P tracks well onto corresponding descriptions of incremental degenerative changes in the face of imprecise norms. As the historical analysis in this article has shown, the R2P has increasingly moved away from its 2001 formulation, becoming more imprecise as well as less constitutionally transformative.

Thus, given the rise of anti-R2P sentiments, a lack of clear norm status – coupled with observations of norm degeneration – it could be argued that the Syrian crisis is symptomatic of trends that might have prompted a process of degeneration. Naturally, only time will tell whether such trends will advance further or whether they are merely part of the very slow normative evolution of a concept that follows an 'ebb and flow' pattern of normative progression. However, this also means that arguments regarding the demise of the R2P norm cannot be dismissed as merely 'cheap talk' and we should remain cautious in suggesting that the R2P is constitutionalising in a meaningful way. This is because there is sufficient evidence to suggest that the R2P norm has already been weakened to the extent that it might be appropriate to talk about its degeneration (or at least its stagnation) and this resonates with the recent observations that a process of deconstitutionalisation might be taking place at the global level.[127]

Despite the potential of norm degeneration, by virtue of its adoption in the 2005 Outcome Document, we propose that it is reasonable to suggest that the R2P has generated a wide enough meta-theoretical understanding to be characterised as an *emerging norm*, yet with the caveat that it has been considerably circumscribed and altered from its original form and that its norm trajectory is far from certain. In this way, understanding the R2P as an 'emerging norm' is loosely appropriate, but merely because

[127] M Rosenfeld, 'Is Global Constitutionalism Meaningful or Desirable?' (2014) 25 *European Journal of International Law* 178.

scholars lack better terminology and conceptual tools and that this 'emerging' status warrants further qualification as a form of *weak* emergence at best. This understanding of the R2P as a *weak emerging norm* also better aligns with Brunnée and Toope's characterisation of R2P as a 'candidate norm', with the potential to become legally binding, but that it is still light years away from accumulating enough positive precedents to be considered 'cascaded' or 'taken for granted'.[128] This also aligns with Welsh's understanding that the R2P represents a 'complex norm' that continues to be contested both procedurally and substantively, thus rendering it more a mechanism for intersubjective norm deliberation than representative of a linear trajectory of progressive norm diffusion – 'which calls into question more positivist approaches to the study of norms'.[129] As Welsh further warns, by ignoring the contestation surrounding the R2P there becomes a tendency for many scholars to overplay convergence, which masks their 'deeper normative desire to see particular norms as universalized'.[130] In addition, labelling the R2P as a 'weak emerging norm' better allows for possibilities of norm degeneration, since the adjective 'weak' signifies and better captures the fragility of the R2P and further denotes its lack of strength and current stagnation. What this all suggests is that the transformative potential of the R2P is much weaker than portrayed by strong defenders of the R2P as well as by global constitutionalist scholars like Peters, who suggest that the 'emergingness' of the R2P might be also perceived as an emerging global constitutional norm.

III. Processes of global constitutionalisation and the R2P

In the prior section we argued that although the R2P could be loosely interpreted as a *weak emerging norm*, the complex history of the R2P renders it difficult to make this determination with any firm sense of assuredness. In addition, the ambiguity of its norm status complicates any further claim that the R2P represents an *emerging global constitutional norm*, since the complications regarding the R2P's norm status relate directly to its legal adoption, compliance pull and institutional practice as a global 'rule of law'. In order to further explore the potential relationship between the R2P and its role as an emerging global constitutional norm, this section will move away from the norm diffusion literature to focus on concepts of constitutionalisation and its explanatory notions

[128] See (n 10) 341.
[129] See (n 15) 395.
[130] Ibid.

of *legal process*, *subjectification* and *objectification* as representing processes of global constitutionalism.[131]

R2P and formal legal processes of global constitutionalism

The common understanding of the concept of constitutionalisation corresponds to its use as an explanatory tool to describe formal legal processes at the global level, where legal rights and duties are codified and where the authoritative mechanisms for legal adjudication become clearly delineated with 'constitutional-like' qualities.[132]

In this way constitutionalisation is most often used as a reference to formal and objectified legal arrangements and their corresponding authority mechanisms, which in comparison to the legal orders found within nation states, are seen to generate compliance pull, a rule of law and formal legal obligation.[133] *Prima facie*, the R2P fits within the above conception of constitutionalisation because we can locate an underlying *formal legal process* of decision-making on the use of force, specified in the Outcome Document. That is, in 2005 the GA established that the decision-making power on the use of force lies exclusively with the UNSC. The Council has to decide as to whether a concrete event activates its jurisdiction to act under Chapter VII and to determine the appropriate measures requisite to restore peace and security. All UNSC decisions to sanction the use of force against a sovereign state require UNSC member states 'to submit to the discipline of a multilateral decision-making process',[134] specified under Article 27 of the UN Charter.[135] The jurisdictional basis for the UNSC to authorise the use of force is clear (at least procedurally) – the manifest failure of a state to fulfil its responsibility to protect with regard to the four mass atrocity crimes. The pecking order is also clear – subsequent to a decision that there has been a manifest failing, the UNSC takes over the responsibility to protect from the state. In addition, some of the substantive elements of the R2P satisfy the criteria of legality. For instance, as Brunnée and Toope advocate, the legalisation of the triggers for R2P action through 'anchoring the responsibility in the framework of "international crime" provides for greater clarity, enhances constancy over time, and minimizes

[131] See (n 45) 205.

[132] Ibid; See also K Milewicz, 'Emerging Patterns of Global Constitutionalization: Toward a Conceptual Framework' (2009) 16 *Indiana Journal of Global Legal Studies* 413–14.

[133] See (n 45) 206.

[134] A Orford, 'Jurisdictions without Territory: From the Holy Roman Empire to the Responsibility to Protect' (2009) 30 *Michigan Journal of International Law* 981.

[135] *Charter of the United Nations*, 59 Stat 1031 (26 June 1945) art 27.

the possibility of norm contradiction'.[136] This is to say that the norm is built, at least to some extent, within the confines of the criteria of legality and formal processes. As a result, the above observations suggest that the R2P represents a prima facie constitutionalisation process that mirrors formal structures of constitutional legal procedures.

However, there is a critical lack of clarity with regard to the details of that legal process. It is unclear how the UNSC makes the decision as to whether or not compliance has been breached, due to the lack of definitional clarity surrounding the manifest failure requirement. In addition to the lack of agreed upon indicators of manifest failing, the question of whether a concrete set of circumstances amounts to 'war crimes', 'ethnic cleansing', 'crimes against humanity' and 'genocide' remains open to subjective legal and political interpretations. Similarly, the considerations that determine specific decisions on the use of force are left in the realm of politics, due to the unwillingness of the 2005 Summit to agree upon explicit guidelines that would require and direct use of force decisions. The activating approach premised upon the political assessment of what constitutes a threat or breach of peace and security contributes to the greater ambiguity surrounding the R2P legal process. Thus, a case-by-case 'triggering approach' fails to meet the criteria of legality, which in turn, represents an impediment to the norm's impartial and consistent operationalisation. Hence, in contrast with the claims put forward by Peters, these problematic elements of the R2P norm that do not fulfil the criteria of legality 'may make it difficult for the norm ever to achieve the status of customary international law'.[137] Essentially, the conceptual ambiguity and lack of definitional certainty surrounding the R2P has resulted in a critical lack of clarity with regard to the legal process it institutes and thus whether it is appropriate to see the R2P as part of a broader constitutionalisation process.

This lack of constitutionalisation is reinforced by the difficulty in establishing a strong relationship between the R2P and the three elements underwriting formal objectified legal arrangements, i.e. formal legal obligation, compliance pull and a rule of law.

First, although the R2P specifies a positive legal obligation of states towards their citizens, which is anchored in international law through its link with the four atrocity crimes, it does not give rise to an entirely *new* corresponding *formal legal obligation* in the sense of positive law on behalf of the international community to act through the Security Council in the event of state failure. At the moment, the R2P reflects a normative

[136] See (n 10) 341.
[137] Ibid.

requirement, not an obligation, which is subject to subjective interpretation, ad hoc consideration, contestation and the whims of reason of state.

Second, due to the R2P's weak emerging status, its meta-theoretical normative consensus cannot generate systematic *compliance pull*, where 'those to whom it is addressed [believe] it has come into being and is applied in accordance with right process' (i.e. is perceived as legitimate and acted upon).[138] In this sense, if the R2P is to generate compliance, it would have to be in the third stage of its life cycle, in which the norm has been internalised by state actors to the extent that they have taken its legality for granted and would act upon it automatically. As clarified before, given a lack of positive precedents, and the thin understanding surrounding the norm, the R2P is not there yet and thus undermines its constitutionalisation properties.

Third, it is particularly important to discuss the relationship between R2P and the pursuit of the ideal of the rule of law at the international level – not least because paragraphs 138 and 139 of the Outcome Document were included under the title 'Human rights and the rule of law', but also because the 'rule of law principle, as embedded in the idea of constitutionalisation, lends international law its formal character'.[139] The Outcome Document's explicit link to the rule of law suggests that the R2P was unambiguously envisioned to operate within the parameters of the global rule of law, commonly understood in the literature as 'a means of better regulating the conduct of international policy'.[140] The precise conception of the rule of law on which the R2P is premised reflects a typical constitutionalist understanding that political power should be confined by a set of judicially protected fundamental human rights. This understanding is well articulated in Bishop's definition of the principle, according to which the rule of law 'includes reliance on law as opposed to arbitrary power in international relations; the substitution of settlement by law for settlement by force; and the realisation that law can and should be used as an instrumentality for the cooperative international furtherance of social aims, in such fashion as to preserve and promote the values of freedom and human dignity for individuals'.[141] In this sense, in theory, the R2P contributes to fortifying the rule of law, insofar as it comes down to securing human rights, by explicitly propagating a view of conditional sovereignty under which in egregious circumstances human rights considerations trump state sovereignty.

[138] T Franck, 'Legitimacy in the International System,' (1998) 82 *American Journal of International Law* 706. For the indicators of a rule's legitimacy see ibid 712.

[139] See Milewicz (n 132) 427.

[140] R Collins, 'The Rule of Law and the Quest for Constitutional Substitutes in International Law' (2014) 83 *Nordic Journal of International Law* 92.

[141] WW Bishop Jr., 'The International Rule of Law' (1961) 59 *Michigan Law Review* 533.

However, the goal of guaranteeing the superiority of law dictated by the international rule of law ideal 'would require an institutional configuration which functions in broadly similar terms to the constitutional ordering of many modern states'.[142] Yet, the international legal system falls short of exhibiting similar institutional characteristics requisite to make it 'complete' from a rule of law perspective. As Collins sums it up, '[i]n the absence of any centralised legislative body, general courts with compulsory jurisdiction, or, in the last measure, an efficient means of securing compliance with the law, international law appears constitutionally deficient in comparison to its domestic counterpart'.[143] In this sense, the rule of law as a whole seems to be undermined by the existing institutional framework of the international legal system. This arguably presents another hurdle that needs to be overcome in the pursuit of greater constitutionalisation at the international level and the constitutionalisation of the R2P norm itself in the absence of adequate R2P institutions.

This concern relates to a second prominent global constitutionalist approach in denoting processes of constitutionalisation in international law, namely, identifying processes by which the international 'legal order has evolved from a set of legal arrangements binding upon sovereign states into a vertically integrated legal regime conferring judicially enforceable rights and obligations on all legal persons and entities, public and private, within the sphere [of a mutually applied rule of law]'.[144] In relation to this understanding, Schorkopf and Walter suggest that '[f]rom the national perspective, the process of globalisation puts into question the hitherto generally accepted position of constitutional law as being at the top of the pyramid of norms'.[145] This represents a value-oriented reading of international law under which there is an emerging hierarchy of rules in the otherwise horizontal multijurisdictional international legal system.[146] This hierarchy is determined by an emerging international value-system, superior to other norms of international law and premised upon the human rights provisions embedded in the UN Charter, the concept of *jus cogens*,[147]

[142] See (n 140) 96.

[143] Ibid 89.

[144] U Haltern, 'Pathos and Patina: The Failure and Promise of Constitutionalization in the European Imagination' (2003) 9 *European Law Journal* 15. Quoted in Brown (n 45) 207.

[145] F Schorkopf and C Walter, 'Elements of Constitutionalism: Multilevel Structures of Human Rights Protection in General International and WTO-Law' (2003) 4 *German Law Journal* 1359.

[146] Unlike the national legal systems, where there is a clear hierarchy of law embedded in their constitutions, international law is premised upon a system of horizontal rules that are binding upon states only insofar as they consent to be bound by them.

[147] In respect to *jus cogens* see Vienna Convention on the Law of Treaties, 23 May 1969 (entered into force 27 January 1980) 1155 UNTS 331, reprinted in 8 ILM 679 (1969) art 53; see also A/CN.4/L.682, para 365.

and arguably the concept of *erga omnes*,[148] which obtain binding force without immediate state consent.[149] This emerging hierarchy 'can serve to guide the outcome of inter-regime conflicts'.[150]

In this sense, the R2P can be theoretically understood as part of the process of the establishment of a new constitutionalised legal order for the sake of which states will acquiesce to limit their sovereign rights, and the principal subjects of which include not only states, but also individuals. The fundamental characteristics of a constitutionalised global legal order that the R2P embodies and seeks to establish are the primacy of global constitutional law over the law of states and the effect of its provisions, which are directly applicable to states and their principals. Thus, in theory the R2P sets up a hierarchy of law by suggesting that state sovereignty can be surrendered, should states fail to meet the criteria of protecting their populations from mass atrocities.

Nevertheless, the nature of the R2P in practice dampens the constitutionalist reading as it relates to the ideational and legal strength of sovereignty. This is because the 2005 World Summit largely committed states to assisting one another to fulfil their responsibility to protect, not just to react if they fail. The explicit wording of Pillar II as it was most recently published is therefore a reminder that the responsibility to protect is intended to reinforce, not undermine, sovereignty. In this regard, the last iteration of the R2P is not designed to create a hierarchical structure in which the international community imposes demands or solutions on states per se. Rather, it reaffirms the fundamental principle of sovereign equality, expressed in Article 2 of the Charter of the United Nations. As sovereign equals, states have both reciprocal rights and responsibilities to participate, as peers, in the creation and maintenance of international rules, norms and institutions. The responsibility to protect is meant to inspire cooperation

[148] See *Barcelona Traction*, Light and Power Company, Limited, Second Phase (Belgium v Spain) ICJ Rep (1970) 32, para 33.

[149] E de Wet, 'The Emergence of International and Regional Value Systems as a Manifestation of the Emerging International Constitutional Order' (2006) 19 *Leiden Journal of International Law* 612–13. It is important to clarify the meaning here. 'Without immediate consent' refers to a state's willingness or unwillingness to comply with international norms and the legitimate legal authority not to do so. This relates to cases where states have been signatories to existing international conventions, but resist compliance, or in cases where states have not been signatories, but are nevertheless held to account in relation to existing legal norms. In either case, a form of constitutionalism is being established, since it could be argued that a hierarchy exists, in which state compliance is demanded with or without its current consent and despite any immediate claims to sovereign self-determination that fly in the face of international norms.

[150] Ibid 613; see also AA Ghouri, 'Determining Hierarchy between Conflicting Treaties: Are There Vertical Rules in the Horizontal System?' (2012) 2 *Asian Journal of International Law* 235.

among a variety of actors that are equally committed to protecting populations from atrocity crimes, in unified prevention, and in doing so, will make sure that there is no need to violate state sovereignty.[151]

The R2P and establishing and clarifying jurisdictional relationships

Constitutionalisation as a descriptive tool often refers to acts of identifying legal entities that are not part of the process of global constitutionalisation (or are in an unclear legal relationship) and to unequivocally bring them under the jurisdiction of the established constitutional legal order, which will in effect supersede prior legal relationships and that ultimately secures a sense of mutual legal obligation.[152]

The 2005 Summit envisioned the existence of complementary jurisdictions in relation to the R2P by virtue of specifying the continued responsibility to protect of both the state and the international community (the two forms of R2P authority specified by the GA, where the primary authority lies with the former and is taken over by the latter in case of state failure). In this way, the R2P brings all states into a clear jurisdictional relationship with the UNSC, specifying that state sovereignty can be surrendered, if they manifestly fail to provide protection against mass atrocity crimes for their principals. Therefore, theoretically, the R2P is constitutionalised in the sense that it has attempted to pin down unclear jurisdictional relationships between the authority of the international community exercised through the UNSC and the authority of sovereigns.

Nevertheless, what remains unclear is how to determine which authority has jurisdiction in a concrete situation where the jurisdictions of the two authorities overlap. As Orford points out, the Outcome Document fails to 'elaborate how the encounter between these jurisdictions is to be negotiated, or according to what protocols or procedures the movement between jurisdictions will be conducted'.[153] For example, it is uncertain by whom, and how, the decision that a certain instance or action amounts to a violation of one of the four mass atrocity crimes is made. Relatedly, it is unclear what evidence or information would be required for international action. Orford puts this lack of certainty down 'to an implicit assumption about the nature of that jurisdiction, [namely that it is] unable to conflict

[151] UN Secretary-General's Report, 'Fulfilling Our Collective Responsibility: International Assistance and the Responsibility to Protect' UN Document A/68/947–S/2014/449 (11 July 2014) para 12.

[152] See (n 45) 205.

[153] See (n 134) 1008.

with state jurisdiction, [from which follows that] there would be no need to elaborate procedures for moving between these forms of jurisdiction'.[154]

Hence, similarly to the understanding of R2P as a formal legal process, there is a persistent lack of certainty that inhibits the subjectification of jurisdictional clarity. Although endeavours to clarify jurisdictional relationships bring the R2P one step closer to representing a constitutional meta-theoretical process, they have done so in an ambiguous way, which has made the trajectory of the R2P as a constitutionalising norm unclear and thus rendered its jurisdictional authority inconclusive. Once again, this brings us to the conclusion that the R2P fits loosely within a common theoretical understanding of constitutionalisation, but that this is ultimately too weak to also suggest that the R2P has moved from a weak emerging norm to a more procedurally robust and jurisdictionally defined emerging global constitutional norm.

The R2P and extra-legal processes of norm socialisation

A third way constitutionalisation is generally employed is as a conceptual tool to describe informal and extra-legal processes of norm socialisation, where norms emerge from various processes of legal and political interaction that act as extra-legal iterations or extra-legal commitments, which eventually provide the juridical basis for establishing a more procedurally authoritative and constitutionalised legal order.[155] This type of socialisation is concerned with *argumentative discourses* in the Habermasian sense, entailing 'socialisation through moral discourse [with an emphasis] on processes of communication, argumentation, and persuasion, [by way of which] actors accept the validity and significance of norms in their discursive practices'.[156]

In some cases, moral discourses contest the validity of the norm's claim, which is what occurred with the R2P in 2008, when certain states contested what was agreed upon in the 2005 Summit Outcome. In other cases, moral discourses attempt to clarify whether a certain situation is defined correctly as a normative foundation. In this sense, although actors might share a consensus with regard to the norm's validity, their assessments as to whether a particular behaviour or action is covered by it might differ. Such discursive practices gained prominence shortly after the 2005 World Summit. This period was characterised by an intensification of political discourse, attested by the invocations of the R2P on three occasions in 2008: 1) in an attempt to facilitate diplomatic consensus preventing mass

[154] Ibid 1009.
[155] See (n 45) 206.
[156] See Risse and Sikkink (n 51) 13.

atrocities in Kenya, 2) by France in the context of the unfolding humanitarian catastrophe caused by cyclone Nargis in Burma and 3) by Russia to justify its military incursion in Georgia. Whether appropriately invoked or not, these R2P references constituted a major contribution to a socialisation process for they helped to clarify both what the norm should and should not encompass. Similarly, R2P's articulation in the Secretary-General's reports and the constructive dialogues that followed them presented the opportunity for argumentative discourses to advance, which in turn has led to progress in the R2P's normative evolution by virtue of enhancing its theoretical clarity. More recently the failure of R2P action in Syria raised important questions with regard to the definition of the manifest failure concept, which, if addressed adequately, will lead to the further clarification of the R2P norm. In this sense, even when the R2P is not being invoked it can potentially lead to enhancing a shared understanding.

On balance, the various R2P iterations have helped to attain normative clarity and thus represent processes of global constitutionalisation and intersubjective communicative action in the Habermasian sense. Nonetheless, although these deliberative processes can move the constitutionalist agenda forward, as argued in Section II, they have not socialised actors into norm-complying practices (i.e. to internalise them), which would occur only when actors abide automatically 'irrespective of individual beliefs about their validity'.[157] Relatedly, various iterations with different legal weight are not sufficient to generate custom in international law. The most commonly cited definition of customary international law, found in Article 38(1)(b) of the Statute of the International Court of Justice, states that 'international custom, as evidence of a general practice accepted as law, is one of the sources of international law'.[158] As traditionally understood, customary international law is premised upon two elements: 1) *state practice* (an objective requirement pertaining to state behaviour); and 2) *opinio juris* (a state's subjective belief that a rule of international law binds them).[159]

To conclude, in contrast with the previous two representations of constitutionalisation, the R2P substantiates a customary understanding of this process and a *weak emerging norm* in terms of discourse around an idea of R2P. However, it is unlikely that the ultimate goal of formal norm constitutionalisation can be attained solely through accumulating various

[157] Ibid 16.

[158] United Nations, Statute of the International Court of Justice, 26 June 1945, art 38(1).

[159] A Guzman and T Meyer, 'Customary International Law in the 21st Century' in R Miller and R Bratspies (eds), *Progress in International Law* (Martinus Nijhoff, Leiden, 2008) 199. See also A Guzman and T Meyer, 'International Common Law: The Soft Law of International Tribunals' (2009) 9 *Chicago Journal of International Law* 526.

R2P portrayals in international discourse, for despite the fact that the latter helps to propel the norm further on its normative track, it alone cannot lead to the norm's formal objectification into legal covenants. This is not to say that through continued intersubjective discourse the R2P may ultimately result in a broad normative shift where the R2P is more formally constitutionalised. This is only to say that, at the moment, the socialisation of R2P remains epistemically uncertain and therefore understanding the R2P as a process of emerging constitutionalisation via socialisation is in many ways hopeful thinking in the midst of divergent pathway dependencies and potential alternative outcomes.

Conclusion: Stalled constitutionalism and the potential degeneration of the R2P norm?

The aim of this article has been to systematically investigate the normative evolution of the R2P and to determine its relationship with global constitutionalisation as well as to explore its wider implication with regard to global constitutionalism. In doing so, we have argued that although the R2P can at best be reasonably labelled as a *weak emerging norm*, it at present systematically fails to meet the more demanding signifiers of an emerging constitutional norm.

Nevertheless, when investigating this relationship questions also arise about whether the R2P displays the hallmarks of what might be labelled as a stalled or degenerating norm. These concerns become particularly germane to current debates about the significance of the R2P, since advocates of the R2P often claim that it has surpassed its norm predecessor humanitarian intervention in terms of both normative advancement and political influence. To reiterate the words of Bellamy, 'the key debates now are ones about how best to implement R2P, not about whether to accept the principle'.[160]

However, Bellamy's more optimistic reading of the R2P's norm status seemingly fails to fully appreciate the relationship between theory and practice, and what practice tells us about how a normative principle might reach some level of acceptance (emergence), while at the same time receiving increased contestation and/or stagnation in terms of policy application and effectiveness (stalled or degenerating). In other words, key political actors might understand the R2P as a concept that has potential relevance to current phenomenona, but this does not also mean that it is held as normatively imperative as an action guiding principle. An analogy could be made with the Genocide Convention, in that there has been broad

[160] See (n 6) 12.

acceptance that genocide represents a humanitarian 'crime of crimes', yet this has not translated into action to prevent Srebrenica, Rwanda or Darfur. Scholars like Gallagher argue that this failure is due to the fact that there is still no agreement on the exact definition of genocide, or when mass atrocities represent genocide, or agreement about when action is required.[161] Although the Genocide Convention enjoys greater constitutionalisation in terms of its status as international law, with more applied practice in post-conflict prosecutions, it has nonetheless remained inert as a prevention norm.[162] This suggests that it is possible for a norm to be deeply entrenched within the political lexicon while at the same time, in practice, constitutionally stalled.

This understanding for the potentiality of stalled or degenerating norms fits with Antje Wiener's constructivist account, which highlights that public endorsement of a norm in an international statement or agreement can lead to renewed arguments about the desirability and scope of the norm, therefore affecting the willingness of norm followers to embrace implementation. As Wiener's more thorough analysis illustrated, in some cases, this can lead to backsliding or differential interpretations of the norm's meaning.[163]

In this way, one particular area where the R2P does not signal clear progress is in relation to a continued sense of frustration about the constitutional deficiency and inferior institutional structure of international politics and law, which finds a prominent expression in both global constitutionalism as well as within much of the humanitarian intervention and R2P literature. In many ways Lang gets to the heart of this persistent problem when he argues that the core problem with the Kosovo intervention was 'the lack of a truly constitutional order at the global level' and in

[161] See (n 5). This is evident by the fact that there is still considerable debate about whether Darfur equates to genocide.

[162] One reviewer suggested that the genocide norm is actually very demanding in its call for action (thus has strong normative imperative as an action guiding principle). The suggestion was that its failure to be invoked relates to political and legal rationales, where certain states shy from the demanding normative commitments that invoking the Convention would then trigger. For the reviewer, this illustrates a distinction between effectiveness versus action guiding. Nevertheless, the result of inaction is the same, and in some ways the reviewer's point strengthens our argument, since it illustrates that there is acceptance that this is a powerful norm as the 'crime of crimes' which demands action, while at the same time there is an unwillingness (for whatever reasons) to allow it to be action guiding in a way that bolsters a sense of global constitutionalism and a global 'rule of law'. As it stands, the Genocide Convention, much like the R2P, has endorsement as an emerging norm, but this has not translated into implementation or action.

[163] A Weiner, 'Enacting Meaning-in-Use: Qualitative Research on Norms and International Relations' (2009) 35 *Review of International Relations* 176.

particular the inability of a 'judiciary to respond to the conflicting sets of rules [on human rights and sovereignty]'.[164] In his discussion of the different elements of a global constitutional order, and their impact on norm compliance, Lang suggests that although international bodies played a prominent role in the Kosovo intervention – namely the OSCE's role in monitoring the 'facts' regarding human rights abuses and the UNSC's executive role realised through generating 'the law' (UNSC Resolution 1244) – when it came to providing a judgment as to 'which set of facts and rules were to be applied in this particular situation, no judicial structure was invoked or even tried to play a role'.[165] Although some have suggested that the UNSC played the role of a judiciary in this situation, had it acted, one institution would be performing both the roles of a judiciary and an executive, which is often held to be a dangerous absence of checks and balances by constitutionalists as well as by political scientists more broadly.[166] Furthermore, it appeared that the function of the institution that is best fit to make such a judgment, as the closest approximation to a constitutional court, the International Court of Justice (ICJ), was compromised by its extremely slow procedural process, which would have made it impossible to decide on a humanitarian emergency case in a timely fashion, even if it had been engaged.[167] Hence, Lang suggests that in order to overcome the deficiencies of humanitarian intervention institutions we need to establish something more like a constitutional order at the global level. For Lang, 'the idea of constitutionalism focuses on the importance of judgements undertaken by a global judiciary in accordance with a broadly understood rule-governed system'.[168] Such judgements may necessitate interpretations (of existing rules) by judicial bodies that can articulate a vision as to when intervention is permissible.[169]

Given the problems above it is not surprising that a lack of sufficient institutional capacity has also often been dubbed as one of the utmost problems obstructing R2P's effective operationalisation. Most prominently, Evans identifies the lack of 'institutional preparedness' as one of the three key challenges of the R2P, namely the capacity for conceptual, institutional and political action.[170] In a nutshell, the conceptual challenge, discussed in the previous section, lies in having greater definitional clarity of the R2P

[164] AF Lang Jr., 'Conflicting Rules: Global Constitutionalism and the Kosovo Intervention' (2009) 3 *Journal of Intervention and Statebuilding* 202.
[165] Ibid 201; United Nations Security Council Resolution, S/RES/1244 (10 June 1999).
[166] See (n 164) 201.
[167] Ibid.
[168] Ibid 187.
[169] Ibid.
[170] See Evans (n 1) 54.

concept; the institutional challenge – in 'establishing the necessary structures and mechanisms to ensure governments and international organisations follow appropriate processes when dealing with potential R2P situations'; and the political – in generating the necessary political will to instigate UNSC (and regional organisations) action in R2P scenarios consistently.[171] This enduring lack of institutional capacity reflects the analysis of the R2P norm put forward by Welsh, who argues that ongoing contestations regarding both the substantive and procedural aspects of R2P strongly remain, rendering it institutionally 'indeterminate' thus making enthusiastic predictions about the R2P's norm trajectory either highly speculative and/or based on wishful thinking.[172]

In addition, since the unresolved institutional challenges of humanitarian intervention have ostensibly come to haunt its R2P successor, the conclusions drawn from Lang's discussion of the failings of the Kosovo intervention not only speak to institutional issues as to whether the R2P should be labelled a global constitutional norm, but apply equally to discussions about whether or not the R2P can be considered to have effectively surpassed its norm predecessor humanitarian intervention. As we have suggested, making such a claim is highly problematic given existing contestations, gaps between global constitutional principles, indeterminate processes of constitutionalisation, and analogous stagnations associated with institutional practice. Although Bellamy and others have argued that the R2P norm should not be considered 'dead' because no key player has formally rejected it, using this criterion as a yardstick alone is problematic, since it seemingly does not allow for the possibility that the R2P might be 'effectively dead' in terms of stalled constitutionalisation and/or potential norm degeneration through inertia.

Given the burgeoning claims of R2P's demise since 2012, the lack of any robust endeavour to put such claims of degeneration to the test is surprising. If the R2P is beyond stalling, and is in fact 'degenerating', as some have suggested, then it is important to investigate this phenomenon in more detail than we have done here and to better appraise any downward trends that might be manifest in R2P's norm trajectory. Looking at this in more detail will suggest important implications in regard to understanding the R2P as part of global constitutionalisation. Namely, if a process of R2P degeneration is currently at work, discussing the R2P as transformative, either constitutionally or otherwise, becomes even more suspect.

[171] Ibid.
[172] See (n 15) 395.