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What constitutes a 'Manifest Failing'?
Ambiguous and inconsistent terminology and the
Responsibility to Protect

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Keywords:	Responsibility to Protect, Manifest Failing, Ambiguity, Inconsistency
Abstract:	<p>Paragraph 139 of the World Summit Outcome Document (WSOD) stipulates that the international community should respond in a 'timely and decisive manner' when 'national authorities are manifestly failing to protect their populations' from genocide, war crimes, crimes against humanity, and ethnic cleansing. But what constitutes a 'manifest failing'? The ambiguity that surrounds the phrase is positive in that it enables flexibility as states act on a 'case-by-case' basis, however, it also heightens fears of Great Power manipulation. Furthermore, there is an inconsistent discourse as many R2P scholars as well as the 2010 U.S., and 2008 U.K., National Security Strategy's continue to use the phrase 'unable or unwilling' despite the fact that this does not appear in the WSOD. As we approach the WSOD's 10th anniversary, this article asks R2P scholars and practitioners to pause and consider what terminology they are using and why. Finally, it suggests five ways in which R2P research can proceed.</p>

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What constitutes a 'Manifest Failing'?

Ambiguous and inconsistent terminology and the Responsibility to Protect

Abstract

Paragraph 139 of the World Summit Outcome Document (WSOD) stipulates that the international community should respond in a 'timely and decisive manner' when 'national authorities are *manifestly failing* to protect their populations' from genocide, war crimes, crimes against humanity, and ethnic cleansing. But what constitutes a 'manifest failing'? The ambiguity that surrounds the phrase is positive in that it enables flexibility as states act on a 'case-by-case' basis, however, it also heightens fears of great power manipulation. Furthermore, there is an inconsistent discourse as many R2P scholars as well as the 2010 U.S., and 2008 U.K., National Security Strategy's continue to use the phrase 'unable or unwilling' despite the fact that this does not appear in the WSOD. As we approach the WSOD's 10th anniversary, this article asks R2P scholars and practitioners to pause and consider what terminology they are using and why. Finally, it suggests five ways in which R2P research can proceed.

Key words: *The Responsibility to Protect, Manifest Failing, Ambiguity, Inconsistency*

Paragraph 139 of the 2005 World Summit Outcome Document (WSOD) stipulates that the international community has a responsibility to act in a 'timely and decisive' manner through the UN Security Council, on a 'on a case-by-case basis', when 'national authorities are *manifestly failing* to protect their populations' from genocide, war crimes, crimes against humanity, and ethnic cleansing.¹ The statement begins to illustrate that within the Responsibility to Protect (R2P) framework, the 'manifest failing' requirement represents *threshold*. The UN Security Council has to agree that the state in question is 'manifestly failing' to protect its populations from genocide, war crimes, crimes against humanity, and ethnic cleansing before it can take collective action against the state in question. The importance of the 'manifest failing' requirement has been re-affirmed by the UN General Assembly (UNGA) on many occasions since, 'Only if and when a State manifestly fails to fulfil such obligation may the international community take collective action in accordance with the Charter'.² But this raises the question, what constitutes a 'manifest failing'? The phrase was introduced in the final drafting stage of the WSOD in order to replace the terminology 'unable or unwilling' but the WSOD, subsequent UN reports, and indeed R2P scholarship offers little to guide decision makers in determining when a state is 'manifestly failing'. As a result, there is no clear benchmark against which to assess the behaviour of the host state in order to gauge whether it is 'manifestly failing' in its R2P.

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3 Although the issue of conceptual vagueness is, in itself, enough to warrant
4 further investigation, a secondary interrelated problem emerges when one considers
5 the inconsistency that is evident in the R2P discourse. For example, the 2010 U.S.,
6 and 2008 U.K., National Security Strategy's continue to use the phrase 'unable or
7 unwilling' even though it does not appear in the WSOD.³ Thus, in a rather striking
8 twist, the very states that have implemented the R2P most explicitly (at least since
9 2009) for example, the intervention in Libya in 2011⁴, continue to use the incorrect
10 terminology at least according to what was agreed on at the World Summit.
11 Furthermore, R2P scholars use an array of different interpretations and phrases. As
12 will be discussed below, some scholars claim that 'manifest failing' was introduced
13 because it is less subjective than 'unable or unwilling', others claim that it was
14 introduced to raise the threshold for intervention, whilst others claim the two phrases
15 mean the same thing and even offer a hybrid formulation. The mix therefore, of both
16 different phrases and contrasting interpretations, only adds to the confusion and
17 complexity that surrounds the identification of a 'manifest failing'. More importantly,
18 this feeds into concerns that Western states may manipulate the ambiguity that
19 surrounds the threshold for a pillar three action which has become more prominent
20 following the controversial regime change in Libya. As we approach the 10th
21 anniversary of the WSOD, this article asks R2P scholars and practitioners to pause
22 and consider what terminology they are using and why and calls for further research
23 to be conducted in this area.
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38 The article is structured in a two-fold format. Section one documents the
39 terminology transition from 'unable or unwilling' to 'manifest failing' to highlight the
40 problems of ambiguity and inconsistency. Section two identifies five ways in which
41 scholars and practitioners may address the issues at stake, first, reject this research
42 agenda; second, do nothing; third, drop the 'manifest failing' requirement; fourth,
43 revert to using the phrase 'unable or unwilling'; and fifth, establish indicators of a
44 'manifest failing' and in so doing, highlights five indicators that could form the basis
45 for future research.
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53 **From 'unable or unwilling' to 'manifest failing'**

54 The phrase 'manifest failing' was introduced in the final drafting stage of the
55 WSOD in order to replace the terminology 'unable or unwilling', but the WSOD offers
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3 little to guide decision makers in determining when a state is 'manifestly failing'. It
4 may be claimed that the phrase is so transparent that there is no need for clarity;
5 after all, the word manifest means 'evident to the eye, mind, or judgement; obvious'.⁵
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7 But when this understanding is applied to the assessment of whether a host state is
8 'manifestly failing' to protect its population from genocide, war crimes, crimes against
9 humanity, and ethnic cleansing, what evidence is required? If it is the case that proof
10 of one of the four crimes being carried out is necessary to warrant a pillar three
11 response then the requirement of a 'manifest failing' would not be needed. Moreover,
12 from a legal perspective, the killing of just one person or a small group of people, for
13 example a group of hostages, could constitute genocide but it is highly doubtful that
14 anyone would argue that this represents a 'manifestly failing'.⁶ It is important
15 therefore to consider that the most controversial pillar of the R2P (which includes
16 wide range of non-coercive response measures under Chapters VI and VIII of the
17 Charter as well coercive measures under Chapter VII⁷) is grounded, in part, on an
18 ambiguous phrase.
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29 In its original formulation the R2P was based on the idea that the international
30 community would respond when states were 'unable or unwilling' to protect their
31 populations from genocide, war crimes, crimes against humanity, and ethnic
32 cleansing.⁸
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35 The emerging principle in question is that intervention for human protection purposes,
36 including military intervention in extreme cases, is supportable when major harm to
37 civilians is occurring or imminently apprehended, and the state in question is *unable or*
38 *unwilling* to end the harm, or is itself the perpetrator (emphasis added).⁹
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40 The statement highlights that the phrase 'unable or unwilling' goes right to the very
41 heart of the R2P.¹⁰ As the report goes on to explain, '*it is only if the state is unable or*
42 *unwilling to fulfill this responsibility*, or is itself the perpetrator, that it becomes the
43 responsibility of the international community to act in its place'.¹¹ Accordingly, the
44 responsibility to respond could only be triggered if the UN Security Council agreed
45 that the state in question was 'unable or unwilling' to protect its population from
46 genocide, war crimes, crimes against humanity, and ethnic cleansing. This exact
47 understanding was restated in the 2004 Report of the UN Secretary-General's High
48 Level Panel,¹² the 2005 Report of the UN Secretary-General,¹³ and applied
49 practically to the assessment of the Sudanese regime by the International
50 Commission on the Inquiry of Darfur.¹⁴
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3 It is important therefore to stress that that phrase 'manifest failing' did not
4 appear in any of the R2P precursory documents yet appears in paragraph 139 of the
5 WSOD:
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8 The international community, through the United Nations, also has the responsibility
9 to use appropriate diplomatic humanitarian and other peaceful means, in accordance
10 with Chapters VI and VIII of the Charter, to help protect populations from genocide,
11 war crimes, ethnic cleansing and crimes against humanity. In this context, we are
12 prepared, to *take collective action, in a timely and decisive manner through the*
13 *Security Council in accordance with the Charter, including Chapter VII, on a case-by-*
14 *case basis and in cooperation with relevant regional organisations as appropriate,*
15 *should peaceful means be inadequate and national authorities are manifestly failing*
16 *to protect their populations from genocide, war crimes, ethnic cleansing and crimes*
17 *against humanity.*¹⁵

18 The statement captures the fact that the third pillar of the R2P embodies a dual
19 element as the international community has to assess primarily, whether one of the
20 four crimes has been committed and secondarily, whether the state in question is
21 'manifestly failing' to protect the population from these crimes.¹⁶ But what constitutes
22 a 'manifest failing' to protect the population from these crimes.¹⁶ But what constitutes
23 a 'manifest failing'?

24 To gain some clarity on where the phrase 'manifest failing' came from, this
25 author contacted the Global Centre for the Responsibility to Protect (GCR2P) and
26 was informed
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28 There will be no documents on this point. At the final days of negotiation, all was
29 done very very informally with no official drafts but through discussions of a few of the
30 key drafters. Manifest failure was a Canadian suggestion, trying to remove the
31 subjectivity of "unable or unwilling" that had appeared in previous drafts, and insert
32 what they believed to be a more evidence-based standard. It was accepted without
33 difficulty.¹⁷

34 According to the GCR2P the phrase 'manifest failing' was included to overcome the
35 subjective problems that a few key drafters felt may arise over international society's
36 ability to evidence that a state is 'unable or unwilling' to prevent genocide, war
37 crimes, crimes against humanity or ethnic cleansing. Notably, this is a very different
38 reason to that put forward by leading R2P scholars which underlines the confusion to
39 be found in the discourse (see below) but even if one accepts the view set out above
40 it is not clear, a) how the phrase 'manifest failing' is more objective than 'unable or
41 unwilling' and b) what evidence is required to prove a 'manifest failing' is taking
42 place. Furthermore, the 'very very informal' nature of the negotiation leaves one
43 questioning whether the drafters even realised that they were perhaps creating
44 unintentional problems that could potentially hinder the implementation of the R2P in
45 the future. As Carsten Stahn explains, 'the requirement of a manifest failure may be
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3 used as an additional means to challenge the legality and timing of collective security
4 action'.¹⁸
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6 Since 2005 it is evident that there have been high profile concerns regarding
7 the identification of a 'manifest failing'. For example, in 2008, the Asia Pacific Centre
8 for the Responsibility to Protect, University of Queensland, used the \$2 million of
9 funding provided by the Australian government to fund fourteen R2P research
10 projects throughout the globe, including, Washington, Vancouver, Jakarta,
11 Singapore, Oxford and New York.¹⁹ The very fact that the research was funded gives
12 weight to this paper's claim that there are unresolved issues surrounding the
13 identification of a 'manifest failing'.²⁰ Of relevance here is that one of the projects
14 focuses on, *Assessing the Parameters for Identifying a 'Manifest Failure' to Protect*
15 *Populations under R2P*. This is led Professor Rosenberg who is conducting on-going
16 research into this area.²¹ In the policy brief that stemmed from that research project,
17 Rosenberg and Strauss establish four principles which are aimed to standardise R2P
18 implementation by providing a systematic and coherent approach.²² Significantly,
19 principle four sets out to 'determine whether a State is "manifestly failing" to meet its
20 responsibility to protect'.²³ But as this was published as part of a policy brief series
21 entitled 'R2P ideas in brief' the reader is presented with a 97 word explanation that
22 culminates in the claim, a 'manifest failure occurs when relatively foreseeable
23 consequences have not been addressed and the risk level prevails or increases'.²⁴
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36 Although this author does not reject the formulation put forward by Rosenberg
37 and Strauss it seems fair to say that more research on this issue is needed. As
38 Labonte explains, 'Research on the concept of manifest failure and its relationship to
39 R2P is relatively new, even within the burgeoning literature that now exists on R2P
40 itself'.²⁵ This is despite the fact that the 'manifest failing' requirement has remained a
41 key component of seminal UN reports on the R2P. For example, Ban Ki-moon's first
42 report on the R2P in 2009 raised the 'manifest failing' requirement nine times and his
43 fourth R2P report specifically on 'timely and decisive response' cited it five times.²⁶ It
44 has also featured prominently in UN discussions, for example, it was cited twelve
45 times in the UN General Assembly's first (of what have now become annual
46 discussions) 'informal interactive dialogue' on the R2P. Each time underlining the
47 centrality and importance of the 'manifest failing' threshold, 'The horrors of the
48 twentieth century inform the final pillar, namely, that timely and decisive action within
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3 the Charter is an option on the table should a State be manifestly failing in its
4 obligation to protect'.²⁷ The UNGA went as far as stating, 'Therefore, if a State has
5 manifestly failed to do so, the international community has the *moral obligation* to
6 give a timely and decisive response'.²⁸ Yet despite the significance attributed to the
7 identification of a 'manifest failing', none of these reports shed light on the evidence
8 needed.
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13 If ambiguity is one issue, inconsistency is another. The most important
14 deviation from the terminology expressed in the WSOD is evident in the 2010 U.S.

15 National Security Strategy:

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18 The United States and all member states of the U.N. have endorsed the concept of the
19 "Responsibility to Protect." In so doing, we have recognized that the primary
20 responsibility for preventing genocide and mass atrocity rests with sovereign
21 governments, but that this responsibility passes to the broader international
22 community when sovereign governments themselves commit genocide or mass
23 atrocities, or when they prove unable or unwilling to take necessary action to prevent
24 or respond to such crimes inside their borders.²⁹
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26 As the above statement highlights, the U.S. continues to use the terminology 'unable
27 or unwilling' even though this does not appear in the WSOD. This is also evident in
28 the 2008 UK National Security Strategy which states, 'where a government is
29 *unwilling or unable* to protect its citizens from genocide, war crimes, ethnic cleansing
30 or crimes against humanity, or is perpetrating these acts itself, the international
31 "Responsibility to Protect" ultimately requires the international community to act'.³⁰
32 To be clear, neither mention 'manifest failing'. Thus, the very states that have been
33 at the forefront of R2P endorsement and implementation (at least since 2009) use
34 terminology that differs from that agreed to in the WSOD. On this point further
35 research is needed on whether the changes made were conscious or unconscious.
36 As interpretivist scholars such as Bevir have highlighted, even if it is the latter,
37 careful consideration needs to be given as to how unconscious utterances and
38 designs can impact on the behaviour of the actors involved as well as the shape the
39 discourse itself.³¹
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49 To consider the implications of inconsistency further let us juxtapose the
50 National Security Strategy's above with the idea that the phrase 'manifest failing' was
51 introduced in 2005 in order to *raise the threshold* for a pillar three action from 'unable
52 or unwilling' to a 'manifest failing'.³² As Alex Bellamy explains, '[t]o appease the US
53 and G77, the threshold at which the responsibility for dealing with genocide and
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3 mass atrocities passed from the host state to international society was altered' from
4 'unable or unwilling' to 'a manifest failure to protect civilians – a *significantly higher*
5 *threshold*'.³³ Although Bellamy does not offer a citation to explain where this thinking
6 comes from – which again underlines the diverse range of interpretations on offer -
7 his position captures a common trend which interprets the terminology change as a
8 conscious attempt to raise the threshold for a third pillar action. However, to return to
9 the National Security Strategy's of the U.S. and the U.K., the grave concern here is
10 that if it is the case that 'manifest failing' was introduced to raise the threshold for
11 intervention, then the use of 'unable or unwilling' by the U.S., and U.K may
12 exacerbate non-Western fears that Western states [mis]use the R2P as a tool for
13 their own personal agenda. For example, the political fallout that surrounded Libya
14 as states such as Russia, China, India, Guatemala, Australia, Brazil, and South
15 Africa criticised the implementation of UN Resolution 1973 stemmed from concerns
16 that '[t]here is a growing perception that the concept of the responsibility to protect
17 might be misused for purposes other than protecting civilians, such as regime
18 change.'³⁴

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30 The idea that Western states may manipulate the ambiguity that surrounds
31 the threshold for a pillar three action was put into explicit context by Ruan Zongze in
32 2012,
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There are so far no objective criteria to judge if "a country is unwilling or unable to
execute responsibility to protect" and therefore it is likely that it would become another
excuse for some countries to impose armed intervention in the internal affairs of other
countries.³⁵

Although one has to be careful not to extrapolate too much from one source, it is
important to bear in mind that Zongze is the Vice President of the China Institute for
International Studies which is the Chinese foreign ministry's think tank which also
hosted the first ever policy discussion on China and the R2P.³⁶ Accordingly, it seems
that whilst there are broader concerns over how Western states utilise the R2P
concept, there are also very specific fears regarding the lack of criteria that
surrounds the threshold for pillar three response measures. Putting aside the fact
that Zongze uses the phrase 'unable or unwilling' rather than 'manifest failing' the
statement indicates that there is a genuine concern that Western states may
manipulate the ambiguity that surrounds the R2P. This feeds into the broader debate
over the Security Dilemma as it may be the perception of what Western states are

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3 doing, rather than what they are actually doing, that heightens mistrust and fear
4 which hinder cooperation.³⁷ For example, if as Bellamy claims, the phrase 'manifest
5 failing' was introduced to raise the threshold for intervention then how are Chinese
6 policymakers meant to interpret the fact that the U.S. and the U.K., use the phrase
7 'unable or unwilling' in their National Security Strategies? Are Western states
8 consciously trying to lower the threshold for a pillar three intervention, or is this
9 simply just an unconscious mistake?
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When one considers that implementation of the R2P rests on a consensus being forged amongst the P5 then the one can see how tensions may arise in the legitimacy process as states invoke different terminology when deciding what constitutes 'rightful conduct'.³⁸ For example, Michael Swaine's analysis of China's 18th Work Report from November 2012 argues that China has set out an 'unprecedented' commitment to 'oppose any foreign attempt to subvert the legitimate government of any other countries' which it is claimed stems from China's concerns regarding the R2P.³⁹ But at the same time, Swaine explains that the statement is worded in such a manner as to imply that there could be an R2P intervention where it was deemed that an illegitimate government was in place. But what constitutes an illegitimate government? To return to Zongze's statement, it seems that China may favour the establishment of criteria for aiding such assessments yet this is something which divides R2P scholars and has not been addressed because of the lack of research in this area.

Problematically, if policymakers look to R2P scholars for clarity on this issue it is not evident that they will find it. For example, Mónica Serrano informs the reader that the international community has a R2P 'if states are manifestly failing – that is, if they are unable or unwilling to protect their populations from these crimes'.⁴⁰ The statement offers a radically different interpretation to that offered by GR2P in that Serrano does not view 'manifest failing' as more objective and instead views the two phrases as synonymous with one another. But of course, if this were true then why was the change of terminology in 2005 even needed? Yet Serrano is not alone in offering interpretations which directly challenge the idea that there is any difference between the two phrases. For example, Thomas Weiss offers a hybrid formulation as he refers to states that are 'manifestly unable' and 'unable or manifestly unwilling'.⁴¹

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3 Again, this interpretation seems to implicitly reject the idea that 'manifest failing' is
4 somehow less subjective than 'unable or unwilling'.
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6 Before one accepts the view that the two phrases mean the same thing –
7 which is obviously not what the drafters of the WSOD felt – consider that in 2009 the
8 UN General Assembly stated, 'Lastly, the third pillar deals with situations where a
9 State manifestly fails in its responsibility, due to unwillingness rather than inability'.⁴²
10 The statement reflects a clear attempt to draw a distinction between a state that is
11 'unable' to protect its population from genocide, war crimes, crimes against
12 humanity, and ethnic cleansing as opposed to a state that is 'unwilling' to do so. It is
13 only the latter that is considered to constitute a 'manifest failing'. This perspective is
14 evidently influenced by Ban Ki-moon's 2009 report (which it refers to as it mentions
15 the 'third pillar') in that a state that is 'unable' to fulfil its R2P would require *state*
16 *assistance* which would be classified as a pillar two operation whereas a state that is
17 'unwilling' suggests a pillar three action is required in that that the international
18 community would have to utilise its coercive and non-coercive measures under
19 Chapters VI, VII, and VIII of the UN Charter in order to try and alter the unwillingness
20 of the state in question. This interpretation therefore directly challenges the idea that
21 'manifest failing' is more objective than 'unable or unwilling' as it is evident that the
22 'unwilling' element of the latter formulation is actually utilised to make sense of the
23 'manifest failing' requirement. Moreover, it is clear that the UNGA did not set out to
24 treat 'unable and unwillingness' as interchangeable with 'manifest failing'. The point
25 here is not to judge the range of interpretations but to simply highlight the lack of
26 clarity that is evident within the discourse
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41 In short, the variety of uses above illustrate an inconsistent discourse which
42 only adds to the confusion that surrounds the question of what constitutes a
43 'manifest failing'. As a result, legitimate questions can be raised over whether the
44 actors involved are even conscious of the terminology change and the language that
45 they themselves use. When I have raised this issue with a number of R2P scholars
46 they have admitted that they were unaware that the WSOD does not include the
47 phrase 'unable or unwilling'. In policy terms, a Political Affairs Officer for the UN
48 Office on Genocide Prevention and the Responsibility to Protect also informed me
49 that the Office was unaware of the inconsistencies to be found the discourse. It is
50 therefore important that actors pause and consider what terminology they are using
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3 and why. Essentially, this helps explain why this author cannot present the reader
4 with an empirical example in which a debate, between policymakers or R2P
5 scholars, has taken place over whether a host state has in fact 'manifestly failed' or
6 is 'unwilling or unable' or is something else entirely. The reason is that because the
7 actors involved may not even be conscious of terminology that they use we do not
8 see heated exchanges framed in these terms; however, to return to the premise of
9 this paper, this should not distract us from the central issue of threshold.
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15 16 17 **Potential Future Directions of Research**

18 19 *i) Option one: reject this research agenda*

20 The reader may reject the idea of developing the 'manifest failing' research agenda
21 on the grounds that it does not matter what phrase is used, the decision to react is a
22 political choice based on things other than a 'manifest failing', such as the national
23 interest, sovereignty, and the complexities of intervention.⁴³ For example, as Bellamy
24 rightly points out, 'France (in relation to Myanmar) and Russia (in relation to Georgia)
25 used RtoP to justify the actual or potential use of coercive force in contexts where
26 there was no apparent manifest failure to protect populations from genocide and
27 mass atrocities.'⁴⁴ Moreover, the lack of clarity regarding a 'manifest failing' did not
28 prevent a consensus on Libya, Mali, the Democratic Republic of Congo, and Yemen.
29 From this view, R2P scholarship should not get bogged down in a research agenda
30 which has no impact on the decision making process and should focus instead on
31 other issues such as UN reform.⁴⁵
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40 Essentially, this critique forms part of a broader debate regarding the importance
41 of words in international relations. Neorealists such as Mearsheimer have explicitly
42 rejected the influence of words whereas interpretivists such as Epstein have
43 emphasised 'the power of words in international relations'.⁴⁶ Although the
44 parameters of this article cannot address this debate in detail, it is necessary to
45 highlight that this author is not trying to overstate the importance of words or
46 downplay factors such as power politics and the national interest. Yet at the same
47 time it is important to bear in mind that within the R2P framework (as set out in the
48 WSOD and many UN Reports since) the 'manifest failing' requirement represents
49 threshold. Whether this is framed in terms of illegitimacy, irresponsibility, an
50 escalation in violence, unable or unwilling, or manifest failure, the underlying logic is
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3 that of threshold: a line has been crossed in that what was tolerated yesterday
4 cannot be today and action has to be taken. When one considers, to return to Zonge,
5 that there are genuine fears of Great Power manipulations – between the Great
6 Powers themselves – it seems fair to suggest that the potential for establishing an
7 intersubjective consensus at the international level regarding the identification of a
8 'manifest failing' may be beneficial in the long term despite the continued
9 significance of other factors such as the national interest and power politics.
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18 ii) Option two: *do nothing*

19 From this perspective it is better not to have indicators as an individual assessment
20 should be done on a 'case-by-case basis' as set out in paragraph 139 of the WSOD:
21 'we are prepared, to take collective action, in a timely and decisive manner through
22 the Security Council in accordance with the Charter, including Chapter VII, on a case-
23 by-case basis.'⁴⁷ The case-by-case approach has two significant strengths that
24 should not be overlooked. First, it would be a mistake to claim that a 'one-size-fits-all'
25 approach can be established as mass atrocity crimes are far too complex for any
26 single framework to provide a solution.⁴⁸ For example, the debates over the causes
27 of genocide alone highlight that no one approach can provide the silver bullet.⁴⁹
28 Second, the 'case-by-case' logic allows flexibility. This is a fundamentally important
29 point and to return to the construction of the UN Charter, its architects deliberately
30 used 'language that was adaptable enough to allow application under unforeseen
31 circumstances in years to come'.⁵⁰ In other words, if guidelines are too rigid, then
32 ultimately this hinders rather than helps the application of policies which again
33 underlines the need to assess each R2P crisis on a 'case-by-case' basis.
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45 Although this UN perspective is the dominant view found in the discourse,
46 there are a number of issues that need to be thought through. First, any attempt to
47 create a 'one-size-fits-all' approach is flawed but, as Bellamy highlights, it is important
48 to differentiate between the interpretation of the R2P and the application of it.⁵¹ For
49 example, the UN Secretary-General states, '[a]s each situation is different, it would
50 be counterproductive to try and make the application of these principles appear
51 identical in all situations'.⁵² The statement sets out the case that the application of the
52 R2P should be shaped by the circumstances involved and the point here is not to
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3 dispute that claim. The response of the international community *should* differ on a
4 case-by-case basis; after all, 'foreign policy must always operate within what Edmund
5 Burke termed "the empire of circumstances"'.⁵³ But in order to help make the R2P
6 sustainable in the 21st century our interpretation of the concept should be consistent
7 and a part of this has to be raising awareness of, and addressing the issues that
8 surround, 'manifest failing'. Second, even on a 'case-by-case basis' states will have
9 to appeal to *something* in order to make the case that a threshold has been passed.
10 This restates the need to address the ambiguity that surrounds 'manifest failing' and
11 gives weight to the idea that indicators may help aid decision makers in making their
12 assessment of a 'manifest failing' thus improving the ability of the UN to fulfil its own
13 commitment to respond in a 'timely and decisive' manner. It is important therefore to
14 understand that establishing indicators compliments the UN approach rather than
15 challenges it – though there is still the issue of flexibility which is discussed below
16 (see option four).
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28 *iii) Option three: drop the 'manifest failing' requirement*

29 One can easily imagine the following argument being made; surely, if any amount of
30 genocide, war crimes, crimes against humanity, or ethnic cleansing is taking place,
31 then this demands a pillar three response. From this perspective 'manifest failing' is
32 an epistemic requirement which should be dropped as proving that one of the four
33 crimes has taken place is enough to warrant a pillar three response. Although this
34 author is sympathetic to this line of thinking, it is rejected on the pragmatic grounds
35 that, a small scale example of genocide, war crimes, crimes against humanity, or
36 ethnic cleansing may take place which would not meet the threshold required to
37 merit a pillar three response. From a legal perspective a war crime can take place if
38 private property is targeted,⁵⁴ and as aforementioned, genocide could be deemed to
39 have taken place if just one person or a group of hostages were killed, as long as it
40 was proven that their murder was intended to destroy their national, racial, ethnic, or
41 religious group in whole or in part.⁵⁵ It is highly doubtful that anyone would interpret
42 this as a 'manifest failing'. Although these are extremes they feed into Robert Pape's
43 recent critique of the R2P when he asks '[w]hat kind of war crime?' and '[w]hat kind
44 of ethnic cleansing?' requires international action.⁵⁶ Surely the decision to insert a
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3 threshold qualifier (whether it is 'manifest failing' or 'unable or unwilling') stems from
4 this understanding.
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8 iv) *Option four: going back to move forward*

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10 From this perspective the phrase 'unable or unwilling' should be used rather than
11 'manifest failing' on the grounds that the former has more purchase and is therefore
12 better for assessing when a state has failed in its R2P. The most significant reason
13 to support this course of action is the fact that the U.S. and U.K. are utilising the
14 phrase 'unable or unwilling' in their National Security Strategies. This is important
15 because if the R2P is to be further entrenched as a norm in 21st century
16 policymaking then the role of the powerful is pivotal. As Theresa Reinhold explains in
17 her analysis of 'hegemonic law-making' and the R2P, it is not that the U.S. can
18 command states to adhere to the R2P (or even wants to) but in order for the R2P to
19 have a successful life-cycle it remains dependent upon U.S. support.⁵⁷ Indeed, it
20 may be that no amendment is made to paragraph 139 but yet the phrase 'unable or
21 unwilling' gradually replaces 'manifest failing' in the discourse precisely because
22 powerful actors such as the U.S. and U.K. start to use this phrase more. As stated
23 above however, actors such as the UN Secretary-General Ban Ki-moon, explicitly
24 talk in terms of 'manifest failure' rather than 'unable or unwilling'. Moreover, it is easy
25 to expect a backlash as non-Western states question the motives of the U.S. and
26 U.K. if they suggest a terminology change, especially if this is interpreted as an
27 attempt to lower the threshold for intervention rather than as an attempt to establish
28 clearer indicators. This fear is further exacerbated by the historical and political
29 baggage that surrounds the phrase 'unable or unwilling': '[t]he United States has
30 long articulated the "unable or unwilling" standard to justify the use of force in self-
31 defence in response to terrorist attacks'.⁵⁸ Thus, the case could be made that in a
32 post-911 world it is important to distance the R2P and mass atrocity prevention from
33 counter-terrorism and the 'War on Terror' – especially as the invasion of Iraq
34 threatened the concept's very existence.⁵⁹ On this fourth option, the jury is still out as
35 there is no way of knowing how the R2P norm will develop, but concerns remain as
36 one can see the potential for tensions to emerge between actors using different
37 terminology.
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Option five: establish indicators for assessment

v) From this perspective, actors should establish indicators that can help an assessment of what constitutes a 'manifestly failure'. This author is conscious here that any attempt to establish criteria may fall into the trap of reducing the complexity of irresponsible sovereignty down to an over simplistic tick-list. For example, in Oliver O'Donovan's analysis of Just War Theory, he claims that modern textbooks tend present the theory as seven criteria which have a 'disconcertingly legalist feel to them, ticking off principles, as it were, one by one'.⁶⁰ In a similar vein, it seems inappropriate to suggest that an assessment of whether a state has in fact 'manifestly failed' can be done through a box ticking exercise. Moreover, such an approach would hinder the flexibility needed as outlined in option one. That said, there is a reason why Just War theorists continually use criteria as these help provide a general framework for identifying a just war. In essence, everyone involved is aware that the judgement is complex but appeal to criteria in order to establish a 'common reference within which argumentation can take place'.⁶¹ At present the R2P discourse does not have this common reference point but at the same time those that wish to pursue this research agenda need to address the issue of flexibility which is aided by the 'case-by-case' approach outlined above.

This final option proposes that analysts begin to put together a framework for judgment in the same way that Just War theorists do. It is with such thinking in mind that this author has produced the first tentative steps toward establishing a list of specific criteria through a case study analysis of the on-going crisis in Syria.⁶² In so doing, the research puts forward five key indicators of a 'manifest failing': i) government intentions, ii) weapons used, iii) death toll, iv) number of people displaced, and v) the intentional targeting of civilians, especially women, children and the elderly. Essentially, these act to try and identify the qualitative and quantitative indicators that actors invoke when attempting to make the case that the threshold of a 'manifest failing' has been reached. In so doing, the case study analysis of Syria also highlights the need to get to grips with the confusion and chaos that academics and policymakers face when analysing the issue of a 'manifest failing' within the context of warfare.⁶³ This is a key component highlighted in the UN Secretary-General Ban Ki-moon's fifth report on R2P (since 2009) as he highlights the need to navigate the 'overlap' between 'armed conflict' and 'atrocities crimes'.⁶⁴ Of course,

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3 further research is needed but of establishing indicators are three fold. First, they will
4 provide policy makers with a set of guidelines that could help the UN fulfil its
5 commitment to respond in a 'timely and decisive manner'. Second, they could help
6 ease fears that Western states are manipulating the ambiguity that surrounds the
7 phrase 'manifest failure'. Third, they may aid both those inside and outside
8 government who wish to hold policymakers to account by creating a framework
9 against which political [in]action can be judged. Although the identification of five
10 criteria, as outlined above, may seem somewhat simplistic, one should remember
11 that the identification of between three and seven criteria (this has changed over
12 time) has been used to guide assessments of what constitutes a *Just War* from St.
13 Aquinas to present day.
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22 **Conclusion**

23 Although there have been many crises since 2005 that could be classified under the
24 R2P umbrella, it is important to bear in mind that pillar three actions remain less
25 frequent than pillar two responses. Notably therefore, in the aftermath of the
26 controversial regime change in Libya, concerns over the potential for Western
27 manipulation of the R2P and more specifically the threshold that surrounds pillar
28 three action began to emerge more prominently. Resolving these concerns will not
29 be easy. Ten years on from the WSOD, an analysis of the R2P discourse underlines
30 the ambiguity that surrounds the 'manifest failing' requirement as well as the
31 inconsistency that stems from different actors invoking diverse interpretations and
32 using different phrases. Accordingly, this article asks scholars and practitioners to
33 pause and consider what terminology they are using and why. Moreover, it calls for a
34 more consistent discourse to be established based on a more informed
35 understanding of what constitutes a 'manifest failing'. To facilitate this, the article set
36 out five options to aid R2P scholarship as it moves forward, each of which raise a
37 series of questions and issues. Again it is worth stressing that this author does not
38 want to downplay the importance of other factors such as power politics and the
39 national interest, however, since the 'manifest failing' requirement represents the
40 threshold for a pillar three response to be actioned, and when one considers that the
41 lives of potentially millions of people may depend on the third pillar of the R2P being
42 triggered, the importance of this issue cannot be overstated. Potentially, this gives
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further credence to the idea that an independent body should be set up to make rulings on such issues,⁶⁵ a part of which has to be whether a 'manifest failing' is taking place.

¹ United Nations, '2005 World Summit Outcome' UNGA Res. 60/1, 16, 2005, paragraph, 139.

² United Nations, General Assembly, 97th Plenary Meeting, (23 July 2009) A/63/PV.97 p. 13.

³ United States, 'National Security Strategy' (May 2010), p. 48. United Kingdom Cabinet Office, *The National Security Strategy of the United Kingdom: Security in a Interdependent World* (March 2008), p. 48.

⁴ This is not to suggest that the intervention could not have taken place without the R2P, see Aidan Hehir, 'Libya and The Responsibility to Protect: Resolution 1973 as Consistent with the Security Council's Record of Inconsistency', *International Security*, Vol. 38. No. 1. (Summer 2013). pp. 137-159.

⁵ Charles T. Onions ed., *The Shorter Oxford English Dictionary on Historical Principles: volume one A-Markworthy* (Oxford: Clarendon Press, 1973), p. 1272.

⁶ This stems from the fact that as long as it is determined that the perpetrator intends to destroy a national, ethnical, racial, or religious group in whole or in part then this constitutes genocide. The problem is that the question of what constitutes part of a group sets the scale of the crime so broad that the killing of just one person could be legally considered as genocide. William A., Schabas, *Genocide in International Law* (Cambridge: Cambridge University Press, 2000), pp. 234-240. This is returned to below. 0000000

⁷ Report of the Secretary-General, Ban Ki-moon, *Responsibility to Protect: Timely and Decisive Response A/66/874-S/2012/578*, 25 July 2012.

⁸ Though it should be noted that at the time, the R2P set out to cover more than just these four crimes, the focus here is on the terminology of 'unable or unwilling'.

⁹ ICISS, *The Responsibility to Protect*, p. 16

¹⁰ The phrases "unable or unwilling" and "unwilling or unable" are used 14 times in the ICISS report.

¹¹ ICISS, *The Responsibility to Protect*, p.17. Emphasis added.

¹² Report of the UN Secretary-General's High Level Panel on Threats, Challenges and Change, *A More Secure World, Our Shared Responsibility* (United Nations Foundation, 2004), 66: 'when they [governments] are unable or unwilling to do so that responsibility should be taken up by the wider international community'.

¹³ Report of the UN Secretary-General, *In Larger Freedom, Towards Security, Human Rights and Development* (United Nations, 2005), p. 35: 'if national authorities are unable or unwilling to protect their citizens, then the responsibility shifts to the international community'.

¹⁴ Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General (Office of the High Commission of Human Rights 25 January 2005), para. 217: 'The Sudanese justice system is unable and unwilling to address the situation in Darfur'.

¹⁵ 'World Summit Outcome', p. 30.

¹⁶ Report of the Secretary-General, Ban Ki-moon, *Implementing the Responsibility to Protect*, A/63/677, 12 January 2009, pp. 22-28. Also, Report of the Secretary-General, *Responsibility to Protect: Timely and Decisive Response A/66/874-S/2012/578*, 25 July 2012. There is an on-going debate over whether each sequence needs to be exhausted before the next can be started. Of relevance here is Edward C. Luck's critique of Brazil's commitment to 'strict chronological sequencing' in the debate over Syria, Thortsen Benner, 'Brazil as a norm entrepreneur: the "responsibility while protecting" initiative', *Global Public Policy Institute* (March 2013, 1-11) 4.

¹⁷ Personal email correspondence with the Global Centre for the Responsibility to Protect, Ralph Bunche Institute for International Studies in New York. 25/05/2009.

¹⁸ Carsten Stahn, 'Responsibility to Protect, Political Rhetoric or Emerging Legal Norm?' *American Journal of International Law* Vol. 101. No. 1 (2007) pp. 99-120, 117.

¹⁹ Asia Pacific Centre for the Responsibility to Protect, *Research in Focus 2012* (1-72)

<http://www.r2pasiapacific.org/docs/R2P%20Fund/Research%20in%20Focus%20Booklet%202012.pdf>

²⁰ This is also reflected in the fact that in 2008 there was a high profile conference on this specific issue, Office of the High Commissioner for Human Rights, 'From Manifest Failure to Collective Action:

Realizing the Responsibility to Protect', *United Nations* (April 28 2008) participants included, Ed Luck, Heidi Hulan, Ramesh Thakur, and Joanna Weschler.

²¹ For the initial groundwork see, Sheri P. Rosenberg, 'The Responsibility to Protect: A Framework for Prevention', *Global Responsibility to Protect* 1 (2009): 442–77;

²² Sheri Rosenberg and Ekkehard Strauss, 'A Common Standard For Applying R2P' *APCR2P Brief* Vol. 2. No. 2. (2012), pp.1-6. The issue of coherence remains an on-going debate, see Henrik Friberg-Fernros and Douglas Brommesson, 'The responsibility to protect – An incoherent doctrine?' *International Politics* Vol. 50. No. 4. (2013) pp. 600–622

²³ Rosenberg and Strauss, 'A Common Standard For Applying R2P', p. 4.

²⁴ Ibid.

²⁵ Melissa T. Labonte, 'Whose responsibility to protect? The implications of double manifest failure for civilian protection', *The International Journal of Human Rights* Vol. 16. No. 7. (2012), pp. 982-1002, 987.

²⁶ UN General Assembly, A/63/677 12 January 2009, p.22. Report of the Secretary-General, A/66/874-S/2012/578, 25 July 2012.

²⁷ United Nations, General Assembly, 97th Plenary Meeting, (23 July 2009) A/63/PV.97 p. 8.

²⁸ Ibid. p.24. Emphasis added.

²⁹ United States, 'National Security Strategy' (May 2010), 48.

http://www.whitehouse.gov/sites/default/files/rss_viewer/national_security_strategy.pdf Accessed 24 June 2010.

³⁰ United Kingdom Cabinet Office, *The National Security Strategy of the United Kingdom: Security in a Interdependent World* (March 2008), p. 48. The 2010 UK National Security Strategy made no reference to the Responsibility to Protect.

³¹ Mark Bevir, *The Logic of the History of Ideas* (Cambridge: Cambridge University Press, 1999), p. 33. This thinking has since been applied to a number of different case studies in, Mark Bevir, Ian Hall, and Oliver Daddow, (eds.), *Interpreting Global Security* (New York: Routledge 2013).

³² Hehir, *The Responsibility to Protect: Rhetoric, Reality and the Future of Humanitarian Intervention*, 48. Also, Adèle Brown, *Reinventing Humanitarian Intervention: Two Cheers for the Responsibility to Protect?* (United Kingdom: House of Commons Research Paper, 08/55, 2008), 24. This understanding has also been confirmed by Spencer Zifcak who conducted with 21 senior diplomats in the Permanent Missions to the UN and in the UN Secretariat in November 2011 but he has not published on the specific issue of a 'manifest failing'. For his views on R2P in general see, Spencer, *United Nations Reform*, ch. 6.

³³ Alex J. Bellamy, *Responsibility to Protect* (Cambridge: Polity, 2009), p. 90. Emphasis added.

³⁴ United Nations, *Letter from the Permanent Representative of Brazil to the United Nations addressed to the Secretary-General A/66/551–S/2011/701*. (9 November 2011)

<http://www.un.int/brazil/speech/Concept-Paper-%20RwP.pdf> Accessed 11.01.2013.

³⁵ Ruan Zongze, 'Responsible Protection: Building a Safer World', *China Institute of International Studies* June 15 2012, http://www.ciis.org.cn/english/2012-06/15/content_5090912.htm Accessed 20 June 2012. Ruan is the vice president of the China Institute of International Studies.

³⁶ See Gareth Evans, *Protecting Civilians Responsibly* (October 25 2013) <http://www.project-syndicate.org/commentary/gareth-evanson-moves-by-china-and-other-brics-countries-to-embrace-humanitarian-intervention> Accessed December 1 2013.

³⁷ See Ken Booth and Nicholas J. Wheeler, *The Security Dilemma: Fear, Cooperation, and Trust in World Politics* (New York: Palgrave, Macmillan, 2008).

³⁸ I am drawing here on the idea of 'rightful conduct' as set out by Ian Clark, *Legitimacy in International Society* (Oxford: Oxford University Press, 2005) pp. 26-29.

³⁹ Michael Swaine, 'The 18th Party Congress and Foreign Policy: The Dog that Did Not Bark?' *China Leadership Monitor* No. 40 (2013), 1-17, p. 5. This is developed regarding the evolving stance of China but also the backlash post Libya in Micael D. Swaine, 'Chinese views of the Syrian Conflict', *China Leadership Monitor*, No. 39. <http://media.hoover.org/sites/default/files/documents/CLM39MS.pdf> Accessed 01.01.2013. See also, Ramesh Thakur, A Chinese Version of Responsible Protection, *The Japan Times*, 1 November 2013 <http://www.japantimes.co.jp/opinion/2013/11/01/commentary/a-chinese-version-of-responsible-protection/#.UrQGH1FGjTo> Accessed 10 November 2013.

⁴⁰ Mónica Serrano 'Responsibility to Protect – True Consensus, False Controversy', *Development Dialogue* Vol. 55 (2011) pp.101 – 112, 103.

⁴¹ Thomas G. Weiss, 'Whither R2P?', *The Responsibility to Protect: Challenges & Opportunities in light of the Libyan Intervention*, (e-International Relations, on-line, November 2011), pp. 8-9. No editor information given.

<http://www.e-ir.info/wp-content/uploads/R2P.pdf> Accessed 12 December 2012.

⁴² UN General Assembly, 99th Plenary Meeting, July 24 2009, A/63/PV.99 p.22

⁴³ Adrian Gallagher, 'A Clash of Responsibilities: Engaging with Realist Critiques of the R2P', *Global Responsibility to Protect* Vol. 4. No. 3 (2012) pp. 334-357.

⁴⁴ Alex Bellamy, 'The Responsibility to Protect: Five Years On', *Ethics and International Affairs*, 24, no. 2 (2010), pp. 143-169, p. 144.

⁴⁵ Ramesh Thakur, *The United Nations, Peace and Security: From Collective Security to the Responsibility to Protect* (Cambridge: Cambridge University Press, 2006), ch. 13. Thomas G., Weiss, *What's Wrong with the United Nations and How to Fix it* (Cambridge: Polity Press, 2009). Spencer Zifcak, *United Nations Reform? Heading North or South* (New York: Routledge 2009). In relation to the R2P see Aidan Hehir, *The Responsibility to Protect: Rhetoric, Reality, and the Future of Humanitarian Intervention* (New York: Palgrave Macmillan, 2012) ch. 8. On the need to reform regional organisations because of the problems facing UN reform see James Pattison, *Humanitarian Intervention and the Responsibility to Protect: Who Should Intervene?* (New York: Oxford University Press, 2010) ch. 8.

⁴⁶ John. J. Mearsheimer, 'E.H. Carr vs. Idealism: The Battle Rages On', *International Relations* Vol 19. No. 2. (2005) pp139-152, esp. p. 145-146. Also, Charlotte Epstein, *The Power of Words in International Relations* (London: MIT Press, 2008).

⁴⁷ United Nations, '2005 World Summit Outcome' paragraph, 139.

⁴⁸ See Report of the Secretary-General, *Responsibility to Protect: Timely and Decisive Response* A/66/874-S/2012/578, 25 July 2012, p.6.

⁴⁹ See Frank Chalk and Kurt Jonassohn, *The History and Sociology of Genocide* (New Haven: Yale University Press, 1990), Alex Alvarez, *Governments, Citizens, and Genocide, a Comparative and Interdisciplinary Approach* (Indiana: Indiana University Press, 2001), Robert Gellately and Ben Kiernan, (eds.), *The Spectre of Genocide, Mass Murder in Historical Perspective* (Cambridge: Cambridge University Press, 2003). Alex Hinton, Ed., *Genocide, an Anthropological Reader* (Oxford: Blackwell Publishing, 2002). For quantitative research see Barbara Harff and Ted Robert Gurr 'Toward an Empirical Theory of Genocides and Politicides: Identification and measurement of cases since 1945', *International Studies Quarterly*, Vol. 32. No. 3. (1998), pp. 359-371. Nicolas Rost, 'Will it Happen Again? On the Possibility of Forecasting the Risk of Genocide' *Journal of Genocide Research* Vol 15. No. 1 (2013) pp. 41-67. Benjamin E. Goldsmith, Charles R. Butcher, Dimitri Semenovich, and Arcot Sowmya. 'Forecasting the Onset of Genocide and Politicide: Annual Out-of-Sample Forecasts on a Global Dataset, 1988-2003,' *Journal of Peace Research* Vol. 50. No. 4 (2013), pp. 1-16.

⁵⁰ See Paul Kennedy discussion of artful language, *The Parliament of Man: The Past, Present and Future of the United Nations* (London: Random House, 2006), pp. 33-47, quote taken from p.45.

⁵¹ Alex Bellamy, "Making RtoP a Living Reality: Reflections on the 2012 General Assembly Dialogue on Timely and Decisive Response", *Global Responsibility to Protect*, Vol. 5. No.1 (2013), pp. 109-125, p. 119.

⁵² Report of the Secretary-General, *Responsibility to Protect: Timely and Decisive Response* A/66/874-S/2012/578, 25 July 2012, p.6.

⁵³ Robert Jackson, *The Global Covenant, Human Conduct in a World of States* (Oxford: Oxford University Press, 2000), p. 20.

⁵⁴ Antonio Cassese, Paola Gaeta, Laurel Baig, Mary Fan, Christopher Gosnell, and Alex Whiting (revisors), *Cassese's International Criminal Law* (Oxford: Oxford University Press, 2013), p. 67.

⁵⁵ Schabas *Genocide and International Law*, pp. 230-240.

⁵⁶ Gareth Evans and Ramesh Thakur, Robert A. Pape, 'Correspondence: Humanitarian Intervention and the Responsibility to Protect', *International Security* Vol. 37. No. 4 (Spring 2013), pp. 199-214, p. 210.

⁵⁷ Theresa Reinold, *Sovereignty and the Responsibility to Protect: The Power of Norms and the Norms of the Powerful* (New York: Routledge, 2013) p. 50.

⁵⁸ Theresa Reinold, *Sovereignty and the Responsibility to Protect: the power of norms and the norms of the powerful* (New York: Routledge 2013), p. 109.

⁵⁹ Thomas G. Weiss, 'The Sunset of Humanitarian Intervention? The Responsibility to Protect in a Unipolar Era', *Security Dialogue* Vol. 35. No. 2. (2004), pp. 135-153.

⁶⁰ Oliver O' Donovan, *The Just War Revisited* (Cambridge: Cambridge University Press, 2003) 14.

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⁶¹ Nicholas J. Wheeler, *Saving Strangers Humanitarian Intervention in International Society* (Oxford: Oxford University Press, 2000)p, 33.

⁶² Anonymous, 'Syria and the Indicators of a 'Manifest Failing' International Journal of Human Rights (forthcoming, 2014).

⁶³ Alex Bellamy, *Mass Atrocities and Armed Conflict: Links, Distinctions, and Implications for the Responsibility to Prevent* (The Stanley Foundation, February 2011, 1-20). Martin Shaw, *War and Genocide: Organized Killing in Modern Society* (Oxford: Polity, 2003).

⁶⁴ UN Secretary-General, *Responsibility to Protect: State Responsibility and Prevention* (9 July 2013) A/67/929-S/2013/399. This is not to suggest that he raises this point in relation to manifest failing or is pro-indicators.

⁶⁵ Fernando Tesón, 'The Vexing Problem of Authority', *Wisconsin International Law Journal* Vol. 24. No. 3, (2006) 761 – 772.

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