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6 Responsibility contestations

A challenge to the moral authority of the UN Security Council

Antje Wiener

Introduction[1]

Agents of global governance typically operate within an environment that extends beyond the territorial borders of national government. The norms, which are constitutive of justice in global society, are therefore generated and re-enacted through interactions within a spatio-temporal context of "criss-crossing normative orders" (Tully 2012: 261). These orders are rooted in both domestic (mostly but not exclusively) nationally agreed norms that are regulated by constitutional frameworks, and inter-nationally agreed norms that are regulated by the treaty regimes of international law, the politics of international organisations as well as multilateral diplomatic practices. If legitimacy is considered as a "local–global" relation (Zwingel 2012) in global international relations (IR),[2] then moral authority matters with regard to the responsibility to maintain and warrant justice, and, relatedly, the opportunity to contest and overcome injustice (Ackerly *et al.* 2017). Following "interactive international law" (Brunnée and Toope 2010a), it is held that beyond formal assignment to a post, moral authority is derived through the practice of public interaction. According to discourse ethics in IR, such moral authority depends on the individual's capability of making moral decisions (Frost 1998; Havercroft 2017b; Robinson 2009). It follows, that in addition to formally established authority structures directly based on a particular site in the normative structure of global governance, moral authority depends on ongoing interactions among individual agents as they practise legality thereby generating normative grids on local sites.

While formal moral authority is ascribed by formal regulations and principles of governance, as identified in a governance setting, the morality, which is constituted through public interactions on local sites, stands to be reconstructed with reference to individual interventions that are practised in a variety of contexts. It follows that, to examine the effect of recurring challenges to moral authority *through* responsibility contestations, it is important to study distinct "normative structures of meaning-in-use" (Milliken 1999: 231). These structures are constituted through both large regulatory and cultural practices, and have

been identified as the formal and informal aspects of the nomos (Tully 1995). Both are re-/enacted by a variety of global agents. Accordingly, this chapter begins from the general assumption that culturally diverse and criss-crossing normative orders matter for identifying the effect of responsibility contestations in global society. They set distinct conditions to interact and engage in "struggles over recognition" (Owen and Tully 2007). This is reflected in the distinction of regulatory practices that are constitutive for global governance institutions, on the one hand, and cultural practices that are constitutive for layers of cultural meaning in global society, on the other. While normative constraints and opportunities have been constituted through common regulatory practices of global governance, the meanings undergirding justice in global society are 'bound up' through practice in localised settings (Bueger 2014; Bueger and Gadinger 2015; Hofius 2016).

Crucially, therefore, in the global terrain agents operate under the condition of *unequal access to agency*. This condition is due to the distinct regulatory and cultural practices that constitute the respective normative structure of meaning-in-use at the three macro-, meso- and micro- 'levels' of global governance, on the one hand, and distinct, yet relatedly, at the 'layers' of global society, on the other. While the normative structure of meaning that is constituted by the formal institutional setting of international organisations is largely shared by the heads of state and government representatives who are responsible for signing treaties and conventions, by contrast, the normative grids generated by localised practices differ according to societal field and geographical location. As Tully notes, the "field of legal and governmental pluralism consists in networks of legal, social, spiritual and ecological norms and governance among all living beings" (Tully 2012: 238, citing Brunnée and Toope 2010a). These remain to be studied

> from the specific perspective of the people who are subjects of a multiplicity of these normative orders and who seek to exercise agency within them in order to make them more just. The crucial feature of normative orders, from this perspective, is that they are actually grounded in the day-to-day *practices of participation* of the agents (individual and collective) who are subject to them (both governors and governed). From this 'interactional' perspective, modes of law and governance gain their democratic authority from the quality and effectiveness of participation available to and exercised by the demos within them.
>
> (Tully 2012: 238–239, citing Brunnée and Toope 2010a)

The resulting gap in global IR, which remains to be filled to counter injustice and enhance access to contestation, therefore, represents distinct normative structures of meaning as the living structures of criss-crossing normative orders. For moral authority, the distinctive feature that differentiates agents who merely partake in global governance, on the one hand, and agents, who enjoy access to agency, on the other, consists in the right to critically engage with the norms of

governance based on "regular access to regular contestation" about norms (Wiener 2014: 1). This difference regarding access to agency is substantiated by the conceptual definition of contestation as a reactive practice that expresses objection to norms, and a proactive practice that enables critical engagement with norms (Wiener 2017). This chapter seeks to illustrate how this distinctive feature bears out in the larger context of global society. To that end, it addresses two scenarios where moral authority is contested: the first scenario addresses the *Kadi* case.[3] In this legal case, the reconstruction of the contested claims for the responsibility to protect fundamental rights of individuals by the UN Security Council (UNSC) and the European Court of Justice (ECJ) demonstrate that effectively the political challenge to moral authority is at stake. The second scenario addresses contestations of the Responsibility to Protect (R2P). In this case, the contestations are initiated by the BRICS[4] states, and therefore from within the normative structure of the UN. The fundamental norm of sovereign rights of states is at stake. And, as in the first scenario, the UNSC's moral authority is under challenge. Both scenarios are situated within the broader normative governance structure of the UN. They therefore demonstrate how the norm contestations take effect on the UNSC. Ultimately, they demonstrate that the UNSC's moral agency is affected by the criss-crossing normative orders with roots in domestic (mostly national), regional, and inter-national encounters.

It is as argued that the political importance of the distinctive feature between agents operating as subjects under conditions of criss-crossing normative orders comes to the fore in relation to the contested implementations of the responsibility norm. According to international ethics scholarship, responsibility requires agents to obtain the "capability" of political agency (Erskine 2008). And IR ethics literature has particularly stressed that this capability depends on the possibility of practising moral authority individually. As Mervyn Frost notes, "in practice, constitutive theorists have done very little of this kind of theorizing. They do not for the most part tackle the question 'What would it be ethical to do in the circumstances'" (Frost 1998: 127). In order to act morally responsible then, agency requires political capabilities. As Cornelia Ulbert demonstrates convincingly, based on the concept of the "geography of responsibility" the principle of Common but Differentiated Responsibility (CBDR) and its declining legitimacy actually depends on contested moral capability options of the involved states (see Ulbert, Chapter 7). Equally mindful of the relation between culturally diverse agents and the distinct—regulatory and cultural—roots of moral capabilities, this chapter argues that unequal conditions of access to regular contestation (i.e. the precondition for obtaining agency) effectively constrain the capability of individual moral authority. The following proceeds in three steps: section one introduces an argument that takes up the call for more distinctly normative research on norms in IR theory. The second section presents the two case scenarios that highlight instances in which contestations of fundamental norms challenge the moral authority of the UNSC from different vantage points in global society. The third section concludes with a summary note on the effect of norm contestation and the challenge of moral authority in global IR.

Agency and moral authority in global IR

The putative definition of legitimate governance links the fundamental right of an agent who is subjected to norms of governance to engage with these norms. Most generally, the argument rests on the central notion that normative validity is generated and confirmed intersubjectively (Habermas 1988; Kratochwil 1984). The claim initiated the move from positivist towards constructivist regime theory and formed a central pillar of the constructivist turn (Kratochwil and Ruggie 1986). Important qualifications of the claim became evident when one group of social (or liberal) constructivists reduced the perspective on norms by studying regulative and constitutive norms only, while leaving evaluative and cultural norms to one side (Katzenstein 1996; see critically Wiener 2007a). The focus on 'logics' of action (see Pouliot 2008; Risse 2000) was conducive to norms research on norm-following and entrepreneurship, taking a predominant interest in compliance and diffusion of norms (i.e. the normalcy dimension of norms). This left the issues of 'contested compliance' and 'norm challenge' which highlighted norm generative practices of contestation (i.e. the normativity dimension of norms) largely off the radar of the liberal constructivist plotter (Wiener 2007b). The distinctive qualifier among both strands of norms research is that the conditions under which norms are considered as in principle contestable, and relatedly, the moral authority exerted in the process (Havercroft 2017b) remain to be explored in more detail. This chapter seeks to contribute to fill that gap in the norms literature.

While sharing the discourse ethical approach, to some the right to contestation exists in principle, however, within the limits of a given normative order (Habermas 1988). To others, the right to contestation refers to practices of contestation that apply to all norm types (Tully 2004). That is, while they are considered as the fundamental norms of the Enlightenment, the "trinity" of human rights, democracy, and the rule of law, are and ought to be contestable, in principle, and at all times (Kumm *et al.* 2017). The decisive conceptual impact of a distinction between the two strands of constructivist norms research in IR (i.e. as considering exclusively the 'normalcy' dimension or norms, or favouring a bifocal perspective on normalcy and 'normativity' of norms) is highlighted with reference to the "typology of norms" (Wiener 2008: 66). For it demonstrates the crucial distinction between studies that maintain the 'trinity' as non-contestable and those which elaborate on the way fundamental norms are constructed and re-enacted through contestations in distinct locales in global society. As this chapter argues, the UNSC's moral authority is challenged through contestations of fundamental norms. At the same time, as norm generative practices, these contestations are vital for identifying alternative policy options. As norm generative practices, contestations are likely to open windows of opportunity based on emerging 'ground rules'. To identify these, the norm typology is key.

It distinguishes three types of norms according to their respective moral reach and degree of generalisation. Accordingly, fundamental principles have the broadest moral reach, and the lowest degree of contestation (*type 1* norms);

organising principles are of medium moral reach and medium degree of contestation (*type 2* norms); and standardised procedures and regulations entail the least moral reach and highest degree of contestation (*type 3* norms). 'Explanatory' or 'liberal' constructivist norms research applying the Habermasian principled approach would allow for contestation of *type 1* and *type 3* norms. Both are clearly visible and exist prior to interactive practices of norm validation. By contrast, 'critical' or 'agonistic' constructivists who apply the political approach to norms allow for the contestation of all three types (see Havercroft 2017a; Wiener 2008, 2014, 2017b). As Tully emphasises, "[t]o overcome this detachment from interaction as political struggles on the ground", he therefore suggests turning directly to the "field of interaction in which the conflict arises" (Tully 2004: 86). That is, the conditions of access to contestation stand to be assessed empirically and normatively in each of the globally criss-crossing normative orders. To that end, a bifocal approach begins from conflict to identify the degree to which normative recognition is—and remains to be—achieved through contestation (Laden and Owen 2007; Owen and Tully 2007). The approach centres on conflict and the process and practices that evolve in order to 'resolve' it, rather than focusing on a given norm and its implementation (Tully 2004: 86).

Agency depends on the terms of engagement. It is never practised in a vacuum (see Brunnée and Toope 2010a, 2011, 2016; Finnemore and Toope 2001; Forst 2010). As noted above, these terms of engagement are generated through the respective large regulatory and cultural practices which set the institutions of global governance and the layered knowledge of global society, respectively. As the social constructivist literature on norms has demonstrated, engaging with norms involves activating socio-cultural experience that has been generated by individual background experience (Adler and Pouliot 2012; Pouliot 2008) and normative structures of meaning-in-use. It follows that through their everyday practice, agents of global governance and global society contribute to normative change. Whether and how the distinct levels of governance/layers of society are affected, depends on the type of—reactive or proactive—contestation that is practised at the micro-, meso- and macro-layers of global social order (see Hofius 2016; Milliken 1999; Onuf 1994; Steffek 2004; Tully 2008). All agents in international relations encounter themselves in and thereby contribute to re-enacting the normative structure of meaning-in-use. That interactive practice is always reconstitutive. This said, not all agents are equally capable of developing agency. The norm generative effect of contestation as the mere objection to norms allows stakeholders a minimal impact on moral change. By contrast, when enjoying regular access to contestation, a stakeholder obtains the option to contribute and change normative validity claims through proactive engagement with norms. With regard to the responsibility norm Cornelia Ulbert calls this context of constraints or opportunities the "geography of responsibility", i.e. an institutional landscape which has been constituted through engagement with selected responsibility norms (see Ulbert, Chapter 7).

To assess the effect of these challenges on moral agency, the following addresses instances where the UNSC's moral authority has been undermined, despite the

international treaty regimes in which the contested norms are formally embedded. It is argued that, if not properly addressed, the normative fragility is likely to mark a critical juncture with regard to the UN's role as a framework that sets an enabling landscape for the 'geography of responsibility'. This landscape is shaped through the potential of moral agency (i.e. conditioned by organising principles in specific areas or treaty regimes such as, for example, R2P, CBDR, or the precautionary principle) on the one hand, and the quality of normative orders (i.e. regulatory institutions, constitutional principles, and treaty regimes) on the other. Against these conditions, moral authority stands to be reconstructed and evaluated by zooming in on instances of conflict where norms stand contested within the UN's main institutional settings. The chapter follows the volume's overarching claim that norm contestation is central for studying the *politics* of responsibility in global IR.

Moral authority

So moral authority is constrained and enabled by specific institutional settings of criss-crossing normative orders within global IR. This is valid for both global governance and societal institutions. An "*institution* in this context is meant to reflect the ways society orders its social systems and the way that formal and informal leaders influence and guide the efforts of their populations" (Cerami 2011; emphasis added). As the changing 'geography of responsibility' demonstrates, in most areas where the politics of responsibility matter, norm implementation turns out to be a complex spatio-temporally distinct procedure. I therefore have suggested speaking of "stages of norm implementation" in the cycle model (Wiener 2017) and to distinguish between practices of constituting, referring and implementing norms, respectively. The cycle model allows for taking into account distinct cultural roots and the respective expectations towards the effects of moral authority in selected operations. The literature that leads beyond Western-style organisational logics and strategising, is therefore of prime importance for understanding the complexity of the geography of responsibility. It focuses on the levels of governance and normativity, regional and cultural plurality as well as the diverse set of actors reflected in access to moral agency. It follows that the interplay between two factors matters. They include, first, distinct levels of order where global normativity stands to be negotiated such as the macro-level of norm setting in the context of global governance institutions, the meso-level of norm negotiation in contexts of deliberation among stakeholders and a range of non-governmental organisations, and the micro-level of norm implementation where the expected norm followers come into play as individual (group, firm, or other) agents (see Park and Vetterlein 2010; Tully 2008; Wiener 2014). Second, the distinguishing factors include a plurality of geopolitically and culturally distinct regions, all of which generate their own specific practices of governance. This plurality includes for example perceptions of the 'West' and the 'others', the rising powers such as the BRICS states, the diverse perceptions of Asia including the Indian subcontinent, South East Asia and the WANA region (West Asia and North Africa), and so on. To illustrate how this plays out with regard to challenges to moral authority of the UN, the following zooms in on two scenarios.

The politics of responsibility: contested moral authority

Following Jean Cohen's question of "whose sovereignty matters" in 21st century international relations (Cohen 2004) this section reconstructs moments of conflict when fundamental norms of the UN's overarching normative order stand contested. The first scenario refers to the responsibility to protect fundamental rights of individuals. Here, the UNSC's moral authority was challenged by the ECJ. In their judgment in the *Kadi* case the moral authority of the EU's regional governance institutions is pitched against that of the UN and its global governance institutions, especially the UNSC. The second scenario refers to the R2P norm where the moral authority of the five permanent members of the UNSC (P5) was contested by the BRICS countries (i.e. the BRICS countries' call for 'Responsibility while Protecting', RwP).[5]

It is argued that the public reoccurrence of such moments of norm contestation of moral authority within the UN signals a decline of the UNSC's until now relatively solid role in sustaining what was long perceived as the liberal community of states (Slaughter 2017). These norm contestations raise the larger issue of 'whose norms count' in today's diverse setting of global IR. While the point needs to be proven through much more systematic case studies, recent research on norms in the field of international development studies has convincingly argued that 'norm ownership' makes a difference for how norms 'work' (Kratochwil 1984; Park and Vetterlein 2010). To explore this claim, the following recalls selected moments of norm contestation in global governance and identifies the respective contestation of moral authority at the time.

Fundamental rights of individuals: the Kadi *case*

A major change to the global "permissive consensus" (Zürn *et al.* 2012) *vis-à-vis* the normative order which is represented, defended, and promoted by the UN's long-standing transregional moral authority occurred when the UNSC began to take control over decisions about fundamental norm implementation. These decisions involved the application of new mechanisms to control and counter international terrorist practices in the 1990s. The European arbitration with regard to *Kadi* shed light on that change when it revealed the links between the UNSC's Sanctions Committee, which had been established to counter terrorist activities in 1999,[6] and the decision to implement the novel instrument of applying 'smart sanctions' including the 'blacklisting' of individuals that effectively results in freezing an individual's accounts, thus impeding any border-crossing activities on their account. A major public contestation of the UN as a protector of fundamental rights of individuals occurred when the EU's legal institutions took issue with such blacklisting in the *Kadi* case. Here, the ECJ cautioned against the allegedly insufficient fundamental rights protection on behalf of the UNSC. At the time,

Advocate General (AG) Miguel Poiares Maduro argued that in light of this omission, the "European legal order" as a "new legal order" that rested on its "basic constitutional charter"[7] would have to provide that protection instead. While the argumentation in the files documenting the arbitration in the prolonged proceedings of *Kadi* remained widely unnoticed by political scientists and the media, it triggered exhaustive debates about the role of law and the rule of law among some of the leading learned scholarship on a global scale (see De Búrca 2009; Kumm 2009; Eckes 2009; Cohen 2010; Cremona 2011; Isiksel 2010 from a political science perspective) to the extent that the case was discussed as a major challenge to the power of international law (De Búrca 2009).

Quite to the contrary, for political scientists the case indicates a major shift in the normative order because it challenges the UN's claim for transregional moral authority. The following excerpts from the arbitration demonstrate how. As AG Maduro noted with regard to the prior judgment of the European Court of First Instance (CFI):

> where pleas are raised concerning *alleged breaches of fundamental rights*, it is preferable for the Court to make use of the possibility of reviewing those pleas as well, both for reasons of legal certainty and in order *to prevent a possible breach of fundamental rights from subsisting in the Community legal order.*
>
> (Opinion of the AG Miguel Poiares Maduro, Para. 16; emphasis added)

The importance of the obligation to protect the fundamental rights of individuals, even by political organisations beyond the national state and therefore unbound by their fundamental constitutional norms, is emphasised by the AG's explanation in Para. 19 when he notes that:

> neither Article 103 of the UN Charter nor those resolutions could have the effect of precluding the courts from reviewing domestic implementing measures in order to assess *their conformity with fundamental rights.* [. . .] *So long as the United Nations do not provide a mechanism of independent judicial review that guarantees compliance with fundamental rights* of decisions taken by the Security Council and the Sanctions Committee, the Community Courts should review measures adopted by the Community institutions with a view to implementing those *decisions for their conformity with fundamental rights as recognized in the Community legal order.*
>
> (Opinion of the AG Maduro, Para. 19; emphasis added)

The AG directly contests the normative legitimacy of the UN decision-making body when noting that, if decisions under Chapter VII of the UN Charter were in breach of the fundamental rights protection provided by the European legal order, then the latter's normative assessment was to prevail over the former:

> The claim that a measure is necessary for the maintenance of international peace and security *cannot operate so as to silence the general principles of*

> *Community law and deprive individuals of their fundamental rights* [. . .]. Certainly, extraordinary circumstances may justify restrictions on individual freedom that would be unacceptable under normal conditions. However, that *should not induce us to say that "there are cases in which a veil should be drawn for a while over liberty*, as it was customary to cover the statues of the gods".
>
> (Opinion of the AG Maduro, Para. 34–35; emphasis added)

In effect, the arbitration in the *Kadi* case raised substantial criticism with regard to the UN's failure to uphold their obligation to protect individual rights. Even if the public profile of the case remained relatively low key, the UN's moral leadership was called into question following the UNSC's practice of undermining the responsibility of securing the protection of fundamental rights of individuals. A follow-up judgment in *Kadi II*[8] stressed the impact of these contestations by noting that:

> The *Court of Justice in fact scrutinised the UN system*; and "such judicial review is liable to encroach on the Security Council's prerogatives".
>
> (*Kadi II*, Para. 114; emphasis added)

As observers noted at the time:

> The General Court therefore read into the Court of Justice's *Kadi* decision an element of potential deference reminiscent of the first 'Solange' ('so long as') jurisprudence of the German Federal Constitutional Court: *So long as the UN system does not offer effective judicial protection, the EU has to do so.*
>
> (Stahlberg 2010; emphasis added)

The summary of the judgment again points to the UN's lacking institutional means for implementing appropriate measures for the protection of fundamental individual rights *vis-à-vis* the alleged culprits targeted by the UNSC. The reconstructive analysis sheds light on how the involved agents re-enacted the normative structure of meaning-in-use with regard to the fundamental human rights of individuals. As this analysis reveals, notwithstanding the actual decision in the case, the deliberations and arbitrations surrounding *Kadi* challenge the UNSC's moral authority. They question the UNSC as a collective agent insofar as the failure to comply with the obligation to protect fundamental rights of individuals has prompted the EU's regional agents to perform that protective role themselves.

Following these arbitrations and related contestations by political observers and the representatives of individuals who had been targeted by the instrument of blacklisting, the UN set up the new Office of an Ombudsperson of the Security Council's 1267 Committee[9] to oversee complaints of those listed.[10] The ombudsperson is mandated with the task to "gather information and to interact with the petitioner, relevant states and organizations with regard to the request. Within an established time-frame, the Ombudsperson will then present a comprehensive report to the Sanctions Committee".[11] The main point of this illustration was to

shed light on the substantive contestation about the moral authority with the responsibility to protect fundamental rights within global (sic) society. As the legal bodies of the EU as a regional order challenge the UNSC and, relatedly, the UN's transregional claim for moral authority in protecting the trinity of fundamental norms, the inter-related re-enactment of normative meanings-in-use among criss-crossing normative orders comes to the fore. The emerging 'ground rule' or organising principle which was foregrounded during the contestation was the '*Solange*' rule maintaining that, 'as long as' (lit. transl. of German '*solange*') the UNSC is not in a position to provide the instruments (*type 3*) to protect the fundamental norm of fundamental rights of individuals (*type 1*), its moral authority is challenged. Hence, a facilitative ground rule legitimises the ruling in favour of the litigant in the *Kadi* case. The scenario illustrated that the contestatory practices involved arbitration in formal legal proceedings, political deliberation, and learned scholars' assessments. The practices thus involved a plurality of regional, national, and group-based agents, in a range of distinct environments involving diverse modes of contestation. The outcome of the process contributed to formal institutional change on behalf of the contested moral authority's normative structure within the immediate global governance context.

The Responsibility to Protect: sovereign power of member states

The R2P norm has been conceived as a new norm in the aftermath of the decision in favour of the NATO's military intervention to protect human rights (*type 1* norm) in the 1999 Kosovo conflict (see Bellamy 2008; Brunnée and Toope 2010b; Erskine 2010; Welsh 2013). Its central function in global IR consists in offering the discursive frame to facilitate talk about the ground rules and specific mechanisms to actually protect human rights in global society. As this illustrative scenario about the proposal to replace R2P with RwP seeks to demonstrate, the criss-crossing normative orders are constitutive of and constituted through a diversity of agents. This diversity has generated conflict about the R2P norm along the is/ought-dimension. Specifically, the UNSC's potential authority to undermine UN member states' sovereignty when implementing the Responsibility *to* Protect norm, was of prime concern for the BRICS. By proposing the Responsibility *while* Protecting initiative the BRICS effectively regained moral authority based on the removal from decisions about sovereignty from the macro- to the meso-stage in global IR. To establish the effect of norm contestation on the challenge of UNSC's moral authority (and, relatedly, how to counter it), it is less important whether R2P is a 'legal' norm (see Hehir, Chapter 5), than how the norm works with regard to the most effective protection of human rights at times of crisis. For example, in her assessment of the narrative Jennifer Welsh argues, "the norm of R2P is best conceived of as a responsibility to consider a real or imminent crisis involving mass atrocity crimes—what in legal literature is sometimes called a 'duty of conduct' "(Welsh 2013: 368).

While after the first decade of its existence it has been evaluated as an "emergent norm" by lawyers (Brunnée and Toope 2010b), R2P was quickly referred to as a

'norm' by the constructivist-leaning norms literature (Gholiagha 2015; Welsh 2013). Within this chapter's framework, R2P is qualified as an organising principle or a ground rule (*type 2* norm) insofar as it emerged from the policy and political process about the R2P. As a *type 2* norm, R2P has emerged from and been re-enacted by the contestatory practices among agents within the UN's normative structure which have generated the three-pillar structure towards the norm's implementation (*type 3* norms). It was developed by the Report of the International Commission on Intervention and State Sovereignty (ICISS) in Ottawa in 2001, and its implementation was mandated at the UN World Summit in 2005 (Bellamy 2008; Gholiagha 2014). The Secretary General's 2009 implementation report suggests a three-pillar strategy to that end.[12] The pillars include (1) the protection responsibilities of the state, (2) international assistance and capacity building, and (3) timely and decisive response (see Gholiagha 2015 for a review). While international lawyers have been particularly interested in establishing the legal quality of the norm, raising the question of whether or not after a decade's existence the norm has crossed the threshold from a political principle to a legal norm (Brunnée and Toope 2010b), others have argued that what matters most regarding the R2P norm is whether or not it is generally complied with and accepted. As Welsh observes "there is continuing contestation within international society about how and to what degree R2P should be operationalized, and—more fundamentally—about the legitimacy of certain interpretations of R2P's content" (Welsh 2013: 366). The sheer number of engagements with and deliberations about the norm have enhanced R2P's increasingly central role in discussions over if, how, and when to enact the norm (Gholiagha 2014).[13]

The proposal to replace R2P with the concept of RwP emerged from both within and outside the UNSC. Some of the contestations that were led in public and outside the confines of the UNSC involved a range of non-state stakeholders. The contestations involved in particular representatives and advocacy groups from the 'rising powers' from the 'Global South'. For example, some of the BRICS states, in particular Brazil, suggested a different terminology of the norm as the RwP.[14] As Kai M. Kenkel and Christina G. Stefan find, the contribution of RwP "lies in reconciling supportive and dissenting views on R2P, including those from both the Global North and South, in the wake of the divisive 2011 intervention in Libya. In this sense, it is an example of the shaping of a norm, done by an emerging power availing itself of the platform offered by non-permanent membership in the UN Security Council" (Kenkel and Stefan 2016: 41).

Taking this chapter's focus on the changing moral authority of the UNSC into account, the most interesting aspect that was highlighted through these contestations was the engagement with the meaning of the norm. The contestants sought to replace 'to protect' with 'while protecting' thereby bringing concerns about the involved parties sovereign status to bear. Thus, RwP reflects the "fear that R2P might be instrumental in legitimising military interventions carried out for the pursuit of vested political, economic or strategic interests, other than those strictly related to humanitarian concerns" (Costa Vaz 2013: 196; see Kenkel and Stefan 2016: 45). The issue then was less one of 'legality' but about engaging

in a discussion about 'meaning'. As the *Guardian* noted, there is considerable contestatory power behind these discursive interventions (i.e. revealing a weight which was not merely due to Brazil's aspirations to an elected seat in the UNSC).[15] Following the former Brazilian President Dilma Rousseff's suggestion to consider the RwP norm as a complementary norm to R2P, a public deliberation about the concept including a diverse group of UN delegations as well as external observers such as, for example, the EU, was organised by the Permanent Mission of Brazil on 21 February 2012 as "an informal discussion" at the United Nations. The discussion was co-chaired by Brazil's Minister of External Relations, Ambassador Antonio de Aguiar Patriota, and UN Special Adviser for the Responsibility to Protect, Dr Edward Luck.[16] The high public interest in the matter across a range of state-plus agents was noticeable. Reportedly, "[t]hirty-seven Members States, Observers and NGOs asked to speak at the meeting", according to the International Coalition for the Responsibility to Protect (ICRtoP 2012). The essence of this critical intervention into the R2P discourse was an interest on the part of the involved interlocutors to be able to maintain their sovereign powers while engaging in activities of humanitarian intervention. At the event Special Adviser Luck argued for example that:

> [r]esponsibility entails early engagement, proactive prevention, *agile employment of non-coercive instruments*, careful planning, and sober *judgment by the appropriate Charter-authorized organs*. Delaying a response does not make it more responsible.
>
> (ICRtoP 2012, emphasis added)

And the Costa Rican delegation noted that:

> the discussion was not calling into question the idea of protecting civilians, but rather raising legitimate *concerns on the application of the use of force*; concerns "of an *operative*, rather than conceptual, *nature*".
>
> (ICRtoP 2012, emphasis added)

These challenges of R2P as a *type 2* norm illustrate its facilitative role: as an organising principle R2P brings agents to the table who share the broad moral claim of human rights protection, yet, who prefer distinct means of implementation. More profoundly, the BRICS states' intervention and the proposal to replace R2P with RwP challenges the UNSC's moral authority as a representative body with a concern for other groups of states, such as the BRICS.

According to the distinction of three norm types (i.e. fundamental norm, organising principle, standardised procedure, respectively) the RwP proposition implies considering the norm as an organising principle (a *type 2* norm). For, first, it has predominantly evolved through a political process (i.e. through stakeholder contestations); and second, and relatedly, it has contributed an alternative or a complementary principle at the meso-level of global governance. That is, the validity of the norm is neither set exclusively by its formal validity (as per

mandate given at the UN World Summit) nor is it purely instrumental (as per the UN's implementation details). Instead, its value has been forged through interaction among involved stakeholders. The legal term 'duty of conduct' matches the notion of R2P as a meso-level organising principle very well. The higher and more diverse the involvement of the group of stakeholders, the more likely is the norm's acceptance due to the constitutive impact of a plurality of agents. While no formal changes have taken place, largely due to reasons of changing political power in the root country of Brazil as the leading agent of the BRICS states' challenge of the UNSC, the concept has made an impact on the normative structure of meaning-in-use. The residue of the resistance has been generated by a diverse set of stakeholders on a widely visible platform which enhanced the moral agency of these challengers and questioned the UNSC's moral agency. Whether or not the residue will be revived and come to fruition in the long run remains to be established.

Conclusion

As this chapter seeks to demonstrate, the potential for and effect of moral authority depends on the normative structure that constrains or enables agency in global IR (i.e. reflecting both the formal structures of global governance and the informal socio-cultural normative grids). These conditions are demonstrated by the two scenarios on distinct contestations of fundamental norms in global society with an effect on the UNSC's moral agency. In turn, the two scenarios in which the moral authority of the UNSC is challenged with regard to its capacity to enact the responsibility norm highlight the contestation of fundamental norms. The legal contestation in the *Kadi* case questions the UNSC's moral authority to protect fundamental rights of individuals; and the political contestation in the RwP scenario challenges the UNSC's moral authority to undermine national sovereignty. As the chapter detailed with reference to the typology of norms, distinct practices of contestation, and norm validation, the conditions for access to contestation set a reciprocal pre-condition for moral authority. In the *Kadi* case scenario litigants complained about the lack of existing legal mechanisms that would facilitate legal contestation of the UNSC's 'blacklisting instrument'. In turn, in the RwP scenario, the involved non-state and civil society agents complained about the lack of convincing political mechanisms to implement the R2P three-pillar structure.

The chapter addresses challenges of the UNSC's moral authority within the 'global geography of responsibility' with reference to the normative structure of the UN. To that end, it zoomed in on two illustrative scenarios where the principle of responsibility stands contested by a plurality of agents, both within (R2P) and outside (*Kadi*) the UN setting. Both scenarios raise questions about the role of moral authority. As both instances of contestation reveal, the mere observation of contested normativity does not suffice for drawing conclusions about fading authority. Yet, based on the distinct modes of contestation and their origin in different contexts of global governance, such as the legal context of arbitration of

Table 6.1 The UNSC's contested moral authority: *Kadi* and R2P/RwP

Moments of conflict	*Type 1 norm*	*Type 2 norm*	*Contesting agents*	*Outcome normative structure*
Kadi case	Fundamental rights of individuals	'*Solange*' principle	ECJ, AG, ECFI, individual litigant	Formal: Ombudsperson's Office
Responsibility to Protect	Human rights; sovereignty	R2P vs RwP	BRICS; plurality of agents: government representatives, advocacy groups	Informal: platform for intervention (UN fringes); RwP as complementary to R2P; enabling dissenting voices

Source: Author's own table.

the *Kadi* case and the context of the public space in which degrees of *responsibility* were justified by a diverse set of actors, it is possible to assess stronger and weaker aspects of moral authority profiles within the UN. For example, the stronger aspects, which will require more far reaching institutional change, involve the case of fundamental rights contestation in *Kadi*. The formal institutional change presented by the new Ombudsperson's office indicates the highly sensitive subject, and the force of the discursive intervention uttered by the European courts denotes the normative power that is at stake here. In turn, the case of R2P and the complementary RwP norm offers the most notable and forward-looking output that may possibly be generated through contestation. By advancing RwP as an alternative which keeps with the focus on the same fundamental norm, the contestations opened the possibility for dissent to a plurality of actors. While challenging the moral authority of the UNSC, these contestations thus effectively allow for soft diplomacy to unfold by way of participatory regular contestation (compare Table 6.1). While more and regular access for all stakeholders should be enabled in the long run, the debate initiated by Brazil's former President Rousseff indicates the norm generative power of norm contestations.

Notes

1 This chapter was written while the author was a Visiting Fellow at the Lauterpacht Centre of International Law and at Hughes Hall at the University of Cambridge (2016) and held an Opus Magnum Fellowship grant by the Volkswagen foundation (2015–17). All are thankfully acknowledged. For comments on the first draft I thank the editors of this volume, especially Cornelia Ulbert and Elena Sondermann.
2 This has been identified as central to the project of global IR theory (Acharya 2016; Hurrell 2016).
3 Judgment of the Court (Grand Chamber) of 3 September 2008—*Yassin Abdullah Kadi, Al Barakaat International Foundation v Council of the European Union, Commission of the European Communities, United Kingdom of Great Britain and Northern Ireland* (Joined Cases C-402/05 P and C-415/05 P); OJ EU 11.8.2008, C/285 2ff, see http://eur-lex.europa.eu/legal-content/en/TXT/PDF/?uri=uriserv%3AOJ.C_2008.285.01.0002.01.ENG.

4 BRICS is the acronym for the association of the five emerging countries Brazil, Russia, India, China, and South Africa.
5 For the leading literature on this shift in the R2P policy development, see especially Stefan (2016), Stuenkel (2016), and Ziegler (2016).
6 The Sanctions Committee was established according to paragraph 6 of Resolution 1267, adopted by the UNSC at its 4051st meeting on 15 October 1999 (S/RES/1267 (1999), available at: http://www.refworld.org/docid/3b00f2298.html.
7 Para. 16, 17, 21 of the Opinion of the AG Miguel Poiares Maduro on the Joined Cases C-402/05 P and C-415/05 delivered on 16 January 2008, see http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1427190174892&uri=CELEX:62005CC0402.
8 Case T-85/09, *Yassin Abdullah Kadi v European Commission*, Judgment of the General Court on 30 September 2010, (*Kadi II*), see http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?isOldUri=true&uri=CELEX:62009TJ0085.
9 As the UN's website notes, "[t]he Office of the Ombudsperson was created by Security Council resolution 1904, adopted on 17 December 2009, and its mandate was extended by resolution 1989, adopted on 17 June 2011, resolution 2083, adopted on 17 December 2012, and resolution 2161, adopted on 17 June 2014." See http://www.un.org/en/sc/ombudsperson.
10 The Office of the Ombudsperson was first held by Canadian Judge Kimberly Prost. She was appointed by the Secretary General on 3 June 2010 and re-appointed for 30 months on 1 January 2013. The current Ombudsperson Catherine Marchi-Uhel was appointed by the Secretary General on 13 July 2015. She took up her official duties on 27 July 2015. See https://www.un.org/sc/suborg/en/ombudsperson.
11 See https://www.un.org/sc/suborg/en/ombudsperson.
12 Compare the UN Secretary General's Report on the implementation of the norm, A/63/677, 12 January 2009, for details see http://responsibilitytoprotect.org/implementing%20the%20rtop.pdf.
13 For a plea to translate the R2P into a legal obligation see Hehir, Chapter 5.
14 RwP was introduced by Brazilian President Rousseff as "responsibility in protecting" during her address to the United Nations General Assembly in September 2011 and then expanded on in a concept note presented to the UNSC on 9 November 2011 by Brazilian Permanent Representative, Maria Luiza Ribeiro Viotti. Compare a Feature article by the International Coalition for the Responsibility to Protect (ICRtoP) from 14 September 2012, see http://icrtopblog.org/2012/09/14/feature-responsibility-while-protecting-the-impact-of-a-new-initiative-on-rtop.
15 "The shift is a sign of the way that the balance of power and influence is changing in the world, particularly since the global economic crisis. China is now Brazil's main trading partner and the country neither wants nor needs Western loans. Brazil has more diplomats in Africa than Britain. It is a creditor to the IMF, provides development assistance to 65 countries. It is also promoting fora such as India-Brazil-South Africa (Ibsa) and BRICS as well as the G20" (Foley, C., *Welcome to Brazil's version of 'responsibility to protect'*, 12 April), see http://www.theguardian.com/commentisfree/cifamerica/2012/apr/10/diplomacy-brazilian-style.
16 For quite elaborate details on the contributions to these deliberations, see ICRtoP 2012.

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Part III

Practising the politics of responsibility in global governance