The Impact of the Security Council on the Efficacy of the International Criminal Court and the Responsibility to Protect[*]

Dr Aidan Hehir
University of Westminster

Professor Anthony Lang
University of St Andrews

Abstract

This article argues that the manner in which the Security Council inhibits the consistent application of the Responsibility to Protect (R2P) and International Criminal Court (ICC) referrals reinforces their power in the international order without creating long term peace and stability. The Security Council's discretionary powers allow it to subjectively determine which situations to address and which lawbreakers to prosecute; this consolidates, and indeed expands, the power of the Security Council in relation to other agents of international law. As a result, international cooperation to protect and promote human rights and punish human rights violators is currently impeded. This article argues that those concerned with the consistent enforcement of international human rights law, and the punishment of human rights violators, must accept the need for reforms to the current international order that would allow a better integration of R2P and the ICC into international law and practice. Our reforms – advanced in the form of general principles taken from legal theory – propose altering the Security Council's powers and developing new judicial structures to enable the more consistent application of international law.

Introduction

In the mythology of the old west, the sheriff made judgments and executed punishments. His image in popular culture (or, more accurately, American political culture) was of a lone hero standing up to criminals without the backing of a fully defined legal order. But there are two central problems with the sheriff. First, while his role is legally authorized, the sheriff's selection of which criminals to pursue and what punishment to inflict is purely discretionary. As a result, law enforcement reflects his personal and professional interests. Second, he

[*] Dr Aidan Hehir is a Reader in International Relations at the University of Westminster; Professor Anthony Lang holds a Chair in International Political Theory at the University of St Andrews. We would like to thank Jason Ralph for his invitation to be part of this special section, and the reviewers for their helpful insights into the paper. Feedback from presentations at the University of Leeds workshop on R2P and the ICC, and the School of International Relations Research Workshop at the University of St Andrews were also helpful in shaping the argument. A revised version of this paper also appears in V. Heins, K. Koddenbrock and C. Unrau, eds., *Humanitarianism and the Challenges of Cooperation* (London: Routledge, forthcoming 2015)

conflates in one person the three different functions of law in a political order: legislation, judgment and enforcement. While he might have the legal 'right' in one sense - or might see himself as being morally right - to act, in so doing he will increase his own power at the expense of other agents in the community.

International relations has long had self-appointed guardians of law and order – most obviously (and literally) in the case of the George W. Bush era US – who, impatient with the procedural delays that come with formal legal methods, see themselves standing sheriff-like before the onslaught of evil.[1] When emergency situations arise – either terrorists or war criminals – someone ostensibly needs to act to stop them. A sheriff differs from a vigilante, though, in that the former is an official authorized by the state while the latter is an individual acting purely in his or her own interests. The vigilante may be acting in accordance with a shared normative sensibility about who deserves punishment, but that is not an officially sanctioned role. The sheriff, however, is officially sanctioned and may act in conformity with shared normative and legal principles. At the same time, the sheriff consolidates his power with each enforcement action and remains outside of any institutional check or judicial review in his decision on how to, or what to, enforce when it comes to transgressions of the law.[2] Thus, a sheriff's actions may be formally legal but they remain disconnected from justice and, as a result, potentially illegitimate.[3]

Our contention in this article is that humanitarian intervention and the punishment of human rights violators in the current international order is being framed in such a way that it

---

[1] See, C.S, Gray, *The Sheriff: America's Defense of the New World Orde*r (Lexington KY: The University Press of Kentucky, 2004).

[2] See N. Wheeler, 'Reflections on the Legality and Legitimacy of NATO's Intervention in Kosovo' in K. Booth, (ed), *The Kosovo Tragedy: The Human Rights Dimension* (New York: Frank Cass Publishers, 2001) 146-163

[3] We acknowledge, of course, that in some contexts, sheriffs undertook their duties in conformity with the rule of law, such as seeking warrants for arrest and ensuring they did not expand their institutional power. The physical location of the sheriff, cut off from any other legal institutions, meant that in almost all cases his actions would result in his power being increased in relation to those he governed. Further, we recognize that the term sheriff derives from older sources in English law where it had a different institutional relationship to the orders of law.

consolidates the position of sheriffs rather than strengthening judges (a metaphor for a stronger legal order). We focus on the Responsibility to Protect (R2P) and the International Criminal Court (ICC) as evidence of the framework being consolidated that enables the selective and arbitrary use both of military force and punitive censure rather than strengthening the formal procedures of a normative legal order. We argue that the efficacy of both R2P and the ICC remains compromised by the powers vested in the UN Security Council (UNSC) and point to examples from the Arab Spring to illustrate these claims. We argue, that so long as the international legal order remains unchanged, we cannot expect R2P or the ICC to operate in a manner consistent with normatively sound principles of legal theory.

This paper suggests the contours of a reformed international legal order that might better function to protect populations and individuals without creating the problem of the sheriff. It does so not by abandoning law enforcement and punishment, but rather by more clearly articulating how they must be connected to a legal and political order in which law making and law enforcement are clearly defined. Our approach advocates a more explicit constitutional order, one in which the powers and practices of law making are separated from law enforcement and which includes a more purposeful law making, or legislative, function within which norms such as R2P can be translated into rules or even laws. In so doing, we circumvent the idea that making R2P a legal obligation is too difficult, for it both incorporates existing legal principles and also can be made a more robust legal instrument if it arises from a clearly defined law making structure.

In the first section, we briefly review the powers of the UNSC as an institution with 'primary responsibility for the maintenance of international peace and security'. We then turn to the nature of law enforcement and punishment in international relations, with a special focus on the use of force. The next section looks at the manner in which the powers of the

UNSC contrive to inhibit the consistent application of both R2P and the ICC. After exploring these theoretical points, we turn to instances arising from the Arab Uprisings as evidence of this selectivity and punitive elements of the international response. We conclude with general suggestions on the contours of the reforms we feel are required.

The Security Council

The unrivalled power of the UNSC derives from the privileged position given to the five permanent members. Their position reflects their power at the founding of the organization, power levels that continue to be constituted by their military and economic might in the current international order (perhaps more so for some of the five than others).[4]

As noted in our introduction the UNSC has substantially increased its authority in the international order. This increased authority is seen by some as a positive development, but we see its increasing authority as more problematic. To understand why this is the case, it is useful to briefly review the legal powers of the UNSC according to the UN Charter. The powers and functions of the UNSC are laid out in Article 24 of the UN Charter which confers on the UNSC 'primary responsibility for the maintenance of international peace and security'. It then goes on to note that more specific powers are enumerated in Chapters VI, VII, VIII and XII of the Charter. But all these powers relate back to this primary responsibility, one that is conferred on the UNSC by the member states of the UN.

The word 'primary' suggests that while the UNSC may have most of the responsibility for peace and security, it is not the only organ even within the UN system to have this responsibility. Both the General Assembly and the International Court of Justice

[4] D. Bosco, *Five to Rule Them All: The United Nations Security Council and the Making of the Modern World* (Oxford: Oxford University Press, 2009)

(ICJ) also have responsibilities in this area, and, as noted by Anne Peters, 'the different organs must observe the institutional balance and pay each other mutual due respect'.[5]

In addition, within the international or global constitutional order the UNSC might be seem to be an 'executive' body in accordance with the traditional division of powers in a legal system; yet, there is nothing in the Charter which labels the UNSC an executive. If considered in a constitutional sense, the Charter is clear that the UNSC must report to the General Assembly, a seemingly innocuous provision but one that has, in fact, important constitutional implications. The provision that the UNSC issue regular reports to the General Assembly was inserted by the smaller states who wished to ensure that the Council understood its role as 'a trustee of the membership (or of the international community) institutionalized in the General Assembly, which must render its 'accounts' to the trust givers'.[6] This suggests that the UNSC was designed to be constrained in some broad sense by its institutional relationship to the General Assembly. Further, while the UNSC is not formally subject to judicial review by the ICJ or any other organ, the 2008 Kadi decision by the European Court of Justice points to the importance of judicial review in order to ensure the UNSC adheres to its responsibilities.[7] There are, of course, numerous legal and political complexities of this case, but it provides one instance of how the UNSC was somehow subject to review by a judicial body.

The Charter alone does not determine the role of the UNSC; as with any 'living' constitution, the international political and legal order is shaped by the practices of those who compose it. In the case of the UNSC, its practices have evolved as a result of various political realities, primarily the Cold War. Since the end of the Cold War, the UNSC has become

[5] A. Peters 'Article 24' in Bruno Simma, et al., *The Charter of the United Nations: A Commentary, 3rd edition*, Volume I (Oxford: Oxford University Press, 2012): 767.
[6] Ibid, 777.
[7] There are numerous discussions of the Kadi Case in law and politics. A good introduction to some of the key issues can be found in: R Wesssel, 'The Kadi Case: Towards a More Substantive Hierarchy in International Law' [2008] *International Organization Law Review* 5, 323-327

active across a range of issues and conflicts. This activity can be interpreted in numerous ways; for some it represents the achievement of the UNSC's responsibilities in the international order, while for others it constitutes a form of global 'mission creep' in which the UNSC has increased its powers to the detriment of other agents. [8] The authority of the UNSC also relates to the power and legitimacy of those states that compose it, particularly the P5. For some theorists, the UNSC's authority relies on the fact that it is controlled by these powers, who they claim have a kind of de facto authority for governing the international order.[9] Others argue that the P5's powers actually undermine the authority of the UNSC by delegitimizing its mandate and practice, a position often linked to calls for reform of the UNSC.[10]

The emergence of new institutions in the international order can both challenge and reinforce the authority of institutions such as the UNSC. For instance, the ICC now shares the responsibility for creating peace and security in the international political and legal order. The ICC's legitimacy does not rely on the UNSC as the war crimes tribunals in the former Yugoslavia and Rwanda did, as they were created by UNSC resolutions. Instead, the ICC arose from a treaty giving it a firm foundation in the international legal order. But, there are links between the two institutions which derive in part from their responsibility for maintaining international peace and security. Articles 13 and 16 of the Rome Statute create the link between the two; Article 13 allows the UNSC to refer cases to the ICC, while Article 16 allows the UNSC to defer the pursuit of a case or situation in order to allow other

---

[8] T. Fraser and V. Popovski, (eds), *The Security Council as Global Legislator* (London: Routledge, 2014)

[9] See for instance, D. Lake, *Hierarchy in International Relations* (Ithaca: Cornell University Press, 2009) who argues that the US has legitimate international authority because of its provision of public goods in the international system. G. J. Ikenberry makes a related point, arguing that the US has played a key role in advancing a liberal world order and so should be considered authoritative in some broad sense at the global level; G. Ikenberry, *Liberal Order and Imperial Ambition: Essays on American Power and International Order* (London: Polity Press, 2006).

[10] M. Imber, *UN Security Council Reform: 'From Here to Eternity?'* (London: The Foreign Policy Centre, 2006)

mechanisms of peace-making to be pursued. The two institutions have seen a range of interactions, some of which we describe below.

Embedded Selectivity: R2P and the ICC

The international legal and political order is constituted by rules which arise from both formal processes (e.g., treaties) and informal understandings (e.g., diplomatic practice). In order for the system to function, however, these rules need enforcement. Importantly, the enforcement of the law and the punishment of those who violate it is not simply about those individual instances; over time, practices of enforcement and punishment shape the wider legal and political order. It is our contention that while the international legal and political order does indeed reveal moments of law enforcement and punishment the present conflation of institutional responsibilities, which is actually further enabled by the discourse of R2P, is consolidating an unjust political and legal order. The argument we make here, therefore, is directed toward how a revised international legal and political order might both ensure the protection of individuals and also create a more just political and legal order.

Debates have long raged on whether international law is actually law. The crux of these debates for the purposes of this paper is not really the question of whether international law exists but rather whether it works. There are myriad international laws on a vast array of subjects; indeed, such is its scope, life as we know it would be impossible without international law. Yet, international law is primarily judged on its efficacy in two particular areas; the use of force and the protection of human rights. While the routine adherence to the majority of international laws goes unremarked, the occasional and "spectacular" violations of international law in these areas generate outrage. The 2003 invasion of Iraq and the

murderous campaign waged since 2011 by President Assad, for example, naturally lead people to wonder "where is international law?"

The existence of a body mandated to enforce law – by both judging that a law has been violated and determining the nature of the requisite punishment for this infraction – is essential for any legal system. Of profound importance for the functioning of this body, and indeed the legal system over which it presides, is its legitimacy which is dependent upon its perceived impartiality and record of practice.[11]

At present the international body serving this function is the UNSC; as we discuss later this is fundamentally problematic because the UNSC does not constitute an impartial judicial body. Though mandated to act on behalf of the international community of states, the UNSC is very obviously a body of states with particular national interests which have often inhibited the enforcement of the very international laws the body is charged with enforcing.

If the enforcement of law – domestic or international – is evidently a function of political interest then this has grave consequences not just for the legal system, but for order amongst the subjects of this system. Arbitrary and politicised law enforcement breeds contempt for the legal system amongst its subjects who are naturally inclined to determine that their safety and survival is dependent on their own initiative rather than the higher authority to which they are formally bound. By opting out of the legal system – formally or not – states may certainly have more formal freedom but in practice this freedom will be repeatedly violated by other free-riders thus precipitating a world order that is 'chaotic and incomprehensible'.[12] Therefore, as Hans Kelsen noted the manner in which law is enforced is

[11] See R. Falk, M. Juergensmeyer, and V. Popovski, (eds), *Legality and Legitimacy in Global Affairs* (Oxford; Oxford University Press, 2012)
[12] M. Koskenniemi 'What is International Law For?' in M. Evans (ed.) *International Law* (Oxford: Oxford University Press, 2006), 69

'the essential stage in any legal procedure' and of paramount importance to the health and efficacy of the legal regime, especially at the international level;

> As long as it is not possible to remove from the interested states the prerogative to answer the question of law and transfer it once and for all to an impartial authority, namely, an international court, any further progress on the way to the pacification of the world is absolutely excluded.[13]

While Kelsen – and indeed many others – reflected on the manner in which international law was enforced in a number of key areas, our focus here is on the enforcement of international law with respects to human rights.

In the contemporary era, R2P and the ICC have become the two most prominent institutions of international human rights enforcement. R2P seeks to prevent and, more controversially, halt human rights violations while the ICC is orientated towards punishing those who violate human rights. Therefore, while R2P and the ICC deal with different legal areas – with the former orientated towards emergency response and the latter retrospective punishment – both share a number of commonalities. Most obviously both deal with egregious human rights violations; R2P's remit is the "four crimes" outlined in Paragraph 138 of the 2005 World Summit Outcome Document, namely genocide, war crimes, ethnic cleansing and crimes against humanity, while the ICC is mandated to try those accused of genocide, crimes against humanity and war crimes.[14] Secondly, both relate to "law enforcement"; R2P is analogous to the emergency response provisions within domestic legal systems – such as most obviously the role of the police – while the ICC clearly parallels the

[13] H. Kelsen, *Peace Through Law* (Cambridge MA: Harvard University Press, 1972), 13

[14] The ICC is also tasked with prosecuting violations of the law of aggression, but this remains a controversial crime. The ICC has sought to give more precision to the definition of the crime of aggression in its 2010 Review conference, but it is unlikely that individuals will be brought before the Court for this crime in the near future. Moreover, because of its contested status, it tends not to be seen as part of the international legal framework in which human rights and international criminal law intersect. Hence, it is largely outside of the concerns of our analysis here.

role played by domestic courts. This is not to suggest, of course, that the international legal order is comparable with any existing domestic legal order; rather the point is that a normative legal order – domestic or international – would comprise both an emergency response component and a judicial punishment process as part of the means by which the laws are enforced. Finally, the efficacy of both is essentially dependent upon the same body; the UNSC. As we discuss below, the manner in which R2P and the ICC are operationalized depends upon the acquiescence of the UNSC, and more specifically, the P5.

Law Enforcement, Punishment and R2P

In 2005 two paragraphs of the World Summit *Outcome Document* made reference to R2P; in essence, they stated that individual states had certain responsibilities towards their own citizens and also that the international community had a concomitant responsibility to act if the host state was unable or unwilling to abide by this responsibility. While this commitment was certainly laudable, it is hardly new.[15] Each of the "four crimes" was illegal long before 2005; indeed, there is no shortage of international laws proscribing human rights abuses.[16] Likewise, that the international community had the right to intervene in the domestic affairs of states to prevent and/or halt these crimes was also established - and indeed actualised - before 2005.[17] Of course, as is well known the enforcement of international human rights law has been erratic; indeed it was this inconsistency that the ICISS explicitly sought to address.

[15] C. Bassiouni, 'Advancing the Responsibility to Protect Through International Criminal Justice', in R.H. Cooper and J.V. Kohler (eds) *Responsibility to Protect: The Global Moral Compact for the 21st Century* (Hampshire, Palgrave Macmillan, 2009); A. Peters, 'Humanity as the A and Ω of Sovereignty', [2009] *The European Journal of International Law*, 20, 513; C. Stahn, 'Responsibility to Protect: Political Rhetoric or Emerging Legal Norm?' [2007] *American Journal of International Law*, 101, 99; T. Reinhold, 'The Responsibility to Protect: Much Ado About Nothing?' [2010] *Review of International Studies*, 36, 55
[16] T. Landman, *Studying Human Rights* (London: Routledge, 2005), 14
[17] S. Chesterman, '"Leading from Behind": The Responsibility to Protect, the Obama Doctrine, and Humanitarian Intervention after Libya', [2011] *Ethics and International Affairs*, 25, 1; A. Hehir 'Libya and The Responsibility to Protect: Resolution 1973 as Consistent with the Security Council's Record of Inconsistency", [2013] *International Security*, 38, 137

This inconsistency stems from the institutional structure of the UN and in particular the power - particularly the veto - wielded by the P5. The only viable legal basis for external intervention in the domestic affairs of a state - without the state's consent - is Chapter VII of the Charter which is dependent on the assent of the UNSC. Unsurprisingly then, the enforcement of international law - specifically the use of force for the protection of human rights - is prey to the political exigencies of the P5. The powers vested in the P5 were consciously designed so as to reflect the realities of power in international politics and orientate the organisation towards the maintenance of order rather than the pursuit of justice.[18] R2P has not altered in any way the institutional arrangements for enforcing international law or the remit of the P5, nor has it created an alternative source of authority to the UNSC and, therefore, law enforcement remains dependant on the political will and national interests of the P5s.

The absence of legal reform is not seen, however, as problematic by many of R2P's advocates who argue that R2P is 'revolutionary' because it creates a framework for ostensibly irresistible moral advocacy.[19] R2P has become, in essence, a means by which normative pressure is consolidated and political will mobilised so as to change the decision-making calculus of the P5.[20] Legal reform is rejected by many as utopian; the ostensibly more

---

[18] M. Berdal, 'The UN Security Council: Ineffective but Indispensable', [2003] *Survival*, 45, 7; D. Bosco, *Five to Rule Them All* (Oxford: Oxford University Press, 2009), 10-38; D. Bourantonis, *The History and Politics of Security Council Reform* (London: Routledge, 2007), 6; N. White, 'The Will and Authority of the Security Council After Iraq', [2004] *Leiden Journal of International Law*, 17, 645; J. Mertus, *The United Nations and Human Rights* (London: Routledge, 2009), 98; G. Simpson, *Great Powers and Outlaw States* (Cambridge: Cambridge University Press, 2004), 68

[19] L. Feinstein, 'Beyond Words: Building Will and Capacity to Prevent More Darfurs', *The Washington Post*, 26 January, 2007; D. Scheffer, 'Atrocity Crimes: Framing the Responsibility to Protect', in Cooper and Kohler (n 15), 95

[20] International Coalition for RtoP, 'Founding Purposes of the Coalition', http://www.responsibilitytoprotect.org/index.php/about-coalition/founding-purposes; A. Bellamy, *Responsibility to Protect*: *The Global Effort to End Mass Atrocities* (London: Polity, 2009), 119; G. Evans, *The Responsibility to Protect: Ending Mass Atrocity Crimes Once and For All* (Washington DC: Brookings Institution Press, 2008), 223

realistic strategy is to craft arguments that will convince states to abide by their previous commitments to respect human rights.[21]

Thus, at present the existing mechanisms by which R2P is enforced remains a matter of political will which is by definition transitory and context-specific. While a case can be made that democratic states are somewhat receptive to moral advocacy - though this is far from assured as the 2003 invasion of Iraq and the non-intervention in Darfur attest[22] - the willingness of China and Russia to accede to humanitarian appeals is surely negligible. As these states become increasingly more powerful, the efficacy of moral advocacy will arguably diminish.[23]

R2P's endorsement of the present system echoes, therefore, the powers vested in the sheriff as noted in the introduction where the legal authority to act is not accompanied by any duty; the UNSC *may* take action but it is under no obligation to do so and thus the P5 thus merely have a 'discretionary entitlement'.[24] Thus, somewhat perversely, the centrality of UNSC authorisation in the application of R2P has in fact further consolidated the P5's primacy, despite its powers actually constituting one of the original catalysts for the ICISS's proposal.

Punitive practices play a role in the law enforcement process, but they also play a central role in creating political order. One can see this in the traditional liberal conception of a constitutional order in which the three parts of the political system – legislator, executive and judiciary – create rules and then enforce them. In this model, the legislative body makes the law, the judge determines if an individual had violated the law leading to the imposition of a sentence, and the executive carries out that sentence. Within that model, it might seem as

[21] Evans, (20), 137
[22] See, A. Hehir *Humanitarian Intervention After Kosovo* (Hampshire: Palgrave Macmillan, 2008), 76-96
[23] A. Hehir and R.W. Murray 'Intervention in the Emerging Multipolar System: Why R2P will Miss the Unipolar Moment', [2012] *Journal of Intervention and Statebuilding*, 6, 387
[24] F. Berman, 'Moral Versus Legal Legitimacy' in C. Reed and D. Ryall (eds.) *The Price of Peace*, (Cambridge: Cambridge University Press, 2011), 161

if the legislator alone creates the order through the creation of rules that define it. But, the related judicial role of finding parties guilty and determining their sentence is also part of the creation of a just political order.[25] The judgment of a judicial body regarding both how to interpret the law and the sanction applied when the law is violated plays a crucial role in the political order that emerges.

A slightly different way to see this traditional constitutional division of labour can be found in an early essay by John Rawls where he argued that there are two types of rules: those that justify a practice as a whole and those that justify a particular application of that practice. He uses this distinction to make the case that punishment can be justified in both utilitarian and retributive ways. The practice of punishment as a means of enforcing justice in a society – that is, as an institution – is utilitarian. But the particular application of punishment in specific cases – the action of punishment – is best understood as retributive. One way to see this distinction is through the different roles played by a legislator and a judge. The legislator constitutes the political through law making, with a focus on the good for the society as a whole. The judge, while seeing his or her role as ensuring that justice is done to this individual, also plays a role in constructing that larger order, although this might not be obvious at first. In so doing, both look to the political community albeit, as Rawls notes, one toward its future and one towards its past.[26] Punishment, as oriented toward violations taking place in the past, constructs the future of the political society.[27]

---

[25] These roles are simplified here, of course. The judicial body plays a central role in interpreting rules through its appellate function, in the US Supreme Court, or as a court of first instance, as in the German Constitutional Court. When it comes to sentencing, moreover, the roles of different institutions might vary across different contexts; for instance, sentencing from guidelines might come from the legislator, or perhaps from the executive. For a description of the relationship between sentencing and punishment, see S. Easton and C. Piper, *Sentencing and Punishment: The Quest for Justice* (Oxford: Oxford University Press, 2005)

[26] J. Rawls, "Two Concepts of Rules" [1954] in H. B. Acton, ed, *The Philosophy of Punishment: Collected Papers* (London: Macmillian, 1969), 108

[27] An alternative conception of how punishment creates political and even social order can be found in Michel Foucault's account of how punishment became discipline. Foucault's assessment, while powerful and insightful, is less relevant for our purposes here, as we wish to propose alternative legal and political structures through which international punitive measures might be more just, something that Foucault would find more

If law enforcement includes both acts of protecting those whose rights are being violated in situations of conflict and the punishment of those doing the violating, a properly constituted legal order would be one in which these functions are undertaken by different institutions. In an ideal world, the UNSC should be engaged in duty-orientated practices that entail the protection dimension; i.e., halting violations taking place and enabling the capture or arrest of those engaged in those violations. But in order to protect the rights of the accused and, more importantly perhaps, to protect the wider international legal order, a different institution should be tasked with trying and sentencing – i.e., punishing – those who are found guilty of such violations. The roles of these two institutions should be somehow connected. But, the current connection between the institutions allows the UNSC to play an active role in the punitive process by giving it the ability to make choices about where the ICC should be active, and it gives the UNSC the ability to halt a prosecution that the ICC prosecutor or a state party wishes to pursue. The reason for the ability of the UNSC to play a role in the prosecutor's decisions seems to rely on the assumption that only by co-opting the powerful would the ICC be able to function. The reason for the deferral role is to allow a peace process to be pursued without the interference of judicial activities. Yet, the decision to give the UNSC the power of deferral was a highly contested one at the Rome Conference. According to William Schabbas, the debate became in part about the powers of the P5 and their ability to control what should have been a completely independent judicial institution.[28] At this moment of creating the Court, many could already see the potential for the UNSC to politicize its activities. The deferral role has some political logic; there may indeed be times when the blind pursuit of justice will interfere with the possibility of political solutions. The

problematic. See M. Foucault, *Discipline and Punish: The Birth of the Prison*, trans by A. Sheridan (New York: Vintage Books, 1977).

[28] W. Schabbas, *An Introduction to the International Criminal Court* (Cambridge: Cambridge University Press, 2001), 65-66.

active prosecutorial role, however, seems less well grounded in long term political logic and seems only designed to appease the powerful states in order to allow the ICC to function.

The emergence of R2P, however, has given the UNSC even more power to combine these roles than the ICC statute allow. As we will make clear below, because its normative agenda does not include any limits on the UNSC, and because the interventions that might be undertaken under the guise of R2P can quickly conflate protection and punishment – as was clearly the case with respects to Libya – the current formulation of the principle will (potentially) give even more power to the UNSC to override the institutional responsibilities of the ICC.

R2P has rarely been defended as a punitive mode of intervention by any of its proponents. Yet, it is our contention that in order to ensure that states uphold their responsibilities to their own citizens, punitive measures are sometimes necessary. Moreover, the few times that R2P has been invoked by the Security Council or individual states in justifying a military action, a discourse of punishment *has* appeared. While interventions are not generally described as punitive – indeed, it is rare that punishment as a formal legal or even political concept is employed in international affairs – but a number of international political practices linked to R2P have strong punitive dimensions, the most obvious one being economic sanctions.[29] Military intervention, even when labelled humanitarian, can also be punitive. Especially when interventions are undertaken in response to harms inflicted on a population and when the intended outcome is 'bringing perpetrators to justice' and/or 'regime change' rather than simply providing humanitarian aid, interventions look and sound more like punitive measures than purely humanitarian ones.[30]

---

[29]See N. Onuf, *Reprisals: Rituals, Rules, Rationales* (Princeton: Centre for International Studies, 1974)
[30] For a definition of and empirical evidence for the existence of punitive intervention, see A.F Lang, Jr., *Punishment, Justice and International Relations: Ethics and Order after the Cold War* (London: Routledge, 2008), 58-77

The ICC, like any judicial body, has its own selectivity issues; cases will only be pursued when prosecutors, state parties, or the UNSC agree. But by giving the UNSC a role in deciding which cases to pursue, the power of the UNSC is further increased. R2P alone, of course, does not create this problem, for the P5 have their own reasons for seeking to increase their power in the international legal and political order. What we are arguing here is that R2P further increases the power of the UNSC by giving it the ability to punish in situations of conflict, a responsibility that is best left with the ICC where it can better conform to liberal norms of a fair trial.

In what follows, we demonstrate how – through a focus on cases drawn from the Arab Uprisings – the use (and non-use) of R2P has contributed to a political and legal order that increases the power of the UNSC to the detriment of the wider international legal and political order.

Arab Spring

The UNSC's response to the crisis in Libya was unusually swift and characterised, at least initially, by unprecedented collective unity. While some criticised the intervention for a variety of reasons[31], the focus here is not on the merits of the intervention itself but the means by which it was sanctioned and the broader context.

If China and/or Russia had chosen to veto Resolution 1973 the intervention would not have occurred; evidence suggests President Obama in particular considered UNSC approval to be Russia a *sine qua non*. What then explains the Chinese and Russian abstentions? The most plausible explanation relates to the position adopted by the African Union (AU) and

[31] A. Kuperman 'NATO's Intervention in Libya: A Humanitarian Success?', in A. Hehir and R.W. Murray (eds) *Libya, The Responsibility to Protect and the Future of Humanitarian Intervention* (Hampshire: Palgrave Macmillan, 2013); C. McKinney *The Illegal War on Libya* (Atlanta, GA: Clarity, 2012); M. Walzer, 'The Case Against Our Attack on Libya', *The New Republic*, 20 March, 2011.

especially the Arab League; neither China nor Russia wished to block an initiative which these regional organisations supported. This indeed, was reflected in the Chinese statement; 'We also attach great importance to the position of African countries and the AU. In view of this...China abstained.'[32] Russia also explained its abstention was an expression of support for the Arab League's call for action.[33] Indeed, according to Gareth Evans the Arab League's support 'was absolutely crucial in ensuring that there was both a majority on the Council and no exercise of the veto by Russia or China'[34] while one scholar stated, without its support, 'China and Russia would have certainly vetoed Resolution 1973.[35] It is also clear that the US's position was greatly influenced by the AU's but most particularly the Arab League's position.[36]

The position of the Arab League - and the members of the Gulf Cooperation Council (GCC) in particular - on the Arab Uprisings has been far from consistent[37] and the reasoning behind their support for military action against Libya points towards obviously geopolitical motives.[38] This inconsistency was most evident in Bahrain. While the Arab League's statement on the 12th March championed the right of the Libyan people 'to fulfil their demands and build their own future and institutions in a democratic framework'[39] just two days later, acting through the GCC, Saudi Arabia and Qatar sent troops into Bahrain to help

---

[32] UNSC, Security Council 6498th Meeting, S/PV.6498, 17 March, 2011, 5.
[33] Ibid., 8.
[34] G. Evans, 'The RtoP Balance Sheet After Libya', September 2, 2011, http://www.gevans.org/speeches/speech448%20interview%20RtoP.html, accessed 28 November 2011.
[35] A. Bellamy, 'Libya and the Responsibility to Protect: The Exception and the Norm', [2011] *Ethics and International Affairs*, 25, 3.
[36] H. Clinton, 'There's "No Way" United States Will Take Unilateral Action in Libya', CBS News, 16 March, 2011, http://www.cbsnews.com/8301-503544_162-20043991-503544.html, accessed 2 September 2012
[37] S. Colombo, 'The GCC Countries and the Arab Spring', in J. Davies (ed.) *The Arab Spring and Arab Thaw*, (Surrey; Ashgate, 2013)
[38] A. Bellamy and P. Williams, 'The New Politics of Protection? Cote d'Ivoire, Libya and the Responsibility to Protect', [2011] *International Affairs*, 82, 842.
[39] League of Arab States () The Outcome of the Council of the League of Arab States Meeting at the Ministerial Level in its Extraordinary Session on the Implications of the Current Events in Libya and the Arab Position, Cairo 12 March, 2012, 2, http://responsibilitytoprotect.org/Arab%20League%20Ministerial%20level%20statement%2012%20march%20 2011%20-%20english.pdf, accessed 25 September 2014

the embattled monarchy crush protesters calling for democratic change. A 'campaign of retribution' followed as the foreign troops, primarily from Saudi Arabia, enabled the government to escalate its draconian crack-down.[40] Despite this, Western states, the US in particular, criticised the violence 'relatively mildly' and supported the Crown-Prince's promises to reform. The Bahrain Centre for Human Rights claimed that the desultory international response emboldened the Khalifa Monarchy; 'the authorities in Bahrain, due to the lack of international consequences, have no incentive to stop the human rights violations'.[41]

The selectivity has been more obvious, however, with respect to the situation in Syria. To date it is estimated that over 191,000 people have died while over 11 million people – more than half of Syria's total population – have been displaced either internally or abroad.[42] There is no doubt it is overly simplistic to argue that the lack of military intervention in Syria[43] constitutes definitive evidence that the intervention in Libya was thus motivated by oil, geopolitics etc. The situations are clearly different and the dynamics of Syria's relationship with key regional and international actors arguably militates against the kind of action taken against Libya. The charge of selectivity regarding Syria, however, should not focus only on Western states; while the US, UK and France have been denounced by many for failing to act robustly, the position of Russia, and to a lesser extent China, evidence a far more obviously inconsistent approach to abiding by R2P. Russia and China have four times vetoed resolutions on Syria yet in each case the draft resolutions sought only to impose

[40] International Crisis Group 'Popular Protests in the Middle East and North Africa: Bahrain's Rocky Road to Reform, Middle East/North Africa Report 111, 28 July, 2011, 4
[41] Bahrain Centre for Human Rights 'No Peace No Progress, 2012, 7, www.bahrainrights.org, accessed 25 August 2014
[42] N. Cumming-Bruce 'Death Toll in Syria Estimated at 191,000'. *The New York Times*, August 22, 2014, www.nytimes.com/2014/08/23/world/middleeast/un-raises-estimate-of-dead-in-syrian-conflict-to-191000.html?_r=0, accessed 25 August 2014
[43] In September 2014 the US led a bombing campaign against Islamic State (IS) militants in Iraq and Syria; while thus technically there has been a military intervention in Syria this was undertaken in response to the threat posed by IS rather than in response to the humanitarian crisis in Syria.

modest economic and political sanctions against Assad's regime and certainly did not suggest intervention. Indeed, beyond just blocking international attempts to censure Syria, Russia has continued to supply the regime with offensive weaponry.[44]

This episode has troubling implications for R2P. Despite the various effusive declarations that it is a 'revolutionary' concept R2P has obviously not inhibited Russia from engaging in a very public display of cynical geopolitics and neither has it forestalled division at the UNSC. As the situation continued to deteriorate throughout 2012, on the 3rd August the General Assembly took the unusual step of condemning the UNSC in a non-binding resolution.[45] In early August 2012 Kofi Annan stepped down as United Nations/League of Arab States Joint Special Envoy for the Syrian Crisis decrying the 'finger-pointing and name-calling in the Security Council' which had impeded his efforts.[46] The UNSC's response to the crisis was neither timely nor decisive, and this arguably cost innumerable lives; in her final speech to the UNSC as UN High Commissioner for Human Rights, Navi Pillay stated, 'greater responsiveness by this council would have saved hundreds of thousands of lives'.[47] The manner in which the UNSC dealt with Syria certainly deflated the optimism which followed the 2011 intervention in Libya; as Evans noted, 'the shame and horror of Syria' has led to 'a real sense of disappointment'.[48]

Whether in the form of the Arab League's intervention in Bahrain, the West's shameful silence over this intervention, or Russia's policy of protecting Syria at the UN, the

---

[44] L. Harding 'Syria's New Anti-aircraft Missiles Will Be Game-changing, Say Defence Analysts', *The Guardian*, May 30, 2013, http://www.guardian.co.uk/world/2013/may/30/syria-anti-aircraft-missile-system, accessed on 24 January 2014.

[45] UN General Assembly, 124th Plenary Meeting, 3 August 2012, http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N12/449/39/PDF/N1244939.pdf?OpenElement, accessed 14 March 2014

[46] UN News Centre, Kofi Annan Resigns as UN-Arab League Joint Special Envoy for Syrian Crisis, 2 August, 2012, www.un.org/apps/news/story.asp?NewsID=42609#.VBAkIvldWSo, accessed 25 August 2014

[47] N. Pillay, 'UN Human Rights Chief Criticises UN Over Global Conflicts' *The Guardian*, August 22, 2014, www.theguardian.com/world/2014/aug/22/un-human-rights-chief-criticises-security-council-over-global-conflicts, accessed 25 August 2014

[48] G. Evans 'After Syria: The Future of the Responsibility to Protect', S.T. Lee Lecture, Institute for Advanced Study, Princeton, 12 March, 2014, www.gevans.org/speeches/speech545.html, accessed 02 June 2014

international response to the Arab Uprisings has alleviated the suffering of certain groups while ignoring the plight of others. Perversely, the power and international standing of NATO, the Arab League and Russia have arguably grown as a result of their various actions during the crises; each have at certain points shaped the "international" response to the dominant concern of the day. Where actors have had their designs thwarted - as surely even the US and Russia at various times have - this has been a result of old-fashioned power politics rather than the influence of R2P. Thus, like the sheriff, the P5 consolidate their power with each enforcement action whilst remaining outside of a judicial review process. Like the sheriff, the P5's actions may be legal but they are of dubious legitimacy.

As we noted above, not only is the problem of UNSC its selectivity, but there is also a strong punitive dimension to the way in which R2P has been invoked in the context of UNSC action. Indeed, it is not simply that the UNSC makes R2P more punitive, but that R2P itself as it is currently constituted, includes a punitive dimension. This means that invocations of the norm around debates about intervention soon become debates about punishing wrongdoers. In the case of the international community's response to the Arab Uprisings, we see this in both the intervention that did take place (Libya) and the one in which it did not (Syria).

A year after the intervention in Libya Benjamin Freidman wrote:

> One [reason to intervene] was to show other dictators that the international community would not tolerate the violent suppression of dissenters. That reverse domino theory has obviously failed. If Qaddafi's fate taught neighbouring leaders like Bashar al-Assad anything, it is to brutally nip opposition movements in the bud before they coalesce, attract foreign arms and air support, and kill you—or, if you're lucky, ship you off to the Hague.[49]

[49] B. H. Friedman, 'Intervention in Libya and Syria isn't Humanitarian or Liberal' *The National Interest*, 5 April 2012, http://nationalinterest.org/blog/the-skeptics/intervention-libya-syria-isn%E2%80%99t-humanitarian-or-liberal-6739, accessed 1 August 2013

It seems evident that the intervention in Libya included both deterrent and retributive dimensions. Unlike others, though, this intervention targeted primarily the leadership, not just Qaddafi but members of his family.

UNSC Resolution 1973 was largely punitive; its operational clauses included five elements: 1) a deferral of the situation in Libya to the International Criminal Court (ICC); 2) an arms embargo; 3) a travel ban for those within the regime; 4) the freezing of assets of those in the regime; and 5) the creation of a sanctions committee to monitor compliance with the resolution. Of these five, only one, the arms embargo, was not explicitly punitive. The others all targeted the regime and the leadership of Libya. The intervention was hailed by supporters for both stopping atrocities and deferring future ones: "Fulfilling the responsibility to protect involves identifying the scenarios whereby civilians may be the victims of mass atrocities, *adopting strategies to deter perpetrators from committing future crimes*, and crucially, employing protective strategies to halt current attacks".[50] A subsequent statement from the same organization, again calling for intervention, implied more clearly a punitive logic: "Behind the firm voice of the Arab League and its support for more forceful action lies the conviction that the Libyan regime *should face the consequences for its brutal actions*".[51]

Resolution 1973 set out the important operational clause of allowing 'all means necessary' for three objectives: 1) protect civilians; 2) create a no-fly zone; and 3) enforce the arms embargo. But as became clear soon after military operations began, the mission of protecting civilians means not simply stopping harms against them but hurting those that are doing the harming; in other words, inflicting harm for violating a rule, the definition of

[50] Open Letter to the UNSC from the International Coalition on R2P and the Global Centre for the Responsibility to Protect 4 March 2011, http://www.responsibilitytoprotect.org/index.php/crises/190-crisis-in-libya/3239-international-coalition-for-rtop-and-global-centre-for-rtop-send-open-letter-to-the-security-council-on-the-situation-in-libya, accessed 24 January 2014. (Italics added)
[51] Global Centre for the Responsibility to Protect, 'Libya: Time for Decision', 11 March 2011, http://www.responsibilitytoprotect.org/index.php/crises/190-crisis-in-libya/3323-global-centre-for-the-responsibility-to-protect-libya-time-for-decision, accessed 24 January 2014. (Italics added)

punishment noted above. In a press conference on 8 April 2011, the deputy commander of the mission hinted at the punitive logic underling the means of protecting civilians:

> On Wednesday, we engaged forces in central Libya including an air defence facility near Surt under our mission to protect civilians and civilian population areas. The pressure of NATO aircraft and the accuracy of our strikes continue to pressure those who would bring harm to innocent civilians.[52]

On 27 June 2011, the ICC issued arrest warrants for three individuals charged with crimes against humanity: Muammar Gaddafi, Saif al-Islam Gaddafi, and Abdullah al-Sanussi.[53] The indictment - designed to support the rebels against the Gaddafi regime[54] - relied primarily on events that took place in February 2011 surrounding the use of military force against protestors. When, the ICC's arrest warrants were issued, NATO's spokesperson stated:

> The arrest warrants are yet another signal from the international community to the Qadhafi regime. Your place is on trial; not in power, in Tripoli. It is not for NATO to enforce that warrant. That is for the appropriate authorities…we have made clear from the start that there is no purely military solution. It's the combination of our continued military pressure and a reinforced political pressure that will bring about the transition to democracy that the Libyan people demand and deserve.[55]

Note the spokesperson affirms that the arrest warrants are part of the same strategy as the military campaign, yet makes it clear that the military campaign is not about arresting individuals. The idea that the intervention and the ICC could work in parallel had been part of the larger intervention; as US Secretary of Defence, Robert Gates stated at a press conference

[52] NATO, 'Press Briefing on events concerning Libya', 8 April 2011,, http://www.nato.int/cps/en/natolive/opinions_72150.htm, accessed 24 January 2014.
[53] The Prosecutor vs Saif al-Islam Gaddafi and Abdullah Senussi, Document number: ICC01/11-01/11, http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/icc0111/related%20cases/icc01110111/Pages/icc01110111.aspx, accessed 1 August 2013
[54] 'ICC Issues Gaddafi Arrest Warrant' *al-Jezeera OnLine*, 28 June 2011, http://www.aljazeera.com/news/africa/2011/06/20116278148166670.html, accessed 1 August 2013
[55] NATO, 'Press briefing on Libya', 28 June 2011, http://www.nato.int/cps/en/natolive/opinions_75808.htm, accessed at 24 January 2014.

in Cairo, ‘the international community has a number of ‘hammers in its toolbox’, one of which is the ICC’.[56]

On 20 October 2011 Qaddafi was killed by rebel soldiers. Only two days later, the NATO Secretary General announced the ‘liberation of Libya’. While NATO had insisted on keeping itself separate from the ICC indictment and tried to keep its focus on protection of civilians rather than punishment, the fact that the intervention ended almost as soon as Qaddafi was killed suggests that his death – or punishment of sorts – fulfilled their mission. The wider discourse of the intervention and the fact that the intervention ended after the death of Qaddafi points to the overarching punitive nature of the intervention, especially when coupled with ICC indictment. While the case against Qaddafi’s son and al-Sanussi continues, the punitive element of the intervention itself seems clear here.

While there has not been an intervention against Assad’s forces in Syria, the arguments being made in support of intervention parallel the punitive logic of the Libyan intervention. The US government’s initial response to Assad’s use of chemical weapons called for accountability in language stronger than most diplomatic statements; Secretary of State John Kerry argued in his press conference of 26 August 2013 that “…there is accountability for the use of chemical weapons so that it never happens again…President Obama believes there must be accountability for those who would use the world's most heinous weapons against the world's most vulnerable people.”[57] While accountability is not necessarily the same as punishment, the primary means of holding agents accountable in a political system is by punishing those who violate the rules. Further, in the case of Syria, it

[56] News Transcript, Department of Defence, 23 March 2011, Cairo Egypt, http://www.defense.gov/transcripts/transcript.aspx?transcriptid=4795, accessed 24 January 2014.
[57] J. Kerry, Press Conference, 26 August 2013, http://politicalticker.blogs.cnn.com/2013/08/26/full-remarks-kerrys-pointed-remarks-on-syria/, accessed 31 August 2013

would appear that the threat of punishment may have prompted the regime to respond, as it soon decided to turn over its chemical weapons materials to the international community.

In response to the call for a punitive intervention in Syria, some international legal scholars have emphasized the illegality of punishment or the related ideas of reprisals and countermeasures in the current international legal order. One analyst, echoing the analysis here, though taking a directly opposed position, argued that punitive intervention violates the primary legal structure concerning the use of force, the UN Charter. [58]

A different account, also from an international legal position, argues that the current international legal order does not allow for the idea of state crime and so it cannot support the idea of punitive intervention.[59] Both these accounts suggest that non-lethal modes of intervention would be preferred to punitive intervention. In the case of Syria, though, it is difficult to see what this would mean. As suggested by the fact that the regime dropped its chemical weapons programme in part because of the pressures placed on it by the Obama administration, perhaps one can conclude that the deterrent threat of punishment accomplished some good.

In addition to the deterrent nature of a possible punitive intervention, there are also suggestions for a retributive one. In August 2011 the UN Human Rights Council established an Independent International Commission of Inquiry on the Syrian Arab Republic with a mandate to 'identify those responsible with a view of ensuring that perpetrators of violations, including those that may constitute crimes against humanity, are held accountable.'[60] Navi Pillay, stated in December 2013 that the Commission's findings made it clear that the regime

[58] J. Moore, 'Punitive Military Strikes in Syria Risk Inhumane Intervention', OUP Blog, 2 September 2013, http://blog.oup.com/2013/09/syria-us-military-strikes-international-law-pil/, accessed 7 February 2014.
[59] C. Stahn, 'Syria and the Semantics of Intervention, Aggression and Punishment', [2013] EJIL Talk, 19 September,http://www.ejiltalk.org/syria-and-the-semantics-of-intervention-aggression-and-punishment/, accessed 4 February 2014.
[60] Independent International Commission of Inquiry on the Syrian Arab Republic, UN Human Rights Council. 'About the Commission', http://www.ohchr.org/EN/HRBodies/HRC/IICISyria/Pages/AboutCoI.aspx, accessed 7 February 2014.

would be held accountable and that she believed members should be tried before the ICC.[61] In January 2013, Switzerland proposed that the UNSC should refer the case of Syria to the ICC in a letter signed by both the United Kingdom and France. Philippe Sands argued that the proposal to try members of the regime before the ICC is a "justified gamble".[62] Though not interventions, these developments suggest that a wider discourse of retributive punishment surrounds and informs the international response to Syria.

Reform

Both R2P and the ICC emerged during a period when there were widespread calls for reform of the UN; NATO's unilateral intervention in Kosovo in 1999, coupled with the fallout from the Rwandan genocide, had created a consensus, albeit heterogeneous, in favour of reform, particularly of the UNSC. Yet the ICISS did not substantively address the very issue that arguably impelled its formation, namely the question of authority.[63] Thus, arguably the most concerted effort in the modern era aimed at reforming the manner in which the international community responds to intra-state crises, culminated in literally no alteration to the existing discredited legal and political system. Likewise, while the ICC was initially lauded as major step forward for international law and the punishment of human rights violators, the court's functioning and capacity continue to be impeded by the constitutional competencies afforded to the UNSC.

[61] 'UN Implicates Bashar al-Assad in Syria War Crimes' BBC Online, http://www.bbc.co.uk/news/world-middle-east-25189834, accessed 7 February 2014.
[62] P. Sands, 'Referring Syria to the International Criminal Court is a "Justified Gamble"' *The Guardian*, 16 January 2013,http://www.theguardian.com/commentisfree/2013/jan/16/syria-international-criminal-court-justified-gamble, accessed 7 February 2013.
[63] C. Focarelli, 'The Responsibility to Protect Doctrine and Humanitarian Intervention: Too Many Ambiguities for a Working Doctrine' [2008], *Journal of Conflict and Security Law*, 13, 191; C. Stahn, 'Responsibility to Protect: Political Rhetoric or Emerging Legal Norm?', [2007] *American Journal of International Law*, 101, 99. For an alternative perspective see, L. Glanville, 'The Responsibility to Protect Beyond Borders', [2012] *Human Rights Law Review*, 12,1

Not reforming the UNSC has a number of negative consequences. First, as the reaction of the "international community" to a particular crisis remains in essence dependant on the disposition of the UNSC, the key factor in determining how violations of human rights are addressed and/or punished remains the political will of the P5. Thus, perpetrators of systematic human rights abuses can shield themselves from external censure if they have cultivated an alliance with one of the veto-wielding P5. Despite the emergence of R2P and the ICC, therefore, certain oppressive regimes have continued to focus on cultivating an alliance with a member of the P5 rather than change their illegal behaviour. In any system where legal censure is not guaranteed – either because of the judiciary's ineffectiveness, lack of coercive capacity or its susceptibility to corruption and/or the influence of power – potential law breakers are naturally less wary of breaking the law. [64]

Another adverse consequence is that the UNSC and the ICC continue to stand accused of impotence and/or hypocrisy. Various commentators have derided the UNSC and the ICC for their failure to act against Assad in Syria.[65] Their capacity to act, however, has been hamstrung by their respective constitutional competencies which inhibit their capacity for independent action; as discussed earlier, the UN High Commissioner for Human Rights published a report in late 2013 suggesting that the Assad regime's tactics amounted to war crimes which could come under the purview of the ICC. Yet, the next stage – enforcement/punishment – was stalled because it was a matter for the P5 to determine how to respond.[66] Additionally, when either organisation *has* acted they have been criticised for engaging in hypocritical realpolitik, and being handmaidens to power. While the UN and the

---

[64] A. Hurrell, 'Legitimacy and the Use of Force: Can the Circle be Squared?' in, D. Armstrong, T. Farrell, and B. Maiguashca (eds) *Force and Legitimacy in World Politics* (Cambridge: Cambridge University Press, 2005), 16

[65] J. Freedland, 'Why it's a good time to be a dictator like Kim Jong-un', *The Guardian*, 18 February, 2014, http://www.theguardian.com/commentisfree/2014/feb/18/north-korea-good-time-to-be-dictator, accessed 14 March 2014

[66] BBC News, 'UN Implicates Bashir Al-Assad in Syria War Crimes', BBC News Middle East, 2 December, 2013, http://www.bbc.co.uk/news/world-middle-east-25189834, accessed 14 January, 2015

ICC are both imperfect institutions, erosion of support for these primary bastions of international law, multilateralism and universal jurisprudence undoubtedly constitutes a set-back for those who support the evolution of a world order which places a primary emphasis on the protection of individual human rights.

We consider the status quo untenable and reform essential. The problem is certainly not the absence of laws proscribing human rights violations – there are few areas *not* covered by international law[67] – nor is there a problem with respects to either the principle of international censure or a lack of an international judicial body. The primary problem, as outlined in earlier sections, is the process by which human rights laws are upheld and violators punished.[68] The problem can thus be located primarily at the point of enforcement; thus the requisite reform need not require a complete transformation of the present legal order. The starting point would be to build on the provisions related to R2P in the 2005 World Summit Outcome Document and the vast corpus of human rights law and consolidate these into a legally binding treaty which reiterates the proscription against various forms of human rights abuses and, crucially, outlines both the point at which these abuses are to be considered so severe as to warrant external involvement of some kind – though not necessarily military intervention – and the manner in which this decision would be taken, by whom and through which legal processes. These processes would, we feel, necessitate the establishment of an independent and accountable judicial body with the power to determine both that a violation of the law has occurred and the nature of the resultant punishment. The nature of the punishment, would of course, potentially vary -as is the case with respects to judicial decisions domestically - and allow for judicial decisions which reflect the reality that in certain contexts particular types of punitive action – most obviously military intervention –

[67] M. Hakimi, 'State Bystander Responsibility', [2010] *The European Journal of International Law*, 21,) 343-4; Landman, (n. 16), 14
[68] Bassiouni, (n. 15), 37

would potentially do more harm than good. Through the imposition of alternative measures – including sanctions, suspension of UN membership, travel bans and ICC referrals – violators would incur punishment of some form. Additionally, and crucially, the very availability of these punitive sanctions, would serve as a deterrent.

This judicial body could also, we contend, come into being without necessitating the dissolution of the UNSC; conceivably it could be triggered into action in situations where the UNSC is demonstrably deadlocked despite consensus in the General Assembly in favour of punitive action, as was very obviously the case with respects to Syria. The new body would, therefore, challenge the UNSC's 'unconditional exclusive legitimacy' rather than its legitimacy per se.[69] A further consideration would be the establishment of a military force within the UN at the disposal of the new body mandated to undertake coercive action should states be unwilling to deploy their troops. Such a force would be used only in very rare cases; there would need to be an atrocity of a grave magnitude, no alternative diplomatic means, deadlock at the UNSC and the unavailability of member state forces. The number of cases where this could happen would be, we feel, very small. Nonetheless, such a force – which has long been suggested – would potentially redress the unedifying spectacle of inertia in the face of egregious human suffering and its very existence would act as a deterrent in itself.

The goal avowed here can of course be criticized, not unreasonably, as utopian. That said, we offer the following rejoinders; first, the primary aim here is to demonstrate that the existing system – even post R2P and the ICC – remains fundamentally corrupted by the constitutional competencies of the UNSC, specifically the P5. Achieving agreement around this claim would constitute progress as it would hopefully impel those concerned about human rights to desist from engaging with strategies which, we feel, are doomed to fail, and

---

[69] A. Buchanan, and R. Keohane, 'Precommitment Regimes for Intervention: Supplementing the Security Council', [2011] *Ethics and International Affairs*, 25, 41

instead work on determining how the reforms we advance in general terms might be implemented in practice. Additionally, the temper of the international community is demonstrably in favour of reform; the UNSC is widely acknowledged as lacking legitimacy in terms of its membership and competencies as reflected in the statements from the General Assembly, the UN Secretary-General and the general trend amount commentators and academics. Our call for reform is not, therefore, an aberration, but rather reflective of many voices in the international community. The international system is, famously, very different from the domestic legal system and thus the institutional configuration and theoretical foundations – normative and real – of domestic legal orders naturally do not equate with that which exists internationally; yet to assert this as a counter to those, like us, who advocate legal reform is somewhat paradoxical as it suggests that the normative systemic configuration cannot be achieved because it does not presently exist. We are certainly not alone in suggesting alternative means of improving the international response to intra-state crises and the commission of mass atrocities; as Susan Meyer argued, '...without major changes in the UN, R2P will go the way of the Genocide Convention'.[70]

Conclusion

R2P as understood by some of its defenders and as framed in some UNSC resolutions conflates the punitive and law enforcement functions. When the UNSC engages in actions that conflate law enforcement, protection, and punishment, it might contribute to a peaceful resolution in a particular case, but in the longer term such actions reconstitute the legal and political order in such a way that the UNSC's powers grow unchecked. So, while we agree that there must be some role for the UNSC in the maintenance of international peace and

[70] S. Meyer, 'In Our Interest: The Responsibility to Protect', in Cooper and Kohler (n 15), 56. See also Buchanan and Keohane, (n. 69); Hurrell, (n. 64), 30; J. Pattison, *Humanitarian Intervention and the Responsibility to Protect* (Oxford: Oxford University Press, 2010)

security, we also believe that this role must be part of a better defined legal and political order with a strengthened judicial structure, organized around both the ICC and the ICJ.

Many hold that R2P has increased the chances that the UNSC will act and that this constitutes progress when compared with bygone eras when - ostensibly - there was consistently no response.[71] It is our contention, however, that R2P entrenches the very structural problems that have contrived to produce the poor record advocates of R2P sought to redress. At present R2P facilitates a world order in which certain agents – specifically the P5 – can selectively increase their own power and still fail to uphold the protection of individuals. This deleterious selectivity was readily apparent during the UNSC's response to the Arab Uprisings particularly with respect to the situations in Libya, Bahrain and Syria.

A fundamental principle underpinning any legal order is the removal of selectivity from law enforcement and to that end the constitutional separation of the judiciary from the executive lest we have the sheriff-like scenario whereby the three different functions of law in a political order - legislation, judgment and enforcement - are conflated in one agent. At present – even post R2P – the international legal system comprises just such a constitutional conflation; the UNSC thus operates as a 'political core in a legal regime'.[72] So long as this remains the case, the enforcement of international law will be compromised. While R2P and the ICC certainly constitute progressive developments, there remains, what Anne Peters terms, a 'missing link' which is precisely the gap between law and enforcement.[73]

We readily acknowledge that the proposals we advance are not necessarily going to be adopted in the near future. But, we do see these as an improvement on the current calls for strengthening R2P which fail to take into account this longer-term political and legal critique.

---

[71] T. Weiss, 'R2P Alive and Well After Libya', *Ethics and International Affairs*, [2011] 25, 5; C. Badescu, *Humanitarian Intervention and the Responsibility to Protect* (London, Routledge, 2010).
[72] N. White 'The Will and Authority of the Security Council After Iraq', [2004] *Leiden Journal of International Law*, 17, 666
[73] Peters, (n. 15), 535

We find the idea that we must submit to the status quo because reform is unrealistic[74] unconvincing; that the international and domestic are very different legal orders is axiomatic; that they should - and will always - be so is fatalistic and, in essence, unhelpful. There have been myriad proposals advanced which advocate reform of the international legal system[75] – and the powers of the UNSC in particular – all of which essentially cohere with Hans Kelsen's conception of the current system as 'primitive' and but a stage in an evolutionary process'.[76] Our contribution has not been to provide a detailed proposal but rather to argue, on the basis of the fate of R2P and the ICC during the Arab Uprisings, that those concerned with human rights protection must accept that any proposals which seek to redress the appalling record of international responses to intra-state crises will fail if they do not aim to reform the current legal system.

[74] A. Bellamy, *The Responsibility to Protect: A Defence* (Oxford: Oxford University Press, 2014), 11
[75] See, Centre for UN Reform Education, ,http://www.centerforunreform.org/?q=node/23, accessed 12 March 2014
[76] H. Kelsen, *General Theory of Law and State* (Cambridge MA: Harvard University Press, 1945), 338