THE ICC AND R2P: VACILLATING BETWEEN UTOPIA AND TYRANNY

Naomi Suzanne Snider

LLM

Faculty of Law
University of Toronto

2012

Abstract

For nearly half a decade discussion of the responsibility to protect (R2P) and international criminal justice proceeded along separate lines. However, in recent years an emerging perception that international criminal law may contribute to putting an end to a continuing atrocity crimes has lead to its use as an R2P reactive tool. This paper examines the relationship between R2P and the activity of International Criminal Court (the ICC), and the implications of their recent rapprochement. Firstly, the paper aims to bring a much-needed focus on the implications of their current interaction in ongoing conflict situations. Secondly it examines whether the convergence of R2P and the ICC represents a paradigmatic shift toward humanity’s law and a possible utopian tyranny or reinforces the traditional statist system as the fundamental framework for conflict mediation opening the door to a possible “cynic tyranny”. Thirdly, it considers how ICC and R2P activities should be coordinated.
ACKNOWLEDGEMENT

This thesis highly benefited from the supervision, comments and advice of Professor Karen Knop. All remaining errors are the author’s alone.
Table of Contents

Table of Contents

Chapter 1 ICC and R2P in Policy, practice and literature

1 Introduction

2 Overview R2P and ICC

2.1 The responsibility to Protect

2.2 The ICC

3 The relationship between R2P and the ICC

3.1 Relationship between R2P and ICC: policy

3.1.1 Determining an R2P violation: the use of international criminal law terminology

3.1.2 Enforcing an R2P violation: utilizing the ICC

3.2 Relationship between R2P and ICC: in Practice

3.2.1 Determining an R2P violation: the use of international criminal law terminology

3.2.2 Enforcing an R2P violation: utilizing the ICC

3.3 Relationship between R2P and ICC: in Academic literature

3.3.1 Closer convergence between order and justice R2P and the ICC is not useful

3.3.2 Closer convergence is useful

Chapter 2 Humanity's law and the Utopian tyranny

1 Introduction

2 Overview of humanity’s law

2.1 Origins and development of humanity's law

2.2 The Shift from the order of states to the law of Humanity

3 Re-conceptualizing the ICC and R2P as Utopian justice

3.1 R2P – Maintaining Order and Justice in the Name of Humanity

3.1.1 Shift in the role of law in global governance

3.1.2 International governance of internal state affairs

3.1.3 State sovereignty redefined
3.1.4 Individualization of international law ................................. 49

3.2 ICC – Humanity’s Court ................................................................. 50
3.2.1 Shift in the role of law in global governance ......................... 50
3.2.2 International governance of internal state affairs .................... 52
3.2.3 State Sovereignty redefined ....................................................... 53
3.2.4 Individualization of International law ....................................... 53

3.3 Re-conceptualizing the convergence between the ICC and R2P ...... 54

4 The Utopian Tyranny ...................................................................... 59
4.1 The theoretical objection ............................................................... 59
4.2 The practical objection ................................................................. 62

Chapter 3 The Statist Paradigm and the Cynic Tyranny ..................... 68
1 Introduction ..................................................................................... 68
2 R2P and the ICC – a state centric perspective .............................. 70
2.1 Police in the Temple – the Politicization of Atrocity Crimes .......... 71
2.2 Temple as Support for the Police ................................................... 76

3 ICC and R2P : Increased Sovereignty for the Powerful and Increased Intervention for the Weak ............................................................... 78

4 R2P and the ICC – Re-shaping Power Structures an “Inside Job” ........ 79
4.1 UNSC from Political Body to Global Jury – the Civilizing Force of Hypocrisy .... 79
4.2 The Role of the ICC – from Puppet to Participant .......................... 86

Chapter 4 Conclusion ......................................................................... 90

BIBLIOGRAPHY .................................................................................. 97
Chapter 1
ICC and R2P in Policy, practice and literature

1 Introduction

Scholarship on the International Criminal Court (the ICC) and the Responsibility to Protect tends to trace the change in expectations about international responses to mass atrocities in the post-Cold War era and, in particular, the aftermath of the 1994 Rwandan genocide. In a bid to ensure that the world never again fails to act, the coming into force of a permanent international criminal court in 2002 and the adoption of the R2P principle in the 2005 World Summit Outcome Document (the “Outcome Document”) were initially seen to have marked the birth of two separate responsibilities: the responsibility to punish and responsibility to protect. This formalistic distinction between the principle of protection and legal logic of punishment means that R2P and the ICC are typically viewed and treated as distinct areas of analysis and practice. On the one hand, the R2P doctrine has been heralded as the new “international security norm” to ensure the protection of peoples against mass atrocity, and discussion largely confined to the

---

3 Ramesh Thakur & Vesselin Popovski “The Responsibility to protect and Prosecute The parallel erosion of Sovereignty and impunity” (2007) 1 The global Community Yearbook of International law and jurisprudence 39 [Thakur].
4 Heather Roff, Global Justice, Kant and the Responsibility to Protect: A Provisional Duty [forthcoming in March 2013].
fields of conflict resolution and humanitarian intervention. The ICC on the other hand is widely viewed as part of the “great global justice dream”\(^5\) and analyzed from an international criminal law perspective.

Following a decade of neglect and ambivalence regarding their conceptual and practical linkage distinctions between these two norms have blurred as various actors have sought to integrate the ICC and R2P agendas. In particular, UNSC referral of the situation in Darfur and Libya to the ICC under the auspices of R2P has lead to an emerging perception of international criminal justice intervention as part of the R2P toolbox.\(^6\) However, despite this increasing recognition that the two concepts are in fact intimately linked the precise nature and impact of the relationship between the ICC and R2P remains unclear.\(^7\)

This lack of clarity, is largely due to the fact that, the limited analysis of the relationship between R2P and the ICC that has emerged to date focuses on an intermediate range of generality, whereby the nature, aims and formal procedures of R2P and order on the one hand are juxtaposed against those of international criminal law, the ICC and justice on the other. Implicit in current analysis is the assumption that order and justice are separate, but parallel realms that can be like or unlike, useful or not useful to one another. This has resulted in a polarized and conflicting presentation of the relationship, whereby the ICC is presented either as a tool for the operationalization of R2P so that justice is seen as instrumental to the requirements of security and order or alternatively R2P is presented as a mechanism for ICC enforcement so that order is

---

\(^5\) Geoffrey Robertson QC, *Crimes Against humanity, the struggle for global justice* (London: Penguin books 2006) at 466 [*Robertson*].

\(^6\) Fatou Bensouda Address (delivered at the Stanley Foundation Conference on Responsibility to Protect, New York, 18 January 2011), online <http://www.r2p10.org>.

\(^7\) *Schiff* Supra note 1.
made conditional on the principles of justice. This binary analysis places the conditions of order and principles of justice in a state of mutual dependence and competition and a complementary yet conflicting relationship between the ICC and R2P appears inevitable.

Underlying current confusion regarding the relationship between ICC and R2P is a conflict in priorities between those favoring the importance of order and those favoring the value of justice. This paper attempts to offer a way out of this self-fulfilling program of mutual attraction and conflict between ICC and R2P by establishing a coherent framework to conceptualize and balance the interaction between international criminal law and justice on the one hand and R2P and collective security on the other. In particular it aims to move discussions of the relationship between the ICC and R2P away from the binary confines of order versus justice to consider how order and justice, and ICC and R2P, are related within different and competing conceptions of world order.

Firstly it examines the relationship between ICC and R2P through the lenses of, what Ruti Teitel terms “humanity’s law”. This framework of analysis suggests that convergence between ICC and R2P reflects and reinforces a principled extension of individual justice principles into the political sphere opening the doors to a move away from ad-hoc military intervention toward universal judicial enforcement as the modus-operandi for responding to mass atrocities. This paper goes on to contrast this humanity law framework with the opposing analytical assumption that the traditional statist system is the fundamental framework for conflict mediation and power

---

8 For the importance of this analytical transition see Andrew Hurrell, “Order and Justice in International Relations: What Is at Stake?” at ch 2 in Rosemary Foot, John Gaddis, and Andrew Hurrell, eds in order and justice in International Relations (Oxford Scholarship Online: 2003). Arguing that “we need to move quickly from a discussion of order versus justice and instead consider how order and justice are to be related within different, and often conflicting, conceptions of world order.”).
management. This analysis suggests that the rapprochement of R2P and the ICC does not represent the advent of the primacy of the juridical over the political on the international scene but rather is an example of the way power manages to instrumentalize justice, so as to subvert it’s meaning to advantage thus potentially creating a “cynic tyranny.” This paper adopts a balanced approach that attempts to expose the light and shadows of these separate frameworks for analysis. On the one hand there is an idealist bias, which tends to blind advocates of humanity’s law to the inherent dangers of even authentic demands for utopian justice and the possibility of creating a “Utopian Tyranny”. On the opposing side of the analytical spectrum critics of the relationship between the ICC and R2P who argue that together these norms reinforce the power structures they claim to transcend, betray a cynical bias which tends to overshadow what has been termed the “civilizing effects of hypocrisy” and the power of the ICC and R2P to shape the very power structures that they enlist for support.

The relationship between the ICC and R2P is in fact far more nuanced than these binary frameworks suggest. The partial shift to the new law of humanity has created a complex world order in which cosmopolitan models of governance, informed by an evolving law of humanity, coexist with many aspects of the old Westphalian order and each normative structure has the power to shape and influence the other. R2P and the ICC represent these tensions in both substance and structure in so far as they are both designed to secure human interests within a

10 Martti Koskenniemi, The Police in the Temple Order, Justice and the UN: A Dialectical View (1995) 6:3 E.J.I.L 325 [Koskenniemi] The present paper builds on Koskenniemi’s work by adapting and applying his model of cynic and utopian tyranny (at 330) to the context of ICC and R2P. Koskenniemi argues that utopian tyranny emerges when emerges when a society’s institutions and the management of its problems are seen from the perspective of one normative belief whereas this paper argues that utopian tyranny also emerges when the relationship between order and justice is viewed from a moral absolutist position, which by stressing the inherent value of justice, fails to query its effects on efforts to secure other core values.

11 Ibid

primarily statist framework. This means that they are at constant risk of either being subverted by the very agents that they purport to control, thus descending into a “cynic tyranny, or on the other hand substituting existing systems of power management and conflict resolution so that they themselves become instruments for violence and repression, thus creating a “utopian tyranny”.

This means that what on the surface appears to be two separate and distinct frameworks requiring different solutions, in fact represent two sides of the same coin so that the problem is the same to solve. The final section outlines a framework for co-ordinating a relationship between ICC and R2P which treats them as neither imposed social control or as completely subordinate to the interests of states and the security council thereby avoiding the traps of both a cynic or utopian tyranny.

In exploring and analyzing the relationship between R2P and the ICC, this paper proceeds in four sections. The first chapter provides an overview of the main elements of R2P and the ICC and elucidates the way in which a relationship between the two has evolved in literature and practice. It argues that the relationship is, in fact, much deeper than current literature suggests. The second chapter locates the development of R2P and the ICC and their closer convergence within humanity’s law framework and explores the extent to which this rapprochement represents the advent of justice over order and the oft-ignored tyranny of this supposed utopia. The third section explores the alternative framework of analysis, which suggests that convergence between the ICC and R2P represents the instrumentalization of justice to create order and explores the possible upside of this supposed “cynic tyranny. The paper concludes with reflections on the future relationship between both R2P and the ICC.
2. Overview R2P and ICC

R2P and international criminal law are notoriously difficult to define. Indeed the difficulty in explaining their relationship is due, in part, to the fact that they are constantly evolving and exist in dynamic tension with each other. This section provides an overview of international criminal justice, as embodied by the work of the ICC, and R2P and the ways in which their relationship has evolved in literature and practice. By an analysis of the current literature, it queries whether the relationship between the ICC and R2P is accurately conceptualized.

2.1 The responsibility to Protect

R2P is an “emerging though neither codified nor fully enforceable norm of international law.”\(^\text{13}\)

In its most widely accepted formulation R2P stands for the responsibility of governments and the international community to protect populations from genocide\(^\text{14}\), war crimes\(^\text{15}\), crimes against humanity\(^\text{16}\) and ethnic cleansing\(^\text{17}\) (“Atrocity Crimes”).

---


14 Genocide covers acts such as murder or serious bodily or mental harm, committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such. Rome Statute of the International Criminal Court, July 17 1998, 37 ILM 999 [Rome Statute], at art. 6, online: <http://untreaty.un.org/cod/icc/statute/romefra.htm>.

15 War crimes refer to “grave breaches”, as specified in the 1949 Geneva Conventions and Additional Protocol I, and other serious violations of international humanitarian norms applicable in international and non-international armed conflict. Important differences remain between the laws applicable in non-international armed conflicts and those applicable to international armed conflict, as evidenced by the shorter list of war crimes that the ICC can prosecute in the context of non-international armed conflicts. See Rome Statute, supra note 14 at art 8.

16 Crimes against humanity encompass serious attacks on human dignity or a grave humiliation or degradation of human beings, the Rome Statute requires that they be committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack. Such crimes can be committed in time of peace as well as during an armed conflict (see Rome Statute supra note 14 at art. 7).

17 Ethnic cleansing is not a distinct crime under the Rome Statute, it is one possible form of crime against humanity, and may be a component of both genocide and war crimes and therefore finds definitional authority in the Rome Statute also.
R2P was first articulated by the international commission on Intervention and State Sovereignty (ICISS) in its 2001 report *The Responsibility to Protect*.18 Building on Francis Deng’s formulation of sovereignty as responsibility,19 this report asserted that primary responsibility for the protection of civilians from “large scale loss of life or ethnic cleansing”20 rests with the state and only when the state is unwilling or unable to fulfil this responsibility does the responsibility fall on the international community.21 A modified version of R2P was unanimously endorsed by the United Nations General Assemble (“UNGA”) in its 2005 World Summit Outcome Document (the “Outcome Document”)22 which was endorsed by the United Nations Security Council (UNSC) in 2006.23 Under this narrower formulation R2P action was confined to the threat or commission of Atrocity Crimes24 and thus conceptually aligned with international criminal justice. R2P engagement extends to a continuum of obligations arising over three potential phases: ‘preventative’, ‘reactive’ and ‘rebuilding’.25 Each phase involves four broad sets of tools: political, economic, legal and military,26 to be utilized in a sequence moving from less to more coercive and intrusive.27 The focus of this paper is on the responsibility to react and the role of

20 ICISS Report, supra note 18 at XII.
21 ICISS Report, supra note 18 at 17.
24 *Outcome Document*, supra note 22.
25 ICISS Report, Supra note 18.
26 Ibid at 23, 30, 39-43.
27 Ibid at XI.
international criminal law in determining and regulating how the international community should identify and react when a state has failed to prevent Atrocity Crimes.

2.2 The ICC

The Rome statute of the International Criminal Court (the “Rome Statute”) was concluded in July 1998 and the ICC came into force on 1 July 2002. The Rome statute establishes the first standing court with the authority, under certain conditions and restrictions, to seek extraction of individuals from states and subject them to international legal processes. The ICC has jurisdiction over genocide, war crimes, and crimes against humanity and thus the ‘core-crimes’ of the ICC coincide with the triggers for R2P action. The ICC’s jurisdiction is complimentary to that of national courts and so, like R2P, is structured on the premise that where a state is unwilling or unable to fulfil its primary responsibility to investigate and prosecute Atrocity Crimes the responsibility is transferred to the international level. The ICC does not have universal jurisdiction, rather its authority is limited to alleged crimes committed on the territory of State Parties or by State Party nationals. This authority can be triggered by referral from

---

28 Rome State supra note 14, arts. 6,7 and 8. The court also has jurisdiction over the crime of aggression, however the Court will only be able to exercise jurisdiction over this once the terms of its definition have been agreed upon by the countries supporting the Court and formally amended into the Statute. (See Rome Statute, at art 5. 2. A definition of the Crime of aggression was adopted by the Assembly of State Parties at the Review Conference of the Rome Statute, held in Kampala, Uganda, from 31 May to 11 June 2010 by Resolution RC/Res.6 (online: http://www.icc-cpi.int/icedocs/asp_docs/Resolutions/RC-Res.6-ENG.pdf). This will only enter into force for those States Parties, which have accepted the amendment one year after the deposit of their instruments of ratification or acceptance (Rome Statute, supra at art 121). Further, the Court shall exercise jurisdiction over the crime of aggression subject to a decision to be taken after 1 January 2017 by the same majority of States Parties as is required for the adoption of an amendment to the Statute (see Assembly of State Parties Resolution RC/Res.6.).

29 Although ethnic cleansing is not a distinct crime under the Rome Statute, it is one possible form of crime against humanity, and may be a component of both genocide and war crimes and therefore finds definitional authority in the Rome Statute also.

30 Rome State supra note 14, art 17.

31 Rome State supra note 14, art 12.
State Parties\textsuperscript{32} or upon the Prosecutors authority on the basis of information received from any source.\textsuperscript{33} The only way to extend jurisdiction is by a UNSC referral. The Rome Statute entrusts all matters pertaining to the collection of evidence, the compelling of persons, the issuance of travel authorizations for witnesses to travel to the Court, the conduct of searches and seizures, the forfeiture of assets, the execution of arrest warrants and the surrender of persons to State Parties rather than a permanent and independent enforcement agency.

3 The relationship between R2P and the ICC

3.1 Relationship between R2P and ICC: policy

Implementation of the responsibility to react entails two components: it must be determined that a government has failed or is failing to protect a population (determination), and then appropriate actions must follow to stop abuses (enforcement).\textsuperscript{34} Thus interaction between the ICC and R2P occurs at two levels (determination and enforcement) and the relationship between the two is circular rather than linear (International criminal law norms trigger R2P action and the ICC is in turn utilized as an R2P enforcement instrument). Much of the ambiguity regarding the relationship between the ICC and R2P arises because the precise nature of this multidimensional relationship is not fully articulated in policy documents.

\begin{flushleft}
\footnotesize
\textsuperscript{32} Rome State supra note 14, art 14.
\textsuperscript{33} Rome Statute supra note 14, art 15.
\textsuperscript{34} Michael Contarino and Selena Lucent, “Stopping the Killing: international criminal court and juridical determination of the responsibility to protect” (2009) 1 560 Global responsibility to Protect 583 at 562 [Contarino & Lucent].
\end{flushleft}
3.1.1 Determining an R2P violation: the use of international criminal law terminology.

The ICC and R2P establish a duality of responsibility for the commission of Atrocity Crimes since a physical person and a state are considered simultaneous perpetrators. The responsibility of an individual for Atrocity Crimes is enacted by Articles 6, 7 and 8 of the Rome Statute, and by Articles 25 stipulating the procedure for the determination of criminal responsibility. The R2P principle articulated in the Outcome Document pinpoints both the responsibility of states and the international community. The state is considered responsible for Atrocity Crimes if either directly committed by a government against its own people, or allowed to happen by a government unable or unwilling to stop them.\(^{35}\) If the state fails to fulfil its responsibility to protect the responsibility falls upon the international community to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate.\(^{36}\)

Under the Rome Statute the ICC is responsible for determining the commission of Atrocity Crimes by individuals and under the Outcome Document the UNSC is responsible for labelling a course of action or inaction as a violation of the R2P principle. Both documents afford the respective institution a certain amount of discretion and thus the normative responsibility of each institution to determine and control the commission of Atrocity Crimes is not absolute. The

\(^{35}\) ICISS Report, supra note 18 at 16; the positive duty on states to prevent Atrocity Crimes is highlighted in the Outcome Document, supra note 22 (“This responsibility entails the prevention of such crimes, including their incitement, through appropriate and necessary means\(^{37}\) at 138).

\(^{36}\) Outcome Document, supra note 22 at 139.
ICC’s jurisdiction is limited to individual criminal perpetrators of “the most serious crimes of concern to the international community”\textsuperscript{37} and only arises when a state is unable or unwilling to prosecute\textsuperscript{38}. Recognizing the limited resources available for prosecutions, and potentially ambivalent effects of prosecution there are additional criteria for judging when the ICC should become engaged: these include the gravity of the situation\textsuperscript{39} and whether a prosecution is in the interests of justice.\textsuperscript{40} Furthermore the only way for the ICC to obtain jurisdiction over non-state parties is for the UNSC to exercise its discretion by referring a case to it under its chapter VII powers.

Under the Outcome Document the UNSC is responsible for labelling a course of action or inaction as a violation of R2P. However, lack of clarity regarding how it should apply international criminal justice norms to determine whether a situation amounts to a violation of R2P and the implications of such a determination results in wide discretion. Ambiguity surrounding the implications of UNSC determination arises because of two factors. Firstly the Outcome Document is unclear as to whether the determination of a threat to peace and security remains a threshold requirement for intervention under Chapter VII of the UN Charter in addition to the determination of Atrocity Crimes, or whether the UNSC can intervene whenever a

\begin{footnotesize}
\begin{itemize}
\item\textsuperscript{37}Rome Statute, supra note 14 at art. 5.
\item\textsuperscript{38}Rome Statute, supra note 14 at art. 17.
\item\textsuperscript{39}Rome Statute, supra note 14 at art. 17.1(d); See also Office of the Prosecutor, \textit{Policy Paper on the Interests of Justice} (September 2007), online: <http://www.icc-cpi.int/NR/rdonlyres/772C95C9-F54D-4321-BF09-73422BB23528/143640/out.html> (“In determining whether the situation is of sufficient gravity, the Office considers the scale of the crimes, the nature of the crimes, the manner of their commission and their impact”)
\item\textsuperscript{40}Rome Statute, supra note 18 art. 53.1 (c). For guidance on the meaning of the concept of the interests of justice see Office of the Prosecutor, \textit{Policy Paper on the Interests of Justice} (September 2007), online: <http://www.icc-cpi.int/NR/rdonlyres/772C95C9-F54D-4321-BF09-73422BB23528/143640/out.html> In particular the guidance notes states that the Office of the prosecutor (OTP) will consider “issues of crime prevention and security under the interests of justice, ….., however, the broader matter of international peace and security is not the responsibility of the Prosecutor; it falls within the mandate of other institutions.”
\end{itemize}
\end{footnotesize}
state is ‘manifestly failing’ to protect their populations from Atrocity Crimes. If the former, R2P will be tied to a deliberately fluid and broadly political decision-making criterion. Secondly it also remains unclear to what extent the UNSC has an obligation to intervene if necessary to protect populations from Atrocity Crimes. The Outcome Document’s reference to ‘case-by-case’ on decisions on the use of force would seem to suggest R2P falls short of imposing a legal duty on the UNSC to respond to R2P violations. This suggests that the UNSC has wide discretion in deciding whether the criteria for intervention under R2P have been met. Consequently, it appears that the constraining function of international criminal law criteria only applies to UNSC decision-making.

Aside from the lack of clarity regarding the implications of R2P determination, there is a great deal of ambiguity regarding how the constraining international law criteria should be applied to determine R2P violations in the first place. Although the Outcome Document limited the scope of R2P to Atrocity Crimes neither this nor any subsequent R2P policy documents contain detailed definitions of the separate Atrocity Crimes. Furthermore there is no discussion of how the UNSC should decide if there is an urgent need for intervention in a given state (i.e. the specific level of gravity or seriousness of potential violations and the standard of proof required to determine when this level has been reached) or the consequences of a situation falling within the R2P (i.e. what type of intervention is justified by the specific breach). The Rome Statute is

42 The Outcome Document, supra note 22 uses the following qualifiers when it comes to responsibility to take action through the UNSC under Chapter VII: Firstly, the Heads of State merely reaffirm that they “are prepared” to take action, implying a voluntary, rather than mandatory engagement. Secondly, they are prepared to do this only “on a case by case basis”, which precludes a systematic responsibility. For further discussion of this issue, See Office of the President of the General Assembly, ‘Concept note on responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity’ Online: UN <http://www.un.org/ga/president/63/interactive/protect/conceptnote.pdf>.
the principle document for understanding the nature of Atrocity Crimes thus it is broadly accepted as providing the basis for determining the substantive scope of intervention under R2P. However it not clear whether international criminal law standards (i.e. proof beyond a reasonable doubt that crimes have been committed) are also appropriate for determining when the level of seriousness or gravity has been reached to justify intervention or the type of intervention that is justified by the specific breach.

3.1.2 Enforcing an R2P violation: utilizing the ICC

Although prosecution is cited in the R2P formal literature as part of the R2P toolbox there is little significant policy discussion or critical analysis of the purpose and scope of this role and how it interacts with other R2P measures.

On the basis of the Outcome Document the UNSC is currently responsible for determining the appropriate action to take to prevent and stop Atrocity Crimes. The ICISS report presents trials as a promising alternative to military intervention in a humanitarian crisis. However it is unclear whether the threat of ICC referral or actual referral and enforcement of ICC arrest

---

43 But see Scheffer supra note 13 (“not all Atrocity Crimes, particularly some categories of crimes against humanity and war crimes, necessarily justify military intervention as the most extreme application of R2P” at 1)

44 For notable exceptions see Scheffer, supra note 1 at 124-5 highlighting that “remains important not to automatically translate the substantiality required for a criminal prosecution of a crime against humanity with the justification for R2P….. The tribunals focus on crimes already committed…. Governments and international organization confronted with the threat of Atrocity Crimes will take additional considerations into mind when determining whether or not to take action under R2P.” [Emphasis added]. See also Sheri Rosenberg & Ekkehard Strauss “A Common Approach to the Application of the Responsibility to Protect” [Rosenberg & Strauss] in Daniel Fiott, Robert Zuber & Joachim Kops, eds, Operationalizing the Responsibility to Protect A Contribution to the Third Pillar Approach (Brussels: the Madariaga – College of Europe Foundation, Global Action to Prevent War, the Global Governance Institute and the International Coalition for the Responsibility to Protect 2012.) (proposing the following standard for R2P determination: “The situation will be considered in the context of the RtoP, if the examination of the situation establishes a real risk that exceptionally grave human rights violations, as described in genocide, war crimes, crimes against humanity and ethnic cleansing, are occurring or could occur in the future.” [emphasis added].

45 ICISS Report supra note 18 at 8 “we are also very much concerned with alternatives to military action, including all forms of preventive measures, and coercive measures – sanctions and criminal prosecutions – falling short of military intervention”.
warrants was envisaged. Furthermore it is unclear whether the putative purpose of legal action is to stop ongoing crimes directly by arresting and prosecuting and thereby removing perpetrators or to end ongoing crimes indirectly through deterrence.\(^{46}\) The distinction between using the threat of ICC referral as a political tool to deter actors from their current action and to encourage parties to reach a negotiated settlement, and the actual referral of a case to the ICC for such ends is crucial and thus the failure to make a clear distinction between the two or to consider the costs of either on the legitimacy of the ICC is significant. The former is a legitimate political strategy, which may actually influence political actors without undermining the legitimacy, or independence of the court. There is of course the risk that if the ICC is only ever threatened in a given situation and no referral made the threat will seem empty, however this merely undermines the efficacy of the threat and not the legitimacy of the thing that is being threatened. However once the machinery of the ICC is actually invoked (i.e. by UNSC referral), and arrest warrants issued failure of the international community to co-operate and enforce arrest warrants could threaten to undermine the very legitimacy and independence of the court. The vague conception of ICC as an operational asset of R2P within policy documents thus avoids the controversial issue of when threat of ICC scrutiny and prosecution should move to actual investigation, issuing of arrest warrants, prosecution and apprehension. It thus bypasses the fundamental question of whether R2P functionaries should be made an operational asset for ICC enforcement.

\(^{46}\) Advocates of deterrence make claims about the capacity of the ICC to deliver both specific deterrence (which focuses on particular individuals and particular conflicts and points to the capacity of the ICC to deter ongoing crimes in specific conflicts that may be difficult to end in the absence of effective peace negotiations, economic sanctions, and general deterrence (whereby deterrence is neither confined to a particular individual or territory nor time-bound, but is a long-term project which can increases the costs to potential future perpetrators and gradually lead to compliance). For further discussion see Leslie Vinjamuri, ‘Deterrence, Democracy, and the Pursuit of International Justice’ (2010) 24 Ethics & International Affairs 191 [Vinjamuri].
The Rome Statute is even more ambivalent regarding whether the ICC is an appropriate mechanism for ensuring peace and security. On the one hand Article 13 authorizes the ICC to accept jurisdiction over cases referred to it by the UNSC, while Article 16 on the other hand gives the UNSC the power to defer ICC investigations and prosecutions, for a renewable 12-month period. Both powers are exercisable by the UNSC acting under Chapter VII of the UN Charter, which sets out its powers to maintain peace and to take military and non-military action to "restore international peace and security". Taken together Article 13 and 16 of the Rome Statute simultaneously conceptualize the ICC as both a potential tool for securing peace and security as well as a potential threat to the peace.

3.2 Relationship between R2P and ICC: in Practice

The ICC and R2P both constitute expressions of international engagement seeking to respond to Atrocity Crimes. Therefore, at this level of abstraction at least, they are normatively complimentary. On an operational level, however, the precise nature of their relationship and whether there can be a stable division of labour between the two is unclear. On the one the limited examination of the relationship between R2P and the ICC in official documents has been read by some as indicating that no discussion is needed because the international criminal law dimension is self-evident and unproblematic. However contrary to the seemingly broad agreement about R2P’s criminal law dimensions the controversy surrounding recent referrals to

48 Rome Statute, supra note 14 at art 16.
49 Schiff, Supra note 1 at 5.
50 Schiff supra note 1 at 13.
51 See Caroline Fehl “Sanctions, Trials and Peace: Promises and Pitfalls of the Responsibility to Protect’s Civilian Dimension”, in Daniel Fiott, Robert Zuber & Joachim Koops, eds, Operationalizing the Responsibility to Protect A Contribution to the Third Pillar Approach (Brussels: the Madariaga – College of Europe Foundation, Global Action to Prevent War, the Global Governance Institute and the International Coalition for the Responsibility to Protect 2012) [Fehl].
the ICC under the auspices of R2P has cast a shadow over the apparent benefit of utilizing prosecutorial strategies as part of the R2P “toolbox”. This section examines how international criminal law is used as both an agent for R2P action (by utilizing the terminology of international criminal law) and as a reactive tool. In particular it examines the blind spots and biases which undermine the role of the ICC in providing a legal basis for and operationalizing R2P and how this impacts upon both the R2P and international criminal justice agendas.

3.2.1 Determining an R2P violation: the use of international criminal law terminology.

On the basis of the Outcome Document the UNSC is currently responsible for labelling violations of the R2P principle. However, in the six years since R2P was unanimously endorsed by the UNSC in resolution 1674 it has shown mixed willingness to respond to mass atrocities.\(^{52}\)

Debates within the UNSC about the legality and legitimacy of the use of force by states is increasingly cantered on the rights and claims of peoples and persons rather than on the interests and prerogatives of states as such. For example in 2011 the UNSC mandated missions in Cote d’Ivoire\(^ {53}\) and Libya\(^ {54}\) both took place with an explicit R2P reference to the protection of

---

\(^{52}\) For discussion of the UNSC mixed responses and successes and failures see Alex J Bellamy, “The responsibility to protect – five years on” (2010) 24:2 Ethics & International Affairs 143 discussing for example the UNSC’s failure to protect in Somalia and Darfur. Somalia, has not commonly been viewed through the prism of RtoP, despite the commission of war crimes, crimes against humanity, and ethnic cleansing, as well as the very real threat of further escalation. Darfur is typically rated an abject R2P failure in that it failed to galvanize international action or, worse, exacerbated the situation by distracting the relevant actors. See for example Alex De Wall, “Darfur and the failure of the responsibility to protect” (2007) 83:6 International Affairs 103. In contrast Libya and Cote d’Ivior are typically cited as examples of the UNSC fulfilling its responsibility to protect (see Alex J. Bellamy and Paul D. Williams, “The new politics of protection? Côte d’Ivoire, Libya and the responsibility to protect” (2011) 87:4International Affairs 825 at 847.

\(^{53}\) UNSC Res UNSCOR, 2011, UN Doc S/RES/1975 (2011) [Resolution 1975]. This Resolution issued targeted sanctions on Gbagbo and his inner circle, and stressed the support given to the mission to use all necessary means within its mandate to protect civilians under threat. The Resolution stated that attacks that have targeted civilians could amount to crimes against humanity, and reaffirmed the primary responsibility of all States to protect civilians.

\(^{54}\) UNSC Res UNSCOR, 2011, UN Doc S/RES/1970 (2011) [resolution 1970.] The UNSC adopted resolution 1970 on 26 February 2011. It affirmed Libya’s ‘responsibility to protect’ and imposed an arms embargo and travel ban on the Gaddafi family and key members of government, froze the assets of the Gaddafi family, and referred the
civilians from possible Crimes Against Humanity. Resolution 1973 is particularly significant in so far as it marked the first time the UNSC had authorized the use of force for human protection purposes against the wishes of a functioning state.

According to some commentators the UNSC’s response to the crises in Côte d’Ivoire and Libya reflects a new politics of protection. However comparing it’s response to Libya to its non-response to the ongoing situation in Syria guards against any quick triumphalism on this point. When the Libya case was referred by the UNSC to the ICC there were less than 1,000 people killed, whereas an estimated death toll of over 10,000 have been killed in Syria and no UNSC action has been taken. Russia and China have vetoed 3 proposed UNSC resolutions, including a resolution in February that would have condemned the abuses in Syria, demanded their cessation, required Syria to give free rein to League of Arab States’ institutions and Arab and international media, and called for an “an inclusive Syrian-led political process conducted in an environment free from violence, fear, intimidation and extremism, and aimed at effectively addressing the

---

situation to the International Criminal Court for investigation into reports of crimes against humanity. UNSC Res UNSCOR, 2011 UN Doc S/RES/1973 (2011) [Resolution 1973] was adopted Resolution 1973 on 17 March it sanctioned a no-fly zone to protect Libyan civilians, and authorized Member States, in cooperation with the UNSC, to take “all necessary measures (...) to protect civilians and civilian populated areas under threat.” Resolution 1975 supra note 53 (“Considering that the attacks currently taking place in Côte d’Ivoire against the civilian population could amount to crimes against humanity”) Resolution 1970 supra not 54 (Considering that the widespread and systematic attacks currently taking place in the Libyan Arab Jamahiriya against the civilian population may amount to crimes against humanity).


56 The number of killed civilians of the Libyan conflict before the intervention started can only be estimated. Different sources report different estimates. According to the UN Secretary General Ban Ki Moon there were approximately 1,000 as at 1 March 2011. See Secretary – General SG/SM/13425 GA/11051 AFR/2130, online <http://www.un.org/News/Press/docs/2011/sgsms13425.doc.htm>.

57 The number of killed civilians, rebels and soldiers for the Syrian conflict can also only be estimated because of only limited and constrained information’s from Syria. 10,000 is the death toll estimated by the UN as at 27 June 2012 online <http://www.un.org/News/Press/docs/2012/sc10536.doc.htm>.
This inconsistent approach to R2P violations has polarized interpretations of the UNSC’s role in determining R2P violations and the extent to which international criminal norms constrain its political mandate or merely serve as a smokescreen to advance political agendas that go beyond the protection of civilian mandates. According to some commentators the lack of consensus over Syria does not undermine consensus on the principle that people should be protected from Atrocity Crimes, but rather highlights the difficult of agreeing on what to do in specific circumstances and how best to protect civilians. This interpretation is consistent with China and Russia’s rationale for their vetoes vis-à-vis Syria, on the grounds that they are trying to achieve a peaceful resolution to the conflict through negotiations within the framework of an international consensus. However many commentators have been sceptical of this analysis, arguing that the emerging humanitarian discourse within the UNSC is at best decorative and a distraction and at worst could be a Trojan horse for neo-colonialist military intervention, which may cause more harm to the very civilians they are designed to protect. Such scepticism has created the
paradoxical situation whereby both supporters and critics of actual R2P interventions accuse the other side of using humanitarian discourse to mask self-interest. The irony of this paradox is exemplified by the internal debate within the UNSC whereby supporters of more coercive intervention have described China and Russia’s recent vetoes as a failure which “put their national interests ahead of the lives of millions of Syrians” while Russia and China have questioned the sponsors of the draft resolutions sincerity in ending the crisis through a Syrian-led political process suggesting that more coercive intervention was designed to further “geopolitical intentions which have nothing in common with the legitimate interests of the Syrian people.”

This in turn it is claimed has lead to further escalation of the conflict.

The majority of analysis has focused on the degree of consensus within the UNSC surrounding the principle of R2P and overlooked the way in which this principle, and in particular the concept of Atrocity Crimes underlying it, has been interpreted and applied. In particular commentators that regard the new politics of protection as a cause for celebration, have tended to overlook the extent to which this so called politics of protection accords with and is embedded in the law of prosecution (i.e. international criminal justice standards). For example resolution 1973 does not clarify the standard for determining Atrocity Crimes triggering intervention or explicitly state whether this amounts to a separate basis for intervention or is tied to the finding that such crimes amount to a threat to international community. In fact its reference to the fact that violence

Assembly, Rev. Miquel D’Escoto Brockman, Remarks at the Opening of the Thematic Dialogue of the General Assembly on the Responsibility to Protect, UN Headquarters, New York, July 23, 2009 online: http://www.un.org/ga/president/63/statements/openingr2p230709.shtml (arguing that that the supposed impartiality of R2P laudable motives can end-up being misused “to justify arbitrary and selective interventions against the weakest states”).


ibid at 8, statement of Mr Chrukin of the Russian Federation.

Ibid.
against the civilian population in Libya “may amount to crimes against humanity” seems to set a very low standard for determination, thus opening the doors to potential manipulation. Furthermore the language of the resolution appears to authorize intervention on the basis of a “determination” of a threat to peace and security, rather than on a finding of Atrocity Crimes per se, thereby tying R2P to a deliberately fluid and broadly political decision-making criterion rather than clear legal standards.

The UNSC is formally responsible for labelling a course of action or inaction as a violation of R2P, and the Rome Statute does not empower the court to formally rule that a state is failing in its responsibility to protect people. However ICC determination that a conflict “situation” fulfils its criteria for jurisdiction overlaps with the situations that trigger R2P action, so in practice it does have a potentially informal power to highlight R2P violations and thus a potentially persuasive role in triggering further R2P action. Steven Roach argues that ICC investigations and indictments are an important source of evidence of the commission of Atrocity Crimes and could put pressure on the UNSC to act. Prior to launching formal investigations the prosecutor has in practice declared that he is watching events in a particular state or region, on the basis of information received from states or NGO’s in the region. However despite the close conceptual overlap between scrutiny by the Office of the Prosecutor (OTP) and calls for action pursuant to R2P, in practice there is not a clear operational link between the two. As Benjamin Schiff points

---

66 Resolution 1973 supra note 54.
67 Resolution 1973 supra note 54.
out the OTP’s announcements of his concern, preliminary and formal investigation overlap with, but are not co-extensive with invocations of R2P violations in so far as the OTP has pursued at least preliminary investigations into more situations than those cited in statements about R2P, responding to reports from states and NGO’s.\textsuperscript{70} The absence of UNSC R2P action in Northern Uganda coupled with the predominant ICC response is a notable illustration of this disparity and the fact that the ICC investigations and prosecutions may have less persuasive power than Roach anticipates. Indeed it could be argued that the Ugandan example illustrates the way in which judicial intervention can mask the international community failure to protect thereby reducing, rather than increasing pressure to fulfil its R2P mandate\textsuperscript{71}.

Even if it could be shown that ICC determination of a conflict situation created a legitimacy push whereby the UNSC was pressurized to intervene due to ICC scrutiny, investigation or indictment, the ICC only has jurisdiction over those states that have judged it propitious to submit to it and thus the biggest offenders often remain outside its purview. Thus so long as the ICC lacks universal jurisdiction it cannot solve the problem of selective R2P intervention. Although the UNSC has shown an increased willingness to delegate its determination function to the ICC (as evidenced by its referral of Libya and Darfur) this has not been exercised consistently\textsuperscript{72} and furthermore in practice many of the referrals from the UNSC have come with political limitations which have undermined the courts ability to determine whether an R2P violation has occurred neutrally. For example the UNSC’s referral of Libya to the ICC restricted

\textsuperscript{70} see Schiff, supra note 1 at 20 and 23-4.
\textsuperscript{71} see Raymond Kwan Sun Lau, “Protection first, Justice later? Stopping mass atrocities in Northern Uganda” (presentation delivered at the Inaugural ISA Asia-Pacific Regional Section Conference 2011 ‘Regions States and People of a World of Many Worlds’. 29-30 September 2011), online: <http://www.uq.edu.au/isaasiapacific/content/raylau.pdf>
\textsuperscript{72} For example the UNSC has failed to refer the situation in Syria to the ICC.
the scope of the ICC’s investigation to events committed after 15 February 2011.\textsuperscript{73} This effectively precluded the ICC from investigating allegations regarding the involvement of powerful states in Libya’s internal affairs and their possible complicity in Atrocity Crimes committed by the Gadaffi regime prior to this date.\textsuperscript{74}

3.2.2 Enforcing an R2P violation: utilizing the ICC

Traditionally developed as a system of “post-conflict justice” international criminal law’s role was primarily seen as preventative (general deterrence) and restorative (help in efforts to rebuild states and societies shattered by war). However in recent years an emerging perception that enforcing international criminal law may also contribute to putting an end to continuing conflicts has lead to its use as a reactive tool in ongoing situations. To date, the ICC has intervened in ongoing conflicts in Uganda, the DRC, Sudan, Côte d’Ivoire, and Libya. There is also, as highlighted above, a clear pattern of the ICC intervening at earlier stages in the escalation of conflict with the hope that its scrutiny will halt further human-rights abuses. With the exception of Côte d’Ivoire judicial intervention in each of these situations was triggered by either UNSC referral (Sudan and Libya) or by state referral (Uganda and DRC). Alongside the operationalization of the ICC as a reactive tool by state parties and the UNSC, the prosecutor has also referred to his consideration of the “impact of the prosecution in prevention of further

\textsuperscript{73}Resolution 1970 supra note 54 ("[The Security Council] Decides to refer the situation in the Libyan Arab Jamahiriya since 15 February 2011 to the Prosecutor of the International Criminal Court."\textsuperscript{73} (emphasis added), at para 4).

\textsuperscript{74} see “Libya: Gaddafi regime's US-UK spy links revealed” BBC News, (4 September 2011), online: BBC News at <http://www.bbc.co.uk/news/world-africa-1477453>(referring to documents found by officials from Human Rights Watch in the office of Gaddafi's defected foreign minister, Moussa Koussa, which detailed American and UK engagement with Libyan intelligence and anti-terrorism practices, including the use of extraordinary renditions of individuals to be interrogated and tortured in Libya).
crimes” when determining whether the court should become engaged. The tactic of prioritizing cases that have a high likelihood of success may in part explain why with the exception of Cote d’Ivoire the prosecutor has not used his Proprio Motu powers to intervene in ongoing conflicts.

Scholarship in domestic criminal law has shown that crime prevention is largely a function of incapacitation and deterrence. From this perspective there are two ways of conceptualizing the ICC as reactive tool. Firstly there is the view that the ICC operates indirectly as a deterrence mechanism to prevent crimes from reoccurring through the threat of prosecution and secondly there is the view that the ICC could operate directly to end violence through judicial intervention and arresting and removing those most responsible. In practice the ICC’s role in ongoing conflicts has primarily been justified according to deterrence and the issue of incapacitation, and the myriad of procedural and substantive difficulties in exercising prosecutions, largely ignored or dismissed as a problem without a real world solution.77

Without its own police or military capability the effectiveness of ICC interventions to deter ongoing violence remains highly contested. Once mass violence has erupted threats of punishment can do little to achieve immediate deterrence. The threat of punishment, let alone an

75 UNSCOR 61st year 5459th Mtg, UN Doc S/PV.5459 [Provisional] Statement of the Prosecutor for the International Criminal Court, Mr Luis Moreno Ocampo Pursuant to UNSC Resolution 1593
76 For example the language of deterrence was central in the decision of the OTP to open investigations into the Central African republic. See ICC OTP, Press Release, ICC-OTP-20070522-220 (22 May 2007) online: ICC Press Releases <http://www.icc-cpi.int/menus/icc/press%20and%20media/press%20releases/2007/prosecutor%20opens%20investigation%20in%20the%20central%20african%20republic?lan=en-GB> (Prosecutor Moreno-Ocampo stated that “in the interests of deterring future violence and promoting enduring peace in the region, we have a duty to show that massive crimes cannot be committed with impunity. We will do our part, working through our judicial mandate”) See also Leslie Vinjamuri, ‘Deterrence, Democracy, and the Pursuit of International Justice’ (2010) 24 Ethics & International Affairs, 191 (highlighting that most prominent arguments in international policy debates and advocacy have stressed its effects in two types of outcomes deterrence and peace and democracy and the rule of law at 193. Discussion of incapacitation as a function of the ICC is notably absent from this analysis).
empty threat, has a limited impact on behaviour in a culture already intoxicated with hatred.\textsuperscript{78} To perpetrators who have already committed crimes and who are still in a position of power, many critics argue, the threat of prosecution provides no incentive to lay down arms, but rather a strong incentive to defend their power with all available means. For example in response to the arrest warrant for Omar Al-Bashir on five counts of crimes against humanity and two counts of war crimes issued by the ICC in March 2009, the Sudanese government immediately expelled 13 humanitarian non-governmental organizations that were working in Darfur.\textsuperscript{79} The government also launched a clampdown on human rights activists in Sudan.\textsuperscript{80} On July 12, 2010 a second arrest warrant was issued for al-Bashir on three counts of genocide committed in Darfur, the first time an arrest warrant for the crime of genocide was issued by the Court.\textsuperscript{81} The African Union (AU) has denounced the warrants on the grounds that they will destabilize the whole region, create more conflict in Darfur and threaten the fragile peace deal that ended decades of civil war between northern and southern Sudan and called for the UNSC to suspend the Warrants under Article 16 of the Rome Statute.\textsuperscript{82} The referral of the situation in Libya also came under similar

\textsuperscript{79} Online: UNHCR<http://www.unhcr.org/refworld/country,,,SDN,456d621e2,49b8df41a,0.html>(describing The expulsion was tantamount to creating another humanitarian crisis, as Internally Displaced Persons (IDPs) in Darfur had been entirely dependent on the work of NGOs for their survival. Halting their operations left 1.1 million people without food, 1.5 million without healthcare, and at least one million without drinking water.)
\textsuperscript{80} Amnesty International Public Statement “African Commission on Human and Peoples’ Rights: Human Rights Situation in Africa – Sudan” (13 May 2009), online: Amnesty International <http://www.amnesty.org/en/library/asset/IOR63/004/2009/en/bb4dcd04-4290-4ac0-8340-872354fd9200/ior630042009en.pdf> Many human rights activists have been forced to leave the country while the government’s National Intelligence and Security Services (NISS) have silenced those remaining
\textsuperscript{81} Prosecutor v Omar Hassan Ahmad Al Bashir (“Omar Al Bashir) ICC-02/05-01/09 Second Warrant of Arrest for Omar Hassan Ahmad Al Bashir 12 July 2010 (International Criminal Court Pre-Trial Chamber 1) online: ICC <http://www.icc-cpi.int/iccdocs/doc/doc907140.pdf>
\textsuperscript{82} Assembly/AU/ Dec.334(XVI) The AU Assembly, at its 16th annual summit, called for the UNSC to defer proceedings against President al-Bashir in accordance with Article 16 of the Rome Statute; The AU has also issued press statements and communiques warning that efforts to arrest President Al Bashir could destabilize certain African countries and interfere with diplomatic efforts to bring about peace, and has taken a decision that the AU Member States “shall not cooperate pursuant to the provisions of Article 98 of the ICC Statute relating to
scrutiny; facing claims ICC intervention deterred the regime from stepping down and escalated violence.\(^8^3\) The experience in Darfur and Libya highlights that prosecutions in ongoing conflicts can thus escalate and extend, rather than de-escalate and shorten conflicts.

Criticism regarding the practicality of using the ICC as a tool for R2P centres largely on the fact that it does not have the capacity to enforce its arrest warrants without cooperation from states. Working in tandem, however, R2P-based interventions could act as the enforcement mechanism for ICC arrest warrants. However this vision has not been realized in practice. To date the UNSC has referred two situations (Darfur and Libya) to the ICC under the auspices of R2P,\(^8^4\) however ICC investigations and arrest warrants issued in respect of these situations have not directly triggered any further R2P responses from the UNSC directed at enforcing the arrest warrants and removing the perpetrators of violence. For example in July 2007, approximately 2 years after it referred the situation in Darfur to the ICC, and 2 months after the ICC issued arrest warrants against Ali Muhammad Ali Abd-Al-Rahman and Ahmad Muhammad Harun\(^8^5\) it passed immunities, for the arrest and surrender” of President Al Bashir. Some have argued or suggested that AU members are therefore not obligated to arrest President Al Bashir.

African Union, Press Release, No 002/2012 “On the decisions of pre-trial chamber I of the International Criminal Court (ICC) pursuant to article 87(7) of the Rome Statute of the alleged failure by the Republic of Chad and the Republic of Malawi to comply with the cooperation requests issued by the court with respect to the arrest and surrender of President Omar Hassan Al Bashir of the Republic of Sudan” (9 January 2012) online: <http://www.au.int/en/sites/default/files/PR-%20002-%20ICC%20English.pdf>  

\(^8^3\) Max Boot “Qaddafi Exile Unlikely” Commentary Magazine (23 May 2011) online: commentary Magazine <http://www.commentarymagazine.com/2011/03/23/qaddafi-exile-unlikely/> (claiming that the ICC ensured Gadafi would “fight to the death and take a lot of people down with him.”); Doug Saunders “When justice stands in the way of a dictator's departure” The Globe and Mail (2 April 2011) (suggested that that the “[T]he ICC may have perpetuated, rather than ended, his crimes”).


Resolution 1769 in recognition of the continuing violence in Darfur.\textsuperscript{86} This resolution ordered the deployment of a hybrid peace operation to the region to establish security, protect victims, and facilitate the work of UN personnel in Darfur. However, they were not directed specifically towards aiding the ICC in investigating the situation and bringing potential criminals to justice. Similarly in Libya resolution 1973, issued 1 month after referral, but prior to the ICC issuing arrest warrants\textsuperscript{87} neither required nor specifically authorized NATO forces to enforce ICC arrest warrants.\textsuperscript{88} This asymmetrical relationship raises a fundamental question mark over whether indictments by the ICC increase pressure on the UNSC to authorize intervention by enhancing the transparency of the threat posed or in fact act as a fig leaf sheltering the UNSC from taking further enforcement action.

3.3 Relationship between R2P and ICC: in Academic literature

Despite their deep and somewhat obvious conceptual and normative connection for nearly half a decade “Discussion and analysis of the protection of civilians and the prosecution of perpetrators ……. Proceeded along separate lines.”\textsuperscript{89} After 5 years of formal separation Ramesh Thakur, one of R2P’s founders, first made the novel contention that the international protection and prosecution agendas were in fact “two sides of the same coin.”\textsuperscript{90} However while the international

\begin{footnotes}
\footnotetext[88]{Resolution 1973 supra note 54.}
\footnotetext[89]{Thakur supra note 3 at 40.}
\footnotetext[90]{Ibid.}
\end{footnotes}
The criminal law dimension of R2P has been growing in practice, it has thus far generated little in-depth analysis and debate within academic literature.

The analysis of the relationship between the ICC and R2P, which has emerged to date, suffers from a number of limitations. Most critically it tends to employ a compare and contrast strategy, in which the nature, aims and formal procedures of R2P and order on the one hand are juxtaposed against those of international criminal law, the ICC and justice on the other. Implicit in current analysis is the assumption that order and justice are separate, but parallel realms that can be like or unlike, useful or not useful to one another. By focusing on intermediate range of generality it fails to establish a coherent framework to conceptualize and balance the interaction between international criminal law and justice on the one hand and R2P and collective security on the other.  

This has resulted in a polarized and conflicting presentation of the relationship. According to some commentators ICC and the R2P norm enjoy a “complementary relationship: they work together toward the prevention of crimes against humanity, war crimes and genocide” while according to other commentators the relationship is inherently problematic because of their different organizational forms, contrasting formal procedures, and different targets. The literature on the topic can thus be crudely divided into two broad categories: those that believe the two realms should be kept separate and those that argue for greater convergence. An instrumental (internal) analysis of the relationship between order and justice underlies both camps so that the ICC and R2P are either seen as useful or not useful to each other and their deeper conceptual connection and mutual constitutiveness is overlooked.

---

91 For an example of this approach see Schiff Supra note 2.
92 Online: international coalition for the responsibility to protect online: <http://www.responsibilitytoprotect.org/index.php/about-rtop/related-themes/2416-icc-and-rtop>
93 Schiff supra note 2 at 6.
3.3.1 Closer convergence between order and justice R2P and the ICC is not useful

The fundamental premise of arguments against closer convergence is that punishing perpetrators and protecting victims are linked, but practically distinct tasks, which should not be confused. They aim, it is argued, at the same final objective - the reduction of violent armed conflicts, but require different techniques and instruments.\(^9^4\) R2P is presented as to security and order what the ICC was to justice: when a nation’s judicial system is inadequate or unable to fairly try cases of crimes against humanity, the ICC will step in; when a nation’s military and police force is unable or unwilling to provide security to the citizens of that nation, the international community will step in.\(^9^5\) International criminal justice and R2P are said to each represent a different approach to the adjudication of Atrocity Crimes: they have different organizational forms,\(^9^6\) formal procedures,\(^9^7\) and different targets.\(^9^8\) This analysis tends to treat the ICC as synonymous with the “old wine” of individual culpability and justice and R2P as synonymous with “old wine” of state responsibility, popular sovereignty and responsible government and peace and security.\(^9^9\) However this dichotomy between justice on the one hand and peace and security on the other and their supposedly “contradictory logics”\(^1^0^0\) is both normatively and empirically limited.

Normatively the warning that justice and order should not be confused ignores the lessons the post cold war era – namely that “neither perfect order or perfect justice can be achieved, but the

---

\(^9^4\) Thakur supra note 3 at 60.
\(^9^5\) Schiff supra note 1.
\(^9^6\) International Criminal Justice has a permanent single organization to investigate, prosecute and punish individual perpetrators of Atrocity Crimes (the ICC) while R2P does not have a unitary organizational form.
\(^9^7\) the ICC’s procedures are formally legally-judicial while R2Ps are political.
\(^9^8\) the ICC focuses on individual responsibility and R2P on state responsibility.
\(^9^9\) Schiff supra note 1 at 4.
\(^1^0^0\) Thakur supra note 3 at 58.
greatest danger lies in failing to recognize the connection between the two.”¹⁰¹ This oversight is particularly acute given that the development of R2P and the coming into operation of the ICC mark the international community’s attempt to provide an integrative solution to these interconnected problems, which the international community had hitherto treated as conceptually and practically distinct. R2P and the ICC both mark the shift in the order (premised on state sovereignty) v justice (premised on human rights) discourse by asserting that claims to sovereignty entail responsibilities. Thus the dichotomous nature of the conception of order and justice operates against the holistic logic of the norms, which it attempts to explain.¹⁰² This transformation in the meaning and nexus between order and justice and its relevance to the relationship between ICC and R2P is further discussed in Chapter 2.

The empirical analysis that order and justice are separate realms rests upon an outmoded conception of the ICC as a formally judicial-legal institution, necessarily “back-ward looking, finger pointing and retributive, requiring acknowledgement and atonement, if not trial and punishment, of the perpetrators of past crimes”¹⁰³ and R2P as an overtly political principle that is “forward looking, problem-solving and integrative, requiring reconciliation between past enemies within an all inclusive community.”¹⁰⁴ These formalist distinctions between the two fields tend to reinforce a perception of continuity and overlook the more revolutionary implications of interactions between each movement. Both categories are treated as bounded

¹⁰² Traditionally the problem of order was understood as how to establish and maintain effective authority among states that recognize no common values or norms. The problem of justice on the other hand, which relates to the role of normative standards as measures of the legitimacy of a political order, was interpreted in terms of the primacy of interstate justice. However this statist conception of the relationship between order and justice has gradually given way to a world order premised upon the rights of individuals. See chapter pages 41-46 of this paper for further discussion.
¹⁰³ Thakur, Supra note 3 at 58.
¹⁰⁴ Ibid.
entities and the way in which the dynamic relationship between the two has changed the relationship between order and justice and the overarching nature of international law is ignored. The rapprochement of international criminal justice and R2P has in fact heralded changing conceptions of the relationship between order and justice and the role of the UNSC and the ICC, which this commentary tends to overlook. On the justice side the development of a permanent court with jurisdiction over acts committed after 2002 and the power to intervene in situations where there is a tangible threat of Atrocity Crimes or where crimes are already taking place undermines the characterisation of justice as necessarily backward looking and retributive. Judge Sang-Hyun Song, President of the ICC, has underlined what makes the ICC fundamentally different from earlier efforts for international justice, which were purely ex post facto tribunals set up in reaction to atrocities that had already occurred, is its potential for the prevention of future crimes.\textsuperscript{105} This shift has meant that following a period where international criminal justice was defended on strictly legal grounds it has entered an era where the pragmatics of punishment are more consciously at the forefront.\textsuperscript{106} International criminal justice is increasingly being recast as a real-time tool for crime prevention and. This fundamental shift is both reflected in and reinforced by the ICC’s convergence with R2P and its conceptualization as one leg of the international community’s ‘protection continuum.’\textsuperscript{107} On the peace and security side since the end of the cold war the UNSC has increasingly been recast as a forum for dealing with problems

\textsuperscript{105} Judge Sang-Hyun Song, ‘From Punishment to Prevention Reflections on the Future of International Criminal Justice’ (delivered at Wallace Wurth Memorial Lecture, 14 February 2012.) (highlighting that the ICC has jurisdiction over acts committed after 2002 therefore has the power to intervene in situations where there is a tangible threat of Atrocity Crimes or where crimes are already taking place).

\textsuperscript{106} Vinjamuri supra note 46 at 191.

of international justice, rather than simply threats to international peace and security and its interventions evaluated according their compliance with universal justice norms. Tying R2P to Atrocity Crimes both reflects and reinforces this shift by enabling supposedly “backward looking” criminal justice legal norms to operate prospectively and retroactively to justify and evaluate a range coercive interventions. As both fields have become somewhat Janus-headed the relationship between the two has become inverted so that the ICC is increasingly evaluated according to ability to change circumstances on the ground rather than according to its inherent morality, while the UNSC is increasingly evaluated according not just to political or military standards, but according to its compliance with international criminal justice norms. The dichotomy between justice as necessarily backward looking and retributive and peace and security as forward looking and reconciliatory has gradually eroded and the normative and operational relationship between the two has inevitably blurred.

3.3.2 Closer convergence is useful

Rather than grounds for separation, the differences between ICC and R2P are increasingly being promoted as reasons for practical convergence and Thakur’s warning that the two tasks should not be confused has been lost amidst the growing perception that “each has in store for the other

---

108 see Koskeineimi (citing UNSC’s authorization of states to ‘take necessary measures’ under Chapter VII in respect of Iraq, Haiti, Somalia, Rwanda, or the protection of Bosnia's 'safety zones’ as evidence that “the Security Council is attempting to deal with the problem of international justice” at 340 and 346).
109 See Teitel supra note 9 at 101 (proposing that evaluation’s of war is increasingly shaped not just in terms of political or military error, but in an ongoing way by the effects of the war on civilians. Citing for example the evaluations of the war in Afghanistan, which was initially justified as a war of self defense however it has been subject to increasing humanity related evaluations regarding, for example, the high number of killings of civilians).
110 The enquiry involving the R2P will often, perhaps always, have elements of both forward-looking and backward-looking investigations, assessing whether sufficient acts have occurred to fall within R2P and whether future atrocities are potentially to occur.
what it is missing.” On the justice side it is argued that the ICC has the ability to highlight victims in an incontrovertible way, but has little ability to fundamentally alter circumstances on the ground and needs to dispel the suspicion that it is dangerous for the very populations that it is meant to protect. On the peace and security side it is argued that the R2P designates victims with less clear authority and thus requires support from other sources, but it has the means to trigger a sizeable intervention. Implicit in this instrumental analysis of the relationship between the ICC and R2P is the idea that justice and order are practically dependent (an illegitimate order is an unstable order and justice requires order to enforce the rule of law) yet conceptually distinct. Realists who stress the importance of order invoke the strategy of compare and contrast to see whether the ICC and principles of justice can appropriately be used in the service of R2P (i.e. to achieve security and order) while idealist approaches highlighting the primacy and non-instrumental value of justice tend to argue that the ICC must engage the politics of R2P in order to move the justice ‘agenda’ forward. This polarized analysis tends to result in asymmetrical accounts of the relationship between ICC and R2P that overlook their deeper conceptual relationship and are thus both practically and normatively limited.

3.3.2.1 ICC as tool for R2P

The relationship between R2P and the ICC has typically viewed the ICC and its mandate in investigating and prosecuting atrocities as part of an R2P 'protection continuum' whereby the

---

112 Ibid at 7.
113 The ICC system of complementarity reflects the fact that support of national structures are necessary to establish the rule of law, while the tying of UNSC chapter VII powers to the commission of Atrocity Crimes reflects the acknowledgement that peace and security is conditional upon respect for international law. For discussion of the instrumental relationship between order and justice see Koskenniemi, supra note 10 at 329.
ICC is viewed as part of R2P’s ‘responsibility to prevent.’ Under this interpretation, the ICC is invoked before military intervention becomes necessary in the hope that judicial intervention will have a deterrent effect on the commission of large-scale human rights abuses. The ICC’s new Chief Prosecutor, Fatou Bensouda, endorsed this arrangement in remarking that “[t]he Court should be seen as a tool in the R2P toolbox” thus highlighting the prevalence of such views.

Empirically depictions of the ICC as a passive tool for supporting and enhancing R2P overlook the ICC’s capacity, as an independent legal body to shape the R2P agenda. Normatively this one-sided analysis means that the rapprochement between ICC and R2P tends to be evaluated according to its impact on peace and security, and the implications of the relationship has upon the underlying international criminal justice norms and the ICC’s legitimacy tends to be overlooked. The complication and confusion, which arises from this one-sided analysis, is evidenced by the controversy surrounding the ICC referrals in Libya and Darfur. Perceived failure of the ICC to deliver either perfect peace or justice has lead to increasing scrutiny of the ICC’s role from the perspective of ensuring collective security. Rather than an acknowledge the nuanced relationship between order and justice an interesting dynamic is emerging whereby the ICC is simultaneously being promoted as part of the international community’s multi-pronged conflict management strategy, on the basis that there is “no peace without justice” or

114 Alex Bellamy, Responsibility to Protect – The Global Effort to End Mass Atrocities, (UK: Polity, 2009), at 118-128.
116 supra note 72.
117 Pursuing justice, it is argued can marginalize the perpetrators of atrocities, halt the spiral of violence by preventing victims from seeking violent retribution, establish truths about the commission and experience of atrocities, and provide closure to victims and survivors. See for example Luis Moreno-Ocampo Address (delivered at the International Conference “Building a Future on Peace and Justice,” 25 June 2007) online: <http://www.peace-justice-conference.info/download/speech%20moreno.pdf> [Moreno-Ocampo]; see also gareth Evans “The Responsibility to Protect (R2P) — From ICISS to Today” (panelist discussion delivered at the Stanley Foundation Conference on Responsibility to Protect, 18, January 2012), online: <http://www.stanleyfoundation.org/r2p.cfm>
alternatively criticized as a means of providing states the ability to evade such responsibilities on
the opposing assumption there is no justice without peace and justice if pursued at all should wait
until a certain degree of stability and order is firmly in place. 118 Scholars on both sides of the
debate evaluate the ICC’s role in terms of whether it is a useful means of achieving collective
security and thus tend to overlook the inherent and non-instrumental value of justice.

Furthermore each side treats the relationship between order and justice as linear: either justice is
a necessary condition to achieve order and security or vice versa. In reality the relationship
between order and justice is circular and dynamic and interactional. As an instrumental value,
some degree of order is necessary though not sufficient for justice and at the same time some
degree of justice is necessary though not sufficient for order. Thus while international order and
justice are both important, their realization is a matter of degree, and therefore there must be
tradeoffs between the two. The question is not absolute order versus justice, but how to balance
choices in particular situations.

3.3.2.2 R2P as tool for ICC enforcement

Idealists who stresses the importance of the pursuit of justice over order on the other hand tend to
view the relationship between ICC and R2P from the perspective of justice and to examine
broader notions of collective security and the doctrine of R2P within the context of ensuring
greater co-operation towards the ICC. Rastan for example argues that the Rome Statute and R2P
should be seen as creating a covenant of undertakings between the individual state and collective

(remarking that “available as a relevant tool, as a relevant form of leverage that we ignore at a cost if we don't use
that leverage to the fullest effect”).

118 Seeking to bring warring parties to justice can hamper peace processes by making it impossible to offer amnesties
or exile to belligerents Faced with the prospect of trials and imprisonment, warring parties will not engage in peace
negotiations. For an example of this type of argument by skeptics see Andrew Natsios, “A disaster in the Making,”
(12 July 2008), online: African Arguments: < http://africanarguments.org/2008/07/12/a-disaster-in-the-making/>
which aim toward the pursuit of justice.\textsuperscript{119} This analysis fails to query the effects of pursuing justice on efforts to secure other core values and in particular the protective mandate of R2P.

These polarized evaluations of the relationship between the ICC and R2P highlight that the recent trend in emphasizing the connection between justice to order has not necessarily helped resolve how that connection should be made. This difficulty arises because of a conflict in priorities between those favouring the importance of order and those favouring the value of justice. Rather than establish an overarching conceptual framework for balancing these two principles proposed reforms regarding the relationship between the ICC and R2P are tilted in favour of solving one or the other problem (order or justice). Such proposals are constantly in danger of supporting tyranny.\textsuperscript{120} The danger of a utopian tyranny emerges if the relationship between the ICC and R2P is viewed from a moral absolutist position, which by stressing the inherent value of justice, fails to query its effects on efforts to secure other core values. On the other hand “cynic tyranny” can emerge when the relationship between the ICC and R2P is tilted in the favour of achieving order thereby creating the risk that justice is subverted to reinforce existing power structures.

This binary analysis of the ICC as tool for the operationalization of R2P or R2P as tool for ICC enforcement places order and justice in a state of mutual dependence and competition and a complementary yet conflicting relationship between the ICC and R2P appears inevitable. While

\textsuperscript{119} Rod Rastan “The responsibility to enforce - Connecting Justice with Unity” 163 in Carsten Stan & Goran Sluter, eds, \textit{The emerging practice of the International Criminal Court} (Netherlands: Koninjlike Brill 2009.) [Rastan] (arguing that R2P establishes a corollary responsibility on the International Community should a States fail to enforce judicial decisions relating to the underlying protective norm at 170)

\textsuperscript{120} This analysis builds on the work of Koskenniemi supra note 10, by adapting and applying his model of cynical and utopian tyranny (see Koskenniemi at 330) to the context of ICC and R2P. Koskenniemi argues that utopian tyranny emerges when emerges when a society’s institutions and the management of its problems are seen from the perspective of one normative belief (Koskenniemi supra at 330) whereas this paper argues that utopian tyranny also emerges when the relationship between order and justice is viewed from a moral absolutist position, which by stressing the inherent value of justice, fails to query its effects on efforts to secure other core values.
there are inherent tensions in the relationship between the fundamental principles of International Criminal Justice grounded in the rule law (such as impartiality, consistency universality) and the protective mandate of R2P (which often requires partial, flexible and political diplomatic solutions to a crises) their circular relationship means that the two movements are inextricably connected and thus an integrated solution is the only viable option. Focusing on the deeper conceptual relationship between the ICC and R2P offers a way out of this self-fulfilling program of convergence and conflict.

The single-minded focus on the instrumental rather than conceptual relationship is symptomatic of what Martti Koskenniemi describes as the failure of modern institutionalism to grasp the external dependence between order and justice. According to Koskenniemi order and justice are externally dependent in so far as they are both constitutive of each other: The notion of order is itself a normative statement and its constitutive units such as state security and sovereignty are premised upon normative concepts of power and justice, which in turn emerge from the activity of social institutions. R2P’s conceptualization of order in terms of human security and stability within states is premised upon conceptions of individual justice, which in turn are shaped by the activity of social institutions and in particular the practice of social institutions in raising the social, economic and human rights activities to the core of the UN mandate. Conceptions of order and justice are mutually constitutive and thus their relationship between the two is circular, interactional and dynamic. Norms can shape and be reshaped by each other and also have the power to shape and be re-shaped by the actors and institutions that use them. Thus R2P and the ICC are powerful forces reshaping power structures (a point ignored by realist

---

121 Koskenniemi, supra note 10 at 330.
122 ibid at 329-30.
scholars) yet they are also at constant risk of being instrumentalized and manipulated to reinforce current power structures (a point ignored by idealists).

Grasping the external relationship between order and justice enables us to move away from discussion of the relationship between the ICC and R2P in terms of order versus justice and to consider how principle of order and justice, and hence the ICC and R2P, are related within different and competing conceptions of world order.\textsuperscript{123} The following chapters examine the relationship between ICC and R2P through the lenses of, two opposing frameworks. Firstly it locates the convergence of international criminal law and R2P as part of a paradigmatic shift toward a broad politics and law of humanity – a trend that Ruti Teitel describes as “humanity’s law.”\textsuperscript{124} It then goes on to contrast this analysis with the opposing analytical assumption that the traditional statist system is the fundamental framework for understanding the relationship between the ICC and R2P.

\textsuperscript{123} Supra note 8.
\textsuperscript{124} Teitel, supra note 9.
Chapter 2
Humanity’s law and the Utopian tyranny

1 Introduction

Employing a strategy of compare and contrast, rather than establishing a coherent framework to conceptualize the nexus between R2P and the ICC, has enabled their relationship to be explored within a normative and political vacuum, shielded from broader developments in the international legal and political sphere. This work fills this current gap in the literature by locating the convergence of international criminal law and R2P, at both the practical and conceptual level, as part of a larger pattern of integrating previously discrete concepts under a broad politics and law of humanity – a trend that Ruti Teitel describes as “humanity’s law.”125 This extension in legality takes as a departure point classic conceptions of state sovereignty and state interests, and moves toward the incorporation of humanitarian concerns as a crucial element in the justification for, and limitation of, state action.126 Literature on the ICC and R2P has tended to overlook this broader paradigmatic shift, while scholarship on humanity’s law has not focused on these specific norms and the implications of their unique relationship in detail. Examining the relationship between R2P and the ICC in the context of this larger conversation promises to enrich both bodies of literature.

125 Teitel, supra note 9.
126 Teitel, supra note 9 at 8.
2 Overview of humanity’s law

Teitel postulates that changes in the nature of interstate relations and conflict point toward at least a partial change in legal regime, away from the pre-existing state centered international law toward “humanity’s law” (the law of peoples and persons).\footnote{Teitel, supra note 9 at preface x} She charts the conceptual merger of human rights law, the law of war, and international criminal law, into the broader framework of humanity’s law and considers how this framework is shaped by and re-shapes these three legal regimes.\footnote{Teitel, supra note 9 at 6} She claims that political and legal actors from the three separate spheres draw on various elements of this legal framework in assessing the rights and wrongs of conflict; determining how and when to intervene and imposing accountability and responsibility on both state and non-state actors.\footnote{Teitel, supra note 9 at 4}

The language of international criminal justice and R2P stand as a stark departure from a concept of global order based on international peace and security alone and at the level of discourse at least points toward the emergence of humanity’s law. However, literature on this new humanity’s law discourse is still at a formative stage. Teitel has taken the first step by examining the origins and development of this new language of justification in the discourse of international relations.”\footnote{Teitel, supra note 9 at 6} However we still need to take the second critical step of exploring the extent to which this new language is actually altering states perceptions of their interests and changing the underlying determinants of state behaviour.\footnote{Teitel, supra note 9 at 6} On the one hand, the international legalism that is now surfacing can be seen as the advent of the primacy of the juridical over the political on the
international scene. Critics on the other hand argue that the judicialization of international politics is an example of the way power manages to instrumentalize the language of justice, so as to subvert its meaning to advantage (a “cynic tyranny”). The former analysis has an idealist bias, which tends to blind it to the inherent dangers of even authentic demands for utopian justice (the “Utopian Tyranny.”) The latter analysis has a cynical bias, which tends to overshadow the potential upsides of the judicialization of international politics. The central position which the ICC and R2P occupy within this shifting international legal order renders the nexus between these two norms useful lenses through which to explore the extent to which the new language of humanity represents (1) the advent of justice over order and a possible “utopian tyranny”; or (2) the instrumentalization of justice to create order and a possible “cynic tyranny”. The former framework will be explored in the remainder of this chapter and the following chapter will explore the alternative statist paradigm.

2.1 Origins and development of humanity’s law

The common conception of the ICC and R2P as forms of norm entrepreneurship; a view most explicitly elucidated by Mégret’s analysis of the relationship, may explain why literature on the ICC and R2P has tended to view this relationship in vacuum isolated from other contemporaneous and historical developments in the international legal sphere. According to this analysis international legal developments are the result of competition and alliances between different actors as well as strategic thinking and drive for power.

The ability of broader paradigm shifts, such as humanity’s law to provide a framework to judge

---

132 See Megret, supra note 111 discussed in chapter 3.
133 Mégret, supra note 111 at 4.
the evolution and potential future of the relationship between R2P and the ICC seems both naive and unrealistic in an international setting where ideas are advanced by a plurality of actors with a variety of interests who at any point in time, may see the promotion of certain ideas as worthwhile. However Patrick J. Glen’s analogy between development in international human rights law and science\textsuperscript{134} bridges the gap between traditional understanding of international law and as a form of natural development and the understanding of the ICC and R2P as initiatives of “norm entrepreneurship” thereby enabling us to view this relationship within the context of broader paradigm shifts. Glen draws an analogy between developments in international law and Thomas Kuhn’s description of scientific development as revolutionary in nature, occurring at that point in time “in which an older paradigm is replaced in whole or in part by an incompatible one.”\textsuperscript{135} The impetus for this paradigm shift is malfunction: “scientific revolutions are inaugurated by a growing sense ... that an existing paradigm has ceased to function adequately in the exploration of an aspect of nature to which that paradigm itself had previously led the way ... [T]he sense of malfunction that can lead to crisis is prerequisite to revolution.”\textsuperscript{136} This analogy is helpful in explaining how the current relationship between R2P and the ICC has reached its present state, and what may need to occur for it develop further.

Teitel traces the historical context for the contemporary shift in international law’s focus from state security toward human security in the post cold war era.\textsuperscript{137} The rise of failed states and new types of conflicts created the pre-requisite sense of malfunction which in turn created the context for a transformation of the relationship of justice to order and law to violence in global

\textsuperscript{135} T.S. Kuhn The structure of scientific revolutions (Chicago: University of Chicago Press, 1996) at 92.
\textsuperscript{136} ibid.
\textsuperscript{137} Teitel, supra note 9 at chapter 2.
politics.\textsuperscript{138} It has, she argues created a normative shift away from a state-cantered understanding of international law and toward an international legal order in which individuals, rather than states as key actors.\textsuperscript{139}

2.2 The Shift from the order of states to the law of Humanity

International law is traditionally understood as placing obligations and duties upon states and international organizations rather than individuals.\textsuperscript{140} Internally states were generally unconstrained in terms of what they did within their own borders and in inter-state relations were only constrained by norms to which they had consented (by treaties or under customary international law).\textsuperscript{141} The principle of non-intervention enshrined in article 2(4) of the UN Charter gives priority to a view of order premised on the principle of interstate justice and the need to respect the sovereign equality of smaller states. Although the UN Charter contains principles and rules that emphasize the importance of individual justice,\textsuperscript{142} this was seen as secondary, and often as a direct challenge to the maintenance of international order. So the primary aims of the international order were non-violence survival and coexistence;\textsuperscript{143} and the framework for the attainment of this order was the system or society of states rather than individual justice.

\textsuperscript{138} Teitel, supra note 9 at 3.
\textsuperscript{139} Teitel, supra note 9.
\textsuperscript{140} Teitel, supra note 9 at 8.
\textsuperscript{141} Teitel, supra note 9 at 8.
\textsuperscript{142} For example UN Charter, art 1(3) refers to the organization's 'purpose' to 'achieve international cooperation in solving international problems of an economic, social, cultural or humanitarian character, and in promoting and encouraging respect for human rights and fundamental freedoms'.
\textsuperscript{143} see Raymond Aron, as reported in Stanley Hoffmann, ‘Conference Report on The Conditions of World Order’, Daedalus, 95/2 (1966), 456.
This statist conception of order and justice underlined the conceptual division between international order and individual justice and enabled the charter to deal with the two problems separately and simultaneously so that neither was fully over taken by or collapsed into the other.\(^{144}\) So the UNSC was given “primary control for the maintenance of international peace and security”\(^{145}\) and the problem of individual justice was dealt with by establishing a general competence for the Assembly to “recommend measures for the peaceful settlement of any situation, regardless of origin, which it deems likely to impair the general welfare or friendly relations among nations”.\(^{146}\) However the problem with this narrow and dichotomous conception of order and justice is that it failed to acknowledge that order and justice in all their varieties are interlocked. Neither can stand-alone. Formalistic separation of two conceptually and practically interconnected issues inevitably meant that both bodies failed to ensure the absence of either violence or injustice.\(^{147}\) The end of the cold war reduced the threat of large-scale military conflicts, however the period following the fall of the Berlin Wall was one of non-international armed conflicts, which exposed the inadequacy of the UN system in effectively managing intra-state conflict. The notion of state sovereignty which underlined the conceptual separation between order and justice effectively created a legal obstruction to intervention in the internal affairs of states resulting in what Douglas Heard described as a “new world disorder.”\(^{148}\) Increasingly, however, international law has directly addressed individual rights\(^{149}\) and provided

\(^{144}\) Koskenniemi supra note 10 at 337-8.
\(^{145}\) UN Charter, art 24.
\(^{146}\) UN Charter, art 14.
\(^{147}\) Koskenniemi supra note 10 noting that as a temple of justice and police neither the UNSC or UNGA have been a tremendous success at 339.
\(^{149}\) For example the expansive body of international human rights law which traditionally concerns the political responsibility of states for violations against individual victims, which includes the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights the International Covenant on Economic, Social and Cultural Rights, the International Convention on the Elimination of all Forms of Racial Discrimination, the
remedies for individuals to challenge the actions of international entities and non-state actors. Teitel argues that these profound changes point in the direction of humanity law and the primacy of justice and to some extent away from traditional interstate international law. Humanity’s law reframes the struggle for justice and order by focusing not on the preservation of state autonomy against the global legal order, but on the effects of law on persons and people and global security. So the problem of order is no longer about how to establish and maintain effective authority among states that recognize no secular or common values, but rather about how to establish and maintain effective authority among and within states in a way that accords with the “transcendent and universal character of obligations owed to human beings.”

Teitel points to a number of interlinked trends, which have marked this shift. Firstly, there has been a rise in international governance of internal state affairs. Under the aegis of humanity law heightened legal protection applies to any civilian population, without regard to nationality or citizenship and irrespective of whether there is an armed conflict. The salient question justifying international intervention is whether the offenses in question had a persecutory and systematic state like quality and whether the conduct itself is widespread and systematic. Furthermore in interpreting the law of humanity courts, tribunals and other actors have expanded the scope of

Convention on the Elimination of all Forms of Discrimination against Women, the International Labour Conference Convention concerning Indigenous and Tribal Peoples in Independent Countries, the Convention relating to the Status of Refugees.

For example the ICTY and ICTR mandated international prosecution of alleged perpetrators of certain international crimes.

Teitel, supra note 9.

Megret, supra note 111 at 17.

Teitel, supra note 9 at 92.
state responsibility, even for the behaviour of non-state actors. Secondly there has been an individualization of international law. The classic interstate system has been challenged by the rise of non-state actors as both rights bearers and duty holders. Whereas the international order was classically defined largely in terms of state interest and state security the new humanitarian rights regime redefines order in other ways, for the benefit of people and persons. The individualization of international law is also connected to the increased tendency toward judicialization. Thirdly, and linked to the second state sovereignty has been redefined. Humanity’s law is not opposed to sovereignty rather it renegotiates its very meaning so that it accords with human rather than state security. Fourthly there has been a shift in the role of law and legal institutions in global security and managing conflict. Non-state actors, in particular judicial institutions are the generators of norms that are then taken up and assimilated into international legal structures. Teitel points out that an expanded humanitarian discourse ultimately contributes an alternative basis for global governance where the concept of the rule of law takes the form of a law-enforcement approach to conflict resolution. For instance the laws of war regarding limits on harm to civilians – are now invoked prospectively to justify and evaluate

\footnote{154} Teitel, supra note 9 at 4.
\footnote{155} During the 20th century a remarkable number of tribunals were established and since the 1990’s much law, institution building and practice have occurred. Of particular importance is the establishment and jurisprudence Institution-building includes the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991 (ICTY), the International Criminal Tribunal for Rwanda (ICTR), the Independent Special Court in Sierra Leone, Extraordinary Chambers for Cambodia, and the International Criminal Court (ICC). The criminal tribunals’ truly revolutionary characteristic is their ability to criminally prosecute acts under conventions and customary international law that either could not be enforced due to lack of jurisdiction over individuals or that would require extraordinary efforts from one jurisdiction to the next to legislate penal legislation enabling prosecution of such international crimes. For example, until the emergence of the criminal tribunals, no internationally codified penal provisions for crimes against humanity existed, leaving only a few explicit domestic laws with criminal sanctions for such crimes. For in depth discussion of the increased tendency toward judicialization see Teitel supra note 9 at 34-104.

\footnote{156} Teitel, supra note 9.
military interventions\textsuperscript{157} such as Kosovo\textsuperscript{158}, Afghanistan\textsuperscript{159} Iraq\textsuperscript{160}. Linked to this there has also been an increase in the role that legal institutions play in midst of conflict.\textsuperscript{161}

3 Re-conceptualizing the ICC and R2P as Utopian justice

The reconceptualization of international law in the direction of humanity’s law illuminates the conceptual and practical relationship between the emerging R2P norm and the ICC. Viewed through the lenses of humanity’s law one can see that both R2P and the ICC are aimed at mediating the gaps between the often competing, but inter-dependent obligations to protect both the state and human interest and that closer convergence between these two norms may herald a transition to a new world order premised on the primacy of individual justice over state security in the international sphere.

Despite the inclusion of humanitarian activities in the UN system and conceptual and operational advances in the fields of human rights, humanitarian law and international criminal law, existing mechanisms intended to ensure respect for fundamental international rules protecting individuals

\footnotesize{
\textsuperscript{157} Teitel, supra note 9 at 7.
\textsuperscript{158} For example NATO sought to justify military intervention in Kosovo and Serbia on the basis of legal norms by arguing before the ICJ that the purpose of intervention was “to safeguard….essential values which also rank as jus cogens” Translation of Oral Pleadings of Belgium, Legality of the Use of Force (Yugoslavia v Belgium), CR 1999/14 (International Court of Justice, May 10, 1999).
\textsuperscript{159} The war in Afghanistan was initially justified as a war of self defense (see resolution 1363 and 1373 the UNSC affirmed view applicability of the right of individual and collective self defense in the United Nations Charter in responding to terrorism) however now that the war has been subject to increasing humanity related evaluations regarding, for example, the high number of killings of civilians, the war is increasingly being justified on moral grounds. For example see Barack Obama, “A just and lasting peace” (Nobel lecture prize acceptance speech delivered at the Nobel Peace Prize Award ceremony 2009) online: http://www.nobelpize.org/nobel_prizes/peace/laureates/2009/obama-lecture_en.html (reviving the just war theory by arguing that the war in Afghanistan was not only necessary, but morally justified.”).
\textsuperscript{160} The primary rationalization for the Iraq war was articulated by a joint resolution of the U.S. Congress known as the Iraq Resolution. The resolution cited many factors to justify the use of military force against Iraq including the “brutal repression of its civilian population” See the U.S. Authorization for Use of Military Force Against Iraq Resolution of 2002,[1] Pub.L. 107-243, 116 Stat. 1498, enacted October 16, 2002, H.J.Res. 114.
\textsuperscript{161} Teitel supra note 9 at chapter 4.
}
from Atrocity Crimes continued to show grave deficiencies. Both R2P and the ICC were inspired by the limitations of the international community in general, and the UNSC in particular, to intervene and enforce humanity’s law both judicially and militarily. Thus prima facie both movements gives credence to the view that “at the beginning of the twenty-first century, the dominant motive in world affairs is the quest – almost the thirst – for justice, replacing even the objective of regional security as the trigger for international action.”162 The following section examines how both movements reflect and reinforce the shift to humanity’s law.

3.1 R2P – Maintaining Order and Justice in the Name of Humanity

The ICISS report highlights that the emerging responsibility to protect norm fills the critical gap between the reality of mass human suffering and the existing rules and mechanisms for managing world order.163 Triggered by the international community’s failure to intervene in Rwanda and Srebrenica and in the wake of ongoing intra state conflicts, R2P was designed to fill the disconnect in logic between the accelerating development of the law governing Atrocity Crimes and the continued impotence of the international community to respond to such crimes effectively. Thus underlying the logic of R2P is the idea that justice without order is impotent and that order without substantive justice leads to suffering, war and disorder.

3.1.1 Shift in the role of law in global governance

Under the charter the UNSC is permitted to use force if there is a threat to or breach of

162 Robertson supra note 5.
163 ICISS Report supra note 18 at 16.
international peace and thus the powers of the council are designed primarily to preserve the peace rather than to enforce the law. R2P authorizes UNSC intervention (under Chapter VII) to protect populations from Atrocity Crimes, thereby reframing the UNSC as enforcer of international criminal law.

3.1.2 International governance of internal state affairs

Framing R2P in international criminal law, so that these norms trigger R2P action, means that interventions are justified in a range of situations extending beyond state and interstate conflicts. R2P thus supports the competence of the UNSC to intervene in human rights violations and civil wars within a state even without evidence that an internal crisis actually has the potential to develop into an interstate conflict.

3.1.3 State sovereignty redefined

According to the ICISS report the notion of sovereignty as responsibility means that “the state authorities are responsible for the functions of protecting the safety and lives of citizens and the promotion of their welfare,” but where a state fails to do so, other responsibilities to protect arise first falling on the international community acting through the UN, even if enforcement infringes the principle of non-intervention. R2P is thus not inherently opposed to sovereignty rather it attempts to renegotiate the very meaning of sovereignty according to the humanity law

164 Article 39 and Chapter VII UN Charter.
166 War crimes apply to non-international armed conflicts and crimes against humanity can be committed in times of peace as well as during an armed conflict see *Rome Statute*, supra note 14 art 8 and 7.
167 ICISS Report, supra note 18 at 13.
logic. In a 2008 speech sec- Gen Ban Ki-Moon stressed that R2P is built upon “a more positive and affirmative concept of sovereignty as responsibility.”\(^{168}\)

### 3.1.4 Individualization of international law

R2P challenges the state-centric status quo of international politics by asserting the primacy of the individual. As the ICISS report notes, “there is a growing recognition worldwide that the protection of human security, including human rights and Human dignity, must be one of the fundamental objectives of modern international institutions.” Thus according to Tod Lindberg R2P “de-centers the state as the actor par excellence in international relations in favor of people, actual human beings, who are not after all subject beyond question to the whims of their rulers.”\(^{169}\) As protection for the individual victims of Atrocity Crimes has increased there has been a corollary extension of individual responsibility. Methods of ensuring state responsibility such as economic sanctions and military intervention often harm the individual rights holders they are designed to protect and thus undermine the humanitarian logic they are supposed to enforce. Thus individualization logically occurs in two directions: toward both increased protection of individuals and individual responsibility. Under humanity’s law the dichotomy between state and individual responsibility has gradually been eroded and this has been reflected in the way in which R2P has been operationalized. R2P enforcement mechanisms are increasingly directed at individual actors, for example via targeted economic sanctions or

\(^{168}\) UN Secretary General Ban Ki-Moon Secretary-General's Address (delivered at "Responsible Sovereignty: International Cooperation for a Changed World" 15 July 2008.) online: <http://www.un.org/News/Press/docs/2008/sgsm11701.doc.htm>

\(^{169}\) Tod Lindberg, “Protect the people; United Nations takes bold stance” The Washington Times (September 27, 2005).
criminal prosecutions, rather than at the state per se. In turn the viability and legitimacy of such measures has been bolstered by shifts in the international criminal legal sphere, which have challenged traditional limits on legal accountability such as sovereign immunity.

3.2 ICC – Humanity’s Court

The creation of a permanent court was designed to erase critical gaps in the humanity regime and the ad-hoc and ex-post system of international criminal justice, which was established by the tribunals of the 1990’s. The establishment and consolidation of a permanent international criminal court meant that illegal conduct, which was previously largely relegated to state responsibility was now the subject of individual responsibility and enforceable within the international sphere and without the prior authorization of the UNSC. The concept of an international criminal court with independent prosecutors has been described as the great global justice dream. Indeed the ability of the ICC to act without prior political support represents a significant challenge to the state centric system.

3.2.1 Shift in the role of law in global governance

Following a period where international criminal justice was defended on strictly legal grounds (i.e. that there is a legal or moral duty to punish Atrocity Crimes) it has entered an era where the pragmatics of punishment (what punishing crimes will achieve) are more consciously at the

---

170 For example UNSC Resolution 1970 imposed targeted sanctions including travel bans and asset freezes on key regime figures inc Qadafi. The UNSC commits to ensure that any frozen assets will be made available to benefit the people of Libya and a Sanctions Committee was established to impose targeted sanctions on additional individuals and entities who commit serious human rights abuses, including ordering attacks and aerial bombardments on civilian populations or facilities.

171 For explanation of changes regarding the law on immunity see Teitel, supra note 9 at 38.

172 Robertson supra note 5 at 466.
The ICC has been at the centre of this shift. The ICC’s role in situations of ongoing conflicts in Darfur, Uganda, Congo and Libya has meant that international criminal justice has become enmeshed in managing conflict itself both internal and international. The pre-amble of the Rome Statute suggests that the primary goal of the Court is to end impunity and its general preventative role is secondary to the former (in terms of it being contingent upon and less important than the former). However in statements of ongoing purpose the ICC is afforded a far bigger role than was initially envisaged: that of conflict resolution and conflict management.

Literature examining the role of international criminal law in global conflict has failed to examine how this shift has been influenced by and also influences global politics. Teitel points out that this surge in judicial enforcement mechanisms is taking place against the context of the inadequacy [sic] failure of multilateral institutions to protect international peace and security, reflecting the presence of norms not evidently soluble through classical interstate diplomacy. Thus it could be said that the surge in legalization and judicialization reflects a trend that aims at filling globalizations accountability deficit. While this growing pragmatic approach to the issue of responsibility does express international societies condemnation and ensure some degree of protection and minimal rule of law they guarantee neither the pursuit nor the arrest of the

---

173 Megret supra note 111 see generally Vinjamuri supra note 46 (noting that recent arguments have emphasized the instrumental purposes of justice, essentially recasting justice as a tool of peacebuilding and encouraging proponents and critics alike to evaluate justice on the basis of its effects); Mirjan R. Damaska, ‘What is the Point of International Criminal Justice?’ (2008) 83 Chicago-Kent L. Rev 329 (noting the many often-competing goals of the international criminal regime -- including retribution, deterrence and conflict resolution -- and arguing that trials are unlikely to achieve all aims).

174 Rome Statute supra note 18 Preamble (“Determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes”).

175 For example see Judge Sang-Hyun Song, ‘From Punishment to Prevention Reflections on the Future of International Criminal Justice’, at Wallace Warth Memorial Lecture, 14 February 2012.

176 Teitel, supra note 9 at 62.

177 Teitel, supra note 9 at 71.
accused, or the resolution of conflict, revealing a continued dependence on state co-operation for the laws effectiveness.

Despite doubts regarding the viability of the ICC playing a direct role in conflict resolution courts and tribunals have played an important, albeit indirect role by shaping and expanding the legal framework for the protection of persons and shaping and enhancing a humanity discourse, which in turn influences political actors as they confront the challenges of mass human rights violations. Courts and tribunals have expanded rights and responsibilities to encompass wider circles of conduct and additional actors within conflicts. That this law and discourse of humanity law is penetrating the sphere of foreign policy and interstate relations can be seen by the emerging R2P. For example the assertion “that state authorities are responsible for the functions of protecting the safety and lives of citizens and the promotion of their welfare” is an extension and codification of the expanded scope of state responsibility for the behaviour of non state actors recognized by the ICTY in Tadic.  

3.2.2 International governance of internal state affairs

In its judgment of 2 October 1995 in the Tadić case, the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia expressly recognized that the concept of serious violations of the laws and customs of war applied to internal as well as international conflicts. Similarly, the Statute of the ICC, allows the Court to impose penalties for war crimes committed during non-international armed conflicts as well as those committed during international armed

178 ICISS Report, supra note 18 at 13.
179 Tadic, Case No. IT-94-1 - ICTY [Tadic]
180 ibid.
conflicts. Legal protection for crimes against humanity applies to any civilian population, without regard to nationality or citizenship and irrespective of whether there is an armed conflict. The salient question justifying international intervention is whether the offenses in question had a persecutory and systematic state like quality and whether the conduct itself is widespread and systematic.

3.2.3 State Sovereignty redefined

The notion of shared responsibility set out by the R2P principle and the nuances in the principles of the primary and secondary responsibility to protect reflects the principle of complementarity under the ICC’s Rome statute. Under the Complementarity principle national legal systems retain primary responsibility for the investigation and prosecution of Rome Statute crimes; the ICC only assumes jurisdiction when nations are unable or unwilling to hold legitimate proceedings concerning the related offences. Similarly the secondary responsibility of the R2P norm—particularly the use of force—can only be exercised (under Chapter VII) when the state involved is unwilling and unable to fulfil their primary responsibility to act. Thus, both the ICC and R2P reinforce the responsibilities of sovereign nations by primarily requiring cooperation from sovereign states to fulfil their obligation in preventing the worst crimes known to humanity from being committed.

3.2.4 Individualization of International law

International criminal law enforcement focuses on individuals often non-state actors. Thus central to the establishment of the ICC is the notion that individuals, as well as states, are

---

181 Rome Statute supra note 14 art 7 and 8.
responsible for violations of international humanitarian and human rights law, reflecting a view “that thinking of human rights violations as perpetrated by monolithic and abstract entities called states, and holding only states responsible...stood in the way of human rights enforcement.”  

Viewed through the lenses of humanity law framework this mechanism for holding individual perpetrators of Atrocity Crimes accountable reflects and reinforces the broader paradigmatic shift away from interstate rights toward a focus on people and persons.

3.3 Re-conceptualizing the convergence between the ICC and R2P

Although the development of R2P and the establishment of the ICC each represent significant advances in the humanity law regime, in isolation they are unable to fill all of the critical gaps. This suggests that convergence between the ICC and R2P is part of a principled move toward a comprehensive humanity regime and thus together constitute the missing pieces in the humanity law framework.

The problem of injustice in the operation of R2P can manifest itself in two forms: inaction or unconscionable action in the name of humanity. Thus the challenge for R2P has always been the establishment of a threshold for international community intervention that is not too restrictive (thus facilitating inaction) or too permissive (thus enabling abuse). The vague formulation of

---

183 For example Ainley, Kirsten “Individual Agency and Responsibility for Atrocity,” in Renee Jeffery (ed.) *Confronting Evil in International Relations*, (UK: Palgrave Macmillan, 2008) (noting that this shift “is a corollary of the increasing focus on the individual, rather than the state, as the key agent in international politics.” At 2)
184 The ICC can guarantee neither the pursuit nor the arrest of the accused, or the resolution of conflict, revealing a continued dependence on state co-operation for the laws effectiveness, while R2P needs to borrow from existing legal norms for ongoing legitimacy.
triggering events in the ICISS Report\textsuperscript{185} facilitated potential manipulation of R2P and inhibits its further evolution into binding norm. The substance of Atrocity Crimes on the other hand, are clearly defined in the Rome Statute and further elaborated upon in the jurisprudence of international tribunals, and thus provide a clear criterion to decide in what circumstances the international community can intervene in the name of humanity. Thus using international criminal law norms as threshold criteria create expectations for intervention (thus guarding against the possibility of the international community avoiding assuming responsibility in the face of humanitarian emergency) and secondly impose clear constraints on UNSC action (thus guarding against abuse).

Robertson argues “Justice once there is a procedure for its delivery is prone to have its own momentum.”\textsuperscript{186} The convergence of R2P and international criminal law can be seen as both reflecting and reinforcing this momentum. While some commentators suggest that tying of R2P to international crimes reflects the pragmatic choice of norm entrepreneurs to bolster R2P’s legitimacy,\textsuperscript{187} viewed through the lenses of humanity’s law narrowing the basis of responsibility to Atrocity Crimes does not represent a conscious design choice so much as logical and principled extension of a more general shift within international law toward the law-enforcement approach to conflict resolution and the increased tendency toward the judicialization of Atrocity Crimes. Indeed it is the principled nature of the extension which enables the norms to serve their

\textsuperscript{185}ICISS Report supra note 18 (framed R2P in terms of protection of civilians from “large scale loss of life or ethnic cleansing” at XII).
\textsuperscript{186}Geoffrey Robertson QC, Crimes Against humanity, the struggle for global justice (London: Penguin books 1999) at 449.
\textsuperscript{187}see Megret supra note 111 (suggesting that tying R2P to international criminal justice was conscious decision choice: international criminal justice is supposed to provide a reasonable incontrovertable and emotionally strong bases for deciding international involvement it should therefore come as no surprise that r2p triggers coincide with core crimes of ICC jurisdiction, at 13-14).
putative function, and which also facilitates more revolutionary implications, which the more cynical analysis otherwise tends to overlook.

Framing R2P in international criminal law, so that these norms trigger R2P action, heralds a new international legal order whereby international criminal legal norms premised on the rights of individuals, which previously were considered to operate epiphenomenally, can legally and legitimately be invoked prospectively to justify a range of coercive interventions including the use of force.\(^{188}\) This can be seen as a positive step in so far as it both enables UNSC intervention to protect victims from mass atrocities, while constraining UNSC discretion by introducing determinate criteria of humanitarian intervention in legal terms. Furthermore, although the responsibility to protect has not yet become a binding norm of international law, tying the doctrine to a set of established legal categories of crimes helps promote this development by ensuring a number of legality requirements such as clarity, non-contradiction and consistency.\(^ {189}\)

A side-affect of tying R2P to international criminal law is that commentators are increasingly looking to international criminal justice mechanisms to operationalize R2P thereby enabling a potential move away from ad-hoc unilateral and politically driven military interventions to an enduring and legitimate judicial deterrence and enforcement. Paradoxically without its own police force or universal jurisdiction the ICC’s future, and that of the international criminal justice dream it is said to represent, hinges to a large extent on whether the UNSC is prepared to refer cases to it and to take on its law enforcement missions.\(^ {190}\) UNSC referrals in Libya and Darfur suggest that the development of R2P has encouraged international security institutions to

\(^{188}\) Teitel supra note 9 at 7.
\(^{189}\) Brunnee & Toope supra note 41 at 206.
\(^{190}\) Robertson supra note 5 at 466.
internalize international criminal justice norms suggesting that there is now the necessary degree of unity within the international community to ensure the effective pursuit of justice. Criticisms regarding the selective nature of UNSC referrals should not blind us to the extraordinary fact that owing to the adoption of the R2P doctrine UNSC prosecutions for extremely serious crimes are likely now to occur, when they were otherwise unlikely to have done so. Accepting UNSC referrals means that selective action is taken against some, in part to affect the conduct of the many by “making an example” of the few. Furthermore, as Franck points out the element of “alikeness” of humanitarian crises is not demonstrable solely by superficial (and possibly inaccurate) claims that Government A is acting “just like” Government B.\textsuperscript{191} There are many variables to be taken into account in such comparisons: one of which is the likelihood of success were a judicial intervention to be undertaken. In this sense UNSC referrals can be seen as a welcome means of taking this political calculation out of the hands of the ICC and placing it firmly in the hands of a body more adept at making such calculations and less likely to be subject to criticism of politicisation.

Furthermore referrals by the UNSC have the advantage of enabling the court to act with the full backing of the UNSC behind it. UNSC referrals come with the authority of Chapter VII of the UN Charter, which the ICC could use to conduct its investigations and ultimately to enforce its decisions.\textsuperscript{192} Under its Chapter VII authority, the UNSC has the theoretical power to compel states to cooperate with the ICC’s investigation and to take repercussive actions against those states that do not cooperate. Although R2P does not explicitly impose obligations upon the

\begin{flushright}
\textsuperscript{191} Thomas Franck, \textit{Recourse to force: state action against threats and armed attacks} (New York, NY : Cambridge University Press, 2002) [\textit{Franck}].
\end{flushright}
international community to enforce ICC arrest warrants, Rastan argues that there must be a corollary responsibility assumed by the international community to enforce judicial decisions related to the underlying protective norm.\textsuperscript{193} The re-interpretation of sovereignty as responsibility implies that all states (and not just State Parties) as part of the organized international community have a responsibility to protect in the form of co-operating with the court and enforcing arrest warrants. It also implies that the UNSC has a duty to take repercussive actions against those states that do not cooperate.

However the UNSC’s Chapter VII theoretical authority is, in practice, ineffective if it is not backed up by a legitimate threat of repercussion. To date the UNSC has not acted to enforce ICC arrest warrants or lend any assistance to the ICC to bring individuals before the ICC. However this does not in and of itself undermine the conceptualization R2P as a system of judicial enforcement. The ICC has the power to request that international organizations co-operate and enforce arrest warrants and to request UNSC action under Chapter VII if such co-operation is not forthcoming. This power represents a significant leverage for the ICC to exert pressure on the international community to fulfil its responsibility to protect by enforcing arrest warrants. The OTP recently exercised this power vis-à-vis the situation in Darfur, by requesting the UNSC to, in due course, evaluate the possibility of requesting United Nations States Members or regional organizations to execute arrest operations in furtherance of the arrest warrants issued by the ICC.\textsuperscript{194} How the UNSC responds to such requests will be an important test case for establishing the extent to which UNSC referrals represent a step toward judicial enforcement as a solution to mass atrocity.

\textsuperscript{193} Rastan supra note 119 at 107.
\textsuperscript{194} UNSC\textsuperscript{0}R 6778th Mtg., UN Doc S/PV.6778 (2012) (Mr. Moreno-Ocampo).
While it may be naive to suggest that we are on the eve of achieving universal humanity law enforcement, the convergence of R2P and the ICC has given credence to both the viability and perceived desirability of such a prospect. This shift is reflected in the burgeoning literature examining judicial solutions to the problem of order and justice on the international scene, such as proposals for the international community develop a standing mechanism to enforce the judicial mandate of the ICC by arresting alleged perpetrators of Atrocity Crimes, thereby effectively replacing the UNSC with a judicial institution as the police of the international system. While such proposals may seem a distant dream, their increasing prominence within the literature on ICC and R2P may represent a significant step toward their possible realization.

4 The Utopian Tyranny

Leaving aside, for now, the issue of whether visions of humanity’s law is a viable framework for understanding the relationship between ICC and R2P or mere utopian fantasy it is important to first address whether this new world order is desirable or amount to a utopian tyranny.

4.1 The theoretical objection

The theoretical objection against a comprehensive concept of security premised upon justice is that it assumes knowledge of the social conditions in which society flourishes. Such assumptions, claims Koskenniemi, open the door to a utopian tyranny in which a society’s institutions and its management are seen from the perspective of one normative belief. Koskenniemi describes

195 For example see Responsibility to protect Center for International Human Rights Northwestern University School of Law The responsibility to Protect and the International Criminal Court: Americas new priorities Conference Report March 2008, online: International Coalition for the Responsibility to Protect (ICRtoP) <http://www.responsibilitytoprotect.org/files/R2P-ICC%20conference%20report-March%202008.pdf>, (proposing that R2P doctrine should be embedded in the judicial path forged by the ICC. A variety of ICC enforcement mechanisms were discussed including the establishment of an international marshalls service at 22.)

196 Koskenniemi supra note 10 at 340.
the possibility of a credible comprehensive recipe for global security as miraculous, thereby implying that a stark choice between non-intervention and cultural imperialism are the only realistic options for UNSC action in the face of injustice. However the shift to humanity law “aims to construct a bridge between the discourse of state power and transpolitical moralism” thereby rendering the supposedly miraculous possible. Thus the emergence of humanist legal-discourse to frame R2P reflects, in part, the apparent lack of agreed-on common political principles for managing current crises and offers an alternative set of principles and values for global governance that avoids falling into the utopian tyrant’s trap of moral imperialism. These principles derive from an “objective minimum conception of human security” and thus do not assume a particular notion of the good life or derive their legitimacy from a particularly western normative ideal. Atrocity Crimes are not only prohibited by customary international law, but are norms of jus cogens, the proof of which requires evidence of acceptance by the international community of states as a whole. Thus the prohibitions of international criminal law constitute one area in which “claims of cultural relativism have little purchase.” Whatever ones criticisms of using international criminal law to frame R2P it would be incorrect to assert that thy represent the manifestation of parochial views on appropriate behaviour.

The appeal of using international criminal law prospectively as a trigger for intervention arises in part from its supposed ability to ease the potential unboundedness of R2P and to “appease anxieties about the inherent politicalness of international involvement” and thus preserve R2P’s image as a rejection of real politics. This defence of R2P assumes that the meaning of

---

197 Koskenniemi supra note 10 at 343.
198 Teitel, supra note 10 at 35.
199 Teitel, supra note 10 at 148.
200 see M Cherif Bassiouni “International Crimes: Jus Cogens and Obligatio Erga Omnes” (1997) 59:4 Law and Contemporary Problems 64 (stating that “the legal literature discloses that the following international crimes are jus cogens: aggression, genocide, crimes against humanity, war crimes, piracy, slavery and slave-related practices, and torture. Sufficient legal basis exists to reach the conclusion that all these crimes are part of jus cogens” at 68)
202 Megret supra note 111 at 14.
Atrocity Crimes is definite, static and subject to consistent application. In fact the indeterminacy of meaning of Atrocity Crimes is reflected in the fact that “no two criminal tribunals share exactly the same law”\textsuperscript{203} and that some categories of atrocity law evolved and acquired greater precision with more recently established tribunals. On the one hand the dynamic nature of the meaning of Atrocity Crimes is useful because it ensures their ongoing relevance as a basis for intervention and also enables judicial mechanisms to shape the development of R2P. However the malleable nature of these labels means that they can be utilized by states to justify actions that they want to take for other narrow foreign policy purposes, such as eliminating state leaders who have fallen out of favour with their previous major power supporters. Or alternatively technical haggling over the meaning and applicability of Atrocity Crimes can be used to evade calls for concrete action as was evidenced by protracted debate over whether the conflicts in Rwanda and Darfur constituted genocide.\textsuperscript{204}

Some commentators argue that this is an inherent risk of using of international criminal law labels to frame R2P intervention. For example Teitel argues that while the “other” is generally depicted in absolute legal terms – as a criminal – there is always an “other”, and therefore political judgment continues to be salient, even if such judgment is somewhat hidden.\textsuperscript{205} However the risk of abuse does not arise from the use of legal standards to justify R2P action per se, but rather from a lack of clarity regarding how to apply these standards. Critics who portray R2P as a Trojan horse for neo-colonist mandate tend to argue that the decision of who to target is

\textsuperscript{204} see Mai-Linh K. Hong “Genocide by Any Other Name: Language, Law, and the Response to Darfur” 49:1 Virgina Journal of International Law at for discussion of protracted debate regarding whether crimes in Darfur and Rwanda constituted Genocide.
\textsuperscript{205} Teitel supra note 9 at 37.
an inevitably political decision and that therefore the possibility of opportunistic violations and manipulation of R2P is a problem with no solution. However if the international community is serious in its assertion that there can be no excuses for the commission of Atrocity Crimes and the inhuman treatments of human beings then the deontological question of whether there has been a human rights abuse justifying intervention must be capable of being subject to consistent legal analysis and separated from the issue of what consequences should flow.

4.2 The practical objection

Utopian tyranny emerges not only when a society’s institutions and the management of its problems are seen from the perspective of one normative belief, but when the relationship between order and justice is viewed from a moral absolutist position, which by stressing the inherent value of justice, fails to query its effects on efforts to secure other core values. In such circumstances the pursuit of perfect justice can in fact create great injustice. There is a risk that the modern emphasis on humanity and justice is being given such priority as to verge on injustice, as well as posing a threat to the peaceful order based on respect for state sovereignty.

For example commentators are increasingly turning to international criminal justice mechanisms as a potential solution to the dangers of “cynic tyranny”, while ignoring the dangers of replacing political with judicial mechanisms. Michael Contarino and Selena Lucent for example argue that a juridical determination of R2P by the ICC could dissuade opportunistic violations of

---

206 Mamdani supra note 62.
208 Franck supra note 191 at 19.
209 Discussed in chapter 3.
national sovereignty made in the name of R2P enforcement and reduce the concerns of critics that the principle may be misused.\textsuperscript{210} However moving away from political to juridical determination mechanisms would effectively mean that R2P would apply only at the stage at which responsibility under international criminal law for an individual culprit could be established. Such a standard and process may undermine the normative concerns embedded within the R2P in particular the need to proactively prevent imminent or on-going forms of mass atrocities.\textsuperscript{211} As Scheffer points out “the most effective enforcement of R2P will normally precede an accurate legal description of the crime at issue, a task that may take years and several criminal trials, or a judgment of the International Court of Justice to establish.”\textsuperscript{212}

While international criminal law derives part of its legitimacy from its consistent and equal application: the ultimate test of its legitimacy is arguably whether it results in significantly more good than harm, not whether there has been a consistent pattern of such interventions whenever and wherever humanitarian crises have arisen.\textsuperscript{213} Thus the law’s legitimacy is also undermined if, by its slavish implementation, it produces terrible consequences. The paradox, which arises from the seemingly irreconcilable choice, between the non-instrumental value of justice and rule of law standards such as consistency and equality on the one hand and the utility of justice and human security issues such as victim protection on the other, is becoming increasingly apparent in light of the ICC’s growing role in conflict management. Teitel points out that while legal accountability has the appeal of providing a fair resolution to conflict it often abstract from conflict issues such as what is the relevant party and who are the relevant actors thereby

\textsuperscript{210} Contarino & Lucent supra note 34 at 560.
\textsuperscript{211} for discussion of dangers of relying on international criminal law standards of proof see Rosenberg & Strauss supra note at 59.
\textsuperscript{212} Scheffer supra note 13 at 134.
\textsuperscript{213} Franck supra note 191 at 189.
rendering some political or diplomatic options more difficult to realize\(^\text{214}\). Teitel recognizes this inherent tension between increased judicialization and the protective mandate of R2P when she highlights that “whatever aims the referral may serve, if such accountability would pose greater risk to the population, the referral would backfire from a humanity law perspective.”\(^\text{215}\)

As the effect of judicial interventions on other core values such as peace, order and conflict resolution is becoming a matter of increasing debate, rather than develop practical mechanisms to deal with this conflict advocates of using the ICC as reactive tool are instead attempting to make the apparent paradox disappear by presenting the ICC not only as a means to peace, but the only road to that end.\(^\text{216}\) By claiming that international criminal justice is the only solution supporters of the ICC are able to provide a defence to criticisms that ICC referrals and investigations may actually exacerbate the conflict rather than being a force toward its resolution while at the same time avoid having to make pragmatic calculations between the utility and inherent values of justice thereby maintaining the perception that international criminal justice is a non-instrumental and non-derogable principle. Without empirical support, such claims in support of the ICC and closer convergence with R2P risk inspiring false confidence in the ICC’s abilities and effectiveness and overshadowing other more state-centric solutions such as nation building.

Furthermore this misleading presentation of the ICC as an independent “civilian” R2P enforcement mechanism and alternative to other forms of intervention draws attention away from the close connection between judicial intervention and military intervention. The argument that

\(^{214}\) Teitel supra note 9 at 221.

\(^{215}\) Teitel supra note 9 at 89.

\(^{216}\) Moreno-Ocampo supra note 117 (arguing that ‘Experience has taught us that […] law is the only efficient way to prevent recurrent violence and atrocities’).
ICC referrals, investigations and arrest warrants will autonomously help to end a conflict is premised upon a deterrence rationale, which suggests that international criminal justice can stop ongoing atrocities without further enforcement action. Other theories of punishment such as the incapacitation model highlight that ICC judicial action is impotent without further enforcement and thus cannot substitute timely and decisive diplomatic or military enforcement action. By focusing exclusively on the issue of deterrence, proponents and critics of international criminal justice ignore the question of incapacitation, thus overlooking the deeper conceptual and practical relationship between judicial and military intervention. For example supporters of the ICC, such as the Chief Prosecutor of the ICC, claim that ‘Experience has taught us that […] law is the only efficient way to prevent recurrent violence and atrocities.’ While critics such as John Bolton, former US Envoy at the UN argue ‘Why should anyone imagine that bewigged judges in The Hague will succeed where cold steel has failed? Holding out the prospect of ICC deterrence to the weak and vulnerable amounts to a cruel joke.’ Both sceptic and optimists base their analysis on a strict dichotomy between the deterrent effect of law and other more coercive mechanisms and the link between the two is thus ignored. While the autonomous deterrent effect of criminal law has been disputed, the underlying image of the ICC as peaceful mechanism to control and prevent violence rather than an instrument of violence has been preserved.

In reality closer convergence between the ICC and R2P means that humanity’s law does not simply constitute a basis for constraining the use of force, but also serve as a justification for moving to force. International criminal law isolates and demonizes the perpetrators of one kind

---

217 Ibid.
of mass violence (genocide, crimes against humanity and war crimes) and at the same time confers impunity on perpetrators of other forms of violence such as counter-insurgency and military intervention\textsuperscript{219}. International criminal law definitions of Atrocity Crimes are not static, but interact dynamically with dominant concepts of what legitimate violence is, and contribute to shaping them. Thus the ICC and R2P are not merely regulatory forces reshaping legitimate use of violence but they are constantly at risk of becoming instruments of that violence either by enabling inaction by ignoring the manifold ways in operates in the world, or legitimizing violence in the face of atrocity.

\textsuperscript{219} Mamdani supra note 62 at 59
Chapter 3
The Statist Paradigm and the Cynic Tyranny

1 Introduction

An idealist interpretation of the convergence of R2P and international criminal law as a triumph of justice over order is a utopian fantasy, which bares little relation to the realities of their more nuanced relationship. The shift to the new law of humanity has only been partial and there is a growing gap between the older bases of justice and order that are premised upon the sovereign equality of states and the primacy of order over individual justice and contemporary understandings of legitimacy, which are informed by an evolving law of humanity. As Andrew Hurrell explains:

“[W]e are not dealing with a ‘now vanished Westphalian world,’ (to paraphrase Buchanan) but rather with a world in which cosmopolitan models of governance coexist, usually rather unhappily, with many aspects of the old Westphalian order.”220

R2P and the ICC embody these tensions in both form and substance. They are both designed to secure human interests within a primarily statist framework and thus at constant risk of being subverted by the very agents that they purport to control. This chapter examines an alternative framework for analysing the shift toward humanity’s law discourse in international relations, which suggests that the apparatus of the state system still provides the fundamental framework for the management of power and the mediation of conflict. According to this framework the relationship between R2P and the ICC does not represent a new world order, but rather the instrumentalization of justice to reinforce existing power structures and the move toward a possible “cynic tyranny”.

This chapter will provide a balanced analysis of both the shadows and the light of using a statist framework for understanding interactions between ICC and R2P. Frederic Megret’s analysis of the relationship between ICC and R2P provides a useful analytic foundation upon which a deeper understanding of this darker side of the nexus between ICC and R2P can be constructed.\(^{221}\) While the ICC and R2P appear to be discourses challenging sovereign power and privileging appeals to justice against the corruption of politics, they are in reality movements designed to exercise power for certain positive ends. Both R2P and the ICC are part of a project to re-imagine the UNSC and states as something that can be harnessed for a higher goal – an instrumental attempt to co-opt power to achieve universal justice.\(^{222}\) However the danger of attempting to achieve utopian ideals in a cynical and divisive world is that what starts out as a demand for authentic (utopian) justice may transform into a cynical tyranny whereby political institutions pay’s lip service to normative standards while constantly adjusting them in response to the daily requirements of the order’s maximal effectiveness.\(^{223}\) This danger arises because norms are not just powerful forces reshaping power structures, but they are also at constant risk of being instrumentalized by current power structures. However it is important not to overlook the brighter nuances of what is a circular and complex relationship. While attempts to instrumentalize order to achieve justice can quickly turn into the subordination of law to the dictates of power this is not inevitable and it is important not to overstate this danger by underplaying the ability of norms to influence and restrain power.

\(^{221}\) Megret supra note 111 at 15 – 34 (arguing that R2P and the ICC gravitate to established sources of power and that states and the security council emerge all the stronger as a result of the interplay between R2P and ICC at 3).

\(^{222}\) ibid at 26.

\(^{223}\) for overview of dangers of cynical tyranny see Koskenniemi supra note 10 at 340.
2 R2P and the ICC – a state centric perspective

Focusing on which institutions have the power to label and respond to breaches of international criminal law under the Rome statute and R2P exposes a clear disconnect and tension between the humanity law discourse, which purports to constrain power and the prevailing state-centric institutional order which both movements gravitate toward.

The disaggregation of the commission of Atrocity Crimes by states and individuals introduced by the R2P doctrine creates some confusion in assessing what body is normatively responsible for determining and controlling the commission of such crimes. Since two international bodies (the ICC and UNSC) different in their character, roles and jurisdictions are now responsible for the determination of Atrocity Crimes, normative responsibility for determination of the commission of Atrocity Crimes finds itself in a potential conflict of jurisdictions and state of confusion. The UNSC in accordance with the Outcome Document has a primary role in the determination and repression of the commission of Atrocity Crimes by the state, however in practice it has failed to deal decisively, swiftly and consistently with R2P violations\textsuperscript{224} and has in some circumstances attempted to outsource this role to the ICC via referrals of the situation in Libya and Darfur. The ICC under its Statute has the jurisdiction to define and process Atrocity Crimes, however without universal jurisdiction its ability to exercise this power is often dependant upon the UNSC and states exercising their normative responsibility to refer cases to it. In theory the ICC and UNSC could represent control mechanisms for each other. However their inaction blocks the normative responsibility to determine and respond to Atrocity Crimes in the international arena and places the normative responsibility in a vicious circle. For example while the ICC does not have

\textsuperscript{224} Supra note 43.
jurisdiction to assess the legality of the use of force and evaluate the proper scope of UNSC mandated interventions the investigation of individual responsibility by the ICC for the commission of Atrocity Crimes after they have occurred enables the international community to assess whether the qualitative threshold for triggering R2P had been triggered on the facts and whether the UNSC fulfilled its, albeit informal, normative duty to determine an R2P violation in a timely and decisive manner. However if the ICC does not initiate proceedings, or fails to follow through once proceedings have been started (as may happen in Libya), there is no way standardized way of assessing the accuracy of UNSC determinations.

2.1 Police in the Temple – the Politicization of Atrocity Crimes

Underlying concerns regarding the disaggregation of normative responsibility for the determination and repression of Atrocity Crimes at the state and individual level are concerns regarding the possible politicization of normativity, which may occur once a determination function is placed in the hands of a political body such as the UNSC. Despite doubts regarding the appropriateness of assigning a judicial role to a political, state-centric body the 2001 ICISS reports justified this attribution on the basis that

“There is no better or more appropriate body than the United Nations UNSC to authorize military intervention for human protection purpose. The task is not to find alternatives to the UNSC as a source of authority, but to make the UNSC work better than it has.”

225 Libya has made a challenge to admissibility under Rome Statute article 19 and the ICC is currently determining the validity of the admissibility challenge see Prosecutor v. Saif Al-Islam Gaddafi and Abdulla Al-Senussi (decision of the Pre-trial chamber) ICC-01/11-01/111 (June 2012) (ruling that as a result of Libya’s admissibility challenge, Libya is entitled, under Article 95 of the ICC Statute to postpone its obligation to surrender Saif Gaddafi to the ICC. That suspension of the obligation of surrender will last until the ICC determines the validity of the admissibility challenge).

226 ICISS report supra note 18 at XI.
Megret describes this process of enlisting the UNSC as the sole authority to determine R2P violations as a mix of realism and also an aspiration to influence power for certain positive ends.\textsuperscript{227} In principle, multilateral organizations are arguably best suited to ensure compliance with common values that the international community considers fundamental, such as the protection of the individual.\textsuperscript{228} Thus on one hand using the UNSC, a body traditionally concerned with the maintenance of peace and security rather than justice, can be a regarded as a positive indication of a new cohesive approach to the problems order and justice on the part of the international community. On the other hand, a number of critics question the adequacy of the UNSC in guaranteeing compliance with humanity law values and becoming the enforcer of humanitarian rules without taking account of its political nature, its mandate or the effects that coercive measures could have in the humanitarian domain.\textsuperscript{229}

The traditional role of the UNSC was to end the threat of interstate conflict and not to punish the failure to comply with international obligations.\textsuperscript{230} Thus the position of the UNSC under the UN Charter is that of police and its composition and procedures reflect this distinctive role. While its political nature, and unrepresentative character ensure that it is an effective centre of power, it is argued that its acknowledged deficiencies in terms of representativeness, openness, fairness and

\begin{flushleft}
\textsuperscript{227} Megret supra note 111 at 24.
\textsuperscript{229} ibid at 149.
\textsuperscript{230} ibid (arguing that “The Council’s powers under Chapter VII are not necessarily directed against violations of international legal obligations, so that they may be used against a state that has not breached international law, or may not be exercised in case of aggression, for instance. The Council acts not as judge or jury, but rather as a police officer. The aim of its actions is to end the threat (coercion) and not to punish the failure to comply with an international obligation (responsibility)” at 149).
\end{flushleft}
accountability render it an unsuitable judge and jury of international justice.\textsuperscript{231} The right of veto, for instance, means that any breach committed by a permanent member of the UNSC – or by any of their strategic allies – will evade action under Chapter VII so that justice is at best partial.\textsuperscript{232}

While the conceptual framework of R2P does seek to generate a consistent approach to grave humanitarian situations, it does not impose a legal obligation on the UNSC to intervene when Atrocity Crimes are occurring.\textsuperscript{233} The adoption of paragraphs 138 and 139 of the Outcome Document by the members of the UN effectively permits the UNSC to broaden its interpretation on what constitutes an ‘international threat to peace and security’ under Article 39 of the UN Charter to include the commission of Atrocity Crimes as threats to international. In this sense it could be argued that R2P does not represent a limited extension of UNSC powers to reflect a move toward humanity’s law, so much as a carte blanche declaration of the limitlessness of its powers. For example had the ICC found that acts in Libya did not amount to Atrocity Crimes and that therefore subsequent international action was not justified according to international criminal law criteria, this arguably may not have affected the legitimacy of UNSC resolution 1973 in so far as the UNSC would have been able to rely upon the catch all defence that the action nonetheless constituted a threat to international peace and security.

Even if R2P did impose a legal duty on the UNSC to respond to Atrocity Crimes in so far as the

\textsuperscript{231} ibid at 150.
\textsuperscript{232} ibid at 150.
\textsuperscript{233} The \textit{Outcome Document}, supra note 22 uses the following qualifiers when it comes to responsibility to take action through the UNSC under Chapter VII: Firstly, the Heads of State merely reaffirm that they “are prepared” to take action, implying a voluntary, rather than mandatory engagement. Secondly, they are prepared to do this only “on a case by case basis”, which precludes a systematic responsibility. For further discussion of this issue, See Office of the President of the General Assembly, ‘Concept note on responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity’ online at http://www.un.org/ga/president/63/interactive/protect/conceptnote.pdf
UNSC continues to have discretion in deciding whether the criteria for intervention under R2P have been met the constraining function of international criminal law criteria only applies to UNSC decision-making, which is not subject to judicial review or any rules on due process.

By giving the UNSC the power to determine whether situations amount to Atrocity Crimes justifying intervention R2P has ensured that the UNSC remains ultimate arbiter in international politics and the judge jury and executioner of international justice. Subjecting the determination of R2P violations to political processes creates the risk that Atrocity Crimes are either re-defined as legitimate violence so as to justify non-intervention, ignored if there is no political incentive to act (as evidenced by the security counsel’s refusal to define Rwanda as genocide at the time) or utilized to try and justify actions that they want to take for other narrow foreign policy purposes. Thus rather than depolitizing R2P framing it in terms of international criminal is actually politicizing international criminal law.

Placing normative responsibility for the assessment of breaches of international law in the hands of a political body, rather than judges allows for arbitrariness in the interpretation and classification of wrongdoings, and represents a serious obstacle to the standardization of the corpus of international crimes. It creates the risk that norms are not applied consistently to all states and thus the very legitimacy of such norms is undermined. Thus rather than constraining discretion of UNSC by rendering the trigger for R2P action more determinate it renders the

---

234 Sir Michael Wood “The UN Security Council and International law” (Hersch Lauterpacht Memorial Lectures 2006 : Lecture 1 delivered at the Lauterpacht Centre for International Law, University of Cambridge, 9th November 2006), online: <http://www.lcil.cam.ac.uk/Media/lectures/pdf/2006_hersch_lecture_1.pdf> (“It seems to be widely accepted that the International Court has no power of direct judicial review such as is found in many national legal systems; but it may have some power of indirect review, where the legality of the Council’s actions arises incidentally in the course of deciding the case or giving the opinion before it. That remains controversial.”).

235 There is no due process clause from the Council’s [provisional] rules of procedure. (see provisional rule of procedure of the Security Council, s/96/rev.7 (online: http://www.un.org/Docs/sc/scrules.htm).
meaning of the crimes less determinate because they are now obscured by UNSC findings. This has lead some commentators to argue that the depoliticizing language of humanity’s law is not an antidote to international power relations, but its latest product.⁴ Taking Syria as an example, situations there are similar to that which existed in Libya when the referral to the ICC was made. However, no international action has been taken to help the protesters against governmental oppression and execution, where evidence of crimes against humanity having been committed is glaring. In the absence of prosecution by the Court or determination of by the UNSC, states and the international community can easily view such abstention as an unjustified bill of clean health. At the same time the selective application of R2P and ICC referrals means that international criminal justice mechanisms can be branded as politically biased by those indicted. Thus the failure of the international community to act in some cases can undermine its ability to deliver justice where it does decide to act.

There is also a danger that the selective enforcement of norms may be used to undermine the very legitimacy of the norms themselves, rather than simply the mechanisms available to ensure their enforcement. Such a claim was made by Sudan in response to the UNSC referral of the situation in Darfur to the ICC. Against the backdrop of criticisms that the referral was selective the Sudanese permanent representative went on to claim that that seeking to ensure prosecution of international crimes is a means of imposing values and an exercise of cultural superiority.⁴ The Sudanese permanent representative said, that the referral "exposed the fact that this criminal court was originally intended for developing and weak States, and that it is a tool for the exercise of the culture of superiority and to impose cultural superiority. It is a tool for those who believe that they have a monopoly on virtues in this world, rife with injustice and tyranny").

⁴ Mamdani, supra note 62 at 59.
⁴ UNSCOR, 60th Year, 5158th Mtg., UN Doc.S/PV.5158 (2005), at12(Mr Erwa). (Following referral of the situation in Darfur to the ICC the Sudanese permanent representative claimed, that the referral “exposed the fact that this criminal court was originally intended for developing and weak States, and that it is a tool for the exercise of the culture of superiority and to impose cultural superiority. It is a tool for those who believe that they have a monopoly on virtues in this world, rife with injustice and tyranny”.)
gaining momentum and legitimacy in the face of selective enforcement should not be underestimated. Thus, in the end, the combined criminalization and politization of Atrocity Crimes may lead to the unintended consequence of rendering the commission of Atrocity Crimes with impunity easier rather than sanctioning it more effectively.

2.2 Temple as Support for the Police

The “cynic tyranny” emerges not only when no attention is paid to the acceptability of power “but also (and more dangerously) when the justice system becomes a vehicle for buttressing the police.”

The current relationship between the ICC and R2P is formulated in such a way that the ICC has become a vehicle for supporting, rather than regulating and challenging UNSC action under R2P. The revolutionary impulses and humanist logic of the ICC is constrained by existing statist constructs. Sadat points out that “[t]he negotiation of the Rome Treaty has worked a quiet, albeit uneasy, revolution that has the potential to profoundly transform the landscape of international law. Yet no revolution would be complete without a counterrevolution, and many aspects of the Statute reflect the constraints of classical international law that did not yield to the forces of innovation and revolution at Rome. This is not surprising, for if State sovereignty . . . is often blamed for the violent condition of world affairs, international governance is not necessarily looked upon as a superior alternative.”

So for example, the ICC’s lack of universal jurisdiction and standing police force means it must depend on co-operation with the UNSC to refer cases to it and on state and interstate co-operation to bring the accused before the court, detain suspects and acquire evidence. These institutional constraints mean that the operation of the ICC continues to depend on the reserve of political will, which undermines its ability to act

---

238 Koskenniemi, supra note 10 at 330.
as an alternative or counterforce to current power politics.

UNSC referrals to the ICC in Libya and Darfur have been hailed as breakthrough for international criminal justice. However the practice of UNSC referrals to the ICC (and the ICC’s acceptance) do not render the ICC an alternative or counterforce to the traditional security system, rather they highlight the internal dependence of order and justice and the way each instrumentalizes the other to achieve competing aims. From the perspective of R2P and the interests of order the ICC is “available as a relevant tool, as a relevant form of leverage that we ignore at a cost if we don't use that leverage to the fullest effect”;240 and from the perspective of the ICC pursuing justice through power-politics, is a necessary compromise, without which some of the worst international crimes would never be adjudicated. However, according to some commentators the ICC’s uncritical acceptance of politically structured UNSC referrals is a compromise that places existing power politics above the interests of justice.241 By accepting UNSC referrals the court is effectively subject to the Council’s power politics and thus reinforces rather than challenges the asymmetry of international power. For example the recent judicial interventions in Darfur and Libya were subject to political limitations by the UNSC, which meant that non-state parties were excluded from the jurisdiction of the court and therefore not subject to the very laws, which they sought to enforce242. The political nature of these referrals means that they do not represent the triumph of justice over order, but rather the instrumentalization of justice to achieve order. The court it is claimed thus ends up highly subservient to the UNSC power logic that was supposed to be so lethal to the fundamental justice

241 see Megret supra note 111 at 26.
of international criminal justice.\textsuperscript{243}

3 ICC and R2P : Increased Sovereignty for the Powerful and Increased Intervention for the Weak

The institutional limitations of both norms means that the purportedly reformist agendas of each tend in practice to gravitate to established sources of power be they states or the UNSC. Megret argues that it is therefore states and the UNSC that emerge all the stronger as a result of the interplay between ICC and R2P and that the interaction between the two reinforces the older statist regime and undermines the revolutionary potential of humanity’s law.\textsuperscript{244} Some commentators take this analysis suggesting that looked at closely and critically through the lenses of R2P and the ICC what we are witnessing is not a global, but a partial transition. The transition from the old system of sovereignty to a new order based on humanity’s law is confined to those states defined as ‘failed’ or ‘rogue.’ The result is a bifurcated system whereby state sovereignty obtains in large parts of the world, but is suspended in more and more countries in Africa and the Middle East, which are increasingly defined in terms of trusteeship and wardship.\textsuperscript{245}

\begin{itemize}
\item \textsuperscript{243} see Megret supra note 111 at 26.
\item \textsuperscript{244} Megret supra note 111 (arguing that the overlap between ICC and R2P reinforces rather than changes exiting practices which “runs against the general consensus that consensus that independently and certainly in conjunction ICC and R2P are fundamentally international legal order-altering moves of almost revolutionary proportions” at 32)
\item \textsuperscript{245} See Mamdani supra note 62 (arguing that “the new global regime of R2P bifurcates the international system between sovereign states whose citizens have political rights, and de facto trusteeship territories whose populations are seen as wards in need of external protection” at 53).
\end{itemize}
4 R2P and the ICC – Re-shaping Power Structures an “Inside Job”

Megret’s conclusion that the relationship between the ICC and R2P reinforces exiting power structures but does little to change them,246 is premised upon a rigid conception of actor identity. Law he argues is constructed by ideas that do not float freely, but rather are embedded in a number of constituencies, which at any point in time, may see the promotion of certain ideas as worthwhile.247 However he which overlooks the potential of both R2P and the ICC to reshape the very power structures that they enlist for support. Identities and norms are not static, but rather are constructed through social interaction and the ends of such interaction are not pre-determined or inevitable. Thus while the current interaction between ICC and R2P may reinforce existing power structures and in particular the sovereignty of powerful states, a bifurcated system of humanity’s law is not the inevitable outcome of interaction between these two norms. The next section examines how the convergence between R2P and the ICC has worked a quiet, albeit uneasy, revolution that has the potential to profoundly transform the World Order and way in which the UNSC operates.

4.1 UNSC from Political Body to Global Jury – the Civilizing Force of Hypocrisy.

By staying within the binary analysis of R2P as source of UNSC power to take a collective security response and a source of restraint commentators have tended to conclude that without imposing formal legal constraints on the UNSC R2P leaves it as ultimate arbiter of international

246 Megret supra note 111 at 32.
247 Megret supra note 111 at 4.
politics without conceding anything in terms of its competence or discretion they will do very little to significantly change practices. However this is only the beginning of the discussion. R2P is not simply a direct source of power or constraint, but has normative implications for the way in which the Council exercises its Chapter VII powers. Megret’s prediction that in so far as R2P do not make any formal demands or impose any legal limits on the UNSC’s powers together they can do very little to significantly change practices implicitly assumes R2P can only affect the decisions and actions of states and other actors in international society through mechanisms that coerce or punish. In actuality laws influence is “strongly felt in processes of persuasion that are grounded in shared understandings of right conduct” and can shape both the identity of the actors and the further evolution of the structures themselves. This suggests that the fact that R2P does not demand anything from the UNSC but instead attempts to “cajole” is not a sign of weakness, as Megret suggests, but is rather a source of strength. Persuading the UNSC to take on normative responsibility to determine whether situations amount to Atrocity Crimes R2P has altered the position of the UNSC under the UN Charter from that of police to judge and jury of international justice and in so transforming its identity has the potential to fundamentally change the way that it operates so that it fulfils its normative duty in a just and coherent way, rather than according to the dictates of national interest.

By treating the underling political identity of the UNSC as static fact Megret fails to acknowledge the fluid nature of actor identity and the normative implications of updating the UNSC mandate by making it enforcer of international criminal law. Tomas Franck points out


249 Ibid at 5.

250 Megret, supra note 111 at 24.
that the UNSC role is not always distinctly political, but rather the political organs of the UN already constitute something approximating a “global jury” whenever there is a confrontation between the strict, literal text of the Charter and a plea of justice and extenuating moral necessity requiring the use of force. Franck’s analysis focuses on how the UNSC acts as “global jury” when called upon to retroactively sanction or condemn the unilateral use of force in response to mass atrocity situations however he admits that the “global jury” answer does not explicitly solve the problem of ensuring more successful UN responses to atrocity led by the UNSC crimes ex-ante. He writes, “Indeed, the problem for the system is not so much how to accommodate such interventions in its framework of legality but how to find states willing to undertake the necessary rescue.” However his examination of the UNSC as ‘global jury’ provides the analytical foundation upon which a response can be constructed to the supposed risks of subjecting the determination of R2P violations to political processes and a more responsive UNSC created.

Incorporation of international criminal law into the R2P framework transforms the role and identity of the UNSC so that it no longer only acts as “global jury” when called upon to retroactively sanction or condemn responses to mass atrocity situations, but also acts as “global jury” and enforcer of international criminal law when exercising its Chapter VII powers ex-ante. Franck’s global jury framework provides an analytical foundation for understanding the mutation in the UNSC’s attitude toward R2P from “timid conception of the responsibility to protect as

---

251 Franck supra note 191 at 186.
252 Ibid at 191.
cautiously promulgated”253 by preceding General Assembly texts towards a “collective obligation of states to help and repair in situations of urgency” as evidenced by Resolutions 1973 and 1975, which “begin to make this ardent obligation real.”254 As Gareth Evans points out states that were last to join the consensus in 2005, and have been most resistant since in expressing support for the concept, have now very definitely changed course.255 A similar mutation has also occurred within the UNSC vis-à-vis its attitude toward the ICC. Whereas the United States’ abstain from vetoing the resolution referring the situation in Darfur to the ICC was seen as a mild thawing in its attitude towards the ICC,256 its active support and lobbying of the ICC referral in Libya and Syria represent a significant turn around and recognition of the court’s authority and ability to contribute to international peace and security. To simply interpret these referrals of the situations to the ICC as cynical utilization of the ICC overlooks the more revolutionary implications of the US, agreeing to an action, which conflicted with its stated core interests. This desire to be seen to be good international citizens by supporting international law mechanisms reflects a revolutionary transformation in the way in which members of the UNSC perceive their role and identity, which could in turn reinforce the international justice regime.

There are a number of potential explanations as to why despite varying national interests and


254 Ibid.

255 Gareth Evans “Crimes Against Humanity and the Responsibility to Protect” 11 Jun 2009 (online: International Crisis Group http://www.crisisgroup.org/en/publication-type/speeches/2009/crimes-against-humanity-and-the-responsibility-to-protect.aspx) (citing the example of India’s Foreign Minister Pranab Mukherjee who stated publicly in April that the Government of Sri Lanka had a clear ‘responsibility to protect’ its civilians at extreme risk in the final operations of the military against the Tamil Tigers.).

alliances the UNSC tends to act more as responsible jurors than committed partisan when interpreting the charter’s normative principles and applying R2P. Franck suggests that desire for peer group approval and an awareness of the importance of practice as precedent both act as counter weights to baser instincts and interests.\textsuperscript{257} Underlying these theories of UNSC compliance with international law is a belief that external factors such as interests, incentives and punishments motivate actors, rather than anything that is internal to the creation and substantive content of R2P. While these external explanations are important they overlook the possibility that that the UNSC’s very identity can be influenced by interaction and mutually created structures. Constructivist insights and emphasis on shaping of identities and actors provide a useful analytic framework for understanding how UN organs internalize and adapt to the norms they claim to be enforcing. Constructivists describe how structures foster ‘‘shared understandings’’ that can then shape both the identity of the actors and the further evolution of the structures themselves.\textsuperscript{258} This emphasis on the shaping of identities contains a further important insight: ideas, shared understandings, or norms are seen not as direct causes of behaviour, but as structures that both constrain and enable choices.\textsuperscript{259} R2P emerges as neither imposed social control or as completely subordinate to the interests of states. Rather it can be seen as generated and moulded through interaction and, in turn, as affecting actor behaviour by influencing actor identity, thereby reconstructing interests. Thus one can see how R2P can generate self-bindingness and adherence to international criminal law norms within the UNSC, even in the absence of material incentives or sanctioning mechanisms vis-à-vis the UNSC.

\textsuperscript{257} Franck supra note 191 at 189.  
\textsuperscript{258} Persuasion and Enforcement supra note 248 at 5.  
\textsuperscript{259} ibid at 5.
Although R2P does not place a legal obligation upon the UNSC to respond to R2P situations it has clearly altered the way that it responds to mass atrocity situations. While it is true that, as Teitel points out, Security Council consensus is hardly synonymous with justice\(^{260}\) the inverse is also true, lack of Security Council consensus is not necessarily synonymous with injustice. Indeed as Franck points out the element of “alikeness” of humanitarian crises is not demonstrable solely by superficial (and possibly inaccurate) claims that Government A is acting “just like” Government B.\(^{261}\) There are many variables to be taken into account in such comparisons: one of which is the likelihood of success were an intervention to be undertaken. Therefore whether the UNSC is an appropriate forum for determining and enforcing R2P cannot be assessed solely on the basis of whether it has responded consistently to atrocity situations. Rather, in order to assess the implications of making the UNSC responsible for determining and responding to mass atrocities is important to look at how it has altered the way in which it responds to mass atrocity situations. Formal adoption of R2P by the 2005 World Summit has undoubtedly raised the political costs of obstructing the delivery on this commitment by casting a veto that prevents timely and decisive collective action in the face of a mass atrocity situation. The practice of states and international organizations, as displayed in official statements and publications, has given rise to a general public expectation that the Council should take sufficiently robust action in R2P cases. Although exercise of the veto is still within the realm of discretion of the permanent member, this expectation essentially forces members of the UNSC to rationalise their decisions on the basis of arguments, which are admissible under humanity’s law logic, and thus better enables us to unmask the power logics at work in the UNSC.\(^{262}\) Generally


\(^{261}\) Franck supra note 191.

\(^{262}\) see Peters supra note 253 for discussion of implication of the duty to give reasons for veto.
speaking, the obligation to give reasons forces decision-makers to base their acts on claims regarding the general interest rather than on selfish appeals. These reasons, even if they may be hypocritical or insincere, still have the consequence of generating better outcomes, because “bad” arguments (for example condoning Atrocity Crimes) are officially banned and “weak” arguments (for example justifying non-intervention on the basis of national interest) are politically less viable and therefore have much less power to influence the ultimate decision that has been reached. An explanation why no action is taken will inevitably have to engage with the facts, and is therefore apt to help clarify them. It enables political actors and the broader international community to criticize and attack the UNSC if the stated reasons are legally and politically unpersuasive. The so called “civilizing effect of hypocrisy” can be evidenced by the reasoning adopted by China and Russia’s to support their veto of the UNSC resolutions regarding the situation in Syria. Rather than supporting the atrocities in Syria or asserting their own national interest both countries justified use of the veto on the basis that the measures contained therein would escalate conflict. Irrespective of whether such claims are insincere or hypocritical, they open the doors to further dialogue on how to reach a peaceful conclusion to conflict in Syria, which basing their veto on national interest would otherwise have closed. In the long run R2P not only rules out those most blatant abuses that can simply not be rationalized, but helps cultivate a civilizing discourse within the UNSC, which irrespective of whether it stems from hypocrisy or sincerity, may in the long run lead to a genuine acceptance of underlying normative structure of a humanitarian discourse and over time can significantly influence the way in which members of the UNSC perceive their role in international affairs.

263 UNCOR 67th year 6810th Mtg, UN Doc S/PV.6810 [provisional].
4.2 The Role of the ICC – from Puppet to Participant

Constructivist insight and in particular its focus on the importance of actor identity also provide a useful analytic framework for re-conceptualizing the relationship between the UNSC, acting under R2P and the ICC. The current relationship between the ICC and R2P is formulated in such a way that the ICC has become a vehicle for supporting, rather than regulating and challenging UNSC action under R2P. However this dynamic is by no means inevitable but rather has been facilitated by a pliant prosecutor who actively chose to align the court with the world’s most powerful states. However in June 2012 the ICC welcomed a new prosecutor and the potential new era in the relationship between the ICC and R2P.

According to Teitel the double-barrelled logic of humanity’s law operates not only to justify intervention on a humanity basis but also to limit (or otherwise shape) intervention through the same humanitarian logic. This analysis suggests that the ICC could represent a counterforce to the current security system and guard against the manipulation of R2P and the possibility of a cynics tyranny by ensuring that all parties to a conflict, including UNSC authorized forces, comply with international humanitarian law.

Although the Rome Statute gives superpowers in the UNSC some power to pull the strings of justice by determining when the ICC can intervene, characterizing the ICC as a puppet for the UNSC is highly misleading and dangerous. While the decision to refer cases to the ICC by the UNSC maybe politically motivated, once the wheels of justice have been put in motion the ICC has substantial powers to ensure that justice is applied fairly and impartially and that those

264 Megret supra note 111.
265 Teitel supra note 9 at 83.
invoking international criminal law are subject to the same constraints as those they seek to use it against. Suggesting that the council can simply use the ICC for political ends creates a sense of legitimacy and inevitability regarding any complicity, which the ICC shows toward the UNSC’s political agenda. In actuality UNSC referrals are not necessarily a poisoned chalice, which beholden the ICC to the power logics of the UNSC.

Although the UNSC has attempted to exclude non-state parties, thus undermining the humanity law logic the Council cannot simply use the ICC as its sees fit: the ICC, as an independent judicial body, must act according to its Statute, not simply in the way in which the Council would like it to.\textsuperscript{266} This means that the UNSC referrals must be read in accordance with the Rome Statute.\textsuperscript{267} Under the Rome Statute the Council can only refer situations, rather than ‘investigations’, ‘prosecutions’, and, a fortiori, ‘cases.’\textsuperscript{268} Thus contrary to Megret’s misleading assertion that UNSC has the “ultimate ability to designate who gets prosecuted”\textsuperscript{269} (emphasis added); in actuality the UNSC cannot limit the referral, even by excluding a small group.

Although the OTP has remained silent on the legality of the imposed restrictions on who can be investigated and prosecuted contained in the Libya and Darfur referral in November 2011, ICC Chief Prosecutor, Luis Moreno-Ocampo said that alleged crimes by NATO would be

\begin{footnotes}
\item \textsuperscript{266} Cryer supra note 256 at 206.
\item \textsuperscript{267} Prosecutor v. Saif Al-Islam Gaddafi and Abdulla Al-Senussi (decision of the Pre-trial chamber) ICC-01/11-01/111 (June 2012) (With regard to the application of the ICC Statute in case of UN Security Council referrals, the chamber reiterated that “the legal framework of the Statute applies in the situations referred by the Security Council in Libya and Darfur, Sudan, including its complementarity and cooperation regimes.” (at para. 28)
\item \textsuperscript{268} Cryer supra note 256 at 212 (citing the text of the Rome Statute Article 13(b), which reads in relevant part, ‘a situation in which one or more of such crimes appears to have been committed, makes it clear that a situation may not be limited ratione personae. This interpretation that a situation may not be limited ratione personae also appears to have been the position adopted by the Prosecutor. When Uganda first sought to refer itself to the ICC under Article 13(a) of the Rome Statute, the referral was for the situation ‘concerning the Lord’s Resistance Army’ in northern Uganda. The Prosecutor, nonetheless, has opened an investigation into northern Uganda more generally.
\item \textsuperscript{269} Megret at 256.
\end{footnotes}
investigated “impartially and independently by the prosecution.” This implicitly suggests that the ICC would override attempts to constrain the jurisdiction of the ICC if there was evidence to suggest that NATO forces belonging to non state parties had committed Atrocity Crimes, which were not being thoroughly investigated by NATO or responsible states. Moreover, as was made clear by Moreno-Ocampo’s report to the UNSC on 16 May the OTP has “a mandate, however, to investigate allegations of crimes by all actors” (emphasis added) and has, in fact, done some preliminary investigations into NATO’s actions. There was no information to suggest that NATO “authorized the launching of strikes” which could fall under the category of war crimes and Moreno-Ocampo thus concluded that the OTP would monitor NATO and Libyan investigations into incidents where NATO bombings caused civilian deaths of sufficient gravity as to warrant attention from the Court. While falling short of officially condemning the attempts to limit ICC jurisdiction, this preliminary investigation highlights that the ICC may fulfil its responsibility to regulate the way in which military interventions under R2P are carried out by all parties, while respecting the principle of complementarity, which ensures that states have primary jurisdiction over any investigations. This nuanced approach will hopefully assuage US government fears that the ICC will embark upon politically motivated prosecutions and thus necessitate against the need for political limitations of ICC referrals in the future.

Furthermore it is important not to let formalistic analysis detract us from the potential for the humanity’s law logic that was used to justify interventions under R2P, to inform the way in which interventions are carried out. Teitel argues that from a humanity law perspective, one

---

272 ibid at paras 54-8.
would expect the laws of war to be most closely observed where the claim is to a ‘just war’ and thus suggests therefore that the principle of R2P should therefore foster better behaviour in warfare irrespective of whether there are mechanisms to enforce these rules.\textsuperscript{273} Such predictions find substantial support in the largely positive evaluations of NATO’s intervention in Libya, which resulted in a remarkably low number of civilian casualties. Notably, while it was critical of NATO in some cases, the report of the UN Commission of Inquiry on Libya concurred that NATO had taken extensive precautions to prevent civilian deaths.\textsuperscript{274} Human Rights Watch also accepts that civilian casualties were likely minimal.\textsuperscript{275} In this context, it is worthwhile noting that neither HRW nor the Commission of Inquiry have called on the ICC to investigate NATO, believing that NATO can and should investigate cases of civilian casualties themselves.

\textsuperscript{273} Teitel supra note 9 at 99.
\textsuperscript{275} Human Rights Watch “Unacknowledged Deaths: Civilian Casualties in NATO’s Air Campaign in Libya,” 14 May 2012 online (http://www.hrw.org/sites/default/files/reports/libya0512webwcov_0.pdf) (noting that “NATO says it took extensive measures to minimize civilian harm, and those measures seem to have had a positive effect: the number of civilian deaths in Libya from NATO strikes was low given the extent of the bombing and duration of the campaign” at 2).
Chapter 4
Conclusion

This work has moved away from discussions of the relationship between the ICC and R2P in terms of order versus justice to consider how order and justice, and the ICC and R2P, are related within different and competing conceptions of world order. In particular it has explored how different evaluations of the relationship between ICC and R2P arise depending upon whether one assumes that humanity’s law or existing state apparatus provides the fundamental framework for the management of power and the mediation of conflict. According to the former analysis the closer convergence between ICC and R2P represents a principled extension of individual justice principles into the political sphere opening the doors to a move away from ad-hoc military intervention toward universal judicial enforcement as the modus-operandi for responding to mass atrocities while according to the latter analysis the convergence between ICC and R2P reinforces existing statist the rapprochement of R2P and the ICC does not represent the advent of the primacy of the juridical over the political on the international scene but rather is an example of the way power manages to instrumentalize justice, so as to subvert it’s meaning to advantage thus potentially creating a “cynic tyranny.”

The relationship between the ICC and R2P is in fact far more nuanced than these binary frameworks suggest. The partial shift to the new law of humanity has created a complex world order in which cosmopolitan models of governance, informed by an evolving law of humanity, coexist with many aspects of the old Westphalian order and each normative structure has the power to shape and influence the other.
R2P and the ICC represent these tensions in both substance and structure in so far as they are both designed to secure human interests within a primarily statist framework. This means that they are at constant risk of either being subverted by the very agents that they purport to control, thus descending into a cynic tyranny, or on the other hand substituting existing systems of power management and conflict resolution so that they themselves become instruments for violence and repression, thus creating a utopian tyranny. This means that what on the surface appears to be two separate and distinct frameworks requiring different solutions, in fact represent two sides of the same coin so that the problem is the same to solve.

However by staying within an intermediate range of generality, literature to date has implicitly explored the relationship between the ICC and R2P within the confines of either one of these paradigms thus ignoring the existence of the other and the deep conceptual relationship between the two. This means that proposed reforms regarding how the relationship between ICC and R2P should be realized are tilted in favour of solving either one or the other problem: utopian or cynic tyranny – while ignoring the implications which solving one has upon the other. So perfect justice is treated as the solution to imperfect order or cynic tyranny\textsuperscript{276} or the pragmatic imperative of order is seen as a counterforce to justice’s tyranny.\textsuperscript{277} However each tyranny faces the other in a relationship of mutual cause and consequence and therefore such proposals are in constant danger of sliding from one tyranny into the other.

\textsuperscript{276} For example see contarino & Lucent supra note 242 (arguing that juridical determination of R2P by the ICC could dissuade opportunistic unilateral violations of national sovereignty made in the name of R2P, and reduce the concerns of critics that the principle may be misuses at 160)

\textsuperscript{277} for example Teitel supra note 9 (arguing that humanity law’s concern with accountability may risk overshadow more stat-centric projects and that therefore “One can see the imperative of a pragmatic approach to accountability” at 221)
There is however a way out of this self-fulfilling program of closer convergence between ICC and R2P facilitating between both cynic and utopian tyranny. While international order and justice are both important, their realization is a matter of degree, and therefore there must be tradeoffs in establishing an enduring relationship between R2P and the ICC. In particular the relationship between the two should be seen not as a means of creating perfect order or perfect justice, but as creating a system of checks and balances, which guards against the excesses of both. This requires a calibrated approach, whereby the relationship between R2P and the ICC is checked and adjusted according to a normative standard.

Humanity provides a normative framework, which balances the interdependent yet conflicting values of order and justice. It reframes the problem of global justice and order in terms of the human so that the core measure of both begins with and concerns human protection, thus making the conceptual paradox between order and justice disappear. Under the humanity framework collective action under R2P and, judicial action under the Rome Statute, must balance the imperatives of population protection against the legal and normative value of criminal responsibility and thus should be applied in such a way that reflects and addresses the tension between the flexibility of politics and prescriptive rigor of law. However this normative framework only takes us so far, in particular it does not establish how the competing ideals should be balanced and by whom.

Constructivist insights provide an analytic framework for co-ordinating future action in these two fields, which respects the principle of humanity justice, and order in a way that does not slip into cynical or utopian tyranny. R2P and the ICC emerge as neither imposed social control (a justice tyranny) or as completely subordinate to the interests of states and the UNSC (a cynic tyranny). Instead the relationship between the ICC and R2P can be seen as generated and moulded through
interaction and, in turn, as affecting actor behaviour by influencing actor identity, thereby reconstructing interests.

Constructivist insights enable us to understand the normative implications of tying R2P to Atrocity Crimes and how this has enabled the UNSC to act as jury rather than a purely political body, even in the absence of material incentive or sanctioning mechanisms. As with any other jury, the UNSC, can only act consistently if there are clear and common rules for it to apply. Thus its failure to deal decisively, swiftly and consistently with R2P violations may be due in large part to the absence of universally accepted criteria to determine when an R2P scenario is occurring, rather than an inevitable consequence of its political composition.

In order for the Responsibility to React doctrine to work at an appropriately early stage it should apply if the examination of a situation establishes a real risk that atrocity crimes are occurring or imminent, rather than at the stage at which responsibility under international criminal law for an individual culprit could be established. This more flexible standard means that the enquiry involving R2P will often, perhaps always, have elements of both forward-looking and backward-looking investigations, assessing whether sufficient acts have occurred to fall within R2P and whether future atrocities are potentially able to occur. The assessment of the likelihood of prospective conduct based on present facts is by its nature a very different enquiry than the assessment of the evidence to determine whether a fact has been proven about a past event and is

---

278 See Rosenberg & Strauss suggesting the following standard for R2P determination: “The situation will be considered in the context of the RtoP, if the examination of the situation establishes a real risk that exceptionally grave human rights violations, as described in genocide, war crimes, crimes against humanity and ethnic cleansing, are occurring or could occur in the future.” [emphasis added.] Rosenberg & Strauss provide a standard suitable for all R2P action (i.e. prevent and react) whereas this work proposes a standard for reactive action under chapter VII. The present work utilizes the real risk requirement proposed by Rosenberg & Strauss, but ties it to a stricter temporal requirement that atrocity crimes are occurring or imminent, rather than the weaker standard that crimes could occur in the future. The assessment of “imminent” conduct is a concept which the UNSC has experience applying when assessing climates for self defense under Art 51 of the UN Charter and is therefore a more stringent and suitable standard for determining R2P violations at the reactive stage.
a task to which the UNSC acting as quasi-jury is better suited than a legal institution such as the ICC, which is designed to assess individual culpability for past events. Thus in theory it is well suited to the task of determining and responding to an R2P situation.

Clearly demarcating the standard for R2P intervention has the additional benefit of distinguishing the implications of state responsibility for Atrocity Crimes under R2P from the invocation of individual culpability for Atrocity Crimes under R2P, thereby preventing UNSC determinations of R2P situations (or lack thereof) from undermining the legitimacy of international criminal justice standards.

While placing determination of R2P violations in the hands of the UNSC guards against the possibility of a utopian tyranny it creates the risk of a “cynic tyranny” whereby atrocity crimes are either ignored if there is no political incentive to act or utilized to try and justify actions that they want to take for other narrow foreign policy purposes. The problem of inaction requires the international community to develop alternative means of enforcement if the UNSC fails to act. The issue of abuse on the other hand requires the international community to ensure that UNSC action does not result in more harm than good. Literature on the relationship between the ICC and R2P to date has largely focused on the former issue of how the ICC can operationalize R2P by directly preventing atrocity crimes (a solution which is in constant danger of sliding into judicial tyranny) and overlooked the potential for the ICC to deal with the secondary issue of preventing abuse of R2P by regulating the operationalization of R2P. It is ambiguous whether referral to the ICC has had any effect in preventing the commission of further crimes in Darfur or Libya, and referral was no substitute for the Council's use of other measures to restore peace and security. Conceptualizing the ICC as a regulator of, rather than alternative to, UNSC action
guards against the possibility of “cynic tyranny” while at the same time avoiding the dangers of “utopian tyranny.”

The double-barrelled logic of humanity’s law operates not only to justify intervention on a humanity basis but also to limit (or otherwise shape) intervention through the same humanitarian logic. This analysis suggests that the ICC represents a counterforce to the current security system and can guard against the manipulation of R2P and the possibility of a “cynic tyranny” by ensuring that all parties to a conflict, including UNSC authorized forces, comply with international humanitarian law. Of particular significance is the principle of proportionality. Under the Rome Statute “intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects … which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated” (emphasis added). This gives the ICC jurisdiction to investigate whether R2P operations are proportional to achieve the overall goal of human protection. From a constructivist perspective the value of this power rests not so much in the ICC’s ability to investigate and sanction the UNSC if it breaches the proportionality principle (although this is important), but rather in helping to develop shared understandings regarding what constitutes proportional and legitimate

---

279 Teitel supra note 9 at 83.
280 Rome Statute supra note 14 Article 8(2)(b)(iv)
281 However the concept of military advantage was traditional interpreted as referring to any concrete and direct military goal – regardless of the ethical ends it may or may not serve. See for example Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, Commentary, Part IV: Civilian Population, Section I: General Protection Against Effects of Hostilities, Chapter II: Civilians and Civilian Population, art. 51, para. 2218 online: <http://www.icrc.org/ihl.nsf/WebPrint/470-750065- COM?OpenDocument> This wide interpretation of what should be included in the evaluation of the expected military advantage threatens the normative restraint of the principle of proportionality and maybe detrimental to humanitarian concerns regarding the way in which R2P missions are carried out. However the ICC could [relying on the development of R2P ] endorse a narrower concept of military advantage in R2P interventions, which takes account of the purported purpose of the intervention so that proportionality is assessed according to the overall human protection goal. This would result in a more stringent standard of assessment, which would ensure that military interventions for R2P do not result in ore harm than good.
R2P action. For example the ICC could issue guidelines on whether the principle of proportionality requires interveners to accept risks in order to minimize harm to civilians, so that, for example, incidental civilian casualties would be deemed to be disproportionate if they could have been avoided even at the cost of soldier casualties.

ICC analysis of legitimate ex-Bello conduct in R2P interventions may also have significant implications for so called ‘ad bellum’ issues of the type of intervention, which is necessary and legitimate to protect populations from mass atrocity crimes. Bellamy and Williams contends that the UNSC’s consensus on this issue will hinge on the perceived performance and legitimacy of the missions it authorizes,\(^{282}\) which in turn requires shared understandings of legitimate conduct. This analysis suggests that UNSC has internalized the requirement that an operation be proportional to achieve the human protection goal, but lack a coherent frameworks for analyzing what constitutes legitimate conduct. The requirement that an operation be proportional to achieve the human protection goal contained in the ICISS report\(^{283}\) was not explicitly set forth in the Outcome Document thus the UNSC lack guidelines on how to apply the proportionality principle. Further ICC guidance on the meaning of proportionality under the Rome Statute could facilitate the UNSC in applying proportionality as one of the precautionary principles to analyze any claim that an intervention is necessary and legitimate to protect populations thereby increasing the possibility of more consistent UNSC decision making and reducing the possibility of interventions, which result in more harm than good.

\(^{282}\) Bellamy and Williams supra note 56 at 826.
\(^{283}\) ICISS Report supra note 18 at XII.
BIBLIOGRAPHY

1. INTERNATIONAL MATERIALS

1.1 INTERNATIONAL DOCUMENTS

1.1.1 INTERNATIONAL CRIMINAL COURT DOCUMENTS


Assembly of State Parties Resolution RC/Res.6.


Third Report of the Prosecutor of the International Criminal Court to the UN Security Council pursuant to UNSCR 1970 at para 54

1.1.2 UNITED NATIONS DOCUMENTS

*The Charter of the United Nations*

(a) MEETINGS

UNSCOR, 60th Year, 5158th Mtg., UN UN Doc.S/PV.5158 (2005)

UNSCOR, 61st year 5459th Mtg., UN Doc S/PV.5459 (2006) [Provisional]

UNSCOR, 67th year 6810th Mtg, UN Doc S/PV.6810 (2012) [provisional]

UNSCOR, 67th Year, 6778th Mtg., UN Doc S/PV.6778 (2012)

(b) SUPPLIMENTS


1.2 CASES


*Prosecutor v. Saif Al-Islam Gaddafi and Abdulla Al-Senussi* (decision of the Pre-trial chamber) ICC-01/11-01/111 (June 2012)

Prosecutor v Ahmadmuhammad Harun (Ahmadharun) and Ali Muhammad Al Abd-Al-Rahman (“Ali Kushayb”) ICC-02/05-01/07 Warrant of Arrest for Ahmadharun 27 April 2007 (International Criminal Court Pre-Trial Chamber 1)

Prosecutor v Ahmadmuhammad Harun (Ahmadharun) and Ali Muhammad Al Abd-Al-Rahman (“Ali Kushayb”) ICC-02/05-01/07 Warrant of Arrest for Ali Kushayb 27 April 2007 (International Criminal Court Pre-Trial Chamber 1)

Prosecutor v Omar Hassan Ahmad Al Bashir (“Omar Al Bashir) ICC-02/05-01/09 Second Warrant of Arrest for Omar Hassan Ahmad Al Bashir 12 July 2010 (International Criminal Court Pre-Trial Chamber 1)

1.3 MISCELLANEOUS INTERNATIONAL DOCUMENTS

Provisional rule of procedure of the Security Council, s/96/rev.7 (1982)

ICC Prosecutor Press release No.: pids.009.2003-EN “Communications received by the Office of the Prosecutor of the ICC” (16 July 2003)


Office of the President of the General Assembly, ‘Concept note on responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity’ July 2009)

UN Secretary – General Press Release, SG/SM/13425 GA/11051 AFR/2130 “United Nations Response to Violence Against Civilians in Libya Sends strong Message there is “no impunity: for crimes against humanity, secretary General Says” (1 March 2011)


African Union, Press Release, No 002/2012 “On the decisions of pre-trial chamber I of the International Criminal Court (ICC) pursuant to article 87(7) of the Rome Statute of the alleged failure by the Republic of Chad and the Republic of Malawi to comply with the cooperation requests issued by the court with respect to the arrest and surrender of President Omar Hassan Al Bashir of the Republic of Sudan” (9 January 2012) online: <http://www.au.int/en/sites/default/files/PR-%20002-%20ICC%20English.pdf>

2 UNITED STATES DOCUMENTS


3 SECONDARY MATERIALS

3.1 BOOKS


Bellamy, Alex Responsibility to Protect – The Global Effort to End Mass Atrocities, (UK: Polity, 2009)


Frazer Egerten & Andy W Knight, Routledge Handbook of the Responsibility to Protect (New
York: Routledge 2012)

Hurrell, Andrew “Order and Justice in International Relations: What Is at Stake?” at ch 2 in Rosemary Foot, John Gaddis, and Andrew Hurrell, eds in order and justice in International Relations (Oxford Scholarship Online: 2003).

Kuhn, T.S. The structure of scientific revolutions (Chicago: University of Chicago Press, 1996)

Marlies, Glasius The International Criminal Court – A Global Civil Society Achievement, (United Kingdom: Routledge, 2006)

Rastan, Rod “The responsibility to enforce - Connecting Justice with Unity” 163 in Carsten Stan & Goran Sluter, eds, The emerging practice of the International Criminal Court (Netherlands: Koninjlike Brill 2009.)

Robertson, Geoffrey QC, Crimes Against humanity, the struggle for global justice (London: Penguin books 2006) at 466

Rosenberg, Sheri & Strauss, Ekkhard “A Common Approach to the Application of the Responsibility to Protect” in Daniel Fiott, Robert Zuber & Joachim Kops, eds, Operationalizing the Responsibility to Protect A Contribution to the Third Pillar Approach (Brussels: the Madariaga – College of Europe Foundation, Global Action to Prevent War, the Global Governance Institute and the International Coalition for the Responsibility to Protect 2012)


Teitel, Ruti Humanity’s Law (New York: Oxford University Press 2011)

3.2 ARTICLES


Bellamy, Alex, “The responsibility to protect – five years on” (2010) 24:2 Ethics & International Affairs 143

Bellamy, Alex & Williams, Paul “The new politics of protection? Côte d’Ivoire, Libya and the responsibility to protect” (2011) 87:4 International Affairs 825

Brunnee & Toope, “Persuasion and Enforcement: Explaining Compliance with International Law” (2002) 13 Finnish Yearbook of International Law


De Wall, Alex “Darfur and the failure of the responsibility to protect” (2007) 83:6 International Affairs 103.


Hong, Mai-Linh “Genocide by Any Other Name: Language, Law, and the Response to Darfur” 49:1 Virginia Journal of International Law

Hurrell, Andrew “Global Inequality and International institutions” (2001) 31:1-2 metaphilosophy 34


Mamdani, Mahmood “Responsibility to Protect or Right to Punish” (2010) 4:1 Journal of Intervention and State Building 53


3.3 REPORTS

Francis Deng, Sadikel Kimaro, Donald Rothchild and William Zartman, Sovereignty as Responsibility Conflict management in Africa (Brookings, 1996)


3.4 MISCELLANEOUS MATERIALS

Aron, Raymond as reported in Stanley Hoffmann, ‘Conference Report on The Conditions of World Order’, (1966) 95:2 Daedalus


Bensouda, Fatou Address (delivered at the Stanley Foundation Conference on Responsibility to Protect, New York, 18 January 2011), online <http://www.r2p10.org.>)

Boot, Max “Qaddafi Exile Unlikely” Commentary Magazine (23 May 2011)

Evans, Gareth “The Responsibility to Protect (R2P) — From ICISS to Today” (panelist discussion delivered at the Stanley Foundation Conference on Responsibility to Protect, 18, January 2012), online: http://www.stanleyfoundation.org/r2p.cfm


Human Rights Watch “Unacknowledged Deaths: Civilian Casualties in NATO’s Air Campaign in Libya,” (14 May 2012)

Hurd, Douglas Address (delivered to the Royal Institute of International Affairs, London, 27 January 1993)

Ki-Moon, Ban UN Secretary-General's Address (delivered at "Responsible Sovereignty: International Cooperation for a Changed World" 15 July 2008.) online: <http://www.un.org/News/Press/docs/2008/sgsm11701.doc.htm>

Lau, Raymond “Protection first, Justice later? Stopping mass atrocities in Northern Uganda” (presentation delivered at the Inaugural ISA Asia-Pacific Regional Section Conference 2011 ‘Regions States and People of a World of Many Worlds’. 29-30 September 2011)


Lindberg, Tod “Protect the people; United Nations takes bold stance” The Washington Times (September 27, 2005)


Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, Commentary, Part IV: Civilian Population, Section I: General Protection Against Effects of Hostilities, Chapter II: Civilians and Civilian Population, art. 51, para. 2218


Responsibility to protect Center for International Human Rights Northwestern University School of Law The responsibility to Protect and the International Criminal Court: Americas new priorities Conference Report March 2008
Saunders, Doug “When justice stands in the way of a dictator’s departure” *The Globe and Mail* (2 April 2011)


Song, Sang-Hyun From Punishment to Prevention Reflections on the Future of International Criminal Justice’ (delivered at Wallace Wurth Memorial Lecture, 14 February 2012.)
