

The Responsibility to Protect and the International Criminal Court: counteracting the crisis

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The Security Council has an inescapable responsibility [to bring accountability in Syria] ... For more than three years, this Council has been unable to agree on measures that could bring an end to this extraordinarily brutal war ... If members of the Council continue to be unable to agree on a measure that could provide some accountability for the ongoing crimes, the credibility of this body and of the entire Organization will continue to suffer.¹

Institutions in crisis

The Responsibility to Protect (R2P) process and the International Criminal Court (ICC) are quite probably the most important innovations in human rights protection for decades. While they are not formally linked, they were developed alongside each other, with similar purposes (to confront atrocity crimes through prevention, protection or prosecution), and were expected to work in tandem to temper international politics and to end impunity.² Indeed, the gradual diffusion of the R2P norm through international governance discourse and institutions following the publication of the ICISS report in 2001, and the entering into force of the Rome Statute that established the ICC in 2002, were judged by many, particularly in UN bureaucracies and the NGO sphere, to be game-changing in their challenge to power politics and state sovereignty. Kofi Annan explained the significance of R2P, after the 2005 World Summit's (limited) endorsement of its principles, as follows: 'Human life, human dignity, human rights raised above

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¹ Remarks to the UN Security Council by UN Deputy Secretary General Jan Eliasson, delivered on behalf of the Secretary General, 22 May 2014, <http://www.un.org/News/Press/docs/2014/dsgsm776.doc.htm>, accessed 18 Nov. 2014.

² The ICC is described in the ICISS report, *International Commission on Intervention and State Sovereignty: the Responsibility to Protect* (Ottawa: International Development Research Centre, 2001), as one of a range of tools for direct prevention of atrocity crimes available to the international community (para. 3.30), and the Rome Statute by which it was founded is cited as one of the sources of the 'Responsibility to Protect' principle (para. 6.17). See also Fatou Bensouda, speech at conference on 'R2P: the next decade', 18 Jan. 2012, http://fora.tv/2012/01/18/R2P_in_2022, accessed 18 Nov. 2014; Michael Contarino, Melinda Negron-Gonzales and Kevin T. Mason, 'The ICC and consolidation of the R2P as an international norm', *Global Responsibility to Protect* 4: 3, 2012, pp. 275–308; International Commission for the Responsibility to Protect, 'The ICC and the R2P', <http://www.responsibilitytoprotect.org/index.php/about-rtop/related-themes/2416-icc-and-rtop>, accessed 18 Nov. 2014.

even the entrenched concept of State sovereignty. Global recognition that sovereignty in the twenty-first century entails the responsibility to protect people from fear and want. A global declaration that reinforces the primacy of the rule of law.³ Human Rights Watch was equally celebratory when the ICC came into being: ‘The International Criminal Court is potentially the most important human rights institution created in 50 years. It will be the court where the Saddams, Pol Pots and Pinochets of the future are held to account.’⁴ But any notion that these twin institutions have brought progress in human rights protection has recently suffered a significant setback.⁵ The ICC and R2P, conceived of as ways to supplement or circumvent state power in order to protect populations within states, have done little, if anything, to assist the civilians who have been caught up or targeted in civil wars in, for instance, Syria and Sri Lanka. In Syria, over 190,000 people are estimated to have been killed since 2011, many of them non-combatants (including over 8,000 children), and chemical weapons have been used on the civilian population.⁶ In Sri Lanka, tens of thousands of civilians were killed during the last weeks of the civil war in 2009.⁷ Despite apparently widespread support for R2P and the ICC, the governance structures of the international community, specifically the United Nations Security Council (UNSC), and the states that work within them, have failed to bring about meaningful action either to protect those under threat or to prosecute those who have committed atrocities.⁸ The ICC and R2P are therefore argued to be in crisis, and the failure of the international community to act according to their principles in the face of suffering on such a scale suggests that they are, at best, in need of substantial reform.⁹

This article appraises solutions to the crisis recently suggested by supporters of R2P and the ICC, in particular calls from academics for radical reform of UN governance structures and from senior ICC staff for the ICC and R2P to be better

³ Kofi Annan, speech at Universidade Nova de Lisboa, 13 Oct. 2005, <http://www.un.org/News/Press/docs/2005/sgsm10161.doc.htm>, accessed 18 Nov. 2014.

⁴ Human Rights Watch press release, ‘International Criminal Court a reality’, 11 April 2002, <http://www.hrw.org/news/2002/04/11/international-criminal-court-reality>, accessed 18 Nov. 2014.

⁵ When referring to the ICC and R2P together, I describe R2P as an ‘institution’ for convenience. When referring to it alone, I use the more accurate ‘doctrine’, ‘process’ or ‘norm’.

⁶ Death toll from Megan Price, Jeff Klingner, Anas Qtiash and Patrick Ball, ‘Updated statistical analysis of documentation of killings in the Syrian Arab Republic’, commissioned by the UN Office of the High Commissioner of Human Rights, 14 Aug. 2014, <http://www.ohchr.org/documents/countries/sy/hrdagupdatedreportaug2014.pdf>. Chemical weapons use confirmed in UN Mission to Investigate Allegations of the Use of Chemical Weapons in the Syrian Arab Republic, ‘Report on allegations of the use of chemical weapons in the Ghouta area of Damascus on 21 August 2013’, http://www.un.org/disarmament/content/slideshow/Secretary_General_Report_of_CW_Investigation.pdf. Both documents accessed 18 Nov. 2014.

⁷ Report of the UN Secretary General’s Panel of Experts on Accountability in Sri Lanka, 31 March 2011, p. iii, http://www.un.org/News/dh/infocus/Sri_Lanka/POE_Report_Full.pdf, accessed 18 Nov. 2014.

⁸ In terms of support, R2P was unanimously adopted by UN member states at the 2005 World Summit, though in a much less powerful form than that suggested in the ICISS report: United Nations World Summit Outcome, A/RES/60/1, 24 Oct. 2005. The ICC currently has 122 states parties.

⁹ Zack Beauchamp, ‘Syria’s crisis and the future of R2P’, *Foreign Policy*, 16 March 2012; Aidan Hehir and Tony Lang, ‘From sheriff to judge: re-imagining R2P as part of a new constitutional order’, paper presented at conference on ‘The responsibility to protect and prosecute’, Leeds University, 24 April 2014; Paul R. Williams, Trevor J. Ulbrick and Jonathan Worboys, ‘Preventing mass atrocity crimes: the Responsibility to Protect and the Syria crisis’, *Case Western Reserve Journal of International Law* 45: 1&2, 2012, pp. 473–503. NB: this is not to suggest that the R2P and the ICC were beyond criticism prior to the Syrian civil war, in particular; just that the war has thrown their weaknesses into sharp relief.

aligned under the control of the Security Council. I argue that neither solution is appropriate. The inconsistent and multipolar international ethical infrastructure is far from perfect, but it is the best worst option that exists at present, and shows signs of evolving into a better bad option. I will argue below that even though the ICC and R2P almost certainly cannot now do anything useful in the Syrian situation, a change of focus within these institutions, rather than reform of the UN system, is the best way to achieve the realization of their objectives in the future.

UNSC failure and prospects for reform

The UNSC is usually seen as the main culprit for the underperformance of R2P and the ICC. Hehir argues that the international response to atrocities committed since the Cold War has demonstrated two principal failings within the current international system: ‘the influence of politics on decision making at the Security Council and the lack of a standing military force capable of being deployed to intervene’.¹⁰ Ralph and Gallagher state that ‘the perceived legitimacy deficit in the way the P₃ has implemented [the] protection of civilian mandate and the way the Security Council is seen to control the process of international criminal justice has made the task of implementing R2P more difficult.’¹¹ And Bellamy claims that: ‘The Security Council’s inability thus far to take timely and decisive action to protect Syrians from mass atrocities is ... likely caused by two generic constraints on the Council ... (1) there are some problems that do not have feasible near-term solutions, and (2) the Council is “not above the vagaries of international politics”.’¹²

These arguments lead to the first set of proposed solutions to the crisis: substantial reform of international governance structures, in particular the UNSC. Hehir suggests that part of the solution is a depoliticization of the way that international law is enforced, so that UNSC decision-making is ‘more pluralist [and] more based on clear guidelines as opposed to subjective discretion’;¹³ and Pattison argues that while some criteria for UNSC authorization of intervention are implied within R2P, more settled guidelines should be developed to limit the scope of interpretation within the Council.¹⁴ Hehir and Lang make some of the most concrete proposals put forward to date, calling for ‘a legally binding treaty which reiterates the proscription against various forms of human rights abuses and, crucially, outlines the point at which these abuses are to be considered so

¹⁰ Aidan Hehir, *The Responsibility to Protect* (Basingstoke: Palgrave, 2012), p. 217.

¹¹ Jason Ralph and Adrian Gallagher, ‘Legitimacy fault lines in international society: the responsibility to protect and prosecute after Libya’, paper presented at the 8th Pan-European Conference, European International Studies Association, Warsaw, 18–21 Sept. 2013, p. 17. The ‘P₃’ refers to the United States, the United Kingdom and France, i.e. the permanent members of the Security Council excluding China and Russia.

¹² Alex Bellamy, ‘Libyan case a red herring in Syria dilemma’, *IPI Global Observatory*, 13 Jan. 2014, <http://theglobal-observatory.org/analysis/653-libyan-case-a-red-herring-in-syria-dilemma.html>, accessed 18 Nov. 2014.

¹³ Hehir, *The Responsibility to Protect*, p. 222.

¹⁴ James Pattison, ‘The case for criteria: moving R2P forward after the Arab Spring’, in R. W. Murray and A. McKay, eds, *Into the eleventh hour: R2P, Syria and humanitarianism in crisis*, E-International Relations, 2014, p. 30. Available at: <http://www.e-ir.info/wp-content/uploads/R2P-Syria-and-Humanitarianism-in-Crisis-E-IR.pdf>, accessed 18 Nov 2014.

severe as to warrant external involvement of some kind' and a 'demonstrably independent and accountable judicial body with the power to determine both that a violation of the law has occurred and the nature of the resultant punishment'.¹⁵

Would these proposals alleviate the current crisis? The Syrian situation is the most pressing example of R2P and ICC failure, and it would certainly appear that the UNSC is to blame for that failure. It is within the Council's power both to authorize intervention under the auspices of R2P and also to refer non-states parties such as Syria to the ICC, yet Russia and China have prevented such action through vetoes and threats to veto UNSC resolutions.¹⁶ Russia's protection of the Assad government is a key problem, as is China's reluctance to breach norms of state sovereignty under just about any circumstances, but the blame for failures over Syria also lies with the P3, which are seen to be too keen to use R2P and the ICC for their own ends. An analysis of UNSC action which focuses entirely on Russia and China misses the justifications they give for their positions, which are based on some fairly widely shared beliefs about P3 abuses of R2P and the ICC. Much has been made of the way in which the UNSC acted with regard to Libya, with the P3 invoking both the ICC and R2P, excluding non-states parties (except Libya) and the history of western dealings with Libya from ICC jurisdiction, then engaging in unauthorized regime change.¹⁷ The case of Libya was the first in which the UNSC authorized a military intervention citing R2P, and the first that the UNSC unanimously referred to the ICC.¹⁸ The NATO bombing which followed quickly after the referral of the situation in Libya to the ICC had the effect of making the ICC seem like a tool that the Council, or some members of it, can use to justify violence.¹⁹ And the use of R2P language in a resolution that was later used to justify regime change in Libya has made R2P sceptics reluctant to allow the norm to be used to justify future resolutions

¹⁵ Hehir and Lang, 'From sheriff to judge'. See also Williams et al., 'Preventing mass atrocity crimes', for proposals to allow low-intensity military actions to take place without authorization from the UNSC.

¹⁶ In May 2014, a draft resolution (S/2014/348) to refer the situation in Syria to the ICC, co-sponsored by 65 countries including the P3 and voted for by 13 of the 15 members of the UNSC, was blocked by Russian and Chinese vetoes. This was the fourth draft resolution on Syria vetoed by Russia and China, which had also vetoed S/2011/612, S/2012/77 and S/2012/538. The US-led intervention against Islamic State in Syria that began in September 2014 is an anti-terrorist rather than a humanitarian campaign. It does not have a specific UNSC mandate and is opposed by Russia.

¹⁷ Alex Bellamy and Paul D. Williams, 'The new politics of protection? Côte d'Ivoire, Libya and the responsibility to protect', *International Affairs* 87: 4, July 2011, pp. 825–50; Mark Kersten, 'A fatal attraction? Libya, the UN Security Council and the relationship between R2P and the International Criminal Court', in J. Handmaker and K. Arts, eds, *International law and the politics of justice* (Cambridge: Cambridge University Press, forthcoming 2015).

¹⁸ While the referral of Libya to the ICC was unanimous, Brazil, Russia, India, China and Germany abstained on Resolution 1973 to authorize the use of force in order to protect Libya's civilian population.

¹⁹ Louise Arbour argues that the UNSC merged the objectives of bringing criminals to justice, protecting civilians and regime change in the Libyan case: Louise Arbour, 'For justice and civilians, don't rule out regime change', *Globe and Mail*, 26 June 2012, <http://www.theglobeandmail.com/globe-debate/for-justice-and-civilians-dont-rule-out-regime-change/article4372211/>, accessed 18 Nov. 2014. NATO itself linked the arrest warrants to its mission to use all necessary means to protect civilians in Libya, noting that while it had no duty to enforce ICC arrest warrants against the Gaddafi regime, 'The arrest warrants are yet another signal from the international community to the Qadhafi regime. Your place is on trial; not in power in Tripoli.' See NATO, 'Press briefing on Libya', 28 June 2011, http://www.nato.int/cps/en/natolive/opinions_75808.htm, accessed 18 Nov. 2014. Bellamy and Williams, in 'The new politics of protection', analyse the slippage between civilian protection and regime change in the Libyan case.

under Chapter VII of the UN Charter.²⁰ The actions of the P3 ‘stoked the embers of long-held suspicions over the trust-worthiness of western powers with neo-imperial proclivities not to use force to violate the sovereignty of weaker states, igniting overt opposition to western interventionary agendas which may well burn for the foreseeable future.’²¹ It is not just Russia and China which harbour these suspicions: the Indian representative to the UN, Hardeep Singh Puri, commented in 2012 that: ‘Selectivity must be avoided with respect to situations that the international community chooses to respond to. The principle must also be applied uniformly to all parties to a conflict.’ He added that, as a result of the selectivity with which western powers have chosen to use R2P, ‘I am afraid the noble idea of R2P will come into disrepute. Indeed, the Libyan case has already given R2P a bad name.’²² Bellamy and Morris both argue that events in Libya were less important than geopolitical concerns in determining UNSC action on Syria, but both conclude that the pursuit of narrow national interests by the P5 made it impossible to apply R2P in the Syrian case.²³

The legacies of the US–UK invasion of Iraq must also be added both to the explanation of why the UNSC was unable to agree (as that invasion justifies, in the minds of many, the assumption that if the US and UK want to intervene in a situation it must be for reasons of national interest rather than international ethics) and also to the explanation of why the US and UK legislatures were opposed to R2P action in Syria.²⁴ Deputy UK Prime Minister Nick Clegg has admitted there was no political will in the UK to risk another Iraq: ‘the UN is divided and we have judged the risk too high that direct military intervention by us or our allies would lead to another Iraq-style imbroglio. Above all, it has not been sufficiently clear that intervention would improve the humanitarian situation.’²⁵ In addition to this concern, Jillions argues that the existence of deep uncertainty about Syria—whose side to intervene on, what the effects of intervention would be, what is the likelihood of success and so on—has been used by western politicians as an excuse not to exercise their judgement and not to act: ‘States have substituted their anxieties about being able to improve the humanitarian situation for a genuine conversation

²⁰ S/RES/1973, 2011. Russia in particular has claimed that the use by NATO of R2P provisions in S/RES/1973 to justify military intervention aimed, in fact, at regime change has made Russia highly reluctant to allow R2P actions elsewhere. See ‘China and Russia veto sanctions on Syria’, Al Jazeera, 5 Oct. 2011, <http://www.aljazeera.com/news/middleeast/2011/10/2011104223132792190.html>, accessed 18 Nov. 2014.

²¹ Justin Morris, ‘Libya and Syria: R2P and the spectre of the swinging pendulum’, *International Affairs* 89: 5, Sept. 2013, p. 1280. See also Ayça Çubukçu, ‘The Responsibility to Protect: Libya and the problem of transnational solidarity’, *Journal of Human Rights* 12: 1, 2013, pp. 40–58.

²² ‘R2P selectively used for regime change: India’, Zee News, 22 Feb. 2012, http://zeenews.india.com/news/nation/r2p-selectively-used-for-regime-change-india_759913.html; also Stephen Zunes, ‘Libya, the “responsibility to protect” and double standards’, *Huffington Post*, 28 March 2011, http://www.huffingtonpost.com/stephen-zunes/libya-the-responsibility-_b_841168.html, both accessed 18 Nov. 2014.

²³ Bellamy, ‘Libyan case a red herring’; Morris, ‘Libya and Syria’.

²⁴ In August 2013, UK Prime Minister David Cameron asked parliament to vote on a limited strike in response to the Syrian government’s alleged use of chemical weapons, but the motion was defeated. In September 2013, US President Barack Obama postponed (seemingly indefinitely) a vote in Congress on the same issue once it became clear it would fail.

²⁵ Nick Clegg, ‘If Iraq taught us anything, it’s this ...’, *Independent*, 17 March 2013, <http://www.independent.co.uk/voices/comment/if-iraq-taught-us-anything-its-this-8537496.html>, accessed 18 Nov. 2014.

about the responsible course of action—up to and including the use of force.²⁶ He sees the uncertain diplomacy and political dithering in the western response to the Syrian civil war as a sign that diplomats are unable (and perhaps unwilling) to engage with moral risk when deciding on a course of action, and tend to be so risk-averse as to render meaningful action almost impossible.

Inaction could also be the result of a straightforward lack of political will. The response of the P3 to the Syrian refugee crisis gives some indication of their willingness to contribute to the relief of humanitarian suffering. France has granted refugee status on humanitarian grounds to around 500 of the 2.8 million people who have fled Syria, the UK has accepted just 24 Syrians on its 'Syrian vulnerable persons relocation scheme' and the United States accepted only 31 of the 135,000 Syrians who applied for asylum there in the year up to October 2013.²⁷ It would seem, then, that the fault for failing to generate an R2P response to Syria does not lie solely with Russia and China, or with the structure of R2P decision-making at the international level. There is such a level of suspicion of the motives of others and so little political will to act (at least until the appearance of Islamic State) that structural reform would not have led to concerted international action under the auspices of the R2P.

Western power projection in Iraq and elsewhere has also made the ICC a source of suspicion. A referral of Syria to the ICC would only have added fuel to the claims that the court is a tool of western interests. Mamdani argued well before the crises in Libya and Syria that the court had lost any veneer of impartiality: 'Its name notwithstanding, the ICC is rapidly turning into a Western court to try African crimes against humanity. It has targeted governments that are U.S. adversaries and ignored actions the United States doesn't oppose ... effectively conferring impunity on them.'²⁸ The referral of Syria, had it happened, would only have been seen to confirm this view.

Constraining UNSC decision-making on R2P and the ICC by applying guidelines or providing an alternative decision-making forum would not have solved the humanitarian problems in Syria.²⁹ In fact, forcing non-western states to agree to military intervention or prosecution under these two doctrines so soon after regime change in Libya, had it been possible to pursue such a policy, would have only provoked further accusations that the ICC and R2P are western projects and cloaks for western interests (which is ironic, in this case, as, *pace* their public

²⁶ Andrew Jillions, 'Diplomacy and the ethics of intervention', paper presented at conference on 'The responsibility to protect and prosecute', Leeds University, 24 April 2014, p. 13.

²⁷ Amnesty, 2013, <https://www.amnesty.org/en/news/fortress-europe-syrian-refugee-shame-exposed-2013-12-11>, accessed 18 Nov. 2014; Harriet Sherwood, 'UK has only let in 24 Syrian refugees under relocation scheme for conflict victims', *Guardian*, 20 June 2014; Reuters, 2014, <http://www.reuters.com/article/2014/02/05/us-syria-crisis-usa-refugees-idUSBREA141ZQ20140205>, accessed 18 Nov. 2014.

²⁸ Mahmood Mamdani, 'The new humanitarian order', *The Nation*, 29 Sept. 2008. Only five African states were among the 58 states that called on UN members to support the resolution to refer Syria to the ICC: 'Letter: 58 states call on UN members to co-sponsor the French resolution referring Syria to the ICC', Human Rights Watch, 19 May 2014, <http://www.hrw.org/news/2014/05/19/letter-58-states-call-un-members-co-sponsor-french-resolution-referring-syria-icc>, accessed 18 Nov. 2014.

²⁹ Alex Bellamy, 'The Responsibility to Protect and the problem of military intervention', *International Affairs* 84: 4, July 2008, pp. 615–39, outlines why imposing criteria on the UNSC to govern how and when R2P should be used is unlikely to lead to increased political will or to constrain the use of the veto.

statements, the US and UK have been reluctant to intervene militarily in Syria on humanitarian grounds; the air strikes against Islamic State are justified as anti-terrorist measures). But pursuit of such a policy is not possible. Concern over the bias towards the West inherent in these supposedly neutral institutions means that reform of the international system to give the UNSC less control of when and how the ICC and R2P are used is highly unlikely. One of the few positions on which the P5 agree is that the UNSC must retain its pre-eminent role, and the pre-eminent role of the P5 in the current international order means that it would be very difficult to reduce their power and discretion.³⁰ Equally, there is unlikely to be a majority of other UN member states in favour of reform to enable wider application of the ICC and R2P. The power of the UNSC was limited under the Rome Statute that created the ICC, but when states at the UN World Summit in 2005 were given the chance to endorse the R2P principles set out in the ICISS report, which included a code of conduct on how the UNSC P5 veto could be used and provision for force to be authorized outside the UNSC structure, the majority favoured maintaining the current system.³¹ And the current system is one in which politics trumps law and decisions are made on a case-by-case basis, according to the political imperatives involved in each, rather than being constrained by guidelines or principles. As Louise Arbour acknowledges:

The Security Council ... was mandated neither to champion fundamental human rights nor be guided by the spirit of brotherhood ... The veto of the five permanent members was explicitly given to them so that they could protect their national interests, not so that they could advance any kind of international public interest. Recent commentary suggesting otherwise has great moral appeal but ... is not grounded in either political realities or institutional history.³²

While it may be desirable for the P5 to be united around the human rights protection agenda and act to protect civilians and enable the prosecution of atrocities, their actions over the last decade have made such a situation less and less likely in all but the rare circumstances in which no national interest is at stake. The pursuit of radical reform is based on an optimistic, but ultimately misguided, reading of what is feasible in contemporary international politics.

³⁰ In October 2013 the French government proposed that the P5 accept a voluntary 'code of conduct' in which they would commit not to use the veto in cases of mass atrocities (as confirmed by the UN secretary general, who would report only if 50 or more UN member states requested him or her to do so). Cases in which vital national interests of P5 members are at stake were excluded. Not one of the remaining P5 members has publicly supported the proposal. See 'Speakers call for a voluntary suspension of veto rights', press release, 29 Oct. 2013, <http://www.un.org/News/Press/docs/2013/sc11164.doc.htm>, accessed 18 Nov. 2014.

³¹ Alex Bellamy, 'Whither the Responsibility to Protect? Humanitarian intervention and the 2005 World Summit', *Ethics and International Affairs* 20: 2, 2006, p. 155.

³² Louise Arbour, 'Are freedom, peace and justice incompatible agendas?', speech on the occasion of the Inaugural Roland Berger Lecture on Human Rights and Human Dignity, Oxford, 17 Feb. 2014, <http://www.crisis-group.org/en/publication-type/speeches/2014/arbour-are-freedom-peace-and-justice-incompatible-agendas.aspx>, accessed 18 Nov. 2014.

Leveraging UNSC power

An alternative response to the crisis faced by the ICC and R2P is to give the UNSC more power over the court by exhorting the former to refer situations to the latter more routinely under the rubric of R2P.³³ This is something that the current prosecutor favours: ‘The Court should be seen as a tool in the R2P toolbox—strengthening the correlation and the interaction between both is what I think we should be concerned more with in order to maximise effectively the protection which we will give to civilians.’³⁴ The implication of this statement is that the UNSC should refer non-state party cases to the court as a way to ensure that states meet their responsibilities to protect. It is easy to see the attraction of this, for the court is an institution in search of a political order from which it can leverage power. A closer relationship with the UNSC, even if it means being used as a tool of power politics, could potentially bring practical benefits to the court in terms of UNSC support and funding. However, the UNSC has done next to nothing to assist the ICC in the cases it has referred so far—none of the ICC arrest warrants in the Darfur and Libya cases have been executed, and there is no provision for automatic travel bans or asset freezes for those against whom the court has issued arrest warrants. In spite of the enthusiasm of the current prosecutor for making the ICC a tool for the UNSC to deploy, the current dynamics between the two institutions suggest that there would be no practical benefits to the ICC of having more cases referred to it by the UNSC.³⁵

There would, however, be three significant disadvantages if the relationship were made closer. The first of these is the substantial disincentive the ICC would have to impinge upon P5 interests if it were to rely increasingly on UNSC referrals to build up its effectiveness and legitimacy. The relationship between the court and the council is the result of a bargain struck between states and NGOs which wanted to see an entirely independent court with inherent jurisdiction over the crimes delineated in the Rome Statute, and far fewer (but more powerful) states, led by the United States, which wanted the UNSC to have full veto power over all cases that the court might try. At present, the UNSC’s referral power prevents the court from prosecuting crimes allegedly committed by nationals of non-states parties who are either members of the P5 or protected by the P5 (unless those crimes take place on the territory of a state party). Maintaining some level of antagonism between the two institutions offers the only hope of seeing cases that implicate powerful states coming before the court (for instance, the complaint lodged at the ICC in January 2014 by lawyers representing over 400 Iraqi victims of alleged offences committed by the British military between 2003 and 2008, and the complaint lodged in

³³ This response would not have helped with the situation in Syria, as a UNSC referral to the ICC was vetoed by Russia and China. The assumption is rather that over the longer term regular referrals of the UNSC to the ICC will help to reduce impunity in non-ICC member states, and by this means both deter atrocities and build the power and legitimacy of the court.

³⁴ Bensouda, speech at conference on ‘R2P: the next decade’.

³⁵ The need for UNSC follow-up on Council referrals was highlighted by the prosecutor in her speech to the UNSC on 23 Oct. 2014: see http://www.icc-cpi.int/EN_Menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/reports%20and%20statements/statement/pages/otp-statement-23-10-2014.aspx, accessed 18 Nov. 2014.

February 2014 by Reprive that asks the court to investigate the involvement of NATO personnel in facilitating CIA drone strikes in Pakistan that are reported to have killed thousands of people, many of them civilians).³⁶ The more the court comes to view itself as a tool of the UNSC, the less likely it will be to embarrass its sponsors by investigating atrocities for which they are alleged to be responsible.³⁷ And any further reluctance of this kind will only lead to more problems with those less powerful states that were initially strong supporters of the court, in particular members of the African Union (AU). The AU decided in 2011 that its member states would not cooperate with the ICC arrest warrants in the Libya case, claiming that the timing of the warrants in particular had hampered a viable peace process; and in October 2013 it held an extraordinary session of its assembly to discuss its relationship with the ICC. The feared mass withdrawal from the court did not happen, but the AU did call on the ICC to amend the Rome Statute to provide that no charges would be brought against AU heads of state or government during their terms of office.³⁸ To regain credibility, the ICC must work to refute its growing reputation as a western court to try Africans—and it can only do this if it ceases to try to persuade the UNSC to refer more cases to it, as those cases are likely to be in Africa (particularly in sub-Saharan Africa, in respect of which the P5 are less likely to have interests at stake, and therefore are less likely to veto referrals).

The second, related, disadvantage of bringing the court closer to the council would be to confuse the legal function of the ICC with the political function of the UNSC and the politico-ethical function of R2P. The ICC's authority lies in its legal character—its ability to act according to law and legal procedure rather than the dynamics of international politics. David Luban reminds us of Alexander Hamilton's prescient statement in the *Federalist Papers*: 'Judicial institutions have "no influence over either the sword or the purse", possessing "neither force nor will, but merely judgment"'.³⁹ This is the way it should be; a court should be insulated as thoroughly as possible from politics, and the drafters of the Rome Statute ensured that provisions were made via the UNSC deferral mechanism for politicians to pause the work of the ICC if necessary, so that the court would not have to make this kind of political decision. Whenever it can, the court should operate on grounds of law rather than in partnership with political institutions. Luban cites approvingly the first ICC prosecutor's decision not to back down from indicting President Bashir of Sudan, noting that there were no good legal reasons for doing

³⁶ European Center for Constitutional and Human Rights and Public Interest Lawyers, 'The responsibility of officials of the United Kingdom for war crimes involving systematic detainee abuse in Iraq from 2003–2008', 10 Jan. 2014, http://www.publicinterestlawyers.co.uk/go_files/files/ZKHQ6FDDKWA4.pdf; Reprive, 'The situation in Afghanistan: the use of drone strikes in Pakistan', 2014, http://www.reprive.org.uk/media/downloads/2014_02_19_PUB_Communication_to_ICC_on_drone_strikes_in_Pakistan.pdf, both accessed 18 Nov. 2014.

³⁷ Fred Megret, in 'ICC, R2P, and the international community's evolving interventionist toolkit', *Finnish Yearbook of International Law* 21: 1, 2010, pp. 21–51, argues that the interplay between the ICC and R2P has already strengthened the UNSC.

³⁸ African Union, 'Declarations and decisions', 2013, p. 2, http://summits.au.int/en/sites/default/files/Ext%20Assembly%20AU%20Dec%20&%20Decl%20_E.pdf, accessed 18 Nov. 2014.

³⁹ David Luban, 'After the honeymoon: reflections on the current state of international criminal justice', *Journal of International Criminal Justice* 11: 3, 2013, p. 509.

so, and that if there were good political reasons, then it was the role of the UNSC to defer the case.⁴⁰ This is not to say that the ICC can ever be a wholly legal institution, hermetically sealed off from politics—just that the court can derive its authority only from the law, so it needs as far as possible to act in accordance with legal codes rather than in response to political objectives. ICC Prosecutor Bensouda's desire for the court to be closer to the council is a signal of how powerless many ICC personnel feel in the face of situations in non-states parties such as Syria and Sri Lanka. But offering the court to the service of the council would only trade authority for power. The power of the court to carry out its work might increase if the UNSC were to stand behind it and offer resources (which, as noted above, is unlikely), but the court's authority, which it derives from its identity as a legal institution, bound by legal codes and operating according to legal logics, would decrease.

The final, but very important, disadvantage of aligning the ICC more closely with the UNSC would be that the court and R2P action would be focused even more narrowly on live conflict situations. When Bensouda argues that she thinks the court should be a tool in the R2P toolbox, she indicates that she assumes the court (and, by extension, R2P) can play a useful role in such conflicts. While it is understandable to expect R2P in particular to have some effects in quelling violence, given that the reason for the initial ICISS report was to explore the options the international community might have to intervene with military force when faced with the kind of situation they saw in Kosovo in 1999, the operation of R2P and the ICC has shown that neither fares well when large-scale violence has already begun.

Humanitarian intervention, whether or not it takes place under the auspices of R2P, is a divisive and unpopular act. Its success can be measured only by using elaborate counterfactuals about what might have happened without intervention, whereas any failings are easy for critics to measure in terms of actual harm caused by intervening forces. Despite a number of humanitarian interventions having taken place since the term became widespread in the early 1990s, it is still not clear when intervention would do more harm than good, how intervention should be carried out, or on whose side the international community (or some representative of it) should intervene.⁴¹ Humanitarian intervention is extremely expensive, requires substantial political will and rarely commands the support of a majority of states. It is inconceivable that R2P interventions could bring conflicts to an end in a manner that would enjoy widespread assent, because the only way to genuinely protect civilians is to enter wars on one side or another—an approach to which sovereigntists on the UNSC could never publicly agree.⁴² This does not mean that intervention should not happen, just that it will never be popular and its

⁴⁰ Luban, 'After the honeymoon', p. 508.

⁴¹ The responsibility to protect populations does not require interveners to 'take sides'. However, when acts that harm populations are labelled as crimes, as they were, for instance, in Libya, interveners are incentivized to fight against the 'criminals' and on behalf of the 'victims'. R2P is now framed in terms of four core crimes, making impartial interventions less likely in future. On the UNSC's moves towards partiality, see Jennifer Welsh, 'Civilian protection in Libya: putting coercion and controversy back into RtoP', *Ethics and International Affairs* 25: 3, 2011 pp. 255–62.

⁴² Bellamy and Williams, 'The new politics of protection'.

success can never be proven. Making R2P primarily about intervention therefore risks squandering any nascent agreement that can be found in international society with regard to protection of civilians.

The ICC faces similar problems. If the court assumes or is given jurisdiction over live conflict (as it has in seven of the eight situations currently on its docket), none of the choices open to it are popular. If it seeks to prosecute atrocities committed by only one side of the conflict (as it did in the Libya case), the institution appears to be a tool of power politics. If it seeks to prosecute atrocities on each side, it hampers prudent politics by making more difficult the rehabilitation of rebel groups that is often necessary in order to establish them as the agents of legitimate government once the fighting has ceased, or projects a false equivalence onto the atrocities committed. Given the way the situation in Syria has developed, with atrocities being reported on various sides of the conflict, the fact that the situation has not been referred to the ICC is actually a blessing for the court as it means the Office of the Prosecutor (OTP) does not have to grapple with decisions under political pressure about whom to prosecute and whose reputations to leave unblemished to facilitate their involvement in later negotiations. Expecting either R2P or the ICC to have broadly positive demonstrable effects in live conflict situations is setting them up to fail.

The foregoing analysis suggests that reform of international governance is unlikely and that the only other conceivable option for reform—bringing the ICC closer to the UNSC in order that the court can be used as a tool of R2P—will only magnify the problems currently faced by these institutions. So do the ICC and R2P have any value in their current state? The next section argues that they do indeed have considerable value, but only when they focus on what each can do to ameliorate the conditions that tend to lead to large-scale violence—that is, when they focus on prevention rather than on intervention or prosecution.

Complementarity to deter conflict

The ICC was set up with complementary jurisdiction, meaning that it is first and foremost the duty of states to exercise their own jurisdiction over international crimes (the principle was a necessary addition to the Rome Statute to reassure states that they retained sovereign jurisdiction over international crimes as long as they showed themselves willing and able to prosecute these crimes in a manner consistent with international standards, as judged by the ICC). An extension of this principle, the positive complementarity principle developed by the court (and the international justice NGO community) is a particularly valuable, and often ignored, feature of the present system. Precisely because the court cannot act to prosecute all atrocity crimes (given its limited physical capacity and also its limited jurisdiction), it is important for it to support the trial of atrocity crimes by national jurisdictions. Luis Moreno-Ocampo, the first prosecutor of the ICC, was right to state that: ‘As a consequence of complementarity, the number of cases that reach the Court should not be a measure of its efficiency. On the contrary,

the absence of trials before this Court, as a consequence of the regular functioning of national institutions, would be a major success.⁴³ Instead of looking to the UNSC to refer more cases to boost the ICC's legitimacy, the court should turn its attention to emptying its docket by supporting national jurisdictions. Work done by the court to strengthen the legal systems in states vulnerable to atrocity crimes would enhance the ICC's legitimacy. It would do this not only by giving states the capacity to prosecute crimes themselves, but also, in enabling these prosecutions, by deterring future atrocities (if prosecutions are to lead to deterrence, it is likely that they will do so best within domestic rather than international legal criminal courts).⁴⁴ Luban argues that the single most important achievement made by campaigners for international justice has been the inclusion within the Rome Statute of the requirement that states parties revise their criminal codes to align with the statute. Luban describes this process as 'norms [getting] spliced into the DNA of domestic law ... norm projection at work'.⁴⁵ He rightly notes that the trickle-down of norms into domestic legislation, media, military training and targeting decisions is likely to have a great deal more effect on future conflict than a small number of trials in The Hague.

The most successful example to date of the use of complementarity provisions to encourage domestic prosecutions has been the court's work in Colombia. When Moreno-Ocampo was appointed as prosecutor, he regarded the situations in the DRC, Uganda and Colombia as the most pressing.⁴⁶ The court quickly launched investigations into the situations in the DRC and Uganda, but its treatment of Colombia was rather different. The ICC (alongside the United States) put pressure on the Colombian government to reform its domestic legal system, which led to the enactment of the Justice and Peace Law in 2005. The Colombian government claimed in 2012 to have achieved impressive results from its collaboration with the ICC: 'i) around 50,000 demobilized individuals; ii) over 18,000 weapons given up and destroyed; iii) the main leaders of the self-defense groups and their accomplices behind bars awaiting trials; iv) more than 280,000 people recognized and registered as victims; v) more than 36,000 criminal actions, previously unknown, being investigated'.⁴⁷ The government credits the ICC OTP with promoting national proceedings by:

Facilitating contacts with independent experts ...; Publicly denouncing the recruitment of child soldiers ...; Requesting periodic information about the progress in the justice and

⁴³ Statement made by Luis Moreno-Ocampo, Chief Prosecutor, 16 June 2003, p. 2, <http://www.iccnw.org/documents/MorenoOcampo16June03.pdf>, accessed 18 Nov. 2014.

⁴⁴ Leslie Vinjamuri, in 'Deterrence, democracy, and the pursuit of international justice', *Ethics and International Affairs* 24: 2, 2010 pp. 191–211, discusses deterrence and war crimes trials.

⁴⁵ Luban, 'After the honeymoon', p. 511. Sarah Nouwen, in *Complementarity in the line of fire: the catalysing effect of the International Criminal Court in Uganda and Sudan* (Cambridge: Cambridge University Press, 2013), notes that the increase in domestic trials for war crimes that the splicing of international norms into domestic laws noted by Luban would lead us to expect has not come about.

⁴⁶ Office of the Prosecutor, ICC, draft policy paper on preliminary examinations, 2010, para. 57, http://www.icc-cpi.int/NR/rdonlyres/E278F5A2-A4F9-43D7-83D2-6A2C9CF5D7D7/282515/OTP_Draftpolicypaperonpreliminaryexaminationso4101.pdf, accessed 18 Nov. 2014.

⁴⁷ Government of Colombia, 'Colombia and the stocktaking exercise of the ICC', http://www.icc-cpi.int/iccdocs/asp_docs/RC2010/Statements/ICC-RC-gendeba-Colombia-SPA.pdf, accessed 18 Nov. 2014.

peace investigations ... ; Conducting visits to Colombia to meet with State officials, judges, prosecutors, NGOs, and victims ... ; Making public the decision to analyze the allegations of international networks supporting armed groups committing crimes in Colombia.⁴⁸

Of course, it is in the interests of the Colombian government to claim that its work with the ICC has been a success (to do otherwise would be to suggest it is unable to prosecute crimes under the Rome Statute, thus opening the door to ICC jurisdiction), and the post-conflict justice process in Colombia is subject to substantial criticism. In 2013, Bensouda publicly warned the Colombian government that the 'Legal Framework for Peace' constitutional reform that it had passed to facilitate peace talks with the rebel group FARC might contravene the ICC's requirements for prosecution of international crimes as it contains provisions such as suspending prison sentences, which could be viewed as offering amnesty.⁴⁹ However, it is unlikely that the Colombian justice process would have made anything like the progress that has been achieved over the last decade without the incentives and threats offered by the ICC.

The positive complementarity agenda, as developed at the ICC's 2010 Kampala review conference, has further potential. The principle of complementarity means that the court can exercise its jurisdiction only when a state party is unwilling or unable to do so. The principle of positive complementarity extends that idea to suggest that the ICC should work to actively enhance the capacity of national justice mechanisms to prosecute crimes under the Rome Statute. It is in this area that the court can do most good in rebuilding its credibility and promoting its values. While the ICC has invested a great deal of time and resources in the Colombian situation, it has allowed international organizations and NGOs to undertake the main burden of work in pursuing positive complementarity through knowledge transfer and capacity-building.

The latest thinking on positive complementarity pushes for a much more ambitious agenda than the court's simply seconding experts from western states to act as temporary advisers in target states, or running occasional seminars and training sessions. Instead, it calls for a coordinated capacity-building programme based on empowerment and equality, with the court sharing the benefit of its experience of investigating and prosecuting crimes, and also providing significant training for local actors.⁵⁰ The court's own report on complementarity, written for the assembly of states parties, acknowledges the importance of increasing complementarity work: 'The Court and its different organs currently engage in activities which enhance the effectiveness of national jurisdiction capacity to

⁴⁸ Government of Colombia, 'Colombia and the stocktaking exercise of the ICC'. The status of Colombia as an ally of the US should not be ignored when discussing the ICC's approach towards it—though seeking to please the US by not prosecuting cases in Colombia is only one possible explanation of ICC action there. Colombia's willingness to work with the ICC, existing infrastructure and genuine, if slow, judicial reform have helped it to retain national jurisdiction over the alleged atrocities with which the ICC is concerned.

⁴⁹ Juan Forero, 'Colombia seeks balance between peace, justice', *Washington Post*, 27 Aug. 2013, http://www.washingtonpost.com/world/in-colombia-a-struggle-between-securing-peace-and-delivering-justice/2013/08/27/68ae7dcc-0eab-11e3-a2b3-5e107edf9897_story.html, accessed 18 Nov. 2014.

⁵⁰ Morten Bergsmo, ed., *Active complementarity: legal information transfer* (Brussels: Torkel Opsahl Academic EPublisher, 2011).

prosecute serious crimes ... Responding to national authorities and cooperating with them is increasingly becoming part of the strategy of the Prosecutor.⁵¹ The report goes on to suggest involving national law enforcement experts as much as possible at the OTP, holding in-situ proceedings and using the ICC registry to help states parties to strengthen their domestic judicial systems. To date, there is little evidence that the court is doing this; but it should, for two reasons. First, the positive complementarity agenda is feasible, in the sense that the ICC has enforcement powers—it can assert its jurisdiction in cases where states parties do not demonstrate the requisite efforts to bring about justice. Second, it is strategically astute, because using international resources to improve local justice mechanisms in ways that are sensitive to context should help the court to rebut criticism that it is a neo-imperial project set up to try the enemies of the United States, or the inhabitants of Africa.

The complementarity principle at the ICC is directly analogous to the main pillar of the R2P, namely that states have the primary responsibility for protecting their citizens, and that other bodies can step in only if the state in question is manifestly failing to offer such protection. The responsibility to prevent, subsumed within the R2P, is analogous to the positive complementarity agenda. The World Summit outcome document acknowledges that the responsibility to protect civilians from atrocity crimes ‘entails the prevention of such crimes ... through appropriate and necessary means’. It goes on to state that: ‘The international community should, as appropriate, encourage and help States to exercise this responsibility and support the United Nations in establishing an early warning capability.’⁵²

R2P has already been successful in what I term here (to make plain the comparison with the ICC) its complementarity agenda. It has changed the way that states justify their behaviour and changed the purpose and vocabulary of much international action: ‘International society is now explicitly focused on civilian protection. This is evident not only in the formal consensus on the “responsibility to protect” ... but also in the Council’s practice in relation to peace operations.’⁵³ R2P has given international institutions and the NGO community a language to supplement the language of human rights with which to praise, criticize and cajole states into compliance. There is now more, though often not enough, pressure on states to treat their citizens well, and when this doesn’t happen, there is more likely to be concerted action from international actors. Bellamy and Dunne note that case-by-case political action under the auspices of R2P is less dramatic and therefore less visible than military intervention, but is more successful.⁵⁴ They list

⁵¹ International Criminal Court, *Report of the Bureau on Stocktaking to the Assembly of state parties: complementarity, 2010*, ICC-ASP/8/51, http://www.icc-cpi.int/iccdocs/asp_docs/ASP8R/ICC-ASP-8-51-ENG.pdf, p. 8, accessed 18 Nov. 2014.

⁵² A/RES/60/1, para. 138.

⁵³ Bellamy and Williams, ‘The new politics of protection’, p. 826. Carrie Booth Walling, in *All necessary measures* (Philadelphia: University of Pennsylvania Press, 2013), documents the increasing power of human rights norms, including R2P, in UNSC decision-making.

⁵⁴ Alex Bellamy and Tim Dunne, “Responsibility to Protect” on trial—or Assad?, *Ethics and International Affairs*, *Ethics of war and peace* blog, 6 June 2012, <http://www.ethicsandinternationalaffairs.org/2012/responsibility-to-protect-on-trial-or-assad-3/>, accessed 18 Nov. 2014.

the actions taken in Kenya and Yemen (diplomacy), Guinea (diplomacy backed by embargoes), Côte d'Ivoire (diplomacy, embargoes and limited force), Burundi (peacebuilding and conflict prevention) and Sudan/South Sudan (diplomacy, coercion, sanctions, international justice, economic incentivization and peacekeeping) as realizing R2P's goals without grabbing headlines in the way that military interventions would have done. Again, as with the case of the ICC in Colombia, these actions have not escaped criticism, nor have they unequivocally solved the problems in the target states. But they all represent improvements, in humanitarian terms, upon the positions one would have expected the international community to have taken only a decade or so ago. Bellamy goes so far as to claim that 'the focus on civilian protection has contributed to a marked decline in the overall number of civilians killed in sub-Saharan Africa since 2003'.⁵⁵ Even sceptics concede that R2P has had some effect: Hehir, for example, acknowledges that despite the many shortcomings of the doctrine, it may have 'made it somewhat more difficult to justify inaction'.⁵⁶ The current situation in the Central African Republic (CAR) supports this view. The UN has acted slowly, and its weak peacekeeping force has not prevented the ethnic cleansing of Muslims in the west of the CAR, according to prominent NGOs.⁵⁷ However, the action eventually taken has been framed in terms of R2P and would not have taken place without the existence of R2P. There are no pressing concerns in the region relating to international peace and security, but nevertheless the UNSC passed four resolutions between October 2013 and April 2014 all of which made reference to both R2P and the ICC, and granted Chapter VII mandates to French, African Union, EU and, later, UN peacekeeping forces to take all necessary measures to protect civilians and restore security.⁵⁸

The ICC has also acted: Bensouda announced on 24 September 2014 that she was opening an investigation into the situation in the CAR since September 2012. These actions may not do enough to remedy a situation in which half of the 5 million population are now in need of humanitarian aid and almost 1 million are internally displaced, and the extent of the international community's concern should be judged in part by its woeful underfunding of the \$500 million strategic response plan published by the UN Office for the Coordination of Humanitarian Affairs.⁵⁹ However, R2P and the ICC seem to have galvanized, or perhaps even generated, *some* political will to act on humanitarian and justice norms.

But what of the 'positive complementarity' agenda of the R2P—the responsibility to prevent? The ICISS report states that 'prevention is the single most important dimension of the responsibility to protect' and Hehir argues that many

⁵⁵ Bellamy, 'The Responsibility to Protect and the problem of military intervention', p. 638.

⁵⁶ Aidan Hehir, 'The permanence of inconsistency: Libya, the Security Council, and the Responsibility to Protect', *International Security* 38: 1, 2013, p. 159.

⁵⁷ Amnesty, 'Central African Republic: ethnic cleansing and sectarian killings', 12 Feb. 2014, <http://www.amnesty.org/en/news/central-african-republic-ethnic-cleansing-sectarian-violence-2014-02-12>, accessed 18 Nov. 2014.

⁵⁸ S/RES/2121(2013); S/RES/2127(2013); S/RES/2134(2014); S/RES/2149(2014).

⁵⁹ OCHA, *Strategic response plan Central African Republic*, 19 Jan. 2014, http://reliefweb.int/sites/reliefweb.int/files/resources/Revision_2014_CAR_o.pdf, accessed 18 Nov. 2014.

R2P supporters understand prevention to be (in his view, mistakenly) the central concept of the doctrine.⁶⁰ UN member states made a commitment to prevention at the World Summit: 'We also intend to commit ourselves, as necessary and appropriate, to helping States build capacity to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity and to assisting those which are under stress before crises and conflicts break out.'⁶¹ Much of the energy around R2P is now focused on a prevention agenda, with NGOs and international organizations working on early warning systems, arms control, rule of law projects and so on. And, again, there is some evidence of success. After the violence surrounding the Kenyan elections of 2007–2008, itself ended with the assistance of a mediation process justified on grounds of R2P, the Kenyan government, supported by domestic and international NGOs and regional and international organizations, instituted significant reforms of the police, the judiciary, the electoral system and laws on hate speech. It has been argued that these efforts, alongside the ICC's investigation into the 2007–2008 violence and arrest warrants issued against President Kenyatta and Vice-President Ruto, prevented a recurrence of atrocities during the 2013 elections, even though to date there has been no prosecution of those responsible for the earlier violence.⁶²

Unfortunately, the work on prevention does not yet integrate in any substantive way the one area that research suggests would make the most difference: economic development. The relationship between development and atrocity is well documented, even if still subject to debate about the relative importance of various contributing factors. Atrocities accompany mass violence—perhaps inevitably so—and research suggests that mass violence follows from smaller-scale episodes of violence.⁶³ Without wishing to imply a settled consensus in the literature, there is significant agreement that small episodes of violence escalate to larger ones in states with high levels of inequality; high levels of poverty; weak, corrupt or brutal governments; and governments dominated by the corrupt politics of natural resources.⁶⁴ Structural explanations for civil war, such as the ethnic composition of a state, its size or its terrain, may play a role, but there is no evidence to suggest that structural factors are the predominant causes of either small- or large-scale violence;⁶⁵ it is far more likely that this violence is caused by conditions within states that could be ameliorated. R2P and the ICC can each help to some extent: R2P can reinforce the principle that governments should

⁶⁰ *International Commission on Intervention and State Sovereignty: the responsibility to protect*, p. 16; Hehir, *The Responsibility to Protect*, p. 87.

⁶¹ A/RES/60/1, para. 139.

⁶² A. B. Halakhe, 'R2P in practice': *ethnic violence, elections and atrocity prevention in Kenya*, Global Centre for the Responsibility to Protect, occasional paper series no. 4, 2013, http://www.globalr2p.org/media/files/kenya_occasionalpaper_web.pdf, accessed 18 Nov. 2014.

⁶³ Martin Shaw, *War and genocide: organized killing in modern society* (Cambridge: Polity, 2003).

⁶⁴ L. Cederman, E. N. Weidmann and K. S. Gleditsch, 'Horizontal inequalities and ethno-nationalist civil war: a global comparison', *American Political Science Review* 105: 3, 2011, pp. 478–95; J. D. Fearon and D. D. Laitin, 'Ethnicity, insurgency, and civil war', *American Political Science Review* 97: 1, 2003, pp. 75–90; Paul Collier, *The bottom billion* (Oxford: Oxford University Press, 2004); Philippe Le Billon, *Wars of plunder* (London: Hurst, 2012); Michael Ross, 'What do we know about natural resources and civil war?', *Journal of Peace Research* 41: 3, 2004, pp. 337–56.

⁶⁵ Fearon and Laitin, 'Ethnicity, insurgency, and civil war'; Collier, *Bottom billion*.

treat all of their population with respect, and the ICC can assist states in setting up functioning court systems and subjecting themselves and their populations to the rule of law. Supporters of the court could also do more to subject corporations to international criminal law, in particular by finding ways to prosecute businesses for the war crime of pillage, given the links between conflict and the exploitation of natural resources.⁶⁶ But neither the ICC nor R2P can confront the underlying causes of many conflicts: to do that requires a commitment to radical change in international economics, not international politics or international law. The international community appears to recognize this—for instance, the World Summit outcome document states: ‘We reaffirm that development is a central goal by itself and that sustainable development in its economic, social and environmental aspects constitutes a key element of the overarching framework of United Nations activities.’⁶⁷ Giving financial and technical assistance to enable good governance and making trade more fair (for example, by offering preferential access to high-income markets for resource-poor states, as suggested by Collier) would be expensive—but the international community already spends vast (and increasing) sums on humanitarian aid: humanitarian assistance from government donors has steadily increased from \$7.1 billion in 2000 to \$12.9 billion in 2012.⁶⁸ A genuine commitment to development would help the international community to meet its responsibility to prevent, and thus help it to avoid needing to exercise its responsibility to protect.

Conclusion: counteracting the crisis

At the moment selectivity, double standards and uncertainty are the price we pay for having any humanitarian action at all in international affairs, and there is no evidence of sufficient political will to change this. In situations in which atrocity crimes are being committed, the only body able to respond is the UNSC, which is only slowly and inconsistently moving towards support of ICC and R2P norms. Terrible as it is to leave situations such as Syria to the vagaries of UNSC decision-making, there are at present no feasible pathways to reform. But R2P and the ICC are not as impotent as they might appear, despite their manifest failings in preventing or prosecuting atrocities in recent civil wars. Rather than judging the institutions by their abilities (or lack of them) to make a positive impact on live conflict, we need to change our expectations and refocus on the original mandates of the court and R2P. Both are complementary institutions, designed to encourage state compliance with humanitarian and justice norms, and to supersede states only in exceptional circumstances. The tragedy of Syria, in particular, has led to a focus on the exceptional; but such a focus dooms the ICC

⁶⁶ L. van den Herik and D. Dam-De Jong, ‘Revitalizing the antique war crime of pillage: the potential and pitfalls of using international criminal law to address illegal resource exploitation during armed conflict’, *Criminal Law Forum* 22: 3, 2011, pp. 237–73.

⁶⁷ A/RES/60/1, para. 10.

⁶⁸ Global Humanitarian Assistance, *Global Humanitarian Assistance Report 2013*, <http://www.globalhumanitarian-assistance.org/wp-content/uploads/2013/07/GHA-Report-20131.pdf>, accessed 18 Nov. 2014; Collier, *Bottom billion*.

and R2P to failure. It is unlikely that there will ever be broad agreement around military intervention designed to prevent atrocities, or on muscular judicial action within live conflict. Moreover, the main threat to R2P at present is not a lack of guidelines or the structure of international decision-making, but the fear of western crusading after Iraq and Libya. The best way forward is to stay away from attempts to define parameters of acceptable intervention, to build R2P into a formal legal structure or to pursue proposals to reform the UNSC—all of which can only antagonize those states and groups that are sceptical towards the merits of R2P. The same goes for the ICC: the UNSC's reluctance to refer cases is probably a good thing, given how complex and controversial the referred cases have turned out to be for the court—and given the lack of support provided by the UNSC even after referrals are made.

The commitment of states and international society to the principles grounding R2P and the ICC *is* increasing; but, paradoxical as it may seem, it will almost certainly change faster while it is allowed to change slowly—while R2P advocates focus more on what wealthy and stable states can do politically and economically (rather than militarily) in solidarity with weaker states, and while the ICC still prosecutes, for the most part, only those cases in which the states concerned have accepted the court's jurisdiction, and works to build domestic capacity to reduce the number of cases tried in The Hague. Both institutions, while failing to provide dramatic solutions in exceptional circumstances, have a great deal to offer in more subtle ways—working towards making conflict less likely and less destructive (and therefore intervention less necessary) in the future by reforming both normative and institutional architectures within states. The court's work in building and policing national justice systems would be far more effective over the long run at ensuring atrocity crimes are prosecuted or deterred than any work it does while mired in live conflict. And a genuine commitment to R2P principles would include progress towards good governance and economic prosperity as well as the further embedding of norms of state responsibility to citizens.