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

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From Sherriff to Judge:

Re-imagining R2P as a Part of a New Constitutional Order

Introduction

In the old west, the sheriff was a figure that both made judgments and executed punishments. His image in popular culture (or, more accurately, American political culture) was of a lonely hero standing up to criminals without the backing of a fully defined legal order.[1] The 'white hat' worn by the sheriff denotes his obvious goodness, a goodness defined in moral rather than legal terms, as he sometimes needed to act 'outside the law' in order to accomplish his objective of defeating the 'bad guys'. International relations has long had self-appointed sheriffs who see themselves standing before the onslaught of evil and impatient with the procedural delays that come with formal legal methods.[2] When emergency situations arise – either terrorists or war criminals – someone ostensibly needs to act to stop them.

But there are two central problems with the sheriff. First, while his role is legally authorized, the sheriff's selection of which criminals to pursue and what punishment to inflict is purely discretionary. As a result, law enforcement reflects his personal and professional interests. Second, when he does decide to enforce the law, he conflates in one person the three different functions of law in a political order: legislation, judgment and enforcement. While he might have the legal 'right' in one sense - or might see himself as being morally right - to take the actions he does, in so doing he will increase his own power at the expense of other agents in the community.

A sheriff differs from a vigilante, though, in that the former is an official authorized by the state while the latter is an individual acting purely in his or her own interests. The vigilante may be acting in accordance with a shared normative sensibility about who deserves

punishment, but that is not an officially sanctioned role. The sheriff, however, is officially sanctioned and may act in conformity with shared normative and legal principles. At the same time, the sheriff consolidates his power with each enforcement action and remains outside of any institutional check or judicial review in his decision on how to enforce or what to enforce when it comes to transgressions of the law.[3] Thus, a sheriff's actions may be legal in the formal sense but they remain disconnected from justice and, as a result, may become illegitimate.

Our contention here is that humanitarian intervention in the current international order is being framed in such a way that it enables sheriffs rather than strengthening judges (a metaphor for a stronger legal order). We focus on the Responsibility to Protect (R2P) as the idea around which a normative agenda is being constructed that enables the arbitrary use of military force as opposed to the formal procedures of a normative legal order. We highlight two dimensions of R2P that are contributing to the sheriff problem: 1) a selectivity in decisions about when to intervene that contradicts the predictability of a legal order and 2) a punitive dimension to intervention that, coupled with the selectivity, results in a moralism surrounding the discourse that does not advance justice but, in fact, creates injustice.

R2P has rarely been defended as a punitive mode of intervention by any of its proponents. Yet, it is our contention that in order to ensure that states uphold their responsibilities to their own citizens, punitive measures are sometimes necessary. Moreover, the few times that R2P has been invoked by the Security Council or individual states in justifying a military action, a discourse of punishment *has* appeared. When coupled with its selective implementation, this punitive aspect of R2P results in military actions against target states that produce an unjust international legal system.

This paper suggests a different approach that might better function to protect populations and individuals without creating the problem of the sheriff. It does so not by

abandoning the punitive elements of intervention, but rather by more clearly articulating how any mode of punishment must be connected to a legal and political order in which law making and law enforcement are clearly defined. Our approach advocates a more explicit constitutional order, one in which the powers and practices of law making are separated from law enforcement and which includes a more purposeful law making, or legislative, function within which norms such as R2P can be translated into rules or even laws. In so doing, we circumvent the idea that making R2P a legal obligation is too difficult, for it both incorporates existing legal principles and also can be made a more robust legal instrument if it arises from a clearly defined law making structure. We explore how R2P can become a stronger legal principle by putting it forth as an international treaty that includes a more clearly separated judicial and executive function.

In the first section, we explore the nature of punishment in international relations, with a special focus on punitive uses of force. We argue that while R2P is usually framed in terms of prevention and protection, it also includes punitive dimensions, at least in the logic of how it has been pursued. The next section looks at the selective nature of how R2P has been deployed and argues that when coupled with its punitive ethos, this selectivity makes R2P even more problematic. After exploring these theoretical points, we turn to the intervention in Libya and the non-interventions in Bahrain and Syria as evidence of both punishment and selectivity in the framing of R2P. We conclude the article with some suggestions for viable reform options.

Punishment

Interventions are not generally described as punitive; indeed, it is rare that punishment as a formal legal or even political concept is employed in international affairs. But a number of international political practices have strong punitive dimensions. The most obvious one is

economic sanctions, which by its very name suggests a mode of punishment.[4] Others include counterterrorism policy[5] and military reprisals.[6] Military intervention, even when labelled humanitarian, can also be punitive especially when interventions are undertaken in response to harms inflicted on a population and when the intended outcome is ‘bringing perpetrators to justice’ and/or 'regime change' rather than simply providing humanitarian aid.[7]

A punishment is the infliction of harm in response to a violation of a norm or rule. Punishment differs from vengeance because it is a response to the violation of a general rule and not a single act of harm. This distinction is important as many assume that vengeance differs from punishment because a non-sovereign undertakes the former while a sovereign undertakes the latter. For an infliction of harm to count as punishment it must be intended to support, in some way, a general rule of behaviour for a society. Reflecting the introductory metaphor, a vigilante undertakes acts of vengeance while a sheriff punishes. Sheriffs punish offenders, although, as will be made clear below, their decisions about who to punish and what kind of punishment is appropriate generates some of the problems currently facing the international order.

Punitive practices do not simply enforce specific rules; they play a central role in creating political order. One can see this in the traditional liberal conception of a constitutional order in which the three parts of the political system – legislator, executive and judiciary – create rules and then enforce them. In this model, the legislative body makes the law, the judge determines if an individual had violated the law leading to the imposition of a sentence, and the executive carries out that sentence. Within that model, it might seem as if the legislator alone creates the order through the creation of rules that define it. But, the related judicial role of finding parties guilty and determining their sentence is also part of the creation of a just political order.[8] The judgment of a judicial body regarding both how to interpret the law and the sanction applied when the law is violated plays a crucial role in the

political order that emerges. While a judge might sentence a guilty party to 5 years in prison, the type of prison, the details of the incarceration and the possibility for early release will be dependent on the executive branch's interpretations of what it means to punish.

A slightly different way to see this traditional constitutional division of labour can be found in John Rawls work when he argued that there are two types of rules: those that justify a practice as a whole and those that justify a particular application of that practice. He uses this distinction to make the case that punishment can be justified in both utilitarian and retributive ways. The practice of punishment as a means of enforcing justice in a society – that is, as an institution – is utilitarian. But the particular application of punishment in specific cases – the action of punishment – is best understood as retributive. One way to see this distinction is through the different roles played by a legislator and a judge. The legislator constitutes the political through law making, with a focus on the good for the society as a whole. The judge, while seeing his or her role as ensuring that justice is done to this individual, also plays a role in constructing that larger order, although this might not be obvious at first. In so doing, both look to the political community albeit, as Rawls notes, one toward its future and one towards its past.[9] Punishment, as oriented toward violations taking place in the past, constructs the future of the political society.[10]

Punitive interventions can be classified in terms of their purpose and their target. Deterrent interventions are designed to inflict harm in order to change behaviour. They might be specific deterrent, i.e. change the behaviour of the target being punished, or general deterrent, i.e. change the behaviour of others who may be witnessing the punishment, either in that country or, often times, at the global level. Retributive interventions are designed to inflict harm on the violator simply because the rule was broken; that is, to achieve some level of justice, a harm of sorts is inflicted on the target. The target can be one of three agents: the individual leader, the governing regime, or the country as a whole.

Underlying these different forms of intervention are different levels of harm, ranging from outright violence to trials and mass education practices in a society. In the final section, we make the case for the less violent means of punishment, those focused on trials in particular. But, this should not diminish the fact that any form of punishment requires the infliction of harm. We also propose punishments that focus on the first two targets, leaders and regimes, rather than entire countries, as it is more difficult to use force proportionally against an entire population.[11]

The following table summarizes these different types:

Purpose/target	**Individual leader**	**Regime**	**Country**
Deterrent	Bomb targets of value to leader (homes, support system)	Bomb targets of value to regime (institutions, party headquarters)	Carpet bombing of industry, cities, agricultural production
Retributive	Assassination or arrest and prosecution in court setting	Lustration or arrest and prosecution of regime supporters	Mass killings, occupation or mass re-education campaigns

These are not simply categories of possible forms of punitive intervention; as we suggest below, punitive interventions of different types can be found in both the Libyan action and in proposals for a Syrian intervention. The categories listed above, further, should be seen as 'ideal types' for they often overlap and are proposed simultaneously. But distinguishing them provides both clarity on how they have been used by advocates of R2P and also how they might be refined if R2P is to become part of a more global constitutional framework. Outside of the specific forms of punitive intervention, it is also important to keep in mind the wider point made above; using punishment not only accomplishes certain objectives in terms of individuals and their violations of the rules, it also constructs a kind of political order through the decision to punish some agents rather than others and to use some particular kinds of punishments. For instance, if international society uses coercive bombing

campaigns against whole countries rather than the arrest and prosecution of leaders and regime supporters, this will further normalize violence and war. We accept that punishment is a necessary response to rule violations but we propose ways by which punitive interventions can be used to sustain human rights and civilian protection in a way that creates a more just global order.

R2P as a form of punishment generates a type of political order at the global level. It normalizes behaviours and legitimatises agents as part of the order through decisions about who can be justly punished, who can carry out those punishments, and the exact crimes that merit punishment. But, as noted in our introduction, the uses of R2P thus far have generated injustice due to their selective employment and their disconnection from a more clearly defined constitutional order. Before reviewing how such an order might be constructed so as to incorporate a more clearly defined R2P or some other rule that might lead to punitive actions, we next clarify the selective – and thus inconsistent – ways R2P has been deployed and why we see it as, albeit unintentionally, facilitating the construction of an unjust order.

Selectivity

R2P is today unarguably the pre-eminent academic framework for discussing humanitarian intervention. It has, additionally, become an established part of the international political lexicon and spawned a near mini-industry of NGOs and think tanks. This ubiquity has been regularly cited by many of R2P's more vocal proponents in defence of its achievements.[12] Yet, achieving fame was not the aim of the International Commission on International and State Sovereignty (ICISS) when they published *The Responsibility to Protect* in 2001; rather they hoped their report would result in, 'no more Rwanda's'.[13]

Since R2P's inception there has not been another Rwanda, if "Rwanda" is taken to mean genocide with some 800,000 casualties. Yet, to employ a cliché, correlation does not

imply causation. R2P's efficacy - not uniquely - cannot be determined by selective, correlative conjecture. Yet, it is precisely this methodology/strategy which is invariably employed to justify R2P's efficacy. For example, the diplomatic pressure - couched in language which explicitly cohered with R2P - successfully brought to bear against the governments in Cote d'Ivoire and Kenya, during the intra-state crises in 2004 and 2007 respectively, is cited as evidence of R2P's achievements.[14] Yet, such diplomatic appeals manifestly failed to influence the strategy of the Sri Lankan government in 2009 during its crack down on the Tamil Tigers.[15] More obviously the "no more Rwanda's" claim can hardly be sustained in light of what the UN High Commissioner for Human Rights described as 'a reign of terror...perpetrated by the government of Sudan'[16] which occurred in Darfur from 2003 to 2009 which claimed between 178-462,000 lives.[17] Indeed, according to Kofi Annan Darfur demonstrated, 'we had learned nothing from Rwanda'.[18] An arguably more emphatic example of selective, correlative conjecture was the various grandiose declarations which greeted the intervention in Libya in 2011; this is dealt with in detail in the subsequent section. Suffice to say, Ban Ki-Moon's claim that the intervention demonstrated 'the international community's determination to fulfil its responsibility to protect civilians from violence perpetrated upon them by their own government'[19] appeared less convincing six months later when he publicly criticised the international inaction in the face of the violence in Syria, a theme which was to appear in his speeches for the next three years.

Even if we accept that R2P did play a causal role in those cases where it is claimed to have positively influenced events - the Ivory Coast in 2004, Kenya in 2007 and Libya in 2011 - it is nonetheless clear that the record since the ICISS report was published in 2001 has been erratic. This, indeed, is acknowledged by some of R2P's more sober supporters; Thomas Weiss, indicatively, has suggested that thanks to R2P '...we can say no more Holocausts, Cambodias, and Rwandas – and *occasionally* mean it'.[20] The fact that R2P works

"occasionally" can be seen as progressive or not of course, but leaving this debate this aside, it is the intention here to identify the root cause of this inconsistency so as to bolster the argument expounded later regarding the need for legal reform.

In 2005 two paragraphs of the World Summit *Outcome Document* made reference to R2P; in essence, they stated that individual states had certain responsibilities towards their own citizens and also that the international community had a concomitant responsibility to act if the host state was unable or unwilling to abide by this responsibility. The crimes listed as being within R2P's purview were genocide, ethnic cleansing, war crimes and crimes against humanity. While this commitment was certainly laudable, it is hardly new.[21] Each of these "four crimes" was illegal long before 2005; indeed, there is no shortage of international laws proscribing human rights abuses.[22] Likewise, that the international community had the right to intervene in the domestic affairs of states to prevent and/or halt these crimes was also established - and indeed actualised - before 2005.[23] Of course, as is well known the enforcement of international human rights law has been erratic; indeed it was this inconsistency that the ICISS explicitly sought to address.

This inconsistency stems from the institutional structure of the UN and in particular the power - particularly the veto - wielded by the permanent five members of the Security Council (P5). The only viable legal basis for external intervention in the domestic affairs of a state - without the state's consent - is Chapter VII of the Charter which is dependent on the assent of the Security Council. Unsurprisingly then, the enforcement of international law - specifically the use of force for the protection of human rights - is prey to the political exigencies of the P5. The Security Council, it must be remembered, was established primarily to prevent conflict between the great powers and maintain - as per the wording of Article 24 - "international peace and security" rather than enforce human rights law.[24] The powers vested in the P5 were consciously designed so as to reflect the realities of power in international

politics and orientate the organisation towards the maintenance of order rather than the pursuit of justice.[25] R2P has not altered in any way the institutional arrangements for enforcing international law or the remit of the P5, nor has it created an alternative source of authority to the Security Council and, therefore, law enforcement remains dependant on the political will and national interests of the P5s.

The absence of legal reform is not seen, however, as problematic by many of R2P's advocates who argue that R2P is 'revolutionary' because it creates a framework for ostensibly irresistible moral advocacy.[26] R2P has become, in essence, a means by which normative pressure is consolidated and brought to bear on those controlling the levers of power. Indicatively, the first aim of the International Coalition for the Responsibility to Protect is, 'Strengthen normative consensus for RtoP at the international, regional, sub-regional and national levels'.[27] The key focus, therefore, is - as many acknowledge - mobilising political will and changing the decision-making calculus of the P5.[28]

There is no doubt that, in many cases, moral norms predate positive law and thus it is not in principle illogical to argue that achieving normative consensus should be the first step towards a more responsive international order. The problem is, however, that there is scant evidence that R2P is orientated in any way towards institutional reform; in fact the opposite appears be the case. Legal reform is rejected by many as utopian; the ostensibly more realistic strategy is to craft arguments that will convince states to abide by their previous commitments to respect human rights.[29] While a case can be made that democratic states are somewhat receptive to moral advocacy - though this is far from assured as the invasion of Iraq and the non-intervention in Darfur attest[30] - the willingness of China and Russia to accede to humanitarian appeals is surely negligible. As these states become increasingly more powerful, the efficacy of moral advocacy will arguably diminish.[31]

Thus, at present the existing mechanisms by which human rights law is enforced and violators punished remains a matter of political will which is by definition transitory and context-specific. Thus this echoes the powers vested in the sheriff as noted in the introduction where the legal authority to act is not accompanied by any duty; the Security Council *may* take action but it is under no obligation to do so and thus the P5 thus merely have a 'discretionary entitlement' to act.[32] Thus, somewhat perversely, the centrality of Security Council authorisation in the application of R2P has in fact further consolidated the P5's primacy, despite its powers actually constituting one of the original catalysts for the ICISS's proposal.

Libya, Syria and Bahrain

Selective Intervention

As the previous section argued, R2P facilitates a world order in which certain agents can selectively increase their own power and still fail to uphold the protection of individuals. This deleterious selectivity has been readily apparent with in the Security Council's response to the Arab Uprisings particularly with respect to the situations in Libya, Bahrain and Syria.

No-one can reasonably deny that the Security Council's response to the crisis in Libya was unusually swift and characterised, at least initially, by unprecedented collective unity. While some criticised the intervention as variously an unwarranted and disproportionate response[33], a cynical act motivated by a desire for resources[34], and a divisive threat to global order[35], the focus here is not on the merits of the intervention itself but the means by which it was sanctioned and the broader context.

If China and/or Russia had chosen to veto Resolution 1973 the intervention would not have occurred; evidence suggests President Obama in particular considered Security Council approval to be Russia a sine qua non. What then explains the Chinese and Russian

abstentions? The most plausible explanation relates to the position adopted by the African Union and especially the Arab League; neither China nor Russia wished to block an initiative which these regional organisations supported and thus they abstained. This indeed, was reflected in the Chinese statement; "We also attach great importance to the position of African countries and the AU. In view of this...China abstained."[36] Russia also explained its abstention was an expression of support for the Arab League's call for action.[37] Indeed, according to Gareth Evans the Arab League's support "was absolutely crucial in ensuring that there was both a majority on the Council and no exercise of the veto by Russia or China"[38] while Bellamy stated, without its support, "China and Russia would have certainly vetoed Resolution 1973."[39] It is also clear that the US's position was greatly influenced by the African Union's but most particularly the Arab League's position.[40] The position of the Arab League - and the members of the GCC in particular - on the Arab Uprisings has been far from principled and the reasoning behind their support for military action against Libya points towards obviously geopolitical motives.[41] This inconsistency was most evident when the GCC sent troops into Bahrain on the 14th March to help the embattled government crush the popular protest. What followed was described by the International Crisis Group (ICG) as a 'campaign of retribution' as the foreign troops, primarily from Saudi Arabia, enabled the government to escalate its draconian crack-down.[42] Despite this, the ICG note that Western states, the US in particular, criticised the violence 'relatively mildly' and 'threw its weight behind the Crown-Prince's efforts to jump-start a substantive reform effort'. This was a consequence, they note, of the US's desire to appease the Saudi royal family who considered the continuation of the monarchy in Bahrain an 'existential issue'.[43]

The selectivity has been more obvious, however, with respect to the situation in Syria. There is no doubt it is overly simplistic to argue that the lack of military intervention in Syria (to date) constitutes definitive evidence that the intervention in Libya was thus motivated by

oil, geopolitics etc. The situations are clearly different and the dynamics of Syria's relationship with key regional and international actors arguably militates against the kind of action taken against Libya. The charge of selectivity regarding Syria, however, should not focus only on Western states; while the US, UK and France have been denounced by many for failing to act as robustly as they did with respects to Libya, the position of Russia, and to a lesser extent China, constitute a far more obviously inconsistent approach to upholding human rights and abiding by R2P. Both Russia and China have three times vetoed resolutions on Syria yet in each case the draft resolutions were far less robust than Resolution 1973 on Libya. None of the draft resolutions mentioned military intervention but sought only to impose arguably modest economic and political punishments against Assad's regime. Indeed, beyond just blocking international attempts to censure Syria, Russia has continued to supply the regime with offensive weaponry.[44] As the situation continued to deteriorate throughout 2012, on the 3rd August the General Assembly took the unusual step of condemning the Security Council in a non-binding resolution which followed an emotive debate on the situation.[45] This episode has troubling implications for R2P. Despite the various effusive declarations that it was a 'revolutionary' concept R2P has obviously not inhibited Russia from engaging in a very public display of cynical geopolitics.

Whether in the form of the Arab League's intervention in Bahrain, the West's shameful silence over this intervention, or Russia's policy of protecting Syria at the UN, the international response to the Arab Uprisings has alleviated the suffering of certain groups while ignoring the plight of others. Perversely, the power and international standing of NATO, the Arab League and Russia have arguably grown as a result of their various actions during the crises; each have at certain points shaped the "international" response to the dominant concern of the day. Where actors have had their designs thwarted - as surely even the US and Russia at various times have - this has been a result of old-fashioned power

politics rather than the influence of R2P. Thus, like the sheriff, the P5 consolidate their power with each enforcement action whilst remaining outside of a judicial review process. Like the sheriff, the P5's actions may be legal but they are of dubious legitimacy.

Punishment

A year after the intervention in Libya Benjamin Freidman wrote:

> One [reason to intervene] was to show other dictators that the international community would not tolerate the violent suppression of dissenters. That reverse domino theory has obviously failed. If Qaddafi's fate taught neighbouring leaders like Bashar al-Assad anything, it is to brutally nip opposition movements in the bud before they coalesce, attract foreign arms and air support, and kill you—or, if you're lucky, ship you off to the Hague.[46]

Was the intervention in Libya a punitive one? How would one evaluate this? Recalling the table of punitive interventions listed above, it seems evident that the intervention included both deterrent and retributive dimensions. Unlike others, though, this targeted primarily the leadership, not just Qaddafi but members of his family.

Security Council Resolution 1973 was largely punitive; its operational clauses included five elements: 1) a deferral of the situation in Libya to the International Criminal Court (ICC); 2) an arms embargo; 3) a travel ban for those within the regime; 4) the freezing of assets of those in the regime; and 5) the creation of a sanctions committee to monitor compliance with the resolution. Of these five, only one, the arms embargo, was not explicitly punitive. The others all targeted the regime and the leadership of Libya. The reasons for the resolution are many, but perhaps the one that galvanized members of the international community to act was the speech by Qaddafi on 22 February in which he described the rebels as 'cockroaches' and said that those resisting his regime should be hunted from house to house. On the same day as Qaddafi's speech, the Global Centre for the Responsibility to Protect issued an open letter requesting many of the items that found their way into the Security Council's resolution.[47] Once Resolution 1970 was passed on 26 February, the same

group stated that while the resolution was a positive step, a military intervention was necessary. That intervention was justified in terms of both stopping atrocities and deferring future ones: "Fulfilling the responsibility to protect involves identifying the scenarios whereby civilians may be the victims of mass atrocities, *adopting strategies to deter perpetrators from committing future crimes*, and crucially, employing protective strategies to halt current attacks".[48] A subsequent statement from the same organization, again calling for intervention, implied more clearly a punitive logic: "Behind the firm voice of the Arab League and its support for more forceful action lies the conviction that the Libyan regime *should face the consequences for its brutal actions*".[49]

Resolution 1973 set out the important operational clause of allowing 'all means necessary' for three objectives: 1) protect civilians; 2) create a no-fly zone; and 3) enforce the arms embargo. Military operations began soon after the resolution was passed and NATO commanders insisted that these three points were the core of their mission. But as soon became clear, the mission of protecting civilians means not simply stopping harms against them but hurting those that are doing the harming; in other words, inflicting harm for violating a rule, the definition of punishment noted above. In a press conference on 8 April 2011, the deputy commander of the mission hinted at the punitive logic underling the means of protecting civilians:

> On Wednesday, we engaged forces in central Libya including an air defence facility near Surt under our mission to protect civilians and civilian population areas. The pressure of NATO aircraft and the accuracy of our strikes continue to pressure those who would bring harm to innocent civilians.[50]

On 27 June 2011, the International Criminal Court issued arrest warrants for three individuals charged with crimes against humanity: Muammar Gaddafi, Saif al-Islam Gaddafi, and Abdullah al-Sanussi.[51] The indictment - designed to support the rebels against the Gaddafi regime[52] - relied primarily on events that took place in February 2011 surrounding the use of

military force against protestors. When, the ICC's arrest warrants were issued, NATO's spokesperson stated:

> The arrest warrants… show exactly why that resolution was necessary; why NATO decided to act; and why NATO will keep up the pressure until that mandate is fulfilled. The arrest warrants are yet another signal from the international community to the Qadhafi regime. Your place is on trial; not in power, in Tripoli. It is not for NATO to enforce that warrant. That is for the appropriate authorities. Our mandate is to protect civilians from attack…this is the military track where NATO foreign ministers have set out three clear goals: an end to all attacks against civilians; the withdrawal to their barracks and bases of all of Qadhafi's military and paramilitary forces; and full and unimpeded humanitarian access…NATO is part of that broad international effort to reach a solution to the crisis. But we have made clear from the start that there is no purely military solution. It's the combination of our continued military pressure and a reinforced political pressure that will bring about the transition to democracy that the Libyan people demand and deserve.[53]

Note the spokesperson affirms that the arrest warrants are part of the same strategy as the military campaign, yet makes it clear that the military campaign is not about arresting individuals. The idea that the intervention and the ICC could work in parallel had been part of the larger intervention; as US Secretary of Defence, Robert Gates stated at a press conference in Cairo, 'the international community has a number of 'hammers in its toolbox', one of which is the ICC'.[54]

On 20 October 2011Qaddafi was executed by rebel soldiers without any trial or official process. Only two days later, the NATO Secretary General announced the 'liberation of Libya' and noted that the intervention would end on 31 October. While NATO had insisted on keeping itself separate from the ICC indictment and tried to keep its focus on protection of civilians rather than punishment, the fact that they ended their intervention as soon as Qaddafi was killed suggests that his death – or punishment of sorts – fulfilled their mission.

At one level, the indictment of Qaddafi, his son and Sanussi reflect the legalized, focused punishment that we advocate in the final section of this article. On another level, though, the wider discourse of the intervention and the fact that the intervention ended after

the death of Qaddafi points to the overarching punitive nature of the intervention, especially when coupled with ICC indictment. While the case against Qaddafi's son and al-Sanussi continues, the punitive element of the intervention itself seems clear here.

While there has not been an intervention in Syria, the arguments being made in support of intervention parallel the punitive logic of the Libyan intervention. The US government's initial response to the use of chemical weapons in Syria called for accountability in language stronger than most diplomatic statements; Secretary of State John Kerry argued in his press conference of 26 August 2013 that "…there is accountability for the use of chemical weapons so that it never happens again…President Obama believes there must be accountability for those who would use the world's most heinous weapons against the world's most vulnerable people."[55] While accountability is not necessarily the same as punishment, the primary means of holding agents accountable in a political system is by punishing those who violate the rules. Further, in the case of Syria, it would appear that the threat of punishment may have prompted the regime to respond, as it soon decided to turn over its chemical weapons materials to the international community.

In response to the call for a punitive intervention in Syria, some international legal scholars have emphasized the illegality of punishment or the related ideas of reprisals and countermeasures in the current international legal order. One analyst, echoing the analysis here, though taking a directly opposed position, argued that punitive intervention violates the primary legal structure concerning the use of force, the UN Charter. She goes on to forcefully contest the idea that R2P might have any punitive justification:

> R2P is not a form of punishment or a rhetorical device. It does not sanction military retaliation against a state for attacking its own civilians, nor does it justify violence as a symbolic gesture for expressing solidarity with that oppressed population. If the United States launches "punitive," "surgical," or "symbolic" military strikes in Syria and we stop while the civilian population remains at risk, our responsibility to protect will be unmet. But if a US military campaign results in greater suffering by the civilian population we will have engaged in an inhumane intervention. In order to fulfil the United States' Responsibility to

> Protect in Syria, we must commit ourselves to non-lethal and life-saving forms of humanitarian assistance for the Syrian people.[56]

A different account, also from an international legal position, argues that the current international legal order does not allow for the idea of state crime and so it cannot support the idea of punitive intervention.[57] Both these accounts suggest that non-lethal modes of intervention would be preferred to punitive intervention. In the case of Syria, though, it is difficult to see what this would mean. As suggested by the fact that the regime dropped its chemical weapons programme in part because of the pressures placed on it by the Obama administration, perhaps one can conclude that the deterrent threat of punishment accomplished some good.

In addition to the deterrent nature of a possible punitive intervention, there are also suggestions for a retributive one. In August 2011 the UN Human Rights Council established an Independent International Commission of Inquiry on the Syrian Arab Republic with a mandate to "establish the facts and circumstances that may amount to such violations and of the crimes perpetrated and, where possible, to identify those responsible with a view of ensuring that perpetrators of violations, including those that may constitute crimes against humanity, are held accountable."[58] The UN High Commissioner for Human Rights, Navi Pillay, stated in December 2013 that the Commission's findings made it clear that the regime would be held accountable and that she believed members should be tried before the ICC.[59] In January 2013, Switzerland proposed that the UN Security Council should refer the case of Syria to the ICC in a letter signed by both the United Kingdom and France. Philippe Sands argued that the proposal to try members of the regime before the ICC is a "justified gamble".[60] Though not interventions, these developments suggest that a wider discourse of retributive punishment surrounds and informs the international response to Syria.

The Need for Reform

Many hold that R2P has increased the chances that the Security Council will act and that this constitutes progress when compared with bygone eras when - ostensibly - there was consistently no response.[61] It is our contention, however, that the influence of R2P on the contemporary international system does not constitute an improvement; rather we see it as entrenching the very structural problems that have contrived to produce the poor record advocates of R2P sought to redress..

R2P emerged during a period when there was widespread calls for reform of the UN; NATO's unilateral intervention in Kosovo in 1999, coupled with the fallout from the wilful inertia in the face of the Rwandan genocide, had created a consensus, albeit heterogeneous, in favour of reform, particularly reform of the Security Council. Yet the ICISS did not substantively address the very issue that arguably impelled its formation, namely the question of authority.[62] Rather R2P is merely a normative framework which can be used to apply leverage against the Security Council to convince them to take action.[63] Thus, arguably the most concerted effort in the modern era aimed at reforming the manner in which the international community responds to intra-state crises, culminated in literally no alteration to the existing discredited legal and political system. We consider this to be untenable as any legal order which is constructed so as to facilitate the selective enforcement of its most fundamental tenets is almost by definition flawed and certainly in need of reform.

R2P's avoidance of legal reform in favour of normative advocacy has four negative consequences. First, it means that R2P can be - and has been - embraced by the P5 precisely because it does not diminish their powers or impose any new obligations. The P5 can, therefore, present themselves as receptive to change and reform by pointing to their openness to R2P. As a result, other proposals which have advanced prescriptions for altering the powers and composition of the Security Council have been side-lined or simply ignored.[64]

The continued focus on R2P, therefore, within academia and indeed at the UN, has overshadowed all other proposals. Whether consciously encouraged by the P5 or not, this certainly suits their interests as R2P does not greatly inhibit their policy options.

Second, as the reaction of the "international community" to a particular crisis remains in essence dependant on the disposition of the Security Council, the key factor in determining how violations of human rights are addressed remains the political will of the P5, itself a product of their respective national interests. There is, therefore, what Anne Peters terms a ‘missing link’ with respects to R2P which is precisely the gap between law and enforcement.[65] Perpetrators of systematic human rights abuses can, even post-R2P, shield themselves from external censure if they have cultivated an alliance with one of the veto-wielding P5; examples include Sudan's relationship with China, Bahrain's relationship with the US – via Saudi Arabia – and Syria's relationship with Russia. The emergence of R2P, therefore, has encouraged certain oppressive regimes to redouble their efforts to align with one or more of the P5. The very existence of an independent judiciary impels people to abide by the extant laws for fear of incurring legal censure.[66] In any system where legal censure is not guaranteed – either because of the judiciary’s ineffectiveness, lack of coercive capacity or its susceptibility to corruption and/or the influence of power – potential law breakers are naturally less wary of breaking the law. Internationally, this is particularly apparent with respects to Assad’s behaviour; while the regime must have known their actions were manifestly illegal, this was ameliorated by their expectation that Russia would shield them from censure. Thus, by not addressing the enforcement gap in international law, R2P has facilitated the perpetuation of a system which drives rogue regimes to cultivate alliances with powerful states thereby further empowering these states who have yet further incentive for perpetuating the flawed system.

The third adverse consequence is that the UN and indeed the ICC continue to stand accused of impotence or hypocrisy or both. In the course of the crisis in Syria various commentators have derided the UN for its failure to act and the ICC for its inability to engage with a regime perpetrating the very crimes it was established to prosecute.[67] The UN and the ICC's capacity to act, however, has been severely hamstrung by their respective constitutional competencies which inhibit their capacity for independent action; indicatively, the UN High Commissioner for Human Rights published a report in late 2013 detailing the atrocities committed by the Assad regime, suggesting that they amounted to war crimes which could come under the purview of the ICC. Yet, the next stage – enforcement/punishment – was corrupted by virtue of the fact that it was a matter for the P5 to determine how to respond.[68] Additionally, when either organisation *has* acted they have been criticised for engaging in hypocritical realpolitik, and both have been presented as handmaidens to power. While the UN and the ICC are both imperfect institutions, erosion of support for these primary bastions of international law, multilateralism and universal jurisprudence undoubtedly constitutes a set-back for those who support the evolution of a world order which places a primary emphasis on the protection of individual human rights.

The fourth and final deleterious consequence of perpetuating the status quo is that unilateral intervention remains a strong possibility. The crisis in Syria - specifically the deadlock at the UN - unsurprisingly led to renewed calls for unilateral action against the Assad regime. For many, Assad's use of chemical weapons in August 2013 constituted the point at which inaction was no longer acceptable, regardless of whether the Security Council supported military action or not. Indeed, one of us has made an explicitly punitive argument for intervention in Syria after evidence emerged that the Syrian regime had used chemical weapons against its own people.[69] In our view, pragmatically, until the system is reformed it is occasionally necessary for ‘sheriffs’ to intervene in order to end the loss of human life.

Crucially, however, we feel that this is an untenable situation which cannot constitute a viable basis upon which to establish a legal order responsive to human rights violations. Unilateralism by definition threatens inclusivity, general law abidance and is a threat to any multi-lateral order. The history of unilateral action testifies to its grave impact on international peace and security - the bedrock of any human rights regime - and indeed recent examples, such as the use of force by the US against Iraq in 2003 and Russia against Georgia in 2008, are contemporary reminders of this. Unilateral intervention may of course be morally legitimate but given the difficulties inherent in regulating such action, there is no guarantee that it always will be.[70] Nor, crucially, does such action do much to address the prevalence of what Simon Chesterman describes as "in-humanitarian non-intervention", that is those cases where in the absence of political will and national interests, humanitarian crises go unaddressed.[71]

R2P's unintended consequences contrast sharply with the general principles of a functioning legal order as discussed in this paper's first section. A fundamental principle underpinning any legal order is the removal of selectivity from law enforcement and to that end the constitutional separation of the judiciary from the executive lest we have the sheriff-like scenario whereby the three different functions of law in a political order - legislation, judgment and enforcement - are conflated in one person. At present – even post R2P – the international legal system comprises just such a constitutional conflation; the Security Council thus operates as a 'political core in a legal regime'.[72]

That the international and domestic are very different legal orders is axiomatic; that they should - and will always - be so is fatalistic and, in essence, unhelpful. There have been myriad proposals advanced which advocate reform of the international legal system[73] – and the powers of the Security Council in particular – all of which essentially cohere with Hans Kelsen's conception of the current system as 'primitive' and but a stage in an evolutionary

process'.[74] Our contribution is not to provide a detailed proposal but rather to argue, on the basis of the fate of R2P and the reaction to the Arab Uprisings, that those concerned with human rights protection must accept that any proposals which seek to redress the appalling record of international responses to intra-state crises will fail if they do not aim to reform the current legal system.

The problem is certainly not the absence of laws proscribing human rights violations; suffice to say there are few areas *not* covered by international law.[75] Nor is there necessarily a problem with the manner in which laws are created; the General Assembly has powers analogous to that of the legislature in domestic orders and as it constitutes a representative body – albeit state-based – it is a body which can boast significant representative legitimacy.[76] The General Assembly is not a legislative body in the formal sense of the word; international law comes about primarily through treaties. At the same time, the General Assembly has a crucial role to play in the advancement and codification of international law. One means by which the institution can play this role is by officially adopting the International Law Commission's various draft articles into more substantive international legal codes; this took place with the Articles on State Responsibility which the General Assembly adopted in various votes. Importantly these votes did not turn the Articles into an international law, which only a treaty can formally do; rather, they expressed, on three different votes, the sense of the international community in support of these rules.[77] The General Assembly's adoption of the World Summit Outcome Document in 2005 is another instance of this role. One reform proposal would be to propose that the General Assembly be given greater competence to actually codify international law. This could, in fact, come about through the simple task of having the General Assembly pass a resolution that directly and clearly affirms the centrality of R2P and perhaps even lays out possible punitive responses to

violations of a state's responsibility. While the international community could, of course, ignore such a resolution, it might prompt some movement forward on this agenda.

The Security Council does not have the power to create laws and as such the institutional configuration with respects to the process by which laws are generated is not necessarily corrupted by hegemonic influence, although there is discussion among international legal scholars about an emerging legislative capacity for the Security Council. In our view, this development is worrying, for its law making capacity would both violate the principle of a separation of powers and would also allow powerful agents to override the interests of a wider international community. So, in this case, we would argue that the Security Council should continue primarily as an executive body rather than a quasi-legislative one.[78]

Nor is there a problem with respects to either the principle of international censure or a lack of an international judicial body. In terms of the former, it is now universally established and recognised that the international community can, in certain circumstances, exercise jurisdiction over intra-state affairs and hold individuals – including state leaders – to account. In terms of the latter the International Court of Justice has been in existence for seventy years while, perhaps more importantly, the ICC was established specifically to deal with human rights violators.

The issue is therefore the process by which human rights laws are upheld and violators punished. In this sense, we agree with those, such as Cherif Bassouni, who appeals for reforms which would involve '…international legal processes that are similar to national legal processes, but which also apdply to state action'.[79] The problem can thus be located almost exclusively at the point of enforcement and thus reforming the existing system need not require a complete transformation of the present legal order. The starting point would be to build on the provisions related to R2P in the 2005 World Summit Outcome Document and

the vast corpus of human rights law and consolidate these into a legally binding treaty which reiterates the proscription against various forms of human rights abuses and, crucially, outlines both the point at which these abuses are to be considered so severe as to warrant external involvement of some kind – though not necessarily military intervention – and the manner in which this decision would be taken, by whom and through which legal processes. These processes would, by definition, necessitate a diminution in the power of the Security Council in favour of 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. The nature of the punishment, would of course, potentially vary, as is the case with respects to judicial decisions domestically where, as noted earlier, judges have a degree of discretion. This would, therefore, allow for judicial decisions which reflect the reality that in certain contexts particular types of punitive action – most obviously military intervention – would potentially do more harm than good. Perhaps coupled with a stronger role for the General Assembly in laying out a range of punitive measures in a resolution, along with some discretion allowed to the Security Council in choosing possible punitive responses, some form of institutional cooperation could yield a stronger set of punitive responses to violations of state's responsibilities to protect their citizens. Through the imposition of alternative measures – including sanctions, suspension of UN membership, travel bans and ICC referrals – violators would incur punishment of some form. Additionally, and crucially, the very availability of these punitive sanctions, would serve as a deterrent.

This judicial body could also, we contend, come into being without necessitating the dissolution of the Security Council; conceivably it could be triggered into action in situations where the Security Council is demonstrably deadlocked despite consensus in the General Assembly in favour of punitive action. This was very obviously the case with respects to Syria as reflected in the General Assembly's condemnation of the Security Council's inability

to unite behind punitive action. The new body would, therefore, challenge what Buchanan and Keohane describe as the Security Council's 'unconditional exclusive legitimacy' rather than its legitimacy per se.[80]

The goal avowed here can of course be criticized as utopian. This is not an unreasonable charge; in 2012 the so-called "Small 5" - Costa Rica, Jordan, Liechtenstein, Singapore and Switzerland - had their modest proposal for reforming the Security Council unceremoniously discarded, so naturally the prospects of our reforms being implemented are, we accept, relatively negligible.[81] That said, we offer the following rejoinders; first, the primary aim here is to demonstrate that the existing system – even post R2P and the establishment of the ICC – remains fundamentally corrupted by the constitutional competencies of its institutions, specifically the P5. Achieving agreement around this finding would constitute progress as it would hopefully impel those concerned about human rights to desist from engaging with strategies which, we feel, are doomed to fail and instead work on determining how the reforms we advance in general terms might be implemented in practice. Additionally, the temper of the international community is demonstrably in favour of reform; the Security Council is widely acknowledged as lacking legitimacy in terms of its membership and competencies as reflected in the statements from the General Assembly, the UN Secretary-General and the general trend amount commentators and academics. Our call for reform is not, therefore, an aberration, but rather reflective of the majority view. Clearly the fact that the P5 have evidently no interest in diminishing their own powers constitutes a major barrier to reform but it need not be seen as insurmountable; the ICC was established despite the opposition of the US, Russia and China and thus, major changes to the architecture of international law can occur absent P5 support. The international system is, famously, very different to the domestic legal system and thus the institutional configuration and theoretical foundations – normative and real – of domestic legal orders naturally do not

equate with that which exists internationally; yet to assert this as a counter to those, like us, who advocate legal reform is somewhat paradoxical as it suggests that the normative systemic configuration cannot be achieved because it does not presently exist. We are certainly not alone in suggesting alternative means of improving the international response to intra-state crises and the commission of mass atrocities; as Susan Meyer argued, '...without major changes in the UN, R2P will go the way of the Genocide Convention'.[82]

Finally, there is the simple fact that historically, institutions – national and international – do not survive if their constitutions become a source of collective derision amongst their subjects even if a powerful elite benefit.

Conclusion

In light of the unedifying spectacle of great power mendacity during the Arab Uprisings – most notably with respects to Russia's shielding of Syria – many have lamented the pre-eminence of a legal system which is both utterly flawed and irrevocably embedded, and consequently mourned the death of R2P, which, they argue, was the most viable alternative to cynical realpolitik. Indicatively Jonathan Freedland wrote, 'today [is] a good time to be a dictator, a butcher or the torturing head of a brutal regime. The world will let you carry on killing – even when it knows exactly what is happening'.[83] Indeed, it surely cannot be acceptable that the UN High Commissioner for Human rights would publish a report detailing the brutal criminality of the Assad regime only for this to be rendered impotent because Russia has a strategic interest in protecting its ally. Likewise, a more recent report by a UN panel detailing the systematic oppression of North Korean's by their illegitimate, murderous government floundered in the face of a Chinese veto – actual or apprehended – which shields the regime from censure at either the UN or the ICC.[84]

R2P's recognition of the exclusive authority of the Security Council and lack of any reform agenda means we are left with the status quo which has, in effect, increased the power of the P5. The selectivity with which the principle is deployed – and not only in the form of military intervention – has been obvious, and constitutes a crucial failure.[85] The Arab Uprisings testify to the pernicious influence of the perennial flaws in the existing international legal order which the concept has demonstrably failed to ameliorate. It is difficult to see how the present system can do anything but fail to respond consistently to human rights violations; this manifest failing naturally leads to a legitimacy crisis – for both the UN and the ICC – and thus the need to initiate reform is an existential issue. As Kelsen noted with respects to the need for international judicial decision-making,

> The objective examination and unbiased decision of the question of whether or not the law has been violated is the most important, the essential stage in any legal procedure. As long as it is not possible to remove from the interested states the prerogative to answer the question of law and transfer it once and for all to an impartial authority, namely, an international court, any further progress on the way to the pacification of the world is absolutely excluded.[86]

As R2P has increased awareness of human rights and championed the legitimacy of external intervention - albeit not always military – it has impelled a jarring juxtaposition between an elevation in the focus on human rights and negligible concomitant reforms to facilitate their protection and realisation. We argue that if punishment is to be a central part of the international legal regime, then sanctions, interventions and ICC referrals/indictments must take place within the context of a more explicit constitutional order which – in accordance with the basic theory of constitutionalism - privileges three principles: the rule of law, the separation of powers and constituent power. We acknowledge that these are somewhat utopian goals; yet, our proposal is not one that sits completely outside existing international legal or political institutions. As such, we see our proposal as a form of chastened utopian global politics, one that can be achieved through negotiation over the medium term.

[1] Interestingly, the figure of the criminal in the mythology of the Wild West usually included a large share of Mexicans and Native Americans. The parallels with an international legal order in which North American and European states need to 'punish' states and individuals from the developing world is too obvious to ignore.
[2] See, Colin S Gray, *The Sheriff: America's Defense of the New World Orde*r (Lexington KY: The University Press of Kentucky, 2004).
[3] See Nicholas Wheeler, 'Reflections on the Legality and Legitimacy of NATO's Intervention in Kosovo' in Ken Booth, ed., *The Kosovo Tragedy: The Human Rights Dimension* (New York: Frank Cass Publishers, 2001): 146-163
[4] Advocates of sanctions as a peaceful alternative to war avoid calling it punishment, especially those who promote 'smart sanctions'; see, for instance, David Cartwright and George Lopez, *Smart Sanctions: Targeting Economic Statecraft* (Lanham MD: Rowman and Littlefield, 2002).
[5] See Anthony F Lang, Jr. "Punishment and Peace: Critical Reflections on Countering Terrorism" *Millennium* 36, 3 (May 2008): 493-511
[6]See Nicholas Onuf, *Reprisals: Rituals, Rules, Rationales* (Princeton: Centre for International Studies, 1974)
[7] For a definition of and empirical evidence for the existence of punitive intervention, see Anthony F Lang, Jr., *Punishment, Justice and International Relations: Ethics and Order after the Cold War* (London: Routledge, 2008): 58-77
[8] These roles are simplified here, of course. The judicial body plays a central role in interpreting rules through its appellate function, in the US Supreme Court, or as a court of first instance, as in the German Constitutional Court. When it comes to sentencing, moreover, the roles of different institutions might vary across different contexts; for instance, sentencing from guidelines might come from the legislator, or perhaps from the executive. For a description of the relationship between sentencing and punishment, see Susan Easton and Chistine Piper, *Sentencing and Punishment: The Quest for Justice* (Oxford: Oxford University Press, 2005)
[9] John Rawls, "Two Concepts of Rules" [1954] in H. B. Acton, ed, *The Philosophy of Punishment: Collected Papers* (London: Macmillian, 1969): 108
[10] An alternative conception of how punishment creates political and even social order can be found in Michel Foucault's account of how punishment became discipline. Foucault's assessment, while powerful and insightful, is less relevant for our purposes here, as we wish to propose alternative legal and political structures through which international punitive measures might be more just, something that Foucault would find more problematic. See Michel Foucault, *Discipline and Punish: The Birth of the Prison*, trans by Alan Sheridan (New York: Vintage Books, 1977).
[11] Although, one of us has argued for collective punishment in certain limited cases; see Anthony F Lang, Jr. "Punishing Genocide: A Critical Reading of the International Court of Justice" in Tracy Isaacs and Richard Vernon, eds., *Accountability for Collective Wrongdoing* (Cambridge University Press, 2011): 93-118
[12] Edward Luck, 'The Responsibility to Protect: Growing Pains or Early Promise?', *Ethics and International Affairs*, 24/4, (2010). Available online, {http://www.carnegiecouncil.org/resources/journal/24_4/response/001.html} Accessed June 2011; Gareth Evans, 'From an Idea to an International Norm' in R. H. Cooper and J. V. Kohler (eds.) *Responsibility to Protect: The Global Moral Compact for the 21st Century* (Hampshire and New York: Palgrave Macmillan, 2009), p. 16; Anne-Marie Slaughter, 'A Day to Celebrate, but Hard Work Ahead', *Foreign Policy*, March 18 (2011). Available online, {http://www.foreignpolicy.com/articles/2011/03/18/does_the_world_belong_in_libyas_war?page=0,7} accessed June 2011
[13] International Commission on Intervention and State Sovereignty (2001) *The Responsibility to Protect* (Ottawa: International Development Research Centre), p. xiii
[14] Ban Ki-Moon, 'Implementing the Responsibility to Protect: Report of the Secretary-General', A/63/677, 12 January, 2009p. 24. Available online, {http://globalr2p.org/pdf/SGR2PEng.pdf} accessed June 2010
[15] Damien Kingsbury (2013) *Sri Lanka and the Responsibility to Protect* (London: Routledge), p. 1
[16] United Nations Economic and Social Council 'Report of the United Nations High Commissioner for Human Rights and Follow-Up to the World Conference on Human Rights: Situation of Human Rights in the Darfur region of Sudan', E/CN.4/2005/3, 7 May, 2004p. 6. Available online, http://www.unhchr.ch/huridocda/huridoca.nsf/AllSymbols/863D14602AA82CAEC1256EA80038E268/$File/G0414221.doc?OpenElement [Accessed February 2011]
[17] Oliver Degomme and Debarati Guha-Sapir, 'Patterns of Mortality Rates in Darfur Conflict', *The Lancet*, 375/9711, 23 January 2010
[18] David Fisher, 'Humanitarian Intervention', in Charles Reed and David Ryall (eds.) *The Price of Peace*

(Cambridge: Cambridge University Press, 2007), p. 103
[19] Ban Ki-Moon, 'Statement by the Secretary-General on Libya', 17th March 2011, available online, {http://www.responsibilitytoprotect.org/index.php/crises/190-crisis-in-libya/3269-ban-says-historic-resolution-was-clearly-the-international-community-fulfilling-of-its-responsibility-to-protect] accessed 28 June 2011
[20] Thomas Weiss, 'R2P Alive and Well After Libya', *Ethics and International Affairs*, 25:3 (2011), p. 5. Our emphasis.
[21] Cherif Bassiouni, 'Advancing the Responsibility to Protect Through International Criminal Justice', in Cooper and Kohler (eds.) *Responsibility to Protect: The Global Moral Compact for the 21st Century*; Anne Peters, 'Humanity as the A and Ω of Sovereignty', *The European Journal of International Law*, 20/3, (2009), 513-544; Carsten Stahn, 'Responsibility to Protect: Political Rhetoric or Emerging Legal Norm?', *American Journal of International Law*, 101/1, (2007) 99-120; Theresa Reinhold, 'The Responsibility to Protect: Much Ado About Nothing?', *Review of International Studies*, 36, (2010), 55-78
[22] Todd Landman, *Studying Human Rights* (London: Routledge, 2005), p. 14
[23] Simon Chesterman, '"Leading from Behind": The Responsibility to Protect, the Obama Doctrine, and Humanitarian Intervention after Libya', *Ethics and International Affairs*, 25/3, (2011) pp. 1-7.; Aidan Hehir 'Libya and The Responsibility to Protect: Resolution 1973 as Consistent with the Security Council's Record of Inconsistency", *International Security* Vol. 38/1 Summer 2013.
[24] Mats Berdal, 'The UN Security Council: Ineffective but Indispensable', *Survival*, 45/2, (2003), 7-30; Bosco, D. (2009) *Five to Rule Them All* (Oxford: Oxford University Press), 10-38; Dimitri Bourantonis, *The History and Politics of Security Council Reform* (London: Routledge, 2007), p. 6; Nigel White, 'The Will and Authority of the Security Council After Iraq', *Leiden Journal of International Law*, 17/4, (2004) pp. 645-672;
[25] Julie Mertus, *The United Nations and Human Rights* (London: Routledge, 2009), p. 98; Gerry Simpson, *Great Powers and Outlaw States* (Cambridge: Cambridge University Press, 2004), p 68
[26] Feinstein, L. 'Beyond Words: Building Will and Capacity to Prevent More Darfurs', *The Washington Post*, 26 January, 2007; David Scheffer, 'Atrocity Crimes: Framing the Responsibility to Protect', in Cooper and Kohler (eds.) *Responsibility to Protect: The Global Moral Compact for the 21st Century*, p. 95
[27] International Coalition for RtoP, 'Founding Purposes of the Coalition', http://www.responsibilitytoprotect.org/index.php/about-coalition/founding-purposes
[28] Alex Bellamy, *Responsibility to Protect*: *The Global Effort to End Mass Atrocities* (London: Polity, 2009), p. 119; Gareth Evans, *The Responsibility to Protect: Ending Mass Atrocity Crimes Once and For All* (Washington DC: Brookings Institution Press, 2008), p. 223; Power, S. 'Foreword', in Cooper and Kohler (eds.) *Responsibility to Protect: The Global Moral Compact for the 21st Century*, p. x
[29] Evans, *The Responsibility to Protect: Ending Mass Atrocity Crimes Once and For All*, p. 137
[30] See, Aidan Hehir *Humanitarian Intervention After Kosovo* (Hampshire: Palgrave Macmillan, 2008), pp. 76-96
[31] Aidan Hehir and Robert W. Murray 'Intervention in the Emerging Multipolar System: Why R2P will Miss the Unipolar Moment', (co-authored with), *Journal of Intervention and Statebuilding*, 6/4, 2012, pp. 387-406
[32] Franck Berman, 'Moral Versus Legal Legitimacy' in Reed and Ryall (eds.) *The Price of Peace*, p. 161
[33] Alan Kuperman 'NATO's Intervention in Libya: A Humanitarian Success?', in Aidan Hehir and Robert W. Murray (eds) *Libya, The Responsibility to Protect and the Future of Humanitarian Intervention* (Hampshire: Palgrave Macmillan, 2013)
[34] Cynthia McKinney *The Illegal War on Libya* (Atlanta, GA: Clarity, 2012)
[35]Michael Walzer, 'The Case Against Our Attack on Libya', *The New Republic*, 20 March, 2011. Available online {http://www.tnr.com/article/world/85509/the-case-against-our-attack-libya} accessed 2 September 2012.
[36] UNSC, Security Council 6498th Meeting, S/PV.6498, 17 March, 2011, p. 5.
[37] Ibid., p. 8.
[38] Gareth Evans, 'The RtoP Balance Sheet After Libya', September 2, 2011. Available online, {http://www.gevans.org/speeches/speech448%20interview%20RtoP.html} accessed 28 November 2011.
[39] Alex Bellamy, 'Libya and the Responsibility to Protect: The Exception and the Norm', *Ethics and International Affairs*, 25:3 (2011), p. 3. Available online, {http://www.carnegiecouncil.org/resources/journal/index.html} accessed 28 September 2011.
[40] Hillary Clinton, 'There's "No Way" United States Will Take Unilateral Action in Libya', CBS News, 16 March, 2011. Available online {http://www.cbsnews.com/8301-503544_162-20043991-503544.html} accessed 2 September 2012
[41] Alex Bellamy and Paul Williams, 'The New Politics of Protection? Cote d'Ivoire, Libya and the Responsibility to Protect', *International Affairs*, 82:7 (2011), p. 842.
[42] International Crisis Group 'Popular Protests in the Middle East and North Africa: Bahrain's Rocky Road to Reform, Middle East/North Africa Report 111, 28th July, 2011. p. 4
[43] Ibid, p. 21

[44] Luke Harding "Syria's New Anti-aircraft Missiles Will Be Game-changing, Say Defence Analysts", *The Guardian*, May 30, 2013. Available online, {http://www.guardian.co.uk/world/2013/may/30/syria-anti-aircraft-missile-system} accessed on 24 January 2014.
[45]UN General Assembly, 124th Plenary Meeting, 3 August 2012. Available online {http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N12/449/39/PDF/N1244939.pdf?OpenElement} accessed 14 March 2014
[46] Benjamin H. Friedman, 'Intervention in Libya and Syria isn't Humanitarian or Liberal' *The National Interest*, 5 April 2012. Available online, {http://nationalinterest.org/blog/the-skeptics/intervention-libya-syria-isn%E2%80%99t-humanitarian-or-liberal-6739} accessed 1 August 2013
[47] Global Centre for the Responsibility to Protect, "Open Statement on the Situation in Libya". Available online, {http://www.responsibilitytoprotect.org/index.php/crises/190-crisis-in-libya/3193-global-centre-for-the-responsibility-to-protect-open-statement-on-the-situation-in-libya} accessed 24 January 2014.
[48] Open Letter to the Security Council from the International Coalition on R2P and the Global Centre for the Responsibility to Protect 4 March 2011. Available online, {http://www.responsibilitytoprotect.org/index.php/crises/190-crisis-in-libya/3239-international-coalition-for-rtop-and-global-centre-for-rtop-send-open-letter-to-the-security-council-on-the-situation-in-libya} accessed 24 January 2014. (Italics added)
[49] Global Centre for the Responsibility to Protect, Libya: Time for Decision, 11 March 2011. Available online, {http://www.responsibilitytoprotect.org/index.php/crises/190-crisis-in-libya/3323-global-centre-for-the-responsibility-to-protect-libya-time-for-decision} accessed 24 January 2014. (Italics added)
[50] NATO, Press Briefing on events concerning Libya, 8 April 2011. Available online, {http://www.nato.int/cps/en/natolive/opinions_72150.htm} accessed 24 January 2014.
[51] The Prosecutor vs Saif al-Islam Gaddafi and Abdullah Senussi, Document number: ICC01/11-01/11. Available online {http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/icc0111/related%20cases/icc01110111/Pages/icc01110111.aspx} accessed 1 August 2013
[52] 'ICC Issues Gaddafi Arrest Warrant' *al-Jezeera OnLine*, 28 June 2011. Available online, {http://www.aljazeera.com/news/africa/2011/06/20116278148166670.html} accessed 1 August 2013
[53] Press briefing on Libya, 28 June 2011. Available online {http://www.nato.int/cps/en/natolive/opinions_75808.htm} accessed at 24 January 2014.
[54] News Transcript, Department of Defence, 23 March 2011, Cairo Egypt. Available online, {http://www.defense.gov/transcripts/transcript.aspx?transcriptid=4795} accessed 24 January 2014.
[55] John Kerry, Press Conference, 26 August 2013. Available online, {http://politicalticker.blogs.cnn.com/2013/08/26/full-remarks-kerrys-pointed-remarks-on-syria/} accessed 31 August 2013
[56] Jennifer Moore, "Punitive Military Strikes in Syria Risk Inhumane Intervention" OUP Blog, 2 September 2013. Available online, {http://blog.oup.com/2013/09/syria-us-military-strikes-international-law-pil/} accessed 7 February 2014.
[57] Carsten Stahn, "Syria and the Semantics of Intervention, Aggression and Punishment" EJIL Talk, 19 September 2013. Available online, {http://www.ejiltalk.org/syria-and-the-semantics-of-intervention-aggression-and-punishment/} accessed 4 February 2014.
[58] Independent International Commission of Inquiry on the Syrian Arab Republic, UN Human Rights Council. "About the Commission". Available online, {http://www.ohchr.org/EN/HRBodies/HRC/IICISyria/Pages/AboutCoI.aspx} accessed 7 February 2014.
[59] "UN Implicates Bashar al-Assad in Syria War Crimes" BBC Online. Available online, {http://www.bbc.co.uk/news/world-middle-east-25189834} accessed 7 February 2014.
[60] Philippe Sands, "Referring Syria to the International Criminal Court is a 'Justified Gamble' The Guardian 16 January 2013. Available online, {http://www.theguardian.com/commentisfree/2013/jan/16/syria-international-criminal-court-justified-gamble} accessed 7 February 2013.
[61] Thomas Weiss, 'R2P Alive and Well After Libya', *Ethics and International Affairs*, 25:3 (2011), p. 5. Cristina Badescu, *Humanitarian Intervention and the Responsibility to Protect* (London, Routledge, 2010).
[62] Carlo Focarelli, "The Responsibility to Protect Doctrine and Humanitarian Intervention: Too Many Ambiguities for a Working Doctrine", *Journal of Conflict and Security Law*, 13/2, (2008) pp. 191-213; Carsten Stahn, 'Responsibility to Protect: Political Rhetoric or Emerging Legal Norm?', *American Journal of International Law*, 101:1 (2007), pp. 99–120. For an alternative perspective see, Luke Glanville, "The Responsibility to Protect Beyond Borders". *Human Rights Law Review*, 12:1, (2012); 1-32
[63] David Scheffer, "Atrocity Crimes: Framing the Responsibility to Protect." in Cooper and Kohler (eds.) *Responsibility to Protect: The Global Moral Compact for the 21st Century*
[64] Bourantonis, *The History and Politics of Security Council Reform*, p. 35; Simon Chesterman, 'The Outlook for UN Reform', New York University School of Law, Public Law & Legal Theory research Paper Series,

Working Paper No. 11-55, August 2011. Available online, {http://ssrn.com/abstract=1885229} accessed September 2013.

[65] Peters, 'Humanity as the A and Ω of Sovereignty', p. 535

[66] Andrew Hurrell, 'Legitimacy and the Use of Force: Can the Circle be Squared?' in, David Armstrong, Theo Farrell, and Bice Maiguashca (eds.) *Force and Legitimacy in World Politics* (Cambridge: Cambridge University Press, 2005), p. 16

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

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

[69] Anthony F Lang, Jr. "Syria: The Case for Punitive Intervention" 30 August 2013. Available online, {http://www.carnegiecouncil.org/publications/articles_papers_reports/0169.html} accessed on 24 January 2014, and Anthony F Lang, Jr., "Clarifying Punitive Intervention" Duck of Minerva, 9 September 2013. Available online, {http://www.whiteoliphaunt.com/duckofminerva/2013/09/clarifying-punitive-intervention.html} accessed at 24 January 2014.

[70] Susan Meyer, 'In Our Interest: The Responsibility to Protect', in Cooper and Kohler (eds.) *Responsibility to Protect: The Global Moral Compact for the 21st Century*, p. 47; Martti Koskenniemi, 'What is International Law For?' in M. Evans (ed.) *International Law* (Oxford: Oxford University Press, 2006), p. 65

[71] Simon Chesterman, 'Hard Cases Make Bad Law' in A. Lang, (ed.) *Just Intervention* (Washington D.C., Georgetown University Press, 2003), p. 54

[72] Nigel White 'The Will and Authority of the Security Council After Iraq', *Leiden Journal of International Law*, 17/4, (2004) p. 666

[73] See Centre for UN Reform Education. Available online, {http://www.centerforunreform.org/?q=node/23} accessed 12 March 2014

[74] Hans Kelsen *General Theory of Law and State* (Cambridge MA: Harvard University Press, 1945), p. 338

[75] Monica Hakimi, 'State Bystander Responsibility', *The European Journal of International Law*, 21/2, (2010), pp. 343-4; Landman, *Studying Human Rights*, p. 14

[76] Hurrell, 'Legitimacy and the Use of Force: Can the Circle be Squared?', p. 18. One aspect of constitutionalism that we do not address is the role of constituent power, particularly the representative nature of a constitutional order. We accept that longer term legal and political reforms are necessary for the international community to better reflect the interests of all.

[77] See James Crawford, 'Articles on States Responsibility Introductory Note'. Available online, {http://legal.un.org/avl/ha/rsiwa/rsiwa.html}, accessed 6 March 2014.

[78] See Anthony F Lang, Jr., 'Constitutionalism and the Law: Evaluating the UN Security Council' in Trudy Fraser and Vesselin Popovski, eds., *The Security Council as Global Legislator* (New York: Routledge, 2014)

[79] Bassiouni, 'Advancing the Responsibility to Protect Through International Criminal Justice', p. 37

[80] Allen Buchanan, and Robert Keohane, 'Precommitment Regimes for Intervention: Supplementing the Security Council', *Ethics and International Affairs*, 25/1, (2011), p. 41

[81] SwissInfo, 'Swiss Withdraw UN Draft Resolution', Swissinfo.ch, May 18, 2012. Available online, {http://www.swissinfo.ch/eng/politics/Swiss_withdraw_UN_draft_resolution.html?cid=32719648}, accessed 12 March 2014

[82] Susan Meyer, 'In Our Interest: The Responsibility to Protect', p. 56. See also Buchanan and Keohane 'Precommitment Regimes for Intervention: Supplementing the Security Council', pp. 41-63; Hurrell, 'Legitimacy and the Use of Force: Can the Circle be Squared?', p. 30; James Pattison, *Humanitarian Intervention and the Responsibility to Protect* (Oxford: Oxford University Press, 2010)

[83] Jonathan Freedland, 'Why it's a good time to be a dictator like Kim Jong-un'.

[84] Peter Walker 'North Korean Human Rights Abuses Resembles Those of the Nazis', The Guardian, 18 February, 2014. Available online, {http://www.theguardian.com/world/2014/feb/17/north-korea-human-rights-abuses-united-nations} accessed 12 March 2014

[85] Aidan Hehir, 'The Permanence of Inconsistency: Libya, The Security Council and the Responsibility to Protect'; Justin Morris, 'Libya and Syria: R2P and the Spectre of the Swinging Pendulum', *International Affairs* 89, 5 (2013); 1265-1283

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