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R2P AND THE ICC: AT ODDS OR IN SYNC?

ABSTRACT. The first years of the new millennium witnessed two global normative and institutional developments in efforts to deal with mass atrocities. These are the responsibility to protect (R2P) norm and the International Criminal Court (ICC). R2P provides a normative framework for preventing and stopping mass atrocity situations, such as genocide and crimes against humanity, in particular through the United Nations. The ICC goes beyond the normative to provide a global, if not universal, institution designed to punish perpetrators and, hopefully, deter future atrocities. They are both tied into the twentieth century global human rights project, as well as the highest reaches of global geopolitics. Both have featured in recent conflicts, yet there is an uneasy relationship between the two which can make conflict management more difficult. In this article I will examine this relationship. I begin by briefly outlining the development of R2P and the ICC. I then discuss the potential positive and negative interactions between the two, using recent cases to illustrate key points. I conclude by considering how the international community might support the use of R2P and the ICC together, including considering the implications of referring an ongoing conflict to the ICC, making clear that all parties to a conflict are subject to potential ICC investigations, and providing normative and practical support for the ICC by, for example, facilitating the arrest of ICC suspects by UN peacekeeping forces.

I RESPONSIBILITY TO PROTECT

A series of failures on the part of the UN – including in Rwanda and the former Yugoslavia – raised significant questions about the ability of the UN to harness increased cooperation after the Cold War to stop genocide and other mass atrocities. These failures led directly to a report in 2001 by the Canadian-sponsored International Commission on Intervention and State Sovereignty (ICISS), entitled *The*

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Responsibility to Protect.[1] It argued that claims to sovereignty entailed responsibility towards individuals in the state and that the international community had a responsibility to step into address the most extreme situations of human rights abuses when a state failed stop them or, indeed, was responsible for the abuses. This responsibility is three-fold: a responsibility to *prevent* atrocities, a responsibility to *react* when mass atrocities occur, and a responsibility to *rebuild* after such situations have ended. The World Summit endorsed[2] a somewhat watered down version of the original R2P concept. This document made clear that R2P only applied to four international crimes – genocide, crimes against humanity, war crimes and ethnic cleansing – what Scheffer refers to as atrocity crimes.[3] It, and the subsequent report by the Secretary-General in 2009,[4] identified three pillars of R2P: (1) states have the primary responsibility to protect their people from mass atrocities, (2) the international community has a responsibility to assist states in this regard, and (3) the international community has a responsibility to use a variety of means – diplomatic, humanitarian, and military – to protect people when the state fails to carry out its responsibilities. However, the most important element of the World Summit recognition of R2P – both normatively and practically – was the fact that the UN committed itself, on a case-by-case basis, and when all other efforts had failed, to use, or authorise the use of, force against the wishes of a state to stop mass atrocities. This use of force is what had previously been called humanitarian intervention. This terminology was avoided, at least partly because of its disfavour in many developing countries, in particular, who saw it as a cover for neo-imperialist intervention.[5] Further, the World Summit Outcome Document made clear that such interventions could only be authorised by the UN Security Council. In this article I am concerned with the 'hard edge'

[1] International Commission on Intervention and State Sovereignty (ICISS), *The Responsibility to Protect,* (Ottawa: International Development Research Centre, 2001).

[2] See paras. 138 and 139 of United Nations General Assembly, '2005 World Summit Outcome' (24 October 2005).

[3] D. Scheffer, 'Genocide and Atrocity Crimes' (2006) 1 *Genocide Studies and Prevention* 229.

[4] United Nations General Assembly, 'Implementing the responsibility to protect. Report of the Secretary-General' A/63/677 (12 January 2009).

[5] A. Bellamy, *Responsibility to Protect* (Cambridge: Polity Press, 2009) 42.

of pillar 3 – the use of military force to protect people from mass atrocities.

The World Summit did not create new international law in this area. There is no legal obligation arising from the outcome document and subsequent resolutions from the UN to engage in such intervention, and there is no legal sanction for individual states or groups of states to engage in such actions absent Security Council authorisation. R2P is thus a *permissive* norm – it allows the Security Council to authorise certain activities, but it does not *require* it to do so. Further, there continues to be much debate over the status of R2P and whether it is just a cover for neo-imperialism. This debate became particularly heated when the Security Council authorised military action in Libya in 2011. Many perceived the coalition of states which intervened to protect people from Muammar Qaddafi's forces to have gone too far when its actions ultimately led to Qaddafi's overthrow, with a resulting backlash from both Russia and China, as well as many developing countries. This backlash has perhaps contributed to the lack of support for robust action to protect civilians during the ongoing conflict in Syria – although there are also many other factors mitigating against military action.[6]

II THE INTERNATIONAL CRIMINAL COURT

Whereas R2P provides a normative and political framework for protecting people at risk of genocide and other mass atrocity crimes, the International Criminal Court (ICC) aims to prosecute those who commit such crimes, implementing the developing 'responsibility to prosecute'.[7] It also lays claim to deterrence of such crimes. The ICC has a much firmer legal grounding than R2P, given that it is treaty-based. Finally, while R2P lays claims to universal application via the Security Council, the ICC is more restricted to state parties to the Rome Statute of the ICC (although jurisdiction can be extended to non-states parties by the Security Council). Yet, they are both part of the set of potential responses the international community can call upon to address mass atrocities.

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[6] For an in-depth discussion of the Syrian case, see T. Dunne and A. Bellamy, '"Syria" R2P Ideas in Brief' (2013) *AP R2P Brief* 1, http://www.r2pasiapacific.org/docs/R2P%20Ideas%20in%20Brief/AP%20R2P%20Syria%20Final%20Copy%2017%20Sept%202013.pdf, accessed 7 February 2015.

[7] K. Mills, 'R2P: Protecting, Prosecuting or Palliating in Mass Atrocity Situations?' (2013) 12 *Journal of Human Rights* 333.

The ICC has its roots in International Humanitarian Law (IHL), which dates back to the middle of the nineteenth century and which attempts to lay out what is unacceptable conduct during wartime. IHL was further codified in 1949 with the Geneva Conventions and the 1977 Additional Protocols. The ICC represents the institutional criminalisation of much of the Geneva Conventions, as well as the Genocide Convention. In 1998 more than 160 countries gathered in Rome to complete negotiations on the Rome Statute of the ICC. One hundred and twenty voted in favour, 21 abstained and 7 voted against.[8] This signaled a fundamental shift in how the international community would deal with mass atrocities. It enshrined into international law individual criminal responsibility for atrocity crimes, and created responsibilities for states parties – including to arrest and surrender to the Court those with outstanding arrest warrants. The ICC formally came into existence in 2002, and currently has 122 member states. These 122 states include only two of the five permanent members of the Security Council (France and the United Kingdom), even though the Security Council can play a formal role in ICC activities.

The ICC has jurisdiction for the prosecution of genocide, crimes against humanity, and war crimes. The Rome Statute also has a provision for jurisdiction over the crime of aggression, although this has yet to come into force. There are three ways a case can come before the Court. A State Party can refer a case over which the ICC would have jurisdiction to the Prosecutor, the Prosecutor can initiate an investigation, or the Security Council can refer a situation to the Court. In the first two cases the individuals who may ultimately be investigated and tried must be citizens of a State Party or the crimes must have taken place on the territory of a State Party, whereas the Security Council can invoke the jurisdiction of the ICC even in cases of a non-State Party. Of the eight situations now under official investigation, four came before the Court via the State Party referral process (all self-referrals – Uganda, Democratic Republic of Congo, Central African Republic, and Mali); two were initiated by the Prosecutor (Kenya and Côte d'Ivoire) via the Prosecutor's *proprio motu* powers; and two came via a referral from the Security Council (Darfur and Libya). In addition to referring cases, the Security Council also has the ability under the Rome Statute to defer the

[8] W. A. Schabas, *An Introduction to the International Criminal Court* (Cambridge: Cambridge University Press, 4th edn, 2011) 18, 21.

proceedings in a case for up to 12 months (indefinitely renewable).[9] The ICC is a court of last resort, and can only claim jurisdiction when a state has demonstrated an unwillingness or lack of capability to try suspects. This is the principle of complementarity.

The ICC is not without controversy. There has been significant criticism of the fact that all active cases before the Court are in Africa, leading to charges of bias and neo-colonialism.[10] The fact that the Security Council can refer situations in states that are not parties to the ICC raises questions regarding the consensual nature of international legal commitments. The role of the Security Council, which will be discussed further below, also raises questions about the independence of the ICC. Questions of prosecutorial independence are also raised, in particular, when states self-refer. There may be a perception that the Prosecutor may be beholden in some way to the government in order to gain its ongoing cooperation. Such issues have been prominent, for example, in Uganda and the DRC, where charges have been made against rebel forces but not against government forces and leaders who may have also been responsible for atrocities.

One claim made on behalf of the ICC is that having a standing court could deter individuals from engaging in genocide and other atrocity crimes. It is difficult to prove the negative – i.e. that crimes have not happened because of the existence of the ICC – and recent experience raises serious questions about the potential for deterrence. There is some limited evidence that the ICC may have had some effect in the DRC on the issue of child soldiers,[11] for example, but such evidence is difficult to corroborate. Regardless, the ICC has only been in existence for 12 years, and it is likely that a much more robust record of timely prosecutions and convictions (there have been only two convictions to date) will need to be built up before one can confidently predict any kind of deterrent effect. The fact that the ICC has no ability on its own to arrest suspects further undermines the

[9] For an in-depth discussion of the legal relationship between the ICC and the Security Council, see J. Trahan, 'The Relationship Between the International Criminal Court and the U.N. Security Council: Parameters and Best Practices' (2013) 24 *Criminal Law Forum* 417.

[10] K. Mills, "'Bashir is Dividing Us": Africa and the International Criminal Court' (2012) 34 *Human Rights Quarterly* 404.

[11] Human Rights Watch, *Selling Justice Short: Why Accountability Matters for Peace* (July 2009) 125–126; Human Rights Watch, *Courting History: The Landmark International Criminal Court's First Years* (July 2008) 67–68; 'Jury still out on ICC trials in DRC' (*IRIN News*, 19 January 2011), http://www.irinnews.org/printreport.aspx?ReportID=91672, accessed 7 February 2015.

deterrent prospects, since deterrence would require an expectation that the ICC could quickly and routinely transfer those with arrest warrants against them to The Hague for trial. This has not been the case, given that it is dependent upon unsure cooperation from states and other actors, who have their own interests and agendas.

As noted, the Rome Statute provides a much more robust legal foundation for the ICC than is the case for R2P. It specifies in significant detail the jurisdiction of the court – both territory and subject – and also specifies the legal requirements for states to arrest and surrender suspects to the ICC. This differs from R2P which, while lacking the same firm legal foundation, is potentially more universal in scope (subject to the vetoes of the permanent members of the Security Council), although the ICC can gain more universality via a Security Council referral.

III UNIVERSAL JURISDICTION

Developing in parallel with the ICC is another framework for international criminal justice called universal jurisdiction. The Princeton Principles on Universal Jurisdiction state that:

> Universal jurisdiction is criminal jurisdiction based solely on the nature of the crime, without regard to where the crime was committed, the nationality of the alleged or convicted perpetrator, the nationality of the victim, or any other connection to the state exercising such jurisdiction.[12]

In other words, a state can try somebody for mass atrocities even if it did not happen within its territory and the perpetrator or victim are not citizens of the state. The justification for this is that these crimes have become international crimes – beyond nationality – through the adoption of the torture and genocide conventions, among others, and that states can act on behalf of the international community to bring these people to justice. This is a highly controversial concept, but it has developed significantly since the 1990s, with the case initiated by Spain against former Chilean President Augusto Pinochet the most famous instance of attempted exercise of universal jurisdiction.[13] It

[12] Princeton Project on Universal Jurisdiction, *The Princeton Principles on Universal Jurisdiction* (New Jersey: Program in Law and Public Affairs, Princeton University, 2001), http://lapa.princeton.edu/hosteddocs/unive_jur.pdf, accessed 7 February 2015.

[13] N. Roht-Arriaza, *The Pinochet Effect: Transnational Justice in the Age of Human Rights* (Philadelphia: University of Pennsylvania Press, 2005).

has been invoked on a number of occasions to try individuals for war crimes and other atrocities, and although there has been a certain backlash against it, it continues to be an active avenue for pursuing international justice.[14]

Indeed, a recent and ongoing attempt to exercise universal jurisdiction demonstrates that the doctrine is alive and well. This is the case of former Chadian President Hissène Habré. In 1990, he fled Chad as a result of a coup, settling in Senegal. There were attempts to try him in Senegal in 2000, which collapsed, and Belgium indicted him and requested his extradition in 2005. A year later, the African Union asked Senegal to try Habré 'on behalf of Africa'[15] – indicating the collective and transnational nature of his crimes. In 2012, the International Court of Justice ordered Senegal to either extradite Habré to Belgium or to try him. Habré was indicted in Senegal and proceedings in the newly created Extraordinary African Chambers started in 2013.[16]

The issue of universal jurisdiction is relevant because it is another avenue for international justice beyond the ICC which has the potential for creating similar complications as the ICC, with the added fact that whereas the ICC is limited in jurisdiction unless the Security Council expands that jurisdiction, universal jurisdiction could potentially be applicable to crimes committed anywhere, and tried anywhere. Further, while the Security Council has the ability to suspend proceedings of the ICC, it has no power over individual states' exercise of universal jurisdiction. Thus, a state might indict an individual in the middle of a conflict, and there is little the Security Council could do about it, even if it might undermine peace negotiations. Further, even if there was little prospect of gaining access to and putting on trial an individual in the near future, an indictment and arrest warrants – and thus potentially extradition requests – could remain for years or decades, beyond the resolution of any

[14] Human Rights Watch, *The Long Arm of Justice* (USA: Human Rights Watch, 2014), http://www.hrw.org/sites/default/files/reports/IJ0914_ForUpload.pdf, accessed 7 February 2015.

[15] African Union Assembly, 'Decision on the Hissène Habré and the African Union' (2006) DOC. ASSEMBLY/AU/3(VII), http://www.hrw.org/news/2006/08/02/decision-hiss-ne-habr-case-and-african-union. This was an interesting development given the AU's criticism of European states for attempting to exercise universal jurisdiction against Africans. See, 'Decision on the Report of the Commission on the Abuse of the Principle of Universal Jurisdiction' (1 July 2008), A.U. Doc. Assembly/AU/14(XI).

[16] C. Hicks, 'Will Hissène Habré's victims in Chad finally get justice?' (*The Guardian*, 11 July 2013).

conflict. This could have important implications for conflict management. No deal could be made with the perpetrator as part of a peace deal to avoid prosecution which could be absolutely binding, since that prosecution would occur with a third party. Thus, regardless of whether the ICC stops a prosecution or the Security Council indefinitely suspends proceedings, any individual cannot be absolutely certain that he or she will remain free of prosecution in the future – even if, as the Taylor and Habré cases demonstrate, that person has been given safe haven in another country.

IV R2P AND THE ICC: ALLIES OR ENEMIES?

R2P and the ICC (as well as the broader international criminal justice regime) are thus both possible responses to mass atrocity situations. They can be invoked individually or used together. They can be sequenced or implemented simultaneously. They might be mutually supportive, or they might undermine each other.

4.1 *Sequencing*

The goal of R2P is to prevent or stop mass atrocities. The ICC can potentially support this end. Theoretically, it can deter mass atrocity situations in the first place, rendering R2P responses unnecessary – although we have seen little evidence of such deterrence to date. Once a mass atrocity situation is under way – or about to occur – the ICC could be useful in sending a signal. It could be a warning to those in power that if they continue with their actions, they could be prosecuted by the ICC – a nonviolent response compared to an R2P military intervention. The hope would be that the threat of prosecution would be enough to deter further atrocities – if not the top political leaders, then perhaps upper- or mid-level military commanders, who might be induced to defect to avoid participation in further atrocities and thus avoid prosecution. Even though most ICC investigations to date have been in the midst of ongoing atrocity situations, there is little evidence that defection is a likely outcome. However, a few encouraging signs have appeared, such as in defections from the Qaddafi regime, which might have been linked to fears of potential ICC prosecution. Yet, at the same time, the ICC took no action against rebel forces, thus undermining any potential deterrence

effect for the rebels during the conflict and not deterring post-conflict abuses by militias.[17]

Invoking the ICC might also be a prelude to further action by the Security Council – it could serve as a justification for military action. By referring a situation to the ICC, the Security Council is making a statement that individuals involved in the conflict have transgressed international humanitarian law, thus providing potential justification for military action to stop those transgressions. Former ICC Prosecutor Moreno-Ocampo argues that 'the ICC could add legitimacy to the Security Council's decision to apply the Responsibility to Protect concept'.[18] This might be used cynically to provide a pretext for a military action for which there might be little support or other justification, or it could be part of a carefully calibrated strategy to build international support for needed R2P enforcement action. Sometimes it may be difficult to see the difference.

In Libya in 2011, after a series of atrocities by the government, the Security Council, citing the possibility that crimes against humanity may have occurred and noting the government's responsibility to protect its population, referred the situation in Libya to the ICC in Resolution 1970 on 26 February. The resolution also made reference to the Security Council's ability to suspend ICC proceedings, perhaps as a way to induce Libya's leaders to stop the atrocities and avoid prosecution, although this also raised questions about the role of the ICC. Was the Security Council instrumentalising anti-impunity norms in order to attain short-term gains – e.g. pressure to stop the fighting and implement R2P – while undermining these same norms in the long run? The Security Council further politicized the ICC by excluding nationals of non-ICC members states from the Court's jurisdiction, illustrating a continuing hypocrisy when invoking the ICC (it did a similar thing when referring Darfur in 2005). It also did not create a binding obligation on states (except Libya) to cooperate with the Court. Beyond the hypocrisy, it is clear that the Security Council does not have an overarching approach to having recourse to the ICC. As with R2P, the ICC is invoked on an ad hoc basis,

[17] M. Kersten, 'Whither ICC Deterrence in Africa?' (*Justice in* Conflict, 6 March 2012), http://justiceinconflict.org/2012/03/06/whither-icc-deterrence-in-libya/, accessed 7 February 2015.

[18] L. Moreno-Ocampo, 'The Responsibility to Protect: Engaging America' (*Responsibility to Protect*, 17 November 2006), http://r2pcoalition.org/content/view/61/86/, accessed 7 February 2015.

without clear criteria, and in particular without invoking the ICC within an accountability framework.[19]

The ICC issued arrest warrants for Qaddafi and two others in June 2011. By then, however, any hope that the referral might have been a deterrent were gone. On 17 March, in response to continuing atrocities and an imminent potential massacre in the city of Benghazi, the Security Council passed resolution 1973 which invoked the responsibility to protect and authorised the use of 'all necessary measures' to protect civilians. This led to air attacks by a coalition of Western states which resulted in Qaddafi's eventual capture and death. Given the short period of time between the two resolutions, there was little likelihood that the threat of ICC prosecutions would have had a sufficient effect to deter further atrocities. But the referral did provide the normative and political rationale for the eventual intervention under UN auspices.[20]

4.2 *Conflict Management*

While the ICC might put pressure on combatants to come to a peace agreement, it can also complicate attempts to bring a conflict to an end by creating incentives to continue fighting. The threat of prosecution, with a promise or hint of withdrawing the threat if parties to the conflict stopped fighting, might induce such behaviour. However, once a situation comes before the Prosecutor, other actors have less control over the situation. If the Prosecutor decides to go forward with an investigation or prosecution, and is given authority to prosecute individuals by the Pre-Trial Chamber, there are few options for stopping a prosecution – particularly once arrest warrants are issued. According to the Rome Statute, the Prosecutor could apply to the Pre-Trial Chamber to halt proceedings based on the interests of justice.[21] They cannot stop proceedings based on the interests of peace – that is, on the basis that the prosecution might

[19] Chatham House, 'The UN Security Council and the International Criminal Court,' (International Law Meeting Summary, with Parliamentarians for Global Action, Chatham House, 16 March 2012) 4–5, http://www.pgaction.org/pdf/activity/Chatham-ICC-SC.pdf, accessed 7 February 2015.

[20] D. Kaye, 'Wanted: Qaddafi & Co.' (*Foreign Affairs*, 19 May 2011), http://www.foreignaffairs.com/articles/67857/david-kaye/wanted-qaddafi-co, accessed 7 February 2015.

[21] For a discussion of this concept see International Criminal Court, 'Policy Paper on the Interests of Justice' (September 2007), http://www.icc-cpi.int/iccdocs/asp_docs/library/organs/otp/ICC-OTP-InterestsOfJustice.pdf, accessed 7 February 2015.

interfere with a peace process. The only other avenue for suspending proceedings is through the Security Council invoking Article 16 of the Rome Statute, which gives it the ability to suspend proceedings for up to a year. It can renew this suspension as many times as it wants, but the threat of prosecution would always be there – the Security Council could always choose not to renew a suspension, even if this had been a condition for a party to a conflict to lay down their arms and negotiate a peace agreement. Knowing that the threat would always be there, the individual(s) would have an incentive to keep fighting, since a peace agreement might lead to their capture and a trial in The Hague – regardless of whether or not a suspension had initially been put in place by the Security Council. Indeed, given the experience of others who had thought they had achieved immunity – including former Chilean president Augusto Pinochet (via a domestic amnesty law) and Liberian president Charles Taylor (by being given safe haven in another country) – but ended up being tried anyway under various mechanisms, those who come under the gaze of the ICC would be quite rational to think that any promises of immunity from prosecution were temporary at best.

Beyond this, however, there would be danger to the ICC itself if it were used as a conflict management tool in this way. If it was clear that the Security Council perceived the ICC as a threat which it could invoke or withdraw at will, the normative purpose of the ICC would be severely undermined, doing significant damage to the ICC, and ultimately undermining the perceived threat of ICC prosecution. As Louise Arbour, former Chief prosecutor for the International Criminal Tribunal for the Former Yugoslavia, has observed:

> The increasing entanglement of justice and politics is unlikely to be good for justice in the long run. To make criminal pursuits subservient to political interests, activating and withdrawing cases as political imperatives dictate, is unlikely to serve the interest of the ICC which must above all establish its credibility and legitimacy as a professional and impartial substitute for deficient national systems of accountability. I'm not sure that partnership with the Security Council is the best way to attain these objectives.[22]

The request by the Prosecutor in 2008 for, and ultimate issuance of, an arrest warrant for Sudanese president Omar al-Bashir in 2009 led

[22] L. Arbour, 'The Rise and Fall of International Human Rights' (*International Crisis* Group, 27 April 2011), http://www.crisisgroup.org/en/publication-type/speeches/2011/the-rise-and-fall-of-international-human-rights.aspx, accessed 7 February 2015.

to calls by the African Union for the warrants to be suspended by the Security Council, arguing that the arrest warrants undermined the peace process.[23] Given the actions of the Sudanese government before and since the issuance of the arrest warrant, there is little evidence that it has had an appreciable effect on the peace process.[24] Yet, such requests do indicate that the ICC is being called upon to be 'subservient to political interests'.

Further, the invocation of the ICC in the midst of conflict could provide incentives for parties to a conflict who might not be the target of ICC investigation to keep fighting. For example, the President or Prime Minister of a country who had an arrest issued against him or her would thus be branded an international criminal and would lose legitimacy. This might embolden rebel groups to refuse to negotiate with an indicted war criminal, perceiving such delegitimisation as an advantage and support by the international community. Such moral hazard was evident in Darfur. After an arrest warrant was issued for Sudanese president Omar al-Bashir, some rebel groups refused to negotiate, saying that Bashir now lacked legitimacy.[25] Peace negotiations were thus imperiled, at least in the short term.

Darfur highlights another potential concern. Whereas the ICC referral in Libya may have paved the way for military action, the Darfur referral provided a political basis for avoiding military action. Even though the situation in Darfur had been labeled as genocide by the US government and others, and the UN had identified crimes against humanity, there was little appetite for a robust intervention to protect civilians, even though weak AU and UN peacekeeping forces were deployed. The ICC referral thus allowed the Security Council to make it seem like it was doing something to address the situation,

[23] Mills (n 10 above) 420–422.

[24] Chatham House (n 19 above) 16; Trahan (n 9 above) 448.

[25] M. Simons, L. Polgreen and J. Gettleman, 'Arrest Is Sought of Sudan Leader in Genocide Case' *The New York Times* (15 July 2008). The Legal Counsel for the African Union reiterated the possibility of this dynamic in 2010. African Union, 'Statement by Mr. Ben Kioko, Legal Counsel of the African Union Commission on Behalf of the AU Commission' (Review Conference of the Rome Statute of the International Criminal Court (ICC), Kampala, Uganda, 31 May–11 June 2010), http://www.icc-cpi.int/iccdocs/asp_docs/RC2010/Statements/ICC-RC-gendeba-AfricanUnion-ENG.pdf, accessed 7 February 2015. Roberto Belloni pursues a similar line of argument with regard to expectations by rebel groups for intervention on their behalf. R. Belloni, 'The Tragedy of Darfur and the Limits of the "Responsibility to Protect"' (2006) 5 *Ethnopolitics* 327.

even though that 'something' was not enough to protect civilians.[26] Using the ICC to highlight atrocities and bring perpetrators to justice is commendable, but not if it takes pressure off the international community to stop ongoing atrocities. Further, the Security Council has done little to provide support for the ICC in its attempt to bring Bashir and others to justice, prompting some to reverse their support for the referral.[27] Indeed, this is a major concern. The ICC is a potentially very powerful institution, but it requires support from other actors to be effective. If it is invoked but does not receive such support, it risks being perceived as weak and a signal would thus be sent that the international community does not care about bringing people to justice, leading to a greater sense of impunity.

One situation where neither pillar 3 of R2P nor the ICC have been invoked is Syria.[28] With close to 200000 people killed since 2011, chemical weapons used, and other crimes against humanity and war crimes identified, the international community has failed in a substantial way to uphold the norms embedded within R2P and the ICC. Geopolitical reasons have played a major role, with Russia supporting the Syria regime and neither China nor Russia wanting to support military intervention or an ICC referral. Any attempt in the Security Council to sanction the use of force in Syria would face a veto by one or both countries. Western powers, too, however, are reluctant to intervene, given the political complexity and volatility of the region. Moreover, Libya was a much less complicated situation, making an intervention much easier than in Syria. However, the move in Libya from protecting civilians to regime change has undermined support for such interventions.[29] It appeared at one point that the West, led by the US, would intervene in Syria, if in a relatively limited way, after chemical weapons attacks in August 2013, although this threat dissipated once the Syrian regime agreed to

[26] K. Mills, 'Vacillating on Darfur: Responsibility to Protect, to Prosecute, or to Feed?' (2009) 1 *Global Responsibility to Protect* 532, 548, 557.

[27] "Former UN rights chief says UNSC referral of Darfur to ICC a 'very bad idea'" (*Sudan Tribune*, 22 July 2013), http://www.sudantribune.com/spip.php?article47363, accessed 7 February.

[28] Security Council Resolution 2139 of 22 February 2014 notes the state's primary responsibility to protect people, and calls for an end to impunity – but does not refer to the ICC as a way to end impunity.

[29] Dunne and Bellamy (n 6 above) 4–5.

give up its chemical weapons.[30] Yet, the focus on chemical weapons did not address the much more widespread atrocities, ongoing today, which have been responsible for most of the deaths.

In this situation, with R2P action blocked by geopolitics and unclear interests on the part of the great powers, the ICC could be useful. The Prosecutor cannot initiate an investigation herself since Syria is not a party to the Rome Statute. However, the Security Council could refer the situation to the ICC, as it did in Libya and Darfur. In September 2013 at least six members of the Security Council had supported such a referral, including three permanent members the UK,[31] France and, most recently, the US. And France had included ICC language in an early draft of a resolution on Syria, which was ultimately removed. Russia has come out against a referral, and China has not expressed support.[32] While an ICC referral would not have an immediate impact on civilian protection in the way that R2P action would, it would still provide a signal to all parties to the conflict – both the government and the many competing rebel factions – that the situation is unacceptable and that those who are responsible for crimes will be held accountable. Indeed, anti-government forces are also responsible for significant atrocities, and signaling that this is not acceptable is important (even if some groups, particularly those connected to Al Qaeda and IS appear to be immune to such entreaties). Given the lack of progress in the peace negotiations to date, it is unlikely that a referral would impede such efforts. But it would signal that the international community was serious about ending impunity.

Further, the identification of specific criminality could create the conditions for more robust action to stop the killing, and the naming of names and the issuance of arrest warrants could reduce the free-

[30] The US has since intervened militarily in Syria – not to protect civilians but to respond to the perceived threat posed by the Islamic State (IS) group to regional stability.

[31] A position which it reiterated in September 2014. UK Mission to the United Nations Geneva, 'UK Statement delivered during the Interactive Dialogue with the Commission of Inquiry on Syria' (16 September 2014), https://www.gov.uk/government/world-location-news/commission-of-inquiry-on-syria-human-rights-council-geneva, accessed 7 February 2015.

[32] Human Rights Watch, 'UN Security Council: Seize Chance for Justice in Syria' (*Human Rights Watch*, 17 September, 2013), www.hrw.org/news/2013/09/17/un-security-council-seize-chance-justice-syria, accessed 7 February 2015; C. Lynch, 'U.S. to Support ICC War Crimes Prosecution in Syria' (*Foreign Policy*, 7 May 2014), http://thecable.foreignpolicy.com/posts/2014/05/07/exclusive_us_to_support_icc_war_crimes_prosecution_in_syria, accessed 7 February 2015.

dom of movement of key players, particularly on the government side. All of this could put pressure on the various players to come to an agreement. The position from the West is that Assad must go – although there is little appetite for using force to ensure that this happens. Given his responsibility for widespread crimes, this is the only path to a stable and peaceful future for Syria. As in the Former Yugoslavia, where Slobodan Milosevic, Ratko Mladic and Radovan Karadzic were made pariahs after their indictments by the ICTY, Assad and others who have perpetrated atrocities would be labeled pariahs, making it harder for them to ultimately stay in office. And, making it clear that all sides would be investigated could allay fears of bias as well as helping to ensure that those who committed atrocities would not end up in power in a post-war Syria – a key development which would contribute to the prevention of further violence.[33] The lack of an ICC referral has been specifically linked to continuing violence. Sérgio Pinheiro, the Chair of the commission set up by the UN Human Rights Council to investigate human rights violations in Syria, asserted in September 2014 that the lack of a referral 'has allowed the warring parties to operate with impunity and nourished the violence that has consumed Syria'.[34]

V R2P AND ICC WORKING TOGETHER?

R2P aims to prevent or stop mass atrocities. The purpose of the ICC is to punish perpetrators of these atrocities. This division of labour would appear to make them ideal complements in the fight against widespread human rights abuses. However, geopolitics and practical considerations make their relationship much more complicated. Coercive R2P action is dependent upon the agreement of the permanent members of the Security Council – or at least an assessment on the part of at least some of the most powerful states that their interests went beyond a veto in the Security Council. In this sense, it is much more a political concept than a legal norm. It is also prospective or present-looking. The ICC is retrospective, in that it seeks punish

[33] Although the current situation in Kenya, where both the President and Vice-President faced proceedings in The Hague, might cast doubt on this eventuality.

[34] UN High Commissioner for Human Rights, 'Statement by Mr. Paulo Sérgio Pinheiro Chair of the Independent International Commission of Inquiry on the Syrian Arab Republic' (16 September 2010), http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15039&LangID=E#sthash.aMEdglxo.dpuf, accessed 7 February 2015.

perpetrators after the fact. Yet, it has a prospective function – to deter atrocities – even if there is little evidence for such an effect yet. And, to the extent it is deployed in the midst of ongoing crises, it also has a conflict management function – it can put pressure on parties to a conflict to come to an agreement, but can have the opposite effect – particularly if the investigation has progressed to the issuance of arrest warrants. At that point, parties to a conflict might have an incentive to keep fighting, thus undermining the goals of R2P. If the ICC is to be used in the middle of conflict, it requires further support from the Security Council and other actors. The ICC cannot stop atrocities by itself; nor can it bring combatants to the bargaining table without further external pressure.

R2P and the ICC could work together to bring an immediate halt to atrocities and remove from positions of power and authority those who perpetrate such atrocities. This requires coordinated efforts by a number of actors. If the country concerned is a State Party, the Prosecutor could initiate an investigation or another State Party could refer the case to the Prosecutor for investigation. The State itself could refer the situation, although such cases to date have led to one-sided investigations, and such an eventuality would not be likely if the main perpetrator of atrocities was the government. Investigations can put pressure on combatants. Simultaneously, the Security Council, or regional bodies such the AU, could support the ICC, by cooperation and coordination, and making a firm commitment to arresting perpetrators identified by the ICC. At the same time, the Security Council could signal its willingness to undertake the requisite forceful action necessary to immediately protect civilians, as well as its resolve that if the situation went too far, it would be necessary for a new political alignment in the country to ensure that such a situation did not occur again. If this did not deter further violence, then the Security Council, in conjunction with regional organisations where relevant, would have to take the necessary military action to protect civilians while arresting perpetrators to prevent those most responsible from initiating further violence.

A number of factors mitigate against such cooperation. First, the ICC is an independent body. It can initiate investigations in countries within its jurisdiction without approval of the Security Council or other bodies. This could potentially come into conflict with global and regional conflict management strategies (indeed this can happen regardless of whether the investigation was initiated by the Prosecutor or members states or the Security Council). Second, to be part of a

coordinated strategy, the permanent members of the Security Council must be in agreement – or at least not willing to block action. Unfortunately such agreement or coordination has been significantly lacking. It was evident in Libya, but when perceived national interests become involved, as in Syria, any such efforts may be blocked. Further, the perceived overreach of the allied forces in Libya to bring about regime change under the banner of R2P leaves many states wary of supporting further R2P action. This could mean that the ICC is turned to by states unwilling to support more robust action, thus implementing half measures. This could be useful in some situations where there is a stalemate at the global level, but any realistic assessment must note that the ICC is not an adequate substitute. But, such a referral might signal that the perpetrators have become illegitimate in some way and pave the way for further action. However, recent experiences such as in Darfur do not hold out much hope for this dynamic. And, there must be support for the ICC in the first place.

Other challenges must also be noted. Even when both R2P and the ICC have been deployed in a situation, the demands of one might come into conflict with the functioning of the other. For example, the ICC needs concrete information from the ground level on atrocities to makes its cases. Peacekeepers and others who have been deployed in the midst of crises will likely possess this information. Yet, for the ICC to expose that this information came from peacekeepers could endanger those peacekeepers or, in situations where this is relevant, undermine their claim to neutrality, which then undermines their ability to do their job.

Peacekeepers might also be given a mandate to capture those who have ICC arrest warrants out against them. This could be a positive complementary relationship. Indeed, the ICC is dependent on other actors – including states and other military forces such as peacekeepers – to arrest and surrender suspects. Yet, the military has frequently been reluctant to do so. Peacekeepers were extremely reluctant to engage in such activity in the former Yugoslavia.[35] More generally, while peacekeepers have been given human rights-related mandates, they may perceive that focusing on human rights broadly and justice more specifically might undermine their mission. While there may be elements of this in all missions, it may be particularly acute in situations where the mission only has limited consent. They would not want to create more tensions with a host

[35] Christopher Lamont, *International Criminal Justice and the Politics of Compliance* (Surrey: Ashgate, 2010).

government. Their overall mission is to stabilize a situation and they would prefer not to create more disturbances. Yet, peacekeepers have many mandates and need to balance them. There may be concern that devoting resources to arresting a suspect would take away resources from civilian protection activities. On the other hand, one might argue that removing leaders who have committed atrocities might lead to a lessening of violence, thus supporting the civilian protection mandate. Peacekeepers would also be worried about getting into a firefight with an armed group which might result in more civilian casualties. One former UN official noted caution in arresting ICC suspects. He argued that it should only be done if it is specifically in the mandate of the mission – he would never consider it without a specific mandate – but such activities require political support and follow-up by the Security Council. Further, it would be all too easy for a mission to become a tool for the government – a 'sharp stick to kill off its enemies'. More broadly it could be seen as one-sided, which would undermine any claims to neutrality which could facilitate its mission.[36]

Finally, to return to the issue of sequencing raised above, the prospects for sequencing were raised with respect to deterrence in the midst of conflict and using the ICC as a prelude for R2P action. Yet, given the potential difficulties created by using the ICC and R2P in parallel, should the ICC be invoked *after* an R2P action has stopped an atrocity? This might mitigate some of the issues related to peace and justice, as well as the difficult positions peacekeepers might be put in. Turning to the ICC after an R2P action could still signal that international norms must be upheld, and that perpetrators must not be allowed to go free. Yet, it seems just as likely that after conflict had ended, there might be momentum against further external intrusion, particularly if it seems likely that potential targets of ICC action will be part of the post-conflict political order. There will be resistance to the ICC from powerful domestic actors, as well as international actors who may be more concerned with order than a perceived undermining of that order by the ICC.

Kenya is a relevant example here. The more diplomatic pillars of R2P were invoked in attempt to stop election violence in 2007, in what some perceived as a successful use of R2P. The ICC then became involved and issued arrest warrants for members of the new government. This led to significant domestic resistance, as well as attempts, as in Darfur, to stop the prosecutions. In the end, the Prosecutor had to suspend proceedings because of a lack evidence

[36] Interview with former UN official, 19 September 2014.

resulting from noncooperation on the part of Kenyan authorities. This is hardly a positive outcome. Accused perpetrators have been able to escape a full accounting of their crimes. There is the possibility that had the ICC been invoked at the same time as R2P, potential ICC targets would have been less likely to end the violence. Yet, in a broader context, it is more likely that momentum for prosecution would be sustained if the ICC is involved as a coherent part of the conflict response, rather than as an add-on when interest calculations on the part of various actors may have changed.

Two issues are key here. First, the point must be stressed again that the ICC is an independent actor, and thus, except in the unlikely event that the Security Council steps into defer a prosecution, the ICC is an empirically and legally separate actor, not subject to the same whims of global politics. Second, from a normative perspective, this distinction *must* be maintained. Anti-atrocity norms are important to uphold in and of themselves, aside from potential consequential benefits or perceived negative consequences. Although it is still intimately tied into global politics, the ICC must be insulated from these dynamics as much as possible. Thus, the ICC as a judicial body must decide upon the right time for it to open an investigation, but the potential positives of early ICC intervention – in-conflict deterrence and pressure, sustained momentum to remove spoilers from a post-conflict situation, and the upholding of anti-atrocity norms – will likely outweigh potential negatives.

VI DEMOCRATIC REPUBLIC OF CONGO

The question of information from peacekeepers became a significant issue in the DRC, where the UN Mission in the Congo (MONUC) provided key information to the ICC. During the proceedings against Thomas Lubanga, the first case to be tried before the ICC, a question arose as to whether information provided by MONUC (as well as some humanitarian NGOs) should be turned over to the defense as potentially exculpatory evidence. The Prosecutor – and MONUC – did not want to turn over the information, since it could lead back to and endanger MONUC operations (as well as those of the NGOs), and impede the flow of necessary information in the future.[37] Yet, the

[37] *Situation in the Democratic Republic of the* Congo, (Decision on the consequences of non-disclosure of exculpatory materials covered by article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008) ICC-01/04-01/

accused is entitled to gain access to relevant information and denying them access could undermine the justice process. In the end a compromise was reached, but the situation highlighted very serious concerns regarding the working relationship between the ICC and those engaged in providing physical protection of civilians.

In the DRC, there was a reluctance to go after ICC suspects, although there were instances where UN peacekeepers contributed to the capture of ICC indictees. In the DRC, there was a Memorandum of Understanding between MONUC and the government – rather than between MONUC and the ICC directly[38] – which indicated that it would 'give consideration' to helping the government arrest those who had arrest warrants from the ICC.[39] It was thus one step removed from a direct relationship between MONUC and the ICC, and was permissive rather than directive. It allowed MONUC to help, but did not require it to – in the same way that the World Summit Outcome Document allowed the Security Council to undertake or authorise R2P action, but did not require it to. This demonstrates a continuing weakness in the relationship between R2P and the ICC, although, in the end, MONUC did contribute to the arrest of Lubanga, as well as Germain Katanga.[40] Yet, it did not attempt to arrest Bosco Ntaganda[41] who, after having an arrest warrant issued against him, became a senior commander in the government armed forces, before rebelling against the government again. During all this time, he was allowed to operate in the open. Mounting an operation to arrest an individual like Ntaganda could be extremely dangerous and costly; yet, MONUC has come under significant criticism for

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Footnote 37 continued
06 (13 June 2008). For a broader discussion of the issue of exculpatory evidence in the Lubanga case, see R. Katzman, 'The Non-Disclosure of Confidential Exculpatory Evidence and the Lubanga Proceedings: How the ICC Defense System Affects the Accused's Right to a Fair Trial' (2009) 8 *Northwest University Journal of International Human Rights* 77. See also, M. Rishmawi, 'The ICC Viewed From the Office of the High Commissioner for Human Rights' (2008) 6 *Journal of International Criminal Justice* 763, 771–772.

[38] M. Melillo, 'Cooperation between the UN Peacekeeping Operation and the ICC in the Democratic Republic of the Congo' (2013) 11 *Journal of International Criminal Justice* 763, 766–768.

[39] *Ibid.*, 769.

[40] G. M. Musila, 'Between rhetoric and action: The politics, processes and practice of the ICC's work in the DRC' (Institute for Security Studies, July 2009) 30–31, http://www.issafrica.org/uploads/MONO164FULL.PDF, accessed 7 February 2015.

[41] Melillo (n 38 above) 773.

coordinating with him while he was in the Congolese army.[42] By participating in the arrest of ICC indictees who were perceived by the government as enemies, while allowing another who was in favor with the government to operate freely, while also engaging in robust military efforts against rebel groups, MONUC risked becoming a 'sharp stick' of the government.

VII UGANDA

Another situation where military operations have become intertwined with the ICC is in Uganda (and beyond) in the fight against the Lord's Resistance Army.[43] Uganda was the first case accepted by the Prosecutor, after a self-referral by the government. The ICC has issued arrest warrants for LRA leader Joseph Kony and several of his lieutenants. The ICC role has been very controversial. First, there have been charges of one-sidedness, given that the ICC has not investigated atrocities committed by government forces, and a perception that the ICC has given sanction to the government's fight against the LRA, as well as against the people of northern Uganda. Second, there is a perception that the ICC has interfered with the peace process and local justice mechanisms.[44]

Most recently, however, the arrest warrants have become wrapped up in broader regional strategies to address the LRA threat. The LRA has not been present in Uganda itself 2005.[45] However, as it has spread throughout the region, so have efforts to stop it. MONUC and its successor mission MONUSCO engaged in operations in the DRC to protect civilians from the LRA in the DRC, although given limited resources this has been in a more defensive than offensive posture,

[42] D. Smith, 'Congo conflict: ''The Terminator'' lives in luxury while peacekeepers look on' *The Guardian*, (6 February 2010).

[43] For an overview of the situation in northern Uganda and the LRA, and the international response, see A. Branch, Displacing Human Rights: War and Intervention in Northern Uganda (Oxford: Oxford University Press 2011).

[44] For an in-depth discussion of these dynamics, see the forthcoming K. Mills, *International Responses to Mass Atrocities in Africa: Responsibility to Protect, Prosecute and Palliate* (Philadelphia: University of Pennsylvania Press, forthcoming 2015).

[45] United Nations Security Council, 'Report of the Secretary-General on children and armed conflict in Uganda' S/2009/462 (15 September 2009) 39.

with only periodic offensive measures.[46] Uganda has engaged in military operations in the DRC, Central African Republic, and the South Sudan. The AU has authorised a force of 5,000 (the African Union Regional Task Force), although it has not been fully deployed, has been dominated by Ugandan forces, and has been restricted in its access to affected areas by political and logistical factors.[47] This effort has been supported by the US since 2011, when the US sent 100 military personnel to support AU operations through training, intelligence operations, etc.[48] Another 150 troops were authorised in March 2014.[49] These troops are part of the recently established US Africa Command (AFRICOM). This deployment was part of the 2010 US 'Strategy to Support Disarmament of the Lord's Resistance Army', which was focused on protecting civilians, arresting (or removing) Kony and other LRA commanders, promoting defections and providing humanitarian assistance. It cited the responsibility to protect in the context of holding those who target civilians to account.[50] The US has also offered a reward of $5 million for information leading the arrest of Kony and his top commanders.

The 'hunt for Kony' has focused on arresting Kony, public support for which has been partially driven by the Kony 2012,[51] campaign which has been criticised for being too simplistic and not

[46] For example, the International Crisis Group noted the limits on the UN peacekeeping operation's capabilities in 2010: 'While MONUC is mandated to support the army in protecting civilians, its almost 1000 Moroccans deployed in Oriental province have neither the necessary numbers nor the intelligence gathering capacity.' International Crisis Group, 'LRA: A Regional Strategy Beyond Killing Kony' (28 April 2010) 13.

[47] K. Agger, 'Blind Spots: Gaining Access to Areas Where the LRA Operates' (*Enough*, November 2013), http://www.enoughproject.org/files/BlindSpots-GainingAccesstoWhereLRAOperates.pdf, accessed 7 February 2015.

[48] T. Shanker and R Gladstone, 'Armed U.S. Advisers to Help Fight African Renegade Group', *The New York Times* (15 October 2011).

[49] H. Cooper, 'More U.S. Troops to Aid Uganda Search for Kony,' *The New York Times* (24 March 2014).

[50] The White House, 'Strategy to Support the Disarmament of the Lord's Resistance Army: A Strategy to Guide United States Support across the Region for Viable Multilateral Efforts to Mitigate and Eliminate the Threat Posed to Civilians and Regional Stability Posed by the Lord's Resistance Army' (Washington, 24 November 2010).

[51] 'Kony 2012: Invisable Children', http://invisiblechildren.com/kony/, accessed 7 February 2015.

understanding the threat posed by the LRA today.[52] It explicitly ties military action to arresting Kony. And while it significantly underestimates the challenge posed by arresting Kony, such efforts have been supported by human rights campaigners, including the Executive Director of Human Rights Watch, Ken Roth, who advocated 'the humanitarian use of force… to arrest Joseph Kony'.[53] Indeed, there is an obvious connection between military efforts which could be used to protect civilians while also looking for Kony. Yet, there is significant danger that any military action becomes so focused on finding Kony that both proportionality – the resources expended and more importantly the potential collateral damage – and the focus on protecting civilians could be undermined. When the focus becomes one individual who becomes demonised – as happened in Somalia with Mohamad Farah Aideed, or indeed, with Saddam Hussein in Iraq – the actual purpose of such initiatives like R2P or the ICC can be set aside.

VIII CONCLUSION

There are obvious connections between R2P and the ICC. They both address the problem of mass atrocities, although in significantly different ways. They can both be part of a strategy to deal with potential or ongoing atrocities. R2P actors can help to apprehend those with ICC arrest warrants issued against them. They are also both tied into the highest reaches of global power, which means they are also subject to the whim of that same power. While there are potential synergies, there are also potentially significant antagonistic interactions between the two. The ICC can get in the way of global or regional conflict management strategies. And, it can provide an excuse for not engaging in more effective actions, including military operations, to protect civilians. Much more thought must be given to questions of sequencing, while the Security Council and other actors must provide more support for the ICC, in particular when they invoke it as part of a strategy to deal with mass atrocities.

[52] M. Wilkerson, 'Kony 2012 campaign: Oprah and bracelets won't solve problem' (*The Guardian*, 8 March 2012), http://www.theguardian.com/commentisfree/2012/mar/08/kony-2012-campaign-oprah-and-bracelets, accessed 7 February 2015.

[53] K. Roth, 'A Plan B for President Obama: Get Tough on Human Rights,' (*Human Rights Watch*, October 2010), http://www.hrw.org/news/2010/10/12/plan-b-president-obama-get-tough-human-rights, accessed 7 February 2015.

More concretely, what might we take away from this discussion? There is a paradox in the relationship between the ICC and R2P. On the one hand, the ICC, by its very nature as a judicial body, needs to be free of political influence to do its job. On the other hand, it was created by a global political process and it has a formal relationship with the most powerful of political global institutions – the UN Security Council – which has primary responsibility for implementing R2P when states do not live up to their responsibility.

The Security Council must thus make a series of determinations in each civilian protection situation where the ICC has been, or could, be invoked – either by states, the Prosecutor, or the Security Council itself. Would such a referral delegitimise relevant actors in a conflict, thus weakening them and potentially contributing to the resolution of the conflict? Or would it further entrench leaders, thus undermining conflict resolution and the protection of civilians? Would an ICC referral enhance post-conflict justice, thus removing perpetrators from power and contributing to the prevention of atrocity recurrence? Or would it undermine local attempts at reconciliation? Although the peace vs. justice debate has been prominent in a number of situations, such as Darfur and Uganda, there is not a lot of evidence that ICC investigations and arrest warrants have undermined realistic peace prospects (vs. being used as an excuse to avoid peace). If actually enforced, ICC action could have the significant positive effect of removing potential spoilers when trying to implement peace. But this requires actual support by the Security Council and member states, which has not been forthcoming. But if support was provided and perpetrators were arrested, this could reduce the necessity for future R2P action to address a resurrected conflict.

Similar questions relate to potential deferrals. Would deferring a prosecution re-legitimise those who are being investigated or prosecuted? Would it thus re-energize a conflict, or would it provide space for reaching a political settlement? Would deferring prosecution make it more likely that leaders who have overseen atrocities could stay in power? If leaders are able to stay in power, it is unlikely that the fundamental causes of the conflict will be addressed, even if a superficial peace is attained, and thus the possibility of conflict will still be there. It is unlikely that deferring prosecution is going to lead to sustainable peace in many situations.

Regardless of what calculations are made – and it is not clear that Security Council has used a coherent framework to weigh such issues – the Security Council and other actors, including the Prosecutor,

need to ensure that they do not undermine the core principles of the ICC. Thus, when the ICC is invoked, it must be clear that all parties to a conflict are potentially subject to investigation, and then investigations of all culpable parties, regardless of affiliation, should be investigated. Further, while it should generally refrain from using its Article 16 power to suspend ICC proceedings in a case, if it does take this action, it should do so with the clear understanding that this is, and must be, a temporary measure. It must take this into account in its approach to addressing the conflict. If it does not uphold these core principles of the ICC and non-impunity more generally, there is a serous risk that these principles fall at the feet of global expediency. And it would be a potentially damaging acceptance of the highly contentious and simplistic[54] argument that there is a fundamental conflict between peace and justice. Threats of prosecution or promises of impunity could become just part of the peacemaking "toolkit," to be invoked in a much more consequentialist manner,[55] again undermining the normative basis of the emerging responsibility to prosecute.

Beyond any consequentialist arguments, we must also recognize that the utility of deferring a prosecution is likely much less than its proponents assume. This is partly due to the time constraints on deferral already noted – how many times would a deferral actually be renewed? Further, given the much broader international criminal justice regime and the global 'justice cascade',[56] a rational actor would not necessarily bet their long-term future on permanent impunity. In this context, the Security Council might also consider referring a situation to the ICC after the conflict has ended. While this might run the risk of reigniting conflict, it might also create the conditions for removing a perpetrators from a post-conflict situation, ensuring that they could not stir up trouble again. This would only happen if domestic processes had not taken some measures to ensure justice, and might take the pressure off of domestic institutions which might not be able to adequately address justice issues. It might also

[54] E. Lutz, 'Transitional justice: Lessons learned and the road ahead', in Naomi Roht-Arriaza and Javier Mariezcurrena (eds), *Transitional Justice in the Twenty-First Century: Beyond Truth versus Justice* (New York: Cambridge University Press 2006) 327.

[55] L. Vinjamuri, 'Deterrence, Democracy, and the Pursuit of International Justice' (2010) 24 *Ethics & International Affairs* 191.

[56] K. Sikkink, *The Justice Cascade: How Human Rights Prosecutions Are Changing World Politics* (W. W. Norton 2011).

energize those same institutions to be more proactive in bringing justice to victims.

The Security Council must provide better support through material and mandatory means. Instead of putting the burden of financing on ICC member states, as it has in Darfur and Libya, it must provide adequate financial resources to the ICC to carry out its investigation and potential prosecutions. If the Security Council finds that a situation is a threat to international peace and security and argues that one appropriate way to address the situation is to engage justice and accountability mechanisms, from a principled point of view it must back up that determination financially. One way to do that might be to allow the possibility of the UN General Assembly to provide providing out of the regular UN budget. A more politically difficult approach would be to have such investigations funded in the same way as peacekeeping missions. Given their responsibility for substantially funding such missions, there will be little support for this option among the permanent members. However, such activities are vastly cheaper than peacekeeping operations and if they can somehow substitute for such operations (which is unlikely) or contribute to creating a situation where an operation might be shortened or not have to reengage because relevant perpetrators have been arrested and thus cannot continue or reignite conflict (somewhat more likely), the ICC might seem like a bargain. Further, to avoid charges of hypocrisy, the Security Council should not exclude non-state member nationals from the jurisdiction of the ICC in the context of the particular investigation, nor should they be exempted from obligations to cooperate with the ICC in its investigations or in its implementation of arrest warrants. Such actions might expose those who engage in Security Council-mandated R2P actions to investigation, an eventuality which the US wants to avoid. Yet, two permanent members – France and the UK – which participated in the Libyan intervention, are already subject to ICC jurisdiction, with little negative consequence. Maintaining such exemptions will just further fuel charges of hypocrisy and undermine the perceived legitimacy of such referrals. In addition, the Security Council has failed to follow up when notified by the ICC of non-compliance with state obligations to arrest suspects. This further undermines faith in the Security Council and its intention to ensure that its resolutions are upheld.[57]

[57] Chatham House (n 19 above) 7–9.

Finally, where peacekeepers and other R2P actors are involved on the ground, they should be mandated, where feasible, to arrest subjects. While peacekeepers will be justifiably wary of diverting resources which might be used to more directly protect civilians, and will not want to get into extended firefights to arrest one person, instances where peacekeepers have stood by and allowed those with ICC arrest warrants against them to operate with impunity demonstrate a need for a rethinking of the relationship between peacekeepers and justice. Indeed, arresting and taking out of commission the worst perpetrators could have a direct positive impact on civilian protection and create a demonstration effect for other potential perpetrators. The fact that MONUC played a role in the arrests of two individuals demonstrates that there can be positive cooperation between those tasked with carrying R2P-related protection of civilian activities and the ICC.

In sum, there are inherent tensions between R2P and the ICC. They do not always sit comfortably together. Yet, there are also significant possibilities for cooperation and mutual support between these two innovative approaches to dealing with mass atrocities. As always, whether these two work together will come down to political will at the highest levels of global political power to implement them, and to do so in a principled manner.