A Fatal Attraction? The UN Security Council and the Relationship between R2P and the International Criminal Court

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Introduction: R2P and the ICC - An Under-investigated Relationship

Given that the relationship between the Responsibility to Protect (R2P) and the International Criminal Court (ICC) goes to the very heart of the politics of international justice it comes as surprise that few have attempted to establish and interrogate the relationship between them. However, recent events – particularly the case of Libya where both R2P and the ICC were invoked – have created a clear need for scholars and analysts to address questions regarding how R2P and the ICC relate and operate in practice. If both are to be increasingly called upon as responses to mass atrocities, understanding the relationship between these two modes of intervention is of immense importance.

In exploring and analyzing the relationship between R2P and the ICC, this paper proceeds in five sections. First, the chapter elucidates the typical understanding of the relationship between R2P and the ICC, one in which the Court and R2P fit neatly within a 'protection continuum'. The second section argues that the relationship is, in fact, much deeper. R2P and the ICC share a common political ethos, liberal cosmopolitanism, which seeks to replace the nation state and national sovereignty with individual human as the primary referent of international politics. However, as argued in section three both R2P and the ICC have become increasingly tethered to the power-politics of the United Nations Security Council (UNSC), a trend that undermines the ability of either R2P or the ICC to achieve liberal cosmopolitan ends. The fourth section examines the case of Libya, illustrating how the role of the UNSC as the dispenser of R2P and the ICC in Libya coloured the invocation of both in ways that reflected the particular political interests and attitudes of the UNSC members and undermined the liberal cosmopolitan intention of R2P and the ICC. The paper concludes with some reflections on the future of both R2P and the ICC, their relationship to the UNSC and its implications for liberal cosmopolitan projects in international relations.

1 I would like to thank Kirsten Ainley, Toni Erskine, Naomi Head, Joe Hoover, Paul Kirby and Elke Schwarz for their helpful comments on earlier drafts of this paper.

I. The ICC for R2P and R2P for the ICC

R2P and the ICC have generally been viewed as constituting a 'protection continuum' encompassed within R2P's three pillars. The ICC, and ending impunity more broadly, is thus viewed as part of R2P's 'responsibility to prevent', wherein the Court seemingly fits comfortably and unproblematically in the prevention-side of R2P. As such, the ICC is seen as a 'tool' in the R2P 'toolbox'. This understanding is shared by both proponents of the Court and R2P.

The ICC's Chief Prosecutor, Fatou Bensouda, alluded to precisely this arrangement in remarking that “[t]he Court should be seen as a tool in the R2P toolbox” (emphasis added).4 Gareth Evans, a co-author of the ICISS report, likewise sees the ICC “as a relevant tool, as a relevant form of leverage that we ignore at a cost if we don't use that leverage to the fullest effect” (emphasis added).5 For Bensouda and Evans, the threat of investigation and prosecution can be wielded against states failing in their responsibility to protect their own citizens from atrocities. Under this interpretation, the Court is invoked before military intervention becomes necessary, in the hope that judicial intervention will have a deterrent effect on the commission of large-scale human rights abuses.6 In this understanding, the ICC exists to make R2P work better.

Along similar lines, Steven Roach has argued that the ICC can act as an evidence-gatherer which can then be tapped in order to justify military intervention. Doing so, he argues, addresses the logistical and informational limitations that have characterized the Security Council's inaction in the face of atrocities.7 Michael Contarino and Selena Lucent concur, arguing that the ICC should be used to assess whether states have failed in upholding their responsibility to protect citizens, and thus “could help develop a faster, more effective, more predictable, and more impartial R2P enforcement mechanism.”8

While the general, cooperative understanding of the relationship between R2P and the ICC

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3 A. Bellamy, 'Responsibility to Protect – The Global Effort to End Mass Atrocities', (UK: Polity, 2009), pp.118-128
4 See remarks by Fatou Bensouda, R2P in 2022, (January 18, 2012), at www.stanleyfoundation.org/r2p.cfm
5 Remarks by Gareth Evans, 'The Responsibility to Protect (R2P) — From ICISS to Today', (January 18, 2012), at www.stanleyfoundation.org/r2p.cfm
8 M. Contarino and S. Lucent, 'Stopping the Killing: The International Criminal Court and Juridical Determination of the Responsibility to Protect' (October 2009) 1 Global Responsibility to Protect p.560
subsumes the Court under the rubric of R2P, it is also possible to consider how R2P can contribute to the mandate and purpose of the ICC. In arguing that the relationship between the ICC and R2P can be symbiotic, Frédéric Mégret claims that the ICC is an institution which is able to place and highlight the individual victim’s experience but, without an enforcement mechanism or police force, is unable to alter on-the-ground realities. R2P, on the other hand, Mégret maintains, is less victim-oriented but, in intervening politically, economically, diplomatically and militarily, has the ability to create substantial changes to domestic contexts. Thus, R2P and the ICC “arguably [have] in store for the other what it is missing.”

A primary criticism of the ICC – and of international criminal justice more generally – is that the Court is ineffective in preventing atrocities because it does not have the capacity to enforce its arrest warrants without cooperation from states. International criminal justice, critics argue, is neutered by its lack of an enforcement mechanism. Working in tandem, however, R2P-based interventions could act as the enforcement mechanism for ICC arrest warrants and/or provide the Court with adequate space and security in which the Court can investigate crimes. R2P could thus offer the ICC a jurisdictional and functional opening into situations that the Court could not otherwise permeate. Importantly, however, this requires that the aims of R2P-based international intervention be consistently in synch with the judicial goals of the Court, something that, as argued below, has not been the case.

There is more to the relationship between the ICC and R2P. They share a common foundation that runs deeper than their existence on a humanitarian or protection continuum. Specifically, both R2P and the ICC share a ethico-political foundation: liberal cosmopolitanism.

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9 Mégret (2010), p.6
II. A Deeper Affinity: The Liberal Cosmopolitan Intentions of R2P and the ICC

There is a shared political and ethical affinity between R2P and the ICC, one which stems from a shared political ethos: liberal cosmopolitanism. The section first elucidates what is meant by a liberal cosmopolitan political ethos and then demonstrates that this ethical vision of international politics is the political and ethical tether that binds the doctrine that is R2P to the institution that is the ICC.

(i) Liberalism, Cosmopolitanism and Liberal Cosmopolitanism

Broadly understood, liberalism is a product of Western Enlightenment philosophy, brought to the international political fore by 20th century 'liberal internationalists'. At its core, liberalism is a belief in the combination of the principles of individual liberty, rights and freedom. Liberalism advocates “political freedom, democracy and constitutionally guaranteed rights, and [privileges] the liberty of the individual and equality before the law.”

Defining cosmopolitanism is no easy task given the lack of any consensus definition and the fact that the boundaries between its variants are often blurred. Nevertheless, cosmopolitanism is taken here to be an ideology grounded in a “consciousness of being a citizen of the world, whatever other affiliations we may have”. It is a universalist ethic espousing the existence of a “worldwide community of human beings” and the existence of universally shared and universally desired values. Cosmopolitanism has been advanced through a narrative “which seeks to reframe human activity and entrench it in law, rights, and responsibilities” and thus seeks to affirm the “irreducible moral status of each and every person”.

Both liberalism and cosmopolitanism view the individual, and not the community or state, as the key international moral actor and, as Molly Cochran claims, place moral value on individual autonomy, attributing “to the individual a capacity to choose one's life, unencumbered by social attachments.” In international relations, liberal cosmopolitanism has posed a challenge the realist

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14 Ibid., p.242
16 D. Held, 'Violence, law, and justice in a global age' (2002) 9 Constellations 75-80
17 M. Cochran, 'Normative Theory in International Relations: A Pragmatic Approach', (United Kingdom: Cambridge University Press, 1999), pp.9-11
mantra of the 'morality of states', wherein states are deemed “the crucial ethical actors in the international context” and “the principles of international ethics [are based] on the principle of state sovereignty.”

The impact of liberal cosmopolitanism on the architecture of the contemporary international society has been impressive. Perhaps its most obvious manifestation is the human rights regime. Moreover, as Chris Brown notes, “[t]he Universal Declaration and subsequent elaborations thereof can serve as a practical summary of what is entailed by cosmopolitan liberalism,” with the human rights regime existing as “a rough approximation of the package of norms and practices that ought to be universally observed.” In short, liberal cosmopolitan ideas have played a central role in shaping legal and political developments in twentieth century international society.

With the end of the Cold War, liberal cosmopolitan-inspired and oriented projects found space to flourish and challenge the ethical and political primacy of state sovereignty. The result was a flurry of institutional and intellectual activity which reflected both liberal and cosmopolitan convictions. Not only did liberal cosmopolitan convictions spur the creation of the ICC and R2P; the concepts and practices of human security, liberal peacebuilding and failed states can all be seen as products of similar institutional and intellectual predilections. All share a fundamentally liberal cosmopolitan presumption: that the ethical and political unit to be 'protected' should not be the state but rather the individual human being.

(ii) The ICC: A Liberal Cosmopolitan Court

Central to the establishment of the ICC is the notion that individuals – and not states – are responsible for violations of human rights; “holding only states responsible...stood in the way of human rights enforcement”. The Court thus seeks to hold individual perpetrators – those bearing the greatest responsibility for war crimes, crimes against humanity and genocide – accountable, reflecting the shift to focusing on individual agency and individual perpetrators of atrocities, wherein “[g]uilt, evil, is defined strictly in individual terms.” Kirsten Ainley has described this shift as “a corollary of the

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20 Ibid.
22 M. Glasius, 'The International Criminal Court – A Global Civil Society Achievement', (United Kingdom: Routledge, 2006), p.29
increasing focus on the individual, rather than the state, as the key agent in international politics,” and the “result of the rise of cosmopolitan liberalism.”

The creation of the ICC was a remarkable triumph for liberal cosmopolitans. As Seyla Benhabib notes, the Court is an acknowledgement that “cosmopolitan norms of justice accrue to individuals as moral and legal persons in a worldwide civil society.” Yet not only is the ICC itself a product of liberal cosmopolitanism; some have argued that state support for and “expectations of the ICC are shaped by different forms of the cosmopolitan political imagination.” (emphasis added)26

Of course, to say that the ICC constitutes a complete victory for liberal cosmopolitans would be misleading. The ICC is the product of a “perpetual accommodation of the hopes for cosmopolitan justice and the requirements of sovereignty and particularity.” Nevertheless, given the relentless efforts of liberal cosmopolitan groups and individuals, the ICC stands today as a remarkable achievement for international actors inclined towards a liberal cosmopolitan vision of international politics. The Court embodies a “cosmopolitan intent: namely, its desire to ensure states parties’ primary attachment or primary loyalties to the whole of humanity.”

(iii) R2P: Liberal Cosmopolitan Protection and Intervention

Like the ICC, R2P also seeks to challenge the state-centric status quo of international politics by placing the individual human and her experience first. To resolve the inherent contradiction of espousing the universality of human rights whilst maintaining the inviolability of state sovereignty, an independent panel, the International Commission on Intervention and State Sovereignty (ICISS) was established by the Canadian government in 2001. Its report, The Responsibility to Protect, was delivered in 2001 and sought to “square the circle...[by reconciling] respect for human life with state sovereignty.” The key to R2P was “that human beings sometimes trump sovereignty.”

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24 Ainley, (2008), p.2
28 This is most evident in the failure to establish universal jurisdiction for the Court. See Glasius (2006), pp.61-76
squares human rights with sovereignty by reaffirming the sovereign rights of states but claiming that sovereignty itself is conditional on the state's ability and willingness to protect their citizens from war crimes, crimes against humanity, genocide and ethnic cleansing. When states fail or are unable to do protect its people, the duty to protect those citizens is transferred to the international community.

For one observer, R2P thus “de-centers the state as the actor par excellence in international relations in favor of people, actual human beings, who are not after all subject beyond question to the whims of their rulers.”32 Similarly, David Chandler writes that advocates of R2P – and humanitarian intervention more broadly – uphold claims “that new international norms prioritizing individual rights to protection promise a framework of liberal peace and that the Realist framework of the Cold War period when state security was viewed as paramount has been superseded.”33

Critically, it is the liberal cosmopolitan political ethos which both determines and justifies intervention in order to 'protect' and 'save strangers'.34 Those states which clearly violate and undermine liberal cosmopolitan norms, are candidates for international intervention. As Karina Sangha puts it, “[g]iven the existence of universal human rights which, in turn, impose universal moral duties on humanity, if a state fails to protect the rights of its citizens, the primary purpose for which it was established, then this responsibility falls on other states, which serve as the collective representation of their citizens.”35 Intervention, then, is both possible and justified on the basis that it is waged in the name of a liberal cosmopolitan conception of humanity.

(iv) R2P and the ICC: Two peas in a Liberal Cosmopolitan Pod?

Of course, some may argue that neither the ICC nor R2P are entirely liberal cosmopolitan projects. Indeed, neither the ICC nor R2P are in opposition sovereignty,36 Still, both were intended, at their core, to renegotiate the very meaning of sovereignty along liberal cosmopolitan lines. As Mégret argues, “[b]oth R2P and the ICC, in their own ways, are part of projects to tame or civilize the power incarnated by sovereignty on the basis of a vigorous cosmopolitan outlook that emphasizes the

32 T. Lindberg, 'Protect the People', Washington Times, (September 27, 2005); see also Bellamy, Alex J., 'Wither the Responsibility to Protect? Humanitarian Intervention and the 2005 World Summit' (Summer 2006) 20 Ethics & International Affairs 143-169
33 D. Chandler, 'The Responsibility to Protect? Imposing the 'Liberal Peace'' (Spring 2004) 11 International Peacekeeping 59
36 See also Mégret (2010), p.19

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transcendent and universal character of obligations owed to human beings.”

It is often suggested that the crimes covered by R2P and the ICC are so grave that they are in the interest of the 'international community' as a whole. Indeed, they are intended to be. But they don't stop there. Responding to the perpetration of war crimes, crimes against humanity, genocide and, in the case of R2P, ethnic cleansing, is intended to be in the interests of *humanity* as a whole. For liberal cosmopolitanism, the only legitimate international community *is* humanity. In this context, international politics is to be displaced from a state-centric position where 'right is might' to an individual-centric model based on 'human rights'. Both the ICC and R2P should thus be viewed as attempts to legalize and moralize international relations under the mantra of liberal cosmopolitanism.

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37 Ibid., p.17
III. The UN Security Council, R2P and the ICC: A Fatal Attraction?

Since their liberal cosmopolitan beginnings, both R2P and the ICC have drifted towards the power politics of the UN Security Council. As Mégret poignantly argues, R2P and the ICC “share a tendency to gravitate towards the very power that they are supposed to constrain...a tendency to reinforce that which they claim to transcend, sovereign states on the one hand, and the UNSC on the other.”38 Both R2P and the ICC were inspired by the limitations of the UNSC to appropriately and effectively intervene – judicially and militarily.39 Yet, rather than provide any real challenge to the functioning of the Council, both R2P and the ICC affirmed the Council's power, authority and legitimacy in international law and politics.

(i) R2P and the UN Security Council

While the question of the UNSC's authority did instigate some debate within the ICISS, it quickly became clear that R2P was about making the Council “work better” rather than establishing an alternative framework for intervention outside of the Council.40 Unsurprisingly, then, the ICISS endorsed a vision of R2P which fit within the mandate of the Council:

There is no better or more appropriate body than the United Nations Security Council to authorise military intervention for human protection purposes. The task is not to find alternatives to the Security Council as a source of authority, but to make the Security Council work better than it has.41

Importantly, however, while reaffirming the primacy of the UNSC over matters of international military intervention, the ICISS report also “expressed some misgivings about relying on the Council to act as the 'proper authority' for military action related to RtoP”.42 As a result, the report suggested that, in cases where the Council was deadlocked and unable to intervene, alternatives were available: having the UN General Assembly consider the matter of intervention or having regional or sub-regional organisations intervene under Chapter VIII of the UN Charter and “seeking subsequent authorisation from the Security Council.”43 Even more firmly, the ICISS warned that a Security Council unable or unwilling to intervene in the face of atrocities was no justification for inaction:

38 Mégret (2010), p.15
39 A similar point is made by Mégret (2010), p.23
40 See Bellamy, (2009), pp.47-8
41 See ICISS (2001), pp.XII
42 J. Welsh, 'Civilian Protection in Libya: Putting Coercion and Controversy Back into RtoP' (2011) Ethics & International Affairs, p.3
The Security Council should take into account...that, if it fails to discharge its responsibility to protect in conscience-shocking situations crying out for action, concerned states may not rule out other means to meet the gravity and urgency of that situation...\(^{44}\)

When it came to negotiating R2P at the UN's World Summit in 2005, the contours laid out by the ICISS inspired little consensus.\(^{45}\) In the background of the negotiations loomed the controversial question of the American and British invasion of Iraq, which had not received approval from the UNSC and which had been justified by the US and the UK on (very questionable) humanitarian grounds.\(^{46}\) This contributed to an atmosphere wherein proposals for a doctrine of intervention outside of the Council were likely to fall on deaf ears.\(^{47}\)

Compromise was reached with a watered-down version of the doctrine. Critically, it was “wedded to Security Council authorization...[placing] the authorization of intervention squarely under the rubric of the Security Council” (emphasis added).\(^{48}\) The final product, elucidated in the World Summit Document, was thus a rather distilled version of the ICISS' vision responsibility to protect, one diluted into the body of two paragraphs, the second of which clearly proclaimed that the authority of the doctrine resided solely within the UNSC.\(^{49}\)

With the World Summit Document, the UN General Assembly confirmed the primary tenets of the R2P equation: states have a responsibility to their people and when this responsibility is shirked, it is transplanted onto, and assumed by, the international community. There thus remained only two legitimate sources of 'protection' for citizens from mass atrocities: the state or via the UNSC, a situation not much different then it had been for decades.

Yet the tethering of R2P to the UNSC need not necessarily be viewed as entirely deleterious. The fact that there is any doctrine of the responsibility to protect was not, it should be noted, a pre-ordained conclusion. As noted above, in the wake of the invasion of Iraq, there was a widespread sense that any intervention needed to be grounded in international law and that this could only be achieved by grounding R2P in the Security Council. Without a significant reform of the UN itself, it is difficult to imagine international interventions being granted both legitimacy and legal-standing outside of the

\(^{44}\) Ibid.
\(^{45}\) Bellamy, (2006), pp.151-152
\(^{46}\) Ibid., p.153
\(^{47}\) Ibid., p.168; Bellamy, however, also accepts that while R2P as outlined in the World Summit Document “does not advance the question of how to deal with unauthorized intervention...it does not preclude the possibility of action outside of the council.” Ibid.
\(^{48}\) Ibid., p.155
UNSC. Taken in this context, the fact that R2P can only be dispensed by the Council may be, at most, a necessary evil, and the inclusion and description of R2P in the World Summit Document can be seen as the product of consensus-building and compromise, albeit representing “a rather curious mixture of political and legal considerations.”

It remains clear that in its World Summit Document form, R2P is a product not of “the power of humanitarian argument but [of] bargaining away key tents of the ICISS's recommendations.” Even for its greatest and most thoughtful advocates, “the summit's language could be seen as a step backward.” As Simon Chesterman sharply declares, “by the time RtoP was endorsed by the World Summit in 2005, its normative content had been emasculated to the point where it essentially provided that the Security Council could authorize, on a case-by-case basis, things that it had been authorizing for more than a decade.” In its World Summit Document instantiation, R2P was virtually guaranteed to be invoked not when humanity needed it, but selectively, when the Security Council powers saw it fit.

(ii) The ICC and the UN Security Council

The relationship between the UNSC and the ICC played a dominant role in the Rome Statute negotiations. Proponents were concerned that giving the UNSC too much influence over the functioning of the ICC would deeply politicize the Court and place international criminal justice at the whim of the Council's five permanent members. They thus sought a Court that would be independent of the Council, centered around an independent Chief Prosecutor. Security Council members – especially the United States, Russia and China – opposed an independent Prosecutor who, they felt, could handcuff the Council in its role of maintaining and restoring international peace and security. The result of these debates was a compromise position which appeared to assuage the concerns of all sides. The so-called “Singaporean compromise” was reflected in Article 16 of the Rome Statute, which proclaims that the Security Council can defer any ICC investigation or prosecution deemed to be a threat to international peace and security by up to 12 months (renewable yearly). In addition to the

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52 Weiss, (2007), p.117
53 S. Chersterman, “‘Leading from Behind’: The Responsibility to Protect, the Obama Doctrine, and Humanitarian Intervention in Libya” (2011) Ethics & International Affairs, pp.2
54 Glasius (2006), p.47-60
55 Negotiators eventually achieved a compromise which allowed the UN Security Council to defer investigations and prosecutions for twelve months, renewably. (See Rome Statute, Article 16)
56 Glasius (2006), p.56
57 Ibid., p.51
58 Article 16, Rome Statute (1998)
Security Council's ability to halt an ICC investigation or prosecution, the Council is also able to refer non-member states to the Court under Chapter VII of the UN Charter. To date, it has done so on two occasions – Darfur (2005) and Libya (2011).

As suggested above, the primary concern with the UNSC's referral power is that it tethers the apparently impartial and independent Court to the partial and political Council. Placing international criminal justice at the ultimate discretion of the Security Council would see to affirm the power hierarchy of international relations that is the very antithesis of international criminal justice as a liberal cosmopolitan project.

In theory, however, the relationship between the Court and the Council need not be seen as inherently negative. Given the ICC's lack of any enforcement mechanism, some believe the Security Council's “[c]ooperation with the Court is absolutely necessary in terms of executing and enforcing arrest warrants, collecting and protecting the evidence and witnesses, and exchanging information.”

This mutually enforcing vision has been adopted by the Court's Office of the Prosecutor, which has argued for a division of labour where the UNSC is responsible for international peace and security while the ICC is responsible for international justice.

However, the practice and eager acceptance by the ICC of UNSC referrals blurs the distinction between peace and justice, whilst reaffirming the primacy of the most powerful states, namely the permanent members of the Security Council. This inevitably politicizes the ICC's work. As Louise Arbour, former Chief Prosecutor at the ICTY and ICTR recently argued:

> [I]nternational criminal justice cannot be sheltered from political considerations when they are administered by the quintessential political body: the Security Council. I have long advocated a separation of the justice and political agendas, and would prefer to see an ICC that had no connection to the Security Council. But this is neither the case nor the trend.

Christian Wenaweser, until recently the President of the ICC's Assembly of States Parties also expressed concern about the UNSC's role in the work of the ICC, stating that “[t]here is little diplomatic political support from the Security Council on referrals and it is not likely to come....In the future we have to think about the benefits for the Court.”

William Schabas interprets Wenaweser's

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59 Article 13b, Rome Statute (1998);
63 See remarks by Christian Wenaweser at W. Schabas, 'The International Criminal Court at Ten', PhD Studies in Human Rights, (February 15, 2012) at http://humanrightsdoctorate.blogspot.co.uk/2012/02/international-criminal-court-at-
comments as suggesting that “we don’t need any more Security Council referrals.”

Still, the situation for the ICC is more murky than clear. Given the current state of international relations, the ICC is 'stuck between a rock and a rock place' in its relationship with the Security Council. Apart from UNSC referrals, the ICC can only open cases in those states which sign and ratify the Rome Statute or which refer themselves to the Court. Clearly, many of the worst violators remain outside of the Court's judicial remit. Where this is the case, the ICC requires the UNSC to refer a situation to the Court, as has been the case with Darfur and Libya. Yet, in accepting the UNSC as its patron, the Court tethers itself to the Council's power-politics, thus politicizing its own work. A paradox thus emerges: on the one hand, a closer relationship between the power-politics of the UNSC and the ICC diminishes the independence, impartiality and legitimacy of international criminal justice; on the other hand, without cooperation between the UNSC and the ICC some of the worst atrocities would never be investigated, a fact which itself may hinder the Court's standing and legitimacy. It is notable, however, that this dilemma appears to be rarely considered by the Court or its advocates, many of whom openly celebrate the increasingly close relationship between the ICC and the Security Council.

(iii) The Fight for Legitimacy: Who Wins?

There appears to be a trend towards accepting that R2P and the ICC should work hand-in-hand with the UNSC. If it weren't for the Security Council endorsing these projects, they would be largely hollow, naive and idealistic. By getting the recognition of the UNSC's major powers and by being taken seriously by the world's most powerful states, R2P and the ICC get to play in the 'big leagues' and bolster their legitimacy. Ideally, then, the invocation of R2P or the ICC by the Security Council legitimizes all three.

For the ICC, it has been argued that UNSC “referrals create 'a mutual legitimacy push [constituting] the evolving normative benefits of mutual assistance or collaboration between institutional players' sharing those values that shape the rules considered to become legitimate as well.’” As for R2P, it seems implausible for the doctrine to achieve legitimacy by being applied outside

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64 Ibid.
66 See case of Libya, below; see also M. Kersten 'Between Justice and Politics: The International Criminal Court's Intervention in Libya', in Carsten Stahn, Christian De Vos and Sara Kendall (eds.), International criminal justice and 'local ownership': Assessing the impact of justice interventions, (Forthcoming, 2013)
67 See Roach in Vanhullebusch, (2008), p.27

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of the Security Council. Where where the doctrine is invoked outside of the Council, as in the case of Russia's 2008 invasion of Georgia, are likely to be viewed as illegitimate. But the biggest winner in the legitimacy sweepstakes, it would seem, is the UNSC itself.

By invoking the justice of the ICC or the humanitarianism of R2P, the Security Council frames intervention within the powerful and persuasive rhetoric associated with these liberal cosmopolitan projects. Some argue this is precisely what should occur. If done impartially and effectively, as Contarino and Lucent maintain, an enhanced relationship between R2P and the ICC “could strengthen the credibility of the United Nations Security Council, and could be politically appealing to its five permanent members.” The ICC's former Chief Prosecutor, Luis Moreno-Ocampo, has also appeared eager to combine forces, declaring that “the International Criminal Court could add legitimacy to the Security Council's decision to apply the Responsibility to Protect.”

In this context, there is a real risk that Security Council interventions are framed as being intended to 'save', 'protect' and bring 'justice' to victims, obfuscating less altruistic motives of intervention and the power asymmetries that are produced and reproduced by Security Council interventions. Humanitarian language gets used for interventions – both judicial and military – which are not humanitarian. International protection and justice emerges as a potential monopoly of the most powerful UNSC member states. For both R2P and the ICC, this signals a rather remarkable transformation from where the Security Council was “seen as corrupting of both the sanctity of international justice and the neutrality of humanitarian intervention” to a point where the Council is seen as the primary, perhaps only, legitimate guarantor of both.

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68 International Coalition for the Responsibility to Protect, 'Global Centre for R2P's Background Note on Georgia and Russia', at www.responsibilitytoprotect.org/index.php/component/content/article/133-europe/1815-global-centre-for-r2ps-background-note-on-georgia-and-russia; see also Gareth Evans, 'Russia, Georgia and the Responsibility to Protect' (2009) 1 Amsterdam Law Forum
69 Mégret, (2010), p.31
70 Contarino and Lucent 2009, pp.560. Contario and Lucent go on to argue that “The record to date suggests that if determination of R2P remains the sole prerogative of the UN Security Council, R2P may be little more than an ideal respected primarily in the breach.”
71 L. Moreno-Ocampo, 'The Responsibility to Protect: Engaging America', (November 16, 2006), pp.28; See also Mégret, (2010), p.31
72 Mégret, (2010), p.22
IV. The UN Security Council, the ICC and R2P: the Case of Libya

Prior to the onset of the so-called 'Arab Spring', few could have predicted that Libya would be the target of either a judicial intervention by the ICC or a military intervention under a R2P mandate. As Alex Bellamy points out, no crisis or conflict monitoring group had Libya on their “at risk” lists. On the contrary, just months before Gaddafi’s crackdown on protesters, an impressive number of states had praised Libya's human rights record during the country's Universal Periodic Review, while Foreign Policy's 2010 Failed States Index ranked Libya 111th in the world – ahead of India, Turkey, Russia and Mexico. Yet, in the span of a few weeks in February and March 2011, two unprecedented Security Council resolutions were passed in response to the devastating threat posed by the regime of Muammar Gaddafi against Libyan civilians. Both illustrated the extent to which the Court and the R2P doctrine are shaped by the political machinations of the most powerful UNSC states.

(i) Responsibility for You but not For Me: R2P in the Case of Libya

Prior to its invocation in the case of Libya, many questioned whether R2P would ever amount to anything more than political rhetoric. While the doctrine had achieved what David Scheffer called “rhetorical presence” in international relations and law, little substantive advances had been made since its acceptance in the 2005 World Summit Document and the Security Council had remained largely silent on the subject. In 2008, Gareth Evans asked whether R2P was “an idea whose time has come...and gone,” noting that states seemed to exhibit “buyers remorse” towards the doctrine. The use of R2P in Libya, however, in the words of former ICISS panellist Ramesh Thakur, was a “game-changer”.

The crisis in Libya was remarkable for both the pace with which seemingly peaceful protests deteriorated into indiscriminate bloodshed as well as the clarity and extent of the threat to civilian lives

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73 A. Bellamy, 'Libya and the Responsibility to Protect: The Exception and the Norm' (2011) Ethics & International Affairs, p.4
75 See 'Failed States Index 2011', The Fund for Peace, at www.fundforpeace.org/global/?q=fsi
76 See C. Stahn, 'Responsibility to Protect: Political Rhetoric or Emerging Legal Norm?' (January 2007) 101 The American Journal of International Law 99-120
77 D. Scheffer, 'Atrocity Crimes Framing the Responsibility to Protect' (2008) 40 Case Western Reserve Journal of International Law 111-135
posed by the Gaddafi regime.\textsuperscript{81} There was little, if any, ambiguity about the intentions of the Gaddafi regime in its crackdown on protesters. Emboldened, if not pressurized, by support from key regional and international organizations and leaders, on February 26, 2011 the UNSC passed Resolution 1970 and subsequently, on March 17, Resolution 1973. Both invoked the R2P doctrine.

In referring Libya to the ICC, Resolution 1970 recalled “the Libyan authorities’ responsibility to protect its population”.\textsuperscript{82} In the case of Resolution 1973, notable for the fact that it marked the first time the Security Council authorized military intervention to protect civilians against the wishes of the target state\textsuperscript{83}, R2P was invoked more substantively:

The Security Council,...

...\textit{Reiterating} the responsibility of the Libyan authorities to protect the Libyan population and reaffirming that parties to armed conflicts bear the primary responsibility to take all feasible steps to ensure the protection of civilians...

“...\textit{Determining} that the situation in the Libyan Arab Jamahiriya continues to constitute a threat to international peace and security,

\textit{Acting} under Chapter VII of the Charter of the United Nations,

...\textit{Authorizes} Member States that have notified the Secretary-General, acting nationally or through regional organizations or arrangements, and acting in cooperation with the Secretary-General, to take all necessary measures, notwithstanding paragraph 9 of resolution 1970 (2011), to protect civilians and civilian populated areas under threat of attack in the Libyan Arab Jamahiriya\textsuperscript{84}

For many, the invocation of R2P in Resolution 1970 and 1973 demonstrated that R2P was not merely rhetoric. UN Secretary General Ban Ki-moon responded to the Security Council's decision to invoke the responsibility to protect by declaring that “Resolution 1973 affirms, clearly and unequivocally, the international community’s determination to fulfill its responsibility to protect civilians from violence perpetrated upon them by their own government.”\textsuperscript{85} Thakur claimed that Libya had “breathed life” into

\begin{footnotesize}
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\item See S. Chesterman, ""Leading from Behind": The Responsibility to Protect, The Obama Doctrine, and Humanitarian Intervention after Libya' (2011) \textit{Ethics & International Affairs}, p.4
\item Bellamy and Williams, (2011), p.825
\item See 'Security Council Approves 'No-Fly Zone' Over Libya', Authorizing 'All Necessary Measures' to Protect Civilians, by Vote of 10 in Favour with 5 Abstentions', \textit{UN Department of Public Information}, (March 17, 2011) at www.un.org/News/Press/docs/2011/sc10200.doc.htm
\end{itemize}
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the R2P doctrine.\textsuperscript{86} Weiss similarly declared that Libya demonstrated that R2P was “alive and well.”\textsuperscript{87} Evans added that the developments in Libya were tailor-made for R2P, arguing that “Libya [is] the absolute textbook case, at least back at the beginning in February, of the Responsibility to Protect.”\textsuperscript{88} Yet the invocation of R2P as a response to the crisis in Libya also reaffirmed the absolute authority of the UNSC in shaping how R2P would – and would not – be applied.

In both Resolution 1970 and 1973, the Security Council invoked only half of the R2P equation. The Resolutions make clear that UNSC member states agreed that Libya had a responsibility to protect its citizens and that, in the absence of doing so, that both judicial and military intervention was appropriate. However, missing from the Resolution is any justification of military intervention on the basis of the \textit{international community} having a responsibility to protect Libyan citizens.

The decision to avoid confirming that the 'international community' assumes legal responsibility to protect citizens when a host state 'manifestly fails' to do so was no accident. Security Council member states are resistant to tying themselves to the possibility of being legally obliged to act similarly in future cases. As Pattison puts it, “states are seemingly reluctant to accept this responsibility for fear of being obliged to act robustly in response to similar cases.”\textsuperscript{89} States clearly want to maintain the ability to select those contexts in which they will intervene – and not be dogged by legal commitments which could further expose the hypocrisy of only protecting some people, some of the time. This seems to reaffirm a pick-and-choose version of humanitarian intervention which is difficult to distinguish from the practice selective interventionism of pre-R2P international relations.

(ii) Mixing Cosmopolitan Justice with Security Council Politics: The UN Referral of Libya to the ICC

UNSC Resolution 1970, passed on February 26, 2011, consisted of a package of sanctions aimed at the Gaddafi regime.\textsuperscript{90} Amongst its measures was the Security Council's second-ever referral of a situation to the International Criminal Court.

If there was any discomfort with the ICC's first UNSC referral – the 2005 referral of Darfur – little to no public concern was voiced when Libya was referred to the Court. Instead, the referral was met with widespread international praise. Observers highlighted, in particular, that it had been passed

\textsuperscript{86} Thakur (2011)
\textsuperscript{87} T.G. Weiss, 'RtoP Alive and Well after Libya' (2011) \textit{Ethics & International Affairs}
\textsuperscript{88} Remarks by G. Evans, 'The Responsibility to Protect (R2P) — From ICISS to Today', (January 18, 2012), at www.stanleyfoundation.org/r2p.cfm

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with unprecedented speed and was authorized unanimously by all members of the UNSC.\textsuperscript{91} Amnesty International, for example, exclaimed that the unanimous “referral of Libya to the International Criminal Court marks a historic moment in accountability for crimes under international law.”\textsuperscript{92} Geoffrey Robertson called it a “great milestone in international criminal justice”\textsuperscript{93} while Richard Dicker, Director of Human Rights Watch's International Justice Program, heaped praise on the Security Council for “showing concerted international resolve to pressure Gaddafi and his henchmen to end their murderous attacks on the Libyan population.”\textsuperscript{94} These celebratory statements obfuscated the deeply political contours of the ICC referral, which made it a matter of politics as much as justice.

Three elements of the Resolution, in particular, highlight the politicization of the ICC's mandate through the referral. First, Resolution 1970 precluded the ICC from investigating citizens of states which are not members of the Court, with the exception of Libya and “unless such exclusive jurisdiction has been expressly waived by the State.”\textsuperscript{95} This exclusion of non-states parties in Resolution 1970 exposes a disturbing paradox – if not plain hypocrisy – in the treatment of the ICC by powerful states. This is especially the case for the US which insisted on the exclusion of non-states parties as a pre-condition for supporting the referral.\textsuperscript{96}

Moreover, the exclusion of non-states parties runs in direct contradiction to one of the key aims of the international criminal justice project and one of the ICC’s primary goals: the achievement of universal jurisdiction. Despite this, Brazil was the sole ICC state party to openly express its reservations on this issue.\textsuperscript{97} Furthermore, the exclusion non-states parties from the ICC's jurisdiction is


\textsuperscript{92} See Amnesty International (2011)

\textsuperscript{93} See remarks by Geoffrey Robertson in 'Milestones for International Criminal Justice', \textit{Chatham House}, September 22, 2011, p. 3

\textsuperscript{94} See Human Rights Watch (2011)


\textsuperscript{96} See du Plessis and Louw, (2011), p. 2; see also T. Dunne Tim and J. Gifkins, 'Libya and the state of intervention' (2011) 65 \textit{Australian Journal of International Affairs} 525

\textsuperscript{97} “Brazil was a long-standing supporter of the integrity and universalization of the Rome Statute, and opposed the exemption from jurisdiction of nationals of those countries not parties to it. Brazil, therefore, expressed its strong reservation to the resolution’s operative paragraph 6, and reiterated its firm conviction that initiatives aimed at establishing those exemptions were not helpful to advance the cause of justice and accountability.” See UN Security Council Resolution 1970, supra note 124
legally questionable. Robert Cryer's comments on the legitimacy and legality of the UNSC referral of Sudan to the ICC are equally applicable in the context of Resolution 1970:

the legitimacy of the referral is impaired by the a-priori exclusion of non-party state nationals from the jurisdiction of the ICC...[T]he exclusion of some states’ nationals fails to respect the Prosecutor’s independence and makes it difficult to reconcile the resolution with the principle of equality before the law. Some states’ nationals, it would appear, are more equal than others.98

In short, the political tailoring of the referral to exclude non-states parties from the ICC's jurisdiction both undermines the Court's ultimate aim to achieve universal justice and confirms that a hierarchy exists wherein similar crimes within the same context will not be similarly investigated and prosecuted.

A second controversial feature of the referral was the inclusion of a preambular reference that recalled Article 16 of the Rome Statute. The reference to Article 16 was almost certainly included in order to assuage the concerns of states that the ICC could complicate attempts to negotiate a political settlement to the conflict in Libya.99

On the face of it, the inclusion of a paragraph referring to a Rome Statute article should be of little concern and instigate little controversy. As noted above, Article 16 is a product of the Rome Statute's “Singaporean Compromise”. However, many international criminal justice scholars had expected – perhaps hoped – that Article 16 would never become relevant in practice.100 The invocation of Article 16 would undoubtedly run contrary to the attempt to end impunity and is certainly problematic for those who fear the ICC's work being instrumentalized by the UNSC. The concern and controversy of the reference to Article 16 in the referral, then, lies both in the possibility that it would set a precedent for subsequent referrals and that it may indicate that states consider Article 16 as be a viable policy option, where politics trumps justice.

The third problematic element the referral is the restriction placed on the temporal jurisdiction of the ICC. Article 11 of the Rome Statute provides the ICC with jurisdiction for crimes allegedly

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99 This is also suggested by Du Plessis and Louw, (2011), p.2 It has also been suggested that the inclusion of the reference to Article 16 was part of a compromise necessary to have Resolution 1970 pass. See 'UNSC refers situation in Libya to ICC, sanctions Gaddafi & aides', Sudan Tribune, (February 27, 2011), at www.sudantribune.com/UNSC-refers-situation-in-Libya-to,38116
perpetrated after 1 July 2002, the date the Court came into existence. Operative Paragraph 4 of the Resolution, restricted the ICC’s jurisdiction to 15 February 2011. There has been no official explanation as to why the ICC’s jurisdiction was restricted to events post-15 February 2011, perhaps suggesting that many view it as unproblematic under international law. However, it would be wrong to suggest that this temporal limitation on the Court's jurisdiction was not pre-meditated and negotiated by UNSC members. In this context, it would appear that the restriction to events after 15 February 2011 was included in order to shield some Western states from having their affairs and relations with Libya investigated or exposed. In the years preceding the intervention, many of the same Western states that intervened in Libya had close economic, political and intelligence connections with the Gaddafi regime. These connections helped legitimize and sustain Gaddafi's regime. In short, the ICC's temporal jurisdiction was likely curtailed to prevent investigators from shedding light on the unsavoury, possibly illegal, and undoubtedly embarrassing political, economic and intelligence relations between the Gaddafi regime and the very states that guaranteed its demise.

Despite the overwhelmingly positive reception of Resolution 1970, the Libya referral has not gone without its critics. Christian Wenawaser, former President of the ICC’s Assembly of States Parties (ASP) and current Ambassador for Lichtenstein to the UN, declared that there was “pretty much everything wrong” with the language in Resolution 1970. His predecessor, Bruno Stagno Ugarte, has similarly wrote that Resolution 1970 included language “inimical to the integrity of the Rome Statute.” Additionally, a group at Chatham House has confronted the politicization of the ICC through its acceptance of Council referrals and concluded that “[t]he selectivity with which the Council has made referrals has become a significant challenge facing the legitimacy of the Court.” It added that “too high a price was being paid [by the ICC] for the conditions for referral which were included in relevant resolutions.” Notably, this discontent has led to some proposals to improve the relationship

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102 UN Security Council Resolution 1970, supra note 124
103 'Libya: Gaddafi regime's US-UK spy links revealed', BBC, (September 4 2011), at www.bbc.co.uk/news/world-africa-1477453. While the US brushed off the reports, the UK government ordered its Gibson Inquiry to add the allegations to its docket. See also L. Hilsum, 'Sandstorm – Libya in the Time of Revolution', (UK: Faber and Faber, 2012).
104 See, for example, R.B. St John, 'Libya – From Colony to Revolution', (UK: Oneworld 2011), pp.225-278; J. Wright, 'A History of Libya', (UK: C. Hurst & Co., 2010), pp.221-229
105 Remarks by Christian Wenawaser at conference, 'Through the Lens of Nuremberg – The International Court at its Tenth Anniversary', Nuremberg, Germany, (October 5, 2012)
106 B. Stagno Ugarte, 'Enhancing Security Council Cooperation with the International Criminal Court', (paper on file with author).
108 Ibid., p.7
between the UNSC and the ICC\textsuperscript{109}, although the conversation remains nascent.

The ICC and a significant portion of the community which supports it eagerly accepted the UNSC's referral of Libya to the ICC, political tailoring and all. The precedent this sets may be deeply problematic for the Court. While Resolution 1970 was celebrated as a “milestone” and “victory” in the pursuit of international criminal justice and was framed as a breakthrough in the relationship between the ICC and the UNSC it certainly came at a heavy price.

(iii) Libya, the UN Security Council, R2P and the ICC

The experience of Libya will undoubtedly shape the future of the ICC as an institution and R2P as a doctrine.\textsuperscript{110} Yet there is good reason to be cautious of the cost of this new age of ‘protection politics’. The price of tethering the ICC to the UNSC was steep: not only did Resolution 1970 deeply politicize the mandate of the Court, but as the intervention progressed, the Court was largely abandoned by the same powers that invoked it.\textsuperscript{111} During May and June of 2011, NATO increased its military activities in order to break the apparent stalemate between the rebels and pro-Gaddafi forces. By late August, Tripoli fell to the rebels while the same NATO states that had intervened began the process of jostling for the predicted lucrative economic windfall from an NTC-controlled Libya.\textsuperscript{112} In this context, the political calculus of Western states shifted from backing international criminal justice to other political interests and goals in a post-Gaddafi Libya. Since then, virtually no significant political support from the Security Council has been lent to the ICC. On the contrary, rhetoric shifted towards Libya being in charge of achieving justice and accountability, despite obvious concerns about the ability of the state to do so after forty years of authoritarian rule and the lack of an independent judiciary. As a result, the ICC is unlikely to gain custody or try any of the individuals it has issued arrest warrants for in Libya.\textsuperscript{113}

The case of Libya seems to cement precisely the selectivity that R2P was intended to transcend. Chesterman might be correct in arguing that R2P “may have made it harder [for the international community] to say no”\textsuperscript{114} to intervention in the face of mass atrocities, but doing so may come at the

\textsuperscript{109} Ibid. Also see Stagno Ugarte (2012)

\textsuperscript{110} For more, see Bellamy and Williams, (2011), pp.845-847

\textsuperscript{111} See Kersten, (forthcoming, 2012)


\textsuperscript{113} See M. Kersten, 'Justice after the War: The ICC and Post-Gaddafi Libya', in Kirsten Fisher and Robert Stewart (eds.), Transitional Justice and the Arab Spring, (Forthcoming: Routledge, 2013)

\textsuperscript{114} Chesterman, (2011), p.6
expense of the underlying aim of R2P. Moreover, the apparent conflation between regime change and protection poses new problems for the R2P doctrine. Initially, there was significant ambivalence towards targeting Muammar Gaddafi. However, by June 2011, NATO officials admitted that they did see Gaddafi as a legitimate military target.\textsuperscript{115} This was a far cry from Evans' claim that the intervention “in Libya is not about bombing for democracy or Muammar Qaddafi's head...Legally, morally, politically, and militarily it has only one justification: protecting the country's people.”\textsuperscript{116} As David Rieff wrote in his article, \textit{R2P, R.I.P}, “R2P was about protecting civilians, and emphatically not about regime change.”\textsuperscript{117} In the end, Libya may signal a step backward for R2P, moving international politics back towards a selective 'right to intervention' rather than an international 'responsibility to protect'.

Lastly, it is apparent that the Security Council's legitimacy and, in the case of Libya the legitimacy of NATO forces, was bolstered by framing its interventions through the language of 'responsibility', 'protection', 'humanity' and 'justice'. This humanitarian language was critical in legitimizing the intervention in Libya, lending political legitimacy to NATO's military operations.\textsuperscript{118}


V. Conclusion: R2P and the ICC - Compromise or Comprised?

How quickly observers and scholars alike have forgotten the driving will behind the International Criminal Court and the Responsibility to Protect! A bitter irony for both the early proponents and crafters of the ICC as well as R2P is that what they so deeply wished would not happen has indeed occurred: both find themselves increasingly at the whim of UNSC powers. Equally remarkable is the fact that this increased proximity is, by and large, celebrated as a triumph rather than thoroughly criticized or critiqued. This appears to be an indication that many proponents of the ICC and R2P have given up on efforts to guarantee a separation between the great power, real-politik of the Security Council and the humanitarian and judicial imperatives of the ICC and R2P.

This paper has sought to demonstrate that the relationship between the ICC and R2P is much deeper than the one typically suggested. The ICC and R2P share a political ethos, liberal cosmopolitanism, which seeks to displace the state and state sovereignty as the primary political and moral referent in international politics, replacing it with the the individual human and her experience. Both R2P and the ICC are intended to be invoked for humanity, in the name of humanity. Yet the liberal cosmopolitan intent of both R2P and the ICC has been mitigated by their proximity to the realpolitik of the UNSC. Rather than challenging the selective power-politics of contemporary international relations, the ICC and R2P increasingly reaffirm them and, in so doing, bolster the legitimacy and credibility of the Security Council. Thus the ICC becomes not a tool of R2P, as Bensouda has suggested. Rather, both the ICC and R2P become instruments of the UNSC.

Of course, it may be that neither the ICC nor R2P were ever capable of transcending the political machinations of the Security Council or, for that matter, international relations. David Chandler, for example, challenges the notion that R2P represents a moral shift away from state-centered international relations, arguing that “[t]he close relationship between Realpolitik and morality is not a contradictory one.”119 Indeed, it is possible to read the narrative outlined in this paper as an indication that both the ICC and R2P have always constituted a compromise between power politics and liberal cosmopolitanism. Still, if we take the view of proponents seriously, then at risk is the very liberal cosmopolitan political project that they believe R2P and the ICC to be capable of turning into a reality.

In the wake of Libya, there is a need for sober critical reflection and evaluation of the invocation of the ICC and R2P by the UNSC. While both were widely celebrated and many had hoped

119 Chandler, David, ‘The Responsibility to Protect? Imposing the 'Liberal Peace'' (Spring 2004) 11 International Peacekeeping 76
that the lesson of Libya was “that we can say no more Holocausts, Cambodias, and Rwandas – and occasionally mean it”,\textsuperscript{120} as Carsten Stahn reminds us, “[t]he rise of the ‘Arab spring’, and the ‘historical’ consensus in the Council, with the recognition of the link between ‘R2P’ and the ICC have created new hopes for the enforcement of international justice. But there is at best limited progress.”\textsuperscript{121}

In the case of the ICC, much has been said about the Court standing apart from its predecessors, the ad hoc tribunals in Rwanda and the former Yugoslavia, not only because the ICC is permanent but because it was intended to stand independent from the politics of the UNSC. As demonstrated by the Court’s intervention into Libya at the behest of the Council, the permanent members of the UNSC appear content on deploying the ICC on an ad hoc basis in those situations where it serves their political interests. As a result, the independence and integrity of the Court are at risk. This is only made worse – and more difficult to rectify – with the chorus of celebratory statements and declarations amongst international human rights organizations when the ICC is invoked by the UNSC.

For R2P, it is difficult to imagine how it can extricate itself from the UNSC. The World Summit Document, subsequent resolutions and practice have firmly entrenched R2P as a response that will be primarily, if not exclusively, invoked by the Council. We seem destined to accept Patrick Stewart’s insight that “[t]here is bound to be selectivity and inconsistency in the application of the responsibility to protect norm given the complexity of national interests at stake in U.S. calculations and in the calculations of other major powers involved in these situations.”\textsuperscript{122} Those who doubt this reality and cling to the original intent of both the ICC and R2P, it would seem, will be placed firmly within the camps of “purists”, “dreamers” and “utopians”.

The creation of the ICC and the elaboration of R2P have been welcome developments in international relations and international law. They are operationalizations of the impulse and need to respond effectively – both politically and legally – to the commission of atrocities. But to retain long-term legitimacy they must not consistently fall prey to the selectivity and hypocrisy of UNSC real-politik. If they do, the very purpose for which they were created may be lost. The liberal cosmopolitan vision within both R2P and the ICC has been and continues to be mitigated by power-politics. The politics of international justice may be undergoing a “convergence of morality and Realpolitik.”\textsuperscript{123} The question remains: to what extent and whether it remains liberal and cosmopolitan at all?

\textsuperscript{120} Weiss, (2011), p.5
\textsuperscript{121} Stahn, (forthcoming, 2012)
\textsuperscript{123} D. Chandler, (2004), p.75