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SYMPOSIUM: INTERNATIONAL CRIMINAL JUSTICE AND THE RESPONSIBILITY TO PROTECT

I INTRODUCTION: THE RESPONSIBILITY TO PROTECT AND PROSECUTE

2015 marks the 40th anniversary of the rise to power of the Khmer Rouge, the 20th anniversary of the Srebrenica massacre, and the 10th anniversary of the United Nations World Summit and the adoption of the Responsibility to Protect (R2P) principle. These events of course are closely connected. R2P is part of a humanitarian response that tries to prevent the kind of crimes that occurred in Cambodia and Srebrenica. Unfortunately, these kinds of crimes are not confined to these two events. Of course, 2014 marked the 20th anniversary of the Rwanda genocide and we are living through a time when war crimes and crimes against humanity are never too far from the headline news. The violent situations in Syria, Iraq, the Central African Republic and elsewhere continue to test the international community's commitment to protect populations from mass atrocity crimes. This year's anniversaries nevertheless present opportunities for reflecting on how practice has been changed by the international recognition that state sovereignty is contingent on the fulfilment of a responsibility to protect populations from genocide, crimes against humanity, war crimes and ethnic cleansing. Several special issues are this year devoted to this kind of reflection. The purpose of this particular special issue is to reflect on one specific aspect of the R2P principle, its relationship with another international norm, the re-

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sponsibility to prosecute, and specifically another international institution, the International Criminal Court (ICC or Court). The five articles that make up this issue all address the relationship between these two norms.

The R2P and the ICC share a recent history and similar goals. Both emerged out of the atrocities of the mid-1990s and the sense that international practices had to change to prevent mass atrocity crimes.¹ The R2P and the ICC also share a similar normative structure. The responsibilities to protect and prosecute reside first and foremost in the state and both regimes insist that a residual responsibility rests with international society.² Yet there are differences. R2P has not sought to allocate residual responsibility to an institution that is independent of the society of states. Paragraph 139 of the World Summit Outcome Document states that the United Nations Security Council decides when international society should intervene with coercive measures to protect populations. For Tim Dunne, this allocates a ‘special responsibility’ to act to the Security Council, but to the extent the Council is made up of states with their own particular interests R2P is still very much located in the society of states.³ International criminal justice, on the other hand, has institutionalised the residual responsibility to prosecute by allocating it to the International Criminal Court and, more specifically, in the Office of the Independent Prosecutor (OTP). The Prosecutor can, in certain circumstances, decide when and where to intervene without state or Security Council authorization. How independent the Prosecutor is in practice is open to debate, but at least on paper the two norms are structured differently.⁴

The R2P and the ICC are often invoked by the international community at similar times and both are committed to the long term goal of ending mass atrocity, but of course both have a different focus

¹ K. Mills, ‘R2P3: Protecting, Prosecuting or Palliating in Mass Atrocity Situations?’ (2013) 12 *Journal of Human Rights* 333.

² M. Contarino and S. Lucent, ‘Stopping the Killing: The International Criminal Court and Juridical Determination of the Responsibility to Protect’ (2009) 1 *Global Responsibility to Protect* 560–583.

³ T. Dunne, ‘Distributing Responsibilities and Counting Costs’ (2013) 5 *Global Responsibility to Protect* 443–465. See also J. Ralph, ‘The International Criminal Court’, in A. Bellamy and T. Dunne (eds.), *Oxford Handbook of the Responsibility to Protect* (Oxford: Oxford University Press, forthcoming 2015).

⁴ On the OTP’s strategy see D. Bosco, *Rough Justice. The International Criminal Court in a World of Power Politics* (Oxford: Oxford University Press, 2014). For further discussion on the normative structure of the responsibilities to protect and prosecute see Ralph, ‘The International Criminal Court’ (n 3 above).

and this can be problematic in moments of crisis. The argument that the pursuit of justice can compromise the pursuit of peace is well rehearsed and need not be repeated here, suffice to say that if peace is the best means of protection the responsibilities to protect and prosecute may clash. But the problem goes beyond that. As the 2011 intervention in Libya illustrates, an ICC indictment of government leaders can link an R2P action to the concept of ‘regime change’, which, in the current political environment, complicates the task maintaining the consensus that lends legitimacy to an intervention. In this sense, there is potentially a conflict between humanitarian intervention and criminal justice. In other words, if military intervention is the best means of protection and if R2P insists this can only be done ‘through the Security Council’ then R2P advocates will hope the ICC does not alienate those permanent members (e.g. Russia and China) who may equate criminal justice with externally imposed regime change. The vexed question of the proper relationship between R2P, ICC, ‘regime change’ and international consensus has clearly been an issue post-Libya and has impacted the diplomatic discourse on the Syria situation.⁵

Despite these shared histories, structures and challenges there is relatively little academic work analysing the exact relationship between the responsibilities to protect and prosecute. In some respects this is a consequence of how the academic disciplines of International Relations and International Law have tended to focus on different sides of the relationship. This is not to overlook the excellent work of IR scholars on the ICC, or IL scholars on R2P,⁶ but there is a sense

⁵ For further discussion see N. McMillan and D. Mickler, ‘From Sudan to Syria: Locating ‘Regime Change’ in R2P and the ICC’ (2013) 5 *Global Responsibility to Protect* 283–316.

⁶ R. Thakur and V. Popovski, ‘The Responsibility to Protect and Prosecute: The Parallel Erosion of Sovereignty and Impunity’ (2007) 1 *The Global Community Yearbook of International Law* 39–61; M. Contarino, M. Negrón-Gonzales and K. T. Mason ‘The International Criminal Court and Consolidation of the Responsibility to Protect as an International Norm’ (2012) 4 *Global Responsibility to Protect* 275–308; see also following contributions in (2009–2010) 21 *Finnish Yearbook of International Law* including: P. Niemela ‘International Criminal Court and the Responsibility to Protect’ 1–4; D. Chandler, ‘Born Posthumously: Re-Thinking the Shared Characteristics of the ICC and R2P’ 5–14; P. Kaukoranta ‘Finnish Perspectives on the ICC and RtoP’, 15–20; F. Mégret, ‘ICC, R2P and the Security Council’s Evolving Interventionist Toolkit’, 21–52; S. M. H. Nouwen, ‘Complementarity in Practice. Critical lessons from the ICC for the Responsibility to Protect’ 53–64; A. Orford, ‘From Promise to Practice; the legal significance of the Responsibility to Protect’ 65–88; K. Quashigah, ‘Future of the International Criminal Court in Afri-

that this particular gap in the literature can be understood as a consequence of the way the disciplines are structured. The aim of this special issue is to help address this gap and in order to do that it has assembled experts from IR, IL and the increasingly secure common ground between those two disciplines. It emerges from a seminar series hosted by the Universities of Leeds, Manchester and Westminster and funded by the Economic and Social Research Council.⁷ The broader aim of that series is to consider the political sustainability of the humanitarian movement that emerged out of the 1990s and whether the relative decline in the power of liberal states is impacting on its trajectory. As noted above, the political imperative to maintain good relations with emerging powers (most notably China) forces humanitarians to consider whether liberal states will continue to champion the R2P and ICC, especially when those powers are critical (and indeed suspicious) of these norms.

Perhaps the ideal scenario from an R2P and ICC perspective is for the post-Srebrenica normative trajectory to be unaffected by shifts in material power from west to east. Yet this scenario makes two assumptions: first, it assumes that western powers *are* in relative decline; and, second, it assumes that the trajectory toward a more human and solidaristic international society *was* sustainable even under western hegemony. Neither of these assumptions can go uncontested. US power may have been hit by the fall out from the financial crisis and the war on terror, but it is by no means certain

Footnote 6 continued

can Crisis and its relationship to the Responsibility to Protect Project' 89–100; B. N. Schiff, 'Lessons from the International Criminal Court for ICC/R2P 101–110. See also The Erik Castrén Institute of International Law and Human Rights, 'The International Criminal Court and the Responsibility to Protect. Synergies and Tensions' (December 2010) http://www.helsinki.fi/eci/Events/R2P_conference.html accessed 6 February 2015; International Coalition for the Responsibility to Protect, 'The RtoP and the ICC. Complementary in Prevention, Assistance and Response' (14 March 2012) <http://icrtopblog.org/2012/03/14/the-rtop-and-the-icc-complementary-in-prevention-assistance-and-response/> accessed 6 February 2015; M. Kersten, 'Between Justice and Politics: The ICC's Intervention in Libya', in C. Stahn, C. De Vos and S. Kendall (eds.), *International Criminal Justice and 'Local Ownership'* (The Netherlands, Martinus Nijhoff Publishers, 2013).

⁷ J. Ralph, A. Gallagher, A. Hehir, and J. Pattison, 'The Responsibility to Protect and Prosecute: The Political Sustainability of Liberal Norms in an Age of Shifting Power balances' (ESRC Seminar Series, grant ES/L00075X/1) <http://www.esrc.ac.uk/my-esrc/grants/ES.L00075X.1/read> accessed 6 February 2015.

that China will replace the US as the global hegemon⁸; and even if the US remains the dominant power it is by no means certain that the liberal trajectory that gave rise to the R2P and the ICC is sustainable. Indeed, one cannot overlook the fact that the sternest opposition to the ICC came from deep within liberal international society, reminding us that cosmopolitan sentiments and commitments do not necessarily flow from liberal values. That opposition has softened, but to the extent the liberal hegemon still demands an exemption from the ICC's jurisdiction, and to the extent this exemption is being granted to secure US commitment to R2P missions, it demonstrates how the post-Srebrenica trajectory reinforces hierarchical conceptions of international order.⁹ In fact, power shifts *within* the liberal order, especially the rise of Brazil and South Africa, have helped to give voice to a critique of these hierarchies and the practices they inform.¹⁰ Questions obviously exist about what the rise of China means for the R2P and ICC but these should not deflect from the equally important task of understanding how the R2P and ICC work under the existing distributions of power.¹¹

It is in this context then that the authors in this special issue make their contribution. Their articles speak to many issues but two are worth highlighting by way of introduction. The first is what might be termed the *relationship* question and the second involves questions of *legitimacy*. As the following summary illustrates, the two questions are related.

What kind of relationship exists between the R2P and the ICC? In the abstract it is of course complementary. They seek to end mass atrocity crimes by protecting populations and by prosecuting perpetrators and some argue the two norms are mutually reinforcing.¹² The R2P and the ICC are two sides of the same coin so to speak. But in practice this relationship may not be as complementary as it might

⁸ See for instance S.G. Brooks and W. Wohlforth, 'US decline or primacy? A debate', in M. Cox and D. Stokes (eds.), *US Foreign Policy* (Oxford: Oxford University Press, 2012) 409–430.

⁹ See Ralph, 'The International Criminal Court' (n 3 above).

¹⁰ See J. Ralph and A. Gallagher, 'Legitimacy faultlines in International Society' (2014) *Review of International Studies* CJO2014. doi:10.1017/S0260210514000242 accessed 6 February 2015.

¹¹ On China and R2P see R. Zongze, 'The Concept of Responsible Protection' (ESRC Seminar Series, University of Leeds, 4 December 2014) <http://iisr2p.leeds.ac.uk/current/responsibility-to-protect-and-prosecute/> accessed 6 February 2015.

¹² See for instance, Contarino and Lucent (n 2 above).

first appear and it might even be the case that they work against one another. Of course it would be cynical in the extreme to suggest the successful protection of a population works against the ICC by preventing crimes and reducing its case load. Advocates of the ICC understand that the world is a better place if it had no reason to exist. A very real problem however flows in other direction. Does the uncompromising pursuit of criminal justice always complement the goal of protecting populations, especially in ongoing crisis situations? Should, in other words, advocates of R2P always support the indictment of those committing mass atrocity crimes? In many respects this is a prudential question that involves the balance of consequences and the timing of an indictment; and as the articles here note there are ways in which such judgments can be made within the existing frameworks (e.g. Article 16 deferrals). But there is another aspect of the relationship question that is addressed here, which is perhaps harder to resolve. This involves the concern that the ICC as a legal institution should avoid being involved in situations where R2P has been invoked because R2P is seen in some significant quarters as a veil behind which liberal states advance their particular political interests.

Carsten Stahn uses the language of family law to focus on the relationship between R2P and ICC. He argues that the two projects draw on similar foundations, such as ‘sovereignty as responsibility’, a humanity-based defence of international authority and complementarity-oriented response schemes to atrocity crimes. He shows that the merger of the concepts was an ‘arranged marriage’ that resulted out of pragmatism and moral appeal. He claims that that there is need for greater distinction between R2P and international criminal justice, in order to respect their autonomy and mutual virtues. He identifies discourse problems in several areas: inflated consequentialist argument in charging practice, declining faith in the nexus of international criminal justice and R2P to collective security, and misguided use of punitive rationales as a justification for intervention. But instead of advocating a full-fledged divorce of the two projects, based on lack of communication and absence of contract, he proposes to strengthen positive synergies in particular areas: atrocity alert, norm expression and compliance. He further stresses the need for greater duties of care in transformative humanitarianism, in particular in relation to victims of atrocity crimes.

Extending Stahn’s metaphor, Andrea Birdsall would argue there are grounds for divorce, or at least separation. The marriage was

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always going to be difficult because, she notes, R2P as articulated in the World Summit Outcome Document, is essentially a political non-binding commitment that embraces the pragmatism of a case-by-case approach. On the other hand, the ICC is a legal institution committed to the universality of justice and it cannot as easily dismiss the need to investigate certain situations on grounds of prudence. Yet, as Birdsall further notes, the issue here is not merely one of prudence, the issue is the selective approach of the Security Council members and the possibility that they are motivated by particular rather than global interests. This of course speaks to the legitimacy question but here Birdsall argues it also impacts on the relationship question. The political (or perhaps *politicized*) nature the R2P concept, at least in contemporary international society, means there is a 'mismatch', and that makes linking R2P and the ICC problematic. The ICC, she concludes, 'does not benefit from being too closely associated with R2P and military intervention. It is not a powerful mechanism for stopping ongoing violence and it risks becoming too much of a political tool, harmed by the geopolitical struggle in the Security Council'.

Certainly questions about the Court's legitimacy stem from its willingness to accept Security Council referrals when some members are neither party to the Rome Statute and insist (even in the wording of the resolutions) that the Court cannot exercise jurisdiction over their citizens. The legitimacy costs for the Court are thus not limited to situations (like Libya) where the Security Council authorised military intervention as part of the international community's responsibility to protect. They exist in R2P situations where coercive military intervention has not occurred (as in Sudan), and they are multiplied when the Security Council is accused of not being responsive enough to regional requests for deferrals (as in Sudan and Libya).

Yet Birdsall's point is an important one. As noted there is a particular sensitivity in international society to the use of military intervention for humanitarian purposes because it has a logic that makes it difficult to limit it to humanitarian (i.e. politically neutral) objectives. As the Libyan operation demonstrated, militaries will seek to use their comparative advantage by going on the offensive to prevent threats against populations even before they properly manifest themselves. This is a kind of humanitarian doctrine of pre-emption and it can multiply target lists, involve the intervening force in ways that determine the political future of a state, and even involve

regime change. Birdsall is right then that the legitimacy costs of being involved in ongoing military conflicts are potentially high, and the ICC may therefore be motivated to avoid such linkages.

The Court finds itself in a dilemma however. Refusing to investigate cases where there is clear *prima facie* evidence of mass atrocity crimes will itself be seen as politically (self-) motivated. There may be legitimate reasons why the Court should investigate the crimes that provoked a military intervention in the first place, even if that intervention was disproportionate in its response. For Kurt Mills, the Court should not necessarily reject Security Council referrals. Rather the Security Council should exercise better judgment in bringing the Court into R2P operations. Mills accepts that there is a ‘paradox’ at the heart of the R2P and ICC relationship.

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.

Yet Mills accepts that we cannot identify preconceived or decontextualised approaches to this particular dilemma. The World Summit Outcome Document is right to insist that the consideration of these issues be on a case-by-case basis. What we can demand, however, is that the Security Council do nothing to undermine the founding principles of the ICC when it responds to the threat of mass atrocity. “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.” In this respect, the problem usually stems not from anything specific to the relationship between R2P and the ICC; rather the problem stems from the unwillingness of Security Council members to accept what are surely minimal risks of ICC prosecution as they commit to R2P-inspired military interventions. This can surely be addressed. It is the ‘hypocrisy’ of the exemption for the protectors that damages the Court’s association with R2P. This should be removed by a preconceived commitment on the part of the interveners to accept the greater (although still minimal) risks of investigation.

Mills continues the examination of the relationship theme by focusing on three challenges. The first involves the question of whether

the criminal process should somehow be coordinated, or even sequenced, with the process of protecting civilian populations. Given his pragmatic approach it is not surprising that there are no firm answers given. This aspect of the article, however, highlights important and possibly paradoxical considerations. For instance, an ICC indictment might on the one hand be a prelude to military intervention, helping to make the case that crimes are being committed, while on the other hand a referral might be used instrumentally by states who wish to be seen as doing something but keen to avoid the risks and costs of a military intervention. Secondly, Mills considers the vexed question of whether the ICC assists the Security Council in meeting its responsibility to protect by providing it with leverage over the participants in a conflict. The danger here, to repeat his main point, is that the normative integrity of the Court would be undermined if, as a consequence of being used in this way, it could not defend itself against the charge of politicization. Thirdly, Mills considers how practices designed to meet the responsibility to protect and the responsibility to prosecute can work together in a mutually beneficial way as they increasingly influence peacekeeping mandates. Given the focus on international society's response to humanitarian emergencies it is perhaps easy to overlook the impact civilian protection and criminal justice is having on this area of international practice. As peacekeeping evolves within the normative context set by R2P it holds open the possibility that these missions will help international society meet its responsibility to prosecute by arresting those wanted by the ICC.

The evolution of UN peacekeeping mandates is the subject of Frédéric Mégret's contribution. Noting how civilian protection rarely featured in traditional peacekeeping, Mégret explains how it has arguably 'become one of the main defining features of peace operations'. This process begins with a redefinition of the concept of international peace and security in the aftermath of the 1991 Gulf War. This of course predates the Srebrenica massacre, but Mégret notes how together with the Rwanda genocide, the events in the Balkans consolidated the post-Cold War tendency to define attacks on civilians as the kind of threat to peace and security that demanded an international response. The broader R2P concept was very much part of this narrative and it too influenced the peacekeeping agenda, as it set out what Mégret calls a 'quasi-obligation ... to launch military operations under Chapter VII when all else fails to prevent such crimes from being committed'. Indeed, Mégret adds to the

evidence that R2P has been influential in changing international practice. R2P he writes,

has provided a powerful language to shape expectations about the role international community has whenever a state is unable or unwilling to guarantee the security of its citizens, a scenario very familiar to many peace operations. It has, moreover, given an added sense of urgency to what the UN should do in those circumstances where threats to civilians reach the level of atrocities. As a result, one of the most unintended side-effects of the R2P Doctrine may be the extent to which it has contributed to reframe the intensity of peace operations' protection of civilians mandate.

These developments have challenged the peacekeeping practices that evolved at a time when state sovereignty was less contested. Such principles as relying on the consent of the state and remaining impartial so as to mediate conflicting parties, and withdrawing when there is no peace to keep (not least to protect the peacekeepers themselves), were, as Mégret puts it, deeply embedded in the 'genetic code' of UN peacekeeping. Interestingly, Mégret argues that it was the simultaneous emergence of a serious state commitment to international criminal justice that helped to reform these traditional practices. The deep investigation of mass atrocity that is a necessary part of the criminal process meant that the Security Council 'could hardly escape scrutiny'. Indeed, the recent decision of the Netherlands Supreme Court to hold Dutch peacekeepers responsible for the deaths of Bosniaks in Srebrenica magnifies this level of scrutiny and opens up the possibility that the families of victims may be due compensation for international society's failure to protect them.¹³ Of course, this level of accountability may deter states from contributing peacekeeping forces if they are held liable for such failures. However, if that liability is distributed through international society, UN peacekeepers after all are acting in its name, then such oversight might not necessarily have the negative consequences that some fear.

Despite the challenges, then, civilian protection has emerged as a 'cross-cutting' theme of UN peace operations. It is now the subject of bi-annual debates at the UN and has informed practice, notably in the Congo and Cote D'Ivoire. Yet Mégret concludes on a note of caution. Protection of civilian principles may have found their way into UN peacekeeping mandates but 'deep seated structural impediments' remain. These include finding the right balance between

¹³ 'Dutch state liable over 300 Srebrenica deaths' (BBC News, 16 July 2014) <http://www.bbc.com/news/world-europe-28313285> accessed 6 February 2015.

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mediation and humanitarian intervention, as well as avoiding the 'temptation' of regime change, which Mégret notes, is a cause for 'alarm'.

This concern, that externally imposed regime change might follow on from developments that humanitarians might otherwise welcome, reminds us of the *legitimacy* question that runs through this special issue. Indeed, the legitimacy of R2P and the ICC is at the centre of Aidan Hehir and Anthony Lang's contribution. Their analysis is a critique of the role the UN Security Council plays in international society's approach to the responsibilities to protect and prosecute. As noted at the outset of this introduction, the Security Council has a special role to play in R2P to the extent it is the authorizing body for any coercive intervention; and while the ICC can investigate certain situations without Security Council authorization it is still dependent on that body for authorization to investigate situations wholly involving states that are not party to the Rome Statute. This provides the Security Council, and in particular the permanent member states, with what Hehir and Lang refer to as significant 'discretionary power'. This is an impediment they argue to the consistent enforcement of human rights law and the consistent application of international criminal law to punish human right violators. More to the point, the inconsistent approach that arises from Security Council involvement cannot always be justified because it is often the consequence of the permanent members pursuing their particular interests at the expense of the common good. The Security Council, in their words, acts like a 'sheriff' on the American frontier, a role that of course ended when law enforcement was integrated into a more perfect Union of states, complete with the checks and balances of a constitution based on republican theory.

Hehir and Lang do not use the language that evokes parallels with the US Constitution but they do seek a more perfect union of states at the international level. 'So long as the international legal order remains unchanged', they write, 'we cannot expect R2P and ICC to operate in a manner consistent with normatively sound principles of legal theory'. To address this they set out the 'contours' of a reformed international legal order. Central to this new order is a clearer separation of the powers to protect and prosecute, which the authors (like Birdsall) see as too closely linked and corrupted by their dependency on the Security Council. The new order in fact involves 'a complete transformation' of the process by which international society goes about meeting its responsibilities to protect and prosecute.

It would involve the establishment of an independent and accountable judicial body that is free of the corrupting influences of national interests and thus more likely to mandate protection and punishment missions based on just criteria. This judicial body would not replace the Security Council, but it would challenge its claim to unconditional exclusive legitimacy. It would be triggered into action in situations where the Security Council was deadlocked despite consensus in the general Assembly.

This is an ambitious blueprint for reform and Hehir and Lang do not necessarily address *how* this proposal might be implemented and *why* it has not already implemented. Answering the last question might lead us acknowledge the necessity of prior shifts in national identities, especially among those permanent members who are accused of putting particular interests before the imperatives of global justice. If they act like this in the Security Council what hope is there that they will delegate authority to another body that weakens the Security Council's powers? One might argue that the ICC itself demonstrates that the reforms needed to create an independent court are possible, but in some sense Hehir and Lang's analysis rules out using this example to support any plausibility claim because, by their analysis, the political process of creating the ICC actually corrupted the ideal. This does not mean their ideal is necessarily utopian but it does demonstrate, as they acknowledge, the difficulty of moving toward their ideal without deeper shifts in national identities.¹⁴ Still, Hehir and Lang are surely right when they argue that the way the Security Council currently responds to its special responsibilities is 'untenable'.

¹⁴ For an expansion of this argument, see Ralph, 'The International Criminal Court' (n 3 above).