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Article:

Legitimacy faultlines in international society.

The Responsibility to Protect and Prosecute After Libya.

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Abstract

There is a perceived legitimacy deficit in contemporary international society. A symptom of this is the political contestation surrounding the 2011 Libyan crisis and its influence on the 2011-3 Syrian crisis. This involved criticism being levelled at the coalition led by the so-called Permanent-3 for the way they implemented the protection of civilians mandate, as well as for the referral of the Libyan situation to the International Criminal Court. How the P3 respond to these developments will be driven in part by how this 'legitimacy fault line' is interpreted. The purpose of this paper is to first give an interpretation that is informed by the work of contemporary English School scholars and the political theorists they draw on; and second to provide the context in which specific policy recommendations may guide the response of the P3 states. We argue that because the new legitimacy fault line divides on the procedural question of *who decides how* international society should meet its responsibilities rather than substantive disagreements about *what* those responsibilities are (i.e. human protection and justice) the challenge to the liberal agenda of the P3 is not radical. However, we also argue that ignoring the procedural concerns of the African and BRICS states is not outcome neutral and could in fact do harm to both the ICC and the wider implementation of R2P. We consider two proposals for procedural reform and examine how the P3 response would impact on their claim to be good international citizens.

Introduction

There is a perceived legitimacy deficit in the ordering structure of international society. A symptom of this is the political contestation surrounding the 2011 Libyan crisis and its influence on the 2011-3 Syrian crisis.[1] This involved criticism being levelled at the coalition led by the so-called Permanent-3 (P3 or France, the UK and US) for the way they implemented the protection of civilians (POC) mandate contained in UN Security Council Resolution 1973 (2011), as well as for the referral of the Libyan situation to the International Criminal Court (ICC) in Resolution 1970 (2011). The coalition intervening to implement Resolution 1973 was accused by the BRICS states of exceeding the POC mandate and pursuing regime change; and the Security Council's decision to refer the situation to the ICC, and to not defer the subsequent indictments, was considered by African states to be imprudent and irresponsible.

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[1] '[O]ne of its [legitimacy deficit's] distinctive symptoms will be fundamental contestation between different groups of intellectuals' David Beetham, *The Legitimation of Power* (Basingstoke: Palgrave, 1991), p.76.

These arguments were not the only indicators of a perceived legitimacy deficit. In many respects they built on previous frustrations with the P3's interpretation of the Responsibility to Protect (R2P), which includes the responsibility to prosecute, and they have influenced post-Libya international relations, especially with regard to the humanitarian crisis in Syria.[2] We do not believe these frustrations amount to a legitimacy 'crisis'. If legitimacy crises are defined, in Christian Reus-Smit's words, as 'critical turning points in which the imperative to adapt is heightened by the imminent possibility of death, collapse, demise, disempowerment, or decline into irrelevance', then we do not think an international society that upholds a responsibility to protect and prosecute is at that point.[3] However, we do see evidence that indicates the perceived legitimacy deficit is making it more difficult for international society to meet its responsibilities. 'Adaptation' is necessary in order to pre-empt a crisis and a better understanding of the 'interpretive arguments' that constitute the current 'legitimacy faultline' will assist that process.[4] The purpose of this article therefore is to first provide that understanding by drawing on the work of contemporary English School scholars and the political theorists they cite; and second to provide the context in which specific policy recommendations may guide the response of the P3 states.

We argue that because the new legitimacy fault line divides on the procedural question of *who decides how* international society should meet its responsibilities rather than substantive disagreements about *what* those responsibilities are (i.e. human protection and justice) the challenge to the liberal agenda of the P3 is not radical. However, we also argue that ignoring the procedural concerns of the African and BRICS states is not outcome neutral and could in fact do harm to both the ICC and the wider implementation of R2P. This is because liberal hegemony, which has never been powerful enough to end mass atrocity, is now even less effective. In an age where the capacity and willingness of the P3 states to intervene is less, the relative importance of non-P3 states to securing effective humanitarian outcomes increases. A further implication of shifting power balances, as Jennifer Welsh suggests, is that 'the principle of

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[2] The responsibility to prosecute is implicit in the Responsibility to Protect concept. See Secretary General Ban Ki-Moon's Report, *Implementing the Responsibility to Protect* 12 January 2009, p.11 available at {http://globalsolutions.org/files/public/documents/CivPro_R2PUNReport.pdf }. See also Jennifer M. Welsh and Serena K. Sharma, *Operationalizing the Responsibility to Prevent* Oxford Institute for Ethics, Law and Conflict, available at {http://www.elac.ox.ac.uk/downloads/elac%20operationalising%20the%20responsibility%20to%20prevent.pdf} accessed 17 July 2014.
[3] Christian Reus-Smit, 'International Crises of Legitimacy', *International Politics,* 44 (2007) p.166-7 quoted in Jean-Marc Coicaud, 'Introduction', in Hilary Charlesworth and Jean-Marc Coicaud (eds), *Faultlines of International Legitimacy* (Cambridge: Cambridge University Press, 2010), p.4.
[4] The phrase 'legitimacy faultines' is taken from Charlesworth and Coicaud (eds), *Faultlines of International Legitimacy.* The phrase 'interpretive arguments' is Reus-Smit's 'International Crises of Legitimacy', p.172.

sovereign equality may enjoy a comeback'.[5] This may be so, but that should not be read as evidence that R2P's days are numbered. Sovereign equality should not be equated with non-intervention. It does mean, however, that those states committed to such a principle will be more determined to assert the claim that they too should be part of the decision on how R2P is implemented. Continuing exclusion could translate into a policy of non-cooperation that is politically more significant because of the shifting power balance.

Including the views of non-P3 states in the decision-making on when and how international society should intervene in the affairs of national societies is thus not simply a matter of representation (or input-legitimacy); it is also increasingly a matter or effectiveness (or output legitimacy).[6] The term 'including' can mean many things here, from making sure the Security Council is given the opportunity to consider and vote on R2P matters, to improving the representation at the Security Council of those with a particular stake in the implementation of R2P (notably the African states). Arguments for improving the representativeness of international decision-making can be (and have been) made by cosmopolitan theorists on purely normative grounds.[7] The line taken here is that there are also pragmatic reasons why the P3 states committed to R2P would want to support more representative decision-making procedures at the UN Security Council.

To advance this argument the paper is structured in four parts. The first discusses the concept of international legitimacy as a means of interpreting the current divide in international society. Drawing on the work of contemporary English School writers it notes a theoretical divide in what legitimacy means in international society. The division rests on the relative value given to representative procedures on the one hand and substantive outcomes on the other. This theoretical divide it is argued can help interpret current policy differences. It also underpins the central claim that these differences centre on the procedural question of *who decides how* R2P is implemented. It might be argued that the question of 'how' R2P is implemented is a substantive rather than a procedural matter. We argue that while there may indeed be substantive disagreements on how to respond to mass atrocity, these exist on a *case-by-case basis* and there are established *processes* within R2P and ICC practice for resolving these disagreements. The

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[5] Jennifer Welsh, 'Implementing the Responsibility to Protect: Where Expectations Meet Reality', *Ethics and International Affairs* 24:4 (2010), p.428.

[6] On 'input' and 'output legitimacy' see Fritz Scharpf *Governing Europe. Effective and Democratic* (Oxford: Oxford University Press, 1999), cited in Andrew Hurrell, 'Legitimacy and the use of force: can the circle be squared?', *Review of International Studies* 31 special issue (2005), p.16. See also Ian Hurd, *After Anarchy. Legitimacy and Power in the United Nations Security Council* (Princeton: Princeton University Press, 2007), pp.66-73; Ian Clark, *Hegemony in International Society* (Oxford: Oxford University Press, 2011), pp.57-8.

[7] See for example David Held, *Democracy and Global Order. From Modern State to Cosmopolitan Governance* (Oxford: Polity Press, 1995).

question of how international society as a whole responds to mass atrocities is thus related to the procedural question of who decides how substantive disagreements are resolved.

As the first section also notes, international society's current commitment to R2P and the ICC exists within a hierarchical conception of decision-making centred on the UN Security Council, and some argue that liberal humanitarianism would be better advanced by further limiting decision-making authority to liberal states (for instance the P3). Such arguments insist that by limiting decision-making authority to a narrow band of liberal states international society becomes more effective in delivering substantively liberal outcomes. It is argued in this first section that such an argument is not only vulnerable to the charge of being undemocratic (and thus, in a liberal context, hypocritical) it also places a heavy burden on hegemonic decision-makers (for instance the P3) to deliver substantively liberal outcomes. An inability or unwillingness to deliver in this regard means the hierarchical model is failing on its own terms and can more easily be considered illegitimate.

The second and third sections interpret the contemporary situation through this theoretical lens. The second section notes how frustration with the Security Council's use of its power to refer and defer situations to the ICC has contributed to a policy of non-cooperation among certain African states. This has exacerbated the Court's problem of bringing the accused to justice and provides an example of how a sense of exclusion from decision-making has a negative impact on the delivery of liberal outcomes. There are similar, although less clear cut, consequences for the protection of civilian populations. Section three notes how the accusation (although not necessarily the fact) that the P3 abused the legal mandate during the Libya operation contributed to the confused and ineffective international response to the humanitarian crisis in Syria. This too provides an example of how the failure to maintain and abide by an international consensus can have a negative impact on the delivery of liberal outcomes. In this context, the final section considers two specific proposals for procedural reform - to Security Council management of international interventions and to the process of ICC deferral - and examines how the P3 response to these would impact on their claims to be good international citizens.

Legitimacy in international society

Hedley Bull famously argued that international society exists when 'a group of states, conscious of certain common interests and common values, form a society in the sense that they conceive themselves to be bound by a common set of rules in their relations with one another, and share

in their working of common institutions'.[8] The most important aspect of this definition for Ian Clark is the sense among states that they were somehow 'bound' by these rules (or norms) and 'obliged' to work through common institutions. It is not the norms themselves that constitute international society but a belief that they are legitimate and should be observed.[9] This is echoed by Andrew Hurrell who notes that legitimacy 'implies a willingness to comply with rules, or accept a political order, even if this goes against specific interests at specific times'.[10] Likewise, Christian Reus-Smit argues that legitimacy facilitates 'voluntary compliance. This is the compliance that actors give when they believe a rule, decision, or command is rightful, even if it contradicts their narrow self-interests.'[11] David Beetham, who is not necessarily associated with English School theory but has clearly informed this aspect of it, writes that 'the legitimacy or rightfulness of power … provides an explanation for obedience through the obligations it imposes on people to obey, and through the *grounds* or *reasons* it gives for their obedience'.[12]

It follows that those international norms, rules and decisions that lack legitimacy have less of a binding quality. State behaviour in these situations may still be consistent with international norms, rules and decisions but its reasons for being so are more likely to be strategic than normative. 'Obedience is therefore to be explained by a complex of reasons, moral as well as prudential, normative as well as self-interested, that legitimate power provides for those who are subject to it.'[13] In other words, compliance can occur in situations where norms lack legitimacy because it is in the state's particular interest rather than because it is deemed appropriate in all circumstances; and of course those interests can be manipulated, and norm compliance coerced, by hegemonic states.[14]

This does not mean legitimacy concerns are ignored either by the hegemonic or the subordinate state. As Beetham notes, the 'realist' approach, 'which holds that obedience is *only* a matter of the resources available to the powerful to ensure compliance with their wishes and that legitimacy is irrelevant', forgets that '[p]eople relate to the powerful as moral agents as well as self-interested actors'. Power 'does not necessarily collapse when legitimacy is eroded' but

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[8] Hedley Bull, *The Anarchical Society. A Study of Order in World Politics* (Basingstoke: Macmillan, 1977), p.13.

[9] Ian Clark, *Legitimacy in International Society* (Oxford: Oxford University Press, 2007), p.23.

[10] Andrew Hurrell, *On Global Order. Power, Values and the Constitution of International Society* (Oxford: Oxford University Press, 2007) p.78; see also Andrew Hurrell, 'Legitimacy and the use of force: can the circle be squared?', *Review of International Studies* 31 special issue (2005), p.16.

[11] Christian Reus-Smit, 'International crises of legitimacy', p.163.

[12] Beetham, *The Legitimation of Power*, p.26. See also Jean Marc Coicaud (translated and edited by David Ames Curtis), *Legitimacy and Politics. A Contribution to the Study of Political Right and Political Responsibility* (Cambridge: Cambridge University Press, 2002), pp.13-14.

[13] Beetham, *The Legitimation of Power*, p.27.

[14] Hurd, *After Anarchy*, pp.34-40; 77-9.

coercion does, in this situation, 'have to be much more extensive and omnipresent, and that is costly to maintain'.[15] Indeed, Reus-Smit notes that IR scholars

> have frequently argued that the critical difference [between] a dominant state and a hegemon is that the latter's power rests as much on legitimacy as material resources, and … it is this quality of legitimacy that makes hegemony, and not domination, conducive to the stability of an international order.[16]

Likewise, Clark argues that hegemony should be understood as more than a measure of material power. He regards it 'exclusively as a legitimate social arrangement … Fundamental to this conception is that hegemony might then make a positive contribution to international order'. From this perspective hegemony is 'an institutionalized practice of special rights and responsibilities, conferred by international society or a constituency within it, on a state (or states) with the resources to lead'.[17] The hegemon can therefore limit the political costs it has to bear if it can encourage 'followership' by convincing other states of the legitimacy of the norm it supports.[18] Reus-Smit again articulates this when he writes that actors who command legitimacy 'can benefit from low levels of opposition, which reduces the costs of coercion and bribery'.[19] In a more positive vein, legitimate actors 'can draw on the active support of other actors who do more than simply comply with their decisions, actively investing their resources and energies in the project that lies behind them.'[20]

What then is legitimacy in the context of international society and how does it help interpret the current impasse over R2P? English School writers identify substantive and procedural elements in their definitions of international legitimacy.[21] The best way to understand this distinction is to recall the difference between natural and positive law. The authority of the former stems from it being an articulation of right and wrong that is external to, and not contingent on, the political bargaining of sovereign and self-interested states. It rests on a consensus that is 'teased out' through the exercise of right reason, finds expression in the legal doctrine of *jus cogens* and does not require the consent of states to be considered binding. The authority of the latter, on the hand, stems from the view that there is no right or wrong beyond which states have consented

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[15] Beetham, *The Legitimation of Power*, pp.27-8; see also Coicaud, *Legitimacy and Politics*, pp.82-85.

[16] Reus-Smit, 'International crises of legitimacy', p.170.

[17] Clark, *Hegemony* p.4. See also Mlada Bukovansky, Ian Clark, Robyn Eckersley, Richard Price, Christian Reus-Smit, Nicholas J. Wheeler, *Special responsibilities : global problems and American power* (Cambridge: Cambridge University Press, 2012).

[18] See Barry Buzan, 'A leader without followers. The United States in World Politics after Bush', *International Politics* 45:5 (2008), pp.554-70. Cited in Clark, *Hegemony* p.4.

[19] Reus-Smit, 'International crises of legitimacy', p.164.

[20] Reus-Smit, 'International crises of legitimacy', p.163

[21] David Armstrong and Theo Farrell, 'Force and Legitimacy in World Politics', *Review of International Studies* 31, special issue (2005); p.5; Hurrell, *On Global Order*, pp.80-91; Clark, *Hegemony* pp.57-8; Reus-Smit, 'International crises of legitimacy', p.170

to through treaty law.[22] In the context of contemporary international society states are bound by laws that accord with the procedures specified by the United Nations Charter, including conferring primary responsibility for international peace and security on the Security Council, because they have, by virtue of their membership of that organisation, consented to be so bound.[23] From the proceduralist perspective of international legitimacy states are bound by UN Security Council resolutions regardless of their moral content. This poses a problem to those who hold a substantive view of legitimacy because from that perspective the Security Council can still make unreasonable decisions even when it follows the letter of the law.[24]

Despite the implication that natural law has an unalterable quality to it, substantive views of legitimacy have of course varied over time. After all, the 'Aristotelian version of natural law justified slavery as well as aristocracy, while most Enlightenment versions postulated a radical difference between the nature of men and women'.[25] What we are interested in here is the view that the prevention of genocide and other mass atrocity crimes is now *jus cogens* and that international society must do more to enforce that. It is this that underpins the R2P narrative. R2P emerged from the commonly held view that the society of states and its governing institutions, most notably the UN Security Council, were failing to respond to a growing cosmopolitan consciousness that mass atrocity crimes had to be prevented.[26]

Yet what we have seen with the ratification and acceptance of the 1998 Rome Statute, and the adoption 2005 World Summit *Outcome Document*, is that this shift in the substantive values international society is supposed to reflect has not led to a radical shift in the legal procedures that structure the way it responds when those values are challenged. While the International Commission on Intervention and State Sovereignty (ICISS) relayed 'two important messages' concerning the credibility of the Security Council should it continue to fail international society, the World Summit *Outcome Document* did nothing to change the structure of international law. Paragraph 139 stated that international society was 'prepared to take collective action, in a timely

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[22] Clark, *Legitimacy in International Society*, pp.191-2; Hurrell *On Global Order*, p.83; Coicaud, *Legitimacy and Politics*, pp.18-25; Jason Ralph, *Defending the Society of States . Why America Opposes the International Criminal Court and its Vision of World Society* (Oxford: Oxford University Press, 2007), pp.55-86.

[23] 'It is upon the UNSC that "[i]n order to ensure prompt and effective action by the United Nations', the organization's 191 members "confer … primary responsibility for the maintenance of international peace and security" (Article 24), and in so doing "agree to accept and carry out [its] decisions … in accordance with the present Charter' (Article 25). Justin Morris and Nicholas J. Wheeler, 'The Security Council's Crisis of Legitimacy and the Use of Force', *International Politics* 44 (2007), 215.

[24] Morris and Wheeler, 'The Security Council's Crisis', p.44. On the distinction between the 'source' and 'content' of rules, see Beetham, *The Legitimation of Power* p.70, see also Norman Geras, 'Intervention in Syria and UN authorization', 27 August 2013 available at {http://normblog.typepad.com/}accessed 17 July 2014.

[25] Beetham, *The Legitimation of Power*, p.73

[26] Aidan Hehir, *The Responsibility to Protect. Rhetoric, Reality and the Future of Humanitarian Intervention* (Palgrave Macmillan, 2012), pp.29-56. See also Alex Bellamy, *Global Politics and the Responsibility to Protect: From Words to Deeds* (Taylor and Francis, 2010), pp.8-25.

and decisive manner, *through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis* …'.[27] There is here a commitment to a substantive goal of protecting populations from mass atrocities but there is no concrete instruction of how to do that or how not to do that. This opens up the possibility of substantive disagreements on the 'how' question, which in turn leads in to a procedural question of 'who' decides how these disagreements are resolved. How international society as whole responds to mass atrocity is, in other words, inextricably linked to the question of who speaks for international society as a whole.

Similarly, by creating and establishing the ICC, international society demonstrated a commitment to the substantive goal of punishing the perpetrators of R2P crimes. Yet on a case-by-case basis there is room for substantive disagreement on the appropriateness of prosecutions; and again this leads to a procedural question of 'who decides how' these disagreements are resolved. In giving the Prosecutor *proprio motu* powers to investigate without Security Council authorisation, the Rome Statute went further in challenging the authority of the Security Council.[28] Yet, even here the Statute reflected the 'counter-revolution' that some states, notably the US, launched with a view to defending the primacy of the Security Council. Article 16 of the Statute, for instance, enables the Security Council to defer investigations if it considers the judicial process to be a threat to international peace and security; and article 12 enables the Security Council to refer situations to the Court even if those involve states that are not parties to the Rome Statute.[29] In this respect R2P, including the responsibility to prosecute, remains vulnerable to the familiar charge that international society is hierarchical, unrepresentative and unresponsive to its constituents. One might expect this charge to resonate more loudly because R2P reflects a more ambitious and more intrusive conception of international society.[30]

This should be of particular concern for an advocate of *liberal* international society given the place representation has in that value-scheme. Christian Reus-Smit's critique of 'liberal hierarchy' is relevant here. The targets of Reus-Smit's criticism were those pushing the idea that forceful interventions could be legitimised by a 'community of democracies', which was said to exist outside (and in competition to) the authority of the UN Security Council. For Reus-Smit proponents of this kind of liberal hierarchy 'contradict the foundational tenets of liberalism by promoting a reconjoining of right and might'.[31] His defence of what he calls the 'equalitarian

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[27] Hehir, *Responsibility to Protect*, pp.75-6.
[28] Ralph, *Defending the Society of States*, pp.96-109.
[29] Ralph, *Defending the Society of States*, pp109-117.
[30] See George J. Andreopoulos, 'The challenges and perils of normative overstretch', in Bruce Cronin and Ian Hurd (eds), *The UN Security Council and the Politics of International Authority* (Abingdon: Routledge, 2008), pp.105-128.
[31] Christian Reus-Smit, 'Liberal hierarchy and the license to use force', *Review of International Studies* 31 special issue (2005), p.90.

regime' articulated in the UN Charter was thus a matter of liberal principle. It was complemented by practical considerations (i.e. the lack of an institutionalised community of democracies) and by prudential concerns (i.e. the potential to trigger revisionism among non-liberal states).[32] This does not mean the UN system is unproblematic. As Reus-Smit acknowledges, those elements of hierarchy that exist within the UN system can cause similar problems, although to a lesser degree.

> While the equalitarian regime constitutes the institutional bedrock of present international society, peaks of institutional hierarchy punctuate the horizon, and each of these peaks has become a focal point of disenchantment and contestation. The Permanent Five and their veto power in the Security Council is one such peak, an understandable gesture to the realities of post-1945 power, and for most of its history a near guarantee of institutional politicisation and paralysis.[33]

Together with weighted voting rights in international financial institutions and differential rights and obligations contained within the nuclear Non-Proliferation Treaty, the institutionalised hierarchy contained within the UN system is one of 'the principal points of institutional contestation in the present international system'. It has not, he concludes, 'achieved anything like a governance equilibrium'.[34]

There are two points to draw from this. First, when the P3 act through the Security Council they are by no means certain of persuading others to follow because the Security Council itself might be considered an illegitimate institution; and second, the P3 are even less likely to encourage followership when they act outside the Security Council because this damages their 'representational credentials' and increases legitimacy costs.[35] A response to this might be to downplay the relative importance of representativeness to legitimacy claims. It does not matter, from this perspective, that the Security Council is unrepresentative and that the P3, by acting independently, lack even less of a mandate to speak for international society. The key point is that they can mobilise sufficient political resources (including military power) to deliver outcomes that are substantively just.[36] The exclusionary nature of the decision-making can, in

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[32] For a related argument that R2P advocates should engage more constructively with advocates of sovereignty equality rather than depict them as 'obstructionist' see Welsh, 'Implementing Responsibility to Protect', pp.427-8.

[33] Reus-Smit, 'Liberal hierarchy', p.88.

[34] Reus-Smit, 'Liberal hierarchy', p.88.

[35] Following Clark, the P3 might be understood as a collective form of hegemony that bases 'its appeal on its effectiveness, namely that it manages to provide the desired public goods' but this inevitably has cost in terms of their 'representational credentials'. Clark, *Hegemony* p.67.

[36] In an R2P context James Pattison calls this a 'moderate instrumentalist' justification of intervention, *Humanitarian Intervention and the Responsibility to Protect: Who Should Intervene?* (Oxford: Oxford University Press, 2010). For an argument that Pattison undervalues proceduralist conceptions of legitimacy and that the Security Council is central to facilitating cooperative responses see Welsh, 'Implementing the Responsibility to Protect'.

other words, be justified by the claim that it serves common interests and/or common values.[37] Andrew Hurrell describes this in the context of the focus on the Security Council:

> even if we continue to think that institutions and international law matter, we still need to place great weight on the relationship between the legal and political order. Thus, those who reject calls for a reform and expansion of the permanent membership of the Security Council often rest their arguments on the importance of effectiveness. Yes, reform might promote representation, but at what cost? If a Council of 25 or 26 is even less able to effectively than the current arrangement, then how has this increased the legitimacy of the organization? [38]

He adds that it is

> this line of argument that is central to those who are tempted by the possibilities of a power-political order built around empire and hegemony – the idea of an American Empire as the only possible provider of global security and other international public goods, as the only state with the capacity to undertake the interventionist and state-building tasks that the changing character of security has rendered so vital, and as the essential power-political pivot for the expansion of global liberalism.[39]

One does not have to make a normative judgment on the relative value of the procedural and substantive components of legitimacy to recognise the immense burden this places on the liberal hegemon. This is especially so when the ambitions of international society have increased from maintaining international peace and security, to protecting civilian populations from mass atrocity and prosecuting the perpetrators of such crimes.[40] Of course, the difficulty of sustaining an international consensus while pursuing a more 'purposive' international agenda has long been at the centre of English School theorising. Hedley Bull wrote for instance that such questions 'answered in a certain way [could] lead to disorder in international relations, or even to the breakdown of international society itself.[41] The point being made here, however, is that exclusionary decision making procedures exacerbate this problem. The failure to include states in decisions on how norms are implemented makes it more difficult to effectively deliver the substantive agenda the norm articulates. The failure to deliver substantive outcomes moreover robs the hegemon of the argument that can justify the hierarchical decision making process. The legitimacy deficit, which already exists on grounds that the decision-making process is unrepresentative, increases. This does not necessarily lead to the collapse of the liberal order, but it makes the realisation of its ideals harder. David Beetham describes this process:

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[37] Beetham, *The Legitimation of Power*, p.82; Clark, *Hegemony*, p.58.
[38] Hurrell, *On Global Order* p.87. see also Clark, *Hegemony*, p.58, pp.153-8
[39] Hurrell, *On Global Order*, p.86.
[40] See Andreopoulos, 'The challenges and perils of normative overstretch'.
[41] Bull, *The Anarchical Society* p.80.

> The collapse of authority where the legitimacy is eroded, and coercive force is insufficient to maintain power on its own, provides only the most dramatic evidence for the significance of legitimacy to the obedience of subordinates. Less dramatic, but equally important, is the effect a lack of legitimacy has on the *degree* of cooperation, and the *quality* of performance, that can be secured from them, and therefore on the ability of the powerful to achieve goals other than simply the maintenance of their position.[42]

The hegemon can find itself in something of a catch-22 in this respect. It risks losing the authority to do what is substantively right if it democratises the decision-making process but if it does not democratise the decision-making process it risks exhausting itself, losing the capacity and/or will to do what is substantively right, which in turn increases the pressure to democratise the decision-making process . Again the increased ambitions of international society reflected by R2P are important here. The main focus of R2P, including the work of the ICC, has been on Africa, which makes it an important 'social constituency of legitimation'.[43] Of course, this continent is not represented among the permanent members of the Security Council and until relatively recently it was in a subordinate (colonial) relationship with the European members of the P3. A continuing perception of exclusion can in this sense, and following Beetham, 'influence the *degree* of cooperation' and with it 'the *quality* of performance' of the liberal hegemon (i.e. the P3). Informed by this insight, the following sections highlight the legitimacy faultlines surrounding R2P, including the responsibility to prosecute. They also assess the impact the perceived legitimacy deficit is having on its implementation of R2P.

Legitimacy faultlines and the ICC in Africa

This section advances the central argument by firstly describing why certain African states are disenchanted with the ICC's activity and why that frustration has focused on the place the Security Council has in the international criminal process. It then explains how the sense of being excluded from that process is, to paraphrase Beetham, affecting the degree of cooperation in international society and the quality of its performance in ending impunity. It starts by describing the fallout from the UN Security Council referral of the situation in Libya. Yet it is apparent that this was symptomatic of a deeper unease about the Court and its relationship to the hierarchical structures of international society.

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[42] Beetham, *The Legitimation of Power*, p.28.
[43] Reus-Smit, 'International crises of legitimacy', p.164 'Where one needs legitimacy will depend … upon where one seeks to act, and the relevant constituency will be determined by the realm of political action. We know all too well, though that a disjuncture often exists between an actor's realm of political action and the community in which they actually command legitimacy, deliberately or otherwise. I shall term this community "the social constituency of legitimation", the actual social grouping in which legitimacy is sought, ordained, or both.'

On 26 February 2011 the Security Council passed resolution 1970, which amongst other things referred the Libyan situation to the ICC. Libya was not a state party to the Rome Treaty but under Article 13 of the Statute the UN Security Council could refer situations involving such states. This is despite the fact that three of the permanent members (the US, Russia and China) are themselves not party to the Rome Treaty. Moreover, there is no requirement that states serving as elected members to the Security Council be parties to the Rome Statute.[44] Taking up the referral, the Court issued three arrest warrants on 27 June 2011. These were for Muammar Gaddafi, his son Saif Al-Islam Gaddafi and the head of Military Intelligence Abdullah al-Senussi.

While the P-3 welcomed the Court's move, others complained. For instance, South Africa's President Jacob Zuma, despite voting for Resolution 1970, expressed his 'extreme disappointment' with the ICC's decision. This was in part a response to domestic considerations. The increasingly powerful African National Congress Youth League had made clear its opposition to the President's decision to support external intervention, calling it an imperial invasion by neo-colonial forces.[45] But it was also an expression of frustration at the timing of the Court's statement. Since its meeting of the Peace and Security Council on 10 March, the African Union (AU) had been working to end the violence in Libya through negotiation. The arrest warrants were issued a day after Zuma reported 'major breakthroughs' to the AU ad hoc committee in Pretoria. Gaddafi had reportedly accepted the AU's roadmap on Libya and had agreed to stay out of peace talks.[46]

In response to the Court's decision, the AU Assembly, which met in Malabo, Equitorial Guinea at the end of June, expressed its 'deep concern' at the manner in which the ICC Prosecutor had handled the situation in Libya. It further noted that the warrant of arrest concerning Colonel Gaddafi seriously complicated the efforts aimed at finding a negotiated political solution to the crisis in Libya, 'which will also address, in a mutually-reinforcing way, issues relating to impunity and reconciliation'. It requested that the UN Security Council 'activate the provisions of Article 16 of the Rome Statute with a view to deferring the ICC process on Libya, in the interest of Justice as well as peace in the country'; and decided that its member states would 'not cooperate in the execution of the arrest warrant'.[47] Of course, this specific issue was overtaken by events.

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[44] Of the 10 elected members two (Lebanon and India) were not party to the Rome Treaty.
[45] Antoinette Louw, 'Perspectives on Africa's response to the ICC's arrest warrants in the Libya situation', *Situation Report*. Institute for Security Studies, 22 July 2011, pp.5-6 available at
{http://www.africaportal.org/dspace/articles/perspectives-africa%E2%80%99s-response-icc%E2%80%99s-arrest-warrants-libya-situation} accessed 17 July 2014.
[46] Louw, 'Perspectives on Africa's response to the ICC's arrest warrants, p.5.
[47] African Union, Decision on the Implementation of the Assembly Decisions on the International Criminal Court, Doc.EXCL/670(XIX), Assembly of the Union. Seventeenth Ordinary Session, 30 June – 1 July 2011, Malabo, Equitorial Guinea.

Gaddafi's death the following October removed that particular case from the Court's business; and with the victory of the National Transitional Council the AU position on Libya changed from one of non-cooperation to an endorsement of 'Libya's request to put on trial in Libya its own citizens charged with committing international crimes'.[48]

The 2011 statement of non-cooperation did not therefore impact on the task of bringing Saif Al-Islam Gadaffi and Abdullah al-Senussi to justice. It is significant, however, because it illustrates the dissatisfaction among African states at what they see as the exclusions contained within the procedures that determine when and where international criminal justice is applied. It also illustrates how responses to these exclusions have impacted on the Court's effectiveness. Indeed, the statement of non-cooperation on the Libyan referral extended the AU's approach to another ICC arrest warrant, specifically the one issued for President Bashir of Sudan. This warrant also followed a Security Council referral – Resolution 1593 was passed in March 2005 - and it too had been the cause of much frustration for the AU. It had for many years prior to the referral been engaged with Sudanese authorities in a mediation process aimed at finding a political solution to the Darfur crisis.[49] Yet its initial calls for an Article 16 deferral were ignored by the Security Council and the non-cooperative stance first became AU policy in July 2009.[50] In addition to calling for a deferral of the Libyan cases, therefore, the 2011 statement of the AU Assembly reiterated 'the need to pursue all efforts and explore ways and means of ensuring that the request by the AU to the UN Security Council to defer the proceedings initiated against President Bashir of The Sudan, in accordance with Article 16 of the Rome Statute... be acted upon'. It also requested a deferral of the investigations and prosecutions in relation to the 2008 post-election violence in Kenya.[51] Indeed, opposition to the ICC appeared to reach new levels when, in the lead up to an extraordinary AU summit on the ICC in October 2013 states threatened to follow Kenya's lead and withdraw from the Court.[52] This did not happen but the AU did force a vote at the Security Council to defer the Court's proceedings against President

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[48] African Union Decision on the Implementation of the Decisions on the International Criminal Court (ICC) Doc.EX.CL/731(XXI), Assembly of the Union. Nineteenth Ordinary Session, 15-16 July 2012, Addis Ababa, Ethiopia.

[49] Charles C. Jalloh,, Dapo Akande, and Max du Plessis, 'Assessing the African Union Concerns about Article 16 of the Rome Statute of the International Criminal Court', *African Journal of Legal Studies* 4:1 (2011), pp7-8; pp.22-6; see also Kurt Mills, '"Bashir is Dividing Us": Africa and the International Criminal Court' *Human Rights Quarterly* 34:2 (2012), pp.404-47; Jakkie Cilliers Sabelo Gumedze, Thembani Mbadlanyana, 'Africa and the 'Responsibility to Protect': What role for the ICC?', *Irish Studies in International Affairs* 20 (2009), pp.55-67.

[50] While the British and French considered a deferral it was opposed by the US, see David Bosco, *Rough Justice. The International Criminal Court in a World of Power Politics* (Oxford: Oxford University Press, 2014) pp.145-6.

[51] African Union, Decision on the Implementation of the Assembly Decisions on the International Criminal Court, 2011.

[52] International Justice Resource Centre, 'African Union Expresses Opposition to International Criminal Court Prosecutions and Seeks Postponement of Kenyatta Trial', 16 October 2013 available at: {http://www.ijrcenter.org/2013/10/16/african-union-expresses-opposition-to-international-criminal-court-prosecutions-and-seeks-postponement-of-kenyatta-trial/} accessed 17 July 2014.

Uhuru Kenyatta and Deputy President William Ruto. It was rejected when 8 states (the US plus 7 members of the ICC) abstained. Russia, China and five non-members supported the deferral resolution.[53]

The AU's position on Libya may not have had a significant effect on the Court's work, but the same cannot be said for the Bashir case. Bashir has reportedly travelled to Chad, China, Djibouti, Egypt, Iran, Kenya and Libya without being arrested. Instead of condemning the African states in this list for a failure to meet their obligations, the AU has instead insisted that by receiving President Bashir, these states 'were discharging their obligations under Article 23 of the Constitutive Act of the African Union ... as well as acting in pursuit of peace and stability in their respective regions'.[54] This is potentially a major obstacle to implementing R2P. The nature of the AU's opposition to the Court, however, should be clear. It does not oppose the practice of international criminal justice per se. Indeed, the Assembly reiterated its commitment to fight impunity in conformity with the provisions of Article 4(h) of the Constitutive Act of the African Union. Rather the source of the AU's opposition is the refusal of the Security Council to listen to its demands that the investigations into African crimes be deferred because of the damage they are doing to the political efforts to create peace and security. The Court's legitimacy is being called into question for procedural rather than substantive reasons.[55] More specifically, it is the Court's relationship to the Security Council and the African exclusion from the referral and deferral process that is the main source of contestation.

This was articulated nicely by Charles Jalloh, Dapo Akande and Max du Plessis

> From the perspective of many African leaders the ICC's involvement ... has come to reflect their central concern about the UN - the skewed nature of power distribution within the UNSC and global politics. Because of the Council's legitimacy deficit, many African and other developing countries see its work as "a cynical exercise of authority by great powers," in particular, the five permanent members ... And the result for the world's first permanent international penal court? The result is that the uneven political landscape of the post-World War II collective security regime has

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[53] Michelle Nichols, 'African bid for Kenya trials deferral fails at U.N. Security Council', Reuters 15 November 2013 available at {http://www.reuters.com/article/2013/11/15/us-kenya-icc-un-idUSBRE9AE0S420131115} accessed 18 July 2014. In its statement the UK put the onus on the Court's Assembly of State parties to resolve the issue, suggesting that it could stagger the trial date without a Security Council resolution under Article 16, available at {https://www.gov.uk/government/speeches/uk-abstains-on-un-security-council-resolution-on-icc} accessed 18 July 2014.

[54] African Union, Decision on the Implementation of the Assembly Decisions on the International Criminal Court, 2011.

[55] For further evidence of the support for international criminal justice among African states see the proposal to expand the mandate an African Court of Justice and Human Rights so that it may prosecute individuals for international crimes such as genocide, crimes against humanity and war crimes. The AU vote to strip this Court of its power to prosecute heads of state does however suggest that there are limits to this support. Monica Mark, 'African leaders vote themselves immunity from new human rights court', *The Guardian* 3 July 2014, available at {http://www.theguardian.com/global-development/2014/jul/03/african-leaders-vote-immunity-human-rights-court} accessed 18 July 2014.

become a central problem of the ICC. ... A failure to engage and assuage the African government concerns about the deferral provision could further damage the credibility of the ICC in Africa.[56]

There is another part to this aspect of the Court's legitimacy deficit. The sense of exclusion among African states is exacerbated by two instances where the Security Council appears to have been responsive to the unreasonable requests of its permanent members.[57] The first of these is the invocation of Article 16 to provide blanket immunity for US peacekeepers serving in Bosnia. This occurred in the early years of the Court's jurisdiction and at the height of US animosity to the Court. While it was argued that the threat of US withdrawal from Bosnia was a threat to peace and security which justified the Council's intervention, many, including Kofi Annan, insisted that Article 16 was meant for a completely different scenario. It was not envisaged at Rome that the Security Council could under this provision provide blanket immunity.[58] The second instance involved the Security Council practice of tailoring referral resolutions in ways that excluded the citizens of non-party states. This was the case in Resolution 1593 (2005) on Sudan and it was repeated in Resolution 1970 (2011) on Libya and also the May 2014 draft resolution on Syria. Such moves contradict 'one of the key aims of the international criminal justice project and one of the ICC's primary goals: the achievement of universal jurisdiction'.[59] More than that, this kind of practice has legitimacy costs that are not, politically speaking, insignificant. Again Jalloh, Akande and du Plessis articulate this point well. A responsiveness to the concerns of the great powers has fuelled 'the African perception that the Council – by bowing to the demands of its influential members even in the face of serious opposition by many other states - is guilty of double-standards given its refusal to endorse the AU's deferral request'.[60]

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[56] Jalloh et.al. 'Assessing the African Union Concerns about Article 16', pp.9-11.

[57] This is in addition to the concern that UN Security Council referrals 'will appear to many as profoundly unprincipled, given that three of the permanent members of the Council are not parties to the Rome Statute'. Welsh and Sharma, *Operationalizing*, p.10.

[58] Ralph, *Defending the Society of States*, pp.163-6; Jalloh et.al. 'Assessing the African Union Concerns about Article 16', pp.16-21.

[59] Mark Kersten, 'A Fatal Attraction? Libya, the UN Security Council and the Relationship between R2P and the International Criminal Court', in Jeff Handmaker and Karin Arts (eds.), *International Law and the Politics of Justice* (UK: Cambridge University Press, forthcoming). Resolution 1970's referral was limited to events after 15 February 2011. Kersten suggests that this may have been included 'in order to shield key Western states from having their affairs and relations with Libya investigated'. Mark Kersten 'Between Justice and Politics: The International Criminals 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,* (Martinus Nijhoff Publishers 2013).

[60] Jalloh et. al, 'Assessing the African Union Concerns about Article 16', p.12. The perception of double-standards is shared outside Africa. Commenting on the adoption of Resolution 1970, Brazil noted how it 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'. Quoted in Kersten, 'Between Justice and Politics', p.7. See also the reaction to the failed resolution referring the Syrian situation. Mark Kersten, 'Argentina slams UN Security Council over Syria', *Justice in Conflict* 27 May 2014, available at {http://justiceinconflict.org/2014/05/27/argentina-slams-un-security-council-over-icc-referral-entrenching-selectivity/} accessed 18 July 2014.

There is an argument associated with liberal constructivism that the identification of double-standards has normative power. That is liberal states could, in this instance, be shamed into reforming the relationship between the ICC and the UN Security Council simply by identifying the hypocrisy of double-standards.[61] But hierarchy is based on double-standards and can, as noted, reduce the significance of this particular legitimacy cost by effectively delivering outcomes that protect international society's substantive values. In short, if the ICC as it is presently constituted can demonstrate advances in ending the culture of impunity for mass atrocity crimes then that could compensate for the procedural legitimacy deficit and justify the role that the Security Council is currently playing. From this perspective it is not the identification of double-standards that has the normative power to trigger international reform. That normative power comes from what those double-standards mean for the protection and promotion of international society's substantive values. If double-standards are an obstacle to progress in this respect then the pressure to reform the procedural aspects of R2P will increase. The argument advanced in this section is that the legitimacy deficit that accrues from excluding significant parts of the Security Council's social constituency is exacerbated by the ICC's lack of progress in ending the culture of impunity; and that in turn increases pressure on the P3 to democratise the decision making process.

Legitimacy faultlines and the protection of civilians after Libya

This section advances the central argument by firstly describing the international reaction to the P3-led military intervention in the 2011 Libyan conflict. In so doing it illustrates a different aspect of the legitimacy faultline in contemporary international society. It is argued that this schism centres on the procedural questions about who should decide how to implement R2P rather than the substantive question of whether civilians should be protected. Indeed, many saw Security Council Resolution 1973, which authorized the use of all necessary means to protect the civilian population after reminding Libya of its responsibility in this area, as the moment R2P 'came of age'.[62] Although the Security Council vote was not unanimous (Brazil, Russia, India,

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[61] See for instance chapters by Kathryn Sikkink, 'The role of consequences, comparison and counterfactuals in constructivist ethical thought'; Amy Gurowitz, 'Policy hypocrisy or political compromise? Assessing the morality of US policy toward undocumented migrants'; Marc Lynch, 'Lie to me: sanctions on Iraq, moral argument and the international politics of hypocrisy' in Richard M. Price (ed.) *Moral Limit and Possibility in World Politics* (Cambridge: Cambridge University Press, 2008), pp.83-111; 138-164; 165-196.

[62] Secretary-General Ban Ki-Moon "Responsibility to Protect' Came of Age in 2011'. Address to the Stanley Foundation Conference. SG/SM/14068 18 January 2012, available at {http://www.un.org/News/Press/docs/2012/sgsm14068.doc.htm}. See also his declaration that that '[b]y now it should be clear to all that the Responsibility to Protect has arrived' Ban Ki-moon, 'Remarks at Breakfast Roundtable with Foreign Ministers on "The Responsibility to Protect: Responding to Imminent Threats of Mass Atrocities"',

China, and Germany abstained) its approval indicates that R2P principles are not intolerable to the major (and emerging) powers. As Alex Bellamy put it:

> [w]here it was once a term of art employed by a handful of like-minded countries, activists, and scholars, but regarded with suspicion by much of the rest of the world, RtoP has become a commonly accepted frame of reference for preventing and responding to mass atrocities.[63]

As the military mission to protect Libya's civilian population progressed, however, these powers expressed concern that the P3 were abusing that mandate to pursue their particular goal of regime change. In essence, this was a debate on the substantive question of *how* to protect civilians. Where the P3 argued that the POC mission would be compromised if it was too concerned about regime change being a consequence, their opponents (spurred on by the BRICS) argued that the POC mandate should not include regime change. Yet, as we note above, embedded in the notion of R2P is an established procedure to resolve such disputes - deliberation at the Security Council. If the legitimacy faultline that emerged during the intervention centred on the substantive question of how to protect civilians, it was the perception that the P3 were unwilling to abide by the terms of the Security Council mandate and were willing to act without the backing of wider international society (a procedural matter) that pushed the faultline open. The Security Council process offers a means of resolving substantive differences on how to implement R2P. If that is ignored then a legitimacy faultline emerges. Gareth Evans, for instance wrote that the P3 may have had reasonable arguments that justified their actions but they did not give other Security Council members 'sufficient information to enable them to be evaluated'. This left many states, in particular the BRICS (all of whom were sitting on the Security Council) feeling 'bruised' and expressing their belief that 'if better process [had] been followed, more common ground could have been achieved'.[64]

UN News Centre, 23 September 2011, available at {http://www.un.org/apps/news/infocus/sgspeeches/search_full.asp?statID=1325} accessed 18 July 2014. Academic opinion echoed this. Tom Weiss noted how Libya 'put teeth in the fledgling RtoP doctrine', suggesting 'that we can say no more Holocausts, Cambodias, and Rwandas – and occasionally mean it'. Tom Weiss, 'RtoP. Alive and well after Libya', *Ethics and International Affairs* 25:3 (2011), p.1 and 5. Catherine Powell even called Libya 'a multilateral constitutional moment'. Powell, 'Libya: A Multilateral Constitutional Moment?' *Georgetown Law Faculty Publications and Other Works,* Paper 983, 2012, available at {http://scholarship.law.georgetown.edu/facpub/983} accessed 18 July 2014.

[63] As Alex Bellamy, 'Libya and the Responsibility to Protect: The Exception and the Norm', *Ethics and International Affairs* 25:3 (2011), p.1. As further evidence, see Alex Bellamy, *The Responsibility to Protect: Towards a "Living Reality",* Report written for the United Nations Association, UK, April 2013, p.17 and 19; Alex Bellamy, 'from Tripoli to Damascus? Lesson learning and the implementation of the Responsibility to Protect', *International Politics* 51:1 (2014), pp.23-44.

[64] Gareth Evans on 'Responsibility to Protect' after Libya. Interview with Gareth Evans by Alan Philips for The World Today, Chatham House, October 2012, available at {http://www.gevans.org/opeds/oped132.html} accessed 18 July 2014.

The argument that regime change had become the West's policy and that the 'civilian-protection mandate of R2P was its cover' lent credence to the views of those who had long been critical of the concept.[65] The concern that R2P would be a 'trojan horse' to notionally legitimise the intervention of states with ulterior motives was well known within academic circles.[66] It took on new significance during the Libya intervention when the BRICS states and their supporters gave voice to exactly that complaint having felt excluded from the process of managing the intervention. South Africa perhaps articulated the concern best in a debate on the protection of civilians in May 2011. It noted how 'the pursuit of political agendas that go beyond the protection of civilian mandates ...will undermine the gains made in this discourse and provide ammunition to those who have always been sceptical of the concept'.[67]

This was echoed several months later by Guatemala's permanent representative to the United Nations. Noting that Guatemala had expressed similar concerns during the 63rd Session of the General Assembly in July of 2009 he argued that these had now

> multiplied exponentially on the heels of the adoption of Security Council Resolution 1973 (2011), which, in the eyes of the sceptics, came to confirm their worst fears, in the sense that invoking the protection of civilians was just a new pretext to meet darker objectives, such as intervening by force to overthrow a regime. For some countries, the execution of resolution 1973 (2011) has been traumatic, and it must be recognized that its implementation has poisoned the environment regarding the "responsibility to protect", to the point that it is compromising the important progress achieved regarding its acceptance and implementation between 2005 and the present.[68]

The issue here then was not the substantive value of civilian protection (no one defended Libya's right to commit or ignore atrocities), nor was it simply the substantive disagreement on how best to secure that value. Rather the concern was also a procedural one that centred on the P3's claim they alone had authority to decide how best to implement the mandate.[69] From the P3

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[65] David Reiff, 'RtoP, RIP' *New York Times* 7 November 2011.

[66] See Alex Bellamy, 'Responsibility to Protect or Trojan Horse? The Crisis in Darfur and Humanitarian Intervention after Iraq', *Ethics and International Affairs* 19:2 (2005), pp.31-54.

[67] United Nations S/PV.6531, 10 May 2011, p.18; see also United Nations S/PV.6627, 4 October 2011, pp.22-3. See also Ruan Zongze, 'Responsible Protection: Building a Safer World', *Chinese Institute for International Studies* Volume 34, May/June 2012 available at {http://www.ciis.org.cn/english/2012-06/15/content_5090912.htm} accessed 18 July 2014.

[68] Remarks of Gert Rosenthal, Permanent, Permanent Representative of Guatemala to the United Nations at the informal discussion on "the Responsibility While Protecting" organized by the permanent mission of Brazil to the United Nations, 21 February 2012 available at {http://www.guatemalaun.org/bin/documents/IDRespon.while%20Protec.pdf} accessed 18 July 2014.

[69] Guatemala stated in a Security Council debate on Syria for instance 'that in an era when the principle of the Responsibility to Protect (R2P) is being questioned, we are not ashamed to affirm that, with some nuances that we have explained in other forums, we support that principle'. Guatemalan Foreign Minister Calls on States' Responsibility to Protect during Security Council Syria Debate, 31 January 2012, available at {http://www.responsibilitytoprotect.org/index.php/component/content/article/35-r2pcs-topics/3967-guatemalan-foreign-minister-calls-on-states-responsibility-to-protect-during-sc-syria-debate} accessed 18 July 2014. See also statements by Russia and China at the General Assembly debate on 11 September 2013. They continued to

perspective regime change was the best way to protect civilians but that was not how their opponents interpreted Resolution 1973. This failure to maintain and abide by a consensus, and the insistence that intervention would continue regardless of these concerns, meant the P3 and R2P incurred significant legitimacy costs. But again these might be balanced by the claim that the P3 delivered outcomes that were consistent with the substantive values of international society. These kinds of arguments draw on counterfactual evidence informed by the experience in Bosnia. Had the P3 limited the military operation because they were too concerned about influencing the politics of another nation it would have left 'safe areas' vulnerable to attack. As Christian Turner of the UK Foreign Office put it, the Free Libya forces were not systematically targeting civilian populations in the way pro-Gaddafi forces were. So although the intention of the POC mandate was to remain politically neutral the consequence was inevitably a weakening of the regime's forces and command and control facilities. Had the Free Libya force been causing widespread civilian casualties, Turner added 'we would absolutely be responding to that'.[70] From this perspective there was no other way to implement what the Security Council had mandated and the objections of those not leading the coalition were unreasonable and to be dismissed on those grounds.[71]

There is however another aspect to the way the P3 responded to the emergence of this particular faultline and this too reinforces the central argument of the paper. Although the P3 have solid grounds for claiming their intervention delivered a positive outcome in terms of the protection of civilians mandate, there were legitimacy costs to breakdown of international consensus; and, crucially, this has had a negative effect on (to paraphrase Beetham again) the quality of international society's performance in other R2P situations. This is captured in the following explanation Russia gave for vetoing a Security Council resolution condemning the Assad regime in Syria. It directly linked its veto back to the NATO-led action in Libya.

> Our proposal for wording on the non-acceptability of foreign military intervention were not taken into account, and based on the well-know events in North Africa, that can only put us on our guard. ... The situation in Syria cannot

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raise concerns over the use of force, but affirmed their commitment to the preventive elements of R2P. The number of states expressing serious reservations about aspects of R2P is decreasing. Those who used the General Assembly debate to voice serious concerns were limited to Bolivia, Cuba, Ecuador, Malaysia, Nicaragua, Syria and Venezuela. GCR2P ' "State Responsibility and Prevention": Summary of the Informal Interactive Dialogue of the UN General Assembly on the Responsibility to Protect held on 11 September 2013', 22 October 2013, available at {http://www.globalr2p.org/media/files/summary-of-the-2013-r2p-dialogue.pdf} accessed 18 July 2014.

[70] Oral Evidence at the Defence Committee, 12 October 2011, available at {http://www.publications.parliament.uk/pa/cm201012/cmselect/cmdfence/uc950-ii/uc95001.htm} quoted in Jason Ralph 'The Liberal State in International Society. Interpreting Recent British Foreign Policy', *International Relations* 28 (1) 2014, p.17.

[71] See conclusion of the UK's Defence Committee Ninth Report of 2010-12, *Operations in Libya* 25 January 2012, p.7 quoted in Ralph 'The Liberal State in International Society', p.17.

be considered in the Council separately from the Libyan experience ... For us members of the United Nations, it is very important to know how the resolution was implemented and how a Security Council resolution turned into its opposite.[72]

It is possible of course that the Russians would have taken such a position regardless of the way the P3 conducted the Libya operation. It was closer to the Assad regime than it was to the Gaddafi regime and its particular interests were clearer. Yet as a stand against what it claimed were irresponsible military interventions by the unaccountable P3 Russia's position attracted the support of China who joined it in vetoing Security Council resolutions relating to Syria. This was noted by the Chairman of the International Affairs Committee of the Russian State Duma, Alexey Pushkov.

> The immediate reason for this cooperation between Russia and China was the Libyan War. Then in 2011, both Moscow and China abstained on Resolution 1973, and it turned out this resolution was given such a broad reading that it almost became the opposite of what was intended. This resolution was taken as a green light for a war by the use of air power and missiles against Libya. The result was that both Russia and China reconsidered their stand on Libya, and decided not to give UN legitimacy to another war of this kind. Thus, China and Russia share the same concept: the world should not be unipolar, because unipolarity leads to wars.[73]

As with the ICC case then, we have a situation where a procedural disagreement (this time centred on who should decide how best to implement a Security Council mandate to use force) has rebounded on the P3 in ways that have made it more difficult to achieve their substantive aim, the protection of civilian populations (this time in Syria). The argument may be made that the P3 had no intention of intervening in the Syrian conflict and that the legitimacy costs incurred by the Libya intervention were therefore inconsequential. But this response confuses R2P with military intervention. The P3 were clearly reluctant to intervene militarily in the Syrian conflict but to the extent Russian and Chinese opposition has impacted on the ability of the international community to coordinate a diplomatic effort on Syria it illustrates how suspicion of the P3's approach has impacted negatively on the quality of international society's response to the crisis.

Conclusion.

There is a danger of the P3 states resting on the laurels of the Libya operation and consoling themselves with the argument that nothing could have been done to save the people of Syria.

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[72] United Nations S/PV.6627, 4 October 2011.
[73] Interview in *National Interest* 19 June 2013 available at {http://nationalinterest.org/commentary/behind-russias-syria-stance-8623?page=2} accessed 18 July 2014.

Yet the Libyan operation could have been more sensitive to the benefits of maintaining and abiding by the consensus underpinning R2P, and this could have been mobilised more effectively to stabilise the Syrian situation. In that context, responsibility for the failings of the Security Council on Syria does not rest exclusively on Russian shoulders. The P3 managed to sell the Libyan operation to the Security Council but they did not prevent what has been compared to 'buyer's remorse'.[74] The use of this phrase makes it sound as if responsibility for the international discord rests entirely with Russia but that misses a crucial point. The legitimation of power does not require consensus but a consensus that helps to bestow legitimacy makes the exercise power easier. The failure to maintain and abide by consensus over Libya made international society's challenge in Syria more difficult. It was in the P3's interests as the collective hegemon to maintain the BRIC commitment to R2P and it could have worked harder to secure that.

This is crucial to understand if international society as a whole is to improve its performance in protecting civilian populations from mass atrocity. This article has demonstrated that the perceived legitimacy deficit in the way the P3 has implemented a protection of civilian mandate and the way the Security Council is seen to control the process of international criminal justice has made the task of implementing R2P more difficult. The danger here is that the P3 state that is willing to meet its responsibilities could find itself caught in a vicious circle. If the only way of justifying the exclusionary decision making process at the core of R2P is to insist that this is the best way to deliver desirable outcomes the P3 state risks assuming burdens that are beyond its material and political capacities. There is clearly little willingness to intervene in African countries (France aside) to arrest those indicted by the court and, as the reaction to Assad's alleged use of chemical weapons demonstrates, there is little appetite for further military intervention.[75] The more likely scenario is that R2P will continue to lose credibility as those with the sense of exclusion maintain policies of non-cooperation and the P3 begin to realise that they alone cannot bear the burden of liberal hegemony.

The alternative of course is to reform the procedures relating to the question of who decides how international society should meet its responsibility to protect and prosecute. The Brazilian

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[74] Jenifer Welsh 'What a Difference a Year Makes' 5 February 2012, available at {http://opencanada.org/features/syria-un/} accessed 18 July 2014.

[75] On the vote against military action in the UK parliament see Jason Ralph Written Evidence to the Foreign Committee Inquiry on Government foreign policy towards the United States, 8 October 2013, available at {http://data.parliament.uk/writtenevidence/WrittenEvidence.svc/EvidencePdf/1952} accessed 18 July 2014. In December 2013 France deployed a small force to the Central African Republic. Hugh Carnegy, 'French troops deploy in bid to halt CAR bloodletting', *Financial Times* 8 December 2013, available at {http://www.ft.com/cms/s/0/7cecc91e-6000-11e3-b360-00144feabdc0.html#axzz2n5rz9X77} accessed 18 July 2014.

initiative, *Responsibility while Protecting* can be interpreted as a positive development in this respect. It sought to establish guidelines for intervening states. These

> must be observed throughout the entire length of the authorization, from the adoption of the resolution to the suspension of the authorization by a new resolution; ... [e]nhanced Security Council procedures are needed to monitor and assess the manner in which resolutions are interpreted and implemented to ensure responsibility while protecting; ...[t]he Security Council must ensure the accountability of those to whom authority is granted to resort to force.[76]

We see here not a rejection of the R2P principle but recognition that those using force in its name have a responsibility to social constituencies of legitimation beyond themselves. Similarly, Ruan Zongze has set out the idea of 'responsible protection', which insists the objectives of intervention must be limited. The 'objects of protection', he writes, 'must be the innocent people, not specific political parties or armed forces…. the purpose of protection must be to mitigate humanitarian catastrophe. It is absolutely forbidden to create greater humanitarian disasters because of protection, let alone to use protection as a means to overthrow the government of a given state.'[77]

While some have argued that these kinds of initiatives complicate the intervener's task of delivering substantively legitimate outcomes, the evidence presented here demonstrates that a concern for procedural legitimacy is important for achieving the long term goal of preventing and stopping mass atrocity.[78] Australia's Ambassador Quinlan, for instance, noted how it was necessary to start

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[76] United Nations A/66/551–S/2011/701 Letter dated 9 November from the Permanent Representative of Brazil to the United Nations addressed to the Secretary-General, available at {http://www.un.int/brazil/speech/Concept-Paper-%20RwP.pdf} accessed 18 July 2014. Brazil, China, Ghana and India referred to RWP in the General Assembly debate on 11 September 2013. GCR2P, 'State Responsibility and Prevention', p.3. For a related development see the S5 (Jordan, Liechtenstein, Costa Rica, Singapore and Switzerland) draft resolution presented to the General Assembly on 4 April 2012, and ultimately withdrawn. It emphasized 'the need for further measures to ensure the accountability, transparency, inclusiveness and representativeness of the work of the Security Council, with a view to strengthening its effectiveness and the legitimacy and implementation of its decisions' Mie Hansen The S5 presents draft resolution on the Improvement the Working Methods of the Security Council, 10 April 2012, available at {http://www.centerforunreform.org/node/473} accessed 18 July 2014. See also Rita Emch, 'Swiss want to "democratise" Security Council', 29 March 2012, available at
{http://www.swissinfo.ch/eng/politics/foreign_affairs/Swiss_want_to_democratise_UN_Security_Council.html?cid=32381282} accessed 18 July 2014.
[77] Zongze, 'Responsible Protection: Building a Safer World'. For a view that this offers 'reason for confidence that it may be possible to recreate international consensus, so long missing in Syria, about how to deal with the hardest mass-atrocity cases', see Gareth Evans, 'Protecting Civilians Responsibly', *Project Syndicate* 25 October 2013, available at {http://www.project-syndicate.org/commentary/on-moves-by-china-and-other-brics-countries-to-embrace-humanitarian-intervention-by-gareth-evans} accessed 18 July 2014.
[78] For the argument that RwP could complicate the intervener's task and make them more reluctant to commit see the comments made by Australia's Ambassador Quinlan. 'On a possible monitoring mechanism, we are open to exploring how the Security Council can ensure its members are properly informed about and able to debate all relevant issues regarding a military mandate. We see this as crucial to maintain the ongoing legitimacy of any Council authorised action. Existing reporting mechanisms in the Council may need to be strengthened, for example through the availability of more detailed military briefing to members.' Yet he added 'The Council should not, of course, be

exploring how the Security Council can ensure its members are properly informed about and able to debate all relevant issues regarding a military mandate. We see this as crucial to maintain the ongoing legitimacy of any Council authorised action. Existing reporting mechanisms in the Council may need to be strengthened, for example through the availability of more detailed military briefing to members.[79]

It is ultimately in the liberal hegemon's own interests that it encourages others to cooperate with it on the implementation of R2P and this can be done by democratising the decision-making process. Following Clark one might argue that this kind of reform would *supplement* rather than replace liberal hegemony.[80]

Ideas for reforming the exclusionary procedures relating to international criminal justice have also been tabled. In November 2009, for instance, states met in The Hague for the Eighth meeting of the Assembly of State Parties. At that meeting African state parties, represented by South Africa, proposed an amendment to the Rome Statute that would empower the UN General Assembly to act should the Security Council fail to act on a deferral request after six months.[81] This has echoes of the Uniting for Peace Resolution, which was part of the original ICISS conception of RtoP. Implicit in these proposals is the idea that the General Assembly is more representative of international society as a whole. A decision on when to authorise force or defer an investigation thus carries more legitimacy if it is made by that body.[82] As Jalloh, Akande and du Plessis point out the South African proposal raises difficult legal questions but that should not be an obstacle to tackling the underlying legitimacy deficit.[83] Their conclusion reinforces the argument of this paper, which is that there are significant pragmatic reasons why R2P advocates should push for procedural reform. A 'strong, independent and successful ICC is', they argue, 'in Africa's best interest as the continent works to face down the beast of impunity. By the same token ... it is equally in the long-term interest of the Court to show greater sensitivity towards the specific interests and views of African States'.[84]

Clark notes that as well as having a special responsibility for enabling action on the part of the Security Council, a hegemon 'arguably has … special responsibilities to push for a satisfactory

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in the business of micromanaging military operations, but if there are sound answers to concerns of Council members, they should be made available'. Responsibility while Protecting Statement by H.E. Mr Gary Quinlan, Ambassador and Permanent Representative of Australia to the United Nations 21 February 2011, available at {http://www.responsibilitytoprotect.org/Australia%2021%20Feb%20RwP.pdf.} accessed 18 July 2014. See also Bellamy, who cites the UN peacekeeping operation in Bosnia as an example of where the UN had a 'bad experience with excessive political interference in military matters'. *Responsibility to Protect. Towards a "Living Reality"*, p.32.

[79] Responsibility while Protecting Statement by H.E. Mr Gary Quinlan.
[80] Clark, *Hegemony*, p.62.
[81] Jalloh et. al, 'Assessing the African Union Concerns about Article 16', p.26-37.
[82] Jalloh et. al, 'Assessing the African Union Concerns about Article 16', p.37.
[83] Jalloh et. al, 'Assessing the African Union Concerns about Article 16', pp.29-35.
[84] Jalloh et. al, 'Assessing the African Union Concerns about Article 16', p.12.

resolution of the issue of reform'.[85] But what is the implication for R2P of the P3 ignoring the concerns of the excluded and resisting any proposal for reform? Three implications have already been mentioned. The task of meeting the demands of the liberal conscience will become more difficult, the P3 will potentially exhaust themselves in trying to meet those demands and R2P will be reduced to being yet another "utopian" idea that failed once it was confronted by the 'realities' of international politics.[86] There is a fourth implication. Unable to argue that exclusionary processes enable desirable outcomes, the P3 will have to find other arguments to legitimise their place in the current hierarchy of states. The danger of course is that they will fall back on 'tradition' or a sense that somehow the existing order is 'natural'.[87] Attempts to legitimise power on either of these grounds could not be described as liberal and the double standards of any such claim would be easily exposed. It would be hard to avoid the conclusion in this circumstance that the P3 would be defending the existing order not out of fidelity to the common good but because they were exploiting their status for their own interests and/or because they remained wedded to particular conceptions of the self. If this was the case, then defence of the existing order would not be the policy of a good international citizen.

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[85] Clark, *Hegemony* pp.175-6.

[86] Such language evokes the Realist critique of interwar idealism. But as EH Carr noted liberal international orders are not destined to fail. If liberal hegemony is to survive 'it must … contain an element of give-and-take, of self-sacrifice on the part of those who have, which will render it tolerable to the other members of the world community'. *The Twenty Years' Crisis, 1919-1939. An Introduction to the Study of International Relations* (London: Macmillan, 1939), p.213. Cited in Clark, *Hegemony*, p.5. For an earlier application to the ICC see Ralph, *Defending the Society of States*, p.217.

[87] This point inspired by Beetham, *The Legitimation of Power*, p.59.