

Amrita Kapur*

1 Introduction

Professor Anne Peters makes a persuasive case for the benefits of a humanized concept of sovereignty to human rights, needs, interests, and security. Adhering to the consensus at the 2005 World Summit, she identifies the Security Council (the Council) as the locus of authority for humanitarian intervention to safeguard humanity. How-

* Visiting Fellow, International Center of Transitional Justice. Email: amrita.k@nyu.edu.

ever, while Peters acknowledges that the Council's political selectivity may prevent the emergence of a customary norm and suggests possible avenues to effect the incomplete and precarious process of crystallization, she fails to adequately address the inherently political motives which may successfully confine the responsibility to protect (R2P) to an obligation without consequences for non-fulfilment. The discrepancies between the scope of R2P and Peters' broader basis of 'human rights, needs, and interests', and the assignment of responsibility for illegal inaction are addressed in the response by Emily Kidd White and are therefore not analysed here. Instead, this response posits that a comprehensive analysis of the potential and pitfalls of the R2P principle must also incorporate politics: the discussion below explores the determinative impact of politics on the development and application of the R2P principle.

Part 2 examines circumstances where the Council fails to act in response to situations clearly within the purview of R2P, and queries whether Peters' purely legal analysis captures the obstacles inherent in vesting the authority to intervene in the Council. Part 3 focuses on situations where the Council's legitimate refusal to act under the R2P principle leads to intervention by other states, and questions whether Peters' analysis of coercive intervention adequately counters the consequentialist objection to the duty. Finally, as an analogous norm development process, the evolution of the principle of individual criminal responsibility suggests that the creation of enforcement mechanisms is a pre-requisite for the R2P to emerge as an international norm. Empirical arguments are used to inform the principled arguments below, consistent

with Peters' concern that 'abstract reasoning applied to the wrong circumstances can engender pernicious results' (at 533).

2 When the Council Does not Fulfil its Moral Duty

Peters suggests that the recognized moral duty of the Council to protect¹ has developed into an 'an emerging international legal norm the exact scope of which however still needs concretization' (at 539). She envisages not only the use of 'legal strategies to enforce this nascent obligation' (at 540), but also an accompanying change in the legal status of the exercise of veto power by the five permanent Council members (P5). Yet the vehicle for this transformation – Security Council authorization – is purely political. For this reason, Peters' failure to address political obstacles and objections to her reconceptualization of sovereignty is problematic.

The abject failure to honour the R2P principle with respect to Darfur (at 524) not only permitted the continuation of genocide, war crimes, and crimes against humanity, but also demonstrated the lack of progress in entrenching the R2P since the Rwandan and Balkan genocides. The juxtaposition of Council inaction against the indisputable suffering in Darfur, Khartoum's intransigence in protecting its population, and Chinese and Russian opposition to escalating the

¹ See Secretary-General, 'We the Peoples: The Role of the United Nations in the 21st Century', 27 Mar. 2000, UN Doc. A/54/2000, at para. 219.

situation belie Peters' claim that the R2P has 'ousted the principle of sovereignty from its position as a *Letztbegründung* (first principle) of international law' (at 514).

This is not to deny the existence of a humanization trend. The Kosovo intervention catalysed recognition of a responsibility owed on the basis of humanity, and the increasing criticism of the Council's failure to protect reflects a changing perception of its role in preserving international peace and security. It is, however, premature to characterize the R2P principle as an emerging international *legal* norm – there are no identified consequences for the failure to fulfil the R2P, by either the subject state or the P5, and there is no will to enforce commitment to it. Further, Peters' faith in the effectiveness of legal strategies to further the norm's development ignores the continuing paralytic effect of politics on the R2P, and the determinative role politics will continue to play in whether and when its concretization occurs.

Peters makes a positive claim that the Council 'no longer has full discretionary powers without international legal limits' and is now governed by the rule of law (at 526), premised on recent European Court of Justice (ECJ) jurisprudence on Council sanctions targeted towards individuals.² This claim does not survive scrutiny with respect to the R2P. First, the failure to fulfil a residual responsibility (to substitute a state) to protect human life is substantively different from positively infringing the human rights of individuals without

providing an avenue for objection and contestation. Even if sovereignty has been 'relegated to the status of a second-order norm' (at 544), it still operates as a threshold to limit intervention presumptively in both cases. The distinction between a positive action and a subsidiary failure to act is evidently more significant than the relative rights at stake – currently, the right not to be arbitrarily deprived of property 'trumps' the right to life and personal dignity because sovereignty is still the prevailing norm.

In the *Kadi* case, the ECJ made it clear that it was not for the Community judiciary to review the lawfulness of resolutions adopted by the Council, 'even if that review were to be limited to the examination of the compatibility of that resolution with *jus cogens*'.³ It also highlighted the primacy of UN Charter obligations over Community measures,⁴ and seemed to deliberately interpret the Council's intentions to accord with human rights, which effectively forces 'the Security Council into explicitly stating the contrary should it so desire'.⁵

This decision may encourage the Council to consider and incorporate human rights into resolutions, but it does not equate to being governed by the rule of law. Indeed, judicial review was explicitly

² Cases C–402 and C–415/05 P, *Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council and Commission*, Judgment of 3 Sept. 2008, not yet reported (hereinafter *Kadi*).

³ *Ibid.*, at para. 287.

⁴ *Ibid.*, at para. 299.

⁵ Howse, 'The NYU Kadi Panel Discussion in Full', 17 Sept. 2008; posted on 14 Oct. 2008 as a full and attributed account of the discussion, held within the framework of the IILJ Hauser Colloquium on Globalization and Legal Theory, NYU, available at: <http://globaladminlaw.blogspot.com/search?updated-max=2008-10-20T10%3A52%3A00-04%3A00&max-results=7>

precluded as a function of the body best placed to perform it, the ICJ.⁶ Although in the past, the ICJ has determined whether resolutions ‘were adopted in conformity with the purposes and principles of the Charter’⁷ – a judicial review-like function – meaningful power of judicial review entails the possibility of concluding that reviewed acts were *ultra vires*, which the ICJ is very unlikely to do. The conspicuous absence of any such ICJ judgments could be attributed to the lack of any *ultra vires* actions by UN organs, but the language of Council resolutions calls for closer analysis. For example, the Council’s declaration that ‘the continued presence of the South African authorities in Namibia is illegal’ was not based on any prior ‘judicial’ determination of illegality or other source of authority, but, instead, solely on South Africa’s non-compliance with previous resolutions. The ICJ subsequently did not address the implications of the legal character of these resolutions, but instead ‘consider[ed] that the qualification of a situation as illegal does not by itself put an end to it’, tacitly accepting the legal validity of the Council’s classification of the situation.

The Council, through its resolutions, effectively decides what the law *is*, not just how to implement it: because it requires no other source to validate its legal authority, its actions in practice are unlikely ever to be judged *ultra vires*. Further, the *Realpolitik* of the UN structure makes it almost untenable for the ICJ to

declare the actions of UN organs (particularly the SC and GA) *ultra vires*⁸ – resolutions are used to express the will and, therefore, the law of the international community. The lack of any enforcement mechanism engenders a reliance on UN organs which necessarily ensures that the legal authority (and relevance) of the ICJ in practice is dependent on the will of the very organs the powers of which it ‘evaluates’. Politics is the critical explicatory factor for the preclusion of a judicial review function at the time the ICJ was formed, and why it is unlikely ever to declare the Council’s actions *ultra vires*. Peters’ claim that the rule of law also governs decisions of the Security Council is made without analysing the interrelationship between international law and politics, and for that reason it does not, and cannot, encapsulate the dynamics behind Council action or inaction.

The second way in which the rule of law is invoked is to suggest that the ‘exercise of the veto may under special circumstances constitute an *abus de droit* by a permanent member’ (at 540). Peters alludes to the possibility that this norm may not develop: the ‘inaction of the Security Council constitutes relevant practice which may prevent the formation of a customary law obligation to intervene’ (at 524). Each of the P5 states will at various times have different motivations not to intervene: Russian aggression prevented a response in Georgia, and Chinese interest in Sudanese oil blocked authorization of intervention in Darfur; many states may balk at the prospect of

⁶ F. Kirgis, *International Organizations in Their Legal Setting* (1993), at 482.

⁷ ICJ, *Advisory Opinion on the Legal Consequences for States of the Continued Presence of South Africa in Namibia* [1971] ICJ Rep 16, at para. 115.

⁸ See J. Alvarez, *International Organizations as Law-Makers* (2005), at 71.

committing financial, military, and technical resources to any, some, or all of the situations satisfying the R2P criteria today.

Most importantly, there has never been a requirement to justify the exercise of the veto, nor a mechanism to evaluate the legitimacy of the exercise, and there are no direct consequences for any Council members using their veto to prevent humanitarian initiatives. Each of these developments is necessary, and independently politically unlikely, for Peters' reconceptualization of the veto power to become manifest. Invalidating the use of veto power in circumstances where there is an obligation to act and commit resources, potentially jeopardizing existing P5 interests, will require successful politicking, not just the rule of law.

3 When the Duty is not Triggered

Equally threatening to humanity is intervention in circumstances which do not fit the R2P criteria, because the motives that drive such action generally result in operations (e.g., Somalia, Haiti, and the Cold War proxy wars) causing more problems than they solve. Despite Peters' acknowledgment that even an illegal intervention can be rightly or wrongly referred to as a precedent, and encourage abusive interventions elsewhere (at 534), her dismissal of the consequentialist concern about pretexts for intervention is perhaps too hasty. Even if we accept that financial constraints, the anti-interventionist disposition of liberal democracies, and complex interdependencies may limit the number of interventions executed, they do not guarantee that the targets and

nature of interventions will be appropriate.

For example, Peters emphasizes the fact that the USA was *not* able to use the UN in 2003, but fails to address the fact that the Iraqi intervention occurred in the absence of legal claims of the atrocities required under the R2P, executed by a coalition comprising several liberal democracies and two P5 members. Even Kenneth Roth of Human Rights Watch, a self-professed proponent of humanitarian intervention, concluded that the Iraq invasion failed the humanitarian intervention six-part test.⁹ The other two natural limitations Peters mentions – financial constraints and complex interdependencies between states – did not prevent an abusive intervention. Again, politics explains why this is the case. Non-UN-authorized interventions requiring military, economic, and human resources will necessarily be driven by states which dominate their relationships with other states. So although the 'world's only Superpower can't go it alone'¹⁰ in a post-imperial era of globalization, the invasion of Iraq demonstrates that it can nevertheless command significant support in its defiance of international institutionalism.

The 2003 invasion is not a triumph in preventing the instrumentalization of institutions (at 532), but rather a 'serious violation of international law' by states

⁹ Roth, 'The War in Iraq: Justified as Humanitarian Intervention?', Kroc Institute Occasional Paper No. 25:OP:1, 20 Apr. 2004, available at: www.ciaonet.org/wps/rok01/rok01.pdf, at 4.

¹⁰ J.S. Nye, *The Paradox of American Power: Why the World's only Superpower can't go it alone* (2002).

acting like ‘world vigilante[s]’.¹¹ Without negative consequences attendant on the blatant disregard for the threshold for intervention, the Iraqi invasion creates a dangerous precedent whereby a legitimate refusal to act by the Council nevertheless results in the wrong type of action in the wrong situation, with, predictably, the wrong consequences. The continuing challenges plaguing Iraq and Afghanistan testify to the morally unjustifiable outcomes inevitably flowing from intervention which is not disinterested or proportional. In both cases, a ‘post-imperial’ (at 532) legal structure was insufficient to check extra-legal state intentions, and unable to enforce any consequences which may be capable of achieving deterrence.

It follows that the R2P is a responsibility without consequences in at least two ways: it does not compel action to protect individuals, and it does not entail negative consequences following a failure to protect or contravention of ‘the non-intervention’ rule in the absence of R2P criteria. Peters’ purely legal analysis of R2P’s current status and support of possible legal strategies of enforcement fails to appreciate the political factors contributing to the current precarious status of the norm, and the complex uncertain path for the R2P to mature into a legally enforceable duty. To discuss Council authorization without also discussing

politics is to misunderstand why the R2P is, and risks remaining, a responsibility without consequences.

4 The Analogy of Individual Criminal Responsibility

The path to meaningful responsibility in international law has already been paved by the concept of individual responsibility for international crimes, which did not emerge as a legal norm until consequences were attached to the commission of these crimes. The modern-day endorsement of the responsibility in the Nuremberg and Tokyo trials preceded decades of impunity¹² despite the duty to prosecute international crimes enshrined in the Genocide Convention, the Geneva Conventions, and the Torture Convention: state practice simply did not support the emergence of a customary law duty.¹³ Indeed, international criminal law has traditionally been defined by irony: ‘international law both condemns certain acts as internationally sanctioned, yet until recently, has delegated responsibility to states, who are frequently the perpetrators of such acts, to respond’.¹⁴ Impunity was most often

¹¹ See, e.g., Norton Taylor, ‘Top Judge: US and UK Acted as “Vigilantes” in Iraqi Invasion’, *The Guardian*, 18 Nov. 2008, available at: www.globalpolicy.org/security/issues/iraq/attack/law/2008/1118topjudge.htm; International Commission of Jurists, Press Release, ‘ICJ Deplores Moves Toward a War of Aggression on Iraq’, 18 Mar. 2003, available at: www.icj.org/IMG/pdf/Iraq_war_18_03_03_.pdf.

¹² See Cherif Bassiouni, ‘Accountability for Violations of International Humanitarian Law and Other Serious Violations of Human Rights’, in M. Cherif Bassiouni (ed.), *Post-Conflict Justice* (2002), at 26.

¹³ Dugard, ‘Possible Conflicts with Truth Commissions’, in A. Cassese, P. Gaeta, and J.R.D.W. Jones (eds), *The Rome Statute of the International Criminal Court. A Commentary* (2002), i, 697.

¹⁴ Sriram, ‘Conflict Mediation and the ICC: Challenges and Options for Pursuing Peace with Justice at the Regional Level’, Workshop presented at *Building a Future on Peace and Justice*, Nuremberg, 25–27 June 2007, at 10.

achieved through an official act such as the passing of a law granting amnesties or pardons for international crimes, but also through politically expedient decisions not to prosecute in preference to 'peace and reconciliation'. Amnesties were a widespread practice and granted in countries such as South Africa, Chile, Peru, Argentina, Cambodia, El Salvador, Haiti, and Indonesia.

The trend of accountability started with the initiation of proceedings under universal jurisdiction and decisions of the Inter-American Court for Human Rights in the 1990s, which in time generated enough international political capital to enforce individual accountability for international crimes committed in Rwanda and the former Yugoslavia. The creation of the *ad hoc* tribunals and hybrid courts strengthened the basis for individual states' duties to investigate, prosecute, and punish, and entrenched the principle of individual accountability for international crimes. International criminal jurisprudence has defined the scope of international crimes, the different types of responsibility that can be ascribed to individuals, the nature and extent of defences, and the acceptable range of appropriate penalties.

As a permanent treaty-based institution established with the express purpose of ending impunity for international crimes, the International Criminal Court formally concretized the legal norm of individual criminal responsibility. The development of international criminal law illustrates the sequence of events leading to meaningful responsibility: state practice did not conform to the duty to prosecute until enforcement mechanisms were created, first on an *ad hoc* basis, and then through a multilateral

treaty. Today, the existence of an operational ICC is credited with shifting the focus of transitional negotiations from amnesties to some measure of accountability in both Colombia and Uganda. While the imposition of similar consequences (imprisonment for political leaders of implicated states or Council members) for failure to comply with the principle is neither feasible nor appropriate in the case of the R2P, the analogy illustrates that international norms are generally predicated on a commitment to recognize and apply enforcement mechanisms.

In order to develop the R2P further, it may be necessary to return to the Draft Articles on the Responsibility of States for Wrongful Acts to supplement the existing consequences for liability and to encourage their adoption into hard law. Peters notes the ongoing dispute over 'whether and how states are entitled to enforce' obligations *erga omnes* (at 527), following the invocation of Article 48. Given the tendency for states to perform obligations only in order to avoid adverse consequences, resolving this dispute in favour of enforcement may be a necessary precondition for a universal notion of responsibility. This approach may improve an individual state's performance of the R2P, but the formidable challenge of attaching consequences for the entire international community's failure to comply with the principle remains.

In the absence of a mechanism to enforce compliance with the R2P principle, politics explains both its inconsistent application and why the doctrinal shift may never be completed. Council politics inevitably result in 'false negatives' – characterized by a failure to act despite

overwhelming evidence confirming the commission of atrocities; and state-level politics create 'false positives', where intervention occurs despite the lack of atrocities fulfilling R2P criteria. This second scenario invariably involves ulterior motives based on the intervening parties' self-interests, which, as Iraq demonstrates, often causes morally unjustifiable casualties requiring long-term rehabilitation of the state.

An obligation without consequences carries little weight, and if the norm of individual criminal responsibility is an accurate guide, effective enforcement

mechanisms are necessary both to crystallize the norm and to change behaviour. Peters' purely legal analysis highlights the capacity for law to encourage a greater commitment to humanity, but also its limitations in changing international culture, standards, and responses. Without considering the determinative role played by politics in Security Council decisions and the requirement of enforcement mechanisms to modify behaviour, a legal analysis cannot capture the inherent complexity in transforming the R2P principle into a legal norm.

doi: 10.1093/ejil/chp064