Born Posthumously: Rethinking the Shared Characteristics of the ICC and R2P

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ABSTRACT: The shared characteristics of R2P and the ICC are considered in the light of their emergence as institutional responses to the problems of liberal interventionism in the late 1990s. Both these institutions are often understood by their advocates as having belied the universalist promise of their birth. This discursive understanding of the limits of R2P and the ICC as being due to the shifting international culture post-9/11 is challenged through re-reading their establishment as an attempt to limit and evade the asserted responsibilities of Western powers in the post-colonial world. The article also traces the shared articulation of this process of limitation and evasion through the development of an institutionalist outlook, which encourages indirect forms of intervention, held to be empowering or capacity-building the post-colonial state, rather than directly undermining its sovereignty. It notes that R2P, operating as a moral norm rather than as a legal mechanism, was better able to make this transitioning than the ICC, and that latterly the ICC has been illustrating a similar shift in priorities and approach.

KEYWORDS: R2P, ICC, post-liberal, post-interventionist, institutionalist, sovereignty

1. Introduction

This paper argues that both the ICC and R2P have had to overcome immense difficulties as they were born out of the retreat of a certain global perspective of international regulation that, in short, could be understood within a liberal governing rationality. In their development they have come to terms with and helped to articulate the changed understanding of the international sphere; one which is less liberal and therefore articulates a different understanding of international in-

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tervention, which could be usefully termed ‘post-liberal’ or ‘post-interventionist’. The post-interventionist world no longer counter positions external intervention to sovereignty as if this was a zero-sum game, or articulates intervention in the language of a clash of rights or as a problem which needs a legal solution, but rather sees the internationalisation of state forms as a process of empowerment, of capacity- and capability-building. Despite the increased regulatory engagement, the discourse is one of prevention and the building of sovereignty, not of intervention and the denial of sovereignty. In their attempts to come to terms with this different – post-interventionist – framing of the international sphere both institutions have adapted, with R2P leading the way and the ICC following more slowly as it has more formal institutional baggage. The forms of adaptation illustrate clearly how our understanding of the international sphere, and intervention within this, has shifted from the 1990s, when these institutions were initially conceived, to the 2010s were it appears that these institutions are finding their feet and regaining international credibility, articulating the modes of reasoning of a post-interventionist world.

2. Liberal Interventionism of the 1990s

In a traditional liberal framing, expressed in the disciplinary division between political theory and international relations, the borders of the sovereign state demarcated a division between a world of law, ethics, community and progress and a world – the international – which lacked all these attributes, as it lacked a sovereign and the constitution of a legal and political sphere distinct from the bare and contested relations of power and interest. In this liberal understanding, the only solution to international conflict was the extension of the state form to the international level and with this the constitution of a global community bound by shared norms and laws. The discipline of IR engaged with the questions of why this was not possible – why the ‘domestic analogy’ with individuals in the pre-social contract state of nature was not a complete one – and of how forms of stability could be maintained amidst this ever constant threat of conflict (for example, through the realist focus upon

the balance of power, various understandings of liberal institutionalism, or the English School’s focus on shared norms and values).

In the 1990s, with the collapse of the cold war divide, many theorists and political leaders suggested that the end of the problematic of IR had been reached with the domestication of the global. States began to articulate ‘ethical’ foreign policies, eschewing the idea of national interests and articulating the values of ‘global citizenship’. In this ‘new international order’, leading Western states suggested that – in the absence of a formally constituted global sovereign or world government – they could act as putative sovereigns of the international sphere. Through discussions of human rights protection and humanitarian intervention, leading policy discourses of the international framed the world in liberal terms whereby Western states and international institutions, such as the United Nations, NATO, the OSCE and the European Union, increasingly came to envisage international policy making as if they were acting not merely as representatives of their own constituencies but as imagined global governors.

In this context, the discursive disciplinary divide between political theory and international relations – the division of internal and external understandings of politics, law and ethics – began to dissolve. The boundaries of sovereignty appeared not to matter and Western governments began to conceive of domestic and foreign policies in similar terms, regardless of representation or accountability. In the terminology of Foucault, the international sphere was imagined as a ‘liberal economy of power’ in which freedom and security could be framed similarly in both the domestic and international arenas. The question of ‘intervention’ was calculated on the basis of this balance:

The principle of calculation is what is called security. That is to say, liberalism, the liberal art of government, is forced to determine the precise extent to which and up to what point individual interest, that is to say individual interests insofar as they are different and possibly opposed to each other, constitute a danger for the interest of all.

The particular freedoms of state sovereignty were weighed against the collective security of ‘international society’, held to be manifest in the duty of protecting the rights and security of all. Security discursively shifted from a concern of states, with the protection and promotion of their national interests, to that of human security, construed as a reflection of the immanent or emerging ‘global community’.

5. Foucault, Biopolitics, supra note 1, at 65.
6. Ibid.
7. As Rob Walker perceptively notes, at stake in discourses of state-based security vis-à-vis global or human-based conceptions of security in the 1990s was the understanding of ‘the form
2. The Crisis of Liberal Interventionism

The liberal framing of the international sphere imagined the domestication of conflict under the regulatory gaze of the putative global sovereigns, acting within or without the consent of the UN Security Council, as representatives of an immanent, global or cosmopolitan legal framework. The power to act – to intervene – of major Western powers, began to be equated with a moral legitimacy to act in accordance with higher laws, articulated over the NATO war over Kosovo, in terms of ‘natural law’, ‘cosmopolitan law’ or ‘global ethics’. The ‘Spider-Man’ movie encapsulated the satisfaction with moral hierarchy, strongly articulated at the time, asserting that ‘with great power comes great responsibility’.

However, the assertive and optimistic mood of the 1990s began to dissipate as the putative claims to global sovereignty resulted in a counter discourse of Western responsibility. If the West was now responsible, why was it that troops were not dispatched to prevent genocide in Rwanda? Why did Western states prevaricate and delay when intervention was needed to prevent genocide in Bosnia? Why was it that the war over Kosovo, the asserted high water mark of global liberal interventionism, was fought from 15,000 feet, preventing the loss of a single NATO life but at the cost of the ‘collateral’ damage of the deaths of many of those who NATO was sent to save? Why was it that global responsibility seemed to stop when it came to addressing the structural inequalities of poverty and insecurity that blighted whole swathes of the post-colonial world, especially sub-Saharan Africa? The political leaders of Western states and international institutions realised that the discourse of global ethics and Western responsibility had its limits: that the consequences of dismissing the importance of international law and sovereign statehood undermined, rather than enforced, their moral claims to global leadership.

It was in the context of the rolling back of claims of Western responsibility, and of the overt claims of Western powers to the mantle of global sovereignty, that the...
ICC and the R2P were born. Both these institutions can retrospectively be understood as emerging in response to the need to limit the claims upon the West; as a retreat from Western responsibility. Legal guidelines needed to be re-established to remove direct accountability for judging and balancing the claims of freedom and security and intervention. The order of the international needed to be reconstituted. The sovereign state had to return to assume its traditional mediating role as the essential discursive barrier separating Western social and economic domination of the world from Western political responsibility for its consequences.

3. The Birth of the ICC and R2P

R2P was formally conceived in 2000, in the wake of the Kosovo campaign, where Western states, under the banner of the NATO alliance launched a humanitarian intervention without the consent of the UN Security Council. The International Commission on Intervention and State Sovereignty (ICISS), which produced the ‘Responsibility to Protect’ report in 2001, sought to deflect attention from Western responsibility and Western rights of intervention, arguing that responsibility for the protection of basic rights and security was shared but was primarily the responsibility of the domestic state concerned. Starting from the functional responsibility to protect the individual, the report steered away from the liberal discourse of intervention, which pitted the universal ‘human’ rights of individuals against the particularist, conditional, sovereign rights of states. Defining the protection of rights as part of the responsibility of sovereignty, the report argued that there was no clash of rights and that Western states had responsibilities to enable and facilitate the sovereign capacities of non-Western states and that only if this failed would coercive intervention be necessary. The report sought to assuage the advocates of Western intervention that bringing the state back in was not a retreat from Western responsibility but, at the same time, was keen to mediate the relationship between Western responsibility and the problems of conflict in the non-Western world, further seeking to bring in the ambiguous normative framework of ‘just war’ to moderate the more interventionist arguments of those who argued that the liberal framing of interventionism was essentially without sovereign limits, and amounted to no more than ‘cosmopolitan law enforcement’, more akin to policing than war.


13. See Kaldor, Global Civil Society, supra note 8.
The ICC was established in 1998 by the Rome Statute and came into force in July 2002. The establishment of the Statute followed similar concerns as those which led to R2P: the need to ‘outsource’ judgments of responsibility and shift the balance away from Western enforcement responsibility to the domestic state and its leaders. Its establishment was deeply influenced by the problems of the ad hoc international tribunals set up to deal with the former Yugoslavia and with Rwanda. These ad hoc tribunals were set up the basis of Western responsibility to judge and thereby to intervene in conflict situations and Western governments faced calls for a multitude of ad hoc tribunals to be set up and even for calls for universal jurisdiction, where domestic tribunals in Western states could pass judgements on events in third countries with third country parties.

Through setting up the independent court, the construction of the ICC thereby sought to delimit the demand for Western judgements and responsibility to address war crimes committed in non-Western states. The ICC replaced the need for ad hoc tribunals or for universal jurisdiction and similarly sought to bring the non-Western state back in as a mediator between the West and the problems of the post-colonial world. The framing of the ICC’s mandate was very similar to that used by the R2P report, suggesting that non-Western states should be seen as primarily responsible for judging war crimes and that only if non-Western states were incapable or unwilling to do, would the Chief Prosecutor step in on behalf of the international community.

4. The Crisis of R2P and the ICC

Both R2P and the ICC were born into a world where the liberal discourse of the globalising or domestication of the international sphere shifted onto the defensive and clearly articulated the signs of retreat from the triumphalist claims of the early- and mid-1990s. However, for the advocates of R2P and the ICC, these institutions were understood, at the time, as representing and institutionalising the gains of that era. They were seen to be symbols of the global cosmopolitan order of liberal rights and justice, which the 1990s appeared to promise. For these advocates, the evolution of both the ICC and R2P has been a disappointment and hard to explain. Why has the interventionist promise of R2P been shelved? Why did the UN World Summit agreement of 2005 entirely separate R2P from the need to reform the decision-making process of intervention in the UN Security Council? Why has the ICC taken on so few cases? Why does the West seem so reluctant to support the ICC in cases of controversy? Why is the ICC increasingly seen to be putting the needs of stability ahead of the need for justice?

In this framework, the crisis of R2P and the ICC is seen to be a product of the retreat from the aspirations of the 1990s, during the 2000s, especially following 9/11, and therefore caused by an alleged return to a more ‘realist’ focus on security and stability. This framing retrospectively brushes under the carpet the fact that both R2P and the ICC emerged as products of the crisis of liberal internationalism in the 1990s. They were born already posthumously, although this was not recognised by the activists and advocates who understandably conflated the retreat from claims of Western responsibility with their own aspirations for a cosmopolitan or universalist transformation of the international order. Despite the still birth of R2P and the ICC, the retreat of Western powers from the universalist framings of the first post-cold war decade has enabled both R2P and the ICC to recover some creditability and to discursively frame the post-interventionist post-liberal international order.

5. The Rise of a Post-Liberal Order

R2P was, in fact, literally still-born, substantially transformed already in its resuscitation by Kofi Annan in 2003, in preparation for the World Summit. In its revived form, R2P was refitted into a post-interventionist framework, concerned with prevention, on the basis of an institutionalist understanding of conflict and underdevelopment in the non-Western world. The UN Secretary General’s follow-up report to the World Summit, illustrates this approach well in asking the question ‘why one society plunges into mass violence while its neighbors remain relatively stable’? The answer it provides is the institutional framing; understanding mass atrocities outside of a concern with economic and social relations, focusing merely on the institutional structures which are held to shape the behavior of individuals, either providing opportunities or incentives for mass atrocities or limiting the possibility of these occurring:

Genocide and other crimes relating to the responsibility to protect do not just happen. They are, more often than not, the result of a deliberate and calculated

18. Implementing the responsibility to protect, Report of the Secretary-General, UN Doc. A/63/677 (12 January 2009, at para. 15.)
political choice, and of the decisions and actions of political leaders who are all to ready to take advantage of existing social divisions and institutional failures.19

The understanding of mass atrocities as a product of institutional shortcomings then sets the agenda for international preventive engagement to assist in institutional capacity-building that would make states ‘less likely to travel the path to crimes relating to the responsibility to protect’:

Experience and common sense suggest that many of the elements of what is commonly accepted as good governance – the rule of law, a competent and independent judiciary, human rights, security sector reform, a robust civil society, an independent press and a political culture that favours tolerance, dialogue and mobility over the rigidities of identity politics – tend to serve objectives relating to the responsibility to protect as well.20

There is no liberal ‘quick fix’ of intervention and exit-strategies, but much lower expectations, stressing the lack of universality and the difference between institutions and cultures, which constitute a barrier to Western capacity and responsibility. Here, the best that the international community can do is to indirectly work to facilitate good governance mechanisms and capacity-build state institutions which are the ultimate solution, rather than the direct provision of expensive social, economic and military resources.

The ICC too, has shifted towards this post-interventionist framework, arguing that the prosecution of war criminals is just part of its remit. In 2010, twelve years after its creation and eight years after the entry into force of its Statute, the first ever Review Conference took place in Kampala, Uganda. At this review point it was clear that the ICC sought to follow R2P in regaining international creditability on the basis of shifting from intervening against sovereignty to understanding its role as capacity-building: strengthening sovereignty through prevention rather than undermining it through intervention. At the review conference this was promoted in terms of ‘positive complementarity’, emphasizing the ICC’s role in the construction of national capacity. Rather than imposing universal justice, the ICC is increasingly referring to itself as a facilitator and empowering agency, working with and involving states, international organisations and civil society in the collective project of strengthening justice at the national level. Just as R2P has been recast as a framework focusing on prevention rather than intervention, the ICC has attempted to recast itself as capacity-building and strengthening non-Western states rather than as prosecuting or judging them.21

19. Ibid., para. 21.
20. Ibid., para. 44.
6. Conclusion

In the post-interventionist framework, the West no longer has the responsibility to secure, to democratise, or to develop the non-Western world. The regulatory mechanisms of empowerment, prevention and capacity-building are premised upon the understanding that there can be no clash of rights between sovereignty and intervention, no inside and no outside. This is not because of the rise of the immanent global sovereign but precisely because of its demise. In the world of R2P and the ICC the dynamic of engagement is provided by the lack of capacity of the target or object states and societies rather than the representative rights of global authority. This framing assumes that the autonomy of the non-Western state is the problem, necessitating regulatory management. State autonomy facilitates or necessitates preventive engagements rather than acting as a barrier to them. External capacity-building to build sovereignty cannot be subjected or bound by liberal framings of clashes of rights or of law. Responsibility once again stops at the boundaries of the sovereign state but this is a state understood as incapable of managing its autonomy without the help of external facilitators.