REFORMING THE AUTHORISING MECHANISM FOR INTERVENTION: HOW CAN THE RESPONSIBILITY TO PROTECT BE ACHIEVED?

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Politics
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<th>Full Form</th>
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<tbody>
<tr>
<td>ASEAN</td>
<td>Association of South East Asian Nations</td>
</tr>
<tr>
<td>AU</td>
<td>African Union</td>
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<tr>
<td>EU</td>
<td>European Union</td>
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<tr>
<td>NATO</td>
<td>North Atlantic Treaty Organisation</td>
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<tr>
<td>ECOMOG</td>
<td>ECOWAS Monitoring Group</td>
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<tr>
<td>ECOWAS</td>
<td>Economic Community of West African States</td>
</tr>
<tr>
<td>ICISS</td>
<td>International Commission on Intervention and State Sovereignty</td>
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<tr>
<td>SAARC</td>
<td>South Asian Association for Regional Cooperation</td>
</tr>
<tr>
<td>SADC</td>
<td>Southern African Development Community</td>
</tr>
<tr>
<td>ECCAS</td>
<td>Economic Community of Central African States</td>
</tr>
<tr>
<td>CEPGL</td>
<td>Community of the Great Lake Countries</td>
</tr>
<tr>
<td>COMESA</td>
<td>Common Market for Eastern and Southern Africa</td>
</tr>
<tr>
<td>ARF</td>
<td>ASEAN Regional Forum</td>
</tr>
<tr>
<td>R2P</td>
<td>The Responsibility to Protect</td>
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<tr>
<td>CoC</td>
<td>The Code of Conduct</td>
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<tr>
<td>R2NV</td>
<td>The Responsibility Not to Veto</td>
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<tr>
<td>G4</td>
<td>Group of Four</td>
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<tr>
<td>UFC</td>
<td>Uniting for Consensus</td>
</tr>
<tr>
<td>P5</td>
<td>Permanent Members of the Security Council</td>
</tr>
<tr>
<td>E10</td>
<td>Elected Members of the Security Council</td>
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Abstract

This thesis considers how the international response to egregious crimes can be made more consistent and effective. It focuses in particular on the Security Council as the authorising mechanism for intervention and comprehensively evaluates the proposals for its reform. It shows that contrary to several existing proposals, reform to the Security Council would not improve its authorisation of international action to address atrocity crimes. Similarly, the thesis considers proposals that seek to circumvent the authority of the Security Council but rejects their capacity to bring about a more consistent humanitarian regime. Finally, it robustly considers and argues for the use of regional organisations as alternative authorising mechanisms during mass atrocities.
Declaration

No portion of the work referred to in the thesis has been submitted in support of an application for another degree or qualification of this or any other university or other institute of learning.

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A version of Chapter 6 has been published in the journal *Global Responsibility to Protect*. I am grateful for the reviewers’ and editorial comments. I am also grateful to the various audiences for their questions and comments on my presentation material from this thesis, including at Kent, Leeds, Bath, London, Seoul, and Manchester.

Finally, I am eternally indebted to my family. I would like to especially thank my partner, Aoife Pokorny, my siblings, Afolabi Adediran, Olafimihan Adediran and Oluwaseun Adediran.
To my mother, Deaconess Rachael Idowu Adediran, whose encouraging words and boundless love lifted me from the depths. My only wish is that you were here. Finally, I am thankful to my Dad, Mr Olusegun Adediran, thank you for the years of sacrifice and for always pushing me to do more and be more.
Dedication

To my angel, Deaconess Rachael Idowu Adediran.

_from a million miles, I can hear your whispers of love. I miss you, mum._
Chapter One

Introduction

1.1 Background

The treaty of Westphalia in 1648 was designed to guarantee the territorial and political sovereignty of European states. The internal affairs of a state were accepted to be sacrosanct and could not be interfered with by external parties. This principle of non-interference progressively became the cornerstone of international relations and was extended to non-European nations over the next centuries.\(^1\) At the founding of the United Nations in 1945, the international community of states further affirmed the commitment to the idea of sovereign inviolability by entrenching the norm in the Articles of the Charter. In Article 2(4), the Charter prohibits the threat and the use of force that jeopardises the political and territorial integrity of any of its member states.\(^2\) Similarly, it establishes in Article 2(7) that the United Nations could not legitimately intervene in matters which are essentially within the domestic jurisdiction of any state or require member states to submit such matters to settlement.\(^3\)

However, the fragility of many newly independent states in the twentieth century, (partly as a result of the Cold War) and the humanitarian consequences of some of the post-colonial civil wars posed a new challenge to the international order. On the one hand was the global commitment to sovereignty entrenched in international law and on the other were the emerging human security concerns. Although the effect of the security environment of the Cold

\(^1\) It is important to state that the notion of the Westphalian treaty being the basis for the sovereignty claims states make is not universally shared. Krasner, for example, argues that “the Peace of Westphalia itself had almost nothing to do with what has come to be termed the Westphalian system” rather he credits Emmerich de Vatel for the idea that states ought to free from external interference. see Krasner, S., (2001). Rethinking the Sovereign State Model. Review of International Studies. Vol 27 (5) p. 17


War cannot be dismissed, the United Nations’ response to this dilemma in many cases privileged the former over the latter. An instance was its continued recognition of the genocidal Khmer Rouge regime as the legitimate government of Cambodia for years after it was ousted and exiled. Although the regime was ousted in Cambodia in 1979, it continued to occupy Cambodia’s seat at the UN General Assembly from 1979 to 1982 and as part of a coalition government from 1982 to 1993.4

The tension between sovereignty and human security was also evident in the responses of states to the commission of atrocity crimes. In limited cases where states intervened in ongoing cases of mass atrocity crimes, they justified their action by referencing the right of self-defence. India’s intervention in East Pakistan, Vietnam’s intervention in Cambodia, and Tanzania’s intervention in Uganda are some of these examples.5 Even when the interventions were partly driven by humanitarian considerations and had clear humanitarian outcomes, these states did not make a sustained humanitarian argument as justification for their interventions. Ostensibly, this was because they were not themselves convinced of its legality, rather, they appealed to the non-controversial right of self-defence in Article 51 of the Charter. By the 1990s, however, the United Nations had reluctantly become amenable to the idea of humanitarian intervention, but, the institution’s tragic failure to adequately respond to the genocides in Rwanda and Srebrenica brought the perennial tension between state sovereignty and human security concerns to the fore once again.

In 1999, Kofi Annan famously asked, “If humanitarian intervention is, indeed, an unacceptable assault on sovereignty, how should we respond to a Rwanda, to a Srebrenica, to gross and systematic violation of human rights that offend every precept of our common

Annan’s intervention on the subject crucially led to the institution of an international commission that examined the relationship between the right to intervene in response to the commission of atrocity crimes and the sovereignty claims of states that are embedded in international law. In 2001, the International Commission on Intervention and State Sovereignty, part-funded by the Canadian government, released its seminal report that proposed a doctrine of Responsibility to Protect.

The Commission, drawing on natural law, international law and human rights, argued against the notion of absolute sovereignty by states—the freedom of a state to do as it pleases within its territorial boundaries without interference. Instead, it noted that sovereignty is conditional. Using Francis Deng and Roberta Cohen’s concept of sovereignty as responsibility, the Commission argued that a state’s claim to sovereignty is contingent not only upon its fidelity to international law but also its fulfilment of certain protective responsibilities towards its citizens. Within the context of the debate, the report redefined sovereignty as the responsibility of a state to protect its citizens from conscience-shocking crimes (crimes of genocide, war crimes, crimes against humanity, and ethnic cleansing). But more importantly, the Commission established that the international community had a residual responsibility to act in response to the commission of atrocity crimes when states fail in their protection duties.

The central arguments of the report were accepted at the 2005 World Summit. The Outcome Document contained three paragraphs that signalled the commitment of the international community to the doctrine of Responsibility to Protect.

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7 Although, the reformulation of sovereignty as responsibility, as a conditional right, was one of the important contributions of the ICISS report. ICISS. (2001). The Responsibility to Protect - Research, Bibliography, Background: Supplementary Volume to the Report of the International Commission on Intervention and State Sovereignty. IDRC, Otawa; Luke Glanville has argued that the idea that sovereignty is conditional has a long history in international politics. See Glanville, L., (2010). The Antecedents of Sovereignty as Responsibility. European Journal of International Relations. Vol 17(2) pp. 233–255
international community to collectively uphold human security concerns against the competing
claims of state sovereignty. In paragraph 139, the Outcome Document notes:

We are prepared to take collective action, in a timely and decisive manner, through the
Security Council, in accordance with the Charter, including Chapter VII, on a case-by-
case basis and in cooperation with relevant regional organizations as appropriate, should
peaceful means be inadequate and national authorities are manifestly failing to protect
their populations from genocide, war crimes, ethnic cleansing and crimes against
humanity.\(^8\)

Although the acceptance of the principles of the responsibility to protect was of significant
normative consequence and was described by Anne Marie Slaughter as the “most important
shift in our conception of sovereignty since the Treaty of Westphalia in 1648”,\(^9\) the R2P that
emerged from the World Summit was severely watered down.\(^10\) The concern related to the
Summit’s rejection of threshold criteria for military intervention, the restriction of the concept
to just four crimes and the prospect of humanitarian intervention not authorised by the UN
Security Council.\(^11\)

Since 2005, R2P has been put to the test in some important cases, and its capacity to
invoke action has been the subject of intense debate.\(^12\) It is, however, the Libyan and Syrian
crises that have elicited the most passionate discussions about the utility of R2P and the future

\(^8\) United Nations. (2005). World Summit Outcome Document. Available at:
Succeeding Generations. Cambridge: Cambridge University Press. p. 49
\(^10\) The R2P that emanated from the Outcome Document has been derisively referred to as ‘R2P
116—17
\(^12\) The debate on R2P ‘s real influence rages on, for instance see Hehir, A., (2010). The
Responsibility to Protect, Sound and Fury Signifying Nothing? International Relations. Vol 24
(2). pp. 218—239
of humanitarian intervention. This is because both conflicts reflect in significant and contradictory ways the promises, shortcomings and failures of R2P.

In 2011, Qaddafi threatened to commit atrocity crimes against his citizens. The language of his threat was disconcerting. This alongside his human rights record made Libya an ideal test for the invocation of the international community’s responsibility to protect. The United Nations Security Council reacted by referring to the Libyan authority’s responsibility to protect in resolution 1970 and invoked the Council’s mandate as contained in Chapter VII to impose a no-fly zone and authorise member states to take all necessary measures to protect civilians in resolution 1973.

The comprehensive response to the crisis excited R2P supporters who enthused that it was a textbook case of the R2P norm working exactly as it was supposed to. Secretary-General Ban Ki-moon further declared, “it should be clear to all that the [responsibility to protect] has arrived”. But as the dust was settling with the Libyan crisis, Bashar al Assad’s regime in Syria was committing heinous crimes against his people. Unlike in Libya, this time, the Council was unable to act. The failure of the Security Council in Syria reveal the shortcomings of R2P, and these limitations relate principally to what it promises in theory and what it offers in practice. While the concept is now well entrenched in the lexicon of the United Nations, and crucially the Security Council, its inability to consistently galvanise Security Council action during mass atrocity situations has limited its contribution, questioned its utility and increased criticisms against it.

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1.2 Research Problem

The inability of the Security Council to act effectively in response to Syria is part of a long-running trend, where it has been paralysed and failed to authorise robust action, the most notable case of which was its failure to support the NATO intervention in Kosovo in 1999. But it had also failed to support in a timely manner, interventions preceeding, such as in Sierra Leone and Liberia. In Liberia for instance, the Security Council refused calls to intervene in the crisis until late December 1992—three years after the conflict started. It was also criticised for its lethargic and non-robust action in response to the situation in Darfur in the mid-2000s. The Council’s response in the words of Kofi Annan was slow, hesitant and uncaring.

The responsibility to protect as I had earlier stated was conceived with the hope that it would bring about a more consistent response to atrocity crimes, yet, the record of the Security Council’s response to the commission of atrocity crimes since the institutionalisation of the doctrine at the United Nations has been less than encouraging. There have been notable failures of the responsibility to protect. The crises in Sri Lanka in 2009 and in Myanmar in 2017, the Bahrain crisis in 2011 and the ongoing crisis in Yemen and in Syria are prime examples. It is however also true that the R2P has had noticeable successes. The principles undergirding the idea were successfully invoked to resolve the post-election crisis in Kenya and Kyrgyzstan. The doctrine was also referenced in the response to the crisis in Ivory Coast in 2011 and in Mali in 2012. What is apparent in this discussion so far is that the response to atrocity crimes is

undermined by what Hehir calls the ‘permanence of inconsistency’, and the capacity of R2P to bring about a more consistent response to atrocity crimes as initially hoped remains in doubt. This brings us to a central question and the focus of the thesis: \textit{How then can the responsibility to protect be effectively and more consistently implemented?}

\subsection*{1.3 Research Question}

The central concern of this thesis is how the responsibility to protect can be effectively and more consistently implemented. Put differently, how can the international response to the commission of mass atrocity crimes be made more effective and consistent? It is important to note that although the responsibility to protect can be implemented in non-coercive ways (the diplomatic resolution of the election crisis in Kenya in 2008 is an example), I will focus most of my attention on the coercive aspects of the doctrine. In other words, I will focus on the reference to ‘timely and decisive action’ in the \textit{Outcome Document} and in accordance with Chapter VII of the UN Charter. Of course, this does not mean that my analysis and the evaluation of proposals would not intermittently assert the importance of action, including non-coercive ones (for instance, diplomatic criticisms), as a minimum expression of the international community’s responsibility to protect. However, the emphasis will be on the coercive elements of the R2P doctrine. This is also important because some critics dispute whether the consensus around the responsibility to protect extends to Pillar III of the doctrine (the responsibility of the international community to take timely and decisive actions). The inconsistency of the Council in responding to atrocity crimes for these scholars is attributable to the lack of consensus on the coercive elements of R2P. At the same time, the implication of focusing on Pillar III and its inconsistent implementation is that inevitably the spotlight would

\begin{footnotesize}


\textsuperscript{22} Hehir, A., (2016). Assessing the Influence of the Responsibility to Protect on the UN Security Council during the Arab Spring. \textit{Cooperation and Conflict}. Vol 51(2).pp. 166-183;

\end{footnotesize}
be shone on the Security Council. This is because of the centrality of the Council to the 
*authorisation* of the use of force in the international system.

In understanding how the responsibility to protect can be more consistently implemented, I will, therefore, focus particularly on the question of authorisation and not enforcement. I am interested in how to ensure that an authorising mechanism can consistently sanction actions that help to implement R2P. The focus on authorisation is for two reasons. The first is that the Council is primarily an authorising mechanism without an independent capacity to deploy force. As such the discussion naturally focusses on the Council’s inconsistency in authorising remedial actions that can address the commission of atrocity crimes. The second is that much scholarly work has focussed on the enforcement of coercive actions. The question of implementation is, of course, a key one and there is certainly scope to make improvements in this regard—but for the most part, this thesis focuses on a far more underexplored issue—the issue of improvements to the agent authorising force.

How can the authorisation of intervention be improved, given the inadequacies of the current mechanism (the Security Council), so that interventions are consistently authorised when required? One approach to addressing this question is to examine the potential of reforms to the Security Council, or in the absence of reforms, to suggest alternative authorising institutions. This thesis intends to comprehensively engage with these ideas and to determine whether a reform to the Security Council or an alternative authorising institution can bring about a more consistent implementation of R2P.

In answering the above questions, the thesis considers the following subquestions:

1. Should the Security Council maintain be the locus of the authorisation of force?

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2. How feasible and legitimate are proposals for reform of Council?

3. Are there feasible alternatives to the Security Council? And if there are, would they be any more legitimate, effective and bring about a consistent response to atrocity crimes?

1.4 Why is Consistency in Implementing R2P Important?

One of the important assumptions that this thesis makes is that ensuring consistency in the response to atrocity crimes is a worthwhile goal. Yet, it is appropriate to determine why consistency in the application of R2P and in the response to mass atrocity crimes is important and desirable. I contend that three arguments can be extended. First is a moral argument. Mass atrocities are by nature egregious. They are acts that often “shock the moral conscience of mankind”. 24 For instance, the genocide in Rwanda was known for its particular brutality. Described by Samantha Power as the “fastest, most efficient killing spree of the twentieth century”, 25 more than 800,000 Rwandans were killed, mostly with machetes and clubs. It seems appropriate therefore to seek a regime of improved interventions. Second, there is a pragmatic case for consistency. The lack of consistency in the application of the responsibility to protect could progressively result in the further delegitimisation of the doctrine and of the Security Council. Indeed, one of the objections often extended against humanitarian intervention is its selective application. 26 There is ample evidence of cases where intervention was necessary, but the absence of material interest resulted in what Simon Chesterman calls ‘inhumanitarian non-

intervention’. Third, there is a deterrence argument that could be made. A regime of consistent interventions could serve as a deterrent to potential mass atrocity perpetrators by diminishing the uncertainty around the response of the international community to such egregious rights violation. This, in turn, could reduce the incidence of atrocity crimes since right violators know that the international community is committed to punishing acts of genocide, war crimes and crimes against humanity.

That said, Chris Brown argues that achieving consistency is not realistic in the practice of intervention. According to him “the number of situations in the world at any one time where human rights are being dramatically violated is, indeed, usually greater than could plausibly be responded to”. What is important to note is that Brown's argument does not dispute the utility or desirability of a consistent response to atrocity crimes, the concern he expresses are of feasibility. Furthermore, the issue Brown raises can be said to highlight the difficulties that emanate from the absence of capable and legitimate enforcement agents (as I will argue below, this thesis focusses on the authorisation of remedial actions and not about enforcement agents).

But what exactly is meant by consistency? In this thesis, consistency is understood as the principle that like cases should be treated alike and that the absence of national interest should not prevent international response to atrocity crimes. Insisting that the response to mass atrocity crimes should be consistent is not an endorsement of coercive military action in every mass atrocity situation; indeed Just War precautionary principles as detailed in the ICISS report

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29 The question of feasibility here relates to a concern that the Security Council could not possibly respond to all cases of egregious human rights abuses. One may retort that Brown exaggerates the ubiquity of atrocity crimes. But even if one agrees with his point, the use of regional institutions as authorising institutions as I argue in chapter six of this thesis addresses this by engaging in burden sharing with the Council.
(although not endorsed in the Outcome Document) should guide the response to atrocity situations. Evidently, international action could still be constrained by many factors, including that an intervention may not meet one or more precautionary principles. In some cases, military action might not be a feasible or even the appropriate solution. However, what is important is that the international community should be willing to explore a range of options in response to the commission of atrocity crimes, including targeted sanctions. The absence of an effective response from the international community to atrocity crimes in Sri Lanka in 2009 and in Myanmar in 2017 are examples of the lack of consistency in the application of R2P and a failure of the international community’s responsibility to protect. In these cases, geopolitics and a general lack of interest were the prime reasons why the Council did not fulfil its responsibility to protect.

To go back to the question of how R2P be consistently and effectively implemented, it is important to note that the Security Council bears primary responsibility for the maintenance of international peace and security and is seen as the only legitimate institution that can authorise the use of force within the international system. It should not be surprising thus that academic and policy contributions, therefore, start with an assertion that the evident failures of the Council, necessitate the need for reform of the composition, structure, and the working methods of the institution. In 2013, Saudi Arabia lampooned the Security Council for its lack of effective action in response to the crisis in Syria. It specifically noted the absence of a reform to the Council as an explanatory factor in the Council’s inaction. The expectation, therefore, is that a reform of the UN Security Council would do at least two things. First, the admission of new states, especially from regions that are more likely to be at risk of mass atrocity crimes would improve the urgency with which the Council addresses humanitarian crises and bring

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about a more consistent engagement with atrocity crimes. Second, a reform to the Council as it is currently constituted (both in terms of its structure and procedures) would improve the democratic outcome of the Council’s decisions ensuring that its resolutions on atrocity situations are legitimate, less contested, and more likely to be enforced. A legitimate Security Council with a more inclusive membership can instigate actions when and where necessary. It could critically influence the political dynamics of the Council ensuring that the addition of ‘new centers of power’ or new ‘moral voices’ results in less recourse to the use of the veto and increased willingness to address the commission of atrocity crimes in formerly under-represented regions.

Although the argument for reform in order to better implement the responsibility to protect is one that has been made in the diplomatic, policy and academic circles\textsuperscript{31}, yet, there is a surprising dearth of academic publications that comprehensively evaluate the potential contributions of reforms to the responsibility to protect. For instance, Dimitris Bourantonis’ \textit{The History and Politics of UN Security Council Reform} is a historical work on the Security Council reform, and it provides a detailed discussion of some of the reform proposals. Dimitris’ detailed discussion of the evolution of the reform debate is particularly illuminating as it also highlights the intensity of the demands for reforms even during the Cold War years. At the same time, the book was published in 2005, and so it is not a comprehensive work and does not reflect more recent proposals for reforms like the L69 or assess their contributions to R2P.

Martin Niemtz’s *Reforming UN Decision-Making Procedures: Promoting a Deliberative System for Global Peace and Security*, published in 2015, is a more detailed evaluative study. However, his discussion on reform only focuses on increasing the legitimacy of the UN’s decision-making procedures *in general* and not on improving it *in relation to mass atrocity situations*—the focus of this thesis. Perhaps the most comprehensive academic studies on Security Council reform are the Center for UN Reform Education’s *Governing and Managing Change at the United Nations: Reform of the Security Council 1945 - September 2013* report and Peter Nadin’s book, *UN Security Council Reform*, published in 2016. Yet, again, neither of these academic publications assesses reform proposals by their potential contribution to *R2P*. Nadia Banteka’s *Dangerous Liaisons: The Responsibility to Protect and a Reform of the U.N. Security Council (a journal article)*, provides an analysis of UN Reform within the context of R2P. But it takes a different approach; it does not problematise the Council’s inconsistent response to atrocity crimes, rather it shows how the expansion of the Council, in particular, the inclusion of some of the BRICS would not hinder the crystallisation of R2P as a customary norm.

This thesis addresses this gap. It does so in two main ways. First, it offers the first major *comprehensive* examination of the major proposals for reform in relation to the effective implementation of the R2P. As noted above, previous accounts have been (i) piecemeal and/or (ii) not focused on the implementation of R2P in *particular*. Second, it offers a sustained and robust argument for the consideration of regional organisations as legitimate *authorising* mechanisms in place of the Security Council during the commission of mass atrocity crimes. It argues that the utility of regional organisations in implementing R2P transcends their assigned Chapter VIII roles. Instead, their proximity to the crisis, knowledge of the local terrain provides them with a certain legitimacy to act in response to local security challenges.
There are several academic publications and UN reports that discuss and assess the utility of regional organisations. For instance, the 2011 UN Secretary-General report on R2P is a comprehensive study that examines the potential contribution of regional and sub-regional organisations to R2P. However, it principally focuses on the role and the capacity of regional organisations in preventing atrocity crimes.\textsuperscript{32} Although several academic publications discuss the utility of regional groups\textsuperscript{33}, none rigorously considers or makes a sustained argument for the use of regional organisations as alternative authorising institutions. Rodrigo Tavares’ \textit{Regional Security: The Capacity of International Organisations}, for instance, only engages in a comparative analysis of regional organisations in conflict prevention and peacekeeping. Similarly, Ademola Abass’s \textit{Regional Organisations and the Development of Collective Security: Beyond Chapter VIII of the UN Charter}, is a detailed historical discussion on the development of collective security by regional organisations. But again, it does not tackle the issue of regional organisations as authorising mechanisms in the implementation of the responsibility to protect. Thus, this thesis also makes a critical contribution to knowledge by extending strong normative arguments on the merits of regional institutions as alternative authorising mechanisms.

\textbf{1.5 Central Arguments of the Thesis}

It is important to clearly state what the central arguments of this thesis are. This thesis starts from the premise that mass atrocity crimes ought to be addressed, and consistently so. It argues that the obligation to respond to atrocity crimes derives not only from natural law but also from

\textsuperscript{32} UN Report, A/65/877—S/2011/393, p.5

the normative agreements of a solidarist international society. Given this then, there is a need to ensure that the primary institution responsible for international peace and security reflects and promotes the substantive values of the international society. The inability to do so calls it procedural legitimacy to question and allows for its reform or its circumvention.

In concrete terms, the thesis argues that the Council’s consistent failure to respond to atrocity crimes opens up questions about its legitimacy. Proposals to reform the Council must, therefore, be evaluated in terms of their capacity to improve the Council’s ability to fulfil its normative responsibilities. In the thesis, I comprehensively examine the major proposals for reform and I show that they are incapable of bringing about a more consistent response to atrocity crimes because of the enduring presence of the veto, the lack of feasibility or the unrepresentativeness of some of the proposals. In essence, the legitimacy of the Council remains in doubt. I also show that suggested alternatives do not address the key issues in this debate (i.e., legitimacy, effectiveness and consistency). Instead, I argue and show the utility of regional institutions. I contend that regional institutions offer better prospects than the Security Council or its suggested alternatives in consistently authorising actions designed to address atrocity crimes on the basis of factors such as the proximity to the conflict and knowledge of the cultural and political terrain.

Scope of discussion

Now it is important to clarify the scope of my discussion. First, I focus on the proposals for reform which (1) have been put forward, and/or (2) are prominent in the debate, and/or (3) are somewhat realistic. This is primarily because some proposals are not immediately feasible. For instance, while Wendt argues that a world state is inevitable, he also admits that it is unlikely to

emerge in this generation. Second, I do not focus on the capacity of the various agents to undertake humanitarian interventions for three reasons. First, it is not immediately clear that some, such as regional organisations, are capable actors in undertaking coercive actions. Second, engaging in this debate would have over-extended this thesis beyond allowed limits. Third, there has already been a significant analysis of propositions for improving the implementation agents, such as by Ann Herro. I recognise that a critic could point out that the response to mass atrocity crimes has been hindered by the Council’s inability to deploy an independent UN force. While it is true that an independent UN force would have eased some operational problems that the UN encounters, this only partly explains the failures of the UN. The Council has also often been hindered by issues of national interest, geopolitics, and the politics of the veto, which are key questions relating to authorisation.

1.6 Research Methodology

A significant part of this thesis involves the evaluation of reform proposals and academic works on the Security Council and the responsibility to protect. To this extent, it engages in extensive archival research. The United Nations Dag Hammarskjold Library and the United States’s State Department online archive are significant resources. Indeed, both online depositories are crucial sources of first-hand information on the negotiations and the concessions granted to facilitate the founding of the United Nations and for interpreting the provisions of the Charter. This is particularly important as the discussions in Chapter 3 on the Security Council examines

36 During the Rwandan genocide African countries offered to contribute troops to the UN mission, yet the Council failed to act adequately and voted to reduce its peacekeeping force from a 2548 strong contingent to 270. The fact that the US was unwilling to use its technological capability to jam the broadcasting signals of the Hutu interhamwe is deeply
its institutional framework and the conditions under which its structure and procedures were produced. Understanding this helps to frame and analyse the ‘conditions of possibility’ in the reform debate.

The thesis also makes use of interviews with diplomats and policy stakeholders to gain new insights and to corroborate existing knowledge in the literature. The interviews were particularly useful in understanding diplomatic positions on some of the issues on UNSC reform. For instance, the interviews provided insights on the prospects of a veto reform, particularly the normative idea of a code of conduct. It also elucidated supposed contentious issues such as Pillar III of R2P, the dynamics of the Council, particularly the influence of elected members on important resolutions, the hegemonic influence of the United States and the prospect of consensus on reform.

In choosing the subjects to interview, I focused on countries or individuals who by their status are relevant to the normative development of R2P or the reform debate. I conducted 11 interviews:

- I interviewed Carl Watson and Kevin Lynch, Political Advisers at the United States permanent mission. This enabled me to obtain the perspective of a permanent five-member, but more importantly, the interview provided information of the US’s perspective on the idea of a code of conduct and the prospects of an expanded Security Council.

- Janina Hasse-Moshine, Second Secretary of the permanent mission of Germany to the UN. The country was chosen for its unique status as a global power and an important member of the Group of Four countries. The interview also provided relevant information on Germany’s bid for a permanent seat, the idea of a Pan-European permanent seat and the absence of support from the United States for Germany’s candidacy as a permanent member.

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Patrick Luna, First Secretary of the permanent mission of Brazil to the UN and Devesh Uttam, Counsellor, India permanent mission to the UN. The representatives of these countries were interviewed because of their importance to the reform debate as members of the Group of Four and L69 (in the case of India). Furthermore, both countries belong to the BRICS and are reticent about humanitarian intervention. They were also crucial to gaining insight into the dynamics of the Security Council from the perspective of elected states.

Alfredo Toro, Deputy Political Coordinator of the Security Council at the permanent mission of the Bolivarian Republic of Venezuela to the UN. Venezuela was chosen because of the country’s sceptical position on the responsibility to protect, especially Pillar III of the R2P norm.

Kayode Ojo, Minister (R2P) of Nigeria’s permanent mission to the UN. Nigeria was chosen because of its leading position as a member of the influential African Group. The African Group is seen as a cog in the wheel in the reform debate. Nigeria is, therefore, crucial to understanding the intractable issues of the reform initiative from the perspective of the African Group.

For historical normative contributions to reform debate and R2P, I interviewed Dr Carrie McDougall, Legal Adviser and First Secretary at the permanent mission of Australia to the UN.

For UN institutional perspective, I interviewed the President of the General Assembly, Mogens Lykketoft and Mario Buil-Merce, Political Adviser, Office of the Special Adviser on Genocide.

For insight on reform and R2P, given both his academic role and his previous role as the UN special representative for R2P, I interviewed Professor Edward Luck.

For NGO advocacy, I interviewed Dr Simon Adams of the Global Center for the Responsibility to Protect.
The interviews were semi-structured. Thus, while I drew a list of questions to ask the participants before the meeting, I did not make it available to them. Although there were general questions I asked all participants, many of the questions addressed issues related to the unique status of the participant as I had outlined above. The structure of the interview also allowed me to ask follow-up questions on details provided by the participants. They were conducted in New York in the summer of 2016.

**Methodological challenges**

One of the criticisms that can be levelled at qualitative methodology is that it is susceptible to bias. Roger Pierce argues that the outcomes of qualitative research could sometimes be exaggerated and may be spurious.\(^37\) This is because prior learning influences the questions of research and choice of issues and concepts. In this case, this would be the absence of an awareness of how biases and preconceived ideas influence research output. The use of semi-structured interview presents unique challenges of its own too. Shohel, Roy and Jahan note that one has to appreciate that the information obtained in an interview setting could be influenced by a variety of factors. According to them:

“interview is a dynamic process, the response obtained through an interview depends not only on how we ask the questions but also on other factors such as the environment, situations, the relationship between the interviewer and the interviewee, interviewee's mood, character and so on. It is possible for the interviewer to get different and contradictory answers for the same question from the same interviewee”\(^38\)

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While some of the concerns about qualitative research cannot plausibly be addressed since for example, prior learning may influence how one makes a judgement on what information or document is relevant for analysis; I have attempted to mitigate more serious ethical concerns. The interviews, for instance, were recorded to ensure research integrity and allow for independent corroboration. Participants were also asked if they wanted to remain anonymous in order to inspire trust, confidence and truthfulness. Indeed, some of the participants went on to identify the controversial points they made and which they would rather not have attributed to them. In some instances, I cross-corroborated the assertions made by participants with other interviewees. Importantly, the research also adhered to the research ethics guidelines of the University, having been granted ethical clearance to conduct interviews for this PhD research.

1.7 Theoretical Framework

This research adopts an English School theoretical framework. The English School’s philosophical dualism (Pluralism and Solidarism) on the nature of the international society and the goals it prioritises is well suited for a discussion on the legitimacy of humanitarian intervention and importantly on how the responsibility to protect can be consistently implemented. Indeed, ethics, according to Cochran, is central to the English School’s study of world politics.\textsuperscript{39} Although pluralism and solidarism are united in their conception that the international society is regulated by norms, customs and institutions; the divergence in their ethical perspective becomes prominent when questions regarding the purpose of the norms that regulate the relations among states within the international society of states are posed. Pluralism responds to this question by focusing attention on what Cochran calls “an ethics of

coexistence"  

Justice between states according to Wight refers to duties owed "by one government to another", for instance, the duty of non-interference. Solidarism, on the other hand, conceives of ethics in terms of the responsibility of the international society to promote human rights and uphold minimum standards of common humanity.

The appropriateness of the English School to this study also extends to its conception of legitimacy which provides the main analytical tool through which I engage with the key issues of the work (i.e., reform proposals and the institutional alternatives to the Security Council). The English School understands legitimacy in diverse ways, for instance, procedurally, in terms of who has the authority to make decisions over the important questions that the international society faces (I employ this conception in my analysis of reforms and alternative institutions in chapters 3, 4, 5, and 6) and substantively, in terms of what outcomes the international society should seek (I draw on this mostly in my discussion about the legitimacy of intervention in chapter 2, but also at various points in the thesis). While these two conceptions of legitimacy form the basis of most of the analysis that the thesis engages in, it is also important to highlight other conceptions of legitimacy within the English School. Ian Clark, for example, has argued that legitimacy in the international society is also conceived in terms of rightful membership and rightful conduct.

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40 Ibid, p.294
44 Ibid.
Having said this, it is important to be clear that this research pitches its theoretical position with the Solidarist approach of the English School. Solidarism is widely used and highly appropriate when considering R2P and humanitarian intervention. Indeed, several of the leading works on intervention and R2P have explicitly drawn on this perspective, including by Alex Bellamy, Timothy Dunne, and Nicholas Wheeler. Consequently, in the adjoining chapters, I defend the importance of addressing egregious human rights violations. I do this by outlining what counts as legitimate conduct within the international society. I draw on this theoretical standpoint to assess the capacity of proposals for reform of the Security Council to improve the response to atrocity crimes.

1.8 Structure of Thesis

The rest of the thesis is organised as follows: In chapter 2, I set out the theoretical perspective of this thesis, which as I have indicated is the Solidarist theory of the English School. In the chapter, I engage in a normative debate about the legitimacy of humanitarian intervention, paying particular attention to the arguments of pluralists about the illegality and the illegitimacy of humanitarian intervention in the current international society. I defend and justify the legitimacy of humanitarian intervention by crucially drawing on arguments from Hugo Grotius. Hugo Grotius, who is considered a key figure in the development of Solidarism of the English School argues for the legitimacy of remedial actions taken to rectify grave injustices by appealing to the non-derogable rights conferred on individuals by natural law. Given that legal positivist dismiss the validity of natural law as a basis for ordering the

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international society or determining what constitutes legitimate conduct, I also make a robust argument for the legitimacy of humanitarian intervention by drawing on the notion that the prohibition of atrocity crimes is *Jus Cogens* and by referencing the customary practices of states which shows a normative shift towards addressing atrocity crimes irrespective of the sovereignty claims of states. The chapter concludes by examining whether the normative shift of the international society towards Solidarism might be reversed by a shift in the power structure with the growing influence of the BRICS.

In chapter 3, I examine the notion that a reform to the Security Council could improve the institution’s legitimacy and response to atrocity crimes. Although there are recurring references to the importance of Security Council reform to the improved implementation of the responsibility to protect (as I earlier argued), the potential contribution of reform has not been comprehensively analysed in the R2P literature. In the chapter, I critically examine six major proposals for a formal reform of the Security Council. These are: (1) the Razali Proposal; (2) the UN’s ‘Model A & B’; (3) the Group of Four; (4) the Uniting for Consensus; (5) the African Group; and (6) the L69. I consider these proposals’ contribution to improving the legitimacy of the Council and the implementation of R2P on the basis of five important evaluative tests. These are the ‘Veto Problem’; the ‘Representativeness Problem’; the ‘Effectiveness Problem’; the ‘Rivalries Problem’; and the ‘Feasibility Problem’. I argue in the chapter that these proposals are unlikely to address the problem of inconsistency that the implementation of R2P faces.

Chapter 4 examines the effort to restrain the veto privilege and considers its impact on the international response to the commission of atrocity crimes and the implementation of the responsibility to protect. It disputes the potential contributions of proposals that seek to restrain the veto because they naively rely on moral suasion and place too much importance on the idea that naming and shaming of states can normatively guide international politics. It also draws on
insights from interviews with diplomats at the United Nations; it highlights some of the problematic issues concerning the proposals for veto restraint. The chapter also considers the proposals that seek to circumvent the Security Council. Some of these are the idea of a Concert of Democracies and the Uniting for Peace resolution.

In Chapter 5, I start by defining regional organisations. I then engage in a robust discussion of the roles regional organisations play in implementing the R2P. In later sections of the chapter, I provide detailed empirical discussions to show that regional institutions have a long history of responding to localised security challenges. This chapter provides the basis for the normative arguments I extend in chapter 6.

Chapter 6 defends regional organisations as an alternative authorising mechanism. It makes a normative case for the legitimacy of regional organisations to act independently in authorising remedial actions. It extends four arguments that justify and establish the utility of regional arrangements as alternative authorising mechanisms. It also considers and responds to possible objections to the use of regional arrangements in the response to atrocity crimes.

The thesis ends with Chapter 7, where I summarise the arguments of the research and highlight the contributions the thesis makes to knowledge.
Chapter Two

The English School and the Legitimacy of Humanitarian Intervention

In this chapter, I make three claims. First, I argue that humanitarian interventions are legitimate. Second, I contend that the international society increasingly recognises the legitimacy of actions initiated to address atrocity crimes. The third argument takes the previous claims further by insisting that current institutions and frameworks must reflect this normative ideal, and where they do not, their legitimacy is in doubt.

To provide a theoretical basis for the arguments, I draw on the English School’s discussion of solidarism and natural law. Legitimacy, as understood by solidarist scholars of the English School, provides a lens through which a host of issues regarding the responsibility to protect that this research is concerned with can be understood. This includes continuing concerns about the response of the Security Council to atrocity crimes, discourses about reforming the Security Council in order to improve the normative outcome of its decisions, and important questions about the legitimacy of actions outside the legal framework established by the UN Charter.

The chapter proceeds as follows: I start by clarifying the notion of legitimacy. This is important given the varied understanding of the term. I also present a brief discussion of the English School and draw particular attention to the notion of the “international society”. Then, I present the ‘Pluralist challenge’ to solidarism, before arguing for the legitimacy of humanitarian intervention. I draw on the work of 17th century Dutch Jurist, Hugo Grotius, whose ideas resonate distinctively with liberal scholars as his expositions illuminate the arguments on legitimacy that this chapter and the rest of the thesis considers. In doing so, I show how international society has evolved to reflect and promote solidarist values. Indeed, I argue that there is a near-universal acceptance by states that mass atrocity crimes must be prevented and that, when they occur, remedial actions should be taken irrespective of the
claims of sovereignty that states make. The acceptance of the responsibility to protect doctrine is perhaps the clearest evidence of this. Here I will also reject the claims extended by scholars such as Aidan Hehir that the scepticism of some states towards the coercive elements of the R2P doctrine undermines the idea of a Solidarist international society. The chapter concludes by contending that current institutions and legal frameworks must reflect the normative goals of the international society—in this case, preventing and reacting to atrocity situations. I argue that failure in this respect legitimises remedial actions taken outside of the current legal framework as established by the UN Charter.

2.1 Defining Legitimacy and Understanding the English School

Legitimacy is at the heart of global governance. The absence of an overarching authority in the international realm to enforce order presents a compelling problem, why do states obey international rules? Ian Hurd notes that three responses can be given. One answer is to note the influence of the threat of force. States comply with rules because of the material capacity of other states to enforce and to punish the violation of rules. While this has some validity, the clear problem with this account is not only that it is a costly mechanism of social control but also, it does not explain why states with hegemonic material capacity comply with international rules.

The second explanation is that it is in a state’s self-interest to uphold the rules governing the international system. States are drawn to comply with international rules because of the net benefits that accrue. This is an important claim, yet, it has its limitations as it does not adequately account for the willingness of states to subject themselves to the authority of international rules over an extended period even when it is not in the self-interest of states to continue to uphold these rules. Indeed, if self-interest completely explained adherence to rules, Hurd notes that states would constantly engage in a cost and benefit analysis that would subject
the system to drastic change that mirrors the structure of payoffs. The third explanation is the belief in the normative legitimacy of the rule or the institution responsible for the rule. Hurd argues that “legitimacy contributes to compliance by providing an internal reason for an actor to follow a rule”. Instead of compliance generated by coercion or calculation of self-interest, “there is an internal sense of moral obligation”, a sense of what is regarded as right.

Yet, there is a sense in which what legitimacy means exactly and what it refers to can sometimes be unclear. For instance, Christian Reus-Smit says that “legitimacy is a quality that society ascribes to an actor’s identity, interests, or practices, or to an institution’s norms, rules, and principles. When society ordains this quality, such things are said to enjoy or command legitimacy. When legitimacy is ascribed to an actor or institution, we describe it as legitimate”. Saying that legitimacy is a quality that ascribes to an actor does not reveal much about the inherent meaning of the concept or why it could have compliance pull beyond mere social acquiescence. Neither does it reflect on the internal logic of the norms and rules considered legitimate.

As I will show, Mark Suchman’s definition of legitimacy as “a generalized perception or assumption that the actions of an entity are desirable, proper, appropriate within some socially constructed system of norms, values, beliefs, and definitions” provides a more solid conceptualisation which is appropriate for this thesis. This is because it highlights two issues

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48 Ibid. p.387  
49 Ibid.  
50 Ibid.  
51 Ibid.  
relevant to the ideas that undergird this research. First, it implies the presence of a social community. Second, is the notion of appropriateness and the standard of behaviour of actors. In the first instance, the relationship between legitimacy and the social community has been noted by Ian Clark who argues on the social context of legitimacy insisting that: “there can be no concept of legitimacy outside of community [and], it can equally be held that a community does not exist without its own sense of legitimacy”. Similarly, Jack Donnelly and David Fidler have shown why legitimate conduct conceived in terms of a minimum standard of civilisation reflects the notion of legitimacy that the international society upholds. In this liberal sense, according to Donnelly, a government is only “entitled to full membership in international society to the extent that it implements internationally recognized human rights”. Of course, this conception of legitimacy has been critiqued, particularly because it relies on a rhetoric that was the basis for the denial of rights to pre-colonial states.

Having said this, within the English School, literature, legitimacy is generally conceived in two ways (procedural and substantive). First, in a procedural sense, legitimacy is somewhat synonymous with legality or constitutionality. It focuses on questions of right authority such as who “determines how the international society should meet its responsibilities” or how clashes in priorities are resolved. Thomas Franck explains that legitimacy in the procedural sense is

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57 Ibid, p.14
also about what “operates in accordance with generally accepted principles of right process.”60

Indeed the notion of procedural legitimacy is central (although I will intermittently refer to substantive legitimacy too) to the analysis of reform proposals and the alternative institutions in chapters 3, 4, 5 and 6. This is because, if we determine as I argue in this chapter, that the international society is Solidarist and is interested in promoting morally just outcomes, then the question of the right authority to fulfil its normative objectives becomes important. In essence, an international institution would have its procedural legitimacy under scrutiny if its decisions and actions do not produce the outcomes the international society promotes.

Second, in a *substantive* sense, it concerns the precepts and norms considered fundamental to the social and political fabric of the society. Legitimacy in this sense (i.e. substantive legitimacy) is a question of whether an action conforms to accepted customs or even the outcome it produces.61

Ian Clark argues that the distinction between procedural and substantive legitimacy can be made clearer by noting the fact legitimacy either derives from a formal idea of rule (procedural) or justice (substantive).62 This conception of the differences in both ideas is shared by Jason Ralph and Adrian Gallagher who articulate the difference by drawing on the distinction between positive and natural law. Within the context of the debate on humanitarian intervention norms, procedural legitimacy insists that “states are bound by laws that accord with the procedures specified by the United Nations Charter”.63 This legalist position, which Ralph and Gallagher argue, does not reflect on the moral content of the law, is akin to the pluralist position in English School theory. Substantive legitimacy, on the other hand, takes a

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63 Ralph and Gallagher, Legitimacy faultiness in International Society, p. 558
contrary view, the moral content of the decisions of the Security Council are subject to the legitimacy test. It is not enough for the Security Council to align its actions with the procedural requirements of the law, it ought to take into account the extent to which its resolutions cohere with the non-derogable norms that promote the fulfilment of justice (this understanding of substantive and procedural legitimacy informs my analysis throughout the thesis).

Of course, legitimacy is not restricted to these two instances, but these instances reflect the broad analytical categories under which most uses of legitimacy in the international society can be subsumed.\(^6^4\) Furthermore, procedural and substantive legitimacy are relevant to the key issues of the work. In particular, procedural legitimacy provides the main analytical tool through which I consider the major reform proposals in the next chapter and whether there are any plausible legitimate procedural bases outside of the Security Council in later chapters. Indeed, my discussion of regional organisations draws directly on the procedural idea that regional organisations are a legitimate locus of authority in place of the Security Council. That said, given that the focus in this chapter is to outline and defend the values which should undergird the international society, (I argue that these are solidarist values) my discussions will largely focus on legitimacy in the substantive sense.

Let us now turn to a discussion of the English School. The English School is a useful lens through which substantive discussions about legitimacy can be understood. Three important concepts distinguish the English School from other theories of international relations. These concepts are: (1) the idea of an international system, (2) an international society, and (3) the concept of a world society. I will focus on international society. This is the most analytically developed of the three concepts, but what is also important here is that the methodological approaches (Pluralism and Solidarism) of the English School capture the

\(^{64}\)Within the legitimacy literature, these two analytical categories prevail. See Ralph, and Gallagher, Legitimacy Faultlines in International Society.pp. 553-573; see also Clark, *Legitimacy in International Society*. pp. 278
debate that this chapter is interested in. In other words, through Pluralism and Solidarism, we can engage in empirical discussions about the nature of the international society, but also normative judgements about what the goals of such a society should be.

2.2 International Society and the Illegitimacy of Humanitarian Intervention

According to Martin Wight, the most fundamental question one can ask in international theory is what is the international society? Hedley Bull defines the international society as a “group of states conscious of certain common interests and 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 the working of common institutions”. This definition takes the perspective that all states elect to be bound by rules and customs evident in the society of states. But what are those rules and to what ends do they exist?

As I had mentioned in the previous section, within the English School, two distinct perspectives exist (Solidarism and Pluralism). Solidarists are optimistic about the degree of solidarity within the international society to uphold minimum standards of common humanity and to promote human rights and justice. Scholars of the pluralist persuasion, however, have a state-centric answer to the question of what the nature of the international society is and what its goals are. For these scholars, the basis of the international society is international law designed to regulate the relations amongst states, reduce the potential for conflict and to establish an international order based on principles such as sovereign equality and non-intervention.

67 Ibid.
This objective of the international society finds expression in the several international treaties that assert the sovereign independence of states and their right of non-interference. Article 2(7) and 2(4) of the UN Charter unequivocally restate the imperative undergirding the society of states. To this extent, actions that contravene this overriding objective and seek to displace the international society as it is, transforming it into one driven by human rights considerations are illegitimate. Hedley Bull drives home this point. For him, the goal of the international society is to sustain and maintain the international order.\textsuperscript{68} Order is not only the primary goal of the international society, it is what sustains it. Bull explicitly argues that the demands of justice must not trump the imperative of maintaining order, because according to him, to pursue justice would be to enter into conflict with the devices through which international order is at present maintained.\textsuperscript{69}

But it is important to also clarify Bull’s conception of justice and its relationship with order. It is not that Bull completely dismisses the importance of justice. Bull distinguishes between three types of justice. These are ‘Individual Justice’, ‘International and Interstate Justice’ and the ‘Cosmopolitan or World Justice’. According to him, individual justice recognises the moral worth of individuals and natural law is the source of the rights conferred in the respect. Interstate justice, on the other hand, concerns the demands of fairness and equity among states and the recognition of the principle of sovereign equality. The third type of justice is Cosmopolitan or World justice, which appropriates the term ‘humanity’ and concerns itself with notions of the common good. In a sense, it subordinates the individual under the collective.

\textsuperscript{68} Scholars dispute whether Bull is a Pluralist or Solidarist. It appears that the overarching aim of his book, \textit{The Anarchical Society}, is to defend some form of Pluralism, yet in patches he admits that questions of human rights can be reviewed on a case by case basis to determine the validity of the claims of intervention. Robert Jackson in Pluralism in International Political Theory maintains that Bull’s ideas clearly had Realist undertones, but at the same time, it was aware of human right concerns. Furthermore, Bull portrays Solidarist thinking in his article, ‘The Grotian Conception of International Society’ by admitting that intervention ‘sometimes occurs in order to uphold minimum standards of humanity’. p. 63

\textsuperscript{69} Bull, \textit{The Anarchical Society}. p.88
Bull argues that individual and cosmopolitan justice are problematic. He insists that any form of justice can only be realised within a context of social order.\textsuperscript{70} It is for this reason he dismisses individual justice which he sees as “potentially subversive” of the international society.

Similarly, the idea of world justice must be rejected because of the unrepresentative nature of its cosmopolitan claims.\textsuperscript{71} What is perceived or held up as being in the interest of mankind are the preferences of particular governments, states or individuals, legitimised by the invocation of humanity. Furthermore, Bull claims that these demands of justice (both individual and world justice) can only be realised if the structure of the international system is transformed. However, he contends that this could damage the international order if the international system is transformed into one where human rights claims are asserted against a state.\textsuperscript{72}

On the other hand, interstate justice is compatible with the social demands of order because both are mutually constitutive. Justice among states emphasises sovereign equality and fairness; which in turn is reinforced by the orderly conduct of state relations. Yet the question remains, why is order valuable and why must it be subordinated to justice? Bull contends that it is because order is central to the realisation of other values. In particular, order is necessary for the maintenance of international peace. And, clearly, peace is important because it promotes human worth and dignity.

Evidently, by insisting that order is valuable as a means to an end—which is the promotion of human dignity—Bull deftly shows how order can assuage some human rights concerns. In other words, even when the demands of justice are subordinated, order performs an enabling function, which is the realisation of just values. Bull summarises this viewpoint:

\textsuperscript{70} Ibid.
\textsuperscript{71} Ibid.
\textsuperscript{72} Ibid.
World order, or order in the great society of all mankind, is similarly the condition for the realisation of goals of human or cosmopolitan justice; if there is not a certain minimum of security against violence, respect for undertakings and stability of rules of property, goals of political, social and economic justice for individual men or of a just distribution of burdens and rewards in relation to the world common good can have no meaning.73

While the discussion has reflected on the relationship between order and justice, it is important to clearly address how this ties with arguments against the legitimacy of humanitarian intervention, especially the responsibility to protect discourse. There are at least three fundamental but interrelated arguments that Pluralists offer against the legitimacy of humanitarian intervention. The first is the normative value of order. Many of the arguments on this have been discussed above, and I shall not rehash them. But it is worth noting that the order argument extends to a concern that subordinating order increases the risk that is inherent in an anarchic international system. Norms of sovereignty and non-intervention have been explicitly enshrined in multilateral agreements, charters, and treaties and dispensing with these rules that regulate state interactions fuels mutual distrust and reduces the predictability of state actions. In essence, for Pluralists, order and stability have inherent value. Robert Jackson argues this. He states: “in my view, the stability of the international society, especially the unity of the great powers is more important, indeed far more important than minority rights and humanitarian protections in Yugoslavia or any other country—if we have to choose between those two set of values”.74

73 Ibid. p.97
The second is the suspicion of attempts to construct universal notions of justice. Pluralists maintain that supposed cosmopolitan values are not global in nature because, for example, while the responsibility to protect may have been collectively agreed upon, in truth, it only reflects the cultural preferences of certain states. Pluralists argue that international order cannot be sustained on the cultural predilections of a few states who are convinced of the need to homogenise the world under the guise of human rights promotion. Thus, restructuring the international society to reflect such supposed ‘global values’ is not only a sinister backdoor attempt at cultural domination, but it also has serious implications for human diversity.\textsuperscript{75} Andrew Hurrell notes that Pluralists are convinced of the intrinsic value of diversity and argue that it is a fundamental feature of humanity.\textsuperscript{76} In their opinion, “the clash of moral, national, and religious loyalties is not the result of ignorance or irrationality but rather reflects the plurality of values by which all political arrangements and notions of the good life are to be judged”.\textsuperscript{77} Furthermore, Pluralists contend that the human rights promotion regime entrenches racist notions. It reifies ideas that certain races or groups are yet to develop an enlightened understanding of human rights. For them, humanitarian intervention and the R2P bifurcate the world into civilised and uncivilised groups and reinforces stereotypes that non-Western people lack the agency to escape their existential conditions.\textsuperscript{78}

Following from this is a third argument that questions the ‘genuineness’ of the human rights promotion discourse considering its selective application. Bull, for instance, notes that “the international order does not provide any general protection of human rights, only a selective protection that is determined not by the merits of the case but by the vagaries of

\textsuperscript{76}Ibid.
\textsuperscript{77}Ibid. p. 46
States who traditionally argue that human rights should be enforced across territories irrespective of concerns about sovereignty selectively promote the human rights agenda. Antagonists point to examples where energy security and economic concerns have ensured that the human rights rhetoric was significantly watered down in the case of states such as Saudi Arabia. States from the Western hemisphere who promote human rights are only willing to bear such burdens that come with promoting human rights when convenient or when objectives align with their national interests. This is an important critique that I will be exploring further in subsequent chapters of the thesis.

These objections from Pluralists are formidable and strike at the foundation of liberal internationalism. They expose the difficulties with constructing and sustaining an international society on the moral whims of one group of the human race. But this should not prevent us from insisting on the legitimacy of humanitarian intervention. In the next section, I defend the legitimacy of humanitarian intervention. I draw on Hugo Grotius to lay out arguments that insist on the non-derogable nature of the demands of justice in response to atrocity crimes.

2.3 Justifying Humanitarian Intervention

The normative idea that states have a responsibility to protect their citizens from mass atrocity crimes and that other states have a duty to step in when the host state fails in this primary responsibility has a long history in political theory and international relations. As early as the 16th Century, governments and states had begun to formulate clear normative ideas and practices about the legitimacy of actions designed to rectify egregious atrocity crimes committed by third parties. One of the earliest evidence of this was Oliver Cromwell’s

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intervention in Savoy in 1655 following the persecution of the Vaudois minority by the government in Turin. According to David Trim, 2,000 Vaudois were killed and starved to death (8 percent of the population) and thousands more ethnically cleansed from their homes. It is reported that Cromwell was so emotionally distraught about the suffering of the Vaudois that he shelved plans to make war with Spain in order to address the “inhumane murther[sic] of the Vaudois”. Over the next two centuries, the practice of intervention became more proliferated and gained in legitimacy. Two important reasons could be adduced. According to Bellamy, the “increasingly popular idea that political authority derived from the will of the people” challenged the claims of divine right of kings and princes to do as they pleased within their territory. While this evolving norm was limited in reach as non-Europeans and non-Christians were at first exempted from the protective demands placed on states, it was nevertheless important since it “marked the beginning of a profound transformation of international society away from an order founded on absolute monarchs and empires towards a society of sovereign states constituted, nominally at least, by the will of the people”.

The second reason is the theoretical contribution made by philosophers and jurists which further legitimised the idea and practice of intervention. Among many of the scholarly contributions on the legitimacy of intervention, the work of 17th century Dutch Jurist, Hugo Grotius, considered the father of international law stands out. This is not least because his ideas had extensive implications on the formulation of international law, particularly the protection of individual rights, and also on the development of an international society. Grotius argues for

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83 Ibid. p.38
85 Ibid. p.43
the legitimacy of humanitarian intervention on the basis that the “societas humana”— the community of humankind — has a right to act when a tyrant inflicts upon its subject such suffering no one is warranted in inflicting.\textsuperscript{86} In Grotius’s opinion, punishment can be exacted against the tyrant irrespective of where or against whom the violations occur. He states, “I may make War upon a Man, tho’ he and I are of different Nations if he disturbs and molest his own Country”.\textsuperscript{87} Grotius elaborates on this duty of \textit{guardianship} and \textit{punishment} held by states by declaring that:

Kings, and those invested with a Power equal to that of Kings, have a Right to exact Punishments, not only for Injuries committed against themselves, or their subjects, but likewise, for those which do not peculiarly concern them, but which are, in any Persons whatsoever, grievous Violations of the Laws of Nature or Nations.\textsuperscript{88}

It is clear that for Grotius a ‘responsibility’ of some sort exists to protect rights that are needlessly violated, and this responsibility extends to a requirement to punish violators of these rights. Clearly, two important implications result from Grotius’ arguments. First, the legitimacy of a government is contingent upon its conduct towards its citizens; the right to rule is not a perfect right, without abrasion or without derogation. Second, the commission of atrocity crimes could legitimately serve as a “catalyst for foreign intervention”.\textsuperscript{89}

According to Claire Cutler, what Grotius has done is to show that the ultimate source of moral and legal obligation derives from natural law principles and these are applicable to all

\textsuperscript{87}Ibid.
states at all times.\textsuperscript{90} These ideas undergird the English School’s Solidarist views on mass atrocity crimes and the legitimacy of coercive remedial actions.

As I have highlighted, for Hugo Grotius, natural law governs and should regulate the actions of a state. The Grotian tradition insists that the “totality of international relations is subject to the rule of law”.\textsuperscript{91} This is contrary to existing rationalist perspectives that contend that only a states’ capabilities and interest can in truth constrain its actions. For Grotians, however, states are not only bound by the imperatives of law, norms, and customs, it is also in their self-interest to ensure that these imperatives regulate their domestic and international policies. Grotius succinctly encapsulates why this is important. He writes:

For just as the national, who violates the law of his country in order to obtain an immediate advantage breaks down that by which the advantages of himself and his posterity are for all future time assured, so the state which transgresses the laws of nature and of nations cuts away also the bulwarks which safeguard its own future peace.\textsuperscript{92}

While in some respects, this contention that state actions should be subject to the dictates of law binds the pluralist and Solidarist traditions of the English School, the difference in both approaches relates to what ends should these laws exist? Pluralists are often willing to suggest that positive international law exists to ensure the preservation of the system and society of states itself, the maintenance of independence or the external sovereignty of states and the establishment of universal and permanent peace.\textsuperscript{93} Solidarists contend, however, that

\textsuperscript{89} Bellamy, Massacres and Morality. P44
\textsuperscript{91} Cutler, The Grotian Tradition in International Relations. p.41
\textsuperscript{92} Ibid, p.47
\textsuperscript{93} In \textit{The Anarchical Society}, Bull lists six fundamental goals of the international society, the other three are: (1) the limitation of violence; (2) the goal of keeping promises and (3) the goal
international norms, customs, and rules should reflect the pursuit of justice.\textsuperscript{94} The rights of the individual are ontologically prior to those of the state or other groups since they are derived from natural law.\textsuperscript{95} And since the tenets of natural law are universal, where the rights of the individual are seriously violated, redress could be sought irrespective of jurisdiction or concerns about sovereignty.

But a question subsists in the debate on humanitarian intervention, what is the character of natural law that makes it obligatory on states to perform this duty? The authority of natural law, Ralph and Gallagher note, “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 \textit{jus cogens} and does not require the consent of states to be considered binding”.\textsuperscript{96} To the extent that natural law does not require the consent of states, I argue that the legitimacy of humanitarian intervention can be asserted.

Yet, it is possible to also argue that any attempt to construct an international order based on abstract natural law in contemporary times cannot be legitimate since the international society of states has laid out unequivocal guidelines in the Articles of the UN Charter regarding when the use of coercive force is legitimate. There are two responses to this critique. First is to reassert the \textit{jus cogens} of the injunction to remediate mass atrocity crimes and to insist that to the extent that any international or institutional framework conflicts with the demand to prevent and punish the crimes of genocide, war crimes and crimes against humanity, they are illegitimate. In the concluding section of this chapter, this is an argument I return to when...
making a case for the legitimacy of actions taken outside of the current legal framework. The second is to draw attention to evolving customary international law and to argue that the consensus on the doctrine of the responsibility to protect provides a basis for asserting the legitimacy of humanitarian intervention. As Wilfred Jenks argues, the will of the international society is the basis of obligation in international law.\textsuperscript{97} This argument that the legitimacy of intervention is grounded in the international consensus on preventing and reacting to egregious atrocity crimes is what I now turn to.

2.4 Practices, Consensus and the Legitimacy of Humanitarian Intervention

Even if we concede the legal positivist position, that international law should be the determinant of what is legitimate and not\textsuperscript{98}, I contend that the legitimacy of humanitarian intervention can be gleaned from the practices of state and the consensus around the responsibility to protect. There are two demands here, however. First, I must show evidence of normative practices which break away from previous the order. Second, I must successfully argue that a claim of customary practices can still be made in spite of the inconsistency in the international community’s response to atrocity crimes.

My claim is that there is a normative shift in the attitude and practices of states to atrocity crimes between the inception of the UN, the Cold War, and the post-Cold War period. For instance, at the Nuremberg trial, perpetrators of the holocaust defended their actions by insisting on sovereign unaccountability. Confronted with evidence of the atrocities committed against their own citizens, Hermann Goering was reported to have shouted: “But that was our


right! We were a sovereign state and that was strictly our business.”

Glanville notes that to some extent the tribunal agreed with Goering’s position and admitted that it had no jurisdiction over domestic matters. Glanville further notes that a guilty verdict was only reached by tying the atrocities committed to the charges of aggressive war.

This is quite instructive as it reflects a shared understanding of the fact that sovereignty claims can trump human rights concerns. We see this dynamic in play again in Tanzania's claims after ousting the murderous Idi Amin regime in Uganda that had killed 300,000 people and Vietnam’s justification for intervening in Cambodia. The government of Julius Nyerere of Tanzania could only justify its actions by appealing to the right of self-defence. In Cambodia, Wheeler notes that Vietnam did not try to appeal to a “legal right of unilateral humanitarian intervention...[although] many states in the Security Council and General Assembly recognised the terrible suffering of the Khmer people under Pol Pot, but they also affirmed the principle that human rights violations could not justify the unilateral use of force”.

Wheeler further notes that “Vietnam was heavily sanctioned by the international society... for breaking the rules of sovereignty, non-intervention, and non-use of force” even with the humanitarian outcome of its actions. The point must be made that Tanzania and Vietnam did not appeal to a humanitarian motive to justify their intervention, possibly because they were themselves not convinced of the legitimacy of humanitarian claims within the international society.

Yet a clear normative shift was immediately noticeable after the end of the Cold War. One of the earliest indications of this shift in international norm and practice was UNSC Resolution 688 that requested the Iraqi government to stop its political repression of the Kurds. Through resolution 688, Western governments created a humanitarian corridor by imposing a

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100 Ibid.

101 Ibid.

102 Wheeler, Saving Strangers, p.79
no-fly zone over Northern Iraq. This was quite significant given the reluctance of the international society to sanction coercive actions against states before the Iraq intervention on humanitarian grounds.\textsuperscript{104} Indeed, not only was there a willingness to violate Iraq’s sovereignty, Wheeler notes that “western powers publicly justified their action in humanitarian terms”.\textsuperscript{105} James Baker, the United States’ Secretary of State, for instance, legitimised the intervention by saying that the US had to do what had to be done to save lives.\textsuperscript{106} Similar claims were made to legitimise the intervention in Kosovo as a humanitarian imperative. President Clinton passionately insisted: “Kosovo is a crucial test...[to] strengthen a global community grounded in cooperation and tolerance, rooted in common humanity”.\textsuperscript{107} He later described the action as the “morally right thing for America”.\textsuperscript{108} By far the most legitimising argument for the intervention in Kosovo was the report of the Independent International Commission on Kosovo. The commission noted that while the legality of the intervention could be questioned, the intervention was ultimately legitimate, “as it was the only practical means available to protect the Albanian Kosovars from further violent abuse”.\textsuperscript{109} Over the years, interventions with explicit humanitarian claims being made have occurred in Somalia, Haiti, Darfur and Libya, a departure from the Cold War years where international order had a clear realist rationale to it.

Further evidence of this normative shift can be provided by contrasting the reaction of the international community to serious violations of human rights during the Cold War and in the post-Cold War period. A good example that could be drawn to buttress this point is the

\textsuperscript{103}Ibid. p.78
\textsuperscript{104} Such examples include the East Pakistan crisis in 1971 and Vietnam’s intervention in Cambodia in 1979
\textsuperscript{105} Wheeler, Saving Strangers, p.154
\textsuperscript{106} Ibid, p.158
\textsuperscript{108} Ibid.
three-week siege in February 1982 where President Hafez al-Assad, father of the current Syrian President, Bashar al-Assad, slaughtered more than 30,000 of his people. The reaction of the international community to the killings was unsurprisingly absent as it was principally considered a domestic problem. What is important to note here is that by treating occurrences of atrocity crimes as domestic problems and by emphasising the international norms of sovereignty and non-interference, the international society revealed itself as unconvinced by the legitimacy of humanitarian intervention.

In contrast, the forceful and violent suppression of pro-democracy protests by Bashar al-Assad in 2011 was roundly condemned internationally. It also sparked debates about the international community’s obligations and its responsibility to protect. Yet, could the use of the veto to prevent Security Council action show that the international society continues to guide the norms of sovereign equality and non-intervention jealously? The absence of action by the Security Council in a case such as Syria should not lead to the dismissal of the Solidarist claims I have made here. It is important to note that while it is true that the Security Council has been deadlocked for most of the conflict and unable to act, there has been concerted international pressure on the regime and an attempt to delegitimise the Syrian government led by Bashar al-Assad. Economic and diplomatic sanctions have been imposed against Syria as states have individually sought to uphold their international responsibility to protect. Although it remains debatable if a more coercive international action could have been successful against an entrenched Syrian regime aided by the terrain of the country and ethnic politics, however, what

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110 See details of the 1982 Hama Massacre. Available at: http://ebooklibrary.org/articles/Hama_Massacre, [Last accessed 29 July 2016]
111 These efforts include the recognition of the Syrian National Council as the legitimate representatives of the Syrian people by a host of countries including the US, UK, France, Bulgaria, Spain, Tunisia and Egypt. The EU, US, and a number of countries have also imposed
is different between both cases is the absence of an attempt to dismiss the current conflict as solely a domestic problem.

If international will and consensus serves as a good indication of the direction of international law and the source of obligation within the international society, as Wilfred Jenk argues, then we must acknowledge that the unanimous adoption of the responsibility to protect doctrine at the largest gathering of world leaders in history in 2005 and its reaffirmation at the General Assembly in 2009 means that the legitimacy of remedial actions to address atrocity crimes is no longer seriously in doubt. Admittedly, the record is chequered as there has not been a consistent enforcement when egregious human rights violations occur, but we can still assert that the international society is no longer indifferent to human rights violations. Bellamy and Gifkins have argued and provided strong empirical evidence to support this conclusion. Bellamy, for instance, argues that the international society has assimilated a new culture of protection. He calls it the ‘Politics of Protection’. For him, state identities and interests have now been shaped such that the protection needs of populations from the threat of atrocity crimes is now internalised. In other words, the international society now considers the protection of populations from serious human rights violations as a matter of routine. Similarly, Jess Gifkins has provided comprehensive evidence to show that the language of protection, specifically R2P language, is now increasingly being used by the Security Council in its resolutions.

unilateral economic sanctions against Syria. At the same time, the Free Syrian Army is being provided training, financial and military support by the US and countries within the region.

114 Bellamy, The Responsibility to Protect: Added Value or Hot Air?
115 Gifkins, R2P in the UN Security Council
Aidan Hehir disputes the claims of a qualitative change in the way the international community responds to atrocity crimes.\textsuperscript{116} He takes inconsistency as indicative of the fact there is a lack of consensus on key areas of the R2P doctrine, particularly pillar III which asserts the international community’s right to engage in coercive remedial actions. These arguments also extend to the observation that the growing influence of the BRICS (Brazil, Russia, India, China, and South Africa) states poses a threat to the increasing Solidarism within the international society. The emergence of this block of states could lead to the strengthening of Pluralist claims in the international society. For instance, Roy Alison suggests that the rise of the BRICS states could lead to a shift in global politics, constraining the West’s capacity to set the norms and rules of behaviour within the international order and its response to violations of norms.\textsuperscript{117}

I have argued strenuously that there is a clear qualitative change in the approach of the international community to humanitarian situations and I will not rehash the evidence presented. Similarly, the inconsistency in the response to atrocity crimes (which cannot be disputed) should instigate the desire to reform the institutional mechanism responsible for realising the normative ambitions of the international society. Indeed, this is the overriding objective of this thesis: to determine how the responsibility to protect can be achieved through reform of the authorising mechanism for intervention and I will be making this case in later chapters of the thesis.

At the same time, I must also respond to the argument that the discomfort of some states about Pillar III (which is considered the most fundamental part of the R2P) shows that there is a lack of consensus around the doctrine and calls into question the claims about a Solidarist


international society. States such as Venezuela, Bolivia, Iran and Somalia belong to these group of fierce critics of Pillar III. But I argue that contrary to this perspective that calls the legitimacy of humanitarian actions into question, the reticence of these states reflects a different sort of legitimacy problem—the procedural legitimacy of R2P and not the substantive legitimacy of the outcomes R2P produces. I contend that none of these states in truth dispute the need to prevent and address atrocity crimes (at least, none has openly done so).

They are, however, concerned about the legitimacy of the institutional mechanism through which R2P is implemented. In a personal interview with Alfredo Toro, the Political Adviser on R2P to the Permanent Ambassador of Venezuela to the United Nations in the June 2016, he admitted that Venezuela is not opposed to the principles of R2P as it were, but it is critical of the institutional mechanism through which R2P is implemented. This is because of the legacy of the US supposed humanitarian intervention in Venezuela and other Latin America states. According to him, this history “makes us a little sceptical when a superpower, or any of the permanent members of the Security Council, especially those close to the responsibility to protect claim that there is a humanitarian need to go somewhere, we always wonder if there is something behind it”.

Venezuela further reiterated this position during an informal dialogue on the responsibility to protect. It asked: “are there no institutions whose origins are outside Europe and the United States that can help prevent violence in developing countries?”. Bolivia made similar remarks that reflect this concern about the procedural legitimacy of R2P. It stated: “while the entirety of the international community agrees on prosecuting crimes against humanity, and war crimes, and of course genocide, and while we are all very much aware of this matter, and condemn it, and deplore it, with no exceptions, [but it

118 Ibid
119 Statement from the Permanent Mission of the Bolivarian Republic of Venezuela during the General Assembly informal dialogue on the Responsibility to Protect. 8 September 2014: Available at: http://statements.unmeetings.org/media2/4493805/venezuela-eng-.pdf [Last accessed 27 May 2017]
asks]…“who defines or sets the red lines, the lines in the sand when it comes to an intervention?”. In essence, the continuing contentions about Pillar III are mostly concerns about the legitimacy of the institutional mechanism that authorises coercive actions and not about substantive questions regarding the need to remediate egregious crimes.

Finally, to what extent does the emergence of BRICS pose a threat to the continuing solidarity within the international society? It has often been noted that the BRICS states have a long-standing history of objecting to Solidarist values such as the idea of humanitarian intervention. Brazil, for example, explicitly enshrines the principle of non-intervention in its constitution, while China and Russia’s record of voting against UN Security Council resolutions that undermine the sovereignty of states is well known. Similarly, scholars argue that India’s history and its controversial relationship with Kashmir ensure that it is equally opposed to intervention norms. The concern for R2P enthusiasts is thus clear: the Solidarist moment in international society since the end of the post-Cold-War could be short-lived. This could be reinforced if Brazil, India, and South Africa were to gain permanent seats on the UN Security Council. Their emergence could thus have telling consequences on the structure of the international society and the values it promotes. To that extent, David Bosco predicts a “fissure

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120 Interactive Dialogue on the Responsibility to Protect at the General Assembly, 11 September 2013
122 China and Russia have vetoed several resolutions proposed at the Security Council against regimes accused of perpetuating or allowing human rights abuses. Some of the notable veto votes include Myanmar ( Draft S/2007/14, 2007), Zimbabwe (Draft S/2008/447, 2008) and Syria (Drafts, S/2012/538 & S/2012/77, 2012) Of course, some activists draw parallel between the use of the veto by China and Russia and the US’s use of veto to protect Israel from being held to account regarding its policies on Palestine. (Drafts, S/2011/24 in 2011, Draft, S/2006/878 in 2006 and Draft S/2004/783, in 2004 are some of the recent examples of the US’s capricious use of the veto).
in the UN between a Western-led interventionist group and a ‘sovereignty bloc’ led by Moscow and Beijing”.

Perhaps the most significant indication of this ‘fissure’ that Bosco refers to is the voting pattern of the members of the Security Council on resolution 1973 that authorised coercive international action in Libya. In an interesting coincidence, the BRICS were fully represented on the Council at the time of the vote. With the exception of South Africa, all members of the block abstained from voting on the resolution. Indeed, South Africa itself was only persuaded to cast an affirmative vote after much international pressure, especially from other African countries. The Syrian crisis witnessed similar voting objectives and arguments on the draft resolutions. In this case, Russia and China vetoed four draft resolutions submitted to the Council between 2011 and 2014.

Given this, it is thus not surprising that some analysts have suggested that BRICS signifies not only the end of the ‘Solidarist moment’ in the international society but of values such as R2P. Chris Keeler argues that the “inability of the United States and its allies to push through even a watered-down version of the Syrian resolution clearly demonstrates that…

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126 Alex De Waal notes that South Africa’s foreign policy establishment were cautious of the language of the draft resolution. According to him, President Zuma was warned that the term ‘all necessary measures’ threatened to negate the AU diplomatic efforts championed by South Africa. Pressure to support resolution 1973 came from states like Nigeria and Ethiopia. See De Waal, A., (2013). African Role in the Libyan Conflict. International Affairs. Vol 89 (2). p. 365-379

127 On Syria, Russia and China vetoed four draft resolutions between 2011 and 2014. On the first of these four resolutions, South Africa which again was a member of the Council abstained this time from voting on draft resolution (S/2011/612). It argued that it was concerned by the “sponsors’ intention to impose punitive actions” and that it saw the resolution as a prelude to further actions which included instituting a regime change. See records of meetings, available at: http://www.un.org/en/sc/meetings/records/2011.shtml [Last accessed 25 August 2016] for comprehensive details on the pattern of vote on the four draft resolutions.
humanitarian intervention norm is not a global one”. 128 Likewise, Keeler argues that “the BRICS countries have determined that humanitarianism should not compromise the sovereignty of individual states and should not restrict the rights of governments over domestic matters”. 129 He further argues that “the refusal to support the resolution on Syria by the BRICS countries demonstrates the clash in ideology”… [and shows the] “growing unity amongst Security Council members against the prospect of international intervention”. 130

But is there a genuine risk that the international society will contract into one driven by Pluralist concerns? It is my contention that such conclusions exaggerate the risk posed by BRICS states and fail to acknowledge the willingness of these states to promote Solidarist values. In the same 2011 Libyan crisis, Ambassador Maria Votti of Brazil, for instance, argued that Brazil was concerned that the demands of an earlier resolution (1970) had not been heeded by the Libyan authorities and called on the regime to “protect the right of free expression of the protesters and to seek a solution to the crisis”. 131 Indeed Brazil’s action in this respect corresponds with the demands of its constitution which explicitly requires in Article 4 (II & IX) that the foreign policy of the country be governed by the respect for human rights and the promotion of “cooperation among people for the progress of humanity”. Likewise, South Africa voted to support resolution 1973 that authorised a no-fly zone over Libyan airspace, while Russia and China, often expected to vote against coercive resolutions on R2P, according to Cristina Stefan, have voted affirmatively for a number of important resolutions, including

129 Ibid.
130 Ibid.
resolution 1894 on the protection of civilians in armed conflict that members of the Security Council unanimously agreed to.\textsuperscript{132}

The point to note here is that while any of the BRICS countries may intermittently express their reticence about proposed humanitarian actions or show concern about the humanitarian outcomes of proposed resolutions, this does not sound the death knell on the international community’s Solidarist values.\textsuperscript{133}

2.7 The Procedural Legitimacy of the Security Council

Finally, we must also acknowledge the continuing concerns about the procedural legitimacy of the Security Council. Time and time again, the Council has failed in its assigned responsibilities. This has no doubt called its legitimacy into question. What then should be done given the ineffectiveness of the Council and its growing legitimacy deficit? The dilemma further still is exacerbated by illegitimacy of the use of force to remediate atrocity crimes without the authorisation of the Security Council: indeed, this is widely considered to be one of the clear shortfalls of the R2P doctrine agreed to by states at the World Summit in 2005.\textsuperscript{134} It is my contention, however, that this position cannot be legitimately defended.

As I have argued in this chapter, the legitimacy of humanitarian intervention emanates from the dictates of natural law and from the customary practices of states within the international society since the end of the Cold War. In the case of natural law, the demands of natural law are non-derogable and transcend any individual state, group of states and institutions. At the same time, customary practices reflect the will of the international society and as such provides legitimacy to the actions embarked on by the society of states. To the extent, therefore, that the current institutional mechanism stands in the way of the normative


ambitions of the international society, there is a “responsibility to reform” and transcend current institutional practices, systems and frameworks to reflect where the international society is at in terms of its legitimacy attribution. In later parts of this thesis, I further expatiate on this claim.

That said, the next chapter examines proposals to improve the procedural legitimacy of the responsibility to protect. It discusses attempts to address the legitimacy deficit of the Security Council by expanding its composition to accommodate supposed marginalised voices and to improve the democratic outcome of its decisions. In later parts of the thesis, I also examine ideas that aim to transcend current legal frameworks to implement R2P.

**Conclusion**

This chapter has laid out arguments that establish the legitimacy of humanitarian intervention. It has done this by the drawing on the ideas of Grotius and showing how his ideas influence discussions about natural rights and the international society. It also discussed the key ideas of the English School, highlighting the centrality of the international society component to the discussion on humanitarian intervention. It reflected on the debates between Pluralist and Solidarists on the legitimacy of humanitarian intervention while at the same time insisting that there is a normative shift in international society where the international society has transited from its Cold War policy of indifference that prioritised sovereign claims to a Solidarist one with more attention to the promotion of human rights. The chapter concludes by contending on the need to address the procedural legitimacy deficit of current institutions and legal frameworks to reflect the normative goals of the international society.

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Chapter Three

Examining Formal Proposals for Security Council Reform

The Security Council has been blamed in the past for its failure to respond and prevent some of the world’s worst humanitarian tragedies. One of the common assumptions regarding these past failures is that the Council is fractured by realpolitik and there is an urgent need for reforms. This perspective was echoed by Miguel d'Escoto Brockmann, President of the General Assembly in his concept note on R2P, he stated, “it is the veto, and the lack of UN Security Council reform rather than...responsibility to protect...that are the real obstacles to effective action”. In essence, the claim is that there is a direct correlation between the failure of R2P in certain conflicts and the incapacity exhibited by the Council. The other argument often made is that the Council suffers from serious legitimacy deficit as a result of its non-inclusive composition. The solution, then, lies somewhat in the reform of the Security Council.

This chapter aims to critically engage this hypothesis by studying in detail the key proposals for the reform of the Security Council. Is it the case that an expansion of the Council to improve its procedural legitimacy will advance the practice of intervention? In this chapter, the first concern will be to briefly highlight the politics that gave rise to the Security Council. This is because the perceived failures of the League of Nations contributed to the unique structuring of the Security Council. Following this, I provide an overview of the current structure of the Council, its composition, voting methods and procedural practices. The chapter

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136 The Carlson report for instance notes that: “The Security Council bears a responsibility for its lack of political will to do more to stop the killing...the delay in the decision-making by the Security Council was a distressing show of lack of unity”. See the report of the independent inquiry into the action of the United Nations during the 1994 genocide in Rwanda (UN DOC S/1999/1257).

then highlights the important reform proposals and evaluates their potential contributions to R2P on the basis of five key tests.

3.1 A League and its Council

The League of Nations emerged from the ashes of the First World War, the costly nature of the war galvanised a desire among nations to secure and guarantee the peace. The Covenant of the League of Nations outlined the principal aims of the fledging organisation as the promotion of international cooperation, peace, and security, and the acceptance of the obligations not to resort to war.\textsuperscript{138} Although the League collapsed at the onset of the Second World War, it is often disputed whether the League would have prevented the war.\textsuperscript{139} However, it is important to show even if in a limited way that the perceived inadequacies of the League of Nations were critical to the design and construction of the United Nations and the Security Council in particular. Two crucial areas often highlighted when discussing the supposed inadequacy and failure of the League are the Charter and the composition of the organisation’s Executive Council.

First, the argument is that the Charter—referred to as the Covenant—was not robust enough, that is, it was equivocal in certain important ways.\textsuperscript{140} Rumki Basu maintains that the phrasing of the Articles of Covenant, especially Articles 12, 13, 15 and 16, which demand that members must not ‘resort to war’ until the Council has arbitrated any such dispute provides insight into some of the problems of the League. According to Basu, the weak language created opportunities for members and potential violators to take refuge in technical interpretations of their actions by, for example, arguing that an undeclared war in the material sense was no war.

\textsuperscript{138} Covenant of the League of Nations, 28 April 1919. Available at: http://www.refworld.org/docid/3dd8b9854.html [Last accessed 2 April 2015]
and as such, the use of force could not constitute a resort to war. But, more importantly, the
League’s Covenant lacked ‘bite’ since it could only recommend and not obligate punitive
measures when the principles of its Covenant were violated. F. S. Northedge argues that the
League was not intended, at least in theory, as an enforcer of peace. According to him, its
design reveals that it was meant as “essentially a deliberative body, hearing arguments from
interested parties about international disputes, then issuing a report on the merits of the case
and leaving the rest to member states”.

By contrast, the UN Charter intended a more coercive Security Council by ensuring that
through Article 25, all decisions and actions taken by the Council under Chapter VII are legally
obligatory on all member states. Basu argues that there also is a difference in the language and
the wordings of the Articles of the UN Charter. For example, Article 2(4) of the UN Charter
unequivocally demands that: “All Members shall refrain in their international relations from the
threat or use of force against the territorial integrity or political independence of any state, or in
any other manner inconsistent with the Purposes of the United Nations”. He claims that this
represents an undoubted improvement and one which has profound implications on the
Charter.

Second, the League was plagued by the lopsided composition of its Council and the
absence of key states as members. The United States, which had played a crucial role in the
formation of the organisation, embarked on an isolationist foreign policy that prevented it from

Political Economy. Vol 5 (2) pp. 173-193. Also see Johnson, G. Lord Robert Cecil and
Europe’s Fascist Dictators; Three Case Studies, 1935-1939. Available at:
http://usir.salford.ac.uk/19250/2/Lord_Robert_Cecil_and_Europes_Fascist_Dictators_Three_C
143 Northedge, The League of Nations: its life and times. pp.278-292
144 United Nations. (1945). Article 2(4). Available at:
joining. Also, Japan and Italy, who were founding permanent members of the Council, withdrew their membership from the organisation and so did co-opted states such as Germany. By 1939, only France and Britain remained as permanent members of the Council. It was therefore not surprising that the attempt during the Second World War at resurrecting the idea of collective security embodied by an international institution would be guided by the lessons of the failures of the League.

3.2 The Institutional Framework of the Security Council

At the Dumbarton Oaks Conference in September 1944 where the nature of the proposed United Nations was discussed, there was specific emphasis on matters relating to the composition, powers and the outlook of the Security Council. Although in certain respects, the proposed Security Council shared similar attributes with the Executive Council of the League of Nations, there were significant differences. The representatives of China, Britain, the USSR, and the US sought to ensure that the Security Council would not be plagued by the problems that undermined the effectiveness of the League. One of such concerns expressed was the rule of unanimity and who could wield the veto power. Under the League’s Covenant, all Council decisions except procedural ones could only be taken with the concurring votes of all members—both permanent and non-permanent members.\(^{146}\) In essence, all members of the Council wielded a veto power. Not surprisingly, such an arrangement had dire consequences. For example, the League Council was gridlocked and unable to muster any effective action regarding Italy’s invasion of Ethiopia in 1935.\(^{147}\)

In an attempt to strengthen the Security Council, whilst also guaranteeing its interest, the USSR envoy insisted on the exclusive powers of the veto for the permanent members of the Security Council, despite objections from several countries. It threatened that without the

\(^{146}\) See the Covenant of the League of Nations, 28 April 1919

\(^{147}\)
exclusive powers of the veto, it would withdraw from the organisation. Understandably, and given the concerted desire to end the cycle of war, the request was acceded to at the subsequent Yalta and San Francisco Conferences after much negotiation and concession by smaller states. The UN Security Council was conceived as the principal organisation responsible for the maintenance of international peace and security. This was its raison d'être and, toward this end, it was duly empowered. Article 24(1) of the UN Charter reflects the intention of member states to submit to the supremacy of the Council’s decisions. It states:

In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf.

The range of its powers is also well defined in the subsequent subsection (2) of Article 24 and Articles 25 and 49. Indeed, Security Council decisions are not only binding on member states,

147 The best the League could do was to propose a number of economic sanctions. See Northedge, The League of Nations: Its Life and Times. p 221-254 for an excellent account of what he calls the ‘Abyssinian disaster’.
149 See Moreen Dee. DR H.V. Evatt And The Negotiations of the United Nations Charter. Available at: http://www.diplomatie.gouv.fr/fr/IMG/pdf/ONU_moreen_dee.pdf. [Last accessed 14 April 2015]. The small and middle power states were greatly concerned that the veto vote privilege created a hierarchy of states going against the fundamental principle of sovereign equality of states. They were also justifiably concerned that the veto could potentially paralyse the Council, restraining the Council from acting when a threat to the peace was imminent. Hebert Vere Evatt, the leader of the Australian delegation to the San Francisco conference specifically sought to limit the veto to decisions taken under Chapter VII while excluding decisions relating to the pacific settlement of disputes. He was convinced that the veto should not be employed to sabotage the peaceful settlement of conflicts. See also Bailey, Voting in the Security Council. p.13
they could also have implications for non-member states according to Article 2(6). The Council’s present structure is determined by Article 23 of the UN Charter. It is composed of five permanent members (US, UK, France, China, and Russia) and ten rotated non-permanent seats whose members are elected based on a state’s considered contribution to international peace and security and by geography. The ten non-permanent seats are elected for a term of two years, and the Charter prohibits the immediate re-election of non-permanent members after the expiration of their term. Each member state of the Council is granted only one vote, and they are required to have a representative permanently stationed at the UN headquarters to ensure the continuous functioning of the organisation.

Article 27 further expounds the voting principles of the Council. The Charter states that substantive issues require nine votes including the concurring votes of all the permanent members, while procedural matters—the definition of which is a matter of dispute—can be decided by the affirmative votes of at least nine members of the Council. In concrete terms, these have come to mean that: (1) any of the five permanent members could prevent a decision on substantive issues by exercising a negative vote; (2) the ten non-permanent members can also exercise what has been referred to as the ‘sixth veto’ by ensuring that a resolution does not amass the nine votes necessary for a decision on substantive matters, and (3) a negative vote by any of the permanent members does not prevent the Security Council from a decision on procedural matters.

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151 Ibid
152 Although, the Charter is not explicit regarding what issues are considered procedural, it is oftened assumed that Articles 28-32 of the Charter can be considered mainly as issues of a procedural nature. See Sydney Bailey: Voting in the Security Council, p14
153 For instance, on 31 December 2014, a resolution tabled by Jordan demanding an end to Israeli occupation was defeated because the resolution failed to amass the minimum nine votes necessary. It is considered that Nigeria’s decision to abstain from voting after a last minute diplomatic consultation with Israel and the US defeated the resolution. In essence, this can be seen as an indication that non-permanent members of the Security Council can effectively defeat a resolution, regardless of the support such resolution enjoys from the P5.
It is important to add that although the UN Charter in Article 27(3) explicitly requires the concurrent vote of all permanent members on substantive issues, this provision has since been sidestepped by the members of the Council for pragmatic purposes. Members of the P5 can abstain from voting on a substantive issue and such action will not be regarded as a veto by the Council.

3.3 The Need for Reform

In March 2010, President of the French Republic, Nicholas Sarkozy, asked:

How can anyone expect us to resolve major crises, major wars and major conflicts within the framework of the UN without Africa, without three-quarters of Asia, without Latin America, without a single Arab country? Is that reasonable? Is that sensible? Is it even imaginable? Who can believe that?\(^{154}\)

The legitimacy of the Security Council has been challenged in recent years. Its actions and inactions have been severely scrutinised and often criticised. During the Cold War, the Security Council was clearly polarised, and realpolitik trumped humanitarian considerations. Indeed, this polarisation was evident in the Council’s inability to act decisively in the East Pakistan crisis in 1971, which reportedly claimed three million lives.\(^{155}\) In resolution 303, the Security Council admitted to its failure on the crisis. It stated: “taking into account that the lack of unanimity of its permanent members at the 1606th and 1607th meetings of the Security Council has prevented it from exercising its primary responsibility for the maintenance of international peace and security, decides to refer the… (agenda) to the General Assembly…as provided for in Assembly resolution 377 A (V) of 3 November 1950”.\(^{156}\) This incapacity of the Council

\(^{154}\)29 March 2010 - Speech by the President of the French Republic, Mr Nicholas Sarkozy at the Columbia University, New York

\(^{155}\)The US and USSR were evidently more concerned about Cold War alliance and were known to have had sympathy for the different sides which ensured that any concerted and decisive action on the crisis was almost impossible. See J.M Hanhimaki’s *The United Nations: A Very Short Introduction*, Oxford, Oxford University Press. p.54

\(^{156}\)UN Document S/RES/303, December, 1971
expectedly drew criticism, especially on the use of the veto. A frustrated Ali Bhutto, the Pakistan Foreign Minister, could not hide his disgust at the Soviet’s veto of the Security Council resolution calling for a ceasefire by the different sides. He quipped: “Let’s build a monument for the Veto, Let’s build a monument for impotence and incapacity”.

Similar crises during the Cold War elicited similar responses. For example, in 1975, General Pol Pot’s Khmer Rouge regime initiated a violent ideological purification of Cambodia. Schools were closed, newspapers banned and television houses shut down. Pol Pot sought to rid the country of Western influence in the bid to create a model agrarian society. Intellectuals were ordered to farm, and in the following 48 months of his rule, two million Cambodians were brutally slaughtered, starved or bludgeoned to death. The Security Council was once again incapacitated—unable to pass any resolution intervening or even condemning the regime for the mass atrocity crimes.

Following the end of the Cold War, the Council was widely expected to be more actively engaged in the maintenance of international peace and security. Briefly, it was. The intransigence noticeable during the Cold War gave way to a more united and vigorous Council. For instance, the Security Council reacted swiftly and unequivocally condemned Iraq’s invasion of Kuwait by passing resolution 660 on the same day of the attack. The Security Council also passed similar resolutions on conflicts in Somalia, Bosnia, and Haiti. However, this ‘renaissance’, which Brian Urquhart labelled a ‘false renaissance’, was truncated by events in Kosovo and Rwanda. In the 1999 Kosovo crisis, the Security Council reverted to the Cold War norm where the veto and the threat of the use of it prevented specific action by the Security Council.

But it is perhaps the failure of the Council during the genocide in Rwanda in 1994 that has caused the organisation the greatest reputational harm since its founding in 1945. Although the Security Council through resolution 872 authorised a peacekeeping mission to implement the Arusha Accords and sustain the ceasefire agreed to by parties to the Rwandan conflict, the Council is often repudiated for actively undermining efforts that could have prevented the large-scale loss of life. At the height of the crisis, the Council passed resolution 912 which reduced the peacekeeping force from a 2,548 strong contingent to 270.\(^\text{159}\)

In 1999, Secretary-General Kofi Annan instituted an independent inquiry regarding the actions of the United Nations during the Rwandan Genocide. The report from the inquiry pointedly notes: “The Security Council bears a responsibility for its lack of political will to do more to stop the killing”.\(^\text{160}\) These failures of the Security Council to effectively deal with humanitarian crises over the years has significantly eroded its legitimacy. The organisation is seen as driven by the rationality of 1945, where international peace and security is conceived as the absence of conflict among the major powers and the use of veto vote is considered integral to the maintenance of this peace. But more importantly, the Council has over the years been condemned for the restricted nature of its membership. It noticeably excludes an African country as a permanent member even though the majority of its resolutions directly affect the

\(^{159}\) Many analysts including General Romeo Dallaire, who commanded the peacekeeping force in Rwanda during the crisis, have argued that a 5,000 strong UN force in Rwanda would have largely prevented most of the 800,000 deaths. It has also been revealed that Secretary General Boutros Boutros Ghali on February 24\(^{\text{th}}\) 1994 had warned President Habyarimana of the International Community’s unwillingness to take responsibility should the political situation explode. See Grünfeld, F., and Huijboom, A., (2007). The Failure to Prevent Genocide in Rwanda: The Role of Bystanders. Leiden, Boston: Martinus Nijhoff Publishers, Brill, p.115

\(^{160}\) See the report of the independent inquiry into the action of the United Nations during the 1994 genocide in Rwanda (UN DOC S/1999/1257)
continent. Essentially, the Security Council as an institution is seen as ‘hermetic’\(^\text{161}\), a ‘closed shop’\(^\text{162}\), and one that should be reformed to align it with current global dynamics.

The Security Council has remained unreformed since the only expansion in 1965 which increased the preponderance of non-permanent members from six to ten in order to reflect the addition of decolonised states as members of the United Nations. The permanent members have remained the ‘so-called’ victors of the Second World War. Although the latest demand for reform was initiated as an item on the agenda of General Assembly in 1979, it was not until 1992 that resolution (A/RES/47/62) officially placed the reform of the Security Council on the agenda of the General Assembly. The following year, resolution A/RES/48/26, set up the ‘Open-Ended Working Group on the Question of Equitable Representation on and Increase in the Membership of the Security Council at the United Nations’ (hereafter referred to as the Working Group). The objective was to provide a platform that would coordinate consultations on the reform project.

As expected, several proposals were submitted to the Working Group by member states. Some of the early suggestions included a quick fix approach to reform with only the addition of Japan and Germany as permanent members. France and Britain, in particular, expressed their reservation about an enlargement of the Council, which may impair the operational efficiency of the organisation. The British argued that the priority should be safeguarding the Council’s ability to fulfil its primary responsibility as stipulated by the Charter.\(^\text{163}\) But in what appears to be a subtle threat, the Japanese Ambassador to the UN, Yoshio Hatano, argued: “we do not want to be just good taxpayers without having a say on the important decisions taken by the


organisation‖. For Japan and Germany whose contribution to the UN budget was bigger than all the other permanent members except the US, it was a case of ‘taxation without representation’.

In a clear departure from the French and British position, in June 1993 the United States voiced its support for the permanent membership of Japan and Germany, recognising that “such permanent membership entails assuming an active role in global peace and security activities”. Following the endorsement of the reform initiative by the US, the United Kingdom, and France extended—albeit a lukewarm—support to the candidacy of both countries on the condition that they will bear their fair share of peacekeeping operations. Understandably, several countries opposed the quick fix proposition. Italy, which had once suggested in 1990 that Britain and France relinquish their permanent seats for a single European Community seat, resurrected the proposition, fearing that the addition of Germany would further undermine its influence in the region. There was also strong opposition was from the non-aligned states, who argued that developing countries were already under-represented in the Council and this imbalance should be addressed. The addition of only Germany and Japan would, therefore, continue to entrench the notion that the Security Council was elitist, and international security was being conceived of from a narrow Western perspective.

At this juncture, it should be stated that there is now a collective desire (even though it remains unclear whether the P5 are sincerely committed to reform) to reform the Council; however, how it should be reformed remains contentious. Specifically, the questions surround, first, which countries should occupy a seat, second, what category of seats they should occupy, and, third, the number of seats to be added. In 2003, after ten years of unsuccessful negotiations and the realities of a faltering Security Council, Secretary-General Kofi Annan voiced the

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164 Ibid p.46
165 Ibid p.48
166 Ibid p.49
general frustration regarding the absence of a compromise or acceptable reform proposal. In his address to the General Assembly, he declared:

I respectfully suggest to you, Excellencies, that in the eyes of your peoples the difficulty of reaching agreement does not excuse your failure to do so. If you want the Council’s decisions to command greater respect, particularly in the developing world, you need to address the issue of its composition with greater urgency.\(^\text{167}\)

He continued: “Excellencies, we have come to a fork in the road. This may be a moment no less decisive than 1945 itself”.\(^\text{168}\) On 18 October 2013, in an unprecedented but deeply political move, Saudi Arabia rejected a seat on the Security Council arguing that the lack of comprehensive reforms and the inability of the Council to prevent mass atrocities crimes informed its decision. It stated:

The Kingdom of Saudi Arabia believes that the manner, the mechanisms of action and double standards existing in the Security Council prevent it from performing its duties and assuming its responsibilities towards preserving international peace and security…In this regard, it is unfortunate that all international efforts that have been exerted in recent years, and in which Saudi Arabia participated very effectively, did not result in reaching reforms required to be made to enable the Security Council to regain its desired role in the serve[sic] of the issues of peace and security in the world…Allowing the ruling regime in Syria to kill and burn its people by the chemical weapons, while the world stands idly, without applying deterrent sanctions against

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\(^{167}\) The Secretary-General’s address to the General Assembly New York, 23 September 2003. Available at: [http://www.un.org/webcast/ga/58/statements/sg2eng030923](http://www.un.org/webcast/ga/58/statements/sg2eng030923) [Last accessed 26 April 2015]
Damascus regime, is also irrefutable evidence and proof of the inability of the Security Council to carry out its duties and responsibilities.\textsuperscript{169}

Saudi Arabia’s unusual decision brought the problems of the Security Council to the fore. The unprecedented rejection of a coveted UNSC seat which is historically well-regarded, and in the case of Saudi Arabia, a first opportunity to seat on the Council, highlighted the serious legitimacy deficit of the Security Council.

Indeed, two issues have often dominated the reform debate. The first is the perception that the Council is increasingly struggling with questions of legitimacy because of the veto vote which has often been used to block humanitarian action as in the case of Syria or employed to protect proxies as in the case of Israel. The extensive range of the veto power has generated much controversy. The Charter recognises that the permanent five can exercise their veto privilege in a number of circumstances. This includes the appointment of the Secretary-General, regardless of the recommendation of the General Assembly, the admission of new UN member states, and crucially the amendment of the UN Charter.\textsuperscript{170}

However, and more controversially, permanent members have sometimes exercised what has been referred to as the ‘double veto’. The double veto is the much-maligned strategy employed by permanent members, where the consideration or determination of an issue as either procedural or substantive is itself considered a substantive issue and therefore open to a veto.\textsuperscript{171} The abuse of the veto power also extends to the threat of the use of veto, known as the ‘silent veto’, and while the veto’s raison d’être remains to ensure that the Council does not take

\textsuperscript{168} Ibid.  
\textsuperscript{171} Bailey, Voting in the Security Council, p.15
decisions that affect the immediate interests of the permanent members, it has come to include vetoes exercised on behalf of proxies and sometimes for solely retaliatory reasons.\(^{172}\)

Concerns about the Council’s legitimacy are further exacerbated by its perceived lack of representativeness. Critics argue that the lack of permanent representation of certain countries and regions on the Security Council is problematic. Africa and Latin America, in particular, lament the absence of any state from either region as permanent members of the Security Council. African states argue that a disproportionate amount of the Council’s work and resolutions focus on Africa and there is hence the need for an African perspective and voice in the organisation. Furthermore, the question also arises: can any enlargement of the Council without the inclusion of Japan and Germany be acceptable? Will the continued exclusion of two countries that respectively account for the second and third highest contribution to the UN budget, not undermine the relevance of the Council as an institution?\(^{173}\) This seems particularly pressing, given the declining influence of World War II victors such as France and Britain. As Daniel Drezner pointedly puts it, “global institutions cease to be appropriate when the allocation of decision-making authority within them no longer corresponds to the distribution of power”.\(^{174}\) The argument, therefore, is that a UN Security Council that continues to refuse the entry of these countries would lose its legitimacy and may soon be replaced in relevance by

\(^{172}\) China vetoed a Security Council resolution in 1999 that sought to extend the UN peacekeeping force in Macedonia. This was ostensibly in retaliation of the country’s decision to establish diplomatic relations with Taiwan. In 1997, it had also exercised its veto rights by blocking a resolution that would authorise military observers to monitor peace accords in Guatemala because of the latter’s relationship with Taiwan. The US’s use of its veto privileges as an intervention mechanism on behalf of Israel is well documented, since its first veto of a draft resolution on Israel in 1972; the US has vetoed forty Security Council resolutions critical of Israel. See details at: [http://www.jewishvirtuallibrary.org/jsource/UN/usvetoes.html](http://www.jewishvirtuallibrary.org/jsource/UN/usvetoes.html) [Last accessed 27 April 2015]


an organisation like the G7, which is more representative of the contemporary geopolitical realities in the world.\footnote{It could not be denied that there is now an increasing use of adhoc platforms like the p5+1 over the Iran nuclear deal.}

The second issue that dominates the reform debate is the absence of transparency in the working methods of the Security Council. Although the UN Charter recognises the Council’s right to adopt its own rules of procedure and working methods, more countries are increasingly uncomfortable with an exclusive, unaccountable Security Council. For instance, rule 57 in the Security Council’s provisional rules of procedure allows the Security Council to designate certain information and documents as confidential and to decide what is made available to member states.\footnote{See Rule 57: Provisional Rule of Procedure of the Security Council. UN Document (S/96/Rev.7)} Participation in Council’s deliberation is also restricted and dependent on the extension of invitation by the Security Council to such a member state if it considers that the matter being deliberated upon affects the state’s interest. Even so, invited members cannot under the rules and procedures introduce a draft resolution without going through a friendly state within the Security Council. Elected non-permanent members also criticise the P5 for holding private consultations where draft resolutions are negotiated, and the agreed texts are sometimes only distributed to other Council members’ hours before a meeting.\footnote{Malone et al. (2015). The UN Security Council in an Age of Great Power Rivalry. \textit{United Nations University Working Paper Series}. p.4}

The argument is that after such closed-door consultations, members of the E10 (elected states) are rarely afforded the opportunity to influence the often carefully negotiated texts substantively. This policy of exclusion is further worsened by the inability of a large number of countries who are unable to secure seats on the Security Council to contribute to the Council’s decisions directly. Many of these states are completely in the dark on the deliberations of the
It is therefore not surprising that the exclusivity of the Council engenders feelings of disenfranchisement and marginalisation by most medium and small states. Reform may, therefore, help move towards a more legitimate and inclusive institution. A more inclusive and legitimate institution would improve the response of the Council to atrocity crimes and ensure that its resolutions on such issues are equally considered legitimate.

3.4 Examining the Reform Proposals

In 1996, Diogo Freitas do Amaral, President of the General Assembly NGO Working Group on the Security Council said:

Much talk has been circulating in the corridors of power, discussing the possibilities, the advantages, and the objections to each name. I want to tell you that, personally, I do not believe that with this method we will ever reach agreement on a single country, because the national competition in favor of one's own candidacy or against other candidacies will be so strong that even if we discussed this issue for ten years, no consensus would be reached.¹⁷⁹

It is now more 25 years since the General Assembly inaugurated the Working Group and as anticipated by Diogo Freitas do Amaral, there is still no acceptable agreement on how the Security Council should be reformed or which countries should occupy any of the proposed permanent seats. To be clear, there is a near universal agreement by all the states on the need for a reform of the Council; most, if not all states, also agree that the reform should include the enlargement of at least the non-permanent membership of the Security Council. Although intergovernmental negotiations have since replaced the Working Group in a bid to align ideas and produce a compromise proposal, the debate remains intractable. Very little progress has

¹⁷⁸ Some of the Security Council meetings are conducted informally without any formal records being kept. States not elected on the Security Council are therefore forced to scramble for information from friendly states on the Council.

been made as states continue to dig their heels in, even as several more proposals, adjustments to previous proposals are being bandied around the United Nations.

Proposals for Security Council reform range from individual ideas put forward by academics and scholars to non-governmental organisations, states, and coalition of states. However, given the lack of space, this chapter will only critically examine the key proposals. Two key factors are the basis for such designation. The first is the predominance of a proposal in academic debates and policy documents. The second is the support such proposal has garnered from countries and important stakeholders. Some of these proposals have been identified in reports like that of the *Center for UN Reform Education’s Governing and Managing Change at the United Nations: Reform of the Security Council 1945 - September 2013*, Peter Nadin’s book, *UN Security Council Reform* and Martin Niemtz’s *Reforming UN Decision-Making Procedures: Promoting a Deliberative System for Global Peace and Security*. Furthermore, some of these proposals such as the Group of Four were circulated ahead of the 2005 World Summit. Thus, the following reform proposals for reform of the membership of the Council shall be examined: (1) the Razali Proposal; (2) the UN’s ‘Model A & B’; (3) the ‘Group of Four’; (4) the ‘Uniting for Consensus’; (5) the ‘African Group’; and (6) the ‘L69’.

In the next chapter, however, I examine proposals for reform of the working methods of the Council, specifically, about the use of the veto. As earlier stated, a number of medium and small countries are much more interested in the efforts to make the Security Council more accountable, democratic and inclusive.

It is important to immediately state that many of the proposals I outlined above share similar positions on, for example, the size of the Council, the category of seats, and the

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180 At one Intergovernmental negotiations meeting in 2010, Chairman Tanin admitted to receiving no less than 30 proposals from states. These include proposals by North Korea, Bolivia, and Monaco. There were also proposals from coalitions such as the Organization of the Islamic Conference.
distribution of seats according to regions, and also importantly, how the Council could be more inclusive and accountable. They therefore also naturally face the same criticisms and are undermined by similar issues. Some of these include:

1. The ‘Veto Problem’: The P5 will continue to possess and exercise the veto (and silent veto).
2. The ‘Representativeness Problem’: The continued concerns about representation on the Council will remain. For instance, an enlarged Council of 24 or 25 members cannot be considered representative enough, or the Council would be dominated by countries from the Western hemisphere.
3. The ‘Effectiveness Problem’: An enlarged Council would not be ‘prompt and effective’ in its decision-making, as intended in Article 24(1).
4. The ‘Rivalries Problem’: Regional rivalry limits the acceptability of the proposal.
5. The ‘Feasibility Problem’: The potential of a proposal being adopted is very low.

I will outline each proposal’s position and also briefly highlight to what extent the above problems affect each proposal. In the final section, I will consider in more detail the potential for reform, but more importantly, the implication that a reform of the Security Council holds for the responsibility to protect.

### 3.4.1 The Razali Proposal

Following resolution (A/RES/47/62), the President of the General Assembly, Razali Ismael from Malaysia who was also the Chairman of the Working Group put forward one of the earliest comprehensive proposals on the reform. In March 1997, the Razali draft resolution, a product of the Working Group deliberations, was submitted to the General Assembly. The draft proposal seeks an enlargement of the Security Council by the addition of five new permanent members and four nonpermanent members. The Security Council membership would be increased to 24 with the voting threshold for a decision also increased to 15 affirmative votes.
The Razali plan proposes the allocation of one permanent seat each to Africa, Asia, and the Latin American and Caribbean states, while industrialised states would be provided with the opportunity to elect two new permanent members. The four non-permanent seats should be distributed among Africa, Asia, Eastern Europe, and Latin American and Caribbean states.\(^{181}\) Interestingly, the proposal rejects the extension of veto powers to the new permanent members, arguing that the privilege is undemocratic and anachronistic.\(^{182}\) Furthermore, it admonishes the P5 to restrict the use of the veto to only actions taken under Chapter VII of the Charter.

**Table 1: Reform seat allocation based on Razali proposal**

<table>
<thead>
<tr>
<th>Region / Seat No</th>
<th>Current Permanent seats</th>
<th>Proposed new permanent seats</th>
<th>Current non-permanent seats</th>
<th>Proposed non-permanent seats</th>
</tr>
</thead>
<tbody>
<tr>
<td>*Industrialised states</td>
<td>N/A</td>
<td>2</td>
<td>N/A</td>
<td>N/A</td>
</tr>
<tr>
<td>Africa</td>
<td>0</td>
<td>1</td>
<td>3</td>
<td>1</td>
</tr>
<tr>
<td>Eastern Europe</td>
<td>1</td>
<td>0</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>Asia and Pacific</td>
<td>1</td>
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<td>1</td>
</tr>
<tr>
<td>Western Europe and other states</td>
<td>3</td>
<td>0</td>
<td>2</td>
<td>0</td>
</tr>
<tr>
<td>Latin America and Caribbean states</td>
<td>0</td>
<td>1</td>
<td>2</td>
<td>1</td>
</tr>
</tbody>
</table>

*The UN elects states to Council seats based on agreed regional groupings; Razali proposal slightly deviates from this. However, note that four of the five permanent seats were occupied by states considered to be industrialised states.

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\(^{181}\) UN Document Supplement No. 47 A/55/47, 2001  
\(^{182}\) Dimitris, *The History and Politics of UN Security Council Reform*. p.75
The Razali proposal does not specify which countries should occupy the new seats, especially the permanent ones; rather it invites member states to inform the General Assembly of their preparedness to assume the responsibilities and functions attached to the role as permanent members. In a decision that later had extensive implications on the reform project, the Razali draft resolution proposed a vote on 28th February 1998 to determine the states that would be elected as permanent members of the Security Council.

In Paragraph 9(a-r), the draft resolution makes wide-ranging contributions to the reform of the Council’s working methods, which it argues should enhance transparency, strengthen the support of the organisation’s decisions and improve the Council’s legitimacy. Although most of its suggestions focus on improving the accountability of the Council, by institutionalising practices that will result in better consultation with member states on issues directly affecting them. These include: improving the relationship between the General Assembly and the Security Council; opening the sanctions committee to democratic governance; conducting more open meetings and Arria-style consultations; and making greater use of the International Court of Justice by seeking a legal advisory opinion in line with Article 96(1) of the Charter. Importantly, it also seeks clarification on the controversial subject of what constitutes a procedural issue.

**Assessing the Razali plan: support, challenges and its implication on R2P**

The Razali reform elicited different reactions from member states. The proposal had put forward a three-staged process towards enlarging the Council. The first stage anticipated that between June and September 1997, the General Assembly would put to the vote the resolution 183 UN Document A/51/47, 2001

184 Razali’s attempt to speed up the negotiations would be denounced by the NAM. It resulted in Decision 62/557, which states that nothing is agreed until everything is agreed’. Some argue that this decision has had huge consequences on the reform.

185 Ibid.
expanding the Council by nine new permanent and non-permanent members according to the regions specified. The second stage would involve the Assembly electing the specific states that would occupy the new permanent seats by February 1998. Following this, the Assembly must within one week, vote to ratify the previous two resolutions put before it as Charter amendments. This was designated as the final stage of the reform process.¹⁸⁷

If a reform proposal is to contribute to the consistent implementation of R2P, then it must pass the feasibility test. The feasibility of the Razali plan is hindered by the intense diplomatic disagreements over the size of the reformed Council. The United States rejected the proposal based on its long-standing commitment to ensuring that any reform proposal would not result in a large, unwieldy Council. It noted: “we have no flexibility above and beyond the 20-21 seats on a reformed Council”.¹⁸⁸ This position puts it in opposition to the Non-Aligned Movement (NAM). Interestingly, while NAM rejected the recommendations in the proposal, its decision was on the basis that the proposal was not inclusive enough. It argued that the membership of the Council must be increased by not less than 11 new members, which would take the total membership to 26.¹⁸⁹

The contrasting and hard-line positions of the NAM states and the US means that although the NAM have a numerical advantage at the General Assembly, a Charter amendment is impossible without the concurrence of a veto-wielding United States. Consequently, we must dismiss the contributions of the Razali plan to R2P since the proposal is unlikely to be adopted. Furthermore, one could argue that the proposal does not address the critical concerns about reform that R2P advocates identify. For instance, it would not have been a representative reform plan because it unduly privileges industrialised nations. Under the recommendations of the plan, Africa, which is disproportionately the subject of UNSC resolutions authorising

¹⁸⁶ Ibid.
¹⁸⁷ Bourantonis, The History and Politics of UN Security Council Reform. p.75
¹⁸⁸ Ibid. p.67
interventions, is granted only one permanent seat and it is not accorded the privileges of veto. The legitimacy concerns that galvanised the reform agenda would, therefore, remain largely unaddressed. The authorisation of the responsibility to protect would continue to be dominated by ‘imperial industrialised states’.

Another concern that the Razali proposal does not address is the paralysing effect of the veto. Although it suggests that the veto should not be extended to new permanent members, it does not, however, address the existing veto powers of the P5. Since the veto power remains unabrogated; we must assume therefore that the use of the veto to prevent the Council from taking actions as seen in East Pakistan in 1971 and in Syria since 2011 would continue unabated under this arrangement. Given that the Razali plan is undermined by the ‘Feasibility Problem’, ‘Veto Problem’ and the ‘Representativeness Problem’, its contributions to an improved humanitarian regime must be disputed.

3.4.2 The Group of Four

The Group of Four (G4) consists of Germany, Japan, Brazil, and India. The four countries have a cumulative sixty-four years of Security Council experience. More importantly, all of the members of the G4 currently rank among the top ten economies in the world. As earlier stated, Japan and Germany are the second and third biggest contributors to the UN budget, while India boasts of its credentials as a nuclear power, the world’s most populous democracy and a key provider of troops for UN peacekeeping missions. Brazil is also a regional power, being the most populated and the most economically successful Latin American country. It is therefore not surprising that these countries are convinced that their global positions as regional,

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189 Ibid. p.78
economic, and military powerhouses uniquely position them as the most serious and natural candidates for permanent membership of the Security Council.

The Group of Four proposes an expansion of both the permanent and non-permanent seats of the Security Council. It seeks to increase the membership of the Council from the current number of fifteen states to twenty-five. Such expansion would include the four countries (Brazil, Japan, India, and Germany)\(^{191}\) and two African representatives. Regarding the non-permanent seats, it proposes four additional seats that will be allocated to Africa, Asia, Eastern Europe, and a joint seat for Latin America and the Caribbean states.\(^{192}\)

**Table 2: Reform seat allocation based on the G4**

<table>
<thead>
<tr>
<th>Region / Seat</th>
<th>Current Permanent seats</th>
<th>Proposed new permanent seats</th>
<th>Current non-permanent seats</th>
<th>Proposed non-permanent seats</th>
</tr>
</thead>
<tbody>
<tr>
<td>Africa</td>
<td>0</td>
<td>2</td>
<td>3</td>
<td>1</td>
</tr>
<tr>
<td>Eastern Europe</td>
<td>1</td>
<td>0</td>
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<tr>
<td>Asia and Pacific</td>
<td>1</td>
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<td>2</td>
<td>1</td>
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<tr>
<td>Western Europe and other states</td>
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<td>2</td>
<td>0</td>
</tr>
<tr>
<td>Latin America and Caribbean states</td>
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</tr>
<tr>
<td>Total</td>
<td>5</td>
<td>6</td>
<td>10</td>
<td>4</td>
</tr>
</tbody>
</table>

\(^{191}\) The resolution does not explicitly mention these four countries; however, the draft proposal was submitted in their names and it has been long assumed that these countries seek permanent representation in the Council and support each other’s candidacy.

\(^{192}\) The G4 draft resolution: UN Document A/60/L.46, January 2005
The G4’s original draft resolution sought the rights, privileges, and responsibilities of the existing permanent members, especially the veto power. The group has, however, modified this requirement in the face of opposition. Under the new plan, the veto vote, which is an area of contention, will be suspended for new permanent members until a review to the “situations created by the amendments” after a period of fifteen years.\(^{193}\) In paragraph 6(b) of its draft proposal to the sixtieth session of the General Assembly, the group proposes that, following the Charter amendment, a resolution would now require the affirmative vote of fourteen of the twenty-five members of the Security Council for a decision. The G4 also make suggestions for improving the working methods of the Council. An example is a recommendation in paragraph 8(h) for the Council to submit an annual detailed, substantive, and comprehensive evaluation of its work to the General Assembly. It also recommends more open meetings, better access for non-members to Council activities, and regular consultations with the Presidents of the General Assembly and the Economic and Social Council.

The G4 proposal is one of the most widely supported plans for Security Council reform currently in circulation, despite vehement opposition from some of the countries who are regional rivals to the G4 states. The proposal’s acceptance is principally anchored on the global stature of these states and, in a less related way, to the fact that it is the only major proposal that has if only implicitly, identified most of the countries that will occupy the new permanent seats. Some of these countries have had their chances of securing a seat boosted by the show of support from some members of the P5. As stated earlier in the chapter, Japan—and to a limited extent—Germany’s\(^ {194}\) candidacies have been publicly supported by the United States. Recently, the US has also thrown its weight behind India’s quest for a permanent seat.\(^ {195}\)

\(^{193}\) Ibid, p.3
\(^{194}\) The US has had a mixed stance on Germany’s candidacy. Although it publicly declared support for the Germany as early as 1993, it is believed that the Bush administration was disappointed with Germany’s position on the US invasion of Iraq in 2003. While the US has not publicly denounced Germany’s ambition, statements attributed to Secretary of state
Assessing the G4 proposal: support, challenges and its implications on R2P

What contributions can the G4 proposal make to the consistent application of the responsibility to protect? The G4 proposal is a more representational proposal in comparison to the Razali plan. It suggests the allocation of two permanent and one non-permanent seat to Africa. It would, therefore, address concerns about the legitimacy of the decisions to authorise coercive enforcement actions in response to the commission of atrocity crimes in Africa.

The G4 proposal has extensive support from UN member states including most of the P5. For instance, UK Ambassador, Sir Mark Lyall Grant, stated at the UN General Assembly on 12 November 2014: “The United Kingdom supports new permanent seats for Brazil, Germany, India, and Japan, alongside permanent African representation. We also support a modest expansion in non-permanent seats”.\textsuperscript{196} France has also been vocal in its support for what is clearly the G4 proposal. On January 22\textsuperscript{nd}, 2010, the French President, Nicolas Sarkozy, passionately argued on the need for the Security Council to “adapt to the realities of the 21st

\textsuperscript{195} President Barack Obama in 2010 during his state visit to India publicly backed a reformed Security Council that includes India. This commitment was also restated by the White House press secretary Josh Earnest on 8 April 2015. At the same time, there is evidence that the US is now reticent about Germany’s candidacy even though President Bill Clinton had publicly supported the candidacy of Japan and Germany in the early years of the reform agenda. In an interview with Janina Hasse-Moshine (Second Secretary at the permanent mission of Germany to the United Nations) on 10 June 2016 in New York, she confirmed that the United States no longer seem to show diplomatic support for their candidacy.

century by welcoming new permanent members: India, Japan, Brazil, Germany, and no doubt one or two African countries”.

Yet, the proposal faces the peculiar problem of regional rivalries. China and South Korea remain vehemently opposed to the permanent membership of Japan; Pakistan considers itself a counterweight to India’s influence; Mexico and Italy are concerned that they would be reduced to second-tier states with the permanent membership of Brazil and Germany respectively. One may, therefore, question the feasibility despite the extensive support it has from states.

But given the assumed legitimacy of the candidacies of each of the G4 states, the question could be rightfully asked; would the G4 proposal result in a more efficient Security Council unrestrained by the politics of the Council? Analysts have expressed concern that the expansion of the Council under the G4 proposal could result in the full representation of the BRICS group. Since the BRICS are seen as counterweights to the global dominance of the P3, it could further entrench the ideological polarisation of the Council and obstruct its capacity to respond effectively to the commission of atrocity crimes. Although this is a valid concern, I argue that the more substantive reason why the G4 proposal would not improve the implementation of the responsibility to protect is the enduring presence of the veto. The ‘Veto Problem’ would be exacerbated if the G4 are granted the privilege, and it will remain unresolved even with the revised G4 proposal that seeks a suspension of the veto privilege for a period. The P5’s veto privilege would remain intact and at the same time the capacity of states to block draft resolutions that propose to address the commission of atrocity crimes.

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3.4.3 The Uniting for Consensus proposal

The Uniting for Consensus (UFC) proposal is advocated by Italy, Argentina, Colombia, Mexico, Kenya, Algeria, Spain, Pakistan, and South Korea. Some of the countries in this group sometimes referred to as members of the ‘Coffee-Club’ see themselves as regional rivals to the G4 states. Italy opposes the candidacy of Germany, Pakistan sees the ascendance of India as a threat to its interests, South Korea opposes Japan’s permanent membership, and Mexico and Argentina will not support Brazil’s quest for a permanent seat. These countries are united in their perception that an increase in the number of permanent members of the Security Council would further deepen the undemocratic nature of the Council and would alienate more members by creating new centers of power, whilst directly undermining the Coffee Club’s own influence within their region. They are also concerned with what is termed the ‘cascade effect’. This is the idea that membership of the Security Council comes with its rights and privileges, and if this is accorded to these new permanent member states, it will inevitably result in an asphyxiating grip of the most important positions in some of the most crucial organisations within the UN by a privileged few. The conclusion is that this has the potential to further increase the marginalisation of middle powers such as Italy and Canada. One other rationale for rejecting permanent seats for the UFC relates to the difficulty in reviewing an existing permanent member’s seat if such a country loses its international standing. The argument is that any of the countries vying for a permanent seat could lose its economic and military advantage in the near future and a shift in the current global dynamics could occur. It would certainly require an almost impossible amendment of the Charter to displace them, especially if they are granted the veto power.

Accordingly, the UFC propose only an increase in the non-permanent membership of the Council with no further additions to the permanent seats. Their proposal seeks to increase
the total membership of the Council to twenty-five, with ten additional new non-permanent seats elected to a two-year term. The group accepts the possibility of the immediate re-election of retiring non-permanent members subject to the decision of the regional groups. An intermediary position has also been suggested by Italy and Colombia, which involves the allocation of longer-term seats to regions. In 2009, both countries submitted a proposal to the intergovernmental negotiations panel. They proposed non-permanent seats for 3-5 years with the possibility of re-election, or two years with the possibility of up to two immediate re-elections, as well as a rotating non-renewable seat for small island states with special consideration for states with between one and ten million inhabitants. These seats would be primarily allocated to the regional groups. In May 2011, Mexico also submitted a revised version of the proposal by Italy and Colombia that called for seats with 8-10 years, although it remains doubtful if this proposal will be accepted. Nevertheless, by leaving the decision regarding which country will occupy a seat to the regional groups, the UFC’s proposal is seen as potentially flexible and democratic. First, it ensures that elected members are accountable to a block of other countries within their region. Second, it is also adaptable (provided longer-term seats are accepted), enough to create what has been referred to as ‘quasi-permanent’ or ‘semi-permanent’ seats since each long-term seat is open to re-election. Regions can determine under the terms of the UFC draft resolution to assign a seat permanently to a country or a sub-region. For instance, under this proposal, the African Union could allocate its seats to the main contenders for its permanent seats or to the sub-regions.

In paragraph four of the draft resolutions, the group recommends that six non-permanent seats should be allocated to Africa; five to Asia; four of the proposed twenty seats should be occupied by Latin America and Caribbean States; three seats from Western Europe and other states; and the remaining two seats to Eastern Europe.

Table 3: Reform seat allocation based on the UFC

<table>
<thead>
<tr>
<th>Region / Seats</th>
<th>Current Permanent seats</th>
<th>Proposed new permanent seats</th>
<th>Current non-permanent seats</th>
<th>Proposed non-permanent seats</th>
</tr>
</thead>
<tbody>
<tr>
<td>Africa</td>
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<tr>
<td>Eastern Europe</td>
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<tr>
<td>Asia and Pacific</td>
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<td>Western Europe and other states</td>
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<td>Latin America and Caribbean states</td>
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<tr>
<td>Total</td>
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<td>0</td>
<td>10</td>
<td>20</td>
</tr>
</tbody>
</table>

Decisions by the enlarged Council would be made following the affirmative votes of at least fifteen members of the Council including the P5. In a similar fashion to the G4, the UFC made recommendations on improving the working methods of the Council. Importantly, it seeks a restraint on the use of the veto privilege by the P5. It also requests consultation and better exchange of information with the General Assembly and the Economic and Social Council, whilst increasing the access of non-member states to the workings of the Council.

**Assessing the UFC proposal: support, challenges and its implications on R2P**

The UFC plan could be seen as the most democratic and possibly the most inclusive resolution on reform. On the one hand, its inclusiveness means that it addresses a large part of the

questions surrounding the legitimacy of the Security Council. On the other hand, by not extending the veto privilege or permanent membership to new states, it exacerbates the belief that the Security Council is hierarchical and that states from the Global South occupy a lower rung within the institution. The UFC plan is therefore likely to continue to engender feelings that Western industrialised states possess the ‘real authority’ to violate sovereignty and to authorise interventions. Rather than improve the implementation of the responsibility to protect, such contentions surrounding the procedural legitimacy of a reformed Security Council under the UFC plan could reignite a new wave of contestations about the objective of R2P or even its merits. Indeed, we could even argue that the feasibility of a Security Council reform based on the plans substantiated in the UFC resolution seems remote (whether original or revised) given that it does not provide for, for example, the permanent representation of African states.

The UFC resolution also encounters similar issues like the G4 proposal. For instance, the Veto Problem of the P5 will continue to impede prompt and effective action designed to address mass atrocity crimes. And, although the UFC calls for a restraint on the use of the veto in situations of mass atrocities, as I will show and argue there is little evidence that this moral advocacy will be successful. The United States and Russia have made it clear that they are unwilling to entertain any restriction on the use of their veto privilege. In an interview with the Carl Watson and Kevin Lynch, political advisers on Security Council reform and the responsibility to protect to the US Ambassador to the United Nations, at the US Permanent Mission in New York in 2016, both advisers reiterated that the US vehemently opposes ‘any restrictions or changes to the use of the veto’. Indeed, the prevailing sentiment among the P3 (Russia, China and US) is that the veto, its rules and its privileges are part of the “exclusive

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competence of the Security Council”, which do not require any explanation and cannot be derogated as certain critics have demanded.201

3.4.4 The Ezulwini Consensus (African Group)

In 2005, the 53 states of the African Union adopted a supposed ‘Common African Position’ on the reform. As previously stated, the African Group are of the opinion that, since a large amount of the Council work pertained to the continent, there was a need for an African voice in the permanent membership of the Council. It recalled that during the founding of the United Nations in 1945, Africa still largely under colonial rule was not well represented and, although there was representation as evidenced by the 1965 expansion, it was limited. The group maintained that Africa is conscious and convinced of the fact that it is ‘now in a position to influence the proposed UN reforms by maintaining her unity of purpose’.202

The group proposes resolution (A/59/L.67) arguing that Africa’s goal is to be ‘fully represented’ on the Council. ‘Full representation’ means: (1) no less than two permanent seats with all the rights and privileges of the existing P5 members, including the veto, and (2) five non-permanent seats. It states that, although in principle it opposes the veto, it is convinced that as long as the veto remains, all new permanent members must enjoy all existing privileges and prerogatives as a matter of ‘common justice’.203 It also maintains that it would be responsible for selecting Africa’s representatives and determining the criteria upon which it representatives would be chosen.

201 Fassbender, UN Security Council Reform and the Right of Veto. p.53
202 Ibid, Appendix I
203 Although the Ezulwini Consensus document and the 2005 Sirte Declaration do not refer to the distribution of permanent and non-permanent seats in other regions, Assembly/AU/Resolution 1(V) provides a clearer picture of the distribution of seats. The African proposal closely mirrors the G4 proposal with only the exception of the additional non-permanent seat to Africa. An interpretation of the African position not only leans on Assembly/AU/Resolution 1(V) but also the 1997 Harare declaration, the July 2005 Sirte declaration and the Ezulwini consensus document. Also see Sam Daws Security Council Reform: The Dual Risks- Proceedings of the International Conference on UN Reform. Iran, Tehran. July 2005.
Table 4: Reform seat allocation based on Ezulwini Consensus

<table>
<thead>
<tr>
<th>Region / Seats</th>
<th>Current Permanent seats</th>
<th>Proposed new permanent seats*</th>
<th>Current non-permanent seats</th>
<th>Proposed non-permanent seats</th>
</tr>
</thead>
<tbody>
<tr>
<td>Africa</td>
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<tr>
<td>Eastern Europe</td>
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<td>2</td>
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<tr>
<td>Asia and Pacific</td>
<td>1</td>
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<td>3</td>
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<td>Western Europe and other states</td>
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<tr>
<td>Latin America and Caribbean states</td>
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<td>Total</td>
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<td>15</td>
</tr>
</tbody>
</table>

Unlike the G4 and the UFC proposals, the Africans intend to increase the Security Council membership to twenty-six, with six new permanent members and five new non-permanent seats. Under the African proposal, two of the five additional non-permanent members will be allocated to Africa, bringing Africa’s quota on the Security Council to seven, while the remaining three non-permanent seats would be allocated to Asia, Eastern Europe and the Latin American and Caribbean States. The draft resolution was, however, silent on the reform of the working methods of the Council. It does, however, make brief reference to the need for a better working relationship between the Security Council and the General Assembly under a separate agenda for the institutional reform of the General Assembly.

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Ibid.
It is important to mention that despite the professed ‘common position’ adopted by the African Union, there are some internal disagreements among African states. First, there is the intense, politicised debate about which countries should represent Africa. Egypt, Nigeria, and South Africa are seen as the leading candidates for the two proposed permanent seats, but Algeria, Tanzania, Ethiopia, and Senegal have also been mentioned as potential candidates. Second, some countries are concerned about the inflexibility of the AU regarding the African position. Specifically, Nigeria and South Africa have mooted the idea of relinquishing the veto privilege and align more closely with the G4 proposal. The then Nigerian President, Olusegun Obasanjo argued that Africa must decide if it “will join the rest of the world, or the majority of the rest of the world, in bringing to a conclusion a demand for UN reform, or if Africa will stand on a non-negotiable position which will certainly frustrate the reform efforts”. The African position is also further undermined by the regional rivalry among member states. Ghana, for example, considers itself a counter-weight to Nigeria’s dominance within the West African sub-region. It is therefore not surprising that Ghana has shown support for the Uniting for Consensus proposal, given that it has little chance of securing a permanent seat. Following signs of ‘cracks’ in the African Consensus position, President Robert Mugabe of Zimbabwe proposed a committee of 10 states to act as the focal point for the continent on Security Council reform. The Committee of Ten (better known as C10), chaired by Sierra-Leone was empowered to negotiate with other groups on the reform of the Security Council, with a view to finding common grounds of compromise, while being guided by the Ezulwini Consensus document and 2005 Sirte Declaration. Since being given the mandate, the C10 has been intensely involved in the reform project by for example engaging in close

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consultations with the L69 group. The C10 is also the focal point of the African Group in the current intergovernmental negotiations process.  

Assessing the African Group proposal: support, challenges and its implications on R2P

Could the African group proposal improve the legitimacy of the Security Council and ensure that the Council consistently implements the responsibility to protect? There is a wide acceptance that any increase in the permanent membership of the Council should include Africa. In March 2008, France and the UK issued a joint statement affirming their support for a permanent representation of Africa on the Council, although they were silent on whether the continent should be granted the two permanent seats it requests. China has also placed on record its support for an African permanent representative. The acceptance of the African group proposal would significantly improve the legitimacy of the Council’s decision in the region given its representativeness.

That said the proposal is undermined by other problems. The insistence on the veto for Africa compounds the ‘Veto Problem’. Indeed, a concern might be that the inclusion of African states as permanent members with veto powers could have consequences on the capacity of the Council to act adequately during humanitarian situations. Although proponents may point to the increasing acceptance of humanitarian intervention among African states as evidenced by Article 4(h) of African Union constitutive act, it is important to temper such optimism with a realistic appreciation of the record of African states. In 2011, during Gaddafi’s last days, the African Union was seen as reluctant to support NATO’s intervention plan, Alex De Waal notes that “instead of applying its newly-developed doctrine of supporting democratic uprisings, the

208 Ibid p.50
209 Ibid p.45
210 France and UK, while supporting the membership of the G4 and African representative(s), also favour an intermediary position which calls for longer-terms seats with the option of permanency after a review.
AU interpreted the Libyan conflict through its more familiar lens of responding to a civil war”. The immediate objective of the AU according to De Waal was to provide an agreement or opportunity for Qaddafi to step down in a timeframe of months, rather the immediate relinquishing of power that the opposition wanted. Furthermore, South Africa, a leading candidate for one of the African permanent seats, was an elected member of the Council but abstained from voting on resolution S/2011/612 on Syria because according to it, it was suspicious of the draft resolution’s ‘intention to impose punitive actions’ and considered the resolution as a prelude to further actions which included instituting a regime change.

One must also ask what impact could Nigeria’s position as a permanent member (Nigeria is also one of the leading candidates for a permanent seat) have on the legitimacy of the Council’s decisions on human rights given the accusation by human rights groups that the country’s military committed crimes against humanity in its fight against the insurgent Boko Haram group. Moreover, given the penchant of African states to regularly retort the need for an ‘African solution to African problems’, there is a potential danger that an African permanent member with veto rights it advocates for could impede the Council if it perceives an overly interventionist policy on Africa.

At the same time, the African Group’s proposal plan to increase the membership of the Council to 26 is widely seen as untenable, and so also is its desire to privately determine which countries would occupy its permanent seats. The US has often reiterated its desire to veto any reform that would impede the Council’s ability to act efficiently and effectively, hence its

212 Ibid.
213 Ibid.
argument for a modest increase in membership. This puts the African group’s proposal on a collision course with the US. We must therefore also add that the proposal suffers from the ‘Feasibility Problem’.

Finally, is there a real danger that the watering down of the exclusiveness of the Council could lead to a less effective Council—the Effectiveness Problem? Could the collegiality among the P5 be severely eroded by the inclusion of states from the Global South? The P5 currently account for 60% of the world’s total defence budget and are among the ten biggest economies in the world. The P5 also belong to the exclusive club of nuclear-armed states. Furthermore, as ‘victors’ of the Second World War, these countries have what could be termed as ‘shared history’, and in some respect, they also see themselves as custodians of world peace. However and more importantly, the P3 (France, UK and the US) have shown a willingness to project power to promote democracy, human rights, and good governance. The pertinent question therefore is: would the introduction of states without this ‘shared history’ or with questionable democratic credentials upset the balance within the Council? Indeed it could be argued that the insistence of the US that representation should not be imperative to the reform initiative, but the focus should be on the Council achieving its primary objective as a platform for effective and efficient action on threats to international peace and security is reflective of such perspective?

216 In an interview with Patrick Luna, First Secretary of the permanent mission of Brazil to the United Nations on 8 July 2016 in New York, he suggests the unwillingness of permanent members—the trio of the United States, United Kingdom and France -- to accommodate the interests of states from the global south.
3.4.5 Kofi Annan’s A & B Models

In what could be seen as an attempt to engender debate on UN reform, Kofi Annan instituted the High-Level Panel on Threats, Challenges, and Change in 2005. The panel made up of eminent diplomats proposed two options that could guide the reform process, ‘Models A & B’.

In Model A, the Security Council would admit six new permanent members without veto rights and three new two-year, non-permanent seats. Under this arrangement, which intends to increase the Security Council membership to twenty-four, Africa would be allocated two permanent seats and one non-permanent seat. Europe and the Americas would have one permanent seat and one non-permanent seat respectively, while the Asia-Pacific region would only be allocated a permanent seat.218

Table 5: Reform seat allocation based on Kofi Annan's Model A

<table>
<thead>
<tr>
<th>Region /Seats</th>
<th>No of States</th>
<th>Current Permanent seats</th>
<th>Proposed new permanent seats</th>
<th>Proposed non-permanent seats</th>
</tr>
</thead>
<tbody>
<tr>
<td>Africa</td>
<td>53</td>
<td>0</td>
<td>2</td>
<td>4</td>
</tr>
<tr>
<td>Asia and Pacific</td>
<td>56</td>
<td>1</td>
<td>2</td>
<td>3</td>
</tr>
<tr>
<td>Europe</td>
<td>47</td>
<td>3</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>Americas states</td>
<td>35</td>
<td>1</td>
<td>1</td>
<td>4</td>
</tr>
<tr>
<td>Total</td>
<td>192*</td>
<td>5</td>
<td>6</td>
<td>13</td>
</tr>
</tbody>
</table>

*Table is from the High Panel Report

217 Bourantonis, *The History and Politics of UN Security Council Reform*. p.47-86; see also the US State Department, 218 Ibid.
In Model B, the Panel proposes a new category of eight four-year renewable non-permanent seats and one new two-year, non-renewable non-permanent seat. Two new four-year seats would be distributed across all regions and an additional one-year seat allocated to Africa.219

Table 6: Reform seat allocation based on Kofi Annan's Model B

<table>
<thead>
<tr>
<th>Region/Seats</th>
<th>No of States</th>
<th>Current Permanent seats</th>
<th>Proposed four-year renewable seats</th>
<th>Proposed non-permanent seats</th>
</tr>
</thead>
<tbody>
<tr>
<td>Africa</td>
<td>53</td>
<td>0</td>
<td>2</td>
<td>4</td>
</tr>
<tr>
<td>Asia and Pacific</td>
<td>56</td>
<td>1</td>
<td>2</td>
<td>3</td>
</tr>
<tr>
<td>Europe</td>
<td>47</td>
<td>3</td>
<td>2</td>
<td>1</td>
</tr>
<tr>
<td>Americas states</td>
<td>35</td>
<td>1</td>
<td>2</td>
<td>3</td>
</tr>
<tr>
<td>Total</td>
<td>192*</td>
<td>5</td>
<td>8</td>
<td>13</td>
</tr>
</tbody>
</table>

*Table is from the High Panel Report

In both Models, the panel advises that election to the Security Council should be based on the assessed financial and military contribution of a state to the UN budget and peacekeeping missions respectively. The opinion of the panel was that, regardless of which model is adopted, a review of the composition of the Council and the principle on which their election is based should be concluded by 2020. This is to assess whether the new Council is effective in managing threats to international peace and security.

The report also provides suggestions on improving the working methods of the Council. It notes the ‘anachronistic’ nature of the veto and decries the absence of any practicable method that can help eliminate the existing veto privileges of the P5.220 It is based on this aversion for

219 Ibid.
220 Ibid.
the veto vote that the report rejects the extension of the veto privilege to new permanent members. That said, the panel admonishes the P5 to refrain from the use of the veto in cases of genocide and human rights abuses. The High Panel report also innovatively calls for an ‘indicative voting system’ intended to bring transparency to the use of the veto. The indicative voting involves a two-stage process. At the first stage, Security Council will call for a public indication of positions of the Council members on a proposed resolution. A negative vote by any of the P5 at this stage would have no veto effect would not defeat the proposed resolution. At the second stage, formal votes would be taken, and this would comply with the existing rules and procedures guiding voting in the Security Council. A negative vote at this stage by any of the P5 would be considered a veto of the resolution. It is clear, then, that the Panel intends this as a ‘naming and shaming’ strategy to improve accountability in the use of the veto.

Assessing the Kofi Annan’s Model A & B proposals: support, challenges and its implications on R2P

Although Kofi Annan was unsuccessful in convincing member states to adopt either of the Models, it is important to note that both models have significantly influenced the reform debate. This can particularly be seen in the adjustments to both the Group of Four proposals and the UFC since 2005. Model A closely reflects the updated proposal of the G4 regarding the allocation of permanent seats without veto votes, while renewable semi-permanent seats are a feature of both Model B and the UFC proposal. It is the case that Model A’s contributions to the consistent implementation of the responsibility to protect mirrors the G4’s. Consequently, it is undermined by the problems identified with the G4 proposal, particularly the enduring and paralysing effect of the P5 veto. At the same time, since Model B and the UFC are similar, then the issues identified with the UFC proposal undermine Model B’s capacity to bring about the

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221 Ibid.
consistent implementation of R2P. To restate, the problems of the UFC proposal are the Feasibility Problem and the Veto Problem.

However, both Models A & B are unique in the recommendation of the ‘indicative voting system’. What potential does the indicative voting system hold for the response to atrocity crimes? The proposal ostensibly emanates from the logic that a naming and shaming practice could address the capricious use of the veto. It also assumes that exacting pressure on the P5 could lead them to reconsider the way the veto is deployed. While the indicative voting idea could bring transparency to practices such as the silent veto, the pertinent question remains whether there is any potential that states would act differently because of the moral opprobrium that follows their veto vote. Indeed, evidence suggests that the US has never been afraid to publicly state its willingness to use the veto at whatever reputational cost to protect Israel and neither has China, which considers the veto as a veritable tool in its foreign policy kit and has used it to chastise dissenting states such as Macedonia.

3.4.6 The L69 proposal

In 2007, frustrated with the slow pace of negotiations under the Working Group model, India led a group of twenty-five states who requested the commencement of intergovernmental negotiations. Unable to realise this objective, the group submitted resolution A/61/L.69/ to the General Assembly. Brazil, India, South Africa and Nigeria are some of the prominent states who co-sponsored the L69 draft proposal. The group calls for the addition of both permanent and non-permanent seats. It aims to increase the Council’s membership to twenty-seven by allocating two permanent seats to Africa and Asia respectively, and one permanent seat each for Western Europe and Latin American states. The proposal also suggests the allocation of two non-permanent seats for Africa, whilst all other regions would be allocated a non-permanent seat.
Most of the resolutions have been silent on the representation of the small island of states on the Security Council, instead choosing to focus solely on the reform of the working methods as a way of assuaging their concerns. The L69 interestingly provides for a one-nonpermanent seat for small island developing states across all regions. Ostensibly, this is in a bid to win more support for its proposal from these states.

Table 7: Reform seat allocation based on the L69 proposal

<table>
<thead>
<tr>
<th>Region/Seats</th>
<th>Current Permanent seats</th>
<th>Proposed new permanent seats*</th>
<th>Current non-permanent seats</th>
<th>Proposed non-permanent seats</th>
</tr>
</thead>
<tbody>
<tr>
<td>Africa</td>
<td>0</td>
<td>2</td>
<td>3</td>
<td>5</td>
</tr>
<tr>
<td>Eastern Europe</td>
<td>1</td>
<td>0</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>Asia and Pacific</td>
<td>1</td>
<td>2</td>
<td>2</td>
<td>3</td>
</tr>
<tr>
<td>Western Europe and other states</td>
<td>3</td>
<td>1</td>
<td>2</td>
<td>2</td>
</tr>
<tr>
<td>Latin America and Caribbean states</td>
<td>0</td>
<td>1</td>
<td>2</td>
<td>3</td>
</tr>
<tr>
<td>Small island states</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>Total</td>
<td>5</td>
<td>6</td>
<td>10</td>
<td>16</td>
</tr>
</tbody>
</table>

It should be noted that, since its first draft resolution, the L69 position has modified its proposal to include the right of veto for all new permanent members. Clearly, this is also a ploy to persuade the recalcitrant African group that has been unwilling to renegotiate the veto privilege.

222 Freiesleben, J.V and Swart, L., Governing and Managing Change at the United Nations: Reform of the Security Council Appendix VIII
The L69 proposal currently enjoys the support of at least 41 countries, and it closely aligns with the African group, G4 and CARICOM states.\textsuperscript{223} Indeed, the L69 proposal could be seen as an attempt to build a more acceptable compromise proposal that could attract the widest possible political acceptance.\textsuperscript{224} Sierra Leone, a key member of the African group and the Chair of the C10, provided insight on the L69 proposal. It states: ‘our engagement and consultations with the L69 has the potential of heading towards the direction of a common platform when fully crystallised’.\textsuperscript{225} The L69 proposal, as with other major proposals, seeks the improvement of the working methods of the Council. In particular, it suggests a closer relationship between the Council and the General Assembly.

*Assessing the L69 proposal: support, challenges and its implications on R2P*

The L69’\textquotesingle s objective is to produce a position on reform that appeals to a wider audience of member states. In 2005, in an attempt to force a vote on the reform, the G4 stated it had garnered the support of 100 countries. Given that a reform of the UN could be set in motion if any proposal could amass the two-thirds requirement of 129 votes at the General Assembly, a compromise proposal that satisfies the G4 and the African Group, and appeals to the small island states, could potentially achieve this requirement. And since the L69 is an amalgamation of different proposals (African Group, G4 and CARICOM), it should not be surprising that the L69 proposal is perhaps the most representative proposal for reform currently in circulation. Without a doubt, the acceptance of the proposal is likely to grant significant legitimacy to the Council’s decisions since it addresses the concerns of most regions, including small island states. However, despite the group’s attempt to build a more inclusive proposal, it is likely to

\textsuperscript{223} CARICOM is composed of 15 Caribbean states and dependencies. Their proposal for reform of the Council almost entirely mirrors the L69 proposal. Ibid., p 51 and Appendix VIII

\textsuperscript{224} The term widest possible political acceptance is the guiding principle for Intergovernmental Negotiations based on Decision 62/557. The intention is to ensure that a compromise proposal garners more than the required 2/3 majority vote.
face strong opposition from the P5, especially the United States. First, its proposal to grant a non-permanent seat to the small island states regardless of geographical location runs contrary to the provisions on elections to the Council based on regional groupings.\textsuperscript{226} Second, the plan to increase the Council’s membership to twenty-seven is seen as untenable by the P5, who are understandably worried about a large, unwieldy Council. Thus, while the proposal is representative and would improve the legitimacy of the Council’s decision on mass atrocity crimes, it is undermined by the Feasibility Problem.

Furthermore, the Veto Problem would remain an impediment to the Council’s response to atrocity crimes and indeed would be exacerbated with the allocation of veto to new permanent members. At the same time, the expansion of the Council in the manner it has proposed is unlikely to have a qualitative impact on the effectiveness of Council decisions—triggering both the Effectiveness problem. If anything, just as with the G4 proposal and the African group plan, the L69 proposal would reinforce the persistent issues the Council is currently grappling with in its response to atrocity situations.

3.5 What hope for a reform and the R2P?

One of the often-stated obstacles to Security Council reform is that the Charter curiously ensured that no amendment is possible without the concurrence of every member of the P5. It is also a significant reason why any effort to curtail or derogate the veto power through Charter amendment is likely to be defeated. Erik Voeten, however, argues that the P5’s veto power is exaggerated since their influence is contingent on the acknowledgement of the Council’s legitimacy and acquiescence of members of the United Nations to the decisions of the Council. He maintains that “veto power only transfers to real-world influence to the extent that members

\textsuperscript{225} Freiesleben, J.V and Swart, L., Governing and Managing Change at the United Nations: Reform of the Security Council. p.51
\textsuperscript{226} Resolution A/RES/1991(XVIII) in 1963 explicitly identifies the path towards a seat on the Security Council.
who do not possess it attach value to the UNSC’s decisions”. This perspective calls the popular narrative to question. The attempt to amend the Charter in 1963 is an often-stated example of the illusory nature of the P5 powers. On that occasion, the P5 was pressurised into ratifying the Charter even though France and the Soviet Union had voted against it at the General Assembly, just as the UK, US and China abstained at various points during the amendment process. Voeten argues that, in real terms, other countries have considerable leverage over the organisation. For instance, “Japan and Germany could cease paying the UN’s bill; India, Brazil and South Africa could co-opt developing nations to ignore UNSC decision”, in such a situation the UNSC’s authority will rapidly decline and with it the value of the veto.

It is thus conceivable to reform the Council based on a proposal that does not entirely assuage the concerns of the members of the P5. To recall, these are the following: China’s opposition to Japan candidacy; the US’s insistence on a Council not expanded beyond 21 members; the UK and France’s reluctance to extend the veto to potential permanent members; and Russia’s general reluctance about new permanent members.

Yet, if even if this happens, we have to seriously doubt the impact any such proposal would have on the implementation of the responsibility to protect. While some proposals such as the G4, African Group and L69 might improve the legitimacy of the Council’s decisions during atrocity crimes because the Representativeness Problem does not undermine them, nevertheless they are weakened by other problems—the Veto Problem. As I shown, none of the proposals addresses the asphyxiating grip of the P5 veto. Indeed, none makes any feasible effort to rid the Security Council of the powers of the veto. At best, they appeal to permanent members to suspend their veto during atrocity crimes.

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228 Ibid.
More so, there are other reasons beyond the threat of the P5 veto why reform remains elusive. Negotiations on the reform of the Security Council have been ongoing for 27 years, and there is no indication that this will not go on for much longer. The absence of compromise can be adduced to two reasons. First, as noted, the Charter has made an amendment to its Articles a herculean task. Article 108 requires that an amendment proposal should be voted for by “two-thirds of the members of the General Assembly and ratified in accordance with their respective constitutional processes by two-thirds of the Members of the United Nations, including all the permanent members of the Security Council.” In essence, this means that a reform proposal must: (1) garner at least two-thirds votes at the General Assembly; (2) be ratified by the legislative authority of at least two-thirds of member states; (3) must also be ratified by all members of the permanent five. This is indeed a cumbersome process and explains why there have been only three successful attempts at amending the Charter.

Thus, member states, especially the potential candidates for permanent seats and the states who oppose their candidacy, are very much motivated to extract the most political gain possible from the process. The second reason is that a large number of states within the United Nations do not have realistic chances of securing permanent seats and are therefore not politically invested enough to desire a quicker resolution to the debate on the expansion of the Council. Consequently, these countries see the enlargement of the Council as secondary to the improvement of its working methods that directly impacts them.

Since we have successfully disputed the argument that a formal reform would address the Council’s inadequacies, the fundamental question of this research subsists, how can the

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229 The difficulty in reforming the Security Council is further compounded by the uncompromising position of the African Group. Given the consensus of its members, any progress on the reform agenda would significantly depend on the African Group. Mogens Lykketoft, 70th President of the General Assembly, in a personal interview in New York reiterated this point to me. According to him, if the Security Council reform will happen, there has to be compromise from the African Group.
responsibility to protect be more consistently implemented? In the next chapter, I examine the suggestion that circumventing the Council from within or without holds significant promise in the quest to implement R2P.

Conclusion

In this chapter, I have contextualised the emergence of the Security Council and the politics that structured it. At the same time, I showed how the structure and composition of the Council threaten its legitimacy and have undermined its effectiveness. The chapter also established how the Council’s continued failure in response to atrocity crimes had instigated calls for reform. Following this, I comprehensively outlined and discussed the major proposals for reform of the Security Council. I evaluated each proposal’s potential contributions to the responsibility to protect.

That said the principal objective of this chapter has been to critically examine an untested hypothesis within the literature on implementing R2P. It is regularly stated or assumed that since the Security Council bears some responsibility for previous failures to react, or respond effectively to the commission of atrocity crimes, a reform of the institution would address this long-running trend of institutional failure. In this chapter, I have shown that this notion is mistaken and that a formal reform of the Council would not address the most serious problems the implementation of the responsibility to protect faces. In particular, I have shown that reform would not address the Veto Problem. The Security Council would continue to be threatened by the presence of the veto which could be deployed at will by any of the permanent members as we have seen too often.

Furthermore, I have shown that many of the proposals are undermined by other problems, the Representativeness Problem, the Effectiveness Problem, the Feasibility Problem and the Regional Rivalries Problem. Finally, I highlighted the limited feasibility of a compromise plan. In the next chapter, I examine a different way of addressing the problems of inconsistency. I look at arguments and ideas that suggest the circumvention of the Security Council.
Chapter Four

Proposals for Circumventing the Security Council

In the previous chapter, I rejected the case for formal reform of the membership of the UN Security Council to improve its procedural legitimacy. I also highlighted the political complexities that make a formal Security Council reform difficult. In this chapter, I focus on a different set of proposals. These are three ideas that have gained prominence in recent years. First, scholars have proposed that the Council’s processes and procedures should be circumvented from within. The second is to get around the Security Council but work within the UN institution in addressing atrocity crimes. The third idea proposes to completely circumvent the Security Council and create an independent institution that addresses the crimes R2P focuses on.

Regarding the first proposal, I will examine the idea of a reform of the working methods of the Council. It has been argued that ‘opening up’ the Council to more deliberative consultations during humanitarian situations and ‘reining in’ the use of the veto by Council members might improve the international response to atrocity crimes.\textsuperscript{232} Since the idea has gained serious diplomatic support in recent years, I will engage in a robust discussion of the arguments for restraining the veto, consider its potential impact on the international response to atrocity crimes and highlight the practical and diplomatic challenges it faces. For the second set of proposals, I consider the Uniting for Peace resolution and the idea of a ‘Concert of Democracies’ for proposals that seek to completely circumvent the Security Council in order to fulfil the protective responsibilities of R2P.

This chapter, however, proceeds as follows: I start by discussing the historical attempts to restrain the veto privilege. This helps in framing current debates about the veto, particularly, some of the enduring arguments for curtailing the veto. It also helps situate the arguments of states who had and continue to resist all efforts to curtail the veto privilege. In the chapter, I draw on the interviews conducted with diplomats in New York to determine the prospects and highlight the challenges of the veto restraint initiative. After determining that the idea of a Code of Conduct is unlikely to address the enduring problems currently undermining R2P, I examine some of the other alternatives suggested. I engage with the idea of circumventing the Security Council through the Uniting for Peace resolution (UFP). I argue that although the UFP was successful in its early years in galvanising action when the Council was deadlocked, as the UFP became a useful tool in getting around the US veto that prevent UNSC resolutions drafted to criticise the practices of Israel in Palestine, the utility of the UFP has waned.

Finally, I consider the idea of a Concert of Democracies set up outside of the United Nations. Proponents of the Concert argue that it would be a procedurally legitimate alternative to the Security Council because it is constituted only by democracies. The understanding is that decisions to protect victims of egregious human rights abuses are better taken by democracies. Furthermore, democracies are likely to be politically willed to respond and react to the commission of atrocity crimes. In this chapter, I show that this notion is mistaken.

4.1 Curtailing the Veto: Background and History

The veto privilege has always been contentious, so also is the long history of attempts to curtail it. At the San Francisco Conference in 1945, several states argued that the idea of a veto negated the principles of sovereign equality of states. Yet, it was also clear that the great powers considered the veto integral to the founding of the United Nations. So uncompromising was their stance on the veto that US Senator, Tom Connally, who was part of the US delegation famously tore his draft copy of the Charter after remarking to other delegates, “You may go
home from San Francisco…and report that you have defeated the veto…but you can also say, ‘we tore up the Charter!’.

Although, many of the states at the conference came round to the idea of the veto, however, there were efforts to restrain its use. Hebert Vere Evatt, who was part of the Australian delegation to the conference argued for the need to limit the veto to decisions taken under Chapter VII. To him, it was unconscionable that “one great power should be able to veto an attempt to settle a dispute through negotiation and arbitration, particularly when that dispute might be in an area outside the power’s sphere of influence”. Similarly, he argued against the extensive powers of the permanent members to veto Charter amendments. Evatt was unsuccessful in his mission as the only concession granted by the great powers was that the veto could not prevent the free discussion of issues. However, other efforts to constrain the veto have yielded some degree of success.

One of such is the accepted practice that an abstention by a permanent member does not effectively constitute a veto. During the Council’s consideration of the Spanish question in 1946, the Security Council determined that the abstention of a permanent member (in this case, the USSR) did not negate Article 27(3) which demands that decisions on substantive issues be made by an “affirmative vote of nine members including the concurring votes of the permanent members”. The Council’s flexibility on what concurring votes should mean was one of the first successful attempts at curtailing the reach of the veto.

The General Assembly also made an early intervention in the veto debate. In resolution 267- III (1949), the Assembly noting its authority under Article 10 of the Charter to “discuss

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any question within the scope of the Charter or relating to any functions of any organ of the United Nations” recommended that permanent members of the Council find an agreement among themselves and should be circumspect in exercising their veto when seven affirmative votes have been cast in the Council on a resolution.\textsuperscript{236} Clearly, the intent of the resolution by the Assembly was to instigate a more efficient and legitimate Council that was less vulnerable to the paralysing powers of the veto, but more importantly, it signalled a concern that the veto could be used to prevent actions on specific issues even when there was broad support from members of the Security Council.

In 1950, the United States Secretary of State, Dean Acheson, initiated the Uniting for Peace resolution because of what L.H. Wosley termed the ‘organic imbecility of the Soviets’ whereby they paralysed Council proceedings through the use of the veto and other tactics.\textsuperscript{237} The Uniting for Peace resolution (Resolution 377) of the General Assembly empowered the General Assembly to consider any issue which may be a threat to international peace and security and make recommendations to member states if the Security Council as a result of lack of unanimity fails to act. Resolution 377 has been invoked ten times, notably during the 1956 Suez Canal crisis and the 1960 Congo conflict. Not surprisingly, since the US and its Western allies lost their influence in the General Assembly following the post 1950s expansion of the UN, they have once again become the strongest defenders of the exclusive powers of the Council and the use of resolution 377 as a ‘circumventory’ tool to curtail the veto privilege has


diminished.\textsuperscript{238} (I will discuss the Uniting for Peace resolution extensively in later parts of this chapter).

\subsection*{4.2 A Code of Conduct}

Calls to restrain the use of the veto re-emerged with the formal proposals for reforming the Security Council. In the High-Level Panel report, Kofi Annan’s Model A and B reform proposal admonish the P5 to refrain from the use of the veto in cases of genocide and human rights abuses. The High-Level Panel report also innovatively calls for an ‘indicative voting system’ intended to bring transparency to the use of the veto by mandating permanent members to publicly indicate their position on a proposed resolution.\textsuperscript{239} Similarly, the ICISS report of 2001 calls on the permanent members of the Security Council not to apply their veto, in matters where their vital state interests are not involved and where resolutions authorising military intervention have majority support.\textsuperscript{240} Other reports such as the Genocide Prevention Taskforce report by Madeleine Albright and William Cohen and the Responsibility Not to Veto report by Citizens for Global Solutions have made similar recommendations on the use of the veto during humanitarian situations.

A more robust and sustained discussion on the veto was initiated by the S-5 group consisting of Costa Rica, Jordan, Liechtenstein, Singapore, and Switzerland. The group in March 2012 presented draft resolution \textit{A/66/L.42} to the General Assembly. While acknowledging the past efforts of the Security Council to improve its working methods, it noted the need for the Council to be more inclusive and accountable to the wider


\textsuperscript{239} UN Document A/59/565, December 2004. P.68

\textsuperscript{240} International Commission on Intervention and State Sovereignty (ICISS).\textit{The Responsibility to Protect}. Ottawa, International Development Research Centre, 2001
The S5 in their draft resolution made 21 recommendations they argued would help ‘institutionalise’ current Council practices. The suggestions ranged from the Council’s relationship with the General Assembly and subsidiary bodies, the effectiveness of its decisions, operations mandated by the Council, governance, and accountability, the appointment of the Secretary-General and the use of the veto. Importantly, the S5 recommended that the Security Council establish a practice of indicating that a negative vote cast is not intended as a veto. It explained that this practice would be of considerable benefit to both the Council and the general membership since it would ensure that even if a permanent member casts a negative vote to register its displeasure at an intended course of action, the UN could still act. The flexibility to cast a negative vote without paralysing Council proceedings should, therefore, insulate such a permanent member from the usual criticisms that accompany a veto vote.

The S5 report generated a lot of controversies. The P5 vehemently opposed some of the recommendations. They argued that the Charter explicitly makes it clear in Article 30 that the Council will adopt its own rules and procedures, and as such, efforts to recommend or reform the working method of the Council impede the institution’s rights and prerogatives. The S5, confident of the support the proposal had garnered, pushed for a vote on the resolution at the General Assembly. In what was considered clever manoeuvring by the P5, and which illustrated the desperate attempt to resist any externally imposed changes to the Council’s working methods, the P5 prompted the UN legal adviser, Patricia O’Brien, to provide a legal opinion on the voting threshold required for the draft resolution. O’Brien argued that the draft

241 The Security Council has endeavoured to be more transparent in its working methods. For instance, it has adopted the Arria formula, where experts on an issue of interest could be invited to an informal meeting and provide Council members knowledge on a specific subject being considered by the Council.


243 Ibid.
resolution would have to be considered under the aspect of comprehensive reform of the Council, which required the mandatory two-thirds votes rather than the simple majority anticipated by the S5.244 Realising that its proposal was facing imminent defeat, the S5 withdrew the draft resolution. Paul Seger, Switzerland’s ambassador to the UN, noted that while most states agreed with the substance of the S-5 proposal, the P5 were clear that they “would not see favourably any kind of resolution regarding working methods of the Security Council”.245

It is important to note that in recent years, however, two proposals have generated broader support from states and are currently the subject of intense diplomatic engagement. These are the Accountability and Transparency group and the French/Mexico proposals which I consider below.

**4.3 The French/Mexico and ACT initiatives**

Following the defeat of the S5 proposal, Switzerland (a key member of the S-5) along with 20 other states formed the ‘ACT’—the ‘Accountability, Coherence, and Transparency’ group. The ACT indicated its interest in building a more consultative, inclusive, and transparent platform than the S5. The new group has adopted a less confrontational approach to the debate. According to the ACT, the strategy is to focus on the Council in its present composition, improving its “working methods here and now through concrete and pragmatic measures”.246 In addition to concerns such as more inclusive allocation of penholders, more public and open consultations, increased use of the Arria formula for consultations with NGOs, the ACT advocates the “voluntary suspension of the use of the veto in cases of atrocity crimes...when

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245 Ibid.

the Council’s actions aim at preventing or ending genocide, war crimes or crimes against humanity”.  

In its explanatory note, the ACT provides more details on the proposal for the suspension of the veto in cases of mass atrocities. It suggests that the CoC should apply not only to permanent members of the Security Council but to other current and future members of the Council, noting that its proposal is not “just about the veto but a broader pledge to support timely and decisive Security Council action in such situations”. Although the group does not outline specific procedural triggers for the CoC, only insisting that ‘facts on the ground’ should instigate Security Council action, it allows for a state committed to the CoC to make an assessment of an atrocity situation and call for the application of the code. Finally, the ACT makes particular reference to the role of the Secretary-General in serving as an ‘important authority’ on atrocity crimes and in bringing such situations to the attention of the Security Council. It is noteworthy that as of January 2018, 112 countries have expressed support and pledged to bind themselves by the principles of the CoC.

At the same time, France and Mexico’s initiative has generated comparable interest. Indeed France, which is yet to employ its veto privilege since 1989, has a long history of advocating for a restraint in the use of veto during mass atrocity situations. During consultations on the R2P norm in 2001, Hubert Védrine, the French foreign minister, proposed

Ibid.
Ibid.
Ibid.
ACT proposal currently attracts more support than the French and Mexican initiative. This is because it demands that all current and future Security Council members should be bound by the Conduct of Conduct. See details at:
that where national interest is not involved, the P5 should commit to a code of conduct barring them from using the veto to obstruct resolutions drafted to address atrocity crimes. The ICISS report reflected Védrine’s recommendations, and the endorsement of CoC in the 2001 report further increased the political currency of the initiative. The ICISS report went on to suggest that the P5 should constructively abstain from using the veto where a resolution would otherwise pass by a majority vote. However, attempts to include this provision in the World Summit Outcome Document met stiff resistance.

France’s advocacy for the CoC re-emerged in an opinion piece by Laurent Fabius in The New York Times on 4 October 2013 and was restated by the French President, Francois Hollande in his address to the 68th General Assembly. The French foreign minister, Laurent Fabius, in particular strenuously argued for the code of conduct in the op-ed admitting that:

For a long time, the Security Council, constrained by vetoes, was powerless in the face of the Syrian tragedy. Populations were massacred and the worst scenario unfolded as the regime implemented the large-scale use of chemical weapons against children, women and other civilians. For all those who expect the United Nations to shoulder its responsibilities in order to protect populations, this situation is reprehensible.

He noted that while France was in favour of expanding the Security Council in order to make it more representative, the difficulties associated with reform necessitates an alternative approach if the Security Council is to retain its legitimacy. Consequently, France, according to Fabius, was proposing that where the Security Council was “required to make a decision with regard to

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253Blätter and Williams, The Responsibility Not To Veto. p 316-9
a mass crime, the permanent members would agree to suspend their right to veto”. However, in contrast to the ACT proposal which does not outline any procedural trigger, the CoC would be initiated when at least 50 member states request the Secretary-General to determine the nature of the crimes being committed in a conflict. Once the commission of atrocity crimes is established, the Code of Conduct immediately applies as long as the vital interest of any of the P5 is not at stake.255 Following two ministerial meetings on the CoC with France, Mexico issued a joint political declaration calling for the suspension of the veto in atrocity situations at the 70th General Assembly. The French and Mexican initiative has garnered considerable support with 96 member states publicly endorsing the principles of the proposal.

4.4 Prospects and Challenges

The lack of decisive action on the Syrian conflict has undermined the Council’s legitimacy and re-energised the call for a code of conduct to regulate the Council’s response to atrocity crimes.256 The Council’s illegitimacy as I argued in chapter 2 stems from its inability to produce outcomes that the solidarist international society promotes. Although Russia, China, and the US have been averse to any proposal that improves the Council’s legitimacy by limiting the exercise of their veto privilege, arguing that it is the “exclusive competence of the Security Council” and there be should be no need for an explanation of its use257; there seems to be increasing confidence among stakeholders that the global advocacy for the code of conduct is putting considerable diplomatic pressure on these countries. Indeed, the advocacy is strengthened by the perception that since the CoC does not require any Charter amendment, it remains the best hope in the quest to substantively change the Security Council’s response to mass atrocity crimes. In 2015, the United Kingdom endorsed the ACT proposal arguing that

255 Briefing by the UNA-UK on the United Nations Security Council and the responsibility to protect: Voluntary restraint of the veto in situations of mass atrocities
“permanent members that use the veto to block credible united action...bear a heavy moral responsibility for the chaos and the situation that follows”.\(^{258}\)

But what are the merits of the CoC and to what extent could the proposal improve the legitimacy of the Council and contribute to an effective and a more consistent implementation of the responsibility to protect? I examine three important merits of the CoC often extended by advocates but I also outline the corresponding challenges to each of these arguments.

4.4.1 The circumvention argument

Proponents argue that the CoC is a positive step towards implementing R2P since it aims to address the Council’s inconsistent record on atrocity crimes by demanding that members should not vote against credible draft resolutions aimed at preventing or ending the commission of these crimes. It is well known that the veto has been used several times in the past to obstruct international efforts designed to address atrocity crimes. An instance is the Soviet’s veto of a draft resolution calling for a cease-fire during the 1971 East Pakistan crisis.\(^{259}\) But the effects of the veto are not limited to such overt cases like East Pakistan and Syria where it was used to impede international action, the threat of its use has equally had obstructive consequences. The threat of veto had extensive implications on the Council’s response to the Rwandan crisis in 1994 and Kosovo in 1999.\(^{260}\) The argument thus is that the acceptance of an international norm that regulates the exercise of the veto—considered a major impediment in implementing the

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\(^{260}\) In Rwanda, the US and France made threats to veto UNSC action, the duo even used their veto to weaken how the event was described. According to Des Forges, A., (1999). *Leave None to Tell the Story: Genocide in Rwanda"* Human Rights Watch, the UNSC at the time could not pass a resolution admitting that genocide was going on.
responsibility to protect—would inevitably lead to a more consistent and effective response to atrocity crimes.

Yet there is a clear problem with this argument. The extensive impact of the veto cannot be underestimated as the veto privilege is perhaps the most powerful and defining policy instrument available in international relations. Nevertheless, the contribution of the veto vote to R2P’s inefficiency is somewhat overstated. Hitoshi Nasu rightly notes that “even if the fetters of the veto were removed, the responsibility to protect will continue to be constrained by other issues”. The suggestion therefore that the CoC could improve the responsibility to protect misses a crucial point and this is that responses to mass atrocity crimes have been hindered mostly by the lack of political will and not institutional impediments like the veto. Indeed, as Bellamy has argued, without political will, R2P falters.

Aidan Hehir also shares a similar sentiment on the centrality of political will to the discourse. According to him, “for all the furore and debate generated by R2P, its efficacy is ultimately dependent on one variable: political will”. This argument can not be easily dismissed. Indeed the absence of political will to ‘do something’ was palpably evident in the months leading to the Rwanda genocide. Secretary-General Boutros Boutros Ghali in February 1994 warned President Habyarimana of Rwanda of the International Community’s unwillingness to take responsibility should the political situation explode. It was not surprising therefore that when the crisis did boil over, the Security Council rather than respond

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robustly, passed resolution 912 that reduced the peacekeeping force from a 2,548 strong contingent to 270.265

Similarly, the centrality of political will to the way international actors respond to atrocity crimes could be seen in Darfur. Whereas there was a general reluctance to identify the crimes in Rwanda as a case of genocide, partly because the 1948 Genocide Convention compels contracting parties in Article 1 to prevent and punish acts of genocide, no such attempt was made with Darfur. In September 2004 Colin Powell testified before the US Congress. He admitted that genocide had been committed in Darfur; yet, he added that “no new action is dictated by this determination”.266 In essence, both cases witnessed the same lack of priority and interest.267 Thus we must concede that whilst efforts to curtail the veto vote are admirable, in the absence of a willingness to undertake humanitarian actions where national interests are absent, the contributions of the CoC to the consistent and effective implementation of the responsibility to protect will be limited.

4.4.2 The naming and shaming argument

A second argument is that the CoC could improve the response to mass atrocity crimes by allowing for the public naming and shaming of states that vote against credible draft resolutions intended to address mass atrocity crimes. A key element in the ACT proposal is the requirement that members who vote against a credible draft resolution should publicly explain the rationale behind their vote. Advocates of the CoC rely on the fundamental assumption that

265 Ibid.
states like individuals are not positively disposed to public shaming. Justin Morris and Nicholas Wheeler argue that states are sensitive to issues of shaming since, according to them, they are “notoriously loath to give up the hard-won fruits of previous diplomatic encounters”. The claim is that the P5 could be discouraged from the capricious use of the veto by increasing the diplomatic costs of actions that undermine the collective will of the international society during humanitarian crises.

The claim above reflects strong constructivist sentiments as it underemphasises the material forces that, rationalists argue, determine state interests and actions. That customs and norms can normatively guide the actions of states is well accepted by liberal scholars. It could even be argued that the fact that 117 countries have signed either of the two CoC declarations reveals a normative commitment by these states to this liberal objective. But there is a sense in which the argument that the CoC could ensure compliance because it encourages the naming and shaming of states is somewhat different. It assumes, and wrongly too, that public disavowal of a state’s action or the threat of it is enough compelling reason for a state to alter its behaviour. States only alter their behaviour when they perceive that the consequences of pursuing a course of action are prohibitively high to bear. In other words, the foreseen consequences of acting contrary to the norm, in this case, must significantly outweigh rewards that a state perceives would result from acting outside what is considered acceptable behaviour.

Yet we know from history that mass atrocity crimes are often highly contentious. Perpetrators of atrocity crimes do not openly admit their crimes, which opens up room for counter-claims and narratives that obfuscate the truth. The point being made here is that in such politically charged atmosphere where the truth is muddled in counter-narratives, the potential

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for default on a norm like the code of conduct which demands the universal acquiescence of states for it to take effect increases. Thus while constructivists argue that the reputational cost of violating norms can serve as a deterrent, I insist that the reality bears differently. At great reputational risk, and many times under morally dubious claims, the United States has employed its veto to protect Israel from international condemnation on 43 occasions since 1972.\textsuperscript{270} This is not surprising as Justin Esarey and Jacqueline DeMerritt have shown in detail that in certain conditions, particularly when strategic interests of a state are involved, naming and shaming has limited normative force.\textsuperscript{271} In other words, they argue, states would ignore and in some cases actively resist moral arguments “when they threaten a politically relevant relationship”\textsuperscript{272}

A proponent of the CoC could insist that this criticism does not completely undermine the CoC since the France and Mexico proposal, for instance, acknowledges that the code would not regulate the P5’s actions when their national interest is at stake. I contend that this caveat is problematic. What constitutes national interest is not immediately self-evident, and this considerably increases the potential for abuse by the P5. A permanent member can avoid the code by consistently invoking the existence of a vital national interest. One must admit, as Gutiérrez Espada argues, that the national interest clause is unhelpful and it takes away with one hand what it has given with the other.\textsuperscript{273}

4.4.4 The Charter reform argument

Third, it is said that the CoC provides an opportunity to curtail the use of the veto while getting around the cumbersome Charter amendment procedure. In this sense, the CoC is

\textsuperscript{272} Ibid. p 616
particularly appealing because it does not require a formal reform of the UN Charter. The quest to reform the structure and composition of the Council remains difficult. Advocates of the CoC assert that an informal amendment to the powers of the Council is more likely and has a better potential to ensure that the Security Council responds to mass atrocity crimes in a consistent and effective manner.

Again, the assumptions here are problematic. In Article 108, the Charter outlines the conditions for amending the Charter.274 A key requirement set by the Charter is the concurring votes of all permanent members. Many analysts agree that this provision which ensures that any of the permanent members can exercise their veto on proposed changes to the Charter makes reform a difficult process. The appeal of the CoC in part then is that it circumvents this requirement. However, contrary to this argument, the CoC does not offer better prospects. The CoC just like Article 108 requires the acquiescence of all permanent members. In effect, all permanent members hold what could be termed an ‘informal veto’ since the CoC proposal would require their compliance if it would be a meaningful and effective norm. Given this, it is not immediately clear how the CoC considerably differs from the supposed cumbersome demands of the Charter.275

4.5 Diplomatic Challenges of the Code of Conduct

Beyond the above challenges, the contribution of the CoC to the consistent and effective implementation of the responsibility to protect is disputable on the grounds of feasibility. The trio of China, Russia, and the United States have denounced and rejected attempts to derogate the veto power. It is important to remember that the veto was a sticking point during the San

275 A proponent could argue that on the contrary, the CoC’s contribution to the reform agenda is that it gets around the intractable debate among member states on the different reform proposals. It might be important and helpful to clarify that the CoC focuses only on curtailing the veto power during atrocity crimes. The CoC makes no contribution to the more difficult issues of
Francisco Conference, and disagreements regarding its use threatened to derail the founding of the United Nations. Within diplomatic circles, there is an acceptance that the US, China, and Russia will continually resist any change to the way the veto is wielded. Mogens Lykketoft, President of the 70th General Assembly, strongly drove home this point in a personal interview at the UN headquarters in New York in June 2016. The former president of the General Assembly shared his concern that he could not see the possibility that these countries could give away the veto power. The US’s position on the subject can be said to be clear and unequivocal. In a personal interview with Carl Watson and Kevin Lynch, political advisers on Security Council reform and the responsibility to protect to the US Ambassador to the United Nations, both advisers reiterated that while the US does not reject calls for concerted international action during the commission of atrocity crimes, it does not ‘support any restrictions or changes to the use of the veto’.

But what is more disconcerting is that while it appears that the two CoC proposals are increasingly garnering support from states, as reflected by other interviews with diplomats at the United Nations, there was evident scepticism and even cynicism among states regarding the utility of the idea. For instance, a diplomat from India contemptuously dismissed the proposals, saying, “there is no meaning to signing the code of conduct; it is only for the sake of taking a moral high ground”. But scepticism about the CoC among states goes beyond this. There are concerns that it would undermine the influence of elected members of the Council. Permanent members are known to discuss and agree on the content of resolutions in private closed-door meetings and often dismiss the contributions of elected members. In the words of a Brazilian

formal reform, which are, composition, structure, rights and privileges of members of an expanded Council.


277 Personal interview conducted with a diplomat who wishes to be anonymous at India’s permanent mission to the United Nations in New York on the 14 June 2016
diplomat in a personal interview, “the dynamics of the Council is cruel, permanent members agree on the content of a resolution and circulate the draft resolution sometimes just forty minutes before votes are taken. When we raise concerns or objections, we are often told that this is not one of the resolutions you can contribute to, this has been agreed to, just vote”. Given this, according to him, one of the few things the non-permanent members have is that they do not give an indication of how they are going to vote. This provides leverage. The objection, therefore, is that with the CoC, permanent members even more than ever are likely to completely dismiss the contributions and concerns of elected members since they can say “I know how you are going to vote because you are part of the ACT code of conduct”, further diminishing the influence of non-permanent members and undermining the Council as a forum for multilateral engagement.

Finally, the potential contribution and utility of the CoC could be disputed on the basis that it unwittingly stifles critical debates surrounding the nature of atrocity crimes or the appropriate action to be undertaken since it advocates and demands the commitment of states to a specific course of action. It has been argued that a consequence of the post-Qaddafi disintegration of Libya is a renewed reluctance to authorise military action. It might seem that one should be critical of the Council’s decision to authorise resolution 1973 because the Council did not fully explore the diplomatic options available to it such as the African Union’s attempt to broker a diplomatic solution to the crisis. The enthusiasm for a military solution was evident in the advocacy of the P3. President Barack Obama in his interview with The Atlantic conceded this argument. The CoC as it is constructed removes the ability of states to make important judgments about the consequences of a resolution. As an example, during the vote on

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278 Personal interview conducted with a diplomat who wishes to be anonymous at Brazil’s permanent mission to the United Nations in New York on the 08 June 2016
279 Ibid.
resolution 1973, Brazil abstained because according to Ambassador Maria Votti, the “use of force as provided for in operative paragraph 4 of the… resolution will [not] lead to the realisation of our common objective — the immediate end of violence and the protection of civilians”. \(^{281}\) She further argued that Brazil was convinced that the measures proposed by resolution 1973 may cause more harm than good, leading to a further destabilisation of the international order. It is arguable that Resolution 1973 meets the threshold of what is considered a credible draft resolution as stipulated by the CoC given the widespread support for military action within the international community. But, in the absence of the flexibility to dissent as Brazil did, even on supposed ‘credible draft resolutions’, there is a real risk, as Daniel Levine notes that the CoC would “make inappropriate intervention too easy to authorise”. \(^{282}\) It would have been irresponsible of the state to vote otherwise regardless of the overwhelming support for the resolution in the Council given the clear concerns raised by Brazil’s envoy about the proposed international action.

Although a supporter of the CoC could take issue with the fact that I consider resolution 1973 a credible draft resolution. Yet it is unclear what constitutes a credible draft resolution. This is clearly open to debate. If one argues that the test of credibility should be that a resolution ameliorates and not worsen a humanitarian crisis, how can this be determined ex-ante? Ultimately, these are political questions and are likely to be subject to political interpretations. This was evident in the Security Council debate on whether the Syrian regime should be referred to the ICC. Russia’s Ambassador to the UN, Vitaly Churkin, denounced the draft resolution… as a ‘publicity stunt’ and justified the use of the veto on the grounds that the

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\(^{281}\) Ibid, Interview with Carl Watson and Kevin Lynch, on 16 June 2016

\(^{282}\) Levine, Some Concerns About the Responsibility Not to Veto. p. 324
resolution would hinder peace negotiations and the efforts to end the civil war. Given all of these, one must question the utility, the feasibility and the potential contribution of the code of conduct to the consistent and effective implementation of the responsibility to protect.

Although I have outlined some clear challenges and shown the grim prospects of the CoC, yet, a critic could insist that while it might not ensure compliance, in the absence of alternatives, the CoC holds the best potential. However, this line of reasoning is untenable. It is important to point out that given the growing diplomatic consideration of the code, efforts to ensure that states accept the principles of the CoC distract attention from bolder solutions. Indeed, this might be a crucial time in the life cycle of the R2P norm, comparable to the 2005 World Summit. The responsibility to protect agreed to at the summit was derisively labelled R2P lite by Thomas Weiss because it fell short in key areas, particularly the absence of criteria governing the use of force and insistence upon Security Council approval. Thus, a piecemeal, placatory approach like the code of conduct to solving the problem of mass atrocities is not only unhelpful but could ultimately be counterproductive. The immense diplomatic efforts being expended to this end, as I have shown, is unlikely to reap rewards. The CoC aims low and would not make any significant difference to the way atrocity crimes have been approached or are addressed. For instance, it would not have made any telling contribution or provided the Council with powers unavailable to it during the crisis in genocide in Darfur in 2003 and Rwandan in 1994 or in Liberia in 1989 and Sri Lanka in 2007 where it declined appeals to act.

Given the clear problems surrounding the Security Council and the dim prospects of an institutional reform (formal or informal) that can improve its response to atrocity crimes, we must, therefore, ask, as the ICISS report did; “should the Security Council retain the legitimacy

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to make decisions on intervention?" In the following sections, I examine some of the arguments extended for an alternative to the Security Council and consider the merit of these ideas.

4.6 Circumventing the Security Council through the Uniting for Peace resolution?

For Andrew Carswell, the Uniting for Peace resolution provides a lawful and legitimate means of circumventing the Security Council. Carswell argues:

what has remained largely overlooked…is the potential residing within the UN Charter to give the organisation’s second principal organ, the General Assembly, a more prominent role in the maintenance of international peace and security…part of the solution may lie in… lawfully unblocking the Council and thereby ensuring the UN’s continued relevance in the domain of international peace.

After the Second World War, the United States and the USSR initiated a range of foreign policy actions that sowed the seeds of mutual distrust. The antagonism between the two countries was also evident within the Council. With its power of veto, the USSR obtained a stranglehold on the Security Council, paralysing the Council by ensuring that the organisation was unable to take decisive actions on matters of international peace and security as stipulated by the UN Charter (the Soviet Union vetoed 45 resolutions in the first five years of the organisation).

References:

On June 25th, 1950, North Korean soldiers crossed the 38th parallel into the Republic of Korea. A rare opportunity for the Council to act to restore international peace was afforded by the Soviet’s self-initiated boycott of the Council to protest the continued occupation of the Chinese permanent seat by the exiled government in Taiwan rather than the Communist government in mainland China. The Security Council determined that North Korea had breached international peace and proceeded to pass a flurry of resolutions. Resolution 82 was passed on June 25 condemning the aggression by North Korea as a ‘breach of the peace’. On June 27, 1950, the Council passed Resolution 83 and requested that the “Members of the United Nations furnish such assistance as may be necessary to repel the armed attack and restore international peace and security in that area”.\footnote{UN Document S/RES/83, June 1950} The Council also passed Resolution 84 on July 7, 1950, recommending that member states place their forces under the unified command of the United States. The swiftness of the Council’s decisions caught the Soviets off guard as they had strategically calculated that the Council would need the concurrent vote of all permanent members as stipulated in the Charter for it to act and had therefore considered their abstention as an effective veto. However, in a creative interpretation of the Charter, the members of the Security Council determined that an abstention of a permanent member did not constitute a veto of a draft resolution (this interpretation has become an accepted practice of the Security Council).

The Soviets, realising this mistake, returned to the Council and effectively prevented the Security Council from taking further actions on the crisis. At the General Assembly meeting in September of that year, the United States’ Secretary of State, Dean Acheson, called for an ‘imaginative’ expansion of the powers of the General Assembly to allow the Assembly act in the consequence that the Security Council was deadlocked. The US delegation argued that given the provisions of the Charter which allowed the General Assembly to discuss any issue
bordering on international peace and security and also recognising the experience of the past
five years where the Council because of lack of unanimity of its permanent members has been
unable to discharge its primary responsibilities, proposes that the General Assembly’s
“contributions to the avoidance of conflicts and restoration of peace should be enhanced”. 289

As expected, the Soviet delegation made strong objections to the proposal, positing that
the draft resolution violated the terms of the Charter. Andrey Vyshinsky, the leader of USSR
delegation, strenuously maintained that the resolution radically revised the Charter which had
placed enforcement action within the exclusive jurisdiction of the Security Council. 290 He argued:

nothing remains as before, and in particular, the basic principles of the Charter are being
thrown on a scrap heap…Consequently, we cannot agree to the proposals contained in
your draft resolution which would destroy the Charter and obstruct the Security Council,
place it somewhere in the background and make it possible to carry on…exclusively
through the General Assembly where you have a majority. 291

According to him, the Charter is clear about the capacity of the General Assembly to discuss
any issue. However, this universal jurisdiction is constrained by Article 11 paragraph 2 and
Article 12 paragraph 1. Both Articles demand that the Assembly restrain itself from
recommending actions while the Security Council is seized of an issue. In later sections, I shall
return to questions surrounding the legality of the resolution. The Acheson plan was adopted by
the General Assembly in Resolution 377A (V) by a vote of 52-5 on the 3rd of November
1950. 292 It is worth reproducing parts of the resolution here, it stated:

289 Carswell, Unblocking the UN Security Council, p.458
290 UN Document, A/1463, 1950
291 Statement to the General Assembly by Soviet Union Representative
Andrei Vyshinsky, 3 November 1950
292 Carswell, Unblocking the UN Security Council, p.458
Conscious that failure of the Security Council to discharge its responsibilities on behalf of all the Member States…recognizing in particular that such failure does not deprive the General Assembly of its rights or relieve it of its responsibilities under the Charter in regard to the maintenance of international peace and security...resolves that if the Security Council, because of lack of unanimity of the permanent Members, fails to exercise its primary responsibility for the maintenance of international peace and security in any case where there appears to be a threat to the peace, breach of the peace, or act of aggression, the General Assembly shall consider the matter immediately with a view to making appropriate recommendations to Members for collective measures, including in the case of a breach of the peace or act of aggression, the use of armed force when necessary to maintain or restore international peace and security.

The resolution further resolved that “if not in session at the time, the General Assembly may meet in emergency special session within twenty-four hours of the request, therefore; such emergency special session shall be called if requested by the Security Council on the vote of any seven members or by a majority of the Members of the United Nations”.293 From the foregoing, the parameters surrounding the resolution can be established. Resolution 377 can only be invoked under the following conditions. (1) The Council is unable to discharge its duties as a result of lack of unanimity (this is usually interpreted as the use of the veto to block action); (2) if by a majority vote, the General Assembly determines that the Council has indeed become incapable of fulfilling its responsibilities; or (3) the Security Council by a procedural (not subject to veto) vote of seven members, transfers the matter to the General Assembly.

Evidently, the objective of the resolution was to preserve peace by ensuring that the United Nations through the General Assembly continued to fulfil its post-war raison d’être

293 UN Document A/RES/377(V), November 1950
without severely deviating from the Charter or significantly derogating the Security Council. In this respect, it could be argued that the Uniting for Peace resolution was indeed innovative.

4.6.1 United for Action

Although the General Assembly had previously employed its recommendatory powers under Article 11 and made attempts to legislate on issues bothering on international peace and security in 1947 and in February 1951\textsuperscript{294}, the 1956 Suez Canal crisis is often seen as the first clear application of the Uniting for Peace procedure. On July 26\textsuperscript{th}, 1956, the Egyptian leader, Gamal Abdel Nasser, ordered the nationalisation of the Suez Canal in response to the perceived reluctance of the United States and Britain to finance the new Aswan Dam. Nasser who had led a government that was belligerent towards Israel also mandated that Israel be prohibited from having access to the nationalised Suez Canal. The Israeli government of Prime Minister Ben Gurion saw the action as an act of war and following assurances from Britain and France, proceeded to attack Egypt on October 29\textsuperscript{th}, 1956. French and British forces under the pretext of imposing a cease-fire between the warring parties crippled Egypt’s air defence capabilities and invaded the country on November 5\textsuperscript{th}, 1956.

The tripartite invasion of Egypt upset international peace and was widely condemned. The Soviets made veiled threats of plans to ‘rain’ nuclear weapons on France and Britain while the United States warned of economic sanctions against the invading forces.\textsuperscript{295} Not surprisingly, the Security Council was again prevented from taking action as Britain and France exercised their veto votes on proposed resolutions. Following the incapacity of the Council, Yugoslavia, a non-permanent member, strongly supported by the United States proposed that an emergency session of the General Assembly under the terms of the Uniting for Peace resolution be


convened. The first emergency session of the General Assembly was held between November 1st and 10th 1956. The Assembly voted for the immediate withdrawal of French and British forces from the occupied territories. The use of the resolution was clearly successful as the France, Britain and Israel withdrew their forces from Egyptian territory, precipitating the deployment of the first UN peacekeeping mission.296

Since the first application of the Uniting for Peace procedure, nine other special emergency sessions have been called with varying degrees of success. For example, while it was successful in pressurising Britain and France over the Suez Crisis and it galvanised UN action in Congo in 1960 following Soviet veto, its limitations were evident by its failure to persuade the USSR’s withdrawal from Afghanistan in 1980. The 10th emergency session also curiously remains in session since it was first convened by Qatar in April 1997 to discuss the Question of Illegal Israeli Actions in Occupied East Jerusalem and the Rest of the Occupied Palestinian Territory. What is clear is that the capacity of the Uniting for Peace resolution to galvanise international action in response to perceived breaches of the peace has diminished. In the next section, I will examine claims that the limited use of the resolution in recent times is linked to an implicit acceptance that the resolution went too far in assigning to the Assembly the primary role of the Security Council in the maintenance of international peace and security.297

4.6.2 Decline and Contestations of Resolution 377298

296 It should be noted that some scholars contest the idea that the withdrawal was much to do with the Uniting for Peace resolution. The argument is that the USSR’s threat and the lack of support from the US convinced the invading forces that their action was badly timed. The Uniting for Peace resolution in that case provided the colonial powers an opportunity to avoid the humiliation of withdrawing as a result of the threats made.
297 Carswell, Unblocking the UN Security Council, p.455
298 Although Andrassy, for instance argued extensively that the Uniting for Peace resolution coheres with the law and spirit of the UN Charter. See J., (1956).Uniting for Peace. American Journal of International Law, Vol.50(3). pp. 563-582. Arguments continue to rage regarding the legal validity of the resolution. There are at least three fundamental points usually made in this regard. The first is that the resolution empowers the General Assembly to authorise the use of
Jean Krasno and Mitushi Das famously pose the question regarding Resolution 377. They ask, is the Uniting for Peace resolution alive? For them, the answer is: yes, it is ‘breathing’, but is it ‘well’? Their conclusion is that ‘barely’—it is clearly not thriving.\textsuperscript{299} This assessment of the Uniting for Peace resolution seems to reflect the position of many academics and diplomats alike.\textsuperscript{300}

Several reasons have been adduced for the diminished importance of the resolution and its limited use even when the Council has been deadlocked as a result of the veto. One of such is that the Resolution was strategically undermined by the United States and its Western allies once they realised they had lost their majority influence within the General Assembly. According to this position, the admission of new UN members especially former colonial territories in the 1950s and 1960s reduced the influence of the P3 (the US, France and Britain) within the General Assembly and consequently the use of the resolution as a viable ‘circumventory’ tool. These newly independent states were motivated to assert their sovereignty and independence by pursuing foreign policies that were often diametrically opposed to the national interest of the P3.

\textsuperscript{299}Krasno, and Das, The Uniting for Peace resolution and other ways of circumventing the authority of the Security Council. p. 189
This opinion, if accepted, would validate Andrey Vashinsky’s argument about the politics behind the emergence of the Uniting for Peace resolution. In 1950, Vashinsky, during the General Assembly debate on the proposal argued that the United States was not interested in abolishing the veto but in curtailing Soviet influence. According to him, the US realises that abolishing the veto would not be politically expedient given that it may need it if things took a different turn and it lost its majority in the Assembly. He believed that the plan of the US and its allies was therefore to retain the veto but somehow block the Soviet’s capacity to employ it. Although this argument has merits, however, it does not entirely explain the reason for the diminished importance of the resolution. The Uniting for Peace resolution has been invoked several times since the West lost its majority in the General Assembly and the P3 have actively participated in some of the debates during the emergency sessions.

A related explanation that has been put forward is that Western states have somewhat realised its procedural illegitimacy and conceded that the resolution usurps Security Council’s exclusive powers. The Canadian diplomat, Geoffrey Murray, explained his country’s growing lukewarm attitude towards the resolution in an interview with Krasno and Das. According to him, the country was not “too keen on the whole Uniting for Peace procedure mainly because…it irritated the Russians and…because we had our own hesitations about its constitutionality”. Again, this argument is tenuous. That Canada’s reluctance is due to concerns about the constitutionality of the procedure is rather surprising given that it was one of the ‘Joint Seven Powers’ that submitted the proposal to the General Assembly in October 1950.

301 Statement to the General Assembly by Soviet Union Representative Andrei Vyshinsky, 3 November 1950
302 Ibid.
303 Krasno, and Das, The Uniting for Peace resolution and other ways of circumventing the authority of the Security Council.p. 180
It could be further posited that if indeed the resolution’s legality was in question, such arguments about constitutionality have been undermined by years of continued use of the resolution. According to the ICJ for example, the provisions of paragraph 12(1) which prohibits the General Assembly from dealing with a matter in parallel with the Security Council has been modified by more than four decades of practice. In reality, the most controversial part of the resolution—the Assembly’s capacity to recommend the coercive use of force—has never been explicitly invoked under the Uniting for Peace resolution.

However, could the hesitation about the legality of the resolution and the sudden desire to delegitimise it by Canada and some Western states be related to the increased use of the procedure to condemn Israel’s continued occupation of Palestine? It is noteworthy that three of the last five emergency special sessions convened by the General Assembly have focused on Israel’s activities in the Middle East. In fact, a cursory look at the voting pattern of Canada and the United States under the Uniting for Peace provision reveals a rather interesting engagement with the procedure. Where the subject relates to Israel, the United States and Canada (both traditional allies) have consistently voted against any proposed resolution or abstained from voting; yet both countries remain willing to push for action in other cases such as Congo, Lebanon, Hungary, Namibia and Afghanistan using the Uniting for Peace procedure.

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304 See Carswell, Unblocking the UN Security Council. p.469
305 Resolution 498 of February 1 1951 on North Korea is often times said to be the first use of the Uniting for Peace resolution, however in that case, the Security Council removed the North Korean subject from its agenda allowing the General Assembly to discuss the matter without invoking the emergency provisions of the Uniting for Peace resolution. That said, resolution 498 had many trappings of the Uniting for Peace procedure, it referred to the lack of unanimity among the permanent members before recommending that member states continue to provide necessary assistance to confront Chinese and North Korean aggression.
A critical observer would argue that Canada’s concerns about the constitutionality of the Uniting for Peace resolution are indeed questions over the politics of its application. Another plausible argument is that the termination of Cold War hostilities improved the relationship among the P5. The evidence of this is the increased willingness of the Council to respond to breaches of the peace by invoking its Chapter VII powers and the dramatic reduction in the use of the veto. The net effect of this has been the restoration of the Council’s primacy and importance; however, it has also reduced the need or willingness of any of the permanent to undercut the Council’s powers through the Uniting for Peace resolution. Granted that the veto is still frequently deployed by the US, Russia and China and sometimes under controversial circumstances, yet, there is a sense in which its use has been more controlled and less arbitrary.

4.6.3 Assessing the Potential Contribution of Resolution 377 to R2P

Although the historical development of the Uniting for Peace resolution had more to do with an attempt to respond to a traditionally defined ‘act of aggression’ than the ideals R2P represents, it has often been highlighted that the resolution could potentially advance the application of the R2P doctrine. The 2001 ICISS report in particular and the 2009 UN report on implementing

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308 Whereas during the Cold War for example, the USSR routinely employed its veto even to object to the addition of new members, it has only vetoed about a dozen resolutions since 1991 compared to the 119 resolutions it vetoed between 1946 and 1991. See United Nations. Resolutions adopted by the Security Council since 1946. Available at: http://www.un.org/en/sc/documents/resolutions/ [Last accessed 27 July 2016]

309 In the immediate post-Cold War years, the use of the veto dramatically decreased (it has picked up recently because of the Syrian crisis), however the veto has not been used by France and Britain since 1989 and Russia has not made an habit of vetoing the admission of new member states as the Soviet Union did regularly in the early years of the UN.

the responsibility to protect made specific and extensive references to the provisions of the resolution and its potential contributions to R2P. The ICISS report, for instance, argues that even though the Security Council remains the “however given the “Council’s past inability or unwillingness to fulfil the role expected of it”... alternative means of discharging the responsibility to protect should not be discounted.”

According to the ICISS, the Uniting for Peace procedure has a distinct advantage in this regard—which is the moral force and legitimacy of its decisions. The 2009 report of the Secretary-General on implementing the responsibility also advocates the use of the resolution as a Pillar 3 response mechanism. Although it could be argued that the report was tepid in its assessment of the Security Council’s dysfunction—barely addressing the P5’s capricious use of the veto—it did highlight the powers of the General Assembly to discuss and recommend both coercive and pacific measures in fulfilling R2P. That said, the important question remains, can a renewed use of the Uniting for Peace resolution bring about a consistent application of the R2P doctrine?

The significant value of the Uniting for Peace resolution is its ‘circumventory’ capacity. However, given that General Assembly resolutions are not legally binding, the ability of the resolution to galvanise humanitarian action becomes acutely dependent—at a broad level—on member states, but critically, on the interest configurations of Western states (especially those with the resources to project force beyond their immediate borders and across continents). In essence, in the absence of Western sympathy, the contributions of the resolution to R2P would at best be minimal. In this respect, the resolution fails the “political will and action test” since its capacity to generate action is in doubt. But even if this position is rebutted on the grounds

311 ICISS, The Responsibility to Protect, paragraph 6:28
312 Ibid
314 The report only mentioned the veto twice throughout the thirty-three page document, and when it did, it was a tepid call for the P5 to refrain from the use of veto in situations of mass atrocities.
that what is important is the use of the resolution and not the support of certain countries, there remains a fundamental impediment. The controversial coercive enforcement mechanism of the resolution as earlier said has never been deployed, and the absence of sustained practice limits its value to humanitarian intervention. Humanitarian actions have increasingly become coercive, and the principles of R2P recognise the importance of such enforcement actions to protect human rights even without the consent of host states. Though the General Assembly (not through Resolution 377) called for the provision of all necessary assistance by member states to the UN action in its Resolution 498 on North Korea on 1st February 1951, this was a resolution that did not substantively add anything to the enforcement action that was already underway and that had been authorised by the Security Council in 1950. Furthermore, the peacekeeping operations authorised by the General Assembly in the Middle East in 1956 and Congo in 1960 were not in the strict sense coercive actions, given that the consent of the host states was sought.

The potential contribution of the Uniting for Peace resolution to the responsibility to protect is further limited by the tendency of the General Assembly to engage in extended debates. The principle of the emergency session was designed as a signal of the need for urgency in response to breaches of the peace or threats to international security. In reality, it has become a talking shop with drawn-out sessions. For instance, the 7th emergency session went on for two years between 22nd July 1980 and 24th September 1982. The 10th emergency session has remained open since April 1997 and was last resumed in January 2009. A parallel consequence of this is that resolutions from these sessions have become nothing more than expressions of moral indignation and tepid calls for the restoration of international peace.

316 United Nations General Assembly Resolution 498(V) February 01, 1951,
318 Ibid
Without question, R2P needs more than such half-hearted calls for action if it would successfully protect victims of atrocity crimes.

Dominik Zaum aptly summarises the current state of the Uniting for Peace resolution, according to him, “what started as an attempt to shift power from the Council to the Assembly has turned into a symbol of the powerlessness of the latter”.\textsuperscript{320} The Uniting for Peace resolution has a long history of politically accepted use, however, extensive questions remain over its ability to galvanise action—even though there might be a will to act from members. As it has been shown, several factors have contributed to this. But more crucially, the lack of institutional practice of using the resolution to authorise force undermines its potential contributions to the R2P doctrine. Thus, I argue that its capacity to substantively advance R2P is questionable.

4.7 What about a Concert of Democracies?

I will now turn to a fourth proposal. Some scholars and political stakeholders are convinced of the futility of working within the UN system.\textsuperscript{321} In their opinion, the Security Council should not only be circumvented, but a parallel organisation should be established to address some of the world’s most important security concerns. In place of the Security Council, a new organisation composing of liberal democracies should be instituted. The philosophical assumption that undergirds this initiative is that democracies share similar normative values—“a common dedication to ensuring the life, liberty, and happiness of free peoples”,\textsuperscript{322} and as such are more legitimate international actors.

\textsuperscript{319} Ibid
\textsuperscript{320} Zaum, The Uniting for Peace resolution. p.174
\textsuperscript{321} There are differing opinions among scholars and stakeholders on the continued relevance of the UN system. Neo-conservatives for example like John Bolton strenuously argue against the value of the UN to the US.
\textsuperscript{322} Lindsay, J. (2009). The Case for a Concert of Democracies. \textit{Ethics & International Affairs}. Vol 23(1) p.5
The idea of a ‘League’ or a ‘Concert’ of Democracies gained traction following the reluctance of the Security Council to authorise the United States planned invasion of Iraq in 2003. Neo-conservative intellectuals and politicians began to mull over what they saw as the dysfunctions within the international security architecture. Robert Kagan and Ivo Daadler argue that the fundamental question of who authorises the use of force needed to be re-thought. According to them, “the traditional answer, the U.N. Security Council, no longer suffices, if it ever did”. The presence of autocratic states undermines the legitimacy of the Security Council’s decisions. However, given that democratic states share a common view of what constitutes a just order and tend to agree on when the international community has an obligation to intervene, they claim, these principles provide a foundation and legitimacy for the use of force by the organisation.

There are many visions of how the Concert of Democracies should be organised and the criteria of what constitutes a democratic state are also contested. John Ikenberry and Anne-Marie Slaughter argue that the Concert of Democracies should be a self-selected institution only admitting states who pledge to be bound by certain agreed principles and obligations rather than any abstract definition of democracy. Ikenberry and Slaughter believe such self-imposed obligation should include a commitment to guaranteeing civil and political rights, multi-party elections and a pledge not to use force against one another. But more importantly, members of the Concert must acknowledge the obligations of the responsibility to protect

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324 Ibid


327 Ibid
That said, they envisage that the Concert would only substitute the Security Council if reform proved impossible and the veto paralysed UN action.329

Could a Concert of Democracies improve the practice of intervention? James Lindsay argues that there is a case to be made for the organisation. Apart from the legitimacy conferred as a consequence of its constitution, Lindsay believes that an organisation of the world’s biggest democracies possesses the capacity to shape global politics.330 These states as a result of their enormous economic and military resources are better placed to ensure the effectiveness of a humanitarian action. More importantly, however, because an intervention by the Concert would reflect the collective will of countries with representative governments, it would “strengthen the moral foundations of the international system”.331

The theoretical foundation of the Concert lies in the democratic peace thesis—the assumption that democracy has an intrinsic value which makes it ideal for the promotion of international peace and security. Critics argue that such logic precisely undermine the proposal. By bifurcating the world into democracies and autocracies, advocates of the Concert inadvertently undermine the very international peace they hope to strengthen.332 The Concert risks alienating China and Russia while triggering a new Cold War according to this perspective. James Lindsay rejects this argument, arguing that democracies should not take their cues on what permissible forms of cooperation are from autocracies.333 Moreover, he contends that it is erroneous to think that China and Russia’s absence from one international institution could reset the West’s relationship with both countries. Lindsay’s argument is predicated on the fact that

328 Ibid
329 Ibid
330 Lindsay, The Case for a Concert of Democracies
332 Ibid.
333 Lindsay, The Case for a Concert of Democracies
there are several bilateral and multilateral platforms that enables and promotes state interaction and therefore, cooperation with these countries can be sought through other institutions.

It is clear, however, that Lindsay misses the point of the critique. Although there are indeed several multilateral platforms open to both countries and it is equally true that their absence from some of these organisations in the past has not diminished international peace; yet it could be argued that those organisations do not openly reflect an ideological preference. The Cold War was at a fundamental level an ideological conflict. The Concert of Democracies alienates, deepens divisions and reduces avenues for multilateral cooperation among affected states. Furthermore, it could also be argued that the proposal overlooks the contributions of supposed ‘autocratic’ states to the maintenance of world peace and, at the same time, overstates the shared visions and values among democracies. One of such example is China’s pivotal role in the past over North Korea’s nuclear programme.334 It also continues to play a significant role in de-escalating the tension between South and North Korea. On the other hand, the controversies surrounding Suez Canal crisis in 1956 and the Iraq invasion in 2003 undermines the notion that democracies always share similar visions regarding the pathway to international peace and security.

Advocates of the Concert are convinced that the centrality of human rights promotion in the organisation would herald a consistent and effective response to mass atrocities. Whereas the Security Council was often stymied by the divergent interests of its permanent members, the Concert of Democracies would prioritise humanitarian concerns over realpolitik.335 It is also argued that since democracies are sensitive to public opinion, increased media exposure of conflicts would increase the frequency of humanitarian actions. Such arguments are naïve and do not reflect a proper understanding of past cases of non-intervention. It is generally accepted

335 Kupchan, Minor League, Major Problems
that the non-intervention of the Security Council or the international community during the Rwandan genocide was a consequence of the lack of political will.\textsuperscript{336} The UN independent report on its role in the genocide made this assessment.\textsuperscript{337} In truth, advocates of the Concert exaggerate the willingness of democracies to respond to atrocity crimes in places where their national interests are not immediately evident.

Furthermore, the influence of the media on public opinion and foreign policy in democratic states is often contested.\textsuperscript{338} Bellamy argues that the so-called CNN effect has never pushed a democratic government to do what it did not want to do. According to him, the simple and brutal reason for this is that “very few, if any voters change the way they vote over a government’s record of responding to foreign mass atrocities, this is because democratic publics, in general, tend to see foreign policy as less important to domestic policy”.\textsuperscript{339}

Moreover, the Concert of Democracies threatens the normative development of R2P. The responsibility to protect doctrine enjoys a near-universal acknowledgement and support. This is because the norm as Ban Ki-Moon asserts, only reinforces obligations that many states have long accepted.\textsuperscript{340} Indeed, R2P was supported by developing states because unlike the concept of a ‘right to intervention’, it reinforces the host state’s sovereign responsibility and not an imperialist’s right. Thus, a coalition led and dominated by Western states will inevitably instigate accusations of neo-imperialism. In many ways, there is a risk that the R2P norm will

\textsuperscript{337} Ibid
\textsuperscript{339} However, Bellamy’s point was limited in empirical evidence and certainly throws up questions about what democracy entails. One could argue that the surge of public opinion against the 2003 Iraq invasion in the UK and many parts of the Western hemisphere and the subsequent actions of the democratically elected government buttresses the argument put forward by Bellamy. See Bellamy, \textit{The Responsibility to Protect: A Defense?}. p. 53
\textsuperscript{340} UN Secretary-General Ban Ki-Moon, Remarks at ‘Responsible Sovereignty’: International Cooperation for a Changed World, July 15 2008.
be delegitimised by developing countries that may be keen to once again assert their sovereign inviolability.

Given all of these, one must dispute the argument that a Concert of Democracies would be a legitimate alternative to the Security Council. That said, in the next chapter, I consider a different alternative. I examine the potential inherent in regional institutions. While chapter 5 examines the record of regional institutions in responding to local security challenges, in chapter 6, I defend the utility of regional institutions as legitimate alternatives to the Security Council.

**Conclusion**

This chapter has investigated the idea that circumventing the Security Council and locating the authority to respond to atrocity crimes in a different institution would bring about a more consistent and effective humanitarian regime. First, it considered the idea of a code of conduct to regulate the use of the veto. While it is indisputable that the capricious use of the veto during the commission of atrocity crimes has significantly undermined the legitimacy of the Security Council, I dispute the argument that the CoC could bring about a more consistent implementation of the responsibility to protect. This is not only because there are serious concerns about the feasibility of the proposal given the P5’s reluctance to accept any derogation of their privileges, more importantly, there are significant reticence by diplomats despite the outward support that the idea has received in recent months.

The other idea that I discussed is the Uniting for Peace resolution. The Uniting for Peace resolution has a long history and is increasingly receiving greater attention by scholars who regard it as a legitimate way to address shortcomings of the Security Council. Yet it is

also the case as I argued that it has been severely undermined in recent years. At best, it offers an opportunity for states to engage in moral rhetoric and to condemn the practices of violators of rights, as we have seen with the State of Israel. One must, therefore, dispute its capacity to galvanise concrete action in a consistent and effective manner.

Although the Concert of Democracies thrives on the notion that democracies are legitimate international actors who are also likely to react and respond to atrocity crimes because they value human rights, I argued that this conclusion is disputable. Indeed, what makes democracies more likely to intervene: i.e., their domestic audiences also present the greatest obstacle for democracies to act in distant places to save strangers. There are ample evidence to show that democracies are reluctant to act when there are clear dangers of causalities to their armed forces. I also contended that a Concert of Democracies could ultimately undermine the responsibility to protect since it is likely to be seen as a civilising mission with imperialistic objectives. Given these, we must, therefore, reject the potential of these as alternative institutions that can consistent authorise and implement the responsibility to protect. In the next chapter, I turn to consider another proposal outside of the Security Council: the use of regional organisations.
Chapter 5

Regional Organisations and Security Challenges

In this thesis so far, I have made the following arguments: First, I have argued that none of the formal proposals currently circulated in the ongoing Intergovernmental Negotiations designed to improve the effectiveness and the legitimacy of the Security Council by expanding it to accommodate states from the global south would result in a regime of consistent response to atrocity crimes. This is because these proposals do not overcome some salient concerns, and these are: (1) the veto problem; (2) the feasibility problem; (3) the representativeness problem; (4) the effectiveness problem; and (5) the regional rivalry problem. Second, I also argued that the ongoing attempt to restrain the use of the veto during the commission of atrocity crimes is unlikely to be diplomatically successful. This in large part is attributable to the unwillingness of the US, China and Russia to accommodate any plan that derogates the privileges of permanent membership.

Furthermore, I argued through the use of interviews conducted with diplomats at the United Nations that the prospects of the ‘veto restraint’ initiative is also undermined by the lack of diplomatic buy-in from states like India and Brazil who consider it as significantly flawed given the realities of the politics within the Security Council. I also considered some of the institutional alternatives (Concert of Democracies and the Uniting for Peace Resolution) to the Security Council and likewise determined that they would not bring about a more consistent response to atrocity crimes, given that it is disputable that either idea would generate the consistent political will to act when necessary.

Here in this chapter, I consider the use of regional institutions. It is my contention that regional arrangements are well positioned to address the multifaceted problems that the Security Council faces in implementing the responsibility to protect. At the heart of the argument is also the notion of legitimacy. Over the next two chapters, I will show that regional
arrangements are procedurally legitimate authorising mechanisms. Indeed regional institutions have a long history of responding to localised security challenges, yet what is not clear is their legitimacy as authorising mechanisms. This is because a strict interpretation of the provisions of the Article 53 of the UN Charter subjects any coercive regional action (including authorisation) to the prior consent of the Security Council. While there are plethora of examples where regional institutions have conducted coercive actions without the prior authorisation of the Council, however, as I indicated in the introductory chapter of the thesis, the intention here is not to advocate for their legitimacy in conducting enforcement actions without prior authorisation from the Council, rather, my interest pertains to their potential as alternative authorising mechanisms to legitimise remedial actions.

To this extent, this chapter foregrounds the normative arguments that the next chapter makes on regional institutions. Here, the focus is on providing a history of regional institutions and the international laws regulating their conduct, I also consider how the literature has articulated the role of regional institutions in implementing the responsibility to protect. Finally, in the chapter, I assess the record of regional institutions in meeting security challenges within their sphere of influence.

5.0 Defining Regional Organisations

It is important to immediately clarify how I define regional organisations in this chapter.\(^{342}\) It is important for two reasons. First, given that the UN Charter does not provide any detailed guidance regarding how regional organisations may be classified, it is vital that an early

\(^{342}\) In this chapter, unless otherwise stated or where it is necessary to make such distinction, both regional and sub-regional arrangements are referred to as regional organisations. I find the term "regional" more convenient and pragmatic. Pragmatic because, in a region like Asia, overarching institutions like the AU or the OAS are absent. For a more detailed discussion on why making a distinction between regional and sub-regional institutions is unnecessary, see Zyck, S.A., (2013). Regional Organisations and Humanitarian Actions. *HPG Working Paper*. London. p.6
discussion on this is undertaken.\textsuperscript{343} This is even made more necessary since there is no consensus on how these organisations should be defined. For instance, although, it is often assumed that the Charter’s reference to regional arrangements or agencies in its Articles refer principally to their geographical terrains, academic discussions of the subject sometimes encompass organisations whose memberships could be said to be geographically amorphous.\textsuperscript{344} Transatlantic organisations such as NATO or cross-cultural organisations whose members span several continents like the Commonwealth or the Organisation of Islamic Cooperation are sometimes described as regional organisations. Second, a clear definition clarifies and sets the boundaries about what sort of organisation the discussion in this chapter and the next focus on.\textsuperscript{345} There are many international organisations whose members belong to a defined contiguous area but are excluded in my consideration of regional organisations.\textsuperscript{346}

\begin{footnotesize}
\textsuperscript{343} Former UN Secretary General, Boutros Boutros Ghali, in the \textit{Agenda for Peace} commented that the Charter "deliberately provides no precise definition of regional arrangements and agencies thus allowing useful flexibility for undertakings by a group of states to deal with a matter appropriate for regional action" which could contribute to the maintenance of international peace and security. See the report of the Secretary- General, \textit{Agenda for Peace}, UN Doc A/47/277-S/24111. Boutros Ghali’s point is further buttressed by the historical fact that the attempt by Egypt’s delegation to seek a definition on regional organisations at the 1945 San Francisco Conference was overwhelmingly defeated. See Adeba\-j\-fo, A., (2016). The Revolt against the West: Intervention and Sovereignty. \textit{Third World Quarterly}. Vol 37 (7). p. 1190.


\textsuperscript{345} The proliferation of international organisations that lay claim to a regional mandate makes a chapter of this nature difficult. In many cases, these organisations like the RIO group—an organisation comprising 23 Latin American states—are without a secretariat. One must therefore dispute their capacity to address international conflicts. Hurrell, A., (1992). Latin America in the New World Order: A Regional Bloc of the Americas?, \textit{International Affairs}, Vol. 68 (1). pp.121–139

\textsuperscript{346} In particular, the discussions in this chapter will exclude regional institutions that are exclusively economic institutions like NAFTA, SAARC, and OPEC. In essence, institutions without a security mandate or that are increasingly taking on political and security objectives. Some scholars have even disputed whether the reference to the capacity of regional organisations to contribute to international peace and security as contained in the Articles of the Charter, particularly Article 52 and 53 means that only organisations with security objectives
\end{footnotesize}
Before attempting to define regional organisations, it is only appropriate to state that the idea of a region itself is problematic. What constitutes a region or how it should be constituted is by no means a settled discourse. Should language, culture, geography or race determine the classification of regions? Indeed many scholars admit that these categories are themselves fluid and that it is difficult to delineate the precise boundaries of these categories.\textsuperscript{347} This is because as Hartshorne notes, "particular elements and complexes of elements within regions are related to those in others".\textsuperscript{348} Not surprisingly, Harstshorne conceives of regions as nothing more than social constructs, saying that regions are "entities only in our thought [providing] some sort of intelligent basis for organising our knowledge of reality".\textsuperscript{349} This conception introduces some arbitrariness into the understanding of regions by dismissing their objective existence. Joseph Nye takes a similar position about the socially constructed nature of the concept. Regions are social constructs according to him, since how they are constituted is shaped by interests, and these interests are often times political.\textsuperscript{350}

Perhaps these complexities and the indeterminate nature of the concept of a region was responsible for the unwillingness of the framers of the Charter to commit themselves to a definition of regional organisations. At the San Francisco Conference in 1945, Egypt’s delegate sought a definition on regional organisations. The delegate proposed:

\begin{quote}
\textsuperscript{349} Ibid., 275
\textsuperscript{350} Nye, International Regionalism; Andrew Hurrell takes the point further. He notes that "there are no natural regions and indicators of "regionness" vary according to the problem or the question under investigation". See Hurrell, Explaining the Resurgence of Regionalism in World Politics. p 334}
\end{quote}
There shall be considered as regional arrangements organisations of a permanent nature grouping in a given geographical area several countries which, by reason of their proximity, community of interest or cultural, linguistic, historical or spiritual affinities, make themselves jointly responsible for the peaceful settlement of any disputes which may arise between them and for the maintenance of peace and security of their region, as well as safeguarding of their interests and the development of their economic and cultural relations.\textsuperscript{351}

The attempt at defining regional organisations was rejected by delegates from other participating countries. In particular, the United States’ delegate argued that the definition was restrictive and failed to accommodate possible variations in the nature and character of organisations which might be embraced by regional arrangements in the future.\textsuperscript{352} These contestations clearly reveal the constructed nature of regions and the political nature of the discourse as I had earlier noted.

The refusal by delegates at the San Francisco conference to formally define what the Charter recognises as regional organisations has not deterred academics and legal scholars to look to the Charter when assessing if an organisation could be recognised as a regional organisation. These scholars argue that Article 52 of the Charter provides some guidance on which international organisations could be considered as regional arrangements or agencies as set out in Chapter VIII of the Charter.\textsuperscript{353} For them, although in Article 52 paragraph 1, the Charter acknowledges the existence of regional arrangements and asserts their right to deal with matters relating to the maintenance of international peace and security as are appropriate

\begin{footnotes}
\footnotetext[352]{See Note 3 in Kelsen, H., (1950). \textit{The Law of the United Nations: A Critical Analysis of its Fundamental Problems}. New York: Frederick A. Praeger, p.320. Interestingly, this push back by the United States allowed the Arab League to be recognised as an example of a regional organisation in the Middle East, even though its constituent members belong to the Middle-East and Africa. In 1947, in one of the earliest recognition of regional organisations, the UNGA identified the Arab League as an example of regional organisations in the Middle-East. The League was granted a permanent observer status in 1950. See UN Doc(1947), A/RES/120(II)}
\end{footnotes}
for regional action. However, it also goes on to provide a caveat, and this is that such arrangements and their activities must be consistent with the principles and purposes of the United Nations.\(^{354}\) The argument is that this provision delineates which organisations can be legitimately considered as regional arrangements or agencies under the Charter. Indeed, the above argument was extended by the Soviet Union regarding the status of NATO. The Soviets contended that NATO could not be categorised as a regional arrangement under the terms of Charter because its activities and the obligations of its treaty were inconsistent with the principles and purposes of the Charter. \(^{355}\)

Others have argued that paragraph 2 and 3 of Article 52 provide clearer guidance regarding the nature and character of regional arrangements. In both Articles, the Charter makes references to the use of regional arrangements to address local disputes.\(^{356}\) Proponents argue that this allusion to 'local disputes' means that the Charter implicitly acknowledges that regional bodies should consist of states "that are geographically contiguous or situated within

\(^{354}\) Ibid.  
\(^{355}\) The USSR argued that Article 5 of the NATO treaty is inconsistent with Article 2(4) of the UN Charter. See UN DOC A/C/SC 602/ paragraph. 35. In truth, it could be argued that since NATO does not formally consider itself as a regional organisation, but a collective defence organisation in accordance with Article 51 of the Charter, contestations about the status of NATO are redundant. But even if so, Article 7 of NATO treaty acknowledges the Security Council’s primary responsibility for the maintenance of international peace. Indeed its Article 1 enjoins its members to refrain in their international relations from the threat or use of force in any manner inconsistent with the purposes of the United Nations, while the Article 5 that the USSR referred to explicitly draws its legality from Article 51 of the Charter--the right of collective self-defence. One must therefore examine USSR contestations as one of the consequences of Cold War Politics. Israel also made a similar argument against the League of Arab States during the 1950 General Assembly debate that granted the League an observer status. Israel maintained that the objective of the league was aggressive and its membership discriminated against peoples of other races. The League from its inception was committed to addressing the Palestine issue and it provided a platform for Arab states to collectively act against Israel. See Abass, *Regional Organisations and the Development of Collective Security.* p.41.  
\(^{356}\) Abass, *Regional Organisations and the Development of Collective Security.* p.40
the same geographical area". In this interpretation, geographical proximity is seen as a necessary condition for the classification of regional arrangements. Eminent jurist, Hans Kelsen, however, disagrees. He contends that 'geographical propinquity' could not solely be the basis for determining what is considered a regional arrangement. Indeed for Kelsen, the term 'regional' within the Articles of the Charter has the connotation of partial treaties concluded only by some members of the United Nations. He argues: "there is good reason to assume that, according to the intention of the framers of the Charter, the meaning of the term 'regional arrangements' is wider than that of treaties concluded by neighbouring states". Kelsen maintains that this interpretation is strengthened by Article 53 which does not preclude action by regional arrangements against enemy states that renew aggressive policies as set out in Article 107. In his considered opinion, this provision is without regard to the geographical situation of the parties to such action.

There is no doubt that Kelsen’s argument has merit. The framers of the Charter as I had previously highlighted wanted flexibility and this was evident in the rejection of Egypt’s definition of regional arrangements at San Francisco. However, it is also the case that his interpretation of Article 53 fails to acknowledge that although there was a clear lack of specificity, some of these Articles were products of political concessions. Indeed, as Goodrich argues, "to understand the United Nations peace and security system and the place of regionalism in it, it is necessary to have in mind some of the details of the plan that was agreed

359 Ibid
360 Ibid. Kelsen cites the rejection of Egypt’s attempt to define regional arrangements. Egypt’s definition had privileged cultural, linguistic and spiritual affinities. It had also assumed that a condition for the existence of such an arrangement is the proximity of member states.
362 Ibid., p.320
Thus, to interpret the Charter, contentious Articles of the Charter must be contextualised. I contend that Kelsen’s insistence that the provisions of Article 53 and 107 are "without regard to the geographical situation of the parties" neglects the fact that Article 107, in particular, was a concession granted to European countries. European states were concerned about Germany’s capacity to renew aggression and during the negotiations; they sought the automatic right to act without recourse to the Security Council. Therefore, since this was mostly a regional concern, the exception granted in Article 53 to use regional arrangements to deter renewed aggression by enemy states must be seen not as an example of the Council’s prescience regarding the potential of ad hoc arrangements, but rather a specific attempt to assuage the concerns of a group of states within a region.

It should be clear by now that although the Charter does not provide a comprehensive guidance on how regional organisations should be defined, there is a case to be made that geography featured in its understanding of the role and responsibilities that these organisations were assigned in Chapter VIII. Thus, in this chapter, I define regional organisations as a composition of a limited number of countries who as a result of common interests -- including geographical proximity -- bound themselves to a formal treaty to regulate their relations and to

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364 See Goodrich, Regionalism and the United Nations. P. 268
365 Alan Henrikson notes that Article 53 was a concession granted to regionalism for "the continued operation of existing mutual assistance pacts including the 1942 Anglo-Soviet Treaty of Alliance" against Nazi Germany and the Four-Nation Declaration signed in Moscow in 1943. See Henrikson, The United Nations and Regional Organizations. p. 39
366 The reference to local disputes in paragraphs 2 and 3 of Article 52 and general UN practice buttress this conclusion.
promote such objectives they consider vital to the principles and purposes of their association.  

Evidently, this conception of regional organisations draws on the English School’s notion of common interests and common rules that moderate the relationships of states that I examined earlier in the thesis. But importantly, this conception is crucial to the second clarification I intend to make. In this chapter, I intend to limit the discussion to regional bodies whose purposes and principles have explicitly stated political or security objectives, or regional economic organisations that have redrawn their purposes and increasingly taken on political and security objectives. This classification allows the inclusion of organisations such as ECOWAS, SADC and ASEAN whose raison d’être at inception was to bring about the deepening of economic relations among member states, but whose mandate now encompass peace and security issues. Conceiving regional arrangements as I have done in this section, allows for a key normative argument and this is that the response to mass atrocity crimes could be made more effective and consistent if a regional organisation with peace and security mandate and which is in geographical proximity to the theatre of conflict is reposed with the legitimacy to authorise action without recourse to the Security Council. In the next chapter, I intend to vigorously defend this position.

5.1 Regional Organisations and the Responsibility to Protect

The importance of regional organisations to the development and the implementation of the responsibility to protect has often been acknowledged. The 2001 International Commission on

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A critic might argue that this definition excludes an organisation such as NATO whose membership is partly based on geographical contiguity, but which includes non-regional members. Joseph Nye argues that such organisations as NATO whose membership is not principally based on geographical proximity are best described as quasi-regional organisations. According to Tavares, the UN recognises this definitional conundrum, hence it named its "sixth and seventh high-level meetings as being on the cooperation with regional and other intergovernmental organisations” see Tavares, R.,(2010) *Regional Security: The Capacity of International Organisations*. Abingdon, Oxon: Routledge. p. 12; see Nye, *International Regionalism*
State Sovereignty (ICISS) report identified the developing practice of regional organisations in addressing incidences of atrocity crimes as providing legitimacy for the concept of the responsibility to protect. It also notes that decisions to intervene must clearly be supported by regional opinion. The ICISS report makes extensive reference to the need to integrate regional organisations into the mass atrocities prevention framework. It acknowledges that: “it is critical that more resources, more energy, more competence and more commitment be put into prevention” and recommends that these “increased resources be made available to support regional and sub-regional conflict prevention initiatives”. More importantly, the commission contends that action can be taken by relevant regional or sub-regional organisations under Chapter VIII of the Charter in the event of the paralysis of the Security Council, although with the caveat that they seek ex-post facto authorisation from the Security Council.

Similarly, paragraph 139 of the 2005 World Summit Outcome Document makes reference to the willingness of the international community to consult with relevant regional organisations where appropriate. The 2011 UN Secretary-General report on the responsibility to protect principally focuses on the role of regional and sub-regional organisations in implementing R2P. In the report, the UN notes the capacity of regional organisations in preventing atrocity crimes, asserting that “regional and sub-regional arrangements can encourage governments to recognise their obligations under relevant international conventions and to identify and resolve sources of friction within their societies...
before they lead to violence or atrocity crimes”.

However, it is important to also be cognisant of the fact that recent accounts, particularly post-ICISS, have mostly conceived of the utility of regional institutions to the R2P by looking at the contributions regional arrangements can make to Pillar II of the doctrine. There is a consistent framing of the importance of regional organisations in terms of their potential to enhance the early warning capacity of the UN and their contributions to preventative diplomacy.

Yet, there is room for regional organisations to contribute to the international response to mass atrocity crimes beyond these outlined roles. Regional organisations may even be better suited to addressing humanitarian situations. Indeed, their proximity to the theatre of conflict increases the potential that the elusive political will to act would be generated. There is evidence to support the hypothesis that proximity to a conflict instigates action even when other international actors show some measure of reluctance. An example that is often widely referenced is the disparity in the engagement of the US in the humanitarian situations in Rwanda and Haiti, both in 1994. While it is reasonable to assume that other considerations played a role in the ignominious response to the Rwandan tragedy, the fact that the US actively took the lead in Haiti was also motivated by the threat Haitian refugees were perceived to pose to the US.

Another instance is the Liberian crisis. While the Security Council rejected calls and failed to respond to the Liberian crisis in 1989, ECOWAS authorised a regional military intervention. This was justified on the grounds of not only the humanitarian situation but also the security threat posed to states within the region. Similarly, the AU found the political

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374 UN Report, A/65/877—S/2011/393, p.5
375 That said, the ICISS report recognised the capacity of regional organisations to engage in coercive enforcement measures and to seek post-event authorisation from the Council. Also see the 2015 UN report on Implementing R2P. A/69/981—S/2015/500

Having said this, it is instructive to note that despite the record of proactive engagement by regional institutions in addressing mass atrocity crimes, there is still a noticeable reticence by regional organisations to respond to crisis situations without first seeking legitimacy from the Security Council. The most recent instance is the 2016 election crisis in Gambia where ECOWAS was evidently reluctant to go beyond rhetoric in the absence of a Security Council resolution legitimating its proposed military action.\footnote{See News24 (2017). Available at: http://www.news24.com/Africa/News/senegal-asks-un-to-back-ecowas-action-in-gambia-20170118 [Last accessed 04 July 2017]. At the same time, it is appropriate to note that while ECOWAS might have sought legitimacy from the Council in

Although, the Gambian election impasse did not deteriorate into a humanitarian crisis, yet ECOWAS’ reluctance to act is still particularly disconcerting given that election crises on the continent have previously deteriorated quickly into mass atrocity situations. The 2008 election crisis in Kenya, the 2011 crisis in Ivory Coast and the 2015 election violence in Burundi are prime examples. But what is more relevant for the discussion here and in the next chapter is that the reticence of ECOWAS was also indicative of the fact that the regional group considered that it needed the authorisation of the Security Council to bestow legitimacy on its intended action.

As I have noted, the overarching objective of this chapter and the next is to make a case for the legitimacy of regional organisations as alternative authorising mechanisms without recourse to the Security Council. In the next chapter, I shall make more substantive normative arguments about this based on factors such as proximity to conflict, knowledge of the cultural and political terrain, and the fact that regional authorisation may be more legitimate because they could potentially address charges of imperialism that critics of the responsibility to protect
often resort to. In the next section, I look at the customary practices of regional organisations in addressing regional security challenges. This provides one part of the legitimacy argument I am extending, which is that the customary practices of regional organisations in responding to localised security challenges could provide a basis for asserting their legitimacy as authorising mechanisms.

Consequently, I focus on organisations that have prominently engaged in addressing regional security challenges and on regions with more incidences of atrocity crimes in recent years. The prominence of African regional arrangements in the discussion is partly reflective of the fact that Africa has witnessed many conflicts with dire humanitarian consequences and has overtime become more open to the idea of external interventions.

### 5.2 The League of Arab States

The first signs of Arab nationalism became evident in the 1860s with the increasing calls by Arabs that Ottoman rule must be resisted. However, it was not until 1943 that efforts were made to concretise the growing Pan-Arab sentiment. These efforts were in part instigated by the British government. Following the failure of the Iraq revolt in 1941, British Foreign Minister, Anthony Eden, announced on May 29, 1941, the British government’s willingness to support the constitution of a regional scheme. Along with the existing inter-American system, the Arab League, whose establishment coincided with the founding of the United Nations, were the frame of reference for the Charter’s conception of the role and duties of regional organisations outlined in Chapter VIII.

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379 Macdonald, *The League of Arab States: A Study in Dynamics of Regional Organisation*. p.33

380 Anthony Eden noted that: “…many Arab thinkers desire for the Arab peoples a greater degree of unity than they now enjoy”. And the need to strengthen the cultural and economic ties among Arab countries.

Although the League’s raison d'être is to facilitate the economic, cultural and political integration of Arab States, however, almost from its inception, the League adopted an interest in regional security challenges. Its earliest engagement in this respect was in 1948 when five of the members of the newly constituted body declared war against the state of Israel. In 1950, states within the Arab League signed the Joint Defence and Economic Cooperation Treaty with the aim that a collective security arrangement would serve as bulwark against external aggression and preserve the sovereignty of member states (this pact was recently activated in March 2015 with the creation of the Joint Arab Forces intended to address the region’s security challenges). At the same time, the Palestinian cause has been at the forefront of the Arab’s League diplomatic agenda and this is best exemplified by the establishment of the Palestine Liberation Organisation at the League’s summit in 1964 and the continuing boycott of Israeli goods since 1948.

The Arab League has been involved in addressing several regional conflicts. Some of these include May 1967, when Egypt, Syria and Jordanian forces led a campaign against Israel, and in 1990-1991 when Saudi Arabia led regional forces against Iraq in the war over Kuwait. The League also played a role in international mediatory efforts in Israel/Lebanon war in 2006 and was the primary broker of peace between warring Lebanese factions in the efforts that led to the Doha Agreement in 2008. Although the League of Arab States deepened its

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382 In 1976, the Arab Security Force (later the Arab Deterrent Force) was created to respond to the crisis in Lebanon. It was the first peacekeeping mission by the regional organisation and it was undertaken under Article 3 of the Joint Defence Treaty. See Vanhullebusch, M., (2015). The Arab League and Military Operations: Prospects and Challenges in Syria, International Peacekeeping. Vol 22(2). pp. 151-168


commitment to the respect of human rights by the formal ratification of the Arab Charter on Human Rights in 2008, however, it is the role it played in legitimising the Libyan intervention in 2011 that has highlighted not only its potential but of other regional organisations in implementing the responsibility to protect.

In the lead up to the intervention in Libya, there were clear indications that some members of the Security Council were concerned about the legitimacy of any intervention in an Arab state without the support of neighbouring states (as I will argue in the next chapter, there is a unique procedural legitimacy that regional institutions have as a result of their proximity to the conflict). Apart from the traditional sceptics of humanitarian intervention in the Council (Russia and China), diplomats and politicians in the US were also reticent. President Obama, for instance, had indicated his willingness to only act if there was broad multilateral support.\textsuperscript{386} Senator John Kerry, Chairman of the US Senate Foreign Relations Committee noted the importance of regional support. He said: “To avoid the perception of NATO or the US attacking another Muslim County, we need the backing of the Arab world”.\textsuperscript{387} Similarly, Secretary of State, Hilary Clinton, also indicated the importance of regional support to resolution 1973.\textsuperscript{388}

The League’s support for the no-fly zone in Libya went a long way in legitimising the Security Council’s action in the 2011 crisis. According to Wajner and Kacowicz, Russia and China ‘tolerated’ the passage of UNSC resolution 1973 because of the extensive support it had from the Arab League.\textsuperscript{389} The US Secretary of State, Hilary Clinton, particularly highlighted the fact that the League’s endorsement was the ‘turning point’ for the intervention and the


\textsuperscript{388} See Wajner, D., & Kacowicz, A., (2018). The Quest for Regional Legitimating: Analyzing the Arab’s League Role in the Arab Spring. \textit{Regional and Federal Studies}. p. 18

\textsuperscript{389} Ibid, p.20
reluctant support of Russia and China. Indeed, the Arab League’s importance to the implementation of R2P, particularly the legitimisation of coercive action was also evident in the latter stages of the intervention. Wajner and Kacowicz note that the perception that the NATO mission had exceeded its mandate threatened to de-legitimise the intervention. The League’s re-affirmation of its support by insisting on “the Arab and nationalist duty” to defend the civilians in Libya was therefore crucial along with the participation of Qatar, UAE and Jordan in the NATO mission.

Although the League’s resurgence has been much discussed, it is important to note that the League’s influence in addressing the Syrian conflict has been notably limited. Its influence and engagement in the conflict has been restricted to strong condemnatory statements, trade embargo and the suspension of the membership of Syria (as it did with Libya).

5.3 OAU/AU

The Organisation of African Unity, the predecessor to the African Union was notorious for its reluctance to interfere in the affairs of its member states, in part because Article III of its Charter forbade external interference in the domestic affairs of its members. Instead, the OAU heavily relied on good offices, presidential mediation, conference diplomacy and other less intrusive strategies as modes of conflict resolution. Although it had some successes, in

390 Ibid.
391 Ibid.
particular, its efforts towards ending colonialism and apartheid, the OAU was severely criticised for its unwillingness to confront the region’s litany of brutal dictators who inflicted serious human rights abuses against their citizens. At the same time, the organisation’s inability to adequately address conflicts in Congo, Nigeria, Somalia, Eritrea, Rwanda and a host of other states brought its continued relevance into focus. By the end of the 20th century, the ineffectiveness of the OAU in rising to the economic and security challenges on the continent had irreparably undermined its legitimacy.

The African Union was instituted to address the shortcomings of the OAU, and according to Rechner, to this extent, it was provided with a more robust mandate. At least, three improvements are relevant to the discussion on mass atrocity crimes. First, the policy of non-intervention gave way to a legal right to intervene in cases of genocide, war crimes and crimes against humanity. The OAU Charter extensively emphasizes non-interference and the sovereignty of member states. In Article 2, the OAU identifies as one of the purposes of the organisations, the defence of the sovereignty, territorial integrity and independence of member states. Article 3 restates this commitment to the principles of sovereign equality and non-interference in subsections 1, 2 and 3. This contrasts with the AU Constitutive Act, where along with the traditional reference to sovereign equality of states, the AU makes reference in Article

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396 Many analysts saw the collegial relationship among the head of states as one of the key problems of the organisation. This was compounded by two important realities. First, the decisions of the organisation were not binding and second, the assembly of the head of states, that naturally includes all of the dictators, was the highest decision-making body. The two factors combined with the commitment to a policy of non-interference ensured that the organisation was often incapable of addressing internal human rights abuses without the support of the state leaders who were the subject of the allegations. Former Tanzania President famously remarked that the “OAU only exists for the protection of African Head of States”. For detailed and incisive discussion, see Schalk, B.; Auriccombe, C., & Bryniad, D., (2005). Successes and Failures of the Organisation of African Unity: Lessons for the Future of the African Union. *Journal of Public Administration*. Vol 40 (3.2). pp. 496-511; Selassie, B., (1988). The OAU and Regional Conflicts: Focus on the Eritrean War. *Africa Today*. Vol 35(3/4). pp. 61-67; Rechner, *From the OAU to the AU* Selassie, The OAU and Regional Conflicts; see also Rechner, *From the OAU to the AU* Rechner, *From the OAU to the AU*. p.545
4(h) to the right of the organisation to intervene when crimes of genocide, war crimes and crimes against humanity are committed by a member state.\textsuperscript{400} Article 4(j), less controversially, recognises the right of member states to request intervention.\textsuperscript{401} A point that is worth noting also is that these articles do not only establish the legitimacy of the AU to act within its sphere of influence but do not subject the AU’s right to intervene to the prior authorisation of the Security Council as demanded by Article 53 of the Charter.

Second, the recommendatory nature of the decisions of the OAU was replaced by the legal requirement of member states to be bound by the decisions of the AU as contained in Article 23(2) of the Constitutive Act, with the possible imposition of punitive measures if decisions and policies of the Union are not complied with.\textsuperscript{402} The third is the creation of the 15 member states Peace and Security Commission (similar to the UNSC). The PSC is “charged with authorizing deployment and deciding the mandate of "peace support missions," recommending armed intervention to the Assembly in "grave circumstances," initiating sanctions on governments that take power unconstitutionally, and other related peace and security functions”.\textsuperscript{403} What is clear is that these additions to the institutional framework of the AU reflect the organisation’s commitment to addressing R2P related crimes.

Since its inception, the AU has made noticeable efforts to respond to the security challenges on the continent. One of its earliest engagements was in Burundi in 2003 to monitor the implementation of the Arusha pact and the ceasefire agreement between the rebels and the

\textsuperscript{399} Ibid. p.562
\textsuperscript{403} Ibid. p. 565
Burundian government. Although, the AU mission was replaced a year later by the United Nations Operation in Burundi (ONUB) authorised under resolution 1545, the AU has notably deployed peacekeeping missions in Darfur, Somalia, and the Central African Republic. Indeed, since the 2005 World Summit when the principles of the responsibility to protect were agreed to by world leaders, the AU has deployed seven peace support operations.\textsuperscript{404} While it is out of the purview of this work to give a detailed assessment of each of these missions or discuss the extent to which they were successful, what is, however, relevant to reiterate is the greater involvement of the organisation in intra-state conflicts.

The AU’s renewed commitment to addressing R2P related crimes, real and potential security challenges, is evident in its mediatory efforts in the 2011 Libyan crisis. Although the African Union was initially reticent to coercive action, instead prioritising mediation and rejecting “external military intervention in Libya, whatever its form”,\textsuperscript{405} however as diplomatic pressure increased, it gave its support to the idea of a no-fly zone on 23 March 2011.\textsuperscript{406} The African Union’s record also extends to its successful mediating role in the 2008 post-election violence in Kenya through the use of its Eminent Personalities framework. The intervention in Kenya is considered one of the first successful cases of implementing the principles of the responsibility to protect), at the same time, the AU deployed diplomatic and economic sanctions in addressing the coup d’état in Guinea Bissau in 2012, and the post-election crisis in Cote d’Ivoire 2011.

The organisation has also institutionalised important conflict prevention and reaction frameworks. Through article 12 of the Peace and Security Council (PSC) Protocol, the AU established the Continental Early Warning System to “facilitate the anticipation and prevention

\textsuperscript{406} Ibid.
of conflicts”. Article 11 of the PSC establishes the Panel of the Wise as an attempt to institutionalise the Union’s mediatory efforts. There is also the Friends of the Panel of the Wise comprising of five to 10 eminent African personalities from the continent’s five regions who are expected to engage in fact-finding missions, formal negotiations and follow up on recommendations. Part of the robust peace and security architecture is the Pan African Network of the Wise that harmonises conflict prevention strategies of the different regions. In January 2014, the AU Assembly, as a temporary measure, operationalised the African Capacity for Immediate Response to Crises (ACIRC). ACIRC is currently a 7,500 military force, expected to be rapidly deployed by the Peace and Security Council as the first responders to crises. In sum, ample evidence suggests that the African Union has become more proactive in addressing security challenges on the continent even when these are within the territorial boundaries of a member state.

5.4 EU

The European Union has been described as a legitimate international actor, partly because it places significant emphasis on the democratic credential of intending member states as a requirement for membership in the union. It is therefore not surprising that the European Union has been a vocal supporter of the responsibility to protect and the principles undergirding it. A few months after the World Summit in 2005, the EU released its Consensus Report on Development where it noted that it strongly supports the idea of a responsibility to protect. “We cannot stand by, as genocide, war crimes, ethnic cleansing or other gross violations of international humanitarian law and human rights are committed. The EU will

407 Ibid.
408 Ibid
409 Ibid
410 The Copenhagen Criteria which was adopted by the EU in 1993 stipulates that intending states must meet have stable institutions that guarantee democracy, respect minority rights, rule of law amongst others. see Matlary, H., (2008). Much Ado about Little: The EU and Human Security. International Affairs. Vol 84 (1). pp. 131-143
support a strengthened role for the regional and sub-regional organisations in the process of enhancing international peace and security”. Similarly, the 2008 report on the European Security Strategy notes that: “governments must take responsibility for the consequences of their actions and hold a shared responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity”.  

The role of the United Kingdom and France in operationalising the responsibility to protect is widely acknowledged. In chapter 4, I discussed France’s influence in the ongoing attempt to restrain the use of the veto. The United Kingdom’s pledge to abide by demands of the Code is also notable given its status as a permanent member of the Security Council. Yet, within the European Union, both countries have also been central to the development of the EU’s normative agenda on human protection and the responsibility to protect. In 1998, following criticisms about the EU’s role in the Kosovo crisis, France and the United Kingdom signed the St Malo declaration urging the creation of a European Security and Defence Policy. The declaration noted that the “Union must have the capacity for autonomous action, backed up by credible military forces, the means to decide to use them, and a readiness to do so, in order to respond to international crises”. Since then, the EU has increasingly taken on peace support operations.

In 2003, it deployed its first mission to Macedonia to replace NATO troops and to facilitate the implementation of the Ohrid Agreement. The mission codenamed Operation Concordia is generally seen as successful and as the EU was able to withdraw its troops a year

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later.\textsuperscript{415} Also in 2003, the EU deployed its first autonomous mission in the Democratic Republic of Congo. Operation Artemis was a response to the Security Council’s resolution 1484 which authorised an Interim Multinational Emergency Force to protect the displaced population of the north-eastern city of Bunia.\textsuperscript{416} Although only deployed for three months, the EU’s troop led by France made significant contributions to the reduction of violence in the region.\textsuperscript{417} The EU has conducted several other notable missions, including Operation Althea in Bosnia and Herzegovina in 2004, its largest multinational deployment in Chad and the Central African Republic in 2008 and the ongoing naval mission to combat piracy off the coast of Somalia, codenamed Operation Atlanta deployed since 2008.\textsuperscript{418} The EU’s reputation as an effective global peace and security actor is evident in its engagement in training missions (i.e., Mali and the Central African Republic) and non-coercive peace support operations (i.e., Iraq and Kosovo). Over the last two decades, under its Common Defence and Security Policy, the EU has conducted 35 military and civilian missions in Africa, Asia and Europe to support international peace and sometimes to address R2P related crimes.\textsuperscript{419}

5.5 ASEAN

Unlike the regional organisations examined so far with a robust history of intervention, the Association of Southeast Asian Nations is widely noted for its commitment to the principle of non-interference. Naturally, this puts it on a collision course with the principle of the responsibility to protect. Here, I examine how ASEAN has previously responded to regional

\textsuperscript{417} Ibid.
\textsuperscript{419} Ibid.
security challenges and to what extent it has now internalised and institutionalised the protective responsibilities of the R2P doctrine.

The ASEAN Charter is quite explicit about the importance of sovereign equality of states and the respect for the political independence of other states within the region. Indeed, most of the subsections of Article 2 (a-n) of the Charter restate this injunction in different ways. For instance, Article 2(a) demands respect for “the independence, sovereignty, equality, territorial integrity and national identity of all ASEAN member states”. Article 2(c) renounces aggression, while Article 2(e) demands “non-interference in the internal affairs of all ASEAN member states”. Similarly, Article 2(f) highlights the importance of allowing each member state to “lead its national existence free from external interference, coercion and subversion”, and in Article 2(k), the Charter enjoins member states to abstain from participating in any policy or activity which threatens the sovereignty, territorial integrity of ASEAN member states. The Zone of Peace, Freedom and Neutrality declaration of the ASEAN states in 1971 and the Treaty of Amity and Cooperation of 1976 only serve to symbolically reiterate this commitment.

These taken together provide compelling evidence of the centrality of non-interference to the political discourse in the regional organisation. Bellamy and Drummond are of the opinion that this fidelity to non-interference stems from an institutional culture that aims to

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422 Ibid
423 Ibid; indeed, the emphasis on political and territorial sovereignty in the Charter should not be surprising as Ayoob has robustly argued about the importance of non-interference to third-world states. see Ayoob, M., (1995). The Third World Security Predicament: State Making, Regional Conflict, and the International System, London: Lynne Rienner.

In the immediate years after the Second World War, the Southeast Asia region witnessed several episodes of conflict and interventions that had destabilising consequences. From the Indochina wars to the proxy wars sponsored by the great powers and the confrontation between Indonesia and Malaysia (the Konfrontasi) over the political independence of the latter, the region was not the only site of instability but of mutual distrust and suspicion.\footnote{Ibid.} Indeed, it was the conclusion of the Konfrontasi that led to the creation of ASEAN.\footnote{Kok Wey, A., (2016). The War that gave birth to ASEAN. The Diplomat. Available at: https://thediplomat.com/2016/09/the-war-that-gave-birth-to-asean/ [Last accessed 29 May 2018]} According to Bellamy and Drummond, the principle of non-interference was, therefore, an important inclusion in the Charter as it “paved the way for new relations premised upon mutual respect for one another’s sovereignty, territorial integrity and national security”.\footnote{Bellamy and Drummond, Between non-Interference and Sovereign Responsibility, p.246} At the same time, the consequences of the strict adherence to a policy of non-interference ensured that egregious human right abuses in the region went unchecked. Perhaps, the clearest example of this is the reaction of the organisation to the overthrow of the repressive Khmer Rouge regime in Cambodia by Vietnamese forces. In this case, ASEAN did not only condemn the intervention but fearing a dangerous precedent in the region, it led a diplomatic offensive at the United Nations that sought to delegitimise the new government of Cambodia. At the UN General Assembly, ASEAN mobilised third-world states and ensured that the Khmer Rouge kept Cambodia’s seat at the UN for thirteen years.\footnote{Jones, L., (2007). ASEAN Intervention in Cambodia: From Cold War to Conditionality. The Pacific Review. Vol 20 (4) pp. 523-550}

\begin{thebibliography}{9}
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\bibitem{Ibid}
Ibid.
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\bibitem{BellamyDrummond246}
Bellamy and Drummond, Between non-Interference and Sovereign Responsibility, p.246
\bibitem{Jones07}
\end{thebibliography}
However, by the 1990s, it was becoming clear that ASEAN’s continued fidelity to non-interference and its willingness to accommodate the repression of human rights was eroding its legitimacy.\textsuperscript{430} This along with other regional challenges, including the East Asia financial crisis, provoked serious conversations about the continuing merits of the policy of non-interference and the relevance of ASEAN.\textsuperscript{431} Bellamy and Drummond further note that the principle of non-interference, after much contestation, gradually gave way to the idea of ‘enhanced interaction’ whereby states were allowed to comment on the domestic affairs of neighbouring states when an issue had regional effects.\textsuperscript{432} This flexibility was most evident in the condemnations of the Malaysian government by Indonesia and Philippines following the arrest and jailing of Malaysia’s Deputy Prime Minister, Anwar Ibrahim, in 1998.

The reaction of ASEAN to the 2008 Cyclone Nagris disaster further affirms this position. While ASEAN states as with many western states were not convinced of the validity of Bernard Kouchner’s call that the actions of the Myanmar regime constituted a basis for armed intervention in order to deliver aid to the people, nevertheless, members states made tangible and successful diplomatic efforts that culminated in Myanmar opening itself up to international aid. Likewise, members of the regional body have explicitly endorsed the responsibility to protect.

Although in some cases, the states have raised concerns about the misuse of the intervention rhetoric, but what is also clear is that none of the states openly rejects the responsibility to protect. At the 2014 informal dialogue on the responsibility to protect, Indonesia noted its “unwavering position that the responsibility to protect is, and must be, a

\textsuperscript{430} Bellamy and Drummond, Between non-Interference and Sovereign Responsibility, p.247
\textsuperscript{432} Bellamy and Drummond, Between non-Interference and Sovereign Responsibility, p.247
universal principle”. It further committed itself to always supporting the three pillars of the responsibility to protect, and engaging in active participation and deliberation on implementing them. Similarly, Philippines affirmed that “states have a responsibility to protect their citizens from atrocity crimes”, and it even went on to assert that the legitimacy of a state is dependent of its capacity to fulfil this international obligation.

While the centrality of the principle of non-interference in the diplomatic relations of ASEAN states could be said to have undermined the crystallisation of the responsibility to protect in the region and may be drawn up as evidence to question the utility and potential of regional institutions as alternative authorising mechanisms, there is increasingly acknowledgement among scholars of the potential for increased institutionalisation of the R2P norm in the region. Indeed, Bellamy and Beeson are of the opinion that there is already evidence of norm localisation, that is, states reconciling the demands of R2P with long-standing norms of non-interference. This was most evident in the 2008 Cyclone Nagris crisis. To the extent that norm localization is the “process in which external ideas are simultaneously adapted to meet local practices,” and if norms have to reflect regional preferences to be diffused successfully, Bellamy and Beeson contend that the “region’s response to Cyclone Nargis offers some guidance for how this reconciliation might happen”. As stated earlier, the diplomatic pressure of ASEAN states on Myanmar must be considered as evidence of its evolving position of non-interference and human rights protection. But more importantly, Bellamy argues that

433 Statement by the deputy permanent representative of the republic of Indonesia to the United Nations at the Informal Interactive Dialogue on the Report of the Secretary-General on: “fulfilling our collective responsibility: international assistance and the responsibility to protect” New York, 8 September 2014
434 Ibid.
435 Statement by the Philippines at the 7th Annual Interactive Dialogue on the Secretary-General’s Report on the Responsibility to Protect at the United Nations General Assembly, New York 8 September 2015
437 Ibid.p. 275
there is great potential for R2P to be institutionalised in the region through existing frameworks. One of these is the ASEAN Regional Forum (ARF).

In 2013, the Council for Security Cooperation in the Asia-Pacific called on the ARF to find ways through which R2P could be concretised in the region.\textsuperscript{438} Furthermore, there are existing institutional platforms such as the ASEAN Intergovernmental Commission on Human Rights, Eminent Persons Group, ASEAN Political and Security Committee that analysts believe are ideal in institutionalising and reconciling ASEAN’s principle of non-interference and the protective responsibilities of the R2P doctrine.

In conclusion, although ASEAN has a limited record in intervening in the affairs of its member states, as I have shown, the regional body is aware that its traditional norm of non-interference ought to be moderated in the light of recent global developments. Bellamy and Beeson are optimistic of this, arguing that ‘the way sovereignty is conceived in the region is gradually beginning to change’.\textsuperscript{439}

5.6 ECOWAS

Although created in 1975 as an economic organisation with the aim: “to raise the living standard of its peoples and to maintain and enhance economic stability”, the Economic Community of West African States is better known for its security interventions in the West African region. The organisation’s metamorphosis from an economic block to one concerned mostly with political and security objectives can be traced to the region’s history of instability. Patrick McGowan identifies eighty-two coup plots and seven civil wars in the region between independence and 2004.\textsuperscript{440} Not surprisingly, since 2004, there have been several other coups.\textsuperscript{441} Given the unstable security climate, ECOWAS remains one of the most active regional

\textsuperscript{438} Bellamy and Drummond, Between non-Interference and Sovereign Responsibility, p.247
\textsuperscript{439} Bellamy and Beeson, The Responsibility to Protect in Southeast Asia p. 275
organisations in the African continent with robust legal instruments to address intrastate conflicts. Indeed, the organisation had determined in the early 1980s that the goal of economic integration and development could not be achieved in a climate of insecurity. Kwesi Aning and Samuel Atuobi argue that to this extent, ECOWAS had to change its raison d’entre. The 1981 Mutual Assistance on Defence Matters treaty was an early expression of the changing focus of ECOWAS from an economic arrangement to one with security objective. In Article 17 of the treaty, ECOWAS could establish peacekeeping forces to secure the peace among warring factions within a state.

By 1989 when the Liberian civil war erupted, ECOWAS was convinced that it already had the political and security instruments to legitimise its intervention in Liberia. Peter Arthur notes that ECOWAS did seek to justify the need to intervene on the basis of the Mutual Assistance on Defence Matters treaty, however, the fact that Liberia appealed to Nigeria (although Nigeria then took the issue to ECOWAS) and not to ECOWAS complicated the legitimacy claims that the interveners were extending. That said, Peter Arthur also notes that the “unique circumstances of Western disengagement and Western withdrawal from African affairs and the perceived lack of interest by the UN Security Council…offered enough reasons and imperatives for ECOWAS’ intervention”.

In May 1990, ECOWAS’ head of states deployed a peacekeeping force known as ECOWAS’ Cease-fire Monitoring Group (ECOMOG) to Liberia without Security Council authorisation. According to Jeremy Levitt, this action set off a chain of interventions that

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444 Ibid. p.10
445 Ibid. p. 11
established the procedural legitimacy of regional organisations to act without recourse to the Security Council on the basis of customary international law.\textsuperscript{446} ECOWAS’ intervention in Liberia was soon followed by a similar action in Sierra-Leone in 1998 where it acted again without the prior authorisation of the Security Council. ECOWAS’ willingness to involve itself in the internal affairs of its members is also evident in its response to the civil war in Ivory Coast where it deployed the ECOWAS Mission in Cote d’Ivoire in 2003. ECOWAS 800 troops along with 3,000 French troops created the conditions for the implementation of the peace accords agreed by the warring parties in Lomé, Togo in 2002.\textsuperscript{447} Furthermore, ECOWAS’ record of intervention practices extends to its response to the 2008 coup in Guinea, and the effort by President Tandja of Niger to unconstitutionally elongate his term in 2009.\textsuperscript{448} In both cases, ECOWAS suspended their membership and imposed economic sanctions as stipulated under Article 45 of the Supplementary Protocol on Democracy and Good Governance.\textsuperscript{449}

ECOWAS has acted in several other situations in the region to restore order or to prevent the commission of atrocity crimes. In response to the 2012 coup in Mali, it imposed economic and diplomatic sanctions and deployed the ECOWAS Mission in Mali (MICEMA). ECOWAS also made serious efforts to address the 2011 post-election violence in Cote d’Ivoire. Its recognition of Alassane Ouattara as the legitimate president of Cote d’Ivoire was significant in persuading the UN Security Council in recognising Ouattara as the winner of the elections and in delegitimising Laurent Gbagbo. While the effectiveness of ECOWAS’ interventions


\textsuperscript{448} Ibid.
remain a matter of dispute, nevertheless it is the case that its ability to respond to regional security challenges and to implement the principles of the responsibility to protect has been significantly aided by its robust Articles, Protocols and Treaties. These legal instruments are evidence of the organisation’s conviction that it has the legitimacy to respond diplomatically and even coercively to local security challenges. For instance, Article 58 of the ECOWAS Revised Treaty states that “Member States undertake to cooperate with the Community in establishing and strengthening appropriate mechanisms for the timely resolutions of intra-State and inter-State conflicts”, while Article 1c of the ECOWAS Protocol on Democracy and Good Governance allows for interference in Member State’s elections. Similarly, the Protocol Relating to the Mechanism for Conflict Prevention, Management, Resolution and Peacekeeping and Security empowers the Mediation and Security Council in Article 10a to decide on all matters on peace and security in the region and to “authorise all forms of intervention” in Article 10c.

But more importantly, as with the African Union, the legitimacy of ECOWAS in responding and reacting to security challenges, particularly R2P related crimes, is enhanced by its extensive customary practices and as I also argued, its treaties and protocols, which reflect the collective determination of member states to independently address threats to peace in the region whether these are external aggressions or massive human rights violations. Evidently, ECOWAS possesses the legal capacity and a record of interventions that reflect a willingness to operationalise and implement the principles of the responsibility to protect.

449 Aning and Atuobi, The Economic Community of West African States and the Responsibility to Protect, p. 227
450 Ibid. p.220
5.8 SADC

The Southern African Development Coordination Conference (SADCC) was established in 1980 as an economic arrangement by Angola, Botswana, Lesotho, Mozambique, Swaziland, Tanzania and Zambia (the so-called frontline states) to reduce their perceived dependence on apartheid South Africa. In its early years, the SADCC lacked any legal framework and operated on a Memorandum of Agreement between member states. In 1992, the organisation was formalised and transformed into the Southern Africa Development Community with the signing of the SADC treaty and the subsequent admission of post-apartheid South African into the regional block.454 Although earlier exempted, South Africa was admitted into the regional block in 1994 after the end of its apartheid policy.

The 1992 SADC treaty noticeable lacks robust engagement with the concerns that the responsibility to protect focuses on and only makes cursory references to the promotion of human rights and the rule of law. This oversight is addressed in its 2001 Protocol on Politics, Defence and Security Cooperation. In Article 11(2), the organisation undertakes to seek to resolve ‘significant’ intra-state conflicts. It goes on to define ‘significant’ as “Large-scale violence between sections of the population or between the state and sections of the population, including genocide, ethnic cleansing and gross violation of human rights”.455 While the specificity of the protocol is indicative of the organisation’s willingness to address atrocity crimes, it is also the case that before the ratification of the Protocol on Politics, Defence and Security Cooperation, the SADC had taken concrete actions in addressing intra-state conflicts in the region. For instance, the SADC Organ for Politics, Defence and Security was established

453 Ibid, see Article 25.
in 1996 to institutionalise the organisation's new thinking on security, according to Breytenbach.456

The SADC’s willingness to intervene in the affairs of member states was put to the test in the DRC crisis in 1998. In August 1998, the trio of Angola, Zimbabwe, and Namibia acted in response to the invitation by President Laurent Kabila to help dislodge Congolese Tutsi rebels who were supposedly supported by Uganda and Rwanda. The intervention was itself controversial and revealed the structural deficiencies of SADC treaty. This is because the SADC Organ of Politics, Defence and Security which was established in 1996 by the Heads of State and Government and described David Francis as SADC’s “most developed and comprehensive institutional mechanism” functioned independently of other SADC structures, including the Summit of the Head of State and Government.457 Although the intervention in DRC by Zimbabwe, Angola, and Namibia were generally deemed successful as it helped halt the advance of Tutsi rebels on the capital city, nevertheless, it also exposed the power struggles among different actors and different institutions of the SADC and their opposing positions on the intervention.

In the same year, the SADC intervened in Lesotho at the request of Prime Minister Pakalitha Moisili, whose Lesotho Congress of Democrats was accused of electoral fraud in the May 1998 elections. The SADC instituted a commission that concluded that the election only witnessed minor irregularities.458 As tensions increased and Prime Moisili’s government lost

control, the SADC deployed a contingent of troops from South Africa, Botswana and Zimbabwe to secure the peace. As with the intervention in the DRC, the South African led intervention is considered successful as it was able to assist Lesotho in reforming its electoral system. Yet it is important to note that while both of SADC’s interventions are generally considered successful, analysts believe that regional rivalry and the material interests of South Africa and Zimbabwe motivated their response to either crisis and further questioned the legitimacy of the interventions. (In the next chapter, I will address the concern that such regional rivalry and the presence of material interests undermine the utility of regional institutions).

The legitimacy of both interventions is also undermined by the fact that neither intervention had the collective support of the organisation. According to Coning, the lack of transparency around who had the procedural legitimacy to authorise the action was the “most significant shortcoming of the SADC interventions”. Indeed, this jostle for authority between SADC Organ on Politics, Defence and Security and Summit of Head of State and Government eventually culminated in suspension of the Organ on Politics, Defence and Security.

That said, the SADC’s remains committed to addressing intrastate conflicts and R2P related crimes. This is evidenced by the creation of the SADC Standby Brigade. The SADC Brigade, launched in 2008 in accordance with Article 13 of the African Union Peace and Security Protocol.

459 Ibid.
461 See, Van As, African Peacekeeping;
463 Breytenbach, Failure of Security Cooperation in SADC
Security Protocol, is envisaged to engage in actions that “prevent the spread of conflict to neighbouring states” and to intervene for peace and security.\textsuperscript{464}

**Conclusion**

There is a good record of regional organisations responding to conflicts within their sphere of influence. Indeed, one could assert that there is evidence of customary practices where regional institutions engage in enforcement actions without seeking prior authorisation from the Council as stipulated in Article 53 of the UN Charter. I have discussed some of these in this chapter, but for the sake of emphasis, let me reiterate a number of these instances. The Arab League’s intervention in Lebanon in 1976, ECOWAS’ action in Liberia in 1990 and in Sierra-Leone in 1997, the SADC’s interventions in DRC and Lesotho in 1998. In none of these instances was the prior authorisation of the Security Council sought.

This chapter has been concerned with detailing and assessing the response of regional organisations to localised security challenges. Given the lack of a universally agreed understanding of regional organisations, the chapter started by defining how regional organisations would be conceived. Here, it drew on international law to reflect on how regional organisations should be best conceived. The chapter went on to engage with the doctrine of the responsibility to protect and identified the role envisaged in various UN documents, including the 2005 World Outcome document, for regional arrangements. Finally, it provided an overview of some selected regional organisations (Arab League, AU, EU, ASEAN, ECOWAS and SADC), their record of responding to intra-state conflict and capacity to operationalise and implement the responsibility to protect. In the next chapter, the objective is to make a robust normative case for regional organisations by leveraging on these established practices that I have discussed here.

Chapter Six

The Case for a Regional Approach to Implementing R2P

In this thesis so far, I have examined proposals for a reform of the Security Council to improve its procedural legitimacy and to ensure that it responds consistently to mass atrocity crimes. I rejected the formal proposals for reform by showing that they would not improve the implementation of R2P. I also examined other ideas including a Code of Conduct and the potential of new bodies outside of Security Council. These were also rejected. In the preceding chapter, I laid the foundations for the consideration of regional institutions. In this chapter, I ask if there are real possibilities for addressing the weaknesses in the implementation of R2P by affirming and legitimating regional organisations as alternative authorising mechanisms. I will defend this as a justifiable option. That is, regional organisations could help to ensure that the responsibility to protect is effectively and more consistently implemented.

To be clear, as with the other chapters, I do not intend to defend the use of regional institutions in undertaking coercive actions. Much scholarly work has focused on the deployment capacity of regional institutions and the utility of this.\(^{465}\) Rather, the interest here pertains to an often overlooked part of the argument, which is, the use of regional institutions as authorising mechanisms. It seems that this oversight is in large part due to the fact that the deployment of force by regional arrangements rests implicitly and explicitly on some form of authorisation. However, it is important, especially for this chapter, to recall that the authorisation of coercive action and the deployment of coercive force need not be contingent on

each other. Both can be located within two different institutions. This is clearly evidenced by the Security Council. The Council lacks the capacity to independently deploy force without the contribution of member states. In truth, the Security Council is primarily an authorising mechanism. The discussion, therefore, focuses on making a case for regional organisations as authorising mechanisms and is less concerned about their capacity to deploy force.

The rest of this chapter is thus structured as follows: I start by addressing the procedural legitimacy of regional organisations in authorising international action during mass atrocity situations. I then consider four arguments that provide justification and establish the utility of regional arrangements as alternative authorising mechanisms. I will also examine and respond to three key objections that can be made against regional organisations. Finally, I will outline a set of criteria that should determine which regional organisations are considered legitimate actors during mass atrocity situations.

6.1 The Legal Case for Regional Institutions?

The legitimacy of regional organisations to authorise actions that contribute to the maintenance of peace within their region predates the founding of the UN.466 A prime example is the Act of Chapultepec adopted by American states in March 1945 which laid the foundations for the Inter-American Treaty of Reciprocal Assistance. Indeed, a key issue at the San Francisco conference later that year was the role envisaged in the Charter for regional organisations. At Dumbarton Oaks, the negotiating parties of the Big Four countries had drawn up proposals that

466 Abass, A., (2004). Regional Organisations and the Development of Collective Security: Beyond Chapter VIII of the UN Charter. Hart Publishing, Oregon. p.135. Abass also provides robust critique of the continued primacy of the Security Council despite its failures, declaring that: “The Power contained in Article 24(1) is based on a corresponding duty that the Security Council shall perform its own obligations by taking effective and prompt action in deserving situations and acting in accordance with the purposes of the Charter. The non-fulfilment of these conditions...should be deemed to postpone the primacy so created in favour of the Security Council. In other words, should the Security Council not act promptly and effectively...it forfeits its primacy in terms of responsibility for the maintenance of peace and security”. P.131. The argument extended by Abass here reflects a key part of my argument—
asserted the compatibility of the fledging institution with regional arrangements like the Inter-American System.\textsuperscript{467} The Dumbarton Oaks proposal suggested that the Security Council “should encourage settlement of local disputes through such regional arrangements or by such regional agencies, either on the initiative of the states concerned or by reference by the Security Council”.\textsuperscript{468} It further stated that where desirable, the Security Council should utilise regional institutions.\textsuperscript{469} Latin America states were uncomfortable with this provision which according to Ezequiel Padilla left the most important matter to the discretion of the Council.\textsuperscript{470} Indeed, they argued that the Charter would negate the principles of the Act of Chapultepec, the juridical instrument meant to regulate their relations.\textsuperscript{471}

Padilla argues that Article 52 of the UN Charter was the result of the concession granted to these states. Paragraph 1 of the Article states: “Nothing in the present Charter precludes the existence of regional arrangements or agencies for dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action provided that such arrangements or agencies and their activities are consistent with the Purposes and Principles of the United Nations”.\textsuperscript{472} In other paragraphs, the Charter stresses the need to use such arrangements for the pacific settlements of disputes.\textsuperscript{473}

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{468} Ibid. p. 104
\item \textsuperscript{469} Ibid
\item \textsuperscript{470} Ibid
\item \textsuperscript{471} The Act of Chapultepec which Latin American had signed before the San Francisco conference predated the authority of the Security Council according to Ademola Abass. See Abass, \textit{Regional Organisations and the Development of Collective Security}, p. 29. But more importantly, The Act of Chapultepec according to him sought to regulate enforcement measures at the regional level. The perception was that the Security Council usurped a key function of the fledging Inter-American system.
\item \textsuperscript{473} See Article 33(1) and Article 52(2), of \textit{The United Nations Charter}
\end{itemize}
\end{footnotesize}
Yet, it is possible to argue that Article 53 (1) which demands that “no enforcement action” shall be taken under regional arrangements or by regional agencies without the authorisation of the Security Council” significantly limits the sweeping authority granted to regional organisations in Article 52.\footnote{See Article 53(1), \textit{The United Nations Charter}. Available at http://www.un.org/en/sections/un-charter/chapter-viii/index.html [Last accessed 07 March 2017]} I am not however convinced that the authority of regional arrangement is curtailed by Article 53.\footnote{See Kelsen, H., (1964). \textit{The Law of the United Nations: A Critical Analysis of its Fundamental Problems: with supplement}. New York, Praeger. p.328} Whatever restriction placed by Article 53(1) is counteracted by the provisions of the Charter under Article 51 which acknowledges the inherent right of individual or collective self-defence arrangements. It is important to note that this right that cannot be impaired until the Security Council adopts measures to restore peace and security.\footnote{Padilla, for instance, made this interpretation in 1945. He argued that if taken literally and separately, the phraseology of Article 53 might be interpreted as carrying the same meaning as the proposal rejected by Latin America states in the Dumbarton Oaks proposal which granted the Council unbridled authority over regional arrangements.\footnote{Article 51, \textit{The United Nations Charter}. Available at http://www.un.org/en/sections/un-charter/chapter-vii/index.html [Last accessed 07 March 2017]} He, however, argues that the “basis for ...such interpretation disappears if the text is related, as it should be, to Article 51, immediately preceding”.\footnote{Ibid} Kelsen agrees with this interpretation that Article 51 effectively circumvents the restrictions placed by Article 53. He argues:

there can be no doubt that the provision of Article 51 authorising collective self-defence constitutes a restriction of the rule laid down in Article 53 that no enforcement actions shall be taken under regional arrangements or by regional agencies without the authorisation of the Security Council.\footnote{Kelsen, The Law of the United Nations. p.328}
Clearly, the suggestion by Padilla and Kelsen is that the capacity of regional arrangements to act outside of the Security Council is not as restrained as it appears. Having said this, it would be disingenuous not to acknowledge that Article 51 places significant restraints on itself. It does not grant unrestrained rights to regional arrangements to act. Article 51 is clear that the only legitimate ground for the exercise of individual or collective self-defence is in response to an “armed attack”.

However, Sean Murphy argues that an expansive reading of what constitutes an armed attack and self-defence opens up the opportunity for regional arrangements to act unimpaired and without recourse to the Security Council.\textsuperscript{480} Self-defence under this view would include anticipatory actions or the use of force to protect nationals abroad.\textsuperscript{481} But more importantly, this interpretation allows for collective humanitarian intervention. Humanitarian intervention by a regional group could, therefore, be justified on the theory that “the destruction of human right values on a large scale threatens stability and the global community”.\textsuperscript{482}

Furthermore Ademola Abass has argued that “a theory that regional organisations possess residual responsibility for the maintenance of international peace and security, in default of action by the Security Council, can be constructed on [the argument] that it was states, rather than the Charter, that imbued the Security Council with primary responsibility for collective security”.\textsuperscript{483}

One might insist that the arguments presented above do not fully appreciate the fact that only the Security Council may authorise coercive actions without the consent of host states.


\textsuperscript{481} Murphy, The United Nations in an Evolving World

\textsuperscript{482} See Murphy, The United Nations in an Evolving World Order p. 75. Also see Jenkins, P., (2008). The Economic Community of West African States and the Regional Use of Force. \textit{Denver J. Int’l L. & POL ’Y.} Vol 35, (2) pp. 333-336, makes a similar argument. He argues that the prohibition in Article 2(7) could be sidestepped when the flow of refugees has destabilising effect on regional states. This could provide the legal basis for regional action under Article 51.

\textsuperscript{483} Abass, \textit{Regional Organisations and the Development of Collective Security}, p.135
The attempt has been to show that there might be a legal case to be made for acting outside the framework of the UN. But more important are the normative arguments for the exercise of authority by regional institutions that I extend in the next section. I draw on the arguments from the Solidarist conception of legitimacy to argue that in view of the failure of the UN’s collective security architecture, the institution’s monopoly of the authorisation of coercive action cannot be defended.

6.2 The Normative Case for Regional Authorisation

As I demonstrated in chapter 5, regional institutions have a long history of engaging in humanitarian interventions. However, their role in implementing R2P has mostly been conceived of from two perspectives. First, in terms of their Chapter VIII duties (prevention, improving the early warning capacity of the UN). Second, in terms of their customary practices (peacekeeping, enforcement actions). There is a third and evolving role, it must be noted. The role of intervention legitimisers. This was particularly evident during the Arab Spring. The Arab League was crucial in the legitimisation of the Libyan intervention.484 The same Arab League was also crucial in the legitimisation of the Gulf Cooperation Council’s actions in Bahrain.485 ECOWAS’ role in facilitating the authorisation of resolution 1975 which consequently provided legitimacy for the French action in the country is another example.486 This developing role of regional organisations as legitimisers provides some basis for the argument that I will be extending in this section.

I contend that the recourse to regional authorisation by the Council should be seen as an acknowledgement of the unique legitimacy regional institutions possess and also an indication of the declining legitimacy of the Security Council. A response to this could be that the role played by the Arab League in legitimising the Security Council’s decision in Libya was an exception and therefore not indicative of a loss of legitimacy. What is, however, difficult to controvert is that these instances (particularly in Libya, less so in Ivory Coast) are tacit recognition by the Council of the unique capacity of regional organisations to grant procedural legitimacy to the authorisation of coercive use of force. If this position is conceded, that regional institutions have a certain procedural legitimacy, should this legitimacy not be extended to situations where the Council is manifestly unable or unwilling to respond to atrocity crimes?

Furthermore, underlying the doctrine of the responsibility to protect is the idea that a state’s legitimacy is contingent upon its ability to fulfil its protective responsibilities towards its citizens. The international effort that re-conceptualised sovereignty as responsibility established the notion that a state’s sovereignty is conditional on its capacity to fulfil its protective responsibilities towards its citizens. By the same token, we could argue that the Security Council’s monopoly of the authorisation of the legitimate use of force is conditional upon its capacity to fulfil its protective responsibilities. Where it is manifestly failing or unable to do, it should be circumvented.

Additionally, as I discussed in chapter 2, an institution’s output or principles need to be justifiable in order for it to be a legitimate political arrangement. In other words, the substantive values that an institution promotes are important in the determination of its procedural legitimacy. This is a point that is widely shared among scholars. For instance, Andrew Hurrell argues that there is a need for international law to build legitimacy around a shared conception of substantive justice. To him, legitimacy should not be based solely on ‘constitutionalist
procedures’, but on substantive moral values.\textsuperscript{487} Buchannan shares a similar perspective, insisting on the importance of ‘just institutions’, particularly those that protect human rights.\textsuperscript{488} The point to be made here is that for Solidarist scholars of the English School, the legitimacy of the Council is dependent on its capacity to adequately address the commission of atrocity crimes. I have shown through several examples in this thesis that the Security Council often fails to produce just outcomes.

Let me note an important point in this debate. It could be argued that the arguments I have extended so far contravene Article 53 of the UN Charter which insists that regional action (including the authorisation of coercive action) is subject to the prior authorisation of the Security Council. In the previous chapter, I demonstrated that regional organisations have acted beyond their Chapter VIII duties. Indeed regional organisations have a long history of conducting enforcement actions with and without Security Council authorisation. It is my contention these ‘illegal actions’ provide some basis for acting outside the Security Council. At the same time, the legitimacy of the regional arrangements to act independently and without recourse to the Security Council is established by the demands of natural law. Conceptions of justice as outlined by natural law scholars like Grotius was influential in the development of the English School, particularly Solidarism. As I argued in chapter 2, there is a demand to prevent and punish the commission of atrocity crimes. But, at the same time, if the collective will of the international society is taken as the basis of international law and the obligations derived from it, as Wilfred Jenk argues,\textsuperscript{489}, then one could insist that R2P which reflects the normative goals

of the international society (taken together with the demands of natural law) legitimises the use of regional organisations to fulfil the society’s Solidarist objectives.

Finally, I address an argument that is often made. It is argued that the Security Council was not founded to address intra-state conflicts and as such its legitimacy or effectiveness cannot be judged on the basis of its failures to act in response to atrocity crimes.\footnote{This is an argument that the report of the International Commission on Kosovo acknowledged. At the same time, the report went on to argue that the principles of the United Nations establishes the responsibility of the Security Council to protect human rights. See, Independent International Commission on Kosovo (2000). \textit{The Kosovo Report: Conflict, International Response, Lessons Learned}. Oxford: Oxford University Press.} This is a highly debatable position since one could point to the potential implication an intrastate crisis could have for international peace and security, which is part of the remit of the Security Council. But if this assertion was conceded then circumventing the Security Council and locating the authority to address mass atrocity crimes in a more appropriate body should not be illegal, illegitimate or controversial. Several regional organisations as I indicated in chapter 5 have the legal instruments that allow them to act in response to mass atrocity crimes. The SADC’s Articles 11(2), ECOWAS’ Article 10 C, and the African Union’s Article 4(h) are some of the examples.

Having said this, the critical question of this chapter is, what establishes the legitimacy of regional institutions as authorisers as I contend? I provide four justifications and three corresponding objections.

\subsection*{6.2.1 The proximity argument}

On December 24\textsuperscript{th}, 1989, Charles Taylor led an armed rebellion against President Samuel Doe of Liberia. Within months, more than 1.2 million Liberians had been displaced, half of the
country’s population.491 As the conflict degenerated into an ethnic carnage, the United Nations stood idly by. Indeed, the UN did not address the conflict until November 1992, almost three years after the conflict began, when it passed resolution 788. There was also an expectation that the United States would intervene in Liberia given its historical relationship with the country.492 The US, however, maintained that “the resolution of this civil war [was] a Liberian responsibility”, although it went ahead to dispatch 200 marines to rescue 300 of its nationals.493 On the other hand, the proximity to the conflict ensured ECOWAS’ engagement. Following unsuccessful attempts at reaching political and diplomatic solutions to the conflict, ECOWAS authorised an intervention. The regional group justified its decision on the basis of regional instability. Elements from the NPFL, the Charles Taylor led group, had joined the RUF, a Sierra-Leone rebel group, to overthrow the government of Joseph Momoh in March 1990.494 There was also a growing refugee problem. Given these, ECOWAS argued, “It is obvious that the situation in Liberia has gone beyond the boundaries of the country and ceases to be an exclusive Liberian question”.495

There are indeed several examples where the proximity to the conflict has had a direct impact on the stability of states within the region. The 1994 Rwanda crisis is an often cited case. More than 1.6 million Rwandans sought refuge in neighbouring Zaire in the aftermath of the genocide; among these were thousands of Hutu genocidaires.496 Although, in the case of states within the Great Lake region, tribal affinities across the states exacerbated the threats posed by refugees, nonetheless, Lemarchand argues that the collapse of the state systems in Rwanda,

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492 Ibid.  
493 Ibid  
494 Ibid  
495 Ibid
Zaire and Burundi is “most patently traceable to insurgencies born of refugee flows”. In recent years, the Boko Haram insurgency in Nigeria has had a destabilising effect on states bordering the Northern region of Nigeria where the Islamist insurgency is rife. The porous border has ensured that refugees and insurgents alike have flowed into Chad, Niger and Cameroon.

The argument I am extending here is that the threats faced by states within a region as a result of refugee outflows, the destabilisation of the regional economy and the threat to peace and security legitimise regional action. It is difficult to defend the continued subordination of regional arrangements to Security Council authority when time and time again; the Council has failed to act effectively or consistently. It is strange that the international security architecture continues to privilege an institution whose effective power resides with five members that are in most cases far removed from the direct impact of the conflict. Indeed, it must be admitted that the inconsistent response to atrocity crimes by the Security Council is attributable to this. Thus, if the doctrine of a responsibility to protect would be made effective and be more consistently applied, R2P advocates must acknowledge the need to reconstitute the relationship between regional arrangements and the Security Council. The legitimacy of regional

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498 It is often overlooked, but conflicts come at huge economic cost to the region. For instance, it estimated that the crisis in Mozambique between 1980 and 1988 cost the economies of member states of the Southern African Development Community (SADC) more than 60 billion dollars, while the economies of states within the Great Lake region shrank cumulatively by 63% as a consequence of the conflict in Rwanda. See the 2013 Alexandre de Gusmão Foundation report on: The Role of Regional Integration in Conflict Prevention, Management, and Resolution in Africa: The Case of African Union. p. 90
arrangements to *authorise* actions that address the commission of mass atrocity crimes in their region without recourse to the Council must be acknowledged and established.\(^{499}\)

### 6.2.2 The political will argument

Closely related to the proximity argument is the justification for regional arrangements based on their capacity to generate political will. The use of regional arrangements to *authorise* coercive actions has the capacity to generate the elusive political will to act in mass atrocity situations. Beyond institutional defects like the veto, a fundamental impediment R2P faces is the lack of a political will by the Council to act adequately to protect populations at the risk of mass atrocity crimes in places where the P5 do not have evident national interests. This is a position shared by many advocates of R2P.

Within the discourse on implementing the responsibility to protect, there is often strong reference to the importance of political will. For instance, Bellamy argues that without political will, R2P falters.\(^{500}\) Richard Solomon and Lawrence Woocher also point out that “the greatest challenge in preventing mass violence is generating the political will to act.”\(^{501}\) Yet, as Tom Keating notes, there is often little engagement of what political will means in this context.\(^{502}\) In this section, I understand political will as Gareth Evans does, the “willingness to make things


It is the interest shown by someone, a state or an institution to address the commission of atrocity crimes. Clearly, this can not be underemphasised as without the willingness to commit political, diplomatic and material resources, the protective objectives of R2P is unlikely to be realised.

How political will affects the response to mass atrocity crimes is best exemplified by the crisis in Haiti and Rwanda. In the same year that the Security Council failed to adequately respond to the genocide in Rwanda that claimed 800,000 lives, the Council had on the urging of the United States government authorised resolution 940 to restore the mandate of President Jean-Bertrand Aristide of Haiti. Whereas Operation Restore Democracy led by US forces was motivated by the will to halt the increasing refugee flow from Haiti into the US, it is well known that the US prevented the Council from taking robust actions in response to the Rwandan genocide. According to Wheeler, the Clinton administration went beyond this to issue a discreet directive to its officials, preventing them from acknowledging or using the word genocide to describe the unfolding situation in Rwanda. This is because under Article I and IV of the 1948 genocide convention, states undertake to prevent and punish the crime of genocide.

Whilst this was clearly the motivating factor behind the unwillingness of the Clinton administration to acknowledge the Rwandan crisis as an unfolding case of genocide, Wheeler maintains that the lack of a will to act was so pervasive that “convention or no convention, the

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administration had no intention of becoming embroiled in Rwanda's nightmare”. On the other hand, there was a clear political will of states within the African region to act. For instance, only Nigeria as a member of the Security Council opposed the plan to reduce the UN peacekeeping contingent, following calls for withdrawal by Western states. Wheeler further notes that in the absence of Western intervention, “the only alternative was for African states to take the lead; and this was what they did. In response to Boutros Boutros Ghali’s requests, Ghana, Ethiopia, Senegal, Nigeria, Zimbabwe, Zambia, Congo, Mali, and Malawi came forward with offers”. 

It has been argued that the media has a role to play in galvanising political will. The absence of political will to effectively address unfolding mass atrocity situations is, therefore, attributable in part to the presence or absence of media attention. Advocates contend that sustained coverage of a humanitarian situation has the capacity to galvanise a Solidarist international society into action. Images of an unfolding carnage could raise the profile of a humanitarian crisis. The so-called “CNN effect” according to Piers Robinson can normatively guide a state’s foreign policy. In essence, media coverage can compel the government to act where it would ordinarily not have done so. But what is problematic about the CNN effect thesis and its capacity to generate political will is that, as Robinson also notes, it is difficult to dispel the notion that “political elites [could] impel the news media to 'read' global events in a

507 Wheeler, Saving Strangers. p.225
508 Only two African countries were represented on the Council at the time of conflict, Nigerian and the representative of the genocidal Rwanda government. Wheeler however notes that after a briefing by the Secretary General’s military adviser, Maurice Baril, regarding the condition the peacekeeping forces were operating in, Nigeria’s opposition relented and the Council subsequently passed resolution 912 reducing the UN peacekeeping contingent to 271. See Wheeler, Saving Strangers. p. 221
509 Wheeler, Saving Strangers. p. 229
particular way‖. If this is the case, then the CNN effect thesis is significantly undermined since the belief that political will can be generated exogenously is misplaced.

But the CNN effect theory seems questionable. The mass atrocity situation in the Darfur region which began in February 2003 is one of such. Romeo Dallaire argues that although the unfolding Darfur genocide received better news coverage than in Rwanda, Western governments approached it with the same lack of priority and interest. And, as it was the case in Rwanda, the UN Security Council’s response in the words of Kofi Annan was slow, hesitant and uncaring. Indeed, whereas there was a reluctance to identify the crimes in Rwanda as a case of genocide, no such attempt was made with Darfur. The US Secretary of State, Colin Powell, testified before the US Senate in September 2004 that genocide had been committed in Darfur; yet, he added that “no new action is dictated by this determination”. This clearly negates the thesis that states can be galvanised into action without their consent.

However, I contend that states within the region are often more engaged and willing to act in response to mass atrocity crimes. And this increased political will to act is motivated partly by the threat posed to regional security as I had argued in the previous section. The political commitment is also evident in the greater willingness to stay the course and bear the risks that come with responding to humanitarian crises. Hence, while the Security Council dragged its feet in response to the crisis in Darfur and could not muster a peacekeeping force

514 For instance, despite the heavy causalities suffered by the Nigeria contingent and the AU peacekeeping force in Darfur, the AU contingent continued to be engaged in the conflict,
until December 2007, the AU acted by deploying a modest peacekeeping force of 150 soldiers as early as August 2004 which was increased to 7,730 by September 2005.\textsuperscript{515} The implication of this is clear. The lack of political will by the UN system and the historic incapacity it has shown in the face of egregious mass atrocity crimes should pave the way for greater regional involvement, especially their legitimacy to authorise coercive actions.\textsuperscript{516}

6.2.3 The local knowledge argument

The use of regional organisations to authorise humanitarian actions can further be justified on the basis of their knowledge of the cultural, political and geographical terrain. Former UN Secretary-General, Ban Ki-Moon, acknowledges this. According to him, regional organisations are “well positioned to understand the root causes of many conflicts and other security challenges close to home and to influence their prevention or resolution, owing to their knowledge of the region”.\textsuperscript{517} Reference to this unique capacity of regional organisations has been made in several UN reports over the years. In the 2011 UN report on the \textit{Role of Regional and Sub-regional Organisations in Implementing the Responsibility to Protect}, the UN Secretary-General noted that the views of regional bodies should be taken into account when determining the course of action to be taken in particular situations. The report argues that this is because states “that are closer to the events on the ground may have access to more detailed information,[or] may have a more nuanced understanding of the history and culture,[and] may be more directly affected by the consequences of action taken or not taken”.\textsuperscript{518} The substance of this argument cannot be disputed.

\textsuperscript{516} Ibid. p. 4
\textsuperscript{517} Ibid. 13
\textsuperscript{518} See UN Doc A/65/877—S/2011/393. p 3
The knowledge of the terrain, whether in terms of the politics, culture or geography is central to the way threats to international peace and security have been addressed in recent years. For instance, Turkey was encouraged to assume leadership of the International Security Assistance Force (ISAF) in the early months of the conflict in Afghanistan. This was strategic. Turkey being a Muslim majority country was an advantage to the international mission. The shared cultural affinity and historical relationship between Turkey and Afghanistan ensured that Turkish ISAF personnel according to the Zorlu, knew “the Afghans' beliefs and customs to such an extent that they [did] not feel like aliens in Afghanistan”.\footnote{While it is true that Afghanistan does not belong to NATO(and it is debatable whether NATO is a regional organisation, as it does not describe itself as such), the reference to Turkey here is to emphasise the centrality of knowledge of culture and politics to a successful international action. Zorlu, H., (2002). \textit{Turkey Has Been Successful As the Leader of the International Force in Afghanistan}. Available at http://www.washingtoninstitute.org/policy-analysis/view/turkey-has-been-successful-as-the-leader-of-the-international-force-in-afgh [Last accessed 08 May 2017]}

At the same time, the failure to fully grasp local culture and politics has been identified as one of the key failings of the US mission in Iraq. Indeed, the evident and widely publicised shortcomings in the US armed forces’ engagement with the local populace exacerbated the conflict in Iraq. To address this, under the direction of the Chairman of the Joint Chiefs of Staff, the US military command published a Counterinsurgency Framework that now strongly emphasises the need for its military personnel to understand and acknowledge the influence of local norms, practices and politics in sustaining conflicts. But more importantly, the COIN framework advocates the need to adapt conflict resolution strategies and deeply root them in local culture.\footnote{Joint Chief of Staff (2013). \textit{Joint Publication FM 3-24: Counterinsurgency}. Available at http://www.dtic.mil/doctrine/new_pubs/jp3_24.pdf [Last accessed 08 May 2017]}Yet, even with the best intentions, it has had limited success according to many observers.\footnote{See Sisk, R (2013). \textit{COIN Doctrine Under Fire}. Available at https://www.dodbuzz.com/2013/11/19/coin-doctrine-under-fire/ [Last accessed 08 May 2017]; see also, Gventer, C., (2014). Counterinsurgency and its Critics. \textit{Journal of Strategic Studies}, Vol 37, (4) pp. 637-663} For example, it was not able to change the narrative that the US armed forces
were foreign occupiers who had to be opposed because they represented not only a physical but also a cultural threat.

It must be acknowledged that regional institutions offer better prospects. The use of regional institutions as conduits of local information on potential mass atrocity situations and the assumption that they are better placed to understand the underlying causes of conflicts has been widely acknowledged in several UN reports and need not be rehashed. On the other hand, what is important here is to acknowledge that the response to mass atrocity situations could significantly benefit from regional arrangement’s unique understanding of the cultural and political terrain. Indeed, one could extend this argument by insisting that a glaring defect with the Security Council and what it has been criticised for is that its decisions do not sometimes reflect a thorough understanding of the complexities of an emerging humanitarian crisis.

This criticism is best exemplified by the 2011 Libyan crisis. During the negotiations on the texts of resolution 1973, members of the Security Council made routine statements about the potential for the intervention to create further destabilisation in the country. But what is most telling according to Alfredo Toro, of Venezuela’s Permanent Mission to the UN is that members freely admitted that “we do not have information on what is happening on the ground”. This statement does not only call to question the basis of the Council’s decision but provides some insight and enables an observer to contextualise the post-intervention disintegration of the country.

### 6.2.4 The imperialism argument

In the 2001 ICISS report, the commission acknowledges that the legitimacy of intervention can be “tainted by any suspicion that [it] is a form of neo-colonial imperialism”. The ICISS report attempts to address many of these concerns by for instance privileging the responsibility

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522 The representative was privy to the debate at the Council. The interview was conducted with Alfredo Toro at Venezuela’s Permanent Mission to the United Nation on 18 June 2016
523 ICISS report, p. 45
of states over the international community’s right of intervention whilst emphasising the protection duties of all parties. Nevertheless, the charge of imperialism remains a constant feature of the international response to mass atrocity crimes. Evidently, it is because the concept of humanitarian intervention or even the responsibility to protect—despite attempts to emphasise pillars I and II of the doctrine—ultimately undermines sovereignty. It is thus not surprising that critics see humanitarian intervention and its R2P equivalent as backdoor attempts to legitimise western interference in the affairs of subaltern states or the continuation of the racist bifurcation of the world into civilised and uncivilised societies.\footnote{See for instance, Chomsky, N., (2008). Humanitarian Imperialism: The New Doctrine of Imperial Right.\textit{Monthly Review}. Vol 60, (4) pp. 22-50} Academics like Philip Cunliffe even extend this critique by arguing that these doctrines foster some form of paternalism by strong states and denies the agency of weak states.\footnote{Cunliffe, P., (2010). Dangerous Duties: Power, Paternalism and the Responsibility to Protect.\textit{Review of International Studies}, Vol 36, (1). pp 79-96}

But beyond these, for developing states that are often at the receiving end of international interventionist efforts, what is even more critical is to question the institutions and the mechanisms through which these doctrines are implemented. This was the position taken by Alfredo Toro, of the Permanent Mission of Bolivarian Republic of Venezuela to the United Nations in an interview conducted in June 2016. Understanding the basis of the 'perceived' hostility of Venezuela, for instance, can elucidate the arguments I am extending in this section.

According to Toro, Venezuela’s scepticism of the intervention norm springs from its historical relationship with the United States.\footnote{See for instance, Chomsky, N., (2008). Humanitarian Imperialism: The New Doctrine of Imperial Right.\textit{Monthly Review}. Vol 60, (4) pp. 22-50} Over the years, the United States sought to legitimise its interventions and interferences in the domestic affairs of Venezuela by insisting on a humanitarian objective. Toro maintains that although portrayed as such, none of these interventions were humanitarian. In his words, the legacy of the US supposed humanitarian intervention in Venezuela and other Latin America states “makes us a little sceptical when a
superpower, or any of the permanent members of the Security Council, especially those close to the responsibility to protect claim that there is a humanitarian need to go somewhere, we always wonder if there is something behind it”.

According to him, Venezuela is not opposed to the principles of R2P as it were, especially Pillars I and II. Yet, it has been Venezuela’s long-standing policy not to interfere in the domestic affairs of other sovereign states. Furthermore, he takes the view that such issues are best resolved by national and sub-regional authorities.

The statements by Venezuela’s envoy provide an important clarification, which is that it is not the case that the country is hostile to the principles of R2P as many critics argue, but it is critical of the institutional mechanism through which R2P is implemented and the potential for imperialist hijack. In 2014, during an informal dialogue on the responsibility to protect, Venezuela expressed this position unequivocally. It argued that current frameworks and institutions preponderantly reflected Euro-centric views. In an indignant tone, it asked, “are there no institutions whose origins are outside Europe and the United States that can help prevent violence in developing countries?".

Indeed, Bolivia expresses similar sentiments about R2P and neo-imperial practices. In 2013, it admitted that “while the entirety of the international community agrees on prosecuting crimes against humanity, and war crimes, and of course genocide, and while we are all very much aware of this matter, and condemn it, and deplore it, with no exceptions, at the same time, we should note that the concept as it had been understood—the concept of R2P—can be interpreted, and used, or utilised, for the violation of the principles of the UN Charter. It can be

526 Interview with Alfred Toro, of Venezuela’s Permanent Mission to the United Nations on 18 June 2016
527 Ibid
528 Ibid
529 Statement from the Permanent Mission of the Bolivarian Republic of Venezuela during the General Assembly informal dialogue on the Responsibility to Protect. 8 September 2014: Available at: http://statements.unmeetings.org/media2/4493805/venezuela-eng-.pdf [Last accessed 27 May 2017]
used as a means of intervening in the domestic affairs of UN member-states.” 530 Again, Bolivia questions the institutions and mechanisms through which R2P is implemented. It argues, “Who defines or sets the red lines, the lines in the sand when it comes to an intervention?” 531

It could even be argued that Africa’s insistence on African solutions to Africa’s problem is also an attempt to resist neo-colonial interference in the domestic politics of member states. Dan Kuwali observes that Article 4(h) of African Union Constitutive Act takes this principle to an unprecedented level. 532 It challenges the primacy of the Security Council by instituting the African Union as the overarching authority on peace and security matters on the continent. The AU Constitutive Act in some respect provides a clear legal basis for African states to address internal issues without recourse to the Security Council. While the legality of Article 4(h) continues to be a topic of debate, the point for many critics is that Article 4(h) is a restatement of Africa’s commitment to resist imperial practices and interference whilst acknowledging some of the fundamental principles that undergird the responsibility to protect.

The argument that I am making here is that these continuing concerns held by states from the Global South that R2P could be directed towards less than humanitarian purposes ensures that international responses to mass atrocity crimes are sometimes seen as manifestations of neo-imperialism. If the implementation of R2P is to be effective and be more consistently applied, then it is important that the doctrine is not pulled towards different directions and concerns about imperialism do not cloud discussions when mass atrocity situations erupt. I argue that centralising the role of regional institutions in the authorisation of the international response to these crimes addresses concerns about imperialism.

531 Interactive Dialogue on the Responsibility to Protect at the General Assembly, 11 September 2013
These four arguments—the proximity argument, the political will argument, the local knowledge argument and the imperialism argument—together capture the central claim of this chapter, that is, regional organisations are well-primed to act in place of the Security Council because they address several of the shortcomings currently visible with the Council. Their proximity to humanitarian situations ensures that there is not only an interest in addressing the conflict but also helps to galvanise the much-needed political will to act. As I have argued, severe human rights abuses have the potential of creating refugee problems for neighbouring countries. The economic burden and the general threat to regional peace and stability can be strong catalysts for action. Furthermore, the political will to act could also be strengthened by the cultural and historical ties shared by states within the region. Similarly, knowledge of the cultural, political and geographic terrain could help international efforts geared towards addressing a humanitarian crisis.

Having made the case for regional organisations as authorising mechanisms, I must now address some of the possible objections to the arguments I have extended. In the following sections, I critically examine three seemingly strong objections to the use of regional organisations as authorising mechanisms.

6.2.5 The international order objection

One of the strongest objections that can be made against the use of regional institutions comes from pluralists who robustly defend the value of order.\footnote{See Kuwali, D., (2013). The Rational for Article 4(h). In: Kuwali, D., &Viljoen, F., (Eds) Africa and the Responsibility to Protect: Article 4(h) of the African Union Constitutive Act. Routledge.} These critics argue that devolving the authorisation of coercive force destabilises the international order. This is because leaving the judgment to a collection of states, rather than deferring to the UN removes consensus and
certainty from international law. Pluralists emphasise the importance of order among states, and it is the basis for their traditional reticence about norms like humanitarian intervention. I need not rehash the pluralist position here. But what is worth highlighting is that although there is a salient rejection of the use of coercive force among states to pursue notions of justice, there is also a recognition that force can be legitimately used in limited circumstances, mostly to restore international order. However, the Security Council is seen as the only legitimate institution that can authorise such 'exceptional' use of force to address threats to the international order. The idea is that non-intervention or the restriction on the coercive use of force could create a more stable international order.

Tim Dunne argues that the persistence of inter-state wars suggests that pluralism fails in its objective. One could attribute this failure to two factors. First, since the end of the Second World War, the threat to international security has come primarily from within states. Severe human rights abuses have resulted in refugee outflows and destabilised regions. Second, the Security Council, seen as the legitimate authority on the use of coercive force within the international system has been slow to react and adapt to these new realities. Indeed, it could be argued that on the contrary, the actions and inactions of the Security Council have had significant negative consequences on the international order. Several examples abound where the inability of the Security Council to take decisive action further exacerbated the threat to international peace and security. The Rwandan genocide and its destabilising effect on the Great Lake region is a concrete example of how the inaction of the Security Council could contribute to the destabilisation of regional order.

Finally, one could insist that the argument that devolving the authorisation of coercive force creates uncertainty in international law over-exaggerates the potentially destabilising

effects of the regionally authorised intervention in the international order. As Buchanan argues, “international law is not a seamless web: cutting one thread—violating one norm…would not destroy the whole fabric and send us towards chaos”.\textsuperscript{535} This objection is, therefore, difficult to sustain in the face of contemporary realities, for example, the effect of intra-state conflicts on the international order and the recognised incapacity of the Security Council to act adequately to address threats to the international order. I argue on this basis that the international order objection fails.

\textbf{6.2.6 The regional hegemony objection}

David Myers defines regional hegemons as states “which possess sufficient power to dominate subordinate state systems”.\textsuperscript{536} Academic works have examined the utility of regional powers and even their constitutive nature,\textsuperscript{537} but engaging in this debate is not the focus here. What is important to this section is to critically examine if regional hegemons pose a threat to the use of regional arrangements as authorising mechanisms.

Attention has often been drawn to the influence of regional hegemons in the decision-making of many regional institutions. Rodrigo Tavares maintains that the delegation of power to regional arrangements must acknowledge the problem of regional hegemony. This is because as Tavares argues, “it is often the case…that a member state has the political and functional capacity to hijack an organisation to advance its national interests under a legitimate camouflage”.\textsuperscript{538} South Africa in SADC, Nigeria in ECOWAS, the US in OAS, Russia in CIS,

\textsuperscript{538} Tavares, Regional Security, The Capacity of International Organisations. p. 15
India in SAARC are examples of dominant powers whose relationship with their sub-regional arrangements is considered hegemonic.

In the Brahimi report of 2000, the high-level panel noted that regional hegemons pose a threat to conflict prevention efforts. It stated:

there is the understandable and legitimate concern of member states, especially the small and weak among them, about sovereignty. Such concerns are all greater in the face of initiatives taken by another member state, especially a stronger neighbour or by a regional organisation that is dominated by one of its members.  

The report went on to argue that such weak states are likely to “readily accept the overtures of the Secretary-General because of the recognised independence and moral high ground of his position”.  

While there are legitimate concerns about regional hegemons, I contend that these concerns do not significantly undermine the contributions of regional arrangements. In defence, the UNSC is not immune to the threat of hegemony itself. The P5, for instance, have a hegemonic stranglehold on the Council. Ian Clark even argues that within the P5, the US displays a certain level of hegemonic influence. Thus, that some states will have outsized influence over the international institutions they belong to must be accepted as inevitable within the current international system as it is constituted. In truth, when an institution successfully neutralises the influence of its strong members, there is a real potential for such institution to lose its relevance as such members are likely to seek alternative avenues to realise their will. A case in point was the threat by US officials to work outside of the UN system following the fallout over Iraq in 2005. It has even been argued that regional institutions benefit

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540 UN Doc A/55/305—S/2000/809  
from the presence of a hegemon.\textsuperscript{542} Barnett, for example, contends that rather being threats to regional stability and primary source of security dilemmas, hegemons can facilitate collective action and encourage solidarity by leading with power and purpose.\textsuperscript{543} The critical point here, therefore, is that the threat of hegemonic influence is not peculiar to regional institutions nor does it pose an insurmountable threat to the proposal here.

At the same time, a critic could maintain that hegemony within regional institutions is different from hegemony encountered in global institutions like the Security Council. Regional hegemons are often not neutral in conflicts and seek to assert their interests. Academics have disputed whether the presence of national interests delegitimises a humanitarian action.\textsuperscript{544} Pattison, for instance, even admits that the presence of national interests could be a “potential source of political will to undertake humanitarian intervention”.\textsuperscript{545} This position has merits. Indeed, it is my contention that it might be desirable to have an arrangement where intervention is driven more by self-interest than by altruism. It must be acknowledged that an intervener with a humanitarian motive alone is unlikely to commit the resources required to prevent and address egregious human suffering beyond its borders and likely to withdraw from the conflict once it begins to suffer losses. This reality has replicated itself in several humanitarian situations. The response of the US to its losses in Mogadishu in 1993 and Belgium’s withdrawal from Rwanda in 1994 are such examples. Without a doubt, such withdrawal may even exacerbate the crisis as perpetrators of mass atrocity crimes are emboldened by the unwillingness of international parties to engage.

On the other hand, as I argued earlier in this chapter, the proximity to the crisis and the threat of instability ensures that regional parties are committed to addressing the crisis. In 1990,

\textsuperscript{542} Barnett, Partners in Peace? The UN, Regional Organisations and Peacekeeping. pp. 411-433
\textsuperscript{543} Ibid. pp. 422-423
in response to charges that Nigeria was exacting hegemonic influence on the region’s response to the crisis in Liberia, former President, Ibrahim Babaginda, dismissed these allegations arguing, “Our critics tend to ignore the appalling human catastrophe which the Liberian crisis has created for us in this sub-region”.

While I have argued that the proximity to the crisis could instigate a willingness to act by neighbouring states, it is not uncommon that states within a region can take differing positions on a conflict. Indeed, the concern is also that regional hegemons can exert their influence through proxy actors within the host state. In the same Liberian crisis, Ivory Coast’s founding President, Houphouet Boigny, provided arms and financed Charles Taylor’s rebellion while Nigeria was sympathetic to the incumbent government of Samuel Doe. Patrick Regan has argued that such third-party interventions could prolong or exacerbate a conflict. Although Reagan also admits that that under certain conditions, third-party interventions in civil wars can facilitate the end of the violent aspects of the conflict, it is my contention that concerns about the disruptive influence of neighbouring states in a conflict do not undermine the argument of this chapter. The arguments I have extended so far have focused on the collective decisions of a regional body rather the individual actions of its constituent members. Clearly, as with all international institutions, individual members may pursue objectives that run counter to the aim of the group.

Finally, I must respond to the argument about neutrality and the notion that the absence of international participation could result in regional institutions being parties to a conflict. It is

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perhaps worth noting that the UN increasingly recognises the need for coercive peacekeeping and tacitly accepts that neutrality is sometimes impossible and even unhelpful during humanitarian crises.\textsuperscript{549} This change has been reflected in the mandates of UN peacekeeping missions in recent years.\textsuperscript{550} For instance, in the 2011 post-election crisis in Ivory Coast, the UN took a partisan position on the conflict, actively taking actions that strengthened the position of one of the parties to the conflict. It is on this basis that I insist that questions or concerns about neutrality should not undermine the utility of regional institutions as legitimate actors.

\subsection*{6.2.7 The feasibility objection}

One other objection that can be levelled against regional institutions is the feasibility argument. It has been noted that “regional organisations have proved almost as awkward and inflexible as the UN itself”; with practical measures often failing because of a lack of political agreement.\textsuperscript{551} According to Wulf, the lack of common values among most member states of regional institutions militates against effective action.\textsuperscript{552} A critic could insist that the existence of political and cultural differences could have a significant impact on the decision-making process and ensure that a concerted and effective response to the crisis is difficult.

\textsuperscript{550} Another example is the mission in Mali where the Council authorised action ‘in support of the transitional authorities of Mali, to stabilise the key population centres, especially in the north of Mali and …to deter threats and take active steps to prevent the return of armed elements to those areas’. See /RES/2227 (2015)
\textsuperscript{552} See Wulf, \textit{Regional Organisations Capacities for Conflict Prevention}. On the other hand, one could argue that differences are more intense or severe in the UNSC than in regional groups whose common interests are bound by factors such as proximity, historical relationships etc.
This objection is strong and difficult to dismiss. The veracity of this claim is evident in not only the response of SADC to the crisis in DRC in the 1990s but also the AU’s response to the Libyan crisis in 2011. In both cases, member states disagreed on the how the crisis should be resolved as some states favoured diplomacy while others favoured coercive military action.\textsuperscript{553} I admit that differences among member states could undermine the institutional response to the crisis. Yet it is also the case that more often than not, there is at the very least an attempt by regional arrangements to do something—which has been aptly described within the R2P community as a ‘responsibility to try’.\textsuperscript{554} On the contrary, the Security Council has in some cases disregarded the commission of atrocity crimes. For example, despite the escalation of the conflict in Sri Lanka in 2009, the Security Council did not formally place the crisis on its agenda or issue any resolution throughout the duration of the conflict which resulted in the death of 40,000 Sri Lankans.\textsuperscript{555} Similarly, the Security Council rejected calls to get involved in the early years of the conflict in Liberia.\textsuperscript{556}

In recent years, the legitimacy of the Security Council has been undermined by its inability to respond to human rights abuses committed in Palestine and Ukraine despite the pressure from states within the region because of the opposition of the United States and Russia respectively.\textsuperscript{557} The point being made here is that while states within a regional arrangement do


\textsuperscript{556} See Ero, ECOWAS and the Sub-regional Peacekeeping in Liberia

\textsuperscript{557} During Lithuania’s membership of the Security Council, it initiated Security Council meeting on Ukraine eight times and was one of the authors of the draft resolution(S/PV.7498) on the conflict vetoed by Russia. See Ministry of Foreign Affairs of the Republic of Lithuania. (2016). \textit{Lithuania at UN Security Council}. Available at: https://www.urm.lt/default/en/foreign-policy/lithuania-in-the-region-and-the-world/international-organizations/united-
disagree on the appropriate response to a humanitarian crisis or severe human rights abuses, it is usually the case that specific and tangible attempts are made to address the situation. Often times, this is reflected in concerted diplomatic actions taken. In Ukraine, Palestine and Syria, international response and reaction has been held hostage by the politics of the Council. In these cases, the Council could not be said to have upheld its responsibility to try since the vetoes prevented any form of effective response. The responsibility to try is about ensuring that something is done.\textsuperscript{558}

There is also the argument that most regional arrangements lack the institutional structure and resources to effectively respond to the commission of atrocity crimes.\textsuperscript{559} Indeed this argument extends to concerns that the proposal explored here disregards the fact that some regional institutions explicitly enshrine the principle of non-intervention in their constitutive charters. The Association of South-East Asian Nations (ASEAN) and the South Asian Association for Regional Cooperation (SAARC) are two examples of such institutions. For instance, the Charter of the South Asian Association for Regional Cooperation prohibits the discussion of contentious issues. Article X states that “bilateral and contentious issues shall be excluded from the deliberation” of the association.\textsuperscript{560} Bellamy further notes that no official document by SAARC makes any reference to R2P; rather the organisation is more focused on less contentious issues such as poverty reduction, democratisation and regional

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\item[\textsuperscript{558}] Pattison, Mapping the Responsibility to Protect, p.196
\item[\textsuperscript{559}] See Tavares, Regional Security: The Capacity of International Organisations. p. 15. I argue that the incapacity of regional organisations is often exaggerated, and the failures amplified. It is important to note that even when proponents acknowledge the failure of the UN, their conclusions are a lot more forgiving. For instance, there is always a tendency to see the failures of the UN peacekeeping missions as exogenously caused, while questions about operational and bureaucratic capacity are asked about regional institutions like the AU.
\item[\textsuperscript{560}] See the Charter of the South Asian Association for Regional Cooperation. Available at: http://www.saarc-sec.org/SAARC-Charter/5/ [Last accessed 09 May 2017]
\end{itemize}
\end{footnotesize}
cooperation. Although Bellamy again notes that ASEAN has not incorporated R2P principles into its Charter, it is also the case that ASEAN is increasingly showing a willingness to adopt frameworks relating to conflict prevention and resolution. An example is the establishment of the ASEAN Regional Forum which acts as the central security forum for the regional group. At the same time, there are calls within the region for the ARF to do more to implement R2P.

Thus, while I acknowledge that the use of regional arrangements to address the commission of atrocity crimes is difficult in certain regions as a result of the lack of institutional structures for such roles, the secondary intention of this chapter is to instigate academic and policy discussions that consider regional institutions as legitimate alternatives to the Security Council.

Having said this, as I will argue later in the next section, it is not the case that all regional arrangements can legitimately authorise coercive actions. I will outline a set of criteria that should determine which regional arrangements can legitimately do so. In essence, the above critique would not apply because regional arrangements like SAARC are excluded from consideration as authorising mechanisms under the criteria I shall outline.

6.3 Which Regional Organisations?

This chapter has been concerned with making a case for the use of regional organisations to authorise humanitarian actions. However, the proliferation of regional arrangements creates a problem that must also be addressed. Which regional institution has the legitimacy to act in response to the commission of mass atrocity crimes? Indeed, one could argue that this is a restatement of the question about whose responsibility it is to protect. Yet, to adequately respond to the commission of mass atrocity crimes, and effectively implement the

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562 Bellamy and Dunne. The Role of Regional Organisations. p.343
responsibility to protect, he argues that this duty “needs to be assigned to a specific agent”. Whilst I have argued for the legitimacy and the utility of regional institutions as authorising mechanisms, the proliferation of regional institutions with competing jurisdictional claims makes it important to clarify who holds this responsibility among regional institutions. For instance, the Democratic Republic of Congo (DRC) belongs to seven regional organisations, therefore maintaining that regional institutions should authorise action is not normatively helpful.

How then should we decide among these organisations? I argue for a set of criteria. I contend that the legitimacy of an institution to act should be determined by four important conditions. First, a regional institution that has a history of acting in response to mass atrocity crimes should be privileged over others. This is because such institutional experience in responding to humanitarian situations could be crucially brought to bear and could significantly improve the effectiveness of its decisions and actions. Having said this, I recognise that such experience could be unhelpful in making any determination regarding the capacity of a regional institution. As Pattison notes “an intervener may have been effective in the past [but]… might not be similarly effective in the future”. Yet, one must admit that this uncertainty is applicable to every institution. Whilst it is possible that an institution without the requisite experience might act effectively, this determination can in truth only be made post-event. The complex nature of mass atrocity situations, therefore, means that one must defer to institutions that have a valuable depository of knowledge and practices of what works and what does not.

564 Pattison, Whose Responsibility to Protect? p.263
565 The DRC belongs to the Southern African Development Community (SADC); the Economic Community of Central African States (ECCAS); Community of the Great Lake Countries (CEPGL); Common Market for Eastern and Southern Africa (COMESA). See the complete list of DRC’s membership in, Zyck Regional Organisations and Humanitarian Actions. Figure 1, p.7
566 Pattison, Whose Responsibility to Protect? p. 267
Second is geographical proximity. Proximity to the conflict is a condition that is central to the use of regional institutions and one that I have emphasised in this chapter. Indeed, the assumption here is that the threat of regional insecurity performs two enabling functions. It generates the political will to act, and at the same time, it legitimates the claim of member states of their right to act.

Third and related to the first condition is the possession of a peace and security mandate. Regional institutions constituted for the purpose of promoting peace and security or institutions that have incorporated this into their constitutive framework should be privileged over others that are not. These institutions, I contend, have a greater legitimacy to act as a result of their legal mandate.

Fourth, regional institutions that are more inclusive should be privileged in comparison to arrangements with limited membership. The reasoning behind this is that given the possibility that the consequences of instability could affect several states within the region; an institution with a higher representation of states would be a more legitimate actor.

Finally, I must acknowledge that there are cases, albeit limited, where the use of regional arrangements is impracticable as a result of the absence of a go-to regional institution. One of such examples is the human rights situation in North Korea. Inevitably, in cases such as this, the authority to respond and address the commission of atrocity crimes exclusively resides with the Security Council.

**Conclusion**

In this chapter, I have shown that regional institutions can be crucial to ensuring a consistent and effective response to mass atrocity crimes. This is because they are more likely to have an interest in addressing a conflict because of the proximity to the theatre of

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567 There are presently about 38 regional organisations with a peace and security mandate. See Tavares, Regional Security: The Capacity of International Organisations.p.2
conflict, the threat to regional peace and stability, and the economic consequences of regional destabilisation. The greater willingness to act legitimises the use of regional institutions. I also argued on the utility of regional organisations as authorising mechanisms by drawing attention to their capacity to address contentious issues such as imperialism.

Furthermore, I argued that the responsibility held by regional institutions should be exercised by the most legitimate regional actor closest to the conflict. I outlined how such an institution can be determined by considering a range of key factors including the possession of peace and security mandate, a history of acting in response to mass atrocity crimes, geographical proximity and inclusive membership.

Finally, let me state that indeed this might be a crucial time in the life cycle of the R2P norm. A piecemeal, placatory approach (like the Code of Conduct, which has gained serious political traction recently) to solving the problem of mass atrocities would ultimately be unhelpful. It aims low and would not make a significant difference to the way atrocity crimes are approached or addressed. While the failure of the Security Council opens up opportunity for a legitimate discussion about its circumvention, there is a need for bolder and more creative answers on the question of ‘how the international response to the commission of mass atrocity crimes be made more effective and consistent? Legitimising the authorising role of regional organisations would do most to help ensure the prompt and effective response to mass atrocities.

Chapter Seven
Conclusion

The overarching objective of this thesis is to answer a pertinent question in the R2P discourse. How can the response to mass atrocity crimes be made consistent? Indeed it could be argued that the responsibility to protect itself emerged to address this enduring problem. The 20th century has been tagged the bloody century for the sheer number of episodes of political violence. Egregious crimes have been committed against the Armenians, Cambodians, Biafrans, the Tutsis, Muslim Bosniaks, to name just a few. Many of these crimes were committed after the ratification of the Genocide Convention. The international community in many of the cases of atrocity crimes stood idly by while the innocent were slaughtered. Political exigencies often trumped humanitarian concerns. At the same time, the international community developed a penchant for expressing its moral indignation about these atrocities after the fact. As Evans notes, ‘never again’ became a popular refrain among states after each episode of genocide.

The near-universal adoption of the principles of the responsibility to protect (R2P) in 2005 was expected to signal the international community’s Solidarist commitment to addressing atrocity crimes in a consistent and effective manner. It was an admission of the failures of the past, but also a commitment to meeting the humanitarian needs of the future. But the poor record of the application of R2P has tempered the noble enthusiasm that surrounded its adoption. States still commit or allow the commission of serious egregious crimes, and the international community often fails to hold many of these states to account. As with the 20th century, the 21st century has witnessed atrocity crimes in Darfur, Sri Lanka, Myanmar and Syria with tepid international reaction to these events. It is not surprising therefore that some

scholars dispute the normative contributions of R2P to the way and manner atrocity crimes are addressed. The argument is that R2P has added nothing new to the international humanitarian regime. The debate has not only been about the normative merits of the responsibility to protect but also its utility.

The limitations of R2P are evident in the fact that it has not consistently galvanised political action as it was expected to do. However, this does not undermine its utility. The failure of the norm so far can be attributed to the institutional mechanism on which its application depends on. The structure and composition of the Security Council makes it ill-equipped to normatively advance R2P. The Security Council was created in a world reeling from the devastating effects of two costly world wars. The failure of the collective security arrangement of the League of Nations as I discussed in chapter 3 instigated a more hard-line approach in the constitution of the Security Council. The Security Council, in particular, was constructed in a way that prioritised peace among the world’s greatest powers. The privilege of a permanent seat and the powers of the veto solidified the pre-eminence of the victors of WWII and their roles as global peacekeepers. Given that peace was fundamentally conceived of as the

571 According to Aidan Hehir, “R2P did not provide the Security Council with a previously unavailable means by which to sanction military action against Libya”. See Hehir, A., (2012). The Responsibility to Protect: Rhetoric, Reality and The Future of Humanitarian Intervention. Basingstoke: Palgrave. p.14; Simon Chesterman also affirms this point of view. According to him, Resolution 1973 was hardly ground breaking and is consistent with resolutions passed by Security Council immediately after the Cold War. See Chesterman,S., (2011). Leading from Behind: The Responsibility to Protect, the Obama Doctrine and Humanitarian Intervention after Libya, Ethics and International Affairs Vol 25(3) . p.1-7. Having said this, Bellamy argues that rather than conclude that R2P has little prescriptive merit or has contributed nothing of substance; R2P’s value lies elsewhere and this is in its ability to create what has been described as ‘habits of protection’. Habits of protection according to him means that the ‘Council gives consideration to R2P related issues as a matter of routine’. According to him, the ‘international community is getting into the habit of responding in some form to the commission of mass atrocities’. See Bellamy, A., (2013). The Responsibility to Protect: Added value or hot air? Cooperation and Conflict, and Bellamy,A., and Williams, P.D., (2011). The New Politics of Protection? Cote d’Ivoire, Libya and the Responsibility to Protect, International Affairs, Vol 87(4). pp. 825-850.
prevention of war among the major powers, it must be conceded that the Security Council as I argue is ill-equipped to promote the normative ambitions that R2P embodies. Indeed, it should not be surprising that the Security Council has overseen several episodes of mass violence where it was unable to muster an adequate and effective response.

Furthermore, if we concede as I argue in chapter 2 that there is an obligation to prevent and to respond to mass atrocities crimes, then the incapacity of the Security Council poses a problem. The procedural legitimacy of the Security Council as the appropriate institution (as currently constituted) for responding to atrocity crimes becomes doubtful. What then should be the alternative? There are three possibilities that I explore in this thesis regarding the right authority. First, the response to mass atrocity crimes could be improved by reforming the Security Council. Adding ‘new centers of powers’ and ‘new voices’ could ensure that the Council becomes more inclined to responding to atrocity crimes. At the same time, the expansion of the Council could ensure that the institution and its resolutions have legitimacy as both reflect the Solidarist ambitions of the international society. However, as I show in chapter 3, this effort to reform the Council would not bring about a more consistent response to atrocity crimes.

The second approach is to circumvent the Council’s processes as I argue in chapter 4. Two proposals are important in this respect. The first is the idea of the code of conduct designed to restrain the use of the veto and enable the council to respond effectively to atrocity crimes. The second idea is to procedurally circumvent the Security Council through the use of the Uniting for Peace resolution. In the thesis, I argue that the idea of a code of conduct falls short because of strong diplomatic obstacles. In my interviews at the United Nations Headquarters, a number of states dismissed the utility of the code of conduct. India, Brazil and the US were particularly scathing in their assessment of the code of conduct. They argued that
it lacks the substantive capacity to change the calculation of state interest. Similarly, I disputed the ability of the Uniting for Peace resolution to galvanise action without support from key members of the Security Council.

The third approach is to address atrocity crimes by completely working outside of the UN system. In this respect, I examine the idea that a league of democracies is a legitimate alternative to the Security Council. This is because the values that bind members together and which they are likely to promote mirror the substantive values a Solidarist international society is interested in. In the thesis, I argue that the proposed Concert of Democracies might be internally legitimate but it would struggle to convince states from the global south (many of whom are non-democratic or partly repressive) of its procedural legitimacy. At the same time, the Concert might be unable to deliver normative outcomes since evidence suggests that citizens and governments of democratic states are often unable to stay the course and bear high casualty costs during a humanitarian intervention. If as I have argued, the Concert of Democracies is not a procedurally legitimate alternative and would not bring about a consistent and effective response to atrocity crimes, how then can this intractable issue (inconsistency in the response to atrocity crimes) be resolved?

I suggest that regional institutions have a unique legitimacy that makes them ideal as alternative authorising mechanisms. Although their contributions to R2P is mostly conceived of from their Chapter VIII functions (preventative diplomacy and improving the early warning capacity of the UN) and customary practices (peacekeeping and peace enforcement), I argue and show that they are well placed to act as alternative authorising mechanisms. This is because of several reasons. First is their proximity to the crisis; second is their capacity to galvanise political will; third is their knowledge of culture, geography and the politics of the region; and fourth is their ability to address the accusation that authorised interventions under R2P are...
evidence of neo-imperialism. These arguments taken together provide powerful grounds for asserting the legitimacy of the regional institutions, but could also ensure that the response to atrocity crimes is more consistent. This is because as I argue in chapter 6, regional institutions are more likely to address conflicts in their sphere of influence as a result of a multiplicity of factors that include the physical and economic threat posed by instability within a region, and the shared cultural affinity among the peoples.

**Original contribution to knowledge.**

What contribution does the thesis make to the R2P literature and the discourse on mass atrocity crimes? There are two important contributions that this thesis makes. First, it is the first comprehensive study of the proposals for Security Council reform that provides an analysis of their potential contribution to the improved implementation of the responsibility to protect. As I discussed in chapter 1, there are several academic works on the Security Council reform (books, journals and reports), and while many of them only provide a cursory discussion of the reform proposals, none analyzes the proposals in terms of the potential contributions to implementing R2P. This is particularly important since several academic and diplomatic analysts have suggested that a reform to the Security Council is critical to the improved implementation of the responsibility to protect. In chapter 3, therefore, I examined each of the major proposals for reform and assessed their feasibility, contribution to the improvement of the Council’s procedural legitimacy and the implementation of the responsibility to protect. I adopted five key tests in assessing the utility of the proposals. These are:

1. The ‘Veto Problem’: Reflects the enduring problem of the veto, the P5 will continue to possess and exercise the veto (and silent veto). Indeed some proposals like the AU, the L69 and the initial Group of Four proposal insist on the veto for new permanent members. This would exacerbate the veto problem and further undermine the legitimacy
of the Council if the Council remains unable to address atrocity crimes as a result of its use.

2. The ‘Representativeness Problem’: This is a concern about representation on a reformed Council. An enlarged Council of 24 or 25 (which the US deems too large and thus rejects) cannot be considered representative enough especially when the Council would be dominated by countries from the Western hemisphere. Some proposals like the UFC and Kofi Annan’s proposals introduce another dimension to this problem because they do not accept the creation of new permanent seats. This clearly has ramifications for the representation of the Council and its democratic and procedural legitimacy. Indeed, a reformed Council that ‘disenfranchises’ underrepresented regions like Africa and South America could further increase the antagonism of these states to the principles of the responsibility to protect, as they already view R2P as a neo-colonial policy.

3. The ‘Effectiveness Problem’: This is the perception that an enlarged Council would not be ‘prompt and effective’ in its decision-making, as intended in Article 24(1). If the Council is enlarged significantly from 15 to 27, as the L69 proposes for instance, then there is a worry that it would be unwieldy and ineffective. In this sense, the Council would be unable to promptly respond to humanitarian crises or incapable of reaching swift decisions. The US is strongly opposed to the possibility of a significantly enlarged Security Council (which it defines as plan that takes the overall number beyond 21 or 22). The worry again is that a Council that is ineffective and incapable of taking timely and decisive actions in response to atrocity crimes would lose its legitimacy.

4. The ‘Rivalries Problem’: The problem of regional rivalries limits the acceptability of certain proposals. There is no agreement on the states that should occupy the permanent seats. Ascension to permanent membership of the Council ought to reflect international capacity to contribute to the maintenance of peace and security. A Council that reflects
new centers of power could be more effective and respond adequately to atrocity crimes. Regional rivals, therefore, pose a risk to the reform plan by undermining the potential of proposals that aim to add stronger and more capable regional rivals to the Security Council.

5. The ‘Feasibility Problem’: The feasibility problem is the assessment that given the intense disagreements by key stakeholders in the reform process, for instance, the strong opposition of the US to a significantly enlarged Council or the AU’s unwillingness to accept any proposal which does not grant African states two permanent seats with veto rights, the potential of a proposal being adopted is very low. The feasibility problem is perhaps the most significant as it has militated against the reform of the Council since it was initiated in 1992. The feasibility problem also has consequences for the legitimacy of the Council and the implementation of the responsibility to protect. An unreformed Council would lose its procedural legitimacy and the inconsistent response to atrocity crimes will persist.

The second contribution this thesis makes is in the suggestion it makes regarding how a consistent response to atrocity crimes could be achieved. In chapter 6, the thesis argues that regional organisations can legitimately authorise remedial actions in response to atrocity crimes. While this contravenes Article 53 of the UN Charter which insists that regional action (including the authorisation of coercive action) is subject to the prior authorisation of the Security Council, the thesis makes a case for regional organisations based on evidence of customary practices. There is evidence to suggest that regional organisations have acted beyond their Chapter VIII duties. In chapter 5 of the thesis, I show that regional organisations have a long history of conducting enforcement actions with and without Security Council authorisation. Although the evidence presented in chapter 5 mostly reflect a history of enforcement actions, the argument is that these otherwise ‘illegal actions’ provide some basis
for acting outside the Security Council. But more importantly, the legitimacy of the regional arrangements to act independently and without recourse to the Security Council is established by the demands of natural law that prohibits and obligates a reaction to the commission of atrocity crimes. At the same time, if the collective will of the international society is taken as the basis of international law and the obligations derived from it\(^{573}\), then one could insist that R2P which reflects the normative goals of the international society (taken together with the demands of natural law) legitimises the use of regional organisations to fulfil the society’s Solidarist objectives.

In the thesis, I further show how the legitimacy of regional institutions can be constructed from arguments of proximity, capacity to galvanise political will and understanding of local culture, politics and geography. In my discussion of these arguments, I provide extensive empirical evidence to show that regional institutions are better primed to respond to local security challenges. Whereas the Security Council can sometimes be disinterested in a conflict (and this is one of the reasons for its inconsistency), regional institutions are significantly more likely to act, coercively or non-coercively.

### 7.1 Summary of Thesis

In its introductory chapter, the thesis chronicled the emergence of the discourse on the responsibility to protect. It noted the expectation of the international community that the doctrine would instigate a more consistent international response to atrocity crimes. While it was far-fetched that it could end mass atrocities once and for all as Gareth Evans\(^{574}\) suggested, the failure to galvanise prompt international action in Darfur, Sri Lanka and Syria questioned the utility of the doctrine. The chapter established the need to reform the Security Council as the authorising mechanism for intervention. It noted, at the same time, the dearth of academic

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\(^{574}\) Evans, Ending Mass Atrocities Once and For All
publications and policy proposals that comprehensively evaluate the contributions of reform proposals to the responsibility to protect. The chapter laid out the research questions, identified and justified the theoretical perspective that undergirds the thesis.

Chapter 2 theoretically grounded the thesis. Drawing on discussions on procedural and substantive legitimacy of the English School, it engaged in the debate between pluralists and Solidarist scholars of the English school regarding the values the international society promotes. Is it order or justice? The chapter argues that ideas such as humanitarian intervention and the responsibility to protect do not only have conceptual origins in Grotius’ work but reflect the international society’s solidarist leanings. The chapter further drew on empirical evidence to show the normative shift in the priorities of the international society.

In Chapter 3, I critically examined the key proposals for the reform of the Security Council. The chapter provided important background discussion on the politics that gave rise to the Security Council and in this regard, drew attention to the influence of the League of Nations and how the perceived failures of this organisation contributed to the unique structuring of the Security Council. The chapter highlighted the important reform proposals and evaluated their potential contributions to R2P on the basis of six key tests. It judged each proposal on the following issues: (1) The ‘Veto Problem’; (2) The ‘Representativeness Problem’; (3) The ‘Effectiveness Problem’; (4) The ‘Rivalries Problem’; (5) ‘Regional Rivalry Problem’; and (6) The ‘Feasibility Problem’. It showed that each proposal suffers from a variety of problems that limits their contributions to R2P. For instance, all the reform plans are undermined by the Veto Problem.

Chapter 4 considered the idea of a code of conduct as an informal reform method and its impact on the international response to the commission of atrocity crimes and the implementation of the responsibility to protect. The chapter disputed the potential contributions of the CoC to the implementation of R2P on the grounds that naming and shaming of states
which the proposal advocates would not alter the behaviour of states. At the same time, drawing on interviews with diplomats it showed some of the understated concerns of UN
member states about the utility of the proposal. In the chapter also, I examined proposals that
advocate for the circumvention of the Security Council, the Uniting for Peace resolution and a
Concert of Democracies. I determined that the capacity of the Uniting for Peace resolution and
the Concert of Democracies to act when necessary is disputable.

Chapter 5 provided a robust discussion of regional institutions. It started by defining
regional organisations. It noted that the lack of a universally agreed definition of regional
organisations, but highlighted that the Charter references their role in the pacific settlement of
local disputes. This remit of regional organisations in Chapter VIII should guide our
understanding. I then argued that they are best conceptualised as a composition of a limited
number of countries who as a result of common interests -- including geographical proximity --
bound themselves to a formal treaty to regulate their relations and to promote such objectives
they consider vital to the principles and purposes of their association.\footnote{A critic might argue that this definition excludes an organisation such as NATO whose membership is partly based on geographical contiguity, but which includes non-regional members. Joseph Nye argues that such organisations as NATO whose membership is not principally based on geographical proximity are best described as quasi-regional organisations. According to Tavares, the UN recognises this definitional conundrum, hence it named its "sixth and seventh high-level meetings as being on the cooperation with regional and other intergovernmental organisations" see Tavares, R.,(2010) Regional Security: The Capacity of International Organisations. Abingdon, Oxon: Routledge. p. 12; see Nye, International Regionalism.} The chapter also
outlined the roles played by regional organisations within the discourse on implementing R2P.
But more significantly, the chapter provides empirical discussions to show that regional
institutions have a long history of responding to localised security challenges.

In chapter 6, I defended the potential role of regional organisations. I made a normative
case for the use of regional institutions on the basis of (1) the proximity argument; (2) locale
knowledge; (3) imperialism argument; and (4) political will. Three key objections that can be
made against regional organisations were extended. Finally, I outlined a set of criteria that should determine which regional organisations are considered legitimate actors during mass atrocity situations.

Ultimately, this thesis has been about improving the response to atrocity crimes. The use of regional institutions as I have demonstrated holds the most promise. Legitimising their role in authorising a response to mass atrocity crimes as I have argued in this thesis is urgently required if the hopes of the responsibility to protect are to be realised.
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