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A responsibility to reality: a reply to Louise Arbour

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Abstract. Louise Arbour presents a pleasant picture of international society in her article on 'Responsibility to protect' (R2P) as a 'duty of care' – one where states not only have a moral responsibility but also a legal responsibility to intervene in some of the worst situations on the planet. However, this argument is misleading and based on faulty legal assumptions which pose significant problems for Arbour's case. This response will argue that upon examination, Arbour's legal case is not very strong or persuasive. Even more importantly, even if we accepted Arbour's legal arguments, it would not make much of a difference to how states respond to international crises. Arbour seems to misunderstand that the problems facing R2P have always been those of 'will' and not law – and this must be understood as a political rather than legal problem.

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It is with some trepidation that one challenges the understanding of both international law and politics of a former prosecutor of an international criminal tribunal, but the intention of this article is to do just that. Certainly, Arbour paints a nice picture in her article on 'The responsibility to protect' (R2P); a world where states not only recognise that the international community has a duty to protect their own citizens and the citizens of other countries from war crimes and genocide – but also that there may in fact be a legally enforceable duty to do so. In fact, no one is allowed to claim the status of 'impotent and powerless bystander'.[1] Yet, bursting this bubble of legal optimism is the fact that her arguments are based on legal assertions which are questionable or, at the very least, a problematic assessment of the politics of international law. Again, given Arbour's pedigree, I do not say this lightly. However, Arbour's contentions create a gap between

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[1] Louise Arbour, 'The responsibility to protect as a duty of care in international law and practice', *Review of International Studies*, 34 (2008), pp. 445–58, 445.

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understandings, expectations and capabilities (including willingness) so great as to cast a shadow over her legal thought-experiment.

This article will make three challenges to Arbour's assertion that states may have signed up for a legally-liable responsibility to protect. First, that legally there is no obligation and Arbour is incorrect to rely so heavily on the 1948 Genocide Convention and the recent International Court of Justice's (ICJ) 2007 decision in Bosnia-Herzegovinia vs. Serbia and Montenegro (*Bosnian Genocide Case*).[2] Second, even if such an obligation could be construed, it would not be a helpful or useful tool of international politics for R2P advocates because it does not help us answer the hard questions of R2P. Third, while there needs to be more research and academic commentary on R2P, this research is best done with a 'responsibility to reality' – that is R2P advocates must work within an imperfect world and UN system where this revolutionary idea remains an essentially contested concept. Attempts to create a legal entrapment for states out of a hodgepodge of international treaties and newly emerging norms do not actually advance the cause of R2P.

Legal liability?

Arbour predominantly rests her argument on Article 1 of the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948 (the Genocide Convention). This is the article which confirms 'that genocide, whether committed in time of peace or in time of war, is a crime under international law' and that signatories to the Convention will 'undertake to prevent and to punish'. Arbour's emphasis is on this last point, noting that this is 'an undisputed obligation of international law'.[3] This is combined with the decision in the *Bosnian Genocide Case* to provide an argument that there has emerged an international legal 'duty of care' when it comes to stopping the crimes outlined in R2P. For Arbour, the judgement which found that Serbia and Montenegro had failed in its obligation to prevent Genocide in neighbouring Bosnia, has strong implications for all states:

> Might the judgement [. . .] also carry responsibilities not only for Serbia and its surrogates in Bosnia Herzegovina, but also to other States parties to the Convention, and indeed to the wider international community? Certainly the logic of the judgement would suggest such an assumption.[4]

She continues this line of reasoning regarding the responsibilities of the great powers of the Security Council:

> If [the responsibility of the Permanent Five Members of the UN Security Council] were to be measured in accordance with the International Court of Justice's analysis, it would seem logical to assume that a failure to act could carry legal consequences and even more so

[2] International Court of Justice, *Case Concerning the Application of the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina vs. Serbia and Montenegro)*, General List, no. 91 (26 February 2007), available at: {http://www.icj-cij.org/docket/files/91/13685.pdf}.
[3] Louise Arbour, 'The responsibility to protect', p. 450.
[4] Ibid., p. 451.

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when the exercise or threat of a veto would block action that is deemed necessary by other members to avert genocide, or crimes against humanity.[5]

There are three problems with this line of reasoning. First, The International Court of Justice's decision in the *Bosnian Genocide Case* indicated that responsibility for the failure to prevent genocide only exists if genocide (or any of the activities outlined in Article III of the Convention) actually occurs.[6] This is relatively straightforward; it would be bizarre to prosecute a country for failure to prevent an action which never happens. But given the difficulty of actually recognising the occurrence of genocide as defined in international law, this also seems highly problematic. That ICJ judges recently rejected Prosecutor Luis Moreno Ocampo's argument to charge Sudanese President Omar al-Bashir with genocide because there was not enough evidence is a good example of this.[7] The crime of genocide requires proof of a special intent (*dolus specialis*) whereby the crimes committed must be done with the intent 'to destroy, in whole or in part, a national, ethnical, racial or religious group'. Without evidence of this special intent, genocide, by definition, cannot be said to be taking place. Bashir is, of course, accused of other international crimes, but, significantly, there seems to be a serious problem with Arbour's argument if the starting point for her obligation is frequently difficult and sometimes impossible to apply given its tricky definition.

To be clear, this is not to imply that the declaration of genocide must be *ex post facto*. The ICJ found that the plausible risk of genocide was sufficient to trigger a duty to prevent.[8] However, this does not take away from the fact that the risk must actually be 'real' (as far as risks can be). Yet the Court did not really indicate as to how such a determination was to be made or which criteria were to be used. The judgment does say that the Serbian government 'could hardly have been unaware of the serious risk' of genocide, and refers to facts that certain government officials likely knew that certain actions were going be taken as evidence.[9] Whether or not this constitutes a legal standard is not clear – or if it does, it remains a vague one. Therefore, the contention here is that the fundamental problem of determining the risk or existence of a genocide in order to trigger an international legal obligation to prevent largely remains.

Secondly, the ICJ recognised that the Genocide Convention is not the only legal instrument which creates a legal obligation for an activity for states to prevent. Rather, there are similar obligations for states to take measures against torture, harm against internationally protected persons and terrorism.[10] However, the

[5] Arbour, Ibid., p. 453.
[6] Judgement, para. 431.
[7] Although the judges argued that these charges could be reinstated with more evidence. On appeal genocide charges were issued against al-Bashir in a second warrant in July 2010. See the press release 'Pre-Trial Chamber I issues a second warrant of arrest against Omar al-Bashir for counts of genocide', International Criminal Court website (12 July 2010). Available at: {http://www.icc-cpi.int/NR/exeres/E9BD8B9F-4076–4F7C-9CAC-E489F1C127D9.htm}.
[8] Judgment, para. 430.
[9] Ibid., para. 436.
[10] Specifically, the Court acknowledged: the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984 (Article 2); the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, Including Diplomatic Agents, of 14 December 1973 (Article 4); the Convention on the Safety of UN and Associated Personnel of 9 December 1994 (Article 11); the International Convention on the Suppression of Terrorist Bombings of 15 December 1997 (Article 15). Judgement, para. 429.

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Court limited its judgement in an important ways that Arbour does not seem to acknowledge. The Court was clear that it did not 'purport to establish a general jurisprudence applicable to all cases where a treaty instrument, or other binding legal norm, includes an obligation for States to prevent certain acts.' Additionally, the Court refrained from finding that 'apart from the texts applicable to specific fields, there is a general obligation on States to prevent the commission by other persons or entities of acts contrary to certain norms of general international law.' Therefore, the Court confined itself to making its determination in the *Bosnian Genocide Case* to 'the specific scope of the duty to prevent in the Genocide Convention'. The application of the decision to create a legal principle of R2P seems contrary to the Court's pronouncement.[11]

Consequently, the level of precedent-setting for this decision, at least in the way that Arbour wants to use it, is very questionable. In fact, it is very strange that she relies on the judgement so heavily after such a warning by the Court was given. That international lawyers are often creative in their uses of the law or in their interpretations is one thing, but in this case, the Court seems rather clear about its intention and on the limitations of its judgement. While it is, perhaps, indicative of the kinds of findings the ICJ or other international criminal tribunals may produce in the future, Arbour should have been clearer about the Court's position on the uses of the judgement and her intention in invoking the decision as a basis of her claims.

Finally, and this is, perhaps, the most straightforward critique, is that while there can be little doubt that the Convention states that parties undertake to prevent genocide, the guidance as to what exactly 'prevent' means is not particularly useful. The Convention states that any contracting party may 'call upon the competent organs of the UN to take such action under the Charter of the UN as they consider appropriate.'[12] In other words, 'prevention' in the Convention is understood as bringing the matter back to the UN Security Council and General Assembly – the very problematic (or at least ineffective) forums which R2P advocates are seemingly trying to cajole into action. This is even more so in highly politicised cases which may divide the international community.

Additionally, there is no guidance as to who should make a determination that genocide is to take place, who should prevent it and what kind of international approval they would need. As Arbour points out, the Court did offer some guidance on these issues – but essentially this amounts to vague calculations of an obligation arising 'at the instant that the State learns of, or should normally have learned of, the existence of a serious risk that genocide will be committed.'[13] As for who should do the intervening, the Court in the *Bosnian Genocide Case* suggests a fuzzy combination of factors comprising a 'capacity to influence' made up of geographical proximity, political links, 'as well as links of all other kinds, between the authorities of that State and the main actors in the events'.[14] Despite Arbour's assertions, the reality is that this list is not very specific and not very helpful. Certainly none of this seems to constitute a clear, direct nor novel legal standard.

[11] Judgement, para. 429.
[12] 1948 Convention on the Prevention and Punishment of the Crime of Genocide, Article VIII.
[13] Judgement, para. 431.
[14] Judgement, para. 430.

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The hard part

But this brings us to the second major critique of Arbour's argument – that even if a legal obligation could be established, the model that Arbour suggests is not helpful because such an obligation could not truly provide any guidance on the 'tough' questions about R2P. Just some of these questions include exactly who may intervene, under what kind of mandate, for how long and where – questions which have plagued debates over humanitarian intervention for decades. Can international law really help us answer them?

Two points may be raised here which suggest not. First, it is one thing to establish a law, principle or even a norm – it is quite another to change practices. As the saying has it, 'old habits die hard' – and this is also true for international bodies like the UN. As Alex J. Bellamy (a strong R2P advocate) writes, even when the international community is armed with criteria:

> [D]ecisions about intervention will continue to be made in an ad hoc fashion by political leaders balancing national interests, legal consideration, world opinion, perceived costs and humanitarian impulses – much as they were prior to the advent of R2P.[15]

If we have learned anything about international law in the last 20 years, if not the last century, it is that its existence rarely delivers consensus.

Yet, for the sake of argument (and the second point), let us assume that Arbour's case for the establishment of a 'duty of care' is broadly accepted by the international community. Other than establishing this liability, what else does Arbour's argument help us decide about R2P? The answer is not much. Of course establishing that states now have a burden to 'take action under the doctrine of responsibility to protect'[16] might be a small step forward, but other than this, it does not help international society answer the really difficult questions concerning the commitment required of states or over authorisation and participation.

Bellamy suggests that there are at least four major problems with prevention in terms of R2P: (1) it is difficult to discern measures which are directed specifically at preventing the international crimes listed by R2P (genocide, war crimes, crimes against humanity and ethnic cleansing) and those which relate more broadly to conflict prevention more generally; (2) there is an absence of limits on what exactly constitutes prevention (which may make states reluctant to commit themselves); (3) do preventative measures lead to additional encroachments on sovereignty; and (4) who should do the prevention work? As it stands the doctrine is unclear as to what sorts of agencies should take the lead.[17]

The establishment of a duty of care under a doctrine of R2P does not help establish answers to these questions. While the decision in the *Bosnian Genocide Case* does provide some rough guidance (as discussed above), this is of much less use and direction than Arbour implies. Bellamy suggests that part of the problem is that the understanding of 'prevention' in the 2001 R2P report issued by the International Commission on Intervention and State Sovereignty (ICISS) was concerned with internal wars more generally as well as other man-made crises

[15] Alex J. Bellamy, *Responsibility to Protect: The Global Effort to End Mass Attrocities* (Cambridge: Polity, 2009). p. 3.
[16] Arbour, 'The responsibility to protect', p. 449.
[17] Bellamy, *Responsibility to Protect*, pp. 99–100.

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compared to the rather narrow international criminal focus in the 2005 World Summit outcome document.[18] The prevention requirements of the former understanding of R2P would, out of necessity, require a much wider focus, but whether this could be said for genocide, war crimes, ethnic cleansing, etc., is questionable.

This is not to say that the Court's judgment rendered the understanding of Article 1 of the Genocide Convention less clear or more confusing. Rather, it is to suggest that the Court's judgment may be significantly less novel and important that what Arbour is suggesting in her argument. If R2P is to become some sort of basis for international action or transformed into a legal principle, (based on Arbour's reading of the Judgment in *Bosnia vs. Serbia*) the questions outlined above are the ones that international lawyers will still have to wrangle with. In this way, Arbour's obligation seems to be little more than papering over a giant chasm of disagreements between R2P stakeholders. With all of the right intentions, it is still a roadmap to nowhere that gets us only a little past the first of many, many intersections.

Realistic R2P?

Answers, or compromise solutions, to these difficult questions will probably not be worked out in law so much as they will be determined through negotiations at various international organisations. This is something I am sure Arbour is aware of. Yet, a third line of critique which can be raised against her assertions is that Arbour is, at the very least, ignoring certain facts of world politics to the great detriment of her argument. At the end of the day the effective realisation of her legal thought-experiment entails a remaking of the world order. If nothing else, it would require a further revolution in the notion of state sovereignty – certainly beyond that which the Non-Aligned Movement and certain great powers like the US would be comfortable with.[19] There can be no question that R2P is a revolution in the notion of 'sovereignty', but translating this into a legally enforceable responsibility is, politically speaking, taking R2P to a whole new level. Whether such a revolution could be brought about in the present day and age by a group of lawyers and R2P advocates is highly suspect. Certainly a fairly small group of diplomats, politicians, international bureaucrats and activists were highly successful in getting the issue on the agenda at the 2005 World Summit. However, the long and arduous process of negotiation process required to get a very slimmed down version of R2P (derisively or depressingly referred to as 'R2P Lite') in the World Summit Outcome document as well as certain scepticism over the concept suggests that, at least for now, there are limits as to how far the doctrine can go. As Gareth Evans has written, by 2008 the Latin American, Arab and African delegates to the UN's budget committee flatly denied that R2P was even ever adopted by the General Assembly.[20]

[18] Bellamy, *Responsibility to Protect*, p. 100.

[19] In speaking off-record with government officials from the UK and US familiar with this issue and in a position to know, they all remarked that their governments would not have signed the World Summit Outcome Document if they felt it created a legal obligation for their state to intervene in a crisis. Interviews conducted by the author, London/Washington 2009.

[20] Gareth Evans, 'The Responsibility to Protect: An Idea Whose Time Has Come . . . and Gone?', *International Relations*, 22:3 (2008), pp. 283–298, 288.

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Is it then fair to speak of a 'responsibility to reality'? Reality is, of course, subjective and notoriously hard to judge. However, what does seem to be very clear is the fact that R2P advocates are going to have to work within a political system to achieve their goals rather than creating contrived legal obligations through stringing together vague and unenforceable laws and/or case law. It is very much a political system that allows for much scepticism, obstruction and provides for a lot of frustration. Yet, that some lawyers, like Arbour, often seem to want to leap over this international political system through asserting a supposedly neutral law is not, in the end, helping their cause. Additionally, it is not helping to solve the larger problems posed by the issues of sovereignty and intervention in the 21st Century. After its adoption by the World Summit in 2005 and the Security Council (Resolution 1674) in 2006, it is fair to say that R2P is an emerging principle in international society. Even better, it may yet work in creating a common language in which action may be debated and plans to help solve some of the world's worst problems may be asserted. R2P may actually work – but it is difficult to imagine that it will work in such a way as to effectively trap states into obligations into which they have not given their consent.

During the negotiation process leading up to the World Summit, the US consistently resisted the argument that the international obligation to protect was on the same level as the domestic duty of states. The notion that the Security Council could also be legally obliged to intervene was also criticised with then-US Ambassador to the UN John Bolton asserting that there needed to be the freedom to decide on courses of action on a case-by-case basis:

> The UN member states recognised their responsibility to protect their own citizens but *did not* recognise a responsibility to act beyond using peaceful means in cases of mass killing, genocide and ethnic cleansing. Instead, they simply reaffirmed their *preparedness* to use other measures if they saw fit – a significantly lower standard.[21]

If, as Bellamy suggests, the problem with humanitarian intervention is one of willingness rather than ability or even obligation to do so, asserting that a legal duty of care exists will accomplish little. The problem of 'will' should be understood as a problem of politics and not a problem of law.

Conclusion

Ultimately, the intention in this article is to not be defeatist but pragmatic. There can be little doubt that engagement with states on the brink of major catastrophe is good for all involved. The great hope of R2P is that it will provide a language for debate when it comes to addressing genocide and war crimes. Still, given these dilemmas that will inevitably arise, I do not think that sending in the lawyers is a good solution.

The difficulties of Arbour's argument go beyond a general concern as to what is the best approach for implementing R2P. It rests on particular interpretations of both the Genocide Convention and international criminal law that are far from unimpeachable. But even if we were to allow for Arbour's legal argument, it is

[21] Bellamy, *The Responsibility to Protect*, p. 90.

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questionable as to how useful the founding of such an obligation would be for the international community.

It is not that establishing a legal obligation would hinder the implementation of R2P. Rather, the argument here is that Arbour's legal construction really does not bring anything new (that is practical) to the table. In truth, given its 2005 manifestation in the World Outcome Document, this may be a critique that could be levied at R2P in general – that, as indicated above, it does little else than provide a new vocabulary in which to discuss old issues.

However, keeping the focus on Arbour, it is clear that the supposed novelty of her argument is to suggest that states are under a legally enforceable 'duty of care' to which they may be held to account in cases of genocide and crimes against humanity. A summary of a response here is that such an obligation cannot really be said to legally exist. Additionally, such an obligation, even if it did exist, would not be particularly useful because other than establishing a 'duty', it does not really answer the 'hard questions' of R2P (such as who may or must intervene, where, when and under whose mandate). These are the giant obstacles that have thus far prevented meaningful action in cases where human security is threatened.

Of course, Arbour does not suggest that the judgment in *Bosnia vs. Serbia* and its implications will solve all political problems related to intervention and R2P. However, it is clear that she feels that such a legal obligation offers new norms, guidance and obligations in international society for states, particularly powerful states, faced with the possibility of a case of genocide. Arbour's contention that states are now under a legal 'duty of care' to prevent and punish genocide and crimes against humanity, can therefore be read as a radical theoretical challenge to notions of sovereignty and the understanding of the responsibility of states.

But practically speaking, her proposal does not add much in the way of clarity or usefulness in answering the tough questions of R2P. In addition, such an obligation would, without a doubt, be rejected by states who continue to be caught-up in the deficient practice of international politics and their own self-interest. This is particularly so when one considers that any fulfilment of her legal proposition is likely to bring the matter right back to the very institutions which have thus far proved inept and ineffective at preventing threats to human security, particularly the UN. In this sense, Arbour's argument actually becomes less novel and perhaps an almost tragic idea. The establishment of legal liability on neighbours or great powers will not get bickering states past the big challenges of R2P, such as what constitutes 'prevention'?, who is responsible?, and what may be done to effectively carry out 'prevention' while working within the framework of the UN Charter? Such challenges will likely be solved in an *ad hoc* manner, in times of urgency, by less-than-perfect international political forums. Advocates of a realistic responsibility would do well to keep this in mind.

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