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Can the Law Help?

Debating Security Council Inaction on Syria

Katja Creutz
The Finnish Institute of International Affairs

ULKOPOLIITTINEN INSTITUUTTI
UTRIKESPOLITISKA INSTITUTET
THE FINNISH INSTITUTE OF INTERNATIONAL AFFAIRS

Katja Creutz
Senior Research Fellow
The Finnish Institute of International Affairs

The Finnish Institute of International Affairs
Kruunuvuorenkatu 4
FI-00160 Helsinki
tel. +358 9 432 7000
fax. +358 9 432 7799
www.fiia.fi

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SUMMARY

The inaction of the UN Security Council with respect to the Syrian crisis has generated widespread aversion. Decision-makers and international humanitarian organizations have debated the particular aspects in which the Council has failed to take measures, such as the widespread abuses that civilians are suffering in the war and the prevailing impunity of the violators.

International legal scholars have, however, debated whether the Security Council could be legally obliged to act in respect of a mass atrocity crisis. This represents a novel departure from the established idea that the Security Council has the right to act. Although this emerging position is controversial, it shows that the argumentation in connection to Security Council inaction is toughening up through increased resort to hard law.

Many, but not all, of the advocates for imposing a duty to act on the Security Council refer to the Responsibility to Protect norm. But the exact measures that fall under the scope of the duty to act remain unclear and context-bound: there can be no specific elaboration of what the Security Council must do. The most concrete discussion has related to the limitation of the veto use of the five permanent members. Yet, the international debate does not shy away from discussing the legal consequences of Security Council inaction for the organ itself, or its member states.

Until now, few scholars have sought to analyse if resort to law really can be beneficial to the overall goal of making the Security Council react to mass atrocity situations. This analysis therefore strives to discuss the elements of the debate and to answer the question 'Can the law help?' in remedying inaction. It will be posited that the law is no panacea when it comes to resolving when or by what means the Security Council should react when it comes to atrocity crimes. Its main value lies in building a decision-making environment in the Security Council which is open, explanatory and dialogue-based.

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Introduction

The uprising against Syria's ruling regime, which started in spring 2011, has turned into one of the bloodiest wars fought in the twenty-first century. Hundreds of thousands have been killed and up to four million refugees have fled the fighting that has been characterized by the use of illegal weapons, extreme suffering and brutal warring parties.

The Syrian conflict has been on the United Nations Security Council's agenda since 2011. Yet the Council has failed to undertake robust action in response to the situation, which clearly poses a threat to international peace and security. In its resolutions on Syria, it has *inter alia* called for the implementation of the so-called Geneva Communiqué, a six-point peace plan of the joint special envoy of the UN and the Arab League;[1] it has established a supervision mission in Syria (UNSMIS);[2] it has condemned the use of chemical weapons and endorsed the removal and destruction of Syria's chemical weapons as agreed between the United States and Russia;[3] it has urged all parties to the conflict to allow and facilitate humanitarian relief;[4] and it has repeatedly stressed that the warring parties must stop all violations of international humanitarian law and human rights.[5] Sanctions against the Syrian leaders have, however, been vetoed by Russia and China,[6] as have demands for the implementation of a peace plan set forth by the League of Arab States.[7] The same permanent members of the Council have also repeatedly blocked a referral of the Syrian situation to the International Criminal Court.[8]

In March 2015, over twenty international humanitarian organizations issued a common statement accusing the United Nations Security Council of insufficient action and of failing to implement resolutions that had already been adopted. The organizations declared that the situation has worsened: 'Despite passing three UN Security Council Resolutions in 2014, violence in Syria has intensified, killings have increased, humanitarian access has diminished, and the humanitarian response remains severely and chronically underfunded'.[9] Moreover, the Council was faulted for upholding a culture of impunity since all the perpetrators

1 UNSC Res. 2042 (2012) (Middle East), adopted 14 April 2012.

2 UNSC Res. 2043 (2012) (Middle East), adopted 21 April 2012.

3 UNSC Res. 2118 (2013) (Middle East), adopted 28 September 2013.

4 For example, UNSC Res. 2165 (2014) (Middle East), adopted 14 July 2014.

5 For example, UNSC Res. 2139 (2014) (Middle East), adopted 22 February 2014.

6 Russia and China have blocked sanctions or the threat thereof, e.g. in October 2011 and July 2012. See UN News Centre, 'Security Council Fails to Adopt Resolution on Syria', 19 July 2012, www.un.org/apps/news/story.asp?NewsID=42513#.Ve_QRvm4WvE (accessed 9 September 2015).

7 United Nations, 'Security Council Fails to Adopt Draft Resolution on Syria as Russian Federation, China veto Text Supporting Arab League's Proposed Peace Plan', 4 February 2012, www.un.org/press/en/2012/sc10536.doc.htm (accessed 9 September 2015).

8 This last happened in May 2014. See UN News Centre, 'Russia, China Block Security Council Referral of Syria to International Criminal Court', 22 May 2014, www.un.org/apps/news/story.asp?NewsID=47860#.Ve_Ppvm4WvE (accessed 9 September 2015).

9 Martin Hartberg, Dominic Bowen and Daniel Gorevan, *Failing Syria. Assessing the Impact of UN Security Council Resolutions in Protecting and Assisting Civilians in Syria*, March 2015, at 5. The report is available at: www.oxfam.org/sites/www.oxfam.org/files/file_attachments/bp-failing-syria-unsc-resolution-120315-en1.pdf (accessed 9 September 2015).

of mass atrocities in Syria remain unpunished. The organizations also blamed the members of the Security Council for inadequate support in finding a political solution to the conflict.

The criticism levelled at this organ is unprecedented in the twenty-first century and is obviously not without justification. Different actors ranging from civil society to state leaders and scholars have all in one way or another taken part in the debate on what has gone wrong and why, as well as what needs to be done about the deadlock in the Security Council. The current debate on Security Council inaction in Syria is crucial in many ways, since it is widely acknowledged that the Council has at times failed to act and will probably do so in comparable situations in the future as well. Different positions are discernible in the international debate on what is to be done about the Council's failure to act. First, there are those who claim that there is no alternative to inaction and that there is simply nothing that can, or even should be done;[10] an alternative position is to transfer the obligation to act to another actor such as a regional organization or a coalition of the willing; and a third position is to say that the Security Council should not be allowed the route of inaction.[11]

The perception that the Security Council is under an obligation to act proliferates among international legal scholars. The debate increasingly turns to hard law for solutions in order to overcome political decision-making and the interests it represents. What is seldom discussed, however, is whether the law can help to begin with. This analysis aims to present the main features of the debate on the Security Council's inaction, arguing that the debate is toughening up through an increased resort to hard legal argumentation where the focus is not on the right to humanitarian intervention, but on the duty to take action in mass atrocity situations. It will present and discuss the different elements of the debate, such as efforts to impose a duty upon the Security Council to act, the debate on veto practices, and how the discussion on the consequences of inaction has moved from shaming to legal implications. By way of conclusion, the analysis will discuss the usefulness of the law in limiting political decision-making in order to better serve the needs of humanity.

The responsibility to protect as a unifying concept

Following the failures in Bosnia, Rwanda, Kosovo and Darfur, there was extensive debate on the right of the Security Council to intervene in sovereign states on humanitarian grounds. This debate had a stark legal dimension to it because it sought to establish boundaries for Security Council action in order to ensure that humanitarian intervention would not be engaged in too lightly. The contemporary debate has a different ambition, namely to guarantee that action is taken. In other words, the Syrian question has stressed the importance of establishing limits for Security Council *inaction*.

This change in approach is partly due to the development of the Responsibility to Protect (RtoP) norm, which in itself was a reaction to the failures to stop the genocides and mass atrocities of the 1990s. The RtoP is a controversial norm or concept, which was first articulated in a report by the International Commission on Intervention and Sovereignty in 2001.[12] What this means is that the state

10 See, for example, Sara Davies and Alex Bellamy, 'Don't Be Too Quick to Condemn the UN Security Council Power of Veto', *The Conversation*, 12 August 2014.

11 Paul R. Williams, J. Trevor Ulbrick and Jonathan Worboys, 'Preventing Mass Atrocity Crimes: The Responsibility to Protect and the Syria Crisis', 45 *Case Western Reserve Journal of International Law* (2012) 473–503.

12 Report of the International Commission on Intervention and State Sovereignty, The Responsibility to Protect, December 2001, available at: responsibilitytoprotect.org/ICISS%20Report.pdf (accessed 15 May 2015).

has a responsibility to protect its population from widespread harm. Should the state fail to do this, the international community should step in and protect the people from atrocities. Although the principle stresses preventive action and capacity-building, it also potentially includes the use of force as a last resort to protect populations.

The norm has been endorsed by the UN and many of its member states,[13] yet it is also conceived of as a possible interventionist tool for imperialist politics. In the 2005 World Summit Outcome document it was stated that 'the international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means...to help protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity'.[14]

The document further laid down that Chapter VII powers could be invoked 'to take collective action, in a timely and decisive manner, through the Security Council' in order to meet these responsibilities.[15] The unclear status of the RtoP norm fuels contradictory positions, leaving it open as to what is actually to be done and whether the obligation to act is moral, political or legal in nature.

But not all those seeking to impose a duty to act on the Security Council do it in the name of the RtoP. Some are also vocal in pointing out that an obligation to act is no novelty.[16] Their arguments are based on clearly existing legal obligations upon states and the United Nations, which makes the argument less troublesome, but not uncontroversial. They see the RtoP more as a 'marketing strategy' than a hard legal norm.[17] Irrespective of the bases for demands for Security Council action, either the RtoP norm or general international law, they share an understanding that the Security Council must take action in situations like Syria. In the following, this standing will be explored from both principled and practical viewpoints.

The Security Council as a duty-bearer

International legal scholars increasingly submit that the Security Council is not only entitled to take action in response to threats to international peace and security, but is actually under an *obligation* to do so. The novel feature of the debate is not supported by a literal reading of the UN Charter, which recognizes that the Security Council 'may decide on measures' or 'may take action' in response to such threats.[18] Neither does it find support in the declaration issued by the five permanent members of the Security Council (P5) at the adoption of the UN Charter in 1945 when they stated that they cannot be assumed 'the obligation to act'.[19] The quest for real change indeed seems to

13 The 2005 World Summit Outcome Document, UN Doc. A/RES/60/1, 24 October 2005, paras 138–139. See also the Report of the Secretary-General Ban-Ki Moon on 'The Implementation of the Responsibility to Protect', UN Doc. A/63/677, 12 January 2009.

14 The 2005 World Summit Outcome Document, UN Doc. A/RES/60/1, 24 October 2005, at para. 139.

15 Ibid.

16 Peter Stockburger, 'Emerging Voices: Is the R2P Doctrine the Greatest Marketing Campaign International Law Has Ever Seen?', *Opinio Juris*, Blog Post, 23 August 2013, available at: opiniojuris.org/2013/08/23/emerging-voices-is-the-r2p-doctrine-is-the-greatest-marketing-campaign-international-law-has-ever-seen/ (accessed 15 May 2015).

17 Ibid.

18 See Arts 41 and 42 in the UN Charter.

19 Statement by the Delegations of Four Sponsoring Governments on Voting Procedure in the Security Council, 7 June 1945, reproduced in Anna Spain, at 332, note 43.

characterize the debate, which focuses on how to increase the ability of the Security Council to make decisions and take action.

A duty, not a right to act

Efforts to impose the language of duty upon the Security Council are twofold: first, there are efforts to impose a general decision-making duty upon the Security Council, and second, there are initiatives aiming at forcing the Council to take action with respect to particular crises. The former suggestion, which is of a procedural character, is arguably easier to achieve since the adoption of procedural rules for the Council cannot be vetoed.[20]

Imposing a decision-making duty upon the Council is to be separated from a duty to take action in certain specific circumstances. Making a decision does not necessarily mean that concrete action is taken with respect to a particular crisis; instead it aims to make the decision-making more expeditious and balanced.[21] Such proposals are composed of broader informative aims that serve the international community at large, which also increases the knowledge of the Council when making decisions.

Three different but connected procedural duties have been suggested that should be adopted on the part of the Council: 1) the duty to decide; 2) the duty to disclose; and 3) the duty to consult. By accepting these duties, scholars envision a more legitimate Security Council, which increasingly makes difficult decisions and justifies them. Indeed, the requirement to justify vetoes is another procedural duty that has also been discussed.[22] This would allow a public debate between different parties, which in the long run could serve to abolish decisions that cannot be rationalized.[23]

As opposed to a general decision-making duty, international legal scholars have also discussed the possibility of imposing an action duty upon the Security Council with respect to particular crises in which serious human rights violations are committed. Although this duty would arise only in cases seriously threatening international peace and security, it would force the Security Council out of a deadlock by taking necessary action. The proponents of such suggestions generally refer to the RtoP and the duty to protect civilians from the scourge of wars unless their own states are able or willing to do that. Thinking in these terms entails establishing the RtoP as more than a moral norm; the Security Council's duty to act in a specific situation would postulate the RtoP as a legal norm. Otherwise there could not be a legal duty to act.[24]

Arguing that the Security Council has a duty to act in particular crises that alarm the international community extends, however, far beyond what most international legal scholars would uncritically accept. At this point in time, few would contest that there are legal limits to what the Security Council can do. In other words, there are legal limits on the actions taken by the Security Council. However, going beyond that and explicating that '[t]here is no reason to treat an explicit or implicit Council decision not to authorize robust action

20 Anna Spain, 'The U.N. Security Council's Duty to Decide', 4 Harvard National Security Journal (2013) 320–384 at 327.

21 Ibid, p. 324.

22 Anne Peters, 'The Responsibility to Protect: Spelling out the Hard Legal Consequences for the UN Security Council and Its Members' in Ulrich Fastenrath et al. (eds), From Bilateralism to Community Interest. Essays in Honour of Judge Bruno Simma (Oxford University Press, 2011) 297–325 at 324.

23 Ibid.

24 Ibid, p. 307.

fundamentally differently from its decision to authorize a coercive measure',[25] is disputed.

There are also alternative bases for claims that the Security Council has a duty to act besides the responsibility to protect. A first legal route often taken is to assert that the obligation to prevent genocide, which is clearly laid down in the Genocide Convention,[26] also binds the Security Council. The obligation to prevent genocide is indeed considered to be a 'general principle recognized as binding upon all states even without explicit conventional obligation'.[27] However, what exactly the obligation to prevent entails remains blurry and contested.

A second basis for arguing that the Security Council must take action with respect to atrocity crimes relates to the obligation to prevent war crimes.[28] This is, however, more controversial and not as widely endorsed. A third normative ground for the Security Council's duty to take action relates not to the concrete content of a particular obligation but rather to the general law of state responsibility, which says that in serious violations of peremptory norms of international law, such as genocide and crimes against humanity, states must cooperate to bring the violations to an end.[29] Accordingly, they are under an obligation to act in order to remedy the situations, which some scholars or commentators perceive as a duty to act within the framework of the Security Council.

A duty to 'do something'

Efforts to concretize what a duty to act would entail exactly in terms of Security Council measures usually fail. The general conviction seems to be that the Council must 'do something',[30] within the confines of the UN Charter. However, defining the content and scope of a duty to act requires a case-by-case analysis. Only the factual circumstances of each case can determine the range of alternatives that the Security Council may consider to be appropriate. For example, with respect to Libya, the Council chose to create no-fly zones and refer the investigation of international crimes to the International Criminal Court, whereas in Bosnia it employed peacekeeping troops, created safe havens for civilians and established an *ad hoc* international criminal tribunal.

Indeed, the particular measures that may be taken are contextual and cannot be stated beforehand exclusively, except to say that they must protect people from the specific conduct that they suffer from.[31] There also seems to be a requirement of reasonableness. Accordingly, an obligation to protect usually entails, for instance, in international human rights law, that states must take measures, but are not obligated to achieve particular outcomes.[32] Whether the same extends by analogy to the Security Council is unclear. As the primary

25 Ibid, p. 308.

26 Convention on the Prevention and Punishment of the Crime of Genocide, adopted in 1948, entered into force, 12 January 1951, 78 United Nations Treaty Series 277.

27 International Court of Justice, Reservations to the Genocide Convention, Advisory Opinion, ICJ Reports 1951, p. 15 at 23.

28 Anne Peters, 'The Security Council's Responsibility to Protect', 8 *International Organizations Law Review* (2011) 1–40.

29 See the Articles on the Responsibility of States for Internationally Wrongful Acts, UN Doc. A/56/10 (2001).

30 Otto Spijkers, 'Bystander Obligations at the Domestic and International Level Compared', 6 *Goettingen Journal of International Law* (2014) 47–79 at 50; Saira Mohamed, 'Omissions, Acts, and the Security Council's (in)Actions in Syria', 31 *Boston University International Law Journal* (2013) 413–434 at 433.

31 Monica Hakimi, 'State Bystander Responsibility', 21 *European Journal of International Law* (2010) 341–385 at 368.

32 Ibid, p. 372.

caretaker of international peace and security, it has specific obligations, and should not be allowed to lose sight of its main task, namely to ensure international peace and security.

One indicator of the reasonableness of measures is, of course, whether the abuses that are reacted to diminish; if the abuses continue with the same scope and level of intensity, it must follow from this that more reasonable measures could be taken. In other words, the level of abuse indicates whether enough is being done or not.[33] Innovative measures may be needed to meet the requirement of reasonableness; the widespread impunity in the Yugoslav dissolution war paved the way for dramatic measures by the Security Council, when in 1993 it established the International Criminal Tribunal for Former Yugoslavia. A ground-breaking move was also to place East Timor and Kosovo under UN administration in the 1990s following the atrocities in both territories.

Limiting veto use

One crucial element in the debate on Security Council inaction on Syria is the use of veto by the P5 member states, which has blocked the adoption of action. Although the issue is not new, the unprecedented number of double vetoes by Russia and China in the Security Council concerning Syria has once again accentuated the difficulties of a practice that manifestly goes against any effort to impose an action duty upon the Council.[34] It has therefore been set forth by numerous actors and scholars that the veto use should be limited when the Security Council deals with mass atrocity situations. There would thus be a 'duty not to obstruct' on the part of the permanent members of the Council.[35] Some commentators even go as far as to label vetoes used in mass atrocity situations as 'illegal'.[36]

The veto privilege has generally been upheld and defended commonly by all P5 states and it has been challenged only recently through a French initiative aiming at limiting its use in mass atrocity situations. For the first time, a permanent member of the Security Council is proposing limitations on the right to veto. The initiative, which was launched by French President François Hollande in October 2013 in his address to the General Assembly,[37] has gained wide support and has turned into an international movement supported by, for example, the Accountability, Coherence and Transparency Group (ACT) in the UN.[38] The Syrian context has brought increased momentum to the initiative, which France has refined in order to improve the likelihood of acceptance.

33 Ibid, p. 374.

34 Russia and China have vetoed different resolutions on Syria on four occasions: 4 October 2011, 4 February 2012, 19 July 2012 and 22 May 2014.

35 For more on the duty not to obstruct, see Monica Hakimi, 'Toward a Legal Theory of the Responsibility to Protect', 39 *The Yale Journal of International Law* (2014) 247–280 at 273 et seqq.

36 John Heieck, 'Emerging Voices: Illegal Vetoes in the Security Council – How Russia and China Breached Their Duty Under Jus Cogens to Prevent War Crimes in Syria', *Opinio Juris*, Blog Post, 14 August 2013, available at: http://opiniojuris.org/2013/08/14/emerging-voices-illegal-vetoes-in-the-security-council-how-russia-and-china-breached-their-duty-under-jus-cogens-to-prevent-war-crimes-in-syria/ (accessed 15 May 2015).

37 The speech was coupled with an op-ed by the French Foreign Minister Laurent Fabius in the *New York Times*, 'A Call for Self-Restraint at the UN', 4 October 2013.

38 The group consists of the following 22 UN member states: Austria, Chile, Costa Rica, Estonia, Finland, Gabon, Hungary, Ireland, Jordan, Liechtenstein, Maldives, New Zealand, Norway, Papua New Guinea, Peru, Portugal, Saudi Arabia, Slovenia, Sweden, Switzerland, Tanzania (observer) and Uruguay.

The French proposal, as set forth in October 2013, is formulated as a voluntary code of conduct, which does not require an amendment of the UN Charter. Instead, it is to be perceived as a gentlemen's agreement between the P5 member states. Its main proposition is that in situations that amount to genocide, war crimes, crimes against humanity or ethnic cleansing the P5 member states should voluntarily abstain from their right to use veto to block decisions.

The proposal includes a procedure for the determination of which situations fall under the responsibility not to veto. According to the proposal, a minimum of 50 UN member states could ask the Secretary-General to decide the nature of the crimes in a particular situation. If the Secretary-General confirms that atrocity crimes have been committed, the code of conduct immediately becomes applicable. However, situations involving mass atrocities that relate to the vital national interests of a P5 member state are excluded from the responsibility not to veto.[39]

The French proposal on the voluntary restraint on the use of veto has been widely endorsed with the explicit support of approximately 70 UN member states. But the reactions to the proposal by the P5 member states themselves have been mixed. No other permanent member of the Security Council apart from France has so far endorsed the idea. Cautious support has been expressed by the United Kingdom, which has not exercised its veto since 1989.

The United States, Russia and China have actively made use of their veto right in recent years, which partly explains their hesitance or reluctance to embrace the French proposal. Russia has consistently maintained that the right to veto should not be restricted through a Charter amendment or otherwise because it has proved to be 'crucial to its [the Council's] ability to function effectively and to arrive at balanced and sustainable decisions'.[40] China, in accordance with its non-interference policy, has also rejected the proposal, whereas the United States has neither endorsed nor rejected it.

Even though the proposal on veto limitation has been described as utopian, the French proposal has several merits. First, although there is no unanimity as yet on the issue among the P5 member states, it seems more likely that change can be achieved through an initiative stemming from one of the permanent members themselves. In addition, the restraint on veto use could be realized without a formal Charter amendment, which is difficult to accomplish. Second, the proposal would probably make P5 states more cautious in playing the 'national interest' card while forcing them to justify their actions before the Security Council to an increasing extent.[41]

But it is worth remembering that the proposal would not solve all future forms of Security Council action in situations of mass atrocity. In fact, it would entail similar problems to the current system. On the one hand, there would be constant contestation about whether a given situation amounts to mass atrocity, or if vital national interests of P5 members are at stake. Furthermore, it is unclear how a veto restraint would affect the practice of so-called hidden vetoes, namely situations where the threat of veto bars resolution drafts from even being presented at a formal Council meeting.

39 See the French proposal.

40 Statement by a Representative of the Russian Federation in the Open-ended Working Group on Security Council Reform on Veto Issue, 'Russia Vetoes the Abolition of the Veto', 24 March 1999, available at: www.globalpolicy.org/the-dark-side-of-natural-resources-st/water-in-conflict/32893.html?itemid=915 (accessed 2 July 2015).

41 Stewart M. Patrick, 'Limiting the Veto in Cases of Mass Atrocities: Is the Proposed Code of Conduct Workable?', *The Internationalist*, 23 January 2015.

The debate on vetoes is intimately connected to the issue of whether the Security Council is under an obligation to act or not in mass atrocity situations. Those turning to the law in order to guarantee action by the Council, also do so with respect to the veto practice. As a consequence, the use of veto is arguably not just a 'fact' or a governmental act to be perceived solely as pertaining to the political realm.[42] Instead, the use of veto can be seen as a procedural right with legal implications.

To sum up, the exercise of veto is not considered unlawful in itself, but its use can be abusive in particular situations. One example that has been mentioned in this connection relates to the Yugoslav dissolution war and the arms embargo imposed upon the territory by the Security Council. Bosnia-Herzegovina claimed that by vetoing the lifting of the arms embargo, the United Kingdom had in effect contributed to the genocide against Bosnians since they did not possess materiel for self-defence. The language of 'illegal' vetoes thus serves to highlight the legal implications of acting against collective interests when populations are in peril.

Consequences of inaction

From shaming to legal responsibility

The prolonged humanitarian suffering in Syria due to the inability of the Security Council to adopt robust measures has met with reproach, targeted in particular at Russia and China due to their blocking of decisions. Humanitarian relief organizations and human rights organizations have widely considered the inaction disgraceful and shameful, and they have even claimed that the weak measures have not only allowed perpetrators to continue killing but further incited them to take the lives of Syrians. The former UN High Commissioner for Human Rights, Navi Pillay, has blamed the permanent members of the Council in particular for failing to attend to their collective duties and she has even claimed that the inaction has left hundreds of thousands dead.[43] States and their leaders, including other P5 member states, have equally condemned the use of veto in the Syrian case. For example, U.S. Ambassador Samantha Powers declared after the fourth double veto by Russia and China with regard to Syria that '[t]here should be accountability for those members of the council who prevented accountability'.[44]

But the reactions with respect to Syria have moved beyond shaming, which has traditionally been the dominant response to inaction.[45] Increasingly, there are calls not only for accountability, but more precisely for *legal* responsibility. This is a consequence of the legal dimension of the debate on the Security Council's inaction, and concomitant efforts to make action mandatory. Thus, the issue of the responsibility of the Security Council as a whole, and the P5 member states in particular, has surfaced. Since both the responsibility of international organizations and states respectively are clearly recognized in international law, there is no *prima facie* reason why legal responsibility for inaction could not be discussed provided that it can be proven that the UN or a member state has breached an incumbent international obligation and that the breach can be attributed to the entity in question.

42 Anne Peters, 'The Security Council's Responsibility to Protect', 8 *International Organizations Law Review* (2011) 1–40 at 27.

43 Sam Jones, 'UN Human Rights Commissioner Attacks Security Council for Failure over Syria', *The Guardian*, 22 August 2014.

44 Lizzie Edmonds, 'Now Putin and China Unite to Stop UN Investigation into Assad's War Crimes in Syria', *Daily Mail*, 22 May 2014, www.dailymail.co.uk/news/article-2636453/Now-Putin-China-unite-stop-UN-investigation-Assads-war-crimes-Syria.html (accessed 9 September 2015).

45 Saira Mohamed, 'Shame in the Security Council', 90 *Washington University Law Review* (2013) 1191–1254.

Security Council responsibility: bystander or accomplice?

The starting-point in discussions on legal responsibility is mostly the responsibility of the Security Council for the inaction. It is important to note, however, that international law does not ascribe responsibility upon separate bodies or organs within an organization, but generally on the whole organization.[46] This means that whatever the Security Council is implicated in extends to the UN as a whole.

Debates on the responsibility of the Security Council are not unprecedented; the lawfulness of its decisions has arisen in connections other than humanitarian interventions as well, mostly when it comes to the issue of sanctions and their legality. However, these are markedly different due to the fact that unlawfulness is claimed to arise from Security Council acts, not omissions. As a matter of principle, the distinction between acts and omission is nevertheless irrelevant: both can trigger responsibility.

The hard question in the debate on the Security Council's responsibility under law is whether there is a positive duty to act in situations of mass atrocity incumbent upon the Council. As noted before, some progressive thinkers accept the legally binding character of the RtoP norm, whereas other commentators derive a binding obligation from primary or secondary norms of international law.

But even if one were to accept that there was a duty to act on the part of the Council, it remains unclear how the performance of that duty is to be assessed. Would it be enough in the case of Syria, for example, to adopt a resolution referring the investigation and prosecution of war crimes to the International Criminal Court? Or does the duty to act require no-fly zones or the holding of international peace conferences? Moreover, who could invoke the responsibility of the world organization and where? So far it has been extremely difficult to hold the UN legally accountable for its alleged violations; functional immunity has hitherto prevented the pursuit of claims for the failure to prevent the Srebrenica genocide or for spreading cholera in Haiti.

A novel approach in the debate is to discuss the Security Council's responsibility in international law from the perspective of so-called bystander responsibility.[47] Many countries have national legislation that extends legal responsibility for failing to help or protect people from peril. By way of analogy, some scholars seek to expand this logic to international relations as well; failing to protect a population from mass atrocities would arguably entail third-party responsibility or so-called bystander responsibility.[48] There is nevertheless no general framework for bystander responsibility internationally;[49] the whole concept seems confusing as scholars use bystander responsibility to mean anything from innocent onlookers to guilty accomplices.

Those who seek to analyze the inaction of the Security Council with respect to Syria through the prism of bystander responsibility conclude that the Security Council is not to be seen as completely innocent, but neither is it to be understood as an accomplice in the atrocities

46 See the Draft Articles on the Responsibility of International Organizations, UN Doc. A/66/10 (2011).

47 The term is used by both scholars and policy-makers alike. See e.g. US Ambassador Samantha Powers, who spoke about states as 'up-standers' and 'bystanders' with respect to the horrors of war. UN Doc. S/PV.7155, 16 April 2014, at p. 12.

48 See, for instance, Otto Spijkers, 'Bystander Obligations at the Domestic and International Level Compared', 6 *Goettingen Journal of International Law* (2014) 47-79.

49 For one contribution on trying to develop a general framework, see Monica Hakimi. 'State Bystander Responsibility', 21 *European Journal of International Law* (2010) 341-385.

in Syria.[50] Although it has been claimed that the Security Council has blood on its hands due to inaction, it is difficult to uphold the assertion that its failure to act amounts to complicity in the atrocities.[51]

It is equally difficult to perceive it as an innocent bystander due to the unique task assigned to the Security Council. There are simply expectations that are currently not being met; but couching these in legal terms is problematic. Two conflicting aspects of the UN Charter complicate the analysis; on the one hand, the charter ensures the 'autonomy' of the Security Council and its member states, but on the other hand 'the Charter establishes a system that prioritizes communitarianism as well, and it tasks the members of the Security Council with realizing those communitarian impulses'.[52]

Scholarly debate shows that holding the UN and the Security Council responsible for inaction in cases of mass atrocity is generally repudiated; those propagating Security Council responsibility remain a marginal group. Indeed, it has been said that UN responsibility for inaction 'would be absurdly premature and not likely to be affirmed by state practice'.[53]

Still, it is noteworthy that a discussion on legal responsibility is taking place to begin with. On the one hand, it indicates that many actors in the international community are searching for new options on how to approach the Security Council inaction; on the other hand, it seems reasonable to conclude that legal considerations are increasingly relevant in the debate on what the Security Council should do. This is also proven by the fact that the search for legal responsibility does not end with the discussion on UN or Security Council responsibility; the difficulties involved in allocating responsibility to the world organization have been met with the pursuit of responsibility of individual Council member states.

The special responsibility of P5

The question of international organization responsibility is closely connected to the issue of member state responsibility. The rules regulating international responsibility open the door for dual responsibility; in principle, a wrongful act or omission can be attributed both to the organization and its member states. As a consequence, there is in principle nothing that precludes holding the members of the Security Council responsible for the organ's inaction.

The role of the P5 member states is often highlighted in contrast to the non-permanent members. They enjoy a privileged position within the Council and are therefore considered to have special obligations. Their unique role is even further heightened due to the restrictive membership of the Security Council and because they have been regarded as representatives of the international community as a whole.[54]

As action in the Syrian case has been hindered by Russian and Chinese vetoes, it would seem reasonable to argue that these two countries are more liable than those voting in favour of resolutions seeking to take action. Yet the law should be able to distinguish between those who have a guilty mind and seek to perpetrate

50 Saira Mohamed, 'Omissions, Acts, and the Security Council's (in)Actions in Syria', 31 *Boston University International Law Journal* (2013) 413–434 at 431–432.

51 Ibid, pp. 430–432.

52 Ibid, p. 428.

53 José E. Alvarez, 'The Schizophrenia of R2P' in Philip Alston and Euan Macdonald (eds), *Human Rights, Intervention and the Use of Force* (Oxford University Press: New York, 2008) 275 at 282.

54 Anne Peters, 'The Responsibility to Protect and the Permanent Five. The Obligation to Give Reasons for a Veto' in Julia Hoffmann, André Nollkaemper (eds), *Responsibility to Protect: From Principle to Practice* (Pallas Publications, 2012) 199–212 at 203–204.

crimes and those who do not. In other words, '[t]o describe Russia's veto of a Security Council resolution as culpable to the same degree as the Assad regime's murder of thousands of civilians would destroy the normative message of international law in this area'.[55]

The debate on what can be expected in terms of action from the Security Council, and its member states in particular, is not legally irrelevant. With respect to genocide, there is an unequivocal obligation to prevent the crime in accordance with the Genocide Convention. The content of the obligation to prevent has been explored by the International Court of Justice in the Bosnian Genocide case,[56] where the Court investigated whether Serbia was to be held responsible for the genocide against Bosnians committed by Bosnian Serbs. The Court held that states indeed must 'take certain steps' to prevent genocide,[57] but only if a state has the means to prevent it. The required action thus varies depending on the 'capacity to influence effectively the action of persons likely to commit, or already committing genocide'.[58] Several factors were taken to affect a state's capacity to prevent genocide, including the geographical distance between the state preventing and the state where genocide is perpetrated, the strength of political links between the preventing state and the 'main actors in the events'.[59] In all, what is expected of states acting individually or together when it comes to the worst international crimes seems ill-defined and highly contextual.

Concluding discussion: Can the law help?

The pleas for Security Council action in Syria, and comparable situations of mass atrocity and enormous human suffering, have been replaced with harder demands invoking the law as a basis for the need to take action. Thus, weakness in the Security Council's reaction to situations involving mass atrocity is no longer accepted. Alternative grounds for a Security Council duty to react are presented, although most commonly the Responsibility to Protect norm is referred to. Yet, its status remains controversial and most international legal scholars would indeed reject such a position.

An analysis of the debate on Security Council inaction shows that a vital question is ignored all too often in the debate, however. The real question to be asked is whether the law can help to begin with. Two different aspects of this question need to be addressed. The first is whether responding to the issue of inaction through legal lenses will help the Security Council to take action or not. The second question relates more to the underlying mentality behind the inaction, namely (in)solidarity.

Can the law build solidarity among peoples or nations so that those suffering from mass atrocity will be assisted? It has been claimed that 'the whole construction of the notion of responsibility to protect can be seen as an institutionalised (through the UN), and also moral and legal expression of solidarity'.[60] According to Laurence Boisson de Chazournes, it thus embodies international solidarity, as do the basic norms of international humanitarian

55 Saira Mohamed, 'Omissions, Acts, and the Security Council's (in)Actions in Syria', 31 *Boston University International Law Journal* (2013) 413–434 at 433.

56 International Court of Justice, Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, ICJ Reports 2007, p. 43.

57 Ibid, p. 220, para. 429.

58 Ibid, p. 221, para. 430.

59 Ibid, p. 221, para. 430.

60 Laurence Boisson de Chazournes, 'Responsibility to Protect: Reflecting Solidarity?' in Rüdiger Wolfrum and Chie Kojima (eds), *Solidarity: A Structural Principle of International Law* 93–122 at 104.

law.[61] Such norms may therefore allegedly have moral implications for the Security Council to take action. But whether international legal obligations, and more precisely the responsibility to protect norm, represent shared ideals can be questioned; as international law is consensual one can say that not all states share the viewpoints that are behind efforts seeking an obligation on the part of the Security Council to act. Although the responsibility to protect may have some expressive value, it is doubtful whether there is a 'conscience collective' behind the ideas suggested by the RtoP.[62]

The answer to the second aspect of the question 'Can the law help?' is also nuanced. First, many of those propagating the Security Council's legal duty to act seem to think that the law provides a substantive answer to each issue. In other words, if there was a legal duty incumbent upon the Security Council to protect the Syrian people, this legal obligation would tell the Council exactly what to do, and when.[63] However, this is not true. Couching the inaction in legal terms means that one has to construct, interpret and enforce norms, processes which are far from unambiguous. Problems such as when to intervene and in what way will continue to characterize the debate. The construction of criteria for when to act will never be able to fit every situation perfectly thus leaving room for differing opinions. There cannot be an automatic or objective truth pertaining to when the Security Council must act to protect populations, and by what means.

A second aspect to be considered, concerning the role that the law can play in helping affected populations is whether a shift to the law may even turn out to be counterproductive; framing protection in 'endless chains of legal obligations' and concomitant liabilities may deter states from accepting the whole ambit of a duty to protect.[64] Furthermore, it may divert attention from the real issues to be decided.

But one should not forsake the law altogether. What is discernible in the debate on the Security Council inaction is not only the desire to protect the Syrian people, but a broader aspiration to increase the transparency, coherence and openness of the Security Council decision-making. In this respect, the law has something to offer. It strives to impose a culture of reasoning and responsibility upon the Security Council, elements that the law is built upon.[65] The law seeks to situate the debate in a framework where the members of the Security Council have to justify their actions or inactions, and where dialogue reigns. This is where the value of the law can reside. Sufficient and responsive action to help victims of mass atrocity must nevertheless be decided upon politically.

61 Ibid, p. 103.

62 On this Durkheimian notion, see Roger B. M. Cotterrell, 4 *British Journal of Law and Society* (1977) 241–252.

63 Cf. Martti Koskenniemi, 'The Place of Law in Collective Security', 17 *Michigan Journal of International Law* (1996) 455–490 at 472.

64 Anne Peters, 'The Responsibility to Protect: Spelling out the Hard Legal Consequences for the UN Security Council and Its Members' in Ulrich Fastenrath et al. (eds), *From Bilateralism to Community Interest. Essays in Honour of Judge Bruno Simma* (Oxford University Press, 2011) 297–325 at 325.

65 See Martti Koskenniemi, 'The Place of Law in Collective Security', 17 *Michigan Journal of International Law* (1996) 455–490 at 478.

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