The International Criminal Court and the Responsibility to Protect

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Abstract

This thesis explores the relationship between the International Criminal Court and the responsibility to protect. Since their emergence at the turn of the 21th century, the Court and the doctrine have developed in parallel. They have the same function to prevent mass violence and the same complementary approach to state sovereignty. As such, they are activated when a state fails to deal with international crimes perpetrated under its jurisdiction. The activity of the Court and the implementation of the doctrine experience similar problems of implementation and double standards, being closely connected to the political structure of the international community, starting with the UN Security Council.

The connection between the International Criminal Court and the responsibility to protect has been the subject of journal articles, book chapters, and conferences, and it has been researched in connection to specific case studies. Yet, their relationship in international law has never been explored in a single monograph. Existing literature focuses mostly on matters of implementation of the doctrine and of the activity of the Court, presenting the controversial results of their interaction. This thesis is wider in scope and aims to provide a general view of how this interaction affects various branches of international law.

The research begins with a review of the literature on the topic and an examination of common ground, such as the shared philosophical origin of liberal cosmopolitanism and the similar subject-matter jurisdiction, sometimes referred to as ‘atrocity crimes’. The study continues by investigating the institutional link between the UN Security Council, the doctrine, and the Court through an analysis of the case studies of Darfur, Libya, and Syria. The thesis then considers the Court’s capability to protect populations from international crimes through the criminal justice theory of deterrence. Finally, it considers the influence of the doctrine and the Court on fundamental international law norms: the prohibition of the use of force and the principle of state sovereignty.

The research shows that the doctrine and the Court experienced significant implementation problems in their first decades of life. However, they have the potential to contribute to the historical evolution of international law in combining their values of promoting international peace and protecting human rights.

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Introduction

The International Criminal Court is the world's first permanent international criminal tribunal. Its Rome Statute was adopted in 1998 and entered into force in 2002. The responsibility to protect has emerged, since its first formulation in 2001 and its adoption at the General Assembly's World Summit in 2005, as a doctrine aimed at addressing the international community's failure to prevent international crimes and humanitarian crises. The International Criminal Court and the responsibility to protect have a remarkable number of aspects in common. They share a parallel history, both having developed in the same decades. They also share a common cultural background, which can be defined as liberal cosmopolitanism. Furthermore, they both pursue the aim of preventing and putting an end to mass violence and international crimes.

The connections between the doctrine and the Court have been highlighted by UN bodies, the organs of the Court, and scholars. The original proponents of the responsibility to protect mentioned the Rome Statute as a legal foundation on which the principle is grounded.[1] The UN secretary-general, in his first report on the doctrine, defined the Court as 'an essential tool to implement the responsibility to protect'.[2] The International Criminal Court Prosecutor reiterated the vision of the Court as an instrument 'in the responsibility to protect toolbox'.[3] Moreover, UN Security Council Resolution 1970 referred the situation of Libya to the Court after recalling Libyan authorities' responsibility to protect their population. Likewise, several scholars have observed the connections between the doctrine and the Court, defining them as 'the two most prominent institutions of international human rights'[4] that are pursuing the same goals to 'tame or civilise the power incarnated by sovereignty'.[5]

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[1] International Commission on Intervention and State Sovereignty, Gareth J Evans and Mohamed Sahnoun, *The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty* (International Development Research Centre 2001) 50.
[2] UNGA 'Report of the Secretary-General 63/677' (2009) UN Doc A/63/677 para 18.
[3] Cit in Kirsten Ainley, 'The Responsibility to Protect and the International Criminal Court: Counteracting the Crisis' (2015) 91 (37) International Affairs 44.
[4] Aidan Hehir and Anthony Lang, 'The Impact of the Security Council on the Efficacy of the International Criminal Court and the Responsibility to Protect' (2015) 26 Criminal Law Forum 153.
[5] Frédéric Megrét, 'ICC, R2P, and the International Community's Evolving Interventionist Toolkit' (2010) 21 (1) Finnish Yearbook of International Law 69.

Nevertheless, despite the clear relationship between the Court and the responsibility to protect and their parallel impacts on the foundational norms of international law, the parallelism between the two institutions has remained largely overlooked. This focus allows the study of the interplay of the doctrine and the Court in practice to explore the risks and opportunities of potential synergies between the two. Additionally, it allows international legal researchers to examine the two institutions' theoretical value for – and impact on – the evolution of the discipline, as they influence fundamental elements of international law.

A growing body of academic literature has separately examined different aspects of both the doctrine and the Court, but less attention has been devoted to the relationship between them, as it covers different branches of international law, mainly public international law and international criminal law. Indeed, their relation has been explored in book chapters and journal articles, or in relation to a specific country. Yet, the general relationship between the two has not been investigated in a single monograph. Existing scholarship on the connection between the doctrine and the Court focuses on specific case-studies or emphasises the problems of implementation of the responsibility to protect, the effectiveness of the Court, or the difficulties of achieving the expected result of preventing or stopping grave international crimes.

Therefore, the aim of the present study is to give a general view of the international legal matters emerging from the interaction between the International Criminal Court and the responsibility to protect. To that end, it reflects on the questions: what is the connection between the International Criminal Court and the responsibility to protect, and what impact does it have on international law? This study considers the Court's practice and the implementation of the responsibility to protect, also in relation to case studies of Darfur, Libya, and Syria, However, the focus of this thesis is on foundational international law issues: the definition of key concepts that are common to the doctrine and the Court, their theoretical origin, their relationship to the United Nations (UN) system, and their influence on the principle of state sovereignty and the prohibition of the use of force.

This research stems from a review of the existing literature to identify the main controversial issues raised by the interaction between the Court and the doctrine. This study similarly relies on secondary sources when dealing with

theoretical academic debates, e.g. on liberal cosmopolitanism (Chapter 1, and the principle of state sovereignty (Chapter 6). To investigate state practice and the application of the responsibility to protect, it mostly relies on official primary sources: General Assembly meetings and resolutions; UN Security Council meetings, resolutions, and presidential statements; UN Secretary-General's reports. The analysis of the International Criminal Court's practice entailed the review of its governing legal documents (Statute, rules of procedure and evidence), case law, policy documents (especially policy papers by the Office of the Prosecutor), and preparatory works, including negotiations of the Kampala review conference of 2010. Case law of other international criminal tribunals and of the International Court of Justice was also examined.

The analysis begins, in Chapter 1, through a review of the existing scholarship to identify the most relevant points of interaction between the two institutions. It then addresses the relationship of the UN Security Council with both the Court (Chapter 2) and the doctrine (Chapter 3). Chapter 4 investigates the Court's capability to protect populations from core crimes through judicial deterrence. Finally, the thesis questions the impact of the two institutions on two fundamental norms of international law: the prohibition to use force (Chapter 5) and the principle of state sovereignty (Chapter 6).

The first chapter examines the interaction between the doctrine and the Court through a discussion of the practical and methodological difficulties of comparing and connecting an international judicial institution with an international law doctrine. Additionally, this chapter addresses the main issues that hinder effective interaction between the doctrine and the Court, from the ongoing development of the doctrine, which has not yet reached a definitive and comprehensive definition, to the dependence of the Court on the Security Council and cooperation with states. The analysis deals in detail with two common elements of the doctrine and the Court: their shared international legal theory of liberal cosmopolitanism and their shared aim to prevent or stop mass violence, sometimes referred to as 'atrocity crimes'.

The second chapter explores the influence of the Security Council on the International Criminal Court. It begins with a presentation of the two Security Council referrals of Darfur and Libya, questioning the legal and political issues that affected the action of the Court in the two situations through the analysis of

the two resolutions and of the subsequent practice of both the Council and the Court. The study covers the controversial provisions of the resolutions and enquires into the possible avenues available to the Court to implement its mandate in situations referred by the Council. In particular, it determines how the controversial provisions of Resolution 1593, reiterated in Resolution 1970, hinder an effective and legally coherent development of the Court's action in Darfur and Libya, for instance the paragraphs that tailor the situation to exclude nationals of other non-states parties from the Court's jurisdiction and that waive the UN's responsibility to cover any expense related to the referral.

Consequently, the analysis considers possible ways of cooperation between the Security Council and the International Criminal Court to achieve the expected aim of holding those responsible for international crimes accountable in the referred situation. As a potential approach of the Court to Security Council referrals, the study submits that the Court could review, and possibly disregard, the referral and to consider the severability of single operative paragraphs on the basis of the non-compliance of the resolution with the Rome Statute of the International Criminal Court (hereinafter, 'the Rome Statute').

The third chapter focuses on the Security Council's relationship with the responsibility to protect. After an overview of the application of the doctrine in Council resolutions and presidential statements, this chapter analyses the Council's action in Libya and Syria as contrasting examples of situations in which it authorised and did not authorise the use of force. A significant part of the debate surrounding the responsibility to protect deals with the use of the veto power by the five permanent members of the Security Council, which in certain cases would jeopardise the protection of populations from mass violence. Accordingly, this section presents various initiatives aimed at overcoming the deadlock between the members of the Council should a stalemate jeopardise actions to stop or prevent mass violence, from Uniting for Peace to the Brazilian proposal of 'responsibility while protecting'.

The fourth chapter questions if the International Criminal Court can contribute to the mandate of the doctrine by protecting populations from international crimes. The Court aims to prevent international crimes by prosecuting those responsible and thus deterring similar future crimes. This chapter examines the main findings of existing studies on the deterrent function of

the Court, or international criminal justice in general. This part of the study presents various theories of deterrence and explores how the organs of the Court have considered deterrence in their practice. Finally, the chapter proposes an extensive interpretation of the concept of deterrence.

The fifth chapter investigates the impact of both the Court and the doctrine on the *ius ad bellum*. According to a common interpretation, the development of the doctrine and of the Court had contradictory effects on the law on the use of force. On the one hand, the Rome Statute motivated the criminalisation and prosecution of the crime of aggression. On the other hand, the responsibility to protect, at least in some propositions, has been presented as an exception to the general prohibition on the use of force. Interventions in violation of the UN Charter might be justified based on the doctrine. The responsibility to protect could therefore be presented as a defence to a charge of aggression. In contrast with this common interpretation, this chapter argues that, in parallel with the Court, the doctrine reinforced the prohibition to use force. Indeed, the responsibility to protect highlighted that the majority of states rejects the legitimisation of interventions in violation of the UN Charter.

The sixth chapter investigates how the Court and the doctrine affect the principle of state sovereignty. This section of the study presents the main scholarly debate on sovereignty. Some scholars privilege the decline of state sovereignty in favour of international institutions that can replace states in assigning accountability and ensuring the protection of human rights. Scholars of a different view argue that sovereignty has an important value in protecting communities from foreign interventions and abuses, including with the use of force. The analysis categorises the internal and external dimensions of sovereignty to reconsider the approach of the International Criminal Court and the responsibility to protect to the principle of sovereignty.

The overall picture emerging from this research shows the potential of the Court and the doctrine to contribute to the evolution of international law. Their development can conciliate the principle of sovereignty with the accountability for perpetrators of international crimes and the protection of populations from mass violence with the prohibition to use force. In particular, this thesis argues that they reinforced the prohibition of the use of force, and that they redefined, not undermined, the principle of sovereignty. Evident matters of implementation and

double standards clearly emerged in the analysis of the situations of Libya and Syria, and of the interaction with the UN Security Council. Yet, this should not eclipse the long-term impact that the Court and the doctrine can make to the progress of international law.

Chapter 1:
The Relationship between the International Criminal Court and the Responsibility to Protect

The purpose of this study is to address the connection between the International Criminal Court and the doctrine of the responsibility to protect. A developing body of scholarship advocates the possibility of a positive role for international criminal justice in protecting populations from mass atrocities, proposing the definition of 'responsibility to protect and to prosecute'.[6] This chapter examines the interaction between the doctrine and the Court through a discussion of the practical and methodological difficulties in comparing and connecting an international judicial institution with an international law doctrine. Additionally, this chapter addresses the main issues that hinder effective interaction between the doctrine and the Court, from the ongoing development of the doctrine, which has not yet reached a definitive and comprehensive definition, to the dependence of the Court on the Security Council and cooperation with states.

1. The Responsibility to Protect: The Need for a Clear Definition and Legal Framework of Action

The responsibility to protect has emerged, since its first formulation in 2001, as a doctrine aimed at addressing the international community's failure to prevent international crimes and humanitarian crises. The evolution of the responsibility to protect has not been plain and consistent, and the legal value of the doctrine, with its possible consolidation as an international norm, remains controversial.[7] This controversy stems from the somewhat haphazard formulation of the concept in 2001 and its subsequent refinement through UN actions and state practice.

In the 1990s, the emergence of a new doctrine aimed at stopping mass atrocities was considered as a response to the international community's

[6] Jason Ralph and Adrian Gallagher, 'Legitimacy Faultlines in International Society: The Responsibility to Protect and Prosecute After Libya' (2014) 41 Review of International Studies; Andrea Birdsall, 'The Responsibility to Prosecute and the ICC: A Problematic Relationship?' (2015) 26 Criminal Law Forum 51.
[7] Noele Crossley, 'Is R2P Still Controversial? Continuity and Change in the Debate on "Humanitarian Intervention" (2018) 31 (5) Cambridge Review of International Affairs 415.

inadequacy in addressing international crises. Subsequently, in 2001, the International Commission on Intervention and State Sovereignty, co-chaired by Gareth Evans, former foreign minister of Australia, and Mohamed Sahnoun, Algerian diplomat and former Special adviser to the UN Secretary-General, introduced the doctrine of responsibility to protect in a detailed report titled 'The Responsibility to Protect' (hereinafter, 'the ICISS report on the responsibility to protect'). The report defined the responsibility to protect as 'the idea that sovereign states have a responsibility to protect their own citizens from avoidable catastrophe—from mass murder and rape, from starvation—but that when they are unwilling or unable to do so, that responsibility must be borne by the broader community of states'.[8] The concept was further analysed in 2003, when UN Secretary-General Kofi Annan created the sixteen-member Secretary-General's High-level Panel on Threats, Challenges and Change, which presented its report, 'A More Secure World: Our Shared Responsibility', in 2004.[9] The doctrine was endorsed, albeit in different terms, by the UN General Assembly at the sixtieth anniversary of the Charter of the United Nations and approved by consensus in 2005.[10]

In 2007, then UN Secretary-General Ban Ki-moon appointed a Special advisor on the responsibility to protect and promoted an informal interactive dialogue within the General Assembly on various aspects of the concept. In 2009, then Secretary-General Ki-moon and the first Special representative for responsibility to protect introduced the three-pillar approach, which built on the definition of the concept set out in the World Summit Outcome Document, to structure the dimensions of the responsibility to protect in a unique framework.[11] The first pillar affirms that states bear the primary responsibility to protect populations within their borders. The second pillar stresses that the international community has a duty to assist states to build their capacity to protect their populations. Finally, the third pillar affirms the responsibility of the international community to take 'timely and decisive action' to prevent or stop mass atrocities should a state fail to protect its population.

[8] International Commission on Intervention and State Sovereignty, Gareth J Evans and Mohamed Sahnoun, *The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty* (International Development Research Centre 2001) 8.
[9] UN Doc A/59/565.
[10] UNGA Res 60/1 (24 October 2005) UN Doc A/RES/60/1.
[11] UNGA 'Report of the Secretary-General 63/677' (2009) UN Doc A/63/677.

In 2011, the responsibility to protect was implemented through UN Security Council resolutions concerning Libya, to refer the situation to the International Criminal Court through Resolution 1970 of 2011[12] and to authorise the use of force with Resolution 1973 of 2011.[13] The Libya referral to the Court was unanimous, whereas Brazil, Russia, India, China, and Germany abstained from voting on the authorisation of the use of force to protect Libya's civilian population.[14] While Resolution 1973 authorised states to use force 'to protect civilians and civilian populated areas under threat of attack', the application of the responsibility to protect in a resolution authorising the use of force provoked several criticisms. One of the actors involved in the negotiation of Resolution 1973, Brazil, affirmed the necessity of a new paradigm: the 'responsibility while protecting',[15] which prioritises preventive actions rather than interventions and proposes strict conditions for the authorisation for the use of force.[16]

The subsequent military intervention in Libya had a wider scope than that identified in the resolution and resulted in a regime change.[17] Yet although the military intervention in Libya was widely debated, the same reaction was absent in other international crises such as Syria. Indeed, after the military operation in Libya resulted in a regime-change, Security Council members adopted a more cautious approach in authorising interventions based on the doctrine. This emphasised the need for clear standards and parameters for the application of the doctrine to avoid double standards caused by political decisions made within the Security Council.

2. The International Criminal Court: The Need for Enforcement Mechanisms and Political Independence

The Rome Statute of the International Criminal Court, which entered into force in 2002, emerged as a result of protracted negotiations among a diverse group of states with both civil and common law legal systems. The outcome of

[12] UN Doc S/RES/1970 (2011).
[13] UN Doc S/RES/1973 (2011).
[14] UN Doc S/PV.6498.
[15] Micheal K Kenkel and Cristina G Stefan, 'Brazil and the Responsibility while Protecting Initiative: Norms and the Timing of Diplomatic Support' (2016) 22 (1) Global Governance 41.
[16] UNSC, 'Letter Dated 9 November 2011 from the Permanent Representative of Brazil to the United Nations addressed to the Secretary-General' UN Doc A/66/551–S/2011/701.
[17] Geir Ulfstein and Christiansen Hege Føsund, 'The Legality of the NATO Bombing in Libya' (2013) 62 International & Comparative Law Quarterly 159.

these negotiations was a treaty that attempted to speak across these systemic differences through the creation of a 'hybrid' institution as a compromise. While this hybridity has resulted in a range of unique features that are beneficial to the work of the Court, it has also created uncertainty and confusion regarding the appropriateness—or inappropriateness—of actions taken. Another necessary compromise to finalise the negotiation of the statute was the retention of a certain degree of control by the Security Council on the activity of the independent Court. As a result of this decision by the drafters, the action of the Court can be triggered by a state party and by the prosecutor *proprio motu*. At the same time, the Security Council maintained the possibility to refer a situation to the Court with Article 13(b) of the Rome Statute, even extending its jurisdiction over non-states parties, and the power to temporarily defer its activities pursuant to Article 16. Most situations before the Court are the result of a state referral or of the prosecutor's initiative. The Security Council referred two situations to the Court, Darfur in 2005 and Libya in 2011. In these cases, the activity of the Court is determined through actions taken by states (which, in case of Security Council referral, are often not party to the treaty, among the permanent five members *in primis*) and individuals performing the role of prosecutors and judges, rather than in the way foreseen and agreed upon by the states parties. The International Criminal Court is therefore an institution *in itinere*, developing along with its emerging practice—and one that will continue to evolve in coming years.

The evolving nature of the provisions and of the dynamics that govern the activities of the International Criminal Court has meant that the practice of the Court has developed in an unexpected way and given rise to situations that were not foreseen by the drafters of the statute. For example, in circumstances that were not anticipated by the drafters, the Court was able to play a role in the broader peace process that was arguably well outside the scope of its intended mandate, for instance in Colombia.[18] In particular, the Security Council recognised the role of the Court in dealing with ongoing armed conflicts and peace processes, triggering its action in the situations of Darfur and Libya. Among the other controversial matters, the Security Council referrals raised several issues: the relationship between conflict resolution and international criminal justice, the

[18] Courtney Hillebrecht, Alexandra Huneeus, Sandra Borda, 'The Judicialization of Peace' (2018) 59 Harvard International Law Journal, 279..

selectivity of the situations referred, and the political constraints imposed in resolutions. The difficulties in dealing with the Darfur and Libya situations revealed that the judicial action of the Court necessarily requires support by effective enforcement mechanisms to successfully achieve the Court's aims.

3. Defining the Developing Concept of Responsibility to Protect

In the context of the responsibility to protect, the interpretation of sovereignty stems from the concept of sovereignty as responsibility that Francis Deng proposed in 1996.[19] Deng's idea of sovereignty as responsibility has a wide scope that extends far beyond the notion of atrocities and core international crimes and generally involves the responsibility for 'the welfare of its citizens':

> [W]here large numbers of populations suffer extreme deprivation and are threatened with death, the international community—obligated by normative standards of humanitarianism and human rights—cannot be expected to watch passively and not respond. Humanitarian intervention then becomes an imperative. The best assurance for maintaining sovereignty is therefore to establish at least minimum standards of responsibility, if need be with international cooperation. Thus, the role of the international community is to render complementary protection and assistance to those in need and to hold governments accountable in the discharge of their national responsibilities. This is the essence of the idea of 'sovereignty as responsibility'.[20]

The doctrine was first presented and defined in the ICISS report on the responsibility to protect, which defined the responsibility to protect as 'the idea that sovereign states have a responsibility to protect their own citizens from avoidable catastrophe—from mass murder and rape, from starvation—but that when they are unwilling or unable to do so, that responsibility must be borne by the broader community of states'.[21] Therefore, the doctrine originally involved a

[19] Francis M Deng (ed), *Sovereignty as Responsibility: Conflict Management in Africa* (Brookings Institution Press 1996). See also Francis M Deng, 'The Evolution of the Idea of "Sovereignty as Responsibility"' in Adekeye Adebajo (ed), *From Global Apartheid to Global Village: Africa and the United Nations* (University of Kwazulu-Natal Press 2009) 191.
[20] Francis Deng, 'From "Sovereignty as Responsibility" to the "Responsibility to Protect"' (2010) 2 Global Responsibility to Protect 353, 354.
[21] International Commission on Intervention and State Sovereignty, Gareth J Evans and Mohamed Sahnoun, *The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty* (International Development Research Centre 2001) 8.

wide scope of protection which included any 'avoidable catastrophe'. The report presents the findings of the commission, established by the government of Canada in response to a question posed by Kofi Annan in 2000 at the UN General Assembly: '[I]f humanitarian intervention is, indeed, an unacceptable assault on sovereignty, how should we respond to a Rwanda, to a Srebrenica—to gross and systematic violations of human rights that affect every precept of our common humanity?'.[22]

The responsibility to protect is generally considered an initiative of Western states.[23] In the 2001 ICISS report on the responsibility to protect, intervention was central to the issue of civilian protection: '[T]he report seems to take it for granted that there is a default responsibility to protect, and the only obstacle to the performance of this responsibility is the principle of nonintervention'.[24] Nevertheless, authors have stressed the relevance of the contribution of African diplomats and scholars (first, Francis Deng, from South Sudan, and Kofi Annan, from Ghana) in the development of the doctrine:

> The fact that Deng and Annan were both from Africa should not be regarded as a coincidence, as most writings on R2P seem to do. … The idea itself of 'sovereignty as responsibility' was developed by the Sudanese scholar and diplomat, Francis Deng. And, unlike other regions, our legal systems have long acknowledged that in addition to individuals, groups and leaders having rights, they also have reciprocal duties. So the responsibility to protect is in many ways an African contribution to human rights.[25]

A similar provision—authorising intervention in case of genocide, crimes against humanity, and war crimes—appears in the Constitutive Act of the African Union, which seems to share the language of the responsibility to protect.[26] Article 2(h) of the Act recognises 'the right of the Union to intervene in a Member State pursuant

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[22] International Commission on Intervention and State Sovereignty, Gareth J Evans and Mohamed Sahnoun, *The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty* (International Development Research Centre 2001) 8.
[23] Philipp Rotmann, Gerrit Kurtz and Sarah Brockmeier, 'Major Powers and the Contested Evolution of a Responsibility to Protect' (2014) 14 (4) Conflict, Security & Development 355.
[24] Kok-Chor Tan, 'The Duty to Protect' in Terry Nardin and Melissa Williams (eds) *Humanitarian Intervention* (New York University Press 2006) 84, 88.
[25] Cit. in Amitav Acharya, *Constructing Global Order: Agency and Change in World Politics* (Cambridge University Press 2018) 108.
[26] Tim Murithi, 'The Responsibility to Protect, as Enshrined in Article 4 of the Constitutive Act of the African Union' (2007) 16 African Security Review 3, 14.

to a decision of the Assembly in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity'.[27] Several authors have explained the compliance of this provision with the UN Charter and the prohibition to use force with various arguments, from treaty-based state consent—expressed at the moment of joining the African Union—to collective self-defence:[28]

> But the inclusion of Article 4(h) in the AU's Constitutive Act appears unique as the first serious attempt to ram down the barriers of state sovereignty in a significant way. It creates a regional carveout of a narrow exception to the non-intervention principle and the prohibition on the use of force against other states articulated in Article 2 of the Charter of the United Nations. All in the name of protecting civilians from war crimes, crimes against humanity and genocide.[29]

3.1. The World Summit Outcome

The General Assembly adopted the wording of the responsibility to protect at the 2005 World Summit. As enshrined in the General Assembly World Summit Outcome Document, the responsibility to protect redefined the core elements of the international law concept of sovereignty.[30] First, it affirmed that states bear the primary responsibility to protect their populations from mass atrocities. Second, it recognised that the international community is responsible for assisting states in protecting their populations. Third, it affirmed that, as a measure of last resort, other states could also intervene using non-peaceful means (in accordance with the UN Charter) if local national authorities fail to stop ongoing mass atrocities. In fact, paragraphs 138–140 of the World Summit Outcome Document are titled 'Responsibility to Protect Populations from Genocide, War Crimes, Ethnic Cleansing and Crimes Against Humanity':

> 138. Each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and

[27] Constitutive Act of the African Union (2000) 2158 UNTS 3.
[28] G Amvane 'Intervention Pursuant to Article 4(h) of the Constitutive Act of the African Union without United Nations Security Council Authorisation' (2015) African Human Rights Law Journal 282; Christian Wyse, 'The African Union's Right of Humanitarian Intervention as Collective Self Defense' (2018)19 Chicago Journal of International Law 1, 9.
[29] Charles C Jalloh, 'The Place of the African Court of Justice and Human and Peoples' Rights in the Prosecution of Serious Crimes in Africa' in Charles C Jalloh, Kamari M Clarke and Vincent O Nmehielle (eds), *The African Court of Justice and Human and Peoples' Rights in Context: Development and Challenges* (Cambridge University Press 2019) 80.
[30] UN Doc A/RES/60/1.

> crimes against humanity. This responsibility entails the prevention of such crimes, including their incitement, through appropriate and necessary means. We accept that responsibility and will act in accordance with it. The international community should, as appropriate, encourage and help States to exercise this responsibility and support the United Nations in establishing an early warning capability.
>
> 139. The international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the Charter, to help to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. In this context, 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. We stress the need for the General Assembly to continue consideration of the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity and its implications, bearing in mind the principles of the Charter and international law. We also intend to commit ourselves, as necessary and appropriate, to helping States build capacity to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity and to assisting those which are under stress before crises and conflicts break out.
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> 140. We fully support the mission of the Special Adviser of the Secretary-General on the Prevention of Genocide.[31]

Since the General Assembly adopted this formulation of the responsibility to protect in 2005, the Assembly of States Parties of the International Criminal Court regularly makes a direct reference to the doctrine at the beginning of its so-called ‘Omnibus Resolution’, which it adopts at its plenary sessions. The reference to the doctrine first appeared in the Omnibus Resolution of December

[31] UN Doc A/RES/60/1.

2005.[32] The 'Resolution on Strengthening the International Criminal Court and the Assembly of States Parties' of 2019 reads:

> The Assembly of States Parties,
>
> Mindful that each individual State has the responsibility to protect its population from genocide, war crimes, and crimes against humanity, that the conscience of humanity continues to be deeply shocked by unimaginable atrocities in various parts of the world, and that the need to prevent the most serious crimes of concern to the international community, and to put an end to the impunity of the perpetrators of such crimes, is now widely acknowledged.[33]

In establishing these parameters, responsibility to protect redefined the concepts of sovereignty and domestic jurisdiction, which are among the cornerstone principles of the UN Charter, in a way that has been considered 'unprecedented in the long history of sovereignty. Never before had the principle of international enforcement of sovereign responsibility been so clearly endorsed by international society as it was in the 2005 summit agreement'.[34]

3.2. State Practice on the Responsibility to Protect

The doctrine proposed a new theoretical framework to encompass what until that point was referred to as 'humanitarian intervention', reiterating that interventions aimed at protecting the civilian population must be performed in accordance with the UN Charter. Responsibility to protect thereby shifted the focus from state sovereignty to securing basic human dignity. It affirmed an obligation upon both states and the international community to protect populations from mass atrocities, although it did not seem to introduce a new international norm or produce legally binding effects. Rather, it provided a clear stance on controversial topics of international law. According to Jennifer Welsh and Maria Banda:

[32] Resolution on Strengthening the International Criminal Court and the Assembly of States Parties ICC-ASP/4/Res.4 (3 December 2005).
[33] Resolution on Strengthening the International Criminal Court and the Assembly of States Parties ICC-ASP/18/Res.6 (6 December 2019) 1..
[34] Luke Glanville, *Sovereignty and the Responsibility to Protect: A New History* (University of Chicago Press 2014) 171.

> Articles 138 and 139, given their virtually unanimous endorsement, can be accepted as an authoritative interpretation of the Charter's provisions on sovereignty, human rights, and the use of force. Thus, even if the Outcome Document is not legally enforceable per se, it does represent an important step in the evolution of international protection law.[35]

As a result of its nature in limiting sovereignty, and its association with humanitarian intervention, critics of the doctrine maintained that it might run the risk of creating a 'Trojan horse' for the benefit of major powers.[36] The actual implementation of the responsibility to protect confirmed the fears about the risk of misuse. For instance, Minister of Foreign Affairs of the Russian Federation Sergey Lavrov mentioned the responsibility to protect in justifying Russia's actions in the crises in South Ossetia and Abkhazia in 2008:

> [U]nder the Constitution [the President] is obliged to protect the life and dignity of Russian citizens, especially when they find themselves in the armed conflict. And today he reiterated that the peace enforcement operation enforcing peace on one of the parties which violated its own obligations would continue until we achieve the results. According to our Constitution there is also responsibility to protect - the term which is very widely used in the UN when people see some trouble in Africa or in any remote part of other regions. But this is not Africa to us, this is next door. This is the area. where Russian citizens live. So the Constitution of the Russian Federation, the laws of the Russian Federation make it absolutely unavoidable to us to exercise responsibility to protect. [37]

Russia used similar arguments to justify its intervention in Crimea in 2014, which was in violation of the UN Charter, not having been authorised by the Security Council. Russia issued general statements about protecting Russian citizens, without making specific references to the doctrine of the responsibility to protect. The Russian president affirmed that the intervention in Crimea coincided 'with

[35] Jennifer M Welsh and Maria Banda, 'International Law and the Responsibility to Protect: Clarifying or Expanding States' Responsibilities?' (2010) 2 Global Responsibility to Protect 213, 230.
[36] Alex Bellamy, 'Responsibility to Protect or Trojan Horse? The Crisis in Darfur and Humanitarian Intervention After Iraq' (2005) 19 Ethics & International Affairs 31.
[37] 'Interview by Minister of Foreign Affairs of the Russian Federation Sergey Lavrov to BBC', Moscow, 9 August 2008, www.un.int/russia/new/MainRoot/docs/off_news/090808/newen2.htm, accessed 3 November 2020.

[Russia's] interests to protect the people with whom [it has] close historical, cultural and economic ties. Protecting these people is in [Russia's] national interests', calling the intervention 'a humanitarian mission.'[38] Thomas Grant observed that although 'the phrasing echoes the initial postulates of a responsibility to protect … the factual basis for a humanitarian intervention in Ukraine did not exist. No other State and no international organization believed that it did'.[39]

Similarly, the intervention of NATO forces in Libya, acting pursuant to Resolution 1973/2011 following the Security Council referral of the Libya situation to the International Criminal Court, was also criticised for extending the scope of the military operation beyond the limited mandate to protect the civilian population. For instance, Lavrov, who advocated Russia's responsibility to protect the population of Abkhazia and South Ossetia, stated during an interview with the 'Rossiskaya Gazeta' on 19 November 2013:

> Let's take responsibility to protect as an example. If a government treats someone badly somewhere we are obliged to protect this 'someone'. So in Libya the civilian population was protected. A classic example where, by distorting the mandate obtained from the UN Security Council to secure a no-fly zone, NATO simply interfered in the war under the flag of protecting the civilian population.[40]

Furthermore, certain non-permanent members of the UN Security Council protested against the misuse of this doctrine.[41] Brazil urged NATO forces to maintain, during the intervention, a 'responsibility while protecting'.[42] As a result, the responsibility to protect was indeed invoked to justify interventions, allegedly to protect populations from mass atrocities. In state practice, the doctrine lacked consistent implementation under clear legal standards, even if the evolution within the UN was coherently respectful of state sovereignty and of the UN Charter's

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[38] Vladislav Tolstykh, 'Reunification of Crimea With Russia: A Russian Perspective' (2014) 13 Chinese Journal of International Law 879.
[39] Thomas D Grant, *Aggression against Ukraine. Territory, Responsibility, and International Law* (Palgrave McMillan 2015) 50.
[40] Cited in Derek Averre and Lance Davies, 'Russia, Humanitarian Intervention and the Responsibility to Protect: The Case of Syria' (2015) 91 (4) International Affairs 813, 819.
[41] For instance the African Union at the Security Council meeting of 15 June 2011. UN Doc S/PV/6555, 4.
[42] UN Permanent Mission of the Federative Republic of Brazil, 'Responsibility while Protecting: Elements for the Development and Promotion of the Concept' (9 November 2011) UN Doc A/66/551-S/2011/701.

provisions on the prohibition of the use of force. In the words of Mark Vlasic: 'Many countries in the so-called Global South view RtoP [responsibility to protect] as yet another rationalization for unwanted, unwarranted interference by developing nations, and the US invasion of Iraq and Russia's invasion of Georgia, both of which cited RtoP as justifications, may have confirmed their fear of such interference'.[43]

3.3. 'To Reinforce, Not to Undermine Sovereignty'

In particular, the 2014 Report of the Secretary-General titled 'Fulfilling our Collective Responsibility: International Assistance and the Responsibility to Protect',[44] along with the subsequent Informal Interactive Dialogue of the General Assembly,[45] presented an interpretation of the doctrine as a way to reinforce state sovereignty. They focused on the responsibility to assist states in protecting populations, which is the second of the three pillars proposed in the 2009 'Report of the Secretary-General'.[46] On the one hand, cooperation among states to assist each other in protecting civilians is a core element of responsibility to protect and is intended to be applied before any coercive measures are considered. At the same time, both the 2014 Secretary-General's report and the informal interactive dialogue contain general statements that go beyond the second pillar and apply to the doctrine as a whole. Thus, some concern might arise regarding a possible shifting understanding of the elements of responsibility to protect. For instance, paragraph 12 of the 2014 Secretary-General's report states that

> the responsibility to protect is intended to reinforce, not undermine, sovereignty. The principle was not designed to create a hierarchical structure in which the international community imposes demands or solutions on States. Rather, it

[43] Mark V Vlasic, 'Europe and North America' in Jared Genser and Irwin Cotler (eds), *The Responsibility to Protect* (Oxford University Press 2011) 173.
[44] Report of the Secretary-General, 'Fulfilling our Collective Responsibility: International Assistance and the Responsibility to Protect' (11 July 2014) UN Doc A/68/947-S/2014/449.
[45] UNGA, 'Informal Interactive Dialogue on Fulfilling our Collective Responsibility: International Assistance and the Responsibility to Protect' (8 September 2014) <https://www.un.org/en/ga/president/68/pdf/calendar/20140908-resptoprotect.pdf> accessed 25 October 2020.
[46] UNGA 'Report of the Secretary-General 63/677' (2009) UN Doc A/63/677.

> reaffirms the fundamental principle of sovereign equality, expressed in Article 2 of the Charter of the United Nations.[47]

Accordingly, delegations taking part in the informal interactive dialogue, particularly those representing the Association of Southeast Asian Nations (ASEAN), gave examples of successful cases of state cooperation in facing humanitarian crises. A considerable number of states, including those in Central and South America and the Middle East, revealed a positive stance on this formulation of responsibility to protect. Iran, for instance, explicitly appreciated the intention to reinforce state sovereignty. However, promoting dialogue between states is not a new or special feature of the responsibility to protect. It is rather a fundamental element of the spirit of the UN itself as initially conceived by the UN Charter. In this respect it is political will, and not a new international law norm, which is required to bolster state cooperation. The existence of successful cases of mutual state assistance reveals that responsibility to protect is not necessary as a premise to this kind of cooperation.

Therefore, if the growing support for responsibility to protect is achieved only in conjunction with a reiteration of the strengthening of state sovereignty, this may create a contradiction in the interpretation of the doctrine. At the same informal interactive dialogue of 2014, the Syrian delegate denounced the gap between the UN discussion, focused on reinforcing state sovereignty, and states' interpretation of the doctrine, advocating interventions:

> But what about when states claim to help a state to protect its population? When these are interventions which are harmful to these very states, how can Member States guarantee the use of R2P? And how can states ensure that other countries do not intervene on behalf of this R2P concept. The Secretary General has referred to these actions and different interests (economic and others), but nobody can say that the militia and foreign combatants, or the training of such foreign combatants, and their infiltration illegally into Syria, nobody can say that such acts are part of assistance agreed to by Member States at the 2005 Summit.[48]

[47] Report of the Secretary-General, 'Fulfilling our Collective Responsibility: International Assistance and the Responsibility to Protect' (11 July 2014) UN Doc A/68/947-S/2014/449 para 2.
[48] UNGA, 'Informal Interactive Dialogue on Fulfilling our Collective Responsibility: International Assistance and the Responsibility to Protect' (8 September 2014).

Responsibility to protect was in fact intended to overcome the structural barriers inherent in the notion of state sovereignty and entrenched through the UN Charter to protect the basic tenets of humanity. By allowing the discourse to centre on state cooperation and bypass the fundamental element, that is, the restriction of sovereignty, the strength of responsibility to protect is being reversed to become nothing more than a reiteration of what is already permissible by the letter of the UN Charter. As Aidan Hehir noted, 'the turn to prevention as R2P's true purpose is primarily a cosmetic exercise designed to maintain the image of R2P as effective, born from a realization that it has substantially failed to achieve its primary purpose'.[49]

Implementation, political interference, lack of judicial review and double standards are all factors that currently challenge the development of the responsibility to protect. The core philosophy of the doctrine, privileging human dignity over state sovereignty, is recognised as a strong innovation towards a global culture of international justice and human rights protection. On the one hand, some scholars view the responsibility to protect as wording to legitimise otherwise illegal military interventions that have alleged humanitarian objectives.[50] On the other hand, UN bodies mention the doctrine with a stricter humanitarian purpose. For instance, Richard Falk, who was one of the authors of the supplementary volume to the ICISS report on the responsibility to protect,[51] invoked the responsibility to protect the population of Gaza in his 2014 report as Special rapporteur on the situation of human rights in the Palestinian territories occupied since 1967:

> The stark reality is that the beleaguered occupied people of Gaza, over half of whom are children, are not receiving the protection to which they are entitled under international

<https://www.un.org/en/ga/president/68/pdf/calendar/20140908-resptoprotect.pdf> accessed 25 October 2020.

[49] Aidan Hehir, 'Questioning the Turn towards the Responsibility to Prevent' in Samuel Totten (ed), *Last Lectures on the Prevention and Intervention of Genocide* (Routledge 2017) 115.

[50] Eg Jeremy Moses, Babak Bahador and Tessa Wright, 'The Iraq War and the Responsibility to Protect: Uses, Abuses and Consequences for the Future of Humanitarian Intervention' (2011) 5 (4) Journal of Intervention and Statebuilding 347; Chelsea O'Donnell, 'The Development of the Responsibility to Protect: An Examination of the Debate over the Legality of Humanitarian Intervention' (2014) 24 Duke Journal of Comparative & International Law 557.

[51] International Commission on Intervention and State Sovereignty, *The Responsibility to Protect—Research, Bibliography, Background: Supplementary Volume to the Report of the International Commission on Intervention and State Sovereignty* (International Development Research Centre for ICISS 2001).

> humanitarian law, which imposes an overall duty on the occupying Power to act in such a manner as to protect the civilian population from harm. … The principles embedded in the concept of the responsibility to protect would seem to have a special applicability to the emergency conditions currently existing in Gaza that are being brought to the attention of the world by graphic pictures of sewage in the streets; widespread flooding; seasonal cold, including snow; and children entrapped by these conditions.[52]

The 2014 report of the Secretary-General and the subsequent General Assembly dialogue have confirmed the uncertainty about the current state of the substantial definition of the doctrine itself. The principles and aims of the responsibility to protect appear to change depending on the context in which it is invoked and for the sake of gaining states' support. However, in the long term, this ambiguity may weaken the nature and relevance of the principle, that still had the potential to create a 'cohesive doctrine that outlines the responsibilities of host and third-party States to prevent and react to the commission of mass atrocity crimes.'[53]

To improve its credibility and fulfil its aims, the international community, and scholars, should strive instead to maintain the theoretical and legal consistency of the definition of the responsibility to protect.

4. Connecting the Doctrine with the Court

The International Criminal Court and the responsibility to protect have a remarkable number of aspects in common. They share a parallel history, both having developed in the last decade; a common cultural background, privileging individual dignity over state sovereignty; and *mutatis mutandis* they both pursue the aim of preventing and putting an end to mass violence and international crimes. In particular, their subject-matter jurisdiction is the same: the responsibility to protect is activated by the same core crimes as those in the Rome Statute (genocide, war crimes, and crimes against humanity), despite slight differences in their definitions (e.g., the responsibility to protect wording includes ethnic cleansing, which is not a specific crime under the Court's statute, and does

[52] A/HRC/25/67 (13 January 2014) 5.
[53] Yasmine Nahlawi, *The Responsibility to Protect in Libya and Syria Mass Atrocities, Human Protection, and International Law* (Routledge 2019), 68.

not include the crime of aggression). International Criminal Court Prosecutor Fatou Bensouda described the doctrine and the Court as 'both manifestations of the global community's determination to work towards ending impunity and to cultivate an ethos of accountability, with a view to protecting citizenry and preventing future crimes'.[54]

While a growing body of academic literature has separately examined different aspects of both the doctrine and the Court, only a few have enquired about the relationship between them. One reason for this academic lacuna is that the responsibility to protect and the International Criminal Court fall within different—and often incommunicable—fields of study. Using the effective metaphor of the three separate tribes of international law (*internationalists*, *pénalists*, and *droit de l'hommistes*),[55] the responsibility to protect has been researched mainly by *internationalists*, given its impact on state sovereignty, the *ius ad bellum*, and the UN system. On the other hand, the studies related to the Court generally have an international criminal law or transitional justice approach. As a result, the responsibility to protect and the Court are usually examined as separate areas of study, regardless of the potential dynamics and synergies between them.[56] Nevertheless, several authors have engaged in analysing the relationship between the doctrine and the Court. While their perspectives and findings differ widely, most scholars agree that the connection between the Court and the responsibility to protect is overlooked and requires more reflection and research: 'little attention has been devoted to some of the founding premises of the concept, namely the link between responsibility under R2P and international criminal justice'.[57]

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[54] Fatou Bensouda, 'The Progress and Convergence of the ICC and R2P Norms in a Rules-Based Global Order' (2020) 12 (4) Global Responsibility to Protect 372, 373.
[55] Andrew Clapham, 'Concluding Remarks: Three Tribes Engage on the Future of International Criminal Law' (2011) 9 Journal of International Criminal Justice 689.
[56] For an example of the recent growing scholarship in this regard, see 'Symposium: International Criminal Justice and the Responsibility to Protect' (2015) 26 (1) Criminal Law Forum, with the following contributions: Carsten Stahn 'Marital Stress or Grounds for Divorce? Re-Thinking the Relationship Between R2P and International Criminal Justice'; Andrea Birdsall, 'The Responsibility to Prosecute and the International Criminal Court: A Problematic Relationship?'; Kurt Mills, 'R2P and the International Criminal Court: At Odds or in Sync?'; Frédéric Mégret, 'Between R2P and the International Criminal Court: "Robust Peacekeeping" and the Quest for Civilian Protection'; L Hehir, 'The Impact of the Security Council on the Efficacy of the International Criminal Court and the Responsibility to Protect'.
[57] Carsten Stahn, 'Marital Stress or Ground for Divorce? Re-thinking the Relationship between R2P and International Criminal Justice' (2015) 26 (1) Criminal Law Forum 13.

After a decade of parallel evolution (from the comprehensive analysis of the ICISS report on the responsibility to protect and the entry into force of the Rome Statute in 2002), the 2009 UN Secretary-General's report 'Implementing the Responsibility to Protect' expressly marked the connection between the doctrine and the Court.[58] According to Secretary-General Ban Ki-moon, '[b]y seeking to end impunity, the International Criminal Court and the United Nations-assisted tribunals have added an essential tool for implementing the responsibility to protect, one that is already reinforcing efforts at dissuasion and deterrence'[59]. Two years later, the UN Security Council adopted Resolution 1970 of 2011 through which it referred the situation of Libya to the International Criminal Court. The resolution recalled 'the Libyan authorities' responsibility to protect its population', thus causing the parallel histories to intersect and affirming the relationship between the doctrine and the Court in facing a situation of crisis.

From both a methodological and practical point of view, a comparison between a judicial institution and a doctrine can be controversial. The International Criminal Court is a permanent Court established by an international treaty, that is, the 1998 Rome Statute. Conversely, the responsibility to protect doctrine is a concept still in evolution. Various subjects (the UN Secretary-General, the Security Council, and individual states) have been able to extend the doctrine according to different contexts and purposes, from international cooperation to operations involving the use of force, creating what has been defined as a 'Tower of Babel'.[60] Thus, the doctrine is to be considered as a tool for diplomacy rather than for international criminal justice. This notwithstanding, from different perspectives, a strong synergy exists between the two. However, it is unclear whether an effective interplay between the doctrine and the Court is in fact desirable.

5. A Common Cultural Background: Liberal Cosmopolitanism

The International Criminal Court and the responsibility to protect share the same philosophical origin. By and large, their common cultural genesis consists of privileging individual over state concerns, or human dignity over national

[58] UNGA 'Report of the Secretary-General 63/677' (2009) UN Doc A/63/677.
[59] ibid para 60.
[60] C Stahn, 'Marital Stress or Ground for Divorce? Re-thinking the Relationship between R2P and International Criminal Justice' (2015) 26 (1) Criminal Law Forum 13.

sovereignty. This approach develops into a variety of international law theories that can be connected to the doctrine and the Court: among others, global legalism,[61] internationalism,[62] and cosmopolitanism.[63] To indicate this common ground between the doctrine and the Court, the present analysis adopts the definition of liberal cosmopolitanism which scholars frequently use with reference to both institutions ('seen to be symbols of the global cosmopolitan order of liberal rights and justice'[64]), both with a positive and negative connotation.[65]

Liberalism prioritises individual liberty, freedom, and property over communities, or societies. As an international relations theory, it can be defined as follows:

> Liberalism is based on the moral argument that ensuring the right of an individual person to life, liberty and property is the highest goal of government. Consequently, liberals emphasise the wellbeing of the individual as the fundamental building block of a just political system. A political system characterised by unchecked power, such as a monarchy or a dictatorship, cannot protect the life and liberty of its citizens. Therefore, the main concern of liberalism is to construct institutions that protect individual freedom by limiting and checking political power.[66]

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[61] Ian Hurd, 'The Empire of International Legalism' (2018) 32 (3) Ethics & International Affairs 265.

[62] Miriam Gur-Arye and Alon Harel, 'Taking Internationalism Seriously: Why International Criminal Law Matters' in Kevin Jon Heller, Frédéric Mégret, Sarah MH Nouwen, Jens David Ohlin and Darryl Robinson (eds), *The Oxford Handbook of International Criminal Law* (Oxford University Press 2020) 215.

[63] Stephen C Roach, 'Value Pluralism, Liberalism, and the Cosmopolitan Intent of the International Criminal Court' (2005) 4 Journal of Human Rights 475; Robert Fine, 'Cosmopolitanism: A Social Science Research Agenda' in Gerard Delanty (ed), *Handbook of Contemporary European Social Theory* (Routledge 2006) 242. Rudall warns that 'when legal scholars talk about cosmopolitanism, they tend to over-generalise', in Jason Rudall, 'A Cartography of Cosmopolitanism: Particularising the Universal' (2014) 3 Cambridge Journal of International and Comparative Law 747.

[64] David Chandler, 'Born Posthumously: Rethinking the Shared Characteristics of the ICC and R2P' (2010) 21 (1) Finnish Yearbook of International Law 5.

[65] For a positive appraisal, Steven C Roach, 'Value Pluralism, Liberalism, and the Cosmopolitan Intent of the International Criminal Court' (2005) 4 Journal of Human Rights 475–490. For a negative interpretation, Padraig McAuliffe, 'From Watchdog to Workhorse: Explaining the Emergence of the ICC's Burden-Sharing Policy as an Example of Creeping Cosmopolitanism' (2014) 13 Chinese Journal of International Law 241; and also F Mégret, 'Between R2P And The International Criminal Court: "Robust Peacekeeping" and the Quest for Civilian Protection' (2015) 26 Criminal Law Forum 101–151.

[66] Jeffrey Meisner, 'Liberalism' in Stephen McGlinchey, Rosie Walters and Christian Scheinpflug (eds), *International Relations Theory* (E-International Relations Publishing 2017) 22.

In Ancient Greece, Diogenes of Sinope created the term 'cosmopolitan', oxymoronic in itself, to affirm to be a 'world citizen'.[67] Cosmopolitanism considers human beings independently from their nationality and advocates values and principles that apply to the entire humankind. Indeed, 'cosmopolitanism holds that we have moral obligations to all persons independently of our particular relations to them'.[68] Sergey Vasiliev proposed a definition of this combination of legalism, liberalism, and cosmopolitanism:

> [A]n ideology or mindset shared among international lawyers postulating that rules must be followed for its own sake (*legalism*), provided that the rules possess a certain normative quality of liberal justice standards, i.e. deontic principles demanding respect for the dignity, rights, and autonomy of individuals as moral and rational subjects (*liberal*), and are valid across the board being irreducible to parochial interpretations (*cosmopolitan*).[69]

In this sense, liberal cosmopolitanism is the legal philosophy at the basis of human rights, which aim to defend, through law, individual freedoms, liberties, and property of all human beings from state abuse:

> [C]osmopolitan liberals are, in principle, committed to the full package of political, civil, and economic rights set out in the contemporary international human rights regime—the Universal Declaration of Human Rights of 1948, the two International Covenants of 1966, the Convention on the Elimination of Discrimination Against Women of 1979, and so on. … The liberal conception of human flourishing is not exhaustively defined by the international rights regime—and indeed existed before that regime came into existence—but, as a rough approximation, the Universal Declaration and subsequent elaborations thereof can serve as a practical summary of what is entailed by cosmopolitan liberalism.[70]

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[67] Bayram A Burcu, 'What Drives Modern Diogenes? Individual Values and Cosmopolitan Allegiance' (2015) 21 (2) European Journal of International Relations 451.
[68] Christopher Paone, 'Diogenes the Cynic on Law and World Citizenship' (2018) 35 Journal for Ancient Greek Political Thought 478, 483.
[69] Sergey Vasiliev, 'The Crises and Critiques of International Criminal Justice' in Kevin Jon Heller, Frédéric Mégret, Sarah MH Nouwen, Jens David Ohlin and Darryl Robinson (eds), *The Oxford Handbook of International Criminal Law* (Oxford University Press 2020) 627.
[70] Chris Brown, 'Liberalism and the Globalization of Ethics' in William M Sullivan and Will Kymlicka (eds), *The Globalization of Ethics: Religious and Secular Perspectives* (Cambridge University Press 2007) 157.

The International Criminal Court's mandate of punishing individuals for international crimes is 'a result of the rise of cosmopolitan liberalism … The International Criminal Court … is seen by its supporters as the best way to deal with evil in the world, and to ensure that the human rights of all individuals are upheld'. The responsibility to protect similarly conceives that the international community is responsible for defending individuals from mass violence when states fail to protect them.

The ideology at the basis of the doctrine and the Court has been criticised on various grounds. First, the focus on individual human beings, rather than on societies, disregards dynamics of power of life in a community. In other words, liberal cosmopolitanism depoliticises issues, disregards the diversity of local specificities, and, as a result, ignores inequalities both at the state level and in the international community. As Mégret has noted:

> [T]he prioritisation of cosmopolitan ambitions over local demands, from Uganda to Libya, is easily faulted for being disconnected from where the true locus of justice should be. It has been repeatedly assailed not only for its lack of realism but, more pointedly and painfully for cosmopolitans, for its inherent unfairness, thus weakening the matter-of-courseness of the cosmopolitan case.[71]

Second, international mechanisms replacing state power pose problems of legitimacy and democracy, as the cosmopolitan belief is that 'progressive ends—such as the protection of human rights, international peace or sustainable development—would be more easily achieved without the institutional constraints of democratic accountability'.[72] Consequently, the nature of international institutions 'raises the issue of democratic legitimacy vis-a-vis an undemocratic *gouvernement des juges* in which judicial self-empowerment is achieved with the help of a constitutional language'.[73]

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[71] Frédéric Mégret, 'In Whose Name? The ICC and the Search for Constituency' in Christian De Vos, Sarah Kendall and Carsten Stahn (eds), *Contested Justice: The Politics and Practice of International Criminal Court Interventions* (Cambridge University Press 2015) 29.
[72] David Chandler, 'Critiquing Liberal Cosmopolitanism? The Limits of the Biopolitical Approach' (2009) 3 (1) International Political Sociology 53, 57.
[73] Anne Peters, 'Are We Moving toward Constitutionalization of the World Community?' in Antonio Cassese (ed), *Realizing Utopia: The Future of International Law* (Oxford University Press 2012) 128.

Third, liberal cosmopolitanism overlooks the structural causes of the violent events it tries to prevent by focusing on individual victims and perpetrators. From this perspective, international justice 'works *in* conflict rather than *on* conflict; in other words, it does not address "root causes". … the focus on the accused has tended to supplant the question of the responsibility of additional "others"; those who produce the conditions that make suffering possible'.[74]

Finally, Koskenniemi has challenged the presumption of neutrality and universality of the doctrine and the Court on grounds of realism. Indeed, any institution claiming to represent all of humanity and to pursue universal values in good faith is still subject to biases and partiality:

> One should be careful with those who speak in the name of humanity and try to impose any particular blueprint on the world. Proposals for the legal institutional architectures for the government of the whole world and other designs may seem appealing when stated in the abstract. However, their concrete realization always involves some distribution of power, and with it, some privileging of preferences and values. Claims to humanity are always infected by the particularity of the speaker, the world of his or her experience, culture and profession, knowledge and ignorance.[75]

Serena Sharma similarly presented the risk, for the doctrine and the Court, to be perceived as externally imposed: 'Among the many factors that will determine the effectiveness of R2P and the ICC in specific cases is the issue of perception, and more specifically, the extent to which they are viewed as consensual and locally driven rather than externally imposed'.[76]The main argument against legal liberal cosmopolitanism, however, is that this school of thought would jeopardise state sovereignty to advance the interests of Western powers, to threaten the prohibition to use force and multiply military interventions.[77]

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[74] Sara Kendall and Sarah MH Nouwen, 'International Criminal Justice and Humanitarianism' in Kevin Jon Heller, Frédéric Mégret, Sarah M. H. Nouwen, Jens David Ohlin and Darryl Robinson (eds), *The Oxford Handbook of International Criminal Law* (Oxford University Press 2020) 719.
[75] Martti Koskenniemi, 'Projects of World Community' in Antonio Cassese (ed), *Realizing Utopia* (Oxford University Press 2012) 3.
[76] Serena Sharma, *The Responsibility to Protect and the International Criminal Court. Protection and Prosecution in Kenya* (Routledge 2016), 22.
[77] Nesam McMillan and David Mickler, 'From Sudan to Syria: Locating "Regime Change" in R2P and the ICC' (2013) 5 Global Responsibility to Protect 283; Theresa Reinold, 'Constitutionalization? Whose Constitutionalization? Africa's Ambivalent Engagement with the International Criminal Court' (2012) 10 International Journal of Constitutional Law 1076.

5.1 Liberal Cosmopolitanism, Peace, and Military Interventions

Scholars often use the notion of liberal cosmopolitanism in relation to the responsibility to protect and the International Criminal Court with a negative connotation, as this philosophy potentially legitimises violations of sovereignty aimed at imposing an imperialist agenda and producing regime change. Frédéric Mégret aptly represented this approach in his explanation that the doctrine and the Court engage in 'the prevention of atrocities through a mix of lobbying, lawyering, and bombing'.[78] Hence, most criticisms of the doctrine and the Court are not based on philosophical arguments against liberalism or cosmopolitanism. Rather, objections concern mostly the practice of the Court and the implementation of the responsibility to protect: what Kofi Annan defined as the 'selective application of the principle by some members of the Security Council, guided by other, less noble, motives'.[79] In other words, the values of liberal cosmopolitanism risk becoming 'a "Trojan horse" used by the powerful to legitimize their interference in the affairs of the weak'.[80] Libya is an example of situation in which the UN Security Council, in 2011, triggered the jurisdiction of the Court with Resolution 1970 and authorised the use of force with Resolution 1973, mentioning the responsibility to protect in both resolutions. The action of the international community in Libya resulted in a regime change.[81]

In addition to these interventionist practices, some scholars advocate an erosion of sovereignty that furthers international interventions and regime changes from a theoretical perspective. From this point of view, 'the problem is not the legitimacy of humanitarian intervention but the overwhelming prevalence of inhumanitarian nonintervention'.[82] For instance, Steven Roach argued that the Court should operate in synergy with the UN Security Council to affirm 'various principles that would legalize politically legitimate humanitarian interventions'.[83]

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[78] Frédéric Megrét, 'ICC, R2P, and the International Community's Evolving Interventionist Toolkit' (2010) 21 (1) Finnish Yearbook of International Law 52.
[79] Kofi Annan, *Interventions, a Life in War and Peace* (Penguin Books 2013) 117.
[80] Alex Bellamy, 'Responsibility to Protect or Trojan Horse? The Crisis in Darfur and Humanitarian Intervention after Iraq' (2005) 19 Ethics & International Affairs 31, 52.
[81] Jason Ralph and Adrian Gallagher, 'Legitimacy Faultlines in International Society: The Responsibility to Protect and Prosecute after Libya' (2015) 41 Review of International Studies 553.
[82] Simon Chesterman, 'Hard Cases Make Bad Law: Law, Ethics, and Politics in Humanitarian Intervention' in Anthony F Lang Jr (ed), *Just Intervention* (Georgetown University Press 2003) 54.
[83] Steven C Roach, *Politicizing the International Criminal Court: The Convergence of Politics, Ethics, and Law* (Rowman and Littlefield Publishers 2006) 166. For an opposing view, see

According to the same author, the Court could also sacrifice certain liberal rights (as well as statutory provisions) to achieve its mandate: 'although promoting the liberal and civil rights of defendants remains a necessary, albeit insufficient, element of the universalization of harm, the Court needs to define its cosmopolitan intent principally in terms of its willingness to challenge the restrictive application of its own procedures'.[84]

With reference to the responsibility to protect, Thomas Weiss recalled the 'assertive liberal interventionism of the 1990s' and lamented that 'the use of military force had been replaced by evasiveness and skittishness from diplomats, scholars, and policy analysts. The increasing and, at times, virtually exclusive emphasis on prevention in the interpretation of RtoP was politically correct but counterproductive'.[85] Furthermore, James Pattison noted that 'the greatest hope for improving the will to intervene … lies with the responsibility to protect' and insisted that the doctrine should legitimise military operations: 'humanitarian intervention is only one part of the responsibility to protect, but … it is a part of the responsibility to protect'.

These arguments reveal that, with reference to the doctrine and the Court, militaristic interpretations of liberal cosmopolitanism are widely supported both in theory and in practice. The origins of this school of thought, on the contrary, were expressly pacifist, as the primary aim of the philosophy consists of avoiding war. In *Towards Perpetual Peace*, Immanuel Kant described the main tenets of legal cosmopolitanism as a necessity to achieve peace:

> Yet any juridical constitution, with regard to the persons that are subject to it, takes one of the following forms: one based on the right of citizens of a state governing the individuals of a people (*ius civitatis*); one based on international right governing the relations of states among one another (*ius gentium*); one based

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William A Schabas, 'Politics and the International Criminal Court' (2007) 9 (4) International Studies Review 751.

[84] Steven C Roach, 'Value Pluralism, Liberalism, and the Cosmopolitan Intent of the International Criminal Court (2005) 4 Journal of Human Rights 475, 490.

[85] Thomas Weiss, 'RtoP Alive and Well After Libya' (2012) 25 (3) Ethics & International Affairs 287, 288. For a further eloquent example, see John J Davenport, 'In Defense of the Responsibility to Protect: A Response to Weissman' (2016) 35 (1) Criminal Justice Ethics 39, 67: 'The "imperialism" that we should really fear in this debate is not in the R2P doctrine; rather, it is the rising dominion of a group of anti-intervention intellectuals who influence public discourse and policymakers, and their willingness to impose an extreme anti-rights ideology on younger readers by way of sophisms, conflations, exaggerations, ad hominem attacks and outrageous misconstruals of the opposing side. Écrasez l'infâme!'.

> on cosmopolitan right, to the extent that individuals and states, who are related externally by the mutual exertion of influence on each other, are to be regarded as citizens of a universal state of humankind (*ius cosmopoliticum*). This classification is not arbitrary but necessary with respect to the idea of perpetual peace. For if only one party were able to exercise physical influence on the other and yet were in the state of nature, then this would amount to the state of war, and it is emancipation from precisely this state of war that is the aim here.[86]

Similarly, writing in 1920, Hans Kelsen reiterated that the purpose of cosmopolitanism is reaching world peace, as he identified nationalism and imperialism as the main sources of aggressive wars:

> [I]t is only temporarily, by no means forever, that contemporary humanity is divided into states, formed in any case in more or less arbitrary fashion. Its legal unity, that is the civitas maxima as organization of the world: this is the political core of the primacy of international law, which is at the same time the fundamental idea of that pacifism which, in the sphere of international politics, constitutes the inverted image of imperialism.[87]

These arguments show that liberal cosmopolitanism is not in itself an interventionist or militaristic school of thought. Conversely, the value of peace is its ultimate objective. At the same time, authors advocating military interventions have been using liberal cosmopolitan arguments to support their views, but this interpretation seems misleading of the original philosophy. Daniel Joyce accordingly affirms:

> Liberal internationalism is not tied to one meaning, one event or series of events, nor even solely to international law. It is a grand political theory that has offered a vocabulary for liberal elites at a time of US hegemony. But it could still offer international law and its constituents an opportunity for greater peaceful interaction and a means to revisit the project of international society.[88]

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[86] Immanuel Kant, *Toward Perpetual Peace and Other Writings on Politics, Peace, and History* (Yale University Press 2006) 74.
[87] Danilo Zolo, 'Hans Kelsen: International Peace through International Law' (1998) 9 European Journal of International Law 306, 307.
[88]Daniel Joyce, 'Liberal Internationalism' in Anne Orford and Florian Hoffmann (eds), *The Oxford Handbook of the Theory of International Law* (Oxford University Press 2016) 471.

Thus, that the International Criminal Court and the responsibility to protect share a liberal cosmopolitan origin does not imply that the two institutions have necessarily become instruments of the 'international community's evolving interventionist toolkit'.[89] The foreign policy of major powers, and the decisions of international bodies such as the UN Security Council, affect the implementation of the responsibility to protect and the practice of the Court much more than their common cultural heritage. Rather, according to their philosophy, the international community is entitled to deal with grave international crimes. As Miriam Gur-Arye and Alon Harel argue, the international community retains legitimacy even if it proves ineffective in achieving its results:

> Robust internationalism does not regard courts as mere instruments to prevent atrocities; the desirability of internationalism does not hinge only on the question of whether it is effective in preventing international crimes or in minimizing the frequency and severity of their violation. The protection of international norms is not a prerogative of the state with which it may or may not comply. It is a prerogative of the international community as such.[90]

6. A Common Subject-Matter Jurisdiction: Atrocity Crimes

The main analogy between the International Criminal Court and the responsibility to protect consists of the shared purpose to engage against mass violence in breach of international law, targeting acts of mass violence that the international community would otherwise leave uncontested and unpunished. The main common ground between the doctrine and the Court is therefore their subject-matter jurisdiction: they share a *ratione materiae* function to address core international crimes. Specifically, by virtue of Article 5 of the Rome Statute, the International Criminal Court has jurisdiction with respect to the crime of genocide, crimes against humanity, war crimes, and the crime of aggression. Its competence is 'limited to the most serious crimes of concern to the international

[89] Frédéric Mégret, 'ICC, R2P, and the International Community's Evolving Interventionist Toolkit' (2010) 21 Finnish Yearbook of International Law 1.
[90] Miriam Gur-Arye and Alon Harel, 'Taking Internationalism Seriously: Why International Criminal Law Matters' in Kevin Jon Heller, Frédéric Mégret, Sarah MH Nouwen, Jens David Ohlin and Darryl Robinson (eds), *The Oxford Handbook of International Criminal Law* (Oxford University Press 2020) 215, 237.

community as a whole'.[91] According to paragraph 138 of the 2005 World Summit Outcome, the doctrine consists of genocide, war crimes, ethnic cleansing and crimes against humanity.[92]

The existing literature on the doctrine and the Court frequently defines these groups of international crimes as 'atrocity crimes' or 'mass atrocities'.[93] The expression has no precedent in the discipline of international criminal law, and the Rome Statute uses this wording only in the preamble—'Mindful that during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity'—and not in relation to the Court's jurisdiction. The use of the word 'atrocity' creates a discrepancy between the subject-matter jurisdiction of the doctrine and the Court. They share the triad of genocide, crimes against humanity, and war crimes. Differently from the Court, the responsibility to protect does not consider, at least in its current formulation, the crime of aggression. In turn, the International Criminal Court (and international criminal law more broadly) does not consider ethnic cleansing as a separate crime. As the International Court of Justice affirmed in *Bosnia v. Serbia*, 'the term "ethnic cleansing" has no legal significance of its own. That said, it is clear that acts of "ethnic cleansing" may occur in parallel' to acts of genocide.[94]

The Commission of Experts on former Yugoslavia defined ethnic cleansing as 'a purposeful policy designed by one ethnic or religious group to remove by violent and terror-inspiring means the civilian population of another ethnic or religious group from certain geographic areas'.[95] In *Bosnia v. Serbia*, the International Court of Justice cited the definition of the Commission of Experts' interim report: 'rendering an area ethnically homogeneous by using force or

[91] Rome Statute 2187 UNTS 90.
[92] UNGA, 'World Summit Outcome' (2005) UN Doc A/RES/60/1.
[93] Mark A Drumbl, *Atrocity, Punishment and International Law* (Cambridge University Press 2007), Hector Olásolo, *The Role of the International Criminal Court in Preventing Atrocity Crimes through Timely Intervention* (Boom Juridische Publishers 2011), Kate Cronin-Furman, 'Managing Expectations: International Criminal Trials and the Prospects for Deterrence of Mass Atrocity' (2013) 7 (3) International Journal of Transitional Justice 434, Kurt Mills, *International Responses to Mass Atrocities in Africa: Responsibility to Protect, Prosecute and Palliate* (University of Pennsylvania Press 2015) 116, Jennifer Trahan, 'Questioning Unlimited Veto Use in Face of Atrocity Crimes' (2020) 52 Case Western Reserve Journal of International Law 73.
[94] *Bosnia and Herzegovina v Serbia and Montenegro* (Judgment) [2007] ICJ Rep 426, para. 190.
[95] UN Doc S/1994/674 (27 May 1994) Annex 3, 33.

intimidation to remove persons of given groups from the area'.[96] For the International Criminal Court, ethnic cleansing can amount to the crime against humanity of persecution, but it can also result in genocide:

> [T]his does not mean that the practice of ethnic cleansing—which usually amounts to the crime against humanity of persecution—can never result in the commission of the crime of genocide … such a practice may result in genocide if it brings about the commission of the objective elements of genocide provided for in article 6 of the Statute and the Elements of Crimes with the dolus specialis/specific intent to destroy in whole or in part the targeted group.[97]

The following analysis examines the reason for this discrepancy in the wording and the relevance of the use of the term 'atrocities' to define the core crimes of pertinence of the doctrine and the Court.

6.1 Reasons for Using the Expression 'Atrocity Crimes'

The analysis of the origin and development of the expression 'atrocity crimes' (or 'atrocities') is meaningful, as this formula was conceived with a clear purpose yet has an ambiguous legal meaning that requires reflection for the purpose of the present analysis. David Scheffer, US representative at the Rome Conference on the establishment of the International Criminal Court, proposed the introduction of the concept of atrocities as 'a single term that is easily understood by the public and accurately reflects the magnitude and character of the crimes'.[98] The purpose of adopting new wording was 'to simplify and yet render more accurate both public dialogue and legal terminology describing genocide and other atrocity crimes'.[99] From the point of view of international criminal law, replacing the distinction between genocide, crimes against humanity, and war crimes with the unique expression of 'atrocity crimes' might be appropriate, as there are no decisive differences in the practical application of the crimes: 'Without suggesting that the distinction is devoid of any significance, in terms of

[96] *Bosnia and Herzegovina v Serbia and Montenegro* (Judgment) [2007] ICJ Rep 426, para. 190.
[97] *Prosecutor v Al Bashir* (Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir) ICC-02/05-01/09 (4 March 2009) para 145.
[98] David Scheffer, 'Genocide and Atrocity Crimes' (2006) 1 (3) Genocide Studies and Prevention 229, 230.
[99] ibid.

putting evildoers behind bars it has not proven to be a terribly productive nuance'.[100]

At the International Criminal Court, sentencing suggests that genocide is considered graver than crimes against humanity. In turn, the two would be graver than war crimes. Other differences consist of the defences of superior orders and of defence of property, which are granted only for war crimes and not for genocide and crimes against humanity, and for the inchoate form of the offence of incitement that the Rome Statutes provides for genocide only.[101] Furthermore, in contrast with the other atrocity crimes, genocide has a compromissory clause that grants the International Court of Justice jurisdiction over disputes between parties to the 1948 Genocide Convention. At the International Criminal Tribunal for Rwanda, in *Kayishema and Ruzindana*, the Trial Chamber considered that the charge of genocide 'completely absorbed' that of a crime against humanity and consequently dismissed the latter.[102] Antonio Cassese criticised this decision to dismiss 'the charge of crimes against humanity by wrongly holding that it was already covered and indeed 'completely absorbed' by genocide'.[103]

International criminal lawyers seem to appreciate the purpose of simplifying the language of the discipline. Yet the use of 'atrocity crimes' has a further objective, that is, 'to galvanize international action to intervene, be it diplomatically, economically, or militarily'.[104] Scheffer further noted that his 'primary concern is to employ a term that stimulates, rather than retards, effective action by governments and international organizations, particularly the United Nations, to stem the tide of genocide (whether or not, as a matter of law, what unfolds in the field is ultimately concluded to be genocide)'.[105] Indeed, genocide has been defined a 'magic word'[106] with an 'unmatched rhetorical power'[107] that

[100] William A Schabas, 'Semantics or Substance? David Scheffer's Welcome Proposal to Strengthen Criminal Accountability for Atrocities' (2007) 2 (4) Genocide Studies and Prevention 31, 33.
[101] William A Schabas, 'Atrocity Crimes (Genocide, Crimes against Humanity and War Crimes)' in William A Schabas (ed), *The Cambridge Companion to International Criminal Law* (Cambridge University Press 2016) 205.
[102] *Prosecutor v Kayishema and Ruzindana* (Judgment) ICTR-95-1-T (21 May 1999) para 577.
[103] Antonio Cassese, *International Criminal Law* (3rd edn, Oxford University Press 2013) 128.
[104] David Scheffer, 'Genocide and Atrocity Crimes' (2006) 1 (3) Genocide Studies and Prevention 229, 232.
[105] ibid.
[106] Antonio Cassese, *I diritti umani oggi* (Laterza 2008) 178.
[107] Genocide Prevention Task Force, Madeleine Albright and William S Cohen, *Preventing Genocide: A Blueprint for US Policymakers* (US Holocaust Memoria Museum, American

has the potential to mobilise governments as well as public opinions and justify military interventions.

Even if it is uncontroversial that the presence of a genocide does not affect the prohibition to use force, it seems that the use of the 'g-word' has the power to influence politics and diplomacy in triggering interventions. The recognition of genocide also has an historical value: 'For victims, it presents itself as a badge of honour, the only adequate way to describe their suffering or that of their ancestors'.[108] At the same time, the definition of genocide is narrow and does not apply to the majority of mass atrocities. This suggest the intention to promote the adoption of measures involving the use of force, which also emerges from the reading of Scheffer's previous definitions of atrocities. Initially, atrocity crimes had a wider definition that included the crime of aggression:

> [T]he crime of genocide, a violation of the laws and customs of war, the crime of aggression (if and when it is defined so as to give rise to clear individual criminal culpability), the crime of international terrorism, a crime against humanity (the precise definition of which has evolved in the development of the criminal tribunals), or the emerging crime of ethnic cleansing.[109]

Conversely, Scheffer later suggested that military interventions with the alleged aim of stopping atrocity crimes, under the responsibility to protect, would not fall within the definition of the crime of aggression of the Rome Statute:

> The concern has long festered that an enforceable crime of aggression in the Rome Statute could undermine any chance for R2P to take firm hold among nations to prevent or end the commission of atrocity crimes. Policy-makers and military commanders likely would hesitate to intervene across borders to confront genocide, crimes against humanity (including ethnic cleansing), and war crimes imperiling a civilian population because of fear that the charge of aggression, involving

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Academy of Diplomacy and US Institute of Peace 2008) xxi; cit in William A Schabas, 'Crimes Against Humanity as a Paradigm for International Atrocity Crimes' (2011) 20 (3) Middle East Critique 253, 255.

[108] William A Schabas, *Unimaginable Atrocities: Justice, Politics, and Rights at the War Crimes Tribunals* (Oxford University Press 2012) 102.

[109] David Scheffer, 'The Future of Atrocity Law' (2002) 25 Suffolk Transnational Law Review 389, 399.

> individual criminal liability, would be levied against them if they act under R2P even with Security Council approval.[110]

The evolution of the concept shows a change of priorities in international criminal law. At Nuremberg, aggressive war was labelled as the supreme crime, 'differing only from other war crimes in that it contains within itself the accumulated evil of the whole'.[111] Seventy-five years later, it does not even qualify for the definition of atrocity crimes. Rather, the focus on atrocities suggests the exclusion from the definition of aggression certain military interventions aimed at stopping other crimes: 'The focus on atrocity—and the aspiration to make war "clean"—may humanize war rather than stigmatize it, and perhaps even enable war instead of limit it'.[112] Other proposals have tried to simplify the categorisation of international crimes without neglecting the importance of aggressive war as a crime. For instance, Benjamin Ferencz has suggested considering the illegal use of force as a crime against humanity.[113]

In his memoir *All the Missing Souls*, Scheffer recalled why he introduced the expression and defined atrocity crimes as 'high-impact crimes of severe gravity that are of an orchestrated character, shock the conscience of humankind, result in a significant number of victims or large-scale property damage, and merit an international response to hold at least the top war criminals accountable under the law'.[114] The crime of aggression fulfils these criteria and could qualify as an atrocity crime to avoid any abuse of the definition in interventionist rhetoric.

6.2 Past, Present, and Possible Future Uses of the Expression

The concept of '*atrocitas*' traces back to Roman law, with an uncertain legal meaning. Mark Osiel suggested a definition that is similar to the current use of the expression: 'Roman military law described the relevant subset of offenses,

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[110] David Scheffer, 'The Missing Pieces in Article 8 bis (Aggression) of the Rome Statute' (2017) 58 Harvard International Law Journal 83, 85.
[111] *France v Goering 1946* (Judgment) [1947] 41 American Journal of International Law 172, 186.
[112] Samuel Moyn, 'From Aggression to Atrocity: Rethinking the History of International Criminal Law' in Kevin Jon Heller, Frédéric Mégret, Sarah MH Nouwen, Jens David Ohlin and Darryl Robinson (eds), *The Oxford Handbook of International Criminal Law* (Oxford University Press 2020) 341. See also Samuel Moyn, 'From Antiwar Politics to Antitorture Politics' in Austin Sarat, Lawrence Douglas and Martha Umphrey (eds), *Law and War* (Stanford University Press 2014) 154.
[113] 'The Illegal Use of Armed Force as a Crime Against Humanity' (2015) 2 (2) Journal on the Use of Force and International Law 187.
[114] David Scheffer, *All the Missing Souls, a Personal History of the War Crimes Tribunals* (Princeton University Press 2012) 494.

those legally inexcusable despite having been performed under orders, as "atrocities". This word never became a legal term of art, however, with a settled meaning distinct from ordinary Latin'.[115] Other authors have affirmed that Roman law used the word '*atrocitas*' not to refer to a crime or a group of crimes but as an aggravating circumstance.[116]

Interestingly, Roman lawyers recommended the use of the word '*atrocitas*' for its rhetoric power, with a similar purpose to the contemporary use of the expression 'atrocity crimes', that is, to persuade people of the gravity of the act and to trigger an emotional reaction:

> The best way however for the accuser to excite the feelings of the judge is to make the charge which he brings against the accused seem as atrocious or, if feasible, as deplorable as possible. Its atrocity may be enhanced by considerations of the nature of the act, the position of its author or the victim, the purpose, time, place and manner of the act: all of which may be treated with infinite variety.[117]

In 1825, Jeremy Bentham similarly contested the rhetorical and ambiguous legal use of the word 'atrocity' (and also, 'crime') in 'Atrocity of an Alleged Offence, How Far a Ground of Incredibility':

> What then is, on this occasion, meant by *atrocity?*—the atrocity of the offence—no, not of the *offence;* that would not be sentimental enough: of the *crime.* The word *crime,* being incurably indistinct and ambiguous, is the word to be employed upon all rhetorical occasions.[118]

At the Moscow Conference of October 1943, Winston Churchill, Franklin Delano Roosevelt, and Josip Stalin signed a 'Statement on Atrocities' which affirmed: 'The United Kingdom, the United States and the Soviet Union have received from many quarters evidence of atrocities, massacres and cold-blooded

[115] *Obeying Orders: Atrocity, Military Discipline, and the Law of War* (Transactional Publishing 1999) 45.
[116] Maria Luisa Biccari, 'Atrocitas: alle radici della teoria penalistica circa le aggravanti del reato', 62 Studi Urbinati di Scienze Giuridiche Politiche ed Economiche 5.
[117] Quintilian, 'Institutio Oratoria' in Quintilian, *Complete Works* (Delphi Classics 2015) Book 6, 124.
[118] *Rationale of Judicial Evidence, Specially Applied to English Practice* (first published 1825, Hunt and Clarke 1995) 386. Emphasis in the original.

mass executions which are being perpetrated by Hitlerite forces'.[119] In international criminal law, the concept of atrocities was used in the draft of the London Charter of the International Military Tribunal. The list of crimes under the jurisdiction of the Tribunal included '[a]trocities against civilian populations' before redefining the category as crimes against humanity.[120] Concerning the use of the expression within the UN, it is worth mentioning the 2014 'Framework of Analysis for the Prevention of Atrocity Crimes'. [121] The Special adviser on the prevention of genocide and the Special adviser on the responsibility to protect published the framework in an attempt to strengthen the protection mechanism through harmonising the approach to UN action. [122]

The framework was conceived as a guide for assessing the risk of genocide, crimes against humanity, and war crimes, and it covers other crucial aspects which have a bearing on the overall UN approach to the protection of civilians. In the foreword of the document, then Secretary-General Ban Ki-moon recalled the responsibility to protect; thus, the document can become a useful tool in the development, interpretation, and application of the doctrine. The document replaces the previous framework of analysis drafted in 2009 by the Special adviser on the prevention of genocide, which dealt exclusively with the crime of genocide. With the inclusion of the Special adviser on the responsibility to protect, the new framework covered the broader concept of atrocity crimes.

The document provided a common language by defining concepts, such as atrocity crimes, which were previously used without a specific definition. Instead of simplifying the discipline, the framework proposed a new and complex definition. According to the document, the expression 'atrocity crimes' includes three legally defined international crimes: genocide, crimes against humanity, and war crimes. In addition to these, the Framework of Analysis includes ethnic

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[119] The Moscow Conference, Joint Four Nations Declaration, October 1943, https://avalon.law.yale.edu/wwii/moscow.asp accessed 3 November 2020.
[120] 'Revised Definition of "Crimes", Submitted by American Delegation, July 30, 1945' in Robert H Jackson, *Report of Robert H Jackson, United States Representative to the International Conference on Military Trials, London, 1945* (Department of State 1949) 394.
[121] UN Office on Genocide Prevention and the Responsibility to Protect, Framework of Analysis for Atrocity Crimes: a Tool for Prevention (2014), <https://www.un.org/en/genocideprevention/documents/about-us/Doc.3_Framework%20of%20Analysis%20for%20Atrocity%20Crimes_EN.pdf> accessed 25 October 2020.
[122] Adama Dieng and Jennifer Welsh, 'Assessing the Risk of Atrocity Crimes' (2016) 9 Genocide Studies and Prevention 3, 4.

cleansing, explaining that it is not a defined crime under international law but that it 'includes acts that are serious violations of international human rights and humanitarian law that may themselves amount to one of the recognized atrocity crimes, in particular crimes against humanity'.[123] However, for the purpose of the examination of the risk factors of atrocity crimes, ethnic cleansing is integrated into the analysis of crimes against humanity. Moreover, the framework is limited, in its application, only to those war crimes that have an impact on the protection of human life. In addition, the document includes a further requirement, that the mechanism is triggered only in respect of war crimes that 'assume a more systematic or widespread pattern of conduct',[124] using the same language which defines the threshold of crimes against humanity.

Finally, international criminal law experts adopted the wording at the Chautauqua Blueprint for a Statute for a Syrian Extraordinary Tribunal to Prosecute Atrocity Crimes. This was an initiative of a committee of experts, chaired by Cherif Bassiouni, David Crane, and Michael Scharf, to support accountability mechanisms for the armed conflict in Syria. The proposal defines atrocity crimes as 'those international crimes recognized in the Statute of the International Criminal Court, namely war crimes, crimes against humanity, and genocide'.[125] In this case, too, the inclusion of the crime of aggression in the list of atrocity crimes would have seemed correct and appropriate.

In summary, the expression 'atrocity crimes' was allegedly introduced to simplify the current categorisation of international crimes. To achieve the purpose of simplification, it is necessary to adopt a consistent definition of the expression, with clear legal definitions. For instance, 'atrocity crime' might be a clear and concise expression to refer to the crimes under the jurisdiction of the International Criminal Court, as defined by the Rome Statute. Conversely, it sometimes includes the crime of ethnic cleansing, which has not been defined in the statute of any international criminal tribunal. The expression also differs from the

[123] UN Office on Genocide Prevention and the Responsibility to Protect, Framework of Analysis for Atrocity Crimes: A Tool for Prevention (2014), 1 <https://www.un.org/en/genocideprevention/documents/about-us/Doc.3_Framework%20of%20Analysis%20for%20Atrocity%20Crimes_EN.pdf> accessed 25 October 2020.
[124] ibid 5.
[125] Michael Scharf, Milena Sterio and Paul Williams, 'The Chautauqua Blueprint for a Statute for a Syrian Extraordinary Tribunal to Prosecute Atrocity Crimes' in *The Syrian Conflict's Impact on International Law* (Cambridge University Press 2020) 181.

jurisdiction of the International Criminal Court, as it excludes the crime of aggression. This suggests that 'atrocities' might be a rhetoric word conceived to replace 'genocide' in galvanising governments and public opinions to trigger military interventions.[126] As a result, the inclusion of aggression (as in Scheffer's initial proposal) among the atrocity crimes would best serve the unique purpose of simplification of the discipline.

7. Positive Synergies between the Doctrine and the Court

The main differences between the doctrine and the International Criminal Court might indeed be interpreted as an opportunity to complement each other by fulfilling the aim of ending mass atrocities while holding accountable those responsible for the commission of international crimes. For instance, Aidan Hehir and Anthony Lang affirm that in 'the contemporary era, R2P and the ICC have become the two most prominent institutions of international human rights enforcement. R2P seeks to prevent and, more controversially, halt human rights violations, while the ICC is orientated towards punishing those who violate human rights'.[127]

Since the moment its statute was drafted, the Court has been referred to as a '[g]iant without legs'.[128] Such an expression emphasises the strength of the legal structure of the Court and, at the same time, its dependency on the cooperation of states when it comes to implementing its decisions. Conversely, as a diplomatic tool, the responsibility to protect can influence state policies, to the point of challenging their sovereignty, to protect their populations from mass atrocities. Yet the doctrine lacks a defined legal framework for its action, which exposes responsibility to protect to the risk of being misused by political actors.

Nonetheless, theoretically, the responsibility to protect might empower the International Criminal Court with the necessary state cooperation to effectively carry out investigations and prosecutions in a certain situation. The Court's prosecutor, for instance, in a report to the Security Council on the Darfur situation,

[126] Gerry Simpson, '"Stop Calling it Aggression": War as Crime' (2008) 61 (1) Current Legal Problems 191.
[127] Aidan Hehir and Anthony Lang, 'The Impact of the Security Council on the Efficacy of the International Criminal Court and the Responsibility to Protect' (2015) 26 Criminal Law Forum 153.
[128] Antonio Cassese, 'On the Current Trends Towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law' (1998) 9 European Journal of International Law 2.

linked the obligation of the government of Sudan to implement the arrest warrants to the responsibility to protect:

> The GoS has the responsibility to implement the warrants of arrest issued by the Court. It has consistently and expressly refused to do so. Immediate execution of the warrants will not only enable the Court to carry out its core function but may also greatly assist in the prevention of further crimes. Indeed, as UNSCR 2296 emphasised, 'the Government of Sudan bears the primary responsibility to protect civilians within its territory and subject to its jurisdiction, including protection from crimes against humanity and war crimes.'[129]

Some authors have argued that its focus on human protection can contribute to advocating the cause of international justice: 'the doctrine has come to constitute a form of international criminal justice, inculcating a residual duty on the international community to act in instances of genocide, war crimes, ethnic cleansing and crimes against humanity in order to remedy an injustice and protect people's fundamental rights and interests'.[130]

At the same time, the International Criminal Court may provide the doctrine with independent judicial scrutiny of its actions. As Michael Contarino and Melinda Negron-Gonzales affirm, 'ICC jurisprudence may over time strengthen R2P in another way: by helping to clarify what acts constitute specific atrocity crimes.'[131]

More generally, the action of the Court in certain situations could ideally have a deterrent effect in relation to the perpetration of mass atrocities, thus contributing to the purpose of the responsibility to protect. In the words of Cherif Bassiouni:

> International criminal justice is … seen as advancing the goals of prevention on the assumption that the prosecution and punishment of decision-makers and senior perpetrators of *jus cogens* crimes will produce deterrence. If this result is obtained, even in part, then prevention of crimes such as genocide, crimes

[129] ICC Office of the Prosecutor, 'Twenty-fourth Report Pursuant to Para. 8 of UN Security Council Resolution (UNSCR) 1593' (13 December 2016).
[130] Samuel James Wyatt, *The Responsibility to Protect and a Cosmopolitan Approach to Human Protection* (Palgrave McMillan 2019) 143.
[131] Michael Contarino and Melinda Negron-Gonzales, 'The International Criminal Court' in Gentian Zyberi, *An Institutional Approach to the Responsibility to Protect* (Cambridge University Press 2013) 411.

> against humanity, and war crimes will be achieved and the goals of R2P will be achieved. In this respect, international criminal justice can be seen as a corollary of R2P modest step that needs to be perfected.[132]

However, the Court's deterrent effect is highly controversial and will be analysed in Chapter 4. Many scholars have affirmed that it is too early to reach definitive conclusions about the possibility of the Court to deter international crimes.[133] Some critics have in fact accused the Court of causing the opposite effect by jeopardising peace processes and, as has been the case in the Darfur situation and on the occasion of the Court's issuing of the arrest warrants for al-Bashir, provoking violent reactions from politically influential individuals when they are charged with international crimes.[134]

8. Risks of Connecting the Doctrine and the Court

The International Criminal Court and the responsibility to protect share the experience of an inherent contradiction. Both were conceived to be independent from any political power to affirm the principle of rule of law.[135] Only then would it have been possible to end impunity regarding the perpetrators of international crimes and identify appropriate cases that would require the intervention of the international community to end mass atrocities. Conversely, both the Court and the doctrine have been subjected to criticisms for applying double standards and being influenced by political powers, chiefly the permanent members of the Security Council. The influence of the Security Council over the Court is partially regulated by the Rome Statute. The Council is indeed empowered to trigger the jurisdiction of the Court, pursuant to Article 13(b), by referring a situation in which international crimes appear to have been committed, acting under Chapter VII of the UN Charter. Acting with a resolution under Chapter VII, the Council

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[132] Cherif Bassiouni, 'Advancing the Responsibility to Protect Through International Criminal Justice' in Richard H. Cooper and Juliette V. Kohler (eds), *Responsibility to Protect: The Global Moral Compact for the 21st Century* (Hampshire: Palgrave Macmillan 2009) 33.
[133] Kate Cronin-Furman, 'Managing Expectations: International Criminal Trials and the Prospects for Deterrence of Mass Atrocity' (2013) 7 (3) International Journal of Transitional Justice 434.
[134] Lutz Oette, 'Peace And Justice, Or Neither?: The Repercussions Of The Al-Bashir Case For International Criminal Justice In Africa And Beyond' (2010) 8 Journal of International Criminal Justice.
[135] Aidan Hehir and Anthony Lang, 'The Impact of the Security Council on the Efficacy of the International Criminal Court and the Responsibility to Protect' (2015) 26 Criminal Law Forum 153.

can also defer a situation or investigation for a renewable period of twelve months, pursuant to Article 16.

Most importantly, part of the influence is exerted through extra-legal pressures (most notably, the denial of support to obtain the necessary cooperation by relevant states following referrals), which are difficult to compare to any statutory countermeasures. In addition, the International Criminal Court is struggling to carry out its actions in situations of ongoing crisis, where the Court is expected to play a role in opposing ongoing atrocities. As for the Libya situation, for instance, the Security Council specifically mentioned the responsibility to protect when it triggered the Court's jurisdiction through Resolution 1970/2011.[136] However, so far, the Court has not been able to prosecute the responsible persons. The prosecutorial strategy privileged domestic proceedings over international prosecution, despite risks of grave violations of the due process rights of the accused.

At the same time, responsibility to protect received similar criticisms for lack of impartiality. The doctrine has been recalled by different actors with contradictory criteria. The opposing approaches of the international community to the 2011 Libya and 2013 Syria crises are recalled as examples of double standards. The absence of a clear legal framework shows that the doctrine has not reached a definitive shape. Even the core elements of the responsibility to protect, such as the concept of 'sovereignty as responsibility', are challenged within diplomatic talks to obtain wider support among states. Given the current situation, the doctrine can neither contribute to the implementation of international justice in a situation of crisis nor benefit the judicial scrutiny of the Court in assessing situations in which intervention is worthwhile.

The doctrine and the International Criminal Court present a complex interaction that Carsten Stahn presented through a family law analogy of 'marital stress or ground for divorce'.[137] As in Manzoni's novel *The Betrothed*, many obstacles occur in the celebration of the marriage between the Court and the responsibility to protect. Their common sources, their shared cultural origin or

[136] UNSC Res 1970/2011 (26 February 2011) UN Doc S/RES/1970.
[137] Carsten Stahn, 'Marital Stress or Ground for Divorce? Re-thinking the Relationship between R2P and International Criminal Justice' (2015) 26 Criminal Law Forum 13.

DNA, might lead one to conclude that it would be even better not to perform the union at all. As Benjamin Schiff stated:

> Because both the ICC and the UN implementation of R2P cover broad ranges of potential activities, there can be synergies and overlaps; however, they are at base rather different activities in that the ICC is intended to be a primarily legal judicial mechanism while R2P articulates a quintessentially political set of norms.[138]

However, given both the doctrine and the Court's recent creation, which occurred less than twenty years ago, it might be too early for an effective interplay between the two. Both the Court and the doctrine are still in the process of developing their identities by finding their places within the international law system and, most of all, struggling for their independence from political power. Yet, the emphasis on implementation and effectiveness might hide the international legal value of the parallel evolution of the two doctrines, as suggested by Carsten Stahn: 'The focus on implementation has detracted from the foundations of the concept ... It is key to understand international criminal justice and R2P not as particular institutional models, but as normative commitments. There is a need for a more careful return to the foundations' and Kirsten Ainley: 'Rather than judging the institutions by their abilities (or lack of them) to make a positive impact on live conflict, we need to change our expectations and refocus on the original mandates of the court and R2P.' The following chapters address the arguments on the implementation of the responsibility to protect and the effectiveness of the International Criminal Court, also with the analysis of the situations of Darfur, Libya and Syria. Afterwards, this study focuses on the impact of the doctrine and the court on key issues of international law: state sovereignty and the prohibition of the use of force.

[138] Benjamin N Schiff, 'Lessons from the ICC for ICC/R2P Convergence' (2010) 21 Finnish Yearbook of International Law 101, 104.

Chapter 2:
The UN Security Council and the International Criminal Court. Reflections on the Situations in Darfur and Libya

1. Introduction

Through Resolution 1970 of 26 February 2011, the UN Security Council referred the Libya situation to the International Criminal Court, after having recalled 'the Libyan authorities' responsibility to protect its population'. In so doing, the Council established a clear bridge between the responsibility to protect and the International Criminal Court. The Council, indeed, activated the jurisdiction of the Court as a way to implement the doctrine of the responsibility to protect, in line with the standpoint taken by International Criminal Court Prosecutor Fatou Bensouda in 2012: 'The Court should be seen as a tool in the R2P toolbox—strengthening the correlation and the interaction between both is what I think we should be concerned more with in order to maximise effectively the protection which we will give to civilians.'[1]

Resolution 1970 was the second Security Council referral to the Court, after Resolution 1593 of 2005, which referred the Darfur situation. Resolution 1593 makes no reference to the responsibility to protect. However, the idea of a connection between the International Criminal Court and the doctrine was already present at the time of the Darfur referral. In its final report, the International Commission of Inquiry on Darfur, headed by Antonio Cassese, expressly recommended to refer the situation to the International Criminal Court, making a reference to the responsibility to protect:

> The Commission is of the view that two measures should be taken by the Security Council to ensure that justice is done for the crimes committed in Darfur, keeping in mind that any justice mechanism must adhere to certain recognized principles: it must be impartial, independent, and fair. With regard to the judicial accountability mechanism, the Commission recommends the referral of the situation of Darfur to the International Criminal Court (ICC) by the United Nations Security Council. As stated

[1] Cit in Kirsten Ainley, 'The Responsibility to Protect and the International Criminal Court: Counteracting the Crisis' (2015) 91 (37) International Affairs 44.

> above, the Sudanese judicial system has proved incapable, and the authorities unwilling, of ensuring accountability for the crimes committed in Darfur. The international community cannot stand idle by, while human life and human dignity are attacked daily and on so large a scale in Darfur. The international community must take on the responsibility to protect the civilians of Darfur and end the rampant impunity currently prevailing there.[2]

Furthermore, in an *amicus curiae* before the Court, UN High Commissioner for Human Rights Louise Arbour expressly envisaged the Court as a tool to implement the doctrine:

> She reaffirmed that ensuring the protection of the people of Sudan, and necessarily the people of Darfur, is primarily the responsibility of the Government of Sudan. She noted also that the world's leaders unanimously enshrined in the outcome document of the World Summit in September 2005 that when a State is unable or unwilling to safeguard its population from genocide, war crimes, ethnic cleansing and crimes against humanity, the responsibility to protect is to be shared by the international community. She noted that the responsibility to protect entails not only putting an immediate stop to violations: it also means prevention and prosecution. Where impunity is allowed to prevail, protection will remain elusive. She said that the international community took a significant step in this direction in the case of Darfur when the Security Council referred the situation to the ICC.[3]

The Libya referral followed, in the wording of the resolution, the model of Resolution 1593 of 2005. The intervention of the International Criminal Court in Darfur, however, cannot be considered a positive example to be followed. Presenting a general overview of the difficulties of the International Criminal Court action in the Darfur situation is worthwhile. This brief analysis reveals that the same issues in the relationship between the Court and the Security Council are reiterated in the situation of Libya.

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[2] United Nations, 'Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General Pursuant to Security Council Resolution 1564 of 18 September 2004' par 569.

[3] United Nations High Commissioner for Human Rights, 'Observations of the UNCHR invited in Application of Rule 103 of the Rules of Procedure and Evidence' (10 October 2006) ICC-02/05.

2. An Overview of the Darfur Situation

Since the first referral in 2005, the aims of the International Criminal Court action regarding the situation of Darfur have not been achieved. The situation, however, has substantially changed with the protests in 2019 that ousted the Sudanese government of Omar al-Bashir, which had been in charge since 1989. In fact, the government that replaced that of al-Bashir detained the former president and two other individuals, Abdel Raheem Hussein and Ahmad Harun, for whom the Court issued arrest warrants. The regime change increased the possibility of cooperation between the Sudanese government and the International Criminal Court.[4] After these events, the prosecutor declared herself 'optimistic that the ongoing transitional process in the Republic of Sudan augurs well for prospects to finally achieve justice for Darfur victims'.[5]

Numerous criticisms of the Court's results in Darfur have been expressed, most significantly by Prosecutor Bensouda. Over the years, Prosecutor Bensouda repeatedly denounced in her reports concerning the Darfur situation the lack of support from the Security Council:

> Over thirteen years after the original referral by the Council, efforts to achieve accountability for victims in the Darfur situation continue to suffer from a lack of cooperation from States, including States Parties to the ICC, members of this Council and the Republic of Sudan … In the face of this lack of cooperation, the suspects in the Darfur situation continue to evade justice, and in the case of Messrs Al Bashir and Harun, continue to travel internationally.[6]

At the time of writing, four of the five individuals subject to an arrest warrant remain at large. In June 2020, Ali Muhammad Ali Abd-Al-Rahman (Ali Kushayb) voluntarily surrendered in the Central African Republic and was transferred to the Court. A Sudanese court convicted al-Bashir for crimes related to financial corruption. Al-Bashir was also charged for acts related to the coup of 1989. Former Minister of Defence Abdel Raheem Hussein and former Governor of South Kordofan Ahmad Harun are detained in Sudan awaiting trial. Moreover,

[4] Jean-Nicolas Bach and Clément Deshayes, 'Sudan' in *Africa Yearbook* (Brill 2019) 378.
[5] ICC Office of the Prosecutor, 'Statement to the UNSC on the Situation in Darfur, pursuant to UNSCR 1593 (2005)' (10 June 2020) 1.
[6] ICC Office of the Prosecutor, 'Twenty-Eighth Report of the Prosecutor of the International Criminal Court to the UNSC pursuant to UNSCR 1593 (2005)' (14 December 2018).

three members of rebel groups, Abu Garda, Abdallah Banda, and Saleh Jerbo, were summoned to appear for alleged crimes committed during an attack on a peacekeeping military base in Haskanita. The three rebels voluntarily appeared before Court in 2009 and 2010. While charges against Abu Garda were not confirmed by the Pre-Trial Chamber and proceedings against Saleh Jerbo were terminated after receiving evidence of his death in 2013, the proceedings against Abdallah Banda are ongoing, and he continues to be at large.[7]

The case of former Sudanese president al-Bashir reveals the main difficulties the Court faces in enforcing its mandate. Al-Bashir was charged with crimes against humanity and war crimes in an arrest warrant issued in 2009, and with genocide in a second arrest warrant issued in 2010. In 2010, he was also re-elected as president of Sudan in an election marked by grave irregularities.[8] After the indictment, al-Bashir carried out missions, in his official capacity, in several foreign countries, both parties and non-parties to the Rome Statute, without fearing the enforcement of the arrest warrant. States not party to the Rome Statute, or non-states parties, do not have a legal obligation to implement an arrest warrant of the International Criminal Court, as is detailed below in the analysis of Resolution 1593 of 2005. Examples of non-states parties that hosted al-Bashir include Egypt, Iran, Libya, and China, the latter a permanent member of the Security Council. However, as the Appeals Chamber affirmed in 2019,[9] states parties to the Rome Statute have an obligation to enforce the arrest warrant despite other international obligations providing the respect for chief-of-state immunities that are mentioned in Article 98 of the Rome Statute:

> The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or

[7] ICC Office of the Prosecutor, 'Statement to the United Nations Security Council on the Situation in Darfur, pursuant to UNSCR 1593 (2005)' (10 June 2020).
[8] EU Election Observation Mission of the Republic of the Sudan, 'Final Report on the Executive and Legislative Elections, 2010', <https://www.europarl.europa.eu/meetdocs/2009_2014/documents/afet/dv/201/201007/20100713_finreportsudan_en.pdf>.
[9] *Prosecutor v Al-Bashir* (Judgment in Jordan Referral re Al-Bashir Appeal) ICC-02/05-01/09 OA2 (6 May 2019) para 97.

> property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity.[10]

Chad, Malawi, Kenya, the Democratic Republic of Congo, South Africa, and Nigeria are among member states that have allowed access to al-Bashir, although Kenya and Malawi subsequently changed their policy on the matter, refusing to host the president of Sudan in 2010 and 2012, respectively.[11] The Pre-Trial Chambers took several decisions against states parties that claimed that al-Bashir was immune to arrest: on Malawi and Chad in 2011,[12] on Democratic Republic of the Congo in 2014,[13] and on South Africa in 2017.[14] Scholars criticised these decisions on the basis that they used inconsistent legal arguments, for example, concerning the immunities and obligations of non-states parties: 'The central determination that there was an obligation to arrest Al Bashir—which was agreed across the Pre-Trial Chambers—lost its authority as a result of the inconsistency, insufficiency and incoherence of the different paths of legal reasoning'.[15]

In 2019, the Appeals Chamber ruled on Jordan's failure to arrest al-Bashir, affirming that, under customary international law, heads of state do not enjoy immunity from prosecution before international courts.[16] Concerning the clash between the statutory provision on immunities in Article 98 of the Rome Statute, the Appeals Chamber stated that the provision 'does not itself stipulate, recognise or preserve any immunities. It is a procedural rule that determines how the Court

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[10] Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3 (Rome Statute) art 98.
[11] Dapo Akande, 'The Immunity of Heads of States of Nonparties in the Early Years of the ICC' (2018) 112 American Journal of International Law Unbound 172.
[12] *Prosecutor v Al-Bashir* (Corrigendum to the Decision Pursuant to Article 87[7] of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al-Bashir) ICC-02/05-01/09 (13 December 2011); *Prosecutor v Al-Bashir* (Decision Pursuant to Article 87[7] of the Rome Statute on the Refusal of the Republic of Chad to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al-Bashir) ICC-02/05-01/09 (13 December 2011).
[13] *Prosecutor v Al-Bashir* (Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Al-Bashir's Arrest and Surrender to the Court) ICC-02/05-01/09 (9 April 2014).
[14] *Prosecutor v Al-Bashir* (Decision under article 87[7] of the Rome Statute on the non-compliance by South Africa with the request by the Court for the arrest and surrender of Omar Al-Bashir) ICC-02/05-01/09 (6 July 2017) para 96.
[15] Gabrielle McIntyre, 'The Impact of a Lack of Consistency and Coherence: How Key Decisions of the International Criminal Court Have Undermined the Court's Legitimacy' (2020) 67 Questions of International Law 25, 39 (footnotes omitted).
[16] *Prosecutor v Al-Bashir* (Judgment in the Jordan Referral re Al-Bashir Appeal) ICC-02/05-01/09 OA2 (6 May 2019) paras 97 and 114.

is to proceed where any immunity exists such that it could stand in the way of a request for cooperation'.[17]

2.1 The Prosecutor's Claims to the Council

The difficulties of the Darfur situation tested the relationship between the Council and the Court. In her report to the Security Council of 12 December 2014, Prosecutor Bensouda announced the decision to put investigations into the Darfur situation on hold. She reiterated the impossibility of obtaining any meaningful result in the situation without a change of attitude from the Security Council, whose inaction she repeatedly criticised in her previous reports:

> It is becoming increasingly difficult for me to appear before the Council to update it when all I am doing is repeating the same things I have said over and over again, most of which are well known to the Council. Not only does the situation in Darfur continue to deteriorate, the brutality with which crimes are being committed has become more pronounced. Women and girls continue to bear the brunt of sustained attacks on innocent civilians, but the Council has yet to be spurred into action. Victims of rapes are asking themselves how many more women must be brutally attacked for the Council to appreciate the magnitude of their plight. In the almost 10 years that my Office has been reporting to the Council, no strategic recommendation has ever been provided to my Office, and neither have there been any discussions resulting in concrete solutions to the problems we face in the Darfur situation.[18]

Prosecutor Bensouda blamed the Council for not supporting the Court on various issues: the development of a coordinated strategy, the achievement of cooperation from Sudan, and the enforcement of the arrest warrant by other states parties. The prosecutor's declaration of hibernating the Darfur situation provoked strong reactions. Al-Bashir celebrated the statement, affirming that 'it is the people of Sudan who stood firm and said that no Sudanese official shall surrender to colonial courts at The Hague or anywhere else'.[19]

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[17] ibid 5.
[18] UNSC Verbatim Record (12 December 2014) UN Doc S/PV/7337, 2.
[19] *Prosecutor v Hussein* (Prosecution's request for a finding of non-compliance against the Republic of the Sudan in the case of The Prosecutor v Abdel Raheem Muhammad Hussein pursuant to article 87[7] of the Rome Statute) ICC-02/05-01/12-32 (5 June 2015) 6.

Still, the hibernation did not impede a development in the proceedings. Only a few months after the declaration, in March 2015, the Appeals Chamber confirmed Abdalla Banda's arrest warrant, and Pre-Trial Chamber II ruled on Sudan's failure to cooperate in the al-Bashir case. Prosecutor Bensouda reported as follows:

> Prosecutor appealed to the Security Council to do all it can to effect the arrest and surrender of the individuals sought. The Prosecutor further conveyed to the Council that with its finite resources and heavy case-load, it is difficult for the Office to fully commit to active investigations of the crimes in Darfur … This does not mean that cases on Darfur have been terminated, but rather other advanced cases have had to be prioritised.[20]

Prosecutor Bensouda's declaration was mostly 'an attempt to stir the Council into action',[21] and this reveals the relevance of the influence of the Security Council on the actions of the Court. Such an influence was partially foreseen by the Rome Statute, which regulates the relationship between the two bodies. Most of the influence, however, arises from the Council's policies and goes beyond any legal provision. This suggests that during politically inconvenient situations, the Council could jeopardise the Court's actions through extra-legal policies without consulting the relevant statutory provisions.

It is commonly acknowledged that the International Criminal Court lacks a 'police force of its own; instead it relies entirely on states to execute its arrest warrants, to provide evidence, to facilitate the appearance of witnesses, and so forth'.[22] Even more so, in the case of referral relating to a situation in a non-party state such as Sudan, the support of the Security Council is crucial in obtaining cooperation for investigations within the territory. As confirmed by the words of Prosecutor Bensouda, it is extremely difficult to collect evidence of crimes in the Darfur villages controlled by the allegedly responsible governmental forces.

Furthermore, the International Criminal Court has not been able to enforce the arrest warrants issued in the Darfur situation. In her statements to the Security

[20] ICC Office of the Prosecutor, 'Twenty-first report pursuant to paragraph 8 of UN Security Council Resolution (UNSCR) 1593' (29 June 2015).
[21]Thomas Weatherall, 'The Evolution of "Hibernation" at the International Criminal Court: How the World Misunderstood Prosecutor Bensouda's Darfur Announcement' (2016) 20 (10) American Society of International Law 6.
[22] Sang-Hyun Song, 'Preventive Potential of the International Criminal Court' (2013) 3 Asian Journal of International Law 203, 205.

Council, Prosecutor Bensouda has regularly highlighted non-cooperation from states parties in arresting al-Bashir during his official visits in their territories. All cases of non-cooperation in this matter have been referred to the Assembly of States Parties and to the Security Council, with the exception of Nigeria, South Africa, and Jordan.[23] Decisions involving non-cooperation did not include a specific request for action by the Security Council. However, replying to the prosecutor's report, UK Representative Helen Mulvein beseeched the Council to effectively and in a timely manner follow up reports of non-cooperation with the Court and to assist the Court in fulfilling the mandate established ten years earlier:

> Where States fail to comply with their obligations, it is important that the Security Council respond. The United Kingdom regrets the fact that the Council has so far been unable to agree to responses to letters from the President of the Court relating to the obligation to cooperate with the Court. We call once again for all Council members to agree to timely and effective follow-up to reports of non-cooperation with the Court. That action should start with responses to the letters the Council has received. It is the responsibility of the Council to assist the Court in fulfilling the mandate we gave it when we referred the situation in Darfur to the Prosecutor almost 10 years ago.[24]

In her report of December 2014, Prosecutor Bensouda mentioned that the hibernation of investigations in Darfur further occurred because already limited resources for investigations were overstretched. This raises the issue of the Security Council's funding for the Court. It constitutes a form of indirect control over the actions of the Court that goes beyond any provision of the Rome Statute, and it is possibly more effective in limiting investigations and prosecutions than the use of Article 16 of the Rome Statute. The limited funding sources available for the Court's work together with the lack of enforcement power even towards states parties undermines the independence of the Court.[25] The Security Council appears to have several ways to hinder the regular development of International

[23] Angela Mudukuti, 'Prosecutor v. Omar Hassan Ahmad Al-Bashir, Judgment in the Jordan Referral re Al-Bashir Appeal' (2020) 114 (1) American Journal of International Law 103.
[24] UNSC Verbatim Record (12 December 2014) UN Doc S/PV/7337, 7.
[25] Victor O Ayeni and Matthew A Olong, 'Opportunities and Challenges to the UN Security Council Referral Under the Rome Statute of the International Criminal Court' (2017) 25 African Journal of International and Comparative Law 239.

Criminal Court actions, as the action of the Court strongly depends on political support from the Council.

3. The Security Council Referrals: Resolutions 1593/2005 and 1970/2011

Some of the difficulties faced by the International Criminal Court in the Darfur situation stem from the very wording of the referral resolution.[26] In particular, (a) the selective exclusion of certain categories of people from the jurisdiction, (b) the lack of a special financing from the UN to the specific situation referred by the Security Council, and (c) the ambiguous obligations imposed on the non-states parties. These factors appear not to promote efficiency in the work of the Court. The three provisions were criticised, during the negotiations, by members of the Security Council that eventually abstained from the vote. Brazil qualified these issues as 'substantial issues that, in our view, will not contribute to strengthening the role of the ICC', while Algeria expressed 'regret that, out of a concern for compromise at all costs and at whatever price, those defending the principle of universal justice have in fact ensured that, in this domain, the use of double standards—of which some have accused the Council—and a two-track justice were most unexpectedly demonstrated'.[27] At the same time, the US presented those provisions as a condition to not veto the resolution. This stemmed from its policy towards the International Criminal Court, whose details can be plainly inferred by the reading of its internal law American Servicemembers' Protection Act, the so-called 'The Hague Invasion Act'.[28] The reasons for the contentious relationship between the US and the Court are further analysed in the next sections.

On 26 February 2011, in approving Resolution 1970 on Libya, the Security Council expeditiously reached unanimity, referring a situation to the Court only two weeks after the turmoil erupted.[29] However, this rapid approval was achieved to the detriment of the possibility to improve the wording of the referral. Resolution 1970, therefore, reiterated the three controversial provisions of

[26] Alexander S Galand, 'Security Council Referrals to the International Criminal Court as Quasi-Legislative Acts' (2016) 19 Max Planck Yearbook of United Nations Law Online 142.
[27] UNSC Verbatim Record (31 January 2005) UN Doc S/PV/5158, 4 and 5.
[28] Sean D Murphy, 'American Servicemembers' Protection Act' (2002) 96 American Journal of International Law 975.
[29] Katerina Dalacoura, 'The 2011 Uprisings in the Arab Middle East: Political Change and Geopolitical Implications' (2012) 88 International Affairs (London) 63.

Resolution 1593: the selective exclusion, from the jurisdiction triggered, of nationals of non-states parties to the Rome Statute, as well as the lack of special financing and the ambiguous obligations on the referred state and third-party states. A further limitation, albeit a less controversial one, was included in Resolution 1970 that was not present in Resolution 1593. Whereas the Darfur referral granted jurisdiction to the International Criminal Court from 1 July 2002, the day of the entrance into force of the Rome Statute, the Libya referral conferred jurisdiction to the Court starting from February 2011. In so doing, the Security Council tailored the resolution to the situation referred to focus on the events of the Arab Spring and the protests against the Gaddafi regime. As a result, given that Libya is not party to the Rome Statute, the resolution excluded any possible international crimes perpetrated in Libya from July 2002 to February 2011 from the situation referred.

However, it seems that temporal, as well as geographical, parameters are acceptable criteria to define a situation to refer, unlike the inclusion or exclusion of determined categories of individuals. An end date of the jurisdiction was not specified in defining the situation referred. This may allow the Court the power to exert its jurisdiction in Darfur and Libya without an established future temporal limit. Indeed, the Security Council has the power to defer a situation only temporarily and under the conditions set by Article 16 of the Rome Statute. Furthermore, even when an investigation or prosecution is suspended or terminated, the prosecutor has the power to lift the suspension or reopen the investigation, as detailed in Articles 19 and 53 of the Rome Statute.[30] Therefore, the absence of an end date for the situation referred may permanently trigger the International Criminal Court's jurisdiction over a non-party state, going beyond the intent of the Security Council resolution and raising significant issues of state consent. The situation may be interpreted as limited to the matter that was ongoing at the time the situation was referred, but this interpretation has no grounds in the text of the resolution and does not ultimately define the clear scope of the situation. In absence of an end date, at least two possible scenarios arise. First, the prosecutor might consider that the situation has expired, thereby ending the Security Council referral, this option would create a controversy in the

[30] Hector Olásolo, *The Triggering Procedure of the International Criminal Court* (M Nijhoff Publishers 2005) 53.

relationship between the Council and the Court, as further detailed below in the analysis of the Court's powers over a Security Council resolution. Second, a further action of the Security Council could be required to establish an end date. In this case, the use of the veto power could enable one permanent member to block the conclusion of the referral.

Finally, an improvement in Resolution 1970, compared to Resolution 1593, is the deletion of the reference to bilateral immunity agreements (BIAs) from the preamble of the resolution. The chapeau of the Darfur referral took note of 'the existence of agreements referred to in Article 98-2'. These agreements bind the contracting parties not to transfer nationals of a state to the jurisdiction of the Court without the consent of the state of origin. The bilateral immunity agreements constitute a practice used by the US to guarantee that its citizens are not prosecuted by the International Criminal Court. The reference at the beginning of Resolution 1593/2005 is not grounded on any legal concern and does not provoke any actual consequence.[31] Its exclusion from the Libya referral removes the recognition, in a Security Council referral, of a practice in sharp contrast with the purposes of the Court.

3.1 Tailoring the Situation by Excluding a Selected Group: Policy Arguments

Resolution 1970 grants jurisdiction of the International Criminal Court over the events occurring in the territory of Libya and obliges the state to fully cooperate with the Court. However, similarly to Resolution 1593, it grants exclusive national jurisdiction over crimes committed by

> nationals, current or former officials or personnel from a State outside the Libyan Arab Jamahiriya which is not a party to the Rome Statute of the International Criminal Court … for all alleged acts or omissions arising out of or related to operations in the Libyan Arab Jamahiriya established or authorised by the Council nationals of other non-State parties—within operations authorised by the Council.

The provision hinders the prosecution of nationals of non-states parties, not only by the International Criminal Court but also by any other judicial action outside of

[31] Salvatore Zappala, 'The Reaction of the US to the Entry Into Force of the International Criminal Court Statute: Comments on UN SC Resolution 1422 (2002) and Article 98 Agreements' (2003) 1 (1) Journal of International Criminal Justice 114.

their country of citizenship. Therefore, the provision prohibits prosecutions even by the Libyan justice system, if it was able and willing to exert its jurisdiction over international crimes perpetrated within its territory. This provision of Resolution 1970 is not an original addition by the Security Council. On the contrary, it reiterates the wording of previous resolutions, including the first referral to the International Criminal Court of the Darfur situation. The language of operative paragraph 6 was first used in Resolution 1497 (2003), which established a multinational force in Liberia to support the implementation of the 17 June 2003 ceasefire agreement. However, in the Libyan context, it is particularly relevant for the practice of the Court.

In the Darfur situation, it is unlikely that the gravest international crimes were committed by nationals of non-states parties. In Resolution 1593/2005, the provision was considered a matter of principle, as there was no actual risk of prosecution. On the other hand, the Libyan situation includes nationals of other states, who intervened pursuant to Resolution 1973/2011 and therefore under an operation authorised by the Council, as a party to the conflict. Non-states parties taking part in the military intervention pursuant to Resolution 1973 include Qatar, Turkey, United Arab Emirates, and the US, the latter advocating within the Security Council for the inclusion of operative paragraph 6 in the resolution.[32] Consequently, the provision excludes a number of possible crimes from the jurisdiction of the Court, creating inequality between the parties to the conflict.[33]

The pressure from the US to include operative paragraph 6 was unexpected if considered in the context of the evolution of US–International Criminal Court relations from 2002 to 2011. After the hostile attitude of the US during the first years of the International Criminal Court's existence,[34] the US started adopting a more cooperative approach. Overall, two phases in US–International Criminal Court relations have been observed, with the watershed occurring with the change of US government in 2008. The first phase is described as an era of flawed cooperation. Two examples of this attitude are the then

[32] Monica Naime, 'Libya and Resolution 1973: The Law of Politics' (2012) 5 (2) Journal of Strategic Security 105.
[33] UNHRC, 'Report of the International Commission of Inquiry on Libya' (2 March 2012) A/HRC/19/68.
[34] David J Scheffer, 'The United States and the International Criminal Court' (1999) 93 American Journal of International Law 12; William A Schabas, 'United States Hostility to the International Criminal Court: It's All About the Security Council' (2004) 15 (4) European Journal of International Law 701.

Undersecretary of State for Arms Control and International Security John Bolton 'unsigning' the Rome Statute in 2002 (with the legal consequence of lifting prohibitions, for the US, to violate the aims and purposes of the treaty) and the proliferation of anti-International Criminal Court legislation and international agreements. In addition to the American Servicemembers' Protection Act, more than a hundred bilateral immunity agreements were ratified under Article 98 of the Rome Statute to ensure US nationals' immunity from International Criminal Court jurisdiction. The second phase, in contrast, shows signs of a more cooperative approach. One meaningful example of this detente phase is the non-renewal, in 2009, of the Nethercutt Amendment that imposed economic sanctions on states that refused to sign bilateral immunity agreements. The proliferation of bilateral immunity agreements was interrupted, and, significantly, the agreements under Article 98 of the Rome Statute were recalled in Resolution 1593, but not in Resolution 1970.[35]

The US considered the inclusion of operative paragraph 6 an essential condition for approving Resolution 1970. The words of French Representative to the UN Gérard Araud make clear that the US would not have voted in favour of the resolution if operative paragraph 6 was not included: 'that was for one country, it was absolutely necessary for one country to have that considering its parliamentary constraints … It was a red line for the United States. It was a deal-breaker, and that's the reason we accepted this text to have unanimity of the Council.'[36] However, US Representative to the UN Susan Rice did not mention operative paragraph 6 in the official meeting records related to Resolution 1970. Nevertheless, for Resolution 1593, then US Representative Anne W. Patterson explicitly supported the provision:

> The language providing protection for the United States and other contributing States is precedent setting as it clearly acknowledges the concerns of States not party to the Rome Statute and recognises that persons from those States should not be vulnerable to investigation or prosecution by the

[35] Kelebogile Zvobgo, 'Human Rights versus National Interests: Shifting US Public Attitudes on the International Criminal Court' (2019) 63 (4) International Studies Quarterly 1065; Megan Fairlie, 'The United States and the International Criminal Court Post-Bush: A Beautiful Courtship but an Unlikely Marriage' (2011) 29 Berkeley Journal of International Law 528.
[36] Embassy of France in Washington, DC, 'Libya/Adoption of UNSCR 1970: Remarks to the press by Gérard Araud, France's Permanent Representative to the United Nations' (2016) <http://www.ambafrance-us.org/spip.php?article2193> accessed 9 July 2016.

> International Criminal Court, absent consent by those States or a referral by the Security Council.[37]

Several scholars have questioned why the US has maintained a lukewarm attitude towards the International Criminal Court, with growing signs of cooperation on the one hand, but still setting insurmountable conditions in negotiating Security Council referrals, and without becoming a party to the Rome Statute. Possible explanations lie in the strict respect for the remaining domestic anti-International Criminal Court legislation and the lack of trust in the effectiveness of the Court in autonomously enforcing its mandate. French Representative to the UN Araud's statement suggests that the concerns of US Congress played a notable role in the negotiation of Resolution 1970. In the 2010 US mid-term elections, Republicans gained the majority of the House of Representatives, making Congress more difficult to control for the US government. Even more so, the provision concerning the financing of the Court may have been influenced by the same factor in light of the budgetary functions of the US Congress. The Security Council accepted the requests of the US as a compromise to obtain unanimous approval of the resolution.

Scholars based their criticisms of the provision on policy arguments, contending that excluding certain nationalities from the referred jurisdiction would jeopardize the credibility of the Court:

> the legitimacy of the referral is impaired by the a-priori exclusion of non-party state nationals from the jurisdiction of the ICC…the point is not that the jurisdiction of the ICC will be significantly limited in a practical fashion, but that the exclusion of some states' nationals fails to respect the Prosecutor's independence and makes it difficult to reconcile the resolution with the principle of equality before the law. Some states' nationals, it would appear, are more equal than others.[38]

Members of the Security Council criticised the provision on the same grounds: since the resolution was approved unanimously, all the members of the Council supported the inclusion of operative paragraph 6, in contrast to

[37] UNSC Verbatim Record (31 March 2005) UN Doc S/PV/5158.

[38] Robert Cryer, 'Sudan, Resolution 1593, and International Criminal Justice' (2006) 19 Leiden Journal of International Law 195, 212. See also Nigel White and Robert Cryer, 'The International Criminal Court and the Security Council: An Uncomfortable Relationship' in Jose Doria, Hans-Peter Gasser and M Cherif Bassiouni (eds), *The Legal Regime of the International Criminal Court* (Martinus Nijhoff Publishers 2009) 455.

Resolution 1593, in which France and Brazil abstained from voting. Nevertheless, Brazil still criticised the provision, albeit voting in favour of the resolution, on the same grounds raised during the negotiations for the first referral:

> [W]e express our strong reservation concerning paragraph 6. We reiterate our conviction that initiatives aimed at establishing exemptions of certain categories of individuals from the jurisdiction of the International Criminal Court are not helpful to advancing the cause of justice and accountability and will not contribute to strengthening the role of the Court.[39]

3.2 Tailoring the Situation by Excluding a Selected Group: Legal Controversies

In addition to examining the policy issues, it is worth analysing the legal controversies of the provision, which could undermine the compliance of the resolution with the Rome Statute and with general international law. The Security Council referred the situation of Libya, then Libyan Arab Jamahiriya, to the Court. Libya is not a party to the Rome Statute, but the power of the Security Council to refer a situation in a non-party state is uncontroversial. Article 13(b) does not limit situations to be referred to those in a territory or involving nationals of a state party. This differs from the other triggering mechanisms of the Court: state referral and *proprio motu* power of the prosecutor. In 2005, the Council similarly referred the situation of Darfur, which was taking place in the territory of another non-party state, Sudan.

The controversy relates to shaping a situation in which grave international crimes may have been committed, such as the Libya crisis, by excluding some of the possible perpetrators, that is, those nationals, officers, or former officers of a non-party state acting on the initiative of the Security Council and therefore party to the possible crimes committed. In so doing, the Security Council creates an unforeseen form of jurisdiction granted to the Court, whose legality has been criticised from different perspectives: (a) noncompliance with Article 13(b) of the Rome Statute, (b) the violation of the general obligation of international law to prosecute international crimes, and (c) the possibility to exclude certain categories of people beyond the Article 16 limitation.

[39] UNSC Verbatim Record (26 February 2011) UN Doc S/PV/6491.

First, tailoring categories of people could be seen as a violation of the mandate of Article 13(b), which provides to refer 'a situation in which one or more of such crimes appears to have been committed'. According to this view, the Rome Statute does not allow the Security Council to focus on specific individuals, or categories of individuals, in the referral. The controversy stems from the word 'situation', used in Articles 13, 14, and 15 regarding the triggering mechanisms of the International Criminal Court's jurisdiction, not being further defined in either the Rome Statute or in the Rules of Procedure and Evidence. It is uncontroversial that a situation can be defined on a temporal and territorial basis. The minimum and maximum extents of a situation are unclear, but the wording of the Rome Statute specifies that a situation can be limited to one single crime. The controversial point concerns the possibility for a situation to be defined according to personal criteria, such as the nationality of the perpetrators of international crimes.

3.3 An Interpretation under the Vienna Convention on the Law of Treaties

According to Article 31 of the Vienna Convention on the Law of Treaties, which codifies existing customary law, 'a treaty shall be interpreted in good faith, in accordance with the ordinary meaning to be given to the terms of the treaty'. In the text of Article 13(b) of the Rome Statute—'A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council …'—the vague word 'situation' in itself does not clarify the possibility to include personal parameters. Article 31 of the Vienna Convention further provides that the terms should be interpreted 'in their context and in the light of its object and purpose'. This includes the wording of the preamble—'that the most serious crimes of concern to the international community as a whole must not go unpunished'—and *inter alia* the Rules of Procedure and Evidence, in which some scholars identified a 'symmetric interpretation principle' that guides the referrals.[40]

Among the other relevant criteria to consider according the Vienna Convention, besides the practice in the application of the treaty, which is not

[40] Although the analysis is focused on state referrals under Article 12 and Uganda's self-referral in particular; C Kress, '"Self-Referrals" and "Waivers of Complementarity": Some Considerations in Law and Policy' (2004) 2 Journal of International Criminal Justice 944.

elucidative and which is analysed below, is 'any relevant rule of international law applicable in the relations between the parties'. In this regard, it is worth considering the general international law obligation to prosecute international crimes. The customary norm, codified *inter alia* in the Geneva Conventions when dealing with grave breaches of international humanitarian law, is even recalled in the preamble of the Rome Statute: 'it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes.'

The provision contained in the referral, subjecting certain categories of perpetrators (nationals or officials of other non-party states) and certain acts (those linked to Security Council operations) to the exclusive jurisdiction of the legal systems in perpetrators' home states, generates a violation of the norm, not only as far as International Criminal Court jurisdiction is concerned but also regarding Libyan jurisdiction. As a result, Libya would be prohibited from exercising jurisdiction over international crimes perpetrated on its territory. This unreasonable, if not absurd, result, together with the persistent ambiguity of the interpretation after applying the other tools provided by the Vienna Convention, leads to the applicability of the supplementary means of interpretation under Article 32 of the Convention. Indeed, the provisions become applicable if the previous criteria of interpretation lead to a result which is manifestly absurd or unreasonable (which is the case when an International Criminal Court referral prohibits the prosecution of certain international crimes, even by the territorial state), or merely if the meaning of the term, after having applied the criteria listed in Article 31, remains ambiguous or obscure. It is uncontroversial that the ambiguity of the issue allows having recourse to the *travaux préparatoires* of the Rome Statute and to the circumstances of its conclusion.

Here, it emerges that the word 'situation' was conceived in contrast with 'case' to express a meaningful distinction between the two terms.[41] The distinction between 'situation' and 'case' reflects the dichotomy between 'matter' and 'complaint', which originated in the 1994 Draft Statute of the International Law Commission. Dealing with the triggering mechanisms of the Court's jurisdiction, the drafters found that the power, for states parties and for the Security Council, to refer a single case (then 'complaint') entailed an excessive role for the referrer. In

[41] UN General Assembly, 'Report of the International Law Commission on the work of its forty-sixth session, 2 May–22 July 1994' (1994) UN Doc A/49/10.

contrast, the determination of cases to be prosecuted had to be entrusted to an organ of the Court itself to obtain a selection of cases from a legal, and not political, body—and under legal, and not political, criteria.[42] Namely, the Office of the Prosecutor was entrusted to carry out investigations and consequently identify the single individuals and crimes to be prosecuted.

On the other hand, non-legal subjects had to refer a more general context, within which the prosecutor could investigate the relevant crimes. Such a general context was called a 'matter', before being renamed 'situation', a word more familiar in the language of the UN.[43] Somewhat ironically, the US delegation was among the main advocates of the advantages of referring a general situation without targeting specific individuals. US Ambassador David Scheffer noted, 'This will encourage politicization of the complaint procedure … This could result in one crime being submitted to the Court's jurisdiction while another, perhaps more serious crime that is part of the same conflict, is not.'[44] Similarly, David Scheffer also stated, 'The Prosecutor would have wide discretion within the parameters of the situation or matter he or she is charged to investigate by either the Security Council or a State Party.'[45] The US is the main actor within the Security Council to have tailored the Darfur and Libya referrals according to personal parameters, but the preparatory work of the treaty and the circumstances of its conclusion suggest that such an exclusion of certain categories of individuals and of certain crimes does not comply with the provisions of the Rome Statute.

3.4 The Practice of the Court

The practice of the Court, so far, has not clarified the possible scope of a situation. Pre-Trial Chamber I stated that a situation can 'generally [be] defined in

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[42] 'It was suggested that States Parties should not be able to make complaints about individual crimes or cases: it would be more appropriate, and less political, if "situations" were instead referred to the Court.' E Wilmshurst, 'Jurisdiction of the Court' in R Lee (ed), *The International Criminal Court. The Making of the Rome Statute: Issues, Negotiations, Results* (Kluwer Law International 1999) 131.

[43] Eg Art 11(3) of the UN Charter: '*The General Assembly may call the attention* of the Security Council to situations which are likely to endanger international peace and security.' The presence of the word 'situation' in the UN Charter led other delegations to support the exclusion of such a word to avoid misunderstandings.

[44] *The Prosecutor v Callixte Mbarushimana* (Observations on behalf of victims on the Defence Challenge to the Jurisdiction of the Court) ICC-01/04-01/10-417 (12 September 2011) 35.

[45] Cit in ibid para 41.

terms of temporal, territorial and in some cases personal parameters'[46] and further affirmed that 'a case arising from the investigation of a situation will fall within the jurisdiction of the Court only if the specific crimes of the case do not exceed the territorial, temporal and possibly personal parameters defining the situation under investigation',[47] thus allowing 'personal parameters', in addition to territoriality and timing, among the criteria to define a situation. To date, three situations were defined, among other criteria, through personal parameters: Uganda's self-referral in 2004 mentioned the 'situation concerning the Lord's Resistance Army', and the two Security Council referrals of Darfur and Libya. The Libya referral excluded from the referred situation 'nationals, current or former officials or personnel from a State outside the Libyan Arab Jamahiriya which is not a party to the Rome Statute … for all alleged acts or omissions arising out of or related to operations in the Libyan Arab Jamahiriya established or authorised by the Council'.[48]

The prosecutor addressed the issue of selectivity by declaring, at the moment of receiving the referrals, to be ready to investigate crimes perpetrated by all the subjects involved in the situation, independently from the selectivity of the referral. In the case of Uganda's self-referral, the prosecutor affirmed the obligation to 'interpret the scope of the referral consistently with the principles of the Rome Statute' and went on to state, 'hence we are analysing crimes within the situation of northern Uganda by whomever committed [them]'.[49] To date, the only cases brought to the Court within the Ugandan situation concern Lord's Resistance Army members. Similarly, after the Libya Resolution, the prosecutor responded to the criticisms of partiality of the referral, affirming that '[t]he Office does not have jurisdiction to assess the legality of the use of force and evaluate the proper scope of NATO's mandate in relation to Resolution 1973. The Office does have a mandate, however, to investigate allegations of crimes by all actors.'[50] On

[46] *Prosecutor v Dyilo* (Decision Concerning Pre-Trial Chamber I's Decision of 10 February 2006 and the Incorporation of Documents into the Record of the Case against Mr. Thomas Lubanga Dyilo) ICC-01/04-01/06-8-Corr (24 February 2006).
[47] *Prosecutor v Gombo* (Decision on the Prosecutor's Application for a Warrant of Arrest against Jean-Pierre Bemba Gombo) ICC-01/05-01/08 (10 June 2008).
[48] UN Doc S/RES/1970, 1.
[49] ICC Office of the Prosecutor, 'Letter to President Kirsch' (17 June 2004) cit. in Tim Allen, *Trial Justice: The International Criminal Court and the Lord's Resistance Army* (Zed Books 2006) 78.
[50] ICC, 'Third Report of the Prosecutor of the International Criminal Court to the UN Security Council Pursuant to UNSCR 1970' (26 February 2011).

the other hand, the prosecutor did not explicitly address the issue of the prosecution of NATO officials who are nationals of a non-party state. To date, all the cases started within the Libyan situation concern individuals linked to the Gaddafi regime. The same individuals, Saif Gaddafi and Abdullah Al-Senussi—and, of course, Muammar Gaddafi—were already listed among those sanctioned with a travel ban by Resolution 1970.

Regarding Darfur, the prosecutor did not make similar references to the possible partiality of the mandate, perhaps because of the unlikelihood of a specific case concerning peacekeeper nationals of non-states parties. However, speaking of the cases of Abdallah Banda and Saleh Jerbo, charged with war crimes committed during the attack on peacekeepers of the African Union mission of Haskanita, the prosecutor affirmed that the case 'shows the impartiality of the International Criminal Court'.[51] Concerning the alleged impartiality, it is perhaps significant that no charges were brought for crimes perpetrated against Sudanese officials or troops: the only rebels who were indicted faced charges for the attack on peacekeepers.

When facing a referral which tailors the situation according to certain categories of individuals, the prosecutor has several options: (a) to follow the wording of the referral, limiting its action to the individuals complying with the relevant personal parameters; (b) to renounce *tout court* to open any investigation within the situation; and (c) to investigate the situation impartially, neglecting the limits imposed in the referral. To summarise the prosecutor's attitude in dealing with 'personally tailored' referrals, it appears that the strategy of the Office of the Prosecutor, at least during the mandate of the first prosecutor, Luis Moreno Ocampo, was taking a middle-ground position. Indeed, Prosecutor Moreno Ocampo tried to prevent criticisms of bias through public declarations in which he affirmed the impartiality of the International Criminal Court and the possibility to investigate all actors. At the same time, he respected the limits received and did not open any case that exceeded the parameters, even the personal ones, defined in the situations referred. This attitude allowed the prosecutor to respond verbally to the criticisms regarding partiality while avoiding the legal consequences that could arise if the Court prosecuted a case outside a referral's mandate. In so doing,

[51] ICC, 'Statement of the Prosecutor to the United Nations Security Council on the situation in Darfur, the Sudan, pursuant to UNSCR 1593 (2005) New York' (8 June 2011).

the prosecutor announced that he intended to undertake a bold approach by extending the mandate received in the referrals, but without actually daring to implement this approach in practice—effectively sweeping the issue under the rug.

Undertaking a prosecution beyond the parameters expressed in the referral would expose the prosecutor to several risks. Besides jeopardizing, from a policy point of view, relations with (and the subsequent necessary cooperation by) the referring state or the Security Council, the decision would hold several legal consequences. Above all, the Court would be compelled to make a judicial decision concerning selective referrals, the possibility to exert jurisdiction over the categories of individuals excluded and, particularly, the legality of a selective referral per se. Given the developments in the practice of the International Criminal Court, especially with the Libya situation, it seems that it is impossible to avoid facing the issue of selective referrals. The legality of the resolution (or of the single provision, if considered severable and as examined in the following sections) could be challenged by the various organs of the Court, and the possibility of impartially investigating the situation referred is a crucial condition to affirm the independence and the credibility of the Court.

3.5 Exclusion of Non-party State Nationals as a Temporary Deferral

The Security Council referred the situation of Libya to the International Criminal Court pursuant to Article 13(b) of the Rome Statute. However, the article is not even mentioned in the resolution, in contrast to another provision of the Statute that is not immediately relevant for the referral. Indeed, Article 16 is the only article *recalled* in Resolution 1970/2011, ‘under which no investigation or prosecution may be commenced or proceeded with by the International Criminal Court for a period of 12 months after a Security Council request to that effect’. Again, the provision reflects the language of the Darfur referral in Resolution 1593.

The application of Article 16 could be used to explain the provision of operative paragraph 6: excluding nationals of other non-states parties could be interpreted as a temporary deferral included in the referral from the beginning. This possible interpretation, proposed by some scholars, does not find strong support in the language of the resolution, and it is clearly contradicted by the

subsequent practice of the Court and of the Security Council. Nevertheless, it is worth considering this idea to attempt to address the Court's ambiguous use of Article 16 in its resolutions and as a possible explanation of the controversial operative paragraph 6. In the words of Robert Cryer:

> In favour of this interpretation the preamble of Resolution 1593 may be prayed in aid. Preambular paragraph 2 of Resolution 1593 specifically recalls Article 16 of the Rome Statute. A highly charitable reading of this, therefore, would be that operative paragraph 6 is simply a request under Article 16, which would expire on 30 March 2006, after which the Prosecutor could investigate the personnel mentioned in that paragraph.[52]

Indeed, the recall of Article 16 in the preamble of the resolution does not have any legal utility. The Rome Statute grants the Security Council the power to defer an investigation or prosecution of the International Criminal Court for one (renewable) year without need to mention it previously in a resolution.

In past resolutions, the Security Council has controversially applied Article 16. When the Rome Statute entered into force on 1 July 2002, the Security Council responded with the unanimous approval of Resolution 1422, a preventive 'universal' deferral, which shielded any personnel of non-states parties involved in any UN operations from International Criminal Court jurisdiction:

> Requests, consistent with the provisions of Article 16 of the Rome Statute, that the International Criminal Court, if a case arises involving current or former officials or personnel from a contributing State not a Party to the Rome Statute over acts or omissions relating to a United Nations established or authorised operation, shall for a twelve-month period starting 1 July 2002 not commence or proceed with investigation or prosecution of any such case, unless the Security Council decides otherwise.[53]

The general deferral was renewed for a further year, with Resolution 1487/2003. However, in 2004 the Security Council could no longer reach consensus after criticism of the exemption, also by the UN secretary, after the acts committed by US officials at Abu Ghraib became public:

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[52] Robert Cryer, 'Sudan, Resolution 1593, and International Criminal Justice' (2006) 19 Leiden Journal of International Law 195, 202.
[53] UNSC Res 1422 (2002) para 1.

> ‘For the past two years, I have spoken quite strongly against the exemption, and I think it would be unfortunate for one to press for such an exemption, given the prisoner abuse in Iraq’, Mr. Annan said. ‘I think in this circumstance it would be unwise to press for an exemption, and it would be even more unwise on the part of the Security Council to grant it.’ Such a move ‘would discredit the Council and the United Nations that stands for rule of law and the primacy of rule of law’.[54]

It was observed that Article 16 allows the Council to suspend an investigation or prosecution on a case-by-case basis and does not allow a general preventive action.[55] In addition, the Council can use Article 16 only within a resolution approved under Chapter VII of the UN Charter to respond to a threat to international peace and security. It is difficult to argue that the preventive exemption imposed by the resolution was motivated by the necessity to address such a threat. Accordingly, the provision should be void, and it could arguably jeopardise the validity of the whole resolution, as is discussed in the following sections. However, operative paragraph 6 of Resolution 1970/2011 does not make any reference to Article 16. Conversely, it tries to shape the limits of the situation by identifying precise categories of people and acts to exclude from International Criminal Court jurisdiction, and it does so without any temporal limitation. Furthermore, the experience of Resolution 1593/2005, which contains the same preambular recall of Article 16 and the same operative paragraph 6, shows that neither the Council nor the Court has ever read the provision as a temporary deferral.

4. The Security Council and Referral Financing: An Indirect Control over International Criminal Court Action

Another controversial provision of Resolution 1970, again reiterated from Resolution 1593, concerns the issue of the Court’s funding. As an independent international organisation, the International Criminal Court is financed through the contributions of the states parties to the Rome Statute, as set out in Article 115. Representatives from these states constitute the Assembly of States Parties, the

[54] UN News, ‘Pressing for Immunity from War Crime Prosecutions “Unwise”, Annan Says’ (17 June 2004) <http://www.un.org/apps/news/story.asp?NewsID=11081&Cr=International Criminal Court&Cr1=> accessed 18 July 2016.
[55] Carsten Stahn, ‘The Ambiguities of Security Council Resolution 1422 (2002)’ (2003) 14 European Journal of International Law 85, 86.

management oversight and legislative body of the Court. Article 115 reveals the peculiar relationship between the Court and the UN, and with the Security Council in particular, given its power to trigger International Criminal Court jurisdiction and thus to add to the Court's workload with referred situations. Article 115 lists, among the funding sources besides the assessed contributions made by states parties, 'funds provided by the United Nations, subject to the approval of the General Assembly, in particular in relation to the expenses incurred due to referrals by the Security Council'. Accordingly, Article 13 of the Negotiated Relationship Agreement between the International Criminal Court and the UN states, 'The United Nations and the Court agree that the conditions under which any funds may be provided to the Court by a decision of the General Assembly of the United Nations pursuant to article 115 of the Statute shall be subject to separate arrangements'.[56]

Hence, the legal framework provides that the UN General Assembly (which, pursuant to Article 17 of the UN Charter, shall consider and approve the budget of the organisation) has the power to approve International Criminal Court funding, in particular in relation to Security Council referrals. Conversely, the Council covers the topic of funding the Court in Resolution 1970, and in in paragraph 8, reflecting paragraph 7 of the Darfur referral, *recognises* that 'none of the expenses incurred in connection with the referral, including expenses related to investigations or prosecutions in connection with that referral, shall be borne by the UN and that such costs shall be borne by the parties to the Rome Statute and those States that wish to contribute voluntarily'. The provision is in blatant contrast to the mandate of the Statute, and it was consequently criticised by non-governmental organisations and scholars:

> The Security Council's unilateral ruling out of the provision of funds by the United Nations to the Court in connection with Darfur is thus at odds not only with the decision to refer, but also with the duty of good faith negotiations, which flows from the obligation mutually agreed upon between the International

[56] UNGA, Negotiated Relationship Agreement between the International Criminal Court and the United Nations, Approved by General Assembly Resolution 58/318' UN Doc A/58/874.

> Criminal Court and the United Nations. The position of the United Nations is unlikely to be flexible on this point.[57]

However, operative paragraph 8 does not impose binding obligations, as 'recognises' is not binding. In so doing, the resolution formally respects the role of the General Assembly in approving possible financing for the Court. Similarly, the Rome Statute and the Relationship Agreement between the United Nations and the International Criminal Court do not foresee compulsory or automatic funding in the case of Security Council referrals. The legal architecture of the financing mechanisms between the UN and International Criminal Court is theoretically respected.

In practice, as a result, the Assembly of States Parties currently bears the whole burden of the budget of the Court, which has increased due to the activities concerning Darfur and Libya. Within the Security Council Open Debate titled 'Peace and Justice, with a Special Focus on the Role of the International Criminal Court', International Criminal Court President Judge Sang Hyun Song noted the difficulties arising from this matter: 'it will be difficult to sustain a system under which a referral is made by the Security Council on behalf of the UN, but the costs of any investigation and trial proceedings are met exclusively by the parties to the Rome Statute.'[58] The prosecutor, reporting to the Security Council on the Libya situation, explained that the lack of funding from the UN limits the quality and the range of investigation: 'It is not yet determined whether the Office's investigation into allegations of war crimes will move forward in this or the coming period, depending on the funds available to the Office to conduct the Libya investigation'.[59]

The limitation of funding from the UN to the International Criminal Court *de facto* jeopardises the action of the Court. This is a form of indirect control over the action of the Court that goes beyond any provision of the Rome Statute, and it is maybe stronger, or more effective in limiting investigations and prosecutions, than the use of Article 16. Formally, the Security Council does not have the power to decide matters of financing, but both Resolution 1593 and 1970 state the clear

[57] Luigi Condorelli, 'Comments on the Security Council Referral of the Situation in Darfur to the International Criminal Court' (2005) 3 Journal of International Criminal Justice 590.
[58] Cit in Sara Kendall, 'Commodifying Global Justice: Economies of Accountability at the International Criminal Court' (2015) 13 (1) Journal of International Criminal Justice 113, 122.
[59] ICC, 'Second Report of the Prosecutor to the UN Security Council Pursuant to UNSCR 1970 (2011)' (2 November 2011).

intention to avoid financial burdens, and the paragraph was considered fundamental by the US delegation to refrain from vetoing the Resolution:

> We are pleased that the resolution recognizes that none of the expenses incurred in connection with the referral will be borne by the United Nations … This principle is extremely important and we want to be clear that any effort to retrench on that principle by this or other organizations to which we contribute could result in our withholding funding or taking other action in response.[60]

With the notable exception of strong diplomatic pressure, nothing legally hinders the General Assembly to approve financing for the International Criminal Court in relation to Security Council referrals, at least from a legal point of view. General Assembly Resolution 66/262 accordingly states:

> *Recalling* the referrals of situations to the International Criminal Court already made by the Security Council, also invites all States to consider contributing voluntarily to the bearing of expenses related to investigations or prosecutions of the Court, including in connection with situations referred to the Court by the Council.[61]

The provision leaves room for a future possible approval of special contributions from the members of the UN.

In practice, however, the General Assembly faces difficulties in approving funding to International Criminal Court referrals, beyond the above-mentioned invitation to consider voluntarily contributing to the International Criminal Court expenses. In particular, states that support the International Criminal Court fear that UN financing may become counterproductive for future referrals, generating opposition among Security Council members. The US legislation that prohibits the US from funding the Court may hinder the US from approving future referrals. Furthermore, funding from non-states parties that are not committed to the International Criminal Court may negatively impact the International Criminal

[60] UNSC Verbatim Record (31 March 2005) UN Doc S/PV/5158, 4.
[61] UN Doc A/RES/66/262, 1.

Court's work, allowing these non-states parties to interfere and to influence investigations and prosecutions.[62]

The Assembly of States Parties, in its annual 'Resolution on Strengthening the International Criminal Court and the Assembly of States Parties', the so-called 'Omnibus Resolution', regularly deals with the issue of financing. At the ninth plenary meeting, on 6 December 2019, it articulated the problem by recalling the provisions of the Rome Statute, namely Article 115; then, it calculated the amount of the expenses attributed to the situations of Darfur and Libya, which were referred by the Security Council. Finally, it urged States Parties to obtain the expected funding through a resolution of the General Assembly:

> The Assembly of States Parties,
> Notes with concern that, to date, expenses incurred by the Court due to referrals by the Security Council continue to be borne exclusively by States Parties and notes that, to date, the approved budget allocated so far within the Court in relation to the referrals made by the Security Council amounts to approximately €65 million;
> Stresses that, if the United Nations is unable to provide funds for the Court to cover the expenses incurred due to referrals by the Security Council, this will, among other factors, continue to exacerbate resource pressure on the Court;
> Urges States Parties to pursue, within the General Assembly of the United Nations, the implementation of article 115, paragraph (b), of the Rome Statute, also taking into account that article 13, paragraph 1, of the Relationship Agreement between the Court and the United Nations states that the conditions under which any funds may be provided to the Court by a decision of the General Assembly shall be subject to separate arrangements.[63]

5. Obligations and Rights Arising from Resolution 1970

A further controversial issue related to Resolution 1970 is the kinds of obligations imposed on the referred state and on other non-states parties. The wording of the resolution in operative paragraph 5 draws a distinction between the referred State—that 'shall cooperate fully'—and other non-states parties involved

[62] Jonathan O'Donohue, 'Financing the International Criminal Court' in D Rothe, J Meernik and T Ingadottir (eds), *The Realities of International Criminal Justice* (Martinus Nijhoff Publishers 2013) 294.
[63] ICC-ASP/18/Res 6 (6 December 2019) 39–41.

in the situation: 'while recognizing that States not party to the Rome Statute have no obligation under the Statute, urges [all non-states parties and organisations] … to cooperate fully'. The actual meaning of the full cooperation imposed is not further specified. Again, the same wording was used in the Darfur referral, which similarly obliged the Sudanese government 'to cooperate fully with and provide any necessary assistance to the Court and the Prosecutor'. In that case, the obligation also applied to 'all other parties to the conflict', differently from the Libya referral, which is silent about the latter.

Concerning the controversial meaning of full cooperation, the issue emerges when dealing with complex positive obligations, such as those provided under Article 88, which requires states parties to adopt national legislation measures to comply with the requests of the Court.[64] In addition, a number of provisions in Chapter IX of the statute include exceptions and power to postpone the fulfilment of the requests of the Court.[65] The mere proposition 'fully cooperate' does not clarify whether the referred State is bound by the whole regime and by every provision of the statute and whether it benefits from the rights granted in Chapter IX. Many authors have addressed the issue, proposing various solutions. To interpret the obligations of a state in light of a referral to the International Criminal Court by the Security Council, the concept of 'functional cooperation'[66] has been proposed, according to which the rules contained in the Rome Statute would apply to the referred state only to the extent necessary to meet the Court's needs and requests.

A different interpretation might suggest that Article 25 of the UN Charter ('The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.')[67] in combination with Article 103 ('In the event of a conflict between the obligations of the

[64] Eg Art 88: 'States Parties shall ensure that there are procedures available under their national law for all of the forms of cooperation which are specified under this Part.'
[65] Eg Art 94(1): 'If the immediate execution of a request would interfere with an ongoing investigation or prosecution of a case different from that to which the request relates, the requested State may postpone the execution of the request for a period of time agreed upon with the Court. However, the postponement shall be no longer than is necessary to complete the relevant investigation or prosecution in the requested State. Before making a decision to postpone, the requested State should consider whether the assistance may be immediately provided subject to certain conditions.'
[66] Goran Sluiter, 'Obtaining Cooperation from Sudan—Where Is the Law?' (2008) 6 Journal of International Criminal Justice 871.
[67] Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI (UN Charter).

Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.')[68] would grant the Security Council resolution a binding and prevailing superiority over the provisions of any other international treaty, including the Rome Statute. Consequently, it has been observed that the Council, by referring a situation to the Court, has chosen the International Criminal Court as the most appropriate forum for prosecution, and the decision was taken under Chapter VII of the UN Charter, thus in response to a threat to international peace and security, which goes beyond any obligation arising from the Rome Statute. Furthermore, granting rights to non-states parties would be in contrast with the emergency indicated by the use of Chapter VII and 'would send the wrong signal' to those states that refuse to ratify the statute and are not empowered to claim any right thereunder.[69]

In any event, it is difficult to conceive how an independent institution established by an international treaty, such as the International Criminal Court, could be obliged by the Security Council to act on any basis other than its founding statute. Scholars who have considered this scenario have hypothesised that when triggered by a Security Council referral, the Court would be constituted and regulated by a separate and distinct regime, provided not by the statute but by the resolution itself. Under this view, the Court can be seen as 'two courts in one': the first governed by the rights and obligations contained in the Rome Statute and the second bound only by the framework elaborated in the referring instrument.[70] The majority of the doctrine, however, affirms that once the jurisdiction of the International Criminal Court is triggered through a Security Council resolution, the Court should plainly work according to its statute.[71] Accordingly, the Council-referred state has the same obligations and rights of any other state party once the Security Council has imposed the Court's jurisdiction over a situation taking place in its territory.

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[193] ibid.

[69] George P. Fletcher and Jens David Ohlin, 'The ICC—Two Courts in One?' (2006) 4 (3) Journal of International Criminal Justice 428.

[70] Carsten Stahn, 'Libya, The International Criminal Court and Complementarity: A Test For "Shared Responsibility"' (2012) 10 (2) Journal of International Criminal Justice 325.

[71] Dapo Akande, 'The Effect of Security Council Resolutions and Domestic Proceedings on State Obligations to Cooperate With the International Criminal Court' (2012) 10 Journal of International Criminal Justice.

This view is supported by the practice of the Court. For example, on 11 October 2013, Pre-Trial Chamber I decided that the Al-Senussi case was inadmissible before the International Criminal Court, thus accepting Libya's admissibility challenge.[72] Perhaps the best view is that the silence of the UN Security Council on any alternative regime that shall be applied in the referred situation can be understood as an indication that the non-party state referred is bound by the normal regime of the statute. When the Security Council refers a situation to the International Criminal Court prosecutor, pursuant to Article 13(b) of the Rome Statute, there is no reason not to consider that the usual operation of the Court should be taken for granted, unless otherwise specified. In the 2019 decision on al-Bashir's immunity, the Appeals Chamber confirmed that Sudan has the same obligations of a state party:

> [T]he fact that Sudan is obliged to fully cooperate with the Court, as per Resolution 1593, means that the cooperation regime for States Parties to the Rome Statute is applicable to Sudan's cooperation with the Court, and not article 87(5) of the Statute. This is because the latter regime is clearly inappropriate for a State that actually has a legally binding duty to cooperate with the Court. Therefore, exercise of jurisdiction by the Court 'in accordance with [the] Statute' means, in relation to cooperation by Sudan, cooperation on the basis of the regime established for States Parties to the Statute.[73]

Concerning the obligations imposed on non-states parties, the weak wording used in Resolution 1593, with the non-binding provision of urging full cooperation, provoked criticism from several authors.[74] Above all, they posed harsh difficulties in the work of the Court, since several non-states parties failed to implement the arrest warrants issued by the Court for individuals present in their territories. The lack of cooperation from other non-states parties, deriving from the non-binding wording of the referral, is legally uncontroversial, as the Security Council has the power to make binding decision and also not to make them. However, the absence of cooperation from third, non-states parties is one of the

[72] *Prosecutor v Gaddafi and Al-Senussi* (Pre-Trial Chamber I Decision on the admissibility of the case against Abdullah Al-Senussi) ICC-01/11-01/11-466-Red (11 October 2013).
[73] *Prosecutor v Al-Bashir* (Judgment in Jordan Referral re Al-Bashir Appeal) ICC-02/05-01/09 OA2 (6 May 2019) para 140.
[74] Jennifer Trahan, 'The Relationship Between the International Criminal Court and the U.N. Security Council: Parameters and Best Practices' (2013) 24 Criminal Law Forum.

major obstacles the International Criminal Court is facing in Darfur, and the reiteration of the wording in the Libya referral betrays a certain ambiguity in the support the Security Council grants to the International Criminal Court to efficiently implement its activity. As a matter of fact, it is clear that a direct reference to the statute and its binding provisions both for the referred state and for other non-states parties would have made the resolution more effective and comprehensive.

Nevertheless, problems in enforcing the International Criminal Court mandate involve the fact that many states parties, from Chad and Malawi to Jordan, have not cooperated in implementing al-Bashir's arrest. The Appeals Chamber has ruled that states parties have the obligation to enforce the arrest warrant, despite other international obligations providing respect for the chief-of-state immunities mentioned in Article 98 of the statute.[75] This issue cannot be solved by a different wording of a Security Council referral but rather requires further support by the Council in enforcing the obligations of Resolution 1593, as is explored in the next section.

6. The Dialectic between the International Criminal Court and the Security Council

Referrals of the Darfur and Libya situations were initially welcomed by most observers as strong signs of commitment by the five permanent members of the Security Council in supporting the main independent institution active in enforcing international justice. The opportunity to extend the International Criminal Court's jurisdiction to non-states parties, such as Sudan and Libya, appeared to be an opportunity for the Court to develop its practice and to enforce international justice in the main armed conflicts and contexts of widespread perpetration of international crimes. However, 'over the years, many friends of the Court adjusted their views'.[76] Indeed, the above analysis concerning the wording of the Libyan referral, borrowing the wording from the Darfur Resolution, shows that the Security Council exerts political control over the Court that exceeds any statutory provision. The Security Council exerts this control through the exclusion

[75] *Prosecutor v Al-Bashir* (Judgment in Jordan Referral re Al-Bashir Appeal) ICC-02/05-01/09 OA2 (6 May 2019) para 151.
[76] William A Schabas, *An Introduction to the International Criminal Court* (6th edn Cambridge University Press 2020) 167.

of individuals from the jurisdiction (that is 'quite plainly contrary to treaty provisions binding upon virtually all United Nations Member States, including the United States'[77]), ambiguous obligations over non-states parties, and limiting the financing of the International Criminal Court. As a result, the provisions of the resolutions risk making entire referrals counterproductive, jeopardising the effective implementation of the Court's work and its credibility, as authoritatively affirmed by Louise Arbour:

> Security Council referrals to the International Criminal Court are, I believe, particularly problematic. Two referrals by the Security Council to the International Criminal Court, in the cases of Darfur and Libya, have done little to enhance the standing and credibility of the International Criminal Court, let alone contribute to peace and reconciliation in their respective regions. … Security Council referrals therefore expose the Court to charges of politicisation, while providing the Court with no compensatory benefits such as additional financial, political or operational support. And in the end, Council referrals may in fact underscore the Court's impotence rather than enhance its alleged deterrent effect.[78]

In addition, the Security Council so far has not properly backed the action of the Court following the referrals. In June 2013, briefing the Security Council on the situation of Darfur, the prosecutor addressed the Council, expressing 'a deep sense of frustration, even despair …' and noting that '[r]egrettably, each briefing has been followed by inaction and paralysis within the Council while the plight of victims of crimes committed in Darfur has gone from bad to worse'.[79] Ambassador Wenaweser, at the Security Council debate on peace and justice in October 2012, effectively explained this issue:

> The referral decisions were significant in the history of international criminal justice but they came at a high cost for the Court. The Court was accused of politicization, of bias against a particular region and of manipulation by powerful countries that

[77] William A Schabas and Giulia Pecorella, 'Article 13. Exercise of Jurisdiction' in Otto Triffterer and Kai Ambos (eds), *Rome Statute of the International Criminal Court: A Commentary* (Hart Publishing 2016) 672, 681.
[78] 'Doctrines Derailed?: Internationalism's Uncertain Future' (International Crisis Group, 26 October 2013) paras 15 and 18.
[79] ICC, 'Statement of the Prosecutor to the United Nations Security Council on the situation in Darfur, the Sudan, pursuant to UNSCR 1593 (2005) New York' (5 June 2013).

> chose to stay outside the Rome Statute, and it found itself with very limited support from its constituency. It is therefore paying the price for the decisions of the Council, and sometimes the lack thereof. Obviously, that is not in the interest of the Court, and more broadly justice, or in the interest of the Security Council. The Council should therefore take several steps to move towards a more symbiotic relationship with the ICC as an independent judicial institution. In order to genuinely advance accountability, several aspects of the Council's practice would have to be addressed in future referrals. Most importantly, the Council must back up its referral decisions with measures that enforce cooperation. [80]

The usual absence of cooperation from the referred states and from third-party states, together with the expected inactivity of the Security Council to support the Court following the referral, created strong pressure on the decisions of the Court. Louise Arbour also affirmed that 'in Libya there is a sense in some quarters that the Court withdrew from a contentious arena leaving the indicted to be tried in a judicial system under severe stress'.[81] Referring a situation to the Court could be a politically convenient way for the Council to take action without engaging in controversial issues. Elies van Sliedregt observed that '[s]etting up an international justice system is less controversial than humanitarian intervention and any other measure that would violate state sovereignty'.[82] In the words of David Bosco,

> [T]he Council in no way committed itself to the success of the investigations it made possible. The Council resolutions included no enforcement mechanisms and imposed no binding obligations on nonmember states (other than the country subject to investigation). In practice, the Council has shown itself incapable of or uninterested in enforcing the ICC arrest warrants that resulted from the investigations. The ICC prosecutor's periodic calls for diplomatic support from the Council have become routine, and they are routinely ignored.[83]

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[80] UNSC Verbatim Record (17 October 2012) UN Doc S/PV/6849 (Resumption 1) 2.
[81] Louise Arbour, 'Doctrines Derailed?: Internationalism's Uncertain Future' (International Crisis Group, 26 October 2013) para 18.
[82] Elies Van Sliedregt, 'International Criminal Law: Over-studied and Underachieving' (2016) 29 Leiden Journal of International Law 1, 4.
[83] David Bosco, *Rough Justice. The International Criminal Court in a World of Power Politics* (Oxford University Press 2015) 181.

6.1 The Power of the International Criminal Court to Review and to Disregard a Security Council Referral

In light of the consequences of the referrals for the practice of the International Criminal Court, the possibility for Court to refuse the jurisdiction triggered by the Council is analysed in this section. The controversial provisions contained in Resolutions 1593 and 1970 have not yet been addressed by the Court: to date, the prosecutor has never sought authorisation to proceed against any individual falling within the categories excluded by the Security Council referral. Consequently, controversy has not arisen yet. However, the Rome Statute states that a challenge to the jurisdiction of the Court, in this case, on the grounds of a referral that violates the statute, may be made by an individual accused or subject to an arrest warrant or a summons to appear; by a State that has jurisdiction over a case; and even by the prosecutor. Analysing the referral, the Court may find that it has no jurisdiction over the excluded categories of individuals pursuant to operative paragraph 6 of the referral, or it may find that operative paragraph 6 is contrary to the Rome Statute and therefore ignore the exemption assuming that jurisdiction requirements are fulfilled. In the most controversial scenario, the Court may consider that operative paragraph 6 violates the statute, but that it cannot be severed from the resolution, consequently deciding that the whole referral is void. In that case, all the proceedings within the situation triggered by the same referral would be cancelled *ex tunc*, potentially undermining the work of the Court in the situation. As a result, the Court would also risk convicting individuals on the basis on an unlawful referral.

This is the result of the absence of an immediate decision on the Security Council resolutions referring a situation to the International Criminal Court that the Court could, if not should, carry out according to a reading of the statute. Indeed, pursuant to Article 19 of the Rome Statute, the Court ‘shall satisfy itself that it has jurisdiction in any case brought before it.’ The provision, using the mandatory verb ‘shall’, appears to include scrutiny of the Security Council resolution in case the jurisdiction of the Court is triggered by a Council referral, under Article 13(b). The scope of the situations referred (in Security Council Resolutions 1593 and 1970 *in primis*, but also in state referrals, e.g., Uganda) are not clearly defined on geographical, temporal, and personal grounds. A definition

of the situations over which the Court has jurisdiction would be crucial to ensure consistent development of International Criminal Court action.

On the other hand, the UN Charter takes precedence over the Rome Statute. Part of the doctrine affirms that it is impossible for the Court to retain discretion regarding Security Council resolutions or judge the compliance of a Council decision under Chapter VII of the UN Charter'.[84] Ohlin argues that the hierarchically superior obligation to respect and implement Security Council decisions derives from Articles 25 and 103 of the UN Charter. Furthermore, Ohlin and Fletcher argue that in the case of Security Council referral, the Court is bound by a special regime that differs from the Rome Statute and is imposed by the Security Council resolution.[85] However, this argument does not consider the nature of the International Criminal Court as a treaty-based independent tribunal. As such, the organs of the Court are bound to work in accordance with the provisions of the Rome Statute only. The Negotiated Relationship Agreement between the International Criminal Court and the United Nations confirms that '[t]he United Nations recognises the Court as an independent permanent judicial institution which, in accordance with articles 1 and 4 of the Statute, has international legal personality …'[86] and that '[t]he United Nations and the Court respect each other's status and mandate'.[87]

Phakiso Mochochoko's speech on behalf of the prosecutor at an open debate with the Council reaffirms the view of the prosecutor that Security Council referrals do not bind the Court to accept jurisdiction over a referred situation:

> The Rome Statute provides for a legal process for the preliminary examination, investigation and prosecution of situations referred by States or the Security Council, as well as for judicial review, during which situations may be rejected if they fail to satisfy statutory legal criteria for opening an

[84] Jens Ohlin, 'Chapter 11: Peace, Security, and Prosecutorial Discretion' in Carsten Stahn and Goran Sluiter (eds), *The Emerging Practice of the International Criminal Court* (Martinus Nijhoff Publishers 2009) 196.
[85] George P. Fletcher and Jens David Ohlin, 'The ICC—Two Courts in One?' (2006) 4 (3) Journal of International Criminal Justice 429.
[86] UNGA, Negotiated Relationship Agreement between the International Criminal Court and the United Nations, Approved by General Assembly Resolution 58/318' UN Doc A/58/874 Art 2.
[87] ibid Art 3.

> investigation. Simply put, the Council may unilaterally trigger, but cannot impose acceptance of jurisdiction by the ICC.[88]

As a result, a Security Council referral may be challenged by the organs of the Court if it does not comply with the relevant provisions of the Rome Statute, namely Article 13(b). The Prosecutor could decide that a resolution was not consistent with Article 13(b) and that therefore there was no requirement imposed by the Statute that she considers undertaking an investigation, or the Chambers could decide that the referral was inconsistent with Article 13(b) and that, as a result, any judicial action would not be in accordance with the Statute.

Arguably, the Court may also redefine the situation referred according to the Rome Statute, thus excluding the limitations *ratione personae* provided by operative paragraph 6. Theoretically, if an individual referred to in operative paragraph 6 was indicted, his or her defence counsel could argue that the paragraph contradicting the Rome Statute is not severable from the resolution. Therefore, the entire resolution would be void, and the Court would not have jurisdiction over the indicted. The issue of severability of Security Council resolutions is controversial: Robert Cryer[89] finds an analogy with states' reactions to invalid reservations to treaties, stating that the position is not clear. Indeed, the 2011 International Law Commission Guide to Reservations to Treaties[90] appears to affirm that an invalid reservation is presumed to be severable to save the integrity of the treaty, unless the reserving state presents the reservation as a necessary condition for its consent to be bound by the treaty.[91] With reference to the Darfur and Libya referrals, it seems that the US did consider operative paragraph 6 as a *conditio sine qua non* for not vetoing the resolutions. As a result, and following this argument, the provision would not be severable, and the entire resolution would be void. Yet, a Security Council is a collective body, and its members vote for a resolution with different intents. Arguably, in case of Security Council resolutions, single paragraphs could not be severable as positions of the members on a single paragraph are impossible to determine.

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[88] Open Debate of the United Nations Security Council on 'Peace and Justice, with a special focus on the role of the International Criminal Court' New York (17 October 2012).
[89] 'Sudan, Resolution 1593, and International Criminal Justice' (2006) 19 Leiden Journal of International Law 195, 214.
[90] II (2) Yearbook of the International Law Commission.
[91] Edward T Swaine, 'Treaty Reservations' in Duncan B Hollis (ed), *The Oxford Guide to Treaties* (Oxford University Press 2012).

If the Court had to decide regarding this case, it would possibly rule differently, affirming that the provision is severable to maintain its jurisdiction over the situation. However, considering also the further controversial provision contained in Resolutions 1593 and 1970 concerning the Court's funding, the most convenient position would probably be to wholly disregard the referral. In hindsight, it would avoid a struggle against uncooperative states and an uncooperative Security Council. The Court did not take the opportunity to review the Security Council referrals triggering its jurisdiction, and the absence of a pronouncement by an International Criminal Court organ is arguably the worst choice from a legal and policy perspective. After the initial enthusiasm surrounding the Darfur referral in 2005, and even the Libya referral in 2011 (when authors argued that the 'UN Security Council, and the governments of the P-5, arguably will have the greatest impact on the effectiveness of the ICC as a promoter of R2P')[92], general awareness has increased of the negative consequences of the dynamics between the Council and the Court. Tom Dannenbaum illustrates the strategic value of moving away from Security Council referrals:

> [T]he notion that Council referrals serve pragmatic ends is not at all obvious. Such referrals target dubious instrumental benefits in situations in which the Court is unlikely to garner cooperation sufficient to pursue those benefits effectively and in which there is a countervailing risk of exacerbating conditions on the ground. … Focusing on the value of international criminal punishment can clarify when it should and should not be used, and in what form. To the extent that its value takes the form of moral expression, standing matters. Recognizing that means moving away from Security Council referrals as a mode of international criminal justice and focusing instead on two pursuits. First, taking action at the ICC in contexts in which its capacity to express moral values on behalf of the community of states parties is clear and well-grounded. And, second, pursuing alternative routes to criminal or other forms of justice, including

[92] Michael Contarino and Melinda Negron-Gonzales, 'The International Criminal Court' in Gentian Zyberi, *An Institutional Approach to the Responsibility to Protect* (Cambridge University Press 2013), 411.

with Security Council support, in contexts in which the ICC would lack that standing.[93]

A radically new interaction between the two institutions is necessary to enforce international justice and to guarantee international security, according to the mandates of the Court and of the Council, respectively.

The Court could decide whether a resolution is adopted in accordance with the Statute. If it is not, then the Court not only may not act but cannot act lawfully under the Statute. By affirming its power to decide on the compliance of the referral with the statute, the International Criminal Court would give a strong sign of independence from the UN political organ.

7. 'Determined to Put an End to Impunity': Reflections on Prosecutorial Strategy in the Presence of Due Process Concerns

In the words of the Preamble of the Rome Statute, the International Criminal Court was established to put an end to impunity for the perpetrators of the most serious crimes of concern to the international community.[94] The International Criminal Court was conceived to prosecute individuals for crimes which were not effectively dealt with by domestic judicial systems, under the principle of complementarity.[95] The statute empowers the prosecutor to request arrest warrants and summonses to appear and grants the accused the right to challenge the admissibility of the case. In this sense, the practice of the Court has, in certain cases, developed in an unexpected way. The International Criminal Court could play a role in situations of high political instability, which arguably falls outside the scope of its intended mandate.

This is the case in situations of grave international crimes perpetrated within an armed conflict, which ultimately result in a regime change, such as in

[93]Tom Dannenbaum, 'Legitimacy in War and Punishment: The Security Council and the ICC' in Kevin Jon Heller, Frédéric Mégret, Sarah M. H. Nouwen, Jens David Ohlin, and Darryl Robinson (eds), *The Oxford Handbook of International Criminal Law* (Oxford University Press 2020), 153.
[94] 'Affirming that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation, Determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes'. Rome Statute 2187 UNTS 90 Preamble.
[95] 'Emphasizing that the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions'; ibid.

Libya in 2011.[96] The Sudanese regime change in 2019 might result in similar dynamics. In Libya, defeated leaders allegedly responsible for international crimes are judged within a system managed by their opponents. In this situation, there is no risk that the alleged perpetrators will enjoy impunity. On the contrary, they risk being subject to a victor's justice[97] that does not result in a trial respecting the basic international standards of due process of law.[98] As a result, the situation undergoes a controversial overturn in the expected roles of the relevant subjects. On the one hand, the International Criminal Court prosecutor does not seek prosecution, instead intending to defer the case to the local judiciary. On the other hand, the accused appeals against his own state to affirm that it is unable or unwilling to genuinely prosecute him, in a type of 'challenge of inadmissibility'.

This is arguably the situation of Libya, where the International Criminal Court intervened pursuant to Security Council Resolution 1970 of 26 February 2011.[99] Upon the prosecutor's request, in June 2011, Pre-Trial Chamber I issued three arrest warrants: against Muammar Gaddafi, Saif Al-Islam Gaddafi, and Abdullah Al-Senussi. Among other charges, the three individuals were accused of crimes against humanity for attacks against the civilian population taking part in demonstrations against Gaddafi's regime. In October 2011, Muammar Gaddafi was killed in the battle of Sirte and his case was terminated. Following a Libyan challenge to International Criminal Court jurisdiction, the Appeals Chamber in 2020 declared Saif Gaddafi's case admissible after he was convicted *in absentia*,[100] whereas in 2014 the Appeals Chamber decided that Al-Senussi be tried in Libya. In the latter case, Al-Senussi's defence counsel appealed to obtain a

[96] Jurdi Nidalnabil, 'The Complementarity Regime of the International Criminal Court in Practice: Is It Truly Serving the Purpose? Some Lessons from Libya' (2017) 30 Leiden Journal of International Law 199; HJ Van der Merwe, 'The Show Must Not Go On: Complementarity, the Due Process Thesis and Overzealous Domestic Prosecutions' (2015) 15 International Criminal Law Review 40.

[97] Enrique Carnero Rojo, 'The Role of Fair Trial Considerations in the Complementarity Regime of the International Criminal Court: From "No Peace without Justice" to "No Peace with Victor's Justice?" (2006) 18 Leiden Journal of International Law 829.

[98] Jennifer Trahan, 'The International Criminal Court's Libya Case(s)—The Need for Consistency with International Human Rights as to Due Process and the Death Penalty' (2017) 17 International Criminal Law Review 803.

[99] Payam Akhavan, 'Complementarity Conundrums: The ICC Clock in Transitional Times' (2016) 14 (5) Journal of International Criminal Justice 1043.

[100] *Prosecutor v Gaddafi* (Judgment on the Appeal of Mr Saif Al-Islam Gaddafi against the decision of Pre-Trial Chamber I entitled 'Decision on the "Admissibility Challenge by Dr. Saif Al-Islam Gaddafi pursuant to Articles 17(1)(c), 19 and 20(3) of the Rome Statute"' of 5 April) ICC-01/11-01/11-695 (9 March 2020).

trial in front of the International Criminal Court, but the prosecutor supported Libya's arguments against a prosecution before the Court.[101]

7.1 The Due Process Thesis

In affirming Gaddafi's case admissible and Al-Senussi's case inadmissible, the International Criminal Court analysed Libya's willingness and ability to prosecute the two accused on various grounds. From a factual perspective, it considered Libya able to exercise control over and to collect evidence against Al-Senussi, but unable to do the same with Gaddafi. However, both cases contributed to the due process thesis, that is, the theory according to which the Court could determine a case admissible on the basis of violations of the accused's right to a fair trial. The prosecutor at the time, Moreno Ocampo, opposed the arguments based on due process concerns, stating that the Court cannot accept an admissibility challenge solely on the ground that the state's procedures are not fully consistent with international standards of due process.[102] Prosecutor Bensouda confirmed the same approach and expressly denied the possibility of challenging Libyan willingness and ability based on fair trial rights alone.[103] On the contrary, Al-Senussi's[104] and Gaddafi's[105] defence teams argued that the Court should declare a case admissible if the accused does not receive an acceptable trial in accordance with the basic international standards of due process. The two positions broadly reflect the debate about the due process thesis that has been ongoing since the drafting of the Rome Statute.[106]

The core of the controversy, whether or not the statute allows the International Criminal Court to admit a case a state is prosecuting by violating the rights of the accused, lies in Article 17 of the Rome Statute, regulating the

[101] *Prosecutor v Gaddafi and Al-Senussi* (Prosecution response to Application on behalf of the Government of Libya pursuant to Article 19 of the International Criminal Court Statute) ICC-01/11-01/11-167-Red (5 June 2012) 27, 32.
[102] ibid.
[103] *Prosecutor v Gaddafi and Al-Senussi (*Prosecution's Response to 'Further Submissions on behalf of Abdullah Al- Senussi Pursuant to Regulation 28') ICC-01/11-01/11-517 (24 February 2014).
[104] *Prosecutor v Gaddafi and Al-Senussi* (Defence Response on behalf of Mr. Abdullah Al-Senussi to 'Application on behalf of the Government of Libya relating to Abdullah Al-Senussi pursuant to Article 19 of the International Criminal Court Statute') ICC-01/11-01/11-356 (14 June 2013).
[105] *Prosecutor v Gaddafi and Al-Senussi* (Defence request concerning Mr. Gaddafi's continued detention in Libya) ICC-01/11-01/11-575 (19 November 2014).
[106] Marta Bo, 'The Situation in Libya and the International Criminal Court's Understanding of Complementarity in the Context of UNSC-Referred Cases' (2014) 25 Criminal Law Forum 505.

grounds of admissibility of a case in front of the Court. Regarding paragraph 10 of the preamble and Article 1, which states that the Court 'shall be complementary to national criminal jurisdictions', Article 17(1) lists the conditions that make a case inadmissible before the Court. Besides issues of gravity, the article introduces the main concept related to the complementarity system of the Court. Indeed, it affirms that a case is not admissible if it is already being investigated or prosecuted, has been dismissed after an investigation, or has already been tried by a state having jurisdiction over it because of the *ne bis in idem* principle (for which the relevant wording of Article 17 is reiterated *mutatis mutandis* in Article 20[3]). The statute includes further conditions regarding local proceedings and inadmissibility before the Court: the inadmissibility criteria listed do not apply if the state is unwilling or unable genuinely to carry out the investigation or prosecution.

Article 17 further specifies the meaning of the concepts of unwillingness and inability. 'Inability' is a rather uncontroversial term: the Court should find a state unable to investigate or prosecute a case if it cannot carry out its proceedings 'due to a total or substantial collapse or unavailability of its national judicial system'.[107] Unwillingness is a more ambiguous concept. Its determination is covered by Article 17(2): first, as a chapeau, the statute provides that the Court shall have 'regard to the principles of due process recognized by international law'. The state's proceedings must not have the 'purpose to shield the person concerned from criminal responsibility'. Then, proceedings must not experience unjustified delays and must not be conducted in a manner inconsistent with the 'intent to bring the person concerned to justice'. Thus, the statute does not expressly affirm that violations of fair trial rights in local proceedings shall be considered in the determination of the admissibility of a case before the Court.

The due process thesis is based mainly on the interpretation of three expressions, which are open to different interpretations: (a) the requirement of the state to be willing and able genuinely to prosecute; (b) the chapeau of Article 17(2), declaring that the Court shall have 'regard to the principles of due process recognized by international law'; and (c) the requirement of the state to conduct the proceedings in a manner consistent with the 'intent to bring the person

[107] Rome Statute Art 17(3).

concerned to justice'. First, the meaning of 'genuine' is neither further clarified nor elaborated in the text, in stark contrast to other potentially vague terms (e.g., 'unwillingness' and 'inability') and other alternative words considered by the drafters (e.g., 'good faith').

In seeking a more concrete definition of this ambiguous and enigmatic term, an interpretation based on the Oxford English Dictionary definition is proposed. The dictionary defines 'genuine' as 'having the supposed character, not sham or feigned'. Some scholars have suggested that an assessment of genuineness should be made by considering compliance with the overall provisions and aim of the statute.[108] From this perspective, to meet the standard of 'genuineness', the investigation or prosecution must be undertaken in good faith and, most relevantly, with the intention to properly address the allegations. The concept of genuineness may also include concerns about the quality of the investigation and prosecution of the accused. This would allow room for consideration of fair trial concerns.

In any event, the question of whether the inclusion of the standard of genuineness in the article adds anything remains unresolved. The drafters may have included the word simply to avoid an otherwise paradoxical wording that would have envisioned a state carrying out an investigation or prosecution despite being unable or simply unwilling to do so. Based on such conditions, the ambiguous reference to the 'genuineness' of the investigation or prosecution allows the Court a certain margin to make determinations without being hamstrung by an excessively narrow framework. It was affirmed that 'some subjectivity had to be retained to give the Court latitude on which to base its decision of finding unwillingness'.[109] Nevertheless, nothing in the statute hinders, in principle, a broad interpretation of the term 'genuinely' that might include due process concerns.

The expression 'to bring to justice', stated in Article 17(2)(c), bears again similar ambiguities.[110] It can be interpreted as the intention to bring a person to

[108] Carsten Stahn and Mohammed El Zeidy, *The International Criminal Court and Complementarity* (Cambridge University Press 2011).
[109] Mohamed M El Zeidy, 'The Principle of Complementarity: A New Machinery to Implement International Criminal Law' (2002) 23 Michigan Journal of International Law 869, 899.
[110] Enrique Carnero Rojo, 'The Role of Fair Trial Considerations in the Complementarity Regime of the International Criminal Court: From "No Peace without Justice" to "No Peace with Victor's Justice?" (2006) 18 Leiden Journal of International Law 829.

court to face a trial, including the consequent principles of due process, or simply to 'hold a person accountable' regardless of the quality of the prosecution. The wording was also understood as an 'expression that is synonymous with the intent to obtain a conviction'.[111] The first interpretation is supported by the references to 'principles of due process recognized by international law' in the chapeau of Article 17(2). According to some scholars, the second interpretation is supported by the wording of Article 17(2)(a), which specifies the 'purpose of shielding somebody from criminal responsibility' as an indicator of unwillingness to prosecute.[112] However, conditions stated in Article 17(2)(c) are not necessarily applicable to the following paragraphs. Nonetheless, because of the ambiguity of the text, the issue remains controversial. Yet it does not hinder the Court from using an extensive interpretation, including due process rights in the textual concept of 'justice'.[113]

A further argument against the due process thesis stems from the *travaux préparatoires* of the Rome Statute. At that time, the Italian proposal to include among the criteria for deciding on issues of admissibility the full respect for the fundamental rights of the accused was rejected:

> In deciding on issues of admissibility under this article, the Court shall consider whether…(ii) the said investigations or proceedings have been or are impartial or independent, or were or are designed to shield the accused from international criminal responsibility or were or are conducted with full respect for the fundamental rights of the accused; (iii) the case was, or is, diligently prosecuted.[114]

This demonstrates that the drafters refused to expressly conceive the International Criminal Court as a human rights court. However, according to Article 32 of the 1969 Vienna Convention on the Law of Treaties, the *travaux préparatoires* are only a supplementary means of interpretation. The rejection of a certain provision of a draft proposal during the negotiation cannot automatically imply that the final version of the treaty states the opposite. When relying on a textual interpretation

[111] Kevin J Heller, 'The Shadow Side of Complementarity: The Effect of Article 17 of the Rome Statute on National Due Process' (2006) 17 Criminal Law Forum 255.
[112] Daniel Nsereko, 'The ICC and Complementarity in Practice' (2013) 26 (2) Leiden Journal of International Law 427.
[113] J Pierini, 'The ICC Rulings in the Libyan Cases and Related Due Process Implications of the Complementarity Relationship with Domestic Prosecutions' (2015) SSRN Electronic Journal.
[114] Draft Proposal by Italy (2 August 1997) UN Doc A/AC.249/1997/WG.3/IP.4.

of the Rome Statute, which is in fact the primary means of the interpretation of treaties, it can be argued that due process criteria are relevant to determine the admissibility of a case.

7.2 The Due Process Thesis in Scholarship

Initially, scholars appeared to support a simple version of the due process thesis. In the first years following the Rome Conference, scholars generally agreed that the complementarity test applied to prosecutions which did not respect fair trial rights, such as those enshrined in the 1966 International Covenant on Civil and Political Rights. Mark Ellis argued that

> if States desire to retain control over prosecuting nationals charged with crimes under the International Criminal Court Statute, they must ensure that their own judicial systems meet international standards. At a minimum, States will have to adhere to standards of due process found in international human rights instruments, particularly as they relate to the rights of defendants.[115]

According to Darryl Robinson, 'it is expected that the International Criminal Court will show considerable deference to national procedural approaches. Thus, most States will be relying on their usual criminal procedures, provided that those procedures are effective and respect basic human rights standards'.[116] Jann Kleffner similarly affirmed that 'the legality and legitimacy of implementation require States to pay due consideration to the rights of due process'.[117] The informal expert paper commissioned by the Office of the Prosecutor shared this position:

> The issue is whether the proceedings are so inadequate that they cannot be considered 'genuine' proceedings. Of course, although the International Criminal Court is not a 'human rights court, human rights standards may still be of relevance and

[115] Mark Ellis, 'The International Criminal Court and Its Implication for Domestic Law and National Capacity Building' (2002) 15 Florida Journal of International Law 215, 241.
[116] 'The Rome Statute and Its impact on National Law' in Antonio Cassese (ed), *The Rome Statute of the International Criminal Court: A Commentary* (2002) 1849.
[117] 'The Impact of Complementarity on National Implementation of Substantive International Criminal Law', 1 Journal of International Criminal Justice 86, 112.

> utility in assessing whether the proceedings are carried out genuinely.[118]

Kevin Jon Heller marked a strong difference with the majority of the scholarship in the article 'The Shadow Side of Complementarity: The Effect of Article 17 of the Rome Statute on National Due Process'.[119] Here, Heller proposed a detailed interpretation of Article 17, concluding with a complete rejection of the due process thesis. According to the author, the Rome Statute drafts the complementarity system of the International Criminal Court in a way to obtain a conviction, either by the state judiciary or the Court, without consideration for the rights of the accused:

> Properly understood, article 17 permits the Court to find a State 'unwilling or unable' only if its legal proceedings are designed to make a defendant more difficult to convict. If its legal proceedings are designed to make the defendant easier to convict, the provision requires the Court to defer to the State *no matter how unfair those proceedings may be*.[120]

Notably, the author regrets the outcome of his own analysis and consequently criticises the current version of the Rome Statute. Finally, he invokes an amendment of the relevant articles to obtain the due consideration for the fair trial rights of the accused: 'What should be beyond debate, however, is the need for such a requirement ... Indeed, if the International Criminal Court simply turns a blind eye to unfair national trials—the inevitable effect of article 17 as written—it will simply permit States to replace one kind of impunity with another'.[121]

Subsequently, Heller offered a more nuanced theory: a 'modified due process' thesis.[122] The new approach still provides that international standards of fair trial rights are not to be considered by the International Criminal Court in evaluating admissibility. However, violations of national provisions of the right to a fair trial shall be relevant for the Court to determine a case admissible. A breach of domestic law may risk jeopardising the entire local proceedings, for instance,

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[118] 'Informal Expert Paper: The Principle of Complementarity in Practice' (30 March 2009) ICC-01/04-01/07-1008-AnxA.
[119] Kevin Jon Heller, 'The Shadow Side of Complementarity: The Effect of Article 17 of the Rome Statute on National Due Process' (2006) 17 Criminal Law Forum 255.
[120] ibid 257 (emphasis added).
[121] ibid 280.
[122] Position discussed in Frédéric Mégret and Giles Samson, 'Holding the Line on Complementarity in Libya: The Case for Tolerating Flawed Domestic Trials' (2013) 11 Journal of International Criminal Justice 583.

by obtaining evidence with recourse to torture, which shall not be allowed by the tribunal, or denying access to a lawyer, which might result in avoidance of the conviction of the accused because of procedural violations. This would be in stark contrast with the 'intent to bring the person concerned to justice' of Article 17. As a result, according to this view, the Court should consider due process concerns as far as they threaten to undermine the regular development of the domestic trial. Nonetheless, the modified due-process thesis was criticised on two grounds. First, it does not consider that a state could obtain a conviction regardless of violations of its own procedural laws. Second, it would allow the Court to evaluate other criteria beyond the respect of the national fair trial rights. For instance, any local prosecutorial strategy that may compromise the proceedings could be presented as a sign of unwillingness.

7.3 Leeway for the Due Process Thesis in the *Al-Senussi and Gaddafi* Case

The Pre-Trial Chamber partially supported the modified due process thesis.[123] In its decision on the admissibility of the case against Saif Al-Islam Gaddafi, the Chamber assessed whether or not Gaddafi's prosecution complied with the Libyan laws concerning due process. However, this determination was not aimed at assessing the possible unwillingness of the state, as supported by the author of the modified due process thesis, but rather its possible inability:

> The Chamber considers that the ability of a State genuinely to carry out an investigation or prosecution must be assessed in the context of the relevant national system and procedures. In other words, the Chamber must assess whether the Libyan authorities are capable of investigating or prosecuting Mr Gaddafi in accordance with the substantive and procedural law applicable in Libya.[124]

Concerning the 'original' due process thesis, in its decision on the admissibility of the case against Al-Senussi of 11 October 2013, the Pre-Trial Chamber emphasised 'that it is not just any alleged departure from, or violation of, national law that may form a ground for a finding of unwillingness or inability. The Chamber will take into account only those irregularities that may constitute

[123] *Prosecutor v Saif Al-Islam Gaddafi and Abdullah Al-Senussi* (Decision on the admissibility of the case against Saif Al-Islam Gaddafi) ICC-01/11-01/11-344-Red (31 May 2013).
[124] ibid para. 200.

relevant indicators of one or more of the scenarios described in article 17(2) or (3) of the Statute'.[125] In other words, the Chamber allows taking into account certain violations of national procedures, only in case those violations make such procedure 'inconsistent with the intent to bring the person of concern to justice'. Here, the expression seems to intend a general judicial proceeding and not directly a conviction.

In its judgment on the appeal of Al-Senussi of 24 July 2014, the Appeals Chamber went further. First, it disregarded the determination of fair trial concerns in the case at stake: 'Taking into account the text, context and object and purpose of the provision, this determination is not one that involves an assessment of whether the due process rights of a suspect have been breached per se'.[126] Then, relying on an interpretation of the wording 'to bring to justice' similar to the one mentioned above, it expressly recognised that a grave violation of due process rights of the accused can make a case admissible, although only in extremely limited circumstances 'whereby violations of the rights of the suspect are so egregious that the proceedings can no longer be regarded as being capable of providing any genuine form of justice to the suspect so that they should be deemed, in those circumstances, to be "inconsistent with an intent to bring the person to justice"'.[127]

In her report to the Security Council in November 2014, the prosecutor seemed to have left room for the due process thesis.[128] She affirmed the possibility of applying for a new challenge of admissibility based on a general pattern of human rights violations in Libya, which may lead to a violation of the fair trial rights of the accused:

> As it concerns the trial of Abdullah Al-Senussi in Libya, my Office is closely monitoring developments in the case, following on recent contacts with the Libyan authorities and independent trial monitors. The on-going violence and alleged threats to judges, prosecutors and lawyers do not augur well for

[125] ibid para. 221.
[126] *Prosecutor v Saif Al-Islam Gaddafi and Abdullah Al-Senussi* (Judgment on the appeal of Mr Abdullah Al-Senussi against the decision of Pre-Trial Chamber I of 11 October 2013 entitled 'Decision on the admissibility of the case against Abdullah Al-Senussi') ICC-01/11-01/11-565 (24 July 2014).
[127] ibid 200.
[128] ICC Office of the Prosecutor, 'Statement to the United Nations Security Council on the Situation in Libya, pursuant to UNSCR 1970 (2011)' (12 November 2014).

> a fair trial that respects all the rights of an accused person. On the basis of the information collected and the status of any progress made, I will assess my options in due course, including whether to apply for a review of the judges' decision up-holding Libya's request that the case against Al-Senussi be tried in Libya.[129]

7.4 Final Remarks on the Due Process Thesis

The interpretation of the Rome Statute's wording and its *travaux préparatoires* does not offer a certain conclusion about whether or not due process concerns are relevant to the admissibility of a case before the International Criminal Court. This retention of a degree of constructive ambiguity in the text grants the Court a certain leeway through which to determine the relevance of fair trial rights in assessing the admissibility of a case.

However, the Libya situation requires the Court to play a delicate and unexpected role. Both the Appeals Chamber and the prosecutor have affirmed the possibility of considering grave violations of fair trial rights in determining the admissibility of a case. The reason the Court should embrace the due process thesis is twofold. First, the consideration of fair trial rights of an accused would respect the roles of the bodies of the Court as they were originally conceived by the Rome Statute. The prosecutor was meant to conduct investigations with the aim of holding proceedings before the Court, whereas the accused, pursuant to Article 19, was given the power to question the admissibility of his case. By opposing the prosecutor in claiming a fair trial in The Hague, an accused has overturned the structure provided by the Rome Statute. The duty to respect fair trial rights remains controversial, and a clear position has not been taken by any of the organs of the Court, neither the prosecutor nor the Chambers. Such ambiguity in the position of the Court towards the due process thesis provoked a stretching of the Rome Statute which comes at the detriment of the effective functioning of the Court.

Second, by disregarding the human rights of the accused, the Court would exclude from its practice the basic principles, and general norms, of international law, often recalled in the Rome Statute, starting from principles of due process recognised by the international law of Article 17. In so doing, the Court could not

[129] ibid.

ultimately fit in the international community discourse of human rights and transitional justice. Above all, it could not fulfil its objective and purpose, which is not only 'to put an end to impunity for the perpetrators of ... the most serious crimes of concern to the international community as a whole' but also 'to guarantee lasting respect for and the enforcement of international justice'.[130]

[130] Rome Statute 2187 UNTS 90 Preamble.

Chapter 3:
The UN Security Council and the Responsibility to Protect

1. Introduction

The following analysis covers the relationship between the responsibility to protect and the UN Security Council. The examination begins with an analysis of Security Council resolutions and presidential statements that applied the responsibility to protect. In addition, for a more comprehensive understanding of the approach the Council has been adopting towards the doctrine, this analysis considers the application of the doctrine in the armed conflicts of Libya and Syria, included through rejected draft resolutions such as those whose adoption would have enacted a different implementation of the doctrine. The veto power of the permanent members of the Security Council, or the threat thereof, shaped the development of the doctrine and, more generally, limited the adoption of resolutions of the Council. This is not necessarily a negative consequence of the functioning of the Council. The requirement of the acquiescence of the five permanent members of the Council allows wider consent in the approval of resolutions. Some among the advocates of the responsibility to protect assume that more international interventions (whether or not authorising the use of force) would contribute to stopping mass violence; or, at least, they blame the inaction of the Council for the persistence of humanitarian crises. Existing research, however, does not show that international interventions actually achieve humanitarian purposes.

A legal matter might arise when the Council refrains from acting against threats to international peace and security, which is the Council's function mandated by the UN Charter. This analysis examines the various initiatives aimed at overcoming the deadlock between the members of the Council should a stalemate jeopardise actions to stop or prevent mass violence. In particular, this study explores the Brazilian proposal of a 'responsibility while protecting', new interpretations of the role of the Uniting for Peace resolution, and a code of conduct to direct the action of the Council. Finally, a general overview of the

obligations and responsibility of the Security Council allows the author to draw several conclusions on the Security Council's responsibility to protect.

2. The Responsibility to Protect in Security Council Resolutions and Presidential Statements

To analyse the impact of the responsibility to protect on the action of the UN Security Council, and vice versa, to explore how the Council influenced the development of the doctrine, it is important to first examine references to the responsibility to protect contained in Security Council resolutions. The examination of these resolutions allows one to draw a straightforward conclusion: the Council applied the doctrine consistently to affirm that States, predominantly from the African continent, bear the primary responsibility to protect their populations.

The Council began to mention the responsibility to protect after the General Assembly endorsed the doctrine at the 2005 World Summit.[1] Resolution 1653 of 2006, concerning the Great Lakes region of Africa, first introduced a reference to the responsibility to protect. The resolution

> *[u]nderscores* that governments in the region have a primary responsibility to protect their populations, including from attacks by militias and armed groups and stresses the importance of ensuring the full, safe and unhindered access of humanitarian workers to people in need in accordance with international law.[2]

Shortly after, Resolution 1674 of 2006, on the protection of civilians in armed conflicts, expressly adopted the wording of the General Assembly as it reaffirmed 'the provisions of paragraphs 138 and 139 of the 2005 World Summit Outcome Document regarding the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity'.[3]

Besides these occasional references, the Security Council began mentioning the doctrine more consistently five years later. From 2011 onwards the practice of the Council shows a quantitative leap in the number of citations of the doctrine. With Resolution 1970 of 26 February 2011, the Security Council first

[1] UNGA, 'World Summit Outcome' (2005) UN Doc A/RES/60/1, 30.
[2] UN Doc S/RES/1653, 3.
[3] UN Doc S/RES/1674, 2.

established a link between the responsibility to protect and the International Criminal Court by referring the situation of Libya to the prosecutor while recalling 'the Libyan authorities' responsibility to protect its population'.[4] Resolution 1973 of 17 March 2011 first applied the doctrine in connection to the use of force: '*Reiterating* the responsibility of the Libyan authorities to protect the Libyan population and *reaffirming* that parties to armed conflicts bear the primary responsibility to take all feasible steps to ensure the protection of civilians',[5] the Council authorised states 'to take all necessary measures … to protect civilians and civilian populated areas under threat of attack in the Libyan Arab Jamahiriya, including Benghazi, while excluding a foreign occupation force of any form on any part of Libyan territory'.[6] Resolutions 1970 and 1973 are considered to have reinforced the responsibility to protect as an international legal norm and constitute a milestone in the development of the doctrine.[7] In this respect, UN Secretary-General Ban Ki-moon declared that 'Resolution 1973 affirms, clearly and unequivocally, the international community's determination to fulfil its responsibility to protect civilians from violence perpetrated upon them by their own government'.[8]

After 2011, the Security Council approved an increasing number of resolutions that mention the responsibility to protect in various situations. An overview of the geographical scope of the resolutions and of the wording the Council used to refer to the doctrine yields some meaningful observations. First, there is a prevailing focus on the African continent, which raises an analogy with the selectivity of situations at the International Criminal Court. Second, the Council focused on the first pillar of the responsibility to protect, that is, the responsibility of states to protect civilian populations under their jurisdiction. Third, the Council does not mention the third pillar, which affirms the responsibility of the international community to take action in case of failure of

[4] UN Doc S/RES/1970, 1.
[5] UN Doc S/RES/1973, 1.
[6] UN Doc S/RES/1973, 2.
[7] Thomas G. Weiss, 'RtoP Alive and Well after Libya' (2011) 25 Ethics & International Affairs 287; Aidan Hehir and Anthony Lang, 'The Impact of the Security Council on the Efficacy of the International Criminal Court and the Responsibility to Protect' (2015) 26 Criminal Law Forum 153.
[8] 'Secretary-General Says Security Council Action on Libya Affirms International Community's Determination to Protect Civilians from Own Government's Violence' (17 March 2011) UN Doc SG/SM/13454.

the territorial state in fulfilling its responsibility to protect civilians on its territory, emerges.

In fact, the Council usually recalls the doctrine in the preambles of the resolutions, with various wordings related to the first pillar. For instance, the Council mentions the doctrine concerning

- Côte d'Ivoire: 'Reaffirming that it is the responsibility of Côte d'Ivoire to promote and protect all human rights and fundamental freedoms, to investigate alleged violations of human rights and international law and to bring to justice those responsible for such acts';[9]
- Sudan: 'Advising and assisting the Government of the Republic of South Sudan, including military and police at national and local levels as appropriate, in fulfilling its responsibility to protect civilians, in compliance with international humanitarian, human rights, and refugee law';[10]
- Yemen, the only non-African country on the list with Syria: 'Recalling the Yemeni Government's primary responsibility to protect its population';[11]
- Somalia: 'Recognizing that the Federal Government of Somalia has a responsibility to protect its citizens and build its own national security forces';[12]
- Mali: 'Emphasizing that the transitional authorities of Mali have primary responsibility for resolving the interlinked challenges facing their country and protecting all their citizens …';[13]
- Liberia: 'Affirming that the Government of Liberia bears primary responsibility for ensuring peace, stability and the protection of the civilian population in Liberia';[14] and
- the Democratic Republic of the Congo: 'Recalling that the Government of the DRC bears the primary responsibility to protect civilians within its

[9] UNSC Res 1975 (30 March 2011) UN Doc S/RES/1975, 1.
[10] UNSC Res 1996 (8 July 2011) UN Doc S/RES/1996, 3.
[11] UNSC Res 2014 (21 October 2011) UN Doc S/RES/2014, 1.
[12] UNSC Res 2093 (6 March 2013) UN Doc S/RES/2093 Preamble.
[13] UNSC Res 2100 (25 April 2013) UN Doc S/RES/2100 Preamble.
[14] UNSC Res 2333 (23 December 2016) UN Doc S/RES/2333 Preamble.

territory and subject to its jurisdiction, including protection from crimes against humanity and war crimes'.[15]

A further reference to the doctrine appeared in Resolution 2185 of 2014, on UN peacekeeping operations, again focused on only the first pillar of the doctrine: '[h]ighlighting the important role that United Nations Police Components can play, where mandated, in consultation with the host State and in collaboration with other components, in supporting host States to uphold their primary responsibility to protect civilians'.[16]

Furthermore, the Council reaffirmed the responsibility to protect in more than twenty presidential statements,[17] starting in Statement 18 of 22 September 2011 on maintenance of international peace and security, which reaffirmed 'the responsibility of each individual State to protect its populations from genocide, war crimes, ethnic cleansing, and crimes against humanity'.[18] In line with the references contained in the resolutions, presidential statements vaguely reiterate the wording of the first pillar of the doctrine, mostly with reference to African states (Central African region,[19] Central African Republic,[20] Nigeria,[21] South Sudan,[22] and 'peace and security in Africa'[23]).

A particularly meaningful expression of the doctrine appears in the 2013 statement on the protection of civilians in armed conflict. The statement reiterated the first pillar of the responsibility to protect: '[t]he Security Council recognises that States bear the primary responsibility to protect civilians as well as respect

[15] UNSC Res 2348 (31 March 2017) UN Doc S/RES/2348 Preamble.
[16] UNSC Res 2185 (20 November 2014) UN Doc S/RES/2185, 1.
[17] Until April 2020, twenty-one presidential statements refer to the responsibility to protect. Besides those detailed below, these are 'Central African Region (LRA)' (25 November 2013) UN Doc S/PRST/2013/8, 'The situation in the Middle East' (2 October 2013) UN Doc S/PRST/2013/15, 'Protection of civilians in armed conflict' (12 February 2014) UN Doc S/PRST/2014/3, 'Promotion and strengthening of the rule of law in the maintenance of international peace and security' (21 February 2014) UN Doc S/PRST/2014/5, 'Women and peace and security' (28 October 2014) UN Doc S/PRST/2014/21, 'Middle East' (17 August 2015) UN Doc S/PRST/2015/15, 'Maintenance of international peace and security' (25 November 2015) UN Doc S/PRST/2015/22, 'Protection of civilians in armed conflict' (25 November 2015) UN Doc S/PRST/2015/23, 'The situation in Myanmar' (6 November 2017) UN Doc S/PRST/2017/22, 'United Nations peacekeeping operations' (21 December 2017) UN Doc S/PRST/2017/27 and 'Maintenance of international peace and security' (18 January 2018) UN Doc S/PRST/2018/1.
[18] UN Doc S/PRST/2011/18, 1.
[19] UN Doc S/PRST/2011/18; UN Doc S/PRST/2011/21; UN Doc S/PRST/2012/18; UN Doc S/PRST/2012/28; UN Doc S/PRST/2014/8.
[20] UN Doc S/PRST/2016/17.
[21] UN Doc S/PRST/2015/3.
[22] UN Doc S/PRST/2016/1.
[23] UN Doc S/PRST/2013/4.

and ensure the human rights of all individuals within their territory and subject to their jurisdiction, as provided for by relevant international law'. It further adopted the wording of the definition of the doctrine as defined by the General Assembly, which reaffirmed 'the relevant provisions of the 2005 World Summit Outcome Document regarding the protection of civilians in armed conflict, including paragraphs 138 and 139 thereof regarding the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity'.[24] The Council cited the statement of 2013 in Resolution 2109 on Sudan and South Sudan, recalling 'the Presidential Statement of 12 February 2013 that recognized that States bear the primary responsibility to protect civilians as well as to respect and ensure the human rights of all individuals within their territory and subject to their jurisdiction as provided for by relevant international law'.[25]

3. The Partial Application of the Responsibility to Protect in Security Council Resolutions

From the perspective of the geographical scope, the Council applied the doctrine almost exclusively on the African continent, with fifty-one resolutions dealing with African states, the only exceptions being a resolution on Yemen[26] and five resolutions on Syria.[27] This evident selectivity focusing on Africa mirrors the debate concerning the International Criminal Court, which includes criticisms about double standards.[28] This selection bias extends to the practice of the Security Council *tout court*, without specific references to the responsibility to protect. More than 70 per cent of resolutions adopted since 1946 indeed refer to Africa or the Middle East.[29] The geographical bias depends on the structure of the Council and reflects the political influence of major powers in the international community. Examining the political economy of the UN Security Council, Vreeland and Dreher conclude that

[24] UN Doc S/PRST/2013/2, 3.
[25] UN Doc S/RES/2109 (2013), 1.
[26] UN Doc S/RES/2014 (2011).
[27] UN Doc S/RES/2165 (2014), UN Doc S/RES/2254 (2015), UN Doc S/RES/2258 (2015), UN Doc S/RES/2332 (2016) and UN Doc S/RES/2449(2018).
[28] Luke Glanville, 'Does R2P Matter? Interpreting the Impact of a Norm' (2016) 51 (2) Cooperation and Conflict 184.
[29] Rossana Deplano, *The Strategic Use of International Law by the United Nations Security Council* (Springer 2015) 55.

> countries vote with the United States upward of 90 percent of the time. We argue that this is partly due to US pressure on countries to deliver favourable votes—the very subject of this book—but we acknowledge that it is also due to massive selection bias. Members of the UNSC act strategically when proposing resolutions—they are less likely to make proposals that they expect to fail.[30]

From the point of view of the integral application of the doctrine in its three pillars ((1) The responsibility of states to protect their populations, (2) the responsibility of the international community to support states in protecting their population, and (3) the responsibility of the international community to act when states fail to protect their populations), the absence of a resolution enacting the responsibility of the international community to take action, as foreseen by the third pillar, mitigates the risk of applying the responsibility to protect as a ground of Security Council authorisation to use force. Indeed, a common concern surrounding the doctrine consists of the possibility to create a legal basis for a military intervention. According to Alex Bellamy, 'western support for R2P [responsibility to protect] derives more from its potential to be abused to legitimize unilateral intervention than from genuine concern about protecting people from grave harm.'[31] However, the World Summit Document, and subsequent formulations adopted by UN bodies, consistently clarify that all actions taken under the doctrine shall be taken '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 manifestly fail to protect their populations'.[32] No resolution interprets the responsibility to protect as a norm granting the international community the responsibility to intervene and protect civilian populations from mass atrocities. Even Resolution 1973 of 2011, which authorises the use of force in Libya 'to protect civilians and civilian populated areas under threat of attack in the Libyan Arab Jamahiriya', does not affirm a responsibility of the international community to protect civilian populations.[33] It

[30] James Raymond Vreeland and Alex Dreher, *The Political Economy of the United Nations Security Council, Money and Influence* (Cambridge University Press 2014) 143.
[31] *Responsibility to Protect: The Global Effort to End Mass Atrocities* (Cambridge 2009) 111.
[32] UNGA, 'World Summit Outcome' (2005) UN Doc A/RES/60/1, 30.
[33] UNSC Res 1973 (17 March 2011) UN Doc S/RES/1973, 1.

mentions only the responsibility to protect of the territorial state, reiterating that 'parties to armed conflicts bear the primary responsibility to take all feasible steps to ensure the protection of civilians'. As Mark Kersten observed,

> [i]n both Resolutions 1970 and 1973, the UNSC invoked only half of the R2P equation. The resolutions made clear that UNSC member states agreed that Libya had a responsibility to protect its citizens and that, in the absence of doing so, international intervention was appropriate. Missing from the resolutions, however, was any justification of military intervention on the basis of the international community itself bearing a responsibility to protect Libyan citizens.[34]

In so doing, the Security Council avoided affirming authorising the use of force as a result of a new legal obligation—that is, the responsibility to protect. Such an obligation would bind the Council when states fail to protect their citizens from mass atrocities. Authors maintain that the omission was a deliberate strategy of the Council, or rather its five permanent members. Aidan Hehir explained the absence of the third pillar from Security Council resolutions: 'in this way, the P5 have employed R2P to emphasise that it is someone else's responsibility to protect suffering peoples'.[35] James Pattison similarly commented that 'states are seemingly reluctant to accept this responsibility for fear of being obliged to act robustly in response to similar cases'.[36]

Even in the absence of military interventions authorised by the Security Council on the basis of the responsibility to protect, the focus on African states reveals a controversial selectivity in the application of the doctrine. Some countries denounced the lack of neutrality in the application of the doctrine at the annual General Assembly debates on the responsibility to protect. For instance, in 2017, Venezuela criticised western countries, stating that these countries

> have promoted and carried out military intervention in sovereign states and often … are the main defenders of this Responsibility to Protect concept. Rather than protecting the rights of people, it is often used as an instrument to destabilize and bring down legitimate governments or to dismantle political

[34] Mark Kersten, 'A Fatal Attraction? The UN Security Council and the Relationship between R2P and the International Criminal Court' in Jeff Handmaker and Karin Arts (eds), *Mobilising International Law for 'Global Justice'* (Cambridge University Press 2018) 154.
[35] Aidan Hehir, *Hollow Norms and the Responsibility to Protect* (Palgrave 2019) 118.
[36] James Pattison, 'Introduction' (2011) 25 (3) Ethics & International Affairs 253.

> institutions in the countries that are victims of aggression. … Therefore, it is paradoxical and dangerous that the promoters of this notion apply double standards in dealing with conflict situations. They show particular interest in some countries while they ignore the perpetration of atrocity crimes in other cases such as the Palestinian case.[37]

As a result, Security Council resolutions partially apply the responsibility to protect, mentioning only one aspect of the doctrine, namely 'as a means by which the host state is identified as the sole locus of Liability',[38] and focusing almost exclusively on African countries. These references do not introduce any legal consequence to the content of the resolutions and do not contribute to developing the doctrine. To examine the evolving implementation of the responsibility to protect, it is worth considering the action of the Council in Libya and Syria. The two countries, where an armed conflict broke out in 2011 and remains ongoing in 2020, represent two opposite examples of the approach of the Security Council in debating and applying the doctrine.

4. The Security Council's Implementation of the Responsibility to Protect in Libya and Syria

In 2014, the Security Council vetoed a draft resolution referring the situation of Syria to the International Criminal Court. This case offers a meaningful example of the interplay between the veto power of the Council, the responsibility to protect, and the court. The behaviour of the Council in this circumstance is a clear example of a situation of threat to international peace and security. The Syrian armed conflict is widely called the worst humanitarian crisis of our time, and the Council is blocked by an impasse between its permanent members and the consequent use of veto power. Furthermore, the Council's approach to Syria marks a blatant distinction with the measures adopted in 2011 in Libya, where Resolution 1970 referred the situation to the Court and Resolution 1973 authorised the use of force. The analysis of the two cases allows an examination of the evolution of the relationship between the Council and the responsibility to protect. The 2011 Libyan and Syrian conflicts constitute

[37] Statement by Venezuela at the 2017 UN General Assembly Debate on the Responsibility to Protect, New York, 6 September 2017 <http://responsibilitytoprotect.org/2017-iid-venezuela-english.pdf>.
[38] Aidan Hehir, *Hollow Norms and the Responsibility to Protect* (Palgrave 2019) 142.

contrasting examples of implementation of the responsibility to protect, as the doctrine was profusely debated in the Council's meetings and in scholarship.[39]

The inaction of the Council in a situation of humanitarian crisis constitutes the most ambitious ground of application of the responsibility to protect. The doctrine finds its challenging purpose in providing an objective framework for the international community to take action against mass violence. In other words, the doctrine proposes that international law, in the context of international regulation, or the rule of law, governs the interventions of the international community in situations of mass violence that so far have been delegated to the political scrutiny of the UN Security Council. Thus,

> R2P's central purpose is to overcome inconsistency in the international community's willingness to be responsible for and respond to unfolding humanitarian crises. It aims to reduce the influence of national considerations, relative to a broader commitment to protecting individuals' human rights, in deliberations over international response.[40]

4.1 The Security Council and the 2011 Conflict in Libya

At the outbreak of the Libyan conflict in 2011 with the 17 February Revolution, the Council promptly adopted two remarkable measures: it referred the Libyan situation to the International Criminal Court with Resolution 1970 of 26 February 2011, adopted unanimously, and it authorised the use of force with Resolution 1973 of 17 March 2011. The action of the Council in Libya constituted an innovative application of the responsibility to protect: the Council mentioned the doctrine in the preambles of the two resolutions, in both the resolution authorising the use of force and the resolution referring the situation to the Court. Resolution 1970 recalls, and Resolution 1970 reiterates, the Libyan authorities' responsibility to protect the Libyan population. In the words of Karin Wester, 'the

[39] Ved Nanda, 'The Future Under International Law of the Responsibility to Protect After Libya and Syria' (2013) 21 Journal of International Law and Practice 1; Simon Chesterman, '"Leading from Behind": the Responsibility to Protect, the Obama Doctrine, and Humanitarian Intervention after Libya' (2011) 25 (3) Ethics and International Affairs 279; Charles R Majinge, 'The Use of Force in International Law and the UN Security Council Resolutions 1970 & 1973 on Libya' (2012) 24 Hague Yearbook of International Law 153.

[40] 'International Law — The Responsibility to Protect — Draft Security Council Resolution Referring Syrian Conflict to the International Criminal Court Vetoed by Russia and China (13 in Favor, 2 Against). — U.N. SCOR, 69th Sess., 7180th Mtg. at 4, U.N. Doc. S/PV.7180 (May 22, 2014)' (2015) 128 Harvard Law Review 1055, 1062.

political-moral imperative encapsulated by the principle played a decisive role in the Security Council's decision to authorize the use of force in order to protect civilians'.[41]

The NATO military operation Unified Protector took place between 23 March and 31 October 2011. Advocates of the doctrine celebrated the interventionism of the Council, as it seemed that the international community had fulfilled its responsibility to protect the Libyan population from grave international crimes. US Permanent Representative to NATO Ivo Haalder and Commander of European Command James Stavridis depicted the mission as a thorough success:

> NATO's operation in Libya has rightly been hailed as a model intervention. The alliance responded rapidly to a deteriorating situation that threatened hundreds of thousands of civilians rebelling against an oppressive regime. It succeeded in protecting those civilians and, ultimately, in providing the time and space necessary for local forces to overthrow Muammar al-[G]addafi. And it did so by involving partners in the region and sharing the burden among the alliance's members.[42]

Gareth Evans, co-chair of the International Commission on Intervention and State Sovereignty, wrote that the intervention in Libya constituted the 'end of the argument' of the doubts surrounding the doctrine:

> [T]he U.N. Security Council has now not only expressly invoked R2P but given it effective sharp-end military application in Ivory Coast and Libya. The Libya intervention was much more prolonged and the interpretation by the NATO-led forces of the scope of its mandate much more controversial, but it unquestionably worked—certainly in preventing a major massacre in Benghazi and arguably in preventing many more civilian casualties elsewhere than would otherwise have been the case.[43]

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[41] Karin Wester, 'Lessons to Be Learned' in *Intervention in Libya: The Responsibility to Protect in North Africa* (Cambridge University Press 2020) 290.
[42] 'NATO's Victory in Libya: The Right Way to Run an Intervention' (2012) 91 (2) Foreign Affairs 7.
[43] Gareth Evans, 'End of the Argument: How We Won the Debate Over Stopping Genocide' Foreign Policy (28 November 2011) <https://foreignpolicy.com/2011/11/28/end-of-the-argument/> accessed 25 October 2020.

Alex Bellamy similarly heralded the strength the responsibility to protect obtained through the intervention in Libya:

> Where it was once a term of art employed by a handful of likeminded countries, activists, and scholars, but regarded with suspicion by much of the rest of the world, RtoP has become a commonly accepted frame of reference for preventing and responding to mass atrocities.[44]

Along the same lines, Sara Bernstein observed the consensus reached on a military intervention as a tool to implement the responsibility to protect:

> After Resolution 1973's passage in 2011, R2P is no longer just a concept; it is a reality for Libyans, the United States, and the North Atlantic Treaty Organization ('NATO'). It is not merely an aspiration of those members of the international community who support military intervention. While the response to the Libyan crisis was not the first use of R2P, it was the first time the doctrine had been used to impose military force in order to protect civilians.[45]

Gareth Evans, furthermore, advocated a growing use of the military force in the application of the doctrine:

> [T]he sharp end of the RtoP stick—the use of military force—had been replaced by evasiveness and skittishness from diplomats, scholars, and policy analysts. The increasing and, at times, virtually exclusive emphasis on prevention in the interpretation of RtoP was politically correct but counterproductive. Libya changed that. Security Council Resolution authorized prompt, robust, and effective international action.[46]

Thomas J Weiss considered the Libyan intervention successful to the point to inspire the international community to adopt, in the future, further military actions to protect civilians:

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[44] Alex J Bellamy 'Libya and the Responsibility to Protect: The Exception and the Norm' (2011) 25 (3) Ethics & International Affairs 263, 265.
[45] 'The Responsibility to Protect After Libya: Humanitarian Prevention as Customary International Law' (2012) 38 Brooklyn Journal of International Law 5.
[46] Gareth Evans, 'End of the Argument: How We Won the Debate Over Stopping Genocide' Foreign Policy (28 November 2011) <https://foreignpolicy.com/2011/11/28/end-of-the-argument/> accessed 25 October 2020.

> Perhaps Libya will make policy—and decision-makers realize that between 1999 and 2011 we witnessed not too much military intervention to protect human beings but rather not nearly enough. The international action against Libya was not about bombing for democracy, sending messages to Iran, implementing regime change, keeping oil prices low, or pursuing narrow interests. These may result from such action, but the dominant motivation for using military force was to protect civilians.[47]

More lukewarm supporters of the doctrine acknowledge that intervening in Libya, ultimately, did not protect the population on the ground and that the intervention instead protracted the armed conflict. Nevertheless, these results were unexpected and unintended, so the authorisation to use force was still the most appropriate decision to take:

> There is no hiding the fact that the form of intervention in Libya was highly imperfect, that it delivered indirect and patchy protection at best, and that it placed the region's long-term stability in the hands of fractious rebels about whom little is known. Such late-in-the-day decisions about military intervention to prevent atrocities will always be taken in a context of deep uncertainty about their effects and will be driven by the specific political context. As such, they tend to be inconsistent and imperfect, but sometimes the best that can be made of a bad situation.[48]

Susan O'Sullivan warns against the ambivalence of this scholarship on the Libyan situation:

> The responsibility to protect can be eaten by a project of military humanitarianism that incorporates critique, utilises the international institutional framework when needed and ignores it when this is not possible, and pursues its own ends of regime change and risk management with ruthless commitment to risk aversion.[49]

[47] 'RtoP Alive and Well after Libya' (2011) 25 (3) Ethics & International Affairs 291.
[48] Alex J Bellamy, 'Libya and the Responsibility to Protect: The Exception and the Norm' (2011) 25 (3) Ethics & International Affairs 263, 269.
[49] Susan O'Sullivan, *Military Intervention in the Middle East and North Africa: The Case of NATO in Libya* (Routledge 2018) 27.

4.2 An Illegal and Detrimental Intervention?

Besides the initial enthusiasm for the military application of the doctrine, further analysis revealed that the intervention in Libya was disputably detrimental and illegal. First, the entire decision to act was based on misperceptions of the situation in the field. The dominant narrative alleviated the behaviour of the rebel groups and amplified the response of the government, which was arguably lighter than professed in Gaddafi's rhetoric:

> Libya's initial uprising was not peaceful, nationwide, and democratic—as reported and perceived in the West—but violent, regional, and riven with tribalism and Islamist extremism. [G]addafi's response was not to slaughter peaceful protesters or bombard civilian areas indiscriminately, as reported in the West, but rather to target rebels and violent protesters relatively narrowly, reducing collateral harm to noncombatants.[50]

Other authors analysed how the international community accepted a simplified description of the Libya situation, with the government opposed to the people, an Arab consensus on Gaddafi's removal, a clear and imminent threat of genocide, and a lack of alternatives to a military solution:

> First, regime change has been represented as a universal interest by elaborating on the Manichean representation of Gaddafi as opposed to 'the rest of Libya', and the existence of a regional, Arab, consensus that he should be removed. Second, existing contradictions in the resort to violence have been simplified. The international community also prematurely dismissed any alternatives to the militarisation of the crisis … Third, the media and scholars have been of vital importance in reiterating the image of Gaddafi as the 'mad dog of the Middle East', and in promoting the idea that regime change was the best solution.[51]

Second, the intervention went far beyond the claimed humanitarian purposes and ultimately resulted in a regime change in Libya. The Libyan armed conflict did not end. On the contrary, it was protracted for years: in November

[50] Alan J Kuperman, 'A Model Humanitarian Intervention? Reassessing NATO's Libya Campaign' (2013) 38 (1) International Security 105, 136. See also Arif Saba and Shahram Akbarzadeh, 'The Responsibility to Protect and the Use of Force: An Assessment of the Just Cause and Last Resort Criteria in the Case of Libya' (2018) 25 (2) International Peacekeeping 242.
[51] Debora Valentina Malito, 'Morality as a Catalyst for Violence: Responsibility to Protect and Regime Change in Libya' (2019) 46 Politikon 104, 113.

2019, International Criminal Court Prosecutor Fatou Bensouda reaffirmed the persistence of mass violence in the country before the Council. Prosecutor Bensouda stated that Libya risked being

> embroiled in persistent and protracted conflict and continued fratricide. The implosion of Libya must carry a heavy burden on the conscience of the international community and galvanize meaningful action to assist the Libyan authorities to bring stability to the country, and an end to the cycle of violence, atrocities and impunity.[52]

Scholar Alan Kuperman further confirmed her view:

> Regrettably, the moral hazard of humanitarian intervention perpetuated the war for seven more months, creating anarchy that persists seven years later. At least 10,000 more Libyans were killed, Mali was destabilized, weapons proliferated throughout the region, international terrorists gained footholds in Libya.[53]

Even then–US President Barack Obama acknowledged the failure in the administration of the Libya intervention, qualifying the management of the post-intervention phase as the worst mistake of his mandate.[54]

The international intervention in Libya raised concerns on its legality under the *ius ad bellum*, and most scholars concur that NATO exceeded its mandate to protect civilians.[55] Initially, NATO seemed to maintain the mandate of protecting civilians by targeting the Libyan forces that were attacking the rebels. After April 2011, NATO began targeting facilities of the Gaddafi regime, and with France, the UK, and other states, it directly supported rebels in their fight against the government, as Ulfstein and Christiansen accurately described:

> NATO provided for the high-precision strike capabilities that the rebel commanders needed. The rebels were also rapidly

[52] ICC Office of the Prosecutor, 'Statement to the UNSC on the Situation in Libya, pursuant to UNSCR 1970 (2011)' (6 November 2019).
[53] Alan Kuperman, 'Did the R2P Foster Violence in Libya?' (2019) 13 (2) Genocide Studies and Prevention 38, 53.
[54] David Unger, 'The Foreign Policy Legacy of Barack Obama' (2016) 51 The International Spectator 4.
[55] Andrea Carati, 'Responsibility to Protect, NATO and the Problem of Who Should Intervene: Reassessing the Intervention in Libya' (2017) 29 (3) Global Change, Peace & Security 293; Alan J Kuperman, 'A Model Humanitarian Intervention? Reassessing NATO's Libya Campaign' (2013) 38 International Security 105.

> improving their operations, especially in combat coordination, due to covert deployment of foreign military advisors and special agents from both France and Britain who trained the rebels and provided tactical intelligence for the NATO aircraft bombing forces. Moreover, the rebels received secret airdrops of weapons and ammunition, admitted both by France and Qatar.[56]

In so doing, the use of force of NATO in Libya appears to have exceeded the mandate of Resolution 1973. In addition, some forms of the direct military support to rebels also violated the arms embargo established in Resolution 1970:

> [A]ll Member States shall immediately take the necessary measures to prevent the direct or indirect supply, sale or transfer to the Libyan Arab Jamahiriya, from or through their territories or by their nationals, or using their flag vessels or aircraft, of arms and related materiel of all types, including weapons and ammunition, military vehicles and equipment, paramilitary equipment, and spare parts for the aforementioned, and technical assistance, training, financial or other assistance, related to military activities or the provision, maintenance or use of any arms and related materiel, including the provision of armed mercenary personnel whether or not originating in their territories.[57]

The question whether, and to what extent, the intervention in Libya went beyond the authorisation to use force as set out in Resolution 1973, and consequently violated the *ius ad bellum*, remains controversial. Several authors affirm the legality of the NATO military operation.[58] The main argument to support the lawfulness of a regime change is, by and large, that the removal of Gaddafi fell within the mandate of the resolution, as it was necessary to protect civilians. The leaders of the US, the UK, and France made this point in an apparently paradoxical statement: 'Our duty and our mandate under U.N. Security Council Resolution 1973 is to protect civilians, and we are doing that. It is not to

[56] 'The Legality of the NATO Bombing in Libya' (2013) 62 International and Comparative Law Quarterly 168.
[57] UN Doc S/RES/1970 (2011) 3.
[58] Michael N Schmitt, 'Wings over Libya: The No-Fly Zone in Legal Perspective' (2011) 36 Yale Journal of International Law Online 45, 45; Mehrdad Payandeh, 'The United Nations, Military Intervention, and Regime Change in Libya' (2012) 52 Virginia Journal of International Law 355, 384–85, Julian M Lehmann, 'All Necessary Means to Protect Civilians: What the Intervention in Libya Says About the Relationship Between the Jus in Bello and the Jus ad Bellum' (2012) 17 Journal of Conflict & Security Law 117, 130; Monica Serrano, 'The Responsibility to Protect: Libya and Côte D'Ivoire' (2011) 3 Amsterdam Law Forum 92, 98.

remove [G]addafi by force. But it is impossible to imagine a future for Libya with [G]addafi in power'.[59]

Similarly, Dapo Akande affirmed that the mandate of the resolution was 'about stopping Gaddafi's forces from winning the civil war in Libya', and Malcolm Shaw wrote that '[a]nything that supports Libyan jets, including the military command structure, airfields and anti-aircraft batteries, would be legitimate'.[60] The text of the resolution seems to allow extensive interpretations, as it authorises the protection of not only civilians but also civilian-populated areas. These must be protected not only when under attack but more broadly when under a general threat of attack. A comparison with Resolution 1975 of 30 March 2011 illustrates the wide scope of these formulations. Indeed, shortly after having authorised the intervention in Libya with Resolution 1973, the Security Council adopted a further resolution authorising the use of force with a reference to the responsibility to protect. Resolution 1975 on Côte d'Ivoire reaffirmed 'the primary responsibility of each State to protect civilians' and recalled the UN Operation in Côte d'Ivoire (UNOCI) 'to use all necessary means to carry out its mandate to protect civilians under imminent threat of physical violence'. As Secretary-General Guterres explained in his 2018 Special Report on the Role of the UN Operation in Côte d'Ivoire, 'while UNOCI already had such authority, the resolution was a further demonstration of the Council's unity behind the mission's mandate and its right to use force'.[61] The authorisation provided a stricter mandate than Resolution 1973, as it is limited 'to protect civilians under imminent threat of physical violence'[62] instead of 'to protect civilians and civilian populated areas under threat of attack'.[63]

5. The Responsibility to Protect After Libya: States' Approaches to the Doctrine

What appears uncontroversial is that several members of the Security Council did not interpret Resolution 1973 as supporting a regime change.

[59] Barak Obama, David Cameron and Nicolas Sarkozy, 'Libya's Pathway to Peace' New York Times (14 April 2011).
[60] Both Akande's and Shaw's statements are cited in Mahasen M Aljaghoub, Ibrahim M Aljazy and Maysa S Bydoon, 'The Arab League' in Gentian Zyberi (ed), *An Institutional Approach to the Responsibility to Protect* (Cambridge University Press 2013) 301.
[61] UN Doc S/2018/958, 4.
[62] UN Doc S/RES/1973 (2011) 3.
[63] UN Doc S/RES/1975 (2011) 3.

Consequently, they criticised this form of implementing the responsibility to protect, and the intervention in Libya became a precedent that influenced subsequent applications of the doctrine, the most evident example being Syria. Whilst Resolution 1970 was adopted unanimously, China, Russia, Brazil, Germany, and India abstained from voting on Resolution 1973 and explicitly stated their concerns about the potential misuse of the authorisation of the use of force. China noted, 'In the Security Council's consultations on resolution 1973 (2011), we and other Council members asked specific questions. However, regrettably, many of those questions failed to be clarified or answered. China has serious difficulty with parts of the resolution'.[64] Germany prudently feared that the intervention would not lower the death toll of the armed conflict and that the use of force could ultimately harm the population on the ground:

> We see great risks. The likelihood of large-scale loss of life should not be underestimated. If the steps proposed turn out to be ineffective, we see the danger of being drawn into a protracted military conflict that would affect the wider region. We should not enter into a militarily confrontation on the optimistic assumption that quick results with few casualties will be achieved.[65]

India lamented the absence of objective information from the field, as well as the lack of clear boundaries to the scope of the military operation:

> The Council has today adopted a resolution that authorizes far-reaching measures under Chapter VII of the United Nations Charter, with relatively little credible information on the situation on the ground in Libya. We also do not have clarity about details of enforcement measures, including who will participate and with what assets, and how these measures will exactly be carried out. It is of course very important that there be full respect for the sovereignty, unity and territorial integrity of Libya.[66]

[64] UN Doc S/PV.6498, 10.
[65] UN Doc S/PV.6498, 5. See also Alister Miskimmon, 'German Foreign Policy and the Libya Crisis' (2012) 21 (4) German Politics 392.
[66] UN Doc S/PV.6498, 6.

Brazil similarly warned against the risk that an intervention could undermine, instead of protect, the Libyan population:

> We are not convinced that the use of force as provided for in paragraph 4 of the resolution will lead to the realization of our common objective—the immediate end to violence and the protection of civilians. We are also concerned that such measures may have the unintended effect of exacerbating tensions on the ground and causing more harm than good to the very same civilians we are committed to protecting.[67]

Russia criticised the lack of clarifications and assurances about the limits of the intervention:

> In essence, a whole range of questions raised by Russia and other members of the Council remained unanswered. Those questions were concrete and legitimate and touched on how the no-fly zone would be enforced, what the rules of engagement would be and what limits on the use of force there would be. Furthermore, the draft was morphing before our very eyes, transcending the initial concept as stated by the League of Arab States. Provisions were introduced into the text that could potentially open the door to large-scale military intervention. [68]

The fact that no state voted against the resolution, in particular the permanent members China and Russia as holders of the veto power, may suggest that the risk of an escalation of the operation to a regime change was not completely unexpected. After the Libyan intervention, in any case, states began to criticise the application of Resolution 2013 and, more generally, began reconsidering the military implementation of the responsibility to protect.[69] At the Security Council meeting of 10 May 2011 on civilian protection, Russia expressly endorsed the statement of Under Secretary-General for Humanitarian Affairs and Emergency Relief Coordinator Valerie Amos:

> The adoption of Resolution 1973 on Libya and the authorization and subsequent use of force and other measures to protect civilians has prevented civilian deaths and injury, but it has also raised concerns in terms of the potential undermining of the protection of civilians agenda and its important role in providing

[67] UN Doc S/PV.6498, 6.
[68] UN Doc S/PV.6498, 8.
[69] David Berman and Christopher Michaelsen, 'Intervention in Libya: Another Nail in the Coffin for the Responsibility-to-Protect?' (2012) 14 (4) International Community Law Review 337.

> a framework for action in future crises. In addition to complying scrupulously with international humanitarian law, the implementation of the Council's decision must be exclusively limited to promoting and ensuring the protection of civilians.[70]

At the Security Council meeting of 15 June 2011, on the situation in Libya, the African Union expressed 'deep concern about the dangerous precedent being set by one-sided interpretations of those resolutions of the United Nations and about the consequences that may result for international legality'.[71] In July 2011, at the informal interactive debate of the General Assembly on the role of regional and sub-regional arrangements in implementing the responsibility to protect, several states criticised the misuse of the doctrine. According to Guatemalan Representative Gert Rosenthal, many states considered the Libyan intervention as an erroneous application of Resolutions 1970 and 1973. This confirmed the interpretation of the responsibility to protect as a new form of intervention of the main Western powers that use humanitarian principles as a pretext.[72]

Ashley Deeks presented the problems of connecting the responsibility to protect to military operations resulting in regime changes. After Libya, Security Council members adopted a more cautious approach in authorising interventions based on the doctrine:

> [T]he year-long civil war in Libya, which followed the NATO intervention in Libya, only to be further complicated by the presence of Islamic state fighters, makes the long-term precedential value of the Libyan intervention difficult to assess. Had [G]addafi left power quietly and a representative, democratic government quickly stepped in, there would surely be more enthusiasm for comparable Chapter VII resolutions in the future. The current, volatile state of affairs in Libya will be in the back of the minds of representatives to the Security

[70] UN Doc S/PV/6531, 4.
[71] UN Doc S/PV/6555, 4.
[72] '*Para aquellos que han expresado dudas en el pasado, o frontalmente se han opuesto al concepto como una nueva forma de intervención de las principales potencias Occidentales, usando como pretexto la ayuda humanitaria, sus riesgos y abusos se han puesto de manifiesto con lo que muchos consideran una aplicación indebida de las Resoluciones 1970 y 1973 del Consejo de Seguridad*.' 'Statement During the Informal Interactive Debate of the General Assembly on the Role of Regional and Sub Regional Arrangements in Implementing the Responsibility to Protect' (12 July 2011).

Council next time they are asked to authorize force in a non-consenting state.[73]

6. The Council and the Doctrine in the Syrian Armed Conflict

The Syrian situation is the clearest example of the approach of the Council to the responsibility to protect after Libya, that is, following Resolution 1973 and the NATO operation Unified Protector. Like in Libya, an armed conflict broke out in Syria in 2011.[74] In November 2011, the 'Report of the Independent International Commission of Inquiry on the Syrian Arab Republic' documented 'patterns of summary execution, arbitrary arrest, enforced disappearance, torture, including sexual violence, as well as violations of children's rights'.[75] This time, though, the Council did not decide to refer the situation to the International Criminal Court and to authorise the use of force.

The Council adopted several measures on the Syrian situation.[76] It unanimously approved Resolution 2118 of 2013, which established a framework for the destruction of Syrian chemical weapons, called for peace talks, and endorsed a transitional governing body 'which could include members of the present Government and the opposition and other groups and shall be formed on the basis of mutual consent'.[77] The Council also adopted Resolution 2165 of 2014, which reaffirmed 'the primary responsibility of the Syrian authorities to protect the population in Syria' and reiterated 'that parties to armed conflict bear the primary responsibility to take all feasible steps to ensure the protection of civilians'.[78] It also established humanitarian corridors in Syria without state consent for UN humanitarian agencies and their implementing partners, as well as a monitoring mechanism.

Nevertheless, Russia vetoed thirteen resolutions on the Syrian situation between 2011 and 2019, including the draft proposal to refer the situation to the

[73] Ashley Deeks, 'Part 3 The Post 9/11-Era (2001–), 56 The NATO Intervention in Libya—2011' in Tom Ruys, Olivier Corten and Alexandra Hofer (eds), *The Use of Force in International Law: A Case-Based Approach* (Oxford University Press 2018) 759.
[74]Carsten Stahn, 'Syria and the Semantics of Intervention, Aggression and Punishment: On "Red Lines" and "Blurred Lines"' (2013) 11 (5) Journal of International Criminal Justice 955.
[75] UNGA (23 November 2011) UN Doc A/HRC/S-17/2/Add.1, 1.
[76] On the actions of the Security Council at the beginning of the armed conflict in Syria, see Saira Mohamed, 'The U.N. Security Council and the Crisis in Syria' (2012) 16 (11) American Society of International Law.
[77] UN Doc S/RES/2118 (2013) 4.
[78] UN Doc S/RES/2165 (2014) 1.

International Criminal Court, in May 2014. In seven cases, China joined the Russian veto. The rejection of the May 2014 draft, which was co-sponsored by sixty-five countries, constituted a clear reversal in the implementation of the responsibility to protect. As such, it sparked a meaningful debate between the members of the Council concerning the attitude of the international community, and of the Security Council in particular, towards the responsibility to protect and the use of veto power.

Before voting, in 2014, on the draft resolution which intended to refer the Syrian situation to the International Criminal Court, the Council had already vetoed three resolutions, explicitly revealing the impact of the Libyan precedent.[79] First, in October 2011, China and Russia rejected a draft that strongly condemned 'the continued grave and systematic human rights violations and the use of force against civilians by the Syrian authorities', after having recalled their primary responsibility to protect their population.[80] In explaining its use of the veto power, Russia drew an explicit parallel between the Libyan and Syrian situations, criticising the Council's approach as an erroneous implementation of the responsibility to protect:

> The situation in Syria cannot be considered in the Council separately from the Libyan experience. The international community is alarmed by statements that compliance with Security Council resolutions on Libya in the NATO interpretation is a model for the future actions of NATO in implementing the responsibility to protect. It is easy to see that today's 'Unified Protector' model could happen in Syria.[81]

In February 2012, China and Russia vetoed a resolution that condemned violence by all parties to the conflict, on the basis that the draft was unbalanced and that it could jeopardise a diplomatic settlement. Again, Russia warned against the risk of a regime change.[82] In July 2012, China and Russia vetoed a third resolution that called for the exercise of the Council's powers under Chapter VII of the UN Charter.[83] Russia declined to vote, as the majority 'for some reason, refused to

[79] UN Doc S/PV.6810; UN Doc S/PV.6711; UN Doc S/PV.6627.
[80] UN Doc S/2011/612.
[81] UN Doc S/PV.6627, 4.
[82] UN Doc. S/2012/77.
[83] UN Doc S/2012/538.

exclude military intervention' from the text of the draft.[84] China criticised the draft on the basis that it 'would not only further aggravate the turmoil, but also cause it to spread to other countries of the region, undermine regional peace and stability, and ultimately harm the interests of the people of Syria and other regional countries'.[85] Two other members of the Council abstained, expressing their concern about the adoption of coercive measures. Pakistan lamented the 'coercive approach, which in our view could further escalate tensions and be counterproductive and unhelpful in the pursuit of a pacific settlement of the situation',[86] while South Africa affirmed that the decision could undermine 'the possibility of finding a peaceful political solution to the Syrian crisis'.[87]

The Syrian situation revealed a clear division between the members of the Security Council. Russia and China affirmed the intention not to reiterate the Libyan scenario with a regime change. Most of the members, conversely, advocated the increased implementation of the responsibility to protect and argued against the use of veto in situations in which the protection of the civilian population against mass violence is at stake. The outcome of the debate clearly emerged at the rejection of the draft proposal to refer the Syrian situation to the International Criminal Court.

7. The Vetoed Referral to the International Criminal Court

The text of the draft Syrian referral reflects most of the features of the previous referrals of Libya and Darfur, including the controversial paragraphs that tailor the situation to exclude nationals of other non-states parties from the jurisdiction and that waive the UN's responsibility to cover any expense related to the referral. Furthermore, the Syrian draft does not define the situation *rationae loci*, with geographical criteria like in the case of Darfur and Libya, but with reference to a specific armed conflict, that is,

> widespread violations of human rights and international humanitarian law by the Syrian authorities and pro-government militias, as well as the human rights abuses and violations of international humanitarian law by non-State armed groups, all

[84] UN Doc S/PV.6810, 7.
[85] UN Doc S/PV.6810, 9.
[86] UN Doc S/PV.6810, 11.
[87] UN Doc S/PV.6810, 12.

> committed in the course of the ongoing conflict in the Syrian Arab Republic since March 2011.[88]

William A. Schabas explained this as a 'nasty bit of hypocrisy in the draft resolution, one that went unmentioned during the debate in the Security Council. … It is likely that the elaborate provision was cunningly drafted in order to exclude Golan, a part of Syria's sovereign territory occupied by a foreign power since 1967'.[89]

A further difference that is meaningful for the present analysis is the absence of any reference to the responsibility to protect, in contrast with Resolution 1970 of 2011. This silence might suggest that the enthusiasm surrounding the doctrine in 2011 had already vanished. The responsibility to protect was, however, a crucial topic in the Council meeting when the draft resolution was put to a vote, in connection with the use of veto power to reject draft resolutions that affect the protection of civilians. To motivate its veto, Russia recalled the Libyan precedent of a referral that did not grant accountability for international crimes and that instead developed into a military intervention that protracted the armed conflict:

> The draft resolution rejected today reveals an attempt to use the ICC to further inflame political passions and lay the ultimate groundwork for eventual outside military intervention. … One cannot ignore the fact that the last time the Security Council referred a case to the International Criminal Court (ICC)—the Libyan dossier, through resolution 1970 (2011)—it did not help resolve the crisis, but instead added fuel to the flames of conflict. After the cessation of hostilities, the ICC did not exactly rise to the occasion, to put it mildly. It did not contribute to a return of normalcy or justice in Libya, and instead evaded the most pressing issues.[90]

China motivated its veto, *inter alia*, on the basis that referring the situation to the Court could undermine the peace process:

> In the current circumstances, to forcibly refer the situation in Syria to the ICC is not conducive either to building trust among all parties in Syria or to an early resumption of the negotiations

[88] UN Doc S/2014/348 para 1 and 2.
[89] William A Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (Oxford University Press 2016) 379.
[90] UN Doc S/PV.7180, 13.

> in Geneva. It will only jeopardize the efforts made by the international community to push for a political settlement.[91]

The responsibility to protect came up in the statement of the Secretary-General, who used language that included references to responsibilities, duties, and rights in relation to the Security Council and Syria. The Secretary-General argued that the Security Council has the responsibility to act on accountability in Syria, the duty to ensure and defend the fundamental right to justice of Syrian people, and that accountability would prevent future violence:

> Since the outbreak of the war in Syria, I have persistently called for accountability for perpetrators of grave human rights violations, crimes against humanity and war crimes. … The Security Council has an inescapable responsibility in that regard. States that are members of both the Security Council and the Human Rights Council have a particular duty to end the bloodshed and to ensure justice for the victims of unspeakable crimes. … The Syrian people have a fundamental right to justice. The United Nations and its Member States have a fundamental duty to defend that right. … Let us also recall that accountability will help prevent further atrocities. For more than three years, the Security Council has been unable to agree on measures that could bring an end to this extraordinarily brutal war, which has deeply affected and damaged not only millions of Syrian civilians but also the entire region. If members of the Council continue to be unable to agree even on a measure that could provide some accountability for the ongoing crimes, the credibility of this body and of the entire Organization will continue to suffer. … We all have a responsibility to help the Syrian people finally see a future of peace.[92]

This approach of the doctrine as an instrument to limit the discretion of the Council is well summarised by the statement of Rwanda at the meeting:

> As co-chair of the Group of Friends on the Responsibility to Protect, and given our own history of genocide, Rwanda takes this opportunity to reiterate its call to all permanent members of the Security Council to consider seriously and carefully the French proposal of a code of conduct among themselves by which they will voluntarily refrain from using the veto in situations of genocide, war crimes, ethnic cleansing and crimes

[91] ibid 14.
[92] ibid 2.

> against humanity. In that context, pending a meaningful reform of the Security Council, we believe that such a code of conduct could be a necessary tool to enable the Council to re-embrace the moral values enshrined in the Charter of the United Nations and the Universal Declaration of Human Rights.[93]

In its declaration, Australia invoked the responsibility to protect to call permanent members to refrain from using the veto:

> The Security Council has a responsibility to protect, a responsibility mandated by all our leaders at their World Summit in 2005, and to prevent mass atrocities where we can. The Council's role was specifically recognized in the Rome Statute, because accountability is central to protection and to the Council's fundamental responsibilities relating to the maintenance of international peace and security. The use of the veto to block a balanced draft resolution, attempting to deliver accountability for the commission of mass-atrocity crimes, comes at a great human cost. The Council will, correctly, be judged harshly for that failure. At the very least, today's failure underlines the importance of voluntary restraint on the use of the veto in situations where mass atrocities are so clear.[94]

The subsequent vetoed resolutions revealed growing divisions in the Council, with Russia labelling states proposing further action in Syria as the 'humanitarian troika'.[95] This dynamic within the Council fostered the initiatives that aimed to reform or overcome the veto power with the purpose of protecting civilians.

8. The Responsibility Not to Veto: Preliminary Remarks on Advocating More Action of the Security Council

This section presents the initiatives aimed at overcoming the deadlock of the Security Council and at consequently triggering an increasing commitment by the international community to prevent or stop mass violence. This section also considers that a higher number of resolutions and interventions of the Security Council is not necessarily desirable. The responsibility to protect was originally conceived to foster international military interventions to stop ongoing

[93] ibid 5.
[94] ibid 9.
[95] UN Doc S/PV.8623, 2.

humanitarian crises beyond Security Council authorisations. As the International Commission on Intervention and State Sovereignty clarified:

> We have made abundantly clear our view that the Security Council should be the first port of call on any matter relating to military intervention for human protection purposes. But the question remains whether it should be the last. In view of the Council's past inability or unwillingness to fulfill the role expected of it, if the Security Council expressly rejects a proposal for intervention where humanitarian or human rights issues are significantly at stake, or the Council fails to deal with such a proposal within a reasonable time, it is difficult to argue that alternative means of discharging the responsibility to protect can be entirely discounted.[96]

From the 2005 World Summit, the doctrine evolved into an assortment of measures not involving the use of force and in full compliance with the UN Charter.[97] Consequently, the aspiration to move the Council to take action in cases of humanitarian crises became a crucial issue in the discourse surrounding the doctrine. The necessity of an authorisation to use force is sometimes considered the preferable outcome from a humanitarian perspective. The efficacy of military interventions in saving lives, however, has not been demonstrated.

Studies evaluating the results of UN missions involving the use of force do not present promising findings. Jared Genser extended the analysis of the Council's application of the doctrine by considering the *de facto* implementation of the responsibility to protect, even without a specific reference to the doctrine.[98] Genser analysed the actions where not only the Security Council but also individual statements by its members explain their actions by mentioning the responsibility to protect, or even the failure to protect. From this perspective, the doctrine would have been implemented successfully in Cote d'Ivoire, Libya, and Mali, and unsuccessfully in the Central African Republic, the Democratic Republic of Congo, Sudan, and South Sudan. Genser further identified four more 'stalled responses' outside the African continent: Myanmar, Syria, Yemen, and

[96] International Commission on Intervention and State Sovereignty, Gareth J Evans and Mohamed Sahnoun, *The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty* (International Development Research Centre 2001) 52.
[97] UNGA, 'World Summit Outcome' (2005) UN Doc A/RES/60/1, 30.
[98] Jared Genser, 'The United Nations Security Council's Implementation of the Responsibility to Protect: A Review of Past Interventions and Recommendations for Improvement' (2018) 18 (2) Chicago Journal of International Law 419.

North Korea. Yet the criteria to establish a successful intervention are not strictly humanitarian in terms of saved lives. In the case of Libya, for example, what determines success is the appraisal of the representative of the government established after the international intervention. During a 2012 General Assembly informal debate, the Libyan delegation called the responsibility to protect 'one of the greatest achievements in the field of human rights this century'.[99] Rather than an analytical evaluation, the declaration appears to be the political opinion of an administration that received a direct benefit from the military intervention.

From another perspective, Seybolt presents a quantitative analysis of Security Council interventions, with an assessment of the strictly humanitarian impact in terms of lives saved, without political evaluations on the achievement of political stability. The study's conclusions are negative: 'Out of five UN operations—in Iraq, Somalia (two), Bosnia and Herzegovina, and Rwanda—the best that can be said is that the UN missions in Bosnia and Herzegovina and Rwanda had a mixed record while the other three were abject failures'.[100] The author also warns that this overall evaluation is generous: 'Some readers will think this judgement too generous. Yet UNPROFOR did help to deliver life-sustaining aid and UNAMIR did protect many thousands of people'.[101]

Still, the implementation of the doctrine on a case-by-case basis, and—with the notable exception of Resolution 1973—disconnected from the use of force, could be the most effective use for the doctrine to protect civilian populations. The Security Council resolutions that mention the doctrine adopt a variety of measures: from embargoes and sanctions to the deployment of peacekeeping operations. These actions give meaning and substance to a doctrine that risks being limited to theoretical or rhetorical debates. Furthermore, they create a possibility of implementation of the doctrine that is unrelated to the controversies surrounding the legitimisation of military interventions. Additionally, the consistent reference to the doctrine in resolutions concerning the protection of civilians may contribute to the doctrine's consolidation as an international norm. Kirsten Ainley argues that the reiteration of the wording of the responsibility to protect 'has changed the way that states justify their behaviour

[99] Cit in ibid 444.
[100] Taylor B Saybolt, *Humanitarian Military Intervention. The Conditions for Success and Failure* (Oxford University Press 2008) 272.
[101] ibid.

and changed the purpose and vocabulary of much international action' and that this approach leads to more results and fewer controversies: 'case-by-case political action under the auspices of R2P is less dramatic and therefore less visible than military intervention, but is more successful … without grabbing headlines in the way that military interventions would have done'.[102]

8.1 The Veto Power in the UN Charter

The UN Security Council, conferred with 'primary responsibility for the maintenance of international peace and security'[103] pursuant to Article 24 of the UN Charter, plays a key role in the application of the responsibility to protect. The practice of the Council in the implementation of the doctrine, however, has demonstrated so far, for various reasons, not to be effective as a response to humanitarian crises. Several diplomatic initiatives have tried to influence the conduct of the Security Council to overcome inaction in circumstances requiring timely action. In particular, the veto power of the five permanent members of the Council is considered to be among the main reasons for inaction and, as a result, the main obstacle to the effective functioning of the UN body.

Initiatives aimed at improving the action of the Council under the responsibility to protect identified use of the veto as a primary obstacle. The veto power of the five permanent members of the Council derives from Article 27 of the UN Charter. The article establishes that, for non-procedural matters, decisions of the Council shall be made by 'an affirmative vote of nine members including the concurring votes of the permanent members'.[104] Francis Wilcox illustrates how the provision was a crucial condition for the approval of the UN Charter:

> At San Francisco, the issue was made crystal clear by the leaders of the Big Five: it was either the Charter with the veto or no Charter at all. Senator Connally dramatically tore up a copy of the Charter during one of his speeches and reminded the small states that they would be guilty of that same act if they opposed the unanimity principle. 'You may, if you wish,' he said, 'go home from this Conference and say that you have

[102] Kirsten Ainley, 'The Responsibility to Protect and the International Criminal Court: Counteracting the Crisis' (2015) 91 International Affairs 49.
[103] UN Charter 1 UNTS XVI.
[104] ibid Art 27(3).

> defeated the veto. But what will be your answer when you are asked: 'Where is the Charter?"[105]

Since the early practice of the Council, the permanent members chose, in certain cases, to abstain intentionally instead of voting against a resolution to avoid blocking the action of the Council when a proposed resolution had reached a majority. Thus, abstentions of the permanent members do not amount to a veto, as emerged since Resolution 4 of 1946 on the Spanish question, which was approved with the abstention of the Soviet Union, and Resolution 30 of 1947 on Indonesia, approved with the abstention of the UK. At the time, the Syrian representative, then president of the Security Council, declared 'that an abstention is not considered a veto, and the concurrent votes of the permanent members mean the votes of the permanent members who participate in the voting. Those who abstain intentionally are not considered to have cast a veto'.[106] The International Court of Justice confirmed this view: 'By abstaining, a member does not signify its objection to the approval of what is being proposed: in order to prevent the adoption of a resolution requiring unanimity of the permanent members, a permanent member has only to cast a negative vote'.[107]

8.2 The Veto Power in the Practice of the Security Council

The practice of the use of the veto power changed significantly over the history of the Security Council. It is possible to identify four phases with clear differences in the behaviour of the permanent members, which slightly differ from the classifications usually adopted in scholarship: from 1945 to 1970, from 1971 to 1980, from 1981 to 2006, and from 2007 on. In the first decades, between 1945 and 1970, the veto was almost exclusively used by the Soviet Union. In that time, the Soviet Union vetoed seventy resolutions. The only other permanent members that used the veto power were France and the UK, vetoing two draft resolutions

[105] Francis O Wilcox, '*The Yalta Voting Formula' (1945)* 39 American Political Sciences Review 943, 954.
[106] UN Doc ST/PSCA/1, 147.
[107] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276* (Advisory Opinion) [1971] ICJ Rep 16.

during the Suez Crisis of 1956.[108] As a further exception, the UK also vetoed a resolution on Southern Rhodesia in 1963.[109]

From 1971 to 1980, all permanent members, except China, regularly used the veto power. The US vetoed twenty resolutions, mostly on Vietnam, Palestine, and South Africa. In the latter situation, France and the UK joined the US veto to block actions against the apartheid government. This could be seen as an example of vetoing the Council's action with the aim to protect civilians, as Jennifer Trahan observes: 'In terms of veto use in the face of atrocity crimes, historically, going back to the apartheid era, there were French, U.K., and US vetoes protecting the government in South Africa'.[110] The same reasoning applies to some of the vetoed resolutions on Vietnam and especially Palestine, where the US kept using its veto power in the decades that followed. The Soviet Union used the veto power eight times, for example, on India–Pakistan, on Cyprus, and on the hostage crisis in Iran. France and the UK vetoed six resolutions, mostly joining the US in blocking the action of the Council.

In subsequent decades, between 1981 and 2006, which include the end of the Cold War and the beginning of the War on Terror, the US became the main power to use the veto. Out of sixty-four draft resolutions that were vetoed during that time, fifty-seven were blocked by the US, sometimes joined by France and the UK. The Soviet Union, from 1991 the Russian Federation, used the veto five times, while China used its power twice.

From 2007 to July 2020, out of twenty-six vetoed draft resolutions, three were blocked by the US, all concerning the Palestinian question.[111] The Russian Federation vetoed the remaining twenty-three resolutions, joined by China in twelve cases.

Any reflection on the practice of the permanent members must consider that the use of the veto power is necessary only to block a resolution approved by the majority of the members of the Council. Before relying on the veto, permanent members and other major powers rely on the diplomatic, political, and economic pressure and influence they can exert on other countries to obtain their support,

[108] UN Doc S/3710; UN Doc S/3713/Rev.1
[109] UN Doc S/5425/Rev.1
[110] Jennifer Trahan, 'Questioning Unlimited Veto Use in Face of Atrocity Crimes' (2020) 52 Case Western Reserve Journal of International Law 73, 78.
[111]UN Doc S/2011/24; UN Doc S/2017/1060; UN Doc S/2018/516.

including through a veto threat, sometimes referred to as a 'hidden veto'.[112] As Richard Goldstone remarks,

> [a] feature of the veto that is all too often overlooked is the frequency with which the mere threat of its exercise by a permanent member effectively blocks resolutions from being formally presented to the Security Council. For the most part, threatened vetoes manifest themselves during informal meetings of the Security Council and a paper trail is usually difficult to find. It is in a comparatively small number of cases that the resolutions are put formally to the Security Council only to be defeated by the use of the veto power.[113]

The practice is difficult to document, but there are known examples. For instance, in 1994 the Security Council refrained from voting on resolutions that qualified as genocide the mass violence in Rwanda because of the veto threats by the US, France, and the UK.[114] In the words of Vreeland and Dreher, major powers indeed

> care more about votes and discussions at the UNSC than they do about foreign aid, which amounts to a paltry sum in their overall budgets. Developing countries, by contrast, may care more about foreign aid than about the global security issues considered by the UNSC. Typically, governments of developing countries stay out of foreign policy matters—they may not even have well-developed policy positions. Exceptions arise, of course, and the governments of some developing countries have strong and sincere preferences concerning certain issues of global security. Yet, when weighing the salience of most foreign policy concerns against the prospect of foreign aid, the latter often trumps.[115]

8.3 Uniting for Peace

Already in 1949, the General Assembly tried to limit the use of the veto power of the permanent members. General Assembly Resolution 267 of 1949, titled 'The problem of voting in the Security Council', recommended that the five

[112] Jan Wouters and Tom Ruys, 'Security Council Reform: A New Veto for a New Century' (2005) 44 Military Law and Law of War Review 139.
[113] Richard Goldstone, 'Foreword' in Jennifer Trahan, *Existing Legal Limits to Security Council Veto Power in the Face of Atrocity Crimes* (Cambridge University Press 2020) xiii.
[114] Ariela Blätter and Paul D Williams, 'The Responsibility Not to Veto' (2011), 3 Global Responsibility to Protect 301.
[115] James Raymond Vreeland and Alex Dreher, *The Political Economy of the United Nations Security Council, Money and Influence* (Cambridge University Press 2014) 4.

permanent members, in case the majority of the members of the Council approved a resolution, 'exercise the veto only when they consider the question of vital importance, taking into account the interest of the United Nations as a whole, and to state upon what ground they consider this condition to be present' and to thus 'avoid impairment of the usefulness and prestige of the Council through the excessive use of the veto'.[116]

Often mentioned in the responsibility to protect discourse,[117] the 'Uniting for Peace' Resolution 377 of 1950 is a further initiative of the General Assembly with the aim to take action in case of inactivity of the Security Council due to the use of veto, or in the words of the resolution, when 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'.[118] The Uniting for Peace resolution relinquishes the exclusive competence of the Security Council to deal with threats to international peace and security.[119] In so doing, it empowers the General Assembly with the authority to recommend coercive measures in case the Security Council is blocked by the use of the veto power of one or more permanent members. The General Assembly

> *[r]esolves* 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

[116] UN Doc A/RES/267(III) 7.
[117] David Chandler, 'The Responsibility to Protect? Imposing the "Liberal Peace"' (2004) 11 International Peacekeeping 59; Christopher Joyner, 'The Responsibility to Protect: Humanitarian Concern and the Lawfulness of Armed Intervention' (2006) 47 Vancouver Journal of International Law 693; Mehrdad Payandeh, 'With Great Power Comes Great Responsibility—The Concept of the Responsibility to Protect within the Process of International Lawmaking' (2010) 35 Yale Journal of International Law 469.
[118] UN Doc A/RES/377(V) Preamble.
[119] Yasmine Nahlawi, 'Overcoming Russian and Chinese Vetoes on Syria through Uniting for Peace' (2019) 24 (1) Journal of Conflict and Security Law 111.

> necessary, to maintain or restore international peace and security.[120]

For this purpose, the resolution further establishes a procedure to convene special emergency sessions of the General Assembly.

The Uniting for Peace resolution has been questioned in terms of both its legality and its value in the practice of the General Assembly. Formally, it does not respect the structure codified in the UN Charter. Article 11(2) states that any questions concerning international peace and security 'on which action is necessary, shall be referred to the Security Council by the General Assembly'.[121] Article 12(1) provides a clear division of powers between the Council and the Assembly and excludes any interference by the latter with the former by stating that while 'the Security Council is exercising in respect of any dispute or situation the functions assigned to it in the present Charter, the General Assembly shall not make any recommendation with regard to that dispute or situation unless the Security Council so requests'.[122] Furthermore, Article 24 grants the Council primary responsibility for the maintenance of international peace and security.

The International Court of Justice in *Certain Expenses of the United Nations* clarified that the General Assembly cannot implement coercive measures but has the power to recommend some forms of actions.[123] In the Israeli Wall advisory opinion, the Court confirmed that the General Assembly can 'recommend measures for the peaceful adjustment'[124] dealing with a case of permanent members vetoing a resolution on a threat to peace, breach of the peace, or an act of aggression. Finally, in the Kosovo advisory opinion, the International Court of Justice confirmed that the General Assembly can deal with a situation that is already under the attention of the Security Council.[125] In practice, pursuant to the resolution, ten special emergency sessions of the General Assembly have been convened.[126] However, the General Assembly did not expressly mention Uniting for Peace when adopting resolutions involving coercive measures, such as

[120] UN Doc A/RES/377(V) A(1).
[121] UN Charter, 1 UNTS XVI.
[122] ibid.
[123] *Certain Expenses of the United Nations* (Advisory Opinion) [1962] ICJ Rep 151 para 164.
[124] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136 para 26.
[125] *Accordance with International Law of the Unilateral Declaration of Independence in respect of Kosovo* (Advisory Opinion) [2010] ICJ Rep 403 para 44.
[126] Christina Binder, 'Uniting for Peace Resolution (1950)' in *Max Planck Encyclopedia of Public International Law* (Oxford University Press 2006) para 35.

during the 1951 Korea Crisis and the 1956 Suez Canal crisis.[127]As Ved Nanda observes, 'the Uniting for Peace has also been used with recommendation on the use of force just once – in the Korean situation on February 1, 1951. Even this recommendation was largely symbolic, although it did employ language from the Uniting for Peace'.[128]

The Uniting for Peace resolution received wide attention in the literature on the responsibility to protect as a possible legal ground to authorise military interventions, even though most scholars reject the possibility that Resolution 377 impacts the *ius ad bellum*.[129] The ICISS report on the responsibility to protect affirms that the Uniting for Peace resolution grants the General Assembly the power to authorise the use of force if the Security Council is blocked by a permanent member's veto:

> One possible alternative, for which we found significant support in a number of our consultations, would be to seek support for military action from the General Assembly meeting in an Emergency Special Session under the established 'Uniting for Peace' procedures. These were developed in 1950 specifically to address the situation where 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. … Although the General Assembly lacks the power to direct that action be taken, a decision by the General Assembly in favour of action, if supported by an overwhelming majority of member states, would provide a high degree of legitimacy for an intervention which subsequently took place, and encourage the Security Council to rethink its position.[130]

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[127] UN Doc A/RES/500(V) and UN Doc A/RES/1000(ES-I).
[128] Ved P Nanda, 'The Security Council Veto in the Context of Atrocity Crimes, Uniting for Peace and the Responsibility to Protect' (2020), 52 Case Western Reserve Journal of International Law 119, 140.
[129] Nicolas Wheeler, *Operationalising the Responsibility to Protect : The Continuing Debate over where Authority should be Located for the Use of Force* (Norsk Utenrikspolitisk Institutt 2008) 27; Eve Massingham, 'Military Intervention for Humanitarian Purposes: Does the Responsibility to Protect Doctrine Advance the Legality of the Use of Force for Humanitarian Ends?' (2009) 91 International Review of the Red Cross 803; Jutta Brunnée and Stephen Toope, 'The Responsibility to Protect and the Use of Force: Building Legality?' (2010) 2 (3) Global Responsibility to Protect 191; Mary Ellen O'Connell 'Responsibility to Peace: A Critique of R2P' (2010) 4 (1) Journal of Intervention and Statebuilding 39; Sassan Gholiagha, 'The Responsibility to Protect: Words, Deeds and Humanitarian Interventions' (2014) 10 Journal of International Political Theory 1755.
[130] International Commission on Intervention and State Sovereignty, Gareth J Evans and Mohamed Sahnoun, *The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty* (International Development Research Centre 2001) 53.

Furthermore, the supplementary volume to the report, in the section titled 'Intervention and the UN Charter', affirms that 'the "Uniting for Peace" Resolution of 1950 specifically authorizes the Assembly to make recommendations on enforcement action when the Security Council is unable to take a decision. As a result, the General Assembly is a potential source of authorization when the Security Council is incapable of acting'.[131]

A parallel proposal that concerns the International Criminal Court is the so-called Uniting Against Impunity initiative.[132] According to this initiative, the General Assembly should arrogate to itself the power to refer a situation to the Court. This is clearly not envisaged by the Rome Statute—and is arguably not even desirable. Indeed, as further detailed in the analysis of the Security Council referrals, triggering the action of the Court is not necessarily advisable. Similarly, with a comparison with the Uniting for Peace initiative, the authorisation to use force does not imply, per se, better protection of civilian populations from mass atrocities.

8.4 The Responsibility While Protecting

Interestingly, a similar interpretation of the resolution appears in Brazil's concept proposal which introduced the notion of 'responsibility while protecting'. The concept of responsibility while protecting emerged after Security Council Resolution 1973 of 2011, which applied the responsibility to protect in connection to the use of force in Libya. Brazil did not vote against the resolution but criticised the military intervention in Libya on the basis that NATO allegedly violated international humanitarian law and rejected offers of ceasefire, and that the intervention, which was initially authorised to protect civilians, ultimately resulted in a regime change.[133]

Responsibility while protecting is therefore considered a constructive criticism of the responsibility to protect by non-Western states opposed to the

[131] *The Responsibility to Protect—Research, Bibliography, Background: Supplementary Volume to the Report of the International Commission on Intervention and State Sovereignty* (International Development Research Centre for ICISS 2001) 159.
[132] Michael Ramsden and Tomas Hamilton, 'Uniting Against Impunity: The UN General Assembly as a Catalyst for Action at the ICC' (2017) 66 International and Comparative Law Quarterly 893.
[133] Cristina G Stefan, 'On Non-Western Norm Shapers: Brazil and the Responsibility while Protecting' (2016) 2 European Journal of International Security 88.

abuse of the doctrine perpetrated for military purposes.[134] Brazil's proposal indeed suggests strict requirements for the use of force to protect civilian populations from mass atrocities, with a clear emphasis on the preventive aspect of the doctrine. This approach seems in line with the evolution of the doctrine in the 2005 World Summit Document and 2009 UN Secretary-General's Report, which expressly considered the use of force as a measure of last resort in the context of the responsibility to protect. The responsibility while protecting reiterates the paradigm of civilian protection and fully supports the development of the responsibility to protect. At the same time, it denounces the abuse of the use of force by observing the 'painful consequences of interventions that have aggravated existing conflicts, allowed terrorism to penetrate into places where it previously did not exist, given rise to new cycles of violence and increased the vulnerability of civilian populations'.[135]

In addition, it considers the abuse of military interventions, with an implicit reference to Libya, as an obstacle to the development of the responsibility to protect:

> There is a growing perception that the concept of the responsibility to protect might be misused for purposes other than protecting civilians, such as regime change. This perception may make it even more difficult to attain the protection objectives pursued by the international community.[136]

Despite its criticism of the military intervention in Libya authorised by Security Council Resolution 1973, Brazil's concept note considers that the UN General Assembly, pursuant to the Uniting for Peace resolution, can lawfully authorise the use of force: 'The use of force, including in the exercise of the responsibility to protect, must always be authorized by the Security Council, in accordance with Chapter VII of the Charter, or, in exceptional circumstances, by the General Assembly, in line with its resolution 377 (V)'.[137]

[134] Brian L Job, 'Evolution, Retreat or Rejection: Brazil's, India's and China's Normative Stances on R2P' (2016) 29 (3) Cambridge Review of International Affairs 891.
[135] UNSC, 'Letter Dated 9 November 2011 from the Permanent Representative of Brazil to the United Nations addressed to the Secretary-General' UN Doc A/66/551–S/2011/701 para 9.
[136] ibid para 10.
[137] ibid para 11.

8.5 Further Initiatives and Final Remarks

In 2012, the 'Small Five', a group of states composed of Costa Rica, Jordan, Singapore, Switzerland, and Liechtenstein, proposed a series of recommendations in its draft General Assembly resolution 'Enhancing the accountability, transparency and effectiveness of the Security Council'. Recommendations included 'refraining from using a veto to block Council action aimed at preventing or ending genocide, war crimes and crimes against humanity'.[138] The Small Five withdrew the draft resolution given the foreseen absence of a majority to approve it.

In 2015, France and Mexico drafted a statement proposing 'a collective and voluntary agreement of the permanent members … in which the permanent members would abstain from using their veto powers in cases of mass atrocities'.[139] By 2020, 105 states had endorsed the French/Mexican initiative.[140]

The Accountability, Coherence and Transparency Group (ACT Group), composed of twenty-four states, proposed a code of conduct at the seventieth anniversary of the UN on 23 October 2015, ten years after the adoption of the World Summit Document. In relation to the veto power, the code of conduct pledges 'to not vote against a credible draft resolution before the Security Council on timely and decisive action to end the commission of genocide, crimes against humanity or war crimes, or to prevent such crimes'.[141] By 2020, 121 states had endorsed the code of conduct.[142]

These initiatives share the same nature of moral suasion towards the permanent members of the Security Council, without proposing substantial changes to the international norms related to the use of the veto power in situations of international crimes.

This chapter explored the relationship between the Security Council and the responsibility to protect. It first noticed that the 2011 NATO intervention in

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[138] UNGA, Draft Res 'Enhancing the Accountability, Transparency and Effectiveness of the Security Council' (15 May 2012) UN Doc A/66/L.42/Rev.2.
[139] Security Council Report, 'Research Report on The Veto' (19 October 2015) <https://www.securitycouncilreport.org/research-reports/the-veto.php> accessed 25 October 2020.
[140] Jennifer Trahan, 'Questioning Unlimited Veto Use in Face of Atrocity Crimes' (2020) 52 Case Western Reserve Journal of International Law 73, 94.
[141] UNGA, 'Letter Dated December 14, 2015 from the Permanent Representative of Liechtenstein to the United Nations Addressed to the Secretary-General' (14 December 2015) UN Doc A/70/621– S/2015/978 annex I.
[142] Christian Wenaweser and Sina Alavi, 'Innovating to Restrain the Use of the Veto in the United Nations Security Council' (2020) 52 Case Western Reserve Journal of International Law 67.

Libya produced a policy change with reference to the application of the doctrine. Indeed, after the Council's action in Libya resulting in a regime-change, Russia and China vetoed proposals to refer the Syrian situation to the International Criminal Court and blocked further initiatives to intervene in Syria. Advocates of the responsibility to protect have argued that the Syrian crisis required an intervention of the international community to protect the Syrian population. Consequently, the chapter analysed possible avenues to bypass the veto power of the five permanent members of the Security Council when a resolution would protect populations from grave international crimes. The examination of initiatives, from Uniting for Peace to the 'responsibility while protecting', demonstrated that they do not constitute a lawful alternative to Security Council authorisation of the use of force. This study also argued that bypassing the veto power, thus obtaining a higher number of Security Council resolutions and interventions, is not necessarily a desirable outcome for the protection of populations from mass violence.

Chapter 4:
Can the International Criminal Court Deter International Crimes?

1. Introduction

This chapter investigates how the International Criminal Court is expected to prevent international crimes by prosecuting those responsible. The theory of deterrence is a key concept for the preventive function of the Court. Despite optimistic findings by some researchers, there is no clear evidence that the Court, or international criminal justice, deters crimes. This analysis therefore argues that, besides specific features of international crimes and tribunals, deterrence is difficult to prove for criminal justice. The author consequently proposes an extensive interpretation of the concept of deterrence.

The Court indeed affects the level of violence in situations in which it operates, beyond prosecutions and punishments. Yet the influence of the actions of the Court, from investigations to arrest warrants, is ambivalent. The Court's interventions can both increase and decrease the level of violence, depending on the actions and on the context. More generally, it is argued that the Court can have an expressive[1] and social[2] deterrent value, as it contributes to disseminating norms that stigmatise international crimes. Effectiveness and legitimacy are crucial to maximising this 'norm infiltration' role.[3] In the practice of the Court, the chambers have relied on the principle of deterrence to determine sentences. The Office of the Prosecutor, conversely, has adopted strategies unrelated to the purpose to deter crimes.

The International Criminal Court, or arguably international justice in general, was created and developed on the basis that it can contribute to values and goals other than justice in the strict sense, such as preventing or stopping violence or contributing to peace and security. The conception of the Court as an instrument to prevent international crimes is widely affirmed in the practice of

[1] Dan Kahan, 'The Secret Ambition of Deterrence' (1999) 113 (2) Harvard Law Review 413.
[2] Michael Wenzel, 'The Social Side of Sanctions: Personal and Social Norms as Moderators of Deterrence' (2004) 28 Law and Human Behavior 547.
[3] Sarah MH Nouwen, 'The International Criminal Court and Conflict Prevention in Africa' in Tony Karbo and Kudrat Virk (eds) *The Palgrave Handbook of Peacebuilding in Africa* (Palgrave Macmillan 2018) 83.

states and international organisations, in academia, in nongovernmental organisations, and in the organs of the Court itself. According to Prosecutor Fatou Bensouda, 'the mere initiation of a preliminary examination has a deterrent effect'.[4] The 2020 'Final Report of the Independent Expert Review of the International Criminal Court and the Rome Statute' ends with these words: 'The Court helps protect humankind from harm through the deterrent effect of international justice. By rallying around the Court, the international community can act together, in solidarity, to foster peace'.[5]

The use of international justice to discourage or stop crimes transcends the International Criminal Court. In a joint statement, the prosecutors of the International Criminal Court, the International Criminal Tribunal for the former Yugoslavia, the International Criminal Tribunal for Rwanda, and the Special Court for Sierra Leone stated:

> We affirm that only a sustained commitment to accountability will deter these atrocities … We believe that the people of the world are entitled to a system that will deter grave international crimes and hold to account those who bear the greatest responsibility. Only when a culture of accountability has replaced the culture of impunity can the diverse people of the world live and prosper together in peace.[6]

Concerning the ad hoc Tribunals for Former Yugoslavia and Rwanda, the UN Security Council affirmed, in both Resolutions 827/1993 and 955/1994: 'Believing that the establishment of an international tribunal for the prosecution of persons responsible for genocide and the other above-mentioned violations of international humanitarian law will contribute to ensuring that such violations are halted and effectively redressed'.[7] Already during the first efforts to establish an international tribunal to prosecute Kaiser Wilhelm II following the First World

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[4] Cit in Dan Saxon, 'The International Criminal Court and the Prevention of Crimes' in Serena K Sharma and Jennifer M Welsh (eds), *The Responsibility to Prevent: Overcoming the Challenges of Atrocity Prevention* (Oxford University Press 2018) 120.

[5] ICC, 'Independent Expert Review of the International Criminal Court and the Rome Statute System Final Report' (30 September 2020) 330 <asp.icc-cpi.int/iccdocs/asp_docs/ASP19/IER-Final-Report-ENG.pdf> accessed 28 October 2020.

[6] Joint Statement of the Prosecutors of the International Criminal Court, the International Criminal Tribunal for the former Yugoslavia, the International Criminal Tribunal for Rwanda, and the Special Court for Sierra Leone, 27 November 2004 <hrlibrary.umn.edu/intribjointstatement2004.html> accessed 28 October 2020.

[7] UNSC Res 827 (25 May 1993) UN Doc S/RES/827; UNSC Res 955 (8 November 1994) UN Doc S/RES/955.

War, British experts believed that a trial in an international court would constitute a deterrent and warning to high-level officials.[8] Uganda was the first state to refer a situation to the Court in the expectation of a preventive effect. According to the text of the government's referral, 'beyond the need for retribution, deterrence, and social rehabilitation … incapacitation of the LRA commanders and their benefactors through arrest and prosecution would most probably result in the organization's collapse and dispersal, and consequently, the prevention of future crimes'.[9]

The Rome Statute makes explicit reference to the preventive role of the Court. After 'affirming that the most serious crimes of concern to the international community as a whole must not go unpunished', the preamble mentions the determination 'to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes'. Moreover, Article 13 (b) of the statute grants the Security Council the power to refer a situation to the prosecutor, acting under Chapter VII of the UN Charter. From this perspective, the Court is intended to be a tool to take 'action with respect to threats to the peace, breaches of the peace and acts of aggression'.[10] The Court is therefore expected to prosecute international crimes—and thus to contribute to their prevention—and to serve, in the words of the UN Charter, as a measure to 'restore international peace and security'. This means that, as a judicial mechanism conceived to prevent international crimes and restore peace and security, the Court holds great expectations from a variety of actors: the judicial parties expecting a fair trial procedure, the victims who suffered the international crimes, the society that needs to heal its victims, or even, as mentioned in the Preamble of the Rome Statute, the conscience of humanity.

A growing body of academic research is questioning the capability of international justice to prevent crimes and to reconcile a society. A growing debate on the Court's performance is also questioning if these are the correct criteria to

[8] William A Schabas, *The Trial of the Kaiser* (Oxford University Press 2018) 51.
[9] 'Referral of the Situation Concerning the Lord's Resistance Army Submitted by the Republic of Uganda' (16 December 2003) para 31; cit in Sarah MH Nouwen 'The International Criminal Court and Conflict Prevention in Africa' in Tony Karbo and Kudrat Virk (eds), *The Palgrave Handbook of Peacebuilding in Africa* (Palgrave Macmillan 2018) 83, 87.
[10] Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI ch VII.

evaluate the functioning of the Court.[11] The following analysis focuses on the capability of the Court to deter international crimes. The possibility for the Court to have an effective impact on mass atrocities depends on a number of requirements: first, the compliance of such an action, and such a purpose, with the Rome Statute, and second, consistent political support for the timely action of the Court in a situation of crisis. Even from these already doubtful premises, however, the most essential preliminary assumption consists of the capability of international justice simply to deter mass atrocities. This latter hypothesis is often taken for granted in the practice of those advocating a deterrent role for the Court, as well as in the practice of states and of the Court. The deterrent power of the Court is not supported by consistent evidence, and scholars disagree on the existence of such a function.

Researchers have been extensively exploring the theme of the capability of international justice to deter international crimes. Besides some reflection on the Nuremberg and Tokyo trials,[12] early studies concerned the ad hoc tribunals,[13] with later studies focusing on the International Criminal Court.[14]. The Court is commonly considered to be a major tool by which the international community can deter international crimes. Indeed, while the other tribunals could deal with limited—both temporally and geographically—situations, with 'potentially unlimited geographic jurisdiction', the Court raised higher expectations related to its power to deter atrocities worldwide.[15] The Court's second president, Sang-Hyun Song, affirmed in 2013 that 'the long-term significance of the Rome Statute framework … does not lie in the punishment of past atrocities. What makes this new system fundamentally different from earlier efforts is its potential for the prevention of future crimes'[16]. Among scholars of different views, a general

[11] Yuval Shany, *Assessing the Effectiveness of International Courts* (Oxford University Press 2014); Hyeran Jo, Mitchell Radtke and Beth A Simmons, 'Assessing the International Criminal Court' in Theresa Squatrito, Oran R Young, Andreas Follesdal and Geir Ulfstein (eds), *The Performance of International Courts and Tribunals* (Cambridge University Press 2018).
[12] Steven R Ratner, Jason Abrams and James Bischoff, *Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy* (Clarendon Press 2009).
[13] David Wippman, 'Atrocities, Deterrence, and the Limits of International Justice' (1999) 23 (2) Fordham International Law Journal 12.
[14] David Bosco, 'The International Criminal Court and Crime Prevention: Byproduct or Conscious Goal?' (2011) 19 (2) Michigan State Journal of International Law 164.
[15]Antonio Cassese, *International Criminal Law* (3rd edn, Oxford University Press 2013) 326
[16] Sang-Hyun Song, 'Preventive Potential of the International Criminal Court' (2013) 2 (3) Asian Journal of International Law 206.

consensus can be identified. Despite sceptical[17] or more optimistic[18] (and sometimes enthusiastic[19]) approaches and findings, it is currently impossible to collect evidence and demonstrate that the Court deters international crimes. The reasons relate to the scarcity of data, given the relatively recent establishment of the Court, and in the research methodology itself.[20]

The following analysis attempts to present the main aspects of the debate on the deterrent power of the International Criminal Court to offer an analysis of the use of the concept of deterrence in the practice of the Court and to analyse the factors that could impact the possible deterrent function of the Court. The analysis begins with a definition of the concept of deterrence in international criminal law and an attempt to identify its relationship with the concept of prevention. It then presents the main difficulties in measuring the deterrent effect of international criminal justice, if not simply of criminal justice, before examining the relevance of deterrence in international tribunals, in particular, in the practice of the prosecutor and the chambers of the Court.

This author argues that the different organs of the Court have consistently relied on deterrence as a key principle to orient the action of the Office of the Prosecutor and to determine sentences. In so doing, the Court has attempted to respond to the general expectations, even in the absence of any certainty about the existence of a deterrent effect. The absence of evidence does not intrinsically exclude the value of considering the possibility of a deterrent effect in fulfilling the mandate of the Court. The main deterrent potential of the Court, however, is clearly not linked to prosecutorial strategies or to the gravity of punishments. With an extensive interpretation of the concept of deterrence, the Court can contribute to creating a growing environment of stigmatisation and accountability that disincentivises the commission of international crimes. The main findings of the

[17] Leslie Vinjamuri, 'Deterrence, Democracy, and the Pursuit of International Justice' (2010) 24 (2) Ethics and International Affairs 191.
[18] Hyeran Jo and Beth A Simmons, 'Can the International Criminal Court Deter Atrocity?' (2016) 70 International Organization 443; Michael L Smidt, 'The International Criminal Court: An Effective Means of Deterrence?' (2001) 167 Military Law Review 239–40.
[19] Houston John Goodell, 'The Greatest Measure of Deterrence: A Conviction for John Pierre Bemba Gombo' (2011) 18 UC Davis Journal of International Law and Policy 193. See also Parliamentarians for Global Action, 'A Deterrent International Criminal Court—The Ultimate Objective' (6 December 2004), <www.pgaction.org/pdf/pre/deterrent%20paper%20rev%20Tokyo.pdf> accessed 28 October 2020.
[20] William A Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (Oxford University Press 2010) 61

analysis suggest that the organs of the Court could avoid referring to deterrence as a criterion to orient their action. The potential deterrent effect, besides specific actions of the Court which impact the behaviour of individual perpetrators, lies indeed in the development and dissemination of norms discouraging international crimes.

2. The Distinction between Prevention and Deterrence

'Prevention' and 'deterrence' are sometimes used as synonyms, but their meaning and scope differ. The former is wider and encompasses the latter, as there are forms of preventing crimes that are not related to judicial deterrence.[21] Several multilateral treaties dealing with international crimes also dictate the obligations to prevent and to punish those crimes as cognate but distinct obligations. The obligation to prevent international crimes has a wide scope and is arguably a customary norm as a duty enshrined in the main treaties dealing with international crimes:

- the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, which the contracting parties undertake to prevent and to punish in Article 1;
- common Article 1 of the 1949 Geneva Conventions, which can be interpreted as including an obligation to prevent violations of international humanitarian law, including war crimes;
- the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, whose Article 2 states that '[e]ach State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction'; and
- the 1997 International Convention on the Suppression of Terrorist Bombings, which states at Article 15 that 'States Parties shall cooperate in the prevention of the offences … by taking all practicable measures, including, if necessary, adapting their domestic legislation, to prevent and counter preparations in their respective territories for the commission of

[21] Serena K Sharma and Jennifer M Welsh (eds), *The Responsibility to Prevent: Overcoming the Challenges of Atrocity Prevention* (Oxford University Press 2015).

> those offences within or outside their territories, including measures to prohibit in their territories illegal activities …'.

The International Court of Justice considered the obligation to prevent genocide in *Bosnia v Serbia*, in which it also examined 'the close link between prevention and punishment'.[22] 'The UN Document Framework of Analysis for Atrocity Crimes', drafted by the UN Special adviser on the prevention of genocide and the Special adviser on the responsibility to protect, defines prevention as

> an ongoing process that requires sustained efforts to build the resilience of societies to atrocity crimes by ensuring that the rule of law is respected and that all human rights are protected, without discrimination; by establishing legitimate and accountable national institutions; by eliminating corruption; by managing diversity constructively; and by supporting a strong and diverse civil society.[23]

Here, the concept of prevention clearly requires a complex variety of actions that transcend the judicial aspect of deterrence.

The International Law Commission draft articles on crimes against humanity further elaborate the link between prevention and judicial deterrence.[24] The wording of the draft articles recalls the 1948 Genocide Convention in preparing a convention on the 'prevention and punishment' of crimes against humanity. The preamble of the draft articles connects the two concepts by adopting the phrasing of the Rome Statute: 'Determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes'.[25] The commentary further explains the link: 'The sixth preambular paragraph affirms the link between the first overall objective (prevention) and the second overall objective (punishment) of the present draft articles, by indicating that prevention is advanced by putting an end to impunity for the perpetrators of such crimes'.[26]

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[22] *Bosnia and Herzegovina v Serbia and Montenegro* (Judgment) [2007] ICJ Rep 426.
[23] UN Office on Genocide Prevention and the Responsibility to Protect, Framework of Analysis for Atrocity Crimes: a Tool for Prevention (2014), 11 <https://www.un.org/en/genocideprevention/documents/about-us/Doc.3_Framework%20of%20Analysis%20for%20Atrocity%20Crimes_EN.pdf> Accessed 25 October 2020.
[24] UN Doc A/74/10, 11.
[25] ibid. See also William A Schabas, 'Prevention of Crimes Against Humanity' (2018) 16 (4) Journal of International Criminal Justice 705–728.
[26] UN Doc A/74/10, 26.

In *Bosnia v Serbia*, the International Court of Justice examined in detail the 'the close link between prevention and punishment' in relation to genocide. It concluded that criminal deterrence constitutes an important part of prevention: 'One of the most effective ways of preventing criminal acts, in general, is to provide penalties for persons committing such acts, and to impose those penalties effectively on those who commit the acts one is trying to prevent'. Still, prevention and criminal punishment are two distinct obligations: 'Despite the clear links between the duty to prevent genocide and the duty to punish its perpetrators, these are, in the view of the Court, two distinct yet connected obligations'. The concept of prevention is indeed wider than criminal punishment, with the International Court of Justice noting that the 'obligation on each contracting State to prevent genocide is both normative and compelling. It is not merged in the duty to punish, nor can it be regarded as simply a component of that duty'.[27]

In summary, international law considers judicial deterrence as an important part of the wider concept of prevention. The wording of the Rome Statute, echoed in the draft articles on crimes against humanity, affirms that the International Criminal Court pursues the aim 'to put an end to impunity', 'to contribute to the prevention' of international crimes. The capability of the Court to discourage the perpetration of international crimes, however, might transcend the mere deterrent effect of punishment. To explore the Court's potential to dissuade perpetrators, it is therefore necessary to analyse the complexity of its possible impact on international crimes—'judicial prevention' that could go beyond the traditional deterrence theory of punishment.

3. Traditional Deterrence Theory and the Rationality of Perpetrators

The theory of deterrence originated in the eighteenth century. The principle intended to replace a moral interpretation of punishment: *punitur, quia peccatum est* [perpetrators must be punished, because they were wrong], otherwise known as the 'just deserts rationale'.[28] The principle instead proposed a functional use of punishment: *punitur ne peccetur* [perpetrators must be punished so that they no

[27] *Bosnia v Serbia* (Judgment) [2007] ICJ Rep 425–427.
[28] Kevin M Carlsmith, John M Darley and Paul H Robinson. 'Why Do We Punish? Deterrence and Just Deserts as Motives for Punishment' (2002) 83 (2) Journal of Personality and Social Psychology.

longer err].[29] Cesare Beccaria in 1746 first advocated a rational function of punishment in the essay 'On Crimes and Punishments'.[30] In Beccaria's view, the state should not punish out of cruelty or revenge, but for the utilitarian purpose of decreasing crime:

> How can a political body, which as the calm modifier of individual passions should not itself be swayed by passion, harbour this useless cruelty which is the instrument of rage, of fanaticism or of weak tyrants? Can the wailings of a wretch, perhaps, undo what has been done and turn back the clock? The purpose, therefore, is nothing other than to prevent the offender from doing fresh harm to his fellows and to deter others from doing likewise.[31]

The utilitarian philosopher Jeremy Bentham further developed the traditional deterrence theory, which became a cornerstone of Western criminal justice in the mid-twentieth century.[32] Previously, the predominant approach interpreted criminal behaviour as a result of mental health issues and considered criminals as individuals affected by a pathology.[33] Traditional deterrence theory is based on the notion that human beings adopt rational behaviour and, accordingly, decide whether or not to perpetrate crimes following a cost-benefit analysis.[34] As rational actors, individuals are expected to respond to incentives and disincentives to engage in criminal behaviour. For deterrence to work, according to the traditional theory, a criminal justice system should ensure severity, certainty, and celerity of punishment.[35]

Thus, the traditional theory of deterrence lays down three main conditions for a legal norm to deter a behaviour. First, potential perpetrators must be rational actors, who decide their behaviour as the result of a cost-benefit analysis. Second, potential perpetrators must recognise the authority that prohibits the behaviours to

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[29] Kai Ambos, *Treatise on International Criminal Law* (Oxford University Press 2013) 67.
[30] Cesare Beccaria, 'The Purpose of Punishment' in Richard Bellamy (ed) and Richard Davies (tr), *Beccaria: 'On Crimes and Punishments' and Other Writings* (Cambridge University Press 1995).
[31] ibid 31.
[32] Jeremy Bentham, *The Principles of Morals and Legislation* (first published 1789, Prometheus Books 1988).
[33] Raymond Paternoster, 'How Much Do We Really Know about Criminal Deterrence' (2010) 100 (3) Journal of Criminal Law Criminology 765.
[34] Ronald Akers, 'Rational Choice, Deterrence, and Social Learning Theory in Criminology: The Path Not Taken' (1990) 81 (3) Journal of Criminal Law and Criminology 65.
[35] Kelli D Tomlinson, 'An Examination of Deterrence Theory: Where Do We Stand' (2016) 80 Federal Probation Journal 33.

deter as capable of enforcing a punishment. They should also recognise the authority and the norm as legitimate. Otherwise, the threat of punishment might even become counterproductive: 'if offenders experience sanctions as illegitimate, have weak bonds to the sanctioning agent and community, and deny their shame and become proud of their isolation from the sanctioning community—defiance, in other words—more crime is more likely than deterrence'.[36] Third, in the cost-benefit analysis, the price of the punishment—which shall be certain, swift, and severe—must prevail over the benefits of perpetrating the crime.[37]

This first assumption, which presupposes the rationality of the perpetrator, is already particularly controversial in the context of international crimes. It is disputed whether the perpetration of atrocities implies the need to consider 'the risk of prosecution against the personal and political gain of continued participation in ethnic cleansing and similar acts'.[38] Several authors resolutely contend that international justice cannot have a deterrent effect because '[i]ndividuals who commit atrocities on the scale of genocide are unlikely to behave as "rational actors", deterred by the risk of punishment'.[39] Drumbl instead has suggested that the presence of the military, or forces of law and order, prevents crimes more effectively than the threat of prosecution by an international tribunal:

> Do genocidal fanatics, industrialized into well-oiled machineries of death, make cost-benefit analyses prior to beginning work? … Although certain people may be deterred from killing or raping in pursuit of eliminationist goals by a fear of imminent retaliation (i.e., an enemy army coming around the corner), there is little to suggest that the threat of punishment by a distant international court would deter.[40]

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[36] Lawrence Sherman, 'Defiance, Deterrence, and Irrelevance: A Theory of the Criminal Sanction' (1993) 30 Journal of Research in Crime and Delinquency 445; Sarah MH Nouwen 'The International Criminal Court and Conflict Prevention in Africa' in Tony Karbo and Kudrat Virk (eds), *The Palgrave Handbook of Peacebuilding in Africa* (Palgrave Macmillan 2018) 83..

[37] John Dietrich, 'The Limited Prospects of Deterrence by the International Criminal Court: Lessons from Domestic Experience' (2014) 88 International Social Science Review 3.

[38] David Wippman, 'Atrocities, Deterrence, and the Limits of International Justice' (1999) 23 (2) Fordham International Law Journal 12.

[39] Martha Minow, *Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence* (Beacon Press 1998) 50. See also Ralph Henham, *Punishment and Process in International Criminal Trials* (Ashgate 2005) 141.

[40] Mark A Drumbl, *Atrocity, Punishment and International Law* (Cambridge University Press 2007) 171.

Mégret observed that there is a cultural bias in applying the rational choice theory to the behaviour of perpetrators of international crimes:

> It beggars belief to suggest that the average crazed nationalist purifier or abused child soldier—neither of which are petty thieves—will be deterred by the prospect of facing trial. … To pretend otherwise is to misunderstand the poisonous venom of political passions and the alienation of extreme outbursts of violence. In fact, the laboratory conceit of guinea pigs reacting to stimuli would seem to be the typical case of liberalism's hegemonious tendency of constructing the other in its own self-image, preferably along the lines of some reductionist form of economic rational choice theory'.[41]

This distinction risks, however, hiding a further cultural bias, as far as it differentiates between rational perpetrators of domestic crimes and irrational perpetrators of international crimes. Koskenniemi developed this crucial point, observing that international crimes are generally perpetrated in a context in which political institutions support the perpetration of atrocities or where perpetrators are in danger or distress:

> As criminal lawyers know well, fitting crimes against humanity or other massive human rights violations into the deterrence frame requires some rather implausible psychological generalisations. either the crimes are aspects of political normality—Arendt's 'banality of evil'—in which case there is no mens rea, or they take place in exceptional situations of massive destruction and personal danger when there is little liberty of action.[42]

These critical arguments surrounding the possible deterrent effect of international criminal justice seem to disregard the broader issue of deterrence in criminal justice. Studies exist that demonstrate a deterrent effect, and others exist that demonstrate the contrary.[43] The effect is largely dependent upon the nature of the crime and upon cultural factors. Several studies investigated the deterrent

[41] Frédéric Mégret, 'Three Dangers for the International Criminal Court: A Critical Look at a Consensual Project' (2002) 9 Finnish Yearbook of International Law 203.
[42] Martti Koskenniemi, 'Between Impunity and Show Trials' (2002) 6 Max Planck Yearbook of United Nations Law 1.
[43] Isaac Ehrlich, 'The Deterrent Effect of Capital Punishment: A Question of Life and Death' (1975) 65 (3) American Economic Review 397; Franklin E Zimring, Jeffrey Fagan and David T Johnson, 'Executions, Deterrence, and Homicide: A Tale of Two Cities' (2010) 7 Journal of Empirical Legal Studies 1.

effect of the death penalty, which is imposed mainly for murder.[44] Murder is one of the most difficult crimes to deter because of the circumstances in which the act is committed, often by those who know the victim. For this reason, too, it is difficult to demonstrate the deterrent effect because there is an extremely low rate of recidivism for murder. Here, there is no evidence to indicate that capital punishment is a superior deterrent to murder to a lengthy term of imprisonment.[45] According to Cottino, 'neither theory nor empirical data support general statements about the deterrent effect of punishment (fines and/or imprisonment). Instead, they warn against an uncritical, generalized use of negative sanctions'.[46] Like Mégrét,[47] Cottino argued that the main problem with the theory of deterrence is the culturally biased approach to the rationality of the perpetrator, 'for which we are sadly indebted to much liberal economic thinking [and which] envisions the person taking action as a *homo oeconomicus*'. However, the traditional theory of deterrence, first formulated in 1764, precedes classical economics as well as the development of capitalism.

A further explanation of the lack of empirical evidence of the deterrence theory is that rational individuals would react to the perception of an immediate punishment. Yet the threat of punishment resulting from a judicial procedure is not sufficiently swift and certain to discourage a perpetrator to commit a crime: 'The criminal justice system, because it has other imperatives (justice must be served and justice frequently takes time), is not culturally positioned to exploit the rationality of offenders'.[48] The *conditio sine qua no* of the rationality of the perpetrator led many authors to propose an anthropological distinction between common 'rational' criminals, who engage in a criminal behaviour as a result of a cost-benefit analysis, and irrational perpetrators of international crimes.

[44] William C Bailey and Ruth D Peterson, 'Murder, Capital Punishment, and Deterrence: A Review of the Evidence and an Examination of Police Killings' (1994) 50 Journal of Social Issues 53; Aaron Chalfin, Amelia M Haviland and Steven Raphael, 'What Do Panel Studies Tell Us About a Deterrent Effect of Capital Punishment? A Critique of the Literature' (2013) 29 Journal of Quantitative Criminology 1, 5; Hashem Dezhbakhsh, Paul H Rubin, and Joanna Shepherd, 'Does Capital Punishment Have a Deterrent Effect? New Evidence from Post-Moratorium Panel Data' (2003) 5 (2) American Law and Economics 344.
[45] John J Donahue and Justin Wolfers 'Uses and Abuses of Empirical Evidence in the Death Penalty Debate' (2005) 58 Stanford Law Review 791.
[46] Amedeo Cottino, 'Crime Prevention and Control: Western Beliefs vs. Traditional Legal Practices' (2008) 90 International Review of the Red Cross 289
[47] Frédéric Mégret, 'Three Dangers for the International Criminal Court: A Critical Look at a Consensual Project' (2002) 9 Finnish Yearbook of International Law 203.
[48] Daniel S Nagin, 'Deterrence in the Twenty-First Century' (2013) 42 Crime and Justice 199.

International criminals instead act out of anger, rage, or other impulses that would not be considered during a cost-benefit analysis and that therefore would not be deterrable:

> [T]he number of rational calculators of costs and benefits, or of individuals whose perceptions of payoffs are affected by the threat of punishment, may regrettably be fewer among those who commit international crimes, than among those who commit the crimes that constitute the staple of national criminal law enforcement. The conflicts which induce massive human rights violations tend to engage powerful passions—even self-transcending behavioural motives—so the threat of terrestrial sanctions loses much or all of its force.[49]

The argument is compelling, but research on perpetrators' rationality does not support the distinction in criminal behaviour between domestic and international crimes. The topic is controversial, and various disciplines offer mixed findings. An opposite argument, for instance, affirms that international crimes are the result of a 'deliberate strategy of belligerent groups' and that perpetrators adopt a more rational behaviour. As an exception to the majority of international criminal research, Cronin Furman mentions, albeit in a footnote, that 'although arguments about the irrationality of low-level perpetrators are common in international legal scholarship and the popular press, micro-level work by both historians and social scientists suggests that even among the lowest-ranking perpetrators, decisions to participate in genocide can be highly rational given the context'.[50] Given the controversial features of the deterrence effect for the special nature of international crimes, this analysis adopts a broad connotation of the concept of deterrence to analyse the possible function of the International Criminal Court to discourage international crimes.

[49] Mirjan Damaška, 'Problematic Features of International Criminal Procedure' in Antonio Cassese (eds), *The Oxford Companion to International Criminal Justice* (Oxford University Press 2009) 178.

[50] Kate Cronin-Furman, 'Managing Expectations: International Criminal Trials and the Prospects for Deterrence of Mass Atrocity' (2013) 7 (3) *International Journal of Transitional Justice* 434, 440. See, among others, Christopher R Browning, *Ordinary Men: Reserve Police Battalion 101 and the Final Solution in Poland* (Harper Collins 1998); Scott Straus, *The Order of Genocide: Race, Power, and War in Rwanda* (Cornell University Press 2006); James E Waller, *Becoming Evil: How Ordinary People Commit Genocide and Mass Killing* (Oxford University Press 2002).

4. Definitions and Categories of Deterrence

For the purpose of the present analysis, to better suit the specific features of international criminal justice, deterrence is defined as 'the capacity of prosecutions (or the work of the tribunals more broadly, including their mere existence) to elicit forbearance from committing further crimes on the part of those prosecuted, the "similarly minded", and the general public'.[51] This definition exceeds the traditional legal understanding of the term. Traditional deterrence theory interprets the concept as the function of criminal punishment to discourage future criminal behaviour (of both the convicted individual and the rest of the community). This definition also exceeds the generic meaning of the word; from the Oxford Dictionary, 'the action of discouraging an action or event through instilling doubt or fear of the consequences'. International criminal justice might discourage the commission of international crimes independently from the consequences that it threatens in case of infringement of a norm. The deterrent effect of the International Criminal Court could indeed depend on factors other than punishment, or threat of punishment, of perpetrators of crimes within the jurisdiction of the Court.

Although typologies and definitions may vary from author to author, deterrence is usually categorised as specific (dissuading the condemned individual from repeating the crime) or general (discouraging other people from engaging in the same conduct).[52] It is maintained that the particular nature of international crimes might be able to raise a further aspect: 'expressive'[53] or 'social'[54] deterrence, which is possibly more effective than the 'classic' or 'prosecutorial' one. This angle, which can vary in the analysis of the authors but generally reflects the theory of positive general prevention,[55] focuses on the 'secondary

[51] Jennifer Schense and Linda Carter (eds), *Two Steps Forward, One Step Back: The Deterrent Effect of International Criminal Tribunals* (Torkel Opsahl Academic EPublisher 2017).
[52] Stephen L Quackenbush, 'General Deterrence and International Conflict: Testing Perfect Deterrence Theory' (2010) International Interactions 36.
[53] Kate Cronin-Furman and Amanda Taub, 'Lions, Tigers and Deterrence, Oh My. Evaluating Expectations in International Criminal Justice' in Yvonne McDermott and William Schabas (eds), *The Ashgate Research Companion to International Criminal Law, Critical Perspectives* (Routledge 2013).
[54] Hyeran Jo and Beth A Simmons 'Can the International Criminal Court Deter Atrocity?' (2016) 70 International Organization 443.
[55] David M Kennedy, *Deterrence and Crime Prevention* (Taylor and Francis 2012).

stigmatising effects of the punishment',[56] as 'a consequence of the broader social milieu in which actors operate: it occurs when potential perpetrators calculate the informal consequences of law-breaking.'[57] In exploring the deterrent value of international criminal justice, other authors have proposed further sub-categories of deterrence. 'Targeted' deterrence attempts to disincentivise specific groups or individuals, while 'restrictive' or 'partial' deterrence aims to minimise, rather than stop, criminal activity.[58] It takes place when, 'to diminish the risk or severity of a legal punishment, a potential offender engages in some action that has the effect of reducing his or her commissions of a crime'.[59]

A further angle of deterrence, which is particularly meaningful for international justice, is a heuristic or pedagogic effect of the development of international criminal law. According to Marina Aksenova, '[i]nternational criminal law enables the dissemination of norms about the prohibited conduct and sets the standard for behaviour in conflict situations'.[60]

Sometimes defined as 'norm infiltration',[61] the diffusion of international justice may be a deterrent 'in the broader sense'.[62] Concerning certain contexts, and certain international crimes, it is even disputed whether the perpetrator is aware of breaking a rule and risking prosecution. David Luban describes how the Rome Statute contributes to the development of national criminal codes, arguing that this role of the Court has a greater impact than an actual celebration of a trial:

> To avail themselves of complementarity, states must revise their own criminal codes to mirror the substantive law of the Rome

[56] Kate Cronin-Furman and Amanda Taub, 'Lions, Tigers and Deterrence, Oh My. Evaluating Expectations in International Criminal Justice' in Yvonne McDermott and William Schabas (eds), *The Ashgate Research Companion to International Criminal Law, Critical Perspectives* (Routledge 2013).
[57] Hyeran Jo and Beth A Simmons 'Can the International Criminal Court Deter Atrocity?' (2016) 70 International Organization 443.
[58] Jennifer Schense and Linda Carter (eds), *Two Steps Forward, One Step Back: The Deterrent Effect of International Criminal Tribunals* (Torkel Opsahl Academic EPublisher 2017).
[59] Jack P Gibbs, 'Deterrence Theory and Research' in Gary B Melton (ed), *The Law as a Behavioral Instrument* (University of Nebraska Press 1986) 87.
[60] Marina Aksenova, 'Introduction: Breaking the Cycle of Mass Atrocities: Criminological and Socio-Legal Approaches to International Criminal Law', in Marina Aksenova, Elie van Sliedregt and Stephan Parmentier (eds.), *Breaking the Cycle of Mass Atrocities: Criminological and Socio-Legal Approaches in International Criminal Law* (Hart Publishing 2019) 3, 5.
[61] Payam Akhavan, 'Justice in the Hague, Peace in the Former Yugoslavia? A Commentary on the United Nations War Crimes Tribunal' (1998) 20 (4) Human Rights Quarterly 737.
[62] Guido Acquaviva, 'International Criminal Courts and Tribunals as Actors of General Deterrence? Perceptions and Misperceptions' (2014) 96 (895) International Review of the Red Cross 784, 789.

> Statute. As they do so, new norms get spliced into the DNA of domestic law. That is norm projection at work. It matters as much, or even more, for changing political imagination than a handful of international trials.[63]

The diffusion, and application, of the Rome Statute has the potential to spread the message that certain conduct is not only frowned but also punishable. Sang-Hyun Song, president of the Court from March 2009 to March 2015, explained how this awareness could influence the conduct of perpetrators:

> This I see as the ICC's greatest potential—to have a significant preventive effect by entrenching a system of norms that outlaw atrocities. I am not merely referring to a layer of international laws that label certain actions as criminal offences. What we need to achieve is a system of fully internalized legal and social norms that make the Rome Statute crimes not only punishable but also simply unacceptable in societies everywhere.[64]

In contrast, international criminal law has features that may contribute to a particular preventive effect. The notion of command responsibility, regulated by Article 28 of the Rome Statute, criminalises the failure to prevent crimes perpetrated by subordinates.[65] Additionally, the Rome Statute criminalises the attempt to commit a crime, which in theory could allow the timely intervention of the Court.[66]

5. Perception of Severity, Certainty, and Swiftness of Punishments

Deterrence theory affirms that to discourage future crimes, punishments must be perceived as severe, certain, and swift. Concerning the determination of sentences, authors generally recognise that the second element is more important than the first. It is not the severity of the punishment which creates a deterrent

[63] David Luban, 'After the Honeymoon. Reflections on the Current State of International Criminal Justice' (2013) 11 Journal of International Criminal Justice 511.
[64] Song Sang-Hyun, 'International Criminal Court, Centred Justice and Its Challenges' (2016) 17 (1) Melbourne Journal of International Law 1.
[65] Sarah MH Nouwen 'The International Criminal Court and Conflict Prevention in Africa' in Tony Karbo and Kudrat Virk (eds), *The Palgrave Handbook of Peacebuilding in Africa* (Palgrave Macmillan 2018) 83.
[66] Héctor Olásolo, *The Role of the International Criminal Court in Preventing Atrocity Crimes through Timely Intervention* (Boom Juridische Publishers 2011).

effect but, rather, the likelihood of being prosecuted and condemned.[67] The issue is particularly relevant in international criminal law, in which uncertainty of prosecution and punishment is generally more severe than it is in the average national judicial system. In *Furundžija*, a Trial Chamber of the International Criminal Tribunal for the former Yugoslavia plainly enunciated this aspect, together with the 'norm infiltration' effect of an international judgment:

> It is the infallibility of punishment, rather than the severity of the sanction, which is the tool for retribution, stigmatization and deterrence. This is particularly the case for the International Tribunal; penalties are made more onerous by its international stature, moral authority and impact upon world public opinion.[68]

Authors have reiterated this concept since the origin of the theory of deterrence. Beccaria affirmed:

> One of the most effective brakes on crime is not the harshness of its punishment, but the unerringness of punishment. This calls for vigilance in the magistrates, and that kind of unswerving judicial severity which, to be useful to the cause of virtue, must be accompanied by a lenient code of laws. The certainty of even a mild punishment will make a bigger impression than the fear of a more awful one which is united to a hope of not being punished at all.[69]

The third requirement of the punishment, swiftness, seems to have an even more significant impact on criminal behaviour. The prohibition of a norm disincentivises crimes only if it shows an immediate threat of punishment. For instance, the presence of police officers in an area seems to discourage criminal behaviour.[70] As a result, only actions that pose an immediate threat of punishment would be capable of deterring crimes. Some authors thus have proposed a distinction between deterrence and compellence:

> [T]he key to ending criminal violence in an ongoing war is not deterrence, which is aimed at dissuading someone from

[67] Christopher W Mullins and Dawn L Rothe, 'The Ability of the International Criminal Court to Deter Violations of International Criminal Law: A Theoretical Assessment' (2010) 10 International Criminal Law Review 771.
[68] *Prosecutor v Furundžija* (Judgment) (1998) 38 ILM 317 para 290.
[69] Cesare Beccaria, 'Lenience in Punishing' in Richard Bellamy (ed) and Richard Davies (tr), *Beccaria: 'On Crimes and Punishments' and Other Writings* (Cambridge University Press 1995)
[70] Anthony N Doob and Cheryl Marie Webster, 'Sentence Severity and Crime: Accepting the Null Hypothesis' (2003) 30 Crime and Justice 143.

> initiating proscribed behavior, but rather compellence, the act of preventing someone from continuing actions on which he has already embarked.6 The threat of prosecution is unlikely to deter because, by the time a tribunal asserts jurisdiction, large-scale crimes have already taken place …. The challenge is to prevent the continuation of crimes that have already been set in motion, and that requires compelling the target to change its behavior.[71]

An important caveat for the analysis of factors affecting deterrence is that *perceived*, rather than actual, judicial consequences influence the conduct of the perpetrator. Concerning international tribunals, authors have identified various elements affecting perception: the presence of the tribunal in the same territory in which crimes were committed, the number of indictments and convictions, the legitimacy of the tribunal, and the effectiveness of enforcement. Even productive international tribunals complete a limited quantity of indictments and convictions, if compared to domestic courts. Therefore, these are elements that do not benefit the deterrent effect of the International Criminal Court.[72]

6. Literature on the Deterrent Power of the International Criminal Court

David Scheffer effectively explained the difficulty of demonstrating whether the International Criminal Court can, or cannot, have a deterrent effect:

> [W]hen you have a permanent international court standing, I think there will be a possible deterrence effect. For people to say there will be no deterrence at all is as factually unprovable as to say there will be deterrence. You can't prove that. How do you prove that? How do you prove the state of mind of a perpetrator of these crimes, or a likely perpetrator who suddenly says, if I do this, yeah, there is a chance they'll go after me very quickly, because there's a permanent court that can do so.[73]

Sang-Hyun Song further elaborated on the point:

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[71] Kenneth A Rodman, 'Darfur and the Limits of Legal Deterrence' (2008) 30 Human Rights Quarterly 529.
[72] Jennifer Schense and Linda Carter (eds), *Two Steps Forward, One Step Back: The Deterrent Effect of International Criminal Tribunals* (Torkel Opsahl Academic EPublisher 2017).
[73] David J Scheffer, 'Should the United States Join the International Criminal Court' (2002) 9 (1) UC Davis Journal of International Law & Policy 45.

> Deterrence is notoriously difficult to measure, since we essentially need to look at the relationship between justice administered and the absence of crimes. … Every situation is unique and each conflict has its specific historical and political setting. The greatest challenge is causality-there are so many factors affecting the occurrence of atrocities that it is close to impossible to determine what the effect of deterrence is.[74]

Despite the intrinsic difficulty of finding evidence of deterrence, a growing body of scholarship has been investigating the deterrent power of the Court through quantitative analysis. Using various data from, among other things, the Uppsala Conflict Data Program and the Armed Conflict Location and Event Dataset, researchers analysed diverse variables.[75] They focused on specific situations, specific crimes (usually, killings), specific kinds of perpetrators (e.g., high-level officials, or rebels rather than state agents). Furthermore, given the small number of prosecutions and convictions, these studies examined the impact of other actions of the Court, from the ratifications of the Rome Statute to the requests for arrest warrants.

The analysis of specific kinds of perpetrators concluded that certain categories of individuals could be more deterrable than others. Following the rational perpetrator theory, Cronin-Furman affirmed that no punishment could balance the benefit for perpetrators who order atrocities. Conversely, perpetrators who fail to control their subordinates could be deterrable. Indeed, they do not share, in principle, the criminal intent of those who order or personally perpetrate atrocities. Consequently, the author recommended a prosecutorial strategy that focuses on command responsibility.[76] The International Criminal Court prosecutor seems to share a similar view, as affirmed in the 2016 'Policy Paper on Case Selection and Prioritisation':

> The Office will also consider the deterrent and expressive effects that each mode of liability may entail. For example, the

[74] Sang-Hyun Song, 'Preventive Potential of the International Criminal Court' (2013) 3 Asian Journal of International Law 203.
[75] 'The ACLED data provide daily event count data and cover a range of events, including violence against civilians. ACLED uses source materials from local, regional, national, and continental news media, NGO reports, and Africa focused news reports'. Courtney Hillebrecht, 'The Deterrent Effects of the International Criminal Court: Evidence from Libya' (2016) 42 (4) International Interactions 628.
[76] Kate Cronin-Furman, 'Managing Expectations: International Criminal Trials and the Prospects for Deterrence of Mass Atrocity' (2013) 7 (3) International Journal of Transitional Justice 434.

> Office considers that the responsibility of commanders and other superiors under article 28 of the Statute is a key form of liability, as it offers a critical tool to ensure the principle of responsible command and thereby end impunity for crimes and contribute towards their prevention.

Cronin-Furman and Taub subsequently advocated a simpler strategy: focusing on high-level perpetrators. They support this advice with the expressive value of international judicial decisions, which can contribute to stigmatising prohibited behaviours.[77] Jo and Simmons focused on different typologies of perpetrators and on certain categories of *mens rea*. According to their research, the deterrent effect of international justice varies according to the degree of accountability of the perpetrator and his or her interest in obtaining legitimacy. As a result, high-level officials would be more deterrable than low-level perpetrators, and state actors would be more deterrable than non-state actors.[78] Similarly, among rebel groups, those who seek legitimacy appear to be more sensitive to social deterrence. A prosecutorial strategy privileging certain types of perpetrators to maximise deterrence (e.g., state agents over rebels), however, would clearly violate the mandate of neutrality disposed by the Rome Statute.

Hillebrecht analysed the action of the International Criminal Court in Libya beyond judicial prosecutions. The author explored the impact on civilian casualties of several variables, including statements, investigations, and the assignment of cases. She found that 'when the ICC became involved in Libya, through issuing statements and arrest warrants, and all of its actions in between, actors on the ground took note and improved their human rights practices'.[79]

Dancy's analysis observed a decline of violence in the territory of states that ratified the Rome Statute. Dancy acknowledged that its study shows a correlation between the two phenomena, but not causation: 'If anything, the Court's mere existence has coincided with downward global trends in the intentional use of atrocity-level violence. In that sense, one may argue that it is

[77] Kate Cronin-Furman and Amanda Taub, 'Lions, Tigers and Deterrence, Oh My. Evaluating Expectations in International Criminal Justice' in Yvonne McDermott and William Schabas (eds), *The Ashgate Research Companion to International Criminal Law, Critical Perspectives* (Routledge 2013).
[78] Hyeran Jo and Beth A Simmons, 'Can the International Criminal Court Deter Atrocity?' (2016) 70 International Organization 443.
[79] 'The Deterrent Effects of the International Criminal Court: Evidence from Libya' (2016) 42 (4) International Interactions 628.

playing a role in conflict prevention, or 'deterrence'.[80] Sikkink proposed the same argument, introducing the concept of a 'justice cascade' as a trend in world politics creating a culture of accountability for human rights violations.[81] The ratification of the Rome Statute contributed to the 'infiltration' of international criminal law norms, which could be correlated to the international crimes.

Further reports on the deterrent power of the Court are mostly anecdotal. Some authors report that Lubanga's conviction in 2012 affected the phenomenon of child recruitment in the Democratic Republic of Congo.[82] The so-called 'Lubanga syndrome' made militia leaders release children from their ranks. According to other versions, perpetrators simply began hiding children from protection officers or lying about their age.[83]

There are two main limits to the current research on International Criminal Court deterrence. First, quantitative analysis shows only preliminary findings. It is based on partial data and could be falsified by future studies. All the authors of the studies on the Court's deterrence warn of the limits of their findings and draw modest conclusions, for example, '[t]he evidence suggests that this role has potential to save at least a few lives in some of the most violent settings in recent decades'.[84] Second, the dynamics underlying the phenomenon remain unclear. As Sikkink maintained:

> We can't yet sort out clearly whether trials work mainly through deterrence and punishment or through socialization and collective memory. We also can't say yet whether it is better to combine prosecutions with amnesties, or to annul amnesties. We suspect that the answers, like most in the social world, are complicated: that prosecutions work both through deterrence and socialization; that prosecutions combined with some kinds

[80] 'Searching for Deterrence at the International Criminal Court' in Joanna Nicholson, *Strengthening the Validity of International Criminal Tribunals* (Brill Nijhoff 2018).
[81] Kathryn Sikkink, *The Justice Cascade: How Human Rights Prosecutions are Changing World Politics* (WW Norton & Co 2018).
[82] Kurt Mills, *International Responses to Mass Atrocities in Africa: Responsibility to Protect, Prosecute and Palliate* (University of Pennsylvania Press 2015) 116.
[83] Serena K Sharma and Jennifer M Welsh (eds), *The Responsibility to Prevent, Overcoming the Challenges of Atrocity Prevention* (Oxford University Press 2015) 148.
[84] Hyeran Jo and Beth A Simmons, 'Can the International Criminal Court Deter Atrocity?' (2016) 70 International Organization 443, 470.

of partial amnesties may be a good solution; and that blanket amnesties should be avoided.[85]

7. Deterrence in the Practice of the International Criminal Court

The approach to deterrence in the practice of the Court can be analysed from two aspects: first is whether deterrence ought to be considered as a criterion in the selection of cases to prosecute; second is whether deterrence is a key factor to be considered in determining sentences. While the former assumption appears to have been dismissed by both the Appeals Chamber and the Office of the Prosecutor, the latter constitutes a consistent practice of the Court.

In *Lubanga*, the Pre-Trial Chamber affirmed that, to strengthen the effect of deterrence, the Court should focus only on high-ranking perpetrators as individuals who can 'prevent or stop the commission' of international crimes.[86] The Appeals Chamber rejected this view, observing that the deterrent effect of the Court would be guaranteed only by avoiding any *a priori* exclusion of certain categories of perpetrators 'from potentially being brought before the Court': '[A]ny perpetrators other than those at the very top [were] automatically excluded from the exercise of the jurisdiction of the Court … [which] could severely hamper the preventive, or deterrent, role of the Court which is the cornerstone of the creation of the [ICC]'.[87] The prosecutor's 'Policy Paper on Case Selection and Prioritisation' issued in September 2016 seems to confirm the approach of the Appeals Chamber, that is, that the deterrent function of targeting high-ranking perpetrators is questionable, and lower-ranking perpetrators should not be excluded from prosecution in virtue of a contested deterrent effect.[88] Conversely, a different approach that includes a wider range of perpetrators might increase the effectiveness of prosecutions before the Court, in line with the theory of deterrence that privileges certainty of prosecution over severity of punishment.

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[85] Kathryn Sikkink, *The Justice Cascade: How Human Rights Prosecutions are Changing World Politics* (WW Norton & Co 2018) 188.
[86] *Prosecutor v Thomas Lubanga Dyilo* (Decision on the Prosecutor's Application for a Warrant of Arrest) ICC-01/04-01/06-8 (10 February 2006) paras 54–5.
[87] *Situation in the Democratic Republic of the Congo* (Judgment on the Prosecutor's Appeal Against the Decision of Pre-Trial Chamber I Entitled 'Decision on the Prosecutor's Application for Warrants of Arrest, Article 58') ICC-01/04-169 (13 July 2006) para 73.
[88] International Criminal Court, Office of the Prosecutor, 'Policy Paper on Case Selection and Prioritisation' (15 September 2016), <www.icc-cpi.int/itemsdocuments/20160915_otp-policy_case-selection_eng.pdf>.

The most ambitious International Criminal Court prosecutions have indeed targeted high-profile individuals identified as bearing the most responsibility for the crimes investigated. Joseph Kony, Omar al-Bashir, and Muammar Gaddafi are distinct examples of senior figures the Court charged but could not apprehend and prosecute or, in case of Uhuru Kenyatta, Jean Pierre Bemba Gombo, and Laurent Gbagbo, for whom the Court could not obtain a conviction. The main obstacle to the effective prosecution of high-profile individuals generally lies in the failure of states to cooperate with the Court in the field to implement arrest warrants and the decisions of the Court.[89] Nevertheless, the discretionary power of the prosecutor allows her to focus on cases with a reasonable prospect of conviction. In particular, the 2016 'Policy Paper on Case Selection and Prioritisation' states:

> The Office may also decide to prosecute lower level-perpetrators where their conduct has been particularly grave or notorious. The notion of the most responsible does not necessarily equate with the de jure hierarchical status of an individual within a structure, but will be assessed on a case-by-case basis depending on the evidence.[90]

This confirms a shift from the previous prosecutorial strategy, which implied investigating and prosecuting those who bear the greatest responsibility, as exposed in the prosecutorial strategy paper published in February 2010:

> … the Office consolidated a policy of focused investigations and prosecutions, meaning it will investigate prosecute those who bear the greatest responsibility for the most serious crimes, based on the evidence that emerges in the course of an investigation. Thus, the Office will select for prosecution those situated at the highest echelons of responsibility, including those who ordered, financed, or otherwise organized the alleged crimes.[91]

The purpose of the new strategy is clearly to privilege targeting individuals who are likely to appear on trial before the Court. This approach appears grounded

[89] Rita Mutyaba, 'An Analysis of the Cooperation Regime of the International Criminal Court and Its Effectiveness in the Court's Objective in Securing Suspects in Its Ongoing Investigations and Prosecutions' (2012) 12 (5) International Criminal Law Review 937.
[90] International Criminal Court, Office of the Prosecutor, 'Policy Paper on Case Selection and Prioritisation' (15 September 2016), 14 <www.icc-cpi.int/itemsdocuments/20160915_otp-policy_case-selection_eng.pdf>.
[91] International Criminal Court, Office of the Prosecutor, 'Prosecutorial Strategy 2009–2012' 19. <www.icc-cpi.int/nr/rdonlyres/66a8dcdc-3650-4514-aa62-d229d1128f65/281506/otpprosecutorialstrategy20092013.pdf>.

from a legal point of view, as it does not conflict with the Rome Statute and may produce new results from a policy point of view, given the failures in the more ambitious prosecutions. However, this prosecutorial strategy has been the object of controversy within other international tribunals.[92]

At the International Criminal Tribunal for the former Yugoslavia, Prosecutor Richard Goldstone decided to begin prosecuting low-level perpetrators. His aim was to respond to public pressure, which asked for prompt indictments, and to build stronger cases for future prosecutions against higher-level individuals. The tribunal judges, nevertheless, explicitly objected to the strategy in a public statement[93] and requested that the prosecutor target high-level perpetrators. Judge Cassese defended the action as a means to safeguard respect for the statute of the tribunal, as 'the Judges as a whole are the only body that can try to reorient prosecutorial action so as to keep it within the Statute's explicit or implied objectives'.[94] The prosecutorial strategy then shifted to focus on higher-level perpetrators.

At the International Criminal Court, the first trial seeming to implement the new strategy, against al-Mahdi in the situation of Mali, has been criticised by scholars on various grounds.[95] The criticism arise, broadly, from the basis that the Court insisted on prosecuting an individual who was likely to be apprehend, disregarding the accuracy of the charges. The criticisms of the strategy in this matter are reminiscent of the criticisms levelled against the low-level charges that the prosecutor brought in the *Lubanga* case. Thomas Lubanga received the arrest warrant while he was detained, among other things, for torture, and he was convicted before the Court and sentenced to fourteen years' imprisonment for the war crimes of enlisting and conscripting children.

In the 2019/2021 strategic plan, the Office of the Prosecutor reiterates the strategy 'of building upwards by focusing on mid-level or notorious perpetrators

[92]Margaret M de Guzman and William A Schabas, 'Initiation of Investigation and Selection of Cases' in Goran Sluiter (ed), *Towards Codification of General Rules and Principles of International Criminal Procedure* (Oxford University Press 2012).
[93] ICTY Press Release, 'The Judges of the Tribunal for the Former Yugoslavia Express their Concern Regarding the Substance of their Programme of Judicial Work for 1995' (1 February 1995) CC/PIO/003E.
[94] Antonio Cassese, 'The ICTY: A Living and Vital Reality' (2004) 2 Journal of International Criminal Justice 585.
[95] William A Schabas, 'Al Mahdi Has Been Convicted of a Crime He Did Not Commit' (2017) 49 Case Western Reserve Journal of International Law 75.

first, with the aim of reaching the level of the most responsible persons at a later stage'.[96] At the same time, the prosecutor acknowledges the problems the strategy can create:

> The Office also recognises that this approach may place increased demands on the other Organs of the Court, including for courtroom space. It also risks creating a temporary misperception that the Office is targeting only low-level perpetrators, even though the goal of the Office remains to prosecute the most responsible either directly or through a building upwards strategy. However, on balance, the Office considers such concerns to be outweighed by the potential benefits.[97]

This prosecutorial strategy disregards the suggestion to focus on high-level perpetrators, who, according to one theory, would be the more deterrable individuals. Conversely, the prosecutor aims to increase the effectiveness of prosecutions and improve the functioning of the Court. In so doing, she could also enact the social and expressive value of deterrence. Any perception of selectivity in prosecutorial strategy indeed would jeopardise the legitimacy of the tribunal—and, consequently, its possible deterrent effect.

Concerning the use of deterrence in determining sanctions, on 22 March 2017, the Trial Chamber in *Bemba*, consistently with the Court's previous practice in *Katanga*[98] and *Al-Mahdi*,[99] recognised deterrence, both its general and specific effects, as one of the primary purposes of sentencing:

> The primary purpose of sentencing … is rooted … in retribution and deterrence. With regard, in particular, to deterrence, the Chamber is of the view that a sentence should be adequate to

[96] ICC Office of the Prosecutor, 'Strategic Plan 2019–2021' 19 <www.icc-cpi.int/itemsDocuments/20190726-strategic-plan-eng.pdf>.
[97] ICC Office of the Prosecutor, 'Strategic Plan 2019–2021' 20 <www.icc-cpi.int/itemsDocuments/20190726-strategic-plan-eng.pdf>.
[98] 'The role of the sentence is two-fold: on the one hand, punishment, or the expression of society's condemnation of the criminal act and of the person who committed it, which is also a way of acknowledging the harm and suffering caused to the victims; and, on the other hand, deterrence, the aim of which is to deflect those planning to commit similar crimes from their purpose'. *Prosecutor v Katanga* (Decision on Sentence Pursuant to Article 76 of the Statute) ICC-01/04-01/07-3484-tENG-Corr (23 May 2014) paras 37–38.
[99] 'In respect of deterrence, the Chamber considers that a sentence should be adequate to discourage a convicted person from recidivism (specific deterrence), as well as to ensure that those who would consider committing similar crimes will be dissuaded from doing so (general deterrence)'. *Prosecutor v Al Mahdi* (Judgment and Sentence) ICC-01/12-01/15-171 (27 September 2016) para 67.

> discourage a convicted person from recidivism (specific deterrence) as well as to ensure that those who would consider committing similar offences will be dissuaded from doing so (general deterrence).[100]

The role of retribution, rehabilitation, and deterrence in the determination of sentences is not regulated by the Rome Statute or by the Rules of Procedure and Evidence. The same uncertainty regarding the purpose of sentencing appears in the case law of the ad hoc tribunals.[101] In 2009, the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia summed up the practice of the ad hoc tribunals regarding the issue: 'It is well established that, at the Tribunal and at the [International Criminal Tribunal for Rwanda], retribution and deterrence are the main objectives of sentencing'.[102]

8. Conclusion

The debate on the possible deterrent power of the International Criminal Court, and of international justice in general, remains open, and a growing body of scholarship is investigating the issue using various and original methodologies. In the absence of any definitive finding, the Court has been maintaining deterrence among the primary purposes of its sentences. Deterrence, however, has not influenced the prosecutorial strategy, so far. Research conclusions are not univocal, but the impression is that the prosecutor is correctly cautious about adopting deterrence as a criterion to select cases.

Empirical research shows that the actions of the Court (beyond prosecution and convictions, from opening an investigation to requesting an arrest warrant) can influence the criminal behaviour of the targeted individuals in specific situations. The details of such an impact remain uncertain. An arrest warrant can even trigger more violence, like in the case of Omar al-Bashir in 2009.[103]

Research on the deterrence aspect of international justice attempts to connect the quantitative decline of many indicators of direct violence in the last

[100] *Prosecutor v Bemba* (Decision on Sentence) ICC-01/05-01/13 (22 March 2017) para 19.
[101] Nadia Bernaz, 'Sentencing and Penalties' in William A Schabas and Nadia Bernaz, *Routledge Handbook of International Criminal Law* (Routledge 2010).
[102] *Prosecutor v Krajišnik* (Appeal Judgment) IT-00-39-A (17 March 2009) 775.
[103] Allard Duursma and Tanja R Müller 'The ICC Indictment Against Al-Bashir and Its Repercussions for Peacekeeping and Humanitarian Operations in Darfur' (2019) 40 (5) Third World Quarterly 890.

decades to the development of international criminal law, which has disseminated norms stigmatising international crimes.[104] The causal relationship is methodologically difficult to prove. As Dancy commented, 'thus far, the ICC has been more influential for what it is than what it does'.[105] To promote the 'norm infiltration' value of deterrence, the Court must be perceived as legitimate and effective. The achievement of a credible and functioning international tribunal might have a stronger impact than any specific punishment.

[104] Steven Pinker, *The Better Angels of our Nature* (Viking 2011).
[105] Geoff Dancy, 'Searching for Deterrence at the International Criminal Court' in Joanna Nicholson, *Strengthening the Validity of International Criminal Tribunals* (Brill Nijhoff 2018) 72.

Chapter 5:
The Impact on *Ius ad Bellum* of the International Criminal Court and the Responsibility to Protect

> Article 2(4) lives and, while its condition is grave indeed, its maladies are not necessarily terminal. There is yet time to prescribe, salvage, to keep alive at all cost the principal norm of international law in our time … The fissures of the Charter are worrisome but they, too, are not as wide in international life as they loom in academic imagination.[1]

1. Introduction

The doctrine of the responsibility to protect and the Rome Statute of the International Criminal Court have had a parallel impact on the *ius ad bellum*. According to a common interpretation, the development of the doctrine and of the Court had contradictory effects on the law on the use of force.[2] On the one hand, the Rome Statute of the International Criminal Court gave impulse to the criminalisation and prosecution of the crime of aggression, thereby reinforcing the *ius contra bellum*. Conversely, the responsibility to protect, at least in its original proposition, was expressly conceived to extend the legality of the use of force beyond the exceptions to the prohibition to use force, that is, Security Council authorisation and self-defence, with the alleged purpose of protecting civilian populations from mass atrocities.

This possible antithetical influence on the *ius ad bellum* presents the most conflicting scenario of the relationship between the doctrine and the Court, in which the former falls under the jurisdiction of the latter. The responsibility to protect, at least in its military configuration, has been proposed as an exception to the general prohibition on the use of force. Interventions in violation of the UN Charter might be justified on the basis of the doctrine. The responsibility to

[1] Louis Henkin, 'The Reports of the Death of Article 2(4) Are Greatly Exaggerated' (1971) 65 (3) American Journal of International Law 544, 545.
[2] See, eg, Jason Ralph, 'The International Criminal Court', in Alex Bellamy and Tim Dunne (eds), *The Oxford Handbook of the Responsibility to Protect* (Oxford University Press 2016), 638; Mahmood Mamdani, 'Responsibility to Protect or Right to Punish?' (2010) 4 Journal of Intervention and Statebuilding 53.

protect could therefore be presented as a defence to a charge of aggression.[3] The individuals responsible for an intervention pursuant to the doctrine of the responsibility to protect could be guilty of the crime of aggression, as defined by the Rome Statute of the International Criminal Court. With the activation of the jurisdiction on the crime of aggression, the Court could have criminalised some forms of implementation of the doctrine.

The analysis of the evolution of the responsibility to protect, from its first formulation in the report of the International Commission on Intervention and State Sovereignty (the ICISS report on the responsibility to protect),[4] to its adoption by the UN General Assembly, until its consequent understandings in Security Council resolutions, shows that the responsibility to protect has instead contributed to strengthening the prohibition to use force. Diplomatic debates on the doctrine confirmed the *opinio iuris* against exceptions to the prohibition to use force based on humanitarian claims. As a result, the impact of the doctrine on the law of the use of force would be in line with the criminalisation of aggression by the Rome Statute, as they both reinforced the *ius contra bellum*. The following analysis challenges this assessment by exploring the influence of both the doctrine and the Court on the prohibition of the use of force.[5] In particular, it considers the area of the *ius ad bellum* where the responsibility to protect and the International Criminal Court risk overlapping: the crime of aggression and the third pillar of the responsibility to protect, which includes an intervention involving the use of force with the purpose of protecting civilian populations. The study investigates whether the doctrine could constitute a defence to a charge of aggression, and it analyses the current status of the *ius ad bellum* with its alleged grey areas where the concepts of prohibition and criminalisation seem nuanced.

This examination begins with an introduction to the approach of the responsibility to protect to the use of force, from its origin in 2001 to its subsequent implementations. It explores states' *opinio iuris* on the debate on whether the doctrine could constitute a new exception to the prohibition of the use

[3] Roland Paris, 'The Responsibility to Protect and the Structural Problems of Preventive Humanitarian Intervention' (2014) 21 International Peacekeeping 569.
[4] International Commission on Intervention and State Sovereignty, Gareth J Evans and Mohamed Sahnoun, *The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty* (International Development Research Centre 2001).
[5] Vito Todeschini, 'The Place of Aggression in the Responsibility to Protect Doctrine' in Richard Barnes and Vassilis Tzevelekos (eds), *Beyond Responsibility to Protect: Generating Change in International Law* (Intersentia 2016) 299.

of force. It examines in particular the debates within the General Assembly on the annual reports by the Secretary-General. It is argued that states consistently refuse any interpretation of the doctrine that violates the UN Charter. From this perspective, the impact of the responsibility to protect on the use of force is less controversial than it is often presented. This contradicts the literature that emphasises ambiguities and grey areas to argue that the doctrine may constitute justification for military interventions.[6] Rather, concerns about current dangers to the *ius contra bellum* stem from illegal military operations that are not consistently criticised and diplomatically condemned by most States. In this regard, this analysis presents episodes of use of force in Syria—the US airstrikes in response to alleged attacks with chemical weapons, and Turkey's Operations Olive Branch and Peace Spring—and the limited reaction of other states. From the analysis, it appears that states are more likely to condemn atrocity crimes (genocide, crimes against humanity, and war crimes) than violations of *ius ad bellum*.

The analysis then shifts to the criminalisation of aggression at the International Criminal Court, from the 1998 UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (the Rome Conference) to the 2017 Activating Resolution, through the 2010 Kampala Review Conference. The process of criminalisation confirms the consensus on the law on the use of force as established by the UN Charter. At the same time, an agreement on the definition of aggression and on the jurisdiction of the Court on the crime was extremely difficult to achieve. The final compromise limited the definition of aggression and the Court's jurisdiction over the crime. This arguably shows that states agree on the prohibition to use force entailing state responsibility but are not similarly eager to support the crime of aggression, which entails individual responsibility. As a result, it is argued that the responsibility to protect follows the path of the Court and introduces aggression in the subject-matter jurisdiction of the doctrine, which is currently composed of genocide, ethnic cleansing, crimes against humanity, and war crimes. This clarifies ambiguities surrounding the nature of the responsibility to protect and reinforces its support

[6] Eve Massingham, 'Military Intervention for Humanitarian Purposes: Does the Responsibility to Protect Doctrine Advance the Legality of the Use of Force for Humanitarian Ends?' (2009) 91 (876) International Review of the Red Cross 803.

within the General Assembly. Moreover, it contributes to strengthening the overall regime of *ius contra bellum*. In so doing, the doctrine could better fulfil its purpose to protect civilian populations from mass atrocities.[7]

2. The Responsibility to Protect and the Prohibition to Use Force

The most ambitious purpose of the doctrine of the responsibility to protect is to provide the international community with a new framework for international responses to situations of mass atrocities. As has been consistently affirmed since the ICISS report on the responsibility to protect that first introduced the doctrine, the responsibility to protect intends to offer a response to Kofi Annan's question at the UN Millennium Summit: 'if humanitarian intervention is, indeed, an unacceptable assault on sovereignty, how should we respond to a Rwanda, to a Srebrenica—to gross and systematic violations of human rights that affect every precept of our common humanity?'[8] The question remains open as, in subsequent years, a series of unauthorised military interventions took place, with alleged humanitarian purposes. From this point of view, the trend of state practice seems to create a tolerance of a certain kind of use of force in exceptional circumstances and with an 'expressly humanitarian purpose'.[9] From a legal point of view, part of the scholarship argues that such a practice could make a change in the *ius ad bellum* and create a new derogation for the prohibition to use force, on the basis that 'if a large enough group of supporters are prepared to adopt the new norm as the standard of appropriate behaviour, it will replace the previously accepted practice'.[10] Or at least, this would demonstrate that international law on the use of force 'is not 'static', but can change constructively—even through breaches of the law'.[11] Still, the majoritarian view agrees that 'the framework of jus ad bellum both under customary law and the UN Charter has proved to be rigorous and

[7] Ryan Liss, 'Crimes Against the Sovereign Order: Rethinking International Criminal Justice' (2019) 113 (4) American Journal of International Law 727.
[8] International Commission on Intervention and State Sovereignty, Gareth J Evans and Mohamed Sahnoun, *The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty* (International Development Research Centre 2001) 8.
[9] Jennifer M. Welsh, *Humanitarian Intervention and International Relations*, (Oxford University Press 2006) 56.
[10] Nicholas J. Wheeler, *Saving Strangers, Humanitarian Intervention in International Society* (Oxford University Press 2000) 5.
[11] Carsten Stahn, 'Between Law-breaking and Law-making: Syria, Humanitarian Intervention and 'What the Law Ought to Be'' (2014) 19 (1) Journal of Conflict & Security Law 25, 47.

robust enough to withstand the pressures for momentous and situational change'.[12]

The following analysis describes the twofold evolution of the debate on the responsibility to protect, from the first version of the doctrine as introduced in the ICISS report on the responsibility to protect, to states' declarations and a growing school of thought in scholarship.[13] The *opinio iuris* of states focused mostly on the preventive aspect of the doctrine, as affirmed in the reports of the Secretary-General, in the documents of the Special representative for the responsibility to protect, and, most significantly, in debates within the General Assembly, which give a valuable indication of the international community's view of the doctrine.[14] This part of the debate aims to encourage collective action to prevent atrocities. From this point of view, the doctrine does not introduce legal innovations: it reiterates, or reinforces, what is already permissible in international law. Several authors have proposed and advocated for an alternative interpretation of the doctrine, which controversially considers possible alteration of the *ius ad bellum* regime.

The definition and the significance of the responsibility to protect are constantly discussed and reshaped. Topics such as natural catastrophes,[15] internally displaced people,[16] and regional cooperation[17] have been part of the debates concerning the doctrine. These issues pertain mostly to the second pillar of the three-pillar structure proposed by UN Secretary-General Ban Ki-moon in 2009, which follows the formulation of the doctrine of paragraphs 138 and 139 of

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[12] Alexander Orakhelashvili, 'Changing Jus Cogens Through State Practice? The Case of the Prohibition of the Use of Force and its Exceptions' in Marc Weller (ed) *The Oxford Handbook of the Use of Force in International Law* (Oxford University Press 2015) 157.
[13] Daniel Fiott and Joachim Koops (eds) *The Responsibility to Protect and the Third Pillar: Legitimacy and Operationalization* (Palgrave Macmillan 2015); Vladimir Baranovsky and Anatoly Mateiko, 'Responsibility to Protect: Russia's Approaches' (2016) 51 The International Spectator 49; Ian Hall, 'Perilous Interventions and the Responsibility to Protect' (2017) 9 Global Responsibility to Protect 203.
[14] Mehrdad Payandeh, "With Great Power Comes Great Responsibility? The Concept of the Responsibility to Protect Within the Process of International Lawmaking' (2010) 35 Yale Journal of International Law 2.
[15] Tyra Ruth Saecho, 'Natural Disasters and the Responsibility to Protect: From Chaos to Clarity' (2007) 32 Brooklyn Journal of International Law 663.
[16] Erin D Mooney, 'Something Old, Something New, Something Borrowed, Something Blue—The Protection Potential of a Marriage of Concepts between R2P and IDP Protection' (2010) 2 Global Responsibility to Protect 60.
[17] David Carment and Martin Fischer, 'R2P and the Role of Regional Organisations in Ethnic Conflict Management, Prevention and Resolution: The Unfinished Agenda' (2009) 1 Global Responsibility to Protect 261.

the 2005 World Summit Outcome:[18] the responsibility of the international community to cooperate with states in preventing mass atrocities.[19] According to this approach, the preventive side of the doctrine consists of cooperating with states in addressing the underlying causes of violence, identifying problems before they escalate, and encouraging states to fulfil their commitments, without resorting to the use of force. This aspect of the doctrine does not raise any controversial issues, as it mainly reiterates and encourages what is already permissible under international law.

Already in the UN Charter, international law foresees and promotes pacific actions and international cooperation to implement human rights and prevent threats to international peace and security. The Charter considers the possibility of the use of force as an *extrema ratio*, to be authorised only in exceptional cases when all other measures are inadequate to maintain or restore peace and security. The Preamble of the Charter mentions, among the purposes of the UN, the aim to 'achieve international cooperation in solving international problems of … [a] humanitarian character and in promoting and encouraging respect for human rights'. Furthermore, the General Assembly has *inter alia* the function of assisting the realisation of human rights, according to Article 14, while Article 24 grants the Security Council the responsibility for the maintenance of international peace and security 'to ensure prompt and effective action by the United Nations'.

Furthermore, the obligation to prevent international crimes is enshrined in the main treaties dealing with international crimes: the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, which the contracting parties undertake to prevent and to punish in Article 1; the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, whose Article 2 states that '[e]ach State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction'; and Common Article 1 of the 1949 Geneva Conventions, which can be interpreted as including an obligation to prevent violations of international humanitarian law, including war crimes. In this regard, the main

[18] UNGA, 'World Summit Outcome' (2005) UN Doc A/RES/60/1, 30.
[19] Report of the Secretary-General, 'Responsibility to Protect: State Responsibility and Prevention' (2013) UN Doc A/67/629-S/2013/399.

innovation of the doctrine might be to contribute to the crystallisation of a customary obligation to prevent international crimes.

The innovative and controversial point of the doctrine concerns the possibility of international interventions involving the use of force in situations of ongoing atrocities, beyond what is permissible by the UN Charter, that is, beyond measures authorised by the Security Council. The essence of the responsibility to protect, since its initial conception in the 2001 report of the International Commission on Intervention and State Sovereignty, lies in the criticism of the UN Charter *ius ad bellum* regime and of the inaction of the Security Council, which is considered the main cause of the lack of international intervention in response to mass atrocities. According to the International Commission on Intervention and Sovereignty, indeed, the current regime leaves

> circumstances when the Security Council fails to discharge what this Commission would regard as its responsibility to protect, in a conscience-shocking situation crying out for action. It is a real question in these circumstances where lies the most harm: in the damage to international order if the Security Council is bypassed or in the damage to that order if human beings are slaughtered while the Security Council stands by. … [I]f the Security Council fails to discharge its responsibility in conscience-shocking situations crying out for action, then it is unrealistic to expect that concerned states will rule out other means and forms of action to meet the gravity and urgency of these situations. If collective organizations will not authorize collective intervention against regimes that flout the most elementary norms of legitimate governmental behaviour, then the pressures for intervention by ad hoc coalitions or individual states will surely intensify.[20]

All subsequent definitions of the responsibility to protect adopted within the UN, from the World Summit Document to the Secretary-General's reports, clearly affirm that any action taken pursuant to the doctrine must respect the UN Charter. The 2004 Report of the High-level Panel on Threats, Challenges and Change, 'A More Secure World: Our Shared Responsibility', states that 'the task is not to find alternatives to the Security Council as a source of authority but to

[20] International Commission on Intervention and State Sovereignty, Gareth J Evans and Mohamed Sahnoun, *The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty* (International Development Research Centre 2001) 55.

make the Council work better than it has', and that 'Article 51 of the Charter of the United Nations should be neither rewritten nor reinterpreted'.[21] The General Assembly Resolution '2005 World Summit Outcome' specifies that all the measures invoked to stop atrocities must be taken 'in accordance with the Charter, including Chapter VII' and 'bearing in mind the principles of the Charter and international law'.[22] The 2009 Secretary-General's Report 'Implementing the Responsibility to Protect' affirms that 'the responsibility to protect does not alter, indeed it reinforces, the legal obligations of Member States to refrain from the use of force except in conformity with the Charter'.[23]

Nevertheless, the responsibility to protect is occasionally presented as a ground for military interventions, both in compliance with the UN Charter—that is, when the doctrine is mentioned in Security Council resolutions, such as the authorisation to use force in Libya by Resolution 1973/2011—and outside the current international law regime. States do not generally share this view. Even the supporters of the doctrine of humanitarian intervention, such as the UK, do not invoke the responsibility to protect as a legal basis for the use of force. They rather interpret the doctrine as a diplomatic tool to prevent atrocities and to promote Charter-based interventions to protect civilians. The UK, for instance, mentions the responsibility to protect as a reason to persuade the permanent members of the Security Council not to veto resolutions aimed at intervening in situations where there is credible evidence of genocide.[24]

The use of responsibility to protect as a legal basis for military interventions is, however, often advocated in scholarship.[25] This begs the question whether and how the doctrine differs from previous theories aimed at extending the legality of military intervention out of the UN Charter. The following analysis

[21] UN Doc A/59/565.
[22] UNGA, 'World Summit Outcome' (2005) UN Doc A/RES/60/1 para 139.
[23] UN Doc A/63/677.
[24] House of Commons Foreign Affairs Committee, *Global Britain: The Responsibility to Protect and Humanitarian Intervention* (2018) HC 1005.
[25] Cristina Gabriela Badescu, *Humanitarian Intervention and the Responsibility to Protect: Security and Human Rights* (Routledge 2011); Alex Bellamy, *Responsibility to Protect: A Defense* (Oxford University Press 2015); Peter Hilpold (ed), *Responsibility to Protect (R2P): A New Paradigm of International Law?* (Brill Nijhoff 2015); Alex Bellamy (ed), *Humanitarian Intervention. Critical Concepts in Military, Strategic, and Security Studies* (Routledge 2017); Allen and Anna Macdonald and Henry Radice (eds), *Humanitarianism: A Dictionary of Concepts* (Routledge 2018); Paul Tang Abomo, *R2P and the US Intervention in Libya* (Palgrave Macmillan/Springer Nature 2019).

therefore covers the current status of the prohibition to use force in international law and the alleged challenges of the doctrine to the prohibition.

3. The Current Status of the *Ius ad Bellum* Regime

The prohibition to use force against the sovereignty of states is the cornerstone of international law as developed during the twentieth century. It is unequivocally expressed in the UN Charter, and it is consistently affirmed in the case law of the International Court of Justice. The Charter prohibits the use of force at Article 2(4): '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'. Furthermore, it limits the exceptions to the prohibition to two cases: Security Council authorisation to take 'action by air, sea, or land forces as may be necessary to maintain or restore international peace and security' (Article 41) and self-defence: 'Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations' (Article 51). The prohibition was reaffirmed by the International Court of Justice in several cases,[26] and it may amount to a *ius cogens* norm.[27] The International Law Commission affirmed that 'the law of the Charter concerning the prohibition of the use of force in itself constitutes a conspicuous example of a rule in international law having the character of *ius cogens*'.[28]

The International Court of Justice quoted this statement in the *Nicaragua* case, where the Court also specifically affirmed that the alleged purpose to protect human rights cannot constitute a legal basis to use force in violation of the UN Charter: 'the use of force could not be the appropriate method to monitor or ensure' the respect of human rights. Moreover, is stated that '[t]he protection of human rights, a strictly humanitarian objective, cannot be compatible with the

[26] Claus Kress, 'The International Court of Justice and the "Principle of Non-Use of Force"' in Marc Weller (ed), *The Oxford Handbook of the Use of Force in International Law* (Oxford University Press 2015) 561.
[27] 'Draft Articles on the Law of Treaties with Commentaries' (1966) 2 Yearbook of the International Law Commission, 247. For an example of doctrine confirming this view, see Ian D Seiderman, *Hierarchy in International Law: The Human Rights Dimension* (Intersentia Antwerp 2001) 62.
[28] Cit in *Nicaragua v United States of America* (Merits) [1986] ICJ Rep 134 para 190.

mining of ports, the destruction of oil installations, or again with the training, arming and equipping of armed forces.' The International Court of Justice therefore concluded that 'the argument derived from the preservation of human rights cannot afford a legal justification' for conduct involving the use of force.[29]

4. Humanitarian Intervention and the Responsibility to Protect

Despite the pre-eminence of the prohibition to use force as one of the main norms of international law, a school of thought still advocates the legitimacy of various exceptions to the *ius contra bellum*. In particular, in the absence of self-defence claims and Security Council authorisation, a military intervention would be legitimate in response to gross violations of international law involving atrocities perpetrated against civilian populations.[30] The debate on the existence of such an exception usually refers to the doctrine of humanitarian intervention. This doctrine has no generally shared definition—let alone recognition—in international law, but it is considered a particular form of use of force in a foreign state. It is characterised by (a) the claim of a humanitarian purpose, or with the wording of the responsibility to protect, for the purpose of stopping or opposing mass atrocities; (b) the absence of a legal mandate from the UN Security Council, and (c) a lack of consent of the state object of the intervention, which would make the use of force legal.[31] Humanitarian intervention does not have a clear legal basis or a defined scope, but it is considered to involve a major military commitment which comprehensively addresses the humanitarian crisis.[32]

The very first words of the ICISS report on the responsibility to protect, which first introduced the responsibility to protect, eloquently state, 'This report is about the so-called "right of humanitarian intervention"'. The report then draws a strong distinction between humanitarian intervention and responsibility to protect. Apparently, the distinction is merely textual, as the Committee did not intend to use the word 'humanitarian' with reference to a military operation and found that

[29] *Nicaragua v United States of America* (Merits) [1986] ICJ Rep 134 para 268.
[30] Fernando R Téson, 'Collective Humanitarian Intervention' (1995) 17 Michigan Journal of International Law 323.
[31] Robert Kolb, 'Note on Humanitarian Intervention' (2003) International Review of the Red Cross 85. For the issue of consent, Max Byrne 'Consent and the Use of Force: An Examination of "Intervention by Invitation" as a Basis for US Drone Strikes in Pakistan, Somalia and Yemen' (2016) 3 Journal on the Use of Force and International Law 97.
[32] Brendan Simms and DJB Trim (eds), *Humanitarian Intervention: A History* (Cambridge University Press 2015).

the former expression focused solely on the side of the intervening parties: 'Beyond the question of "humanitarian intervention" terminology, there is a rather larger language change, and associated reconceptualization of the issues, which the Commission has also felt it helpful to embrace. It is to this—the concept of the responsibility to protect'.[33]

The International Commission on Intervention and State Sovereignty emphasises the 'cost of inaction' of the international community in cases of mass atrocities and proposes two ways to extend the legality of the use of force in international law. First, it recalls the Uniting for Peace resolution, Resolution 377, adopted by the General Assembly in 1950. According to the resolution:

> 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.[34]

Nevertheless, unlike the Security Council, the General Assembly cannot adopt binding resolutions but can, instead, adopt only recommendations that do not have binding legal force.

Second, the ICISS report on the responsibility to protect advocates a regional intervention under Chapter VIII of the UN Charter, bypassing the requirement of Security Council authorisation. The authorisation, according to the report, could be obtained *ex post facto*. The report adds that 'there may be certain leeway for future action in this regard', suggesting the possible development of a customary norm. Despite some scholars' support of military interventions justified with the responsibility to protect,[35] state practice and *opinio iuris*, with the international community interpretation of the doctrine, are clearly against the

[33] International Commission on Intervention and State Sovereignty, Gareth J Evans and Mohamed Sahnoun, *The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty* (International Development Research Centre 2001).
[34] UNGA Res 377 (1950) UN Doc A/RES/377(V) A.
[35] Alex Leveringhaus, 'Liberal Interventionism, Humanitarian Ethics, and the Responsibility to Protect' (2014) 6 Global Responsibility to Protect 162.

constitution of such an exception to the *ius contra bellum*.[36] In the states' interpretation of the responsibility to protect, the aspect of the use of force is indeed considered as an *extrema ratio* to be implemented in accordance with the UN Charter. Conversely, states focus primarily on prevention of atrocities and state cooperation in facing crises. The doctrine is thus generally intended as to reiterate, or to reinforce, the actions of prevention, cooperation, and any other peaceful means to act against mass atrocities. Furthermore, even when dealing with international intervention if a state fails to protect its population, states see the doctrine as providing a framework for interventions in accordance with the UN Charter and, therefore, previously authorised through a Security Council resolution.

5. In Accordance with the Charter: *Opinio Iuris* on the Responsibility to Protect and the Use of Force

The analysis of the ICISS report on the responsibility to protect shows that the origin of the responsibility to protect clearly included the effort to introduce a derogation to the international prohibition of the use of force. From the perspective of the supporters of the doctrine, the introduction of a further legal base to use force outside of the UN Charter was necessary to create a legal framework for and limit to the military interventions in violation of the UN Charter, as performed in the 1990s, such as the case of Kosovo and, in the following years, in Afghanistan and Iraq.[37]

The progressive and ongoing development of the doctrine into an international norm, however, radically changed the original spirit of reformation of the *ius ad bellum*. In 2005, the General Assembly Resolution of 2005 adopted, with the World Summit Outcome, an interpretation of the doctrine that allows interventions only in accordance with the UN Charter. The majority of the UN General Assembly could not support the introduction of new legal leeway for military interventions. States confirmed this approach during subsequent debates

[36] Jonathan Graubart, 'R2P and Pragmatic Liberal Interventionism: Values in the Service of Interests' (2013) 35 Human Rights Quarterly 69; Anthea Roberts, 'Legality vs. Legitimacy: Can Uses of Force be Illegal but Justified?' in Philip Alston and Euan Macdonald (eds), *Human Rights, Intervention, and the Use of Force* (Oxford University Press 2008); Milena Sterio 'Humanitarian Intervention Post-Syria: Legitimate and Legal' (2014) 40 Brooklyn Journal of International Law 109.

[37] Iram Khalid, 'Politics of Intervention: A Case of Kosovo, Afghanistan and Iraq' (2011) 2 International Journal of Business and Social Science 11.

within the UN. A meaningful source to assess the positions of states on the doctrine and the use of force is the series of debates within the General Assembly in response to the UN Secretary-General's annual report on the responsibility to protect. Since 2009, the Secretary-General has drafted an annual report on the doctrine. Between 2009 and 2017, an informal interactive dialogue has followed the release of the ICISS report on the responsibility to protect. Since 2018, the responsibility to protect has been included in the formal agenda of the General Assembly.

The main General Assembly discussion on the implication of the doctrine for the *ius ad bellum* arguably took place in 2009, following the UN Secretary-General's report 'Implementing the Responsibility to Protect'.[38] This was the first annual report after the doctrine was adopted in paragraphs 138–139 of the World Summit Outcome Document.[39] In the subsequent annual discussions, the concern regarding *ius ad bellum* issues gradually decreased, as it was clarified that the doctrine involved only actions in accordance with the UN Charter. The General Assembly endorsed the first Secretary-General's report through Resolution 63/308 of 14 September 2009. Held in July 2009, the plenary debate of the General Assembly involved ninety-four speakers, representing 180 UN member states.

States discussed the three-pillars approach of the ICISS report on the responsibility to protect, which articulated the doctrine in three parts: the protection responsibilities of the state, international assistance and capacity building, and timely and decisive response. The third pillar attracted attention for its claim of international intervention in situations of mass atrocities. The report clearly stated that the third pillar involved only actions that respect the *ius ad bellum*. It clarified that the responsibility to protect is intended to respond to the 'need for an early and flexible response in such cases, one both tailored to the circumstances of the situation and fully in accord with the provisions of the Charter'.[40] Nevertheless, most states, in their declarations, expressed their concern for the possible impact of the doctrine on the prohibition to use force.

Egypt, representing the non-aligned movement, raised 'concerns about the possible abuse of R2P by expanding its application to situations that fall beyond

[38] Report of the Secretary-General, 'Implementing the Responsibility to Protect' (2009) UN Doc A/63/677.
[39] UNGA, 'World Summit Outcome' (2005) UN Doc A/RES/60/1.
[40] UN Doc A/63/677 Summary.

the four areas defined in the 2005 World Summit Document, misusing it to legitimize unilateral coercive measures or intervention in the internal affairs of States'.[41] Sweden, on behalf of the EU, Turkey, and other states from Eastern Europe and South Caucasus, supported the approach that keeps 'the scope of the principle narrow and the range of possible responses deep' and allows that 'enforcement measures in accordance with the United Nations Charter, through the Security Council or approved by the Security Council, should be possible, if needed'.[42] Pakistan acknowledged that 'everyone agreed with the first two pillars' but denounced the third, as it seems to introduce a 'right of intervention'.[43] Venezuela defined the third pillar as 'a challenge to the basic principles of international law, such as the territorial integrity of States, non-interference in internal affairs and, of course the indivisible sovereignty of States'.[44] Several states, such as Colombia, Japan, Chile, Liechtenstein, Serbia, Switzerland, Sri Lanka, and the Caribbean Community, invoked clear criteria to establish the threshold triggering actions under the responsibility to protect. The Caribbean Community representative asked, '[A]t what stage and under which circumstances will the Security Council be authorized to take action under Chapter VII of the Charter, including authorizing the use of force?'[45]

Notwithstanding these concerns, most delegations supported the Secretary-General's document, still emphasising that the approach to the use of force was in full compliance with the UN Charter. In summary, the debate was partially between those states denouncing the erosion of the prohibition to use force and those states reaffirming the validity of the prohibition. Both positions merely reiterated the existing provisions of the *ius ad bellum*, confirming the widespread opinion that the responsibility to protect should not impact conditions in the field. States clarified that they did not consider the doctrine as a new legal basis for military interventions in violation of the UN Charter. The mere risk that the responsibility to protect could have some negative impact on the *ius contra bellum*

[41] UNGA Verbatim Record (23 July 2009) UN Doc A/63/PV.97.
[42] ibid.
[43] UNGA Verbatim Record (24 July 2009) UN Doc A/63/PV.98.
[44] ibid.
[45] UNGA Verbatim Record (24 July 2009) UN Doc A/63/PV.99.

led many states to decline their support of the doctrine. As Ireland noted, the debate was 'reduced to a myopic argument about military force'.[46]

In the following years, the annual discussions within the General Assembly gradually lost interest in and became less concerned about the use of force. Ten years later, in June 2019, only four states raised concerns about the consequences of the doctrine for the prohibition of the use of force.[47] The debates within the General Assembly clarified that the doctrine does not support any action that is not 'fully in accord with the provisions of the Charter'.[48]

6. Use of Force in Syria: State Practice and the Responsibility to Protect

A source of concern for the development of the *ius contra bellum* comes from state practice in the use of force for self-defence and due to Security Council authorisation. To further enquire the reasons of this concern, a meaningful situation to analyse is a series of military interventions that took place in the territory of Syria between 2016 and 2019. Indeed, while states do not question the UN Charter system of the law on the use of force, certain blatant violations of the prohibition to use force have failed to trigger a consistent reaction from the international community. The illegality of these operations and the reactions of states allow some reflection on the development of the international community's opinions and practices regarding the use of force and the protection from mass atrocities.

While some scholars argue that the responsibility to protect is a legal justification for these military operations, states do not rely on the doctrine to justify these interventions.[49] Instead of directly invoking the doctrine, the US and Turkey claimed different justifications for the use of force in alleged response to human rights abuses, including the legality of forcible countermeasures.[50] In cases of internationally wrongful acts, international law allows affected states to adopt countermeasures, subject to various limitations (e.g., the existence of a breach, the

[46] ibid.
[47] UNGA Verbatim Record (27 June 2019) UN Doc A/73/PV.93.
[48] Report of the Secretary-General, 'Implementing the Responsibility to Protect' (12 January 2009) UN Doc A/63/677 Summary.
[49] Daniela Abratt, 'US Intervention in Syria: A Legal Responsibility to Protect' (2017) 95 Denver Law Review 21.
[50] Marco Longobardo, 'Genocide, Obligations Erga Omnes, and the Responsibility to Protect: Remarks on a Complex Convergence (2015) 19 The International Journal of Human Rights 1199.

need for a prior demand for reparation, the necessity to comply with proportionality), including the prohibition to use force, as clearly stated in Article 50 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts, adopted by the International Law Commission in 2001.[51] Thus, forcible countermeasures, sometimes referred to as reprisals, are in principle illegal under international law.[52]

In the aftermath of the 1999 NATO military intervention in Serbia, undertaken without Security Council authorisation, it was argued that a new international customary norm was *in statu nascendi*, modifying the status of the prohibition of forcible countermeasures in international law.[53] Accordingly, in cases of gross violations of human rights, the use of force as a countermeasure could be allowed under certain conditions. This type of derogation from the regulation of the use of force did not yet exist in international law because of the lack of sufficient state practice, while, according to the author, there was already an *opinio iuris ac necessitatis*, given the diplomatic position of the majority of states concerning the NATO intervention.

In April 2017, the US launched a missile strike against Syria's Shayrat Airbase, claiming to be acting in response to an alleged chemical attack by Syrian forces. At the time of the armed attack, no independent investigation had confirmed the use of chemical weapons by Syria. Two months later, in June 2017, the Organisation for the Prohibition of Chemical Weapons published a report stating that it had found evidence of the chemical attack.[54] The report could not confirm that the Syrian government was the perpetrator of the attack, as the mandate of the fact-finding mission of the organisation was to determine whether chemical weapons had been used and not to identify those responsible for the alleged attack. Most commentators defined the Shayrat airstrike as a clear

[51] International Law Commission, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts' UN Doc A/56/10.
[52] Paolo Picone, 'L'insostenibile leggerezza dell'art. 51 della Carta ONU' (2000) 83 Rivista di diritto internazionale 326.
[53] Antonio Cassese, 'A Follow Up: Forcible Humanitarian Countermeasures and Opinio Necessitatis' (1999) 10 European Journal of International Law 791; Bruno Simma, 'NATO, the UN and the Use of Force: Legal Aspects' (1999) 10 European Journal of International Law 1; Antonio Cassese, 'Ex iniuria ius oritur: Are We Moving Towards Legitimation of Forcible Humanitarian Countermeasures in the World Community?' (1999) 10 European Journal of International Law 23.
[54] 'Decision Report of the OPCW Fact-finding Mission in Syria Regarding an Alleged Incident in Khan Shaykhun, Syrian Arab Republic April 2017' (30 June 2017) UN Doc S/2017/567.

violation of international law, perpetrated in the absence of a self-defence justification and without any Security Council authorisation.

Conversely, a considerable segment of the international community condemned Syria's alleged use of chemical weapons, but not the forcible countermeasure taken against it. The US attack was, in fact, criticised as an act of aggression by Syria; by its main allies in the area, Russia and Iran; and by other states such as North Korea.[55] Russia defined the attack as 'an act of aggression against a sovereign state delivered in violation of international law under a far-fetched pretext'.[56] Iran described the 'unilateral measure as dangerous, destructive and a violation of international law'.[57] North Korea condemned the operation as 'an unforgivable act of aggression against a sovereign state'.[58]

The legitimacy of the attack was first affirmed by the US and its allies in the area. Interestingly, most states not involved in the conflict criticised Syria for using chemical weapons but not the US aggression in itself. In a joint statement, France and Germany maintained that Syria 'bears full responsibility' for the attack.[59] The EU, through President of the European Council Donald Tusk, similarly supported the intervention: 'U.S. strikes show needed resolve against barbaric chemical attacks. EU will work with the U.S. to end brutality in Syria'.[60] Saudi Arabia defined the operation as 'a response to crimes this regime has committed towards its people in light of the inaction of the international community in stopping it in its tracks'.[61] Jordan considered the strike 'a necessary and appropriate response to the nonstop targeting of innocent civilians'.[62] Turkey characterised the attack as 'a positive response to the Assad regime's war crimes'.[63] NATO Secretary-General Jens Stoltenberg assigned the responsibility

[55] Michael P Scharf, 'Striking a Grotian Moment: How the Syria Airstrikes Changed International Law Relating to Humanitarian Intervention' (2019) 19 Chicago Journal of International Law 6.
[56] Julian Ku, 'Almost Everyone Agrees that the U.S. Strikes Against Syria are Illegal, Except for Most Governments'. Opinio Juris (7 April 2017) <http://opiniojuris.org/2017/04/07/almost-everyone-agrees-that-the-u-s-strikes-against-syria-are-illegal-under-international-law-except-for-most-governments/> accessed 25 October 2020.
[57] ibid.
[58] ibid.
[59] Chiara Palazzo and Peter Foster, 'Assad Bears Full Responsibility: How the World Reacted to Donald Trump's Missile Strike on Syria' The Telegraph (7 April 2017) <https://www.telegraph.co.uk/news/2017/04/07/us-air-strike-syria-world-reacted-donald-trumps-decision-intervene/> accessed 25 October 2020.
[60] ibid.
[61] ibid.
[62] ibid.
[63] ibid.

of the attack to Syria, noting that 'NATO has consistently condemned Syria's continued use of chemical weapons as a clear breach of international norms and agreements'.[64]

The tolerance towards this kind of intervention was repeated the following year with another airstrike. On 14 April 2018, the US, the UK, and France conducted a second attack on Syrian chemical weapons facilities in response to the alleged use of chemical weapons in the Syrian city of Douma on 7 April 2017. The Organisation for the Prohibition of Chemical Weapons confirmed that there were 'reasonable grounds that the use of a toxic chemical as a weapon took place', without identifying possible perpetrators.[65]

The first official statement came from the UN Security Council Emergency Session, which was called the day of the airstrike.[66] The Russian Federation proposed a draft resolution which demanded 'that the United States and its allies immediately and without delay cease the aggression against the Syrian Arab Republic and … refrain from any further use of force in violation of international law and the UN Charter'.[67] However, only three members of the Council supported the resolution: Russia, China, and Bolivia. Côte d'Ivoire, France, Kuwait, Netherlands, Poland, Sweden, the UK, and the US voted against it, whereas Equatorial Guinea, Ethiopia, Kazakhstan, and Peru abstained.

The positions of the fifteen members of the Security Council give the first hint of the approach of the international community to a military intervention adopted in response to an alleged use of chemical weapons. The members failed to express the clear condemnation of a blatant breach of the prohibition to use force. The support for the operation went beyond the group of so-called Western states: almost half of the members of the international community expressly supported the military intervention, while only a minority of states explicitly condemned the action. The support for the use of force, however, makes no reference to the legal justifications, and the lack of reaction to a violation of

[64] Julian Ku, 'Trump's Syria Strike Clearly Broke International Law—And No One Seems to Care' Vox (19 April 2017) <https://www.vox.com/the-big-idea/2017/4/19/15345686/syria-un-strike-illegal-un-humanitarian-law> accessed 25 October 2020.
[65] 'Report of the Fact-Finding Mission of the Organisation for the Prohibition of Chemical Weapons Dated 1 March 2019' (S/1731/2019); Gavan Patrick Gray, 'Evidentiary Thresholds for Unilateral Aggression: Douma, Skripal and Media Analysis of Chemical Weapon Attacks as a Casus Belli' (2019) 13 Central European Journal of International & Security Studies.
[66] UNSC Verbatim Record (14 April 2018) UN Doc S/PV.8233.
[67] UNSC Draft Res (14 April 2018) UN Doc S/2018/355.

international law is not sufficient to create a derogation to a treaty norm or to affirm its decay. The US, the UK, and France provided different and contradictory justifications for the operation, and few other states clarified their support for the military intervention with legal arguments.

The UK Government promptly issued a policy paper to affirm that the intervention could be justified by the doctrine of humanitarian intervention: 'the UK is permitted under international law, on an exceptional basis, to take measures in order to alleviate overwhelming humanitarian suffering. The legal basis for the use of force is humanitarian intervention'.[68] The paper further lists the conditions for the doctrine to be applicable: evidence of humanitarian distress on a large scale, a requirement for immediate action, absence of practicable alternatives to the use of force, and necessity and proportionality. While the UK consistently affirmed the legality of humanitarian intervention in Syria since 2013, it is worth reiterating that international law does not yet recognise the doctrine, as, among others, an inquiry of the UK Foreign Affairs Committee confirmed in May 2018.[69]

The US Justice Department's Office of Legal Counsel published a memorandum opinion for the counsel to the president on 31 May 2018 to justify the legality of the April 2018 airstrike. The US justified the operation, affirming the purpose to 'further important national interests in promoting regional stability'; to prevent 'the worsening of the region's humanitarian catastrophe'; and to deter 'the use and proliferation of chemical weapons'.[70] In addition, it affirmed that the operation did not constitute a proper war and therefore did not require the approval of the US Congress. The memorandum presents controversial arguments under US law, but it does not engage in the debate of the legality of the intervention under international law.

France abstained from providing legal justifications for the intervention. In the Security Council emergency meeting, its representative evoked the words of the Preamble of the UN Charter, and affirmed, somewhat dryly, the purpose 'to

[68] UK Prime Minister's Office, 'Syria Action – UK Government Legal Position' (Policy Paper 14 April 2018) <https://www.gov.uk/government/publications/syria-action-uk-government-legal-position/syria-action-uk-government-legal-position> accessed 25 October 2020.
[69] House of Commons Foreign Affairs Committee, *Global Britain: The Responsibility to Protect and Humanitarian Intervention* (2018) HC 1005.
[70] United States Office of Legal Counsel, 'Memorandum Opinion for the Counsel to the President, April 2018 Airstrikes Against Syrian Chemical-Weapons Facilities' (2018) 11 Opinions of the Office of Legal Counsel 42.

establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained'.[71]

The silence of states could arguably express an acquiescence to the adoption of forcible countermeasures in response to gross human rights violations. Even in this case, it would constitute an exception, and state practice does not show any crystallisation of a similar customary norm. In case of use of force without any Security Council authorisation, states have mostly relied on an extensive interpretation of the principle of self-defence.[72] In contrast, states do not usually claim the possibility to use force as a reprisal for a violation of human rights.

7. Turkey's Military Operations in North-West Syria

The military interventions Turkey carried out in the territory of Syria between 2018 and 2019 show meaningful developments in the interpretation of the responsibility to protect and the *ius ad bellum*. The operations were respectively named Olive Branch and Peace Spring, this choice was considered 'an Orwellian designation even by modern military standards'.[73]

On 20 January 2018, Turkey initiated Operation Olive Branch, a military operation in the territory of Northern Syria, also known as Rojava, an autonomous region of the Kurdish majority which obtained international attention as a result of both its role in fighting the Daesh in the field and its model governance called 'democratic confederalism'. The main attacks targeted the Afrin Region (one of the three cantons of Rojava, the other two being Jazira and Kobane), which Turkey captured on 18 March. However, Turkey affirmed that the military operation could expand the attacks in the rest of Northern Syria and possibly in the territory of Iraq.[74]

Operation Olive Branch seems to constitute a clear example of violation of *ius ad bellum* that amounts to an act of aggression. For the analysis of the

[71] UNSC 'Following Air Strikes against Suspected Chemical Weapons Sites in Syria, Security Council Rejects Proposal to Condemn Aggression' (14 April 2018) Press Release SC/13296.
[72] Jim Whitman, 'Humanitarian Intervention in an Era of Pre-Emptive Self-Defence' (2005) 36 Security Dialogue.
[73] Peter Galbraith 'The Betrayal of the Kurds' (21 November 2019) <www.nybooks.com/articles/2019/11/21/betrayal-of-the-kurds/>. Peter Galbraith is the former US ambassador to Croatia and assistant Secretary-General of the UN in Afghanistan.
[74] Tom Ruys, Carl Vander Maelen and Sebastiaan Van Severen (eds), 'Digest of State Practice 1 January–30 June 2018' (2018) 5 Journal on the Use of Force and International Law 324.

evolution of the *ius ad bellum*, it is particularly interesting to examine the reaction, or lack thereof, of most actors in the area, as well as of the international community in general. The general acquiescence towards the military operation seemed indeed to question the current interpretation of the fundamental tenets of self-defence as a legitimate basis for use of force. Turkey argued for the legality of the intervention in two identical letters, dated 20 January 2018, to the UN, one addressed to the Secretary-General and the other to the president of the Security Council. Turkey based the legitimacy of its actions on Article 51 of the UN Charter, thereby invoking the principle of self-defence against a 'threat of terrorism'. According to the document, this threat undermined Turkish national security, the territorial integrity of Syria, and regional and international security.

However, there are fundamental flaws in Turkey's argument on the legality of its actions. The Turkish justification falls within the evolving legal regime of self-defence against imminent terrorist attacks in territories which are not under the control of any state. The justification of self-defence requires several conditions. Turkey was required to clearly substantiate its allegation that an armed attack took place.[75] But in this case, Turkey merely mentioned general, not even imminent, 'threats of terrorism' occurring at its Syrian border. In addition, self-defence against a non-state actor, such as Rojava, would arguably only be legitimate in the presence of a large-scale attack,[76] a circumstance which did not arise in this case. The argument that the operation was intended to safeguard the territorial integrity of Syria is also problematic in that the government of Damascus denounced it as an act of aggression in a letter to the UN Security Council. In its declaration to the Security Council, furthermore, Turkey affirmed that it targeted Daesh activity in the region of Afrin, yet the Syrian Army denied that Daesh had a presence in the area.

Moreover, the Kurdish institutions controlling the region of Afrin, and other groups active in the area, are not designated as 'terrorist' groups. Turkey defined the Kurdish administration in Northern Syria as the PKK/KCK/PYD/YPG terrorist organisation. In so doing, Turkey equated the Turkish Kurds organisation the PKK (*Partiya Karkerên Kurdistanê* [Kurdistan Workers' Party]) to the Kurdish administration of Northern Syria (PYD, or *Partiya Yekîtiya Demokrat*

[75] *Democratic Republic of the Congo v Uganda* (Judgment) [2005] ICJ Rep 168 para 146.
[76] ibid para 147.

[Democratic Union Party]) and its militia (YPG, or *Yekîneyên Parastina Gel* [People's Protection Unit]). While the PKK is considered a terrorist organisation by several states, including the US and the EU (but not other states or entities, *inter alia,* the UN), the Syrian institutions are not listed as terrorist organisations. On the contrary, they have been receiving military support in the fight against Daesh from the international coalition Combined Joint Task Force – Operation Inherent Resolve.

In the context of the Syrian conflict, which broke out in 2011, Rojava proclaimed its autonomy from the Syrian government in January 2014. The Kurdish Democratic Union Party (PYD) led the self-proclaimed autonomous region to elections and to the adoption of its first constitution: the Charter of the Social Contract. This charter promoted the democratic participation and human rights of minorities within the multicultural region of Rojava by means of a polity system called 'democratic confederalism'. This theory aims to foster coexistence in multicultural societies by transcending the notion of the nation state. The region implemented its autonomous administration without claiming independence but by choosing to remain part of a united Syria.

In May 2014, Daesh began carrying out attacks in the region. The most notable success of the local army, the People's Protection Unit (YPG), was their resistance in the siege of Kobane, one of the three cantons of Rojava, which lasted from September 2014 to March 2015. The resistance to the siege is considered a turning point in the war against Daesh. The notion of the state, and of the nation-state in particular, is presented in the Preamble of the Social Contract as the root of the crises and problems affecting the people of Rojava. The administration accordingly does not aim to self-proclaim an independent state. At the same time, it does not enter into conflict with the Syrian state but recognises its territorial integrity and maintains a 'tacit alliance' with the government. Article 7 of the Social Contract reiterates that the region does not aim to build a new state.

With the attack in Northern Syria, Turkey invoked the principle of self-defence against a potential threat of terrorism—in the absence of an armed attack and against a group which is not largely acknowledged as being terrorist. In so doing, Turkey violated the prohibition to use force in blatant violation of the fundamental tenets of self-defence as a legitimate basis for the use of force. The tacit acceptance of the abuse of the self-defence principle to carry out military

operations dilutes, under certain conditions, the prohibition to use force. An extensive interpretation of self-defence, and the tolerance of unauthorised military operations, may extend the possibility to use force beyond the current limits established under international law and allow states to justify acts of aggression with arguments of self-defence against threats of terrorism.

On 24 February 2018, the UN Security Council unanimously adopted Resolution 2401, which demands 'a durable humanitarian pause for at least 30 consecutive days throughout Syria'.[77] The resolution was adopted following the increase in violence by the Syrian Army in Ghouta and Idlib, which are specifically mentioned in the document. Conversely, because Afrin is not mentioned in the document, Turkey has argued that its military operation in Afrin is not covered by the resolution and that the resolution does not prohibit the use of force against the Kurdish targets. While specifically referring to Ghouta and Idlib in the context of humanitarian crises and the escalation of violence in the territory of Syria, the resolution clearly states that the only exception to the ceasefire, imposed 'throughout Syria', relates to the operations against Daesh and Al-Qaeda. The humanitarian pause, therefore, is fully applicable in relation to Northern Syria; thus, the Turkish attacks against Kurdish militia fall squarely within the scope of the resolution.

Beginning in January 2018, Turkey started to perpetrate grave violations of international law, including a breach of the *ius ad bellum* regime, failure to adhere to a UN Security Council resolution, and a pattern of violations of humanitarian law. The Syrian government immediately denounced the aggression against its territorial integrity. The US, the EU, and most of the international community expressed concern only for the humanitarian situation. An interpretation of the responsibility to protect entails the obligation to act against violations of the use of force, to protect both the victims of the military intervention and, from a theoretical point of view, the same legal regime of *ius contra bellum.*

7.1 Operation Peace Spring of 2019

Operation Peace Spring extended and further developed the Olive Branch military operation. As was the case for Operation Olive Branch, Turkey issued a justification that appeared elaborate by reaffirming the right of self-defence and

[77] UN Doc S/RES/2401 (2018).

the responsibility to fight terrorism. The aim 'to save brotherly Syrians' became the aim 'to liberate Syrians from a tyranny'.[78]

Turkey initiated Operation Peace Spring on 9 October 2019, affirming that it was acting in line with the right of self-defence as outlined in Article 51 of the UN Charter. The purpose of the operation, according to Turkey, was to counter the imminent terrorist threat; to ensure Turkey's border security; to neutralise terrorists, starting along the border regions adjacent to Turkish territory; and to liberate Syrians from the tyranny of PKK's Syrian branch, PKK/PYD/YPG, and Daesh. According to Turkey, this operation was essential also within the context of the responsibility attributed to UN member states in the fight against terrorism through Security Council Resolutions 1373 (2001), 1624 (2005), 2170 (2014), 2178 (2014), 2249 (2015), and 2254 (2015). Furthermore, Turkey affirmed its use of force in the Syrian territory to protect the Syrian territorial integrity from separatists:

> unequivocally and strongly committed to the territorial integrity and political unity of Syria, Turkey undertakes this measure with a view to contributing to and furthering these fundamental principles. This operation was also a solid expression of Turkey's determination to reject any separatist agenda aimed at undermining the sovereignty and territorial integrity of Syria.[79]

Syria unequivocally rejected the Turkish version of events:

> On 9 October the Turkish regime began a new chapter in its aggression against my country, in flagrant violation of international law, the principles of the Charter of the United Nations, the relevant Security Council resolutions, the outcome documents of the Astana meetings and the Sochi memorandum, all of which stress the importance of respecting Syria's territorial integrity and sovereignty.[80]

In this case, the reaction of the international community was a strong condemnation of the Turkish initiative. Interestingly, however, only a few states (among which Cyprus, Liechtenstein, Greece, and Switzerland) referred to international law on the use of force or labelled the invasion as an act of

[78] UNGA, 'Letter dated 9 October 2019 from the Permanent Representative of Turkey to the United Nations addressed to the President of the General Assembly' UN Doc S/2019/804, 2.
[79] ibid.
[80] UNSC Verbatim Record (24 October 2019) UN Doc S/PV.8645.

aggression. States preferred to focus on the humanitarian consequences of the invasion and other atrocities that followed the use of force.[81] In other words, states appeared to privilege criticisms on violations of *ius in bello* rather than on violations of *ius ad bellum*. Given the clear consequences of acts of aggression, the responsibility to protect may have played a role in promoting the opposition of states to illegal military interventions.

The actual possibility of protecting human rights using force, and its ethical and political value, have yet to be demonstrated. In any case, the argument does not question the persistence of the legal prohibition to use force, which is the key international rule to protect international peace and security. The current risks of abuse of a new exception for military intervention are the same as those identified by the International Court of Justice in *Corfu Channel:*

> The Court can only regard the alleged right of intervention as the manifestation of a policy of force, such as has, in the past, given rise to the most serious abuses and as such cannot, whatever be the present defects in international organization, find a place in international law. Intervention is perhaps still less admissible in the particular form it would take here; for, from the nature of things, it would be reserved for the most powerful States, and might easily lead to perverting the administration of international justice itself.[82]

8. The International Criminal Court and the Criminalisation of Aggression

Alongside the development of the responsibility to protect, during the 2010s the international community's approach towards the *ius ad bellum* was influenced by the criminalisation of the act of aggression, with the inclusion of the crime of aggression in the Rome Statute and the subsequent activation of the jurisdiction of the International Criminal Court in 2017. The activation of the jurisdiction of the Court over the crime of aggression affected the responsibility to protect and the *ius ad bellum* and deserves specific reflection. If the doctrine of the responsibility to protect risked eroding the prohibition to use force, the

[81] Benedikt Behlert and Maximilian Bertamini, 'In dubio contra bellum. Why the Prohibition to Use Force will Survive Turkey's Operation Peace Spring' (29 October 2019) *Völkerrechtsblog*.
[82] *Corfu Channel Case (UK v Albania)* (Merits) [1949] ICJ Rep 4, 35.

criminalisation of aggression might have had the opposite effect of strengthening the prohibition.

Most relevantly for the relationship between the doctrine and the Court, the activation of the jurisdiction over the crime of aggression hypothetically generates the harshest clash between the two institutions.[83] An operation involving the use of force based on the responsibility to protect, indeed, could be prosecuted in front of the International Criminal Court. This analysis argues that such a hypothesis is unlikely because of the definition of the crime and limited jurisdiction. Rather, the impact of the doctrine and the Court on the *ius ad bellum* constitutes a complex variety of circumstances that are not clearly attributable to established definitions.[84] The following analysis then explores the possible grey areas in the interplay between the crime of aggression, the prohibition to use force, and the responsibility to protect.[85]

8.1 Historical Development of the Criminalisation of Aggression

The criminalisation of aggression is the result of more than a century of diplomatic efforts. In 1758, the Swiss jurist Emmerich de Vattel affirmed the necessity to prosecute those responsible for acts of aggression. Chapter XI of his *The Book of Nations*, titled 'On the Sovereign who Wages an Unjust War', declares: 'whoever takes up arms without a lawful cause … is chargeable with all the evils, all the horrors of the war: all the effusion of blood, the desolation of families, the rapine, the acts of violence, the ravages, the conflagrations, are his works and his crimes … in consequence of it [he] is guilty of a crime against mankind'.[86]

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[83] Frédéric Mégret, 'ICC, R2P, and the International Community's Evolving Interventionist Toolkit' (2010) 21 Finnish Yearbook of International Law 21; S Nouwen, 'Complementarity in Practice: Critical Lessons from the ICC for R2P' (2010) 21 Finnish Yearbook of International Law 53; Mark Kersten, 'A Fatal Attraction? Libya, the UN Security Council and the Relationship between R2P and the International Criminal Court' in J Handmaker and K Arts (eds), *International Law and the Politics of Justice* (Cambridge University Press 2014); EF Defeis, 'The Responsibility to Protect and International Justice' (2011) 10 Hofstra Journal of International Business and Law 91.

[84] Sergey Sayapin, *The Crime of Aggression in International Criminal Law: Historical Development, Comparative Analysis and Present State* (Springer 2014).

[85] Benjamin B Ferencz, 'Enabling the International Criminal Court to Punish Aggression' (2007) 6 Washington University Global Studies Law Review 551.

[86] Emmerich de Vattel, *The Law of Nations: Or, Principles of the Law of Nature Applied to the Conduct and Affairs of Nations and Sovereigns* (first published 1758, Liberty Found 2008) 278.

The first proposal to prosecute an individual for waging an aggressive war came in the aftermath of the First World War.[87] Article 227 of the Treaty of Versailles provided for the establishment of a special tribunal to prosecute the Kaiser of Germany, identified as the leader of the state responsible for the First World War, 'for a supreme offense against international morality and the sanctity of treaties'. In 1928, the Briand–Kellogg Pact historically outlawed the use force as a method of dispute settlement. Oona A. Hathaway and Scott J. Shapiro highlighted the relevance of the agreement, also known as the Paris Peace Pact, as follows:

> The Peace Pact quite plainly did not create world peace. Yet it was among the most transformative events of human history, one that has, ultimately, made our world far more peaceful. It did not end war between states, but it marked the beginning of the end—and, with it, the replacement of one international order with another.[88]

The pact, however, concerned state responsibility and not individual criminal responsibility. Article 1 states that '[t]he High Contracting Parties solemnly declare in the names of their respective peoples that they condemn recourse to war for the solution of international controversies and renounce it as an instrument of national policy in their relations to one another'.

Aggressive warfare was prosecuted at the International Military Tribunal at Nuremberg (the Nuremberg trial), where twelve individuals were convicted of crimes against peace,[89] and at the International Military Tribunal for the Far East (the Tokyo trial), which convicted twenty-three defendants for the same crime, under the same definition of crimes against peace.[90] When the Second World War

[87] William A Schabas, *The Trial of the Kaiser* (Oxford University Press 2018) 20.
[88] Oona A Hathaway and Scott J Shapiro, *The Internationalists. How a Radical Plan to Outlaw War Remade the World* (Simon & Shuster 2017) 9.
[89] Roger S Clark, 'Nuremberg and the Crime Against Peace' (2007) 6 Washington University Global Studies Law Review 527.
[90] Mary Ellen O'Connell and Mirakmal Niyazmatov, 'What is Aggression?: Comparing the Jus ad Bellum and the ICC Statute (2012) Journal of International Criminal Justice 189; Carrie McDougal, *The Crime of Aggression under the Rome Statute of the International Criminal Court* (Cambridge University Press 2013); Kirsten Sellars, *'Crimes Against Peace' and International Law* (Cambridge University Press 2013);Yuma Totani, 'The Case against the Accused Yuma Totani' in Yuki Tanaka, Tim McCormack and Gerry Simpson (eds), *Beyond Victor's Justice? The Tokyo War Crimes Trial Revisited* (Brill 2011); Noah Weisbord, 'Bargaining Practices: Negotiating the Kampala Compromise for the International Criminal Court' (2014) 76 Law and Contemporary Problems 85; Jennifer Trahan, 'The Rome Statute's Amendment on the Crime of Aggression: Negotiations at the Kampala Review Conference' (2011) 11 International Criminal

began and aggression was perpetrated, crimes against peace were not codified. The Nuremberg Tribunal addressed the problem with the principle of legality by creating a bridge between state and individual responsibility. It argued that the principle was respected, as the defendants were aware that their conduct was illegal:

> [T]he maxim *nullum crimen sine lege* is not a limitation of sovereignty, but is in general a principle of justice. To assert that it is unjust to punish those who in defiance of treaties and assurances have attacked neighbouring states without warning is obviously untrue, for in such circumstances the attacker must know that he is doing wrong, and so far from it being unjust to punish him, it would be unjust if his wrong were allowed to go unpunished.[91]

In addition, the tribunal stressed the relevance of the deterrent value of sanctioning individuals: 'Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced'.[92]

Interestingly, the Nuremberg and Tokyo trials had a meaningful impact on the positions adopted decades later by Germany and Japan on the crime of aggression. Both states demonstrated to be committed to finding a consensus to introduce the crime of aggression in the Rome Statute on the basis that what was considered the supreme crime in 1945 could not be disregarded by an independent permanent international criminal court established more than fifty years later. Moreover, Germany and Japan insisted on the necessity to codify the crime in accordance with the principle of legality. During the negotiation, Germany and Japan thus made explicit reference to the necessity to develop the precedent of international military tribunals and to introduce the crime in the statute to

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Law Review 49; David Scheffer, 'The Complex Crime of Aggression under the Rome Statute' (2010) 23 Leiden Journal of International Law 897.Claus Kress and Leonie von Holtzendorff, 'The Kampala Compromise on the Crime of Aggression' (2010) 8 Journal of International Criminal Justice 1179; Christian Wenaweser and Sina Alavi, 'From Nuremberg to New York: The Final Stretch in the Campaign to Activate the ICC's Jurisdiction over the Crime of Aggression'(2017) 58 Harvard International Law Journal*;* M Cherif Bassiouni, 'The History of Aggression in International Law, Its Culmination in the Kampala Amendments, and Its Future Legal Characterization' (2017) 58 Harvard International Law Journal.

[91] Carsten Stahn, 'The "End", the "Beginning of the End" or the "End of the Beginning"? Introducing Debates and Voices on the Definition of "Aggression"' (2010) 23 Leiden Journal of International Law 875.

[92] *Judgment of the Nuremberg International Military Tribunal 1946* (1947) 41 American Journal of International Law 172.

safeguard the principle of *nullum crimen sine lege*, in contrast with the Nuremberg and Tokyo trials.

In the Preparatory Committee, prior to the Rome Conference, Germany stated:

> Not to include this crime would, in our view, be a regression behind the Nuremberg Charter of 1945 … we need the inclusion of this crime for reasons of deterrence and prevention, and in order to reaffirm in the most unequivocal manner that the waging of an aggressive war is a crime under international law. We continue to favour a viable self-sustained definition, as short as possible, containing - in accordance with the principle of 'nullum crimen sine lege'—all the necessary elements and precise criteria of a full international criminal norm.[93]

At the Review Conference, where provisions on the crime of aggression were adopted, in 2010, Japan affirmed:

> Japanese nationals were convicted of crime against peace and of war crimes by the International Military Tribunal for the Far East. Japan solemnly accepted its judgments by virtue of the San Francisco Peace Treaty. As a country with an ingrained memory of the history and lessons learned therefrom, Japan firmly believes that ICC should be able to exercise its jurisdiction over the crime of aggression. And international criminal tribunals should not be operated on the basis of ex post facto law. Any criminal suspect should be prosecuted and punished based on the principle of legality including due process of law. I am saying this at the outset, because for Japan, this is a matter of 'principle', and I believe that this must be the case for all those who are dealing with criminal law.[94]

Article 6(a) of the Statute of the International Military Tribunal defines crimes against peace as 'planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the

[93] 'Preparatory Committee on the Establishment of an International Criminal Court 1–12 December 1997, Working Group on Definitions and Elements of Crime Proposal by Germany, Article 20: The Crime of Aggression' cit in Stefan Barriga and Claus Kress (eds), *The Travaux Préparatoires of the Crime of Aggression* (Cambridge University Press 2011) 233.
[94] 'Statement by HE Mr Ichiro Komatsu Special Envoy of the Government of Japan Ambassador Extraordinary and Plenipotentiary of Japan At the Review Conference of the Rome Statute of the International Criminal Court (ICC) 4 June 2010, Kampala'.

accomplishment of any of the foregoing'. The concept of war of aggression, however, was left undefined. The definition is reiterated, with minor amendments, in the Tokyo trial, which at article 5(a) defines crimes against peace as 'the planning, preparation, initiation or waging of a declared or undeclared war of aggression, or a war in violation of international law, treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing'. At Nuremberg, aggression was considered the 'supreme crime', on a higher level than other international crimes. As Nuremberg prosecutor Robert Jackson eloquently stated:

> War is essentially an evil thing. Its consequences are not confined to the belligerent states alone, but affect the whole world. To initiate a war of aggression, therefore, is not only an international crime; it is the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole.[95]

8.2 The Rome Statute and the Crime of Aggression

Despite the relevance of the criminalisation of aggression being recognised after the Second World War, the criminalisation of aggression did not develop in international law during the following decades, and it was not included in the statutes of the ad hoc tribunals for former Yugoslavia and Rwanda. The General Assembly established a special committee,[96] whose work led to the definition of the crime of aggression that appears in Resolution 3314 of 1974.[97] The International Law Commission worked on a draft statute which formed the basis for negotiations of the Rome Statute at the Rome Conference. The crime of aggression was finally included in Article 5 of the Rome Statute among the crimes within the jurisdiction of the International Criminal Court, in addition to genocide, crimes against humanity, and war crimes.[98]

The introduction of aggression in the subject-matter jurisdiction of the Court was the result of a difficult negotiation. In principle, the records of the Rome Conference show that the vast majority of states supported the inclusion of

[95] *France v Goering 1946* (Judgment) [1947] 41 American Journal of International Law 172, 186.
[96] UNGA Res 2330 (XXII) (18 December 1967) UN Doc A/RES/2330(XXII)
[97] UN Doc A/RES/29/3314.
[98] Philippe Kirsch and John T Holmes, 'The Rome Conference on an International Criminal Court: The Negotiating Process' (1999) 93 American Journal of International Law 2.

the crime in the statute. Of 134 statements on aggression, only four states, Morocco, Pakistan, Turkey, and the US, rejected the idea that some acts of aggression entail individual criminal responsibility.[99] The controversial points, however, concerned the definition of the crime and the role of the Security Council in its prosecution.

Several states, led by Germany and the Non-Aligned Movement, were ready to reject any proposal of the statute that did not include the crime of aggression. Other states, in particular Arab countries, contributed to the introduction of the crime in the statute with a strong diplomatic effort. At the same time, they affirmed that the absence of the jurisdiction of the Court over the crime was a reason not to ratify the statute.[100] As a result of the agreement reached at the Rome Conference, the jurisdiction of the Court over the crime was conditioned to the adoption of a provision that, in the words of Article 5(2), served the purpose of 'defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime'. Article 5(2) further stated that the provision shall be consistent with the UN Charter. The article was deleted once the provisions, the definition at Article 8bis and the exercise of jurisdiction at Articles 15bis and 15ter, were adopted at the 2010 Review Conference.

In addition, the Final Act of the Rome Conference granted the Preparatory Committee the responsibility to draft a proposal for the future review conference. The proposal was intended to constitute the basis for the future negotiation on the definition, the elements of crimes and jurisdiction, 'with a view to arriving at an acceptable provision on the crime of aggression'.[101] In 2002, the Assembly of States Parties further established the Special Working Group on the Crime of Aggression to draft a proposal of a definition.[102]

8.3 The Kampala Review Conference and the Definition of the Crime

This provision was adopted twelve years later, at the Review Conference of the Rome Statute, which was held in Kampala from 31 May to 11 June 2010. The crime of aggression was included in the Rome Statute of the International

[99] Carrie McDougal, *The Crime of Aggression under the Rome Statute of the International Criminal Court* (Cambridge University Press 2013).
[100] Claus Kress, 'On the Activation of ICC Jurisdiction over the Crime of Aggression' (2018) 16 Journal of International Criminal Justice 1.
[101] 'Final Act of the Rome Conference' (17 July 1998) UN Doc A/CONF.183/13 para 7.
[102] 'Report of the Special Working Group on the Crime of Aggression' ICC-ASP/5/35 Annex II 9.

Criminal Court with a series of amendments.[103] Regarding the definition of the crime, the Non-Aligned States group advocated the recall of the text of General Assembly Resolution 3314 of 1974.[104] Article 1 of the resolution defines aggression as 'the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations, as set out in this Definition'. At the same time, Article 5(2) of the resolution clarifies that the definition entails state responsibility but not individual criminal responsibility: 'A war of aggression is a crime against international peace. Aggression gives rise to international responsibility'. Other states proposed a narrower definition based on the definition of the International Military Tribunal.

Ultimately, Article 8bis of the Rome Statute defines both the crime of aggression and the act of aggression:

> 1. For the purpose of this Statute, 'crime of aggression' means the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations. 2. For the purpose of paragraph 1, 'act of aggression' means the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations.

The article then lists a series of acts qualifying as a crime of aggression. The list mostly follows General Assembly Resolution 3314 of 14 December 1974:

> (a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof; (b) Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State; (c) The blockade of the ports or coasts of a State by the armed forces of

[103] Tom Ruys, 'The Impact of the Kampala Definition of Aggression on the Law on the Use of Force' (2016) 3 Journal on the Use of Force and International Law 187.
[104] UN Doc A/RES/3314(XXIX).

> another State; (d) An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State; (e) The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement; (f) The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State; (g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.

The definition in Article 8bis combines a generic approach, with a general definition of the crime, with a specific approach of a list of acts that constitute an aggression, which reflects Resolution 3314. This structure follows the definitions of genocide and crimes against humanity.[105] The definition limits aggression as a leadership crime, narrowing the possible perpetrators to 'persons in a position effectively to exercise control over or to direct the political or military action of a State'.[106] This excludes categories of perpetrators that the Rome Statutes includes for the other crimes. For instance, aiders and abettors are particularly relevant to the crime of aggression, as state leaders might be strongly influenced by third states in carrying out a military intervention. The concept of 'manifest violation' of the UN Charter provides for a narrower scope of the prohibition, compared to Article 2(4) and general *ius ad bellum*.

The definition foresees some violations of the prohibition to use force that are not necessarily criminalised. The threshold of 'manifest violation' is twofold: quantitative (gravity and scale) and qualitative (by its character).[107] The qualitative threshold reveals that between the prohibition to use force and the crime of aggression there are some grey areas. The concept is further detailed in the Elements of Crimes: paragraph 3 states that the term 'manifest' is an objective qualification, while paragraph 4 affirms that there is no 'requirement to prove that

[105] William A Schabas, *An Introduction to the International Criminal Court* (6th edn Cambridge University Press 2020) 144.
[106] The Crime of Aggression, RC/Res.4 Annex I para 5.
[107] Claus Kress, 'On the Activation of ICC Jurisdiction over the Crime of Aggression' (2018) 16 Journal of International Criminal Justice 1.

the perpetrator has made a legal evaluation as to the "manifest" nature of the violation of the Charter of the United Nations'.[108]

The negotiation process on the criminalisation of aggression at the International Criminal Court is an important source for exploring the *opinio iuris* of states concerning the *ius ad bellum*.[109] In particular, it provides the opportunity to identify the clear aversion of the majority of states to the introduction of a new exception to the prohibition to use force. The doctrines of humanitarian intervention, and a certain interpretation of the responsibility to protect, have received widespread scholarly attention. There are no uncontroversial examples of military interventions performed for humanitarian purposes that proved successful in achieving their goal. Still, several authors warn that the criminalisation of aggression could lead to a decrease of military operations that actually fulfil humanitarian purposes. For this reason, at the moment of defining the crime at the review conference of Kampala, scholars advocated the introduction of a clear exception for humanitarian interventions carried out in good faith.[110]

The US formulated a proposal for an understanding to be adopted at the same time as the definition to exclude military operations conducted in good faith to prevent international crimes:

> It is understood that, for purposes of the Statute, an act cannot be considered to be a manifest violation of the United Nations Charter unless it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith, and thus an act undertaken in connection with an effort to prevent the commission of any of the crimes contained in Articles 6, 7 or 8 of the Statute would not constitute an act of aggression.[111]

In so doing, the US tried to affirm a broad understanding of the definition, whereby humanitarian intervention would be a defence to the crime of

[108] UN Review Conference Res RC/Res.6 (11 June 2010) Annex II.
[109] Alexander H McCabe, 'Balancing "Aggression" and Compassion in International Law: The Crime of Aggression and Humanitarian Intervention' (2014) 83 Fordham Law Review 991.
[110] Michael Reisman, 'Reflections on the Judicialization of the Crime of Aggression' (2014) 39 Yale Journal of International Law 73; Leslie Esbrook, 'Exempting Humanitarian Intervention from the ICC's Definition of the Crime of Aggression: Ten Procedural Options for 2017' (2015) 53 Virginia Journal of International Law 802; Elise Leclerc-Gagne and Michael Byers, 'A Question of Intent: The Crime of Aggression and Unilateral Humanitarian Intervention' (2009) 41 Case Western Reserve Journal of International Law 391.
[111] Kevin Jon Heller, 'The Uncertain Legal Status of the Aggression Understandings' (2011) 9 Journal of International Criminal Justice 11.

aggression.[112] The majority of states, however, saw the proposal as an attempt to carve out a general exception on the use of force. Given the aversion to an explicit reference to humanitarian intervention, Germany, in an effort to achieve an agreement, proposed a more nuanced version of the understanding:

> It is understood that a determination whether an act of aggression has been committed requires consideration of all the circumstances of each particular case, including the purposes for which force was used and the gravity of the acts concerned and their consequences, and that only the most serious and dangerous forms of the illegal use of force constitute aggression.[113]

The Iranian delegation objected that the understanding did not respect the language of the UN Charter, which deserved an explicit reference to Article 2(4). Furthermore, according to previously agreed upon definitions of aggression, such as the text contained in Resolution 3314, the purpose of the use of force could not be an excuse for the crime. The text of the understanding eventually excluded the reference to the purposes for which force was used and included a mention of the UN Charter:

> It is understood that aggression is the most serious and dangerous form of the illegal use of force; and that a determination whether an act of aggression has been committed requires consideration of all the circumstances of each particular case, including the gravity of the acts concerned and their consequences, in accordance with the Charter of the United Nations.

The US agreed to this version of the understanding, despite the stark difference with its previous position. McDougall reported that the leaders of the US delegation, Harold Koh and Stephen Rapp, were absent at the moment of negotiating this specific point. Thus, 'in an unguarded moment the US representatives agreed to compromise text'.[114] As a result, the requirement that any use of force be in accordance with the UN Charter was reaffirmed. Yet the

[112] Harold Hongju Koh and Todd F Buchwald, 'The Crime of Aggression: The United States Perspective' 2 The American Journal of International Law (2015) 257.
[113] UNRC Res RC/Res.6 (11 June 2010).
[114] Carrie McDougall, 'An Act of Aggression: By Any Other Name' in *The Crime of Aggression under the Rome Statute of the International Criminal Court* (Cambridge University Press 2013).

legal value of understandings is controversial.[115] Some authors have suggested that their relevance for the interpretation of the provisions is unclear, as states conceived them as the most practical tool to state their position on the final agreement:

> The precise legal significance of what were to become the Understandings was neither debated nor decided upon in the course of the negotiations. There was, for example, no debate as to whether and where the Understandings are to be situated within the legal framework of article 31 of the Vienna Convention on the Law of Treaties. The approach of the negotiators was a pragmatic one: the Understandings had been discovered as a useful additional tool to clarify certain aspects of the ultimate compromise package, and delegations chose to make use of this tool.[116]

8.4 The Kampala Review Conference and Issues of Jurisdiction

Besides the definition of the crime, the main controversy concerned the jurisdiction of the Court. Kai Ambos observed that 'jurisdictional issues almost led to the failure of the entire endeavour'.[117] In particular, the main disputes concerned the role the UN Security Council should play in determining the existence of aggression, the trigger mechanisms for the jurisdiction over the crime, and the possibility of states parties not accepting the jurisdiction.

First, states were divided on the role of the UN Security Council in determining the existence of an act of aggression. For some states, led by the five permanent members of the Security Council, a resolution determining an act of aggression was a *conditio sine qua non* for the exercise of the Court's jurisdiction. The opposite view maintained that granting such power to the Security Council would undermine the independence of the Court. Possible compromises proposed a role for the General Assembly or the International Court of Justice in determining the existence of an act of aggression. Nevertheless, it was impossible to find common ground, and until the final days of the conference, this provoked a

[115] Kevin Jon Heller, 'The Uncertain Legal Status of the Aggression Understandings' (2012) 10 Journal of International Criminal Justice 229.
[116] Claus Kress, Stefan Barriga, Leena Grover and Leonie von Holtzendorff, 'Negotiating the Understandings on the Crime of Aggression' in Claus Kress and Stefan Barriga (eds), *The Travaux Préparatoires of the Crime of Aggression* (Cambridge University Press 2012) 83.
[117] Kai Ambos, 'The Crime of Aggression after Kampala' (2010) 53 German Yearbook of International Law 463.

high risk of entirely excluding the crime of aggression from the subject-matter jurisdiction of the Court.

Article 39 of the UN Charter gives the Security Council the responsibility to determine situations of acts of aggression: 'The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression'. As a result of the pressure of the five permanent members of the Security Council, the Rome Conference had specified that the provision on aggression to be adopted at the Review Conference should comply with the UN Charter. This was a direct reference to the role of the Security Council providing a preliminary determination on the existence of an act of aggression. The two permanent members of the Security Council that ratified the Rome Statute, the UK and France, thus proposed that the Court could deal with only aggressions previously determined with a resolution of the Security Council. This would have given the Council a preeminent role that would have seriously jeopardised the independence of the Court in the exercise of jurisdiction over acts of aggression. Therefore, the proposal raised problems both in theory and in practice.

In theory, the Security Council is a political body that the UN Charter invests as the authority that determines the occurrence of acts of aggression. As such, the Council decides according to political, rather than legal, criteria. Its evaluation of a possible occurrence of an act of aggression does not have legal value. As Judge Schwebel of the International Court of Justice stated:

> the Security Council is invested by the Charter with the authority to determine the existence of an act of aggression, it does not act as a court in making such a determination. It may arrive at a determination of aggression—or, as more often is the case, fail to arrive at a determination of aggression—for political rather than legal reasons … In short, the Security Council is a political organ which acts for political reasons. It may take legal considerations into account but, unlike a court, it is not bound to apply them.[118]

In practice, the Security Council does not actually label situations of the use of force as aggressions. Giorgio Gaja identified a unique case in Resolution 387 (1976), which condemned the aggression of South Africa against Angola.[119] Other

[118] *Nicaragua v United States of America* (Dissenting Opinion) (1986) ICJ Reports para 170.
[119] UN Doc S/RES/387 (1976).

uncontroversial acts of aggressions, such as Iraq invading Kuwait, was defined just as a 'breach of the peace'.[120]

The final agreement on the exercise of jurisdiction is reflected in Articles 15bis and 15ter. The articles regulate the jurisdiction of the Court on the crime of aggression according to the various trigger mechanisms: state referral, *proprio motu* (15bis), and Security Council referral (15ter). If the prosecutor decides to start an investigation concerning a crime of aggression *proprio motu*, the prosecutor must first verify whether the Security Council has determined the existence of an act of aggression in that situation. If the Council made such determination, or if it does so within six months, the prosecutor could proceed with the investigation. Otherwise, the investigation must be authorised by the judges of the Pre-Trial Division. This distinguishes aggression from the other crimes under the jurisdiction of the Court, where the prosecutor must be authorised by the Pre-Trial Chamber. Article 15bis recalls the deferral power of the Security Council, which pursuant to Article 16 can suspend an investigation of a crime of aggression for 12 months.

In case of Security Council referral, there is no difference between the crime of aggression and the other crimes within the jurisdiction of the Court. Pursuant to Articles 13(b) and 15ter, the Council can refer a situation in which an act of aggression was allegedly perpetrated without further conditions. The Security Council referral can also establish the jurisdiction of the Court over territories and nationals of non-states parties. As a result, the Security Council confirms the authority to determine an act of aggression, following Article 39 of the UN Charter, but the determination is not binding for the exercise of the jurisdiction of the Court for the crime of aggression.

A major limitation to the jurisdiction of the Court over the crime of aggression, however, concerns the possibility to investigate only nationals of the states that ratified the amendments in the absence of a Security Council resolution. The debate developed at the Review Conference of Kampala. Some states requested a consent-based regime that would require states to ratify the amendments to be subjected to the jurisdiction of the Court. France, the UK, Canada, and most European states were among this group. Other states argued

[120] UNSC Res 661 (6 August 1990) UN Doc S/RES/661 (1990).

that once the amendments were adopted, they became binding for all the states parties: an interpretation that respects the provisions of the Rome Statute, such as Article 12(b). Article 121(b) seems to limit the jurisdiction on crimes covered by amendments to those States which have expressed their consent, as it states:

> Any amendment to articles 5, 6, 7 and 8 of this Statute shall enter into force for those State Parties which have accepted the amendment one year after the deposit of their instruments of ratification or acceptance. In respect of a State Party which has not accepted the amendment, the Court shall not exercise its jurisdiction regarding a crime covered by the amendment when committed by that State Party's nationals or on its territory.

Nevertheless, this does not apply to the crime of aggression, which was already included in Article 5 of the Rome Statute. The effort to adopt the amendments by consensus followed a Statutory provision of Article 112(7): 'Each State Party shall have one vote. Every effort shall be made to reach decisions by consensus in the Assembly and in the Bureau'. As a result, states adopted controversial provisions that since then provoked legal debates on jurisdiction.

8.5 The Activating Resolution of 2017

The activation of the Court's jurisdiction over the crime was conditioned to at least thirty ratifications of the amendment and a further decision of the Assembly of States Parties to be taken after 1 January 2017.[121] The minimum number of ratifications was reached on 26 June 2016, when Palestine became the thirtieth State to have ratified the amendments on the crime of aggression. The Assembly of States Parties adopted the activating resolution in New York on 14 December 2017:

> *The Assembly of States Parties*, …
> 1. *Decides* to activate the Court's jurisdiction over the crime of aggression as of 17 July 2018;
> 2. *Confirms* that, in accordance with the Rome Statute, the amendments to the Statute regarding the crime of aggression adopted at the Kampala Review Conference enter into force for those States Parties which have accepted the amendments one year after the deposit of their instruments of ratification or acceptance and that in the case of a State referral or *proprio*

[121] ICC Res ICC-ASP/Res.5 (14 December 2017) ICC-ASP/16/20.

> *motu* investigation the Court shall not exercise its jurisdiction regarding a crime of aggression when committed by a national or on the territory of a State Party that has not ratified or accepted these amendments;
> 3. *Reaffirms* paragraph 1 of article 40 and paragraph 1 of article 119 of the Rome Statute in relation to the judicial independence of the judges of the Court
> 4. *Renews* its call upon all States Parties which have not yet done so to ratify or accept the amendments to the Rome Statute on the crime of aggression. [122]

The resolution thus activated the jurisdiction of the Court on 17 July 2018. The text of the resolution seems a concession to the states arguing for a consent-based regime. Indeed, the resolution hinders the jurisdiction of the Court over nationals and the territory of states that have not accepted or ratified the amendments. At the same time, the resolution does not clarify the issue, as paragraph 3 reiterates the principle of judicial independence. This could leave the judges the authority to extend the jurisdiction of the Court over all states parties.

The entire process of criminalising aggression did not reveal a strong consensus by states in developing individual criminal responsibility for violations of the prohibition to use force. During the negotiations, a caveat was introduced so that the adopted provisions on aggression concerned only the International Criminal Court, without affecting international law on the use of force. This was considered a concession to states who advocated exceptions to the prohibition to use force. After the activating resolution, however, the *opinio iuris* that emerged during the negotiation risked being interpreted as a restriction to the prohibition to use force. The International Law Association, in its final report on aggression and the use of force, emphasised that the negotiation within the International Criminal Court did not negatively impact Article 2(4) of the UN Charter:

> Article 8 bis of the Rome Statute of the International Criminal Court (crime of aggression) is relevant only to the crime over which the International Criminal Court has jurisdiction; it neither affects the definition of 'act of aggression' within the meaning of Article 39 of the UN Charter nor should it lead to a diminished appreciation of the prohibition of the use of force under Article 2(4) of the UN Charter and customary

[122] ibid.

> international law, and the constraints on States resulting therefrom.[123]

The criminalisation of aggression is certainly a step forward in the development of the *ius contra bellum.* Benjamin Ferencz affirmed in 2009 that '[g]iving an international criminal tribunal effective jurisdiction over aggression, even if it seems remote today, would be an historical achievement of incalculable significance'.[124] The negotiations demonstrated the reticence of some states in accepting individual responsibility for the acts of aggression committed by their nationals, in or outside their territories. Still, this does not have any impact on the prohibition to use force, which entails state responsibility. Rather, states appear to recognise the aspects of the *ius ad bellum* that pertain to state responsibility, while they seem more hesitant to support the criminalisation of violations of the prohibition to use force. This creates a gap, or a grey area, between those illegal acts that violate the *ius ad bellum* and those 'manifest violations of the UN Charter' that constitute a crime of aggression.[125] In 2007, Cassese described the grey area between those acts that trigger the responsibility of the state, but not of the individual, with a list of examples:

> (i) [B] reaching Article 2(4) of the UN Charter by violating through the use of force the territory or the air space or the independence of a state by means of acts that are sporadic or in any event not large-scale; (ii) engaging in an armed conflict in violation of international treaties proscribing resort to armed violence; (iii) using force under the authority of the resolution of an international body or on humanitarian grounds but in contravention of the UN Charter; or (iv) resort to self-defence in disregard of the conditions laid down in Article 51 of the UN Charter (for instance, individual self-defence not followed by a report to the Security Council or collective self-defence initiated without a request by the victim state and not followed by such state's consent).[126]

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[123] Noam Lubell and Michael Wood, 'The ILA's 2018 Report on Aggression and the Use of Force' (2019) 6 (1) Journal on the Use of Force and International Law 4.
[124] Benjamin B Ferencz, 'Ending Impunity for the Crime of Aggression' (2009) Case Western Reserve Journal International Law 291.
[125] Jennifer Trahan, 'Defining the "Grey Area" Where Humanitarian Intervention May Not Be Fully Legal, but Is Not the Crime of Aggression' (2015) 2 (1) Journal on the Use of Force and International Law 42.
[126] Antonio Cassese, 'On Some Problematical Aspects of the Crime of Aggression' (2007) 20 Leiden Journal of International Law 841

Most relevant for the relationship between the doctrine and the Court, an abuse of the responsibility to protect, with an action involving the use of force under its third pillar, would arguably fall within this grey area of illegal, but not criminalised, action. The extension of the grey area and the tolerance towards illegal military interventions ultimately depends on how the international community reacts to violations of the prohibition to use force.

Cherif Bassiouni argued that a focus on crimes against humanity and war crimes, rather than on aggression, is desirable.[127] The reason is twofold. First, military interventions that would fall within the definition of aggression are decreasing. States generally try to offer legal justifications for their use of force. Other states usually condemn war crimes and crimes against humanity instead of aggression. Second, autonomous weapons system and cyber technology give states an alternative to acts of aggressions. It concerns the evolution in warfare that Mary Kaldor defined as 'new wars', in which new technology decreases the likelihood of the occurrence of 'old wars' and acts of aggression.[128] As Bassiouni argued, 'With some poetic license, I can say that aggression has been a crime in the minds of many for such a long time that they have come to take it for granted, as if it were a legal reality. Unfortunately it was not, and there does not seem to be much of a reason to continue that illusion'. Still, Jackson defined the act of waging war as 'the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole'.[129] The doctrine of the responsibility to protect may thus reconsider the focus on the so-called atrocity crimes, disregarding violations of *ius ad bellum*, as the latter might be considered the supreme atrocity. In so doing, the doctrine could better fulfil its purpose to protect civilian populations from mass atrocities.

[127] M Cherif Bassiouni, 'The History of Aggression in International Law, Its Culmination in the Kampala Amendments, and Its Future Legal Characterization' (2017) Harvard Journal of International Law 58.
[128] Christine Chinkin and Mary Kaldor, *International Law and New Wars* (Cambridge University Press 2017).
[129] International Military Tribunal, *Trial of the Major War Criminals Before the International Military Tribunal* (Vol 1 International Military Tribunal – Nuremberg 1948) 427.

Chapter 6:
The Impact of the International Criminal Court and the Responsibility to Protect on State Sovereignty

> Where contemporary international law doctrine does not completely eliminate the concept of sovereignty, it attempts at least to minimize it. The attempt is made to draw its fangs by construing the nature of sovereignty as a kind of modest, legally normed capacity to act, as authority under international law, or as a discretionary sphere granted by international law. What an illusion!
>
> —Herman Heller, 1927[1]

1. Introduction

State sovereignty is considered to be the foundational principle, or *Letztbegründung*, of modern international law.[2] Indeed, the first international agreements between nation states were based on Westphalian sovereignty, even if the historical relevance of the 1648 Peace of Westphalia in the establishment of state sovereignty is now considered to be overstated.[3] International law developed on the assumption that nation states, the subjects of the international community, were sovereign, equal, and independent in the relations regarding each other.

Both the International Criminal Court and the responsibility to protect have a crucial impact on the principle.[4] The Court deals with criminal jurisdiction, which is 'one of the most sacred areas of state sovereignty'.[5] International criminal justice challenges two main elements of this area: the criminal jurisdiction of a state on its territory and over its nationals, and the functional immunity of their offices. Universal jurisdiction postulates that the perpetration of

[1] Hermann Heller and David Dyzenhaus, *Sovereignty: A Contribution to the Theory of Public and International Law* (Belinda Cooper tr, Oxford University Press 2019) 168.
[2] Anne Peters, 'Fragmentation and Constitutionalization' in Anne Orford and Florian Hoffmann (eds), *The Oxford Handbook of the Theory of International Law* (Oxford University Press 2016) 1030.
[3] Andreas Osiander, 'Sovereignty, International Relations, and the Westphalian Myth' (2001) 55 (2) International Organization 251; Derek Croxton, 'The Peace of Westphalia of 1648 and the Origins of Sovereignty' (1999) 21 International History Review 569.
[4] Markus Benzing, 'Sovereignty and the Responsibility to Protect in International Criminal Law' in Doris König, Peter-Tobias Stoll, Volker Röben and Nele Matz-Lück (eds) *International Law Today: New Challenges and the Need for Reform?* (Springer 2008).
[5] Antonio Cassese, 'On the Current Trends towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law' (1998) 9 European Journal of International Law 11.

heinous crimes affects the entire international community.[6] Consequently, the territorial state becomes a *terra nullius* for the purpose of criminal prosecution and waives its sovereign exclusive jurisdiction.[7] According to universal jurisdiction, every state is therefore entitled to prosecute those responsible for serious international crimes, even without any link with the territory where the crime is committed, the *locus commissi delicti*, or with the nationality of the perpetrator. The Appeals Chamber of the International Criminal Court affirmed that, under customary international law, heads of state do not enjoy immunity in front of international courts, stating that 'there is a *ius puniendi* that transcends state sovereignty and resides in the international community itself'.[8]

The entire doctrine of the responsibility to protect has developed from a redefinition of the concept, intended as 'sovereignty as responsibility'. A controversial relationship with sovereignty is thus an aspect that the doctrine and the Court have in common. This study shows how authors often portray the dynamic between the two institutions and sovereignty as conflicting, if not hostile.[9] From this perspective, there are two opposite views. One school of thought welcomes and advocates the decline of state sovereignty in favour of the development of global institutions for accountability and the protection of human rights. An antithetical view supports the current relevance of state sovereignty in international law as a shield to foreign interventions and abuses related to interference by major powers, including with the use of force.

This chapter examines the conflicting impact of the doctrine and the Court on state sovereignty and engages with both perspectives. The analysis begins with a historical categorisation of sovereignty to introduce a distinction between the internal and external dimensions of the concept and to enquire the origin of international norms protecting individuals from states' power. This perspective allows one to reconsider the approach of the International Criminal Court and the responsibility to protect to the principle of state sovereignty. The analysis concludes that neither the doctrine nor the Court constitutes a threat to state

[6] Devika Hovell, 'The Authority of Universal Jurisdiction' (2018) 29 (2) European Journal of International Law 427.
[7] Anthony Sammons, 'The Under-Theorization of Universal Jurisdiction' (2003) 21 Berkeley Journal of International Law 111.
[8] *Prosecutor v Al-Bashir* (Judgment in the Jordan Referral re Al-Bashir Appeal) ICC-02/05-01/09-397-Corr (6 May 2019) 84.
[9] Sara Irigoyen Chávez, *La Responsabilidad de Proteger y los Crímenes Internacionales. Progresos en el Derecho Internacional Actual* (Aranzadi 2018).

sovereignty. On the contrary, both institutions are formally articulated to implement their mandate mostly with the consent of states.

2. State Sovereignty: Historical Evolution and Categorisation of the Concept

The idea of sovereignty emerged during the 1500s to describe the structure of authority within the modern state. Sovereignty described the power of the state—which at the time was considered the only subject of the international community—to make laws, being above the law, and to exert its power in relation to other states.[10] The historian Sir Martin Gilbert defined the responsibility to protect as 'the most significant adjustment to national sovereignty in 360 years', the previous key historical event being the Peace of Westphalia of 1648.[11] Westphalia is considered to be the foundation of state sovereignty and the naissance of modern international law, as it established a political structure in the European Continent essentially based on nation states. The international community in modern history was consequently based on state sovereignty, which had two key implications: first, the ultimate authority over a territory and the people belonged to the state—instead of deriving from an emperor or a religious authority. Second, a state had exclusive jurisdiction within its borders, without interference by other states. At this moment, the concept of sovereignty developed to define the ultimate source of power within states and to limit the authority of other states not to breach the limits of state territorial power. It was therefore an 'external' sovereignty, established to limit the power of a state in relation to another. In contrast, the power of the sovereign over its territory had no limitations or constraints, with the state thus retaining absolute internal sovereignty, with the exception of minimum standards of respect towards aliens, such as diplomatic immunities, which remain a consequence of the external dimension of sovereignty.

The relevance of the Peace of Westphalia in the context of the establishment of state sovereignty and the beginning of international law is

[10] Malcolm N Shaw, *International Law* (Cambridge University Press 2008) 21.
[11] Martin Gilbert, 'The Terrible 20th Century' The Globe and Mail (31 January 2007); cit Lloyd Axworthy and Allan Rock, 'R2P: A New and Unfinished Agenda' (2009) 1 Global Responsibility to Protect 69.

considered a myth.[12] The distinction between political and religious power dates back to the 1555 Peace of Augsburg. This agreement established the principle *cuius regio eius religio* allowing political leaders to decide the official religion to adopt in their territories. The Holy Roman Empire, in contrast to the Westphalian system, included several nations and claimed a transcendent authority, and it collapsed only in 1806 with the Napoleonic Wars. However, the concept of Westphalian sovereignty is helpful to define an international system that emerged after the Thirty Years' War, based mostly on nation states that developed international agreements with each other. A description of external sovereignty, with the principle of non-interference in domestic affairs of states, appears in the peace treaty between the Holy Roman Emperor and the King of France and their respective allies concluded in Münster on 24 October 1648:

> To prevent for the future any differences arising in political matters, all and every one of the Electors, Princes and Estates of the Holy Roman Empire, are so established and confirmed in their ancient rights, prerogatives, liberties, privileges, free exercise of territorial right both in ecclesiastical and in political matters, in their lordships and sovereign rights, by virtue of this present transaction: that they never can or ought to be molested therein by any whomsoever upon any manner of pretence.[13]

Between 1600 and 1700, natural law authors, including Thomas Hobbes, John Locke, and Jean-Jacques Rousseau, introduced a new interpretation of the origin of sovereignty.[14] Natural law conceives society as *the* result of a social contract which overcomes the state of nature to establish a political order. This overturns the source of sovereignty, which is no longer seen as an innate power of the emperor or a religious authority but as the outcome of an agreement between individuals. This paradigm can be considered the establishment of the rule of law.[15] Some authors, such as John Locke, used this theory to make consent a

[12] Stephane Beaulac, 'The Westphalian Model in Defining International Law: Challenging the Myth' (2004) 7 Australian Journal of Legal History 181; Stephane Beaulac, 'The Westphalian Legal Orthodoxy – Myth or Reality?' (2000) 2 Journal of the History of International Law 148.
[13] Treaty of Westphalia, Peace Treaty between the Holy Roman Emperor and the King of France and their respective Allies para 64 <avalon.law.yale.edu/17th_century/westphal.asp> accessed 25 October 2020.
[14] Thomas Hobbes, *Leviathan* (first published 1651, Penguin 1985); John Locke, *Two Treatises of Government* (first published 1690, Cambridge University Press 1988); Jean-Jacques Rousseau, *The Social Contract* (first published 1762, Oxford University Press 1999).
[15] Martin Loughlin, 'The Apotheosis of the Rule of Law' (2018) 89 Political Quarterly 659.

condition for exerting authority. Other authors, such as Thomas Hobbes, interpreted the theory to advocate for absolute power of the sovereign. However, interestingly for the analysis of the responsibility to protect, Hobbes specified that 'the obligation of subjects to the sovereign is understood to last 'as long, and no longer, than the power lasteth by which he is able to protect them'.[16]

In any case, such an approach was revolutionary because it created the theoretical basis for radical transformation of the sovereign power such as the American Declaration of Independence and the French Revolution. The American Declaration of Independence clearly describes that citizens grant authority to a sovereign to secure their rights:

> [U]nalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. … [T]o secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed, that whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness.[17]

The 1789 French Declaration of Human and Civil Rights similarly affirmed that

> [m]en are born and remain free and equal in rights. Social distinctions may be founded only upon the general good. The aim of all political association is the preservation of the natural and imprescriptible rights of man. These rights are liberty, property, security, and resistance to oppression. The principle of all sovereignty resides essentially in the nation. No body nor individual may exercise any authority which does not proceed directly from the nation.[18]

Grants of rights by an absolute sovereign date back to the Magna Carta Libertatum, which is considered to have recognised, already in 1215, fundamental rights such as *habeas corpus*.[19] However, concessions of rights and privileges to

[16] Thomas Hobbes, *Leviathan* (first published 1651, Penguin 1985) 23.
[17] United States of America Declaration of Independence 1776.
[18] Déclaration des Droits de l'Homme et du Citoyen de 1789 (French Declaration of Human and Civil Rights) 1789.
[19] Brian Farrell, 'From Westminster to the World: The Right to Habeas Corpus in International Constitutional Law' (2008) 17 Michigan State University College of Law Journal of International Law 551.

individuals constituted per se an expression of the discretionary power of the sovereign, who can decide whether or not to allow benefits to its subjects without the influence of or constraints imposed by foreign rules or authorities. Conversely, the evolution of international law recognised that individuals have inalienable rights as human beings and that states have the obligation to protect them. As a result, a part of sovereignty is transferred from the state to its citizens as individuals who are part of humanity.

3. Sovereignty of Humanity: International Law after the Second World War

The legitimacy of the sovereign and its relationship with the political community concerns the idea of 'internal sovereignty', which formed the theoretical basis for the limitation of power of the sovereign and the recognition of individual rights on the international level in the 1900s. Internal sovereignty indeed concerns the limitations of power of the state authority towards its citizens. Until the 1900s, international law developed in relation with the principle of external sovereignty. The role of international law was to regulate the relations between states. It dealt with border regulation and dispute settlement and safeguarded the sovereignty of states in relation to other States through institutions such as state immunity.

During the 1900s, individuals started gaining an international subjectivity, with the awareness that human beings are not only subjects of their heads of state but also part of humanity. In *Humanity's Law* Ruti Teitel describes the emergence of a 'paradigm shift toward humanity law and, to some extent, away from interstate international law'.[20] In the words of Rustam Atadjanov, 'Humanity, defined as the quality of being human, or humanness, represents a fully valid legal interest'—some norms of contemporary international law are not based on state consent but on an international rule of law that takes into account so-called principles of humanity.[21] The paradigm shift consists of a transition from internal to international rule of law. Here, part of the source of power, and of sovereignty,

[20] Ruti Teitel, *Humanity's Law* (Oxford University Press 2011) xii
[21] Rustam Atadjanov, *Humanness as a Protected Legal Interest of Crimes Against Humanity, Conceptual and Normative Aspects* (Springer 2019).

lies in humanity, as human beings are recognised as having legal rights.[22] As defined by Hannah Arendt, 'the right to have rights, or the right of every individual to belong to humanity, should be guaranteed by humanity itself'.[23]

As a result, the concept of sovereignty stopped being limited to the relations between states in its external dimension.[24] Rather, the concept extended to an internal dimension: the relationship between the state and the people under its jurisdiction, the latter becoming subjects of international law, entitled to rights and powers. A clear watershed between the old and new international legal culture took place in the aftermath of the Second World War with the adoption of three paramount international documents: the 1945 San Francisco Charter of the United Nations declared the purpose to respect human rights and individual freedoms, the 1945 Charter of the International Military Tribunal regulated the prosecution and punishment of the 'major war criminals of the European axis',[25] and the 1948 Universal Declaration of Human Rights affirmed the existence of universal rights of individuals in relation to states. In so doing, international law began introducing norms that privileged the internal dimension of sovereignty, that is, the protection of individual dignity from the abuse of states' power, over external sovereignty, that is, the safeguard of states' jurisdiction from the interference of other states.[26] In the words of the International Criminal Tribunal for the former Yugoslavia:

> [T]he impetuous development and propagation in the international community of human rights doctrines, particularly after the adoption of the Universal Declaration of Human Rights in 1948, has brought about significant changes in international law, notably in the approach to problems besetting the world

[22] C Reus-Smit, 'Human Rights and the Social Construction of Sovereignty' (2001) 27 Review of International Studies 519; JS Barkin, 'The Evolution of the Constitution of Sovereignty and the Emergence of Human Rights Norms' (1998) 27 Millennium: Journal of International Studies 229
[23] Hannah Arendt, *The Origins of Totalitarianism* (Harcourt Brace & Co. 1973) 298.
[24] Dieter Grimm, *Sovereignty: The Origin and Future of a Political and Legal Concept* (Columbia University Press 2015) 90.
[25] Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, and Establishing the Charter of the International Military Tribunal (IMT) Annex (1951) 82 UNTS 279.
[26] William Schabas, *The Three Charters: Making International Law in the Post-War Crucible* (Universiteit Leiten 2013).

> community. A State-sovereignty-oriented approach has been gradually supplanted by a human-being-oriented approach.[27]

A crucial element that affects the concept of sovereignty is the relevance of states' consent in joining international treaties that limit their powers, for example, by recognising and granting individual rights. Before the Second World War, individuals and groups obtained rights and freedoms due to a decision of the state. By accepting being part of a binding treaty, states agreed to establish limitations to their power, not in virtue of a higher law or value but as an expression of their sovereign power. The Permanent Court of International Justice affirmed this view in the *Wimbledon* case: 'Any convention creating an obligation … places a restriction upon the exercise of the sovereign rights of the State, in the sense that it requires them to be exercised in a certain way. But the right of entering into international engagements is an attribute of State sovereignty.'[28] It said much the same in the *Lotus* case: 'International law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law'.[29]

The case law of the Permanent Court also shows the predominance, at the time, of the external dimension of sovereignty. The 1931 *Austro-German Customs Union* case concerned the creation of a free-trade customs union between Austria and Germany. Here, Judge Anzilotti explained that sovereignty is respected as far as an agreement does not place a state under the authority of another:

> The independence of Austria … is nothing else but the existence of Austria … as a separate State and not subject to the authority of any other State or group of States. Independence as thus understood is really no more than the normal condition of States according to international law; it may also be described as sovereignty (*suprema potestas*), or external sovereignty, by which is meant that the State has over it no other authority than that of international law.[30]

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[27] *Prosecutor v Tadic* (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) ICTY IT—94-1-AR72 (2 October 1995) para 97.
[28] *SS Wimbledon (UK v Japan)* PCIJ Rep Series A No 10, 35.
[29] *SS Lotus (France v Turkey)* PCIJ Rep Series A No 10, 44.
[30] PCIJ Rep Series A/B No 41, 6 AD 26.

The international system that emerged after the Second World War had a twofold impact on state sovereignty. On the one hand, the UN Charter regulated external sovereignty by establishing clear parameters of non-interference in domestic affairs. Most of all, the UN Charter introduced the prohibition to use force. The process of outlawing war dates back at least to the 1928 Paris Peace Pact, also known as Briand–Kellogg Pact. Oona Hathaway and Scott Shapiro described the importance of the pact as follows:

> Those who signed the Pact sought to end war between states by renouncing war as an instrument of national policy. This renunciation was the beginning of a transformation, not the end. …
>
> The Pact was aimed at ending war *between states* and, in that, it proved remarkably successful. But it has certainly not ended all armed conflict. Paradoxically, by removing war from states' legal toolkit and reinforcing their sovereignty, it even may have made some conflicts more difficult to resolve.
>
> The Pact outlawed war. But it did more than that. By prohibiting states from using war to resolve disputes, it began a cascade of events that would give birth to the modern global order. As its effects reverberated across the globe, it reshaped the world map, catalyzed the human rights revolution, enabled the use of economic sanctions as a tool of law enforcement, and ignited the explosion in the number of international organizations that regulate so many aspects of our daily lives.[31]

From this perspective, some authors affirm that this is the first time that external sovereignty was actually established. The so-called Westphalian sovereignty, based on non-interference in domestic affairs, was not affirmed by a norm prohibiting forced intervention. Therefore, the 'traditional meaning of sovereignty would be firmly established for the first time … in the signing of the UN Charter at San Francisco in 1945'.[32]

Besides the prohibition to use force, external sovereignty finds an application in two main legal precepts, both listed among the principles of the UN

[31] Oona A Hathaway and Scott J Shapiro, *The Internationalists. How a Radical Plan to Outlaw War Remade the World* (Simon & Shuster 2017) 9.
[32] Luke Glanville, 'The Myth of "Traditional' Sovereignty" (2013) 57 International Studies Quarterly 85.

at Article 2 of the UN Charter: equality between states, in Article 2(1),[33] and non-interference in domestic affairs, in Article 2(7).[34] The duty not to interfere in domestic affairs of other states is reaffirmed in the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States. Adopted by the UN General Assembly in October 1970, the declaration affirms that

> [n]o state or group of states has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other state. Consequently, armed intervention and all other forms of interference or attempted threats against the personality of the state or against its political, economic and cultural elements, are in violation of international law.[35]

At the same time, while reinforcing external sovereignty, the system of international law that emerged from the Second World War increased the relevance of non-consent-based norms.[36] A higher corpus of norms was established, which bound states beyond their consent.[37] Besides consent-based treaties, Article 38 of the Statute of the International Court of Justice recognises as sources of international law international customs, general principles of law recognised by civilized nations, and, as a subsidiary mean, judicial decisions and the teachings of the most highly qualified publicists of the various nations. In particular, *ius cogens* norms cannot be derogated by a consensual agreement between states as peremptory norms of general international law mentioned in Article 53 of the 1969 Vienna Convention on the Law of Treaties.

As a result, an international rule of law emerged, depriving states of part of their 'internal' sovereignty, especially with rules aimed at protecting individuals.[38] Scholars examining the conflicting relationship between sovereignty and the

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[33] 'The Organization is based on the principle of the sovereign equality of all its Members.'
[34] 'Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter.'
[35] UNGA Res 2625 (24 October 1970) UN Doc A/RES/2625(XXV) 6.
[36] John A Perkins, 'The Changing Foundations of International Law: From State Consent to State Responsibility' (1997) 15 Boston University International Law Journal 433.
[37] Samantha Besson, 'The Authority of International Law – Lifting the State Veil' (2009) 31 Sydney Law Review 343; Samantha Besson, 'State Consent and Disagreement in International Law Making: Dissolving the Paradox' (2016) 29 Leiden Journal of International Law 289; DB Hollis, Why Consent Still Matters – Non-State Actors, Treaties and the Changing Sources of International Law' (2005) 2 Berkeley Journal of International Law 137.
[38] Patrick Capps and Henrick Palmer Olsen (eds), *Legal Authority Beyond the State* (Cambridge University Press 2018).

international rule of law often quote a statement attributed to Antonio Cassese: 'either one supports the rule of law, or one supports state sovereignty. The two … are not compatible'.[39] This position is actually a paraphrasis of the author's reasoning and was first written by Bruce Broomhall.[40] In the cited article, Cassese presents state sovereignty as an obstacle to the implementation of international justice; the author also laments that international tribunals must rely on the cooperation of sovereign states: 'drawing from the experience of the ICTY and from the current proposals for an international criminal court, state sovereignty resurfaces when it comes to the day-to-day operations of the Tribunal and its ability to fulfil its mandate'.[41]

4. Laws of Humanity

The concept of 'laws of humanity' and 'dictates of public conscience' have played a crucial role in the evolution of international law in the last century. The concepts appear with different wordings in various international treaties, for example, 'conscience of mankind', 'conscience of humanity', and 'principles of humanity'. The ambiguity of the terms, and the lack of a clear definition and scope, has permitted the creative application of the principles and has fostered extensive interpretations of rules, even if their value as international norms is controversial.[42] To assess the decline of state sovereignty in international law making, the following analysis examines these concepts and their contribution to the development of international law. The concept of humanity in international law also finds relevance in the concept of crimes against humanity, which this study examines in the context of the definition of the so-called atrocity crimes.

[39] Robert Cryer, 'International Criminal Law vs State Sovereignty: Another Round?' (2005) 16 European Journal of International Law 979; Tanja E Aalberts and Werner G Wouter, 'Mobilising Uncertainty and the Making of Responsible Sovereigns' (2011) 37 Review of International Studies 2185; Padraig McAuliffe, 'From Watchdog to Workhorse: Explaining the Emergence of the ICC's Burden-sharing Policy as an Example of Creeping Cosmopolitanism' (2014) 13 Chinese Journal of International Law 259; Christine Schwöbel-Patel, 'The Rule of Law as a Marketing Tool: The International Criminal Court and the Branding of Global Justice' in Christopher May and Adam Winchester (eds), *Handbook on the Rule of Law* (Edward Elgar Publishing 2018) 435.
[40] Bruce Broomhall, *International Justice and the International Criminal Court Between Sovereignty and the Rule of Law* (Oxford University Press 2004) 55.
[41] Antonio Cassese, 'On the Current Trends towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law' (1998) 9 European Journal of International Law 11.
[42] Antonio Cassese, 'The Martens Clause: Half a Loaf, or Simply Pie in the Sky?' (2000) 11 European Journal of International Law 187.

A proposed definition of laws of humanity states, 'Laws of humanity represent unwritten and non-fixed rules (or considerations) of an active goodwill towards fellow human beings, which recognize the inherent humanity (i.e., human status) in them'.[43] The international law principles of 'laws of humanity' and 'dictates of public conscience' have gained relevance since the end of the 1800s. They were first mentioned in the Martens Clause of the Second Hague Convention with Respect to the Laws and Customs of War on Land of 1899. The formula takes the name from the Russian delegate Friederich Martens and was approved in unusual circumstances to overcome a disagreement in the negotiation of the status of civilians who took arms against an occupying power:[44]

> Until a more complete code of the laws of war is issued, the High Contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity and the requirements of the public conscience.[45]

These principles were reiterated, albeit with varied wording, in several humanitarian law and human rights treaties. The wording appears, for instance, in the four 1949 Geneva Conventions (respectively, Articles 63, 62, 142, and 158), the two additional protocols (Article 1 and Preamble), and the 1980 Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects.[46] Their role and purport in international law were examined by the International Court of Justice and by human rights bodies. International Criminal Tribunals, from Nuremberg to the International Tribunal for former Yugoslavia, also relied on these principles.[47] The International Criminal Court, in the *Ntaganda* case, mentioned the Martens Clause to affirm that the protection of the

[43] Rustam Atadjanov, *Humanness as a Protected Legal Interest of Crimes Against Humanity, Conceptual and Normative Aspects* (Springer 2019).
[44] Rotem Giladi, 'The Enactment of Irony: Reflections on the Origins of the Martens Clause' (2014) 25 European Journal of International Law 847.
[45] Preamble of the 1899 Convention (II) with Respect to the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land 32 Stat 1803 Treaty Series 403.
[46] 1342 UNTS 22495, 137 preamble para 5.
[47] Theodor Meron, *The Humanization of International Law* (Brill Nijhoff 2006) 21.

provisions on war crimes of rape and sexual slavery extends to members of armed groups, but the Appeals Chamber then rejected the use of the clause.[48]

Laws of humanity are currently recognised as principles of international law, applicable in times of both armed conflict and peace. The existence of a public conscience that expresses, in the words of International Court of Justice Judge Alejandro Alvarez, 'sentiments of humanity'[49] is a phenomenon conceived at the end of the 1800s, and it has been growing ever since. The affirmation of this notion in international law allowed progressive interpretations of international agreements by judges and treaty bodies and the constant evolution of customary law.[50]

The notion of public conscience played a crucial role in promoting negotiations of treaties and conventions. In so doing, it shaped, in the words of Jean Pictet, a 'large body of public international law derived from humanitarian sentiments and centred upon the protection of the individual'.[51] After the Second World War the diffusion of democratic regimes on various continents, with the parallel phenomena of decolonisation, globalisation, and the—albeit partial—democratisation of the international system, provided the public opinion with a fundamental role in the evolution of international law. Media development, together with technologies, gave further strength to the phenomenon. Across the decades, numerous observers monitored and reported the positions of state delegations in diplomatic meetings. In so doing, the presence of civil society mitigated the adoption of decisions based purely on state interests and promoted decisions made in the interests of other sectors of society, or again, for the common interests of mankind.

As for the notion of humanity, it has also played a crucial role in the conclusion of international agreements in the last century. The history of the law of treaties experienced a gradual change. From bilateral treaties concluded in the name of state interests, and mainly under the principle of reciprocity, multilateral treaties thrived, throughout the 1900s and especially in the aftermath of the

[48] *Prosecutor v Ntaganda* (Judgment on the Appeal of Mr Ntaganda against the 'Second Decision on the Defence's Challenge to the Jurisdiction of the Court in respect of Counts 6 and 9") ICC-01/04-02/06 OA5 (15 June 2017) para 63.
[49] *Corfu Channel Case (UK v Albania)* (Individual Opinion by Judge Alvarez) [1949] ICJ Rep 4.
[50] Nina HB Jørgensen, *The Responsibility of States for International Crimes* (Oxford University Press 2000) 123.
[51] Jean Pictet, 'The Need to Restore the Laws and Customs Relating to Armed Conflicts' (1969) 9 International Review of the Red Cross 464.

Second World War, with a different purpose: to safeguard the common interests of mankind. Paul Reuter accordingly stated that

> [i]n fields such as public health, communications, maritime security, protection of maritime resources, literary, artistic and scientific property, metrological unification, and protection of certain basic human rights, multilateral treaties were called upon to serve an entirely new purpose: the defence of the common interests of mankind.[52]

From this perspective, sovereignty in international law making experienced a transfer from states to humanity by establishing international norms, or at least guiding progressive interpretations of international norms.[53] A meaningful example of this development of sovereignty can be found in international humanitarian law, where the application of treaty provisions of international armed conflict, for example, concerning war crimes, was extended to non-international armed conflicts. The Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia shows how an international norm adopted to regulate armed conflict between states (an expression of external sovereignty) can extend its application—although with certain limitations—to internal armed conflict to protect human beings within the jurisdiction of a state (an expression of internal sovereignty):

> Why protect civilians from belligerent violence, or ban rape, torture or the wanton destruction of hospitals, churches, museums or private property, as well as proscribe weapons causing unnecessary suffering when two sovereign States are engaged in war, and yet refrain from enacting the same bans or providing the same protection when armed violence has erupted 'only' within the territory of a sovereign State? If international law, while of course duly safeguarding the legitimate interests of States, must gradually turn to the protection of human beings, it is only natural that the aforementioned dichotomy should gradually lose its weight. … [T]his extension has not taken place in the form of a full and mechanical transplant of those rules to internal conflicts; rather, the general essence of those

[52] Paul Reuters, *Introduction to the Law of Treaties* (Routledge 2012) 2.
[53] Olivier de Frouville, 'La Cour pénale internationale: une humanité souveraine?' (2000) 610 Temps modernes 257.

> rules, and not the detailed regulation they may contain, has become applicable to internal conflicts.[54]

4.1 Different Dimensions of Sovereignty and the Impact of the Doctrine and the Court

The concept of sovereignty is complex, encompassing a variety of legal principles, from non-interference to state equality. Many authors have recognised the controversial purport of the principle. In the words of Lassa Oppenheim,

> [T]here exists perhaps no conception, the meaning of which is more controversial than that of sovereignty. It is an indisputable fact that this conception, from the moment when it was introduced into political science until the present day, has never had a meaning which was universally agreed upon.[55]

Similarly, according to Louis Henkin:

> States are commonly described as 'sovereign', and 'sovereignty' is commonly noted as an implicit, axiomatic characteristic of Statehood. The pervasive- ness of that term is unfortunate, rooted in mistake, unfortunate mistake. Sovereignty is a bad word, not only because it has served terrible national mythologies; in international relations, and even in international, law, it is often a catchword, a substitute for thinking and precision. It means many things, some essential, some insignificant; some agreed, some controversial; some that are not warranted and should not be accepted.[56]

Sovereignty could be defined as a collection of powers, or rights, that an authority is capable of exerting. In the case of state sovereignty, such powers might be articulated as political decision making; the legitimacy of electing a government or representing a community; self-determination and national independence; international recognition; and the equality of states, non-interference in internal affairs, and jurisdictional competence to make or to apply law.[57]

For the purpose of the examination of the impact of the International Criminal Court and the responsibility to protect on sovereignty, two dimensions of

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[54] *Prosecutor v Tadic* (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) ICTY IT-94-1-AR72 (2 October 1995) paras 97 and 126.
[55] Lassa Oppenheim, *International Law* (Longmans 1905) 137.
[56] Louis Henkin, 'International Law: Politics, Values and Functions – General Course on Public International Law' (1989) 216 Recueil ds Cours de l'Académie de Droit International 24.
[57] Winston P Nagan and Craig Hammer, 'The Changing Character of Sovereignty in International Law and International Relations' (2004) 43 Columbia Journal of Transnational Law 141.

the principle emerge in particular: first, external, or Westphalian, sovereignty, based on the principle of equality between states and non-interference in domestic affairs, and second, internal sovereignty, that is, the authority of a state to legislate and enforce its decisions over the territory and the people falling under its jurisdiction, and vice versa, the rules recognising citizens' rights that limit the power of the state.[58] This created tension between the two dimensions of sovereignty, whereby violations of internal sovereignty, such as gross violations of human rights within the territory of a state, might compromise the principle of non-interference.[59]

A common interpretation sees international law as an enemy of sovereignty. From this perspective, international norms act as a force that erodes the *domaine reservé* of states to protect individual rights, and state sovereignty is an obstacle to the progressive concern for individual dignity rather than state interest. An opposite view on sovereignty values the importance of safeguarding the equal independence between states. Formally, the principle of state equality uniformly applies to all states, independently from their power. In an asymmetric international community, however, equality between states is only a theoretical provision. Consequently, the growing concern for individual rights and human security is labelled as an excuse to justify violations of the sovereign equality of states.

The International Criminal Court and the responsibility to protect plainly fall within the dynamic between state sovereignty and individual dignity. They share a common cultural background that has been defined as cosmopolitanism or globalism, which broadly prioritises individuals over states.[60] The two institutions constitute the main international law development in focusing on individual—rather than state—concerns. By addressing perpetrators of international crimes to be prosecuted, or victims of atrocities to be protected, the doctrine and the Court

[58] Niki Aloupi, 'The Right to Non-intervention and Non-interference' (2015) Cambridge Journal of International and Comparative Law 566.
[59] Dominik Zaum, *The Sovereignty Paradox: The Norms and Politics of International Statebuilding* (Oxford University Press 2007).
[60] Steven C Roach (ed), *Governance, Order, and the International Criminal Court: Between Realpolitik and a Cosmopolitan Court* (Oxford University Press 2009). Francis Deng, 'From "Sovereignty as Responsibility" to the "Responsibility To Protect"' (2010) 2 Global Responsibility to Protect; Jared Genser and Irwin Cotler, *The Responsibility to Protect, the Promise of Stopping Mass Atrocities in Our Time* (Oxford University Press 2012); Charles J G Sampford and Ramesh Chandra Thakur (eds), *Responsibility to Protect and Sovereignty* (Routledge 2016).

became the protagonists of the debate between globalism and state sovereignty. To challenge this dichotomy, it is worth examining the point of view that advocates a strong role of state sovereignty in contemporary international law.

4.2 The Value of State Sovereignty

International lawyers generally interpret sovereignty as an obstacle to the development of their discipline. State sovereignty is seen as the intransigence of the political power to fulfil the international values of rights and justice. Referring to international criminal law in particular, Robert Cryer affirms:

> When sovereignty appears in international criminal law scholarship, it commonly comes clothed in hat and cape. A whiff of sulphur permeates the air. Generally, international criminal law scholars see sovereignty as the enemy. It is seen as the sibling of realpolitik, thwarting international criminal justice at every turn.[61]

Similarly, Antonio Cassese mentions the metaphor of German lawyer Hans Gerd Niemeyer, who depicted international law as an edifice built on the volcano of state sovereignty:

> [W]henever state sovereignty explodes onto the international scene, it may demolish the very bricks and mortar from which the Law of Nations is built. It is for this reason that international law aims to build devices to withstand the seismic activity of states: to prevent or diminish their pernicious effect.[62]

A different school of thought criticises this approach and supports the strength of state sovereignty in current international law as a way to protect states from the interference of major powers and to safeguard the democratic interests of local political communities. The globalist approach that opposes sovereignty is therefore criticised as follows:

> 'Sovereignty: loathe it or mock it' is the politically correct imperative currently influencing mainstream intellectual élites. Anybody evoking this concept—which lies at the heart of the theory of the State, public law, national constitutions, and the

[61] Robert Cryer, 'International Criminal Law vs State Sovereignty: Another Round?' (2005) 16 European Journal of International Law 979.
[62] Antonio Cassese, 'On the Current Trends towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law' (1998) 9 European Journal of International Law 11.

> UN Charter—is considered ill-mannered and primitive, as someone who deserves to be pitied, taunted like someone still using typewriters or even disparaged as a fascist. Sovereignty is considered a sign of an archaic worldview, tribalism, nostalgia, racism, ineptness, or even criminal tendencies. And sovereignty is synonymous with malice.[63]

The value of local sovereignty is considered to belong to a school of thought, or political culture, with conservative, or reactionary, principles. However, the value of local communities and the criticism of globalisation has been a key component of progressive movements, as they advocate for legitimacy and accountability of the political power.[64] In the interpretation of independence, self-determination, and state equality, the defence of sovereignty has also been an argument against imperialism during decolonisation.[65]

The first theoretical argument here examined is a realist defence of sovereignty. This perspective questions states' equality from a formal point of view. The theoretical principle was described by Emmerich de Vattel:

> [S]ince men are naturally equal, and a perfect equality prevails in their rights and obligations, as equally proceeding from nature—Nations composed of men, and considered as so many free persons living together in a state of nature, are naturally equal, and inherit from nature the same obligations and rights. Power or weakness does not in this respect produce any difference. A dwarf is as much a man as a giant; a small republic is no less a sovereign state than the most powerful kingdom. By a necessary consequence of that equality, whatever is lawful for one nation is equally lawful for any other; and whatever is unjustifiable in the one is equally so in the other.[66]

This is not actually implemented in the international community, where major powers control weaker states with various means of influence. Advocating for a stronger state sovereignty, consequently, would protect states from the

[63] Carlo Galli, *Sovranità* (Il Mulino 2019) 3.
[64] B Baumgarten, 'The Global Justice Movement: Resistance to Dominant Economic Models of Globalization' in Stefan Berger and Holger Nehring (eds), *The History of Social Movements in Global Perspective: A Survey* (Palgrave Macmillan 2017).
[65] Karuna Mantena, 'Popular Sovereignty and Anti-Colonialism' in Richard Bourke and Quentin Skinner (eds), *Popular Sovereignty in Historical Perspective* (Cambridge University Press 2016) 257.
[66] Emmerich de Vattel, *The Law of Nations: Or, Principles of the Law of Nature Applied to the Conduct and Affairs of Nations and Sovereigns* (first published 1758, Liberty Found 2008) 63.

interference of forceful powers.[67] For instance, Cherif Bassiouni noted that despite the formal strength of the principle, the practice of international relations shows that violations of state sovereignty are widespread: 'While contemporary international law evolves within the framework of the Westphalian system that jealously guards national sovereignty, the state of international relations is mostly characterized by the Hobbesian anarchical state of nature that allows for a wide degree of unilateral exceptionalism'.[68]

Interferences do not necessarily imply the use of force. A heterogenous distribution of economic power within the international community creates an unequal system where sovereignty is not ultimately respected. Stephen Krasner affirms this in his work *Sovereignty: Organized Hypocrisy*:

> Of all the social environments within which human beings operate, the international system is one of the most complex and weakly institutionalized. It lacks authoritative hierarchies. Rulers are likely to be more responsive to domestic material and ideational incentives than international ones. Norms are sometimes mutually inconsistent. Power is asymmetrical. No rule or set of rules can cover all circumstances. Logics of consequences can be compelling. Organized hypocrisy is the norm.[69]

Krasner's description, however, seems to go beyond the concept of state sovereignty encompassing the entire international rule of law, with overall problems of implementation and double standards. Furthermore, his approach does not necessarily support a stronger role for sovereignty in international relations. If state sovereignty constitutes an obstacle to the evolution of human security in theory, the principle still has value if the oppressive and unequal dynamics of international relations is practiced. Mégret further proposes a distinction between sovereignty as a negative obligation (i.e., not to violate the sovereignty of other states) and a positive obligation (to protect populations all over the world, with interventions and prosecutions):

> States are not only required to simply refrain from interfering with the affairs of other states, but to actively uphold the laws of

[67] Costas Douzinas, 'Speaking Law, on Bare Theological and Cosmopolitan Sovereignty' in Anne Orford (ed), *International Law and Its Others* (Cambridge University Press 2006) 35.
[68] Cherif Bassiouni, 'ICC – *Quo Vadis*?' (2006) 4 Journal of International Criminal Justice 421.
[69] Stephen Krasner, *Sovereignty: Organized Hypocrisy* (Princeton University Press 1999) 42.

> war, prosecute or extradite individuals suspected of atrocities, and rescue peoples in danger. In this they are also part of a movement of endowing an amorphous 'international community' with a sort of immanent subjecthood.[70]

A second argument to support state sovereignty concerns the protection of the political authority of a certain community. In contemporary international relations, non-political powers assumed sovereign powers by gaining *de facto* authority and decision making. The defence of state sovereignty would hence return legitimacy and political accountability to the authorities that exert power over a certain territory or group of people. Indeed, according this perspective, the decline of sovereignty favours the diffusion of non-democratic international institutions that replace states in addressing economic and social issues.[71] In so doing, these global actors do not bear any political and democratic accountability and do not consider the needs and the will of local communities. On the contrary, they pursue an international agenda that is drafted and evaluated with criteria of efficiency. Koskenniemi thus describes the concerns about democracy and accountability of a decline of sovereignty:

> Many people worry that the informal management of an increasing number of significant social problems within global expert regimes and outside the structures of formal statehood undermines the ability of human groups to constitute themselves and to live as 'political communities.[72]

This perspective identifies a threat to state sovereignty which does not depend on the interference of other states but on the impact of transnational non-state actors. Non-political institutions, that is, military or commercial organisations, have a strong influence on states' policies. They have no formal legitimacy to make decisions on the action of states, but they still exert a *de facto* sovereign power over populations. Even when a decision or a policy is formally

[70] Frédéric Mégret, 'Beyond the "Salvation" Paradigm: Responsibility to Protect (Others) vs the Power of Protecting Oneself' (2009) 40 (6) Security Dialogue 575; Frédéric Mégret, 'ICC, R2P, and the International Community's Evolving Interventionist Toolkit' in Jan Klabbers (ed), [2010] 21 Finnish Yearbook of International Law.
[71] Daniel Danielsson, 'Corporate Power and Global Order' in Anne Orford (ed), *International Law and Its Others* (Cambridge University Press 2006) 85.
[72] Martti Koskenniemi, 'What Use for Sovereignty Today?' (2011) 1 Asian Journal of International Law 61.

adopted by a legitimate government, the decision can be the result of 'networks of financial, military, or environmental expertise':[73]

> On one hand, in structural terms it is a lack of sovereign authority on the part of international institutions. On the other, it is a democratic deficit, which is defined as the attenuation of political legitimacy beyond the state. The unstated assumption is that legitimacy flows from democratic participation, and sovereign delegation strains the authority of international law, which exists at a remove from citizenship. At its most simple, we can call this the problem of systemic anarchy and the democratic deficit.[74]

When non-political actors are ultimately responsible for decision making, the democratic process of legitimacy and accountability is no longer respected. The principle of internal sovereignty of a democratic state is therefore denied. Jacques Derrida explains how sovereignty can contribute to counterbalancing these kinds of power:

> Nation-state sovereignty can even itself, in certain conditions, become an indispensable bulwark against certain international powers, certain ideological, religious, or capitalist, indeed linguistic, hegemonies that, under the cover of liberalism or universalism, would still represent, in a world that would be little more than a marketplace, a rationalization in the service of particular interests.[75]

Koskenniemi also critiques a functional use of the concept of sovereignty. According to this perspective, sovereignty ultimately consists of only a group of obligations. Consequently, the sovereign power is flexible, as it can be exercised by any *de facto* authority that has the capability to fulfil those obligations.[76] Koskenniemi gives examples of human rights obligations of occupying powers to affirm that sovereignty is defined by the objectives it has to serve. The purpose of

[73] Martti Koskenniemi, 'What Use for Sovereignty Today?' (2011) 1 Asian Journal of International Law 60.
[74] Mark D. Froese, *Sovereign Rules and the Politics of International Economic Law* (Routledge 2018) 199.
[75] Jacques Derrida, *Rogues: Two Essays on Reason* (Pascale-Anne Brault and Michael Naas trs, Stanford 2005) 158.
[76] Carsten Stahn, *The Law and Practice of International Territorial Administration. Versailles to Iraq and Beyond* (Cambridge University Press 2008) 760.

sovereignty (obligations towards the people) overcame the subject of sovereignty (state power).[77]

Nevertheless, the International Court of Justice affirms that sovereignty retains a functional aspect in international law. In case of a territorial dispute, *de facto* sovereign activities (*effectivités*, or *acts à titre de souverain*) play a key role in establishing what state is entitled to sovereignty. *De jure* elements of sovereignty, or title, are the primary criteria to establish sovereignty and cannot be overcome by *de facto* activities. In the *Burkina Faso/Mali* case, the Court affirmed, 'Where the act does not correspond to the law, where the disputed territory is effectively administered by a State other than the one possessing the legal title, preference should be given to the holder of the title'.[78] In case of an unclear *de jure* attribution, however, the state exerting effective functions of sovereignty also acquires a legal title. To constitute *acts à titre de souverain*, states must show 'the intention and the will to act as a sovereign and some actual exercise or display of such authority'.[79] When the International Court of Justice examines a territorial dispute and decides what state is entitled to exert sovereignty on a certain territory, it uses functional criteria.[80]

Yet Koskenniemi agrees that international law should have the purpose to 'make transparent existing global decision-making and to enhance the accountability of the professional classes to the communities affected by their (contentious) choices'.[81] Both aims share the cultural approach that interprets state sovereignty as an ensemble of powers of the state towards the people under its jurisdiction. Koskenniemi's critique still acknowledges the necessity to limit the internal sovereignty of states to safeguard the rights of the members of their communities. From this point of view, advocating the value of state sovereignty is not a position that challenges the development of international values such as human rights and an international rule of law. On the contrary, the safeguard of

[77] *Legality of the Threat and Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 2.6 at Z.39 para 24; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136 para io6; *Democratic Republic of the Congo v Uganda* [2005] ICJ Rep 116 paras 215–21.
[78] *Frontier Dispute (Burkina Faso/Mali)* (Judgment) [1986] ICJ Rep 554 para 63.
[79] *Legal Status of Eastern Greenland (Denmark/Norway)* PCIJ Rep Series A/B No 53, 45.
[80] Hent Kalmo and Quentin Skinner (eds), *Sovereignty in Fragments: The Past, Present and Future of a Contested Concept* (Cambridge University Press 2010).
[81] Martti Koskenniemi, 'What Use for Sovereignty Today?' (2011) 1 Asian Journal of International Law 61, 68.

state sovereignty is a way to guarantee democratic accountability for state policies.

A further articulation of the concept of sovereignty can explain the conflicting perspectives that form a debate on the value of the concept. Sovereignty can be deconstructed from three angles, according to the different threats the principle receives: from supranational institutions, from other states, or from individuals. The first relates to international institutions that replace sovereign powers of the state. Treaty-based international institutions still respect state consent. The Rome Statute and the responsibility to protect, as adopted by the General Assembly in accordance with the UN Charter, fall within this category. Yet corporations and other non-political institutions influence state policies, and their sovereign decision making, without democratic accountability.[82] These institutions exert substantial political power, bypassing diplomatic negotiations, and fall out of the control of state authorities.[83]

Koskenniemi noted that 'this is global governance: rule by preferences and norms, regimes and practices that have no localizable centre or ethos and constantly penetrate and define what the "sovereignty" of our states is allowed to mean, what room for action there is for public power'.[84] This interpretation of sovereignty argues that nation states and their elected people are not in control of political decision making.[85] This idea of sovereignty is usually defended in public speech, since it claims a defence of an accountable and identifiable authority, that is, the state that has legitimate power to exert jurisdiction over a community. Conversely, supranational entities, which may be defined as dynamics more than institutions, cannot be controlled or subjected to the will of states.[86]

Second, sovereign equality in relation to other states, which is also defined as Westphalian sovereignty, is possibly the most classic connotation of the concept

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[82] Antony Anghie, *Sovereignty, Imperialism and the Making of International Law* (Cambridge University Press 2004) 258.
[83] Arthur Stein, 'The Great Trilemma: Are Globalization, Democracy, and Sovereignty Compatible?' (2016) 8 International Theory 297.
[84] Martti Koskenniemi, 'What Use for Sovereignty Today?' (2011) 1 Asian Journal of International Law 61, 62.
[85] Stephan De Spiegeleire, Stephan and Clarissa Skinner and Tim Sweijs, *The Rise of Populist Sovereignism: What It Is, Where It Comes From, and What It Means for International Security and Defense* (The Hague Centre for Strategic Studies 2017).
[86] Thomas Biersteker and Cynthia Weber (eds), *State Sovereignty as Social Construc*t (Cambridge University Press 1996).

in international law.[87] The UN reinforced this 'external' angle of sovereignty through the prohibition of the use of force. The traditional state authority inspired the conclusion of multilateral treaties in the twentieth century. The main and most ambitious purposes of international law in the 1900s - the peaceful settlement of disputes between states and the prohibition of the use of force - are based on the mutual respect of each state sovereignty, which shall not be invaded by other equal states.

Third is the protection of individuals from abuses of state sovereignty. It is the aspect of the concept called 'internal sovereignty', dealing with the protection of human rights. This last approach is the one relevant for the analysis of the impact of the International Criminal Court (and international justice in general) and the responsibility to protect (and the idea of international protection of civilian populations—and of humanitarian intervention) in particular.

Considering the debate between critics and supporters of sovereignty, it appears that both sides agree on the equality of states before international norms and that both accept the limitations of internal state sovereignty in safeguarding human rights. The globalist view might overlook the risks of supranational institutions replacing political functions of the state. Therefore, the school of thought supporting the role of state sovereignty in contemporary international law contributes to affirming the values of the legitimacy and accountability of authorities.

5. The International Criminal Court and Previous International Tribunals

A meaningful example of concern about violations of state sovereignty by the International Criminal Court is to be found in the US government statement titled 'Protecting American Constitutionalism and Sovereignty from the International Criminal Court'. The US president affirmed that the Rome Statute, and the power of the prosecutor in particular, constitutes an unacceptable erosion of state sovereignty: 'The United States' view was grounded in concerns over the broad, unaccountable powers granted to the ICC and its Chief Prosecutor by the Rome Statute, powers that posed a significant threat to United States sovereignty

[87] Jens Bartelson, *A Genealogy of Sovereignty* (Cambridge University Press 2005).

and our constitutional protections.'[88] In so doing, the US even attributed to the Court the power to deter the use of force: 'Some of our closest allies, including Israel, have pointed out the ICC's flawed approach as constraining liberal, democratic nations in exercising their right of self-defence'.[89] Yet a comparative analysis with other international criminal tribunals shows that the International Criminal Court is more respectful of state sovereignty than previous international justice institutions.[90]

The Rome Statute attributes the jurisdiction of the Court only on the territory and on nationals of states parties. The Security Council can extend the jurisdiction over non-states parties, acting under Chapter VII of the UN Charter. However, the same provision allows the Security Council to authorise the use of force on the territory of any state or to establish an ad hoc international tribunal, which are arguably more severe violations of state sovereignty compared to the activation of the jurisdiction of the International Criminal Court. As a treaty-based institution, the Court's jurisdiction depends on state consent. France, the Soviet Union, the UK, and the US established the International Military Tribunal with the London Agreement of 1945.[91] The four victors of the Second World War exerted criminal jurisdiction over the leaders of Germany on the basis of their right as occupying powers. The International Military Tribunal affirmed that 'the undoubted right of these countries to legislate for the occupied territories has been recognized by the civilized world'.[92] The impact of the Nuremberg Trial on state sovereignty was unprecedented. As Hersch Lauterpacht eloquently stated, 'The mystical sanctity of the sovereign state, shorn of the paraphernalia of pomp and power, is here arraigned before the judgment of the law'.[93]

The International Military Tribunal affirmed that individuals could be convicted of violating international law norms, namely by committing crimes

[88] White House Fact Sheet, 'Protecting American Constitutionalism and Sovereignty from the International Criminal Court' (10 September 2018). See also 'Trump Administration Expresses Strong Disapproval of the International Criminal Court' (2019) 113 (1) American Journal of International Law 169.
[89] ibid.
[90] Emanuela Piccolo Koskimies, 'Sovereignty as Responsibility at the International Criminal Court: The Frontiers of International Judicial Intervention' in Ekaterina Yahyaoui Krivenko (eds), *Human Rights and Power in Times of Globalisation* (Brill Nijhoff 2017) 67.
[91] Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and Charter of the International Military Tribunal. London, 8 August 1945.
[92] *France v Goering 1946* (Judgment) [1947] 41 American Journal of International Law 172, 216.
[93] Hersch Lauterpacht, 'Draft Nuremberg Speeches' (2012) 1 Cambridge Journal of International and Comparative Law 67.

against peace and war crimes, even if their conduct was not prohibited under German law.[94] It denied the superior order defence and lifted the immunities of heads of states. Guénaël Mettraux lists the elements of the 'paradigm shift' on state sovereignty that the Nuremberg Trial introduced:

> The Charter did not just add or remove pieces from existing international law. It also marked a paradigm shift in the international legal—and, arguably, political—universe. First, the Charter pierced through the concept of state sovereignty and inflicted much damage to the idea of absolute sovereignty under the law. As already noted, the Charter literally retired vibrant legal symbols of the idea of state sovereignty—namely, the doctrine of 'acts of state'—and caused official immunities to shrink, including those granted to heads of state. By criminalizing breaches of law committed against a state's own citizens under the label of 'crimes against humanity' and setting penal limits to the permissible use of military force through 'crimes against peace', the Charter reached deep into the sovereign territory of states.[95]

The so-called ad hoc tribunals—the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda—were established through Resolutions 827 (1993) and 995 (1994), respectively, of the UN Security Council. In so doing, the Security Council, acting under Chapter VII of the UN Charter, granted the ad hoc tribunals the sovereign power to exert jurisdiction for genocide, crimes against humanity, and war crimes committed in the territory of former Yugoslavia since 1 January 1991 and in the territory of Rwanda, or by Rwandan nationals in neighbouring countries, in 1994. Article 8 of the Statute of the International Criminal Tribunal for the Former Yugoslavia and Article 9 of the Statute of the International Criminal Tribunal for Rwanda regulate the relationship between the international tribunals and domestic courts, on the principle of concurring jurisdiction, but affirm that the international tribunals have primary jurisdiction over the crimes within their mandate.[96]

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[94] Henry T King Jr, 'Nuremberg and Sovereignty' (1996) 28 Case Western Reserve Journal of International Law 135.
[95] Guénaël Mettraux, 'Trial at Nuremberg', in William Schabas and Nadia Bernaz (eds), *Routledge Handbook of International Criminal Law* (Routledge 2010) 8.
[96] Mohamed El Zeidy, 'From Primacy to Complementarity and Backwards: (Re)-Visiting Rule 11 Bis of the Ad Hoc Tribunals' (2008) 57 The International and Comparative Law Quarterly 403.

The Special Tribunal for Lebanon shares the same origin and a similar interference in state sovereignty of the domestic judicial system. The Special Tribunal was established by Security Council Resolution 1757 (2007), with the Security Council acting under Chapter VII, after a previous agreement between Lebanon and the UN was not ultimately ratified by the Lebanese Parliament.[97] Its jurisdiction is limited to the perpetrators of the attack that killed former Lebanese Prime Minister Rafik Hariri on 14 February 2005.

The Special Court for Sierra Leone was established by a bilateral treaty between Sierra Leone and the UN to prosecute those responsible for serious violations of international humanitarian law and Sierra Leonean law, committed in Sierra Leone since 30 November 1996.[98] As a result, the so-called hybrid tribunal did not undermine state sovereignty, as affirmed by the Appeals Chamber:

> The establishment of the Special Court did not involve a transfer of jurisdiction or sovereignty by Sierra Leone. The Special Court is a completely new organisation established by an international treaty between Sierra Leone and the United Nations and functioning under its own Statute with an independent Prosecutor.[99]

The Extraordinary Chambers in the Courts of Cambodia, established after a long negotiation with the UN, are formally a domestic court. They have the jurisdiction to prosecute senior leaders of the Khmer Rouge and those responsible for the crimes perpetrated in Cambodia, then Democratic Kampuchea, between 17 April 1975 and 6 January 1979. They are set up under Cambodian law and work within the Cambodia judicial system. The international component consists of some of the judges, counsel, and staff, which are appointed by the UN.[100]

In the context of the International Criminal Court, the principle of sovereignty of states has been preserved through the doctrine of

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[97]Frédéric Mégret, 'A Special Tribunal for Lebanon: The UN Security Council and the Emancipation of International Criminal Justice' (2008) 21 Leiden Journal of International Law 485.

[98] Agreement between the United Nations and the Government of Sierra Leone on the establishment of a Special Court for Sierra Leone (16 January 2002) 2178 UNTS 137.

[99] *Prosecutor v Gbao* (Decision on Preliminary Motion on the Invalidity of the Agreement between the United Nations and the Government of Sierra Leone on the Establishment of the Special Court) SCSL-2004-15-AR72/(E) (25 May 2004) para 6.

[100] Alex Bates, 'Cambodia's Extraordinary Chamber: Is it the Most Effective and Appropriate Means of Addressing the Crimes of the Khmer Rouge?' in Ralph Henham and Paul Behrens (eds), *The Criminal Law of Genocide: International, Comparative and Contextual Aspects* (Routledge 2007) 195.

complementarity.[101] The Rome Statute clearly positions the principle of complementarity as a precondition for the admissibility of a case. The importance of this principle is emphasised by its inclusion in the preamble ('International Criminal Court … shall be complementary to national criminal jurisdictions') and again in Article 1, which reiterates the preambular phraseology. The principle is reaffirmed in Article 17, where grounds of inadmissibility are listed, and in Articles 18 and 19 concerning procedural details about the notification of domestic prosecutions and the possible consequent challenge of admissibility. Furthermore, Article 53 provides that the prosecutor, when deciding whether to start an investigation, must take the principle into account.

In contrast with the ad hoc tribunals, complementarity provides that the jurisdiction of the International Criminal Court is secondary to the domestic legal system of the state concerned. Accordingly, the jurisdiction of the Court can be triggered only in circumstances where the domestic legal system is not deemed to be functioning effectively in the context of the offence in question. Judge Chile Eboe-Osuji, president of the International Criminal Court since 11 March 2018, described in a concurring separate opinion in *Kenyatta* in 2013 that complementarity respects state sovereignty. He thus connected the state obligation to investigate and prosecute international crimes to the responsibility to protect:

> '[S]ince the obligation to protect victims of atrocities wherever they are in the world is an obligation erga omnes (an obligation to the whole world), African leaders are also entitled to press both the Court and the international community to ensure that victims of atrocities everywhere—not only in Africa—are extended the very justice that the ICC promises humanity. So, too, are leaders outside Africa entitled to insist that justice must be done for African victims of international crimes, notwithstanding any optics in the Court's work that might cause even legitimate worry to African leaders. This is the whole point of responsibility to protect as an international norm. […]The ICC did not usurp the jurisdiction of Kenya in these cases; the Prosecutor only stepped in to trigger the Court's jurisdiction as a court of last resort, following the failings of national authorities to do what international law required in the circumstances to

[101] Eric K Leonard, 'Discovering the New Face of Sovereignty: Complementarity and the International Criminal Court' (2005) 27 New Political Science 87.

> investigate and prosecute as part of their responsibility to protect.'[102]

This system creates the so-called 'paradox of complementarity': the Court, to implement its mandate, has to rely on the cooperation of states that are, in the words of Article 17 of the Rome Statute, 'unwilling or unable genuinely to carry out the investigation or prosecution'.[103] The dependence on the cooperation of states, or on the Security Council, creates in practice a problem of partiality at the moment of selecting cases to investigate and prosecute within a situation.[104] This study discusses the problem of the Court with the selectivity of situations in Chapter 2, on the UN Security Council and the International Criminal Court.

The issue of prosecutions and investigations targeting only one side within a situation appears to be an unfortunate pattern in the action of the Court. In cases in which the Court's jurisdiction was triggered through a self-referral (e.g., Uganda, the Democratic Republic of Congo, the Central African Republic, and Mali), the Office of the Prosecutor has tended not to target any state official. On the contrary, it focused on the rebels, that is, the non-state actors and adversaries of the referring government. Conversely, in the Darfur and Libya situations, referred by the UN Security Council, prosecutions disregarded crimes perpetrated against government officials. For example, in Darfur, no charges were brought for crimes committed against Sudanese troops—only the rebels who were indicted faced charges for attacking peacekeepers. In Libya, prosecutions targeted only officials of the then Libyan Arab Jamahiriya.

From a legal and formal point of view, the prosecutor has consistently proclaimed the duty to deal with all the groups and parties within a situation. This position has been clear since the context of the first self-referral by the government of Uganda in 2004. Under the principle of symmetric interpretation of a referral enshrined in Rule 44(2) of the Rules of Procedure and Evidence, the prosecutor clarified his mandate to impartially prosecute international crimes within the situation referred, regardless of possible selectivity in the text of the referral. Yet, in practice, not only was the referral jointly announced in January

[102] *Prosecutor v Kenyatta* (Concurring Separate Opinion of Judge Eboe-Osuji) ICC-01/09-02/11-830-Anx3 (18 October 2013) paras 36–38.
[103] Sarah MH Nouwen, *Complementarity in the Line of Fire: The Catalysing Effect of the International Criminal Court in Uganda and Sudan* (Cambridge University Press 2013) 394.
[104] David Garcia Vanegas and Nancy Solano de Jinete, 'Salvaguarda Corte Penal Internacional vs. Soberanía Estatal' (2008) 1 Misión Jurídica 75.

2004 by then Prosecutor Luis-Moreno Ocampo and Ugandan President Yoweri Museveni, but prosecutions have targeted only rebel leaders so far.

The Policy Paper on Case Selection and Prioritisation of 2016 further reiterates the principles of impartiality and objectivity to avoid one-sided or biased case selection:

> The Office will examine allegations against all groups or parties within a particular situation to assess whether persons belonging to those groups or parties bear criminal responsibility under the Statute. However, impartiality does not mean 'equivalence of blame' within a situation. It means that the Office will apply the same processes, methods, criteria and thresholds for members of all groups to determine whether the crimes allegedly committed by them warrant investigation and prosecution.[105]

In practice, it appears that the Court regularly joins the side of the subject referring the situation, that is, the local government or the Security Council. In contrast with the narrative of the International Criminal Court threatening sovereignty, this could be interpreted as a sign of excessive deference towards the principle. In a dissenting opinion in *Ruto and Sang*, Chile Eboe-Osuji used a metaphor to describe sovereignty as a false threat that states use to obstruct international justice. In so doing, he recognised the role of the responsibility to protect in weakening state sovereignty:

> [A]ll care must be taken to avoid reducing, in effect, the august notion of sovereignty of states to a hackneyed bogeyman, to be conjured up at every convenient opportunity, with the evident aim of frightening judges of an international criminal court, as one would frighten small children. The raison d'être of this Court particularly implicates firm crystallisation of the current international legal order in which sovereignty was long rejected as an argument whose effect or claim was to leave to the government of a State and its officials to do as they pleased with the human rights of their citizens. The plea of 'sovereignty' in such an unfortunate sense was an old bogeyman that was interred long ago in the graveyard of international legal history, following the Second World War. The epitaph is engraved in the language of obligations *erga omnes* and burnished in the terms of 'R2P'—responsibility to protect that the international

[105] ICC Office of the Prosecutor (15 September 2016).

> community no longer leaves to the exclusive domain of the States whose populations are in the need of the protection.[106]

6. The Responsibility to Protect and Sovereignty as Responsibility

The responsibility to protect is grounded on a peculiar interpretation of the concept of state sovereignty, which is the idea of sovereignty as responsibility. The principle of state sovereignty evolved with several definitions and limitations. Already in Thomas Hobbes's interpretation—whose idea of sovereignty is one in which all members of a nation confer their powers onto one Leviathan, the sovereign, who is then empowered to both represent and control his citizens—the authority lasts only as long as the state can protect its subjects.[107] The idea that sovereignty includes a role of protection of citizens, therefore, dates back to the origins of the concept.[108] The innovation of the approach to sovereignty as responsibility is to affirm that protecting populations is an international obligation, to be fulfilled by the territorial state in the first place and by the international community should the responsible state fail to respect its obligation.

Francis Deng first proposed the idea of sovereignty as responsibility in 1996.[109] The ICISS report on the responsibility to protect formulated the concept as follows, with an element of individual accountability which is meaningful for the relationship with the International Criminal Court:

> Thinking of sovereignty as responsibility, in a way that is being increasingly recognized in state practice, has a threefold significance. First, it implies that the state authorities are responsible for the functions of protecting the safety and lives of citizens and promotion of their welfare. Secondly, it suggests that the national political authorities are responsible to the citizens internally and to the international community through the UN. And thirdly, it means that the agents of state are responsible for their actions; that is to say, they are accountable for their acts of commission and omission. The case for thinking of sovereignty in these terms is strengthened by the ever-

[106] *Prosecutor v Ruto and Sang* (Partially Dissenting Opinion of Judge Eboe-Osuji) ICC-01/09-01/11-1313-Anx (14 May 2014) para 47 (emphasis in the original).
[107] Thomas Hobbes, *Leviathan* (first published 1651, Penguin 1985) 23.
[108] Nicolas Michel, 'La responsabilité de protéger – Une vue d'ensemble assortie d'une perspective suisse' (2012) 131 Revue de droit suisse 5.
[109] Francis Deng (ed), *Sovereignty as Responsibility: Conflict Management in Africa* (Brookings Institution Press 1996).

> increasing impact of international human rights norms, and the increasing impact in international discourse of the concept of human security.[110]

The report approached state sovereignty with a principle similar to the complementarity adopted in the Rome Statute, the primary responsibility resting with the territorial state, and, as the report subsequently sets out, 'it is only if the state is unable or unwilling to fulfil this responsibility, or is itself the perpetrator, that it becomes the responsibility of the international community to act in its place'.[111]

When the General Assembly adopted the principle of responsibility to protect in 2005, it expressly excluded any interference with state sovereignty beyond the exceptions already permitted by the UN Charter.[112] The most meaningful debate on the impact of the doctrine on sovereignty is the General Assembly discussion that followed the 2009 UN Secretary-General's Report 'Implementing the Responsibility to Protect'.[113] This was the first report issued by the Secretary-General after the 2005 World Summit.[114] The plenary debate of the General Assembly demonstrates the importance of states recognising the principle of sovereignty. Ireland appreciated 'the reiteration of the principle of responsible sovereignty, and the move away from the false dichotomies sometimes posed between the interests of the state and its populations, between the interests of the state and those of the international community'. The Philippines recalled article 2(4) of their national constitution, providing that '[t]he prime duty of the Government is to serve and protect the people … Sovereignty resides in the people and all Government authority emanates from them'.

Again, the report of the Secretary-General reiterated an approach to sovereignty which is like the complementarity of the Rome Statute. Formulating the idea of sovereignty as 'responsible sovereignty', Secretary-General Ban Ki-moon articulated the doctrine in terms of three pillars: (a) the primary protection responsibilities of the state; (b) should the concerned state fail to comply with its

[110] International Commission on Intervention and State Sovereignty, Gareth J Evans and Mohamed Sahnoun, *The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty* (International Development Research Centre 2001) 13.
[111] ibid.
[112] UNGA, 'World Summit Outcome' (2005) UN Doc A/RES/60/1 para 139.
[113] UN Doc A/63/677.
[114] UNGA, 'World Summit Outcome' (2005) UN Doc A/RES/60/1.

responsibility, international assistance and capacity-building; and (c) should the previous measures be insufficient, timely and decisive response. In contrast with the 2001 International Commission for Intervention and Sovereignty, the third pillar dealing with an international response clearly excludes interventions in violation of the UN Charter: 'The process of determining the best course of action, as well as of implementing it, must fully respect the provisions, principles and purposes of the Charter. In accordance with the Charter, measures under Chapter VII must be authorized by the Security Council'.[115] The Secretary-General further noted,

> As the assembled Heads of State and Government made absolutely clear, the responsibility to protect is an ally of sovereignty, not an adversary. It grows from the positive and affirmative notion of sovereignty as responsibility, rather than from the narrower idea of humanitarian intervention. By helping States to meet their core protection responsibilities, the responsibility to protect seeks to strengthen sovereignty, not weaken it.[116]

The parallel complementary approach to state sovereignty of both the doctrine and the Court was observed by Kirsten Ainley: 'Both are complementary institutions, designed to encourage state compliance with humanitarian and justice norms, and to supersede states only in exceptional circumstances'.[117] Additionally, the 2017 Secretary-General's Report 'Implementing the Responsibility to Protect: Accountability for Protection' focused on the role of international criminal justice in the implementation of the responsibility to protect:

> Each State's primary responsibility to protect entails a duty to investigate and prosecute alleged atrocity crimes, as established by international law, reinforcing the international criminal justice principle of complementarity between national jurisdictions and the International Criminal Court. I encourage States to ensure that those responsible for atrocity crimes in their territory are prosecuted. If they fail to do so, I encourage the international community to consider all legal options and

[115] Report of the Secretary-General, 'Implementing the Responsibility to Protect' (2009) UN Doc A/63/677, 9.
[116] ibid para 10.
[117] Kirsten Ainley, 'The Responsibility to Protect and the International Criminal Court: Counteracting the Crisis' (2015) 91 International Affairs 53.

> practical steps to ensure justice for all victims and contribute to the prevention of future violations.[118]

7. Conclusion

This chapter reconsidered the impact of the responsibility to protect and of the International Criminal Court on state sovereignty. The original culture of both institutions clearly favours individual dignity over the sovereignty of nation states, but the analysis shows a more complex dynamic: 'Neither the ICC nor R2P are in any profound theoretical way against sovereignty. The battle is much better understood as one over the continued definition of sovereignty (one as old as sovereignty itself which, needless to say, never had an immutable meaning) rather than a frontal challenge to it'.[119]

The historical analysis exposed that the principle of state sovereignty is difficult to define and that it has been evolving since its conception. This study examines sovereignty as an important international norm, with possible legal interpretations and limitations. As Lauterpacht affirmed, the principle is indeed a part of international law and not its original foundation: 'The sovereignty of the State in international law is a quality conferred by international law. It cannot, therefore, be either the basis or the source of the law of nations'.[120]

The evolution of sovereignty developed with growing limitations to the power of the state, which created an international rule of law, with some norms created under the authority of 'humanity'. Furthermore, the reading of the school of thought criticising the global trend opposing sovereignty challenges the conflicting dynamic between sovereignty and human dignity. Sovereignty can play a role in protecting states, and consequently the human rights of their populations, from the interferences of major powers and of transnational non-democratic institutions. Chandra Muzaffar eloquently describes the ambivalent impact of the principle:

> National sovereignty is thus becoming a protective armour for the states of the South trapped within an international system

[118] UN Doc A/71/1016 para 25.
[119] Frédéric Mégret, 'ICC, R2P, and the International Community's Evolving Interventionist Toolkit' in Jan Klabbers (ed), [2010] 21 Finnish Yearbook of International Law.
[120] Hersch Lauterpacht, *The Function of Law in the International Community* (first published in 1933, Oxford University Press 2011) 104.

> where the strong do what they will and the weak suffer what they must. It is an armour which, from a human rights angle, could have a positive effect just as it could have negative consequences. There are times when it will be used for the protection of the collective rights of communities and peoples. But there will also be occasions when ruling elites in the South will use the armour to ward of legitimate criticisms from foreign governments and international organizations about gross violations of fundamental human rights—especially civil and political rights—within their nation-states. More often than not, however, the same ruling elite uses national sovereignty for both purposes: to defend the rights of its people as a collectivity within an unjust global order and, at the same time, to suppress dissent within its own boundaries with impunity.[121]

The complementarity approach of the International Criminal Court, based on a statute binding, in principle, only the states party to the statute, does not constitute a threat to sovereignty if compared to previous international tribunals that replaced the primary jurisdiction of territorial states without the consent of the latter. On the contrary, the practice of the Court shows a lack of independence, as it must rely on the cooperation of states, or the Security Council, to implement its mandate.

Concerning the responsibility to protect, the approach to sovereignty made a turnaround between the initial idea of sovereignty as responsibility, allowing the international community to intervene in case of failure of the territorial state, and the subsequent formulations, until the Secretary-General's reports and relative plenary discussions within the General Assembly that portray the doctrine as an ally of sovereignty.

[121] Chandra Muzaffar, *Human Rights and the New World Order* (Just World Trust 1993) 81.

Conclusions

The present study has revealed that the interplay between the International Criminal Court and the responsibility to protect affects several crucial areas of international law: the protection of human rights, the prevention of core crimes, the effectiveness of the UN Security Council, the role of international criminal justice in protecting populations, the prohibition of the use of force, and the principle of state sovereignty.

Through an analysis of the existing literature on the relationship between the doctrine and the Court, the first chapter showed that most of the academic attention has been devoted to the issues of implementation, effectiveness, and expectations on the capability to prevent and stop violence. This introductory chapter analysed two elements in particular that are common to the doctrine and the Court: the international legal theory of liberal cosmopolitanism and the subject-matter jurisdiction of so-called atrocity crimes. The examination of liberal cosmopolitanism revealed that this cultural common ground is criticised on the basis that it would inherently favour the military agendas of major powers. This political abuse depends on the institutional structure of the international community, while liberal cosmopolitanism is originally a pacifist philosophy. In addition, further findings have shown that the responsibility to protect was initially conceived to advocate international community action against grave international crimes. Nevertheless, the evolution of the doctrine clarifies that any application of the responsibility to protect must comply with the UN Charter and be respectful of state sovereignty. The analysis of the expression ‘atrocity crimes’ has shown that the introduction of this formula was intended to consolidate the relevant areas of international criminal law.

However, the definition of atrocity crimes is inconsistent, as it includes ethnic cleansing, a crime that is not defined in international criminal law and that does not fall within the jurisdiction of the International Criminal Court. At the same time, the crime of aggression, included in Article 5 of the Rome Statute, is not considered an atrocity crime. The exclusion of aggression contradicts the original formulation of ‘atrocity crimes’ and might suggest that the use of the

expression has the rhetorical purpose of promoting interventions rather than the progressive development of the discipline.

The second chapter explored the relationship between the International Criminal Court and the UN Security Council, beginning with the two referrals of Darfur and Libya. The analysis of the two Security Council referrals revealed that Resolution 1970/2011 on Libya expressly mentioned, for the first time, the responsibility to protect as a ground to trigger the Court's jurisdiction. Yet in 2005, at the time of the Darfur referral, several sources, from the report of the International Commission of Inquiry on Darfur to Louise Arbour's *amicus curiae*, recognised a link between the doctrine and the Court.[1] The action of the Court in Darfur and Libya did not achieve the expected results, in terms of both legal and political issues. The analysis of the two referrals highlights controversial provisions such as the selective exclusion of certain categories of people from the jurisdiction of the Court, the lack of a special funding from the UN for the specific situations referred by the Security Council, and the ambiguous obligations imposed on non-states parties. This study suggested that the best strategic option, for the Court, could be to entirely disregard the referral. This would bypass the disputes with uncooperative states and, above all, the uncooperative Security Council. The Court did not immediately review the Security Council referrals, and the absence of a preliminary pronouncement by an organ of the Court on a resolution triggering its jurisdiction is arguably the worst possible choice from a legal and policy perspective. Conversely, by affirming its power to review a Security Council resolution, the Court would provide a strong sign of independence from the UN political organ. Finally, the chapter analysed the controversial practice of the Court in Libya with reference to fair trial considerations of defendants who are prosecuted in their home country. After the initial enthusiasm surrounding the Darfur referral in 2005, and even the Libya referral in 2011, overall awareness has increased of the undesirable effects of the Council's influence over the Court.

[1] United Nations, 'Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General Pursuant to Security Council Resolution 1564 of 18 September 2004' par 569; United Nations High Commissioner for Human Rights, 'Observations of the UNCHR invited in Application of Rule 103 of the Rules of Procedure and Evidence' (10 October 2006) ICC-02/05.

Up to 2020, the Court has not had further opportunities to deal with Security Council referrals. This is among the main topics covered in Chapter 3, which deals with the relationship between the Council and the responsibility to protect. In fact, after the Council's action in Libya resulting in a regime-change, Russia and China vetoed proposals to refer the Syrian situation to the Court and blocked further initiatives to intervene in Syria. Consequently, the chapter analysed possible avenues to bypass the veto power of the five permanent members of the Security Council when a resolution would protect populations from grave international crimes. The examination of initiatives, from Uniting for Peace to the 'responsibility while protecting', demonstrated that they do not constitute a lawful alternative to Security Council authorisation of the use of force. This study also argued that bypassing the veto power, thus obtaining a higher number of Security Council resolutions and interventions, is not necessarily a desirable outcome for the protection of populations from mass violence.

The fourth chapter examined the capability of the Court to deter international crimes. The analysis revealed that international justice has specific features that affect the deterrent power of criminal prosecutions and punishments. In the practice of the Court, deterrence has influenced decisions on sentencing but has not seemed to impact the prosecutorial strategy, so far. This study argues that the prosecutor is correctly cautious about selecting cases with the aim of optimising the deterrent effect. An extensive interpretation of the concept of deterrence suggests that, to prevent and stop international crimes, the Court must be perceived as legitimate and effective. The achievement of a credible and functioning international tribunal might have a stronger deterrent effect than any specific punishment.

The fifth chapter explored the impact of the doctrine and the Court on the prohibition of the use force. The Court contributed to the *ius ad bellum* by criminalising acts of aggressions. This section of the study analysed the difficulties of the process to activate the jurisdiction of the Court over aggression. With reference to the responsibility to protect, this analysis demonstrated that the doctrine has contributed to strengthening the prohibition to use force. Discussing the doctrine, states have the opportunity to confirm their consistent *opinio iuris* against exceptions to the prohibition to use force based on humanitarian claims.

As a result, the impact of the doctrine on the law of the use of force would be in line with the criminalisation of aggression by the Rome Statute, as they both reinforced the *ius contra bellum*.

The sixth chapter discussed a key principle for both the Court and the doctrine: state sovereignty. The original culture of both clearly privileges individual dignity over the sovereignty of nation states, but the analysis revealed a more nuanced position. The complementarity approach of the Court does not constitute a threat to sovereignty if compared to previous international tribunals that, established with UN Security Council resolutions, replaced the primary jurisdiction of territorial states without the consent of the latter. Conversely, the practice of the Court shows a lack of independence, as it must rely on the cooperation of states, or the Security Council, to implement its mandate. Concerning the responsibility to protect, the approach to sovereignty completely changed from the initial idea of sovereignty as responsibility, allowing the international community to intervene in case of failure of the territorial state, and subsequent formulations, to the UN Secretary-General's reports and related plenary discussions within the General Assembly that portray the doctrine as an ally of sovereignty.

The overall research allows for some concluding remarks. The analysis of the parallelism between the doctrine and the Court suggests that a coordinated action between the two is neither feasible nor desirable. On the one hand, while acquiring a growing relevance in the language of the UN, the responsibility to protect has not introduced any new legal obligation. The doctrine instead introduced a new jargon and a new focus on humanitarian issues in the political and diplomatic debate. On the other hand, the Court struggles with issues of selectivity and enforcement and with fulfilling its statutory mandate while resisting political pressures and suffering a lack of support. The problems experienced by the two institutions are therefore related – as far as they concern the effort to become effective and gain independence from political power and, more specifically, the Security Council – but the paths to the solutions for these problems are not interconnectable.

The case studies of Libya and Syria demonstrate that the application, or lack thereof, of the doctrine by the Court does not offer a solution to stopping international crimes. The action of the Security Council in Libya, which activated

the Court's jurisdiction and authorised NATO intervention, recalling the responsibility to protect, proved to be legally controversial and, most of all, ineffective in protecting the Libyan population. Similarly, but conversely, no military or Court intervention was authorised in Syria, but the population still suffered heinous international crimes. This grim outcome begs to renew and update the version of Kofi Annan's question at the Millennium Summit: if the application of the responsibility to protect, authorising the use of force and referring the Libyan situation to the Court, proves to be legally questionable and practically detrimental, how should we respond to an Aleppo, to a Kobane, to gross and systematic violations of human rights that offend every precept of our common humanity? In the first twenty years of their existence, the Court and the responsibility to protect have failed to provide a solution.

Announcements of the end of the responsibility to protect have been endemic in the life of the doctrine. In contrast, the practice of the General Assembly and of the Security Council shows that the language of the doctrine has been constantly growing, together with its presence in the debate of civil society and academia. The value of the doctrine instead emerges from the analysis of its impact on fundamental international principles: state sovereignty and the prohibition of the use of force. The responsibility to protect was expressly introduced to legitimise international interventions in cases in which the UN Security Council did not take action. From this perspective, the doctrine did not achieve its goal, but this failure is a welcome outcome for the evolution of international law. Thus, as the Court reinforced the prohibition of the use of force by criminalising aggression, the responsibility to protect raised a debate that clarified the consensus, among most states, on the *ius ad bellum* prescribed by the UN Charter. In so doing, the doctrine inspired a political and diplomatic debate on efforts to protect populations without unlawful interference in the principle of state sovereignty, where both the Court and the doctrine follow the principle of complementarity.

The future development of the responsibility to protect should relinquish the obsolete interpretation of legitimising military intervention and should instead emphasise the soft-law value of prioritising humanitarian protection in compliance with the UN Charter, at the diplomatic level. Conceiving a direct interplay with the Court is controversial. As the examination of the deterrent

theory of international justice revealed, the Court should focus on adhering to its judicial mandate to be perceived as legitimate and effective. The analysis determined that the achievement of a credible and functioning international tribunal might have a stronger impact on the prevention of international crimes than any specific punishment. Consequently, the most favourable interplay between the doctrine and the Court is for them to continue pursuing their common goals in parallel, without intersections. In this way, they may indirectly benefit from each other's work: the doctrine underpinning a system that prioritises humanitarian protection and in which states cooperate to prosecute those responsible for international crimes; the Court performing an effective action to end impunity, thus contributing to the prevention of international crimes. Indeed, the Court would not be an instrument in the responsibility to protect toolbox but rather a distinct institution that can autonomously contribute to the achievement of the same goal of protecting populations from core international crimes.

This thesis determines that the doctrine and the Court are contributing to the evolution of international law through subtle and complex dynamics. Their ambitious mandate compels the doctrine and the Court to respond promptly to events of mass violence. Their failures result in protracted violence and humanitarian crises, which undermine the high expectations of their performance. This perception also affects research on the doctrine and the Court. The tight focus on biased implementation and ineffective outcomes hides deeper changes that the doctrine and the Court might promote in international law. The affirmation of the values of accountability and of responsibility, while reinforcing the prohibition to use force, are permanent results that may protect possible outcomes of future misuses of the doctrine or erroneous decisions of the Court's organs.

This thesis shows the potential of the two institutions to conciliate the principle of sovereignty with the accountability for perpetrators of international crimes and the protection of populations from mass violence with the prohibition to use force. Conciliating these values can lead the way towards the affirmation of the main values of international law: peace and human dignity.

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